

Animal Law: Yesterday and Today

by Robin Bernstein

What is animal law? While there is no unanimity in its definition, by all accounts animal law is a growing field requiring knowledge of many different areas of law.

An attorney practicing animal law might have the following caseload: a plaintiff animal protection group trying to stop a bear hunt from taking place or trying to come up with a way to sue a factory farm that is violating anti-cruelty laws; a couple who wants to draw up their wills to ensure that their animals are cared for after their death; a defendant whose dog knocked over or bit someone; a plaintiff who is suing for veterinary malpractice; or an animal rights activist accused of using terrorist tactics in protesting against a corporate animal user. As the topics within the field of animal law vary, so do the ways in which animal law is taught in the increasing number of law schools across the country that are adding animal law to the curriculum

Today, animal law is taught at 40 law schools in the U.S. The Animal Legal Defense Fund (ALDF), founded in 1979, now has student chapters known as SALDFs in over 50 law schools, and hopes to have chapters in all of the 186 accredited law schools within 20 years. There are also independent student groups on law school campuses, such as the Rutgers Law Students for Animal Rights

The focus of animal law classes varies from the philosophical to the pragmatic, from the rights of the animal to the rights of those who use animals. The teaching of animal law might include such topics as the philosophy of animal rights as compared to the philosophy of animal protection; or an exploration of the differences in the treatment of animals raised for food versus animals that share our homes; or a discussion of fundamental procedural legal issues that impact

animals, such as the crucial, and often frustrating, question of who has standing to sue when an animal is harmed in a way that violates the law. It may involve the discussion of what constitutes legal cruelty, or how to deal with the growing recognition of the connection between violence against animals and other forms of domestic violence, such as the implementation of cross-reporting by child welfare workers and the Society for the Prevention of Cruelty to Animals (SPCA) of child abuse and animal abuse. Additionally, it may involve discussions of how to defend the free speech rights of animal activists or how to best represent the business interests of those who use animals in the production of food, entertainment, clothing or research.

Two of the most prominent leaders in the field are located in New Jersey.

While many credit Professor Peter Singer, currently the Ira DeCamp Professor of Bioethics at Princeton University's Center for Human Values, as being the father of the modern animal movement, most credit Rutgers' Professor Gary Francione as the father of animal law. In 1995, Francione wrote *Animals, Property and the Law*, widely viewed as the seminal work discussing the ramifications of the role of animals in the legal system—as property. The majority of, if not all, animal law classes either teach animal law from this viewpoint or use it as the point from which to diverge.

In the 1980s, Francione, then a professor at the University of Pennsylvania Law School, began to instruct students on the legal status of animals as part of his course on legal theory. In 1989, he left his tenured position at Penn to move to Rutgers-Newark, and in 1990, he and Anna Charlton founded the first law school animal law clinic. Although the Rutgers Animal Rights Law Clinic ran with success for many years, Francione became convinced early on that significant social change would come not from within the legal system, which he claimed “is unlikely to provide any meaningful protection for animals as long as they are property.”

Francione describes animal law as divided into two camps: Those who think the goal should be “better regulation of animal slavery and those who believe that the slavery should

end." As an abolitionist, Francione states that the goal of the animal lawyer "should not be an additional inch of space in the egg battery cage or the amendment of anticruelty laws," which, he contends, do very little. Rather, the animal lawyer should be "representing and defending animal advocates who are using nonviolent means to educate all of us about the need to abolish institutionalized animal exploitation. Once there is a change in social thinking, legal change will follow."

Animal law professors often discuss their classes in terms of whether they teach "animal rights law" or "animal law." For example, Bruce Wagman, who teaches at UC Hastings College of the Law and is a co-author of the only animal law case book currently available,¹ says, "The thrust and focus of my classes is definitely an objective survey of the law as it is affected by the biological, psychological or special nature of animals qua animals. It is not about animal rights activism, although notions of animal rights logically come into the discussion as a natural consequence. I don't teach veganism or vegetarianism or activism—I try to treat it just as any other law school course—analyzing cases and laws that affect or are affected by animals." While Wagman acknowledges that notions regarding what constitutes humane treatment or cruelty inevitably come into play, he insists "the focus is on the law. The rest follows."

Professor Kathy Hessler, who teaches at Case Western Reserve University School of Law, makes clear that "the one thing my class is not is an animal rights class. My focus is locating the animal movement along the spectrum of other social justice movements." Hessler believes this approach gives the students not only the ability to understand the importance of the issues, but to compare tactics and arguments "from the well-farists to the violent abolitionists." Within this theoretical framework, Hessler

deals with "how the courts and legislatures address reform issues, and whether they are doing a good job at what they are attempting, without worrying first about whether it's the right thing."

On the other hand, Professor William Reppy, at Duke Law School, takes a very different approach. Reppy teaches "animal law as a very practical course, hoping to groom the students into being excellent advocates for animals. Thus, I am teaching creative use of tort law, or contract law, or trusts law, etc. The thrust of my class is to assist the student in becoming a smart and clever advocate. It is not at all philosophical."

Similarly, Professor Paul Waldau, who teaches at Boston College School of Law, has taught at both Harvard and Yale, and is currently the director of the Center for Animals and Public Policy at Tufts University School of Veterinary Medicine, sees "animal law expanding dramatically in the coming decades. I think most of the expansion will be through non-rights vehicles (such as work in trusts, perhaps new torts, greater enforcement of anti-cruelty laws, and new legislation limiting the right of humans to own or harm certain nonhuman animals)." Thus, Waldau points out, the focus of his course "is directed to seeing the basic nature of today's legal system (which I hold to be speciesist in the extreme), and then seeing the possibilities for effective, fundamental protections for some or all nonhumans. I emphasize that the law has many tools other than rights, and is, in reality, a very flexible system when it is freed from its humanocentric bias."

Steven Wise, one of the pioneers in teaching animal law and the first to teach at Harvard, makes clear that he teaches animal rights law, while practicing animal law, or, as he provocatively refers to it, "animal slave law." Thus, while the current practice of law is based on a legal system that treats non-human animals as slaves, the course he teaches

"discusses the jurisprudential and philosophical problems of where legal rights come from, who should have them, and which ones should they have—in other words, the animal law of the future." In Wise's opinion, this approach "implies the most sacred and powerful legal values."

While the starting point of animal law for all of these professors, no matter what their techniques, tends to be how far they are willing to delve into animal rights theory, as opposed to sticking to practical applications, there are also animal law professors who see the strength of their work in providing what they consider to be an even-handed approach to presenting the treatment of animals within the legal system, whether a particular animal plays the role of food, research subject, object d'art, entertainment or companion. While Professor Jerrold Tannenbaum, who teaches animal and veterinary ethics and law at University of California at Davis, agrees that animal law classes should include discussions of whether animals should be given standing, or "be categorized as legal persons" he objects to the "radical positions" of some who teach animal law and points out that "[m]any law students are interested in animals and in helping and defending those who use and deal with animals."

David Wolfson, a partner at Milbank, Tweed, Hadley & McCloy, LLP, who has taught animal law at Harvard, Yale and Cardozo, and will be teaching at Columbia in the fall, teaches his course from a philosophical basis, giving background in the history and philosophy of animals in the legal system, their capabilities, how they are treated in general and how they are treated in their specific uses, such as in farming and scientific research. While he acknowledges that in his class "the goal is to show that the legal system for animals doesn't work, and that it should be changed," he points out that the challenge is to "portray all

that, without making it propaganda.”

Wolfson, like many others in the field, notes that his classes usually include a wide variety of viewpoints, from animal activists, to dog breeders, to farmers, and points out that his purpose is not to convert his students into vegetarians, but to teach them how the legal system deals with animals and allow them to come to their own conclusions. Indeed, Professor Waldau notes that he finds it “best if there are some skeptics in the class—they are educational opportunities of the first rank (in two senses—they argue the ‘other side’ more fully and articulately, and they also can be impressed with the deep value of the course).”

Whether, or to what extent, law courses should be taught from an advocates’ perspective, or, instead, should constitute a balanced presentation that offers the status quo as equally legitimate to alternative visions of the future, is a question familiar to those who were involved in legal education during the early years of other legal activist movements, such as the civil rights movement and movements advocating for the rights of women, children, etc. While one point of view holds that teaching from an advocates’ perspective is unbalanced, others argue that teaching that supports the status quo, merely because it is the status quo, is just as biased, and, more importantly, fails to benefit the students, the legal system or society by refusing to seriously examine cultural and legal values and norms.

This is a question with which Professor Iaimie Bryant, at UCIA, has struggled. “Oddly,” Bryant points out, “a student who would never question whether we should have corporations while taking corporations or a student who would never question whether we should protect children in the context of a class on advocacy for children, nevertheless will use disproportionate amounts of time trying to keep a people-first hierarchy in place throughout

the animal law class.” While Bryant does focus on current controversy, her approach is more philosophical than practical. She focuses on philosophical, and, in particular, feminist approaches to understanding the role of animals in law and society. “If you teach a student how a particular case is/was handled, you haven’t given them as much as you have if you have given them theories through which they can define meaningful projects and stay the course when demands to compromise are made.”

Animal Law: Why Now?

In the early years of animal law in the law schools, the course was frequently started because of the efforts of one dedicated professor, such as Gary Francione at Rutgers. Iaimie Bryant points out that her interest in animal law predated the students’ interest, but adds that it’s the students’ interest that has kept it going for the last nine years. Bryant insists that she teaches animal law, “not because I believe that law is the most effective vehicle for changing social practices and attitudes toward animals.” Instead she teaches animal law because she cares about “how society treats and views animals, and I was a law professor at the time I decided I couldn’t just stand by without doing something about my strong belief that the treatment of animals in this society falls short of the threshold of decency.”

More and more, however, the arrival of an animal law course on a law school campus is the result of student interest, which seems to reflect a growing concern among the general populace about the way animals are treated in our society and whether the law is doing enough to protect them. Just this year, Columbia, New York University and Stanford have decided to add classes, all as a result of student requests.

In addition to animal law courses, there are other signs on law school campuses of the growing importance of this

field. Ten years ago, students at Oregon’s Lewis and Clark College of Law started the field’s first scholarly journal, *Animal Law*. Now, a second one is starting up at Michigan State University College of Law under the tutelage of Professor David Favre, a long-time scholar and teacher of animal law and editor of the *Animal Legal & Historical Web Center*.²

One of the most important aspects of the effort to establish animal law both on campuses and in the real world is the development of law school clinics that will help train students to take on actual cases involving animals and introduce them to some of the special issues that arise in this field. During its decade of operation, the Rutgers Animal Rights Law Clinic, which is presently on hiatus, trained students using a variety of cases that included opposing deer hunts and wild horse round-ups and representing students opposed to dissection. Currently, an increasing number of schools are allowing students to do externships in animal law and are preparing to create animal law clinics.

In the meantime, just this year, the Environmental Law Clinic at Rutgers–Newark, directed by Professor Robin Greenwald, started to take on animal law cases in addition to its environmental caseload. By networking with the New Jersey Bar Association’s Animal Law Committee, the clinic has been reaching out to the New Jersey legal community, and is now working on a number of cases with animal law attorney and committee member Isabelle Strauss. Working with community lawyers, especially in conjunction with the growing number of bar association committees devoted to animal law, is a model that shows promise and is being used at several law schools.

Another important new project at the law schools is the National Center for Animal Law (NCAI), which has been run by Laura Ireland since her graduation from law school in 2001

Ireland says, "I went to law school for animal law at Lewis & Clark Law School, and while there I was the co-director of the SALDF chapter and was editor in chief of the Animal Law Review. As a student, I realized there were no organized resources for future and current law students. In addition, while Lewis & Clark Law School has been a pioneering law school in animal law, the effort had always been student-driven. While students are still the driving force, the center provides institutional memory for law students and a resource to develop a program in animal law." The center's goals are to draw, train, and support animal law students, and provide them with training for them to be effective advocates for animals in the legal system. While located at Lewis & Clark, the center works with law students and administrators in law schools around the nation "to promote legal education for animal advocacy."

One of the projects the center has taken on is the National Animal Advocacy Competitions, including the annual moot court and closing argument competition in animal law, which draws students from around the country. This year's competition, like last year's, will be held at Harvard Law School. Additionally, there will be a legislative drafting and lobbying competition to be held at George Washington School of Law.

NCAI also holds a yearly conference in Portland on topics of interest to students who are either taking animal law, or are interested in the topic but attend a school where a course has not yet been introduced. In addition, this year a three-day conference sponsored by ALDF, titled *The Future of Animal Law*, was held at Yale Law School, drawing students, as well as practicing lawyers, from around the world.

One of the most important developments over the last three years in the growth of animal law is the influx of sig-

nificant funding for such programs. Most notably, Bob Barker, the host of the daytime game show "The Price is Right," and a longtime advocate for animals, has focused on animal law as an important area for attention. Not only was Barker one of the silent donors of the first animal rights law clinic at Rutgers-Newark, but he continues to donate generously to law schools nationally.

Three years ago, Pearson Television, in honor of and at the request of Barker, gave Harvard Law School a \$500,000 endowment to teach animal rights in law. As recently reported in *The New York Times*, Barker has also established \$1 million endowments for the study of animal rights law at Stanford, Columbia, Duke, and the University of California in Los Angeles. Furthermore, it is speculated that he will continue to add other schools to the list.

Animal Law: Tomorrow

So what will the current, and future, generations do with their knowledge of animal law when they graduate? While there are still students who take animal law courses for numerous non-career track reasons, e.g., because they love animals, because their parents are farmers, because they are wondering what the fuss is all about, or because they are hoping for an easy A, there are more and more students going into law specifically to practice animal law. What will these students be doing? Despite progress in the law schools, and some signs that animal law is gaining ground as its own practice area, the practice of animal law still remains essentially a field for the jack-of-all-trades, cobbled together from what are now considered very disparate types of cases, rather than a recognized specialty in its own right.

Moreover, animal law, as a new practice area, is frequently not given the respect it deserves, and often necessitates that the lawyer practicing it expose

him or herself to situations in which animals have been treated with significant cruelty, which can be particularly emotionally trying for those who care about animals. Professor Taimie Bryant is focusing on these problems as she explores the stress, damage, etc., of working in a legal area that is not only emotionally challenging but, to a large extent, socially unaccepted. Bryant, who is attempting to create strategies for legal advocacy that address these limitations, might have her finger on one of the most important factors in the growth of animal law. You can train lawyers to work in animal law, but how can you keep them there?

According to Joyce Tischler, executive director of the ALDF, the opportunities for animal lawyers to do cutting edge work are increasing. "I see more and more cases, and a growing level of sophistication in the handling of those cases," said Tischler. Still, she adds, "It's hard to guess how many practitioners will be able to make a living at animal law."

According to David Wolfson, one of the factors leading to increasing recognition of animal law as a legitimate area of practice is the increased interest on the part of legal scholars, and prominent lawyers in other fields. "The participation of renowned experts from other legal fields into the discussion of animal law—Martha Nussbaum, Cass Sunstein, Laurence Tribe—has changed the debate. It has made it a little less radical, making it more achievable. Their presence changes the discussion from whether animals have rights to, to what extent they have rights." As a result, Wolfson noted, there is now "more focus on what having legal rights entails and how to make them meaningful, and less discussion of abolition and property status."

The presence and interest in the field of such prominent legal minds is helping to bring animal law into the

mainstream Suddenly, it is not just animal lawyers but constitutional law scholars such as Laurence Tribe discussing animal rights in terms of slavery; and Cass Sunstein discussing not whether animals have rights or should have rights, but whether they have sufficient rights under the current legal system The participation of these individuals shifts the starting point of the discussion, which will inevitably shift the end point.

Another exciting development is the burgeoning number of bar associations that have animal law committees In addition to the New Jersey Bar Association, which was among the first to create a committee devoted to this practice area, 17 state and local bar associations now have animal law committees. Moreover, the American Bar Association, clearly recognizing an important trend, has recently added an animal law committee to its torts and insurance practice section

Clearly, on all fronts, animal law is an idea whose time has come. Students, as well as practicing lawyers, are learning about animal law in law school animal law classes, in animal law clinics, and through bar association committees and continuing legal education programs. Inevitably, this will mean changes for the law that will result in changes in the way animals are viewed and treated in society. Many would say it is a development that is long overdue. ♠

Endnotes

- 1 Frasci, Waisman, Wagman & Beckstead, eds., *Animal Law Casebook*, 3d ed (Carolina Academic Press, 2004)
- 2 www.animallaw.info.

Robin Bernstein is a 2006 J.D. candidate at Rutgers Law School–Newark. The author would like to Mariann Sullivan for the guidance and inspiration for this article

WINNING WEBSITES

www.asPCA.org

The website of the American Society for Prevention of Cruelty to Animals (ASPCA), whose mission is to provide a means for prevention of cruelty to animals throughout the United States through humane education, public awareness, government advocacy and animal placement.

www.hsus.org

The website of the Humane Society of the United States, which champions causes of animal protection throughout the United States and offers a wealth of information for individuals interested in animal protection and advocacy.

www.associatedhumanesocieties.org

The website of the Associated Humane Societies and Popcorn Park Zoo, providing information on the largest animal sheltering system in New Jersey. The Popcorn Park Zoo is a federally licensed, nonprofit zoo of rescued animals located in Forked River.

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