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MAN BITES DOG WITH OHIO'S VICIOUS DOG STATUTE

Attention: Pit Bull Terrier Owners

> As you may be aware, there are new laws in effect concerning the maintenance of pit bull terriers in the state of Ohio. In an effort to alert and educate you, the owner, keeper or harborer, the following analysis of the law is being provided for you. . . . Pit bull terriers make up 1% of the dog population in the United States. However, they are responsible for 67% of the deaths caused by dogs. It is these types of statistics which prompted the state of Ohio to create legislature [sic] directed to this problem. The criminal penalties under this bill ranges [sic] from a misdemeanor in the fourth degree to a felony in the fourth degree.[1]

I. INTRODUCTION

The prevalence of pit bull dog attacks in the state of Ohio and throughout the country has created a furor regarding that type of dog. The Ohio legislature reacted to this situation by passing a new vicious dog statute which was signed into effect on July 10, 1987.[2] Ohio Revised Code section 955.11 was deemed necessary to correct the problem with pit bull dogs by revising the prior dog law concerning ownership or keeping of dogs

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[1] Excerpt from the letter addressed to each person suspected to be a pit bull dog owner in Mahoning County, Ohio by the county dog warden. The letter, dated August 10, 1987 and addressed solely to the owners of pit bull terriers outlined the various provisions of the newly enacted Am. Sub. H.B. No. 352.

[2] OHIO REV. CODE ANN. § 955.11 (Baldwin Supp. 1987).

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in Ohio.[3] The statute was introduced as an emergency provision to preserve public safety as a result of numerous incidents, both in Ohio and nationwide, where dangerous or vicious dogs caused severe injury or death to individuals. The Act was initially intended to apply to all dogs without regard to breed on the basis of their dangerous or vicious propensities, but was amended to specifically designate pit bull dogs as vicious. Consequently, pit bull dogs achieved the dubious honor of being the only breed to be specifically mentioned as prima facie vicious in the text of the statute.[4]

Breeders associations, pit bull owners and other enforcement officials who deal with the dogs on a regular basis are disturbed by the specific mention of pit bull dogs in the newly enacted statute. They argue that any breed or mixed breed can become a "renegade" or "bad dog." The root of the problem is man made. It is a result of human interference with the natural propensities of the animals to create excellent guard dogs, fighting machines, or whatever suits man's purpose.

The constitutionality of the statute has been called into question for several reasons, largely because it appears to be an attempt to eradicate pit bull dogs, rather than to control the problems caused by all dangerous and vicious dogs, and because of questionable enforcement methods.[5] This Note will explore the background of the pit bull dog problem and examine allegations that the new statute is unconstitutional. It will then propose alternative legislation and enforcement methods for controlling all dogs without the necessity of singling out specific breeds.

II. Background of the Pit Bull Dog Problem

Pit bull dogs and attacks associated with them have caught the attention of the public through extensive media coverage in newspapers and television.[6] In Ohio, the introduction of Ohio Revised Code section 955.11

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[3] The Act amended Ohio Rev. Code Ann. §§ 715.23, 955.11, 955.20, 955.25, 955.26, 955.28, 955.44 and 955.99 (Baldwin 1953) and enacted Ohio Rev. Code Ann. § 955.21 and 955.261 relative to the transfer and control of dangerous, vicious, and other dogs, the quarantine of certain dogs, the right to kill certain dogs, and related criminal penalties, and to declare an emergency.

[4] Ohio Rev. Code Ann. § 955.11(A)(4)(a)(Baldwin Supp. 1987).

[5] Methods of enforcement such as the letter sent out by the Mahoning County Dog Warden and allegedly arbitrary seizure of dogs not necessarily pit bull dogs, along with an intent to decimate the pit bull dog population are among the many things alleged in the complaint in Ohio Dog Breeders Ass'n v. Celeste, No. C87-2708Y (N.D. Ohio Oct. 14, 1987).

[6] The subject of pit bull dog attacks attained coverage in a number of media sources. For instance, the television documentary show *West 57th* (CBS television broadcast, Jan. 9, 1988) covered pit bull dogs. Magazines addressed to children have also covered the topic. Fox, *The Problem With Pit Bulls*, Boys Life, Jan. 1988, at 16 [hereinafter Fox]. Michael Fox is the scientific director of the Humane Society of the United States. Magazines designed to aid legislators and local law makers in formulating the law have published articles to assist them in dealing with the perceived pit bull dog problem. *Some Dogs Will No Longer Get Their Day*, Governing, Oct. 1987, at 10-11. Even advice columnists have seen fit to address the problem in their columns. Cleveland Plain Dealer, Dec. 3, 1987, at G-9.

was spurred by publicity and concern surrounding the pit bull attack which killed a retired physician in Dayton, Ohio on April 6, 1987.[7] Such media coverage has contributed to pit bull dogs' fearsome reputation. A brief history of the pit bull terrier may help explain some of the fear associated with the animal. The lineage of pit bull dogs runs back to England and the sport of bull baiting.[8] Both English and Staffordshire bull terriers were bred to fight the bulls until Parliament outlawed the sport.[9] Then, in the early 1800's, it became popular to make the dogs fight each other.[10] When Parliament also outlawed this, the sport was carried on illicitly. In the United States, the dogs acquired the denomination of pit bull dogs because they were trained by some owners to fight in a "pit" for gambling purposes.[11] Most so-called pit bull dogs in the United States are actually mixed breeds. Over the years, the dogs have been interbred with the Mastiff, Boxer, and Boarhound breeds.[12]

While dogfighting is illegal in every state, there is purportedly widespread support for the cruel sport where dogs will frequently tear each other apart, fighting to the death.[13] Pit bulls are favored for dogfighting

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[7] The Act was introduced by Rep. Robert Hickey, D-39th District, of Dayton. The attack that served as the catalyst for the introduction involved the death of retired physician William G. Eckman. Eckman was mauled by two pit bull dogs owned by Joetta Darmstetter, an alleged prostitute, and Wilbur Rutledge. The couple was tried and subsequently acquitted under a city dog ordinance which did not cover fatal attacks occurring on the dog owner's property. The question of when the fatal portion of the attack occurred went to the jury and resulted in acquittal. During the trial the prosecution attempted to show that Eckman was a customer of Darmstetter and was attacked while he and Darmstetter argued about money on the premises. The prosecution also argued that the dogs had shown vicious tendencies beforehand and that the owners should have known. However, neither of these arguments succeeded in persuading the jury. *See* Cleveland Plain Dealer, Oct. 16, 1987, at B-3.

[8] Bull baiting is an old English sport, now universally prohibited, of tormenting bulls by setting dogs to attack them.

[9] *See* Fox, *supra* note 6, at 16.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] OHIO REV. CODE ANN. § 959.16 (Baldwin 1980) is the pertinent statute in Ohio. The statute reads in part:

> (A) No person shall knowingly do any of the following:
> (1) Promote, engage in, or be employed at dogfighting;
> (2) Receive money for the admission of another person to a place kept for dogfighting;
> (3) Sell, purchase, possess, or train a dog for dogfighting;
> (4) Use, train, or possess a dog for seizing, detaining, or maltreating a domestic animal;
> (5) Purchase a ticket of admission to or be present at a dogfight;
> (6) Witness a dogfight if it is presented as a public spectacle.

While prohibited because of its cruelty, based on the number of dog fight prosecutions, dog fighting obviously enjoys considerable popularity. *See* Barton v. State, 253 Ga. 478, 322 S.E.2d 54 (1984) (sustaining a conviction of dogfighting and gambling); Williams v. State, 462 So. 2d 771 (Ala. Crim. App. 1984) (interpretation of

because of their powerful jaws.[14] Once the dog has bitten down on something, they are trained to retain their grip, making it nearly impossible to force them to let go.[15] Pit bull dogs have also become the favored pet of drug dealers, street gangs and others who depend on the dog's fierce reputation to support their illicit activities.[16] Thus, association with criminal activity has also contributed to the dog's bad reputation.

Many would argue that the reputation is ill-deserved.[17] The pit bull dog is not the first breed to cause such a reaction. Similar public outrage was expressed in the media in the past over German shepherds, Doberman pinschers, Chow Chows and Rottweilers.[18] In addition, not all pit bull dogs are vicious. Advocates of pit bull dogs claim the dogs are obedient and loyal pets, if properly trained. Many are, in fact, friendly family pets, not killers. They have even been used successfully to work with children in television shows.[19] Most experts consider dogs to be a product of their environment and training.[20] Pit bull dogs are the same as any other dog in the

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an Alabama statute making it a crime to own, possess, keep or train a dog or dogs with intent that such dog or dogs be engaged in an exhibition of fighting with another dog); Hargrove v. State, 253 Ga. 450, 321 S.E.2d 104 (1984) (upholding convictions for dogfighting and gambling, as well as finding a statute prohibiting dogfighting to be constitutional); People v. Cyr, 113 Mich. App. 213, 317 N.W.2d 857 (1982) (conviction for conspiracy to violate dog fighting statute upheld).

[14] Intent on creating the ultimate fighting animal, certain breeders have gone further, training the dogs on treadmills to build stamina and muscle. The dogs may be starved or fed blood to make them mean. Some trainers have been caught stealing cats or small dogs for pit bulls to use as practice kills. *See* Fox, *supra* note 6, at 16.

[15] Pit bull dogs may be generally described as a small, powerful animal with a muscular body. Pit bulls are distinguished by their blunt muzzles, blocky heads, small dark triangular eyes, and a short, flat glossy coat. According to the court in City of Lima v. McFadden, No. 1-85-22 (Ct. App. Allen County, June 30, 1986):

> There are two varieties [of pit bull dogs]: white and colored . . . The Bull Terrier can be called the original egghead in the canine world. Looking at the dog full face, the head appears long and strong and is oval, or egg shaped. In profile, it curves gently downward from the top of the skull to the tip of the nose. The coat is short, flat, harsh to the touch, and has a fine gloss. The dog's skin fits very tightly. The small, triangular eyes, as dark as possible, have a piercing glint. They are close set and high on the dog's head.

[16] See Fox, *supra* note 6, at 16. This problem is addressed in OHIO REV. CODE ANN. § 955.11(A)(5) (Baldwin Supp. 1987).

[17] *West 57th* (CBS television broadcast, Jan. 9, 1988).

[18] *West 57th* (CBS television broadcast, Jan. 9, 1988).

[19] Pete, of the old "Our Gang" television show was a pit bull terrier who was a lovable little dog. He was used successfully to work with the children on the show. Opponents of municipal laws which ban people from keeping pit bull dogs have emphasized this point. "In Cincinnati . . . that city's law . . . would not only prohibit 'Spuds McKenzie' entirely, but also 'Petey', the Our Gang dog, and probably the 'Victrola' dog." Nat'l L.J., Oct. 31, 1988, at 3, col. 1.

[20] *West 57th* (CBS television broadcast, Jan. 9, 1988).

respect that if they are trained to be aggressive, they will become aggressive.[21]

III. The Pre-July 1987 Dog Law in Ohio

To understand the impact of the new statute, an examination of Ohio dog law is helpful. Prior to the enactment of the new statute, a party injured by a dog could sue under either common law or the prior Ohio statute.[22] The common law dealt primarily with injuries to persons or property. The statute dealt with not only injuries, but also transfer of ownership of dogs, justifiable dog killings, and local dog control laws, among other things.

A. Common Law

At common law, the injured party had to allege and demonstrate the owner's knowledge of the vicious propensities of the dog. A showing that the dog owner knew the dog had bitten or attempted to bite previously was generally required. This led to development of the doctrine that every dog was entitled to one free bite before the owner could be held to knowledge of its propensities.[23] The key to common law liability was the owner's negligent conduct in keeping the animal after obtaining knowledge of its mischievous propensities and in failing to properly restrain the animal to prevent future harm to anyone not a trespasser.

The one bite rule was actually a misunderstood proposition. It was true that once a dog had bitten, the owner would have notice of its dangerous propensities, and thus be held liable for all bites thereafter. However, the converse of the proposition was not true. A dog that had not bitten previously could still have exhibited other evidence of its dangerous propensities

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[21] It is necessary at this point to insert a caveat. While it may be true that some people have pit bull dogs as pets, it is also true that the dogs are most frequently associated with a group of people who abuse them and train them for fighting. The consequences of these activities are extremely serious. This Note does not support the position that such behavior should be condoned or go unpunished. Animal owners do not have an unfettered right to possess animals which present a danger to others. This Note merely questions the propriety of a statute which singles out a specific type of dog. Such narrowness in statutory drafting fails to account for the other breeds, particularly Dobermans and German Shepherds, which have been associated with viciousness in the past, as well as new breeds which may develop in the future with equal or greater vicious tendencies.

[22] In Lisk v. Hora, 109 Ohio St. 519, 143 N.E. 545 (1924), the court established a right to maintain an action at common law or under the statute. This was subsequently reaffirmed in McIntosh v. Doddy, 81 Ohio App. 351, 77 N.E.2d 260 (1947), where the court advanced the proposition that it was not necessary to the cause of action to specifically plead whether the action was brought under the common law or the statute because the facts pleaded would distinguish between the two causes of action.

[23] This common law rule finds its roots in old English cases dealing with animal attacks. *See* May v. Burdett, 9 Q.B. 101, 115 Eng. Rep. 1213 (1846); and Baker v. Snell, 2 K.B. 825 (1908).

such that the owner would be put on notice of its potential to be dangerous.[24]

B. Under the Prior Statute

Under the prior Ohio statute, the owner or keeper of a dog was absolutely liable for any damage or injuries caused by his dog.[25] The absolute liability applied unless the person was injured while trespassing or teasing, abusing, or tormenting the dog on the owner's property.[26] The trespassing and teasing, abusing, or tormenting provisions represented the codification of the concept that an owner should not be penalized for the dog's actions when the injured party had engaged in conduct that in some manner contributed to the likelihood of the attack. An action brought under the statute abrogated the common law requirement of negligence and imposed absolute liability for any injury. Therefore, under Ohio Revised Code section 955.28 liability was based solely on the dog's conduct.[27] The injured party did not need to allege or prove either knowledge on the owner's part of the vicious nature of the dog or any associated negligence.

In interpreting the statute, courts adopted a tort causation analysis of any injury caused by a dog. Thus, under the statute the manner in which the injury was inflicted was immaterial, provided the dog was the proximate cause of the injury. This test resulted in cases where owner liability was predicated on the dog being the catalyst of some accident which resulted in the ultimate injury or damage.[28]

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[24] For instance, the Restatement (Second) of Torts, §509 comment g (1976), states:

> It is not necessary to the application of the rule ... that the possessor of the domestic animal know of its abnormally dangerous propensities; it is enough that he had reason to know of them. Thus it is not necessary that he know that it has previously attacked human beings or animals or has done harm by being over-violent in play or by digging up vegetation. A dog is not necessarily regarded as entitled to one bite. It is enough that the possessor of the animal knows that it has on other occasions exhibited such a tendency to attack human beings or other animals or other wise to do harm as should apprise him of its dangerous character. ...

[25] This analysis incorporates both the provisions of the old Ohio General Code, as well as the Ohio Revised Code, as the provisions concerning dogs remained substantially unchanged in the revision. *See* OHIO GENERAL CODE § 5838, which was adopted in essentially the same form in OHIO REV. CODE ANN. § 955.28 (amended 1987).

[26] OHIO REV. CODE ANN. § 955.28 (Baldwin Supp. 1987).

[27] The statute imposed an absolute liability on the owner of the dog, making the common law requirement of averring and proving scienter unnecessary. The dog was considered property, the conduct of which rendered the owner liable. Kleybolte v. Buffon, 89 Ohio St. 61, 105 N.E. 192 (1913); Lisk v. Hora, 109 Ohio St. 519, 143 N.E. 545 (1924).

[28] Bailey v. Prickett, 15 Ohio L. Abs. 336 (1933) (owner of a dog was held liable for injuries to a school boy on roller skates who was struck by a car as a result of trying to escape a dog who was leaping at him by fleeing into the street).

The prior law also contained specific provisions on transfer of ownership or possession of a dog. It required the seller of a dog to give the buyer a signed transfer of ownership certificate containing the dog's registration number, the seller's name, and the dog's description. This transfer was to be recorded with the appropriate county official.[29] The failure to comply with the procedure was a minor misdemeanor for the seller.[30]

IV. Analysis of the New Statute

The new vicious dog statute in Ohio was designed to revise and supplement the existing law. The statute reflects several significant changes from the former law. For instance, it changes the Ohio dog law regarding the control of dangerous, vicious, and other dogs, the power to kill certain dogs, and related criminal penalties.[31] The statute imposes liability insurance requirements for the owners, keepers, and harborers[32] of vicious dogs. It also amends the ownership transfer provisions to require additional information concerning the animal's behavior.[33]

A. Language

The act was the subject of much debate, publicity, and protest in the legislature.[34] The statute underwent many changes before reaching the form in which it was passed. The legislative hearings and resulting statute were "based more on emotion and a sense of urgency, than on rationality."[35] Given the state of the common law and statutory law at the time of the decision to amend, the legislature went through some interesting convolutions to reach the desired results, and created some problematic

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[29] Ohio Rev. Code Ann. § 955.11 (Baldwin Supp. 1987).

[30] Ohio Rev. Code Ann. § 955.99(A) (Baldwin Supp. 1987).

[31] The criminal penalties associated with the act were somewhat higher than expected by some members of the legislature. Interview with Ohio State Senator Grace Drake, R-22nd District (Dec. 29, 1987).

[32] Hereinafter, the term "owner" will be used to encompass the three states of possession of a dog: owners, keepers, and harborers.

[33] Ohio Rev. Code Ann. § 955.11(D) (Baldwin Supp. 1987).

[34] The legislature debated the act and gave it considerably more attention than other topics before it. The debates were very emotional and resulted in a lack of good sense in certain parts. *See infra* note 36. Not only did the legislature get caught up in the emotion, but pit bull owners and their dogs arrived to protest the legislation being considered. One particularly memorable event involved a pit bull owner who had just finished telling observers that his dog was a friendly animal. When a microphone was placed in front of the dog's face, it proceeded to try to take a bite of the microphone. Interview with Ohio State Senator Grace Drake, R-22nd District (Dec. 29, 1987).

[35] Interview with Ohio State Senator Grace Drake, R-22nd District (Dec. 29, 1987).

situations along the way.[36]

The most significant change from the prior dog law was the inclusion of propensity analysis. As originally introduced, the statute categorized dogs according to their behavioral propensities.[37] However, the statute was amended to designate pit bull dogs as prima facie vicious, while retaining the propensities analysis for other types of dogs. This was an important but troubling change.

The new statute retains the absolute liability standard found in the old statute. It makes any owner of a dog liable for damages or any injury, death, or loss caused to a person.[38] The exception to this rule prevents an injured party from recovering if, at the time of the injury, they were committing or attempting to commit a trespass or other criminal offense against any person, or were teasing, tormenting, or abusing the dog on the owner's property.[38]

To fulfill the notice requirements of criminal statutes, the new statute provided several elaborate definitional provisions to identify dogs to which the other provisions would apply. The statute defines a 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, keeper, or harborer and not under the reasonable control of its owner, keeper, harborer, or some other responsible person, 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.[40]

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[36] As the proposed act originally read, a literal reading would have resulted in the outlawing of using dogs for hunting. This would be an unusual result considering that the proposal originated in southern Ohio, an area known for hunting. Interview with Ohio State Representative William G. Batchelder III, R-4th District (Dec. 29, 1987).

[37] The statute as introduced by Representative Hickey, D-39th District, of Dayton, contained no mention of the pit bull dog as a breed, and instead opted for the more general language which classified dogs according to their dangerous or vicious propensities. *See supra* note 4. While this language was retained in the statute as adopted, it was also amended to include the specific reference to pit bull dogs in OHIO REV. CODE ANN. § 955.11(A)(4)(a)(iii) (Baldwin Supp. 1987).

[38] The new statute updated the language of the old law from the owner or keeper, to the owner, keeper, or harborer language to eliminate inconsistencies within the provisions of the Act and to more accurately reflect traditional tort liability language. Interview with Ohio State Senator Grace Drake, R-22 District (Dec. 29, 1987). This information is also reflected in a file report prepared for the Senator before the report of the House Agriculture, Commerce, and Labor Committee was documented.

[39] OHIO REV. CODE ANN. § 955.11(A)(5) (Baldwin Supp. 1987).

[40] OHIO REV. CODE ANN. § 955.11(A)(1)(a) (Baldwin Supp. 1987). The Code then excepts from this definition of dangerous dogs, any police dog that has behaved in a manner which would ordinarily indicate a dangerous dog while that dog was being used in a law enforcement capacity. See OHIO REV. CODE ANN. § 955.11(A)(1)(b) (Baldwin Supp. 1987).

As defined by the statute, a menacing fashion means that the dog would cause any person being chased or approached to reasonably believe that the dog will cause physical injury to that person.[41] Without provocation means that there was no teasing, tormenting, or abuse by a person, or that the dog was not coming to the aid or the defense of a person who was not engaged in illegal or criminal activity and who was not using the dog as a means of carrying out such activity.[42]

The statute defines a vicious dog as a dog which:

> 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; (iii) belongs to a breed 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.[43]

There are two exceptions to the vicious dog definition. First, there is a "line of duty" exception for police dogs. A police dog is not a vicious dog if the dog kills or causes injury to any person while assisting one or more law enforcement officers in the performance of their official duties.[44] Second, a dog is not considered vicious if it kills or causes serious injury to any person while a person is committing or attempting to commit a trespass or other criminal offense on the property of the dog's owner.[45]

The statute amended the prior law concerning transfer of ownership or possession of a dog and recodified it with additional provisions. The act provides a specific course of action to be followed in transferring ownership of any dog. The transfer of ownership requires the filing of an ownership certificate.[46] Prior to the transfer, at the buyer's request, a seller must provide written notice to the new owner relative to the behavior and propensities of the dog.[47] In addition, within ten days after the transfer of the animal, if the seller has knowledge of the dog being dangerous or vicious, he must provide a completed copy of a written form[48] which describes the dog's behavior to the buyer or other transferee, the board of health for the district in which the buyer or other transferee resides, and the dog warden

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[41] OHIO REV. CODE ANN. § 955.11(A)(2) (Baldwin Supp. 1987).

[42] OHIO REV. CODE ANN. § 955.11(A)(5) (Baldwin Supp. 1987). This provision is specifically aimed at the use of pit bull dogs in illicit activities, such as narcotics offenses.

[43] OHIO REV. CODE ANN. § 955.11(A)(4)(a) (Baldwin Supp. 1987).

[44] OHIO REV. CODE ANN. § 955.11(A)(4)(b)(i) (Baldwin Supp. 1987).

[45] OHIO REV. CODE ANN. § 955.11(A)(4)(b)(ii) (Baldwin Supp. 1987).

[46] OHIO REV. CODE ANN. § 955.11(B) (Baldwin Supp. 1987).

[47] OHIO REV. CODE ANN. § 955.11(C) (Baldwin Supp. 1987).

[48] The form is available from the dog warden.

of the county in which the buyer or transferee resides.[49] The criminal penalty for failure to file a certificate is a minor misdemeanor.[50] If a seller violates the notice requirements relative to behavior and propensities or the requisite form requirements relative to dangerous or vicious dogs, it is a minor misdemeanor on the first offense and a misdemeanor of the fourth degree on each subsequent offense.[51]

The statute requires the owner of any dog to either keep it physically confined or restrained on his premises by a leash, tether, adequate fence, supervision, or secure enclosure to prevent escape, or under reasonable control of some person.[52] This does not apply to dogs lawfully engaged in hunting.[53] In addition, the statute requires the owner of a dangerous or vicious dog, except when the dog is lawfully engaged in hunting, to control the dog both on and off the owner's premises. If the dog is on the owner's premises, it must be securely confined at all times in a locked pen or enclosure with a top, or in a locked fenced yard. If the dog is dangerous, but not vicious, it can be tied with a leash or tether so long as it is adequately restrained.[54]

If the dog is to be off the premises, it must be kept on a chain link leash or tether of not more than six feet, and must meet at least one of the following requirements: 1) It must be kept in a locked pen which has a top, locked fenced yard, or other locked enclosure with a top; 2) It must be on a leash or tether controlled by a person of suitable age and discretion, or it must be securely attached, tied, or affixed to the ground, a stationary object, or fixture so that the dog is adequately restrained, and the person

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[49] OHIO REV. CODE ANN. § 955.11(D) (Baldwin Supp. 1987). This Code section requires the seller to furnish the following information:

> (1) The name and address of the buyer or other transferee of the dog; (2) The age, sex, color, breed, and current registration number of the dog. In addition, the seller shall answer the following questions which shall be specifically stated on the form as follows: "Has the dog every chased or attempted to attack or bite a person? If yes, describe the incident(s) in which the behavior occurred." "Has the dog ever bitten a person? If yes, describe the incident(s) in which the behavior occurred." "Has the dog ever seriously injured or killed a person? If yes, describe the incident(s) in which the behavior occurred."

[50] OHIO REV. CODE ANN. § 955.99(A)(1) (Baldwin Supp. 1987). For penalties, see *infra* note 51.

[51] OHIO REV. CODE ANN. § 955.99(A)(2) (Baldwin Supp. 1987). OHIO REV. CODE ANN. § 2929.21 (Baldwin Supp. 1986) provides the penalties for misdemeanors, which may involve both a fine and/or a term of imprisonment. The penalty for a minor misdemeanor may be a fine of up to $100. A misdemeanor of the fourth degree may result in up to a 30 day prison sentence and/or a $250 fine. A misdemeanor of the third degree may result in up to 60 days in prison and/or a $500 fine. A misdemeanor of the second degree may result in up to 90 days in prison and/or a $750 fine. A misdemeanor of the first degree may result in up to 6 months in prison and/or a $1,000 fine.

[52] OHIO REV. CODE ANN. § 955.22(C) (Baldwin Supp. 1987).

[53] *Id.*

[54] OHIO REV. CODE ANN. § 955.22(D)(1) (Baldwin Supp. 1987).

must be stationed in close enough proximity to the dog so as to prevent it from causing injury to any person; 3) The dog must be muzzled.[55]

A failure to comply with the confinement and leash requirements may result in a fine or imprisonment under the terms of the statute.[56] In addition, for a violation of the confinement laws, the court may order an offender to personally supervise his dog, cause him to send the dog to obedience training, or both.[57] For dangerous dogs, a violation of the confinement laws can result in a fourth degree misdemeanor on the first offense and a third degree misdemeanor for each subsequent offense.[58] If necessary, the court may also order a dangerous dog to be humanely destroyed by a licensed veterinarian.[59] If the violation involves a vicious dog that has killed or caused serious injury, it is a fourth degree felony on the first offense, and on any subsequent offense.[60] Additionally, the court must order the dog destroyed.[61] Alternatively, the court may impose a misdemeanor of the first degree on a first offense and a felony of the fourth degree on each subsequent offense and may order the dog destroyed.[62] If a vicious dog causes injury other than killing or serious injury, it is a misdemeanor of the first degree.[63]

The owner of a vicious dog is required by statute to obtain liability insurance with an authorized insurer who can write liability insurance in the state. The insurance coverage must be not less than $50,000 to cover any damage, bodily injury, or death to a person caused by a vicious dog.[64] Failure to obtain the requisite insurance is a first degree misdemeanor.[65]

B. Consequences

As a consequence of the new statute, owners of pit bull dogs, in particular, and all dogs, in general, have found themselves in an unusual situa-

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[55] OHIO REV. CODE ANN. § 955.22(D)(2) (Baldwin Supp. 1987).

[56] OHIO REV. CODE ANN. § 955.99(E)(1) (Baldwin Supp. 1987).

[57] OHIO REV. CODE ANN. § 955.99(E)(2) (Baldwin Supp. 1987).

[58] OHIO REV. CODE ANN. § 955.99(F) (Baldwin Supp.1987). *See supra* note 51, for accompanying penalties in Ohio.

[59] *Id.*

[60] OHIO REV. CODE ANN. § 955.99(G)(1) (Baldwin Supp. 1987). OHIO REV. CODE ANN. § 2929.11 (Baldwin Supp. 1986) provides the penalties for felonies, which may involve both a fine and/or a term of imprisonment. The penalty for a felony of the fourth degree may be a fine of up to $2,500 and a maximum prison sentence of five years. A felony of the third degree may result in a fine of up to $5,000 and a maximum prison sentence of 10 years. A felony of the second degree may result in a fine of up to $7,500 and a maximum prison sentence of 15 years. A felony of the first degree may result in a fine of up to $10,000 and a maximum prison sentence of 25 years.

[61] *Id.*

[62] OHIO REV. CODE ANN. § 955.99(G)(2) (Baldwin Supp. 1987).

[63] OHIO REV. CODE ANN. § 955.99(G)(3) (Baldwin Supp. 1987).

[64] OHIO REV. CODE ANN. § 955.22(E) (Baldwin Supp. 1987).

[65] OHIO REV. CODE ANN. § 955.99(H) (Baldwin Supp. 1987).

tion. The pit bull dog is considered prima facie vicious, and hence ownership is a violation of the statute unless the owner complies with the statutory obligations, particularly the liability insurance requirement. Not wishing to subject themselves to the criminal penalties which accompany the law, owners who seek to obtain the required insurance find that insurance companies are reluctant to provide them with the insurance because the dogs are considered uninsurable risks.[66] In addition, no dog owner is safe if his dog resembles the concept of what a pit bull looks like in the minds of law enforcement officers, judges, or juries. Regardless of whether the dog is a pit bull, if it is found to be vicious by the authorities, the owner can be subject to criminal penalties.

As an unexpected and unfortunate result of the statute, many pit bull dog owners are voluntarily turning in their dogs to enforcement authorities, rather than complying with the terms of the statute.[67] Owners consider the burden of the legal, financial, and moral obligations too great if their dog should get loose and injure someone, fatally or otherwise. Most dogs turned in are considered unadoptable, and are subsequently destroyed. The other alternative to turning the dog in, for which many owners have opted, is simply to set it free. Such a release causes its own set of problems. The owner is still liable for the dog's actions, if the owner can be identified. Such animals running wild pose an even greater threat to safety than those that are owned as pets. The loose dogs suffer from hunger and disease and are more prone to attack than those kept as pets.

The specification of the pit bull dog on the face of the statute has also led law enforcement officials to take actions that owners resent. Special letters informing the owners of pit bull dogs of the new statute and its requirements sent to those owners who were identified by using county dog registration records prompted outrage and accusations that the en-

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[66] Both Ohio State Senator Grace Drake and Ohio State Representative William G. Batchelder III commented on the fact that no insurance company is willing to take on the dogs as they are an uninsurable risk. Senator Drake suggested that if the legislature felt that it was necessary to institute an insurance requirement, then there should be some sort of provision designating the company or companies who must write the policies. Interviews with Ohio State Senator Grace Drake, R-22nd District (Dec. 29, 1987) and Ohio State Representative William G. Batchelder, III R-4th District (Dec. 29, 1987).

[67] In counties throughout Ohio, owners have voluntarily turned in their pit bull dogs, or similar breeds, to be destroyed. In Summit County, the number of dogs turned in the first half of 1987 went from five to 12 and then after the statute took effect in July, the number more than doubled again. In Montgomery County, owners have turned over more than 12 pit bulls, or similar dogs, each month since June 1987. Similar results have followed in other counties. Akron Beacon Journal, Oct. 1, 1987, at 1. These voluntary turn ins are in addition to the number of animals impounded under the statute. In Summit County, 62 pit bull dogs were impounded between the beginning of 1987 and October 1, 1987. The complaint in Ohio Dog Breeders Ass'n v. Celeste, No. C87-2708Y (N.D. Ohio Oct. 14, 1987) alleged that as of the time of filing, 63 dog owners had surrendered their dogs to the county dog warden for destruction.

forcement officials were engaging in a vendetta to eliminate pit bull dogs entirely.[68]

V. CONSTITUTIONALITY OF THE STATUTE

The statute poses difficult problems from a constitutional standpoint. Criticism of the statute followed immediately upon its passage.[69] The statute has been challenged on several fronts as being unconstitutional. These challenges include vagueness, denial of equal protection and denial of due process.

Specifically, dog breeders and pit bull owners claim that the statute singles out pit bull owners without defining what a pit bull dog is, thus allowing wide discretion in determining which dogs fall into the classification.[70] Owners allege that by making the pit bull dog prima facie vicious, the statute has in effect prohibited their ownership within the state, and licensed the courts to mandate their destruction.[71] The liability insurance

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[68] Attached to the complaint in Ohio Dog Breeders Ass'n v. Celeste, No. C87-2708Y (N.D. Ohio Oct. 14, 1987) was a copy of a letter addressed to pit bull terrier owners in Mahoning County by the Mahoning County Dog Warden informing the owners of the new law and its terms. The letter was addressed solely to pit bull terrier owners. The Ohio Dog Breeders Association claims this is further evidence of the discriminatory enforcement intent against pit bull owners only.

[69] Interview with Ohio State Representative William G. Batchelder III, R-4th District (December 29, 1987).

[70] This is not a novel claim with respect to statutes that are breed specific. Prior to the passage of OHIO REV. CODE ANN. § 955.11, many municipal statutes both in Ohio and nationwide sought to control the ownership of pit bull dogs by specifically mentioning them in some capacity and similar outrages resulted. Several municipal statutes have been the subject of litigation on constitutional grounds. *See* Holt v. City of Maumelle, 647 F. Supp. 1529 (E.D. Ark. 1986); Starkey v. Township of Chester, 628 F. Supp. 196 (E.D. Pa. 1986); City of Lima v. McFadden, No. 1-85-22 (Ct. App. Allen County, June 30, 1986).

OHIO REV. CODE ANN. § 955.01 (Baldwin 1985) governs registration of dogs in Ohio. The statute requires the registration every year by every person who owns, keeps, or harbors a dog more than three months of age. The application must state the following: "age, sex, color, character of hair, whether short or long, breed if known, and the name and address of the owner of the dog."

The nature of the statute poses a unique problem in that it encourages evasion of enforcement. To a certain degree, the statute is self-enforcing because it requires the dog owner to register the breed of animal, if known, pursuant to OHIO REV. CODE ANN. § 955.01 (Baldwin Supp. 1987). Thus, it is left to the owner to either truthfully identify their dog as a pit bull dog or to allege that the dog is a mixed breed. Enforcement officials can therefore place little faith in information provided in registration forms. In fact, the use of dog registration records to identify potential pit bull dog owners creates an ironic situation. The statute may do more to encourage owners to falsify the registration forms and claim that they own a mixed breed dog of unknown lineage, rather than truthfully claim the dog as a pit bull and be an identifiable subject of the statute.

[71] Such prima facie crimes are always somewhat troublesome, both constitutionally and philosophically. The presumption that mere possession of such an animal makes it prima facie vicious and that its ownership carries additional

requirement is also challenged as imposing an unfair burden on the owners of pit bull dogs.[72] It can be asserted that the state has overstepped its bounds in regulating the dogs to the point where the state is in effect taking the dogs without due process of law or just compensation for their value to the owners. For these reasons, among others, the statute has been attacked as unconstitutionally vague and for violating both the equal protection and due process clauses of the fourteenth amendment.

Challengers to the statute face a difficult battle since a legislative act is generally entitled to a strong presumption of constitutionality.[73] Further, clear and convincing evidence to the contrary must be presented if the statute is to be successfully challenged.[74]

A. Vagueness Challenge

The main challenge to the constitutionality of the statute is that the use of the term "pit bull dog" is definitionally vague. The act defined a pit bull dog as prima facie vicious without providing a definition as to what a pit bull dog is or subjecting it to the propensities analysis to which other dogs are subject, thereby making a blanket assumption about the nature of that type of dog.[75]

It is a fundamental requirement of criminal statutes that they inform the citizens with reasonable precision what acts are prohibited so the citizens may have a certain, understandable standard of conduct to which to conform.[76] The standard for determining whether a statute should be declared void for vagueness may also be stated as follows: The statute may not be so vague that "men of common intelligence must necessarily guess

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burdens raises immediate constitutional concerns for the rights of those who exercise their free will in owning such animals, and philosophical concerns as to whether it is just to isolate the single breed and attach a stigma to it.

[72] OHIO REV. CODE ANN. § 955.22(E) (Baldwin Supp. 1987).

[73] State v. DePascale, 11 Ohio App. 3d 163, 463 N.E.2d 1284 (1983) (recited the general principles which govern a constitutional challenge to a statute in a challenge to OHIO REV. CODE ANN. § 955.21 which requires the application for registration and the payment of associated fees that the court upheld as not unconstitutionally discriminatory).

[74] *Id.*

[75] The fact that there was no attempt to define what a pit bull dog is or to give any identifying characteristics is highly inconsistent given the meticulous definitions provided in the same section of the statute for the purposes of identifying dangerous or vicious dogs. *See* OHIO REV. CODE ANN. § 955.11(A) (Baldwin Supp. 1987).

[76] *See also* U.S. v. Harriss, 347 U.S. 612 (1954) (person cannot reasonably be held criminally responsible for conduct not reasonably understood to be proscribed); Palmer v. City of Euclid, 402 U.S. 544 (1971) (where the court reversed judgment against Palmer for violation of a 'suspicious person' ordinance because the ordinance was so vague and lacking in ascertainable standards of guilt that it failed to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden); Coates v. Cincinnati, 402 U.S. 611 (1971) (held city ordinance requiring three or more people who meet together on a street corner or sidewalk to conduct

at its meaning and differ as to its application."[77]

A criminal statute must meet two requirements of clarity or it may be struck down as overly vague. First, it must place persons on notice as to what activity is made criminal to prevent a deterrent effect on the exercise of constitutional rights which could result if the statute's application was unclear.[78] Second, and more important, for a statute not to be considered vague, it must provide clear guidelines of offending conduct to govern law enforcement.[79] Without such guidelines, law enforcement officers, judges, and juries would have discretion to enforce statutes on an arbitrary basis.[80] However, a statute need not define its own terms with extreme particularity.[81] The law in Ohio merely requires that criminal statutes must be so explicit and clear that all persons of ordinary intelligence who are subject to their penalties will understand their provisions.[82]

Since "the degree of constitutionally tolerable vagueness is not calculable with precision,"[83] the legislature was confronted with the dilemma of whether to draft a statute narrowly and risk its ineffectiveness by evasion through the use of technical loopholes or to draft it with great generality and risk trapping more "innocents in a net designed for others."[84] The question ultimately arises whether the term "pit bull dog" is a term susceptible to definition by reference to reasonable and readily accessible source material. When engaging in such interpretation, courts can, and frequently do, rely on common law devices to save statutory terms from vagueness.[85]

There is disagreement about what a pit bull dog is and whether it is actually a breed. Certain courts have defined a pit bull dog by using a

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themselves so as not to annoy a police officer or other passerby unconstitutionally vague because the standard was unascertainable).

[77] Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[78] Raley v. Ohio, 360 U.S. 423, 438 (1959).

[79] J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW § 16.9 (1986) [hereinafter CONSTITUTIONAL LAW].

[80] United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921).

[81] For one thing, there are inherent limitations in the use of language; few words possess the precision of mathematical symbols. Secondly, legislators cannot foresee all the variations of fact situations which may arise under a statute." W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW § 2.3(a) (1986) [hereinafter CRIMINAL LAW].

[82] City of Lima v. McFadden, No. 1-85-22, (Ct. App. Allen County, June 30, 1986).

[83] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 718 (1978).

[84] *Id.*

[85] United States v. Sullivan, 332 U.S. 689 (1948) (although criminal statutes must be so unambiguous that an ordinary person may avoid unlawful conduct, such statutes must be given their fair meaning in accord with evident intent of legislators when interpreted).

convoluted dictionary approach to establish a definition.[86] Other sources claim the pit bull dog is not a recognized breed.[87] Certainly, if the term is susceptible to definition, the statute cannot be struck down on the grounds of vagueness and the constitutional attack must run to other fronts. The argument can also be validly asserted that since the statute applies to pit bull dog owners, it could reasonably be expected that the owner knows what kind of dog he possesses.[88] Consequently, the persons subject to the penalties of the statute certainly find the use of the term pit bull dog explicit enough to understand to whom the statute is directed.

Even if the statute were self-identifying as to owners, a problem exists with the definition for law enforcement purposes.[89]

> The risk of abuse in the administration of the law is present in two forms when the meaning of a criminal statute is unclear. One risk is that the law may be arbitrarily applied by police and prosecution officials. . . . The other risk is that the law may be so unclear that a trial court cannot properly instruct the jury.[90]

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[86] In *McFadden*, the court defined a pit bull dog by looking to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (ed. 1981), where the term "pit bull" or "pit bull terrier" referred the reader to "bullterrier." Bullterrier was defined as:

> a short-haired terrier of a breed originating in England by crossing the bulldog with terriers to develop a dog of speed, hardihood and powerful bite for use in dog fights, dogs of breed having great courage and strength but being built on the trim lines of a terrier.

Id. at 295. Using the bull terrier as a basis, the court then turned to two different books on dogs, and determined what the pit bull dog looked like by referring to photographs and descriptions of what a bull terrier should look like. On this basis, the court concluded that the term pit bull dog was susceptible to definition and therefore was not void for vagueness.

[87] THE NEW DOG ENCYCLOPEDIA 631 (1970) contains the specific warning in its description of bull terrier: "Bull terrier should not be confused with what is popularly called the American Bull Terrier or Pit Bull which was the dog sometimes used for fighting in this country. These dogs had a shorter, squarer head with more stop and were of a mixed type."

[88] If this is so, the question then arises whether the legislature can rightfully delegate authority for identifying pit bull dogs to the owners and make them responsible for taking actions to protect themselves. This type of self-enforcing statute also poses the additional danger of evasion through deliberately mis-stating the breed of dog on registration materials. *See supra* note 70. While self-enforcing statutes are well known to American citizens (the most common being the federal income tax statutes and their corresponding requirement of filing an income tax return), it is questionable whether a statute which relies in part on the willingness of citizens to comply is an appropriate measure in an area which poses serious threat to the well being of others.

[89] It must be noted that a statute is not tested for vagueness by the terms on its face, but rather "as it has been authoritatively construed by state courts." *See supra* note 81. This "judicial gloss" will be the ultimate arbiter of whether the term pit bull dog is susceptible to definition and hence, the statute not vague. Even with judicial interpretation, however, it is difficult to imagine a workable standard which would provide sufficient guidance for all involved.

[90] *See supra* note 81.

If an owner knows what kind of dog he has, this does not mean that a dog warden, enforcement officer, judge, or jury can reasonably be expected to recognize a dog as a member of a specific breed. Therefore, no dog owner can be reasonably secure in the knowledge that his dog is safe from the application of the statute by enforcement officers. If the statute does not clearly define what is meant by a pit bull dog, it "may trap the innocent by not providing fair warning"[91] and may, in practical effect, impermissibly delegate "basic policy matters to policeman, judges, and juries for resolution on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory application."[92]

To summarize the vagueness argument, by using the term "pit bull dog" in the statute, the legislature denies the owners of pit bull dogs and dogs which may be considered pit bulls equal protection and due process of law by the vagueness of the term. Indeed, the arguments for equal protection and due process run further than the vagueness of the statute's terms.

B. Equal Protection Challenge

The equal protection claims suggest that the statute discriminates against pit bull dog owners and denies them equal protection of the laws by exempting certain other classifications.[93] "The guarantee of equal protection means that no person or class of persons shall be denied the same protection of the law which is enjoyed by other persons or other classes in the same place and under similar circumstances."[94] "All laws however

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[91] Grayned v. Rockford, 408 U.S. 104, 108 (1977).

[92] *Id.*

[93] Assuming that the term pit bull dog is susceptible to definition and not void for vagueness, opponents of the statute claim that the exception of police dogs that would be vicious but for the fact that the offending behavior occurred in the line of their law enforcement activities, dogs that have created injury to various persons who are engaging in criminal activities on the owners property, and hunting dogs that are otherwise vicious is an equal protection violation. Complaint in Ohio Dog Breeders Ass'n v. Celeste, No. C87-2708Y (N.D. Ohio, Oct. 14, 1987).

The claims do not suggest that the dogs themselves are being denied equal protection. One must be careful to distinguish between the allegation of denial of equal protection to the dogs and the denial of equal protection to the owners of the dogs. The former is deemed a frivolous claim, while the latter may be colorable. *See* Bogan v. New London Hous. Auth., 366 F. Supp. 861 (D.C. Conn. 1973). In *Bogan*, the residents of a federally assisted low income housing project claimed, among other things, that the housing authority violated the equal protection clause by permitting tenants to keep cats but not dogs. In response to this claim, the court stated:

> Insofar as this claim suggests that dogs have equal protection rights, it is plainly frivolous. Insofar as this claim asserts that defendant's prohibition of dogs but not cats is unreasonable, it is subsumed under plaintiff's more general claim that defendants had no just cause to evict tenants for owning a dog.

Id. at 866.

[94] State v. DePascale, 11 Ohio App. 3d 163, 163, 463 N.E.2d 1284, 1285 (1983).

do not have to apply to all citizens in exactly the same manner and there may be lawful classifications based upon reasonable grounds for such varying classifications."[95] This is generally determined by application of the rational basis test.

Under the rational basis test, to withstand equal protection review, the law must be rationally related to a legitimate government purpose.[96] The legislature has a reasonable degree of discretion in developing laws which apply to some persons differently than others.[97] However, such laws must be based on fundamentally reasonable classifications and must have the capability of being applied reasonably and fairly among all to whom they pertain.[98] In general, courts have been "quite permissive in allowing state legislatures to draw whatever classifications they choose in enacting criminal laws."[99] The state must also have a legitimate interest which it is furthering by enacting the statute.[100]

It can be claimed that the statute is facially discriminatory on two grounds. First, it applies immediately only to pit bull dogs, while other breeds of dog are examined by their propensities prior to being labelled "dangerous" or "vicious." Second, it exempts other dogs entirely from the statute's requirements thereby not including all who are similarly situated with respect to the intent of the law.

The equal protection claims further suggest that the statute constitutes unconstitutional discrimination because it hampers persons desiring to own pit bull dogs from achieving their objective, when no such obstacle to ownership faces those who wish to own other types of dogs. The liability insurance requirement can also be challenged as an unconstitutional penalty imposed on persons who exercise free choice to own a particular breed of dog.

Under the traditional rational basis analysis,[101] the judiciary is reluctant to interfere in social and economic regulations and therefore defers to the judgment of the legislature concerning the necessity and reasonableness of the statute.[102] The courts have determined that the state,

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[95] *Id.* at 163, 463 N.E.2d at 1285.

[96] There are various articulations of the rational basis standard. Generally, the equal protection clause is satisfied if the statutory classification is "rationally related to a legitimate state interest." New Orleans v. Dukes, 427 U.S. 297, 303 (1976). At times, the court has adopted a more restrictive approach to equal protection, stating the test as: "The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[97] *See* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[98] *See* State v. DePascale, 11 Ohio App. 3d 163, 463 N.E.2d 1284 (1983).

[99] CRIMINAL LAW, *supra* note 81, § 2.11(b) at 144.

[100] *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979).

[101] *See supra* note 96.

[102] *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980). In Fritz, the court stated: "[T]he court in cases involving social and economic benefits has consistently refused to invalidate on equal protection grounds legislation which

rather than federal, level is appropriate for such decisions concerning social and economic regulation. Therefore, given the testimony and exhibitions on the floor of the House concerning pit bulls, the legislature could reasonably determine that pit bull dogs are in fact vicious enough to warrant special treatment.[103] On this analysis, the statute reflects reasonable classifications to protect the health, safety, and welfare of the citizens of Ohio.

The protection of the health and safety of its citizens is recognized as a legitimate state interest. The use of pit bulls in dog fighting, gambling, and other criminal activity poses a valid threat to health and safety, particularly when the dogs are trained to be aggressive. However, it can be argued that the means chosen to protect that end are not adequately related to those goals. By singling out pit bull dogs, the legislature in effect ignores the fact that other breeds are also to blame for injury and leaves those potentially vicious animals untouched. In fact, many dangerous dogs are not registered under any specific breed and a breed specific statute would not reach them.

A state is also justified in legislating on a step by step basis to conquer a problem it considers a threat to health or safety of state residents.[104] As the legislature could reasonably have inferred that pit bull dogs were responsible for a majority of dog attacks based on the testimony before them, they could justifiably make pit bull dogs their first step in controlling the problem.

It is the state legislatures which are best able to decide whether a particular situation poses a threat to the health, safety, or welfare of its citizens. If they find it necessary to enact legislation, the courts will step

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it simply deemed unwise or unartfully drawn. . . . [T]he plain language of [the statute] marks the beginning and end of our inquiry." *Id.* at 167, 176. *Accord* Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481 (1988), where the court stated that social and economic legislation bear a presumption of constitutionality that can only be overcome by a clear showing of arbitrariness and irrationality. *Id.* at 2489.

Likewise, in the context of vicious dog legislation, see Holt v. City of Maumelle, 647 F. Supp. 1529 (E.D. Ark. 1986), where the court abstained from judgment and dismissed without prejudice until questions of state law could be resolved, but did comment on the distinctly local nature of the ordinance which prohibited the keeping of dogs which "substantially conformed to the standards of the American Kennel Club for American Staffordshire Terrier or Staffordshire Bull Terrier or the United Kennel Club for American Pit Bull Terrier" and expressed a desire to avoid needless conflict with legitimate social interests being expressed by municipalities through legislation.

[103] *See supra* note 34.

[104] The method of approaching a problem step by step in the equal protection analysis was approved by the Court in Railway Express Agency v. New York, 336 U.S. 106 (1949), where the court stated "[I]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Id.* at 110. Likewise, in Starkey v. Chester, 628 F. Supp. 196 (E.D. Pa. 1986), the court stated: "The township does not have to regulate every dangerous animal at the same time in the same way to pass constitutional muster." *Id.* at 197.

in if the statute clearly reflects no possibility of being rationally related to those legitimate goals. Consequently, while dog owners may consider the statute questionable, the overwhelming concern for protecting the citizens of the state allows the legislature to take control of the situation on a step by step basis to eliminate the problem of dog attacks, and if the legislature chooses to begin with pit bull dogs, then it may do so.[105]

The liability insurance requirement for pit bull owners has also been challenged as discriminatory.[106] If the designation of the pit bull dog as vicious can withstand equal protection scrutiny, then the liability insurance is also likely to withstand challenge. The best way to understand the insurance requirement is to analogize it to other types of insurance which are risk dependent. Risk dependent insurance examines the amount of risk associated with the particular individual or property they wish to insure. For instance, in the same way that the twenty-two year old male owner of an expensive sports car can expect to pay more for auto insurance than the married fifty-five year old owner of a compact family car because they are at different risk levels, the owner of a dog, which the legislature has reason to believe is considerably more dangerous than many other types of dogs, can expect to pay a premium for owning that type of dog.

The greatest criticism of the liability requirement is that the insurance is largely unavailable to those who seek to attain it.[107] By an act of the legislature, the insurance companies were given the power to determine the fate of pit bull owners in the state. The pit bull dogs are considered a poor insurance risk, and consequently the insurance companies will not write policies on them at all. Thus, the fate of some pit bulls rests not in the hands of law enforcement officials, but in insurance companies who can deprive the owner of the protection of the law merely by refusing to insure, even though the owners have attempted compliance.[108]

C. Due Process Challenge

Allegations have arisen that the statute deprives citizens of their due process rights by depriving them of their property. Owners complain that

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[105] Railway Express Agency v. New York, 336 U.S. 106 (1949).

[106] *See* complaint in Ohio Dog Breeders Ass'n v. Celeste, No. C87-2798Y (N.D. Ohio Oct. 14, 1987). Claims associated with liability insurance also arose in the context of a similar county ordinance in Florida. In Responsible Dog Owners of Florida, Inc. v. Board of County Comm'rs, No. 85-6743 (S.D. Fla. Jan. 9, 1985), the plaintiffs challenged an ordinance purporting to regulate "Pit bulls," "American Staffordshire Terriers" and "Staffordshire Bull Terriers." The ordinance required every owner of a pit bull to maintain liability insurance. The federal court abstained from deciding the merits of the claim and instructed the plaintiffs to litigate any claims fully in state court before approaching the federal courts again.

[107] *See supra* note 66.

[108] In Ohio, the liability insurance provision has also been challenged as an unconstitutional delegation of authority to insurance companies under the Ohio Constitution, Art. II, Sec. 1 and Art. I, Sec. 16. *See* complaint in Ohio Dog Breeders Ass'n v. Celeste, No. C87-2708Y (N.D. Ohio Oct. 14, 1987).

the statute has granted enforcement officials the power to identify and take their dogs if they do not meet the requirements of the statute. Owners claim that the dogs are personal property that the state has recognized through its prior and continued regulation, and that the statute has suddenly denied that right to those who possess pit bull dogs.[109] In addition, the regulation of pit bull dogs has given rise to the claim that the state has exceeded its police power[110] to control dangerous conditions and has, in fact, initiated a statute which constitutes a taking of the dogs without compensation to the owners.[111]

The Due Process clause of the fourteenth amendment denies the states the power to deprive any person of certain substantive rights—life, liberty, and property—except pursuant to constitutionally adequate procedures. Due process is a constitutional guarantee which the legislature may not circumvent. Once the legislature elects to confer a property right, it may not constitutionally authorize the deprivation of such an interest without appropriate procedural safeguards.[112]

Pit bull owners allege that the statute is arbitrary, unreasonable, oppressive, and confiscatory for two reasons. First, it permits the seizure and destruction of any dog without compensation, either before or after the seizure, and second, it delegates some of the power to determine the fate of the pit bull dogs to insurance companies who ultimately decide whether they will insure the dog or deny that insurance thus putting the owner in violation of the statute.[113]

The terms of the statute effectively give pit bull owners an ultimatum. They must either comply with the terms of the statute or face the sanc-

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[109] *See* Board of Regents v. Roth, 408 U.S. 564 (1972) (where the court stated that property interests are not created by the constitution, but are created and defined by existing rules or understandings that stem from an independent source such as state law). *See also* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (where the court emphasized that a property interest is created by state law, but once it is created, the procedures governing deprivation are a matter of federal law).

[110] Dogs are subject to the full force of police power and may be regulated in whatever manner the legislature deems reasonable for the protection of citizens. Sentell v. New Orleans & Carrollton R.R., 166 U.S. 698 (1897).

[111] While the principles of "taking" versus regulation are generally applied to real property, they can just as readily be applied to personal property. In Agins v. Tiburon, 447 U.S. 255 (1980), the court concluded that for a land use regulation to avoid being considered a compensable taking it must meet two requirements. First, it must advance legitimate state interests, and second, it must not deny an owner economically viable use of his land. This principle can be applied equally well to the pit bull dog situation. While the same state interests that apply to equal protection analysis (health and safety) are also applicable here, the owners of pit bull dogs have effectively been denied the possession of their animals (some of which can be quite costly to purchase) by their designation as prima facie vicious and the failure of insurance companies to provide the requisite insurance.

[112] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

[113] Complaint in Ohio Dog Breeders Ass'n v. Celeste, No. C87-2708Y (N.D. Ohio Oct. 14, 1987).

tions which the statute imposes. If the owner cannot comply with the insurance requirement or any other provision of the statute, he can either turn the dog over to the appropriate officials for destruction, or risk the penalties of the statute. The actions of officials in demanding the surrender of dogs may be a deprivation of the ajudicative process for the owners of pit bull dogs. This is highlighted by the fact that while the statute affords the opportunity for a determination by a judge or jury of whether their dog can be reasonably classified as dangerous or vicious, pit bull owners are not afforded this option. It appears that pit bull dog owners suffer a serious deprivation of procedural due process by this denial.

The taking issue presents a unique problem.[114] It is within a state's police power to regulate situations which it considers a threat to public health or safety, yet "a regulation may be so restrictive as to warrant a finding that a taking has occurred."[115] If a taking has occurred, the owners must receive compensation for the harm they have suffered.[116] Four factors are normally determinative in deciding whether compensation is due to the owner:

> 1. Whether or not the public, government or one of its agents have physically used or occupied something belonging to the claimant.
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> 2. The size of the harm sustained by the claimant or the degree to which his affected property has been devalued.
>
> 3. Whether the claimant's loss is or is not outweighed by the public's commitant gain.
>
> 4. Whether the claimant has sustained any loss apart from restriction of his liberty to conduct some activity considered harmful to other people.[117]

Given these factors, a valid argument may be made that no compensation is due the pit bull dog owners for the taking of their dogs because

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[114] This problem was recognized in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), where the court stated: "The general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. The court also cautioned that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for change." *Id.* at 416. However, the key to claims, for a taking under the fifth or fourteenth amendments is "that it is wanted for a public use." *Id.* at 415.

[115] CONSTITUTIONAL LAW, *supra* note 79, § 11.12(e), at 413.

[116] There are various formulations of what constitutes just compensation. The most frequently quoted standard is attributed to Justice Holmes: "What has the owner lost, not what has the taker gained." Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910). This is generally referred to as the market value test. CONSTITUTIONAL LAW, *supra* note 79, § 11.14 at 417.

[117] CONSTITUTIONAL LAW, *supra* note 79, § 11.12(e), at 413-14.

any harm that the owners may suffer is outweighed by gains in public safety.[118] Nonetheless, these owners have been deprived of property by a law which offered them few alternatives except to surrender their dogs for destruction.

D. Constitutional Conclusions

If the fate of constitutional challenges to similar statutes is any indication of the outcome of this challenge, then the courts will likely uphold this statute. Similar municipal statutes in state and federal courts have been upheld or the court has abstained from reaching a decision.[119] Municipal statutes which designated pit bull dogs as dangerous or vicious have been interpreted to withstand the many constitutional challenges in a variety of ways.

The vagueness argument has been rejected by using definitional manipulations to reach an explanation of what a pit bull dog is, or by simply saying that the owner of a pit bull should know what type of dog he owns.[120]

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[118] *See* Redford v. United States Dep't of Treasury, 691 F.2d 471 (10th Cir. 1982) (the court denied compensation to the plaintiff whose firearms had been seized and declared forfeited pursuant to a statute which prohibited any person who had been adjudged mentally incompetent from possessing firearms); Quilici v. Village of Morton Grove, 532 F. Supp. 1169 (N.D. Ill. 1981), *aff'd* 695 F.2d 261 (7th Cir. 1982), *cert. denied,* 464 U.S. 863 (1983) (the court found that an ordinance banning possession of handguns was not a compensable taking because a gun owner was only limited within the village but could sell or otherwise dispose of the handguns outside of the village and in addition, could store handguns at licensed gun clubs). These cases can be distinguished from Ohio's vicious dog law on two grounds. First, the pit bull dogs are taken under the statute with no prior adjudication of their viciousness, unlike the guns in *Redford* that were taken only after the possessor had been adjudicated mentally incompetent. Second, the pit bull dogs have been effectively banned in the entire state of Ohio. Therefore, an owner must travel out of state before he may find a willing buyer for his dog if he does not wish to submit to the terms of the statute. Unlike a gun owner in *Quilici,* an owner of a pit bull dog has no means of selling or otherwise disposing of his dog within a reasonable distance of his home.

[119] *See* Holt v. City of Maumelle, 647 F. Supp. 1529 (E.D. Ark. 1986) (the court abstained from ruling on an ordinance prohibiting ownership of certain dogs substantially conforming to the standards of the American Staffordshire Terrier or Staffordshire Bull Terrier or the American Pit Bull Terrier until questions of state law could be resolved, but the challenge involved questions of vagueness and equal protection); Starkey v. Township of Chester, 628 F. Supp. 196 (E.D. Pa. 1986) (the court held that a township ordinance requiring pit bull owners to meet various standards for ownership was not facially discriminatory and the township could reasonably determine that pit bull dogs are dangerous); City of Lima v. McFadden, No. 1-85-22 (Ct. App. Allen County June 30, 1986) (the court upheld a municipal ordinance prohibiting the keeping or ownership of more than one pit bull dog per residence despite a challenge on the grounds that the use of the term pit bull dog was impermissibly vague).

[120] *McFadden,* No. 1-85-22. For a description of these manipulations, see *supra* note 86.

Given the dispute over whether the pit bull dogs are an identifiable breed and the convoluted approach to defining them that many courts have used, there appears to be a valid approach to a constitutional attack.[121] In fact, the legislature appears to be caught in a dilemma of its own making. While the statute is narrowly drafted to encompass the breed that is suspected of many attacks, the potential for evasion takes the form of not only the other breeds that are excluded, but also in actions to disguise the ownership of pit bull dogs, *e.g.,* falsifying registration forms.

In addition, given the definitional deficiencies of the term pit bull dog,[122] this narrowly drafted provision risks the entrapment of innocents "in a net designed for others."[123] In this instance, the dilemma appears to be that a narrowly drafted provision risked the possibility of both evasion and of trapping innocents, while a more general provision did not solve the problem of identifying those dogs considered to be the major cause of attacks prior to the first exhibition of their propensities. In choosing the narrowly drafted provision, the legislature responded to the urgency surrounding pit bull dogs and provided an immediate "fix" for the problem. In the long run, however, such specificity in the statute does not address the entire problem, but only a small part of it.

The discrimination argument has been dismissed by the courts as a matter which is of great local concern for the health and safety of the citizens. The courts will not intervene or disrupt the autonomy of the municipalities to engage in the administration of their own affairs.[124] The probable conclusion to a court challenge on equal protection grounds can best be summed up by the following language:

> For a state is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment. Nor is it prevented by the equal protection clause from continuing 'its restrictions to those classes of cases where the need is deemed to be clearest.'[125]

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[121] The federal courts have concluded that municipal statutes which mention pit bull dogs on their face are constitutionally permissible. These statutes can be distinguished from the Ohio statute by virtue of the inclusion of an additional description of what constitutes a pit bull dog under the statute's terms. In Holt v. City of Maumelle, 647 F. Supp. 1529 (E.D. Ark. 1986), the statute involved purported to prohibit "keeping of dogs substantially conforming to the standards of the American Kennel Club for American Staffordshire Terrier or Staffordshire Bull Terrier or the United Kennel Club for American Pit Bull Terrier . . ." *Id.* at 1530. In Starkey v. Township of Chester, 628 F. Supp. 196 (E.D. Pa. 1986), the statute involved purported to regulate pit bull dogs which were defined according to American Kennel terminology and sought to reach dogs "bred for fighting." *Id.* at 197.

[122] L. TRIBE, *supra* note 83, at 718.

[123] *See id.*

[124] Holt v. City of Maumelle, 647 F. Supp. 1529 (E.D. Ark. 1986).

[125] Skinner v. Oklahoma, 316 U.S. 535, 540 (1942).

The due process claims also have some merit. A valid argument can be made that the state has exercised its police powers such that the pit bull dog has been regulated right out of the owner's possession. While this is not done explicitly, it is the result of the combined impact of the statutory requirements and the unavailability of the requisite insurance. Consequently, the state government should take responsibility for the loss to the dog owners who have turned their dogs in or had them taken under the statute.

The likely outcome in further challenges is difficult to predict, particularly given the controversy, definitional problems, and difficulties getting insurance that surround statutes such as this. Given the courts lack of receptiveness to constitutional challenges in similar cases, a constitutional attack will probably fail. However, a declaration of constitutionality does not make the statute any less problematic. By opting for specificity on the face of the statute, the legislature invited citizens to engage in "creative evasion." The self-enforcing aspect of the statute which depends on registration forms to identify pit bull dog owners delegates the ultimate enforcement authority to the dog owner himself. In an area which the legislature considered important enough to enact emergency legislation, the ultimate decision as to whether a dog is dangerous or vicious should rest in the hands of a judge, jury, or administrative body. Any dog that is dangerous or vicious poses an immediate threat to the health and safety of the citizenry. A self-enforcing statue is not the most efficient or effective way to address the physical and emotional damage a dog attack could create.[126]

VI. Alternatives to the Existing Statute

Due to the potential ineffectiveness of Ohio Revised Code section 955.11, the initiation of a new statutory format to resolve more of the problems of dog control is in order. Primarily, vicious animal ordinances should aim at controlling dogs through leash laws, stricter penalties for loose dogs, and other violations of the statute, and improved enforcement laws. For pit bull dogs, the answer does not lie in banning their ownership, whether such a ban is constitutional or not, but in reaching the true cause of the problem.[127] A statute which is more inclusive could conceivably achieve

[126] This should be contrasted with federal and state income tax codes which require citizen cooperation in preparing and submitting tax returns. Although, these laws are self-enforcing, the potential evasion does not pose a threat of physical harm to society.

[127] Ohio Rev. Code Ann. § 955.221(D) (Baldwin Supp. 1987) permits municipal corporations to "adopt and enforce ordinances to control dogs within the municipal corporation that are not otherwise in conflict with any other provision of the revised code." Perhaps the simplest way for the state to resolve its problems would have been to simply draft a broad statute to resolve major problems that it perceived and leave it to the municipalities to draft dog control statutes as they deemed necessary. In this way, the state could avoid the necessity of designating a specific

the desired results while avoiding the accompanying controversy. In addition, such a statute, which would concedely be a less offensive alternative to dog owners, would be a much greater asset from a cooperation and enforcement standpoint, particularly if the legislature sought to control the problem largely by voluntary acquiescence to the statute.

The first change in the formulation of a new statute would therefore be to eliminate the designation of a specific breed. The revised statute would instead rely on the propensities of the individual dog in determining whether it is dangerous or vicious.[128] In general, no dog is inherently dangerous or vicious but has merely become that way as a result of human manipulation. To designate a specific breed in a statute implies that breed is more dangerous or vicious than another breed. This implication may serve to discourage the ownership of a designated breed, but it can also foreseeably lead to the development of a different type of dog with equally dangerous or vicious tendencies which is not subject to the statutory penalties.

A statutory format which relies solely on classification of dogs by propensity for the purpose of imposing criminal liability on its owner is a more even-handed approach to the control problem. Such a classification system also makes it much simpler for law enforcement officials. Rather than focusing on whether a dog fits into the breed given in the statute, law enforcement officials have the freedom to seek out all statutory offenders. A similar classification method is to allow the particular city or state to take action against dog owners, again regardless of breed, for "terrorism" without provocation so that officials can take action against a dangerous animal before it has a chance to cause injury to anyone.[129] Prevention is the answer. The key to any such format would be to identify a dangerous or vicious animal before it bites or attacks.

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breed and leave it to the discretion of the individual municipalities whether pit bull dogs posed such a threat to the safety and security of their citizens that they bore specific mention in a statute. This solution is not truly functional and, to use a colloquiallism, is a "cop out." There is a recognized necessity for a uniform statewide law regarding the control of dogs. It is merely the means that the legislature selected to reach that goal, not the goal itself, that is problematic.

[128] Support for this view has been recognized in New York City where the type of statute to control vicious dogs must be chosen. Editorial, N.Y. Times, Nov. 7, 1988, at 26.

[129] *Some Dogs Will No Longer Get Their Day,* GOVERNING Oct. 1987, at 10-11. The use of the term "terrorism" was chosen as an alternative to a breed specific statute in Aurora, Colorado because the city was reluctant to enact a statute which would make it vulnerable to a court challenge. While use of the term "terrorism" may be an attractive alternative to designating a specific breed, it must be noted that that is only true provided there is more definitional material in the statute to indicate (1) precisely what is meant by terrorism and (2) what acts of terrorism by a dog subject the owner to the penalties of the statute. Otherwise, the statute is vulnerable to a constitutional challenge on the grounds that the term "terrorism" is vague and overbroad.

Another potential solution would be the formation of a dog "court" as a division of the county dog warden's office, to hear claims arising from dog related problems.[130] Such a court would be the main body responsible for administering the dog law. It would take complaints from concerned parties involving potentially dangerous or vicious dogs. Once a dog had been adjudicated to be dangerous or vicious by the court, the owner would then have to comply with the leash, confinement, and other requirements of the law.

The one aspect of the new statute which serves a desirable function is the penalties. While the penalties were more severe than many legislators anticipated,[131] such penalties can serve a useful function.[132] The Humane Society recommends that state laws involving dangerous or vicious dogs should include penalties because they are the most effective deterrent to dog attacks.[133] Owners are more likely to comply with the terms of the statute if serious penalties are involved. Perhaps the use of dogs in the commission of criminal offenses, such as illicit drug sales or dog-fighting, deserves harsher penalties to further deter the use of the animals.

Another change in the statutory law necessary to control the dog problem is an upgrading of enforcement forces. Even when laws to protect the public health and safety exist, they must be enforced to be effective. Many enforcement officers are too overburdened by enforcing laws which control people who engage in illegal conduct to enforce animal laws and give them any "teeth." To crack down on animal problems, enforcement agencies need to be revitalized. Agencies such as the American Society for the Prevention of Cruelty to Animals (ASPCA) which have units authorized to carry guns and make arrests relating to crimes against animals, need the funding necessary to carry on operations. Such units can conduct surveillance and develop a network of informants to get to the deeper problems that create vicious dogs, such as dog-fight promoters, drug dealers, and others who use the dogs as part of their criminal endeavors. An active enforcement agency creates the impression that there is a hard line stance being taken against the problem and assures people that if they engage in illegal behavior, they will be punished.

The initial steps have already been made in an effort to assist lawmakers in making intelligent decisions about what types of laws will

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[130] Such a plan is admittedly difficult and costly to implement on a statewide basis, but the drawbacks must be weighed against the concern for public safety and welfare, and the need for a uniform application of the law once adopted. An advantage of using the existing offices of the county dog wardens, is that these offices already have a structure of individuals who are familiar with animals and their propensities and the administration of problems that involve animals.

[131] Interview with Ohio State Senator Grace Drake, R-22nd District (Dec. 29, 1987).

[132] *See supra* note 70.

[133] *Some Dogs Will No Longer Get Their Day,* GOVERNING Oct. 1987, at 10-11.

best achieve their goals without relying on breed specific statutes.[134] Ultimately, the best source of dog control may be in a general public awareness program to counteract some of the negative publicity certain breeds have received in the past and to inform people that the dogs are not vicious by nature, but are as much victims of the humans who trained them, as the man, child, or other animal they harm. Such publicity, however, should not only be aimed at informing the public of such general information, but also at educating them about the law and making an effort to get the assistance of the public in counteracting the problems associated with all breeds and those who use them for illegal purposes.

VII. Proposed Revision of the New Statute

The best illustration of implementing the above criticisms and suggestions is to rewrite a portion of the statute. Since the definitional section of the statute which designated pit bull dogs as prima facie vicious is the source of most criticism associated with the statute, it will serve as a useful example.[135] All revisions will appear in italics. The proposed statute would retain the dangerous/vicious distinction but would read as follows:

Sec. 955.11 (A) As used in this section:

(1)(a) "Dangerous Dog" means a dog that without provocation has *engaged in menacing behavior toward the general public, any individual person, or another animal.*

(2) *"Menacing Behavior" means behavior which indicates a predisposition on the part of the dog to* chase or approach in either a threatening fashion or an apparent attitude of attack, or to attempt to bite or otherwise endanger any person while that dog is off the premises of its owner, keeper, or harborer, or some other responsible person, 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.

(3) *"Predisposition" means that the dog has exhibited previous behavior that would indicate to the owner, keeper, or harborer that the dog had the propensity to engage in any of the behavior described in subsection (2).*

(4) *"Threatening* fashion" means that a dog would cause any person being chased or approached to reasonably believe that the dog will cause physical injury to that person.

(5) "Vicious Dog" means a dog that, without provocation meets any of the following criteria:

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[134] The International Institute of Municipal Clerks published a guide to ordinances dealing with dangerous and vicious dogs. The 26 page booklet offers information and sample ordinances from around the country to help states and localities in framing dog laws. *See supra* note 133, at 11.

[135] Ohio Rev. Code Ann. § 955.11 (Baldwin Supp. 1987).

(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) *Has previously been classified as a dangerous animal but has continued to engage in menacing behavior such that it could be considered a repeat offender capable of engaging in one of the behaviors contained in (i) or (ii) of this subsection if allowed to continue.*

(6) "Without Provocation" means that a dog was not teased, tormented, or abused by a person, or that the dog was not coming to the aid or the defense of a person who was not engaged in illegal or criminal activity and who was not using the dog as a means of carrying out such activity.[136]

VIII. CONCLUSION

The fate of breed specific statutes such as Ohio Revised Code section 955.11 is presently unknown. The controversy surrounding them has resulted in numerous challenges on constitutional grounds. The resolution of these cases has led to results that are unfavorable for pit bull dog owners but, in the eyes of legislators, are extremely favorable in terms of the health and safety of communities. The available alternatives to breed specific statutes appear viable as substitutes that could achieve substantially similar results without alienating a portion of the citizens of a community.

[136] This proposed portion of a statute is based on the current statutory format of OHIO REV. CODE ANN. § 955.11 (Baldwin Supp. 1987). It addresses only the problem of specifically mentioning pit bull dogs on the face of the statute, but does not include any of the necessary exceptions which must be made to the definitions. Of particular importance are those exceptions which concern the use of dogs in the area of law enforcement, as they become satisfactory once the designation of a specific breed is removed from the face of the statute.

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