IN THE SUPREME COURT OF OHIO

	*	On Appeal from the
City of Toledo,	*	Lucas County Court of Appeals,
	*	Sixth Appellate District
	*	
Appellant,	*	
	*	Supreme Court Case No. 2006-0690
	*	
v.	*	Court of Appeals Case No. L-04-1224
	*	
	*	
Paul Tellings,	*	
	*	
Appellee,	*	
	*	

AMICUS BRIEF AMERICAN CANINE FOUNDATION

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BRIEF *AMICUS CURIAE* THE AMERICAN CANINE FOUNDATION

INTRODUCTION

Now comes the American Canine Foundation (hereinafter "ACF") amicus curiae:

ACF, formerly Washington Animal Foundation, is a national non profit organization dedicated to promoting responsible canine ownership through education and legislation to ensure the welfare of canines (www.americancaninefoudationlaw.com).

ACF has drafted dangerous dog laws and animal fighting laws for federal, state and local governments across the country. ACF is the leading expert authority on canines in the United States and has filed briefs as amicus curiae in other cases involving the questions of whether a breed of canine is inherently dangerous. For example, Huntsville v. Four Pit Bull Puppies was heard by the Alabama Supreme Court and was a significant case cited at trial in Tellings. The Alabama Supreme Court agreed with the trial court which found that American Pit Bulls are not inherently dangerous as a breed (Refer to amicus brief, Huntsville v. Four Pit Bull Puppies (Ala. 08-30-02), No.1010459, and Appellants/Defendants Trial Ex J).

STATEMENT OF AMICUS INTERESTS

In 2002, the ACF was made aware of possible activities of the Lucas County Dog Warden Tom Skeldon by a Tammy Price a member of the Ohio Dog Fighting Task Force and a former Ohio Dog Warden. She testified at trial in the Toledo v. Tellings case for Appellee. She, along with other members of the task force, was alarmed by a video the Lucas County Dog Warden presented at one of the task force meetings. The video showed an American Pit Bull Terrier in confinement in a condition that appeared to be abusive. A federal investigation was initiated by the United States Department of Agriculture (USDA) and ACF formerly known as Washington Animal Foundation. The Ohio Department of Agriculture also became involved. A

court subpoena served upon the Toledo Humane Society for the results of their investigation and their director refused to honor the subpoena (ACF Amicus Exhibit 1).

Reports were coming to ACF that arbitrary and erratic law enforcement was taking place in Ohio concerning R.C. §955.11 R.C. §955.22. It was a consensus of the Ohio Dog Fighting Task Force that Ohio's breed specific laws were not effective in addressing illegal activities involving canine. Further, these laws were not protecting the public (ACF Amicus Exhibit 2). ACF decided to challenge Ohio's breed specific laws and did so in 2003 by supporting Appellee in this case.

The Lucas County Dog Warden and a Denver City Attorney both of whom support and promote the same animal rights agenda as explicated as ACF Amicus exhibit 4. The Lucas County Dog Warden and the Denver City Attorney attempted to discredit ACF by making false accusations in an attempt to persuaded the courts. The Denver City Attorney, Kory Nelson, worked closely with the Lucas County Dog Warden (ACF Amicus exhibit 3).

ARGUMENT

OHIO R.C §955.11-§955.22 AND TMC 505.14 VIOLATE DUE PROCESS, EQUAL PROTECTION AND SUBSTATIVE DUE PROCESS

Before a dog owner can be deprived of his property, the owner must be given a meaningful opportunity to be heard (Toledo v. Tellings). Appellant on its part cites Niccchia v. People of State of New York (1920) 254 U.S. 228 which states that drastic measures can be taken to regulate and control dogs. The Court found that dog licensing requirements do not take away due process. The Court makes it clear that we, as dog owners, do have the right to due process.

Appellee defended his right to life, liberty, due process, and property interest. While the Nicchia case is referring to the licensing of dogs, the U.S. Supreme Court does address due process and makes it clear that the requirement of dog licenses does not take one man's property and give it to another, nor does it deprive dog owners of liberty without due process of law.

The U.S. Supreme Court supported a finding from a New York Appeals Court case Fox v. Mohawk & H.R. Humane Society (1901). By the U.S. Supreme Courts definition, a menacing dog can be controlled and destroyed without due process, however the dog has to be found dangerous and this finding will not reflect on the specific breed of dog. The Toledo Ordinance 505.14 and R.C. §955:11 – §955.22 violates due process of law by declaring the American Pit Bull breed vicious with no evidence to prove that the breed in whole is inherently dangerous.

A New York appellate court refused a plaintiff in a personal injury case the use of judicial notice to prove the alleged vicious propensities of specific dog breeds defined under the "umbrella term" of "Pit Bull" Carter v. Metro North Assocs. (1998) 255 A.D.2d 251; 680 N.Y.S.2d 229. The Court determined that the alleged propensities of pit bull terriers to behave more viciously than other breeds had not been authoritatively established to be a matter of common knowledge Carter, 680 N.Y.S.2d at 240. Such assertions require definite proof. Id. **at 241. "A court may only apply judicial notice to matters 'of common and general knowledge, well established and authoritatively settled, not doubtful or uncertain.**

The Ohio Attorney General argues in his amicus brief that the property interests in Tellings are only qualified. Next, he argues that Mr. Tellings has a right to due process and a trial. Then, he argues the fact that Pit Bulls are dangerous and because of that, breed specific laws in Ohio are constitutional. While it is true that the ownership of dogs is subject to police power regulation, any interference by the government is only justified when "necessary

for the protection of its citizens." Sentell v. New Orleans & Carrollton R.R., (1897)166 U.S 698 at 704. Accordingly, the Supreme Court approved the principle that legislatures have broad police powers to regulate all dogs in order to protect the public against the nuisance caused by a dog, which -with due process of law- has been declared vicious or dangerous to people or property. Id.at 705. (Emphasis supplied).It does not mean that the police have power or authority to seize and exterminate a dog because of its breed. One should take notice that Sentell was decided over 100 years ago. The value of the canine since Sentell has drastically changed. The Ohio Supreme Court ruled canines are valuable property State v. Cowen (2004), 103 Ohio St. 3d 144.

The Ohio Attorney General also cites Vanater v. South Point (S.D. Ohio 1989) 717 F. Supp. 1236 in attempt to convince this Court it was a good decision. The Vanater case did not have any scientific data presented as evidence and this clearly affected the decision. A person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government. In the case of Appellee, it was proven through scientific evidence and expert testimony beyond a reasonable doubt that American Pit Bull Terriers as a breed are not dangerous or vicious. The scientific evidence and information presented by experts in Tellings was overwhelming. R.C. §955.11 declares a breed of canine vicious with no credible evidence to support such a finding. This results in loss of due process rights and arbitrary action by the government. Criminal charges are filed and property seized based on a law that serves no legitimate governmental purpose.

Appellants supporting amicus brief by the Ohio Attorney General cite Mathews v. Eldridge (1976), 424 U.S. 319, 334, 335. The argument posed by the Attorney General in his

Amicus brief using the Mathews analysis is moot. Further, in Tellings Appellee proved that the American Pit Bull Terrier is neither dangerous nor vicious as a breed. The trial court ruled that there was little if any evidence to prove the breed is dangerous. The Sixth District Court of Appeals in its decision found no evidence to prove the breed is dangerous. Under existing definitions in the Ohio Revised Code, neither the American Pit Bull Terrier nor any breed of canine fit definition of dangerous. Appellee has been deprived of due process and liberty. There is no justification to charge citizens with a crime for owning a specific breed of canine. In our country, forty-nine states allow for due process and therefore before a dog is seized and the owner charged with a crime, the dog first has to engage in dangerous behavior.

Data in this case was presented to show many other breeds in Ohio were responsible for fatal attacks before and after R.C. 955.11 and R.C. 955.22 were passed in 1987. The numbers of other breeds engaging in fatal attacks greatly outweighed American Pit Bull Terriers (Defendant/Appellee's trial exhibit C). The data showed that in State of Ohio between the years 1975 and 2001, the following breeds engaged in fatal attacks: Great Dane (1), German Shepherds(2), Malamute(1), Dobermans(2), Chows(2), Mixed breeds(3), Pit Bulls(3), Rottweilers (2), Husky (1) and Wolfdog (1).

In this case, the Appellant at trial and in Appellant's supporting amicus briefs cited a study done on fatal dog attacks by the Center for Disease and Control (CDC) covering the years 1979-1998. Appellant alleged that Rottweilers and Pit Bulls were responsible for the majority of fatal attacks based upon the CDC report. At trial, every expert agreed the CDC study was flawed and useless. It left out eight-nine fatal attacks during the time period listed. Further, the data used in the CDC report was provided by Humane Society of the United States (HSUS), an organization which has supported breed bans. The CDC study fails to provide the populations of

the breeds listed in fatal attacks and therefore, the report serves no scientific value. The CDC study has been found to be erroneous in other court litigation.

In analyzing nonfatal dog bite injuries, we have found an increase in serious injuries yearly. A study was done on nonfatal dog bite injuries by the U.S. Consumer Product Safety Commission and the Center for Injury Prevention http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5226a1.htm. The study showed in 1994, that 333,700 patients were treated in emergency room departments for dog bites. In 2001, 368,245 patients were treated in the emergency room for dog bites. But interestingly enough, a study was done by the ACF showed that in the areas where breed bans had been enacted, dog bite incident reports increased. For instance, banning ten breeds of dogs from a city, using the current dog bite data, will not reduce dog bite injuries given the ratio between mixed breed dogs compared to purebred dogs.

Furthermore, the National Electronic Injury Surveillance System (NEISS) collects reports on dog bite injuries from emergency rooms nation wide. In three years between 2002-2005, one million eighty thousand people were treated in emergency rooms for dog bite related injuries. From 2002-2005, ACF tracked media accounts where the dog bite incident made headlines and the media identified the breed as a Pit Bull. ACF found approximately 924 cases nationwide. Although, one million eighty thousand people have been admitted to emergency rooms for attacks by dogs between 2002-2005, only 924 cases could be attributed to what the media identified as a Pit Bull. These of course were cases where injury was serious enough that emergency room attention was needed. Therefore .086% of possible injury given the study statistics represented injuries caused by a dog labeled as a Pit Bull. The other approximately 99.014% of reported cases were from countless other breeds. This data base alone proves there is

no legitimate government purpose to ban or restrict ownership of one specific breed of canine. At trial ACF entered data which proved there are approximately 4.8 million American Pit Bull Terriers registered in the major dog registries of our country. The numbers of actual American Pit Bull Terriers identified in fatalities in our country when divided by 4.8 million does not come to finding that the breed is more likely to attack and kill somebody than other breeds listed for causing human fatalities.

Many breed bans have been passed by cities in the United States claiming that the ban will reduce dog bites and fatalities, with certain animal rights organizations supporting these bans. Statistics show that breed bans do not reduce dog bite incidents, fatalities nor stop illegal activity involving dogs. In fact, in the last thirty years, the number of people who died each year from fatal attacks has average approximately twenty five per year. That number has not increased in the last thirty years, although the canine population increased. With millions of American Pit Bull Terriers residing in family homes across the country the question is raised, that if the breed is so extremely dangerous then why would we not see higher numbers of fatalities and severe attacks taking place? If this increase would have occurred it greatly out weigh all other breeds both on dog bite incident reports and accurate fatal dog attack data bases. This is not the case and accurate data proves this beyond a reasonable doubt.

PRECEDENCE

Appellant cites precedence claiming years ago supreme courts and appeals court found breed specific laws constitutional. Thirty three or more cases heard by the United States Supreme Court have been overturned Payne v. Tennessee (1991) 501 U.S. 808. In Payne, the Court states that in constitutional cases where correction through legislative action is practically impossible or governing decisions are badly reasoned, the lower courts do not have to follow precedent.

New scientific data that was introduced resulted in an overturning of a nine year old Ohio State Supreme decision State v. Koss (1990) 49 Ohio St.3d 213.

In the instant case, Tellings accurate scientific data was presented before and at trial by Appellee's experts which included a U.S. Government Scientist, several college professors of veterinarian medicine, at least one PhD in animal behavior and dog training, a member of the Ohio Dog Fighting Task force who was a former Ohio Dog Warden, a Chief Cruelty Investigator from the Toledo Humane Society, and a local Veterinarian with a degree in canine behavior. These experts proved beyond a reasonable doubt no breed of canine is inherently vicious or dangerous.

ACF reviewed all of the constitutional challenges involving canines, mainly American Pit Bull Terriers that were cited by the Appellants dating back to the 1980's these cases were cited in the merit brief and both amicus briefs supporting Appellant. We have read the trial transcripts, reviewed the evidence, and memoranda in the case. It was found that newspaper 'stories' were used for evidence and 'opinions' were from animal rights groups, who provided experts with no credible supporting documentation to substantiate the opinions given cases cited.

ACF found that the experts who testified for the Appellant were disturbing and lacked credibility. The Lucas County Dog Warden when faced with cross examination (Trial Tr. -- Tom Skeldon pg 100-106) admitted he had no expertise in canine genetics. In fact, when asked if he had studied genetics, he stated he read a book and the newspapers. Tom Skeldon also attempted to testify during the trial that American Pit Bull Terriers are genetically dangerous. When reviewing Skeldon's responses to cross examination one would find that he had no competent knowledge of canines existed outside of the ability to impound and euthanize canines as a Dog Warden in the State of Ohio. In one response, Tom Skeldon stated the Pit Bull can inflict severe

damage when attacking and then subsequently testified that the Chow breed in Toledo is responsible for the most injuries that required sutures (Tom Skeldon Trial Tr.-- pg 100). Tom Skeldon also testified that he did not know the different types of canine aggression (Tom Skeldon Trial Tr ---. pg 107). Tom Skeldon's cross examination testimony not only proved R.C. 955.11- 955.22 and TMC. 505.14 are violative of the 14th Amendment, but they also result in erratic and arbitrary enforcement.

Dr. Peter Borchelt PhD testified for the Appellant. Dr Borchelt on his resume claimed to be a board certified animal behavioralist. Under cross examination he admitted he was not board certified (Trial Tr -- Borchelt pg 81). Dr Borchelt then presented outdated studies that had no real scientific value relative to canines. The data was garnered from the 1960's and was erroneous by scientific standards of today. Dr. Borchelt testify as to canine genetics, but under cross examination he admitted he never studied genetics (Trial Tr-- Borchelt pg 68). Dr. Borchelt PhD admitted he has participated obedience dog training (Trial Tr --.Borchelt pg 69). From reading at his testimony he is an expert in house breaking canines and giving people with minor behavioral canine problems advice. In no way does he qualify as an expert to testify about genetic traits, dog attacks, or the behaviors of the American Pit Bull Terriers. In one instant, Dr. Borchelt testified American Pit Bull Terriers were dangerous when they attack and then in another instance he testified that they had a stable temperament (Trial Tr.-- Borchelt pg 76). Evidence was presented at trial to proximately link Dr. Borchelt to a specific animal rights movement (Trial Appellees/defendants Exhibit R, Q).

Lucas County Deputy Dog Warden Karla Hamlin, who testified for the Appellant was presented as a professional dog trainer. She was alleged to operate an obedience training school in Toledo. She further testified for Appellant, however under cross examination she admitted she

agreed with all the testimony of the Appellee's experts. She also admitted that after TMC 505.14 and R.C. 955:11–R.C. 955:22 were enacted, problems began with American Pit Bull Terriers being impounded not for biting people and acting viciously, but for violations of the breed specific laws (Trial Tr all cross examination K Hamlin).

Toledo Veterinarian Dr. Wright testified for Appellant. Dr Wright. He admitted he had never done any studies, had no scientific proof or other evidence to support his opinions.

R.C. 955.11 – 955.11 AND T.M.C. 505.14 ARE UNCONSTITUTIONALY VAGUE

The Appellant argues that the Appellee had no standing to challenge the vagueness of R.C. 955.11 – R.C. 955.22 and TMC 505.14.

Evidence in this case proved Appellee was cited for owning what was claimed to be one mixed breed and two American Pit Bull Terriers. The dog labeled as a mixed breed was an American Bull Dog. Appellee claimed that his two American Pit Bull Terriers were not covered by the laws being challenged. Appellee for the record during sentencing did make it clear that he owned an American Bull Dog. Appellee has standing because he clearly owned one American Bull dog which on the citation is identified as a mix breed. Appellee also discussed in his opening brief, appeal brief, and appeal reply brief the breeds of his dogs. Upon questioning Appellee to prepare this amicus it was made clear one of his three dogs was an American Bull Dog. At one time it was thought he had owned two American Bull Dogs. Appellee has standing to challenge vagueness of the laws because at no time on the record did he admit his dogs were covered by the laws, State v. Peters, 534 So.2d 760, 766 n. 10 (Fla.Dist.Ct.App. 1988).

Evidence was entered beyond a reasonable doubt that Lucas County Dog Warden is responsible for arbitrary and erratic enforcement of R.C. 955.11 and R.C. 955.22 (Sixth District Court of Appeals Decision March 3rd 2006 Toledo v. Tellings pg 10 - # 30).

The due process clause of the Fourteenth Amendment requires that any state or municipality, in making an enactment, must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 US 104, 108; United States v. Marriss, 347 US 612. In addition, an enactment should not encourage arbitrary and discriminatory enforcement. Appellee's experts entered scientific evidence that many breeds have phenotypic characteristics of the American Pit Bull Terrier. Pictures admitted into evidence of numerous other breeds that are registered with national registries that have no relation to the American Pit Bull Terrier, but look exactly like it. Appellee's experts provided scientific testimony and proof that there is no such breed as a Pit Bull or Pit Bull type dog (Defendants exhibits P and study by Dr. Irene Stur pg 3 "Identification Possibilities") that was entered into this case before trial in the memoranda and is in (ACF Amicus Ex 5).

Appellee has proven the phrase "commonly known as a pit bull dog" applies to many other breeds and it was proven that there is no difference between the jaw of the American Pit Bull Terrier and other breeds. It was proven that the bite pressure of the American Pit Bull Terrier is the same as all other breeds of comparable size. Further it was proven that there is no scientific way to measure bite pressure (Appellee's Trial Ex F). Evidence was entered (ACF video Ex T), that American Pit Bull Terrier's can release quite easily when biting with no hesitations and that they show good control. Defendants provided proof American Pit Bull Terrier's are capable of many tasks that other breeds can also perform. Appellant's experts did not submit any credible evidence backed by scientific research or data to counter Appellee's evidence.

Appellant's expert, Tom Skeldon testified, (Tom Skeldon transcript pg 105-106

lines 15-25/1-3) that he does not know the reason why Pit Bulls are bred in Lucas County. Further, he testified that he bases his seizure of dogs that may resemble the Pit Bull solely on appearance. The Lucas County Dog Warden went on to admit that many young canines could resemble a Pit Bull, but when they mature they turn out to be a different breed. Tom Skeldon admitted that he does not care about the breed and are seizing all breeds that look like American Pit Bulls Terriers.

This proves beyond a reasonable doubt the R.C. 955.11 R.C. 955.22 and Toledo Municipal Code 505.14 are unconstitutionally void for vagueness. It proves the laws encourage arbitrary and erratic arrests and convictions leading to police enforcement. Forty-nine states allow due process for dogs that bite or act aggressive and cause severe injury. Appellee proved there are over fifteen breeds that have characteristics of the American Pit Bull Terrier. It was also proven the breed is not dangerous (Papachrista v. Jacksonville, (1972) 405 U.S. 156, 168 Kolender v. Lawson (1983), 461 U.S. 352, 357 refer to Sixth District Court of Appeals 111. #71 - #77).

IS DENVERS BREED BAN CONSTITUTIONAL

The City of Cleveland mentions Denver Colorado in its amicus brief. Denver Colorado passed a breed ban on American Pit Bull Terriers in 1988. A state law was passed in 2004 to stop breed specific legislation in Colorado (HB1279). At the 2004 legislative session, Denver could not convince the Colorado House and Senate that their breed ban was constitutional.

In 2004, the law firm of Walter Gerash hired by ACF litigated Denver's breed ban at trial July 7, 2004, in Margolius v Denver. City of Denver lost the case. It was proven by the law firm of Walter Gerash that the Denver Pit Bull ban would not withstand criminal charges. ACF's

lawyers proved that the City of Denver could not identify an American Pit Bull Terrier beyond a reasonable doubt and all charges against Denver resident Howard Margolius were dismissed.

Denver's City Attorney, Kory Nelson, was providing flawed data to legislators and other Colorado cities on breed specific legislation. He has failed to disclose that Denver's breed ban did not withstand court litigation (Margolius v Denver 03GV501504-3GV501202-2004 Denver Municipal Court). Mr. Nelson told the media he believes people would be justified in shooting Pit Bulls running loose. Mr. Nelson started a yahoo.com internet message list to fight the ACF, on his list he writes about the attempts to discredit ACF. Mr. Nelson's behavior forced Colorado State Representative Debbie Stafford to report his actions to the FBI suggesting that Mr. Nelson is corrupting the public. Also, Denver sued the state over HB1279 and that case is on appeals at this time. Several other lawsuits have been filed in Colorado regarding breed specific legislation challenges.

WHATS BEHIND BREED SPECIFIC LEGISLATION THE ANIMAL RIGHTS MOVEMENT

Breed specific legislation was devised by animal rights organizations which believe we should not own domestic pets (Refer to ACF Amicus Ex.4). They believe canines should be exterminated breed by breed and at trial experts who testified for Appellee addressed the movement behind breed specific legislation. There are two main animal rights organizations who have openly supported breed specific legislation, one being the Humane Society of the United States (HSUS) and the other People for the Ethnical Treatment of Animals (PETA). The data supplied by these organizations have been used to support and pass breed specific legislation. ACF would like the Ohio Supreme Court to read quotes from HSUS and PETA. The data presented in this amicus brief on animal rights is accurate and available on the internet.

ANIMAL RIGHTS AND "COMPANION ANIMALS"

"We are not especially 'interested in' animals. Neither of us had ever been inordinately fond of dogs, cats, or horses in the way that many people are. We didn't 'love' animals." -- Peter Singer*, Animal Liberation: A New Ethic for Our Treatment of Animals, 2nd ed. (New York Review of Books, 1990), Preface, p. ii.

*Peter Singer is the acknowledged founding father and chief guru of the Animal Rights movement. Singer's disciple is Ingrid Newkirk, who co-founded People for the Ethical Treatment of Animals, also known as PETA. For more information, read About Peter Singer & Who is Peter Singer?

In a perfect world, all other-than-human animals would be free of human interference, and dogs and cats would be part of the ecological scheme, as they were before humans domesticated them and as they remain in some parts of the undeveloped world. PETA

"The cat, like the dog, must disappear... We should cut the domestic cat free from our dominance by neutering, neutering, and more neutering, until our pathetic version of the cat ceases to exist." - John Bryant, Fettered Kingdoms: An Examination of A Changing Ethic (Washington, DC: People for the Ethical Treatment of Animals (PETA), 1982), p.

"It is time we demand an end to the misguided and abusive concept of animal ownership. The first step on this long, but just, road would be ending the concept of pet ownership." - Elliot Katz, President, In Defense of Animals, "In Defense of Animals," Spring 1997

FROM HSUS

"Human care (of animals) is simply sentimental, sympathetic patronage." - Dr. Michael W. Fox, HSUS, in 1988 Newsweek interview.

"We have no ethical obligation to preserve the different breeds of livestock produced through selective breeding. ... One generation and out. We have no problem with the extinction of domestic animals. They are creations of human selective breeding." - Wayne Pacelle, Senior Vice-President oF HSUS, formerly of Friends for Animals; Quoted in Animal People, May, 1993.

"The life of an ant and that of my child should be granted equal consideration." - Wayne Pacelle, Senior Vice-President of HSUS, formerly of Friends for Animals - In Inhumane Society, 1990.

"The life of an ant and the life of my child should be accorded equal respect." - Wayne Pacelle, Senior Vice-President oF HSUS, formerly of Friends for Animals, The Associated Press, Jan. 15, 1989"

HSUS president John Hoyt hinted in 1986 that the animal-rights movement might be a means to a larger end, telling Washingtonian magazine: **"This new philosophy [animal rights] has served as a catalyst in the shaping of our own philosophies, policies, and goals."** John McArdle, the group's Director of Laboratory Animal Welfare, frankly admitted in the same article that HSUS was "definitely shifting in the direction of animal rights faster than anyone would realize from our literature."

The group completed its animal-rights transformation during the 1990s, changing its personnel in the process. HSUS assimilated dozens of staffers from PETA and other animal-rights groups, even employing **John "J.P." Goodwin, a former Animal Liberation Front member and spokesman with a lengthy arrest record and a history of promoting arson to accomplish animal liberation and end all animal agriculture in the United States.**

* In a 1992 report by the NCIB, National Charities Investigation Bureau, PETA spent 42% of its organizational expenses on fundraising. **Only 20% on actual research and investigation in to animal cruelty.**

* More current reports examining PETA's tax filings have shown **as little as 1% of PETA's total revenue actually goes directly to helping animals**; usually small donations to animal clinics or similar organizations.

Supporting Terrorism.

Both HSUS and PETA support breed bans and breed restrictions, and other organizations in the United States including animal control that follow the Animal Rights agendas also support them. The intent of the breed ban is not to protect the public but to end domestic pet ownership which is why when we look at the data in cities where breed bans have been enacted we find they do not protect the public, what we do find is heavy lobbying by animal rights organizations and their members to aid in attempting to pass breed bans. Animal rights groups such as PETA, HSUS, et al. and others have launched an all out attack on the animal industry in the United States. The vast agriculture/animal industry includes everything from our pets, to our food supply, to garment manufacturers, shoe, and leather goods, circuses, rodeos, to pharmaceuticals.

Under the guise of helping animals the animal rightists have worked to initiate legislation against poultry producers, beef producers, pork producers, and wool growers, and pet owners.

CONCLUSION

Breed specific legislation (BSL) is any law that seeks to eliminate or single out a particular breed of canine, usually premised upon a fictitious belief that such breed is somehow "dangerous." On its face, singling out a dog breed may appear to address what some believe are safety issues with "certain" canines. However, both scientifically and socially, when one examines the issues squarely on a factual basis, it becomes apparent that this type of discrimination is not based upon facts, nor accurate data. In addition, it becomes more obvious that this type of disparate treatment will not only be extremely expensive to implement and enforce, but also that its purpose will not be accomplished due to the faulty premises upon which it is based.

There have been studies conducted in the past that are heavily relied upon by the animal rights groups who push for BSL. The fact is, those studies (there are only several) are not complete scientific studies, they were not done with complete variables, the evidence used was not adjusted for variables not taken into account, and the extrapolation from such studies is flawed due to the failure of not having set the foundation correctly to start with. Valid scientific studies take into account nearly every conceivable variable that might affect the outcome. Carefully controlled studies are done precisely and under carefully controlled circumstances—as opposed to "guessing", "speculation", and "we are not sure, but...."

Unfortunately, the SCIENCE of canine genetics has been thrown to the wayside, and has been reduced instead, to a few paltry "studies" relied upon by lawmakers, where such studies are not reliable, nor proven. This is even admitted by the people who did these studies, because they

had incomplete data. Incomplete and inaccurate data does not lend itself to producing valid scientific results.

In reality, when carefully examining all the memoranda, the data, the exhibits and evidence presented before and at trial Appellee presented, and reading Justice Skow's opinion it is clear that breed specific legislation does nothing to protect the public and it does nothing to stop illegal dog fighting. It creates erratic and arbitrary enforcement which leads to criminal charges against responsible dog owners whose dogs have never acted aggressively. It leads to seizure of numerous breeds that are not named in the legislation which leading to unnecessary criminal convictions. Ohio is the only state in the country that has a state level breed specific law which that declares a breed of canine vicious. In our country, animal rights activists are providing flawed data to politicians in an attempt to ban ownership of canines. Mastiffs, Bull Mastiffs, German Shepherds, Rottweilers, Dobermans, Husky's, Chows, Kuvazs, American Pit Bull Terriers, Staffordshire Bull Terriers, American Bull Dogs, Malamutes, Great Danes, Akita's, Malamutes, Wolfdogs, Bull Terriers, Staffordshire Bull Terriers, Dalmatians, St. Bernards, Irish Wolfhounds, Presas, Neo Mastiffs, Labradors, Ban Dogs, Collies and a significant number of mixed breeds have been lumped into breed specific laws. These laws have all been targeted with actual attempts to ban or restrict the breed. In the cases, were the breed specific legislation has actually passed lawsuits have been brought to stop it.

There attempts to ban canines by weight through legislation. The City of Auburn Washington in 2004 actually attempted to pass a law declaring all canines over 30lbs dangerous requiring special confinement and other restrictions. In Ohio, there are over 400 cities and perhaps 400 townships who support breed ban legislation. We find only one city, that being Cleveland which supported the City of Toledo with an amicus brief. We find that the City of

Cleveland makes claim they need breed specific legislation because the numbers of dangerous dog cases has increased over 346% since the year 2000. The data presented in this case by Appellee consisted of Ohio county dog bite statistics does not support the City of Cleveland allegations. One would question why all the other major cities in Ohio did not support the Appellant with amicus briefs. We find that the Ohio Attorney General office at one time made a video with the HSUS which most likely meant the attorney generals office was provided with data from HSUS. The attorney general's office cites old constitutional canine cases and does not present one solid piece of evidence that any scientific or credible data was ever presented in the in those cases.

There are effective dangerous dog laws that are in place in our country that have been proven to protect the public and reduce dog bites and problems related to regulation and control of canines. We should not hold the legislators in Ohio who voted in favor of R.C. 955.11 and R.C. 955.22 in 1987 to blame. They based their decision off of data that was provided by organizations such as HSUS.

The experts that testified for Appellee presented credible evidence beyond a reasonable doubt. On the Appellant's side, Deputy Dog Warden, Karla Hamlin, a professional dog trainer, admitted during trial she agreed with all the testimony of Appellee's experts. Karla Hamlin still showed some bias in parts of her testimony, but in fact she knew the truth and admitted it by agreeing with the twelve experts that testified on behalf of Appellee.

In this case it was proven that the main reason the Lucas County Dog Warden seized Pit Bull Terriers are because of violations of the breed specific laws. It was proven that the problems began with American Pit Bull Terriers after R.C. 955.11 passed declaring the Pit Bull vicious. It was proven the American Pit Bull Terrier does not bite with 2000lbs of jaw pressure and does

not inflict more serious injury than other breeds of canines. No proof was submitted by the Appellant to support the claim that the American Pit Bull Terrier is owned by criminals and was dangerous in urban areas.

In fact, the evidence entered and the testimony of the Lucas County Dog Warden (Trial Trans Tom Skeldon pg 115-116) proved there is no evidence to make a finding in urban areas the American Pit Bull Terrier posed a danger to the citizens of the community. Tom Skeldon was asked under cross examination how many drug cases involved Pit Bulls and he evaded the question. Then he attempts to claim at least fifty Pit Bulls were shot or more within a five year time period. If this were true, then Tom Skeldon would have brought to the trial court the data from police reports to support his testimony. The fact was he did not. When police go out to serve a warrant any breed of canine on the premises could likely be shot because of the threat the canine poses to the safety of the lives of the officers when the quickly enter the residence and secure it.

To state that a breed of dog is aggressive is scientifically impossible. Statistics do not support such a finding. Dogs have been domesticated for thousands of years and within all breeds, there can be dangerous dogs because of owner issues such as training the dog to attack, lack of training, and lack of socialization. There is no such thing as the "Mean Gene" in dogs.

Aggressiveness has many definitions and it is the stimulus of the environment that causes behavior. Dogs defend territory. Further, they exhibit dominance and if allowed can become protective of their family. All this behavior can be controlled by the owner and aggression is mainly an act of behavior. To make the claim the American Pit Bull Terrier can cause more severe injury than other breeds is ludicrous.

Over thirty breeds of dogs and hundreds of mixed breeds were responsible for over 500

fatal attacks in the last thirty years. Every victim was severely injured.

One of the most serious problems with some of the existing "dangerous dog laws" is that the owner receives little or no punishment. Irresponsible owners are chronic repeat offenders of animal control laws. Thus, the public suffers the consequences of the dog owner's irresponsibility.

Strong laws that penalize the owners, regardless of the breed are what is needed. These types of laws are valid, have merit and are not vague or capricious. ACF supports laws that hold owners accountable for their dog's behavior with strong penalties when it's proven the owner was responsible for the injury the canine caused. If a canine kills a human and it can be proven the owner was responsible, there should be a charge of negligent homicide and the owner should be prohibited from owning dogs. Washington's RCW 16.08 070 – 100 is one state law for regulation and control of dangerous dogs and one of the most effective laws in the country. Many other states have adopted language from Washington's dangerous dog statute.

In Sentel v. New Orleans & Carrollton Railroad (1896) 166 US 698 nothing was stated to allow selective laws against specific breeds of dog. It was stated that it is "practically impossible by statute to distinguish between the different dog breeds". Id. at 701. Every state now affords U.S. citizens due process rights for dog ownership under state dangerous dog statutes. Fourteen states prohibit breed specific dog laws at the state and local level.

While the police power is broad, it is not boundless. For the Fourteenth Amendment of the United States Constitution limits the power of the legislature to act with respect to private property. In particular, pertinent sections of the Fourteenth Amendment provide that no state shall deprive any person of property with out due process of law, or deny any person equal protection of the law. If an ordinance encourages arbitrary and erratic law enforcement, or if it

places unlimited discretion in the hands of the police, the law will be unconstitutionally vague and violative of due process Papachrista v. Jacksonville, 405 U.S. 156, 168 (1972).

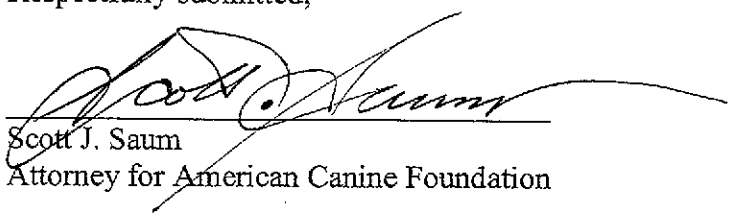
The American Pit Bull Terrier is clearly a useful member of society (refer to Appellee's Trial Ex F, H,J, N, O). The breed was a World War One Hero. It's rated as having one of the best overall temperaments in the United States (Appellee's Trial Ex H). The breed is used for dog show competitions, therapy, service work, search and rescue, police work and companionship. Man has domesticated dogs to the point that they serve as companions, workers, and even objects of beauty. Dogs will protect man, see for him, hunt for him, and play. One breed is not more inherently good or evil, vicious, harmful, or helpful. It is man who is responsible for the behavior of the dog, not the breed of dog. Those passing breed bans fail to understand that any breed can be owned by an irresponsible owner and become a danger to society. People determine whether dogs will be useful members of a community or a nuisance. It is the people who allow their dogs to become dangerous. Legislators must control and punish the people." In the memoranda in this case a study on canine aggression was submitted. It is known to be the most conclusive study in existence (ACF amicus Ex 5).

Breed specific legislation is supported by certain animal rights organizations and nobody else. These organizations in reality have no love for animals and are using them for financial and political gain. Congress just passed AETA a federal law to ensure animal rights activism stops in our country. It very easy to verify many other breeds of man's best friend that have been the target of breed specific legislation in our country in the last decade. One would wonder what the argument would be for declaring these other breeds dangerous.

When looking at the future of the canine if breed specific legislation is not stopped in the

courts then man's best friend will fall to the mercy of the certain animal rights groups whose agenda is not directed at protecting the public or the canines. We would ask the Ohio Supreme Court to read the entire trial transcript and review all documents including affidavits presented before and at trial and find that breed specific legislation serves no legitimate government purpose and that it violates responsible dog owners constitutional rights.

Respectfully submitted,



Scott J. Saum
Attorney for American Canine Foundation

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Amicus Brief of the American Canine Foundation in support of the Appellee, Paul Tellings, Case No. 2006-0690 was served by US mail on this 22ND day of November 2006, upon the following counsel:

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*49 Ohio St. 3d 213, *; 551 N.E.2d 970, **;*
*1990 Ohio LEXIS 92, ****

THE STATE OF OHIO, APPELLEE, v. KOSS, APPELLANT

No. 88-1908

Supreme Court of Ohio

49 Ohio St. 3d 213; 551 N.E.2d 970; 1990 Ohio LEXIS 92

December 5, 1989, Submitted
March 7, 1990, Decided

PRIOR HISTORY:
[*1]**

APPEAL from the Court of Appeals for Cuyahoga County, No. 54213.

DISPOSITION: *Judgment reversed and cause remanded.*

CASE SUMMARY

PROCEDURAL POSTURE: Defendant, convicted of murder, appealed from the Court of Appeals for Cuyahoga County (Ohio), which had affirmed her conviction. Defendant contended that the trial court erred in refusing to admit expert testimony on the battered woman syndrome.

OVERVIEW: Defendant was charged with murder after a shooting. She claimed self-defense and contended that she had suffered domestic abuse. The trial court did not permit defendant to present expert testimony regarding the battered woman syndrome, and she was convicted. The court, overruling State v. Thomas, 56 Ohio St. 2d 518, held that expert testimony concerning the battered woman syndrome could be admitted to support the affirmative defense of self-defense. The court held that the trial court properly refused to instruct on negligent homicide as a lesser included offense of murder. The court found no error in the determination that probation was not appropriate because the offense was committed with a firearm.

OUTCOME: The court, holding that the trial court should have admitted expert testimony on the battered woman syndrome, reversed defendant's murder conviction and remanded.

CORE TERMS: woman, battered, syndrome, expert testimony, self-defense, lesser, imminent danger, battered women, gun, negligent homicide, battering, great bodily harm, trier of fact, killing, murder, kill, statutorily, honest belief, admissibility, specification, inadmissible, scientific, homicide, firearm, affirmative defense, greater offense, relevance, admitting, ordnance, deceased

LexisNexis(R) Headnotes ◆ Hide Headnotes

Criminal Law & Procedure > Defenses > Battered Person Syndrome

Criminal Law & Procedure > Defenses > Self-Defense

HN1 In Ohio, to prove self-defense it must be established that the person asserting this defense had a bona fide belief that he/she was in imminent danger of death or great bodily harm and that his/her only means of escape from such danger was in the use of such force. Thus, Ohio has adopted a subjective test in determining whether a particular defendant properly acted in self-defense. The defendant's state of mind is crucial to this defense. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Testimony > Experts > Admissibility

Evidence > Testimony > Experts > Criminal Trials

Evidence > Testimony > Experts > Helpfulness

HN2 Expert testimony in Ohio is admissible if it will assist the trier of fact in search of the truth. However, when such knowledge is within the ken of the jury, expert testimony is inadmissible. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Scientific Evidence > General Overview

Evidence > Testimony > Experts > Criminal Trials

HN3 Ohio R. Evid. 702 provides: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Defenses > Battered Person Syndrome

Criminal Law & Procedure > Defenses > Self-Defense

Evidence > Testimony > Experts > Admissibility

HN4 Expert testimony regarding the battered woman syndrome can be admitted to help the jury not only to understand the battered woman syndrome but also to determine whether the defendant had reasonable grounds for an honest belief that she was in imminent danger when considering the issue of self-defense. Expert testimony on the battered woman syndrome helps dispel the ordinary lay person's perception that a woman in a battering relationship is free to leave at any time. The expert evidence counters any "common sense" conclusions by the jury that if the beatings were really that bad the woman would have left her husband much earlier. Popular misconceptions about battered women can be put to rest, including the beliefs that the women are masochistic and enjoy the beatings and that they intentionally provoke their husbands into fits of rage. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Defenses > Battered Person Syndrome

Evidence > Testimony > Experts > Admissibility

Evidence > Testimony > Experts > Helpfulness

HN5 State v. Thomas, 66 Ohio St. 2d 518, is overruled to the extent that it holds that

expert testimony concerning the battered women syndrome may not be admitted to support the affirmative defense of self-defense. Where the evidence establishes that a woman is a battered woman, and when an expert is qualified to testify about the battered woman syndrome, expert testimony concerning the syndrome may be admitted to assist the trier of fact in determining whether the defendant acted in self-defense. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Accusatory Instruments > Informations

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Lesser Included Offenses

HN6 Ohio R. Crim. P. 31(C) states in part that when the indictment, information, or complaint charges an offense including degrees, or if lesser offenses are included within the offense charged, the defendant may be found not guilty of the degree charged but guilty of an inferior degree thereof, or of a lesser included offense. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Lesser Included Offenses

HN7 An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense. However, even though an offense may be statutorily defined as a lesser included offense of another, a charge on such lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. Thus the facts and evidence of a particular case are irrelevant to the determination of whether an offense, as statutorily defined, is necessarily included in a greater offense. The facts become relevant only in the determination of whether a jury could reasonably convict the defendant of the lesser included offense as defined. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > General Overview

HN8 See Ohio Rev. Code Ann. § 2903.02.

Criminal Law & Procedure > Criminal Offenses > Homicide > Involuntary Manslaughter > General Overview

HN9 See Ohio Rev. Code Ann. § 2903.05.

Criminal Law & Procedure > Criminal Offenses > Homicide > Involuntary Manslaughter > Elements

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Lesser Included Offenses > Homicide

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Lesser Included Offenses

HN10 Because negligent homicide is not always and necessarily included in murder, negligent homicide is not a lesser included offense of murder. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Sentencing > Alternatives > Probation > General Overview

Criminal Law & Procedure > Sentencing > Suspension

HN1[1] See Ohio Rev. Code Ann. § 2951.02(F)(3).

◆ Hide Headnotes

HEADNOTES:
Criminal law -- Murder -- Self-defense claim -- Battered woman syndrome -- Admissibility -- Purpose of admission of expert testimony regarding battered woman syndrome -- Negligent homicide is not a lesser included offense of murder.

SYLLABUS: On May 2, 1986, the body of Michael Koss was found in a front bedroom in the Kosses' house in Cleveland, Ohio. The cause of death was a single gunshot wound to the head with perforations of both the skull and brain. The body was discovered by Arthur Piiparinen, a patrolman in the Cleveland Police Department. Patrolman Piiparinen testified that he had been called to the Kosses' residence upon receiving a radio broadcast of a "male shot" at this residence. Michael Koss was found dressed in his Coast Guard uniform, with his head lying over one edge of the bed and his feet lying over the other edge.

Brenda J. Koss, appellant-defendant, wife of the victim, Michael Koss, was asked to come in for questioning by the Cleveland Police Department on May 3, 1986. During questioning, appellant signed a typewritten statement, wherein she stated, in [***2] part, that upon returning home around midnight or 1:00 a.m. on May 2, 1986, she went to the bedroom where her husband was in bed. As she undressed, she stated that her husband "hauled off" and hit her. The next thing she remembered was a "noise or something." At this point she saw a holster on the floor which she retrieved. She then left the house, picked up her son at her daughter's house, and drove to her mother's house in Michigan. During questioning, appellant stated that the first time she saw the gun was in the car, when she put the gun in the holster. When asked if she shot her husband as he slept, she responded, "No."

On May 28, 1986, appellant was indicted for the murder of her husband in a one-count indictment, with a gun specification. Appellant pleaded not guilty.

At trial, appellant presented witnesses who testified that she had been beaten on a number of occasions by her husband, Michael, during their marriage. Various witnesses testified to these alleged beatings including a counselor at the Witness and Victim Services Center.

Appellant took the stand in her own defense at trial. She recounted several instances when her husband had beaten her or threatened to [***3] kill her. She also testified that her husband on one occasion had tried to smother her with a pillow, and that on another occasion, when she was taking a bath, her husband put a radio in the bathtub. Appellant testified that her husband had threatened to kill her children if she did not drop a domestic violence charge she had filed against him in December 1983. Because of this threat, appellant dropped the charge. Appellant further testified that in some ways, her marriage had improved in 1985 and 1986 from her first years of the marriage.

When questioned about what happened on May 2, 1986, appellant testified that upon entering the bedroom, she saw a gun on the bedside table. She stated that this frightened her because she previously had never seen the gun out. She testified that she "must have picked" up the gun, afraid that her husband was going to kill her. According to appellant, her husband then hit her. She could not remember anything from the time her husband hit her to the time when she heard a "noise," which she believed was gurgling blood. When asked upon cross-examination if she caused the death of Michael, purposely or not, appellant answered that she had "no [***4] idea." She testified that, "I purposely did not kill Michael Koss," and "[i]f I killed him, it was an accident."

Appellant sought to introduce evidence of the battered woman syndrome, which the trial court denied. This evidence was proffered evincing that experts on the battered woman syndrome would have testified that there are two components of the syndrome. The first component is met when the woman is established to be a battered woman. The second component is that at the time of the incident, all the prior battering incidents appear in a flashback to the woman, thus triggering an immediate fear of death and causing her to respond almost instinctively in self-defense.

At the close of all the evidence, the trial court instructed the jury on murder, voluntary manslaughter, and self-defense. The court refused to instruct on negligent homicide. The jury found appellant not guilty of murder, but guilty of the lesser included offense of voluntary manslaughter. The jury did not find appellant guilty of the gun specification. Appellant was sentenced to eight to twenty-five years at the Marysville Reformatory for Women.

Appellant appealed to the court of appeals, which affirmed the **[***5]** trial court. This cause is now before this court upon the allowance of a motion for leave to appeal.

1. The battered woman syndrome has gained substantial scientific acceptance to warrant admissibility into evidence. (*State* v. *Thomas* [1981], 66 Ohio St. 2d 518, 20 O.O. 3d 424, 423 N.E. 2d 137, overruled to the extent inconsistent herewith.)

2. A defendant attempting to admit expert testimony regarding the battered woman syndrome must offer evidence which establishes herself as a "battered woman."

3. Admission of expert testimony regarding the battered woman syndrome does not establish a new defense or justification. It is to assist the trier of fact to determine whether the defendant acted out of a honest belief that she is in imminent danger of death or great bodily harm and that the use of such force was her only means of escape.

4. Negligent homicide is not a lesser included offense of murder.

COUNSEL: *John T. Corrigan*, prosecuting attorney, *George J. Sadd* and *Robert G. Trusiak*, for appellee.

David R. Harbarger and *Stuart A. Saferin*, for appellant.

JUDGES: Alice Robie Resnick, J. Douglas, Wright and H. Brown, JJ., concur. Moyer, C.J., Sweeney and Holmes, **[***6]** JJ., concur in the syllabus and judgment. Holmes, J.

OPINIONBY: RESNICK

OPINION: [*214] [972]** We shall first address whether the trial court erred in refusing to admit evidence of the battered woman syndrome. The trial court excluded the testimony based on the earlier decision of this court in *State* v. *Thomas* (1981), **[*215]** 66 Ohio St. 2d 518, 20 O.O. 3d 424, 423 N.E. 2d 137.

In *Thomas, supra*, the defendant alleged that she killed her common-law husband in self-defense. The trial court did not allow the defendant to introduce expert testimony of the battered woman syndrome in support of her defense. This court held that expert testimony on the battered woman syndrome was "inadmissible in evidence where (1) it is irrelevant and immaterial to the issue of whether defendant acted in self-defense at the time of the shooting; (2) the subject of the expert testimony is within the understanding of the jury; (3) the 'battered wife syndrome' is not sufficiently developed, as a matter of commonly accepted scientific knowledge, to warrant testimony under the guise of expertise; and (4) its prejudicial impact outweighs its probative value." *Id.* at syllabus.

In the case before us, appellant urges [***7] this court to overrule *Thomas, supra*, and hold that the trial court incorrectly excluded expert testimony as to the battered woman syndrome.

In *Thomas, supra*, at 521, 20 O.O. 3d at 426, 423 N.E. 2d at 139, we stated that "such expert testimony is inadmissible because it is not distinctly related to some science, profession or occupation so as to be beyond the ken of the average lay person. Furthermore, no general acceptance of the expert's particular methodology has been established." However, since 1981, several books and articles have been written on this subject. n1 In jurisdictions which have been confronted with this issue, most have allowed expert testimony on the battered woman syndrome. See *People* v. *Torres* (1985), 128 Misc. 2d 129, 135, 488 N.Y. Supp. 2d 358, 363; *State* v. *Hodges* (1986), 239 Kan. 63, 71, 716 P. 2d 563, 567; *Smith* v. *State* (1981), 247 Ga. 612, 277 S.E. 2d 678; *Hawthorne* v. *State* (Fla. App. 1982), 408 So. 2d 801; *State* v. *Kelly* (1984), 97 N.J. 178, 202, 478 A. 2d 364, 375-376.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 See, *e.g.*, Walker, The Battered Woman (1979); Walker, The Battered Woman Syndrome (1984); Ewing, Battered Women Who Kill (1987); Browne, When Battered Women Kill (1987); Rosen, Battered Wives: A Comprehensive Annotated Bibliography of Articles, Books and Statutes in the United States of America (1988); Comment, The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis (1982), 77 N.W.U.L. Rev. 348; Mather, The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony (1988), 39 Mercer L. Rev. 545; Waits, The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions (1985), 60 Wash. L. Rev. 267; Schneider, Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering (1986), 9 Women's Rights L. Rptr. 195, 196, at fn. 5.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [***8]

Appellant **[**973]** argues that expert testimony on the battered woman syndrome is essential to her claim of self-defense. HN17 In Ohio, to prove self-defense it must be established that the person asserting this defense had "* * * a *bona fide belief* that he [she] was in imminent danger of death or great bodily harm and that his [her] only means of escape from such danger was in the use of such force." (Emphasis added.) *State* v. *Robbins* (1979), 58 Ohio St. 2d 74, 12 O.O. 3d 84, 388 N.E. 2d 755, paragraph two of the syllabus.

Thus, Ohio has adopted a subjective test in determining whether a particular defendant properly acted in self-defense. The defendant's state of mind is crucial to this defense. **[*216]** See *State* v. *Smith* (1983), 10 Ohio App. 3d 99, 101, 10 OBR 122, 125, 460 N.E. 2d 693, 696-697; *State* v. *Thomas* (1983), 13 Ohio App. 3d 211, 213, 13 OBR 261, 262-263, 468 N.E. 2d 763, 765.

The trial court in the instant case properly instructed the jury that it must put itself in the position of the appellant in determining whether she acted in self-defense:

"In determining whether the Defendant had reasonable grounds for an honest belief that she was in imminent **[***9]** danger, you must put yourself in the position of the Defendant, with her characteristics, knowledge, or lack of knowledge, and under the same circumstances and conditions that surrounded the Defendant at the time. You must consider the conduct of Michael Koss and determine if such acts and words caused the Defendant to reasonably and honestly believe that she was about to be killed or to receive great bodily harm."

HN2 Expert testimony in Ohio is admissible if it will assist the trier of fact in search of the truth. See Mathews v. McKay (1987), 38 Ohio App. 3d 165, 526 N.E. 2d 603. However, when such knowledge is within the ken of the jury, expert testimony is inadmissible. See *Bostic* v. *Connor* (1988), 37 Ohio St. 3d 144, 524 N.E. 2d 881, paragraph three of the syllabus; *Lee* v. *Baldwin* (1987), 35 Ohio App. 3d 47, 519 N.E. 2d 662.

Further, HN3 Evid. R. 702 provides: "If scientific, technical, or *other specialized knowledge* will assist the trier of fact to understand evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." (Emphasis **[***10]** added.)

Appellant argues that expert testimony regarding the battered woman syndrome is admissible to help the trier of fact understand the syndrome and decide whether she is in fact a battered woman who possessed reasonable grounds for an honest belief that she was in imminent danger.

HN4 Expert testimony regarding the battered woman syndrome can be admitted to help the jury not only to understand the battered woman syndrome but also to determine whether the defendant had reasonable grounds for an honest belief that she was in imminent danger when considering the issue of self-defense. "Expert testimony on the battered woman syndrome would help dispel the ordinary lay person's perception that a woman in a battering relationship is free to leave at any time. The expert evidence would counter any 'common sense' conclusions by the jury that if the beatings were really that bad the woman would have left her husband much earlier. Popular misconceptions about battered women would be put to rest, including the beliefs that the women are masochistic and enjoy the beatings and that they intentionally provoke their husbands into fits of rage. See Walker, The Battered Woman, 19-31 (1979)." **[***11]** *State* v. *Hodges* (1986), 239 Kan. 63, 68-69, 716 P. 2d 563, 567. See, also, *Smith* v. *State, supra*, at 618-619, 277 S.E. 2d at 683; *Hawthorne, supra*; *Torres, supra*, at 133-134, 488 N.Y. Supp. 2d at 362.

As the Supreme Court of New Jersey stated in *State* v. *Kelly, supra*, at 193, 478 A. 2d at 371:

"[']Battered women include wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself **[**974]** in an abusive relationship with a man once. If it occurs a second time, and she remains in **[*217]** the situation, she is defined as a battered woman.[']" (Quoting Walker, The Battered Woman [1979], at *xv.)*

"* * *[E]xpert testimony would be essential to rebut the general misconceptions regarding battered women.

"The difficulty with the expert's testimony is that it *sounds* as if an expert is giving knowledge to a jury about something the jury knows as well as anyone else, namely, the reasonableness of a person's fear of imminent serious danger. That is not at all, however, what this testimony is *directly* aimed at. **[***12]** It is aimed at an area where the purported common knowledge of the jury may be very much mistaken, an area where jurors' logic, drawn from their own experience, may lead to a wholly incorrect conclusion, an area where expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge." *Kelly, supra*, at 206, 478 A. 2d at 378.

Thus, admission of expert testimony regarding the battered woman syndrome does not establish a new defense or justification. Rather, it is to assist the trier of fact determine whether the defendant acted out of a honest belief that she was in imminent danger of death

Appellant further argues that the trial court erred in refusing her request to charge the jury on negligent homicide. The record shows that the trial court instructed the jury on murder, the offense with which appellant was charged; voluntary manslaughter; and self-defense. HN6 Crim. R. 31(C) states in part: "* * * When the indictment, information, or complaint charges an offense including degrees, or if lesser offenses are included within the offense charged, the defendant may be found not **[***15]** guilty of the degree charged but guilty of an inferior degree thereof, or of a lesser included offense." See, also, R.C. 2945.74.

This court in *State* v. *Deem* (1988), 40 Ohio St. 3d 205, 533 N.E. 2d 294, at paragraph three of the syllabus, set forth a three-part test to determine when an offense may be a lesser included offense of another offense:

HN7 "An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense. (*State* v. *Kidder* [1987], 32 Ohio St. 3d 279, 513 N.E. 2d 311, modified)." However, "[e]ven though an offense may be statutorily defined as a lesser included offense of another, a charge on such lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. (*State* v. *Kidder* [1987], 32 Ohio St. 3d 279, 513 N.E. 2d 311; **[***16]** *State* v. *Davis* [1983], 6 Ohio St. 3d 91, 6 OBR 131, 451 N.E. 2d 772; *State* v. *Wilkins* [1980], 64 Ohio St. 2d 382, 18 O.O. 3d 528, 415 N.E. 2d 303, clarified.)" *State* v. *Thomas* (1988), 40 Ohio St. 3d 213, 533 N.E. 2d 286, paragraph two of the syllabus.

Thus the facts and evidence of a particular case become pertinent only after the court first finds that the offense indeed is a lesser included offense. "[O]ur longstanding rule [is] **[*219]** that the evidence presented in a particular case is irrelevant to the determination of whether an offense, as statutorily defined, is necessarily included in a greater offense. The facts become relevant only in the determination of whether a jury could reasonably convict the defendant of the lesser included offense as defined." *Kidder, supra*, at 282, 513 N.E. 2d at 315.

The two offenses at issue here are R.C. 2903.02 and 2903.05. "Murder" is defined in R.C. 2903.02 as:

HN8 "(A) No person shall purposely cause the death of another.

"(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code."

HN9 "Negligent homicide," R.C. 2903.05, is defined as:

"(A) No person **[***17]** shall negligently cause the death of another by means of a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code.

"(B) Whoever violates this section is guilty of negligent homicide, a misdemeanor of the first degree."

The first prong of the test is met because negligent homicide carries a lesser penalty than murder. However, the second prong of the test is not met because one can purposely cause the death of another by means other than by a deadly weapon or dangerous ordnance. Therefore, HN10 because negligent homicide is not always and "necessarily included in" murder, we hold that negligent homicide is not a lesser included offense of murder. The trial court, therefore, properly refused to instruct on negligent homicide as a lesser included

offense of murder. See *Thomas, supra* (40 Ohio St. 3d 213), at 215, 533 N.E. 2d at 288-289.

[976]** In her third proposition of law, appellant argues that she is entitled to an acquittal because the jury's verdict is inherently inconsistent. The jury found her guilty of voluntary manslaughter but not guilty of the gun specification. Accordingly, she contends that the verdict is inconsistent in view of the evidence. **[***18]**

The record clearly establishes that the victim died of a gunshot wound to the head. Appellant testified at trial that she remembers observing the gun on the nightstand and reaching for it. Although she stated that she "must have picked" up the gun, she does not remember firing it. The gun was not positively identified as the murder weapon, but the bullets remaining in the gun were similar to the type of bullet used to kill the victim.

In view of the evidence which demonstrates that the victim died of a gunshot wound, we must find that the jury's verdict that appellant was guilty of voluntary manslaughter but not guilty of having "a firearm on or about her person or under her control while committing the offense" is inconsistent. The jury not having found appellant guilty of the gun specification, the prosecution will not be permitted to retry her on the specification upon remand.

Lastly, appellant argues that the trial court erred in determining that her sentence was non-probationable. The controlling statute, then effective, is R.C. 2951.02(F)(3), which provides:

HN11"An offender shall not be placed on probation or otherwise have his sentence of imprisonment suspended pursuant to **[***19]** division (D)(2) or (4) of section 2929.51 of the Revised Code when any of the following applies:

"* * *

"(3) The offense involved was not a violation of section 2923.12 of the Revised Code and was committed while the offender was armed with a firearm or dangerous ordnance, as **[*220]** defined in section R.C. 2923.11 of the Revised Code."

Although the jury acquitted appellant of the gun specification, the evidence establishes that the victim died of a gunshot wound to the head. The jury also found that appellant caused the death of the victim and found her guilty of voluntary manslaughter. Thus, the trial court properly determined that probation was not appropriate because the offense was committed with a firearm. See *State v. Fisher* (1985), 26 Ohio App. 3d 197, 198, 26 OBR 418, 419 499 N.E. 2d 344, 346 (trial court correctly determined that the offense was non-probationable where the presentence investigation disclosed that a firearm was involved in the commission of the crime charged).

For the foregoing reasons, the judgment of the court of appeals is reversed and the cause is remanded to the trial court for further proceedings consistent with this opinion.

CONCURBY: HOLMES

CONCUR: Holmes, **[***20]** J., concurring in syllabus and judgment.

I concurred in the syllabus and judgment in *State v. Thomas* (1981), 66 Ohio St. 2d 518, 20 O.O. 3d 424, 423 N.E. 2d 137, in which a unanimous court denied expert testimony on the so-called "battered wife syndrome" or "battered woman syndrome." As clearly set forth in the syllabus of *Thomas*, there were four bases for our decision that such testimony was inadmissible. Today, the majority overrules only the third such enumerated basis, and I join in the majority's holding "that the battered woman syndrome has gained substantial scientific acceptance to warrant admissibility in evidence."

I write separately, however, to emphasize that the other limitations enumerated in *Thomas* on the admissibility of this type of testimony still remain. Of especial importance to the case before us, general expert testimony as to this "syndrome" should be admitted *only* in connection with testimony of a clinical psychiatrist or psychologist **[**977]** who has in fact examined the defendant which states that the defendant herself was a battered woman. Expert testimony regarding battered women in general or concerning only the syndrome itself would be wholly **[***21]** "irrelevant and immaterial to the issue of whether defendant acted in self-defense at the time of the shooting." *Thomas, supra*, at syllabus. n3 The record before us here indicates that defendant's proffer was limited to expert testimony regarding the two components of the syndrome **[*221]** itself. No proffer was made of expert testimony that defendant Koss was herself a battered woman, or that the syndrome was in any way relevant to defendant's conduct in the killing of her husband. n4

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n3 See, *e.g.*, *State* v. *Anaya* (Me. 1981), 438 A. 2d 892 (expert testimony relevant to defendant's behavior and perception at time of killing because testimony gave the jury reason to believe that defendant's conduct was consistent with self-defense); *State* v. *Kelly* (1984), 97 N.J. 178, 478 A. 2d 364 (expert testimony relevant to objective reasonableness and honesty of defendant's belief that deadly force was necessary); *State* v. *Allery* (1984), 101 Wash. 2d 591, 682 P. 2d 312 (admitting expert testimony to explain why a battered woman remains in an abusive relationship and why defendant perceived herself in imminent danger at time of shooting). See, also, *Smith* v. *State* (1981), 247 Ga. 612, 277 S.E. 2d 678 (admitting expert evidence regarding battered women in general). **[***22]**

n4 See *Buhrle* v. *State* (Wyo. 1981), 627 P. 2d 1374 (excluding expert testimony because, *inter alia*, defendant's behavior did not fit into patter of battered woman syndrome).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

I also wish to stress the point made in paragraph three of the syllabus of today's decision, which point goes both to relevance of expert testimony in a given case, as well as to whether the prejudicial impact of admitting such testimony outweighs its probative value. The battered woman syndrome we recognize today does not establish a new defense to or justification for the killing of an abusive husband or lover. The battered woman syndrome is not a defense in itself, and does not -- standing alone -- excuse the defendant. *State* v. *Kelly* (1982), 33 Wash. App. 541, 655 P. 2d 1202, reversed on other grounds (1984), 102 Wash. 2d 188, 685 P. 2d 564; *State* v. *Leidholm* (N.D. 1983), 334 N.W. 2d 811.

"Most battered woman's defense cases involve situations in which the defendant was not, in fact, in imminent danger of death or serious bodily harm at her victim's hands. The defense relies on persuading the **[***23]** jury that defendant suffered from an identifiable psychological syndrome that caused her to assess the dangerousness of the situation in a different manner than an average, ordinary person -- including a woman who does not suffer from battered woman syndrome. In other words, acquittal is dependent upon proving that defendant had * * * a disability that caused a mistaken, but reasonable, belief in the existence of circumstances that would justify self-defense. *It is a theory of excuse rather than of justification*. Because defendant responded to internal and external coercive pressures, for which she was not responsible but which were created by her social reality as a battered woman, she is not to blame for her conduct. A person who did not suffer from battered woman syndrome, however, would be culpable under identical external circumstances. * * *" (Emphasis added; footnotes omitted.) Rosen, The Excuse of Self-

Defense: Correcting A Historical Accident On Behalf Of Battered Women Who Kill (1986), 36 Amer. U.L. Rev. 11, 43. The grave danger, in my view, posed by stating that a battered woman who kills her abuser is *justified* in doing so is that such conduct may be in some **[***24]** manner encouraged. *Id.* at 44.

I would also caution trial courts to carefully weigh the prejudicial impact of such expert testimony, pursuant to Evid. R. 403(B), in cases where its relevance is less than clear. A real danger for abuse exists, in my view, in that the battered woman syndrome may be used to divert the jury's attention to the prior bad acts and alleged bad character of the "battering husband."

"In defining the defendant as a battered woman, the expert would necessarily identify the deceased as a battering husband and highlight the years of abuse which the accused suffered at her spouse's hands. Both the character and the conduct of the **[**978]** deceased would be described, interpreted, and defined through the vehicle of scientific testimony. The jury's attention would in this manner be deflected from the *responses* of the *accused* **[*222]** at the *time of the homicide* to the general bad character and repeated acts of misconduct *of the deceased* at times *far removed* from the homicide. Imbued with the 'aura of infallibility' typically ascribed to expert witnesses, and benefiting from the tendency of scientific testimony to be exceptionally persuasive, the **[***25]** effect of the expert's testimony could thus be to enhance the relevance of conclusions that are not germane to a claim of lawful justification." (Footnote omitted.) Acker & Toch, Battered Women, Straw Men, and Expert Testimony: A Comment on *State* v. *Kelly* (1985), 21 Crim. L. Bull. 125, 146-147.

I have considerable empathy with those women who are physically abused by their husbands or the men in their lives, and this court should extend to them every reasonable opportunity to present every legal defense available within the realm of our evidentiary process. Thus, with the aforestated caveats, I am able to concur in today's syllabus and judgment.

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NICCHIA *v.* PEOPLE OF THE STATE OF NEW YORK

No. 74

SUPREME COURT OF THE UNITED STATES

254 U.S. 228; 41 S. Ct. 103; 65 L. Ed. 235; 1920 U.S. LEXIS 1184; 13 A.L.R. 826; 19 Ohio L. Rep. 2

Argued November 17, 1920
December 6, 1920

PRIOR HISTORY: [***1]

ERROR TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK

LAWYERS' EDITION HEADNOTES:

Constitutional law -- due process of law -- regulating property in dogs -- police power. --

Headnote:
Property in dogs is of an imperfect or qualified nature, and they may be subjected to peculiar and drastic police regulations by the state without depriving their owners of any Federal right.
[For other cases, see Constitutional Law, IV. b, 5; IV. c, 2, in Digest Sup. Ct. 1908.]

Constitutional law -- due process of law -- liberty -- dog licenses -- police power. --

Headnote:
Dog owners are not deprived of their property nor of their liberty without due process of law by a state statute under which those desiring to keep dogs must secure licenses from, and pay fees to, a private corporation created by the state to enforce the laws enacted to prevent cruelty to animals, such fees to be used by it for the payment of expenses fairly incurred, and any excess to be retained as compensation for its services in law enforcement.
[For other cases, see Constitutional Law, IV. b, 5, in Digest Sup. Ct. 1908.]

SYLLABUS: It is within the police power of a State to require payment of license fees by the owners of dogs in cities, under penalty of fine. P. 230.

If, in exercising this power, the State sees fit to provide that the licenses shall be issued and the fees collected by a private corporation created by the State for the purpose of aiding in the enforcement of laws enacted to prevent cruelty to animals, and that the fees so collected shall be applied by such corporation in payment of its expenses fairly incurred and as just compensation for valuable service rendered in such law enforcement, the owners of dogs are not thereby deprived of property or liberty in violation of the Fourteenth Amendment. P. 231.
224 N.Y. 637, affirmed.

THE case is stated in the opinion.

COUNSEL: *Mr. George P. Foulk*, with whom *Mr. Joseph Nicchia* was on the brief, opened for plaintiff in error. The court declined to hear further argument.

Mr. Harry E. Lewis, Mr. Harry G. Anderson, Mr. J. Mayhew Wainwright and *Mr. William N. Dykman* for defendant in error.

JUDGES: White, McKenna, Holmes, Day, Van Devanter, Pitney, McReynolds, Brandeis, [***2] Clarke

OPINIONBY: McREYNOLDS

OPINION: [*228] [**237] MR. JUSTICE McREYNOLDS delivered the opinion of the court.

Plaintiff in error owned two dogs which she harbored within New York City without having obtained the license required by c. 115, Laws of New York 1894, as amended by c. 412, Laws 1895, and c. 495, Laws 1902. She was charged with violating the statute on October 11, 1916, [*229] found guilty in the City Magistrates' Court, Brooklyn, and required to pay a fine. The Court of Appeals affirmed the judgment without opinion.

Chapter 115 as amended provides:

"Sec. 1. Every person who owns or harbors one or more dogs within the corporate limits of any city having a population of over eight hundred thousand, shall procure a yearly license and pay the sum of two dollars for each dog. . . ."

"Sec. 8. The American Society for the Prevention of Cruelty to Animals is hereby empowered and authorized to carry out the provisions of this act, and the said society is further authorized to issue the licenses and renewals, and to collect the fees therefor, as herein prescribed; and the fees so collected shall be applied by said society in defraying the cost of carrying out the [***3] provisions of this act and maintaining a shelter for lost, strayed or homeless animals; and any fees so collected and not required in carrying out the provisions of this act shall be retained by the said society as compensation for enforcing the provisions of title sixteen of the penal code and such other statutes of the state as relate to the humane work in which the said society is engaged."

"Sec. 9. Any person or persons, who shall hinder or molest or interfere with any officer or agent of said society in the performance of any duty enjoined by this act, or who shall use a license tag on a dog for which it was not issued, shall be deemed guilty of a misdemeanor. Any person who owns or harbors a dog without complying with the provisions of this act shall be deemed guilty of disorderly conduct, and upon conviction thereof before any magistrate shall be fined for such offense any sum not exceeding ten dollars, and in default of payment of such fine may be committed to prison by such magistrate until the same be paid, but such imprisonment shall not exceed ten days."

[*230] The validity of the act was questioned upon the ground that it violates the Fourteenth Amendment, § [***4] 1, by "depriving a citizen of his liberty without due process of law, to-wit, the liberty of owning and harboring a dog without procuring a license from and paying a fee therefor to the Society, a private corporation." In *Fox* v. *Mohawk & H. R. Humane Society* (1901), 165 N.Y. 517, the Court of Appeals declared a statute essentially the same as c. 115 before the amendment of 1902 invalid under the state constitution because it appropriated public funds for the use of a private corporation and also because it conferred an exclusive privilege. But the court repudiated the suggestion that the statute deprived dog owners of property without due process or delegated governmental power to a private corporation. Thereafter (1902) the legislature amended c. 115 with the evident purpose of meeting objections pointed out in the *Fox Case*. Thus amended the law has been upheld. Our only concern is with the suggested federal question.

The American Society for the Prevention of Cruelty to Animals was incorporated by c. 469, Laws of New York 1866. "The purpose of the corporation was to enforce the laws enacted to prevent cruelty to animals." Davis v. [**238] American Society, 75 [***5] N.Y. 362, 366. It has long been recognized by the legislature as a valuable and efficient aid toward the enforcement of those laws. New York Penal Laws, Article XVI, § 196. The payment of public funds to a similar corporation for assistance in enforcing penal statutes has been declared unobjectionable. *People ex rel. State Board of Charities v. The New York Society for the Prevention of Cruelty to Children*, 161 N.Y. 233, 239, 250.

Property in dogs is of an imperfect or qualified nature and they may be subjected to peculiar and drastic

police regulations by the State without depriving their owners of any federal right. *Sentell* v. *New Orleans & Carrollton* [*231] *R.R. Co.*, 166 U.S. 698. *Fox* v. *Mohawk & H. R. Humane Society, supra.* Its power to require those who wish to keep dogs to secure licenses from and pay fees to a public officer is also clear. And when the State in the reasonable conduct of its own affairs chooses to entrust the work incident to such licenses and collection of fees to a corporation created by it for the express purpose of aiding in law enforcement, and in good faith appropriates the funds so collected for payment of expenses [***6] fairly incurred and just compensation for the valuable services rendered, there is no infringement of any right guaranteed to the individual by the Federal Constitution. Such action does not amount to the taking of one man's property and giving it to another, nor does it deprive dog owners of liberty without due process of law.

The judgment below must be

Affirmed.

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Shirley **Carter,** Respondent, v. **Metro North** Associates et al., Appellants.

1873

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

255 A.D.2d 251; 680 N.Y.S.2d 239; 1998 N.Y. App. Div. LEXIS 12720

November 24, 1998, Decided
November 24, 1998, Entered

COUNSEL: [***1] For Plaintiff-Respondent: Steve Weissman.

For Defendants-Appellants: Edward J. O'Gorman.

JUDGES: Concur--Tom, J. P., Andrias and Saxe, JJ.

OPINION: [*251] [**240] Order, Supreme Court, New York County (Lorraine Miller, J.), entered April 17, 1998, denying defendants' motion for summary judgment, and, upon searching the record, granting summary judgment to the plaintiff on the issue of liability, reversed, on the law, without costs, judgment in favor of plaintiff vacated, defendants' motion granted and the complaint dismissed. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Before a pet owner, or the landlord of the building in which the pet lives, may be held strictly liable for an injury inflicted by the animal, the plaintiff must establish both (1) that the animal had vicious propensities *and* (2) that the defendant knew or should have known of the animal's propensities (*see, Vavosa v Stiles,* 220 AD2d 363; *Gibbs v Grenadier Realty Corp.,* 173 AD2d 171). Here, although it was established that plaintiff, a resident of a building owned and managed by the defendants, was attacked and bitten on the face [***2] by a pit bull owned by another tenant, there was no evidence indicating that the dog had ever attacked any other individual, or previously displayed any vicious behavior. The IAS Court erred in circumventing the requirement for evidence concerning the particular animal by purporting to take judicial notice of the vicious nature of the breed as a whole.

"A court may only apply judicial notice to matters 'of common and general knowledge, well established and authoritatively settled, not doubtful or uncertain. The test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof' " (*Dollas v Grace & Co.,* 225 AD2d 319, 320, quoting *Ecco High Frequency Corp. v Amtorg Trading Corp.,* 81 NYS2d 610, 617, *affd* 274 App Div 982). The fact at issue must be " 'generalized knowledge as [is] so notorious as not to be the subject of reasonable dispute' " (*Abrevaya v Palace Theatre & Realty Co.,* 25 Misc 2d 600, 603 [Sup Ct, NY County 1960], quoting Model Code of Evidence rule 801).

On the subject of the propensities of pit bull terriers as a breed there are alternative opinions [***3] that preclude judicial notice such as was taken by the court. While many sources, including the authorities relied upon by the IAS Court, assert [*252] the viciousness of pit bulls in general, numerous other experts suggest that, at most, pit bulls possess the *potential* to be trained to behave viciously (*see, e.g.,* Green, *It's Unfair to Categorize Any Dog Breed As A Biter,* Seattle Times, Aug. 17, 1997, at G5; Kuntz, *Word for Word/Rover Rage,* New York Times, June 7, 1998, section 4, at 7, col 1; Foote, *That is Not A Bad Dog--That's a Splendid Dog,* 23 Smithsonian Mag 60-71 [1992]).

Furthermore, scientific evidence more definitive than articles discussing the dogs' breeding history is necessary before it is [**241] established that pit bulls, merely by virtue of their genetic inheritance, are inherently vicious or unsuited for domestic living, such as, for instance, wolves and leopards would be (*but see, Plue v Lent,* 146 AD2d 968, 969 [3d Dept]). No statistical analysis is offered to demonstrate that a high percentage of the total number of pit bulls has engaged in violent incidents.

Even accepting that the evidentiary submissions [***4] created an issue of fact as to whether this particular animal had vicious propensities, none of the evidence supports a finding that the landlord had, or should have had, knowledge of any such propensities. In particular, the claimed admission of the dog's owner to the plaintiff immediately before the incident, that the dog had become aggravated due to children playing in the vicinity, provides no support for an inference that the landlord knew of such propensities. Nor does evidence that the landlord's agents knew of the dog's existence and presence in the building support the inferential leap to knowledge on the part of the landlord that the dog had vicious propensities.

The defendants' failure to enforce the "No Pets" provision of the lease cannot be characterized as a proximate cause of plaintiff's injuries. There is no causal connection between the lease violation and plaintiff's injuries, particularly in the absence of any demonstrated reliance on the lease clause by the plaintiff.

In response to defendants' motion, it was incumbent upon plaintiff to submit evidentiary proof sufficient to raise an issue of fact (*see, Machinery Funding Corp. v Loman Enters.,* 91 AD2d 528). [***5] In the absence of sufficient evidence to support plaintiff's claim, defendants' motion for summary judgment dismissing the complaint should have been granted.

Concur--Tom, J. P., Andrias and Saxe, JJ.

DISSENTBY: MAZZARELLI

DISSENT: Mazzarelli, J., Dissents in a memorandum as follows: Plaintiff, a 72-year-old resident of defendants' apartment complex, seeks to hold defendants liable for personal injuries sustained during an attack by a pit bull owned by another tenant. [*253] The standard leases issued by defendants prohibited tenants from keeping pets on the premises. Despite defendants' knowledge of this dog's presence, the lease provision was not enforced and the dog was permitted to remain.

The majority holds that summary judgment should have been granted to defendants because no evidence was produced by the plaintiff showing that this pit bull had vicious propensities, and because the IAS Court improperly took judicial notice of the alleged vicious propensities of pit bulls as a breed. While I agree that judicial notice was inappropriate under these circumstances, I believe that triable issues of fact exist as to whether this particular breed of dog has innate vicious propensities, [***6] and whether the defendants knew or should have known of this propensity so as to give rise to a duty to protect other residents from a dangerous animal on the premises. Accordingly, I would modify to deny summary judgment to both parties and remand for further proceedings.

Plaintiff was attacked on August 8, 1995, as she was walking along a path leading to one of the exit gates of defendants' apartment complex. As she neared the gate, she heard a dog's "vicious" barking, and then observed another tenant with a dog (a pit bull) on a leash. According to plaintiff's deposition testimony, the tenant told her that the dog was only behaving in this manner because the children playing in the immediate vicinity were "aggravating" it. Moments later, the pit bull leaped onto the plaintiff's body, biting her left cheek and cutting her left side. Plaintiff remembered feeling a heavy, muscular presence on her that knocked her into the security cabin. Plaintiff went to the emergency room, where she was treated for her injuries.

On the issue of defendants' knowledge, one of defendants' employees testified at his deposition that he had seen the dog being walked by the tenant's son on some [***7] five prior occasions, that the dog appeared to be "strong" from the manner in which it pulled on its leash and that he thought the dog had big teeth. Both this employee and another [**242] testified that they were aware that tenants were prohibited from keeping pets on the premises.

For a landlord to be held liable for an attack by a domestic animal kept by a tenant on its leased premises, it must be shown that the landlord had knowledge of the vicious propensities of the animal, and had control of the premises or other capability to remove or confine it (*Strunk v Zoltanski,* 62 NY2d 572, 575). "Vicious propensity" has been defined as "a natural inclination or habitual tendency to act in a manner that might [*254] endanger the person or property of others" (1A NY PJI3d 2:220, at 876 [1998]; *see also, Dickson v McCoy,* 39 NY 400; *Appel v Charles Heinsohn, Inc.,* 91 AD2d 1029, 1030, *affd* 59 NY2d 741; *Shuffian v*

Garfola, 9 AD2d 910). Whether the animal that caused the plaintiff's injuries had vicious propensities is a question for the jury (*Rider v White*, 65 NY 54; 1A NY [***8] PJI3d 2:220, *op. cit.*, at 876; 3 NY Jur 2d, Animals, § 156, at 635). In deciding this question, the jury may consider the nature and results of the attack on the plaintiff (*Lynch v Nacewicz*, 126 AD2d 708, 709; *Ford v Steindon*, 35 Misc 2d 339, 340), whether the animal had previously attacked other persons (*Lynch v Nacewicz, supra*), and the disposition of the animal toward persons coming near it (*Rider v White, supra;* 1A NY PJI3d 2:220, *op. cit.*). "Proof of a previous attack is unnecessary where other factors are indicative of knowledge [of an animal's vicious propensities] (*see, Perrotta v Picciano*, 186 App Div 781, 783)." (*Brophy v Columbia County Agric. Socy.*, 116 AD2d 873, 874.)

In the case at bar, the unprovoked and brutal nature of the attack on the plaintiff strongly suggests that this animal had vicious tendencies. This conclusion is supported by the owner's admission to the plaintiff, immediately before the attack, that the dog had become "aggravated" due to children playing in the vicinity. From these facts, it may be reasonably inferred that this dog posed [***9] an unreasonable risk of danger to other residents and passersby, and that defendants should have known of this risk (*see, Brophy v Columbia County Agric. Socy., supra*, at 875 [defendants' knowledge of horse's vicious propensities may be inferred from fact of defendants' maintenance and inspection of leased premises]).

Additionally, while the taking of judicial notice of the vicious propensities of pit bulls as a breed was improper (*see, Sorel v Iacobucci*, 221 AD2d 852, 853-854; *DeVaul v Carvigo, Inc.*, 138 AD2d 669, *lv denied* 72 NY2d 806; 3 NY Jur 2d, Animals, § 149, at 625), there is authority to support the proposition that a degree of viciousness may be implied solely by virtue of the specific breed involved (*see, Sorel v Iacobucci, supra* [while judicial notice is inappropriate, some degree of viciousness may be implied in case of German Shepherd]; *Carlisle v Cassasa*, 234 App Div 112 [court can almost take judicial knowledge of the fact that police dogs are, by nature, vicious, inheriting their wild and untamed characteristics from their wolf ancestors]; *see also, Strunk v Zoltanski, supra*, at 578, n 1 [***10] [Kaye, J., dissenting]; *Plue v Lent*, 146 AD2d 968).

As noted by the IAS Court, there is also case authority from other jurisdictions, as well as from non-legal sources, from [*255] which the viciousness of pit bulls may be inferred. For example, several commentators have discussed how the selective breeding of pit bulls, including their long history of being bred for participation in the sport of dogfighting, has resulted in a "breed which is much more easily aroused than most dogs, incredibly tenacious, insensitive to pain, and that attacks without warning" (*Kensington Sq. II Ltd. Partnership v Perez*, 1995 Conn Super LEXIS 3102, *60 [Conn Super Ct, Oct. 17, 1995, Jones, J.], citing *Killer Genes Ate My Dog*, Economist [U.K.], June 1, 1991, at 83; *see also*, Comment, *The New Breed of Municipal Dog Control Laws: Are They Constitutional?*, 53 U Cin L Rev 1067 [1984]). Further, the physical characteristics of the breed (*see, State v Anderson*, 57 Ohio St 3d 168, 171-172, 566 NE2d 1224, 1227, *cert denied* 501 US 1257, quoting [**243] *Hearn v City of Overland Park*, 244 Kan 638, 643, 772 P2d 758, 762, [***11] *cert denied* 493 US 976 [" ' "short, squatty body with developed chest, shoulders and legs ... muscular neck and a protruding jaw" ' "]), including their exceptionally strong bite (*see, Kensington Sq. II Ltd. Partnership v Perez, supra*, at * 11, citing Sullivan, *Banning the Pit Bull: Why Breed-Specific Legislation is Constitutional*, 13 U Dayton L Rev 279, 283-284 [pit bulls can bite with a force of 1,800 to 2,000 pounds per square inch, or twice the force of the average Doberman Pinscher or German Shepherd]), have only reinforced their dangerous reputation.

Most significantly, the IAS Court cited authorities that relied on statistical studies to demonstrate that pit bulls have been responsible for a disproportionate number of canine attacks on human beings, and fatalities resulting from such attacks (*see, Kensington Sq. II Ltd. Partnership v Perez, supra*, at * 4, citing *Pit Bulls--Dangerous or Misunderstood?*, 14 Current Mun Probs 497 [1988] [between 1983 and 1988, pit bulls were responsible for 21 of the nation's 29 fatal canine attacks]; *see also*, Sacks, *Dog Bite-Related Fatalities from 1979 through* [***12] *1988*, 262 J of Am Med Assn 1489 [1989] [between 1979 and 1988 pit bulls were responsible for 42 of 101 (41.6%) of deaths by dog bites, which was three times the rate of German Shepherds]; *Dog Days Indeed*, New York Times, Dec. 10, 1997, at B 3 [pit bulls constitute only 4% of licensed dogs in New York City but account for one-third of reported dog bites]). Further, as a result of the alarming increase in fatal attacks by pit bulls, many jurisdictions have passed legislation banning or regulating the ownership of pit bulls (*see, e.g., State v Anderson, supra* [upholding the constitutionality of State statute providing that ownership of dog commonly known as "pit bull" is prima facie ownership of a vicious dog]; *Garcia v Village* [*256] *of Tijeras*, 108 NM 116, 767 P2d 355 [NM App 1988], *cert denied* 107 NM 785, 765 P2d 758 [upholding village ban on pit bulls]; *Hearn v City of Overland Park, supra* [unique public hazard created by presence of pit bulls within community justifies city's attempt to regulate this breed of dog]).

Collectively, the ferocious nature of the pit bull's attack on the [***13] plaintiff, the dog's behavior immediately prior to the attack and the historical and statistical evidence adduced with respect to a pit bull's tendency to behave in a vicious and potentially lethal manner, in my view, give rise to triable issues of fact as to this particular dog's vicious propensities and whether the defendants should have had knowledge thereof (*see, Abrevaya v Palace Theatre & Realty Co.,* 25 Misc 2d 600, 603 [Sup Ct, NY County 1960] [holding whether a rhesus monkey is a wild animal or a mild one, and if the former, whether it may be trained to tameness, is a question of fact]; *see also, Donchin v Guerrero,* 34 Cal App 4th 1832, 41 Cal Rptr 2d 192 [1995]; *Rosado-Carrasco v Wathne,* 1997 Conn Super LEXIS 2193 [Conn Super Ct, Aug. 12, 1997, Sullivan, J.]). Expert testimony could be offered at trial to supplement the authorities relied on by the motion court (*Abrevaya v Palace Theatre & Realty Co., supra; Donchin v Guerrero, supra*).

It must also be remembered that the particular setting of this attack was a densely populated apartment complex where numerous infants, children and [***14] elderly persons, all of whom are especially unable to defend themselves from a vicious dog attack, reside. Thus, the jury would also have to resolve the questions of whether the defendants took adequate precautions to protect third persons from an unreasonable risk on the premises (*see, Strunk v Zoltanski, supra,* at 576 [landlords as others must exercise reasonable care not to expose third persons to an unreasonable risk of harm]), whether the defendants had "control of the premises or other capability to remove or confine the animal" (*supra,* at 575), and whether the failure to enforce the lease provision prohibiting animals was the proximate cause of plaintiff's injuries. As none of the aforementioned questions may be answered in defendants' favor as a matter of law, I would modify as indicated and remand for further proceedings.

Document 1 of 1.

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THE STATE OF OHIO, APPELLANT, v. COWAN, APPELLEE.
SUPREME COURT OF OHIO
103 Ohio St. 3d 144; 2004 Ohio 4777; 814 N.E.2d 846; 2004 Ohio LEXIS 2132
No. 2003-1406
September 22, 2004, Decided

Editorial Information: Prior History

APPEAL from the Court of Appeals for Portage County, Nos. 2002-P-0029, 2002-P-0030, and 2002-P-0031, 2003-Ohio-3547. State v. Cowan, 2003 Ohio 3547, 2003 Ohio App. LEXIS 3252 (Ohio Ct. App., Portage County, July 3, 2003)

Disposition Judgment of the court of appeals affirmed.

Headnotes

Dogs -- R.C. 955.22 -- Failure to confine or restrain vicious or dangerous dog -- Procedural due process -- Statute unconstitutional insofar as it fails to provide dog owner with opportunity to be heard on question whether dog is "vicious" or "dangerous"--Convictions reversed.

Syllabus

{814 N.E.2d 847} {103 Ohio St. 3d 144} SYLLABUS OF THE COURT R.C. 955.22 violates the constitutional right to procedural due process insofar as it fails to provide dog owners a meaningful opportunity to be heard on the **{103 Ohio St. 3d 145}** issue of whether a dog is "vicious" or "dangerous" as defined in R.C. 955.11(A)(1)(a) and (A)(4)(a) .

Counsel Victor V. Vigluicci, Portage County Prosecuting Attorney, and Pamela J. Holder, Assistant Prosecuting Attorney, for appellant.
Mentzer, Vuillemin & Mygrant, Ltd., and Erik M. Jones, for appellee.

Judges: FRANCIS E. SWEENEY, SR., J. RESNICK, PFEIFER and LUNDBERG STRATTON, JJ., concur. MOYER, C.J., dissents with opinion. O'CONNOR, J., dissents. O'DONNELL, J., dissents with opinion.

Opinion

Opinion by: FRANCIS E. SWEENEY, SR.

FRANCIS E. SWEENEY, SR., J.

P1 On the night of October 1, 2001, a Portage County deputy dog warden was summoned to the home of Margaret and Jeffrey Maurer to investigate a dog-bite incident. At the home, the deputy dog warden spoke with Jeffrey Maurer. Mr. Maurer told the deputy that two dogs, belonging to his neighbor, Janice Cowan, defendant-appellee, had attacked his wife. After talking with Mr. Maurer, the deputy dog warden made the determination that appellee's dogs were vicious. The deputy dog warden then went to appellee's home to inform appellee of this determination and to advise appellee of her responsibilities according to the law. Appellee was notified that she must confine her dogs in a certain manner and was given paperwork explaining her legal responsibilities. Appellee refused to sign the paperwork.

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P2 After this incident, the dog warden's office was summoned two more times to appellee's residence in response to complaints that her dogs were roaming the neighborhood. The first time, the deputy warden found the dogs tethered to a tree in a manner that was not in compliance with the vicious-dog law, which requires confinement in a locked, fenced yard or in a pen with a top. The deputy handed appellee a copy of the law and advised her {814 N.E.2d 848} to follow it. The second time, the deputy warden investigated and found the dogs chained to a stake in the ground, a form of restraint that does not comply with the vicious-dog law. After discussing the case with his superior, the deputy warden filed charges against appellee.

P3 Appellee was subsequently charged with two counts of failing to confine a vicious dog, violations of R.C. 955.22(D)(1) , misdemeanors of the first degree; one count of failing to obtain the required liability insurance for a vicious dog, a violation of R.C. 955.22(E) , a misdemeanor of the first degree; and one count of failing to restrain a dangerous dog, a violation of R.C. 955.22(D)(2)(b) , a misdemeanor of the fourth degree. Prior to her trial, appellee filed a motion to dismiss the charges on the grounds that R.C. 955.22 was void for vagueness and further that the statute violated her due process rights. The motion was overruled and the case proceeded to trial.

P4 At trial, appellee renewed her motion to dismiss. Again, it was denied. The jury convicted her of all charges. The trial court fined appellee $ 750 plus costs and sentenced her to 365 days in jail. The court suspended $ 250 of the fine {103 Ohio St. 3d 146} and 360 days of the sentence on certain conditions, including a requirement that appellee surrender her dogs1 and that she not own another dog for one year.

P5 The court of appeals reversed her convictions, finding that R.C. 955.22 unconstitutionally deprived appellee of her due process rights. Specifically, the appellate court found that appellee had been denied due process because she had no opportunity to be heard prior to her property rights being substantially and adversely affected. The court found that, according to R.C. 955.22 , the dog warden had unfettered discretion to label appellee's dogs as dangerous and/or vicious. Further, there was no mechanism for appealing that determination.

P6 This cause is now before this court upon the acceptance of a discretionary appeal.

P7 At issue in this case is whether R.C. 955.22 violates procedural due process. It is well settled that an enactment of the General Assembly is entitled to a strong presumption of constitutionality. *State v. Hochhausler* (1996), 76 Ohio St.3d 455, 458, 1996 Ohio 374, 668 N.E.2d 457 . Therefore, challenged legislation will not be invalidated unless the challenger establishes the unconstitutional nature of the statute beyond a reasonable doubt. Id. We apply these principles to this case.

P8 Although the concept is flexible, at its core, procedural due process under both the Ohio and United States Constitutions requires, at a minimum, an opportunity to be heard when the state seeks to infringe a protected liberty or property right.2 *Boddie v. Connecticut* (1971), 401 U.S. 371, 377, 91 S.Ct. 780, 28 L. Ed. 2d 113 . Further, the opportunity to be heard must occur at a meaningful time and in a meaningful manner. *Mathews v. Eldridge* (1976), 424 U.S. 319, 333, 96 S.Ct. 893, 47 L. Ed. 2d 18 ; *Hochhausler*, 76 Ohio St.3d at 459, 668 N.E.2d 457 . The right to procedural due process is conferred not by legislative grace, but by constitutional {814 N.E.2d 849} guarantee. Thus, while the legislature may elect not to confer a particular property right, it may not constitutionally authorize the deprivation of a property interest, once conferred, without appropriate procedural safeguards. *Arnett v. Kennedy* (1974), 416 U.S. 134, 167, 94 S.Ct. 1633, 40 L. Ed. 2d 15 (Powell, J., concurring in part).

P9 It is undisputed that citizens enjoy the right to own dogs, and in *State v. Anderson* (1991), 57 Ohio St.3d 168, 566 N.E.2d 1224 , we recognized the special relationship that often exists between owners and dogs. We remarked that "to many, a pet dog is as important and as loved as* * * human members of the {103 Ohio St. 3d 147} family." Id. at 170, 566 N.E.2d 1224 . Thus, most dog owners consider their pet to be more than a mere thing, and the ownership of it constitutes a valuable right.

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Regardless, however, of the possibility of strong sentimental attachment, a dog is still property. Therefore, dogs are subject to the state's police power. The state may use its power to regulate or destroy dogs in order to protect its citizenry. Id.

P10 One way for the state to regulate dogs is found in R.C. 955.22 .3 R.C. 955.22(D)(1) requires owners of a dangerous or vicious dog, as defined in R.C. 955.11(A)(1)(a) and (A)(4)(a) , to confine the dog in a certain manner. R.C. 955.22(E) requires the owner of a vicious dog to obtain a certain amount of liability insurance. Any owner who fails to comply with these requirements is guilty of a misdemeanor of the first or fourth degree. R.C. 955.99(F) and (G)(2) .

P11 According to appellee, R.C. 955.22 violates procedural due process as there is no opportunity for a defendant to be heard with respect to the labeling of a dog as either vicious or dangerous. Here, appellee asserts that the deputy dog warden made her determination based upon the unsupported word of the complaining parties that her dogs, without provocation, attacked Mrs. Maurer. Appellee asserts that she was not given the chance to present contrary evidence before substantial regulatory burdens were imposed on her property.

P12 {103 Ohio St. 3d 148} {814 N.E.2d 850} However, appellant argues that R.C. 955.22 is constitutional because appellee was afforded the right to challenge her dogs' classification at her criminal trial. Appellee responds that the ability to challenge this label at a later criminal trial does not offer her a meaningful opportunity to be heard before her property rights have been infringed by official state action. We agree with appellee.

P13 Once the dog warden made the unilateral decision to classify appellee's dogs as vicious, R.C. 955.22 was put into effect and restrictions were placed upon appellee and her dogs. No safeguards, such as a right to appeal or an administrative hearing, were triggered by this determination to challenge the viciousness label or its ramifications. In fact, it was not until appellee was formally charged as a criminal defendant that she could conceivably challenge the viciousness designation under R.C. 955.22 . We find it inherently unfair that a dog owner must defy the statutory regulations and become a criminal defendant, thereby risking going to jail and losing her property, in order to challenge a dog warden's unilateral decision to classify her property. The statute does not provide appellee a right to be heard in a meaningful time and in a meaningful manner on the issue of whether her dogs were vicious or dangerous. Accordingly, we find that R.C. 955.22 violates procedural due process insofar as it fails to provide dog owners a meaningful opportunity to be heard on the issue of whether a dog is "vicious" or "dangerous" as defined in R.C. 955.11(A)(1)(a) and (A)(4)(a) .

P14 Even assuming that R.C. 955.22 provides a meaningful opportunity to be heard on a dog's classification, it is certainly unconstitutional as applied here. Although appellant now argues that one aspect of its case at trial was to establish that the dogs were vicious and dangerous, a reading of the transcript reveals that the state did not believe that it had this burden. It is true that the state presented evidence at trial from the victim and an eyewitness relating the dog-bite incident and identifying the dogs as belonging to appellee. However, the state also presented testimony from the deputy warden that the determination that these dogs were vicious had already been made prior to trial. Moreover, the state repeatedly told the jury that the warden had already determined that the dogs were vicious and it was not the jury's job to decide whether it is fair for the dog warden to make this determination. Thus, although the jury was given the definition of a "vicious" or "dangerous" dog, this element of the crime was removed from their consideration.

P15 Previously, this court has stated that "due process of law implies, in its most comprehensive sense, the right of the person affected thereby to be present before the tribunal which pronounces judgment upon a question of life, liberty or property, to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right {103 Ohio St. 3d 149} in the matter involved. If any question of fact or liability be conclusively presumed against him, such is not due process of law." *Williams v. Dollison* (1980), 62 Ohio St.2d 297, 299, 16

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O.O.3d 350, 405 N.E.2d 714 . So even assuming that the statute provides a constitutionally adequate opportunity to be heard on this issue, appellee was not afforded this right.

P16 Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

RESNICK, PFEIFER and LUNDBERG STRATTON, JJ., concur.

MOYER, C.J., dissents with opinion.

O'CONNOR, J., dissents.

O'DONNELL, J., dissents with opinion.

Dissent

Dissent by: MOYER; O'DONNELL

{814 N.E.2d 851} MOYER, C.J., dissenting.

P17 I respectfully dissent. We should not be surprised if today's decision is remembered as the case where--to paraphrase Justice Holmes4 --dead dogs made bad law. Despite the common belief that a dog is man's best friend, the facts of this case demonstrate that there is an exception to every rule.

P18 In declaring R.C. 955.22 unconstitutional, the majority leaves Ohio with statutory definitions of "dangerous dog" and "vicious dog," R.C. 955.11(A)(1)(a) and (A)(4)(a) , but no requirements for confining such dogs and no requirement that an owner of a dangerous or vicious dog obtain insurance against liability for injury caused by such a dog. The majority does so despite the clear mandate of the General Assembly imposing those requirements.

P19 We should clarify precisely what R.C. 955.22 requires. It imposes duties on the owners of dangerous or vicious dogs in order to protect people from being harmed by such dogs. Those owners must restrain their animals in a statutorily prescribed manner and procure liability insurance for the damage they might cause. See R.C. 955.22(D) and (E) . These duties are imposed *by the statute itself,* irrespective of the determinations of a dog warden or other law enforcement official.

P20 R.C. 955.22 does not vest a dog warden with authority to conclusively label any particular animal as vicious or dangerous. Notably, R.C. 955.22 does not even mention dog wardens or any other law enforcement official. Nor does it establish any procedural framework, let alone an unconstitutional one. As noted {103 Ohio St. 3d 150} by the dissenting judge in the court of appeals, the proceedings below did not constitute "an administrative action; rather, it was a criminal prosecution* * * [and] the only notice required was the complaint or the indictment."

P21 When accused of failing to meet the duties imposed by R.C. 955.22 , a dog owner is provided procedural due process by virtue of the fact that a conviction of violation of the statute is dependent upon the accused being afforded all the procedural protections surrounding any criminal misdemeanor prosecution. The deputy dog warden here responded to the complaint of a citizen, whose testimony at trial was believed by a jury, that Cowan's dogs had attacked her. At that point, the deputy dog warden did nothing more than advise Cowan of the statutory duties imposed by the General Assembly upon owners of vicious or dangerous dogs and the deputy dog warden's own conclusion that she was such an owner. The deputy dog warden did not force Cowan to purchase liability insurance. The deputy dog warden did not remove the dogs from Cowan's possession.

P22 It was only after Cowan failed to heed the warnings of the deputy dog warden, and the dogs were found only loosely restrained on more than one subsequent occasion, that the dog warden filed

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misdemeanor charges of violating R.C. 955.22 . A jury in the Portage County Municipal Court found her guilty; Cowan failed to post bond and only at that point were the dogs taken from her and destroyed. Procedural due process was fully satisfied.

P23 R.C. 955.22 is not unconstitutional either on its face or as applied.

Facial Unconstitutionality

P24 The majority holds that R.C. 955.22 violates the constitutional right to procedural due process because it fails to {814 N.E.2d 852} provide dog owners a meaningful opportunity to be heard on the issue whether a dog is vicious or dangerous. It thus appears to hold R.C. 955.22 unconstitutional on its face.

P25 The majority holds that the owner of a dangerous or vicious dog has a right to some form of administrative procedure before a dog warden may warn--much less charge--an owner that the warden considers the owner's dog to be vicious and thus subject to R.C. 955.22 , even where the warden has investigated a complaint that the dog has attacked a person, causing serious injury. In so holding, the majority seems to set a new standard for procedural due process in Ohio.

P26 The syllabus implies that a dog owner is under no duty to comply with R.C. 955.22 unless and until a law enforcement officer determines the dog to be vicious. This is simply no different from saying that a person traveling 50 m.p.h. in a 25-m.p.h. speed zone is not violating the speeding laws unless and until a law enforcement officer advises the person that his or her conduct conflicts with the {103 Ohio St. 3d 151} law. Clearly the officer's conclusion that the driver was speeding does not entitle the driver to some sort of administrative hearing before the officer may file a speeding charge against the driver.

P27 The majority strays from the appropriate analysis in accepting the premise that "once the dog warden made the unilateral decision to classify appellee's dogs as vicious, R.C. 955.22 was put into effect and restrictions were placed upon appellee and her dogs." R.C. 955.22 does not, however, impose a requirement that a warden classify a dog in order to trigger the duties of that statute. The warden did not "classify" the animals so as to accomplish any change in the duties the law imposed on Cowan. No new legal consequences flowed from the deputy dog warden's determination that Cowan's dogs were vicious or dangerous.

P28 It is true that Cowan's dogs were added to a registry maintained in the dog warden's office of dogs that office considered vicious. However, identifying Cowan's dogs in that registry did not subject Cowan to any statutory requirement not already imposed directly by R.C. 955.22 . Adding those dogs to the registry was simply a clerical procedure employed by the dog warden. The majority's conclusion that it is unconstitutional for a county dog warden to add specific dogs to an internal record of dogs considered by the office to be vicious without first holding an administrative hearing places the priority of concern with the dog owner rather than with the safety of persons with whom a dangerous dog may have contact.

P29 The majority confuses administrative adjudications with the internal discretionary procedures and decisionmaking of law enforcement officials as to the filing, and the timing of filing, of criminal charges. The deputy dog warden in this case, who was a certified peace officer, did not *adjudicate* Cowan's dogs to be vicious; rather, she advised Cowan that, in her opinion, and based on her interview of the husband of the neighbor who was bitten,5 {814 N.E.2d 853} Cowan's dogs were vicious. She then informed Cowan of her belief that Cowan was subject to the vicious-dog law, including the requirement that vicious dogs be restrained in the {103 Ohio St. 3d 152} manner described in R.C. 955.22 .6 Upon concluding that Cowan was the owner of vicious dogs and had not adequately restrained them, the deputy dog warden chose to educate and warn Cowan at that time rather than immediately prosecute her.

P30 Would the majority view this case differently if the deputy dog warden had observed the dog

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bite a neighbor, or been bitten herself? Would the majority then find it unconstitutional for the deputy dog warden to inform Cowan, without first holding an administrative hearing, that she was required by law to keep that dog restrained and carry liability insurance, and that if the dogs were thereafter found running loose she would be criminally charged? Is not an investigating officer entrusted with determining the credibility of complainants, without holding a formal adversarial hearing, before arriving at the conclusion that a person's conduct is not lawful?

P31 The majority states that it is unfair for a dog owner to be put in a position where he or she "risk[s] going to jail and losing her property, in order to challenge" a dog warden's decision that the dog is vicious. However, every person informed by a law enforcement official that he or she must alter conduct because it is not in conformance with the law or risk prosecution is faced with that situation. That is the nature of every law-enforcement warning. In every criminal prosecution some person initially determines that the accused has violated a statute or an ordinance and makes a charge in accord with that determination. Surely the majority does not mean to imply that a citizen is entitled to an administrative hearing before a law enforcement officer may issue warnings and advise changes in conduct. The unintended consequences of such a holding would wreak havoc in the administration of criminal justice.

P32 For example, assume a book seller is deemed by law enforcement officers to be unlawfully selling obscene materials. That book owner has a choice: he must either eliminate the materials deemed obscene from his inventory--thereby affecting his property rights--or risk having to defend in court his contention that the materials are not obscene.

P33 {103 Ohio St. 3d 153} Similarly, a motorist stopped for driving a vehicle equipped with a damaged muffler might be issued an immediate citation or simply warned by the officer that the law requires her to have a fully operable muffler. Whether the officer merely gives a warning or actually cites the driver at that time is largely a matter of the officer's discretion. If the officer exercises that discretion in favor of issuing {814 N.E.2d 854} a warning, it would not be constitutionally suspect for that officer to share with his fellow officers the fact of his contact with that owner and to advise fellow officers to be on the watch for the vehicle to see if the owner has complied with the law without the necessity of initiating formal criminal proceedings. Certainly, the officer would not be required to provide the motorist with an administrative hearing prior to "classifying" her as the driver of a statutorily noncompliant vehicle and informing her of the requirement of the law--even if the driver thereafter must expend her financial resources to repair or replace the muffler to avoid the risk of prosecution.

P34 The majority finds that "appellee ha[s] been denied due process because she had no opportunity to be heard prior to her property rights being substantially and adversely affected." It is not clear to what property rights the majority refers. If the majority means that the dog owner was required to buy liability insurance after the warden advised her to, then the argument fails because the duty to obtain insurance flows directly from the statute. If an owner's dogs are vicious--a factual matter-- then that owner must have insurance not because a dog warden deems the dogs to be vicious, but because the statute mandates it.

P35 If the deprivation of property referred to by the majority is the seizure and ultimate destruction of appellee's dogs, then the majority ignores the facts of the case: the seizure of the dogs occurred *after* a jury determined that appellee's dogs did indeed injure her neighbor and appellee failed to pay the bond required by the trial court to obtain a stay of its seizure order.7 Clearly Cowan was provided procedural due process before her animals were destroyed.

{103 Ohio St. 3d 154} *Unconstitutionality As Applied*

P36 I also dissent from the majority's conclusion that the statute was unconstitutional as applied to the dog owner in the case before us. I agree with the majority that it was the state's burden at trial to prove that Cowan had violated every element of the charges under R.C. 955.22 , including the burden of proving that Cowan's animals fell within the statutory definition of a vicious or dangerous dog.

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Clearly, a trial court would err in instructing a jury that it is bound by the factual determination of a dog warden that any particular dog is vicious or dangerous, as defined in the statute. That determination is a matter to be determined by the factfinder.

P37 However, in the case at bar it is simply untrue, as stated by the majority, that "although the jury was given the definition of a 'vicious' or 'dangerous' dog, this element of the crime was removed from their consideration." The jury was *not* {814 N.E.2d 855} instructed that the dog warden's determination that Cowan's dogs were vicious or dangerous was conclusive. To the contrary, the jury was given the statutory definitions of "dangerous dog" and "vicious dog" and instructed that "before you can find the Defendant guilty, you must find beyond a reasonable doubt that* * * the Defendant was the owner, keeper, or harborer of a dangerous or vicious dog."

P38 The majority contends that the prosecutor on occasion improperly told the jury that it was not its job to decide whether Cowan's dogs were, in fact, vicious or dangerous. Review of the record discloses that the prosecutor did state that the deputy dog warden had concluded that those dogs were vicious and at times implied that violation of the statute was dependent upon a warden's determination to that effect. Although this implication is legally incorrect, the prosecutor's statements were not challenged by objection, and any error inherent in these statements was waived.

P39 The record further discloses that during the state's opening argument, the prosecutor told the jury that it would ultimately be called upon to "make a decision* * * whether or not this was a dangerous dog* * * [or] a vicious dog." Similarly, the prosecutor acknowledged in closing argument that although the deputy dog warden had declared the dogs vicious, the jury could itself decide "which testimony to believe and which testimony* * * to disbelieve" and argued at length the evidence presented at trial concerning incidents involving the dogs, in an attempt to convince the jury that the dogs were indeed vicious. That statement is no different from a prosecutor advising a jury that it may choose whether to believe an arresting officer or a person accused of speeding.

P40 In addition, defense counsel expressly argued at length the factual issue of the viciousness of Cowan's dogs during closing argument, introducing those comments by stating, "What we have, Ladies and Gentlemen, is Janice Cowan {103 Ohio St. 3d 155} telling you her dogs are not vicious. What has the State shown you to prove that they are?"

P41 In the course of investigating the complaint in this case that one of Cowan's dogs had bitten a neighbor, the deputy dog warden informed Cowan that she considered Cowan's dogs to be vicious and of the statutory requirements that the owner of a vicious dog must meet. Instead of filing a complaint asserting a violation of R.C. 955.22 at that time, which the deputy dog warden could have done, she instead gave Cowan a warning and another chance to comply with the law before initiating criminal proceedings. That action was no different from a law enforcement officer advising a motorist that the driver's automobile is unsafe, on the assumption that the motorist will correct the condition, thereby bringing the auto into compliance with law. Indeed, when called back to the neighborhood on a subsequent occasion, the law enforcement official gave Cowan a second chance before finally filing criminal charges after a third complaint about the dogs. I know of no due process right to protection from receiving a warning.

P42 Cowan, however, held an opinion contrary to that of the deputy dog warden as to whether her dogs fell within the statutory definitions of "dangerous dog" and "vicious dog" and concluded that the requirements of the vicious-dog statute did not apply to her. She chose to take a chance that the jury would believe her and not the person who was attacked as to whether the dogs were in fact vicious. The jury believed the victim and the deputy dog warden and found Cowan guilty of violating R.C. 955.22 . Then and only then {814 N.E.2d 856} was Cowan deprived of her property rights to the dogs.

P43 R.C. 955.22 is neither unconstitutional on its face nor as applied. The judgment of the court of appeals should be reversed.

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O'CONNOR, J., concurs in the foregoing dissenting opinion.

O'DONNELL, J., dissenting.

P44 I respectfully dissent. The uncontroverted facts here reveal that Janice Cowan appealed from a judgment of the Portage County Municipal Court entered pursuant to a jury verdict finding her guilty of two counts of failing to confine a vicious dog, one count of failing to confine a dangerous dog, and one count of failing to obtain the liability insurance required by R.C. 955.22(E) . These charges arose from three separate incidents from October 2001 through January 2002.

P45 The appellate court determined that Cowan had been denied due process of law, based on the fact that Cowan had no opportunity to challenge Deputy Portage County Dog Warden Cheryl Heckman's conclusion that Cowan owned vicious dogs. However, Deputy Heckman conducted an investigation of {103 Ohio St. 3d 156} the October 2001 attack on Margaret Maurer, which had resulted in multiple bites on her arm and leg, required hospital treatment, and caused permanent scarring. Heckman concluded that Cowan's dogs had perpetrated the attack on Maurer and had seriously injured her, and therefore, in accordance with R.C. 955.11 , determined her dogs to be vicious.8

P46 Deputy Dog Warden Jason Williard subsequently investigated charges that the dogs were running loose on January 18, 2002 and filed a charge against Cowan because he determined that the dogs had not been properly confined on that date.9 Essentially, the appellate court concluded that Cowan had no administrative process to appeal Heckman's conclusion.

P47 In my view, however, the criminal charges that formed the basis of this case are unaffected by any classification by Heckman.

P48 The burden of the prosecution never changed. It had the obligation to prove guilt beyond a reasonable doubt. And Cowan had the ability to present as a defense the fact that the dogs were not vicious, or had been properly confined, or that no need existed to confine them.

P49 R.C. 955.11(A)(1)(a) defines a dangerous dog, and R.C. 955.11(A)(4)(a) defines a vicious dog. Cowan's guilt was only known following trial. No unilateral dog-warden classification resulted in destruction of her animals; that occurred only after the jury had reached its verdict and the court imposed sentence. And nothing prevented Cowan from seeking a temporary order or other stay of any determination of the dog warden pending trial; nothing in law prevents any dog owners from challenging any classification by dog wardens. The fact is that the General Assembly has defined a vicious {814 N.E.2d 857} dog as one that kills or injures persons. A dog is dangerous or vicious if the prosecution proves beyond a reasonable doubt that the dog meets those definitions as specified in R.C. 955.11 . Here, Cowan had a full opportunity at trial to contest charges that she owned vicious dogs. And prior to trial, she had the opportunity to contest allegations regarding the confinement of her animals had she chosen to do so. She did not.

P50 {103 Ohio St. 3d 157} Accordingly, in my view, Cowan had a meaningful opportunity to contest the evidence that her dogs seriously injured Margaret Maurer on October 1, 2001, and had the same due process rights accorded to any other defendant. In other instances of criminal prosecution, the state removes defendants from society pending trial, seizes the evidence from a crime scene--often the home of a defendant--pursuant to a warrant pending trial, and even removes children pending trial, and otherwise takes actions designed to preserve evidence and maintain safety and security in society pending outcomes of trials.

P51 Requiring these dogs to be secured pending trial is not a denial of due process, but rather a reasonable measure designed to maintain neighborhood safety pending trial. Accordingly, I would reverse the judgment of the appellate court.

O'CONNOR, J., concurs in the foregoing dissenting opinion.

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Footnotes

Footnotes

1 Although only two of appellee's dogs were implicated in the biting incident, all three of her dogs were seized and, according to appellant, ultimately destroyed.

2 The right to procedural due process is found in the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution. *State v. Hayden,* 96 Ohio St. 3d 211, 2002 Ohio 4169, 773 N.E.2d 502, P6 .

3 R.C. 955.22 provides:

"(A) As used in this section, 'dangerous dog' and 'vicious dog' have the same meanings as in section 955.11 of the Revised Code.

"* * *

"(D) Except when a dangerous or vicious dog is lawfully engaged in hunting or training for the purpose of hunting and is accompanied by the owner,* * * no owner* * * of a dangerous or vicious dog shall fail to do either of the following:

"(1) While that dog is on the premises of the owner,* * * securely confine it all times in a locked pen that has a top, locked fenced yard, or other locked enclosure that has a top, except that a dangerous dog may, in the alternative, be tied with a leash or tether so that the dog is adequately restrained;

"* * *

"(E) No owner* * * of a vicious dog shall fail to obtain liability insurance* * * providing coverage in each occurrence* * * of not less than one hundred thousand dollars because of damage or bodily injury to or death of a person caused by the vicious dog."

R.C. 955.11(A)(1)(a) defines "dangerous dog" as "a dog that, without provocation,* * * has chased or approached in either a menacing fashion or an apparent attitude of attack, or has attempted to bite or otherwise endanger any person, while that dog is off the premises of its owner* * * and not under the reasonable control of its owner* * * or not physically restrained or confined in a locked pen which has a top, locked fenced yard, or other locked enclosure which has a top."

R.C. 955.11(A)(4)(a) defines "vicious dog" as "a dog that, without provocation* * *, 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."

4 *N. Securities Co. v. United States* (1904), 193 U.S. 197, 400, 24 S.Ct. 436, 48 L.Ed. 679 (Holmes, J., dissenting) ("Great cases, like hard cases, make bad law").

5 The neighbor described the October 1, 2001 incident at trial as follows:

"I walked out through the garage and [Cowan's dogs] were coming towards me, and I shouted at them and waved and told them to go home, and they kept coming.

"***

"*** They came across the grass from the Cowan's property to our driveway, and they just kept coming and I became frightened and turned around to get ready to run and they jumped me from behind and one of them grabbed my arm and the other one grabbed my leg, and I swung around on my left leg to throw them off and [my husband] came out of the garage at the same time with a log and -- a couple logs he got there and started throwing them at them, and I was able to get away and go

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into the house."

6 The deputy dog warden testified as follows:

"Q. When you attempted to contact Ms. Cowan [after investigating the October 1, 2001 dog-bite complaint] what were you going to discuss with her?

"A. Well, she needed to be advised of [the] quarantine [imposed by R.C. 955.261], double-check that the dogs were confined, check to see if the dogs had rabies shots, advised of the vicious dog law.

"***

"Q.* * * And based upon your investigation that evening, have Ms. Cowan's dogs done something to qualify as a vicious dog?

"A. Yes.

"Q. And what specifically had they done?

"A. Seriously injured a person."

7 After the jury returned a guilty verdict, the court included in its sentencing order the following:

"Defendant's dogs are to be surrendered to the Portage County Dog Warden immediately. The Dog Warden is given the authority to place the animals with an appropriate owner, not in Portage County, or if necessary, the Portage County Dog Warden is granted the authority to destroy the Defendant's dogs. The Portage County Dog Warden must retain the animals at the Portage County Dog Shelter for at least thirty (30) days. The Dog Warden, after thirty (30) days has lapsed, may allow the dogs to be adopted by an appropriate out of county owner, or if absolutely necessary, may authorize the destruction of the animals."

The court of appeals stayed this part of the sentence pending appeal contingent upon the payment of $ 840 per month, but ordering that "if appellant fails to make a timely payment as to any particular month, the Portage County Dog Warden shall be allowed to dispose of the three dogs in the manner stated in the trial court's judgment."

8 Pursuant to R.C. 955.11(A)(4)(a) , a "vicious dog" is one 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."

9 R.C. 955.22(D) provides that the owner of a vicious dog must securely confine it all times.

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GRAYNED v. CITY OF ROCKFORD

No. 70-5106

SUPREME COURT OF THE UNITED STATES

408 U.S. 104; 92 S. Ct. 2294; 33 L. Ed. 2d 222; 1972 U.S. LEXIS 26

January 19, 1972, Argued
June 26, 1972, Decided

PRIOR HISTORY:

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

DISPOSITION: 46 Ill. 2d 492, 263 N. E. 2d 866, affirmed in part and reversed in part.

SUMMARY: A demonstrator in front of a Rockford, Illinois, high school was convicted in the Circuit Court of Winnebago County of violating the Rockford antipicketing ordinance, which outlawed demonstrations near schools in session (except peaceful labor picketing), and the Rockford antinoise ordinance, which prohibited disturbing a school session by wilfully making a noise or diversion while on adjacent public or private grounds. The Supreme Court of Illinois affirmed (46 Ill 2d 492, 263 NE2d 866).

On appeal, the United States Supreme Court reversed with respect to the antipicketing ordinance, but affirmed with respect to the antinoise ordinance. In an opinion by Marshall, J., expressing the views of seven members of the court, it was held that (1) the antipicketing ordinance violated the equal protection clause because it made an impermissible distinction between labor picketing and other peaceful picketing; and (2) the antinoise ordinance was neither unconstitutionally vague nor unconstitutionally overbroad in restricting First Amendment freedoms.

Blackmun, J., joined in the court's opinion as to (1), and concurred in the result as to (2).

Douglas, J., joined in the court's opinion as to (1), but dissented as to (2) on the ground that the demonstrator could not constitutionally be convicted, because he was not noisy, boisterous, or rowdy at the demonstration.

LAWYERS' EDITION HEADNOTES:

[***HN1]
APPEAL AND ERROR §1084(2)
claims not presented --

Headnote: [1A]
[1B]
On an appeal in which the appellant's sole claim is that he was convicted under facially unconstitutional ordinances, there is no occasion for the court to evaluate either the police's selective arrests or the sufficiency of the evidence that the appellant himself actually engaged in conduct within the terms of the ordinances.

[***HN2]
CONSTITUTIONAL LAW §501
equal protection -- offenses --

Headnote: [2]
A municipal disorderly conduct ordinance which prohibits picketing or demonstrating on a public way within 150 feet of any primary or secondary school building, from 30 minutes before school is in session until 30 minutes after school has been concluded, "provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute," is unconstitutional because it makes an impermissible distinction between labor picketing and other peaceful picketing.

[***HN3]
APPEAL AND ERROR §1660
statutory amendment pending appeal --

Headnote: [3A] [3B]
Notwithstanding the postconviction amendment of the ordinance under which an appellant was arrested and convicted, so as to delete unconstitutional language, the United States Supreme Court must consider the facial constitutionality of the ordinance in effect when the appellant was arrested and convicted.

[***HN4]
STATUTES §17
vagueness --

Headnote: [4]
It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.

[***HN5]
STATUTES §18
vagueness --

Headnote: [5A]
[5B]
[5C]
An antinoise ordinance, which forbids any person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, from wilfully making or assisting in the making of any noise or diversion which disturbs the peace or good order of such school session or class thereof, is not impermissibly vague.

[***HN6]
APPEAL AND ERROR §709
construing state laws --

Headnote: [6]
The United States Supreme Court is without power to construe and narrow state laws.

[***HN7]
CONSTITUTIONAL LAW §525
statutes -- overbreadth --

Headnote: [7]
A clear and precise enactment may nevertheless be "overbroad" if in its reach it prohibits constitutionally protected conduct.

[***HN8]
STATUTES §37
standing to challenge --

Headnote: [8]
One convicted under an ordinance has standing to challenge the ordinance as unconstitutionally overbroad.

[***HN9]
CONSTITUTIONAL LAW §925
free speech -- public places --

Headnote: [9]
The right to use a public place for expressive activity may be restricted only for weighty reasons.

[***HN10]
CONSTITUTIONAL LAW §925
free speech --

Headnote: [10]
The government has no power to restrict expressive activity because of its message.

[***HN11]
CONSTITUTIONAL LAW §935.5
demonstrations --

Headnote: [11]
Reasonable "time, place and manner" regulations on expressive activity may be necessary to further significant governmental interests, and are permitted; but subject to such reasonable regulation, peaceful demonstrations in public places are protected by the First Amendment, although when they turn violent, demonstrations lose their protected quality as expression under the First Amendment.

[***HN12]
CONSTITUTIONAL LAW §925
free speech -- regulation --

Headnote: [12]
The nature of a place and the pattern of its normal activities dictate the kinds of regulations of the time, place, and manner of expressive conduct that are reasonable; the crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time, weighing heavily the fact that communication is involved and that the regulation must be narrowly tailored to further the state's legitimate interest.

[***HN13]
CONSTITUTIONAL LAW §925
,940 First Amendment rights -- public places --

Headnote: [13]
Access to the streets, sidewalks, parks, and other similar public places for the purpose of exercising First Amendment rights cannot constitutionally be denied broadly.

[***HN14]
CONSTITUTIONAL LAW §925
free speech -- regulation --

Headnote: [14]
Free expression cannot be abridged or denied in the guise of regulation.

[***HN15]
STATUTES §14
ordinance -- validity --

Headnote: [15A]
[15B]
An antinoise ordinance, which forbids any person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, from wilfully making or assisting in the making of any noise or diversion which disturbs the peace or good order of such school session or class thereof, is not an unconstitutionally overbroad regulation of expressive activity around a school.

[***HN16]
CONSTITUTIONAL LAW §925.8
expression -- school regulation --

Headnote: [16]
School property may not be declared off-limits for expressive activity by students, and the public sidewalk adjacent to school grounds may not be declared off-limits for expressive activity by members of the public, but in each case, expressive activity may be prohibited if it materially disrupts classwork or involves substantial disorder or invasion of the rights of others.

[***HN17]
CONSTITUTIONAL LAW §925
free speech -- place --

Headnote: [17]
One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

[***HN18]
CONSTITUTIONAL LAW §925.8
demonstrations -- schools --

Headnote: [18]
Noisy demonstrations which disrupt or are incompatible with normal school activities may be prohibited next to a school when classes are in session.

SYLLABUS: 1. Antipicketing ordinance, virtually identical with one invalidated as violative of equal protection in *Police Department of Chicago* v. *Mosley, ante*, p. 92, is likewise invalid. P. 107.

2. Antinoise ordinance prohibiting a person while on grounds adjacent to a building in which a school is in session from willfully making a noise or diversion that disturbs or tends to disturb the peace or good order of the school session is not unconstitutionally vague or overbroad. The ordinance is not vague since, with fair warning, it prohibits only actual or imminent, and willful, interference with normal school activity, and is not a broad invitation to discriminatory enforcement. *Cox* v. *Louisiana*, 379 U.S. 536; *Coates* v. *Cincinnati*, 402 U.S. 611, distinguished. The ordinance is not overbroad as unduly interfering with First Amendment rights since expressive activity is prohibited only if it "materially disrupts classwork." *Tinker* v. *Des Moines School District*, 393 U.S. 503, 513. Pp. 107-121.

COUNSEL: Sophia H. Hall argued the cause for appellant. With her on the briefs were William R. Ming, Jr., and Aldus S. Mitchell.

William E. Collins argued the cause for appellee. With him on the brief were A. Curtis Washburn and Charles F. Thomas.

JUDGES: Marshall, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, Stewart, White, Powell, and Rehnquist, JJ., joined. Blackmun, J., filed a statement joining in the judgment and in Part I of the Court's opinion and concurring in the result as to Part II of the opinion, post, p. 121. Douglas, J., filed an opinion dissenting in part and joining in Part I of the Court's opinion, post, p. 121.

OPINIONBY: MARSHALL

OPINION: [*105] [***225] [**2297] MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellant Richard Grayned was convicted for his part in a demonstration in front of West Senior High School in Rockford, Illinois. Negro students at the school had first presented their grievances to school administrators. When the principal took no action on crucial complaints, a more public demonstration of protest was planned. On April 25, 1969, approximately 200 people -- students, their family members, and friends -- gathered next to the school grounds. Appellant, whose brother and twin sisters were attending the school, was part of this group. The demonstrators marched around on a sidewalk about 100 feet from the school building, which was set back from the street. Many carried signs which summarized the grievances: "Black cheerleaders to cheer too"; "Black history with black teachers"; "Equal rights, Negro counselors." Others, without placards, made the "power to the people" sign with their upraised and clenched fists.

[***226] In other respects, the evidence at appellant's trial was sharply contradictory. Government witnesses reported that the demonstrators repeatedly cheered, chanted, baited policemen, and made other noise that was audible in the school; that hundreds of students were distracted from their school activities and lined the classroom windows to watch the demonstration; that some demonstrators successfully yelled to their friends to leave the school building and join the demonstration; that uncontrolled latenesses after period changes in the school were far greater than usual, with late students admitting that they had been watching the demonstration; and that, in general, orderly school procedure was disrupted. Defense witnesses claimed that the demonstrators were at all times quiet and orderly; that they did not seek to violate the law, but only to "make [*106] a point"; that the only noise was made by policemen using loudspeakers; that almost no students were noticeable at the schoolhouse windows; and that orderly school procedure was not disrupted.

[***HR1A] [1A]
After warning the demonstrators, the police arrested 40 of them, including appellant. n1 For participating in the [**2298] demonstration, Grayned was tried and convicted of violating two Rockford ordinances, hereinafter referred to as the "antipicketing" ordinance and the "antinoise" ordinance. A $ 25 fine was imposed for each violation. Since Grayned challenged the constitutionality of each ordinance, he appealed directly to the Supreme Court of Illinois. Ill. Sup. Ct. Rule 302. He claimed that the ordinances were invalid on their face, but did not urge that, as applied to him, the ordinances had punished constitutionally protected activity. The Supreme Court of Illinois held that both ordinances were constitutional on their face. 46 Ill. 2d 492, 263 N. E. 2d 866 (1970). We noted probable jurisdiction, 404 U. S. 820 (1971). We conclude that the antipicketing ordinance is unconstitutional, but affirm the court below with respect to the antinoise ordinance.

[***HR1B] [1B]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
n1 Police officers testified that"there was no way of picking out any one in particular" while making arrests. Report of Proceedings in Circuit Court, 17th Judicial Circuit, Winnebago County 66. However, apparently only males were arrested. *Id.*, at 65, 135, 147. Since appellant's sole claim in this appeal is that he was convicted under facially unconstitutional ordinances, there is no occasion for us to evaluate either the propriety of these selective arrests or the sufficiency of evidence that appellant himself actually engaged in conduct within the terms of the ordinances. MR. JUSTICE DOUGLAS, in concluding that appellant's particular behavior was protected by the First Amendment, reaches a question not presented by the parties here or in the court below. See Tr. of Oral Arg. 16-17; Jurisdictional Statement 3; *City of Rockford* v. *Grayned*, 46 Ill. 2d 492, 494, 263 N. E. 2d 866, 867 (1970).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*107] I

[***HR2] [2]
[***HR3A] [3A]
At the time of appellant's arrest and conviction, Rockford's antipicketing ordinance provided that

"A person commits disorderly conduct when he knowingly:

. . . .

"(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection [***227] does not prohibit the peaceful picketing of any school involved in a labor dispute . . . ." Code of Ordinances, c. 28, § 18.1 (i).

This ordinance is identical to the Chicago disorderly conduct ordinance we have today considered in *Police Department of Chicago* v. *Mosley, ante*, p. 92. For the reasons given in *Mosley*, we agree with dissenting Justice Schaefer below, and hold that § 18.1 (i) violates the Equal Protection Clause of the Fourteenth Amendment. Appellant's conviction under this invalid ordinance must be reversed. n2

[***HR3B] [3B]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n2 In November 1971, the antipicketing ordinance was amended to delete the labor picketing proviso. As Rockford notes, "This amendment and deletion has, of course, no effect on Appellant's personal situation." Brief 2. Necessarily, we must consider the facial constitutionality of the ordinance in effect when appellant was arrested and convicted.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

II

The antinoise ordinance reads, in pertinent part, as follows:

"No person, while on public or private grounds adjacent to any building in which a school or any [*108] class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof. . . ." Code of Ordinances, c. 28, § 19.2 (a).

Appellant claims that, on its face, this ordinance is both vague and overbroad, and therefore unconstitutional. We conclude, however, that the ordinance suffers from neither of these related infirmities.

A. Vagueness

[***HR4] [4]
It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity [**2299] to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. n3 Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. n4 A vague [***228] law impermissibly delegates [*109] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. n5 Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," n6 it "operates to inhibit the exercise of [those] freedoms." n7 Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." n8

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n3 *E. g., Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287 (1961); *United States* v. *Harriss*, 347 U.S. 612, 617 (1954); *Jordan* v. *De George*, 341 U.S. 223, 230-232 (1951); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939); *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926); *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 89 (1921); *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, 223-224 (1914).

n4 *E. g., Papachristou* v. *City of Jacksonville, supra; Coates* v. *Cincinnati*, 402 U.S. 611, 614 (1971); *Gregory* v. *Chicago*, 394 U.S. 111, 120 (1969) (Black, J., concurring); *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 684-685 (1968); *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966); *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966); *Shuttlesworth* v. *Birmingham*, 382 U.S. 87, 90-91 (1965); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Saia* v. *New York*, 334 U.S. 558, 559-560 (1948); *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940); *Herndon* v. *Lowry*, 301 U.S. 242, 261-264 (1937).

N5 Where First Amendment interests are affected, a precise statute "evincing a legislative judgment that certain specific conduct be . . . proscribed," *Edwards* v. *South Carolina*, 372 U.S. 229, 236 (1963), assures us that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation. See Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 32; *Garner* v. *Louisiana*, 368 U.S. 157, 200, 202 (1961) (Harlan, J., concurring in judgment).

n6 *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964).

n7 *Cramp* v. *Board of Public Instruction*, 368 U.S., at 287.

n8 *Baggett* v. *Bullitt, supra*, at 372, quoting *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958). See *Interstate Circuit* v. *Dallas, supra*, at 684; *Ashton* v. *Kentucky, supra*, at 195, 200-201; *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965); *Smith* v. *California*, 361 U.S. 147, 150-152 (1959); *Winters* v. *New York*, 333 U.S. 507 (1948); *Stromberg* v. *California*, 283 U.S. 359, 369 (1931).

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[***HR6] [6]
Although the question is close, we conclude that the antinoise ordinance is not impermissibly vague. The court below rejected appellant's arguments "that proscribed conduct was not sufficiently specified and that police were given too broad a discretion in determining whether conduct was proscribed." 46 Ill. 2d, at 494, 263 N. E. 2d, at 867. Although it referred to other, similar statutes it had recently construed and upheld, the court [*110] below [**2300] did not elaborate on the meaning of the antinoise ordinance. n9 In this situation, as Mr. Justice Frankfurter put it, we must "extrapolate its allowable meaning." n10 Here, we are "relegated . . . to the words of the ordinance itself," n11 to the interpretations the court below has given to analogous statutes, n12 and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it. n13 "Extrapolation," of course, is a delicate task, for it is not within our power to construe and narrow state laws. n14

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n9 The trial magistrate simply charged the jury in the words of the ordinance. The complaint and verdict form used slightly different language. See n. 24, *infra*.

n10 *Garner* v. *Louisiana*, 368 U.S., at 174 (concurring in judgment).

n11 *Coates* v. *Cincinnati*, 402 U.S., at 614.

n12 *E. g., Gooding* v. *Wilson*, 405 U.S. 518 (1972).

n13 *E. g., Lake Carriers Assn.* v. *MacMullan*, 406 U.S. 498, 506-508 (1972); *Cole* v. *Richardson*, 405 U.S. 676 (1972); *Ehlert* v. *United States*, 402 U.S. 99, 105, 107 (1971); cf. *Poe* v. *Ullman*, 367 U.S. 497 (1961).

n14 *United States* v. *37 Photographs*, 402 U.S. 363, 369 (1971).

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With that warning, we find no unconstitutional vagueness in the antinoise ordinance. Condemned to the use of words, we can never expect [***229] mathematical certainty from our language. n15 The words of the Rockford ordinance are marked by "flexibility and reasonable breadth, rather than meticulous specificity," *Esteban* v. *Central Missouri State College*, 415 F.2d 1077, 1088 (CA8 1969) (Blackmun, J.), cert. denied, 398 U.S. 965 (1970), but we think it is clear what the ordinance as a whole prohibits. Designed, according to its preamble, "for the protection of Schools," the ordinance forbids deliberately [*111] noisy or diversionary n16 activity that disrupts or is about to disrupt normal school activities. It forbids this willful activity at fixed times -- when school is in session -- and at a sufficiently fixed place -- "adjacent" to the school. n17 Were we left with just the words of the ordinance, we might be troubled by the imprecision of the phrase "tends to disturb." n18 However, in *Chicago* v. *Meyer*, 44 Ill. 2d 1, 4, 253 N. E. 2d 400, 402 (1969), and *Chicago* v. *Gregory*, 39 Ill. 2d 47, 233 N. E. 2d 422 (1968), reversed on other grounds, 394 U.S. 111 (1969), the Supreme Court of Illinois construed a Chicago ordinance prohibiting, *inter alia*, a "diversion tending to disturb the peace," and held that it permitted conviction only where there was " [**2301] *imminent* threat of violence." (Emphasis supplied.) See *Gregory* v. *Chicago*, 394 U.S. 111, 116-117, 121-122 (1969) (Black, J., concurring). n19 Since *Meyer* was specifically cited in the opinion below, and it in turn drew heavily on *Gregory*, we think it proper to conclude that the Supreme Court of Illinois would interpret the Rockford ordinance to prohibit only actual [*112] or imminent interference with the "peace or good order" of the school. n20

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n15 It will always be true that the fertile legal "imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question." *American Communications Assn.* v. *Douds*, 339 U.S. 382, 412 (1950).

n16 "Diversion" is defined by *Webster's Third New International Dictionary* as "the act or an instance of diverting from one course or use to another . . . : the act or an instance of diverting (as the mind or attention) from some activity or concern . . . : a turning aside . . . : something that turns the mind from serious concerns or ordinary matters and relaxes or amuses."

n17 Cf. *Cox* v. *Louisiana*, 379 U.S. 559, 568-569 (1965) ("near" the courthouse not impermissibly vague).

n18 See *Gregory* v. *Chicago*, 394 U.S., at 119-120 (Black, J., concurring); *Gooding* v. *Wilson*, 405 U.S., at 525-527; *Craig* v. *Harney*, 331 U.S. 367, 372 (1947); cf. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942) (statute punishing "fighting words," that have a "*direct* tendency to cause acts of violence," upheld); *Street* v. *New York*, 394 U.S. 576, 592 (1969).

n19 Cf. *Chicago* v. *Terminiello*, 400 Ill. 23, 79 N. E. 2d 39 (1948), reversed on other grounds, 337 U. S. 1, 6 (1949).

n20 Some intermediate appellate courts in Illinois appear to have interpreted the phrase "tending to" out of the Chicago ordinance entirely, at least in some contexts. *Chicago* v. *Hansen*, 337 Ill. App. 663, 86 N. E. 2d 415 (1949); *Chicago* v. *Holmes*, 339 Ill. App. 146, 88 N. E. 2d 744 (1949); *Chicago* v. *Nesbitt*, 19 Ill. App. 2d 220, 153 N. E. 2d 259 (1958); but cf. *Chicago* v. *Williams*, 45 Ill. App. 2d 327, 195 N. E. 2d 425 (1963).

In its brief, the city of Rockford indicates that its sole concern is with *actual* disruption. "[A] court and jury [are] charged with the duty of determining whether or not . . . a school *has been disrupted* and that the defendant's conduct, [no matter what it was,] caused or contributed to cause the disruption." Brief for Appellee 16 (emphasis supplied). This was the theory on which the city tried appellant's case to the jury, Report, *supra*, n. 1, at 12-13, although the jury was instructed in the words of the ordinance. As already noted, *supra*, n. 1, no challenge is made here to the Rockford ordinance as applied in this case.

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Although [***230] the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted. We do not have here a vague, general "breach of the peace" ordinance, but a statute written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of the school. Given this "particular context," the ordinance gives "fair notice to those to whom [it] is directed." n21 Although the Rockford ordinance may not be as precise as the statute we upheld in *Cameron* v. *Johnson*, 390 U.S. 611 (1968) -- which prohibited picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from" any courthouse -- we think that, as in *Cameron*, the ordinance here clearly "delineates its reach in words of common understanding." *Id.*, at 616.

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n21 *American Communications Assn.* v. *Douds*, 339 U.S., at 412.

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[*113] *Cox* v. *Louisiana*, 379 U.S. 536 (1965), and *Coates* v. *Cincinnati*, 402 U.S. 611 (1971), on which appellant particularly relies, presented completely different situations. In *Cox*, a general breach of the peace ordinance had been construed by state courts to mean "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet." The Court correctly concluded that, as construed, the ordinance permitted persons to be punished for merely expressing unpopular views. n22 In *Coates*, the ordinance punished the sidewalk assembly of three or more persons who "conduct themselves in a manner annoying to [**2302] persons passing by . . ." We held, in part, that the ordinance was impermissibly vague because enforcement depended on the completely subjective standard of "annoyance."

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n22 Cf. *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Cantwell* v. *Connecticut*, 310 U.S. 296, 308 (1940). Similarly, in numerous other cases, we have condemned broadly worded licensing ordinances which grant such standardless discretion to public officials that they are free to censor ideas and enforce their own personal preferences. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969); *Staub* v. *City of Baxley*, 355 U.S. 313 (1958); *Saia* v. *New York*, 334 U.S. 558 (1948); *Schneider* v. *State*, 308 U.S. 147, 163-164 (1939); *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Hague* v. *CIO*, 307 U.S. 496 (1939).

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[***HR5C] [5C]
In contrast, Rockford's antinoise ordinance does not permit punishment for the expression of an unpopular point of view, and it contains no broad invitation to subjective or discriminatory enforcement. Rockford does not claim the broad power to punish all "noises" and "diversions." n23 The vagueness of these terms, by themselves, is dispelled by the ordinance's requirements that (1) the "noise or diversion" be actually incompatible with normal school activity; (2) there be a demonstrated causality between the disruption that occurs and the "noise or diversion"; and (3) the acts be [*114] "willfully" done. n24 "Undesirables [***231] " or their "annoying" conduct may not be punished. The ordinance does not permit people to "stand on a public sidewalk . . . only at the whim of any police officer." n25 Rather, there must be demonstrated interference with school activities. As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible. The Rockford City Council has made the basic policy choices, and has given fair warning as to what is prohibited. "The ordinance defines boundaries sufficiently distinct" for citizens, policemen, juries, and appellate judges. n26 It is not impermissibly vague.

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n23 Cf. *Cox* v. *Louisiana*, 379 U.S. 536, 546-550 (1965); *Edwards* v. *South Carolina*, 372 U.S., at 234-237.

n24 Tracking the complaint, the jury verdict found Grayned guilty of "wilfully causing diversion of good order of public school in session, in that while on school grounds and while school was in session, did wilfully make and assist in the making of a diversion which tended to disturb the peace and good order of the school session and class thereof."

n25 *Shuttlesworth* v. *Birmingham*, 382 U.S., at 90.

n26 *Chicago* v. *Fort*, 46 Ill. 2d 12, 16, 262 N. E. 2d 473, 476 (1970), a case cited in the opinion below.

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B. Overbreadth

[***HR7] [7]
[***HR8] [8]
A clear and precise enactment may nevertheless be "overbroad" if in its reach it prohibits constitutionally protected conduct. n27 Although appellant does not claim that, as applied to him, the antinoise ordinance has punished protected expressive activity, he claims that the ordinance is overbroad on its face. Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge. n28 The crucial question, then, is [*115] whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments. Specifically, appellant contends that the Rockford ordinance unduly interferes with First and Fourteenth Amendment rights to picket on a public sidewalk near a school. We disagree.

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n27 See *Zwickler* v. *Koota*, 389 U.S. 241, 249-250 (1967), and cases cited.

n28 *E. g., Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Coates* v. *Cincinnati*, 402 U.S., at 616; *Dombrowski* v. *Pfister*, 380 U.S., at 486, and cases cited; *Kunz* v. *New York*, 340 U.S. 290 (1951).

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[***HR9] [9]
In considering the right of a municipality to control the use of public streets for the expression of religious [or political] views, we start with the words of Mr. Justice Roberts that 'Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing [**2303] public questions.' *Hague* v. *CIO*, 307 U.S. 496, 515 (1939)." *Kunz* v. *New York*, 340 U.S. 290, 293 (1951). See *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 152 (1969). The right to use a public place for expressive activity may be restricted only for weighty reasons.

[***HR10] [10]
[***HR11] [11]
Clearly, government has no power to restrict such activity because of its message. n29 Our cases make equally clear, however, that reasonable "time, place and manner" regulations may be necessary to further significant governmental interests, [***232] and are permitted. n30 For example, two parades cannot march on the same street simultaneously, and government may allow only one. *Cox* v. *New Hampshire*, 312 U.S. 569, 576 (1941). A demonstration or parade on a large street during rush hour [*116] might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. *Cox* v. *Louisiana*, 379 U.S., at 554. If overamplified loudspeakers assault the citizenry, government may turn them down. *Kovacs* v. *Cooper*, 336 U.S. 77 (1949); *Saia* v. *New York*, 334 U.S. 558, 562 (1948). Subject to such reasonable regulation, however, peaceful demonstrations in public places are protected by the First

Amendment. n31 Of course, where demonstrations turn violent, they lose their protected quality as expression under the First Amendment. n32

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n29 *Police Department of Chicago* v. *Mosley, ante*, p. 92.

n30 *Cox* v. *New Hampshire*, 312 U.S. 569, 575-576 (1941); *Kunz* v. *New York*, 340 U.S., at 293-294; *Poulos* v. *New Hampshire*, 345 U.S. 395, 398 (1953); *Cox* v. *Louisiana*, 379 U.S., at 554-555; *Cox* v. *Louisiana*, 379 U.S. 559 (1965); *Adderley* v. *Florida*, 385 U.S. 39, 46-48 (1966); *Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308, 320-321 (1968); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969).

n31 *Police Department of Chicago* v. *Mosley, ante*, at 95-96, and cases cited.

n32 See generally T. Emerson, The System of Freedom of Expression 328-345 (1970).

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[***HR13] [13]
[***HR14] [14]
The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." n33 Although a silent vigil may not unduly interfere with a public library, *Brown* v. *Louisiana*, 383 U.S. 131 (1966), making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; n34 the regulation must be narrowly [*117] tailored [**2304] to further the State's legitimate interest. n35 Access [***233] to the "streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly . . . ." n36 Free expression "must not, in the guise of regulation, be abridged or denied." n37

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n33 Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027, 1042 (1969). Cf. *Cox* v. *Louisiana*, 379 U.S. 559 (1965); *Adderley* v. *Florida*, 385 U.S. 39 (1966); *Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308 (1968); *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969).

n34 *E. g., Schneider* v. *State*, 308 U.S. 147 (1939); *Talley* v. *California*, 362 U.S. 60 (1960); *Saia* v. *New York*, 334 U.S., at 562; *Cox* v. *New Hampshire*, 312 U.S., at 574; *Hague* v. *CIO*, 307 U.S., at 516. See generally Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1.

n35 *De Jonge* v. *Oregon*, 299 U.S. 353, 364-365 (1937); *Lovell* v. *Griffin*, 303 U.S., at 451; *Schneider* v. *State*, 308 U.S., at 164; *Cantwell* v. *Connecticut*, 310 U.S., at 307; *Cox* v. *Louisiana*, 379 U.S., at 562-564; *Davis* v. *Francois*, 395 F.2d 730 (CA5 1968). Cf. *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

n36 *Food Employees* v. *Logan Valley Plaza*, 391 U.S., at 315.

n37 *Hague* v. *CIO*, 307 U.S., at 516.

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In light of these general principles, we do not think that Rockford's ordinance is an unconstitutional regulation of activity around a school. Our touchstone is *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969), in which we considered the question of how to accommodate First Amendment rights with the "special characteristics of the school environment." *Id.*, at 506. *Tinker* held that the Des Moines School District could not punish students for wearing black armbands to school in protest of the Vietnam war. Recognizing that "'wide exposure to . . . robust exchange of ideas'" is an "important part of the educational process" and should be nurtured, *id.*, at 512, we concluded that free expression could not be barred from the school campus. We made clear that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," *id.*, at 508, n38 and that particular expressive activity could not be prohibited because of a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," *id.*, at 509. But we nowhere suggested that students, teachers, or anyone else has an absolute constitutional right to use [*118] all parts of a school building or its immediate environs for his unlimited expressive purposes. Expressive activity could certainly be restricted, but only if the forbidden conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.*, at 513. The wearing of armbands was protected in *Tinker* because the students "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder." *Id.*, at 514. Compare *Burnside* v. *Byars*, 363 F.2d 744 (CA5 1966), and *Butts* v. *Dallas Ind. School District*, 436 F.2d 728 (CA5 1971), with *Blackwell* v. *Issaquena County Board of Education*, 363 F.2d 749 (CA5 1966).

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n38 Cf. *Hague* v. *CIO, supra*, at 516.

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Just as *Tinker* made clear that school property may not be declared off limits for expressive activity by students, we think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public. But in each case, expressive activity may be prohibited if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker* v. *Des Moines School District*, 393 U.S., at 513. n39

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n39 In *Tinker* we recognized that the principle of that case was not limited to expressive activity within the school building itself. *Id.*, at 512 n. 6, 513-514. See *Esteban* v. *Central Missouri State College*, 415 F.2d 1077 (CA8 1969) (Blackmun, J.), cert. denied, 398 U.S. 965 (1970); *Jones* v. *Board of Regents*, 436 F.2d 618 (CA9 1970); *Hammond* v. *South Carolina State College*, 272 F.Supp. 947 (SC 1967), cited in *Tinker*.

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[***HR17] [17]
We [***234] would be ignoring reality if we did not recognize that the public schools in a community are important institutions, and are often the focus of [**2305] significant grievances. n40 Without interfering with normal school activities, [*119] daytime picketing and handbilling on public grounds near a school can effectively publicize those grievances to pedestrians, school visitors, and deliverymen, as well as to teachers, administrators, and students. Some picketing to that end will be quiet and peaceful, and will in no way disturb the normal functioning of the school. For example, it would be highly unusual if the classic expressive gesture of the solitary picket disrupts anything related to the school, at least on a public sidewalk open to pedestrians. n41 On the other hand, schools could hardly tolerate boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse. n42

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n40 Cf. *Thornhill* v. *Alabama*, 310 U.S., at 102. It goes without saying that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U.S., at 163.

n41 Cf. *Jones* v. *Board of Regents, supra*.

n42 Cf. *Barker* v. *Hardway*, 283 F.Supp. 228 (SD W. Va.), aff'd, 399 F.2d 638 (CA4 1968), cert. denied, 394 U.S. 905 (1969) (Fortas, J., concurring).

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Rockford's antinoise ordinance goes no further than *Tinker* says a municipality may go to prevent interference with its schools. It is narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning, and does not unnecessarily interfere with First Amendment rights. Far from having an impermissibly broad prophylactic ordinance, n43 Rockford punishes only conduct which disrupts or is about to disrupt normal school activities. That decision is made, as it should be, on an individualized basis, given the particular fact situation. Peaceful picketing which does not interfere with the ordinary functioning of the school is permitted. [*120] And the ordinance gives no license to punish anyone because of what he is saying. n44

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n43 See *Jones* v. *Board of Regents, supra; Hammond* v. *South Carolina State College, supra*.

n44 Compare *Scoville* v. *Board of Education*, 425 F.2d 10 (CA7), cert. denied, 400 U.S. 826 (1970); *Dickey* v. *Alabama State Board of Education*, 273 F.Supp. 613 (MD Ala. 1967) (cited in *Tinker*).

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We recognize that the ordinance prohibits some picketing that is neither violent nor physically obstructive. Noisy demonstrations that disrupt or are incompatible with normal school activities are obviously within the ordinance's reach. Such expressive conduct may be constitutionally protected at other places or other times, cf. *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Cox* v. *Louisiana*, 379 U.S. 536 (1965), but next to a school, while classes are in session, it may be prohibited. n45 The [***235] antinoise ordinance imposes no such restriction on expressive activity before or after the school session, while the student/faculty "audience" enters and leaves the school.

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n45 Different considerations, of course, apply in different circumstances. For example, restrictions appropriate to a single-building high school during class hours would be inappropriate in many open areas on a college campus, just as an assembly that is permitted outside a dormitory would be inappropriate in the middle of a mathematics class.

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[**2306]

[***HR15B] [15B]
In *Cox* v. *Louisiana*, 379 U.S. 559 (1965), this Court indicated that, because of the special nature of the place, n46 persons could be constitutionally prohibited from picketing "in or near" a courthouse "with the intent of interfering with, obstructing, or impeding the administration of justice." Likewise, in *Cameron* v. *Johnson*, 390 U.S. 611 (1968), we upheld a statute prohibiting [*121] picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses." n47 As in those two cases, Rockford's modest restriction on some peaceful picketing represents a considered and specific legislative judgment that some kinds of expressive activity should be restricted at a particular time and place, here in order to protect the schools. n48 Such a reasonable regulation is not inconsistent with the First and Fourteenth Amendments. n49 The antinoise ordinance is not invalid on its face. n50

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n46 Noting the need "to assure that the administration of justice at all stages is free from outside control and influence," we emphasized that "[a] State may protect against the possibility of a conclusion by the public . . . [that a] judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process." 379 U.S., at 562, 565.

n47 Quoting *Schneider* v. *State*, 308 U.S., at 161, we noted that "'such activity bears no necessary relationship to the freedom to . . . distribute information or opinion.'" 390 U.S., at 617.

n48 Cf. *Garner* v. *Louisiana*, 368 U.S., at 202-203 (Harlan, J., concurring in judgment).

n49 Cf. *Adderley* v. *Florida*, 385 U.S. 39 (1966). In *Adderley*, the Court held that demonstrators could be barred from jailhouse grounds not ordinarily open to the public, at least where the demonstration obstructed the jail driveway and interfered with the functioning of the jail. In *Tinker* we noted that "a school is not like a hospital or a jail enclosure." 393 U.S., at 512 n. 6.

n50 It is possible, of course, that there will be unconstitutional applications; but that is not a matter which presently concerns us. See *Shuttlesworth* v. *Birmingham*, 382 U.S., at 91, and n. 1, *supra*.

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The judgment is

Affirmed in part and reversed in part.

MR. JUSTICE BLACKMUN joins in the judgment and in Part I of the opinion of the Court. He concurs in the result as to Part II of the opinion.

DISSENTBY: DOUGLAS (In Part)

DISSENT: [***236] MR. JUSTICE DOUGLAS, dissenting in part.

While I join Part I of the Court's opinion, I would also reverse the appellant's conviction under the antinoise ordinance.

[*122] The municipal ordinance on which this case turns is c. 28, § 19.2 (a) which provides in relevant part:

"That no person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof."

Appellant was one of 200 people picketing a school and carrying signs promoting a black cause -- "Black cheerleaders to cheer too," "Black history with black teachers," "We want our rights," and the like. Appellant, however, did not himself carry a picket sign. There was no evidence that he yelled or made any noise whatsoever. Indeed, the evidence reveals that appellant simply marched quietly and on one occasion raised his arm in the "power to the people" salute.

The pickets were mostly students; but they included former students, parents of students, and concerned citizens. They had made proposals to the school board on their demands and were turned down. Hence the picketing. The picketing [**2307] was mostly by black students who were counseled and advised by a faculty member of the school. The school contained 1,800 students. Those counseling the students advised they must be quiet, walk hand in hand, no whispering, no talking.

Twenty-five policemen were stationed nearby. There was noise but most of it was produced by the police who used loudspeakers to explain the local ordinance and to announce that arrests might be made. The picketing did not stop, and some 40 demonstrators, including appellant, were arrested.

The picketing lasted 20 to 30 minutes and some students went to the windows of the classrooms to observe it. It is not clear how many there were. The picketing [*123] was, however, orderly or, as one officer testified, "very orderly." There was no violence. And appellant made no noise whatever.

What Mr. Justice Roberts said in *Hague* v. *CIO*, 307 U.S. 496, 515-516, has never been questioned:

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

[***237] We held in *Cox* v. *Louisiana*, 379 U.S. 536, 544-545, that a State could not infringe the right of free speech and free assembly by convicting demonsrators under a "disturbing the peace" ordinance where all that the students in that case did was to protest segregation and discrimination against blacks by peaceably assembling and marching to the courthouse where they sang, prayed, and listened to a speech, but where there was no violence, no rioting, no boisterous conduct.

The school where the present picketing occurred was the center of a racial conflict. Most of the pickets were indeed students in the school. The dispute doubtless disturbed the school; and the blaring of the loudspeakers of the police was certainly a "noise or diversion" in the [*124] meaning of the ordinance. But there was no evidence that appellant was noisy or boisterous or rowdy. He walked quietly and in an orderly manner. As I read this record, the disruptive force loosed at this school was an issue dealing with race -- an issue that is preeminently one for solution by First Amendment means. * That is all that was done here; and the entire picketing, including appellant's part in it, was done in the best First Amendment tradition.

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* The majority asserts that "appellant's sole claim . . . is that he was convicted under facially unconstitutional ordinances" and that there is, therefore, no occasion to consider whether his activities were protected by the First Amendment. *Ante*, at 106 n. 1. Appellant argues, however, that the ordinance is overly broad in that it punishes constitutionally protected activity. A statute may withstand an overbreadth attack "only if, as authoritatively construed . . . , it is not susceptible of application to speech . . . that is protected by the First and Fourteenth Amendments." *Gooding* v. *Wilson*, 405 U.S. 518, 520 (1972). If the ordinance applies to appellant's activities and if appellant's activities are constitutionally protected, then the ordinance is overly broad and, thus, unconstitutional. There is no merit, therefore, to the Court's suggestion that the question whether "appellant's particular behavior was protected by the First Amendment," *ante*, at 106 n. 1, is not presented.

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REFERENCES: Return To Full Text Opinion

16 Am Jur 2d, Constitutional Law 346, 500

US L Ed Digest, Constitutional Law 501; Statutes 14, 17

ALR Digests, Constitutional Law 430; Statutes 26, 44

L Ed Index to Anno (Rev ed), Equal Protection of the Laws; Freedom of Speech, Press, Religion, and Assembly

ALR Quick Index, Equal Protection of Law; Freedom of Speech and Press; Picketing

Federal Quick Index, Equal Protection of the Laws; Freedom of Speech and Press; Picketing

Annotation References:

Indefiniteness of language as affecting validity of criminal legislation or judicial definition of common-law crime. 96 L Ed 374, 16 L Ed 2d 1231.

The Supreme Court and the right of free speech and press. 93 L Ed 1151 ,2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.

Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense. 32 ALR3d 551.

Nonlabor picketing or boycott. 93 ALR2d 1284.

Validity of statute or ordinance against picketing. 35 ALR 1200, 108 ALR 1119, 122 ALR 1043, 125 ALR 963, 130 ALR 1303.

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PAPACHRISTOU ET AL. v. CITY OF **JACKSONVILLE**

No. 70-5030

SUPREME COURT OF THE UNITED STATES

405 U.S. 156; 92 S. Ct. 839; 31 L. Ed. 2d 110; 1972 U.S. LEXIS 84

December 8, 1971, Argued
February 24, 1972, Decided

PRIOR HISTORY:

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT.

DISPOSITION: 236 So. 2d 141, reversed.

SUMMARY: Eight defendants were convicted in the Jacksonville (Florida) Municipal Court of violating a Jacksonville vagrancy ordinance which levied criminal penalties on rogues and vagabonds; dissolute persons who go about begging; common gamblers; persons who use juggling or unlawful games or plays; common drunkards; common night walkers, thieves, pilferers, or pickpockets; traders in stolen property; lewd, wanton, and lascivious persons; keepers of gambling places; common railers and brawlers; persons wandering or strolling around from place to place without any lawful purpose or object; habitual loafers; disorderly persons; persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served; and persons able to work but habitually living on their wives or minor children. The Florida Circuit Court affirmed, and the District Court of Appeal of Florida, First Circuit, dismissed a petition for writ of certiorari (236 So 2d 141).

On certiorari, the United States Supreme Court reversed. In an opinion by Douglas, J., expressing the unanimous views of the court, it was held that the Jacksonville ordinance was void for vagueness, both in the sense that it failed to give a person of ordinary intelligence fair notice that his contemplated conduct was forbidden by the ordinance, and because it encouraged arbitrary and erratic arrests and convictions.

Powell and Rehnquist, JJ., did not participate.

LAWYERS' EDITION HEADNOTES:

[***HN1]
STATUTES §18
ambiguity -- vagrancy ordinance --

Headnote: [1]
A municipal vagrancy ordinance is void for vagueness, both in the sense that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the ordinance, and because it encourages arbitrary and erratic arrests and convictions, in punishing rogues and vagabonds; dissolute persons who go about begging; common gamblers; persons who use juggling or unlawful games or plays; common drunkards; common night walkers, thieves, pilferers, or pickpockets; traders in stolen property; lewd, wanton, and lascivious persons; keepers of gambling places; common railers and brawlers; persons

wandering or strolling around from place to place without any lawful purpose or object; habitual loafers; disorderly persons; persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served; and persons able to work but habitually living on their wives or minor children.

[***HN2]
STATUTES §18
ambiguity -- criminal statutes --

Headnote: [2]
With respect to criminal statutes and ordinances, all persons are entitled to be informed as to what the state commands or forbids.

[***HN3]
STATUTES §17
ambiguity -- regulatory statutes --

Headnote: [3]
In the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed with respect to the definiteness of the statutory language.

[***HN4]
CONSTITUTIONAL LAW §833
due process -- probable cause for arrest --

Headnote: [4]
Under a Fourth and Fourteenth Amendment standard applicable to the states as well as to the federal government, police may make arrests only on probable cause.

[***HN5]
STATUTES §18
ambiguity -- criminal statutes --

Headnote: [5]
A direction by a legislature to the police to arrest all "suspicious" persons does not pass constitutional muster.

SYLLABUS: The Jacksonville vagrancy ordinance, under which petitioners were convicted, is void for vagueness, in that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," it encourages arbitrary and erratic arrests and convictions, it makes criminal activities that by modern standards are normally innocent, and it places almost unfettered discretion in the hands of the police. Pp. 161-171.

COUNSEL: Samuel S. Jacobson argued the cause and filed briefs for petitioners.

T. Edward Austin, Jr., argued the cause for respondent. With him on the brief were James C. Rinaman, Jr., and J. Edward Wall.

JUDGES: Douglas, J., delivered the opinion of the Court, in which all Members joined except Powell and Rehnquist, JJ., who took no part in the consideration or decision of the case.

OPINIONBY: DOUGLAS

OPINION: [*156] [***112] [**840] MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case involves eight defendants who were convicted in a Florida municipal court of violating a Jacksonville, Florida, vagrancy ordinance. n1 Their convictions [**841] [*157] were affirmed by the Florida Circuit Court in a consolidated appeal, and their petition for certiorari was denied by the District Court of Appeal on the authority of *Johnson* v. *State*, 202 So. 2d 852. n2 The case is [*158] here on a petition for certiorari, which we granted. 403 U.S. 917. [***113] For reasons which will appear, we reverse.

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n1 Jacksonville Ordinance Code § 26-57 provided at the time of these arrests and convictions as follows:

"Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses."

Class D offenses at the time of these arrests and convictions were punishable by 90 days' imprisonment, $ 500 fine, or both. Jacksonville Ordinance Code § 1-8 (1965). The maximum punishment has since been reduced to 75 days or $ 450. § 304.101 (1971). We are advised that that downward revision was made to avoid federal right-to-counsel decisions. The Fifth Circuit case extending right to counsel in misdemeanors where a fine of $ 500 or 90 days' imprisonment could be imposed is *Harvey* v. *Mississippi*, 340 F.2d 263 (1965).

We are advised that at present the Jacksonville vagrancy ordinance is § 330.107 and identical with the earlier one except that "juggling" has been eliminated.

n2 Florida also has a vagrancy statute, Fla. Stat. § 856.02 (1965), which reads quite closely on the Jacksonville ordinance. Jacksonville Ordinance Code § 27-43 makes the commission of any Florida misdemeanor a Class D offense against the City of Jacksonville. In 1971 Florida made minor amendments to its statute. See Laws 1971, c. 71-132.

Section 856.02 was declared unconstitutionally overbroad in *Lazarus* v. *Faircloth*, 301 F.Supp. 266. The court said: "All loitering, loafing, or idling on the streets and highways of a city, even though habitual, is not necessarily detrimental to the public welfare nor is it under all circumstances an interference with travel upon them. It may be and often is entirely innocuous. The statute draws no distinction between conduct that is calculated to harm and that which is essentially innocent." *Id.*, at 272, quoting *Hawaii* v. *Anduha*, 48 F.2d 171, 172. See also *Smith* v. *Florida, post*, p. 172.

The Florida disorderly conduct ordinance, covering "loitering about any hotel, block, barroom, dramshop, gambling house or disorderly house, or wandering about the streets either by night or by day without any known lawful means of support, or without being able to give a satisfactory account of themselves" has also been held void for "excessive broadness and vagueness" by the Florida Supreme Court, *Headley* v. *Selkowitz*, 171 So. 2d 368, 370.

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At issue are five consolidated cases. Margaret Papachristou, Betty Calloway, Eugene Eddie Melton, and Leonard Johnson were all arrested early on a Sunday morning, and charged with vagrancy -- "prowling by auto."

Jimmy Lee Smith and Milton Henry were charged with vagrancy -- "vagabonds."

Henry Edward Heath and a codefendant were arrested for vagrancy -- "loitering" and "common thief."

Thomas Owen Campbell was charged with vagrancy -- "common thief."

Hugh Brown was charged with vagrancy -- "disorderly loitering on street" and "disorderly conduct -- resisting arrest with violence."

The facts are stipulated. Papachristou and Calloway are white females. Melton and Johnson are black males. Papachristou was enrolled in a job-training program sponsored by the State Employment Service at Florida Junior College in Jacksonville. Calloway was a typing and shorthand teacher at a state mental institution

located near Jacksonville. She was the owner of the automobile in which the four defendants were arrested. Melton was a Vietnam war veteran who had been released from the Navy after nine months in a veterans' hospital. On the date of his arrest he was a part-time computer helper while attending college as a full-time student in Jacksonville. Johnson was a tow-motor operator in a grocery chain warehouse and was a lifelong resident of Jacksonville.

At the time of their arrest the four of them were riding [*159] in Calloway's car on the main thoroughfare in Jacksonville. They had left a restaurant owned by Johnson's uncle where they had eaten and were on their way to a nightclub. The arresting officers denied that the racial mixture in the car played any part in the decision to make the arrest. The arrest, they said, was made because the defendants had stopped near a used-car lot which had been broken into several times. There was, however, no evidence of any breaking and entering on the night in question.

Of these four charged with "prowling by auto" none had been previously arrested [**842] except Papachristou who had once been convicted of a municipal offense.

Jimmy Lee Smith and Milton Henry (who is not a petitioner) were arrested between 9 and 10 a. m. on a weekday in downtown Jacksonville, while waiting for a friend who was to lend them a car so they could apply for a job at a produce company. Smith was a part-time produce [***114] worker and part-time organizer for a Negro political group. He had a common-law wife and three children supported by him and his wife. He had been arrested several times but convicted only once. Smith's companion, Henry, was an 18-year-old high school student with no previous record of arrest.

This morning it was cold, and Smith had no jacket, so they went briefly into a dry cleaning shop to wait, but left when requested to do so. They thereafter walked back and forth two or three times over a two-block stretch looking for their friend. The store owners, who apparently were wary of Smith and his companion, summoned two police officers who searched the men and found neither had a weapon. But they were arrested because the officers said they had no identification and because the officers did not believe their story.

Heath and a codefendant were arrested for "loitering" and for "common thief." Both were residents of Jacksonville, Heath having lived there all his life and being [*160] employed at an automobile body shop. Heath had previously been arrested but his codefendant had no arrest record. Heath and his companion were arrested when they drove up to a residence shared by Heath's girl friend and some other girls. Some police officers were already there in the process of arresting another man. When Heath and his companion started backing out of the driveway, the officers signaled to them to stop and asked them to get out of the car, which they did. Thereupon they and the automobile were searched. Although no contraband or incriminating evidence was found, they were both arrested, Heath being charged with being a "common thief" because he was reputed to be a thief. The codefendant was charged with "loitering" because he was standing in the driveway, an act which the officers admitted was done only at their command.

Campbell was arrested as he reached his home very early one morning and was charged with "common thief." He was stopped by officers because he was traveling at a high rate of speed, yet no speeding charge was placed against him.

Brown was arrested when he was observed leaving a downtown Jacksonville hotel by a police officer seated in a cruiser. The police testified he was reputed to be a thief, narcotics pusher, and generally opprobrious character. The officer called Brown over to the car, intending at that time to arrest him unless he had a good explanation for being on the street. Brown walked over to the police cruiser, as commanded, and the officer began to search him, apparently preparatory to placing him in the car. In the process of the search he came on two small packets which were later found to contain heroin. When the officer touched the pocket where the packets were, Brown began to resist. He was charged with "disorderly loitering on street" and "disorderly [*161] conduct -- resisting arrest with violence." While he was also charged with a narcotics violation, that charge was *nolled*.

Jacksonville's ordinance and Florida's statute were "derived from early English law," *Johnson* v. *State*, 202 S. 2d, at 854, and employ "archaic language" in their definitions of vagrants. *Id.*, at 855. The history [***115] is an oftentold tale. The breakup of feudal estates in England led to labor shortages which in turn resulted in the Statutes of Laborers, n3 designed to stabilize the labor force by prohibiting increases in wages and prohibiting the movement of workers from their home areas in search of improved conditions. Later vagrancy laws became criminal [**843] aspects of the poor laws. The series of laws passed in England on the subject became increasingly severe. n4 [*162] But "the theory of the Elizabethan poor laws no longer fits the

facts," *Edwards v. California*, 314 U.S. 160, 174. The conditions which spawned these laws may be gone, but the archaic classifications remain.

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n3 23 Edw. 3, c. 1 (1349); 25 Edw. 3, c. 1 (1350).

n4 See 3 J. Stephen, History of the Criminal Law of England 203-206, 266-275; 4 W. Blackstone, Commentaries *169.

Ledwith v. *Roberts*, [1937] 1 K. B. 232, 271, gives the following summary:

"The early Vagrancy Acts came into being under peculiar conditions utterly different to those of the present time. From the time of the Black Death in the middle of the 14th century till the middle of the 17th century, and indeed, although in diminishing degree, right down to the reform of the Poor Law in the first half of the 19th century, the roads of England were crowded with masterless men and their families, who had lost their former employment through a variety of causes, had no means of livelihood and had taken to a vagrant life. The main causes were the gradual decay of the feudal system under which the labouring classes had been anchored to the soil, the economic slackening of the legal compulsion to work for fixed wages, the break up of the monasteries in the reign of Henry VIII, and the consequent disappearance of the religious orders which had previously administered a kind of 'public assistance' in the form of lodging, food and alms; and, lastly, the economic changes brought about by the Enclosure Acts. Some of these people were honest labourers who had fallen upon evil days, others were the 'wild rogues,' so common in Elizabethan times and literature, who had been born to a life of idleness and had no intention of following any other. It was they and their confederates who formed themselves into the notorious 'brotherhood of beggars' which flourished in the 16th and 17th centuries. They were a definite and serious menace to the community and it was chiefly against them and their kind that the harsher provisions of the vagrancy laws of the period were directed."

And see Sherry, Vagrants, Rogues and Vagabonds -- Old Concepts in Need of Revision, 48 Calif. L. Rev. 557, 560-561 (1960); Note, The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality, 37 N. Y. U. L. Rev. 102 (1962).

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[***HR1] [1]
This ordinance is void for vagueness, both in the sense that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States* v. *Harriss*, 347 U.S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. *Thornhill* v. *Alabama*, 310 U.S. 88; *Herndon* v. *Lowry*, 301 U.S. 242.

[***HR2] [2]
Living under a rule of law entails various suppositions, one of which is that "[all persons] are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453.

[***HR3] [3]
Lanzetta is one of a well-recognized group of cases insisting that the law give fair notice of the offending conduct. See *Connally* v. *General Construction Co.*, 269 U.S. 385, 391; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445; *United States* v. *Cohen Grocery Co.*, 255 U.S. 81. In the field of regulatory statutes governing business [***116] activities, where the acts limited are in a narrow category, greater leeway is allowed. *Boyce Motor Lines, Inc* . v. *United States*, 342 U.S. 337; *United States* v. *National Dairy Products Corp.*, 372 U.S. 29; *United States* v. *Petrillo*, 332 U.S. 1.

The poor among us, the minorities, the average householder are not in business and not alerted to the regulatory [*163] schemes of vagrancy laws; and we assume they would have no understanding of their meaning and impact if they read them. Nor are they protected from being caught in the vagrancy net by the necessity of having a specific intent to commit an unlawful act. See *Screws* v. *United States*, 325 U.S. 91; [**844] *Boyce Motor Lines, Inc.* v. *United States, supra*.

The Jacksonville ordinance makes criminal activities which by modern standards are normally innocent.

"Nightwalking" is one. Florida construes the ordinance not to make criminal one night's wandering, *Johnson* v. *State*, 202 So. 2d, at 855, only the "habitual" wanderer or, as the ordinance describes it, "common night walkers." We know, however, from experience that sleepless people often walk at night, perhaps hopeful that sleep-inducing relaxation will result.

Luis Munoz-Marin, former Governor of Puerto Rico, commented once that "loafing" was a national virtue in his Commonwealth and that it should be encouraged. It is, however, a crime in Jacksonville.

"Persons able to work but habitually living upon the earnings of their wives or minor children" -- like habitually living "without visible means of support" -- might implicate unemployed pillars of the community who have married rich wives.

"Persons able to work but habitually living upon the earnings of their wives or minor children" may also embrace unemployed people out of the labor market, by reason of a recession n5 or disemployed by reason of technological or so-called structural displacements.

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n5 In *Edwards* v. *California*, 314 U.S. 160, 177, in referring to *City of New York* v. *Miln*, 11 Pet. 102, 142, decided in 1837, we said: "Whatever may have been the notion then prevailing, we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence.' Poverty and immorality are not synonymous."

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[*164] Persons "wandering or strolling" from place to place have been extolled by Walt Whitman and Vachel Lindsay. n6 The qualification "without any lawful purpose or object" may be a trap for innocent acts. Persons "neglecting all lawful business and habitually spending their time by frequenting . . . places where alcoholic beverages are sold or served" would literally embrace many members of golf clubs and city clubs.

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n6 And see Reich, Police Questioning of Law Abiding Citizens, 75 Yale L. J. 1161, 1172 (1966): "If I choose to take an evening walk to see if Andromeda has come up on schedule, I think I am entitled to look for the distant light of Almach and Mirach without finding myself staring into the blinding beam of a police flashlight."

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Walkers and strollers and wanderers may be going to or coming from a burglary. Loafers or loiterers may be "casing" a place for a holdup. [***117] Letting one's wife support him is an intra-family matter, and normally of no concern to the police. Yet it may, of course, be the setting for numerous crimes.

The difficulty is that these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.

They are embedded in Walt Whitman's writings, especially in his "Song of the Open Road." They are reflected, too, in the spirit of Vachel Lindsay's "I Want to Go Wandering," and by Henry D. Thoreau. n7

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n7 "I have met with but one or two persons in the course of my life who understood the art of Walking, that is, of taking walks, -- who had a genius, so to speak, for *sauntering*: which word is beautifully derived 'from idle people who roved about the country, in the Middle Ages, and asked charity, under pretence of going *a la*

Sainte Terre, to the Holy Land, till the children exclaimed, "There goes a *Sainte Terrer,*" a Saunterer, a Holy-Lander. They who never go to the Holy Land in their walks, as they pretend, are indeed mere idlers and vagabonds; but they who do go there are saunterers in the good sense, such as I mean. Some, however, would derive the word from *sans terre,* without land or a home, which, therefore, in the good sense, will mean, having no particular home, but equally at home everywhere. For this is the secret of successful sauntering. He who sits still in a house all the time may be the greatest vagrant of all; but the saunterer, in the good sense, is no more vagrant than the meandering river, which is all the while sedulously seeking the shortest course to the sea. But I prefer the first, which, indeed, is the most probable derivation. For every walk is a sort of crusade, preached by some Peter the Hermit in us, to go forth and reconquer this Holy Land from the hands of the Infidels." Excursions 251-252 (1893).

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[*165] This [**845] aspect of the vagrancy ordinance before us is suggested by what this Court said in 1876 about a broad criminal statute enacted by Congress: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States* v. *Reese*, 92 U.S. 214, 221.

While that was a federal case, the due process implications are equally applicable to the States and to this vagrancy ordinance. Here the net cast is large, not to give the courts the power to pick and choose but to increase the arsenal of the police. In *Winters* v. *New York*, 333 U.S. 507, the Court struck down a New York statute that made criminal the distribution of a magazine made up principally of items of criminal deeds of bloodshed or lust so massed as to become vehicles for inciting violent and depraved crimes against the person. The infirmity the Court found was vagueness -- the absence of "ascertainable standards of guilt" (*id.*, at 515) in the [*166] sensitive First Amendment area. n8 [***118] Mr. Justice Frankfurter dissented. But concerned as he, and many others, n9 had been over the vagrancy laws, he added:

"Only a word needs to be said regarding *Lanzetta* v. *New Jersey*, 306 U.S. 451. The case involved a New Jersey statute of the type that seek to control 'vagrancy.' These statutes are in a class by themselves, in view of the familiar abuses to which they are put. . . . Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense. In short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided." *Id.*, at 540.

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n8 For a discussion of the void-for-vagueness doctrine in the area of fundamental rights see Note, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 104 *et seq.*; Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, 3 Crim. L. Bull. 205, 224 *et seq.* (1967).

n9 See *Edelman* v. *California*, 344 U.S. 357, 362 (Black, J., dissenting); *Hicks* v. *District of Columbia*, 383 U.S. 252 (DOUGLAS, J., dissenting); *District of Columbia* v. *Hunt*, 82 U. S. App. D. C. 159, 163 F.2d 833 (Judge Stephens writing for a majority of the Court of Appeals); Judge Rudkin for the court in *Hawaii* v. *Anduha*, 48 F.2d 171.

The opposing views are numerous: *Ex parte Branch*, 234 Mo. 466, 137 S. W. 886; H. R. Rep. No. 1248, 77th Cong., 1st Sess., 2; Perkins, The Vagrancy Concept, 9 Hastings L. J. 237 (1958); *People* v. *Craig*, 152 Cal. 42, 91 P. 997.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Where the list of crimes is so all-inclusive and generalized n10 as the one in [**846] this ordinance, those convicted [*167] may be punished for no more than vindicating affronts to police authority:

"The common ground which brings such a motley assortment of human troubles before the magistrates in vagrancy-type proceedings is the procedural laxity which permits 'conviction' for almost any kind of conduct and the existence of the [***119] House of Correction as an easy and convenient dumping-ground for problems [*168] that appear to have no other immediate solution." Foote, Vagrancy-Type Law and Its Administration, 104 U. Pa. L. Rev. 603, 631. n11

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n10 President Roosevelt, in vetoing a vagrancy law for the District of Columbia, said:

"The bill contains many provisions that constitute an improvement over existing law. Unfortunately, however, there are two provisions in the bill that appear objectionable.

"Section 1 of the bill contains a number of clauses defining a 'vagrant.' Clause 6 of this section would include within that category 'any able-bodied person who lives in idleness upon the wages, earnings, or property of any person having no legal obligation to support him.' This definition is so broadly and loosely drawn that in many cases it would make a vagrant of an adult daughter or son of a well-to-do family who, though amply provided for and not guilty of any improper or unlawful conduct, has no occupation and is dependent upon parental support.

"Under clause 9 of said section 'any person leading an idle life . . . and not giving a good account of himself' would incur guilt and liability to punishment unless he could prove, as required by section 2, that he has lawful means of support realized from a lawful occupation or source. What constitutes 'leading an idle life' and 'not giving a good account of oneself' is not indicated by the statute but is left to the determination in the first place of a police officer and eventually of a judge of the police court, subject to further review in proper cases. While this phraseology may be suitable for general purposes as a definition of a vagrant, it does not conform with accepted standards of legislative practice as a definition of a criminal offense. I am not willing to agree that a person without lawful means of support, temporarily or otherwise, should be subject to the risk of arrest and punishment under provisions as indefinite and uncertain in their meaning and application as those employed in this clause.

"It would hardly be a satisfactory answer to say that the sound judgment and decisions of the police and prosecuting officers must be trusted to invoke the law only in proper cases. The law itself should be so drawn as not to make it applicable to cases which obviously should not be comprised within its terms." H. R. Doc. No. 392, 77th Cong., 1st Sess.

n11 Thus, "prowling by auto," which formed the basis for the vagrancy arrests and convictions of four of the petitioners herein, is not even listed in the ordinance as a crime. But see *Hanks* v. *State*, 195 So. 2d 49, 51, in which the Florida District Court of Appeal construed "wandering or strolling from place to place" as including travel by automobile.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [***HR4] [4]
Another aspect of the ordinance's vagueness appears when we focus, not on the lack of notice given a potential offender, but on the effect of the unfettered discretion it places in the hands of the Jacksonville police. Caleb Foote, an early student of this subject, has called the vagrancy-type law as offering "punishment by analogy." *Id.*, at 609. Such crimes, though long common in Russia, n12 [**847] are not compatible with our constitutional [*169] system. We allow our police to make arrests only on "probable cause," n13 a Fourth and Fourteenth Amendment standard applicable to the States n14 as well as to the Federal Government. Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system, even when the arrest is for past criminality. Future criminality, however, is the common justification for the presence of vagrancy statutes. See Foote, *supra*, at 625. Florida has, indeed, construed her vagrancy statute "as necessary regulations," *inter alia*, "to deter vagabondage and prevent crimes." *Johnson* v. *State*, 202 So. 2d 852; *Smith* v. *State*, 239 So. 2d 250, 251.

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n12 J. Hazard, The Soviet Legal System 133 (1962):

"The 1922 code was a step in the direction of precision in definition of crime, but it was not a complete departure from the concept of punishment in accordance with the dictates of the social consciousness of the judge. Laying hold of an old tsarist code provision that had been in effect from 1864 to 1903 known by the term 'analogy,' the Soviet draftsmen inserted an article permitting a judge to consider the social danger of an individual even when he had committed no act defined as a crime in the specialized part of the code. He was to be guided by analogizing the dangerous act to some act defined as crime, but at the outset the analogies were not always apparent, as when a husband was executed for the sadistic murder of a wife, followed by dissection of her torso and shipment in a trunk to a remote railway station, the court arguing that the crime was analogous to banditry. At the time of this decision the code permitted the death penalty for banditry but not for murder without political motives or very serious social consequences."

"On the traditionally important subject of criminal law, Algeria is rejecting the flexibility introduced in the Soviet criminal code by the 'analogy' principle, as have the East-Central European and black African states." Hazard, The Residue of Marxist Influence in Algeria, 9 Colum. J. of Transnat'l L. 194, 224 (1970).

n13 *Johnson* v. *United States*, 333 U.S. 10, 15-17.

n14 *Whiteley* v. *Warden*, 401 U.S. 560.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [***HR5] [5]
A direction by a legislature to the police to arrest all "suspicious" persons n15 would not pass constitutional muster. A vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest. *People* [*170] v. *Moss*, 309 N. Y. 429, 131 N. E. 2d 717. But as Chief Justice Hewart said in *Frederick Dean*, 18 Crim. App. 133, 134 (1924):

" [***120] It would be in the highest degree unfortunate if in any part of the country those who are responsible for setting in motion the criminal law should entertain, connive at or coquette with the idea that in a case where there is not enough evidence to charge the prisoner with an attempt to commit a crime, the prosecution may, nevertheless, on such insufficient evidence, succeed in obtaining and upholding a conviction under the Vagrancy Act, 1824."

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n15 On arrests for investigation, see Secret Detention by the Chicago Police, A Report by the American Civil Liberties Union (1959). The table below contains nationwide data on arrests for "vagrancy" and for "suspicion" in the three-year period 1968-1970.
$

	Vagrancy		Suspicion		Combined Offenses	
Year *	Total rptd. arrests	Rate per 100,000	Total rptd. arrests	Rate per 100,000	Total rptd. arrests	Rate per 100,000
1968	99,147	68.2	89,986	61.9	189,133	130.1
1969	106,269	73.9	88,265	61.4	194,534	135.3

1970	101,[illegible]	68.7	70,173	46.3	171,266	113.0
3-year averages	102,170	69.6	82,808	56.5	184,978	126.1

* Reporting agencies represent population of: 1968 -- 145,306,000; 1969 -- 143,815,000; 1970 -- 151,604,000.

Source: FBI Uniform Crime Reports, 1968-1970.

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Those generally implicated by the imprecise terms of the ordinance -- poor people, nonconformists, dissenters, idlers -- may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts. Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98. It results in a regime in which the poor and the unpopular are permitted to "stand on a public sidewalk . . . only at the whim of any police officer." *Shuttlesworth* [**848] v. *Birmingham*, 382 U.S. 87, 90. Under this ordinance,

"If some carefree type of fellow is satisfied to work just so much, and no more, as will pay for one square meal, some wine, and a flophouse daily, but a court thinks this kind of living subhuman, the fellow can be forced to raise his sights or go to jail as a vagrant." Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, [*171] Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, 3 Crim. L. Bull. 205, 226 (1967).

A presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police are to become future criminals is too precarious for a rule of law. The implicit presumption in these generalized vagrancy standards -- that crime is being nipped in the bud -- is too extravagant to deserve extended treatment. Of course, vagrancy statutes are useful to the police. Of course, they are nets making easy the roundup of so-called undesirables. But the rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped that even-handed administration of the law is not possible. The rule of [***121] law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.

The Jacksonville ordinance cannot be squared with our constitutional standards and is plainly unconstitutional.

Reversed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

REFERENCES: Return To Full Text Opinion

21 Am Jur 2d, Criminal Law 17

US L Ed Digest, Statutes 18

ALR Digests, Statutes 29

L Ed Index to Anno, Statutes

ALR Quick Index, Certainty and Definiteness; Vagrancy

Federal Quick Index, Certainty and Definiteness; Vagrancy

Annotation References:

Indefiniteness of language as affecting validity of criminal legislation or judicial definition of common-law crime. 96 L Ed 374, 16 L Ed 2d 1231.

Validity of vagrancy statutes and ordinances. 25 ALR3d 792.

Vagueness as invalidating statutes or ordinances dealing with disorderly persons or conduct. 12 ALR3d 1448.

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SENTELL v. **NEW ORLEANS** AND CARROLLTON RAILROAD COMPANY.

No. 232.

SUPREME COURT OF THE UNITED STATES

166 U.S. 698; 17 S. Ct. 693; 41 L. Ed. 1169; 1897 U.S. LEXIS 2061

Submitted March 25, 1897.
April 26, 1897, Decided

PRIOR HISTORY:

ERROR TO THE COURT OF APPEALS FOR THE PARISH OF ORLEANS, IN THE STATE OF LOUISIANA.

THIS was an action originally instituted by Sentell in the civil district court for the Parish of Orleans, to recover the value of a Newfoundland bitch, known as "Countess Lona," alleged to have been negligently killed by the railroad company.

The company answered, denying the allegation of negligence, and set up as a separate defence that plaintiff had not complied either with the requirements of the state law, or of the city ordinances, with respect to the keeping of dogs, and was, therefore, not entitled to recover. The law of the State was as follows:

"SECTION 1. Be it enacted by the General Assembly of the State of Louisiana, That sec. (1201) twelve hundred and one of the Revised Statutes of Louisiana be amended and reenacted so as to read as follows: From and after the passage of this act dogs owned by citizens of this State are hereby declared to be personal property of such citizens, and shall be placed on the same guarantees of law as other personal property; provided, such dogs are given in by the owner thereof to the assessor.

"SEC. 2. Be it further enacted, etc., That no dog shall be entitled to the protection of the law unless the same shall have been placed upon the assessment rolls.

"SEC. 3. Be it further enacted, etc., That in civil actions for the killing of or for injuries done to dogs, the owner cannot recover beyond the amount of the value of such dog or dogs, as fixed by himself in the last assessment preceding the killing or injuries complained of.

"SEC. 4. Be it further enacted, etc., That all laws in conflict with this act be repealed.

"Approved July 5, 1882." Laws of 1882, p. 160.

By the city ordinance, adopted July 1, 1890, No. 4613, "no dog shall be permitted to run or be at large upon any street, alley, highway, common or public square within the limits of the city of New Orleans; provided that this section shall not apply to any dog to which a tag, obtained from the treasurer, is attached." By section 8 the treasurer was directed to furnish metal dog tags to all persons applying for the same at the rate of two dollars each, available only for the year in which they were issued.

Plaintiff denied the constitutionality of the state act; and the court charged the jury that the fact that the dog was not tagged, as required by the city ordinances, could not affect the right of the plaintiff to recover; that

the above act of the legislature was unconstitutional as destructive of the right of property; and that a dog, being property, a law which requires that property should not be protected unless listed for taxation, was in conflict with the Constitution of the United States, providing that no person shall be deprived of his life, liberty or property without due process of law. The jury returned a verdict in favor of the plaintiff for $250, upon which judgment was entered.

The case was carried to the Court of Appeals, which reversed the judgment of the trial court, and entered judgment in favor of the defendant, holding that plaintiff should have shown a compliance with the law of the State and the ordinances of the city as a condition precedent to recover. Whereupon plaintiff sued out a writ of error from this court.

LAWYERS' EDITION HEADNOTES:
Property in dogs -- statute as to assessment and recovery for dogs. --

Headnote:
1. Restrictions on property in dogs making its protection conditional upon compliance with regulations for the protection of persons and property from destruction and annoyance by them are within the police power.
2. A state statute providing that no dog shall be entitled to the protection of the law unless placed upon the assessment rolls, and that no recovery for its value can be had for more than the amount fixed by the owner in the last assessment, is a constitutional exercise of the police power.

SYLLABUS: A state statute providing that no dog shall be entitled to the protection of the law unless placed upon the assessment rolls, and that in a civil action for killing a dog the owner cannot recover beyond the value fixed by himself in the last assessment preceding the killing, is within the police power of the State.

COUNSEL: Mr. George Denegre and Mr. Omer Villere for plaintiff in error.

Mr. Henry P. Dart for defendant in error.

OPINIONBY: BROWN

OPINION: [*700] [**694] [***1170] MR. JUSTICE BROWN, after stating the case, delivered the opinion of the court.

This case turns upon the constitutionality of a law of the State of Louisiana requiring dogs to be placed upon the assessment rolls, and limiting any recovery by the owner to the value fixed by himself for the purpose of taxation.

The dog in question was a valuable Newfoundland bitch, registered in the American Kennel's stud-book, and was kept by her owner for breeding purposes. It seems that while following him in a walk upon the streets, she stopped on the track of the railroad company, and, being otherwise engaged for the moment, failed to notice the approach of an electric car which was coming toward her at great speed; and, being moreover heavy with young, and not possessed of her usual agility, she was caught by the car and instantly killed. The Court of Appeals was evidently of opinion that her owner, knowing of her condition, should not have taken her upon a public thoroughfare without exercising the greatest care and vigilance, and that the accident was largely due to a want of prudence upon his part. The facts, however, were not properly before the court, and the opinion was put upon the ground that the state law was constitutional and valid as a police regulation to prevent the indiscriminate owning and breeding of worthless dogs. The judges also annexed a certificate that the decision was reversed upon the ground that the law was constitutional, and that no other point was passed upon.

By the common law, as well as by the law of most, if not all, the States, dogs are so far recognized as property that an action will lie for their conversion or injury, 2 Bl. Com. 393; Cummings v. Perham, 1 Met. 555; Kinsman v. State, 77 Indiana, 132; State v. McDuffie, 34 N.H. 523; Parker v. Mise, 27 Alabama, 480; Wheatley v. Harris, 4 Sneed, 468; Dodson v. Mock, 4 Dev. & Bat. 146; Perry v. Phipps, 10 Ired. Law, 259; Lentz v. Stroh, 6 S. & R. 33; although, in the absence of a statute, they are not regarded as the subjects of [*701] larceny. 2 Bish. New Crim. Law, § 773; Case of Swans, 7 Coke, 86, 91; Norton v. Ladd, 5 N.H. 204; Findlay v. Bear, 8 S. & R. 571; People v. Campbell, 4 Parker C.C. 386; State v. Doe, 79 Indiana, 9; Ward v. State, 48 Alabama, 161; State v. Lymus, 26 Ohio St. 400; State v. Holder, 81 N.C. 527.

The very fact that they are without the protection of the criminal laws shows that property in dogs is of an imperfect or qualified nature, and that they stand, as it were, between animals feroe naturoe in which until

killed or subdued, there is no property, and domestic animals, in which the right of property is perfect and complete. They 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 pleasure, curiosity or caprice. They have no intrinsic value, by which we understand a value common to all dogs as such, and independent of the particular breed or individual. Unlike other domestic animals, they are useful neither as beasts of burden, for draught (except to a limited extent), nor for food. They are peculiar in the fact that they differ among themselves more widely than any other class of animals, and can hardly be said to have a characteristic common to the entire race. While the higher breeds rank among the noblest representatives of the animal kingdom, and are justly esteemed for their intelligence, sagacity, fidelity, watchfulness, affection, and, above all, for their natural companionship with man, others are afflicted with such serious infirmities of temper as to be little better than a public nuisance. All are more or less subject to attacks of hydrophobic madness.

As it is practically impossible by statute to distinguish between the different breeds, or between the valuable and the worthless, such legislation as has been enacted upon the subject, though nominally including the whole canine race, is really directed against the latter class, and is based upon the theory that the owner of a really valuable dog will feel sufficient interest in him to comply with any reasonable regulation designed to distinguish him from the common [***1171] herd. Acting upon the principle that there is but a qualified property [*702] in them, and that, while private interests require that the valuable ones shall be protected, public interests demand that the worthless shall be exterminated, they have, from time immemorial, been considered as holding their lives at the will of the legislature, [**695] and properly falling within the police powers of the several States. Laws for the protection of domestic animals are regarded as having but a limited application to dogs and cats; and, regardless of statute, a ferocious dog is looked upon as hostis humani generis, and as having no right to his life which man is bound to respect. Putnam v. Payne, 13 Johns. 312; Hinckley v. Emerson, 4 Cow. 351; Brown v. Carpenter, 26 Vermont, 638; Woolf v. Chalker, 31 Connecticut, 121; Brent v. Kimball, 60 Illinois, 211; Maxwell v. Palmerton, 21 Wend. 407.

Statutes of the general character of the one in question have been enacted in many of the States, and their constitutionality, though often attacked, has been generally, if not universally, upheld. Thus in Tower v. Tower, 18 Pick. 262, an act which authorized "any person to kill any dog or dogs found, and being without a collar," was construed to authorize the killing of a dog out of the enclosure of his owner, although he was under his immediate care, and this was known to the person killing the dog.

In Morey v. Brown, 42 N.H. 373, a statute providing that no person should be liable for killing a dog found without a collar with the name of the owner engraved thereon, was held to justify the killing, although the defendant had actual notice of the ownership of the dog found without such collar. Plaintiff claimed that the act was unconstitutional, but the court held that it was not an act to take private property for public use, or to deprive parties of their property in dogs; but merely to regulate the use and keeping of such property in a manner which seemed to the legislature reasonable and expedient. "It is a mere police regulation, such as we think the legislature might constitutionally establish." To the same effect are Carter v. Dow, 16 Wisconsin, 317; Mitchell v. Williams, 27 Indiana, 62; Haller v. Sheridan, 27 Indiana, 494.

The statutes of Massachusetts, from the earliest colonial [*703] period to the present day, are reviewed in an elaborate opinion in Blair v. Forehand, 100 Mass. 136, and laws are shown to have existed, sometimes for the killing of "unruly and ravenous dogs"; sometimes, as in Nantucket in 1743, for the killing of "any dog or bitch whatsoever that shall at any time be found there"; and sometimes for the killing of dogs "strolling out of the enclosure or immediate care of the owner," or going at large without a collar. In the particular case it was held that a statute declaring that any person might, and every police officer and constable should, kill or cause to be killed, all dogs, whenever or wherever found, not licensed and collared according to other provisions of the statute, was within the constitutional limits of the authority of the legislature. Such acts appear to have been very frequent in that States, and their constitutionality generally acquiesced in.

In the more recent case of Morewood v. Wakefield, 133 Mass. 240, the same statute was construed as authorizing any person to kill a dog which was licensed, but had no collar on, provided that he could do so without committing a trespass, although no warrant for the killing of dogs had been issued. The constitutional objection against general warrants, which was the occasion of so much controversy in that State in its colonial days, was held not to apply to dogs, and a warrant was sufficient which ordered the killing of all dogs, living in a town, not duly licensed and collared.

In Ex parte Cooper, 3 Tex. App. 489, it was held that dogs were not property within the tax clause of the constitution, and that a tax upon dogs was a police regulation and a legitimate exercise of the police power. The point was made that dogs, being property, should, under the constitution, be taxed ad valorem as other

property was. But it was held that the law was not a tax law in its ordinary sense, but a police regulation.

So in Tenney v. Lenz, 16 Wisconsin, 566, it was held that it was a legitimate exercise of the police power "to regulate and license the keeping of dogs," and that the exercise of that power was based upon the idea that the business licensed, or [*704] kind of property regulated, is liable to work mischief, and therefore needs restraints which shall operate as a protection to the public.

In Jenkins v. Ballantyne, 8 Utah, 245, the constitutional question is considered at great length, and the provisions of a city charter authorizing the city to tax, regulate or prohibit the keeping of dogs, and to authorize the destruction of the same, when at large, contrary to the ordinance, and the issuance of a certificate of registration, requiring the wearing of a collar by the dog with his registered number thereon, and providing that all dogs not so registered and collared should be liable to be killed by any person, were valid and were not in violation of the Fifth Amendment to the Constitution.

The only case to the contrary, to which our attention has been called, is that of Mayor &c. v. Meigs, 1 MacArth. 53, in which a city ordinance of Washington, requiring the owner of dogs to obtain a license for the keeping of the same, was held to be illegal. The substance of the opinion seems to be that if the dog be a species of property, which was conceded, it was entitled to the protection of other property, and the owner should not be required to obtain a license for keeping the same.

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. That a State, in a bona fide exercise of its police power, may interfere with private property, and even order its [**696] destruction, is as well settled as any legislative power can be, which has for its objects the welfare and comfort of the citizen. For instance, meats, fruits and vegetables do not cease to become private property by their decay; but it is clearly within the power of the State to order their destruction in [***1172] times of epidemic, or whenever they are so exposed as to be deleterious to the public health. There is also property in rags and clothing; but that does not stand in the way of their destruction in case they become infected and dangerous to the public health. No property is more sacred than [*705] one's home, and yet a house may be pulled down or blown up by the public authorities, if necessary to avert or stay a general conflagration, and that, too, without recourse against such authorities for the trespass. Bowditch v. Boston, 101 U.S. 16; Mouse's case, 12 Coke, 63; Governor &c. v. Meredith, 4 T.R. 794, 797; Stone v. The Mayor &c., 25 Wend. 157; Russell v. The Mayor &c., 2 Denio, 461.

Other instances of this are found in the power to kill diseased cattle, to destroy obscene books or pictures, or gambling instruments; and, in Lawton v. Steele, 152 U.S. 133, it was held to be within the power of a State to order the summary destruction of fishing nets, the use of which was likely to result in the extinction of valuable fisheries within the waters of the State.

It is true that under the Fourteenth Amendment no State can deprive a person of his life, liberty or property without due process of law; but in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but so far as it is dangerous to the safety or health of the community, due process of law may authorize its summary destruction. As was said in Jenkins v. Ballantyne, 8 Utah, 245, 247, "The emergency may be such as not to admit of the delay essential to judicial inquiry and consideration, or the subject of such action and process may be of such a nature, or the conditions and circumstances in which the act must be performed to effect the protection and give effect of the law may be such as to render judicial inquiry and consideration impracticable."

Although dogs are ordinarily harmless, they preserve some of their hereditary wolfish instincts, which occasionally break forth in the destruction of sheep and other helpless animals. Others, to small to attack these animals, are simply vicious, noisy and pestilent. As their depredations are often committed at night, it is usually impossible to identify the dog or to fix the [*706] liability upon the owner, who, moreover, is likely to be pecuniarily irresponsible. In short, the damages are usually such as are beyond the reach of judicial process, and legislation of a drastic nature is necessary to protect persons and property from destruction and annoyance. Such legislation is clearly within the police power of the State. It ordinarily takes the form of a license tax, and the identification of the dog by a collar and tag, upon which the name of the owner is sometimes required to be engraved, but other remedies are not uncommon.

In Louisiana there is only a conditional property in dogs. If they are given in by the owner to the assessor,

and placed upon the assessment rolls, they are entitled to the same legal guaranties as other personal property, though in actions for their death or injury the owner is limited in the amount of his recovery to the value fixed by himself in the last assessment. It is only under these restrictions that dogs are recognized as property. In addition to this, dogs are required by the municipal ordinance of New Orleans to be provided with a tag, obtained from the treasurer, for which the owner pays a license tax of two dollars. While these regulations are more than ordinarily stringent, and might be declared to be unconstitutional, if applied to domestic animals generally, there is nothing in them of which the owner of a dog has any legal right to complain. It is purely within the discretion of the legislature to say how far dogs shall be recognized as property, and under what restrictions they shall be permitted to roam the streets. The statute really puts a premium upon valuable dogs, by giving them a recognized position, and by permitting the owner to put his own estimate upon them.

There is nothing in this law that is not within the police power, or of which the plaintiff has a right to complain, and the judgment of the Court of Appeals is, therefore,

Affirmed.

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1976 U.S. LEXIS 141,*;424 U.S. 319;
96 S. Ct. 893;47 L. Ed. 2d 18

MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE v. ELDRIDGE

No. 74-204.

SUPREME COURT OF THE UNITED STATES

424 U.S. 319;96 S. Ct. 893;47 L. Ed. 2d 18;1976 U.S. LEXIS 141;41 Cal. Comp. Cas 920

Argued October 6, 1975

February 24, 1976

PRIOR HISTORY: [*1]

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

COUNSEL: Solicitor General Bork argued the cause for petitioner. With him on the briefs were Deputy Solicitor General Jones, Acting Assistant Attorney General Jaffe, Gerald P. Norton, William Kanter, and David M. Cohen.

Donald E. Earls argued the cause for respondent. With him on the briefs was Carl E. McAfee. *

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

a1 J. Albert Wall, Laurence Gold, and Stephen P. Berzon filed a brief for the American Federation of Labor and Congress of Industrial Organizations et al. as amici curiae urging affirmance.

David A. Webster filed a brief for Caroline Williams as amicus curiae.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*10]

JUDGES: Burger, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, Stevens

OPINION BY: POWELL

OPINION:

[1A]MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing.

I

Cash benefits are provided to workers during periods in which they are completely disabled under the disability insurance benefits program created by the 1956 amendments to Title II of the Social Security Act. 70 Stat. 815, **42 U.S.C. § 423.** n1 Respondent Eldridge was first awarded benefits in June 1968. In March 1972, he received a questionnaire from the state agency charged with monitoring his medical condition. Eldridge completed the questionnaire, indicating that his condition had not improved and identifying the medical sources, including physicians, from whom he had received treatment recently. The state agency [*11] then obtained reports from his physician and a psychiatric consultant. After considering these reports and other information in his file the agency informed Eldridge by letter that it had made a tentative determination that his disability had ceased in May 1972. The letter included a statement of reasons for the proposed termination of benefits, and advised Eldridge that he might request reasonable time in which to obtain and submit additional information pertaining to his condition.

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n1 The program is financed by revenues derived from employee and employer payroll taxes. **26 U.S.C. §§ 3101**(a), 3111(a); **42 U.S.C. § 401**(b). It provides monthly benefits to disabled persons who have worked sufficiently long to have an insured status, and who have had substantial work experience in a specified interval directly preceding the onset of disability. **42 U.S.C. §§ 423**(c)(1)(A) and (B). Benefits also are provided to the worker's dependents under specified circumstances. §§ 402 (b) (d). When the recipient reaches age 65 his disability benefits are automatically converted to retirement benefits. §§ 416(i)(2) (D), 423(a)(1). In fiscal 1974 approximately 3,700,000 persons received assistance under the program. Social Security Administration, The Year in Review 21 (1974).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*12]

In his written response, Eldridge disputed one characterization of his medical condition and indicated that the agency already had enough evidence to establish his disability. n2 The state agency then made its final determination that he had ceased to be disabled in May 1972. This determination was accepted by the Social Security Administration (SSA), which notified Eldridge in July that his benefits would terminate after that month. The notification also advised him of his right to seek reconsideration by the state agency of this initial determination within six months.

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n2 Eldridge originally was disabled due to chronic anxiety and back strain. He subsequently was found to have diabetes. The tentative determination letter indicated that aid would be terminated because available medical evidence indicated that his diabetes was under control, that there existed no limitations on his back movements which would impose severe functional restrictions, and that he no longer suffered emotional problems that would preclude him from all work for which he was qualified. App. 12-13. In his reply letter he claimed to have arthritis of the spine rather than a strained back.

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Instead of requesting reconsideration Eldridge commenced this action challenging the constitutional validity of the administrative procedures established by the Secretary of Health, Education, and Welfare for assessing whether there exists a continuing disability. He sought an immediate reinstatement of benefits pending a hearing on the issue of his disability. n3 **361 F. Supp. 520 (WD Va. 1973).** The Secretary moved to dismiss on the grounds that Eldridge's benefits had been terminated in accordance with valid administrative regulations and procedures and that he had failed to exhaust available remedies. In support of his contention that due process requires a pretermination hearing, Eldridge relied exclusively upon this Court's decision in **Goldberg v. Kelly, 397 U.S. 254 (1970),** which established a right to an "evidentiary hearing" prior to termination of welfare benefits. n4 The Secretary contended that Goldberg was not controlling since eligibility for disability benefits, unlike eligibility for welfare benefits, is not based on financial need and since issues of credibility and veracity do not play a significant role in the [*14] disability entitlement decision, which turns primarily on medical evidence.

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n3 The District Court ordered reinstatement of Eldridge's benefits pending its final disposition on the merits.

n4 In Goldberg the Court held that the pretermination hearing must include the following elements: (1) "timely and adequate notice detailing the reasons for a proposed termination"; (2) "an effective opportunity [for the recipient] to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally"; (3) retained counsel, if desired; (4) an "impartial" decisionmaker; (5) a decision resting "solely on the legal rules and evidence adduced at the hearing"; (6) a statement of reasons for the decision and the evidence relied on. **397 U.S., at 266-271.** In this opinion the term "evidentiary hearing" refers to a hearing generally of the type required in Goldberg.

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The District Court concluded that the administrative procedures pursuant to which the Secretary had terminated Eldridge's benefits abridged his right to procedural due process. The court viewed the interest of the disability recipient in uninterrupted benefits as indistinguishable from that of the welfare recipient in Goldberg. It further noted that decisions subsequent to Goldberg demonstrated that the due process requirement of pretermination hearings is not limited to situations involving the deprivation of vital necessities. See **Fuentes v. Shevin, 407 U.S. 67, 88-89 (1972); Bell v. Burson, 402 U.S. 535, 539 (1971).** Reasoning that disability determinations may involve subjective judgments based on conflicting medical and nonmedical evidence, the District Court held that prior to termination of benefits Eldridge had to be afforded an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act. **361 F. Supp., at 528.** n5 Relying entirely upon the District Court's opinion, the Court of Appeals for the Fourth Circuit affirmed the injunction barring

termination of Eldridge's benefits [*16] prior to an evidentiary hearing. **493 F. 2d 1230 (1974).** n6 We reverse.

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n5 The HEW regulations direct that each state plan under the federal categorical assistance programs must provide for pretermination hearings containing specified procedural safeguards, which include all of the Goldberg requirements. See **45 CFR § 205.10(a) (1975)**; n. 4, supra.

n6 The Court of Appeals for the Fifth Circuit, simply noting that the issue had been correctly decided by the District Court in this case, reached the same conclusion in **Williams v. Weinberger, 494 F. 2d 1191 (1974),** cert. pending, No. 74-205.

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II

[2] [3]At the outset we are [*17] confronted by a question as to whether the District Court had jurisdiction over this suit. The Secretary contends that our decision last Term in **Weinberger v. Salfi, 422 U.S. 749 (1975),** bars the District Court from considering Eldridge's action. Salfi was an action challenging the Social Security Act's duration-of-relationship eligibility requirements for surviving wives and stepchildren of deceased wage earners. We there held that **42 U.S.C. § 405**(h) n7 precludes federal-question jurisdiction in an action challenging denial of claimed benefits. The only avenue for judicial review is **42 U.S.C. § 405**(g), which requires exhaustion of the administrative remedies provided under the Act as a jurisdictional prerequisite.

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n7 Title **42 U.S.C. § 405**(h) provides in full:

"(h) Finality of Secretary's decision.

"The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

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Section 405(g) in part provides: S

"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the

Secretary may allow." n8I On its face § 405(g) thus bars judicial review of any denial of a claim of disability benefits until after a "final decision" by the Secretary after a "hearing." It is uncontested that Eldridge could have obtained full administrative review of the termination of his benefits, yet failed even to seek reconsideration of the initial determination. Since the Secretary has not "waived" the finality requirement as he had in **Salfi, supra, at 767,** he concludes that Eldridge cannot properly invoke § 405(g) as a basis for jurisdiction. We disagree.

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n8 Section 405(g) further provides:
"Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia... The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive...."

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[*19]

[4] [5A]Salfi identified several conditions which must be satisfied in order to obtain judicial review under § 405(g). Of these, the requirement that there be a final decision by the Secretary after a hearing was regarded as "central to the requisite grant of subject-matter jurisdiction...." **422 U.S., at 764.** n9 Implicit in Salfi, however, is the principle that this condition consists of two elements, only one of which is purely "jurisdictional" in the sense that it cannot be "waived" by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no "decision" of any type. And some decision by the Secretary is clearly required by the statute.

[5B] [*20]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -n9 The other two conditions are (1) that the civil action be commenced within 60 days after the mailing of notice of such decision, or within such additional time as the Secretary may permit, and (2) that the action be filed in an appropriate district court. These two requirements specify a statute of limitations and appropriate venue, and are waivable by the parties. **Salfi, 422 U.S. at 763-764.** As in Salfi no question as to whether Eldridge satisfied these requirements was timely raised below, see **Fed. Rules Civ. Proc. 8(c), 12(h)(1),** and they need not be considered here.

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That this second requirement is an essential and distinct precondition for § 405 (g) jurisdiction is evident from the

different conclusions that we reached in Salfi with respect to the named appellees and the unnamed members of the class. As to the latter the complaint was found to be jurisdictionally deficient since it "[c]ontained no allegations that they have even filed an application [*21] with the Secretary...." **422 U.S., at 764.** With respect to the named appellees, however, we concluded that the complaint was sufficient since it alleged that they had "fully presented their claims for benefits 'to their district Social Security Office and, upon denial, to the Regional Office for reconsideration.'" **Id., at 764-765.** Eldridge has fulfilled this crucial prerequisite. Through his answers to the state agency questionnaire, and his letter in response to the tentative determination that his disability had ceased, he specifically presented the claim that his benefits should not be terminated because he was still disabled. This claim was denied by the state agency and its decision was accepted by the SSA.

[6A]The fact that Eldridge failed to raise with the Secretary his constitutional claim to a pretermination hearing is not controlling. n10 As construed in Salfi, § 405 (g) requires only that there be a "final decision" by the Secretary with respect to the claim of entitlement to benefits. Indeed, the named appellees in Salfi did not present their constitutional claim [*22] to the Secretary. Weinberger v. Salfi, O.T. 1974, No. 74-214, App. 11, 17-21. The situation here is not identical to Salfi, for, while the Secretary had no power to amend the statute alleged to be unconstitutional in that case, he does have authority to determine the timing and content of the procedures challenged here. **42 U.S.C.§ 405** (a). We do not, however, regard this difference as significant. It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context. The Secretary would not be required even to consider such a challenge.

[6B]

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -n10 If Eldridge had exhausted the full set of available administrative review procedures, failure to have raised hisconstitutional claim would not bar him from asserting it later in a district court. Cf. **Flemming v. Nestor, 363 U.S. 603, 607 (1960).**

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[*23]

[7]As the nonwaivable jurisdictional element was satisfied, we next consider the waivable element. The question is whether the denial of Eldridge's claim to continued benefits was a sufficiently "final" decision with respect to his constitutional claim to satisfy the statutory exhaustion requirement. Eldridge concedes that he did not exhaust the full set of internal-review procedures provided by the Secretary. See 20 CFR §§ 404.910, **404.916, 404.940 (1975).** As Salfi recognized, the Secretary may waive the exhaustion requirement if he satisfies himself, at any stage of the administrative process, that no further review is warranted either because the internal needs of the agency are fulfilled or because the relief that is sought is beyond his power to confer. Salfi suggested that under § 405 (g) the power to determine when finality has occurred ordinarily rests with the Secretary since ultimate responsibility for the integrity of the

administrative program is his. But cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that [*24] deference to the agency's judgment is inappropriate. This is such a case.

[8A]Eldridge's constitutional challenge is entirely collateral to his substantive claim of entitlement. Moreover, there is a crucial distinction between the nature of the constitutional claim asserted here and that raised in Salfi. A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing. See **Regional Rail Reorganization Act Cases, 419 U.S. 102, 156 (1974).** In light of the Court's prior decisions, see, e.g., **Goldberg v. Kelly, 397 U.S. 254 (1970); Fuentes v. Shevin, 407 U.S. 67 (1972),** Eldridge has raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments. n11 Thus, unlike the situation in Salfi, denying Eldridge's substantive claim "for other reasons" or upholding it "under other [*25] provisions" at the post-termination stage, **422 U.S., at 762,** would not answer his constitutional challenge.

[8B]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -n11 Decisions in different contexts have emphasized that the nature of the claim being asserted and the consequences of deferment ofjudicial review are important factors in determining whether a statutory requirement of finality has been satisfied. The role these factors may play is illustrated by the intensely "practical" approach which the Court has adopted, **Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541, 546 (1949),** when applying the finality requirements of **28 U.S.C. § 1291,** which grants jurisdiction to courts of appeals to review all "final decisions" of the district courts, and **28 U.S.C. § 1257,** which empowers this Court to review only "final judgments" of state courts. See, e.g., **Harris v. Washington, 404 U.S. 55 (1971); Construction Laborers v. Curry, 371 U.S. 542, 549-550 (1963); Mercantile Nat. Bank v. Langdeau, 371 U.S. 555, 557-558 (1963); Cohen v. Beneficial Ind. Loan Corp., supra, at 545-546.** To be sure, certain of the policy considerations implicated in §§ 1257 and 1291 cases are different from those that are relevant here. Compare **Construction Laborers, supra, at 550; Mercantile Nat. Bank, supra, at 558,** with **McKart v. United States, 395 U.S. 185, 193-195 (1969);** L. Jaffe, Judicial Control of Administrative Action 424-426 (1965). But the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*26]

We conclude that the denial of Eldridge's request for benefits constitutes a final decision for purposes of § 405 (g) jurisdiction over his constitutional claim. We now proceed to the merits of that claim. n12

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n12 Given our conclusion that jurisdiction in the District Court

was proper under § 405 (g), we find it unnecessary to consider Eldridge's contention that notwithstanding § 405 (h) there was jurisdiction over his claim under the mandamus statute, **28 U.S.C. § 1361,** or the Administrative Procedure Act, **5 U.S.C. § 701** et seq.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

III

A

[1B] [9] [10]Procedural due process imposes constraints on governmental decisions which deprive individuals [*27] of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions, e.g., **Richardson v. Belcher, 404 U.S. 78, 80-81 (1971); Richardson v. Perales, 402 U.S. 389, 401-402 (1971); Flemming v. Nestor, 363 U.S. 603, 611 (1960),** that the interest of an individual in continued receipt of these benefits is a statutorily created "property" interest protected by the Fifth Amendment. Cf. **Arnett v. Kennedy, 416 U.S. 134, 166** (POWELL, J., concurring in part) (1974); **Board of Regents v. Roth, 408 U.S. 564, 576-578 (1972); Bell v. Burson, 402 U.S., at 539; Goldberg v. Kelly, 397 U.S., at 261-262.** Rather, the Secretary contends that the existing administrative procedures, detailed below, provide all the process that is constitutionally due before a recipient can be deprived of that interest.

[11] [*28] This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. **Wolff v. McDonnell, 418 U.S. 539, 557-558 (1974).** See, e.g., **Phillips v. Commissioner, 283 U.S. 589, 596-597 (1931).** See also **Dent v. West Virginia, 129 U.S. 114, 124-125 (1889).** The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." **Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951)** (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." **Armstrong v. Manzo, 380 U.S. 545, 552 (1965).** See **Grannis v. Ordean, 234 U.S. 385, 394 (1914).** Eldridge agrees that the review procedures available to a claimant before the initial determination of ineligibility becomes final would be adequate if disability benefits were not terminated [*29] until after the evidentiary hearing stage of the administrative process. The dispute centers upon what process is due prior to the initial termination of benefits, pending review.

In recent years this Court increasingly has had occasion to consider the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter. In only one case, **Goldberg v. Kelly, 397 U.S., at 266-271,** has the Court held that a hearing closely approximating a judicial trial is necessary.

In other cases requiring some type of pretermination hearing as a matter of constitutional right the Court has spoken sparingly about the requisite procedures. **Sniadach v. Family Finance Corp., 395 U.S. 337 (1969),** involving garnishment of wages, was entirely silent on the matter. In **Fuentes v. Shevin, 407 U.S., at 96-97,** the Court said only that in a replevin suit between two private parties the initial determination required something more than an ex parte proceeding before a court clerk. Similarly, **Bell v. Burson, supra, at 540,** held, in the [*30] context of the revocation of a state-granted driver's license, that due process required only that the prerevocation hearing involve a probable-cause determination as to the fault of the licensee, noting that the hearing "need not take the form of a full adjudication of the question of liability." See also **North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607 (1975).** More recently, in **Arnett v. Kennedy, supra,** we sustained the validity of procedures by which a federal employee could be dismissed for cause. They included notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. Following dismissal, an evidentiary hearing was provided. **416 U.S. at 142-146.**

[12] [13] [14]These decisions underscore the truism that "'[d]ue process, [*31] ' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." **Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).** "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." **Morrissey v. Brewer, 408 U.S. 471, 481 (1972).** Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. **Arnett v. Kennedy, supra, at 167-168** (POWELL, J., concurring in part); **Goldberg v. Kelly, supra, at 263-266; Cafeteria Workers v. McElroy, supra, at 895.** More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [*32] finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e.g., **Goldberg v. Kelly, supra, at 263-271.**

We turn first to a description of the procedures for the termination of Social Security disability benefits, and thereafter consider the factors bearing upon the constitutional adequacy of these procedures.

B

The disability insurance program is administered jointly by state and federal agencies. State agencies make the initial determination whether a disability exists, when it began, and when it ceased. **42 U.S.C. § 421** (a). n13 The standards applied and the procedures followed are prescribed by the Secretary, see § 421 (b), who has delegated his responsibilities and powers under the Act to the SSA. See 40 Fed. Reg. 4473 (1975).

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n13 In all but six States the state vocational rehabilitation agency charged with administering the state plan under the Vocational Rehabilitation Act of 1920, 41 Stat. 735, as amended, **29 U.S.C. § 701** et seq. (1970 ed., Supp. III), acts as the "state agency" for purposes of the disability insurance program. Staff of the House Committee on Ways and Means, Report on the Disability Insurance Program, 93d Cong., 2d Sess., 148 (1974). This assignment of responsibility was intended to encourage rehabilitation contacts for disabled workers and to utilize the well-established relationships of the local rehabilitation agencies with the medical profession. H.R. Rep. No. 1698, 83d Cong., 2d Sess., 23-24 (1954).

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[*33]

In order to establish initial and continued entitlement to disability benefits a worker must demonstrate that he is unable S
"to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months...." **42 U.S.C. § 423** (d)(1)(A).I
To satisfy this test the worker bears a continuing burden of showing, by means of "medically acceptable clinical and laboratory diagnostic techniques," § 423 (d)(3), that he has a physical or mental impairment of such severity that S

"he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." § 423 (d)(2)(A). n14I

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n14 Work which "exists in the national economy" is in turn defined as "work which exists in significant numbers either in the region where such individual lives or in several regions of the country." § 423 (d)(2)(A).

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[*34]
The principal reasons for benefits terminations are that the worker is no longer disabled or has returned to work. As Eldridge's benefits were terminated because he was determined to be no longer disabled, we consider only the sufficiency of the procedures involved in such cases. n15

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n15 Because the continuing-disability investigation concerning whether a claimant has returned to work is usually done directly by the SSA Bureau of Disability Insurance, without any state agency involvement, the administrative procedures prior to the post-termination evidentiary hearing differ from those involved in cases of possible medical recovery. They are similar, however,

in the important respect that the process relies principally on written communications and there is no provision for an evidentiary hearing prior to the cutoff of benefits. Due to the nature of the relevant inquiry in certain types of cases, such as those involving self-employment and agricultural employment, the SSA office nearest the beneficiary conducts an oral interview of the beneficiary as part of the pretermination process. SSA Claims Manual (CM) § 6705.2 (c).

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The continuing-eligibility investigation is made by a state agency acting through a "team" consisting of a physician and a nonmedical person trained in disability evaluation. The agency periodically communicates with the disabled worker, usually by mail -- in which case he is sent a detailed questionnaire -- or by telephone, and requests information concerning his present condition, including current medical restrictions and sources of treatment, and any additional information that he considers relevant to his continued entitlement to benefits. CM § 6705.1; Disability Insurance State Manual (DISM) § 353.3 (TL No. 137, Mar. 5, 1975). n16

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n16 Information is also requested concerning the recipient's belief as to whether he can return to work, the nature and extent of his employment during the past year, and any vocational services he is receiving.

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Information regarding the recipient's current condition is also obtained from his sources of medical treatment. DISM § 353.4. [*36] If there is a conflict between the information provided by the beneficiary and that obtained from medical sources such as his physician, or between two sources of treatment, the agency may arrange for an examination by an independent consulting physician. n17 Ibid. Whenever the agency's tentative assessment of the beneficiary's condition differs from his own assessment, the beneficiary is informed that benefits may be terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, and afforded an opportunity to review the medical reports and other evidence in his case file. n18 He also may respond in writing and submit additional evidence. Id., § 353.6.

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n17 All medical-source evidence used to establish the absence of continuing disability must be in writing, with the source properly identified. DISM § 353.4C.

n18 The disability recipient is not permitted personally to examine the medical reports contained in his file. This restriction is not significant since he is entitled to have any representative of his choice, including a lay friend or family member, examine all medical evidence. CM § 7314. See also 20 CFR § 401.3 (a)(2) (1975). The Secretary informs us that this curious limitation is currently under review.

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The state agency then makes its final determination, which is reviewed by an examiner in the SSA Bureau of Disability Insurance. **42 U.S.C. § 421** (c); CM §§ 6701 (b), (c). n19 If, as is usually the case, the SSA accepts the agency determination it notifies the recipient in writing, informing him of the reasons for the decision, and of his right to seek de novo reconsideration by the state agency. **20 CFR §§ 404.907**, **404.909 (1975)**. n20 Upon acceptance by the SSA, benefits are terminated effective two months after the month in which medical recovery is found to have occurred. **42 U.S.C.§ 423** (a) (1970 ed., Supp. III).

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n19 The SSA may not itself revise the state agency's determination in a manner more favorable to the beneficiary. If, however, it believes that the worker is still disabled, or that the disability lasted longer than determined by the state agency, it may return the file to the agency for further consideration in light of the SSA's views. The agency is free to reaffirm its original assessment.

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n20 The reconsideration assessment is initially made by the state agency, but usually not by the same persons who considered the case originally. R. Dixon, Social Security Disability and Mass Justice 32 (1973). Both the recipient and the agency may adduce new evidence.

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If the recipient seeks reconsideration by the state agency and the determination is adverse, the SSA reviews the reconsideration determination and notifies the recipient of the decision. He then has a right to an evidentiary hearing before an SSA administrative law judge. **20 CFR §§ 404.917**, **404.927 (1975)**. The hearing is nonadversary, and the SSA is not represented by counsel. As at all prior and subsequent stages of the administrative process, however, the claimant may be represented by counsel or other spokesmen. § 404.934. If this hearing results in an adverse decision, the claimant is entitled to request discretionary review by the SSA Appeals Council, § 404.945, and [*39] finally may obtain judicial review. **42 U.S.C. § 405**(g); **20 CFR § 404.951 (1975)**. n21

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n21 Unlike all prior levels of review, which are de novo, the district court is required to treat findings of fact as conclusive if supported by substantial evidence. **42 U.S.C. § 405** (g).

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Should it be determined at any point after termination of benefits, that the claimant's disability extended beyond the date

of cessation initially established, the worker is entitled to retroactive payments. **42 U.S.C. § 404.** Cf. § 423(b); **20 CFR §§ 404.501**, **404.503**, **404.504 (1975)**. If, on the other hand, a beneficiary receives any payments to which he is later determined not to be entitled, the statute authorizes the Secretary to attempt to recoup these funds in specified circumstances. **42 U.S.C. § 404.** n22

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N22 The Secretary may reduce other payments to which the beneficiary is entitled, or seek the payment of a refund, unless the beneficiary is "without fault" and such adjustment or recovery would defeat the purposes of the Act or be "against equity and good conscience." **42 U.S.C. § 404**(b). See generally **20 CFR §§ 404.501**- **404.515 (1975)**.

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C

Despite the elaborate character of the administrative procedures provided by the Secretary, the courts below held them to be constitutionally inadequate, concluding that due process requires an evidentiary hearing prior to termination. In light of the private and governmental interests at stake here and the nature of the existing procedures, we think this was error.

Since a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim. His potential injury is thus similar in nature to that of the welfare recipient in **Goldberg, see 397 U.S., at 263-264,** the nonprobationary federal employee in **Arnett, see 416 U.S., at 146,** and the wage earner in **Sniadach. See 395 U.S., at 341-342.** n23

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n23 This, of course, assumes that an employee whose wages are garnisheed erroneously is subsequently able to recover his back wages.

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Only in Goldberg has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence: S

"The crucial factor in this context -- a factor not present in the case of... virtually anyone else whose governmental entitlements are ended -- is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." **397 U.S., at 264** (emphasis in original).I
Eligibility for disability benefits, in contrast, is not based upon financial need.n24 Indeed, it is wholly unrelated to the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards, n25 tort claims awards, savings, private insurance, public or private pensions, veterans' benefits, food stamps, public assistance, or

the "many other important programs, both public and private, which contain provisions for disability [*42] payments affecting a substantial portion of the work force...." **Richardson v. Belcher, 404 U.S., at 85-87** (Douglas, J., dissenting). See Staff of the House Committee on Ways and Means, Report on the Disability Insurance Program, 93d Cong., 2d Sess., 9-10, 419-429 (1974) (hereinafter Staff Report).

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n24 The level of benefits is determined by the worker's average monthly earnings during the period prior to disability, his age, and other factors not directly related to financial need, specified in **42 U.S.C. § 415** (1970 ed., Supp. III). See § 423(a)(2).

n25 Workmen's compensation benefits are deducted in part in accordance with a statutory formula. **42 U.S.C. § 424a** (1970 ed., Supp. III); **20 CFR § 404.408 (1975)**; see **Richardson v. Belcher, 404 U.S. 78 (1971).**

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[*43]

[15]As Goldberg illustrates, the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process. Cf. **Morrissey v. Brewer, 408 U.S. 471 (1972).** The potential deprivation here is generally likely to be less than in Goldberg, although the degree of difference can be overstated. As the District Court emphasized, to remain eligible for benefits a recipient must be "unable to engage in substantial gainful activity." **42 U.S.C. § 423; 361 F. Supp., at 523.** Thus, in contrast to the discharged federal employee in Arnett, there is little possibility that the terminated recipient will be able to find even temporary employment to ameliorate the interim loss.

[16]As we recognized last Term in **Fusari v. Steinberg, 419 U.S. 379, 389 (1975),** [*44] "the possible length of wrongful deprivation of... benefits [also] is an important factor in assessing the impact of official action on the private interests." The Secretary concedes that the delay between a request for a hearing before an administrative law judge and a decision on the claim is currently between 10 and 11 months. Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cutoff of benefits and final decision after a hearing exceeds one year.

[17]In view of the torpidity of this administrative review process, cf. **id., at 383-384, 386,** and the typically modest resources of the family unit of the physically disabled worker, n26 the hardship imposed upon the erroneously terminated disability recipient may be significant. Still, the disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance [*45] will become available where the termination of disability benefits places a worker or his family below the subsistence level. n27 See **Arnett v. Kennedy, 416 U.S., at 169** (POWELL, J., concurring in part); **id., at 201-202**

(WHITE, J., concurring in part and dissenting in part). In view of these potential sources of temporary income, there is less reason here than in Goldberg to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.

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n26 Amici cite statistics compiled by the Secretary which indicate that in 1965 the mean income of the family unit of a disabled worker was $ 3,803, while the median income for the unit was $2,836. The mean liquid assets -- i.e., cash, stocks, bonds -- of these family units was $4,862; the median was $940. These statistics do not take into account the family unit's nonliquid assets -- i.e., automobile, real estate, and the like. Brief for AFL-CIO et al. as Amici Curiae App. 4a. See n. 29, infra.

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n27 Amici emphasize that because an identical definition of disability is employed in both the Title II Social Security Program and in the compensation welfare system for the disabled, Supplemental Security Income (SSI), compare **42 U.S.C. § 423** (d)(1) with § 1382c(a)(3) (1970 ed., Supp. III), the terminated disability-benefits recipient will be ineligible for the SSI Program. There exist, however, state and local welfare programs which may supplement the worker's income. In addition, the worker's household unit can qualify for food stamps if it meets the financial need requirements. See **7 U.S.C. §§ 2013**(c), 2014(b); 7 CFR § 271 (1975). Finally, in 1974 480,000 of the approximately 2,000,000 disabled workers receiving Social Security benefits also received SSI benefits. Since financial need is a criterion for eligibility under the SSI program, those disabled workers who are most in need will in the majority of cases be receiving SSI benefits when disability insurance aid is terminated. And, under the SSI program, a pretermination evidentiary hearing is provided, if requested. **42 U.S.C. § 1383** (c) (1970 ed., Supp. III); **20 CFR § 416.1336(c) (1975)**; 40 Fed. Reg. 1512 (1975); see Staff Report 346.

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D

An additional factor to be considered here is the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards. Central to the evaluation of any administrative process is the nature of the relevant inquiry. See **Mitchell v. W. T. Grant Co., 416 U.S. 600, 617 (1974);** Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1281 (1975). In order to remain eligible for benefits the disabled worker must demonstrate by means of "medically acceptable clinical and laboratory diagnostic techniques," **42 U.S.C. § 423**(d)(3), that he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment...." § 423 (d)(1)(A) (emphasis supplied). In short, a medical assessment of the worker's physical or mental condition is required. This is a more sharply focused and easily documented decision than the

typical determination [*48] of welfare entitlement. In the latter case, a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process. Goldberg noted that in such circumstances "written submissions are a wholly unsatisfactory basis for decision." **397 U.S., at 269.**

[18]By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon "routine, standard, and unbiased medical reports by physician specialists," **Richardson v. Perales, 402 U.S., at 404,** concerning a subject whom they have personally examined.n28 In Richardson the Court recognized the "reliability and probative worth of written medical reports," emphasizing that while there may be "professional disagreement with the medical conclusions" the "specter of questionable credibility and veracity is not present." **Id., at 405, 407.** To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of [*49] error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, is substantially less in this context than in Goldberg.

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n28 The decision is not purely a question of the accuracy of a medical diagnosis since the ultimate issue which the state agency must resolve is whether in light of the particular worker's "age, education, and work experience" he cannot "engage in any... substantial gainful work which exists in the national economy...." **42 U.S.C. § 423**(d)(2)(A). Yet information concerning each of these worker characteristics is amenable to effective written presentation. The value of an evidentiary hearing, or even a limited oral presentation, to an accurate presentation of those factors to the decisionmaker does not appear substantial. Similarly, resolution of the inquiry as to the types of employment opportunities that exist in the national economy for a physically impaired worker with a particular set of skills would not necessarily be advanced by an evidentiary hearing. Cf. 1 K. Davis, Administrative Law Treatise § 7.06, p. 429 (1958). The statistical information relevant to this judgment is more amenable to written than to oral presentation.

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The decision in Goldberg also was based on the Court's conclusion that written submissions were an inadequate substitute for oral presentation because they did not provide an effective means for the recipient to communicate his case to the decisionmaker. Written submissions were viewed as an unrealistic option, for most recipients lacked the "educational attainment necessary to write effectively" and could not afford professional assistance. In addition, such submissions would not provide the "flexibility of oral presentations" or "permit the recipient to mold his argument to the issues the decision maker appears to regard as important." **397 U.S., at 269.** In the context of the disability-benefits-entitlement assessment the administrative procedures under review here fully answer these objections.

The detailed questionnaire which the state agency periodically sends the recipient identifies with particularity the information

relevant to the entitlement decision, and the recipient is invited to obtain assistance from the local SSA office in completing the questionnaire. More important, the information critical to the entitlement decision usually is derived [*51] from medical sources, such as the treating physician. Such sources are likely to be able to communicate more effectively through written documents than are welfare recipients or the lay witnesses supporting their cause. The conclusions of physicians often are supported by X-rays and the results of clinical or laboratory tests, information typically more amenable to written than to oral presentation. Cf. W. Gellhorn & C. Byse, Administrative Law -- Cases and Comments 860-863 (6th ed. 1974).

A further safeguard against mistake is the policy of allowing the disability recipient's representative full access to all information relied upon by the state agency. In addition, prior to the cutoff of benefits the agency informs the recipient of its tentative assessment, the reasons therefor, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions. These procedures, again as contrasted with those before the Court in Goldberg, [*52] enable the recipient to "mold" his argument to respond to the precise issues which the decisionmaker regards as crucial.

[19A]Despite these carefully structured procedures, amici point to the significant reversal rate for appealed cases as clear evidence that the current process is inadequate. Depending upon the base selected and the line of analysis followed, the relevant reversal rates urged by the contending parties vary from a high of 58.6% for appealed reconsideration decisions to an overall reversal rate of only 3.3%. n29 Bare statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process. Their adequacy is especially suspect here since the administrative review system is operated on an open file basis. A recipient may always submit new evidence, and such submissions may result in additional medical examinations. Such fresh examinations were held in approximately 30% to 40% of the appealed cases in fiscal 1973, either at the reconsideration or evidentiary hearing stage of the administrative process. Staff Report 238. In this context, the value of reversal [*53] rate statistics as one means of evaluating the adequacy of the pretermination process is diminished. Thus, although we view such information as relevant, it is certainly not controlling in this case.

[19B]

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -n29 By focusing solely on thereversal rate for appealed reconsideration determinations amici overstate the relevant reversal rate. As we indicated last Term in **Fusari v. Steinberg, 419 U.S. 379, 383 n. 6 (1975),** in order fully to assess the reliability and fairness of a system of procedure, one must also consider the overall rate of error for all denials of benefits. Here that overall rate is 12.2%. Moreover, about 75% of these reversals occur at the reconsideration stage of the administrative process. Since the median period between a request for reconsideration review and decision is only two months, Brief for AFL-CIO et al. as Amici Curiae App. 4a, the deprivation is significantly less than that concomitant to the lengthier delay before an evidentiary hearing. Netting out these reconsideration reversals, the overall reversal

rate falls to 3.3%. See Supplemental and Reply Brief for Petitioner 14.

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E

In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision. No one can predict the extent of the increase, but the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases of this attractive option. Nor would the theoretical right of the Secretary to recover undeserved benefits result, as a practical matter, in any substantial offset to the added outlay of public funds. The parties submit widely varying estimates of the probable additional financial cost. We only need say that experience with the constitutionalizing of government procedures suggests [*55] that the ultimate additional cost in terms of money and administrative burden would not be insubstantial.

[20]Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited. See Friendly, supra, 123 U. Pa. L. Rev., at 1276, 1303.

[21] [*56] [22] [23] [24]But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." **FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940).** The judicial model of an evidentiary hearing is neither a required, nor [*57] even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." **Joint Anti-Fascist Comm. v. McGrath, 341 U.S., at 171-172** (Frankfurter, J., concurring). All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to

be heard," **Goldberg v. Kelly, 397 U.S., at 268-269** (footnote omitted), to insure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals. See **Arnett v. Kennedy, 416 U.S., at 202** (WHITE, J., concurring in part and dissenting in part). This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process [*58] for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final. Cf. **Boddie v. Connecticut, 401 U.S. 371, 378 (1971).**

We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

DISSENT BY: BRENNAN

DISSENT: MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

For the reasons stated in my dissenting opinion in **Richardson v. Wright, 405 U.S. 208, 212 (1972),** I agree with the District Court and the Court of Appeals that, prior to termination of benefits, Eldridge must be afforded an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act, **42 U.S.C. § 601** [*59] et seq. See **Goldberg v. Kelly, 397 U.S. 254 (1970).** I would add that the Court's consideration that a discontinuance of disability benefits may cause the recipient to suffer only a limited deprivation is no argument. It is speculative. Moreover, the very legislative determination to provide disability benefits, without any prerequisite determination of need in fact, presumes a need by the recipient which is not this Court's function to denigrate. Indeed, in the present case, it is indicated that because disability benefits were terminated there was a foreclosure upon the Eldridge home and the family's furniture was repossessed, forcing Eldridge, his wife, and their children to sleep in one bed. Tr. of Oral Arg. 39, 47-48. Finally, it is also no argument that a worker, who has been placed in the untenable position of having been denied disability benefits, may still seek other forms of public assistance.

1983 U.S. LEXIS 159,*;461 U.S. 352;
103 S. Ct. 1855;75 L. Ed. 2d 903

KOLENDER, CHIEF OF POLICE OF SAN DIEGO, ET AL. v. LAWSON

No. 81-1320

SUPREME COURT OF THE UNITED STATES

461 U.S. 352;103 S. Ct. 1855;75 L. Ed. 2d 903;1983 U.S. LEXIS 159;51 U.S.L.W. 4532

November 8, 1982, Argued

May 2, 1983, Decided

PRIOR HISTORY: [*1]

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DISPOSITION: **658 F.2d 1362,** affirmed and remanded.

COUNSEL: A. Wells Petersen, Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Daniel J. Kremer, Assistant Attorney General, and Jay M. Bloom, Deputy Attorney General.

Mark D. Rosenbaum, by invitation of the **Court, 459 U.S. 964,** argued the cause as amicus curiae in support of the judgment below. With him on the brief were Dennis M. Perluss, Fred Okrand, Mary Ellen Gale, Robert H. Lynn, and Charles S. Sims. *

* Briefs of amici curiae urging reversal were filed by William L. Cahalan, Edward Reilly Wilson, and Timothy A. Baughman for the Wayne County Prosecutor's Office; and by Wayne W. Schmidt, James P. Manak, and Fred E. Inbau for Americans for Effective Law Enforcement, Inc., et al.

Briefs of amici curiae urging affirmance were filed by Eugene G. Iredale for the California Attorneys for Criminal Justice; and by Michael Ratner for the Center for Constitutional Rights.

Briefs of amici curiae were filed by John K. Van de Kamp, Harry B. Sondheim, and John W. Messer for the Appellate Committee of the California District Attorneys Association; by Dan Stormer, John Huerta, and Peter Schey for the National Lawyers Guild et al.; and by Quin Denvir and William Blum for the State Public Defender of California. [*3]

JUDGES: O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, post, p. 362. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, post, p. 369.

OPINION BY: O'CONNOR

OPINION: JUSTICE O'CONNOR delivered the opinion of the Court.

[1A]This appeal presents a facial challenge to a criminal statute that requires persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of **Terry v. Ohio, 392 U.S. 1 (1968).** n1 We conclude that the statute as it has been construed is unconstitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement that a suspect provide a "credible and reliable" identification. Accordingly, we affirm the judgment of the court below.

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n1 **California Penal Code Ann. § 647(e)** (West 1970) provides:

"Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

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I

Appellee Edward Lawson was detained or arrested on approximately 15 occasions between March 1975 and January 1977 pursuant to **Cal. Penal Code Ann. § 647(e)** (West 1970). n2 Lawson was prosecuted only twice, and was convicted once. The second charge was dismissed.

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n2 The District Court failed to find facts concerning the particular occasions on which Lawson was detained or arrested under § 647(e). However, the trial transcript contains numerous descriptions of the stops given both by Lawson and by the police officers who detained him. For example, one police officer testified that he stopped Lawson while walking on an otherwise vacant street because it was late at night, the area was isolated, and the area was located close to a high crime area. Tr. 266-267. Another officer testified that he detained Lawson, who was walking at a late hour in a business area where some businesses were still open, and asked for identification because burglaries had been committed by unknown persons in the general area. *Id.*, at 207. The appellee states that he has never been stopped by police for any reason apart from his detentions under § 647 (e).

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Lawson then brought a civil action in the District Court for the Southern District of California seeking a declaratory judgment

that § 647(e) is unconstitutional, a mandatory injunction to restrain enforcement of the statute, and compensatory and punitive damages against the various officers who detained him. The District Court found that § 647(e) was overboard because "a person who is stopped on less than probable cause cannot be punished for failing to identify himself." App. to Juris. Statement A-78. The District Court enjoined enforcement of the statute, but held that Lawson could not recover damages because the officers involved acted in the good-faith belief that each detention or arrest was lawful.

Appellant H. A. Porazzo, Deputy Chief Commander of the California Highway Patrol, appealed the District Court decision to the Court of Appeals for the Ninth Circuit. Lawson cross-appealed, arguing that he was entitled to a jury trial on the issue of damages against the officers. The Court of Appeals affirmed the District Court determination as to the unconstitutionality of § 647(e). **658 F.2d 1362 (1981).** The appellate court determined [*6] that the statute was unconstitutional in that it violates the Fourth Amendment's proscription against unreasonable searches and seizures, it contains a vague enforcement standard that is susceptible to arbitrary enforcement, and it fails to give fair and adequate notice of the type of conduct prohibited. Finally, the Court of Appeals reversed the District Court as to its holding that Lawson was not entitled to a jury trial to determine the good faith of the officers in his damages action against them, and remanded the case to the District Court for trial.

The officers appealed to this Court from that portion of the judgment of the Court of Appeals which declared § 647(e) unconstitutional and which enjoined its enforcement. We noted probable jurisdiction pursuant to **28 U. S. C. § 1254**(2). **455 U.S. 999 (1982).**

II

[2] [3A] [4A] [5A]In the courts below, Lawson mounted an attack on the facial validity of § 647(e). n3 "In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." **Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, n. 5 (1982).** [*7] As construed by the California Court of Appeal, n4 § 647(e) requires that an individual provide "credible and reliable" identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a *Terry* detention. n5 **People v. Solomon, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973).** "Credible and reliable" identification is defined by the State Court of Appeal as identification "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." **Id., at 438, 108 Cal. Rptr., at 873.** In addition, a suspect may be required to "*account for his presence* . . . to the extent that it assists in producing credible and reliable identification . . . ." **Id., at 438, 108 Cal. Rptr., at 872.** Under the terms of the statute, failure of the individual to provide "credible and reliable" identification permits the arrest. n6

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n3 The appellants have apparently never challenged the propriety of declaratory and injunctive relief in this case. See **Steffel v. Thompson, 415 U.S. 452 (1974).** Nor have

appellants ever challenged Lawson's standing to seek such relief. We note that Lawson has been stopped on approximately 15 occasions pursuant to § 647(e), and that these 15 stops occurred in a period of less than two years. Thus, there is a "credible threat" that Lawson might be detained again under § 647(e). See **Ellis v. Dyson, 421 U.S. 426, 434 (1975).**

[*8]

[3B] [4B]
n4 In **Wainwright v. Stone, 414 U.S. 21, 22-23 (1973),** we held that "[for] the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it.' **Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 273 (1940).**" The Court of Appeals for the Ninth Circuit noted in its decision that the state intermediate appellate court has construed the statute in **People v. Solomon, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973),** that the State Supreme Court has refused review, and that *Solomon* has been the law of California for nine years. In these circumstances, we agree with the Ninth Circuit that the *Solomon* opinion is authoritative for purposes of defining the meaning of § 647(e). See **658 F.2d 1362, 1364-1365, n. 3 (1981).**

[5B]
n5 The *Solomon* court apparently read **Terry v. Ohio, 392 U.S. 1 (1968),** to hold that the test for a *Terry* detention was whether the officer had information that would lead a reasonable man to believe that the intrusion was appropriate. The Ninth Circuit noted that according to *Terry*, the applicable test under the Fourth Amendment requires that the police officer making a detention "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." **392 U.S., at 21.** The Ninth Circuit then held that although what *Solomon* articulated as the *Terry* standard differed from what *Terry* actually held, "[we] believe that the *Solomon* court meant to incorporate in principle the standards enunciated in *Terry*." **658 F.2d, at 1366, n. 8.** We agree with that interpretation of *Solomon*. Of course, if the *Solomon* court misread *Terry* and interpreted § 647(e) to permit investigative detentions in situations where the officers lack a reasonable suspicion of criminal activity based on objective facts, Fourth Amendment concerns would be implicated. See **Brown v. Texas, 443 U.S. 47 (1979).**

In addition, the *Solomon* court appeared to believe that both the *Terry* detention *and* frisk were proper under the standard for *Terry* detentions, and since the frisk was more intrusive than the request for identification, the request for identification *must* be proper under *Terry*. See **33 Cal. App. 3d, at 435, 108 Cal. Rptr., at 870-871.** The Ninth Circuit observed that the *Solomon* analysis was "slightly askew." **658 F.2d, at 1366, n. 9.** The court reasoned that under *Terry*, the frisk, as opposed to the detention, is proper only if the detaining officer reasonably believes that the suspect may be armed and dangerous, in addition to having an articulable suspicion that criminal activity is afoot. [*9]

n6 In **People v. Caylor, 6 Cal. App. 3d 51, 56, 85 Cal. Rptr.**

497, 501 (1970), the court suggested that the State must prove that a suspect detained under § 647(e) was loitering or wandering for "evil purposes." However, in *Solomon*, which the court below and the parties concede is "authoritative" in the absence of a California Supreme Court decision on the issue, there is no discussion of any requirement that the State prove "evil purposes."

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III

[6]Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression. See generally M. Bassiouni, Substantive Criminal Law 53 (1978).

[7] [8]As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. **Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra;** [*10] **Smith v. Goguen, 415 U.S. 566 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Connally v. General Construction Co., 269 U.S. 385 (1926).** Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement." **Smith, 415 U.S., at 574.** Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." **Id., at 575.** n7

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N7 Our concern for minimal guidelines finds its roots as far back as our decision in **United States v. Reese, 92 U.S. 214, 221 (1876):**

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*11]

[9A]Section 647(e), as presently drafted and as construed by the state courts, contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable

cause to arrest. An individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets "only at the whim of any police officer" who happens to stop that individual under § 647(e). **Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965).** Our concern here is based upon the "potential for arbitrarily suppressing First Amendment liberties. . . ." **Id., at 91.** In addition, § 647(e) implicates consideration of the constitutional right to freedom of movement. See **Kent v. Dulles, 357 U.S. 116, 126 (1958); Aptheker v. Secretary of State, 378 U.S. 500, 505-506 (1964).** [*12] n8

[9B]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -n8 In his dissent, JUSTICE WHITE claims that"[the] upshot of our cases . . . is that whether or not a statute purports to regulate constitutionally protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications." *Post*, at 370. The description of our holdings is inaccurate in several respects. First, it neglects the fact that we permit a facial challenge if a law reaches "a substantial amount of constitutionally protected conduct." **Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982).** Second, where a statute imposes criminal penalties, the standard of certainty is higher. See **Winters v. New York, 333 U.S. 507, 515 (1948).** This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application. See, *e. g.*, **Colautti v. Franklin, 439 U.S. 379, 394-401 (1979); Lanzetta v. New Jersey, 306 U.S. 451 (1939).** The dissent concedes that "the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the First Amendment. . . ." *Post*, at 371. However, in the dissent's view, one may not "confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own." *Post*, at 370. But we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines. See, *e. g.*, **Keyishian v. Board of Regents, 385 U.S. 589, 609 (1967); NAACP v. Button, 371 U.S. 415, 433 (1963).** See also Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 110-113 (1960).

No authority cited by the dissent supports its argument about facial challenges in the arbitrary enforcement context. The dissent relies heavily on **Parker v. Levy, 417 U.S. 733 (1974),** but in that case we deliberately applied a less stringent vagueness analysis "[because] of the factors differentiating military society from civilian society." **Id., at 756. Hoffman Estates, supra,** also relied upon by the dissent, does not support its position. In addition to reaffirming the validity of facial challenges in situations where free speech or free association are affected, see **455 U.S., at 494, 495, 498-499,** the Court emphasized that the ordinance in *Hoffman Estates* "simply regulates business behavior" and that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow." **Id., at 499, 498.**

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*13]

Section 647(e) is not simply a "stop-and-identify" statute.

Rather, the statute requires that the individual provide a "credible and reliable" identification that carries a "reasonable assurance" of its authenticity, and that provides "means for later getting in touch with the person who has identified himself." **Solomon, 33 Cal. App. 3d, at 438, 108 Cal. Rptr., at 872-873.** In addition, the suspect may also have to account for his presence "to the extent it assists in producing credible and reliable identification." **Id., at 438, 108 Cal. Rptr., at 872.**

[10A]At oral argument, the appellants confirmed that a suspect violates § 647(e) unless "the officer [is] satisfied that the identification is reliable." Tr. of Oral Arg. 6. In giving examples of how suspects would satisfy the requirement, appellants explained that a jogger, who was not carrying identification, could, depending on the particular officer, be required to answer a series of questions concerning the route that he followed to arrive at the place where the officers detained him, n9 or could satisfy the identification requirement simply [*14] by reciting his name and address. See *Id.*, at 6-10.

[10B]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -n9 To the extent that § 647(e) criminalizes a suspect's failure to answer such questions put to him bypolice officers, Fifth Amendment concerns are implicated. It is a "settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." **Davis v. Mississippi, 394 U.S. 721, 727, n. 6 (1969).**

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[1B] [11]It is clear that the full discretion accorded to the police to determine whether the suspect has provided a "credible and reliable" identification necessarily "[entrusts] lawmaking 'to the moment-to-moment judgment of the policeman on his beat.'" **Smith, supra, at 575** (quoting **Gregory v. Chicago, 394 U.S. 111, 120 (1969)** (Black, J., concurring)). Section 647(e) "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups [*15] deemed to merit their displeasure,'" **Papachristou, 405 U.S., at 170** (quoting **Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)),** and "confers on police a virtually unrestrained power to arrest and charge persons with a violation." **Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974)** (POWELL, J., concurring in result). In providing that a detention under § 647(e) may occur only where there is the level of suspicion sufficient to justify a *Terry* stop, the State ensures the existence of "neutral limitations on the conduct of individual officers." **Brown v. Texas, 443 U.S., at 51.** Although the initial detention is justified, the State fails to establish standards by which the officers may determine whether the suspect has complied with the subsequent identification requirement.

[12]Appellants stress the need for strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation. The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, it cannot

[*16] justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity. See **Lanzetta v. New Jersey, 306 U.S. 451 (1939).** Section 647 (e), as presently construed, requires that "suspicious" persons satisfy some undefined identification requirement, or face criminal punishment. Although due process does not require "impossible standards" of clarity, see **United States v. Petrillo, 332 U.S. 1, 7-8 (1947),** this is not a case where further precision in the statutory language is either impossible or impractical.

IV

[1C] [13A]We conclude § 647(e) is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute. n10 Accordingly, the judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

[13B]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -n10 Because we affirm the judgment of the court below on this ground, we find it unnecessary to decide the other questions raised by the parties because our resolution of these other issues would decide constitutional questions in advance of the necessity of doing so. See**Burton v. United States, 196 U.S. 283, 295 (1905);** *Liverpool, N. Y. & P. S.S. Co.* v. **Commissioners of Emigration, 113 U.S. 33, 39 (1885).** See also **Ashwander v. TVA, 297 U.S. 288, 346-347 (1936)** (Brandeis, J., concurring). The remaining issues raised by the parties include whether § 647(e) implicates Fourth Amendment concerns, whether the individual has a legitimate expectation of privacy in his identity when he is detained lawfully under *Terry*, whether the requirement that an individual identify himself during a *Terry* stop violates the Fifth Amendment protection against compelled testimony, and whether inclusion of the *Terry* standard as part of a criminal statute creates other vagueness problems. The appellee also argues that § 647(e) permits arrests on less than probable cause. See **Michigan v. DeFillippo, 443 U.S. 31, 36 (1979).**

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*17]

It is so ordered.

CONCUR BY: BRENNAN

CONCUR: JUSTICE BRENNAN, concurring.

I join the Court's opinion; it demonstrates convincingly that the California statute at issue in this case, **Cal. Penal Code Ann. § 647(e)** (West 1970), as interpreted by California courts, is unconstitutionally vague. Even if the defect identified by the Court were cured, however, I would hold that this statute violates the Fourth Amendment. n1 Merely to facilitate the general law enforcement objectives of investigating and preventing unspecified crimes, States may not authorize the arrest and criminal prosecution of an individual for failing to produce identification or further information on demand by a police officer.

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n1 We have not in recent years found a state statute invalid directly under the Fourth Amendment, but we have long recognized that the government may not "authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct." **Sibron v. New York, 392 U.S. 40, 61 (1968).** In *Sibron*, and in numerous other cases, the Fourth Amendment issue arose in the context of a motion by the defendant in a criminal prosecution to suppress evidence against him obtained as the result of a police search or seizure of his person or property. The question thus has always been whether particular conduct by the police violated the Fourth Amendment, and we have not had to reach the question whether state law purporting to authorize such conduct also offended the Constitution. In this case, however, appellee Edward Lawson has been repeatedly arrested under authority of the California statute, and he has shown that he will likely be subjected to further seizures by the police in the future if the statute remains in force. See *Los Angeles* v. *Lyons, ante*, at 105-109; **Gomez v. Layton, 129 U. S. App. D. C. 289, 394 F.2d 764 (1968).** It goes without saying that the Fourth Amendment safeguards the rights of those who are not prosecuted for crimes as well as the rights of those who are.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*18]

It has long been settled that the Fourth Amendment prohibits the seizure and detention or search of an individual's person unless there is probable cause to believe that he has committed a crime, except under certain conditions strictly defined by the legitimate requirements of law enforcement and by the limited extent of the resulting intrusion on individual liberty and privacy. See **Davis v. Mississippi, 394 U.S. 721, 726-727 (1969).** The scope of that exception to the probable-cause requirement for seizures of the person has been defined by a series of cases, beginning with **Terry v. Ohio, 392 U.S. 1 (1968),** holding that a police officer with reasonable suspicion of criminal activity, based on articulable facts, may detain a suspect briefly for purposes of limited questioning and, in so doing, may conduct a brief "frisk" of the suspect to protect himself from concealed weapons. See, *e. g.,* **United States v. Brignoni-Ponce, 422 U.S. 873, 880-884 (1975); Adams v. Williams, 407 U.S. 143, 145-146 (1972).** Where probable cause is lacking, we have expressly declined to [*19] allow significantly more intrusive detentions or searches on the *Terry* rationale, despite the assertion of compelling law enforcement interests. "For all but those narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." **Dunaway v. New York, 442 U.S. 200, 214 (1979).** n2

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n2 A brief detention is usually sufficient as a practical matter to accomplish all legitimate law enforcement objectives with respect to individuals whom the police do not have probable cause to arrest. For longer detentions, even though they fall short of a full arrest, we have demanded not only a high standard of law enforcement necessity, but also objective indications that an individual would not consider the detention significantly intrusive. Compare **Dunaway v. New York, 442**

U.S., at 212-216 (seizure of suspect without probable cause and custodial interrogation in police station violates Fourth Amendment), and **Davis v. Mississippi, 394 U.S. 721, 727-728 (1969)** (suspect may not be summarily detained and taken to police station for fingerprinting but may be ordered to appear at a specific time), with **Michigan v. Summers, 452 U.S. 692, 701-705 (1981)** (suspect may be detained in his own home without probable cause for time necessary to search the premises pursuant to a valid warrant supported by probable cause). See also **Florida v. Royer, 460 U.S. 491, 500 (1983)** (opinion of WHITE, J.) ("least intrusive means" requirement for searches not supported by probable cause).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*20]

Terry and the cases following it give full recognition to law enforcement officers' need for an "intermediate" response, short of arrest, to suspicious circumstances; the power to effect a brief detention for the purpose of questioning is a powerful tool for the investigation and prevention of crimes. Any person may, of course, direct a question to another person in passing. The *Terry* doctrine permits police officers to do far more: If they have the requisite reasonable suspicion, they may use a number of devices with substantial coercive impact on the person to whom they direct their attention, including an official "show of authority," the use of physical force to restrain him, and a search of the person for weapons. **Terry v. Ohio, supra, at 19, n. 16;** see **Florida v. Royer, 460 U.S. 491, 498-499 (1983)** (opinion of WHITE, J.); **United States v. Mendenhall, 446 U.S. 544, 554 (1980)** (opinion of Stewart, J.). During such an encounter, few people will ever feel free not to cooperate fully with the police by answering their questions. Cf. 3 W. LaFave, Search and Seizure § 9.2, pp. [*21] 53-55 (1978). Our case reports are replete with examples of suspects' cooperation during *Terry* encounters, even when the suspects have a great deal to lose by cooperating. See, *e. g.,* **Sibron v. New York, 392 U.S. 40, 45 (1968); Florida v. Royer, supra, at 493-495.**

The price of that effectiveness, however, is intrusion on individual interests protected by the Fourth Amendment. We have held that the intrusiveness of even these brief stops for purposes of questioning is sufficient to render them "seizures" under the Fourth Amendment. See **Terry v. Ohio, 392 U.S., at 16.** For precisely that reason, the scope of seizures of the person on less than probable cause that *Terry* permits is strictly circumscribed to limit the degree of intrusion they cause. *Terry* encounters must be brief; the suspect must not be moved or asked to move more than a short distance; physical searches are permitted only to the extent necessary to protect the police officers involved during the encounter; and, most importantly, the suspect must be free to leave after a short time and to decline to answer the [*22] questions put to him.

"[The] person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." **Id., at 34** (WHITE, J., concurring).

Failure to observe these limitations converts a *Terry* encounter into the sort of detention that can be justified only by probable cause to believe that a crime has been committed. See **Florida v. Royer, 460 U.S., at 501** (opinion of WHITE, J.); **id., at 509-511** (BRENNAN, J., concurring in result); **Dunaway v. New York, supra, at 216.**

The power to arrest -- or otherwise to prolong a seizure until a suspect had responded to the satisfaction of the police officers -- would undoubtedly elicit cooperation from a high percentage of even those very few individuals not sufficiently coerced by a show of authority, brief physical detention, and a frisk. We have never claimed that expansion of the power of police officers to act [*23] on reasonable suspicion alone, or even less, would further no law enforcement interests. See, *e. g.,* **Brown v. Texas, 443 U.S. 47, 52 (1979).** But the balance struck by the Fourth Amendment between the public interest in effective law enforcement and the equally public interest in safeguarding individual freedom and privacy from arbitrary governmental interference forbids such expansion. See **Dunaway v. New York, supra; United States v. Brignoni-Ponce, 422 U.S., at 878.** Detention beyond the limits of *Terry* without probable cause would improve the effectiveness of legitimate police investigations by only a small margin, but it would expose individual members of the public to exponential increases in both the intrusiveness of the encounter and the risk that police officers would abuse their discretion for improper ends. Furthermore, regular expansion of *Terry* encounters into more intrusive detentions, without a clear connection to any specific underlying crimes, is likely to exacerbate ongoing tensions, where they exist, between the police and the public. See Report of the National [*24] Advisory Commission on Civil Disorders 157-168 (1968).

In sum, under the Fourth Amendment, police officers with reasonable suspicion that an individual has committed or is about to commit a crime may detain that individual, using some force if necessary, for the purpose of asking investigative questions. n3 They may ask their questions in a way calculated to obtain an answer. But they may not *compel* an answer, and they must allow the person to leave after a reasonably brief period of time unless the information they have acquired during the encounter has given them probable cause sufficient to justify an arrest. n4

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n3 Police officers may have a similar power with respect to persons whom they reasonably believe to be material witnesses to a specific crime. See, *e. g.,* ALI Model Code of Pre-Arraignment Procedure § 110.2(1)(b) (Proposed Official Draft 1975).

n4 Of course, some reactions by individuals to a properly limited *Terry* encounter, *e. g.*, violence toward a police officer, in and of themselves furnish valid grounds for arrest. Other reactions, such as flight, may often provide the necessary information, in addition to that which the officers already possess, to constitute probable cause. In some circumstances it is even conceivable that the mere fact that a suspect refuses to answer questions once detained, viewed in the context of the facts that gave rise to reasonable suspicion in the first place, would be enough to provide probable cause. A court confronted with such a claim, however, would have to evaluate it carefully to make certain that

the person arrested was not being penalized for the exercise of his right to refuse to answer.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*25]

California cannot abridge this constitutional rule by making it a crime to refuse to answer police questions during a *Terry* encounter, any more than it could abridge the protections of the Fifth and Sixth Amendments by making it a crime to refuse to answer police questions once a suspect has been taken into custody. To begin, the statute at issue in this case could not be constitutional unless the intrusions on Fourth Amendment rights it occasions were necessary to advance some specific, legitimate state interest not already taken into account by the constitutional analysis described above. Yet appellants do not claim that § 647(e) advances any interest other than general facilitation of police investigation and preservation of public order -- factors addressed at length in *Terry, Davis*, and *Dunaway*. Nor do appellants show that the power to arrest and to impose a criminal sanction, in addition to the power to detain and to pose questions under the aegis of state authority, is so necessary in pursuit of the State's legitimate interests as to justify the substantial additional intrusion on individuals' rights. Compare Brief for Appellants 18-19 (asserting [*26] that § 647 (e) is justified by state interest in "detecting and preventing crime" and "protecting the citizenry from criminal acts"), and **People v. Solomon, 33 Cal. App. 3d 429, 436-437, 108 Cal. Rptr. 867, 872 (1973)** (§ 647(e) justified by "the public need involved," *i.e.*, "protection of society against crime"), with **United States v. Brignoni-Ponce, supra, at 884** (federal interest in immigration control permits stops at the border itself without reasonable suspicion), and **California v. Byers, 402 U.S. 424, 456-458 (1971)** (Harlan, J., concurring in judgment) (state interest in regulating automobiles justifies making it a crime to refuse to stop after an automobile accident and report it). Thus, because the State's interests extend only so far as to justify the limited searches and seizures defined by *Terry*, the balance of interests described in that case and its progeny must control.

Second, it goes without saying that arrest and the threat of a criminal sanction have a substantial impact on interests protected by the Fourth Amendment, far more severe than [*27] we have ever permitted on less than probable cause. Furthermore, the likelihood that innocent persons accosted by law enforcement officers under authority of § 647(e) will have no realistic means to protect their rights compounds the severity of the intrusions on individual liberty that this statute will occasion. The arrests it authorizes make a mockery of the right enforced in **Brown v. Texas, 443 U.S. 47 (1979),** in which we held squarely that a State may not make it a crime to refuse to provide identification on demand in the absence of reasonable suspicion. n5 If § 647(e) remains in force, the validity of such arrests will be open to challenge only after the fact, in individual prosecutions for failure to produce identification. Such case-by-case scrutiny cannot vindicate the Fourth Amendment rights of persons like appellee, many of whom will not even be prosecuted after they are arrested, see *ante*, at 354. A pedestrian approached by police officers has no way of knowing whether the officers have "reasonable suspicion" -- without which they may not demand identification even under § 647(e), *ante*, at 356, and n. 5 -- because that condition depends [*28] solely on the objective facts known to the officers and evaluated in light of

their experience, see **Terry v. Ohio, 392 U.S., at 30; United States v. Brignoni-Ponce, 422 U.S., at 884-885.** The pedestrian will know that to assert his rights may subject him to arrest and all that goes with it: new acquaintances among jailers, lawyers, prisoners, and bail bondsmen, firsthand knowledge of local jail conditions, a "search incident to arrest," and the expense of defending against a possible prosecution. n6 The only response to be expected is compliance with the officers' requests, whether or not they are based on reasonable suspicion, and without regard to the possibility of later vindication in court. Mere reasonable suspicion does not justify subjecting the innocent to such a dilemma. n7

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n5 In *Brown* we had no need to consider whether the State can make it a crime to refuse to provide identification on demand during a seizure permitted by *Terry*, when the police have reasonable suspicion but not probable cause. See **443 U.S., at 53, n. 3.** [*29]

n6 Even after arrest, however, he may not be forced to answer questions against his will, and -- in contrast to what appears to be normal procedure during *Terry* encounters -- he will be so informed. See **Miranda v. Arizona, 384 U.S. 436 (1966).** In fact, if he indicates a desire to remain silent, the police should cease questioning him altogether. **Id., at 473-474.**

n7 When law enforcement officers have probable cause to believe that a person has committed a crime, the balance of interests between the State and the individual shifts significantly, so that the individual may be forced to tolerate restrictions on liberty and invasions of privacy that possibly will never be redressed, even if charges are dismissed or the individual is acquitted. Such individuals may be arrested, and they may not resist. But probable cause, and nothing less, represents the point at which the interests of law enforcement justify subjecting an individual to any significant intrusion beyond that sanctioned in *Terry*, including either arrest or the need to answer questions that the individual does not want to answer in order to avoid arrest or end a detention.

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By defining as a crime the failure to respond to requests for personal information during a *Terry* encounter, and by permitting arrests upon commission of that crime, California attempts in this statute to compel what may not be compelled under the Constitution. Even if § 647(e) were not unconstitutionally vague, the Fourth Amendment would prohibit its enforcement.

DISSENT BY: WHITE

DISSENT: JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

The usual rule is that the alleged vagueness of a criminal statute must be judged in light of the conduct that is charged to be violative of the statute. See, *e. g.,* **United States v. Mazurie, 419 U.S. 544, 550 (1975); United States v. Powell, 423 U.S. 87, 92-93 (1975).** If the actor is given sufficient notice

that his conduct is within the proscription of the statute, his conviction is not vulnerable on vagueness grounds, even if as applied to other conduct, the law would be unconstitutionally vague. None of our cases "suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it [*31] because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." **Parker v. Levy, 417 U.S. 733, 756 (1974).** The correlative rule is that a criminal statute is not unconstitutionally vague on its face unless it is "impermissibly vague in all of its applications." **Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982).**

These general rules are equally applicable to cases where First Amendment or other "fundamental" interests are involved. The Court has held that in such circumstances "more precision in drafting may be required because of the vagueness doctrine in the case of regulation of expression," **Parker v. Levy, supra, at 756;** a "greater degree of specificity" is demanded than in other contexts. **Smith v. Goguen, 415 U.S. 566, 573 (1974).** But the difference in such cases "relates to how strict a test of vagueness shall be applied in judging a particular criminal statute." **Parker v. Levy, 417 U.S., at 756.** [*32] It does not permit the challenger of the statute to confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own. See *ibid.* Of course, if his own actions are themselves protected by the First Amendment or other constitutional provision, or if the statute does not fairly warn that it is proscribed, he may not be convicted. But it would be unavailing for him to claim that although he knew his own conduct was unprotected and was plainly enough forbidden by the statute, others may be in doubt as to whether their acts are banned by the law.

The upshot of our cases, therefore, is that whether or not a statute purports to regulate constitutionally protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications. If any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional on its face and should not be vulnerable to a facial attack in a declaratory judgment action such [*33] as is involved in this case. Under our cases, this would be true, even though as applied to other conduct the provision would fail to give the constitutionally required notice of illegality.

Of course, the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the First Amendment; and, as I have indicated, I also agree that in First Amendment cases the vagueness analysis may be more demanding. But to imply, as the majority does, *ante*, at 358-359, n. 8, that the overbreadth doctrine requires facial invalidation of a statute which is not vague as applied to a defendant's conduct but which is vague as applied to other acts is to confound vagueness and overbreadth, contrary to **Parker v. Levy, supra.**

If there is a range of conduct that is clearly within the reach of the statute, law enforcement personnel, as well as putative arrestees, are clearly on notice that arrests for such conduct are

authorized by the law. There would be nothing arbitrary or discretionary about such arrests. If the officer arrests for an act that both he and the lawbreaker know is clearly barred by the statute, it seems to [*34] me an untenable exercise of judicial review to invalidate a state conviction because in some other circumstance the officer may arbitrarily misapply the statute. That the law might not give sufficient guidance to arresting officers with respect to other conduct should be dealt with in those situations. See, *e. g.,* **Hoffman Estates, supra, at 504.** It is no basis for fashioning a further brand of "overbreadth" and invalidating the statute on its face, thus forbidding its application to identifiable conduct that is within the State's power to sanction.

I would agree with the majority in this case if it made at least some sense to conclude that the requirement to provide "credible and reliable identification" after a valid stop on reasonable suspicion of criminal conduct is "impermissibly vague in all of its applications." **Hoffman Estates v. Flipside, supra, at 495.** * But the statute is not vulnerable on this ground; and the majority, it seems to me, fails to demonstrate that it is. Suppose, for example, an officer requests identification information from a suspect during a valid *Terry* stop and the [*35] suspect answers: "Who I am is just none of your business." Surely the suspect would know from the statute that a refusal to provide any information at all would constitute a violation. It would be absurd to suggest that in such a situation only the unfettered discretion of a police officer, who has legally stopped a person on reasonable suspicion, would serve to determine whether a violation of the statute has occurred.

"It is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is [a failure to provide credible and reliable identification] and that would be covered by the statute . . . . In these instances, there would be ample notice to the actor and no room for undue discretion by enforcement officers. There may be a variety of other conduct that might or might not be claimed [to have failed to meet the statute's requirements] by the State, but unpredictability in those situations does not change the certainty in others." **Smith v. Goguen, 415 U.S., at 584** (WHITE, J., concurring in judgment).

See **id., at 590** (BLACKMUN, J., joined by BURGER, C. J., agreeing with WHITE, [*36] J., on the vagueness issue). Thus, even if, as the majority cryptically asserts, the statute here implicates First Amendment interests, it is not vague on its face, however more strictly the vagueness doctrine should be applied. The judgment below should therefore not be affirmed but reversed and appellee Lawson remitted to challenging the statute as it has been or will be applied to him.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

* The majority attempts to underplay the conflict between its decision today and the decision last Term in *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.,* by suggesting that we applied a "less strict vagueness test" because economic regulations were at issue. The Court there also found that the ordinances challenged might be characterized as quasi-criminal or criminal in nature and held that because at least some of respondent's conduct clearly was covered by the ordinance, the facial challenge was unavailing even under the "relatively strict test" applicable to criminal laws. **455 U.S., at 499-500.**

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*37]

The majority finds that the statute "contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification." *Ante*, at 358. At the same time, the majority concedes that "credible and reliable" has been defined by the state court to mean identification that carries reasonable assurance that the identification is authentic and that provides means for later getting in touch with the person. The narrowing construction given this statute by the state court cannot be likened to the "standardless" statutes involved in the cases cited by the majority. For example, **Papachristou v. City of Jacksonville, 405 U.S. 156 (1972),** involved a statute that made it a crime to be a "vagrant." The statute provided:

"'Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, . . . common drunkards, common night walkers, . . . lewd, wanton and lascivious persons, . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, . . . shall be deemed vagrants.'" **Id., at 156-157, n. 1.**
[*38]
In **Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974),** the statute at issue made it a crime "'for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.'" The present statute, as construed by the state courts, does not fall in the same category.

The statutes in *Lewis* v. *City of New Orleans* and *Smith* v. *Goguen, supra*, as well as other cases cited by the majority clearly involved threatened infringements of First Amendment freedoms. A stricter test of vagueness was therefore warranted. Here, the majority makes a vague reference to potential suppression of First Amendment liberties, but the precise nature of the liberties threatened is never mentioned. **Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965),** is cited, but that case dealt with an ordinance making it a crime to "'stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on,'" **id., at 90,** and the First Amendment concerns implicated [*39] by the statute were adequately explained by the Court's reference to **Lovell v. City of Griffin, 303 U.S. 444 (1938),** and **Schneider v. State, 308 U.S. 147 (1939),** which dealt with the First Amendment right to distribute leaflets on city streets and sidewalks. There are no such concerns in the present case.

Of course, if the statute on its face violates the Fourth or Fifth Amendment -- and I express no views about that question -- the Court would be justified in striking it down. But the majority apparently cannot bring itself to take this course. It resorts instead to the vagueness doctrine to invalidate a statute that is clear in many of its applications but which is somehow distasteful to the majority. As here construed and applied, the doctrine serves as an open-ended authority to oversee the States' legislative choices in the criminal law area and in this case leaves the State in a quandary as to how to draft a statute

that will pass constitutional muster.

I would reverse the judgment of the Court of Appeals.

C

United States District Court, S.D. Ohio, Western Division.

Robert R. VANATER, Plaintiff,
v.
VILLAGE OF SOUTH POINT, et al., Defendants.

No. C-1-87-708.

June 29, 1989.

Dog owner brought action challenging constitutionality of village criminal ordinance, which prohibited the owning or harboring of "pit bull" terriers or other vicious dogs within village limits. The District Court, Herman J. Weber, J., held that: (1) ordinance was valid exercise of village's police power; (2) ordinance had rational relation to legitimate governmental interest of responding to specific threat presented by "pit bull" dog breed; (3) definitions of "pit bull terrier" in ordinance were not unconstitutionally vague; (4) distinction in ordinance between "pit bull" terriers and other dogs was not arbitrary or irrational; and (5) ordinance was not overbroad as drawn.

So ordered.

West Headnotes

[1] **Municipal Corporations** 589
268k589 Most Cited Cases

[1] **Municipal Corporations** 592(1)
268k592(1) Most Cited Cases

Under Ohio law, villages have authority to adopt and enforce within their limits local "police" regulations, as long as those regulations are not in conflict with general laws of state.

[2] **Municipal Corporations** 595
268k595 Most Cited Cases

[2] **Municipal Corporations** 597
268k597 Most Cited Cases

Under Ohio law, village's police power encompasses protection of health, safety, and welfare of public

[3] **Municipal Corporations** 622
268k622 Most Cited Cases

Under Ohio law, village's police power includes power to prohibit.

[4] **Municipal Corporations** 53
268k53 Most Cited Cases

Village's police power is checked by United States constitutional limits on power of government to act with regard to private property.

[5] **Municipal Corporations** 604
268k604 Most Cited Cases

Control of dogs falls within village's police power to protect public health and safety.

[6] **Animals** 4
28k4 Most Cited Cases

[6] **Municipal Corporations** 604
268k604 Most Cited Cases

Village criminal ordinance, which prohibited the owning or harboring of "pit bull terriers" or other vicious dogs within village limits, was valid exercise of village's police power.

[7] **Constitutional Law** 48(5)
92k48(5) Most Cited Cases

Heavy burden of proof is imposed upon party challenging public safety law, as such legislation is entitled to strong presumption of constitutionality.

[8] **Constitutional Law** 48(5)
92k48(5) Most Cited Cases

Party challenging public safety law must prove by clear and convincing evidence that legislative enactment is unconstitutional.

[9] **Municipal Corporations** 604
268k604 Most Cited Cases

Test to determine "constitutionality of village criminal ordinance", which prohibited the owning or harboring of "pit bull" terriers or other vicious dogs within village limits, was whether ordinance had rational relationship to legitimate state interest, as ordinance did not affect any fundamental rights and did not make "suspect classification.".

[10] **Municipal Corporations** 589

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268k589 Most Cited Cases

Where justified, deprivation of private property by ordinance is legitimate exercise of police power, if ordinance bears rational relationship to legitimate legislative goal or purpose.

[11] **Animals** ⚷4
28k4 Most Cited Cases

Dog ownership is not one of the cherished rights which must be carefully protected.

[12] **Municipal Corporations** ⚷604
268k604 Most Cited Cases

Village criminal ordinance, which prohibited the owning or harboring of "pit bull" terriers or other vicious dogs within village limits, had rational relationship to legitimate governmental interest; ordinance was reasonable response to special threat presented by pit bull dog breed based upon their phenotypical characteristics and traits, such as exceptional aggression, which have been bred into breed by owners.

[13] **Municipal Corporations** ⚷111(1)
268k111(1) Most Cited Cases

[13] **Statutes** ⚷47
361k47 Most Cited Cases

Facial vagueness occurs when statute or ordinance is so utterly void of standard of conduct that it simply has no core and cannot be validly applied to any conduct.

[14] **Statutes** ⚷47
361k47 Most Cited Cases

There is no constitutional requirement that legislation be written with specific precision to be enforceable.

[15] **Municipal Corporations** ⚷111(1)
268k111(1) Most Cited Cases

To sustain challenge for facial vagueness, it is not mandatory that ordinance itself define in some manner its own terms.

[16] **Municipal Corporations** ⚷604
268k604 Most Cited Cases

Definitions of "pit bull terrier" in village criminal ordinance, which prohibited the owning or harboring of "pit bull" terriers or other vicious dogs within village limits, were not unconstitutionally vague, but instead set forth meaningful standard which could be used to identify those dogs subject to ordinance's prohibition, as "pit bull terrier" has certain phenotypical characteristics in its appearance which allow such dogs to be identifiable.

[17] **Constitutional Law** ⚷211(2)
92k211(2) Most Cited Cases

Equal protection laws under United States and State Constitution guarantee that classifications imposed by law will not be used to arbitrarily burden a group of people. Ohio Const. Art. 1, § 2; U.S.C.A. Const.Amend. 14.

[18] **Constitutional Law** ⚷237
92k237 Most Cited Cases

[18] **Municipal Corporations** ⚷604
268k604 Most Cited Cases

Village criminal ordinance, which prohibited the owning or housing of "pit bull" terriers or other vicious dogs within village limits, was entitled to minimum scrutiny under equal protection clause and thus analysis only required that there be rational basis for specific classification and reasonable relationship between that classification and purpose of law, as ordinance did not classify people based on suspect categories and did not affect fundamental rights. Ohio Const. Art. 1, § 2; U.S.C.A. Const.Amend. 14.

[19] **Constitutional Law** ⚷237
92k237 Most Cited Cases

[19] **Municipal Corporations** ⚷604
268k604 Most Cited Cases

For purpose of determining constitutionality of village criminal ordinance, which prohibited the owning or harboring of "pit bull" terriers or other vicious dogs within village limits, constitutional guarantee of equal protection of the laws does not guarantee that all dog owners will be treated alike, but that all dog owners of defined "pit bulls" will be treated alike. Ohio Const. Art. 1, § 2; U.S.C.A. Const.Amend. 14.

[20] **Constitutional Law** ⚷237
92k237 Most Cited Cases

[20] **Municipal Corporations** ⚷604
268k604 Most Cited Cases

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ferocity or the extreme concentration on fighting and attacking, e) a history of catching, fighting, and killing instinct, f) the ability to be extremely destructive and aggressive, g) highly tolerant of pain, h) great biting strength, i) undying tenacity and courage and they are highly unpredictable.

*1241 While these traits, tendencies or abilities are not unique to Pit Bulls exclusively, Pit Bulls will have these instincts and phenotypical characteristics; most significantly, such characteristics can be latent and may appear without warning or provocation.

The breeding history of Pit Bulls makes it impossible to rule out a violent *propensity* for any one dog as gameness and aggressiveness can be hidden for years. Given the Pit Bull's genetical physical strengths and abilities, a Pit Bull always poses the *possibility* of danger; given the Pit Bull's breeding history as a fighting dog and the latency of its aggressiveness and gameness, the Pit Bull poses a danger distinct from other breeds of dogs which do not so uniformly share those traits.

While Pit Bulls are not the only breed of dog which can be dangerous or vicious, it is reasonable to single out the breed to anticipate and avoid the dangerous aggressiveness which may be undetectable in a Pit Bull.

CONCLUSIONS OF LAW

I. *Valid Exercise of Police Power*

[1][2] Local government is accorded a great deal of discretion in this area of legislation. Villages are given the authority to adopt and enforce within their limits local "police" regulations as long as those regulations are not in conflict with the general laws of the state. This police power encompasses the protection of the health, safety, and welfare of the public. *See, e.g., Stone v. Mississippi*, 101 U.S. 814, 818, 25 L.Ed. 1079 (1880).

[3][4] This police power granted to villages includes the power to prohibit. *See Benjamin v. Columbus*, 167 Ohio St. 103, syllabus ¶ 4, 146 N.E.2d 854 (1957). Although this police power is extensive, it is checked by the United States constitutional limits on the power of government to act with regard to private property. *Jacobson v. Massachusetts*, 197 U.S. 11, 25, 25 S.Ct. 358, 361, 49 L.Ed. 643 (1905). Clearly, the Village of South Point cannot deprive Mr. Vanater of property without due process of law or deny Mr. Vanater equal protection of the laws.

[5] It is a well established principle, however, that property is held subject to the general police power of a state and may be regulated pursuant to the police power. *Porter v. City of Oberlin*, 1 Ohio St.2d 143, 205 N.E.2d 363 (1965). The Constitution of Ohio specifically recognizes the subordination of private property to the general welfare. Ohio Const. Art. I, § 19. In the *Benjamin* case, the Ohio Supreme Court set forth the following standard for reviewing challenges to police power regulations:

> Although almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, within the meaning of Section 1 of Article I of the Ohio Constitution, or involve an injury to a person within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States any 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. Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public and whether it is unreasonable or arbitrary are questions which are committed in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them.

Benjamin, 167 Ohio St. at 103-104, syllabus ¶ ¶ 5 & 6, 146 N.E.2d 854.

The control of dogs falls within the "public health" and "safety" provisions. *Dowling v. Cook*, 69 Ohio St.2d 149, 431 N.E.2d 995 (1982). The United States Supreme Court has held that government retains great power and discretion to control, prohibit and even destroy dogs without offending the constitutional rights of their owners. In *1242 *Sentell v. New Orleans and Carrollton R.R.*, 166 U.S. 698, 17 S.Ct. 693, 41 L.Ed. 1169 (1897), the Supreme Court considered a challenge to a dog registration law and stated:

> 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.

Id. at 704, 17 S.Ct. at 695.

[6] While the Court in *Sentell* conceded that most dogs are harmless, it also approved the principle that legislatures have broad police powers to control all dogs to protect against the public nuisance posed by a

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vicious dog. *Id.* at 102, 17 S.Ct. at 696. Since *Sentell*, courts have upheld a wide variety of canine control ordinances based on the principle that governments' police power to control dogs is virtually unlimited. *See, e.g., Nicchia v. New York*, 254 U.S. 228, 231, 41 S.Ct. 103, 104, 65 L.Ed. 235 (1920); *Thiele v. Denver*, 135 Colo. 442, 449-50, 312 P.2d 786, 790-91 (1957); *Walker v. Towle*, 156 Ind. 639, 642, 59 N.E. 20, 22 (1901).

The Court concludes that the enactment of Ordinance 87-6 was a valid exercise of the Village of South Point's police power.

II. *Presumption of Constitutionality*

In examining the substance of a health and welfare regulation, such as the Village of South Point Ordinance 87-6, courts apply a basic test of reasonableness: a police power regulation will be upheld as reasonable if the requirements of the law have a rational connection with the promotion and protection of public safety. *Kelley v. Johnson*, 425 U.S. 238, 247, 96 S.Ct. 1440, 1445, 47 L.Ed.2d 708 (1976); *Nebbia v. New York*, 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L.Ed. 940 (1934).

[7] There is a heavy burden of proof imposed upon the party challenging a public safety law because such legislation is entitled to a strong presumption of constitutionality. *Jackman v. Court of Common Pleas*, 9 Ohio St.2d 159, 224 N.E.2d 906 (1967); *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). The strength of this presumption is further enforced when the challenged legislation is designed to promote and protect public safety. *Downing*, 68 Ohio St.2d at 131, 431 N.E.2d 995.

[8] A party challenging a public safety law must prove by clear and convincing evidence that the legislative enactment is unconstitutional. *Hilton v. Toledo*, 62 Ohio St.2d 394, 405 N.E.2d 1047 (1980); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Proof by clear and convincing evidence has been defined as:

> [T]hat measure of proof which is more than a 'mere preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.

Cross v. Ledford, 161 Ohio St. 469, syllabus ¶ 3, 120 N.E.2d 118 (1954).

III. *Rational Relation to a Legitimate Governmental Interest*

[9] As this Ordinance does not affect any fundamental rights such as voting or the freedom of speech and does not make a "suspect classification" such as a law based on race or nationality, the test to determine its constitutionality is whether it has a rational relationship to a legitimate state interest. *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 489, 97 S.Ct. 1898, 52 L.Ed.2d 513 (1977).

The rational basis analysis is used under either the guarantee of the due process or equal protection clauses because no fundamental right or suspect classification is involved. *Holloway v. Brown*, 62 Ohio St.2d 65, 76, 403 N.E.2d 191 (1980) citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976); *see also Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

[10][11] While Mr. Vanater has a protected interest in the property of his dog, this interest must be balanced against the *1243 local government's power to provide for public safety. Where justified, a deprivation of private property is a legitimate exercise of police power. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980), if the Ordinance bears a rational relationship to a legitimate legislative goal or purpose. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978); *see also Kelley*, 425 U.S. at 247, 96 S.Ct. at 1445. Further, dog ownership is not considered one of the cherished rights which the Court must carefully protect. *See Sentell*, 166 U.S. at 704, 17 S.Ct. at 695.

[12] The Court finds that the Ordinance is a reasonable response to the special threat presented by the Pit Bull dog breed based upon their phenotypical characteristics and the traits which have been bred into the breed by their owners in order that the animals may suit the purposes of their owners. The evidence indicates that Pit Bulls possess the inherent characteristics of exceptional aggression, athleticism, strength, viciousness and unpredictability which are unique to the breed; they possess an extraordinary fighting temperament and have been shown to be the most tenacious dog of any breed; they have a history of unpredictably and instantaneously attacking in a berserk and frenzied rage and have the ability to inflict significant damage upon their victims. While this description is not true of every Pit Bull, the Court must defer to the legislature's consideration of the

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conflicting positions. This Court should not substitute its judgment for the reasoned findings and decision of the Village of South Point Council.

This Court does not accept plaintiff's argument that the threat of danger is only perceived and has been fabricated by the media or by traditional misconceptions. The Court concludes that enactment of Ordinance 87-6 was based on verifiable factors and was a reasonable preventative response and solution to a dangerous and possibly tragic situation.

IV. *Vagueness*

Since plaintiff has admitted ownership of a Pit Bull, plaintiff's vagueness challenge is that the Ordinance is facially (as written) unconstitutional, as opposed to unconstitutional as it applies to him. Plaintiff arguably lacks standing to challenge the Ordinance on this ground. "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to others." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982); *see also Gallaher v. City of Huntington*, 759 F.2d 1155, 1160 (4th Cir.1985). A resident in the Village of South Point who owns or is considering acquiring a Pit Bull need only look at the explicit prohibition of that breed in the law to realize that he or she cannot do so.

[13][14] Facial vagueness occurs when a statute or an ordinance is so utterly void of a standard of conduct that it simply has no core and cannot be validly applied to any conduct. *See United States v. Powell*, 423 U.S. 87, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975). To sustain such a challenge, the plaintiff must prove that the Ordinance is vague, "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971). There is no constitutional requirement that legislation be written with scientific precision to be enforceable. "The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific." *Dandridge*, 397 U.S. at 485, 90 S.Ct. at 1161 citing *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 57 L.Ed. 730 (1913).

The United States Supreme Court has explained that "void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." **1244 *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 811, 98 L.Ed. 989 (1954). Plaintiff claims that Ordinance 87-6 defines "Pit Bull" in such vague terms that an ordinary person would not be given fair notice as to ownership of which dogs violate the statute.

[15] It is a fundamental requirement of a criminal statute or ordinance that it must "inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct and know what acts it is his duty to avoid." 25 Ohio Jur.3d (1981), 106 Criminal Law Section 8. This is a general requirement, however, and it is not mandatory that the ordinance itself define in some manner its own terms. *See City of Lima v. McFadden*, No. 1-85-22 (3rd App.D., Allen Cty., Ohio, June 30, 1986).

[16] Whether a dog is covered by the Village of South Point Ordinance 87-6 is a matter of evidence, not constitutional law. *See City of Lima v. McFadden* (3rd App.D., Allen Cty., Ohio, June 30, 1986). A factfinder, with the assistance of expert testimony or a qualified veterinarian duly licensed by the State of Ohio mentioned in the Ordinance, can determine whether a particular dog is within the scope of the Ordinance in most, if not all, cases.

The Court concludes that the definitions of a Pit Bull Terrier in this Ordinance are not unconstitutionally vague. An ordinary person could easily refer to a dictionary, a dog buyer's guide or any dog book for guidance and instruction; also, the American Kennel Club and United Kennel Club have set forth standards for Staffordshire Bull Terriers and American Staffordshire Terriers to help determine whether a dog is described by any one of them. While it may be true that some definitions contain descriptions which lack "mathematical certainty," such precision and definiteness is not essential to constitutionality. *See Dandridge*, 397 U.S. at 485, 90 S.Ct. at 1161; *see also Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972).

The Court concludes that Ordinance 87-6 sets forth a meaningful standard which can be used to identify those dogs subject to its prohibition and that the Pit Bull has certain phenotypical characteristics in its appearance which allows this breed of dog to be identifiable.

V. *Equal Protection--Under Inclusiveness*

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[17][18] The equal protection laws under the 14th Amendment to the United States Constitution and under Article I, Section 2 of the Ohio Constitution guarantee that classifications imposed by law will not be used to arbitrarily burden a group of people. As Ordinance 87-6 does not classify people based on suspect categories and does not affect fundamental rights, it is entitled to minimal scrutiny under the equal protection clause. This analysis requires that there is a rational basis for the specific classification and a reasonable relationship between that classification and the purpose of the law. *McGowan*, 366 U.S. at 425, 81 S.Ct. at 1104; *Sage Stores Co. v. Kansas*, 323 U.S. 32, 35, 65 S.Ct. 9, 10, 89 L.Ed. 25 (1944); *Atchison, Topeka and Santa Fe R.R. v. Vosburg*, 238 U.S. 56, 59, 35 S.Ct. 675, 676, 59 L.Ed. 1119 (1915).

A legislative classification under this level of scrutiny must be sustained unless it is "patently arbitrary" and bears no rational relationship to a legitimate governmental interest. *Frontiero v. Richardson*, 411 U.S. 677, 683, 93 S.Ct. 1764, 1768, 36 L.Ed.2d 583 (1973); *Felske v. Dougherty*, 64 Ohio St.2d 89, 92, 413 N.E.2d 809 (1980).

In a "rational basis" equal protection analysis, the United States Supreme Court has stated:

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude *1245 that the legislature's actions were irrational.

Vance v. Bradley, 440 U.S. 93, 97, 99 S.Ct. 939, 942-43, 59 L.Ed.2d 171 (1979).

The United States Supreme Court explained that courts must give legislatures great leeway in creating classifications:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative. The legislature may select one phase of one field and apply a remedy there, neglecting the others.

Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 331, 86 S.Ct. 803, 820, 15 L.Ed.2d 769 (1966); *see also Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 610, 55 S.Ct. 570, 571, 79 L.Ed. 1086 (1935).

As the United States Supreme Court explained:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 [31 S.Ct. 337, 340, 55 L.Ed. 369 (1911)]. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 68-70 [33 S.Ct. 441, 443, 57 L.Ed. 730 (1913)]. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland*, 366 U.S. 420, 426 [81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961)].

Dandridge, 397 U.S. at 485, 90 S.Ct. at 1161. "[T]he Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Id.* at 486, 90 S.Ct. at 1162.

Several recent cases have upheld the right of the legislative body to define and regulate Pit Bulls. In *Starkey v. Township of Chester*, 628 F.Supp. 196, 197 (E.D.Pa.1986), a federal district court rejected the contention that a law regulating only Pit Bulls violated equal protection: "The Township does not have to regulate every dangerous animal at the same time in the same way to pass constitutional muster." Likewise, a New Mexico state appeals court upheld a law which prohibited the ownership of American Pit Bull Terriers: "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." *Garcia v. Village of Tijeras*, 108 N.M. 116, 767 P.2d 355, *cert. denied* 107 N.M. 785, 765 P.2d 758 (1988); *see also State v. Peters*, 534 So.2d 760 (Fla.App.1988), review den. 542 So.2d 1334890739965 (Fla.1989); *City of Lima v. McFadden*, (3rd App.D., Allen Cty., Ohio, June 30, 1986).

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[19] Plaintiff argues that the Ordinance is unconstitutional because it irrationally distinguishes between Pit Bulls and other breeds of dogs and that it fails to include other specific breeds of dogs which could be grouped into the dangerous Pit Bull category. The Court finds this argument to be without merit since the constitutional guarantee of equal protection of the laws does not guarantee that all dog owners will be treated alike, but that all dog owners of defined Pit Bulls will be treated alike.

[20] The evidence presented at trial indicates that the Village of South Point Council chose to deal with the unique threat of harm posed by the Pit Bulls which were kept in the Village. The fact that council decided to take preventative *1246 measures against this one specific breed of dog and not against other breeds is reasonable in light of the types and numbers of the various breeds of dogs in the Village and in light of the type of threat that Pit Bulls pose. The decision not to name or ban other potentially dangerous breeds does not render the law constitutionally defective.

Also, there was substantial evidence that Pit Bulls presented a special threat to the safety of the residents of the Village of South Point over and above that presented by any other breed of dogs which is kept there. Attacks by Pit Bulls, as opposed to dog attacks in general, were of acute concern to the Village.

Plaintiff has not proven to this Court by clear and convincing evidence that the Village of South Point Council's distinction was arbitrary or irrational.

VI. *Overbreadth*

[21] Plaintiff argues that Ordinance 87-6 is overly broad because there is a danger of misidentification since other dogs have similar phenotypical characteristics but are not within the statutory definition and, therefore, similar dogs will be subject to enforcement of the criminal ordinance. Plaintiff further maintains that the Ordinance is unconstitutional since the decision as to whether a dog falls within the parameters of the ordinance is placed upon a dog warden or veterinarian or, possibly, a police officer, all of whom have no accurate guideline available to know with some certainty that a particular individual is subject to the criminal penalty.

For the reasons stated in the section of this Order concerning vagueness, and for the basic reason that one cannot be convicted of a criminal offense without having been proven guilty of each element of the offense beyond a reasonable doubt, the Court concludes that the Ordinance is not overbroad as drawn. While identification of a Pit Bull may be difficult in some situations, there are other methods to determine with sufficient certainty whether a dog is a Pit Bull within the meaning of the Ordinance to survive the overbreadth challenge.

Further, the Court concludes that the difficulties in enforcement and the burdens placed on a prospective or current owner of a dog which may be a Pit Bull do not present unique constitutional problems, but are merely issues and obligations which are incidental to most criminal ordinances.

VII. *Conclusion*

Based upon the foregoing, this Court concludes that the enactment of Ordinance 87-6 of the Village of South Point was a valid exercise of the Village's police power and is entitled to a strong presumption of constitutionality. Therefore, if there exists any conceivable set of facts under which the legislative classification furthered a legitimate legislative objective, this Court must uphold it. *McGowan*, 366 U.S. at 425-26, 81 S.Ct. at 1104-1105; *Denicola v. Providence Hospital*, 57 Ohio St.2d 115, 387 N.E.2d 231 (1979); *Leis v. Cleveland R. Co.*, 101 Ohio St. 162, 128 N.E. 73 (1920).

Based upon the substantial evidence presented at trial, notwithstanding plaintiff's evidence and arguments to the contrary, this Court concludes that Ordinance 87-6 is rationally related to the safety and welfare of the residents of the Village of South Point. The Court finds that the Ordinance is a reasonable response to the special threat presented by the Pit Bull dog breed based upon their phenotypical characteristics and the traits which have been bred into the breed.

This Court finds that Ordinance 87-6 is not unconstitutionally vague, underinclusive or overbroad and, therefore, concludes that the Ordinance does not violate any constitutional provision.

The United States Supreme Court has cautioned that we cannot decide today that the Village of SouthPoint's Ordinance is wise, that it best fulfills the relevant social and economic objectives which the Village might ideally espouse, or that a more just and humane system could not be devised; certainly, conflicting claims of morality and intelligence are

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raised by opponents and proponents of almost every measure and *1247 the United States Constitution does not empower this Court to second guess state officials charged with the difficult responsibility of protecting the safety and welfare of its public. *See Dandridge*, 397 U.S. at 487, 90 S.Ct. at 1162.

Upon consideration of the evidence presented at trial, the pleadings, exhibits, memoranda, and arguments of counsel, and upon application of the controlling authority, this Court is required to uphold the constitutionality of the Village of South Point's Ordinance 87-6.

ORDER

Pursuant to the trial of this matter and in accordance with the Finding of Fact and Conclusions of Law herein, the Court hereby GRANTS judgment in favor of defendants, the Village of South Point, William Gaskin, Carl Vance, Patrick Leighty, Richard Meyers and Jim Treadway, and hereby ORDERS the Clerk of Courts to enter final judgment accordingly.

IT IS SO ORDERED.

717 F.Supp. 1236

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UNITED STATES v. HARRISS ET AL.

No. 32

SUPREME COURT OF THE UNITED STATES

347 U.S. 612; 74 S. Ct. 808; 98 L. Ed. 989; 1954 U.S. LEXIS 2657

October 19, 1953, Argued
June 7, 1954, Decided

PRIOR HISTORY:

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

DISPOSITION: 109 F.Supp. 641, reversed.

SUMMARY: The issue before the Supreme Court was the constitutionality of the disclosure provisions of the Federal Lobbying Act (2 USC 261 et seq.).

In an opinion by Warren, Ch. J., five members of the Court construed these provisions as applicable only to persons who solicited, collected, or received contributions, where one of the main purposes is to influence the passage or defeat of congressional legislation and the intended method of accomplishing this purpose is through direct communication with members of Congress. So construed, the disclosure provisions were held not to be unconstitutionally vague nor to violate the freedom of speech and press or the freedom to petition the government.

Douglas, J., joined by Black, J., dissented. So did Jackson, J. The dissents were based primarily on the ground that the act was unconstitutionally vague and could not be saved by construction such as attempted by the majority.

Clark, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[***HN1]

APPEAL AND ERROR §103
dismissal of information -- review by government -- scope. --

Headnote: [1]
On appeal from a decision of a district court dismissing an information for violation of the Federal Lobbying Act (2 USC 261 et seq.) on the ground that the act is unconstitutional, the Supreme Court is not concerned with the sufficiency of the information as a criminal pleading. Its review is limited to a decision on the alleged invalidity of the statute; in making this decision the court judges the statute on its face.

[***HN2]

contention that the penalty provided in 310(b) of the act (restraint from lobbying for three years from the date of conviction) violates the First Amendment guaranties, since the penalty has not yet been applied to the defendants, and it will never be so applied if they are found innocent, and, moreover, the elimination of the penalty provisions, if ultimately declared unconstitutional, would still leave the balance of the statute effective.

[***HN14]

STATUTES §58
separability -- Lobbying Act. --

Headnote: [14]
If 310(b) of the Federal Lobbying Act (2 USC 261 et seq.), providing that any person convicted of a violation of the act should be prohibited from lobbying for three years from the date of his conviction, should be declared unconstitutional, its elimination would still leave a statute defining specific duties and providing a specific penalty for violation of any such duty; consequently the separability clause of the act could be given effect.Point from Separate Opinion

[***HN15]

STATUTES §18
indefiniteness. --

Headnote: [15]
In determining whether a criminal statute is unconstitutionally vague, the Supreme Court will consider the statute on its face. [Per Douglas and Black, JJ.]

SYLLABUS: 1. As here construed, §§ 305, 307 and 308 of the Federal Regulation of Lobbying Act are not too vague and indefinite to meet the requirements of due process. Pp. 617-624.

(a) If 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. P. 618.

(b) If this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, the Court is under a duty to give the statute that construction. P. 618.

(c) Section 307 limits the coverage of the Act to those "persons" (except specified political committees) who solicit, collect, or receive contributions of money or other thing of value, and then only if one of the main purposes of either the persons or the contributions is to aid in the accomplishment of the aims set forth in § 307 (a) and (b). Pp. 618-620, 621-623.

(d) The purposes set forth in § 307 (a) and (b) are here construed to refer only to "lobbying in its commonly accepted sense" -- to direct communication with members of Congress on pending or proposed legislation. Pp. 620-621.

(e) The "principal purpose" requirement was adopted merely to exclude from the scope of § 307 those contributions and persons having only an "incidental" purpose of influencing legislation. It does not exclude a contribution which in substantial part is to be used to influence legislation through direct communication with Congress or a person whose activities in substantial part are directed to influencing legislation through direct communication with Congress. Pp. 621-623.

(f) There are three prerequisites to coverage under §§ 307, 305 and 308: (1) the "person" must have solicited, collected or received contributions; (2) one of the main purposes of such "person," or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by Congress; and (3) the intended method of accomplishing this purpose must have been through direct communication with members of Congress. P. 623.

2. As thus construed, §§ 305 and 308 do not violate the freedoms guaranteed by the First Amendment -- freedom to speak, publish and petition the Government. Pp. 625-626.

3. In this case, it is unnecessary for the Court to pass on the contention that the penalty provision in § 310 (b) violates the First Amendment. Pp. 626-627.

(a) Section 310 (b) has not yet been applied to appellees, and it will never be so applied if appellees are found innocent of the charges against them. P. 627.

(b) The elimination of § 310 (b) would still leave a statute defining specific duties and providing a specific penalty for violation of any such duty, and the separability provision of the Act can be given effect if § 310 (b) should ultimately be found invalid. P. 627.

COUNSEL: Oscar H. Davis argued the cause for the United States. With him on the brief were Robert L. Stern, then Acting Solicitor General, Assistant Attorney General Olney, Beatrice Rosenberg and John R. Wilkins. Walter J. Cummings, Jr., then Solicitor General, filed the Statement as to Jurisdiction.

Burton K. Wheeler argued the cause for Harriss, appellee. With him on the brief was Edward K. Wheeler.

Hugh Howell argued the cause for Linder, Commissioner of Agriculture of Georgia, appellee. With him on the brief was Victor Davidson.

Ralph W. Moore, appellee, submitted on brief pro se.

JUDGES: Warren, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton

OPINIONBY: WARREN

OPINION: [*613] [**810] [***994] MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The appellees were charged by information with violation of the Federal Regulation of Lobbying Act, 60 Stat. 812, 839, 2 U. S. C. §§ 261-270. Relying on its previous [*614] decision in *National Association of Manufacturers* v. *McGrath*, 103 F.Supp. 510, vacated as moot, 344 U.S. 804, the District Court dismissed the information on the ground that the Act is unconstitutional. 109 F.Supp. 641. The case is here on direct appeal under the Criminal Appeals Act, 18 U. S. C. § 3731.

Seven counts of the information are laid under § 305, which requires designated reports to Congress from every person "receiving any contributions or expending any money" for the purpose of influencing the passage or defeat of any legislation by Congress. n1 One such count charges the National Farm Committee, a [***995] Texas corporation, [*615] with failure to report the solicitation and receipt of contributions to influence the passage of legislation which would cause a rise in the price of agricultural commodities and commodity futures and the defeat of legislation which would cause a decline in those prices. The remaining six counts under § 305 charge defendants Moore and Harriss with failure to report expenditures having the same single purpose. Some of the alleged expenditures consist of the payment of compensation to others to communicate face-to-face with members of Congress, at public functions and committee hearings, concerning legislation affecting agricultural [**811] prices; the other alleged expenditures relate largely to the costs of a campaign to induce various interested groups and individuals to communicate by letter with members of Congress on such legislation.

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n1 Section 305 provides:

"(a) Every person receiving any contributions or expending any money for the purposes designated in subparagraph (a) or (b) of section 307 shall file with the Clerk between the first and tenth day of each calendar quarter, a statement containing complete as of the day next preceding the date of filing --

"(1) the name and address of each person who has made a contribution of $ 500 or more not mentioned in the preceding report; except that the first report filed pursuant to this title shall contain the name and address of each person who has made any contribution of $ 500 or more to such person since the effective date of this title;

"(2) the total sum of the contributions made to or for such person during the calendar year and not stated under paragraph (1);

"(3) the total sum of all contributions made to or for such person during the calendar year;

"(4) the name and address of each person to whom an expenditure in one or more items of the aggregate amount or value, within the calendar year, of $ 10 or more has been made by or on behalf of such person, and the amount, date, and purpose of such expenditure;

"(5) the total sum of all expenditures made by or on behalf of such person during the calendar year and not stated under paragraph (4);

"(6) the total sum of expenditures made by or on behalf of such person during the calendar year.

"(b) The statements required to be filed by subsection (a) shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous statement only the amount need be carried forward."

The following are "the purposes designated in subparagraph (a) or (b) of section 307":

"(a) The passage or defeat of any legislation by the Congress of the United States.

"(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The other two counts in the information are laid under § 308, which requires any person "who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation" to register with Congress and to make specified disclosures. n2 These two counts allege [***996] in considerable [*616] detail that defendants Moore and Linder were hired to express certain views to Congress as to agricultural prices or to cause others to do so, for the purpose of attempting to influence the passage of legislation which would cause a rise in the price of agricultural commodities and commodity futures and a defeat of legislation which would cause a decline in such prices; and that pursuant to this undertaking, without having registered as required by [*617] § 308, they arranged to have members of Congress contacted on behalf of these views, either directly by their own emissaries or through an artificially stimulated letter campaign. n3

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n2 Section 308 provides:

"(a) Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate and shall give to those officers in writing and under oath, his name and business address, the name and address of the person by whom he is employed, and in whose interest he appears or works, the duration of such employment, how much he is paid and is to receive, by whom he is paid or is to be paid, how much he is to be paid for expenses, and what expenses are to be included. Each such person so registering shall, between the first and tenth day of each calendar quarter, so long as his activity continues, file with the Clerk and Secretary a detailed report under oath of all money received and expended by him during the preceding calendar quarter in carrying on his work; to whom paid; for what purposes; and the names of any papers, periodicals, magazines, or other publications in which he has caused to be published any articles or editorials; and the proposed legislation he is employed to support or oppose. The provisions of this section shall not apply to any person who merely appears before a committee of the Congress of the United States in support of or opposition to legislation; nor to any public official acting in his official capacity; nor in the case of any newspaper or other regularly published periodical (including any individual who owns, publishes, or is employed by any such newspaper or periodical) which in the ordinary course of business publishes news items, editorials, or other comments, or paid advertisements, which directly or indirectly urge the passage or defeat of legislation, if such newspaper, periodical, or individual, engages in no further or other activities in connection with the passage or defeat of such legislation, other than to appear before a committee of the Congress of the United States in support of or in opposition to such legislation.

"(b) All information required to be filed under the provisions of this section with the Clerk of the House of

Representatives and the Secretary of the Senate shall be compiled by said Clerk and Secretary, acting jointly, as soon as practicable after the close of the calendar quarter with respect to which such information is filed and shall be printed in the Congressional Record."

n3 A third count under § 308 was abated on the death of the defendant against whom the charge was made.

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We are not concerned here with the sufficiency of the information as a criminal pleading. Our review under the Criminal Appeals Act is limited to a decision on the alleged "invalidity" of the statute on which the information is based. n4 In making this decision, we judge the statute on its face. See *United* [**812] *States* v. *Petrillo*, 332 U.S. 1, 6, 12. The "invalidity" of the Lobbying Act is asserted on three grounds: (1) that §§ 305, 307, and 308 are too vague and indefinite to meet the requirements of due process; (2) that §§ 305 and 308 violate the First Amendment guarantees of freedom of speech, freedom of the press, and the right to petition the Government; (3) that the penalty provision of § 310 (b) violates the right of the people under the First Amendment to petition the Government.

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n4 18 U. S. C. § 3731. See *United States* v. *Petrillo*, 332 U.S. 1, 5. For "The Government's appeal does not open the whole case." *United States* v. *Borden Co.*, 308 U.S. 188, 193.

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I.

[***HR2] [2]
The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. n5

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n5 See *Jordan* v. *De George*, 341 U.S. 223, 230-232; Quarles, Some Statutory Construction Problems and Approaches in Criminal Law, 3 Vand. L. Rev. 531, 539-543; Note, 62 Harv. L. Rev. 77.

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[*618]

[***HR3] [3]
[***HR4] [4]
On the other hand, if the general class of offenses to which the 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. *United States* v. *Petrillo*, 332 U.S. 1, 7. Cf. *Jordan* v. *De George*, 341 U.S. 223, 231. And if this general class of offenses can be made constitutionally definite by a reasonable [***997] construction of the statute, this Court is under a duty to give the statute that construction. This was the course adopted in *Screws* v. *United States*, 325 U.S. 91, upholding the definiteness of the Civil Rights Act. n6

[5]

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n6 Cf. *Fox* v. *Washington*, 236 U.S. 273; *Musser* v. *Utah*, 333 U.S. 95; *Winters* v. *New York*, 333 U.S. 507, 510.

This rule as to statutes charged with vagueness is but one aspect of the broader principle that this Court, if fairly possible, must construe congressional enactments so as to avoid a danger of unconstitutionality. *United States* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407-408; *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 120-121; *United States* v. *Rumely*, 345 U.S. 41, 47. Thus, in the *C. I. O.* case, *supra*, this Court held that expenditures by a labor organization for the publication of a weekly periodical urging support for a certain candidate in a forthcoming congressional election were not forbidden by the Federal Corrupt Practices Act, which makes it unlawful for ". . . any labor organization to make a contribution or expenditure in connection with any [congressional] election . . . ." Similarly, in the *Rumely* case, *supra*, this Court construed a House Resolution authorizing investigation of "all lobbying activities intended to influence, encourage, promote, or retard legislation" to cover only "'lobbying in its commonly accepted sense,' that is, 'representations made directly to the Congress, its members, or its committees.'"

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The same course is appropriate here. The key section of the Lobbying Act is § 307, entitled "Persons to Whom Applicable." Section 307 provides:

> "The provisions of this title shall apply to any person (except a political committee as defined in [*619] the Federal Corrupt Practices Act, and duly organized State or local committees of a political party), who by himself, or through any agent or employee or other persons in any manner whatsoever, directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid, in the accomplishment of any of the following purposes:
>
> "(a) The passage or defeat of any [**813] legislation by the Congress of the United States.
>
> "(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States."

[***HR6] [6]
This section modifies the substantive provisions of the Act, including § 305 and § 308. In other words, unless a "person" falls within the category established by § 307, the disclosure requirements of § 305 and § 308 are inapplicable. n7 Thus coverage under the Act is limited to those persons (except for the specified political committees) who solicit, collect, or receive contributions of money or other thing of value, and then only if "the principal purpose" of either the persons or the contributions is to aid in the accomplishment of the aims set forth in § 307 (a) and (b). In any event, the solicitation, collection, or receipt of money or other thing of value is a prerequisite to coverage under the Act.

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n7 Section 302 (c) defines the term "person" as including "an individual, partnership, committee, association, corporation, and any other organization or group of persons."

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The Government urges a much broader construction -- namely, that under § 305 a person must report his expenditures to influence legislation even though he does not solicit, collect, or receive contributions as

provided in [*620] § 307. n8 Such a construction, we believe, would do violence to the title and language of § 307 as [***998] well as its legislative history. n9 If the construction urged by the Government is to become law, that is for Congress to accomplish by further legislation.

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n8 The Government's view is based on a variance between the language of § 307 and the language of § 305. Section 307 refers to any person who "solicits, collects, or receives" contributions; § 305, however, refers not only to "receiving any contributions" but also to "expending any money." It is apparently the Government's contention that § 307 -- since it makes no reference to expenditures -- is inapplicable to the expenditure provisions of § 305. Section 307, however, limits the application of § 305 as a whole, not merely a part of it.

n9 Both the Senate and House reports on the bill state that "This section [§ 307] defines the application of the title . . . ." S. Rep. No. 1400, 79th Cong., 2d Sess., p. 28; Committee Print, July 22, 1946, statement by Representative Monroney on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., p. 34. See also the remarks of Representative Dirksen in presenting the bill to the House: "The gist of the antilobbying provision is contained in section 307." 92 Cong. Rec. 10088.

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We now turn to the alleged vagueness of the purposes set forth in § 307 (a) and (b). As in *United States* v. *Rumely*, 345 U.S. 41, 47, which involved the interpretation of similar language, we believe this language should be construed to refer only to "lobbying in its commonly accepted sense" -- to direct communication with members of Congress on pending or proposed federal legislation. The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or through their hirelings or through an artificially stimulated letter campaign. n10 It is likewise clear that Congress would have [*621] intended the Act [**814] to operate on this narrower basis, even if a broader application to organizations seeking to propagandize the general public were not permissible. n11

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n10 The Lobbying Act was enacted as Title III of the Legislative Reorganization Act of 1946, which was reported to Congress by the Joint Committee on the Organization of Congress. The Senate and House reports accompanying the bill were identical with respect to Title III. Both declared that the Lobbying Act applies "chiefly to three distinct classes of so-called lobbyists:

"First. Those who do not visit the Capitol but initiate propaganda from all over the country in the form of letters and telegrams, many of which have been based entirely upon misinformation as to facts. This class of persons and organizations will be required under the title, not to cease or curtail their activities in any respect, but merely to disclose the sources of their collections and the methods in which they are disbursed.

"Second. The second class of lobbyists are those who are employed to come to the Capitol under the false impression that they exert some powerful influence over Members of Congress. These individuals spend their time in Washington presumably exerting some mysterious influence with respect to the legislation in which their employers are interested, but carefully conceal from Members of Congress whom they happen to contact the purpose of their presence. The title in no wise prohibits or curtails their activities. It merely requires that they shall register and disclose the sources and purposes of their employment and the amount of their compensation.

"Third. There is a third class of entirely honest and respectable representatives of business, professional, and philanthropic organizations who come to Washington openly and frankly to express their views for or against legislation, many of whom serve a useful and perfectly legitimate purpose in expressing the views and interpretations of their employers with respect to legislation which concerns them. They will likewise be required to register and state their compensation and the sources of their employment."

S. Rep. No. 1400, 79th Cong., 2d Sess., p. 27; Committee Print, July 22, 1946, statement by Representative Monroney on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., pp. 32-33. See also the statement

in the Senate by Senator La Follette, who was Chairman of the Joint Committee, at 92 Cong. Rec. 6367-6368.

n11 See the Act's separability clause, note 18, *infra*, providing that the invalidity of any application of the Act should not affect the validity of its application "to other persons and circumstances."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [***HR7] [7]
There remains for our consideration the meaning of "the principal purpose" and "to be used principally to [*622] aid." The legislative history of the Act indicates that the term "principal" was adopted merely to exclude from the scope of § 307 those contributions and persons having only an "incidental" purpose of influencing legislation. n12 Conversely, [***999] the "principal purpose" requirement does not exclude a contribution which in substantial part is to be used to influence legislation through direct communication with Congress or a person whose activities in substantial part are directed to influencing legislation through direct communication with Congress. n13 If it [**815] were otherwise -- if an organization, for example, were exempted [*623] because lobbying was only one of its main activities -- the Act would in large measure be reduced to a mere exhortation against abuse of the legislative process. In construing the Act narrowly to avoid constitutional doubts, we must also avoid a construction that would seriously impair the effectiveness of the Act in coping with the problem it was designed to alleviate.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n12 Both the Senate and House reports accompanying the bill state that the Act ". . . does not apply to organizations formed for other purposes whose efforts to influence legislation are merely incidental to the purposes for which formed." S. Rep. No. 1400, 79th Cong., 2d Sess., p. 27; Committee Print, July 22, 1946, statement by Representative Monroney on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., p. 32. In the Senate discussion preceding enactment, Senator Hawkes asked Senator La Follette, Chairman of the Joint Committee in charge of the bill, for an explanation of the "principal purpose" requirement. In particular, Senator Hawkes sought assurance that multi-purposed organizations like the United States Chamber of Commerce would not be subject to the Act. Senator La Follette refused to give such assurance, stating: "So far as any organizations or individuals are concerned, I will say to the Senator from New Jersey, it will depend on the type and character of activity which they undertake. . . . I cannot tell the Senator whether they will come under the act. It will depend on the type of activity in which they engage, so far as legislation is concerned. . . . *It* [the Act] *affects all individuals and organizations alike if they engage in a covered activity*." (Italics added.) 92 Cong. Rec. 10151-10152. See also Representative Dirksen's remarks in the House, 92 Cong. Rec. 10088.

n13 Such a criterion is not novel in federal law. See Int. Rev. Code, § 23 (o)(2) (income tax), § 812 (d) (estate tax), and § 1004 (a)(2)(B) (gift tax), providing tax exemption for contributions to charitable and educational organizations "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." For illustrative cases applying this criterion, see *Sharpe's Estate* v. *Commissioner*, 148 F.2d 179 (C. A. 3d Cir.); *Marshall* v. *Commissioner*, 147 F.2d 75 (C. A. 2d Cir.); *Faulkner* v. *Commissioner*, 112 F.2d 987 (C. A. 1st Cir.); *Huntington National Bank* v. *Commissioner*, 13 T. C. 760, 769. Cf. *Girard Trust Co.* v. *Commissioner*, 122 F.2d 108 (C. A. 3d Cir.); *Leubuscher* v. *Commissioner*, 54 F.2d 998 (C. A. 2d Cir.); *Weyl* v. *Commissioner*, 48 F.2d 811 (C. A. 2d Cir.); *Slee* v. *Commissioner*, 42 F.2d 184 (C. A. 2d Cir.). See also Annotation, 138 A. L. R. 456.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [***HR8] [8]
[***HR9] [9]
To summarize, therefore, there are three prerequisites to coverage under § 307: (1) the "person" must have solicited, collected, or received contributions; (2) one of the main purposes of such "person," or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by

in the Senate by Senator La Follette, who was Chairman of the Joint Committee, at 92 Cong. Rec. 6367-6368.

n11 See the Act's separability clause, note 18, *infra*, providing that the invalidity of any application of the Act should not affect the validity of its application "to other persons and circumstances."

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To summarize, therefore, there are three prerequisites to coverage under § 307: (1) the "person" must have solicited, collected, or received contributions; (2) one of the main purposes of such "person," or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by

Congress; (3) the intended method of accomplishing this purpose must have been through direct communication with members of Congress. And since § 307 modifies the substantive provisions of the Act, our construction of § 307 will of necessity also narrow the scope of § 305 and § 308, the substantive provisions underlying the information in this case. Thus § 305 is limited to those persons who are covered by § 307; and when so covered, they must report all contributions and expenditures having the purpose of attempting to influence legislation through direct communication with Congress. Similarly, § 308 is limited to those persons (with the stated exceptions n14) who are covered by § 307 and who, in addition, engage themselves [*624] for pay or for any other valuable consideration for the purpose of attempting to influence legislation [***1000] through direct communication with Congress. Construed in this way, the Lobbying Act meets the constitutional requirement of definiteness. n15

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n14 For the three exceptions, see note 2, *supra*.

n15 Under this construction, the Act is at least as definite as many other criminal statutes which this Court has upheld against a charge of vagueness. *E. g., Boyce Motor Lines* v. *United States*, 342 U.S. 337 (regulation providing that drivers of motor vehicles carrying explosives "shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings"); *Dennis* v. *United States*, 341 U.S. 494 (Smith Act making it unlawful for any person to conspire "to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence . . . ."); *United States* v. *Petrillo*, 332 U.S. 1 (statute forbidding coercion of radio stations to employ persons "in excess of the number of employees needed . . . to perform actual services"); *Screws* v. *United States*, 325 U.S. 91, and *Williams* v. *United States*, 341 U.S. 97 (statute forbidding acts which would deprive a person of "any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States"); *United States* v. *Wurzbach*, 280 U.S. 396 (statute forbidding any candidate for Congress or any officer or employee of the United States to solicit or receive a "contribution for any political purpose whatever" from any other such officer or employee); *Omaechevarria* v. *Idaho*, 246 U.S. 343 (statute forbidding pasturing of sheep "on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower"); *Fox* v. *Washington*, 236 U.S. 273 (state statute imposing criminal sanctions on "Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice . . . ."); *Nash* v. *United States*, 229 U.S. 373 (Sherman Act forbidding "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations"). Cf. *Jordan* v. *De George*, 341 U.S. 223 (statute providing for deportation of persons who have committed crimes involving "moral turpitude").

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[*625] II.

[***HR10] [10]
Thus construed, §§ 305 and 308 also do not violate the freedoms guaranteed [**816] by the First Amendment -- freedom to speak, publish, and petition the Government.

[***HR11] [11]
Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent. n16

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their experience, see **Terry v. Ohio, 392 U.S., at 30; United States v. Brignoni-Ponce, 422 U.S., at 884-885.** The pedestrian will know that to assert his rights may subject him to arrest and all that goes with it: new acquaintances among jailers, lawyers, prisoners, and bail bondsmen, firsthand knowledge of local jail conditions, a "search incident to arrest," and the expense of defending against a possible prosecution. n6 The only response to be expected is compliance with the officers' requests, whether or not they are based on reasonable suspicion, and without regard to the possibility of later vindication in court. Mere reasonable suspicion does not justify subjecting the innocent to such a dilemma. n7

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n5 In *Brown* we had no need to consider whether the State can make it a crime to refuse to provide identification on demand during a seizure permitted by *Terry*, when the police have reasonable suspicion but not probable cause. See **443 U.S., at 53, n. 3.** [*29]

n6 Even after arrest, however, he may not be forced to answer questions against his will, and -- in contrast to what appears to be normal procedure during *Terry* encounters -- he will be so informed. See **Miranda v. Arizona, 384 U.S. 436 (1966).** In fact, if he indicates a desire to remain silent, the police should cease questioning him altogether. **Id., at 473-474.**

n7 When law enforcement officers have probable cause to believe that a person has committed a crime, the balance of interests between the State and the individual shifts significantly, so that the individual may be forced to tolerate restrictions on liberty and invasions of privacy that possibly will never be redressed, even if charges are dismissed or the individual is acquitted. Such individuals may be arrested, and they may not resist. But probable cause, and nothing less, represents the point at which the interests of law enforcement justify subjecting an individual to any significant intrusion beyond that sanctioned in *Terry*, including either arrest or the need to answer questions that the individual does not want to answer in order to avoid arrest or end a detention.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*30]

By defining as a crime the failure to respond to requests for personal information during a *Terry* encounter, and by permitting arrests upon commission of that crime, California attempts in this statute to compel what may not be compelled under the Constitution. Even if § 647(e) were not unconstitutionally vague, the Fourth Amendment would prohibit its enforcement.

DISSENT BY: WHITE

DISSENT: JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

The usual rule is that the alleged vagueness of a criminal statute must be judged in light of the conduct that is charged to be violative of the statute. See, *e. g.*, **United States v. Mazurie, 419 U.S. 544, 550 (1975); United States v. Powell, 423 U.S. 87, 92-93 (1975).** If the actor is given sufficient notice

that his conduct is within the proscription of the statute, his conviction is not vulnerable on vagueness grounds, even if as applied to other conduct, the law would be unconstitutionally vague. None of our cases "suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it [*31] because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." **Parker v. Levy, 417 U.S. 733, 756 (1974).** The correlative rule is that a criminal statute is not unconstitutionally vague on its face unless it is "impermissibly vague in all of its applications." **Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982).**

These general rules are equally applicable to cases where First Amendment or other "fundamental" interests are involved. The Court has held that in such circumstances "more precision in drafting may be required because of the vagueness doctrine in the case of regulation of expression," **Parker v. Levy, supra, at 756;** a "greater degree of specificity" is demanded than in other contexts. **Smith v. Goguen, 415 U.S. 566, 573 (1974).** But the difference in such cases "relates to how strict a test of vagueness shall be applied in judging a particular criminal statute." **Parker v. Levy, 417 U.S., at 756.** [*32] It does not permit the challenger of the statute to confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own. See *ibid*. Of course, if his own actions are themselves protected by the First Amendment or other constitutional provision, or if the statute does not fairly warn that it is proscribed, he may not be convicted. But it would be unavailing for him to claim that although he knew his own conduct was unprotected and was plainly enough forbidden by the statute, others may be in doubt as to whether their acts are banned by the law.

The upshot of our cases, therefore, is that whether or not a statute purports to regulate constitutionally protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications. If any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional on its face and should not be vulnerable to a facial attack in a declaratory judgment action such [*33] as is involved in this case. Under our cases, this would be true, even though as applied to other conduct the provision would fail to give the constitutionally required notice of illegality.

Of course, the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the First Amendment; and, as I have indicated, I also agree that in First Amendment cases the vagueness analysis may be more demanding. But to imply, as the majority does, *ante*, at 358-359, n. 8, that the overbreadth doctrine requires facial invalidation of a statute which is not vague as applied to a defendant's conduct but which is vague as applied to other acts is to confound vagueness and overbreadth, contrary to **Parker v. Levy, supra.**

If there is a range of conduct that is clearly within the reach of the statute, law enforcement personnel, as well as putative arrestees, are clearly on notice that arrests for such conduct are

authorized by the law. There would be nothing arbitrary or discretionary about such arrests. If the officer arrests for an act that both he and the lawbreaker know is clearly barred by the statute, it seems to [*34] me an untenable exercise of judicial review to invalidate a state conviction because in some other circumstance the officer may arbitrarily misapply the statute. That the law might not give sufficient guidance to arresting officers with respect to other conduct should be dealt with in those situations. See, *e. g.*, **Hoffman Estates, supra, at 504.** It is no basis for fashioning a further brand of "overbreadth" and invalidating the statute on its face, thus forbidding its application to identifiable conduct that is within the State's power to sanction.

I would agree with the majority in this case if it made at least some sense to conclude that the requirement to provide "credible and reliable identification" after a valid stop on reasonable suspicion of criminal conduct is "impermissibly vague in all of its applications." **Hoffman Estates v. Flipside, supra, at 495.** * But the statute is not vulnerable on this ground; and the majority, it seems to me, fails to demonstrate that it is. Suppose, for example, an officer requests identification information from a suspect during a valid *Terry* stop and the [*35] suspect answers: "Who I am is just none of your business." Surely the suspect would know from the statute that a refusal to provide any information at all would constitute a violation. It would be absurd to suggest that in such a situation only the unfettered discretion of a police officer, who has legally stopped a person on reasonable suspicion, would serve to determine whether a violation of the statute has occurred.

"It is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is [a failure to provide credible and reliable identification] and that would be covered by the statute . . . . In these instances, there would be ample notice to the actor and no room for undue discretion by enforcement officers. There may be a variety of other conduct that might or might not be claimed [to have failed to meet the statute's requirements] by the State, but unpredictability in those situations does not change the certainty in others." **Smith v. Goguen, 415 U.S., at 584** (WHITE, J., concurring in judgment).

See **id., at 590** (BLACKMUN, J., joined by BURGER, C. J., agreeing with WHITE, [*36] J., on the vagueness issue). Thus, even if, as the majority cryptically asserts, the statute here implicates First Amendment interests, it is not vague on its face, however more strictly the vagueness doctrine should be applied. The judgment below should therefore not be affirmed but reversed and appellee Lawson remitted to challenging the statute as it has been or will be applied to him.

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* The majority attempts to underplay the conflict between its decision today and the decision last Term in *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, by suggesting that we applied a "less strict vagueness test" because economic regulations were at issue. The Court there also found that the ordinances challenged might be characterized as quasi-criminal or criminal in nature and held that because at least some of respondent's conduct clearly was covered by the ordinance, the facial challenge was unavailing even under the "relatively strict test" applicable to criminal laws. **455 U.S., at 499-500.**

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The majority finds that the statute "contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification." *Ante*, at 358. At the same time, the majority concedes that "credible and reliable" has been defined by the state court to mean identification that carries reasonable assurance that the identification is authentic and that provides means for later getting in touch with the person. The narrowing construction given this statute by the state court cannot be likened to the "standardless" statutes involved in the cases cited by the majority. For example, **Papachristou v. City of Jacksonville, 405 U.S. 156 (1972),** involved a statute that made it a crime to be a "vagrant." The statute provided:

"'Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, . . . common drunkards, common night walkers, . . . lewd, wanton and lascivious persons, . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, . . . shall be deemed vagrants.'" **Id., at 156-157, n. 1.**
[*38]
In **Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974),** the statute at issue made it a crime "'for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.'" The present statute, as construed by the state courts, does not fall in the same category.

The statutes in *Lewis* v. *City of New Orleans* and *Smith* v. *Goguen, supra*, as well as other cases cited by the majority clearly involved threatened infringements of First Amendment freedoms. A stricter test of vagueness was therefore warranted. Here, the majority makes a vague reference to potential suppression of First Amendment liberties, but the precise nature of the liberties threatened is never mentioned. **Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965),** is cited, but that case dealt with an ordinance making it a crime to "'stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on,'" **id., at 90,** and the First Amendment concerns implicated [*39] by the statute were adequately explained by the Court's reference to **Lovell v. City of Griffin, 303 U.S. 444 (1938),** and **Schneider v. State, 308 U.S. 147 (1939),** which dealt with the First Amendment right to distribute leaflets on city streets and sidewalks. There are no such concerns in the present case.

Of course, if the statute on its face violates the Fourth or Fifth Amendment -- and I express no views about that question -- the Court would be justified in striking it down. But the majority apparently cannot bring itself to take this course. It resorts instead to the vagueness doctrine to invalidate a statute that is clear in many of its applications but which is somehow distasteful to the majority. As here construed and applied, the doctrine serves as an open-ended authority to oversee the States' legislative choices in the criminal law area and in this case leaves the State in a quandary as to how to draft a statute

that will pass constitutional muster.

I would reverse the judgment of the Court of Appeals.

C

United States District Court, S.D. Ohio, Western Division.

Robert R. VANATER, Plaintiff,
v.
VILLAGE OF SOUTH POINT, et al., Defendants.

No. C-1-87-708.

June 29, 1989.

Dog owner brought action challenging constitutionality of village criminal ordinance, which prohibited the owning or harboring of "pit bull" terriers or other vicious dogs within village limits. The District Court, Herman J. Weber, J., held that: (1) ordinance was valid exercise of village's police power; (2) ordinance had rational relation to legitimate governmental interest of responding to specific threat presented by "pit bull" dog breed; (3) definitions of "pit bull terrier" in ordinance were not unconstitutionally vague; (4) distinction in ordinance between "pit bull" terriers and other dogs was not arbitrary or irrational; and (5) ordinance was not overbroad as drawn.

So ordered.

West Headnotes

[1] **Municipal Corporations** 589
268k589 Most Cited Cases

[1] **Municipal Corporations** 592(1)
268k592(1) Most Cited Cases

Under Ohio law, villages have authority to adopt and enforce within their limits local "police" regulations, as long as those regulations are not in conflict with general laws of state.

[2] **Municipal Corporations** 595
268k595 Most Cited Cases

[2] **Municipal Corporations** 597
268k597 Most Cited Cases

Under Ohio law, village's police power encompasses protection of health, safety, and welfare of public

[3] **Municipal Corporations** 622
268k622 Most Cited Cases

Under Ohio law, village's police power includes power to prohibit.

[4] **Municipal Corporations** 53
268k53 Most Cited Cases

Village's police power is checked by United States constitutional limits on power of government to act with regard to private property.

[5] **Municipal Corporations** 604
268k604 Most Cited Cases

Control of dogs falls within village's police power to protect public health and safety.

[6] **Animals** 4
28k4 Most Cited Cases

[6] **Municipal Corporations** 604
268k604 Most Cited Cases

Village criminal ordinance, which prohibited the owning or harboring of "pit bull terriers" or other vicious dogs within village limits, was valid exercise of village's police power.

[7] **Constitutional Law** 48(5)
92k48(5) Most Cited Cases

Heavy burden of proof is imposed upon party challenging public safety law, as such legislation is entitled to strong presumption of constitutionality.

[8] **Constitutional Law** 48(5)
92k48(5) Most Cited Cases

Party challenging public safety law must prove by clear and convincing evidence that legislative enactment is unconstitutional.

[9] **Municipal Corporations** 604
268k604 Most Cited Cases

Test to determine "constitutionality of village criminal ordinance", which prohibited the owning or harboring of "pit bull" terriers or other vicious dogs within village limits, was whether ordinance had rational relationship to legitimate state interest, as ordinance did not affect any fundamental rights and did not make "suspect classification.".

[10] **Municipal Corporations** 589

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268k589 Most Cited Cases

Where justified, deprivation of private property by ordinance is legitimate exercise of police power, if ordinance bears rational relationship to legitimate legislative goal or purpose.

[11] **Animals** ⚷4
28k4 Most Cited Cases

Dog ownership is not one of the cherished rights which must be carefully protected.

[12] **Municipal Corporations** ⚷604
268k604 Most Cited Cases

Village criminal ordinance, which prohibited the owning or harboring of "pit bull" terriers or other vicious dogs within village limits, had rational relationship to legitimate governmental interest; ordinance was reasonable response to special threat presented by pit bull dog breed based upon their phenotypical characteristics and traits, such as exceptional aggression, which have been bred into breed by owners.

[13] **Municipal Corporations** ⚷111(1)
268k111(1) Most Cited Cases

[13] **Statutes** ⚷47
361k47 Most Cited Cases

Facial vagueness occurs when statute or ordinance is so utterly void of standard of conduct that it simply has no core and cannot be validly applied to any conduct.

[14] **Statutes** ⚷47
361k47 Most Cited Cases

There is no constitutional requirement that legislation be written with specific precision to be enforceable.

[15] **Municipal Corporations** ⚷111(1)
268k111(1) Most Cited Cases

To sustain challenge for facial vagueness, it is not mandatory that ordinance itself define in some manner its own terms.

[16] **Municipal Corporations** ⚷604
268k604 Most Cited Cases

Definitions of "pit bull terrier" in village criminal ordinance, which prohibited the owning or harboring of "pit bull" terriers or other vicious dogs within village limits, were not unconstitutionally vague, but instead set forth meaningful standard which could be used to identify those dogs subject to ordinance's prohibition, as "pit bull terrier" has certain phenotypical characteristics in its appearance which allow such dogs to be identifiable.

[17] **Constitutional Law** ⚷211(2)
92k211(2) Most Cited Cases

Equal protection laws under United States and State Constitution guarantee that classifications imposed by law will not be used to arbitrarily burden a group of people. Ohio Const. Art. I, § 2; U.S.C.A. Const.Amend. 14.

[18] **Constitutional Law** ⚷237
92k237 Most Cited Cases

[18] **Municipal Corporations** ⚷604
268k604 Most Cited Cases

Village criminal ordinance, which prohibited the owning or housing of "pit bull" terriers or other vicious dogs within village limits, was entitled to minimum scrutiny under equal protection clause and thus analysis only required that there be rational basis for specific classification and reasonable relationship between that classification and purpose of law, as ordinance did not classify people based on suspect categories and did not affect fundamental rights. Ohio Const. Art. I, § 2; U.S.C.A. Const.Amend. 14.

[19] **Constitutional Law** ⚷237
92k237 Most Cited Cases

[19] **Municipal Corporations** ⚷604
268k604 Most Cited Cases

For purpose of determining constitutionality of village criminal ordinance, which prohibited the owning or harboring of "pit bull" terriers or other vicious dogs within village limits, constitutional guarantee of equal protection of the laws does not guarantee that all dog owners will be treated alike, but that all dog owners of defined "pit bulls" will be treated alike. Ohio Const. Art. I, § 2; U.S.C.A. Const.Amend. 14.

[20] **Constitutional Law** ⚷237
92k237 Most Cited Cases

[20] **Municipal Corporations** ⚷604
268k604 Most Cited Cases

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ferocity or the extreme concentration on fighting and attacking, e) a history of catching, fighting, and killing instinct, f) the ability to be extremely destructive and aggressive, g) highly tolerant of pain, h) great biting strength, i) undying tenacity and courage and they are highly unpredictable.

*1241 While these traits, tendencies or abilities are not unique to Pit Bulls exclusively, Pit Bulls will have these instincts and phenotypical characteristics; most significantly, such characteristics can be latent and may appear without warning or provocation.

The breeding history of Pit Bulls makes it impossible to rule out a violent *propensity* for any one dog as gameness and aggressiveness can be hidden for years. Given the Pit Bull's genetical physical strengths and abilities, a Pit Bull always poses the *possibility* of danger; given the Pit Bull's breeding history as a fighting dog and the latency of its aggressiveness and gameness, the Pit Bull poses a danger distinct from other breeds of dogs which do not so uniformly share those traits.

While Pit Bulls are not the only breed of dog which can be dangerous or vicious, it is reasonable to single out the breed to anticipate and avoid the dangerous aggressiveness which may be undetectable in a Pit Bull.

CONCLUSIONS OF LAW

I. *Valid Exercise of Police Power*

[1][2] Local government is accorded a great deal of discretion in this area of legislation. Villages are given the authority to adopt and enforce within their limits local "police" regulations as long as those regulations are not in conflict with the general laws of the state. This police power encompasses the protection of the health, safety, and welfare of the public. *See, e.g., Stone v. Mississippi*, 101 U.S. 814, 818, 25 L.Ed. 1079 (1880).

[3][4] This police power granted to villages includes the power to prohibit. *See Benjamin v. Columbus*, 167 Ohio St. 103, syllabus ¶ 4, 146 N.E.2d 854 (1957). Although this police power is extensive, it is checked by the United States constitutional limits on the power of government to act with regard to private property. *Jacobson v. Massachusetts*, 197 U.S. 11, 25, 25 S.Ct. 358, 361, 49 L.Ed. 643 (1905). Clearly, the Village of South Point cannot deprive Mr. Vanater of property without due process of law or deny Mr. Vanater equal protection of the laws.

[5] It is a well established principle, however, that property is held subject to the general police power of a state and may be regulated pursuant to the police power. *Porter v. City of Oberlin*, 1 Ohio St.2d 143, 205 N.E.2d 363 (1965). The Constitution of Ohio specifically recognizes the subordination of private property to the general welfare. Ohio Const. Art. I, § 19. In the *Benjamin* case, the Ohio Supreme Court set forth the following standard for reviewing challenges to police power regulations:

> Although almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, within the meaning of Section 1 of Article I of the Ohio Constitution, or involve an injury to a person within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States any 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. Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public and whether it is unreasonable or arbitrary are questions which are committed in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them.

Benjamin, 167 Ohio St. at 103-104, syllabus ¶ ¶ 5 & 6, 146 N.E.2d 854.

The control of dogs falls within the "public health" and "safety" provisions. *Dowling v. Cook*, 69 Ohio St.2d 149, 431 N.E.2d 995 (1982). The United States Supreme Court has held that government retains great power and discretion to control, prohibit and even destroy dogs without offending the constitutional rights of their owners. In *1242 *Sentell v. New Orleans and Carrollton R.R.*, 166 U.S. 698, 17 S.Ct. 693, 41 L.Ed. 1169 (1897), the Supreme Court considered a challenge to a dog registration law and stated:

> 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.

Id. at 704, 17 S.Ct. at 695.

[6] While the Court in *Sentell* conceded that most dogs are harmless, it also approved the principle that legislatures have broad police powers to control all dogs to protect against the public nuisance posed by a

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vicious dog. *Id. at 705, 17 S.Ct. at 696.* Since *Sentell,* courts have upheld a wide variety of canine control ordinances based on the principle that governments' police power to control dogs is virtually unlimited. *See, e.g., Nicchia v. New York,* 254 U.S. 228, 231, 41 S.Ct. 103, 104, 65 L.Ed. 235 (1920); *Thiele v. Denver,* 135 Colo. 442, 449-50, 312 P.2d 786, 790-91 (1957); *Walker v. Towle,* 156 Ind. 639, 642, 59 N.E. 20, 22 (1901).

The Court concludes that the enactment of Ordinance 87-6 was a valid exercise of the Village of South Point's police power.

II. *Presumption of Constitutionality*

In examining the substance of a health and welfare regulation, such as the Village of South Point Ordinance 87-6, courts apply a basic test of reasonableness: a police power regulation will be upheld as reasonable if the requirements of the law have a rational connection with the promotion and protection of public safety. *Kelley v. Johnson,* 425 U.S. 238, 247, 96 S.Ct. 1440, 1445, 47 L.Ed.2d 708 (1976); *Nebbia v. New York,* 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L.Ed. 940 (1934).

[7] There is a heavy burden of proof imposed upon the party challenging a public safety law because such legislation is entitled to a strong presumption of constitutionality. *Jacknian v. Court of Common Pleas,* 9 Ohio St.2d 159, 224 N.E.2d 906 (1967); *McGowan v. Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). The strength of this presumption is further enforced when the challenged legislation is designed to promote and protect public safety. *Dowling,* 60 Ohio St.2d at 181, 431 N.E.2d 995.

[8] A party challenging a public safety law must prove by clear and convincing evidence that the legislative enactment is unconstitutional. *Hilton v. Toledo,* 62 Ohio St.2d 394, 405 N.E.2d 1047 (1980); *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Proof by clear and convincing evidence has been defined as:

> [T]hat measure of proof which is more than a 'mere preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.

Cross v. Ledford, 161 Ohio St. 469, syllabus ¶ 3, 120 N.E.2d 118 (1954).

III. *Rational Relation to a Legitimate Governmental Interest*

[9] As this Ordinance does not affect any fundamental rights such as voting or the freedom of speech and does not make a "suspect classification" such as a law based on race or nationality, the test to determine its constitutionality is whether it has a rational relationship to a legitimate state interest. *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 489, 97 S.Ct. 1898, 52 L.Ed.2d 513 (1977).

The rational basis analysis is used under either the guarantee of the due process or equal protection clauses because no fundamental right or suspect classification is involved. *Holloway v. Brown,* 62 Ohio St.2d 65, 76, 403 N.E.2d 191 (1980) citing *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976); *see also Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

[10][11] While Mr. Vanater has a protected interest in the property of his dog, this interest must be balanced against the *1243 local government's power to provide for public safety. Where justified, a deprivation of private property is a legitimate exercise of police power. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980), if the Ordinance bears a rational relationship to a legitimate legislative goal or purpose. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978); *see also Kelley,* 425 U.S. at 247, 96 S.Ct. at 1445. Further, dog ownership is not considered one of the cherished rights which the Court must carefully protect. *See Sentell,* 166 U.S. at 704, 17 S.Ct. at 695.

[12] The Court finds that the Ordinance is a reasonable response to the special threat presented by the Pit Bull dog breed based upon their phenotypical characteristics and the traits which have been bred into the breed by their owners in order that the animals may suit the purposes of their owners. The evidence indicates that Pit Bulls possess the inherent characteristics of exceptional aggression, athleticism, strength, viciousness and unpredictability which are unique to the breed; they possess an extraordinary fighting temperament and have been shown to be the most tenacious dog of any breed; they have a history of unpredictably and instantaneously attacking in a berserk and frenzied rage and have the ability to inflict significant damage upon their victims. While this description is not true of every Pit Bull, the Court must defer to the legislature's consideration of the

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conflicting positions. This Court should not substitute its judgment for the reasoned findings and decision of the Village of South Point Council.

This Court does not accept plaintiff's argument that the threat of danger is only perceived and has been fabricated by the media or by traditional misconceptions. The Court concludes that enactment of Ordinance 87-6 was based on verifiable factors and was a reasonable preventative response and solution to a dangerous and possibly tragic situation.

IV. *Vagueness*

Since plaintiff has admitted ownership of a Pit Bull, plaintiff's vagueness challenge is that the Ordinance is facially (as written) unconstitutional, as opposed to unconstitutional as it applies to him. Plaintiff arguably lacks standing to challenge the Ordinance on this ground. "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to others." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982); *see also Gallaher v. City of Huntington*, 759 F.2d 1155, 1160 (4th Cir.1985). A resident in the Village of South Point who owns or is considering acquiring a Pit Bull need only look at the explicit prohibition of that breed in the law to realize that he or she cannot do so.

[13][14] Facial vagueness occurs when a statute or an ordinance is so utterly void of a standard of conduct that it simply has no core and cannot be validly applied to any conduct. *See United States v. Powell*, 423 U.S. 87, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975). To sustain such a challenge, the plaintiff must prove that the Ordinance is vague, "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971). There is no constitutional requirement that legislation be written with scientific precision to be enforceable. "The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific." *Dandridge*, 397 U.S. at 485, 90 S.Ct. at 1161 citing *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 57 L.Ed. 730 (1913).

The United States Supreme Court has explained that "void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." **1244 *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 811, 98 L.Ed. 989 (1954). Plaintiff claims that Ordinance 87-6 defines "Pit Bull" in such vague terms that an ordinary person would not be given fair notice as to ownership of which dogs violate the statute.

[15] It is a fundamental requirement of a criminal statute or ordinance that it must "inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct and know what acts it is his duty to avoid." 25 Ohio Jur.3d (1981), 106 Criminal Law Section 8. This is a general requirement, however, and it is not mandatory that the ordinance itself define in some manner its own terms. *See City of Lima v. McFadden*, No. 1-85-22 (3rd App.D., Allen Cty., Ohio, June 30, 1986).

[16] Whether a dog is covered by the Village of South Point Ordinance 87-6 is a matter of evidence, not constitutional law. *See City of Lima v. McFadden* (3rd App.D., Allen Cty., Ohio, June 30, 1986). A factfinder, with the assistance of expert testimony or a qualified veterinarian duly licensed by the State of Ohio mentioned in the Ordinance, can determine whether a particular dog is within the scope of the Ordinance in most, if not all, cases.

The Court concludes that the definitions of a Pit Bull Terrier in this Ordinance are not unconstitutionally vague. An ordinary person could easily refer to a dictionary, a dog buyer's guide or any dog book for guidance and instruction; also, the American Kennel Club and United Kennel Club have set forth standards for Staffordshire Bull Terriers and American Staffordshire Terriers to help determine whether a dog is described by any one of them. While it may be true that some definitions contain descriptions which lack "mathematical certainty," such precision and definiteness is not essential to constitutionality. *See Dandridge*, 397 U.S. at 485, 90 S.Ct. at 1161; *see also Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972).

The Court concludes that Ordinance 87-6 sets forth a meaningful standard which can be used to identify those dogs subject to its prohibition and that the Pit Bull has certain phenotypical characteristics in its appearance which allows this breed of dog to be identifiable.

V. *Equal Protection—Under Inclusiveness*

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[17][18] The equal protection laws under the 14th Amendment to the United States Constitution and under Article I, Section 2 of the Ohio Constitution guarantee that classifications imposed by law will not be used to arbitrarily burden a group of people. As Ordinance 87-6 does not classify people based on suspect categories and does not affect fundamental rights, it is entitled to minimal scrutiny under the equal protection clause. This analysis requires that there is a rational basis for the specific classification and a reasonable relationship between that classification and the purpose of the law. *McGowan*, 366 U.S. at 425, 81 S.Ct. at 1104; *Sage Stores Co. v. Kansas*, 323 U.S. 32, 35, 65 S.Ct. 9, 10, 89 L.Ed. 25 (1944); *Atchison, Topeka and Santa Fe R.R. v. Vosburg*, 238 U.S. 56, 59, 35 S.Ct. 675, 676, 59 L.Ed. 1119 (1915).

A legislative classification under this level of scrutiny must be sustained unless it is "patently arbitrary" and bears no rational relationship to a legitimate governmental interest. *Fronniero v. Richardson*, 411 U.S. 677, 683, 93 S.Ct. 1764, 1768, 36 L.Ed.2d 583 (1973); *Felske v. Dougherty*, 64 Ohio St.2d 89, 92, 413 N.E.2d 809 (1980).

In a "rational basis" equal protection analysis, the United States Supreme Court has stated:

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude *1245 that the legislature's actions were irrational.

Vance v. Bradley, 440 U.S. 93, 97, 99 S.Ct. 939, 942-43, 59 L.Ed.2d 171 (1979).

The United States Supreme Court explained that courts must give legislatures great leeway in creating classifications:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative. The legislature may select one phase of one field and apply a remedy there, neglecting the others.

Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 331, 86 S.Ct. 803, 820, 15 L.Ed.2d 769 (1966); *see also Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 610, 55 S.Ct. 570, 571, 79 L.Ed. 1086 (1935).

As the United States Supreme Court explained:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 [31 S.Ct. 337, 340, 55 L.Ed. 369 (1911)]. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 68-70 [33 S.Ct. 441, 443, 57 L.Ed. 730 (1913)]. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland*, 366 U.S. 420, 426 [81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961)].

Dandridge, 397 U.S. at 485, 90 S.Ct. at 1161. "[T]he Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Id.* at 486, 90 S.Ct. at 1162.

Several recent cases have upheld the right of the legislative body to define and regulate Pit Bulls. In *Starkey v. Township of Chester*, 628 F.Supp. 196, 197 (E.D.Pa.1986), a federal district court rejected the contention that a law regulating only Pit Bulls violated equal protection: "The Township does not have to regulate every dangerous animal at the same time in the same way to pass constitutional muster." Likewise, a New Mexico state appeals court upheld a law which prohibited the ownership of American Pit Bull Terriers: "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." *Garcia v. Village of Tijeras*, 108 N.M. 116, 767 P.2d 355, *cert. denied* 107 N.M. 785, 765 P.2d 758 (1988); *see also State v. Peters*, 534 So.2d 760 (Fla.App.1988), review den. 542 So.2d 1334 89073965 (Fla.1989); *City of Lima v. McFadden*, (3rd App.D., Allen Cty., Ohio, June 30, 1986).

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raised by opponents and proponents of almost every measure and *1247 the United States Constitution does not empower this Court to second guess state officials charged with the difficult responsibility of protecting the safety and welfare of its public. *See Dandridge*, 397 U.S. at 487, 90 S.Ct. at 1162.

Upon consideration of the evidence presented at trial, the pleadings, exhibits, memoranda, and arguments of counsel, and upon application of the controlling authority, this Court is required to uphold the constitutionality of the Village of South Point's Ordinance 87-6.

ORDER

Pursuant to the trial of this matter and in accordance with the Finding of Fact and Conclusions of Law herein, the Court hereby GRANTS judgment in favor of defendants, the Village of South Point, William Gaskin, Carl Vance, Patrick Leighty, Richard Meyers and Jim Treadway, and hereby ORDERS the Clerk of Courts to enter final judgment accordingly.

IT IS SO ORDERED.

717 F.Supp. 1236

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UNITED STATES v. HARRISS ET AL.

No. 32

SUPREME COURT OF THE UNITED STATES

347 U.S. 612; 74 S. Ct. 808; 98 L. Ed. 989; 1954 U.S. LEXIS 2657

October 19, 1953, Argued
June 7, 1954, Decided

PRIOR HISTORY:

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

DISPOSITION: 109 F.Supp. 641, reversed.

SUMMARY: The issue before the Supreme Court was the constitutionality of the disclosure provisions of the Federal Lobbying Act (2 USC 261 et seq.).

In an opinion by Warren, Ch. J., five members of the Court construed these provisions as applicable only to persons who solicited, collected, or received contributions, where one of the main purposes is to influence the passage or defeat of congressional legislation and the intended method of accomplishing this purpose is through direct communication with members of Congress. So construed, the disclosure provisions were held not to be unconstitutionally vague nor to violate the freedom of speech and press or the freedom to petition the government.

Douglas, J., joined by Black, J., dissented. So did Jackson, J. The dissents were based primarily on the ground that the act was unconstitutionally vague and could not be saved by construction such as attempted by the majority.

Clark, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[***HN1]

APPEAL AND ERROR §103
dismissal of information -- review by government -- scope. --

Headnote: [1]
On appeal from a decision of a district court dismissing an information for violation of the Federal Lobbying Act (2 USC 261 et seq.) on the ground that the act is unconstitutional, the Supreme Court is not concerned with the sufficiency of the information as a criminal pleading. Its review is limited to a decision on the alleged invalidity of the statute; in making this decision the court judges the statute on its face.

[***HN2]

contention that the penalty provided in 310(b) of the act (restraint from lobbying for three years from the date of conviction) violates the First Amendment guaranties, since the penalty has not yet been applied to the defendants, and it will never be so applied if they are found innocent, and, moreover, the elimination of the penalty provisions, if ultimately declared unconstitutional, would still leave the balance of the statute effective.

[***HN14]

STATUTES §58
separability -- Lobbying Act. --

Headnote: [14]
If 310(b) of the Federal Lobbying Act (2 USC 261 et seq.), providing that any person convicted of a violation of the act should be prohibited from lobbying for three years from the date of his conviction, should be declared unconstitutional, its elimination would still leave a statute defining specific duties and providing a specific penalty for violation of any such duty; consequently the separability clause of the act could be given effect.Point from Separate Opinion

[***HN15]

STATUTES §18
indefiniteness. --

Headnote: [15]
In determining whether a criminal statute is unconstitutionally vague, the Supreme Court will consider the statute on its face. [Per Douglas and Black, JJ.]

SYLLABUS: 1. As here construed, §§ 305, 307 and 308 of the Federal Regulation of Lobbying Act are not too vague and indefinite to meet the requirements of due process. Pp. 617-624.

(a) If 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. P. 618.

(b) If this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, the Court is under a duty to give the statute that construction. P. 618.

(c) Section 307 limits the coverage of the Act to those "persons" (except specified political committees) who solicit, collect, or receive contributions of money or other thing of value, and then only if one of the main purposes of either the persons or the contributions is to aid in the accomplishment of the aims set forth in § 307 (a) and (b). Pp. 618-620, 621-623.

(d) The purposes set forth in § 307 (a) and (b) are here construed to refer only to "lobbying in its commonly accepted sense" -- to direct communication with members of Congress on pending or proposed legislation. Pp. 620-621.

(e) The "principal purpose" requirement was adopted merely to exclude from the scope of § 307 those contributions and persons having only an "incidental" purpose of influencing legislation. It does not exclude a contribution which in substantial part is to be used to influence legislation through direct communication with Congress or a person whose activities in substantial part are directed to influencing legislation through direct communication with Congress. Pp. 621-623.

(f) There are three prerequisites to coverage under §§ 307, 305 and 308: (1) the "person" must have solicited, collected or received contributions; (2) one of the main purposes of such "person," or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by Congress; and (3) the intended method of accomplishing this purpose must have been through direct communication with members of Congress. P. 623.

2. As thus construed, §§ 305 and 308 do not violate the freedoms guaranteed by the First Amendment -- freedom to speak, publish and petition the Government. Pp. 625-626.

3. In this case, it is unnecessary for the Court to pass on the contention that the penalty provision in § 310 (b) violates the First Amendment. Pp. 626-627.

(a) Section 310 (b) has not yet been applied to appellees, and it will never be so applied if appellees are found innocent of the charges against them. P. 627.

(b) The elimination of § 310 (b) would still leave a statute defining specific duties and providing a specific penalty for violation of any such duty, and the separability provision of the Act can be given effect if § 310 (b) should ultimately be found invalid. P. 627.

COUNSEL: Oscar H. Davis argued the cause for the United States. With him on the brief were Robert L. Stern, then Acting Solicitor General, Assistant Attorney General Olney, Beatrice Rosenberg and John R. Wilkins. Walter J. Cummings, Jr., then Solicitor General, filed the Statement as to Jurisdiction.

Burton K. Wheeler argued the cause for Harriss, appellee. With him on the brief was Edward K. Wheeler.

Hugh Howell argued the cause for Linder, Commissioner of Agriculture of Georgia, appellee. With him on the brief was Victor Davidson.

Ralph W. Moore, appellee, submitted on brief pro se.

JUDGES: Warren, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton

OPINIONBY: WARREN

OPINION: [*613] [**810] [***994] MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The appellees were charged by information with violation of the Federal Regulation of Lobbying Act, 60 Stat. 812, 839, 2 U. S. C. §§ 261-270. Relying on its previous [*614] decision in *National Association of Manufacturers* v. *McGrath*, 103 F.Supp. 510, vacated as moot, 344 U.S. 804, the District Court dismissed the information on the ground that the Act is unconstitutional. 109 F.Supp. 641. The case is here on direct appeal under the Criminal Appeals Act, 18 U. S. C. § 3731.

Seven counts of the information are laid under § 305, which requires designated reports to Congress from every person "receiving any contributions or expending any money" for the purpose of influencing the passage or defeat of any legislation by Congress. n1 One such count charges the National Farm Committee, a [***995] Texas corporation, [*615] with failure to report the solicitation and receipt of contributions to influence the passage of legislation which would cause a rise in the price of agricultural commodities and commodity futures and the defeat of legislation which would cause a decline in those prices. The remaining six counts under § 305 charge defendants Moore and Harriss with failure to report expenditures having the same single purpose. Some of the alleged expenditures consist of the payment of compensation to others to communicate face-to-face with members of Congress, at public functions and committee hearings, concerning legislation affecting agricultural [**811] prices; the other alleged expenditures relate largely to the costs of a campaign to induce various interested groups and individuals to communicate by letter with members of Congress on such legislation.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Section 305 provides:

"(a) Every person receiving any contributions or expending any money for the purposes designated in subparagraph (a) or (b) of section 307 shall file with the Clerk between the first and tenth day of each calendar quarter, a statement containing complete as of the day next preceding the date of filing --

"(1) the name and address of each person who has made a contribution of $ 500 or more not mentioned in the preceding report; except that the first report filed pursuant to this title shall contain the name and address of each person who has made any contribution of $ 500 or more to such person since the effective date of this title;

"(2) the total sum of the contributions made to or for such person during the calendar year and not stated under paragraph (1);

"(3) the total sum of all contributions made to or for such person during the calendar year;

"(4) the name and address of each person to whom an expenditure in one or more items of the aggregate amount or value, within the calendar year, of $ 10 or more has been made by or on behalf of such person, and the amount, date, and purpose of such expenditure;

"(5) the total sum of all expenditures made by or on behalf of such person during the calendar year and not stated under paragraph (4);

"(6) the total sum of expenditures made by or on behalf of such person during the calendar year.

"(b) The statements required to be filed by subsection (a) shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous statement only the amount need be carried forward."

The following are "the purposes designated in subparagraph (a) or (b) of section 307":

"(a) The passage or defeat of any legislation by the Congress of the United States.

"(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

The other two counts in the information are laid under § 308, which requires any person "who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation" to register with Congress and to make specified disclosures. n2 These two counts allege [***996] in considerable [*616] detail that defendants Moore and Linder were hired to express certain views to Congress as to agricultural prices or to cause others to do so, for the purpose of attempting to influence the passage of legislation which would cause a rise in the price of agricultural commodities and commodity futures and a defeat of legislation which would cause a decline in such prices; and that pursuant to this undertaking, without having registered as required by [*617] § 308, they arranged to have members of Congress contacted on behalf of these views, either directly by their own emissaries or through an artificially stimulated letter campaign. n3

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n2 Section 308 provides:

"(a) Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate and shall give to those officers in writing and under oath, his name and business address, the name and address of the person by whom he is employed, and in whose interest he appears or works, the duration of such employment, how much he is paid and is to receive, by whom he is paid or is to be paid, how much he is to be paid for expenses, and what expenses are to be included. Each such person so registering shall, between the first and tenth day of each calendar quarter, so long as his activity continues, file with the Clerk and Secretary a detailed report under oath of all money received and expended by him during the preceding calendar quarter in carrying on his work; to whom paid; for what purposes; and the names of any papers, periodicals, magazines, or other publications in which he has caused to be published any articles or editorials; and the proposed legislation he is employed to support or oppose. The provisions of this section shall not apply to any person who merely appears before a committee of the Congress of the United States in support of or opposition to legislation; nor to any public official acting in his official capacity; nor in the case of any newspaper or other regularly published periodical (including any individual who owns, publishes, or is employed by any such newspaper or periodical) which in the ordinary course of business publishes news items, editorials, or other comments, or paid advertisements, which directly or indirectly urge the passage or defeat of legislation, if such newspaper, periodical, or individual, engages in no further or other activities in connection with the passage or defeat of such legislation, other than to appear before a committee of the Congress of the United States in support of or in opposition to such legislation.

"(b) All information required to be filed under the provisions of this section with the Clerk of the House of

Representatives and the Secretary of the Senate shall be compiled by said Clerk and Secretary, acting jointly, as soon as practicable after the close of the calendar quarter with respect to which such information is filed and shall be printed in the Congressional Record."

n3 A third count under § 308 was abated on the death of the defendant against whom the charge was made.

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We are not concerned here with the sufficiency of the information as a criminal pleading. Our review under the Criminal Appeals Act is limited to a decision on the alleged "invalidity" of the statute on which the information is based. n4 In making this decision, we judge the statute on its face. See *United* [**812] *States* v. *Petrillo*, 332 U.S. 1, 6, 12. The "invalidity" of the Lobbying Act is asserted on three grounds: (1) that §§ 305, 307, and 308 are too vague and indefinite to meet the requirements of due process; (2) that §§ 305 and 308 violate the First Amendment guarantees of freedom of speech, freedom of the press, and the right to petition the Government; (3) that the penalty provision of § 310 (b) violates the right of the people under the First Amendment to petition the Government.

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n4 18 U. S. C. § 3731. See *United States* v. *Petrillo*, 332 U.S. 1, 5. For "The Government's appeal does not open the whole case." *United States* v. *Borden Co.*, 308 U.S. 188, 193.

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I.

[***HR2] [2]
The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. n5

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n5 See *Jordan* v. *De George*, 341 U.S. 223, 230-232; Quarles, Some Statutory Construction Problems and Approaches in Criminal Law, 3 Vand. L. Rev. 531, 539-543; Note, 62 Harv. L. Rev. 77.

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[*618]

[***HR3] [3]
[***HR4] [4]
On the other hand, if the general class of offenses to which the 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. *United States* v. *Petrillo*, 332 U.S. 1, 7. Cf. *Jordan* v. *De George*, 341 U.S. 223, 231. And if this general class of offenses can be made constitutionally definite by a reasonable [***997] construction of the statute, this Court is under a duty to give the statute that construction. This was the course adopted in *Screws* v. *United States*, 325 U.S. 91, upholding the definiteness of the Civil Rights Act. n6

[5]

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n6 Cf. *Fox* v. *Washington*, 236 U.S. 273; *Musser* v. *Utah*, 333 U.S. 95; *Winters* v. *New York*, 333 U.S. 507, 510.

This rule as to statutes charged with vagueness is but one aspect of the broader principle that this Court, if fairly possible, must construe congressional enactments so as to avoid a danger of unconstitutionality. *United States* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407-408; *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 120-121; *United States* v. *Rumely*, 345 U.S. 41, 47. Thus, in the *C. I. O.* case, *supra*, this Court held that expenditures by a labor organization for the publication of a weekly periodical urging support for a certain candidate in a forthcoming congressional election were not forbidden by the Federal Corrupt Practices Act, which makes it unlawful for ". . . any labor organization to make a contribution or expenditure in connection with any [congressional] election . . . ." Similarly, in the *Rumely* case, *supra*, this Court construed a House Resolution authorizing investigation of "all lobbying activities intended to influence, encourage, promote, or retard legislation" to cover only "'lobbying in its commonly accepted sense,' that is, 'representations made directly to the Congress, its members, or its committees.'"

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The same course is appropriate here. The key section of the Lobbying Act is § 307, entitled "Persons to Whom Applicable." Section 307 provides:

> "The provisions of this title shall apply to any person (except a political committee as defined in [*619] the Federal Corrupt Practices Act, and duly organized State or local committees of a political party), who by himself, or through any agent or employee or other persons in any manner whatsoever, directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid, in the accomplishment of any of the following purposes:
>
> "(a) The passage or defeat of any [**813] legislation by the Congress of the United States.
>
> "(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States."

[***HR6] [6]
This section modifies the substantive provisions of the Act, including § 305 and § 308. In other words, unless a "person" falls within the category established by § 307, the disclosure requirements of § 305 and § 308 are inapplicable. n7 Thus coverage under the Act is limited to those persons (except for the specified political committees) who solicit, collect, or receive contributions of money or other thing of value, and then only if "the principal purpose" of either the persons or the contributions is to aid in the accomplishment of the aims set forth in § 307 (a) and (b). In any event, the solicitation, collection, or receipt of money or other thing of value is a prerequisite to coverage under the Act.

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n7 Section 302 (c) defines the term "person" as including "an individual, partnership, committee, association, corporation, and any other organization or group of persons."

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The Government urges a much broader construction -- namely, that under § 305 a person must report his expenditures to influence legislation even though he does not solicit, collect, or receive contributions as

provided in [*620] § 307. n8 Such a construction, we believe, would do violence to the title and language of § 307 as [***998] well as its legislative history. n9 If the construction urged by the Government is to become law, that is for Congress to accomplish by further legislation.

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n8 The Government's view is based on a variance between the language of § 307 and the language of § 305. Section 307 refers to any person who "solicits, collects, or receives" contributions; § 305, however, refers not only to "receiving any contributions" but also to "expending any money." It is apparently the Government's contention that § 307 -- since it makes no reference to expenditures -- is inapplicable to the expenditure provisions of § 305. Section 307, however, limits the application of § 305 as a whole, not merely a part of it.

n9 Both the Senate and House reports on the bill state that "This section [§ 307] defines the application of the title . . . ." S. Rep. No. 1400, 79th Cong., 2d Sess., p. 28; Committee Print, July 22, 1946, statement by Representative Monroney on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., p. 34. See also the remarks of Representative Dirksen in presenting the bill to the House: "The gist of the antilobbying provision is contained in section 307." 92 Cong. Rec. 10088.

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We now turn to the alleged vagueness of the purposes set forth in § 307 (a) and (b). As in *United States* v. *Rumely*, 345 U.S. 41, 47, which involved the interpretation of similar language, we believe this language should be construed to refer only to "lobbying in its commonly accepted sense" -- to direct communication with members of Congress on pending or proposed federal legislation. The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or through their hirelings or through an artificially stimulated letter campaign. n10 It is likewise clear that Congress would have [*621] intended the Act [**814] to operate on this narrower basis, even if a broader application to organizations seeking to propagandize the general public were not permissible. n11

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n10 The Lobbying Act was enacted as Title III of the Legislative Reorganization Act of 1946, which was reported to Congress by the Joint Committee on the Organization of Congress. The Senate and House reports accompanying the bill were identical with respect to Title III. Both declared that the Lobbying Act applies "chiefly to three distinct classes of so-called lobbyists:

"First. Those who do not visit the Capitol but initiate propaganda from all over the country in the form of letters and telegrams, many of which have been based entirely upon misinformation as to facts. This class of persons and organizations will be required under the title, not to cease or curtail their activities in any respect, but merely to disclose the sources of their collections and the methods in which they are disbursed.

"Second. The second class of lobbyists are those who are employed to come to the Capitol under the false impression that they exert some powerful influence over Members of Congress. These individuals spend their time in Washington presumably exerting some mysterious influence with respect to the legislation in which their employers are interested, but carefully conceal from Members of Congress whom they happen to contact the purpose of their presence. The title in no wise prohibits or curtails their activities. It merely requires that they shall register and disclose the sources and purposes of their employment and the amount of their compensation.

"Third. There is a third class of entirely honest and respectable representatives of business, professional, and philanthropic organizations who come to Washington openly and frankly to express their views for or against legislation, many of whom serve a useful and perfectly legitimate purpose in expressing the views and interpretations of their employers with respect to legislation which concerns them. They will likewise be required to register and state their compensation and the sources of their employment."

S. Rep. No. 1400, 79th Cong., 2d Sess., p. 27; Committee Print, July 22, 1946, statement by Representative Monroney on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., pp. 32-33. See also the statement

in the Senate by Senator La Follette, who was Chairman of the Joint Committee, at 92 Cong. Rec. 6367-6369.

n11 See the Act's separability clause, note 18, *infra*, providing that the invalidity of any application of the Act should not affect the validity of its application "to other persons and circumstances."

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There remains for our consideration the meaning of "the principal purpose" and "to be used principally to [*622] aid." The legislative history of the Act indicates that the term "principal" was adopted merely to exclude from the scope of § 307 those contributions and persons having only an "incidental" purpose of influencing legislation. n12 Conversely, [***999] the "principal purpose" requirement does not exclude a contribution which in substantial part is to be used to influence legislation through direct communication with Congress or a person whose activities in substantial part are directed to influencing legislation through direct communication with Congress. n13 If it [**815] were otherwise -- if an organization, for example, were exempted [*623] because lobbying was only one of its main activities -- the Act would in large measure be reduced to a mere exhortation against abuse of the legislative process. In construing the Act narrowly to avoid constitutional doubts, we must also avoid a construction that would seriously impair the effectiveness of the Act in coping with the problem it was designed to alleviate.

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n12 Both the Senate and House reports accompanying the bill state that the Act ". . . does not apply to organizations formed for other purposes whose efforts to influence legislation are merely incidental to the purposes for which formed." S. Rep. No. 1400, 79th Cong., 2d Sess., p. 27; Committee Print, July 22, 1946, statement by Representative Monroney on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., p. 32. In the Senate discussion preceding enactment, Senator Hawkes asked Senator La Follette, Chairman of the Joint Committee in charge of the bill, for an explanation of the "principal purpose" requirement. In particular, Senator Hawkes sought assurance that multi-purposed organizations like the United States Chamber of Commerce would not be subject to the Act. Senator La Follette refused to give such assurance, stating: "So far as any organizations or individuals are concerned, I will say to the Senator from New Jersey, it will depend on the type and character of activity which they undertake. . . . I cannot tell the Senator whether they will come under the act. It will depend on the type of activity in which they engage, so far as legislation is concerned. . . . *It* [the Act] *affects all individuals and organizations alike if they engage in a covered activity*." (Italics added.) 92 Cong. Rec. 10151-10152. See also Representative Dirksen's remarks in the House, 92 Cong. Rec. 10088.

n13 Such a criterion is not novel in federal law. See Int. Rev. Code, § 23 (o)(2) (income tax), § 812 (d) (estate tax), and § 1004 (a)(2)(B) (gift tax), providing tax exemption for contributions to charitable and educational organizations "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." For illustrative cases applying this criterion, see *Sharpe's Estate* v. *Commissioner*, 148 F.2d 179 (C. A. 3d Cir.); *Marshall* v. *Commissioner*, 147 F.2d 75 (C. A. 2d Cir.); *Faulkner* v. *Commissioner*, 112 F.2d 987 (C. A. 1st Cir.); *Huntington National Bank* v. *Commissioner*, 13 T. C. 760, 769. Cf. *Girard Trust Co.* v. *Commissioner*, 122 F.2d 108 (C. A. 3d Cir.); *Leubuscher* v. *Commissioner*, 54 F.2d 998 (C. A. 2d Cir.); *Weyl* v. *Commissioner*, 48 F.2d 811 (C. A. 2d Cir.); *Slee* v. *Commissioner*, 42 F.2d 184 (C. A. 2d Cir.). See also Annotation, 138 A. L. R. 456.

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[***HR9] [9]

To summarize, therefore, there are three prerequisites to coverage under § 307: (1) the "person" must have solicited, collected, or received contributions; (2) one of the main purposes of such "person," or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by

Congress; (3) the intended method of accomplishing this purpose must have been through direct communication with members of Congress. And since § 307 modifies the substantive provisions of the Act, our construction of § 307 will of necessity also narrow the scope of § 305 and § 308, the substantive provisions underlying the information in this case. Thus § 305 is limited to those persons who are covered by § 307; and when so covered, they must report all contributions and expenditures having the purpose of attempting to influence legislation through direct communication with Congress. Similarly, § 308 is limited to those persons (with the stated exceptions n14) who are covered by § 307 and who, in addition, engage themselves [*624] for pay or for any other valuable consideration for the purpose of attempting to influence legislation [***1000] through direct communication with Congress. Construed in this way, the Lobbying Act meets the constitutional requirement of definiteness. n15

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n14 For the three exceptions, see note 2, *supra*.

n15 Under this construction, the Act is at least as definite as many other criminal statutes which this Court has upheld against a charge of vagueness. *E. g., Boyce Motor Lines* v. *United States*, 342 U.S. 337 (regulation providing that drivers of motor vehicles carrying explosives "shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings"); *Dennis* v. *United States*, 341 U.S. 494 (Smith Act making it unlawful for any person to conspire "to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence . . . ."); *United States* v. *Petrillo*, 332 U.S. 1 (statute forbidding coercion of radio stations to employ persons "in excess of the number of employees needed . . . to perform actual services"); *Screws* v. *United States*, 325 U.S. 91, and *Williams* v. *United States*, 341 U.S. 97 (statute forbidding acts which would deprive a person of "any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States"); *United States* v. *Wurzbach*, 280 U.S. 396 (statute forbidding any candidate for Congress or any officer or employee of the United States to solicit or receive a "contribution for any political purpose whatever" from any other such officer or employee); *Omaechevarria* v. *Idaho*, 246 U.S. 343 (statute forbidding pasturing of sheep "on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower"); *Fox* v. *Washington*, 236 U.S. 273 (state statute imposing criminal sanctions on "Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice . . . ."); *Nash* v. *United States*, 229 U.S. 373 (Sherman Act forbidding "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations"). Cf. *Jordan* v. *De George*, 341 U.S. 223 (statute providing for deportation of persons who have committed crimes involving "moral turpitude").

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[*625] II.

[***HR10] [10]
Thus construed, §§ 305 and 308 also do not violate the freedoms guaranteed [**816] by the First Amendment -- freedom to speak, publish, and petition the Government.

[***HR11] [11]
Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent. n16

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n16 Similar legislation has been enacted in over twenty states. See Notes, 56 Yale L. J. 304, 313-316, and 47 Col. L. Rev. 98, 99-103.

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Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much. It acted in the same spirit and for a similar purpose in passing the Federal Corrupt Practices Act -- [***1001] to maintain the integrity of a basic governmental process. See *Burroughs and Cannon* v. *United States*, 290 U.S. 534, 545.

Under these circumstances, we believe that Congress, at least within the bounds of the Act as we have construed it, is not constitutionally forbidden to require the disclosure of lobbying activities. To do so would be to deny Congress in large measure the power of self-protection. [*626] And here Congress has used that power in a manner restricted to its appropriate end. We conclude that §§ 305 and 308, as applied to persons defined in § 307, do not offend the First Amendment.

[***HR12] [12]
It is suggested, however, that the Lobbying Act, with respect to persons other than those defined in § 307, may as a practical matter act as a deterrent to their exercise of First Amendment rights. Hypothetical borderline situations are conjured up in which such persons choose to remain silent because of fear of possible prosecution for failure to comply with the Act. Our narrow construction of the Act, precluding as it does reasonable fears, is calculated to avoid such restraint. But, even assuming some such deterrent effect, the restraint is at most an indirect one resulting from self-censorship, comparable in many ways to the restraint resulting from criminal libel laws. n17 The hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest.

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n17 Similarly, the Hatch Act probably deters some federal employees from political activity permitted by that statute, but yet was sustained because of the national interest in a nonpolitical civil service. *United Public Workers* v. *Mitchell*, 330 U.S. 75.

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[**817] III.

The appellees further attack the statute on the ground that the penalty provided in § 310 (b) is unconstitutional. That section provides:

> "(b) In addition to the penalties provided for in subsection (a), any person convicted of the misdemeanor specified therein is prohibited, for a period of three years from the date of such conviction, from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation or from [*627] appearing before a committee of the Congress in support of or opposition to proposed legislation; and any person who violates any provision of this subsection shall, upon conviction thereof, be guilty of a felony, and shall be punished by a fine of not more than $ 10,000, or imprisonment for not more than five years, or by both such fine and imprisonment."

This section, the appellees argue, is a patent violation of the First Amendment guarantees of freedom of speech and the right to petition the Government.

[***HR13] [13]
We find it unnecessary to pass on this contention. Unlike §§ 305, 307, and 308 which we have judged on their face, § 310 (b) has not yet been applied to the appellees, and it will never be so applied if the appellees are found innocent of the charges against them. See *United States* v. *Wurzbach*, 280 U.S. 396, 399; *United States* v. *Petrillo*, 332 U.S. 1, 9-12.

[***HR14] [14]
Moreover, the Act provides for the separability of any provision found invalid. n18 If § 310 (b) should ultimately be declared unconstitutional, its elimination would still leave a statute defining specific [***1002] duties and providing a specific penalty for violation of any such duty. The prohibition of § 310 (b) is expressly stated to be "In addition to the penalties provided for in subsection (a) . . ."; subsection (a) makes a violation of § 305 or § 308 a misdemeanor, punishable by fine or imprisonment or both. Consequently, there would seem to be no obstacle to giving effect to the separability clause as to § 310 (b), if this should ever prove necessary. Compare *Electric Bond & Share Co.* v. *Securities & Exchange Commission*, 303 U.S. 419, 433-437.

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n18 60 Stat. 812, 814:

"If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby."

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[*628] The judgment below is reversed and the cause is remanded to the District Court for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE CLARK took no part in the consideration or decision of this case.

DISSENTBY: DOUGLAS; JACKSON

DISSENT: MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

I am in sympathy with the effort of the Court to save this statute from the charge that it is so vague and indefinite as to be unconstitutional. My inclinations were that way at the end of the oral argument. But further study changed my mind. I am now convinced that the formula adopted to save this Act is too dangerous for use. It can easily ensnare people who have done no more than exercise their constitutional rights of speech, assembly, and press.

[***HR15] [15]
We deal here with the validity of a criminal statute. To use the test of *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, the question is whether this statute "either forbids or requires the doing of an act in terms so vague that [**818] men of common intelligence must necessarily guess at its meaning and differ as to its application." If it is so vague, as I think this one is, then it fails to meet the standards required by due process of law. See *United States* v. *Petrillo*, 332 U.S. 1. In determining that question we consider the statute on its face. As stated in *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453:

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. . . . It is the statute, not the accusation [*629] under it, that prescribes the rule to govern conduct and warns against transgression. . . . No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

And see *Winters v. New York*, 333 U.S. 507, 515.

The question therefore is not what the information charges nor what the proof might be. It is whether the statute itself is sufficiently narrow and precise as to give fair warning.

It is contended that the Act plainly applies

-- to persons who pay others to present views to Congress either in committee hearings or by letters or other communications to Congress or Congressmen and

-- to persons who spend money to induce others to communicate with Congress.

The Court adopts that view, with one minor limitation which the Court places on the Act -- that only persons who solicit, collect, or receive money are included.

The difficulty is that the Act has to be rewritten and words actually added and subtracted to produce that result.

[***1003] Section 307 makes the Act applicable to anyone who "directly or indirectly" solicits, collects, or receives contributions "to be used principally to aid, or the principal purpose of which person is to aid" in either

-- the "passage or defeat of any legislation" by Congress, or

-- "To influence, directly or indirectly, the passage or defeat of any legislation" by Congress.

We start with an all-inclusive definition of "legislation" contained in § 302 (e). It means "bills, resolutions, amendments, nominations, and other matters [*630] pending or proposed in either House of Congress, and includes any other matter which may be the subject of action by either House." What is the scope of "any other matter which may be the subject of action" by Congress? It would seem to include not only pending or proposed legislation but any matter within the legitimate domain of Congress.

What contributions might be used "principally to aid" in influencing "directly or indirectly, the passage or defeat" of any such measure by Congress? When is one retained for the purpose of influencing the "passage or defeat of any legislation"?

(1) One who addresses a trade union for repeal of a labor law certainly hopes to influence legislation.

(2) So does a manufacturers' association which runs ads in newspapers for a sales tax.

(3) So does a farm group which undertakes to raise money for an educational program to be conducted in newspapers, magazines, and on radio and television, showing the need for revision of our attitude on world trade.

(4) So does a group of oil companies which puts agents in the Nation's capital [**819] to sound the alarm at hostile legislation, to exert influence on Congressmen to defeat it, to work on the Hill for the passage of laws favorable to the oil interests.

(5) So does a business, labor, farm, religious, social, racial, or other group which raises money to contact people with the request that they write their Congressman to get a law repealed or modified, to get a proposed law passed, or themselves to propose a law.

Are all of these activities covered by the Act? If one is included why are not the others? The Court apparently excludes the kind of activities listed in categories (1), (2), and (3) and includes part of the activities in (4) and (5) -- those which entail contacts with the Congress.

[*631] There is, however, difficulty in that course, a difficulty which seems to me to be insuperable. I find no warrant in the Act for drawing the line, as the Court does, between "direct communication with Congress" and other pressures on Congress. The Act is as much concerned with one as with the other.

The words "direct communication with Congress" are not in the Act. Congress was concerned with the raising of money to aid in the passage or defeat of legislation, whatever tactics were used. But the Court not only strikes out one whole group of activities -- to influence "indirectly" -- but substitutes a new concept for the remaining group -- to influence "directly." To influence "directly" the passage or defeat of legislation includes any number of methods -- for example, nationwide radio, television or advertising programs promoting a particular measure, as well as the "buttonholing" of Congressmen. To include the latter while excluding the former is to rewrite the Act.

This is not a case where one or more distinct types of "lobbying" are specifically proscribed and another and different group defined in such loose, broad terms as to make its definition vague and uncertain. Here if we give the words of the Act their ordinary meaning, we do not know what the terminal points are. Judging from the words Congress used, one type of activity which I have enumerated is as much proscribed as another.

[***1004] The importance of the problem is emphasized by reason of the fact that this legislation is in the domain of the First Amendment. That Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people . . . to petition the Government for a redress of grievances."

Can Congress require one to register before he writes an article, makes a speech, files an advertisement, appears [*632] on radio or television, or writes a letter seeking to influence existing, pending, or proposed legislation? That would pose a considerable question under the First Amendment, as *Thomas* v. *Collins*, 323 U.S. 516, indicates. I do not mean to intimate that Congress is without power to require disclosure of the real principals behind those who come to Congress (or get others to do so) and speak as though they represent the public interest, when in fact they are undisclosed agents of special groups. I mention the First Amendment to emphasize why statutes touching this field should be "narrowly drawn to prevent the supposed evil" (see *Cantwell* v. *Connecticut*, 310 U.S. 296, 307) and not be cast in such vague and indefinite terms as to cast a cloud on the exercise of constitutional rights. Cf. *Stromberg* v. *California*, 283 U.S. 359, 369; *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98; *Winters* v. *New York*, 333 U.S. 507, 509; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 504-505.

[**820] If that rule were relaxed, if Congress could impose registration requirements on the exercise of First Amendment rights, saving to the courts the salvage of the good from the bad, and meanwhile causing all who might possibly be covered to act at their peril, the law would in practical effect be a deterrent to the exercise of First Amendment rights. The Court seeks to avoid that consequence by construing the law narrowly as applying only to those who are paid to "buttonhole" Congressmen or who collect and expend moneys to get others to do so. It may be appropriate in some cases to read a statute with the gloss a court has placed on it in order to save it from the charge of vagueness. See *Fox* v. *Washington*, 236 U.S. 273, 277. But I do not think that course is appropriate here.

The language of the Act is so broad that one who writes a letter or makes a speech or publishes an article [*633] or distributes literature or does many of the other things with which appellees are charged has no fair notice when he is close to the prohibited line. No construction we give it today will make clear retroactively the vague standards that confronted appellees when they did the acts now charged against them as criminal. Cf. *Pierce* v. *United States*, 314 U.S. 306, 311. Since the Act touches on the exercise of First Amendment rights, and is not narrowly drawn to meet precise evils, its vagueness has some of the evils of a continuous and effective restraint.

MR. JUSTICE JACKSON, dissenting.

Several reasons lead me to withhold my assent from this decision.

The clearest feature of this case is that it begins with an Act so mischievously vague that the Government charged with its enforcement does not understand it, for some of its important assumptions are rejected by the Court's interpretation. The clearest feature of the Court's decision is that it leaves the country under an Act which is not much like any Act passed by Congress. Of course, when such a question is before us, it is easy to differ as to whether it is more appropriate to strike out or to strike down. But [***1005] I recall few cases in which the Court has gone so far in rewriting an Act.

The Act passed by Congress would appear to apply to all persons who (1) solicit or receive funds for the purpose of lobbying, (2) receive and expend funds for the purpose of lobbying, or (3) merely expend funds for the purpose of lobbying. The Court at least eliminates this last category from coverage of the Act, though I should suppose that more serious evils affecting the public interest are to be found in the way lobbyists spend their money than in the ways they obtain it. In the present indictments, six counts relate exclusively to failures to [*634] report expenditures while only one appears to rest exclusively on failure to report receipts. . . .

Also, Congress enacted a statute to reach the raising and spending of funds for the purpose of influencing congressional action *directly or indirectly*. The Court entirely deletes "indirectly" and narrows "directly" to mean "direct communication with members of Congress." These two constructions leave the Act touching only a part of the practices Congress deemed sinister.

Finally, as if to compensate for its deletions from the Act, the Court expands the phrase "the principal purpose" so that it now refers to any contribution which "in substantial part" is used to influence legislation.

I agree, of course, that we should make liberal interpretations to save legislative Acts, including penal statutes which punish conduct traditionally recognized as morally "wrong." Whoever kidnaps, steals, kills, or commits similar [**821] acts of violence upon another is bound to know that he is inviting retribution by society, and many of the statutes which define these long-established crimes are traditionally and perhaps necessarily vague. But we are dealing with a novel offense that has no established bounds and no such moral basis. The criminality of the conduct dealt with here depends entirely upon a purpose to influence legislation. Though there may be many abuses in pursuit of this purpose, this Act does not deal with corruption. These defendants, for example, are indicted for failing to report their activities in raising and spending money to influence legislation in support of farm prices, with no charge of corruption, bribery, deception, or other improper action. This may be a selfish business and against the best interests of the nation as a whole, but it is in an area where legal penalties should be applied only by formulae as precise and clear as our language will permit.

[*635] The First Amendment forbids Congress to abridge the right of the people "to petition the Government for a redress of grievances." If this right is to have an interpretation consistent with that given to other First Amendment rights, it confers a large immunity upon activities of persons, organizations, groups and classes to obtain what they think is due them from government. Of course, their conflicting claims and propaganda are confusing, annoying and at times, no doubt, deceiving and corrupting. But we may not forget that our constitutional system is to allow the greatest freedom of access to Congress, so that the people may press for their selfish interests, with Congress acting as arbiter of their demands and conflicts.

In matters of this nature, it does not seem wise to leave the scope of a criminal Act, close to impinging on the right of petition, dependent upon judicial construction for its limitations. Judicial construction, constitutional or statutory, always is subject to hazards of judicial reconstruction. One may rely on today's narrow interpretation only at his peril, for some later Court may expand the Act to include, in accordance with its terms, what today the Court excludes. This recently happened with the antitrust laws, which the Court cites as being [***1006] similarly vague. This Court, in a criminal case, sustained an indictment by admittedly changing repeated and long-established constitutional and statutory interpretations. *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533. The *ex post facto* provision of our Constitution has not been held to protect the citizen against a retroactive change in decisional law, but it does against such a prejudicial change in legislation. As long as this statute stands on the books, its vagueness will be a contingent threat to activities which the Court today rules out, the contingency being a change of views by the Court as hereafter constituted.

[*636] The Court's opinion presupposes, and I do not disagree, that Congress has power to regulate lobbying for hire as a business or profession and to require such agents to disclose their principals, their activities, and their receipts. However, to reach the real evils of lobbying without cutting into the constitutional right of petition is a difficult and delicate task for which the Court's action today gives little guidance. I am in doubt whether the Act as construed does not permit applications which would abridge the right of petition, for which clear, safe and workable channels must be maintained. I think we should point out the defects and limitations which condemn this Act so clearly that the Court cannot sustain it as written, and leave its rewriting to Congress. After all, it is Congress that should know from experience both the good in the right of petition and the evils of professional lobbying.

REFERENCES: Return To Full Text Opinion

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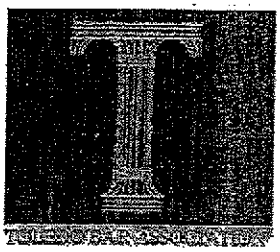

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1991 U.S. LEXIS 3821,*;501 U.S. 808;
111 S. Ct. 2597;115 L. Ed. 2d 720

PERVIS TYRONE PAYNE, PETITIONER *v.* TENNESSEE

No. 90-5721

SUPREME COURT OF THE UNITED STATES

501 U.S. 808;111 S. Ct. 2597;115 L. Ed. 2d 720;1991 U.S. LEXIS 3821;59 U.S.L.W. 4814;91 Cal. Daily Op. Service 5052;91 Daily Journal DAR 7697

April 24, 1991, Argued

June 27, 1991, Decided

SUBSEQUENT HISTORY: Rehearing denied by **Payne v. Tennessee, 501 U.S. 1277, 115 L. Ed. 2d 1110, 112 S. Ct. 28, 1991 U.S. LEXIS 4106, 60 U.S.L.W. 3207 (1991)**

PRIOR HISTORY: [*1]

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE, WESTERN DIVISION. **State v. Payne, 791 S.W.2d 10, 1990 Tenn. LEXIS 169** (Tenn., 1990)

COUNSEL: J. Brooke Lathram argued the cause and filed briefs for petitioner.

Charles W. Burson, Attorney General of Tennessee, argued the cause for respondent. With him on the brief was Kathy M. Principe, Assistant Attorney General.

Attorney General Thornburgh argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Solicitor General Starr, Assistant Attorney General Mueller, Deputy Solicitor General Bryson, and Stephen L.

Nightingale.

Stephen B. Bright and J. L. Chestnut filed a brief for the Southern Christian Leadership Conference as amicus curiae urging reversal.

Briefs of amici curiae urging affirmance were filed for the Criminal Justice Legal Foundation by Kent S. Scheidegger; for the Washington Legal Foundation et al. by Richard K. Willard, Daniel J. Popeo, Paul D. Kamenar, and Richard Samp; and for Congressman Thomas J. Bliley, Jr., et al. by Michael J. Lockerby and Frank G. Carrington.

Briefs of amici curiae were filed for the State of Alabama et al. by Daniel E. Lungren, Attorney General of California, George Williamson, Chief Assistant Attorney General, Harley D. Mayfield, Senior Assistant Attorney General, Frederick R. Millar, Jr., Supervising Deputy Attorney General, and Louis R. Hanoian, Deputy Attorney General, James H. Evans, Attorney General of Alabama, Grant Woods, Attorney General of Arizona, Gale A. Norton, Attorney General of Colorado, John J. Kelly, Chief State's Attorney of Connecticut, Robert A. Butterworth, Attorney General of Florida, Linley E. Pearson, Attorney General of Indiana, Frederic J. Cowan, Attorney General of Kentucky, J. Joseph Curran, Jr., Attorney General of Maryland, Mike Moore, Attorney General of Mississippi, William L. Webster, Attorney General of Missouri, Marc Racicot, Attorney General of Montana, Don Stenberg, Attorney General of Nebraska, Frankie Sue Del Papa, Attorney General of Nevada, Robert J. Del Tufo, Attorney General of New Jersey, Lacy H. Thornburg, Attorney General of North Carolina, Lee Fisher, Attorney General of Ohio, Dave Frohnmayer, Attorney General of Oregon, Ernest D. Preate, Jr., Attorney General of Pennsylvania, T. Travis Medlock, Attorney General of South Carolina, Mark W. Barnett, Attorney General of South Dakota, and Kenneth O. Eikenberry, Attorney General of Washington; for the Appellate Committee of the California District Attorneys Association by Ira Reiner, Harry B. Sondheim, and Martha E. Bellinger; for the Justice for All Political Committee et al. by Mario Thomas Gaboury and Sally S. King; and for the National Organization for Victim Assistance et al. by Judith Rowland.

JUDGES: REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which WHITE and KENNEDY, JJ., joined, post, p. 830. SCALIA, J., filed a concurring opinion, in Part II of which O'CONNOR and KENNEDY, JJ., joined, post, p. 833. SOUTER, J., filed a concurring opinion, in which KENNEDY, J., joined, post, p. 835. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN, J., joined, post, p. 844. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, post, p. 856.

OPINIONBY: REHNQUIST

OPINION: CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[1A]In this case we reconsider our holdings in **Booth v. Maryland, 482 U.S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987),** and **South Carolina v. Gathers, 490 U.S. 805, 104 L. Ed. 2d 876, 109 S. Ct. 2207 (1989),** that the Eighth Amendment bars the admission of victim impact evidence during the penalty phase of a capital trial.

Petitioner, Pervis Tyrone Payne, was convicted by a jury on two counts [*7] of first-degree murder and one count of assault with intent to commit murder in the first degree. He was sentenced to death for each of the murders and to 30 years in prison for the assault.

The victims of Payne's offenses were 28-year-old Charisse Christopher, her 2-year-old daughter Lacie, and her 3-year-old son Nicholas. The three lived together in an apartment in Millington, Tennessee, across the hall from Payne's girl-friend, Bobbie Thomas. On Saturday, June 27, 1987, Payne visited Thomas' apartment several times in expectation of her return from her mother's house in Arkansas, but found no one at home. On one visit, he left his overnight bag, containing clothes and other items for his weekend stay, in the hallway outside Thomas' apartment. With the bag were three cans of malt liquor.

Payne passed the morning and early afternoon injecting cocaine and drinking beer. Later, he drove around the town with a friend in the friend's car, each of them taking turns reading a pornographic magazine. Sometime around 3 p.m., Payne returned to the apartment complex, entered the Christophers' apartment, and began making sexual advances towards Charisse. Charisse resisted and Payne became violent. [*8] A neighbor who resided in the apartment directly beneath the Christophers heard Charisse screaming, "'Get out, get out,' as if she were telling the children to leave." Brief for Respondent 3. The noise briefly subsided and then began, "'horribly loud.'" *Ibid.* The neighbor called the police after she heard a "blood curdling scream" from the Christophers' apartment. *Ibid.*

When the first police officer arrived at the scene, he immediately encountered Payne, who was leaving the apartment building, so covered with blood that he appeared to be "'sweating blood.'" The officer confronted Payne, who responded, "'I'm the complainant.'" *Id.*, at 3-4. When the officer asked, "'What's going on up there?'" Payne struck the officer with the overnight bag, dropped his tennis shoes, and fled. **791 S.W.2d 10, 12 (Tenn. 1990).**

Inside the apartment, the police encountered a horrifying scene. Blood covered the walls and floor throughout the unit. Charisse and her children were lying on the floor in the kitchen. Nicholas, despite several wounds inflicted by a

butcher knife that completely penetrated through his body from front to back, was still breathing. Miraculously, he survived, but not until after undergoing seven hours of surgery and [*9] a transfusion of 1,700 cc's of blood -- 400 to 500 cc's more than his estimated normal blood volume. Charisse and Lacie were dead.

Charisse's body was found on the kitchen floor on her back, her legs fully extended. She had sustained 42 direct knife wounds and 42 defensive wounds on her arms and hands. The wounds were caused by 41 separate thrusts of a butcher knife. None of the 84 wounds inflicted by Payne were individually fatal; rather, the cause of death was most likely bleeding from all of the wounds.

Lacie's body was on the kitchen floor near her mother. She had suffered stab wounds to the chest, abdomen, back, and head. The murder weapon, a butcher knife, was found at her feet. Payne's baseball cap was snapped on her arm near her elbow. Three cans of malt liquor bearing Payne's fingerprints were found on a table near her body, and a fourth empty one was on the landing outside the apartment door.

Payne was apprehended later that day hiding in the attic of the home of a former girlfriend. As he descended the stairs of the attic, he stated to the arresting officers, "'Man, I ain't killed no woman.'" **Id., at 13.** According to one of the officers, Payne had "'a wild look about him. His pupils were [*10] contracted. He was foaming at the mouth, saliva. He appeared to be very nervous. He was breathing real rapid.'" *Ibid.* He had blood on his body and clothes and several scratches across his chest. It was later determined that the blood stains matched the victims' blood types. A search of his pockets revealed a packet containing cocaine residue, a hypodermic syringe wrapper, and a cap from a hypodermic syringe. His overnight bag, containing a bloody white shirt, was found in a nearby dumpster.

At trial, Payne took the stand and, despite the overwhelming and relatively uncontroverted evidence against him, testified that he had not harmed any of the Christophers. Rather, he asserted that another man had raced by him as he was walking up the stairs to the floor where the Christophers lived. He stated that he had gotten blood on himself when, after hearing moans from the Christophers' apartment, he had tried to help the victims. According to his testimony, he panicked and fled when he heard police sirens and noticed the blood on his clothes. The jury returned guilty verdicts against Payne on all counts.

During the sentencing phase of the trial, Payne presented the testimony of four witnesses: [*11] his mother and father, Bobbie Thomas, and Dr. John T. Hutson, a clinical psychologist specializing in criminal court evaluation work. Bobbie Thomas testified that she met Payne at church, during a time when she was being abused by her husband. She stated that Payne was

a very caring person, and that he devoted much time and attention to her three children, who were being affected by her marital difficulties. She said that the children had come to love him very much and would miss him, and that he "behaved just like a father that loved his kids." She asserted that he did not drink, nor did he use drugs, and that it was generally inconsistent with Payne's character to have committed these crimes.

Dr. Hutson testified that based on Payne's low score on an IQ test, Payne was "mentally handicapped." Hutson also said that Payne was neither psychotic nor schizophrenic, and that Payne was the most polite prisoner he had ever met. Payne's parents testified that their son had no prior criminal record and had never been arrested. They also stated that Payne had no history of alcohol or drug abuse, he worked with his father as a painter, he was good with children, and he was a good son.

[*12] The State presented the testimony of Charisse's mother, Mary Zvolanek. When asked how Nicholas had been affected by the murders of his mother and sister, she responded:

> "He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie." App. 3.

In arguing for the death penalty during closing argument, the prosecutor commented on the continuing effects of Nicholas' experience, stating:

> "But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and baby sister." *Id.*, at 9.
>
> "There is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do to ease the pain of Bernice or Carl Payne, and that's a tragedy. There is nothing you can do basically to ease the pain of Mr. and Mrs. Zvolanek, and that's [*13] a tragedy. They will have to live with it the rest of their lives. There is obviously nothing you can do for Charisse and Lacie Jo. But there is something that you can do for Nicholas.

> "Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer." *Id.*, at 12.

In the rebuttal to Payne's closing argument, the prosecutor stated:

> "You saw the videotape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will always come into your mind, probably throughout the rest of your lives. . . .
>
> . . . .
>
> ". . . No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken from her at the age of two years old. So, no there won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anybody to take her to her high school prom. And there won't be [*14] anybody there -- there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby.
>
> . . . .
>
> "[Petitioner's attorney] wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever." *Id.*, at 13-15.

The jury sentenced Payne to death on each of the murder

counts.

The Supreme Court of Tennessee affirmed the conviction and sentence. **791 S.W.2d 10 (1990).** The court rejected Payne's contention that the admission of the grandmother's testimony and the State's closing argument constituted prejudicial violations of his rights under the Eighth Amendment [*15] as applied in **Booth v. Maryland, 482 U.S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987),** and *South* **Carolina v. Gathers, 490 U.S. 805, 104 L. Ed. 2d 876, 109 S. Ct. 2207 (1989).** The court characterized the grandmother's testimony as "technically irrelevant," but concluded that it "did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty and was harmless beyond a reasonable doubt." **791 S.W.2d at 18.**

The court determined that the prosecutor's comments during closing argument were "relevant to [Payne's] personal responsibility and moral guilt." **Id., at 19.** The court explained that "when a person deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab to death a twenty-eight-year-old mother, her two and one-half year old daughter and her three and one-half year old son, in the same room, the physical and mental condition of the boy he left for dead is surely relevant in determining his 'blameworthiness.'" The court concluded that any violation of Payne's rights under *Booth* and *Gathers* "was harmless beyond a reasonable doubt." *Ibid.*

We granted certiorari, **498 U.S. 1080 (1991),** to reconsider [*16] our holdings in *Booth* and *Gathers* that the Eighth Amendment prohibits a capital sentencing jury from considering "victim impact" evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family.

In *Booth*, the defendant robbed and murdered an elderly couple. As required by a state statute, a victim impact statement was prepared based on interviews with the victims' son, daughter, son-in-law, and granddaughter. The statement, which described the personal characteristics of the victims, the emotional impact of the crimes on the family, and set forth the family members' opinions and characterizations of the crimes and the defendant, was submitted to the jury at sentencing. The jury imposed the death penalty. The conviction and sentence were affirmed on appeal by the State's highest court.

This Court held by a 5-to-4 vote that the Eighth Amendment prohibits a jury from considering a victim impact statement at the sentencing phase of a capital trial. The Court made clear that the admissibility of victim impact evidence was not to be determined on a case-by-case basis, but that such evidence was *per se* inadmissible [*17] in the sentencing phase of a capital case except to the extent that it "related directly to the circumstances of the crime." **482 U.S. at 507, n. 10.** In *Gathers*, decided two years later, the Court extended the rule

announced in *Booth* to statements made by a prosecutor to the sentencing jury regarding the personal qualities of the victim.

The *Booth* Court began its analysis with the observation that the capital defendant must be treated as a "'uniquely individual human being,'" **482 U.S. at 504** (quoting **Woodson v. North Carolina, 428 U.S. 280, 304, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976)),** and therefore the Constitution requires the jury to make an individualized determination as to whether the defendant should be executed based on the "'character of the individual and the circumstances of the crime.'" **482 U.S. at 502** (quoting **Zant v. Stephens, 462 U.S. 862, 879, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983)).** The Court concluded that while no prior decision of this Court had mandated that only the defendant's character and immediate characteristics of the crime may constitutionally be considered, other factors are irrelevant to the capital sentencing [*18] decision unless they have "some bearing on the defendant's 'personal responsibility and moral guilt.'" **482 U.S. at 502** (quoting **Enmund v. Florida, 458 U.S. 782, 801, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982)).** To the extent that victim impact evidence presents "factors about which the defendant was unaware, and that were irrelevant to the decision to kill," the Court concluded, it has nothing to do with the "blameworthiness of a particular defendant." **482 U.S. at 504, 505.** Evidence of the victim's character, the Court observed, "could well distract the sentencing jury from its constitutionally required task [of] determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." The Court concluded that, except to the extent that victim impact evidence relates "directly to the circumstances of the crime," **id., at 507, and n. 10,** the prosecution may not introduce such evidence at a capital sentencing hearing because "it creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner," **id., at 505.**

[*19] *Booth* and *Gathers* were based on two premises: that evidence relating to a particular victim or to the harm that a capital defendant causes a victim's family do not in general reflect on the defendant's "blameworthiness," and that only evidence relating to "blameworthiness" is relevant to the capital sentencing decision. However, the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment. Thus, two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm. "If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater." **Booth, 482 U.S. at 518** (SCALIA, J., dissenting).

The same is true with respect to two defendants, each of whom participates in a robbery, and each of whom acts with reckless disregard for human life; if the [*20] robbery in which the first defendant participated results in the death of a victim, he may be subjected to the death penalty, but if the robbery in which the second defendant participates does not result in the death of a victim, the death penalty may not be imposed. **Tison v. Arizona, 481 U.S. 137, 148, 95 L. Ed. 2d 127, 107 S. Ct. 1676 (1987).**

The principles which have guided criminal sentencing -- as opposed to criminal liability -- have varied with the times. The book of Exodus prescribes the *Lex talionis*, "An eye for an eye, a tooth for a tooth." Exodus 21: 22-23. In England and on the continent of Europe, as recently as the 18th century, crimes which would be regarded as quite minor today were capital offenses. Writing in the 18th century, the Italian criminologist Cesare Beccaria advocated the idea that "the punishment should fit the crime." He said that "we have seen that the true measure of crimes is the injury done to society." J. Farrer, Crimes and Punishments 199 (1880).

Gradually the list of crimes punishable by death diminished, and legislatures began grading the severity of crimes in accordance with the harm done by the criminal. The sentence for a given offense, rather [*21] than being precisely fixed by the legislature, was prescribed in terms of a minimum and a maximum, with the actual sentence to be decided by the judge. With the increasing importance of probation, as opposed to imprisonment, as a part of the penological process, some States such as California developed the "indeterminate sentence," where the time of incarceration was left almost entirely to the penological authorities rather than to the courts. But more recently the pendulum has swung back. The Federal Sentencing Guidelines, which went into effect in 1987, provided for very precise calibration of sentences, depending upon a number of factors. These factors relate both to the subjective guilt of the defendant and to the harm caused by his acts.

Wherever judges in recent years have had discretion to impose sentence, the consideration of the harm caused by the crime has been an important factor in the exercise of that discretion:

> "The first significance of harm in Anglo-American jurisprudence is, then, as a prerequisite to the criminal sanction. The second significance of harm -- one no less important to judges -- is as a measure of the seriousness of the offense and therefore as a standard [*22] for determining the severity of the sentence that will be meted out." S. Wheeler, K. Mann, & A. Sarat, Sitting in Judgment: The Sentencing of White-Collar Criminals 56 (1988).

Whatever the prevailing sentencing philosophy, the sentencing authority has always been free to consider a wide range of relevant material. **Williams v. New York, 337 U.S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949).** In the federal system, we observed that "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." **United States v. Tucker, 404 U.S. 443, 446, 30 L. Ed. 2d 592, 92 S. Ct. 589 (1972).** Even in the context of capital sentencing, prior to *Booth* the joint opinion of Justices Stewart, Powell, and STEVENS in **Gregg v. Georgia, 428 U.S. 153, 203-204, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976),** had rejected petitioner's attack on the Georgia statute because of the "wide scope of evidence and argument allowed at presentence hearings." The joint opinion stated:

> "We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and [*23] far-ranging argument. . . . So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision."

The Maryland statute involved in *Booth* required that the presentence report in all felony cases include a "victim impact statement" which would describe the effect of the crime on the victim and his family. **Booth, supra, at 498.** Congress and most of the States have, in recent years, enacted similar legislation to enable the sentencing authority to consider information about the harm caused by the crime committed by the defendant. The evidence involved in the present case was not admitted pursuant to any such enactment, but its purpose and effect were much the same as if it had been. While the admission of this particular kind of evidence -- designed to portray for the sentencing authority the actual harm caused by a particular crime -- is of recent origin, this fact hardly renders it unconstitutional. **Williams v. Florida, 399 U.S. 78, 26 L. Ed. 2d 446, 90 S. Ct. 1893 (1970)** [*24] (upholding the constitutionality of a notice-of-alibi statute, of a kind enacted by at least 15 States dating from 1927); **United States v. DiFrancesco, 449 U.S. 117, 142, 66 L. Ed. 2d 328, 101 S. Ct. 426 (1980)** (upholding against a double jeopardy challenge an Act of Congress representing "a considered legislative attempt to attack a specific problem in our criminal justice system, that is, the tendency on the part of some trial judges to mete out light sentences in cases involving

organized crime management personnel'").

We have held that a State cannot preclude the sentencer from considering "any relevant mitigating evidence" that the defendant proffers in support of a sentence less than death. **Eddings v. Oklahoma, 455 U.S. 104, 114, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982).** See also **Skipper v. South Carolina, 476 U.S. 1, 90 L. Ed. 2d 1, 106 S. Ct. 1669 (1986).** Thus we have, as the Court observed in *Booth*, required that the capital defendant be treated as a "'uniquely individual human being,'" **482 U.S. at 504** (quoting **Woodson v. North Carolina, 428 U.S. at 304).** But it was never held or even suggested in any of our cases preceding *Booth* that the defendant, [*25] entitled as he was to individualized consideration, was to receive that consideration wholly apart from the crime which he had committed. The language quoted from *Woodson* in the *Booth* opinion was not intended to describe a class of evidence that *could not* be received, but a class of evidence which *must* be received. Any doubt on the matter is dispelled by comparing the language in *Woodson* with the language from *Gregg* v. *Georgia*, quoted above, which was handed down the same day as *Woodson*. This misreading of precedent in *Booth* has, we think, unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering "a quick glimpse of the life" which a defendant "chose to extinguish," **Mills v. Maryland, 486 U.S. 367, 397, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988)** (REHNQUIST, C. J., dissenting), or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide.

The *Booth* Court reasoned that victim impact evidence must be excluded because it would be difficult, if not impossible, for the defendant to [*26] rebut such evidence without shifting the focus of the sentencing hearing away from the defendant, thus creating a "'mini-trial' on the victim's character." **Booth, supra, at 506-507.** In many cases the evidence relating to the victim is already before the jury at least in part because of its relevance at the guilt phase of the trial. But even as to additional evidence admitted at the sentencing phase, the mere fact that for tactical reasons it might not be prudent for the defense to rebut victim impact evidence makes the case no different than others in which a party is faced with this sort of a dilemma. As we explained in rejecting the contention that expert testimony on future dangerousness should be excluded from capital trials, "the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party." **Barefoot v. Estelle, 463 U.S. 880, 899, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983).**

Payne echoes the concern voiced in *Booth*'s case that the

admission of victim impact evidence permits a [*27] jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. **Booth, supra, at 506, n. 8.** As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind -- for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be. The facts of *Gathers* are an excellent illustration of this: The evidence showed that the victim was an out of work, mentally handicapped individual, perhaps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being.

[2]Under our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests with the States. The state laws respecting crimes, punishments, and criminal procedure [*28] are, of course, subject to the overriding provisions of the United States Constitution. Where the State imposes the death penalty for a particular crime, we have held that the Eighth Amendment imposes special limitations upon that process.

> "First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot challenge the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant." **McCleskey v. Kemp, 481 U.S. 279, 305-306, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987).**

But, as we noted in **California v. Ramos, 463 U.S. 992, 1001, 77 L. Ed. 2d 1171, 103 S. Ct. 3446 (1983).** "beyond these limitations . . . the Court has deferred to the [*29] State's choice of substantive factors relevant to the penalty determination."

[1B] [3]Within the constitutional limitations defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." **Blystone v. Pennsylvania, 494 U.S. 299, 309, 108 L. Ed. 2d 255, 110 S. Ct. 1078 (1990).** The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the *Booth* Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. See **Darden v. Wainwright, 477 U.S. 168, 179-183, 91 L. Ed. 2d 144, 106 S. Ct. 2464 (1986).** [*30] Courts have always taken into consideration the harm done by the defendant in imposing sentence, and the evidence adduced in this case was illustrative of the harm caused by Payne's double murder.

[1C]We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." **Booth, 482 U.S. at 517** (WHITE, J., dissenting) (citation omitted). By turning the victim into a "faceless stranger at the penalty phase of a capital trial," **Gathers, 490 U.S. at 821** (O'CONNOR, J., dissenting), *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the [*31] proper punishment for a first-degree murder.

The present case is an example of the potential for such unfairness. The capital sentencing jury heard testimony from Payne's girlfriend that they met at church; that he was affectionate, caring, and kind to her children; that he was not an abuser of drugs or alcohol; and that it was inconsistent with his character to have committed the murders. Payne's parents testified that he was a good son, and a clinical psychologist testified that Payne was an extremely polite prisoner and suffered from a low IQ. None of this testimony was related to the circumstances of Payne's brutal crimes. In contrast, the only evidence of the impact of Payne's offenses during the sentencing phase was Nicholas' grandmother's

description -- in response to a single question -- that the child misses his mother and baby sister. Payne argues that the Eighth Amendment commands that the jury's death sentence must be set aside because the jury heard this testimony. But the testimony illustrated quite poignantly some of the harm that Payne's killing had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating [*32] evidence introduced by the defendant. The Supreme Court of Tennessee in this case obviously felt the unfairness of the rule pronounced by *Booth* when it said: "It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims." **791 S.W.2d at 19.**

In *Gathers*, as indicated above, we extended the holding of *Booth* barring victim impact evidence to the prosecutor's argument to the jury. Human nature being what it is, capable lawyers trying cases to juries try to convey to the jurors that the people involved in the underlying events are, or were, living human beings, with something to be gained or lost from the jury's verdict. Under the aegis of the Eighth Amendment, we have given the broadest latitude to the defendant to introduce relevant mitigating evidence reflecting on his individual personality, and the defendant's attorney may argue that evidence to the jury. Petitioner's [*33] attorney in this case did just that. For the reasons discussed above, we now reject the view -- expressed in *Gathers* -- that a State may not permit the prosecutor to similarly argue to the jury the human cost of the crime of which the defendant stands convicted. We reaffirm the view expressed by Justice Cardozo in **Snyder v. Massachusetts, 291 U.S. 97, 122, 78 L. Ed. 674, 54 S. Ct. 330 (1934):** "Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

[4]Payne and his *amicus* argue that despite these numerous infirmities in the rule created by *Booth* and *Gathers*, we should adhere [*34] to the doctrine of *stare decisis* and stop short of overruling those cases. *Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived

integrity of the judicial process." See Vasquez v. Hillery, 474 U.S. 254, 265-266, 88 L. Ed. 2d 598, 106 S. Ct. 617 (1986). Adhering to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right." Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406, 76 L. Ed. 815, 52 S. Ct. 443 (1932) (Brandeis, J., dissenting). Nevertheless, when governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent." Smith v. Allwright, 321 U.S. 649, 665, 88 L. Ed. 987, 64 S. Ct. 757 (1944). *Stare decisis* is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision." Helvering v. Hallock, 309 U.S. 106, 119, 84 L. Ed. 604, 60 S. Ct. 444 (1940). This is particularly true in constitutional cases, because in such cases "correction [*35] through legislative action is practically impossible." Burnet v. Coronado Oil & Gas Co., supra, at 407 (Brandeis, J., dissenting). Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved, see Swift & Co. v. Wickham, 382 U.S. 111, 116, 15 L. Ed. 2d 194, 86 S. Ct. 258 (1965); Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 50 L. Ed. 2d 550, 97 S. Ct. 582 (1977); Burnet v. Coronado Oil & Gas Co., supra, at 405-411 (Brandeis, J., dissenting); United States v. Title Ins. & Trust Co., 265 U.S. 472, 68 L. Ed. 1110, 44 S. Ct. 621 (1924); *The Genesee Chief* v. Fitzhugh, 53 U.S. 443, 12 How. 443, 458, 13 L. Ed. 1058 (1852); the opposite is true in cases such as the present one involving procedural and evidentiary rules.

[1D]Applying these general principles, the Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions. n1 *Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by Members [*36] of the Court in later decisions and have defied consistent application by the lower courts. See Gathers, 490 U.S. at 813 (O'CONNOR, J., dissenting); Mills v. Maryland, 486 U.S. at 395-396 (REHNQUIST, C. J., dissenting). See also State v. Huertas, 51 Ohio St. 3d 22, 33, 553 N.E.2d 1058, 1070 (1990) ("The fact that the majority and two dissenters in this case all interpret the opinions and footnotes in *Booth* and *Gathers* differently demonstrates the uncertainty of the law in this area") (Moyer, C. J., concurring). Reconsidering these decisions now, we conclude, for the reasons heretofore stated, that they were wrongly decided and should be, and now are, overruled. n2 We accordingly affirm the judgment of the Supreme Court of Tennessee.

- - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n1 Perez v. Campbell, 402 U.S. 637, 29 L. Ed. 2d 233, 91 S. Ct. 1704 (1971) (overruling Kesler v. Department of

Public Safety of Utah, 369 U.S. 153, 7 L. Ed. 2d 641, 82 S. Ct. 807 (1962)); Dunn v. Blumstein, 405 U.S. 330, 31 L. Ed. 2d 274, 92 S. Ct. 995 (1972) (overruling Pope v. Williams, 193 U.S. 621, 48 L. Ed. 817, 24 S. Ct. 573 (1904)); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 35 L. Ed. 2d 351, 93 S. Ct. 1001 (1973) (overruling Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 72 L. Ed. 927, 48 S. Ct. 553 (1928)); Miller v. California, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973) (overruling *Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. Attorney General of Mass., 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1966)); North Dakota Pharmacy Bd. v. Snyder's Drug Stores, Inc., 414 U.S. 156, 38 L. Ed. 2d 379, 94 S. Ct. 407 (1973) (overruling Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 73 L. Ed. 204, 49 S. Ct. 57 (1928)); Edelman v. Jordan, 415 U.S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974) (overruling in part Shapiro v. Thompson, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969)); State Dept. of Health & Rehabilitative Services of Florida v. Zarate, 407 U.S. 918, 32 L. Ed. 2d 803, 92 S. Ct. 2462 (1972); and Sterrett v. Mothers' & Children's Rights Organization, 409 U.S. 809, 34 L. Ed. 2d 70, 93 S. Ct. 68 (1972)); Taylor v. Louisiana, 419 U.S. 522, 42 L. Ed. 2d 690, 95 S. Ct. 692 (1975) (overruling in effect Hoyt v. Florida, 368 U.S. 57, 7 L. Ed. 2d 118, 82 S. Ct. 159 (1961)); Michelin Tire Corp. v. Wages, 423 U.S. 276, 46 L. Ed. 2d 495, 96 S. Ct. 535 (1976) (overruling Low v. Austin, 80 U.S. 29, 13 Wall. 29, 20 L. Ed. 517 (1872)); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976) (overruling Valentine v. Chrestensen, 316 U.S. 52, 86 L. Ed. 1262, 62 S. Ct. 920 (1942)); National League of Cities v. Usery, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976) (overruling Maryland v. Wirtz, 392 U.S. 183, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968)); New Orleans v. Dukes, 427 U.S. 297, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976) (overruling Morey v. Doud, 354 U.S. 457, 1 L. Ed. 2d 1485, 77 S. Ct. 1344 (1957)); Craig v. Boren, 429 U.S. 190, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976) (overruling Goesaert v. Cleary, 335 U.S. 464, 93 L. Ed. 163, 69 S. Ct. 198 (1948)); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977) (overruling Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, 95 L. Ed. 577, 71 S. Ct. 508 (1951)); Shaffer v. Heitner, 433 U.S. 186, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977) (overruling Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565 (1878)); Department of Revenue of Washington v. Association of Washington Stevedoring Cos., 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978) (overruling Puget Sound Stevedoring Co. v. State Tax Comm'n, 302 U.S. 90, 82 L. Ed. 68, 58 S. Ct. 77 (1937)); United States v. Scott, 437 U.S. 82, 57 L. Ed. 2d 65, 98 S. Ct. 2187 (1978) (overruling United States v. Jenkins, 420 U.S. 358, 43 L. Ed. 2d 250, 95 S. Ct. 1006 (1975)); Hughes v. Oklahoma, 441 U.S. 322,

60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979) (overruling Geer v. Connecticut, 161 U.S. 519, 40 L. Ed. 793, 16 S. Ct. 600 (1896)); United States v. Salvucci, 448 U.S. 83, 65 L. Ed. 2d 619, 100 S. Ct. 2547 (1980) (overruling Jones v. United States, 362 U.S. 257, 4 L. Ed. 2d 697, 80 S. Ct. 725 (1960)); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 69 L. Ed. 2d 884, 101 S. Ct. 2946 (1981) (overruling Heisler v. Thomas Colliery Co., 260 U.S. 245, 67 L. Ed. 237, 43 S. Ct. 83 (1922)); Illinois v. Gates, 462 U.S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983) (overruling Aguilar v. Texas, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964)); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984) (overruling in part Polston v. Missouri Fund Comm'rs, 120 U.S. 390, 30 L. Ed. 721, 7 S. Ct. 599 (1887)); *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984) (overruling Coffey v. United States, 116 U.S. 436, 29 L. Ed. 684, 6 S. Ct. 437 (1886)); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985) (overruling National League of Cities v. Usery, supra); United States v. Miller, 471 U.S. 130, 85 L. Ed. 2d 99, 105 S. Ct. 1811 (1985) (overruling in part Ex parte Bain, 121 U.S. 1, 30 L. Ed. 849, 7 S. Ct. 781 (1887)); Daniels v. Williams, 474 U.S. 327, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986) (overruling in part Parratt v. Taylor, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981)); Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986) (overruling in part Swain v. Alabama, 380 U.S. 202, 13 L. Ed. 2d 759, 85 S. Ct. 824 (1965)); Solorio v. United States, 483 U.S. 435, 97 L. Ed. 2d 364, 107 S. Ct. 2924 (1987) (overruling O'Callahan v. Parker, 395 U.S. 258, 23 L. Ed. 2d 291, 89 S. Ct. 1683 (1969)); Welch v. Texas Dept. of Highways and Public Transportation, 483 U.S. 468, 97 L. Ed. 2d 389, 107 S. Ct. 2941 (1987) (overruling in part Pardon v. Terminal Railway of Alabama Docks Dept., 377 U.S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207 (1964)); South Carolina v. Baker, 485 U.S. 505, 99 L. Ed. 2d 592, 108 S. Ct. 1355 (1988) (overruling Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 39 L. Ed. 759, 15 S. Ct. 673 (1895)); Thornburgh v. Abbott, 490 U.S. 401, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989) (overruling in part Procunier v. Martinez, 416 U.S. 396, 40 L. Ed. 2d 224, 94 S. Ct. 1800 (1974)); Alabama v. Smith, 490 U.S. 794, 104 L. Ed. 2d 865, 109 S. Ct. 2201 (1989) (overruling *Simpson* v. *Rice* (decided with *North Carolina* v. *Pearce*), 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969)); Healy v. Beer Institute, 491 U.S. 324, 105 L. Ed. 2d 275, 109 S. Ct. 2491 (1989) (overruling Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 16 L. Ed. 2d 336, 86 S. Ct. 1254 (1966)); Collins v. Youngblood, 497 U.S. 37, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990) (overruling Kring v. Missouri, 107 U.S. 221, 27 L. Ed. 506, 2 S. Ct. 443 (1883); Thompson v. Utah, 170 U.S. 343, 42 L. Ed. 1061, 18 S. Ct. 620 (1898)); California v. Acevedo, 500 U.S. 565, 111 L. Ed. 2d 619,

111 S. Ct. 1082 (1991) (overruling Arkansas v. Sanders, 442 U.S. 753, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979)).

n2 Our holding today is limited to the holdings of Booth v. Maryland, 482 U.S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987), and South Carolina v. Gathers, 490 U.S. 805, 104 L. Ed. 2d 876, 109 S. Ct. 2207 (1989), that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing. *Booth* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

- - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - -

[*37] *It is so ordered.*

CONCURBY: O'CONNOR; SCALIA; SOUTER

CONCUR: JUSTICE O'CONNOR, with whom JUSTICE WHITE and JUSTICE KENNEDY join, concurring.

In my view, a State may legitimately determine that victim impact evidence is relevant to a capital sentencing proceeding. A State may decide that the jury, before determining whether a convicted murderer should receive the death penalty, should know the full extent of the harm caused by the crime, including its impact on the victim's family and community. A State may decide also that the jury should see "a quick glimpse of the life petitioner chose to extinguish," Mills v. Maryland, 486 U.S. 367, 397, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988) (REHNQUIST, C. J., dissenting), to remind the jury that the person whose life was taken was a unique human being.

Given that victim impact evidence is potentially relevant, nothing in the Eighth Amendment commands that States treat it differently than other kinds of relevant evidence. "The Eighth Amendment stands as a shield against those practices and punishments which are either inherently cruel or which so offend the moral consensus of this society as to be deemed 'cruel and unusual.'" South Carolina v. Gathers, 490 U.S. 805, 821, 104 L. Ed. 2d 876, 109 S. Ct. 2207 (1989) [*38] (O'CONNOR, J., dissenting). Certainly there is no strong societal consensus that a jury may not take into account the loss suffered by a victim's family or that a murder victim must remain a faceless stranger at the penalty phase of a capital trial. Just the opposite is true. Most States have enacted legislation enabling judges and juries to consider victim impact evidence. *Ante*, at 821. The possibility that this evidence may in some cases be unduly inflammatory does not justify a prophylactic, constitutionally based rule that this

evidence may never be admitted. Trial courts routinely exclude evidence that is unduly inflammatory; where inflammatory evidence is improperly admitted, appellate courts carefully review the record to determine whether the error was prejudicial.

We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, "the Eighth Amendment erects no *per se* bar." *Ante*, at 827. If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may [*39] seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.

That line was not crossed in this case. The State called as a witness Mary Zvolanek, Nicholas' grandmother. Her testimony was brief. She explained that Nicholas cried for his mother and baby sister and could not understand why they did not come home. I do not doubt that the jurors were moved by this testimony -- who would not have been? But surely this brief statement did not inflame their passions more than did the facts of the crime: Charisse Christopher was stabbed 41 times with a butcher knife and bled to death; her 2-year-old daughter Lacie was killed by repeated thrusts of that same knife; and 3-year-old Nicholas, despite stab wounds that penetrated completely through his body from front to back, survived -- only to witness the brutal murders of his mother and baby sister. In light of the jury's unavoidable familiarity with the facts of Payne's vicious attack, I cannot conclude that the additional information provided by Mary Zvolanek's testimony deprived petitioner of due process.

Nor did the prosecutor's comments about Charisse and Lacie in the closing argument violate the Constitution. The jury [*40] had earlier seen a videotape of the murder scene that included the slashed and bloody corpses of Charisse and Lacie. In arguing that Payne deserved the death penalty, the prosecutor sought to remind the jury that Charisse and Lacie were more than just lifeless bodies on a videotape, that they were unique human beings. The prosecutor remarked that Charisse would never again sing a lullaby to her son and that Lacie would never attend a high school prom. In my view, these statements were permissible. "Murder is the ultimate act of depersonalization." Brief for Justice For All Political Committee et al. as *Amici Curiae* 3. It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back.

I agree with the Court that Booth v. Maryland, 482 U.S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987), and Gathers, supra, were wrongly decided. The Eighth Amendment does not prohibit a State from choosing to admit

evidence concerning a murder victim's personal characteristics or the impact of the crime on the victim's family and community. [*41] *Booth* also addressed another kind of victim impact evidence -- opinions of the victim's family about the crime, the defendant, and the appropriate sentence. As the Court notes in today's decision, we do not reach this issue as no evidence of this kind was introduced at petitioner's trial. *Ante*, at 830, n. 2. Nor do we express an opinion as to other aspects of the prosecutor's conduct. As to the victim impact evidence that was introduced, its admission did not violate the Constitution. Accordingly, I join the Court's opinion.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR and JUSTICE KENNEDY join as to Part II, concurring.

I

The Court correctly observes the injustice of requiring the exclusion of relevant aggravating evidence during capital sentencing, while requiring the admission of all relevant mitigating evidence, see, e. g., **Eddings v. Oklahoma, 455 U.S. 104, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982); Lockett v. Ohio, 438 U.S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978)** (plurality opinion). I have previously expressed my belief that the latter requirement is both wrong and, when combined with the remainder of our capital sentencing jurisprudence, unworkable. See **Walton v. Arizona, 497 U.S. 639, 671-673, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990)** (opinion concurring in part and concurring in judgment). Even if it were abandoned, however, I would still affirm the judgment here. True enough, the Eighth Amendment permits parity between mitigating and aggravating factors. But more broadly and fundamentally still, it permits the People to decide (within the limits of other constitutional guarantees) what is a crime and what constitutes aggravation and mitigation of a crime.

II

The response to JUSTICE MARSHALL's strenuous defense of the virtues of *stare decisis* can be found in the writings of JUSTICE MARSHALL himself. That doctrine, he has reminded us, "is not 'an imprisonment of reason.'" **Guardians Assn. v. Civil Service Comm'n of New York City, 463 U.S. 582, 618, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983)** (dissenting opinion) (quoting **United States v. International Boxing Club of N. Y., Inc., 348 U.S. 236, 240, 99 L. Ed. 290, 75 S. Ct. 259 (1955)** (Frankfurter, J., dissenting)). If there was ever a case that defied reason, it was **Booth v. Maryland, 482 U.S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987),** imposing a constitutional rule that had absolutely no basis in constitutional text, in historical practice, [*43] or in logic. JUSTICE MARSHALL has also explained that "the jurist concerned with public confidence in and acceptance of the judicial system might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to

the public sense of justice as it is operates, so far as it is known, to diminish respect for the courts and for law itself." **Flood v. Kuhn, 407 U.S. 258, 293, n. 4, 32 L. Ed. 2d 728, 92 S. Ct. 2099 (1972)** (dissenting opinion) (quoting Szanton, Stare Decisis; A Dissenting View, 10 Hastings L. J. 394, 397 (1959)) (internal quotation marks omitted). *Booth*'s stunning *ipse dixit*, that a crime's unanticipated consequences must be deemed "irrelevant" to the sentence, **482 U.S. at 503,** conflicts with a public sense of justice keen enough that it has found voice in a nationwide "victims' rights" movement.

Today, however, JUSTICE MARSHALL demands of us some "special justification" -- *beyond* the mere conviction that the rule of *Booth* significantly harms our criminal justice system and is egregiously wrong -- before we can be absolved of exercising "power, not reason." *Post*, at 844. [*44] I do not think that is fair. In fact, quite to the contrary, what would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes.

It seems to me difficult for those who were in the majority in *Booth* to hold themselves forth as ardent apostles of *stare decisis*. That doctrine, to the extent it rests upon anything more than administrative convenience, is merely the application to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts. It is hard to have a genuine regard for *stare decisis* without honoring that more general principle as well. A decision of this Court which, while not overruling a prior holding, nonetheless announces a novel rule, contrary to long and unchallenged practice, and pronounces it to be the Law of the Land -- such a decision, no less than an explicit overruling, should be approached with great caution. It was, I suggest, *Booth*, and not today's decision, that compromised [*45] the fundamental values underlying the doctrine of *stare decisis*.

JUSTICE SOUTER, with whom JUSTICE KENNEDY joins, concurring.

I join the Court's opinion addressing two categories of facts excluded from consideration at capital sentencing proceedings by **Booth v. Maryland, 482 U.S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987),** and **South Carolina v. Gathers, 490 U.S. 805, 104 L. Ed. 2d 876, 109 S. Ct. 2207 (1989):** information revealing the individuality of the victim and the impact of the crime on the victim's survivors. *n1* As to these two categories, I believe *Booth* and *Gathers* were wrongly decided.

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n1 This case presents no challenge to the Court's holding in *Booth v. Maryland* that a sentencing authority should not

receive a third category of information concerning a victim's family members' characterization of and opinions about the crime, the defendant, and the appropriate sentence. See *ante*, at 830, n. 2.

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[*46] To my knowledge, our legal tradition has never included a general rule that evidence of a crime's effects on the victim and others is, standing alone, irrelevant to a sentencing determination of the defendant's culpability. Indeed, as the Court's opinion today, see *ante*, at 819-821, and dissents in **Booth, supra, at 519-520** (opinion of SCALIA, J.) and **Gathers, supra, at 817-820** (opinion of O'CONNOR, J.), make clear, criminal conduct has traditionally been categorized and penalized differently according to consequences not specifically intended, but determined in part by conditions unknown to a defendant when he acted. The majority opinion in **Booth, supra, at 502-503,** nonetheless characterized the consideration in a capital sentencing proceeding of a victim's individuality and the consequences of his death on his survivors as "irrelevant" and productive of "arbitrary and capricious" results, insofar as that would allow the sentencing authority to take account of information not specifically contemplated by the defendant prior to his ultimate criminal decision. This condemnation comprehends two quite separate elements. As [*47] to one such element, the condemnation is merited but insufficient to justify the rule in *Booth*, and as to the other it is mistaken.

Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. Cf. **Penry v. Lynaugh, 492 U.S. 302, 319-328, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989)** (capital sentence should be imposed as a "'reasoned *moral* response'") (quoting **California v. Brown, 479 U.S. 538, 545, 93 L. Ed. 2d 934, 107 S. Ct. 837 (1987)** (O'CONNOR, J., concurring)); **Gholson v. Estelle, 675 F.2d 734, 738 (CA5 1982)** ("If a person is to be executed, it should be as a result of a decision based on reason and reliable evidence"). But this is just as true when the defendant knew of the specific facts as when he was ignorant of their details, and in each case there is a traditional guard against the inflammatory risk, in the trial judge's authority and responsibility to control the proceedings consistently with due process, on which ground defendants may object and, if necessary, appeal. See **Darden v. Wainwright, 477 U.S. 168, 179-183, 91 L. Ed. 2d 144, 106 S. Ct. 2464 (1986)** [*48] (due process standard of fundamental fairness governs argument of prosecutor at sentencing); **United States v. Serhant, 740 F.2d 548, 551-552 (CA7 1984)** (applying due process to purportedly "inflammatory" victim impact statements); see also **Lesko v. Lehman, 925 F.2d 1527, 1545-1547 (CA3 1991); Coleman v. Saffle, 869 F.2d 1377, 1394-1396 (CA10**

1989), cert. denied, 494 U.S. 1080, 108 L. Ed. 2d 964, 110 S. Ct. 1835 (1990); Rushing v. Butler, 868 F.2d 800, 806-807 (CA5 1989). With the command of due process before us, this Court and the other courts of the state and federal systems will perform the "duty to search for constitutional error with painstaking care," an obligation "never more exacting than it is in a capital case." Burger v. Kemp, 483 U.S. 776, 785, 97 L. Ed. 2d 638, 107 S. Ct. 3114 (1987).

Booth, supra, n2 nonetheless goes further and imposes a blanket prohibition on consideration of evidence of the victim's individuality and the consequential harm to survivors as irrelevant to the choice between imprisonment and execution, except when such evidence goes to the "circumstances of the crime," Id., at 502. [*49] and probably then only when the facts in question were known to the defendant and relevant to his decision to kill, Id., at 505. This prohibition rests on the belief that consideration of such details about the victim and survivors as may have been outside the defendant's knowledge is inconsistent with the sentencing jury's Eighth Amendment duty "in the unique circumstance of a capital sentencing hearing . . . to focus on the defendant as a 'uniquely individual human being.'" Id., at 504 (quoting Woodson v. North Carolina, 428 U.S. 280, 304, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976) (plurality opinion of Stewart, Powell, and STEVENS, JJ.)). The assumption made is that the obligation to consider the defendant's uniqueness limits the data about a crime's impact, on which a defendant's moral guilt may be calculated, to the facts he specifically knew and presumably considered. His uniqueness, in other words, is defined by the specifics of his knowledge and the reasoning that is thought to follow from it.

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n2 Because this discussion goes only to the underlying substantive rule in question, for brevity I will confine most references to *Booth* alone.

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[*50] To hold, however, that in setting the appropriate sentence a defendant must be considered in his uniqueness is not to require that only unique qualities be considered. While a defendant's anticipation of specific consequences to the victims of his intended act is relevant to sentencing, such detailed foreknowledge does not exhaust the category of morally relevant fact. One such fact that is known to all murderers and relevant to the blameworthiness of each one was identified by the *Booth* majority itself when it barred the sentencing authority in capital cases from considering "the full range of foreseeable consequences of a defendant's actions." 482 U.S. at 504. Murder has foreseeable consequences. When it happens, it is always to distinct individuals, and, after

it happens, other victims are left behind. Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, "survivors," who will suffer harms and deprivations from the victim's death. Just as defendants know that they are [*51] not faceless human ciphers, they know that their victims are not valueless fungibles; and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents. Thus, when a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt. The fact that the defendant may not know the details of a victim's life and characteristics, or the exact identities and needs of those who may survive, should not in any way obscure the further facts that death is always to a "unique" individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable.

That foreseeability of the killing's consequences imbues them with direct moral relevance, cf. **Penry v. Lynaugh, supra, at 328** (death penalty should be "'reasoned moral response'"), and evidence of the specific harm caused when a homicidal risk is realized is nothing more than evidence [*52] of the risk that the defendant originally chose to run despite the kinds of consequences that were obviously foreseeable. It is morally both defensible and appropriate to consider such evidence when penalizing a murderer, like other criminals, in light of common knowledge and the moral responsibility that such knowledge entails. Any failure to take account of a victim's individuality and the effects of his death upon close survivors would thus more appropriately be called an act of lenity than their consideration an invitation to arbitrary sentencing. Indeed, given a defendant's option to introduce relevant evidence in mitigation, see, e. g., **Eddings v. Oklahoma, 455 U.S. 104, 113-114, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982); Lockett v. Ohio, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978),** sentencing without such evidence of victim impact may be seen as a significantly imbalanced process. See **Mills v. Maryland, 486 U.S. 367, 397, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988)** (REHNQUIST, C. J., dissenting).

I so view the relevance of the two categories of victim impact evidence at issue here, and I fully agree with the majority's conclusion, and the opinions expressed by the dissenters in *Booth* and [*53] *Gathers*, that nothing in the Eighth Amendment's condemnation of cruel and unusual punishment would require that evidence to be excluded. See *ante*, at 827 ("If the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar"); **Booth, supra, at**

515-516 (WHITE, J., dissenting) ("nothing cruel or unusual or otherwise unconstitutional about the legislature's decision to use victim impact statements in capital sentencing hearings"); **Gathers, 490 U.S. at 816-821** (O'CONNOR, J., dissenting); **Id., at 823-825** (SCALIA, J., dissenting).

I do not, however, rest my decision to overrule wholly on the constitutional error that I see in the cases in question. I must rely as well on my further view that *Booth* sets an unworkable standard of constitutional relevance that threatens, on its own terms, to produce such arbitrary consequences and uncertainty of application as virtually to guarantee a result far diminished from the case's promise of appropriately individualized sentencing for capital defendants. **482 U.S. at 502.** [*54] These conclusions will be seen to result from the interaction of three facts. First, although *Booth* was prompted by the introduction of a systematically prepared "victim impact statement" at the sentencing phase of the trial, *Booth*'s restriction of relevant facts to what the defendant knew and considered in deciding to kill applies to any evidence, however derived or presented. Second, details of which the defendant was unaware, about the victim and survivors, will customarily be disclosed by the evidence introduced at the guilt phase of the trial. Third, the jury that determines guilt will usually determine, or make recommendations about, the imposition of capital punishment.

A hypothetical case will illustrate these facts and raise what I view as the serious practical problems with application of the *Booth* standard. Assume that a minister, unidentified as such and wearing no clerical collar, walks down a street to his church office on a brief errand, while his wife and adolescent daughter wait for him in a parked car. He is robbed and killed by a stranger, and his survivors witness his death. What are the circumstances of the crime that can be considered at the sentencing [*55] phase under *Booth*? The defendant did not know his victim was a minister, or that he had a wife and child, let alone that they were watching. Under *Booth*, these facts were irrelevant to his decision to kill, and they should be barred from consideration at sentencing. Yet evidence of them will surely be admitted at the guilt phase of the trial. The widow will testify to what she saw, and, in so doing, she will not be asked to pretend that she was a mere bystander. She could not succeed at that if she tried. The daughter may well testify too. The jury will not be kept from knowing that the victim was a minister, with a wife and child, on an errand to his church. This is so not only because the widow will not try to deceive the jury about her relationship, but also because the usual standards of trial relevance afford factfinders enough information about surrounding circumstances to let them make sense of the narrowly material facts of the crime itself. No one claims that jurors in a capital case should be deprived of such common contextual evidence, even though the defendant knew nothing about the errand, the victim's occupation, or his family. And yet, if these facts are not kept [*56] from the jury at the guilt stage, they will be in the

jurors' minds at the sentencing stage."

Booth thus raises a dilemma with very practical consequences. If we were to require the rules of guilt-phase evidence to be changed to guarantee the full effect of *Booth*'s promise to exclude consideration of specific facts unknown to the defendant and thus supposedly without significance in morally evaluating his decision to kill, we would seriously reduce the comprehensibility of most trials by depriving jurors of those details of context that allow them to understand what is being described. If, on the other hand, we are to leave the rules of trial evidence alone, *Booth*'s objective will not be attained without requiring a separate sentencing jury to be empaneled. This would be a major imposition on the States, however, and I suppose that no one would seriously consider adding such a further requirement.

But, even if *Booth* were extended one way or the other to exclude completely from the sentencing proceeding all facts about the crime's victims not known by the defendant, the case would be vulnerable to the further charge that it would lead to arbitrary sentencing results. [*57] In the preceding hypothetical, *Booth* would require that all evidence about the victim's family, including its very existence, be excluded from sentencing consideration because the defendant did not know of it when he killed the victim. Yet, if the victim's daughter had screamed "Daddy, look out," as the defendant approached the victim with drawn gun, then the evidence of at least the daughter's survivorship would be admissible even under a strict reading of *Booth*, because the defendant, prior to killing, had been made aware of the daughter's existence, which therefore became relevant in evaluating the defendant's decision to kill. Resting a decision about the admission of impact evidence on such a fortuity is arbitrary.

Thus, the status quo is unsatisfactory, and the question is whether the case that has produced it should be overruled. In this instance, as in any other, overruling a precedent of this Court is a matter of no small import, for "the doctrine of *stare decisis* is of fundamental importance to the rule of law." **Welch v. Texas Dept. of Highways and Public Transportation, 483 U.S. 468, 494, 97 L. Ed. 2d 389, 107 S. Ct. 2941 (1987).** To be sure *stare decisis* is not [*58] an "inexorable command," **Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405, 76 L. Ed. 815, 52 S. Ct. 443 (1932)** (Brandeis, J., dissenting); and our "considered practice [has] not [been] to apply *stare decisis* as rigidly in constitutional [cases] as in nonconstitutional cases." **Glidden Co. v. Zdanok, 370 U.S. 530, 543, 8 L. Ed. 2d 671, 82 S. Ct. 1459 (1962).** See **Burnet, supra, at 405-407; Patterson v. McLean Credit Union, 491 U.S. 164, 172-173, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989).** But, even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some "special justification." **Arizona v. Rumsey, 467 U.S. 203, 212, 81 L. Ed. 2d 164,**

The Court has a special justification in this case. *Booth* promises more than it can deliver, given the unresolved tension between common evidentiary standards at the guilt phase and *Booth*'s promise of a sentencing determination free from the consideration of facts unknown to the defendant and irrelevant to his decision to kill. An extension of the case to guarantee a sentencing authority free from the influence of information extraneous under [*59] *Booth* would be either an unworkable or a costly extension of an erroneous principle and would itself create a risk of arbitrary results. There is only one other course open to us. We can recede from the erroneous holding that created the tension and extended the false promise, and there is precedent in our *stare decisis* jurisprudence for doing just this. In prior cases, when this Court has confronted a wrongly decided, unworkable precedent calling for some further action by the Court, we have chosen not to compound the original error, but to overrule the precedent. See **Swift & Co. v. Wickham, 382 U.S. 111, 15 L. Ed. 2d 194, 86 S. Ct. 258 (1965);** n3 **Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977);** n4 see also **Patterson v. McLean Credit Union, supra, at 173.** Following this course here has itself the support not only of precedent but of practical sense as well. Therefore, I join the Court in its partial overruling of *Booth* and *Gathers*.

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n3 In *Swift & Co. v. Wickham*, the Court overruled **Kesler v. Department of Public Safety of Utah, 369 U.S. 153, 7 L. Ed. 2d 641, 82 S. Ct. 807 (1962).** The issue presented in both *Swift* and *Kesler* concerned the application of the three-judge district court statute, **28 U. S. C. § 2281** (1970 ed.), in cases of alleged state statutory pre-emption by federal law. The Court had held in *Kesler* that "§ 2281 comes into play only when the Supremacy Clause of the Federal Constitution is immediately drawn in question, but not when issues of federal or state statutory construction must first be decided even though the Supremacy Clause may ultimately be implicated." **382 U.S. at 115.**

Three years later in *Swift & Co. v. Wickham* a majority of the Court disagreed with the *Kesler* analysis of the question, finding it inconsistent with the statute and earlier precedents of this **Court. 382 U.S. at 122** ("The upshot of these decisions seems abundantly clear: Supremacy Clause cases are not within the purview of § 2281."). The Court concluded that there were

"two possible interpretations of § 2281 [that] would provide a more practical rule for three-judge court jurisdiction. The first is that *Kesler* might be extended to hold, as some of its language might be thought to indicate, that *all* suits to enjoin the enforcement of a state statute, whatever the federal

ground, must be channeled through three-judge courts. The second is that no such suits resting solely on 'supremacy' grounds fall within the statute." Id., at 125 (footnote omitted).

Rather than extend the incorrectly decided opinion in *Kesler*, the Court decided to overrule it. 382 U.S. at 126-127.

n4 In *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, the Court overruled United States v. Arnold, Schwinn & Co., 388 U.S. 365, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967), which had held that "under the Sherman Act, it is *[per se]* unreasonable . . . for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." Id., at 379. The decision distinguished between restrictions on retailers based on whether the underlying transaction was a sale, in which case the Court applied a *per se* ban, or not a sale, in which case the arrangement would be subject to a "rule of reason" analysis. In *Continental T. V., Inc.*, the Court reconsidered this *per se* rule in light of our traditional reliance on a "rule of reason" analysis for § 1 claims under the Sherman Act and the "continuing controversy and confusion, both in the scholarly journals and in the federal courts" caused by the sale/nonsale distinction drawn by the Court in Schwinn, 433 U.S., at 47-56. The Court proceeded to reexamination and concluded "that the distinction drawn in *Schwinn* between sale and nonsale transactions is not sufficient to justify the application of a *per se* rule in one situation and a rule of reason in the other. The question remains whether the *per se* rule stated in *Schwinn* should be expanded to include nonsale transactions or abandoned in favor of a return to the rule of reason." Id., at 57. The Court found "no persuasive support for expanding the *per se* rule," and *Schwinn* was overruled. 433 U.S. at 57.

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DISSENTBY: MARSHALL; STEVENS

DISSENT: JUSTICE [*60] MARSHALL, with whom JUSTICE BLACKMUN joins, dissenting.

Power, not reason, is the new currency of this Court's decisionmaking. Four Terms ago, a five-Justice majority of this Court held that "victim impact" evidence of the type at issue in this case could not constitutionally be introduced during the penalty phase of a capital trial. Booth v. Maryland, 482 U.S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987). By another 5-4 vote, a majority of this Court rebuffed an attack upon this ruling just two Terms ago. South Carolina v. Gathers, 490 U.S. 805, 104 L. Ed. 2d 876, 109 S. Ct. 2207 (1989). Nevertheless, having expressly invited respondent to renew the attack, 498 U.S. 1076 (1991), today's majority overrules

Booth and *Gathers* and credits the dissenting views expressed in those cases. Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did.

In dispatching *Booth* and *Gathers* to their graves, today's majority ominously suggests that an even more extensive upheaval of this Court's precedents may be in store. Renouncing this Court's historical commitment to a conception of "the [*61] judiciary as a source of impersonal and reasoned judgments," **Moragne v. States Marine Lines, 398 U.S. 375, 403, 26 L. Ed. 2d 339, 90 S. Ct. 1772 (1970),** the majority declares itself free to discard any principle of constitutional liberty which was recognized or reaffirmed over the dissenting votes of four Justices and with which five or more Justices *now* disagree. The implications of this radical new exception to the doctrine of *stare decisis* are staggering. The majority today sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration, thereby inviting the very type of open defiance of our precedents that the majority rewards in this case. Because I believe that this Court owes more to its constitutional precedents in general and to *Booth* and *Gathers* in particular, I dissent.

I

Speaking for the Court as then constituted, Justice Powell and Justice Brennan set out the rationale for excluding victim-impact evidence from the sentencing proceedings in a capital case. See **Booth v. Maryland, supra, at 504-509; South Carolina v. Gathers, supra, at 810-811.** As the majorities in [*62] *Booth* and *Gathers* recognized, the core principle of this Court's capital jurisprudence is that the sentence of death must reflect an "'*individualized* determination'" of the defendant's "'personal responsibility and moral guilt'" and must be based upon factors that channel the jury's discretion "'so as to minimize the risk of wholly arbitrary and capricious action.'" **Booth v. Maryland, supra, at 502,** quoting **Zant v. Stephens, 462 U.S. 862, 879, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983); Enmund v. Florida, 458 U.S. 782, 801, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982),** and **Gregg v. Georgia, 428 U.S. 153, 189, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976)** (joint opinion of Stewart, Powell, and STEVENS, JJ.); accord, **South Carolina v. Gathers, supra, at 810.** The State's introduction of victim-impact evidence, Justice Powell and Justice Brennan explained, violates this fundamental principle. Where, as is ordinarily the case, the defendant was unaware of the personal circumstances of his victim, admitting evidence of the victim's character and the impact of the murder upon the victim's family predicates the sentencing determination on "factors . . . wholly [*63] unrelated to the blameworthiness of [the] particular defendant." **Booth v. Maryland, supra, at 504; South Carolina v. Gathers, supra, at 810.** And even where the defendant was in a position to foresee the likely impact of his conduct, admission

of victim-impact evidence creates an unacceptable risk of sentencing arbitrariness. As Justice Powell explained in *Booth*, the probative value of such evidence is always outweighed by its prejudicial effect because of its inherent capacity to draw the jury's attention away from the character of the defendant and the circumstances of the crime to such illicit considerations as the eloquence with which family members express their grief and the status of the victim in the community. See **Booth v. Maryland, supra, at 505-507, and n. 8; South Carolina v. Gathers, supra, at 810-811.** I continue to find these considerations wholly persuasive, and I see no purpose in trying to improve upon Justice Powell's and Justice Brennan's exposition of them.

There is nothing new in the majority's discussion of the supposed deficiencies in *Booth* and [*64] *Gathers*. Every one of the arguments made by the majority can be found in the dissenting opinions filed in those two cases, and, as I show in the margin, each argument was convincingly answered by Justice Powell and Justice Brennan. n1

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n1 The majority's primary argument is that punishment in criminal law is frequently based on an "assessment of [the] harm caused by the defendant as a result of the crime charged." *Ante*, at 819. See also **Booth v. Maryland, 482 U.S. 496, 516, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987)** (WHITE, J., dissenting); **Id., at 519-520** (SCALIA, J., dissenting); **South Carolina v. Gathers, 490 U.S. 805, 818-819, 104 L. Ed. 2d 876, 109 S. Ct. 2207 (1989)** (O'CONNOR, J., dissenting). Nothing in *Booth* or *Gathers*, however, conflicts with this unremarkable observation. These cases stand merely for the proposition that the State may not put on evidence of one particular species of harm -- namely, that associated with the victim's personal characteristics independent of the circumstances of the offense -- in the course of *a capital murder proceeding*. See **Booth v. Maryland, supra, at 507, n. 10** (emphasizing that decision does not bar reliance on victim-impact evidence in capital sentencing so long as such evidence "relate[s] directly to the circumstances of the crime"); **Id., at 509, n. 12** (emphasizing that decision does not bar reliance on victim-impact evidence in sentencing for noncapital crimes). It may be the case that such a rule departs from the latitude of sentencers in criminal law generally to "take into consideration the harm done by the defendant." *Ante*, at 825. But as the *Booth* Court pointed out, because this Court's capital-sentencing jurisprudence is founded on the premise that "death is a 'punishment different from all other sanctions,'" it is completely unavailing to attempt to infer from sentencing considerations in noncapital settings the proper treatment of any particular sentencing issue in a capital case. **482 U.S., at 509, n. 12,** quoting **Woodson v. North Carolina, 428 U.S. 280, 303-304, 305, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976)** (opinion of Stewart, Powell, and STEVENS, JJ.).

The majority also disclaims Justice Powell's concern with the inherently prejudicial quality of victim-impact evidence. "The mere fact that for tactical reasons it might not be prudent for the defense to rebut victim impact evidence," the majority protests, "makes the case no different than others in which a party is faced with this sort of a dilemma." *Ante*, at 823. See also **Booth v. Maryland, supra, at 518** (WHITE, J., dissenting). Unsurprisingly, this tautology is completely unresponsive to Justice Powell's argument. The *Booth* Court established a rule excluding introduction of victim-impact evidence not merely because it is difficult to rebut -- a feature of victim-impact evidence that may be "no different" from that of many varieties of relevant, legitimate evidence -- but because the effect of this evidence in the sentencing proceeding is *unfairly prejudicial*: "The prospect of a 'mini-trial' on the victim's character is more than simply unappealing; it could well distract the sentencing jury from its constitutionally required task -- determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." **482 U.S. at 507.** The law is replete with *per se* prohibitions of types of evidence the probative effect of which is generally outweighed by its unfair prejudice. See, *e. g.*, **Fed. Rules Evid. 404, 407-412.** There is nothing anomalous in the notion that the Eighth Amendment would similarly exclude evidence that has an undue capacity to undermine the regime of individualized sentencing that our capital jurisprudence demands.

Finally, the majority contends that the exclusion of victim-impact evidence "deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder." *Ante*, at 825. The majority's recycled contention, see **Booth, supra, at 517** (WHITE, J., dissenting); **Id., at 520** (SCALIA, J., dissenting); **Gathers, supra, at 817-818** (O'CONNOR, J., dissenting), begs the question. Before it is possible to conclude that the exclusion of victim-impact evidence prevents the State from making its case or the jury from considering relevant evidence, it is necessary to determine whether victim-impact evidence is consistent with the substantive standards that define the scope of permissible sentencing determinations under the Eighth Amendment. The majority offers no persuasive answer to Justice Powell and Justice Brennan's conclusion that victim-impact evidence is frequently *irrelevant* to any permissible sentencing consideration and that such evidence risks exerting *illegitimate* "moral force" by directing the jury's attention on illicit considerations such as the victim's standing in the community.

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[*651] But contrary to the impression that one might receive

Both reading the majority's lengthy rehearing of the issues addressed in *Booth* and *Gathers*, the outcome of this case does not turn simply on who -- the *Booth* and *Gathers* majorities or the *Booth* and *Gathers* dissenters -- had the better of the argument. Justice Powell and Justice Brennan's position carried the day in those cases and became the law of the land. The real question, then, is whether today's majority has come forward with the type of extraordinary showing that this Court has historically demanded before overruling one of its precedents. In my view, the majority clearly has not made any such showing. Indeed, the striking feature of the majority's opinion is its radical assertion that it need not even try.

II

The overruling of one of this Court's precedents ought to be a matter of great moment and consequence. Although the doctrine of *stare decisis* is not an "inexorable command," **Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405, 76 L. Ed. 815, 52 S. Ct. 443 (1932)** (Brandeis, J., dissenting), this Court has repeatedly stressed that fidelity to precedent is fundamental to "a society governed by [*65] the rule of law," **Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 420, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983).** See generally **Patterson v. McLean Credit Union, 491 U.S. 164, 172, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989)** ("It is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.' The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton)"); **Appeal of Concerned Corporators of Portsmouth Savings Bank, 129 N.H. 183, 217, 525 A.2d 671, 701 (1987)** (Souter, J., dissenting) ("*Stare decisis* . . . 'is essential if case-by-case judicial decision-making is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results,'" quoting **Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 786-787, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986)** (WHITE, J., dissenting)).

Consequently, this [*67] Court has never departed from precedent without "special justification." **Arizona v. Rumsey, 467 U.S. 203, 212, 81 L. Ed. 2d 164, 104 S. Ct. 3305 (1984)**. Such justifications include the advent of "subsequent changes or development in the law" that undermine a decision's rationale, **Patterson v. McLean Credit Union, supra, at 173**; the need "to bring [a decision] into agreement with experience and with facts newly ascertained," **Burnet v. Coronado Oil & Gas Co., supra, at 412** (Brandeis, J., dissenting); and a showing that a particular precedent has become a "detriment to coherence and consistency in the

law," Patterson v. McLean Credit Union, supra, at 173.

The majority cannot seriously claim that *any* of these traditional bases for overruling a precedent applies to *Booth* or *Gathers*. The majority does not suggest that the legal rationale of these decisions has been undercut by changes or developments in doctrine during the last two years. Nor does the majority claim that experience over that period of time has discredited the principle that "any decision to impose the death sentence be, and appear to be, [*68] based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977) (plurality opinion), the larger postulate of political morality on which *Booth* and *Gathers* rest.

The majority does assert that *Booth* and *Gathers* "have defied consistent application by the lower courts," *ante*, at 830, but the evidence that the majority proffers is so feeble that the majority cannot sincerely expect anyone to believe this claim. To support its contention, the majority points to JUSTICE O'CONNOR's dissent in *Gathers*, which noted a division among lower courts over whether *Booth* prohibited prosecutorial arguments relating to the victim's personal characteristics. See 490 U.S. at 913. That, of course, was the issue expressly considered and resolved in *Gathers*. The majority also cites THE CHIEF JUSTICE's dissent in Mills v. Maryland, 486 U.S. 367, 395-398, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988). That opinion does not contain a *single word* about any supposed "[in]consistent application" of *Booth* in the lower courts. Finally, the majority refers to a divided Ohio Supreme Court decision disposing of an issue concerning [*69] victim-impact evidence. See State v. Huertas, 51 Ohio St. 3d 22, 553 N.E.2d 1058 (1990), cert. dism'd as improvidently granted, 498 U.S. 336, 111 S. Ct. 807, 112 L. Ed. 2d 837 (1991). Obviously, if a division among the members of a single lower court in a single case were sufficient to demonstrate that a particular precedent was a "detriment to coherence and consistency in the law," Patterson v. McLean Credit Union, supra, at 173, there would hardly be a decision in United States Reports that we would not be obliged to reconsider.

It takes little real detective work to discern just what *has* changed since this Court decided *Booth* and *Gathers*: this Court's own personnel. Indeed, the majority candidly explains why this particular contingency, which until now has been almost universally understood *not* to be sufficient to warrant overruling a precedent, see, e. g., Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Assn., 450 U.S. 147, 150, 67 L. Ed. 2d 132, 101 S. Ct. 1032 (1981) (STEVENS, J., concurring); Mitchell v. W. T. Grant Co., 416 U.S. 600, 636, 40 L. Ed. 2d 406, 94 S. Ct. 1895 (1974) (Stewart, J., dissenting); Mapp v. Ohio, 367 U.S. 643, 677, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961) [*70] (Harlan, J., dissenting); but see South Carolina v. Gathers, supra, at 824 (SCALIA, J., dissenting) *is* sufficient

to justify overruling *Booth* and *Gathers*. "Considerations in favor of *stare decisis* are at their acme," the majority explains, "in cases involving property and contract rights, where reliance interests are involved[;] the opposite is true in cases such as the present one involving procedural and evidentiary rules." *Ante*, at 828 (citations omitted). In addition, the majority points out, "*Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents" and thereafter were "questioned by Members of the Court." *Ante*, at 828-829. Taken together, these considerations make it legitimate, in the majority's view, to elevate the position of the *Booth* and *Gathers* dissenters into the law of the land.

This truncation of the Court's duty to stand by its own precedents is astonishing. By limiting full protection of the doctrine of *stare decisis* to "cases involving property and contract rights," *ante*, at 828, the majority sends a clear signal that essentially *all* decisions implementing the personal [*71] liberties protected by the Bill of Rights and the Fourteenth Amendment are open to reexamination. Taking into account the majority's additional criterion for overruling -- that a case either was decided or reaffirmed by a 5-4 margin "over spirited dissent," *ante*, at 829 -- the continued vitality of literally scores of decisions must be understood to depend on nothing more than the proclivities of the individuals who *now* comprise a majority of this Court. See, *e. g.*, **Metro Broadcasting v. FCC, 497 U.S. 547, 111 L. Ed. 2d 445, 110 S. Ct. 2997 (1990)** (authority of Federal government to set aside broadcast licenses for minority applicants); **Grady v. Corbin, 495 U.S. 508, 109 L. Ed. 2d 548, 110 S. Ct. 2084 (1990)** (right under Double Jeopardy Clause not to be subjected twice to prosecution for same criminal conduct); **Mills v. Maryland, supra** (Eighth Amendment right to jury instructions that do not preclude consideration of nonunanimous mitigating factors in capital sentencing); **United States v. Paradise, 480 U.S. 149, 94 L. Ed. 2d 203, 107 S. Ct. 1053 (1987)** (right to promotions as remedy for racial discrimination in government hiring); **Ford v. Wainwright, 477 U.S. 399, 91 L. Ed. 2d 335, 106 S. Ct. 2595 (1986)** (Eighth [*72] Amendment right not to be executed if insane); **Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986)** (reaffirming right to abortion recognized in **Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973)**); **Aguilar v. Felton, 473 U.S. 402, 87 L. Ed. 2d 290, 105 S. Ct. 3232 (1985)** (Establishment Clause bar on governmental financial assistance to parochial schools). n2

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n2 Based on the majority's new criteria for overruling, these decisions, too, must be included on the "endangered precedents" list: **Rutan v. Republican Party of Illinois, 497 U.S. 62, 111 L. Ed. 2d 52, 110 S. Ct. 2729 (1990)** (First Amendment right not to be denied public employment on the

basis of party affiliation); **Ford v. Attorney Registration and Disciplinary Commin of Ill., 496 U.S. 91, 110 L. Ed. 2d 83, 110 S. Ct. 2281 (1990)** (First Amendment right to advertise legal specialization); **Zinermon v. Burch, 494 U.S. 113, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990)** (due process right to procedural safeguards aimed at assuring voluntariness of decision to commit oneself to mental hospital); **James v. Illinois, 493 U.S. 307, 107 L. Ed. 2d 676, 110 S. Ct. 648 (1990)** (Fourth Amendment right to exclusion of illegally obtained evidence introduced for impeachment of defense witness); **Rankin v. McPherson, 483 U.S. 378, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987)** (First Amendment right of public employee to express views on matter of public importance); **Rock v. Arkansas, 483 U.S. 44, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987)** (Fifth Amendment and Sixth Amendment right of criminal defendant to provide hypnotically refreshed testimony on his own behalf); **Gray v. Mississippi, 481 U.S. 648, 95 L. Ed. 2d 622, 107 S. Ct. 2045 (1987)** (rejecting applicability of harmless error analysis to Eighth Amendment right not to be sentenced to death by "death qualified" jury); **Maine v. Moulton, 474 U.S. 159, 88 L. Ed. 2d 481, 106 S. Ct. 477 (1985)** (Sixth Amendment right to counsel violated by introduction of statements made to government informant-codefendant in course of preparing defense strategy); **Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985)** (rejecting theory that Tenth Amendment provides immunity to States from federal regulation); **Pulliam v. Allen, 466 U.S. 522, 80 L. Ed. 2d 565, 104 S. Ct. 1970 (1984)** (right to obtain injunctive relief from constitutional violations committed by judicial officials).

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[*73] In my view, this impoverished conception of *stare decisis* cannot possibly be reconciled with the values that inform the proper judicial function. Contrary to what the majority suggests, *stare decisis* is important not merely because individuals rely on precedent to structure their commercial activity but because fidelity to precedent is part and parcel of a conception of "the judiciary as a source of impersonal and reasoned judgments." **Moragne v. States Marine Lines, 398 U.S. at 403.** Indeed, this function of *stare decisis* is in many respects even more critical in adjudication involving constitutional liberties than in adjudication involving commercial entitlements. Because enforcement of the Bill of Rights and the Fourteenth Amendment frequently requires this Court to rein in the forces of democratic politics, this Court can legitimately lay claim to compliance with its directives only if the public understands the Court to be implementing "principles . . . founded in the law rather than in the proclivities of individuals." **Vasquez v. Hillery, 474 U.S. 254, 265, 88 L. Ed. 2d 598, 106 S. Ct. 617 (1986).** n3 Thus, as JUSTICE STEVENS has explained, the "strong [*74] presumption of validity" to which "recently decided cases" are entitled "is an

essential thread in the mantle of protection that the law affords the individual. . . . It is the unpopular or beleaguered individual -- not the man in power -- who has the greatest stake in the integrity of the law." **Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Assn., 450 U.S. at 153-154** (concurring opinion).

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n3 It does not answer this concern to suggest that Justices owe fidelity to the text of the Constitution rather than to the case law of this Court interpreting the Constitution. See, *e. g.*, **South Carolina v. Gathers, 490 U.S. at 825** (SCALIA, J., dissenting). The text of the Constitution is rarely so plain as to be self-executing; invariably, this Court must develop mediating principles and doctrines in order to bring the text of constitutional provisions to bear on particular facts. Thus, to rebut the charge of personal lawmaking, Justices who would discard the mediating principles embodied in precedent must do more than state that they are following the "text" of the Constitution; they must explain why they are entitled to substitute *their* mediating principles for those that are already settled in the law. And such an explanation will be sufficient to legitimize the departure from precedent only if it measures up to the extraordinary standard necessary to justify overruling one of this Court's precedents. See generally Note, **103 Harv. L. Rev. 1344, 1351-1354 (1990)**.

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[*75] Carried to its logical conclusion, the majority's debilitated conception of *stare decisis* would destroy the Court's very capacity to resolve authoritatively the abiding conflicts between those with power and those without. If this Court shows so little respect for its own precedents, it can hardly expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind. See **Mitchell v. W. T. Grant Co., 416 U.S. at 634** (Stewart, J., dissenting). By signaling its willingness to give fresh consideration to any constitutional liberty recognized by a 5-4 vote "over spirited dissent," *ante*, at 829, the majority invites state actors to renew the very policies deemed unconstitutional in the hope that this Court may now reverse course, even if it has only recently reaffirmed the constitutional liberty in question.

Indeed, the majority's disposition of this case nicely illustrates the rewards of such a strategy of defiance. The Tennessee Supreme Court did nothing in this case to disguise its contempt for this Court's decisions in *Booth* and *Gathers*. Summing up its reaction to those cases, it concluded:

> "It is an affront [*76] to the individual members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the

background, character and past deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or harm imposed, upon the victims." **791 S.W.2d 10, 19 (1990).**

Offering no explanation for how this case could possibly be distinguished from *Booth* and *Gathers* -- for obviously, there is none to offer -- the court perfunctorily declared that the victim-impact evidence and the prosecutor's argument based on this evidence "did not violate either [of those decisions]." *Ibid.* It cannot be clearer that the court simply declined to be bound by this Court's precedents. n4

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n4 Equally unsatisfactory is the Tennessee Supreme Court's purported finding that any error associated with the victim-impact evidence in this case was harmless. See **791 S.W.2d at 19.** This finding was based on the court's conclusion that "the death penalty was the only rational punishment available" in light of the "inhuman brutality" evident in the circumstances of the murder. *Ibid.* It is well established that a State cannot make the death penalty mandatory for any class of aggravated murder; no matter how "brutal" the circumstances of the offense, the State must permit the sentencer discretion to impose a sentence of less than death. See **Roberts v. Louisiana, 428 U.S. 325, 49 L. Ed. 2d 974, 96 S. Ct. 3001 (1976); Woodson v. North Carolina, 428 U.S. 280, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976).** It follows that an appellate court cannot deem error to be automatically *harmless* based solely on the aggravated character of a murder without assessing the impact of the error on the sentencer's discretion. Cf. **Clemons v. Mississippi, 494 U.S. 738, 751-752, 108 L. Ed. 2d 725, 110 S. Ct. 1441 (1990).**

To sentence petitioner to death, the jury was required to find that the mitigating circumstances shown by petitioner did not outweigh the aggravating circumstances. See App. 21-22. In what it tried to pass off as harmless error analysis, the Tennessee Supreme Court failed to address how the victim-impact evidence introduced during the sentencing proceedings in this case likely affected the jury's determination that the balance of aggravating and mitigating circumstances dictated a death sentence. Outside of a videotape of the crime scene, the State introduced *no* additional substantive evidence in the penalty phase *other than* the testimony of Mary Zvolanek, mother and grandmother of the murder victims. See **791 S.W.2d at 17.** Under these circumstances, it is simply impossible to conclude that this victim-impact testimony, combined with the prosecutor's extrapolation from it in his closing argument, was harmless beyond a reasonable doubt.

End Footnotes

[*77] Far from condemning this blatant disregard for the rule of law, the majority applauds it. In the Tennessee Supreme Court's denigration of *Booth* and *Gathers* as "'an affront to the civilized members of the human race,'" the majority finds only confirmation of "the unfairness of the rule pronounced by" the majorities in those cases. *Ante*, at 826. It is hard to imagine a more complete abdication of this Court's historic commitment to defending the supremacy of its own pronouncements on issues of constitutional liberty. See **Cooper v. Aaron, 358 U.S. 1, 3 L. Ed. 2d 5, 78 S. Ct. 1401 (1958)**; see also **Hutto v. Davis, 454 U.S. 370, 375, 70 L. Ed. 2d 556, 102 S. Ct. 703 (1982)** (per curiam) ("Unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be"). In light of the cost that such abdication exacts on the authoritativeness of *all* of this Court's pronouncements, it is also hard to imagine a more short-sighted strategy for effecting change in our constitutional order.

III

Today's decision charts an unmistakable course. If the majority's radical [*78] reconstruction of the rules for overturning this Court's decisions is to be taken at face value -- and the majority offers us no reason why it should not -- then the overruling of *Booth* and *Gathers* is but a preview of an even broader and more far-reaching assault upon this Court's precedents. Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women, or the indigent. Inevitably, this campaign to resurrect yesterday's "spirited dissents" will squander the authority and the legitimacy of this Court as a protector of the powerless.

I dissent.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

The novel rule that the Court announces today represents a dramatic departure from the principles that have governed our capital sentencing jurisprudence for decades. JUSTICE MARSHALL is properly concerned about the majority's trivialization of the doctrine of *stare decisis*. But even if **Booth v. Maryland, 482 U.S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987)**, and **South Carolina v. Gathers, 490 U.S. 805, 104 L. Ed. 2d 876, 109 S. Ct. 2207 (1989)**, had not been decided, today's decision would represent a sharp break with past decisions. Our cases provide no support whatsoever for the majority's conclusion that the prosecutor may introduce evidence that [*79] sheds no light on the defendant's guilt or moral culpability, and thus serves no purpose other than to encourage jurors to decide in favor of

that the question whether an individual defendant should be executed is to be determined on the basis of "the character of the individual and the circumstances of the crime," **Id., at 502** (quoting **Zant v. Stephens, 462 U.S. 862, 879, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983)**). See also **Eddings v. Oklahoma, 455 U.S. 104, 112, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982)**. Relying on those cases and on **Enmund v. Florida, 458 U.S. 782, 801, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982)**, the Court concluded that unless evidence has some bearing on the [*82] defendant's personal responsibility and moral guilt, its admission would create a risk that a death sentence might be based on considerations that are constitutionally impermissible or totally irrelevant to the sentencing process. **482 U.S. at 502**. Evidence that served no purpose except to describe the personal characteristics of the victim and the emotional impact of the crime on the victim's family was therefore constitutionally irrelevant.

Our decision in *Booth* was entirely consistent with the practices that had been followed "both before and since the American colonies became a nation," **Williams, 337 U.S. at 246**. Our holding was mandated by our capital punishment jurisprudence, which requires any decision to impose the death penalty to be based on reason rather than caprice or emotion. See **Gardner v. Florida, 430 U.S. 349, 362, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977)** (opinion of STEVENS, J.). The dissenting opinions in *Booth* and in *Gathers* can be searched in vain for any judicial precedent sanctioning the use of evidence unrelated to the character of the offense or the character of the offender in the sentencing process. Today, however, relying [*83] on nothing more than those dissenting opinions, the Court abandons rules of relevance that are older than the Nation itself and ventures into uncharted seas of irrelevance.

II

Today's majority has obviously been moved by an argument that has strong political appeal but no proper place in a reasoned judicial opinion. Because our decision in **Lockett, 438 U.S. at 604** (opinion of Burger, C. J.), recognizes the defendant's right to introduce all mitigating evidence that may inform the jury about his character, the Court suggests that fairness requires that the State be allowed to respond with similar evidence about the *victim*. See *ante*, at 825-826, n1 This argument is a classic non sequitur: The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or a mitigating circumstance.

Footnotes

n1 JUSTICE SCALIA accurately described the argument in his dissent in **Booth v. Maryland, 482 U.S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987)**:

"Recent years have seen an outpouring of popular concern for

what has come to be known as victims' rights -- a phrase that describes what its proponents feel is the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's moral guilt, but also the amount of harm he has caused to innocent members of society. Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced -- which (and *not* moral guilt alone) is one of the reasons society deems his act worthy of the prescribed penalty." Id., at 520.

In his concurring opinion today, JUSTICE SCALIA again relies on the popular opinion that has "found voice in a nationwide 'victims' rights' movement." *Ante*, at 834. His view that the exclusion of evidence about "a crime's unanticipated consequences" "significantly harms our criminal justice system," *ibid.*, rests on the untenable premise that the strength of that system is to be measured by the number of death sentences that may be returned on the basis of such evidence. Because the word "arbitrary" is not to be found in the constitutional text, he apparently can find no reason to object to the arbitrary imposition of capital punishment.

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[*84] Even if introduction of evidence about the victim could be equated with introduction of evidence about the defendant, the argument would remain flawed in both its premise and its conclusion. The conclusion that exclusion of victim impact evidence results in a significantly imbalanced sentencing procedure is simply inaccurate. Just as the defendant is entitled to introduce any relevant mitigating evidence, so the State may rebut that evidence and may designate any relevant conduct to be an aggravating factor provided that the factor is sufficiently well defined and consistently applied to cabin the sentencer's discretion.

The premise that a criminal prosecution requires an evenhanded balance between the State and the defendant is also incorrect. The Constitution grants certain rights to the criminal defendant and imposes special limitations on the State designed to protect the individual from overreaching by the disproportionately powerful State. Thus, the State must prove a defendant's guilt beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Rules of evidence are also weighted in the defendant's favor. For example, the prosecution generally cannot [*85] introduce evidence of the defendant's character to prove his propensity to commit a crime, but the defendant can introduce such reputation evidence to show his law-abiding nature. See, e. g., Fed. Rule Evid. 404(a). Even if balance were required or desirable, today's decision, by

permitting both the defendant and the State to introduce irrelevant evidence for the sentencer's consideration without any guidance, surely does nothing to enhance parity in the sentencing process.

III

Victim impact evidence, as used in this case, has two flaws, both related to the Eighth Amendment's command that the punishment of death may not be meted out arbitrarily or capriciously. First, aspects of the character of the victim unforeseeable to the defendant at the time of his crime are irrelevant to the defendant's "personal responsibility and moral guilt" and therefore cannot justify a death sentence. See **Enmund v. Florida, 458 U.S. at 801;** see also **id., at 825** (O'CONNOR, J., dissenting) ("Proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness"); **Tison v. Arizona, 481 U.S. 137, 149, 95 L. Ed. 2d 127, 107 S. Ct. 1676 (1987)** (" [*86] The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender"); **California v. Brown, 479 U.S. 538, 545, 93 L. Ed. 2d 934, 107 S. Ct. 837 (1987)** (O'CONNOR, J., concurring).

Second, the quantity and quality of victim impact evidence sufficient to turn a verdict of life in prison into a verdict of death is not defined until after the crime has been committed and therefore cannot possibly be applied consistently in different cases. The sentencer's unguided consideration of victim impact evidence thus conflicts with the principle central to our capital punishment jurisprudence that, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." **Gregg v. Georgia, 428 U.S. 153, 189, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976)** (joint opinion of Stewart, Powell, and STEVENS, JJ.) Open-ended reliance by a capital sentencer on victim impact evidence simply does not provide a "principled way to distinguish [cases], in which the death penalty [*87] is imposed, from the many cases in which it is not." **Godfrey v. Georgia, 446 U.S. 420, 433, 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980)** (opinion of Stewart, J.).

The majority attempts to justify the admission of victim impact evidence by arguing that "consideration of the harm caused by the crime has been an important factor in the exercise of [sentencing] discretion." *Ante*, at 820. This statement is misleading and inaccurate. It is misleading because it is not limited to harm that is foreseeable. It is inaccurate because it fails to differentiate between legislative determinations and judicial sentencing. It is true that an evaluation of the harm caused by different kinds of wrongful conduct is a critical aspect in legislative definitions of offenses and determinations concerning sentencing guidelines. There is a rational

correlation between moral culpability and the foreseeable harm caused by criminal conduct. Moreover, in the capital sentencing area, legislative identification of the special aggravating factors that may justify the imposition of the death penalty is entirely appropriate. n2 But the majority cites no authority for the suggestion that unforeseeable and indirect harms to a victim's [*88] family are properly considered as aggravating evidence on a case-by-case basis.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 Thus, it is entirely consistent with the Eighth Amendment principles underlying *Booth* and South Carolina v. Gathers, 490 U.S. 805, 104 L. Ed. 2d 876, 109 S. Ct. 2207 (1989), to authorize the death sentence for the assassination of the President or Vice President, see 18 U. S. C. §§ 1751, 1111, a Congressman, Cabinet official, Supreme Court Justice, or the head of an executive department, § 351, or the murder of a policeman on active duty, see Md. Ann. Code, Art. 27, § 413 (d)(1) (1987). Such statutory provisions give the potential offender notice of the special consequences of his crime and ensure that the legislatively determined punishment will be applied consistently to all defendants.

- - - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - -

The dissents in *Booth* and *Gathers* and the majority today offer only the recent decision in Tison v. Arizona, 481 U.S. 137, 95 L. Ed. 2d 127, 107 S. Ct. 1676 (1987), and two legislative examples to support their contention that harm to the victim has traditionally influenced sentencing discretion. *Tison* held that the death [*89] penalty may be imposed on a felon who acts with reckless disregard for human life if a death occurs in the course of the felony, even though capital punishment cannot be imposed if no one dies as a result of the crime. The first legislative example is that attempted murder and murder are classified as two different offenses subject to different punishments. *Ante*, at 819. The second legislative example is that a person who drives while intoxicated is guilty of vehicular homicide if his actions result in a death but is not guilty of this offense if he has the good fortune to make it home without killing anyone. See Booth, 482 U.S. at 516 (WHITE, J., dissenting).

These three scenarios, however, are fully consistent with the Eighth Amendment jurisprudence reflected in *Booth* and *Gathers* and do not demonstrate that harm to the victim may be considered by a capital sentencer in the ad hoc and post hoc manner authorized by today's majority. The majority's examples demonstrate only that harm to the victim may justify enhanced punishment if the harm is both foreseeable to the defendant and clearly identified in advance of the crime by the legislature as a class [*90] of harm that should in every case result in more severe punishment.

In each scenario, the defendants could reasonably foresee that their acts might result in loss of human life. In addition, in each, the decision that the defendants should be treated differently was made prior to the crime by the legislature, the decision of which is subject to scrutiny for basic rationality. Finally, in each scenario, every defendant who causes the well-defined harm of destroying a human life will be subject to the determination that his conduct should be punished more severely. The majority's scenarios therefore provide no support for its holding, which permits a jury to sentence a defendant to death because of harm to the victim and his family that the defendant could not foresee, which was not even identified until after the crime had been committed, and which may be deemed by the jury, without any rational explanation, to justify a death sentence in one case but not in another. Unlike the rule elucidated by the scenarios on which the majority relies, the majority's holding offends the Eighth Amendment because it permits the sentencer to rely on irrelevant evidence in an arbitrary and capricious [*91] manner.

The majority's argument that "the sentencing authority has always been free to consider a wide range of *relevant* material," *ante*, at 820-821 (emphasis added), thus cannot justify consideration of victim impact evidence that is *irrelevant* because it details harms that the defendant could not have foreseen. Nor does the majority's citation of *Gregg* v. *Georgia* concerning the "wide scope of evidence and argument allowed at presentence hearings," 428 U.S. at 203 (joint opinion of Stewart, Powell, and STEVENS, JJ.), support today's holding. See *ante*, at 821. The *Gregg* joint opinion endorsed the sentencer's consideration of a wide range of evidence "so long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant." 428 U.S. at 203-204. Irrelevant victim impact evidence that distracts the sentencer from the proper focus of sentencing and encourages reliance on emotion and other arbitrary factors necessarily prejudices the defendant.

The majority's apparent inability to understand this fact is highlighted by its misunderstanding of Justice Powell's argument in *Booth* that admission of victim impact evidence is undesirable [*92] because it risks shifting the focus of the sentencing hearing away from the defendant and the circumstances of the crime and creating a "'mini-trial' on the victim's character." 482 U.S. at 507. *Booth* found this risk intolerable not, as today's majority suggests, because it creates a "tactical" "dilemma" for the defendant, see *ante*, at 823, but because it allows the possibility that the jury will be so distracted by prejudicial and irrelevant considerations that it will base its life-or-death decision on whim or caprice. See 482 U.S. at 506-507.

IV

The majority thus does far more than validate a State's

judgment that "the jury should see a quick glimpse of the life petitioner chose to extinguish," **Mills v. Maryland, 486 U.S. 367, 397, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988)** (REHNQUIST, C. J., dissenting)." *Ante*, at 830-831 (O'CONNOR, J., concurring). Instead, it allows a jury to hold a defendant responsible for a whole array of harms that he could not foresee and for which he is therefore not blameworthy. JUSTICE SOUTER argues that these harms are sufficiently foreseeable to hold the defendant accountable because "every defendant knows, if endowed [*93] with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, 'survivors,' who will suffer harms and deprivations from the victim's death." *Ante*, at 838 (SOUTER, J., concurring). But every juror and trial judge knows this much as well. Evidence about who those survivors are and what harms and deprivations they have suffered is therefore not necessary to apprise the sentencer of any information that was actually foreseeable to the defendant. Its only function can be to "divert the jury's attention away from the defendant's background and record, and the circumstances of the crime." See **Booth, 482 U.S. at 505**.

Arguing in the alternative, JUSTICE SOUTER correctly points out that victim impact evidence will sometimes come to the attention of the jury during the guilt phase of the trial. *Ante*, at 840. He reasons that the ideal of basing sentencing determinations entirely on the moral culpability of the defendant is therefore unattainable unless a different jury is empaneled for the sentencing hearing. *Ante*, [*94] at 841. Thus, to justify overruling *Booth*, he assumes that the decision must otherwise be extended far beyond its actual holding.

JUSTICE SOUTER's assumption is entirely unwarranted. For as long as the contours of relevance at sentencing hearings have been limited to evidence concerning the character of the offense and the character of the offender, the law has also recognized that evidence that is admissible for a proper purpose may not be excluded because it is inadmissible for other purposes and may indirectly prejudice the jury. See 1 J. Wigmore, Evidence § 12 (P. Tillers rev. 1983). In the case before us today, much of what might be characterized as victim impact evidence was properly admitted during the guilt phase of the trial and, given the horrible character of this crime, may have been sufficient to justify the Tennessee Supreme Court's conclusion that the error was harmless because the jury would necessarily have imposed the death sentence even absent the error. The fact that a good deal of such evidence is routinely and properly brought to the attention of the jury merely indicates that the rule of *Booth* may not affect the outcome of many cases.

In reaching our [*95] decision today, however, we should not be concerned with the cases in which victim impact evidence will not make a difference. We should be concerned

instead with the cases in which it will make a difference. In those cases, defendants will be sentenced arbitrarily to death on the basis of evidence that would not otherwise be admissible because it is irrelevant to the defendants' moral culpability. The Constitution's proscription against the arbitrary imposition of the death penalty must necessarily proscribe the admission of evidence that serves no purpose other than to result in such arbitrary sentences

V

The notion that the inability to produce an ideal system of justice in which every punishment is precisely married to the defendant's blameworthiness somehow justifies a rule that completely divorces some capital sentencing determinations from moral culpability is incomprehensible to me. Also incomprehensible is the argument that such a rule is required for the jury to take into account that each murder victim is a "unique" human being. See *ante*, at 823; *ante*, at 830-831 (O'CONNOR, J., concurring); *ante*, at 838 (SOUTER, J., concurring). The fact that each of us is unique is [*96] a proposition so obvious that it surely requires no evidentiary support. What is not obvious, however, is the way in which the character or reputation in one case may differ from that of other possible victims. Evidence offered to prove such differences can only be intended to identify some victims as more worthy of protection than others. Such proof risks decisions based on the same invidious motives as a prosecutor's decision to seek the death penalty if a victim is white but to accept a plea bargain if the victim is black. See McCleskey v. Kemp, 481 U.S. 279, 366, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987) (STEVENS, J., dissenting).

Given the current popularity of capital punishment in a crime-ridden society, the political appeal of arguments that assume that increasing the severity of sentences is the best cure for the cancer of crime, and the political strength of the "victims' rights" movement, I recognize that today's decision will be greeted with enthusiasm by a large number of concerned and thoughtful citizens. The great tragedy of the decision, however, is the danger that the "hydraulic pressure" of public opinion that Justice Holmes once described n3 -- and that properly influences [*97] the deliberations of democratic legislatures -- has played a role not only in the Court's decision to hear this case, n4 and in its decision to reach the constitutional question without pausing to consider affirming on the basis of the Tennessee Supreme Court's rationale, n5 but even in its resolution of the constitutional issue involved. Today is a sad day for a great institution

Footnotes

n3 Northern Securities Co. v. United States, 193 U.S. 197, 400-401, 48 L. Ed. 679, 24 S. Ct. 436 (1904) (Holmes, J., dissenting)

n4 See Payne v. Tennessee, 501 U.S. 808, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991) (STEVENS, J., dissenting).

n5 Rust v. Sullivan, 500 U.S. 173, 223, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991) (O'CONNOR, J., dissenting).

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ACF

AMICUS BRIEF
EXHIBIT 1

USDA SKELDON CASE

IN THE TOLEDO MUNICIPAL COURT
LUCAS COUNTY, OHIO

STATE OF OHIO COUNTY DOG WARDEN, Plaintiff, vs. PAUL TELLINGS, Defendant.	Case No.: CRB02-15267 JUDGE GORMAN AFFIDAVIT Sol Zyndorf (0002398) 320 N. Michigan Street, 2nd Floor Toledo, OH 43624 PH: (419) 243-1144 FAX: (419) 243-5821 Attorney for Defendant

****

My name is Tammy Price. I am a breeder, owner and exhibitor of American Staffordshire Terriers. I am a past Bellefontaine City dog warden and Logan County Humane Agent. I served as the director of the Humane Society serving Logan County for four years. In 1978, I was licensed by the Ohio Veterinary Medical Association as an Animal Technician in the State of Ohio. Recently I served on the Ohio Dog Fighting Task Force, making recommendations to assist in the investigation, prosecution and prohibition of dog fighting here in the State of Ohio. This Task Force reported directly to the Ohio Dept. of Agriculture, who in turn made recommendations directly to the Governor of Ohio. Currently, I am an assistant trainer and instructor at a local obedience training facility in the Logan County area.

I received a video for my review, which had been submitted into evidence in the case of State of Ohio, County Dog Warden vs. Paul Tellings (Case # CRB02-15267).

I reviewed this video several times, and although I would mention it is extremely difficult to view video and come to any fail-proof conclusion, my observations are as follow:

I feel the procedures followed when handling this dog fell far short of any common protocol used in the facility in which I worked. First and foremost, some dogs simply do not kennel well. This being said, the dog in the video – or any dog, any breed – being displaced from familiar surroundings, regardless of the conditions existing there, needs adequate time to adjust. The dog in the video was most certainly exhibiting signs of high stress levels and separation anxiety. My interpretation is that the body language exhibited by this dog in the beginning of the video, dated April 11, 1997, 10:06:46 AM, fails to show true signs of aggression. The tail is wagging, he stops pulling periodically to watch what is taking place in front of him, and he easily changes runs when a trap-door is opened in the next run, allowing him to escape. The dog only views the door as a way out of his confinement. Fence biting, scratching and climbing are all viewed as escape – a typical response to separation from familiar surroundings. I also see evidence that the shelter staff was indeed aware that this dog was having some adjustment problems, as seen by the cage card shown on the video.

This serves to cause me serious concern. I feel adequate steps were not taken to ensure the health and well being of the dog on the video as well as the safety of the shelter staff assigned to his care. This is evident by the self-mutilation of the dog witnessed on this videotape. As a former Humane Society director, I would have viewed this as incompetence, and one of the worst forms of cruelty. These are individuals who should be aware and have knowledge of how to handle such a situation in a safe-well-controlled manner for dog and human alike.

Tammy D. Price

STATE OF OHIO)
) ss
COUNTY OF ~~LUCAS~~ Logan)

Sworn to and subscribed before me this 22nd day of ~~April, 2003.~~ August ~~22~~, 2003

NOTARY PUBLIC
CATHERINE E. BAUGHMAN
My Commission Expires 12-11-2007

Catherine E. Baugaman
NOTARY PUBLIC

WASHINGTON ANIMAL FOUNDATION
http://legislation2002.tripod.com/
http://members.tripod.com/waf4/index.htm
waf8@hotmail.com
253 582 2938
May 28, 2002

COMPLAINT OF ANIMAL CRUELTY AND VIOLATION OF OHIO STATE LAW

TO THE USDA
A. P. H. I. S. DIVISION ANIMAL CARE
EASTERN REGION
920 MAIN CAMPUS DR.
SUITE 200
RALEIGH NC 27606

The Washington Animal Foundation is a non-profit organization that advocates for responsible dog ownership. WAF assists with legislation and education. In 2001 WAF assisted the state of Louisiana in revising their dangerous dog law. WAF assisted seven cities in passing "dangerous dog laws" including Walla Walla, Washington, WAF worked with State Senators and Representatives in California, Florida, Washington, Washington DC, New Hampshire, Oregon, Maryland, and in Europe, Denmark. In 2002 we drafted a dangerous dog law for the U.S. Government for use on military installations in place of breed specific legislation. WAF endorsed SB6635 in Washington, which prohibits declaring a dog dangerous by breed. WAF teaches responsible dog ownership and dog bite prevention for the Department of Education in Washington. WAF also has a task force to stop illegal "street dogfighting" in Pierce County Wa.

It was brought to our attention that an extreme case of animal cruelty has taken place in the State of Ohio. Located on the Ohio Valley Dog Owners website at http://www.canismajor.com/orgs/ovdo/ohptbull.html is information concerning a video.

The task force met for the first time in August. Tom Skeldon, the dog warden in Lucas County who considers all 'pit bulls' to be vicious, showed two videotapes to the committee. According to Melanie Tierney of Canine Friends of Cleveland, the first tape was developed for use as a training tool for dog fighting and pit bull identification and contains a great deal of misinformation about bull breeds, and the second tape depicts a dog mutilating itself in a frantic attempt to escape confinement.

"The dog was videotaped for approximately 20-30 minutes of continuous footage, and appeared to be in a frenzy as it tugged and fought with the kennel fencing and cable to the outside dog door," Tierney said.

"From the perspective of basic dog behavior, the dog was in an extreme state of anxiety and was seeking escape from a highly stressful situation. During the video, the dog was self-injuring and self-mutilating as it attempted to escape. The injuries were serious and bloody."

Dogs impounded in dog fighting cases are evidence, Tierney noted, and should be given good care until disposition of the case. However, she said, "Allowing this dog to mutilate and seriously injure itself for nearly 30 minutes shows utmost indifference to the suffering of a living creature," and "raises compelling questions" about the care of these dogs.

If this information is true this violates the Ohio state law:

§ 959.13 Cruelty to animals.
Text of Statute
(A) No person shall:
(1) Torture an animal, deprive one of necessary sustenance, unnecessarily or cruelly beat, needlessly mutilate or kill, or impound or confine an animal without supplying it during such confinement with a sufficient quantity of good wholesome food and water;
(2) Impound or confine an animal without affording it, during such confinement, access to shelter from wind, rain, snow, or excessive direct sunlight if it can reasonably be expected that the animals would otherwise become sick or in some other way suffer. Division (A)(2) of this section does not apply to animals impounded or confined prior to slaughter. For the purpose of this section, shelter means a man-made enclosure, windbreak, sunshade, or natural windbreak or sunshade that is developed from the earth's contour, tree development, or vegetation.[;
(3) Carry or convey an animal in a cruel or inhuman[e] manner;

This complaint involves State of Ohio Lucas County Dog Warden Tom Skeldon and information about this video has been verified by the Ohio Dog Fanciers Association and countless responsible dog owners through-out the state of Ohio. There would be no justified reason or excuse for such activity concerning the treatment of dogs in confinement. We ask the USDA to look into this extreme cruel treatment of animals by the Lucas County Dog Warden. Due to information this video was presented to the Ohio Dog Fighting Task Force we felt it useless to proceed at the state level with a formal complaint. We were told this video was to show the prey drive in the dog being recorded. This would be hard to conceive considering the length of time the dog was recorded. Be it 1 minute or 30 minutes to allow an animal to harm itself while recording it is the most extreme cruelty one could administer. Our Foundation has a task force to stop illegal dog fighting and we would never conceive using such material as described in this video for any purpose.
Our Foundation has received other complaints concerning the Lucas County Dog Warden using excessive practice when attempting to enforce Ohio dog laws on dog owners. WAF has been successful in Alabama and California in stopping cruel treatment to animals in County Shelters and we pray for justice in this case from the USDA.

Tom Skeldon is located at:
410 Erie St.
Toledo, Ohio 43602

Sincerely,
Cynthia McCammon
CEO W.A.F.

WASHINGTON ANIMAL FOUNDATION
http://legislation2002.tripod.com/
http://members.tripod.com/waf4/index.htm
legislation2002@hotmail.com
253 582 2938
August 12, 2002

To ODA/ Jim Hoekstra
cc:USDA
From: WAF

This is to make you aware of the issue concerning the complaint we brought to the USDA's attention on May 28, 2002. The USDA requested the Toledo Humane Society investigate the allegations of cruel treatment of a dog by Tom Skeldon. What USDA did not know is Greg Bloomfield from the Humane Society is working close with Tom Skeldon and has been covering up complaints in the past filed against Tom Skeldon

When the request came to the Toledo Humane Society, we were contacted by a chief cruelty investagator named Jed. The stories he told us of whats been going on at both the Toledo Humane Society and the Dog Wardens shelter confirm abuse and cruel treatment of dogs.

Also another employee from the Toledo Humane Society contacted us and confirmed abuse from Tom Skeldon of dogs. Responsible dog owners have been contacting us from the Toledo area and across the state there has been concern raised about the practice of the Toledo Dog Warden.

A veterinarian , Dr Krop also filed a complaint against the Toledo Dog Warden with the Toledo Humane Society, it was never completed. Countless dog owners who have been to court from citations issued by Tom Skeldon have come forward with information confirming animal cruelty, including one woman who has saved her dogs for evidence.

We do know the video that is the issue in question of the dog mutilating itself was filmed at the Dog Wardens Shelter. A Police Detective was involved in making the video. Why a detective was invovled in making this video only raises more intent of the real reason the video was made. Mr. Skeldon uses the video and sells footage of it in a training video for 40 dollars. In his training video we find several violations of the state law on animal cruelty. They show footage of two dogs fighting and call it a roll. This was staged for the video. There is nothing educational about the training video or the video of the dog mutilating itself.

We are asking that the USDA investigate the exploitation of the video. We also are requesting the Ohio Department of Agriculture investigate also. When so many people come forward in a case like this, it confirms the allegations about the video and the Toledo Dog Warden are true.

The issue of Federal law Title 18 code (48) is raised. The only possible arguement from the Dog Warden would be it is for educational purposes. This would not be true, given all the other complaints raised against Mr. Skeldon. They claim they sedated the dog in the first episode of the video, then in the second part they claim it was not sedated. If this dog was so dangerous as they claim, then under Ohio law, they would of euthanized the dog. Also we have viewed the video and the dog is not aggressive, he is playing tug of war with the fence, he is allowed to continue to the point he starts to mutilate his guns and teeth. This is cruel treatment to an animal. The Dog Warden claims to be an expert on Pit Bulls, they could of stopped the dog instantly.

There is also concern for the statitics broadcast by Ch 24 Toledo in late July 2002. Mr. Skeldon claims there is a decrease in the canine population, but a serious increase in the amount of dog bites reported in Lucas County, with Shepherds number one on the list. A high rate of children are being victimized.

We feel Mr. Skeldon is not an expert and is incompetent. Because of his actions focusing on the Pit Bull he has neglected a more serious issue of an increase in dog bites from all breeds of dog.

What Mr. Skeldons campaign is doing, is enhancing the demand for the American Pit Bull Terrier. When citizens are led to think that a breed of dog is extremly dangerous, all those who do not obey the laws crave that type of dog for illegal uses. In fact the APBT is not a dangerous dog and there is genetic proof proving that.

The Ohio Department of Agriculture, because of state laws on animal cruelty should be the agency to investigate Tom Skeldon and the Toledo Humane Society. We ask the ODA to investigate.

Sincerely,
Cynthia McCammon
President
WAF

WASHINGTON ANIMAL FOUNDATION
http://legislation2002.tripod.com/
http://members.tripod.com/waf4/index.htm
legislation2002@hotmail.com
263 582 2938
AUGUST 23 2002

To: Shannon McQuaid
Legal Dept. ODA

From: WAF

Dear Shannon,

We have 16 dog owners who have had court cases where their dogs were in Tom Skeldons custody and returned in poor condition. There are also two other veterinarians and a former employee of Tom Skeldon. We are in the process of getting them to give us authorization to release their names. Here are three names which should be enough to start with. Until we hear back from the others we can't release their names. Jed from the Humane Society will testify if court ordered.

Robin Sherman 419 810 7230 This ladies dogs where court ordered to be returned to her from Tom Skeldon after he euthanized them. They are in cold storage because their condition was serious enough that she is holding them as evidence of abuse that occured while they were in Tom Skeldons custody.

Dr Krop (Toledo) told WAF consultants that she had a patient with a male Pit Bull that was in the custody of Tom Skeldon. The dog was to be neutered. The condition of the dog was so bad Dr. Krop filed a complaint with the Toledo Humane Society. WAF has the name of the owner of the dog and she told us it had scars on it and it was bad enough that a veterinarian filed a complaint. Jed from the Toledo Humane Society told us that Greg Bloomfield never followed through with an investigation. WAF asked Greg Bloomfield about the complaint and was told it would take time to look it up and that he would get back to us on it. WAF never heard anything else about it.

Jed M. A cruelty investigator for the Toledo Humane Society confirmed to WAF that Tom Skeldon is cruel to dogs at his shelter and made us aware of several issues concerning violations the state laws regulating and controling animals(dogs).

Sincerely,
Glen Bui

WAF

Ohio Department of Agriculture

Governor Bob Taft
Lieutenant Governor Maureen O'Connor
Director Fred L. Dailey

Division of Enforcement
8995 E. Main Street Building 1 Reynoldsburg, Ohio 43068-3399
Phone: 614-728-6240 Fax 614-728-6328
ODA home page: www.state.oh.us/agr/ e-mail: wwwagri@ohio.gov

July 2, 2002

VIA TELECOPIER

Ms. Cynthia McCammon
CEO W.A.F.
Washington Animal Foundation

RE: LETTER DATED MAY 28, 2002 - TOM SKELDON

Dear Ms. McCammon::

As a follow-up to your letter dated May 28, 2002, the department lacks jurisdiction, however, I have forwarded your letter of complaint regarding alleged animal cruelty by Tom Skeldon to Mr. Greg Bloomfield with the Greater Toledo Area Humane Society, in Maumee, Ohio.

I am most confident that he will be able to follow-up and will make contact with you regarding the allegations.

Thank you for your concern, and if I can be of further assistance, please do not hesitate to call me at (614) 728-6240.

Sincerely,

OHIO DEPARTMENT OF AGRICULTURE

James R. Hoekstra
Chief of Enforcement

jrh/ldl

216 556-5POT

CASE NUMBER: CRB02-15267

PRAECIPE FOR SUBPOENA
TOLEDO MUNICIPAL COURT
CRIMINAL DIVISION

State of Ohio, County Dog Warden

vs.

Paul Tellings

Clerk issue subpoena for witness to appear in Court room No. ___Toledo Municipal Court, 555 N. Erie St., Toledo, Ohio 43624. On the 20 & 21ST day of November, 2003, at 9:00 am in behalf of Plaintiff/Defendant.

1. Greg Bloomfield-Toledo Humane Society
Street 1920 Indian Wood Circle
City Maumee, Ohio 43537
Reason Please provide the reports from the investigation of a video made by the Lucas County Dog Warden, requested by the United States Department of Agriculture and the Washington Animal Foundation in 2002. Please have all reports in by November 19, 2003.

2. _____
Street _____
City _____
Reason _____

3. _____
Street _____
City _____
Reason _____

Reason-Briefly explain why a particular witness is needed in Court-try to eliminate needless duplication of witnesses.

4. _____
Street _____
City _____
Reason _____

5. _____
Street _____
City _____
Reason _____

Use reverse side for additional details if needed. Consult with prosecutor if in doubt about necessity of a witness.

November 18, 2003

Signed [signature]

FILED
TOLEDO MUNICIPAL COURT
03 NOV 18 PM 1:47
CLERK
THERESA M. GABRIEL

ACF

AMICUS BRIEF
EXHIBIT 2

TAMMY PRICE OHIO DOG FIGHTING TASK FORCE

IN THE TOLEDO MUNICIPAL COURT
LUCAS COUNTY, OHIO

STATE OF OHIO COUNTY DOG WARDEN, Plaintiff, vs. PAUL TELLINGS, Defendant.	Case No.: CRB02-15267 JUDGE GORMAN AFFIDAVIT Sol Zynhoff (0002398) 320 N. Michigan Street, 2nd Floor Toledo, OH 43624 PH. (419) 243-1144 FAX: (419) 243-5821 Attorney for Defendant

****

My name is Tammy Price. I am a breeder, owner and exhibitor of American Staffordshire Terriers. I am a past Bellefontaine City dog warden and Logan County Humane Agent. I served as the director of the Humane Society serving Logan County for four years. In 1978, I was licensed by the Ohio Veterinary Medical Association as an Animal Technician in the State of Ohio. Recently I served on the Ohio Dog Fighting Task Force, making recommendations to assist in the investigation, prosecution and prohibition of dog fighting here in the State of Ohio. This Task Force reported directly to the Ohio Dept. of Agriculture, who in turn made recommendations directly to the Governor of Ohio. Currently, I am an assistant trainer and instructor at a local obedience training facility in the Logan County area.

The American Staffordshire Terrier (the American Pit Bull Terrier) began to appear in this country around the Civil War. As most dogs of that era, their uses were many and diverse. They were used as general farm dogs, whose duties included herding, rodent control and guarding, as well as the hunting of wild pigs, bear and other large game,

besides being a trusted and loyal companion animal. These dogs were instrumental in the success of farmers and settlers who developed this country. Because the American Staffordshire Terrier (American Pit Bull Terrier) possesses both intelligence and extreme loyalty, they often traveled west with settlers who took nothing that wasn't a necessity. Though early ancestors of this breed came from England, the development of the American Staffordshire Terrier (American Pit Bull Terrier) makes this breed truly an American dog. Offspring of these dogs came to the United States where they were bred larger for the demands of the new frontier. Jack, the bulldog that accompanied Laura Ingalls Wilder's family across the prairies was one such dog. The American Staffordshire Terrier (American Pit Bull Terrier) was recognized by the American Kennel Club in 1936. One of the first American Staffordshire Terriers recognized by the AKC was a famous and highly-visible dog. He was the beloved "Pete the Pup". His real name was Luceney's Peter, the dog star of the original "Our Gang Comedies".

There are several other notable American Staffordshire Terriers in history. Stubby was the most decorated dog in WWI. He earned the rank of Sergeant and was awarded two medals. He was invited to the White House on three separate occasions, by Presidents Wilson, Harding and Coolidge. Helen Keller's dog "Phiz" also appeared with her on the U. S. Postal Service poster from the early 1900s.

Since 1936 with the AKC and 1978 with the UKC, these dogs have been selectively bred for companionship and conformation. This type of breeding not only concentrates on the overall attributes of the animal, but also the temperament that the animal possesses. The American Staffordshire Terrier (American Pit Bull Terrier) is a bull and terrier cross, once called the "Half and Half". Being a terrier, the American Staffordshire Terrier and Pit Bull Terrier possess prey drive as do all terriers. That in itself does not make them dangerous or vicious. It has been my experience that the problems associated with this breed are related to the inappropriate behavior of man.

After sitting on the Ohio Dog Fighting Task Force, and becoming more familiar with the problems that continue to exist with dog fighting in Ohio, it has become clear to me that the current 14-year Ohio breed-specific law is not only ineffective in the struggle against dog fighting and irresponsible ownership, but criminalizes the responsible owners of this breed, rather than accomplishing its objectives of public safety.

The American Staffordshire Terrier (American Pit Bull Terrier) is owned and loved by many responsible owners in the State of Ohio and across the United States. They are: companion dogs, family pets, therapy dogs, show dogs, rescue dogs, herding dogs, and tracking dogs, and have proven their worth time and time again. I urge Ohio to make critical changes in the current breed-specific law, to enable responsible breeders, owners and exhibitors to enjoy this breed without fear of recrimination.

To quote noted author of canine publications Anna Katherine Nicholas, "No matter how many good and courageous acts these dogs perform, no matter how frequently their loyalty and intelligence is demonstrated, no matter how many lives they help to save and children they tend and adore, there are still those people who will continue to feel that

they are dangerous and unreliable. A Bull and Terrier dog wants nothing more than to please his master. Thus, the conduct of the dog is largely dependent on the beliefs, conduct, and proper upbringing with which they are – or are not – raised. When ferocity is demanded, wanted, and expected by the human, the dog trains easily to comply. If, on the other hand, the dog's good qualities are encouraged, the Bull and Terrier stands right high on the list of thoroughly desirable, reliable, loving, amusing, intelligent, and friendly canines."

STATE OF OHIO)
) ss: Tammy D Price
COUNTY OF LUCAS)

Sworn to and subscribed before me this 20 day of ~~April~~ May, 2003.

NOTARY PUBLIC
SONDRA D. PRATER
My Commission Expires 10/07

Sondra Prater
NOTARY PUBLIC

ACF

AMICUS BRIEF
EXHIBIT 3

ACF SKELDON/ NELSON LETTER

CAROLYN CHAN
ATTORNEY AT LAW
2701 DEL PASO ROAD STE. 130-373
SACRAMENTO CA 95835
916/484-4020/24 HR.

"Anybody who shoots a pit bull running loose is justified," said Kory Nelson, the Denver city attorney.

San Francisco Chronicle, Monday, June 27, 2005

Kory Nelson, City Attorney
1437 Bannock St.
201 West Colfax Avenue
Denver CO 80202

Interested Parties:

I represent the American Canine Foundation in California litigation, currently against San Francisco and Los Angeles counties. Each of these counties has either enacted laws which are premised off of "Breed specific Legislation" (BSL) or are based upon BSL.

It has recently come to our attention that you have a **personal or quasi-governmental website** posted universally on the world wide web, whereby you clearly state that....

> ....."politically correct" arguments and lawsuits from dog owners, organizations of dog owners seeking to expand their political base and justify collections of dues and donations, **and strawmen for dog fighters, including but not limited to such anti-BSL groups as the American Canine Foundation."**

Inasmuch as you are a governmental employee, and one that has sought to influence, of your own accord, such cities as San Francisco, attempting to convince the city that they should adopt your stance which involves rounding up and killing dogs which have done absolutely nothing against anyone or any specific person, it strikes me as horrendously unethical, unprofessional, and egregious that you should publish a public statement, wherein you outright accuse a nationally known group (ACF) for its advocacy work on behalf of canines, and blatantly accuse the group of being "strawmen for dogfighters", when it is a known fact that dog fighting is illegal in the United States.

Making this statement public, and sending it out on the world wide web, combined with your position as a governmental employee, indicates not only have you purposely availed to use your governmental position and authority, but in fact have attempted to utilize your position to gain an advantage in the civil arena by attempting to influence those who may have, will, or intend to seek out facts regarding the legislative canine law regarding BSL.

In this regard, we consider your attempt to influence others who are similarly positioned in other government jobs as both illegal, as well as seriously unethical; furthermore, it is an obvious ploy on your part to do damage to the credibility of American Canine Foundation because American Canine Foundation has managed to obtain a ruling in Colorado which proves at least one of your breed specific laws is not constitutional.

You have absolutely no evidence that would prove your allegation, and on its face this might well be purposeful defamation published for the sole purpose of creating a false light, misrepresentation, and fraud.

Furthermore, as a governmental employee, your statement is made in conjunction with your position as a city employee, and you have therefore involved your employer as you claim this **group will "act as a clearinghouse" for local and state government officials** to obtain information" as to BSL. You have, therefore, chosen to use your position as a city employee to gain an advantage in spreading false information, misrepresentation, and fraud.

You also claim that "anti BSL" groups are "misleading" ignorant lawmakers into making quick decisions. Surely you are aware that any advocacy group may lobby appropriately without running afoul of any first amendment violations, and that your characterizations of "misleading", without more, are without merit.

Your statement that government attorneys, and officials can "network, share experiences, possible solutions" indicates that you specifically intend to disseminate your false information to these particular individuals involved in specific issues, thereby it is overtly stated that your information will travel to those in positions of authority involving these issues. As an example, the Missouri Municipal League: Attorneys Newsletters states that your Yahoo group site on the world wide web is available to "share both factual information on pit bulls and legal research".....

As such, this is an attempt to mislead and influence those who will, may hear, or may intend to consider BSL law, and therefore, your intent can only be to intentionally poison and corrupt the minds of these lawmakers with misrepresentations, including those misrepresentations as to American Canine Foundation specifically.
It is no secret that you only specifically NAMED the American Canine Foundation.

It is the American Canine Foundation's formal demand that you immediately remove all statements alluding to "strawmen for dogfighters", or any implication that such advocacy groups are in violation of legally expanding their political base or expanding their base by obtaining donations *which are implicated to further illegal interests.*

Second, we demand that you issue a public retraction which includes the factual statement that you have absolutely no knowledge or evidence of this allegation, and that you are retracting such statement. Such retraction shall be done by the close of business day (5pm) August 22, 2006, in writing, and sent directly to my address on this letterhead. In addition, a duplicate of this retraction shall be sent via email by the same date, directly to my email used for our federal case (doglitigation@yahoo.com)

Further, if you do not make such changes, or if you insist on promoting your agenda regarding BSL in this method, we will be forced to take further action against you and see to it that such antics are stopped once and for all.

Very truly yours,

Carolyn Chan, Esq.
Representing the American Canine Foundation

SOL ZYNDORF
Attorney at Law
320 N. Michigan Street • Second Floor • Toledo, Ohio 43624 • Office (419) 243-1144 • Fax (419) 243-5821

COPY

October 20, 2003

Karla Hamlin
c/o Lucas County Dog Warden
410 S. Erie St.
Toledo, Ohio 43602

RE: City of Toledo v. Paul Tellings

Dear Karla:

It has been brought to our attention by Mary Lee Nitschki, that while attending a convention for Association of Pet Dog Trainers you allegedly approached her and stated that everybody associated with the Toledo dog trial are dog fighters and that they are proceeding with this litigation for the money.

This is an inaccurate statement with no factual basis. No one involved with the Paul Tellings case is associated, whatsoever, with illegal dog fighting.

Please be advised that making false statements is a civil tort.

Sincerely,

Sol Zyndorf

Sol Zyndorf

SZ:rs

PERSONAL INFORMATION ONLY!

ACF

AMICUS BRIEF
EXHIBIT 4

WHATS BEHIND BREED SPECIFIC LEGISLATION

WHATS BEHIND BREED SPECIFIC LEGISLATION

BY THE

AMERICAN CANINE FOUNDATION

ACF
23969 NE STATE RTE 3
SUITE G101
BELFAIR WA. 98528
360 277 3647
ameicancaninefoudationlaw.com

2006

In the 1980's the Humane Society of the United States supported breed bans and lobbied around the country to pass such legislation. One significant case is Denver where they provided data that was inaccurate on American Pit Bull Terriers and fatal dog attacks. People for the Ethnical Treatment of Animals also support breed bans and have been lobbying to end domestic pet ownership by banning dog ownership. These organizations are under FBI investigation and support domestic terrorism. Below is some data on H.S.U.S.
http://www.activistcash.com/organization_overview.cfm/oid/136

ANIMAL RIGHTS AND "COMPANION ANIMALS"

"We are not especially 'interested in' animals. Neither of us had ever been inordinately fond of dogs, cats, or horses in the way that many people are. We didn't 'love' animals." -- Peter Singer*, Animal Liberation: A New Ethic for Our Treatment of Animals, 2nd ed. (New York Review of Books, 1990), Preface, p. ii.

***Peter Singer is the acknowledged founding father and chief guru of the Animal Rights movement. Singer's disciple is Ingrid Newkirk, who co-founded People for the Ethical Treatment of Animals, also known as PETA. For more information, read About Peter Singer & Who is Peter Singer?**

In a perfect world, all other-than-human animals would be free of human interference, and dogs and cats would be part of the ecological scheme, as they were before humans domesticated them and as they remain in some parts of the undeveloped world.

From The PETA Statement on Companion Animals

"In a perfect world, animals would be free to live their lives to the fullest: raising their young, enjoying their native environments, and following their natural instincts. However, domesticated dogs and cats cannot survive "free" in our concrete jungles, so we must take as good care of them as possible. People with the time, money, love, and patience to make a lifetime commitment to an animal can make an enormous difference by adopting from shelters or rescuing animals from a perilous life on the street. But it is also important to stop manufacturing "pets," thereby perpetuating a class of animals forced to rely on humans to survive." - PETA pamphlet, Companion Animals: Pets or Prisoners?

MORE PETA

"The cat, like the dog, must disappear... We should cut the domestic cat free from our dominance by neutering, neutering, and more neutering, until our pathetic version of the cat ceases to exist." - John Bryant, Fettered Kingdoms: An Examination of A Changing Ethic (Washington, DC: People for the Ethical Treatment of Animals (PETA), 1982), p. 15.

"It is time we demand an end to the misguided and abusive concept of animal ownership. The first step on this long, but just, road would be ending the concept of pet ownership." - Elliot Katz, President, In Defense of Animals, "In Defense of Animals," Spring 1997

FROM HSUS

"Human care (of animals) is simply sentimental, sympathetic patronage." - Dr. Michael W. Fox, HSUS, in 1988 Newsweek interview

"We have no ethical obligation to preserve the different breeds of livestock produced through selective breeding. ... One generation and out. We have no problem with the extinction of domestic animals. They are creations of human selective breeding." - Wayne Pacelle, Senior Vice-President oF HSUS, formerly of Friends for Animals; Quoted in Animal People, May, 1993

"The life of an ant and that of my child should be granted equal consideration." - Wayne Pacelle, Senior Vice-President oF HSUS, formerly of Friends for Animals - In Inhumane Society, 1990

"The life of an ant and the life of my child should be accorded equal respect." - Wayne Pacelle, Senior Vice-President oF HSUS, formerly of Friends for Animals, The Associated Press, Jan. 15, 1989

HSUS president John Hoyt hinted in 1986 that the animal-rights movement might be a means to a larger end, telling Washingtonian magazine: **"This new philosophy [animal rights] has served as a catalyst in the shaping of our own philosophies, policies, and goals."** John McArdle, the group's Director of Laboratory Animal Welfare, frankly admitted in the same article that HSUS was "definitely shifting in the direction of animal rights faster than anyone would realize from our literature."

The group completed its animal-rights transformation during the 1990s, changing its personnel in the process. HSUS assimilated dozens of staffers from PETA and other animal-rights groups, even employing **John "J.P." Goodwin, a former Animal Liberation Front member and spokesman with a lengthy arrest record and a history of promoting arson to accomplish animal liberation and end all animal agriculture in the United States.**

INFORMATION ON PETA

* They want animals to have more rights than human beings.
* They are against eating meat.
* They are against people having pets.
* They are against hunting and fishing.
* They are against the use of seeing-eye dogs.
* They are against the use of dolphins by the US military to find ocean mines.
* They are against the use of police dogs.
* They are against the use of animals for research that saves human lives.
* They are against putting animals in a zoo.
* They are against using animals for any form of entertainment.

* In a 1992 report by the NCIB, National Charities Investigation Bureau, PETA spent 42% of its organizational expenses on fundraising. **Only 20% on actual research and investigation in to animal cruelty.**

- More current reports examining PETA's tax filings have shown **as little as 1% of PETA's total revenue actually goes directly to helping animals**; usually small donations to animal clinics or similar organizations.

Supporting Terrorism.

PETA has contributed thousands of dollars to known activist extremists. Most of these extremist were involved in either ALF or ELF, two organizations under FBI watch. The FBI is monitoring these organizations for acts of terrorism in the United States. These acts include arson, bombings, cutting the brake lines on fishery trucks, breaking and entering, destruction of government and organizational research laboratories and murder. ALF, in one statement, has admitted to over 100 acts of terrorism, all in the name of animal rights and the economy.

PETA has given over $45,000 to the defense of Rodney Coronado, an ALF member convicted of a firebombing at Michigan State University. During this criminal act of arson, Rodney Coronado stole documents and had them sent to a PETA member, the sending of these packages was prearranged by the president of PETA, herself. One of the packages was intercepted by the FBI.

Timothy McVeigh, the Oklahoma City bomber, during his last meal, decided to not eat meat. PETA's response to this was given by Bruce Friedrich, when he told reporters "Mr. McVeigh's decision to go vegetarian groups him with some of the world's greatest visionaries."

PETA published a pamphlet entitled "Activism and the law", that offers advice on burning laboratory buildings. This same pamphlet states "there is a higher law than that written by those who subjugate the helpless", it states that the use of illegal actions may be unpopular, but "no struggle against exploitation has been won without them."

PETA contributed $27,000 to the legal defense of Roger Troen for burglary and arson at the University of Oregon in 1986. In 1989, PETA informed its members of the payment.

PETA's 1988 Form 990. PETA contributed $7,500 to the legal defense of Fran Stephanie Trutt, convicted of possessing pipe bombs and prosecuted for the attempted murder of the president of a medical laboratory.

PETA's 2001 Form 990. PETA payed lawyer fees for animal rights criminals involving the North American Earth Liberation Front, an FBI-declared domestic terrorist organization.

-"I will be the last person to condemn ALF (Animal Liberation Front)."
- Ingrid Newkirk, in the New York Daily News, [December 7, 1997]

-"If we really believe that animals have the same right to be free from pain and suffering at our hands, then, of course we're going to be, as a movement, blowing things up and smashing windows ... I think it's a great way to bring about animal liberation ... I think it would be great if all of the fast-food outlets, slaughterhouses, these laboratories, and the banks that fund them exploded tomorrow. I think it's perfectly appropriate for people to take bricks and toss them through the windows ... Hallelujah to the people who are willing to do it."
- Bruce Friedrich, vegan campaign coordinator of PETA, "Animal Rights 2001" conference

CONCLUSION

Both HSUS and PETA support breed bans and breed retrictions, and other organizations in the United States including animal control that follow the Animal Rights agendas also support them. The intent of the breed ban is not to protect the public but to end domestic pet ownership which is why when we look at the data in cities where breed bans have been enacted we find they do not protect the public, what we do find is heavy lobbying by animal rights organizations and their members to aid in attempting to pass breed bans.

Animal rights groups such as PeTA, HSUS, Green Peace, et,al have launched an all out attack on the animal industry in the United States. The vast agriculture/animal industry includes everything from our pets, to our food supply, to garment manufacturers, shoe, and leather goods, circuses, rodeos, to pharmaceuticals. Under the guise of helping animals the animal rightists have worked to initiate legislation against poultry producers, beef producers, pork producers, and wool growers, and pet owners.

They have created a media monster in order to have cities and counties, and states initiate breed specific ordinances to prohibit pet ownership by breed. Breed specific dog ordinances remove ownership and property rights in animals. Once enacted any or all other breeds or species are eligible to be added until animal ownership and use has been abolished, collapsing the economy of the United States. Under laying all of the other facets of our economy is the animal/agriculture industry. The animal rights groups are being closely monitored by the Justice Department, specifically the ATF, and the FBI. The ALF, and ELF are supported by PeTA and are considered to be domestic terrorists. They support the radical overthrow of the United States government, and are willing to sacrifice the total economic collapse of our Country to achieve that goal.

By Associated Press
June 17, 2005, 2:15 PM EDT

AHOSKIE, N.C. -- Two employees of People for the Ethical Treatment of Animals were charged with animal cruelty for allegedly picking up dogs and cats from shelters and dumping their dead bodies in the garbage.

Police said they found 18 dead animals in the bin and 13 more in a van registered to the activist group, all from shelters in the state's northeastern corner.

Investigators arrested the two workers after staking out a garbage bin where animals had previously been dumped, police said Thursday.

PETA President Ingrid Newkirk said the workers were picking up animals to be brought to PETA headquarters for euthanization. Veterinarians and animal control officers said the PETA workers had promised to find homes for the animals rather than euthanize them, according to police.

Neither police nor PETA offered any theory on why the animals might have been dumped. PETA spokeswoman Colleen O'Brien said the organization euthanizes animals by lethal injection, which it considers more humane than gassing animals in groups, as some counties do. The group scheduled a news conference Friday in Norfolk, Va., where the group is based.

Police charged Andrew Benjamin Cook, 24, of Virginia Beach, Va., and Adria Joy Hinkle, 27, of Norfolk, Va., each with 31 felony counts of animal cruelty and eight misdemeanor counts of illegal disposal of dead animals. They were released on bond.

No home telephone number was listed for either Hinkle or Cook, and a message left for Cook at PETA headquarters was not returned. A PETA spokesman said he did not know how to reach Hinkle.

In this country according to a study done by the National Council on Pet Population between 1994-1998 showed 2- 2.3 million dogs are taken in by shelters across the country each year. 44% are found new homes or returned to their owners. The number two leading cause of dogs ending up in shelters is landlord issues (insurance discrimination and breed specific legislation)

American Canine Foundation
23969 NE State Rte 3
Suite G101
Belfair Wa 98528

July 2006

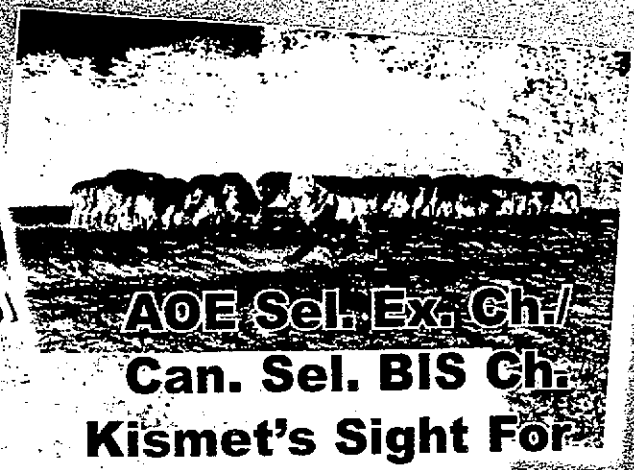
The Official Magazine of the German Shepherd Dog Club of America, Inc.

Volume 84, No. 7

The German Shepherd Dog Review

Conformation. Performance. Working.

Dallas



AOE Sel. Ex. Ch./ Can. Sel. BIS Ch. Kismet's Sight For Sore Eyes ROM, TC, PT, HSCs

Top Living ROM Sire 2005

My Dog Votes ... Does Yours?

Yes my dog votes...but what about yours?
It's high time they did or the possibility of no-dog households may become a reality.

More than 40,000,000 American households own at least one dog. When you add cats into the equation more than 50 percent of all Americans own a loveable furry fuzz ball. Furthermore...when you add all categories of pets into the equation, pet ownership approaches 70 percent of all Americans. That's a very impressive statistic and these same folks sponsor a multi-billion-dollar pet industry that generates more than $14 billion in food and billions more in veterinary care, toys, and other related products. One could also assume this would create a significant block of voters -- and it does. The rub of course, is that not all of those pet owners belong to the same party or share the same ideologies. The purpose of this article is to persuade you to come together to actively support your right to own a pet.

There are groups that are busily working to make the right to own any animal a memory. They are known as "Animal Rights Organizations." They are well financed and committed with thousands of like-minded activists promoting legislation and ordinances that will eventually lead to "no pet" households.

These organizations sound like kind and caring groups who only want what's best for "man's best friends." Humane Society of the United States (HSUS) is the largest. The word "Humane" by its very nature sounds great. People for the Ethical Treatment of Animals (PETA) is another Animal Rights Organization (ARO). Who wouldn't want their animals treated ethically? However, these two organizations do not support the animal welfare that their names would indicate, but instead are committed to the concept of "Animal Rights." There is a huge difference between the two!

Both organizations subscribe to the "Animal Rights Agenda" (ARA) listed below...

1. Abolish all animal research.
2. Abolish all product testing, dissection, or demonstrations on animals.
3. Encourage 'vegetarianism' for ethical, ecological, and healing reasons.
4. Phase out all forms of 'animal agriculture' ...i.e. the growing of animals for food.
5. Abolish all pesticides and any form of predator control.
6. Transfer the enforcement of animal welfare legislation from the Department of Agriculture to a new agency created for the protection of animals and the environment.
7. Abolish all trapping and fur ranching.
8. Abolish all 'hunting and fishing' for sport.
9. Save the rain forests and ban all international trade in wildlife or goods produced from exotic animals.

10. Abolish all breeding of companion animals...including pedigreed or purebred dogs and cats.
11. Abolish the use or association of animals in sports, entertainment, zoos, rodeos, coursing, or aquariums.
12. Prohibit the production of genetically manipulated transgenic animals.

If you pay attention to Plank 10 of the ARA you will understand why it's important for anyone's dog, cat, ferret, goldfish, or parrot to vote. Now is the time for pet owners to cross party lines and come together in one unyielding group that will spoil the plans of the ARO's. It's "Good bye Fluffy" if we do not.

"It can never happen" you say! Au contraire ... and here's why. In the last 20 years the Animal Rights folks have incrementally chipped away at your right to own...let alone breed...a dog or a cat. They have influenced legislators from every State in the Union to introduce legislation that would curtail your rights to breed or own a pet. I have testified before such legislative committees and in one heated moment...a lobbyist for an ARO stood up and shouted ..."Even one litter is too many!" and they mean it folks. Animal Rights Organizations have influenced communities, cities, and a couple of states to adopt the "Guardian Issue." That takes any pet out of the property category and while they make it sound so innocent, there will come a day when a judge will allow a pet "Guardian" to act in the "best" interest of your animal, no matter what you want to do. Innocent it is not.

Breed Specific Legislation (BSL) also is a hot topic and Pit Bull or Pit Bull-like dogs are banned in many cities in the United States and Canada. Now California has SB 861 that will allow any city to establish dangerous dog ordinances on any breed. That's a big incremental CHIP at your right to own a dog or cat. Lately AROs are pursuing a new tactic -- Mandatory Spay & Neuter Laws (MSN). MSN is a critical step toward their ultimate goal of completely eliminating pets. If all dogs and cats must be spayed or neutered they simply cannot reproduce...ergo success to Plank 10. Yes, current propositions allow for service dogs and show dogs to be exempt from MSN...but chip...chip...chip... they'll be back for them in a year or two.

Your political preference makes no difference on this issue, but your position on animal ownership does! Do you want to be able to own a pet or not? If you don't...continue to elect or do nothing to impede the ARO-backed candidates that would do away with pets...period. AROs have web sites with just such candidates listed to be worthy of your money and support. Why don't we? The simple answer is we're not as organized as they, but that must change and change quickly.

Continued on page 7

2005 ROM Sire C

POINTS	NAME				
114	Ch Utopia's Weekend Warrior	1	2	8	0
113	Ch Dan Ann's Seiko	4	1	0	0
111	Leiter's Nip and Tuck	2	2	5	0
110	Jerr's Pinebeach American Jazz	4	1	0	0
110	Ch Midnight Sun's Double Trouble	3	1	0	0
110	Ch Moorheide's Yuma v Leebo's	3	1	0	0
110	Regency Alta Gestone	2	0	0	1
109	Survival's Kool Dude	1	0	0	0
102	Ch Circle Slash's Oscaras	3	3	0	0
102	Ch Zytut Hoheneichen Shiloh	3	1	0	0
102	ADE Sel EX Ch WeLove DuChien's Patriot HT, TC	2	0	73	0
101	Ch Linnloch Paper Chase	3	4	30	0
101	Ch Mari Fiori's Bold Ruler v Judeen	3	3	18	0
101	Peddacres Mr. Goodbar	1	0	48	0
100	Ch Gunyea's Durango	3	1	16	0
100	Ch Bravo's Do Or Die of Nordlicht	3	2	57	0
99	Ch Carousel Farms Cosby Elkhill PT	1	2	5	0
99	Ch Windwalker's Yuma TC, HT	3	1	22	0
99	Ch Kaleef's Man O'War Falkrigia CD	3	0	32	0
99	Kaimacha Winning Colors CD	2	2	99	0
98	Kaimacha The Racketeer	3	0	5	0
97	Ch Frohlich's Coltrain	4	0	0	0
97	Topa's Cam Neely v Debonair	3	0	0	0
97	Ch Eagle Valley's Pfizer	1	0	26	0
96	Ch Marydon's Othello	2	0	0	0
96	Ch Von Saar's Starsky	2	1	0	0
96	Ch Sonnenbachtal's Dream Chaser	1	1	6	0
92	Ch Kohom's Going Places	3	4	0	0
92	Sel Ch Landaleigh's Quedo Vuelo CD	3	1	0	0
91	Caralon QED Texas Cutter	2	3	0	0
90	Windwalker's Fire N'Brimstone	2	2	15	0
89	Ch Baa Baa Black Sheep of Edan TC, ROM	2	2	24	0
89	Summerside's Army of Sandmark	1	1	0	0
89	Brown Hills Blacksmith Rotoba	1	1	0	0
89	Sel Ex Ch Karagin's Hoodlum of Castlehill	2	7	82	0
88	Ch Saterhaus Invader TC	3	0	0	0
88	Covy Tucker Hill's Saber	2	1	0	1
87	Ch Kos Mar's Shoeless Joe	1	1	15	1
87	Sel Ch Linden Hills Hayabusa	2	5	43	0
87	Covy Tucker Hill's Firestorm	1	2	10	0
86	Sel Ch Trafalgar's Nightraider Kismet	2	2	22	0
85	Scherlo's Lindenhills Shooter	2	2	5	1
83	Ch Huntington's Talk of the Town	1	1	25	0
83	Ch Lamar of Mardon	3	2	23	0
82	Ch Seashore's Monopoly of Beary	3	0	0	0
82	Ch Tara Airway Carly's Legend KCK HT, RN, CD	2	4	20	0
81	Ch Ich Dien von Haus Aye	3	1	10	0
81	Ch Von Zecher's Doc Holiday	2	1	19	0
81	Kennelwood's Knight Rider	2	0	10	1
81	Ch Beaufort's St. Nick	2	0	58	0
80	Hoheneichen San Mar MVP Edan	1	2	15	1

Continued from page 6

That means you must support groups that are dedicated to spoiling the ARO's plans. Groups like the German Shepherd Dog Club of America's group Responsible Animal Legislation Educational Effort (RALEEF), the National Animal Interest Alliance (NAIA) -- an excellent organization headed up by Patti Strand, and the American Kennel Club (AKC) are knee deep in fighting the AROs. The newest and very effective group is the American Canine Foundation. The ACF was a party to the successful appeal and overturning of a BSL case in Ohio. (Tellings v Toledo Ohio) They also have filed suit against the CA SB 861 bill. I'm hoping for results similar to Ohio.

Contact any of these organizations at the following websites:

- RALEEF@bellsouth.net
- www.naiaonline.org
- www.akc.org
- www.americancanineforundationlaw.com

You are the key! We need all animal lovers to come together to defeat those who would...and are...taking away your right to own a dog, cat, or any pet. Horse owners unite! ARO success would also eliminate horses from the planet. We must put politics aside and form a coalition that will insure big sloppy kisses or a purring cat rubbing up against you forever. This isn't a liberal or conservative issue. Liberals and conservatives love their pets in the same ways. Each of you must become an advocate for your continued relationship with your pets and influence your friends to do the same. We must form coalitions of owners, Parent Clubs, and all those who want to have their right to own a pet guaranteed in the future.

NAIA has another site called the NAIA Trust. Find them at www.naiatrust.org. They have great information on how to make your votes count the most. It's time we take off the gloves and give back to the AROs what they've given us over the past 20 years. We cannot remain complacent in this battle or we surely will lose. We must educate the uneducated and then use education to elevate standards in responsibility and care.

The AROs would have you all believe theirs are the only solutions to their perceived crisis. There is no crisis. Statistics show that 7 of 10 owners of dogs and cats have them spayed or neutered. There are irresponsible pet owners though, and they are the ones we must reach. We can do that by teaching "Responsible Pet Ownership 101" at every educational level. By doing so, we could graduate class after class of responsible pet owners that will obey existing pet laws. We don't need more laws...we need more common sense. You cannot legislate responsibility...you must educate.

Get involved – make your voice heard. Go online and contribute – contact your local leaders, write letters to your editors and encourage TV reporters to explore the AROs and their plans. We need to make ourselves heard above the din of ARO's demands. But whatever you do, VOTE! My dog votes and will do so with common sense. How about yours? ■

Paul Root, Chair
RALEEF (a committee of)
German Shepherd Dog Club of America

ACF

AMICUS BRIEF
EXHIBIT 5

DR STUR STUDY ON AGGRESSIVE CANINE BEHAVIOR

EXHIBIT E-1

REGARDING THE QUESTION OF PARTICULAR AGGRESSIVENESS OF DOGS BASED ON AFFILIATION WITH CERTAIN BREEDS

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REGARDING THE QUESTION OF PARTICULAR AGGRESSIVENESS OF DOGS BASED ON AFFILIATION WITH CERTAIN BREEDS

By Prof. Dr. Irene Stur
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LITERARY OVERVIEW

FORMATION OF PHENOTYPICAL CHARACTERISTICS

The individual formation of phenotypical characteristics is based on interaction between genetic type and the environment. The heritability is a gauge for that part which the genetic type plays in the formation of phenotypical characteristics. Characteristics with low heritability are strongly modified through environmental factors and can only be influenced in a small degree through breeding, characteristics with high heritability are insignificantly changed through environmental factors and are generally easily influenced through breeding (SCHLEGER and STUR, 1986). The problem in breeding of low heritable characteristics is, among other things, that on the one hand the judgment on the genetic type of the individual animal and on the other hand the inclusion of a genetic variant in a population of a breed, which is the prerequisite for selection, is only possible amid a strictly standardized environment. Because of the fact that in dogs the common demeanor represents the individual attitude, it cannot be concluded that the genetic judgment of an individual animal or the inclusion of a genetic variant as the prerequisite for effective selection for low heritable characteristics is the necessary standard norm.

BREEDCONCEPTION

A breed is a group of individuals within a species that are different in certain characteristics from other groups of individuals and inherit these variations of characteristics (WIESNER and RIBBECK, 1978). The frequent features within the breed make up the norm, or the breed standard (COMBERG, 1971). Generally between the breeds exists a discontinuous variation relating to the characteristics of the breed, that means that animals with extreme characteristics of a breed are still outside of the standard variation of another breed.

Within each breed exists a genetic or phenotypical variation for all characteristics of which the extent for each characteristic is different and which is dependent on size of population, inbreeding standard of the population, and selection.

DOMESTICATION AND FORMATION OF BREED

As a result of domestication there is a change from the selection versus natural selection, which the wild population is exposed to, to artificial selection through people. According to differing interests that people have in pets, new breeds are created.

ORIGINS OF BREEDS IN DOGS

Apart from geographically determined differences relating to color and length of coat, bone structure or ear shape, things that are already consciously preferred by breeders, the first dog breeds originated as the result of selection for certain uses (ZIMEN, 1992). Without a doubt, people at first used the instinct of fight and protection in dogs. From there originated the first herding dogs, that protected the herds against attacks from wolves and coyotes (FINGER, 1988), the first hunting dogs, that were used among other things for the hunt of valiant game, the first farm dog for protection of human settlements and later war dogs, that were taken into a war as living weapons (ZIMEN, 1992). In the beginning, there were no breed standards as we know them today. Selection resulted on half natural basis. Only those dogs were used for reproduction that were suited the best for a certain purpose. Because only large, powerful, and courageous dogs showed the best skills in the aforementioned utilization there were no significant differences in reference to their exterior or their character.

In the course of time nothing substantial changed in the main utilization of dogs. Specialized direction in breeds was established in the area of hunting dogs as well as in special leisure activities that were established in England toward the end of the 16th century. Greyhound races and dogs fighting bulls lead to the breeding of dogs that were especially suited for this "sport". Through the use of the fighting dog those qualities were used that were also evident in the original usage of the dogs for hunting and guarding. Originally only reserved for royalty, especially the bullfighting soon became a national pastime. Later dogs fought against dogs (because buying bulls was too expensive) and after dog fighting was forbidden by the parliament in 1835, they were used against rats (SEMENCIC, 1984).

Breeding of pedigree dogs in the modern sense only existed since the middle of the 19th century. In 1859 the first dog show was held in England. With the establishment of the British Kennel Club in 1873 the framework for affiliation in breed, breeding and exhibition was laid (ZIMEN, 1992).

BREEDING OF PEDIGREE DOGS TODAY

The goal of today's breeders concerns itself with the breed typical exterior, which was defined by the Federation Cynologique International (FCI) for standards of breeds. In some breeds a prerequisite for breeding is the absence of certain congenital defects, i.e. hipjointdysplasy and for certain breeds (like hunting dogs and working dogs) a test for the animals that are to be bred is requested.

As the international umbrella federation, the FCI is worldwide the most significant institution in dog breeding. In each country the FCI acknowledges a national breeding association, in Austria it is the Austrian Kynologenverband (OKV). The FCI is responsible for the recognition of breeds and breed standards, whereby the standard of individual breeds is made available by the country of origin of the individual breed. The breed standards address the outward characteristics as well as give indications to desired nature and temperament of the breed.

The OKV makes available on a national level a framework for classification which outlines the minimum requirements for breeding permits. The individual breeding associations can only influence this framework as far as intensifying the breeding prerequisites is concerned.

TEST FOR USAGE AS A BASIS FOR SELECTION

Breeds which are selected based on tests, must not necessarily be preferred for breeding because of genes that promote aggressive behavior. In working with guard dogs one builds on the instinct to search for prey and the play instinct. The protective sleeve that is used is for the dog only prey for which the fictitious culprit competes with him (BECHTOLD, 1985; SWAROVSKI et al., 1986). This connection is also confirmed through results of a test by HRUBY (1991), where 1119 dogs had completed the guard dog test and a significant correlation between the test subjects of "fighting instinct" , "attack" and "courage" as well as the subordination field "fetch", which rests especially on the instinct to search for prey and the joy to retrieve, was found. In addition, in this test the significant correlation was found between the points that were achieved in the guard work and the points in the subordination. It testifies on the one hand that the performance in the guard work makes up a large part of trained performance and on the other hand underlines the significance of obedience and the willingness for subordination in the training of a guard dog and therefore in the choosing of a breed as well. These results support the opinions of FEDDERSEN-PETERSEN (1992b) and REHAGE (1992), who describe as especially dangerous such dogs that have been encouraged within a framework of guard training to be aggressive in behavior, but then the training was discontinued and they were not adequately trained in subordination.

IDENTIFICATIONPOSSIBILITIES

Identification possibilities in the individual animal are possible on the basis of inherent and acquired markings, whereby the possibility of falsification and error can never be excluded. Unmistakable identification is possible on the basis of definition of blood groups respectively polymorphuous protein and enzyme systems (SCHLEGER and STUR, 1986), on the basis of DNA - fingerprints (JEFFREYS and MORTON, 1987; GEORGES et al., 1988) as well as with microchip identification (N.N., 1993).

Based on blood groups, polymorphuous protein- and enzyme systems as well as DNA-fingerprints respectively canine micro satellites, the verification of an indicated lineage of two specific parent animals is possible in an individual dog (MORTON et al., 1987; BINNS et al., 1995; FREDHOLM and WINTERO, 1996; ZAJC and SAMPSON, 1996).

Identification of a particular breed affiliation is nevertheless only possible based on exterior markings which are defined in the breed standards, however in an individual case the undoubted affiliation of a dog to a breed is only partially possible.

Of course, based on canine DNA markers one can execute genealogical studies about the genetic distance between breeds or populations (FREDHOLM and WINTERO, 1995; OKUMARA et al., 1996; PIHKANEN et al., 1996; ZAJC et al., 1997) but affiliation of a single dog to a certain breed or the determination of lineage of a mixed breed dog of certain breeds based on canine markers is not possible according to current scientific standings (TEMPLETON, 1990).

SHORT OVERVIEW ABOUT HISTORY AND DEVELOPMENT OF INDIVIDUAL INCRIMINATED BREEDS

1) **MASTIFF** (SCHMIDT, 1990): molossoid, mastiff like dogs were already found in very early cultures. A terracotta plate of Assyrian origin dated from the 7th century BC shows a man whose hand is resting on the back of a dog of enormous size and molossoid type. Based on archeological finds, depictions

and sculptures it can be concluded how mastiff like dogs were used in the time before Christ. Obviously they were used as guard, fighting and hunting dogs for valiant game. In the antique Rome such dogs were used for gladiator fights and for fighting against wild animals such as bears or lions. Mastiff like dogs were also used in the time after Christ, especially in the Anglo-Saxon realm, predominantly as guard dogs and for protection as well as fighting dogs. To be sure they were used in England as well for show fights against lions and bears. Orderly breeding of the Mastiff was established through the formation of the OEMC (Old English Mastiff Club) in 1883. World War I and II formed a population genetic bottleneck for the breed, so that through cross breeding with St. Bernards and Bullmastiffs the population was expanded.

MASTIFF BREEDING TODAY: Additionally to the detailed standards for the exterior for today's Mastiff, the following is required (FCI standard):

Characteristic distinctions: large, massive, powerful, symmetrical, well build body. A combination of nobility and courage.

Demeanor: Quiet, loving towards his owner, yet able to protect him.

MASTIFF BREEDING IN AUSTRIA: Mastiffs are bred in Austria within the framework of the Molosser-Club-Austria . Fundamental prerequisite for the use of the breed, (MOLOSSER-CLUB-AUSTRIA) are health, age based development, demeanor and appearance that are distinctive to the breed. Additionally to genetic defects like exterior defects and hipdysplasia, excessive aggressiveness and pronounced timidity are causes for exclusion to breed.

2). **BULLTERRIER** (SCHLEGER, 1983): The ancestor of the Bullterrier was the Mastiff, out of which the Bull dog was bred at the beginning of the 17th century. It was smaller and lighter than the Mastiff and was used for bull fighting. In order to breed more agile and faster dogs that were willing to submit, to be used for pure dogfights (fighting dog vs. dog), the Bullterrier was cross bred to the Terrier at the end of the 18th century. In 1835 animal fighting was officially forbidden in England, unofficially, however they continued. The popularity for selection in the initial Bullterrier resulted out of his usage. Only those dogs that succeeded and survived their fights were bred. Particular worth was always given to the dogs being ready to submit, because it had to be possible to separate the animals after individual fighting rounds and because the aggression of the dog should not be directed towards the owner of the dog.

BULLTERRIER BREEDING TODAY: Along with the detailed standards for exterior (FCI standards), the following is required of today's Bullterrier:

General appearance: The Bullterrier must be powerful, symmetrically muscular and mobile. His expression should be lively and intelligent; he should show courage alongside an even temper and the willingness for subordination.

BULLTERRIER BREEDING IN AUSTRIA: In Austria Bullterriers are bred within the framework of the Austrian Bullterrier Club.

Prerequisites for breeding are (AUSTRIAN BULLTERRIER-CLUB, 1979): Health, faultless build, sufficient strong bones.

Show assessments must include at the minimum two "excellent" for males at international shows, for bitches two "very good" or one "excellent" respectively at international shows.

3) **MASTINO NAPOLETANO** (WEISSE, 1990): The origin of the Mastino Napoletano was in the pack dogs of Italy in the middle ages. Like the Mastiff or Bulldog in England, the boar hound in Germany, and the Great Dane in France, they were used to hunt valiant game. The actual establishment of the Mastino Napoletano happened in 1949 with the recognition of the standards for breed.

MASTINO NAPOLETANO BREEDING TODAY: Along with the detailed standards for exterior (FCI standards), the following is required of today's Mastino Napoletano:

General, breed typical characteristics: The Mastino Napoletano is the guard dog par excellence. He is enormously heavy, strong boned, powerful, rough looking but yet majestic, robust and courageous, his expression is intelligent, his temper is even, obedient and not aggressive; as a defender of people and property he is unequalled.

MASTINO NAPOLETANO BREEDING IN AUSTRIA: The Mastino Napoletano is bred in Austria within the framework of the Molosser-Club-Austria.
Foundational prerequisites for breeding according to the Molosser-Club-Austria are: Health, age based development, temperament and appearance distinctive to the breed. Genetic defects like exterior faults, hipdisplasie, as well as excessive aggressiveness and pronounced timidity are causes for the exclusion to breed.

4) **FILA BRASILEIRO** (DASER, 1990): The molossoid dogs of Southern Europe are considered to be the ancestors of the Fila Brasileiro. These dogs accompanied the immigrants to Brazil where there were first used mostly to hunt. In addition they served to protect haciendas and guarded slaves. They were supposed to find and confront run away slaves, but not hurt them, because loss of a slave was considered economical loss. With time different breeds were crossed with the original mastiff like dogs of Brazil, such as Bulldogs, Bloodhounds, as well as Foxhounds, Greyhounds, and Pointers.

FILA BRASILEIRO BREEDING TODAY: Besides the detailed standard for appearance according to the FCI standards, the following is required of the Fila Brasileiro: A significant part of his character is courage, determination and projected bravery. He is submissive towards his owner and his family and tolerant of children. His loyalty is famed in Brazil. He always seeks out the companionship of his owner. He is suspicious of strangers. He is basically quiet, his self-assurance and self-confidence are not shaken by unknown noises or new environment. He is unequalled as a guard dog. His instincts define him as a hunting dog for large game and a herding dog for cattle.

FILA BRASILEIRO BREEDING IN AUSTRIA: The Fila Brasileiro is bred in Austria within the framework of the Molosser-Club-Austria.
Foundational prerequisites for breeding according to the Molosser-Club-Austria are: Health, age based development, temperament and appearance distinctive to breed. Genetic defects like exterior faults, hipdisplasie, as well as excessive aggressiveness and pronounced timidity are causes for exclusion to breed.

5) **BORDEAUX DANE** (PUFAHL, 1990): The Bordeaux Dane is the direct descendant of the numerous Dane types that have existed for a long time in France. They were used as pack dogs for large game, war dogs, in the arena and to protect cattle, as well as butcher dogs. The first breed standard was publicized in 1896.

BORDEAUX DANE BREEDING TODAY: Besides the detailed standard for appearance according to the FCI standards, the following is required of the Bordeaux Dane: Overall appearance: The Bordeaux Dane is an extremely robustly build colossus with a very muscular, harmonic body build. It offers a view of an athlete that demands respect, is muscular, imposing, and proud. Once a fighting dog, they now are used as guard dogs, a task which they fulfill with attentiveness and courage, yet without being aggressive. This dog is very loyal to his master and loving towards children.

BORDEAUX DANE BREEDING IN AUSTRIA: The Bordeaux Dane is bred in Austria within the framework of the Molosser-Club-Austria. Foundational prerequisites for breeding according to the

Molosser-Club-Austria are: Health, age based development, temperament and appearance distinctive to breed. Causes for exclusion to breed include genetic defects, like exterior faults, hipdysplasie, as well as excessive aggressiveness and pronounced timidity.

6) **DOGO ARGENTINO** (SCHIMPF, 1992): The origin of the Dogo Argentino was probably the Spanish Alano, a dog that was brought with the Germanic exodus around 400 by the Alanians to Spain. These dogs corresponded in type to a Dane like pack and sporting dog. In the course of colonization these dogs were brought to South America and used among other things as support for the Spaniards during the colonization of South America. Through performance selection a breed with unsurpassed instinct for fighting was developed. They were largely insensitive to pain and robust to the point of self sacrifice. The British, who came to Argentina to build the railroad net, brought Bullterriers along so that dog fights would distract them from being homesick. In that way Bullterriers were introduced into the local dog breeds and dog fighting as entertainment was established. Around 1920 dog fights were lawfully forbidden. In order to sustain the Dogo Argentino it was decided that, based on the old fighting dogs, to create a new breed that would be used to hunt game like wild boar and puma. To improve the hunting abilities, dogs of different breeds, like Pointers, German Danes, Bullterriers, Bordeaux Danes, Boxers and Irish Wolfhounds were crossbred in the 50's. In 1947 a new breed goal was established: A dog who pursues quietly with a persistent sense of smell, a strong fighting instinct because of the game that was hunted (wild boar and puma), but not rowdy, because it had to work with other dogs. Of white color so he could be distinguished from the opponents. Small enough to work in thick brush but large enough to be fast and strong.

DOGO ARGENTINO BREEDING TODAY: Besides the detailed standard for exterior appearance according to the FCI standard, no other general characteristics are required.

DOGO ARGENTINO BREEDING IN AUSTRIA: The Dogo Argentino is bred in Austria within the framework of the Austrian Dogo Argentino Club. Prerequisites for permission to breed were not available at this time.

7) **AMERICAN STAFFORDSHIRE TERRIER** (GORDON, 1986): The origin of the American Staffordshire Terrier dates back to the time of dog fighting in England. For the fights dog vs. dog or dog vs. rats smaller and more mobile dogs were used than the Mastiffs or Bull dogs that were used in bull fighting. Through cross breeding of different Terriers the Staffordshire Bullterrier, among others, originated. In 1935 the first Staffordshire Bullterrier Club was founded. In 1936 the American Staffordshire Terrier was recognized by the American Kennel Club.

AMERICAN STAFFORDSHIRE BREEDING TODAY: Additionally to the detailed standards for appearance according to the FCI standards, the following is required of the American Staffordshire Terrier: The American Staffordshire Terrier should give the impression of great strength with respect to his size. A harmonic, muscular dog, lively and interested in his environment. In his general appearance he should appear stocky an not too long legged. His courage is proverbial.

AMERICAN STAFFORDSHIRE BREEDING IN AUSTRIA: The American Staffordshire Terrier is bred in Austria within the framework of the Austrian Club for American Staffordshire Terrier. As a prerequisite for breeding, the following is required (AUSTRIAN CLUB FOR AMERICAN STAFFORDSHIRE TERRIER, 1990): In light of the fact that the original use of the breed as a fighting dog is without justification, aggressiveness is not a characteristic under the "breed typical demeanor". Therefore, a breed admission test as well as the guide dog test is required at a minimum. In the breed admission test the reaction of the dog to optical as well as acoustic stimulation is tested. As well as his reaction to a threat to his master and how he responds to passing through crowds. If the animal shows aggression or fear it is excluded from breeding.

8) **ROTTWEILER** (PIENKOSS, 1982): The molossoid dogs of the Roman province Germania are the ancestors of the Rottweiler. Out of crossings of indigenous herding dogs and Bull dogs in the area surrounding the city of Rottweil, the Rottweiler butcher dog originated. At one time he was used as guard dog and then as a chase dog for cattle and as a helper for butchers. At the beginning of the 20th

century the Rottweiler was discovered as working dog and was used by police and army as a service dog. During the two world wars the Rottweiler, along with other working dog breeds, was used as a messenger, in the medical field, as well as reconnaissance.

ROTTWEILER BREEDING TODAY: In addition to the detailed standards for appearance according to FCI standards, the following is required of the Rottweiler: General appearance: The Rottweiler is a medium to large sized sturdy dog, neither plump nor light, not high legged or shaky. His well proportioned stocky and strong shape points to great strength, mobility and endurance. Temperament and character (demeanor): Basically friendly and peaceful, loves children, very devoted, obedient, easily lead and willing to work. His appearance speaks of origin, his behavior is self confident, nerves of steel and fearless. He reacts with high attentiveness to his surroundings.

ROTTWEILER BREEDING IN AUSTRIA: The Rottweiler is bred in Austria within the framework of the Austrian Rottweiler Club. The following is asked of the breeding animal (AUSTRIAN ROTTWEILER CLUB, 1990): Unmistakable definition of species, health and vitality, endurance ensuring use of body, strong, complete scissors bite, hard constitution, good nerves and well grounded demeanor, self confidence, courage and toughness. Different breed classes are compared as follows: Simple breed: one of the breed partners must have a certificate of training (at a minimum a test as a dog for protection), however both partners must have passed a breed qualification test. Service dogs breeding: Parents have a certificate of training. Performance breeding: Parents and great parents have a certificate of training. Selected breeding: both parents have been selected. Selected and service dogs breeding: both parents have been selected and the great parents have a certificate of training. Selection prerequisites: minimum age of 36 months for males and 30 months for bitches, passed a breed qualification test. For male dogs a passed test as a dog for protection (Test III), for bitches a passed test as a dog for protection (Test I). No indication of hipdysplasy. The following are considered faults and exclude animals from being bred: Demeanor: Fearful, shy, cowardly, gun shy, malicious, exaggerated distrustful and nervous animals.

9)**RHODESIAN RIDGEBACK** (N.N., 1992): The Rhodesian Ridgeback originated in Southern Africa where it was used by the different tribes as a hunting dog and to chase game. Selection was based originally on long legs and swiftness, later the dogs were bred to be a bit more massive in order to be able to deal with large game, such as lions. The Boer crossbred among others bloodhounds and Airdaleterriers with the Rhodesian Ridgeback. The first Rhodesian Ridgeback Club (Lion Dog Club) was founded in 1922, in 1924 acknowledgement was given through the FCI.

Rhodesian Ridgeback Breeding today: The Rhodesian Ridgeback is used as before as a hunting dog, as well as a pet and guard dog, and a police dog and guide dog. Besides the detailed standards for appearance, the following is required of the Rhodesian Ridgeback (FCI standard): Imposing, muscular and self confident dog, that can be recognized for its swiftness, strength and endurance. The temperament is calm, nevertheless because of its swiftness, endurance, smartness, mobility and great sense of sight and smell it disposes of a astonishing dominance. The Rhodesian Ridgeback is characterized by calmness and self control.

Rhodesian Ridgeback breeding in Austria: The Rhodesian Ridgeback is bred in Austria within the framework of the Rhodesian Ridgeback Club.
As a prerequisite for breeding the following is required (RHODESIAN RIDGEBACK CLUB): Performance in the breed qualification test which focuses on appearance and demeanor. Free of HD. A minimum score of "very good" in form at a show.

9) **Pitbullterrier and Bandog** SEMECIC, 1984): Neither Pitbullterriers nor Bandog are recognized breeds by the FCI, even though the Pitbullterrier is characterized as a breed in America by its breeders and handlers. It probably originated based on the Staffordshire Bullterrier through cross breeding with especially fight willing dogs of other breeds. The Bandog is a hybrid product among others of the Bullterrier and Mastiff. The goal of breeding with the Pitbullterrier and the Bandog is their performance in dog fights. Since the Pitbullterrier and the Bandog are not recognized as breeds by the FCI, no breed standards exist and therefore no Pitbullterriers or Bandogs are bred in Austria.

POPULATIONDYNAMICS

Changes or stability in the genepool of a population are subject to interaction between selectivity and genetic chance (FALCONER, 1984).

Selectivity causes an accumulation of genes which determine one or more desired and therefore selectively favored characteristics. Selectivity is carried out in the frame of natural selection as far as characteristics, such as self preservation and procreation are concerned. Through natural selection therefore an accumulation of certain color genes occurs, that influence the camouflage, or genes that determine especially swiftness or particular strength.

Within the frame of artificial selection based on domesticated restriction, the selectivity changes; characteristics that ensure the survival of the species are not selectively favored anymore. Instead characteristics the are deemed important by the breed influencing person.

Genes that are not exposed to selectivity are subject to genetic drift effect. The direction of the genetic drift is determined through chance. The extent of the genetic drift and therefore the rate of change in the genepool is proportioned to the growth of population. Therefore smaller populations experience faster drift related changes in the genepool .

As the result of the genetic drift, single genes of the population can not be lost or homozygot fixed.

Genes, that for instance determined in the 19th century the special willingness to fight in Mastiffs, can be lost in a few generations, if willingness to fight is not subject to selection anymore.

Additionally, if a population encounters a so called population genetic bottleneck (the number of breed animals is temporarily reduced to a few animals) like it happened for instance with Mastiffs as a result of the war (SCHMIDT, 1990), the genepool of the following generation corresponds exclusively to the genepool of the population that passed through the bottleneck and to those of later crossbred animals.

The generation that follows is therefore not genetically identical with the original population anymore.

If one looks at the goals for breeding in the incriminated breeds, no willingness to fight or aggressive behavior is mentioned, on the contrary, excessive aggressiveness is considered a fault for exclusion from breeding.

Earlier existing genes that supported willingness to fight and aggressiveness in ancestors of today's breeds are not subject to today's positive selectivity and are therefore exposed to genetic drift or even negative selectivity. Which leads to focused expulsion of such genes in the population. Wherefore according to SCOTT and FULLER (1965) a few generations of focused selection are enough to change the genetic structure of a population regarding certain behavior. This not only carries weight for the incriminated breeds but fundamentally for all breeds.

One example of the genetic drift might be the Dachshund. Originally used as a hunting dog for work under the earth, the elevated will to fight was probably based on high pain tolerance which was described by ZIMEN (1992) for the hunting terrier. The main use of the Dachshund today is that of a family pet. The originally important will to fight is therefore not subject to selectivity. The determining genes drift by chance, and as surely as there are still Dachshunds today that exhibit the required need for rigour and willingness to fight, most of them are peaceful and good natured dogs.

DANGEROUS DOGS

With the danger that originate with dogs, one has to differentiate two points:

1) general fear of animals: is the result of the unpredictability of an animal, which is not a reasonable being, and is fundamentally valid for all species of animals that are in the care of a person.

2) the particular danger that is exhibited by an individual animal and is the result of individual characteristic. These characteristics can affect the following

a) individual demeanor of the dog
b) individual bodily characteristics of the dog
c) individual characteristics of the owner or handler
d) accident situation
e) individual characteristics of the victim

The law or ordinance giver base their opinions on that higher danger is displayed by dogs of certain breeds solely based on their affiliation with that breed, than dogs of another breed.

That would preclude that in the above mentioned points understandable differences between dogs of differing breeds exist.

Re: a) individual characteristic traits in dogs

The essence of a dog is defined as the whole of all inborn bodily and spiritual tendencies, capacities and abilities that determine, shape, and regulate its reaction to the environment (SEIFERLE 1972). The idea embraces the whole reaction of a dog to its people, its attachment to them as well as its reaction toward strange people and new stimulation and its reaction toward other dogs. It includes the inclination of a dog to either domination or to quick subordination. It includes constitutional factors like readiness to react, how fast it reacts and endurance and refers to the behavior inventory of a dog. This can be more or less complete or can prove loss on one hand and excessiveness within distinctive areas of function. Temperament, endurance, ability of the dog (learned through association and combination), flows into the idea of essence.

The idea of essence is therefore extremely complex and excludes a simple and measurable judgment of an individual dog or dogs of a certain breed. Especially since the environment of the dog, which cannot be measured nor standardized, must be included in the definition. Characteristic traits therefore belong mostly to the less inheritable attributes, whose genetic inclusion in the individual animal or the population is only limited possible. Objective judgments in individuals or judging of differences in breeds are only possible in reference to individually definable demeanors. So described FEDDERSEN-PETERSEN (1992) and FEDDERSEN-PETERSEN and HAMANN (1994) the differences in demeanor of different breeds (Labrador Retriever, Golden Retriever, Siberian Husky, Bullterrier, Giant Poodle, Miniature Poodle, German Shepherd). Judged at the time of earliest occurrence of particular demeanor.

HART and MILLER (1985) made a breed profile available based on subjective judgment by chosen veterinary surgeons, judges and dog trainers, who classified 56 breeds according to the degree of impression of established characteristics, such as irritability, tendency to bark, willingness to obey, aggression against other dogs, dominant over the owner, etc. They concluded that greater differences between the breeds for certain characteristics such as irritability and general activity than for other characteristics such as aggression against dogs and dominance over the owner were recognizable. Based on analysis of factors and cluster analysis HART and HART (1985) established groups of breeds with similar tendencies using the same data. For instance belonging to the group with the characteristic of "very high readiness for aggression, low threshold of irritation, and medium difficulty of training, are breeds like the Dachshund, Miniature Schnauzer, Chihuahua and diverse Terriers. Belonging to the group with the characteristics of "very high readiness for aggression, very well trainable and very high threshold of irritability are the German Shepherd, Akita Inu, Dobermann and Rottweiler. An indication of particular danger with a certain breed cannot be determined from these results, as especially the characteristics of irritability threshold and trainability only have an influence on the dangerous demeanor of an individual animal through interaction with the individual's environment. In this study the authors examined as well the differences in behavior in females and males and found that female animals excelled in the

characteristics of obedience training, house training and devotion. In the male animals characteristics such as dominance over the owner, aggression toward other dogs, general activeness, defense of territory, snapping children, destructiveness and playfulness were more pronounced. In evaluating these results the very subjective foundation of data interpretation is to be considered.

The scientifically established view of behavior and demeanor in dogs ,which would be the presupposition for justified distinctions between breeds, presupposes in each case a possibly objective inclusion of characteristics, a standardized test situation as well as sufficient figures for statistical reliability.

Tests for demeanor like for instance the Campbell-Test (CAMPBELL, 1975) would be a possibly suitable system to determine the demeanor and behavior characteristics of individual dogs and the inclusion of breed differences. However, up to now, sufficient scientifically ensured investigations to evaluate the test results are lacking. So far only with Beagles the Campbell-Test was evaluated in view of its assertion (VENZI, 1990).

Aggression as a definite characteristic is not objective as well. A study by SCHLEGER (1983) shows the Bullterrier as an particularly aggressive breed, where even procreative functions like mating and care for the puppies are disturbed through the extreme aggressive behavior between the mating pair respectively and of the mother towards her pups. However, the study only included 11 litters totaling 58 puppies. Moreover, a very high inbreeding co-efficiency existed during the time of the study of the Bullterrier population (between 19% and 22%). Since 1960 a few Bullterriers were imported from England in order to improve the breed and as a result strict breeding according to lineage of a small number of ancestors was conducted. The observed problems caused by aggression are therefore rather viewed as a consolidation of ethopathy releasing defective genes within a lineage caused by inbreeding than as breed typical behavior.

With Bernese Mountain Dogs a hint towards genetically caused ethopathy, which caused aggressive behavior, was discovered by van der VELDEN et al. (1976). The affected animals were always male and were observed as puppies to be especially shy and nervous. A diminishing threshold for sexual hormone led aggression was accepted as a foundational defect.

According to SCOTT and FULLER (1965) an important foundation for genetic differences of aggression between breeds is the difference between male and female animals. In more aggressive breeds the difference in gender regarding aggressive behavior is more pronounced than in less aggressive breeds. In this study breeds like the Foxterrier and the Basenji were established as aggressive breeds, whereas the Cocker Spaniels and Shelties were established as more peaceful breeds.

Comparable results were found by PINXTEREN et al. (1983). A survey that was conducted with a total of 202 dog owners showed that aggressive behavior is a major part in behavioral problems. A direct breed predisposition could not be found, however it was shown that with Mastiffs, Shepherding Dogs and mixed breeds the males were clearly more aggressive than the females of the same breed.

An objective evaluation of particular aggressiveness and therefore characteristic danger of certain breeds could possibly be established through an over representation of individual breeds that were involved in accidents with dogs. There are a number of studies for this.

In a total of 5711 biting incidents with dogs WRIGHT (1985) found a total of 16 serious incidents, in which the dog bit more than once. All 16 dogs were males and 10 of them had already bitten before. Five of them were American Staffordshire Terrier, three St. Bernhards and two Cocker Spaniels. All incidents happened in the immediate vicinity of the dog owner's house.

According to a study by PODBERSCEK and BLACKSHAW (1990) above all male representatives of large dog breeds, like German Shepherds, Bullterrier, Pit Bull Terrier and Labradors were involved in bite wounds. In most cases the victims were known by the dog and the incidents always occurred in the dog's own territory. Stray dogs only seldom attack people.

AVNER and BAKER (1991) evaluated bite injuries in a total of 168 children. In 35 cases German Shepherds were involved, in 33 cases Pit Bulls, as well as 9 Rottweiler, 7 Doberman, 6 Terrier and 5 Huskies. Males bit more often than females and most of the bite injuries occurred through dogs that were known to the child and in direct vicinity of the dog's living area.

BLACKSHAW (1991) found in an evaluation of data by a special clinic in Australia for behavioral disturbance that with 87 dogs that were presented because of aggression against people, 16% were Bull Terrier, 15% German Shepherds and shepherd mixes, 9.2% Guard Dogs, 9.2% Terrier, 8% Labradors, and each 5.7% Poodles and Cocker Spaniels and 4.6% Rottweiler.

SHEWELL and NANCARROW (1991) examined in the framework of a written survey the involvement of breeds in biting incidents. Out of a total of 107 returned surveys it showed that the Staffordshire Bull Terrier (15 cases), the Jack Russell Terrier (13 cases), medium sized mixed breeds (10 cases) and German Shepherds (9 cases) were the most involved. In most cases it was the males that bit and mainly the owner was bitten within the home.

A police statistic by HARTWIG (1990) on the use of guns in order to kill dogs, it shows that in a total of 34 cases, where dogs had to be killed with a gun because of aggression against people, 16 were German Shepherds, 1 mixed breed, 5 Pit Bulls, 2 Rottweiler, 3 Boxer, 1 Wolf Spitz, 1 Greyhound, 2 Bernese Mountain Dogs, 1 St. Bernhard, 1 American Staffordshire Terrier and 1 Great Dane.

REHAGE (1992) furnishes an overview of dogs in a small animal clinic that since 1987 had to be euthanized because of hyper aggressiveness. It was a total of 5 Rottweiler, 4 German Shepherds, 2 Muensterlaender, 7 red Cocker Spaniels, 5 mixed breeds, 1 Hovawart, 2 Chow Chow, 1 Poodle, 2 Dachshund, and 1 German Shorthair.

In an examination of biting accidents that caused death (a total of 109 cases) (SACKS et al., 1996) in 24 cases Pit Bull Terrier were involved, in 16 cases Rottweiler and in 10 cases German Shepherds. Another corresponding study, in which biting accidents over a period of 1979 - 1996 that caused death were evaluated (MMWR, 1997) it shows 60 Pit Bull Terrier, 29 Rottweiler, 19 Shepherds, 14 Huskies, 12 Alaskan Malamute, 8 Doberman, 8 Chow Chow, 6 Great Dane, 4 St. Bernhard, 4 Akita Inu, 14 Wolf Hybrids, 11 Shepherd mixes, 10 Pit Bull mixes, 6 Husky mixes, 3 Alaskan Malamute mixes, 3 Rottweiler mixes, 3 Chow Chow mixes and 199 mixes of unknown origin were the involved breeds.

In a study about fear based aggression in dogs that was conducted by the University of Utrecht (GALAC and KNOL, 1997), a total of 284 dogs were evaluated that were presented with behavioral problems in the time frame between 1991 and 1994. In 26% fear based aggression was diagnosed. A total of 18 mixed breeds were represented the most, followed by Golden Retrievers (9 dogs), Rottweiler (6 dogs) and Bernese Mountain Dogs (4 dogs). The aggressive behavior was exhibited in growling, snapping, biting with laid back ears, lowered tail and ducked posture. It was directed towards children and adults and was shown primarily in the house, when a person would approach the dog or touch it.

All mentioned studies admittedly show certain breeds in connection with bite incidents, however, in order to establish a foundational and justified discrimination of certain breeds as particularly dangerous based on these studies, one must

a) evaluate the number of a particular breeds involved in bite incidents in relation to the total number of dogs of this breed within the area of the study
b) statistically ensure the over representation of representatives of a breed
c) consider the influence of other factors on the evaluation of the incident
d) evaluate a greater amount of data for each case.

In none of the quoted works these prerequisites have been fulfilled, so that one must view the appearance of certain breed dogs in the mentioned studies as coincidental.

A study about breed involvement in bite incidents from Germany (SCHNEPPEN, 1992) shows a rank for individual, discriminated breeds in the Steiermark:

Rottweiler	3rd place
Mastino Napoletano	23rd place
Staffordshire Bull Terrier	26th place
Fila Brasileiro	42nd place
Bordeaux Dane	not mentioned
Dogo Argentino	not mentioned

The first two places are taken by the German Shepherd and mixed breeds. No reference is made to the other breeds that are mentioned in the ordinance of the provincial government in Steiermark. The rank system shows no exact numbers and the involvement of individual breeds in biting incidents is not evaluated in relation to the total number of dogs of these breeds.

A study by BERZON (1978) established that 44% of all dog bites were attributed to the German Shepherds, even though they only represented 22% of the dog population.

SZPAKOVSI et al. (1989) found in an examination of 250 bite incidents a 2% higher involvement of Shepherds and mixed breeds in proportion to the total population.

In a study by TERNON (1993) which analyzed protocols of Austrian insurance companies regarding the causes of bite incidents with dogs, the number of in cases involved dogs of individual breeds was compared to the number of dogs registered in the Austrian Dog Breeding Book (OHZB) as well as to the breed dispersion in an Austrian small animal clinic. In the biting incidents the Shepherd was over represented in comparison to the breed dispersion and patient records and the Rottweiler was over represented in relation to the OHZB as well as in relation to the breed dispersion of the small animal clinic. In this study as well the number of the evaluated incidents was much too small for a foundational testimony and statistical insurance was not accomplished. The evaluated material in the study can not be viewed as a representative random sample for all bite incidents, because only bites of insured dogs and those that were made known to the insurance companies were evaluated. The study also showed that Rottweilers in particular were involved in bite incidents that involved more than one dog and therefore the study can't conclude the particular danger of the Rottweiler as an individual dog.

A particular danger through the involvement of two dogs results, according to ZIMEN (1992), in connection with the fear directed inhibition of aggression in dogs. Aggressive behavior always succumbs in the view of the dog to a cost or need. The dog must always consider that he can be injured in a fight and so experience pain. Therefore aggressive behavior in view of the dog only makes sense then, when he can be either sure that he can win or that he won't be subjectively injured or that the motivation to fight is stronger than the fear of injury. When two or more dogs attack simultaneously, the risk of injury diminishes for the individual dog and therefore the willingness to attack increases even with small gain for the individual dog. Independent of breed, dogs that attack together have to be viewed as extremely dangerous.

In a study by UNSHELM et al. (1993) first a few statistics about bodily injuries through dogs in large German cities are quoted. In the district of Cologne from 1989 - 1990 45 cases were recorded, of these 18 were induced by Shepherds, 12 by Rottweiler, 4 by Boxer, 3 by mixed breeds, 2 by Doberman as well as one each by Bullterrier, Beagle, Labrador Retriever, Dalmatian, Great Dane and Toy Poodle. In the district of Dortmund 234 cases were documented between 1988 and 1990. Of these 85 were Shepherds, 53 mixed breeds, 18 Rottweiler, 9 Bullterrier, 3 Collies, 3 Hunting Dogs and 63 animals without indication of breed or other breeds.

In the study itself, a total of 330 dogs (of these 248 were pure bred), that in the time frame between 1986 and 1990 were noted because of aggressive behavior, were evaluated. The author proves the following significant factors in the accidents that have been insured through the Chi-Test:

Incorrect behavior of the dog owner
Biting dog was not trained
Dog was not leashed
Incident occurs in a public place

The breeds that were included in the study were compared with the puppy statistic of the VHD (Association of German Dog Breeders). Breeds involved in the bite incidents that were over represented in comparison to the puppy statistic, were

German Shepherd
Boxer
Rottweiler
Great Dane
Doberman
Bullterrier
Mixed breeds were not over proportionally involved in the bite incidents

The over representation of the mentioned breeds however was not statistically ensured. A correction of the other included influences did not follow either as postulated by GERSHMAN et al. (1994). Moreover, the author points to the difficulty of inclusion of exact numbers to breed statistic and that therefore the results of the study are to be viewed only with reservation.

In a targeted study on the basis of a "matched pair analysis" (GERSHMAN et al., 1994), 128 pairs of dogs were evaluated. In each of the pairs one was a dog that had bitten before, whereby only such bite incidents were evaluated that affected a stranger and not a member of the home. The second dog of the pair was a randomly selected dog from the close vicinity of the first, selected based on the first 5 digits of the dog owner's phone number. This second dog was only included in the study if it had not bitten before. The owner of each dog was questioned by phone. Breed association was made based on owner information. If the owner could not associate their dog to a certain breed or a mixed breed was involved, they were asked what kind of breed their dog resembled the most or which breed was involved the most. Evaluated as well was the gender and age of the dog, place of the incident, training or upbringing of the dog and experience of the owner in keeping a dog. Using the Chi-Test both groups were compared with one another. A significant over representation showed itself for the following breeds: Akita Inu, Chow Chow, Collie and German Shepherd. A significant under representation in the biting dogs was the Golden Retriever and the Poodle. Rottweiler didn't show up in this study at all, Doberman were evenly distributed in the biting and not biting dogs. In other factors, significant differences showed themselves as well in the distribution of biting and not biting dogs. So was found in the biting dogs significantly more male animals, not neutered, heavier than 50 lbs and younger than 5 years. In the statistical correction of these influences a significant over representation was only left for the Shepherd and the Chow Chow.

Because of the fact that in this study only bite incidents involving non-members of the household were evaluated, the result cannot be viewed as really representative for all bite incidents. Other studies (AVNER and BAKER, 1991; SHEWELL and NANCARROW, 1991; BANDOW, 1996; KLAASEN et al., 1996) prove that a large number of the victims were bitten by their own dog or a dog that they knew.

A study of the University of Washington (BANDOW, 1966) shows as well a comparison between the share of breeds in bite incidents in comparison with the recorded numbers. The following breeds appeared in a higher percentage in the biting dogs than their dispersion among the recorded dogs:

German Shepherd
Pit Bullterrier
Rottweiler
Collie
Doberman
Great Dane
Poodle

In this study as well no statistical insurance regarding the deviation of breed dispersion resulted. The breed statistic, moreover, is according to the testimony of the author, to be viewed with reservation. Because the breed association is based on testimony of the victim, who can not always, in an accident situation,

correctly identify the breed of the attacking dog or on the testimony of the owner who does not always state the correct breed as well, unless the dog is registered with a kennel club (i.e. AKC).

According to RIECK (1977) the biting dog is typically male, not neutered, younger than 2 years and belongs to a working dog breed such as for instance Shepherd or Rottweiler or is for instance a Cocker Spaniel or a Chow Chow and originates in mass breeding, in which the temperament or other desired qualities of a dog are not considered in breeding. The author quotes a statistic about deaths through dog bites. In 34 death cases in 1989 to 1990, 10 cases were caused by Nordic breeds like the Husky, Samoyed or Malamute, 10 further cases were caused by Pitbull type dogs. Six deaths were caused by German Shepherds or Shepherd mixes, 3 by Doberman, one by a Rottweiler and 5 by dogs of other breeds.

In a study of 154 bite incidents in Australia (THOMPSON, 1997), a representation ratio (=share of breeds in dog attacks/total share of the breed) for individual breeds is quoted. This amounts to:

Shepherd	2.5
Bullterrier	2.1
Blue Heeler	1.8
Doberman	4.7
Rottweiler	2.2
Collie	0.5
Labrador	0.6

In this study as well a statistical insurance of variation is waived, other factors, such as gender of the dog or the accident situation are not taken into consideration.

The MMWR (1997) points to the difficulty of exact numbers being available for the total present breed dispersion in order to determine the percentage of over represented breeds in bite incidents. Since the recorded numbers don't reflect the true breed dispersion and the owners of different breeds have differing willingness to register their dogs.

In summary it can be said that even though in all these diverse studies on bite incidents percentage wise over represented breeds were found, but also that not one single study did justice to the requirements for a methodical and statistically unobjectionable evaluation.

A particular danger in certain breeds based on breed typical characteristics is consequently traced back neither to definition of nature nor to up to now studies about involvement of certain breeds in bite incidents.

Re: b) Bodily characteristics of dogs

Bodily characteristics are generally easier included than characteristic of nature.

Weight, Height, length and caliber are measurable parameters, that are described in the various breed standards and are not unessential varied from breed to breed.

Strength and speed are characteristics that result from bodily qualities and hence differ from breed to breed as well. Speed is objectively measurable, strength is a more complex parameter that is not so suitable for objective inclusion and is in need of a way to measure standardized regulations for research.

Bite strength is a parameter that is measurable in the framework of a particular research regulation (TRISKA, 1924). Studies of that time were limited however to 24 dogs of different breeds and different ages so that a conclusion on particular bite strength in certain breeds is not possible. Even though in description of some breeds the particular bite strength is hinted at, however scientifically insured studies to that nature are not known to us.

It can be determined even without scientific insurance that larger and stronger dogs in general pose a higher potential for danger than smaller and weaker dogs. A threat that is based on the size of a dog can quite easily show itself through the friendly greeting behavior of a dog. Friendly leaps at people by a large dog, no matter what breed, can topple a human. Because there is a variance regarding the size of a dog within a breed (most breed standards only state a limit for size) and the strength of a dog considering the genetic foundation and state of training, a particular disposition regarding a threat based on bodily characteristics can not be determined.

One parameter, that must be counted as a bodily characteristic and which plays an important part in regards to aggression, is the pain threshold.

In almost every confrontation between two dogs of the same size and strength the fear of pain and injury exert a restrain on the willingness to be aggressive. In the naturally selected Wolf pack real injury fights are therefore rare and only happen if the motivation (place of rank or defense of territory) is stronger than the fear of pain and injury (ZIMEN, 1992). In principle one has to assume that with the dog as well fear of pain has a restraining effect on aggression.

A high readiness for aggressive altercation can therefore rest on two causes:
1) strong motivation for altercation
2) loss of restraint due to high pain tolerance

So it appears according to ZIMEN (1992) that the fighting behavior of hunting terriers does not rest in the first rank on a higher stimulus producing endogenous aggression, but rather on the loss of sensitivity for pain and fear which leads to a corresponding loss of restraint and therefore to dangerous situations. This loss of restraint is important for the hunt (hunting terriers must fight under ground against foxes and badgers). In dogs that are used for big game hunting against valiant game, a high tolerance for pain is preferred as well, because it allows the dog to be without restraint which is viewed as toughness and represents for the dog the psychic requirement to attack the game, which is really superior to the dog. In this case as well the pack hunt (the combined attack of numerous dogs) represents, besides the high tolerance for pain, an intensifier which was used in practice. With shepherding dogs that had to protect herds against wolves or bears, high tolerance for pain was a functional advantage as well. High pain tolerance represented an important requirement as well for dogs that were used for dog fights, because the altercation with the opponent of approximately same strength otherwise would have been prematurely discontinued or not held at all based on fear induced restraint.

A possibility of scientifically exact objective judgment of pain tolerance in a dog is not known to us. It exists therefore no possibility to prove, based on previous knowledge, if certain breeds have a higher pain tolerance than others.

High pain tolerance as release mechanism for aggression only plays a role in connection with an opponent of equal or greater strength, because only with such opponents fear of pain results in restrain of aggression. In dogs with high pain tolerance a higher threat could be shown based on the connection of dominance based aggression in regards to rank confrontations with the owner or other dogs.

Gender must be considered a bodily characteristic. It is described by different authors that male dogs are more involved in biting accidents than female dogs (WRIGHT, 1985; PODBERSCEK and BLACKSHAW, 1990; AVNER and BAKER, 1991; SHEWELL and NANCARROW, 1991; TERNON, 1993; UNSHELM et al., 1993; GERSHMAN et al., 1994; GALAC and KNOL, 1997; RIECK, 1997). The young unneutered male dog is described as the main culprit in bite injuries (GERSHMAN et al., 1994; RIECK, 1997). HART and HART (1985) discovered in their study as well, the characteristics like dominance over the owner, aggression towards other dogs, defense of territory and snapping after children were more pronounced in male dogs than females. Therefore male dogs are, regardless of breed, to be viewed as more dangerous than female dogs. Castration as a therapeutic step with hyper aggression shows according to studies by HOPKINS et al. (1976) and HART (1976) success in roughly half of the cases.

In addition to the individual bodily characteristics that can cause aggression, all physical disorders are to be counted, that have a direct or indirect influence on the behavior of the animal. To name the following:

- acute or chronic pain
- illness in the area of the central nervous system
- poisoning
- seizures

Physical disorders of this nature can occur in all breeds and therefore don't justify discrimination against certain breeds.

A particular threat of certain breeds based on bodily characteristics according to previous knowledge is therefore not to be allowed.

Re: c) individual characteristics of the dog owner or dog handler

With regard to the manner of coexistence with humans dogs are pets of particular nature. In the course of this coexistence, that began 12,000 to 14,000 years ago, a sort of social symbiosis with close behavior biological connection developed, that is so pronounced only between humans and pets. The many different jobs that dogs fulfill for their human companions are based largely on this partnership. Therefore dog behavior cannot be completely analyzed without inclusion of humans (FEDDERSEN-PETERSEN, 1992a).

In regard to the threat of a dog the influence of the owner must be considered in two ways.

1) Influence of the owner of the behavioral development of the dog
2) Influence of the owner on the actual accident situation

Influence of the owner of the behavioral development of the dog

In order to correctly judge the influence of the owner on the behavioral development of the dog, the question of ethological reasons that lead to the dog biting, should be discussed in the following.

According to FEDDERSEN-PETERSEN (1991), behavioral disorders in dogs according to their causes can be classified as follows:

1) Ethopathies:
   a) genetically caused pathological behavior disorders
   b) exogenous caused pathological behavior disorders
2) Neurosis: Acquired behavior disorders as a result of missing environmental stimuli or environmental strain that lead to faulty adjustment
   a) Early ontogenetic acquired behavior disorders with often highly stable neurotic developmental disorders.

- deprivation damage due to lack of social stimuli
- deprivation damage due reduction of environmental stimuli
- wrong imprint
- missed imprints

   b) Actual genetic acquired behavior disorders

- behavior disorders due to spatially confined and stimuli lacking keeping
- stereotypes of motion model
- traumatic behavior disorders after learning process

In all forms of behavior disorders aggression is named as one of the symptoms.

Except for the inborn genetic or exogenous caused pathological behavior disorders, the human being as the provoking factor or the modifying factor in behavior disorders plays a significant role (SCHLEGER, 1983; van der VELDEN et al., 1976).

In answer to the question "Why does a dog bite" FEDDERSEN-PETERSEN (1992b) names four main reasons:

1) Because of fear, out of social insecurity and out of inadequate adjustment to the environment. The social connection to own species and/or humans is inadequate or lacking completely based on faulty use of socializing phases in the course of early development. Such dogs represent the typical fear biter.

2) Socially expanded dogs that live in unresolved rank relationships with their humans. Such dogs particularly often bite family members of their own territory or strangers that invade their territory (i.e. letter carrier).

3) Dogs, that show massive disrupted development because of misguided breed selection. In connection with this the author clearly means dogs that are especially bred for dog fights or dogs that, based on inborn genetically caused ethopathies, show higher aggressiveness (see as well SCHLEGER, 1983). The author makes allowance too, that dogs that were knowingly bred because of higher readiness for aggressiveness have usually a massive disturbed early development, so that it is difficult if not impossible in the individual case, to divide inborn or acquired behavior defects.

4) Dogs bite if they were conditioned for particular aggressive behavior in the course of unbiological training. Causative in these cases are often dog handlers who want to impress with their dogs. Particularly dangerous in this connection are dogs that prematurely terminate training for guard dogs. The particular threat of such dogs rests assuredly in that they were encouraged to behave aggressively, but that the submission that is an obligatory component of a completed guard dog training, was not sufficiently trained.

REHAGE (1992) classifies hyper aggressive dog patients according to three view points:

1) totally normal family dogs that simply slip from their owners as a result of ignorance or incompetence.

2) derailed protection or guard dogs from private hand. Often this involves dogs that were inadequately socialized and then show hyper aggressive behavior toward their owner, even though the owner originally desired a certain amount of aggressiveness.

3) "Fight"- and "Impress dogs". The so called "Fight dogs" that partly correspond to the objective discriminated breeds and that acquired prominence as half world status symbols, number wise don't play a large role in this group. "Impress dogs" are not tied to a certain breed, but are kept unanimously with the goal to impress the environment with the fact that one can have an intimidating dog and subdue it.

Besides the classical development of hyper aggressive patients that usually already starts with the puppy and is based on stereo typical training mistakes by the owner, the author states the following as typical determinant of hyper aggressiveness problems:

1) a sub dominant owner
2) a large framed dog with/without deprivation syndrome
3) a dog that regularly practices severity on humans at a dog training facility
4) but that is often not able, beyond the training facility, to even reliably execute the command "down".

PINXTEREN et al. (1983) determined in the framework of 202 questioned dog owners of behavior disturbed dogs, that due to ignorance of the owner, aggression problems predominantly happened because the dog had an abnormal place of rank within the household. 80% of the problem cases were successfully solved through illumination of the owner and rank training of the dog.

The conditions as well under which a puppy is raised play a large role for the later displayed threat of a dog. Therefore FEDDERSEN-PETERSEN and HAMANN (1994) name deprivation damage through reduced unspecific environment stimuli in kennel rearing as the often cause for accidents involving dogs. The authors demand in this connection consideration of prohibition for commercial dog dealers and the prevailing or exclusive kennel rearing or keeping.

In this connection it seems a hint towards the problem of illegal imports of dogs from the former east block is necessary. Prerequisites for rearing that are relevant to the protection of animals in the sense of data by FEDDERSEN-PETERSEN and HAMANN (1994) favor in these dogs later handling problems in the sense of endangering humans and animals.

UNSHELM et al. (1993) found an influence of the dog owners in the creation of the "recurring culprit": They found a significantly higher portion of recurring culprits in dogs that didn't obey their owners. In attacks on other dogs the influence of training in a dog showed itself. Dogs that completed training were involved in bite incidents at a rate of 17%, the portion of dogs that did not complete training was 83%.

BANDOW (1996) names as a reason why a dog bites the fact that the dog owner has no clue about dog keeping and dog behavior respectively, or the dog was not properly restrained respectively, or not properly socialized.

Influence of the owner on the accident situation

The influence of the owner on the accident situation was studied by UNSHELM et al. (1993). They determined in 197 evaluated cases that in 68% the owner of the dog did not intervene, in 15% of the cases the owner incited the dog and only in 17% of the cases the owner took responsibility. In those cases where the dog attacked without warning, the portion of dog owners that did not intervene rose to 81%.

FEDDERSEN-PETERSEN and HAMAN (1994) point to the problem of the indeed few number wise but in regard to endangerment of humans highly problematic fringe groups of dogs, that are truly to be viewed as fighting dogs. They belong in principle to no breed and therefore appear in regard to their exterior in large variety. They are bred specifically by a particular people group and a disturbed youth development of the dogs is added to the negative breeding selection.

In summary it can be concluded that humans are responsible for a large part of the behavior disorders in dogs of all breeds.

So writes SEMENCIC (1984) in his book about "The world of fighting dogs" verbatim:
"The Pit Bull has a main characteristic - name it a fault in his personality - he shows his affection through his service to his master. Some of these "masters" are evil, bad and sick people that train the dog to fight and to kill and therefore turn him into a deadly weapon."
And in another place:
"Pit Bulls are pets, that fulfill a desire to own the "meanest dog on the block".
And further:
"The aggression that is often shown by Pit dogs, is in general either learned or tolerated behavior by the owner. Whoever wants to own a "Pit dog" but fears his aggressive behavior toward other animals, only needs to take a puppy and punish each attempt of aggression and praise friendly behavior. <u>This rule however is valid in general for all dogs.</u> The Pit dog as well is only so aggressive as his owner allows."

With all skepticism regarding to the named simple recipe to hinder aggressive behavior in dogs of all breeds it becomes evident, that especially misguided motivation of dog owners can make dangerous dogs out of normal dogs and this independently of breed.

<u>**On the basis of individual characteristics of the owner a particular danger of certain breeds is therefore not to be allowed.**</u>

Re: d) Accident situation

In order to justify the meaning of an accident situation in a bite case, the question of motivation in a dog to display aggressive behavior must be asked. As already cited, aggressive behavior as viewed by the dog, is subject to a cost or need (ZIMEN, 1992). This means that the actual attack is a result of a combination of motivation and of restraint. Motivations for attack result out of four ethological functions (IMMELMANN, 1983):

1) intraspecific aggression
   a) aggression based on dominant behavior
   b) aggression based on territorial behavior
2) interspecific aggression
   a) capturing of prey
   b) defense

With dogs, which represent the domesticated form of the wolf, an overlaying of different impulses can happen as the result of domestication (ZIMEN, 1992). For instance, intraspecific play behavior (dog plays with the child of the owner which was accepted by the dog as part of the pack) can turn into interspecific prey capture through overlaying (child falls down or runs away). Humans normally don't belong to the prey repertoire of a dog. Certain elements of human behavior, however, can be very strong hunt incentives, for instance quick passing by or walking away, uncontrolled movements, tripping or falling (children, intoxicated person, disabled person). If two dogs are involved the situation can be intensified through dominant behavior (both dogs are fighting over the prey).

Under consideration of the four mentioned ethological functions the following typical accident situations arise:

-Victim enters the territory of the dog (territorial defense)
-Victim runs away from dog (capturing of prey)
-Victim rides bicycle past dog (capturing of prey)
-Victim does not come up to the critical distance of the dog
-Dog feels threatened (defense)
-Victim inflicts pain on the dog (defense)
-Victim takes food away from the dog (dominant behavior)
-Victim dislodges dog from a favored place (i.e. bed or couch) (dominant behavior)

A relatively often accident situation is the intervention of the victim in the fight between two dogs (SZPAKOWSKI, 1989; TERNON, 1992). Bite injuries to humans are to be viewed as accidental in these cases because the aggression of the biting dog, which primarily is based on dominant behavior, is not directed towards the human but against the opposing dog.

BORCHELT (1983) establishes in a study of 245 cases of aggressiveness in dogs eight types of aggression:

Fear based aggression
Dominance based aggression
Defense of property
Instinct to protect
Instinct to hunt prey
Reaction to punishment
Pain
Aggression against others of the species

According to this study, dominance based aggression is shown especially by the English Springer Spaniel, the Doberman, the Toy Poodle and the Lhasa Apso, to a lesser degree by hunting dogs. Whereas aggression for the purpose of property defense was observed with the Cocker Spaniel. The highest frequency of aggression based on instinct to protect was found with German Shepherds, whereas Cocker Spaniels and Toy Poodles proved to be a large part of fear biting. In interpreting the results, however, the very low number of patients and the missing comparison regarding breed frequency as far as total dog population is to be observed.

BLACKSHAW (1991) showed in an analysis of 87 dogs that were presented on account of hyper aggressiveness in a special clinic for behavior disturbance, that 31.6% of all cases were due to dominant behavior, 29% were due to territorial behavior, 12.3% due to prey instinct, 12.3% due to rivalry between male dogs and 7.9% between siblings. 6% of the patients were fear biters and 0.9% showed idiopathic aggressiveness, aggressiveness of unknown cause.

TERNON (1992) established a statistic on accident situation in her study and found in a total of 193 cases the following situations:

Situation	Number of cases
1) Victim walked past dog	78
a) of those leashed	30
b) of those free roaming	46
c) without indication	2
2) Initiation of contact by the victim	25
a) by victim known to dog	14
b) by victim unknown to the dog	11
3) Visit or delivery to the owner	47
4) Visit with the dog at victim	3
5) Intervention in dog fight	23
6) Brawl between people	1
7) Dog was held or reprimanded	9
8) Dog was teased or pain inflicted upon	4
9) Food or water was taken away from the dog	3

The largest part of aggression release therefore relates to territory defense (3), prey behavior (1b) and defense (1a,2b,8) as well as dominance (2a,7,9).

The bite injuries through leashed dogs by which the victim walked past (1a) are explained on the basis of defensive biting of the dog, who felt threatened because of invasion of critical distance. The dog can not flee from the confrontation due to the constraint of the leash or the dog feels strenghtened through the presence of his owner and turns unknown aggression of the owner against the victim into action (TERNON, 1992).

UNSHELM et al. (1993) evaluated in their study the accident situation as well. Through this the following allocations resulted:

Place of accident	
Accident on public streets	74.8%
Accident in parks	9.2%
Accident in public buildings	8%
Accident on private grounds, sport- or playgrounds	8%
Leash	
Dog was not leashed	68.1%
Dog was leashed	13.0%
Roaming dog	8.7%
No indication	10.1%
Accident releaser	
Dog attacks without recognizable signs	45.9%
Victim wanted to end a dog fight	19.3%
Dog defends his owner or territory	34.2%

A study by BANDOW (1996) which evaluated among others bite injuries to children, showed in a total of 419 bite incidents the following accident situations:

Child plays with own or known dog	36.4%
Child disturbs dog while eating	26.0%
Child tries to pet dog	11.7%

Child enters territory of dog	6.5%
Child is bitten by free roaming dog in public area	6.5%
Other causes	12.9%

Most of the bite injuries evaluated in this study happened through dogs that belonged to the parents of the child or through dogs out of a close circle of acquaintances of the bitten child.

As main cause for bite incidents the author states intentional or unintentional provocation of the dog.

A study by the MMWR (1997) of death causing bite injuries shows that in a total of 23 deaths, 7 were caused by a free roaming dog in a public area, 5 were caused by a leashed dog on the property of the owner, and 11 by a free roaming dog on the property of the owner.

Especially critical accident situations occur when more than one dog is involved. As previously mentioned, the presence of a second dog represents an amplifier in the realm of aggression releasers (ZIMEN, 1992). SACKS et al. (1989) determined that 70.4% of all attacks occurred through a single dog. In 18.5% of the accidents two dogs were involved and in 11.1% more than two dogs. TERNON (1992) found that in 5.1% of her studied cases more than one dog was involved. A study by the MMWR (1997) shows that in a total of 25 bite injuries followed by death in 16 cases more than one dog was involved.

According to different examinations (WRIGHT, 1985; SZPAKOWSKI et al., 1989; PODBERSCEK and BLACKSHAW, 1990; AVNER and BAKER, 1991; SHEWELL and NANCARROW, 1991; BANDOW, 1996) most of the bite incidents happened in the home of the dog or in the immediate vicinity. TERNON (1993) determined as well that a majority of the bite incidents happened in the dog's territory (31.8%) or in his immediate vicinity (30.6%). Only 37.6% of the studied dogs bit on foreign territory. PODBERSCEK and BLACKSHAW (1990) hinted that roaming dogs only seldom attack people. Because of the fact that according to IMMELMANN (1993), independently of species, the defensive instinct always the greatest in the center of the own territory is, and that it diminished with distance, the frequency of bite injuries in the home of the dog or in the immediate vicinity rests on the natural, breed independent territorial behavior of the dog.

A majority of the bite incidents that were evaluated by UNSHELM et al. (1993) occurred in an open area. However, only those cases were evaluated in this study, where the victim gave a report after the incident. Bite injuries of family members were probably included in this study only in exceptional cases.

TERNON (1993) also examined in this work the meaning of leash usage and determined that in 95 cases in which it was documented if the dog was leashed, 45 dogs were leashed and of those 9 animals broke lose.

The study by UNSHELM et al. (1993) showed that a majority of the dogs that caused a bite incident were not leashed. In this study as well one needs to bear in mind that only cases with following report were evaluated.

Situations that further aggression ensue independently of the breed of the involved dogs. A specific danger of certain breeds based on special accident situations is therefore not to be allowed.

Re: e) Individual characteristics of the injured

Diverse studies show that a large number of bite victims are bitten by their own dogs or dogs known to them (AVNER and BAKER , 1991; SHEWELL and NANCARROW, 1991; BANDOW, 1996; KLAASEN et al., 1996).

If one considers the aggression causing accident situations mentioned in d), a series of points emerges in which the victim can cause an attack through conscious or unconscious wrongful behavior. Not in every case wrongful behavior of the victim can be avoided. A real substantial possibility of reducing danger through dogs is nevertheless to be seen in extensive information to the public about dealing with dogs. Many mistakes can be avoided if one is aware of the influence of certain human behaviors on dogs. And

without wanting to be controversial, at this point analogy to other dangers that a human is exposed to in every day life must be pointed out which similarly can be controlled through appropriate information and correct behavior.

UNSHELM et al. (1993) point to the necessity of appropriate information in their catalog of measures to reduce biting incidents by dogs (as quoted):

"e) conveyance of information about behavior inventory and demands of handling of dogs in pre-schools and schools"

A similar strategy of avoiding dog bites is recommended by the MMWR (1997) (as quoted):

"Education and precautionary measures should include parents and children."

This seems to be particularly important when the results of BANDOW (1996) are considered who made an analysis of the age of bite victims. Accordingly the age of the victims in 628 evaluated incidents distributed themselves as follows:

Up to 6 years	8.6%
7-12 years	15.0%
13-17 years	7.6%
18 years and older	68.8%

That means that almost one third of the victims are children or juvenile. In all age categories the number of male victims was clearly larger with 58.2% than the number of female victims.
Even though the author names individual over represented breeds in relation to their occurrence in bite incidents, he clearly speaks against a breed specific legislation. He points to the fact that adults must realize never to leave small children alone unsupervised with a dog (or a cat) and that all children should be taught how to behave in the presence of a dog, especially with strange dogs.

GERSHMAN et al. (1994) indicate a share of 51% of children under the age of 12 years in bite victims. They recommend that pediatricians clarify parents about the risk of owning a male dog that is not neutered of breeds like German Shepherd or Chow Chow.

According to a study by KLAASEN et al. (1996) 30% of bite victims were younger than 15 years, of those 75% were male; in adults the share of male victims was 66%. RIECK (1997) arrived at similar results. According to his study 48% of all bite victims are younger than 15 years.

An Australian study (THOMPSON, 1997) showed that with children up to 4 years the risk of being bitten was twice as high as the age category between 21 and 59 years. This study showed as well that with men independent of age the share of victims was 50% higher than with women.

CORNWELL (1997) indicates, that in the U.S. about 70% of dog bites affect children of which 55% are boys. 5% of children between the ages of 5 and 9 were already bitten by a dog once. The author estimates in addition that in 30% to 50% of biting incidents the dog was provoked - in most cases through entering the territory of the dog. The most effective measure to protect from dog bites is therefore to teach children as well as adults how to avoid provocation of a dog. The author gives concrete tips how children should behave in the presence of a dog.

1) Don't approach stray dogs.
2) Tell an adult about a stray dog.
3) If the dog approaches you, remain quiet, avoid direct eye contact with the dog and use a soothing tone with the dog.
4) If you have been pushed to the ground by the dog, stay on the ground with stretched out legs and face to the ground, fold your hands behind your neck and protect your ears with your forearms.

Similar tips for correct behavior in the presence of a dog were given in the MMWR (1997), in which in addition a large share of children in the victims of dogs was stated as well. Of 25 deaths through dogs between 1995 and 1996, 20 children in the age up to 11 years were affected.

The cause for aggression through individual characteristics of the victim is at the worst to be viewed in connection with the age and gender of the victim or, as the case may be, with the conscious or unconscious provoking actions of the victim, but not in connection with certain breeds.

A particular threat of certain breeds is therefore not permissive based on individual characteristics of victims.

Definition of the dangerous dog

A really objective judgment of the danger in a dog is possible if the dog was already once or repeatedly involved in a biting incident. WRIGHT (1985) reports about 16 dogs in a total of 5711 biting incidents that were noticed because of specially serious attacks and that had already bitten earlier.

In a total of 60 cases in which previous history was reported, only 33.3% were first time perpetrators according to TERNON (1992). 35% already had bitten once, 6.7% had bitten twice, 6.7% thrice and 1.7% had already bitten five times.

According to UNSHELM et al. (1993) 28% of dogs that attacked a person had already bitten once, 11.6% of dogs had already been reported because of three or more incidents. Among dogs that attacked other dogs 36% were repeat offenders and 30.9% serial offenders.

Dogs that already bit once or repeatedly without particular reason are therefore, independent of their association with a breed, to be considered as particularly dangerous in comparison to dogs without history of aggression.

This view point is quite well the basis of definition for dangerous dogs that was brought to discussion by the VDH (1991). According to this definition those dogs count as dangerous that are socially incompatible and of which can be said with high probability that they will bite in confrontation with people and animals, even their own kind. The social incompatibility can be called forth through genetic disposition of through learning processes. Particularly count as dangerous dogs:

1. Dogs that have proven to be biters
2. Dogs that repeatedly prove that they uncontrollably have a bent to chase and take down game or life stock
3. Dogs that habitually jump aggressively and therefore threatening at people.

This definition allows however no classification a priori of a dog as particularly dangerous.

It is understandable that the legislators are eager to establish a if possible simple and executable inclusion of the risk in dogs for lay people. The naming of certain more or less arbitrary or chosen breeds based on media bias can not be of service to the actual problem solving. The law giver oversees with the defined breed incrimination the essential circumstance that the definition of particular breeds as especially dangerous ex-criminates all other breeds, or so identifies them de facto as not particularly dangerous. This is in view of all discussed points as not permissive. That this point of view is not permissible on the basis of legislation was decided by the Higher Administrative Court of Baden Wuerttemberg (1992) in its decision of 18 August 1992. Three dog owners of the breeds Mastiff and Bull Terrier complained against an ordinance by the ministry of rural districts, in which their breeds were categorized as fighting dogs and therefore as extremely dangerous, because they felt discriminated against opposed to owners of other dogs. The Higher Administrative Court determined the right of the complaint and declared the mentioned ordinance as invalid in that part which defines certain breeds as fighting dogs. In the decision of the Higher Administrative Court it was objected that the legislator treats in the inclusion of "fighting dog breeds" the equal as unequal without factual reason and therefore violated the constitutional right for equality. Certainly the legislator has much room for formation and judgment in the regulation of such an ordinance,

but it does not empower him to pick a few breeds out of the total number of potentially dangerous breeds and to burden them with the limiting measures of the ordinance. Or not to include other dogs that are comparable in danger without sufficient reason.

The legislator therefore is faced with the admittedly difficult problem , on one side, to satisfy the need for security in the public, and on the other side not to have enough scientifically ensured knowledge for a simple and uncomplicated definition of dangerous dogs.

A study from Great Britain (KLAASEN et al., 1996) shows, that the definition of certain breeds as "especially dangerous" does not lead to a better protection of the public. In which the distribution of breeds that were involved in biting incidents were compared before the implementation of the "Dangerous Dog Act" and two years after the implementation. Even though the sequence of the most involved breeds changed a little bit (before the "Dangerous Dog Act" the German Shepherd was in first place followed by the mixed breed, two years after that the mixed breed was in first place followed by the German Shepherd) nothing essential changed in breed dispersion. The share of bite injuries in total changed from 73.9% before implementation of the "Dangerous Dog Act" to 73.1% after. The breeds that are defined as "dangerous" in the "Dangerous Dog Act" were responsible for a total of 6.1% of all dog bites before it's implementation. After that they were the cause for a total of 11.25% of all bite injuries. The authors conclude that the "Dangerous Dog Act" contributed little in view of better security of the public from dog attacks.

The above quoted definition of the dangerous dog by the Higher Administrative Court represents a compromise, that allows the legislator to order appropriate injunctions or safety precautions for dogs that have been proven as truly dangerous.

This compromise can already be found in up-to-date laws. In the free Hanseatic town of Bremen dangerous dogs are defined in Section 1 of the police ordinance (16 Nov. 1992 FREIE HANSESTADT BREMEN) about keeping of dogs as follows:

1) As dangerous are counted such dogs of which it can be said with high probability that they bite people or animals, and dogs that already threateningly jumped at people or animals or bit them. Dangerous, as well, are dogs that tend to chase or take down game or life stock outside of hunting or shepherding duties.
2) Dogs are not considered as dangerous when they bit in defense of their owner or in own defense.

Noteworthy in this legislation is that room is made for the dog for self defense, so that defensive and protective aggression is valued as normal behavior specific to the species.

The Dangerous Dog Ordinance of Nordrhein Westfalen (GefHuVO NW), which was established on September 21, 1994, deliberately forgoes the listing of certain breeds that are considered dangerous. This ordinance addresses the breeding, training, drilling and keeping of dangerous dogs in the state of Nordrhein Westfalen (KLINDT, 1996). According to this ordinance dogs are considered dangerous if they

a) possess aggressiveness, readiness to fight or severity above the natural measure as a result of purposeful breeding.
b) If they have shown themselves as repeatedly biting.
c) If they repeatedly jump at people in a threatening manner.
d) If they have proven repeatedly that they uncontrollably chase or take down game, life stock, cats or dogs.

It is to be noticed that according to this definition a certain "natural measure" of aggressiveness, readiness to fight and severity is granted to the dog as a species.

A corresponding ordinance in Minnesota (USA) (MINNESOTA STATUTES, 1996) differentiates between dangerous dogs and potentially dangerous dogs.

A dog counts as potentially dangerous if he

1) without provocation has bitten people or pets on public or private grounds
2) without provocation chases or attacks a person, including bicyclists, on public or private grounds (with the exception of private property of the owner)
3) has a known bent, tendency or disposition for unprovoked attacks that lead to injuries or the frightening of people or pets.

A dog counts as **dangerous** if he

1) without provocation severely injures a person on public or private grounds
2) without provocation kills a pet on public grounds
3) was classified as potentially dangerous and, after the potential risk of the dog was known to the owner, has bitten people or pets, aggressively attacked or endangered them.

It is noteworthy that this law text agrees with scientific perception to the extent that provocation of the dog, which represents one of the substantial causes for an attack according to BANDOW (1996) and CORNWELL (1997), excuses so to speak an attack.

An a priori judgment of a dog as particularly dangerous is in view of all discussed situations, that in individual cases led to the endangerment of people through the dog, only possible through an experienced ethologist if at all.

In the framework of Veterinary training ethology is not provided for as a mandatory requirement (Schedule of Lectures University of Veterinary Medicine, Vienna, 1997).
Offered are the optional subjects
"Ethology and Ethopractice" (2 weekly hours)
"Film illustrations for Ethology (2 weekly hours)
"Behavior and Behavior Disorders in dogs" (1 weekly hour)

An ethological training can not be presumed in every case with a veterinarian, only in accordance with personal interest the optional subjects are visited during study.

In summary it can be captured based on the discussed literature, that dogs certainly represent in principle a potential for endangerment of people and other animals, that the danger that emanates from a dog, however, stands in no objective connection with breed association and can not be established a priori with sufficient reliability.

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