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Animal Law and Welfare - International Perspectives

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Chapter 2

Second Wave Animal Law and the Arrival of Animal Studies

Paul Waldau

Abstract Many societies today reflect that animal protectionists are going beyond efforts to establish fundamental protections of the kind signaled by terms like “animal rights,” “animal welfare,” and even “animal liberation.” This Chapter uses four interrelated questions to explore this new stage of animal law: (1) how should animal law courses in law school proceed given the obvious interdisciplinary reach of the larger field of Animal Studies?; (2) what is the place in second wave animal law for answers to the root question “who, what are ‘animals’?”; (3) why is the field of “Animal Studies” important to legal education and, more broadly, education as a whole?; and, (4) What roles have personal connection with and meeting of nonhuman animals played in first wave animal law, and what roles might they play in second wave animal law, the larger field of Animal Studies and its sub-disciplines, and the educational mega-fields we know as “the humanities” and “the sciences”?

2.1 Introduction

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 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, I examine the burgeoning academic field known as “Animal Studies,” but which is known variously under other names such as “Anthrozoology,” and “Human-Animal Studies” (there are at least a half-dozen other options that I do not list here. For further discussions, see Waldau 2013). In order to see why the field of law and the subfield of animal law need perspectives from Animal Studies, I employ what I will refer to as *three lenses*—these include 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

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Cover (1986): “*Law is the projection of an imagined future upon reality.*” 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.*”¹ 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, this chapter tries to look at both mid- 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 twenty-first century.

2.2 Focusing with Three Lenses

Peer with me through three lenses as we 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 lenses can do more than help us see further into the future. They can also help us today as we 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 with animal law, as well as the mid-term prospects and the long-term future of both animal law and Animal Studies.

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, went into its *fifth* edition in 2014. Another indication of change in the offing 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 of Animal Studies. It is not, in fact, *at all hard to find other signs* that people are reevaluating humans’ possible

¹Said by Larbi Ben M’Hidi to Ali la Pointe in the 1966 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.

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 take it for granted that today there is a great deal of first-rate evidence for three claims: (1) that change of many kinds is happening all about us (this has been going on for centuries, of course), (2) that our society has an astonishing number of features that attest we are decidedly “human-centered,” and (3) that our societies are plagued by myriad unsolved human problems.

At the end of this chapter and in both *Animal Rights* (Waldau 2011) and *Animal Studies* (Waldau 2013), 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* it does not generate mostly *human* benefits, let me ask you to look through the following three “lenses” with the goal of seeing better the possible futures of animal law.

2.2.1 The First Lens—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-nonhuman relationships into the midst of our lives—so, too, we will shape laws and legal concepts and thereby project our ideas about our membership in a more-than-human community 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.

The impact of our choices on future humans 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 animal courses were overwhelmingly demanded by students rather than proposed

by visionary law school administrators or tenured professors has given today's teachers an extraordinary opportunity. Those who teach animal law courses today by and large did not benefit from a form of legal education—or general education, really—that was sensitive to nonhuman animal issues in the manner that animal law courses are today. Those 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 their own general and legal education. The upshot is that contemporary courses can fully address 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 today react strongly to these inadequacies. This phenomenon prevails in spite of the fact that today's students also had, as did their present instructors, relentless emphasis on the importance and "rightness" of human exceptionalism.

As in the past, today human-centerednesses of many kinds and an astonishing variety of exceptionalism and its exclusivist strategies often arrive in our lives as a virulent political correctness, even a belligerent moral arrogance that insists that focusing on humans *alone* is morality itself. If one pierces through this fundamentalist veil, what emerges is that such insistence is often less than a privileging of all humans, but, instead, merely a privileging of one human group, such as males, a single culture, one's own nation or religious tradition, or economically important consumers.

A vast array of exceptionalist fundamentalisms, then, make raising the interests of other-than-human animals a risky enterprise. Yet law schools can be, in general, a wonderful place to develop free expression. This is one of the reasons that so many law schools have been hospitable to animal law courses proposed by students and then, with the help of faculty and administrators, realized. The result is often only a single course, true, in a curriculum that continues to be dominated by strident, human-exceptionalist rhetoric and concepts, but the upshot is extraordinary—these developments in animal law are the most developed part of the broader field Animal Studies (more on this below).

2.2.2 Peering Through a Second Lens—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.

The revolution has thus started, and it is easy to see that legal education's embrace of animal law courses thereby reflects that a first wave of the field "animal law" has arrived on our shores. From 1977, when the first such course went forward at Seton Hall Law School, to the year 2000, difficulties in getting this revolution off the ground must have been formidable, for fewer than a dozen such courses in the United States were started. But with Harvard Law School's offering of an animal law course (called "Animal Rights" and taught by Steven Wise in 2000), the field took off nationally and internationally—within only a decade, for example, the United States saw a ten-fold increase in the number of such courses. Such an increase would be significant in any field, of course, but particularly so in the case of animal law—there are just under 200 accredited law schools in the United States, and with well over 140 schools offering an animal law course in 2014 (virtually all of which were the result of *student* petitions), a large majority of American law schools now offer this kind of course. This also means that thousands of law students are taking this course each year around the world—given lawyers' proficiency at getting their voice heard in public policy circles (compare them to, say, veterinarians who historically have not been successful at having their voices heard, let alone taken 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 augurs more critical thinking, technical sophistication, and compassion-driven content for future policy discussions in this area.

In the spirit of critical thinking, let me call attention to some important disputes and even the polarization that attends much discussion of the animal law phenomenon—it is likely that this phenomenon will seem wonderful *if* one is interested in and favors (i) the ethics-tenor of contemporary animal law education (by which I mean the prevalence of ethics-based and justice-focused concerns as students express why they pursue and hope to expand "animal law"), or (ii) a similar concern for animal protective values and outcomes in the field of Animal Studies, or (iii) developing ever-greater sophistication when scrutinizing law for evidence of compassion. *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.

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 the vast majority of criticisms of the animal law phenomenon are based on a failure to see the movement for what it is—the opening up of law beyond the species line.

2.3 First and Second Wave Animal Law

2.3.1 First Wave Animal Law

It seems to me that these initial stages of the animal law movement have opened up so many questions and issues that it is clear that first wave animal law reflects a true revolution. Caution is in order, for there are always difficulties when one attempts to assess the future of a young social movement, which contemporary animal protection is even though it is sustained by roots in ancient cultures' visions that we, as humans, are capable of rich forms of animal protection. But celebration is also in order, as it were, for this early phase of modern animal law has surmounted the challenges of the first part of Larbi Ben M'Hidi's warning—*It's hard enough to start a revolution*. But no one who celebrates this will fail to recognize Larbi Ben M'Hidi's 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, and which were commonly termed "pets" until the late twentieth century when a certain political correctness prompted emergence of the now favored term "companion animals"—there has been much discussion of research animals, too, and more recently food animals (wildlife, it seems to me, receives much attention because this category of nonhumans is the focus of species-level discussions dominated by extinction risks, but the sentience of the individual "wild" animals is less talked about, although there are *many* substantial efforts to protect and rehabilitate injured wild animals of both endangered and non-endangered species);
- preoccupation with the special cognitive abilities of nonhuman animals, all of which risks a surreptitious affirmation that the human mind, often seen as the pinnacle of cognitive abilities, is the definitive measure of the universe; and,
- forms of activism that work primarily within established public policy circles, particularly courts, legislative bodies and administrative agencies as if these circles are where we (our modern, industrialized societies) create and sustain broad 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. While there can be little doubt that these achievements will continue to play important roles in the future, 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.

2.3.2 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 and interdisciplinary engagement with other living beings. The result can be a *qualitatively different* stage of animal law.

- *Use of traditional law school methods*—While animal law educators' use of traditional law school methods (such as casebooks) will very likely always remain essential, *much more* is needed. The typical form of animal law education, with a few notable exceptions, is a survey/introductory course taken as an elective by interested law students. Second wave animal law must be creative in reaching beyond this important but clearly preliminary 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 to create a battery of courses that cover animal law adequately will come from liaisons that animal law creates with (i) other law courses, such as environmental law, and (ii) 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 in litigation techniques, since these forms of expertise have often been used in support of oppression of *human* "others." First wave animal law has had success engaging legal systems' technicalities, many of which have been designed to limit non-lawyers' access to courts. Such mastery has been important because such technicalities have long been utilized by the wealthy and powerful segments of modern societies who can hire the most accomplished and politically connected lawyers for the purpose of limiting claims that might divest the powerful of their privileges. There are, in addition to standard legal reasoning patterns, important perspectives that non-lawyers have to offer animal law that help illuminate the values that drive the legal system. Both law insiders and those outside law have helped everyone see that 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. Further, since legislative fiats can override the breakthroughs achieved 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"*—Because foregrounding of a "question everything" mentality about the very concept of "legal rights" opens doors and minds, this practice has had a high profile in first wave animal law and thus has been historically and psychologically important. Extending rights has been a key element of first wave animal law, but it is equally important to see that this valuable tool has its limits, for it is but one tool 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—for example, David Kennedy in his 2004 book *The Dark Sides of Virtue: Reassessing International Humanitarianism* supplies important examples of how public remedies involving "explicit rights formalized and implemented by the state" do not work well in some other cultures (Kennedy 2004, p. 11). On the nonhuman front, rights can surely work well in some contexts for, say, chimpanzees and other extraordinarily complex nonhuman animals, although there are also other legal tools that can work as well. But for many nonhuman animals that do not fit so well our fascination with cognitive abilities, the tool of individual *legal* rights with public remedies might not work well at all. Instead, other tools, such as legislatively mandated prohibitions on ownership, may work far better.
- *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 of course animal law as a field has many tasks to accomplish beyond protecting these important lives and family members. 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 active citizens' 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 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 cognition is but one of many factors that draw humans' attention to nonhuman animals, as Peter Singer's historically important emphasis on sentience four decades ago underscored (Singer 1975). Yet there is *no doubt* that the heavy concentration on the cognitive complexities easily demonstrated in certain other social mammals (the nonhuman great apes, elephants, whales and dolphins) has opened minds to the fact that out beyond the species line are brainy, amazing nonhuman animals *who* exhibit overwhelmingly rich and compelling personalities, lives and various forms of intelligence. This is one reason some publishing houses these days now suggest that their authors avoid using the relative pronoun "it" and feel free to use "who" when referring to a nonhuman living being. There is, however, something of a two-edged sword risk that lurks nearby, for as noted above a too heavy preoccupation with cognitive complexities can amount to a surreptitious affirmation that only those nonhumans that are *cognitively* somewhat *like us* get protected. If the upshot is that those nonhuman animals 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 protection—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?*" (Bentham 1970, p. 283, n. 2).
- *Focus on activism in courts, legislatures and administrative agencies*—work within public policy circles promoted by first wave animal law has been crucial, particularly courts, legislation and administrative regulation. *But* these venues, as important as they are, are decidedly *not* the only circles of modern societies that *create and sustain* our social values. Social values are rooted in deep-seated psychological factors like inherited customs and cultural stories. That these factors plainly go far deeper and well 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 multi-year curriculum. This happens as every lawyer-to-be is trained to think about fact situations or legal arrangements that "violate public policy."

The literature of the first wave of animal law characteristically involved lawyers talking to judges, lawyers and law students. 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 regarding humanity's inevitable interactions with other-than-human animals. In crucial ways, such a fundamental change requires numerous additional changes *beyond the legal system*. The good news is that such changes have begun, for they can easily be found throughout the ferment already mentioned. This ferment contributes in psychologically important ways to what can happen inside legal systems—for example, the rich concerns for companion animals no doubt appeal to legislators with dogs at home and 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."

Why might it be hard to sustain first wave animal law's achievements in starting a revolution? Since the achievements of first wave animal law have been so important, the risks of remaining at this stage might seem minor, especially given that the revolution has been started. But the risks are real, though less than obvious at first—they involve *future* possibilities, which everyone senses are quite remarkable. Said most simply, 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 (it has, for example, permitted student demand to nurture animal law's growth), but it still harbors—indeed, promotes—narrow, arrogant and ultimately harmful forms of human-centeredness that will remain the unchallenged heartbeat of modern law *unless* animal law progresses to much greater fullness and power. Said another way, the revolution which has started will not long survive without growth.

Legal education has often been inhospitable to interdisciplinary considerations, and on the issue of nonhuman animals in particular, legal systems often feature inherited views (such as the claim that only humans can have legal rights) that dominate, eclipsing the common sense proposition that *any* legal system can, if the host society wishes it to do so, offer rights-based protections to nonhuman animals. Conservative approaches that are blinkered can easily become reactionary over time, and one hallmark of such an "evolution" is the fostering of negative attitudes within established legal circles toward the emergence of animal law. The following story illustrates how one reaction turned up in an unusual place. I happened to teach an animal law course at a famous law school a number of years back. When I visited the faculty lounge during my first week of teaching, 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 B.S!" (in the interest of decorum I have substituted "B.S." for the actual word used). Immediately, another faculty member rebutted the first assertion in an equally eager tone, saying, "Oh, no it's not!" On this occasion, the first faculty member spoke freely, I suspect, because he knew absolutely *nothing* of the course's subject matter, how the course was run, what the student dynamics were, what the level of rigor and/or scholarship was, or what the state of contemporary scholarship in this subfield of law was.

In his facile, ignorance-driven dismissal, this highly educated, very accomplished faculty member reflected attitudes that only two decades ago dominated all law schools. But today, first wave animal law has successfully started a revolution, such that animal law courses are now available at a majority of American law schools. One sign that the revolution is progressing is that such less-than-polite responses are far less likely at law schools where the faculty is secure with legal education's wonderful tradition of open-minded inquiry. But if one is familiar with

such signs that the first wave of animal law has started a revolution, no one familiar with today's law schools asserts that the long-prevailing tradition of human exceptionalism in legal education is now weak. It remains *very* powerful, appearing in both overt and far 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 and still today dominates in the vast majority of courses offered in the modern law school curriculum.

What drives some people's continuing, wholesale dismissal of animal law is a deeper, culturally ingrained attitude that the philosopher Mary Midgley (1984) has called "the absolute dismissal" of nonhuman animals characteristic of western culture generally. Any number of things make this kind of radical dismissal *terribly* problematic—one is that most other human cultures have *not* taken this position; another is the ethic of free inquiry I describe above, for a complete dismissal is so undetermined by known facts today that it can only be characterized as ignorance-driven. As the saying goes, "those who know nothing about a topic can speak freely." Yet only a little inquiry today readily shows that many sciences, the field of ethics, and even the formerly staid study of religion and spirituality offer a variety of rich ways to inquire about other animals' *actual* realities. In a very real way, many new (that is, non-traditional in western culture) approaches to other living beings reflect humans' elegant abilities with ethics, imagination, community and humility. In effect, such approaches attempt to notice other animals on *their* terms, not on solely on our terms. Law as traditionally taught was, and in some quarters still remains, truly autistic about this possibility because it was deeply rooted in its own past absolute dismissals of nonhuman living beings.

The dominance in modern 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 below—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 clearly 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*.

Some legal theorists and philosophers assert there *now* exists sufficient legal and scientific grounds to make major changes (see, for example, Wise 2000; White 2007); further, there is some evidence that sufficient political will exists today to

make fundamental changes (for example, there is information on polls below that could be used to support such an assertion). But even if there are some encouraging signs around the world, we remain in a period of education about animal law where many institutions, disciplines and even professional organizations still exhibit a stark refusal to admit, let alone seek out, *other animals' realities*. Ignorance serves the status quo, but just as the economist Paul Samuelson once observed "theory advances, funeral by funeral," 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.

As for second wave animal law developing ways to push beyond today's preoccupation in law and in legal education with humans as the measure of all things, there is an important shortcoming in the present system that must be addressed. As with so many other major fields in education that are only now engaging nonhuman animal issues, the legal system does not itself generate much expertise, if any at all, about nonhuman animals. It is true that 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.

2.3.3 *Entering the Tower of Babel*

Inputs on nonhuman animals available to litigation via expert testimony and to legislators via lobbyists and research are important mechanisms, but they are, from the standpoint of an ethic of inquiry, very weak. Law, in effect, uses a non-scientific approach to other animals even if some establishment science can enter the courtroom or legislative chamber through hired experts or lobbyists. Note, however, who it is who is invited into courtrooms—it is establishment scientists with "credentials." The incomparable Jane Goodall is thus admitted, but so are research scientists whose opinions can be unduly compromised by those who employ or retain them, as has happened again and again in public health disputes over leaded gasoline, smoking tobacco, the dangers of asbestos, and the effects of widespread use of

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 rarely attempt to go beyond their own expertise is that "out there" (that is, out in the non-law precincts of society) lawyers and legal scholars find the vast body of claims and communications about other-than-human animals to be something like the biblical and now legendary 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 apes, primates, mammals and vertebrates (all of which are *animal* categories). But vernacular speech and the legal system use the highly anti-scientific "humans and animals" division, all of which simply anchors human-centeredness ever more firmly in people's minds. Unless we acknowledge that we have been trained to speak sloppily about this subject, there is no simple way to attack the dualism. What is needed, then, is a straightforward and honestly pursued ethic of inquiry about our slovenly language habits and ethically problematic refusal to take other animals seriously.

Interestingly, though, our society has today developed the "ferment" discussed early in this chapter, such that contemporary thinking about some of the life out beyond our species is developing rapidly away from ignorance and toward a more informed character. Thereby, traditional out-of-hand 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.

2.3.4 *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 that, in discussions of public policy changes and possibilities, *their own fields* belong every bit as "front and center" as do law and legal technicalities. So even if lawyers have admitted expertise at public policy discussion, they are by no means the only voice needed in 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*