

Catching the Second Wave of Animal Law

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How do we go about our attempt to see the future of animal law? We can speak rather specifically, of course, about the near-term projects on which we will focus in the coming few years. But what I’m after in this paper is our need to assess the possible directions and shape of animal law *decades out into the future*, which takes an altogether different imagination than does looking only at possible projects in the coming years. To meet this need, in this paper I employ what I call *three lenses*—a generalization, a warning about social movements, and an imaginative image to help us see the terrain we walk as ethical creatures.

The generalization is this pithy observation by Robert Cover: “*Law is the projection of an imagined future upon reality.*”¹

The warning is embodied in this observation about social movements: “*It’s hard enough to start a revolution, even harder still to sustain it, and hardest of all to win it. But it is only afterwards, once we’ve won, that the real difficulties begin.*”²

The third lens is a simple, three-word phrase that I take to be an imaginative image luring us into a healthy intersection with lives beyond our species—this image is “the animal invitation.” This image suggests that other animals have lives that, if we notice and take them seriously, call out not only to the deep ethical instincts so characteristic and defining of human lives *but also* to our desire for communion or relationship with the larger life community. Other-than-human animals invite us to inquire about them, to take them seriously, to take enjoyment in our similarities and differences, and even to relate to them as community members.

Using these lenses, the rest of this paper (as well as my oral comments during the April 11 panel “Defining the Second Wave of Animal Law”) tries to look at both middle and longer term issues. So I will speculate about the future of animal law out to, say, the year 2030 and also about longer term issues regarding the shape of animal law at the end of this 21st century.

Considering these longer-term issues is an important exercise for a variety of reasons—if we do this exercise well, we surely can better help the many nonhuman animals that will

¹ Robert M. Cover, “Violence and the Word,” 95 Yale Law Journal 1601, 1604 (1986).

² Said by Larbi Ben M’Hidi to Ali la Pointe in the 1957 documentary “The Battle of Algiers” directed by Gillo Pontecorvo. This influential film in the history of political cinema focused on the 1957 revolution in Algeria.

benefit if different societies develop laws that are based on scientifically-informed and compassion-sensitive views of the living beings outside our species. In addition, we will also educate better in response to students' values and needs. Both of these goals—creating laws related to nonhumans' realities, and educating humans better—have been driving forces shaping the “animal law” we encounter today in law school education. Both also can also be decisive factors in choosing how we go forward for the rest of this century.

What we learn from this exercise will help us closer to home, as it were, with the important challenges of prioritizing our allocation of scarce resources, recognizing what kinds of programs are needed for the future, and providing guidance as we pursue data collection and research. Above all, though, asking questions about the future of animal law forces us to recognize that *we are responsible for this future*. Grappling with this responsibility promises to deepen everyone's reflection about possible shapes and directions for the future of animal law. It is this deepening of our awareness that will advance our community's ability to talk about the general problem and, hopefully, see relevant issues and make responsible choices.

The Task-at-Hand—Animal Law with Humility and Imagination. My own sense after teaching animal law for a decade and animal studies for two decades is that the task of assessing the future must be pursued with equal parts of humility and imagination. The need for imagination in assessing the future is grasped by anyone reading this paper, but less obvious may be the need for humility. When it comes to thinking about and treating nonhuman animals, my personal experience is that we are at our best when we are at our most humble about other animals, and at our worst when we arrogantly assume other animals are mere resources for our use. By “at our best,” I mean that our ethical and scientifically discerning insights are greatest about other animals' realities when we leave aside the breathtaking claims about our own importance. Most of us have been raised in an education system, law schools included, that assumed without sophisticated argument that *human* intelligence has paradigmatic qualities for *any* intelligence. In other words, the particular ways in which we are smart often is employed as the measuring stick by which we measure all intelligence, including that of other animals and even divine entities. This is a very troubling paradigm given what we know from our sciences, religions and common sense experiences, but this unreflective tendency nonetheless continues to operate in *every* precinct of the education establishment today, including law schools.

As everyone knows, humans throughout our recent history have made an astonishing number of claims that reveal we truly think a great deal of ourselves. A good example, because it is so common *and* transparently false, is the religiously-anchored belief that the world was designed *for us*. A related idea is harbored by *non-religious* people who repudiate religious claims that the world was “designed for us.” This is the notion is that it is perfectly acceptable for humans to dominate the world because we are the most powerful animals. There is little practical difference between these two assumptions, for both lead to moralities and education that teach people to act as if other living beings are on the Earth solely for our taking and enjoyment.

Think of legal education's complicity in this arrogant fiction—our legal universe is a stark place because it is dominated by the dualistic “legal persons *versus* legal things” categorization of our world. Legal education perpetuates this division in countless ways—in first year property courses, the 1805 case *Pierson v. Post*³ continues to be discussed as if the right to possess wild animals generally revolves solely around the conflict of *human* interests. The hunted animal is a mere resource, and we have trained many generations to treat silence about dead fox's interests as the order of nature—the obscuring of this one fox and other animals is, of course, merely our own culture's custom. Many *other societies* have noticed that foxes or other hunted animals are, like us, sentient beings who have interests of their own. But our legal system has for a substantial while now assumed away the importance of even noticing the fox's interests, let alone taking them seriously.

We now know that claims suggesting *this world* was designed primarily for humans are baseless and thus, to borrow a phrase from Jeremy Bentham, “nonsense on stilts.” Other cultures have often treated interactions with other-than-human animals as events of great importance, and many people in our culture have as well—think of Francis of Assisi and Albert Schweitzer. Empirical evidence, which we prize so often in other contexts, reveals how fully wrong humans can be when acting as if the world is *for us alone*. John Muir, for example, spoke the plain truth when he commented, “I have never yet happened upon a trace of evidence that seemed to show that any one animal was ever made for another as much as it was made for itself.”⁴

Today, quite a few students in animal law courses (as well as other courses) wonder whether our inherited certainties regarding an individual's “right” to own any and all nonhuman animals can be morally justified. Students also regularly question whether this traditional position is one that today's legal system ought to perpetuate, let alone champion. Students' “wondering” in this vein provides educational opportunities of the first rank. As one of the deep beauties of an animal law course, they repeatedly remind us how easily and well this course creates chances to consider what legal systems do, and whether they do—or do not—offer fundamental protections, and if so for *which* of the world's living beings. When this most basic question is asked, the same question about *humans* is nearby as well. Animal law courses are, it turns out, about the most fundamental features of legal systems—more on this below when the issue of philosophy of law is broached.

Based on teaching somewhere in the range of a thousand students in animal law and animal studies courses, my impression is that people interested in today's animal law discussions display regularly remarkably strong commitments to the importance of ethical inquiry for both nonhumans *and humans* alike. The prevalence of such

³ *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805)

⁴ John Muir, “Wild Wool,” *Overland Monthly* 20 (April 1875), 364. Cited by many authors, including Nash, Roderick. 1989. *The rights of nature: a history of environmental ethics*. History of American thought and culture. Madison, Wis: University of Wisconsin Press.

sensibilities owes much to the fact that the pioneers of today's animal law movement were from the start, and remain, gifted at a broad vision—they clearly noticed other-than-human animals and took them *seriously*.⁵ But these pioneers also cared as fully about humans, and in myriad ways. Comparable abilities to notice nonhuman and human “others” clearly exist in all humans, so it is perfectly plausible to claim that our species is a *potentially* moral species.⁶ I suggest below in Footnote 12 that our species' record regarding protecting one category of animals—humans—supports the conclusion that our species has yet to realize this potential.

In the matter of our treatment of nonhumans, as well, the record of modernized, industrialized cultures in dismissing living beings beyond the species line also falls far short of what one might expect of a truly *moral* species—secularists and religionists alike continue to make unreflective claims today that humans *alone* have, *and ought to have*, the unquestionable right, morally and legally, to dominate the Earth and other-than-human animals. What is particularly telling is that self-serving, narrow-minded behavior promoting radical human superiority in even minor, luxury-driven ways is not only tolerated, but actively promoted, by our leaders, our businesses, our public policy specialists, our consumers, *and our laws*.

Most relevant to the future of animal law is the fact that our legal system has been fully complicit in promoting such debilitating versions of human superiority. Our educational system has simply not produced a majority of citizens (or lawyers or lawmakers) who are informed and sensitive about the natural world. Especially disheartening is that today's education is of the kind that continues to produce highly effective vandals of the Earth. As to legal education, before the emergence of animal law there was an astonishing failure to problematize or challenge *in any way* claims that “legal things” are there *for us* as legal persons, whether as individuals or as our corporate entities. Simply said, this tenet of modern law has long been *and remains* the heartbeat of much contemporary law in those modern, industrialized societies that evaluate themselves as “the most advanced.”

There have been critics, of course, of our own species' exclusions of all other-than-human animals from moral protections. Some of these critics have come from within religious traditions, but many have come from secular traditions. For example, secular-minded analysts have given various names to this benighted tendency to dismiss any and all nonhuman animals—speciesism, human exceptionalism, human chauvinism, homocentrism, human imperialism, human solipsism, exclusive humanism.⁷ Today, active citizens around the world challenge many forms of ignorance-anchored and arrogance-driven species-based selfishness. They do this in a number of ways—not only through animal-related legislation, litigation and consumer-reform, but also through

⁵ For a most helpful view of the early history of today's animal law movement, see Joyce Tischler's “The History of Animal Law, Part I (1972-1987),” 1 *Stanford Journal of Animal Law & Policy* 3 (2008).

⁶ I explain in other publications how the question “who are the others?” sits at the very heart of all ethics—see, for example, the material on ethics in the forthcoming *The Animal Invitation: Religion, Law, Science and Ethics in a More-Than-Human World* (Columbia University Press, 2010).

⁷ These terms and others are discussed in *The Specter of Speciesism*, Chapter Two.

environmental legislation and litigation, educational initiatives of many kinds, documentary films like “The Cove,” and even literature. Certain practices that formerly were seen as modern and cutting edge, like factory farming, are now challenged because those practices reveal how truly insensitive we have become as individual consumers, as business entities, and as whole societies.

That such challenges abound in both animal law and animal studies augurs both good prospects and complex problems for the future of animal law. Both areas can create awareness of the importance of humans’ engagement with other-than-human animals. In place after place around the world today, many humans reveal what many cultures in era after era have shown—humans have the imagination to live in ways that share the world with other animals. This alone speaks loudly about our great strengths as potentially caring, compassionate and thus moral creatures. This is what I mean when I say “we are at our best when we are most humble about the importance of other animals.”

Such achievements are those of our imagination, which takes us beyond the myopic, self-serving features of the ideas that all of us have inherited from our culture and the present legal status quo regarding our right to dominate and own any living being that happens not to be a member of the human species. Once we have imagined such a future, there are further steps. We next arrive, for example, at the challenge of creating specific, daily, *actual* practices that allow us to share the Earth with other living beings. Practical arrangements are, of course, a key strength in law circles. Key roles are already being played by *specific* visions, ideas and concepts about specific animal groups—examples include focus on protecting natural habitat for free living populations, prosecutions of cruelty violations in our midst, proposals to use our most fundamental and effective legal protections for chimpanzees and other nonhuman great apes, suggestions that legal ownership be coupled with duties to provide fundamental needs of domesticated animals, and protections for wild populations tied closely to detailed science about the animals’ *actual* abilities and social realities. It is through engagement with such specific topics that we can see *possible futures* for a world that is generally hospitable to a wide range of nonhuman animals.

In the list of human abilities needed to imagine and realize a plausible future in which humans coexist with other-than-human animals, the key skills of imagination and humility will be joined by other crucial human skills. We surely need a keen sense of history and cultural change as we think about our possibilities with other living beings. In addition, I think a willingness to listen is important, for there are many options before us—no one person or group or culture is likely to imagine all of the options we might choose. These are, of course, supremely important learning tools in any facet of life, but especially so as one revamps education and attempts changes in social values, which developing animal law fully will require.

Another important human skill is a willingness to think carefully about other animals’ *actual* realities and their *whole* lives in *their* contexts. Doing this presents a very special set of challenges, to be sure, for we quite clearly have serious limitations when it comes to thinking about *them*. Other animals often have abilities, like echolocation or keen

senses of smell or a difference sense of identity and relation to their local community, that are impossible for us to imagine even when we are completely committed to “knowing” these realities. Despite such limitations, surely we can, to some extent, discern the general outlines of the lives and abilities of many other mammals, birds, and more. Thomas Merton once observed, “We owe a definite homage to the reality around us and we are obliged, at certain times, to say what things are and to give them their right names.”⁸ This sentence captures the common-sense issue at stake when we try to learn about other animals’ lives. We might call this approach an “ethics of inquiry,” because it suggests we know that one task we have, if we are to be a moral species, is to go out into the world and fairly evaluate what the realities of other living beings are. We will not be a moral species if we merely dwell on the elegance of our own intelligence and dismiss anything alien to that.

Calling out realities as they actually are sounds simple, but of course it is not. We will have to work hard to employ sciences and various versions of common sense to accomplish this. It should not be overlooked that this enterprise has an ethical feature to it. The philosopher Thomas Nagel states clearly why such inquiries are important to *us* and our own character development: “transcendence of one’s own point of view in action is the most important creative force in ethics.”⁹

Because we are a science-focused society, and because so many humans are gifted at being science-literate, pursuit of the truth is quite familiar to us. We convene this conference at a university that has a one word motto—*veritas*. This is that same goal that motivates an ethics of inquiry. Thus, while working toward an honest evaluation of what other animals are actually like in their world may be a challenge, doing so is clearly consistent with much else that humans attempt to do and know—live life with simple, common sense approaches that are rich with empirical evidence, pay attention to what our science-based enterprises say about the world around us, and lead on the basis of our ethics-based sensibilities. If we do such things, human communities can surely claim that we are indeed a moral species.

This makes the task of animal protection sound simple—figure out what *they* are like, and then protect them efficiently. Of course this has great challenges in practice, as the present poverty of animal protective laws makes only too clear. But we know the basics about how to go about this challenge—be our ethical selves, be imaginative, be humble, and be in conversation with other humans about why this is important. I will suggest below that it is *clearly* possible and reasonable to do this—the starting point is our daily lives, for as another philosopher once wrote, “The only way to find a larger vision is to be somewhere in particular.”¹⁰ Animal law classes have the particular advantage of starting amidst students’ frank acknowledgement that nonhuman animals have interests, and that human-centeredness is an impoverished and extremely limited form of humans’ moral

⁸ Thomas Merton, *No Man is an Island*. New York: Dell, 1955, at 187.

⁹ Nagel, Thomas, *The View from Nowhere* (New York and Oxford: Oxford University Press, 1986, at page 8).

¹⁰ Haraway, Donna. 1988. "Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective." *Feminist Studies* 14/3: 575-599, at 590.

abilities. Students clearly display the intuition that, as a practical matter, we are *failing today* to use common sense in approaching the matter of protecting other living beings. Students thus grasp easily and well that our ethical and legal abilities have to be combined as we approach the animals beyond the species line.

So in this paper, I am after a “larger vision,” namely, one that goes beyond the interests of our own species, and one that clearly aims to surmount the prevailing human-centeredness so evident in modern laws that are designed only for the protection of humans’ interests. So the task-at-hand is to pursue a vision of how we can use our legal systems to protect what we in good faith come to know of other animals because we have pursued an honest inquiry about their actual lives (this is the ethics of inquiry in action).

Focusing with Three Lenses. In the following, I ask you to peer with me through the three lenses to attempt an honest, humble, and imaginative view of the future of animal law.

The generalization: *Law is the projection of an imagined future upon reality.*

The warning: *It’s hard enough to start a revolution, even harder still to sustain it, and hardest of all to win it. But it is only afterwards, once we’ve won, that the real difficulties begin.*

The three-word phrase: The animal invitation.

These three lenses can do more than help us see further into the future. They can also help us see better today as we look around and try to recognize what is currently happening in law, animal law more specifically, and allied fields such as animal studies. Seeing such things better, we can begin to talk to one another about what might happen in the near term, the middle term, and the longer term future with regard to animal law.

One important problem that complicates any attempt to see the future of animal law is the widespread ferment one easily discerns in humans’ relationship with other animals. One indication of the pervasive changes is that the *Animal Law* casebook from Carolina Academic Press, which first appeared in 2000, is now in its fourth edition. Another indication is the increasing number of schools offering an animal law course. A third indication of our society’s opening up to animal issues is the rapid emergence of the field that has several names but which I think is best understood as “animal studies.”¹¹ It is not

¹¹ What’s in a name? This emerging field is perhaps best thought of as a super-field. At times, it goes under other names such as “human-animal studies.” Note how this name for the field starts out with “human”—the field today clearly is tinged by human-centered concerns, but while that is inevitable in some minor senses of “inevitable,” it is to be hoped that the principal focus will not be the animals within the species line but those beyond. Some of the individual fields in this super-field are very practical, while others can become so dominated by intellectual pyrotechnics that one struggles to find any real concern for or engagement with *actual, biological animals*. No doubt there are decades ahead in which we have to sort such problems—my fervent hope is that this emerging field, whatever it ends up being called, can take as its truest heartbeat the *actual realities of other-than-human animals*.

at all hard to find other signs that suggest people are reevaluating humans' possible relationships to other living beings—these signs are all about us in media, art, business opportunities, scholarship of many kinds, religious communities, local and state government, national policy debates, and on and on.

This rich, extraordinary ferment in humans' relations with other living beings has three important backgrounds or contexts. One is that the changes in the way we think and feel about "animals" are taking place even as much else is in ferment in our culture. Another background or context for increasing concern for nonhuman animals is that the increase takes place against prevailing human-centerednesses that are pervasive and often altogether unhealthy. Finally, shifts in attitudes about animal issues are going forward even though we have very serious unresolved human problems.

I am not going to spend time here on justifying these claims. I take it for granted that you would concede me or any other speaker at this conference the rhetorical power to convince the average person of these three claims:

- that change of many kinds is happening all about us (this has been going on for centuries, of course),
- that our society has an astonishing number of features that attest we are decidedly "human-centered," and
- that our societies are plagued by myriad unsolved human problems.

I include an extensive footnote here on humans-on-human problems—the footnote mentions salient facts about the prevalence of war in our history, contemporary problems with genocide despite international declarations of "universal" human rights, and the extraordinary problems faced today by women even though we have benefitted greatly from decades of a successful women's rights movement.¹²

¹² Will and Ariel Durant in *The Lessons of History* (New York: Simon and Schuster, 1968, at page 81) observed that over the last 3421 years, only 268 had been without a war. It is often assumed that nothing could be worse than war, but in 2009 Daniel Jonah Goldhagen published *Worse than war: genocide, eliminationism, and the ongoing assault on humanity* (New York: PublicAffairs). At Page xi, the opening sentence in Goldhagen's Preface states, "Hundreds of millions of people are at risk of becoming the victims of genocide and related violence." A short second paragraph describes some places of extreme risk, and then the third paragraph explains the title: "Our time, dating from the beginning of the twentieth century, has been afflicted by one mass murder after another, so frequently and, in aggregate, of such massive destructiveness, that the problem of genocidal killing is worse than war." Tragically, this account of mass killing of humans by humans is rivaled by stories of yet another human-on-human oppression—the disadvantaging of women *today* is described in Kristof, Nicholas D., and Sheryl WuDunn, *Half the sky: turning oppression into opportunity for women worldwide*. New York: Alfred A. Knopf, 2009. At page xvii, after describing the 1990 claim of the Nobel prize winning economist Amartya Sen about the fact that our human population seems to be missing 100 million women (at pages xiv-xv), the authors say the following in their introduction: "The global statistics on the abuse of girls are numbing. It appears that more girls have been killed in the last fifty years, precisely because they were girls, than men were killed in all the wars of the twentieth century. More girls are killed in this routine 'gendercide' in any one decade than people were slaughtered in all the genocides of the twentieth century.

"In the nineteenth century, the central moral challenge was slavery. In the twentieth, it was the battle against totalitarianism. We believe that in this century the paramount will be the struggle for gender equality in the developing world."

At the end of this paper and in *The Animal Invitation* I argue that we will handle our human-on-human problems *far* better if we stay open-minded to animal law prospects. To explain why this is so, and especially to make the point that animal law is *in and of itself* an extraordinarily important field *even if* we don't get such human benefits, let me ask you to look through these three "lenses" with the goal of seeing better the possible futures of animal law.

Lens 1—Cover's Generalization. Recognition that a society's law is a projection of someone's imagined future upon reality helps us see that a version of animal law was solidly in place long before the modern animal protection movement. It also tells us that *what we do today and tomorrow* with law in our societies will *also be a projection of a future* for those who come after us. What is it that *we* will imagine in animal law? What will we project *onto our children and their children*? Just as we live in terms of laws that our parents and grandparents enacted—and thereby projected *their* vision about human-animal relationships into the midst of our lives—so, too, we will shape laws and legal concepts and thereby project our ideas about human-animal relationships onto our children and their children.

This means that much is at stake in the future we choose. It also means that even if we do nothing, we will project onto our children's future the vision that our parents and grandparents projected onto us. There is no hiding from the fact that what we do, or fail to do, will impact our children and grandchildren.

This is but one reason that many active citizens interested in animal law seek changes today. Of equal or greater importance is the impact our laws will have on life beyond our species.

The fact that today's courses were demanded by students has given today's teachers an extraordinary opportunity. Today's teachers did not benefit from legal education—or general education, really—that was sensitive to nonhuman animal issues of the kind dealt with in animal law as we know it today. Those of us who are privileged to teach animal law today have been given the chance to teach a course less dominated by the human-centered concerns that shaped so decisively our own general and legal education. This means we have an important opportunity to meet student demand to engage honestly the inadequacies of present laws that govern the inevitable intersection of humans and other living beings.

It should not go unnoticed that most students in animal law courses are reacting strongly to these inadequacies. This phenomenon has developed in spite of countless teachings about the importance and "rightness" of human-centeredness, which comes in an astonishing variety of forms and strategies. As in the past, today human-centeredness is often a virulent political correctness, even a belligerent moral correctness.¹³

¹³ Permit me lighted-hearted play to illustrate something awful about the many different forms of human-centeredness that dominate today: Human-centeredness, or HC, is a reductionist form of thinking, really,

Human-centeredness, especially as it manifests in forms of political correctness and moral correctness, makes raising the interests of other-than-human animals a risky enterprise. But American law schools in general are a wonderful place to develop free expression. This is one of the reasons that so many animal law courses have been sought and realized, all of which has allowed today's developments in animal law to be the most developed part of the broader field called "animal studies" in this paper—more on this below.

Peering through Lens 2—Larbi Ben M'Hidi's Warning. This warning humbles anyone who seeks major changes in prevailing political realities, social practices, or ethical visions—all of which *any* legal system embodies.

It's hard enough to start a revolution, even harder still to sustain it, and hardest of all to win it. But it is only afterwards, once we've won, that the real difficulties begin.

Certain facts today—such as the number of courses, journals, conferences, and bar association groups—suggest strongly that "animal law" has arrived not just as a topic and/or course possibility, but as a field. The earliest pioneers in this field readily confirm the first part of Larbi Ben M'Hidi's warning—*It's hard enough to start a revolution*. They struggled for decades, and today we can see well how their insight and persistence paid off.

So the revolution has in fact started. Legal education's embrace of animal law courses reflects that a first wave of the field "animal law" has arrived on our shores.¹⁴ From 1977, when the first such course went forward at Seton Hall Law School, to 2000, difficulties in getting this revolution off the ground must have been formidable, for fewer than a dozen such courses were started. But with Harvard Law School's offering of an animal law course (called "Animal Rights" and taught by Steve Wise in 2000), the field took off—within only a decade, a ten-fold increase in the number of such courses has taken place. Such an increase would be significant in any field, of course, but particularly so in the

and I find it impossible to resist the temptation of reducing this arrogant, intellectually weak, ethically bankrupt version of speciesist valuing to a mere equation: $HC = PC \times MC$ (in ordinary language, human-centeredness is a product of the error of "political correctness" (PC) multiplied by the error of "moral correctness" (MC) of the self-righteous sort so common in fundamentalist approaches to religion and human-centered secularism). An implication of this equation is that the more insistent the political or moral correctness factor is in focusing on humans alone, the more virulent the human-centeredness.

¹⁴ Alternatively, one might choose to frame the historical issues a different way by suggesting that the *first* wave came not in the twentieth century, but in the nineteenth century and as early as 1822 with the passage of Martin's Law and other early nineteenth century legislation. This is not unreasonable, and if this alternative framing is how one chooses to see the different stages of animal law, then the emergence of animal law courses in late twentieth century law schools, which Joyce Tischler has pointed out first occurred in 1977 at Seton Hall Law School (1 *Stanford Journal of Animal Law & Policy*, at 10) might be seen as a *second* wave. The number of waves, indeed the terminology of "waves," "stages" or whatever, is less important than the simple reality that legal developments, like so many other social movements and changes, come in distinctive phases that over time grow into multifaceted phenomena.

case of animal law—there are about 196 accredited law schools in the United States, and with well over 110 schools offering an animal law course in 2010 (virtually all of which were the result of *student* petitions), a large majority of law schools in the U.S. now offer this kind of course to students. This also means that more than a thousand law students are taking this course each year—given lawyers’ proficiency at getting their voice heard in public policy circles (compare them to, say, veterinarians who historically have not been engaged seriously in public policy discussions), the emergence of so many animal law courses means that future policy discussions touching upon “animal issues” will likely be attended by graduates of these courses, all of which is very suggestive for the sophistication, direction and content of future policy discussions in this area.

If one is interested in the ethics-tenor of contemporary animal law education, or in animal studies, or in developing ever-greater sophistication when scrutinizing law for evidence of compassion, the animal law phenomenon in law schools will seem wonderful. *But* if one works in one of those institutions, professions or businesses where the use of law to protect nonhuman animals is seen as a threat to humans’ hegemony, then these developments no doubt create a chill.

Reflect for a moment on one feature of contemporary animal law’s development—it has emerged from a different source than do many of the other fields in law that have “arrived” in law schools in the last decade. Patent law, for example, finally has arrived (Harvard Law School hired its first full-time patent law professor in 2008). Patent law was already a significant field in business schools (Harvard Business School already had in the range of a dozen faculty members teaching about patent issues). Patent law is reliant (one might even say “parasitic”) on many other forms and sources of business-driven and economics-rationalized law, and it is no surprise to anyone that modern patent law is consonant with so much else in the existing economic order. Animal law has come about in a different way and from a different place—it bubbles up, as it were, from below. One of the political images we use for such phenomena is a biological/botanical one—animal law is a “grass roots” phenomenon. Another political description of this kind of development is “populist.” Other fields of law that have emerged in this grass roots, populist manner include women’s studies in law and the fields of law focusing on children.

The grass roots or popular sources for animal law are no doubt multiple and complex, but whatever they are, they can lead to what some in the establishment view as superficialities—the prevalence of anecdote, an insistence that common sense reasoning should prevail, the constant use of morals-based reasoning and motivations, the dominance of reaction and perfectionism, the absence of allegedly dispassionate and rigorous scholarship, and an alleged dearth of truly scholarly conferences that betoken a mature field.¹⁵

¹⁵ As I note below, such things are on the agenda of many animal law leaders—this conference is an example. Second wave animal law will surely blend the virtues and energies of first wave animal law with expertise drawn from a wide range of legal *and* non-legal fields.

My own sense is that all burgeoning social movements include any number of these features, if only because they are energy-driven rather than parasitic on established values, as is an economics-driven field like patent law. My observations here may be biased—I'm personally interested in "the cause" and have confidence that the future of animal law is robust. Even after I correct for such "biases," it seems "obvious" to me that such criticisms are based on a failure to see the movement for what it is—the opening up of law beyond the species line.

First Wave Animal Law. Another personal evaluation regarding the current state of animal law—to my mind, the first wave of animal law has opened up so much that it has, in fact, started a true revolution. In the concluding section of this paper, I will relate what I see as a possible future, but I acknowledge here that my vision is driven by my values and also subject to extreme limits given how I was educated. Such is the nature of trying to assess the future of a young social movement.

So I celebrate the early phase of modern animal law as having surmounted the challenges of the first part of Larbi Ben M'Hidi's warning—*It's hard enough to start a revolution.* But as I celebrate this, I recognize the caveat that revolutions are *even harder still to sustain.* So let me use this warning to raise some issues about what I have characterized as first wave animal law.

First wave animal law has prompted forms of animal law education that relies greatly on the following:

- use of traditional law school methods (such as casebooks, teaching of income making skills)
- traditional legal reasoning patterns in litigation
- a foregrounding of questions about "legal rights" as if that important legal tool is the "be all and end all" of legal protections
- preoccupation with those animals we dominate and live with (companion animals)—there has been much discussion of research animals, too, and more recently food animals. Wildlife remains the focus of species-level discussions dominated by extinction risks, not the sentience of the individual animals.
- preoccupation with cognition which risks a surreptitious affirmation that the human mind is the measure of the universe

First wave animal law has also been characterized by forms of activism that work primarily within public policy circles, particularly courts, legislative bodies and administrative agencies as if these circles are where we (our society) create and sustain our social values

These are achievements both interesting and important—in many ways, they have so far

proven a good road map to starting the revolution. So these achievements will continue to play important roles in the future. But below I suggest that these features of contemporary animal law education and activism are first wave “stuff,” if you will, and that the future of a robust animal law field requires more and different approaches.

I address each of these in turn when we come to a description of second wave animal law. But first, we turn to the third of our three lenses in order to consider what amounts to a common sense query about the ways in which animal law education today goes forward as does so much of our formal education “about” animals—that is, *with no provision for getting students around the very animals who are the subject of the work*. It is of the utmost importance that any field that aspires to help our societies engage the more-than-human world do so on the basis of an informed understanding of nonhuman animals. Can legal education do this? Of course it can, but virtually all education, including legal education, has yet to tackle this awesome challenge. This is one reason that that the second part of Larbi Ben M’Hidi’s warning—that it is *even harder still to sustain the revolution*—helps us focus on what is needed for the future of animal law *and education in law schools* as we press forward in this century to the years 2030, 2050 and eventually the beginning of the twenty-second century.

Lens 3—A Helpful Image. The three words “the animal invitation” are, on the page, just a phrase, an image, a generality. But *the actual realities* and countless invitations from nonhuman animals to humans that the phrase points to are rich beyond the ken of contemporary education. In his 2010 book *The Animal Manifesto*, the biologist Marc Bekoff begins the Introduction with this invitational note: “Animals are constantly asking us in their own ways to treat them better or leave them alone.” Many other animals’ lives, *if we notice and take them seriously*, beckon much within us—our profound and powerful ethical instincts, our desire and abilities for communion with individuals and the larger life community as a whole, and much more.

Today’s education, of course, is dominated by a series of exclusivist human-centerednesses that have resulted in deep failures to engage—not only does our education systematically fail to engage nonhuman animals’ realities, but it also fails to engage our impacts on other living beings. Especially relevant to the issue of animal law, there are few, if any, more virulent exclusions of other animals than that the legal system’s stark and impoverished dualism “legal persons versus legal things.”

Other-than-human animals invite us to inquire about this dualism, of course, and their general exclusion from our ethics courses, our professional ethics codes, our religious sermons, and our educational curricula. There is tragedy in this for many different reasons. For example, even though we know to a moral certainty that other animals have traits that we, as moral beings, should protect,¹⁶ our current traditions of engaging other

¹⁶ About all living beings we continually make what amounts to (hopefully) informed guesses, and this feature of our life is thus important in every human endeavor from science to ethics. This point is relevant to our judgments about nonhuman animals’ realities, as is made clear in a very elegant way by the following three philosophers—notice the common sense features of what is said here about the need for humility and generosity in assessing other animals’ lives and how we might respond to our search for the

animals' realities remain young and immature.

It is responsiveness to animals' invitations, especially as this is sensitive to the realities of nonhuman animals themselves, that today drives students to petition for animal law courses. So it is altogether relevant to the future of animal law that engagement with nonhuman lives prompts delight in the world, in the profound similarities and differences between humans and many other animals, and in prospects for community and all of its fulfillments and challenges. Such simple facts intimate how rich and robust the future of animal law can be. It also opens up the question implicit in Cover's generalization—*what future will we project as our children's reality?*

Bringing nonhuman realities into our awareness, pushing for protections of them as part of our moral circle and educational curricula, and then establishing legal protections will take a multifaceted effort by our society. It will surely take both imagination and an ethics of inquiry that are far more mature and sophisticated than that now prevailing in the legal establishment. It is gratifying that, in legal education, one already sees inklings of the possibilities in the dynamics of animal law courses where students willingly bring stories to class about different problem areas *and* how we are now learning more and more about other animals (about their emotions, communications, intelligences, communities, cultures and relationship capabilities).

So we need more than legal education that is flexible enough to allow animal law courses to emerge at the demand of students. We need the educational establishment, “the humanities” and “the sciences,” school administrators and professional organizations to notice other animals' invitations to us, to take these seriously, *and then* to assess how we might use our flexible legal, educational, and governing mechanisms to offer effective protections—each of these tasks requires us to project an open future, that is, a future dominated by discussion dynamics that *welcome* open-mindedness *and* open-heartedness.

In what is said below about second wave animal law, it will be clear that legal education has these values already by virtue of its commitments to open inquiry, Socratic method, freedom of speech, and critical thinking. These are, simply said, the reason that animal law could emerge as the leading edge of animal studies today.

truth about them. Daniel Dennett in his 1995 essay entitled “Animal Consciousness: What Matters and Why” suggests, “...a curious asymmetry can be observed. We do not require absolute, Cartesian certainty that our fellow human beings are conscious—what we require is what is aptly called *moral* certainty. Can we not have the same moral certainty about the experiences of animals? I have not yet seen an argument by a philosopher to the effect that we cannot, with the aid of science, establish facts about animal minds with the same degree of moral certainty that satisfies us in the case of our own species.” Other philosophers have commented on this “curious asymmetry.” James Rachels observed the following dilemma about attempts to use *nonhumans* in research in his 1991 book *Created From Animals: The Moral Implications of Darwinism*: “In order to defend the usefulness of research [researchers] must emphasize the similarities between the animals and the humans, but in order to defend it ethically, they must emphasize the differences.” Bernard Rollin, upon considering this dilemma, suggested, “From a strictly philosophical point of view, I think that we must draw a startling conclusion: If a certain sort of research on human beings is considered to be immoral, a *prima facie* case exists for saying that such research is immoral when conducted on animals.”

But we have come out of a virulently human-centered heritage—again, nothing demonstrates this more forcefully than contemporary legal systems’ fundamentalist attitude that *only* humans (“legal persons”) *really matter*. The upshot is that other animals’ realities are often not at all well known, and certainly not appreciated with imagination, humility and compassion. A key to achieving such imagination and inquiry will be interdisciplinary, multifaceted approaches that go well beyond what law alone can do now. This is why it argued in the next section that second wave of animal law will be characterized by increased recognition of the fact that law works hand-in-hand with many other disciplines to discover, explore and understand such nonhuman realities. From another angle, what animal law must do, now that it has achieved the first step of starting a revolution, is nurture other disciplines’ capacity for caring about others beyond the species line, just as the best of our human-centered law nurtures caring about other humans.

Second Wave Animal Law. Consider how each of the achievements of first wave animal law listed above might be enriched by an imaginative, humble, ethics-sensitive engagement with other living beings. The result can be a *qualitatively different* stage of animal law.

- *Use of traditional law school methods*—animal law educators surely should make use of traditional law school methods (such as casebooks), but much more is needed. The standardized form of animal law classes, with a few notable exceptions, is the introductory course that is an elective taken by interested students. Second wave animal law must be creative in reaching beyond this important but clearly introductory offering. As anyone who has taught an animal law course will attest, there is *no way* that a single course can address the many different dimensions and possibilities of animal law. Some of the creativity needed will come from liaisons that animal law creates with other academic disciplines that have informative perspectives on nonhuman animals.
- *Traditional legal reasoning patterns in litigation*—animal law activists and litigators *should be* experts at traditional legal reasoning patterns, and surely at litigation if only because litigation has often been the stronghold of those who use law to oppress others. First wave animal law has often had to engage the fact that the legal system’s technicalities have not only been mastered by the powerful, who can hire the cleverest, most connected lawyers, but have also been designed to limit non-lawyers’ access to courts. As discussed below, there are important perspectives that non-lawyers have to offer animal law. The values that drive the legal system are at best mixed—legal systems *clearly* have birthed and nurtured some very oppressive ideas and practices, such as oppressive notions of property and business that have been historically used against not only nonhumans, but humans as well. Franklin Roosevelt commented during the presidential campaign of 1935 that the U. S. Supreme Court had allowed notions of property rights and “freedom to contract” to create a “constitutional regime [that] had degenerated into a legalistic smokescreen for a world in which ‘life was no longer free; liberty

no longer real; men could not longer follow the pursuit of happiness.”¹⁷ And this was about *humans*. Further, since legislative fiats can override what breakthroughs one achieves in courts (even at the constitutional level via amendments authorized by a super majority), in liberal democracies one *must get to the people* who are the ultimate drivers of consumer patterns, economics, and legislative pronouncements, all of which will play key roles in the future of animal law.

- *Foregrounding questions about “legal rights”*—the foregrounding of questions about “legal rights” opens doors and minds, so its high profile in first wave animal law has been historically and psychologically important. But this valuable tool has its limits, and is but one among many others in the legal tool box. Invoking “rights for animals” is part of the larger moral revolution, but rights-based approaches have complex features that can actually disadvantage if used insensitively—see, for example, David Kennedy’s 2004 book *The Dark Sides of Virtue: Reassessing International Humanitarianism* where the author supplies important examples of how public remedies involving “explicit rights formalized and implemented by the state” do not work well in some other cultures. Rights will surely work well for chimpanzees in some contexts, although there are other tools that can work as well. But for many nonhuman animals that do not fit so well our fascination with cognitive abilities (addressed below), the notion of individual rights with public remedies might not work well at all.
- *Preoccupation with companion animals*—first wave animal law’s preoccupation with those *companion animals who are our family members* has been a brilliant populist move, but animal law as a field has many tasks to accomplish beyond protecting these important lives and family members. Frankly, these animals, as lovable and companioning as they are, are animals that we dominate as we live with them. Some imagine them to be “ambassadors” for other animals, but since companion animals fail to represent well the broad spectrum of nonhuman animals “out there,” use of companion animals as a paradigm poses some serious risks discussed elsewhere in this paper. The focus of first wave animal law on companion animals is evident in many places—the kinds of legislation proposed and passed, challenges to prevailing measures of damages for certain torts, and the agenda items featured by the ABA’s Animal Law Committee in its meetings. There are obvious political realities at play here, and it cannot be overstated how important these are for first wave animal law. But the revolution will surely prove *even harder still to sustain* if it stays at this level. Discussions about protecting other nonhumans, such as those used as research tools, still demand much attention, and more recently food animals are on many people’s ethical radar. As animal law proceeds with its revolution, we all do well to keep in mind that the very notions of “companion animal,” “research animal,” and “food animals” are *human-centered* categories (that is, categories we create—they do not fairly and

¹⁷ Ackerman, Bruce. 1998. *We the People. Vol.2: Transformations*. Cambridge, Mass: The Belknap Press of Harvard University Press, at page 310.

fully define the living beings within them). Wildlife remains a category less fully addressed by first wave animal law, in part because the early revolution gained advantages if, for a variety of reasons, it concentrated on cognitively sophisticated nonhuman animals or those with a companioning genius. Simply said, such concentrations gave first wave animal law a foothold in humans' imagination. But as everyone involved in animal law is so acutely aware, there are *many* other animals "out there," and animal law needs to engage them with creativity *and* in light of these additional animals' actual realities. Doing so will necessitate much greater entry into new realms, including environmental law in order to challenge this important field's one-dimensional focus on species-level discussions dominated by extinction risks. In short, second wave animal law needs richer approaches, for the present preoccupations are but one part of the future of animal law and do not provide detailed road maps to all future stages of this revolution.

- *Preoccupation with cognition*—people in the animal protection movement have long been aware that there is much more than cognition, of course, as Peter Singer's heavy emphasis on sentience decades ago underscored. There is *no doubt* that the heavy preoccupation with the cognitive complexities of the big social mammals (the nonhuman great apes, elephants, whales and dolphins) has opened minds to the fact that out beyond the species lines are brainy, amazing nonhuman animals *who* exhibit overwhelmingly rich and compelling cognitive features. This is one reason some publishing houses these days now suggest to their authors that the relative pronoun "who" be used instead of "that" if the reference is to a nonhuman living being. But a too heavy preoccupation with cognitive complexities can amount to a surreptitious affirmation that the human mind is the measure of the universe—those nonhumans that are sort of like us get protected because we are fascinated by the fact that someone else is cognitively somewhat *like us*. But if the upshot of this is that those that are not like us therefore count *less*, the price will be very high. Many ethicists, scientists and animal protectionists are deeply uncomfortable with this sort of cognitive hierarchy as the leading edge of our ethical obligation and legal protections—the insight that drives this discomfort is the insight at the heart of the most famous quote in the western world's animal protection movement, Bentham's penetrating observation that "[T]he question is not, Can they *reason*? nor Can they *talk*? but, Can they *suffer*?"
- *Focus on activism in courts, legislatures and administrative agencies*—work by first wave animal law within public policy circles has been crucial, particularly legislation and administrative regulation. *But* these venues, as important as they are, are decidedly *not* the circles of our society that *create and sustain* our social values. The fact that values are anchored out beyond specific laws and legal systems is a notion to which every law student is introduced during the first year of law school and then throughout the three-year curriculum. This happens as every lawyer-to-be is trained to think about fact situations or legal arrangements that "violate public policy." Consider what is at issue in this particular notion of public policy (which is *not* the same notion used in many public policy programs,

where the focus is almost exclusively on government action or what politicians do). The focus is not merely on public laws, public debates and government-based actions, but *also* on a set of values that are both broader and deeper—the words “cultural values,” or sometimes “social values” or “public mores,” catch what is at stake in the way law education uses the notion “against public policy.” These values are deep, foundational values, and they may well be found in and advanced by religious communities, historical narratives, education, linguistic habits, and even scientific practices. These deeper values *must* be addressed in second wave animal law if it is to get to the core problems driving the radical subordination of all nonhuman lives in today’s legal system.

The literature of the first wave of animal law necessarily involved lawyers talking to lawyers—Steve Wise often comments that he wrote *Rattling the Cage* for judges. This important function, clearly to be expected in an early phase of a legal revolution, is only a first step in developing the conditions for fundamental change. In crucial ways, such additional changes *beyond the legal system* are found throughout the ferment already mentioned. This ferment contributes in psychologically important ways—for example, the rich concerns for companion animals no doubt appeal to those judges whose lap dogs join them on the bench, even if under the protective covering of the judicial robe. Everyone in law is also impacted by the grass roots ferment reflected in the use of legislative tools like popular initiatives, for these help us all to see the great breadth of concern for “animal issues.”

Even harder still to sustain ... Why might it be hard to sustain first wave animal law’s achievements in starting a revolution? The achievements of first wave animal law can be evaluated in three words: important, important, important. So the risks of remaining at this stage might seem minor, especially given that the revolution has been started.

Admittedly, the risks of remaining at the level of first wave animal law are not simple, but they can be described relatively easily. Above all, it is important to talk about these risks in a conference where everyone is excited about the energy that animal law is drawing today. Much of this energy is due to the important features of first wave animal law that I have outlined, and yet much is also about *future* possibilities, which everyone senses are quite remarkable.

So my strategy here is to speak broadly even as I caution about complacency, to warn that even though much good growth has taken place, there is a risk of animal law in its present state remaining ingrown, bound by the legal profession’s traditional approaches to education and by today’s legal establishment—this establishment is tolerant in some senses, but I suggest to you the revolution which has started will not long survive without growth. So while today’s legal establishment may tolerate animal law, it will not easily give up the narrow, arrogant and ultimately harmful forms of human-centeredness that remain the unchallenged heartbeat of modern law *unless* animal law progresses to much greater fullness and power.

For me, the risks of staying at the level of first wave animal law were called out

creatively by David Souter in March 2009 when he spoke at American Academy of Arts and Sciences. *The New York Times* described this as “a rare out-of-court public appearance ... [which] therefore attracted news coverage.”¹⁸ Here’s the passage that I want to focus on.

The take-away quotation from the session was his remark that as each new Supreme Court term began, he prepared himself to undergo “sort of an annual intellectual lobotomy.”

The journalist then clarified. “What he meant was clear from the prepared portion of his talk: that the demands of the term tore him away from the serious reading he sees as essential to the job.”

Notice that Souter recognizes that someone who must make decisions about the world, even if they are technical decisions in a highly specialized field like law, *needs* to read from sources *outside* law in order to under this complex world around us which is so aptly summed up in William James’ famous description “buzzing blooming confusion.”

Law, as most of you will recognize, is invested in its own unique approach and sometimes law is well described by the colloquial adjective “turfy.” This approach is embodied in law’s jargon (vocabulary), law’s finite set of concepts, its commitment to its own historical continuity, and the arrogance and conservatism of law’s establishment.

A side story—the conservatism of the law establishment has many facets, and negative attitudes within established legal circles toward the emergence of animal law are probably like many other reactions. The following story illustrates how one reaction turned up in an unusual place. I happened to teach an animal law course at a famous university a number of years back. When I visited the faculty lounge on my first day of the term, I met a number of the core faculty members who were enjoying both wine and conversation. After I joined this primate social occasion, one of the core faculty members asked me what I did. When I replied, “I teach the animal law course,” his immediate response was a loud, uncompromising “Oh, that’s bullshit.” Another faculty member immediately jumped into the conversation, rebutting the first assertion in an eager tone with “Oh, no it’s not!” On this occasion, the first faculty member spoke freely, I suspect, because he knew absolutely *nothing* of the subject, how the course was run, what the student dynamics were, what the rigor level was, what contemporary scholarship said. In his facile, ignorance-driven dismissal, this highly educated, very accomplished faculty member reflected attitudes that long dominated all law schools. But today, because animal law courses are now available at a majority of American law schools, I suspect that earlier exchange would be far less likely at law schools where the faculty is secure with legal education’s wonderful tradition of open-minded inquiry. That this is so suggests how successful the first wave of animal law has been. But no one familiar with today’s law schools doubts that the long-prevailing attitude is gone. It is still very

¹⁸ New York Times, May 3, 2009, on page WK1 of the New York edition. “David H. Souter: Justice Unbound” by Linda Greenhouse, originally published May 2, 2009.

powerful, although it may take more subtle forms. Second wave animal law has the task of engaging even hardened skeptics who support the “humans only” thesis that has driven law for centuries.

What drives many people’s wholesale dismissal of animal law is a deeper, culturally ingrained attitude that the philosopher Mary Midgley has called “the absolute dismissal” of nonhuman animals characteristic of western culture generally.¹⁹ Any number of things make this kind of radical dismissal *terribly* problematic—one is that most other human cultures have *not* taken this position;²⁰ another is the ethics of inquiry I described above because such a dismissal is so often ignorance-driven. As the saying goes, “those who know nothing about a topic speak freely.” But science, ethics, and even spirituality today offer a variety of rich ways to inquire about other animals’ *actual* realities, and many of these approaches to other living beings reflect humans’ elegant abilities with imagination and humility. In effect, such approaches attempt to notice other animals on *their* terms, not on solely on our terms. Law as it stands today can be truly autistic about this possibility, because it has *so many anchors to its own past absolute dismissals* of nonhuman living beings.

The dominance in the legal systems of such dismissals prompts one to ask, how much of first wave animal law has *really* penetrated the legal education establishment? Today, law still is done virtually exclusively on *our human terms*, with only human interests playing determinative roles. One can see this in what conferences exist, what courses are offered, who is hired, and whether animal law courses are expanded or confined to a single offering. In all of this the stark dualism described above—legal persons *versus* legal things—is clearly the controlling reality that functions like a heartbeat in today’s law. Through the offices of first wave animal law, a door by which a few nonhuman animals may actually exit the subordinated category of “legal things” has been outlined. Further, in the larger society and in some precincts of the legal system, first wave animal law has admittedly facilitated the emergence of more open-mindedness on animal law as a viable subject. Most importantly, a powerful description has been stated in first wave animal law regarding the *radical* inadequacy of the “*us versus them*” dualism of “legal persons versus legal things” that every legal student today is still indoctrinated into by virtue of attending law school. This dualism exists outside law, of course, such that virtually all domains and institutions in our society have inherited it *and by and large still operate under it*.

It is possible that some at this conference will assert there *now* exists sufficient political will to make major changes (there is information on polls below that could be used to support such an assertion). There are, indeed, some encouraging signs around the world. But we remain in a period of education about animal law where many institutions,

¹⁹ Midgley, Mary 1984. *Animals and Why They Matter*, Athens, Georgia: University of Georgia Press, Chapter 1.

²⁰ This argument is made more fully in *The Animal Invitation*. One benefit of the ferment described in this paper is that there are today literally *hundreds* of books and *thousands* of scholarly articles available to those inclined to explore the diverse ways that humans have found other animals worthy of deep ethical concern.

disciplines and even professional organizations still exhibit a stark refusal to admit, let alone seek out, *other animals' realities*. Ignorance serves the status quo, such that the facile dismissal by the law professor described above still likely exists even if it has gone underground. But just as Paul Samuelson of Harvard once observed that “theory advances, funeral by funeral” in economics, so too in legal education the field of animal law will have more possibilities as new administrators and professors familiar with the accomplishments of first wave animal law come into power.

Second wave animal law needs to find a variety of ways to push beyond today’s preoccupation in law and in legal education with humans as the measure of all things. An important shortcoming in the present system, as with so many other fields just engaging nonhuman animal issues, is that the legal system does not itself generate much expertise, if any at all, about nonhuman animals. The litigation side of law includes the important mechanisms of expert testimony in courts. But those of you who are or have been trial lawyers know that expert testimony is at best a complicated matter—each side in our advocacy system can offer “experts” whose credentials can be manipulated by crafty trial lawyers. Judges have some criteria by which to assess such ploys, but as a practical matter triers of fact (whether they be judges or juries) are not at all sophisticated in deciding which “expert” is to be believed.

Even worse problems regarding “expertise” appear in the area of legislation because it is so intensely impacted by lobbyists. The animal issue in particular is well described by Will Rogers quip (he was echoing an idea earlier advanced by Otto von Bismarck):

People who love sausage and respect the law should never watch either one being made.

The irony of the ugly process of making sausage, a dregs-based meat where flaws are covered over by intense spices, being compared to the all-important law making of legislatures is particularly apt for animal law issues.

Entering the Tower of Babel. The inputs available to litigation via expert testimony and to legislators via lobbyists and research are important mechanisms, but they are, from the standpoint of an ethics of inquiry, very weak. Law, in effect, uses a non-scientific approach to other animals even if some establishment science can come through the door via hired experts or lobbyists. But note who does get into courtrooms—it is establishment scientists with “credentials.” The incomparable Jane Goodall is thus admitted, but so are research scientists employed by industries who can be unduly compromised by those who employ or retain them, as has happened again and again in public health disputes over tobacco, asbestos, and pesticides. No one who has used the expert witness system in today’s litigation world or watched legislative hearings is unfamiliar with the problem of expert opinion being distorted by some value other than the truth.

So how do we get high quality information before those who make decisions about law? One reason that lawyers and legal scholars so rarely attempt to go beyond their own

expertise, vocabulary and limited concepts is that “out there” (that is, out in the non-law precincts of society) they find claims and communications about other-than-human animals to be something like the Tower of Babel. Plainly speaking, there are many different ways of talking about other animals. One of them—the common phrase “humans and animals”—already puts into place the dualism that legal systems have been anchoring for centuries now. This is odd, of course, because we know that scientifically humans are animals. But regular society and the legal system itself use the highly anti-scientific “humans and animals” division, all of which simply anchors human-centeredness ever more firmly in people’s minds. There is no simple way to attack the dualism other than a straightforward ethics of inquiry—we must acknowledge that we speak poorly about this subject because we have been trained to do so.

Interestingly, though, our society has today developed what above is called “ferment” (or is that chaos?) in our thinking about some of the life out beyond our species. Whatever one chooses to call the general state of affairs, traditional dismissals of other-than-human animals are being powerfully challenged in *many* different ways in many different fields.

So lawyers will miss much if they are too inclined to stay solely within legal precincts, for in many fields today extraordinarily rich thinking is developing about our past, present and future with other living beings. If you doubt this, read *The Animal Invitation*, which carries the subtitle “Religion, Law, Science and Ethics in a More-Than-Human World.”

An Aside—Law as a Concern of *Non-Lawyers*. For obvious reasons, there is *much* talk about law outside of legal circles. Public policy specialists, commentators on globalization, social movement activists, philosophers, theologians, NGO leaders, and so many others think their own fields belong every bit as “front and center” as do law and legal technicalities in discussions of public policy changes and possibilities. So even if lawyers have admitted expertise at public policy discussion, they are by no means the leading edge of public policy discourse.

So here I add two observations about law that are quite sobering, though in very different ways. Each is from a non-lawyer—the first is from an activist, the second from a theologian whose ideas have sparked a remarkable world-wide movement known as “religion and ecology.” These together suggest how truly important it is that lawyers and second wave animal law pay close attention to *non-lawyer* comments on animal issues and, more specifically, on the socio-cultural background that makes changes in law possible *or not*.

The first example comes from Theodore Shaw, as quoted by Jonathan Kozol—both of whom are great supporters of the social movement to ensure quality education for all children.²¹ Kozol cites Theodore Shaw’s comments regarding what litigation does to activists.

²¹ This is from Chapter 10 of *The Shame of the Nation*, at 257-258.

In the Montgomery bus boycott ... litigation didn't lead the movement. It came afterwards and served it. ... When lawyers think that they can lead a movement in their role as lawyers, they are doomed to failure, because courts themselves are socially reactionary institutions....

Kozol adds comments on “the need for activism outside of the legal process and *preceding* it” [emphasis in original] before again quoting Shaw.

Then, too, because the litigation process is so slow and so complex, it can turn activists into bystanders far too easily. Lawyers like Gandhi and Mandela can awaken and create a movement, but not in their role as lawyers. You need to create a climate of political momentum first. That, then, is the challenge.

Others have long noticed this feature—Alexis de Tocqueville commented in the 19th Century about American lawyers’ orderly turn of mind and reaction to revolution and excesses of democracy.²² One of the ways law has “ordered” the world—that all nonhuman animals are property—is challenged by the revolution of first wave animal law. But first wave animal law continues to utilize mainstream legal terminology, as when lawyers and law professors train new law students to talk about “animals” when they mean, scientifically speaking, “nonhuman animals.” This extremely biased way of talking about animal issues continues to reinforce the all-important background worldview against which interpretations and changes are considered as “reasonable” or “radical.” First wave animal law in some ways, then, continues to reveal that today’s law has, as de Tocqueville commented, “an orderly turn of mind” that involves subordinating any and all nonhumans to the human species. This ordering of the world is, of course, not a neutral act, but one by which power over other animals is maintained as a kind of “natural order.”

Let me turn to that “theologian” whose ideas drive today’s world-wide movement known as “religion and ecology.”²³ His name is Thomas Berry, and his work resounds with the theme about how so much of our culture, including today’s version of “law,” is human-centered *in the extreme*. Clearly, he would *not* qualify as an expert witness in the technical senses that term is used in litigation, just as he would not likely be called as an “expert” of the kind that public policy debates feature. But his insights are dramatic and impressive, nonetheless, and they led him during his lifetime to write as follows.

... [t]he deepest cause of the present devastation is found in a mode of consciousness that has established a radical discontinuity between the human and other modes of being...²⁴

Berry labels human-centered thinking of this kind “anthropocentrism,” citing Albert

²² Tocqueville, Alexis de, *Democracy in America*, Chapter 8.

²³ The leader in this ecumenical movement is Yale University’s Forum on Religion and Ecology—the website is <http://fore.research.yale.edu/>.

²⁴ Berry, Thomas 1999. *The Great Work: Our Way into the Future*, New York: Bell Tower, at 4.

Einstein's definition of this word as meaning an "optical delusion of human consciousness" where we come to regard "humanity as the centre of existence."

More specifically, Berry addresses a certain feature of American political and legal life pertinent to the risk to which first wave animal law is subject—in other words, what Berry suggests about the American legal system suggests that animal law done on this model is at great risk.

... from its beginning the American constitution was clearly a document framed for the advancement of the human with no significant referent to any other powers in heaven or on Earth. In the Bill of Rights, added as the first ten amendments, a detailed listing of the rights of individual persons was given. Humans had finally become self-validating, both as individuals and as a community. This self-validation was invented and sustained by the union of the commercial-entrepreneurial powers with the legal-judicial powers to sustain an assault on the natural world.²⁵

Such comments make one pause, given the iconic status of the U. S. Constitution in so many circles. But that document's "feet of clay," as it were, are well known in light of the framers' acceptance of race-based slavery, the exclusion of women, and ... well, the list goes on. Our legal system is far from perfect, and this alone strongly suggests the importance of studying *other* legal systems to see if they offer insights into how to create more openness on nonhuman animal issues. First wave animal law clearly takes risks when it unreflectively assumes that *American* jurisprudential values and habits of mind represent what jurisprudence can generally do—this is part of Americans' regrettable tendency to think American phenomena represent all or perhaps merely the highest version of phenomena that appear throughout cultures. In this sense, first wave animal law could, without major adjustments, project *an imagined future upon reality* that leaves much to be desired—hence, the concern to see how we might move to second wave animal law.

Berry is not alone, of course, in his appraisals of our current legal system's radical shortcomings. The property theorist Eric T. Freyfogle notes that we, through our legal system,

Produce an image of the physical world, divided into pieces and subject to private ownership and control, a countryside populated with castles, each with an owner who controls...It should be quite plain to us upon even a brief reflection that this image of ownership and domination stands in the way of environmental progress. It suggests that we may do what we want on the land that we own, that what we do is no business of others, even if it involves destruction, and that what others do is no business of ours. The private-fiefdom image also extends to things other than land. An automobile is ours to do with as we will, and we can ruin, destroy and cast off any item that we buy. To own anything, the law seems to suggest, is

²⁵ Berry, Thomas 2002. "The Mystique of the Earth". *Caduceus* 59: 1, at 13.

to dominate, control and if we want, to destroy. *The implications of all this are disturbing, for they ignore even the most fundamental principles of natural health.*²⁶

This passage does not mention nonhuman animals, but the issue is the same. Second wave animal law needs to engage such parallel insights, to be enriched by them, and to nuance other fields' insights so that other-than-human animals are on the topical and ethical radar, as it were, of many other disciplines.

More Risks Inside First Wave Animal Law Precincts. Berry characterizes the global environmental crisis as a “cultural crisis,” and he thinks it a delusion to assume that such a basic problem can be corrected simply by judicial decisions, passage of new laws, constitutional amendments, or a even restructuring of current governments or other governance systems. Indeed, *even though he welcomes such changes as vitally important in the short-run*, Berry argues that such changes are not going to create a better world *unless* the are part of a far more important shift in cultural values and worldview. He refers to this kind of change as a “reinvention of the human at the species level.”²⁷

The fact that a theologian would chose to address law along with religion, education and science in his magnum opus (*The Great Work*) clearly suggests how important law is thought to be outside legal circles. It also suggests that *law does not belong to lawyers alone*.

Second wave animal law will gain energy, insight and followers when and if it engages these debates outside standard law precincts. I refer to these as “extra-legal debates,” and it is important that those interested in animal law contribute to them so that these debates can be sophisticated, informed and nuanced in the best tradition of first-rate legal scholarship. Equally, it is important that legal scholars, educators, judges, and law-based policy makers listen and learn from such extra-legal debates.

Such connections across disciplines ensure that the legal profession avoids one of the pitfalls into which the veterinary profession has fallen, namely, the assumption that veterinary profession alone is entitled to lead our society in developing insights about what is often called the human-animal bond. In many ways, animal law today is a protest against the veterinary profession's failure to lead in this area. But law is, when it proceeds *solely* on its own lights, in a quandary, for it too has reflected the dramatic inadequacy of using *legal tradition alone* to structure this essential intersection.

In every culture and surely in liberal democracies, leadership on matters of the human intersection with other-than-human animals and the broader more-than-human world will be dispersed among many human professions, disciplines and interest groups. Law and the legal profession must be part of this leadership, but the subject of animal law no more

²⁶ Freyfogle, Eric. 1995. *Justice and the Earth, Images of our Planetary Survival* New York: Free Press, at 51-52.

²⁷ Berry 1999, at 159.

belongs to the law profession alone, or to legal education, than the subject and last word on animal welfare and the realities of nonhuman animals belong to the veterinary profession.

Hard to start a revolution? Harder to sustain, hardest of all to win. Those who compare one legal system to another talk regularly about how changes take place in legal systems, and first wave animal law clearly reflects that important shifts have already taken place in the American legal system (a good example is the emergence of felony-level penalties for acts of animal cruelty). Comparativists suggests, however, that *truly fundamental changes* in legal systems happen apart from the stroke of the legislature's pen and before the judge's gavel comes down.

... there are features of the law which can only be changed at the slow rhythm at which the civilization of the country itself, the sense of justice of its citizens, its economic structure, language and social matters themselves are changed.²⁸

The operative insight here is that without pervasive social change, the possibilities of changing law *at a fundamental level* are limited—"The legislators may, indeed, with the stroke of the pen modify the actual legal rules, but these other elements and features nonetheless subsist. They are not so arbitrarily changed because they are intimately linked to our civilization and ways of thinking." Importantly, such deep, persisting features of legal system are major factors in establishing the all-important continuity sought by legal systems. At the same time, however, they foster the inherent conservatism of law. Those citizens who are favored by special privileges under the existing order of the legal system no doubt feel strongly that privilege-threatening developments, like animal law, are not in continuity with the rest of the species-centered law that anchors these elites' privileges. This is normal, for just as Upton Sinclair once observed, "It is difficult to get a man to understand something when his salary depends upon his not understanding it," it is also difficult to get many citizens and businesses to support new legal protections when continued enjoyment of their own privileges depend upon their blocking such new protections.²⁹

Said another way, a certain selfishness, perhaps even autism, prevails in law when it comes to the marginalized, whether they are human or nonhuman. To change any feature of the system, one *has to stay work within the system*, complying with legal procedure and other legal niceties. This applies with special force to those who would change our treatment of nonhuman animals. In the United States, for example, protection of marginalized humans can call upon the ideals of the founders and fundamental protections in the human-centered founding documents. But those who would use the legal system itself to remedy abuses of *nonhumans* must make their arguments in an exclusivist, even speciesist neighborhood. In essence, animal advocates must always play

²⁸ David, René, and John E. C. Brierley. 1978. *Major legal systems in the world today: an introduction to the comparative study of law*. New York: Free Press, at page 18. The following quote is also from page 18.

²⁹ Sinclair, Upton. *I, Candidate for Governor: And How I Got Licked*. Pasadena, Calif.: (self-published), 1935.

in the oppressors' power alley, as it were. Some constitutions today call out the issue of nonhuman animal protections (for example, India and Germany), but in the United States this possibility is widely considered laughable. True, the existing system allows challenges and even amendments, but these were hard to achieve for women and those subject to racial and ethnic discrimination. Further, as is well known, even at its lower levels the existing legal system has myriad ways of defeating challenges—standing limits, how statutory language is read (as with the meaning of “necessity” when it comes to harming nonhuman animals), which harms and measures of damages are permitted, and of course the age-old limits imposed by lack of enforcement.

So, while working matters out in courts has some potential (Wise's *Rattling the Cage* creatively calls on what Wise sees as the legal system's core values), this risks playing out challenges in a system so fully geared to humans that legal fictions and other dishonesties can bar common sense, science-based certainties, and open-hearted ethics. Playing out challenges in the courts is important, but it clearly runs the risk of creating the negative precedents that will cement in place an altogether ghettoized version of animal law where there will be very little critique of the fundamental features of law as it now centers on humans.

What is interesting is that legislation is no less subject to such games and limits. Wise has been known to comment that he chose the litigation route because prospects in legislation were *worse*—*now that says something* rather negative about legislation and the power of special interest lobbying, especially because today some polls suggest that *nine out of ten* Americans believe “strongly” that “we have a moral obligation to protect the animals in our care.”³⁰ Consider percentage figures for *farm animals* from a 2004 study by The Ohio State University of Ohio citizens—an astonishingly high number (92 percent) agreed or strongly agreed that it is important that farm animals are well cared for. An almost equal number (85 percent) had the opinion that the quality of life for farm animals is important even when they are used for meat. 81 percent also agreed that “the well-being of farm animals is just as important as the well-being of pets,” and 75 percent agreed, “farm animals should be protected from feeling physical pain.”

How is it, in the face of such numbers, that legislation on animal issues struggles so? Second wave animal law must grapple with this. The answer surely is in cultural values, what Brierly and David called “the civilization of the country itself, the sense of justice of its citizens, its economic structure, language and social matters.”

The poll numbers just quoted suggest that today we may be edging ever closer to a political climate in which protecting some nonhuman animals is possible in a variety of ways, including use of our prized legal protections such as specific legal rights. The numbers also suggest the possibility of legislative bans on certain harms, and qualifying personal property ownership rights with special responsibilities of care and protection. As suggested above, likely candidates for such high level protections are those other-than-

³⁰ An example is the 2006 study conducted by Lake Research Partners cited by Marc Bekoff in his 2010 *The Animal Manifesto* at page 3.

human animals who companion us even as they submit to our domestication.

Of course, fundamental protections for those nonhumans whose interests are not so integrally tied to humans' interests remain at best outside chances. First wave animal law will transition to second wave animal law when nonhuman beings are considered candidates for legal protections by legislatures and courts *no matter what the similarities to human abilities* might be—other words, an ethics of inquiry will not pursue whether other animals are “like us” but, instead, whether they have demonstrable cognitive, emotional, cultural and sentience-based capacities that our ethical imaginations recognize as *in an of themselves important*. There is *no doubt* that our imagination, humility and ethics can address other animals with such capacities, and that we can do so as fully as we now address our companion animals and the wonderful nonhuman great apes, cetaceans, and elephants now are on the radar screens of first wave animal law.

Second wave animal law can also press some additional constituencies, like veterinary medicine, where most people think nonhuman animals have natural supporters. Some animals get healed through the efforts of this profession, for which animal protectionists are overwhelmingly grateful. But, statistically, most of the nonhuman animals that are subjected to veterinary oversight (as happens in food production and experimental situations) are either eaten or used as experimental subjects. This happens because veterinary medicine's establishment (though not the majority of veterinarians, thankfully) is addicted to the money streams from research and industry. This has led to a very ingrown set of professional ethics by which veterinary medicine's establishment allows many people to use science and the welfare of the *human race* as kind of fig leaf to cover over the profession's complicity in harming nonhumans. The result is a veterinary establishment that is human-centered in the extreme, and one that is at best deeply impatient with, at worst extremely intolerant of, animal law courses of the kind found today in law schools throughout the United States.³¹

Animal Studies. There are *many* other people interested in animals, of course. In the academic world outside law schools, the prospective super-field of animal studies has already been mentioned several times. Our possibilities of a more informed, ethically richer relationship with other animals has prompted broad ferment in academic fields like history, literature, geography, sociology, psychology, religious studies and more. Such “ferment” is akin to what has happened with law students on animal law. We are discovering in our past, in our arts, in our social worlds, in our cultures, and in religious

³¹ One obviously helpful group is the vast majority of veterinary students, for they arrive in veterinary school wanting to heal. But they enter a system reliant on government grants and research that has its own political realities. Administrators at veterinary schools are generally quite antagonistic toward discussions of animal law because they view this new field as trespassing on their turf. An AVMA representative requested the opportunity to come to the Harvard animal law class to give what he/she called “*the veterinary perspective*.” There is no humility in this, for veterinarians no more hold a single view of animal protection/animal rights than lawyers hold a single view of any subject. The one-dimensionality of the veterinary profession's formal leadership is sad because the participation of the veterinary establishment in dialogues about the future of animal law would help. But so far the veterinary establishment has viewed the animal law phenomenon in legal education as meddling, and they go forward with impoverished caricatures of what animal law is and can be.

communities that humans have long responded to the animal invitation in a stunning variety of ways. The second wave of animal law will be emboldened by this in countless ways.

But animals studies in each discipline must swim upstream as it engages the prevailing human-centeredness of “the humanities” generally and that of each discipline. Still, historians, literature scholars, art experts, and the comparativists who work in religion, cultural studies, anthropology, politics, sociology and many other fields have created an astonishing body of work that today dwarfs the literature of animal law. These additional constituencies interested in animal issues suggest possibilities for the next wave of animal law, just as such widespread interest in animal issues suggests why, despite difficulties, it is possible *to start a revolution, sustain it, and perhaps even win it.*

Teaching Now. Crucially, we need *now* to teach in ways that allow the second wave to develop. We can do this because the first wave of animal law has matured rapidly—many involved now recognize that people other than law students, practicing lawyers, judges, regulators, legislators, policy makers, and law school administrators are interested in protections for other living beings. These are more than just voters in elections or potential jury members in a trial where an animal-favorable outcome is sought. People outside of law have tremendous interest in finding a better way—said in terms of the Cover generalization, they are interested in changing the existing legal order that our parents and grandparents projected onto us. The stark dualistic universe of humans/legal persons dominating the beings in the rights-less category “legal things” conflicts with most people’s intuitions. It also conflicts with much that has been buried in our own culture, and surely with much in our past. Said another way, what our grandparents and parents projected onto us as a legal system conflicts with *the future* that a large majority of modern citizens, not to mention those involved today in animal law and animals studies, would choose to project onto our children and grandchildren.

Second wave animal law’s task is to move the revolution forward, and it can do this by helping lead our society to a consensus that involves fundamental protections, even legal rights, for some other-than-human living beings. This will indeed be a true revolution. It will move away from humans as the sole center of legal protections, to multiple centers. No doubt additional centers will come slowly, but they will happen sooner, more widely, and better *if* the second wave of animal law is allowed to build on the first wave achievements by working with other disciplines.

We can now look out and see that a second wave is not only possible, *but is happening*, and that we must meet the challenge of surmounting ghettoized versions of law as the leading edge of all our interactions with nonhuman animals. Law can no more regulate the animal invitation than it can regulate all aspects of human-to-human relationships. It can regulate some features of our interactions, of course, but the essential features of humans’ acceptance of the animal invitation will require the arts, storytelling, psychological integratedness, religious awareness, and certainly moral reflections. These are all beyond—better said, *before*—the practice of law. To the extent that law is related to morality (which, hopefully is the case often, but which historically has often not been

so), law is primarily a *secondary* phenomenon, by which I mean only that law is meant to embody society's deep, morally laden insights, not override them. Law can be used to promote any society's underlying values, surely, but it "embodies" them in the secondary sense of *reflecting* them—law's primary function is not to create such values out of whole cloth and then dictate these back to its host society. This is what I mean by "law is a secondary phenomenon."

Given that the second wave of animal law will need to be intensely interdisciplinary and multifaceted, not doubt it too will have some "Tower of Babel" features, for the human intersection with the more-than-human world and its nonhuman animals will be so rich that it will take some time to learn to speak carefully and productively about that world.

But this challenge can easily be met in legal circles, for law is by its nature a domain where diverse constituencies meet. If we as a species are to notice other animals and take them seriously, law will *necessarily* be in the front ranks as we go forward. Thus, second wave animal law will be very prominent as our society goes forward with the animal invitation. Indeed, the upshot will likely be an enriched sense of the relevance of law and law-making to our relationship with other living beings.

Five Specific Challenges in Second Wave Animal Law

First, how do we create more environments where discussions can thrive? Those who have pioneered first wave animal law know that the educational establishment has been and is now, with only a few notable exceptions, a hostile world. Importantly, though, the emergence of first wave animal law has revealed some of the remarkable strengths and flexibility of the American legal education. In particular, law schools today consistently exhibit a profound commitment to the importance of critical thinking, Socratic method, and student's and faculty's free expression of ideas. How can this deeply important tradition be exported, so to speak, to other realms of the academic world where such commitments *in the matter of nonhuman animals* are less robust? Throughout history, pioneers in social movements have been at great risk in political, educational, social and religious establishment circles as they challenged the status quo. How can the success of animal law be used to open up education generally so that the educational establishment is no longer a part of the problem and becomes, instead, a contributor to creative solutions? If this is done, those who pursue animal law, animal studies, and the need for reform will be able to teach in a variety of places in our educational system, and even rise to positions of leadership. Today, those educators who choose to make animal law or animal studies their principal focus are welcome in only a few institutions. In effect, such educators need a place they can be safe.

Second, the importance of political realism must be recognized. Currently, the animal law issue receives some political flack, but by and large it is not yet a major concern for many people. Recent challenges reported on by the media—such as skepticism about the science community's emerging consensus regarding the risk of climate change or claims that American attorneys are "unpatriotic" merely because they undertake representation of defendants in terrorism cases—have revealed both the lack of civility in American

politics and the political risk of going against reactionary forces in “the establishment.” Animal issues have elicited a few comparable challenges already—an example is the way Harvard Law School’s Cass Sunstein was taken to task during his confirmation hearings in May 2009 after being nominated to be administrator of the Office of Information and Regulatory Affairs. The mere fact that Sunstein had written about animal law issues triggered efforts to characterize him as radical. When animal law becomes even more successful in the educational establishment (a sign that second wave has arrived), the revolution will get “harder still” for it will arrive on the radar screen of people who challenge *even* those who want to be generous to *all humans*.

Third, how can a heavy focus on the sweet beings we know as “companion animals” be maintained with creating challenges for other animals? Companion animals need fundamental protections, and because they are so near and dear they have understandably been a preoccupation. But allocating resources so heavily to creating protections for this group risks setting up companion animals as *the* paradigm of what nonhuman animals are, can and should be. Companion animals are not particularly good representatives of nonhuman animals generally in one sense—they are, by definition, subordinate to humans and of all animals, and they fit most easily and often harmlessly (though hardly always) into the politically entrenched notion of personal property. *But many other animals do not.* The emergence of a paradigm of change based on our fascination with companion animal risks a version of animal law that promotes the right of humans to own *all* other-than-human animals generally. Notice how the dominance of such a paradigm is in tension with another understandable emphasis in first wave animal law—the attention given the charismatic, powerful, sometimes fearsome and always brainy animals we know as chimpanzees, gorillas, orangutans, bonobos, elephants, orcas, humpback whales and other cetaceans. These animals are humans’ competitors in very significant ways, and in this very unlike companion animals. They are not generally subordinate to us and thus do not reinforce our self-image as rulers of the world. Offering these animals and others fundamental legal protections is a major challenge raised by first wave animal law, and second wave animal law can meet this challenge only if it is not burdened by a system that takes the paradigm of all animals to be our cats and dogs.

A fourth challenge is the move to interdisciplinary approaches—how do we keep law’s existing virtues in this regard and yet cross into an approach by which law helps other fields and they in turn help law deepen its understanding of nonhuman animals and possible ways human communities can coexist with thriving nonhuman communities? If one peruses the amicus briefs filed in *U.S. v. Stevens* (argued in late 2009), one encounters the Brief for a Group of American Law Professors As Amicus Curiae in Support of Neither Party—this document is filled with information about studies done in a variety of disciplines. This tradition of citing empirical evidence in briefs, pioneered in 1908 by Louis Brandeis, reflects how the insights and findings of multiple disciplines already have a major role in legal thinking. The relevant issue is taking interdisciplinary explorations of nonhuman animals, policy possibilities, and value-laden issues to their fullest possibilities. It is, as suggested above, extremely important that the realities of other animals guide our thinking about how we might treat them. In addition, as already suggested, there are extremely important perspectives on humans’ ethical abilities outside

the law and contemporary legal discussion—if “law and economics” is an important and influential topic, how much more so should be the topic of “law and ethics”?

Finally, how can legal education train young lawyers to think and speak in ways that open minds, not close them? The last of the challenges mentioned here brings us back to how we speak—George Orwell once observed that our use of the English language “becomes ugly and inaccurate because our thoughts are foolish, but the slovenliness of our language makes it easier for us to have foolish thoughts.” Orwell’s motive in making these observations was simple—“the point is that the process is reversible.” We stack the deck *against fundamental change and in favor of continued human-centeredness* by using the common phrase “humans and animals.” This verbal habit reinforces powerfully the legal system’s dismissive legal persons/legal things dualism because it makes the division seem natural. The division is *not* a natural division, but a cultural habit masquerading as the order of nature. It should not go unrecognized in second wave animal law that this verbal habit is *anti-scientific*. In this regard alone it undermines our ability to talk about nonhuman animals as important cousins or, as Henry Beston said in *The Outermost House*, “other nations, caught with ourselves in the net of life and time, fellow prisoners of the splendour and travail of the earth.” We know in our own bodies and *from our own animality* how an animal can hurt, suffer, and on and on. The linguistic habit “humans and animals” pushes us constantly away from such awareness and the reality of many shared experiences.

It may seem radical to suggest that second wave animal law can effect such fundamental change—after all, I have argued above that fundamental change follows a “slow rhythm.” But we know from recent experiences that care with language matters, and it takes courage. Examples appear all around us—an example is given above about publishing houses prompting use of “who” or “he” or “she” (instead of “that” or “it”) when authors refer to nonhuman animals. Another recent change can be found in the ways speakers today regularly find ways to avoid the habit of using “he” when they are referring to a generic human, as when one says, “If someone visits Boston, she should consider exploring Cambridge.” Word habits may take decades to change, but as the following story from 1994 suggests, change can come quickly *if* people will courageously call out problems.³²

In 1973, *Sexism in School and Society* was published. Written for teachers, it was the first textbook to establish the nature of sexism in school. Documenting sex-segregated courses, unfair teaching and counseling, and bias in books, it raised issues 20 years ago that remain a blueprint for the study of gender bias in education today.

During the second year of the book's life, a publishing company called with disturbing news. Not only were people no longer buying *Sexism in School and Society*, but a group of first-year purchasers had returned the book and asked for their money back....

³² Sadker, Myra, and David Miller Sadker. *Failing at Fairness: How America's Schools Cheat Girls*. New York: C. Scribner's Sons, 1994, at pages VII-IX.

... Pornography stores were among the major purchasers of *Sexism in School and Society* that first year. They stocked their shelves with what they thought was a book about sex in school.

During the early 1970s, the word *sexism* was unfamiliar to many people. It did not mean bias or discrimination as it does today. In 30 years we have journeyed from Betty Friedan's "problem that has no name" to a realization that sexism affects every part of our lives, from what we watch on television to what we do on our jobs, from the preaching in our religious institutions to the teaching in our schools.

Second wave animal law needs to challenge the many different ways that a powerful, sometimes hidden agenda dismisses all nonhuman animals in the name of human superiority—speaking plainly and in scientifically accurate ways would be one way to begin to open up minds to the question of what future we want to create in our inevitable relationship with the other-than-human lives who are part of the Earth community. Careful speech can unstack the deck against nonhuman animals, for as Orwell said about being careful with language, "the point is that the process is reversible."

Look Again. Peer once again through the first lens, Cover's idea that law is "*the projection of an imagined future upon reality.*" The second wave of animal law will likely be aided immensely by recognition of the fact that we will get better at such projections as we try to do this work self-consciously. When we fail, we will no doubt try again. A key is openness to invitations, which we will notice better and better as we open up to the fact that they are ubiquitous.

Look again through the second lens—we are warned about any revolution that while it is *hardest of all to win, nonetheless it is only afterwards, once we've won, that the real difficulties begin.* This warning is humbling, for it suggests that well into the second wave of animal law, which no doubt will have its difficulties, there will be many challenges even when the revolution is prevailing. Indeed, *even after the revolution is won,* we will be in such a new era that our successors will be challenged to engage nonhuman animals in ways that we today can only begin to imagine. Our successors will be living a version of T.S. Eliot's insights in "Little Giddings":

We shall never cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.

No doubt, a third wave of animal will by then have come and gone, and maybe fourth and fifth waves as well. Whatever transpires, it is important to note that this revolution is in fact a "win-win-win-win" situation—a win for nonhuman animals, a win for the whole community of life in its ecological interrelatedness, a win for the Earth, and thus a win for humans who will finally be able to enjoy the deep benefits that come from truly being a moral species. It is possible, then, that by the end of the twenty-first century, ***animal law can transform law generally.*** Within a few more centuries, it can have moved

humans to a new self-understanding as themselves as one species among others.

Today, we can further this process. The first wave of animal law is now mature, and we must move it along to realize such extraordinary potential. We can do this, for we are extraordinary animals, especially when we are at our most humble about our own qualities. In protecting all of life we gain the possibility of realizing our most human selves.

The Real Difficulties Begin—Can We *See* What Will the Future Bring?

Primates' dominant sensory ability is sight, and thus we rather naturally respond "I *see* what you are saying" whenever we grasp a claim that a conversation partner is making. Sometimes we use colloquialisms like "I *hear* you" or perhaps "what she said *touched* me" to convey comprehension. We do not often use olfactory images in such positive ways, but we do in negative ways—"I could smell what he was up to" or "her story stunk."

Can we *see or otherwise sense* what will happen in animal law in the coming decades? Where will animal law be in the year 2030? What will the shape of animal law be at the end of this century?

I make some suggestions here in order to stimulate your thinking. Granted, you may not "hear" what I'm saying because you "see through" these suggestions or conclude that "you smell a rat." Such reactions will serve my purposes, for if we are to think out our educational priorities, we must try to sense what will happen—and what can happen—in this century. As the dynamics in any animal law class so well attest, when we discuss either our impressions of general prospects or a more specific plan for going forward, each of us is exposed to a wide variety of approaches, to different reasoning processes, to new subject matter, and even a general openness that models how each of us individually might "think out into the future." I suggest in *The Animal Invitation* that the twenty-first century will be the century of the species line. How might this process unfold?

A primary task we *must* accomplish is keeping other animals' realities in the foreground. Today, most people easily recognize the obvious relevance of the notion of other animals' "interests." This is a very imprecise term that covers very complex issues talked about by a variety of philosophers. Despite the generality of this term and the inevitable problem of imprecision, "interests" is an appealing notion by which virtually everyone recognizes that other animals have their realities that need to be described fairly and, when appropriate, protected. The protection can come in a variety of forms, some of which are within the legal toolbox, others of which call upon our senses of ethics, humility, community, mystery, aesthetics and even spirituality. What is paramount as we use any and all of our abilities to protect other living beings (just as these are appropriate in protecting human animals) is that we go forward in a frame of mind that allows us to notice and take seriously the *realities* of the living beings we are addressing.

The relevance of formal legal systems to this necessarily multifaceted process of noticing and then protecting other animals cannot be underestimated. Legal systems may be but one of our protection schemes, but today they are both extremely flexible *and* highly systematized in ways that other schemes, such as a moral scheme anchored in a culture or by specific religious communities, are not. Accordingly, “law” is particularly relevant to future protections because it is, in effect, a large toolbox by which we organize ourselves and in which one finds an astonishing variety of protection methods.

Rights for individuals is often thought of as the paradigm tool because it carries such important possibilities *and* has psychological ramifications—the affirmation of rights means the recipient has “arrived” in a political sense. So rights will always receive great attention. This is one reason some people have been so parsimonious with recognition of specific legal rights.

But there are many, many **other tools in the legal toolbox by which the interests of other living beings can be given fundamental, effective legal protections**—there are other forms of rights (such as collectively held rights), legislative protections of many kinds that do not invoke rights, and equitable measures that call upon deep traditions and insights within our legal heritage regarding the importance of fairness, justice and “doing the right thing.”

Below I speculate on two distinctly different topics that will no doubt be part of animal law as grows into the year 2030, then into the middle of this century, and finally toward this century’s closing years. The first topic is possible changes in various substantive areas of the law. The second topic is increasing awareness of different kinds of reasoning and valuing that might dominate the law—the latter will be in competition with the human-centered, economics-driven calculations that now are so paramount. Some focus on our reasoning patterns is important because it helps us evaluate, even parse out, why a decision is being made in a court, a legislature, an administrative body, a popular vote, etc. By identifying controlling assumptions in debates and decisions we see how virulent has been past human-centeredness and how exclusivist and speciesist are contemporary policies against which so much animal law is reacting today.

Criminal law has played an important role because of the anti-cruelty tradition that developed in the culture *but outside of the common law legal tradition*. Anti-cruelty was included into the law by way of 19th century statutes. This tradition has seen conflicting trends—the vast majority of states now offer felony-level convictions for some forms of cruel behavior, but at the same time the vast majority of the animals that our society impacts (farm animals) are now exempted from anticruelty provisions. There is some irony here, given that the original targets of anti-cruelty legislation were farm and work animals. Law here reflects Will Rogers’ insight quoted above, and thus reflects that law making mechanisms can be dominated by interests that do not reflect popular will; they can also compromise the more compassionate strands of our cultural heritage regarding the importance of humans noticing and taking seriously the animal invitation.

My personal guess is that criminal law will continue to be important because our society

so often sends powerful signals to individuals that nonhuman animal individuals simply do not count as much as human individuals do. So some bad apples, as it were, will take this message as license to harm nonhuman others, and thus will have to be dealt with by anti-cruelty laws. Yet, as the century progresses, criminal law may become less important because we resolve some of the awful problems that criminal courts must now address because many individuals get the signal from our society that it is humans alone, not nonhumans, who *really* matter. Change the cultural evaluation of animals, and we will lessen the amount of cruelty that our dismissal of other animals now spawns.

Further, to the extent that some of the provisions of criminal law are parasitic on our tradition of owning and holding powerful, exotic animals captive (think of the horrible harms inflicted on a woman by Travis the Chimpanzee in 2009), I also think that our societies will eventually defuse the captivity fascination by the end of the century, and thus tolerate less and less the presence in our communities of animals that belong in their own communities. So I think criminal law will be a factor through 2030, but will be *far* less so by the end of the century.

Tort law is a major contributor to ferment in animal law today because it addresses a wide range of issue. My guess is that by 2030 it will have addressed fully the problems of measures of damages that now draw so much attention. These problems are really human-on-human problems (who pays damages of how much *to the human* who owns the harmed animal). There is the enticing probability of awarding damages to injured nonhuman (we are clearly capable of creating trust-like arrangements and fiduciary duties to handle such awards in fair ways), and this will, I guess, be in place by the end of the century.

But to the extent that tort law must deal with dangerous wild animals, by the end of the century that problem will likely have subsided because we will have learned that dangerous wild animals can no more thrive in our midst than we can survive in their midst. We will likely have learned to respect other animals by the end of the century in ways that prompt us to protect their communities so that they can lead lives undisturbed by human dominance. In other words, tort law by the year 2100 is likely to be less important only because today's debates are premised on (1) human domination of wild animals, and (2) the radical inadequacy of using market-based measures of damage for the companion animals that are our family members. By the end of the century we will have found a *modus vivendi* with domesticated animals and free-living animals such that many of today's debates will have become moot.

Constitutional law in places like the United States has such iconic status that many people refuse to even consider it possible that nonhuman animals could be protected at this level. But developments in other countries (India, Germany) reveal that constitution-based protections can be a part of the future of animal law. More countries are likely to create constitution-level protections, although the form is likely to be very general and, in the end, rely heavily on cultural values that exist outside, and thus are not led by, law.

Property law is, as the leading casebook in this area suggests, overwhelmingly the dominant factor today in substantive animal law.

Animals are property. These three words—and their legal implications and practical ramifications—are at the core of the most significant doctrines and cases in this book, and a telling reality for current practitioners of animal law.³³

By the year 2030, we are likely to see nuanced, responsibility-focused notions of personal property ownership of animals in the United States, much as we already see such things in other legal systems. The fact that the political and legal history in the United States has been dominated by a notion of personal property that is so closely connected with individual rights has been a boon in some areas, but a disaster in animal law matters. Recognition of how limited the debates over property rights have been in the United States will eventually come, for the property notion has been far more flexibly applied in other traditions. In effect, the peculiar American tradition of hallowing the property concept has distorted tort and other substantive law in ways that obscure the true potential of legal systems to help us manage how we handle the animal invitation.

Since animal law in its modern version was born out of the radical dissatisfaction with the law as it handles nonhuman animals, evolution of the law and ferment in social values will lead to a more realistic handling of the property concept—this alone will open up animal law possibilities of great power. With property law more realistically and compassionately conceived, the law's true potential to be a partner in our society going forward on animal protection can be seen far better. I doubt this process is particularly far along by 2030, but hopefully this process will be well under way by the end of this century.

These comments are not meant in any way to deny that *some* protection of property is deeply important to our society. *Every* society has included some provision for personal property in one way or another. But reifying the property concept in the way American politics, law and history have is destructive of not only nonhuman lives but also, as Roosevelt's observations suggest, human thriving.

Contract law is not one of the areas of substantive law in ferment, although the area gets much attention because the commercial realities governed by contract law reflect fully the maladies visited upon life if a one-dimensional idea of property rights dominates a society, as has clearly happened in the United States. The result has been the stark commercial realities of factory farming, which have led to lawyers making sad comments such as the following without any pangs of conscience. This story appears in the 2002 book entitled *Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy* by Matthew Scully, formerly the senior speechwriter to President George W. Bush. The state involved is New Jersey. This story suggests the crucial role that the

³³ *Animal Law: Cases and Materials*, 4th Edition, Carolina Academic Press 2010, at 51. Virtually identical statements open the discussion of the chapter on property in the 1st, 2nd and 3rd editions as well.

contract law and property law play in subordinating nonhumans and also placing humans in the position of ignoring the animal invitation.

Just how bereft of human feeling that entire industry has become was clear at a municipal court case heard in Warren County, New Jersey, in the fall of 2000. A poultry company ... was convicted of cruelly discarding live chickens in trash cans. The conviction was appealed and overturned, partly on the grounds that [the corporate owner] ... had only six employees overseeing 1.2 million laying hens, and with workers each left to tend two hundred thousand creatures it remained unproven they were aware of those particular birds dying in a trash can. The company's initial defense ... asserted outright that this is exactly what the birds were anyway—trash:

[Attorney to the Judge]: We contend, Your Honor, that clearly my client meets the requirements [of the law]. Clearly it's a commercial farm. And clearly the handling of chickens, and how chickens are discarded, falls into agricultural management practices of my client. And ... we've litigated this issue before in this county with respect to my client and how it handles its manure. . . .

[Judge]: Isn't there a big distinction between manure and live animals?

[Attorney]: No, Your Honor. Because the Right to Farm Act protects us in the operation of our farm and all of the agricultural management practices employed by our firm.

As this century progresses, it is possible that animal law advocates, now so riveted on companion animals, will use ideas such as implied contracts or *quantum meruit* in creative ways. Ideas from outside the legal system, such as social contract theory and feminist ethics of caring, might also have a part to play in what we consider “fair” and even “equitable.” Such ideas can even be applied to food animals who “serve” humans in one sense. But since substantive contract law is a weak area of the law because it is so dominated by the harsh, exclusivist notions of personal property rights that now prevail, this area is not likely to be a leader unless the background social realities change such that cultures insist on better treatment of nonhuman animals. If that occurs, the contract notion could turn out to be quite valuable.

Others areas of substantive law, such as the law of **wills and trusts**, have already incorporated important changes that will bring protections of different kinds to some animals (by and large, these are now focused on companion animals, but there is little to prevent this important set of legal rights for humans from being mobilized to protect farm animals, rescued research animals, and wildlife).

Apart from changes in substantive law areas, there are many other aspects of law that offer prospects for a robust animal law in the future.

Philosophy of Law and other theoretical enterprises are sometimes disfavored in first wave animal law, which has had much practical business to attend to as it tries to blunt the worst of harms that contemporary law permits (as Hegel is alleged to have said, *what the law permits, the law encourages*—this is especially true where private property is

treated as trump on all other values). Theoretical approaches admittedly can be mere abstraction or detached theorizing of the kind that has historically led to a pronounced anti-intellectualism in some circles. But the *broad thinking* that theory encourages *can be helpful* in social movements. Philosophers have had, as many recognize, an important role in the modern animal protection movement (for example, Peter Singer and Tom Regan).

By 2030, though, animal law will have become an important force in areas such as philosophy of law for a number of reasons. The inclusion of nonhuman animals in legal protections offers unrivaled opportunities for seeing how legal systems were formed, now operate, and, most relevant to this conference, *can operate in the future*. If thinking about the larger issues in animal law can avoid the pitfalls of *mere* theory, and instead be helpful with the essential practical work that animal law has attempted in its first stage, then thinking about the larger issues will certainly take its place in both education generally and legal education in particular.

Consider how even discussing the possible relevance of philosophy of law to animal law illuminates what might be called “the one class problem.” First wave animal law has been content, with only a few exceptions, to accept *a single course* called “animal law” or “animal rights” within the law school curriculum. The title of the course risks being a misnomer for a variety of reasons—“animal rights” is, given what has been said about the crucial importance of non-rights legal tools to fundamental animal protections, only partly what animal law courses are about. Even the title “animal law” for the one course offered misleads, for there is *so much* that can be discussed that all possible “animal law” topics hardly fit into a single course any more than all the “humanities” fit easily into a single course.

Second wave animal law will cross many thresholds as it gets beyond the one class problem. Entire programs are possible, as the Lewis and Clark program has so remarkably demonstrated. Additional courses will also help second wave animal law get over the anti-intellectualism that prevails in some corners of first wave animal law. This field will *never* be captured by mere theory, for the motivations for attending to animal law are deeply personal for most people. But *some* theorizing has a place as this complex, incompletely formed field goes forward. Comparative studies of law in different kinds of legal systems (which vary widely) will help everyone see the distinctive—and limiting—features of each system now operating. Such comparative work requires high-level generalizations, which are a feature of any mature field of education, animal law included.

Legal ethics is another area where animal law considerations will enrich the debate dramatically. The passage above from Scully *begs* the question about whether professional ethics within law can handle fundamental, substantive questions, or will remain focused solely on the narrow version professional ethics now taught. Professional ethics can more fully engage fundamental questions about the distribution of justice, the place of substantive ethics in the delivery of legal services, and the like.

Non-lawyers will naturally be inclined to condemn the lawyer in the Scully passage because they are unaware that an American lawyer is obligated when arguing in court to be a “zealous” advocate for the interests of their client, and also to follow existing law. These are important obligations, but animal law can help legal professional ethics pause just long enough to imagine how the attorney’s assertions here would sound to new law students, ordinary citizens, and even our grandparents. Surely the system has room for the judge’s response of disbelief that chickens can be compared to manure. Animal law will, by the end of this century, help legal ethics engage profoundly important matters.

Who will the leaders be? I have said or implied many times in this paper that *law alone cannot lead* the way as humans examine their inevitable intersection with nonhuman lives on the Earth. But law *must* help lead the animal protection movement for some obvious and some non-obvious reasons. Law is an area where we project imagined futures onto others. It is where we create peaceful revolutions. It is also where oppressions are set into stone, framed as the “property rights” of legal persons over other living beings who are reduced by the system’s portrayal of them as mere legal things.

So law has a vital role to play in animal protection going forward. And given the successes of first wave animal law, it will. But animal law has many tasks—not only beginning the revolution, but sustaining it as well, then winning fundamental change such that the revolution is won. But then, as Larbi Ben M’Hidi’s warning suggests, *it is only afterwards, once we’ve won, that the real difficulties begin*. It is at this point that we will face the challenge of living up to our claim to be a moral species. Will we see the animal invitation? Will we notice that it is an essential part of our own health for a thousand reasons?

I think the answer is “yes,” as long as we recognize that animal law must mature into its future possibilities or waves. With this in mind, I think those who shape animal law today and in the coming years can provide not only future law students, but also our society, with a vision of our species’ engagement with life beyond the species line.