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AM. SUB. H.B. 352: AN OVERVIEW—DOGS UNDER CONTROL

I. INTRODUCTION

In Dayton, Ohio, on April 6, 1987, a retired physician died after being attacked and mauled by a "pit bull" dog.¹ On the same day in Oklahoma City, Oklahoma, a sixteen-month-old baby was killed by a "pit bull" kept by her parents in their back yard.² Widely-publicized incidents such as these have caused much of the public's concern about dangerous and vicious dogs to focus on regulating or eliminating "pit bulls" as a solution to the problem of controlling vicious dogs.³

The 117th Ohio General Assembly has taken legislative action directed at *all* dangerous or vicious dogs by enacting Am. Sub. H.B. 352 (H.B. 352).⁴ H.B. 352 is a wide-reaching, comprehensive law that is intended to address many of the facets of dog control. This note will explain and analyze the provisions of H.B. 352. The analysis will primarily focus on two of the most controversial provisions of the act: the sections concerning "pit bull" dogs and the section concerning liability-insurance requirements for owners of vicious dogs. The analysis will also consider the possible problems of H.B. 352 and will compare the legislation to guidelines suggested by the Humane Society of the United States for regulating dangerous and vicious dogs.⁵ Comparisons will also be made to other legislative attempts to address the problem of "pit bulls."

II. BACKGROUND

Under common law, evidence of scienter, knowledge on the part of the owner of a dog's dangerous or vicious character, had to be shown in order for the owner to be held liable for the dog's actions.⁶ Such knowledge was usually acquired through a previous incident of the dog biting someone, and as such came to be known as the "free bite" or "one

1. *Two Facing Charges in Pit Bull Attack: Pair Indicted on Manslaughter Charge*, Dayton Daily News and Journal Herald, May 27, 1987, at 1, col. 1 [hereinafter *Two Facing Charges*].

2. *Pit Bull Dog Danger*, Columbus Dispatch, Apr. 8, 1987, at 8A, col. 1.

3. See, e.g., *A Shorter Leash for Pit Bulls*, N. Y. Times, Aug. 2, 1987, E-22, col. 1 ("Pit bulls" are reported to be responsible for 21 of the 29 fatal U.S. dog attacks reported since 1983).

4. Act of July 10, 1987, 1987 Ohio Legis. Serv. 5-312 (Baldwin) (codified as amended at OHIO REV. CODE ANN. §§ 715.23, 955.11, .20, .22, .221, .26, .261, .28, .44, .99 (Anderson Supp. 1987)). H.B. 352 was declared to be an emergency measure, *id.* § 3, so that the Act would go into effect immediately upon enactment instead of 90 days later. See OHIO CONST. art. II, § 1(d).

5. HUMANE SOCIETY OF THE UNITED STATES, GUIDELINES FOR REGULATING DANGEROUS OR VICIOUS DOGS (1987) [hereinafter HSUS GUIDELINES] (on file with the University of Dayton Law Review).

6. *Kleybolte v. Buffon*, 89 Ohio St. 61, 64, 105 N.E. 192, 193 (1913).

bite" rule.⁷

However, Ohio statutes have long abrogated the common-law requirement of scienter, instead holding one strictly liable for any damage or injury caused by the dog.⁸ There were only two exceptions to the owner's strict liability for damage or injury: when the "victim" was (1) trespassing on the owner's property or (2) tormenting or abusing the dog on the owner's property.⁹ Therefore, even under the pre-existing statutes, Ohio had no "free bite."

Authorization for municipal corporations to regulate, restrain, or prohibit the running at large of both various animals and dogs was formerly contained in a single section of the Ohio Revised Code.¹⁰ Female dogs in heat were not permitted off the owner's premises unless leashed.¹¹ All dogs, unless lawfully engaged in hunting, had to be confined to the owner's premises or be kept under reasonable control.¹² Violation of this pre-existing confinement statute called for a fine from \$25 to \$100 for the first offense, and \$75 to \$250 for each subsequent offense.¹³ Repeat offenders could also be imprisoned for up to thirty days.¹⁴ Transferring ownership of a dog required a certificate with the seller's name, the dog's registration number, a brief description of the dog, and the seller's signature.¹⁵

The pre-existing law allowed a person, at any time or place, to kill a dog that chased, injured, or killed a person, sheep, domestic fowl, or any domestic animal other than a cat or another dog.¹⁶ If a person, in trying to kill such a dog, only wounded it, he would not be held liable for cruelty to animals.¹⁷

Yet, Ohio's pre-existing statutes were inadequate, according to H.B. 352's sponsor, State Representative Robert E. Hickey (D-Dayton).¹⁸ In fact, most existing laws are considered inadequate because they do not recognize the role of dogs in our modern society, current knowledge of canine behavior, or trends in managing potentially dangerous dogs.¹⁹ The laws have also been criticized for punishing the dog

7. *E.g.*, *Domm v. Hollenbeck*, 259 Ill. 382, 385, 102 N.E. 782, 783 (1913).

8. *Kleybolte*, 89 Ohio St. at 66, 105 N.E. at 193-94.

9. OHIO REV. CODE ANN. § 955.28 (Anderson 1968) (amended 1987).

10. *Id.* § 715.23 (amended 1987).

11. *Id.* § 955.22 (amended 1987).

12. *Id.* (amended 1987).

13. *Id.* § 955.99(D) (Anderson Supp. 1986) (amended 1987).

14. *Id.* (amended 1987).

15. *Id.* § 955.11 (amended 1987).

16. *Id.* § 955.28 (Anderson 1968) (amended 1987).

17. *Id.* (amended 1987).

18. Interview with Rep. Robert E. Hickey, sponsor of H. 352, in Dayton, Ohio (Aug. 13, 1987) [hereinafter Hickey Interview] (notes on file with the University of Dayton Law Review).

19. HSUS GUIDELINES, *supra* note 5, at 1.

rather than the owner.²⁰ As a result of these concerns, Rep. Hickey gathered information from animal-control authorities, dog-owner groups, and other sources and subsequently drafted and introduced H.B. 352.²¹

III. OVERVIEW OF THE ACT

H.B. 352 addresses several areas that either directly or indirectly relate to the control and handling of dangerous and vicious dogs. Regulation of dogs is provided for in specific sections of the Code that are separate from regulations for other animals.²² Having differentiated the control of dogs from that of other animals, H.B. 352 makes changes and adds new requirements in various areas affecting regulation of dogs.

A. Definitions

The act begins with an extensive definitional section.²³ A "dangerous dog" is defined 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 . . . off the premises of its owner, keeper, or harbinger and not under . . . reasonable control . . . or not physically restrained."²⁴ Acceptable modes of physical restraint include a locked pen with a top, a locked fenced yard, or any other locked enclosure with a top.²⁵ Police dogs assisting a law enforcement officer are not considered dangerous dogs.²⁶

A "vicious dog" is a dog that without provocation either "[h]as killed or caused serious injury to any person . . . [or] [h]as caused injury, other than killing or serious injury, to any person, or has killed another dog [or] [b]elongs to a breed that is commonly known as a pit bull dog."²⁷ The ownership, keeping, or harboring of a "pit bull" is

20. *Id.*; see also *infra* notes 109–10 and accompanying text.

21. Hickey Interview, *supra* note 18.

22. OHIO REV. CODE ANN. § 715.23 (Anderson Supp. 1987). Authorization for regulation of dogs by various government entities is now contained in § 955.221, discussed *infra* notes 59–60 and accompanying text.

23. OHIO REV. CODE ANN. § 955.11(A) (Anderson Supp. 1987). In addition to the definitions covered in the text of this article, this section also includes a definition of "police dog." *Id.* § 955.11(A)(3). A police dog is one "that has been trained, and may be used, to assist one or more law enforcement officers in the performance of their official duties." *Id.*

24. *Id.* § 955.11(A)(1)(a).

25. *Id.*

26. *Id.* § 955.11(A)(1)(b).

27. *Id.* § 955.11(A)(4)(a). The third criteria concerning "pit bulls" is perhaps one of the most controversial portions of the act. This provision may be read as either defining or presuming "pit bulls" to be vicious. See *infra* notes 83–91 and accompanying text.

prima-facie evidence of the ownership, keeping, or harboring of a vicious dog.²⁸ H.B. 352 excepts from the definition of "vicious dog" both police dogs while on duty and dogs that kill or seriously injure a person who is committing or attempting to commit a criminal act or trespass on the property of the owner or harborer of the dog.²⁹

There are other definitions in H.B. 352 that should be noted. According to the statutory definition, a dog is acting in a "menacing fashion" when his actions would "cause any person being chased or approached to reasonably believe that the dog will cause physical injury" ³⁰ A dog is acting "without provocation" so long as the "victim" has not teased, tormented, or abused the dog.³¹ A dog is also acting "without provocation" when "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."³² The over-use of negatives in this section of the definition makes it confusing. Stated in the positive, a dog is acting *with* provocation, and thus does not qualify as a dangerous or vicious dog, if it is coming to the aid or defense of a person who was engaged in a *legal* activity. A dog is acting without provocation, and thus is dangerous or vicious, if it is protecting a person who is either engaged in illegal activity himself or "using the dog" in "carrying out" such an activity.

B. *Transfer of Ownership*

In addition to the basic transfer of ownership certificate, the buyer or transferee *may request* the seller or transferor to provide written notice of the behavior and propensities of the dog.³³ In addition, if the seller or transferor has knowledge that the dog is vicious or dangerous, he *must complete* a form to that effect within ten days of the transfer and give copies of it to the buyer or transferee, as well as to the board of health and the dog warden where the transferee resides.³⁴ Along with the basic identifying information, the seller must describe any incident in which the dog has ever "chased or attempted to attack or bite a person[,] . . . bitten a person[, or] . . . seriously injured or killed a person."³⁵

28. OHIO REV. CODE ANN. § 955.11(A)(4)(a)(iii) (Anderson Supp. 1987).

29. *Id.* § 955.11(A)(4)(b).

30. *Id.* § 955.11(A)(2).

31. *Id.* § 955.11(A)(5).

32. *Id.*

33. *Id.* § 955.11(C).

34. *Id.* § 955.11(D).

35. *Id.* Presumably, this is intended to inform and educate the buyer or the transferee so that appropriate precautionary actions may be taken. If the seller or transferor fails to comply with the transfer of ownership certificate requirements he will be guilty of a minor misdemeanor.

C. Control Provisions

In section 955.22, which provides various dog-control requirements, the terms "dangerous dog" and "vicious dog" have the same meanings as previously described.³⁶ This section requires that a dog in heat be kept on the owner's premises unless on a leash.³⁷

Any dog, at any time it is on its owner's or harborer's premises, must be physically confined or restrained by a "leash, tether, adequate fence, supervision, or secure enclosure to prevent escape," or be under the reasonable control of some person.³⁸ Furthermore, the owner or harborer of a dangerous or vicious dog must, while the dog is on his own premises, "securely confine it at all times in a locked pen which has a top, locked fenced yard, or other locked enclosure which has a top, except that a dangerous dog may . . . be tied . . . so that the dog is adequately restrained."³⁹

If the dangerous or vicious dog is off the premises of the owner or harborer, it must be on a "chain-link" leash no more than six-feet long.⁴⁰ While "off the premises," the dog must be kept in a locked pen with a top, locked, fenced yard, or other locked enclosure; leashed and controlled by a person of a suitable age and discretion, or on a leash affixed to the ground or a stationary object with a person close enough to keep the dog from causing injury; or muzzled.⁴¹

The last subpart of section 955.22 requires the owner or harborer of a vicious dog to obtain a \$50,000 liability insurance policy covering the damage or personal injury caused by the dog.⁴²

Id. § 955.99(A)(1). Failure to comply with either buyer-requested information or the required information for the dangerous and vicious dogs is a minor misdemeanor on the first offense, and a fourth-degree misdemeanor on each subsequent offense. *Id.* § 955.99(A)(2). The minor misdemeanor carries a maximum fine of \$100. *Id.* § 2929.21(D) (Anderson 1987). Penalties for a fourth-degree misdemeanor are 30 days in jail, *id.* § 2929.21(B)(4), a maximum fine of \$250, *id.* § 2929.21(C)(4), or both. *Id.* § 2929.21(A).

36. OHIO REV. CODE ANN. § 955.22(A) (Anderson Supp. 1987).

37. *Id.* § 955.22(B).

38. *Id.* § 955.22(C). There is an exception for hunting dogs while engaged in lawful hunting. *Id.*

39. *Id.* § 955.22(D)(1).

40. *Id.* § 955.22(D)(2).

41. *Id.* § 955.22(D)(2)(a)-(c). It seems inconsistent to require that the dog be on a chain-link leash while in a locked enclosure. The act's sponsor was unable to "clean-up" all of the language before the passage of the Act on the last day of the legislative session, but stated an intention to do so at a later time. Hickey Interview, *supra* note 18.

42. OHIO REV. CODE ANN. § 955.22(E) (Anderson Supp. 1987) (discussed *infra* notes 92-99 and accompanying text). Violation of the insurance requirement is a first-degree misdemeanor, OHIO REV. CODE ANN. § 955.99(H), which carries a maximum fine of \$1,000 or 60 days in jail or both. *Id.* § 2929.21 (Anderson 1987).

D. Penalties

Sanctions for violation of the confinement statute are complex and severe.⁴³ Violation of the provisions concerning confinement of any dog at any time, or a dog in heat, retains the same penalties as the pre-existing confinement statute.⁴⁴ In addition, the court may order the offender to personally supervise the dog, have the dog complete obedience training, or both.⁴⁵

A person who violates the confinement statute for a dangerous dog is guilty of a fourth-degree misdemeanor for the first offense⁴⁶ and of a third-degree misdemeanor for each subsequent offense.⁴⁷ The court may also order the offender to personally supervise the dog or have it complete obedience training, and may require the owner to obtain a \$50,000 liability insurance policy.⁴⁸ The court is also authorized to order the vicious dog to be humanely destroyed.⁴⁹

If the violation of the confinement provision involves a vicious dog, there are three penalty provisions depending on the circumstances.⁵⁰ If the vicious dog kills or seriously injures a person, it is a fourth-degree felony resulting in a maximum fine of \$2,500.⁵¹ In addition, the minimum term of imprisonment for a fourth-degree felony ranges from eighteen months to three years while the maximum term is five years.⁵² Moreover, under these circumstances, the court shall order the vicious dog destroyed.⁵³

The second possible penalty for a violation involving a vicious dog is a first-degree misdemeanor on the first offense with a maximum fine of \$1,000 or six months in jail or both.⁵⁴ Subsequent offenses under this provision are fourth-degree felonies.⁵⁵ Under this provision as well, the

43. OHIO REV. CODE ANN. § 955.99 (Anderson Supp. 1987).

44. *Id.* § 955.99(E)(1).

45. *Id.* § 955.99(E)(2).

46. *Id.* § 955.99(F). This calls for a maximum fine of \$250 or 30 days in jail or both. *Id.* § 2929.21 (Anderson 1987).

47. *Id.* § 955.99(F) (Anderson Supp. 1987). The maximum penalty is a \$500 fine or 60 days in jail or both. *Id.* § 2929.21 (Anderson 1987).

48. *Id.* § 955.99(F) (Anderson Supp. 1987).

49. *Id.*

50. *Id.* § 955.99(G).

51. *Id.* § 955.99(G)(1); *id.* § 2929.11(C)(4) (Anderson 1987). This felony provision is significantly more severe than penalties imposed on dog owners in the past. See *supra* notes 10–15 and accompanying text.

52. OHIO REV. CODE ANN. § 2929.11(B)(7) (Anderson 1987). Sentencing under § 2929.11(B)(7) requires that the indictment contain a specification that either physical harm was caused or threatened with a deadly weapon. *Id.* § 2929.11(G).

53. *Id.* § 955.99(G)(1) (Anderson Supp. 1987).

54. *Id.* § 955.99(G)(2); *id.* § 2929.21 (Anderson 1987).

55. *Id.* § 955.99(G)(2) (Anderson Supp. 1987); see also *supra* notes 51–52 and accompany-

court may order the dog to be destroyed.⁵⁶

The third provision calls for the offender to be guilty of a first-degree misdemeanor if the vicious dog caused injury other than killing or serious injury to any person.⁵⁷ A first-degree misdemeanor carries a maximum fine of \$1,000 or sixty days in jail or both.⁵⁸

E. Miscellaneous Provisions

H.B. 352 empowers county commissioners, township trustees, and municipal corporations to adopt resolutions to control dogs as long as they do not conflict with any provisions of the Ohio Revised Code.⁵⁹ Township resolutions are preempted by any conflicting county dog-control resolution.⁶⁰

Section 955.26 provides for the quarantine of all dogs when the appropriate authorities judge rabies to be prevalent.⁶¹ One change that H.B. 352 brings to this section is that it removes an owner's option to put his dog in a shelter provided by the city or county, and instead requires such an arrangement to be at the owner's expense.⁶² The other change in this section allows the public-health council to determine appropriate methods of rabies vaccination and quarantine, instead of prescribing specific methods by law.⁶³

H.B. 352 also enacts a new section that deals with measures to be taken when a dog has bitten a person.⁶⁴ Section 955.21 requires that a dog that has bitten someone not be removed from the county or transferred to anyone other than an animal-control authority until an appropriate quarantine period for rabies has been completed.⁶⁵ The dog must not be killed until the quarantine period is completed, except if necessary to prevent serious injury or death or if the dog is diseased or seriously injured.⁶⁶ If it is necessary to kill a dog that has bitten someone, the person who kills the dog must notify the appropriate board of health immediately, identifying the facts of the bite and the killing of the dog. The person must also hold the body of the dog for testing.⁶⁷

56. OHIO REV. CODE ANN. § 955.99(G)(2) (Anderson Supp. 1987). It is unclear when the second penalty is to be imposed in place of the first one. If judicial latitude is intended, the legislature should so specify.

57. *Id.* § 955.99(G)(3).

58. *Id.* § 2929.21 (Anderson 1987).

59. *Id.* § 955.221 (Anderson Supp. 1987).

60. *Id.* § 955.221(C).

61. *Id.* § 955.26.

62. *Id.*

63. *Id.*

64. *Id.* § 955.261.

65. *Id.* § 955.261(A)(1).

66. *Id.* § 955.261(A)(2).

67. *Id.* § 955.261(A)(3).

The board of health is responsible for providing quarantine facilities for dogs that have bitten and for claiming the bodies of dogs that have been necessarily killed, in order to perform rabies testing.⁶⁸

The new statute extends justifiable killings of dogs to include any dog that is "chasing or approaching in a menacing fashion or apparent attitude of attack, [or] that attempts to bite or otherwise endanger, or that kills or injures a person"⁶⁹ A dog that chases, injures, or kills another domestic animal, except a cat or another dog, may be killed.⁷⁰ The time frame of a justified killing is limited to "the time of that chasing, approaching, attempt, killing, or injury."⁷¹

As to a dog-owner's liability, under the pre-existing statute the owner or keeper was liable for any damage or injury that the dog caused, unless the person injured was trespassing on the owner's property or tormenting or abusing the dog.⁷² H.B. 352 adds the category of "harborer" to those who can be held liable.⁷³ It also enlarges the exclusion of liability to one committing or attempting to commit a trespass or criminal act.⁷⁴

IV. ANALYSIS

This analysis of H.B. 352 will focus on the Act's breed-specific ("pit bull") provision,⁷⁵ the liability-insurance provision,⁷⁶ and the penalties provisions.⁷⁷ These areas are of particular interest to both the public and to legislators wishing to enact, amend, or evaluate vicious-dog legislation.⁷⁸ Although H.B. 352 was not initiated in reaction to any specific incident,⁷⁹ many Ohio legislators advocated breed-specific legislation⁸⁰ after a fatal attack in Dayton, Ohio.⁸¹ As a compromise with the Ohio Senate, the provision defining or presuming "pit bulls" to

68. *Id.* § 955.261(C). A violation of § 955.261 is a minor misdemeanor carrying a maximum fine of \$100 for the first offense. All subsequent offenses are fourth-degree misdemeanors, for which the penalty is a \$250 fine, 30 days in jail, or both. *Id.* § 955.261(C); *id.* § 2929.21 (Anderson 1987).

69. *Id.* § 955.28(A) (Anderson Supp. 1987); *see also supra* notes 16-17 and accompanying text.

70. OHIO REV. CODE ANN. § 955.28 (Anderson Supp. 1987).

71. *Id.*

72. *Id.* § 955.28 (Anderson 1968).

73. *Id.* § 955.28(B) (Anderson Supp. 1987).

74. *Id.*

75. *Id.* § 955.11(A)(4)(a)(iii).

76. *Id.* § 955.22(E).

77. *Id.* § 955.99.

78. Hickey Interview, *supra* note 18.

79. *Id.*

80. *Id.*

81. *See The Facing Charges, supra* note 17

be vicious was added to the Act.⁸²

However, although the legislation specifically seeks to regulate "pit bulls," there is no breed simply called "pit bull."⁸³ "Pit bull" is a generic term referring to several breeds of dogs, as well as to mixtures of those breeds with one another or with other breeds.⁸⁴ Legislation that attempts to define its use of the term "pit bull" by listing specific breeds such as the American Staffordshire Terrier will be ineffective in regulating the wider population of mixed-breed "pit bull" dogs or other specific breeds not listed. Furthermore, veterinarians, animal control officers, and various experts may not be able to agree with one another on whether a given dog is a "pit bull."⁸⁵ Also, difficulties in identifying a particular dog as a "pit bull" may lead to lengthy trials—in an already clogged court system—as a result of the use by each side of various experts to testify on whether the dog is a "pit bull."

Legislation, such as Ohio's, that merely uses the generic term "pit bull" may also run into vagueness problems. In order for a criminal statute not to be unconstitutionally vague, it must define the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."⁸⁶ Since H.B. 352 does not define the term "pit bull" and since various experts may not be able to say for sure whether a given dog is a "pit bull," a court could easily find that "ordinary people" may not be able to know if the dog they have is or is not a "pit bull." Not knowing whether or not they have a "pit bull," they will be unable to comport their behavior to the law and possibly be unable to avoid violating it. Furthermore, those charged with enforcing the law may not be able to tell if one dog is a "pit bull" while another is not, thus inviting and "encourag[ing] arbitrary and inconsistent enforcement."⁸⁷ This is a significant problem, since

82. Hickey Interview, *supra* note 18. Never-enacted legislation sponsored by Ohio Senator Neal Zimmers, Jr., (D-Dayton), which sought to enable county commissioners to regulate ownership, control, and use of "pit bulls," was under legislative consideration at the time of H.B. 352. See S.B. 96, 117th Ohio Gen. Assembly, Reg. Sess. (1987).

83. R. LOCKWOOD & P. MILLER, "PIT BULL" REPORT (Jan. 21, 1986) (published by the Humane Society of the United States) (on file with University of Dayton Law Review).

84. *Id.*

85. Telephone conversation with Randall Lockwood, Ph.D., Director of Higher Education Programs, Humane Society of the United States (Aug. 6, 1987).

86. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citations omitted).

87. *Cf. Dragelevich v. City of Youngstown*, 176 Ohio St. 23, 197 N.E.2d 334 (1964) (an ordinance mandating seizure by police of any machine or device "which tends to encourage gambling" was unconstitutionally vague because of the lack of any rule or standard to guide police, causing inconsistent enforcement); *State v. Gottfried*, 163 Ohio St. 469, 127 N.E.2d 371 (1955) (zoning ordinance that provides no uniform rule or standard and makes enjoyment of rights depend upon arbitrary choices by officials is unconstitutional).

preventing arbitrary and inconsistent enforcement, by providing clear enforcement guidelines, is considered even more important than giving notice of what is prohibited.⁸⁸

It is of note that the Humane Society of the United States does not recommend breed-specific laws as an effective way of dealing with the problems associated with control of dangerous and vicious dogs.⁸⁹ However, even if the small portion of H.B. 352 that deals with "pit bulls"⁹⁰ is found to be void for vagueness, it will not affect the validity of the rest of the act.⁹¹

The insurance provision⁹² of H.B. 352 is another area that raises concern. The provision may be a genuine effort by the legislature to provide some avenue of compensation to victims of dog attacks.⁹³ However, it may also be viewed as an attempt to discourage the ownership of "pit bull" dogs by making it too expensive and troublesome.⁹⁴

Regardless of the light in which one views the insurance provision, the real problem is that compliance appears difficult, if not impossible. Legislators have received reports that insurance companies do not want to insure owners of large, traditionally dangerous or vicious dogs.⁹⁵ An attorney for the Ohio Breeder's Association, which filed suit to challenge Ohio's new law, charged that insurance companies would not sell the coverage required for owners of "pit bulls."⁹⁶

88. *Kolender*, 461 U.S. at 357.

89. HSUS GUIDELINES, *supra* note 5.

90. OHIO REV. CODE ANN. § 955.22(E) (Anderson Supp. 1987).

91. *Id.* § 1.50 (Anderson 1968). This section provides that if any provision or its application in a certain case is found to be invalid, it does not affect the rest of the section or related sections that can be given effect without the invalid portion. *Id.* For examples of cases severing part of a statute, see *Okey v. Walton*, 36 Ohio App. 2d 87, 302 N.E.2d 895 (1973) (agreeing with the trial court that an unconstitutional portion of an Ohio statute could be severed from the remainder of the statute); *Livingston v. Clawson*, 2 Ohio App. 3d 173, 440 N.E.2d 1383 (1982) (citing OHIO REV. CODE ANN. § 1.50); *City of Dayton v. Strausbaugh*, 10 Ohio Misc. 2d 29 (Dayton Mun. Ct. 1984) (citing OHIO REV. CODE ANN. § 1.50) (permitting severance of unconstitutional portions of new legislation when legislative intent may still be implemented by remaining portions).

92. OHIO REV. CODE ANN. § 955.22(E) (Anderson Supp. 1987).

93. See HSUS GUIDELINES, *supra* note 5, at 11-12. While the guidelines note that victims have often been unable to recover for medical expenses, they also suggest that any insurance requirement should specify a reasonable dollar amount of required coverage and be obtainable. *Id.*

94. See *Pit Bull Owners Don't Like Being Singled Out*, Dayton Daily News and Journal Herald, July 12, 1987, B3, col. 4.

95. Hickey Interview, *supra* note 18.

96. *Breeders File Suit Against State's Vicious Dog Statute*, Dayton Daily News and Journal Herald, Aug. 28, 1987, at 13, col. 1; see also *Pit Bull Owners Don't Like Being Singled Out*, *supra* note 94, at B3, col. 4. A member of the Miami Valley Pit Bull Terrier Club says no company will offer the required insurance: "There is no company that will give the liability insurance that they're asking for," Oliver said." *Id.* In Broward County, Florida, a law requiring liability insurance was passed. See Watson, *A Mean Breed or a Defamed Pooch?*, *Insight*, July 27, 1987, at 54, 55. The executive director of the Broward County Humane Society said that such insurance was unobtainable and suggested "they'd better go across the ocean to Lloyd's of London. They're

Even assuming insurance could be obtained, the law is unclear as to the circumstances under which insurance would be required. Section 955.22(E) requires the owner, keeper, or harbinger of a "vicious dog" to obtain insurance.⁹⁷ Confusion again arises because the definition of "vicious dog" in section 955.11(A)(4) apparently includes any dog that "belongs to a breed commonly known as a pit bull dog."⁹⁸ These two provisions can be read together as requiring all owners of "pit bulls" to obtain insurance. However, the sponsor of H.B. 352 interprets the "pit bull"-specific sentence in conjunction with the following sentence of that same provision, which states that having such a breed of dog is prima-facie evidence of having a vicious dog. He concludes that it would take a court determination that the prima-facie evidence was not rebutted and, therefore, a court finding that the dog is "vicious," before a "pit bull" owner would be required to obtain insurance.⁹⁹ At this point, it is not known how Ohio courts will interpret this provision.

Courts in a number of jurisdictions have considered breed-specific laws.¹⁰⁰ A Pennsylvania township enacted an ordinance that found "pit bulls" to be dangerous and required special licensing fees and the posting of a \$20,000 bond by "pit bull" owners.¹⁰¹ The ordinance was upheld against an equal-protection challenge under the rational basis test.¹⁰² Broward County, Florida, twice enacted breed-specific laws that were struck down by the courts.¹⁰³ An Ohio appellate court that upheld the use of the term "pit bull" in a municipal ordinance against a vagueness challenge used a two-part rationale.¹⁰⁴ First, the court suggested that any owner, as the one subject to penalty, should know what kind of dog he owns.¹⁰⁵ However, if the dog is not of one particular breed the owner may have no way of predicting whether his mixed-

not going to get insurance here." *Id.*

97. OHIO REV. CODE ANN. § 955.22(E) (Anderson Supp. 1987).

98. *Id.* § 955.11(A)(4).

99. Hickey Interview, *supra* note 18. Rep. Hickey feels the insurance requirement will only be enforced after some incident, such as a menacing or a bite, has brought the case of a particular dog before the court. *Id.*

100. For a more comprehensive discussion of court decisions on breed-specific legislation, see Comment, *Banning the Pit Bull: Why Breed-Specific Legislation Is Constitutional*, 13 U. DAYTON L. REV. 279 (1988).

101. *Starkey v. Township of Chester*, 628 F. Supp. 196 (E.D. Pa. 1986).

102. *Id.* (township could reasonably determine that "pit bulls" were dangerous). The only constitutional challenge was that the ordinance violated equal protection since there were no similar regulations for other dogs. *Id.* As a result, the court was not called upon to consider the possible vagueness of the term "pit bull."

103. *Watson*, *supra* note 96, at 54-55. Broward County finally adopted a general vicious-dog law. *Id.*

104. *City of Lima v. McFadden*, No. 1-85-22 (Ohio Ct. App., Allen County June 30, 1986) (LEXIS, States library, Ohio file).

105. *Id.* at 3.

breed dog will be considered a "pit bull" by law enforcement officials or the courts.¹⁰⁶ Secondly, the court defined the term "pit bull" by referring to the dictionary and ended up with a definition of a Bull Terrier.¹⁰⁷ In fact, the court had defined "pit bull"—which is not a breed—as a Bull Terrier, which is a recognized breed.¹⁰⁸

The Ohio legislation is also notable for its increased penalties. The Humane Society of the United States, in its *Guidelines for Regulating Dangerous or Vicious Dogs*,¹⁰⁹ expressed concern that laws that punish the offending dog severely, often calling for the destruction of the dog while mandating minimal fines for owners, do not deter repeat offenders.¹¹⁰ As demonstrated in the overview of the Act, Ohio now has penalties as high as fourth-degree felonies, which can carry up to a maximum of five years in jail as well as fines up to \$2500.¹¹¹ Such stringent penalties should put all dog owners on notice that Ohio is now taking

106. See *supra* notes 83–88 and accompanying text.

107. *McFadden*, No. 1-85-22, slip op. at 3–4.

108. R. LOCKWOOD & P. MILLER, *supra* note 83; see also notes 83–85 and accompanying text. Under the *McFadden* court's definition, an American Staffordshire Terrier or a mixed-breed dog would presumably not come within the ordinance.

109. HSUS GUIDELINES, *supra* note 5.

110. *Id.* at 1. Many of the new Ohio penalties are in excess of those suggested.

111. OHIO REV. CODE ANN. § 955.99 (Anderson Supp. 1987); *id.* § 2929.11 (Anderson 1987). The fourth-degree-felony penalty may cause some problems. Failure to properly confine a vicious dog may be a strict liability offense as no intent level is specified. In Ohio when an offense does not specify an intent level and "plainly indicates a purpose to impose criminal liability" then no intent level is necessary to be guilty of the offense. *Id.* § 2901.21(B) (Anderson 1987). However, if no intent level is specified, but the statute does not clearly indicate "a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." *Id.*

It remains to be seen whether or not Ohio courts will interpret failure to confine a vicious dog as a strict liability offense in light of this section of the Code. In *State v. Wac*, 68 Ohio St. 2d 84, 428 N.E.2d 428 (1981), the Ohio Supreme Court applied § 2901.21(B) to the offenses of book-making and operating a gambling house. *Id.* at 87, 428 N.E.2d at 431. The *Wac* court found both offenses, which did not specify culpability levels, to be strict liability offenses. *Id.* at 86–87, 428 N.E.2d at 431. The applicable statutes for both offenses contained either another phrase or another portion delineating a related offense that did include a culpability level. *Id.* The court said that the exclusion of such a requirement in another portion of the same or a related subsection plainly indicated legislative intent to impose strict liability. *Id.* However, there is no culpability level stated elsewhere in any portion of the confinement statute. See OHIO REV. CODE ANN. § 955.22 (Anderson Supp. 1987). In *State v. Adams*, 62 Ohio St. 2d 151, 404 N.E.2d 144 (1980), the Ohio Supreme Court held that the Ohio child-endangerment statute did not impose strict liability. *Id.* at 152–53, 404 N.E.2d at 145–46. The applicable statute in *Adams* is similar to the offenses in the confinement statute for dangerous and vicious dogs, which states that "[n]o owner, keeper, or harbinger . . . shall fail . . ." OHIO REV. CODE ANN. § 955.22(D) (Anderson Supp. 1987). It is possible that courts may interpret the confinement offenses to require a culpability level of recklessness.

However, if the dangerous-and-vicious-dog-confinement statute is read as a strict liability offense with a fourth-degree felony as a penalty, it is possible that it may be found to be unconstitutional; however, such an inquiry is beyond the scope of this note. Cf. *United States v. Freed*, 401 U.S. 601 (1971); *Lambert v. California*, 355 U.S. 225 (1957); *Morissette v. United States*, 342 U.S. 246 (1952).

the regulation of dangerous and vicious dogs very seriously.

V. CONCLUSION

H.B. 352 is a comprehensive dog-control policy. This legislation responds to the concern "that any dog may become dangerous under the wrong circumstances."¹¹² The provisions for dangerous and vicious dogs seem capable of addressing the necessity of control with *any* dog. Even if the breed-specific provision of the act is struck down by the courts, H.B. 352's broadness in dealing with many different aspects of the problem of dangerous and vicious dogs, as well as dog control in general, make it superior to short-sighted, limited attempts to deal with only "pit bull" dogs.

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