INTEGRATING ANIMAL INTERESTS INTO OUR LEGAL SYSTEM

By
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This article explores the obstacles to obtaining legal rights for animals, both within the animal rights movement and within the broader political context. The author examines in which arena legal change might best be sought—the courts, the legislature, state governments, or the federal government. Finally, it makes a number of suggestions as to what type of laws would be the most successful in advancing the interests of animals.

I. INTRODUCTION

In the summer of 1990, the first March for the Animals in Washington, D.C. ("March") took place. The first of its kind national event attracted thousands of people interested in animal issues. The March was from the back of the White House to the steps of the Capitol Building. As we moved down Pennsylvania Avenue the chant of the marchers was "What do we want?" "Animal rights!" "When do we want it?" "Now!"

The phrase "animal rights," as chanted by the crowd, refers to legal rights and not to moral or personal philosophy;[1] changing the con-

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[1] The roots of the moral debate are centuries old, with Jeremy Bentham arguably one of the key figures in the debate. *See* Jeremy Bentham, *A Utilitarian View*, in *Animal Rights and Human Obligations*, 25–26 (Tom Regan & Peter Singer eds., 2d ed.,

ditions suffered by many animals requires that the legal system intervene when personal morals or ethics do not adequately protect animals from human abuse. However, because law is based upon the moral and ethical beliefs of the society adopting it, law is ethics by majority vote of elected officials.

The use of the term "rights" in that first March was not constructive. The general public overuses the term. It seems to generate a response of: "Here we go again—another wacky group wants something silly." A more appropriate term than "rights" is "interests," because it enhances mental clarity.[2] The legal system is about balancing the conflicting interests of society.[3] If the legal system consistently holds in a particular fact pattern for one set of individuals—as a summary of expected outcomes—it can be said that these individuals possess legal rights. Legal rights are a judged outcome of the legal process. We must more closely focus on the input side of the legal process. If we can enhance the interests of animals within the legal system, their "rights" will come into existence in the natural course of events.

Another difficulty with the protestors' chant is the word "now." It has been over a decade since that march, and it is difficult to measure how much the law has progressed on behalf of animals. It is impossible to determine when "now" will occur; the word "now" seems idealistic and naive. The word chanted in Washington, D.C. referred not to the pace of real world change, but to an idealized world in which animal rights would suddenly materialize. While everyone has dreams, changes in the legal system occur not by dreaming, but rather by thoroughly understanding the system and how it can be changed by those concerned about a particular topic.

As suggested above, the legal system provides a mechanism for resolving disputes when the beliefs and interests of individuals or groups conflict. The development of the American anti-smoking laws provides an example of this process. From the 1920s into the 1960s, smoking cigarettes was accepted and even glamorized. It was socially and legally permissible to require non-smokers to breathe the smoke of others.[4] Over the past decade, American society has decided that it is

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Prentice Hall 1989) (basing consideration for animals not on their linguistic or rational capacities, but on their capacity for suffering). This perspective was recently re-articulated by Professor Cass R. Sunstein in *The Rights of Animals*, 70 U. Chi. L. Rev. 387 (2003). *See also* Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 Harv. L. Rev. 1506 (2001) (reviewing Steven M. Wise, *Rattling the Cage* (Perseus Books 2000) (containing an overview of the various bases for legal claims regarding animals)).

[2] *See generally* Roscoe Pound, *Jurisprudence vol. III*, 3–334 (West 1959).

[3] Conflict among interests arises out of one-on-one competition between individuals; competition among groups, associations, or societies; and competition between individuals and such groups, associations, or societies—all in the endeavor to satisfy human wants and desires. *Id*. at 17.

[4] *See generally* Cassandra Tate, *Cigarette Wars: The Triumph of "The Little White Slaver"* (Oxford U. Press 1999). In the author's experience, the most oppressive examples of passive smoke exposure were in airplanes on flights to Europe in the 1990s,

ethically wrong and medically risky to expose non-smokers to second hand cigarette smoke.[5] As a result, increasingly restrictive laws, regulations, and policies now limit where a person can smoke in public.[6] Many smokers did not discriminate regarding who else had to breathe their smoke. As smokers were not changing their conduct, laws forced a change in behavior.

We have the same necessity with animal issues. Those individuals who care about animals make personal decisions based upon moral beliefs that take non-human interests into account. But there are many who are either ignorant of the issues or do not care that their actions impose pain and suffering upon animals. While education and enlightenment will change the conduct of some, only by altering the law can we force changes of behavior upon the unwilling. Then, many or most animals will receive the consideration that is due.

II. HINDRANCE TO LEGAL CHANGE

Before jumping into specific recommendations for transforming the legal system, this article first addresses the process of change, or lack thereof, in our legal system. Why has "now" not arrived? What is hindering change within the legal system?

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before smoking on such trips was banned. Several times, the author could barely breathe by the time he arrived at his destination.

[5] Not only are airplanes smoke free, but entire airport facilities are also non-smoking. Environmental Protection Agency, Indoor Air-Secondhand Smoke, *What You Can Do About Secondhand Smoke as Parents, Decision-Makers, and Building Occupants*, http://www.epa.gov/iaq/pubs/etsbro.html (last updated Sep. 25, 2003).

[6] The current set of legal restrictions against passive cigarette smoking represents the most recent portion of a second wave of public opposition. Smoking as an accepted public activity began in World War I, when cigarettes were provided to soldiers. Smoking grew in acceptance in the twenties and thirties, with the boost of advertising and the decline of preaching by social reformers. At its peak in 1965, 42% of Americans smoked. In 1994, the number of smokers had declined to 25%. The primary hook for the second wave of smoking opposition is the medical effect of passive smoking on bystanders. *See* Tate, *supra* n. 4, at 3–10 (primarily focusing on the history of the first wave of organized opposition to smoking in the United States, through the 1920s). The second wave of opposition began with the 1964 report by the Surgeon General. The first responsive step by the legal system was to assure that individuals understood the risk of the behavior—thus, the warning requirement on cigarette packages. The second approach was the adoption of taxes, in the hope that increasing the cost of cigarettes would discourage users (this positive motivation has recently been confused with the states simply seeking more income and finding sin taxes politically easy to implement). A third legal approach was to ban the sale of cigarettes to the most susceptible individuals—minors. *See generally Regulating Tobacco* (Robert L. Rabin & Stephen D. Stigarman eds., Oxford U. Press 2001). The most recent approach has been to focus on passive cigarette smoke itself. By 1997, 49 states had restrictions on smoking in public places. Peter D. Jacobson & Jeffrey Wasserman, *Tobacco Control Laws: Implementation and Enforcement*, 2–15 (Rand 1997) (discussing origins and strategies of the anti-smoking movement).

A. Within the Animal Rights Movement

This division stems from divergent visions and methodologies, as well as an unwillingness to compromise in the political arena or to join with others who do not hold the same purity of view. Human pride seems to be a major issue, hindering non-human animals from receiving the help that they need. Progressing toward a goal is not an immoral compromise simply because the advancement does not represent a full realization of a personal philosophy. It is the height of human arrogance to sacrifice the welfare of existing animals because the political system will not give complete and immediate satisfaction. In 2000, Congress passed the Chimpanzee Health Improvement, Maintenance, and Protection Act.[7] The issue before Congress was what should be done for or with the more than 1,000 chimpanzees who were part of the federal research system for many years, but are no longer needed. Congress opted to create retirement sanctuaries that are operated and supported partially by Congress and partially by non-profit organizations.[8] Though this provided positive alternatives for many chimpanzees, there was a significant split in the animal rights movement, with a number of groups opposing the legislation because it did not go far enough in that the requirement that chimpanzees be permanently retired was removed.[9]

Do we have to reach 100% agreement within the movement about the ultimate end point of legal change in order to take the next step? I hope not, because otherwise next steps will not happen. Animal rights activists lack a plan for advancing toward a better future in a systemic way. There must be focus on what should and can be accomplished in the next five years, as well as who can best accomplish it.

Many in the animal rights movement possess an incorrect understanding of property law. Progress will not be made if one's threshold engagement with the legal system is to demand that the property status of animals be eliminated.[10] It is highly unlikely that the elimination of property status will occur in the foreseeable future. To seek such abolition is unwise and unnecessary. It is unwise because the

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[7] 42 U.S.C. § 287a-3a (2000).

[8] *Id*. at § 287a-3a(e).

[9] Two organizations who opposed the adoption of the Act as finally drafted were In Defense of Animals, *Chimp Act Letter*, http://www.idausa.org/alert/currentalerts/chimpactletter.html (accessed Mar. 2, 2004); and Friends of Animals, Act'ionline, *Special Feature: Commentary and Action on the "Chimp Act"*
A Primer on the "Chimp Act" http://www.friendsofanimals.org/action/spring2002/spring2002chimp.htm (accessed March 2, 2004).

[10] Professor Gary Francione has long railed against the property status of animals and has stated that the treatment of animals will not change significantly until the property status of animals is eliminated. "Part of the confusion that plagues the modern animal protection movement is connected to the failure to realize that rights theory has at its core the rejection of the property status of animals." Gary Francione, *Animal Rights Theory and Utilitarianism: Relative Normative Guidance*, 3 Animal L. 75, 100–01 (1997).

only outcome from the adoption of this view may be the elimination of domesticated animals altogether, which the author believes is a wrong in and of itself. It is unnecessary because property law can be transformed such that ownership is redefined as guardianship, allowing animals to receive the legal respect that they deserve.[11]It is an incorrect legal analysis that the interests of animals cannot be accommodated within the legal system if they remain legal property.[12]

B. Outside the Animal Rights Movement

Traditional views and uses of animals are difficult to change within a large and complex society. As with racism, change sometimes comes only with the immergence of the next generation. This is an enormous barrier on a global basis. Where respect for human life does not exist in a society, respect for animal life is not even a shadow on the horizon.

In the past, most of what was done to animals was seen and thus judged by other humans.[13] The public would never support what happens to animals today, and for that reason, more and more animals are hidden away under conditions of which the public is not aware.[14] One of the key roles that the animal rights movement presently fills is overcoming this lack of information barrier.[15]

The political powers and financial resources of those who make money from the suffering of animals are overwhelming. This issue is vastly more important than it was 50 years ago. The impact of globalization is beyond the scope of this paper, but it continues to occur, whether we like it or not.[16] Corporations, with their money and political power, now span the globe. As a result, any use of animals in science or agriculture deemed objectionable here in the United States can be taken elsewhere. Animal activists must be aware that realizing

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[11] *See generally* David S. Favre, *Equitable Self-Ownership for Animals*, 50 Duke L.J. 473 (2000) (proposing that some progress on behalf of animals can be made by modifying the concept of property ownership; by dividing the concept of title into legal and equitable categories and then awarding the equitable title to the animal, some degree of self-ownership can be allowed without destroying the acknowledged relationship between animal and human).

[12] *See infra* § III for further examination.

[13] *See generally* Matthew Scully, *Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy* (St. Martin's Press 2002).

[14] *Id*.

[15] For examples of attempts by the animal rights movements to disseminate information on the issue of confinement agriculture, see Cem Akin, *The Serious Welfare Problems Associated With Housing Sows in Gestation Stalls and the Immediate Need for Implementation of Group Housing Systems*, http://www.kfcruelty.com/cemsgestationreport.html (accessed Mar. 2, 2004); *The Transformation of Animals Into Food: Institutionalized Cruelty: Factory Farms*, http://www.veganoutreach.org/whyvegan/animals.html (accessed March 2, 2004).

[16] *See generally* Thomas Friedman, *The Lexus and the Olive Tree* (Farrar, Straus, & Giroux 1999) (discussing the process of globalization).

change in the United States or European legal systems will be insufficient to protect animals in an increasingly globalized world.

Animal issues are never among the top three issues of the day in the media or on anyone's political agenda. It is virtually impossible to raise awareness of animal issues when war, terrorism, job losses, and access to the medical system are always given priority. Animals cannot vote or contribute to political campaigns, and it is unlikely that President George Bush will soon declare that "It is time that we do something for the animals."

III. CHANGES IN THE LEGAL SYSTEM

Assuming that the difficulties of obtaining legal change can be overcome, there are three possible focal points within the legal system where we can seek change: the executive branch, the legislative branch, and the judicial branch. Legal change can best be effectuated in the legislature or in the courts. The executive branch does have powers that can affect transformation for the benefit of animals; however, the legislature or the courts best accomplish substantial, lasting change.

A. Legislative Change

In all likelihood, the federal level of government, with its constitutional basis, is a limited avenue for addressing animal welfare concerns. Animals can be addressed at this level as articles of commerce or as the subject of international treaties.[17] These contexts can be powerful hooks for beneficial action, and have supported the passage of the Endangered Species Act of 1973[18] and the Animal Welfare Act of 1966.[19] However, it is not clear that animals could be deemed juristic persons within the scope of federal law. Animals may face the same issue as human slaves did in the *Dred Scott*[20] decision; animals do not have an acknowledged legal personality within the scope of the national constitution. Additionally, the current conservative political climate in Washington, D.C. is such that it is not wise to focus energy on animal legislation at the federal level until the climate changes.

Unlike Congress, states can and have created laws protecting the interests of animals.[21] Anti-cruelty laws, starting with Henry Bergh's New York law of 1867, have been specifically adopted in all states to prevent the infliction of cruelty upon animals.[22] There is no similar

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[17] *See e.g.* 16 U.S.C. § 1531 et seq. (1973) (United States Endangered Species Act).

[18] 16 U.S.C. § 1538 (a)(1)(F) (1973 & Supp. 2000).

[19] 7 U.S.C. § 2131 (1966).

[20] *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (holding that slave Scott could not sue for his freedom because he was not considered a citizen).

[21] *See* Wise, *supra* n. 1, at 89–118 (discussing what might convince a state common law judge to rule on behalf of animals).

[22] *See generally* David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800s*, 1993 Det. C. L. Rev. 1 (1993).

law that prohibits an owner of other types of property from harming that property. State legislatures acknowledged that animals can suffer, and society judged that they should not suffer unnecessarily. In *Stephens v. State*, the court found that "[t]his statute is for the benefit of animals, as creatures capable of feeling and suffering, and it was intended to protect them from cruelty, without reference to their being property, or to the damages which might thereby be occasioned to their owners."[23] Though animal activists would argue that the line between necessary and unnecessary pain needs to be moved, this does not change the reality that our laws can and have addressed the issue of animal suffering even while animals remain property. Over the past decade, anti-cruelty laws have slowly evolved; their scope has been enhanced and many violations of the laws are now felonies rather than misdemeanors.[24] A major shortcoming of these criminal laws is that they require government action, through the prosecutor's office, and prosecutors, as individual humans, may or may not be motivated to act on behalf of animals.

The recent implementation of new trust law illustrates the flexibility of the state legal system. With the adoption of a new provision for the Uniform Trust Act of 2000,[25] many states approved a law that allows for pet trusts. These trusts can make a pet the beneficiary of a trust. Section 408 of the Act specifically sanctions the creation of a trust for the care of an animal, along with a court appointee to enforce the trust.[26] Parallel language has been used in the Uniform Probate Law.[27] While this law will not impact a large number of animals, and

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[23] *Stephens v. State*, 3 So. 458, 459 (Miss. 1888).

[24] By the end of 2003, 41 states had legislated some form of felony provision in their anti-cruelty statutes. *See* Animal Legal Defense Fund, *Felony States List*, http://www.aldf.org/uploads/Felony_Status_List.pdf (June 20, 2003) (listing of states with and without felony animal abuse provisions). *See also* Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 Animal L. 69 (1999) (survey of state anti-cruelty laws).

[25] Unif. Trust Code § 408, 4 U.L.A. 408 (2000) (amended 2001 and 2003).

[26] Trust for Care of Animal:

(a) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

Id. at § 408.

[27] Unif. Prob. Code § 2-907 (1990) (revised 1993), as adopted by Arizona. Note also Arizona's version of the pet trust statute:

A trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust. A governing instrument shall be liberally construed to bring the transfer within this subsection, to presume against the merely precatory or honorary nature of the disposition and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent.

Ariz. Rev. Stat. Ann. § 14-2907(B) (West 1994).

it does not alleviate suffering, this legislation does represent a conceptual breakthrough for the United States legal system. Animals have been granted legal personhood for purposes of trust enforcement. This fact demonstrates that there is no inherent limitation of the legal system of the states that limits the interests of animals, even though they are still considered property. For the narrow purpose of probate and trusts, animals are juristic persons with equal rights before the court.

At the state legislative level, the possibilities for furthering the interests of animals are wide open, but not many activists target this level because they think that a national program would be more advantageous. For the next decade, the building process for animal rights should be primarily focused at the state level. It is at the state level that the laws of property are molded. Three suggestions for subsequent steps in the state legislative arena include:

1. Modify divorce laws such that a judge decides issues relating to pets in the best interests of the animal and not on the basis of property ownership.[28]
2. Adopt laws that allow qualified individuals and organizations to bring criminal prosecutions for violations of state anti-cruelty laws.[29]
3. Clarify the law regarding pet adoption from a public or private agency such that the organization retains the ability to intervene on behalf of the animal. If the new owners/guardians do not fulfill their obligations toward the animal, the agency ought to be able to step in and correct the problem.

While these may seem modest goals given the present extent of animal suffering, building up the legal system in diverse situations will lay a firm foundation for future action. Articulating the interests of animals in the legal system will allow more formidable action in the future against vested economic interests like agriculture and science. A legal beachhead must be secured before activists can engage in the larger battles. A more positive future for animals will not be obtained by revolution, but by the evolution of the status of animals.

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[28] While there is considerable dispute about what legal test ought to be used in divorce custody proceedings, "the most common judicial determination, (whether formulated by a legislature or by an appellate court) continues to be the 'best interests test.'" *Legal and Mental Health Perspectives on Child Custody Law: A Deskbook for Judges*, 22 (Robert Levy ed., West Group 1998); Mich. Comp. Laws Ann. § 722.23 (West 1970) (an example of a state law listing criteria for implementing the "best interest of the child" standard).

[29] Today, it is not unusual for larger humane societies with full-time investigators to integrate their investigations at some level with local police or sheriff departments. *See e.g.* Michigan Humane Society, http://www.mihumane.org/html/animalCops/index.HTML (accessed Mar. 10, 2004). A similar system should be implemented at the prosecution level, with attorneys who could substitute for prosecutors in anti-cruelty proceedings.

B. Legal Change through the Courts

Courts possess limited power, but their opinions can set a tone. In the early 1970s, the federal courts supported a citizen-driven environmental law movement, allowing liberal access to the courts by citizens seeking to direct the government or to halt harmful projects.[30] It was a mere five years ago that activists experienced the first such judicial support for animal welfare issues. The District of Columbia Court of Appeals found that a particular individual had standing under the Animal Welfare Act to question the decisions of a federal agency.[31] Since then, a few similar cases have been allowed to proceed on the merits,[32] but because the United States Supreme Court has not yet considered the question, it cannot be considered settled as a matter of law. As with the power of state legislatures, state courts have the capacity to benefit animals.[33]

Again, activists must consider how they want the courts to proceed on behalf of animals. Animal interests, such as freedom from assault, should be asserted in the courts just as we assert human interests. While some seek a legal trump card, where animal interests will always win over the human interests, it is unlikely to occur in the foreseeable future. The first step is encouraging the courts to consider balancing the interests of humans with those of non-humans in more complex circumstances. When non-humans interests win more often than they do now, the number of victories will grow. If activists can argue animal interests, legal rights will follow.

C. A New Tort

To further foster a new perspective regarding the interests of animals in the legal system, the author proposes the creation and recognition of a new legal tort to be used by animals against humans. Fundamental to the concept of a tort is the creation and existence of a duty obligating one being to take into account the interests of another. It is the role of the common law courts to determine whether a particular moral claim or interest asserted by a plaintiff will be accepted by a court, resulting in the imposition of a legal duty upon others to accommodate the newly affirmed interest. As moral perspectives change and

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[30] *See* National Resources Defense Council, *Environmental Legislation: In Brief: History: E-law: What Started It All?*, http://www.nrdc.org/legislation/helaw.asp (last updated May 5, 2000) (historical review of the roots of environmental law).

[31] *Animal Leg. Def. Fund v. Glickman*, 154 F.3d 426, 432 (D.C. Cir. 1998).

[32] *See Am. Socy. for Prevention of Cruelty to Animals. v. Ringling Bros. and Barnum & Bailey Circus*, 317 F.3d 334, 335 (D.C. Cir. 2003) (ruling that plaintiff had standing arising out of his concern for the well-being of an elephant that he had seen abused while in the employment of the defendant, and therefore could bring an action under the Endangered Species Act to determine if defendant's actions "harmed" the elephant in violation of the Act).

[33] *See generally* Wise, *supra* n. 1 (fully developing this topic).

society evolves, courts may find the existence of a duty where none existed before.[34]

The asserted duty of this new tort is that humans must not interfere with the fundamental interests of an animal unless the individuals are asserting a more important, human interest. Under this cause of action, the plaintiff, an animal, must demonstrate the following elements:

1. An interest of fundamental importance to the plaintiff animal, and
2. interference with that fundamental interest or harm by the actions or inactions of the defendant, and
3. the weight and nature of the animal plaintiff's interests substantially outweigh the weight and nature of the defendant's interests.

While this may seem novel and unsupportable to some, the duty not to interfere with the fundamental interests of animals has long existed, but the duty has previously been owed to the government rather than to the animal. As discussed above, for more than 100 years, criminal law (that has been adopted in every state of the union) has imposed the duty to not inflict pain and suffering upon an animal without justification, as well as an affirmative duty to care for animals within an individual's possession and control.[35] This proposed tort simply allows for recognition of a comparable duty on the civil side of the legal system.

This is but a logical next step. It is the well-being of the animal that is the focus of concern in the first place, so why tie the duty directly to the being that deserves the protection and consideration? Implementation of this obligation will then be more efficient. As might be conjectured, a number of reasons arise making it difficult for the government, through the offices of the local prosecuting attorneys, to enforce this duty. Thus the presence of a civil action will allow new resources, not politically or economically limited, to support the animals in asserting their interests. The duty not to interfere with the fundamental interests of animals presently exists. It is a matter of how the legal system will impose the obligations of this duty.

Three remedies shall be available for violation of this tort: money damages, injunctive relief,[36] and title transfer. The expected remedy for violation of a tort is money damages of a sufficient amount to "make the plaintiff whole." Damages should also be available under this tort, in the amount necessary to eliminate interference with the fundamental right of an animal. If pain and suffering were part of the

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[34] *See* David Favre, Conference, *The Evolving Legal Status of Chimpanzees* (Harvard Law School, September 30, 2002), in 9 Animal L. 1, 31–40 (2003) (outlining the philosophical and legal underpinnings for this new tort).

[35] *See e.g.* Sarah J. Williams, *Detailed Discussion of Michigan Anti-animal Cruelty Law*, http://www.animallaw.info/articles/ddusmianimalcruelty.htm (accessed Mar. 2, 2003).

[36] *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 640–41 (W. Page Keeton ed., 5th ed., West 1984) (discussing the availability of injunctive relief for a continuing nuisance).

plaintiff animal's experience, then, as with humans, some compensation is appropriate to ensure that such conditions do not recur.[37]

IV. CONCLUSION

Enhancing the status of animals in the legal system is a critical task, one that requires much thought and planning. It is a task that appears to be without end, composed of many small steps. The law follows the development of sentiment within society, yet it seldom leads that sentiment. While we in the United States are doing much to develop the attitude of the general public toward animals, we are at the threshold of understanding what needs to occur in the legal system. This article hopefully provided some insight as to what might be done on behalf of animals.

[37] For example, the money could be put into a trust with a court appointed trustee who would be under the obligation to expend the money for the benefit and well-being of the animal in question.