

July 2015

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Recommended Citation

Hoch, David (1988) "Business Ethics, Law, and the Corporate Use of Laboratory Animals," *Akron Law Review*: Vol. 21 : Iss. 2 , Article 3.

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BUSINESS ETHICS, LAW, AND THE CORPORATE USE OF LABORATORY ANIMALS

by

DAVID HOCH*

*Until he extends the circle of his compassion to
all living things, man will not himself find peace.*

— Albert Schweitzer¹

We hear quite a bit about corporate social responsibility in our economy. The emphasis in these matters is upon the corporation's treatment of its customers in terms of financial fairness and personal well-being. Few people can be unfamiliar with the Pinto scenario² (which culminated in the Ford Motor Company's being tried for murder and acquitted in 1978) or the Dalkon Shield debacle (which resulted in many cases of death, stillbirth, sterilization, and other such tragedies).³ These cases touch directly upon the issue of corporate responsibility for the consumers' well-being.

Cases involving the fiscal misconduct of corporations are always with us. The E.F. Hutton affair⁴ involving "creative" banking, and the Boesky insider-trading incident,⁵ were simply the latest in a history-rich tradition of commer-

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¹ A. Schweitzer, *The Philosophy of Civilization*, in *THE EXTENDED CIRCLE* 316 (J. Wynne-Tyson ed. 1985).

² *State v. Ford Motor Co.*, No. 11-431 (Pulaski County Cir. Ct. (Ind.) Mar. 13, 1980). This was reputedly the first case in which a corporation was sued under a reckless homicide statute for allegedly failing to warn of a dangerous defect in product design. Ford was acquitted. See C. Redman, *Indiana's Pinto Trial May Alter Corporate Responsibility in the U.S.*, *Washington Star*, March 9, 1980; L. STROBEL, *RECKLESS HOMICIDE?* (1980). In another suit against Ford, *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981), punitive damages of \$125 million were awarded for uncrashworthiness in design to the family of a 13 year old boy who died in the flames of a defective Pinto. It was the largest punitive damages sum ever awarded in a products liability suit and was eventually reduced to \$3.5 million.

³ See S. PERRY & J. DAWSON, *NIGHTMARE: WOMEN AND THE DALKON SHIELD* (1985), and M. MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD* (1985), for a detailed discussion of the Dalkon Shield story, in which A.H. Robins has been sued for damages by thousands of women for injuries ranging from forced sterilization to death.

⁴ See Alexander, *Crime in the Suites*, *TIME*, June 10, 1985, at 56-57. E.F. Hutton pleaded guilty to bank fraud that cost 400 banks \$8 million. They agreed to repay the banks and no executives were criminally prosecuted. Congressional critics were furious. Said Senator Joseph Biden of Delaware, "Respect for the law suffers immensely when the public reads that you have [the Hutton] scheme going on, and nobody is prosecuted. I think it is a travesty." *Id.* See also Weiss, *How E.F. Hutton is Trying to Clean its Slate*, *BUSINESS WEEK*, Jan. 26, 1987, at 79; Tell, *Hutton's Check Scheme Floats it into Troubled Waters: Pleads Guilty to Fraud Counts: SEC Delays Move on Disqualification*, *BARRONS*, May 6, 1985, at 34; Bianco, *What Did Hutton's Managers Know — and When Did They Know It?*, *BUSINESS WEEK*, May 20, 1985, at 110-12.

⁵ See Glaberson et al., *Who'll be the Next to Fall?*, *BUSINESS WEEK*, Dec. 1, 1986, at 28. In the biggest insider trading scandal in Wall Street history, famous arbitrager, Ivan Boesky, agreed to pay the govern-

cial scandals in this country. Recently, however, one particular aspect of corporate responsibility has come to occupy more time of corporate boards, managerial decision-makers, consumer watch-dogs, and college professors.

The issue is environmental ethics.⁶ What responsibility does a corporation have to the natural environment, its indigenous animal inhabitants, and the people who use and appreciate it? Surely, the problems of toxic and nuclear waste, acid rain, and the depletion of natural fossil resources such as oil have recently become more central to the debate over corporate responsibility in this society. Right now, the Alaskan landscape is being fought over (once more) by environmentalists and oil companies⁷ who claim we need more fuel, even if it happens to be located in the midst of a National Wildlife Refuge.

We have gotten used to the idea of corporate environmental responsibility. We have not resolved the issue or discovered the optimal formula which provides an ecologically protective policy and simultaneously allows for reasonable utilization of natural resources and technological and industrial growth, but we have now accepted that an inquiry into the limitations on corporate license to "explore" the environment is a valid and even necessary facet of "doing business" in the modern age. While we continue to search for the proper balance between industry and ecology, we have realized that the two are interdependent.

Now that our culture has accepted the environmental ethic as a necessary component of corporate morality in a post-industrial society, we see a new ethical topic being debated with increasing frequency. This new element introducing

ment \$100 million-half in damages, half in disgorged profits, and, in return for a guaranty of no more than five years in jail, to tell all he knew about insider trading irregularities on Wall Street. The scandal spread like wildfire until February, 1987 when "principals of two of the classiest old-line investment banks were arrested at their desks and taken out through a trading room full of open-mouthed colleagues. One indeed wore handcuffs. Like a common criminal." A. Bianco & G. Weiss, *Suddenly the Fish Get Bigger*, BUSINESS WEEK, March 2, 1987, at 28. (The article includes a "scorecard" of all the investment bankers arrested to date in this growing scandal.) See also N. Youman, *Boesky Affair May Tarnish Brokerage Industry Image*, ADWEEK MARK WEEK, Nov. 24, 1986, at 11; G. Kinkead, *Ivan Boesky: Crook of the Year*, FORTUNE, Jan. 5, 1987, at 48; Glaberson, *Did the SEC Give Boesky Too Sweet a Deal?*, BUSINESS WEEK, Dec. 8, 1986, at 37.

⁶ See E. Johnson, *Treating the Dirt: Environmental Ethics and Moral Theory*, in EARTHBOUND 339 (T. Regan ed. 1984); T. REGAN, *The Nature and Possibility of an Environmental Ethic*, in ALL THAT DWELL THEREIN. ESSAYS ON ANIMAL RIGHTS AND ENVIRONMENTAL ETHICS [hereinafter cited as ALL THAT DWELL] (1982).

⁷ See Defenders of Wildlife, ACTIVIST NEWS NETWORK, Feb., 1987, at 3: "... [Congressman] Morris Udall . . . introduced . . . legislation which would designate as wilderness the 1.5 million acre coastal plain within the Arctic National Wildlife Refuge. . . . The bill is the latest in a series of battles to determine whether this pristine arctic environment will be explored and developed for its oil and gas reserves or left intact as wilderness. . . . The Interior Department . . . in a draft report of the congressionally mandated study . . . recommended that the entire coastal plain be opened for oil and gas development. After combing through the . . . draft report, Defenders of Wildlife and three other conservation groups discovered that the Interior Department failed to mention there is only a 19% chance of discovering any recoverable oil. The bill in question, The Arctic National Wildlife Refuge Bill H.R. 39, 100th Cong., 1st Sess. (1987), has over 70 co-sponsors at this time. The bill would prohibit any oil exploration within the boundaries of the refuge. As of now, under The Alaska Lands Act, sec. 1003, drilling may not take place in the refuge without Congressional action to that effect." See also Jones, *The Development of Alaska's Outer Continental Shelf Oil and Gas Resources and the Federal Trust Responsibility to Native Alaskans*, 6 VA. J. OF NAT. RESOURCE LAW 53 (1986).

itself, somewhat controversially, into the field of business ethics is the concept of animal interests. Does the Biblical mention⁸ of man's dominion over animals endow us with a moral right to abuse nonhumans without limit, or does man have a responsibility of benign stewardship toward the "lesser" creatures?⁹

We are seeing the relationship between man and beast called into focus by critics who propound moral questions that cannot readily be answered. Philosophers take the question of animal interests quite seriously and a number of scholarly books have been written on the subject.¹⁰ Laws regulate the use of animals; however, laws are minimal guidelines, and ethically proper conduct frequently demands greater responsibility from us than does the law. A relationship exists between business ethics, animal interests, and the law, and this paper will consider that functional matrix, but limit its application to the corporate use of laboratory animals.

This paper will examine, first, the fundamental theories pertaining to animal interests; then the relevant laws and the recognition of animal interests the laws require of corporate laboratories; and finally, how (if at all) these claims to interests for animals impinge upon corporate ethics. Perhaps a consideration of these matters will clarify the validity of the unorthodox proposition that corporate responsibility extends to nonhumans.

ANIMAL INTERESTS

The attribute of "interest" discussed herein means to have a sentient capacity for experiencing pleasure and pain and correlative preferences, however minimal, that creates a corresponding obligation in others toward any entity possessing such interests. It is implied here that beings owing obligations to animals with interests are, in fact, moral beings, capable of understanding right and wrong and therefore having the capacity to be obliged toward others.

Those beings with moral capacities are known as moral agents. Those beings that are owed obligations by moral agents, whether or not they themselves are capable of such moral discernment, are known as moral patients. If we assume that most animals are incapable of moral reasoning, and thereby precluded from the category of moral agents, they are still, if shown to be owed cer-

⁸The following passage is frequently cited as moral justification for abusive treatment toward animals: "... and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth." Genesis 1:26 (King James).

⁹For an interesting perspective running counter to this attitude, See T. Regan, *The Promise and Challenge of Religion*, THE ANIMALS' AGENDA, April, 1986, at 30: [E]ven if we believe in mankind's mystical primacy over the animals, the Bible clearly teaches that some of the things that are done to them are simply sinful in the eyes of God. Could a God that despises a 'proud look' be anything but outraged at the sight of a \$25 thousand mink coat?" In a more pointed statement that speaks directly to the issue of research with animal subjects, Regan suggests that "[i]t is a morally depraved image of the Good Shepherd that would allow us to blind, shock, burn, drown, suffocate, starve or mutilate our animal brethren—all in the name of science." *Id.* at 36.

¹⁰See, e.g., J. E. REGAN, *ALL THAT DWELL*, *supra* note 6; T. REGAN, *THE CASE FOR ANIMAL RIGHTS* (1983); P. SINGER, *ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS* (1975).

tain commissions or omissions in conduct by others, moral patients.¹¹

The view that animals have no interests shall be called the minimalist position. This argument holds that animals are neither moral agents nor moral patients. They are incapable of moral reasoning and there is no basis for a person to be ethically obligated to animals in any way. Animals may be used without reservation in any fashion for any reason whatsoever.

Rene Descartes was the most famous and original proponent of this position, comparing animals to clockwork-like mechanisms, incapable of feeling and impervious to pain. Said Descartes, "like the clock, animals are not conscious."¹² This is as minimalist a position as can be taken in regard to animal interests. Slightly less indifferent is the view that animals may indeed suffer pain, but that that suffering is their burden in being here to serve human ends.¹³ The least indifferent of the minimalist positions, but one still wholly without regard or concern for animals, is the idea that abusive cruelty toward animals is unacceptable because such conduct may demean the moral status of the abuser.¹⁴

These positions seem remarkable in light of what we now know about animals' abilities to communicate with each other (and with humans),¹⁵ show loyalty,¹⁶ solve simple but abstract problems,¹⁷ and plan for the future.¹⁸ The

¹¹ For a discussion of moral agents and moral patients, see T. REGAN, *THE CASE FOR ANIMAL RIGHTS* (1983), at 151-156.

¹² Comment, *Antinomy: The, Use, Rights, and Regulation of Laboratory Animals*, 13 PEPPERDINE L. REV. 723 (1986) (quoting REGAN, *supra* note 11, at 3).

¹³ See *supra* note 8 and accompanying text.

¹⁴ "Advocates of rights for nonhumans have argued that . . . the statutes are 'to preserve the moral standards of human beings rather than to prevent the abuse of other living creatures.'" Comment, *Rights for Nonhuman Animals: A Guardianship Model for Dogs and Cats*, 14 SAN DIEGO L. REV. 490 (1977) (quoting Committee For Humane Legislation, Inc., Model State Animal Protection Statutes (undated)). See Nelson, *Duties to Animals*, in *ANIMALS, MEN AND MORALS* 149 (R. Godlovitch, S. Godlovitch, & J. Harris eds. 1972); Burr, *Toward Legal Rights for Animals*, 4 ENVTL. AFF. 205 (1975).

¹⁵ See F. PATTERSON & E. LINDEN, *THE EDUCATION OF KOKO* (1981). This book describes the relationship between Patterson and Koko, a gorilla she taught to speak in sign language. See also T. SEBEOK & A. RAMSAY, *APPROACHES TO ANIMAL COMMUNICATION* (1969).

¹⁶ See F. ROBSON, *STRANDINGS, WAYS TO SAVE WHALES: A HUMANE CONSERVATIONIST'S GUIDE* (1984). The author writes of the strong loyalties that bind cetaceans, and claims this loyalty, among other things, leads to many of the mass whale beachings.

¹⁷ See, e.g., K. PRYOR, *DON'T SHOOT THE DOG! THE NEW ART OF TEACHING AND TRAINING* (1985), at 171, where the author, a renowned animal trainer, discusses not only the learning skills of dolphins, but their creative capacities as well: "[T]he subjects caught on and began 'inventing' . . . amusing behaviors. . . . Once those dolphins learned the value of innovating, they became real nuisances, opening gates, stealing props, and inventing mischief." See also D. McKelvey, *Llamas, Leopards, and Leaping Lizards*, *CREATIVE LIVING*, Winter, 1987, at 5. McKelvey discusses the capacity of buzzards to rationally minimize danger: "[B]uzzards are now not only selecting road kills . . . but are dragging them off the pavement before consuming them." The tales of what conundrums animals will solve to get at food are legion. Does this not involve a rational problem-solving capacity? For a porpoise to go after a fish dinner may be instinctive, but for that same porpoise to choose between a red and a green door to get at that fish requires an altogether different level of cognitive abstraction.

¹⁸ Ethologists continually discover more indices of animal conduct that connote anticipation of the future. On the simplest level, do not birds build nests to house their yet unborn, squirrels store nuts for the winter, and dogs bury bones in an exercise of rationally selected delayed gratification? As Tom Regan put it: "We

belief that many animals possess faculties often considered the exclusive domain of humans is by no means novel. Over a hundred years ago, Darwin wrote that "the senses and intuitions, the various emotions and faculties, such as love, memory, attention, and curiosity, imitation, reason, etc., of which man boasts, may well be found in an incipient, or even sometimes in a well-developed condition, in the lower animals."¹⁹

Nevertheless, minimalist views are still widely-held (and one may wonder if the claim that animals have no interests is based on a genuine belief or a need to conveniently justify the abuse of helpless creatures). Countering this argument is the view that animals in fact have interests entitling them to moral consideration by human beings. The animal interest school of thought can be divided into two basic camps, the utilitarian position, and the rights position.

The most fundamental position in support of animal interests was stated with an almost mystical clarity by British philosopher Jeremy Bentham who declared that the question is not "[c]an they reason? or can they talk? but, can they suffer?"²⁰ Bentham was a utilitarian philosopher, however, and allowed for various situations in which it would be perfectly acceptable to subject an animal to suffering. The utilitarian philosophy requires more restraint in affording animals protection than does the minimalist position, but under utilitarianism, human obligations are founded upon the notion of promoting a greater sum good, rather than upon any inhering of fundamental rights in individual nonhuman creatures.

The heart of the utilitarian philosophy is that "[e]veryone ought to act so as to bring about the greatest possible balance of intrinsic good over intrinsic evil for everyone concerned."²¹ According to utilitarianism, what moral agents ought to do is that which, directly or indirectly, can most reasonably be expected to result in the best consequences (where goodness of consequence is measured by the extent to which satisfaction of preference is maximized, and dissatisfaction minimized).²²

This is the contention of the renowned utilitarian "animal interest" philosopher, Peter Singer. Singer claims that in deriving the optimal calculus (that which will result in the most benefit for the most beings with interests) we are to take into account all interests, including those of animals.²³ Obvious-

have . . . reasons for crediting . . . animals with beliefs about the future . . . since to act in the present with the intention of satisfying one's desire in the future (as Fido does when he acts in a way that leads us to let him out in order that he may satisfy his desire by getting his mouth on the bone he believes we have buried) requires that Fido and . . . other animals have these beliefs." T. REGAN, *THE CASE FOR ANIMAL RIGHTS* (1983), at 75.

¹⁹ Comment, *supra* note 14, at 498 (quoting C. DARWIN, *DESCENT OF MAN* 193 (1871)).

²⁰ J. BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION*, at ch. 17.

²¹ T. Regan, *Introduction*, in *JUST BUSINESS: NEW INTRODUCTORY ESSAYS IN BUSINESS ETHICS* [hereinafter cited as *JUST BUSINESS*] 21 (T. Regan ed. 1984).

²² E. Johnson, *supra* note 6, at 339.

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²³ *Id.* at 340. See also P. SINGER, *supra* note 10.

ly, this position goes beyond the minimalist stance in that it does attribute interests to animals.

Singer argues that since animals can suffer like people, they have interests like people. According to Singer, animals have an equal claim to relief from pain. However, like most animal protectionists, Singer eventually concedes that even while speciesism²⁴ (an anthropocentric assumption that human claims are superior to claims of other species) is unacceptable, there is some type of hierarchical ladder of claims. As Singer himself puts it, "it does seem that the more highly developed the conscious life of the being, the greater the degree of self-awareness and rationality, the more one would prefer that kind of life. . . ."²⁵ Consistent with this view, Singer agrees with conventional wisdom that the average human life is more important in determining the overall utilitarian good than the average nonhuman life.

Singer goes far beyond the minimalist position and finds that animals do indeed have interests. He even argues that these interests require human beings (as moral agents) to discontinue the hunting and eating of animals. However, he is still an advocate of the utilitarian school, which has two weaknesses insofar as the protection of animals is concerned.

First, it is very difficult to determine the proper weights to afford each variable in the utilitarian calculus when animal interests conflict with human interests. If, for example, an experiment that causes suffering and death to fifty thousand mice might result in a vaccine that will immunize children under ten years of age against a severe type of measles that would cause them considerable temporary discomfort but not threaten their lives, how does one accurately calculate the greatest good for the greatest number? We have here qualitative values that cannot be precisely quantified.

Even if one has moved beyond the minimalist position (that no consideration of animal well-being is valid), most of us, like Singer, adhere to a hierarchical scale of worth or prioritized claims which complicates the utilitarian formula by comparing the value of the lives of mice to the cost of children's discomfort in order to arrive at the proper course of conduct in this instance.

Where situations can be easily calculated, however, the utilitarian principle does lend greater protection to animals than the anthropocentric minimalist position. For example, in testing cosmetics, particularly eyeliners and eyeshadows, a process known as the Draize test²⁶ is frequently used. This involves restraining an animal (usually a rabbit) in a device so it cannot move,

²⁴Speciesism (according to Singer) is "a prejudice or attitude of bias toward the interests of members of one's own species and against those members of other species." P. SINGER, *supra* note 10, at 7. Anthropocentrism, then, is speciesism practiced by human beings.

²⁵P. SINGER, PRACTICAL ETHICS (1979), at 90.

²⁶Office of Technology Assessment, *Alternatives to Animal Use In Research, Testing, and Education* (1986).

and inserting drops of a cosmetic formula into the eye of the creature. The resulting ulceration, blindness, carcinogenic consequence, or death of the rabbit is studied to determine the suitability of various cosmetics.

In cases such as this, utilitarianism recognizes or insists that the intense suffering, if not the very life of the animal(s) in question, outweighs the importance of women having a cosmetic eyeliner, which is clearly a nonessential luxury. Thus, the utilitarian position, even though the weakest argument for animal interests, could result in radical demands upon our culture, if applied with philosophical integrity. Nevertheless, utilitarian choices are not always as clear as this example and a second shortcoming remains.

The second problem is that the utilitarian view allows for the intentional imposition of suffering upon any number of beings if such suffering can be expected to provide a greater overall good for an even greater number of beings. In short, the utilitarian position minimizes the importance of individual claims made by beings in their capacity as moral patients.

The second pro-interest view attempts to solve these problems by attributing rights to animals. The most eloquent proponent of this position is North Carolina State philosophy professor Tom Regan, who argues that animals possess inherent rights which stem from the fact that they are "the subjects of a life that is better or worse for them, logically independently of whether they are valued by anyone else."²⁷

Regan attributes rights to animals in the same way he would claim them for human beings. Briefly, he claims that we must distinguish an animal from a human before we can philosophically deny it rights that humans are afforded without question. Regan persuasively argues that many mammals have greater consciousness and the attendant capacity to prefer, perceive, discriminate between things, and experience pain and pleasure than do some humans, such as seriously retarded or brain-dead people, and infant children.

Having attributed inherent rights to animals, Regan argues that while circumstances may arise in which morality permits us to harm innocent individuals, the only way we can justify harming those animals that do have a discerning life is by having a "very good reason to believe that overriding the individual's right prevents, and is the only realistic way to prevent, vastly greater harm to other innocent individuals."²⁸

²⁷ ALL THAT DWELL. *supra* note 6, at 94.

²⁸ *Id.* at 96-97. Suppose, for example, that a terrorist held a loaded gun to the throat of a hostage and stood ten feet from his car, in which, we had very strong reason to believe was the detonating device to set off a nuclear blast that would destroy an entire city. If a "SWAT" team of police sharpshooters was fairly certain that its members could shoot through the hostage and kill the terrorist, and we had every reason to believe that the terrorist fully intended to move to the car using the hostage as a safety screen, and set off the nuclear device, this would then constitute one of the very limited situations in which Regan would consider it acceptable to injure or kill an innocent person (with a discerning life) as a necessity for protecting a far greater number of lives.

Critics of this position argue that no inherent rights adhere in beings that are not innocent, and that only moral agents (those capable of discerning right from wrong) can be innocent, because only they can be guilty. Innocents, however, include not only moral agents but moral patients (those capable of being undeserving recipients of wrongs committed by others).²⁹ If one does not accept this position then one cannot argue for the inherent right of retarded people and infants to be protected from harm by wrongdoers.

Certain aspects of Regan's position are questioned by other animal rights advocates. Australian philosopher Mary Anne Warren calls Regan's thesis the "strong animal rights" position and argues that his philosophy requires one to adopt the view that all mammals (both human and nonhuman) have moral rights of the same strength.³⁰ Furthermore, Warren suggests that "inherent value appears as a mysterious non-natural property which we must take on faith."³¹ The gist of Warren's argument is that Regan requires us, in her opinion, to grant to all beings with inherent value equal moral claims, and to all beings without inherent value, no moral claims (no status as a moral patient). She believes that this line of demarcation, arrived at through the implementation of a formula based upon a non-assessable quality known as inherent value, is unnecessary and that we may simply allow the rights of animals with different claims to vary in strength.³²

Warren calls this the "weak animal rights" theory,³³ and claims that creatures' moral claims vary proportionately with their respective degrees of mental sophistication, since more mentally sophisticated beings are capable of greater suffering. Consistent with this position, one can then claim that humans have greater rights than nonhumans. (Here again, we see the hierarchical ladder of prioritized claims.)

Warren by no means uses this tenet to argue that humans have unquestioned license to do with animals as they please. On the contrary, she (like Regan) suggests that no being capable of pain and suffering should be subjected to such experiences without good reason and concludes that no sentient being should be killed without just cause.

While Warren disputes the technical logic in Regan's position, she certainly agrees with his basic and most important premise that many nonhumans have substantial moral claims and even suggests that it is "perhaps probable that some non-human animals — such as cetaceans and anthropoid apes — should

²⁹ See T. Regan, *supra* note 11.

³⁰ M.A. Warren, *Difficulties with the Strong Animal Rights Position*, BETWEEN THE SPECIES: A JOURNAL OF ETHICS, Fall 1986, at 163.

³¹ *Id.* at 165.

³² *Id.* at 165, 166.

³³ *Id.* at 164.

be regarded as persons . . . and have the same basic moral rights as human[s].”³⁴ In spite of her criticism of Regan, Warren is a staunch supporter of animal rights.

The trend today, in both cultural and philosophical terms, is toward a greater recognition of the legitimacy of animals' moral claims. In this regard, the law is certainly behind the times.

ANIMALS AND THE LAW

Common Law and Standing

The common law has historically treated animals as mere property with no rights.³⁵ “Blackstone set the common law standard by characterizing cats and dogs as creatures ‘only kept for pleasure, curiosity, or whim.’ Their value was not intrinsic; rather, it depended ‘on the caprice of the owner.’”³⁶ Statutory law pertaining to animals has traditionally been concerned with the interests of humans, not animals. These concerns were basically that animal cruelty should be prevented because it is morally debasing for humans to act in an abusive manner and that animal extinction would deplete valuable resources.³⁷

Animal protectionists have long sought autonomous legal recognition for animal interests, and frequently petition the courts for permission to serve as legal guardians for nonhumans. Most attempts have failed, however, because the courts usually deny standing to animals or their guardian advocates. The United States Supreme Court has said that standing requires a showing that a legal right has been invaded³⁸ or that a “zone of interests”³⁹ should be protected. Many courts fear that granting private parties standing to sue for injunctive relief on behalf of animals would cause “utter chaos” in the courts.⁴⁰ Nevertheless, some judges (usually federal) have granted standing to animal groups.

In *Animal Welfare Institute v. Kreps*,⁴¹ petitioners challenged the termination of a moratorium on allowing the importing of sealskin furs from South Africa.⁴² In granting petitioner organization standing, the court said, “[w]here an act is expressly motivated by considerations of humaneness toward 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

³⁴*Id.* at 172.

³⁵It is worth noting that slaves were once treated in the identical manner under common law.

³⁶Comment, *supra* note 14, at 487 (quoting II W. BLACKSTONE, COMMENTARIES 1241 (W.C. Jones ed. 1916).

³⁷Comment, *supra* note 12, at 739.

³⁸Ass'n. of Data Processing Service Org., Inc. v. Camp, 397 U.S. 150 (1969).

³⁹Barlow v. Collins, 397 U.S. 159 (1969).

⁴⁰Parker v. Lowery, 446 S.W. 2d 593, 595-96 (Mo. 1969).

⁴¹561 F.2d 1002 (D.C. Cir. 1977), cert. denied, 434 U.S. 1013 (1978).

⁴²See Note, *supra* note 12, at 738, 739.

welfare to invoke the aid of the courts in enforcing the statute.”⁴³

In a recent Ninth Circuit decision,⁴⁴ where an animal protection organization sought to enjoin the Navy from shooting feral goats on Navy property, the court held that the group lacked standing because the shooting took place on an island and produced no “direct sensory impact” on the organization’s own environment.⁴⁵ However, the court noted that a showing of adequate “longevity and indicia of commitment to preventing inhumane behavior” would be a proper basis for standing.⁴⁶

Animal advocates seek liberalized standing rules that would grant easier access to the courts for people wishing to serve as guardians to animals. In *Creating a Private Cause of Action Against Abusive Animal Research*,⁴⁷ Karen L. McDonald points out that professional associations are frequently granted standing to sue because “the courts see the professionals and their associations as being in the best position to protect the interests of the public.”⁴⁸ She argues that animal welfare groups should also be viewed as professional associations with legal standing to sue in animal cruelty cases.

McDonald points out that state courts are not bound by the case or controversy requirement of Article III of the U.S. Constitution⁴⁹ and suggests that they may be growing increasingly more amenable to arguments that would allow persons to serve protective legal stewardships on behalf of animals. Several state courts are now granting standing to non-traditional parties who claim that a public interest is involved, particularly if they can show a “slight additional private interest.”⁵⁰ According to McDonald, “[t]he 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.”⁵¹

⁴³ *Animal Welfare Institute v. Kreps*, 561 F.2d, 1002, 1007 (D.C. Cir. 1977). In this case the Court granted standing on the basis of statutory implication. *Id.* at 1006. However, standing was also based on a three-part test derived from prior Supreme Court decisions, under which 1) an injury in fact must exist; 2) a causal connection between plaintiff’s injury and defendant’s action must exist; and 3) the interest to which injury is claimed must fall within the zone of interests protected by the statute. *Id.* at 1005. The Court found injury in fact to members’ “recreational, aesthetic, scientific, and educational interests.” *Id.* at 1007. A causal relationship, said the Court, means a “substantial probability” that if the relief requested is granted, the injury will be removed. *Id.* at 1009 (quoting *Warth v. Seldin*, 422 U.S. 490, 504 (1975)). The Court also held that the interest sought to be protected here was within the “zone of interests . . . regulated by the statute . . . in question.” *Id.* at 1010 (citing *Ass’n of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 153-154 (1969)).

⁴⁴ *Animal Lovers Volunteer Ass’n, Inc. v. Weinberger*, 765 F.2d 937 (9th Cir. 1985).

⁴⁵ *Id.* at 939.

⁴⁶ *Id.*

⁴⁷ Comment, *Creating A Private Cause of Action Against Abusive Animal Research*, 134 U. PA. L. REV. 399 (1986).

⁴⁸ *Id.* at 424.

⁴⁹ U.S. CONST. art. III, sec. 2, cl. 1.

⁵⁰ See, e.g., *Salorio v. Glaser*, 82 N.J. 482, 491, 414 A.2d 943, 947 (1980). The Court here held that a state court is not bound by case and controversy requirements and “remains free to fashion its own law of standing consistent with notions of substantial justice . . .” *Id.*

⁵¹ Comment, *supra* note 47, at 429.

(Her concept of public nuisance would include animal cruelties perpetrated in laboratory experiments.)

Animal Legal Defense Fund attorney Joyce Tischler suggests the implementation of a guardianship model for dogs and cats that would grant humans standing to sue on behalf of their animal wards.⁵² Tischler suggests that the courts "broaden the definition of natural guardian to include the human who has elected to take responsibility for the care and well-being of a nonhuman."⁵³

The idea that nonhuman entities be granted constructive standing through the agency of human guardians is not new to American jurisprudence. In *Sierra Club v. Morton*,⁵⁴ the U.S. Supreme Court refused to grant standing to the Sierra Club, which was seeking injunctive relief to prohibit the construction of a recreational resort in the Mineral King Valley of the Sierra Nevada Mountains of California.⁵⁵ The Club sought standing as a representative of the public interest and was refused, having alleged no injury in fact to any of its members.⁵⁶

In his classic dissent, however, Justice William O. Douglas wrote that "[c]ontemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation."⁵⁷ He then argued that inanimate objects such as ships and corporations have suits brought in their names; further, ecological systems such as rivers, and all the inanimate, animal, and human interests which such rivers represent should be entitled to similar standing.⁵⁸

In a famous law review article, *Should Trees Have Standing?*,⁵⁹ Christopher Stone also suggested that natural objects have legal rights. Said Stone, "I am quite seriously proposing that we give legal rights to forests, oceans, rivers and other so-called 'natural objects' in the environment. . ." ⁶⁰ (Stone's vision of natural objects entitled to standing included animals, of course.) "[W]e should

⁵² See Comment, *supra* note 14, at 484.

⁵³ *Id.* at 503.

⁵⁴ 405 U.S. 727 (1972).

⁵⁵ The U.S. Forest Service, entrusted with the maintenance and administration of the national forests, had approved a plan by Walt Disney Enterprises, Inc., to construct a "\$35 million complex of motels, restaurants, swimming pools, parking lots, and other structures designed to accommodate 14,000 visitors daily." *Id.* at 729.

⁵⁶ Standing is traditionally granted when the party bringing suit has a legitimate "personal stake in the outcome of the controversy." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

⁵⁷ *Sierra Club v. Morton*, 405 U.S. 741, 742 (1972) (Douglas, J., dissenting).

⁵⁸ Douglas's eloquent prose is self-explanatory: "The river, for example, is the living symbol of all the life it sustains or nourishes — fish . . . deer, elk, bear, and all other animals . . . who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water . . . must be able to speak for the values which the river represents . . ." *Id.* at 743.

⁵⁹ Stone, *Should Trees Have Standing? — Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

⁶⁰ *Id.* at 456.

have a system in which, when a friend of a natural object perceives it to be endangered, he can apply to a court for the creation of a guardianship."⁶¹ Anticipating the incredulity his suggestion would meet, Stone reminded us that "[t]hroughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable."⁶²

While Douglas' and Stone's views may be compelling, they haven't obtained the status of judicial orthodoxy, and the cases here were federal, not state. Despite a trend toward liberalizing the rules of standing, many state courts fear administrative chaos would result if standing were granted to animals and the environment. Add to this the fact that the law still essentially views animals as no more than proprietary interests of people, and it is apparent that animal rights advocates will be fighting the common law battle of standing for some time to come. Meanwhile, animal protectionists must turn to statutory law for help.

State Regulation

State regulation of animal welfare resides in anti-cruelty statutes. Such statutes have limited effectiveness, however, because "[s]tatutory provisions . . . have been exclusively derived from the common law, regarding animals as property, whose 'rights' are only established by the interests of humans,"⁶³ and "almost any human interest is sufficient to outweigh almost any animal interest The 'rights' of the animals are rarely at issue."⁶⁴ Anti-cruelty statutes are not designed to prevent cruelty and are only activated "after the . . . [animal] has already suffered the damage. This situation emphasizes that their focus is on punishing the human rather than protecting the nonhuman."⁶⁵ State legislation usually exempts laboratory research facilities from state interference in "properly conducted scientific experiments or investigations."⁶⁶ However, state regulation rarely interferes with improperly conducted experiments. When the state does choose to become involved, it is usually hindered because researchers working under federal grants are immune from liability for the violation of state anti-cruelty statutes.

The most notorious example of this situation is the *Taub* case.⁶⁷ Dr. Edward Taub of the Institute for Behavioral Research in Silver Spring, Maryland, was convicted under the Maryland anti-cruelty statute for abominable treat-

⁶¹ *Id.* at 464.

⁶² *Id.* at 453. Stone continued this thought with the observation that "we are inclined to suppose the rightlessness of rightless 'things' to be a decree of Nature, not a legal convention acting in support of some status quo." *Id.*

⁶³ Comment, *supra* note 12, at 746 n. 152.

⁶⁴ Comment *supra* note 12, at 746.

⁶⁵ Comment, *supra* note 14, at 501 (citing Burr, *supra* note 14, at 227-29).

⁶⁶ Comment, *supra* note 12, at 747 (quoting CAL. PENAL CODE sec. 599c (West 1970)).

⁶⁷ *Taub v. State*, 296 Md. 439, 463 A.2d 819 (1983).

ment of monkeys. Monkeys were found suffering with open wounds from self-amputation, in conditions of extreme filth.⁶⁸ The Maryland Court of Appeals overturned the conviction, holding that the state anti-cruelty statute does not apply to federally funded research.⁶⁹ The fact is that "[n]either the case law nor the present (state) humane statutes and anti-cruelty laws operate to assure nonhumans the rights they need and deserve."⁷⁰ Perhaps genuine protection for laboratory animals can be found in federal statutory law.

Federal Regulation

A. Protection of Laboratory Animals and the Animal Welfare Act

Animals don't cease to feel when chosen as experimental subjects. They are confined, fed, examined, experimented upon and, if not then dead, observed and studied in post-operative states. Since animals do continue to feel until death, we should monitor the conditions of their existence as laboratory subjects, inspecting such specifics as confinement cages (their size and cleanliness), climatic conditions in the laboratory (temperature and humidity), availability and quality of food and exercise, medical attention, pre- and post-operative use of anesthetics and painkillers, and access to creature companionship. Does federal legislation offer substantive protection of this breadth and detail? Let us consider legislation and amendments intended to protect the interests of laboratory animals.

Public response to Congressional revelations on the sale of stolen pets to laboratory facilities prompted the 1966 passage of the Laboratory Animal Welfare Act.⁷¹ The Act, intended to protect pet owners from animal theft, also established humane standards for the treatment of animals in research facilities. Administrative and enforcement powers under the statute were vested in the Department of Agriculture.⁷²

The Act did not provide comprehensive protection for laboratory animals and was soon amended by the Animal Welfare Act of 1970 (AWA).⁷³ The AWA acknowledged that animals are in fact entitled to certain basic necessities: "[A]nimals 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."⁷⁴

⁶⁸ See *Police Raid Lab, Seize Animals*, Washington Post, Sept. 12, 1981, at A1, col. 2.

⁶⁹ *Taub v. State*, 296 Md. 439, 463 A. 2d 819 (1983).

⁷⁰ Comment, *supra* note 14, at 491.

⁷¹ Pub. L. No. 89-544, 80 Stat. 350 (1966).

⁷² 7 U.S.C. § 2131 (1976).

⁷³ Pub. L. No. 91-579, 84 Stat. 1560 (1970).

⁷⁴ H.R. Rep. No. 91-1651, 91st Cong., 2nd Sess. 2, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 5103, 5104. 13

Neither of these Acts demonstrated a Congressional willingness to question the arbitrary discretion of medical researchers. A 1970 House report made that point eminently clear by stating, "The bill in no manner authorizes the disruption or interference with scientific research or experimentation. Under this bill the research scientist still holds the key to the laboratory door."⁷⁵

Subsequent disclosure of animal abuses led to the 1976 Amendments to the AWA, which focused on protective measures for animals while in transport. These abuses commonly involved deprivation of adequate air, food, and water, unreasonable confinement, and exposure to temperature extremes. The Amendments brought interstate carriers within the regulatory jurisdiction of the statute,⁷⁶ and established minimal requirements that interstate handlers must meet before transporting animals designated for protection under the Act.⁷⁷

The 1976 Amendments also clarified provisions of the earlier legislation and amended certain definitions, particularly the term "animal."⁷⁸ In redefining "animal" to determine what creatures will fall within the protective scope of the Act, Congress established the statutory basis for a continuing debate as to what animals are in fact intended to be protected under the legislation. Animal protectionists argue that the amended 1976 definition should clearly include rodents, which make up the overwhelming majority of animals used in laboratories today, but the United States Department of Agriculture (USDA), responsible for promulgation and enforcement of regulations under the law, refuses to classify rodents as animals entitled to protection under the Act. (This issue will be considered later.)

The latest Amendments, the *Improved Standards for Laboratory Animals Act* (ISLAA),⁷⁹ were passed in December, 1985. Although the ISLAA, commonly known as the Dole-Brown Act, has been hailed as a "truly rigorous [law] giving proper protection to laboratory animals,"⁸⁰ it has proven to be an extremely controversial piece of legislation, and animal protection groups have been at each other's throats over the Amendment.

Animal rights abolitionists have called the ISLAA a treacherous and regressive step that merely sanctions and perpetuates the abuse and destruction of animals used in laboratory experiments. Said reporter Carol Grunewald in *The Animals' Agenda* (a popular periodical of the animal protection movement),

Despite more than two decades of work by some sectors of the animal rights movement, there is still no meaningful protection for lab animals

⁷⁵ *Id.*

⁷⁶ 7 U.S.C. § 2136 (1982).

⁷⁷ 7 U.S.C. § 2143 (1982).

⁷⁸ 7 U.S.C. § 2132(g) (1982).

⁷⁹ Pub. L. No. 99-198, 99 Stat. 1645 (1985).

⁸⁰ Animal Welfare Institute, *AWI QUARTERLY*, Winter, 1985/86, at 1.
<http://www.aqlaw.org/akron/vol21/iss2/3>

nearly 20 years after the adoption of the Animal Welfare Act. . . . Most animal advocates feel that while [the] professed intentions appear great, the [ISLAA] lacks integrity. Activists point to a host of inadequacies, the foremost of these being that . . . the bill do[es] not address the use of animals during experimentation.⁸¹

In a letter to *The Animals' Agenda*, Christine Stevens, of the Society for Animal Protective Legislation, claimed that Grunewald's criticism that the ISLAA does not cover animals during experimentation is a misconception. Said Stevens, "The more specific requirements [of the ISLAA] with respect to pain relief and pain avoidance will apply at all times, not merely to the period before and after use and not merely to the care of the animals."⁸²

Grunewald's remarks were tame when compared to a position paper issued by another group, United Action for Animals (UAA). In their stinging condemnation of the Act and its supporters, UAA's report said: "One animal welfare society . . . is happy because the amendment provides [for the exercise of dogs] . . . We assume the dogs are exercised before they are baked alive in microwave ovens, or before their spines are severed, as they could hardly be exercised afterwards."⁸³

The report later quotes from a letter written by ISLAA co-author, Rep. George E. Brown (D-California), to the journal *SCIENCE*, in which he wrote:

"I have worked to make it the least possible burden to researchers. Instead, it will benefit the research community, since improving laboratory animal care can increase accuracy in research and enhance society's continued support for these institutions."⁸⁴

Brown's admission that he worked for the "least possible burden to researchers" arguably lends credence to his critics' case.⁸⁵ The UAA report went on to say, "What [Brown] means is that if the public is led to believe that laboratory animals are well 'cared' for, the public will not object to the animals being burned, blinded, gassed, blasted by explosives, starved and all other obscene cruelties inflicted on them, because they are being 'cared' for."⁸⁶ While other animal rights spokespersons were less scathing in their indictment of the ISLAA, many consider the new legislation to be woefully ineffective. Animal welfare groups, however, are pleased with passage of the new Act. One group reported to its members that, "For us in AWI the victory is especially sweet."⁸⁷

⁸¹ Carol Grunewald, *Protection v. Prevention — Which (if any) of Two Proposed Laws Would Help Lab Animals Now?*, *THE ANIMALS' AGENDA*, May 1985, at 12, 13.

⁸² Letter from Christine Stevens to *Letters Section*, *THE ANIMALS' AGENDA*, July-Aug. 1985, at 3.

⁸³ United Action for Animals, *A No Frills Report*, (undated), at 1.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*, at 2.

⁸⁷ *AWI QUARTERLY*, *supra* note 80, at 1.

In a quarterly report to members of the National Alliance for Animal Legislation, Syndee Brinkman wrote:

We consider the passage of this legislation a step in the right direction . . . We know that there was/is a lot of controversy surrounding this particular legislation within the humane community. However, we want our members to know that those amendments to the Animal Welfare Act are provisions which we support. It is an unfortunate fact that animals are in labs; but we believe that these animals will experience a "bit of a better" situation. That does not mean that we will stop here.⁸⁸

The debate raises questions of consequence, for there may be some truth in the biting claim of animal rights advocates that the ISLAA is merely a facade, granting researchers covert license to maltreat animal subjects in perpetuity.

The ISLAA was never intended to prohibit the experimental use of animal subjects. Senator Robert Dole (R-Kansas) co-sponsored the Bill. In his opening statement before the 1983 Senate Committee on Agriculture, Nutrition, and Forestry Hearing on the ISLAA, he said, "It's certainly not my intent to eliminate animals from scientific research."⁸⁹ Animals will continue to be used in research and abolitionists will continue to apprise the lay and scientific communities of viable alternatives and the unconscionability (in their opinion) of such experiments. Ms. Brinkman's position, however, is founded on an irrefutable corollary: Any reduction in the suffering these creatures experience will improve the quality of their lives, however pathetic those lives may be.

The purpose of the ISLAA is to provide laboratory animals greater protection from pain and distress than they were afforded under various federal statutes collectively known as the Animal Welfare Act. While the specifics of the new Act are complicated, its focus is straightforward.

Arguing for passage at House Hearings in the fall of 1984, Christine Stevens described the effect it would have:

[The Act] would . . . prevent avoidable pain and pain that can be relieved by drugs and other methods. The principal investigator . . . would consider alternatives to any painful experiment. . . . The National Agricultural Library would provide him with updated information on substitutes for laboratory animals, ways of limiting their numbers to those strictly necessary, and the best ways of preventing pain and distress. . . . He would consult with a veterinarian before performing an experiment which could cause pain in order to ascertain the best methods of avoiding it.⁹⁰

⁸⁸S. Brinkman, Alliance: Quarterly Report To Our Members, March, 1986, at 1,2.

⁸⁹*Improved Standards for Laboratory Animals, 1983: Hearings on S. 657 Before the Senate Committee on Agriculture, Nutrition, and Forestry, 98th Cong., 1st Sess. 2 (1983)* (opening statement of Sen. Robert Dole).

⁹⁰*Improved Standards for Laboratory Animals Act (1984): And Enforcement of the Animal Welfare Act by the Animal and Plant Health Inspection Service? Hearings on H.R. 5725 Before the House Subcommittee* 16

At the Senate Hearing, Stevens argued more philosophically for legislative enactment:

There is a form of blindness, which I have often observed in the course of decades of visiting laboratories, that makes legislation . . . so necessary. It is easy to become accustomed to the sight of needless suffering and even easier when . . . responsible individuals in an institution rarely even look at the animals.⁹¹

While advocates of the ISLAA promoted it as a moderate measure and militant abolitionists labeled the bill worthless, members of the commercial and scientific communities found the bill less innocuous, as evidenced by their opposition to its passage. James B. Wyngaarden, Director of the National Institutes of Health, which awards vast sums of federal money in research grants, argued against the bill, stating "We agree with its goal . . . we do not agree, however, with the premise that new legislation is needed to achieve that end."⁹²

Opponents of the new Act insisted at the House Hearings that the abuse of laboratory animals is an exceptional occurrence. Dr. Glenn Geelhoed, speaking for the Association of American Medical Colleges, argued that the bill was sponsored as a result of unfair claims of animal mistreatment.

These groups . . . by citing infrequent and extreme examples . . . have created an unjust image of research laboratories as torture chambers where animals are mistreated and neglected. As a result, these organizations have been able to lend credibility to efforts encouraging the adoption of governmental policies that would seriously impede the progress of one of our nation's most treasured resources — its biomedical research enterprise.⁹³

Dr. Gerald Van Hoosier, Jr., Director of Animal Medicine at the University of Washington, said the "allegations of general mistreatment of animals in research are devoid of factual basis."⁹⁴ Steven L. Kopperud, Legislative Director of the American Feed Manufacturer's Association, stated that "There is no verifiable record of the alleged widespread abuse of lab animals."⁹⁵

These statements echo the opinion expressed at the earlier Senate Hearing by Dr. Walter Randall, of the American Physiological Society, who said that "statements of malicious laboratory animal abuse by those who oppose animal research and scientific inquiry are anecdotal and are largely without verifica-

tee on Department Operations, Research, and Foreign Agriculture of the Committee on Agriculture, 98th Cong., 2nd Sess. 219 (1984) (prepared statement of Christine Stevens).

⁹¹ *Senate Hearings*, *supra* note 89, at 125 (statement of Christine Stevens, Society for Animal Protective Legislation).

⁹² *House Hearings*, *supra* note 90, at 28, 29 (statement of James B. Wyngaarden, National Institutes of Health).

⁹³ *House Hearings*, *supra* note 90, at 150 (prepared statement of Glenn Geelhoed, Association of American Medical Colleges).

⁹⁴ *House Hearings*, *supra* note 90, at 42 (statement of Gerald Van Hoosier, University of Washington).

⁹⁵ *House Hearings*, *supra* note 90, at 101 (statement of Steven L. Kopperud, American Feed Manufacturer's Association).

tion.”⁹⁶

Christine Stevens impeached the credibility of these statements, however, with a documented presentation of materials obtained from the USDA under the Freedom of Information Act. Explained Ms. Stevens:

Far from being a rarity, animal abuse is extremely common. . . . The data collected shows that major and repeated deficiencies or alleged violations of the minimum standards of the Animal Welfare Act [were committed] by 23.7 percent of [a] sample of 186 institutions. Another 22 percent have less frequent major violations, 28.5 percent have only minor ones, and 1.6 percent are under investigation. Thus, even using the most optimistic assumptions, only 24.2 percent of registered research facilities are regularly meeting the existing minimum standards of the Animal Welfare Act.⁹⁷

B. Analyzing Key Provisions of the ISLAA

The intense opposition raised before the new Act's⁹⁸ passage could be a portent of its potential value. A review of the ISLAA's key provisions may provide further insight into the Act's true significance.

Animal Pain and Distress and the Use of Anesthetics and Painkillers

The ISLAA requires research facilities “in experimental procedures to ensure that animal pain and distress are minimized, including adequate veterinary care with the appropriate use of anesthetic, analgesic, tranquilizing drugs, or euthanasia. . . .”⁹⁹ At first glance, this provision appears likely to reduce the amount of suffering to which lab animals will be subjected in the future. The Act further states, however, that “exceptions to such standards may be made only when specified by research protocol”¹⁰⁰ and that “[n]othing in this Act . . . shall be construed as authorizing the Secretary [of the USDA] to promulgate rules . . . with regard to the performance of actual . . . experimentation by a research facility. . . .”¹⁰¹

While the language of the Act goes on to require that exceptions to the provision for minimizing animal pain “be detailed and explained in a report,”¹⁰² it clearly leaves researchers discretionary power to decide when protocol precludes the use of painkillers. This interpretation is supported by Dean Franklin M. Loew, of the Tufts University School of Veterinary Medicine, who said that “these proposals would not restrict even painful research providing that

⁹⁶ *Senate Hearings*, *supra* note 89, at 48 (statement of Walter Randall, American Physiological Society).

⁹⁷ *House Hearings*, *supra* note 90, at 104 (statement of Christine Stevens, Society for Animal Protective Legislation).

⁹⁸ Improved Standards for Laboratory Animals Act of 1985, Pub. L. No. 99-198, 99 Stat. 1645 (1985).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1646.

¹⁰¹ *Id.*
<http://ideaexchange.uakron.edu/akronlawreview/vol21/iss2/3>

¹⁰² *Id.*

appropriate review and accountability . . . takes place.”¹⁰³ Perhaps being required to justify the withholding of anesthetics from an animal will lead to more “soul-searching” by researchers as to when the administration of pain reducing agents is appropriate.

In response to a USDA solicitation for suggested guidelines in the Federal Register,¹⁰⁴ the Animal Legal Defense Fund has written a Submission on Pain and Anesthesia¹⁰⁵ favoring the promulgation of regulations listing experiments which should not be performed on unanesthetized animals, including “surgery, burning, scalding, trauma produced by drumming, beating . . . or other means, bone fracture, drowning . . . microwave and other radiation, rapid decompression, and prey killing.”¹⁰⁶

The gravity of this act can’t be understood without a visceral grasp of what lies beneath the veneer of polished jargon. We are talking here about experiments such as “the scalding of baboons and guinea pigs, burning of dogs with hotplates, and the exposure of fully conscious rabbits and guinea pigs to the chemical warfare agent sulfur mustard.”¹⁰⁷ Any restrictions on the imposition of these types of suffering are welcome relief. The limits which the USDA will impose in its new regulations remain to be seen.

The new Act requires that the “principal investigator considers alternatives to any procedure likely to produce pain to or distress in an experimental animal”¹⁰⁸ and also, “in any practice which could cause pain to animals . . . that a doctor of veterinary medicine is consulted in the planning of such procedures for the use of tranquilizers, analgesics, and anesthetics.”¹⁰⁹ Common sense and modest optimism suggest that required veterinary consultation prior to painful experimentation should often contribute to a reduction in the subject’s suffering.

The Act further requires veterinary consultation for “pre-surgical and post-surgical care by laboratory workers, in accordance with established veterinary medical and nursing procedures.”¹¹⁰ Enforcement of this provision could end the horror stories about post-surgical neglect of laboratory animals. The Society for Animal Protective Legislation’s 1984 report to Congress described a typical example, wherein a “dog [was] suffering unbearable pain and bleeding heavily

¹⁰³ *House Hearings*, *supra* note 90, at 38 (statement of Franklin M. Loew, Tufts University School of Veterinary Medicine).

¹⁰⁴ 51 FED. REG. 7950 (1986).

¹⁰⁵ Animal Legal Defense Fund, Submission On Pain and Anesthesia With Reference to the Improved Standards for Laboratory Animals Act of 1985, 1986.

¹⁰⁶ *Id.* at 11.

¹⁰⁷ *Id.* at 30, 31, 37.

¹⁰⁸ Pub. L. 99-198, Title XVII, sec. 1752(a), Dec. 23, 1985, 99 Stat. 1646.

¹⁰⁹ *Id.*

following heart surgery [and] analgesics [had] not been administered.”¹¹¹

Dr. John McCardle, former Director of Laboratory Animal Welfare for the Humane Society of the United States (HSUS), pointed out in his testimony before Congress that such neglect is not the exception to the rule:

Although the value of proper post-surgical and nursing care is a basic tenet of modern veterinary practice, it is not universally characteristic of biomedical research laboratories and is often absent in testing laboratories, whose goals usually are to allow the animals to die as a consequence of the testing protocols.¹¹²

The Act also dictates that no animal shall be “used in more than one major operative experiment from which it is allowed to recover except in cases of scientific necessity.”¹¹³ This theoretically limits multiple surgeries on the same test animal to instances where the protocol in one procedure is inseparably predicated upon a prior surgical experiment. The provision may restrict the traditionally habitual laboratory practice of cumulatively dismembering animals in serial steps. The Act provides the Secretary (of the USDA), however, with broad discretionary power to make exceptions.¹¹⁴

Institutional Animal Committees

The most controversial provision of the new Act, considered a major legislative victory by many animal welfare groups, says “the Secretary shall require that each research facility establish at least one [Institutional Animal] Committee,”¹¹⁵ and that “at least one member is intended to provide representation for general community interests in the proper care and treatment of animals.”¹¹⁶ Much store is placed in the Act’s authorization that “[t]he Committee shall inspect . . . all animal study areas . . . of such research facility and review . . . practices involving pain to animals and the conditions of animals to ensure compliance with the provisions of this Act.”¹¹⁷ The Committee is further directed to file an inspection certification reporting “any violation of the standards promulgated . . . by the Secretary, including any deficient conditions of animal care or treatment.”¹¹⁸

Many people feel that the placement of an outside “humane” person on the Committee will substantially reduce the frequency of animal abuse in laboratory experiments. Dr. McCardle, in supporting the appointment of such

¹¹¹ *House Hearings*, *supra* note 90, at 213 (statement of Christine Stevens, Society for Animal Protective Legislation).

¹¹² *House Hearings*, *supra* note 90, at 133 (statement of John McCardle, Humane Society of the United States).

¹¹³ Pub. L. 99-198, Title XVII, sec. 1752(a), Dec. 23, 1985, 99 Stat. 1646.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1647.

¹¹⁶ *Id.*

¹¹⁸ *Id.*

a member, said "I believe it will be difficult to hide a lack of inspections or to hide serious violations of the Animal Welfare Act when a responsible member of the local humane community is on the animal care committee."¹¹⁹

Dr. Barbara Orlans, Executive Director of the Scientists Center for Animal Welfare, spoke more emphatically about the importance of the Institutional Animal Committee: "These Committees are a key link in the review process that sets the standard for humaneness of animal experiments. An effective institutional committee can profoundly influence the welfare of animals kept for research."¹²⁰

Still another witness at the Hearings, Dr. Herbert Rackow of the Scientists Group for Reform of Animal Experimentation, emphasized the crucial role played by the outside Committee member. Said Dr. Rackow:

For the first time, [the Act] brings to the inspection committee an independent, unpaid lay member, who is not affiliated with the research facility, has no conflict of interest, and whose primary responsibility is to the welfare of the animal subjects, not to NIH and not to the USDA. The effectiveness of [the Act] in ensuring humane treatment of research animals, will stand or fall on the quality of this member.¹²¹

Such optimism that the outside "humane" members of Institutional Animal Committees can substantially help in reducing the suffering of laboratory animals is not shared by everyone. The United Action for Animals report on the ISLAA graphically illustrates past failures of care committees to reduce or eliminate the abuse of experimental animals, and notes that "Care committees [have not] done anything to alleviate the suffering of animals here in the United States."¹²² Let us look at some experiments done in U.S. laboratories which already have care committees that review experiments in advance:

At Fort Sam Houston, Texas: Guinea pigs and rats were scalded over 50% of their bodies to observe the effects of oxygen consumption, and goats were burned with flames to observe the effects on breathing and oxygen consumption.¹²³

At the General Motors Research Laboratories, Warren, Michigan: Rabbits' chests were crushed to observe injuries including heart and lung rupture.¹²⁴

At the Division of Biological and Medical Research, Argonne National

¹¹⁹ McCordle, *supra*, note 90, at 44.

¹²⁰ *House Hearings, supra*, note 90, at 161 (statement of Barbara Orlans, Scientists Center for Animal Welfare).

¹²¹ *House Hearings, supra*, note 90, at 197, 198 (prepared statement of Herbert Rackow, Scientists Group for Reform of Animal Experimentation).

¹²² United Action for Animals, *supra* note 83, at 3.

¹²³ *Id.* at 4.

Laboratory, Argonne, Illinois: 216 beagles were exposed to whole-body irradiation with gamma rays, 22 hours a day for life to calculate the lethal dose of radiation.¹²⁵

Although these examples severely impugn the worth of animal care committees, it is not known if the committees here included outside members in the review process. Committees without external representation employ what is known as the "peer review system," which has not been effective in protecting animals.¹²⁶ Two dramatic examples of peer review failures are the *Taub* monkey case, where a committee failed to condemn abominable conditions that included monkeys suffering with open wounds from self-amputation,¹²⁷ and the head injury lab at the University of Pennsylvania, which for thirteen years used NIH funding to brutally abuse test monkeys,¹²⁸ without protest from any of four committees that approved of "the research and methodology."¹²⁹

Perhaps the new committees will prove more effective than peer review has been in protecting laboratory animals. What success they do have will more likely result from organizing public opinion than influencing researchers. To do this, however, committee members must inform their communities about activities at research facilities. Are they free to do this under the new Act? Possibly not.

Section 1754 of the new Act provides that "It shall be unlawful for any member of an Institutional Animal Committee to release any confidential information of the research facility including any information that concerns or relates to the trade secrets, processes, operations, style of work . . ." ¹³⁰ and that "it shall be unlawful for any member of such Committee to use or attempt to use to his advantages, or to reveal to any other person, any information which is entitled to protection as confidential information. . . ." ¹³¹

For violating any of these provisions, a member is subject to removal from the committee, a fine of up to one thousand dollars and up to one year's imprisonment if the violation is inadvertent,¹³² and a fine of up to ten thousand dollars and up to three years' imprisonment for a willful violation of the Act.¹³³

Although the Act became effective only in December of 1986 and the USDA has yet to promulgate comprehensive regulations, Section 1754 is certain to

¹²⁵ *Id.* at 5.

¹²⁶ Comment, *supra* note 47, at 406.

¹²⁷ See *supra* note 68.

¹²⁸ Comment, McDonald, *supra* note 47, at 406. Also see Pothier, *Animal-Research Aid Cut Off at Penn*, Philadelphia Inquirer, July 19, 1985, at 1-A, col. 1.

¹²⁹ Comment, McDonald, *supra* note 47, at 407.

¹³⁰ Pub. L. 99-198, Title XVII, sec. 1754, Dec. 23, 1985, 99 Stat. 1649.

¹³¹ *Id.*

¹³² *Id.*

have a chilling effect on the enthusiasm with which "outside members"¹³⁴ inform the public until the courts determine precisely what disclosures are protected under the first amendment¹³⁵ and what activities are precluded from disclosure under these provisions. Furthermore, Section 1752's express refusal to authorize USDA regulation of the performance of "actual research,"¹³⁶ together with co-sponsor Brown's asserted aim to limit the burden on researchers,¹³⁷ suggest a legislative intent that will discourage courts from granting outside committee members expansive freedom to inform under Section 1754.

This caveat represents a cautious interpretation of the potential strength of the Act's confidentiality provisions. Few supporters raised this issue during hearings on the bill. However, testifying against the bill, Howard C. Brown, Jr., representing the National Association of Life Sciences Industries, Inc., recognized that the statute might "chill" outside committee members. He stated, "The nonassociated community member . . . is placed in an awkward position. The individual does not enjoy the rewards or benefits of employment but would be exposed to . . . the possible risks . . . of fines and imprisonment for the release of confidential information."¹³⁸

Duplication in Experiments

The ISLAA requires that "[t]he Secretary shall establish an information service at the National Agricultural Library [(NAL)],"¹³⁹ and that this service, in cooperation with the National Library of Medicine (NLM), shall "provide information . . . which could prevent unintended duplication of animal experimentation."¹⁴⁰ This sounds like an impressive step toward eliminating duplicative research but these institutions need operating funds to effectively "provide information."

The Reagan administration has zero-budgeted the AWA, which now includes the ISLAA, for several years now. Last year "Congress voted 4.865 million dollars as it has done for the past five years despite attempts to reduce funding in the President's budget."¹⁴¹ Critics claim, however, that no real reduction in duplicative testing can occur without establishing a more comprehensive

¹³⁴ See Pub. L. 99-198, Title XVII, sec. 1752(a), Dec. 23, 1985, 99 Stat. 1647, wherein the statute defines what has come to be known as an "outside member" of the Committee as someone who "shall not be affiliated in any way with such facility other than as a member of the Committee (and who) is intended to provide representation for general community interests . . ."

¹³⁵ U.S. CONST. amend. I.

¹³⁶ Pub. L. 99-198, Title XVII, sec. 1752(a), Dec. 23, 1985, 99 Stat. 1646.

¹³⁷ United Action for Animals, *supra* note 83, at 1.

¹³⁸ House hearings, *supra*, note 90, at 68 (statement of Howard C. Brown, National Association of Life Sciences Industries).

¹³⁹ Pub. L. 99-198, Title XVII, sec. 1752(a), Dec. 23, 1985, 99 Stat. 1648.

¹⁴⁰ *Id.*

¹⁴¹ Letter from Christine Stevens to David Hoch (March 31, 1986) (discussing Federal funding of the AWA and the ISLAA).

computer-based bibliographic service than that called for in the present Act.

Toward that end, Congressman Robert Torricelli (D-New Jersey) introduced the "Information Dissemination and Research Accountability Act,"¹⁴² which would have established a National Center for Research Accountability to prevent duplicative experimentation or testing on live animals. "The bill mandate[d] the use of modern technologies for the dissemination of biomedical information to all of the nation's medical libraries for ready and economical use of the researchers."¹⁴³ The bill anticipated a computer network far greater in scope than that called for in the ISLAA, with a projected cost of millions of dollars, and did not pass. Torricelli, however, has reintroduced a more modest bill of the same name with a more realistic hope of passage in the 100th Congress.¹⁴⁴

Uncertain funding is not the only bar to an effective reduction in duplicative testing. Even if the NAL information service succeeds in making data readily available to researchers, the new Act calls for information to prevent "unintended" duplication and many scientists are unwilling to rely on data derived from past studies. The American Institute of Biological Sciences' statement to the House reveals the reluctance of researchers to rely on such information. Said the report, "As scientists, we are disturbed by an attitude which would discourage 'research duplication' since replicability by other investigators is our only means of verification."¹⁴⁵ Despite these difficulties, the service created under the Act should eliminate some duplication, and save many animals from suffering and destruction.

Alternatives to Animal Experiments

Technological advances are enabling researchers to conduct a growing number of experiments in which live subjects are no longer required. Advocates of alternative research consider this a laudable and necessary development. Dr. McCardle's testimony before the House strongly supported this position: "I want to stress the importance of the alternative information center at the NAL . . . many people in the research community are not aware of the extent to which alternatives are available. . . . So I want to emphasize the importance of this section."¹⁴⁶

Other scientists are more emphatic in their support of alternative research. In a statement to Congressional appropriations committees, Dr. Richmond C. Hubbard, Chairman of the Medical Research Modernization Committee, had

¹⁴²H.R. 1145, 99th Cong., 2d Sess. (1986).

¹⁴³United Action for Animals, *Update on H.R. 1145*, (undated), at 1.

¹⁴⁴H.R. 1708, 100th Cong., 1st Sess. (1987).

¹⁴⁵*House Hearings, supra*, note 90, at 260 (prepared statement of The American Institute of Biological Sciences).

¹⁴⁶*House Hearings, supra*, note 90, at 45 (statement of John McCardle, Humane Society of the United States). 24

this to say:

[T]he "animal model" of research into human diseases and behavioral problems has been largely rendered obsolete by the "tremendous advances in radiology, laboratory and computer sciences, cell and culture techniques. . . . [D]ata obtained from human study is directly relevant . . . whereas that obtained from "animal model" study is often irrelevant, wasteful, redundant, and a hindrance rather than an aid to progress.¹⁴⁷

In the new Act's introduction, Congress found that "methods of testing that do not use animals are being . . . developed which are faster, less expensive, and more accurate than traditional animal experiments for some purposes."¹⁴⁸ Consistent with these findings, the Act requires that "[e]ach research facility shall provide for the training of . . . personnel involved with animal care and treatment [and that] such training shall include instruction on . . . research or testing methods that minimize or eliminate the use of animals."¹⁴⁹ Congress apparently agreed with doctors McCardle and Hubbard, as the NAL duplication provisions also call for information "which could reduce or replace animal use."¹⁵⁰

Furthermore, "Animal Testing Alternatives" is a new heading appearing for the first time in 1985 editions of the National Library of Medicine's catalogs and computer bases. The heading will be used to index materials that describe procedures used to avoid experimentation with animals. Dr. George J. Cosmides, Deputy Associate Director for Specialized Information Services, NLM, reports that "[t]he . . . description . . . includes 'procedures such as tissue culture, mathematical models, etc., when used or advocated for use in place of the use of animals in research or diagnostic laboratories.'" ¹⁵¹

While attempts to promote alternatives to animal use are proving successful in certain areas, numerous representatives of the research community warn against placing too much faith in the future of alternative research. The American Heart Association statement concerning the alternative research provisions of the new Act states:

Biomedical research is a key element in the overall mission of the Association to "reduce . . . disease." The death rates due to cardiovascular disease have decreased . . . since 1968. Many . . . discoveries which . . . allow these dramatic declines in morbidity . . . can be traced to . . . research involving studies with animals.¹⁵²

The American Institute of Biological Sciences also voiced concern that "some critics of live animal studies are unrealistically optimistic in their ex-

¹⁴⁷ R.C. Hubbard, *Statement to Congressional Appropriations Committees*, (undated), at 1.

¹⁴⁸ Pub. L. 99-198, Title XVII, sec. 1751, Dec. 23, 1985, 99 Stat. 1645.

¹⁴⁹ *Id.* at 1648.

¹⁵⁰ *Id.*

¹⁵¹ Animal Welfare Institute, *supra* note 80, at 2.

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¹⁵² *House Hearings*, *supra* note 90, at 252, 253 (prepared statement of the American Heart Association).

pectations concerning the usefulness of computer modeling, cell cultures, and other substitutes for live animals.”¹⁵³

Dr. Van Hoosier’s statement to the Subcommittee was militantly guarded on the question of alternatives:

While adjunct methods have been developed in recent years . . . fundamental elements of biomedical research will always require the use of animals. We do not believe the word “alternatives” is reasonable. It is not fair nor accurate to hold out the promise that there are — or will be — research substitutes for animals.¹⁵⁴

While it is usually the animal rights activists who are accused of passionate moral claims in this debate, Dr. William F. Raub, Deputy Director of Extramural Research and Training at the NIH, testified at the 1983 Senate Hearing that “the NIH regards animal experimentation as both a legislative mandate and a moral imperative.”¹⁵⁵

It is interesting to note that opinions on the value of alternative research correlate almost directly with each scientist’s support or opposition to the Bill. Both sides give persuasive arguments, with the pro-experimenters claiming that even if we do find effective alternatives to the use of animals, the alternative methods must first be tested on animals. The animal protectionists obviously contest the logic of that paradoxical premise. Such philosophical nuance dims in importance if the modest but hard-won legislative victories of the protectionists are not enforced at law. Let us then consider the record in this regard.

USDA: Regulation, Promulgation, and Enforcement

Section 1752 of the ISLAA orders, among other things, that “The Secretary shall promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors.”¹⁵⁶ The USDA has always been responsible for regulation under the AWA,¹⁵⁷ however, and its past record will discourage those hoping for stringent regulation. The USDA’s attitude toward laboratory animals is clearly reflected in the following example of Department conduct:

The vast majority of animals used in laboratory research are rats and mice.¹⁵⁸ “At the present time . . . 85% of the 70 million laboratory animals killed annually in United States research and testing facilities are excluded from any

¹⁵³House Hearings, *supra* note 90, at 260 (prepared statement of the American Institute of Biological Sciences).

¹⁵⁴House hearings, *supra* note 90, at 41 (statement of Gerald Van Hoosier, School of Medicine, University of Washington).

¹⁵⁵Senate Hearings, *supra* note 89, at 7 (statement of William F. Raub, National Institutes of Health).

¹⁵⁶Pub. L. 99-198, Title XVII, sec. 1752(a), Dec. 23, 1985, 99 Stat. 1645.

¹⁵⁷7 U.S.C. 2143(a).

¹⁵⁸Office of Technology Assessment, Project Staff, *Alternatives to Animal Use in Research, Testing, and Education* (1986), at 10.

legal protection. We will accomplish little if [the Act] does not include these voiceless and unprotected animals within its provisions."¹⁵⁹ Nevertheless, the Secretary did exclude "birds, rats and mice, and horses . . ." ¹⁶⁰ from protective regulation under the AWA, even though the AWA defined "animal" to include "such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use"¹⁶¹ in research or testing.¹⁶²

After analyzing this exclusion, Henry Cohen, Legislative Attorney for the Library of Congress, concluded:

Because rats and mice are warm-blooded animals . . . if [the Secretary] determines that a rat or mouse is being used for research . . . then . . . such rat or mouse is an "animal". . . . The Act does not appear to give the Secretary the discretion to determine that a warm-blooded animal being used for research is not an "animal" for purposes of the Act.¹⁶³ . . . Thus, the Secretary's exclusion of rats and mice . . . appears to be inconsistent with the language of the . . . AWA and with Congress's intent in enacting it.¹⁶⁴

It would appear then that the regulation, as promulgated by the Secretary, frustrates the policy that Congress sought to implement.¹⁶⁵ Such frustration, however, is mild in comparison to that suffered by anyone who has ever looked to the USDA for enforcement of the AWA.

Until now, the AWA has been "virtually ineffective," primarily because of the USDA.¹⁶⁶ From the very beginning, the Department has been reluctant to involve itself with enforcement of the Act. In a 1966 letter¹⁶⁷ to a Senate Committee, the Secretary expressed the department's unwillingness to accept its appointment as the enforcement body of the AWA: "there is a question as

¹⁵⁹ *House Hearings*, *supra* note 90, at 148 (statement of John McArdle, Human Society of the United States).

¹⁶⁰ 9 C.F.R. sec. 1.1(n).

¹⁶¹ 7 U.S.C. sec. 2132(g).

¹⁶² See H. Cohen, *Two Questions Concerning the Animal Welfare Act*, in Animal Legal Defense Fund, Submission on Pain and Anesthesia with Reference to the Improved Standards for Laboratory Animals Act of 1985, Exhibition B, p. CRS-1 n. 1 (1986), which explains that "the introductory comments published by the Secretary upon promulgating the regulation do not discuss the basis for this exclusion." See also 42 FED. REG. 31022.

¹⁶³ Cohen, *supra* note 161, at CRS-1,2. Cohen's report then discusses the legislative history of the provision and concludes that the Secretary's exclusion of rats and mice from the definition of "animals" defeats the intent of Congress in this regard. Cohen questions the legal validity of this policy and suggests that the courts "must reject administrative constructions of the statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought . . .", as stated in *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 31-32 (1981). Cohen believes that the exclusion of coverage to rats and mice is "beyond the Secretary's statutory authority," *supra* note 161, at CRS-5.

¹⁶⁴ Cohen, *supra* note 161, at CRS-4.

¹⁶⁵ Review of the USDA's behavior in administering the various provisions of the AWA can indeed reach the bizarre. One is tempted to send a lapel button to the Secretary stating that "Rats are People Too!"

¹⁶⁶ Rikleen, *Animal Rights, The Animal Welfare Act: Still A Cruelty to Animals*, 7 B.C. ENVTL. AFF. L. REV. 134 (1978).

¹⁶⁷ Letter from Secretary of Agriculture, USDA as contained in S. REP. No. 1281, 89th Cong., 2nd Sess., reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2635.

to whether it would not be desirable that [the] law . . . in question be administered by a Federal agency more directly concerned and having greater expertise. . . ." ¹⁶⁸

In 1970, the USDA sought to be removed from its role as enforcement agency under the AWA. This time, in a letter to the House, the Department wrote that in the Department's opinion, the Department of Health, Education, and Welfare was "the appropriate agency to administer such an activity." ¹⁶⁹ In 1976, when the House Report ¹⁷⁰ on the proposed 1976 Amendments suggested strengthening the authority of the Secretary of Agriculture to establish humane standards for animal treatment, the Chairman of the House Committee on Agriculture received yet another letter from the Department opposing enactment of the Amendments and suggesting that "[t]here are available alternative measures which can achieve many of the objectives of the bill." ¹⁷¹ The letter failed to specify the alternatives. ¹⁷²

These letters do not reveal an attitude conducive to aggressive enforcement measures. Neither does the fact that in the USDA's first decade of regulation under the AWA only two persons were prosecuted. ¹⁷³ The Department's opposition to improved regulations has continued. During the 98th Congress, the Department's Enforcement Administrator testified against the ISLAA, claiming that "the bill would be a duplication of effort [and] . . . will increase the enforcement problems." ¹⁷⁴ Additionally, Secretary John R. Block wrote one more letter to the Chairman of the House Committee on Agriculture. Secretary Block again opposed passage of the ISLAA, and said that "proper care and treatment and appropriate use of laboratory animals can be achieved under current authorities." ¹⁷⁵

The USDA's attitude toward enforcement has never changed. For example, despite federal investigators' repeated criticism of facility conditions, and the campus veterinarian's refusal to sign required AWA compliance forms for 1980 and 1983, the Department took no action against the University of California at Berkeley until a local television expose aroused public concern. ¹⁷⁶ Even then, the Department did not file charges against the University until a local citizen's group, Californians for Responsible Research, brought suit to force action. The

¹⁶⁸ *Id.* at 2643.

¹⁶⁹ Letter from Office of the Secretary, USDA *as contained in* H. REP. No. 91-1651, 91st Cong., 2nd Sess. 3, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5105, 5106.

¹⁷⁰ H. REP. No. 94-801, 94th Cong., 2nd Sess. 6, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 758.

¹⁷¹ *Id.* at 767.

¹⁷² Rikleen, *supra* note 165, at 136.

¹⁷³ Animal and Plant Health Inspection Service, United States Department of Agriculture, Prosecutions for Animal Welfare Violations [1966-1976] 2 (August 1976).

¹⁷⁴ *House Hearings, supra* note 90, at 25 (statement of Bert W. Hawkins, APHIS (USDA)).

¹⁷⁵ *House Hearings, supra* note 90, at 16 (letter from USDA secretary John R. Block to E. (Kika) de la Garza, Chairman, Committee on Agriculture).

¹⁷⁶ Comment, *supra* note 125, at 405.

case involved culpable neglect; thousands of animals died due to repeated malfunctions of the laboratory heating system.¹⁷⁷ The case typifies the Department's continuing unwillingness to enforce the AWA.

If the Department's track record with the AWA doesn't raise doubts about the USDA's attitude toward animals, consider its role in the notorious hot iron branding debacle. In April, 1986, to maintain dairy prices by reducing the supply of cattle, the government agreed, under the Dairy Termination Program,¹⁷⁸ to buy approximately two million dairy cattle, most of which were to be slaughtered. To avoid being swindled by farmers who might supply the Department with lower-yield cattle than those originally purchased, the USDA required all farmers whose bids were accepted to brand the government-purchased animals "on the face with a hot branding iron."¹⁷⁹

Extraordinary protest arose in response to the USDA's requiring such a torturous procedure. The Humane Society of the United States (HSUS) advocated prosecution, under various state statutes prohibiting cruelty to animals, of anyone who proceeded with the hot-iron face-branding. The HSUS sued the USDA in Federal District Court,¹⁸⁰ claiming that the Department could not require such branding. The court agreed, and the USDA had to amend its regulation to allow farmers the choice between hot branding and a relatively painless alternative, freeze-branding.¹⁸¹

One must question the wisdom of appointing an agency to enforce federal statutes designed to protect animals from pain and suffering, when that agency legally mandates the torture of cattle.

At the controversial 1984 House Hearings on the proposed ISLAA, there was one point on which almost everyone agreed: the USDA enforcement record has been pathetic. The AWA is actually administered by the Animal and Plant Health Inspection Service (APHIS) of the USDA. When asked at the Hearings if he felt the current enforcement budget was adequate, Mr. Bert Hawkins, Administrator of APHIS, and understandably the only witness satisfied with his department's performance, made an astute observation. After responding that he considered the present budget adequate, he said, "all people's ideas of care of animals won't be changed in a day. We could put an army of people out there with an abundance of funds to support them, and we would still have infractions of the act."¹⁸² While his observation is correct insofar as full compliance

¹⁷⁷ A. ROWAN, *OF MICE, MODELS, AND MEN: A CRITICAL EVALUATION OF ANIMAL RESEARCH* 174,175 (1984).

¹⁷⁸ Dairy Termination Program, see H.R. REP. NO. 99-271 (I), 99th Cong., 1st Sess. 20-21, *reprinted in* [1985] U.S. CODE CONG. & AD. NEWS 1124-25, amended by 7 U.S.C. sec. 1446 (d)(3).

¹⁷⁹ See USDA Notice LD-249 (1986), which provides that "all female dairy cattle must be branded with a hot branding iron."

¹⁸⁰ *Humane Society of Rochester and Monroe county for the Prevention of Cruelty to Animals, et al v. Lyng*, CIV-86-307T (unpublished opinion of Judge Michael Telesca) (U.S.D.C. W.D.N.Y. 1986).

¹⁸¹ *Id.* at 15,16.

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¹⁸² Hawkins, *supra* note 173, at 26.

is concerned, the overall enforcement record of APHIS is clearly quite poor.

Few others share Mr. Hawkins' belief that APHIS is sufficiently funded. Dr. Geelhoed, cited earlier as an opponent of ISLAA, had some thoughts on APHIS enforcement:

APHIS, the Government agency charged with the enforcement of these acts, has rarely, if ever, been provided with sufficient resources to ensure full compliance with the law . . . With only 6 of the 485 inspectors working full time in animal inspection, and the remaining inspectors devoting only 6 percent of their time to that inspection . . . it is clear to us . . . that agency should be significantly strengthened with increased appropriations and direction."¹⁸³

In her testimony to Congress, Gretchen Wyler referred to a 1984 speech against passage of the ISLAA by Ms. Franki Trull, Executive Director of the Foundation for Biomedical Research. Ms. Trull had said that one reason the AWA hasn't worked well is that the APHIS inspection program receives only \$4.8 million a year (which it did at that time). To quote Ms. Trull: "Let's face it, that's an absolute drop in the bucket and, of course, they therefore have inspectors who are not trained under the same training program, who are not necessarily qualified to be in a research institution . . . I mean, we've got a real problem."¹⁸⁴

Dr. Van Hoosier also pointed out the problem of inadequate funding and its effect on AWA enforcement: "It is not difficult to find ways to significantly improve the application of current standards . . . Little else would be needed . . . than to provide APHIS with adequate funding annually. There are too few inspectors, and too few of them able to devote themselves to the area of animal welfare."¹⁸⁵

Finally, Dr. Loew tactfully voiced the same opinion: "I would like to . . . assess . . . current APHIS enforcement of the AWA. In a word, it has been uneven. The program suffers . . . from a lack of adequate funds, a too-small professional and technical staff . . . and from internal legal support which is stretched too thinly."¹⁸⁶

The USDA's questionable attitude toward enforcement, combined with inadequate funding and poorly trained inspectors has resulted in a situation where

¹⁸³ *House Hearings*, *supra* note 90, at 47 (statement of Glenn Geelhoed, Association of American Medical Colleges).

¹⁸⁴ From speech by Mrs. Franki Trull, Executive Director of The Foundation for Biomedical Research, Illinois, Jan. 31, 1984, as quoted in *House Hearings*, *supra* note 90, at 199 (prepared statement of Gretchen Wyler, The Fund For Animals, Inc.).

¹⁸⁵ *House Hearings*, *supra* note 90, at 128 (prepared statement of Gerald Van Hoosier, Jr., University of Washington).

¹⁸⁶ *House Hearings*, *supra* note 90, at 39 (statement of Franklin M. Loew, Tufts University School of Veterinary Medicine).

"the laboratories have not really taken the USDA seriously . . . the laboratories have been able to just push USDA aside."¹⁸⁷

Because of the USDA's unwillingness or inability to adequately enforce the law, it has been suggested that civil suits be made available to compel enforcement of the Act. The HSUS asked that the 1985 Amendments contain a provision that "any person may commence a civil suit on his own behalf or on behalf of any animal protected by this chapter to compel the Secretary to apply and enforce the provisions of this chapter,"¹⁸⁸ and that "district courts shall have jurisdiction . . . to order the Secretary to take any action necessary to apply and enforce the provisions of the chapter."¹⁸⁹ The suggestion was not incorporated into the ISLAA.

A very similar suggestion has been made by the Animal Legal Defense Fund, in an extensive set of proposed changes to the AWA (and ISLAA). The Animal Legal Defense Fund advocates that a Citizens Enforcement Provision, modeled after the Citizens Enforcement Provision of the Clean Water Act,¹⁹⁰ be included in the Act.¹⁹¹ Like the HSUS proposal, this would allow citizens to bring suit against the USDA to enforce violated provisions of the Act. Given the USDA's enforcement history, the exclusion of a provision of this type constitutes a major flaw in the AWA and its amendments.

Representatives Charlie Rose (D-N.C.) and Rod Chandler (R-Washington) also introduced an Amendment¹⁹² to the Animal Welfare Act which would have given individuals and groups standing to sue the USDA directly for any failures to enforce the Act. The bill failed to pass in either the 98th or 99th Congress, but Rose has again introduced this legislation in the 100th Congress.

What then does one conclude? Are the new Amendments going to provide additional protection for laboratory animals, or is the ISLAA, as some claim, merely a paper lion aimed at appeasing interest groups and constituents? The ISLAA contains too many thoughtful provisions, advocated by too many concerned parties, authorizing too many safeguards for even its harshest critics to argue that it will do no good whatsoever. There are weaknesses, it is true, in various provisions that reflect the compromise between animal welfare advocates and those supporting unfettered and unsupervised research.

The stipulation, for example, that research protocol may exempt an in-

¹⁸⁷ *House Hearings*, *supra* 90, at 107 (statement of Christine Stevens, Society for Animal Protective Legislation).

¹⁸⁸ *House Hearings*, *supra* note 90, at 45 (statement of John McArdle, Human Society of the United States).

¹⁸⁹ *Id.*

¹⁹⁰ 33 U.S.C. 1365 (1982).

¹⁹¹ See S.A. Chambers, *Professionals*, News: Progressive Animal Welfare Society Newsletter, May, 1987, at 3.

¹⁹² H.R. 4536, 98th Cong., 2d Sess. (1985).

vestigator from administering anesthesia or painkillers to an animal,¹⁹³ indicates that a great deal of discretion remains in the hands of the scientist and research facility. Other provisions, however, requiring that the reason for withholding anesthesia be explained in a report filed with the Institutional Animal Committee,¹⁹⁴ that the principal investigator must have considered alternatives to this procedure,¹⁹⁵ and that a veterinarian must be consulted in planning the procedure and supervising post-surgical care,¹⁹⁶ certainly provide the impetus for greater protection than that found in previous legislation.

Similarly, the threat of criminal sanction for disclosing confidential information¹⁹⁷ compromises the ability of the newly required committees to effectively protect animals. Inevitable future suits, however, challenging ISLAA restrictions on an outside member's right to inform, will clarify the members' limitations and power. Their power may prove surprisingly expansive. Furthermore, the committees' authority to inspect facilities,¹⁹⁸ examine the condition of the animals,¹⁹⁹ and file reports of violations with APHIS inspectors²⁰⁰ seems certain to influence researchers. This inspection process, combined with personnel training programs called for in the Act,²⁰¹ should have a salutary effect on the future treatment of laboratory animals.

Law finds compromise among competing interests. It seeks a workable world. It cannot resolve conflicts to the complete satisfaction of all involved. There are disapproving parties at both ends of the laboratory animal controversy, who think the new law is terrible. Animal rights advocates consider the Act gratuitous faldral while scientists condemn it as a serious impediment to research. Nevertheless, the ISLAA holds out at least the promise of improved conditions for laboratory animals. For this to happen, however, the Act must be enforced.

Enforcement is the crucial link between the new Act and reduced suffering for laboratory animals. The ISLAA will lend no greater protection to animals than past Amendments of the AWA unless the USDA is more rigorous in its enforcement policy. The Department hasn't been vigilant in the past, however, and there are no substantial reasons to hope for change. Current House Resolution 1770²⁰² (the present version of Congressman Rose's Amendment to the Animal Welfare Act), authorizing citizen suits to enforce provisions of the AWA,

¹⁹³ Pub. L. 99-198, Title XVII, sec. 1752(a), Dec. 23, 1985, 99 Stat. 1646.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 1649.

¹⁹⁸ *Id.* at 1647.

¹⁹⁹ *Id.* at 1647.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1648.

²⁰² *Id.* at 1648.
<http://ideaexchange.uakron.edu/akronlawreview/vol21/iss2/3>
²⁰² H.R. 1770, 100th Cong., 1st Sess. (1987).

would help. However, the bill is currently in committee; no hearings are scheduled; and no co-sponsorship of a companion bill in the Senate has been forthcoming.

For many people opposed to unnecessary animal suffering, hoping for the eventual passage of legislation with questionable odds of adequate enforcement will no longer suffice.

As Dean Loew of the Tufts University School of Veterinary Medicine said at the House Hearings on the ISLAA, "in controversy, where you stand depends on where you sit."²⁰³ (Loew argued the case for a moderate middle ground in shaping the new Act.)²⁰⁴ From where many animal rights activists sit, the need exists to take a stronger stand.

On April 24, 1987, a coalition of animal activists organized the largest demonstration ever held on behalf of animals in commemoration of World Day for Laboratory Animals.²⁰⁵ The event drew thousands of activists from some thirty states to demonstrations, debates, "teach-ins," and acts of civil disobedience in protest against the use of animal subjects in laboratory experiments.²⁰⁶

The Congress adopted Loew's advice in drafting the ISLAA and adopted a bill it considered to be cautious, responsible, and effective. Whether or not the new legislation will in fact prove beneficial to laboratory animals, only time and the courts can tell. Meanwhile, experiments utilizing animal subjects will continue and researchers themselves will exercise the greatest control over the fate of laboratory animals.

Another federal law, The Health Research Extension Act (HREA) of 1985,²⁰⁷ requires the establishment of animal care committees (like those created by the ISLAA) at all facilities that conduct behavioral and biomedical research with animals and receive Public Health Service (PHS) funding.²⁰⁸ The Director of the National Institutes of Health (the branch of the PHS which actually awards federal research grants) is "empowered under the HREA to suspend or revoke funding if violations of the act are found and not corrected. [This Act] puts the force of federal law behind certain elements of the PHS policy."²⁰⁹ However, only the most flagrant violators of NIH policy ever have their fun-

²⁰³ *House Hearings*, *supra* note 90, at 38 (statement of Franklin Loew, Tufts University School of Veterinary Medicine).

²⁰⁴ *Id.* In arguing here for a moderate approach to legislation, Loew said, "Those who come today to talk about total vivisection or, on the other hand, about bureaucratic big brother watching us, will have to look elsewhere, not here. Such extreme and unacceptable approaches should never . . . be considered by Congress."

²⁰⁵ L. Pardue and B. Swart, *World Day for Laboratory Animals — 1987, THE ANIMALS' AGENDA*, July/August 1987, at 10,11.

²⁰⁶ *Id.*

²⁰⁷ HEALTH RESEARCH EXTENSION ACT OF 1985, P.L. 99-117 (1985), 42 U.S.C. sec. 289 (West Supp. 1986).

²⁰⁸ See National Institutes of Health, *Guide for the Care and Use of Laboratory Animals* (1985).

²⁰⁹ *Office of Technology Assessment Project Staff, supra* note 26, at 23.

ding suspended,²¹⁰ and the NIH enforcement record is not much better than USDA regulation under the AWA and the ISLAA.

Given this reality, at least for the time being, ethical decisions of researchers, particularly academic and corporate researchers, will affect the lives of laboratory animals to a far greater extent than the law, and it would behoove us to consider the application of business ethics to the realm of corporate (and academic)²¹¹ research.

BUSINESS ETHICS

The analysis of business ethics does not lend itself to scientific verification. One may have strong opinions, intuitive leanings, and beliefs, but certainty cannot exist. The same may be said, however, of the law, as it attempts to create workable compromises among irreconcilable differences, and yet we promulgate concrete guidelines for acceptable conduct. The traditional debate in the realm of business ethics is whether or not the corporation has a social responsibility.

The most noted advocate of the "business has no responsibility other than to maximize profits for its shareholders" school is the Nobel Laureate, Dr. Milton Friedman. Yet even he suggests that "business make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom."²¹² The express modifiers in this quote render the "profits only maxim" something else again. Friedman is by no means suggesting that no moral curbs exist on the corporation's pursuit of profit. He expressly delimits that pursuit by parameters in law and ethical societal custom. The question of corporate ethics and responsibility is far more complicated than it appears at first glance. By way of example, let us further analyze Friedman's statement.

To begin with, he suggests that the company make as much money as possible. Assumedly, that is in accordance with the agency theory of corporate management²¹³ which suggests that the policy-making executives and board members are merely agents of the stockholding principals, and therefore employees of

²¹⁰ See Pothier, *Animal Research Aid Cut off at Penn*, Philadelphia Inquirer, July 19, 1985, at 1-A, col. 1. The article explains how stolen videotapes showed researcher cruelty toward monkeys in a head injury laboratory that, nevertheless, had received thirteen years of funding from the NIH. See also Delgado & Francione, *Controversy at the University of Pennsylvania*, ANIMAL L. REP., winter 1984-85, at 4; *University of Pennsylvania Head Injury Lab Closed*, ANIMAL L. REP. Summer/Fall 1985, at 6.

²¹¹ The intense competition for grant moneys in academic research and the direct relationship between obtaining grant moneys, publishing articles based on the research conducted with that grant money, and increases in faculty salary and rank, lend much credence to the assumption that academic research now is business research.

²¹² M. Friedman, *The Social Responsibility of Business is to Increase Its Profits*, NEW YORK TIMES MAGAZINE, Sept. 13, 1970, at 33.

²¹³ See C.D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* (1975), at 82-83, wherein Stone discusses moral inconsistencies in viewing corporate managers as the agents of stockholder principals.

the principals. Friedman appears to agree with this theory: in the same interview in which he made the above remarks, he also said, "[t]he key point is that . . . the manager is the agent of the individuals who own the corporation."²¹⁴

If that is the case, however, the agent's responsibility is not necessarily to always maximize profits but rather to fulfill the wishes of his principal, who may desire different ends from his corporate manager-agent. Consider, for example, the case of Dow's manufacture of napalm during the Vietnam War era. If Dow viewed itself as the agent of the stockholding principals, the company would gladly have provided the stockholders with an opportunity to let their views on this company policy be heard. However, "like most major companies faced with shareholder requests to include 'social action' measures on proxy statements, [Dow] fought the proposal tooth and claw."²¹⁵

It appears then that many policy-makers only believe in the agency theory when it concurs with corporate profit maximizing goals. This concurrence may be quite frequent, however, because most shareholders like to see a profit, and corporate policy-makers are frequently major shareholders as well.

The next thing to consider is that Friedman says the profit maximization effort should conform to rules of law. This may not be very limiting, however, if the corporation's power has been used to mold the very law it must follow.²¹⁶ It would be ludicrous to suggest, for example, that the transportation industry did not once dominate the regulatory scheme of the ICC, at least insofar as rate scheduling was concerned.²¹⁷ The agency set fixed fees for the industry; the fees were higher than those which the companies could have demanded in an unregulated competitive market. It does not automatically follow that some immoral, collusory relationship existed between the agency and the corporations being regulated. Rather, such results arise from the government-industrial context within which agencies regulate. The corporations are the de facto promulgators of agency regulations simply because the corporations have more expertise than the government bureaucrats.

²¹⁴ See Friedman, *supra* note 95, at 33.

²¹⁵ See STONE, *supra* note 96, at 83 (quoting S.P. Sethi, *Dow Shalt Not Kill*, in *UP AGAINST THE CORPORATE WALL* (1971), at 236).

²¹⁶ See STONE, *supra* note 96, at 94. Stone suggests that corporate influence on lawmaking is nothing new. "The whole history of commercial law is one in which, by and large, the 'legislation' has been little more than an acknowledgement of rules established by the commercial sector, unless there are the strongest and most evident reasons to the contrary." *Id.*

²¹⁷ See R. FELLMETH, *THE INTERSTATE COMMERCE COMMISSION, THE PUBLIC INTEREST AND THE ICC* (1970): "[T]he ICC has set longevity records in its systematic failure to protect or further the public interest. Long ago, the ICC found itself surrounded by a special interest constituency that viewed the agency as an opportunity for protection from competition and for insulation from consumer demands. *Id.* at vii. [T]he ICC acts aggressively to enforce monopoly power pricing . . . it does not even pretend to consider the benefits . . . for all concerned. The benefit, of course, is lower rates, increased incentive for greater efficiency in transportation and . . . lower commodity prices . . . [M]onopoly gouging of shippers is not only promoted, but required by the ICC — particularly where the shippers are able to pass the cost on to the consumer. *Id.* at 144-146. Although these passages were written in 1970, many transportation experts argue that nothing has changed at the ICC."

Another theory in business ethics is known as the "stakeholder maxim."²¹⁸ This theory suggests that, in our capacity as commercial operants, we assess the costs suffered by persons not party to our business transactions. This proposed ethic asks the corporation to assume far greater responsibility for its conduct than the law would demand.

If A contracts with B to manufacture product C and a byproduct of that manufacturing process is toxic waste D, leaving aside questions of existing environmental regulation, has not the negative effect of this legal transaction on the public at large removed the situation from a private realm encompassing only parties A and B? Even if we include the environmental regulation variable, is not part of the corporate cost of meeting such regulations passed on to the public? We still have consequences which remove the process from the realm of private contract. The law is not equipped to handle all of these complex variables that arise in the modern technological state.

"More and more, the major problems falling to the courts to decide are . . . 'polycentric issues' — issues characterized not only by their technical complexity, but by their impact on large and diverse groups of people, far beyond the parties immediately represented in court."²¹⁹ And if the courts cannot adequately handle these polycentric issues, we must look elsewhere for appropriate guidelines for corporate social conduct. This leads us back to the last point in Friedman's remarks: that we must conform to the basic rules of society embodied in ethical custom as well as law.

Ethical customs change and society today shows growing recognition of an "environmental ethic."²²⁰ In its barest form, this concept suggests that both the environment and its nonhuman animal populus have a value of their own and that the public at large is entitled to appreciate that value. This ethic precludes a corporate right to irreparably damage that environment or its animal inhabitants without compelling justification. Business as usual is not an ethically substantial reason; nor is the claim that "it was legal." Moral restraints are usually more stringent than legal ones. A responsible manager will inform himself about the consequences of his business actions. Should he find the opportunity to make corporate gains through legal but environmentally detrimental conduct, he may please the stockholders and pass muster with the courts, but he will not necessarily have acted in a morally responsible manner.

To avoid responsibility, decision-makers sometimes hide behind the complexities involved in corporate decision-making. Certainly a manager must make decisions that involve myriad potential consequences, and the process is not

²¹⁸ See H. Rolston, *Just Environmental Business* in JUST BUSINESS, *supra* note 21, at 326.

²¹⁹ See STONE, *supra* note 96, at 106 (quoting Boyer, *Alternatives to Administrative Trial — Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111 (1972)).

²²⁰ See T. REGAN, *supra* note 6, at 184-203, for a detailed discussion of environmental ethics. See also DONALDSON & O'NEILL, *A SEARCH FOR ENVIRONMENTAL ETHICS: AN INITIAL BIBLIOGRAPHY* (1980). 36

made easier by the need to please shareholders. Such difficulties, however, do not excuse one from individual responsibility. Philosopher John Ladd refers to "the moral demands made of corporate managers as individuals and the decision-making imperatives that a purely market-based ethic imposes on them in their work life . . . as moral schizophrenia."²²¹

Such moral schizophrenia is a plight with which we can all sympathize but it does not excuse the manager from imposing his individual morality upon his corporate policy-making, at least in certain instances. Surely, where a corporate decision will cause undeserved harm to others or irreparable damage to the environment, it becomes the manager's moral imperative to make his individual responsibility the business ethic of the firm. If it is so readily accepted that corporations have responsibilities as legal entities that roughly approximate those of individual entities, is it outrageous to suggest that they should also be bound by a business ethic that coincides with accepted individual moral principles?

Corporations do not exist in a vacuum. Management should extend moral judgments through the whole event in which their business plays a part.²²² As philosopher Holmes Rolston III has said, "[T]he scope of judgement should not stop at the boundaries of [a] business. . . . Ethical judgement needs to reach for the compound unit. . . . We might formerly have thought that the relevant unit to consider was merely the company and its customers . . . [but now] it needs to be society, the country, the global Earth!"²²³

In this increasingly complex and technologically sophisticated world, ethical issues become more difficult to resolve as the universe of relevant consequences continually expands. Having suggested that the sophisticated "polycentricity" of issues a manager faces today calls for policies that respond to more than the corporation's immediate fiscal and legal concerns, let us briefly examine the question of corporate responsibility toward laboratory animals.

Few people concur with Descartes' minimalist position described earlier, that animals are without consciousness. While some people think the only human responsibility toward animals is to not demean one's moral stature by perpetrating acts of cruelty upon them, the vast majority of us agree with Bentham that animals can indeed suffer and therefore have some interests, however minimal, that oblige us as moral agents to fulfill some obligations toward them.

Perhaps Regan's concept of animal rights, founded upon the idea that nonhuman creatures have inherent value which makes them moral patients, is too unorthodox or novel a concept for the average citizen in a technologically

²²¹ See K. Goodpaster, *The Concept of Corporate Responsibility*, in JUST BUSINESS, *supra* note 21, at 317 (quoting J. Ladd, *Morality and the Ideal of Rationality in Formal Organizations*, 54 THE MONIST, 1970, at 488.

²²² See H. Rolston, *supra* note 101, at 349, 350 for further discussion of this concept.

advanced western society to accept. Most of us, however, think animals are capable of some discernment and preference and therefore possess some interests. Even if we do not extend the sphere of these interests so far as to say that animals have rights, there is something akin to a cultural consensus that animals, at least the more advanced mammals, should not be subjected to conduct detrimental to their interests, without a morally legitimizing reason.

In short, attributing the most conservative philosophical position to our culture, consistent with the way in which we view animals and our relationship toward them, our society adopts a utilitarian construct in searching for guidelines for our treatment of animals (or, more likely, a justification for the way in which we do treat them). In that context, we cannot ethically justify subjecting animals to fear, pain, suffering, and death, unless their misfortune serves to provide a greater good for the larger society. Otherwise, we say they have no interests, and by implication, cannot suffer, a position the vast majority of us, on the bases of observation, scientific inquiry, and common sense, simply do not accept. Individually then, we can only justify the use of animals in experiments when such use will provide measurably greater benefit to society at large than the suffering the animals undergo.

Using either the conservative Friedman's view of limitations on corporate license being found in cultural ethics, or the more expansive environmental concept which extends business responsibility to the entire eco-system, corporations operate outside any code of acceptable business ethics when they conduct experiments on animals that do not result (or at least promise to result) in more societal good than the collective harm they impose on their animal subjects. Let us look then at the types of research that utilize animal subjects.

There are six basic categories of research that employ animal subjects: Educational experiments (such as physiology classes), military experiments (such as gunshot wound experiments on live animals), cosmetic products testing, household products testing, psychological behavioral testing, and biomedical research. The educational experiments do not directly relate to corporate activity in laboratories. (Many corporations breed animals solely for experimental use, which certainly raises ethical questions. However, such breeding is beyond the scope of this review).²²⁴ Military experiments on animals, while morally questionable, also fall outside the purview of this analysis. The other four types of experiments are quite commonly carried out in corporate laboratories. Are they useful?

²²⁴Charles River Breeding Laboratories, for example, is the largest breeder of laboratory animals in the world. "The company was recently acquired by Bausch & Lomb for \$135 million in stock . . . Charles River has always tried to present itself as a major contributor to crucial medical research. Time Magazine gave a more accurate view . . . when it wrote of Charles River in 1980, '[t]his year the company will dispatch more than 18 million of its well-bred rats, mice, hamsters, guinea pigs, rabbits and monkeys to research labs throughout the world, where in the name of science the creatures will debauch themselves gobbling saccharin, lushing liquor, and inhaling cigarette smoke.'" T. Soos, *Charles River Breeding Labs, THE ANIMALS' AGENDA*, Dec. 1986, at 42.

Psychological behavioral experiments are frequently conducted by both university and corporate laboratories that receive federal funding for accepted projects (usually from the NIH).²²⁵ Two common experiments are deprivation tests and drug dependency tests. In the former, young animals, often baboons or monkeys, are taken from their mothers, frequently permanently. The animals are studied to determine the effects of such deprivation on their mental states.

What for? The researchers justify using animals in such experiments by assuring us of their complete lack of similarity with humans, and then attempt to equate the psychological response of an infant monkey to that of a human. Many of the infants become so deranged that they repeatedly bang their heads against the cages (to which they are sometimes confined for life) or chew off their own limbs.

The latter experiment often involves addicting animals to cocaine or alcohol to study the addicted animals' conduct. Again, what for? Surely a study of all the alcoholics and cocaine addicts we are spending millions of dollars to cure would provide more useful results than experiments on monkeys. But the experiments on monkeys are more readily funded by government agencies. Psychological behavioral testing on animals is one instance in which the utilitarian calculus can be easily interpreted. The benefits of these experiments, if any, do not justify the suffering of their animal subjects.²²⁶

Cosmetic testing was discussed earlier and the Draize test, in which cosmetic compounds are dropped into the eyes of restrained rabbits, was used as an example of utilitarian mathematics insisting upon a justification of the researcher's conduct. The animal subjects are harmed, as Regan suggests, not metaphorically, but in that they are actually "made to endure what is detrimental to their welfare, even death."²²⁷ But what is the justification here? All cosmetic testing serves human vanity at a cost of incalculable suffering and millions of innocent animals' lives.

Household product testing often involves the LD-50 test.²²⁸ This is one

²²⁵ It is difficult to determine precisely how much NIH funding goes toward animal research but the sum is substantial. See L. Thompson, *NIH and the Politics of Disease*, The Washington Post National Weekly Edition, Feb. 16, 1987, at 6,7,8. The NIH, which started in 1887 with an annual budget of \$300, now, according to Thompson, spends more than \$6 billion a year, \$3.5 billion of which is allocated as annual research grants to educational institutions, governmental agencies, and private corporations, all of whom use a considerable portion of this money to conduct research with animal subjects. See also Dresser, *Research On Animals: Values, Politics, and Regulatory Reform*, 58 S. CAL. L. REV. 1153 (1985), (quoting Rowan & Rollin, *Animal Research — For and Against: A Philosophical, Social, and Historical Perspective*, 27 PERSP. BIOLOGY & MED. 1, at 21 (1983), stating that the NIH and other federal agencies contribute over \$6 billion annually to biomedical research in the United States. The comparative figures are quite close so it is reasonable to assume they are accurate. Whatever the precise amount spent on research with animal subjects may be, it is certainly a formidable figure.

²²⁶ See A. Bond, *Ethical Reservations About Psychological Research with Animals*, THE PSYCHOLOGICAL RECORD (1980), at 201-210, for a more detailed critique of psychological behavioral testing on animals.

²²⁷ See T. REGAN, *supra* note 27, at 96.

²²⁸ The LD-50 test is severely criticized by both researchers and animal protectionists. Consider the state-

of the most inhumane procedures in all of laboratory testing. Massive doses of household products, such as detergent or paint, are sprayed down the subject's throat (frequently rabbits), until half of the test animals die. The experiments are supposed to establish the lethal doses of the various products. However, the animals frequently die of ruptured intestines, pain, or asphyxiation, rather than from toxic doses of the product being tested.

The Congressional Office of Technology Assessment calls this "[o]ne of the oldest and . . . least sophisticated tests,"²²⁹ and adds that "[s]cientists . . . have criticized it in recent years, in part because it cannot be extrapolated reliably to humans, and in part because the imposition of a highly toxic or lethal dose seems particularly inhumane."²³⁰

The Food and Drug Administration, which used to require administration of the LD-50 test, no longer does, and the Environmental Protection Agency has defined circumstances where the LD-50 test can be replaced by an alternative.²³¹ However, thousands of companies continue to use the test, allegedly to avoid products liability suits. If that is true, it is a tragic cost in lives due to a lack of information. As Laurence S. Cloutz, an insurance executive, has said, "Insurers . . . do not know much about the products being produced. They will expect the industry to test their products, and live animal testing is the routine. Until the insurance . . . industry is alerted to the inadequacy of live animal testing and the waste in time, money and life it causes, there will be no real changes in the position of industry."²³²

Various alternatives to live animal testing are available. *In vitro* testing and computer modeling are two proposed alternatives to the Draize Test and the LD-50 Test. Additionally, there are other alternative methods of testing that could replace much animal experimentation, including mathematical models, patient models, cell cultures, organ cultures, the Ames test (which uses salmonella bacteria to test for toxicity and carcinogenicity), gas chromatography, mass spectrometry, and clinical and epidemiological studies.²³³ According to a report by the Congressional Office of Technology Assessment entitled "Alternatives to Animal Use in Research, Testing, and Education,"²³⁴ there are both

ment of a Swiss author who calls the LD-50 test "a crude hit and miss procedure, and scientists everywhere have expressed doubts about its validity . . . [A]lthough clumsy to the point of being grotesque, it is the only system the scientists have been able to devise for establishing toxicity and irritability." H. RUESCH, *SLAUGHTER OF THE INNOCENT* (1978), at 115,116. See also M. Balls, R. Riddell, & A. Worden (eds.), *ANIMALS AND ALTERNATIVES IN TOXICITY TESTING* (1983); H. Spira, *Fighting to Win*, in *IN DEFENSE OF ANIMALS* (P. Singer ed. 1985), at 204, 205; A. ROWAN, *ALTERNATIVES TO LABORATORY ANIMALS: DEFINITIONS AND DISCUSSIONS* (1980).

²²⁹ See Office of Technology Assessment Project Staff, *supra* note 26, at 14.

²³⁰ *Id.* at 15.

²³¹ *Id.* at 31.

²³² Letter from Laurence S. Cloutz to THE ANIMALS' AGENDA, March 1987, at 37.

²³³ See Note, *Antinomy: The Use, Rights, and Regulation of Laboratory Animals*, *supra* note 12, at 755, for a more detailed discussion of available alternatives.

²³⁴ See Office of Technology Assessment Project Staff, *supra* note 26, at 13. The advantages listed include

advantages and disadvantages in different tests. However, given the extent of suffering that laboratory animals undergo, it is morally incumbent upon corporations engaged in laboratory tests using animal subjects to seriously investigate alternative methods of research.²³⁵ If the sole reason for using animal subjects in testing household products is to avoid legal liability, then, considering points raised earlier, it is arguable that with the possible exception of biomedical research (which we shall consider next), none of these laboratory experiments is morally justifiable.

Biomedical research is extremely complicated. However, many researchers suggest that alternative methods in certain areas are equal to or more valuable than experiments using live animal subjects.²³⁶ Experiments with animals in those areas, however beneficial to mankind, are unacceptable in that they involve the gratuitous imposition of great suffering.

Consider one other limitation on the use of animals in biomedical research. What if the research does not result in substantial benefits to humans? For example, has cancer research on live animals diminished human suffering or the incidence of humans contracting the disease? Conventional wisdom suggests that it is taboo to even consider such things. Yet, Dr. Irwin Bross,²³⁷ a leading biomedical researcher, claims that cancer research on live animals is useless. Dr. Bross argues that "[t]his slaughter can serve little or no scientific purpose for mutagenic diseases (those caused by genetic damage) such as cancer. Hence, serious ethical questions can be raised about the motives of agencies that grant funds for performing this ritual, and of the physicians and scientists who accept money for fraudulent research."²³⁸ Bross argues that mutagenetic diseases cannot be studied outside the "host environment," the body in which the disease is found, and that therefore, all studies of cancer in animals are useless in the extrapolation of such studies to man.²³⁹ Bross' opinions need not be taken as factual, but they should be explored. Rigorous epidemiological and statistical

reduction in the number of animals used; reduction in animal pain and distress; savings in time and the cost of research. Disadvantages listed include reduced ability to study organismal growth processes; reduced ability to study behavior; reduced ability to study interaction between the organism and its environment.

²³⁵ *Id.* at 21, explaining that Revlon has given \$1.25 million to The Rockefeller University to support research on alternatives to the Draize Test, and that the Cosmetic, Toiletry, and Fragrance Ass'n and Bristol Myers Company have given \$2.1 million to the Center for Alternatives to Animal Testing at The Johns Hopkins University. This sounds impressive and should be commended, but given the revenues of these organizations and the expenditures they make on other research, the figures are not so impressive.

²³⁶ Medical Research Modernization Committee, *Statement to Congressional Appropriations Committees* (undated). In the statement, committee chairman, Dr. R.C. Hubbard says, "the animal idea of research into human diseases and behavioral problems has been largely rendered obsolete by the tremendous advances in radiology, laboratory and computer sciences, cell and organ culture techniques . . . (Data) obtained from 'animal model' study is often irrelevant, wasteful, redundant, and a hindrance rather than an aid to progress."

²³⁷ I. Bross, *Animal Models: Fighting Cancer with a Failed Technology*, THE ANIMALS' AGENDA, March, 1987, at 16.

²³⁸ *Id.* at 16.

²³⁹ *Id.* For more information on the use of animals in cancer research, see B. REINES, CANCER RESEARCH ON ANIMALS AND IMPACT ON ALTERNATIVES (1986); see also J. CAIRNS, CANCER: SCIENCE AND SOCIETY (1978).

studies should be conducted by all parties engaged in biomedical research using animal subjects in order to assess the benefits, if any, that are being derived from such research.

Both the utilitarian and "rights" principles "view the harming of an individual as presumptively wrong . . . [T]he burden of proof must always be on those who cause harm to animals in scientific settings . . . [I]t is not the critics, it is the advocates of animal use in science who should bear [this burden]." ²⁴⁰ If animals have some interests, then we in turn have some obligations toward them, and it is reasonable to assert that only medical research with no available alternatives to the use of live animal subjects, and a high potential for providing substantial benefits to either humans or other animals, is ethically justifiable. Even in the few areas of research that meet these conditions, bona fide efforts should be continually made toward finding alternative methods.

These conclusions could have a substantial effect on our culture and the scientific corporate community. It is understandable that people have difficulty relating to the unfamiliar ideas suggested here, but that does not negate the validity of such concepts. Should one agree with even some of the ideas presented here, it might necessitate changes in his or her view of our relationship to animals, based on a new model of our moral obligations toward them.

Corporations are equally ethically bound to reconsider their relationship to animals and make whatever policy changes such re-assessment might require. At the very least, corporations should terminate gratuitous and needlessly repetitive testing, police their own laboratories to eliminate cruelty toward test animals,²⁴¹ work with Congress and insurers for effective products liability statutes that would eliminate the need for useless testing on animal subjects, and actively fund and research alternative methods of testing. If corporate researchers choose not to do this, their refusal will most likely be rooted in economic rather than ethical considerations. And if corporations are no more than a collective reflection of our individual selves, this should serve as an insightful gaze into our societal mirror.

CONCLUSION

We have moved past Descartes' minimalist view of the valuelessness of animals. While the majority of our society could not accurately be classified as animal rights activists (or even sympathizers), we construct (even if only

²⁴⁰ D. Jamieson & T. Regan, *On the Ethics of the Use of Animals in Science*, in *THE USE OF ANIMALS IN SCIENCE* 191 (1986).

²⁴¹ See *Animal Abuse at Gillette Labs Exposed — International Boycott Called*, *THE ANIMALS' AGENDA*, December 1986, at 14, 15. The article describes videotape footage taken by a former Gillette employee, allegedly showing LD-50 tests and overt acts of cruelty toward animal subjects. In a form letter (Jan. 19, 1987), Beverly J. Smart, Gillette Consumer Service Representative, denied any cruelty on the part of Gillette researchers. (She did not deny that Gillette administers the LD-50 test, a test they previously claimed had been discontinued at Gillette years ago.) It is interesting to note that although Gillette denies the allegations aired in various international media, the company has brought no legal action against the accuser. This is a notorious example of the alleged mistreatment laboratory animals are exposed to on a continuing basis. ⁴²

subconsciously) utilitarian models for employment in moral decision-making that give growing weight or importance to animals as moral patients.

Although the jurisprudential parallel of "the" great artistic debate — does art imitate life or vice versa (in this case does law imitate life or vice versa) can never be fully resolved, it is safe to assume that law and life influence each other and are synergistically involved in the evolution of our culture's moral fiber.

Law and ethics both play critical roles in society's advancement toward a more caring treatment of animals. Insofar as the use of animals as laboratory subjects is concerned, while we may never see the complete abolition of such conduct, and we certainly shall not see it for a long time to come, we are seeing tangible evidence all around us of a growing sensitivity to the suffering and interests (if not rights) of the nonhuman fellow travelers with which we share this planet.

The ISLAA amendments to the Animal Welfare Act provide statutory proof of our growing concern for the well-being of animals. The astute observations of the bill's critics deserve consideration, as there are weaknesses in the legislation. The bill should have included more omnibus coverage of related provisions that are now being raised in various bills pending in the Congress.

Most important of these is H.R. 1770,²⁴² Congressman Rose's amendment to the AWA (discussed earlier), which would allow citizens to sue the USDA in cases where the AWA and the ISLAA are not being enforced. Given the USDA's sketchy enforcement record in this area, H.R. 1770 would guarantee more effective implementation of the new legislation.

Other provisions that should have been included in a broader ISLAA are H.R. 1708,²⁴³ the Information Dissemination And Research Accountability Act, sponsored by Congressman Torricelli (also discussed earlier), which would promote the dissemination of biomedical information through modern methods of science and technology to prevent the duplication of experiments on live animals, and H.R. 778,²⁴⁴ the Pet Protection Act, sponsored by Congressman Robert Mrazek (D-N.Y.), which would prohibit the NIH from issuing research grants to researchers using animals directly or indirectly acquired from animal shelters.²⁴⁵ The ISLAA should also have incorporated the key provisions of H. Con. Res. 19,²⁴⁶ the Draize Rabbit Eye Irritancy Test resolution, sponsored by

²⁴²H.R. 1770, 100th Cong., 1st Sess. (1987).

²⁴³H.R. 1708, 100th Cong., 1st Sess. (1987).

²⁴⁴H.R. 778, 100th Cong., 1st Sess. (1987).

²⁴⁵The Pet Protection Act is intended to eliminate pound seizure on a federal level. Pound Seizure is the term applied to the sale by pounds and animal shelters of unclaimed animals to research laboratories for experimental purposes. Many pounds are involved in accepting animals of "questionable" origin (meaning stolen pets, to translate freely), for the purpose of profiting on the sale of such animals to research facilities.

²⁴⁶H.R. Con. Res. 19, 100th Cong., 1st Sess. (1987).

Congressman Andy Jacobs (D-In.), and H.R. 1635,²⁴⁷ the Consumer Products Safe Testing Act, sponsored by Congresswoman Barbara Boxer (D-Ca.), which taken together would have essentially eliminated the use of the Draize and LD-50 tests from use in research conducted or sanctioned by any federal agencies.

Inclusion of these provisions in a more comprehensive ISLAA would have lent greater guaranteed protection to the animals. Beyond that, the criminal sanctions pertaining to inadvertent divulgence of trade secrets²⁴⁸ by members of Institutional Animal care and Use Committee members should not have been included in the new Act, as this provision can only serve to minimize public awareness of laboratory treatment of animal subjects.

Nevertheless, the new law indicates a growing social awareness of our moral obligations toward animals. While the Act is not as stringent in its application or enforcement provisions as animal protectionists had hoped for, it at least creates the possibility of better treatment of laboratory animals.

Ultimately, however, the law can only serve to mitigate injustices in a system's treatment of its members; the ethical conduct that flows from an understanding and compassionate heart is the greatest safeguard available to the innocent and unprotected members of a society. Perhaps the growing concern over animal welfare will lead to more truly protective legislation and a more compassionate personal and commercial ethic in our relationship with the animal kingdom. One can only fervently hope for such a result and for it to come quickly, because the present laws and ethics as applied to laboratory animals are subjecting millions of those pathetic creatures to a fate far worse than death.

²⁴⁷ H.R. 1635, 100th Cong., 1st Sess. (1987).

<http://ideaexchange.uakron.edu/akronlawreview/vol21/iss2/3>

²⁴⁸ Pub. L. 99-198, Title XVII, sec. 1754, Dec. 23, 1985, 99 Stat. 1649.