

Short Circuit 209

Mon, 3/14 2:59PM 1:02:17

SUMMARY KEYWORDS

dog, swans, animal, bees, case, court, people, police, book, drugs, human, question, law, ownership, pigs, monkey, sniff, katy, australia, bit

SPEAKERS

Anthony Sanders, Jeremy Gans, Katy Barnett

A

Anthony Sanders 00:06

Hello, and welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. But today is a special Short Circuit. Now, as our listeners well know, usually we talk about a couple cases from the federal courts of appeals, the United States federal courts of appeals, that is. And sometimes we have specials where we talk about other subjects usually related to what we do at IJ, like constitutional issues, state constitutional issues we talked about a couple weeks ago, and various other topics that intersect with those. But, occasionally, we do something even more a little bit different. Now, last year, we had a fun episode where we talked about robot law, how the law intersects with robots and artificial intelligence. And that includes constitutional issues. And so I've thought a lot about that episode since we recorded it. And then along comes a book that recently was published, which is about animals and the law. Now, usually, when people hear animals and the law, they think about, well, that's maybe an animal rights issue. And of course, that has all kinds of controversial angles to it. But there's actually so much more on animals and the law. And, of course, many, many, many more years of experience of animals and the law, then robots and the law. So this book I learned about is called Guilty Pigs. It was just published a few weeks ago. I've read it; it's fascinating. If you have any interest in animals or animals in the law, you should grab a copy and read it too. It is alsom and this was even more exciting, by a couple Australian law professors. And I don't think we've ever had an Australian on Short Circuit before. So I am very glad and excited to have with us today first time ever from the University of Melbourne, in Victoria, Australia, Professor Katy Barnett and Professor Jeremy Gans, the co-authors of Guilty Pigs. Welcome to both of you.

K

Katy Barnett 02:34

Thank you so much, Anthony. We're just delighted to be here as well.

A

Anthony Sanders 02:40

Wonderful. Well, hopefully we can we can up your US sales just a tad, although we are listened

all over the world, as any podcast would be able to say. But there's so much in this book about law in all kinds of places, especially common law countries like Australia, the United States, United Kingdom, but really all over the world. And it really makes you understand how complicated animals in the law can be. It's not just what you would think, you know, animals are property, how does property law interface with how animals are considered property? But there's so much more to it than that. And it's much more complicated than that. And so what I'd like to do is talk about a few of the subjects that you guys discuss. We're only going to scratch the surface of your book. But the first one is the funnest question. And that is, why did you guys write it?

J

Jeremy Gans 03:44

Well, there's lots of origin stories of this book. But one of them is that there was an Australian case from 2013, where Australia's top court, the High Court of Australia, saved the life of a dog. And like you said, of course, that has an animal rights angle. But for Katy and me, it also was just so interesting about how many parts the law were in play in that case. Here's a case where a dog had attacked another dog and it's human owner. And that raises issues of private law, who can sue and who can claim compensation, criminal law, whether the owner of the the attacking dog could be prosecuted, and she was. But the case actually went to the High Court on a further issue: When is the government allowed to kill a dog in those circumstances? And how? And so it was that idea that there are so many different areas of human law that were in play that got us thinking about writing out how all of human laws can interact with animals in so many different ways.

A

Anthony Sanders 04:48

Well, that's the opening you discuss, this amazing case, bringing all of that. It's like the kind of case you would start a textbook with where you want to introduce the students to how there can be all these complications in an area of law. The next chapter begins with another fascinating story about an animal, a monkey who was shopping at IKEA. And Katy, why was that particular story in there?

K

Katy Barnett 05:19

So, this is exploring the nature of how animals can be seen as property, what kind of property are they? And when do we lose ownership in animals? And so the IKEA monkey whose real name was Darwin, became really quite famous on the internet for a while. He was the subject of many memes. My daughter was impressed with my coolness that I knew about the IKEA monkey. He had a snazzy little woolen coat, and he became a bit of a celebrity. But basically what happened was he had escaped from his owner's car. And his owner, Yasmin Nakhuda, was a lawyer who had a penchant for collecting exotic animals. And Toronto Animal Services came and picked up the monkey and wanted to put the monkey with an animal sanctuary. But then there was a fight over who was actually the owner of the monkey, who had the right to decide what would happen to him next? And so basically, that's the story which threads through that chapter. And there's a real distinction between wild animals, where you only have a qualified

form of ownership, and domesticated animals, where you have a more absolute form of ownership. So the first question for Justice Vallee was, is Darwin wild or domestic? Because that really made a difference to how ownership in him was analyzed.

A

Anthony Sanders 07:14

And this wild or domestic a lot of our listeners in the US who have gone to law school and taken first-year property probably think of this famous case, *Pierson v. Post*, about a fox. Right? And is it not true that it would have come out differently if this had been in much of the United States? Because there are alternatives to the *Pierson v. Post* rule?

K

Katy Barnett 07:43

Yeah. So, I'm actually wearing my *Pierson v. Post* t-shirt today for this interview. But basically, in many legal systems with wild animals, what you have is a form of qualified ownership. So it really depends on the level of control you have over the animal, and whether the animal is actually likely to return to you. Now *Pierson v. Post* was actually case about pursuit. And the question was there was is simply being in pursuit of a fox and having an intention to kill it enough to say that it's your fox? And the court in that case said, the majority said no. The minority said, Yeah, look, there was an intent. It was close enough in pursuit that that Lodowick Post should own the fox, not Jesse Pierson, who ended up killing the fox. But what was at issue in Darwin's case was, firstly, was he wild? Yes, he was. Secondly, he wasn't in Nakhuda's control anymore. So he was out of her control. What happens then? Is she still the owner of the monkey? And the answer is only if the monkey has a tendency to return to her. Did the monkey have a tendency to return to her? Nope, it was out. It was off. It was around IKEA. It did not want to go back. So what Justice Vallee found was that she lost ownership in the monkey because the monkey basically escaped and showed absolutely no desire whatsoever to want to go back. The monkey was found to be wild because the poor thing have been separated from his mother very young. And he was certainly not domesticated; he bit people. He had to wear a diaper. He had to be on a leash. So there was no question of him actually being categorized as a domestic animal.

A

Anthony Sanders 10:08

You know, one thing our listeners may be wondering on this is, is it not necessarily what type of animal or what breed it is, whether it's domesticated or whether it's wild, but it can be particular to the animal? Whether it's been, you know, housebroken, so to speak?

K

Katy Barnett 10:29

Yeah, I think it is, to an extent, right. I mean, I think he would have been wild anyway. But let's say he had a tendency to return, if he was more housebroken, if he did want to go back to Nakhuda, she would have retained ownership of him. So he still would have counted as a wild animal. And if there's one message from this book that I think really came out to me, it's don't own wild animals, don't own chimpanzees. Don't pat zebras. Don't own monkeys. Just really don't.

A

Anthony Sanders 11:06

Not a lot of rights coming your way if you "own" wild animals.

K

Katy Barnett 11:13

Well, no. And they're wild. They can really hurt you.

A

Anthony Sanders 11:21

So I want to turn in a moment to a very domesticated animal, in fact, a best friend of humans, but first a little bit more on wild animals. You have this example in the book, which I think a lot of people have heard of and have always thought is quite different. I'm not exactly sure if this is a wild animal or not, but swans in the United Kingdom, or at least in England, they are by right owned by the Queen, who I should say, we were recording this late February, we just heard she she's has COVID, although she has mild symptoms, so best to her recovery. But that's the news as of right now. But as of right now, she's still on the throne. And does she own all the swans in England?

o

12:17

Okay, sorry, this is a great question. And I loved researching this part of the book. So what I discovered was, she has a royal privilege to own all the mute swans in England and Wales and it's a particular kind of swan.

A

Anthony Sanders 12:37

And are they wild or domesticated swans?

K

Katy Barnett 12:39

They're basically wild. Yeah, they're basically wild. But she has this privilege whereby she can claim ownership of all the wild mute swans in England and Wales. She can't claim any other species. And she can't even claim them in Scotland. She certainly can't claim black swans in Australia. They are not within her privilege. But then during medieval times, because of this, this really strange status symbol thing built up, whereby people kind of wanted to own a swan to show some kind of linkage with the monarch. And so what happened was, different monarchs started to grant nobles, the right to mark a swan as their own. And a whole thing grew up whereby people were granted the right to mark one with their own swan mark, where they do the cut or brand the swan on the beak, thus showing they had the right from the monarch to own that swan on their property. And then what would happen is that people would go around and count up all the swans, work out whose swans have mated, and so on and so forth. It was called swan upping, and they'd marked the new swans. It's just like the weirdest

thing. It was so popular during medieval times, that they actually had a court of swan moot. There was a royal swanherd, who was responsible for organizing the swans. I should also note that swan was a delicacy dish. So some of the kings served it for Christmas dinner and things like that, but it's just like the most wacky things. But actually, those swan marks are really the beginning of trademarks. Because what they did is they kept all the swan marks in big books, and just kept notes of it all. Who's swan is who's, who swans mated with whom? So on and so forth. And it's just extraordinary. And there were they were fights about this, like there's a fight between Elizabeth I and two nobles who ended up getting what had been a former monastery but was dissolved by Henry VIII. And these two noble said, Hey, we want the swans in this monastery and the court found, Justice Cook found no, you don't own them. It's up to the Queen to decide whether you get them. All unmarked swans belong to her. If she chooses to claim them. And she did. So you might ask, what about now? Does our current queen and yeah, I hope she gets well soon as well. I should say my grandma's the same age and she managed to recover from COVID. So hoping the queen might have similar stuff. So does she own all the swans now? Well, technically, she could own all the unmarked mute swans in England and Wales. However, I went and checked the Queen's website. And she said she doesn't want to. She doesn't want to claim all the unmarked mute swans. She does actually claim the ones around Windsor Castle, because she's rather fond of them, and she conducts a swan upping and goes and checks on them. But these days, the purpose of the swan upping is not to kind of brand or mark swans. It's basically to ensure that they are conserved and that they're looked after. But it's just this extraordinary little vision into a different world where swans were a status symbol.

A

Anthony Sanders 17:04

The Ancien Regime of swan ownership, I suppose. One final question on that. So I think they migrate, mute swans. When they leave the realm, does she claim ownership? Or would they be owned by you know, where North Africa or whoever's there?

K

Katy Barnett 17:23

So once they're out of the realm, she can't claim them until they come back in, and then they become subject to the privilege.

A

Anthony Sanders 17:31

So then they have a tendency to return.

K

Katy Barnett 17:35

Which they do. So we relate back to Darwin again, because they do have this tendency to return, well then they can become re-owned again, when they've returned. It's just so weird.

A

Anthony Sanders 17:48

Another animal that I would not think is weird that they have a tendency to return is man's best

Another animal that I would not think is weird that they have a tendency to return is man's best friend, the dog, who have been with people we now know for upwards of I think 25,000 years is the latest that the scientists are saying. But dogs have been used in many ways with people over the years, but one fascinating part of the book is where the authors discuss how they started to be used by law enforcement, which is a big way in which Americans today and people around the world interact with dogs. So Jeremy, tell us about the the origins of that story and then where the the research on dogs and law enforcement took you.

J

Jeremy Gans 18:34

Well, the ancient history of dogs, probably even the prehistoric history of dogs and humans, did involve humans using dogs and perhaps dogs using humans in all sorts of ways, including dogs' sense of smell for things like hunting. But the use of dogs by the police is a much more recent phenomenon. In fact, I had a look at the the hunt for Jack the Ripper in London. And towards the end of Jack the Ripper's reign of terror, there was a proposal for bloodhounds to be used the next time when the Ripper's victims were found. And that turned out to be really controversial. And it was debated in London's papers about whether it's right to have dogs in the city in the East End where they could attack someone or cause angst if someone was hurt. But in particular, there was discomfort with the idea that dogs could distinguish different humans by smell, just the idea of humans having different scents. Even scents that could overpower the stench of the East End of London was just worrying to the Londoners. And in the end, bloodhounds we're not used to try to track Jack the Ripper, although the proponents of bloodhound said that just the debate in the newspapers, seemingly, they claimed deterred Jack the Ripper for a few more weeks from one of his final murders. But the upshot of all of that is that actually, police were quite slow to use dogs for policing purposes. And with one exception, it didn't really take off in the common law world until the middle of the 20th century, after World War Two when dogs were used in war. The one exception was South Africa, where for racist reasons the South African police started using dogs. For criminal investigations, they said that they found it hard to tell black South Africans apart, that they wanted a police counterpart to the native trackers that were sometimes used in South Africa, and that they otherwise found black South Africans inscrutable and needed help. So for those reasons, they started using dogs in policing in South Africa. The South African police sent dogs to other jurisdictions. But it didn't take off until after World War Two in those other jurisdictions. There's an interesting difference, actually, between South Africa and the rest of the common law world, which is that eventually the rest of the common law world got onboard, not just with the police use of dogs but also using dogs in court cases as evidence. So the fact that a dog could sniff someone or something could be used as evidence now in most common law courts. Not South Africa, though, they always said, We think dogs are too inscrutable and their experts are too biased to risk using them to actually convict people. So the status of dogs in South Africa is a bit like the status of lie detectors in the US. Lie detectors are used by the police but are not used in court. And the same in South Africa with dogs. It actually freed up the South African police to work without court scrutiny. By contrast, in the rest of the common law world, the court started taking a close look at how the police use dogs and how useful dogs were.

A

Anthony Sanders 22:05

Something I don't remember if you cover in the book: Was it at that time or was it a bit later that the the tie between drugs and dogs rose to the fore at least in the United States?

J

Jeremy Gans 22:19

So the use of dogs specifically to sniff out illegal drugs obviously coincided with the rise in policing of drug enforcement. And again, it's a relatively recent phenomenon. The early use of dogs by the police and by authorities, say the United States, was to have people, to sniff out people, but the current most common use, but certainly not the only use, is for dogs that are trying to sniff out drugs. And that's where the courts eventually came on side with the police using using dogs to sniff drugs. They did it for the same reason they often come on side with police forensic work. They initially say, oh, that's a strange thing the police are doing. We're not sure we understand what they're doing. We don't know about these fingerprints or this blood spatter analysis or whatever. And then all of a sudden they switch and they decide it's not strange. It's actually so obvious and common sense. We barely have to question when it's being done. So the courts now generally accept that dogs can sniff out drugs, and the fight is more on individual issues. How exactly can a dog be used to sniff out drugs? Which dogs can be used? When can courts trust the fact that a dog has sniffed something or someone?

A

Anthony Sanders 23:34

Well, as many listeners will remember, one area where this intersects with what we do at the Institute for Justice is how dog sniffs can be used for probable cause when police are conducting a search. And in particular it comes up in civil forfeiture cases at IJ, where someone may be has cash with them but not drugs. The dog sniffs says there's drugs in this trunk, the trunk is opened, and there's cash but there's no drugs, and then the cash is seized by the police. And they given a receipt and say, well, you can prove that you're not connected to drug activity and hire a lawyer, and, you know, maybe we'll see you in a few months. Which is a lot of the time how we get our forfeiture cases and people who are completely innocent and have a heck of a time trying to get their property back. So there were two cases, they happen to be in the same year as an interesting juxtaposition in 2013 at the US Supreme Court, about drug sniffing dogs, they both involved the state of Florida. One was called Harris and this was about a dog that it seems falsely alerted but led to the prosecution of someone for owning an illegal firearm I believe. The other one was about a dog going up to someone's front porch. We filed a brief in the about the prosecution of the illegal firearm. But maybe, Jeremy, tell us a bit about why you were interested in those two cases and in how they came out in different ways.

J

Jeremy Gans 25:21

Well, there are a whole host of issues about police using dogs and courts using dogs. And one of them is just whether and when the police are allowed to bring a dog along to assist in law enforcement. And the general answer is that because smell is a public thing, in Australia and the United States, you're allowed to go and sniff the air. No one has ownership in the air. It's not a search the sniff the air. Canada, mind you, does regard some sniffing as a search that has to be regulated.

A

Anthony Sanders 25:53

And in my state of Minnesota, I'll say, under the state constitution.

J

Jeremy Gans 25:57

That's a very polite term, by the way, bunt, that I'm not familiar with. It's a lot more polite than other terms you could use. Yes, I'm so making the mistake of only looking at federal constitutional law there. But you're right, yes. So you can go and sniff but then there's a question of how can you bring a dog up to somebody? In Sydney, we had a case where the police were taking a dog along a line lining up for a nightclub, and that was fine, was on a public street. But the dog, in order to alert the police officer that he'd had sniffed something of interest, went up and bunted the lower body, the genitals in fact, of one of the people in the line. And so part of the fight was whether, there's no problem with a dog sniffing, but was the dog allowed to bunt? They also use the word ferreting through the man's pants at one point. And that's in fact, where the courts drew a line. Originally, a lawyer had said to a judge, Look, if you went and did this, what would happen to you? And the judge actually at first said, Maybe they'd just think I was eccentric. But anyway, I'm a dog. And so it's different for dogs. But the appeal judges all said, Look, there's a line that gets crossed, maybe with touching, certainly with ferreting. And so they sent it back to lower courts to work out whether the police had a good reason to suspect that person had drugs on his body before the dog started the ferreting rather than after; if it came after, then that man was going to go free. So back to the United States case, the Florida case, the first one, there the issue was that the police had received a tip off that there was drugs in someone's house. And so the police couldn't use their dog to sniff that house from the street. They walked onto the porch of the house and the dog then alerted, and they ended up searching the house. And so the fight in the Supreme Court of the United States was whether that was okay or not. But for the minority judges, they said, you're allowed to go on a porch, you're allowed to bring a dog on a porch, that's part of the implied invitation of all homeowners unless they put up a sign stopping that sort of thing. But for the majority of judges, they said that implied invitation is for people and for regular dogs, but not for trained tools of law enforcement. And so they likened to bringing the dog on the porch to bringing a metal detector and snooping around in someone's backyard or front yard. Or for Justice Kagan, it was like bringing in a pair of high powered binoculars and then peering into someone's window from the porch. And again, the invitation doesn't extend that far. So that was a win for the defense in that case. The findings from in the house became subject to exclusion from the court, and presumably the prosecution therefore failed. The second case, though, went the other way. And that was the one the Institute for Justice was involved or did a submission for. That was on the question that wasn't about a house. It was about a stop around a car and the police can bring dogs up to cars. Although the question when exactly they can stop a car is more complex.

A

Anthony Sanders 29:10

You can't keep them there all that long. But while you're there for other reasons, you can bring the dog.

J

Jeremy Gans 29:15

Yeah. So you stop them and then the dog's with you and the dog then alerts. And in this case, the dog alerted several times. But they searched the truck and didn't find the drugs the dog was trained to alert for. Unfortunately for Mr. Harris, what they did find was other evidence of

crime, sort of paraphernalia used to make drugs and so on. And so then the fight was over whether the police were right to rely on this dog. Like I said, the courts are pretty happy with the idea that dogs can provide useful information to the police in these settings, but that doesn't prove whether a particular dog is that useful. I mean, I have a dog which wouldn't be at all useful in this setting. Because it hasn't been trained and it's not that smart. So how can you tell that the dog the police officer has is smart? The police said, We trained the dog. And the question arises was the training any good? Did it stick? Was the police officer with the dog good at reading the training, given that the dog had alerted twice to a truck that actually did not have the drugs that the dog was trained to find. So the Florida Supreme Court had said, this isn't good enough. And first, we need to have records, we need to have testing of the dog. It's not good enough that the dog was capable of finding drugs when you put some drugs near the dog. You had to make sure the dog didn't alert when there weren't drugs nearby, you need to have tests against false positives and false negatives. That case went to United States Supreme Court. And the Court unanimously said none of that is necessary. Sorry, I think that was one of the sets. No, I think you're right, I think it was unanimous. Yeah. Okay. So they said that's asking too much. What's enough is if there's a record of training of the dogs. If you require dogs to go through all sorts of tests, negative and positive, especially tests in the field, it's unworkable, because you never know whether a dog that has alerted in the field and yet no drugs have been found, that could just be because the drugs were well hidden, and the dog had done the right thing and hadn't failed the test at all. They also said more controversially, that in any case, the dog might just be alerting to the residue of drugs, the fact that drugs had once been there. And that's the dog doing the right thing again, although I wonder whether the fact that there's residue of drugs is a particularly compelling evidence that there might be a crime or evidence of a crime in progress or within that car. You sometimes hear that there's residue of drugs on lots of things, including innocent things. What's remarkable is that the court was so willing to trust the police in their willingness to train and their use of dogs, they couldn't see a reason why the police would rely on a dog for bad information. Although of course, there are all sorts of answers to the police if they both come to believe that there are drugs in a car. And they were also very trusting of the legal process, the lawyers in the case to cross examine the police officer. They can't cross examined the dog. To work out whether this dog was a bit of a dud or not. And again, I'm not sure that most lawyers would really know quite what questions to ask in a very specialized field to work out whether a dog is up to snuff as Justice Kagan wrote in that case.

A

Anthony Sanders 32:48

By the way, I apologize. I said there was an illegal firearm. There actually was a bunch of pills that that were illegal. I'm thinking of a recent case from the same area where a guy got pulled over and various things happened. There's no shortage, I think in the 11th Circuit or Florida. But the thing that really set us aflame when this case came out, Harris, the the car search case, is that the court just thinks that the evidence of the dog false alerting, is supportive of the dogs because it shows the dog's working because it can get even the small amounts that no human could be able to find. And yet in my mind that shows that if you have a dog alerting where there is no crime, and there was no crime of the kind the dog was trained for in this case, then that should be a mark against that kind of investigatory technique. And as we were talking before we started recording Jeremy, if this was like the metal detector example in Jardines, the other case, if there was some machine that could detect methamphetamine residue or cocaine residue or marijuana residue, whatever the drug is, and it had a failure rate like dogs have, I think it would have about as good a chance of getting into court as the lie detector. Like you were talking about, those aren't allowed in American courts. And yet the dog gets in and, you

know, this is just speculation, but I wonder if that is something to do with our acceptance of dogs in our lives. Everyone lives with dogs, they don't live with lie detectors, right? My wife and I do not have a lie detector that helps our relationship but we do have two dogs in the house that are part of the family, with our children. And so does that in some way warp our understanding, when otherwise we would think, well, this is a real constitutional problem.

J Jeremy Gans 35:07

Yeah, well look. A difference between machines and dogs is that machines can be mass produced, mass tested. And although they can individually go wrong, you can test an individual machine in a straightforward way. Dogs are really varied. And they aren't mass produced, well actually they are in some ways mass produced, but their training is very individual, and very human dependent. And testing them is also very individual, and feels almost unfair. I think part of the issue Justice Kagan had is she didn't like the idea that the dog was doing its job, smelling drugs, and then being kind of told you got it wrong. And she felt, you know, that's mean to the dog because the dog can't possibly distinguish between drugs that were once there and drugs that are currently there. I mean, I've certainly had that experience flying into airports in Australia, where they have strict quarantine, and a dog will come up and sit on my bag. And it's because I'd eaten an apple, had an apple in my bag eight hours earlier. And I thought, wow, that was a good dog. It could sniff the apple I had eight hours earlier. But of course, it's also a sort of bad dog in that it wrongly sniffed and suggested there was an apple in my bag when there wasn't. And I think it's partly that dilemma of that good and badness that worried the court there, as well as just the general happiness the courts had with dogs in general, as being used by the police. And they didn't want that to be undermined by then a complete skepticism of dogs individually. Because having to have a full-on training regime and testing regime, Justice Kagan worried about the rookie dog who wouldn't have any field behavior to be tested. Surely the rookie dog should be allowed to find drugs, said Justice Kagan. Of course, the response could be you could bring two dogs to every car stop, the rookie dog and the trained dog and just use the rookie dog as a backup and get it up to scratch in its record of successful drugs by watching the other dog. But the court didn't want to impose that kind of burden, I guess, on the dog regime.

A Anthony Sanders 37:22

And we certainly would never say that about a rookie cop. Like, well, he's a new guy. You know, we can let this evidence in. He'll get it right later on. Otherwise, we'd never get started.

J Jeremy Gans 37:34

Well, there's the rookie expert witness you and your crime scene examiner and they're having their first go. But of course, they go in pairs, they go with the senior crime scene examiner. I guess the problem is the dogs don't work in pairs, they work with humans.

A Anthony Sanders 37:49

Well, another animal that works with humans are pigs, who were on the cover of this book, *Guilty Pigs* and the term *guilty pigs* might be the weirdest thing to my money that I learned in

Guilty pigs, and the term guilty pigs might be the weirdest thing to my money that I learned in this book, even weirder than the Queen and swans. I think this says like volumes about how humans have changed over the years and their relationship to animals and what we think about guilt and innocence and all kinds of stuff. But, Katy, in the time we have, please give us a primer on how pigs could be tried and found guilty, it seems like under criminal law.

K

Katy Barnett 38:40

Yeah. So this is a very interesting phenomenon. It was basically medieval France and Switzerland and that kind of area of the world. A phenomenon arose where pigs unfortunately, as medieval societies increased urbanization, they had a bit of a tendency to maul or eat young children. And so most of these cases, most of the early cases involved pigs basically mauling or killing children.

A

Anthony Sanders 39:23

These are the days before helicopter parenting it seems.

K

Katy Barnett 39:26

Yeah, definitely before helicopter parenting. And so, what they do with these pigs is they put them on trial, like a human, they put them in the dock. We've got an engraving of a scene with the mother pig with her little piglets, standing in the dock. And, you know, they had lawyers, so on and so forth. And then in some of the cases they interrogated them. Jeremy and I were thinking, what did they find out? How can you get a confession from a pig? But apparently, how well behaved the pig was was kind of important. If it snorted a lot and made loud squealing noises that was a bad pig. And then if they were found guilty, the pigs were hung like a human criminal, or executed executed in a variety of ways. The main mind was being hung, but there were several other ways. Some were burned at the stake, some were beheaded. It is just the most bizarre thing. Then, in early modern times, this kind of phenomenon spread out across Europe, and it spread to other kinds of animals as well. So not just pigs, but also horses. There are apparently some bad horses who have a tendency to throw their riders in rivers if you don't like them, and then the people drown, something I discovered in this book. Donkeys, cows that knock people over. Apparently cattle can cause grievous injury. And that's actually part of where all this comes from. If you go back to the Bible, there is a prohibition against goring oxen in the book of Exodus. And what it says there is that goring oxen, the owner can be held liable but also the oxen itself can be held liable. And so there was a kind of rabbinical discussion about well, what do we do with the goring oxen who's guilty? And in fact, it was kind of discussed, well, we need to have a full rabbinical trial of 23, we need to try this ox properly. Because if we're going to treat it like it's a bad human, we need to give it the same protections that a human has. But I think this kind of biblical stipulation was basically taken up by the medieval French, and then by later, it went down to Germany. There's a case in Italy. There's a case in Portugal. So it just kind of went everywhere that animals were actually blamed.

A

Anthony Sanders 42:46

And do you have a sense of why? Like in this case, it seems like people knew who the pigs

owner was, for example. Why was it not a trial against the owner in some way? Why was the animal itself put on trial?

K

Katy Barnett 43:04

So actually, that's a really good question. In these European jurisdictions, they don't seem to blame the owner at all. Conversely, in England and Scotland, they blame the owner. Like, they look at it in a much more modern way, or how we look at it today. But they also, in English law, very much treat an animal as a thing. That being said, they had a bit of a weird view of things. So you could actually prosecute things for causing harm through the law of deodands, which meant that the bad thing, whether it be a rope, a bucket or a pig, had to be forfeited to the king. So there's all these cases of items up to and including animals being forfeited to the king for causing harm. But for whatever reason, in Europe, they seem to regard the animal itself as culpable. Now, I was really interested in the psychological aspects of this. Now, we might say that's really strange, but I'm not sure that that impulse has totally left us. There's some really interesting research I cite in the book by two US scholars, a psychologist and a lawyer, Goodwin and Benforado. They basically showed people hypothetical newspaper articles of animal attacks. And what they found was that people's response to the animal attacks really varied according to who the victim was and what the animal was. So whether people thought the animal was blameworthy, So if the animal killed a child, people became incredibly punitive, incredibly punitive. So they gave an example where a shark attacked a young girl or shark attacked a pedophile. And basically, where the shark attacked the pedophile people were like, Yeah, whatever. When the shark killed a child, they were like, We need to go hunt down that shark. We need to kill it. And actually, if we inflict pain on the shark while we're killing it, that's fine. So I think what happens when an animal attacks a child, is that it's a kind of moral event. It's something that triggers something in us which is kind of punitive. And I think that's what we're seeing in the French cases, is this idea that in some ways, the animal has behaved wrongly, and must be punished and retribution must be taken out. So I think that's what's going on.

A

Anthony Sanders 46:14

Well, another animal that many times in my life, I'm sure many others who are listening to this too, I want retribution against is a bee or a wasp right after they sting you. And, you know, you could try and kill that bee. I mean, of course, some bees die because they sting you but wasps often don't. And many bumble bees don't. And right after they sting you, I think you could justify it to yourself, if you need to, that I need to kill that bee because, you know, it's a dangerous bee obviously, it just stung me. But of course, that's true of any bee or any wasp. So that definitely, there's an impulse there to try to get back at that creature. I actually I knew a guy who was he was a vegan, he was a very strong animal rights type of fellow, but he hated wasps. He was all for their destruction. So I think there was some background there. But we, of course, want to let our listeners go and read this. But give us the just the basics, Katy, about bees and property because one of the most interesting things in the book is, I have the sentence here, "A property right in bees is difficult to establish for several reasons," which I grew to understand is quite the understatement. So how, like, if I am a beekeeper, how do I think about how I own those bees? Where can they go? What do my neighbors think of me? What are my rights there?

K

Katy Barnett 47:48

So I found this area just so interesting. I always liked bees, actually, I got made to do an assignment on them in grade six. And I've been obsessed with them since then. But now I'm even more obsessed. But anyway, the problem with bees is they're kind of many and singular at once. You have a hive, right, and in some ways, they're all part of the same entity. They're all kind of part of the hive. And they don't have an individual existence in the same way. But on the other hand, you know, they're also uncontrollable. So we have real difficulties with owning animals when they're uncontrollable. We go back to Darwin, the monkey. We can't tell a bee where to go. We can't say, stay, stop, bee, stop. A bee just goes where it wants to go. And also bees swarm. That is one of the things that makes ownership of bees really difficult; They will just randomly decide, okay, some of us are leaving this hive now, we're gonna fly off and form a new hive. So, in different legal systems, there's really elaborate ways of claiming ownership in bees. If you hive them, you own them. But then once they escape, and we get back to that escaping thing again, you might lose ownership of them depending upon the legal system in which you're in. It seems to be a kind of Indo-European thing historically that you had to chase the bees and keep them in eyesight. That's how you retain your ownership of them. So keep running after those bees and one thing I ended up looking at was ancient Irish judgments about bees. The Irish were obsessed by bees as well. And they had a whole book of bee judgments where they decided who owned what bees, how you decide bee ownership. But also what happens where bees trespass. So there was actually a post in Australia, I think on Reddit, where someone was like my neighbor's bees are flying in and drinking from my flowers, can I claim honey from my neighbor? I'm really not kidding. My moment in life had come, right? Because everyone was like, Katy, Katy, you need to get on this thread, you need to answer it. And my answer to this person was you can't do anything about that in Australia right now. But if you were in medieval or early Ireland, you would be able to go to your neighbor and get some honey as compensation for that bee drinking from your flowers. So the Irish decided that they were going to analogize bees with cows. And one thing you had to do was follow the bee. And then I was like, how do you follow a bee and work out to whom it belongs? Apparently, they reckon that they sprinkled flour on the bee. So I see a bee on my plant. I sprinkle flour on it. And then I follow it back to see whose hive does it come from. But yeah, I mean who has time to follow bees, but apparently people did. I guess honey was a really important thing, because this is before sugar. So honey is our main sweetener. And it seems to have been really important in many societies. But in terms of liability for bees, bees are treated totally differently. So in terms of ownership, wild bees are treated as uncontrollable. Once they leave your control, once they're out of your sight, you don't own them anymore. In terms of liability for bees, they're treated totally differently. So they're treated as domesticated. In one of the cases, an American judge says, Oh, look, bees are as domesticated as cows. You know, the fact that a bee occasionally stings someone is neither here nor there. The justification seems to be that bees are useful. And in one of the Australian cases, the South Australian case, most bees die after they sting you. You know, they actually pay a pretty bad price for what's happened. They die themselves. So we don't want to be too harsh on them. We don't want to say that they're intrinsically dangerous. I actually also hate wasps.

A

Anthony Sanders 53:02

It might be different if you're keeping wasps.



... - ... - - -

K Katy Barnett 53:07

I mean, no one seems to be insane enough to do that. But if you're keeping wasps, it'd be totally different. So there's this whole thing of bees are useful. Bees are helpful. So in terms of liability, courts are generally reluctant to impose liability on people. Unless it's really egregious, you cause a massive swarm and it kills the neighbor next door. We've got an Irish case of that.

A Anthony Sanders 53:43

I don't know if you know that there was a case here in the Fourth Circuit Court of Appeals we talked about on the show last year, actually, where there were beekeepers. The local authorities sprayed for mosquitoes and they had in the past tipped these farmers off to cover their bees, which I guess protects them, but there was a miscommunication or they forgot, I can't remember the exact details, but they sprayed and the bees died. And so they sued to say that it was a taking under the US Constitution, but it was ruled to not be a taking and it went on appeal. So if you're a beekeeper apparently you need to be in tight communication with your local mosquito authorities.

K Katy Barnett 54:34

Oh, so that's actually an interesting way in which US law is a bit different and actually a bit reminiscent of Irish law. So there's a whole bunch of US cases, some of which are described in the book, where bees die because of pesticides being put on crops. And in one of those cases, the court says well, the bee's a trespasser. And it's like, are you gonna tell the bee it's a trespasser? But the court actually says the bee's a trespassing bee. No one let it go on that flower. It's actually really interesting again, it kind of shows where not so far from perhaps these ancient people as we thought.

A Anthony Sanders 55:19

Well, we are just about out of time but one issue that of course you do get to in the book is animal cruelty laws and animal rights. Now, you know we are the Institute for Justice, a libertarian outfit, and usually people think about libertarians not being so into animal rights but I've been surprised over the years talking with libertarians. A lot of them do have nuanced views on you know, well, an animal is a little bit more like a human than, you know, a rock or whatever. And therefore they can see some argument that there would be some kind of natural rights that the animal might have, like you might have, to go back to the beginning of the podcast, if you had artificial intelligence that got to a certain state; you know, people of course have talked about maybe that would have some kinds of rights. So, Jeremy, what are some issues of animal cruelty and animal rights that maybe people don't think about maybe in response to your book and in writing it that people could think about more and how to work through some of those issues that arise?

J Jeremy Gans 56:33

Right well, laws against cruelty again, a relatively recent phenomenon, started off in England with just a bit of abhorrence of some agricultural practices. But it's spread and become more general and not as general as you might think. Jeremy Bentham, one of the leading jurists

general and not as general as you might think. Jeremy Bentham, one of the leading jurists, called for laws about animal cruelty. He said the question, back to the show about robots, isn't whether they can talk or whether they can think, but whether they suffer. And so that was his test for whether you need to have a rule against animal cruelty. Note that a ban on animal cruelty doesn't protect an animal from being killed. You can kill your dog, typically, unless there's a specific rule against it; what you can't do is do that cruelly. So it's not quite like the sort of protection humans have from that kind of thing. And the other thing is these laws are often drafted as you cannot be cruel to an animal, but then there's a definition of animal. And following Bentham, the animals are often just mammals, the ones who we can easily identify as suffering the same way we do. There's a modern movement to recognize not suffering, but sentience. And that's a broader idea and it covers a wider range of animals, including, and this is the cutting edge, some invertebrate animals such as octopuses, who, although their common ancestor with us is a non-sentient worm from half a billion years ago. They developed sentience in their own way, in a different way to humans. And the modern movement is to include them in some animal cruelty laws. On the other hand, where you talked about taking revenge on a wasp, I'm not aware of any animal cruelty law that stops you from not just killing a wasp, but doing so cruelly. And that's because wasps and their ilk aren't regarded as sentient or even capable of suffering. Although how we know any of that is a bit of a mystery. The most modern movement in terms of animal rights is an attempt to apply some human laws for the benefit of animals or even directly to animals. And that relies on just the general nature of human law. Human laws don't usually specifically say this is only for humans. And so there'll be an attempt to say, No, here's a law, which also works for animals. An example of that is habeas corpus, where you can ask a court to identify whether there's an illegal detention. And the question is whether that can include the illegal or unlawful detention of an animal. Habeas corpus is really convenient, you don't need standing. Unlike civil actions, it applies even if the animal is properly owned by someone else. And it's a common law action, which means the courts don't have to puzzle over a statute to work out whether the principle applies to animals as well. On the other hand, and this is the real catch with all of these rights laws, if you take them to their logical conclusion, they start to impinge on human activities in some significant ways. And so if you could get habeas corpus for animals, then you could perhaps free all the pets of the world, which wouldn't necessarily be good for the pets and certainly wouldn't necessarily be good for humans who have to deal with it. And so that's the fight and it's a fight which, after we finished the book, has been taken on by the New York Court of Appeals. They're going to try and resolve the extent to which habeas corpus could apply, say, to an elephant who is in captivity in a zoo or a chimpanzee that's in captivity in some sort of other environment or lab or the like.

A

Anthony Sanders 1:00:14

Interesting. And you mentioned standing. And that is something we talk all too often on Short Circuit about, because so often people who have been harmed have trouble getting standing in court. But I do know that there's these cases where they've tried to have an animal have standing in court that you discuss in the book. Some people may remember the monkey who took a photo of him or herself, and there was a whole fight about whether there would be IP rights in that monkey. So that story is in there. But I think we have run to the end of our time. But I want to thank you both so much for coming all this way from the state of Victoria, Australia, to speak to us here in the United States. And any last words you'd like for our listeners on the subject of animals in the law?

J

Jeremy Gans 1:01:09

Oh, it's enjoyable to talk about this. And these discussions are so lovely and interesting to do. Whether you're interested in animal rights or just the law in general. And it's really interesting to be talking with other jurisdictions as well. Because we focus a little on Australia, but we always found that we had to go well beyond that to get the extent of animal law and to find lots of interesting examples and contrast in how they're dealt with.

K

Katy Barnett 1:01:38

Yeah, it's just a delight to be the first Australians on your awesome podcast.

A

Anthony Sanders 1:01:44

Well, thank you. Well, everyone should go out and check out your awesome book. Again, Guilty Pigs. We'll have a link in the show notes and a link to some of the cases that we've discussed. So thank you to both of our professor guests for coming on here. And in the meantime, I'd ask everyone else, as I always do, to get engaged.