Cleveland State University
EngagedScholarship@CSU

Cleveland-Marshall
College of Law Library

Cleveland State Law Review | Law Journals

2013

What is Animal Law?

Jerrold Tannenbaum
School of Law, University of California at Davis

Follow this and additional works at: http://engagedscholarship.csuohio.edu/clevstlrev

Part of the Animal Law Commons

Recommended Citation
Jerrold Tannenbaum, *What is Animal Law?*, 61 Clev. St. L. Rev. 891 (2013)
available at http://engagedscholarship.csuohio.edu/clevstlrev/vol61/iss4/4

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized administrator of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

WHAT IS ANIMAL LAW?

JERROLD TANNENBAUM*

ABSTRACT

This Article considers a critically important issue facing the new field of animal law: how to define animal law itself. Two sharply different general approaches to defining the area currently vie for support. One defines animal law as committed to advocacy on behalf of animals, including, for many proponents of this approach, promotion of animal rights. The competing approach defines animal law in a purely descriptive manner, as (roughly) the area of law that relates to animals, whatever substantive principles regarding animals the law may adopt. The Article demonstrates that advocacy-oriented definitions violate fundamental standards of definition and conflict with crucial aims and values of our legal system. The discussion argues in favor of descriptive definition of animal law, but explains why such a definition may be difficult to formulate. The Article maintains that a necessary first step in finding a satisfactory definition—and in motivating lawyers, law school faculty, and law students to pay sufficient attention to animal-related legal issues—is rejection of advocacy-oriented definitions of animal law.

I. INTRODUCTION 894
II. PRELIMINARY CONSIDERATIONS..... 895
A. *Infrequency of Formal Definitions of Animal Law*..... 895
B. *Agreement about the Meaning of the Term "Animal"* 896
III. ADVOCACY-ORIENTED DEFINITION OF ANIMAL LAW 896
A. *Rights-Centered Advocacy Definition* 896
1. Representative Examples 896
2. Definitional Elements and Compatible Claims 901
B. *Reformist Advocacy Definition*..... 902
IV. EMERGENCE AND EARLY DOMINANCE OF RIGHTS-CENTERED DEFINITION 906
A. *Necessary Conditions of an Area of Animal Law: Content, Connections, and Interest* 906
B. *The Long History of Law Relating to Animals* 907

* Professor of Veterinary and Animal Ethics and Law, School of Veterinary Medicine, and Visiting Professor, School of Law, University of California at Davis (King Hall). J.D., Harvard Law School; B.A. and M.A. (Philosophy), Cornell University. I would like to thank Zachary Colbeth, King Hall Class of 2013, for invaluable research and editorial assistance. I am deeply grateful to the King Hall students who have taken my animal law course since 2003, from whom I have learned so much, and without whom the article could not have been written. By their large numbers, diverse perspectives, and enthusiastic interest in all points of view, they have confirmed the wisdom of attempting to define animal law in the manner urged in the article.

Published by EngagedScholarship@CSU, 2013

C. Connections among Legal Principles Relating to Animals 908
D. Interest of Animal Advocates in Recognizing "Animal Law" 908
E. Animal Rights Theory as a Motivating and Unifying Factor 910
F. Adoption of Rights-Centered Definition by Observers and Opponents of the Animal Rights Movement 912
V. EMERGENCE OF DESCRIPTIVE DEFINITIONS OF "ANIMAL LAW" 914
VI. SOME GENERAL PRINCIPLES OF DEFINITION 917
A. Components and Nature of Definitions 917
B. Definition versus Factual Descriptions or Ethical Conclusions 919
C. Limited Role of Definitions 919
D. Purposes of Definitions 920
1. Interrelation of Definitional Purpose and Content 920
2. Lexical and Stipulative Definitions 920
E. Analytic Definition and its Limitations 921
F. Impossibility of Defining Some Words 923
VII. APPLICATION OF PRINCIPLES OF DEFINITION BY DEFINITIONS OF AREAS OF LAW 924
A. The Definitions of Most Areas of Law Include or Imply Very Little about These Areas' Current Basic Concepts, Causes of Action, and Substantive Principles 924
B. The Definitions of Areas of Law Typically Include or Imply Very Little about What Substantive Principles These Areas Ought to Endorse 926
C. The Definitions of Areas of Law Typically Include or Imply Very Little About the Underlying Fundamental Goals and Structure of These Areas 927
D. Some Areas of Law Are Not Susceptible to Analytic Definition 928
E. Not Every Area of Law May be Capable of Definition 929
VIII. FOLLOWING STANDARDS OF GOOD DEFINITION FURTHERS CENTRAL AIMS AND VALUES OF SPECIFIC AREAS OF LAW AND THE LEGAL SYSTEM IN GENERAL 930
A. Flexibility, Adaptability, and Ability to Change 930
B. Openness to Empirical and Normative Argument and Competing Theories of Law 931

C. Application of Principles Involving Multiple Areas of Law 931
D. Commitment to the Adversarial Process 931
1. Most Definitions of Areas of Law Do Not Target Particular Parties for Protection 931
2. Definitions of Areas of Law That Do Target Kinds of Parties for Protection Do Not Impede the Ability of Opposing Attorneys to Argue on Behalf of Their Clients 932
IX. WHY ADVOCACY DEFINITIONS OF ANIMAL LAW SHOULD BE REJECTED 933
A. Rights-Centered Advocacy Definition Does Not Define an Area of Law 934
B. Rights-Centered Definition Will Likely Never Define an Area of Law 934
C. Rights-Centered Definition Would Exclude Many Animals from the Purview of Animal Law 935
D. Rights-Centered Definition Violates Principles of Good Definition 936
1. Endorsement of Empirical and Normative Propositions and Substantive Legal Principles 936
2. Impeding Professional Development of Lawyers and Effective Representation of Clients 938
3. Reducing Potential Enrollments in Animal Law Courses and Attention to Animal Law by Law School Faculty 938
E. Identical Flaws of Reformist Advocacy Definition 942
X. VIRTUES AND CHALLENGES OF DESCRIPTIVE DEFINITION OF ANIMAL LAW 943
A. Apparent Advantages of Descriptive Definition 943
B. Potential Impediments to Formulating a Satisfactory Descriptive Definition 944
1. An Analytic Definition Is Not Required 944
2. Existence of a Distinct Area of Law Capable of Definition Is Required 944
C. The Tasks Ahead 950
1. Attempting to Find a Satisfactory Descriptive Definition 950
2. Dealing with the Possibility That a Descriptive Definition Is Unachievable 950
XI. CONCLUSION: A NECESSARY FIRST STEP 951
TABLE: SOME ANIMAL-RELATED LEGAL SCENARIOS 953

> "The only way in which a human being can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his wisdom in any mode but this; nor is it in the nature of human intellect to become wise in any other manner. The steady habit of correcting and completing his own opinion by collating it with those of others, so far from causing doubt and hesitation in carrying it into practice, is the only stable foundation for a just reliance on it: for, being cognisant of all that can, at least obviously, be said against him, and having taken up his position against all gainsayers—knowing that he has sought for objections and difficulties, instead of avoiding them, and has shut out no light which can be thrown upon the subject from any quarter—he has a right to think his judgment better than that of any person, or any multitude, who have not gone through a similar process."[1]

I. INTRODUCTION

This Article considers a critically important issue facing the new field of animal law: how to define "animal law" itself.[2] There is at present no definition that is accepted generally by lawyers in the United States.[3] Two sharply different approaches to defining animal law currently vie for support. One characterizes animal law as essentially and necessarily committed to *advocacy* on behalf of animals. For many proponents of this approach, such advocacy (and thus animal law by its very nature) includes endorsement of a number of claims of the contemporary animal rights movement.[4] Among these claims are: that countless animals are wrongly exploited and abused to benefit and please humans, that ending this mistreatment requires fundamental changes in how the law deals with animals, and that among these changes is granting animals legal *rights* they do not yet have.[5] The competing approach to defining animal law does not view the area as committed to advocacy of any kind, or to any particular substantive legal principles. This approach seeks to define animal law in a purely *descriptive* manner, as (roughly) the area of law that deals with or pertains to animals, whatever substantive principles regarding animals the law may happen to adopt.[6]

The primary aim of this Article is to urge rejection of advocacy-oriented, or as I shall sometimes call it "advocacy," definition of animal law. I argue that general

---

[1] JOHN STUART MILL, ON LIBERTY 39-40 (1859).

[2] In the Article, I usually do not place quotation marks around the words "animal law" when discussing definitions of the area because doing so repeatedly can be distracting. As is explained in Part VI.A *infra*, philosophers of language counsel the use of quotation marks around defined terms because it is important to keep in mind that definitions are of *words* or terms, and not things. This Article considers how the *term* "animal law" is and should be defined.

[3] *See infra* Parts IV, V.

[4] *See infra* Part III.A.

[5] *Id.*

[6] *See infra* Part V.

adoption of this kind of definition by the legal profession will hinder the ability of attorneys to represent clients with animal-related legal issues, and will prevent adequate discussion of how the law ought to deal with animals. Although the Article supports the descriptive approach to defining animal law, it does not propose a final definition in accordance with this approach. The approach has a problem of its own: The many and varied ways in which the law relates to animals make it difficult to define animal law as an area with a coherent and distinct identity. The Article urges continuing discussion about how animal law might be defined descriptively. However, at present, formulating a satisfactory descriptive definition of animal law is less important than putting advocacy-oriented definitions unequivocally, universally, and permanently to rest.

Part II discusses preliminary matters regarding the competing definitional approaches. Part III characterizes the two major variants of advocacy-oriented definition of animal law. Part IV explains why the variant that identifies animal law with animal rights law gained significant acceptance when talk of an area of "animal law" began in the late twentieth century. Part V describes the emergence and growing acceptance of descriptive definitions of animal law. Part VI presents several key principles relating to definition that are generally accepted in the field of the philosophy of language. These principles are subsequently employed to argue for rejection of advocacy-oriented definitions of animal law, and in assessing potential descriptive definitions. Parts VII and VIII discuss how and why definitions of other areas of law adhere to these definitional principles. Part IX demonstrates why advocacy definitions of animal law are unacceptable. Part X reviews the advantages of descriptive definition, but explains why formulating a satisfactory descriptive definition of animal law may prove to be difficult. Part XI concludes that rejection of advocacy definition is a necessary first step in advancing the legal profession's ability to deal adequately with animal-related issues.

II. PRELIMINARY CONSIDERATIONS

A. Infrequency of Formal Definitions of Animal Law

Discussions of animal law do not always provide explicit definitions of the area. Often, one must glean how authors define animal law from statements about what they regard as the area's central features. It is usually obvious whether an author employs an advocacy-oriented or descriptive definition. However, variations within each of these general definitional approaches are possible, and it may sometimes be unclear whether a given author, if pressed to provide an explicit definition, would include certain specific statements.[7] I shall attempt to characterize accurately and fairly how various authors define animal law, even when (as is usually the case) they do not provide explicit or clear definitions. The aim of this Article is to compare the two different general ways of defining animal law. Characterizations of these general definitional approaches will suffice if they advance this aim, even if some individual authors might object that I have omitted a detail they would, or added a detail they would not, include in a precise definitional statement.

[7] For example, as discussed below, although all proponents of rights-centered advocacy definition seek a "paradigm change" in how the law deals with animals, individual proponents of this type of definition may or may not include this locution in an explicit definition of animal law.

B. Agreement about the Meaning of the Term "Animal"

There have been interesting and important disagreements regarding how the term "animal" is, or should be, defined in a number of legal contexts.[8] However, one must note from the outset that proponents of advocacy-oriented and descriptive definitions do not talk about how in their view the term "animal" should be defined for the purposes of defining *animal law*. Proponents of the competing definitional approaches thus appear to agree about what animals are. Their disagreement concerns what role animal law, when properly defined, should have regarding animals. This explains why the particular advocacy-oriented and descriptive definitions of "animal law" discussed in this Article, like such definitions generally, do not include, and are not supplemented further by, statements about how the term "animal" should be defined.

III. ADVOCACY-ORIENTED DEFINITION OF ANIMAL LAW

A. Rights-Centered Advocacy Definition

It might be possible to characterize advocacy-oriented definitions of animal law simply as those that include *any* kind of advocacy on behalf of animals as an essential element of animal law—without specification of what constitutes such advocacy or what substantive legal principles animal law is supposed to advance. However, this characterization would not accurately reflect the definitions employed by the great majority of lawyers who define animal law in terms of animal advocacy. There have in fact been two major types of advocacy definition of animal law, each of which includes more than general or indeterminate "advocacy." The initial, and still predominant, form of advocacy definition has as its central feature the proposition that animal law seeks to establish and enforce certain fundamental legal *rights* for animals. I shall therefore call this variant of advocacy definition, "rights-centered" advocacy definition, or sometimes more simply, "rights-centered" definition of animal law.

1. Representative Examples

In characterizing rights-centered definition, it is useful to begin with some examples. As is discussed later in the Article,[9] including advocacy of legal rights for animals in the definition of animal law was first endorsed by most of the lawyers who persuaded a significant proportion of the legal profession to view animal law as a distinct legal field. Perhaps the lawyer most influential in this development was Joyce Tischler, who in the late 1970s organized Attorneys for Animal Rights, which became the current Animal Legal Defense Fund (ALDF). In a discussion of the history of the ALDF, Tischler describes how in 1979 she met with a group of attorneys who believed that animals should have legal rights. These lawyers wanted,

---

[8] For example, a number of cases have considered whether certain kinds of creatures that are classified biologically as "animals" are included within the meaning of the term for the purposes of a state's cruelty-to-animals statutes. *See, e.g.*, Kansas v. Claiborne, 505 P.2d 732 (Kan. 1973) (holding that birds used in cockfights are not "animals" within the meaning of the state cruelty law). *Contra* People v. Baniqued, 101 Cal. Rptr. 2d 835 (Cal. App. 3d 2000).

[9] *See infra* Part IV.

she says, to play a role "in the newly forming animal rights movement."[10] She continues:

> In the twenty years since then, attorneys both in and around ALDF *have created a new area of the law: Animal Law*. They have worked to expand tort law concepts in order to increase the damages recoverable for an injury to or the death of a companion animal; applied environmental laws to challenge hunting, trapping and removal of wildlife from their habitat; tried to protect farm animals through innovative application of state consumer laws and challenged trapping via state anti-cruelty laws. They have been forced to master the highly political issue of standing to sue and have agonized over the problems of litigating on behalf of rightless beings.[11]

It is possible that proponents of rights-centered advocacy-oriented definition of animal law believe that such definition should prevail because they think those who create a field are thereby entitled to define it. In any event, Tischler is correct in asserting that she and her colleagues viewed themselves as deliberately constructing a new area of law in order to advance their viewpoints and aims regarding animals. As the passage above indicates, among these aims was (and remains) obtaining legal rights for animals and opposition to many current uses of animals. In a two-part article chronicling what she calls the "history of animal law," Tischler makes clear that in her view many animals are subjected to terrible exploitation; that establishing legal rights for animals is necessary to remedy this mistreatment; and that in its essence, animal law seeks to create and enforce these rights. Indeed, for Tischler, the terms "animal law" and "animal rights law" are synonymous. She describes animal law as

> a large-scale, organized movement, which started in the early 1970s in the United States, spearheaded by attorneys and law students with the express purpose of filing lawsuits to protect animals and *establishing the concept of their legal rights*, regardless of the species of the animals or the ownership interest of humans. *What we now call Animal Rights Law or Animal Law* began when attorneys consciously considered animal-related legal issues from the perspective of the animal's interests, when they began to view the animal as the *de facto* client, and where the goal was to challenge institutionalized forms of animal abuse and exploitation.[12]

Tischler frequently characterizes animal law as "animal law advocacy" and "the animal law movement"—and uses these terms interchangeably. For example, she introduces the second installment of her history of animal law as follows:

> In a prior article, I chronicled the beginnings of *the animal law movement*. In this article, I focus on the second wave of *animal law advocacy*,

---

[10] Joyce M. Tischler, *Toward Legal Rights for Other Animals*, *in* ANIMAL LAW: CASES AND MATERIALS 745, 745 (Sonia S. Waisman et al. eds., 2d ed. 2002) [hereinafter Tischler, *Other Animals*].

[11] *Id*. at 747 (emphasis added).

[12] Joyce M. Tischler, *The History of Animal Law, Part I (1972-1987)*, 1 STAN. J. ANIMAL L. & POL'Y 1, 2 (2008) [hereinafter Tischler, *Part I*] (first two sets of emphasis added).

> tracking progress, examples of innovation, and trends. This second wave has been characterized not only by the lawsuits filed, but by the building of an infrastructure within the legal profession, so one can say with some certainty that *animal law* will be around long after its founders have been laid to rest. No one person can build a *social movement*. *Animal law* is the product of the unique and varied talents of many committed individuals and this article is dedicated to each of them.[13]

Speaking interchangeably of "animal law," "the animal law movement," and animal law as a "social movement" is an expression of the view that by its nature animal law is a cooperative endeavor of like-minded attorneys. Defining animal law as a "movement" also reiterates the identification of animal law with animal *rights* law. As is noted below, proponents of animal rights view the struggle for such rights as a historical and logical development of preceding movements to gain legal rights for exploited groups, such as the civil rights and women's rights movements.[14] Defining animal law as a "social movement" like these other movements also asserts that animal law aims at significant social change and seeks to accomplish this change by marshaling the support of society in general.

Innumerable statements by proponents of advocacy-oriented definition place at the core of animal law itself the advocacy of animal rights—and indeed advocacy of some of the same legal rights for animals that are accorded to humans. For example, in an article describing the early history of animal law at Lewis & Clark Law School, Nancy Perry writes as follows:

> In 1993, three hundred and ten years after Thomas Tryon published what is believed to be the first English language work employing the term "rights" in a discussion of the "violence and oppression" of society's treatment of animals, the students at Lewis & Clark Law School founded the first student chapter of the Animal Legal Defense Fund, and hosted the first Animal Law Conference. In the decade that followed, the fundamental ethical principle underlying Tryon's condemnation of his seventeenth century contemporaries—that animals have the same fundamental right to legal protection from "violence and oppression" as everyone else—has enjoyed an unprecedented renaissance in the United States, and has spawned a compelling and propitious new field of law virtually unheard of in the preceding decade. . . .
>
> It requires no rhetorical license to say that Lewis & Clark Law School is the very epicenter of the movement to explore and develop the legal means to answer the solitary thesis that Tryon nailed to the door of our society more than three-hundred years ago.[15]

Perry's statement reflects the view of proponents of rights-centered advocacy definition that animal law, by its nature, seeks to remedy allegedly outrageously

---

[13] Joyce M. Tischler, *A Brief History of Animal Law, Part II* (1985-2011), 5 STAN. J. ANIMAL L. & POL'Y 27, 28 (2008) [hereinafter Tischler, *Part II*] (emphasis added).

[14] *See infra* Part IV.E.

[15] Nancy V. Perry, *Ten Years of Animal Law at Lewis & Clark Law School*, 9 ANIMAL L. ix, ix (2003).

unethical and oppressive behavior by seeking fundamental rights for animals. She also believes that law school courses in animal law have this goal.[16] This is not surprising. If animal law *is*, as Tischler states, animal *rights* law—meaning advocacy of legal rights for animals—then law school courses in animal law will be courses in advocacy for animal rights. As Richard Katz observes,

> [d]ecades ago, when animal lawyers across the country first came together, they realized that the fight for recognition of the rights and protection of animals by the law had to be staged on two fronts. First, they committed to use what resources the law provided to protect the population of animals then existing. Additionally, they recognized that the only thing that would protect the populations of animals in the future would be to make animal law education available to those who would practice law in the coming generations.[17]

Also not surprising is the fact that lawyers who speak interchangeably of animal law, animal rights law, and the animal law movement, regard law school courses in animal law as an important component of this movement. For example, law professor Peter Sankoff begins his discussion of the growth in the number of animal law courses as follows:

> Although the extent to which the animal law movement has succeeded in generating meaningful change for animals remains a subject of debate, one thing about the movement cannot be disputed: it is growing at a remarkable pace, both in the United States and abroad. For one thing, there are more people working as animal lawyers and studying to earn this informal classification than ever before. Where twenty years ago individuals practicing or trying to acquire knowledge in this area operated in isolation, today's enthusiast can attend animal law conferences, participate in moot court simulations and chat with like-minded individuals on animal law related websites. Most importantly, for the student undertaking the study of law in 2008, there now exists a very strong possibility that the institution they attend offers a course in animal law or will do so in the near future.[18]

Another locution that many proponents of rights-centered advocacy definition of animal law have adopted is that animal law by its nature aims at a "paradigm shift" in how the law deals with animals. An especially significant usage of this term occurred in the mission statement of the American Bar Association (ABA) Tort Trial and Insurance Practice Section (TIPS) Animal Law Committee, which was formed in 2004.[19] Chairperson Barbara Gislason declared on the Committee's official website that

---

[16] *Id.*

[17] Richard J. Katz, *Origins of Animal Law: Three Perspectives*, 10 ANIMAL L. 1, 1 (2004).

[18] Peter Sankoff, *Charting the Growth of Animal Law in Education*, 4 J. ANIMAL L. 105, 105 (2008) (references omitted).

[19] *Animal Law Committee*, A.B.A. TORT & INS. PRAC. SECTION, http://www.abanet.org/tips/animal (last visited Aug. 10, 2005) (emphasis added).

> Animal law is broader than laws pertaining to animals. It is the body of law reflecting the efforts of people to create a just world through the rule of law. The status of animals in our legal system is in flux and attorneys are discovering creative and interesting ways to use legal arguments in the face of increasingly complex scenarios. Our clients are legally impacted by a vast array of human/animal interactions. They range from the legality of estate planning for companion animals, to changing liability standards and insurance coverage in dog bite cases, to compensation beyond fair market value when an animal is killed, to public and private conflicts about where an animal can be, and finally, to the competing interests of wild animals and urban, farming, and recreational land use. . . .
>
> The mission of the Animal Law Committee is to evolve our thinking on animal issues for both the United States and the world. By attracting the best and brightest lawyers in this country, with a wide variety of perspectives, we will look at animal-related problems and issues today, and think about new ways to define, manage, and solve them. Utilizing problem-solving strategies, we will also look at the law as it exists today—fragmented around the country—and envision what it could be. The TIPS ABA Animal Law Committee will be the *instrument of a paradigm shift*, and will bring to the table and address legitimate business and economic interests, and humane concerns.[20]

The first two sentences of this statement unequivocally reject descriptive definition of animal law. The entire statement indicates that animal law seeks not minor improvements in the treatment of animals, but significant changes across a range of issues—a "paradigm shift" in how the law deals with animals. The Committee's statement does not define this term, nor does it explicitly mention

---

[20] *Id.*; *see also,* Barbara J. Gislason, *The Animal Law Committee: A New Commitment for TIPS and the ABA*, 34 WTR BRIEF 6, 10 (2005) (repeating the second paragraph). An article published on behalf of the Committee in 2009 reiterated its commitment to a "paradigm shift," but contains unclear statements that might include the inconsistent endorsement of a descriptive definition of animal law. The authors state that the Committee:

> embodies the qualities that make TIPS so special: *diversity and balance*. This young committee's mission is to promote a paradigm shift in the field of animal law by attracting the best and brightest lawyers, *with a wide variety of perspectives*, in order to examine animal-related issues and develop novel ways to address them.

Meena Alagappan & Joan Schaffner, *Animal Law Committee: Leading the Pack in the Emerging Field of Animal Law*, 38 WTR BRIEF 8, 8 (2009) (emphasis added). The authors also state:

> Whether you specialize in the area of animal law, *have clients with animals who seek your advice, or are just interested in the legal issues surrounding animals*, the ALC is for you, and we welcome your participation. We encourage you to join and become involved in an innovative and active committee on the cutting edge of the law.

Id. at 9 (emphasis added). The italicized portions of these statements appear to disavow a rights-centered definition of animal law, but the talk of a "paradigm shift" and of an "innovative and active" committee "on the cutting edge of the law" seem to reiterate the Committee's original rights-centered definition.

animal "rights." However, those who speak of "paradigm" shifts or changes in laws that affect animals typically mean affording animals legal rights and, more specifically, effecting a change in their status from property owned by persons to persons in their own right who have standing to sue on their own behalf for alleged wrongdoing against them.[21]

2. Definitional Elements and Compatible Claims

As the foregoing examples illustrate, the rights-centered advocacy approach includes in the definition of animal law the following propositions: (1) Animal law seeks to protect and benefit animals; (2) Achieving this goal requires widespread and significant changes in how the law deals with animals; (3) More specifically, animal law's central and ultimate aim is a paradigm shift in how the law deals with animals. This shift will involve according to animals legal rights they do not yet possess, including rights that involve and will follow from their change in status from property to persons; and (4) Animal law is practiced by attorneys who share common values and goals, who work to effect significant social change, and who seek to enlist the support of society in general. Animal law is thus itself a social movement, like the civil rights or women's rights movements.

Rights-centered advocacy definition is compatible with a range of different positions regarding how to advance fundamental legal rights for animals. For example, some lawyers who seek an ultimate paradigm change in the legal status of animals work to achieve, for the time being, more modest goals, some of which reflect the current legal status of animals as property.[22] There is also disagreement among those who seek fundamental legal rights for animals (whether or not they *define* animal law to include promotion of such rights) about whether animal lawyers should in the short-term cooperate with those who do not support a paradigm change, in order eventually to achieve such change.[23]

---

[21] *See*, *e.g.*, Lee Hall, *Gary Francione's Introduction to Animal Rights: Your Child or Your Dog?*, 34 SUFFOLK U. L.REV. 83, 93 (2000) (book review) ("When our paradigm shifts, and we are ready to seriously undertake to end the commodification of nonhumans, the historically profound constitutional tools are in place, including the Thirteenth Amendment's prohibition of slavery. . . . The use of nonhuman animals underlies an enormous proportion of our current economic and social interactions. The law will embrace the idea only after a paradigm shift, or a profound change in our world view."); Paul Waldau, *Will the Heavens Fall? De-Radicalizing the Precedent-Breaking Decision*, 7 ANIMAL L. 75, 107 (2001) ("Once common law extends beyond its present speciesism, the 'humans only' paradigm that traps judges in a universe that no longer exists will no longer control. Being nonhuman will no longer, per se, disqualify one from legal personhood."); Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L.REV. 471, 475 (1996) ("The paradigm of all nonhuman animals as legal things has presented formidable obstacles to the development of personhood for nonhuman animals under the common law, indeed throughout Western law."). The term "paradigm shift" was popularized by Thomas Kuhn, who argued that science advances by adopting radically different (and, as Kuhn maintained, conceptually incompatible) ways of looking at the universe. Among Kuhn's examples was the rejection by astronomy of the view that the sun and planets revolve around the Earth, in favor of the view that the planets revolve around the sun. THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

[22] *See infra* Part III.B.

[23] The most prominent opponent of such cooperation has been Gary Francione. He argues that by working with those who accept the use of animals in agriculture and research, for

B. Reformist Advocacy Definition

There is a second variant of advocacy-oriented definition, which I shall call "reformist," because it defines animal law as seeking changes in how the law deals with animals that are less fundamental than the changes demanded by rights-centered advocacy definition. In her history of animal law, Tischler describes what she calls a "split" in the "approach to the practice of animal law," which she characterizes as "rights versus welfare reform."[24] In the animal ethics literature, the distinction between promotion of animal "rights" and animal "welfare" is commonplace. It is often said that advocates of animal *rights* seek to end all human use of animals for the benefit of humans or animals. In contrast, advocates of animal *welfare* are said not to oppose human use of animals in general, or most traditional uses in particular (such as raising animals for meat); rather, they attempt to improve the lives of animals used in these ways by preventing them from suffering unnecessary pain or distress or by promoting their health and well-being.[25] Tischler states that

> [f]rom its outset, the animal law movement has struggled with the distinction between rights and welfare and the resulting choice of which concept to spend one's time promoting. Proponents on each side argue their positions vehemently, each believing that the approach he supports will provide the most likely, if not the only, path to meaningful change in the status of and protections received by animals.[26]

Tischler's statement—that from the outset the animal law movement struggled with the distinction between rights and welfare—contradicts her other claims, quoted above, that animal law is animal *rights* law and that promotion of animal rights was the central aim of lawyers who first talked about and created the field.[27] In any event, there are lawyers who believe that many animals are treated horribly and that ending this mistreatment requires vigorous and extensive legal action; who hold that animal law, by definition, seeks to advocate on behalf of animals; and who view animal law as a movement in the sense of a common effort by lawyers to use the law to benefit animals. However, they do not believe that animal law, by definition, must seek legal *rights* for animals that would mark a paradigm shift in how the law deals with them by, among other things, changing their status from property to persons.

One supporter of reformist advocacy definition, and the only proponent of animal welfare, as distinguished from animal rights, identified by Tischler in her article, is

---

example, people who *call* themselves "animal rights" advocates in fact strengthen institutions and practices that violate animal rights, by helping to improve the lot of animals sufficiently to satisfy the public that these animals are being treated properly. *See* GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 78-109 (1996).

[24] Tischler, *Part II*, *supra* note 13, at 48.

[25] *See*, *e.g.*, FRANCIONE, *supra* note 23, at 1-6 (maintaining that animal "rights" and "welfare" are incompatible concepts). *But see* JERROLD TANNENBAUM, VETERINARY ETHICS 150-52 (2d. ed. 1995) (arguing that advocacy of animal welfare and rights are compatible under a commonly used concept of "rights" that allows for human use of animals).

[26] Tischler, *Part II*, *supra* note 13, at 48.

[27] *See* Tischler, *Part I*, *supra* note 12.

Jonathan Lovvorn.[28] Lovvorn urges practitioners of animal law to work to improve the lot of animals—but not to try to obtain legal rights for animals, not to compare their efforts to the civil rights movement, and not to seek a paradigm shift in the legal status of animals.[29] Lovvorn maintains that "this society's support for granting nonhuman animals meaningful rights is exceedingly low. And it is likely to remain so for a good long time."[30] He argues that animal lawyers

> can make a good start by jettisoning our own revolutionary rhetoric—such as granting animals "personhood" or otherwise eliminating the property status of animals. It is an intellectual indulgence and a vice for animal lawyers to concern ourselves with the advancement of such impractical theories while billions of animals languish in unimaginable suffering that we have the power to change.[31]

Tischler, I would suggest, overestimates the degree of acceptance of Lovvorn's views among early and current proponents of advocacy definitions of animal law. She says that

> Lovvorn's plea has gained a good deal of traction with animal law practitioners who are either more attuned to welfare concepts or are pragmatically viewing incremental reform as the only truly viable option. . . . We cannot know at this early juncture which path will create greater gains for animals, whether one will dilute the other or support and enhance the speed of progress.[32]

However, Tischler devotes relatively few sentences to Lovvorn's approach, as compared with lengthy discussions of the views and activities of animal rights advocates.[33] This discrepancy is not, I submit, intended to unfairly bolster her own choice of rights-centered definition of animal law; it reflects the fact (as is clear from her extensive historical account) that from its inception until the present, the great majority of lawyers who define animal law in terms of animal advocacy have believed that animals should be accorded fundamental legal rights that would mark a paradigm shift in how the law deals with them.

Lovvorn appears to believe that in an ideal (though for the foreseeable time unattainable) world, animals *would* have fundamental legal rights that would render them persons and not property.[34] However, there are doubtless some lawyers who do not believe that animals should even in an ideal world have legal rights or be regarded as persons, and who still want to define "animal law" in terms of animal

---

[28] Tischler, *Part II*, *supra* note 13, at 51.

[29] Jonathan R. Lovvorn, *Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform*, 12 ANIMAL L. 133, 136 (2006).

[30] *Id.* at 136.

[31] *Id.* at 139.

[32] Tischler, *Part II*, *supra* note 13, at 52.

[33] *Id.*

[34] Lovvorn, *supra* note 29, at 142 (stating that it is a "hard truth" that "each and every one of us is most likely going to depart this Earth living in a country that does not recognize the legal personhood of animals").

advocacy. Additionally, as I (and others) have argued, it is possible to ascribe legal rights to animals that do not imply that they are legal persons, that they should have standing to sue on their own behalf, or that they cannot be used in a myriad of ways for the benefit of humans or other animals. According to this view, cruelty-to-animals statutes, for example, accord animals covered by these statutes the legal *right* not to be treated cruelly, although these animals do not have standing to sue, and remain property of their owners.[35] A number of courts have endorsed this view.[36] Evidence that some lawyers favor advocacy-definition of animal law that includes promotion of animal rights, but not fundamental, paradigm-changing rights, may be provided by the following description of the Animal Law Section of the State Bar of Michigan. According to its Chairperson, the Section was established

> for the purpose of promoting the interests of attorneys concerned about the welfare of animals. The goals of the section are to educate members of the Bar and the public about legal issues concerning animals, promote legislation/regulations that advance animal protection and animal rights, facilitate communication between concerned attorneys, and encourage changes in the law. . . .
>
> In the last five years, there have been exciting developments in the area of animal law. Attorneys as well as the general public are becoming increasingly aware of and intolerant of unjust laws and behaviors that adversely affect animals.37

Although this statement includes advocacy of animal "rights" in its conception of animal law, it also includes promotion of animal "welfare" and "protection." It is therefore reasonable to interpret the statement as endorsing a wide range of changes in the treatment of animals, which would include promotion of rights in the sense in which animal rights is consistent with animal use, animal welfare, and the legal status of animals as property.

By "reformist" advocacy-oriented or advocacy definitions of animal law, I mean definitions that include advocacy on behalf of animals, but do not include promotion

---

[35] *See*, *e.g.*, Tom L. Beauchamp, *Opposing Views on Animal Experimentation: Do Animals Have Rights?*, 7 ETHICS & BEHAVIOR 113 (1997); JOEL FEINBERG, *Human Duties and Animal Rights*, *in* RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 185 (1980); Jerrold Tannenbaum, *Animals and the Law: Property, Cruelty, Rights*, 63 SOCIAL RESEARCH 538 (1995).

[36] *See*, *e.g.*, Cetacean Community v. Bush, 386 F.3d 1169, 1175 (9th Cir. 2004) ("Animals have many legal rights, protected under both federal and state laws. In some instances, criminal statutes punish those who violate statutory duties that protect animals."); State v. Karstendiek, 22 So. 845, 847 (La. 1897) (asserting that the state animal cruelty statute "is based on the theory, unknown to the common law, that animals have rights which, like those of human beings, are to be protected").

[37] Catherine L. Wolfe, *The Annual Report of the Animal Law Section of the State Bar of Michigan*, 79 MICH. B.J. 1340, 1340 (2000) (emphasis added). The Section filed an amicus brief supporting a plaintiff who sued a kennel for negligent infliction of mental distress allegedly caused to the owner by the death of the animal. The Section's brief "argued that companion animals have social and psychological value for which their owners deserve compensation beyond the animals' status as personal property. It offered scientific and other data to supplement the legal argument in the plaintiff's own appeal brief." *Id.*

of a paradigm shift in how the law deals with animals, or of legal rights that would reflect a change in the status of animals from property to persons. Reformist advocacy definition can be endorsed by lawyers who believe that animals should not be accorded legal rights; that animals should have minimal legal rights that would not reflect fundamental changes in their legal status as property; or that animals in an ideal world would have such fundamental rights, but that animal lawyers ought not, at least presently, work to establish these rights. Whatever their view of animal rights, proponents of reformist definition of animal law, like proponents of rights-centered definition, assert that animal law by definition combats the widespread mistreatment of animals. Some proponents of reformist definition also explicitly characterize animal law as "the animal law movement."[38]

For a number of reasons, presenting a list of goals and tactics that are distinctive of reformist advocacy definition is not possible. First, there has been a wide range of aims and legal tactics that have been adopted by lawyers who view themselves as advocating benefits for animals that are more modest than those pursued by advocates of animal rights.[39] Second, many proponents of rights-centered definition of animal law favor some of the same kinds of legal changes, and engage in the same kinds of litigation and lobbying, as lawyers who do not seek a fundamental legal paradigm shift. For some proponents of fundamental animal rights, these activities are viewed as stepping-stones to eventual paradigm change.[40] Third, the concept of animal "advocacy" by itself is not useful in identifying examples of reformist conceptions of animal law. Legitimate questions can be raised about whether some of the goals and strategies of proponents of reformist definition will in fact benefit animals, and are therefore appropriately characterized as animal *advocacy*.[41] In

---

[38] One such attorney is Pamela Frasch, who writes: "the term 'animal law movement' encompasses the efforts by legal professionals to 'protect the lives and advance the interests of animals through the legal system' (as defined by Animal Legal Defense Fund's Mission Statement)." Pamela D. Frasch, *Finding Our Voice: Challenges and Opportunities for the Animal Law Community*, 14 ANIMAL L. 1, 1 n.4 (2007); *see also* Kathy Hessler, *The Role of the Animal Law Clinic*, 60 J. LEGAL EDUC. 263, 282 (2010) ("Animal law, like the law relating to civil and other human rights, is a part of a larger social justice movement. Though there may be disagreement about the importance of, or need for, this type of social justice work, the evidence is clear that the subjugation of animals in our society is substantial and results in significantly negative consequences for animals, and to some extent for people as well."). Hessler defines animal law "to include legal efforts to determine, consider, and protect the interests of animals rather than any law that just happens to involve animals." *Id.* at 264 n.5. Although Hessler does not include advocacy of animal rights in her definition of animal law, she appears to support some rights for animals, and speaks of animal law as "the movement for animal protection or rights." *Id.* at 283. She also states that "[i]t is important for any advocate wishing to facilitate great change to consider how to create paradigm shifts. This is no less true in the field of animal law." *Id.* at 277.

[39] *See infra* note 41 and accompanying text.

[40] *See* Francione, *supra* note 23; Richard Marosi, *Every Dog Has His Day in Court*, L.A. TIMES, May 24, 2000, at 1; *infra* text accompanying notes 40 and 41.

[41] For example, one common position of reformist advocates (as well as of some advocates of eventual personhood for animals) is that animal owners ought to be allowed to sue veterinarians who negligently kill their animals for negligent infliction of emotional distress because: (1) many animals are treated as members of their owners' families, and if someone can sue a physician who negligently kills a family member for emotional distress, so

characterizing reformist definition of animal law, it is therefore necessary to understand what aims and strategies proponents of such definition tend to *think* will benefit animals.

The following are among the typical aims and strategies of proponents of reformist definition of animal law: urging courts or legislatures to reject the currently prevailing rule that restricts animal owners to recovery for economic damages from a veterinarian or other person who negligently kills their animal, and also to allow recovery for their emotional distress caused by such negligence; urging courts or legislatures to create a new cause of action for loss of animal companionship that would allow an animal owner to recover damages for emotional distress from someone who negligently or intentionally kills the animal; campaigning for statutes or regulations that would prohibit certain common practices used in raising animals for meat and other food products (such as confinement of multiple egg-laying hens in small cages and raising large numbers of pigs, chickens, turkeys, and other animals indoors in relatively small enclosures); urging legislatures to increase potential penalties for violation of cruelty-to-animals statutes; urging legislatures to prohibit large commercial dog breeding operations (so-called "puppy mills"); seeking restrictions on the breeding of dogs and cats to prevent unwanted animals from becoming strays or being killed in pounds and shelters; and suing federal agencies for alleged failure to promulgate or enforce effective regulations to protect animals used for research, marine mammals, and endangered species.[42]

IV. EMERGENCE AND EARLY DOMINANCE OF RIGHTS-CENTERED DEFINITION

For reasons explained below, advocacy-oriented definitions of animal law are fundamentally and, I shall argue, clearly flawed. To understand why such definitions have nevertheless gained significant acceptance, one must understand how talk of a field of "animal law" began and why most lawyers who began speaking about and promoting the field adopted rights-centered advocacy definitions.

A. Necessary Conditions of an Area of Animal Law: Content, Connections, and Interest

There are, I would suggest, three necessary conditions for a subject to be considered a distinct area or field of a body of knowledge, or of law. First, there must be a sufficient number of elements that constitute the subject matter of the purported field. We would not say, for example, that quantum physics is an area or

---

should an animal owner be able to sue a veterinarian; and (2) allowing such lawsuits will benefit animals and animal owners by motivating veterinarians to practice more competently. For defenses of these claims, see, for example, Christopher Green, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 ANIMAL L. 163, 189-204; (2004); Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J. L. & PUB. POL'Y 314, 326-27, 399-404 (2007). However, it has been argued that allowing such suits would harm many animals and animal owners by making veterinary malpractice insurance premiums so expensive that veterinary fees would need to be raised beyond the ability of many veterinary clients to pay. *See, e.g.*, Richard L. Cupp, Jr., *Barking Up the Wrong Tree*, L.A. TIMES, June 22, 1998, at B5; Victor E. Schwartz & Emily J. Laird, *Non-Economic Damages in Pet Litigation: The Serious Need To Preserve a Rational Rule*, 33 PEPP. L. REV. 227, 261-67 (2006).

[42] For discussions of these and other common aims of reformist animal advocates, see, for example, Hessler, *supra* note 38; Lovvorn, *supra* note 29.

field of physics (or that animal law could be an area or field of law) if there were no more than a handful of experiments or discoveries in quantum physics (or if there were just a few court decisions or statutes relating to animals). Second, there must be connections or relationships among these elements that reasonably lead people to classify the elements as belonging to the same field. Otherwise, there would be a random collection of constituents of physics or law, for example, and not what we could call a *field* or *area* such as quantum physics or animal law. Moreover, we do not in ordinary discourse apply the terms "area" or "field" unless the connected or related elements that make up the area or field have a distinctive identity that distinguishes the area from other areas in a general subject or discipline. If there were nothing distinctive about quantum physics that makes it significantly different from the general subject of physics or from other areas of physics there would be no need to speak of *it* as a field of physics. Likewise, if there is nothing distinctive about the connected or related constituents of animal law that would distinguish it from other areas of law, we would not speak of it as an area or field of animal law.[43] Finally, for reasons I shall explain shortly specifically with regard to animal law, the existence of a distinct area or field presupposes an *interest* on the part of a sufficient number of people in viewing the area or field as constituting a coherent and distinct area or field.

B. The Long History of Law Relating to Animals

There has long been enough material from which the legal profession could have attempted to construct a distinct area of animal law had the profession been inclined to do so. The early forms of action at common law that related to the possession and ownership of personal property were developed largely in response to situations in which cattle and other farm animals were killed or taken from their owners or bailees. Such was the case because these animals (cattle, oxen, sheep, chickens, and horses) were the major form of moveable property that people possessed at that time.[44] Legislatures and courts have since dealt with an enormously broad range of animal-related issues, including determination of rights and obligations relating to the breeding and ownership of domestic animals; grazing rights and responsibilities; ownership and government authority regarding stray and wild animals; protection of persons and property from trespass or physical harm caused by animals; commercial contracts relating to the purchase and sale of animals and of food and fiber produced from animals; liability for sale of defective animal products; and nuisance and public health problems caused by diseased or dangerous animals. Beginning in the mid-1800s, and increasingly thereafter, numerous statutes and regulatory schemes (such as state cruelty-to-animals statutes) have sought to protect animals from experiencing unnecessary and unjustifiable kinds of pain or distress when used for a variety of human purposes.[45] Virtually every area of law has dealt at least to some

---

[43] *See infra* Part X.B.2.

[44] FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, 2 THE HISTORY OF ENGLISH LAW 150-54 (2d ed. 1968).

[45] A comprehensive summary of the law relating to animals from the early common law to the early twentieth century is contained in 2 AM. JUR *Animals* (1936). Excellent surveys of contemporary animal-related legal issues can be found in PAMELA D. FRASCH ET AL., ANIMAL LAW IN A NUTSHELL (2011) [hereinafter FRASCH ET AL., NUTSHELL] and LITIGATING ANIMAL LAW DISPUTES (Joan Schaffner & Julie Fershtman eds., 2009). I suggest in Part X.B.2 below

extent with animals—understandably, because of the many and important roles animals play in the economy, the environment, and the personal lives of the populace.

C. Connections among Legal Principles Relating to Animals

Moreover, there have long been significant connections among legal principles relating to animals. One important fact that underlies many of these principles is the legal status of many animals as private property. This status is fundamental, for example, to the ability of owners of animals to sue in tort for compensation if their animals are destroyed or stolen or their economic value is wrongfully diminished by others. That animals are property also explains why, pursuant to principles of criminal law, there can be criminal prosecution of those who steal or destroy others' animals, and why in contract law, there can be enforceable agreements to buy and sell animals and products produced from animals. The property status of animals protects animal owners, in a variety of circumstances, from government taking of or restrictions upon the use and enjoyment of their animals without due process of law.

D. Interest of Animal Advocates in Recognizing "Animal Law"

A few commentators have used the term "animal law," or have spoken of a "field" of law relating to animals, to refer to principles regarding animals that were part of the law well before the 1980s.[46] However, before then the term "animal law" simply was not in general use among lawyers.[47] Before the late twentieth century, it was not a lack of legal material, or connections among this material, that prevented lawyers from wanting to speak of and recognize an area of animal law. Missing was sufficient *interest* in classifying this material as a separate area of law.[48] Without such interest, lawyers dealing with animal issues viewed themselves as working in other legal fields. For example, a prosecutor and defense attorney involved in an animal cruelty trial would have considered themselves to be practicing criminal law. A city attorney and a lawyer representing a home owner doing battle over the enforceability of an ordinance restricting the number of dogs permitted in homes in the city would have considered themselves to be practicing municipal, property, and perhaps constitutional law. The attorneys representing a landlord and a tenant in a dispute about whether the tenant should be allowed to keep a pet in her apartment

---

that some of the topics discussed in these books (e.g., sales of certain kinds of animals and veterinary malpractice law) might not appropriately be included in animal law.

[46] *See* 2 AM. JUR *Animals* § 1 (1936) ("This article deals with the law relating to animals. It aims to cover the entire field of the law as it is affected by man's relation to, use of, or exercise of ownership over, animals."); MARGARET E. COOPER, AN INTRODUCTION TO ANIMAL LAW 1 (1987) (asserting that "animal law" is "the law relating to animals"); Richard A. Posner, *Animal Rights*, 110 YALE L.J. 527, 529 (2000) (reviewing STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000) [hereinafter WISE, RATTLING THE CAGE]) (commenting on Wise's account of how animals were treated from the time of the Old Testament and into the eighteenth century and beyond, that his "treatment of the history of animal law is not entirely satisfactory. He fails to note the inconsistency between the law's treating animals like slaves and what he takes to be the law's ignorance of the commonality between people and animals.").

[47] *See supra* Part III.A.1; Tischler, *Other Animals*, *supra* note 10.

[48] *Id.*

would have considered themselves to be practicing landlord-tenant and contract law. These attorneys would not have considered themselves all to be practicing the same type of law. None would have called what they were practicing "animal law."

There was not sufficient interest in viewing animal-related legal issues as constituting a single field, I would suggest, because relatively few lawyers spent a significant proportion of their time on animal-related matters. It would have been highly unusual for most attorneys of the kinds described in the previous paragraph—indeed for the great majority of lawyers—to see many animal-related cases in the course of a year. If a lawyer had a case involving animals, she probably could learn enough about the law at that time to handle the matter. Because the next animal-related issue could be years away, if it occurred at all, there was no need for most lawyers to gain *general knowledge* about how the law deals with *animals* even in their own areas of practice, much less in the law generally.

Moreover, there certainly was usually no need for most lawyers handling an animal-related case to know about how attorneys in other legal fields handled animal-related cases. The lawyers involved in a cruelty prosecution, for example, likely would not have been interested in the ability of the city in which they practiced to seize or destroy stray dogs—unless that issue was directly relevant to the criminal case. It is therefore not surprising that most lawyers who handled animal cases did not consider themselves to be practicing "animal law," but rather viewed themselves as practicing the types of law on which they spent a significant amount of their time and about which they required general knowledge.

The key development that nurtured interest in finding similarities and connections in the vast body of law relating to animals, and viewing it as a distinct area of law, was the emergence (beginning around the 1980s) of a significant number of attorneys with similar views about what they regarded as the mistreatment of animals.[49] Joyce Tischler describes them in her historical accounts of animal law.[50] As Tischler notes, these attorneys began to devote a substantial portion of their legal practice to what they regarded as the protection of animals.[51] They were the first to say that there is, and should be, a field called "animal law." They were not hindered in doing so by the fact that (as discussed below) it might be impossible to find in the ways in which the law has dealt with animal-related issues a coherent and distinctive set of principles.[52] The *very aim* of these lawyers—to promote animal interests (as they conceived of these interests)—was *itself* a common principle on which a coherent and organized field of animal law could rest.

Documenting in detail the activities of the lawyers who began speaking of a field of "animal law" is beyond the scope of this Article. Some who participated in these events have provided excellent accounts of their work in organizing attorneys, bringing litigation, founding legal publications, and teaching early law school

---

[49] *See supra* Part III.A.1.

[50] *See* Tischler*, Part I*, *supra* note 12; Tischler*, Part II*, *supra* note 13; *see also* Taimie L. Bryant, *The Bob Barker Gifts to Support Animal Rights Law,* 60 J. LEGAL EDUC. 237, 246-47 (2010); Clayton Gillette & Joyce Tischler, Symposium, *Confronting Barriers to the Courtroom for Animal Advocates: Introduction*, 13 ANIMAL L. 13, 15-19 (2006).

[51] Tischler, *Part I*, *supra* note 11.

[52] *Id.*

courses in animal law or animal rights law.[53] The publication of the first legal journal in 1994[54] and the first commercially available casebook in 2000[55] with the words "animal law" in their titles, as well as the formation of "animal law" bar association committees or sections,[56] all indicated that talk of a new legal field was growing. Perhaps the best and most dramatic evidence of the recent vintage of acceptance of a field of "animal law" was the rapid increase in the number of law school courses on the subject. According to a 2008 survey, between 1986 and 1988 there was one law school course in animal law in the United States. Three courses were taught in United States law schools in 1995, with the number increasing to eleven in 1999, twenty-seven in 2002, fifty-five in 2005, and seventy-five in 2007.[57]

E. Animal Rights Theory as a Motivating and Unifying Factor

Another crucial development—the emergence of contemporary animal rights theory—motivated some attorneys to organize their practice of law around animal advocacy and helped them to find connections among diverse strands of law dealing with animals. In 1975, Australian philosopher Peter Singer published *Animal Liberation.* [58] Singer argued that standard practices of raising animals for meat and other food products, and using animals in research, are unethical because (in Singer's view) they cause on balance more suffering to animals than benefits to humans.[59] Singer is a utilitarian, and does not believe that animals have inherent moral rights that are violated by using them to benefit people or other animals.[60] Nevertheless, Singer is correctly credited with attracting to animal advocacy people

---

[53] The most comprehensive account is contained in Joyce Tischler's two-part history. *See* Tischler, *Part I*, *supra* note 12; Tischler, *Part II*, *supra* note 13. For other descriptions of early talk of a field of "animal law," see also Gillette & Tischler, *supra* note 50; Barbara J. Gislason, *Animal Law: A Significant Journey*, *in* LITIGATING ANIMAL LAW DISPUTES: A COMPLETE GUIDE FOR LAWYERS xxxi (Joan Schaffner & Julie Fershtman eds., 2009); Joyce Tischler, *Building Our Future*, 15 ANIMAL L. 7 (2008); Tischler, *Other Animals*, *supra* note 10; Delcianna J. Winders, *Confronting Barriers to the Courtroom for Animal Advocates*, 13 ANIMAL L. 1 (2006); Steven M. Wise, *The Evolution of Animal Law Since 1950*, *in* THE STATE OF THE ANIMALS II 99 (Deborah J. Salem & Andrew N. Rowan eds., 2003).

[54] ANIMAL LAW, published beginning in 1994. Other law reviews have followed: THE JOURNAL OF ANIMAL LAW in 2005, THE JOURNAL OF ANIMAL LAW AND ETHICS in 2006, THE STANFORD JOURNAL OF ANIMAL LAW AND POLICY in 2008, and THE JOURNAL OF ANIMAL & ENVIRONMENTAL LAW in 2009.

[55] PAMELA FRASCH ET AL., ANIMAL LAW (1st ed. 2000) [hereinafter FRASCH ET AL., ANIMAL LAW].

[56] As of 2009, sixteen state Bars, and twelve regional bar associations had sections or committees devoted to animal law. Shaffner & Fershtman, *supra* note 44, at 2.

[57] Sankoff, *supra* note 17, at 124. According to the ALDF, as of 2013 there were 146 law schools in the U.S. and Canada that "have offered a course in animal law." Animal Legal Defense Fund, *Animal Law Courses*, http://aldf.org/resources/law-professional-law-student-resources/law-students-saldf-chapters/animal-law-courses/ (last visited Jul. 29, 2013).

[58] PETER SINGER, ANIMAL LIBERATION (1975).

[59] PETER SINGER, ANIMAL LIBERATION 25-157 (rev. ed. 1990).

[60] PETER SINGER, PRACTICAL ETHICS 14-71 (1979).

who became proponents of animal rights, by advancing the idea that animal causes could be supported by theories in philosophy and ethics.[61]

In the late 1970s and early 1980s, there began to appear a number of philosophical defenses of what has come to be called animal rights theory, the most comprehensive (and still most influential) of which was Tom Regan's *The Case for Animal Rights*.[62] According to this theory, animals have certain interests of their own, irrespective of how humans view or use them.[63] Animal rights theory further argues that animals have an inherent moral right to have these interests respected by humans, whether or not respecting these interests is on balance enjoyable or beneficial to us. Because these theorists call for ending the use of animals to benefit humans or animals, they are characterized (and characterize themselves) as animal use "abolitionists." There is disagreement among abolitionist theorists regarding what qualifies animals for moral rights, and indeed about what kinds of animals have moral rights.[64] However, all abolitionist theorists argue that animal rights implies, among other things, that people should not kill animals that have rights for meat, or use them in scientific or biomedical research, even if such research leads to great benefits for humans or animals.[65]

Animal rights theorists, some of whom were lawyers, argued (and continue to argue) that fundamental moral rights possessed by animals—which people ought to recognize because it is *ethically* obligatory to do so—can be realized in fact only if these rights also become *legal* rights: rights that courts, legislatures, and regulatory bodies recognize and enforce. Animal rights theory identified a number of legal principles that it regarded as sources of the oppression of animals, including the categorization of animals as property and the absence of legal standing for animals.[66] Animal rights theory regarded legal rights for animals as a logically necessary and historically inevitable development of previous rights-movements, such as the civil and women's rights movements, the aims of which were to extend legal rights to

---

[61] JAMES M. JASPER & DOROTHY NELKIN, THE ANIMAL RIGHTS CRUSADE: THE GROWTH OF A MORAL PROTEST 92-3 (1992) (observing that ANIMAL LIBERATION "gave the incipient [animal rights] movement an ideology and a vocabulary. Joyce Tischler, then a law student and later founder of the Animal Legal Defense Fund, says: 'Singer's book influenced us all. It gave us a philosophy on which to hang our emotions, feelings, sentimentality—all the things we had thought were bad; it gave us an intellectual hat to put on our heads.' Activism for animals was no longer just compassion; it had recourse to systematic philosophical arguments.").

[62] TOM REGAN, THE CASE FOR ANIMAL RIGHTS (1983).

[63] *Id.*

[64] *See infra* Part IX.C and notes 150-5.

[65] *See*, *e.g.*, Tom Regan, *The Case for Animal Rights*, *in* IN DEFENSE OF ANIMALS 13, 13 (Peter Singer ed., 1985) ("I regard myself as an advocate of animal rights—as a part of the animal rights movement. That movement, as I conceive it, is committed to a number of goals, including: the total abolition of the use of animals in science; the total dissolution of commercial animal agriculture; the total elimination of commercial and sport hunting and trapping.").

[66] *See, e.g.*, GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 33-49, 65 (1994); WISE, RATTLING THE CAGE, *supra* note 46, at 23-34, 49-61 (2000).

oppressed or rightless groups.[67] This purported link to other rights movements further encouraged practitioners of the new field of animal law (as they defined it) to regard the goal of significant *social change* as another feature that gave coherence and distinctness to animal law.

In a discussion of the origins of animal law, Barbara Gislason, the first chair of the ABA Animal Law Committee (whose rights-centered definition is quoted above) confirms the key role of animal rights theory in the creation of the new field of animal law. She identifies what she calls the two "waves" that gave birth to, and then established, the field.

> [T]he First Wave of what we now call Animal Law was influenced by philosopher Peter Singer, the author of Animal Liberation, first published in 1975, as well as Animal Rights lawyers who emerged in the 1980s. They were concerned about subjects like standing, anticruelty, and of course, personhood.
>
> The Second Wave came in the new millennium, where it was particularly influenced by law school courses, case books, and law reviews, and the formation and evolution of bar associations, including the momentous inclusion of Animal Law in the ABA in 2004, the largest professional organization in the world.[68]

F. Adoption of Rights-Centered Definition by Observers and Opponents of the Animal Rights Movement

The statements about the nature and purpose of animal law quoted above are representative of how most of the early proponents of animal law viewed and defined the area.[69] It is thus not surprising that rights-centered definition predominated not only in legal periodicals, but also in reports in the general public media. For example, according to a 1999 *New York Times* article,

> [m]ore than a generation after civil rights and environmental lawyers took their battles to the courts, there are now lawyers who say they are

---

[67] For an extensive historical account of how the animal rights movement has viewed itself as a logically necessary and historically inevitable development of earlier rights movements, see HELENA SILVERSTEIN, UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT 27-54 (1996).

[68] Gislason, *supra* note 53.

[69] A notable exception has been Steven Wise, an early proponent of legal rights and personhood for at least some kinds of animals. Wise maintains that the term "animal law" "is neutral. 'Animal law' can be wielded by those working either for or against the interests of nonhuman animals. In a lawsuit brought to stop an abuse of nonhuman animals, both sides are practicing animal law. . . . 'Animal rights law' . . . the object of which is to have judges recognize that at least some nonhuman animals possess at least some basic legal rights, does not yet exist. However, the groundwork for its emergence is rapidly being laid." Steven M. Wise, *Animal Law—The Casebook*, 6 ANIMAL L. 251, 253 (2000) (book review) [hereinafter Wise, *Casebook*]. Wise does not indicate whether his reason for endorsing a descriptive definition of animal law is the fact that, as discussed *infra* in Part IX.A, one cannot define an area of law that does not exist.

> following in those footsteps on behalf of clients with names like Freckles and Muffin and Rainbow.
>
> Fighting for creatures like performing orangutans and dogs used in experimentation, the lawyers are creating a new field of animal law with far more ambitious goals than traditionally weak anti-cruelty laws. They are filing novel lawsuits and producing new legal scholarship to try to chip away at a fundamental principle of American law that animals are property and have no rights.70

The early predominance of rights-centered advocacy definition of animal law is demonstrated by the fact that even *opponents* of animal rights accepted rights-centered advocacy definition of the area—and maintained that the *entire area of animal law* was therefore unacceptable. For example, critics were characterized in the article quoted above as rejecting "animal law as the latest example of absurdity in the legal system" as well as "an attack on the economic system's reliance on animal products that could wreak havoc in the courts."[71] In 2001, law professor Richard Cupp was reported as viewing the

> emergence of "animal law" as much more than simply trying to dispassionately calculate the value of lost afternoons watching your cat nap in the sunshine.
>
> "The strongest proponents of this trend are in favor of blurring the distinction between humans and animals. They see this as one battle in that war," he said. "I think it is harmful for society if the law encourages that attitude, to value a pet in the same way we value a human being."[72]

Likewise, some supporters of the use of animals in biomedical research condemned animal law itself on the grounds that the field, by definition, includes a commitment to animal rights, including the right of animals not to be used in research. For example, a 2000 editorial in *Nature Neuroscience*, which rejected demands by animal rights lawyers to curtail or prohibit animal experimentation, remarked that "animal rights advocates are working to build not only case law but also legal scholarship in their field: courses in animal law are now being offered at

---

[70] William Glaberson, *Legal Pioneers Seek to Raise Lowly Status of Animals*, N.Y. TIMES, Aug. 18, 1999, at A1; *see also, e.g.*, Marosi, *supra* note 40 ("For now, animal law attorneys are focusing primarily on broadening the rights of pet owners by recognizing the human suffering caused by the loss or injury of a pet. But eventually, some activists hope courts will extend certain rights to animals—changing their status from simple property to something more. Such a shift could have broad implications, giving new protections to lab animals and prompting tougher punishments against humans who abuse pets."); Dru Sefton, *Small but Growing Number of Attorneys Specialize in Animal Law*, NEWHOUSE NEWS SERVICE (Washington, DC), Mar. 27, 2002, at 1 (describing "animal law attorneys" as "guardians of the interests of nonhumans, they work to protect and provide legal rights to companion pets, wildlife, farm livestock and research animals").

[71] Glaberson, *supra* note 70, at A1.

[72] P. Kennedy Page, *The Potential Cost of Losing Fido's Company*, THE NATIONAL LAW JOURNAL, Jan. 17, 2001, at A15.

several prominent law schools."[73] In 2004, attorney Steven Michael, writing in *The Physiologist*, an influential journal for biomedical scientists, described the "leaders in the new field of animal law," as engaged in the "campaign to provide new legal rights for animals."[74] Among these, he observed, would be the right not to be used in research, a right that would follow from the goal of animal lawyers to change the legal status of animals from property to persons.[75] Michael concluded that

> [t]his is an evolving field of law and in that sense, efforts to address new legal challenges is akin to shooting at a moving target. We do not know when or how these challenges will be presented, but we do know a large number of talented and committed animal law advocates are seeking to limit severely or prohibit any animal research. The research community can, and must, rise to this challenge.[76]

V. EMERGENCE OF DESCRIPTIVE DEFINITIONS OF "ANIMAL LAW"

Descriptive definitions of animal law do not include advocacy on behalf of animals, and merely define the area (roughly, for reasons discussed below) as the body of law that deals with animals. By the early 2000s, such definitions began to appear with increasing frequency. A growing number of lawyers who did not share the views of animal rights advocates nonetheless wanted to learn more about how the law deals with animals. Some of these lawyers already represented, or thought they might represent, clients who did not share the views of the animal rights movement. Some of these lawyers were interested in a field of animal law, but not a field that was (by definition) committed to advocacy, fundamental legal change, or animal rights. In short, these lawyers were interested in an area of "animal law" that would be defined neutrally and thus descriptively.

Striking evidence of the growing interest in a descriptively-defined area of animal law is provided by statements by some of the newly-formed bar association animal law sections, which explicitly disavowed rights-centered advocacy definition. For example, in 2002, the Washington State Bar Association's Board established its animal law section, refusing to endorse "the animal rights movement in accepting animal law as a new field" and approving the section only "after being assured it would cover a broad area, including the intersection of landlord-tenant, animal control, trust and estate, and other laws."'[77]

In 2004, the new animal law section of the Arizona Bar "had to assure the Board of Governors and fellow lawyers that the new group would not be an animal rights section. There would be no lobbying against cosmetics companies, no call for animal suffrage, no blood thrown on fur coats."[78] One of the founders of the section stated

---

[73] Editorial, *Legal Challenges to Animal Experimentation*, 3 NATURE NEUROSCIENCE 523, 523 (2000).

[74] Steven Michael, *Animal Personhood—A Threat to Research?*, 47 THE PHYSIOLOGIST 447, 447 (2004).

[75] *Id.*

[76] *Id.* at 450.

[77] Kathy George, *Animal Laws Gaining Attention: Movement Seeks to Clarify What Rights Exist*, SEATTLE POST INTELLIGENCER, Dec. 2, 2002, at B1.

[78] Tim Eigo, *Laws for Paws: A New Breed of Law Section*, 42 ARIZ. ATT'Y 14, 16 (2005).

that "[w]e are a mandatory bar, and we can't be an advocacy section; we have to be an academic section to consider the law."[79]

The Maryland State Bar Association, in 2005, established its animal law section and explicitly disavowed rights-centered definition.[80] According to one report, although some of the section's members considered themselves animal rights advocates,

> the recruiting advertisements the committee ran in various bar journals around the state specified that the group "is not an animal rights group or a political organization, but rather a forum for attorneys of all viewpoints whose practices may involve animal-related issues." The ads listed some of the types of lawyers who had attended the first meeting in November: people interested in protecting farmers and researchers from "over-reaching animal rights legislation," strengthening animal cruelty laws, working with the horse racing industry, changing veterinary malpractice laws, protecting the sport of fox chasing.[81]

The Animal Law Committee of the Florida Bar Association also met resistance from lawyers who assumed it would promote animal rights. The vice chair of the committee, an animal rights advocate, assured bar members that the

> purpose of the committee is to provide information on the development of animal law, not to be an advocacy group. . . . We understand that. So we have members who are on both sides of animal law-related issues. There is no animal rights law. There is animal law. Just like we have a family law section; it's not an advocacy group.[82]

In the early 2000s, some texts and discussions that were aimed at lawyers in general began to employ descriptive definitions of animal law. They did so, I would suggest, for the same reason some animal law sections adopted descriptive definitions: Lawyers who did not view themselves as animal advocates wanted a field of animal law that would facilitate their understanding and handling of animal-related issues. The first commercially available casebook in animal law, which appeared in 2000, offered a descriptive definition of the area.[83] Some lawyers

---

[79] *Id.*

[80] *See* Caryn Tamber, *All Creatures Great and Small*, 5 DAILY RECORD (Baltimore), Mar. 3, 2006.

[81] *Id.* However, according to this report, some observers remained skeptical that the section would not become an advocate for animal rights: "'Not everyone is thrilled when an animal law committee sets up shop, and there are people watching closely to see how the new group treads the line between animal law and animal activism. . . . We've seen in a lot of places the folks pushing the radical animal rights agenda tend to be sort of proselytizers,' said Bill Horn, Washington counsel to the U.S. Sportsmen's Alliance. 'They've been behind a lot of these committees, and I think that's why a lot of people look at them askance.'" *Id.*

[82] Jan Pudlow, *Bar's Animal Law Committee Rounds Up Interested Lawyers*, 32 FLA. BAR NEWS 26, 27 (Mar. 1, 2005).

[83] FRASCH ET AL., ANIMAL LAW, *supra* note 55, at xvii ("Animal law is, in its simplest (and broadest) sense, statutory and decisional law in which the nature—legal, social, or biological—of nonhuman animals is an important factor.") For a critique of this and the

explaining the new field to colleagues also defined animal law descriptively.[84] A 2009 volume published by the ABA covers a wide range of issues relating to animals that lawyers are increasingly handling. This book defines animal law as follows:

> So, what exactly is "animal law"? All law is animal law. Animal law cuts across virtually every substantive area of the law, including tort, contract, property, family, taxation, trust and estates, insurance, criminal, administrative, international, and environmental. On the one hand, because companion animals are now so common in the United States and they are often considered family members, lawyers are now finding themselves confronted with "animal law" cases more frequently and require guidance. On the other hand, because of the continued growth in business industries involving animals, such as dog show and horse show industries, the demand is greater than ever for lawyers to serve these businesses on the many legal issues they confront. This book is designed to provide such guidance.[85]

A 2011 publication of the ABA Law Practice Management Section, titled *Careers in Animal Law*, also offers a descriptive definition of the field. According to its author Yolanda Eisenstein,

> [a]lthough it started with the animal protection movement, animal law is a legal discipline. It is the law that affects, but not always protects, animals. While definitions vary somewhat, the first animal law casebook provides a good working definition: "statutory and decisional law in which the nature—legal, social, biological—of nonhuman animals is an important factor." . . . Animal law is a city ordinance, a state or federal law, an international treaty, or a case whose provisions or result has an impact on an animal or animals. It is law, legal precedent, rules, and regulations that affect animals' care and use, how they can and cannot be treated, and even whether or not they are considered animals.[86]

Although Eisenstein defines animal law descriptively, the primary intended audience of her book is lawyers who want to advocate on behalf of animals.[87] The book, she states,

---

descriptive definitions quoted *infra* in the text accompanying notes 84 and 85, see *infra* Part X.B.2.

[84] *See*, *e.g.*, Geordie L. Duckler & Dana M. Campbell, *Nature of the Beast: Is Animal Law Nipping at Your Heels?*, 61-Jun OR. ST. BULL. 15, 15 (2001) (endorsing the definition of in *supra* note 83 and also stating that "[i]nnumerable local, state and federal statutes and regulations that affect the welfare, use and abuse, sale and management, protection and killing of animals are all part of animal law").

[85] Joan E. Schaffner & Julie Fershtman, *Introduction*, *in* LITIGATING ANIMAL LAW DISPUTES: A COMPLETE GUIDE FOR LAWYERS xxxv (Joan E. Schaffner & Julie Fershtman, eds. 2009).

[86] YOLANDA EISENSTEIN, CAREERS IN ANIMAL LAW: WELFARE, PROTECTION, AND ADVOCACY 7-8 (2011).

[87] *Id.* at xi-xii.

> is for people who care about the welfare of animals. It is for lawyers and law students who are interested in careers where they can use the law to protect or improve the lives of animals. It is for lawyers who want to work for clients—whether corporations, governments, individuals, or nonprofits—whose work involves animals guided by a concern for their welfare. In my research and interviews, this reality quickly became clear, as the lawyers who called themselves animal lawyers were animal protection lawyers.[88]

Eisenstein may be correct that, at least at present, attorneys who *call* themselves "animal lawyers" and who devote all or most of their legal practice to animal issues tend to be animal advocates in some sense, even though her definition of the field is descriptive and neutral. Herein lies a critical point that, as I discuss in detail below, strongly argues for descriptive rather than advocacy definition of animal law. If animal law is defined descriptively, lawyers who consider themselves animal advocates or proponents of views associated with the animal rights movement can practice animal law. But so can lawyers who do not consider themselves animal advocates, or who oppose (or represent clients who oppose) the views of animal advocates or of the animal rights movement. However, if animal law is defined in terms of animal rights advocacy, or advocacy of significant but less fundamental changes in how the law deals with animals, only lawyers who accept these views can practice "animal law."

Empirical studies have not been conducted to determine whether, at present, advocacy or descriptive definitions of animal law have greater popularity among lawyers. It is *clearly* the case that both approaches are well-represented. The choice of which approach the legal profession will make is therefore still an open one. There is still time to make the right, or the wrong, choice.

VI. SOME GENERAL PRINCIPLES OF DEFINITION

Proposing a general approach to defining areas of law is beyond the scope of this Article. However, some consideration of concepts and principles of definition generally accepted by scholars in the field of the philosophy of language is essential in formulating and evaluating definitions of animal law. Because there is disagreement about how to define the area, standards for evaluating definitions are needed for deciding which of the competing approaches to defining animal law is preferable. Significantly, none of the authors of proposed definitions of animal law that have been published to date explicitly defends, or even identifies, the standards these definitions are supposed to reflect.

A. Components and Nature of Definitions

All definitions consist of two components: (1) the word or term being defined and (2) the definition of the word.[89] Philosophers of language employ the terms "*definiendum*" (Latin for "that which is defined") to refer to the former and "*definiens*" (Latin for "that which defines") to the latter.[90] The *definiendum* is often placed in quotation marks (or can be italicized) to indicate that it is the word to be

[88] *Id.*

[89] MAX BLACK, CRITICAL THINKING 188 (1946).

[90] *Id.*

defined, and the *definiens* is set forth without quotation marks to indicate that the *definiendum* is not being defined simply in terms of other words, but in terms of *what* the *definiens* means.[91] The following statement illustrates a typical formulation of a definition: "triangle" means a closed plane figure comprised of three connecting straight lines. Quite often, definitions omit quotation marks around the *definiendum*, or are responses to the question "What is an X?" or "What is X?" Thus, we can ask how "triangle" or the word "triangle" should be defined. We can also ask how a triangle should be defined, or what is a triangle? Likewise, we can ask how "animal law" or the term "animal law" is defined. We can also ask how animal law is defined, or as the title of this article inquires: What is animal law? These are all common and equivalent ways of asking how to define the *words* "triangle" or "animal law."

Formulations of definitions that do not indicate explicitly that a word is being defined need not be problematic as long as it is understood that a *word* is being defined. However, as philosophers of language observe,[92] failure to understand that definitions are of words has led some authors of definitions to think that they are defining or analyzing a *thing* and not a word. This can be problematic because someone who thinks she is defining a thing may be drawn to questions that are not matters of definition, but issues of factual description or empirical investigation. The illustrious philosopher of language Max Black explains this point by considering the following statements:

> (A): A dictionary has the entry, "*fox*: Red-furred sharp-snouted bushy-tailed quadruped."
> (B): Foxes are swift runners.[93]

As Black observes, these are fundamentally different assertions that require different kinds of investigation to determine their correctness.

To establish the truth of B, we must observe *foxes*, or use the testimony of others who are in a position to do this: moreover, this is *all* we need do. One way of establishing the truth of A would be to wait for opportunities of hearing people say "That's a fox!" checking in each such case whether the speaker did point to a quadruped that was bushy-tailed, and so on. If this procedure were followed, we should, as in the first case, observe foxes; but we should also observe people using *the word* "fox"; and A could not be tested *without* direct or indirect reference to such linguistic behavior. To look at foxes alone in order to test the definition would be as futile as looking at the planet Mars through a powerful telescope to see if the word "Mars" were inscribed upon it. The reason why we must pay attention to linguistic behavior in testing A is that the connection between *being a fox* and *having red fur* (or the other characteristics mentioned in the definition) is artificial or man-made. For this reason, also the definition, A, unlike the second statement, can also be established without attention to foxes at all—as by asking sufficiently competent speakers of English what *they mean* when using the word.[94]

---

[91] *Id.*

[92] *See, e.g.*, *id.* at 187-188; RICHARD ROBINSON, DEFINITION 12-34 (1950).

[93] BLACK, *supra* note 89, at 187.

[94] *Id.*

In sum, to determine whether the definition of a word like "fox" is correct, one asks whether the definition correctly reports *how the word is used*, that is, whether the definition accurately indicates the *linguistic behavior* of people who use the word. To determine whether certain factual claims about things to which these words refer are correct, one must examine the *characteristics of the things* themselves.[95]

B. Definition versus Factual Descriptions or Ethical Conclusions

That definitions are of words and not things has an important implication that some authors of definitions overlook: A typical *definiens* does not include, and indeed cannot include, the vast majority of things that are factually true of that to which the *definiendum* refers. Nor does a typical *definiens* include all value judgments regarding how people ought to think about, use, or in some other way interact with what the definition defines—even value judgments that almost everyone would regard as obviously correct.

The term "astronomy," for example, has been defined as "the science that treats of the celestial bodies, of their positions, magnitudes, motions, distances, constitution, physical condition, mutual relations, history, and destiny."[96] This definition does not include the many thousands of discoveries about celestial bodies made by astronomers. These are discoveries *in* the field of astronomy. Nor would the definition of astronomy include conclusions astronomers may reach regarding empirical controversies. Thus, if, as some astronomers now believe, Pluto is really not a planet of the Sun, the definition of "astronomy" would not be affected. Nor does the definition of "astronomy" include statements about which most people might agree regarding how astronomy should be viewed or used; for example, "The federal government should fund research in astronomy that can lead to important advances in knowledge about the universe." This is a value judgment *about* astronomy. It does not affect the definition of astronomy, or what astronomy is. The definition of astronomy would not change if people changed their minds about whether the federal government should fund research in astronomy.

C. Limited Role of Definitions

Because definitions typically do not state factual truths about what is being defined, or how what is defined ought to be regarded or used, definitions tend to have a limited role. Factual discovery and ethical argument are discovery and argument *about* things, events, or practices that those who are doing the discovery or argument must already be able to recognize. Otherwise, they would not be making discoveries or arguing about the same things. If definitions of terms used in discovery or ethical debate had to contain everything (or even most or a significant proportion of things) true or ethically defensible about what is being defined, discovery and debate could not begin until people *already* knew a great deal about these things or agreed about how they ought to be regarded.

Put another way, a shared definition of a word can *make it possible* for people to communicate about the thing, to learn about it, and to argue about what is or is not

---

[95] Some words do not refer to anything. For example, what philosophers call "emotive" or "expressive" terms, such as "ouch!," "hurrah!," or "stop!," express an emotion or feeling (in the case of "ouch!") or make a request or statement (in the case of "stop!" and "hurrah!").

[96] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 136 (1986 ed.).

factually true about it, or about what ought or ought not to be done with it. However, although a good definition can allow such inquiry and argument, it is almost always the inquiry and argument about which people are primarily interested. A student will not do well in an astronomy course if all he learns is the definition of the subject. Likewise, it is no accident that in a casebook, hornbook, or legal treatise in an area of law, discussion of the definition of the area typically constitutes a minuscule portion of the text. A student or lawyer who stops reading after the definition not only will fail as a student or lawyer, he will have misunderstood the primary purpose of the text: to help one understand the substance and rationale of the law. It does not diminish the importance of definitions to appreciate that they enable, but rarely guide or settle, discovery or argument. As I argue below, this limited role of definitions is an especially important *virtue* regarding definitions of areas of law.

D. Purposes of Definitions

1. Interrelation of Definitional Purpose and Content

Philosophers of language emphasize two central features that one must consider in proposing or evaluating any definition: (1) the purpose or purposes of the definition—what the definition is intended to accomplish; and (2) the content of the *definiens* and the verbiage employed to convey this content. Definitional purpose and content are related. When a definition is constructed with careful attention to its purpose, the purpose can guide the content to some extent. To illustrate, Black cites a definition he attributes to Samuel Johnson's famous *Dictionary of the English Language*: "Net: a reticulated texture with small interstices."[97] Black (who believes this definition was intended as a joke) observes that although it may accurately describe the kind of thing to which the word "net" refers, the definition is worthless in a dictionary intended for speakers of the English language because few speakers would understand it.[98] Black states that the first rule of definition is that "[t]he definition should be adequate for the purpose for which it is intended."[99] Accordingly, because the definition of animal law is in dispute, it is crucially important to consider carefully what purposes a definition of an area of law, and of animal law in particular, should have.

2. Lexical and Stipulative Definitions

Philosophers of language counsel authors of a definition to be clear about whether the fundamental purpose of the definition is to report on how certain speakers actually use a *definiendum* or to decide that the word shall be used in a certain way. Philosophers use the terms "lexical" or "reported" to refer to a definition intended to describe the actual use of a word[100] and "stipulative" or

---

[97] BLACK, *supra* note 89, at 192.

[98] *Id.* Although a towering figure in the history of the philosophy of language and lexicography, Black misquotes Johnson, who in fact defined "net" as "a texture woven with large interstices or meshes, used commonly as a snare for animals." SAMUEL JOHNSON, 2 A DICTIONARY OF THE ENGLISH LANGUAGE 1357 (1755). Johnson's actual definition was perhaps a bit better for its intended purpose.

[99] BLACK, *supra* note 89, at 191.

[100] *Id.* at 190-191; ROBINSON, *supra* note 92, at 59-62.

"stipulated"[101] to refer to a definition that decides that the word shall be used as stated in the *definiens*. Stipulative definitions are commonly employed by scientists and members of the professions when an important term is used in more than one sense. As philosopher Richard Robinson observes in his classic study of definition, "[l]earned and professional societies make stipulative definitions in order that intercourse between their members may not be rendered futile by such ambiguities."[102]

For a number of reasons, it is important when assessing definitions of animal law to keep in mind the nature of stipulative definitions and standards that philosophers of language apply in evaluating them. First, at some time in the future a group of lawyers or legal academics (a committee of the American Law Institute, for example) might attempt to determine that the best way of resolving current disagreements about how to define animal law is for the legal profession to *decide* on a definition that lawyers shall henceforth employ. Second, even in the absence of a deliberate decision by a group of lawyers or some authoritative body about how to define animal law, eventually a definition that is generally accepted may emerge—as a result of individual decisions by lawyers that one of the two competing definitional approaches is preferable. Because stipulative definitions often reflect a choice among competing definitions of a given term, criteria for good stipulative definitions can be helpful in choosing between advocacy and descriptive definition of animal law.

Robinson warns against "stipulating degenerate meanings for terms. A redefinition of a word degenerates if it leaves us bereft of any means of indicating an important distinction that could be indicated by the word in its previous sense."[103] Thus, for example, if one stipulative or proposed definition of animal law prevents lawyers and courts from making distinctions that *ought* to be possible when thinking about how the law deals or should deal with animals and the other definition allows such distinctions, then the latter definition is preferable to the former. Robinson further states that "we may remind ourselves to be *responsible in stipulation*. We should consider what hangs on our stipulations in the way of good or bad consequences to human knowledge and communication and to our language as a tool of human communication and emotion and enjoyment."[104] In evaluating any stipulative or proposed definition of animal law, one must therefore ask whether this definition adds to or detracts from the ability of lawyers, the courts, and society to communicate and freely discuss all relevant viewpoints about how the law should deal with animals.

E. Analytic Definition and its Limitations

Since the time of Aristotle (384-322 B.C.), many scholars in scientific and academic fields have favored what is called "definition by analysis" or "analytic definition."[105] This method of definition seeks to characterize the meaning of a term that refers to a thing by analyzing the thing into its constituent parts. Aristotle

---

[101] BLACK, *supra* note 89, at 190; ROBINSON, *supra* note 92, at 59-62.

[102] ROBINSON, *supra* note 92, at 66.

[103] *Id.* at 82.

[104] *Id.* at 91-92.

[105] *Id.* at 153-54.

believed that each thing has a core essence that constitutes its fundamental nature and that the purpose of a definition is to state this essence.[106] Accordingly, when applied to the definition of a term, analytic definition seeks to state what is "essential" to all uses of the term—understood as what is *common* to and *distinctive* of everything to which the term refers.

One major form of analytic definition, associated with Aristotle himself, is known as "definition by *genus* and *differentia*" or "definition by division."[107] As described by Robinson, in defining a term that refers to a thing (an object, practice, or a field of inquiry, for example), this approach requires that we

> name a bigger class within which the object falls [its *genus* or general class] and then name something that distinguishes it from the rest of that class [its differentiating characteristic or characteristics]. If man falls within the bigger class of animal, and is distinguished from the rest of that class by rationality, we may define the word "man" as meaning the rational animal.[108]

Definition by *genus* and *differentia* is often illustrated by reference to geometrical figures, such as the triangle.[109] The term "triangle" can be defined as a closed plane figure (the genus or general class) comprised of three connecting straight lines (the differentiating characteristics). This definition captures the essence of the use of the term "triangle" by stating what is common to all things that are properly called "triangles" and by indicating what distinguishes triangles from all other plane figures, such as trapezoids and circles.

Analytic definition has two important features. If one has defined a term (say, the term "A") and there is something that people who use the term would apply to "A" but such usage is not encompassed within the definition, the definition is erroneous. The definition is also erroneous if it does not exclude from application of the term "A" something to which people who use the term "A" would not apply the term. For example, a definition of the term "human being" that does not include male members of the species *Homo sapiens* is erroneous because it does not include beings that speakers of English call "human beings." A definition of "human being" that does not exclude members of the species *Felis catus* is erroneous because we do not call such beings "human beings;" we call them "cats."

As is discussed below, some legal scholars appear to think that only analytic definitions of areas of law are acceptable.[110] Most philosophers of language now reject the view that all meaningful terms must be defined analytically, because of arguments advanced by the Austrian philosopher Ludwig Wittgenstein (1889-1951). Wittgenstein demonstrated that many words used in ordinary discourse are not

---

[106] *Id.* As Robinson explains, Aristotle regarded definition as definition of things, and not, as is now accepted by philosophers, of words. *Id.*

[107] BLACK, *supra* note 89, at 195-197.

[108] ROBINSON, *supra* note 92, at 96.

[109] *See, e.g*, *id.* at 96; Norman Swartz, *Definitions, Dictionaries, and Meanings*, http://www.sfu.ca/~swartz/definitions.htm (last visited Dec. 29, 2013).

[110] *See infra* Part VII.D.

capable of being defined analytically.[111] In one of the most famous discussions in modern philosophy, he examined the word "game" (in the original German, "*Spiel*").[112] Although people know how to use this term and can identify games when they see them, it is impossible, Wittgenstein showed, to find anything common to all games, much less to find something that would distinguish games from all other practices or kinds of behavior.[113] As Wittgenstein observed, there are board-games, card-games, and ball-games, which are quite different from one another. Many games involve winners and losers, but some do not. Many games involve more than one player, but some do not. Many games are amusing, but some are not. (Wittgenstein gives chess as an example of the latter).[114] Wittgenstein compared many words in ordinary language to a rope: "What ties the ship to the wharf is a rope, and the rope consists of fibres, but it does not get its strength from any fibre which runs through it from one end to the other, but from the fact that there is a vast number of fibres overlapping."[115] In ordinary language, many terms are used and properly applied, even though there is nothing common to all uses of the term and nothing that excludes all uses of the term from uses of different terms. The search for a common thread or strand in the use of many terms is sometimes unsuccessful because such a thread sometimes does not exist.

F. Impossibility of Defining Some Words

Wittgenstein questioned not just the assumption that all words must be susceptible to definition by analysis. He also maintained that some words might not be capable of being defined at all, in the sense in which a definition is a precise and accurate statement about how the word is used.[116] Some words, he argued, are used in so many different contexts, and in such complex ways, that such a statement is unachievable. He regarded the sciences, which often use key terms according to precise rules, as areas of endeavor in which defining terms, even analytically, is often possible. However, Wittgenstein argued that for many terms used in general discourse (such as the word "game") it may simply be impossible to state clearly how these words are used. Wittgenstein criticized those who assume that all meaningful words *must* have a definition and then conclude that something must be wrong when one cannot be found.[117] We just know what games are; we use the word "game" meaningfully, even if it is impossible to construct a precise definition that captures how the word is used in all possible contexts.

---

[111] LUDWIG WITTGENSTEIN, 1 PHILOSOPHICAL INVESTIGATIONS § 66 (G.E.M. Anscombe, trans., 3rd ed. 2001).

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] LUDWIG WITTGENSTEIN, THE BLUE AND BROWN BOOKS 87 (1958) [hereinafter WITTGENSTEIN, BLUE & BROWN].

[116] *Id.* at 25-7.

[117] *Id.* at 25.

VII. APPLICATION OF PRINCIPLES OF DEFINITION BY DEFINITIONS OF AREAS OF LAW

For law students and attorneys, definitions of areas of law typically serve a limited, though useful, purpose. Whether in a law school course (in initial remarks by the instructor or in the opening pages of a case or hornbook) or at the beginning of a comprehensive legal treatise, the definition of an area of law usually functions as a welcoming introduction to someone who is not familiar with the area. The definition serves to quickly inform the learner about the area's core features. Further explanation of these features follows, as the course or text considers the body of the area of the law itself.

There are, however, other functions of definitions of areas of law that allow these areas to express and protect a number of fundamental aims and values of our legal system. What enables definitions of areas of law to do this is precisely that they are *good definitions*. It is beyond the scope of this Article to consider in detail a large number of definitions of areas of law to demonstrate how employment of standards of good definition advances these crucial aims and values of the law. Several representative examples will suffice.

A. The Definitions of Most Areas of Law Include or Imply Very Little about These Areas' Current Basic Concepts, Causes of Action, and Substantive Principles

As discussed above, a central feature of good definitions is that they typically do not specify most facts that are true of what is defined or value judgments that are (or ought to be) made about what is defined. The fact that definitions of most areas of law specify or imply relatively little about the content of these areas is illustrated nicely by the standard definitions of criminal law and criminal procedure. LaFave defines criminal law (which he sometimes calls "substantive criminal law") as follows: "The substantive criminal law is that law which, for the purpose of preventing harm to society, declares what conduct is criminal and prescribes the punishment to be imposed for such conduct. It includes the definition of specific offenses and general principles of liability."[118] He contrasts criminal law with criminal procedure, which he defines as being "concerned with the legal steps through which a criminal proceeding passes, from the initial investigation of a crime through the termination of punishment."[119]

These definitions of criminal law and criminal procedure include very little of substance regarding the subject matter of these areas. The definition of criminal law does not include, for example, the names of any crimes, specification of what acts or omissions constitute the elements of any crimes, or potential punishments that can be imposed for their commission. Likewise, LaFave's definition does not mention,

---

[118] WAYNE R. LAFAVE, CRIMINAL LAW 8 (5th ed. 2010) [hereinafter LAFAVE, CRIMINAL LAW] (emphasis added). LaFave provides the identical definition in his three-volume treatise on criminal law. Wayne R. LaFave, 1 SUBSTANTIVE CRIMINAL LAW § 1.2 (2d ed.), *available at* Westlaw SUBCRL.

[119] LAFAVE, CRIMINAL LAW, *supra* note 118, at 3. In their text for law students on criminal procedure, LaFave and co-authors state that their "hornbook reviews and analyzes the law of criminal procedure—i.e., the law governing that series of procedures through which the substantive law is enforced." WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE 3 (5th ed. 2009). The authors also begin their seven-volume treatise with the same definition. WAYNE R. LAFAVE ET AL., 1 CRIMINAL PROCEDURE § 1.1(a) (3d ed.), *available at* Westlaw CRIMPROC [hereinafter LAFAVE ET AL., CRIMINAL PROCEDURE].

much less define, a number of concepts fundamental to liability in criminal law, such as "act," "omission," "*mens rea*," and "proximate cause." The definition does not even contain further definition or characterization of the two fundamental concepts of criminal law: "crime" and "punishment." The definition is consistent, for example, with the position of the Model Penal Code that an offense is a violation and not a crime "if no other sentence than a fine, or fine or forfeiture or other civil penalty is authorized upon conviction."[120] LaFave's definition of criminal law is also consistent with the classification of such offenses as crimes.

The standard definition of criminal procedure quoted above is also largely content-nonspecific. There are a number of sources of rules of criminal procedure, including the Constitution of the United States and state constitutions; state and federal statutes dealing with criminal procedure; court rules; and decisional law interpreting constitutional, statutory, and common law principles.[121] These sources of procedural rules and the rules themselves are not included explicitly or by implication in the definition of criminal procedure.

Another area of law the definition of which states or implies little of the area's content is contract law. Although minor variations in verbiage can be found in definitions of the term "contract," the Second Restatement of Contracts states the substance of how the term is most often defined: "A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[122] This definition does not define the term "promise," does not indicate what constitutes a breach of a promise, does not specify any ways that contract law recognizes the performance of a promise as a duty, and does not indicate what kinds of contracts the contract law of various jurisdictions deems enforceable or what kinds of remedies it makes available for breaches of contract. The definition also does not include, imply the existence of, or define central concepts of contract law that govern when promises are enforceable, such as "offer," "acceptance," "mutual assent," and "consideration."

The common definition of tort law also states little regarding the area's key concepts and substantive principles. Typically, a "tort" is defined as a "civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages."[123] This definition does not include the names or elements of any torts, what kinds of acts or omissions can constitute their commission, what

---

[120] MODEL PENAL CODE § 1.04(5) (1962).

[121] *See* LEFAVE ET AL., CRIMINAL PROCEDURE, *supra* note 119, at § 1.7(a) (describing the various rule sources of criminal procedure); *see also Criminal Procedure: An Overview*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/criminal_procedure (last visited Jan. 29, 2013).

[122] RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979); *see also* RICHARD A. LORD, WILLISTON ON CONTRACTS 3 (4th ed. 2007) (quoting section 1 of the RESTATEMENT (SECOND), *supra* as the "[t]raditional definition of the term 'contract'"); SAMUEL WILLISTON, THE LAW OF CONTRACTS 1 (1920) ("A contract is a promise, or set of promises, to which the law attaches legal obligation.").

[123] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 1-2 (5th ed. 1984); *see also* VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 1 (12th ed. 2011) ("A tort is a civil wrong, other than a breach of contract, for which the law provides a remedy. . . . A person who breaches a tort duty has committed a tort and may be liable to pay damages in a lawsuit brought by a person injured because of that tort.").

kinds of injuries or damage they can compensate, remedies, or defenses to tort actions.

Some generally accepted definitions of certain areas of law, however, are more specific regarding the content of these areas than are the definitions of criminal, contract, and tort law. The definitions of these areas of law include explicit or implied reference to documents, statutes, regulations, or decisional law that provide some specificity regarding the content of these areas. For example, federal constitutional law deals with the United States Constitution and judicial interpretation and application of its standards,[124] and First Amendment law deals with the First Amendment of the Bill of Rights.[125] Copyright law deals with the federal Copyright Act,[126] and intellectual property law deals with copyrights, patents, and trademarks and their associated statutes.[127] However, even when the definition of an area of law provides some specificity regarding its content or focus, the definition does not state or imply most of the details of the area's content, which are subject to varied interpretations and to change. Standard definitions of federal constitutional law, for example, do not (with the possible exception of *Marbury v. Madison*, which is viewed as the decisional source of the area) contain or imply statements about precisely how the Supreme and other courts have interpreted the Constitution.[128]

B. The Definitions of Areas of Law Typically Include or Imply Very Little about What Substantive Principles These Areas Ought to Endorse

Like good definitions generally, definitions of legal areas typically do not include or imply propositions regarding how these areas ought to function. Accordingly, such definitions assert or imply very little about what basic concepts and substantive principles these areas of law ought to endorse. For example, the definition of contracts as agreements the law will enforce reflects the judgment of contract law, and of the law itself, that some promises ought to be enforced. The definition does

---

[124] *See Constitutional Law: An Overview*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/constitutional _law (last visited Jan. 29, 2013); *Constitutional Law: Law and Legal Definition*, USLEGAL.COM, http://definitions.uslegal.com/c/constitutional-law/ (last visited Jan. 30, 2013) (stating that the "broad topic of constitutional law deals with the interpretation and implementation of the United States Constitution").

[125] *See Constitutional Law: An Overview*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/constitutional_law (last visited Jan. 29, 2013); *First Amendment: An Overview*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/first_amendment (last visited Jan. 29, 2013).

[126] *See Copyright: An Overview*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/copyright (last visited Jan. 29, 2013).

[127] *See Intellectual Property: An Overview*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/intellectual_property (last visited Jan. 29, 2013); *Intellectual Property: Law and Legal Definition*, USLEGAL.COM, http://definitions.uslegal.com/i/intellectual-property/ (last visited Jan. 30, 2013) ("Intellectual property law covers the protection of copyrights, patents, trademarks, and trade secrets, as well as other legal areas, such as unfair competition.").

[128] *See, e.g.*, *Constitutional Law: An Overview*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/constitutional _law (last visited Jan. 29, 2013); *Constitutional Law: Law and Legal Definition*, USLEGAL.COM, http://definitions.uslegal.com/c/constitutional-law/ (last visited Jan. 30, 2013).

not, however, state or imply anything about what kinds of promises ought to be enforced. Likewise, the standard definition of criminal law reflects the judgment that some kinds of behavior ought to be punished by government. But the definition does not state or imply what kinds of behavior the criminal law ought to punish or what principles it ought to include regarding such matters as requisite mental states for the commission of crimes, defenses, and kinds and degrees of punishment for various types of behavior.

C. The Definitions of Areas of Law Typically Include or Imply Very Little About the Underlying Fundamental Goals and Structure of These Areas

There has been a great deal of sophisticated and important scholarship that attempts to elucidate the fundamental nature of various areas of the law by identifying and analyzing their key concepts and substantive principles and by examining whether there are underlying doctrines that explain and unify these concepts, principles, and structure. These so-called "theories of law" are typically classified as either "analytical" or "normative." Analytical theories attempt to identify existing key concepts and substantive principles of an area of law, or of the law generally, and to explain why these concepts and principles have been adopted and how they are related. Normative theories argue that certain concepts and principles ought to be adopted by a given area of law or by the law generally.

Both analytical and normative theories of law can be classified as either "instrumental" or "non-instrumental." Instrumental theories characterize the fundamental purpose or purposes of an area of law in terms of some further purpose or a response to some kind of social problem.[129] Perhaps the best known kind of instrumental theory is the "law and economics" approach, variants of which invoke (roughly) the promotion of general economic efficiency in the allocation of costs and resources.[130] Non-instrumental theories, typically called "moralistic," view areas of law or the law itself not as aimed at accomplishing some social aim, but as expressing certain moral principles that are entitled to adherence in their own right.[131] For example, a proponent of law and economics jurisprudence might maintain that the purpose of tort law in general, and of the general rule that liability is imposed upon people who are negligent or at fault for certain actions in particular, is (or should be) to motivate members of society, most of whom are rational actors, to take cost-justified precautions in preventing or avoiding accidents. This, one might claim, is economically efficient because it results in optimal risk-taking. In contrast, a proponent of a moralistic approach might argue that tort law principles in general, and those regarding liability for negligence in particular, function (or should function) to reflect society's judgment that people have a fundamental moral duty not to injure others in certain ways and that when they do so, they have a

---

[129] *See, e.g.*, Jules Coleman & Gabriel Mendlow, *Theories of Tort Law*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2010), http://plato.stanford.edu/entries/tort-theories/ (last visited Dec. 29, 2013).

[130] For a useful overview of the variety and complexity of "law and economics" theories, see Lewis Kornhauser, *The Economic Analysis of Law*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 129, http://plato.stanford.edu/entries/legal-econanalysis/ (last visited Dec. 26, 2012).

[131] Coleman & Mendlow, *supra* note 129.

fundamental moral duty to make up for such injuries by compensating their victims.[132]

Definitions of areas of law typically do not endorse or reject, explicitly or by implication, analytical or normative theories of these areas. That this is so is evident from the fact that there are disagreements about whether instrumental or non-instrumental analytical or normative accounts of various areas of law are correct—and whether, assuming an instrumental or non-instrumental approach is preferable, which such approach is preferable. Commentators could not argue about whether, for example, contract and tort law function, or should function, to maximize economic efficiency or to endorse certain moral principles unless the definitions of these areas allowed for such disagreement.[133]

D. Some Areas of Law Are Not Susceptible to Analytic Definition

Just as it is sometimes impossible to provide analytic definitions of terms used in ordinary discourse,[134] there are standard definitions of legal areas that do not specify concepts or principles common to these areas and do not exclude all legal concepts or principles that are regarded as belonging to a different area of law. Although some of these definitions have been widely and successfully used by generations of law students and lawyers, even their authors sometimes reject them as unsatisfactory because they do not meet the—sometimes unachievable—requirements of analytic definition. For example, there is a long history of skepticism about the possibility of defining "tort law," because there is no one element common to all torts and nothing that distinguishes all torts from other kinds of causes of action.[135] Thus, according to the final edition of the Prosser and Keeton hornbook,

> [e]ven though tort law is now recognized as a proper subject, a really satisfactory definition of a tort is yet to be found. The numerous attempts which have been made to define the term have succeeded only in achieving language so broad that it includes other matters than torts, or else so narrow that it leaves out some torts themselves.[136]

The authors discuss typically cited examples to demonstrate that analytic definition of tort law is impossible. Such examples include identical behavior that can qualify as the tort of conversion or the crime of theft, and voluntary assumption of duties that can qualify as contractual in nature but can also result in tort liability (for example, when a common carrier agrees to transport passengers, but is then

---

[132] For an excellent general survey of competing instrumental and moralistic accounts of tort law, see *id.*

[133] *See, e.g.*, Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 543 (2003) ("Contract law has neither a complete descriptive theory, explaining what the law is, nor a complete normative theory, explaining what the law should be. These gaps are unsurprising given the traditional definition of contract as embracing all promises that the law will enforce.").

[134] *See supra* Part VI.F.

[135] KEETON ET AL., *supra* note 123, at 1-2 (emphasis added). This discussion includes a number of references to other authors who have contended that it is impossible to define "tort" or "tort law" for these same reasons.

[136] *Id.*

liable for negligently injuring them).[137] The authors state that for the general purpose of defining tort law, "[b]roadly speaking, a tort is a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages."[138] However, they simply assume, without supporting argument, that only an analytic definition of tort law would be satisfactory—even while conceding that their definition is "sufficiently accurate to serve the purpose."[139]

One area of law that clearly intersects other areas is the law of property. As one leading discussion defines it, "private property" is "the right of a person or a defined group of persons to use a thing and to exclude others from interfering for a time long enough to extract from the thing the benefits it is capable of affording."[140] Because there are so many different kinds of contexts in which claims of property rights can arise, and different kinds of uses of property, property law overlaps areas of law that regularly deal with issues relating to persons' ability to use things and exclude others from using or affecting them (such as real estate, commercial transactions, constitutional, contract, criminal, environmental, land use, and tort law), as well as areas of law that focus on particular kinds of property (such as intellectual property and marital property law). Animal law, one of the central concerns of which is the ownership of animals, certainly intersects property law.

E. Not Every Area of Law May be Capable of Definition

As noted above, Wittgenstein observed that some terms may be used in such a wide variety of contexts and in so many different (but related) ways that it may be impossible to define these terms, in the sense in which a definition is a precise and accurate statement of their use.[141] An area of law that a significant number of commentators believes may be impossible to define is environmental law. As the authors of a discussion that attempts to distinguish principles of environmental law from traditional tort doctrines observe,

> [w]hile almost universally acknowledged by courts, legal scholars, policy makers, and even the public as a distinct field of law, environmental law lacks a generally accepted definition. Rather, the label "environmental law" has come to encompass the universe of statutes, regulations, and actions at common law impacting environmental interests. These interests include both harm to humans from hazardous substances introduced into an environment, and harm to the natural habitat irrespective of direct injury to a person or other legally recognized entity. They may implicate a wide range of public policy, such as resource conservation, pollution control and prevention, education, scientific research, rehabilitation, deterrence, and corrective justice.[142]

---

[137] *Id.* at 5.

[138] *Id.* at 2.

[139] *Id.*

[140] WILLIAM B. STROEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY v (3rd ed. 2000).

[141] *See* WITTGENSTEIN, BLUE & BROWN, *supra* note 115.

[142] Mark Latham et al., *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 FORDHAM L. REV. 737, 740-41 (2011). For differing definitions

VIII. FOLLOWING STANDARDS OF GOOD DEFINITION FURTHERS CENTRAL AIMS AND VALUES OF SPECIFIC AREAS OF LAW AND THE LEGAL SYSTEM IN GENERAL

Following standards of good definition furthers central aims and values of specific areas of law, as well as of the legal system in general. Standards of good definition enable this protection of aims and values precisely because these standards prohibit definitions from containing or implying a great deal of specific content.

A. Flexibility, Adaptability, and Ability to Change

The content non-specificity of typical definitions of areas of law allows these areas enormous latitude regarding what substantive content they can contain at any given time. This in turn allows these areas—and our legal system generally—to adjust to and deal with new circumstances and issues. Room is allowed for new or modified causes of action, defenses, and remedies. In the case of tort law, for example, the current standard definition allowed the area to add to the early torts (such as assault and battery) wrongs to person and property that address more modern situations and problems (such as defamation and liability for the manufacture or sale of dangerous or defective products).[143] Because the definition of tort law does not specify or imply the kinds of activities, instrumentalities, or objects with which compensable wrongs can be committed, the area has allowed for the application of old torts (and possibly yet to be defined torts) to situations that could not have been anticipated even just a few years ago, such as injuries caused by radioactivity, chemical pollution, or nanoparticles.[144] Moreover, that the definition of tort law does not include only physical or economic harms allowed for the development of torts relating to emotional harm or distress.

---

of environmental law see, for example, Frances Irwin, *The Law School and the Environment*, 12 NAT. RESOURCES J. 278, 280 ("Environmental law considers the role of law in man's relationship to these surrounding systems of air, land, water, energy and life."); Thomas Lundmark, *Systemizing Environmental Law on a German Model*, 7 DICK. J. ENVTL. L. & POL'Y 1, 9 (1998) ("Environmental law covers the aggregate of rules that have as their primary purpose the protection from anthropogenic degradation, or the restoration, of those resources essential to human life (atmosphere, water, and land), the prevention or minimization of pollution, and the conservation of components of nature, including landforms and forms of life not unreasonably injurious to humans."); Alyson C. Flournoy, *In Search of an Environmental Ethics*, 28 COLUM. J. ENVTL. L. 62, 64 n.2 (2003) (defining "the term environmental law to describe the vast realm of law, largely statutory, that addresses human actions affecting the rest of the natural world. Although the contours of environmental law are somewhat murky, most can agree that laws dealing with pollution control (including waste disposal and the regulation of toxic substances) form part of environmental law. I also include within my definition of environmental law the related field commonly known as natural resources law, encompassing, for example, wetlands and endangered species protection."); RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 1 (2004) ("Broadly stated, environmental law regulates human activity in order to limit ecological impacts that threaten public health and biodiversity. . . . It accepts, in light of the laws of thermodynamics, that ecological transformation is both unavoidable and very often desirable, yet it seeks to influence the kind, degree, and pace of those transformations resulting from human activity.").

[143] *See* 74 AM. JUR. 2D *Torts* § 4 (1998); *Tort Law: An Overview*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/tort (last visited Jan. 29, 2013).

[144] *Id.*

B. Openness to Empirical and Normative Argument and Competing Theories of Law

By not asserting or presupposing factual propositions about people, society, or issues the law may or may not need to address (such as whether many animals in contemporary society are exploited and abused) typical definitions of areas of law allow free discussion and discovery regarding different or opposing factual claims of legal relevance. Additionally, by not including or implying a particular analytical or normative theory of law, typical definitions of areas of law allow for discussion about what the central features and structure of these areas are or ought to be.

C. Application of Principles Involving Multiple Areas of Law

By not employing analytic definitions that would distinguish all instances of their application from all instances of the application of any other area of law, the definitions of some legal areas allow for kinds of overlap that our law has come to require. Thus, if criminal procedure and constitutional law could not, by definition, ever overlap, constitutional constraints could never be imposed on criminal procedures. If tort law could not invoke principles of property law, torts such as trespass to chattel and conversion, which first require that someone has a property or possessory right in property, could not exist.

D. Commitment to the Adversarial Process

The relative lack of specificity of content in definitions of areas of law also promotes the general commitment of our legal system to the adversarial process, in which parties with opposing or different claims or interests can present their arguments fully. Most definitions of areas of law assure this simply by not targeting particular parties for protection by these areas; such non-specificity allows opposing parties to employ the concepts and principles of these areas. Some areas of law do, by definition, seek to protect particular kinds of persons or interests; however, the definitions of these areas still allow opposing parties to employ the concepts and principles of these areas. The definitions of a very small number of areas of law not only target particular kinds of persons or interests for protection, but also restrict the practice of these areas to attorneys who seek to protect such persons or interests; however, even these areas permit the attorneys for opposing parties to utilize the concepts and principles of other areas of law that are not defined restrictively.

1. Most Definitions of Areas of Law Do Not Target Particular Parties for Protection

In recognizing a cause of action that allows a plaintiff to bring suit, an area of law indicates that it seeks to protect certain kinds of persons or interests. For example, criminal and tort law protect people from being injured or harmed in various ways by others. Contract law protects parties to and beneficiaries of enforceable agreements against others who fail to live up to these agreements. Although one can say that protecting potential plaintiffs involves the choice by an area of the law to choose the interests of some over the interests of others, this sort of choice is so general as to be non-specific. For in allowing certain persons (or in the case of criminal law, a government on behalf of its people) to become successful plaintiffs, the law does not presume that any particular people (or people with certain kinds of interests, needs, or wants) are such plaintiffs. Thus, at least ideally, no one becomes a convicted criminal defendant unless he violates the criminal law; anyone on whom a battery is inflicted may have a cause of action in tort for battery; and anyone who has entered into an enforceable agreement that is breached may have a

cause of action for breach of contract. It is therefore not helpful to say that criminal, tort, or contract law, for example, seek to promote the interests of one group of people (victims of crimes or torts or breaches of contract) against those of another group of people (criminals, tortfeasors, or contract-breachers). These are not groups that already exist independently of legal standards and that the law steps in to protect or disfavor; rather, people enter these "groups" if they do something that can invoke the law's protection or disfavor. By having definitions that do not favor particular plaintiffs or defendants, criminal, tort, contract, and most other areas of law, promote the adversarial process by allowing both plaintiffs and defendants to fully employ the concepts and principles of these areas.

2. Definitions of Areas of Law That Do Target Kinds of Parties for Protection Do Not Impede the Ability of Opposing Attorneys to Argue on Behalf of Their Clients

There are some areas of law that, by definition, directly seek to protect and promote the interests, needs, or wants of specified individuals or groups of people against other individuals or groups who do or can hinder or frustrate these interests, needs, or wants in certain ways. Many such definitions are of areas of law that can be characterized as sub-fields of "anti-discrimination" or "civil rights" law, including age discrimination, disability civil rights, educational discrimination, employment discrimination, housing discrimination, pregnancy discrimination, prisoners' rights, race discrimination, sex-based discrimination, sexual harassment, and voters' rights law.[145] However, although these areas seek to protect certain interests, their concepts and substantive principles subsume all relevant legal issues, and lawyers who represent both parties practice these areas of law. For example, sex-based discrimination law (and its branches of pregnancy discrimination and sexual harassment law) have as their definitional core the aim of protecting certain people from various kinds of treatment by others.[146] However, in any particular lawsuit none of these areas favors the party who alleges that she has suffered the kinds of wrongs the area is defined as prohibiting. Correct application of the law to the facts of the case may exonerate the defendant. This is why, in a lawsuit by a plaintiff alleging one of these kinds of discrimination, the plaintiff's and the defendant's lawyers are both practicing sex-based, pregnancy discrimination, or sexual harassment law.

There are a very few definitions of areas of law that not only target particular kinds of persons or interests for protection, but also restrict use of the name, and the practice of, the area to lawyers who represent those the area specifies for protection. However, even these definitions do not have the consequence of making it difficult for lawyers to represent adversaries of such people.

The term "poverty law," for example, is typically understood to mean the body of law that seeks to protect poor people, and poverty law as commonly understood is

[145] *See Discrimination by Type*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/types/index.cfm (last visited Jan. 30, 2013) (outlining various legal areas of discrimination).

[146] *See* Aaron Larson, *Sexual Discrimination Law*, EXPERTLAW, http://www.expertlaw.com/library/employment/sexual_discrimination.html (last visisted Jan. 30, 2013); *Sex-Based Discrimination*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/types/sex.cfm (last visited Jan. 30, 2013).

practiced by lawyers who employ this body of law to protect such people.[147] Thus, an attorney who sues a city for failing to keep its public housing clean and safe for indigent residents would be said to be practicing poverty law. However, the attorney representing the city would not be said to be practicing poverty law, but rather housing and municipal law. Importantly, the attorney representing the indigent residents would also be considered to be practicing housing and municipal law. That both attorneys are practicing and employing the principles of these same areas of law permits the case to be heard, for there must be concepts and substantive legal principles that would apply to both the plaintiffs and defendant, pursuant to which the dispute can be decided.

Another example of an area of law that targets particular kinds of persons or interests for protection, but also restricts use of the name, and the practice of, the area to lawyers who represent those the area specifies for protection is women's rights law. An attorney for a plaintiff suing a corporation alleging discrimination against women in its job promotion practices might describe herself, and be described by the legal profession, as engaged in the practice of "women's rights law," while the attorney representing the corporation would not be so described.[148] However, both the women's rights lawyer and the lawyer representing the corporation are practicing and employing the concepts and principles of sex-based discrimination law, and perhaps contract, labor, and/or corporate law.

In sum, even when definitions of areas of law do target certain kinds of persons or interests for protection—or reserve the practice of an area to attorneys who seek to protect certain persons or interests—these definitions do not impede the ability of parties with opposing interests to employ the adversarial process.

IX. WHY ADVOCACY DEFINITIONS OF ANIMAL LAW SHOULD BE REJECTED

We have considered several principles of good definition, and have examined how adherence to these principles by definitions of areas of law advance fundamental values of these areas and of the legal system generally. It can now be

---

[147] See, for example, Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, N.Y.U. REV. L. & SOC. CHANGE 659, 661 (1987), who states that that "[b]y definition, the subject of poverty law is the poor. It is the poor who experience the objective force of poverty and the deprivation of powerlessness." Moreover, "[t]he goal of poverty law should, indeed, must be the abolition of poverty." *Id*. at 711. *See also* Stephen Wexler, Practicing Law for Poor People, 79 YALE L.J. 1049, 1053 ("[T]he object of practicing poverty law must be to organize poor people, rather than to solve their legal problems. The proper job for a poor people's lawyer is helping poor people to organize themselves to change things so that either no one is poor or (less radically) so that poverty does not entail misery.").

[148] *See Women's Rights Law*, HG.ORG: GLOBAL LEGAL RESOURCES, http://www.hg.org/women.html (last visited Jan. 30, 2013) (describing women's rights law as "made up of a set of laws, legislation and regulations enforced internationally and nationally to improve the wellbeing of women throughout the world"); *see also Welcome and Introductions*, 23 WOMEN'S RTS. L. REP. 203 (2002) (explaining that "the Women's Rights Law Reporter is a feminist legal journal whose mission is to provide a critique of law and society through the lens of gender"); *Who We Are*, NATIONAL WOMEN'S LAW CENTER, http://www.nwlc.org/who-we-are (last visited Jan. 30, 2013) (showing that women's rights law largely involves "expand[ing] the possibilities for women and . . . advanc[ing] the issues that cut to the core of women's lives in education, employment, family and economic security, and health and reproductive rights").

demonstrated why advocacy definition of animal law is unacceptable. This is best appreciated by first considering rights-centered advocacy definition.

A. Rights-Centered Advocacy Definition Does Not Define an Area of Law

It is a truism that any definition of an area of law must define an *area of law*. However, for a subject to be an area of law, it must be a branch or part of *existing* law. Proponents of rights-centered advocacy definition of animal law concede that animals do not currently have the kinds of legal rights that, according to such definitions, animal law seeks to establish.[149] Therefore, animal law, as they define it, does not yet exist as an area of law. Animal law as defined by rights-centered advocacy definition appears to refer to either or both of the following: (1) a *set of goals* regarding how the law *should* (in the view of some people) deal with animals; (2) *a group of lawyers who have certain views* about how the law should deal with animals.[150] Neither of these is an area of law. This is not a small point. It means that in determining what animal law is, as defined by proponents of rights-centered definition, one cannot examine *the law*, but what *certain lawyers want* the law to be. Calling a subject an "area of law," however, implies a certain status—the status of something real, something already part of the law. Thus, if a law school instructor proposes a course on "animal law," faculty evaluating the proposal might assume that the course will focus on a part or branch of *the law*. If it were clear that the course would focus on the *aspirations* of a *segment* of the legal profession regarding what the law *should* be, the course might not seem so attractive.

B. Rights-Centered Definition Will Likely Never Define an Area of Law

As some of the passages quoted above indicate, many proponents of rights-centered definition of animal law, and of animal rights, appear certain that the law will someday adopt their views, just as the law has extended previously-denied rights and equality to African-Americans, women, and others. Perhaps proponents of rights-centered definition of animal law believe that the legal profession might as well adopt such definition because (in their view) it is inevitable that animals will eventually have fundamental legal rights. Perhaps they believe that the adoption of rights-centered definition will motivate the legal profession to accelerate, or at least accept, the inevitable.

Our legal system, however, will *never* classify animals as persons, the ownership of which would be equivalent to slavery and the killing of which would be equivalent to murder. A wide range of animal uses that animal personhood would render illegal—including raising and killing animals for food, keeping animals in zoos and aquariums, and using animals in biomedical research—will *not* be made illegal. There will never, in short, be an actual area of law to which rights-centered advocacy definition would refer. Our economic system, key components of which involve the use of animals for human benefit, will not allow animals to be classified as persons. Ethical principles accepted by the great majority of people will not allow this. Deeply held religious beliefs of much of the populace will not allow this. It would make no sense for the legal profession to adopt a definition of an "area" of law that calls for legal principles that will likely never exist.

---

[149] *See supra* Part III.A.

[150] *Id.*

Some readers may find my prediction about the future of animal personhood overly confident. I certainly cannot demonstrate the correctness of the prediction here. However, let us assume for purposes of discussion that the aims of proponents of rights-centered definition have a 25% probability of adoption by the law, indeed to be even more generous, a 75% probability of adoption. It would still be unreasonable for the legal profession to adopt a definition of animal law that might someday correspond to reality when a descriptive definition would now and always do so—no matter how the law deals with animals and even if the law should come to regard animals, or some animals, as persons.

C. Rights-Centered Definition Would Exclude Many Animals from the Purview of Animal Law

By including the goal of establishing legal rights that confer personhood for animals in its definition of "animal law," rights-centered definition creates another serious problem for itself: Many animals would be excluded from the purview of animal law. Proponents of legal rights for animals concede that not all creatures commonly called "animals" qualify for such rights. Animal rights theorists disagree about what characteristics animals must possess to have moral and legal rights. Gary Francione, for example, maintains that merely the ability to suffer is sufficient to confer personhood and fundamental moral and legal rights on animals.[151] Tom Regan requires more.[152] Animals, he argues, must also be what he calls "subjects-of-a-life," which includes "[p]erception, memory, desire, belief, self-consciousness, intention, a sense of the future," as well as "emotion (e.g., fear and hatred and sentience, understood as the ability to experience pleasure and pain)."[153] Regan opines that "these are among the leading attributes of normal mammalian animals aged one or more."[154] Steven Wise requires still more. He maintains that to have fundamental rights animals must possess what he calls "practical autonomy." According to Wise, "a being has practical autonomy and is entitled to personhood and basic liberty rights if she: 1. can desire; 2. can intentionally try to fulfill her desires; and 3. possesses a sense of self sufficiency to allow her to understand, even dimly, that it is she who wants something and it is she who is trying to get it."[155] Although Wise argues that chimpanzees, orangutans, gorillas, and dolphins have such autonomy, he is not certain about dogs, for example, which he maintains have under a 0.70 probability of having such autonomy.[156]

---

[151] GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? xxvii-xxx, 100-02 (2000).

[152] REGAN, *supra* note 61, at 81.

[153] *Id.*

[154] *Id.* Regan thinks there is insufficient evidence to include fish and birds among rights-holders, but states that "(e)ven assuming birds and fish are not subjects-of-a-life, to allow their recreational or economic exploitation is to encourage the formation of habits and practices that lead to the violation of the rights of animals who are subjects-of-a-life." *Id.* at 417 n.30.

[155] STEVEN M. WISE, DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS 32 (2002).

[156] *Id.* at 129.

Francione, Regan, Wise, and all members of the animal rights movement who seek legal rights for animals agree that certain animals lack sufficient mental capacity to be given legal rights, including many species and billions of individual animals, such as clams, oysters, and shrimp. If Regan's conception of "rights" is correct, to this list would be added birds, fish, and amphibians. If Wise is correct, and dogs might have to be added to the list of rightless animals based on their level of mental capacity, so might a whole range of other animals need to be added, including animals used to produce food (such as chickens, turkeys, ducks, cows, and pigs) and many animals used in research (such as mice, rats, hamsters, guinea pigs, and rabbits).

That many animals might not be accorded legal rights by proponents of rights-centered definition of animal law means that legal issues relating to many animals will not come within the purview of animal law so defined. However, these are *animals* with which the legal system deals and will want to deal (in statutes, regulations, litigation, and public policy). It is not clear whether proponents of rights-centered definition would want to recognize a *different* area of law that would deal with permanently rightless animals or would instead prefer to have existing areas of law deal with such animals. In any event, if, as is presumably the case, the legal profession would want an area of animal law that can assist lawyers in handling and considering the broad panoply of legal issues involving *all animals* (whatever their level of mental sophistication), even proponents of rights-centered definition must concede that animal law as they define it cannot constitute such an area of law.

D. Rights-Centered Definition Violates Principles of Good Definition

Rights-centered advocacy definition of animal law has a still more serious problem. Adopting such definition would violate standards of good definition and thereby hinder and subvert aims and values that definitions of areas of law typically protect.

1. Endorsement of Empirical and Normative Propositions and Substantive Legal Principles

As discussed above, it is typically not the function of a definition to settle or preclude argument about empirical or normative issues regarding what is defined. Neither lexical definitions, nor good stipulative definitions adopted to assist in discovery and discourse, prevent reasonable empirical or normative argument.[157] By following this basic canon of definition, definitions of areas of law affirm that discussion and disagreement are important in evaluating legal principles and ensure that areas of law are open to development and change.

In contrast, rights-centered definition of animal law settles and precludes a great deal of argument regarding how the law ought to deal with animals. For example, as indicated in a number of proponents' statements of these definitions quoted above, a presupposition of rights-centered definition is the view that humans routinely mistreat many animals.[158] This is why proponents of rights-centered definition assert that animal law, by its nature, seeks to counter this alleged mistreatment. However, many people disagree with this general assessment of the treatment of animals and

[157] *See infra* Parts VI.C and VI.D.2.

[158] *See supra* Part III.A.

with more specific claims made by animal rights advocates about animal abuse and exploitation.[159]

Rights-centered advocacy definition of animal law would also preclude, regarding animal law, the kinds of vigorous debates among proponents of instrumental and non-instrumental normative theories of law that continue with respect to other areas of law. By declaring that the law may not facilitate the use of animals for the benefit of humans generally, or for economic growth and efficiency in particular, rights-centered definition of animal law would impose, by definition, a non-instrumental theory of law for the area. It would impose a particular moralistic theory, which maintains that owning, using, or killing animals violates their moral rights.

Indeed, the central feature of rights-centered advocacy definition—that animals should have legal *rights*—has engendered considerable controversy that would be foreclosed by adopting such definition. Quite a few philosophers have argued that the attribution of rights (moral or legal) to animals is nonsensical and incoherent because, in their view, having rights requires the ability to understand and claim these rights.[160] Others maintain that rights can sensibly be accorded to some animals, and that some animals already have or can be given legal rights that do not preclude their categorization as property and do not imply that they cannot be used for a myriad of purposes by humans.[161] Even if philosophers and legal theorists who argue that animals cannot (or should not) have the kinds of legal rights demanded by rights-centered definition of animal law are mistaken, it would surely be unwise to prevent them from arguing their views by declaring—by definitional fiat—that the law should seek to give animals rights that will, among other things, render them persons. This is no way to settle difficult philosophical disputes.

In this regard, it should be noted that definitions of legal areas typically do not include or imply propositions that *are* universally accepted in society and *do* seem indisputably correct. For example, few would deny that unjustified killing or beating of others is morally wrong and ought to be disfavored by the law. However, the definitions of criminal and tort law do not include or imply the existence of causes of action for murder or battery.[162] If definitions of areas of law do not reflect ethical and legal propositions that *are* universally accepted, surely the definition of animal law should not include or imply views that are widely *rejected* or that are at the very least open to legitimate questions.

---

[159] *See, e.g.*, HAL HERZOG, SOME WE LOVE, SOME WE HATE, SOME WE EAT (2011).

[160] For examples and defenses of this view, see Carl Cohen, *The Case for the Use of Animals in Biomedical Research*, 315 N. ENG. J. MED. 865, 865-6 (1986); H. J. McCloskey, *Rights*, 15 PHILOSOPHICAL QUARTERLY 115, 122-27 (1965); ROGER SCRUTON, ANIMAL RIGHTS AND WRONGS 79-81 (3d ed. 2000); ALAN R. WHITE, RIGHTS 89-92 (1984).

[161] For extended defenses of these two views, see JOEL FEINBERG, *The Rights of Animals and Unborn Generations*, *in* RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY, *supra* note 35, at 159, and JOEL FEINBERG, *Human Duties and Animal Rights*, *in* RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY, *supra* note 35, at 185; Tannenbaum, *supra* note 35.

[162] *See supra* Part VII.A.

2. Impeding Professional Development of Lawyers and Effective Representation of Clients

As discussed above, areas of law bring together legal concepts and principles that are related in significant ways. This enables lawyers to obtain, efficiently and systematically, knowledge of these concepts and principles and thereby to represent clients effectively. For example, an attorney representing a physician in a medical malpractice case has at her disposal, and if she regularly defends or sues physicians can maintain continuing knowledge of, the field of medical malpractice law. This makes it unnecessary for her to begin learning afresh about relevant law before representing each client, nor need she research, in separate and unconnected sources, a large number of issues relevant to medical malpractice.

Moreover, definitions of most legal areas do not restrict the practice of these areas to lawyers who represent certain kinds of clients. As observed above, the vast majority of areas of law (including medical malpractice law) do not target specific clients for protection. This allows attorneys who represent plaintiffs and defendants to practice these areas of law and to employ the principles of these areas. As noted earlier, this is also the case with areas of law (such as sex-based discrimination law) that do target specific people or interests for protection, but contain concepts and principles that all parties in litigation employ. Finally, even those very few areas of law (such as poverty and women's rights law) that do restrict their practice to attorneys who seek to promote specified interests or parties do not actually burden attorneys who represent opposing interests, because these attorneys practice and employ more general areas of law that apply to all parties in a given dispute or lawsuit.

In contrast, adoption of rights-centered definition of animal law would hinder the ability of some lawyers to represent clients with animal-related issues. In its common usage, the term "animal" is universal and all-inclusive; it refers to *all* animals. This is why, as is noted above, however it is defined, *animal law* likely will be viewed by lawyers as *the* area that the law designates as pertaining to *all animals*. It will therefore be this area of law that will contain and organize concepts and principles that lawyers representing clients regarding matters involving animals will want to understand and employ. Because animal law is likely to be the primary general area of law relating to animals, attorneys whose clients oppose the explicit goals and implications of rights-centered definition will need to go elsewhere in the law for a comprehensive and organized body of laws relating to animals. The only places these lawyers could go would be to already-recognized areas of law that contain principles that might be useful, such as criminal, housing, municipal, property, and tort law. Thus, these lawyers will necessarily be faced with the disparate, diverse, and unorganized accretion of laws relating to animals that, as I observed above, was the state of the law before talk arose in the 1980s about a distinct field of animal law.

3. Reducing Potential Enrollments in Animal Law Courses and Attention to Animal Law by Law School Faculty

Although rights-centered definition of animal law has not yet been generally accepted by the legal profession, there is, I would suggest, a place where such definition, as well as reformist advocacy definition, has gained widespread acceptance and where deleterious effects of such definitions can already be observed. This place is the country's law schools. Animal advocacy groups and

lawyers commonly claim that there has been a dramatic upsurge in the interest of law students in animal law. An increasing number of law students and future lawyers, it is said, view animal law as an important subject, and their appetite for it is growing.[163] The evidence for this claim is said to be the increase in the number of animal law courses taught in United States law schools.[164]

I would suggest that when one looks beneath the surface of typical claims about the increase in the number of animal law courses, however, quite a different picture emerges. What I am about to say is, and presently must be, based largely on anecdotal evidence, including a decade of teaching animal law and conversations with current and former law students and faculty from a number of law schools. However, I am confident that careful empirical study of what is occurring at most law schools would confirm the following observations.

At the great majority of law schools, there appears to be only one course in animal law, and at many schools this course is not offered each academic year.[165] At most schools, enrollments in these courses are small relative to other electives. Reports I have received from students and faculty, and what little hard evidence is available, suggest that few of these courses have more than twenty students.[166] At some law schools, full-time faculty members teach animal law, but many (and probably most) instructors are outside practicing attorneys who teach only animal law.[167] It is difficult to ascertain how many animal law courses promote animal rights, or at the very least animal "advocacy" as understood by proponents of reformist advocacy definition. My estimate is that this is the case for the majority, and likely the great majority, of current courses.

This estimate is supported by the fact that at many law schools, the animal law course is taught by a member of the ALDF, and at a number of schools the course was begun after a petition was presented to the administration by the school chapter

---

[163] *See, e.g.*, Bryant *supra* note 50, at 247; Sankoff, *supra* note 17, at 106-08; Megan A. Senatori & Pamela D. Frasch, *The Future of Animal Law: Moving Beyond Preaching to the Choir*, 60 J. LEGAL ED. 209, 210-13 (2010); Tischler, *Part II*, *supra* note 13, at 36-7.

[164] *See, e.g.*, Sankoff, *supra* note 17.

[165] Sankoff's 2008 survey of animal law courses found that 53% were offered annually. *Id.* at 126.

[166] Sankoff's 2008 survey revealed that in animal law courses at North American law schools, 79% had enrollments of twenty or fewer students and 61% had enrollments of fifteen or fewer students. *Id.* at 137. Sankoff believes one explanation for these low enrollments is that many animal law courses are taught as seminars with enrollment caps of between twenty and twenty-five students. *Id.* at 136. However, his survey indicated that many courses had far fewer than twenty students. Sankoff concedes that, at least as of 2008, although the number of animal law courses and student interest in animal law had increased substantially, one obstacle to attracting students faced by instructors was "low student demand, a factor that was occasionally expressed as a matter of concern (e.g. 'students don't seem interested in this class'), but sometimes tended to reflect a more serious problem, to wit, the lack of priority given to the course by the administration (e.g. 'this course is often scheduled in a very poor time slot')." *Id.* at 132. I suggest below that low enrollments and the low priority given to animal law courses by administrators are the result of the prevalence of advocacy definitions of animal law among law school faculty, and courses that promote animal rights or advocacy.

[167] Sankoff's 2008 survey found that 61% of courses in the U.S. are taught by such adjunct faculty. *Id.* at 130.

of the Student Animal Legal Defense Fund (SALDF).[168] The ALDF makes clear that it regards these courses as furthering its general mission of "fighting to protect the lives and advance the interests of animals through the legal system."[169] My estimate that the great majority of animal law classes promote animal rights or advocacy is also supported by Sankoff's 2008 survey of law school animal law courses, in which Sankoff states that

> [although it is impossible to chart a road map showing the precise route to a legal system that better protects animals . . . the development of animal law courses worldwide has helped give the movement a subtle push forward, both by increasing the quantity and quality of available legal research upon which to build new ideas, and by providing knowledge and inspiration for the "soldiers" who take up the battle.[170]

According to Bruce Wagman, who has taught animal law at several law schools,

> animal law teachers have been motivated by the desire to protect innocent and unrepresented animals in our society just as the environmental and civil rights law programs were founded by lawyers who believed they had a mission to stop injustice in those areas. And like the significant and valuable precedent and legal doctrine created by those social justice predecessors, animal law classes bring scholarly and intellectual discipline and credibility to the field.[171]

The question one must ask, I would suggest, is not whether there has been an increase in the number of animal law courses and in the total number of students who take these courses. The more important question is whether there would be even

---

[168] Sankoff remarks that regarding "the manner in which the animal law movement began in the United States, the ALDF has been a powerful force for almost two decades. . . . Early on, the ALDF recognized the importance of encouraging the development of animal law courses, and many members of the ALDF have taught them." *Id.* at 131; *see also How to Start an Animal Law Class at Your School*, ANIMAL LEGAL DEFENSE FUND, http://aldf.org/resources/law-professional-law-student-resources/law-students-saldf-chapters/how-to-start-an-animal-law-class-at-your-school/ (last visited Jul. 29, 2013).

[169] *About Us*, ANIMAL LEGAL DEFENSE FUND, http://aldf.org/about-us/ (last visited Jul. 29, 2013). The ALDF states that it "works to protect animals" by, among other things, "[n]urturing the future of animal law through Student Animal Legal Defense Fund chapters and our Animal Law Program." *Id.* The Animal Law Program "collaborates with students, faculty, and school administrations to facilitate the development of animal law courses and assists students in forming Student Animal Legal Defense Fund (SALDF) chapters." *Animal Law Program*, ANIMAL LEGAL DEFENSE FUND, http://aldf.org/about-us/programs/animal-law-program/ (last visited Jul. 29, 2013).

[170] Sankoff, *supra* note 17, at 141.

[171] Bruce A. Wagman, *Growing Up with Animal Law: From Courtrooms to Casebooks*, 60 J. LEGAL ED. 193, 200-01 (2010). Wagman also thinks that what has given impetus to animal law courses are "the exponential increase in institutionalized animal abuse and cruelty in the name of human interests, causing more and more animals to suffer at greater and greater levels; an increased appreciation of the inner lives and consciousnesses of animals thanks to a growing scientific body of information establishing the undisputed similarities between human and animal sentiency; and an emotional response to at least the most egregious acts of cruelty to animals, whether deemed legal or not." *Id.* at 199.

more courses and significantly larger enrollments if more courses did not focus on promoting animal rights or animal advocacy. My course in animal law at King Hall has been taught eight times since 2003; only other teaching duties have prevented my offering it annually. Enrollments have ranged from a low of twelve to a high of thirty-four, with an average of twenty-five students. (King Hall has approximately 200 students in each class.) This is, I believe, a very high enrollment relative to most animal law courses.[172] The explanation is not the pedagogical skill or personal charm of the instructor, but the fact that the course approaches the subject without arguing for or against positions on controversial issues.[173] In the first class session, we discuss the differences between advocacy and descriptive definition of animal law, and I explain, always to the relief of the class, that the course adopts the latter. Animal rights and animal advocacy are considered, but so are arguments that reject animal rights and that oppose legal campaigns that have become associated with reformist animal advocacy. Students of all viewpoints are welcome and all viewpoints are considered fully—not with toleration, but with sincere respect and avid interest.

Some instructors who teach animal law concede that they regard themselves as animal advocates, but insist that their courses are taught objectively and welcome students with all viewpoints.[174] I have no empirical evidence to contest this claim. But I have absolutely no doubt that nationwide *many* law students (perhaps many hundreds) avoid animal law courses because at their schools these courses do in fact present themselves as training future lawyers to right the alleged horrible wrongs society has perpetrated on animals. In many of these courses, among the most prominent targets—not subjects of study, but targets to be attacked—is the legal status of animals as property. And although a course in animal law that adopts a descriptive definition of the area can be taught in a manner that actively promotes animal advocacy in general or animal rights in particular, a course that *defines* the area in terms of rights-centered or reformist advocacy *must* be taught in such a manner because this is how such a course conceives of the field of animal law itself.

I *know* that if the animal law course at King Hall adopted a rights-centered or reformist advocacy definition of the area, or promoted animal rights or advocacy,

---

[172] *See also supra* note 166.

[173] To be sure, students are encouraged to do so. I conceal my own views as much as possible to promote student discussion and debate.

[174] *See* Senatori & Frasch, *supra* note 163, at 235-36. These authors also state, "[a]nimal law can be viewed as simply an area of academic study or as an important component of a larger social justice movement aimed at more compassionate treatment of animals. Like other areas of social justice study—such as women's rights, racial inequality, disability rights, or environmentalism—professors of animal law often wish to improve the lives of their subject of study outside the classroom. That does not mean, however, that animal law professors should, or do, indoctrinate students with particular viewpoints." *Id.* at 213. The authors appear to concede, however, that most students who take these courses might not need indoctrination; they state, "animal law courses arguably tend naturally to draw students already likely to view protection issues through the prism of animals' interests, even when classes are taught from a neutral perspective." *Id.* I respectfully submit that at least some instructors who regard animal law as an "important component of a larger social justice movement" and not as "simply" an area of "academic study," would find it extremely difficult if not impossible to teach the subject from a *neutral* perspective—because doing so would preclude their presenting animal law as part of a social justice movement that seeks changes in how animals are treated.

there would not be sufficient interest to offer the course annually. No more than a third of the students who take the course would do so. I know this because the students tell me so. Moreover, several students have reported that friends at other law schools were contemplating taking the animal law course, but did not because the instructor made clear that the general aim of the course is to train students to combat the supposedly widespread unethical exploitation and abuse of animals.

I *know* that enrollments in many animal law courses would increase substantially if these courses were taught without intent to promote animal rights or animal advocacy of any kind.[175] It is far from clear that students who favor animal rights or reformist advocacy would avoid courses that are not skewed toward either of these approaches; such students at King Hall certainly do not. I would suggest that the primary responsibility of a law school that offers one course in animal law is not to promote animal advocacy, but to assist as many students as possible to learn about legal concepts and principles that may be relevant to *their* future practice of law and to *their* future clients.

Many more students would also enroll in animal law courses if faculty signaled to students that animal-related legal issues are important in the contemporary practice of law. I believe that one reason many faculty members and administrators do not do this is that advocacy-oriented definition of the area, and rights-centered definition in particular, predominates among full-time law school faculty. Most faculty members appear to assume that animal law is animal rights law. I cannot count the number of faculty members at law schools who, when learning that I teach animal law, ask (often with bemusement, and sometimes with criticism) why I think that animals should be able to sue their veterinarians, that using animals in agriculture and biomedical research should be prohibited, and that mice and rats (among other animals) should be classified as persons. Many law school faculty members would not think of teaching a course, or trying their hand at scholarly work, in animal law at least in part because they flatly reject components and implications of rights-centered advocacy definition of the area. The result, I submit, is that at the great majority of law schools animal law instruction has a low priority. Because animal law is not *widely* regarded by law school faculty as something that is *serious, useful,* and *important* for many future lawyers to know, it is similarly regarded by many law students.

E. Identical Flaws of Reformist Advocacy Definition

The appropriate response to the deficiencies of rights-centered advocacy definition of animal law is not adoption of reformist advocacy definition. To be sure, some of the goals associated with reformist definition may be more palatable to

[175] My experience at King Hall contradicts Steven Wise's assertion that law students who take a course in animal law "are usually those committed, however vaguely, to the idea of 'animal rights law.' The course they seek is precisely one that grapples with the difficult moral and legal questions that surround the legal personhood of nonhuman animals and whether we should be able to use and abuse them as we do. Those who would prefer to see the law remain as it is rarely seek an animal-related class; they would prefer that it never be offered or that it wither away." Wise, *Casebook*, *supra* note 69, at 257. It is inaccurate to claim that only courses in animal rights law can grapple with moral and legal questions surrounding proposed personhood for animals, or that the only alternative to seeking animal rights as Wise understands animal rights is preferring that the law relating to animals remains as it is.

more people than the paradigm shift envisioned by rights-centered definition. Some of the positions urged by proponents of reformist definition (such as better treatment of certain agricultural animals) may come to be adopted by the law, and perhaps rightly so. However, reformist definition of animal law has all the same general faults as rights-centered definition.

Because the aims of proponents of reformist definition are not universally accepted by lawyers or their clients, animal law so-defined does not yet (and may never) exist. In imposing, by the definition of animal law itself, several approaches to various kinds of animals and animal use, reformist definition would not permit completely unimpeded discussion about how these animals ought to be treated. By requiring that all practitioners of "animal law" be opposed to certain kinds of animal use, reformist definition excludes from its practice lawyers and lawyers with clients who engage in or favor the kinds of practices that a reformist definition rejects. Adoption of such definition will also deprive these latter lawyers, and their clients, of the benefits of having an area of law that can contain and organize concepts and principles useful to all people who have animal-related legal issues. As discussed above, reformist definition of animal law can only discourage law school faculty and students who do not consider themselves animal "advocates" from teaching and taking courses in animal law.

X. VIRTUES AND CHALLENGES OF DESCRIPTIVE DEFINITION OF ANIMAL LAW

A. Apparent Advantages of Descriptive Definition

It would appear that descriptive definition of animal law avoids the flaws of advocacy definition. By defining animal law as the area of law that deals with animals, a descriptive definition would assure that the area actually exists and will always exist as an area of law. For the law does (and will presumably always) deal with animals, whether or not it ever affords animals the kinds of legal rights demanded by rights-centered definition or adopts some of the positions of proponents of reformist advocacy definition. Nor would animal law, descriptively defined, restrict coverage of the area to issues involving animals that some people believe deserve special or preferred treatment or status.

By neither including nor excluding general viewpoints or specific propositions about how the law does or should deal with animals, a descriptive definition would allow for discussion and argument about what legal concepts and principles animal law does, and should, include. Nor would discussion be foreclosed or hindered regarding an appropriate analytical or normative theory of the area. Proponents of legal rights and personhood for animals, for example, would be able to make their best arguments, as would opponents of these views.

By not restricting the practice of animal law to attorneys who have certain viewpoints or represent certain kinds of clients, a descriptive definition would allow the area to be, or develop into, a comprehensive body of law that attorneys can use to effectively make a wide range of arguments and represent a wide range of clients. Attorneys who seek to prohibit, curtail, or regulate certain kinds of animal use would be able to study and employ this body of law, as would attorneys whose clients oppose such measures.

By not restricting animal law to animal advocacy in general, or the promotion of certain legal rights in particular, a descriptive definition would indicate to law students with a diverse range of viewpoints about animals that the subject is relevant to *their* current and future legal interests. More law school faculty might be willing

to teach or support the establishment of animal law courses that give full and objective coverage to all points of view.

By not restricting animal law to animal advocacy in general, or to the promotion of certain rights for animals in particular, a descriptive definition would mark out an area of law that provides the broadest possible forum for the expression of all manner of views about animals and how the law ought to deal with them. Those who advocate rights and personhood for animals would be no less welcome than those who seek more modest changes in how the law deals with animals, or those who would argue that various ways the law deals with animals should remain unchanged. In sum, a descriptive definition of "animal law," unlike an advocacy definition, would promote, regarding animals and the law, the robust consideration and discussion of diverse points of view urged by John Stuart Mill in the passage quoted at the beginning of this Article.

B. Potential Impediments to Formulating a Satisfactory Descriptive Definition

1. An Analytic Definition Is Not Required

Unfortunately, formulating a satisfactory descriptive definition of animal law presents a number of difficult challenges. One of these is *not* the fact that it might be impossible to find a descriptive definition that encompasses all concepts and principles that would be included in animal law and that excludes all concepts and principles that are included in other legal areas. This requirement would clearly make it impossible to define animal law descriptively because many areas of law deal with animal-related issues. However, for reasons discussed in detail above, many areas of law are not susceptible to analytic definition, and wisely so, so the fact that an analytic definition of animal law might not be possible would not itself be a problem.

2. Existence of a Distinct Area of Law Capable of Definition Is Required

However, one essential attribute of a definition of a term that denotes an area of law would seem to be that there *is* an *area of law* that the term denotes. I observed earlier that an "area" of law must have some kind of coherence that gives the area a recognizable character and distinguishes it from other areas.[176] In recent years, several commentators have asked whether certain fields that are sometimes *called* areas of law have sufficient coherence and distinctiveness to be genuine areas of law. The question is commonly raised by asking whether a purported area has a "law of the horse problem."

This locution has been popularized by Judge Frank Easterbrook, who asks whether the law relating to property in cyberspace is a real area of law, or a non-existent "area" like the imaginary field he calls "the law of the horse." Easterbrook observes that "[l]ots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows."[177] According to

[176] *See supra* Part IV.A.

[177] Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207 (1996). Easterbrook attributes the locution to Dean Gerhard Casper of the University of Chicago Law School, *id*. at 207, but Easterbrook was the first to use it to discuss the requirement that a genuine, and teachable, area of law must have an organized and distinctive character.

Easterbrook, there are no unifying principles that connect cases that deal with horses.[178] Anything that can be said or understood about these cases (or about how the law deals with horses) is adequately handled by areas of law, the coherence, distinctiveness, and the existence of which cannot be questioned, such as property, torts, and commercial transactions. Thus, Easterbrook concludes, there really is no distinct "law of the horse" that can be taught, studied, or practiced as such.[179]

A great deal more needs to be said than is discussed by Easterbrook and others who have considered possible law of the horse problems of various "areas" of law about what constitutes sufficient coherence and distinctiveness to render something a genuine area of law.[180] A feature Easterbrook finds critical is that the area must be

---

[178] *Id.* at 207-08.

[179] *Id.*

[180] Easterbrook appears to regard doctrinal *content* (that is, substantive concepts and rules) as the sole determinant of coherence and distinctiveness of a legal field. Richard Epstein observes that although content provides coherence and distinctiveness for some areas of law (primarily historically established areas traditionally taught separately in law schools), lawyers facing contemporary issues are sometimes required to employ doctrinal principles that cut across a number of traditional legal fields. It thus sometimes seems more reasonable to look for coherence and distinctiveness, Epstein suggests, in what lawyers *do* with various kinds of doctrinal principles and in the institutions with which lawyers deal regarding these matters, rather than in the principles themselves. (Epstein offers the study and practice of land development and finance as an example.) Richard A. Epstein, *The Erosion of Individual Autonomy in Medical Decisionmaking: Of the FDA and IRBs*, 96 GEO. L.J. 559, 560-63 (2008). One area of law that appears to support Epstein's view is agricultural law, which tends to be defined in terms not of doctrinal principles but kinds of clients and issues faced by these clients. *See* Neil D. Hamilton, *The Study of Agricultural Law in the United States: Education, Organization and Practice*, 43 ARK. L. REV. 503, 503 (1990) (defining agricultural law as "the study of the law's effects upon the ability of the agricultural sector of the economy to produce and market food and fiber"). Hamilton observes, "there are several features of agriculture which make it uniquely suited as a separate area of legal study and practice. The most important features are the fundamental nature of the production of food to human existence, the extensive use of natural resources made by the sector, and the magnitude of the economic transactions it represents. . . . One feature that separates agricultural law from such conceptual topics as property law, torts, or evidence is of special significance. As a sectoral analysis, agricultural law starts with the economic activity of agriculture and then confronts the unique legal issues associated with agriculture." *Id.* at 504-05. There is also a *real* law of the horse—equine law—that ironically may not have a law of the horse problem because its organizing principles are *not* doctrinal but involve the area's distinctive clientele and certain of their legal issues. Two prominent practitioners of this area state that "'equine law' really doesn't exist as a separate area for the practice of law," perhaps because they too think that doctrinal content determines distinctive legal areas. But they go on to indicate precisely why and how equine law *does* exist.

> Attorneys *who focus their clientele on horse-owners, and would-be horse owners*, use a combination of several specific areas of law. Such attorneys use portions of the law related to business formation to select the proper form of ownership for a business involving horses. Tax law has a bearing on the form of business ownership, deductions for expenses, depreciation, estate planning, etc. that horse owners may need to know. Attorneys use principles of contract law to describe fully an agreement between two or more persons or entities, whether it's an agreement to buy or sell, to breed, or to board a horse.

useful in teaching legal issues and must be at least as useful for this purpose as already existing legal fields.[181] By this measure, Easterbrook maintains, cyberspace law resembles the law of the horse. Among areas of law that commentators have suggested might or might not have a law of the horse problem are, in addition to cyberspace law,[182] entrepreneurship law,[183] environmental law,[184] health law,[185] and the law of globalization.[186]

Easterbrook's views present a particularly serious challenge to descriptive definition of animal law. Because the term "animal law" has not been used until recently to distinguish an area of law, in attempting a descriptive definition one cannot begin with the assumption that there *is* an area of animal law that would capture in a distinctive manner how the law deals with animals. For at least until recently, *everything* the law has said about animals has been said by other areas of law. Moreover, because these other areas have long dealt with animal-related issues, it might seem reasonable to suspect, at least initially, that the concepts and principles of these areas are *adequate* to deal with such issues. Additionally, animals are used and treated by people in a myriad of different ways. Because many kinds of animal use have been the subject of litigation, statutes, and regulation, the law has dealt with animals in an enormously wide range of different contexts and has addressed an enormously wide range of issues within these contexts. It might, therefore, be reasonable to begin any approach to defining animal law descriptively with a strong suspicion that if Easterbrook's law of the horse (which would relate to only one species of animal) lacks sufficient coherence and distinctiveness to constitute a

---

MILTON C. TOBY & KAREN L. PERCH, EQUINE LAW: YOUR GUIDE TO HORSE HEALTH CARE AND MANAGEMENT 6 (1999) (emphasis added); *see also* Joan S. Howland, *Let's Not "Spit the Bit" in Defense of "The Law of the Horse": The Historical and Legal Development of American Thoroughbred Racing*, 14 MARQ. SPORTS L. REV. 473, 475 (2004) (claiming that equine law does not have a law of the horse problem but maintaining that in any event it is useful to distinguish and consider the law of thoroughbred horse racing).

[181] Easterbrook, *supra* note 177, at 207-08.

[182] *See also* Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999) (rejecting Easterbrook's contention that cyberlaw has a law of the horse problem).

[183] *See* Darian M. Ibrahim & D. Gordon Smith, *Entrepreneurs on Horseback: Reflections on the Organization of Law*, 50 ARIZ. L. REV. 71, 76 (2008) (arguing that entrepreneurship law avoids a law of the horse problem because it involves a "discrete factual setting [that] generates the need for distinctive legal solutions"). *Contra* Benjamin Means, *Foreword: A Lens for Law and Entrepreneurship*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 1 (2011).

[184] *See infra* note 197.

[185] *See, e.g.*, Wendy K. Mariner, *Toward an Architecture of Health Law*, 35 AM, J.L. & MED 67, 86 (2009) ("Health law is an eclectic and integrated translegal field, drawing on multiple domains of law to create an identifiable applied field of law. It applies and adapts existing law to protect health within the constraints of justice and human rights.").

[186] *See* Harold Hongju Koh, *Is There a "New" New Haven School of International Law?*, 32 YALE J. INTL. L. 559, 572 ("While sometimes derided as the proverbial 'Law of the Horse,' one of the analytic challenges facing the law of globalization is asking whether there is 'in fact a distinctive, emerging law of which topics like human rights and international business transaction are a part.'").

discrete area of law, so might animal law (which would presumably deal with all animal species).

Whether any purported area of law has sufficient coherence and distinctiveness to qualify as a genuine area of law cannot be deduced simply from its definition. Because definitions of areas of law typically contain minimal substantive content, one cannot expect that the definition of an area will state or imply its unifying and distinguishing principles and organization. Determining whether animal law defined descriptively would have a law of the horse problem requires careful examination of its content and organization, which is beyond the scope of this Article. However, although definitions of areas of law might not capture their coherence and distinctiveness, the definition of an area can indicate that the area might have a law of the horse problem. This may well be the case with descriptive definitions of animal law.

The problem can be appreciated by considering the following possible descriptive definitions of "animal law," and how these definitions would apply to a range of animal-related scenarios presented in the Table at the end of this Article.[187]

> A. Animal law is the area of law that deals with (or synonymously pertains to, relates to, or involves) animals.
>
> B. Animal law is the area of law that affects (or synonymously impacts or has an impact on) animals.[188]
>
> C. "Animal Law brings together statutes and cases from multiple fields of law that consider, at their core, the interests of animals or the interests of humans with respect to animals."[189]
>
> D. "Animal law is, in its simplest (and broadest) sense statutory and decisional law in which the nature—legal, social, biological—of nonhuman animals is an important factor."[190]
>
> E. "All law is animal law. Animal law cuts across virtually every substantive area of the law, including tort, contract, property, family,

[187] The scenarios in the Table, although representative of kinds of animal-related issues, are entirely fictional and not intended to represent actual cases or situations. It is important to note that the Table illustrates only a minuscule fraction of animal-related legal issues. If, as I argue, just the scenarios in the Table indicate that formulating a descriptive definition of animal law will be challenging, a larger and more representative sample of animal-related legal issues will likely provide even more compelling evidence of the difficulty of the task.

[188] *See* Duckler & Campbell, *supra* note 84, at 15 ("Innumerable local, state and federal statutes and regulations that affect the welfare, use and abuse, sale and management, protection and killing of animals are all part of animal law."); EISENSTEIN, *supra* note 86, at 8 (stating that animal law "is law, legal precedent, rules, and regulations that affect animals' care and use, how they can and cannot be treated, and even whether or not they are considered animals").

[189] FRASCH ET AL., NUTSHELL, *supra* note 45.

[190] FRASCH ET AL., ANIMAL LAW, *supra* note 55, at xvii.

> taxation, trust and estates, insurance, criminal, administrative, international, and environmental." [191]

Definition A is the broadest possible descriptive definition; animal law in this sense would include any legal concept or principle (including anything in decisional, statutory, and regulatory law) that relates in some way to animals. Definition A is unsatisfactory because it would include in animal law some issues that would be viewed as being *solely* within the province of *other* areas and not of "animal law" as most lawyers would likely understand the term. All the scenarios in the Table deal with or involve animals. However, some seem not to relate to animal law, and the legal principles they involve could be (and sometimes have been) nicely taught in courses in other areas of law.

One would likely not say that Scenario 1, for example, involves or applies principles of animal law.[192] This is a tort case in which an animal plays an important role. To be sure, among the central issues in the lawsuit will be whether, in light of how dogs behave, it was possible under all the circumstances for an ordinarily reasonable and prudent driver to have been able to see the dog and avoid A's car. But the case does not involve any distinctive *legal* principles relating to animals or dogs. Likewise, Scenario 3 appears to involve solely tort law. The dispute in Scenario 6 seems essentially a matter of contract law, and not animal law, even though the legal principle that dogs are property that can, under certain circumstances, be bought and sold might be regarded as part of animal law, and even though in her lawsuit E may want to invoke facts about dogs in general or the particular dog she contracted to purchase to argue that she should not be compelled to accept a different animal. Scenario 9 appears to be a matter of environmental law and 11 a matter of tort law. Veterinarians diagnose and treat animals. But the standard of care that would be applied in Scenario 13 (performing as would the ordinarily reasonable and prudent practitioner) is the same general standard that is applied to physicians,[193] and thus arguably belongs to tort law, health care provider law, or perhaps the more specific areas of veterinary or veterinary malpractice law. Scenario 18 seems to raise issues in food and perhaps agricultural law.

Definition B is somewhat more restrictive than Definition A because not everything that relates to animals can be said to "affect" or "impact" animals. The dog in Scenario 1, for example would not be affected by how the law would resolve this dispute. However, the application of legal principles in most of the other scenarios in the Table (including some already noted that would not be included in animal law) would or could in some manner "affect" either the particular animals in these scenarios or other animals in similar circumstances.

Definition C has two major defects. As discussed above, good definitions generally (and definitions of areas of law in particular) avoid significant controversies regarding what is defined. There is disagreement among philosophers

---

[191] Schaffner & Fershtman, *supra* note 85, at xxxv.

[192] The particular facts of this and the other numbered scenarios discussed below are related in the accompanying Table.

[193] 78 AM. JUR. 2D *Veterinarians* § 7 (2012) (observing that "[t]he broad basis of liability of a veterinarian is to be tested by the rules with respect to what is ordinary care and the lack thereof, as they are applied to physicians and surgeons generally").

about whether it is appropriate to say that some or all animals have "interests."[194] More importantly, saying that animal law "considers" the "interests of humans with respect to animals" renders Definition C identical in application to Definition A. Because the law is a human institution, it is hard to imagine *any* legal principle relating to animals (or anything else) that does not, in *some* way, express or affect the interests of some humans. Thus, Definition C boils down to defining animal law as the entire body of laws relating to animals.

Definition D is unhelpful, and not just because it requires further explanation of what is understood by the "legal," "social," and "biological" "nature" of animals—terms the meaning of which are not clear on their face. In any ordinary sense, just the "biological nature" of the animals is an "important factor" in *all* the scenarios in the Table, some of which (as already noted) do not appear to involve animal law. For example, dogs are involved in automobile accidents because many have a natural tendency to escape or roam, and are valued as companions because of their ability to interact in significant ways with humans; animal species can become endangered because the biological nature of their members cannot always sustain challenges from humans, other animals, or the environment; and it is the biological nature of pigs and other animals that causes them to excrete waste that can become nuisances or environmental threats.

Finally, in stating that animal law "cuts across virtually every substantive area of the law," Definition E clearly does not exclude, at least without further characterization, issues that would not be included in animal law.

The scenarios in the Table also indicate why it may be difficult to formulate any descriptive definition of animal law that reflects what most lawyers would be inclined to regard as belonging to the area *and* that avoids a law of the horse problem. Some of the scenarios present situations that, I would suggest, many lawyers might indeed be inclined to regard as involving concepts and principles of animal law.[195] However, some of these same scenarios also appear to involve *another* area of law *at least as much* as animal law. These include Scenarios 2 (torts, remedies); 4 (criminal law); 5 (wildlife law); 7 (contract, landlord-tenant law); 8 (municipal, public health law); 10 (agricultural law); 12 (veterinary law); 14 (education law); 15 (estate and trust law); 16 (wildlife, constitutional, tort law); 17 (administrative law); and 19 (intellectual property, patent law).

As discussed above, some issues are covered concurrently by more than one area of law. However, even when this is the case, it is usually possible to determine that a given principle belongs to a particular area of law. For example, while a rule of criminal procedure mandated by constitutional law is also a rule of criminal procedure, we can say that the rule derives essentially from constitutional law. If the scenarios listed in the previous paragraph involve another area (or more than one other area) at least as much as they would involve animal law, animal law might lack a sufficiently strong character and identity to distinguish it from those other areas. If

---

[194] *See, e.g.*, McCloskey, *supra* note 160 (arguing that "interests" are matters that ought to be of concern to a being that has them, and that although various things can affect an animal's welfare, one cannot say that an animal *ought* to feel or do anything). *Contra* REGAN, *supra* note 61, at 87-88 (arguing that animals have an "interest" in whatever is beneficial to their welfare).

[195] I do not contend that all these scenarios should, after due consideration, be regarded as of concern to animal law, but only that many lawyers would be inclined to so regard them.

animal law must give way (so to speak) to some other area of law in a large and widely diverse range of situations in which the law deals with animals, animal law would not seem to contain much substance—or at the very least would not appear to be an area of law that would be necessary or even useful in dealing with the wide range of animal-related issues the law considers.

Moreover, even when it might seem reasonable to regard certain issues to be of concern to animal law, it is far from obvious what general principle or principles would explain *why* legal approaches to these issues would help to demarcate a distinct area of animal law. Among the topics raised by scenarios in the Table that, some might argue, would be of concern to animal law are practices and behavior that relate to the following: the welfare of animals (Scenarios 5, 10, 12, 15, 16, 17); public health and safety (Scenarios 3, 8, 12, 17, 18); economic interests certain people have in animals (Scenarios 6, 10, 12, 17, 18, 19); emotional attachments and interests certain people have in animals (Scenarios 2, 7, 15, 16); activities involving animals that are important to people for esthetic, life-style, or ethical reasons (Scenarios 5, 8, 14, 17); and potential personal injury or property damage caused by animals (Scenarios 2, 8, 17, 18). It is not immediately apparent what connects these topics as they are exemplified in just the scenarios in the Table, in a way or ways that would assist in delineating a single, unified, and coherent area of law.

C. The Tasks Ahead

1. Attempting to Find a Satisfactory Descriptive Definition

Proposing a satisfactory descriptive definition of animal law is beyond the scope of this Article. Framing such a definition will require careful study of the many and diverse legal concepts and principles the law has employed (or might employ) to deal with animals, and the extent to which lawyers and courts want to subsume these concepts and principles under the rubric of "animal law." It is possible that a descriptive definition that reflects what lawyers would be inclined to include in animal law (and that might avoid a law of the horse problem) will involve determining what, in the enormous and growing mass of legal material relating to animals, the great majority of lawyers will find *useful* to organize in one body of law. Perhaps the profession will choose to adopt a stipulative descriptive definition of animal law that would select some, and exclude other, issues and principles that pertain to animals. Or perhaps it will prove useful to eschew general talk of "animal law" altogether, and to distinguish with stipulative definitions a number of more limited areas that deal with particular kinds of issues relating to animals.[196]

2. Dealing with the Possibility That a Descriptive Definition Is Unachievable

It is also possible that sustained efforts will not result in a precise, clear, and useful descriptive definition of animal law. It might prove to be impossible to characterize animal law as an area with a coherent and distinctive identity. However,

[196] *See supra* Part VI.D.2. For example, it might be useful to distinguish separate areas of animal research, animal welfare, companion animal, entertainment and performance animal, equine, food and farm animal, and wildlife law. These are only some possibilities. There has already been some recognition of distinct areas of equine law, see *supra* note 180, and wildlife law. *See, e.g.*, MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW (3d ed. 1997); ERIC T. FREYFOGLE & DALE D. GOBLE, WILDLIFE LAW: A PRIMER (2009); THOMAS A. LUND, AMERICAN WILDLIFE LAW (1978).

it is far better to have an indefinable "area" of animal law with a law of the horse problem, than to accept the deleterious consequences of advocacy definitions. Lawyers and clients would still benefit from increased interest by the general profession in animal-related legal issues and from robust debate about how the law should deal with animals in various situations. Such benefits might be accomplished—perhaps even spectacularly—even if animal law is incapable of definition or of having, or developing, a coherent and unique character. To be sure, it might then be more appropriate to title courses and texts something like "animals and the law" or "animal-related legal issues" rather than "animal law." But courses, texts, and bar association committees could still serve as a repository and forum for consideration of important legal concepts and principles relating to animals. More lawyers could still become better educated about animal-related legal issues and better able to represent clients with animal issues.

That animal law might accomplish such benefits even if it is incapable of definition or of having, or developing, a coherent and unique character is supported by the area of environmental law. As observed above, scholars have thus far been unable to reach agreement on a definition of environmental law.[197] Moreover, some commentators believe a satisfactory definition may never be found precisely because, in their view, environmental law is not a coherent and distinctive field.[198] This has not, however, prevented a large number of attorneys from practicing "environmental law," the existence of many popular law school courses, and a large and growing scholarly literature. If environmental law can be home to so much interesting, vigorous, and important inquiry and argument, so might a perhaps indefinable and indistinct "area" of animal law.

XI. CONCLUSION: A NECESSARY FIRST STEP

An accurate and useful descriptive definition of animal law, if one is to be found, likely must await general acceptance by lawyers of the need for descriptive definition of the area. Once the profession appreciates why advocacy definition is

---

[197] *See supra* Part VII.E.

[198] *See* Elizabeth Fisher et al., *Maturity and Methodology: Starting a Debate About Environmental Law Scholarship*, 21 J. ENVTL. L. 213, 219 (2009) (stating that environmental law is inherently "incoherent," meaning "that the subject has no single guiding logic, no overarching doctrinal framework or no 'constitutional' grounding. . . . [M]uch ink has been spilled attempting to define the boundaries of the subject as if this exercise will bring with it intellectual coherence. Despite the effort, no definitive definition of the subject has been forthcoming."). *Contra* Jay D. Wexler, *The (Non)Uniqueness of Environmental Law*, 74 GEO. WASH. L. REV. 260, 316 (2006) (concluding that "[e]nvironmental law addresses a unique set of problems and seeks to protect a unique set of resources, and those facts alone suffice to set the field apart as an area of inquiry and study"). For discussions that admit apparent lack of unity and coherence in environmental law but propose different ways finding structure in the disorder, see Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L.REV. 221 (2010); Robert L. Fischman, *The Divides of Environmental Law and the Problem of Harm in the Endangered Species Act*, 83 IND. L. J. 661 (2008); Zygmunt J.B. Plater, *Environmental Law and Three Economies: Navigating a Sprawling Field of Study, Practice, and Societal Governance in Which Everything is Connected to Everything Else*, 23 HARV. ENVTL. L.REV. 359 (1999); A. Dan Tarlock, *Is There a There There in Environmental Law?*, 19 J. LAND USE & ENVTL. L. 213 (2004); David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L. REV. 619 (1994).

unacceptable and recognizes that a good descriptive definition is lacking, more work will likely be done in attempting to formulate such a definition, and legal scholars may be more motivated to seek coherence, organization, and distinctiveness in animal law.

Animals and their use play an enormous role in society. Law students and lawyers should therefore understand that animal-related legal issues are not of interest only to a relative few or only to people with certain views about animals, but are important to anyone who is affected by such issues, which is virtually everyone. Adequate attention by the profession to animal-related issues, however, will not be guaranteed by rejection of advocacy definitions of animal law or even by the formulation and general endorsement of a satisfactory descriptive definition. By its nature, a descriptive definition (or at the very least rejection of advocacy definition) would be neutral regarding how the law, lawyers, and law schools ought to deal with animals. A law school instructor could espouse a descriptive definition (or disavow advocacy definition) and still teach a course that is aimed at training advocates for animal rights or other causes. A bar association animal law section could espouse a descriptive definition, but devote its efforts to animal rights or reformist advocacy. Even if animal law comes to be universally defined by the legal profession in a descriptive manner, many lawyers, law faculty, and law students might still avoid the area if *in fact* it remains associated with viewpoints regarding animals that many clients of lawyers, and many lawyers themselves, reject.

Rejection of advocacy definition of animal law will not by itself result in widespread interest among lawyers in animal issues. However, such interest will never occur if lawyers begin, as many still do, with a *definition* of animal law that requires promotion of animal rights or other kinds of animal advocacy. The first order of business, then, must be rejection of advocacy definitions of animal law.

TABLE: SOME ANIMAL-RELATED LEGAL SCENARIOS

1. The driver (A) of an automobile sues the driver (B) of another car for negligence. A and B were traveling in opposing lanes of traffic on a two-lane road when B swerved into A's lane after a dog darted from the sidewalk on B's side of the road in front of B's vehicle. B's car struck A's vehicle head-on causing A to suffer serious physical injuries, for which A is suing B for compensation.

2. Driver B in Scenario 1 hit the dog as well as driver A's car, and the dog died as a result. The owner (C) of the dog sues B for negligently killing the dog, demands compensation for the economic value of the animal, and asks the court to allow her also to sue for the emotional distress she has suffered as a result of the dog's death.

3. Before the accident that is the subject of Scenarios 1 and 2, while the dog was roaming through the neighborhood it attacked two children who were playing in their front yard. The parents of the children are suing C, on behalf of the children, for compensation for the costs incurred in obtaining medical care for them and for the children's pain and suffering caused by the attack.

4. After the accident that is the subject of Scenarios 1 and 2, local authorities learned from neighbors of C that C routinely failed to provide the dog with adequate food and water and periodically beat it when it roamed from C's property. C has been charged with the crime of cruelty to animals.

5. The Department of Fish and Game of State S has issued new regulations concerning the hunting of deer in the state, including when in the year hunting is permissible; what weapons may be used; and limitations on the age, gender, and size of deer that can be taken. The regulations are intended to maintain a sustainable deer population for hunting and to assure that deer are killed humanely.

6. A breeder (D) of Dalmatian and Akita dogs signed a contract with purchaser (E) for $2,000 for the sale of a Dalmatian puppy that E selected from a litter. D received a check from E and agreed to keep the puppy for a week. When E arrived to pick up the puppy on the agreed-upon date, she was told by D that the puppy had been sold the previous day to someone else, that D had already deposited E's check on the day she had received it, but that E could have another puppy from the same litter for no extra money. E sues D demanding either the puppy she contracted to purchase or return of her money.

7. E lives in an apartment pursuant to a lease that prohibits possession by any tenant of more than one dog. E depends on the one dog she now has for love and companionship and wanted to purchase the Dalmatian puppy from D because her current dog is elderly and she wants to prepare for the time when this dog will die. E has been told by the apartment building manager that eviction proceedings will be instituted against her should she keep a second dog in her apartment.

8. The city in which D lives and breeds her dogs has enacted an ordinance prohibiting the possession of Pit Bulls, Rottweilers, Akitas, and Chows within city limits. The City Council stated that the ordinance is intended to protect people in the city from attacks by dogs of these breeds.

9. After the discovery of a hitherto-unknown species of field mouse in Town Q, a suburb of a large city, the United States Department of Interior classified the species as endangered, pursuant to the federal Endangered Species Act (ESA). The Department has stated that any future construction of houses in the area designated as the habitat of the endangered mouse would constitute an unlawful taking of the animals pursuant to the ESA.

10. The voters of State S have passed a referendum prohibiting pig farmers from keeping pregnant sows in gestation cages (in which the pigs are prevented from movement other than getting up and lying down). The law was described in the initiative as intended to protect the welfare of pigs used in agriculture in the state.

11. The owner of a private residence adjacent to a pig farm in State S has sued the owner of the farm for nuisance, demanding that the farm be closed and seeking monetary compensation because of the foul smells that emanate from the pigs' waste.

12. The veterinary licensing board in State S has issued regulations governing the behavior of veterinary practitioners pursuant to the State's veterinary medicine practice act. Some of these regulations relate to protecting the interests of veterinary clients and the public and others to protecting the welfare of veterinary patients. Among the regulations aimed at protecting clients and the public is a requirement that veterinarians perform all services for which they are paid and a prohibition against providing controlled substances to humans for their use.

13. A dairy farmer has sued his veterinarian for negligently killing one of his milking cows. The amount of the client's economic loss because of the animal's death is not in dispute. The only issues are whether the veterinarian's treatment of the cow was negligent and whether any such negligence caused the animal's death and the client's loss.

14. A veterinary student has sued the veterinary school she is attending to permit her to graduate without taking a required course that students fail unless they euthanize a dog after they have performed various surgical procedures on it.

15. A lawyer writes a trust document that provides for the care of testator T's dogs and cats after T's death.

16. An animal activist group held a protest during a deer hunt in State S, in which members of the group ran through the woods during the hunt, making noises to chase off the deer and yelling insults at the hunters. Several hunters have sued the individuals who disturbed the hunt demanding a court injunction to prohibit them from disrupting their hunting in the future.

17. The Horse Racing Board of State S has adopted new restrictions on the use of specified pain-killing and performance-enhancing drugs in horses for seventy-two hours prior to races. The restrictions are intended to protect the horses from breakdowns during races caused by the masking of underlying medical issues, to

protect jockeys riding horses during races from injury, and to assure that racetrack patrons who bet on horses have a fair chance of success.

18. Biotech Company X has inserted the gene of a cactus plant into cattle, thereby producing animals whose meat has more protein and less fat than the meat of ordinary cattle. X is asking the United States Food and Drug Administration to allow it to breed and market the animals to cattle ranchers, based on tests conducted by X's scientists showing that the meat is safe for human consumption.

19. Company X has filed a patent application for the genetically modified cattle.