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CAROLINA ACADEMIC PRESS
Durham, North Carolina

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Print ISBN 978-1-611163-092-3
eBook ISBN 978-1-53100-610-5
LCCN 2017947251

Carolina Academic Press, LLC
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

*KH: For John, Kele and Gale, and for my students
and our clients.*

*JT: In memory of Jolene Marion, a gifted and passionate animal lawyer
and the first to promote a scholarly approach to animal law.*

*PH: For Jack and Audrey, who bring me endless
pride, love, and laughter.*

*SW: For Pablo and Lola, and in loving memory of Wilma,
Fred and Mooki.*

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Acknowledgments

The authors of the book would like to thank Tom Krepitch, Rajesh Reddy, Keiko Rose, David Rosengard, Matthew Taxman, Caitlin Zittkowski and all our law clerks, for their contributions as this project came to fruition.

We would also like to thank our colleagues who offered valuable encouragement, insight, and assistance: Jennifer Bridges, Howard Erlanger, Peter Fitzgerald, Scott Heiser, Jeff Kerr, Courtney Lee, Justin Marceau, Russ Mead, Bernie Vail and Anne Villella.

Series Editor's Preface

Welcome to a new type of casebook. Designed by leading experts in law school teaching and learning, Context and Practice casebooks assist law professors and their students to work together to learn, minimize stress, and prepare for the rigors and joys of practicing law. Student learning and preparation for law practice are the guiding ethics of these books.

Why would we depart from the tried and true? Why have we abandoned the legal education model by which we were trained? Because legal education can and must improve.

In Spring 2007, the Carnegie Foundation published *Educating Lawyers: Preparation for the Practice of Law* and the Clinical Legal Education Association published *Best Practices for Legal Education*. Both works reflect in-depth efforts to assess the effectiveness of modern legal education, and both conclude that legal education, as presently practiced, falls quite short of what it can and should be. Both works criticize law professors' rigid adherence to a single teaching technique, the inadequacies of law school assessment mechanisms, and the dearth of law school instruction aimed at teaching law practice skills and inculcating professional values. Finally, the authors of both books express concern that legal education may be harming law students. Recent studies show that law students, in comparison to all other graduate students, have the highest levels of depression, anxiety and substance abuse.

The problems with traditional law school instruction begin with the textbooks law teachers use. Law professors cannot implement *Educating Lawyers* and *Best Practices* using texts designed for the traditional model of legal education. Moreover, even though our understanding of how people learn has grown exponentially in the past 100 years, no law school text to date even purports to have been designed with educational research in mind.

The Context and Practice Series is an effort to offer a genuine alternative. Grounded in learning theory and instructional design and written with *Educating Lawyers* and *Best Practices* in mind, Context and Practice casebooks make it easy for law professors to change.

I welcome reactions, criticisms, and suggestions; my e-mail address is mschwartz@pacific.edu. Knowing the author(s) of these books, I know they, too, would appreciate your input; we share a common commitment to student learning.

In fact, students, if your professor cares enough about your learning to have adopted this book, I bet s/he would welcome your input, too!

Michael Hunter Schwartz, Series Designer and Editor
Consultant, Institute for Law Teaching and Learning
Dean and Professor of Law, University of the Pacific,
McGeorge School of Law

General Overview

We often look for new tools to help us explain complex legal concepts and to better engage in the study of law. Sometimes, those tools come from surprising and seemingly unrelated sources. While traditional areas of the law experience change over time, a newly created legal area may provide a condensed version of the process by which social debate and legal development interact. The emerging field of animal law offers such an opportunity to more fully explore and understand legal systems and has fascinating insights to offer traditional law courses.

What is Animal Law?

Animal law poses a fundamental question, “How is legal analysis affected when the interests of sentient (but non-human) beings are considered?” This evolving legal field is developing rapidly. Animal law overlaps with contracts, criminal law, torts, property, constitutional law, commercial law, wills and trusts, domestic relations, environmental law, evidence, patent and even tax law, all relating to the use or protection of animals. Animal law classes focus on common and statutory law at the local, state and federal levels and often include international law consideration. The breadth of the legal analysis results from the ubiquitous presence, and use, of animals in this country and around the world. Animals are bred, raised, transported, killed and processed for food and clothing. Animal “by-products” are in literally millions of consumer, military and industrial products and processes. Animals are: companions; forms of transportation; hunted and trapped; sources of education and entertainment in zoos, movies, circuses and other venues; tools in scientific and medical research; and helpers to people who have various physical, mental and emotional disabilities. These and other uses are deeply embedded in the structure of society and each implicates some aspect of the law. The relevant legal frameworks establish what can and cannot be done with and to animals, thus setting, accepting and rejecting legal standards based on social, scientific, religious, economic and philosophical concepts of animals and their roles in society. Studying these concepts helps us understand not just the law’s evolving attitude toward animals, but how the law operates and the nature of legal development as well.

The Utility of Incorporating Animal Law Cases into More Traditional Law Classes

Animal law cases offer a new lens through which to explore core legal concepts. For example, the student taking a constitutional law course might examine which sort of plaintiffs would be able to allege standing to sue, and how they would do so, when the injured victim is a factory farmed cow. In a torts class, students could determine the available remedies and measure of damages for a plaintiff's ten-year-old mixed-breed dog harmed by a third-party's tortious act. Or, the student in a wills and trusts course might grapple with a case in which a testator tried to create an estate plan to provide lifetime care for her five beloved dogs, but family members challenged her will in order to gain access to the residue without having to wait for the last dog to die of natural causes.

Animal law cases invite focus on the way judges grapple with changing values—here, the treatment of living beings who some consider to be family, and others view as a resource. They shine a different light on traditional legal subject matters and the role of courts when legislatures have not yet addressed certain issues. Learning to analyze the law and advocate within this context is instructive in any area of legal study. The goal of this book is to offer a fresh and engaging way to approach core legal concepts as well as the opportunity to think creatively about the application and development of legal principles. These goals can be achieved by including animal law cases and concepts throughout a course or focusing on them as examples within a specific legal framework.

Why Does Animal Law Matter to Other Areas of Law?

Overlap and Legal Development

Animal law questions are embedded in substantive areas of law and practice, presenting significant overlap with many other legal issues. Industrialized animal agriculture¹ alone implicates environmental law, consumer law (from labeling to public health), zoning, worker health and safety, nuisance, contract, tort, criminal law (animal cruelty) and more. Critics of “factory farms” claim that they not only cause the animals confined in them physical and mental suffering, but they also have deleteri-

1. Also referred to as “industrial animal factories,” “factory farming,” “Concentrated Animal Feeding Operations,” and “Confined Animal Feeding Operations” (CAFOs).

ous effects on the neighboring environment and people.² The waste these facilities generate can pollute nearby bodies of water, contaminate the air and increase contributions to climate change.³ Pollution from industrial agriculture also raises environmental justice and workers' rights concerns, as well as health and safety issues for those who work at or live close to these operations.⁴ Industrial scale operations raise important questions about the ability of societies to efficiently and economically feed their citizens. Some argue that factory farms offer the most cost effective way to produce affordable meat and dairy products. Others counter that improving the living conditions for these animals will result in improved health and living conditions for humans as well, highlighting an important conversation about the connection between human and animal well-being.

The lessons we learn from these overlapping and intersecting spheres of law are important and can help us reframe our understanding of individual substantive areas. For example, a person who owns a domesticated mouse cannot legally poison or cruelly kill the mouse, whereas it is standard practice—and legal—to trap, kill, and/or poison wild mice and rats who come into our homes and are considered pests. If the behavior is the same and the legal consequence is different, one may question whether the contextual differences support that outcome from an evidence-based perspective. This illustrates just one of the ways in which laws pertaining to animals operate differently depending on the context in which the animal is used, who owns the animal, the jurisdiction in which the action takes place and other factors. When we look at these factors objectively, we see a lack of legal consistency in our approaches. This is fertile ground for legal analysis and study, and offers an opportunity to explore more harmonized legal approaches that are legally consistent and sufficiently supported.

Further, applying animal law analysis to existing legal frameworks encourages us to reconsider some fundamental assumptions upon which we operate. For example, animals are legally classified as property. However, scientifically, animals are classified as living beings with certain capacities. While the law generally fails to explic-

2. Elizabeth Overcash, *Detailed Discussion of Concentrated Animal Feeding Operations: Concerns and Current Legislation Affecting Animal Welfare*, ANIMAL LEGAL & HIST. CENTER, MICH. ST. U.C.L. (2011), <http://www.animallaw.info/articles/dduscafo.htm#id-6>; Cassuto, David N., *The CAFO Hothouse: Climate Change, Industrial Agriculture and the Law*, THE ANIMALS AND SOCIETY INSTITUTE POLICY PAPERS (2010); CAFO (CONCENTRATED ANIMAL FEEDING OPERATION): THE TRAGEDY OF INDUSTRIAL ANIMAL FACTORIES (Daniel Imhoff, Ed., Foundation for Deep Ecology/Earth Aware, 2010); Kirby, David, *ANIMAL FACTORY: THE LOOMING THREAT OF INDUSTRIAL PIG, DAIRY, AND POULTRY FARMS TO HUMANS AND THE ENVIRONMENT* (St. Martin's Press 2010); Robert Goodland & Jeff Anhang, *Livestock and Climate Change*, <http://www.worldwatch.org/files/pdf/Livestock%20and%20Climate%20Change.pdf> (last visited June 14, 2017); Pew Commission on Industrial Farm Animal Production, *Putting Meat on the Table: Industrial Farm Animal Production in America* (2008), <http://www.pewtrusts.org/en/research-and-analysis/reports/2008/04/29/putting-meat-on-the-table-industrial-farm-animal-production-in-america> (last visited June 14, 2017).

3. *Id.*

4. *Id.*

itly distinguish between living beings (non-human animals) and inanimate objects, the dissonance between the scientific and legal realities creates anomalies within the law, which are surfacing with increasing frequency and must be addressed. The property classification of animals, in particular, results in inconsistent legal outcomes. For example, a person can be found guilty of cruelty to an animal, but not to a book; the victim of domestic violence may request inclusion of a companion animal within a protective order but cannot include protection for a favorite piece of furniture. Additionally, because the law focuses on the behavior of humans rather than the biological reality of animals, the outcomes of cases are determined by the human context rather than the impact on the affected animal. Thus, a person who owns a “companion animal”⁵ may not cut that animal with a knife to induce bleeding; to do so would be a violation of state anti-cruelty laws. However, this activity could be considered legal and appropriate in a laboratory setting. Because these differing outcomes may be considered appropriate in some instances and not in others, they are engaging examples to consider both in the academic realm and in practice.

As the foregoing examples illustrate, while labeled as property in all instances, in effect, the law treats animals as property in some cases, and as quasi-property beings in other cases. As such, we see the legal system creating new rules to balance existing law with a growing recognition of the special character of living forms of property. In the criminal law sphere, prosecutors and judges are considering unique questions about pre-trial forfeiture of evidence when that evidence is a live animal who⁶ cannot be humanely “stored” for months in an evidence room.⁷ In wills, trusts and probate law, we encounter cases in which animal owners wish to provide for the care of their beloved animals in the event of their incapacity or death. How do probate courts deal with the testator’s stated desire to care for his or her animal companions by having them live out their natural lives in the family home, and still facilitate the orderly transfer of ownership of the testator’s property? In family law, judges need to consider what property division means in a divorce setting when the property in question is an animal in need of ongoing nutrition, housing and medical care (suggesting resource allocation considerations), and both sides claim an emotional attachment to that property.

These and other questions cause us to consider whether our current legal frameworks can be applied usefully to animal law questions, or whether we need to develop

5. Although companion animals have historically been called “pets,” some consider the term derogatory, particularly as it reifies the role of animals as property. Some jurisdictions have opted to use the term companion animals. Though there is no consensus regarding the term, we have elected to use “companion animal” rather than “pet,” in our own writing and respect the choice of others to use the term “pet” in decisions, statutes or elsewhere.

6. Pronouns indicative of beings, rather than things, are used for animals in our writing.

7. See *State v. Branstetter*, 181 Or. App. 57 (2002) (discussing the trial court’s decision to issue a search warrant and impound defendant’s animals to the Pioneer Humane Society); see also, Amy Breyer, *Asset Forfeiture and Animal Cruelty: Making One of the Most Powerful Tools in the Law Work for the Most Powerless Members of Society*, 6 ANIMAL L. 203, 219–220 (2000).

expanded and refined legal theories that take into account the biological realities of the animals who are subjects of legal analysis. Regardless of how these questions are answered, engaging with animal law concepts allows us to analyze structural change regarding legal principles, and it is important to do so in an explicit and rigorous manner.

Legal Developments Follow Social Developments

Laws that affect the treatment and use of animals have been evolving as social attitudes change. This change is most obvious when we focus on how the treatment and status of companion animals has been transformed in the U.S. within the past generation. According to the American Pet Products Association, 62% of American households include a companion animal.⁸ Spending on these animals nearly tripled in the fifteen years between 1994 and 2009, growing from \$17 billion to \$60 billion.⁹ The companion animal industry is now the seventh largest retail industry in the U.S. with a growth rate second only to consumer electronics.¹⁰ This annual expenditure is projected to increase to \$69.36 billion in 2017.¹¹ In addition to increased spending on companion animals, overwhelming empirical evidence demonstrates that most Americans do not consider companion animals to be like any other type of property.¹² A 2012 survey of 50,000 companion animal guardians revealed that “[m]ost people consider their pets to be family members or companions, not property. . . . The statistics reveal that almost all pet owners feel a strong human-animal bond.”¹³ According to the survey, 63.2% of guardians viewed their companion animals as “family,” while another 35.8% considered them “companions.”¹⁴ Only 1% of those surveyed viewed their companion animals as property.¹⁵

Further, there are more than 180 million cats and dogs in this country living with humans in private homes—one for every two Americans.¹⁶ Studies show that 45% of dog guardians take their dogs on vacation; more than half of companion animal

8. Andrew Martin, *‘For the Dogs’ Has a Whole New Meaning*, N.Y. TIMES (June 4, 2011) at BU1, <http://www.nytimes.com/2011/06/05/business/05pets.html?pagewanted=all>.

9. Am. Pets Products Ass’n (APPA), *Industry Statistics & Trends*, http://www.americanpetproducts.org/press_industrytrends.asp (last visited June 14, 2017).

10. Paul Mann, *How the Rich Pamper Their Pets*, FORBES (Jan. 15, 2008), http://www.forbes.com/2008/01/14/pets-pampering-celebs-oped-cx_pma_0115pets.html.

11. APPA *supra* note 9.

12. William C. Root, “Man’s Best Friend”: Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury, 47 VILL. L. REV. 423, 423 (2002).

13. Katie Burns, *Vital Statistics*, (Jan. 16, 2013), <https://www.avma.org/News/JAVMANews/Pages/080101a.aspx>.

14. *Id.*

15. *Id.*

16. *Id.*; see also Root, *supra* note 12, at 423.

guardians would prefer a dog or a cat to a human if they were stranded on a deserted island; and 50% would be “very likely” to risk their lives to save their companion animals, while another 33% would be “somewhat likely” to put their own lives in danger to save their companion animals.¹⁷

This shift in how Americans view companion animals is increasingly reflected in both statutory and case law. For instance, anti-cruelty laws have been strengthened in all fifty states in the past twenty-five years.¹⁸ The federal government and state legislatures have enacted other laws acknowledging the suffering of animals and the need for increased protections as well.¹⁹ A review of federal legislative efforts to ban “crush videos,”²⁰ a particularly gruesome form of animal abuse, and the resulting judicial responses shows how quickly the democratic process can move regarding an issue about which the public feels passionately.²¹ Analysis of this issue represents a case study on the development of law, the differing roles of the judicial and legislative branches of government in responding to evolving social opinion regarding legal responsibility and the balancing involved when applying fundamental legal concepts to a challenging issue.

17. Root, *supra* note 12, at 423.

18. See <http://animallaw.info/statutes/topicstatutes/sttoac/htm> (last visited June 14, 2017) (listing animal anti-cruelty laws in the U.S.); <http://aldf.org/resources/advocating-for-animals/animal-protection-laws-of-the-united-states-of-america-and-canada> (last visited June 24, 2017).

19. As a result of Hurricane Katrina, e.g., Congress passed the Pets Evacuation and Transportation Standards Act, Pub. L. No. 109-308, 120 Stat. 1725 (2006) (codified at 42 U.S.C. §§ 5121, 5196, 5196b, 5170b(a)(3)) to require that state emergency management plans include people’s companion and other animals. Veal crates (intensive confinement for juvenile cows) have been banned in the following states: Arizona, California, Colorado, Maine, Michigan, Ohio and Rhode Island. Additionally, Arizona, California, Colorado, Florida, Maine, Michigan, Ohio, Oregon and Rhode Island are phasing out the use of gestation crates (intensive confinement for sows).

20. “Crush videos” are videos of intentional animal torture, aimed at those who find such films sexually stimulating. These videos generally feature scantily clad young women in high heel shoes, stepping on and slowly crushing to death small animals who are nailed or taped to the floor. Apparently, the viewers of these videos enjoy hearing the screams of the animals. While the making of such videos violates every state’s anti-cruelty laws, the videos are most often sold on the Internet, and identifying and locating the perpetrators of the crimes is rarely possible.

21. In *United States v. Stevens*, 559 U.S. 460 (2010), the Supreme Court struck down a federal law banning the interstate sale of crush videos, finding the statute contravened the First Amendment. However, less than eight months after the Supreme Court handed down its ruling, Congress passed and the President signed into law the Animal Crush Video Prohibition Act of 2010, Pub. L. 111-294, 124 Stat. 3177, criminalizing the creation and sale of crush videos. The new statute aimed to remedy the constitutional defects cited by the Supreme Court and reaffirmed society’s progress towards preventing animal cruelty. As an example of the ongoing nature of this legal evolution, one federal district judge found the new statute unconstitutional, *see U.S. v. Richards*, 940 F. Supp. 2d 548, 550 (S.D. Tex. 2013) (holding that while “animal crush videos are disturbing and horrid,” § 48 “abridges the freedom of speech protected by the First Amendment”), but that decision was reversed on appeal. *U.S. v. Richards*, 755 F.3d 269 (5th Cir. 2014).

Legal Developments Follow Scientific Developments

Though animals are property under the law of every state, they are unlike other forms of property. Scientists have discovered that animals feel pain and pleasure; that many experience a wide variety of emotions, including joy, fear, compassion, grief, anger and empathy; and that they form strong social bonds, in some cases with humans and in other cases with members of their own or even other species.²² The wealth of scientific discovery about the capacities of non-human animals is having repercussions in many spheres of our society. For example, in 2012 the National Institutes of Health announced that it will no longer fund medical research on chimpanzees, largely based on ethical concerns raised by a growing body of scientific evidence indicating how emotionally and intellectually similar chimpanzees are to human beings.²³

Scientific research concerning animal behavior and cognitive ability has spurred and provided *post hoc* support for changes in the ways humans treat animals. For instance, a group of scientists has now concluded that dogs may be able to experience positive emotions and “have a level of sentience comparable to that of a human child.”²⁴ Other scientists have determined that consciousness is not a quality unique to humans, suggesting that a wide range of animals, from mammals to birds, have demonstrated conscious states.²⁵ This mounting evidence and growing acceptance in the scientific community of animal consciousness and, in turn, the ability of animals to experience suffering, likely will continue to fuel changes in how we view the role of animals in our society. These scientific conclusions also raise interesting and important legal questions. Because laws currently restrict unnecessary suffering for animals, our society is engaging in new conversations about what suffering is, and

22. MARC BEKOFF, *THE EMOTIONAL LIVES OF ANIMALS* (New World Library, 2007); JAMES L. GOULD & CAROL GOULD, *ANIMAL ARCHITECTS: BUILDING AND THE EVOLUTION OF INTELLIGENCE* (Basic Books, 2007); TEMPLE GRANDIN & CATHERINE JOHNSON, *ANIMALS IN TRANSLATION: USING THE MYSTERIES OF AUTISM TO DECODE ANIMAL BEHAVIOR* (Scribner, 2005); MARC BEKOFF, *MINDING ANIMALS: AWARENESS, EMOTIONS AND HEART* (Oxford Univ. Press, 2002); MARC BEKOFF & STEPHEN JAY GOULD, *THE SMILE OF A DOLPHIN: REMARKABLE ACCOUNTS OF ANIMAL EMOTIONS* (Weidenfeld Nicolson Illus., 2000); GEORGE PAGE, *INSIDE THE ANIMAL MIND* (Doubleday, 1999); JAMES L. GOULD & CAROL GRANT GOULD, *THE ANIMAL MIND* (Scientific American Library, 1994); DONALD R. GRIFFIN, *ANIMAL MINDS: BEYOND COGNITION TO CONSCIOUSNESS* (Univ. of Chicago Press, 2001); DONALD R. GRIFFIN, *ANIMAL THINKING* (Harvard Univ. Press, 1984); DONALD R. GRIFFIN, *QUESTION OF ANIMAL AWARENESS* (W. Kaufman, 1981); MARC BEKOFF, *THE QUESTION OF ANIMAL EMOTIONS, IN MENTAL HEALTH AND WELL-BEING IN ANIMALS* 15, 17 (Franklin D. McMillan ed., 2005).

23. National Institute of Health News Release (June 26, 2013), <http://www.nih.gov/news/health/jun2013/od-26.htm>.

24. Gregory Berns, Editorial, *Dogs are People, Too*, N.Y. TIMES (Oct. 5, 2013), at SR5, <http://www.nytimes.com/2013/10/06/opinion/sunday/dogs-are-people-too.html>.

25. See PHILIP LOW, *THE CAMBRIDGE DECLARATION ON CONSCIOUSNESS* (Jaak Panksepp et al., eds., 2012) (“evidence indicates that non-human animals have the neuroanatomical, neurochemical, and neurophysiological substrates of conscious states along with the capacity to exhibit intentional behaviors”).

about what may be legally required or prohibited as a result of this new scientific information. These conversations will in turn lead to changes in the development and interpretation of laws relating to animals and will impact our broader legal frameworks.

Conclusion

Investigating animal law cases within traditional areas of law helps to foster an understanding of how the law develops in response to new information and evolving social consensus. It also encourages critical thinking and questioning of the function of certain legal constructs, sharpens our legal analysis, tests the law's ability to respond to changing realities, and allows us to clearly see bridges between legal fields and other non-legal disciplines. What follows is an exploration of cases²⁶ in which animal law analysis helps illuminate, and sometimes challenges, the application and structure of traditional legal paradigms.²⁷

26. Some of the cases have been edited, including some formatting changes, elimination of internal citations and other non-substantive changes, for ease of reading.

27. The following seven chapters are available under this title, separately or combined: Constitutional Law, Contracts, Criminal Law, Environmental Law, Property, Torts, and Wills & Trusts. These chapters are designed for use as stand alone material and, as a result, there is some intentional overlap between them. The chapters are also designed so that individual sections might be used in tandem with other materials. Therefore, there is some overlap within sections as well.