

Canine legislation: Can dogs get a fair shake in court?

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Several news stories appeared the month before the Animal Welfare Forum that illustrate a dilemma often expressed during the meeting. On Nov 1, 1996, the Sarasota Herald Tribune carried a graphic account of a 10-year-old boy killed by a neighbor's Rottweilers,¹ and on November 27, a press conference in Pound Ridge, New York credited Abby the Rottweiler with foiling a baby's kidnapping by biting the perpetrator as he tried to flee.² It is a troubling paradox that the canine qualities we value so highly in many contexts are so horrifying in others.

In the Florida story, a neighbor was quoted as saying that these dogs had gotten loose several times in the past and that people were uneasy about them. "I wanted to report it to somebody, but I didn't know who to report it to, and I thought they wouldn't do anything, anyway," he said.¹ Here we have another paradox. It is easy to react to the statement with disbelief, citing the availability of animal control services, but it points to a broader need, not simply for access to such services but for genuine outreach to areas of the community where calling law enforcement may not be a familiar or socially accepted practice.

Defining the Problem

Are certain types or breeds of dogs like assault rifles, so inherently dangerous that they should be banned altogether? A few people believe this, and they say so to their lawmakers. Assault rifles are mechanical devices, designed to perform in a certain way. Aren't dogs far more complex and individualized -- and able to be modified?

Does it even make sense to try? In reading Vicki Hearne's *Bandit: Dossier of a Dangerous Dog*,³ a remarkable account of the rehabilitation of a dog with a serious biting history, one cannot help wondering if many dogs designated as dangerous are not euthanatized unnecessarily. Yet in her preface to the 1994 edition of *Adam's Task*,⁴ Hearne acknowledges that "...if a very serious dog and a very serious handler are lucky enough to walk into a serious world together, then there is, say, no biting problem. [But] In a different world with a different handler, that's a different dog..." The reality is that there are too few supremely gifted handlers; such work is labor-intensive and costly, and local government, with its limited resources and high volume of animal-related problems, is unlikely to be interested in making exceptions. The question, though, is whether current accepted methods of dealing with dog bites simplify matters too much, gloss over the complexities of unacceptable behavior and thereby limit their own effectiveness.

Dog Laws and Dog Owners

Government, by its very nature, thinks more in terms of groups or categories than of individuals in their uniqueness. There is a tension between this feature of government and the aspect of law that is concerned with the exercise of individual rights. Those who dislike the idea of animals as property may be reassured to realize that their right to the "use and enjoyment" of the dogs they own is protected from improper government interference by the Fifth Amendment to the US Constitution, which provides that no one may be deprived of life, liberty, or property without due process of law.

This means that property rights are not absolute; they may be restricted for the good of the community, as we see with local ordinances that limit the number of dogs that may be kept or treat excessive

barking as a nuisance. But these rights may not be restricted arbitrarily, or capriciously, or vaguely, or too broadly, because of the established principle that any intrusion on constitutional rights must be as narrowly tailored as possible to achieve its intended purpose. Therefore, legal challenges to breed-specific bans or to severe limits on the number of dogs that may be kept usually focus on vagueness in classification (i.e., the impossibility of scientifically defining which animals are to be banned or on the unreasonableness of declaring that a particular number of dogs constitutes a nuisance, irrespective of the qualities of the individual animals involved).⁵ Although in recent years a few of these bans and restrictions have been upheld, they have often been found unconstitutional.⁶

Such bans and limits are preemptive, attempting to prevent problems with dogs before they develop. In contrast, 41 states have enacted dangerous dog laws as mechanisms for uniform handling of incidents of canine aggression that have already happened. Many counties and towns enact separate ordinances of their own, and sometimes the state law contains a provision that it does not preclude or preempt such local schemes. Consider the following example, an excerpt from a letter of notification in a county that did not have a leash law:

"Dear Mr. _____:

We have received four reports of your animals attacking people when unprovoked. According to the authority invested in me as _____ County Health Director and defined in Public Health Law Section _____, I notify you that your dog has been defined as dangerous as of this date....

This letter serves as notification to you that these animals must be confined to your property and only permitted to be unconfined when accompanied by a responsible adult and restrained on a leash.

If the dog is found to be unconfined, it will be ordered confined for observation by the Animal Control Officers.

The owner will be responsible for costs of confinement.

If you have any further questions, please feel free to contact me at _____."

Although the requirement of confinement will hardly seem excessive to those who recognize the necessity of leash laws, there are several legal difficulties in this letter. First, the offending animal is not identified or even described, and because the writer alternates between using the words 'dog' and 'animals,' it is impossible to determine with any degree of specificity which (or even how many) animals are affected by the directive.

Second, the owners are not offered an opportunity for a hearing as provided by the constitutional principle of due process. In a community where there is no leash law and custom tolerates free-roaming canines, an individualized confinement requirement is a substantial limitation on an owner's rights. Those at risk for losing the free use and enjoyment of their dogs are entitled to a full and fair hearing on the matter. The courts have been scrupulous in reasserting due process requirements in dangerous dog cases when they have not been observed at the local level.⁷

On the other hand, it has proven very difficult to challenge the wording of dangerous dog laws on grounds of vagueness in areas other than breed-specific bans. A recent appellate case centered on the phrase, "*approach in a vicious or threatening manner, in an apparent attitude of attack,*" which is one

criterion for a finding of potential dangerousness in a number of statutes. Appellants introduced current findings on common misinterpretations of canine behavioral signals⁸ and argued that the definitions portion of the statute should include a list of behavioral correlates against which a "*vicious or threatening manner*" and "*apparent attitude of attack*" could be measured. Nevertheless, the statute was not found to be impermissibly vague.⁹

A Role for Behaviorists

It is safe to say that most dangerous dog laws indicate little awareness of advances that have taken place in our understanding of canine behavior in the past few decades. Only the most rudimentary distinctions are made (e.g., between unprovoked and provoked attacks or between aggressive acts occurring on and off the owner's property). The behaviors that cause a dog to be classified as dangerous or vicious are outlined with surprising brevity, often in broad, sweeping phrases that are obviously problematic. In Montana, for example, a vicious dog is defined as *one that bites or attempts to bite any human being without provocation or that harasses, chases, bites, or attempts to bite any other animal.*¹⁰ There is no explanation of what constitutes an attempted bite, nor is there room in this scheme for the normal exploratory behavior of young canines. In Colorado, one way that a dog may be designated as dangerous is to demonstrate "*tendencies which would cause a reasonable person to believe that the dog may inflict injury upon or cause the death of any person or domestic animal*"; however, these tendencies are not specified.¹¹

On the other hand, a few ordinances are disturbingly specific. In Omaha, Neb the term "*dangerous*" may be applied to "*any dog or other animal that snaps, bites, or manifests a disposition to snap or bite.*"¹² The ordinance provides that the court may order dangerous animals destroyed, presumably even animals in the "*snapping*" category, and it further states that if a dangerous animal is found at large, the city shall be under no duty to attempt to confine or capture it rather than kill it, nor shall the city be under a duty to notify the owner prior to killing it.

Thus, dangerous dog laws may, if taken literally, pose many problems with interpretation and enforcement. The input of behaviorists clearly would be helpful in drafting or amending these pieces of legislation in the future.

The opinion of behaviorists was useful to the US District Court in Alaska in a 1994 dog bite liability case¹³ as it struggled with the defense that prior biting incidents were the result of "*natural instincts, not dangerous tendencies*" (i.e., that they were within the range of normal canine behavior). Yet the court concluded: "*It is the act of the animal and not the state of mind of the animal from which the effects of a dangerous propensity must be determined.... If Anchor did have a dangerous propensity, then it is immaterial whether this propensity was driven by anger, playfulness, affection or curiosity.*" Does this mean that the aforementioned Pound Ridge, New York hero dog should now be designated as dangerous?

The stimulus may be immaterial if one is looking solely at the physical effects of an incident, but identifying the triggers for a dog's actions is highly relevant for a determination of its temperament and whether the offending behavior can be corrected. Conspicuously absent from almost all dangerous dog laws is any consideration of how a dog may be rehabilitated and the label of "*dangerous*" removed. A great deal of attention is given to how the dog must be confined and controlled, but no attention is focused on how its behavior may be evaluated, modified, and certified as corrected. In California, the law¹⁴ provides that the dangerous label may be removed after 36 months if there are no additional

incidents, or sooner if there is a mitigating factor such as training; however, it does not make specific provisions for how this second alternative will work.

To achieve their objectives, dangerous dog laws should be reworked to reflect the current state of knowledge about canine behavior so that it will be possible to assess the real importance of transgressions and act accordingly. They must reflect the fact that a dog's behavior is not static and periodic reassessment is needed to be fair to everyone involved.

Other Legal Remedies

Unfortunate incidents involving direct action against dogs by the police or animal control have resulted in a number of noteworthy lawsuits under the civil rights law¹⁵ that implements the application of the Bill of Rights to the states under the Fourteenth Amendment. This law forbids any deprivation of constitutional rights by persons "*acting under color of state law*" (i.e., with governmental authority). In 1995, the US District Court for the Western District of Michigan applied this law, finding that shelter workers engaged in a public-private conspiracy to deprive plaintiffs of their Fourth Amendment rights when they sold impounded dogs to a laboratory before the expiration of the statutory holding period.¹⁶

A 1987 Georgia case¹⁷ illustrates the pitfalls into which local governments can fall when conducting searches and seizures involving animals, even when a search warrant has been obtained. Cobb County Animal Control, the veterinarian with whom it contracted for services, and the county attorney were all sued under the civil rights law¹⁵ after a raid on a pet shop exceeded the scope of the authorized search and a number of animals, mostly purebred dogs, were seized. The individual defendants were sued for defamation because of comments made to the press about allegedly inhumane conditions in the shop at the time the animals were removed. The animals were taken to the local shelter "*to be made well*" and when the pet store refused to pay the impoundment fees they were adopted out. The court found that the store had been deprived of its property in violation of the Fourteenth Amendment; at one stage, an award was granted for loss of business reputation as well as actual worth of the animals, but, later, this was reversed.

A very disturbing line of cases involves the shooting of dogs by police in the line of duty, often during the course of an entry for the purpose of search and seizure. Sometimes these cases have failed because they have not been pled correctly, but a 1993 Texas case¹⁸ that went to the US Supreme Court yielded a landmark decision about the requirements for stating a civil rights claim successfully. This case involved a mother and son who were stopped by police and informed that their home had been the subject of a drug raid and that their 2 dogs had been killed. When they arrived home, they found their Doberman Pinscher shot dead in the driveway and their Miniature Schnauzer dead in the master bedroom. Drugs were not found during the raid.

In a noteworthy 1989 case,¹⁹ Manitowoc County, Wis officers were granted a search warrant to locate 4 stolen pressure cookers and 4 ounces of marijuana. While one served the warrant, the others, moving through the house to secure it, encountered the family dog, a German Shepherd Dog. "*After the house was 'secured' the dog was dead, the children and adults were screaming, and the officers found no pressure cookers or marijuana.*" One officer claimed that he shot the dog in self-defense, but forensic evidence introduced by a veterinarian indicated otherwise. On appeal, the court did not reverse the jury and trial judge's finding that the officer acted unreasonably. This and other cases raise the issue of failure to train police properly in the execution of search warrants when a dog is present, and it is to be expected that similar costly suits will be brought under the civil rights law¹⁵ in the future.

Conclusions

Despite the many criticisms of existing statutes and ordinances affecting dogs, the answer does not lie in eliminating such laws, but in reworking them. We can look to other areas of the law for innovative approaches to the problems discussed at this Animal Welfare Forum. Keeping of highly aggressive dogs perhaps should be classified as an ultra hazardous activity, comparable to blasting or manufacture of chemicals, for which permits and inspections are required. Just as someone who wishes to drive a commercial vehicle must obtain a different type of license than someone who operates a passenger car, perhaps the keepers of such animals should be required to obtain a special license to be earned only after testing and certification. It is tempting to respond to problems such as dog bites with sweeping statutes and ordinances that cover the largest possible number of cases. Yet this broad approach sacrifices the precision and clarity needed to analyze individual incidents and work out solutions that are fair to the public and dog owners alike. The input of behaviorists in drafting and implementing dog-related legislation could make a big difference.

The phenomenon of costly civil rights suits against police and animal control agencies is a growing one. The Fourth Amendment guarantee against unreasonable searches and seizures should logically extend to constraints on harming animals encountered during the search. Again, some training in animal behavior could enable police to avoid deadly force unless absolutely necessary.

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JAVMA, Vol 210, No. 8, April 15, 1997 **Animal Welfare Forum** Human-Canine Interactions
pg. 1139

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