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SOME THOUGHTS ON ANIMAL EXPERIMENTATION

By
DAVID FAVRE*

Animal experimentation is an extraordinarily complex topic. In this limited space, I simply want to provide some frames of reference and explain some of the issues that need to be addressed.

A little bit of my background might help you have some perspective on where I am coming from. My undergraduate degree is in chemistry. Before I got into the animal rights movement, I wrote a law review article on the need for First Amendment protection for scientific inquiry. In this co-authored article, I explained how important science is, and how important it is that scientists have the right to engage in scientific inquiry for our culture and for our society.¹

However, I also believe that animals definitely have interests that deserve our respect and protection. That leaves me with a dilemma, and I think anybody who looks into this issue very long ends up with quandaries as well.

Over a decade ago, I started doing some work on proposals for regulations under the Animal Welfare Act, the federal law.² I worked with Jolene Marion from New York, who was employed at the time by the United Action for Animals. We produced an inch-thick report giving examples of publicly-funded projects that involved inhumane experiments, including experiments in which the animals had not been anesthetized properly or were not properly taken care of afterwards. It was quite a list. We had deceleration experiments, microwave experimentation, experiments where the animal subjects were caused to suffer heat stroke, rapid decompression, toxicity, burns, poisonings, radiations, wounding, tumors, sleep deprivation, electric shock avoidance and punishment, electric shock preference, and so on.³ We basically compiled a sickening list of things that humans were willing to do to animals in the name of science. Of course, I did not find most of that to be particularly impressive as science. Just because one human being decides to do something to another

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¹ David Favre & Matthew McKinnon, *The New Prometheus: Will Scientific Inquiry Be Bound By The Chains Of Government Regulation?* 19 Duq. L. Rev. 651 (1981).

² Animal Welfare Act, 7 U.S.C. § 2131 (1994).

³ David Favre, Submission on Pain and Anesthesia with Reference to the Improved Standards for Laboratory Animals Act of 1985 (1986) (submitted to the U.S. Dep't. of Agric., on file with author).

animal to see what can happen does not make it science by any stretch of the imagination.

At the time, we were part of a group trying to get Congress to make some changes. In 1985, Congress added several amendments to the Animal Welfare Act.⁴ We have been dealing with that Act and its consequences since 1985. The Animal Legal Defense Fund had to file a series of suits seeking merely to get the regulations promulgated. The industry and the federal government just refused to implement the new law; so we had to file a suit to get a judge to order the government to write the regulations.⁵ Then, Congress proposed regulations, the first version of which was almost reasonable.⁶ That was a bit scary because they looked like I could live with them. It turns out there was a reason to be scared because the government fired most of the people that wrote these regulations, re-wrote new regulations, and produced what we have today.⁷ These regulations are not widely enforced today, but by their nature they are very difficult to enforce because the core of the regulations is a delegation of duty from the federal government to the institutions that are being regulated. These institutions are allowed to develop their own rules, a topic to which I will return.

However, I now want to draw attention to three areas of law that effect animal welfare. First is property law. Animals are owned by humans or by institutions. What they do with them is governed by the laws of property, laws of bailment, laws of sale, and other laws. So who owns a chimpanzee in a lab, for example, is an issue of property law. You have to look at leases and contracts and where the animal is to ascertain how much control you have over that animal.

The second area of law that comes to play here is anticruelty laws.⁸ As a society, we have decided that we are going to impose certain constraints on the use of living property. If I destroyed a chair—my own chair—nobody would say anything. I could burn it, stomp on it, and do anything I want to it. If it were my cat, however, could I burn it, stomp on it, do anything I want to it? Well, I could if I were a scientist, because scientists are exempted by most of the cruelty laws. They are either specifically exempted in the statutes or by customs provisions.⁹ I am aware of only one scientist convicted for violating cruelty laws, and that conviction was reversed on appeal.¹⁰ This was one scientist convicted of cruel use of animals in Maryland, but very shortly thereafter, the Maryland law was changed so that it would not happen again.¹¹

⁴ Amendments to Animal Welfare Act, Pub. L. No. 99-198, tit. XVII, §§ 1751-1759, 99 Stat. 1645, 1645-50 (codified as amended at 7 U.S.C. §§ 2132, 2143-2146, 2149, 2157 (1994)).

⁵ Animal Legal Defense Fund v. Yeutter, 760 F. Supp. 923 (D.D.C. 1991).

⁶ 54 Fed. Reg. 10,822 (1991) (proposed Mar. 15, 1989).

⁷ 9 C.F.R. § 3 (1995).

⁸ *E.g.*, IOWA CODE § 717.2 (1995); INDIANA CODE § 35-46-3 (1995).

⁹ *E.g.*, IDAHO CODE § 18-2113 (1995); VA. CODE ANN. § 29-213.91 (Michie 1995).

¹⁰ Taub v. State, 463 A.2d 819 (Md. 1983).

¹¹ See generally Larry Falkin, Note, *Taub v. State: Are State Anti-Cruelty Statutes Sleeping Giants?* 2 PACE ENVTL. L. REV. 255, 268 (1984).

Animal cruelty law is a fascinating topic.¹² The basis for today's anti-cruelty laws began in the 1860s through the hard work of Mr. Henry Burg in New York. Over one hundred years later, we basically have the same law today. Our present conception of the human relationship to animals is essentially the same as that which existed during the Civil War period. I think it is about time for a little bit of evolution. The law about women has evolved, the law about children has evolved. Think of all the different laws that have changed with more ethical evolvement of attitudes in the last century and a half in the United States. However, animals seem to be stuck somewhere in the distant past.

The third area of law relates to scientific inquiry, and the right to engage in scientific inquiry. No right is without its limits, and clearly under the Constitution, the state always has the right to control the time, place and manner of scientific research. Also, just as clearly, when the intent of any scientific inquiry is to serve a bona fide public interest, that is a sufficient justification for state regulation. Looking out for the welfare of animals is certainly a justification for the regulation of science. Therefore, we have the Animal Welfare Act, which affects what happens in some of the labs in the United States.

Overlaying all of the legal issues is a moral issue: under what, if any, circumstances should a human be able to place another animal in a position inflicting pain, causing psychological stress, or shortening its natural life? The answers to that question have four basic elements. The first element pertains to the source of the animals used for experiments. Does it make any ethical or moral difference from where the animals come? We do not use pets for research. What about using dogs about to be put to death in a shelter for research? What about using wild chimpanzees for research? What about using rats that have not seen the light of day or been outside a lab for fifteen or twenty generations?

The second element concerns the animal's welfare while waiting before experimentation. This is the area where the Animal Welfare Act asserts itself. We have decided as a society that, if a scientist is going to experiment on an animal, the scientist at least owes that animal proper housing, care, veterinary care, food, and water. We have inspectors who go around to make sure that in fact the proper care occurs. To a degree, the way that the inspection process works is open to a fair amount of dispute. The difficulty here is that the vast majority of animals used in research are not now covered by the Animal Welfare Act. Birds, rats, mice and farm animals are excluded by regulation from the scope of the law.¹³

The third element involves the animal's welfare during experiments. The Animal Welfare Act goes out of its way to make clear that the Act does not seek to impose its judgment as to the condition of the experi-

¹² See, e.g., David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1993 *Der. C.L. Rev.* 1 (1993).

¹³ 9 C.F.R. § 1.1(n) (1985); *ALDF v. Madigan*, 781 F. Supp. 797 (D.D.C. 1992).

ment itself, or even whether there ought to be an experiment.¹⁴ That key point of science is left to the scientist. It is an unregulated issue. Nevertheless, I still consider it a public policy issue. In fact, I have proposed a regulatory scheme that would regulate the nature of the experiment itself, precluding certain kinds of experiments on their face and not allowing certain other types of experiments except under extraordinary conditions.¹⁵

The fourth element concerns what happens to an animal post-experiment. The method of death is something that ought to be considered when discussing animals in experiments. The Animal Welfare Act seeks to assert itself somewhat in this area by prescribing when painkillers should be used and when euthanasia should be used.¹⁶

When considering the moral question of whether a human may inflict pain or shorten an animal's life, it is equally important to ask, "who answers that question?" Who answers will determine quite often what the answer is going to be. If you ask the experimenter to make that judgment, his answer is going to be different than mine. This should suggest that one thing we must be aware of is the issue of community. Who is the decision-making community regarding animal experimentation? Often in the United States and the rest of the world, the only decision maker concerning the ethics of animal experiments is the person engaging in those experiments. If we put decision-making authority in the lab, and exempt scientists from the cruelty laws, they can do all sorts of things. We should realize that science is an enterprise—a huge multibillion dollar industry—and production of information is what secures grants and enables a scientist to keep his job. So there is a built-in financial incentive to conduct animal experiments.

The decision-making community is an immediate curb to the scientist's authority. If we are dealing with a chimpanzee, for example, is this experiment acceptable within the community of primatologists? What would other primatologists say about that? There is, at least for federal grants, some concept of peer review. However, I have not always been very impressed with that level of peer review because there is a considerable potential conflict of interest.

A broader concept of community has been encouraged by the 1985 Act because it requires each experimenting institution to convene a review committee which should include other academic disciplines and members of the public.¹⁷ You might have an English professor on it, for example, and he would have a much different perspective than a scientist. In some institutions, this has had profound impacts on animal testing. In other institutions, this requirement has been ignored. Unfortunately, the federal

¹⁴ 7 U.S.C. § 2143(a)(6)(A)(i) (1994) states: "Nothing in this chapter . . . shall be construed as authorizing the Secretary to promulgate rules, regulations, or orders with regard to the design, outlines, or guidelines of actual research or experimentation."

¹⁵ David Favre, *Laboratory Animal Act: A Legislative Proposal*, 3 PACE ENVTL. L. REV. 123 (1986).

¹⁶ 7 U.S.C. § 2143(a)(3)(A), (C).

¹⁷ *Id.* § 2143(b).

government has no way of evaluating the effectiveness of the review committees and makes no attempt to intervene in the process.

The largest community would be a decision by the public at large, not by the scientists themselves. Today, we have already begun moving to this broader area. The result is a reduction in stupid experiments, a reduction in the number of animals used, and a reduction in the kinds of pain and suffering to which they are subjected. However, there is still lot of science that is dependent on animal testing.

Do we need more law? If we just get the definition of what is an "animal" right, we could make a big step forward. Are we going to get more law? I think not. The national interests now seem to be moving in another direction. Do we need more enforcement? Absolutely, but the federal government does not do a particularly good job of enforcement, and outside organizations, like the Animal Legal Defense Fund, have found it extraordinarily difficult to bring public enforcement issues against either the federal government or the institutions themselves. Research is big money—a major industry. I do not think it is capable of internal self-reform. Some progress is possible, but not radical reform. Organizations like the Animal Legal Defense Fund have been knocking on the door, and I think we have the attention of the federal government and the testing institutions. They now know who we are, but we have not been able to knock the door down and get inside. My hope is that people will come forward with some new strategies, new ideas, and new approaches so that the legal system can protect the interests of animals.

