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HUMANE SOCIETY: GOOD GUYS OR GESTAPO?

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ABSTRACT: Humane Societies and Societies for the Prevention of Cruelty to Animals perform important functions for the state, the counties, the community, and the public in protecting animal rights and enforcing state animal laws. Their staffs are hardworking and well meaning, but are not trained in police work. As the Societies have the right to conduct searches, seize property, make arrests, and use deadly force, they are required by the Constitution to perform such functions only after they have shown probable cause to a neutral party and obtained a warrant. Their failure to obtain warrants before performing such intrusive functions violates trappers' and homeowners' civil rights which subjects the Societies to suits for damages. To truly protect the public and to protect their budgets, the Societies should train their staff in civil rights and procedures. The Societies have the powers of the police, but resist following the laws and rules that apply to the exercise of police powers. In their zeal to protect animals, they have invaded people's property, even their houses, confiscated traps and released animals—all without warrants or other review of their actions. These actions have led to the question of whether the Societies are "Good Guys or the Gestapo?"

KEY WORDS: Humane Societies, Societies for the Prevention of Cruelty to Animals, civil rights, police powers, constitution, Fourth Amendment, due process, lawsuits, damages, searches and seizures, arrests, trappers

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INTRODUCTION

The Humane Society is a private organization that has been given significant powers by the state to prevent and to enforce the state law concerning cruelty to animals. The Humane Societies see themselves as animal protection organizations to foster respect, understanding, and compassion for all creatures. In many California counties, the Humane Societies or Societies for the Prevention of Cruelty to Animals, which are referred jointly to as "Society" for the balance of this paper, fulfill the functions of the animal control officer under contract to the county.

The thesis of this paper is that while the Societies see themselves as compassionate, caring "good guys," they lack respect and understanding of basic rights protected by the Fourth Amendment to the United States Constitution and the California Constitution. There is no doubt that the Societies mean well and do important work in the area of animal control; however, no matter how much good work they do, it cannot justify their violations of the civil rights of trappers and their customers. The right of a citizen to be secure in his or her home is one of the most fundamental rights protected by the United States Constitution and the Bill of Rights. This right, which includes the right to not be subjected to warrantless searches and seizures and to not be subjected to warrantless arrests, is routinely violated by the Society and its compassionate and well-meaning, but overzealous, staff who trample onto private property, invade homes, seize traps, and arrest people—all without warrants. In some of cases the author has seen, the Society staff have acted like storm troopers trampling the rights of citizens in their efforts to protect animals, giving rise to the question, "Is the Humane Society a Good Guy or Gestapo?"

HUMANE SOCIETIES HAVE STATE POLICE POWERS

Societies are private organizations that have no inherent power, but derive all their powers and authority to enforce animal laws from the State. As in most states, in California, the counties can chose to operate their own animal control services or to hire the Society to perform animals control services for the county.

Officers of Societies ("Humane Officers") are given powers of a policeman to enforce the animals laws and to arrest people who violate the laws. California Law (Civil Code § 607) states that a Humane Officer is not a peace officer, but may exercise the powers of a peace officer at all places within the state in order to prevent the perpetration of any act of cruelty upon any animal. To that end, a Humane Officer may summon to his or her aid any bystander. A Humane Officer may make arrests for the violation of any penal law of this state relating to or affecting animals in the same manner as any peace officer. A Humane Officer may also serve search warrants and is authorized to carry firearms while exercising the duties of a Humane Officer. A Humane Officer may even use reasonable force, and deadly force, to prevent the perpetration of any act of cruelty upon any animal (Civil Code § 607).

FEDERAL AND STATE CIVIL RIGHTS LAWS LIMIT THE SOCIETIES POWERS AND METHODS; THEY HAVE TO GET SEARCH WARRANTS AND GIVE MIRANDA WARNINGS JUST LIKE THE POLICE DO

While ordinarily one does not think of the Humane Society, animal control staff, or the "dog catcher" as subject to civil rights laws, they are because they are acting under the "color of state law" with the powers to seize property, search, and make arrests. Just as police

powers are limited in the manner and procedures used to collect evidence, conduct searches, make seizures, and effectuate arrests, when Societies are fulfilling police-like functions, they are governed by the same civil rights laws, rules, and procedures. To understand the limitations that the civil rights laws put on the Societies, a review of the civil rights laws is necessary.

The Federal Civil Rights Statute (42 U.S.C. § 1983, "Section 1983") states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 has two essential elements: "[1] the conduct complained of must have been committed by a person acting under color of state law; and [2] must result in a deprivation of rights, privileges, or immunities secured by the Constitution or laws of the United States" (Bendiburg v. Dempsey 1990). Each of these elements will be discussed in the following sections.

THE SOCIETIES ACT UNDER COLOR OF STATE LAW

By delegating significant state power to the Societies, including the right to enforce laws, serve warrants, and make arrests, the state effectively deputized the Societies, rendering them state actors under Section 1983. "Actions of private individuals performing state functions are subject to the Fourteenth Amendment" (Amalgamated Food Employees Union v. Logan Valley Plaza 1968). The Societies perform the state function of enforcing animal control laws pursuant to a state law, and the state has granted Society officers with peace officer authority to arrest, wear uniforms and badges, carry guns, and use deadly force. Clearly, the Societies are operating under the color of state law.

The situation is no different than if a city contracted with a private firm to provide a police force. No one would argue that a city police officer who worked for a private company under contract to a city, instead of directly for the city, would be able to search without warrants, arrest without probable cause, or interrogate in back rooms with a rubber hose, all without judicial controls. The same reasoning applies to the Societies: their "private" status does not exempt them from civil rights laws when they are performing governmental functions.

The California courts have routinely held that Societies' actions are state action under the civil rights laws. In a recent case, the court said: "This appeal presents the question of whether animal control officers can lawfully enter a home, absent a warrant or consent, to seize and impound a homeowner's dog for a violation of the leash law. We hold that the Fourth Amendment to the United States Constitution precludes such conduct." (Conway v. Pasadena Humane Society 1996).

SEARCHES, SEIZURES OF TRAPS, AND ARRESTS BY THE SOCIETIES MAY VIOLATE CITIZEN'S CIVIL RIGHTS

Since the Societies are operating under the color of state law, the Constitutional Bill of Rights applies to their actions, which means if they violate the rights, privileges, or immunities secured by the Constitution or laws of the United States, they are liable under the civil rights laws. The question is then, "What types of activities may give rise to a violation of rights?"

Warrantless Searches

Humane Officers routinely enter backyards to investigate hurt or sick animals, and to release animals from traps. Such entries are almost always done without warrants or without permission from the homeowner. California law has held that absent prior permission, Societies cannot conduct a warrantless search and seizure. In Pasadena, a Society officer was chasing an injured dog and the dog ran into a house through the dog door. The officer was concerned about the dog, so he tried the door and when he found it unlocked, he went into the house—all without a warrant. The homeowner found out about the invasion, sued, and the court, not surprisingly, held that the statutes upon which the Society relied did not dispense with the Fourth Amendment requirement that official entry into a home be justified by warrant, consent, or exigent circumstances. "A statute does not trump the Constitution" (Conway v. Pasadena Humane Society), which means the law creating the Societies can not give them any more power than the Constitution allows.

Warrantless Seizures

Societies seize traps when they believe that they are either illegal traps, improperly marked, or contain distressed animals. These seizures are routinely done without warrants and without prior notice to the trapper. In one case with which the author's firm was involved, the Society was in a dispute with a trapper over tagging of his traps. On numerous occasions, the Society seized his traps and released the animals. The Society claimed that it seized the traps because they were unidentified, but when the trapper demanded the return of the traps, the Society argued that all of his traps were returned. Asked the simple question, "If you seized the traps because you could not tell who they belonged to, how did you know they were returned?"—they had no answers. In fact, if the traps were seized because they were unmarked, how could the Society have returned any of them? The real problem is that the seizure of the trapper's property without notice or a warrant is a clear violation of the Fourth Amendment prohibitions against warrantless seizures.

Releases

Societies believe that they have a duty to release animals from any trap, legal or illegal, if the animal is suffering, a definition which includes wet animals. (Does a wet raccoon fair better in the rain than when it is in a trap?) To perform a release, the Humane Officer must conduct a search of the homeowner's property, then

seize, at least temporarily, the trapper's property (the trap), and then release what is arguably the trapper's property, the animal. The loss of the animal adversely affects the trapper's business because he or she does not get paid, which means a property right is involved. The releases, if done without a warrant, violate trappers' rights.

THE EXCEPTIONS TO WARRANT REQUIREMENTS DO NOT APPLY IN SOCIETY FUNCTIONS SO THEY NEED TO GET WARRANTS OR PERMISSION IN ALL CASES

Probable Cause Is Not an Excuse for Not Getting a Warrant

Often the Societies' initial justification for warrantless searches is "probable cause," which demonstrates that the Societies are clueless regarding the Fourth Amendment and violations of civil rights. In one case, the Society justified its warrantless searches as follows: "In each case, because the officers had reason to believe that criminality may be afoot, they were justified in entering onto the property in question to investigate the complaints they received."

The problem with this justification is that probable cause is not a justification for a warrantless search; it is a necessary ingredient to obtaining a warrant. "Reasonable or probable cause to suspect or believe that contraband is present or that a crime is being committed or attempted must exist to justify a search pursuant to a search warrant" (Shvey v. Superior Court of Los Angeles County 1973).

The Societies' standard for warrantless searches as stated above does not even meet the test for probable cause for obtaining a warrant, which is "such a state of facts as would lead a person of ordinary care and prudence to believe, or entertain an honest and strong suspicion that the person involved is guilty of the offense charged" (People v. Kilvington 1894). A belief is not a set of facts, because a belief is, by definition, based on unverifiable feelings. That "criminality may be afoot" falls far short of the requirement that the government has a good faith belief that a crime is being committed. The Societies' position that they can conduct warrantless searches based on a "belief" that criminality "may be afoot" is beyond chilling, indeed, it is scary. Think about big brother busting into your house anytime it says it "believes that criminality may be afoot."

Wet Or Even Suffering Animals Are Not Exigent Circumstances

Societies also try to justify their warrantless searches and seizures based on the "exigent circumstances" exception, but exigent circumstances are true emergencies such as police searches where a fire has broken out and they have to enter before a warrant could be obtained, not mere conveniences or concerns by Society staff. Some Societies argue that any time an animal is being mistreated, the Society can conduct warrantless searches and seizures under a emergency or exigent circumstance doctrine, but a suffering animal does not rise to the level of emergency required to justify civil rights violations.

Warrantless searches have been recognized in emergency situations requiring swift action to prevent imminent danger to life and limb, such as where the police were investigating a conspiracy to kill a presidential candidate such as Robert Kennedy (People v. Sirhan 1972), to prevent serious damage to property (People v. Remiro 1979), or where the police were at the door and heard moaning sounds as if a person were in distress (People v. Roberts 1956). Exigent circumstances also include hot pursuit of a fleeing felon (People v. Escudero 1979), but there are no cases which allow warrantless searches for fleeing, or even suffering, animals.

In a feeble attempt to justify its warrantless searches under an exigent circumstances exception, one Society tried to justify its warrantless searches by claiming that traps were close to the public sidewalk creating an imminent danger to small children and other passersby. The court rejected that argument not only because the emergency did not rise to the "exigent circumstances" level, but because it is not the Societies' responsibility to protect passersby from traps. This example shows the Societies' tendencies to operate outside of the law, perhaps out of frustration at the lack of action by the police, who have to get warrants and comply with civil rights laws.

The Plain View Exception Is Not an Excuse for Illegally Entering Onto Property; It Applies Only to What is Really in Plain View

"Plain view" is an exception to the Fourth Amendment which has four elements. If the police: 1) are legitimately on the property; 2) discover evidence; 3) see such evidence in plain view; and 4) have cause to believe the item is evidence of a crime, then they may seize the evidence without first obtaining a warrant.

In one case, the Humane Officer was told by the homeowner that he was trespassing and ordered him off the property. The officer left, but came back an hour later, decided that the fact the homeowner was not at home justified his entry onto the property, even though it was contrary to the homeowner's express instructions an hour before. In his zeal to release the raccoon, he trespassed on the property without a warrant. To compound the initial illegal entry, he repeated this action an hour later and released another raccoon. In another incident, the Humane Officers left a message on the homeowners' answering machine advising them that the Society had reports of suffering animals, so they entered the property and confiscated traps and released animals. In both incidents, the Society justified its warrantless search based on the plain view doctrine. As none of the officers had the consent of the homeowners to be on the property, the Humane Officers were not legitimately on the premises, and the first leg of the plain view doctrine is not met.

It is the author's view that the second leg of the plain view doctrine is rarely met because in most of the trap-related incidents, the evidence is not in plain view. The plain view exception allows police officers to observe things only in plain sight which means open and visible to the naked eye (People v. Nichols 1970). The plain sight test does not extend to situations where something was easily reached though it was out of sight. For instance, it is not a legal search for a police officer to reach into a

recessed area between the bumper and the body of an automobile even though the bumper and the car are in plain view (People v. Conley 1971).

Many of the Society seizures were done at night, because that is when the pests are trapped and start screaming, prompting the neighbors to call the Society. At night it would be virtually impossible to plainly see that a trap is illegal, unless it was an obvious leghold or similar trap. In the case being discussed here, the Society was seizing the traps because under the theory they believed the traps were not properly tagged. It was successfully argued that at night it would be impossible for the Humane Officers to determine whether the traps contained the correct tag, or even if they contained a tag at all, without a search, which was above and beyond what the officers could see in plain view. Similar arguments apply to traps under houses.

The most important aspect of the plain view exception is that the government cannot stand it on its head, and use the fact that they saw something illegal as the basis to invade the property. They have to be legally on the property before the plain view doctrine can be considered. For example, if the homeowner gives permission to search and then the Humane Officers see an illegal trap, that would be under the exception.

Just Because Traps Are in the Open Does Not Mean There Is No Expectation of Privacy

Another theory advanced by the Societies is that no warrant is needed to enter onto private property to seize traps because they are in open fields. If the traps were placed in a field or other area where there would be no expectation of privacy, then the police, a Society, or a passerby could seize them without a warrant, because the trapper had surrendered his rights in the traps. However, traps are not placed in open fields because no one cares about pests in open fields; homeowners and business owners hire trappers. Traps are placed on customers' property adjacent to their houses, or under houses, because that is where the pests live. Whether the traps are under the house, adjacent to the house, or scattered throughout the backyard, clearly they are within the protected zone of privacy, which in England 500 years ago was referred to as the curtilage of the house.

> At common law, the curtilage is the area to which extends the intimate activity associated with the sanctity of a person's home and the privacies of life; the protection afforded the curtilage under the Fourth Amendment is essentially a protection of the families and the personal privacy of an area immediately linked to the home both physically and psychologically where the privacy expectations of most heightened . . . (California v. Ciraolo 1986).

No one would argue that the police could conduct a warrantless search and seizure in a backyard because the owner had no expectation of privacy, but Societies routinely make this argument to justify their trespasses.

Homeowners Cannot Give Permission to Seize Traps

To justify their actions, some Societies have argued that the trappers lend the traps to their customers; therefore, trappers have no right of privacy or reason to object to the taking by the Societies. This argument is contrary to good sense. A trapper's customers hire him to trap and dispose of animals, and, to do so, he must maintain control of the traps. A trapper is obligated by the law to protect the animals in the traps from the elements and to ensure that they have water and food so they do not suffer. Lastly, his clients pay him to take the animals away and dispose of them, and the law requires him to dispose of them in a humane manner. To comply with these rules, a trapper must maintain control of his traps. After all, a trapper is not running a trap leasing service; he is operating a pest control service.

A Temporary Taking Even for One Day or Only One Hour is Still a Taking

Apparently under the theory that a small violation of civil rights does not count, Societies argue that since the seizures are temporary, there are no violations of the Fourth Amendment. In a case against an animal control officer for return of farm animals which had been seized and impounded for running "at large," the court said that: "Moreover, the fact that the deprivation may be temporary does not alter the need for due process" (Carrera v. Bertaini 1976). Even a temporary taking of property without proper procedures is a violation of civil rights.

TAKING TRAPS WITHOUT A PRE-SEIZURE HEARING IS A PROCEDURAL DUE PROCESS VIOLATION

The United States Constitution guarantees every person "procedural due process," which means that the government must provide notice *and* an opportunity to be heard to a person *before* depriving a person of a property interest. The California Supreme Court has also noted that "the Constitution generally requires that an individual be accorded notice and some form of hearing before he is deprived of a protective or liberty interest" (Kash Enterprises, Inc. v. City of Los Angeles 1977). In Beaudreau v. Superior Court (1975), the court again emphasized a need for a hearing *before* a state actor takes another's property:

> We start with the basic proposition that in every case involving a deprivation of property within the purview of the due process clause, the Constitution requires some form of hearing. Absent extraordinary circumstances justifying resort to summary procedures, this hearing must take place *before* an individual is deprived of a significant property interest.

The Societies fail to give trappers notice and an opportunity to be heard before they seize traps; thus, they deprive trappers of procedural due process. The Societies defend their clearly unconstitutional activities under the theory that Humane Officers are exempt from search and seizure laws and that Humane Officers are given privileges not even held by the police. The due process violation is obvious and patent.

SUMMARY

Societies perform important functions for the State, the counties, the community, and the public. Their staffs are hardworking and well meaning, but are not trained in

police work. As the Societies perform police functions of conducting searches, seizing property, making arrests, and using deadly force, they are required by the Constitution to perform such functions only after they have shown probable cause to a neutral party and obtained a warrant. Their failure to obtain warrants before performing such intrusive functions, violates the trappers' and homeowners' civil rights, which subjects the Society to suits for damages. To truly protect the public and to protect their budgets, the Societies should train their staff in civil rights and procedures.

The Societies have the powers of the police, but resist following the laws and rules that apply to the exercise of police powers. In their zeal to protect animals, they have invaded people's property, even their houses, confiscated traps, and released animals—all without warrants or other review of their actions. Unless the Societies reform their methods and comply with the Fourth Amendment, they are going to be known as the Animal Control Gestapo.

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