

The Law and Bioethics of Using Animals in Research

Thursday, Aug. 31, 2017



CLE Information



Overview

The Center for Legal Education (CLE) of the New Mexico State Bar Foundation is a self-sustaining, nonprofit entity dedicated to providing high quality, affordable, professional training and education programs to the legal community. Live credit options include live seminars, video webcasts, video replays and teleseminars. Self-study credit options include on-demand streaming videos from your computer and DVDs. CLE receives no subsidy from membership licensing fees.

CLE Credit Information

New Mexico

CLE will file New Mexico attorney CLE credits with the New Mexico Supreme Court MCLE Board within 30 days following programs. Credits for live programs and video replays are based on the attendee sign-in sheets at the registration desk. Credits for teleseminar and online courses—video webcasts and on-demand streaming videos—are based on phone call and website attendance reports accessed by staff. Certificates of attendance are not necessary. Credits for DVD courses must be filed by attendees.

Other States and Paralegal Division

CLE will provide certificates of attendance upon request. Attendees are responsible for forwarding certificates to the organizations to which they belong.

Center for Legal Education
New Mexico State Bar Foundation
P.O. Box 92860
Albuquerque, NM 87199-2860
505-797-6020 or 1-800-876-6227
cleonline@nmbar.org
www.nmbar.org



Purpose and Use of Materials

These materials reflect the opinions of the authors and/or the reference sources cited and are not necessarily the opinions of the Center for Legal Education (CLE) of the New Mexico State Bar Foundation (NMSBF), the State Bar of New Mexico (SBNM), or any Division, Committee or Section thereof. They were prepared to furnish the participants with a general discussion of certain specific types of legal issues and problems commonly incurred in connection with representing clients in matters related to the subject of these materials. The issues selected for comment, and the comment concerning the issues selected, are not intended to be all-inclusive in scope, nor a definitive expression of the substantive law of the subject matters.

The issues discussed herein are intended as illustrative of the types of issues which can arise in the course of representation and are not intended to address, nor do they address the broad range of substantive issues which could potentially arise in the scope of such representation.

The authors/speakers suggest that careful independent consideration, to include a review of more exhaustive reference sources, be undertaken in representation of a client regarding this subject, and therefore the practitioner should not solely rely upon these materials presented herein.

No representation or warranty is made concerning the application of the legal or other principles discussed by CLE instructors or authors to any specific fact situation, nor is any prediction made concerning how any particular judge, or other official, will interpret or apply such principles. The proper interpretation or application of these materials is a matter for the considered judgment of the individual practitioner, and therefore CLE, NMSBF and SBNM disclaim all liability.

Disclaimer

Publications of the Center for Legal Education of the NMSBF and the SBNM are designed to provide accurate and current information with regard to the subject matter covered as of the time each publication is printed and distributed. They are intended to help attorneys and other professionals maintain their professional competence. Publications are sold with the understanding that CLE, NMSBF and SBNM are not engaged in rendering legal, accounting, or other professional advice. If legal advice or other expert assistance is required, the service of a competent professional should be sought. Attorneys using CLE, NMSBF and SBNM publications in dealing with specific legal matters should also research the original source of authority cited in these publications.

© Copyright 2017 by
Center for Legal Education of the New Mexico State Bar Foundation

The Center for Legal Education of the NMSBF owns the copyright to these materials. Permission is hereby granted for the copying of individual pages or portions of pages of this by photocopy or other similar processes, or by manual transcription, by or under the direction of licensed attorneys for use in the practice of law. Otherwise, all rights reserved, and no other use is permitted which will infringe the copyright without the express written consent of the Center for Legal Education of the NMSBF.

Photo Release

The majority of CLE programs are videotaped for later showings and are webcast over the Internet. In addition, a State Bar photographer may take photos of participants. These photos are for NMSBF and SBNM use only and may appear in publications and on the website. Your attendance constitutes consent for videotaping, photographing and its subsequent usage.

Presenter Biographies

Leslie Rudloff is senior counsel for the Physicians Committee for Responsible Medicine, a nationwide organization of physicians and laypersons that promotes preventive medicine, especially good nutrition, and addresses controversies in modern medicine, including ethical issues in research.

As senior counsel, Ms. Rudloff assists the director of legal affairs with the Physicians Committee's advocacy litigation, which challenges industry and government when they encourage the consumption of animal products and other unhealthful foods. Ms. Rudloff also assists in the Physicians Committee's efforts to use the legal system to promote vegan diets and alternatives to the use of animals in medical research and education.

Since joining the Physicians Committee in early 2010, Ms. Rudloff's caseload has included multiple lawsuits against national restaurant chains for failing to warn consumers of carcinogens in grilled chicken products; a consumer protection suit against processed meat manufacturers; and litigation against federal agencies for violations of the Administrative Procedure Act.

One of Ms. Rudloff's significant focus areas is the use of open government laws, at both the state and federal level, to advance the Physicians Committee's work, including recent public records suits in California, Michigan, New York, and South Dakota state courts. Additionally, she drafts federal petitions, handles corporate governance matters for the Physicians Committee and its affiliates, and assists in submitting shareholder proposals to corporations who use animals in research.

Rudloff received a Bachelor of Science in paralegal studies from Mississippi College. She received her law degree from Western Michigan University and her LL.M. in Intellectual Property Law from The John Marshall Law School. Prior to joining the Physicians Committee, Ms. Rudloff was in private practice where she litigated civil and criminal matters.

Rudloff is a member of the Texas, Kentucky, Illinois, and Tennessee bars and has been admitted to the United States District Court for the Western District of Kentucky. Ms. Rudloff is 2018-2019 Chair-Elect for the American Bar Association's Animal Law Committee. She also acts as vice chair of membership of the American Bar Association's Animal Law Committee and chair of the Animals in Science and Technology subcommittee. She is also former standing committee director for Kentucky Bar Association's Animal Law Section. Ms. Rudloff presented at Harvard Law School's *Animal Welfare Act at 50* conference and authored *Failure to Launch: The Lack of Implementation and Enforcement of the Animal Welfare Act*, 66 Syr. L. Rev.

Marilyn J. Chimes, DVM, DACLAM, JD, is currently Counsel to the Chicago law firm Scharf Banks Marmor LLC. She previously practiced law for many years with the major firm of Jenner & Block in Chicago, and is licensed to practice law in both Illinois and New Mexico. Additionally, she is registered to practice as an attorney before the USPTO. Prior to becoming an attorney, Dr. Chimes enjoyed a career as a veterinarian, first treating dogs and cats in private practice in New York for several years, then caring for animals being used in biomedical research. She worked for many years with a wide variety of species in corporate, academic, and governmental research facilities in Illinois, operating within the scope of the Animal Welfare Act regulations and other legal and institutional protections for research animals. She is board-certified in the veterinary specialty of laboratory animal medicine and a member of the American

Society of Laboratory Animal Practitioners, the Association of Primate Veterinarians, and the American Association for Laboratory Animal Science.

Dr. Derek Hamilton is a Professor of Psychology and Neurosciences at the University of New Mexico. He received his Ph.D. in Psychology from the University of New Mexico and completed postdoctoral training at the Canadian Centre for Behavioural Neuroscience in Alberta, Canada. Dr. Hamilton's research investigates the behavioral and neurobiological effects of drug exposure, with an emphasis on better understanding the neurobiological factors underlying behavioral and cognitive consequences of prenatal alcohol exposure. His research has been continually funded by the National Institutes of Health since 2006. He is currently the Vice-President and President-Elect of the Fetal Alcohol Spectrum Disorders Study Group, an international society of basic scientists and clinicians. Dr. Hamilton served as a scientific member of the UNM Main Campus Institutional Animal Care and Use Committee (IACUC) from 2008-2013, and as Chair of the IACUC since 2013.

John Gluck is Professor Emeritus of Psychology at the University of New Mexico and Research Professor at the Kennedy Institute of Ethics, Georgetown University. He earned his Ph.D. in Psychology at the University of Wisconsin – Madison, completed a Clinical Fellowship at the University of Washington, Department of Psychiatry and Behavioral Sciences, and a Fellowship in Bioethics at Georgetown University and the National Institutes of Health. He was the founding Director of the Research Ethics Service Project, Co-Director of the Health Sciences Center Institute for Ethics, and Director of the Clinical Psychology Training Program at the University of New Mexico. He served as member and Chair of the New Mexico Board of Psychologist Examiners for 12 years and is a Fellow of the Association of State and Provincial Psychology Boards.

Jessica Johnson is Chief legislative Officer for Animal Protection Voters and Animal Protection of New Mexico. Johnson leads Animal Protection Voters' legislative and political efforts for the protection of all New Mexico's animals and oversees Animal Protection of New Mexico's programmatic and legal work to prevent wildlife and equine cruelty.

With more than five years of experience in government relations on behalf of animal protection, her expertise includes citizen advocacy training, legislative analysis, campaign strategy, and digital communications. Prior to her current work, Jessica served as Senior Manager of Grassroots Advocacy in the ASPCA's Government Relations department in Washington, D.C., where she led efforts to organize citizen support for state and federal legislation, ballot measures, voter registration, and get-out-the-vote efforts.

Jessica earned a J.D. from Lewis & Clark Law School in 2011, where she specialized in environmental and animal law and received the Animal Law Leadership Award upon graduation. She lives in Santa Fe, NM with her husband and beloved rescued canines, Zelda and Edwin, with whom she enjoys hiking across New Mexico's fabulous landscapes.

His most recent work is concerned with understanding what characteristics an entity must possess in order to gain ethical protection from the norms of a society and includes the books *Applied Ethics in Animal Research* published by Purdue University, and *The Human Use of Animals: Case Studies in Ethical*

Choice published by Oxford University Press and co-authored with Tom Beauchamp, F. Barbara Orlans, Rebecca Dresser, and David Morton. In 2016 The University of Chicago press published his memoir *Voracious Science and Vulnerable Animals: A Primate Scientists Ethical Journey*.

Laura Bonar, Chief Program & Policy Officer, Animal Protection of New Mexico and Animal Protection Voters . Laura Bonar has worked for Animal Protection of New Mexico (APNM) since 2007 and has helped pass stronger local and state animal protection laws, developed programs to benefit the animals of domestic violence victims, and organized communities in support of numerous successful campaigns to help animals in need.

Since 2010, Bonar has led APNM's Securing Sanctuary for Chimpanzees campaign, during which time the United States formally ended support for invasive testing on chimpanzees, and in 2013 she worked with the New Mexico Community Foundation to launch the Chimpanzee Sanctuary Fund, where she currently serves as an advisor on grantmaking that has supported the movement of dozens of New Mexico chimpanzees into sanctuary. In 2015, Bonar was promoted to APNM's Chief Program & Policy Officer, supervising community-driven programs to benefit animals and people.

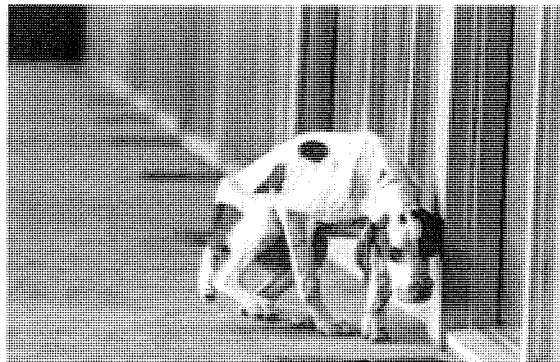
Bonar is a registered nurse and received a bachelor of interdisciplinary studies in business and dance from Arizona State University.

The AWA as it Applies to Research Animals

The Animal Welfare Act—History, Standards, and Exclusions

Leslie Rudloff
Senior Counsel

History of Animal Welfare Act

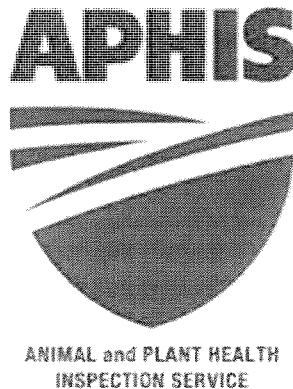


1985 Amendment

- The Improved Standards for Laboratory Animals Act
- Created Institutional Animal Care and Use Committees

Enforcement

- Federal law enforced by USDA's agency



Enforcement

- USDA inspects facilities

- Once per year
- Upon complaint

[illegible]

■ Facilities

- # Self-inspection months
- ## No self-inspection to USDA
- ### Submit only annual summary of animal use

ANALYSIS OF VARIANCE: TESTS FOR DIFFERENTIAL EFFECTS OF RESIDENTIAL INFLUENCE ON ADOLESCENT SPENDING PATTERNS AND ATTITUDES TOWARD SPENDING									
SOURCE OF VARIATION		1	2	3	4	5	6	7	8
1	Between all groups	1	1	1	1	1	1	1	1
2	Within all groups	1	1	1	1	1	1	1	1
3	Between residential groups	1	1	1	1	1	1	1	1
4	Within residential groups	1	1	1	1	1	1	1	1
5	Between non-residential groups	1	1	1	1	1	1	1	1
6	Within non-residential groups	1	1	1	1	1	1	1	1
7	Between all groups (repeated)	1	1	1	1	1	1	1	1
8	Within all groups (repeated)	1	1	1	1	1	1	1	1
9	Between residential groups (repeated)	1	1	1	1	1	1	1	1
10	Within residential groups (repeated)	1	1	1	1	1	1	1	1
11	Between non-residential groups (repeated)	1	1	1	1	1	1	1	1
12	Within non-residential groups (repeated)	1	1	1	1	1	1	1	1
13	Between all groups (total)	1	1	1	1	1	1	1	1
14	Within all groups (total)	1	1	1	1	1	1	1	1
15	Between residential groups (total)	1	1	1	1	1	1	1	1
16	Within residential groups (total)	1	1	1	1	1	1	1	1
17	Between non-residential groups (total)	1	1	1	1	1	1	1	1
18	Within non-residential groups (total)	1	1	1	1	1	1	1	1
19	Between all groups (grand total)	1	1	1	1	1	1	1	1
20	Within all groups (grand total)	1	1	1	1	1	1	1	1
21	Between residential groups (grand total)	1	1	1	1	1	1	1	1
22	Within residential groups (grand total)	1	1	1	1	1	1	1	1
23	Between non-residential groups (grand total)	1	1	1	1	1	1	1	1
24	Within non-residential groups (grand total)	1	1	1	1	1	1	1	1
25	Between all groups (grand total, repeated)	1	1	1	1	1	1	1	1
26	Within all groups (grand total, repeated)	1	1	1	1	1	1	1	1
27	Between residential groups (grand total, repeated)	1	1	1	1	1	1	1	1
28	Within residential groups (grand total, repeated)	1	1	1	1	1	1	1	1
29	Between non-residential groups (grand total, repeated)	1	1	1	1	1	1	1	1
30	Within non-residential groups (grand total, repeated)	1	1	1	1	1	1	1	1
31	Between all groups (grand total, grand total)	1	1	1	1	1	1	1	1
32	Within all groups (grand total, grand total)	1	1	1	1	1	1	1	1
33	Between residential groups (grand total, grand total)	1	1	1	1	1	1	1	1
34	Within residential groups (grand total, grand total)	1	1	1	1	1	1	1	1
35	Between non-residential groups (grand total, grand total)	1	1	1	1	1	1	1	1
36	Within non-residential groups (grand total, grand total)	1	1	1	1	1	1	1	1
37	Between all groups (grand total, grand total, grand total)	1	1	1	1	1	1	1	1
38	Within all groups (grand total, grand total, grand total)	1	1	1	1	1	1	1	1
39	Between residential groups (grand total, grand total, grand total)	1	1	1	1	1	1	1	1
40	Within residential groups (grand total, grand total, grand total)	1	1	1	1	1	1	1	1
41	Between non-residential groups (grand total, grand total, grand total)	1	1	1	1	1	1	1	1
42	Within non-residential groups (grand total, grand total, grand total)	1	1	1	1	1	1	1	1
43	Between all groups (grand total, grand total, grand total, grand total)	1	1	1	1	1	1	1	1
44	Within all groups (grand total, grand total, grand total, grand total)	1	1	1	1	1	1	1	1
45	Between residential groups (grand total, grand total, grand total, grand total)	1	1	1	1	1	1	1	1
46	Within residential groups (grand total, grand total, grand total, grand total)	1	1	1	1	1	1	1	1
47	Between non-residential groups (grand total, grand total, grand total								

Enforcement

- USDA does not address science

- Institutions control animal use (IACUC)
 - No experiments are prohibited
- USDA's enforcement is lax
- Focus on husbandry issues

Animal Welfare Act's Infamous Flaw

- An “animal” (7 U.S.C. § 2132(g))
 - Dogs, cats, primates, guinea pigs, rabbits
 - Other warm-blooded animals intended for research, testing, exhibition, or as pets
- Not an “animal”
 - Rats, mice, fish and birds bred for research (95% of all research animals)
 - Fish

Minimize pain and consider alternatives

- Animal Welfare Act mandates “that animal pain and distress are minimized”
(7 U.S.C. § 2143(a)(3)(A))
- Each principal investigator is supposed to “consider alternatives to any procedure that is likely to produce pain or distress” (7 U.S.C. § 2143(a)(3)(B))

The Reality

“[USDA] believes that [the Animal Welfare Act] only requires that the principal investigator consider alternatives, but that there is no requirement that an alternative be used after having been considered.”

– Kenneth Vail, Asst. Gen. Counsel, 2007

“[O]ur position at USDA remains unchanged.”

– Carrie Ricci, Asst. Gen. Counsel, 2012

By the Numbers

- Approx. 100 million animals used in U.S. labs each year
- Dogs, cats, and non-human primates = 0.6% combined
- Rats and mice = 95%*



*Reporting not required by federal Animal Welfare Act

2015 USDA Report

- 61,950 nonhuman primates
- **61,101** dogs
- 19,932 cats
- 172,864 guinea pigs
- 98,420 hamsters
- 46,477 pigs
- 138,348 rabbits
- 10,678 sheep
- 27,768 other farm animals
- 130,066 other species

Experimentation

1. Basic research—

Often disease focused

- *Alzheimer's*
- Heart Disease
- Cancer
- Diabetes
- Study of mechanisms
- Often feeds into drug development
- Curiosity-driven

What Are We Getting?

- Pharmaceuticals

- 96 percent of drugs that appear safe in animals fail in human trials
- More than half of all approved drugs will be withdrawn or relabeled for serious or lethal effects in humans



Alzheimer's

- 5.3 million Americans suffer from Alzheimer's. Rates are expected to triple by 2050.
- In the last decade, not one new drug has been developed that effectively treats Alzheimer's because all of the Alzheimer's research relies on animal models.
- 99.6% of Alzheimer's drugs that test successfully in animals, fail in humans.

“The history of cancer research has been a history of curing cancer in the mouse We have cured mice of cancer for decades, and it simply doesn't translate to humans.”

– Richard Klausner, M.D.
Director
National Cancer Institute
(1998)

“The history of cancer research has been a history of curing cancer in the mouse We have cured mice of cancer for decades, and it simply doesn't translate to humans.”

– Richard Klausner, M.D.
Director
National Cancer Institute
(1998)

[illegible]

Alternatives

REVOLUTION in drug testing

✓ 92% of all drug tests fail to detect the presence of drugs in the system.

Designed to detect better, physicians should demand the use of a system of improved drug testing by next year.

That's why we've developed a new, improved drug testing system.

THE NEW DRUG TESTING SYSTEM.

It's the only system that can detect the presence of drugs in the system.

It's the only system that can detect the presence of drugs in the system. It's the only system that can detect the presence of drugs in the system.

It's the only system that can detect the presence of drugs in the system.

It's the only system that can detect the presence of drugs in the system.

It's the only system that can detect the presence of drugs in the system.

It's the only system that can detect the presence of drugs in the system.

It's the only system that can detect the presence of drugs in the system.

It's the only system that can detect the presence of drugs in the system.

It's the only system that can detect the presence of drugs in the system.

It's the only system that can detect the presence of drugs in the system.

It's the only system that can detect the presence of drugs in the system.

It's the only system that can detect the presence of drugs in the system.

It's the only system that can detect the presence of drugs in the system.

It's the only system that can detect the presence of drugs in the system.

It's the only system that can detect the presence of drugs in the system.

Physicians' Committee on Responsible Drug Use

Learn more at PhysiciansCommittee.org/Research

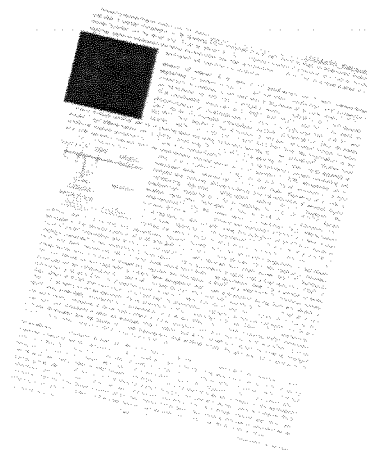
Legal Efforts

- FOIA/State Public Records
- Complaints/Petitions to USDA/FDA
- Complaints to NIH
- Lawsuits
- Investigations



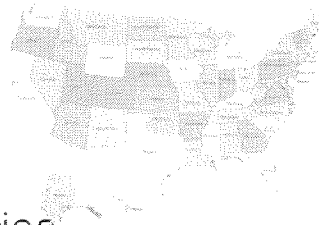
Freedom of Information Act

- Typical Documents
 - USDA inspections
 - Correspondence
 - Photos and video footage (rare)
 - NIH grants



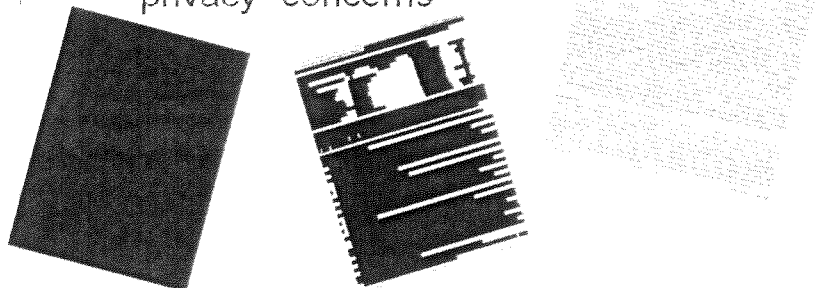
State Public Records

- From public universities
 - Research protocols
 - Veterinary records
 - Purchasing documents
 - Communications
- From other state agencies
 - Import/export records
 - Inspection records



State Public Records

- Common Redactions
 - “proprietary” information
 - “medical committees”
 - “privacy” concerns



State Public Records Lawsuits

- Court required Wayne State university to disclose records of its heart experiments on dogs



State Public Records Lawsuits

- Court forced NY State Psychiatric Institute to disclose experiments on nonhuman primates



Second of Experimentation

2. Chemical testing

- Toxicity
- Corrosivity/Irritation
- Absorption
- Cosmetic testing amounts to about 3% of testing overall

Legal efforts regarding chemical testing

- Lobbied for the passage of Frank R. Lautenberg Chemical Safety for the 21st Century Act
- The bill requires alternatives to animal tests be considered and used, and places restrictions on animal testing—which are stronger than current law—that will over time facilitate the development and adoption of human-relevant, nonanimal methods. Because information obtained on chemicals will be human-relevant, products Americans use will be safer.

	<h2>Medical Education</h2>
	<p>3. Medical Education and Training</p> <ul style="list-style-type: none">– Medical students– Physicians– Military personnel– Other areas

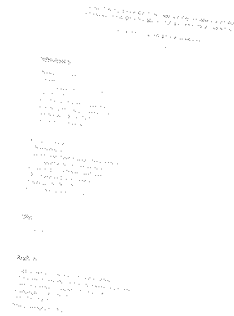
	<h2>Animal Use in Medical Education</h2>
	<ul style="list-style-type: none">-unnecessary/cruel-simulators* and mentored training are gold standard-not one medical school opened since 1979 uses animals to train.

	Legal efforts to end using animals for medical training
	<ul style="list-style-type: none">■ USDA rulemaking petition■ State public records requests and publicize info■ Lobbying for the BEST Practices Act Briefings demonstrating simulators to MOC

	Legal efforts regarding drugs
	<ul style="list-style-type: none">■ Currently, there are 29 FDA regulations that require drug sponsors to provide animal data for pre-clinical testing■ We filed a citizen's Petition to update FDA regulations to accept modern test methods that are demonstrated to be more predictive of human response than currently mandated test methods.

Legal efforts--USDA Petition ambiguous regulations

- Update Animal Welfare Act regulations to eliminate gaps:
 - define “alternative”
 - define “painful procedure”
 - detailed guidance for “considering” alternatives

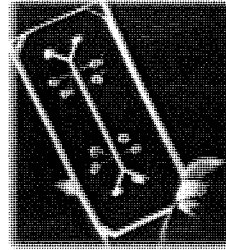


What are the Costs of Relying on Animal Experiments?

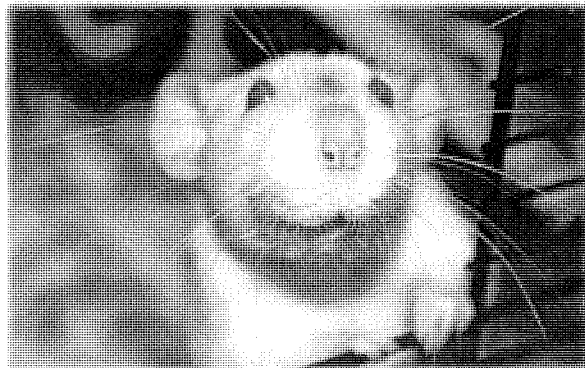
- Wasted money/resources
- Wasted hope
- Wasted time
- Lives lost (both humans and animals)

The New Paradigm

- Human-focused medicine
- Epidemiological research
- Expansion of existing cell-based models
- Investment in developing technologies
- Greater protections for animals



Thank You!



Connect with Us



[Facebook.com/PCRM.org](https://www.facebook.com/PCRM.org)



[@PCRM](https://twitter.com/PCRM)



[Pinterest.com/PCRMorg](https://www.pinterest.com/PCRMorg)



lrudloff@pcrm.org

[illegible]

Beyond the AWA: Other Protections for Research Animals

BEYOND THE AWA: OTHER PROTECTIONS FOR RESEARCH ANIMALS

Marilyn Chimes, DVM, JD,
Diplomate ACLAM

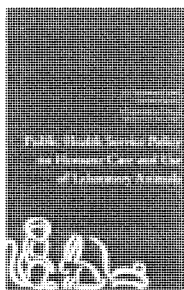
PROTECTIONS FOR RESEARCH ANIMALS BEYOND THE AWA

- PHS Policy
- Federal agencies' policies
- AAALAC Accreditation
- State Laws

ANIMAL WELFARE ACT REGULATIONS

- Definitions
 - "Animal" = warmblooded *except* mice, rats, birds
- Regulations
 - Federal research facilities not registered
 - IACUC
 - At least 3 members
 - Semiannual inspections & reviews
 - Animal activity protocol review & approval
 - Adequate veterinary care
- Standards
 - Facilities
 - Animal health & husbandry
 - Transportation








PUBLIC HEALTH SERVICE POLICY ON HUMANE CARE AND USE OF LABORATORY ANIMALS

PUBLIC HEALTH SERVICE (PHS)

- National Institutes of Health (NIH)



- Centers for Disease Control (CDC) 
- Food & Drug Administration (FDA) 
- Indian Health Service (IHS) 
- More

PHS: National Institutes of Health (NIH)

- Primary federal agency supporting & conducting medical research
- 27 different components (Institutes, Centers), each with specific research agenda
- Largest public funder of biomedical research in the world



PHS POLICY: History

- Original NIH Policy written 1971
- Revised by Health Research Extension Act of 1985 (42 USC §289d)
 - Required establishment of guidelines for proper care & treatment of animals to be used in research & while being used in research.
 - Animal care committees (IACUC)
 - Appropriate use of tranquilizers, analgesics, anesthetics, paralytics, euthanasia
 - Appropriate pre-surgical & post-surgical veterinary care
 - Training in humane practices for all personnel involved in animal care, treatment, or use
- Incorporates U.S. Government Principles for Utilization & Care of Vertebrate Animals published 1985
 - 3 Rs, minimize pain & distress, comfortable animal housing, training
 - Assume that procedures causing pain or distress in humans may cause pain or distress in other animals*
 - Consider relevance of procedures to human or animal health, advancement of knowledge, or good of society*
 - Apply to any U.S. government agency developing requirements for testing, research, or training procedures involving use of vertebrate animals*

PHS POLICY: History

- Pub. L. 101-166, §214 (1989)
 - No federal funds may be used on any project that entails taking chimps from wild*
- NIH Revitalization Act of 1993
 - Reiterated support, acceptance, & training of research into 3 Rs
 - Methods that do not require animals (*Replace*)
 - Methods that reduce number of animals (*Reduce*)
 - Methods that cause less pain & distress in animals (*Refine*)
- Since 2014, NIH funds may not be used for other than USDA Class A (purpose-bred) dogs & cats*

PHS POLICY



- Does not supersede any more stringent applicable laws or regs
- Administered by Office of Laboratory Animal Welfare (OLAW) of NIH
 - Oversight of all PHS-supported animal research activities
- Incorporates standards described in *Guide for the Care and Use of Laboratory Animals*

PHS POLICY

- Facilities covered
 - Any institution receiving PHS support for an activity involving live vertebrates
 - Most universities & colleges that perform animal research
- "Animals"*
 - Any live vertebrate animal used or intended for use in research, research training, experimentation, biological testing, or related purposes
 - Includes rats, mice, birds, fish, reptiles, amphibians



PHS POLICY: Animal Welfare Assurance

- By Institutional Official to PHS (OLAW)
- Policy guidelines have been met
- Full description of animal care & use program
 - Veterinarian qualifications & authority
 - IACUC membership & procedures
 - Training available to all personnel involved with animal care, treatment, & use
 - Humane animal maintenance
 - Humane animal experimentation
 - Research methods that limit animal numbers & distress

PHS POLICY

- Institutional status
 - Category 1
 - Accredited by AAALAC International
 - Category 2
 - Evaluated by institution's IACUC

PHS POLICY: IACUC

- At least 5 members*
 - Member not otherwise affiliated with institution (to represent community)
 - Veterinarian
 - Program authority & responsibility for animal activities at institution
 - Training or experience in laboratory animal medicine & science*
 - Scientist experienced in animal research*
 - Nonscientific professional (e.g., lawyer, clergy, ethicist)*

PHS POLICY: IACUC Review of PHS-Supported Research

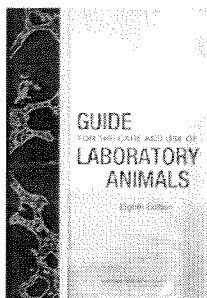
- Continuing review of each approved ongoing activity
- Complete re-review of each protocol at least every 3 years*
- IACUC may suspend previously-approved activity if it determines it's not being conducted in accordance with AWA, *Guide*, Assurance, or PHS Policy
 - Suspensions must be reported to OLAW

PHS POLICY: Enforcement

- No activity involving animals may be conducted or supported by PHS until:
 - Institution has approved Assurance on file with OLAW
 - IACUC has approved activity protocol
- Assurance approval valid no longer than 5 years
- OLAW fosters compliance via Assurance & education
- OLAW monitors compliance by evaluating institutional reports of noncompliance
 - IACUC, via Institutional Official, must promptly report to OLAW any serious or continuing noncompliance with Policy, serious deviations from *Guide*, & any IACUC activity suspension
 - IO must report loss of AAALAC accreditation

PHS POLICY: Enforcement

- Institutions are required to correct confirmed noncompliance & institute appropriate measures to prevent repeated noncompliance
- Possible enforcement actions by funding agency:
 - Disallow costs
 - Withhold further awards
 - Suspend grant, in whole or part, pending corrective action
 - Suspend or debar organization or individual
 - Other legal remedies, such as civil action



GUIDE FOR THE CARE AND USE OF LABORATORY ANIMALS

GUIDE

- First published in 1963
- 8th edition published 2011
- Internationally accepted primary reference on animal care & use
 - Used by many entities not subject to AWA or PHS Policy
- Establishes minimum ethical, practice, & care standards for researchers & their institutions

GUIDE

- "Strongly affirms the principle that all who care for, use, or produce animals for research, testing, or teaching must assume responsibility for their well-being"
- Goal to promote humane care & use of laboratory animals by providing information that will enhance animal well-being, research quality, & advancement of scientific knowledge

GUIDE

- Intended audience
 - Scientific community
 - Administrators
 - IACUCs
 - Veterinarians
 - Educators & trainers
 - Producers of laboratory animals
 - Accreditation bodies
 - Regulators
 - The public

GUIDE

- Written in general terms
 - So as to be applicable to diverse institutions & settings
 - Requires use of professional judgment
- Based on published data, scientific principles, expert opinion, & experience with methods & practices proven to be consistent with both high-quality research and humane animal care & use

*GUIDE: Animals**

- Any vertebrate animal produced for or used in research, testing, or teaching
- Establishes general principles & ethical considerations also applicable to agricultural animals, wildlife, aquatic species, invertebrates
 - Whether in lab, nature, or production
 - References provide additional info

GUIDE: Standards

- Engineering standards
- Performance standards
- Practice standards

GUIDE: Standards

- Engineering standards
 - Detail method, technology, or technique
 - No modification allowed
 - Useful as baseline
 - Easy to use to evaluate compliance
- Performance standards
- Practice standards

GUIDE: Standards

- Engineering standards
- Performance standards*
 - Describe desired outcome & allow flexibility in achieving outcome
 - Able to accommodate many variables
- Practice standards

GUIDE: Standards

- Engineering standards
- Performance standards
- Practice standards*
 - Permit application of professional judgment by qualified, experienced individuals to task or process over time
 - Allows flexibility to modify practices & procedures with changing conditions & new information

GUIDE: Chapters

- Goals, concepts, terminology, 3 Rs, ethics, obligations
 - *Reduce*: use fewest animals
 - *Refine*: avoid pain & distress
 - *Replace*: less sentient or nonanimal models
- Animal care & use program
- Animal housing & environment
- Veterinary care, vet responsibilities, biosecurity
- Physical plant

GUIDE: Animal Care & Use Program

- Regulations, policies, & principles
- Program management
 - Responsibilities of IO, AV, IACUC
 - Personnel management
- Program oversight
 - IACUC
 - Postapproval monitoring
- Disaster planning

GUIDE: Animal Housing & Environment

- Macroenvironment
- Microenvironment
- Social environment
- Environmental enrichment
- Terrestrial animals
- Aquatic animals

GUIDE: Animal Housing & Environment

- Terrestrial animals
 - Primary enclosure security, safety, flooring
 - Temperature & humidity
 - Ventilation & air quality
 - Lighting intensity, wavelength, period
 - Noise intensity, frequency, rapidity of onset, duration*
 - Vibration intensity, frequency, duration*
 - Bedding & structures for nesting, sleeping, hiding, foraging, manipulation*

GUIDE: Animal Housing & Environment

- Terrestrial animals
 - Social environment*
 - Habituation & training of animals to routine procedures
 - Human interaction
 - Social housing of compatible animals
 - Single housing of social species must be reviewed regularly by vet & IACUC
 - Environmental enrichment*
 - Provide animals with choices & control
 - Primary enclosure space*

GUIDE: Performance Standards



- Provide sufficient space + supplementary structures & resources required to meet physical, physiologic, & behavioral needs*
 - Varies by age, sex, # of cohabitants, special needs, quality & usability of space
 - Bedding &/or structures for resting
 - Environmental enrichment
 - House social animals in stable pairs or groups of compatible individuals

GUIDE: Veterinary Care

- "The proper use of anesthetics and analgesics in research animals is an ethical and scientific imperative"
- "It is essential that personnel caring for and using animals be trained in species-specific and individual clinical, behavioral, physiologic, and biochemical indicators of well-being"

GUIDE: Veterinary Care

- Euthanasia = "induce rapid unconsciousness and death without pain or distress"
 - "Essential that euthanasia be performed by personnel skilled in methods for the species in question and in a professional and compassionate manner"*
 - Consistent with AVMA *Guidelines*

AVMA Guidelines for the Euthanasia of Animals

GUIDE: References Incorporated

- Alternatives
- Ethics & welfare
- Experimental design & statistics
- Research & testing methodology
- Program management
 - Laws, regulations, policies
 - Education
 - Monitoring care & use of animals
 - Occupational health & safety

GUIDE: References Incorporated

- Environment, housing, management
 - Environmental enrichment
 - Genetics & genetically modified animals
 - Species-specific references on environment, housing, management
- Veterinary care
 - Transportation
 - Anesthesia, pain, surgery
 - Disease surveillance, diagnosis, treatment
 - Pathology, clinical pathology, parasitology
 - Species-specific references on veterinary care
- Design & construction of animal facilities

DEPARTMENT OF VETERANS AFFAIRS



VHA HANDBOOK 1200.07

- Applies to all research involving animals conducted in VAs or by VA researchers on VA time
 - Regardless of funding source
- VA animal programs must comply with AWA, U.S. Gov't Principles, PHS Policy, *Guide*, & *AVMA Guidelines on Euthanasia* and be AAALAC-accredited
 - All research must be covered by a PHS Animal Welfare Assurance
 - Compliance with PHS Policy mandatory whether or not PHS funds accepted

VHA HANDBOOK

- "The use of animals in VA research is a privilege granted with the understanding and expectation that such research is conducted according to the highest ethical and legal standards."

VHA HANDBOOK: Basic Principles

- Undertake animal experiments only after due consideration of their relevance for human or animal health & the advancement of biological knowledge
- Use the fewest number of animals necessary to achieve scientific objectives
- Use the least sentient species that will permit attainment of research objectives

VHA HANDBOOK: Basic Principles

- Use the least painful or distressful procedures needed to meet research objectives and use all reasonable measures to minimize pain & distress
- Always consider principles of replacement, reduction, & refinement
- Consider procedures painful in a human to be painful in an animal

VHA HANDBOOK: Basic Principles

- Maintain the best possible living conditions for animals kept for research
 - Veterinarian experienced in lab animal medicine must supervise animal care
 - Housing must ensure that general health of animals is safeguarded & undue stress is avoided

VHA HANDBOOK: Basic Principles

- Personnel must have appropriate qualifications, training, & experience when conducting procedures on animals
 - Opportunities for hands-on training must be provided as needed

DEP'T OF DEFENSE



DOD INSTRUCTION 3216.01

- All DoD institutions housing animals for research, training, etc. must be AAALAC-accredited
- IACUCs must have at least 5 members
 - Quorum requires at least one veterinarian & one non-affiliated member*
- 3 Rs must be considered & alternatives used whenever possible
- "Animals" = vertebrates, alive & dead, including rats, mice, birds, cold-blooded animals

DOD INSTRUCTION 3216.01

- Use of dogs, cats, nonhuman primates, or marine mammals for inflicting wounds from any type of weapon to conduct training in surgical or other medical treatment procedures is prohibited*
- All allegations of misconduct or noncompliance with animal care & use standards must be referred to higher management

ASSOCIATION FOR ASSESSMENT & ACCREDITATION OF LABORATORY ANIMAL CARE INTERNATIONAL



AAALAC

- Nongovernmental, nonprofit organization incorporated in 1965
- Promotes humane treatment of animals in science through voluntary accreditation & assessment programs
- >980 companies, universities, hospitals, government agencies, & other research institutions in 44 countries have earned AAALAC accreditation

AAALAC

- Any public or private institution, organization, or agency maintaining, using, importing, or producing animals for purposes of scientific research, teaching, or testing may be accredited
 - Including breeders & dealers of lab animals
- **All** animals used or to be used in research, teaching, or testing are included & evaluated*

AAALAC

- AAALAC-accredited facilities in New Mexico:
 - University of New Mexico Health Sciences Center (Albuquerque)
 - New Mexico Veterans Affairs Health Care System (Albuquerque)
 - Lovelace Respiratory Research Institute
 - Alamogordo Primate Facility (NIH) (Holloman Air Force Base)

AAALAC

- Initial accreditation
 - Extensive internal review of animal care & use program ("Program Description")
 - Comprehensive on-site assessment by professionals knowledgeable in field of laboratory animal science*
- Accreditation maintenance
 - Annual reports
 - Re-evaluation every 3 years
 - Program description
 - Onsite assessment
 - Prompt notification to AAALAC of adverse events relating to the animal care & use program
 - Investigation by USDA or OLAW, or other serious incidents or concerns that negatively impact animal well-being

AAALAC

- Compliance with any & all applicable laws & regulations required
- *Guide* is basic guide to specific standards for accreditation
- Care & management of laboratory animals must be directed by qualified persons
- All animal care personnel must be qualified by training & experience in care of laboratory animals
- Physical facilities and methods of care & use for animals must permit their maintenance in a state of well-being & comfort

AAALAC



- Primary references
 - *Guide for the Care & Use of Laboratory Animals*
 - *Guide for the Care & Use of Agricultural Animals in Research & Teaching*
 - *European Convention for the Protection of Vertebrate Animals Used for Experimental & Other Scientific Purposes*

AAALAC

- Numerous additional references, e.g.,
 - *ACLAM Position Statement on Adequate Veterinary Care*
 - *AVMA Guidelines on Euthanasia*
 - *Institutional Animal Care & Use Committee Guidebook*
 - *International Guiding Principles for Biomedical Research Involving Animals*



STATE LAWS



STATE LAWS

- Every state prohibits animal cruelty
 - Most state cruelty laws exempt research
 - Specifically
 - If institution subject to federal requirements
 - Acts authorized by law
 - Research use as affirmative defense
- Some states regulate research facilities
 - Licensure
 - Inspection

NEW MEXICO LAW 30-18-1

- "Cruelty"
 - Negligently mistreating, injuring, killing without lawful justification, or tormenting an animal
 - Abandoning or failing to provide necessary sustenance to an animal under person's custody or control
 - Misdemeanor
 - ≥ 4 convictions is 4th degree felony

NEW MEXICO LAW 30-18-1

- "Extreme cruelty"
 - Intentionally or maliciously torturing, mutilating, injuring, or poisoning an animal
 - Maliciously killing an animal
 - 4th degree felony
- "Animal" does not include insects or reptiles

NEW MEXICO LAW 30-18-1

- Does not apply to research facilities licensed under AWA ***"except when knowingly operating outside provisions, governing the treatment of animals, of a research or maintenance protocol approved by the institutional animal care and use committee of the facility"***



PROTECTIONS FOR RESEARCH ANIMALS

- Animal Welfare Act
 - Excludes rats, mice, birds, cold-blooded vertebrates, invertebrates
 - Excludes federal research facilities
- PHS Policy
 - Includes all live vertebrates
 - Includes most universities & colleges
 - Higher standards than AWAR
- Federal agencies' policies
 - Include at least all vertebrates, usually all animals
 - Higher standards than PHS Policy
- AAALAC Accreditation
 - Includes all animals
 - Includes federal agencies, many universities & colleges, many corporate & private research facilities, and research animal breeders & dealers
 - Highest & continually improving evidence-based standards
- State Laws

RESEARCH ANIMAL PROTECTION REFERENCES

Animal Welfare Act, 7 U.S.C. §§ 2131-2159, available at <http://uscode.house.gov/browse/prelim@title7/chapter54&edition=prelim>

Animal Welfare Act Regulations, 9 C.F.R. §§ 1.1-4.11, available at https://www.ecfr.gov/cgi-bin/text-idx?SID=2c5af04972910e2da415a464131fb6e7&mc=true&tpl=/ecfrbrowse/Title09/9cfrv1_02.tpl#0

Health Research Extension Act of 1985, 42 U.S.C. § 289d, available at <https://grants.nih.gov/grants/olaw/references/hrea1985.htm>

NIH Revitalization Act of 1993, 42 U.S.C. § 283e, available at <https://grants.nih.gov/grants/olaw/pl103-43.pdf>

Office of Laboratory Animal Welfare, U.S. Dep't of Health & Human Services, **Public Health Service Policy on Humane Care and Use of Laboratory Animals** (2015), available at <https://grants.nih.gov/grants/olaw/references/PHSPolicyLabAnimals.pdf>

Office of Laboratory Animal Welfare, U.S. Dep't of Health & Human Services, **U.S. Government Principles for the Utilization and Care of Vertebrate Animals Used in Testing, Research, and Training**, 50 Fed. Reg. 20864-65 (May 20, 1985), available at <https://grants.nih.gov/grants/olaw/references/phspol.htm#USGovPrinciples>

Nat'l Inst. of Health, U.S. Dep't of Health & Human Serv., **NIH Grants Policy Statement**, available at <https://grants.nih.gov/grants/policy/nihgps/nihgps.pdf>

Comm. for the Update of the Guide for the Care and Use of Laboratory Animals, Nat'l Research Council, **Guide for the Care and Use of Laboratory Animals** (8th ed. 2011), available at <https://grants.nih.gov/grants/olaw/guide-for-the-care-and-use-of-laboratory-animals.pdf>

Panel on Euthanasia, Am. Veterinary Med. Ass'n, **AVMA Guidelines for the Euthanasia of Animals: 2013 Edition**, available at <https://www.avma.org/KB/Policies/Documents/euthanasia.pdf>

Fed'n of Animal Sci. Societies, **Guide for the Care and Use of Agricultural Animals Used in Research and Teaching** (3rd ed. 2010), available at https://aaalac.org/about/Ag_Guide_3rd_ed.pdf

Council of Europe, **Appendix A of the European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes (ETS No. 123): Guidelines for Accommodation and Care of Animals (Article 5 of the Convention)** (2006), available at <https://aaalac.org/about/AppA-ETS123.pdf>

Dep't of Veterans Affairs, Veterans Health Admin., **VHA Handbook 1200.07: Use of Animals in Research** (2011), available at https://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2464. See also https://www.research.va.gov/programs/animal_research/

Dep't of Defense, **Instruction No. 3216.01: Use of Animals in DoD Programs** (2010), available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/321601p.pdf>

NASA Policy Directive, **NPD 8910.1B: Care and Use of Animals** (2008), available at <https://nodis3.gsfc.nasa.gov/displayDir.cfm?t=NPD&c=8910&s=1B>

NASA Procedural Requirements, **NPR 8910.1C, Care and Use of Animals** (2011), available at <https://nodis3.gsfc.nasa.gov/displayDir.cfm?t=NPR&c=8910&s=1C>

See also 14 C.F.R. §§ 1232.100-1232.102, available at <https://www.ecfr.gov/cgi-bin/text-idx?SID=3ca90e25066642cf98633de1029c567f&mc=true&node=pt14.5.1232&rqn=div5>

MEMORANDUM OF UNDERSTANDING AMONG THE ANIMAL AND PLANT HEALTH INSPECTION SERVICE, U.S. DEPARTMENT OF AGRICULTURE, AND THE FOOD AND DRUG ADMINISTRATION, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND THE NATIONAL INSTITUTES OF HEALTH, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CONCERNING LABORATORY ANIMAL WELFARE (2016), available at <https://grants.nih.gov/grants/olaw/references/finalmou.htm>

Applied Research Ethics Nat'l Ass'n & Office of Lab. Animal Welfare, **Institutional Animal Care and Use Committee Guidebook** (2nd ed. 2002), available at <https://grants.nih.gov/grants/olaw/guidebook.pdf>

N.M. STAT. § 30-18-1: Cruelty to animals; extreme cruelty to animals; penalties; exceptions, available at <http://public.nmcompcomm.us/nmpublic/gateway.dll/?f=templates&fn=default.htm>

Council for Int'l Org. of Med. Sci. & Int'l Council for Lab. Animal Sci., **International Guiding Principles for Biomedical Research Involving Animals** (2012), available at https://grants.nih.gov/grants/olaw/Guiding_Principles_2012.pdf

F. Claire Hankenson et al., **ACLAM Position Statement on Adequate Veterinary Care**, 55 J. Am. Ass'n for Lab. Animal Sci. 826-28 (2016), available at <https://www.aclam.org/Content/files/files/Public/Active/ACLAM%20Position%20Statement%20-%20Adequate%20Veterinary%20Care.pdf>

Pat Turner et al., **ACLAM Position Statement on Pain and Distress in Research Animals**, 55 J. Am. Ass'n for Lab. Animal Sci. 821 (2016), available at <https://www.aclam.org/Content/files/files/Public/Active/ACLAM%20Position%20Statement%20-%20Pain%20and%20Distress.pdf>

Comm. for Evidence-Based Performance Standards, **ACLAM Guidance Document on Evaluation of Laboratory Animal Care Standards** (2010), available at https://www.aclam.org/Content/files/files/Public/Active/ebps_evaluation_of_standards_guidance-08-2010.pdf

Animal Care, U.S. Dep't of Agric., **Animal Care Policy Manual** (2016), available at http://www.aphis.usda.gov/animal_welfare/downloads/Animal%20Care%20Policy%20Manual.pdf

AAALAC International (Association for Assessment & Accreditation of Laboratory Animal Care International), see <https://aaalac.org/>

American Association for Laboratory Animal Science, see <https://www.aalas.org/>. AALAS is a membership association of professionals employed around the world in academia, government, and private industry who are dedicated to the humane care and treatment of laboratory animals, as well as the quality research that leads to scientific gains that benefit people and animals. AALAS provides educational materials to laboratory animal care professionals and researchers, administers certification programs for laboratory animal technicians and managers, publishes scholarly journals, supports laboratory animal science research, and serves as the premier forum for the exchange of information and expertise in the care and use of laboratory animals. AALAS was founded as the Animal Care Panel in 1950. See also <https://www.aalas.org/iacuc> for a compilation of resources for IACUCs.

American College of Laboratory Animal Medicine, see <https://aclam.org/>. ACLAM advances the humane care and responsible use of laboratory animals through certification of veterinary specialists, professional development, education, and research.

American Society of Laboratory Animal Practitioners, see <https://aslap.org/about>. ASLAP provides a mechanism for the exchange of scientific and technical information among veterinarians engaged in laboratory animal practice. ASLAP actively encourages its members to provide training for veterinarians in the field of laboratory animal practice at both the pre- and postdoctoral levels and lend their expertise to institutions conducting laboratory animal medicine programs.

Association of Primate Veterinarians, see <https://www.primatevets.org/about-apv>. APV is an international organization consisting of over 400 veterinarians concerned with the health, care, and welfare of nonhuman primates.

U.S. Government Principles for the Utilization and Care of Vertebrate Animals Used in Testing, Research, and Training

The development of knowledge necessary for the improvement of the health and well-being of humans as well as other animals requires *in vivo* experimentation with a wide variety of animal species. Whenever U.S. Government agencies develop requirements for testing, research, or training procedures involving the use of vertebrate animals, the following principles shall be considered; and whenever these agencies actually perform or sponsor such procedures, the responsible Institutional Official shall ensure that these principles are adhered to:

- I. The transportation, care, and use of animals should be in accordance with the Animal Welfare Act (7 U.S.C. 2131 et seq.) and other applicable Federal laws, guidelines, and policies.
- II. Procedures involving animals should be designed and performed with due consideration of their relevance to human or animal health, the advancement of knowledge, or the good of society.
- III. The animals selected for a procedure should be of an appropriate species and quality and the minimum number required to obtain valid results. Methods such as mathematical models, computer simulation, and *in vitro* biological systems should be considered.
- IV. Proper use of animals, including the avoidance or minimization of discomfort, distress, and pain when consistent with sound scientific practices, is imperative. Unless the contrary is established, investigators should consider that procedures that cause pain or distress in human beings may cause pain or distress in other animals.
- V. Procedures with animals that may cause more than momentary or slight pain or distress should be performed with appropriate sedation, analgesia, or anesthesia. Surgical or other painful procedures should not be performed on unanesthetized animals paralyzed by chemical agents.
- VI. Animals that would otherwise suffer severe or chronic pain or distress that cannot be relieved should be painlessly killed at the end of the procedure or, if appropriate, during the procedure.
- VII. The living conditions of animals should be appropriate for their species and contribute to their health and comfort. Normally, the housing, feeding, and care of all animals used for biomedical purposes must be directed by a veterinarian or other scientist trained and experienced in the proper care, handling, and use of the species being maintained or studied. In any case, veterinary care shall be provided as indicated.
- VIII. Investigators and other personnel shall be appropriately qualified and experienced for conducting procedures on living animals. Adequate arrangements shall be made for their in-service training, including the proper and humane care and use of laboratory animals.
- IX. Where exceptions are required in relation to the provisions of these Principles, the decisions should not rest with the investigators directly concerned but should be made, with due regard to Principle II, by an appropriate review group such as an institutional animal care and use committee. Such exceptions should not be made solely for the purposes of teaching or demonstration.

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Situations That Require the Use of Animals in Biomedical Research

**NM Bar Association
August 31, 2017**

Derek Hamilton, Ph.D.
Professor of Psychology
University of New Mexico

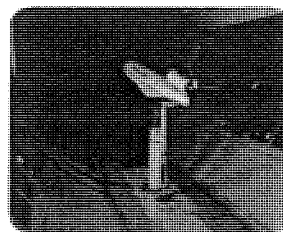
Chair, Institutional Animal Care and Use Committee (IACUC)

Outline and Goals of Presentation

- *What* model systems are and *why* they are used in science.
- Legal factors and scope concerning *when* work with animals is required.
- Federal agency requirements concerning work with non-human animals.
- Understand the sequence of work required for US FDA approval.
- Alternatives to work with animals.

Model systems

A model systems approach to science involves utilizing *simple* (model) systems to generate knowledge that is potential useful in understanding more complex systems.

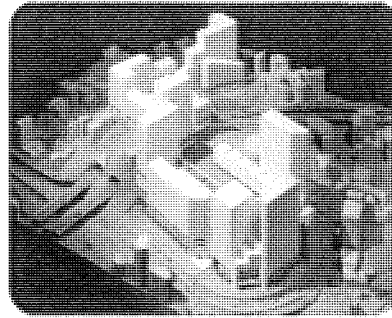


Some factors influencing the use of model systems approaches.

- Ethical
- Legal
- Practical
- Conceptual

Model systems

- The importance of correspondence between the model system and the real system with respect to the dimension of interest
- Observations in the model system are predictive of outcomes in the real system



Model systems

Evaluation of the success of a model system is relative to the goals of the approach.

Omega-6 Fatty Acids

Limitations of studies in rodents for generalization to humans

Complex Behavior

Social behavior, emotion, memory, language

Basic and Applied Research

Model systems approaches are utilized in basic and applied work

Applied research is undertaken to solve a particular problem (to develop an application).

Basic research is undertaken to understand general principles (how things work).

Knowing which basic research projects will lead to successful applications in advance is difficult.

Basic and Applied Research

The National Cancer Act of 1971 and the War on Cancer

Basic knowledge regarding cell adhesion molecules was not well established, and is not complete.

Legal Requirements

Compliance with the Federal Food, Drug, and Cosmetics Act, the Public Health Service Act, and the Public Welfare Act.

- Work that cannot legally or ethically be performed with humans.
- Work that must be performed with animals to establish safety and effectiveness prior to human trials.

Additional Considerations

Objectives of Research

Intended application to humans?

Benefit only to non-human animals?

Levels of analysis.

Protections for Humans

Nuremberg Code

1. Required is the voluntary, well-informed, understanding consent of the human subject in a full legal capacity.
2. The experiment should aim at positive results for society that cannot be procured in some other way.
3. It should be based on previous knowledge (e.g., an expectation derived from animal experiments) that justifies the experiment.
4. The experiment should be set up in a way that avoids unnecessary physical and mental suffering and injuries.
5. It should not be conducted when there is any reason to believe that it implies a risk of death or disabling injury.
6. The risks of the experiment should be in proportion to (that is, not exceed) the expected humanitarian benefits.
7. Preparations and facilities must be provided that adequately protect the subjects against the experiment's risks.
8. The staff who conduct or take part in the experiment must be fully trained and scientifically qualified.
9. The human subjects must be free to immediately quit the experiment at any point when they feel physically or mentally unable to go on.
10. Likewise, the medical staff must stop the experiment at any point when they observe that continuation would be dangerous.

Protections for Humans

Belmont Report (1978)

Respect for persons: protecting the autonomy of all people and treating them with courtesy and respect and allowing for informed consent. Researchers must be truthful and conduct no deception;

Beneficence: The philosophy of "Do no harm" while maximizing benefits for the research project and minimizing risks to the research subjects; and

Justice: ensuring reasonable, non-exploitative, and well-considered procedures are administered fairly — the fair distribution of costs and benefits to potential research participants — and equally.

Protections for Humans

National Research Act (1974)

Public Welfare Act, Title 45, Part 46
Research with Humans
Institutional Review Board

Protections for Non-human Animals

Animal Welfare Act (1966)

US Department of Agriculture, for covered species

The Health Research Extension Act of 1985 (99-158) provides the legislative mandate for the Public Health Service (PHS) Policy on Humane Care and Use of Laboratory Animals (Policy).

Office of Laboratory Animal Welfare (OLAW) provides guidance and interpretation regarding PHS Policy and monitors compliance for assured institutions and PHS-funded projects. OLAW publishes the "Guide for the Care and Use of Laboratory Animals"

Institutional Animal Care and Use Committee (IACUC)
Review of protocols, compliance with assurances and PHS policy.

US Food and Drug Administration (FDA)

A federal agency under the Department of Health and Human Services (DHHS).

The FDA does not make laws, but is empowered by congress to enforce laws and establish regulations.

US Food and Drug Administration

The FDA is responsible for protecting and promoting public health through the control and supervision of ...

- food safety
- prescription and OTC pharmaceutical drugs (medications)
- medical devices
- vaccines
- biopharmaceuticals
- blood transfusions
- electromagnetic radiation emitting devices (ERED)
- cosmetics
- animal foods & feed
- tobacco products

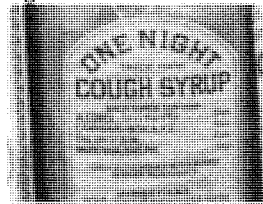
US FDA History and Selected Amendments

- 1906 : Pure Food and Drug Act
- 1938 : Federal Food, Drug, and Cosmetic Act
- 1944 : Public Health Services Act
- 1962 : Kefauver-Harris Amendment
- 1976, 1990, 1992 : Medical Devices Amendments
- 2011 : Food Safety Modernization Act

Pure Food and Drug Act of 1906

A consumer protection law enacted to address adulteration and mislabeling of food products and drugs.

Ingredients considered addictive and/or dangerous must be listed on labels, and could not be listed if not present (e.g., alcohol, opium).



Enforcement was charged to the Bureau of Chemistry in the US Dept. of Agriculture (USDA), which later became the FDA in 1930.

Safety was not emphasized and approval was not required prior to marketing.

Sulfanilamide Tragedy

Elixir Sulfanilamide tragedy (1938).

In the early 1930s the effectiveness of sulfanilamide in preventing bacterial infection was demonstrated in mice.

Several companies developed and marketed sulfanilamide drugs in tablet form (Lilly, Merck). S.E. Massengill company of Tennessee marketed a liquid form.

The Massengill concoction was 72% diethylene glycol, which caused 107 deaths.

Federal Food, Drug, and Cosmetic Act of 1938

A consumer protection law enacted to address the safety of food and drug products.

US Code Title 21 (Food and Drugs), Chapter 9.

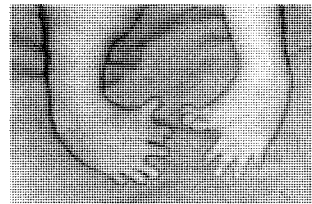
The FFDCA is more comprehensive than the Pure Food and Drug Act of 1906, which primarily emphasized accuracy in labeling.

Federal Food, Drug, and Cosmetic Act of 1938

Kefauver-Harris Amendment (1962)
"Drug Efficacy Amendment"

Requires drug manufacturers to demonstrate *safety* and *effectiveness* prior to marketing.

Prompted by the thalidomide tragedy in Europe and other countries (thalidomide was never approved by the US FDA)



Federal Food, Drug, and Cosmetic Act of 1938

Medical Devices Amendment (1976)

Provides for the safety and effectiveness of medical devices intended for human use.

Prompted by numerous injuries caused by medical devices.

US FDA Approval

New medical products (e.g., drugs, implants) require FDA approval before marketing in the US.

Approval requires product safety and effectiveness to be demonstrated and for potential benefits to outweigh risks.

- Discovery
- Preclinical evaluation
- Phase I (Human)
- Phase II (Human)
- Phase III (Human)
- FDA review
- Post-marketing testing

US FDA Approval

Work with animals is primarily required to address safety of medical products.

For drugs and biologics the emphasis is on the drug's

- chemistry
- pharmacological effects
- potential damage to the body (toxicity)
- pharmacokinetics (absorption, metabolism of the drug, toxicity of metabolites, time for elimination from the body).

US FDA Approval

For medical devices the emphasis is on the device's ability to function in living tissue without causing harm (biocompatibility).

Class I – Low risk in humans

Require General Controls

Class II – Moderate risk in humans

Performance Standards

Class III – High risk in humans

Premarket Approval for Safety and Effectiveness

US FDA Approval

When work with non-human animals is performed for FDA approval of products, adherence to FDA regulation *Good Laboratory Practice for Nonclinical Laboratory Studies* (21 CFR Part 58) is required.

FDA also requires approval by independent animal care and use committees (IACUC) for laboratory studies.

US FDA “Animal Rule”

The “Animal Rule” provides a pathway to drug or biologic approval without completion of clinical trials in humans.

Approval can be granted based on data exclusively from animal work when the work cannot be performed ethically in humans, and/or when field studies in humans cannot be performed.

US FDA “Animal Rule”

FDA will rely on evidence from animal studies to provide substantial evidence of effectiveness only when several criteria are met

- Pathophysiological mechanisms are understood and the product is reasonably expected to be effective
- The effect is demonstrated in more than one species, or in one species with good predictive validity
- The endpoint is clearly related to desired benefit in humans
- Pharmacology data allow for identification of dose in humans

US FDA Animal Drugs

Evaluation of new drugs intended only for use in non-human animals requires work with non-human animals.

US FDA Approval : Exemptions/Exceptions

Medical devices : If the constituents of the device have already been established as safe classified based on FDA risk categories then no work with animals is required and a premarket notification (under 510k) may be sufficient.

Established safety : Food, drug, and cosmetic products composed of ingredients known to be safe do not require animal work.

Abbreviated approval : Typically applies to generic drugs.

The three R's and Alternatives

FDA : "There are still many areas where animal testing is necessary and non-animal testing is not yet a scientifically valid and available option. However, FDA has supported efforts to reduce animal testing. In addition, FDA has research and development efforts underway to reduce the need for animal testing and to work toward replacement of animal testing." (retrieved from fda.gov on Aug 11, 2017).

- Organs/Systems on a chip
- Computational approaches

Summary

- FDA Approval of new medical products requires safety and effectiveness to be established.
- Safety may be established based on prior knowledge of the elements of the new product.
- New investigational products with no prior history require initial work with animals prior to clinical trials.
- Approval of medical products designed for the benefit of non-human animals require work with non-human animals.
- Models are selected and used to provide understanding or prediction of outcomes in more complex systems.
- Emerging technologies may offer predictive model systems that can replace or reduce the need for work with animals.

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Alternatives to Animal Use in Research, Testing and Training

[illegible]

The Bioethics of Research Using Nonhuman Animals

CLE: Taking Animal Ethics Seriously

John P. Gluck

UNM

Kennedy Institute of Ethics

Georgetown University

jgluck@unm.edu

<http://press.uchicago.edu/ucp/books/book/chicago/V/bo23671366.html>

Former NIH Director James Wyngaarden: "Science should not be hampered by ethical Considerations."

Nobel Recipient-Physiology and Medicine Robert Gallo: "I would lock the protesters up in a psychiatric facility."

Nobel Laureate - Literature John Coetzee: Animal treatment is a "crime of stupefying proportions"

Nobel Laureate - Literature I.B. Singer: "...for the animals, it is an eternal Treblinka"

Neurosurgeon and Bioethicist Robert J. White: "Animal ethics???"

Biomedical Researcher - Peter Grabitz: "The pressure to publish more articles is unrestrained by the lack of veracity in what is published."

I. Definition of Terms: Morality, Ethics; Common Morality; Professional Morality; Harm;

II. Ethical Theories and their Focus. An Ethical Event:

The Act	The Actor	The Consequence	The Context
----------------	------------------	------------------------	--------------------

I. Kant

Aristotle

JS Mill, J Bentham

C. Gilligan

III. Desire, Progress, The Unfinished Creation, Science/Technology and Cultural Judgment - "Machines as the Measure of Men" - M. Adas

IV. Early Evidence of Concern for Animal Harming: Las Caux, Altimira, Chauvet, Hunter-Gatherer Ritual Apologies

V. The Modern Problem: Goltz /Ferrier Debate - 1881 7th world Congress. "It is a Patient" - J. Charcot. "Arrowsmith" Sinclair Lewis (1925). The Naturalization of Animal Research

VI. Central Question: What Characteristics must an Entity Possess to be Protected by the Ethical (and legal) Norms of a Society? - Moral Standing

A. Historical Example: Juan de Sepulveda and Bartoleme de Las Casas (1550, 1551)

B. Related Controversial Questions: Definition of Death, Abortion, Chimeras...

- C. Ability to Engender Acts of Human Charity
- D. Complex Cognition: Second Order Intentions
- E. Having Interests, Plans, Sense of a Self Continuing Through Time
- Richness of a Life: Metaphysical Personhood
- F. Acting in Concert with Societal Duties and Responsibilities:
- Greco/Roman Tradition
- G. Feeling Pain and Pleasure – Jeremy Bentham
- H. Life Feels Like Something.
- I. Simply Having an Ecological Place in the World. Deserving or Needing Protection
- J. The Closer to Human Characteristics the Better
 - 1. Animal Minds - The current view - The Cambridge

Declaration

VI. What level of Standing? - They Matter but Human Needs Override; Equal Consideration; Rights of Some Kind - Ruth Harrison (1964) The 5 Freedoms: disease, discomfort, pain, hunger/thirst, restriction of species typical behavior.

IV. Is the system of regulatory protection in the US adequate? The 3Rs

A. When do IACUCS work best?

1. **Varied membership.** 2. Goes **beyond info provided.** 3. Acknowledges **Responsibility that inherently valuable lives are in the balance.** 4. **Put aside demands of relationships and friendships.** 5. Access to info about **what constitutes welfare - beyond just the absence of disease.** 6. The balance between **experimenter convenience and welfare needs.** 7. **experimental design.** 8. **ethics sophistication .**

VII. The Effectiveness of Animal Models - the gold standard for preclinical research? Are the results compromised?

VIII. What is Missing?

A. Henry K. Beecher NEJM (1966).

1. "science is not the highest value to which all others ... should be subordinated"

2. Informed Consent

3. Gain Proportional to the Risks

4. Research must be Ethical at Inception

5. No Creating Martyrs for Science

6. The Incentive Structure of the Research Environment

B. The Moral Residual

C. David Hume: The "Is-Ought" Distinction

D. The Issue of Critical Distance.

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Aftermath of Research:
Litigation, Retiring Research
Animals; New Mexico's Chimps

The Law and Bioethics of Using Animals in Research

AFTERMATH OF RESEARCH

Litigation, Retiring
Research Animals, and
New Mexico's Chimps

Laura Bonar, R.N. &
Jessica Johnson, J.D.
Animal Protection of New Mexico



History of Chimpanzee Use in Invasive Research in New Mexico



Research Using Chimps in NM: 1950s

- Excerpt from **History of Research in Space Biology and Biodynamics at Air Force Missile Development Center, Holloman AFB: ADMINISTRATIVE HISTORY OF THE AEROMEDICAL FIELD LABORATORY AT THE AIR FORCE MISSILE DEVELOPMENT CENTER 1951-1958; ADMINISTRATIVE HISTORY AEROMEDICAL FIELD LABORATORY 1951-1958**
 - ...A wide variety of animals is required for research at Holloman because no one animal is suited for all test purposes. As Colonel Stapp remarked to a Congressional subcommittee: *You wonder why I use hogs-hogs and chimpanzees? Well, man is somewhere between the hog and the chimpanzee. Some people are more like hogs; others are more like chimpanzees.* In over-all proportions and in some details of internal structure the chimpanzee-for example-is actually quite similar to man, but in certain aspects of spinal structure the bear seems a better fit. Bears had the added advantage of being cheaper and more plentiful than chimpanzees. Hogs, of course, are the most plentiful of all, at least among the large animals, and in addition have their points of resemblance to the human body.

Research Using Chimps in NM: 1950s-1960s

- Testing by US Air Force on 65 very young chimpanzees at HAFB began in the 1950s. Chimps were used for tests involving the forces of gravity, the effects of high-speed movement, and other conditions anticipated in space travel.

Unfortunately, the headrest failed even before the sled reached supersonic speed, the helmet failed in turn, and the head was yanked so violently as to break the subject's neck.

—Project Abrupt Deceleration,
Weekly Test Status Report,
16 Sept and 26 Oct 1954, 8 Feb 1955.
NASA History site

- Ham was about 3 ½ when he was selected as the chimpanzee to test the safety of space flight, travelling approximately 5800 mph, 157 miles above the earth.
- Enos was selected to orbit the earth and died 11 months after his test flight. Enos received 76 shocks in orbit for performing as he had been trained because of problems with the equipment.
- Ham was transferred to The National Zoo in 1963 where he lived alone for 17 years, and then sent to the North Carolina Zoo where he could live with other chimps. He died January 18, 1983, at the estimated age of 26. Some of Ham's remains are at the New Mexico Space History Museum in Alamogordo.



Ham shown in a fear grimace after his space flight in 1961. Photo: National Archives



Fig. 1. A chimpanzee wearing a spherical helmet with various sensors. The helmet is made of a lightweight material and is designed to be comfortable and secure. The helmet is connected to a computer system which records the data from the sensors. The helmet is also connected to a power source which provides the necessary power for the sensors.

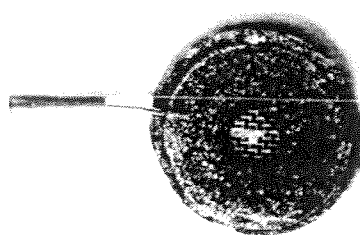


Fig. 2. A chimpanzee wearing a spherical helmet with various sensors. The helmet is made of a lightweight material and is designed to be comfortable and secure. The helmet is connected to a computer system which records the data from the sensors. The helmet is also connected to a power source which provides the necessary power for the sensors.

The helmet was attached to the chimpanzee's head with a strap and a buckle. The helmet was made of a lightweight material and was designed to be comfortable and secure. The helmet was connected to a computer system which records the data from the sensors. The helmet was also connected to a power source which provides the necessary power for the sensors.

Images from NASA's "Project Mercury Ballistic and Orbital Chimpanzee Flights"

Research Using Chimps in NM: 1960s-1980s

- **1964:** Eight chimpanzees have electrodes surgically implanted into their skulls, sternums, and vertebrae in space decompression experiments.
- **1970:** Chimpanzees are no longer needed for the space program so the Air Force begins leasing them to laboratories.
- **1972:** Toxicologist Frederick Coulston, Ph.D., leases some chimpanzees.
- **1980:** At Coulston's private laboratory—the White Sands Research Center—chimpanzees are used for toxicity testing and infectious disease research.
- **1988:** White Sands advertises the availability of chimpanzees for testing cosmetic and insecticide products.



Flo, born in the wild, was captured and exhibited in a circus and a zoo before being purchased and brought to Alamogordo in 1972 for use in breeding. Flo died in 2015 before reaching sanctuary.

Photo: National Institutes of Health

The Coulston Foundation: Early '90s

- **April 1993:** New Mexico State University (NMSU) announces intent to transfer lease to operate primate lab on Holloman Air Force Base to Coulston. Coulston consolidates his for profit companies into the non-profit Coulston Foundation (TCF) in order to receive from NMSU hundreds of chimpanzees and monkeys, \$400,000 in cash, and more than \$700,000 in chimpanzee "endowment" funds restricted for the lifetime care of specific chimpanzees.
- **July 1, 1993:** TCF assumes management of Holloman chimp colony. Combined with the chimpanzees at White Sands, TCF now claims ownership of more than 500 chimpanzees, making it the world's largest captive chimpanzee colony. Included are more than 140 Air Force-"owned" chimpanzees, who have been used in space flight research and whom TCF "leases."
- **October 31, 1993:** Three chimpanzees—Robert, James and Raymond—overheat and die after the temperature in their unmonitored enclosure soars to 150 degrees.
- **May 1994:** The National Institutes of Health (NIH) conducts a site visit at TCF, and finds TCF's veterinary care program "inadequate" and its overall animal care and use program out of compliance with the minimal standards mandated by the NIH Guide for the Care and Use of Laboratory Animals.
- **December 1994:** Four monkeys at Holloman die from water deprivation.
- **February 1995:** A USDA inspection report shows that TCF caretakers had falsified daily care logs for the four dead monkeys. The USDA inspector notes that the caretakers should have noticed the obvious signs of monkeys slowly and painfully dying from thirst.
- **July 1995:** The USDA formally charges TCF for multiple violations of federal animal welfare laws which had led to the deaths of the three chimpanzees who overheated and the four monkeys who died of thirst. Numerous chimpanzee caging size violations are also noted.

Page 5
Regents' Minutes
April 16, 1993

is the Treasurer of the Southwest Foundation for Biomedical Research. As indicated on the letterhead, it is located in San Antonio, Texas. Some of you may know that the Southwest Research and Mid-West Research are non-profit entities that did research on specialty areas. Southwest Research has spun off this Foundation because they wanted to separate their liability and activities with respect to biomedical activities. Based upon his experience in this area, Mr. Speck believes that the supply of chimpanzees for research exceeds the demand, and that the market is very limited. You will note in his letter that he says: "We might be able to sell 5 to 10 a year." To my knowledge, NMSU has never sold one. He said, "... it would be improbable, if not impossible, to sell an entire colony." His estimate of the annual liability to maintain 150 chimpanzees was \$547,500 per year. Those are Southwest Foundation for Biomedical Research's research costs. For 351 chimpanzees (NMSU 220, USAF 131) at the NMRRPRL (utilizing the figures from Mr. Speck) translates to \$1,281,150 per year as the liability for NMSU. If the colony was assumed to have an average lifespan of 20 years, that translates to over \$25 million of contingent liability.

* Also attached is a report from the National Chimpanzee Breeding and Research Program (CBRP). Quoting from this report:

Page 1, "The continued non-availability of appropriate facilities for research and housing of chimpanzees will soon force a crisis type of management for this vital animal resource rather than allowing the CBRP to make plans and decisions based on the best long-range interests for biomedical research."

Page 2, "At present, the supply of chimpanzees for research exceeds the demand. The CBRP has an adequate reserve at this time and may be 2-3 years ahead of predicted requirements for animals in the area of AIDS vaccine testing. There are also approximately 150 chimpanzees (not in the CBRP) that are available for biomedical research. Most of these animals were exposed to hepatitis, but are clinically normal."

Page 3, "The CBRP has been successful, but lack of research use, coupled with limited holding space makes population growth a serious problem."

Page 4, "The biomedical research community is accustomed to working with short-lived animals — i.e. animals are used up (terminated), and animal colonies are restocked with new (younger) animals."

Page 5, "Economics is becoming the driving force related to research use of chimpanzees. HIV research may trend in the future toward use of more macaque models. The very limited period of research utility for the use of the chimpanzee (1-2 years) compared to its long-term care requirements and necessary commitments by the user agency are major considerations."

"There is a surplus of chimpanzees. I could take you to the site where I first said, 'We have a deficit at the PRL; let's sell some.' The facial muscles of the person to whom I am referring told me that what I had been told was a valuable resource was a surplus resource."

Page 6
Regents' Minutes
April 16, 1993

"In the proposed Memorandum of Agreement, Coulston International Corporation estimates the long-term liability of 350 chimpanzees at \$14 million. Finally, NMSU has consistently had difficulty balancing the budget at NMRRPRL. The cumulative deficit over twelve years is \$2.3 million as of June 30, 1992. If the University had an average of \$150,000 a year over the next 40 years is conservative estimate, I believe, this would consume \$14 million in support. It is the assessment of the Administration, and the person who speaks to you, that the liabilities are in excess of \$14 million.

"You can look at the assets. We have (as reported by our Business Office) capital outlay and equipment totaling \$2,452,239 (animals and equipment). Not included on this list are two items. The first of these items involves endowments of \$755,000 for 35 chimpanzees who are no longer useful for testing purposes. It is our assessment that the liabilities are equal to or greater than the assets value, and we recommend that they be considered.

"The use of the original buildings was transferred to New Mexico State University from Auburn Medical College in fiscal year 1980-81. The lease with the U.S. Air Force for these facilities expires in the year 2000.

"In addition, the Federal Government provided \$10 million for new housing for approximately 284 chimpanzees. Coulston International Corporation has agreed to use these facilities for their intended purpose and to provide animals to NMSU in payment to these and other facilities, on a grant available basis at standard government rates. NMSU will be provided oversight to ensure reasonable access to these monkeys by our faculty. It is our judgement that NMSU is not losing any asset value by this arrangement and it is ensuring the facility will be used for its intended purpose.

"Behind Tab 8, Mr. President and members of the Board, is a Memorandum of Agreement with Coulston International Corporation. [See Appendix A for a complete copy.] If it please the Board, I will not go through and read every aspect of it to you since you have received it in the mail and have had a chance to review it. I shall simply give you a few highlights that I think are important:

"The first is that a non-profit corporation or a new foundation (which will be referred to as CICNP) will be established by CIC under which the trusteeship and management of NMRRPRL will be placed. We are not giving this to a profit-making entity, but instead to a non-profit entity. Larry Bill Cushman will be the Chief Operating Officer. He will have responsibility for the organization.

"All current NMRRPRL employees expressing an interest in employment with CIC or CICNP will be given priority consideration for any position for which they are employed within a CIC organization. We are not talking just about the non-profit aspect; we are also talking about the operation throughout the corporation. They will be given priority consideration on an individual basis.

"The next is an important one, and I want to pause just a moment to try to ensure that the Board appropriately appreciates this. I had the good fortune to meet Eileen Coulston.

The Coulston Foundation: Late '90s

- **August 1995:** New York University (NYU) announces its intention to give TCF its Laboratory for Experimental Medicine and Surgery in Primates (LEMSIP) primates—including more than 200 chimpanzees. The deal falls through, but not before NYU gives TCF 99 chimpanzees and more than \$1.75 million in cash. LEMSIP Director C. James Mahoney, DVM, Ph.D. transfers the remaining chimpanzees to various sanctuaries and other facilities
- **June 1996:** TCF settles the July 1995 USDA charges by agreeing to pay a \$40,000 fine and promising to comply with the federal Animal Welfare Act (AWA).
- **January 1997:** TCF's chief veterinarian, Dr. Pat Frost, resigns. She was the only remaining TCF veterinarian with the credentials and experience necessary for managing the lab's large chimpanzee colony, according to a May 1994 NIH site visit. Dr. Frost becomes the seventh veterinarian to leave since TCF assumed management of the Holloman primates in July 1993.
- **January 21, 1997:** Jello, a healthy 11-year-old former-LEMSIP chimpanzee dies after being negligently anesthetized in a group by an inexperienced veterinarian. Pathology reports show Jello's lungs and trachea to be full of plant material, indicating that he had not been fasted prior to sedation.
- **February 4, 1997:** In a front-page *New York Times* story TCF claims that no negligence was involved in Jello's death. In the article, TCF founder Fred Coulston states that he could raise chimpanzees like cattle for use as human blood and organ banks, and claims lead levels in the blood have no effect on intelligence.

The Coulston Foundation: Late '90s

- **April 23, 1997:** The Environmental Protection Agency (EPA) files a formal complaint (FIFRA-H-08) against TCF predecessor, Coulston Products, Inc., an Easton, Pennsylvania-based company then owned by Frederick Coulston. The complaint cites multiple and serious violations of Good Laboratory Practice Standards (GLPs) under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Although the complaint was filed against Coulston Products, Inc., the actual laboratory where the violations occurred was White Sands Research Center in Alamogordo, New Mexico, a predecessor of The Coulston Foundation. (White Sands Research, Inc. merged with TCF in 1994). Among numerous complaints about TCF research procedures, the EPA also cited the lab for submitting a false compliance statement. On October 14, 1997, Coulston Products settles the EPA complaint by agreeing to pay a \$12,000 fine and promising to comply with "the requirements set forth in FIFRA and its regulations." Frederick Coulston, Chairman of the Board and CEO of Coulston Products, Inc., signs the consent order.
- **July 1997:** TCF chief veterinarian Dr. Drew Williams resigns, along with another veterinarian and the lab's psychological enrichment director.
- **July 31, 1997:** A USDA inspection report finds numerous violations, including lack of proper procedures, regarding a *Shigella* outbreak that has killed several chimpanzees. Among the causalities is Panda, another former-LEMSIP chimpanzee. The USDA characterizes the *Shigella* outbreak as a "public health risk."
- **February 24-25, 1998:** TCF schedules a site visit by the Association for Assessment and Accreditation of Laboratory Animal Care (AAALAC). AAALAC cites the lab for inadequate veterinary staffing, experience and care, inadequate IACUC functioning, and physical plant problems and withholds accreditation.

The Coulston Foundation: Late '90s

- **March 19, 1998:** The USDA formally charges TCF for the negligent deaths of Jello and Echo, failure to provide adequate veterinary care, and numerous physical plant and sanitary violations. The charges state that TCF failed "to establish and maintain programs of adequate veterinary care by group sedating chimpanzees (Jello) and by failing to treat chimpanzee Echo for shock and to stabilize him before surgical treatment." It is the first time in the history of the AWA that the USDA has formally charged a facility for violations related to negligent primate deaths.
- **April 1998:** Nelson Garnett, the head of the NIH's Office of Protection from Research Risks (OPRR), which is responsible for enforcing PHS, claims that TCF has fixed all of its problems. Garnett is contradicted by the findings of the USDA and AAALAC, which evaluates labs for their compliance with this PHS policy.
- **June 9-11, 1998:** A USDA inspection report cites TCF for uncorrected IACUC violations.
- **June 26, 1998:** Chimpanzees Terrance and Muffin die on the same drug study that had resulted in a January death of chimp Holly and from the same known drug side effect. The USDA launches an official investigation into the three chimpanzee deaths.
- **June 30, 1998:** AAALAC formally rejects TCF's accreditation bid and issues a report detailing the facility's deficiencies, including inadequate veterinary care, inadequate veterinary staffing, inadequate IACUC functioning, and numerous physical plant problems.

The Coulston Foundation: Late '90s

- **July 1998:** TCF contracts with Spinal Dynamics, a Mercer Island, Washington company to perform invasive cervical disk replacement experiments on chimpanzees. Spinal Dynamics' proposed study has already been rejected by at least one other chimpanzee lab.
- **August 1998:** Despite TCF's well-known, abysmal animal care record, the Air Force awards the lab 111 chimpanzees, sending the remainder to a Texas sanctuary.
- **August 1998:** The NIH approves a grant to study benign prostate hyperplasia on the chimpanzees at TCF. Study director is Mitchell Steiner of the University of Tennessee-Memphis. The NIH peer review process fails to address TCF's record of inadequate animal care and federal animal welfare law violations.
- **October 1998:** TCF veterinarian Scott Walden resigns, the 13th veterinarian to leave the lab since 1994.
- **December 2-3, 1998:** The USDA, for the second time in nine months, cites Coulston for failing to provide adequate veterinary care, because TCF now has only 2.5 clinical veterinarians to care for more than 600 chimpanzees and 300 monkeys. The USDA states that TCF needs 3-5 more veterinarians to establish an adequate animal care program.
- **December 1998:** Responding to USDA's December 2-3 findings, OPRR launches an investigation of TCF.
- **December 31, 1998:** The National Cancer Institute terminates a subcontract TCF inherited from NMSU to maintain HIV-infected chimpanzees.

The Coulston Foundation: 1999

- **February 8-10, 1999:** A USDA inspection report cites TCF for failure to employ qualified personnel to run a psychological enrichment program for almost 1,000 primates. The agency also cites TCF for illegally housing chimpanzees in single cages because the lab has nowhere else to house them.
- **February 11, 1999:** The USDA files a third set of formal charges against TCF. The complaint amends the March 19, 1998 complaint to incorporate the negligent deaths of three more chimpanzees: Terrance, Muffin and Holly. The charges state that TCF "failed to establish and maintain a program of adequate veterinary care by not making itself and its veterinarians aware of the known side effects and complications of pharmaceutical compounds being tested, resulting in the unnecessary deaths of three chimpanzees..." The USDA also cites TCF for numerous IACUC violations related to their deaths.
- **February 22, 1999:** The NIH's Office for the Protection from Research Risks (OPRR—later renamed the Office of Lab Animal Welfare) restricts TCF's Animal Welfare Assurance. NIH bases its restriction on "continuing concerns about the number of veterinarians and their credentials available to provide veterinary care to chimpanzees and other non-human primates at (TCF) and the major changes in other aspects of (TCF's) program of animal care and use..."
- **March 10, 1999:** Coulston meets with the USDA and several NIH offices, offering conflicting accounts of the lab's financial stability. He tells the USDA that TCF has only enough money left for one or two more payrolls.
- **March 16, 1999:** In a meeting with various USDA and NIH officials, OPRR's Garnett claims the NIH shares the USDA's concerns that TCF has inadequate IACUC review and inadequate veterinary staffing. He says that his office has "great concern about the long-term situation/animals at serious risk."
- **March 31, 1999:** TCF's contract with the National Institute on Allergy and Infectious Diseases to maintain HIV-infected chimpanzees expires. Along with the National Cancer Institute subcontract, this contract paid TCF more than \$10 million beginning in 1993, and was critical" to the lab's operations, according to CEO Fred Coulston

The Coulston Foundation: 1999

- **April 6-7, 1999:** NIH conducts a site visit and audit of TCF, discovering that the lab is on the verge of bankruptcy, with \$800,000 in unpaid bills and \$2.6 million in outstanding loans. NIH auditors report millions of dollars in endowments, meant for lifetime care of specific chimpanzees, have been "expended." Site visitors fault TCF for inadequate veterinary care. The NIH characterizes then-TCF president Ronald Couch as "evasive" and unfamiliar with the facilities, and reports that CEO Fred Coulston made "contradictory" statements.
- **May 1, 1999:** Chimpanzee Eason dies while on the Spinal Dynamics invasive spinal disk replacement experiment.
- **May 24, 1999:** TCF requests additional financial support from the NIH; supplementary awards begin in June.
- **May 25-27, 1999:** A USDA inspection report again cites TCF for multiple IACUC violations, many related to the invasive spinal disk experiment. The report notes that TCF was told to correct these violations in August 1997 and again in June 1998.
- **June 1999:** For the second time in two years, the USDA prepares a subpoena, this time for records related to Eason's death. A highly placed USDA official interprets TCF's refusal to turn over the records as reluctance to release damaging evidence.
- **August 19, 1999:** The FDA identifies more than 270 violations of GLP regulations on just three studies reviewed at TCF. GLP regulations exist to ensure data integrity and human safety. The report also documents numerous AWA violations.
- **August 24, 1999:** TCF settles March 1998 and February 1999 formal charges and the investigation into Eason's death by signing a Consent Decision and Order (Order—AWA Docket No. 98-0014) with the USDA under which the lab agrees to: comply with federal animal welfare laws; maintain disease control and prevention programs, euthanasia programs and adequate veterinary care programs under supervision of a doctor of veterinary medicine; employ an adequate number of veterinarians; cease breeding chimpanzees absent resources for the long term care of their offspring; and, divest of 300 chimpanzees by January 2, 2002. The USDA holds in abeyance a \$100,000 fine, pending TCF's compliance with the Order. Within four months, TCF violates the Order by breeding chimpanzees. The USDA never levies the fine.

The Coulston Foundation: 1999

- **October 19-22, 1999:** A USDA inspection report again cites TCF for IACUC violations.
- **November 9, 1999:** Donna, a 36-year-old ex-Air Force chimpanzee, dies after carrying a large, dead fetus inside her uterus for almost two months, resulting in massive infection and uterine rupture. During a belated C-section, the TCF veterinarians remove a liter of pus from her abdomen, and observe the dead fetus's skull poking through her torn uterus. Donna awakens from surgery and dies the next day.
- **December 13-16, 1999:** A USDA inspection report again finds TCF veterinary care inadequate in relation to the deaths of three more chimpanzees: Dean, Babu, and Albro. It is the fifth such finding since March 1998. The USDA reveals that TCF has only 2.4 clinical veterinarians—fewer than were employed when OPRR issued its restriction requiring TCF to hire seven fully qualified veterinarians.
- **December 22, 1999:** The FDA issues TCF a warning letter based on the agency's on-site investigation of the lab conducted between July 26 and August 19, 1999. Violations noted include: lack of standard operating procedures that insure the quality and integrity of study data; missing or misplaced documents; record discrepancies, and unapproved changes in experiment protocols. The FDA's 31-page observation of TCF violations fuels alarm. The data integrity of two drug studies and the study of a spinal device are questioned. The FDA concludes "that the conditions are serious violations of GLPs regulations...(and) unless these deficiencies are corrected, we would consider future studies conducted at your facility to be seriously flawed." The FDA directs that: "Prior to the initiation of any further new non-clinical laboratory studies, the observed GLP deficiencies must be corrected...." The prior August, the FDA had identified more than 270 GLP violations in the three studies.

The Coulston Foundation: 2000

- **January 2000:** The USDA launches an official investigation of Donna's death. Such full-blown investigations are precipitated when a preliminary inquiry finds evidence of AWA violations sufficient to warrant it.
- **February 2000:** To comply with the terms of the 1999 USDA Order, TCF's External Review Team invites AAALAC to conduct another on-site inspection, completed in February. AAALAC issues its report on April 28, 2000, again finding TCF veterinary care and staffing inadequate. AAALAC says the lab's IACUC is still not functioning properly and indicates that conditions have actually worsened since its February 1998 site visit. It notes a 100 percent turnover in veterinary staff and blames inadequate veterinary care for the deaths of four chimpanzees. AAALAC suggests deficient conditions may have played a role in the deaths of 13 other chimpanzees within two years.
- **February 17, 2000:** TCF denies USDA inspectors access to the facility, a blatant AWA violation.
- **March 2000:** TCF sells a young chimp to California animal trainer Sid Yost.
- **April 28, 2000:** The External Review Team (ERT) mandated by the 1999 USDA Order issues its report, acknowledging that AAALAC has again refused to accredit TCF. The AAALAC report states that: "the evaluation team identified issues ... mandatory...for correction, in the same programmatic and facilities areas indicated in the 1998 AAALAC report. The ERT team was of the opinion that resource shortages were sufficiently significant to preclude the current program from meeting the requirements of accreditation. Of further concern was (TCF President) Dr. Renquist's resignation from TCF shortly after the evaluation." In addition, AAALAC noted "...the complete separation of the experimental procedures from the husbandry procedures in most instances resulted in lack of knowledge/ understanding by animal care personnel as to research procedures/drugs being used."

Some Changes for NM Chimps: 2000

- **May 10-11, 2000:** Amid concerns about TCF's financial stability and staffing, the **NIH takes title to 288 chimpanzees**, ostensibly fulfilling the divestiture requirement of the 1999 USDA Order. An inventory states: "All of these animals have been reported by (TCF) to be either purposely or incidentally exposed/infected with various hepatitis viruses and/or HIV and need appropriate biocontainment and specialized veterinary care." **These chimps will be referred to as a "research reserve colony" after the new lease agreement between the Air Force and NIH stipulates that no invasive research may be conducted on the Base.**
- **May 19, 2000:** NIH restricts TCF's Animal Welfare Assurance for the second time, stating that based on the External Review Team Report, the lab is in "serious noncompliance" with PHS Policy. NIH directs TCF's IACUC—already found grossly deficient by both AAALAC and the USDA—to conduct the review.
- **July 11-14, 2000:** The USDA again cites TCF for multiple IACUC violations in an inspection report, including studies started without IACUC approval.
- **October 2000:** An independent peer review panel convened by the NIH rejects TCF's bid for the RFP to care for the 288—now 287—chimpanzees NIH took title to in May. The NIH cancels the RFP and sole sources its oversight contract to Charles River Laboratories.
- **October 23-26, 2000** – The USDA again cites TCF for multiple IACUC violations, as well as physical plant violations. TCF again attempts to deny access to the USDA inspectors, but relents after several hours.
- **November 27-December 8, 2000:** The FDA conducts another inspection of TCF. The FDA identifies five new laboratory studies TCF has initiated in violation of the agency's December 22, 1999 Warning Letter.
- **December 29, 2000:** The USDA launches the investigation into Ray's death.

The Coulston Foundation: 2001

- **July 12, 2001:** The USDA issues a fourth set of formal charges against TCF (AWA Docket No. 01-0044), noting that TCF has "failed to establish and maintain programs of adequate veterinary care" in relation to the negligent deaths of chimpanzees Ray (8/16/01) from an alleged "fungal infection" and Donna (10/27/99), from complications resulting from carrying a dead fetus in her womb for an extended period of time.
- **July 31, 2001:** The NIH cancels TCF's Animal Welfare Assurance, making the lab ineligible for further federal research funds.
- **September 2001:** APNM reviews the Pharmacy Board records, which raise serious concerns about the veracity of information provided to the Board by TCF in order to renew its annual animal control clinic and controlled substance applications. The records show TCF has failed to acknowledge to the Board disciplinary actions taken or pending by federal agencies as well as US District Court's finding that TCF created a hostile work environment and sexually harassed a female former employee.
- **October 25, 2001:** APNM formally exposes to the New Mexico Board of Pharmacy TCF's failure to disclose any federal complaints and enforcement actions as required, on its applications for licenses to dispense controlled substances. APNM asks the Board to investigate and to withhold approval of any TCF applications to renew its license to dispense controlled substances. The Board begins investigating APNM's complaint.

Sanctuary for Some NM Chimps: 2002

- **September 16, 2002:** Center for Captive Chimpanzee Care (CCCC), using a \$3.7 million grant from the Kalamazoo, Michigan based Arcus Foundation, purchases the beleaguered Coulston facilities. TCF "donates" 266 chimpanzees and 61 monkeys to CCCC.
- **September 30, 2002:** The NIH announces selection of Chimp Haven, Inc., a 200 acre Louisiana sanctuary located near Shreveport, to build and operate a sanctuary system for chimpanzees retired from federal biomedical facilities. Authorization of the program was established with passage of the federal CHIMP Act.

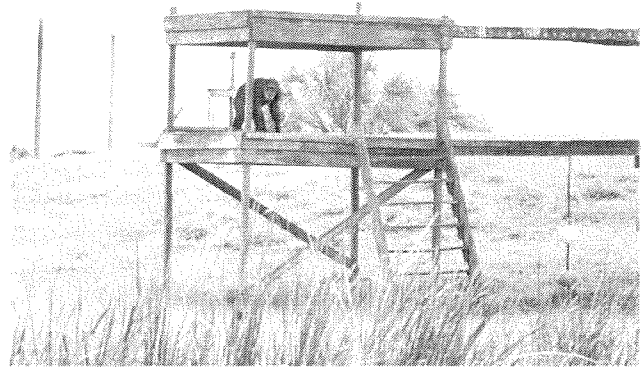
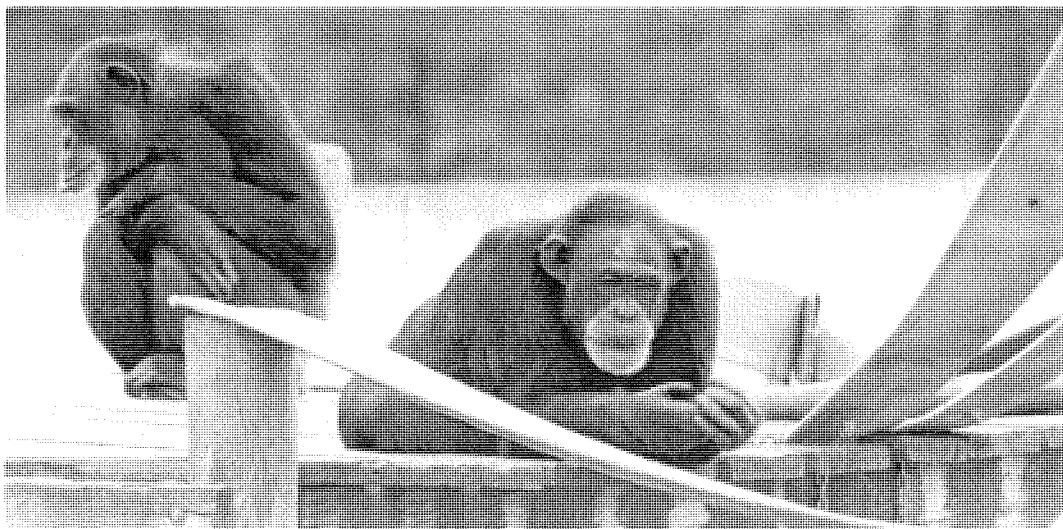


Photo: Yvette at Save the Chimps, by Sylvia Elzafor

Notable Litigation & Legislation Impacting Chimps (in NM and Beyond) in Research



Endangered Species Act Listing

- **1973** – ESA enacted
- **1976** – Chimpanzees listed as “threatened” (likely to become endangered within the foreseeable future) in 1976
 - **But USFWS promulgated 4(d) rule that stripped typical “threatened” protections from captive chimps originating from the U.S. so they could still be used in biomedical research, entertainment, and pets in the U.S.**
- **1990** – Wild chimpanzees declared “endangered” (in danger of extinction throughout all or a significant portion of range)
 - **But captive chimp status remained the same**

Ctr. for Captive Chimp Care v. Air Force

- **1997** – In 1997, the Air Force invited bids on 141 “surplus” chimpanzees. Bidders were required to demonstrate their financial ability to provide the chimpanzees’ lifetime care and to agree either to use them for research or to retire them.
- **Aug. 1998** – Despite TCF’s well-known, abysmal animal care record, the Air Force awards 111 chimpanzees to TCF, sending the remainder to Primarily Primates, a Texas sanctuary.
- **Oct. 1998** – The Florida-based Center for Captive Chimpanzee Care (CCCC) (now known as Save the Chimps), whose bid for the Air Force chimpanzees was rejected, sues the Air Force for awarding TCF the chimpanzees.
- **Oct. 1999** – The Air Force settles the CCCC lawsuit by awarding the sanctuary 21 chimpanzees previously awarded to TCF. Included are 17 descendants of former chimpanzee space program veterans.

Freedom of Information Act (FOIA) Lawsuit

- **2000** – Animal Protection of New Mexico (APNM) sued USDA Animal and Plant Health Inspection Service (APHIS) in U.S. District Court, when the agency withheld records responsive to 2 FOIA requests re: chimps at the Coulston Foundation (TCF) facility.

Timeline:

- **Feb.** – APNM submitted FOIA request
- **Apr.** – APNM sued APHIS for failing to provide records
- **May** – APNM submits a 2nd FOIA request, joined by In Defense of Animals
- **Jul.** – APNM sues again; FOIA case is consolidated with the first case
- **Mar. 2001** – Settled

Freedom of Information Act (FOIA) Lawsuit

- Through the lawsuit, APNM obtained records withheld by the USDA and certain information withheld from the records that were provided earlier to APNM. **Documents withheld by the USDA included:**
 - copies of key research protocols under which some chimpanzees had died;
 - the results of necropsies performed on the deceased chimpanzees;
 - the report of an External Review Team;
 - videotape of a 7-hour surgery where an experimental cervical disc was inserted into chimpanzee Leonard's spine.
- **Other records released subsequent to the lawsuit:**
 - TCF's atrocious record of inadequate veterinary care;
 - a chronic pattern of federal AWA violations
 - additional violations of research protocols;
 - TCF had continued to breed chimpanzees in direct violation of a USDA order, without penalty

2001 NM Cruelty Statute Amendments

Senate Bill 35 (Exceptions to Cruelty to Animals Provisions) (2001)

- Passed Senate 34-2
- Passed House on voice vote
- Signed by Gov.

4	(6) research facilities [intermediate
5	handlers, carriers and exhibitors] licensed pursuant to the
6	provisions of 7 U.S.C. Section 2136, <u>except when knowingly</u>
7	<u>operating outside provisions, governing the treatment of</u>
8	<u>animals, of a research or maintenance protocol approved by the</u>
9	<u>institutional animal care and use committee of the facility; or</u>

State of NM v. Charles River Labs

- **2002** – Two chimps died and a third nearly died while in the care of Charles River Labs (Alamogordo Primate Facility's NIH-contracted operator)
 - Ashley was wounded after an altercation with 11 other chimps; untreated although known to be prone to hemorrhage; bled out and died
 - Rex suffered from organ failure was left semi-conscious after anesthetized for an examination; asphyxiated on vomit and died
 - Topsy suffered immense blood loss from a wound after a fight with another chimp; found listless, pale, in a pool of blood; needed blood transfusion following morning to replace half her blood volume; survived
- **2004** – Otero County Dist. Attorney brought three counts of animal cruelty charges against Charles River Labs and lead veterinarian Dr. Rick Lee
- District court dismissed the case, ruling that chimp deaths/suffering did not constitute cruelty because it fell under cruelty statute's veterinary practice exemption
- **2007** – NM Court of Appeals affirmed
- **2008** – Supreme Court did not reverse

NM AG's Civil Investigative Demand

- **Early 2002** – APNM brought to the attention of NM Attorney General Patricia Madrid evidence of TCF's potential misappropriation of tax funds permanently restricted to endowments for the long term care of specific chimpanzees.
 - (1) Were the purposes for which TCF was incorporated by the state of New Mexico as a private non profit remain valid; and
 - (2) Did TCF unlawfully expend restricted endowment funds?
- **Aug. 2002:** AG issued a Civil Investigative Demand (CID) for TCF's audited financial statements from 1993 through the present.
- **Sep. 2002:** TCF filed suit to block the AG's request. TCF claims AG has no jurisdiction because the New Mexico Charitable Solicitations Act—under which the AG seeks the records—does not apply.
- **Jan. 2003:** Twelfth Judicial District Court ruled to enforce the AG's Civil Investigative Demand, requiring TCF to turn over financial documents that had been withheld. The judge ordered that the AG must keep the documents confidential. TCF appealed.
- **Mar. 2004** – NM Court of Appeals upheld lower court ruling.

Efforts to recognize personhood and rights

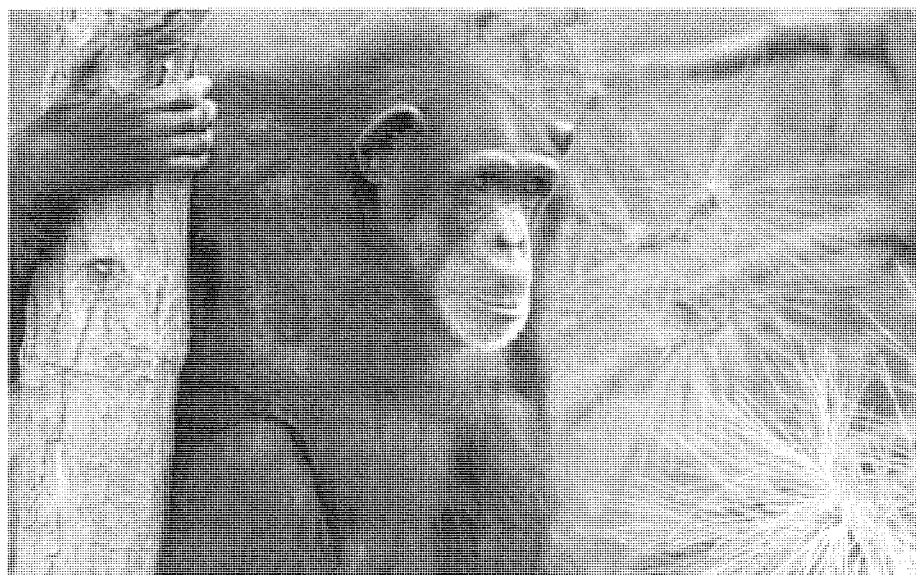
- **2013** – The Nonhuman Rights Project filed a petition for a common law writ of habeas corpus in NY State Supreme Court (first denied without hearing; then issued after a second 2015 filing with an order to show cause)
- **2015** – After a hearing to show cause, Jaffe expresses support support for the merits of the case but ultimately denied the petition:

pet Efforts to extend legal rights to chimpanzees are thus understandable; some day they may even succeed. Courts, however, are slow to embrace change, and occasionally seem reluctant to engage in broader, more inclusive interpretations of the law, if only to the modest extent of affording them greater consideration. As Justice Kennedy aptly observed in *Lawrence v Texas*, albeit in a different context, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." (539 US 558, 579 [2003]).

Federal Legislation

- **The Chimpanzee Health Improvement, Maintenance, and Protection (CHIMP) Act** (H.R.3514) – Passed in Dec. 2000! Created a federally & privately financed sanctuary system to provide lifetime care for chimps retired from federal biomedical research programs, and prohibited the labs from killing the chimps simply for convenience.
- **The Chimp Haven is Home Act** (S.1916) – Passed in 2007! Amended the CHIMP Act to provide *permanent* retirement to formerly-federally owned chimps.
- **The Great Ape Protection and Cost Savings Act** (H.R.1513/S.810 (2011))– Introduced 2008-2011; Would have ended use of chimpanzees in invasive research.
- **The Chimp Act Amendments of 2013** (S.1561) – Provisions incorporated in another bill (PREEMIE Reauthorization Act) that passed in 2013! Removed \$30 million spending cap on NIH-funded chimp care.

Recent Milestones and Present Day



NM Chimps to be Moved to TX for Invasive Tests: 2010

Dear NIH: Chimp Testing Broke My Dad's Heart

By Toni L. Wood, Albuquerque resident

U.S.

The New York Times

I read with dismay the National Institute of Health's (NIH) current decision published in the Aug. 10 Albuquerque Journal to continue to use the Alamogordo chimpanzees in medical research.

I have some personal history with this issue. My father was a histotechnologist. He worked for hospitals, national laboratories and for one short time at the Coulston Foundation—research lab—in Alamogordo.

He prepared microscopic slides from tissues gathered at autopsies; in animal research, these are called necropsies. The slides are then studied to attempt to trace back what contributed to the death—or "termination"—of the animal and what could be learned. In chimpanzees, what were the results of experimentation from chemicals, burns, gunshot wounds, trauma, radiation and drug studies?

It was a gruesome task, but he did so because he believed it would contribute to the greater good. Healing could come from this. And he was a man trying to provide for his family.

As time went on he no longer believed that experimentation on animals, including those experiments performed on chimpanzees and primates, showed results. He would state that if there was some benefit, some result that was useful, then perhaps, perhaps, the suffering and the treatment these

intelligent beings endured could be void and understood. But he did not find this to be true.

I can recall his frustration, exasperation and sadness because of the experimentation on the Alamogordo chimpanzees. He said the experiments were repeated and repeated without resolution to the questions asked and with no proven medical benefit. In addition, much of the "necessary data" collected was never used. Put aside or more often disposed of because it was a repetition of what already had been studied.

Isn't that one of the definitions of insanity? Do something over and over again hoping for different results?

My father would come home in frustration, and in tears, because of the suffering he witnessed due to the endless painful experimentation on these chimpanzees. He quit his position in protest of the treatment of these beings.

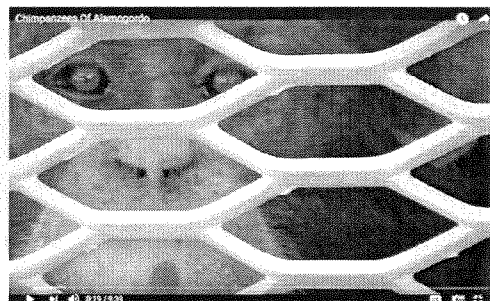
My father has long since passed away. However, he took his opportunity to act, to make a humane moral decision, although silent to most.

All of us, now, we have an opportunity to act as well. To act in a responsible, humane and fiscally sound manner. We can ask NIH to permanently retire these chimpanzees from research.

Will Aging Chimps Get to Retire, or Face Medical Research?

By DAN FROCH, SEPT. 1, 2010

ALAMOGORDO, N.M. — Flo the chimpanzee bounds about her enclosure, hurls a rubber ball then stuns quizzically at the New Mexico



NM Disrupts Plans for Govt Chimps: 2010



For Immediate Release
August 18, 2010

Cristen Alon Ray-Garcia
(505) 241-1350

Governor Bill Richardson to Meet with National Institutes of Health Officials Regarding Alamogordo Chimps

SAN JUAN — Governor Bill Richardson will meet next week with officials at the National Institutes of Health to discuss on-going research regarding their plan to transfer chimpanzees from the Alamogordo Primate Facility to research facilities in Texas. The meeting will take place Tuesday at NIH headquarters in Bethesda, Maryland.

In a letter to NIH Director Francis Collins last month, Governor Richardson urged the organization to permanently retire the chimpanzees and convert the Alamogordo Primate Facility into a sanctuary for the primates.

"These chimpanzees have already given so much of themselves as part of medical research, and they should be able to live out the remainder of their years in peace not hindered by invasive research," Governor Richardson said. The community of Alamogordo is so proud to lose more than 40 jobs due to the proposed transfer. It is our belief that there is a more prudent and compassionate alternative to the National Institutes of Health's plan."

The NIH chimpanzees have been housed at the Alamogordo Primate Facility on Holloman Air Force Base since 2001. According to the agreement with Holloman, no research may be conducted in the primates which they are at the facility.

Charles River Laboratories, which operates the Alamogordo Primate Facility, is contracted with NIH until May 2011. NIH has announced plans to move all of the chimpanzees to Texas where they will be used for invasive medical research by as early as 2011. In recent weeks, 15 of the chimps have been moved to the Southwest National Primate Research Center in Texas.

United States Senate

Washington, D.C.

Barack Obama, M.D., Ph.D.
President
National Institutes of Health
101 Alexander Drive
Bethesda, Maryland 20892

Dear Dr. Obama:

I thank you for your statement with the National Institutes of Health, NIH, and for the support you have shown in the recent months. I am grateful for the opportunity to discuss the future of the chimpanzees at the NIH. I am grateful for the opportunity to discuss the future of the chimpanzees at the NIH. I am grateful for the opportunity to discuss the future of the chimpanzees at the NIH.

The NIH is a part of the National Institutes of Health, which is a part of the Department of Health and Human Services. The NIH is a part of the National Institutes of Health, which is a part of the Department of Health and Human Services. The NIH is a part of the National Institutes of Health, which is a part of the Department of Health and Human Services.

I am grateful for the opportunity to discuss the future of the chimpanzees at the NIH. I am grateful for the opportunity to discuss the future of the chimpanzees at the NIH. I am grateful for the opportunity to discuss the future of the chimpanzees at the NIH.

I am grateful for the opportunity to discuss the future of the chimpanzees at the NIH. I am grateful for the opportunity to discuss the future of the chimpanzees at the NIH. I am grateful for the opportunity to discuss the future of the chimpanzees at the NIH.

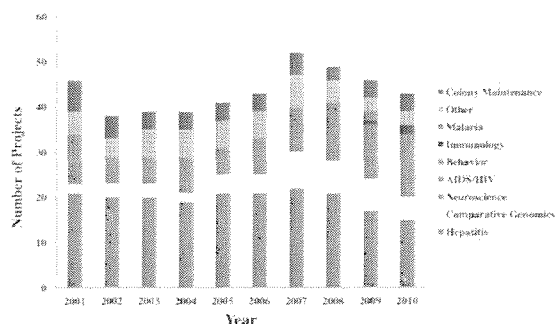
Barack Obama
President

Michelle Obama
First Lady

Joe Biden
Vice President

Chimpanzees in Biomedical & Behavioral Research: Assessing the Necessity (2011)

Chimpanzee Research Supported by the NIH



INSTITUTE OF MEDICINE

See all the IOM briefing slides:

<http://www.nationalacademies.org/hmd/Reports/2011/Chimpanzees-in-Biomedical-and-Behavioral-Research-Assessing-the-Necessity.aspx>

Biomedical Research Conclusions

While the chimpanzee has been a valuable animal model in past research, most current use of chimpanzees for biomedical research is unnecessary based on the criteria established by the committee, except for two potential current research uses:

- * Development of future monoclonal antibody therapies will not require the chimpanzee, due to currently available technologies. However, there may be a limited number of monoclonal antibodies already in the developmental pipeline that may require the continued use of chimpanzees.
- * The committee was evenly split and unable to reach consensus on the necessity of the chimpanzee for the development of a prophylactic HCV vaccine. Specifically the committee could not reach agreement on whether a pre-clinical challenge study using the chimpanzee model was necessary and if or how much the chimpanzee model would accelerate or improve prophylactic HCV vaccine development.

INSTITUTE OF MEDICINE

REPORT OF THE COMMITTEE ON THE USE OF CHIMPANZEES IN NIH-SUPPORTED RESEARCH

2011

18

Council of Councils Working Group: 2012-2013

In December 2011, the IOM committee completed its review, concluding that although the chimpanzee has been a valuable animal model in the past, most current biomedical use of chimpanzees is unnecessary. At the same time, the IOM committee concluded that chimpanzees could still serve an important role in some areas of research but in these areas, the research must be governed by a set of principles and criteria. These principles and criteria address the necessity of the research for answering important public health questions, the need to use the chimpanzee model to answer these questions, and whether the chimpanzee-housing and the research conditions are appropriate for humans' closest relative.

The NIH immediately accepted the IOM committee's principles and criteria and assembled the Working Group on the Use of Chimpanzees in NIH-Supported Research in February 2012. The NIH charged the Working Group in February 2012 with:

- Developing a plan for implementation of the IOM's guiding principles and criteria;
- Analyzing currently active NIH-supported research using chimpanzees to advise on which studies currently meet the principles and criteria defined by the IOM report and advising on the process for closing studies if any do not comply with the IOM recommendations;
- Advising on the size and placement of active and inactive populations of NIH-owned or -supported chimpanzees that may need to be considered as a result of implementing the IOM recommendations; and
- Developing a review process for considering whether potential future use of the chimpanzee in NIH-supported research is scientifically necessary and consistent with the IOM principles.

Read the entire report Council of Councils Working Group on the Use of Chimpanzees in NIH-Supported Research: https://dpcpsi.nih.gov/council/pdf/FNL_Report_WG_Chimpanzees.pdf

Council of Councils Working Group: 2012-2013

Field Trips

The Working Group conducted several field trips to chimpanzee facilities (listed below) to observe and better understand the environments in which the animals are housed. These experiences helped Working Group members develop their definition of ethologically appropriate environments.

May 25, 2012: New Iberia Research Center, The University of Louisiana at Lafayette, New Iberia, Louisiana

May 26, 2012: Chimp Haven, Inc., Keithville, Louisiana

August 1, 2012: Lincoln Park Zoo, Chicago, Illinois

November 26, 2012: Southwest National Primate Research Center, Texas Biomedical Research Institute, San Antonio, Texas

November 26, 2012: Michale E. Keeling Center for Comparative Medicine and Research, The University of Texas M.D. Anderson Cancer Center, Bastrop, Texas

November 27, 2012: Alamogordo Primate Facility, Alamogordo, New Mexico

December 4, 2012: Save the Chimps Sanctuary, Fort Pierce, Florida

Read *The New York Times* "Unlikely Partners, Freeing Chimps from the Lab"

http://www.nytimes.com/2013/07/09/science/unlikely-partners-freeing-chimps-from-the-lab.html?_r=0

USFWS Finalize Rule Listing Captive Chimps as Endangered: 2015

- Read more: <https://www.fws.gov/endangered/what-we-do/chimpanzee.html>

Certain activities involving chimpanzees will require a permit, including import and export of the animals into and out of the United States, "take" (defined by the ESA as harm, harass, kill, injure, etc.) within the United States, and interstate and foreign commerce.

Ethics Discussion: *Nature*

- Excerpt from “Great ape debate” editorial published 16 June 2011:

The purview of the task that the NIH has set the IOM is troubling. It contains no mention of ethical aspects of the research, and the NIH has publicly stated that this omission was deliberate. Of the 12 current members of the committee, just one is a bioethicist. The agency may wish to divorce the science from the ethics, but society at large will not accept such a distinction. Nor is it intellectually defensible: a moral choice to use intelligent, emotionally complex creatures to their detriment, for the benefit of human welfare, is intimately related to what can be achieved scientifically. It would be wrong for the NIH to make any change in its support for chimpanzee research — or indeed to maintain the status quo — solely on the basis of the scientific report from the IOM.

Ethics Discussion: *Scientific American*

- Excerpt from “Ban Chimp Testing: Why it is time to end invasive biomedical research on chimpanzees” editorial published Sept 27 2011

- “The IOM project itself has been criticized: the NIH instructed it to omit ethics from consideration.”

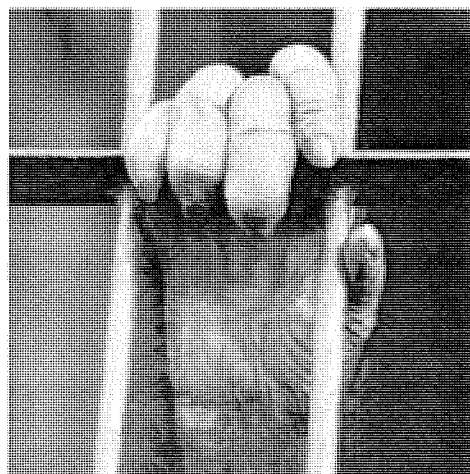


Image: Suzi Eszterhas/Getty Images

Ethics Discussion: *Institute of Medicine*

Ethical Considerations

The committee felt ethics was at the core of any discussion about the necessity of continued use of chimpanzees in research. While the committee was not sufficiently constituted to take on the ethics of research on chimpanzees, its considerations were suffused with an awareness of the moral cost of such research. These concerns were manifest in the very high level of justification the committee required to support the necessity of chimpanzee research in the specific areas of research it examined and assessed.

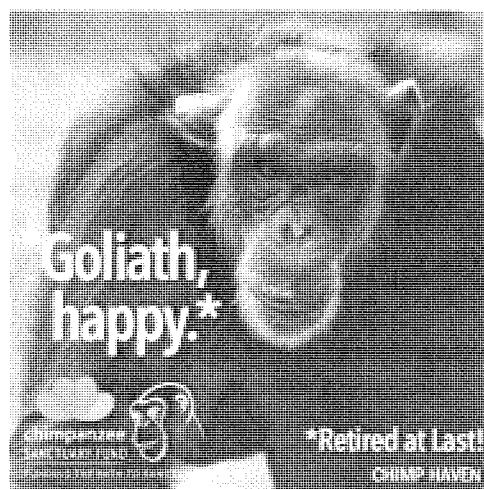
INSTITUTE OF MEDICINE

of the National Academies of Sciences, Engineering, and Medicine
of the United States of America

10

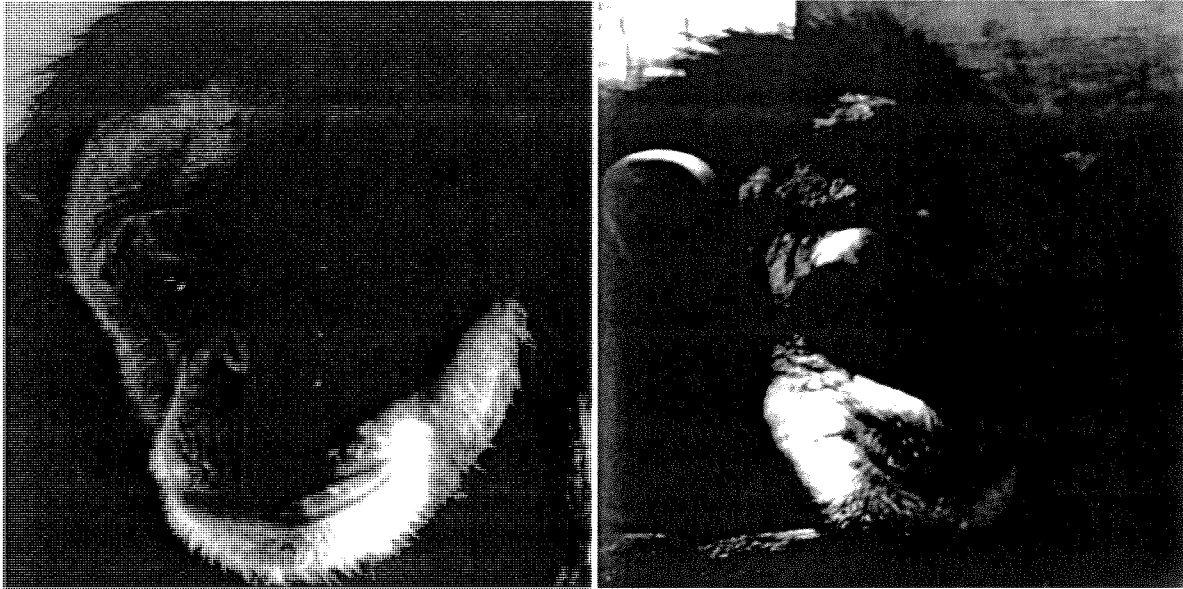
NM Chimps Getting In/Awaiting Sanctuary: 2017

- Since 2016, 44 govt-owned chimps have moved to sanctuary – 19 who were held at the Southwest National Primate Research Center (NM history); 25 chimps moved from Holloman AFB to sanctuary Fall 2016-Spring 2017.
- NIH coordinates transports of chimps with veterinarians at Alamogordo Primate Facility and Chimp Haven.
- Currently 109 chimps at Holloman awaiting sanctuary. Next transports scheduled for Fall 2017. We lose ~5%/year to death.



BRANDON KEIM SCIENCE 12.02.11 5:59 PM

NIH ACCUSED OF DISHONESTY OVER CHIMP RESEARCH PLANS



AFTER NATIONAL OUTCRY over its plan to send 209 retired, federally owned chimpanzees back into traumatic medical research, the National Institutes of Health said it would wait. The chimps' fate would only be decided after independent experts judged whether research was necessary.

But animal advocates say the NIH has already planned to pursue the controversial program, though the Institute of Medicine report on chimp research won't be released until later in December.

Read More:



Hep C: The Last Chimpanzee Research Battleground



A Second Life for Retired Lab Chimps

Leading U.S. Lab Accused of Illegal Chimp Breeding

Documents obtained by animal advocacy groups show that the National Center for Research Resources, the NIH's chimp-overseeing division, approved in September a \$19 million proposal to move the chimpanzees from their current home in Alamogordo, New Mexico, and back into lab duty at the Texas Biomedical Research Institute. "The NIH's actions here are deceitful and incredibly unethical," said Laura Bonar, program officer for Animal Protection of New Mexico. "The public has been misled. The public was told, 'We'll wait to see this independent report

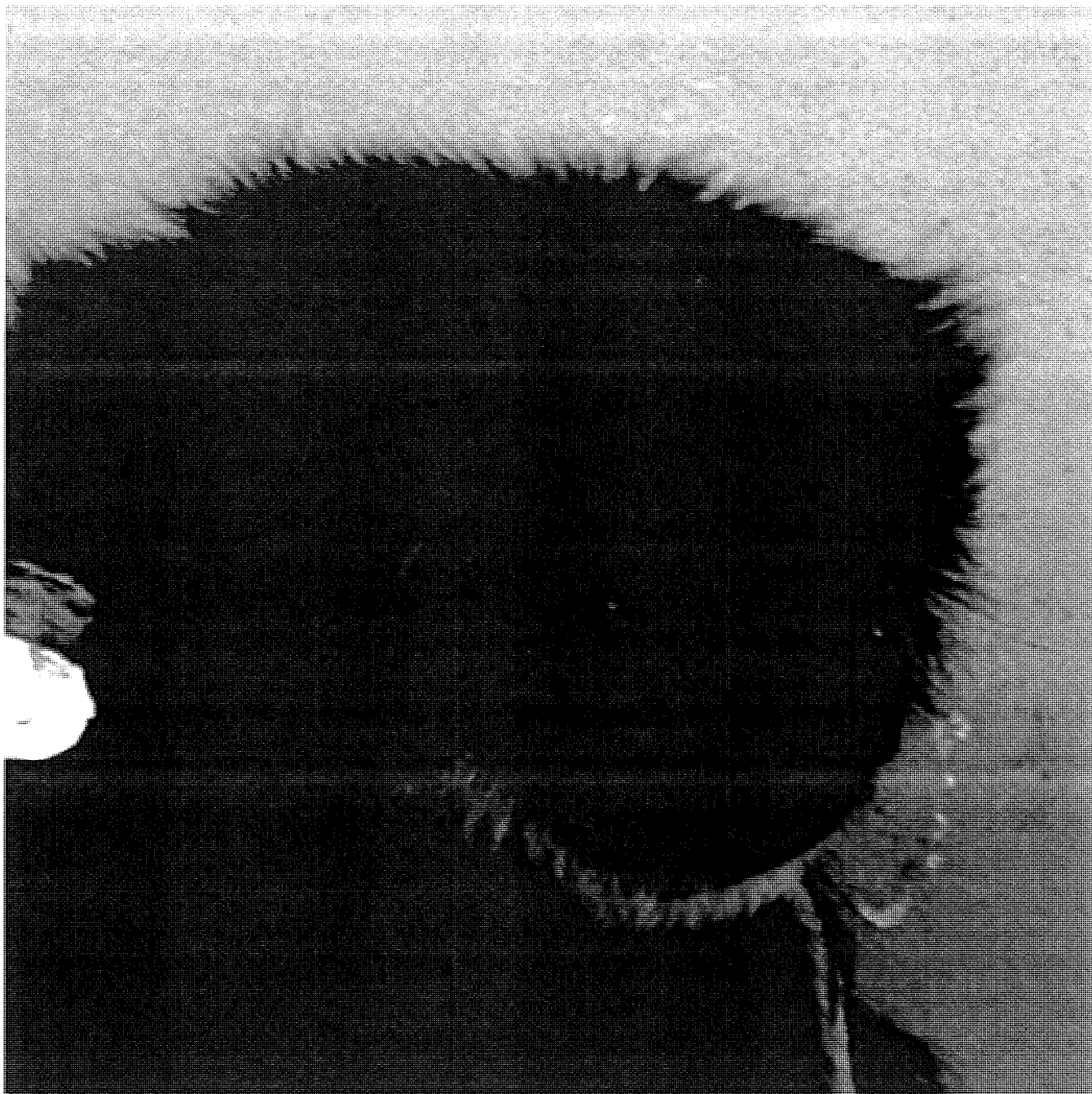


before we decide what to do.’ But the NIH has already decided to move forward.”

The Alamogordo chimpanzees — 184 who live there now, and 25 sent to the Texas Biomedical Research Center in 2010 — were retired in 2001 after the NIH seized them from the Coulston Foundation, a private laboratory found guilty of treating its chimps with extraordinary cruelty and carelessness.

Some of the chimpanzees had been bred by Coulston. Others were purchased from the Air Force, zoos and various laboratories, and had been subjected to decades of research. Their experiences are typified in the oldest Alamogordo chimp, a 52-year-old female named Flo, who in her research career had been knocked out with a dart gun at least 110 times; was repeatedly caged in isolation or with chimps who attacked her; had four infants taken from her within days of birth; and now suffers from seizures.

When the NIH announced in August 2010 that Flo and the other Alamogordo chimps would be returned to research duty, the public fought back. Animal rights advocates and concerned citizens were joined by scientists who said invasive medical research on chimpanzees was morally troubling and unjustified by the limited clinical benefits.



Flo, a 52-year-old chimpanzee at Alamogordo. Image: National Institutes of Health

The last time chimpanzee research had received so much attention was in the early 1990s, when they appeared — misleadingly — to be a promising tool in AIDS research. In the intervening years, cognitive studies and natural observations established beyond doubt that chimpanzees are, as befits the closest living relative of humans, deeply intelligent and emotional creatures for whom captive medical research is akin to torture.

In January of this year, the NIH acceded to public pressure, announcing that the Alamogordo chimps wouldn't be moved until the Insitute of Medicine — an

independent group that provides expert scientific advice to the government — had reviewed the medical need for chimpanzees.

At that time, the NCRR had already received a grant application from Texas Biomedical to support a full-fledged research program on the entire Alamogordo colony. The program would involve experiments with HIV, hepatitis viruses, papilloma viruses, and “uncharacterized viruses.” Chimpanzees would be routinely knocked out with dart guns and subjected to organ biopsies, cerebrospinal fluid collection and internal probes.

Texas Biomedical also asked for promotional funds. The program’s long-term goal, beyond immediate scientific exploration, would be to “create a paradigm shift in the way investigators think about biomedical research with chimpanzees” and “attract investigators who haven’t previously used chimpanzees in research.” On Sept. 5, the NCRR approved the grant, disbursing \$471,185 for the next year and recommending \$18.6 million over the following four years.

“It seems pretty clear that NIH’s actions indicate that they plan to move the chimps regardless of what the IOM report says,” said Kathleen Conlee, animal research director with the Humane Society, which has pushed the federal government to end invasive chimpanzee research.

According to the NCRR, that \$471,185 reflects only the costs of caring for the 25 Alamogordo chimpanzees already at Texas Biomedical, and does not represent a first payment on a larger plan. “The grant award was adjusted to provide support for only the 25 NIH-owned chimpanzees,” wrote Watson in an email to Bonar.

But Bonar doubts their intentions. “The award this year is for that amount. But in year two, year three, year four, year five, you see it increasing. Those amounts coincide with what Texas Biomed asked for all the chimps,” said Bonar, who said the NIH could have made a short-term support agreement.

When asked for clarification, the NCRR referred Wired.com to its grant policy statement, which explains that approval “expresses NIH’s intention to provide continued financial support for the project” but “are not guarantees by NIH that the project will be funded or will be funded at those levels and create no legal obligation to provide funding” beyond the first budget period — in this case, the one-year support for 25 chimps.

“I feel like they’re talking out both sides of their mouths,” said Bonar. “They’re saying, ‘We look forward to this rigorous review and analysis.’ But in the meantime,

they're also saying, 'Texas Biomed, here's our plan for you for the next five years, and it includes cruel and invasive testing on all these chimps.'"

"I am very concerned that the future budget is already laid out," Conlee said. The NCRR "give no indication that plans may change, or that chimpanzee research is being questioned, even though this was awarded in the midst of the IOM study. It's as if there isn't an IOM study going on."

The NCRR's recent track record with their chimpanzees is not exemplary. In November, they declined to address allegations of large-scale, contract-violating chimpanzee breeding at the New Iberia Research Center, the largest U.S. primate research facility. The lab's director subsequently admitted that breeding took place, after which the NCRR launched a technicality-based defense that earned a rare and stinging rebuke from the influential journal *Nature*.

"I would guess Harold Watson would say, 'We're waiting to decide what will come,'" Bonar said. "But every action shows they're already paving the way to move the chimps."

Image: Two Alamogordo chimpanzees named Heidi and Robbie. Images acquired through Freedom of Information Act Request by Project R&R. (National Institutes of Health)

We use cookies to provide you with a better onsite experience. By continuing to browse the site you are agreeing to our use of cookies in accordance with our **Cookie Policy**.

SHARE

LATEST

SCIENTIFIC
AMERICAN

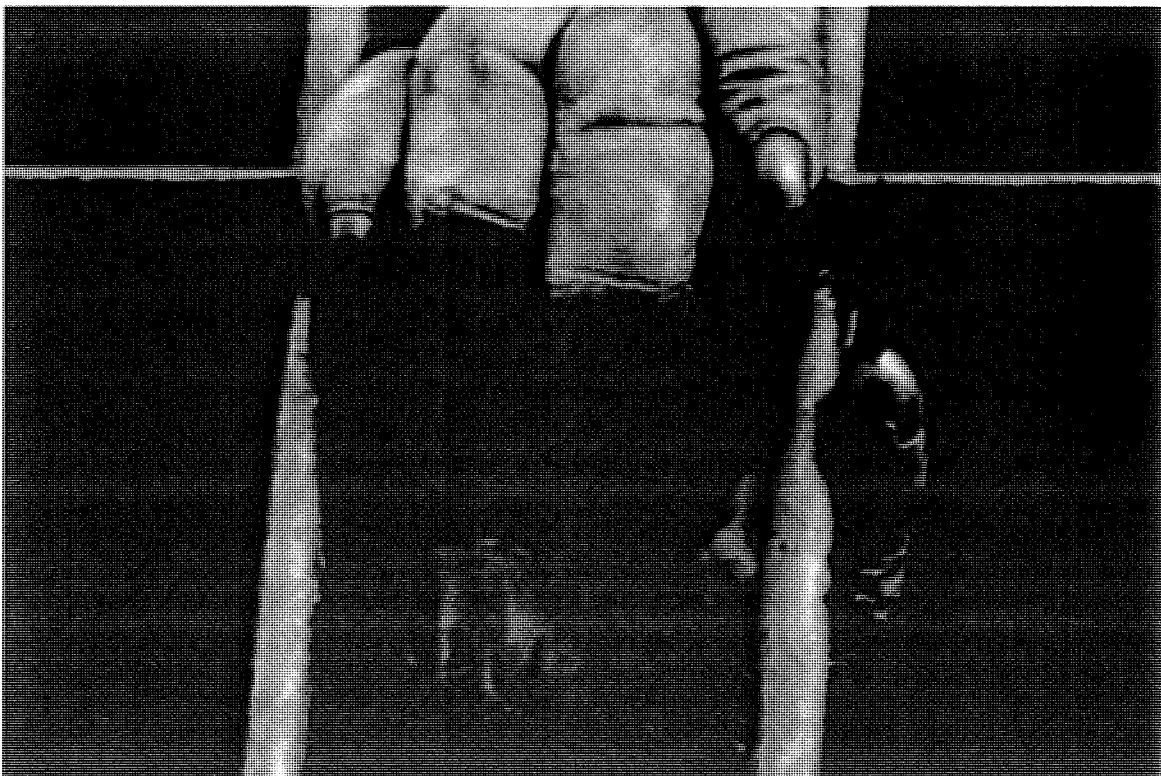
SUBSCRIBE

THE SCIENCES

Ban Chimp Testing

Why it is time to end invasive biomedical research on chimpanzees

By THE EDITORS on October 1, 2011



Credit: Suzi Eszterhas/Getty Images

SHARE

LATEST

The testing began shortly after Bobby's first birthday. By the time he was 19 he had been anesthetized more than 250 times and undergone innumerable biopsies in the name of science. Much of the time he lived alone in a cramped, barren cage. Bobby grew depressed and emaciated and began biting his own arm, leaving permanent scars.

Bobby is a chimpanzee. Born in captivity to parents who were also lab chimps, he grew up at the Coulston Foundation, a biomedical research facility in Alamogordo, N.M., that was cited for repeated violations of the Animal Welfare Act before it was shuttered in 2002. He is one of the lucky ones. Today he lives in a sanctuary called Save the Chimps in Fort Pierce, Fla., where he can socialize and roam freely. Last year the National Institutes of Health announced plans to put some 180 ex-Coulston chimps currently housed at the Alamogordo Primate Facility back in service, to rejoin the roughly 800 other chimps that serve as subjects for studies of human diseases, therapies and vaccines in the U.S., which is the only country apart from Gabon to maintain chimps for this purpose.

Public opposition is on the rise. In April a bipartisan group of senators introduced a bill, the Great Ape Protection and Cost Savings Act, to prohibit invasive research on great apes, including chimps. And when the NIH announced its plans for bringing the Alamogordo chimps out of retirement, objections from the Humane Society, primatologist Jane Goodall and others prompted the agency to put the plans on hold until the Institute of Medicine (IOM) completes a study of whether chimps are truly necessary for biomedical and behavioral research. The IOM project itself has been criticized: the NIH instructed it to omit ethics from consideration.

In April, McClatchy Newspapers ran a special report based on its review of thousands of medical records detailing research on chimps like Bobby. The stories painted a grim picture of life in the lab, noting disturbing psychological responses in the

chimps. Then, in June, Hope R. Ferdowsian of George Washington University and her colleagues reported in *PLoS ONE* that chimps that had previously suffered

SHARE LATEST

That chimps and humans react to trauma in a like manner should not come as a surprise. Chimps are our closest living relatives and share a capacity for emotion, including fear, anxiety, grief and rage.

Testing on chimps has been a huge boon for humans in the past, contributing to the discovery of hepatitis C and vaccines against polio and hepatitis B, among other advances. Whether it will continue to bear fruit is less certain. Alternatives are emerging, including ones that rely on computer modeling and isolated cells. In 2008 pharmaceutical manufacturer GlaxoSmithKline announced it would end its use of chimps.

In our view, the time has come to end biomedical experimentation on chimpanzees. The Senate bill would phase out invasive research on chimps over a three-year period, giving the researchers time to implement alternatives, after which the animals would be retired to sanctuaries.

We accept that others may make a different moral trade-off. If the U.S. elects to continue testing on chimps, however, then it needs to adopt stricter guidelines. Chimps should be used only in studies of major diseases and only when there is no other option. Highly social by nature, they should live with other chimps and in a stimulating environment with room to move around. And when a test inflicts pain or psychological distress, they should have access to treatment that eases those afflictions.

The Animal Welfare Act affords chimps some protection. But clearly more is needed. To develop and enforce tighter regulations, the U.S. Department of Agriculture, which enforces the Animal Welfare Act, should establish an ethics committee specifically for biomedical research on chimps. The committee would need to include not just medical researchers but also bioethicists and representatives from animal welfare groups. Such measures would no doubt make medical testing on chimps even

more expensive than it already is. Yet if human lives are going to benefit from research on our primate cousins, it is incumbent on us to minimize their suffering,

SHARE LATEST

Rights & Permissions

ADVERTISEMENT

ABOUT THE AUTHOR(S)

THE EDITORS

Recent Articles

The New Science of Sex and Gender

No One Should Have Sole Authority to Launch a Nuclear Attack

Robust Emergency Fund Needed to Respond to Future Disease Outbreaks

The New York Times

U.S.

Will Aging Chimps Get to Retire, or Face Medical Research?

By DAN FROSCHE SEPT. 1, 2010

ALAMOGORDO, N.M. — Flo the chimpanzee bounds about her enclosure, hurls a rubber ball then stares quizzically at the New Mexico green chili pepper that will be her morning snack.

It has been a long time since Flo was on exhibit at the Memphis Zoo, even longer since she learned to smoke cigarettes during a stint with the circus. Most recently, she was a research chimpanzee here in New Mexico, part of an expansive biomedical testing program for hepatitis C and H.I.V.

At the moment, though, she is out of a job — but perhaps not for long.

Flo and the 185 other chimpanzees who live at the Alamogordo Primate Facility at Holloman Air Force Base have not been research subjects for nearly a decade — part of an agreement between the National Institutes of Health and the military, which prohibits using the animals for biomedical tests on the base.

But recently, the health institute decided it wanted to use the chimp colony for medical research again, primarily to help develop the elusive hepatitis C vaccine. This past June, the institute began shipping some of the animals by special trucks to

the Southwest National Primate Research Center in San Antonio and plans on moving the remaining chimpanzees by the end of 2011.

The move has spurred outrage among animal rights advocates, primate experts and politicians, who say the chimpanzees — many of them middle-aged and elderly — should get to live out the rest of their lives in peace after years of invasive research. It has also cast a fresh light on the debate over the tipping point between science and ethics, with everyone from the legendary primatologist Dr. Jane Goodall to Gov. Bill Richardson of New Mexico weighing in.

“These chimpanzees have given up their freedom, if not their natural environment, their bodies, their health, their children to research,” said Laura Bonar, program director for Animal Protection of New Mexico, which wants the government to turn the Alamogordo facility into a retirement sanctuary for the chimps. “And at the end of their lives, we can give them something back.”

For the health institute, though, the Alamogordo chimpanzees represent an invaluable resource. As per the agreement with the Air Force, biomedical research cannot be conducted on the animals. That agreement was forged after the institute acquired the chimpanzees from the Coulston Foundation, an infamous New Mexico research laboratory that was found by federal officials to have abused and neglected the animals.

In 2001, the institute gave the private Charles River Laboratories a 10-year contract to provide medical care to the chimps, most of whom have been infected or exposed to hepatitis C and H.I.V. through prior research.

These days, chimps like Flo, who at 53 is the oldest of the Alamogordo colony, spend their days living in small groups in geodesic domes: foraging for food, swinging from structures and whooping greetings at visitors and one another.

Harold Watson, who heads the chimpanzee research program for the National Center for Research Resources, said that with the end of the contract, it only makes sense to use the chimps for their original purpose. The research — which will most likely entail drawing periodic blood samples, liver biopsies and in some cases inoculations of hepatitis C — will be carefully monitored, he said.

“I think people envision pictures of monkeys with electrodes in their heads,” Dr. Watson said. “This is not what we’re talking about.”

The history of primate research, however, has been long and controversial. Because of their genetic closeness to humans, chimpanzees are considered well-suited for studies of how various infectious diseases or psychological environments might affect mankind.

But some have questioned whether that research has yielded any substantive breakthroughs, and the United States is currently the only developed country that continues large-scale confinement of chimps in laboratories, according to the Humane Society of the United States. Supporters of the research say the animals have been critical in the development of hepatitis A and B vaccines.

Pending Congressional legislation known as the Great Ape Protection Act would retire about 500 federally owned chimpanzees currently in laboratories to permanent sanctuary. The Alamogordo colony traces its lineage to the Air Force’s space chimp experiments in the late 1950s. A decade later, the toxicologist Frederick Coulston set out to build the world’s largest captive colony of chimpanzees for research, in New Mexico. His foundation’s tenure was marred by charges of severe mistreatment.

That legacy still haunts the health institute, which got 288 of the chimpanzees around 2001 and has tried to distance itself from the Coulston Foundation.

John Gluck, a professor emeritus of psychology at the University of New Mexico, who has visited the Alamogordo colony at least four times since the 1970s, is worried what a move to Texas would mean for the animals’ physical and mental health, particularly given “the tremendous price” paid by most of the chimpanzees while research subjects of the Coulston Foundation, he said.

“N.I.H., in general, is a place I respect,” Dr. Gluck said. “But it seems to me that they’ve lost both their ethical and scientific compass here.”

Governor Richardson has also urged the institute to reconsider, and Dr. Goodall wrote to the institute that the chimpanzees “will surely suffer considerable physical

and emotional distress from this plan.”

9

ARTICLES REMAINING

Dr. Lon Lammey, the director of the Alamogordo primate facility for Charles River, the private contractor, disputed the notion and said he was “confident the animals would continue to receive optimal medical care.”

[SEE MY OPTIONS](#)[Subscriber login](#)

Despite the mounting pressure, the institute has shown little sign of changing its plan.

Some 15 miles from the base, a separate group of 82 chimpanzees are also waiting to be moved, but to a lush Florida sanctuary run by Save the Chimps, a rescue group.

The animals were part of a larger group handed over to the rescue organization by the Coulston Foundation after its demise and have gradually been moved to Florida over the past few years. Save the Chimps wants the institute to permanently retire the rest of the Alamogordo chimpanzees to a sanctuary as well.

At the old Coulston facility, which has been transformed into a temporary sanctuary itself, a 13-year-old chimp named JJ clutched a bundle of security blankets while readying for lunch. As a worker placed bushels of fruit in the enclosures, the chimpanzees began to yelp in unison, their cries carrying across the high desert.

A version of this article appears in print on September 2, 2010, on Page A23 of the New York edition with the headline: Will Aging Chimps Get to Retire, or Face Medical Research?.

© 2017 The New York Times Company

The New York Times | <https://nyti.ms/1bjTB8q>

SCIENCE

Unlikely Partners, Freeing Chimps From the Lab

By JAMES GORMAN JULY 8, 2013

Jane Goodall says it was a “Damascus moment” that turned her from the groundbreaking studies of chimpanzees in the wild that revealed their complex social and emotional lives, to a life of nomadic global activism on their behalf.

That moment, at a conference on chimps nearly 27 years ago, led her to begin a campaign to protect chimps, wild and captive, and inspired numerous animal welfare activists who took up the cause. Last month, they all counted two major victories when two federal agencies took steps that together may come close to halting such research.

“There’s a lot of problems in the world, this is a problem we can all solve,” said Laura Bonar, the program director of Animal Protection of New Mexico, where the most recent chapter in the campaign for chimp protection began. “The very least that the chimps deserve is for us to work together to see them have some peace and dignity.”

Back in 1986, what moved Dr. Goodall were presentations on dangers to wild chimp populations and the treatment of captive chimps in research. She went into the meeting a contented field scientist, and, she says, “I left as an activist.”

Until that time, “I always felt that I didn’t have the credentials to stand up to some of these white-coated lab people,” she said, speaking recently in an interview from her home in Tanzania. “But by this time I had done the book” — “The

Chimpanzees of Gombe: Patterns of Behavior” — “and therefore I had more self-confidence.”

Over the past few years, as animal welfare groups have mounted a strong but pragmatic campaign against invasive experiments like subjecting chimps to vaccines and treatments for human diseases, Dr. Goodall has been having the occasional conversation with arguably the ultimate white-coated lab person, Dr. Francis S. Collins, the director of the National Institutes of Health and former head of the Human Genome Project.

“I was impressed from the very beginning,” Dr. Goodall said of Dr. Collins. “He agreed something should be done and went ahead and did it.”

Dr. Collins, who invited her to speak to the N.I.H. staff, said, “I found her to be remarkably realistic and practical, but also idealistic in terms of her views.”

And on June 26, Dr. Collins announced that more than 300 of the 360 or so chimpanzees owned by the N.I.H. would be retired to sanctuaries over the next few years.

That followed a proposal two weeks earlier by the United States Fish and Wildlife Service to list all chimpanzees, including those in captivity, as endangered. The plan would raise barriers for experimenting on chimps even higher, by requiring a permit for almost all medical research on the animals unless it involved only observation or tests that are part of normal veterinary visits. Permits would be granted only if the research was judged to be for the benefit of chimpanzees.

Dr. Goodall said the decisions were not the end of efforts to protect chimps in captivity, a campaign prompted by Animal Protection of New Mexico and expanded by groups like the Goodall Institute, the Humane Society of the United States and others.

“There are still chimpanzees in private labs,” she said, as well as in other countries, though Gabon is the only other country known to allow medical

The path to the decisions began in June 2010, when the N.I.H. started to move 186 chimps, held in semiretirement at Holloman Air Force Base in Alamogordo, N.M., back into the research stream. The plan was to move them to the Southwest National Primate Research Center at the Texas Biomedical Research Institute in San Antonio.

The animals had been used in research by the Coulston Foundation, at the Alamogordo facility, which closed after many allegations of mistreatment of the chimps. Save the Chimps brought some of the Coulston animals to Florida, where the group has the largest North American chimpanzee sanctuary. Others were still being held at the facility but were not used in research.

“That’s what triggered all of this,” said Sarah Baeckler Davis, now head of the North American Primate Sanctuary Alliance. One of the leaders of the movement, she has both a Ph.D. and a law degree. Dr. Davis had run a sanctuary and has worked with the Goodall Institute in the past. (“I read about her in fourth grade,” she said of Dr. Goodall, “and I wanted to be her.”)

“That’s when we all yelled and screamed about the move,” she said, “because they were supposed to be a holding colony.”

Ms. Bonar of Animal Protection of New Mexico said the N.I.H. move was so egregious that “the public was outraged.”

“We reached out to the public and to all of our elected leaders,” she said.

Bill Richardson, then the governor of New Mexico, objected to the move, and that December, Senators Jeff Bingaman and Tom Udall, both of New Mexico, and Senator Tom Harkin of Iowa, all Democrats, called for a high-level review of the need for chimpanzees in research.

Other animal welfare groups — like the Humane Society and its president, Wayne Pacelle; the Jane Goodall Institute; and the New England Anti-Vivisection Society — rallied to the cause. The N.I.H. relented, and Dr. Collins asked the Institute of Medicine to perform the requested study.

Dr. Collins said recently that he did not know what the institute's study would conclude. "It was entirely possible that group might have said, 'My goodness, there are so many things that we need to know for human health that we can only figure out by studying chimpanzees and if you care about yourselves and your families and your children, this is just something that we should continue, albeit with great attention to ethical principles.' "

"But," he said, "that's not what they said."

Instead, the report, released in December 2011, concluded, despite vigorous arguments from some scientists, that almost no research on chimpanzees was necessary, with the possible exception of some work on preventive vaccines for hepatitis C, still in midstream. The report said other techniques, like using cultured cell lines, and other animals, as well as human testing, were just as good.

Chimpanzees, the report said, said should be used only in cases necessary for human health, and even then, the animals should be housed in social groups, with plenty of space and enrichment.

Dr. Collins set up a working group to advise him how to implement the Institute of Medicine findings. Last month, he accepted the working committee's recommendations, released in January, almost in their entirety.

"Much of chimpanzee research could no longer be justified because we had other ways to get the same answers," Dr. Collins said of his decision.

"Then you factor into that that chimpanzees are special creatures," he added. "That they are biologically possessing of similarities to ourselves that are quite breathtaking."

Ms. Bonar said Dr. Collins deserved credit for his actions. "When you look back at the history of work with chimps, you could call the agency almost intractable." Change was long overdue, she said, "but someone had to have the courage to start it."

Katie Conlee of the Humane Society of the United States said, "I'll always think of Dr. Collins as having a legacy of doing what's right by the chimps."

Dr. Collins said he was interested in assessing the value of using chimps in research even before the Alamogordo conflict, after some scientists had raised questions “about whether, in fact, the scientific needs were sufficient to justify maintaining this colony of so many chimpanzees.”

Of the pressure from senators and others, he said: “Did that hasten the efforts to get the science looked at by the Institute of Medicine? I suspect it might have sped it up a little bit, but we would have gotten there anyway.”

Dr. Collins cautioned that there were still areas of disagreement between the N.I.H. and the animal welfare movement. “Now obviously if we moved from talking about chimpanzees to talking about mice and rats, we’d be in a different place,” he said.

For now, the goal of the N.I.H. and animal welfare groups is the same: to find homes for the retiring chimps.

At the time, in the mid- to late 1980s, Ms. Goodall began to work against experimentation on chimpanzees, they were no longer being imported into the United States, but they were routinely being bred. The N.I.H. was increasing breeding to produce more of the animals to study AIDS, a program that was not successful. Many chimpanzees now in research institutions or sanctuaries were born during that period. Chimpanzees in captivity can live up to 60 years, so many of their parents are also still alive.

A female chimpanzee named Jody, for example, was used as a breeder at a Pennsylvania laboratory. She had nine babies, all quickly taken away to be used in research, and two miscarriages, before she ended up at Chimpanzee Sanctuary Northwest a few years ago. “I often think about what they’ve lived through,” Dr. Goodall said. “Some of them, the older ones, must remember a bit about the forest, though.”

While some of the N.I.H. chimpanzees that are being retired, including a number of babies bred at the New Iberia Research Center in Louisiana, have already arrived at Chimp Haven in Louisiana, others face an uncertain future. Not all research chimps are owned by N.I.H., and as such, may not be retired.

Even for the N.I.H. chimps, there are challenges ahead. Sanctuaries must find room. Money must be found. And the N.I.H. is planning to keep a colony of about 50 chimps available should it need research that is not possible any other way — for instance, on an emerging disease that strikes humans.

“I want the public to be aware,” said Jennifer Whitaker, the executive director of Chimpanzee Sanctuary Northwest, “that there are reasons to celebrate, but not all of the chimpanzees will be retired.”

Nor will the animal welfare movement stop at chimpanzees, as all parties are aware.

“What the chimpanzee has done is to prove there is no hard and fast line dividing us from the rest of the animal kingdom,” Dr. Goodall said. “Once you admit that we’re not the only beings with personalities, minds, capable of thought and emotions, it raises ethical issues about the ways we use and abuse so many other sentient, sapient beings — animal beings — every day.”

Correction: July 9, 2013

An earlier version of a picture caption with this article referred incorrectly to Chimpanzee Sanctuary Northwest, east of Seattle. It is a private sanctuary and is not affiliated with the National Institutes of Health.

A version of this article appears in print on July 9, 2013, on Page A1 of the New York edition with the headline: Unlikely Partners, Freeing Chimps From the Lab.



The Horrible Thing That Happened to Enos the Chimp When He Orbited Earth 50 Years Ago

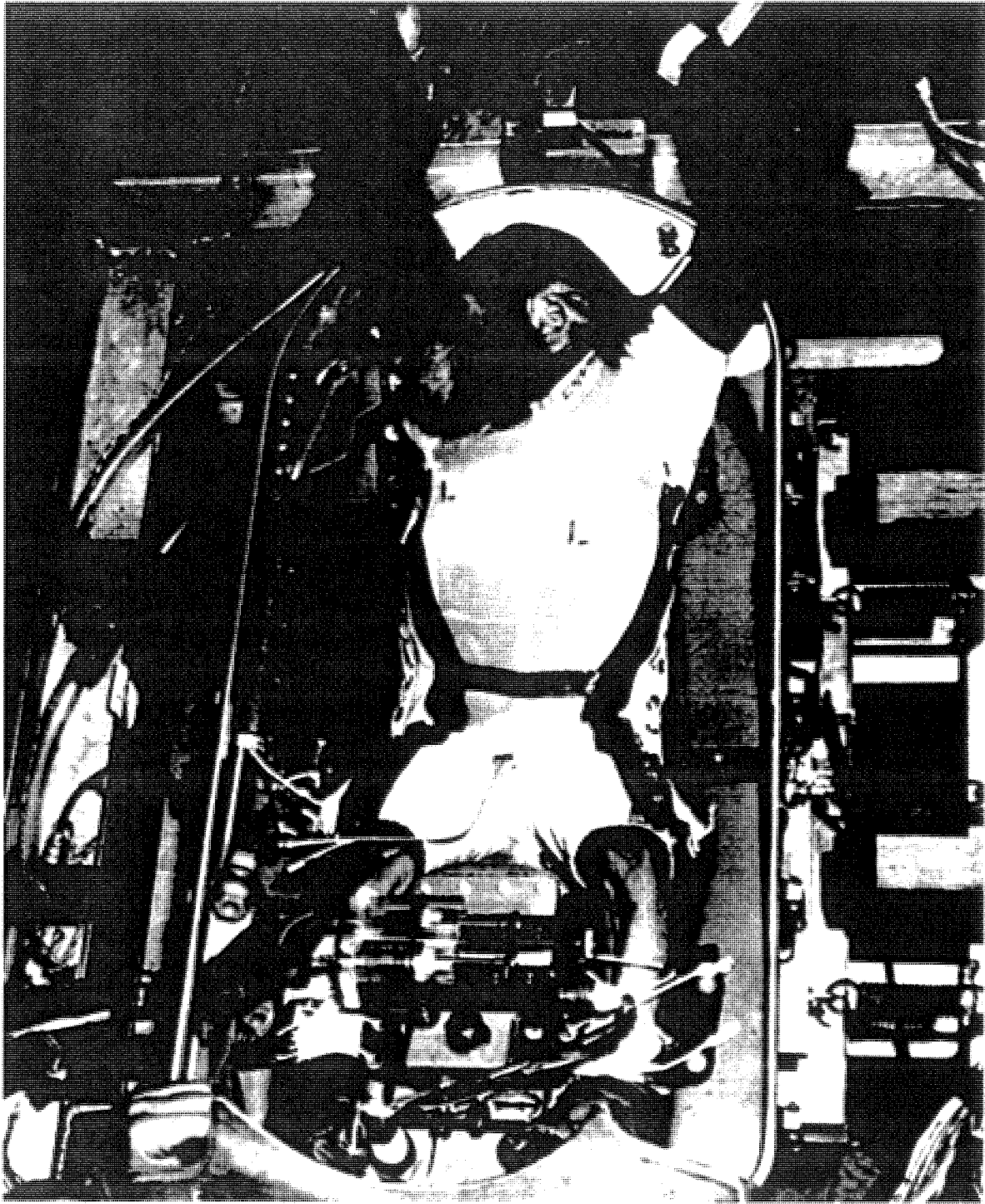
ALEXIS C. MADRIGAL

NOV 29, 2011 | TECHNOLOGY

Like *The Atlantic*? Subscribe to The Atlantic Daily, our free weekday email newsletter.

SIGN UP

Few remember the second chimp launched into space by the United States. Even fewer remember the terrible equipment malfunction that subjected the animal to 76 electric shocks in orbit.



The chimps of space -- Ham, the first primate in space, and Enos, the second primate (after Yuri Gagarin) to orbit Earth -- have a special place in our memories of

NASA. These animals paved the way for the United States space program by convincing biologists that animals' bodies *and* minds could function in orbit.

But there was a dark side to the missions. The chimps were the first to be trained by "avoidance conditioning" during which electric shocks were administered to the soles of their feet when the animals responded incorrectly in carrying out simple tasks. So, for example, the animals would be presented with three shapes and were trained to pick out the one that was not like the two others. They made their selections by pressing one of three levers that corresponded to the three symbols. On problem one below, the chimp should press the middle lever. On problem two, the chimp should press the right lever, and so on. Scientists call these oddity problems.

After Enos was in orbit, his first battery of oddity problems went as well as could be expected. After 18 problems, Enos had received 10 shocks. But on his next battery of tests, the center lever malfunctioned as did the switch controlling which question was presented. Enos kept being presented the same problem -- number one above -- in which the correct answer required pressing the center lever, but his center lever was broken. Enos, strapped into a space module orbiting the earth, was subjected to 33 shocks in a row, no matter what he did. The chimp kept trying to press

different levers, NASA researchers record, but he kept getting shocked. Mercifully, the test ended after 35 shocks, and Enos performed normally on the other tasks he was given.

But then, as per the preexisting schedule, he was presented with the oddity problem again. Just like the time before, the apparatus malfunctioned and Enos was shocked 41 times. Even NASA scientists were amazed that the chimp soldiered on, despite the horrible malfunction.

Note that the malfunctioning of the center lever, which resulted in the subject receiving 35 shocks on the second session of the oddity problem, did not disrupt his subsequent performance. ... And likewise, the 41 shocks received during the third oddity session did not affect performance during the subsequent fourth session of the CA-DA tasks. Certainly, following a malfunction of this nature, it might be expected that behavior would be disrupted, but this was not in evidence.

Eventually, Enos' flight ended and he came back to Earth. His capsule did not land where NASA anticipated, so he was stuck in the capsule for 3 hours and 20 minutes. By the time the USS Stormes crew extracted him, "The subject had broken through the protective belly panel and had removed or damaged most of the physiological sensors," a NASA report records. "He had also forcibly removed the urinary catheter while the balloon was still inflated."

A little less than a year later, Enos died of dysentery. We know his body was inspected, but the location of his remains is unknown.

ABOUT THE AUTHOR



ALEXIS C. MADRIGAL is a staff writer at *The Atlantic*. He's the author of *Powering the Dream: The History and Promise of Green Technology*.

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for Chimpanzee and Pygmy Chimpanzee

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The Fish and Wildlife Service (Service) proposes to reclassify wild populations of the chimpanzee and all populations of the pygmy chimpanzee from threatened to endangered status. Both species have declined through such problems as massive habitat destruction, excessive hunting and capture by people, and lack of effective national and international controls. This proposal, if made final, would enhance the protection of the Endangered Species Act of 1973, as amended, for these species. Captive populations of the chimpanzee would continue to be classified as threatened, and individuals of that species in the United States would continue to be covered by a special regulation allowing activities otherwise prohibited. The Service seeks relevant data and comments from the public.

DATES: Comments must be received by April 25, 1989. Public hearing requests must be received by April 10, 1989.

ADDRESSES: Comments and materials concerning this proposal should be sent to the Chief, Office of Scientific Authority, U.S. Fish and Wildlife Service, Washington, DC 20240. Comments and materials received will be available for public inspection, by appointment, from 8:00 a.m. to 4:00 p.m., Monday through Friday, in Room 750, 4401 Fairfax Drive, Arlington, Virginia.

FOR FURTHER INFORMATION CONTACT: Dr. Charles W. Dane, Chief, Office of Scientific Authority, at the above address (703-358-1708 or FTS 358-1708).

SUPPLEMENTARY INFORMATION:**Background**

The genus *Pan* contains two species: the chimpanzee (*P. troglodytes*) and the pygmy chimpanzee (*P. paniscus*). There actually is little over-all difference in size between the two species, both weighing up to about 100 pounds (45 kilograms) in the wild. However, *P. paniscus* has relatively larger lower limbs and a narrower chest than does *P. troglodytes*. The chimpanzee is known to have occurred originally in 25 countries of equatorial Africa, from

Senegal in the west to Tanzania in the east. The pygmy chimpanzee is found only in the nation of Zaire, and only to the south of the Zaire River. The ranges of the two species are not known to overlap.

In the Federal Register of October 19, 1978 (41 FR 45993), the Service classified both the chimpanzee and pygmy chimpanzee as threatened species, pursuant to the Endangered Species Act of 1973 (Act) (16 U.S.C. 1531 *et seq.*). Cited problems included human destruction of natural habitat, capture and export for research laboratories and zoos, the spread of disease from people to chimpanzees, and ineffectiveness of existing regulatory mechanisms. Simultaneously, the Service issued a special regulation providing that the prohibitions, which generally cover all threatened species, would not apply to live *P. troglodytes* and *P. paniscus* held in captivity in the United States on the effective date of the rule, or to the progeny of such animals, or to the progeny of chimpanzees legally imported into the United States after the effective date of the rule. This exemption was intended to facilitate legitimate activities of American research institutions, zoos, and entertainment operations, without affecting wild chimpanzee populations.

Within the last decade there have been increasing indications that the status of wild chimpanzees is deteriorating and that most populations are continuing to decline. On November 4, 1987, the Service received a petition from the Humane Society of the United States, World Wildlife Fund, and Jane Goodall Institute, requesting that *P. troglodytes* be legally reclassified from threatened to endangered. The petition was accompanied by a detailed report from the Committee for Conservation and Care of Chimpanzees (Teleki 1987). This report cites practically all pertinent recent literature on the status of the chimpanzee in the wild, and was prepared with the assistance of numerous field research workers. It points out that the chimpanzee has declined drastically because of such problems as massive habitat destruction, population fragmentation, excessive local hunting, and international trade. On February 4, 1988, the Service made a finding, in accordance with section 4(b)(3)(A) of the Act, that the petition had presented substantial information indicating that the requested reclassification may be warranted. In the Federal Register of March 23, 1988 (53 FR 9480), the Service published this finding and announced a status review of both *P. troglodytes* and

P. paniscus. The comment period for the review ended on July 21, 1988.

During the review period, the Service received 40 comments from major authorities and organizations, and from governments of nations with wild chimpanzee populations, all of which agreed with the petition and/or provided additional information lending support. Of these, 17 were from parties who actually have studied chimpanzees in the wild. In addition, during the review period, 54,212 supporting letters and postcards were received from the public. Since the end of the review period, several thousand more supporting comments have arrived.

The Service received six comments opposing reclassification during the review period, and several more afterward. None of these comments provided information about the status of chimpanzees in the wild, but they did make three general points: (1) The petition and accompanying report do not present a complete or accurate picture, and contain errors; (2) any plans for reclassification should await the results of a prospective National Institutes of Health Survey of chimpanzees and other primates in Africa; and (3) chimpanzees are important in biomedical research, no animals have been imported to the United States for such purposes in the last decade, and reclassification to endangered would interfere with study, transportation, and propagation of animals already here.

With respect to the first point, the Service is satisfied that the report by the Committee for Conservation and Care of Chimpanzees is reliable and contains much valuable information derived in large part from parties who have observed first hand the situation in the wild. Its over-all assessment corresponds closely with that found in a new International Union for Conservation of Nature (IUCN) Red Data Book, *Threatened Primates of Africa* (Lee, Thornback, and Bennett 1988), which became available to the Service following the review period. The indicated errors seem to be mostly minor typographical ones. The report acknowledges that data are limited for some areas and that additional survey work is urgently needed. However, and with respect to the second point above, major new field surveys would take years to complete, and the Act requires that classification be based on the best data available and that decisions on petitions be made within 12 months of receipt. The report, the IUCN Red Data Book, and other currently available information provide a sufficiently comprehensive picture of the

chimpanzee's status to allow assignment of legal classification.

With respect to the third point, the chimpanzee (*P. troglodytes*) is considered to be of much importance in biomedical and other kinds of research, and is also held in captivity for use by zoos, as pets, and in entertainment. The petition and supporting documents and comments dealt primarily with status in the wild, and not with the viability of captive populations. To the extent that self-sustaining breeding groups of captive *P. troglodytes* provide surplus animals for research and other purposes, there is a reduced probability that other individuals of that species will be removed from the wild. There has been no major legal importation of wild chimpanzees into the United States for about a decade, and recently passed legislation would prohibit investigators supported by Federal funds from using chimpanzees taken from the wild. At present, research work continues in the United States through the use of captive breeding groups. Without the availability of such groups, the relevant research probably would be done by others, perhaps in foreign countries and with wild-caught animals and their progeny. This line of reasoning suggests that severe restrictions on the use of captive animals in the United States could both discourage propagation efforts and lead to a decline in the population here, and possibly contribute to a greater demand for wild-caught animals elsewhere.

The management of some captive breeding groups reportedly continues to become more sophisticated and successful. A studbook for *P. troglodytes* has been developed, and proposals to establish a Species Survival Plan are being prepared by members of the American Association of Zoological Parks and Aquariums. These plans are designed to maintain the genetic diversity of the captive population. Approximately 240 *P. troglodytes* are held by the Association's member institutions. The extent of breeding among *P. troglodytes* held as private pets or for entertainment purposes is not known, and neither is the number of individuals involved, but there has been one estimate of 200.

From 1,100 to 1,450 *P. troglodytes* are held by biomedical facilities in the United States. Many of these animals have been used in various studies of infectious diseases and are not suitable for breeding programs. Furthermore, eight institutions hold most of these animals, and all but one currently provide records to the International Species Inventory System. Five of the

eight are part of the National Chimpanzee Breeding Program coordinated and supported by the National Institutes of Health. This program now has about 400 animals. Its immediate goal is to augment the breeding population with half of the offspring (about 35 animals/year). In addition, the National Institutes of Health has funded research directed at increasing the breeding capability of the captive population. Finally, there have been promising findings that may enhance this population and reduce the need for additional animals, especially through development of a means to distinguish chimpanzees exposed to, but not infected with, non-A/non-B hepatitis virus.

There are also over 1,000 captive *P. troglodytes* in Europe, including about 300 in biomedical research facilities and 550 in zoos. Many of these animals are in groups that are being managed with the objective of achieving self-sustaining breeding populations. In addition, there are approximately 300 captive members of this species in Japan, including over 100 in research facilities, and about 60 more in zoos in Australia and New Zealand.

Considering the above management situation, the Service is not proposing reclassification of captive *P. troglodytes*, and those populations in the United States would still be covered by the present special regulation. The Service would monitor captive status by requesting an annual report from each major facility in the United States holding chimpanzees, relative to numbers, mortality, breeding success, and other pertinent factors. This proposal is restricted to reclassification of the species in the wild, which evidently was the primary objective of the petition. Section 4(b)(3) of the Act requires that, within 12 months of receipt of such a petition, a finding be made as to whether the requested action is warranted, not warranted, or warranted but precluded by other listing activity. In the Federal Register of December 28, 1988 (53 FR 52452), the Service announced its finding that reclassification of wild populations of the chimpanzee from threatened to endangered is warranted. The Service now also announces that its status review indicates that the pygmy chimpanzee should be reclassified from threatened to endangered. The latter species is represented by fewer than 100 captive individuals throughout the world.

Summary of Factors Affecting the Species

Section 4(a)(1) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and regulations (50 CFR Part 424) promulgated to implement the listing provisions of the Act set forth the procedures for adding species to the Federal Lists. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). These factors and their application to the chimpanzee (*Pan troglodytes*) and pygmy chimpanzee (*Pan paniscus*) are as follows (information from Lee, Thornback, and Bennett 198, and Teleki 1987, unless otherwise indicated).

A. The present or threatened destruction, modification, or curtailment of its habitat or range. The historical range of *P. troglodytes* encompassed all or parts of at least 25 countries, from Senegal to Tanzania. This distribution corresponded closely with the tropical forest belt of equatorial Africa, and indeed the chimpanzee is usually dependent on areas of unbroken forest, though there is increasing evidence that it is not uniformly distributed throughout such areas. The species also is able to survive at lower density in secondary forests, savannahs, and other habitats, if food sources, particularly fruit trees, remain available, and human disturbance is not extensive. *P. paniscus* is found only in the forests of central Zaire, between the Zaire, Lomami, and Kasai/Sankuru Rivers, but its distribution is not continuous in this area.

Habitat destruction, with consequent access and disturbance by people, is one of the major factors in the decline of the chimpanzees. Human population increase, conversion of forests to agriculture, and commercial logging have drastically reduced available chimpanzee habitat. These processes are most prevalent in the western and eastern parts of the over-all range of *P. troglodytes*, and seem to be working towards the center. Most of the primary forests of such countries as Sierra Leone, Rwanda, and Burundi have already been eliminated, along with most of the resident chimpanzee populations.

The IUCN already classifies one of the three subspecies of *P. troglodytes* as endangered. This subspecies, *P. t. verus*, formerly ranged from Senegal to Nigeria, and may have numbered 500,000 individuals. There are now probably fewer than 17,000, mostly in small, discontinuous populations. Much of the

decline has taken place only in the last few decades. In Sierra Leone, for example, numbers crashed from about 20,000 in the 1960's to around 2,000 today. The other two subspecies of *P. troglodytes*, *P. t. troglodytes* in the central part of the range of the species, and *P. t. schweinfurthi* in the east, are together estimated to number between about 85,000 and 215,000 individuals. The latter figure is highly speculative and based on the probably incorrect assumption that many uninvestigated areas still contain suitable habitat and are occupied at potential carrying capacity (see discussion of Zaire, below).

Both the central and eastern subspecies of *P. troglodytes*, as well as the species *P. paniscus*, are classified as vulnerable, rather than endangered, by the IUCN. It must be noted, however, that the IUCN designations of endangered and vulnerable are not the precise equivalents of the terms endangered and threatened as defined in the Act. The latter term is often applied by the Service to entities in which deterioration is only potential or even in which such deterioration has been arrested. The term endangered refers to any species that is in danger of extinction throughout all or a significant portion of its range. With respect to the chimpanzees, in which major declines are ongoing and likely to accelerate, endangered is the more appropriate classification. Moreover, the IUCN designations were applied to the chimpanzee prior to availability of new information indicating that serious problems have developed in what was thought to be the safest part of the range of the species (see below).

The chimpanzee now has been entirely extirpated from 5 of the 25 countries in which it is known to have originally occurred. Its numbers have been reduced to fewer than 1,000 individuals in 10 other countries, to fewer than 5,000 in 6 others, and to fewer than 10,000 in 2 of the remaining 4 countries. There had been an assumption that the chimpanzee was relatively secure in the nation of Gabon, based on a survey in the early 1980's, which estimated numbers there at about 64,000. However, Dr. Caroline E.G. Tutin, who headed that survey, recently submitted a comment during the Service's status review, in which she stated that, because of habitat disruption and hunting, the chimpanzee had begun "to decline at an alarming rate" in Gabon. She thinks that numbers will fall by at least 20 percent by 1998, and she now favors reclassification to endangered.

The status of *P. troglodytes* is most poorly known in the nation of Zaire. Numerical estimates range up to 110,000 individuals, but such figures are based on calculations of the amount of habitat thought to be suitable, and on the assumption that all such habitat is still occupied. There are indications that much of the involved area may never have supported substantial chimpanzee populations, even under natural conditions, and that the species already has been eliminated in other parts of the area, particularly through logging and hunting. A more realistic estimate for the number of *P. troglodytes* in Zaire would be around 20,000. In other countries in the eastern part of the range of the species, populations are known to have become highly fragmented and to be declining.

Numerical estimates for *P. paniscus*, which occurs only in Zaire, also sometimes have been high, up to about 100,000–200,000. Again, however, such figures are based on the belief that distribution is continuous. Actually, according to the IUCN, the species is absent or rare in many areas of presumed suitable habitat, even under natural conditions, and is apparently not present in the central part of its range. It now remains common only in a few scattered localities, with the most reliable population estimate being about 15,000 animals. The main ongoing problem is habitat loss through increasing slash and burn cultivation, and commercial logging. Reduction and fragmentation of the already discontinuous range also has resulted from local hunting. These problems are relatively well known with respect to *P. paniscus* south of the Zaire River, and provide an idea of what may also be happening to *P. troglodytes*, found to the north. *P. paniscus* evidently is the rarer of the two species.

B. *Overutilization for commercial, recreational, scientific, or educational purposes.* Chimpanzees are extensively sought by people, both alive for use in research, entertainment, and exhibitions, and dead, for local use as food and in religious rituals. Such utilization is contributing substantially to the decline of each species. The United States was once the chief importer of chimpanzees (41 FR 45983; October 19, 1976), but has experienced no major legal activity of this kind for about a decade. Commercial trade has continued elsewhere, and there has been an alarming recent trend towards killing adult females both for local use as meat and in order to secure their live offspring for export. Also, because entire family groups may have to be eliminated

in order to secure one live infant, and since many of these infants perish during the process, it has been estimated that five to ten chimpanzees die for every one that is delivered alive to an overseas buyer. Many thousands of wild chimpanzees have been lost in this manner during the last several decades, with a resulting extermination or great reduction of several major populations, particularly in western Africa. There remains a substantial commercial demand for chimpanzees, especially for biomedical research, and to a lesser extent for behavioral studies.

There also is an escalating demand for local utilization of the meat of chimpanzees. Opening of forest habitat and the spread of modern weapons are helping to satisfy this demand. Mining operations attract large concentrations of people and result in intensive hunting to supply meat from the surrounding forests. Such activity is of particular concern with respect to *P. troglodytes* in eastern Zaire. Comments from several authorities (Dr. Arthur D. Horn, Dr. Geza Teleki, and Drs. Nancy Thompson-Handler and Richard K. Malenky), received by the Service during its recent status review, also indicate that *P. paniscus* has declined in numbers and distribution through local taking for use as food or pets, and in religious rituals.

C. *Disease or Predation.* Chimpanzees are susceptible to many of the same diseases that afflict people (indeed this is why chimpanzees are considered vital in biomedical research. When natural chimpanzee populations are reduced and come into increasing contact with the expanding human population, the former may be exposed to infectious diseases. In a comment in response to the Service's status review, Dr. Jane Goodall pointed out that illnesses of various types, including several major epidemics, have been among the factors preventing an increase in the chimpanzee population of Tanzania's Gombe National Park, even though that area is better protected than are most chimpanzee habitats of Africa.

D. *The inadequacy of existing regulatory mechanisms.* Both *P. troglodytes* and *P. paniscus* are on Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Convention), meaning essentially that export and import are prohibited by member nations, unless such activity is not detrimental to the species. In addition, domestic legislation in various non-African countries, including the United States, restricts or forbids importation of chimpanzees. Many of the African nations with wild

chimpanzee populations also have protective laws. Nonetheless, chimpanzees continue to be exported, imported, and captured and killed illegally for various uses.

Internationally, there have been problems, both because not all involved countries are parties to the Convention, and because the controls of the Convention are sometimes surreptitiously bypassed. There have been cases of chimpanzees being illegally captured in and exported from countries in Africa, and then brought into nations that are parties to the Convention. In response to inquiries by the Service during its recent status review, the governments of several African nations indicated that they have regulations protecting chimpanzees, but that enforcement is very weak because of lack of resources and expertise. The Central African Republic, for example, explained that hunting pressure by the native forest people was relatively light, but that poachers from surrounding areas, and even from outside the country, were causing increasing problems. In her response to the review, Dr. Jane Goodall stated that poaching even had become a problem in the well-protected Gombe National Park of Tanzania.

E. Other natural or manmade factors affecting its continued existence. Dr. Goodall's response also pointed out that the naturally slow reproductive rate of chimpanzees (very few adult females raise more than two young to maturity during their approximately 27 years of reproductive life), combined with increasing human pressures, places the chimpanzee in a precarious survival position. It is her opinion that "the continued removal of infants from wild populations [even if this does not involve the killing of breeding females] will, within a relatively short period of time, bring wild chimpanzees to the verge of extinction in Africa." In a separate response to an inquiry from the United States Embassy in Tanzania, made at a request from the Service during its recent review, Dr. Goodall added that the chimpanzee population of Gombe National Park had become isolated by surrounding human agricultural activity, and there were thus doubts about the long-term genetic viability of the population.

The problems indicated by Dr. Goodall are unfortunately becoming prevalent throughout the range of the chimpanzee. All populations are undergoing fragmentation into ever smaller and more isolated units. This process is most advanced in the western and eastern populations, but is

underway even in Zaire. It restricts natural interbreeding and increases vulnerability to decimation by various intrinsic and extrinsic factors. Small, isolated groups of chimpanzees are more easily eliminated by human hunting, disease, or any local environmental disruption. Fragmentation and associated disturbance may also have adverse long-term effects relating to social structure and reproduction.

The decision to propose reclassification to endangered status for the chimpanzee in the wild, and for the pygmy chimpanzee in the wild and in captivity, was based on an assessment of the best available scientific information, and of past, present, and probably future threats to the two species. Wild populations of the chimpanzee have been reduced to a small fraction of their original size, and the species has disappeared entirely from a number of countries. Its status continues to deteriorate through habitat destruction, expansion of human activity, hunting, commercial exploitation, and other problems. Such deterioration is likely to continue or accelerate with respect to wild populations, though in the United States and certain other countries there are captive groups sufficiently large to be maintained independently; current efforts to enhance the care and breeding potential of these groups could reduce the demand for additional wild individuals. The pygmy chimpanzee, which evidently is rarer and more restricted in range than is the other species, has suffered from similar problems in the wild and is represented by only a few captive individuals. To retain a classification of threatened for the pygmy chimpanzee, and for the chimpanzee in the wild, would not adequately reflect the decline of these species and the multiplicity of long-term problems confronting them. Critical habitat is not being proposed, as its designation is not applicable outside of the United States.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages conservation measures by Federal, international, and private agencies, groups, and individuals.

Section 7(a) of the Act, as amended, and as implemented by regulations at 50 CFR Part 402, requires Federal agencies to evaluate their actions that are to be

conducted within the United States or on the high seas, with respect to any species that is proposed or listed as endangered or threatened and with respect to its proposed or designated critical habitat (if any). Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat. If a proposed Federal action may affect a listed species, the responsible Federal agency must enter into formal consultation with the Service. Since the chimpanzee and pygmy chimpanzee are now listed as threatened, they are already fully covered by section 7(a), and their reclassification to endangered would add no new requirements in this regard.

Section 9 of the Act, and implementing regulations found at 50 CFR 17.21, set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take, import or export, ship in interstate commerce in the course of a commercial activity, or sell or offer for sale in interstate or foreign commerce, any listed species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service. With respect to the case at hand, these prohibitions would not apply to live members of the species *Pan troglodytes* held in captivity in the United States on the effective date of the final rule, or to the progeny of such animals, or to the progeny of animals legally imported into the United States after the effective date of the final rule.

Permits may be issued to carry out otherwise prohibited activities involving endangered wildlife species, including individuals and parts and products thereof, under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 and 17.23. Such permits are available for scientific purposes, to enhance propagation or survival, or for incidental take in connection with otherwise lawful activities. All such permits must also be consistent with the purposes and policy of the Act, as required by section 10(d) of the Act. Reclassification to endangered status would preclude issuance of permits to import wild-caught individuals solely for zoological exhibition or educational purposes, as is not allowed for threatened species pursuant to 50 CFR 17.32. In some instances, permits may be issued during

a specified period of time to relieve undue economic hardship that would be suffered if such relief were not available.

Revision of Special Rules

This proposal would continue the current special regulation, described above under "Background," with respect to captive individuals of the species *P. troglodytes* in the United States, but there also would be an additional provision. Since all members of that species in captivity would be classified as threatened, there could be potential for individuals to be taken from the wild and then for such individuals or their progeny to be imported into the United States pursuant to regulations covering threatened species, which are less restrictive than those covering endangered species. To assure that removal of animals from the wild is not encouraged by less restrictive regulations, which might result in a drain on wild populations, the special rules would provide that the regulations covering endangered species, which are discussed above under "Available Conservation Measures," would apply to any individual chimpanzee within the historic range of the species, regardless of whether in the wild or in captivity. This provision also would apply to any chimpanzee not within the historic range, but which originated within this range after the effective date of the new rule, and also would apply to the progeny of any such chimpanzee, other than to the progeny of animals legally imported into the United States after the effective date. This last exception is made so that a chimpanzee, born to parents already legally imported into the United States under the restrictive endangered species regulations, would not have to be tracked and treated separately from the rest of the captive population.

Public Comments Solicited

The Service intends that any final rule adopted will be accurate and as effective as possible in the conservation of endangered or threatened species. Therefore, comments and suggestions concerning any aspect of this proposed rule are hereby solicited from the public, concerned governmental agencies, and other parties. Comments are particularly sought concerning the following:

- (1) Biological, commercial, or other relevant data concerning any threat (or lack thereof) to the subject species;
- (2) Additional information concerning the distribution and captive status of these species; and
- (3) Current or planned activities in the involved areas, and their possible effect on the subject species.

Final promulgation of the regulation on the subject species will take into consideration the comments and any additional information received by the Service, and such communications may lead to adoption of a final regulation that differs from this proposal.

The Endangered Species Act provides for a public hearing on this proposal, if requested. Requests must be filed within 45 days of the date of the proposal, should be in writing, and should be directed to the party named in the above "ADDRESSES" section.

National Environmental Policy Act

The Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act, as amended. A notice outlining the Service's reasons for this determination was published in the *Federal Register* of October 25, 1983 (48 FR 49244).

References Cited

Lee, P.C., J. Thornback, and E.L. Bennett. 1988. Threatened primates of Africa. The

IUCN Red Data Book. International Union for Conservation of Nature, Gland, Switzerland, xx + 155 pp.

Teleki, G. 1987. Recommendations on the need to reclassify the African "common" chimpanzee (*Pan troglodytes*) from threatened to endangered under the Endangered Species Act of 1973.

Committee for Conservation and Care of Chimpanzees, Washington, DC, 49 pp.

Authors

The primary authors of this proposed rule are Drs. Charles W. Dane and Ronald M. Nowak, Office of Scientific Authority, U.S. Fish and Wildlife Service, Washington, DC 20240 (703-358-1708 or FTS 358-1708).

List of Subjects in 50 CFR Part 17

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

Proposed Regulations Promulgation

Accordingly, it is hereby proposed to amend Part 17, Subchapter B of Chapter I, Title 50 of the Code of Federal Regulations, as set forth below:

PART 17—(AMENDED)

1. The authority citation for Part 17 continues to read as follows:

Authority: Pub. L. 93-205, 87 Stat. 884; Pub. L. 94-359, 90 Stat. 911; Pub. L. 95-632, 92 Stat. 3751; Pub. L. 96-159, 93 Stat. 1225; Pub. L. 97-304, 96 Stat. 1411; Pub. L. 100-478, 102 Stat. 2300; Pub. L. 100-653, 102 Stat. 3825 (16 U.S.C. 1531 *et seq.*); Pub. L. 99-625, 100 Stat. 3500, unless otherwise noted.

2. It is proposed to amend § 17.11(h) by revising the entries for "Chimpanzee" and "Chimpanzee, pygmy" under "MAMMALS," in the List of Endangered and Threatened Wildlife, to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
MAMMALS							
Chimpanzees	<i>Pan troglodytes</i>	Africa—see 17.40(c)(3)	Wherever found in the wild.	E	16, _____	NA	NA
Do	do	do	Wherever found in captivity.	T	16, _____	NA	17.40(c)
Chimpanzees, pygmy	<i>Pan paniscus</i>	Zaire	Entire	E	16, _____	NA	NA

3. It is proposed to amend § 17.40 by revising paragraph (c)(1) and by adding, after the concluding paragraph of (c)(2), a new paragraph (c)(3) to read as follows:

§ 17.40 *Special rules—mammals.*

(C) *Primates*—(1) Except as noted in paragraphs (c)(2) and (c)(3) of this section, all provisions of § 17.31 shall apply to the lesser slow loris, *Nycticebus pygmaeus*; Philippine tarsier, *Tarsius syrichta*; white-footed tamarin, *Saguinus leucopus*; black howler monkey, *Alouatta pigra*; stump-tailed macaque, *Macaca arctoides*; gelada baboon, *Theropithecus gelada*; Formosan rock macaque, *Macaca cyclopis*; Japanese macaque, *Macaca*

fuscata; Toque macaque, *Macaca sinica*; long-tailed langur, *Presbytis potenziani*; purple-faced langur, *Presbytis senex*; Tonkin snub-nosed langur, *Pygathrix (Rhinopithecus) avunculus*; and, in captivity only, chimpanzee, *Pan troglodytes*.

(3) The provisions of §§ 17.21, 17.22, and 17.23 shall apply to any individual chimpanzee (*Pan troglodytes*) within the historic range of the species, regardless of whether in the wild or captivity, and also shall apply to any individual chimpanzee not within this range, but which has originated within this range after the effective date of these regulations, and also shall apply to the progeny of any such chimpanzee, other than to the progeny of animals legally

imported into the United States after the effective date of these regulations. For the purposes of this paragraph, the historic range of the chimpanzee shall consist of the following countries: Angola, Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Congo, Cote d'Ivoire, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Nigeria, Rwanda, Senegal, Sierra Leone, Sudan, Tanzania, Togo, Uganda, and Zaire.

Dated: February 10, 1989.

Becky Norton Dunlop,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 89-4362 Filed 2-23-89; 8:45 am]

BILLING CODE 4310-55-M

SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR
SENATE BILL 35

45TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2001

AN ACT

RELATING TO ANIMALS; REPEALING CERTAIN EXCEPTIONS IN THE
CRUELTY TO ANIMALS PROVISION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 30-18-1 NMSA 1978 (being Laws 1999,
Chapter 107, Section 1) is amended to read:

"30-18-1. CRUELTY TO ANIMALS--EXTREME CRUELTY TO ANIMALS-
-PENALTIES--EXCEPTIONS.--

A. As used in this section, "animal" does not
include insects or reptiles.

~~[A.]~~ B. Cruelty to animals consists of a person:

- (1) negligently mistreating, injuring, killing
without lawful justification or tormenting an animal; or
- (2) abandoning or failing to provide necessary

1 sustenance to an animal under that person's custody or control.

2 [B-] C. As used in Subsection [A] B of this
3 section, "lawful justification" means:

4 (1) humanely destroying a sick or injured
5 animal; or

6 (2) protecting a person or animal from death
7 or injury due to an attack by another animal.

8 [C-] D. Whoever commits cruelty to animals is
9 guilty of a misdemeanor and shall be sentenced pursuant to the
10 provisions of Section 31-19-1 NMSA 1978. Upon a fourth or
11 subsequent conviction for committing cruelty to animals, the
12 offender is guilty of a fourth degree felony and shall be
13 sentenced pursuant to the provisions of Section 31-18-15 NMSA
14 1978.

15 [D-] E. Extreme cruelty to animals consists of a
16 person:

17 (1) intentionally or maliciously torturing,
18 mutilating, injuring or poisoning an animal; or

19 (2) maliciously killing an animal.

20 [E-] F. Whoever commits extreme cruelty to animals
21 is guilty of a fourth degree felony and shall be sentenced
22 pursuant to the provisions of Section 31-18-15 NMSA 1978.

23 [F-] G. The court may order a person convicted for
24 committing cruelty to animals to participate in an animal
25

1 cruelty prevention program or an animal cruelty education
2 program. The court may also order a person convicted for
3 committing cruelty to animals or extreme cruelty to animals to
4 obtain psychological counseling for treatment of a mental
5 health disorder if, in the court's judgment, the mental health
6 disorder contributed to the commission of the criminal offense.
7 The offender shall bear the expense of participating in an
8 animal cruelty prevention program, animal cruelty education
9 program or psychological counseling ordered by the court.

10 ~~[6-]~~ H. If a child is adjudicated of cruelty to
11 animals, the court shall order an assessment and any necessary
12 psychological counseling or treatment of the child.

13 ~~[H-]~~ I. The provisions of this section do not apply
14 to:

15 (1) fishing, hunting, falconry, taking and
16 trapping, as provided in Chapter 17 NMSA 1978;

17 (2) the practice of veterinary medicine, as
18 provided in Chapter 61, Article 14 NMSA 1978;

19 (3) rodent or pest control, as provided in
20 Chapter 77, Article 15 NMSA 1978;

21 (4) the treatment of livestock and other
22 animals used on farms and ranches for the production of food,
23 fiber or other agricultural products, when the treatment is in
24 accordance with commonly accepted agricultural animal husbandry
25

practices;

(5) the use of commonly accepted Mexican and American rodeo practices, unless otherwise prohibited by law;

(6) research facilities [~~intermediate handlers, carriers and exhibitors~~] licensed pursuant to the provisions of 7 U.S.C. Section 2136, except when knowingly operating outside provisions governing the treatment of animals, of a research or maintenance protocol approved by the institutional animal care and use committee of the facility; or

(7) other similar activities not otherwise prohibited by law.

[~~H.~~] J. If there is a dispute as to what constitutes commonly accepted agricultural animal husbandry practices or commonly accepted rodeo practices, the New Mexico livestock board shall hold a hearing to determine if the practice in question is a commonly accepted agricultural animal husbandry practice or commonly accepted rodeo practice.

[~~J.~~] K. The provisions of this section shall not be interpreted to prohibit cockfighting in New Mexico.

L. Nothing in this act shall create a private right of action, civil or criminal, including injunctive actions, as to institutions described in Paragraph (6) of Subsection I of this section when not knowingly operating outside provisions governing the treatment of animals."

**FORTY-FIFTH LEGISLATURE
FIRST SESSION, 2001**

SB 35/a

February 20, 2001

Mr. President:

Your **PUBLIC AFFAIRS COMMITTEE**, to whom has been referred

SENATE BILL 35

has had it under consideration and reports same with
recommendation that it **DO PASS**, amended as follows:

1. On page 4, line 4, strike "or".
2. On page 4, line 5, remove the opening bracket and the line through the words "research facilities", delete the comma and insert a bracket before "intermediate".
3. On page 4, line 6, insert a closing bracket after "exhibitors" and remove the line-through on the remainder of the line and on all of line 7.
4. On page 4, line 7, between "2136" and the semicolon insert ", except when knowingly operating outside the provisions of a research protocol governing the treatment of animals approved by the institutional animal care and use committee of the research facility".
5. On page 4, line 8, remove the bracket and line-through.
6. On page 4, line 17, strike the quotation marks at the end of the line.
7. On page 4, between lines 17 and 18, insert the following:

"L. With regard to the provisions of this act, private causes of action, lawsuits, tort claims or other civil actions are prohibited."".,

**FORTY-FIFTH LEGISLATURE
FIRST SESSION, 2001**

SPAC/SB 35

Page 2

and thence referred to the **JUDICIARY COMMITTEE.**

Respectfully submitted,

Shannon Robinson, Chairman

Adopted _____ Not Adopted _____
(Chief Clerk) (Chief Clerk)

Date _____

The roll call vote was 9 For 0 Against

Yes: 9

No: 0

Excused: None

Absent: None

S0035PA1

.137150.2/a

1 IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO
FILED

2007 JUN 14 AM 8:53

2 STATE OF NEW MEXICO,

3 Plaintiff-Appellant/Cross-Appellee
COURT OF APPEALS
STATE OF NEW MEXICO
GINA MAESTAS

4 v.

NO. 25,822

5 DR. DONALD RICK LEE, DVM,

6 Defendant-Appellee/Cross-Appellant,

7 and

8 STATE OF NEW MEXICO,

9 Plaintiff-Appellant/Cross-Appellee,

10 v.

11 CHARLES RIVER LABORATORIES, INC.,

12 Defendant-Appellee/Cross-Appellant.

13 APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY

14 Jerry H. Ritter, Jr., District Judge

15 Gary K. King, Attorney General

16 Max Shepherd, Assistant Attorney General

17 Albuquerque, NM

18 for Appellant/Cross-Appellee

19 Robert M. Doughty II, P.C.

20 Robert M. Doughty II

21 Alamogordo, NM

1 Goodwin/Proctor LLP
2 John J. Falvey, Jr.
3 Boston, MA

4 Heather H. Anderson
5 Washington, D.C.

6 for Dr. Donald Rick Lee, Appellee/Cross-Appellant

7 Freedman Boyd Daniels Hollander & Goldberg P.A.
8 David A. Freedman
9 Charles W. Daniels
10 Zachary A. Ives
11 Albuquerque, NM

12 for Charles River Laboratories, Inc., Appellee/Cross-Appellant

13 **MEMORANDUM OPINION**

14 **ROBINSON, Judge.**

15 This case presents a question of first impression regarding New Mexico's cruelty to
16 animals statute, NMSA 1978, § 30-18-1 (2001), and its exception for the practice of
17 veterinary medicine, Section 30-18-1(I)(2). We hold that the exception for the practice of
18 veterinary medicine under Section 30-18-1 applies to the acts of Defendants.

19 We also consider whether the district court had authority under Rule 5-601(B)
20 NMRA to dismiss pretrial the charges of cruelty to animals by deciding the issue of whether
21 Defendants' conduct constituted the practice of veterinary medicine. We hold that the
22 district court had authority to decide the issue prior to a trial on the merits, and properly
23 ruled as a matter of law that Defendants were at all times engaged in the practice of
24 veterinary medicine and exempt from the criminal penalties of Section 30-18-1. Since we

1 find that the exemption under Section 30-18-1(I)(2) applies to Defendants' conduct as a
2 matter of law, we do not reach the State's argument that Defendants are not exempt under
3 Section 30-18-1(I)(7).

4 We reject the State's argument that certain deliberate conduct and/or business
5 decisions suspend the nature of the practice of veterinary medicine and take it outside the
6 exception provided by the statute. Because we decide this issue on state law, we need not
7 address the issues raised on cross-appeal. We therefore affirm the district court's dismissal
8 of charges against Defendants.

9 **I. BACKGROUND**

10 Defendants were each charged with three counts of animal cruelty in violation of
11 Section 30-18-1(B)(2). The State alleged that Defendants abandoned three chimpanzees in
12 their care by leaving them "without qualified animal care personnel and in the 'care' of
13 untrained night security guards." Defendants moved to dismiss the charges on several
14 grounds, particularly that New Mexico's animal cruelty statute expressly excluded their
15 conduct because it involved the practice of veterinary medicine. Defendants argued that it
16 was undisputed that their activities were veterinary in nature as Dr. Donald Rick Lee was
17 at all times a licensed veterinarian employed by Charles River Laboratories, Inc., a facility
18 under government contract providing veterinary care for chimpanzees and managing
19 facilities that house them. The State responded that dismissal would be improper under Rule
20 5-601(B) because the issue of whether Defendants' conduct constituted the practice of
21 veterinary medicine could not be determined pretrial. The State alleged the following facts.

1 Defendants Charles River Laboratories, Inc. (Lab) and its employee, Dr. Donald Rick
2 Lee (Dr. Lee), were operating the Alamogordo Primate Facility (APF) in 2002, when two
3 chimpanzees, Rex and Ashley, died, and in 2003, when a third chimpanzee, Topsy, nearly
4 died. APF houses approximately 250 chimpanzees that have effectively retired from
5 invasive medical testing at the Coulston Foundation of Alamogordo and other national sites.
6 In 2001, the Lab won a ten-year, \$42.8 million government contract to maintain and care for
7 the chimpanzees at APF. Many of the chimpanzees had been the subjects of various medical
8 testing, and had been exposed to diseases and conditions like AIDS and hepatitis. As with
9 any population, the health and overall condition varied from chimp to chimp. The Lab
10 implemented a policy of having veterinarians on-call after regular business hours and having
11 security guards, rather than trained animal care workers, on duty between the hours of 4:00
12 p.m. and 6:00 a.m. The State alleges that this business decision caused the premature deaths
13 of Ashley and Rex, and exacerbated the suffering of Topsy.

14 On September 16, 2002, Ashley was attacked from all sides in her cage by her eleven
15 cage mates, evidently during the Lab's regular business hours, and suffered a wound to her
16 perineal sexskin. Following the attack, Ashley was removed to a treatment area where she
17 bled continuously throughout the day. In the afternoon, during a five-minute period of
18 observation, she was observed standing on her head and shaking in a continuous and violent
19 manner. Around 3:30 p.m., the animal care workers, who were monitoring Ashley,
20 apparently recognizing the need for heightened care, informed the night security guard that
21 he should check on Ashley once an hour instead of the standard once every two hours. The
22 trained care workers then left for the day. When the security guard, who was new to the job

1 and had no animal care training of any kind, expressed concern about the large pools of
2 blood forming on the floor around Ashley, he was told by Dr. Lee, the facility director, and
3 others not to worry. The security guard discovered Ashley dead within hours after the
4 animal care staff left the facility.

5 Rex had been ill for several months and, on December 30, 2002, failed to regain
6 consciousness after being anesthetized for a physical examination the previous day. He was
7 vomiting repeatedly, and an animal care worker stayed in Rex's cage for much of the day,
8 removing vomit from his mouth with the aid of a suction-pump machine. Although Rex had
9 never recovered from sedation, the animal care workers left at the end of the day, again
10 telling the security guard to check on Rex hourly instead of every other hour. Rex was later
11 found dead by the night security guard with vomit in his mouth and trachea.

12 On June 26, 2003, Topsy suffered a wound to her sexskin, and bled steadily during
13 the day whenever she would pick at her wound. At the end of regular business hours, she
14 was prescribed Diazepam, and was left in her own cage instead of a sick room where her
15 continued bleeding might have been noticed. The following morning, she was discovered
16 in a pool of fresh blood, and had to undergo an emergency blood transfusion. After having
17 about half of her blood volume replaced, Topsy survived, but her medical records indicate
18 that she was in a weakened state for days following the incident.

19 The State alleges that each of these incidents constitutes an egregious example of
20 deliberate abandonment and thus cruelty to each of these chimpanzees under Section 30-18-
21 1(B). The State also alleges that Defendants' conduct falls outside the "practice of
22 veterinary medicine" because these actions "violate[] basic ethical medical treatment and is

1 contrary to the very policies, regulations and protocols [the Lab] and Dr. Lee were mandated
2 to follow." We disagree based on our analysis of the statutes regulating human behavior
3 toward animals.

4 II. DISCUSSION

5 A. Pretrial Motion

6 Rule 5-601(B) provides that "[a]ny defense, objection or request which is capable of
7 determination without a trial on the merits may be raised before trial by motion." The State
8 contends that the district court exceeded its authority under Rule 5-601 by granting
9 Defendants' motion to dismiss. The State relies on *State v. Mares*, 92 N.M. 687, 689, 594
10 P.2d 347, 348 (Ct. App. 1979); *State v. Masters*, 99 N.M. 58, 60, 653 P.2d 889, 891 (Ct.
11 App. 1982); and *State v. Eder*, 103 N.M. 211, 214, 704 P.2d 465, 468 (Ct. App. 1985).
12 However, each of these cases involved a dispute of either the facts of the crime, the intent
13 or state of mind of the defendant, or elements of a crime. In *Mares*, this Court reversed the
14 district court's ruling on whether a peace officer had acted lawfully in a shooting, stating
15 that "[t]he lawfulness of defendant's action, in shooting the victim, does involve the facts
16 of the crime." *Id.* at 689, 594 P.2d at 348. *Masters* involved a pretrial ruling on whether the
17 defendant had acted willfully as required by New Mexico's failure to appear statute. This
18 Court reversed, stating that "[t]he word 'willfully,' as used in our statute, concerns
19 defendant's state of mind. . . . The question of willfulness is a factual question." *Id.* at 60,
20 653 P.2d at 891 (citations omitted). In *Eder*, the trial court was reversed for dismissing an
21 indictment in advance of trial by making factual determinations concerning the elements of
22 the crime charged. "Whether the crime was larceny or embezzlement depends upon whether

1 defendants were entrusted with the money they took from the jail.” *Id.* at 214, 704 P.2d at
2 468.

3 The State correctly states the rule that purely legal questions may be decided pretrial,
4 but asserts that the rule does not apply here. *See State v. Foulentfont*, 119 N.M. 788, 790,
5 895 P.2d 1329, 1331 (Ct. App. 1995); *State v. Rendleman*, 2003-NMCA-150, ¶ 27, 134
6 N.M. 744, 82 P.3d 554. We disagree because in this case the facts of the alleged crime are
7 not disputed that, on three different occasions, Dr. Lee and the Lab left sick chimpanzees
8 that were under their charge in the care of night security guards. Two chimpanzees died, and
9 one suffered serious blood loss. The State focused its argument on whether Defendants’
10 conduct falls within the definition of “the practice of veterinary medicine,” a legal question
11 of statutory construction. § 30-18-1(T)(2). *Foulentfont* and *Rendleman* involved questions
12 of statutory construction where the predicate facts were undisputed.

13 In *Foulentfont*, the defendant argued that the predicate facts underlying a burglary
14 charge—entry of a fenced area—did not fit within the statutory definition of burglary.
15 Distinguishing *Mares*, where lawfulness was a factual issue, in *Foulentfont*, this Court noted
16 there was no dispute that the burglary charges were predicated on the act of climbing the
17 fence. *Id.* at 789, 895 P.2d at 1330. Therefore, the dispute focused on the legal issue of
18 whether a fence came within the definition of a “structure” in the burglary statute. *Id.* This
19 court held that because the predicate facts were undisputed, the question of whether a fence
20 was a structure under the burglary statute was purely a legal question. *Id.* at 790, 895 P.2d
21 at 1331.

1 For our purposes, *Rendleman* concerned the legal question of whether a photograph
2 of a child could be construed as lewd as defined by our sexual exploitation of children
3 statute. This Court held that the district court may grant a pretrial motion to dismiss charges
4 alleging sexual exploitation of children where "on the undisputed face of the materials
5 before the court," elements of the offense cannot be met. 2003-NMCA-150, ¶ 31. The
6 Court further framed the rule as follows: "New Mexico courts have held that under Rule 5-
7 601(B) a court may rule pretrial on legal questions that involve predicate facts underlying
8 the charges where those facts are undisputed." 2003-NMCA-150, ¶ 27.

9 **B. Cruelty to Animals Statute**

10 Whether Defendants' conduct falls within the definition of the practice of veterinary
11 medicine, and is therefore excepted from criminal penalties under Section 30-18-1(I)(2), is
12 a question of statutory interpretation which we review de novo. *See State v. Arellano*, 1997-
13 NMCA-074, ¶ 3, 123 N.M. 589, 943 P.2d 1042.

14 The State alleges that Defendants are criminally liable under Section 30-18-1(B)
15 which provides:

16 Cruelty to animals consists of a person:

- 17 (1) negligently mistreating, injuring, killing without lawful justification or
18 tormenting an animal; or
19 (2) abandoning or failing to provide necessary sustenance to an animal
20 under that person's custody or control.

21 We agree that abandoning an animal and negligently mistreating an animal are indeed
22 considered cruelty to animals. However, the Legislature clearly and unambiguously
23 excepted the provisions of the animal cruelty statute from applying to the practice of

1 veterinary medicine. Section 30-18-1(I)(2) states, in pertinent part, that “[t]he provisions
2 of this section do not apply to . . . the practice of veterinary medicine, as provided in
3 [Section 61-14-13].” In *State v. Parson*, 2005-NMCA-083, ¶ 19, 137 N.M. 773, 115 P.3d
4 236, this Court opined that Section 30-18-1(A) “expressly does not apply to the practice of
5 veterinary medicine.” *Parson*, 2005-NMCA-083, ¶ 19.

6 **C. Veterinary Practice Act**

7 As used in the Veterinary Practice Act, Section 61-14-2(B)(1), the practice of
8 veterinary medicine means:

9 the diagnosis, treatment, correction, change, relief or prevention of animal
10 disease, deformity, defect, injury or other physical or mental condition,
11 including the prescription or administration of any drug, medicine, biologic,
12 apparatus, application, anesthetic or other therapeutic or diagnostic substance
13 or technique and the use of any procedure for artificial insemination, testing
14 for pregnancy, diagnosing and treating sterility or infertility or rendering
15 advice with regard to any of these[.]

16 As previously noted, Dr. Lee, a licensed veterinarian, and his employer, the Lab, were under
17 government contract to provide care and treatment to aging and diseased animals formerly
18 used as federal research subjects. The State concedes that “treatment and correction of
19 injured or sick animals must . . . include decisions about how to administer such treatment
20 and/or correction,” but contends that making a business decision to “deliberately abandon
21 . . . obviously sick animals to the care of untrained . . . personnel” does not constitute the
22 practice of veterinary medicine as defined in the Act. This argument is without merit. The
23 State cannot provide further reasoning to support its argument because the plain meaning
24 of treatment includes the manner, method, or systematic course of conduct, which implies

1 intentional or deliberate conduct, whether or not it is correct. Notably, the State does not
2 allege accidental conduct, but rather deliberate conduct. Therefore, we hold that
3 Defendants' conduct in deciding to leave the chimpanzees in the care of night security
4 guards is a manner or method of treatment that constitutes the practice of veterinary
5 medicine.

6 Next, the State argues that such conduct could not have been the type the Legislature
7 meant to exempt under Section 30-18-1(B)(2). The State concludes that such an
8 interpretation would lead to an absurd, unreasonable, or unjust result. However, such
9 conduct, "abandoning or failing to provide necessary sustenance to an animal under that
10 person's custody or control," is expressly the kind of conduct the statute exempts. *Id.* In
11 applying the plain meaning rule, we see no difference between "deliberately abandoning"
12 and "abandoning." Therefore, we find the statute is clear as to the conduct it proscribes and
13 further, that its exemption for the practice of veterinary medicine applies to the conduct of
14 Defendants.

15 The State flatly argues that "exemptions are not absolute" and cites to several cases
16 relative to medical practice on humans. It is well established that where it is alleged that a
17 medical doctor's treatment of a human patient falls below the appropriate standard of care,
18 the doctor can be held civilly liable for malpractice. *See Alberts v. Schultz*, 1999-NMSC-
19 015, ¶ 20, 126 N.M. 807, 975 P.2d 1279. However, it is also clearly established that a
20 license to practice medicine does not exempt a physician from criminal prosecution when
21 the jury finds beyond a reasonable doubt that the doctor's treatment constitutes a gross
22 deviation from the standard of care. *See People v. Phillips*, 75 Cal. Rptr. 720 (Cal. App.

1 1969) (regarding a second-degree murder conviction affirmed upon a jury's finding that a
2 licensed chiropractor's conduct was malicious); *State v. Heines*, 197 So. 787 (Fla. 1940)
3 (regarding a licensed chiropractor's manslaughter conviction based on a jury's finding of
4 felonious and grossly negligent conduct); *State v. McMahan*, 65 P.2d 156 (Idaho 1937)
5 (regarding an involuntary manslaughter conviction where jury questioned whether
6 physician's conduct constituted gross negligence); *State v. Warden*, 813 P.2d 1146, 1151
7 (Utah 1991) (stating that a physician's conviction for negligent homicide affirmed upon by
8 a jury finding that defendant's conduct in treating the victim/patient deviated significantly
9 from the applicable standard of care); *State v. Catellier*, 179 P.2d 203 (Wyo. 1947)
10 (regarding a physician's manslaughter conviction affirmed on a jury's finding of gross
11 ignorance of art of the practice of medicine).

12 While it is true that these cases hold that a physician can be criminally charged for
13 treatment outside the accepted standard of care, the concept does not yet apply to the
14 treatment of animals in New Mexico. It is patently clear that we treat animals differently
15 than humans. We hunt them, we experiment on them, and we euthanize them. In New
16 Mexico, the Legislature has excepted hunting, experimentation, and euthanasia of animals
17 from criminal prosecution, and instead enacted or referred to other laws that regulate these
18 practices. The same is true of the exception for the practice of veterinary medicine, which
19 while perhaps is not absolute, covers nearly every conceivable act that man can do to
20 animals. If, as the State argues, the Legislature had intended to exclude from its exception
21 conduct outside the usual course of the practice of veterinarian medicine, it could have done
22 so. A similar exception listed in Section 30-18-1(D)(6) is research facilities, but the

1 Legislature excluded from this exemption "knowingly operating outside provisions" of
2 approved protocol. The Legislature also qualified its exception for the treatment of livestock
3 to "commonly accepted agricultural animal husbandry practices." § 30-18-1(D)(4).

4 The State argues that the Legislature could not have intended to "exempt from
5 prosecution for cruelty to animals regardless of how egregious and deliberate a
6 veterinarian's mistreatment of animals in his or her care was." However, we need not decide
7 the scope of the exemption for veterinary practice in this case where Defendants' acts were
8 a conceded, through perhaps negligent or even deliberately neglectful, part of that practice.

9 **III. CONCLUSION**

10 For the reasons stated above, we hold that Defendants' conduct constituted the
11 practice of veterinary medicine, and that the Legislature clearly intended to except the
12 practice of veterinary medicine from the cruelty to animals statute of the New Mexico
13 criminal code.

14 **IT IS SO ORDERED.**

15 
16 **IRA ROBINSON, Judge**

17 **I CONCUR:**

18 
19 **CELIA FOY CASTILLO, Judge**

1 I CONCUR IN RESULT ONLY:

2 Lynn Pickard
3 LYNN PICKARD, Judge

[Subscribe](#) [eJournal](#) [Subscriber Services](#)

	News	Sports	Business	Entertainment	Obituaries	Opinion	Calendar	Real Estate	Classifieds	Jobs	Drive
---	----------------------	------------------------	--------------------------	-------------------------------	----------------------------	-------------------------	--------------------------	-----------------------------	-----------------------------	----------------------	-----------------------

Subscribe to the Journal, call 505-823-4400

[Front Page](#) [»news](#) [»state](#)



Wednesday, April 16, 2008

N.M. High Court Hears Arguments in Alamogordo Chimp Case

By Deborah Baker/
Associated Press

SANTA FE — The New Mexico Supreme Court has heard arguments that the state should prosecute a federal government contractor for the deaths of two chimpanzees and the near-death of a third at a former research laboratory.

The attorney general's office wants the state's highest court to reverse the dismissal of criminal animal cruelty charges against Massachusetts-based Charles River Laboratories and veterinarian Rick Lee.

Charles River manages the Alamogordo Primate Facility, which houses about 220 chimps formerly used in medical experiments. It calls the southern New Mexico facility "a model of humane care."

The district attorney in Alamogordo brought the misdemeanor animal cruelty charges in 2005 for incidents that occurred in 2002 and 2003.

Two injured chimps died after animal care workers left for the day. Another came close to death after bleeding overnight, but survived after a transfusion.

A state district court dismissed the charges and the Court of Appeals upheld the ruling, saying the animal cruelty law has an exception for the practice of veterinary medicine that covers the contractor and Lee, who runs the facility.

The attorney general contends that the facility had a policy of having security guards — rather than trained animal care workers — on duty after 4 p.m.

Assistant Attorney General Max Shepherd on Tuesday called that an "economically motivated business decision" that had nothing to do with the practice of veterinary medicine and argued that the exception in the law didn't apply.

The lawyer for Charles River, David Freedman, called that "a ludicrous allegation" and denied there was such a policy. He said veterinarians were on call after hours and had told the workers to notify them if the chimps' conditions changed. The veterinary exception applies, he said.

A couple of the Supreme Court justices greeted the state's arguments with some skepticism, pointing out that the exemption in the law for veterinarians is clear.

"Go down the street to the Legislature and get a (different) statute ... instead of trying to twist this one," suggested Justice Richard Bosson.

The court made no immediate ruling in the case.


Copyright ©2008 Associated Press. All rights reserved. This material may not be published, broadcast, rewritten, or redistributed.

Featured Jobs

Featured Jobs

**Feature Your
Jobs: call 823-
4444**

Story Tools

 [E-mail Story](#)

 [Print Friendly](#)

Newsstate

[More Newsstate](#)

[Subscribe](#) [eJournal](#) [Subscriber Services](#)

	News	Sports	Business	Entertainment	Obituaries	Opinion	Calendar	Real Estate	Classifieds	Jobs	Drive
---	----------------------	------------------------	--------------------------	-------------------------------	----------------------------	-------------------------	--------------------------	-----------------------------	-----------------------------	----------------------	-----------------------

Subscribe to the Journal, call 505-823-4400

[Front Page](#) [news](#) [state](#)

Tuesday, April 29, 2008

Chimp Cruelty Case Is Dead

By Scott Sandlin
Journal Staff Writer

The criminal misdemeanor case against an Alamogordo lab contracted to care for chimps once used for medical testing is dead.

The New Mexico Supreme Court, after accepting briefs and hearing oral arguments in the case earlier this month, decided to send it back to the state Court of Appeals. The Court of Appeals had ruled in favor of the Charles River Laboratories and Dr. Rick Lee, the veterinarian director of the lab, in an unpublished memorandum opinion in June 2007.

"Their opinion is the opinion in the case. There's nothing left to do," said Assistant Attorney General Max Shepherd, who argued the state's position.

"This is a pretty active Supreme Court. They look at a lot of cases. Then they decide oops, maybe the (Court of Appeals) is not such a bad opinion."

Lee and Charles River were charged with criminal misdemeanors in 2004 under the state Animal Cruelty Act after the deaths of two chimps and injuries to a third.

Charles River argued that its care at the Alamogordo Primate Facility, where some 220 aging and diseased adult primates are housed, was appropriate and compassionate—and that its medical management fell under an exemption in the law for veterinarians.

"Both the district court and the Court of Appeals concluded that the care and treatment of the animals housed at the APF fall squarely within the statute's definition of the 'practice of veterinary medicine,'" Charles River said in a statement after the case was argued at the high court.


The company said it got the contract in 2001 because of its "history and leadership in humane care."

Featured Jobs


Featured Jobs

**Feature Your
Jobs: call 823-
4444**

Story Tools

 [E-mail Story](#)

 [Print Friendly](#)

 [Send E-mail](#)
To: Scott Sandlin

BY Recent stories

by Scott Sandlin

\$\$ [NewsLibrary Archives](#)
search for
Scott Sandlin '95-now

 [Reprint story](#)

CASES & CODES PRACTICE MANAGEMENT JOBS & CAREERS NEWSLETTERS BLOGS LAW TECHNOLOGY Search FindLaw

Forms Lawyer Marketing Corporate Counsel Law Students JusticeMail Reference

FindLaw Caselaw New Mexico NM Ct. App COULSTON FOUNDATION v. MADRID

COULSTON FOUNDATION v. MADRID

Print

Font size: A A Reset

Court of Appeals of New Mexico.

**The COULSTON FOUNDATION, a not-for-profit corporation, Plaintiff-Appellant,
v. Patricia A. MADRID, Attorney General, State of New Mexico, Defendant-Appellee.**

No. 24,000.**Decided: March 16, 2004**

F. Randolph Burroughs, Burroughs & Rhodes, Alamogordo, NM, for Appellant. Patricia A. Madrid, Attorney General, David K. Thomson, Jerome Marshak, Assistant Attorneys General, Santa Fe, NM, for Appellee.

OPINION

{1} The Attorney General (AG) issued a "civil investigative demand" (CID) to the Coulston Foundation (the Foundation) pursuant to the Charitable Solicitations Act, NMSA 1978, §§ 57-22-1 to -11 (1983, as amended through 1999) (the Act). The AG was conducting an investigation of the Foundations's endowment system established for the care and well-being of chimpanzees, and issued the CID to obtain information and documents relevant to that investigation. The district court denied the Foundation's petition to set aside the CID, and the Foundation appeals, contending: (1) its petition should have been granted because the AG did not file a responsive pleading; (2) because the Foundation did not solicit charitable funds and because it performed non-charitable research for the federal government, it is not subject to the AG's investigatory powers under the Act; (3) the AG's affidavit in support of the CID is insufficient, and the CID is therefore invalid; and (4) because federal law preempts the Act, the district court lacks subject matter jurisdiction to enforce the CID. In our notice of assignment to the general calendar, we requested that the parties also brief the issue of whether the district court's order enforcing the CID is a final, appealable order.

{2} We determine that the order is a final, appealable order and affirm the district court.

FACTUAL AND PROCEDURAL BACKGROUND

{3} The Foundation is a New Mexico nonprofit corporation which performs biomedical research on chimpanzees. The Foundation is exempt from federal income tax under Section 501(a) of the Internal Revenue Code, I.R.C. § 501(a) (1986), as an organization described in Section 501(c)(3), and it is registered as a "charitable organization" with the AG as required under the Act. See Section 57-22-3(A) (defining a "charitable organization" to be "any entity that has been granted exemption from the federal income tax by the United States commissioner of internal revenue as an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or identifies itself to the public as having a charitable purpose"); Section 57-22-6(A) (requiring every charitable organization "existing, operating or soliciting in the state, unless exempted," to register with the AG). Registration with the AG is consistent with the purpose of the Act, which is "to authorize the attorney general to monitor, supervise and enforce the charitable purposes of charitable organizations and regulate professional fundraisers operating in this state." Section 57-22-2.

{4} The Foundation implemented a "Chimpanzee Endowment Policy," establishing an endowment system consisting of an irrevocable trust from which funds were used only for the permanent and long-term care of individual chimpanzees that were used in research.

{5} In April 2002, the AG's Office received a complaint against the Foundation, alleging that the irrevocable trust funds were misspent, and the AG initiated an investigation pursuant to its authority under the Act. From May to August of 2002, the AG and the Foundation worked cooperatively in the investigation, until the Foundation refused to comply with the AG's request for audited financial statements. In response, the AG issued a CID to obtain the information and requested documents. See Section 57-22-9.1(A) (permitting the AG to serve a civil investigative demand requiring the person to answer interrogatories or produce requested documentary material that may be "relevant to the subject matter of an investigation of a probable violation of the [Act]").

FindLaw Career Center

Attorney
Corporate Counsel
Academic
Judicial Clerk
Summer Associate
Intern
Law Librarian

[Search Jobs](#) [Post a Job](#) [View More Jobs](#)

[View More](#)

{6} The Foundation filed a petition with the district court to set aside the CID pursuant to Section 57-22-9.1(G) (providing that upon filing of petition and showing of good cause, district court may set aside, modify, or extend return date of CID). After receiving pleadings and holding hearings on the matter, the district court entered its order enforcing the CID. The Foundation appeals.

FINAL, APPEALABLE ORDER

{7} This Court's jurisdiction lies from final, appealable orders. *Kelly Inn No. 102, Inc. v. Kapnison*, 113 N.M. 231, 236, 824 P.2d 1033, 1038 (1992). An order is final if all issues of law and fact necessary to be determined have been determined and the case has been disposed of by the trial court to the fullest extent possible. *Id.* at 236, 238, 824 P.2d at 1040, 1042 (stating that "a question remaining to be decided thereafter will not prevent the judgment from being final if resolution of that question will not alter the judgment or moot or revise decisions embodied therein"); see also *Trujillo v. Hilton of Santa Fe*, 115 N.M. 397, 397, 851 P.2d 1064, 1064 (1993) (reiterating that an order is final if it determines the rights and liabilities of the parties to the underlying controversy).

{8} We agree that the order in this case is final because it practically disposes of all matters raised by the petition to set aside the CID. See *Kelly Inn No. 102, Inc.*, 113 N.M. at 236, 824 P.2d at 1038. The AG's authority to investigate possible violations of the Act, and in that capacity, to issue CIDs and its authority to enforce the Act are two separate powers and functions. See Section 57-22-9(A) (stating AG may examine and investigate any charitable organization to ascertain "conditions of its affairs and to what extent, if at all, it fails to comply with the trusts it has assumed or if it has departed from the purposes for which it was formed"); Section 57-22-9.1(A) (providing AG may, prior to initiating a civil proceeding, issue a CID to a person the AG has reason to believe has information or documents which AG believes to be relevant to the subject matter of an investigation of a probable violation of the Act); Section 57-22-9(A), (B), and (C) (giving AG authority to institute a proceeding to correct noncompliance or departure by a charitable organization from its trust or purposes for which it was formed; to seek injunctive relief, civil penalties, financial accounting or restitution from any person who has failed to comply with registration, filing or disclosure provisions of the Act; and to initiate proceedings to seek compliance with the Act). The Foundation initiated this proceeding by filing its petition which was resolved to its fullest extent by the district court order enforcing the CID. We therefore hold that it is a final and immediately appealable order. Cf. *Wilson Corp. v. State ex rel. Udall*, 1996-NMCA-049, ¶¶ 13-14, 121 N.M. 677, 916 P.2d 1344 (enforcing CIDs under the New Mexico Antitrust Act, not discussing finality but describing the district court action as summary, in which only initial matters are determined regarding the investigation and authority under the Act). Accordingly, we address the merits of the Foundation's appeal below.

DISCUSSION

{9} The Foundation raises mostly legal questions and challenges to legal conclusions. The district court's interpretation of a statute is a question of law which we review *de novo*. See *Morgan Keegan Mortgage Co. v. Candelaria*, 1998-NMCA-008, ¶ 5, 124 N.M. 405, 951 P.2d 1066. "When a party is challenging a legal conclusion, the standard for review is whether the law correctly was applied to the facts, viewing them in a manner most favorable to the prevailing party, indulging all reasonable inferences in support of the court's decision, and disregarding all inferences or evidence to the contrary." *Golden Cone Concepts, Inc. v. Villa Linda Mall, Ltd.*, 113 N.M. 9, 12, 820 P.2d 1323, 1326 (1991).

A. WHETHER THE DISTRICT COURT ERRED IN DENYING THE PETITION BECAUSE THE AG FAILED TO FILE A RESPONSIVE PLEADING.

{10} The Foundation filed its petition in the district court seeking to set aside the CID on various grounds. The AG in turn filed a motion to dismiss the petition and to enforce the CID, together with a memorandum in support of the motion which defends the issuance of the CID and responds to every argument set forth in the Foundation's petition.

{11} The Foundation argues that the AG's motion to dismiss the petition and enforce the CID is not a responsive pleading as required under Rule 1-007 NMRA 2004. The Foundation further contends that without a responsive pleading, the allegations in the petition should be deemed true and admitted pursuant to Rule 1-012(B) NMRA 2004 and Rule 1-008(D) NMRA 2004. It therefore contends that it was entitled to have the CID set aside as requested in its petition. Referring us to *Wilson Corp.*, 1996-NMCA-049, ¶¶ 13, 17, 121 N.M. 677, 916 P.2d 1344, the AG responds that we have previously held that a proceeding brought to enforce or quash compulsory process—whether denominated by a subpoena, a summons, or a CID—on behalf of an administrative agency is not a trial but is summary in nature and that the district court has discretion in how it is conducted.

{12} We hold that the district court did not abuse its discretion in proceeding to consider the merits of the Foundation's petition on the basis of the AG's motion to dismiss the petition and enforce the CID. The AG's motion responded to every argument set forth in the Foundation's petition, and this record fails to show any prejudice to the Foundation. For all practical purposes, it fulfilled the function of a responsive pleading. We would be elevating form over function by accepting the Foundation's argument. In the circumstances of this case, we refuse to do so. See *Sanchez v. City of Belen*, 98 N.M. 57, 60, 644 P.2d 1046, 1049 (Ct.App.1982) (stating that "[t]he general policy on pleadings require that an adjudication on the merits rather than technicalities of procedures and form shall determine the rights of the litigants," and concluding that the denial of allegations was sufficient to plead an affirmative defense); *Biebelle v. Norero*, 85 N.M. 182, 184, 510 P.2d 506, 508 (1973) (stating a general policy of providing maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities and deciding that failure to incorporate a previously filed

counterclaim into an amended answer was not a basis for dismissal); see also *Wilson Corp.*, 1996-NMCA-049, ¶ 17, 121 N.M. 677, 916 P.2d 1344 (permitting the district court broad discretion in conducting these summary enforcement proceedings). Therefore, we reject the Foundation's argument that it was entitled to have the CID set aside on grounds the AG failed to file a responsive pleading.

{13} For these reasons, we find no error in accepting the AG's pleading and affirm the district court on this issue.

B. WHETHER THE FOUNDATION IS SUBJECT TO THE NEW MEXICO CHARITABLE SOLICITATION ACT.

{14} The Foundation argues that because it did not solicit charitable funds and because it performed non-charitable care of chimpanzees for the federal government, the Act does not apply to the Foundation, and therefore the CID was improperly issued under the Act. We reject this argument.

{15} First, in support of its contention that it did not solicit the investigated funds, the Foundation presented only arguments of counsel and a copy of its "Chimpanzee Endowment Policy" that simply sets forth the criterion for assessment of endowment fees. The Foundation failed to present specific evidence that its arrangement with the federal government or other organizations should not be considered a solicitation. See *In re Metro. Invs., Inc.*, 110 N.M. 436, 441, 796 P.2d 1132, 1137 (Ct.App.1990) (stating that "arguments of counsel are not evidence"). Without a more compelling showing at this early stage on what the Foundation argues is a definitive issue in the AG's investigation, we agree with the district court that the Foundation failed to establish good cause to set aside the CID. Cf. *Wilson Corp.*, 1996-NMCA-049, ¶ 17, 121 N.M. 677, 916 P.2d 1344 (holding that "the scope of the hearing will depend on the nature of the challenge and the strength of the showing," leaving this determination to the sound discretion of the district court). Therefore, we hold that the district court did not abuse its discretion in the summary proceeding by refusing to set aside the CID.

{16} Secondly, the Foundation's argument overlooks pertinent provisions of the Act. The Foundation is clearly a "charitable organization" since it was granted an exemption from the federal income tax by the United States commissioner of internal revenue as an organization described in I.R.C. § 501(c)(3). Section 57-22-3(A). Moreover, the Foundation is clearly performing "charitable purposes." It states that it performs "biomedical research in the war against disease and pain for both humans and animals" and Section 57-22-3(B) of the Act defines a "charitable purpose" in part to mean "a benevolent, social welfare, scientific, educational, environmental, philanthropic, humane, patriotic, public health, civil or other eleemosynary objective."

{17} The stated purpose of the Act is "to authorize the attorney general to monitor, supervise and enforce the charitable purposes of charitable organizations and regulate professional fund raisers operating in this state." Section 57-22-2 (emphasis added). The AG is not limited to regulating professional fund raisers; it is also authorized to monitor, supervise, and enforce charitable purposes of charitable organizations. To this end, it is granted broad powers to "examine and investigate any charitable organization subject to the [Act] to ascertain the conditions of its affairs and to what extent, if at all, it fails to comply with the trusts that it has assumed or if it has departed from the purposes for which it was formed." Section 57-22-9(A). Finally, the Foundation overlooks the requirement that every charitable organization "existing, operating or soliciting" in this state must register with the AG, as the Foundation did. Section 57-22-6(A) (emphasis added). We hold that the Foundation is subject to the Act, and that the CID was properly issued pursuant to the Act.

C. WHETHER THE AG AFFIDAVIT IN SUPPORT OF THE CID WAS ADEQUATE.

{18} In *Wilson Corp.*, this Court stated that before a court will enforce a CID issued pursuant to the Antitrust Act, the AG "must make a sworn showing of the basic elements required for compulsory process." *Wilson Corp.*, 1996-NMCA-049, ¶ 16, 121 N.M. 677, 916 P.2d 1344. We stated that an affidavit or testimony would need to establish that: (1) the AG is investigating a possible violation of the statute; (2) the information sought is relevant to the investigation; and (3) there is reasonable cause to believe that the recipient of the CID possesses the information. *Id.* The Foundation argues that the affidavit submitted in this case failed to comply with these requirements, and the CID should not have been enforced.

{19} Assuming this procedure is also required for a CID to issue pursuant to the Act, we hold that the AG substantially complied with *Wilson Corp.* The AG filed an affidavit in support of its motion to dismiss the petition filed by the Foundation and to enforce the CID. The affidavit in pertinent part states:

1. I am the Attorney General of the State of New Mexico and the Respondent in this matter.
2. I, through my Assistant Attorneys General, am conducting an investigation of Petitioner, The Coulston Foundation, to determine whether The Charitable Solicitations Act has been or is being violated.
3. The information sought by the Civil Investigative Demand is relevant to this investigation.
4. I have reasonable cause to believe that Petitioner possesses the information sought by the Civil Investigative Demand.

{20} The district court found that the affidavit does not set forth facts, only conclusions and that it does not state that it is based on the AG's personal knowledge. Despite these deficiencies, the district court concluded that based upon the pleadings, which included the facts set forth in the CID, it was clear what information was wanted, and that the AG had the authority to obtain it under the Act. We agree. See *Herrera v. Roman Catholic Church*, 112 N.M. 717, 721, 819 P.2d 264, 268 (Ct.App.1991) (stating that "[u]nless clearly erroneous or deficient, findings of the trial court will be construed so as to uphold a judgment rather than to reverse it").

{21} It is not disputed that the AG was conducting an investigation of the Foundation. It is also undisputed that the Foundation admitted to possessing the audited financial statements sought by the AG and that those statements are relevant to the AG's investigation into funds used in the chimpanzee endowment program. Although the AG's affidavit lacks an ideal factual foundation, the AG substantially complied with a procedure this Court adopted in the context of another statute. We therefore hold that the CID was properly enforced.

D. WHETHER THE DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION

{22} We understand the Foundation's argument under this point to be that the district court lacked subject matter jurisdiction to enforce the CID because federal law preempts the Act. The Foundation seems to argue that because its irrevocable trust to care for chimpanzees was funded under an agreement with the federal government, federal law preempts the operation of the Act against it. We reject this argument.

{23} "Federal law may preempt state law under the Supremacy Clause, U.S. Const. art. VI, cl. 2, by express provision, by implication, or by a conflict between federal and state law." *Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶ 30, 133 N.M. 669, 68 P.3d 909 (internal quotation marks and citations omitted). However, the Foundation does not point to any language in any federal statute expressly displacing the Act, and the Foundation has failed to demonstrate Congress' intent to preempt the field covered by the Act. See *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 7, 126 N.M. 396, 970 P.2d 582 (stating that when statute does not expressly displace state law, burden is to show Congress' intent to preempt).

{24} We therefore reject the Foundation's argument and hold that the district court had subject matter jurisdiction to enforce the CID. N.M. Const. art. VI, § 13 (stating that the district courts have original jurisdiction in all matters and causes not excepted by the Constitution).

CONCLUSION

{25} For the reasons discussed above, we affirm the district court's order denying the petition and enforcing the CID.

{26} IT IS SO ORDERED.

VIGIL, Judge.

JAMES J. WECHSLER, Chief Judge and CELIA FOY CASTILLO, Judge.

RESEARCH THE LAW

Cases & Codes / Opinion Summaries / Sample Business Contracts / Research An Attorney or Law Firm

MANAGE YOUR PRACTICE

Law Technology / Law Practice Management / Law Firm Marketing Services / Corporate Counsel Center

MANAGE YOUR CAREER

Legal Career Job Search / Online CLE / Law Student Resources

NEWS AND COMMENTARY

Law Commentary / Featured Documents / Newsletters / Blogs / RSS Feeds

GET LEGAL FORMS

Legal Forms for Your Practice

ABOUT US

Company History / Media Relations / Contact Us / Privacy / Advertising / Jobs

FIND US ON



Copyright © 2017 FindLaw, a Thomson Reuters business. All rights reserved.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

BARBARA JAFFE
J.S.C.

PRESENT: _____
Justice

PART 12

In re The Nonhuman Rights Project Inc
-v-
Samuel L. Stanley Jr. M.D

INDEX NO. 152736/15
MOTION DATE _____
MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this ~~motion~~ Order to Show Cause

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/29/15

BARBARA JAFFE
J.S.C.

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : IAS PART 12

-----X
In the Matter of a Proceeding under Article 70 of the
CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC.,
on behalf of HERCULES and LEO,

Petitioner,

- against -

SAMUEL L. STANLEY JR., M.D., as President of
State University of New York at Stony Brook
a/k/a Stony Brook University and
STATE UNIVERSITY OF NEW YORK
AT STONY BROOK a/k/a STONY BROOK
UNIVERSITY,

Respondents.
-----X

JAFFE, BARBARA, J.:

For petitioner:

Elizabeth Stein, Esq.
5 Dunhill Rd.
New Hyde Park, NY 11040
516-747-4726

Steven M. Wise, Esq., pro hac vice
Nonhuman Rights Project
5195 NW 112th Terrace
Coral Springs, FL 33076

For respondents:

Christopher Coulston, AAG
Michael R. Kelkman, AAG
Office of the New York State Atty General
120 Broadway, 24th fl.
New York, NY 11040
212-416-8556

For amicus curiae:

Bob H. Kohn, Esq., pro hac vice
The Center for the Study of Great Ideas, Inc.
140 East 28th St.
New York, NY 10016
408-602-5646

Daniel J. Kornstein, Esq.
Kornstein Veisz Wexler & Pollard, LLP
757 Third Ave.
New York, NY 10017
212-418-8600

Petitioner brings this proceeding pursuant to CPLR article 70 and under the common law

for a writ of habeas corpus on behalf of Hercules and Leo, two chimpanzees now in the custody of respondent State University of New York at Stony Brook (University). It seeks an order directing respondents to demonstrate the basis for detaining Hercules and Leo, and an order directing their release and transfer to a sanctuary in Florida. (Verified Petition [Pet.]).

Respondents oppose the petition and cross move to change venue. (Respondents' Memorandum of Law in Opposition to the Petition for a Writ of Habeas Corpus and in Support of their Cross-Motion to Change Venue to Supreme Court, Suffolk County, dated May 22, 2015 [Resps. Memo. of Law]).

While previous considerations of the issues raised here are thoughtful (*see infra*, at II.), they lack the benefit of input from both sides. Given the important questions raised here, I signed petitioner's order to show cause, and was mindful of petitioner's assertion that "the court need not make an initial judicial determination that Hercules and Leo are persons in order to issue the writ and show cause order." (Pet. at 1).

I. BACKGROUND

Petitioner is a non-profit organization with a mission to "change the common law status of at least some nonhuman animals from mere 'things,' which lack the capacity to possess any legal rights, to 'persons,' who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them." (Pet., ¶¶ 11, 18; Memorandum of Law in Support of Petition [Pet. Memo. of Law] at 71 n 35; *see generally* NhRP website (www.nonhumanrightsproject.org). Hercules and Leo, on whose behalf petitioner seeks a writ of habeas corpus, are two young adult male chimpanzees who, since November 2010, have been held at the University and

used as research subjects in studies on the locomotion of chimpanzees and other primates. (Pet., ¶¶ 12, 22; Affidavit of Styliana-Anna Tsirka in Opposition to Petition [Tsirka Affid.], ¶ 4). The University, located in Suffolk County, New York, is part of the State University of New York, a statewide system of geographically diverse university and college campuses established to “provide to the people of New York educational services of the highest quality, with the broadest possible access” (Education Law §§ 351, 352). Respondent Samuel L. Stanley Jr., M.D., is President of the University. (Pet., ¶ 13).

In accordance with its mission, petitioner commenced this litigation and has filed similar cases in several other New York courts with the goal of obtaining legal rights for chimpanzees, and ultimately for other animals. (See NhRP Press Release, dated Dec. 2, 2013, available on NhRP website). Petitioner filed its first cases in New York after learning that three of seven known chimpanzees being held in New York had recently died. (Pet., ¶ 6). It hopes for a successful outcome here, given this state’s recognition of legal personhood for some nonhuman animals under the Estates, Powers and Trusts Law (EPTL), which expressly permits a “domestic or pet animal” to be designated as a beneficiary of a trust. (See EPTL § 7-8.1 [“Trusts for pets”]; Pet. Memo. of Law at 54-56).

The conditions under which Hercules and Leo are confined are not challenged by petitioner, which denies that they are relevant to the relief it seeks, and it advances no allegation that respondents are violating any federal, state or local laws by holding Hercules and Leo (Pet., ¶¶ 5, 8), nor does it “seek improved welfare for Hercules or Leo” (*id.*), or otherwise “to reform animal welfare legislation” (*id.*, ¶ 11; see Pet. Memo. of Law at 5). Rather, according to petitioner, the sole issue is whether Hercules and Leo may be legally detained at all. (Pet., ¶ 5;

Pet. Memo. of Law at 5-6).

Before proceeding here, petitioner unsuccessfully sought similar determinations in Fulton and Niagara counties on behalf of other chimpanzees, and in Suffolk County, on behalf of Hercules and Leo. While petitioner allows that its efforts to obtain judicial recognition of chimpanzees as legal persons are unprecedented (Pet. Memo. of Law at 59; *but see Matter of Fouts*, 176 Misc 2d 521 [Surr Ct, Nassau County 1998] [court declined to reach issue of whether chimpanzees should be treated as persons under disability pursuant to SCPA 103(40)]), and that this and the prior proceedings constitute the first attempts to obtain habeas corpus relief on behalf of chimpanzees, it argues that “the novelty of their claims is no reason to deny Hercules and Leo habeas corpus relief.” Even without legal precedent, it asserts, the “great writ” of habeas corpus must be broadly construed to protect Hercules and Leo (*id.* at 54-56).

In support, petitioner offers affidavits from psychologists, zoologists, anthropologists, and primatologists, who have conducted in-depth research into the behavior, personality, cognition, intelligence, communication, and language skills of chimpanzees and other nonhuman primates. Each expert attests, collectively and generally, to the complex cognitive abilities of chimpanzees. (Pet., ¶¶ 38-39 and annexed affidavits; Pet. Memo. of Law at 6-22 and citations therein).¹

¹ Petitioner submits nine affidavits: from psychologist James Anderson, who specializes in the behavior of nonhuman primates; psychologist Mary Lee Jensvold, who specializes in chimpanzees’ communication and use of sign language; psychologist James King, who specializes in personality structure and the psychological well being of chimpanzees and other great apes; psychologist Emily Sue Savage-Rumbaugh, who specializes in language learning and the cognition of chimpanzees and bonobos; psychologist and anthropologist William McGrew, who specializes in the behavior and ecology of chimpanzees; primatologist Christophe Boesch, who specializes in the study of wild chimpanzees; primatologist Tetsuro Matsuzawa, who specializes in chimpanzee intelligence; psychologist and zoologist Jennifer Fugate, who

According to the experts, humans and chimpanzees share almost 99 percent of their DNA, and chimpanzees are more closely related to human beings than they are to gorillas. (Pet. Memo. of Law at 6, 7). They share with humans similarities in brain structure and cognitive development, including a parallel development of communications skills, as shown by their use and understanding of sign language. (*Id.* at 7-8). Chimpanzees also demonstrate self-awareness, recognizing themselves in mirrors and photographs and on television, and have the capacity to reflect on their behavior. (*Id.* at 8-9). They manifest a capacity for empathy, are attuned to the experiences and emotions of others, and imitate and emulate others. (*Id.* at 15, 16, 19-20). They behave in ways that reflect moral inclinations (*id.* at 20), and demonstrate compassion and depression when a member of their community or familial group dies (*id.* at 16-17; Boesch Aff., ¶ 17). They also have a cooperative social life (Pet. Memo of Law at 20), engage in imaginary play, and display a sense of humor (*id.* at 14, 15).

Based on this research and the belief that chimpanzees are autonomous and self-determining beings entitled to such fundamental rights as bodily liberty and equality, petitioner seeks the issuance of a writ and a determination that Hercules and Leo are being unlawfully deprived of their liberty.

II. PRIOR RELATED PROCEEDINGS

In December 2013, petitioner filed three nearly identical lawsuits seeking substantially the same relief sought here, in Fulton County Supreme Court on behalf of Tommy, a chimpanzee held in a shed on a trailer sales lot; in Niagara County Supreme Court on behalf of Kiko, a

specializes in human and nonhuman social cognition; and cognitive zoologist Mathias Osvath, who specializes in complex cognition, specifically mental representation and planning abilities, of great apes.

chimpanzee living in a cement building on his owner's property; and in Suffolk County Supreme Court on behalf of Hercules and Leo.

The Fulton County justice, after hearing petitioner's arguments *ex parte*, declined to sign petitioner's order to show cause and writ of habeas corpus on the ground that a chimpanzee is not a person for whom a writ of habeas corpus may be sought. (Affirmation of Christopher Coulston in Opposition to Petition and in Support of Cross-Motion to Change Venue, dated May 22, 2015 [Aff. in Opp.], Exh. F at 26). The Third Department affirmed, holding that "a chimpanzee is not a 'person' entitled to the rights and protections afforded by the writ of habeas corpus." (*People ex rel Nonhuman Rights Project, Inc. v Lavery*, 124 AD3d 148, 150 [3d Dept 2014]). In reaching its conclusion, the Court, although noting that the "lack of precedent for treating animals as persons for habeas corpus purposes does not . . . end the inquiry" (*id.*), reasoned that "legal personhood has consistently been defined in terms of both rights *and* duties" (*id.* at 152 [emphasis in original]), and found that chimpanzees' "incapability to bear any legal responsibilities and societal duties" disqualifies them from receiving legal rights afforded human beings (*id.*). The Court also observed that petitioner was not without a remedy, and may look to "the Legislature to extend further legal protections to chimpanzees." (*Id.* at 153).

In the Niagara County case, after hearing petitioner *ex parte*, the justice denied petitioner's request for an order to show cause and writ of habeas corpus, also finding that Kiko is not a person within the meaning of the law relating to habeas corpus, and suggesting that the matter is more legislative than judicial. (Aff. in Opp., Exh. E at 15-16). The Fourth Department upheld the lower court, finding, without reaching the issue of legal personhood, that the petition for a writ should have been dismissed on the ground that the petitioner did not seek Kiko's

immediate release but sought to have him placed in an appropriate facility. (*Matter of Nonhuman Rights Project, Inc. v Presti*, 124 AD3d 1334, 1335 [4th Dept 2015], *lv denied* 126 AD3d 1430 [4th Dept]). Decisions by the Court of Appeals presently pend on motions for leave to appeal from the decisions of the Third and Fourth Departments.

In Suffolk County Supreme Court, a justice declined to sign an order to show cause seeking a writ of habeas corpus on behalf of Hercules and Leo, without hearing either side, noting that “there is no reason for this matter to be brought by means of an [order to show cause],” that petitioners have an “adequate remedy at law,” and that CPLR 7002 “applies to persons, therefore Habeas Corpus relief does not lie.” (Aff. in Opp., Exh. D). The Second Department dismissed petitioner’s appeal “on the ground that no appeal lies as of right from an order that is not the result of a motion made on notice (*see* CPLR 5701),” and declined to grant leave to appeal or reargue. (Aff. in Opp., Exh. G). The Office of the Attorney General submitted a brief in opposition to petitioner’s motion for leave to reargue. (Affirmation of Jason Harrow, ASG in Opposition to Appellant’s Motion for Reargument, dated Apr. 30, 2014).

Petitioner then filed the instant order to show cause, which I signed *ex parte* and without granting a writ of habeas corpus. On May 13, 2015, pursuant to CPLR 511(a) and (b), respondents filed a demand for a change of venue to Suffolk County. (NYSCEF 49). On May 22, 2015, respondents opposed the petition and cross moved for an order changing the venue to Suffolk County. (Aff. in Opp.; Resps. Memo. of Law). They also filed an affidavit in opposition to the petition and in support of the cross-motion to change venue. (Tsirka Affid.).

On May 26, 2015, petitioner filed its opposition to respondents’ cross-motion to change venue and reply to respondents’ answer to the petition, including the letter brief of *amicus curiae*

Laurence H. Tribe, dated May 8, 2015, supporting petitioner's motion for leave to appeal to the Court of Appeals. It also moved for an order striking portions of Tsirka's affidavit. (Affirmation of Elizabeth Stein, Esq., dated May 26, 2015 [Aff. in Opp. to Cross-Motion/Reply/Motion to Strike]). Respondents oppose. (Affirmation of Christopher Coulston in Opposition to the Motion to Strike the Affidavit of Styliani-Anna Tsirka, dated June 5, 2015 [Aff. in Opp. to Motion to Strike]).

Oral argument was held on May 27, 2015. Thereafter, petitioner offered additional evidence in support of its contention that "Hercules and Leo possess attributes sufficient to establish legal personhood." (Affirmation of Elizabeth Stein, Esq., dated June 4, 2015, Exhs. A, B; Affirmation of Elizabeth Stein, Esq., dated June 10, 2015, Exhs. A, B). Respondents oppose. (Affirmations of Christopher Coulston, Esq., dated June 10 and 16, 2015).

III. DISCUSSION

"The great writ of habeas corpus lies at the heart of our liberty" (*Figueroa v Walsh*, 2008 WL 1945350 [ED NY 2008]), and is deeply rooted in our cherished ideas of individual autonomy and free choice (*Rivers v Katz*, 67 NY2d 485, 493 [1986]; *People ex rel. DeLia v Munsey*, 117 AD3d 84, 90 [2d Dept 2014]). As "the remedy against illegal imprisonment," the writ is described as "the greatest of all writs" and "the great bulwark of liberty." (*People ex rel. Tweed v Liscomb*, 60 NY 559, 566 [1875]). The writ of habeas corpus "has been cherished by generations of free men [sic] who had learned by experience that it furnished the only reliable protection of their freedom." (*Hoff v State of New York*, 279 NY 490, 492 [1939]). It must, therefore, be liberally construed "in harmony with its grand purpose." (*Tweed*, 60 NY at 568-569).

According to some scholars, the writ is rooted in Roman law and "[t]he authority for it in

the Anglo-American legal system is found in the 39th clause of Magna Carta.” (*People ex rel. Lobenthal v Koehler*, 129 AD2d 28, 30 [1st Dept 1987] [internal citations omitted]; see *Tweed*, 60 NY at 565). Authority for it is traced to 1166, with the Assize of Clarendon (*Rosa v Senkowski*, 1997 WL 436484, *5 [SD NY 1997]), well before Magna Carta (*Tweed*, 60 NY at 565).

The writ “is a ‘part of the common law of this State’” (*Munsey*, 117 AD3d at 90, citing *People ex rel. Lobenthal v Koehler*, 129 AD2d at 30), and courts have, “by the slow process of decisional accretion, made increasing use of ‘one of the hallmarks of the writ . . . its great flexibility and vague scope’” (*People ex rel. Keitt v McMann*, 18 NY2d 257, 263 [1966] [citations omitted]). Safeguarded by the United States and New York Constitutions (NY Const., Art. 1, § 4; US Const., Art. 1, § 9 [2]), the writ “cannot be abrogated, or its efficiency curtailed, by legislative action” (*Tweed*, 60 NY at 566).

Although writs of habeas corpus are commonly sought in criminal cases (*People v Gersewitz*, 294 NY 163, 168 [1945], *cert dismissed* 326 US 687; see generally *Tweed*, 60 NY 559), the habeas corpus proceeding is a special civil proceeding governed by article 70 of the Civil Practice Law and Rules (CPLR), although other statutes provide for analogous procedures which are tailored to the specific relief sought (eg Family Court Act § 651 [family court given same powers possessed by supreme court in habeas proceedings for determination of custody and visitation of minors]; see *Matter of Welch*, 74 NY 299 [1878] [temporary custody of minor sought by habeas petition]; *Matter of Melinda D.*, 31 AD3d 24, 29 [2d Dept 2006] [writ of habeas corpus is proper means of determining child custody]; Domestic Relations Law §§ 70-72 [specifying procedures in child custody disputes between parents or involving grandparents];

Mental Hygiene Law § 33.15 [for persons challenging their detention in psychiatric facilities]). Writs have issued in other circumstances as well. (See eg *Brevorka ex rel. Wittle v Schuse*, 227 AD2d 969 [4th Dept 1996] [habeas corpus relief may be granted on assertion that elderly woman imprisoned and restrained by respondents who had removed her from apartment and concealed her whereabouts from her friends and family, even if proceeding pursuant to article 81 of the Mental Hygiene Law appropriate]; *Siveke v Keena*, 110 Misc 2d 4, 7-8 [Sup Ct, Suffolk County 1981] [habeas proceeding appropriate remedy for wife to compel respondent-stepdaughter to return to her custody her incapacitated husband, respondent's father; conservatorship proceeding under article 77 of Mental Hygiene Law not exclusive remedy]).

With these principles in mind, I address the issues raised by the parties' submissions and arguments.

A. The order to show cause

Petitioner invokes CPLR 7003(a) in distinguishing its application from a petition seeking immediate release. (Pet. Memo. of Law).

That statute provides, in pertinent part, as follows:

The court to whom the petition is made shall issue the writ without delay on any day, or, where the petitioner does not demand production of the person detained or it is clear that there is no disputable issue of fact, order the respondent to show cause why the person detained should not be released.

This proceeding thus commenced with the signing of an order to show cause.

As with any motion, the burden of proof on an order to show cause is on the movant, notwithstanding that it directs the recipient to show cause why the particular relief being sought should not be granted. (Siegel, NYPRAC § 248 [5th ed]). And, because the CPLR is silent about

when a show cause order may issue other than that it may be used “in a proper case” (CPLR 2214[d]), its issuance is within the court’s discretion to determine whether it is properly used; it is “in fact liberally used” (Siegel, NYPRAC § 248).

Here, given the “great flexibility and vague scope” of the writ of habeas corpus (*People ex rel. Keitt*, 18 NY2d at 263), and as noted (*supra*, at 2), I exercised my discretion in favor of hearing from both sides, as respondents had not been heard by the lower courts or by the Appellate Divisions beyond their opposition to petitioner’s motion to reargue the Second Department’s summary affirmance of the Suffolk County justice’s summary denial of the petition.

B. Standing

In asserting standing to seek a writ of habeas corpus on behalf of Hercules and Leo, petitioner relies on CPLR 7002(a) which provides that a petition for a writ of habeas corpus may be made not only by “[a] person illegally imprisoned or otherwise restrained in his [or her] liberty,” but also “by one acting on his [or her] behalf . . .” (Pet. Memo. of Law). Respondents deny that petitioner has standing to bring this proceeding absent a substantial relationship between it and the chimpanzees. (Resps. Memo. of Law).

As the statute places no restriction on who may bring a petition for habeas on behalf of the person restrained, and absent any authority for the proposition that the statutory phrase “one acting on his behalf” is modified by a requirement for obtaining standing by a third party, petitioner has met its burden of demonstrating that it has standing. (*See Matter of Larner*, 68 AD 320, 322 [2d Dept 1902] [only requirement under habeas statute is that application for release “shall be signed ‘either by the person for whose relief it is intended, or by some person on his

behalf”]; cf. *State ex rel. Harkavy v Consilvio*, 7 NY3d 607 [2006] [assuming without deciding that Mental Hygiene Legal Service had standing to initiate habeas proceeding on behalf of involuntary committed persons]; *Munsey*, 117 AD3d 84 [same]). In any event, petitioner demonstrates an interest in vindicating what it perceives to be the rights of these chimpanzees.

C. Venue

Petitioner asserts that New York County is an appropriate venue for seeking relief. (Pet. Memo. of Law).

Respondents move pursuant to CPLR 7002 and 7004 or CPLR 510, 511, 2201, for an order changing the venue of this proceeding to Suffolk County, but maintain that the latter provisions govern venue here. They argue that the determination of whether chimpanzees are legal persons within the meaning of article 70 constitutes a “threshold determination,” and that because resolution of that threshold determination yields the conclusion that chimpanzees are not legal persons, the venue provisions of article 70 do not apply. (Resps. Memo. of Law).

Respondents’ argument requires that I reach a substantive determination on the petition before addressing the procedural issues. As venue is a threshold determination (*Matter of Stevens v Coudert Bros.*, 242 AD2d 454, 454-455 [1st Dept 1997]), and not substantive (*Elie v Marathon REO Mgt., LLC*, 119 AD3d 890 [2d Dept 2014] [improper venue does not require dismissal of action]), and as the courts that have previously considered the legal personhood of chimpanzees did not address the issue of venue in habeas proceedings, I address it here.

Preliminarily, even though respondents’ motion to change venue is denominated a cross motion, and petitioner objects to it as untimely and not filed in response to a motion, to deny the cross motion on that basis “would exalt form over substance.” (See *Matter of Jordan v City of*

New York, 38 AD3d 336, 338 [1st Dept 2007]). In any event, the motion is neither untimely nor improperly advanced. (CPLR 406; *Goldman v McCord*, 120 Misc 2d 754, 755 [Sup Ct, New York County 1983] [motions in special proceedings may be made on little or no notice as long as they are made returnable at same time petition to be heard]; *126 Spruce St., LLC v Club Cent., LLC*, 15 Misc 3d 538, 539 [Dist Ct, Nassau County 2007] [same]; see also *Matter of Jordan*, 38 AD3d at 338 [late service of motion in special proceeding overlooked where made in accordance with CPLR 406 and no showing of prejudice to other party]).

I commence with CPLR 7002(b), which provides that a habeas petition must be made to “ (1) the supreme court in the judicial district in which the person is detained; or . . . (3) any justice of the supreme court.”

Petitioner relies on the statute and on the common law for the proposition that the writ may be sought from any justice of the supreme court. (Pet. Memo. of Law). Respondents maintain that petitioner violated CPLR 7002(b) by not filing the petition with the supreme court in Suffolk County, where Hercules and Leo are detained, and that in filing it with the court in New York County, as opposed to filing it with “any justice,” petitioner is precluded from relying on the provision permitting the filing of the petition with “any justice of the supreme court.” (Resps. Memo. of Law).

A party filing an order to show cause commencing a proceeding in this county is restricted to filing it with the court (http://www.nycourts.gov/courts/1jd/supctmanh/court_parts.shtml). Had petitioner passed over the Clerk’s Office and filed its order to show cause directly with a particular justice, it would have engaged in forum shopping. Thus, to the extent that the random assignment of a justice by the court is equivalent to filing it with “any justice,” the

petition was filed pursuant to CPLR 7002(b)(3).

Respondents also maintain that even assuming that the order to show cause was properly signed, the writ should have been made returnable in Suffolk County, where Hercules and Leo are detained. They rely on CPLR 7004(c), and on Education Law §§ 350 and 352 as support for their contention that the University is a “state institution” within the meaning of CPLR 7004(c). (Resps. Memo. of Law).

Petitioner argues that absent a definition within article 70 of the term “state institution,” the legislative intent should be consulted in discerning its scope. Given that intent, petitioner argues, the term should be narrowly construed to include only state prisons or correctional facilities and state mental institutions. (Pet. Memo. of Law).

Pursuant to CPLR 7004(c):

A writ to secure the discharge of a person from a state institution shall be made returnable before a justice of the supreme court . . . being or residing within the county in which the person is detained; if there is no such judge it shall be made returnable before the nearest accessible supreme court justice In all other cases, the writ shall be made returnable in the county where it was issued, except that where the petition was made to the supreme court or to a supreme court justice outside the county in which the person is detained, such court or justice may make the writ returnable before any judge authorized to issue it in the county of detention.

The primary consideration in the court’s construction of a statute is to “ascertain and give effect to the intention of the Legislature.” (McKinney’s Cons Law of NY, Book 1, Statutes § 92). It is well established that legislative intent is “ascertained from the words and language used, and that statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction. (McKinney’s Cons Law of NY, Book 1, Statutes § 94).

Here, the term “state institution” is broad enough to include not only any institution run by the state, but any institution within the state. The Legislature’s failure to define the term within article 70 does not warrant such broad construction, especially since the statute is directed at “reliev[ing] wardens of State prisons from the burden of producing inmates out of the county of detention, under guard, and often at great distances and great expense” (*Matter of Hogan v Culkin*, 18 NY2d 330, 334-335 [1966]), and “to obviate the administrative, security and financial burdens entailed in requiring prison authorities to produce inmates pursuant to such writs in a county other than that in which they were detained” (*id.* at 333; *see Greene v Supreme Ct, Westchester County*, 31 AD2d 649, 649-650 [2d Dept 1968] [provision intended to avoid “burden of transporting prisoners who have instituted such proceedings throughout the State”])).

In *Matter of Hogan*, the Court also observed that:

CPLR 7004(c) . . . distinguishes between writs of habeas corpus concerning the inmates of State institutions, in the first instance, and writs “In all other cases.” Where the writ is directed to the warden of a State prison, . . . it must be made returnable in the county of detention, subject to the exception applicable when there is no available judge in that county. In all other cases, the writ is to be made returnable in the county of issuance, unless the issuing judge should decide in his discretion to make it returnable in the county of detention.

(18 NY2d at 335).

Here, if issued, the writ would not be directed to a state prison warden. Consequently, as “in all other cases,” the writ here is to be made returnable in the county of issuance, namely, New York County. That the University is denominated a “state-operated institution” in the Education Law is irrelevant. Moreover, where no factual issues are raised, no one sought the production in court of Hercules or Leo, and “[a]ll that remains is for the Court to issue its decision,” a change of venue is not required. (*Chaney v Evans*, 2013 WL 2147533 at *3, 2013 NY Slip Op 31025[U]

[Sup Ct, Franklin County 2013] [even though petitioner administratively transferred to other county during pendency of habeas proceeding and no longer detained in Franklin County, change of venue not required]).

In any event, “[s]o primary and fundamental” is the writ of habeas corpus “that it must take precedence over considerations of procedural orderliness and conformity.” (*People v Schildhaus*, 8 NY2d 33, 36 [1960]; see *Harris v Nelson*, 394 US 286, 291 [1969]; *Tweed*, 60 NY at 568-569). And the Legislature was so concerned that judges issue valid writs that it enacted a provision, unique in all respects, requiring that a judge or group of judges who refuse to issue a valid writ must forfeit \$1,000 to the person detained. (CPLR 7003[c]; Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 7003[b] [provision enacted for in terrorem effect]).

For all of these reasons, a transfer of venue is not required.

D. Res judicata

Petitioner denies that the Suffolk County justice’s determination constitutes a valid judgment entitled to preclusive effect as it was not issued on the merits, as evidenced by the Second Department’s order dismissing the appeal. (Pet. Memo. of Law).

Respondents assert that to avoid “overrul[ing] the decision of another Supreme Court justice in another county,” and “in the interest of comity” and to “prevent forum shopping,” the petition should have been made returnable to the Suffolk County justice who refused to sign the order to show cause. (Resps. Memo. of Law). They allege that the Suffolk County justice “definitively resolved on the merits that petitioner may not proceed based on article 70 by refusing to sign the order to show cause and signing an order holding specifically that habeas

corpus relief does not lie because Hercules and Leo are not persons to which Article 70 applies.” (*Id.*).

Respondents thus claim that petitioner was barred from filing another order to show cause seeking the same relief from a different justice. The justice’s definitive resolution, they argue, is evidenced by his “refus[al] to analyze the request for relief” by reference to article 70, instead citing CPLR 2214 as the procedural basis for declining to sign petitioner’s show cause order. (Resps. Memo. of Law). They characterize the justice’s refusal to sign the order as a “threshold determination” that should be given preclusive effect, and assert that cases cited by petitioner are inapposite because they all involve petitions brought by legal persons. (*Id.*).

Again, respondents’ argument inappropriately requires an initial, substantive finding that chimpanzees are not entitled to legal personhood for the purpose of obtaining a writ of habeas corpus. Even so, the issue of whether the “determination” of the Suffolk County justice precludes my consideration of the issues here merits discussion.

Before a claim may be barred as res judicata, there must be a final judgment on the merits issued in a prior proceeding. (*Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 12-13, 14 [2008]; *Bayer v City of New York*, 115 AD3d 897, 899 [2d Dept 2014] [“there must have been, in the prior proceeding, a final judgment on the merits.”]; *Figueroa v Ercole*, 800 F Supp 559, 564-565 [SD NY 2011] [“A state court resolves a claim on the merits when it reduces its disposition to a final judgment with res judicata effect on substantive rather than procedural grounds.”]).

Petitioner’s case in Suffolk County involved the parties named and issues raised here. The petition was summarily dismissed ex parte, without oral argument or any opportunity given for petitioner to litigate beyond filing the order to show cause, petition, and memorandum of law.

Respondents cite no authority for the proposition that a declined order to show cause constitutes a determination on the merits, that it has any precedential value, or that a justice in one county is precluded from signing an order to show cause for relief previously sought from and denied by virtue of a justice in another county refusing to sign the order to show cause.

The Third Department found no such preclusion in *People ex rel. David NN. v Hogan*, wherein a justice in one county was upheld in considering a petition for habeas relief, even though a justice in other county had previously declined to consider an order to show cause related to the same facts underlying the petition. (53 AD3d 841 [3d Dept 2008], *lv denied* 11 NY3d 708). On the other hand, in *People ex rel. Roache v Connell*, the Court held that where a justice in Oneida County had issued a decision upon “review[ing] and adjudicat[ing]” the petitioner’s habeas corpus application, a justice in Albany County had no authority to rule on the matter. (23 AD3d 941 [3d Dept 2005]). The Court relied on *Matter of DeLanoy v O’Rourke*, where an order to show cause in an election proceeding was signed by one justice and served on the respondents, after which another justice signed an order to show cause seeking the same relief, denied the petition, and dismissed the proceeding. As “[a] court of coordinate jurisdiction has no authority to rule on a matter already reviewed by another Judge of equal authority,” the Court vacated the subsequent order. (276 AD2d 728, 729 [2d Dept 2000]).

In *DeLanoy*, the first order to show cause was signed, and in *Roache*, the first justice issued a decision. Here, by contrast, the Suffolk County justice refused to sign the order to show cause. Consequently, *Roache* may not be apposite.

Although the Suffolk County justice briefly noted on the order to show cause his reasons for refusing to sign it, that refusal was no less summary and no more on the merits, than had he

withheld his reasoning. The Appellate Division indicated as much when it relied on CPLR 5701 in summarily dismissing the appeal. (Aff. in Opp., Exh. G).

In any event, the governing statute itself poses no obstacle to this litigation. Pursuant to CPLR 7003(b):

[a] court is not required to issue a writ of habeas corpus if the legality of the detention has been determined by a court of the state on a prior proceeding for a writ of habeas corpus and the petition presents no ground not theretofore presented and determined and the court is satisfied that the ends of justice will not be served by granting it.

Notwithstanding the interest in issuing valid writs (*see supra*, at III.C.), the Legislature apparently found it necessary to include within the statute a provision permitting, but not requiring, a court to decline to issue a writ under certain circumstances, thereby permitting successive writs, a construction reflected in the traditional and general common law rule that res judicata has no application in habeas corpus proceedings. (*See Sanders v United States*, 373 US 1, 7 [1963] ["Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged"]; noting that at common law, denial by court or judge of habeas application not res judicata]; *People ex rel. Lawrence v Brady*, 56 NY 182, 191-192 [1874] ["a decision under one writ refusing to discharge (the relator), did not bar the issuing of a second writ by another court"]; *People ex rel Leonard HH v Nixon*, 148 AD2d 75, 80 [3d Dept 1989] ["traditional and historic rule" that "res judicata does not apply to habeas corpus . . . continues to be extant and covers both the claim preclusion and issue preclusion branches of res judicata"]; *see also People ex rel Woodard v Berry*, 163 AD2d 759, 760 [3d Dept 1990], *lv denied*, 76 NY2d 712 ["res judicata principles do not bar successive petitions for a writ of habeas corpus on the same ground . . . (although) orderly administration would require, at

least, a showing of changed circumstances”]; Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR 7003 [successive applications “looked upon with disfavor if the petition raises no new evidence or grounds.”]).

Petitioner is thus not barred by the Suffolk County disposition from proceeding here. (*See People v Evans*, 94 NY2d 499, 502 [2000] [claim preclusion and issue preclusion contemplate “that the parties had a ‘full and fair’ opportunity to litigate the initial determination”]). Nor should it be. (*Schildhaus*, 8 NY2d at 36 [writ is “so primary and fundamental,” “that it must take precedence over considerations of procedural orderliness and conformity.”]).

E. Collateral estoppel

Relying on CPLR 7003(a), petitioner denies that it is estopped by the Suffolk County proceeding. (Pet. Memo. of Law). Respondents claim that the same issue was necessarily decided by the justice in Suffolk County, that petitioner had a full and fair opportunity to contest that decision, and that CPLR 7003(a) permits successive petitions only when brought by a person within the meaning of article 70. (Resps. Memo. of Law).

A party is estopped from raising an issue, as opposed to a claim (*see* III.D., *supra*), only “‘if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action.’” (*City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 128 [2007], quoting *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]; *see Sage Realty Corp. v Proskauer Rose L.L.P.*, 251 AD2d 35, 39 [1st Dept 1998]).

As the justice in Suffolk County refused to sign petitioner’s order to show cause, ex parte and partly on procedural grounds, and as the Appellate Division dismissed the appeal therefrom

based solely on a procedural ground, petitioner had no full and fair opportunity to litigate the substantive issue. Consequently, and because successive writs are permitted (*see supra*, III.D.), petitioner is not estopped from raising the same issues here. (*Cf. eg Zinter Handling, Inc. v Britton*, 46 AD3d 998 [3d Dept 2007] [court's denial of request for preliminary injunction did not estop defendant from contesting substantive issue as issue not specifically decided by court in its denial]).

F. Legal personhood

The substance of the petition requires a finding as to whether a chimpanzee is a legal person entitled to bring a writ of habeas corpus.

“Person” is not defined in CPLR article 70, or by the common law of habeas corpus. Petitioner agrees that there exists no legal precedent for defining “person” under article 70 or the common law to include chimpanzees or any other nonhuman animals, or that a writ of habeas corpus has ever been granted to any being other than a human being. Nonetheless, as the Third Department noted in *People ex rel Nonhuman Rights Project, Inc. v Lavery*, the lack of precedent does not end the inquiry into whether habeas corpus relief may be extended to chimpanzees. (124 AD3d 148, 150-151 [3d Dept 2014]).

“Legal personhood” is not necessarily synonymous with being human. (*Byrn v New York City Health & Hosp. Corp.*, 31 NY2d 194, 201 [1972]). Nor have autonomy and self-determination been considered bases for granting rights. In any event, petitioner denies that it seeks human rights for chimpanzees. Rather, it contends that the law can and should employ the legal fiction that chimpanzees are legal persons solely for the purpose of endowing them with the right of habeas corpus, as the law accepts in other contexts the “legal fiction” that nonhuman

entities, such as corporations, may be deemed legal persons, with the rights incident thereto. The determination of legal personhood, it maintains, is a matter of policy and not a question of biology, and in this case, policy requires that Hercules and Leo be recognized as legal persons with rights. (Pet., ¶ 3; Pet. Memo. of Law at 30).

While not clearly articulating the policy underlying a supposed mandatory recognition of chimpanzees as persons beyond the guarantee of fundamental rights to liberty for all persons, petitioner argues that because chimpanzees possess fundamental attributes of personhood in that they are demonstrably autonomous, self-aware, and self-determining, and otherwise are very much like humans, “justice demands” that they be granted the fundamental rights of liberty and equality afforded to humans. (*Id.* at 32-33).

Amicus curiae correctly observes that while corporations and partnerships have been deemed persons for certain purposes, those entities are composed of humans, hence the legal fiction of personhood accorded them. It also cites certain penal law provisions that refer exclusively to persons as human beings, “and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality.” (Penal Law § 135.05). Amicus thus argues that the expanded definition of person in a restricted context connotes a legislative intent that the definition not be further expanded, and that the extension of the right to be named as a beneficiary that is accorded to animals pursuant to EPTL § 7-8.1 does not require a different result, as nowhere in that statute are animals defined as persons. (Amicus Curiae Brief by the Center for the Study of the Great Ideas in Opp. To Pet. For Writ of Habeas Corpus, dated May 4, 2015).

And yet, the concept of legal personhood, that is, who or what may be deemed a person

under the law, and for what purposes, has evolved significantly since the inception of the United States. Not very long ago, only caucasian male, property-owning citizens were entitled to the full panoply of legal rights under the United States Constitution. Tragically, until passage of the Thirteenth Amendment of the Constitution, African American slaves were bought, sold, and otherwise treated as property, with few, if any, rights. Married women were once considered the property of their husbands, and before marriage were often considered family property, denied the full array of rights accorded to their fathers, brothers, uncles, and male cousins. (See generally, Saru M. Matambanadzo, *Embodying Vulnerability: A Feminist Theory of the Person*, 20 Duke J Gender L & Policy 45, 48-51 [2012]). “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.” (*Obergefell v Hodges*, US , 135 S Ct 2602 [2015]).

The past mistreatment of humans, whether slaves, women, indigenous people or others, as property, does not, however, serve as a legal predicate or appropriate analogy for extending to nonhumans the status of legal personhood. Rather, the parameters of legal personhood have long been and will continue to be discussed and debated by legal theorists, commentators, and courts, and will not be focused on semantics or biology, or even philosophy, but on the proper allocation of rights under the law, asking, in effect, who counts under our law. (*Byrn*, 31 NY2d at 201).

For purposes of establishing rights, the law presently categorizes entities in a simple, binary, “all-or-nothing” fashion. “Persons have rights, duties, and obligations; things do not.” (See generally, Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 Hast L J 369, 371, 403 [2007]; Note, *What We Talk About When We Talk About*

Persons: The Language of a Legal Fiction, 114 Harv L Rev 1745 [2001]; *see also* Atiba R. Ellis, *The Impact of Citizens United: Corporate Speech in the 2010 Elections: Citizens United and Tiered Personhood*, 44 J Marshall L Rev 717, 727-731 [2011]). Animals, including chimpanzees and other highly intelligent mammals, are considered as property under the law. They are accorded no legal rights beyond being guaranteed the right to be free from physical abuse and other mistreatment (*see eg* Agriculture and Markets Law Article 26, §§ 353, 353-a, 362), and the right to humane living conditions (*id.* §§ 353-b, 353-d, 356), although they may be included in orders of protection. (*See* Fam Ct Act § 842 [i]). In one instance, Oregon's highest court found that a horse was a "person" under a statute permitting warrantless searches of property where there was a reasonable belief that a person was suffering serious injury or harm. In that case, the Court upheld the conduct of a police officer who had entered property and seized an obviously emaciated horse, although it "exercise[d] judicial restraint and [left] for another day questions unnecessary to the resolution of this case, such as whether the emergency aid exception [to the warrant requirement] extends to animals." (*State of Oregon v Fessenden*, 355 Ore 759, 774-775 [2014]).

Moreover, some animals, such as pets and companion animals, are gradually being treated as more than property, if not quite as persons, in part because legislatures and courts recognize the close relationships that exist between people and their pets, who are often viewed and treated by their owners as family members. (*See generally* *Feger v Warwick Animal Shelter*, 59 AD3d 68, 71-72 [2d Dept 2008] ["Companion animals are a special category of property" and courts recognize their "cherished status"]; *see also* *People v Garcia*, 29 AD3d 255 [1st Dept 2006] [goldfish are companion animals protected by animal cruelty law]; *Raymond v Lachmann*, 264 AD2d 340, 341 [1st Dept 1999] [recognizing cherished status of pets and considering cat's

interests by awarding possession of her to defendant as “best for all concerned,” notwithstanding plaintiff’s actual ownership interest]; *Travis v Murray*, 42 Misc 3d 447 [Sup Ct, New York County 2013] [recognizing, in dispute over custody of dog in divorce proceeding, that dogs are seen as family members, and declining to apply strict property analysis, applying something akin to “best interests of the child” standard]]. At least one New York court, recognizing that “a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property,” found that a dog’s owner may be entitled to emotional distress damages for the wrongful destruction and loss of her dog, thereby departing from contrary precedent. (*Corso v Crawford Dog & Cat Hosp., Inc.*, 97 Misc 2d 530, 531 [Civ Ct, Queens County 1979]; cf. *Mongelli v Cabral*, 166 Misc 2d 240 [Yonkers City Ct 1995] [absent equitable jurisdiction in small claims part, and as substantial justice not served if claim dismissed and pursued in higher court, claimant awarded damages unless defendants return Peaches, a cockatoo, “in good health, along with her cage, her bowl, and her toys”])).

Consonant with these recent trends, New York enacted section 7-8.1 (“Trusts for pets”) of the Estates, Powers and Trusts Law (EPTL), providing that a domestic or pet animal may be named as a beneficiary of a trust. (Pet. Memo. of Law, at 54-56; see McKinley, *Dog-Related Bills Flood Albany as Major Legislation Stalls*, New York Times, June 11, 2015, http://www.nytimes.com/2015/06/12/nyregion/dog-related-bills-flood-albany-as-major-legislation-stalls.html?_r=0 [noting that dogs’ interests “are exceptionally well represented in Albany this year.”])).

Some commentators have described the current legal status of animals as “quasi-persons, being recognized as holding some rights and protections but not others.” (Eg, Matambanadzo, *Embodying Vulnerability: A Feminist Theory of the Person*, 20 Duke J Gender L & Policy at 61).

Petitioner claims, however, that its effort to elevate the legal status of chimpanzees, and some other animals, above the level of things or mere property, is not addressed by animal welfare legislation.

The determination of whether an entity or being counts as a legal person is largely context-specific, and not necessarily consistently made.

In the United States' common law tradition there is no discrete body of law containing all of the applicable provisions of legal personhood. Legal persons constitute a diverse community that includes various individuals, entities and collectives in different ways for different jurisdictions. To add to this diversity, the common law of legal personhood is disparate and diffuse, found in cases, statutes and treatises.

(Matambanadzo, *Embodying Vulnerability: A Feminist Theory of the Person*, 20 Duke J Gender L & Policy at 64-65; see also Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 Harv L Rev 1745, 1746 [2001]).

Often . . . arguments for animal rights proceed by way of analogy. First, biological human beings are entitled to rights. Second, animals share many of the characteristics of human beings, at least to some lesser degree. Therefore, animals are entitled to at least some of the same rights as human beings. Obviously, this argument only works if the shared characteristics are relevant to the ascription of rights - otherwise the analogy loses its force. . . . Extending the concept of the person to animals therefore merely indicates that they share relevant characteristics with human beings and deserve rights on that basis.

(Jens David Ohlin, Note, *Is the Concept of the Person Necessary for Human Rights*, 105 Colum L Rev 209, 222 [2005]). This seems to be the argument advanced by petitioner, namely, that chimpanzees should be accorded rights consonant with their abilities, and that their autonomy and self-determination merit the right to be free from illegal detention, and to that extent, the status of legal personhood.

Relying on the so-called "social contract" and the common law in determining that chimpanzees are disqualified from receiving the status of legal personhood, the Third Department in *People ex rel Nonhuman Rights Project, Inc. v Lavery* determined, in effect, that

according chimpanzees the status of legal personhood is inappropriate as they are incapable of bearing any legal responsibilities and societal duties. (124 AD3d 148, 151-152). The Court also noted, among other sources of support, that the definition of “person” in Black’s Law Dictionary (9th ed 2009) includes “human being,” or “natural person,” and “[a]n entity (such as a corporation) that is recognized by law as having the rights and duties of a human being,” also described as an “artificial person.” It thus found that petitioner had failed to establish that Tommy was entitled to be granted common-law relief in the nature of habeas corpus, adding that petitioner “is fully able to importune the Legislature to extend further legal protections to chimpanzees.” (124 AD3d at 153).

The parties differ as to whether I am bound by that determination.

G. Stare decisis

Petitioner denies that *Lavery* binds me, maintaining that the Third Department applied the wrong legal standard for determining legal personhood when it applied the rights and duties paradigm, and that absent “settled law” on the issue, a lower court has no legal obligation to follow the decisions of the appellate courts. It does not, however, argue that there is a conflict between the decisions of the Third and Fourth Departments; each reached the same result on different grounds. Rather, it maintains that both decisions are wrong on the law, that the law relied on by those courts is not settled, and that the Third Department in particular is wrong because habeas corpus relief has and continues to be granted to persons who are not part of the “social contract,” such as slaves and noncitizens (*see Rasul v Bush*, 542 US 466, 484-485 [2004] [Guantanamo detainees entitled to habeas]). (Pet. Memo. of Law at 61-62).

Petitioner observes that “sister common law countries” have recognized that a legal person need not have duties or responsibilities, citing instances where a river, a sacred text, a

mosque, and a religious idol were designated as persons. (Pet. Memo. of Law at 63). According to petitioner, “a ‘person’ need not even be alive.” (*Id.*). Thus, petitioner argues, the Third Department confused its “demand for the ‘immunity-right’ of bodily liberty, to which the ability to bear duties and responsibilities is irrelevant, with a ‘claim-right.’” (*Id.* at 64).

Respondents argue that absent a decision to the contrary by the Court of Appeals or the First Department, I am bound by the Third Department’s determination in *Lavery* that, given a chimpanzee’s inability to take on duties or responsibilities, chimpanzees are not entitled to legal personhood. (Resps. Memo. of Law).

“‘Stare decisis et non quieta movere’ is Latin for ‘[t]o stand by things decided, and not to disturb settled points.’” (*People v Taylor*, 9 NY3d 129, 148 n 13 [2007], quoting Black’s Law Dictionary 1443 [8th ed. 2004]).

[O]nce a court has decided a legal issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision. Its purpose is to promote efficiency and provide guidance and consistency in future cases by recognizing that legal questions, once settled, should not be reexamined every time they are presented.

(*People v Bing*, 76 NY2d 331, 337-338 [1990]).

“Precedents and rules must be followed, unless flatly absurd or unjust” (*Matter of Estate of Eckart v Eckart*, 39 NY2d 493, 498-499 [1976], citing Blackstone, Commentaries on the Law, p. 70), although “the lessons of time may lead to a different result” (*Taylor*, 9 NY3d at 149; see generally *Doerr v Goldsmith*, 2015 WL 3549864, 2015 NY Slip Op 04752 [Ct App] [June 9, 2015] [Fahey, J., dissenting] [precedent may be overruled by “lessons of experience” and force of “better reasoning”; patent judicial mistake need not be allowed to “age” before being corrected]).

Stare decisis, to its credit, is a far more subtle and flexible concept than some of those who would give it slavish adherence suggest. Its limitations are inherent, for the stability it espouses must coexist with both the dynamics of an evolving society and the accruing wisdom born of the repeated injustices which a particular ruling has wrought. To that

end, its temper partakes more of the malleability of gold than of the rigidity of steel. How else do we narrow the gap between the social philosophy of the present and the law of the past?

(*Matter of Higby v Mahoney*, 48 NY2d 15, 22 [1979] [Fuchsberg, J., dissenting] [citation omitted]).

In the foregoing decisions, the Court addressed its obligation to follow its own precedents. Here, by contrast, the issue presented is the precedential impact of an opinion of a court of superior jurisdiction on a court of inferior jurisdiction. In such a case, the Legislature has determined that, “[w]hether a judicial construction of a statute is a binding precedent depends on the court by which it was rendered and the rank of the tribunal in the judicial hierarchy.” (McKinney’s Cons Laws of NY, Book 1, Statutes § 72[b]).

Thus the decisions of the Court of Appeals are binding upon the Appellate Division; those of the Appellate Division on the Supreme Court; and so on down from the superior to the inferior judicatories. . . . A decision of a court of equal or inferior jurisdiction is not necessarily controlling, though entitled to respectful consideration.

(*Id.*). Courts analogously hold that:

Supreme Court is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department . . . and where the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of stare decisis to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals.

(*D’Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]; *Tzolis v Wolff*, 39 AD3d 138, 142 [1st Dept 2007], *aff’d* 10 NY3d 100 [2008]; *Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984]).

State trial courts must follow a higher court’s existing precedent “even though they may disagree.” (*People v Rivera*, 5 NY3d 61, 72 n 2 [2005] [Kaye, Ch. J., dissenting] [internal citations omitted], *cert den* 546 US 984 [2005]). And even where a decision of the Appellate

Division has been appealed, the weight of authority stands for the proposition that the lower court remains bound by the apposite decision of the Appellate Division. (*Matter of Estate of Weinbaum*, 51 Misc 2d 538, 539 [Surr Ct, Nassau County 1966], citing *Vanilla v Moran*, 188 Misc 325, 334 [Sup Ct, Albany County 1947], *affd on other grounds*, 272 AD 859 [3d Dept 1947], *affd* 298 NY 796 [1949]; see *Cunningham v Bayer AG*, 2003 NY Slip Op 30175[U] [Sup Ct, NY County 2003] [plaintiff's argument that Appellate Division decision erroneous no basis for supreme court to refuse to follow it]; see also *Vasquez v National Sec. Corp.*, 2015 WL 1963675, 2015 NY Slip Op 25143 [Sup Ct, NY County] ["While defendants and respected commentators persuasively argue why the (Appellate Division) holdings . . . are outdated and do not reflect the current state of (the law) . . . , it is up to the appellate courts or legislature to undo clear New York precedent and change policy."]). Ultimately, "a higher court commands superiority over a lower not because it is wiser or better but because it is institutionally higher. This is what is meant, in part, as the rule of law and not of men." (*People v Hobson*, 39 NY2d 479, 491 [1976] [Breitel, CJ.]).

Thus, a lower court is bound by an apposite decision of an Appellate Division not within its judicial department when there is no decision on point from the Court of Appeals or the Appellate Division within its judicial department, but not where apposite decisions of other Appellate Divisions conflict. And while the Court of Appeals may not be bound by its own decisions if they do not constitute settled law, absent any authority for the proposition that a lower court is bound only by the settled law of a superior court, petitioner's argument that the decision in *Lavery* is based on an erroneous legal analysis or "unsettled" law is immaterial.

Relying on *Byrn v New York City Health & Hosp. Corp.*, 31 NY2d 194 (1972), petitioner asserts that the Third Department in *Lavery* failed to recognize that the determination of whether

a chimpanzee is a legal person is a policy question, not a biological one. (Pet. Memo. of Law at 64)

In *Byrn*, the Court held that question of “[w]hether the law should accord legal personality . . . in most instances devolves on the Legislature . . .” (*Id.* at 201). It also observed that, “[t]he Constitution does not confer or require legal personality . . . ; the Legislature may, or it may do something less, . . . and provide some protection far short of conferring legal personality.” (*Id.* at 203). Similarly, the Court in *Lavery* held that petitioner failed to establish that common-law relief in the nature of habeas corpus was appropriate, and referenced the Legislature as the appropriate forum for obtaining additional protections. (*Lavery*, 124 AD3d at 153). As *Lavery* does not appear to be inconsistent with *Byrn* in that regard or any other, I am bound by *Lavery*.

Even were I not bound by the Third Department in *Lavery*, the issue of a chimpanzee’s right to invoke the writ of habeas corpus is best decided, if not by the Legislature, then by the Court of Appeals, given its role in setting state policy. (See *Hynes v Tomei*, 237 AD2d 52, 60 [2d Dept 1997], *revd on other grounds*, 92 NY2d 613 [1998], *citing People v Keta*, 165 AD2d 172, 178 [2d Dept 1991], *revd on other grounds sub nom. People v Scott*, 79 NY2d 474 [1992] [Court of Appeals is “the state’s policy-making tribunal”]; *see also Matter of Estate of Eckart v Eckart*, 39 NY2d 493, 499 [1976] [if recent holding interpreting a statute is contrary to line of well-reasoned opinions, Court need not wait for Legislature to repair damage]; *see also People ex rel. Tweed v Liscomb*, 60 NY 559, 566 [1875] [writ of habeas corpus “[s]afeguarded by the United States and New York Constitutions [and] “cannot be abrogated, or its efficiency curtailed, by

legislative action”)).²

IV. CONCLUSION

The similarities between chimpanzees and humans inspire the empathy felt for a beloved pet. Efforts to extend legal rights to chimpanzees are thus understandable; some day they may even succeed. Courts, however, are slow to embrace change, and occasionally seem reluctant to engage in broader, more inclusive interpretations of the law, if only to the modest extent of affording them greater consideration. As Justice Kennedy aptly observed in *Lawrence v Texas*, albeit in a different context, “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.” (539 US 558, 579 [2003]). The pace may now be accelerating. (See *Obergefell v Hodges*, US , 135 S Ct 2584, 2595

² Respondents also argue that according personhood to Hercules and Leo “could set a precedent for the release of other animals held in captivity, whether housed at a zoo, in an educational institution, on a farm, or owned as a domesticated pet, and enmesh New York courts in continuing litigation over the applicability of habeas corpus to other animals.” (Resps. Memo. of Law).

The floodgates argument is not a cogent reason for denying relief. (See *Enright v Enright v Eli Lilly & Co.*, 77 NY2d 377 [1991] [“floodgates of litigation” alarm unpersuasive in view of Court’s “repeated admonitions that it is not ‘a ground for denying a cause of action that there will be a proliferation of claims’ and ‘if a cognizable wrong has been committed that there must be a remedy, whatever the burden of the courts.’”], quoting *Tobin v Grossman*, 24 NY2d 609, 615 [1969]).

Respondents also maintain that as petitioner does not seek the release of the chimpanzees from the University, but their transfer to a chimpanzee sanctuary, it has no legal recourse to habeas corpus. (Resps. Memo. of Law). There is, however, authority to the contrary in the First Department. (See *McGraw v Wack*, 220 AD2d 291, 292 [1st Dept 1995] [observing that Court of Appeals approved, sub silentio, use of writ of habeas corpus to secure transfer of mentally ill individual to another institution], citing *Matter of MHLS v Wack*, 75 NY2d 751 [1989]). Consequently, I am not bound by the decision of the Fourth Department in *Matter of Nonhuman Rights Project, Inc. v Presti* (124 AD3d 1334, 1335 [4th Dept 2015], *lv denied* 126 AD3d 1430 [4th Dept]).

[2015] [granting right to marry to same sex couples and acknowledging that institution of marriage has evolved over time notwithstanding its ancient origins]).

For now, however, given the precedent to which I am bound, it is hereby

ORDERED, that the petition for a writ of habeas corpus is denied and the proceeding is dismissed; it is further

ORDERED, that respondents' cross motion to change venue is denied; and it is further

ORDERED, that petitioner's motion to strike the affidavit of Styliana-Anna Tsirka and respondents' motion to strike the additional evidence offered by petitioner are denied as moot.

ENTER:



Barbara Jaffe, JSC

Dated: July 29, 2015
New York, New York

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Panel Discussion and Q&A: A Closer Look at the Issues

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.