COMMENTS

CREATING A PRIVATE CAUSE OF ACTION AGAINST ABUSIVE ANIMAL RESEARCH

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Animals have been the subject of scientific research and experimentation since the third century B.C.[1] Although painful experiments are no longer justified by resorting to the Cartesian view that animals are simply machines,[2] research on animals continues in the hope of discovering answers to medical and biological questions. With the development of an active movement for the recognition of animal rights, however, both the use of animals in research and the pain that is inflicted on them in the name of science are coming under increasing scrutiny.[3]

Scientists have exercised almost exclusive control over the use of animals to further scientific knowledge. As a number of commentators have shown, however, the scientific community often fails to account adequately for animals' interests in research projects.[4] Examples of questionable research include the mutilation of cats to observe the effects of physical changes on their sex lives,[5] subjecting baboons to simulated car accidents to test the safety of automobiles,[6] and administering doses of radiation to monkeys to test the effect on their ability to turn a wheel.[7]

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[1] *See* A. ROWAN, OF MICE, MODELS, AND MEN: A CRITICAL EVALUATION OF ANIMAL RESEARCH 42 (1984).

[2] *See* Descartes, *Animals Are Machines,* in ANIMAL RIGHTS AND HUMAN OBLIGATIONS 60 (1976).

[3] *See* Robbins, *Animal Rights: A Growing Movement in U.S.,* N.Y. Times, June 15, 1984, at A1, col. 3. For a discussion of the philosophical basis for granting animals' rights, see generally T. REGAN, THE CASE FOR ANIMAL RIGHTS (1983); P. SINGER, ANIMAL LIBERATION (1975). These two books offer utilitarian and neo-Kantian arguments for the recognition of rights of animals.

[4] *See, e.g.,* A. ROWAN, *supra* note 1, at 167-76; P. SINGER, *supra* note 3, at 28-80.

[5] *See* Singer, *Ten Years of Animal Liberation,* N.Y. REV. BOOKS, Jan. 17, 1985, at 46-47.

[6] *See* A. ROWAN, *supra* note 1, at 168-69.

[7] *See* Singer, *supra* note 5, at 48.

It is open to debate when, and if, research on animals is justified as a means of acquiring medical knowledge to benefit humans. At the same time, it is clear that the level of pain that animals are frequently subjected to and the trivial nature of some of the experiments are unacceptable. Animals must be provided with more respect than they are currently receiving inside research facilities.

In a system in which animals do not have legal rights,[8] the question of how to ensure adequate protection of animal interests in the laboratory is problematic. One possible answer is to promote legislation at the state level that will recognize animals as having certain legal rights.[9] This solution provides an answer to the inadequacies of current state anticruelty laws.[10] Another possibility is to turn to the federal government for improved regulations on the use of laboratory animals.[11] These approaches, however, share a common difficulty: the need to wait for legislative action before animals can be protected. In light of the current abuses, it is necessary to examine possible means by which animals can be afforded some protection under existing law.

This Comment proposes that animal rights groups be given a cause of action against unjustifiable research[12] under state anticruelty laws. Part I argues that current federal regulations, which place exclusive control over research in the hands of scientists, provide inadequate protection for animals and that state law can be used to enforce humane standards of care. Part II proposes a public nuisance action as a means of obtaining injunctive relief against experiments that violate state anticruelty laws. Part III discusses granting standing to societies for the prevention of cruelty to animals (SPCA's) and other animal rights groups in public nuisance actions as a response to the lack of enforcement of anticruelty statutes by public authorities. Part III concludes that these groups should have standing in light of the liberal approach that state courts have taken towards standing in other areas

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[8] *See* Dichter, *Legal Definitions of Cruelty and Animal Rights,* 7 B.C. ENVTL. AFF. L. REV. 147, 151 (1978).

[9] *See* Burr, *Toward Legal Rights for Animals,* 4 ENVTL. AFF. 205, 231-44 (1975) (proposing a model act to regulate the use of animals in research); Comment, *Rights for Non-Human Animals: A Guardianship Model for Dogs and Cats,* 14 SAN DIEGO L. REV. 484, 491-506 (1977) (proposing that legislatures provide for the possibility of legal guardians for animals).

[10] *See infra* notes 84-85 and accompanying text.

[11] *See* Comment, *Use of Animals in Medical Research: The Need for Governmental Regulation,* 24 WAYNE L. REV. 1733, 1749-51 (1978).

[12] The exact line that should be drawn as to what constitutes unjustifiable research is not addressed in this Comment. The purpose of this Comment is to suggest a cause of action that would enable societies for the prevention of cruelty to animals and animal rights groups to litigate the scientific and moral issues surrounding animal experimentation. *See infra* notes 71-74 and accompanying text.

of the law. Although there are many problems with applying the notoriously weak anticruelty statutes to laboratory research, it is hoped that this approach will put an end to the most egregious cases of animal abuse and will spur legislatures and the scientific community into making real changes in the treatment of laboratory animals.

I. APPLYING ANTICRUELTY STATUTES TO LABORATORY RESEARCH

The use of animals in laboratory research has become an issue of broad public debate. The recent outcry over the Department of Defense's plan to shoot dogs in order to train doctors in treating combat injuries illustrates that the concern over animal rights is no longer confined to a small group of animal rights advocates.[13] Public exposure of the nature of some of the experiments—the sex manipulation research on cats[14] and the baboon car crash tests,[15] for example—is resulting in both a marked increase in the membership of animal rights groups and a growing sentiment that public control should be exerted over the work performed in the laboratory.[16] The position that "almost any cruelty [is] tolerated in American laboratories if it [is] perpetrated by a man in a white lab-coat with letters after his name"[17] is no longer widely accepted. The American public's faith in scientists has been shaken by the dissatisfaction many feel towards the balance science has struck between animal and human interests.

The imposition of public control over laboratory research has raised concerns on the part of the scientific community about intrusions into academic and scientific freedom. In the recent prosecution of Dr. Edward Taub for violations of Maryland's anticruelty laws,[18] his sup-

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[13] *See Weinberger Halts School's Plan to Shoot Dogs,* Washington Post, July 27, 1983, at C1, col. 2 (discussing the outcry from Congress and animal welfare advocates over military plans to shoot dogs for medical research); *see also* P. SINGER, *supra* note 3, at 28 (The Department of Defense received more letters protesting the use of beagles for poisonous gas tests than for any other event.).

[14] In the 1970's the Museum of Natural History conducted research on the effects of certain physical mutilations—including "destruction of sense of smell, removal of parts of the brain, castration, and severing the nerves to the penis"—on the sex lives of cats. *See* A. ROWAN, *supra* note 1, at 165. A public campaign against these experiments succeeded in terminating this research project in 1977 in favor of one in which animal behavior was studied in more natural settings. *See id.*

[15] *See id.* at 168-69.

[16] *See* Robbins, *supra* note 3, at A1, A14.

[17] C. NIVEN, HISTORY OF THE HUMANE MOVEMENT 129 (1967). In Niven's view, a major reason for the failure to date of the antivivisectionist movement is the high esteem in which the public holds scientists. *See id.* at 128-29.

[18] Dr. Edward Taub was charged with 17 counts of violating anticruelty statutes and was convicted on one. *See* Taub v. State, 296 Md. 439, 441, 463 A.2d 819, 820

porters argued that application of these statutes to laboratory research threatened scientific freedom.[19] This challenge to public control as a threat to the autonomy of the scientist has been largely successful in Congress. As the *Senate Report to the Laboratory Animal Welfare Act*[20] noted, "[T]he committee was very careful to provide protection for the researcher . . . by exempting from regulation all animals during actual research or experimentation."[21]

To argue that the imposition of public controls would violate scientific freedom ignores the fact that scientists' freedom is already curtailed by the need to file for grants and receive funding from outside sources. As one commentator has noted, "Funding agencies provide support for their research missions, not the whims and fancies of the researcher scientist."[22] The separation between the scientific community and the rest of the public is equally unsound. In this age of massive federal funding of research,[23] it is unrealistic to think of science as operating outside the public domain. With the heavy involvement of the government, and hence, the public, in current research, the issue becomes "not whether to impose social control, but how to do so."[24]

A. *The Inadequacy of Federal Regulations*

The Animal Welfare Act of 1970[25] (the Act) is the heart of federal regulation over the use of animals by research laboratories.[26] Licensing

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(1983). This conviction was overturned on the grounds that the statute did not apply to federally funded research. *See id.* at 444-45, 463 A.2d at 822; *see also* text accompanying notes 48-55 (discussing *Taub*).

[19] *See* A. ROWAN, *supra* note 1, at 175.

[20] S. REP. NO. 1281, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2635.

[21] *Id.* at 56, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2637.

[22] A. ROWAN, *supra* note 1, at 275.

[23] The federal government's support of research involving laboratory animals was estimated to be over $1.5 billion in 1972. *See* Regan, *Introduction* to ANIMAL RIGHTS AND HUMAN OBLIGATIONS 3 (1976).

[24] Goldberg, *Controlling Basic Science: The Case of Nuclear Fusion,* 68 GEO. L.J. 683, 684 (1980). This Comment assumes that it is constitutionally permissible for the state to regulate the methods chosen by scientists for research. For discussions of the first amendment implications of governmental regulation of science, see, for example, Delgado, *Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race-IQ Research,* 31 UCLA L. REV. 128 (1983); Ferguson, *Scientific Inquiry and the First Amendment,* 64 CORNELL L. REV. 639 (1979); Robertson, *The Scientist's Right to Research: A Constitutional Analysis,* 51 S. CAL. L. REV. 1203 (1978).

[25] 7 U.S.C. §§ 2131-2156 (1982).

[26] The first federal legislation dealing with the regulation of the use of animals by research laboratories was the Act of Aug. 24, 1966, Pub. L. No. 89-544, 80 Stat. 350 (codified as amended at 7 U.S.C. §§ 2131-2156 (1982)). The 1966 Act arose out of a storm of public protest caused by a *Life* magazine story detailing the abuse of animals

and recordkeeping requirements are imposed on animal dealers, carriers, and research facilities to prevent the theft of animals for sale to laboratories.[27] All warmblooded animals designated by the Department of Agriculture are subject to regulations governing their care during transportation.[28] The Act, however, is far too limited to provide real protection for laboratory animals.

Although the House Report to the Act included the statement that "animals should be accorded the basic creature comforts of adequate housing, ample food and water, reasonable handling, decent sanitation, sufficient ventilation, shelter from extremes of weather and temperature, and adequate veterinary care including the appropriate use of pain killing drugs,"[29] Congress refused to place any restrictions on the actual research performed by scientists. The Act explicitly states that the Secretary of Agriculture is not authorized to regulate the actual research "as determined by such research facility."[30] Congress has chosen to leave it up to the scientific community to ensure that research is performed with "compassion and with care,"[31] refusing to legislate any duties on the researchers beyond the filing of annual reports to show that their care and use of animals meets professionally acceptable standards.[32]

Congress's expectation that animals will be treated with compassion and care has not been fulfilled. After reviewing current practices, one commentator concluded that "a careful and detailed reading of the research literature . . . reveals far too many cases where a little more thought would have resulted in a lot less animal suffering."[33] In one experiment, for example, four monkeys were placed in restraining chairs, and steady force was applied to their facial bones for 84 to 205

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by dealers. *See* Stevens, *Laboratory Animal Welfare,* in ANIMALS AND THEIR LEGAL RIGHTS: A SURVEY OF AMERICAN LAWS FROM 1641 TO 1978, at 46 (3d ed. 1978). The Act provided protection only for certain animals—dogs, cats, monkeys, guinea pigs, hamsters, and rabbits. *See* Act of Aug. 24, 1966, § 2(h), 80 Stat. at 351. For a detailed history of the 1966 Act, see Stevens, *supra,* at 46-49.

[27] *See* 7 U.S.C. §§ 2131, 2133, 2140 (1982).

[28] *See* 7 U.S.C. § 2143 (1982).

[29] H. REP. NO. 1651, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5103, 5104.

[30] 7 U.S.C. § 2143(a) (1982). Bills are now before the House of Representatives and the Senate that would require the Secretary of Agriculture, acting through the Director of the National Institutes of Health, to establish guidelines for the care and treatment of animals during the actual research process. *See* H.R. 2409, 99th Cong., 1st Sess. § 493(a) (1985); S. 1309, 99th Cong., 1st Sess. § 493(a) (1985).

[31] H. REP. NO. 1651, *supra* note 29, at 2, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS at 5104.

[32] *See* 7 U.S.C. § 2143(a) (1982).

[33] A. ROWAN, *supra* note 1, at 173.

days to study the possibility of treating human skeletal deformations.[34] The result of the experiment: two monkeys died, all suffered severe inflammations, and the researchers concluded that in light of current technology, "the clinical application of the present investigation is questionable."[35] In head injury tests at the University of Pennsylvania, precise amounts of pressure were applied to monkeys' heads with a pneumatic hammer-like mechanism. Helmets that had been placed on the monkeys' heads were then removed by the researchers with hammers and chisels, thus raising serious doubts about the validity of the researchers' findings as well as concerns about the level of pain to which the monkeys were subjected.[36] The failure of the Animal Welfare Act to fulfill its goal of ensuring that "animals intended for use in research facilities . . . are provided humane care and treatment,"[37] can be ascribed to two basic problems: the level of discretion that the scientist retains under the Act, and the lack of enforcement of the provisions that are in place.

By allowing scientists much, if not total, discretion in the design and implementation of experiments, the Act has failed to counteract pressures that lead to the abuse of animals in the laboratory. Scientists are not cruel people. Their education, however, has taught many of them to view animals as "mere tools" to be used to further their professional and altruistic goals.[38] These other interests tend to prevail over concerns about the interests of animals. Moreover, as one physician stated, "some scientific problems are not really worth solving."[39] Persons intimately involved in the pursuit of knowledge may at times lose sight of what is truly necessary to learn.

The second problem with the Animal Welfare Act is the reluctance of the Department of Agriculture to enforce the existing provisions.[40] In the first decade of federal regulation in this area, only two

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[34] *Id.* at 167-68.

[35] *Id.* at 168.

[36] *See* Pothier, *Penn Will Discuss Its Animal Research,* Philadelphia Inquirer, Dec. 19, 1984, at 3-B, col. 1.

[37] 7 U.S.C. § 2131 (1982).

[38] *See* P. SINGER, *supra* note 3, at 46-48.

[39] Goldman, *Controversial Aspects of Current Animal Experimentation,* in ANIMAL RIGHTS—A SYMPOSIUM 192 (1979).

[40] The Department of Agriculture has never been an enthusiastic supporter of the legislation. In 1966 it expressed concern over the inclusion of research facilities in the requirements of the Act of Aug. 24, 1966, Pub. L. No. 89-544, 80 Stat. 350 (codified as amended at 7 U.S.C. §§ 2131-2156 (1982)). *See* S. REP. No. 1281, *supra* note 20, at 10-12, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2643 (letter from Secretary of Agriculture to Chairman of Commerce Committee (Mar. 25, 1966)). During the debate over the Animal Welfare Act of 1970, Pub. L. No. 91-579, 84 Stat. 1560 (1970), the Department advocated giving responsibility for enforcement to the Depart-

persons were prosecuted.[41] The annual reporting requirement has not spurred the Department into taking action in questionable cases. Despite the refusal of the campus veterinarian at the University of California at Berkeley to sign the annual reports, and repeated criticism of the facilities by federal investigators, no action was taken against the University until a local television station ran an exposé on the conditions of the animal facilities.[42] The performance of the agency charged with the enforcement of the Act demonstrates the difficulty of protecting laboratory animals through existing legislation.

The National Institutes of Health (N.I.H.) has attempted to exert some control over the treatment of animals in federally funded research through the adoption of a *Guide for the Care and Use of Laboratory Animals*[43] and by requiring that annual assurances of adequate treatment of animals be filed with the N.I.H.'s Office for Protection from Research Risks.[44] Despite the optimism of some,[45] there does not appear to be any reason to expect that these reports will be more effective than the Animal Welfare Act's reporting requirement—especially since the N.I.H. was a vocal opponent of federal regulation when it was first proposed.[46] Moreover, the essential element of the agency's review pro-

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ment of Health, Education & Welfare. *See* H. REP. NO. 1651, *supra* note 29, at 3, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS at 5105 (letter from Undersecretary of Agriculture to Chairman of Committee on Agriculture (June 9, 1970)). In 1976 the Department opposed amendments to the Animal Welfare Act in favor of unspecified alternative measures. *See* H. REP. NO. 801, 94th Cong., 2d Sess. 14-15, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 758, 766-67 (letter from Assistant Secretary of Agriculture to Chairman of Committee on Agriculture (Sept. 25, 1975)).

The Department's opposition to improved regulations has continued. During the 98th Congress the Department's representative testified against a bill that would have required the Secretary to develop standards of care for laboratory animals, claiming that "the bill would create unnecessary oversight procedures." *Improved Standards for Laboratory Animals: Hearing on S. 657 Before the Senate Comm. on Agriculture, Nutrition, and Forestry,* 98th Cong., 1st Sess. 6 (1983) (statement of Bert Hawkins, Administrator, Animal and Plant Health Inspection Service, Department of Agriculture) [hereinafter cited as *Improved Standards for Laboratory Animals*].

[41] *See* Rikleen, *The Animal Welfare Act: Still a Cruelty to Animals,* 7 B.C. ENVTL. AFF. L. REV. 129, 137-38 (1978).

[42] *See* A. ROWAN, *supra* note 1, at 174-75.

[43] COMMITTEE ON CARE AND USE OF LABORATORY ANIMALS, INSTITUTE OF LABORATORY ANIMAL RESOURCES, NATIONAL INSTITUTES OF HEALTH, GUIDE FOR THE CARE AND USE OF LABORATORY ANIMALS (rev. ed. 1978).

[44] *See* 41 C.F.R. § 3-4.5802 (1984).

[45] Thomas Malone, of the Office of the Director of the N.I.H., has suggested that the written assurances provide protection for laboratory animals because they must be acceptable in order for the scientist to receive funding. *See* Malone, *Toward Refinement, Replacement and Reduction in the Care and Use of Laboratory Animals,* in SCIENTIFIC PERSPECTIVES ON ANIMAL WELFARE 12-13 (1982).

[46] *See* Stevens, *supra* note 26, at 47-48. One of the reasons why the Department of Agriculture rather than the N.I.H. was charged with enforcement was the N.I.H.'s opposition to any regulation. *See id.* at 48-49. This distrust of the N.I.H. appears to be

cess is the "peer review system."[47] Peer review, however, has not provided effective protection of animal interests.

The case of *Taub v. State*[48] illustrates the ineffectiveness of a peer review system. Dr. Taub was charged with seventeen counts of violating Maryland's anticruelty statutes and was convicted on one.[49] Although Taub's conviction was overturned by the Maryland Court of Appeals on the grounds that the anticruelty statute did not apply to federally funded research projects,[50] the care accorded monkeys in his research project raises serious questions about the adequacy of the peer review process. In one of his grant applications, Taub proposed to spend fifty-five cents per day on maintenance for each monkey, whereas the national average for care for normal monkeys was $2.50 to $4.00 per day.[51] When the police went into his laboratory, they discovered monkeys with open wounds from self-amputation[52] and a disturbing lack of hygiene, including cages "caked with feces."[53] Further investigation uncovered substantial evidence of a lack of veterinary care for Taub's monkeys.[54] The animal care committee at Taub's laboratory failed to act on this deplorable level of care. Indeed, one member of the committee is said to have assumed that the treatment of the monkeys was satisfactory simply because the laboratory had been inspected by the Department of Agriculture and the project was funded by the N.I.H.[55]

Another showing of the failure of peer review involves the N.I.H.-funded head injury tests at the University of Pennsylvania. These tests were funded by the N.I.H. for thirteen years.[56] After animal rights activists stole and released tapes of the experiments, public outcry led to

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lessening. Two bills before Congress give the N.I.H. the responsibility for developing guidelines for the care of animals and require that violations be reported to the N.I.H. *See* H.R. 2409, *supra* note 30, at § 493; S. 1309, *supra* note 30, at § 493.

[47] *See The Use of Animals in Medical Research and Testing: Hearings Before the Subcomm. on Science, Research and Technology of the House Comm. on Science and Technology,* 97th Cong., 1st Sess. 66 (1981) (statement of Dr. William Raub, Associate Director for Extramural Research and Training, National Institutes of Health) [hereinafter cited as *Hearings on Medical Research*].

[48] 296 Md. 439, 463 A.2d 819 (1983).

[49] *See id.* at 441, 463 A.2d at 820.

[50] *See id.* at 444-45, 463 A.2d at 822.

[51] *See* A. ROWAN, *supra* note 1, at 176.

[52] *See* White, *Police Raid Lab, Seize Animals,* Washington Post, Sept. 12, 1981, at A1, col. 2.

[53] Singer, *Ten Years of Animal Liberation, supra* note 5, at 47.

[54] *See* A. ROWAN, *supra* note 1, at 62.

[55] *See Hearings on Medical Research, supra* note 47, at 43 (statement of Alex Pacheco, Chairperson, People for Ethical Treatment of Animals).

[56] *See* Heidorn, *Penn Halts Injury Tests on Animals: "Serious Concerns" Prompted Decision,* Philadelphia Inquirer, July 25, 1985, at 1-B, col. 1.

investigations by both the N.I.H. and the University.[57] Four different academic groups approved of the research and methodology.[58] Continued investigation by the Department of Health and Human Services, however, led the Department to order the N.I.H. to suspend federal funding because "serious concerns [had] been raised about the procedures."[59] The reluctance of the scientific community to condemn these experiments reinforces the view that peer review cannot adequately protect animals.

That the peer review process is unsatisfactory should come as no surprise. When individuals in research institutions criticize the treatment of animals, the response tends to be an attack on the person rather than an investigation of the criticism.[60] Although one can hope that these institutions will become more responsive to internal criticisms, there is a deeper reason to be skeptical of the adequacy of peer review. The process of peer review "reflects rather than challenges the status quo."[61] Since it is the status quo that must be challenged, it is doubtful that peer review can serve to improve the level of care that animals are currently receiving.

One solution may be to copy Sweden's example and include lay persons on oversight committees to monitor the treatment of laboratory animals.[62] Review at the institutional level by such committees may well be the ideal approach to the problem of ensuring adequate representation of animal interests.[63] The inclusion of lay persons on animal

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[57] *See* Pothier, *Animal-Research Aid Cut Off at Penn,* Philadelphia Inquirer, July 19, 1985, at 1-A, col. 1.

[58] *See id.*

[59] *Id.*

[60] For examples of the response of research institutions to internal criticisms, see A. ROWAN, *supra* note 1, at 36-38. As Andrew Rowan reports, although questions are raised in the scientific community from time to time, laboratories tend to stifle criticisms. Responses have included attempts to discredit the critic's work, as well as forced resignations. *See id.*

[61] *Id.* at 279.

[62] In Sweden a scientist must receive the approval of an oversight committee consisting of a scientist, a technician, and a layperson before beginning an experiment on animals. *See* Öbrink, *Swedish Law on Laboratory Animals,* in SCIENTIFIC PERSPECTIVES ON ANIMAL WELFARE 56 (W. Dodds & F. Orlans eds. 1982). If the proposed experiment does not adequately account for the animals' interests, the committee works with the scientist to develop an alternate experimental method. Further, the local health authorities receive reports on each experiment. *See id.* at 56-58.

[63] The composition of such committees has provoked some debate among persons concerned with protecting the interests of laboratory animals. Andrew Rowan has suggested that each committee should include "at least one member who is specifically charged with looking after the interests of the animals." A. ROWAN, *supra* note 1, at 280. Another noted animal rights advocate, Peter Singer, has responded to this suggestion by proposing that "[i]t would be more appropriate to have a balance between those representing the interests of the animals, and those representing the researchers, with

care committees, however, is not the norm in this country.[64]

By leaving the research process to the sole discretion of scientists, the federal regulations have failed to provide adequate protection for laboratory animals. Examples of unacceptable treatment of animals and questionable experiments[65] illustrate that the current regulatory scheme offers inadequate assurances that the interests of laboratory animals will be respected. That the N.I.H. eventually suspended the funding of the head injury experiments at the University of Pennsylvania and ordered the University to review all of its laboratories and open them to federal investigators[66] does not indicate that the regulatory process is working. It is encouraging that the N.I.H. took these steps, but it did so well over a year after the laboratory tapes were stolen and publicized.[67] During this time, the tests continued. If the treatment of laboratory animals is to be improved under current laws, an alternative to federal regulation is needed.

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some tie-breaking neutral members." Singer, *supra* note 5, at 48.

[64] The Department of Health and Human Services requires that research facilities receiving federal funding have an animal care committee that includes a veterinarian. *See* 41 C.F.R. § 3-4.5804(a)(2) (1984). Despite hopes that a veterinarian may be more sensitive to the needs of animals, veterinarians as a whole go through much the same training process as other researchers and, thus, may not be any more attentive to the needs of animals. *See* P. SINGER, *supra* note 3, at 74-76. As long as the sole protection for animals is in the hands of the scientific community, one cannot hope for real improvement in the care of animals.

Currently, both the House of Representatives and the Senate have bills before them that would require the animal care committee to include at least one individual not associated with the research facility. *See* H.R. 2409, *supra* note 30, at § 493(b); S. 1309, *supra* note 30, at § 493(b). Although this change in the composition of animal care committees might improve their effectiveness to some extent, there are reasons to be skeptical. First, there is no requirement that the committee include a lay person. Second, the role of the committee is limited to "evaluat[ing] compliance with applicable guidelines established under [the previous subsection of the bill] for appropriate animal care and treatment." *Id.* § 493(b)(3)(A); *see also supra* notes 29-32 and accompanying text (discussing standards of care under existing and proposed legislation). Finally, the committees have no power to disapprove proposed research; rather, their role is limited to "report[ing] violations of NIH guidelines first to their institutions and, if a violation continues, then to NIH." H.R. REP. NO. 158, 99th Cong., 1st Sess. 40 (1985). Animals will have to be subjected to violations of the guidelines before any attempt can be made to stop the experimentation. A far preferable approach is the one adopted by Sweden. *See supra* note 62.

[65] *See supra* text accompanying notes 33-36.

[66] *See* N.Y. Times, Oct. 5, 1985, at A7, col. 4.

[67] The tapes were stolen on Memorial Day, 1984. *See* Robbins, *supra* note 3, at A1, col. 3.

B. *Intervention by the States in the Treatment of Laboratory Animals*

1. The Use of State Anticruelty Statutes

State anticruelty statutes embody the public consensus that persons have duties to animals.[68] The common-law position that animals were property and "could be exploited, used, abused, or dispatched at [the owner's] pleasure"[69] has been rejected in favor of defining acceptable levels of care, applicable to the owner as well as others. In most states, the infliction of unnecessary or unjustified pain on animals is a violation of the state anticruelty statute.[70] That there may be some benefit to humans from a particular experiment should not preclude insisting that scientists adhere to these statutory limits in their use of laboratory animals.

Advocacy of the application of state anticruelty laws does not require that all scientific experimentation involving animals cease. Rather, it requires that such experimentation be justifiable to the public.[71] The fear that the courts will become entwined in a scientific inquiry in which they lack the expertise to adjudicate the issue should not prevent courts from hearing these cases. In cases in which the issue revolves around the quality of the experiment—whether the research project is properly designed[72]—courts can avail themselves of the plethora of expert witnesses that both sides will undoubtedly call forth. In other cases, even if a proper design has been established, the issue will be whether the pain inflicted upon the animals is justifiable in terms of the asserted benefits to humans.[73] This is largely a moral issue, and

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[68] *See* Burr, *supra* note 9, at 229.

[69] *See* Friend, *Animal Cruelty Laws: The Case for Reform,* 8 RICHMOND L. REV. 201, 201 (1974).

[70] *See id.* at 205; *see also* CAL. PENAL CODE § 597 (West 1970 & Supp. 1984) (directed at anyone who "inflicts unnecessary cruelty"); DEL. CODE ANN. tit. 11, § 1325(a)(2) (1974 & Supp. 1984) ("unnecessary or unjustifiable physical pain or suffering"); 18 PA. CONS. STAT. § 5511 (1982). For a review of the law in all 50 states, see D. MORETTI, ANIMAL RIGHTS AND THE LAW (1984).

[71] *See* Leavitt & Halverson, *The Evolution of Anti-Cruelty Laws in the United States,* in ANIMALS AND THEIR LEGAL RIGHTS, *supra* note 26, at 20-27 (reviewing qualifying language in state anticruelty laws); *see also* 3A C.J.S. *Animals* § 101 (1973) ("The test of whether the injury inflicted constitutes that cruelty forbidden by statute is whether the injury inflicted on the animal was, under the circumstances, justifiable.").

[72] An experiment is improperly designed if errors in technique necessarily preclude the achievement of valid results. The defects in the planning and administration of the head injury tests at the University of Pennsylvania illustrate how an improperly designed experiment can invalidate results and cause pain to animals without any possible benefit to any person. For a discussion of the defects in these tests, see *supra* notes 34-35 and accompanying text.

[73] Some have argued that no amount of benefit for humans can justify experimen-

there is no reason why courts should not be as competent as scientists to evaluate the duty that society owes to animals. Most jurisdictions have either legislative or judicial standards concerning animal cruelty.[74] Courts will not be striking out on their own, but enforcing duties that now exist in many states.

A number of states, however, have specifically exempted scientific research from the standards of their anticruelty statutes,[75] thus precluding court action against inhumane experimentation until the legislatures act.[76] In jurisdictions in which the statutes do not specifically exempt research, however, there is reason to believe that courts will be willing to entertain prosecutions against researchers. As stated earlier, in *Taub v. State* the Court of Appeals of Maryland held that Maryland's anticruelty statute did not apply to federally funded research projects.[77] Less than a year later the state legislature amended the law to make it clear that the prohibitions did extend to all experiments involving animals.[78] The increasing awareness of the need to protect animals, coupled with the state legislature's reversal of the highest Maryland court, may convince state courts that the silence in the anticruelty statutes implies that experimentation is covered rather than exempted.

2. Concerns with the Application of Anticruelty Statutes

A number of animal rights advocates have cautioned against levying the charge of cruelty against individual scientists. As one commen-

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tation on animals of a different species. *See* T. REGAN, *supra* note 3, at 314, 397.

[74] *See, e.g.,* People v. Arcidicono, 75 Misc. 2d 294, 296, 347 N.Y.S.2d 850, 853 (Dist. Ct. 1973) (statute requires culpable intent), *aff'd,* 79 Misc. 2d 242, 360 N.Y.S.2d 156 (App. Term. 1974); MASS. GEN. LAWS ANN. ch. 272, § 77 (West 1980) ("unnecessary cruelty"). A number of commentators have also suggested standards to judge research on animals. *See* Goldman, *supra* note 39, at 191 (Experimentation on animals that causes pain and suffering is justified if it has "a direct benefit, a good and immediately relevant reason—one which most people would accept as adequate."); Kerr, *The Investigator's Responsibilities in Research Involving Animals,* in SCIENTIFIC PERSPECTIVES ON ANIMAL WELFARE 19, 25 (1982) (Painful experimentation is justified where the "investigator not only is willing to, but actually has tested the painful stimulus he plans to employ, and *will not subject an animal to pain which he cannot readily tolerate himself.*").

[75] *See, e.g.,* DEL. CODE ANN. tit. 11, § 1325(b) (1974 & Supp. 1984); *cf.* ILL. ANN. STAT. ch. 8, § 710 (Smith-Hurd 1975 & Supp. 1985) (exempting institutions operating under a federal license).

[76] Not all of the scientific exemptions are absolute. *See, e.g.,* VT. STAT. ANN. tit. 13, § 403(c)(2) (1974) (scientific research exempt if done by "competent" researchers "in a humane manner with a minimum suffering to the animals").

[77] *See Taub,* 296 Md. at 444, 463 A.2d at 822.

[78] *See* MD. ANN. CODE art. 27, § 59 (Supp. 1985) ("It is the intention of the General Assembly that all animals . . . under private, local, State, or federally funded scientific or medical activities . . . shall be protected from intentional cruelty.").

tator noted, the label of cruelty "conjures up images of crazed sadists" and may serve to intensify the conflict between the scientific community and animal rights groups rather than increase cooperation between them.[79] Bringing an individual up on charges may also be seen as inappropriate because the problem is more an institutional one than an individual one.[80] To the extent that the current situation is viewed as a systemic lack of consideration of animals' interests, one may be reluctant to impose fault on scientists as individuals. Moreover, judges and juries may be reluctant to convict a respected scientist. Concern for the interest of laboratory animals is a relatively recent development, and animal anticruelty statutes have not been applied to scientific experimentation in most jurisdictions. It may be unfair to give a defendant a criminal record for actions in an area in which public standards are changing so rapidly.[81]

Although these objections to a cruelty label are powerful, the benefits to be derived from the use of the state statutes outweigh the potential problems. Scientists should be held to the standards that the legislatures have imposed on the rest of society. The failure to do so has resulted in the lack of any voice for animals behind the laboratory door and has prevented "a moral evaluation of experimental techniques by any parties but the scientists themselves."[82] Finally, although individual scientists are not sadists, it can hardly be doubted that some of the experiments are cruel if cruelty is defined as "behavior that inflicts *unnecessary* pain or torment."[83] Failure to recognize this may perpetuate the disregarding of animal interests until the scientific community agrees to change.

A far greater concern with reliance on the state anticruelty statutes

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[79] *See* T. REGAN, ALL THAT DWELL THEREIN: ANIMAL RIGHTS AND ENVIRONMENTAL ETHICS 62 (1982).

[80] *See* P. SINGER, *supra* note 3, at 35-36.

[81] *See Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1017-18 (1965).

[82] *See* Burr, *supra* note 9, at 222-23.

[83] Feinberg, *Human Duties and Animal Rights*, in ON THE FIFTH DAY: ANIMAL RIGHTS AND HUMAN ETHICS 45, 60 (1978). A different view of cruelty is presented by philosopher Tom Regan. Regan contends that cruelty necessarily refers to one's mental state, and thus to be cruel one must either be sadistic or indifferent to pain. *See* T. REGAN, *supra* note 79, at 67. Under this definition of cruelty, one might hesitate a great deal before applying the anticruelty statutes. If, however, cruelty is defined in terms of the act rather than the actor, there may be less reason to hesitate. It is interesting to note that many of the states have adopted Regan's view of cruelty by requiring a culpable state of mind in order to sustain a conviction under the anticruelty statutes. *See infra* note 84 and accompanying text. In Wisconsin the legislature recently eliminated the intent requirement, indicating a possible change in the states' definition of cruelty; "bona fide" research, however, is not covered by the Wisconsin statute. WIS. STAT. ANN. § 948.02 (West 1982).

than a reluctance to label scientists cruel is the difficulty of establishing criminal intent on the part of the researchers. As is true with any crime that is not a strict liability offense, state courts will read in a requirement of criminal intent even if the statute does not explicitly require a culpable state of mind.[84] The insistence on a showing of criminal intent greatly limits the potential effectiveness of these statutes.[85] As the prosecution of Dr. Taub illustrates, however, it is possible to obtain a conviction under these statutes. Although the application of anticruelty statutes cannot realistically be expected to stop all questionable experimentation, it will at least move the law in the direction of protecting animals' interests.

Criminal sanctions, however, may not serve adequately to protect laboratory animals. Criminal laws come into play only after the animals have been abused. In addition, the focus of criminal statutes is on an individual's intent and not the institutional nature of much of the abuse. Injunctive relief that would prevent the mistreatment of animals is therefore often preferable to the levying of criminal penalties for violations of the statutes.

II. EQUITABLE ENFORCEMENT OF STATE ANTICRUELTY STATUTES UNDER A PUBLIC NUISANCE THEORY

It is a well-established rule that courts will enjoin the violation of a criminal statute if the criminal activity also constitutes a public nuisance.[86] Where a state statute or municipal ordinance explicitly provides that violations are considered public nuisances, courts have exercised their equitable powers and issued injunctive relief.[87] The

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[84] *See* People v. Olary, 10 Mich. App. 640, 642-43, 160 N.W.2d 348, 349 (1968) (willfulness shown), *aff'd,* 382 Mich. 559, 170 N.W.2d 842 (1969); State v. Brookshire, 355 S.W.2d 333, 337 (Mo. Ct. App. 1962) (criminal intent an "essential element"); State v. Hafle, 52 Ohio App. 2d 9, 14, 367 N.E.2d 1226, 1230 (1977) (recklessness required). *But see* State v. Vance, 119 Vt. 268, 274, 125 A.2d 800, 803 (1956) (If the legislature intended to make intent a requirement, it would have said so.).

[85] *See* Dichter, *supra* note 8, at 159.

[86] *See* People v. Lim, 18 Cal. 2d 872, 877-78, 118 P.2d 472, 475 (1941) ("Where particular activity . . . has been held to come within the language of a statute defining the term 'public nuisance' for the purposes of equity jurisdiction on behalf of the state, courts have granted injunctions . . . even though the acts were also criminal."); Evans Theatre Corp. v. Slaton, 227 Ga. 377, 382, 180 S.E.2d 712, 716 (enjoining film that violated criminal obscenity law as a public nuisance), *cert. denied,* 404 U.S. 950 (1971); Benton v. Kernan, 127 N.J. Eq. 434, 459-60, 13 A.2d 825, 838 (Ch. 1940) ("[W]hile it is true that equity will not enforce the penal laws of the state . . . it will act when the act sought to be enjoined is a nuisance."); *see also Developments in the Law—Injunctions, supra* note 81, at 1013-16 (explaining that since the 18th century public nuisances have constituted an exception to the rule that equity will not enjoin a crime).

[87] *See, e.g.,* Portage Township v. Full Salvation Union, 318 Mich. 693, 703-05,

difficulty in obtaining an injunction against criminal activity arises when the criminal statute does not include such a statement, as is the case with state anticruelty statutes. Whether the court will be willing to enjoin the activity will depend on whether it finds either statutory or common-law support for the claim that the activity is a public nuisance.[88]

This part of the Comment argues that research that violates anticruelty statutes is a public nuisance, and that courts therefore may enjoin these experiments despite the fact that the activity is also a criminal offense. In the first section, it is shown that inhumane experiments come within the doctrinal rubric of public nuisance. The second section responds to concerns that courts have raised about inferring a public nuisance from a criminal statute. Finally, it is argued that legal remedies are inadequate to meet the problem of abusive research and that equitable relief is necessary to provide a complete solution.

A. *Violations of Anticruelty Statutes and the Public Nuisance Doctrine*

Public nuisances are a group of low-level crimes that interfere with some right or interest common to the public.[89] They include those actions that "offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons."[90] That the legislature has proscribed the activity may serve as an indication that the activity is prejudicial to the public interest and threatens the requisite "[i]njury to the public."[91]

At common law, activity violative of public morality was a public

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29 N.W.2d 297, 302-03 (1947) (enjoining the violation of a municipal zoning ordinance), *appeal dismissed,* 333 U.S. 851 (1948); Napro Dev. Corp. v. Town of Berlin, 135 Vt. 353, 359-60, 376 A.2d 342, 347 (1977) (refusing to enjoin operation of an adult bookstore because neither statutory nor common law provided that the activity was a public nuisance).

[88] *See* People *ex rel.* Kerner v. Huls, 355 Ill. 412, 416-17, 189 N.E. 346, 348-49 (1934) (enjoining refusal to submit cattle to tuberculosis test because cattle infected with dangerous diseases are a common-law public nuisance); Commissioner of Dep't of Bldgs. v. Sidne Enters., 90 Misc. 2d 386, 389, 394 N.Y.S.2d 777, 780 (Sup. Ct. 1977) (enjoining lewd exhibitions as a common-law nuisance); Commonwealth v. Barnes & Tucker Co., 455 Pa. 392, 414, 319 A.2d 871, 883 (1974) (Polluting a stream can be enjoined as a public nuisance on either statutory or common-law grounds.).

[89] *See* Prosser, *Private Action for Public Nuisance,* 52 VA. L. REV. 997, 1000 (1966).

[90] Copart Indus. v. Consol. Edison Co., 41 N.Y.2d 564, 568, 362 N.E.2d 968, 971, 394 N.Y.S.2d 169, 172 (1977) (citation omitted).

[91] *See* Pennsylvania Soc'y for the Prevention of Cruelty to Animals v. Bravo Enters., 428 Pa. 350, 360, 237 A.2d 342, 348 (1968).

nuisance.[92] Courts may find that a public nuisance exists if the action in question is shown to be "offensive to a community's moral sensibilities."[93] The broad public nuisance rubric has been held to encompass such activities as the operation of a gambling house,[94] the showing of an obscene movie,[95] the running of a massage parlor,[96] and the maintenance of a nude dancing establishment.[97]

A strong case can be made for considering violations of state anticruelty statutes public morality public nuisances. One, if not the major, reason for originally enacting these statutes was to protect the morals of the community.[98] Reliance on this historical rationale, however, will not in itself suffice to show that abusive research is a public nuisance, since "there can be little doubt now . . . that the directly intended beneficiaries of animal protection statutes are the protected animals themselves."[99] Evidence of the current morality of the American public is needed.

As Senator Dole recently stated, "[T]he public's concern is that we can do a better job in caring for the animals we experiment with and minimizing their pain and distress . . . ."[100] Senator Dole's observation is supported by a number of examples of the public's strong reaction to inhumane and unnecessary experimentation. When the plan to shoot dogs for the training of doctors was leaked to the press, "calls of protest poured in to the offices of [Representative] Lantos and other members of Congress."[101] Exposure of the head injury tests at the University of Pennsylvania provoked a stream of letters to local papers pro-

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[92] *See* RESTATEMENT (SECOND) OF TORTS § 821B comment b (1977).

[93] People *ex rel.* Busch v. Projection Room Theater, 17 Cal. 3d 42, 51, 550 P.2d 600, 605, 130 Cal. Rptr. 328, 333 (Adult bookstores and obscene movies may be enjoined on the grounds that they are public nuisances.), *cert. denied,* 429 U.S. 922 (1976).

[94] *See* Engle v. Scott, 57 Ariz. 383, 389, 114 P.2d 236, 239 (1941).

[95] *See* Evans Theatre Corp. v. Slaton, 227 Ga. 377, 382, 180 S.E.2d 712, 716, *cert. denied,* 404 U.S. 950 (1971).

[96] *See* Village of Bensenville v. Botu, Inc., 39 Ill. App. 3d 634, 635, 350 N.E.2d 239, 241 (1976).

[97] *See* Commissioner of Dep't of Bldgs. v. Sidne Enters., 90 Misc. 2d 386, 391-92, 94 N.Y.S.2d 777, 781 (Sup. Ct. 1977).

[98] *See* Commonwealth v. Higgins, 277 Mass. 191, 194, 178 N.E. 536, 538 (1931) (interpreting a state anticruelty statute as directed against "acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or have knowledge of those acts"); *see also* Feinberg, *supra* note 83, at 48 (1978).

[99] Feinberg, *supra* note 83, at 48.

[100] *Improved Standards for Laboratory Animals, supra* note 40, at 2 (statement of Senator Robert Dole, Chairman, Senate Comm. on Agriculture, Nutrition and Forestry).

[101] *Weinberger Halts School's Plan to Shoot Dogs, supra* note 13, at C1, col. 2.

testing the research.[102] Finally, the publicity surrounding Dr. Taub's treatment of animals led to congressional hearings on Capitol Hill.[103] In light of the public's negative reaction to abusive research, there should be little doubt that such research is offensive to our sensibilities.

Labeling research a public nuisance may be objected to on the grounds that actions normally considered public morality nuisances, such as lewd dancing, serve little or no social purpose. Scientific research, on the other hand, is generally conceded to serve society, and to consider it in the same vein as these other activities ignores this important distinction. This objection assumes that because some research is valuable to society, all scientific experimentation should be viewed as beneficial. When research is shown to violate anticruelty statutes, however, it is difficult to understand why it should not be treated as an offense to public morality. Cruel and unnecessary research on animals offends the public's sense of decency, and the fact that other experiments are acceptable should not preclude courts from acting against experiments that are not.

Once it is shown that an activity is offensive to public morality, courts have often required some further showing of interference with the public's interest in order to sustain a public nuisance action.[104] One result of this requirement is that some jurisdictions have interpreted public nuisances to apply only to activities occurring in a public place, where the public may come into contact with the offensive activity.[105] Most jurisdictions, however, have not held to a literal meaning of interference with the public, permitting actions to be brought against adult bookstores, massage parlors, and obscene movies.[106] Although these cases involve the public to the extent that the objects of the injunctions are commercial enterprises, there are cases in which the courts have not

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[102] *See, e.g., Letters to the Editor: Only Extra-Legal Action Stopped Penn,* Philadelphia Inquirer, July 28, 1985, at 6-C, col. 3; *Letters to the Editor: Responsible Probe Needed at Penn Lab,* Philadelphia Inquirer, Jan. 8, 1985, at 8-A, col. 3; *Letters to the Editor: Higher Laws,* Philadelphia Inquirer, June 6, 1984, at 22-A, col. 3.

[103] *See Hearings on Medical Research, supra* note 47; *Humane Care for Animals in Research: Hearing Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce,* 97th Cong., 2d Sess. (1982).

[104] *See* Prosser, *supra* note 89, at 1001.

[105] *See* State v. Rocker, 52 Hawaii 336, 339, 475 P.2d 684, 687 (1970) (A public nuisance must occur in a public place where it may be seen by others.); Napro Dev. Corp. v. Town of Berlin, 135 Vt. 353, 358, 376 A.2d 342, 347 (1977) ("[T]he concept of public nuisance is intended only to govern conduct thrust upon those who find it repugnant.").

[106] *See, e.g.,* People *ex rel.* Busch v. Projection Room Theater, 17 Cal. 3d 42, 51, 550 P.2d 600, 605, 130 Cal. Rptr. 328, 333 ("The fact that obscene or other indecent exhibitions take place behind closed doors and are viewed only by those who choose to view them does not defeat the community's interest in regulating such exhibitions."), *cert. denied,* 429 U.S. 922 (1976).

required that the public have access to the place in which the activity occurs.[107] In these jurisdictions, it is sufficient that persons know of the activity for it to constitute a public morality public nuisance.

Given the willingness of many courts to enjoin offensive conduct, it is difficult to conclude that they strictly adhere to the requirement of a showing of interference with the public. The vast amount of public funding received by research institutions should be sufficient to provide a nexus between the public and the experiment for purposes of a public nuisance action. The public contact requirement, therefore, should not be a stumbling block in efforts to obtain an injunction against inhumane experimentation.

A related doctrinal requirement for maintaining a public nuisance action is a showing that the public is threatened with harm from the activity.[108] Massage parlors and adult bookstores can be seen as threatening the quality of a neighborhood and attracting criminals.[109] Research violating anticruelty statutes does not pose this type of threat to property interests, but to the extent that courts are willing to view the harm in terms of the injury to our sense of decency, the harm to the public should be treated in the same way whether the activity is lewd dancing or abusive experimentation. Some state courts, moreover, have been willing to presume that the public is harmed by activities that the legislature has proscribed.[110] This approach was taken by the Pennsylvania Supreme Court when it stated that a bullfight could be enjoined as a public nuisance because it violated the anticruelty statute and was therefore prejudicial to the public.[111]

It thus appears that abusive research on laboratory animals can come under the doctrinal rubric of public nuisance law. Yet courts have shown reluctance to label criminal activities public nuisances. It is to these concerns that the Comment will now turn.

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[107] *See* Engle v. Scott, 57 Ariz. 383, 389-90, 114 P.2d 236, 238-39 (1941) (Nuisances affecting public morals can be enjoined without a showing of interference with the public.); Adams v. Commonwealth, 162 Ky. 76, 80, 171 S.W. 1006, 1007 (1915) (finding sufficient in a public nuisance prosecution for cohabitation that the community knew that the unmarried parties were living together).

[108] *See* Prosser, *supra* note 89, at 1004.

[109] *See* Comment, *Can an Adult Theater or Bookstore Be Abated as a Public Nuisance in California?*, 10 U.S.F. L. REV. 115, 121-24 (1975).

[110] *See* Attorney Gen. *ex rel.* Optometry Bd. of Examiners v. Peterson, 381 Mich. 445, 465, 164 N.W.2d 43, 53 (1969) ("Harm to the public is presumed to flow from the violation of a valid statute enacted to preserve public health, safety and welfare."); Pennsylvania Soc'y for Prevention of Cruelty to Animals v. Bravo Enters., 428 Pa. 350, 360, 237 A.2d 342, 348 (1968) (violation of the legislature's proscription is prejudicial to the public interest).

[111] *See* Pennsylvania Soc'y for Prevention of Cruelty to Animals v. Bravo Enters., 428 Pa. 350, 360, 237 A.2d 342, 348 (1968).

B. *The Relationship Between Public Nuisance Law and State Criminal Statutes*

There is a tension between public nuisance doctrine and the development of a codified criminal law. Although public nuisances have traditionally been both torts and crimes,[112] it is clear that not all crimes are public nuisances. For example, no one would doubt that it is in the public interest to prohibit murders. At the same time, it seems ludicrous to suggest that homicide is a public nuisance. One reason for this is that we know public nuisances include only low-level crimes, but this answer does not resolve the problem of when it is justifiable for the courts to treat an activity proscribed by the legislature as a public nuisance.

One reason state courts have been reluctant to infer that a criminal activity also constitutes a public nuisance is that defendants will be deprived of rights they would have in a criminal action.[113] Criminal trials provide the defendant with the possibility of a jury trial and a standard of proof higher than that applied in an action at equity.[114] To refuse to label an activity a public nuisance on this basis, however, misinterprets the reasons for making the activity criminal. This position assumes that at least one reason for the legislature's decision to make an activity criminal was to afford the defendant the protections of a criminal trial.[115] It is doubtful that the legislature had this in mind. Rather, one can assume that the purpose was to deter the activity with the threat of punishment. Because the researcher will not be stigmatized by the state with a criminal conviction when an experiment is enjoined,[116] the fact that the researcher could also be criminally prosecuted should not prevent the courts from labeling the activity a public nuisance.

Another concern with using public nuisance doctrine to enjoin activities proscribed by the criminal law is that it disrupts the enforcement mechanism chosen by the legislature.[117] This concern has led some courts to hold that when a criminal penalty is provided, it is the exclusive remedy.[118] There are, however, a number of cases in the pub-

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[112] *See* RESTATEMENT (SECOND) OF TORTS § 821B comment b (1977).

[113] *See* People v. Lim, 18 Cal. 2d 872, 880, 118 P.2d 472, 476 (1941). Although the court in *Lim* held that a gambling house could be enjoined as a public nuisance, it expressed its concern that "the equitable remedy has the collateral effect of depriving a defendant of the jury trial to which he would be entitled in a criminal prosecution for violating exactly the same standards of public policy." *Id.*

[114] *See id.*

[115] *See Developments in the Law—Injunctions, supra* note 81, at 1019.

[116] Although an injunction may exact a high price, it is not generally seen as a state punishment. Hence, there is not the need for the safeguards that exist in a criminal trial.

[117] *See* People v. Vandewater, 250 N.Y. 83, 91, 164 N.E. 864, 866-67 (1928).

[118] *See, e.g.*, Southland Theaters, Inc. v. State *ex rel.* Tucker, 254 Ark. 192, 193,

lic nuisance area and elsewhere in which such a restrictive reading of criminal statutes has been rejected. State courts have been willing to exercise their equitable powers when the criminal statute imposes a duty for the benefit of others[119] or when it is in the public interest to do so.[120] If the use of an injunction furthers the goals of the legislation, state courts should be willing to exercise their traditional equitable powers to enjoin a public nuisance.

When it can be established that an activity meets the doctrinal requirements of a public nuisance action, there seem to be few reasons for the courts to be concerned about interfering with the legislature's prerogatives. Moreover, most jurisdictions appear to recognize this; they are willing to apply the public nuisance doctrine in situations in which they can find implicit support—either common law or statutory—for labeling the activity a public nuisance.[121] If it can be shown

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492 S.W.2d 421, 423 (1973) (refusing to enjoin showing of obscene films because the obscenity statute provided only criminal sanctions).

The possibility of courts interpreting the criminal penalties as the exclusive remedy is also implicated by the movement away from amorphous criminal public nuisance statutes to more specific statutes. *See* N.Y. PENAL LAW § 240.45 practice commentary (McKinney 1980) (noting that the purpose of the revision of the criminal nuisance statute is "to restrict the offense to its generic scope by limiting the kinds of [places] prohibited to those where persons gather for purposes of 'engaging in' unlawful conduct"). This trend may lead to an increased reluctance on the part of the courts to consider an activity a public nuisance. *See* Napro Dev. Corp. v. Town of Berlin, 135 Vt. 353, 358-59, 376 A.2d 342, 347-48 (1977) (refusing to enjoin adult bookstore). Other courts, however, by continuing to employ more traditional definitions, have implicitly refused to consider these statutes as limiting the activities that come within the public nuisance rubric. *See* Burns Jackson Miller Summit & Spritzer v. Linder, 59 N.Y.2d 314, 335, 451 N.E.2d 459, 468, 59 N.Y.S.2d 712, 721 (1983) ("[T]he allegation of substantial interference with the common rights of the public at large is a sufficient predicate for a private action based on public nuisance.").

Most states, however, continue to give a broad definition to public nuisances. *See* RESTATEMENT (SECOND) OF TORTS § 821B comment c (1977); *see also, e.g.*, CAL. PENAL CODE § 370 (West 1970) (defining public nuisance as "[a]nything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property"). Thus, the fact that violations of state anticruelty laws are not specifically labeled public nuisances should not prevent the courts from issuing injunctive relief against unlawful scientific experiments.

[119] *See, e.g.*, Everett v. Harron, 380 Pa. 123, 127-30, 110 A.2d 383, 385-86 (1955) (enjoining the operation of a racially restrictive park because it violated the state public accommodations statute).

[120] *See* Evans Theatre Corp. v. Slaton, 227 Ga. 377, 382, 180 S.E.2d 712, 716 (Activities that threaten the public welfare may be enjoined as public nuisances even if they are punishable under a criminal statute.), *cert. denied*, 404 U.S. 950 (1971); Attorney Gen. *ex rel.* Optometry Bd. of Examiners v. Peterson, 381 Mich. 445, 466, 164 N.W.2d 43, 53 (1969) ("The existence of a criminal or other penalty for the practice of a profession without a license will not oust equity from jurisdiction.") (citations omitted).

[121] *See* Commonwealth v. MacDonald, 464 Pa. 435, 458-59, 347 A.2d 290, 303 (1975) ("A thing may be a public nuisance because it is so declared by statute, either

that a criminal prosecution is an inadequate response to experiments that violate anticruelty statutes, courts should be willing to enjoin the research as a public nuisance.

C. *The Inadequacy of Legal Remedies*

Although to obtain equitable relief it is generally necessary to prove that legal remedies are inadequate, courts tend to assume that this is true in a public nuisance action involving a public morality offense. It seems likely, however, that courts will insist on a showing of inadequate legal remedies in an attempt to obtain an injunction against a scientific experiment. The typical public morality public nuisance action involves the operation of an illegal enterprise, and the courts presume either that there will be too few arrests or that the fines will be too low to discourage the owner from operating the business.[122] In an action against a research facility, on the other hand, only a specific experiment within the institution, not the institutional activity itself, is criminal.

The adequacy of legal remedies may be a difficult argument to overcome in light of Dr. Taub's prosecution.[123] That the criminal prosecution ended the abuse of animals in that case, however, does not mean that legal remedies will provide adequate relief in all cases. Courts have held that equitable relief will be granted if the plaintiff can show that it will be more effective than the available legal remedy.[124]

There are strong reasons to prefer equitable relief in an action

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explicitly or implicitly. Alternatively, it may be declared a nuisance as a matter of common law if, though not prohibited by statute, it unreasonably interferes with the rights of the public.") (footnotes omitted), *cert. denied,* 429 U.S. 816 (1976); *cf.* People v. Lim, 18 Cal. 2d 872, 882, 118 P.2d 472, 477 (1941) (A gambling house may be enjoined as a public nuisance.); Commissioner of Dep't of Bldgs. v. Sidne Enters., 90 Misc. 2d 386, 391-92, 394 N.Y.S.2d 777, 781-82 (Sup. Ct. 1977) (finding lewd dancing in violation of obscenity statute a public nuisance).

[122] *See, e.g.,* Commissioner of Dep't of Bldgs. v. Sidne Enters., 90 Misc. 2d 386, 392, 394 N.Y.S.2d 777, 781 (Sup. Ct. 1977). The presumption that legal remedies will not be an adequate solution has led courts to state that the existence of legal remedies is "irrelevant" to the question of equitable relief. *See* Village of Bensenville v. Botu, Inc., 39 Ill. App. 3d 634, 636, 350 N.E.2d 239, 242 (1976).

[123] When the police raided Taub's laboratory, all of the monkeys were seized, ending the experiments on them. *See* Washington Post, Sept. 12, 1981, at A1, col. 2. Moreover, his grant from the N.I.H. was revoked within one month of the raid. *See HHS Sanction Against Researcher Upheld,* Washington Post, June 16, 1984, at B3, col. 4.

[124] *See* Portage Township v. Full Salvation Union, 318 Mich. 693, 705, 29 N.W.2d 297, 302 (1947), *appeal dismissed,* 333 U.S. 851 (1948); *cf.* Engle v. Scott, 57 Ariz. 383, 391, 114 P.2d 236, 239 (1941) (stating that the trial judge has discretion to decide whether injunctive relief is preferable because other remedies are not complete).

against inhumane experimentation. Because injunctions can be issued when harm is threatened,[125] they can be used prior to the commencement of an experiment, whereas a criminal prosecution can take place only after the abuse has occurred. If one is forced to wait, living beings will be irreparably injured. Moreover, injunctive relief can be used to advance far-reaching solutions. Instead of simply convicting researchers for violations of the statute, the legal system could encourage them to work with other scientists and animal groups to develop less painful methods by which the goals of their experiments could still be achieved.

In relying on the substance of the anticruelty laws in public nuisance actions, one is again faced with the problem that these statutes are notoriously weak. It is likely that some courts will be unwilling to enjoin an experiment in the face of a scientist's claim that it is necessary for the public's health. In one of the few cases involving animal research, a New Jersey court rejected the claim that a high school student's experiments inducing cancer in live chickens fell within the state anticruelty statute because the motives were "purely scientific and educational."[126] According to this court, "[I]f there is a truly useful motive, a real and valid purpose, there can, under the statute, be acts done to animals which are ostensibly cruel, or which ostensibly cause pain."[127] The reluctance of some state courts to give adequate attention to the interests of animals should not, however, deter the institution of these actions. It can be hoped that the recent publicity on abusive research will encourage courts to insist on more proof that the research is justified than merely that the motives were scientific.

Although abusive research falls within the public nuisance doctrine, recognition of this alone may do little to protect laboratory animals. Public authorities have been reluctant to enforce the criminal statutes,[128] and there is little reason to expect that they will be any more enthusiastic about bringing public nuisance actions in this area. Without a more liberalized approach to the standing requirement in public nuisance actions, recognizing violations of anticruelty statutes as

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[125] *See* RESTATEMENT (SECOND) OF TORTS § 821B comment i (1977).

[126] New Jersey Soc'y for Prevention of Cruelty to Animals v. Board of Educ., 91 N.J. Super. 81, 94, 219 A.2d 200, 208 (Essex County Ct. 1966), *aff'd per curiam,* 49 N.J. 15, 227 A.2d 506 (1967).

[127] *Id.* at 92, 219 A.2d at 206 (footnotes omitted).

[128] *See* Friend, *supra* note 69, at 217. The lack of enforcement of state anticruelty statutes by state authorities is understandable. The offenses are usually misdemeanors, and when local prosecutors are faced with limited resources, it stands to reason that they would choose to focus their energies on crimes in which people are seriously injured or killed.

public nuisances cannot be expected to alleviate the conditions suffered by laboratory animals.

III. Granting Animal Welfare Groups Access to the Courts in Public Nuisance Actions

Courts have traditionally limited standing in public nuisance actions to public authorities and private individuals who can show harm different from that suffered by the general public.[129] Private individuals have thus been barred from bringing nuisance actions based on the infringement of public morals.[130] The standing requirement in this area of the law can be understood in part as an outgrowth of the origins of the public nuisance action. In its early stages, the public nuisance action was seen as an action to protect the rights of the King, and only persons appointed by him were authorized to represent him in court. Continued adherence to the rule has been justified on the grounds that only public officials have the authority to speak for the general public.[131]

Practical considerations have also played a role in the vitality of the rule. Permitting private persons to bring these actions has been seen as threatening "utter chaos" in the courts.[132] Moreover, some commentators have assumed that the harm to individuals from public nuisances is usually trivial and that the standing requirement prevents the harassment of defendants by overly sensitive individuals.[133]

This part of the Comment argues that the considerations supporting restrictive standing requirements should not prevent state courts from granting standing to animal rights groups in actions against unacceptable research on laboratory animals. In states where SPCA's have the authority to prosecute violations of the anticruelty statutes, the societies may be viewed as coming within the traditional requirements for standing in public nuisance actions. Because this approach will be successful in only a few states, the Comment turns to analogies with other areas of the law in an attempt to ensure judicial review of questionable

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[129] *See, e.g.*, B & W Management, Inc. v. Tasea Inv. Co., 451 A.2d 879 (D.C. 1982) (no standing to maintain action for violation of zoning ordinance because plaintiff suffered no special damages); Poulos v. Dover Boiler & Plate Fabricators, 5 N.J. 580, 587, 76 A.2d 808, 811 (1950) (no standing to enjoin closing of road without showing special injury); *see also* RESTATEMENT (SECOND) OF TORTS § 821C comment j (1977).

[130] *See* Parker v. Lowery, 446 S.W.2d 593, 595 (Mo. 1969) (private citizen denied standing in action against a gambling house for injunction and monetary relief).

[131] *See* Prosser, *supra* note 89, at 1007.

[132] *See* Parker v. Lowery, 446 S.W.2d 593, 596 (Mo. 1969).

[133] *See* Prosser, *supra* note 89, at 1007.

activity in research facilities. A strong argument can be made to treat SPCA's the same as other professional associations that have been granted standing to bring actions to protect the public interest. Finally, the Comment argues that standing requirements in public nuisance actions should reflect the liberalization of standing in other areas of state law.

A. *Standing in Jurisdictions Where SPCA's Have Authority to Prosecute*

The legislatures in seven states have provided SPCA's and humane societies[134] with the power to prosecute violations of the anticruelty statutes.[135] This authority should be sufficient for the courts to grant the societies standing in a public nuisance action. The state legislatures in these jurisdictions have recognized the societies as representatives of the public. The concern, therefore, that a private group might illegitimately usurp the role of guardian of the public interest does not apply.

It is equally unsound to rely on the other considerations justifying a restrictive standing doctrine in these jurisdictions. The societies were granted prosecutorial powers at least in part because the legislatures recognized that traditional law enforcement mechanisms were not sufficient to enforce the statutes.[136] If the courts were to ignore this motivation in deciding whether to grant these same organizations standing in a public nuisance civil suit, they would be disregarding the legislatures' decision that the societies must be able to bring suit in order to assure adequate enforcement of the anticruelty laws.

SPCA's should therefore have little trouble with the standing requirements of public nuisance actions in jurisdictions that grant them prosecutorial powers. The majority of states, however, do not vest prosecutorial authority in the humane societies, but rather limit their

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[134] The terms SPCA and humane society will be used interchangeably in this Comment to signify the organization recognized in state codes as responsible for animal care.

[135] *See* DEL. CODE ANN. tit. 3, § 7904 (1974 & Supp. 1984); MASS. ANN. LAWS ch. 129, § 9 (Michie/Law. Co-op. 1981 & Supp. 1985) (Agents can prosecute violations that occur in specified activities, but research is not included among those activities.); MICH. COMP. LAWS ANN. § 750.55 (West 1968 & Supp. 1983); N.J. STAT. ANN. § 4:22-3 (West 1973); OHIO REV. CODE ANN. § 2931.18 (Page 1982); VT. STAT. ANN. tit. 13, § 419 (1974); WASH. REV. CODE ANN. § 16.52.040 (1962 & Supp. 1986).

[136] *See* Pennsylvania Soc'y for Prevention of Cruelty to Animals v. Bravo Enters., 428 Pa. 350, 368, 237 A.2d 342, 353 (1968) (Musmanno, J., dissenting) (arguing that one reason for granting the SPCA its powers is the failure of district attorneys to act in this area).

authority to the power to arrest or aid in prosecution.[137] In one public nuisance action based on an anticruelty statute, the power to arrest was held insufficient to grant standing to the SPCA as a public authority.[138] Thus, the public authority argument will, in all likelihood, be effective only in a limited number of cases. It is necessary to turn to alternative means by which the societies can obtain standing.

B. *The Analogy with Professional Associations*

Many states permit professionals and their associations to bring actions to enjoin the unlicensed practice of a profession.[139] One justification offered for recognition of standing in these cases is that professionals are seeking to protect their property interest in their licenses

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[137] *See* ARK. STAT. ANN. § 41-2956 (1977) (power to arrest); CAL. NONPROFIT CORP. CODE § 10404 (West 1977) (power to file complaints and aid in prosecution); CONN. GEN. STAT. ANN. § 17-23 (West 1975 & Supp. 1985) (power to arrest); FLA. STAT. ANN. § 828.03(1) (West 1976 & Supp. 1985) (power to investigate); HAWAII REV. STAT. § 711-1110 (1976) (power to arrest); IDAHO CODE § 18-2111 (1979) (power to arrest); ILL. ANN. STAT. ch. 8, § 710 (Smith-Hurd 1975 & Supp. 1985) (power to investigate complaints); KY. REV. STAT. § 436.605 (1985) (powers of peace officers for purposes of enforcement of anticruelty statutes); LA. REV. STAT. ANN. § 3:2391 (West 1973) (police powers granted to agents); ME. REV. STAT. ANN. tit. 17, § 1212 (1983 & Supp. 1984-1985) (power to arrest granted to agents of animal welfare board, which includes the humane societies); MD. ANN. CODE art. 27, § 63 (1982) (power to arrest); MINN. STAT. ANN. § 343.01 (West 1972 & Supp. 1985) (power to enforce law, arrest, make reasonable rules, and investigate or otherwise assist in prosecution); N.H. REV. STAT. ANN. § 105:18 (1977) (power to arrest); N.Y. NOT-FOR-PROFIT CORP. LAW § 1403(b)(2) (McKinney 1970) (power to file complaints and aid in prosecution); 18 PA. CONS. STAT. ANN. § 5511(i) (Purdon 1983 & Supp. 1985) (power to initiate criminal proceedings); R.I. GEN. LAWS § 4-1-21 (1976) (power to arrest and search); S.D. CODIFIED LAWS ANN. § 40-2-3 (1977) (power to arrest); TENN. CODE ANN. § 39-3-111 (1982) (power to arrest); VA. CODE § 29-213.78 (1985) (power to arrest); WIS. STAT. ANN. § 948.16 (West 1982) (power to apply for a search warrant); WYO. STAT. § 11-29-107 (1977) (power to arrest). A minority of the states do not specify the powers of the humane societies. In these jurisdictions, it is reasonable to assume that they do not possess any special law enforcement powers.

[138] *See* Pennsylvania Soc'y for Prevention of Cruelty to Animals v. Bravo Enters., 428 Pa. 350, 362, 237 A.2d 342, 349 (1968).

[139] *See, e.g.*, Rush v. City of St. Petersburg, 205 So. 2d 11 (Fla. Dist. Ct. App. 1967) (action by physician); Burden v. Hoover, 9 Ill. 2d 114, 118-19, 137 N.E.2d 59, 62 (1956) (action by chiropractors to enjoin unlicensed practice); Touchy v. Houston Legal Found., 432 S.W.2d 690, 694 (Tex. 1968) (action by lawyers to enjoin violations of canon of ethics); Washington State Bar Ass'n v. Washington Ass'n of Realtors, 41 Wash. 2d 697, 701, 251 P.2d 619, 621 (Wash. 1952) (action to enjoin unlicensed practice of law). *But see* Michigan License Beverage Ass'n v. Behnan Hall, Inc., 82 Mich. App. 319, 326, 266 N.W.2d 808, 810 (1978) (finding that association did not have standing to bring action for violation of state liquor license code); Nassau Neuropsychiatric Soc'y v. Adelphi Univ., 18 N.Y.2d 370, 376, 222 N.E.2d 380, 383, 275 N.Y.S.2d 511, 515 (1966) (finding that society lacked standing to enjoin university's practice of allowing unlicensed persons to give medical treatment).

from unlawful intrusion.[140] Under this rationale, permitting associations to bring suit is justified on the grounds that the associations are acting to protect their members' interests.[141] One should question, however, whether the property interest rationale is convincing. Courts that rely on this justification do not insist on a showing of harm but merely state that harm is presumed from the existence of the professional group.[142] It seems likely that the reason professionals and their associations do not have to show harm to maintain the actions is that it would be very difficult for them to do so. As one state court has acknowledged, in suits against the unlicensed practice of a profession, "the injury to the plaintiff's property rights may be so small as to be almost undetectable."[143]

A more persuasive argument for the recognition of standing in this area is that the courts see the professionals and their associations as being in the best position to protect the interests of the public.[144] Professional organizations such as state bar associations are perceived as the most likely to discover unlicensed practitioners and, thus, most able to protect the public from these persons.[145] In light of the dubious claim

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[140] *See* Hobson v. Kentucky Trust Co., 303 Ky. 493, 499, 197 S.W.2d 454, 458 (1946) (The license to practice law is a property right that the lawyer can protect against intrusion.), *overruled on other grounds,* Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1965).

[141] *See* Feiler v. New Jersey Dental Ass'n, 191 N.J. Super. 426, 431, 467 A.2d 276, 279 (Super. Ct. Ch. Div. 1983) (finding that association had standing to protect members from fraudulent practices of the defendant), *aff'd,* 199 N.J. Super. 363, 489 A.2d 1161 (Super. Ct. App. Div.), *cert. denied,* 99 N.J. 162, 491 A.2d 673 (1984); *cf.* Muskegon Bldg. & Constr. Trades v. Muskegon Area Intermediate School Dist., 130 Mich. App. 420, 428, 343 N.W.2d 579, 583 (1983) (finding that labor organization had standing to sue to "protect the rights and interests of its members").

[142] *See, e.g.,* Burden v. Hoover, 9 Ill. 2d 114, 118, 137 N.E.2d 59, 62 (1956); Hobson v. Kentucky Trust Co., 303 Ky. 493, 499, 197 S.W.2d 454, 458 (1946), *overruled on other grounds,* Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1965).

[143] William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 194 n.21, 346 A.2d 269, 282 n.21 (1975); *see also* Texas Indus. Traffic League v. Railroad Comm'n, 628 S.W.2d 187, 194 (Tex. Ct. App.) (explaining that in Touchy v. Houston Legal Found., 432 S.W.2d 690 (Tex. 1968), an action to enjoin the unlicensed practice of law, there was "nothing . . . to indicate any actual harm to any plaintiff; instead, the facts [supported] only what was primarily an abstract harm or an injury to the plaintiffs' sensibilities"), *rev'd on other grounds,* 633 S.W.2d 821 (Tex. 1982).

[144] *See* Herman v. Prudence Mut. Casualty Co., 41 Ill. 2d 468, 479, 244 N.E.2d 809, 815 (1969) ("We have enjoined the unauthorized practice of law not primarily for the protection of attorneys generally, but rather for the protection of the public.") (citation omitted); Washington State Bar Ass'n v. Washington Ass'n of Realtors, 41 Wash. 2d 697, 700, 251 P.2d 619, 621 (1952) (not necessary to show that a pecuniary or property interest of the plaintiff is harmed because the power of the court to enjoin the unlicensed practice of law is based on harm to the public).

[145] *See* New Jersey State Bar Ass'n v. Northern N.J. Mortgage Assocs., 22 N.J. 184, 196, 123 A.2d 498, 504 (1956).

of harm and the ability of the associations to effect the purposes of the regulating statutes, it is reasonable to conclude that the motivation for the granting of standing is the public interest in ensuring that persons who hold themselves out as doctors and lawyers are properly trained.

In the context of standing, SPCA's should be viewed in the same light as professional associations. These societies have an expertise in the area of animal care not generally found in law enforcement agencies. Moreover, they are recognized as responsible for standards of care provided to animals in much the same way as professional associations are regarded as guardians of their professions. A possible problem with this analogy is that some courts may insist on maintaining the fiction of an infringement of property rights as the basis of an action against an unlicensed practice. Granting standing to professional associations can be justified under this fiction with the rationale that actions brought by the associations will benefit their members, whereas the humane societies' members and the direct beneficiaries of their actions are of different species. Yet to the extent that the societies' suits and those of the professional associations are seen as a means to ensure the protection of the public interest, the two are indistinguishable.[146]

The analogy to standing granted to professional associations is problematic because it limits the types of animal welfare groups that will be able to obtain standing. Although courts may be willing to grant standing on this basis to well-established groups, it may be difficult to convince a court that newer animal rights groups should be accorded the same respect as legal or medical associations. In light of the limited resources of most established humane societies,[147] they may be unwilling to bring costly civil actions and, hence, may not provide sufficient protection to laboratory animals.[148] Moreover, courts have expressed reluctance to expand the number of professional associations that will be granted standing in these actions[149] and, thus, may be unwilling to

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[146] *See supra* text accompanying notes 68-74 (Anticruelty statutes protect the public's decisions on standards of treatment for animals.).

[147] *See* Friend, *supra* note 69, at 217.

[148] A number of animal rights advocates have questioned the willingness of humane societies to challenge scientists. *See* P. SINGER, *supra* note 3, at 241-44. There have been instances in which persons have held positions in the traditional humane societies while working with organizations heavily involved in animal research. *See* N.Y. Daily News, *Conflicts of Interest in Animal Welfare?*, May 16, 1982, at 4, col. 1. Whether or not humane societies will begin to take a more active role in ending abusive research, it is advisable to provide the opportunity for other animal rights groups to bring suit in cases in which the societies are reluctant to take action.

[149] *See* Feiler v. New Jersey Dental Ass'n, 191 N.J. Super. 426, 431, 467 A.2d 276, 278 (Super. Ct. Ch. Div. 1983), *aff'd*, 199 N.J. Super. 363, 489 A.2d 1161 (Super. Ct. App. Div.), *cert. denied*, 99 N.J. 162, 491 A.2d 673 (1984). In *Feiler* the court refused to extend the holding in New Jersey State Bar Ass'n v. Northern N.J.

entertain the analogy. An equally plausible argument for standing in actions against abusive research, however, can be made in terms of the trend toward liberal standing rules in cases in which an important public issue is at stake.

C. *Relying on a Public Interest Argument to Obtain Standing for Animal Rights Groups*

There have been few cases in which animal rights groups have attempted to bring suit under state anticruelty statutes. In *Walz v. Baum,*[150] a New York appellate court held that the plaintiff did not have standing to bring a suit against state officials for cruel methods of animal slaughtering, reasoning that the plaintiff had no personal or property rights at stake.[151] Five years later the New York Court of Appeals dismissed an action against New York City officials for injunctive relief against the mistreatment of animals in city zoos because it did not want to involve the court in questioning the decisions made by the executive branch of government during a fiscal crisis.[152] Despite the court's refusal to hear the case, however, it did note that the Society for Animal Rights was "probably correct" in asserting that it had standing.[153] This apparent shift in the New York courts' thinking on the standing issue can be best understood in terms of some of the recent developments in the law of standing.

1. The Changing Role of the Courts and the Relaxation of the Standing Doctrine

State courts are not bound by the case and controversy requirement of article III of the Constitution, and some state courts have recently developed a more flexible approach to the issue of standing than that adopted by their federal counterparts.[154] This relaxation of stand-

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Mortgage Assocs., 22 N.J. 196, 123 A.2d 504 (1956) (granting standing to a bar association using the public interest rationale), to other professional associations. *See Feiler,* 191 N.J. Super. at 431, 467 A.2d at 278.

[150] 42 A.D.2d 643, 345 N.Y.S.2d 159 (App. Div. 1973) (memorandum opinion).

[151] *See id.* at 644, 345 N.Y.S.2d at 160.

[152] *See* Jones v. Beame, 45 N.Y.2d 402, 408, 380 N.E.2d 277, 280, 408 N.Y.S.2d 449, 452 (1978).

[153] *Id.* at 409, 380 N.E.2d at 280, 408 N.Y.S.2d at 452.

[154] *See* Salorio v. Glaser, 82 N.J. 482, 490-91, 414 A.2d 943, 947 (explaining that the court is not bound by the case and controversy requirement but "remains free to fashion its own law of standing consistent with notions of substantial justice and sound judicial administration"), *cert. denied,* 449 U.S. 804 (1980). On the refusal of state courts to be bound by the federal standing requirements described in Warth v. Seldin, 422 U.S. 490 (1975), see Stocks v. Irvine, 114 Cal. App. 3d 520, 528, 170 Cal. Rptr. 724, 728 (1981); Home Builders League v. Berlin, 81 N.J. 127, 135, 405 A.2d 381,

ing requirements should be viewed in terms of a changing perception of the role of the courts. At common law, litigation was perceived as a means to settle private disputes: the court's role was to serve as an "adjunct to [the] private ordering" between autonomous individuals.[155] Claims of injury to the population at large had little place in a civil court system that was seen essentially as a private dispute resolution mechanism.[156] Unless an individual could show that she had a legal interest that had been encroached upon, she could not invoke the aid of the courts.[157] The issue of standing was thus bound to the legal merits of a case.[158] Since legal rights were defined exclusively in terms of the individual,[159] only an individual who had suffered discrete harm had standing.

Once the courts began to take into account explicitly the public interest in their decisions, the nineteenth-century justifications for the role of the courts became less persuasive. As one commentator has noted, when a court involves itself in the balancing of public policies, "the fundamental conception of litigation as a mechanism for private dispute settlement is no longer viable."[160] Rather, the court has taken on the larger role of furthering public values. In these types of cases, continued adherence to standing requirements that are based on the vision of society as secondary to the autonomy of individuals is inconsistent with the changing view of the role of law. This was recently recognized by the Washington Supreme Court, when it held that although the plaintiff did not have standing to challenge the constitutionality of the state lottery, the court should hear the case because it involved an issue "of significant public interest that . . . allow[s] the court to reach the merits."[161] In the area of public nuisance actions, it may be particularly appropriate to recognize that the philosophical underpinnings of

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385 (1979).

[155] *See* Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1285 (1976). As Chayes explains, the role of the court in the nineteenth century was a product of a particular "vision of society, which assumed that the major social and economic arrangements would result from the activities of autonomous individuals." *Id.* Courts were to settle disputes that arose from these arrangements and to clarify the law "to guide future private actions." *Id.*

[156] *See id.* at 1285-88. Chayes points out that this view of the courts fits well with a larger view of restricted governmental powers. *See id.* at 1288.

[157] *See* J. VINING, LEGAL IDENTITY 43 (1978).

[158] *See* Chayes, *supra* note 155, at 1290.

[159] *See* J. VINING, *supra* note 157, at 43-44. According to Vining, at common law "there was no conception of illegality as such or, to use a phrase so pejorative in the law, 'in the abstract,' without regard to the circumstances and claims of a person who might complain." *Id.* at 43.

[160] Chayes, *supra* note 155, at 1294-95.

[161] Farris v. Munro, 99 Wash. 2d 326, 330, 662 P.2d 821, 824 (1983).

the standing doctrine have been altered, "since the theory of public nuisance is the protection of public rights."[162]

This is not to say that the standing doctrine is of no use to the courts at this point in the development of our legal system. Considerations of the proper role of the judiciary and a desire to avoid issuing merely advisory opinions have persuaded the courts to continue to rely on standing restrictions.[163] Standing can also serve to assure the courts that the interests of affected parties are properly represented. At the same time, standing should not be a barrier to judicial review of important controversies. The tension between the changing perception of the courts and the positive role that standing may play in the court system has led the New Jersey Supreme Court to adopt the position that recognition of standing is appropriate when the "litigant can show sufficient personal stake so that the Court is not asked to render an advisory opinion."[164]

Public nuisance actions brought by animal rights groups will not place the court in the position of rendering advisory opinions. In asking the court for injunctive relief against a research experiment, the groups will be providing the court with a specific case to decide. These groups have shown their dedication to the welfare of animals, and it seems foolish to doubt that the suits would be sufficiently adversarial. Thus, actions by these groups would not endanger the salutary goals of the standing requirement.

Although other state courts have not adopted the position of the Washington state court by ignoring standing doctrine when important public issues are involved, they have implicitly recognized the limits of the standing doctrine by taking into account the public interest in their decisions on standing.[165] If a plaintiff in a public interest case can show

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[162] Bryson & MacBeth, *Public Nuisance, the Restatement (Second) of Torts and Environmental Law,* 2 ECOLOGY L.Q. 241, 258 (1972).

[163] *See* Skaggs-Albertson's v. ABC Liquor, Inc., 363 So. 2d 1082, 1088 (Fla. 1978) (noting that special damages are still required to establish standing in challenges to zoning laws, even though "that rule has acquired a more liberal application"); Akau v. Olohana Corp., 65 Hawaii 383, 388, 652 P.2d 1130, 1134 (1982) (standing granted in public nuisance action because plaintiff showed injury); *In re* Biester, 487 Pa. 438, 444, 409 A.2d 848, 851-52 (1979) (refusing to allow private citizen to intervene in attorney general's request for grand jury on the grounds that the issue was one of common, not personal, interest); *see also* Green, *The Public Plaintiff Comes to Nebraska: An Essay on the Limits of State Judicial Power,* 13 CREIGHTON L. REV. 31, 69 (1979) (discussing requirement of special injury to establish standing for public nuisance action).

[164] Jersey Shore Medical Center-Fitkin Hosp. v. Estate of Baum, 84 N.J. 137, 144, 417 A.2d 1003, 1006 (1980) (granting standing to hospital to challenge common law rule that husbands could be held liable for their spouse's medical expenses, but wives could not).

[165] *See* Salorio v. Glaser, 82 N.J. 482, 491, 414 A.2d 943, 947 (1980); Boryszew-

a "slight additional private interest," a state court may be willing to grant standing.[166] The willingness of state courts to recognize nontraditional plaintiffs in public interest actions should result in a liberalization of standing requirements in actions to enjoin public nuisances. As the commentary to the *Restatement (Second) of Torts* explains, the reasons for restricting standing in public nuisance actions for damages "are much less applicable to a suit to enjoin the public nuisance and there are indications of a possible change. Statutes allowing citizens' actions or authorizing an individual to represent the public, and extensive general developments regarding class actions and standing to sue are all pertinent."[167]

The devotion of animal rights groups to the welfare of animals and their efforts to improve the conditions of laboratory animals should be sufficient to grant them standing under the liberal "additional private interest" standard. That suits brought by these groups are motivated by ideological considerations should not prevent the courts from recognizing that the groups have standing. One of the reasons that courts are reluctant to grant standing to ideological plaintiffs is that they are fearful of overloading the courts with trivial concerns.[168] As one commentator has noted, however, "It is possible to gauge the sincerity and strength of a person's commitment to ideological principles by what he has said or done, and the problem of the insubstantiality of interests must frequently be faced even with material interests."[169] The Ninth Circuit recently concurred with this approach to ideologically motivated plaintiffs when it recognized that an animal rights organization may have standing when it can demonstrate "longevity and indicia of commitment to preventing inhumane behavior."[170]

Humane societies should have an even stronger argument for the recognition of standing based on an additional private interest. They have been recognized by the state legislatures as the groups to be entrusted with maintaining humane standards of animal care. It seems

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ski v. Brydges, 37 N.Y.2d 361, 363-64, 334 N.E.2d 579, 580-81, 72 N.Y.S.2d 623, 625-26 (1975); William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 198, 346 A.2d 269, 284 (1976).

[166] Salorio v. Glaser, 82 N.J. 482, 491, 414 A.2d 943, 947 (1980) (challenge to state tax on out-of-state commuters) (citations omitted); *see also* Texas Indus. Traffic League v. Railroad Comm'n, 628 S.W.2d 187, 194 (Tex. Ct. App.) ("[M]ere special interest" may be sufficient for standing in some circumstances.) (emphasis omitted), *rev'd on other grounds,* 633 S.W.2d 821 (Tex. 1982).

[167] RESTATEMENT (SECOND) OF TORTS § 821C comment j (1977).

[168] *See* Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1669, 1738 (1975).

[169] *Id.* (footnotes omitted).

[170] Animal Lovers Volunteer Ass'n v. Weinberger, 765 F.2d 937, 939 (9th Cir. 1985). For a further discussion of this case, see *infra* note 175.

particularly appropriate to grant a group standing under the "slight additional private interest" approach when the legislature has identified it as having a special interest in an issue.[171]

2. Denial of Standing as a Bar to Review

The state courts' reluctance to adhere strictly to standing requirements in public interest cases reflects not only a change in the nature of legal rights, but also the courts' concern that to deny standing "would be in effect to erect an impenetrable barrier to any judicial review."[172] The departures from traditional standing requirements tend to occur when there is good reason to believe that the plaintiff before the court is the only person likely to bring suit, such as when the injury is diffused among the population or when the injured parties are unable to represent themselves. For example, the National Organization for Women was granted standing to challenge the use of sex-based employment advertisements solely because it was a "bona fide and nationally recognized organization dedicated to eliminating discriminating practices against women."[173] On the other hand, the New York Public Interest Research Group was denied standing in an action against a city's assessment procedures when the members of the community could have sued under a state statute authorizing taxpayer suits.[174]

Because public authorities have not enforced anticruelty statutes and animals cannot bring suit under current law, the refusal to recognize standing for animal rights groups will effectively preclude judicial review of the treatment of laboratory animals. It can, therefore, be convincingly argued that actions against research institutions by these groups fall within the exceptions to standing recognized elsewhere in the law. As one court has noted, "Where an act is expressly motivated by considerations of humaneness towards animals, who are uniquely incapable of defending their own interests in court, it strikes us as eminently logical to allow groups specifically concerned with animal welfare to invoke the aid of the courts."[175]

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[171] *See* Pennsylvania Soc'y for Prevention of Cruelty to Animals v. Bravo Enters., 428 Pa. 350, 367-69, 237 A.2d 342, 353-54 (1968) (Musmanno, J., dissenting).

[172] Boryszewski v. Brydges, 37 N.Y.2d 361, 364, 334 N.E.2d 579, 581, 372 N.Y.S.2d 623, 626 (1975).

[173] National Org. for Women v. State Div. of Human Rights, 34 N.Y.2d 416, 419-20, 314 N.E.2d 867, 869, 358 N.Y.S.2d 124, 127 (1974).

[174] *See* New York Pub. Interest Research Group v. Board of Assessment Review, 104 Misc. 2d 128, 131, 427 N.Y.S.2d 665, 669 (Sup. Ct. 1979).

[175] Animal Welfare Inst. v. Kreps, 561 F.2d 1002, 1007 (D.C. Cir. 1977) (dicta), *cert. denied*, 434 U.S. 1013 (1978). Although the court in *Kreps* based its standing decision on the construction of a federal environmental statute, it did express its will-

Some commentators have expressed the concern that if animal rights groups are granted the power to enforce anticruelty statutes they will be "overzealous" in their efforts.[176] This is in all likelihood an empty concern, given the costs of a nuisance action. Moreover, the alternative is to continue the current lack of enforcement of state anticruelty laws. In light of the absence of attention paid to animal interests by research institutions,[177] the risk of some overzealousness is a small price to pay for a change in the present state of affairs.

The traditional reasons for denying standing to private individuals in actions to enjoin public nuisances should not prevent the courts from granting standing in actions by animal rights groups against inhumane experiments. Given the expansion of standing in public interest cases, the concern that it would be illegitimate for a private group to represent the public rings hollow. Speculative worries about a deluge of suits have not prevented the courts from granting standing when the public interest is involved. Moreover, the fear of chaos in the courts is not persuasive when some states allow private citizens to bring public nuisance actions without a showing of particularized harm.[178]

Refusal to grant standing will leave laboratory animals unprotected from abuse by researchers. Although one can hope that research institutions will become more sensitive to the issue of animal rights, there is a clear need to act to ensure the humane treatment of laboratory animals. In light of the great public controversy over the use of animals in scientific research, courts should not prevent the application of anticruelty statutes by adhering to rigid standing requirements of questionable value.

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ingness to reach the same conclusion on the basis of the language quoted in the text. *See id. But see* National Audubon Soc'y v. Johnson, 317 F. Supp. 1330, 1335 (S.D. Tex. 1970) (denying standing in public nuisance action based on threat to whooping cranes because no special harm shown).

In a recent decision the Ninth Circuit held that the Animal Lovers Volunteer Association (ALVA) did not have standing to enjoin the Navy from shooting goats on federal property. *See* Animal Lovers Volunteer Ass'n v. Weinberger, 765 F.2d 937, 938-39 (9th Cir. 1985). The court stated that ALVA had no organizational stake in the controversy and that its members had no personal stake; the court indicated, however, that standing might have been granted had ALVA been a better-known organization with an "indicia of commitment to preventing inhumane behavior." *Id.* The Fund for Animals, which had challenged the Navy in a related action, was granted standing because of its longevity and demonstrated commitment to preventing inhumane behavior. *See id.* at 939.

[176] *See* Chambers & Hines, *Recent Developments Concerning the Use of Animals in Medical Research,* 4 J. LEGAL MED. 109, 123 (1983).

[177] *See supra* text accompanying notes 33-36 & 48-59.

[178] *See, e.g.,* State *ex rel.* Gardner v. Sailboat Key, Inc., 295 So. 2d 658, 660 (Fla. Dist. Ct. App.) (finding that plaintiffs had standing to enjoin construction on undeveloped island as a public nuisance because statute authorized private suits to abate public nuisances), *cert. denied,* 308 So. 2d 111 (Fla. 1974).

CONCLUSION

The cause of action proposed by this Comment raises serious questions about the direction the law should take in increasing the protection it offers to animals. In a public nuisance action a court is likely to evaluate the merits of the case in terms of whether the level of pain inflicted on animals can be justified by the potential benefit to humans. Courts are therefore unlikely to halt research on the grounds that it inflicts an inhumane amount of pain on animals unless there is also little or no evidence of a benefit to humans.

The public nuisance action is problematic because it is based on the desire to protect the public's morality and may reinforce the notion that anticruelty statutes exist to protect human rather than animal interests.[179] Viewing the anticruelty statutes as a statement of public morality, however, is not inconsistent with recognizing animals as the principal beneficiaries of these statutes. Moreover, the public nuisance action may have some political benefits. Court actions by animal rights groups may serve to mobilize public opinion sufficiently to motivate legislators to enact laws recognizing legal rights for animals.[180] Legal actions may also encourage the scientific community to be more responsive to animals' interests. Although the theoretical underpinnings of the public nuisance action are disquieting, the action is one of too few means to provide some protection for laboratory animals in a system that denies legal rights to animals.

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[179] A number of commentators have bemoaned the fact that anticruelty statutes serve mainly to protect human interests. *See* Burr, *supra* note 9, at 213; Dichter, *supra* note 8, at 159. The concern is that until statutes are written that protect animals' interests, animals will not receive protection from the law because their interests will be subordinate to those of humans. *See* Dichter, *supra* note 8, at 160.

[180] For an in-depth proposal of state legislation on this issue, see Burr, *supra* note 9, at 231-44; *see also* Comment, *supra* note 9, at 500-06 (suggesting a guardianship model for protecting the rights of dogs and cats).