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# They Asked For Protection and They Got Policy: International Primate's Multilated Monkeys

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## THEY ASKED FOR PROTECTION AND THEY GOT POLICY: *INTERNATIONAL PRIMATE'S MUTILATED MONKEYS*

The United States Supreme Court recently refused to review the decision of the Fourth Circuit Court of Appeals in *International Primate Protection League v. Institute for Behavioral Research, Inc.*<sup>1</sup> The court of appeals had affirmed a lower court ruling that several animal rights groups lacked standing to protect fifteen macaque monkeys from inhumane treatment in a research laboratory, and could not get custody of the monkeys.<sup>2</sup>

*International Primate* is significant for several reasons. It is an excellent example of the difficulties animal rights advocates typically encounter in litigation. By refusing to review the case, the Supreme Court allowed a very questionable interpretation of a key Supreme Court case, *Sierra Club v. Morton*,<sup>3</sup> to go uncorrected. Also, the true purpose of the Animal Welfare Act<sup>4</sup> in regulating scientific experiments on animals remains ambiguous. Finally, the surviving monkeys continue to suffer, and their fate is still being debated.<sup>5</sup>

In the next sections, this note will discuss animal rights litigation in general, examine the facts and background of *International Primate*, analyze the decision, suggest an alternate means of review for the plaintiffs, and discuss the present situation and ramifications of the case.

### ANIMAL RIGHTS CONCERNS AND LITIGATION

In recent years, the legal community has expressed a growing concern for animals, particularly those used in scientific research. Various commentators have proposed ways to give laboratory animals more protection. The proposals include a model for state legislation regulating the use of animals in research aimed at correcting inadequacies in state anti-cruelty statutes<sup>6</sup>; stronger federal

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<sup>1</sup>799 F.2d 934 (4th Cir. 1986), *reh'g denied* Oct. 7, 1986, *cert. denied*, 107 S. Ct. 1624 (1987).

<sup>2</sup>*Id.* at 935. When the suit began, seventeen monkeys were involved. By the time the decision was rendered, two had died. *Id.* at 936, n.3.

<sup>3</sup>405 U.S. 727 (1972). In this case, the Sierra Club, a conservationist organization interested in the preservation of national parks and forests, sought declaratory and injunctive relief against federal officials. The Sierra Club wanted to prevent commercial development of the Mineral King Valley, a quasi-wilderness area in California. The District Court granted a preliminary injunction, but the Court of Appeals reversed, holding that the club lacked standing. The Supreme Court affirmed, holding that judicial review under the Administrative Procedure Act requires that the plaintiff show individualized injury, economic or otherwise. *Id.* at 734-35.

<sup>4</sup>7 U.S.C. Sections 2131-2156 (1985). For a discussion of the history of the Act and how its provisions have been implemented, see generally Note, *The Animal Welfare Act: Still a Cruelty to Animals*, 7 B.C. ENVTL. AFF. L. REV. 129 (1978).

<sup>5</sup>See Reinhold, *Fate of Monkeys, Deformed for Science, Causes Human Hurt After 6 Years*, N.Y. TIMES, May 23, 1987, at 8, col. 1. Also, some of the animal rights advocates involved in *International Primate* intend to appeal the decision in a related case, in their effort to get custody of the monkeys. Telephone interview with Edward L. Genn, attorney for the appellants (Aug. 2, 1987).

<sup>6</sup>Burr, *Toward Legal Rights for Animals*, 4 ENVTL. AFF. 205, 231-44 (1975).

legislation regulating the use of laboratory animals<sup>7</sup>; using public nuisance laws to give animal rights groups a cause of action against unjustifiable research<sup>8</sup>; establishing new legal standards which reflect real concern for animals and provide more realistic remedies<sup>9</sup>; and expanding the concept of legal rights to recognize that natural objects have inalienable rights like humans.<sup>10</sup>

This concern for animals is also evident in litigation. Generally, at least one of three legal obstacles stands between animal rights advocates and the relief they request: standing, statutory interpretation and public policy. A survey of some animal rights cases will illustrate how these obstacles operate.

Two cases involve standing problems. In *Animal Lovers Volunteer Ass'n, Inc. (ALVA) v. Weinberger*,<sup>11</sup> an animal rights organization attempted to enjoin the Navy from shooting feral goats on Navy property. The organization claimed that the Navy's shooting violated the National Environmental Protection Act (NEPA).<sup>12</sup> The court stated that ALVA needed to demonstrate two things to obtain standing: "injury-in-fact" and an "injury arguably within the zone of interests to be protected" by the NEPA.<sup>13</sup> The court held that ALVA did not have standing because it had not existed long enough before the lawsuit was brought, suggesting that ALVA had been formed solely to pursue that particular suit.<sup>14</sup> According to the court, this meant that ALVA did not have an organizational or personal stake in the outcome of the litigation and thus failed the injury-in-fact requirement.<sup>15</sup> The court did note that another organization, Fund for Animals, had been given standing to sue in two previous lawsuits, indicating that a right of action did exist in the NEPA.<sup>16</sup> But the court suggested that ALVA would have failed the zone of interests test because its injury was only psychological and abstract.<sup>17</sup>

In *Walz v. Baum*,<sup>18</sup> the plaintiff sought an injunction to prevent New York State officials from using allegedly cruel methods to slaughter animals. The plaintiff claimed that the officials had violated the cruelty to animals sec-

<sup>7</sup>Note, *Use of Animals in Medical Research: The Need for Governmental Regulation*, 24 WAYNE L. REV. 1733, 1749-51 (1978).

<sup>8</sup>Comment, *Creating a Private Cause of Action Against Abusive Animal Research*, 134 U. PA. L. REV. 399, 420 (1986).

<sup>9</sup>Note, *Legal Definitions of Cruelty and Animal Rights*, 7 B.C. ENVTL. AFF. L. REV. 147, 151 (1978).

<sup>10</sup>Stone, *Should Trees Have Standing? — Toward Legal Rights For Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

<sup>11</sup>765 F.2d 937 (9th Cir. 1985)

<sup>12</sup>*Id.* at 938.

<sup>13</sup>*Id.* (citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972)).

<sup>14</sup>*Id.* at 939.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>*Id.* at 938-39.

tion of the state Agriculture and Markets Law.<sup>19</sup> The court held that the plaintiff lacked standing as a citizen and taxpayer because the plaintiff had no personal or property rights at stake.<sup>20</sup> The courts also indicated that there was no statutory right to relief available to the plaintiff.<sup>21</sup>

*American Horse Protection Ass'n, Inc. v. Frizzell*<sup>22</sup> is an example of the second obstacle animals rights advocates encounter — statutory interpretation. The American Horse Protection Association sought declaratory and injunctive relief against federal and state defendants, claiming that a roundup of wild horses violated the Wild Free-Roaming Horses and/or Burros Act (Wild Horses Act) and the National Environmental Protection Act (NEPA).<sup>23</sup> The court found that the plaintiffs had standing to sue by showing an injury-in-fact and that the injury was to an interest arguably within the zone of interests to be protected.<sup>24</sup> But the court denied relief, holding that the roundup did not violate either Act.<sup>25</sup> The court found that the Bureau of Land Management (BLM) was authorized to conduct the roundup under the Wild Horses Act and the BLM's actions were neither arbitrary nor capricious.<sup>26</sup> In making this finding, the court noted that the Wild Horses Act gave the Secretary of the Interior much discretion.<sup>27</sup> The court also found that the defendants did not violate the NEPA and were not, therefore, required to file an environmental impact statement, because the roundup would not significantly affect the environment.<sup>28</sup> The court indicated that "[t]his may have been a different case had plaintiff been able to satisfy the Court that the proposed round up [sic] would extinguish the wild horse population in Stone Cabin Valley."<sup>29</sup>

Policy considerations are demonstrated by the decisions in *Jones v. Beame*<sup>30</sup> and *New Jersey Society for Prevention of Cruelty to Animals v. Board of Education*.<sup>31</sup> In *Jones v. Jones*, the plaintiffs sought declaratory and injunctive relief against New York City officials providing inadequate care to zoo animals.<sup>32</sup> The court affirmed the lower court order to dismiss, holding that the judiciary should not interfere with municipal budget allocations, especially

<sup>19</sup>*Id.* at 160.

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

<sup>22</sup>403 F. Supp. 1206 (D. Nev. 1975).

<sup>23</sup>*Id.* at 1208, 1212.

<sup>24</sup>*Id.* at 1214.

<sup>25</sup>*Id.* at 1215, 1218-19.

<sup>26</sup>*Id.* at 1217-18.

<sup>27</sup>*Id.* at 1217.

<sup>28</sup>*Id.* at 1219.

<sup>29</sup>*Id.*

<sup>30</sup>45 N.Y.2d 402, 380 N.E.2d 277, 408 N.Y.S.2d 449 (1978).

<sup>31</sup>91 N.J. Super. 81, 219 A.2d 200 (Essex County Ct. 1966), *aff'd per curiam*, 49 J.J. 15, A.2d 506.

<sup>32</sup>45 N.Y.2d at 407, 380 N.E.2d at 279, 408 N.Y.S.2d at 451.

during a fiscal crisis.<sup>33</sup> In *New Jersey Society*, the court held that a high school student's experiments inducing cancer in live chickens did not violate the state anti-cruelty statute because the motives were "purely scientific and educational."<sup>34</sup>

Two cases in which animal rights advocates succeeded contain notably progressive opinions. In *Humane Society of Rochester and Monroe County, Inc. v. Lyng*,<sup>35</sup> the plaintiff organization obtained standing because the "Humane Society is specifically authorized under New York State law to prosecute violations of animal cruelty laws."<sup>36</sup> The plaintiffs also proved that facial branding of dairy cows by the hot-iron method, as recommended by government agencies, violated the anti-cruelty laws.<sup>37</sup> The court additionally commented:

It is evident to me, as it should have been to the Department of Agriculture, that the type of branding espoused . . . constitutes cruelty to animals. If the [defendants] had been as concerned with cruelty to animals as they now claim to be, [the method] would never have been adopted.<sup>38</sup>

In *Animal Welfare Inst. v. Kreps*,<sup>39</sup> the plaintiffs also obtained standing,<sup>40</sup> and convinced the court that a federal waiver permitting importation of baby fur seal skins violated the Marine Mammal Protection Act.<sup>41</sup> The court was willing to adjudicate the case even if plaintiffs had not satisfied standing requirements. In dictum, the court stated:

Where an act is expressly motivated by considerations of humaneness toward animals, who are uniquely incapable of defending their own interests in court, it strikes us as eminently logical to allow groups specifically concerned with animal welfare to invoke the aid of the courts in enforcing the statute.<sup>42</sup>

As will be seen, the three obstacles discussed in this brief overview all had a bearing on the decision in *International Primate*.

### THE FACTS AND BACKGROUND

Dr. Edward Taub was the director of the Behavioral Biology Center of the Institute for Behavioral Research (IBR), a private research facility in

<sup>33</sup>*Id.*

<sup>34</sup>91 N.J. Super at 94, 219 A.2d at 208.

<sup>35</sup>633 F. Supp. 480 (W.D.N.Y. 1986).

<sup>36</sup>*Id.* at 485.

<sup>37</sup>*Id.* at 487.

<sup>38</sup>*Id.*

<sup>39</sup>561 F.2d 1002 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

<sup>40</sup>*Id.* at 1006.

<sup>41</sup>*Id.* at 1014.

<sup>42</sup>*Id.* at 1007.

Maryland.<sup>43</sup> Taub was studying the capacity of monkeys to learn to use their limbs after the sensory nerves to their arms and shoulders had been severed at the spinal cord.<sup>44</sup> These experiments were supposed to benefit humans suffering from neurological injuries.<sup>45</sup> Taub's project was funded by the National Institute of Health (NIH), a federal agency.<sup>46</sup>

In May, 1981, Taub hired Alex Pacheco as a volunteer lab assistant to help with the experiments. At that time, Pacheco was an undergraduate student at George Washington University.<sup>47</sup> According to the opinion in *International Primate*, these experiments "amplified" Taub's earlier research.<sup>48</sup> The appellants supplied evidence that these experiments not only "amplified" previous research, but that they were also needlessly repetitive and that the NIH even questioned their value.<sup>49</sup> The appellants also claimed that these experiments were pointless and extremely cruel.<sup>50</sup> In the course of his work, Pacheco discovered that the monkeys were receiving inadequate care.<sup>51</sup> He asked "other researchers" to visit the laboratory to confirm his findings.<sup>52</sup> Actually, these "other researchers" included experts on primates and other respected scientists.<sup>53</sup> After collecting affidavits and photographs, Pacheco

<sup>43</sup>*International Primate*, 799 F.2d at 936.

<sup>44</sup>*Id.* at 936. See also Reinhold, *supra* note 5, at 8, col. 5.

<sup>45</sup>799 F.2d at 936.

<sup>46</sup>*Id.*

<sup>47</sup>*Id.* Pacheco had been involved with animal rights since 1978, and co-founded People for the Ethical Treatment of Animals (PETA), one of the appellants, in 1980. See Pacheco and Francione, *The Silver Springs Monkeys*, in IN DEFENCE OF ANIMALS 135 (P. Singer ed. 1985).

<sup>48</sup>799 F.2d at 936.

<sup>49</sup>Brief for Appellant at 19-20.

<sup>50</sup>*Id.* at 2, 6. See also Pacheco and Francione, *supra* note 47, at 136-39. Here Pacheco describes the experiments and the injuries the monkeys suffered. "Twelve . . . had disabled limbs as a result of surgical interference (deafferentation) when they were juveniles. . . . According to a later count, thirty-nine of the fingers on the monkey's deafferented hands were severely deformed or missing, having been either torn or bitten off. . . . The monkeys also suffered from . . . wounds that were self-inflicted or inflicted by monkeys grabbing at them from adjoining cages. I saw discoloured, exposed muscle tissue on their arms. Two monkeys had bones protruding through their flesh. Several had bitten off their own fingers and had festering stubs." Pacheco also describes one of the experiments, an "acute noxious stimuli test," in which a monkey is strapped by the waist, ankles, wrists and neck into a homemade immobilizing chair. The acute noxious stimuli were then applied with a pair of surgical pliers while observers watched which parts of the monkey felt pain. One of the monkeys "had been in such bad shape that he had begun to mutilate his own chest cavity, and [a lab assistant] . . . confided that putting him in a restraining device, and administering the noxious stimuli test, with his chest ripped open, and having to experience the stench of his rotting body, was the most disgusting thing she had ever done. After the acute pain test, she said, he was destroyed."

<sup>51</sup>*Id.* at 136-41. In addition to the tiny, filthy cages, Pacheco noted that no one properly bandaged the monkeys limbs, that the monkeys went for many days without being fed, that no one cleaned the cages and lab rooms regularly, and that Taub never used a veterinarian. See also Comment, *supra* note 8, at 406: "In one of his grant applications, Taub proposed to spend fifty-five cents per day on maintenance for each monkey, whereas the national average for care for normal monkeys was \$2.50 to \$4.00 per day. When the police went into his laboratory, they discovered monkeys with open wounds from self-amputation and a disturbing lack of hygiene, including cages 'caked with feces.' Further investigation uncovered substantial evidence of a lack of veterinary care for Taub's monkeys." (footnotes omitted).

<sup>52</sup>799 F.2d at 936.

<sup>53</sup>Brief for Appellant at 23, 24. See also Pacheco and Francione, *supra* note 47, at 141. These experts included Dr. Geza Teleki, a noted primatologist; Dr. Michael Fox, a veterinarian and ethologist; Dr. Ronnie

asked the Montgomery County Police Department to investigate IBR for violations of the Maryland animal cruelty statutes. The police seized the seventeen monkeys and the state charged Taub with seventeen criminal violations of the statutes.<sup>54</sup> The appellants took temporary custody of the monkeys.<sup>55</sup> Later, the Circuit Court for Montgomery County ordered the transfer of the monkeys to an NIH facility in Maryland. This order was to remain in effect "until further order of this Court or the termination of the pending criminal prosecution against Dr. Taub, whichever occurs first."<sup>56</sup>

Taub was convicted on six of the seventeen counts.<sup>57</sup> Concerned that the custody order would partially expire and Taub regain custody with the acquittal of eleven counts, the animal rights groups filed suit in the circuit court naming IBR and NIH as defendants.<sup>58</sup> They claimed that IBR violations of the Maryland animal cruelty statutes extended beyond those established by the criminal trial. They also alleged violations of the federal Animal Welfare Act. They asked the court for custody of the monkeys, and for an injunction preventing the defendants from keeping the monkeys.<sup>59</sup>

After an appeal and new trial, Taub's convictions were reduced to one count of cruelty to animals.<sup>60</sup> The Maryland Court of Appeals reversed the conviction, holding that the statute did not apply to federally-funded research.<sup>61</sup>

In December, 1981, the suit against IBR and NIH was removed to the United States District Court for the District of Maryland.<sup>62</sup> In January, 1985, the court adopted a federal magistrate's recommendation to dismiss for lack of

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Hawkins, a physician and primate authority; Dr. John McArdle, a primate anatomist; and Donald Barnes, a psychologist with primate experience.

<sup>54</sup>799 F.2d at 936.

<sup>55</sup>Brief for Appellant at 26-27. In discussing the events leading to the civil lawsuit, the court does not recognize that appellants had, or even claimed to have, custody of the monkeys after they were seized from IBR. However, the opinion notes that the date of seizure was September 11 and that on October 9, the circuit court ordered the monkeys to be transferred to an NIH facility. 799 F.2d at 936. The court does not say where the monkeys were between seizure and transfer. They had to have been somewhere. For the purposes of this Note, the appellants' claim of temporary custody and care during this period will be presumed truthful. See *id.* at 938, discussing the appellants' "maintenance payments," "transfer receipt," and "voluntary offer to help." These items suggest that the court implicitly acknowledged the appellants' custody of the monkeys. See also Pacheco and Francione, *supra* note 47, at 141-43, where the events of this period are chronicled more fully. According to this version, the monkeys first stayed at an activist's home; then were taken to an unnamed location (still in the apparent control of the animal rights group) because it was feared that the monkeys would be returned to IBR; and eventually were returned to IBR, until the court order to transfer them to the NIH facility.

<sup>56</sup>799 F.2d at 936.

<sup>57</sup>*Id.* (referring to *State of Maryland v. Edward Taub*, Criminal Number, 11848-81).

<sup>58</sup>*Id.* at 936.

<sup>59</sup>*Id.* at 936-37.

<sup>60</sup>*Id.* at 937.

<sup>61</sup>*Id.* (citing *Taub v. State*, 296 Md. 439, 463 A.2d 819 (1983)). *But see* Comment, *supra* note 8, at 410. "Less than a year later the state legislature amended the law to make it clear that the prohibitions did extend to all experiments involving animals." (citing MD. ANN. CODE art. 27, Section 59 (Supp. 1985)).

standing.<sup>63</sup> The plaintiffs appealed to the Fourth Circuit Court of Appeals.<sup>64</sup>

### THE DECISION

The court of appeals held that the appellants failed the injury-in-fact requirement for standing and that the Animal Welfare Act did not provide a private right of action to the appellants.<sup>65</sup> The appellants claimed they had suffered two kinds of injuries, economic and personal.<sup>66</sup>

As for their economic injuries, the appellants claimed their tax payments entitled them to ensure enforcement of the Animal Welfare Act.<sup>67</sup> The court responded that *United States v. Richardson*<sup>68</sup> denied taxpayer authority to purchase regulatory enforcement.<sup>69</sup> The appellants also claimed that their care of the monkeys during temporary custody was an economic injury.<sup>70</sup> The court regarded this claim as merely a voluntary offer to help, precluding any ownership of interest in the monkeys.<sup>71</sup> The court reasoned that, "like attorney's fees or other litigation costs, the maintenance payments were part of the response to the contested conduct, not part of the conduct itself, and therefore do not establish a 'personal stake in the outcome of the controversy.'"<sup>72</sup>

As for their personal injuries, the appellants claimed to be:

individuals and members having a personal interest in the preservation and encouragement of civilized and humane treatment of animals, whose own aesthetic, conservational, and environmental interests are specifically and particularly offended and affected by the matters hereinafter described, and which interests, along with their educational interests, will be detrimentally impacted upon if the relief sought is not granted.<sup>73</sup>

The court rejected this statement of interest because it resembled "the pleading that the Supreme Court found to be inadequate in *Sierra Club v. Morton* . . . [where the] Court held that 'a mere interest in a problem; [sic] no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself' to create standing."<sup>74</sup>

<sup>63</sup>*Id.*

<sup>64</sup>*Id.*

<sup>65</sup>*Id.* at 935, 938.

<sup>66</sup>*Id.* at 937. Although the court refers to the appellants' injuries as financial and non-financial, this Note will use the more commonly used terms, economic and personal, to facilitate analogies to other cases.

<sup>67</sup>*Id.*

<sup>68</sup>418 U.S. 166 (1974).

<sup>69</sup>799 F.2d at 937-38.

<sup>70</sup>*Id.* at 938.

<sup>71</sup>*Id.*

<sup>72</sup>*Id.* (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

<sup>73</sup>*Id.* at 938.

<sup>74</sup>*Id.* (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)).

The second kind of personal injury the appellants claimed was the disruption of their relationships with the monkeys.<sup>75</sup> The court rejected this as an ineffective analogy to parties injured by disturbances to national parks because they use those areas.<sup>76</sup> The court found that the plaintiffs in *International Primate* “have been with the monkeys primarily because of this litigation . . . [and] could not see the monkeys in the IBR laboratory if the defendants satisfied all the requirements of care.”<sup>77</sup> The court also compared this claim to the claim in *ALVA v. Weinberger*,<sup>78</sup> challenging the Navy’s shooting of goats. According to the *International Primate* court, the *ALVA* court “found that the plaintiff had suffered no injury because its members could not be with the goats and therefore could not claim the direct personal involvement necessary for standing.”<sup>79</sup>

The court gave a number of reasons for deciding that the Animal Welfare Act did not provide a private right of action. First, it was the intent of Congress to keep the administrative supervision subordinate to “the continued independence of research scientists.”<sup>80</sup> Second, the only remedial scheme the Act provided for was judicial review for an aggrieved research facility.<sup>81</sup> Third, the judiciary is not equipped to deal with “problems and requirements of biomedical research,” and must exercise restraint.<sup>82</sup> Fourth, damage awards would discourage scientists from pursuing research.<sup>83</sup> Finally, animals play an important and necessary part in medical progress.<sup>84</sup>

#### ANALYSIS OF THE DECISION

The court’s determination that the appellants suffered no economic injury in caring for the monkeys is arguable. Characterizing the appellants’ actions as voluntary, and finding that they did not acquire an ownership interest in the monkeys seem irrelevant to evaluating a claim of economic injury. The appellants had claimed they spent more than \$10,000 to adapt a home to provide shelter for the monkeys, and for food and veterinary care.<sup>85</sup> But the court dismissed this expenditure as being “. . . part of the response to the contested conduct, not part of the conduct itself,” comparing it to attorneys’ fees and

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<sup>75</sup>*Id.* at 938.

<sup>76</sup>*Id.* (construing *Sierra Club*, 405 U.S. at 735 n.8).

<sup>77</sup>*Id.* at 938.

<sup>78</sup>765 F.2d 937 (9th Cir. 1985).

<sup>79</sup>799 F.2d at 938.

<sup>80</sup>*Id.* at 939.

<sup>81</sup>*Id.* at 940.

<sup>82</sup>*Id.*

<sup>83</sup>*Id.*

<sup>84</sup>*Id.*

<sup>85</sup>Brief for Appellant at 26-27. See Pacheco and Francione, *supra* note 47, at 141. A local activist’s basement was installed with new drains, windows, ventilation, insulation, and new cages were built in order to care for the monkeys.

court costs.<sup>86</sup> The court used the *Baker v. Carr* “personal stake in the outcome of the litigation” test as authority for this distinction.<sup>87</sup> The point the court was trying to make is difficult to understand. Was it saying that the appellants’ expenditure did not stem from the controversy, but was instead peripheral to it? This view seems illogical, because the expenditure was made *before* the suit was filed, unlike fees and costs. Moreover, because the controversy was about custody of the monkeys, how could the expenditure be considered peripheral to that controversy? The court’s distinction between *response* to the contested conduct and *part of* the conduct seems irrelevant to establishing a personal stake in the outcome of the litigation.

The court’s analysis of the appellants’ personal injuries also warrants careful examination. The court found that the appellants’ statement of interest resembled the inadequate pleading in *Sierra Club*. The *Sierra* Court did find the *Sierra Club*’s pleadings to be inadequate. But they were inadequate because the organization did not assert the *individualized* injuries of its members. In fact, the *Sierra* Court virtually reprimanded the organization’s impersonal statement of interest:

The Club apparently regarded any allegations of individualized injury as superfluous, on the theory that this was a ‘public’ action involving questions as to the use of natural resources, and that the Club’s longstanding concern with and expertise in such matters were sufficient to give it standing as a ‘representative of the public.’ This theory reflects a misunderstanding of our cases involving so-called ‘public actions’ in the area of administrative law.<sup>88</sup>

The Court further explained that the *Sierra Club* “specifically declines to rely on its individualized interest, as a basis for standing.”<sup>89</sup> Yet the Court suggested that the *Sierra Club* could correct the pleading flaw by amending its complaint.<sup>90</sup> Thus, the appellants’ statement of interest in *International Primate* does not at all resemble that of the *Sierra Club*. The appellants in *International Primate* specifically characterized their injuries as belonging to individual members.

A second problem the *International Primate* court had with the appellants’ statement of interest also misrepresents *Sierra Club*. Apparently, the court interpreted the following passage from *Sierra Club* to mean that a “mere interest” does not confer standing:

It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. . . . But a mere ‘interest

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<sup>86</sup>799 F.2d at 938.

<sup>87</sup>*Id.* (citing *Baker*, 369 U.S. at 204).

<sup>88</sup>405 U.S. at 736.

<sup>89</sup>*Id.* at 735 n.8.

in a problem,' no matter how longstanding the interest and no matter how qualified the *organization* is in evaluating the problem, is not sufficient by itself to render the *organization* 'adversely affected' or 'aggrieved' within the meaning of the APA. (citations omitted) (emphasis added).<sup>91</sup>

Actually, the *Sierra* Court was simply re-emphasizing the need to assert individual injury, even though those individuals are also represented by an organization. In other words, an organizational interest alone does not satisfy the requirement for individual injury. Again, the appellants' injury claim in *International Primate* is vindicated by an accurate reading of *Sierra Club*.

In its analysis of the appellants' injury based on disruption of their personal relationships with the monkeys, the court's reasoning suffers from factual and logical errors. It correctly reasoned that the *Sierra* Court would have approved a pleading alleging that members were deprived the use of a park or forest.<sup>92</sup> The *International Primate* court stated that the appellants had been with the monkeys only because of the litigation, and would not have been able to see the monkeys in the IBR laboratory had defendants cared for the monkeys properly.<sup>93</sup> Apparently the court forgot that the appellants *were* with the monkeys *before* the litigation commenced, and that Pacheco worked as Taub's lab assistant. (Even more striking, the court virtually acknowledged that the defendants did not care for the monkeys adequately.) Because it summarily dispensed with this personal injury claim, the court overlooked the time appellants spent with the monkeys in the IBR laboratory, their custody of the monkeys, and the relationships which developed.<sup>94</sup> Certainly, this is precisely the kind of individualized injury claim the *Sierra* Court wanted.

The *International Primate* court's use of *ALVA* is also questionable. It stated that the *ALVA* court found that the plaintiff in that case "could not be with the goats and therefore could not claim the direct personal involvement necessary for standing."<sup>95</sup> While the *ALVA* court did find an insufficient personal stake, the finding was not based on an inability to "be with the goats." In fact, "being with the goats" is nowhere discussed in the *ALVA* opinion. Actually, the *ALVA* court held that the organization lacked the "longevity and indicia of commitment to preventing inhumane behavior," suggesting that the organization existed only to pursue that lawsuit.<sup>96</sup> Thus, the *International Primate* court's use of *ALVA* to support its denial of standing, and its curious "be with the goats" language, are at best misleading.

The conclusion that the *International Primate* court erroneously analyzed

<sup>91</sup>405 U.S. at 739.

<sup>92</sup>799 F.2d at 938. See 405 U.S. at 735, 736 n.8.

<sup>93</sup>799 F.2d at 938.

<sup>94</sup>See *supra* notes, 50, 53, 55 & 85.

<sup>95</sup>799 F.2d at 938.

<sup>96</sup>765 F.2d at 939.

the appellants' injury-in-fact claims seems inescapable. But did the court correctly find that the Animal Welfare Act does not provide a right of action? To be sure, the Act provides only for administrative supervision and enforcement, and judicial review is provided for aggrieved research facilities.<sup>97</sup> However, perhaps other provisions should be considered in determining whether the Act provides a right of action. For instance, it requires the Secretary of Agriculture to:

. . . require, at least annually, every research facility to show that professionally acceptable standards governing the care, treatment, and use of animals, including appropriate use of anesthetic, analgesic and tranquilizing drugs, during experimentation are being followed by the research facility during actual research or experimentation.<sup>98</sup>

In *Marshall v. Barlow's, Inc.*,<sup>99</sup> the Supreme Court indicated the extent of the Secretary's power to enforce the Act. Discussing statutory provisions for federal court enforcement, the Court noted that:

Exemplary language is contained in the Animal Welfare Act of 1970 which provides for inspections by the Secretary of Agriculture; federal district courts 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.'<sup>100</sup>

Recent legislation has increased protection for laboratory animals by requiring that NIH-funded facilities establish animal care committees consisting of a veterinarian and a person with no financial ties to the facility.<sup>101</sup> It must also be remembered that the Animal Welfare Act was intended to "deal with the abuses that have developed as a result of the Nation's vast program of medical research," particularly research involving experimentation with animals.<sup>102</sup> Congress recently strengthened its statement of policy at the beginning of the Act, stating that:

- (1) the use of animals is instrumental in *certain* research and education for *advancing* knowledge of cures and treatment for diseases and injuries which afflict both humans and animals;
- (2) methods of testing *that do not use animals* are being and continue to be developed which are faster, less expensive, and more accurate than traditional animal experiments for some purposes and further opportunities exist for the development of these methods of testing;

<sup>97</sup> U.S.C. Section 2146 (1985).

<sup>98</sup> *Id.*, Section 2143 (a).

<sup>99</sup> 436 U.S. 307 (1978).

<sup>100</sup> *Id.* at 322 n.19.

<sup>101</sup> Health Research Extension Act of 1985, Pub. L. No. 99-158.

<sup>102</sup> S. Rep. No. 1281, 89th Cong., 2d Sess. 5 (1966), *reprinted in* U.S. Code Cong. & Admin. News, 2635, 2636.

(3) measures which *eliminate or minimize* the *unnecessary duplication* of experiments on animals can result in more productive use of Federal funds; and

(4) measures which help meet the *public concern for laboratory animal care and treatment* are important in assuring that research will continue to progress. (emphasis added).<sup>103</sup>

Keeping these considerations in mind, if the Animal Welfare Act by itself did not, another federal statute may have supplied the necessary right of action for the appellants.

### THE APA

The Administrative Procedure Act (APA)<sup>104</sup> should have given the appellants in *International Primate* a right of action. It provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within meaning of a relevant statute, is entitled to judicial review thereof."<sup>105</sup> In *Sierra Club*, the Supreme Court stated that standing is available through the APA if the party shows an injury-in-fact, and if the injury is to an interest "arguably within the zone of interests to be protected or regulated by the statutes that the agencies allegedly violated."<sup>106</sup> The Court also stated that non-economic injuries are as viable as economic injuries, so long as the party seeking review be himself among the injured.<sup>107</sup>

The real issue, then, is whether the appellants' injuries in *International Primate* were arguably within the zone of interests protected or regulated by the Animal Welfare Act. This would certainly seem to be the case. A ruling by the Supreme Court in *Japan Whaling Association v. American Cetacean Society*<sup>108</sup> supports this view. In *Japan Whaling*, wildlife conservation groups sought a writ of mandamus to compel the Secretary of Commerce to fulfill duties the plaintiffs claimed were required by the Pelly and Packwood Amendments in order to protect sperm whales.<sup>109</sup> The Court found that there was a justiciable controversy despite the defendant's political question contention.<sup>110</sup> The Court also indicated that the APA would have given the plaintiffs a cause of action:

We also reject the Secretary's suggestion that no private cause of action is available to respondents . . . [T]he suit, in essence is one to 'compel agen-

<sup>103</sup> 7 U.S.C. Section 2131 (1985).

<sup>104</sup> 5 U.S.C. Section 702 (1982).

<sup>105</sup> *Id.*

<sup>106</sup> 405 U.S. at 733.

<sup>107</sup> *Id.* at 734-35.

<sup>108</sup> 106 S. Ct. 2860 (1986).

<sup>109</sup> *Id.* at 2865.

<sup>110</sup> *Id.* at 2866.

cy action *unlawfully withheld*,<sup>111</sup> 5 USC Sec. 706(1), or alternatively, to 'hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, *an abuse of discretion*, or otherwise not in accordance with law.' Sec. 706(2)(A). The 'right of action' in such cases is expressly created by the Administrative Procedure Act. . . . A separate indication of congressional intent to make agency action reviewable under the APA is not necessary; instead the rule is that the cause of action for review of such action is *available absent some clear and convincing evidence of legislative intention to preclude review*. (emphasis added).<sup>111</sup>

Recently, in *Clarke v. Securities Industry Ass'n*,<sup>112</sup> the Court said:

We have most recently reaffirmed this liberal reading of the review provisions of the APA in *Japan Whaling Association v. American Cetacean Society* (citations omitted). . . . We [held] that respondents had a right of action 'expressly created by the Administrative Procedure Act. . . .' We held further . . . that 'a separate indication of congressional intent to make agency action reviewable under the APA is not necessary. . . .'<sup>113</sup>

Granted, the Animal Welfare Act does not authorize the Secretary of Agriculture to regulate the design of research projects.<sup>114</sup> But it does direct the Secretary to supervise the care research facilities give to animals, and empowers the Secretary to investigate facilities suspected of mistreating animals.<sup>115</sup> The Act also empowers the Secretary to remove an animal found to be suffering.<sup>116</sup> It is important to remember that the Act was intended to protect the animals; it certainly does not entitle research facilities to abuse them. Given the Supreme Court's language in *Japan Whaling* and *Clarke*, its recognition of judicial enforcement of the Secretary's investigatory powers in *Marshall v. Barlow's, Inc.*, stronger Congressional policy and measures that increased protection for the animals, and the absence of legislative intent to preclude review, one may propose that the Department of Agriculture's failure to supervise IBR was indeed "agency action unlawfully withheld," and that NIH's funding was an "abuse of discretion," according to the standards in *Japan Whaling*.<sup>117</sup>

### THE PRESENT SITUATION

In June, 1986, the monkeys were taken to Delta Regional Primate Research Center in Louisiana, a unit of Tulane University Medical Center.<sup>118</sup>

<sup>111</sup>*Id.*, n.4.

<sup>112</sup>107 S. Ct. 750 (1987).

<sup>113</sup>*Id.* at 755 n.9.

<sup>114</sup>7 U.S.C. 2143 (1985).

<sup>115</sup>*Id.*, Section 2146.

<sup>116</sup>*Id.*

<sup>117</sup>106 S. Ct. at 2866, n.4.

<sup>118</sup>Reinhold, *supra* note 5, at 8, col. 1.  
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There are fourteen of the original seventeen monkeys left. One monkey died while in Delta's custody.<sup>119</sup> This monkey was reportedly healthy, having been used as a control animal in Taub's experiments.<sup>120</sup> However, Delta destroyed his body before an autopsy could be performed.<sup>121</sup> Delta and NIH are considering destroying the remaining monkeys.<sup>122</sup> The animal rights groups oppose this plan and are still trying to get custody of the monkeys.<sup>123</sup>

NIH stopped funding Taub's experiments.<sup>124</sup>

A number of bills dealing in various ways with abuses in animal research have been introduced in Congress. None have been given very high odds of passage.<sup>125</sup> One of these bills calls for transferring the International Primate monkeys to Primarily Primates, Inc., the animal sanctuary where appellants intend to keep the monkeys if they get custody.<sup>126</sup> It seems unlikely that it will be passed.<sup>127</sup>

### CONCLUSION

It was noted that at least one of three legal barriers — standing, statutory interpretation, and policy — usually frustrates animal rights litigants. All three barriers determined the outcome of *International Primate*. Perhaps the most influential was policy. In the beginning of the opinion, the court made this observation:

To imply a cause of action in these plaintiffs might entail serious consequences. It might open the use of animals in biomedical research to the hazards and vicissitudes of courtroom litigation. It may draw judges into the supervision and regulation of laboratory research. It might unleash a spate of private lawsuits that would impede advances made by medical science in the alleviation of human suffering. To risk consequences of this magnitude in the absence of clear direction from the Congress would be

<sup>119</sup>Telephone interviews with Patrice Green, PETA Research and Investigation Staff (Feb.-Mar. 1987).

<sup>120</sup>*Id.*

<sup>121</sup>*Id.*

<sup>122</sup>Reinhold, *supra* note 5, at 8, col. 1.

<sup>123</sup>*Id.* Edward L. Genn, attorney for the appellants in *International Primate*, plans to appeal a related decision. Telephone interview (Aug. 2, 1987).

<sup>124</sup>Rheinhold, *supra* note 5, at 8, col. 5.

<sup>125</sup>Among the bills introduced in the 100th Cong. 1st Sess. (1987) are: H.R. 2594, proposing an amendment to the Animal Welfare Act to prohibit unnecessary surgery or alteration of animals; H.R. 241, proposing an amendment to the Act respecting temporary restraining orders and injunctions; H.R. 1708, aimed at promoting improved dissemination of biomedical data to prevent duplication of experiments on live animals; and H.R. 778, proposing restrictions on NIH-funded research using animals acquired from shelters. S. 1457, which mirrors H.R. 778, was recently introduced in the Senate. Odds that each will pass the various legislative stages are formulated by George Mason University and available on Billcast (LEXIS, Genfed library).

<sup>126</sup>H.R. 2883, 100th Cong., 1st Sess. (1987), was introduced July 1, 1987, by Rep. Robert Smith. *See also* Reinhold, *supra* note 5, at 8, col. 5. Smith and 229 members of Congress cosponsored a similar bill last year.

<sup>127</sup>Billcast (LEXIS, Genfed library).

ill-advised. In fact, we are persuaded that Congress intended that the independence of medical research be respected and that the administrative enforcement govern the Animal Welfare Act.<sup>128</sup>

These policy concerns are evident in the court's interpretation of the Animal Welfare Act.<sup>129</sup> For purposes of comparison, it is worth repeating the interpretation given the Marine Mammal Protection Act by the court in *Animal Welfare Inst. v. Kreps*: "Where an act is expressly motivated by considerations of humaneness toward animals, who are uniquely incapable of defending their own interests in court, it strikes us as eminently logical to allow groups specifically concerned with animal welfare to invoke the aid of the courts in enforcing the statute."<sup>130</sup>

How the Supreme Court would have decided *International Primate* remains to be seen. Interestingly, the Court permitted the *Animal Welfare Inst.* decision to stand.<sup>131</sup> Also, although the Court in *Japan Whaling* ultimately decided against the animal rights groups on the basis of statutory interpretation, Justice Marshall wrote a dissent in which Justices Brennan, Blackmun and Rehnquist joined. The dissenting opinion strongly disagreed with the majority's interpretation of the statute involved.<sup>132</sup> It ended with a powerful appeal for preservation of an endangered species.<sup>133</sup>

For whatever reason, the Supreme Court chose not to review *International Primate*. But given the growing concern for animals in the legal community and legislature, it seems likely that issues dealing with research animals, like those posed by *International Primate*, will eventually need to be resolved.

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<sup>128</sup>799 F.2d at 935.

<sup>129</sup>See *supra* text accompanying notes 80-84.

<sup>130</sup>561 F.2d 1002, 1007 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

<sup>131</sup>*Id.*

<sup>132</sup>106 S. Ct. at 2875 (Marshall, J., dissenting).

<sup>133</sup>*Id.* at 2876.

