

FOREWORD

ANIMAL LAW: THINKING ABOUT THE FUTURE

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I

INTRODUCTION

In the spring of 2006, Duke University School of Law and *Law and Contemporary Problems* hosted a conference on animal law. Dean Katharine Bartlett opened the conference with a short address. She suggested that future generations will look back on our treatment of animals with shame, viewing our behavior as blind, or even without conscience. The time was ripe, she suggested, for dramatic changes in animal law.¹

It was a thoughtful and well-received address. Dean Bartlett is not alone in believing that future generations will be aghast at the way animals are treated now. Most readers of this symposium likely agree with her. And perhaps the future is not so far off: the explosive growth of the field of animal law provides some evidence that there is momentum for change. Yet there are troubling divisions within the field, and we have made little progress on several key issues, including the treatment of farm animals. This foreword touches on some of the challenges animal lawyers and animal advocates face today, then proposes some future directions, both for the field in general and for legal academics in particular.

II

PROMISING SIGNS

As a field of study, animal law is something new under the sun. Although its history has been detailed elsewhere,² a short summary is worth repeating. The first law school class in animal law was offered in 1990.³ The first volume of the

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This article is also available at <http://law.duke.edu/journals/lcp>.

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1. The entire address is available on the web at Duke Law Events, Webcasts, April 2006, <http://www.law.duke.edu/webcast> (last visited Dec. 21, 2006).

2. See, e.g., David Favre, *The Gathering Momentum*, 1 J. ANIMAL L. 1, 9–14 (2005) (describing history of the study of animal law); Clayton Gillette & Joyce Tischler, *Introduction: Symposium: Confronting Barriers to the Courtroom for Animal Advocates*, 13 ANIMAL L. 13 (2006).

3. This class was offered at Harvard Law School. See Favre, *supra* note 2, at 2.

Animal Law Review was published in 1994.⁴ The first animal law casebook was not published until 2000.⁵

Over the past decade, animal law has seen remarkable growth. Seventy-five law schools now offer classes on the subject.⁶ Three law reviews are dedicated to animal law,⁷ and several academic conferences each year focus on it. At least three law schools have animal law clinics, including Duke. Academically, animal law is moving away from the fringe.⁸ Prominent law professors in traditional fields are now working in and writing on animal law.⁹

Outside the ivory tower, animal law is also growing. An increasing number of attorneys in private practice are specializing in animal law, and many bar associations have animal-law sections.¹⁰ Major animal advocacy groups like the Humane Society of the United States, People for the Ethical Treatment of Animals, Farm Sanctuary, and others have ramped up their litigation efforts.¹¹ The mainstream media has publicized the field's growth.¹²

These developments have not gone unnoticed by those who use, and in many cases abuse, animals. The National Association of Biomedical Research has formed an animal-law section.¹³ Publications by the animal-agriculture industry are sounding the alarm about animal lawyers' efforts.¹⁴ Likewise, veterinary journals now regularly feature articles about avoiding or defending

4. *Animal Law Review* is published by Lewis & Clark Law School in Portland, Oregon. See *Animal Law Review*, <http://www.lclark.edu/org/animalaw/> (last visited Feb. 26, 2007).

5. See PAMELA D. FRASCH ET AL., *ANIMAL LAW* (2000).

6. The Animal Legal Defense Fund maintains a list of animal law classes on its website. See *Animal Legal Defense Fund, Programs: Animal Law Courses*, <http://www.aldf.org/content/index.php?pid=83> (last visited Dec. 21, 2006).

7. *ANIMAL LAW REVIEW*, *JOURNAL OF ANIMAL LAW*, and *JOURNAL OF ANIMAL LAW AND ETHICS*.

8. Bob Barker has helped this process along by giving at least seven law schools, including Duke, a total of more than \$5 million to promote the study of animal law.

9. See, e.g., Alan M. Dershowitz, Remarks, *The Evolving Legal Status of Chimpanzees*, 9 *ANIMAL L.* 1, 55 (2003); Cass R. Sunstein, *A Tribute to Kenneth L. Karst: Standing for Animals (with Notes on Animal Rights)*, 47 *UCLA L. REV.* 1333 (2000); Laurence H. Tribe, Remarks, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 *ANIMAL L.* 1 (2001).

10. Again, the Animal Legal Defense Fund maintains a list. *Animal Legal Defense Fund, Resources*, <http://www.aldf.org/resources/details.php?id=101> (last visited Jan. 23, 2007).

11. Jonathan R. Lovvorn, *Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform*, 12 *ANIMAL L.* 133, 148–49 (2006).

12. See, e.g., Warren St. John, *New Breed of Lawyer Gives Every Dog His Day in Court*, *N.Y. TIMES*, Sept. 3, 2006, at 1; Laura Parker, *When Pets Die at the Vet, Grieving Owners Call Lawyers*, *USA TODAY*, Mar. 15, 2005, at 1A; William Glaberson, *Legal Pioneers Seek to Raise Lowly Status of Animals*, *N.Y. TIMES*, Aug. 18, 1999, at 1.

13. National Association for Biomedical Research, *Animal Law Section*, <http://www.nabr.org/AnimalLaw> (last visited Jan. 23, 2007).

14. See, e.g., Marlys Miller, *A Shift in Climate*, *PORK*, Oct. 2006, at 4 (noting that “[l]egislation and lobbying have become key pathways in moving the animal activists’ agenda forward” and describing the “in-house litigation team” at HSUS).

malpractice lawsuits,¹⁵ and an increasing number of attorneys are holding themselves out as experienced in veterinary malpractice defense.

III CHALLENGES

An organized opposition is not the only challenge facing animal lawyers. We also struggle with persistent internal divisions. Take, for example, the split between defenders of animal rights and advocates for animal welfare. On the surface, this controversy has quieted down. Even among those who have marched for animal rights, many now find the “animal rights” label “not constructive,” and propose that alternative terminology be used.¹⁶ But substantive disagreement still swirls beneath the surface, with some arguing that incremental improvements in the treatment of animals are well worth pursuing, while others see anything short of abolishing the property status of animals as akin to putting a band-aid over a bullet hole. (In this symposium, Gary Francione’s interesting article argues vigorously for the latter position.¹⁷)

Other issues divide us, as well. Companion-animal advocates may have little interest in farm animals. Those who are passionate about farm animals may pay little mind to wild animals and habitat destruction. To some extent, the development of niches is simply a sign of a growing field. After all, not every criminal lawyer handles capital cases, and not every family lawyer handles international adoptions. Still, we can do more to support one another. Companion-animal advocates should consider the extent to which their dietary choices (and the choices they make for their animals) support factory farming, and farm-animal advocates must recognize that habitat destruction kills millions, if not billions, of animals each year.

Another challenge we are beginning to face stems from a fact noted earlier: the emergence of lawyers—true experts in animal law—who work for agribusiness, the biomedical industry, and other traditional targets of animal lawyers. We must decide whether there is room under the animal-law umbrella not only for those in favor of more legal protections for animals, but also for those who believe that current law is sufficient, or even overprotective. Virtually none of the articles in the leading animal-law journals reflect the latter perspective, though of course it has articulate defenders.¹⁸ Likewise, many

15. See, e.g., Robert Newman, *Defend Your Practice from Lawsuits*, VETERINARY ECON., May 2002, at 33; Harold W. Hannah, *Reducing Your Malpractice Vulnerability*, 209 J. AM. VETERINARY MED. ASS’N 1859 (1996). It should go without saying that the vast majority of veterinarians are not animal abusers.

16. David Favre, *Integrating Animal Interests into Our Legal System*, 10 Animal L. 87, 87–88 (2004).

17. See Gary Francione, *Reflections on Animals, Property, and the Law and Rain Without Thunder*, 70 LAW & CONTEMP. PROBS. 9 (Winter 2007).

18. For example, Victor Schwartz, former dean of the University of Cincinnati College of Law and co-author of a leading torts casebook, VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ’S TORTS: CASES AND MATERIALS (2001), opposes non-economic damages in cases

animal-law classes are taught exclusively from the perspective that animals are undervalued in the law. By contrast, environmental-law classes must serve students preparing for careers in industry and students planning careers with environmental-advocacy groups. Do we want to include lawyers for factory farms or drug-testing companies in our classes, journals, conferences, and committees? The answer need not be all-or-nothing. Just as the American Bar Association embraces both plaintiffs' personal injury lawyers and insurance defense lawyers, who might belong to different, more specific, professional groups as well, so we might welcome multiple perspectives in our classes, while our conferences remain ours alone.

A third challenge for animal lawyers is the challenge of effecting meaningful change respecting the treatment of farm animals. Welfare-enhancing changes have occurred in many areas of animal law: the law has never been more protective of companion animals; the regulations governing some laboratory animals—particularly non-human primates—have become stricter; and wild animals have at least some protection by virtue of environmental laws and the Endangered Species Act.

There have been no comparable advances for farm animals. It is not for lack of interest. Academics and others have issued repeated calls for reform,¹⁹ such reform has public support,²⁰ and yet litigation in the last decade has resulted in no significant wins for farm animals. Arguably, the legislative situation has actually gone backwards: federal law remains almost non-existent, and an increasing number of states have adopted farming exemptions to their cruelty statutes.²¹

Perhaps the explanation for this is partly cultural. Americans idealize farm life, are suspicious of government intrusion, and trust "farmers" to care for their animals. (All this despite the virtual disappearance of small-scale family farms and the ascendance of the corporate factory farm, well-documented in Darian Ibrahim's article²² in this symposium.) Perhaps it is partly political: agribusiness is a powerful, well-organized, well-funded lobby that spends nearly \$100 million

involving the death of a pet. See Judy Sarason, *Tort Watch for Animal Lovers*, WASH. POST, Dec. 29, 2005, at A21 ("If soft or non-economic compensatory damages were allowed, costs of vets would zoom, and many animals would not get the care they need or would be put to sleep when not absolutely necessary."). At least one law review article—in a general-interest law review—has argued explicitly against animal rights. See David R. Schmamann & Lori J. Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747 (1995).

19. See, e.g., Robyn Mallon, *The Deplorable Standard of Living Faced by Farmed Animals in America's Meat Industry and How to Improve Conditions by Eliminating the Corporate Farm*, 9 MICH. ST. J. MED. & LAW 389 (2005); Cass R. Sunstein, *Centennial Tribute Essay: The Rights of Animals*, 70 U. CHI. L. REV. 387 (2003).

20. See, e.g., Lovvorn, *supra* note 11, at 137 (citing polling data).

21. See, e.g., Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69, 77 (1999) (noting that as of 1999 thirty states provide exemptions for farm animals).

22. See Darian Ibrahim, *A Return to Descartes: Property, Profit, and the Corporate Ownership of Animals*, 70 LAW & CONTEMP. PROBS. 87 (Winter 2007).

per year to protect its interests,²³ while dog fighters (for example) have no comparable clout. David Wolfson and Mariann Sullivan, in their contribution to this symposium, argue that it is due to several factors, including the sheer size of the problem and the lack of a regulatory regime governing farm animals that could be a platform for incremental change.²⁴ Whatever the explanation, the animal-agriculture nut has not yet been cracked.

IV

FUTURE DIRECTIONS

Changing the lot of farm animals may require tools beyond the lawyer's one-two punch of litigation and legislation. Ballot initiatives, where allowed by state law, have shown promise as a way to avoid the animal-agriculture lobby and tap directly into the public's desire to protect the welfare of farm animals. Recent wins in Florida (outlawing gestation crates in 2002)²⁵ and Arizona (outlawing veal crates and gestation crates in 2006)²⁶ are largely symbolic given the limited livestock industries in those states, but may build momentum for change elsewhere.²⁷

Another mechanism for helping farm animals is providing accurate information to consumers about the conditions under which a particular piece of meat was produced, allowing consumers to support only production practices of which they approve. In this symposium, Cass Sunstein and Jeff Leslie's article explores the demand for, and feasibility of, welfare-based labeling of foods.²⁸ Several labeling initiatives are, in fact, already underway. Lawyers are sorely needed in this area, particularly to resist misleading or meaningless labeling programs supported by industry, such as the bogus "Animal Care Certified" label used by the egg industry until legal action forced it to stop.²⁹

23. See Agribusiness, Industry Profile 2005, <http://www.opensecrets.org/lobbyists/indus.asp?Ind=A> (last visited Jan. 25, 2006) (reflecting agribusiness's expenditure of \$95.5 million on lobbying in 2005).

24. See Mariann Sullivan & David J. Wolfson, *What's Good For the Goose . . . The Israeli Supreme Court, Foie Gras, and the Future of Farmed Animals in the United States*, 70 LAW & CONTEMP. PROBS. 137 (Winter 2007).

25. See FLA. CONST. art. X, § 21.

26. See ARIZ. REV. STAT. ANN. § 13-2910.07 (2006).

27. Industry fears this. For example, animal agriculture news source Brownfield Network worried that "[a]nimal rights organizations would ban all forms of livestock production in this country and going for the low-hanging fruit in states like Florida and Arizona helps these extremist groups to build momentum." BrownfieldNetwork.com, *Anti Groups Win Arizona*, Nov. 22, 2006, <http://www.brownfieldnetwork.com/gestalt/go.cfm?objectid=10526743-F798-AABE-87D7F88146B3DDAE>.

28. Jeff Leslie & Cass R. Sunstein, *Animal Rights Without Controversy*, 70 LAW & CONTEMP. PROBS. 115 (Winter 2007).

29. Compassion Over Killing spearheaded this litigation. See *Compassion Over Killing*, "Animal Care Certified" Eggs: Campaign Victory!, <http://www.cok.net/camp/acc> (last visited Dec. 15, 2006). The egg industry has proven to be resilient in defeat, however. Producers now use a label that reads "UEP Certified—Produced in Compliance with United Egg Producers' Animal Husbandry Guidelines." See generally UNITED EGG PRODUCERS CERTIFIED, UNITED EGG PRODUCERS ANIMAL HUSBANDRY GUIDELINES FOR U.S. EGG LAYING FLOCKS (2006), http://www.uepcertified.com/docs/2006_

Areas for future work go beyond farm animals, of course. Aquatic animals are dramatically underserved. The problems of wild aquatic animals (depleted populations, the tuna–dolphin issue, et cetera) are comparatively well-known as political issues, but few animal lawyers have engaged these topics. And almost no attention has been paid to aquaculture, despite its rapid growth.³⁰ Likewise, international animal law is in its infancy. It is common enough for those interested in companion animals to cheer Rome’s mandatory dog-walking law, or for farm-animal advocates to cite the welfare protections offered by some European countries. But very little work has been done outside Europe and North America, a failing that becomes more pronounced as intensive-confinement animal agriculture spreads through the developing world. And insufficient consideration has been given to international trading rules and how they may undercut countries’ efforts to raise animal-welfare standards. Gaverick Matheny and Cheryl Leahy’s article in this symposium begins to tackle the issue of trade.³¹

There are many more issues that require attention. Municipal ordinances rarely deal effectively with animal hoarders. The Animal Welfare Act excludes most laboratory animals. Advances in genetic engineering will bring complex questions. This is no place for a comprehensive list of issues, if such a list is even possible. But it is clear that the need for animal lawyers will increase as difficult problems remain and a wide array of new ones arise.

V

THE ROLE OF ACADEMICS

Animal law is unlike many traditional doctrinal fields. Criminal law, for example, is built around a common core of closely related concepts, and criminal statutes are normally codified together. By contrast, animal law is scattered: it cuts across administrative law, environmental law, trusts and estates, criminal law, and many other doctrinal areas, and statutes relating to animals are widely scattered in most jurisdictions. Animal law is also unlike a doctrinal-hybrid field, such as law and economics. Such fields offer unique sets of analytic tools, which animal law does not.

Instead, animal law focuses on the law whenever it affects animals. In that sense, animal law is intellectually akin to gender law, which focuses on the law whenever it affects women. And like that discipline, but some years behind it,

UEPanimal_welfare_guidelines.pdf. The guidelines permit the use of battery cages, recommending only sixty-seven to eighty-six square inches of space per bird. *See id.* at 4.

30. A LEXIS search conducted March 6, 2007 revealed fifteen law review articles with the word “aquaculture” in the title. None of the fifteen addresses animal welfare.

31. Gaverick Matheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade*, 70 LAW & CONTEMP. PROBS. 323 (Winter 2007).

animal law has begun to feel like a coherent field.³² We have leading scholars, important conferences, and field-specific journals.

In fact, some animal lawyers think that we have too many scholars, conferences, and journals. Jon Lovvorn, of the Humane Society of the United States, recently argued that “we need foot soldiers, not philosophers.”³³ Lovvorn’s call for more nuts-and-bolts lawyers, and fewer academicians, is reminiscent of the well-known argument made by Judge Harry Edwards that “many law schools—especially the so-called ‘elite’ ones—have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy.”³⁴

Both Lovvorn and Judge Edwards recognize that there is a proper place for abstract theory in the law.³⁵ (Indeed, there is a proper place for abstract theory in this symposium, as the provocative articles by Taimie Bryant³⁶ and David Cassuto³⁷ show.) But assuming *arguendo* that the theory niche is full with respect to animal law, there remains important work that academics are well-suited to do.

First, we can undertake the painstaking research projects and empirical studies that are incredibly useful building blocks for practitioners, but that practitioners do not have time to do. This symposium contains a fine example of this type of work: Bill Reppy’s detailed exploration of the history, scope, and constitutionality of the statutory exemptions to North Carolina’s animal cruelty law.³⁸ My own contribution, an analysis of methods of animal slaughter and the legal regulation thereof, also falls mainly in this category.³⁹

Second, we can help practicing lawyers bridge the gap between theory and practice. Whereas we might argue abstractly in a law review that pet-custody cases ought to be decided under the “best interests of the animal” standard, we can write about the same subject, with a more practical bent, in publications targeted towards practitioners. Many legal fields have such mid-level journals:

32. By one measure, we are about twenty years behind. The first gender law journal was the *Women’s Rights Law Reporter*, founded in 1972. See Richard H. Chused, *A Brief History of Gender Law Journals: The Heritage of Myra Bradwell’s Chicago Legal News*, 12 COLUM. J. GENDER & L. 421, 429 (2003). Now there are many, including journals at Harvard, Yale, Duke, Columbia, Michigan, and other leading schools.

33. Lovvorn, *supra* note 11, at 148 (2006).

34. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992).

35. See *id.* at 35–36 (stating that the author does not “doubt for a moment the importance of theory in legal scholarship,” but arguing that theory must be balanced with practice). Lovvorn is more grudging on this point, but seems to see some value in the work of “the handful of scholars who are already devoted to exploring what a future world with animal rights might look like.” Lovvorn, *supra* note 11, at 148.

36. Taimie L. Bryant, *Similarity or Difference as a Basis for Justice: Must Animals Be Like Humans to Be Legally Protected from Humans?*, 70 LAW & CONTEMP. PROBS. 205 (Winter 2007).

37. David N. Cassuto, *Bred Meat: The Cultural Foundation of the Factory Farm*, 70 LAW & CONTEMP. PROBS. 57 (Winter 2007).

38. William A. Reppy, Jr., *Broad Exemptions in Animal-Cruelty Statutes Unconstitutionally Deny Equal Protection of the Law*, 70 LAW & CONTEMP. PROBS. 253 (Winter 2007).

39. See Jeff Welty, *Humane Slaughter Laws*, 70 LAW & CONTEMP. PROBS. 173 (Winter 2007).

The Business Lawyer serves corporate attorneys, *The Champion* serves criminal defense lawyers, and so on. Animal law does not yet have such a publication, but state bar journals and legal newspapers will serve until we do.

Third, we can use the prominence that our academic positions give us to influence those outside the legal field. We can write in interdisciplinary journals, like this one. We can reach the public by writing op-eds in newspapers. And we can address policymakers directly, by commenting on proposed regulations and giving testimony at legislative hearings.

Fourth, and finally, we can teach our students. “Foot soldiers” need basic training, and future animal lawyers need guidance and encouragement.

VI

CONCLUSION

There is much to be done. But this symposium shows that many are willing to join in the task. The authors in this volume include both new voices and familiar faces, academics and practitioners, lawyers and laypersons, welfarists and rightists. It has been a privilege to work with each of them.

In the grand scheme of things, it may be no great accomplishment to produce a well-attended and interesting conference, and a volume of thoughtful legal scholarship. Still, for me, for my co-editor Bill Reppy, and for all of those who worked on this symposium, it has been a rewarding experience. Thanks especially to the staff of *Law and Contemporary Problems*, to all those who attended the conference, and to those who may find the articles in this volume to be of some interest or use.