

# Animal Law: Whirlwind Notes and focus on Wise, Posner, Epstein

“law is the projection of an imagined future upon reality” [Robert M. Cover]

## Tools in the legal box

- 1-legal rights
- 2-prohibitions on actions (anti-cruelty, prohibitions on ownership)
- 3-legislative approaches
- 4-private law (wills and trusts)
- 5-contracts (private parties agreeing to behave in a certain way)
- 6-financial liability (torts)/MOD; damages to XYZ (owners)
- 7-education
- 8-Notice/federal process at agencies
- 9-teaching animals to communicate
- 10-tax breaks/benefits – incentives/disincentives; public/assistance
- 11-mandated disclosure and deceptive advertising laws (“puffing”?)
- 12-voluntary standards
- 13-‘reconciliation with science’ --- and: how we selectively fund research grants

## Some General Points

- distinguishing **common law** and **civil law** systems
- the intersection of **municipal**, **state**, **federal**, and **international** law (some countries have more internal ‘tiers’, too...)
- the role of comparative constitutional law (notably Switzerland, Germany, India, and the EU)
- On the role of **ballot initiatives** and voter referenda (see attached handout)
- Some categories of concern: standing, property, civil (or tort) law, criminal law, wills and trusts
- Two options**: Wise (change the property paradigm) v. Posner (work within the existing system)...are there others?

## Standing

- threshold determinant: standing is supposed to be a pre-merits discussion
- Glickmann*—injury in fact, causation, redressability
- not only corporations, but churches and boats can be legal persons...

## Property

The **property paradigm**: is animals’ status as property necessarily an all-or-nothing proposition? What, for example, are some ways in which property owners are limited in the way they can treat their property? (in a non-animal context)

- Which limitations *now exist*? Which limitations are conceptually possible? Which limitations are feasible?

*Dred Scott* case – Assault/confinement following...

- ‘regarded as an axiom in morals as well as in politics’ [an ‘axiom’ = unquestionable (and unfounded...)]
- Taney’s selection bias – is he right on the facts? No.
- the role of religion: (top of 42) in opinion of Justice McLean, reference to “Laws of God”
- “curse of Ham” myth – a (thin) justification for enslavement
- Taney hides behind basic property concept: ‘it’s property; stop asking questions’

‘violation of public policy’ (*Brand* case – no: we won’t kill your horses after you’re dead; the horse is different from the Cadillac) [vs. difference between chickens and manure]

## Torts

*PCRM v. Tyson Foods, Inc.* (California Appeals Court, 2004)

- 1- healthy chicken ads: no
- 2- “natural” claim – PCRM says heck no
- PCRM sought injunctive relief, but anti-SLAPP statute allows claims based on consumer product
- Tyson spends lots of money because they don’t want to allow one victory to open the floodgates
- then, PCRM voluntarily dismissed suit (ads no longer running) – also: chilling effect for tyson

*ALDF Boston v. Provimi Veal Corp* (Mass District Court, 1986) – ALDF sought order obligating Provimi to tell public how veal cows are raised. [under Mass. Statute – FDCA and FMIA preempt it]

**McLibel** -- {**SLAPP** suit – strategic lawsuit against public participation}

- Wolfson article: *McLibel* (UK law as reverse of US law – claimant has obligation to demonstrate truth)
  - they put into play “the common sense of cruel” (the common meaning of the word ‘cruel’)
- McDonald’s argued the standard approach in US—the typical farming practice “can’t” be cruel...court says no.
- MacDo also said cruelty should only be present in the contravention of governmental guidelines

## **Emotional Distress and SLAPP suits**

*Rabideau v. City of Racine* (Wisconsin supreme court, 2001) – woman’s dog shot by police officer – sued for negligent *and* intentional infliction of **emotional distress**. Court said no to both [negligent, no: certain class of family members only: not companion animals] [intentional, no: fails on question of purpose/intention]

*Campbell v. Animal Quarantine Station* (Hawaii Supreme Court, **1981**) – princess died in transport from heat prostration. Sued for emotional distress. Trial court granted \$1,000. Appellate questioned: is this a proper issue for recovery? (injury to property), etc.

- policy limits: serious mental distress (not simply opening the flood gates), & ‘the court says’ (supra.)
- Q) what if it were an iguana??

*Corso v. Crawford Dog and Cat Hospital, Inc.* (Civil Court of New York, 1979) [Bide-a-Wee] – wrongful disposal of dog. Key: “a special place somewhere between a person and property” and “the plaintiff is entitled to damages beyond the market value of the dog”

*Brousseau v. Rosenthal* (Civil Court of NYC, 1980) – 8-year-old dog brought to a kennel and somehow dies. The court sets out that negligence is presumed in such a case, so the kennel must bear the burden of proof. [also: part german shepherd, she got hosed afterwards] (nb, usually it’s legally irrelevant what happens after the tort). Award of \$550

*Johnson v. Douglas* (NY Supreme Court, 2001) Coco got run over while plaintiff was walking her dog. “the law is clear that pet owners cannot recover for emotional distress based on an alleged negligent or malicious destruction of a dog”

*La Porte v. Associated Independents, Inc.* (Florida Supreme Court, 1964) --- dachshund gets killed by a garbage can ☹. The issue: whether or not the plaintiff can recover for mental suffering. Exception to “impact rule” if there is malicious intent or extreme indifference: yes, in this case. (district court overruled)

*Kennedy v. Byas, d/b/a/ Agape Animal Hospital [d/b/a?]* (Florida Appeals Court, 2004) – dog having bouts of gastric – dog dies overnight. Court raises the impact rule: no physical impact, the plaintiff cannot recover for emotional distress. Court argues: simple negligence, so the plaintiff cannot recover for emotional distress.

*Liotta v. Segur* (Superior Court of Connecticut, 2004 – trial case): negligence of a dog groomer. Count 1, financial loss. Count 2, mental anguish (construed as ‘bystander’ anguish). ....

*Burgess v. Taylor* (Kentucky appeals court, 2001) – ‘free-lease agreement of horses’ [powerful story!] 2 counts: first=property, second=intentional infliction of emotional distress [IIED claim]. Thus, ‘sufficiently outrageous’ behavior.

*Ammons v. Welty* (Kentucky appeals court, 2002) – warden didn’t wait mandatory 7-day waiting period. The sheriff shot dog by shooting him in the head (his customary practice) – the court doesn’t feel the sheriff’s behavior rises to the level of maliciousness [extreme language...cites *Burgess*]

*Oberschlake v. Veterinary Associates Animal Hospital* (Ohio Appeals Court, 2003) – defendants tried to spay the dog while under anaesthesia. Damages sought: for the dog’s pain and suffering, emotional distress, loss of companionship. Court says: no, the dog is property.

*Green v. Leckington* (Oregon Supreme Court, 1951) -- plaintiff’s dog killed. Here the court *did* have a market value, so the trial court erred in proving special value: the court awarded \$250.

*Lockett v. Hill* (Oregon Appeals Court, 2002) – Defendant’s dog killed plaintiff’s cat. Lower court dismissed claims, appellate court says that a plaintiff can only recover emotional damages if the plaintiff has experienced distress. The cat as “constitutive property” [important to the owner’s sense of identity – again citing *Wise*]

*Katsaris v. Cook* [Court of Appeal, California, 1986] – relying on California statute...dog gets shot by neighbor.

## Wills and Trusts

*In Re. Capers Estate*, 1964, ‘Orphans’ Court, Pennsylvania’ (deals with people and entities that need protection: a collage of interests) – 2 Irish setters...Capers’ real concern was that they be well looked-after, killing them would violate public policy.

*In re. Estate of Howard H. Brand* (Vermont Probate Court, 1999) – not effectuating the intent of the willperson – rather: we can’t do this, but...[Chittendon County, VT]

## Criminal Law

*Celinski v. State* (Texas appeals court, 1995) – cat burning/poisoning. Boyfriend claims circumstantial evidence. Acetaminophen poisoning/microwaving...no loose pills, plenty of evidence... ---comment: poor evidence collection. “beyond a reasonable doubt”, with all circumstantial evidence: lots of resources used – forensics, etc...

*People v. Bunt* (NY justice court, 1983): guy beats dog to death w/baseball bat. His lawyer says: NY anti-cruelty statute is vague – not qualified enough to know what’s prohibited.

*People v. Dunn* (California appeals court, 1974) – Dunn and neighbor’s livestock eating fruit from his trees: killed 2 horses, donkey shot. The Q: does **malice** have to be directed towards a person? ...Looking at the California penal code’s history: the statute was intended to protect the animals. Analysis: malice can be towards nonhumans

*State v. Bruner* (Supreme Court of Indiana, 1887) – cruelty to wild goose and the question of ownership. Int. distinction between common law (unkind to animals) and non-common law offense).

*Martinez v. State* (Texas Court of Appeals, 2001) – [animal cops Houston?] Grandma Martinez case who takes in homeless dogs...question of “intentionally and knowingly withholding care for the dog” (court is torn...)  
-the issue of “**hoarding**” (overwhelmingly women) (and: statehopping)  
-[pw] the law in this area, on hoarding, is ‘quite servicable’ [relatively uncontroversial as a topic, though...]

*People v. Youngblood* (California court of appeal, 2001) – lady with trailer cats (90) in horrible condition.  
-convicted of cruelty to all 92 cats, but no counts of cruelty to individual cats  
-on appeal: **defense of necessity**: balancing test. Failed: legal alternatives exist.

*State v. Schott* (Nebraska Supreme Court, 1986) – a blizzard, carcasses of farm animals found dead in field and in barn

*Brackett v. State* (Georgia appeals court, 1977) – cockfighting case. Appeal of conviction of spectators who were convicted of cruelty to animals. Does ‘animal’ cover fowl: yes. But the appeals court won’t convict for guilt by association.

*Ash v. state* (Supreme Court of Arkansas, 1986) – court deciding what it means to ‘promote’ a dog fight. Mrs. Hook, 12-year-old son videotaping dogfighting, family moved to Arkansas because of the legality of dogfighting...

*Hargrove v. State* (Georgia Supreme Court, 1984) Georgia dogfighting case in the woods. Blood on the defendant, on the dog. Found washtubs, treadmills, breaking sticks, scales. 1) vague: no, 2) violates 8<sup>th</sup> amendment: no, 3) equal protection: no, 4) evidence of gambling: no.

*Boushehry v. State* (Indianan Appeals Court, 1995) ...killing some geese out of season and unethically (killing a goose: not sufficient to establish cruelty. Missing a fatal shot: is so)

*Mohler v. Labor Day Committee, Inc.* (Pennsylvania Superior Court, 1995) PETA brings case v. pigeon shoot: 6000 pigeons. Court says no: does not rise to violation of “wantonly ill-treat” animal statute...not the killing or wounding, but the treatment of animals

*Waters v. People* (Colorado Supreme Court, 1896) similar case 100 years earlier in country club...whether the acts covered are “unnecessary or unjustifiable” (‘wantonly’ in Missouri statute...) Killing not the problem here: just the injuring...

*State v. Thompson* (North Carolina Appeals court, 2000) abuse to siblings: abuse to cat – NC statute does not allow inclusion of other crimes. But: exception: if the *only* value of the evidence is to show propensity to commit a crime. In this case: there is another reason, because sibling/cat abuse was relevant to the girl’s state of mind. – Reasoning: abuse of a cat is something that reasonably would cause fear violence to others.

### Steve Wise, “A Great Shout”: ‘treat like things alike’

- The stark dichotomy of ‘legal personhood’ versus ‘legal thinghood’
- Wise puts a lot of faith in the “unceasing tendency of the common law “to work itself pure”. What do you think? (e.g., is this a socially acceptable form of ‘judicial activism’, or is this form of ‘judge-made law’ not in line with public morals?)
- Isaiah Berlin on positive (‘freedom to’) v. negative (‘freedom from’) liberties—or ‘dignity rights’, for Wise
- Distinguishing ‘full autonomy’ from ‘practical autonomy’ (591)
- Responding to Cohen’s defense of speciesism (593)

### Steve Wise, “The Evolution of Animal Law since 1950”

- On the **anti-cruelty** paradigm, with ‘the gist’ of “cruelty” defined as “the infliction of unnecessary abuse or unnecessary or unjustifiable pain and suffering upon an animal.” Generally speaking, this hasn’t been applied to ‘institutionalized cruelty’ (on which see the related idea of **conditioned ethical blindness**, and the judge’s ruling on the McLibel case, at 100)
  - Wise argues that 25ish states’ exemptions of ‘common farming practices’ from anti-cruelty statutes is a de facto admission of at least a certain kind of guilt. Following David Wolfson, who has written a well-known and much-cited article called “Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production”, Wise writes that “Amendments specifically exempting customary husbandry practices indicate that, but for the exemption, such practices would be determined to be cruel.”
  - When you think about it, “unjustifiable” is a really, really broad provision!
- **Standing**, constitutional requirements, and prudential requirements (100-1)
  - Why is standing a particularly big issue in animal law?
- Protections for great apes
- “Rights talk” and the impact of the European **Treaty of Amsterdam** (103) and other countries’ laws
- The role of common law
- What does Wise mean by the importance of ‘legal education in animal law’?

### Richard Posner, “Book Review: *Rattling the Cage*”

- Posner is one of the nation’s most well-known advocates of what is known as the **law and economics** movement
- What is the core of Posner’s critique of Wise’s book?
- Look at the range of questions on 598 (many of which we’ve discussed...): do you think any of these pose a serious problem to Wise’s arguments?
- “Legal rights have been designed to serve the needs of human beings having the usual human capacities and so make a poor fit with the needs and interests of animals...there is a sad poverty of imagination in an approach to animal protection that can think of it only on the model of the civil rights movement.” (598) What model does Posner suggest instead? (and is *his* suggestion at all ‘imaginative’?)
  - Posner’s two-part suggestion: “one way to protect animals is to make them property, because people tend to protect what they own....[a second way] is simply to extend, and more vigorously to enforce, laws designed to prevent gratuitous cruelty to animals.” (599) In which issue domains would Posner’s solution ‘work’ (for Mia, clearly, but where else)? Where would it not ‘work’?

### Richard Epstein, “The Dangerous Claims of the Animal Rights Movement”

- What are some of what Epstein perceives to be the dangerous logical extensions of Wise’s argument?
- In what context does Epstein mention the *Glickman* case? (603-4)