

# THE GATHERING MOMENTUM

DAVID FAVRE<sup>1</sup> © 2005

It was back in 1994 that I was asked to write an introduction to the first volume of the *Animal Law Review* being produced by the students at Lewis and Clark Law School, in Portland Oregon.<sup>2</sup> At approximately the same time at the same school, a group of law students formed the first Student Animal Legal Defense Fund (SALDF). Since that time interest in the topic of animal law has exploded in the realm of the law schools all across the nation. One consequence of this increasing interest is this opportunity I now have to write an introduction to the first volume of the second law journal dedicated to the issues surrounding animals, namely, the *Journal of Animal Law*, a peer reviewed law review of Michigan State University College of Law.

This is a propitious moment to consider what has and has not happened between the creation of the first and this second animal law journals within the United States.<sup>3</sup>

## I. SOCIAL/LEGAL MOVEMENT

While the roots of the present animal welfare social movement reaches back into the 1950's with the efforts of a number of individuals to pass a national animal protection law,<sup>4</sup> it was not until the publication of Professor Peter Singer's *Animal Liberation* (1977) and Professor Tom Regan's *A Case for Animal Rights* (1983) that the philosophical claim for animal rights ignited and the movement achieved intellectual traction. This focus on obtaining rights for animals has caused considerable problems for those seeking change in the legal system and confusion in the minds of the broader public who are less willing to accept the brash new ideas of animal rights, but are fairly accepting of the promotion of animal welfare.<sup>5</sup>

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<sup>2</sup> David Favre, *Time For a Sharper Legal Focus*, 1 ANIMAL L. 1 (1995). In that article the focus was on the conflicting views the American public had about wildlife. For example, state agencies were killing wolves in Alaska as unwanted predators while a federal agency was spending millions to reintroducing them in the Yellowstone ecosystem and National Park.

<sup>3</sup> In just the past six months it has come to the attention of the author that an animal legal journal was published in England and another is planned for publication in Brazil. It is fair to say that this is now a global issue.

<sup>4</sup> See Christine Stevens, *History of the AWA*, in ANIMALS AND THEIR LEGAL RIGHTS 66 (Emily Stewart Leavitt ed., 4th ed. 1990).

<sup>5</sup> The difference between the two concepts is important. Animal welfare has as an initial premise that humans have an ethical, moral or religious based obligation to treat animals well, to not inflict unnecessary pain or suffering on

On Thanksgiving weekend in 1981, at Brooklyn Law School, the first national conference was held for lawyers to consider animal legal issues. (While names can and should be associated with all this historical information, that level of detail will have to wait until a book is written.) The next year at a meeting in San Francisco, the first national organization of attorneys was formed to promote animal welfare/rights. The initial name was Attorneys for Animal Rights, but several years later the name was changed to the Animal Legal Defense Fund (ALDF).<sup>6</sup> Also in the 1980's the activist organization People for the Ethical Treatment of Animals (PETA) and many others were formed.<sup>7</sup> Thus began the legal and social movement to create awareness of animal suffering and to obtain change within the legal system. This growing movement had sufficient activity and interests in the general population that in the summer of 1990 there was a "March for the Animals" in Washington D.C. Upwards of 10,000 people showed up to march from the White House to the steps of the Capitol, chanting slogans and giving speeches on behalf of animals.

## II. LAW SCHOOLS

All of this broader social activity had only a very modest impact within the legal profession and the law schools until the 1990's. But as the issues obtained increasing public awareness, college students, in the tradition of the environmental movement thirty years earlier, went to law schools to pursue legal change on behalf of animals. The past decade saw the first offering of an animal law course at Harvard Law School. Two aspects of this occurrence are important to note. First, it was taught by Steve Wise, past president of ALDF and activist attorney, as an adjunct professor,<sup>8</sup> not by one of the tenured professors. In 2005 it is still the case that only a few of the law school's animal law courses are taught by tenured faculty. Secondly, the occurrence of the class at Harvard gave legitimacy to the issue that had not previously existed. An article in the *New York Times* about the course and the movement resulted in a large cascade of press coverage about the movement generally and possible legal changes specifically.<sup>9</sup>

Another key ingredient necessary for the emergence of a law school offering is the existence of a corresponding textbook. For deans and faculty to approve the creation and teaching of new courses, it is very helpful to be able to show a national textbook that by its chapter headings defines the scope and nature of the course. As might be expected pioneer teachers, who were and are still adjunct professors at various law schools, wrote such a book in

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animals. It is fairly clear that this premise is not reflected in present laws and that considerable change would be required to fulfill that standard. Animal rights has a different premise: that animals are beings with a moral, ethical status just like human beings, and that as a result they should have not just protection of the law (welfare) but be a part of the legal system with rights of their own.

<sup>6</sup> See generally ALDF, <http://www.aldf.org>.

<sup>7</sup> See PETA, <http://www.peta.org>; and *Animal Rights Organizations*, YAHOO! SEARCH DIRECTORY, [http://dir.yahoo.com/Science/Biology/Zoology/Animals\\_\\_Insects\\_\\_and\\_Pets/Animal\\_Rights/Organizations/](http://dir.yahoo.com/Science/Biology/Zoology/Animals__Insects__and_Pets/Animal_Rights/Organizations/) (last viewed Oct. 1, 2005).

<sup>8</sup> An adjunct professor teaches only part time, is usually underpaid, and is not an academic appointment that has any responsibility for the policy of the college.

<sup>9</sup> William Glaberson, *Legal Pioneers Seek to Raise Lowly Status of Animals*, N.Y. TIMES, Aug. 18, 1999, at A1. For months after that article the office of ALDF received phone calls from the press around the country asking questions about "this animal rights stuff."

1999.<sup>10</sup> Increasing student demand, the availability of a textbook and the availability of practicing attorneys to teach the course have created a significant increase in course offerings over the past decade. Omitting the intervening details, consider the scope of the interests today as measured by both the number of law schools who are offering the course and the number of law schools where students have self organized to promote animal issues. The best count is kept by the Animal Legal Defense Fund and is available from their website. In of the summer of 2005 the list comprised of 59 law schools offering courses, and 63 law schools having SALDF organizations. (There are approximately 190 ABA approved law schools in the U.S.) Another measure of growing interests is that there is now a national animal law moot court competition being held annually at Harvard Law School with teams from over a dozen law schools.<sup>11</sup> A second national textbook joined the scene in 2002 and a book of essays for use in classes in 2004.<sup>12</sup> As a further example of expanding interests, in 2004 at California Western Law College the first international conference for attorneys and professors interested in animal issues was held.<sup>13</sup>

All this activity has created a presence for animal legal issues within the teaching world. However, much is to be done before it can be judged as a fully integrated part of legal academics. Presently, there is no section of the American Society of Law Schools that has an animal welfare, or animal rights focus. This is primarily because of the small number of full time professors who write and teach in this area; perhaps not more than six or eight in the U.S., depending on how you count. For a number of people it is a novelty course, not a mainstream area where significant academic effort should be expended. While at least one law professor has received tenure at an ABA law school based upon scholarship in the animal law area, scholarship by professors is still low. Most of the courses presently being taught are by adjunct professors. If animal law is to be fully accepted as a respectable topic within the academic portion of the legal profession, then it will be expected that more full time professors will begin writing and teaching in the area. This is an area of growth for the future.

### III. THE BROADER LEGAL COMMUNITY

To raise animal issues at attorney meetings (bar associations) a decade ago, often resulted in cat calls and dog barking; it was not taken seriously by the legal establishment. Initial inroads in this portion of the legal world occurred with the creation of recognized committees within

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<sup>10</sup> SONIA WAISMAN, BRUCE WAGMAN, PAMALA FRASCH AND SCOTT BECKSTEAD, *ANIMAL LAW: CASES AND MATERIALS* (1999). By conscious decision the book focused on classical legal issues like damages, torts, standing and property law, rather than legal rights for animals, which was perhaps too radical for law faculties to accept. While law faculties are often presumed to be very liberal, when acting as a body or institution they are often conservative about new ideas.

<sup>11</sup> This competition is organized by the National Center for Animal Law (of Lewis and Clark Law School) and the Student Animal Legal Defense Fund (of Harvard Law School).

<sup>12</sup> DAVID FAVRE, *ANIMAL LAW, INTERESTS, WELFARE AND RIGHTS* (2002); *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* (Cass R. Sunstein & Martha Craven eds., 2004).

<sup>13</sup> Individuals came from nine different countries and had a wide assortment of experiences and ideas. The presentations were published in 2004. See *A GLOBAL PERSPECTIVE ON ANIMALS IN THE LEGAL SYSTEM* (2004). More information is available at ANIMAL LEGAL AND HISTORICAL WEB CENTER, <http://www.animallaw.info/policy/pobowelfareconf2004.htm>. A course on animal law was also offered in Australia in 2004.

state bar associations (usually denoted as an Animal Law Section or Committee). The first such event happened in Michigan in 1995 when the State Bar Association accepted the application of a group of attorneys to form an Animal Law Section. Also, the Bar Association of the City of New York has a long standing committee and has sponsored a number of important conferences over the years. At the moment there are eleven state bars with formally recognized animal law sections. Additionally there are nine regional or city bar associations with animal law sections.<sup>14</sup> The importance of these sections is that they are a critical educational catalysis for attorneys, as almost all of these sections hold educational conferences at least once a year. These efforts within the formal associations, dealing with officers and executive directors, are building credibility among the large group of attorneys who do not have personal interests in animal issues.

Just within the past year this assimilation process started within the premiere national association of attorneys, the American Bar Association. Through considerable effort an Animal Law Committee within the TIPS Section of the ABA was approved in the fall of 2004.<sup>15</sup> This initial presence will hopefully foster more acceptance of animal issues within the broader bar activities.

#### IV. WITHIN THE COURTS

There has not been any break through case for animal rights, and not much change in animal welfare in the courts over the past decade. Perhaps the most litigated issue of the past decade (besides dog bite cases) has been the issue of what damages will be available for someone whose pet has been harmed or killed by another. At the beginning there were high hopes that state supreme courts would allow loss of companionship, intrinsic value or human pain and suffering as the measures for the value of the loss of a pet. But as we look at the legal landscape today, it is fairly clear that the courts will not be the catalysis for change in this area,<sup>16</sup> and that legislatures are the only avenue open for real change.

For example, a Texas trial court awarded damages to a plaintiff whose dog had escaped defendant's care and was killed. On appeal the court would not let stand the damages for mental anguish of the plaintiff or the intrinsic value of the animal companion.<sup>17</sup> In the past decade, notwithstanding the occasional award at the trial court level, no state supreme court has allowed recovery for harm to pets based upon companionship or intrinsic value. The Wisconsin Supreme Court gave a fairly detailed discussion of the public policy considerations before holding that they were unwilling to extend the law, and left the issue in the hands of the legislature.<sup>18</sup> The cause of action known as intentional infliction of emotional distress, where available, generally

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<sup>14</sup> See *Bar Association Animal Law Sections and Committees*, ALDF, <http://aldf.org/associations.asp?sect=resources> (last visited Oct. 1, 2005).

<sup>15</sup> Barbara Gislason was the first chair of the committee. In August of 2005 they presented their first program within ABA's annual meeting.

<sup>16</sup> See generally Rebecca Huss, *Recent Developments in Animal Law*, 40 TORT & INS. L.J. 233, 237-46 (2005).

<sup>17</sup> *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554 (Tex. App. 2004).

<sup>18</sup> *Rabideau v. Racine*, 627 N.W.2d 795 (Wis. 2001), available at ANIMAL LEGAL & HISTORICAL WEB CENTER, <http://animallaw.info/cases/causwi627nw2d795.htm>.

is still available for fact patterns that include harm to animals. However, negligent infliction of emotional distress has not received a warm reception.<sup>19</sup>

At the federal level there was one significant case over the past decade. A key issue for the enforcement of the Animal Welfare Act has been that of standing; which plaintiff might qualify to bring an action to challenge the implementation of the law. The D.C. Court of Appeals in 1998 for the first time found an individual had standing under the AWA based upon his personal interest in not seeing animals kept in conditions in violation of the AWA.<sup>20</sup>

## V. WITHIN THE LEGISLATURES

At the national level the political mix in Washington D.C. has resulted in loss of protection for animals. On the wildlife side there has been very little new legislation. Amendments to the Migratory Bird Act in 2004 removed protection for nonnative birds.<sup>21</sup> A 2004 amendment to the Wild Horses and Burros Act has made it easier to get older unwanted horses to slaughter. Change to the Endangered Species Act and the Marine Mammal Protection Act occurred in 2004 when provisions were added which reduced the burden on the Defense Department in complying with these laws when required by the national defense needs of the country.<sup>22</sup>

On the domestic animal side, the premier federal legislation is the Animal Welfare Act (AWA).<sup>23</sup> After the significant enhancement of the AWA in the 1987 amendments, there have been only two changes to the AWA. In 1990 there was a modest strengthening of the provisions to keep stolen pets out of the chain of commerce.<sup>24</sup> In 2002 Congress, under the watchful eye of Senator Helms, amended the AWA to make clear that birds, rats and mice were exempted from the protections of the AWA.<sup>25</sup> Amendments to help restrain puppy mills and outlaw the use of downed animals for commercial slaughter were removed from the final version that became law.<sup>26</sup> The housing and care of the millions of commercial food animals in the U.S. have never been under the provisions of the AWA and there has not been any movement to include them.

At the state level, the past decade has seen a number of positive changes. The criminal provision of state cruelty laws have been enhanced in many states, including amending the laws

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<sup>19</sup> *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1143-46 (N.J. Super. Ct. L. Div. 2001); *see also* *Pickford v. Masion*, 98 P.3d 1232 (Wash. Ct. App. 2004).

<sup>20</sup> *ALDF v. Glickman*, 154 F.3d 426 (1998), *available at* ANIMAL LEGAL & HISTORICAL WEB CENTER, <http://www.animallaw.info/cases/caus154f3d426.htm>.

<sup>21</sup> *See* Rebecca F. Wisch, *Overview of the Migratory Bird Treaty Reform Act*, ANIMAL LEGAL & HISTORICAL WEB CENTER, <http://www.animallaw.info/articles/ovusmbtra2004.htm>.

<sup>22</sup> *See generally* Defense Authorization Act, Pub. L. No. 108-136, 117 Stat. 1392 (2004); *and* *Legislative Review*, 11 ANIMAL L. 325, 328-34 (2003).

<sup>23</sup> 7 U.S.C. §§ 2131-2159 (2002), *available at* ANIMAL LEGAL & HISTORICAL WEB CENTER, <http://www.animallaw.info/statutes/stusawa.htm>.

<sup>24</sup> Food, Agriculture, Conservation, and Trade Act of 1990, 7 U.S.C. 1421 (1990), *available at* ANIMAL LEGAL & HISTORICAL WEB CENTER, [http://www.animallaw.info/statutes/stusawapl\\_101\\_624.htm](http://www.animallaw.info/statutes/stusawapl_101_624.htm).

<sup>25</sup> Animal Welfare Act Amendments of 2002, 116 Stat. 134 (2002), *available at* ANIMAL LEGAL & HISTORICAL WEB CENTER, [http://www.animallaw.info/statutes/stusawapl107\\_171.htm](http://www.animallaw.info/statutes/stusawapl107_171.htm).

<sup>26</sup> *Legislative Review*, 9 ANIMAL L. 331, 334-35 (2003).

to make some of the provisions felonies rather than just misdemeanors.<sup>27</sup> A few legislatures have tentatively begun to allow the recovery for harm to pets based upon non-economic basis.<sup>28</sup> Additionally, based on an addition to the Uniform Trust Act, a number of states have made it possible to have lawful pet trusts.<sup>29</sup>

## VI. THE DIRECTION FOR THE FUTURE

Eventually the wave of individuals passing through law schools will have their full effect on legal institutions. As they become legislators, judges and community leaders, the issues of animal welfare will rise on the national agenda. The welfare of animals is most likely to be enhanced at the state level rather than the federal level in the foreseeable future. As states have primary control over animal property and anti-cruelty laws, they are the appropriate place for change to originate. Additionally, getting animals on the national agenda in Washington D.C. is not likely in the present political climate.

It is natural for the laws of a maturing civilization (with its increased social and economic wealth) to reflect concern about the less capable, to acknowledge the needs of others, and to be willing to dedicate some level of resources to the well-being of those not able to speak for themselves. Within this context there is considerable hope for obtaining increasing consideration of the plight of so many animals. I am sure the *Journal of Animal Law* will play a significant role in the consideration of the ideas and concepts that will aid in this progression to a more civilized world.

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<sup>27</sup> See Stephan K. Otto, *State Animal Protection Laws – The Next Generation*, 11 ANIMAL L. 131 (2005), available at ANIMAL LEGAL & HISTORICAL WEB CENTER, [http://www.animallaw.info/journals/jo\\_pdf/vol11\\_p131.pdf](http://www.animallaw.info/journals/jo_pdf/vol11_p131.pdf).

<sup>28</sup> In 2002 Tennessee adopted a statute allowing up to \$4,000 in non-economic damages, in limited circumstances. TENN. CODE ANN. § 44-17-403(e) (2004). In 2005 Connecticut added a section allowing such damages in small claims court (maximum of \$3,500), CONN. GEN. STATUTE § 22-351 (2005). UNIFORM TRUST CODE § 408 (2003). See generally Suzette Daniels, *An Introduction to Pet in Wills and Pet Euthanasia*, ANIMAL LEGAL & HISTORICAL WEB CENTER, <http://www.animallaw.info/articles/arusdanielssuzette2004.htm>.