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Laboratory Animal Act: A Legislative Proposal

David Favre*

I. Introduction

In one recent experiment, mongrel dogs were anesthetized after which thirty-five percent of their body was burned to the third degree by the application of a two hundred degree centigrade hot plate to their skin.¹ In 1983, researchers at the New Jersey Medical School placed electrodes in the hippocampus portion of the brains of five female cats. The brain was stimulated with electrical current to determine whether or not there was an increase in the tendency of the cat to bite at an anesthetized rat.² Researchers at Georgia State University divided a group of ten infant chimpanzees into pairs and triads. Two weeks later the pairs were split and one from each of the triads was isolated. The study was designed to measure the degree of "protest" behavior and the reunion responses. In the researcher's own words, "the results of this study indicated that chimpanzees react in predictable ways to separation from cage mates . . . the data on separation of chimpanzees are intermediate between those of humans and monkeys."³

The above examples of animal use are neither unique nor isolated. Are they examples of the incremental steps necessary

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1. Animal Welfare Institute, *Beyond the Laboratory Door* 140 (1985) (citing Wolfe, *Effect of Thermal Injury on Energy Metabolism, Substrate Kinetics, and Hormonal Concentrations*, 9 *Circulatory Shock* 383 (1982)).

2. *Id.* at 183-84 (citing Watson, *An Analysis of the Mechanics Underlying Hypocamial Control of Hypothalamically-elicited Aggression in the Cat*, 269 *Brain Research* 327 (1983)).

3. *Id.* at 229-30 (citing Bard & Nadler, *The Effect of Peer Separation in Young Chimpanzees*, 5 *Am. J. of Primatology* 25 (1983)).

for the advancement of science or are they unjustified infliction of pain and suffering best characterized as torture? The application of a hot plate or the use of electricity on a living animal by a person would, in a different circumstance, most likely violate state cruelty laws.⁴ Presently, within our society, there is a wide range of perspectives on this issue. Some individuals believe any use of animals in experiments is ethically unacceptable regardless of the human motivation.⁵ Others would leave such decisions entirely in the hands of the scientist, behind the laboratory door.⁶ Still others would argue that while the use of animals may be necessary for science, there is presently too much wastefulness, too much repetition, and that it is unacceptable to inflict pain and suffering on animals.⁷

To pursue these ethical issues requires the opening of the historically closed laboratory door to public and governmental observation. Most reflective people are willing to agree that animals should not suffer pain needlessly.⁸ The key issue has

4. See *State v. Tweedie*, 444 A.2d 855 (R.I. 1982) (upholding a conviction for cruelly killing where the defendant put a cat in a microwave oven and turned it on); *Anderton v. State*, 390 So. 2d 1083 (Ala. Crim. App. 1980) (in which the defendant was convicted of killing, by burning with gasoline, three two-week-old puppies).

5. One organization against all use of animals in research is the International Society for Animal Rights. The organization recently announced, "ISAR is willing and eager to work with other organizations of a like mind in a vigorous campaign against experimentation on animals." Int'l Soc'y for Animal Rights Rep., *Editorial: Startergy and Pressure Points 2* (Aug. 1985) (available from International Society for Animal Rights, Inc., 421 South State Street, Clarks Summit, Pa. 18411).

6. In testimony before Congress, Dr. Walter Randall representing the American Physiological Society stated, "[t]he society maintains its position that restrictive legislation is not needed." *Improved Standards for Laboratory Animals Act: Hearings on S. 657 Before Comm. on Agriculture, Nutrition, & Forestry*, 98th Cong., 1st Sess. 48 (1983).

7. The Scientists Center for Animal Welfare, established in 1979, is dedicated to the principle that a humane concern for animals should be incorporated into our conduct of science. The Scientists Center's outlook is one of responsible inquiry - seeking the best possible reconciliation of human needs with concern for the needs and well-being of all other animals. The Center recognizes that there is a need for the use of live animals in biomedical research and holds that high standards of animal welfare complement the quality of scientific results.

Scientists Center for Animal Welfare, Brochure (1985-1986).

8. In a statement made before the House of Representatives one of the Associate

always been who should decide when pain is necessary, and in accordance with what standards is the decision to be made. Today, as in the past, individual scientists make the decision on a case by case basis with some oversight by a peer review process. The government has bowed to the demands of research scientists who wish to be free in their choice of research technique.⁹ Would the imposition of government regulation be constitutional? Would government regulation stifle scientific research, killing the golden goose?

This article proposes new legislation which would reduce the pain and suffering of animals to a minimum while allowing maximum flexibility for the researcher. The primary legal mechanism for accomplishing this goal is a federal permit system. Under this system, rather than trying to control all animal research, permits will be required only for specifically listed techniques which produce pain and suffering in animals and any use of primates.

Before describing the specific provisions of my Laboratory Animal Act (LAA), some background may be useful. First, a brief examination of present laws will show how little

Directors of the National Institute of Health said:

In appearance before this panel last October, I said, "It is almost impossible to exaggerate the importance of laboratory animals in the search for new or improved means to prevent, treat and cure human disease. Virtually every major advance in health care stems in whole or in part from research performed with animals."

Such research is essential if we are to continue to make progress toward overcoming such maladies as cancer, heart disease, diabetes, brain dysfunction and environmentally caused disorders.

At the same time, Mr. Chairman, I emphasized that the social imperative that calls for the use of animals in research "is not a license to take animals' lives needlessly, or to inflict pain and suffering that could reasonably be avoided. Abuse of laboratory animals is as inconsistent with good science as it is with good conscience."

I believe that the vast majority of the scientific community and the general public shares that view.

Humane Care and Development of Substitutes for Animals in Research Act: Hearings on H.R. 6245 Before the Subcomm. on Science, Research and Technology of the Comm. on Science and Technology, 97th Cong., 2d Sess. 3 (1982) (testimony of William F. Raub).

9. See *infra* notes 16-21 and accompanying text. The constitutionality of the proposed act will be considered.

regulation exists to govern the use of animals for scientific purposes. Second, a legal frame of reference for the regulation of scientific experimentation will be developed. Third, an ethical perspective for animals will be considered.

II. Present Legal Structures

A. *State Regulation of Experimentation on Animals*

Current law regards animals as personal property. Under state law their status as living personal property is recognized,¹⁰ and a minimum standard of humane care is generally provided for. The starting point for analysis is the state cruelty law.¹¹ These criminal law provisions, with roots back into the 1880's and 1890's, contain general language which apply to human conduct but usually make no specific reference to the use of animals in the laboratory.¹² In a majority of states, there is no exception or special provision for the use of animals in research and testing.¹³ While phrases such as "torture", "unjustifiably injure", and "cruelly beat or needlessly

10. "A dog, for all its admirable and unique qualities, is not a human being and is not treated in the law as such. A dog is personal property, ownership of which is recognized under the law." *Arrington v. Arrington*, 613 S.W.2d 565, 569 (Tex. Civ. App. 1981).

Animals are a unique classification of personal property in that they have the ability to move of their own volition; they will, with a certain regularity, produce more of the same; they require care. In sum, they are alive, and being so gives rise to several unique considerations within personal property law. . . .

All animals within the boundaries of the United States are in theory the property of either a private individual (any legal entity) or the state.

D. Favre & M. Loring, *Animal Law* 21 (1983).

11. For a full analysis of typical state cruelty laws, see D. Favre & M. Loring, *Animal Law* 121-66 (1983).

12. For example, the Mississippi cruelty law remains today basically the same as it was when initially passed in 1880. Miss. Code Ann. § 97-41-1 (1973 & Supp. 1985).

13. A 1984 survey found that in twenty-three states research received some level of protection from the general application of state cruelty laws. Assoc. for Biomedical Research, *State Laws Concerning the Use of Animals in Research* 13-15 (1st ed. 1984) (available from Association of Biomedical Research, 400-2 Totten Pond Rd., Suite 200, Waltham, Mass. 02154). A student review of the various statutes suggests that thirty-four states have rejected the use of an express exemption of researchers from cruelty statutes. Note, *Taub v. State: Are State Anti-Cruelty Statutes Sleeping Giants?* 2 Pace Envtl. L. Rev. 255, 268 (1984).

mutilate" often appear in state criminal law,¹⁴ it is difficult to apply such general terms to the specific activities of a scientist. What is clearly cruel or unjustifiable to one person, such as the intentional burning of the skin of guinea pigs,¹⁵ is not to another. The end result is that state cruelty laws have had negligible impact on the activities of science and animal testing. In fact, there is only one recorded case of a scientist being charged and convicted under a state cruelty law, and in that case the conviction was reversed by the Court of Appeals of Maryland.¹⁶

The cruelty laws of a number of states, such as Virginia¹⁷ and California,¹⁸ provide a simple exemption for scientific research. Other states, such as Michigan and Massachusetts, have set up affirmative provisions governing some aspect of the use of animals in research. Michigan has created an animal research advisory board within the Department of Health.¹⁹ This board may "establish standards . . . controlling the humane use of animals."²⁰ The regulations adopted in Michigan focus on the appropriate use of drugs and the post experimental care of animals. Incorporated into the regulations by reference is the *Guide for the Care and Use of Laboratory Animals*.²¹ While this guide is eighty-one pages long, it

14. See, e.g., Miss. Code Ann. § 97-41-1 (1973 & Supp. 1985).

15. Animal Welfare Institute, *supra* note 1, at 136-40.

16. *Taub v. State*, 296 Md. 439, 463 A.2d 819 (1983). Edward Taub was conducting research on monkeys which entailed surgically abolishing all sensation in the limb of a monkey (deafferentation). He was found guilty of failure to provide necessary veterinary care, but this conviction was overturned when the highest court in Maryland, in a very unclear opinion, held that the legislature had not meant for the general cruelty statute to apply to scientific research even though no language could be found in the statute supporting this conclusion. See, Note, *supra* note 13, at 255.

17. The general cruelty language is qualified by the phrase "not connected with bona fide scientific or medical experimentation." Of course, there is no hint as to what makes something "bona fide." Va. Code § 29-213.91 (1985).

18. The phrase in the California Code is "or with properly conducted scientific experiments or investigations performed under the authority of the faculty of a regularly incorporated medical college or university of this state." Cal. Penal Code § 599(c) (West 1970).

19. Mich. Comp. Laws Ann. § 333.2672 (West 1980).

20. Mich. Comp. Laws Ann. § 333.2673 (West 1980). The regulations are located in Mich Admin. Code R. § 325.921-.926 (1980).

21. Public Health Service National Institutes of Health, U.S. Dep't of Health &

does not provide much in the way of detailed standards of care for animals. The primary focus is on the housing of animals rather than the scientific techniques or procedures which may be used in experiments. The Michigan regulations, which cover all vertebrate animals, do require inspections on an annual basis.²²

In 1983, Massachusetts passed a new law which allows the commissioner of the Department of Public Health to adopt regulations for the licensing and inspection of research institutions that use dogs and cats.²³ The regulations adopted by the state are very close to the national regulations adopted under the federal Animal Welfare Act.²⁴

B. *Federal Regulation of Experimentation on Animals*

At the federal level there is one primary law which directly affects the conditions of animals in a laboratory: the Animal Welfare Act.²⁵ Although extensive regulations have been adopted by the Department of Agriculture,²⁶ the concern is upon the housing of animals rather than what is done to the animal by the scientist. For example, the law requires minimum standards for food, water, sanitation, ventilation, shelter and veterinary care.²⁷ The law does require the use of pain-relieving drugs when pain is present but also provides a large loophole by further stating that such drugs need not be used if their use would interfere with the purpose of the experiment.²⁸ This situation is precisely what Congress desired. During the congressional debate it was made clear that there

Human Services, Pub. No. 85-23, Guide for the Care and Use of Laboratory Animals (1985).

22. "'Animal' means any living, vertebrate animal." Mich. Admin. Code R. § 325.921(1)(a) (1980).

23. Mass. Gen. Laws Ann. ch. 140 § 174 D (West Supp. 1986).

24. Mass. Admin. Code tit. 105 §§ 910.001-.210 (1984).

25. 7 U.S.C. §§ 2131-2157 (1982 & Supp. III 1985).

26. 9 C.F.R. §§ 1.1-3.142 (1986).

27. 7 U.S.C. § 2143(a) (1982).

28. "[I]n any practice which could cause pain to animals . . . the withholding of tranquilizers, anesthesia, or euthanasia when scientifically necessary shall continue for only the necessary period of time. . . ." 7 U.S.C. § 2143(a)(3) (1982), amended by 7 U.S.C.S. § 2143(a)(3)(C)(i-v) (Law. Co-op 1985 & Supp. 1986).

was to be no interference with research and experimentation.²⁹ Congress did not seek to distinguish between interfering with scientific research and controlling the methods used in doing research.

Not only is the Animal Welfare Act limited in the activities that it covers, but it is also limited by its definition of the term "animal". The law itself lists specific animals (dogs, cats, primates, etc.) and then allows the Secretary of Agriculture to designate other warm blooded animals.³⁰ The same subsection of the law, however, excludes all farm animals used in food and fiber research from the protection of the law. A further narrowing occurs in the regulations. The Secretary specifically excludes birds, rats and mice in the regulatory definition of "animal".³¹ Ironically, these species represent the three most used species in research and testing.³² Thus, existing federal law provides animals with protection only in the area of housing, and some of the species receive no protection at all.

Although not part of any law, there is normally a peer review process both at the institution where research occurs and during the grant review when N.I.H. grants are involved. Undoubtedly, some concern is given to animals and their pain and suffering during these reviews, but the published literature continues to show the use of experimental techniques ethically unacceptable to many.³³ Additionally, it may be presumed that a number of lesser quality research projects involving great pain and suffering to animals are either never

29. For example, consider the commentary of Senator Monroney:

Let me make it crystal clear that this bill in no way will impair the rights of researchers and the managers of research facilities to subject animals to medical or surgical procedures required for research and experimentation. . . . The researcher is left completely free to use an animal in his research project in whatever way, no matter how painful, and for as long as he deems necessary, including removing any organs or vital parts, or even experimentation that he knows will result in the death of the animal.

112 Cong. Rec. S13893 (daily ed. June 22, 1966). See also 112 Cong. Rec. H9210 (daily ed. April 28, 1966) (statement of Rep. Pepper).

30. 7 U.S.C. § 2132(g) (1982).

31. 9 C.F.R. § 1.1(n) (1986).

32. See *infra* note 49.

33. See generally Animal Welfare Institute, *supra* note 1, at 121-250 (for a review of the scientific literature).

written up or never accepted for publication and thus remain totally hidden from the public.

At the moment neither the state nor the federal laws directly address the issue of when, if ever, it is appropriate to intentionally inflict pain and suffering on animals under the argued need of scientific research. It is now time to develop a legal framework in which it is possible to control or regulate the use of animals by science. It is such a legal framework which is being proposed herein.

III. The Regulation of Science

Science, both as a truth seeking intellectual activity and as a producer of information upon which our technological society is based, is a fundamental component of western culture, particularly that of the United States.³⁴ As a definition of science, Dr. Joshua Lederberg, a Nobel laureate, has suggested the following:

The profession of science is the search for truths about the natural world; more precisely it seeks verifiable generalizations that simplify human comprehension and prediction of natural phenomena. Still more must be said: the truths must be novel and significant — which is to suggest that they are measured according to their impact on the minds of other scientists, a statement which labels science firmly as a human and social enterprise.³⁵

34. Favre & McKinnon, *The New Prometheus: Will Scientific Inquiry Be Bound by the Chains of Government Regulation?*, 19 Duq. L. Rev. 651, 712-27 (1981) [hereinafter cited as *Prometheus*].

35. Lederberg, *The Freedoms and the Control of Science: Notes from the Ivory Tower*, 45 S. Cal. L. Rev. 596, 599 (1972). Dr. Lederberg received the Nobel Prize for Medicine in 1958. With a slightly different focus, Ralph E. Lapp described science:

The goals of science focus upon the exploration of the unknown and the enlargement of knowledge. Very often the greatest discoveries come when a man sees relationships between things which no one recognized before—or sees these in a new light. But usually science expands into the unknown like a huge amoeba, moving first this way and then that, seeking the virgin and the fertile. Its goals are determined by opportunity and chance and sometimes by design.

R. Lapp, *The New Priesthood* 1-2 (1965).

Science is, in the first instance, the creative use of individual minds.³⁶ As with many creative activities, breakthroughs are unpredictable; new developments do not arrive like completed cars at the end of the assembly line. Likewise, it is impossible to know, in advance, which individuals will produce useful new insights about nature. Therefore, to maximize the "output" of science there should be minimal, if any, control on who is a scientist or what issues he or she might pursue.

Freedom to research, freedom to choose the topic of research, freedom to choose the method of research, all of these are essential to the individual scientist. This author and others have previously argued that scientific research in general is so important that it is protected by the U.S. Constitution from unwarranted government intervention.³⁷ The basis of this constitutional protection would be either as a component of free speech under the first amendment, or as a fundamental right. One author has argued that because the basic attribute of science is the expression of ideas and opinions, scientific research is pure speech.³⁸ It may be more useful to bring the research aspects of science within the scope of constitutional protection as a necessary incident to speech or as "speech plus".³⁹

From another perspective, scientific inquiry can be considered as a fundamental right standing alone. Other rights have been recognized by the Supreme Court as fundamental even though not explicitly mentioned in the Constitution.⁴⁰

36. See J. Bronowski, *Science and Human Values* 13-15 (1965). See generally J. Bronowski, *The Origins of Knowledge and Imagination* (1978); T. Kuhn, *The Structure of Scientific Revolution* (1969).

37. *Prometheus*, *supra* note 34, at 651. See also Delgado & Millen, *God, Galileo and Government: Toward Constitutional Protection for Scientific Inquiry*, 53 Wash. L. Rev. 349 (1978); Robertson, *The Scientist's Right to Research: A Constitutional Analysis*, 51 S. Cal. L. Rev. 1203 (1977).

38. See Davidson, *First Amendment Protection for Biomedical Research*, 19 Ariz. L. Rev. 893, 896-907 (1977).

39. *Prometheus*, *supra* note 34, at 668-85.

40. These rights would include: (a) the right to privacy, *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965), (b) family rights, *Moore v. City of New East Cleveland*, 431 U.S. 494 (1977), (c) the right to vote and have one's vote be worth as much as another's, *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

Supporting this idea is a historical argument that the activities of scientific inquiry were considered of the highest stature during the period of the adoption of the Constitution and continue to be of the highest importance in today's society.⁴¹

Given that the activities of science and individual scientists receive some level of constitutional protection, is it possible for society to interfere with their use of animals in the laboratory? The answer is yes. No right, not even a fundamental right, is without limitations.⁴² To give research the status of a constitutionally protected activity means only that in order to regulate it, the government must bear the burden of proving the existence of an overriding social interest.⁴³ If a scientist is an observer of distant stars, it is difficult to imagine any social interest which would justify an interference with that scientific activity. If another scientist wishes to do research on the spread of bubonic plague bacillus among urban populations, the risk to human health would justify government restrictions. Finally, if a scientist uses live subjects in an experiment which creates a risk of pain and suffering for the subject, then some form of government restraint will be justified. Presuming for the moment that a concern for the pain and suffering of animals is an appropriate one for our government to assert, the parameters of possible government regulation remain to be determined.

It should be noted that persons who engage in product

41. *Prometheus*, *supra* note 34 at, 707-29.

42. For example, the first amendment clearly provides for the right of individuals to petition the government as a fundamental right yet the Supreme Court has always recognized that limits to this right exist:

Although the values in the right of petition as an important aspect of self-government are beyond question, it does not follow that the Framers of the First Amendment believed that the Petition Clause provided absolute immunity from damages for liable. . . .

Nor do the Court's decisions interpreting the Petition Clause in contexts other than defamation indicate that the right to petition is absolute. For example, filing a complaint in court is a form of petitioning activity; but "baseless litigation is not immunized by the First Amendment right to petition." *McDonald v. Smith*, 105 S. Ct. 2787, 2790-91 (1985).

43. Without such constitutional protection any law passed by Congress would be presumed to be lawful and the burden of proving a particular restriction unconstitutional would be on those individuals seeking to overturn the law.

testing are not engaging in the constitutionally protected activities of scientific inquiry and therefore may be regulated as any other activity in the United States. This distinction can be made on the basis of the underlying purpose of the activity. The purpose of testing is not to obtain new insight concerning the fundamental principles of the universe. Rather, a "test" is an activity seeking a specific bit of information concerning a characteristic or purity or effect of a particular substance. Often they are performed because of legal requirements.⁴⁴ For example, monkeys are given the polio vaccine to determine the safety of a particular batch of vaccine.⁴⁵ Even though the test is carried out using principles of scientific experimentation, it is not scientific activity, i.e. drug safety, not scientific discovery, is the motivation for the activity. Since testing does not have the same purpose as scientific research, it is not protected as a fundamental activity. Congress may regulate testing as it does the transportation of animals⁴⁶ or the slaughter of animals.⁴⁷ The public interest in protecting animals from pain and suffering becomes the dominant interest, shifting the burden of showing no alternative to those who wish to use animals.

IV. Ethical Concern for Animal

Because of the lack of a centralized data collection point, it is difficult to estimate the total number of laboratory animals used in the United States. Part of the problem is that the vast majority of animals used in research are specifically bred for these purposes by private, profit making companies who do not reveal their sales data. The 1983 report under the federal Animal Welfare Act shows a total of 1,680,242 animals being used, but this includes only activities covered by the

44. See generally Reagan, *Federal Regulation of Testing with Laboratory Animals: Future Decisions* 3 Pace Env'tl. L. Rev. 165 (1986).

45. A. Rowan, *Of Mice, Models, & Men: A Critical Evaluation of Animal Research* 117-20 (1984).

46. 7 U.S.C. § 2143(a) (Supp. III 1985).

47. 7 U.S.C. §§ 1901-1906 (1982).

act, and excludes rats, mice and birds.⁴⁸ (It does show 54,926 primates being used in experimentation, but this number may be a little high.) One experienced author estimates that seventy million animals are used each year.⁴⁹ While some animals are used in more than one experiment, most are killed at the end of an experiment or test.

The uses made of these animals defy the imagination of average people. Since there is almost no legal limitation on the use of animals by scientists, every possible use is made of them. They are shocked by electricity, poisoned, burned, injected with hormones, separated, radiated, restrained, cut up,

48. Animal & Plant Health Inspection Service, U.S. Dept. of Agriculture, Animal Welfare Enforcement FY 1983-10 (Mar. 1984) (report of the Secretary of Agriculture to the President of the Senate and Speaker of the House of Representatives). This report is required by the Animal Welfare Act, 7 U.S.C. §§ 2131-2157. (1982 & Supp. 1985).

49. The following tables are found in A. Rowan, *supra* note 45, at 71:

TABLE 5.6
ESTIMATED LABORATORY ANIMAL USE

Mice	45 million	63.1%
Rats	15 million	21.0
Hamsters	1 million	1.4
Guinea pigs	1 million	1.4
Rabbits	750,000	1.1
Dogs	250,000	0.4
Cats	100,000	0.1
Primates	25,000	0.04
Ungulates	200,000	0.3
Birds	5 million	7.0
Frogs	3 million	4.2
Total	71.325 million	100.0%

SOURCE: Compiled from available data, excluding ILAR Survey.

TABLE 5.7
LABORATORY ANIMAL USE

	Percentage	Number (in millions)
Teaching programs	8	5.7
Research programs	40	28.5
Toxicology programs	20	14.3
Drug development programs	26	18.5
Other programs	6	4.3

and any number of other actions⁵⁰ which in any other setting, would constitute torture and violate most state cruelty laws.⁵¹ The three examples at the beginning of this article are but a few of the many that could be cited.⁵² Not only are innumerable animals subjected to pain and suffering, but the United States taxpayer pays a substantial portion of the cost for such research.⁵³

The fact that numerous such experiments are conducted annually makes it obvious that specific individuals have decided that it is morally and ethically appropriate to engage in research which results in the pain and suffering of animals. (It should be noted that not all animal research results in pain and suffering. Likewise, not all scientists support some of the painful research done by others.) Criticism by one scientist of the ethics of another has seldom occurred and when it has occurred there has been little change.

There are three issues which need to be addressed: (1) Is the use of animals in research ethically acceptable? (2) If there are situations where it is not acceptable, should society impose restrictions by the adoption of laws? (3) If some re-

50. Examine any primary scientific publication which reports research and focus on the animals and their use as set out by the protocol rather than the results of the experiment. Summaries of a number of experiments can be found in various books dealing with the topic of animals in research. See Animal Welfare Institute, *supra* note 1; D. Pratt, *Alternatives to Pain in Experiments on Animals* (1980); A. Rowan, *supra* note 45.

51. See *supra* notes 10-15 and accompanying text.

52. See J. Diner, *Animal Rites: A Research Perspective* (1986) (published by Nat'l Anti-Vivisection Soc'y); Ryder, *Speciesism in the Laboratory*, in *In Defense of Animals* 77-88 (P. Singer ed. 1985); A. Rowan, *supra* note 45, at 163-85.

53. Records are not kept on government expenditure for animal research, however, the scope of such expenditures is indicated by biomedical research spending.

Approximately \$9 billion worth of biomedical research is conducted annually in the United States. The major, single source of funding is the National Institutes of Health (NIH), which supported \$3.55 billion worth of research in 1981. The Alcohol, Drug Abuse and Mental Health Administration supported a further \$1.05 billion, while the rest of the Federal government allocated an estimated \$1.5 billion to \$2 billion. Private industry accounted for a further \$2 billion to \$2.5 billion, while nonprofit groups (such as private foundations and universities) accounted for a further \$0.4 billion to \$0.6 billion.

A. Rowan, *supra* note 45, at 21.

strictions are appropriate, how might they be drafted in order to comply with the limits of the Constitution?

There are a number of suggestions concerning an ethical system that takes into account the interests of animals.⁵⁴ My argument and the thoughts which flow from it are within the mainstream of these various suggestions. The initial premise is that animals share an evolutionary tie with humans. There is a similarity in body and brain between the human animal and non-human animals that correlates with the evolutionary closeness of a species with homo sapiens.⁵⁵ In short, animals are alive in the same sense we are. Being alive, each individual animal has specific interests or preferences of activities. Animals eat, sleep, play, kill and engage in other behavior or activities in accordance with their individual interests or preferences. A second premise is that animals feel pain in the same general sense that humans do. This premise is based upon the science of neurobiology⁵⁶ and the common experience of observing animals that become hurt.

There is a paradox in which science is trapped. The reason that animals are used in many experiments and tests is that they are so similar to humans, yet scientists inflict pain and suffering on animals that would never be inflicted upon a human. Within the human context, the infliction of pain upon others without consent is unethical. This ethical view has been accepted within the legal system. It is both a part of criminal law and the law of torts.⁵⁷ Assuming that the pain felt by animals is of the same generic type as that felt by humans, should not our ethical system also preclude the intentional infliction of pain upon animals? Are there any factors which would so distinguish human animals from non-human animals that the interest of the nonhuman animal in

54. T. Regan, *The Case for Animal Rights* (1983); B. Rollin, *Animal Rights and Human Morality* (1981); In *Defense of Animals* (P. Singer ed. 1985).

55. See Favre, *Wildlife Rights: The Ever-Widening Circle*, 9 *Envtl. L.* 241, 259-64 (1979).

56. See A. Rowan, *supra* note 45, at 74-92. See also Pratt, *supra* note 50, at 11-30. See generally G. Shepherd, *Neurobiology* (1983).

57. See Model Penal Code § 211 (1985); W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* §§ 9-10 (5th ed. 1984).

avoiding pain can be totally ignored by humans? I can find none.

On the other hand, science and the information it provides to our society is critical to the health and standard of living of many humans. Often animals have been the key to providing new insight about the world around us. The conflict is sharp: the ethical concern for animals versus the need of science to use animals in experiments that may ultimately benefit mankind. How should the differing interests be weighed? Do the ethical interests of animals weigh so heavily so as to eliminate any use of them by science? I think not. It is equally clear that their interest does have weight, more than enough to outweigh the whims of individual researchers or the desire of researchers and institutions to obtain funding.⁵⁸ The premise upon which to build a statute is that animals should not have to endure the infliction of pain or suffering for the benefit of science except upon the specific decision of society that the sacrifice is one that is necessary for the benefit of society as a whole (as opposed to the benefit or curiosity of the scientist).

The infliction of pain and suffering should only be allowed as the result of a rational dialogue made in the public

58. It should be pointed out that much of the use of animals is not motivated by the long-term good of society but by short-term personal need of the scientist. Dr. Samuel Peacock has stated:

Research productivity has become the yardstick by which institutions, departments and individuals are measured and evaluated. Indeed, research programs lend a sort of window dressing to what were at one time purely clinical departments. Frequently, evaluation is based on the number of publications, often quite regardless of quality or redundancy. Closely linked with this publication pressure is the talent of grantsmanship, the ability to obtain enormous sums of money for funding research programs. These programs have become progressively more expensive with the development of highly sophisticated techniques requiring specialized technicians to operate very complex equipment. . . .

The survey in the succeeding pages covers many projects of this type, most of them motivated by the doctrine of "publish or perish." In my view, this is not science in the traditional sense but rather a kind of scientific prostitution in an attempt at empire building within a very competitive atmosphere.

Peacock, *Preface to Animal Welfare Institute Beyond the Laboratory Door* at xiii-xv (1985).

view. If sound reasons for a particular experiment or technique can not be articulated, then it should not be allowed. This perspective creates a burden of proof upon the individual scientist to justify their use of animals. It allows some government decision maker to weigh the arguments of the scientist against the interest of the animals. This is simply the recognition of an animal's interests by the providing of legal due process. Since animals are unable to make their own arguments it will be necessary to provide a process in which other humans can argue on behalf of the animals.

While the ethical considerations discussed above were without regard to specific species, the proposed legislation acknowledges that primates are a special case. This is for a number of reasons. First of all, captive breeding programs do not work particularly well. As a result, a significant number of primates are imported annually from wild populations to satisfy the demands of testing and research.⁵⁹ The importation

59.

TABLE 2
UNITED STATES "NEW PRIMATE" REQUIREMENTS, 1981

	# of Animals	Mortality	Net	Percent ¹
Imported	22,454	12% ²	19,759	62
Domestic Production	8,645	10% ³	7,780	24
PIC ⁴	4,596		4,596	14
Total	35,695		32,256	100
Less re-exported ⁴			<u>-4,000</u>	-12
"New primates" ⁵			28,256	

¹ Percent of total "new primates".

² Estimated average mortality of imported animals.

³ Estimated average mortality between birth and weaning.

⁴ Approximately 4,000 primates exported from U.S. annually.

⁵ New animals available from all sources.

⁶ Placement of primates by Primate Information Clearinghouse (PIC).

Source: Taken from Wolfie (1983)

Eudey and Mack, *Use of Primates and Captive Breeding Programs in the United States*, in 1 *International Primate Trade* 156 (D. Mack & R. Mittermeier eds. 1984) (a joint publication of TRAFFIC (U.S.A.), the World Wildlife Fund - U.S. Pri-

process itself is both wasteful of the species and a significant source of pain and suffering for the individual animals involved. It is not uncommon for adult primates to be killed in order to capture their young. Further, one study suggested a sixty-eight percent death rate during the capture and holding of primates in the source country.⁶⁰ Additionally, there is a death rate of approximately seventeen percent during the importation process prior to their being used.⁶¹ Thus, there may be as much as two deaths for every imported primate that is ultimately used in science or testing. It is not difficult to presume significant suffering during the capture and transportation phase even for those that survive and are used in "painless" research.

Second, these animals are all protected as endangered or threatened under an international treaty.⁶² Yet, we have allowed science and testing to create and maintain a significant market demand upon the wild populations. The spirit of the international agreements to protect wildlife would be best served if this demand were eliminated.

A third reason to treat primates differently is to acknowledge that, whatever their source, these animals are the most like humans. We evolved from common ancestors. We both have a social structure and strong mother-child bonding. It is almost impossible to create a laboratory environment that comes anything close to a natural setting. (Rats and mice can be provided with a rich and fulfilling living environment in a

mate Program and the IUCN/SSC Primate Specialist Corp.).

60. Kavanaugh, *A Review of the International Primate Trade*, in 1 *International Primate Trade* 62 (D. Mack & R. Mittermeier eds. 1984).

61.

According to information analyzed from Center for Disease Control Import forms, 5,206 or 18.2% of the 28,558 primates imported into the U.S. in 1978 were dead-on-arrival or died within 90 days of entering the country . . . and in 1979, 3,818 or 17.1% of the 22,276 primates imported experienced comparable mortality. Mortality rates ranged from a low of 15.3% for all African species in 1978 to a high of 25.1% for Neotropical species during the same year.

Mack & Eudey, *A Review of the U.S. Primate Trade*, in 1 *International Primate Trade* 98-99 (D. Mack & R. Mittermeier eds. 1984).

62. See *infra* note 65.

laboratory.) The present housing standards for primates are no more than a very small prison cell, without the opportunity for physical or mental exercise. There is nothing redeeming about their living conditions. There can be a presumption of suffering from the mere fact of laboratory confinement of primates. Therefore, they should not be subjected to testing or experiments except in the most extraordinary cases.

V. A Statutory Proposal

The proposed legislation found in Appendix A seeks to control animal use in testing and certain kinds of scientific research. The legislation seeks to be no more restrictive than is necessary. Therefore, it does not seek to bring within government review all scientific research or even all animal research. Instead, it seeks to control all primate research and all research which has a significant risk of inflicting pain and suffering on animals.

The proposed legislation, as with all regulatory legislation, contains six components:

- a) statement of legislative policy - (§ 1),
- b) definitions of key terms - (§ 2),
- c) creation of regulatory authority and granting of administrative authority - (§ 3),
- d) operative provisions - (§§ 4-8),
- e) powers of enforcement - (§§ 9-10)
- f) penalty provisions - (§ 11).

A. Section 1: Policy

The policy statement of section one serves two different functions. First, it suggests that the law is constitutionally justified under three basis: as interstate trade,⁶³ as a condition of federal funding,⁶⁴ and as an extension of a treaty obligation.⁶⁵

63. Congress may not only regulate the actual interstate commerce of an item, but may also regulate the production and ultimate use of an item which passes through interstate trade. *Katzenback v. McClung*, 379 U.S. 294 (1964); *Tribe, American Constitutional Law* 232-37 (1978).

64. Since Congress does not have to give grants for scientific research and individuals are not obligated to receive the funds, Congress may impose rational condi-

Second, section one sets out the broad policy which the succeeding sections seek to implement. In this case there is first a statement dealing with animals generally:

It is, therefore, the policy of the United States that animals be subjected to pain and suffering for our collective benefit only when it has been established that no alternative exists and that the information gained is truly useful and necessary.

The second statement deals with primates in particular.⁶⁶

It is, therefore, the policy of the United states that primates should not be used in any research or testing except under the most extraordinary of circumstances.

These broad statements are important because they tell the administrative decision maker what Congress considers to be important and what type of outcome is desired in the context of individual, specific decisions. It sets the tone for the administration of the law.

The policy statement also begins to establish that the legislation is concerned only with the methods of research, not with stopping the progress of science in any area. Although the actual structure of the proposed law would have to be looked at as well, the courts give considerable weight to what Congress states as the purpose of the legislation.⁶⁷

tions, such as the care of animals, upon those receiving the funds. Of course not all research is funded by the federal government. For example, the Howard Hughes Medical Institute announced plans to spend one billion dollars for biomedical research during 1986-1991. N.Y. Times, Feb. 3, 1986, at 9 (nat'l ed.).

65. It was established in *Missouri v. Holland*, 252 U.S. 416 (1920), that Congress has the power to pass legislation not otherwise justified under the Constitution when implementing an international treaty. The Convention on International Trade in Endangered Species of Wild Fauna and Flora, July 1, 1975, 27 U.S.T. 1087, T.I.A.S. No. 8249, list all primates as either endangered (Appendix I) or threatened (Appendix II). As a signatory of the treaty, the United States has a legal obligation to protect primates.

66. See *supra* note 58-60 and accompanying text.

67. See *United States v. O'Brien*, 391 U.S. 367, 383 (1968); see also *Tribe*, *supra* note 63, at 591-98.

B. Section 2: Definitions

The definitional section provides the contours of the legislation. By examining the definition of "person" and "animal" a sense of scope may begin. Animal is defined by the listing of five specific categories: mammals, birds, fish, amphibians and reptiles. Within these groups, all of which contain a centralized nervous system and a brain, the perception of pain and suffering is of the same general nature as what we humans experience. To the extent that science provides us with the information that others within the animal kingdom are also subject to the infliction of pain and suffering, then the list should be expanded. The list also may reflect a judgement about how far protections can be extended, not as a matter of science but as a matter of political reality.

The definition of "person" does not provide any limit to the application of the law. The definition is all inclusive. The only limiting factor will be what acts are performed by a "person". In effect, no one is exempt from the operative provisions of the law.

The definitions of pain and suffering are not to be judged by their biological accuracy but by their legal usefulness. There is significant debate as to just what constitutes pain and suffering.⁶⁸ These definitions give broad guidelines to the Commission to decide when to apply the operative provisions of this Act. The courts are always available to correct any abuses by the Commission in making specific decisions. Additionally, the definitions try to focus on the important while excluding the trivial or truly disputed areas in defining pain and suffering. The legal definition would not include minimal or momentary pain such as arises in the receiving of an injection. For purposes of efficiency and consistency, the conditions provided for under the federal Animal Welfare Act are presumed to not result in suffering, even though an argument might be made that certain provisions do result in animal suf-

68. See A. Rowan, *supra* note 45, at 74-92; D. Pratt, *supra* note 50, at 11-29; Wright, Marcella & Woodson, *Animal Pain: Evaluation and Control*, 14 Lab Animal 20, 20 (May-June 1985).

fering. In part, these limitations on the definition are to assure scientists that the law will not be able to interfere on trivial or unimportant points. There is enough significant pain and suffering imposed upon animals to make it ill-advised to devote resources to the trivial.

C. *Section 3: Administration*

One major decision which must be made when suggesting a government regulatory program is determining who should carry out the responsibilities of the law. Neither of the two agencies presently involved with animal research are appropriate for the new law. The Animal and Plant Health Inspection Service, within the Department of Agriculture, deals with the provisions of the Animal Welfare Act. They have been less than enthusiastic in carrying out their responsibilities under the Act.⁶⁹ Additionally, while they have veterinarians in their

69.

Several examples of the Department of Agriculture's attitude are available. First, with every law that is implemented through regulation by an agency or department, there is considerable variability in the scope of the regulations which the agency may pass. An agency can do the minimum to comply with the law or it can push the goals and spirit of the law forward by producing regulations which are comprehensive, requiring the maximum from those who are regulated. The regulations under the A.W.A. are minimal. They are not assertive in protecting animal interests; they require only the bare minimum. For example, the law requires the Secretary to be assured that professionally acceptable standards are being utilized by research facilities, yet the regulation contains no clear mechanism for obtaining such information. . . .

A second place to take the pulse of an agency's level of commitment to a law is the area of enforcement. Again, the effort seems to be minimal at best. While the level of available funds do impact the ability to enforce, even at present levels very little seems to happen. The individuals regulated under the A.W.A. are given every possible opportunity to remove themselves from enforcement proceedings. This is not to say that specific individuals are not trying to enforce the Act. Rather this is a criticism of the burdensome process the agency has imposed upon them.

Perhaps the most telling example of the Department's attitude toward the A.W.A. is the administration's proposed budget for the 1986 fiscal year—zero funding. They want to repeal the law by not funding it. What dedicated, forward-looking civil servant would want to become involved with a zero-budgeted program? Even if the budget level was based more on politics than economics, it nonetheless tells everyone in the agency that the Secretary and Executive branch give the care of animals zero priority.

service, they do not have the experience with scientific experimentation which will be necessary to engage in the permit program being proposed. The other existing agency is the National Institute of Health. As a major granting agency for animal research money, they certainly possess an understanding of the scientific experimentation process. The problem is that this agency has always been opposed to any regulation of the use of animals in research. It seems unlikely that the policies of the proposed act would ever be aggressively pursued in such an environment.⁷⁰

This is a new concern of the government. It is best to locate it where it has a fair chance of developing some administrative strength. The best thing to do is to create a new agency which can focus all of its energy and budget toward the goals of the legislation. In section three of the Act, the Commission on Laboratory Animals is created. Because of the newness of this issue and the desirability of having strong open public debate, a five member commission is created rather than having just a faceless administrator. The full composition of this Commission can be further debated. What is critical is that the general public be represented and that the interests of the animals be represented. Section three also gives the necessary administrative authority to the Commission.

D. *Sections 4-8: Operative Provisions*

Section four is the first of the operative provisions. This section sets out specific experimental techniques, such as the application of thermal burns, which may not be used on an animal that is conscious or will regain consciousness unless the "person" using the technique has a federal permit. The list of techniques or procedures triggering the need for a permit may be expanded by the Commission. The government

D. Favre, *The Federal Animal Welfare Act: A Legal Analysis* § 8.1 (Sept. 13, 1986) (unpublished manuscript). (To be published during 1987 by Michigan Humane Society, Detroit.)

70. It might be considered the old problem of having the fox guard the chicken coop, but, of course, that is a slur on the character of foxes.

thus assumes the burden in the first instance of identifying where it will assert its regulatory authority. It would be an unnecessary overreaching of federal authority if a permit was required for all scientific experiments. Those techniques and procedures listed under this section are not meant to be a definitive list, but rather representative of what might be listed. Once on the list, the burden shifts to the applicant to show that the prerequisites for a permit can be satisfied.

Section five goes a step further by listing certain procedures and techniques which are absolutely prohibited. In effect Congress will have weighed the pain and suffering against the prospect of new knowledge and decided that the possible gain is not worth the cost in pain and suffering to the animals that would be used. An example of this is the use of electric shock. By its very nature it is meant to produce pain. Whatever the usefulness of the procedure in the past, it is doubtful that the continued use of this technique is necessary for the advancement of science.⁷¹ Again, the Commission is authorized to expand this list by regulation. As the public discussion becomes increasingly sophisticated and as science makes further progress, it is expected that other techniques will be considered ethically unacceptable.

Section six sets out the provisions for a primate permit. Any use of a primate, whether a painful procedure or technique is used or not, requires a permit. Another major difference from the general experiment permit requirements is that for a primate permit the Commission must make the finding that the proposed research will potentially provide essential information for human or primate health (or deal with lan-

71. The case against continued electric shock experiments, and all behavioral psychology, is forcefully presented in *Animal Rights and Human Morality*. B. Rollin, *Animal Rights and Human Morality* 124-30 (1981).

[N]ot all basic research ought to be sanctified by the "right to know." There are certain things studied in the name of research that we already know; there are others that we do not need to know, most notably in the field of psychology. . . . This sort of research makes all research look bad, is methodologically suspect, can not be extrapolated to man, belabors the obvious, and can result in no conceivable benefit to human beings.

Id. at 129. See also Dresser, *Research on Animals: Values, Politics, and Regulatory Reform*, 58 S. Cal. L. Rev. 1147, 1158-59 (1985).

guage development). This is a value judgement which, while difficult to make, must occur before society can justify utilizing primates. A permit will not be issued if equivalent information is available through other than animal research. For example, information may be available through the direct observation of humans, or by doing epidemiological surveys. Again there is a list of ethically unacceptable techniques or procedures which may not be used in any situation.

Section seven deals with a related but separate topic, that of animals used in testing. The approach of this section is to set out national uniform standards which must be complied with for any testing. These standards, which forbid painful testing, must be developed and implemented within two years. The use of live animals in painful tests would be allowed for an additional two years if the Commission certifies that the test is essential for protecting human health and that alternatives or substitute procedures are being sought. The implementation of this section should result in the ultimate elimination of painful testing procedures, most within two years, all within four years. This provision may be considered technology forcing. Congress can not be certain that adequate substitutes exist for painful animal testing but this provision will spur the development of new tests. If substitutes can not be found then Congress always retains the option of amending the statute.

Section eight is meant to help clarify a confusing situation. It is unclear how much or what kind of testing or animal research is done to satisfy government requirements. Nor is it clear how much is in fact necessary to protect other public interests. Therefore, section eight directs the Commission to study this matter and report its findings to Congress.

E. *Sections 9-10: Powers of Enforcement*

Section nine provides the Commission with the authority to investigate and inspect facilities as may be required. This section presumes the continuing inspection service under the

Animal Welfare Act.⁷² It also allows the use of trained private citizens to do routine inspections in certain circumstances.

Section ten is a critical component for the successful working of this legislation. It provides for full citizen participation. Citizens or organizations may petition the Commission to address whether or not certain procedures, techniques or tests should be listed and therefore controlled. They also have the right to bring issues of enforcement before the Commission and to participate in the permit process. This is a critical backstop for the effective operation of the legislation. It helps overcome staff shortages or shortcomings by allowing outside experts to be part of the process. Also, it fosters a full and open debate of all the major issues.

F. *Section 11: Penalties*

The final section, eleven, deals with enforcement and penalties. There is a strong parallel between these provisions and those of the Animal Welfare Act. Both civil and criminal penalties are provided for. Both the criminal and more serious civil penalties (including forfeiture of the animals) will come into play if any violation of any provision of the law, regulations, or a permit results in pain or suffering to an animal.

VI. The Constitutionality of the Laboratory Animal Act

As previously discussed,⁷³ scientific research can be considered to enjoy constitutional protection. However, a key distinction must be established between regulating the topic of research and regulating the methods of research. This distinction is critical in determining that the proposed statute is constitutional. If the government passed a law banning research on high speed automobile accidents, it would not be upheld by the courts. Such a law would constitute an interference with a fundamental aspect of science, the right to choose the topic of

72. To fully implement an inspection program, more money needs to be authorized by Congress. There is presently insufficient manpower to do an appropriate job. See General Accounting Office Report, The Dep't of Agric. Animal Welfare Program, GAO/RCED 85-8 (May 16, 1985).

73. See *supra* text accompanying notes 34-43.

research. It would be an unauthorized prior restraint to the extent the law sought to restrain the development of ideas or the communication of ideas in this area.⁷⁴ However, if Congress passed a law prohibiting the use of live primates in automobile crash experiments, the courts would most likely uphold this law. Its goal would be to preclude harm to living animals, not to stop the gathering of knowledge through research. Science has the right to pursue any topic of its choice, but it may not use any method of its choice in pursuit of the topic. Automobile crashes may be researched. Techniques requiring the crushing of primates may be banned. To the extent that the inability to use primates makes it more difficult to obtain specific information, the law will be considered to create an incidental infringement on research. In certain circumstances this incidental infringement is lawful.

*United States v. O'Brien*⁷⁵ was the first Supreme Court case to clearly set out the requirements which must be satisfied before a court will uphold, as constitutional, a law which has the effect of being an indirect restraint on a constitutionally protected right or activity.⁷⁶ A government regulation or law which results in some restraint of a protected activity, like scientific research, is permissible if:

- 1) it is within the constitutional power of the government,
- 2) it furthers an important or substantial government interest,
- 3) the government interest is unrelated to the suppression of free expression (research),
- 4) the restriction is incidental,
- 5) it is no greater than is essential to the furtherance of

74. For discussion of the concept of prior restraint see generally *Whitney v. California*, 274 U.S. 357 (1927); *Schenck v. United States*, 249 U.S. 47 (1919).

75. 391 U.S. 367 (1968).

76. *Id.* at 377. In this case the Court affirmed a conviction for destroying a draft card. The Court held that Congress has a legitimate and substantial interest in preventing the destruction of draft cards to insure the availability of registrants for induction. *Id.* at 380. See also *Buckley v. Valeo*, 424 U.S. 1, 26-27, 47-48 (1976), where the impact of the Federal Election Campaign Act upon free political speech is discussed. The government interest asserted was that of a corruption-free election process and therefore any restraints (spending limits) were incidental and therefore lawful.

the government interest.⁷⁷

The first element of the *O'Brien* test requires that the law in question be an appropriate exercise of constitutional authority. As the discussion of section one of the Laboratory Animal Act pointed out, the act is grounded in the commerce clause, the budget power, and the treaty power.⁷⁸ It is unlikely that a challenge to the Laboratory Animal Act based on the first element of the *O'Brien* test could be successful. The Animal Welfare Act which deals with similar subject matter has been upheld as constitutional.⁷⁹

The second element requires that the government regulation further an "important or substantial government interest" before an indirect restraint on a scientific activity is justified. If a human animal is involved the necessary government interest is present. With non-human animals the answer is a little less certain.

By government regulation, human subjects of scientific experiments are protected.⁸⁰ Humans cannot be used in experiments without full disclosure of risk by the experimenter and informed consent of the subject. The protection of humans from unknown risks is clearly an important or substantial government interest. Does the protection of animals from unnecessary pain and suffering also rise to the level of an important or substantial governmental interest? In this author's estimation it should be so considered, but the ultimate test is how much weight the interest is given by the judge who might hear a case arising out of the LAA. At the moment it is questionable as to whether or not this interest would be judged to be important by those outside the animal rights, animal welfare movement. However, what is considered an important interest within our legal system evolves over time. Attitudes change as we focus on different problems and conflicts and as more information comes to our general attention.

77. For a full discussion of these elements see *Prometheus*, *supra* note 34, at 692-706.

78. See *supra* notes 63-65 and accompanying text.

79. *Haviland v. Butz*, 543 F.2d 169 (D.C. Cir. 1976).

80. 45 C.F.R. §§ 46.101-409 (1985).

Two examples of recently changing attitudes within the legal system include the importance of wetlands to the natural ecology and the legal status of tenants in landlord tenant disputes.⁸¹ Our society is in the midst of awakening to the issues surrounding animals. Ten years ago it would have been very difficult to argue that the protection of animals was an important government interest. Ten years from now it may be a relatively easy argument to make. A good test of when the shift occurs will be when the legislation itself finds sufficient political support to be adopted by Congress and signed by the President of the United States. Therefore, a final determination of this element of the *O'Brien* test will have to be put off until such time as the LAA is enacted and challenged in court, but the enactment itself will stand as compelling evidence that the protection of laboratory animals is an important governmental interest.

The third element of the *O'Brien* test requires that the governmental interest be unrelated to the protected activity. This element is clearly satisfied. The government interest is protection of animals. The protected activity is the develop-

81. Back in the 1950's and earlier, wetlands were usually referred to as marsh and swamp; areas without value. The first attempts to protect wetlands were struck down by the courts under the "takings" argument in part because the courts did not believe there was a societal interest in protecting them. As science provided more information about the value of the wetlands, the interest of society became heavier and more likely to uphold or justify the restrictions on private land owners. See *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 499 (1985); *Am. Dredging Co. v. State Dep't of Env'tl. Protection*, 161 N.J. Super. 504, 391 A.2d 1265 (1978); *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972); *Maine v. Johnson*, 265 A.2d 711 (1970); F.Bosselman, D. Gallies and J. Banta, *The Taking Issue* 155-63 (1973) (publication by Council on Environmental Quality).

For many years urban tenants could seldom force landlords to take care of the leased property. The common law concept of *caveat emptor* put many burdens on the tenant while requiring payment of rent to the landlord without exception. During the late 1960's and early 1970's there was a substantial shift by society and the judicial system as to the interest and rights of tenants. They changed from a second class citizen to legal equality with the landlord. Tenants now have an assortment of legal concepts to aid them in the struggle for decent housing. (i.e., the implied warranty of habitability). See, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, *cert. denied*. 400 U.S. 925 (1970); *Green v. Superior Court of San Francisco*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Schowhinski, *American Law of Landlord and Tenant* § 3.16 (1980).

ment and dissemination of knowledge. There is no support for an argument that the government's real purpose here is to interfere with science.⁸²

The fourth element is satisfied because, although the LAA is comprehensive within the area of prevention of pain and suffering in laboratory animals, when compared to the broader world of scientific research the resulting interference is merely incidental. The LAA does not seek to preclude a scientist from pursuing any topic of research they may desire. Instead, it limits the type of procedures and techniques which may be used by persons in the gathering of information. The number of absolute prohibitions is modest, for the most part the LAA would regulate the use of animals in research. Finally, there is no restraint on the communication of ideas or theories, that aspect of science of which the courts would expect to be most protective.

The final element of the test requires that the restrictions be no more burdensome than is necessary to accomplish the goals of the law. The LAA does not require federal permits for all scientific experiments, or even all experiments which use animals. The LAA is carefully limited to those aspects of research which may involve causing pain and suffering to animals. The permit procedures and requirements are carefully drawn to interfere with science no more than necessary. In this way, the fifth element of the *O'Brien* test is satisfied. The law is no more burdensome than is necessary to address the governmental interest.

Since all of the elements of the *O'Brien* test are satisfied or are expected to be satisfied, the proposed law is a lawful

82.

The requirement that the government's asserted interest must be unrelated to the suppression of free expression is really only another way of saying that the regulation must be facially neutral; that is, it must not state or imply an intent to suppress ideas or information. It has been argued by commentators that even a facially neutral regulation may be struck down if it was motivated by an intent to directly abridge speech. The right of free expression would be meaningless if the government could accomplish indirectly that which it could not accomplish directly. The Supreme Court, however, has shown an unwillingness to examine the motives of legislative bodies. *Prometheus*, *supra* note 34, at 694 (citations omitted).

and ethically mandated act of legislation.

VII. Conclusion

The LAA as set out in Appendix A represents the next logical step for a society with increasing concern over the use of animals in scientific experimentation. The present Animal Welfare Act seeks to protect animals from unnecessary pain and suffering. It is as protective as possible while still allowing the specific decisions to be private. The LAA would take the next step by making the use of animals in certain circumstances a public decision. Passage of the LAA will be significant proof of our society accepting the concept that animals have individual interests which we humans have an ethical duty to recognize through our legal system.

Appendix A: Laboratory Animal Act

§ 1. Statement of Policy

Congress acknowledges the important role that animals play in scientific research and testing. Most of these animals travel through interstate commerce. Much of the research is either done by federal agencies or private parties with federal monies. It also recognizes that animals have been subjected to significant pain and suffering as a result of human activities in the laboratory. It is, therefore, the policy of the United States that animals be subjected to pain and suffering for our collective benefit only when it has been established that no alternative exists and that the information gained is truly useful and necessary.

Additionally, it is acknowledged that primates, as our closest evolutionary kin in the animal world are deserving of special protection. Primates are unique in that they are one of the few laboratory animals for which wild specimens must still be obtained. Our obligations under international agreements are to protect endangered species. All primates are listed as either endangered (Appendix I) or threatened (Appendix II) under the international treaty. It is, therefore, the policy of the United States that primates should not be used in any research or testing except under the most extraordinary of circumstances.

§ 2. Definitions.

When used in this chapter:

(a) The term "animal" includes all mammals, birds, fish, amphibians, reptiles, and such other creatures as may be designated by the Commission.

(b) The term "Commission" refers to the Commission on Laboratory Animals.

(c) The term "pain" refers to those neuron signals transmitted from nociceptors found throughout the body to the brain (i.e. the thalamus and somatosensory cortex) at sufficient strength to be considered a negative stimulus and resulting in the animal seeking to withdraw from the source of pain.

It includes both sharp pain and chronic pain. It does not include such minimal or momentary pain as might arise from the giving of injections or taking of blood samples. It is presumed that surgery will produce pain and that animals recovering from surgery will experience pain. The euthanasia of an animal by a technique set out in a regulation of the Commission shall be presumed to not result in pain.

(d) The term "person" includes any individual, partnership, firm, company, corporation, association, organization, or other legal entity, whether foreign or domestic, including any department, agency, subdivision or instrumentality of the federal or a state government.

(e) The term "testing" refers to a repetitive procedure or technique which is used to identify the presence or absence of a substance or to determine a particular characteristic or effect or purity of a substance. For purposes of this chapter only those procedures or techniques which use live animals shall be considered tests.

(f) The term "suffering" refers to a general state of an animal where, because of environmental factors, including but not limited to pain, temperature, lack of proper food or water, withdrawal of appropriate sensory input, withdrawal from needed social contact, or inability to engage in normal posturing, the animal would be expected to experience stress, tension, anxiety, fear, frustration or exhaustion. The housing of animals in accordance with the Animal Welfare Act shall be presumed not to create a condition of suffering.

§ 3. Administrative Authority and Duty to Cooperate.

(a) There is hereby created the Commission on Laboratory Animals. The Commission shall consist of five members. The members shall be appointed by the President of the United States to serve staggered four year terms. The composition of the Commission shall reflect a diversity of views and interest and shall have representatives from an animal welfare organization and the general public. The Commission may employ a full time Administrator to carry on the day-to-day activities of the organization.

(b) The Commission is authorized to promulgate such rules, regulations and orders as it may deem necessary in order to accomplish the purpose of this Act.

(c) The Commission shall consult and cooperate with other federal departments, agencies, or instrumentalities concerned with the welfare of animals used in research, experimentation or testing when establishing standards under this title or otherwise carrying out the purpose of this chapter.

(d) All federal departments, agencies, or instrumentalities concerned with the welfare of animals used in research, experimentation or testing or having information concerning research, experimentation or testing by private persons shall provide information and data when so requested by the Commission.

§ 4. Permits for Certain Procedures and Techniques.

(a) Any person who uses animals obtained in interstate commerce, or federal money for animal research or experimentation, or the results of animal experimentation to satisfy any federal law or regulation and who uses any of the procedures or techniques listed in this section must first obtain a general experiment permit from the Commission before subjecting an animal to such procedure or technique. At an educational institution or research facility which receives federal money for animal research, the individual with primary responsibility for the specific research experiment in question shall obtain a permit.

(b) Experiments and research using the following procedures or techniques shall require a permit if an animal will be conscious at any time during or after the application of the technique.

- (1) Application of any chemical irritant, including acids, to any part of the animal.
- (2) The application of thermal burns.
- (3) The use of radiation.
- (4) The shooting of any animal with a projectile.
- (5) Any cutting of neuron connections within the brain.
- (6) Any tail pinching.

(7) Any implantation of medical devices.

(c) The Commission shall add, by regulation, to this list of research procedures and techniques when it finds that the application of the procedure or technique is likely to produce or result in pain. A technique may also be listed if the Commission finds that there is a risk that a particular technique may be misused resulting in pain to animals, or if the procedure or technique will result in suffering for an animal.

(d) A general experiment permit for a specific period of time shall be issued by the Commission only after making the following findings:

- (1) There is no alternative technique which will produce the same quantity and quality of information.
- (2) That specific knowledge is sought, not random information.
- (3) That the simplest appropriate biological system is being used.
- (4) That the smallest feasible number of animals is being used.
- (5) That the experimenter has the appropriate background, by education or experience, to work with the animal proposed.
- (6) That there are sufficient institutional resources available to support the research or experimentation as well as the care of the animals.
- (7) That the individual has not previously been found to have violated this chapter as provided for in § 11(b) or any portion of the Animal Welfare Act which deals with the care and housing of animals in the preceding five years. Additionally, a permit may be denied if the proposal is the repetition of a previous experiment or research which has already been shown to be reproducible by other persons. The Commission may by regulation establish categories of research for which it shall be presumed that further repetition is unjustified.

(e) The Commission may request such information from an applicant as is necessary to make the findings required under this section.

(f) If a particular procedure or technique using the appropriate type and amount of anesthetic, analgesic or tranquilizing drugs would not be painful to an animal, and if the research or experiment complies with the guidelines hereinafter established by the Commission for the use of such drugs, then a general experiment permit will not have to be obtained. For purposes of this chapter the Commission shall establish guidelines by regulatory process which set out the appropriate chemicals and their dosage level to be used for each species of animal by sex, age and weight, which may be used as an anesthetic, analgesic, or tranquilizer in research, experimentation, or testing.

(g) In granting a general experiment permit, the Commission may add such conditions as are necessary to assure that any animals are protected from unintended pain and suffering.

§ 5. Prohibited Procedures and Techniques.

(a) The use of the following procedures and techniques or ones hereafter added to the list by the Commission are unlawful and may not be used by any individual upon any animal:

(1) Permanent or temporary blindness by closure of the eye.

(2) Induction of shock trauma by a rolling drum.

(3) Artificial stimulation of aggression.

(4) Sleep deprivation.

(5) Use of hot plates which produce burns.

(6) Use of restraint chairs.

(7) Use of electric shock.

(8) Infliction of pain or distress to modify or control behavior unless the animal has the ability to exercise total aversion to the stimulus.

(b) The Commission shall add to this list those procedures and techniques which they find present a risk of significant pain and suffering in animals and are either not necessary because of the availability of alternate procedures and techniques or offer the prospect of only diminutive new knowledge.

§ 6. Primate Experiment Permits.

(a) It is unlawful for any person to use a primate in scientific research or experimentation without a primate permit from the Commission.

(b) An application for a primate permit shall contain whatever information the Commission determines is necessary to make a fully informed decision.

(c) A primate experiment permit shall not be granted until the applicant has shown the following:

- (1) That a primate is the only species suitable for the proposed research or experimentation.
- (2) That the proposed research or experiment will potentially provide essential information for human or primate health or will study primate communication skills without invasive procedures.
- (3) That the equivalent expenditure of money and effort, not involving animal research, could not be expected to produce equivalent information.
- (4) That the experimenter is fully qualified by training or experience to deal with the proposed primate.
- (5) That the institution where the research or experiment will occur has sufficient resources to assure the well being of all primates.

(d) The Commission shall not grant a primate experiment permit if it involves the following techniques or procedures:

- (1) Restraint chair.
- (2) Separation of infants from mothers.
- (3) Electric shock.
- (4) Any technique or procedure listed under section five (§ 5) of this Act or listed by the Administrator under subsection 5(b).
- (5) Any transfer of organs from primates to humans.
- (6) Any implant of medical devices, unless for the benefit of the primate.
- (7) The crushing of the skull or portions of the brain by application of force to the skull.
- (8) Any permanent destruction of any portion of the central nervous system.

(9) The amputation of any portion of the animal.

(e) The conditions of any proposed research or experiment including the housing of primates shall take into account their social nature.

(f) No primate experiment permit shall be for longer than a two year period.

(g) In the granting of a primate permit the Commission may add such conditions as are necessary for the protection of the interests of the primates.

§ 7. Testing with Animals.

(a) No live animal shall be used in scientifically conducted testing initiated two years after the effective date of this legislation except in accordance with the provisions of subsection (b).

(b) The Commission shall adopt and publish a list of tests and acceptable testing procedures 18 months from the effective date of this legislation. The list may be modified thereafter as is necessary to take into account new information.

(c) Before adding a testing procedure to the published list, the Commission must determine that:

(1) The procedure does not inflict pain upon the animal after the appropriate use of anesthetics, analgesics, or tranquilizing drugs.

(2) The purpose of the test is important to human or animal health.

(3) The procedure produces a consistent, useful result.

(4) The appropriate species and number of animals is used.

(d) Any animal testing which is painful to the subject animal must cease within two years after the effective date of this legislation, except that a test may be allowed for an additional two year period provided that the Commission shall certify that the test is essential for protecting human health, that no alternative presently exists, and that at least one project for seeking an alternative to the painful test is funded and underway.

(e) Notwithstanding any other portion of this section the

following tests shall be unlawful to perform:

(1) Draize eye irritancy test.

(2) The classical LD50 test (as opposed to the approximate lethal dose test).

(f) If a test does not qualify for listing but is apparently required by federal law, then the Commission shall notify Congress as per the provisions of § 8.

§ 8. Government Required Testing.

(a) The Commission shall report to Congress one year after the effective date of this Act setting forth all of the provisions of federal law which require animal research, experimentation or testing. The Commission shall also include recommendations as to whether or not the required use of animals is still necessary or may be modified, given the public policy of this chapter.

(b) The Commission shall be an advocate for non animal research or testing or minimal use of animals before any federal agency, department or instrumentality which has required or might in the future propose the requirement of animal research or testing by any regulation. The Commission shall review and comment upon any proposed federal regulation dealing with animal research and testing.

(c) The Commission shall seek to participate, whenever possible, in any international organization, or foreign government standard setting process or the development of guidelines which will require the use of animals in research and testing and will be binding on United States corporations and other persons engaged in the foreign sale of any product. If the Commission does so participate, it shall foster the policies of this Act.

§ 9. Inspections and Investigations.

(a) The Commission shall make such investigations or inspections as it deems necessary to determine whether or not any person has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Commission and its agents shall have

reasonable access to places where animal experimentation or testing is carried out or where the Commission reasonably believes animal experimentation or testing may be occurring. The Commission shall promulgate such rules and regulations as it deems necessary to permit inspectors to confiscate or destroy in a humane manner any animal found to be in pain or suffering as a result of a failure to comply with the provisions of this chapter or any regulation or any standard or any permit issued under this Act.

(b) Any person who forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person while engaged in or on account of the performance of his or her official duties under this chapter shall be fined not more than \$5,000, or imprisoned not more than one year, or both. Whoever, in the commission of such acts, uses a deadly or dangerous weapon shall be fined not more than \$10,000, or imprisoned not more than 10 years, or both. Whoever kills any person while engaged in or on account of the performance of his or her official duties under this chapter shall be punished as provided under sections 1111 and 1114 of Title 18.

(c) For the efficient administration and enforcement of this chapter, the Commission shall have the power to issue subpoenas for the attendance of persons or the production of documents.

(d) For purposes of gathering useful information the Commission may require those individuals using animals in research and testing to provide information through the use of one time surveys or through periodic reports not more often than annually.

(e) The Commission may establish regulations under which specific enforcement personnel of Humane Societies or Societies for the Protection of Animals can be authorized agents of the Commission for the purpose of regular inspections of facilities used by permit holders or other inspections as may be specifically requested by the Commission. No individual may become an authorized agent without proof of appropriate training and education.

§ 10. Citizen Participation.

(a) Any person, including any non-profit organization formed for the protection of animals, has the right to engage in the following activities:

- (1) Petition the Commission to consider the regulatory listing, delisting, or modification of a specific technique, procedure or test under § 4(c), § 5(b) or § 7(b).
- (2) Petition the Commission to investigate potential violations of this chapter or regulations, standards or permits issued thereunder.

Within 90 days from receipt of the petition the Commission shall give notice of its intent to proceed with the requested action or its intent not to proceed with the requested action in which case the reasons for the denial shall be clearly stated.

(b) Any person, including any non-profit organization formed for the protection of animals, has the right to submit comments and information upon any application for a permit or any proposed regulation under this chapter. Such comments and information shall be considered by the Commission prior to acting on the matter.

(c) Except for the granting of a general experimental permit, any person who has been a participant in any of the proceedings described in subsections (a) and (b) may appeal a final determination of the Commission to the appropriate District Court in accordance with the Administrative Procedure Act.

§ 11. Enforcement and Penalties.

(a) The United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the highest court of American Samoa, and the United States courts of the other territories, are vested with jurisdiction specifically to enforce, and to prevent and restrain violations of this chapter, and shall have jurisdiction in all other kinds of cases arising under this chapter, except as provided in sections 11(b) and 11(c) of this title.

(b) Any person who violates any provision of this chapter,

or any rule, regulation, standard, or permit promulgated or issued by the Commission shall be subject to civil fine assessed by the Commission of not more than \$5,000 for each such violation. Each day that a violation continues to exist shall be a separate offense. No penalty shall be assessed unless such a person is given notice and opportunity for a hearing with regard to such alleged violation. The order of the Commission assessing a penalty and making a finding shall be final and conclusive unless the affected person files an appeal from the Commission's order with the appropriate United States Court of Appeals. If the Commission makes a finding that a person knowingly violated any provision of this chapter, or any rule, regulation, standard or permit promulgated or issued by it and that such violation resulted in pain or suffering to an animal, the individual shall not qualify for any permit under this chapter for a period of five years, and may be required to forfeit ownership of the animal or animals in question. In setting the level of a fine the Commission shall take into account the gravity of the violation, in particular whether or not animals were subjected to pain and suffering, the person's good faith or lack thereof, and any history of previous violations. Upon any failure to pay the penalty assessed by a final order under this section, the Commission shall request the Attorney General to institute a civil action in a district court of the United States in which such person is found, resides or transacts business, to collect the penalty.

(c) Any person aggrieved by a final order of the Commission issued pursuant to this section may, within 60 days after entry of such order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of Title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Commission's order.

(d) Any person who knowingly violates any provision of this chapter or any rule, regulation, standard or permit promulgated or issued by the Commission which results in pain and suffering to an animal shall, on conviction thereof, be subject to imprisonment for not more than two years or a

fine of not more than \$10,000, or both. With the consent of the Attorney General, any action under this subsection may be conducted, both at trial and upon appeal by attorneys of the Commission on Laboratory Animals.