



# The Hidden Costs of Sexier Lipstick: Animal Testing in the Cosmetic Industry

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The Hidden Costs of Sexier Lipstick:  
Animal Testing in the Cosmetic Industry

## I. Introduction

Although it has appeared in the social and political spotlight more so in the past few decades than it has at any other point in history, opposition to the use of animals in scientific experiments – especially those aimed at facilitating the production of new cosmetic products – is nothing new. Since at least the 18<sup>th</sup> century, many notable philosophers and activists have spoken out for animal rights and against the use of non-humans for testing of products whose sole beneficiary is the human race. In 1739, David Hume recognized that animals were “endow’d with thought and reason as well as men,” and Immanuel Kant opposed cruelty to animals not for their sake but rather for man’s, noting animal abuse’s detrimental effect on humans’ relationships with one another.<sup>1</sup>

Perhaps most famously, Jeremy Bentham supplied many modern animal rights activists with early philosophical support when he stated, “[t]he question is not, Can they *reason*? nor Can they *talk*? but Can they *suffer*?”<sup>2</sup> The response to this final rhetorical question was, in the nineteenth century, the enactment of incipient animal rights’ legislation in Europe<sup>3</sup> and additional formal opposition to animal cruelty in the United States.<sup>4</sup> And even if many of the writers who followed Bentham have argued for the discontinuation of animal experimentation in the field of medicine as well as that of cosmetics,<sup>5</sup> it is the latter – because

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<sup>1</sup>See JANE A. SMITH & KENNETH M. BOYD, LIVES IN THE BALANCE: THE ETHICS OF USING ANIMALS IN BIOMEDICAL RESEARCH 300 (1991). Kant’s statement was: “He who is cruel to animals becomes hard also in his dealings with men.” *Id.*

<sup>2</sup>*Id.*

<sup>3</sup>See CLIFFORD J. SHERRY, ANIMAL RIGHTS 73 (1994) (noting that “the British were the first to attempt to regulate painful research [on animals] with the passage of the Cruelty to Animals Act of 1876.”).

<sup>4</sup>See *id.* at 47-54. Sherry explains that two important organizations – the American Society for the Prevention of Cruelty to Animals and the American Humane Association – were founded in this country in the mid-1800s. Sherry goes on to mention that many more radical organizations, begun in the 1970s and 80s, were aimed specifically at combating the use of animals in research, teaching, and the testing of products. *Id.* at 53-54.

<sup>5</sup>See, e.g., Tom Regan, *The Case for Animal Testing*, in IN DEFENSE OF ANIMALS 13 (Peter Singer ed., 1985) (arguing that true animal rights activists must not only support the total abolition of the use of animals in *all* of science, but also seek to eliminate commercial animal agriculture and sport hunting). *But see* Robert Wright, *Are Animals People Too?*, THE NEW

of its relative frivolity, or at the very least its lack of absolute necessity – that has been most successfully criticized and indeed serves today’s animal rights campaigners with their most promising avenue towards gaining relief for their non-human brethren.

A common stumbling block, however, for activists attempting to follow this path has been the dismissal by more moderate policy-makers of proposals that, often partly because of the mere manner in which they are presented, strike them as morally unconscionable. Without any doubt, a great deal of emotion inheres in both sides of the argument over the use of animals in scientific experimentation, and the debate’s viewpoints have consequently polarized. This is unfortunate. For when advocates in any setting are led to make unreasonable statements and arguments<sup>6</sup> out of anger rather than reason, the chance of success by either side becomes remote. This essay’s goal is first to survey some of what has recently been asserted – by philosophers as well as legal codes – about animal testing and then, more importantly, to analyze the difficulties that have arisen in this discourse with an eye toward developing a means of resolving them.

In order to determine the gamut of issues involved in the debate over animal experimentation, it is helpful first to examine in brief the reasons that the subject is one so charged with emotion. Many of the essays on both sides of the issue begin with stories meant to pull at heart-strings. “We wept and watched, my wife and I, as a little girl fought for her life,” begins one account explaining the vitality of animal testing to life-saving advances in medical science.<sup>7</sup> Other emotionally-effective accounts begin with stories of dogs dying in their

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REPUBLIC, Mar. 12, 1990, at 23 (claiming that animal rights advocates can coherently support and rely upon socially valuable uses of animal testing).

<sup>6</sup>Carl Cohen, for example, in an article criticized even by those who share his pro-testing views, argues that the use of animal testing should be *increased* rather than decreased, providing a questionable argument in support of this proposition. See Carl Cohen, *The Case for the Use of Animals in Biomedical Research*, 315 NEW ENG. J. MED. 865, 867 (1986). See also Edwin Converse Hettinger, *The Responsible Use of Animals in Biomedical Research*, BETWEEN THE SPECIES, Summer 1989, at 129 (1989) (attacking Cohen’s extreme position). For an equally inappropriate, anger-invoking essay advocating the other side of the argument, see Peter Singer, *To Do or Not to Do?*, HASTINGS CENTER REPORT, Nov.-Dec. 1989, at 42-43 (fabricating an emotional story about experimentation on mentally retarded people but only disclosing its falsity midway through the essay). See also ROD PREECE & LORNA CHAMBERLAIN, ANIMAL WELFARE & HUMAN VALUES 45 (noting the counterproductive effect of each polarized viewpoint’s distortion of facts regarding animal use in science).

<sup>7</sup>Robert B. White, *Beastly Questions*, HASTINGS CENTER REPORT, Mar.-Apr. 1989, at 39.

futile attempts to save children,<sup>8</sup> atrocities involving chimpanzees in scientific laboratories,<sup>9</sup> and the like. Aside, of course, from providing a colorful opening to a persuasive essay, such strategies attempt to win the reader over to the author's side from the get-go – before, that is, they introduce any substantive arguments. And while the immediate effect might be, rhetorically, a strong one, this paper's reasoning attempts to reveal its double edge. That is to say, the truth is that there are equally disturbing stories to be told by those who support animal testing and those who oppose it. Neither side suggests – at least when it is speaking credibly<sup>10</sup> – that adoption of its position would result in a complete end to suffering.

William Timberlake uses the first paragraph of one of his essays to espouse an observation somewhat more significant than a sympathy-evoking story. “Animal suffering,” he submits in response to the impassioned writings of the outspoken animal advocate Peter Singer, “has become so emotionally charged a term that attempts to analyze it critically have been rejected in favor of immediate action to stop it.”<sup>11</sup> The civil disobedience Timberlake alludes to and Singer himself describes,<sup>12</sup> however, can hardly be viewed as a reasonable road toward resolution of any problem. If the majority of the animal rights movement embraces, as one author notes some activists have, a “general disillusionment, or even hostility towards science itself”<sup>13</sup> rather than towards the more narrow target of unnecessary infliction of pain upon animals, it will have let its emotions get the better of it – and will likely, given its relatively small size, suffer the consequence of simply being silenced by the powers of the *status quo*.

All of this said, perhaps emotions will always – and perhaps, to a carefully limited degree, should – play a role in the debate this paper addresses. Tom Regan provides the following support for such a proposition:

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<sup>8</sup>See ROBERT M. BAIRD AND STUART E. ROSENBAUM, ANIMAL EXPERIMENTATION: THE MORAL ISSUES 7 (1991).

<sup>9</sup>See Stephen Zak, *Ethics and Animals*, THE ATLANTIC, Mar. 1989, at 69 (1989).

<sup>10</sup>Compare *supra* note 1 (noting Descartes' now discredited “view that animals lacked not only reason, but also consciousness and any capacity to suffer pain.”).

<sup>11</sup>William Timberlake, *The Attribution of Suffering*, BEHAVIORAL AND BRAIN SCIENCES, Mar. 1980, at 36.

<sup>12</sup>See Singer, *supra* note 6, at 44-45 (describing how one activist severely damaged a laboratory that had been performing tests on monkeys).

<sup>13</sup>ROSEMARY RODD, BIOLOGY, ETHICS, AND ANIMALS 144 (1990).

It *is* our hearts, not our heads, that call for an end to it all, that demand of us that we overcome, for [animals'] sake, the habits and forces behind their systematic oppression. All great movements, it is written, go through three stages: ridicule, discussion, adoption. It is the realization of this third stage, adoption, that requires both our passion and our discipline, our hearts and our heads.<sup>14</sup>

Perhaps the general principle here, rather than the one-sided nature of its argument for animal rights, is the important thing. Read in a neutral way, it instructs those interested in resolving the animal-experimentation dilemma to keep at least in the back of their minds not only the compelling emotional reasons for holding the views they do but also the equally-valid emotional bases for the ideas of those who oppose them. Perhaps most importantly, no one involved in this debate should forget the bridge-burning, door-closing effect that over-reliance on emotions can cause.

## **II. The Arguments For and Against Animal Experimentation**

If emotion has established the tone of the ongoing – and sometimes violent – debate over the use of animals in scientific experimentation, what represents its substance? Since people obviously began using animals in laboratories before they began to articulate arguments against doing so, perhaps the most logical place to begin in answering this question is by noting the most fundamental argument in support of animal testing.

There is little question that animal experimentation has led to significant advances in medicine, and that these advances have in turn led more or less directly to the protection of countless human lives. Treatments such as

the enzyme streptokinase (which dissolves clotted blood in the coronary arteries of heart attack patients), the vaccination against poliomyelitis that has turned polio into a near-forgotten American memory, the surgical replacement of arthritis-crippled joints,<sup>15</sup> and the life-saving treatment for cystic fibrosis<sup>16</sup> are just a very few of the great number of drugs and medical processes that have been made available for human use only after being tested and perfected on dogs, cats, monkeys, and other animals.<sup>17</sup> The empirical human value, then, of animal testing, seems clear enough from examples such as these.

But this statement may not be entirely true. As much as it can be of use to the development of life-saving technology, required animal testing can also, potentially, be a hindrance. One author, for instance, notes that penicillin, one of the most important medications of the modern world, was used almost immediately on humans because of limited supply of the drug on the one hand and its immediate need on the other. “It is interesting to note,” the authors state, “that much testing [of penicillin] was done on cell cultures *in vitro* . . . [.] One may wonder if the present regulatory demands would crumble if a situation were to recur in which such urgency of therapeutic need was unmistakable.”<sup>18</sup> The implication here – that current regulations place undue burdens on the availability of drugs to the public – will be more fully addressed in section three of this paper. The fundamental point – that effective testing does not necessarily require the use of live animals – has been an argument mounted with some force for those who favor careful testing but oppose the use of living animals.<sup>19</sup>

Perhaps the strongest criticism, however, of animal experimentation is that the results of many animal tests may be invalid as applied to humans. Walsh and Pyrich assert this claim by noting that “[s]ome

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<sup>15</sup>See *supra* note 7.

<sup>16</sup>See *supra* note 8, at 9.

<sup>17</sup>*Id.*

<sup>18</sup>D.R. Laurence, A.E.M. McLean, & M. Weatherall, *Conclusions*, in SAFETY TESTING OF NEW DRUGS 166 (Laurence, McLean, and Weatherall eds., 1984).

<sup>19</sup>See, e.g., *The Commission of the European Communities's Annual Report: Development, Validation and Legal Acceptance of Alternative Methods to Animal Experiments*, COM/94/0606/FIN 4 (1994). Cf. Smith and Boyd, *supra* note 1, at 40-41, who note that “[n]ot every addition to scientific knowledge . . . is sufficiently significant to justify the use (let alone every use) of animals” and therefore have developed a three-part test for determining when use of living animals in scientific testing is justified.

commentators have argued that the FDA relies too heavily on animal studies, which are, in fact, of fairly limited use . . . in proving safety and effectiveness in humans.”<sup>20</sup> To return to the subject of penicillin with the more formidable weight of this argument, consider the following statement:

[A] number of drugs used successfully to treat human beings cause tumors or leukemias in animals. In fact, Sir Alexander Fleming claimed that the penicillin project was successful because he never tested the drug in animals. Had he known of penicillin’s animal toxicity, Fleming said that he never would have tried it on human subjects.<sup>21</sup>

While Laurence *et al.* note the number of lives saved because of penicillin’s speedy approval for human use compared to the imagined result of its delay through lengthy animal testing,<sup>22</sup> Dillman imagines a scenario even more detrimental to human life, viz., the non-acceptance of a pivotal drug on the basis of none other than animal testing itself.

Another commentator on this topic is Mark A. Kassel, who submits in an essay arguing for reform of the procedures necessary before new drugs may be put on the market: “Studies... show that at least twenty percent of the positive predictions for toxicity and side effects in animals proved to be false in human beings.”<sup>23</sup> As all of the above-referenced scholars do, noting the at least potential invalidity – and therefore irrelevance, or indeed even dangerously misleading nature – of animal experimentation only opens the door for compelling criticism. For, as the final section of this essay will argue, even if the pro-testing contingent is not moved by emotional, rights-based, or traditional utilitarian arguments against animal use in scientific experiments, it should at the very least agree that it is undesirable to waste money and effort on procedures whose results are invalid.

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<sup>20</sup>Charles J. Walsh and Alissa Pyrich, *Rationalizing the Regulation of Prescription Drugs and Medical Devices: Perspectives on Private Certification and Tort Reform*, 48 RUTGERS L. REV. 883, 936 (1996).

<sup>22</sup>See *supra* note 18.

<sup>23</sup>Mark A. Kassel, Note, *Getting There First with the Best: The Need to Shorten the Prescription Drug Approval Process*, 27 VAL. U. L. REV. 95, 10506 (1992).

Another noteworthy observation is that this section of the essay has, heretofore, considered only arguments pertaining to the use of animal experimentation aimed at producing new and more effective, life-saving medicines rather than products voluntarily used to improve physical appearance. It is no coincidence that most of the support for animal testing applies to the medical setting rather than to that of cosmetics,<sup>24</sup> and perhaps also no surprise that animal rights advocates most often focus their attack on the latter. The main reason for this phenomenon, as mentioned above, is readily-apparent: while medicines save lives, cosmetics do not. This is not to say, of course, that cosmetics are the only frivolous products (relative, that is, to life-saving medicines) tested on animals.<sup>25</sup>

Discounting such extreme positions as Cohen's, which do more merely to anger those opposed to animal testing than they do to convince them of the problems with their position, there is a more viable argument in favor of the use of animals in the testing of cosmetics and other non-essential products. This argument, in a nutshell, is protection of human health<sup>26</sup> – and, as such, is actually the very same one that applies to the medical field. The only difference, in fact, is that people in need of new medicines usually have no choice in

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<sup>24</sup> But see Cohen, *supra* note 6, at 103-104 (arguing that, since animals have no rights whatsoever and lack the capacity for moral judgment, even slight benefits to man justify any amount of animal suffering).

<sup>25</sup> If it considered them in a more in-depth manner, this essay would view countless other products – such as laundry detergents, pesticides, and food color additives – as open to the exact same type of attack, addressed in this paragraph, that has been focused against cosmetic products. Rather than discuss each of them individually, however, this paper implicitly groups all such “frivolous” products together; the arguments against animal testing for cosmetics parallel those against other similar, non-essential products. One final point in this regard is that while the strength of these arguments lessens as against testing of non-prescription (and, therefore, also non-life-saving) drugs since such products undoubtedly assist humans in meaningful ways, this essay would still assert them but – most importantly – would allow them to be trumped by the more forceful weight of the economic argument asserted in section four. As the observation about penicillin, *supra* note 21, implies, this final argument ultimately applies to testing procedures involving cosmetics as well as drugs (whether they must be obtained by prescription or not) and thus renders their life-saving or mere pain-relieving, &c. property irrelevant.

<sup>26</sup> See *The Commission of the European Communities' Annual Report*, *supra* note 19, at 2, which sums up the primary purpose of the European Community's cosmetic safety statute as follows: “A cosmetic product put on the market within the Community *must not cause damage to human health* when applied under normal or reasonably foreseeable conditions of use, taking account, in particular, of the product's presentation, its labeling, any instructions for its use and disposal as well as any other indication or information provided by the manufacturer or his authorized agent or by any other person responsible for placing the product on the Community market” (emphasis added).



the matter, whereas users of cosmetics make a conscious decision to apply or consume products that could bring them harm.

Criticism of testing for frivolous ends, not surprisingly, abounds.<sup>27</sup> Standing alone, such criticism probably does not do the persuasive work needed in order to convince most of those who favor animal testing that their position is mistaken. When, however, the argument is coupled with credible and non-emotional attacks on the validity of animal tests, it gains (as suggested above) strength. Baird and Rosenbaum give an example of how the two elements can be woven together by first noting the pain caused by the “Lethal Dose-50” (LD-50) test and then giving the following description of that test:

T[he] LD-50 test requires feeding [test animals] a sufficient quantity of the product in question to find the dose that kills 50 percent of [them] . . . . “Because most cosmetic products are not especially poisonous, it necessarily follows that if a rat or a dog has to be killed this way, then very great quantities of the cosmetic must be forced into their stomachs, blocking or breaking internal organs, or killing the animal by some other physical action, rather than by any specific chemical effect.”<sup>28</sup>

While this statement may at first seem to constitute an effective argument based on the observation that the LD-50 test is misplaced in an area of products in which not only very small quantities of any given substance are intended for use at one time but also that none of the substances are intended to be taken internally, the interest in human health could easily be seen to trump nonetheless. For what, researchers are required to imagine,<sup>29</sup> would happen if, say, a toddler came across a bottle of fingernail polish remover and drank its entire contents?

If reasonable animal rights supporters would concede that it is an important objective of science and regulatory schemes to prevent products that can kill people (in however improbable a manner) from reaching

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<sup>27</sup>See, e.g., Wright, *supra* note 5 (distinguished between frivolous and non-frivolous uses of animal resources); Dillman, *supra* note 21, at 946 (discounting as frivolous animal tests aimed at predicting future potential risks for patients who do not have more than a few months to live); Jack M. Kress, *Xenotransplantation: Ethics and Economics*, 53 FOOD & DRUG L.J. 353, 366 (1998) (asserting that “opposing the abuse of animals for the sake of selling a new cosmetic” is a “relatively easy position.”).

<sup>29</sup>See *The Commission of the European Communities’ Annual Report*, *supra* note 19, at 2.

consumers, animal testing of cosmetics should arguably be thought every bit as important as animal testing of drugs. But if a combination of the frivolity and invalidity arguments is ultimately somewhat disappointing in this instance, what, exactly, is wrong with it? As this essay sees it, the problem with Baird and Rosenbaum's statement is once again over-reliance on emotion, and the strength of arguments such as those of Dillman, Green, Peskoe, and others<sup>30</sup> is their simplicity – their unemotional, wholly empirical nature. The preceding paragraph is by no means an argument that the validity argument should fail. Instead, it is attempt to delineate that defense's boundaries – an important endeavor in this area, where strong arguments may ultimately fall short of their mark when they are made specious through the use even of implied, let alone vividly explicit, emotional pleas.

Focused on discussion of realizing medical advances, protecting consumers, and proving the validity of tests on animals, this section's discourse has up until now taken place on a mostly practical, rather than theoretical, plane. Yet many of the arguments concerning animal rights in the area of scientific experimentation are penned not by legal scholars or scientists but rather by philosophers. Although the final section of this essay will view them as mostly irrelevant to the actual resolution of the problem of animal testing in this country and others, the following few pages provide a brief sketch of some of these thinkers' positions.

Perhaps the most logical theoretical question to begin with is what people mean when they use the word "animal." While Singer sees humans as falling within this definition, referring to man as the "human animal,"<sup>31</sup> most writers embrace the more colloquial – and, arguably, speciesist – definition that views mankind as standing outside of the "animal" group and within a category that excludes, indeed, all else. The question such theorists and this paper wish to address is where the line should be drawn below which living things should be accorded no right to avoid being subjected to scientific tests. If most would argue that man is

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<sup>30</sup>See *supra* note 21.

<sup>31</sup>See Peter Singer, *The Significance of Animal Suffering*, BEHAVIORAL AND BRAIN SCIENCES, Mar. 1980, at 9. See generally Philip Dziuk, *The Need for SYMBiosis Between Animals including Humans: SYMBAH*, in ANIMAL RESEARCH, ANIMAL RIGHTS, ANIMAL LEGISLATION 29 (Patrick W. Concannon ed., 1990).

not below that line, and some would argue that dogs are not either, would, say, spiders – or amoebas – be?

Addressing this question, Steven Zak asks:

Must we treat dragonflies the same as dolphins? Surely not. Distinctions must be made, though to judge definitively which animals must be ruled out as holders of rights may be impossible even in principle. In legal or moral discourse we are virtually never able to draw clear lines. This does not mean that drawing a line anywhere, arbitrarily, is as good as drawing one anywhere else.<sup>32</sup>

Zak's answer does not give much in the way of a practical answer. Richard Ryder, however, offers at least some assistance in this regard – and indeed represents the most commonly-held position among animal rights supporters. He states, simply: “I believe our respect for others should include all sentients.”<sup>33</sup> The obvious question that follows such a statement is how anyone could ever determine which animals are capable of feeling what degree of sensation. This question is, of course, even less determinable<sup>34</sup> than the one this paragraph opens with, redoubling the difficulties involved in its own determination.

Whatever it or other people understand “animals” (or “beasts,” as it calls them) to include, the Bible has been a starting point for many arguments involving animal rights: “Modern philosophical debate about the use of animals in biomedical research,” Smith and Boyd explain, “has roots in ancient Hebrew and Classical culture. In the Genesis myths, . . . man is given dominion over the animals, and the opportunity to name each species.”<sup>35</sup> This biblical excerpt is one that some advocates of animal testing in the distant past relied upon to justify almost all action against animals in the name of furthering human welfare.<sup>36</sup> Animals were put on

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<sup>33</sup>Richard Ryder, *Speciesism*, in VICTIMS OF SCIENCE: THE USE OF ANIMALS IN RESEARCH 14 (1983). See also PETER SINGER, ANIMAL LIBERATION 3 (1975).

<sup>34</sup>But see Hettinger, *supra* note 6, at 127 (implying that it is indeed possible to determine degrees of sentience, and noting in fact that less-developed organisms will sometimes feel more, rather than less, pain as compared to more-developed organisms).

<sup>35</sup>See *supra* note 1, at 298.

<sup>36</sup>After noting that Descartes “supported this view by pronouncing animals to be machines without minds or souls,” Julian McAllister Groves goes on to submit that such a view, based on biblical justification, was prevalent in seventeenth-century England: “[P]eople began to believe that animals benefit from and even enjoy sacrificing themselves for humans.” JULIAN McALLISTER GROVES, HEARTS AND MINDS: THE CONTROVERSY OVER LABORATORY ANIMALS 32 (1997). See also HELENA SILVERSTEIN, UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT 39 (1996) (adding St. Augustine and St. Thomas Aquinas to the list of those who relied upon biblical arguments favoring the unfettered utilization of animals). But see Kress, *supra* note 27, at 367 (claiming that “[b]oth JudeoChristian teaching and Greek philosophy agreed that cruelty to

this earth, the argument goes, for man to make use of in any way he saw fit. While there are undoubtedly some that might still support this view, most credible advocates of animal testing adhere at least partially to Kant's idea that animal cruelty is injurious to man's dignity<sup>37</sup> – in other words, that conscience dictates responsible treatment of those over which the human race is able to exercise so great a degree of control.<sup>38</sup> It is this type of reasonable, mainstream defense that the Associated Medical Schools of New York (AMA) asserts<sup>39</sup> as well as, assumably, other organizations whose daily bread and butter is experimentation on animals.

The view directly opposing the AMA's (which might be summed up as a necessity argument tacked onto the original Kantian position) appears a good deal less reasonable to most people. This less-popular – if, when divorced from emotion, perfectly rational – view is that every animal has just as much right to survival as does every human being: “Animal liberationists do not separate out the human animal. A rat is a pig is a dog is a boy.”<sup>40</sup> This position is a reaction to a concept known in the animal rights debate as “speciesism”; the previous paragraph describes a somewhat watered-down version of it. In its pure form, speciesism is “the view that species membership is, *in itself*, a reason for giving more weight to the interests of one being than to those of another.”<sup>41</sup> Although Singer mentions that “this position, properly understood, is virtually never defended,”<sup>42</sup> J.A. Gray is one writer who advocates it. In an essay that is, as much as anything else,

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animals was wicked in itself, and furthermore was demeaning to humans.”).

<sup>37</sup>See *supra* note 1.

<sup>38</sup>Expressing, uncharacteristically, a fairly well-accepted modern view, Peter Singer eschews consideration of religious arguments shortly after he acknowledges them in one of his essays: “I am putting aside . . . theological questions, partly because there is no rational foundation for the premises on which they are based, and also because if we are considering public policy in a pluralistic society, we should not take a particular religious outlook as the basis for our laws.” Singer, *supra* note 31.

<sup>39</sup>In a pro-testing position statement for this organization, David H. Schwarz explains: “AMS fully acknowledges that, along with the responsibility to fulfill our research role is the need for stewardship on behalf of those animals which are so vital to this work. All institutions conducting research must enforce appropriate standards for the care and use of laboratory animals. Research centers are currently subject to extensive laws, policies, guidelines and accreditation standards dealing with the use of animals in research . . . . Our disagreement is not with advocates of appropriate and respectful use of animals in a manner consistent with established guidelines for animal welfare, but with extremists who insist that no circumstances exist under which we can morally differentiate between the worth of the life of a human being and that of an animal.” Letter to the Editor, 244 SCIENCE 1128 (1989).

<sup>40</sup>Katie McCabe, *Who Will Live, Who Will Die?*, WASHINGTONIAN, Aug. 1986, at 114 (quoting Ingrid Newkirk).

<sup>41</sup>See Singer, *supra* note 31, at 10.

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

a rebuttal to Singer's *The Significance of Animal Suffering*, Gray first draws a distinction "between ethical principals and moral choices" to conclude that while, in the abstract, it might be equally reprehensible to inflict unnecessary pain on a spider as it would be to inflict it on a human being, a type of biological – that is, innate or instinctual – morality guides our actions.<sup>43</sup>

Gray then applies his example of this automatic tendency of a mother's protection of own child to the context of animal rights by first noting that the use or non-use of animals in scientific experiments is a decision that affects who (i.e., either test animals or sick people) will suffer and then arguing that the medical world should follow the mother's emotion-based logic to favor protection of its own kind over another's. Such is the logic that allows Gray and other defenders of speciesism to conclude it is "morally right to carry out . . . experiments [on animals]." <sup>44</sup> It is perhaps not surprising that this position is infrequently defended.

As this paper sees it, the strongest argument for animal testing comes from the likes of Mary Anne Warren, who bases her reasoning upon the consideration that animals, unlike humans, lack the ability to reason and make thoughtful decisions.<sup>45</sup> Rationality is morally relevant, Warren argues, not because it makes humans somehow *better* than members of other species but rather because it "provides greater possibilities for cooperation and for the nonviolent resolution of problems."<sup>46</sup> Her argument is better reasoned – not to mention more reasonable – than Gray's: "The recognition of the moral equality of other persons is the price

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<sup>43</sup> See J.A. Gray, *In Defense of Speciesism*, BEHAVIORAL AND BRAIN SCIENCES, Mar. 1980, at 22-23. The hypothetical Gray uses to illustrate his point is that of a mother who is faced with the dilemma "of saving one of two small children from a fire, knowing that the other will die." Only one of the children is her own. While the original choice (the mother saves her own child) is as morally acceptable as any to Gray, when the author changes the conditions, viz., "[t]he mother's own child is crippled, mentally handicapped, or shows dangerous psychotic tendencies, whereas the other is healthy and normal," he reasons that "a point would come at which the imbalance between the two children . . . would outweigh the initial bias in favor of the mother's own child." Gray qualifies this somewhat nebulous remark with the assertion that "few would find it morally unacceptable if the required degree of imbalance turned out to be rather large, as I imagine it would in most real cases." *Id.* at 22.

<sup>44</sup> *Id.* at 23. See also Cohen, *supra* note 6, at 68, who declares that he is a speciesist and, therefore, would likely support Gray's conclusions whole-heartedly.

<sup>45</sup> See Warren, *supra* note 32, at 170.

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

we must each pay for their recognition or our moral equality.”<sup>47</sup>

The crucial argument here is that humans stand above animals in one important respect: namely, in their ability to take actions that cause harm in the short run (e.g., performing painful tests on animals) but produce great benefits in the long run (e.g., saving human lives). We should not accord animals the same rights as humans because we cannot work with them to better the world for us all. Her position is credible partly because it rejects the unthinking speciesist position, which animals instinctually apply, for the more thoughtful and caring approach of a human mind: “Because we cannot reason with most non-human animals,<sup>48</sup> we cannot always solve the problems which they may cause without harming them – although we are always obligated to try.”<sup>49</sup> To argue strict speciesism, in other words, is to strip human existence of the one thing that might in fact justify its superiority over that of animals.

If Warren expresses a strong argument for animal testing, how do those who oppose her respond? Steven Zak notes that “early animal-protection advocates and groups . . . seldom talked about rights. They condemned cruelty – that is, acts that produce or reveal bad character.”<sup>50</sup> These types of arguments, such as the one that led “early nineteenth-century England campaigners against the popular sport of bull-baiting [to argue] that it ‘fostered every bad and barbarous principle of our nature,’<sup>51</sup> fall rather quickly into two traps identified above: Not only would the protest be subject to an analog of Warren’s implied criticism of Gray’s instinct-

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<sup>47</sup>*Id.* Warren, incidentally, notes parenthetically the detrimental effect of weak arguments on the cause of those who favor animal experimentation: “Bad reasoning reduces our effective intelligence rather than increasing it.” *Id.*

<sup>48</sup>To illustrate this proposition, Warren quotes from Bonnie Steinbock, *Speciesism and the Idea of Equality*, 53 *PHILOSOPHY* 253 (1978) (stating that “[i]f rats invade our houses . . . we cannot reason with them, hoping to persuade them of the injustice they do us. We can only attempt to get rid of them.”).

<sup>49</sup>Warren, *supra* note 32, at 171.

<sup>50</sup>See Zak, *supra* note 9 at 70.

<sup>51</sup>*Id.* For an earlier version of such opposition, see Silverstein, *supra* note 36, at 29 (noting Pope Pius V’s 1567 decree condemning bullfighting).

based reasoning, but it could also easily be placed into the same category of theological thinking that Singer effectively discredits.<sup>52</sup> Furthermore, this argument, if asserted today in the animal experimentation debate, would almost certainly be conceded to those who voice it since no one persuasively argues for intentional cruelty to animals for nothing more significant than human entertainment.<sup>53</sup>

If this type of argument is misplaced in the modern context, what is a more effective one? Zak claims that “[m]odern activists have abandoned the idea that cruelty is demeaning to human character (‘virtue thought’) in favor of the idea that the lives of animals have intrinsic value (‘rights thought’).”<sup>54</sup> One of the most prominent rights theorists in the animal experimentation field is Tom Regan. To Regan, the “fundamental wrong” with any activity that harms animals is not the pain or suffering it might cause but rather the mindset of its human perpetrator that it is permissible to view animals as resources for mankind.<sup>55</sup> This statement is clearly aimed at the Biblical justification for the use of test animals this section mentioned at the beginning of its survey of philosophical viewpoints. Regan goes on to consider and reject the “indirect duty” view that no animal itself has any rights and that any wrong done against it, if considered a violation at all, is a violation of its owner’s right.<sup>56</sup>

Although he supports this right-based position (“we ... must at least recognize that we have some duties directly to animals, just as we have some duties directly to each other”), it is a utilitarian theory that Regan at least seems to want to embrace.<sup>57</sup> Utilitarianism, as Regan sees it, adheres to two moral principals:

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<sup>52</sup>See *supra* note 31.

<sup>53</sup>See, e.g., *supra* note 32.

<sup>54</sup>See Zak, *supra* note 6, at 70. See also Warren, *supra* note 32, at 173 (claiming that current theorists in many areas, only one of them being animal testing, have chosen to rely on rights arguments).

<sup>55</sup>See Regan, *supra* note 5, at 13.

<sup>56</sup>*Id.* at 14-16. Regan’s means of refuting the “indirect duty” argument is by noting that animals feel pain and thus can be directly and personally harmed, and by asserting that protecting only those members of the hegemony who are permitted to have a say in how they are treated would result in unpunishable crimes not only against animals but indeed against any human being who is a member of a minority group that has effectively been silenced through social, economic, or political means.

<sup>57</sup>*Id.* at 18. See also Zak, *supra* note 6, at 71, who likewise seeks to unify the arguments: “Even true utilitarianism is incomplete without taking account of rights.”

first, that everyone's interests should be accorded equal weight, and second, that the best act is that which brings about "the best balance between satisfaction and frustration for everyone affected by the outcome."<sup>58</sup> Regan admits that the dictate of utilitarianism – "to add up (somehow!) the separate satisfactions and frustrations of everyone likely to be affected by our choice" and then to choose the option that generates more total satisfaction than frustration – is a tall order and indeed one that is often performed in no single clearest way.<sup>59</sup> Regan tries briefly to rescue his admittedly indeterminate utilitarian theory, but soon gives up, reverting to his rights-based position – which in his view requires the protection of all human and animal beings, regardless of how "useful" they may be to the aggregate social welfare.<sup>60</sup> His final position seems to be that every entity has equal "inherent value," which should be respected in an even-handed way across the board.<sup>61</sup> At the end of the day, Regan seems to be claiming that no one person or animal should ever be harmed for the benefit of another.<sup>62</sup> Regan's theory is, then, just that.<sup>63</sup> Little practical advice can be gleaned from it, as his treatment of utilitarianism proves.

Finally, the topic of animal use for food by both humans and other animals has made its way into the philosophical debate. Human consumption of animals, to begin with, has been criticized for at least two hundred years. Peter Singer explains that "William Paley, a progressive moral theologian of the late eighteenth century . . . wrote that the practice of killing animals to eat them caused them pain and death for our pleasure and convenience; moreover, eating meat was unnecessary, since we could live on fruits and vegetables, as the Hindus do."<sup>64</sup> Currently, most animal rights advocates recognize that the worldwide meat industry causes not only great pain and suffering but also large-scale environmental destruction. Consequently, many such

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<sup>58</sup>Regan, *supra* note 5, at 18.

<sup>59</sup>*Id.* at 19. Regan illustrates utilitarianism's potentially drastic results with a hypothetical in which he has his cantankerous but healthy "Aunt Bea" killed so that he can use the resulting inheritance money to make a donation to a local children's hospital. *Id.*

<sup>60</sup>*Id.* at 21.

<sup>61</sup>*Id.* at 24.

<sup>62</sup>*Id.*

<sup>63</sup>Regan, *id.* at 16, admits to being overly cerebral, and is – to his position's detriment.

<sup>64</sup>See Singer, *supra* note 31, at 9.



advocates do not themselves consume animal products. But what about those that do? Despite Cohen's assertion that "[o]ne cannot coherently object to the killing of animals in biomedical investigations while continuing to eat them,"<sup>65</sup> this paper submits that such a statement is simply irrational. For while an animal rights advocate who eats animal products might be rightly called a hypocrite, his personal habits should not affect the coherence – and certainly not the validity – of his arguments. Would anyone, to illustrate, attempt to refute the arguments of a lawyer representing a consumer group against a tobacco manufacturer on the grounds that she is a smoker? Incoherence between act and assertion – *is* and *ought* – is no grounds, at least in this instance, for the dismissal of a potentially valid position.

The second, related topic – animal consumption of other animals – allows those who disfavor animal rights to mount another, somewhat more persuasive, argument. Timberlake sums it up by asking his readers to

[c]onsider the incompatibility of the following beliefs [esposed by Peter Singer and other animal rights supporters]: (1) All animals (including humans) are equal in moral status; (2) all animals except humans can promote the survival of their own kind at the expense of the suffering and restricted access to resources of other species.<sup>66</sup>

The case for inconsistency here is much stronger than the one asserted by Cohen in the preceding paragraph. It is indeed a troubled argument, asserting equality among humans and animals and then immediately attempting to hold humans to a higher standard. The difference, this essay submits, is that no animal causes the degree of destruction that humans do. To hunt for food necessary for survival is one thing; to clear-cut forests for real estate developments or cattle pastures so that people may have spacious back-yards and plenty of steaks in their grocery store freezers is somewhat of another. Most animals take what they need, and no more. Humans often take all that they can get, regardless of what effect doing so might have on animals and the environment. The important statement, then, is the one Warren asserts: rationality, the

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<sup>65</sup>Cohen, *supra* note 6, at 68 (stating further that "[s]crupulous vegetarianism, in matters of food, clothing, shelter, commerce, and recreation, and in all other spheres, is the only fully coherent position the critic may adopt." *Id.*

ability to reason and make thoughtful decisions, distinguishes us from animals.<sup>67</sup> As humans, we possess a great power that animals lack. We could be viewed as owing it to ourselves and the world to make choices that reflect that difference.

The preceding paragraphs have attempted to present (albeit it in an admittedly cursory fashion) some of the most prominent philosophical arguments surrounding the use of animals in scientific experiments. Although most of these arguments are applied to medical tests rather than to those performed in the field of cosmetics, it is important to keep in mind that it is the latter, arguably less justifiable field, rather than the former on which this essay focuses directly. The following section will consider what types of laws have been instituted in this country and others regarding animal experimentation in the cosmetic industry itself. The final section will return to, and modify, some of the arguments discussed in the present section in a way that hopes to synthesize the essay's four parts and at least begin to formulate a way of solving this heated and long-lived debate.

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<sup>67</sup>See Warren, *supra* note 32, at 170.

### III. Current Laws Addressing Animal Experimentation

One document this essay has already mentioned in footnotes more than once – the Commission of the European Communities’s Annual Report from 1994 concerning animal testing (the “Report,” hereinafter)<sup>68</sup> – and the proposed legislation it engendered will serve as this section’s initial focus. The Report is especially significant to this paper not only because it provides a good overview of both European and other countries’ approaches to the debate over animal experimentation in the specific area of cosmetics<sup>69</sup> but also because it evidences the success one group of animal rights activists almost realized in establishing protection for laboratory animals.

The Report begins, as noted above, by delineating the foremost goals involved with regulation of the European Community cosmetic market, including the role it plays in that endeavor. The balance to be struck, the Report declares, is between “assur[ing] a better level of quality and safety of products and their ingredients and hence a better level of consumer health protection” on the one hand and “avoid[ing,] . . . wherever possible, . . . the suffering and death of animals”<sup>70</sup> on the other. While the Report concedes that the former goal should remain the first and foremost concern, the latter is the very reason for the Report’s own existence.

The Report, then, is aimed at assessing means of “offer[ing] the consumer a degree of protection equivalent

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<sup>68</sup>See Report, *supra* note 19.

<sup>69</sup>*Id.* The Report notes that “cosmetic products covers a very wide range of products, including: classical make-up products[,] perfumes[,] products for use on the hair[,] hygiene and toilet products (including soap, toothpaste[,] pre-shave and after-shave products)[,] ‘natural’ cosmetic products[,] and various products which protect the skin or mucous membrane and keep them in good condition, such as sun creams, certain anti-dandruff shampoos, wart removers, moisteners, deodorants, cariostatic toothpastes, etc.” *Id.* at 10.

<sup>70</sup>*Id.* at 2. Two pages later, the Report identifies the “three-point plan” first proposed by W.M.S. Russel and R.L. Birch in their 1959 book THE PRINCIPALS OF HUMANE EXPERIMENTAL TECHNIQUE, namely, the now well-known “three r’s”: “(1) reducing the number of animals used[,] (2) refining existing protocols, so as to reduce animal suffering[,] and] (3) replacing tests on animals.” *Id.* at 4, 11.

to that obtained by animal experiments” without experimenting on sentient animals. Its practical objective was to offer proof to the European Parliament that animal testing of cosmetic products could be prohibited without untoward effect on consumers.<sup>71</sup>

The first alternative to animal testing the Report considers is testing by way of *in vitro* methods, which “include sample biological systems in the form of bacteria, cultures of cells or animal or human tissues, organotypical cultures or systems using artificial media (reconstructed skin) . . . or physical and chemical tests (alkaline-acid reserve, etc.).”<sup>72</sup> While the Report notes that *in vitro* toxicity tests are often “incomplete by comparison with the effects observed *in vivo*,”<sup>73</sup> and that to gain legal acceptance any such test would need to be subjected to years of study to ensure – by “consensus within the scientific community of the 25 Member States”<sup>74</sup> – its validity, the Report nonetheless suggests that *in vitro* methods may present viable options for at least some tests. Examples of *in vitro* tests that have been “validated” by the European scientific community include photoirritation and phototoxicity,<sup>75</sup> and, to a less-definitive degree, an *in vitro* eye irritation test that would replace the much-criticized *in vivo* Draize procedure.<sup>76</sup> Aside from these two tests, the Report claims that one other – percutaneous absorption – is in the “prevalidation” stage<sup>77</sup> and that three more – skin sensitization, acute toxicity, and skin irritation – are in the “development” stage.<sup>78</sup>

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<sup>71</sup>*Id.* at 2-3. The Report provides, however, that “[i]f there has been insufficient progress in developing satisfactory methods to replace animal testing, and in particular those cases where alternative methods of testing, despite all reasonable endeavors, have not been scientifically validated as offering an equivalent level of protection for the consumer . . . the Commission shall, by 1 January 1997, submit draft measures to postpone the date of implementation of this provision, for a sufficient period, and in any case for no less than two years. . . . Before submitting such measures, the Commission will consult the Scientific Committee on Cosmetology.” *Id.* at 3.

<sup>72</sup>*Id.* at 4. As opposed to *in vitro* methods, standard animals tests are *in vivo* (i.e., performed on live animals). The Report later goes on to list and describe commonly-used *in vivo* test procedures. *Id.* at 7-9.

<sup>73</sup>*Id.* at 4.

<sup>74</sup>*Id.* at 6.

<sup>75</sup>*Id.* at 15 (noting also that “[c]orrelation with *in vivo* data in the literature (man/animal) is excellent.”).

<sup>76</sup>*Id.* at 15-16. The Report qualifies the eye irritation test’s “validation” status by noting: “Although sampling is not enough to cover the entire cosmetic universe, . . . the study should cast light on certain classes of products.” *Id.* at 16.

<sup>77</sup>*Id.* at 15. Despite percutaneous absorption’s prevalidation status, the Report seems optimistic about its at least partial eventual success: “The method . . . has been validated through reproducible intra- and interlaboratory results showing a good *in vitro* / *in vivo* correlation for several substances. It can replace *in vivo* cutaneous penetration tests but tells us nothing about the metabolism and toxicokinetics.” *Id.*

<sup>78</sup>*Id.* at 16. The prognosis for these tests is dim: “In view of the current state of research, and the difficulty of validation exercises, *in vitro* methods cannot yet replace tests on live animals.” *Id.*

The conclusion of the Report, then, is not an especially positive one for those who would have liked to see the use of animals in cosmetic product testing abolished by 1998. Indeed, after having postponed it more than once, the European Parliament quite recently pushed this abolition date back again, noting that sufficient alternative methods to *in vivo* tests had still not been realized.<sup>79</sup> The 1994 Report lists some reasons why its efforts failed. First and foremost, it recognizes that “[v]alidation studies are costly and time-consuming.”<sup>80</sup> Apparently, the support provided by a variety of countries and organizations<sup>81</sup> has simply not been sufficient, given the high standards necessary to ensure consumer protection.<sup>82</sup> In its concluding pages, the Report states:

The results obtained in the development and validation of batteries of *in vitro* eye irritation tests concern specific chemical families and certain groups of finished products[. T]here is no conclusive evidence that these results can be extrapolated to the evaluation of ingredients belonging to different structural classes and functional groups, notably to the ingredients likely to be included in the positive lists, viz., preservatives, colouring agents and UV filters (hair dyes).<sup>83</sup>

But even if *in vitro* tests have not been accepted by the scientific community as viable alternatives to testing on live animals, the Report does support with somewhat more optimism methods that “contribute to reducing the number of test animals and the sufferings inflicted on them.”<sup>84</sup> At least a step in the right direction as far as animal rights goes, this partial remedy applies to the fixed dose method,<sup>85</sup> the acute toxic

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<sup>79</sup>See *Commission Directive of 17 April 1997*, 97/18/EC 1 (“postponing the date after which animal tests are prohibited for ingredients or combinations of ingredients of cosmetic products.”).

<sup>80</sup>Report, *supra* note 19, at 16. The report provides the following reason for this statement, implying that test methods must be repeated by many more laboratories than the ones that developed them: “As regards alternative *in vitro* tests, it is difficult to draw conclusions on the performance of the individual tests. The performance of the test systems varies with the substances and the groups of products tested and it is impossible to extrapolate the results of a validation exercise to all types of substances and products.” *Id.*

<sup>81</sup>The Report lists the following – though not all financial – supporters of its project: the Consumer Policy Service, the Galileo Data Bank, Invittox, the Fund for the Replacement of Animals in Medical Experiments, SCAAT, CFTA, JCLA, and COLIPA. *Id.* at 13-14.

<sup>82</sup>*Id.* at 22.

<sup>84</sup>*Id.* at 17. See also Rodd, *supra* note 13, at 150 (arguing that “it would be desirable to have a legal requirement that all experiments should obtain advice from a statistician (and follow it) so that numbers of animals used in experiments are reduced to an absolute minimum.”); ALTERNATIVES TO ANIMAL USE IN RESEARCH, TESTING, AND EDUCATION, OTA-BA-273 7 (1986) (stating that “even if animals cannot be replaced in certain experiments, researchers can attempt to reduce the number used and also to minimize pain and distress.”).

<sup>85</sup>*Id.* at 17. “The *in vivo* fixed dose method proposed by the British Toxicology Society restricting the number of test animals and reducing animal suffering was accepted by the OECD . . . after an international validation study showed that it was

class method,<sup>86</sup> the skin sensitization test,<sup>87</sup> and mutagenicity / genotoxicity testing.<sup>88</sup>

The final section of the Report, “The Outlook,” claims that *in vitro* alternatives are just around the corner in the area of tests for eye irritation, percutaneous absorption, basic mutagenicity, and phototoxicity / photoirritation.<sup>89</sup> However, while the Report notes that such tests might soon be countenanced by the scientific community, it also states that “their legal acceptance cannot be assured until the difficulties and unknowns in the validation and evaluation exercises referred to earlier on have been removed.”<sup>90</sup> The Report ends by calling for: (1) more research as to whether “studies currently being developed and validated can be applied to a greater number of different substances,” (2) selection of “a group of substances whose *in vivo* toxicity data are pertinent to an *in vitro* / *in vivo* correlation exercise” (assumably to avoid the need to repeat *in vivo* tests whose results are known), and (3) optimization of “databases of tests and implement[ation of] an adequate and coordinated system for providing information by creating a cosmetic products database.”<sup>91</sup> Currently, *in vivo* animal testing continues in Europe, if to a somewhat lesser degree, in the same way it has for many years.<sup>92</sup>

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scientifically valid for the values LD < 25 mg/kg, 25 to 200 mg/kg, 200 to 2000 mg/kg and > 2000 mg/kg. It has been approved with the preliminary screening test[,] which provides information on the dose to be applied in the main study.” *Id.*

<sup>86</sup>*Id.* at 18. This test is apparently somewhat akin to the LD-50 test mentioned in the previous section in that “death is the main biological consequence.” It requires, however, fewer animals. *Id.* See also ALTERNATIVES TO ANIMAL USE IN RESEARCH, TESTING, AND EDUCATION, *supra* note 84, at 8 (noting that “[t]ests providing the same information [as the LD-50 test] have recently been developed using as few as 10 animals, i.e., a 3- to 10-fold reduction.”)

<sup>87</sup>*Id.* “OECD recommends using these tests as a first stage in evaluating a sensitizing potential. If a positive result is obtained in one of these tests, it is not necessary to continue with *in vivo* tests.” *Id.*

<sup>88</sup>*Id.* In these types of tests, which relate generally to genetic mutation, the Report claims that “[u]se of *in vivo* tests can be limited to certain cases, to verify whether an activity observed *in vitro* is also expressed *in vivo*.” *Id.*

<sup>89</sup>*Id.* at 23.

<sup>90</sup>*Id.*

<sup>91</sup>*Id.* at 24.

<sup>92</sup>*Id.* at 19: “On the basis of partial communication by the Member States under Articles 13 and 26 of Directive 86/609/EEC on the number of animals used for experimental purposes or other scientific purposes during 1991, no monkeys, cats or dogs were used to test cosmetics, and the numbers of rodents and rabbits used to test cosmetics and body hygiene products, compared with the total number of animals of the same species used in toxicity tests in the field of human, animal and environmental protection, are: 248 to 25 994 in the Netherlands[,] 2 028 to 19 468 in Spain[,], 22 880 to 89 620 in France[,], and] 3 082 to 171 530 in the United Kingdom.” Perhaps even more noticeable, however, than the difference in numbers of animals used in cosmetic versus health and environmental protection is the sheer amount of animals used *in toto* in these countries. See, e.g., Zak, *supra* note 6, at 73 (claiming that, in the United States alone, “estimates of the number of animals used each year in laboratories . . . range from 17 million to 100 million: 200,000 dogs, 50,000 cats, 60,000 primates, 1.5 million guinea pigs, hamsters, and rabbits, 200,000 wild animals, thousands of farm animals and birds, and millions of rats and mice.”)

Unfortunately for animal rights activists in this country, the American outlook is not even as hopeful as Europe's. "The Food and Drug Administration," the Report claims, "encourages the development of alternative methods but . . . concludes that it is unlikely that animal tests can be completely dispensed with in the near future."<sup>93</sup> While the first attempt at legal protection of animals used for scientific experiments came in 1896 with Minnesota Republican Representative James McMillan's proposal of a Congressional bill "to regulate vivisection in the District of Columbia," the bill did not pass and indeed the following century witnessed a large – and largely unchecked – increase in animal experimentation.<sup>94</sup> Finally, in 1966, some progress for animals was made. In that year, Democratic Representative Joseph Y. Resnick convinced Congress to pass the Cats and Dogs Act, whose three objectives were "(1) to protect the owners of dogs and cats from the theft of such pets; (2) to prevent the sale or use of stolen dogs or cats for the purpose of research or experimentation; and (3) to establish humane standards for the treatment of dogs, cats, monkeys (non-human primates), guinea pigs, hamsters, and rabbits by animal dealers and medical research facilities."<sup>95</sup>

These first two objectives – the ones, indeed, most central to the Act – protected animal owners more than they protected animals themselves. This should not come as much of a surprise, given that the impetus behind the passage of the 1966 Act was the retention of an owner's lost dog by an arrogant New York dog dealer over the owner's adamant objection.<sup>96</sup> Indeed, for those who take a dim view of animals' intrinsic rights, a property interest in animals is one – and perhaps the only – way that legal protection can be, albeit indirectly, extended to them.<sup>97</sup> It makes sense, then, given the evolution of thought on the subject, that

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<sup>93</sup>Report, *supra* note 19, at 15.

<sup>94</sup>See Sherry, *supra* note 3, at 73. See also MARY T. PHILLIPS AND JERI A. SECHZER, ANIMAL RESEARCH AND ETHICAL CONFLICT: AN ANALYSIS OF THE SCIENTIFIC LITERATURE: 1966-1986 18 (1989) (noting the post World War II increase in animal use in science).

<sup>95</sup>*Id.* at 74.

<sup>96</sup>*Id.* at 73-74.

<sup>97</sup>See Regan, *supra* note 5, at 14. Regan summarizes this "indirect duty view" with an example: "[B]y kicking your dog your

it is under this conceptual framework that animal-protection legislation began.<sup>98</sup> There remains, of course, the Act's third objective, which directs the U.S. Secretary of Agriculture "to promulgate regulations to ensure the humane handling, care, treatment, and transportation of animals by dealers and research facilities, except during actual research of experimentation as determined by the research facility."<sup>99</sup> It is the final clause of this statement that is most important: While the 1966 Act requires that animals be *moved about* in a considerate way, it nullifies their rights when they actually reach the laboratory.

Four years later, the Cats and Dogs Act was amended and renamed the Animal Welfare Act (AWA) of 1970. This 1970 version expanded the range of people responsible for transporting, handling, &c. animals in a humane manner to those who ran "carnivals, road shows, circuses, and zoos," and, for whatever reason, also extended the term "animal" to include both living and dead members of the species listed in the 1966 Act.<sup>100</sup> Most importantly for purposes of this paper, the 1970 Act required "each research facility [to] show that professionally acceptable standards governing the care, treatment, and use of animals during actual research or experimentation are being followed, including the appropriate use of anesthetic, analgesic, and tranquilizing drugs."<sup>101</sup> This provision marked the first legally-documented concern in this country about the unpleasant effects of *in vivo* testing on animals. In 1976, the AWA was amended once again to broaden

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neighbor damages your property. And since it is wrong to damage another person's property, your neighbor has done something wrong – to you, of course, not to your dog." *Id.* See also GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 34 (1995) (explaining the historical basis for the animal-as-property theory in part by noting that "[in] many European languages, the word 'cattle' was synonymous with the words 'chattle' and 'capital' and that "[t]he Spanish word for property, *ganaderia*, is virtually identical to the word for cattle, *ganado*."). This theory has led a great number of writers to compare the current use of animals to slavery. See, e.g., Ryder, *supra* note 33, at 2 (noting that slavery in America was, like animal testing today, considered "necessary for economic survival" and that many white people believed black slaves could not suffer or feel pain in the way that they could); Wright, *supra* note 5 (submitting that one crucial difference between slaves and animals fighting for their rights is that the former could voice an opinion while the latter cannot – and that this makes animal's chance of success remote); Singer, *supra* note 31, at 10-12 (claiming that speciesism is closely akin to racism, sexism, and other methods that advocate allowing the interests of one's own group to take precedent over other, equally valid interests); Hettinger, *supra* note 6, at 126 (arguing that "attempting to justify differential treatment on the basis of species membership alone (as Cohen does) is not *just* as morally objectionable as doing so on the basis of race or sex, since members of different species are more likely to require differential treatment than are members of different races of sexes (within a species).").

<sup>98</sup>Zak, *supra* note 6, at 72 (noting that "[u]nder the Uniform Commercial Code, for instance, animals – along with refrigerators and can openers – constitute 'goods.'").

<sup>99</sup>Sherry, *supra* note 3, at 74.

<sup>100</sup>*Id.* at 75.

<sup>101</sup>*Id.* Sherry also notes that the 1970 Act "describes civil and criminal procedures and penalties" for violation of this provision. *Id.*



the scope of animal-handling people and entities covered and to prohibit animal fighting or the raising of animals for the purposes of fighting. It failed, however, to tighten experimentation restrictions.<sup>102</sup>

Yet another amendment to the AWA – this one “Subtitle F: Animal Welfare” of the Food Security Act of 1985 – provides that dogs and primates confined in laboratories be given the opportunity to exercise in an adequate physical environment.<sup>103</sup> Additionally, the 1985 Act mandates that “[d]uring actual experimentation, animal care, treatment, and practices should ensure that animal pain and distress are minimized, including [sic] adequate veterinary care with appropriate use of anesthetic, analgesic, tranquilizing drugs, and euthanasia.”<sup>104</sup> Furthermore, the 1985 Act moves markedly beyond its predecessors by “direct[ing] the principal investigator . . . to consider alternatives to any procedures that are likely to cause pain or distress.”<sup>105</sup> While this was an important step toward animal rights for American legislation, it still falls short of the European Community’s efforts. That is to say, while the 1985 Act requires the principal investigator to “consider” alternative methods (a potential illusory promise), the Report proves that many European companies – as well as some U.S. organizations<sup>106</sup> that have joined Europe in its effort to end animal testing in the cosmetic industry – are contributing in more tangible ways to the development of *in vitro* and other alternatives.<sup>107</sup>

One major difference between efforts to reduce *in vivo* animal testing in the United States and those in Europe is the latter’s stated commitment to expending substantial sums of money on investigation of the viability of

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<sup>102</sup>*Id.* at 76.

<sup>103</sup>Zak, *supra* note 6, at 31. *See also* Sherry, *supra* note 3, at 77; Phillips and Sechzer, *supra* note 94, at 24. One even more recent legislative act – the Animal Enterprise Protection Act of 1992 – is worth mentioning even though it protects laboratories rather than the animals inside them. “This law,” Sherry explains, “makes it a federal crime for anyone who crosses national or state borders and/or uses the mails to cause a physical disruption in the functioning of an animal enterprise. The terrorism provision says that it is illegal to steal, damage, or cause the loss of property, including animals and records, that causes economic damage exceeding \$10,000.” *Id.*

<sup>104</sup>*Id.*

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

<sup>106</sup>*See* Report, *supra* note 19, at 13 (claiming that “[s]ince 1981 the CFTA (Cosmetics, Toiletry and Fragrance Association) has supported the establishment of a Centre for Alternatives to Animal Test (CAAT) at the John[s] Hopkins University (USA).”).

<sup>107</sup>*See* Report, *supra* note 19.

painless tests: “The European industry devoted ECU 25 million during 1993 to meet the challenge presented by the sixth amendment to the Cosmetics Directive. It played a major role in the research and development of *in vitro* methods which made it possible to reduce or avoid the use of animals.”<sup>108</sup> It is important that, though spurred by legislation, industry participants – and not merely European governments – are taking an active role in the development of alternative testing procedures. To note this, however, is of course not necessarily to say that European industry acts as it does out of some sense of moral obligation. For while some CEOs both here and abroad might sympathize with the cause of animal rights, it is their primary obligation (at least in this country) to act in ways that maximize the profits of their corporations. European industry acted as it did, we must assume, in order to stay in business. Faced with the threat of such pro-animal legislation, there was little it could do but take a proactive monetary hit to ensure future survival. This essay’s final section will further explore the implications of such simple economic truths.

The current state of the law in Europe, however, remains that *in vivo* animal testing – even for cosmetic products – is still requisite to consumer protection. In America such testing is even more ensconced: the FDA effectively requires it for all new products,<sup>109</sup> and animal protection statutes such as those surveyed in this section offer only minimal protection for laboratory animals. The current outlook, at least based upon the animal rights activists’ positions described in section two of this essay, is bleak for both animal

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<sup>108</sup>*Id.* at 12.

<sup>109</sup>See 21 C.F.R. Sec. 312.23, “Drugs for Human Use,” which refers more than once to the FDA’s need to review the results of animal tests before it will even consider approving a new drug for sale to human consumers. See also Richard A. Merrill, *FDA’s Implementation of the Delaney Clause: Repudiation of Congressional Choice or Reasoned Adaptation to Scientific Progress?*, 5 YALE J. ON REG. 1, 88 (1988) (noting that “[r]egulators . . . consider the results of properly conducted experiments in animals, primarily rodents, to be highly relevant evidence of a substance’s capacity to cause cancer in humans.”). While there may be no explicit animal-testing requirement for cosmetics, there is a tacit one. See, e.g., Office of Technological Assessment, ALTERNATIVES TO ANIMAL USE IN RESEARCH, TESTING, AND EDUCATION, *supra* note 84, 160 (1986): “FDA has no statutory authority to require testing of cosmetics for safety (other than their color additives) before they are marketed. However, animal testing is commonly undertaken to substantiate labeling claims and, by regulation, FDA has stated that any cosmetic with an ingredient that has not been substantiated for safety in its final product form must bear a prominent label declaration that the safety of the product has not been determined.”

test subjects and their human advocates. However, the following section will propose a critical rethinking of the issue and, potentially, a way to brighten the prospects for these long-ignored groups.

#### IV. Conclusion and Proposal

To summarize by analogy, the conclusions of both the Report and current U.S. legislation state an implicit claim that is somewhat akin to one from the modern-day automobile industry, viz., that while new technologies to replace the environmentally-destructive internal combustion engine seem just barely out of reach, there is still a lot of work that needs to be done – and a great deal of money spent – before such new technology’s development and implementation can be realized. The two scenarios are similar in other ways as well: today’s automobile engine, like traditional *in vivo* animal testing, has been around since the days of Ford and Bentham, respectively, is broadly recognized as undesirable, will require time and money to replace, and is surrounded by an aura of untouchability since so many people – naturally resistant to change – have come to rely quite comfortably upon it. Perhaps in both industries, a significant question may be just how much the penultimate similarity listed, as compared to the final one, is checking progress.

But even if readers of this paper conclude that most people are either too complacent or simply do not care about animal suffering enough to question their cosmetic purchases, there remains the question – merely assumed by many animal rights theorists – of whether we *should* care about the suffering that goes on in laboratories. Such writers as Regan<sup>110</sup> and Singer<sup>111</sup> – and even less extreme animal rights advocates such as

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<sup>110</sup>See Regan, *supra* note 5.

<sup>111</sup>See Singer, *supra* note 31.

Kress<sup>112</sup> – do not genuinely consider the idea that they might be entirely wrong, that animals should in fact be accorded no rights and that humans are justified in performing any and all tests on them no matter how frivolous or trivial the end product or result may be. Yet intelligent (if extreme) thinkers on the other side of the debate, like Cohen, maintain this very opinion. Having made such an observation, and acknowledging that the issue will almost certainly never be resolved on a philosophical level (for what debate ever is?), might it make sense for animal rights supporters simply to concede that their most adamant counterparts could in fact be correct? Animals, arguably, should be accorded no rights at all, at least when such rights bump up against even the slightest of human interests.

If animal advocates did allow this concession, would they not be giving up their single most powerful argument – the very one, indeed, that has succeeded in forcing both regulatory agencies and research institutions the world over, in the field of cosmetics as well as medicine, to rethink their positions regarding the use of animals in scientific experimentation? If this argument is taken away from the laboratory animals it has partially protected, what possible method of persuasion could remain for them? The answer is a simple but strong one: economics. There are three economic reasons that traditional *in vivo* animal testing should be replaced by alternative methods: *In vivo* tests (1) are, in and of themselves, quite expensive; (2) require a great deal of time to complete; and (3) often do not produce results that are valid as applied to humans. This proposal, then, is one based not on the utilitarian model that Regan and other animal rights supporters assert,<sup>113</sup> but rather on economic utilitarianism focused on companies rather than animals.

The first, most directly economic, point is documented not only by recommendations to governing bodies<sup>114</sup> but also, somewhat surprisingly, by one of animal-testing's most vehement supporters. Cohen writes:

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<sup>112</sup>See Kress, *supra* note 27, at 367.

<sup>113</sup>See, *e.g.*, Regan, *supra* note 5, at 25-26.

<sup>114</sup>See, *e.g.*, Report, *supra* note 19.

For the investigator, the use of animals as subjects is often more expensive, in money and time, than the use of human subjects. Access to suitable human subjects is often quick and convenient, whereas access to appropriate animal subjects may be awkward, costly, and burdened with red tape. Physician-investigators have often had more experience working with human beings and know precisely where the needed pool of subjects is to be found and how they may be enlisted. Animals, and the procedures for their use, are often less familiar to these investigators. Moreover, the use of animals in place of humans is now more likely to be the target of zealous protests from without.<sup>115</sup>

What, one might ask, is Carl Cohen doing making statements such as these? Although he intends them to provide support for his somewhat convoluted argument about why animal testing should be *increased*, rather than decreased,<sup>116</sup> they in fact do more for the opposite proposition. Perhaps one problem with Cohen's reasoning is that he sees only two options: experimentation on animals or experimentation on humans. The development of alternative *in vitro* and computer-model methods of testing cosmetic products for safety is a third option which, though it may be costly at its inception, would eventually be cheaper than both animal and human testing and would eliminate the moral issues that both Cohen and his opponents raise.

The second point, also supported by Cohen's statement, is based on the cliché that "time is money," an unavoidable reality in the manufacturing industry. In the production of new medications and drugs, postponing the date at which a product is available for sale causes the manufacturer to lose the money he might have made had it been placed on the shelf earlier. This concept is simple and intuitive. However, it does not fully encapsulate the monetary losses a manufacturer would experience as a direct result of a time delay. Every day of the testing process means one day more of wages paid to laboratory employees, animal housing and care costs, &c. The economic incentive – which Cohen is distressed to discover leads manufacturers to favor the quicker and less expensive method of human testing by physicians in the field – favors seeking out ways to avoid such costs. Once again, *in vitro* alternatives would do just that and would provide the safer

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<sup>116</sup>Cohen continues: "The upshot is that humans are sometimes subjected to risks that animals could have borne, and should have borne, in their place. To maximize the protection of human subjects, I conclude, the wide and imaginative use of live animal subjects should be encouraged rather than discouraged. This enlargement in the use of animals is our obligation." *Id.*

products Cohen wants to see made available to the human consumer.<sup>117</sup>

The final point has been stated above: namely, that while the results of *in vivo* tests in animals often correlate fairly closely with those of tests in human populations, there are many instances in which they do not. While it may be true that many *in vitro* tests will take a great while to develop, and in the meantime researchers will have to get by, in order to protect consumers, with wasteful and perhaps even misleading data from *in vivo* test procedures, the day will come (as long as there is sufficient money to fund such needed progress) when alternative testing methods will be perfected and animals will be relieved of onerous and unwilling duties in the scientific laboratory.<sup>118</sup> The fundamental economic argument here is one of waste-prevention:<sup>119</sup> it is illogical to spend money on tests whose results are unreliable, especially if they lead a company to market a product whose detriment to human – as opposed to animal – health results in a suit for damages filed by an injured person. It simply does not make economic sense to continue spending money on illusory protection, unless of course such illusory protection is a regulatory prerequisite to allowing the product to be sold to humans. And if this is true, animal rights advocates should focus at least part of their efforts on convincing the regulators of the safety problems with the tests – and hopefully also of the benefits, in terms of both validity and cost, of alternative methods.

This paper does not argue, as the opening paragraphs of this section may seem to suggest, that animals should be seen as devoid of rights. On the contrary, it is filled with strong arguments pointing the other way.

Its final assertion, however, is that those seeking to secure protection for animals in cosmetic laboratories

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<sup>117</sup>ALTERNATIVES TO ANIMAL USE IN RESEARCH, TESTING, AND EDUCATION, OTA-BA-273, *supra* note 84, at 7 (citing as one advantage in a list of both problems with and benefits gained from animal testing “savings in time, with the benefit of obtaining results more quickly.”).

<sup>118</sup>*See, e.g., id.* at 12, 13 (claiming not only that while “[g]overnment regulatory practices can be read as promoting animal testing, . . . the laws and practices appear flexible enough to accept alternatives when such tests become scientifically acceptable” but also that “research areas most likely to result in useful alternatives include computer simulation of living systems; cell, tissue, and organ culture technology; animal care and health; and mechanisms of pain and pain perception.”) Finally, for U.S. Supreme Court support of this hopeful vision, *see generally* Justice Douglas’s dissent in *Sierra Club v. Morton*, 405 U.S. 727, 751 (1972) (hoping that eventually “all of the forms of life . . . will stand before the court – the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams. Those inarticulate members of the ecological group cannot speak. But . . . people . . . will be able to speak for the entire ecological community.”).

<sup>119</sup>*See* Dillman, *supra* note 21.

should not allow themselves to become entangled in the emotional side of this old and ongoing debate. To do so invites an ultimately inconclusive, and perhaps violent, discourse. While animal advocates should continue to uphold whatever emotion-based views they feel are correct, if they are interested in tangible change they should follow the advice of the Commission of the European Communities's Annual Report and not only encourage legislation that will force industry to eliminate *in vivo* testing through alternative methods but also seek to demonstrate just how much money could be saved in the long run if, even absent legislation compelling them to do so, cosmetics manufacturers would invest now<sup>120</sup> in developing *in vitro* and other alternative means of testing their products that require less time than traditional *in vivo* tests and, most importantly, fewer dollars and cents.

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<sup>120</sup>BERNARD E. ROLLIN, THE UNHEEDED CRY: ANIMAL CONSCIOUSNESS, ANIMAL PAIN AND SCIENCE 168 (1989), provides the following observation, which both identifies the chief motivating power in the American corporate environment and suggests a way it can quite effectively be harnessed to further the interests of animal rights: "In a remarkable coup, [the outspoken animal advocate Henry] Spira . . . managed to extract from Revlon a 'donation' of \$750,000 to fund the study of alternatives to the Draize eye-irritancy test in rabbits, pointing out quite reasonably that cosmetics manufacturers would be adversely affected by a campaign which showed that they tortured rabbits to create their products."