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Taub v. State: Are State Anti-Cruelty Statutes Sleeping Giants?

I. Introduction

Vivisection¹ was practiced only on a small scale prior to World War II. Since that time, it has mushroomed into a major industry which consumes 80 million animals per year in the United States alone.² Worldwide, the figure has been estimated at between 125 and 200 million animals per year.³ Billions of tax dollars have been spent on vivisection.⁴

Opposition to vivisection has also mushroomed in recent years. "While in the past the issue of whether research animals were being abused was discussed by only a handful of animal rights advocates, today society as a whole is very aware of the controversy."⁵ Organizations opposed to vivisection have experienced rapid recent growth.⁶

Every state in the union has adopted some form of anti-

1. Vivisection is defined as any form of animal experimentation especially if considered to cause distress to the subject. Webster's Third New International Dictionary of the English Language Unabridged 2560 (1971).

2. Rowan, A.N., 2 International Journal for the Study of Animal Problems 218 (1981), *quoted in* Am. Anti-Vivisection Soc'y, The Casebook of Experiments with Living Animals 9 (1983).

3. Am. Anti-Vivisection Soc'y, The Casebook of Experiments with Living Animals 9 (1983).

4. National Institute of Health, U.S. Dept. of Health and Human Services, National Survey of Laboratory Animal Facilities and Resources, Publication No. 80-2091 (1980), *quoted in* Am. Anti-Vivisection Soc'y, The Casebook of Experiments with Living Animals 9 (1983).

5. Chambers & Hines, *Recent Developments Concerning the Use of Animals in Medical Research*, 4 J. of Legal Medicine 109 (1983).

6. For example, People for the Ethical Treatment of Animals (PETA), founded in 1980, now reports 70,000 members. People for the Ethical Treatment of Animals, Press Release (July 15, 1985) (available from the PETA office); The Humane Society of the United States, founded in 1954, has 315,000 members (Encyclopedia of Associations 901, (20th ed. 1986)); The Animal Legal Defense Fund, founded in 1978, now has over 300 attorney members. Animal Legal Defense Fund, 1985 Membership List (unpublished) (available from Animal Legal Defense Fund Office).

cruelty statute to protect animals from abuse.⁷ These state statutes usually take the form of broad prohibitions against unnecessary cruelty,⁸ sometimes accompanied by exemptions for conduct such as hunting, fishing, and slaughtering food animals.⁹ Some states explicitly exempt research facilities from their anti-cruelty statutes.¹⁰ Only Maryland explicitly includes research facilities in the coverage of its statute.¹¹ The majority are silent on the subject.

In addition to these state statutes, the Federal Animal Welfare Act (AWA),¹² passed by Congress in 1966¹³ and

7. D. Morretti, *Animal Rights and the Law* 116-17 (1984).

8. *See, e.g.*, Ark. Stat. Ann. § 41-2918(1) (1985).

A person commits the offense of cruelty to animals if, except as authorized by law, he knowingly:

- (a) Abandons any animal;
- (b) Subjects any animal to cruel mistreatment;
- (c) Subjects any animal in his custody to cruel neglect; or
- (d) Kills or injures any animal belonging to another without legal privilege or consent of the owner.

See also Colo. Rev. Stat. § 18-9-202(1) (1977).

A person commits cruelty to animals if, except as authorized by law, he knowingly or with criminal negligence overdrives, overloads, overworks, tortures, torments, deprives of necessary sustenance, unnecessarily or cruelly beats, needlessly mutilates, needlessly kills, carries in or upon any vehicles in a cruel manner or otherwise mistreats or neglects any animal, or causes or procures it to be done, or, having the charge or custody of any animal, fails to provide it with proper food, drink, or protection from the weather, or abandons it.

9. The Delaware statute exempts from the anti-cruelty statute "accepted veterinary practices and activities carried on for scientific research." Del Code Ann. tit. 11, § 1325(b) (1974 & Supp. 1984). The Georgia statute provides in relevant part: "This code section does not apply to the killing of animals raised for the purpose of providing food nor does it apply to any person who hunts wild animals in compliance with the game and fish laws of this state." Ga. Code Ann. § 16-12-4(b) (1984). The Illinois statute provides: "Nothing in this Act affects normal, good husbandry practices utilized by any person in the production of food, companion or work animals, or in the extermination of undesirable pests." Ill. Ann. Stat. ch. 8, § 713 (Smith-Hurd 1975 & Supp. 1985).

10. *See supra* note 9, Del. Code Ann. tit. 11, § 1325(b) (1974 & Supp. 1984).

11. Md. Ann. Code art. 27, § 59 (1982 & Supp. 1985).

12. 7 U.S.C. §§ 2131-2155 (1973 & Supp. 1985).

13. Laboratory Animal Act of 1966, Pub. L. No. 89-544, 80 Stat. 350 (1966).

amended in 1970,¹⁴ 1976,¹⁵ and 1985^{15.1} is designed to insure that animals intended for use in research facilities are provided humane care and treatment.¹⁶ For various reasons, especially enforcement problems, this federal scheme has been generally ineffective.¹⁷

The principle question to be considered in this note is to what extent research facilities are subject to state anti-cruelty statutes in the states where they are not specifically exempted. The applicability of anti-cruelty statutes to laboratory experiments on animals is generally untested. Depending on court interpretation, the anti-cruelty statutes could be sleeping giants, waiting to be used by anti-vivisectionists to bring humane protections to laboratory animals or they may be horse and buggy relics which modern courts will refuse to apply. *Taub v. State*¹⁸ is the first attempt to apply a general anti-cruelty statute to specific laboratory conduct. As such, it deserves attention, not because it resolves the issues raised, but because it provides a context for analysis and discussion.

II. Taub v. State

Dr. Edward Taub, the appellant in *Taub v. State*,¹⁹ was the chief scientific investigator in charge of animal research at the Institute for Behavioral Research in Silver Spring, Maryland. The research being conducted involved deafferenting the limbs of monkeys, that is, severing the nerves in an arm or leg to abolish all sensation from that arm or leg, and attempting to train the animal to use the deafferented appendage. The laboratory was funded by the National Institute of Health and was periodically inspected by the U.S. Department of Ag-

14. Animal Welfare Act of 1970, Pub. L. No. 91-579, 84 Stat. 1560 (1970).

15. Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, 90 Stat. 417 (1976).

15.1. Agricultural Food Security Act of 1985, Pub. L. No. 99-198 (1985).

16. 7 U.S.C. § 2131(1) (1973 & Supp. 1985).

17. For critiques of the AWA, See, Chambers & Hines, *supra* note 5 at 117-18, 121-22; Friend, *Animal Cruelty Laws, The Case For Reform*, 8 U. Rich. L. Rev. 201, 215-20 (1974); D. Favre & M. Loring, *Animal Law* § 9.22 (1983).

18. 296 Md. 439, 463 A.2d 819 (Md. 1983).

19. *Id.*

riculture. A U.S.D.A. inspection during the relevant period found no violations.

A complaint about laboratory conditions by an employee led to an investigation of Dr. Taub's facility by local authorities. On September 11, 1981, a monkey named Nero and sixteen other monkeys were removed from Dr. Taub's lab by Montgomery County Police. Nero was in generally good health but had open and untreated wounds on his deafferented arm. Dr. Taub was arrested and charged with seventeen counts of violating the Maryland anti-cruelty statute.²⁰ Each count related to one of the seventeen primates and each count contained seven separate allegations of wrong doing. For each of the primates, Taub was charged with infliction of unnecessary pain or suffering, failure to adequately feed, failure to provide adequate veterinary care, failure to provide proper drink, failure to provide proper air, failure to provide sufficient space, and failure to provide proper shelter. The Maryland district court convicted Taub of failing to provide veterinary care to six of the animals, and acquitted him of all other charges.²¹ On appeal, the Maryland circuit court overturned five of the convictions while upholding the one pertaining to Nero.²² *Taub* was an appeal of this one remaining conviction to the Maryland Supreme Court.²³

The Maryland Supreme Court held in the *Taub* case; the court "do[es] not believe the legislature intended § 59 of article 27 [Maryland's anti-cruelty statute] to apply to this type of research activity under a federal program. We shall, therefore, reverse Dr. Taub's conviction. . . ."²⁴

III. Preemption

One question raised by the *Taub* case is whether the Federal Animal Welfare Act preempts states from regulating the

20. Md. Code Ann. art. 27, § 59 (1982 & Supp. 1985).

21. *State v. Taub*, Crim. No. 111848-81 (Md. Dist. Ct. Nov. 23, 1981).

22. *State v. Taub*, Crim. No. 27534 (Md. Cir. Ct. June 30, 1982).

23. Brief for Appellants at 7-19, *Taub v. State*, 296 Md. 439, 463 A.2d 819 (1983); Brief for Appellees at 3-7, *Taub v. State*, 296 Md. 439, 463 A.2d 819 (1983).

24. 296 Md. at 444-45, 463 A.2d at 822.

activities of research facilities. This issue received lengthy treatment by all parties to the case²⁵ but was not reached by the court. This issue merits discussion because it is potentially determinative of the role of states and state statutes in regulating experimental use of animals.

Recent Supreme Court opinions have identified four situations in which a state statute will be invalidated because of preemption: (1) Where Congress has explicitly mandated the preemption, (2) Where Congress has indicated an intent to occupy the field, (3) Where compliance with both the state and federal enactments would be impossible, and (4) Where compliance with the state statute would frustrate the purpose of the congressional enactment.²⁶ It is the second and fourth of these situations which merit an in depth examination here.

A. Has Congress occupied the field of regulating laboratory use of animals?

Appellant argued that the AWA was a comprehensive federal enactment designed to fully occupy the field of regulating research facilities.²⁷ There is no doubt that Congress can preempt state activity by occupying the field.²⁸ The ques-

25. Brief for Appellants, *supra* note 23, at 29-37; Brief for Appellees, *supra* note 23, at 11-15; Amicus Curiae at 9-46, *Taub v. State*, 296 Md. 439, 463 A.2d 819 (1983).
26.

When federal preemption is invoked under the directive of the supremacy clause, it falls to this court to examine the presumed intent of Congress. . . . Our task is quite simple if, in the federal enactment, Congress has explicitly mandated the preemption of state law. . . . or has adequately indicated an intent to occupy the field of regulation, thereby displacing all state laws on the same subject. . . . Even in the absence of such express language or implied congressional intent to occupy the field, we may nevertheless find state law to be displaced to the extent that it actually conflicts with federal law. Such actual conflict between state and federal law exists when compliance with both federal and state regulations is physically impossible. . . . or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[citations omitted]

Brown v. Hotel and Restaurant Employees and Bartenders International Union, ___ U.S. ___, ___, 104 S. Ct. 3179, 3185-86 (1984).

27. Brief for Appellants, *supra* note 23, at 34-36.

28. *Pennsylvania v. Nelson*, 350 U.S. 497, 502 (1956); *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 230 (1947). *But see Engdahl, Preemptive Capability of Federal Power*, 45 U. Colo. L. Rev. 51 (1973-74) and Engdahl, *Some Observations on State*

tion is whether Congress did so in this case. Appellant relied primarily on the specificity of regulations adopted under the AWA²⁹ to show "a scheme of federal regulations so pervasive as to leave no room for the states to supplement it."³⁰

Appellee's position against preemption rests on Congress's specific recognition of the existence of state law in this area and endorsement of its continued existence.³¹ The appellees further supported their position that Congress did not intend to preempt state law with the holding of the Supreme Court of Colorado in *Winkler v. Colorado Department of Health*.³² Even though the AWA comprehensively regulates the transport of animals, *Winkler* held that the AWA did not preempt a state law governing transport of animals.

This author finds the argument against preemption to be the more persuasive one. The AWA, when enacted, was not sufficiently comprehensive to preempt the field. The AWA covers treatment of animals before and after but not during research procedures. The AWA covers certain warm blooded animals, but no cold blooded animals, and other warm blooded animals only upon a finding by the secretary.³³ The AWA covers research facilities which are federally funded or which buy or ship animals "affecting commerce,"³⁴ but this definition excludes the majority of research facilities. Statistics on the scope of the AWA provided during debate on adoption of the AWA exemplify the narrow applicability of the statute:

and Federal Control of Natural Resources, 15 Houston L. Rev. 1201 (1978) arguing that Congress lacks the power to preempt in areas where their power to regulate is implied, not express.

29. For example, federal regulations governing non-human primates specify minimum cage sizes, feeding frequencies, watering frequencies, ventilation, sanitation, etc. 9 C.F.R. § 3.75-3.91 (1985).

30. Brief for Appellants, *supra* note 23, at 34.

31. "The secretary is authorized to cooperate with the officials of the various States or political subdivisions thereof in carrying out the purposes of this chapter and of any state, local, or municipal legislation or ordinance on the same subject." 7 U.S.C. § 2145(b) (1973 & Supp. 1985).

32. 193 Colo. 170, 564 P.2d 107 (1977).

33. 7 U.S.C. § 2132(g) (1973 & Supp. 1985).

34. 7 U.S.C. § 2132(e) (1973 & Supp. 1985).

Of the 11,000 laboratories in the United States, approximately 2,000 will be covered by H.R.13881 [The Laboratory Animal Welfare Act of 1966]. . . Of the hundreds of millions of animals consumed by the laboratories, the bill will, at most, bring its limited benefits to 5 million. . . [E]ven these limited benefits of housing and care stop when research starts, and once that determination is made, protection for the animal ceases under the terms of the legislation.³⁵

Further, preemption by occupying the field is seldom established simply by the scope of a federal statute.³⁶ It is common for Congress to enact complex systems of regulation, not as the last word on a subject, but as a minimum level upon which the states are encouraged to build.³⁷ Congress included language in the AWA encouraging cooperation between the federal government and the states.³⁸ This language would be consistent with a congressional intent to establish a floor upon which the states may build, and inconsistent with an intent to preempt the field.

B. Does state regulation of laboratory animals frustrate congressional intent?

Appellant's second preemption argument was that the AWA was intended, in part, to protect research from outside interference. Appellant argued that any attempt by a state to

35. 112 Cong. Rec. 19,608; 112 Cong. Rec. 19,559. Subsequent amendments have expanded the scope of the AWA (*see supra* notes 13-15), but these amendments do not affect the preemption discussion. If the Act as originally passed did not displace state law, it is hard to see how incremental changes in the Act's scope could have that effect.

36. "It will not be presumed that a federal statute was intended to supercede the exercise of the power of the state unless there is a clear manifestation of the intention to do so. The exercise of federal supremacy is not lightly to be presumed." *New York State Div. of Soc. Services v. Dublino*, 413 U.S. 405, 413 (1973), *quoting*, *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952).

37. *See* Resource Conservation & Recovery Act, 42 U.S.C. §§ 6901-6987 (1982); Resource Conservation & Recovery Act, 42 U.S.C. § 6926 (1982) (authorization of state programs). *See also* Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h (1982); Civil Rights Act of 1964, 42 U.S.C. § 2000e-7 (1982) (authorization of state programs).

38. *See supra* note 31.

regulate laboratories would frustrate Congress's purpose and would therefore be invalid.³⁹ Support for this position appears in the legislative history for the 1966 Act.

We have diligently tried to bring back to the House an effective bill which will codify the noblest and most compassionate concern that the human heart holds for those small animals whose very existence is dedicated to the advancement of medical skill and knowledge while at the same time still preserving for the medical and research professions an unfettered opportunity to carry forward their vital work in behalf of all mankind.⁴⁰

The appellant also found support for his position in the legislative history of the 1970 amendment to the AWA, which stated that "[t]he 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."⁴¹

These passages show that Congress did not intend the AWA to interfere with actual research. They do not necessarily show that Congress intended to prevent the states from interfering with actual research. The 1966 history speaks of the AWA preserving, not creating or expanding, an unfettered opportunity to carry on research, yet in 1966 every state had an anti-cruelty statute. While these statutes varied in their stringency and applicability to research facilities, the words chosen by Congress are inappropriate to express an intent to displace this state patchwork. Since the passage of the AWA in 1966 marked the first federal effort to protect laboratory animals, it seems likely that it was freedom from federal regulations, not all regulations, that was being "preserved".

The passage from the 1970 debate quoted above states that *the bill* does not authorize interference with research and

39. Brief for Appellants, *supra* note 23, at 32-33.

40. Conf. Rep. No. 1848, 89th Cong., 2d Sess. 1, reprinted in 1966 U.S. Code Cong. & Ad. News 2635, 2649.

41. H.R. Rep. No. 1651, 91st Cong., 2d. Sess. 2, reprinted in 1970 U.S. Code Cong. & Ad. News 5103, 5104.

under *this bill* the scientist retains the key to the laboratory door. The 1970 language seems to apply only to the 1970 amendments. Congress's words indicate that in 1970 they were leaving unchanged their 1966 decision not to protect animals during actual experimentation. Congress gave no indication that in 1970 their objective was to oust the states from the field of laboratory animal protection or that they considered the states already ousted by the 1966 act.

If Congress had wished to preclude state regulation of laboratory research, an unambiguous provision to that effect could have been made. Instead, Congress precluded the misinterpretation of the AWA by clarifying the purpose of that bill but stopped short of the language which would be necessary to bar the states from the field.

Having determined that the AWA should not be read as preempting state involvement in the regulation of research facilities, the next inquiry is whether Maryland in particular, and other states in general, became involved in regulating research facilities when they passed general anti-cruelty statutes.

III. State Legislative Intent

A. *Maryland*

As previously noted,⁴² the Maryland Supreme Court ruled in *Taub* that the Maryland anti-cruelty statute did not apply to research facilities. While this ruling can be criticized on procedural grounds,⁴³ it is the substance of the holding which

42. See *supra* note 24 and accompanying text.

43. The issue of whether or not the anti-cruelty statute applied to research facilities was not raised or decided at the trial court level and was not raised or briefed by either party on appeal. If the Maryland court believed this issue to be crucial, they could have asked the parties to brief it so the court would have a record on which to base their opinion. Also, Maryland Rule 813 states that the scope of appellate review is "ordinarily" limited to questions raised and decided by the trial court. In *Taub*, the court writes, "as the rule employs the term 'ordinarily', it permits exceptions and we have occasionally decided cases on issues not previously raised. See, e.g., *Squire v. State*, 280 Md. 132, 368 A.2d 1019 (1977); *Bartholomey v. State*, 260 Md. 504, 273 A.2d 164 (1971). . . *Martin G. Imbach, Inc. v. Deegan*, 208 Md. 115, 117 A.2d 864 (1955). Because our conclusion as to this issue is completely dispositive of the case,

is relevant to this discussion.

At the inception of the *Taub* case, the Maryland anti-cruelty statute⁴⁴ set up three different standards of care, each to be used in appropriate situations. The general rule, applicable in most cases, is the "unnecessary" standard. Under this rule, a person who "inflicts *unnecessary* suffering or pain upon the animal, or *unnecessarily* fails to provide the animal with nutritious food in sufficient quantity, necessary veterinary care, proper drink, air, space, shelter or protection from the weather is guilty of a misdemeanor. (emphasis added)"⁴⁵

The second standard is the "most humane method" standard. It applies to "activities in which physical pain may unavoidably be caused to animals, such as food processing, pest elimination, animal trapping, and hunting."⁴⁶ This standard is

we shall consider it." *Taub*, 463 A.2d at 820, 296 Md. at 441-42. The three cases cited by the *Taub* court all involved situations where, due to a quirk of timing or other extraordinary events, it would work a substantial injustice on the parties not to allow the hearing of a new issue on appeal. The *Taub* court presents no extraordinary circumstances, merely the statement that the new issue would be dispositive of the case.

Such a holding leaves every party free on appeal to raise any new argument. The mere finding that it is dispositive of the case would make it admissible in the appeals court.

44. The full statute read:

Any person who (1) overdrives, overloads, deprives of necessary sustenance, tortures, torments, cruelly beats, mutilates or cruelly kills; or (2) causes, procures or authorizes these acts; or (3) having the charge or custody of an animal, either as owner or otherwise, inflicts unnecessary suffering or pain upon the animal, or unnecessarily fails to provide the animal with nutritious food in sufficient quantity, necessary veterinary care, proper drink, air, space, shelter or protection from the weather, is guilty of a misdemeanor and shall be punishable by a fine not exceeding \$1,000 or by imprisonment not to exceed 90 days, or both. Customary and normal veterinary and agricultural husbandry practices including but not limited to dehorning, castration, docking tails, and limit feeding, are not covered by the provisions of this section. In the case of activities in which physical pain may unavoidably be caused to animals, such as food processing, pest elimination, animal training, and hunting, cruelty shall mean a failure to employ the most humane method reasonably available. It is the intention of the General Assembly that all animals shall be protected from intentional cruelty, but that no person shall be liable for criminal prosecution for normal human activities to which the infliction of pain to an animal is purely incidental and unavoidable.

Taub, 296 Md. at 442-43, 463 A.2d at 821.

45. *Id.*

46. *Id.*

violated when a person fails to use the "most humane method reasonably available."⁴⁷

The third standard is the "total exemption" standard. This applies only to "customary and normal veterinary and agricultural husbandry practices."⁴⁸ These practices are totally exempt from the Maryland anti-cruelty statute.

The first standard is the general rule. The second standard applies to an open class of activities. A court may decide that a new type of conduct involves unavoidable pain and therefore should be judged by the second standard. The third standard applies to a closed class of activities. Only veterinary and animal husbandry practices receive total exemption from the statute's operation.

By finding laboratory research to be exempt from the Maryland anti-cruelty statute, the Maryland Supreme Court applied the third standard to an activity not listed in the statute. If there is a construction of the statute which supports their viewpoint, the court did not reveal it. The legislature named the activities that were to be exempt. The rationale of the Maryland Supreme Court was that the legislature could not have intended to interfere with research. This rationale does not justify the court's decision. If research were placed in the second category, any experimental procedure could be carried out if there was no more humane way of accomplishing the same result. Such a standard would appear to be entirely acceptable since science is in no way advanced by permitting the inhumane procedure when there exists a humane way to conduct the same research. In *Taub*, the failure to provide Nero with veterinary care in no way advanced the scientific purpose of the research. To the contrary, the lack of veterinary care led to the amputation of the very appendage Dr. Taub wished to study. Thus, science might well have been advanced by holding Dr. Taub to a stricter standard of humane care.

The Maryland legislature apparently agrees that it is reasonable to require humane behavior from researchers. Follow-

47. *Id.*

48. *Id.*

ing the *Taub* decision in 1983, Maryland became the only state in the nation to expressly include research facilities in the coverage of their state anti-cruelty statute. The new passage reads, "It is the intention of the General Assembly that all animals, whether they be privately owned, strays, domesticated, feral, farm, corporately or institutionally owned, under private, local, state, or federally funded scientific or medical activities, or otherwise being situated in Maryland shall be protected from intentional cruelty."⁴⁹ The substantive portion of the *Taub* opinion has thus been legislatively overruled.

B. *Other States*

The common law gave animals no protection against cruelty.⁵⁰ Prior to this century, there were few anti-cruelty laws,⁵¹ but by the early 1920's most, if not all, of the states had some form of anti-cruelty statute.⁵² The early statutes made no mention of laboratory research, but they did generally exempt from the statutes pain inflicted for lawful purposes and with justifiable intent.⁵³ In 1961, the American Law Institute (ALI) published a draft model penal code section on cruelty to animals.⁵⁴ This tentative draft was approved by the ALI in 1962 and has since been included in the Model Penal Code and remained unchanged. The Model Penal Code section provides:

A person commits a misdemeanor if he purposely or recklessly: (1) subjects any animal to cruel mistreatment; or (2) subjects any animal in his custody to cruel neglect; or (3) kills or injures any animal belonging to another without legal privilege or consent of the owner. Subsections (1) and (2) shall not be deemed applicable to accepted veterinary practices and activities carried on for scientific research. ⁵⁵

49. Md. Code Ann. art. 27, § 59 (1982 & Supp. 1985).

50. Model Penal Code § 250.11 comment 1 (1980).

51. D. Morretti, *Animal Rights and the Law* 1 (1984).

52. 2 H. Brill, *Cyclopedia Criminal Law* § 844 (1923).

53. 2 H. Brill, *Cyclopedia Criminal Law* § 852 (1923).

54. Model Penal Code § 250.6 (Tentative Draft No.13 1961).

55. Model Penal Code § 250.11 (1980).

The last sentence of the model code section is explained in the comments as follows:

There remains the critical question whether the pain or suffering inflicted was unjustifiable. This issue can not be further refined and in any event is adequately suggested by the word "cruel". In light, however, of the wide differences of view as to when pain or death may justifiably be imposed on animals, it is at least necessary to exempt the professionally accepted practices of veterinarians and scientific researchers. Section 250.11 does so explicitly.⁵⁶

It can be presumed that state legislatures are aware of the Model Penal Code provision and of the possibility of exempting research activities. However, of the eight states which have adopted at least part of the Model Penal Code formulation,⁵⁷ four have chosen not to adopt the scientific research exemption⁵⁸ and one adopted it only to later repeal it.⁵⁹ In all, twenty-seven states have modified their animal cruelty statutes since the Model Penal Code provision was adopted in 1962 without including an exemption for research activities.⁶⁰

56. *Id.* comment 2.

57. *Id.* at 428 and n.13. (Ala., Ariz., Del., Or., Pa., Mass., Mich., W. Va.)

58. *Id.* at 428 and n.15. (Ala., Ariz., Or., Mich.)

59. 18 Pa. Cons. Stat. Ann. § 5511 (Purdon 1983 & Supp. 1985).

60. The 27 state statutes, and the year most recently modified are: Ala. Code § 13A-11-14 (1982) (1978); Ariz. Rev. Stat. Ann. § 13-2910 (1978 & Supp. 1985) (1978); Ark. Stat. Ann. § 41-2918 (1985) (1985); Colo. Rev. Stat. §§ 18-9-202, 35-42-112 (1981) (1977); Fla. Stat. § 828.12 (1976 & Supp. 1985) (1971); Idaho Code § 18-2102 (1979 & Supp. 1985) (1972); Ill. Ann. Stat. ch. 8, § 704 (Smith-Hurd 1975 & Supp. 1985) (1973); Ind. Code Ann. § 35-46-3-2 (Burns 1985) (1985); Iowa Code Ann. § 717.2 (West 1979 & Supp. 1985) (1978); Ky. Rev. Stat. § 525.130 (1985) (1984); Md. Code Ann. art. 27, § 59 (1982 & Supp. 1985) (1984); Mass. Gen. Laws Ann. ch.272, § 77 (West 1970 & Supp. 1985) (1968); Mich. Stat. Ann. § 752.21 (1968 & Supp. 1985) (1975); Minn. Stat. Ann. § 343.20-36 (1985) (1985); Mont. Code Stat. § 45-8-211 (1981) (1981); Neb. Rev. Stat. § 28-1002 (1979) (1979); Nev. Rev. Stat. § 574.100 (1981) (1981); N.H. Rev. Stat. Ann. § 644:8 (1974 & Supp. 1983) (1983); N.M. Stat. Ann. § 30-18-2 (1978 & Supp. 1985) (1981); N.C. Gen. Stat. § 14-360 (1981 & Supp. 1985) (1979); N.D. Cent. Code § 36-21.1-02 (1971 & Supp. 1985) (1975); Ohio Rev. Code Ann. § 959.13 (1968 & Supp. 1984) (1977); Or. Rev. Stat. § 167.850 (1983) (1973); 18 Pa. Cons. Stat. Ann. § 5511 (Purdon 1983 & Supp. 1985) (1984); R.I. Gen. Laws] 4-1]-2 (1976 & Supp. 1985) (1984); Wash. Rev. Code Ann. § 16.52.070 (1962 & Supp. 1986) (1979); Wyo. Stat. § 11-29-102 (1977 & Supp. 1985-1986) (1978).

There are, in addition, seven other states with older statutes which do not expressly exempt research.⁶¹

In all, thirty-four states have rejected any express exemption for researchers. They rely on statutes functionally similar to the Maryland statute discussed in *Taub*. Being aware of the possibility of expressly exempting scientific research, and choosing not to add scientific research to their list of exempt activities, these thirty-four states have apparently chosen to treat researchers in the same way they treat other non-exempted activities. An additional nine states and the District of Columbia deal expressly with scientific research but stop short of a blanket exemption such as the one in the Model Penal Code. At least eight of these provisions postdate the Model Penal Code.⁶² Only seven states have provided a blanket exemption for scientific research, such as the one proposed in the Model Penal Code.

In short, the *Taub* decision, the response of the Maryland legislature, and the reactions of most states to the Model Penal Code suggest that it would be a mistake for a court to imply an exemption for researchers if a state's legislature has not expressly created one.

IV. Conclusion

The *Taub* case raised several new and interesting questions about state anti-cruelty statutes. Are they, in part, preempted by federal law? Do they apply to research facilities? What requirements do they place on research facilities? The answers to those questions will determine whether anti-cru-

61. The seven state statutes are: 53 Conn. Gen. Stat. § 247 (West 1960 & Supp. 1985); La. Rev. Stat. Ann. § 3:2361 (1973 & Supp. 1985); Miss. Code Ann. § 94-41-1 (1972); Okla. Stat. Ann. tit. 21, § 1685 (West 1983 & Supp. 1984-1985); S.C. Code Ann. § 47-1-40 (Law. Co-op. 1977 & Supp. 1981); Tenn. Code Ann. § 39-3-104 (1982 & Supp. 1985); W. Va. Code § 61-8-19 (1984 & Supp. 1985).

62. These statutes are: Alaska Stat. § 11.61.140 (1983); Cal. Penal Code § 599c (1970 & Supp. 1985); D.C. Code Ann. § 22-812(b) (1981 & Supp. 1985); Hawaii Rev. Stat. tit. 37, § 711-1109 (1976 & Supp. 1984); Kan. Stat. Ann. § 21-4310 (1981 & Supp. 1984); Me. Rev. Stat. Ann. tit. 17-A § 510 (1983 & Supp. 1985); N.J. Rev. Stat. § 4:22-16 (1973 & Supp. 1985); N.Y. Agric. & Mkts. Law § 353 (McKinney 1972 & Supp. 1985); S.D. Codified Laws Ann. § 40-1-16 (1977 & Supp. 1984); Vt. Stat. Ann. tit. 13, § 403 (1974 & Supp. 1985).

elty statutes are sleeping giants to be used by animal rights advocates to reshape laboratory procedures, unimportant provisions used only to intervene in the event of wanton sadism outside the professions, or something in between.

The answers given in the *Taub* case are merely indicative of a misinterpretation of legislative intent. It is this author's opinion that state anti-cruelty statutes are not preempted by the AWA, and that if a state anti-cruelty statute does not specifically exempt researchers, those researchers can be convicted for unreasonable and unjustifiable infliction of pain and suffering to animals but not for reasonable or justifiable acts. It is for the trial courts to determine on a case by case basis whether specific conduct is reasonable. In *Taub*, the trial court found Dr. Taub's conduct to be unreasonable. That finding should have been upheld.

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