

Animal Law
Syllabus
Harvard Law School, Course Number 30550-31
Paul Waldau, Spring 2008
Monday and Tuesday, 8:00-9:30

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I. TOPICS AND GOALS

In this course, we consider a series of topics that come under the general headings “animal law” and “animal rights.” We also address the extent to which legal systems, specific cases, legislation, and background cultural values have affected, and will continue to affect, the ways in which judges, administrators, politicians, lawyers, law students, legal scholars, and lay people see and speak about animals other than humans (these living beings are referred to in any number of ways: “animals,” “nonhuman animals,” “other animals,” “other-than-human animals”).

We also examine why this general subject matter is controversial for many inside and outside the legal community. As is stated at the website of Federation of American Societies for Experimental Biology (opa.faseb.org) regarding the recent launch of an animal law website by the National Association of Biomedical Research,

Animal activists and animal rights lawyers have stepped up the campaign to change existing laws as they relate to animals. This campaign involves legislative initiatives at the state and federal level and the establishment of new common law through the courts. These initiatives have the potential to profoundly affect animal research. NABR believes the biomedical research community should better understand existing laws affecting animals as well as the many new legal challenges and theories advocated by animal rights lawyers and activists.

The purpose of the course is, thus, not only to learn substantive law in relevant areas, but also to understand the background of claims made explicitly or implicitly in or about legislation, judicial or regulatory decisions, and enforcement that concerns other animals. To address such questions, we will examine how decision-makers and the general public now think and speak about these living beings. We will thus regularly ask questions such as these:

- ◆ How well have decision-makers in law seen and/or understood other animals?
- ◆ In what ways do case decisions and legislation reflect values from outside of law regarding other animals? In other words, what extra-legal sources are relevant to decisions in cases and the interpretation of legislation and administrative regulations?
 - ◆ Note—we will use the categories “legal,” “ethical,” “philosophical,” and “cultural” to identify different kinds of issues, each of which plays a major role in the current legal system. These categories aren’t the only ones that could be used, and students should feel

free to suggest alternative category schemes that may help us see the vast array of issues we will encounter.

- ◆ What are the future prospects for using various parts of the legal system to address the status of other animals?
- ◆ How does the American legal system handle new scientific findings regarding the lives and complex realities of nonhuman animals? We will give particular emphasis to questions about new findings regarding the more complex living beings outside the human species, such as the large-brained social animals known as cetaceans (that is, whales and dolphins), nonhuman great apes, and elephants. For example, we will ask, What do legal systems and their decision-makers do when new, observation-based findings contradict traditional, mainline interpretations that these animals are simple, lacking in mental complexities, "red in tooth and claw," or exist solely for the use of the human species?
- ◆ Going beyond the basic notion of how "animal law" is developed in national legal systems, what happens when one journeys into the more amorphous and increasingly important domain(s) of international law?

Because this is a dynamic field with new developments occurring on a regular basis, we will incorporate into our discussion references to various developments and new legal issues that may occur during the term.

The **primary goals of this course**, then, are:

- ◆ Learn the substance and principles of existing law as it addresses nonhuman animals.
- ◆ Develop a sense of the many different traditions that contribute to legal and other understandings of nonhuman animals, especially as these traditions affect conceptualization of legal protections and existing rights with which court systems and lawyers must deal.
- ◆ Grasp the complex debates about "animal law" and "animal rights" now common in 21st century policy discussions.
- ◆ Assess the future possibilities of using various legal concepts and tools, such as "rights," "legal personhood," and "standing," to address the relationship of humans to living beings outside the human species.

II. COURSE REQUIREMENTS

1. Regular attendance, reading of the assigned texts, and participation in class discussions (see Section III. below, Some Notes on Teaching Matters, and Section V re the importance of participation in grading).

2. Occasional presentations in class on specific parts of the day's assigned reading (this will begin in the second class session). Typically, several students will be assigned ahead of time the

task of describing certain cases and/or concepts for the general class. This will facilitate the discussion of these cases in the next session. We will, from time to time, use active learning techniques and ask students to explain concepts to the rest of us.

3. Final paper on an approved topic

4. Midterm (see section V. below)

III. SOME NOTES ON TEACHING MATTERS

While classes in this course are a combination of lecture and group discussion, the goal is collaborative learning. As noted above, your course grade will be based, in part, on participation (see section V. Grading for more on this topic).

Some of the sessions will involve longer class-wide or smaller group discussions. Each student is encouraged to articulate her or his views of the subjects discussed, and each student is expected to handle in a respectful manner the opinions expressed and questions asked by others. It has been said that to be educated is to know how to understand, experience, and respect difference. Indeed, as Gandhi pointed out, differences can even “prove helpful, where there are tolerance, charity and truth.”¹ Listening carefully to others' questions and analyses turns out, then, to be as important as attempting to answer one's own questions. The important skills of asking questions and listening carefully are talents that can be acquired and enhanced, and each of us is benefited when we inquire individually and as a group in a manner that encourages everyone to state opinions openly.

While the texts you will read are, at times, challenging, you will be expected to have read them carefully and to be prepared to discuss them. In addition, the materials in the various handouts will be the subject of discussion, and students may from time to time be asked to relate them to an ongoing discussion or lecture materials presented.

IV. BIBLIOGRAPHIC INFORMATION

A. Required Texts

- *Animal Law: Cases and Materials*, Third Edition, ed. by Sonia S. Waisman, Bruce A. Wagman, and Pamela D. Frasch, Carolina Academic Press, Durham, North Carolina (referred to below as "Casebook")
- Wise, Steven W. 2000. *Rattling the Cage: Toward Legal Rights for Animals*, Cambridge, Massachusetts: Merloyd Lawrence/Perseus (referred to below as “RTC”)

B. Handouts. In addition to these readings, handouts from various other sources will be made available.

C. Additional References will be provided in a handout.

V. GRADING

Due to the collaborative nature of this course, attendance, reading, and participation are essential. Grades will be based on these factors:

1. *An Autobiography: The Story of My Experiments with Truth*, Boston: Beacon, 1957, page 159.

- (1) 15% of the final grade will be based on participation in class.
- (2) 15% of the grade is based on the midterm.
- (3) A paper on an approved topic will constitute 70% of the final grade.

CLASS SCHEDULE

Week 1

Session 1, January 28, Monday— Introduction, "What is Animal Law?"

- a. Today's ferment on the "animals" issue
- b. Ingham's 1900 book versus the present casebook (Handout #1)
- c. The extra-legal debates
 - ethical—who are "the others" and what should a moral agent do or not do?
 - philosophical—how do we know what we claim to know about "animals"? And, given a rigorous, evidence-based answer to this question, how do we speak about other animals?
 - cultural—what is the significance of differences from one culture to the next, especially mutually exclusive claims and viewpoints about other animals?
- d. The future—where are we headed? Will changes be made, or will today's status quo prevail? What will "animal law" look like in 2100?
- e. Student introductions
- f. Raising our self-consciousness about how we see and talk about "animal issues"—the relevance of this to ethical, philosophical, cultural, and legal issues.

Session 2, January 29, Tuesday— Historical, International, Practical Issues

- a. The history of animal law: from ancient times to the present dominant cultural tradition in the United States
- b. Brief discussion of non-US legal systems and international law
- c. Discussion of the sources of various contemporary "doctrines" and their evolution from religion and philosophy into today's law.

Reading: Casebook—469-472 (the passage from Evans); opening comments and Knox case at 3; Holcomb at 21; Cleve at 11; Lock at 5; look generally at (i) 472-476 on anti-cruelty statutes and (ii) definitions of "animals" at 17-18.

Casebook; RTC Chapters 1-4

Recommended Reading: Casebook 3-37; Handout #2 at course website—sources for "animal law"

PART I—SUBSTANTIVE LAW

Week 2

Session 3, February 4, Monday—The Central Role of Property Concepts

- a. The concept of nonhuman animals as personal property (look closely at the opening comments at Casebook 39-40)
- b. Have nonhuman animals always and everywhere been regarded as property?
- c. Is property status an "all or nothing" matter?

Reading: Casebook 39-69; Handouts #3 (Property or Persons—All or Nothing?) and #4 (Bewitchment by Means of Language? "Guardian" versus "Owner")

Session 4, February 5, Tuesday—Property and Other Animals (continued)

We continue with the discussion of the ways in which the property notion works in legal systems and the nature and sensitivity of analogies between humans and other animals. We will raise various issues raised by the treatment of and thinking about other animals, including the nature of property across jurisdictions and the notion of interlocking oppressions (sometimes called “The Link”

Reading: Same as previous session

Week 3

Session 5, February 11, Monday—Contracts and Other Animals

- a. Various ways in which “contract” issues are central to human life. In what ways are nonhuman animals part of this and in what ways are nonhuman animals outside this feature of human lives?
- b. The Landlord/Tenant cases
- c. Condominium Law and attempts to control the kinds of “property” that residents can possess
- d. Marital Dissolution issues regarding nonhuman animals
- e. Polls regarding “animals” and various statutes regarding language about nonhuman animals

Reading: Casebook 541-572

Session 6, February 12, Tuesday—Contracts (continued)

- a. Bailment issues as they affect nonhuman animals

Reading: Casebook 135-139

- b. Common Carrier issues

Reading: Casebook 572-581

- c. Insurance issues

Reading: Casebook 581-585

- d. Horse and dog racing, various entertainment issues

Reading: Casebook 462-468

Week 4

Session 7, February 18, Monday—Torts

We consider various issues affecting how nonhuman animals are seen and public policy options.

- a. Types and measures of damages (both the prevailing measures used now and possible alternatives); and

- b. SLAPP suits and defamation

Reading: Casebook 71-134, 307-359

Session 8, February 19, Tuesday—Torts (continued)

- a. Veterinary malpractice

Reading: Casebook 139-155

- b. Injuries by caused by different kinds of animals

Reading: Casebook 161-181

- c. Alternative Causes of Action

Reading: Casebook 156-160

- d. Tort law as public policy, tort law as cultural bias, tort law as education

Reading: Casebook 699-700

Week 5

Session 9, February 25, Monday—Will and Trusts

What happens to animals after their human companions die? Are humans free to dedicate their own resources for the benefit of any nonhuman animals? Issues arising from trust and will provisions impacting nonhuman animals will be discussed in this session—we focus as well on the creative possibilities in these areas of substantive law as examples of legal system's flexibility in meeting human needs and values.

Reading: Casebook 587-618; 711-712; Handout #5—Favre 2000 article in *Duke Law Journal*

Session 10, February 26, Tuesday—Criminal Law

What protections are there for nonhuman animals under the criminal law? What is the nature of these protections? How is cruelty defined? We will discuss (1) changes in penalties for violation of anti-cruelty laws, and (2) non-governmental groups working with prosecutors to prosecute animal abusers. If time permits in this session, we will also address animal fighting provisions, the link between animal abuse and human violence, forfeiture of impounded animals, prosecuting animal collectors, hunting issues, and animal trainers.

Reading for this Session and next: review again Casebook 469-476
Casebook 477-540

Week 6

Session 11, March 3, Monday—Criminal Law, second session—More Basic Issues

Review Handout #3 (Property or Persons—All or Nothing?)

Casebook 307-374

Handout #6 (Wolfson, David 1996. "Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production", 2 *Animal Law* 123-151; this article also appears in book form: Wolfson, David J. 1999. *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*. US: Farm Sanctuary)

Session 12, March 4, Tuesday—Midterm

PART II—WHICH LEGAL CONCEPTS FOR WHICH ANIMALS?

Week 7

Session 13, March 10, Monday—Rights and Alternative Legal Tools

Reading: RTC Chapters 5 and 6

Review again Casebook 63-69

Casebook 691-693, Joyce Tischler, "Toward Legal Rights for Other Animals"

Handout 6A Declaration on Great Apes

Handout 6B Jerrold Tannenbaum article on anticruelty laws and rights

Session 14, March 11, Tuesday—More on the Complexities of the "Rights" Concept

Reading: Same as Session 13

Week 8

Session 15, March 17, Monday—Alternatives to "Rights" Discourse

We focus directly on which concepts other than “rights” (1) have been used and (2) might now be used to discuss the place of nonhuman animals in human society and legal systems.

Reading: Handout #7—Tribe on RTC; Handout #8—Waldau article on RTC (hard copies of this will be made available); Handout #9—Waldau and Whitman article “The Animal Invitation”

Session 16, March 18, Tuesday—Alternatives to "Rights" Discourse, Part II

We continue to examine concepts and legal “tools” other than a specific grant of “rights” to individuals.

Reading: We’ll address any readings from the previous session that we did not cover in the March 17 session.

Week 9: Spring Recess

No class on March 24 and 25

Week 10

Session 17, March 31, Monday—The Concept of Constitutional-Level Legal Protections

In this session, we address the historically important use of constitution-level legal protections. We begin with a brief survey of several countries’ constitutional provisions regarding animals. We then turn to the historically important debate regarding “standing,” a concept which continues to play a central role in discussions regarding legal protections for nonhuman animals.

Reading: Casebook 183-271; Handout #10 regarding constitutional protections in India, Switzerland, and Germany; Handout #10A on recent decision by Austrian court on “personhood” for chimpanzee Hiasl

Session 18, April 1, Tuesday—Constitutional, Part 2

We consider what limitations are imposed by practical realities of the present system, the free exercise of religion and freedom of speech as “animal law” issues (for example, we will ask if activities harmful to nonhuman animals, such as animal sacrifice and hunting, are covered by fundamental constitutional protections such as those of the First Amendment). We will also address due process issues.

Reading: Casebook 272-306

PART III—LEGISLATIVE ISSUES

Week 11

Session 19, April 7, Monday—Federal Legislative Issues

We consider in this session some major federal legislation affecting other animals—we will ask what policies, values, and worldviews are evident in the materials we examine.

Reading: Casebook 374-415 (Animal Welfare Act); 359-374 (Humane Slaughter Act)

Handout #11—Legislation: The Challenge of Basic Issues and Questions

Session 20, April 8, Tuesday—Federal and State Wildlife Law

We will look at a variety of wildlife statutes, and then ask specific questions regarding the nature and source of the policies, values, and worldview(s) that undergird them.

Reading: Casebook review again 695-698; 619-643 (Endangered Species Act); 643-667 (Marine Mammal Protection Act)

Handout #12—Massachusetts regulations v. Texas regulations;

Handout #13—State and Federal Laws Regarding Chimpanzees

Week 12

Session 21, April 14, Monday—State Legislative Issues

We examine specific pieces of state legislation to assess what policies, values, and worldviews are evident in the materials we examine.

Reading: Handout #14—2005-2006 Legislative Review from *Animal Law*, Volume 12

Handout #14A—2004 Legislative Review from *Animal Law*, Volume 11

Handout #15, Humane Scorecard for 109th Congress

Session 22, April 15, Tuesday—Local Ordinances and Popular Initiatives

We discuss the role of municipal or county law in the past and future of “animal law,” and then the role of popular or ballot initiatives.

Reading: Handout #16—this contains samples of local ordinances (Malibu, CA, resolution re cetacean rights; Cambridge, MA ordinance re oversight of laboratories; West Hollywood, California, ban re declawing of cats).

Handout #16A—this contains information on various popular initiatives.

Week 13

Session 23, April 21, Monday—International and National Ferment in the Animal Protection Movement

Reading: Handout #17, *State of Animals 2003* summary of developments

Handout #18, Kinshasha Declaration and one-page flyer from Great Ape World Heritage Species Project

Session 24, April 22, Tuesday—Concluding Remarks on the Future in Relation to the Past

We discuss possibilities in the shape of “animal law” in the year 2100. Will “animals” and “animal law” become increasingly important issues in public consciousness? If so, why and to what extent (and why these areas and not others)? What lies ahead in this field of law? What will the role of legislation be relative to common law and judicial decision making?

We will also discuss student ideas regarding what directions litigation and legislation might go in the coming years.

Reading: Handout #1 (again)

Handout #19, What and Who is the Future of Animal Law?

Handout #20, hard copy of presentations, questions and answers from 2002 Harvard Law School conference “The Evolving Legal Status of Chimpanzees”

Due Date of Final Paper to be agreed upon and announced in class.