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CARTE BLANCHE FOR CRUELTY: THE NON-ENFORCEMENT OF THE ANIMAL WELFARE ACT

Katharine M. Swanson*

This Note explores both the judicial and administrative underenforcement of the Animal Welfare Act in protecting the welfare of laboratory animals used for purposes of experimentation. Specifically, the Note suggests that judicial underenforcement is borne as a result of the difficulties of lodging a private cause of action under the Act or gaining standing under the alternative statutory scheme of the Administrative Procedure Act. It further suggests administrative underenforcement in describing the promulgated regulations of the Act as inadequate and the lack of self-policing mechanisms. Finally, the Note suggests some ways that enforcement can be made more effective in these two areas.

Whenever people say “we mustn’t be sentimental,” you can take it that they are about to do something cruel. And if they add, “we must be realistic,” they mean they are going to make money out of it.¹

I tremble for my species when I reflect that God is just.²

Donna, a thirty-six year old chimpanzee, died recently in the Coulston Foundation, a federally funded research laboratory, after carrying a dead fetus in her womb for almost two months.³ She had a liter of pus in her peritoneal cavity and the partially decomposed fetus’s head was visible through the tear in the ruptured uterus.⁴ A reviewing veterinarian stated that it was clear “that Donna must have suffered excruciating pain.”⁵ Donna was used for breeding, not for actual experimentation, and so she was nominally

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⁴ Id.
⁵ Id.
protected from such pain under the Animal Welfare Act (AWA). The United States Department of Agriculture (USDA) was aware of the Coulston Foundation's AWA violations that resulted in the deaths of two other chimpanzees and began investigations in March 1998. Since that time, Donna and five other chimpanzees have died due to inadequate veterinary care, indicating that the USDA's investigations have not helped the animals that they were mandated to protect.

Donna's torturous death is not an isolated incident at the Coulston Foundation, or at the thousands of other research facilities in the United States. The AWA is egregiously underenforced, especially in research laboratories. This Note addresses the underenforcement in research laboratories. Part I discusses the creation and evolution of the AWA through its successive iterations over the past thirty-five years. Part II explores the problems with judicial enforcement of the AWA, focusing on the lack of a private cause of action under the Act and the difficulties for potential plaintiffs in gaining standing to attack the AWA under the alternative statutory scheme of the Administrative Procedure Act. Part III illustrates the problems with administrative enforcement of the AWA, which include the Department of Agriculture's failure to promulgate and enforce adequate regulations pursuant to the Act, the inherent difficulties of the AWA's self-policing mechanisms for research facilities, and judicial unwillingness to correct the agency's failure to regulate and punish violations of the AWA. Part IV concludes with suggestions for reforming the AWA and its enforcement mechanisms in ways that will satisfy its goal of protecting animals' welfare.

I. Evolution of the Animal Welfare Act

[W]e turn God's creations into piteous and abject creatures of fear and misery whose only recourse is to stare at man in sullen hatred and then to die.
The question is not, Can they reason? nor, Can they talk? but, Can they suffer? 10

Animals have been used in scientific research since the third century B.C. in a quest to discover answers about human biology and medical problems, and more recently, to test the safety of consumer products. 11 Proponents of such animal research argue that human life is more important than the lives of animals, so pain or death of an animal in research that may lead to avoidance or curtailment of human suffering is justified. 12 Because continuing the status quo of animal experimentation is viewed as less costly than investigating alternatives, "institutionalized animal exploitation is permitted because society has determined that economic efficiency outweighs the inhumanity of an animal's suffering or death." 13 Opponents contend that any creature capable of suffering should not be deliberately subjected to pain for human benefit simply because humans think the ends justify the means. 14 Many opponents of animal testing thus argue that in working towards the ultimate goal of banning all animal experimentation, such testing must be monitored and regulated to "prevent all inhumane treatment of animals, not just treatment that is unjustified or unnecessary." 15

The AWA was enacted in 1966 as the Laboratory Animal Welfare Act (LAWA), primarily aiming to prevent companion animals 16 from being stolen from their homes and sold to research facilities. 17 Its preamble stated that its primary purpose was "to protect the owners of dogs and cats from theft of such pets," and its secondary and tertiary purposes were to prevent the sale or use of stolen pets and ensure humane treatment in research facilities. 18 LAWA also authorized the Secretary of Agriculture (the Secretary) to issue licenses to animal dealers and to promulgate regulations

15. Nowicki, supra note 13, at 490.
16. A companion animal is an animal of a species commonly considered to be a pet.
18. Id. § 1, 80 Stat. at 350 (emphasis added).
dictating minimum handling and treatment standards. 9 One congressman expressed concern that “[o]ur nation has a moral obligation to eliminate animal suffering wherever it is possible to do so without impeding legitimate research.” 20 A senator observed that “enactment of legislation to ... provide for the humane treatment for those animals legitimately used for such [research] purposes is absolutely necessary. Such humane legislation will in no way deter the advance of medical science. To the contrary, it will eliminate needless brutality.” 21 Such views were not reflected in LAWA, whose laboratory coverage was “little more than a token gesture.” 22 The LAWA was extremely limited in scope, regulating only the use of “live dogs, cats, monkeys . . ., guinea pigs, hamsters, and rabbits.” 23 Additionally, it expressly stated that the Secretary was not authorized to “prescribe standards for the handling, care, or treatment of animals during actual research or experimentation.” 24 Also, although LAWA required the Animal and Plant Health Inspection Service (APHIS), an enforcement division of the USDA, to inspect research facilities, it did not stipulate the frequency of such inspections. 25

The Animal Welfare Act of 1970 (AWA of 1970) was passed to amend the LAWA, including some attention to the humane concerns of those Congressmen that “the unbelievable brutality we inflict on mammals and birds . . . is a national disgrace.” 26 The Congressional Record on the AWA of 1970 stated that the purpose of this legislation was to:

establish by law the humane ethic that animals should be accorded the basic creature comforts . . . The bill in no manner authorizes the disruption or interference with any scientific research or experimentation . . . This Committee and Congress, however, expect that the work that's done behind that laboratory door will be done with compassion and with care. 27

The AWA of 1970 “elaborates in greater detail the standards to be promulgated and extends coverage to any warm-blooded ani-

19. Id. § 13, 80 Stat. at 352.
23. Laboratory Animal Welfare Act § 2 (h).
24. Id. § 18, 80 Stat. at 352.
25. Id. § 16, 80 Stat. at 352.
whom the Secretary determines "is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet," thereby expanding coverage beyond the research domain. This version of the Act also directed the Secretary to promulgate standards for "basic creature comforts" for laboratory animals. The legislation also instituted fines for people who interfered with APHIS inspectors and required the Secretary to report annually to Congress regarding licenses and inspections of facilities.

In 1975, further amendments outlawed animal fighting and restated Congress's commitment to "humane care and treatment" of animals used in, or intended for, research. Although Congress rewrote the preamble to the AWA to reprioritize its purposes as first ensuring humane treatment of animals in research facilities, followed by assuring humane transportation of animals, and finally protection of pet owners from theft, the revised AWA continued to defer completely to the research community in allowing it to determine humaneness without interference. These amendments continued the LAWA's aversion to regulating testing, stating that "nothing in this chapter shall be construed as authorizing the Secretary to promulgate rules, regulations, or orders with regard to design, outlines, guidelines, or performance of actual research or experimentation."

The 1985 amendments (known as the Improved Standards for Laboratory Animals Act (ISLAA)), were the last substantial modification of the AWA, essentially generating the version of the

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30. H.R. Rep. No. 91-1651, at 2. The House decreed "a statutory mandate that small helpless creatures deserve the care and protection of a strong and enlightened public." Id.
31. See Animal Welfare Act of 1970 § 16(b). Penalties consisted of up to a $5,000 fine and three years imprisonment for unarmed interference; $10,000 and ten years for armed. See id.
32. Id. § 25, 84 Stat. 1565.
statute which is in force presently. These amendments were generated against the backdrop of several high profile cases in which federally funded research laboratories were shown to have engaged in cruelty toward their animals. ISLAA’s touchstone is internal review and policing, spearheaded by the creation of Institutional Animal Care and Use Committees (IACUCs). Every facility covered by the AWA is required to create at least one IACUC consisting of at least three members, one of whom must be a veterinarian, and one of whom must be unconnected with the research facility and theoretically able to represent animal welfare concerns. IACUCs must inspect their facilities semi-annually and prepare reports on the inspections explaining violations of standards and deviations from approved protocols, including any minority views of IACUC members. If the IACUC finds any problems it notifies the facility, and if the facility fails to remedy the situation, the IACUC notifies APHIS and any federal funding agencies. No remedy is specified in statute or regulations to correct potential problems of IACUC intractability or noncompliance.

In addition, each facility is required to submit its own annual report to the Secretary containing assurances that the principal researcher considered alternatives to any painful procedures, assurances of compliance with ISLAA § 2143, and explanations of any deviations from standards. These reporting requirements di-

38. Subsequent amendments sought to curb the practice of selling stolen companion animals to research facilities (pound seizure) through mandatory holding periods for pounds and other animal dealers. See generally AWA, 7 U.S.C. §§ 2131–2159 (1994).

39. FRANCIONE, supra note 35, at 196. The two most prominent such cases involved Edward Taub, discussed infra notes 165–67 and accompanying text, and Thomas Gennarelli’s University of Pennsylvania Head Injury Clinical Research Laboratory. Gennarelli’s experimentation, designed to develop a reproducible head injury model in baboons, involved accelerating an animal’s head at extremely high speeds in order to damage the brain. FRANCIONE, supra note 35, at 179. Videotapes of the experiments taken by the researchers themselves showed researchers accidentally severing a baboon’s ear with a hammer and chisel while trying to remove a stone helmet, smoking and using unsterilized equipment during surgery, and teasing and mocking the animals during experimentation. See id.; e.g. Videotape: Unnecessary Fuss (People for the Ethical Treatment of Animals 1984) (transcripts on file with University of Michigan Journal of Law Reform). National Institutes of Health continued funding Gennarelli for a year after the videotape was made public, then concluded that the researchers’ egregious conduct was a “material failure to comply” with the AWA and suspended research indefinitely. FRANCIONE, supra note 35, at 181–82; e.g. U.S. Public Health/National Institutes of Health, Evaluation of Experimental Procedures Conducted at the University of Pennsylvania Experimental Head Injury Laboratory 1981–1984 in Light of the Public Health Service Animal Welfare Policy, 5 (July 17, 1985).


41. See id.

42. Id. § 2143(b)(3)–(4)(A).

43. Id. § 2143(b)(4)(C).

44. Id. § 2143(a)(7)(A)–(B).
rect that painful procedures should not be permitted without anesthetic unless the pain is necessary to the experiment and the experimenter has "considered" alternatives.\textsuperscript{45}

Finally, the Secretary is directed to promulgate minimum requirements for the exercise of dogs, for "a physical environment adequate to promote the psychological well-being of primates," and for care, treatment, and pain and distress minimization of experimental animals.\textsuperscript{46} However, the section of the earlier Act prohibiting the Secretary from interfering in actual research design has been retained in its entirety.\textsuperscript{47}

II. PROBLEMS WITH JUDICIAL ENFORCEMENT

[T]hese little animals, however worthless they may be, have a way of endearing themselves.\textsuperscript{48}

This case involves animals, a subject that should be of great importance to all humankind.\textsuperscript{49}

A. No Private Cause of Action Under the AWA

Very few cases have ever been litigated under the AWA; only one of these ever reached beyond standing issues to the merits of the case.\textsuperscript{50} The AWA offers no explicit citizen suit provision akin to those in many environmental statutes.\textsuperscript{51} In a dramatically

\textsuperscript{45} Id.
\textsuperscript{46} Id. § 2143(a)(2)(B)-(3)(A).
\textsuperscript{49} Thirty cases have been litigated under the AWA since its passage: fifteen appeals of administrative actions, six preemption issues, two procedural issues, six cases regarding failure to enforce which never reached beyond standing issues, one case that was settled after the plaintiff was granted standing, and one case actually deciding failure to enforce.
\textsuperscript{50} See, e.g. Endangered Species Act, 16 U.S.C. § 1540(g) (2000); Federal Water Pollution Prevention and Control Act, 33 U.S.C. § 1365 (1995); Clean Air Act, 42 U.S.C. §§ 7604, 9659 (2000). Citizen suits are "lawsuits by private individuals as a complement to the authority of the federal government to enforce or compel enforcement of a federal law. Int'l
publicized case, the Fourth Circuit held in 1986 that the AWA offers no such private cause of action to individuals. In *International Primate Protection League v. Institute for Behavioral Research*, a group of individual and organizational plaintiffs claimed that a research laboratory was in violation of the AWA by failing to provide adequate food, water, sanitation, and veterinary care to its monkey subjects. Plaintiffs sought no damages in the case, but instead designation as guardians of the seventeen monkeys, two of whom died as the case was pending. The court held that the plaintiffs could claim no cause of action under the AWA because "Congress intended the administrative remedy to be the exclusive remedy." The opinion underscores two purposes of the AWA: "a commitment to administrative supervision of animal welfare" and "subordination of such supervision to the continued independence of research scientists" such that "enforcement authority does not extend to the confiscation of animals in use" or to private citizens. The court explained that a private cause of action could undermine predictability of enforcement, deter scientists from research, and that discovery was too burdensome to add to the existing administrative inspection process. The Supreme Court denied certiorari of the case without comment and the issue has not since been challenged, nor has the AWA been amended to create a private cause of action.

The frank admission of the D.C. Circuit Court, which has handled almost all AWA cases, is disturbing because it has held that the enforcement of the AWA must be subordinated to the independence of the regulated community, demonstrating an acceptance of an extremely broad reading of § 2143(a)(6)(A)(i) that leaves no room for enforcement. That the court condones the entire abdication of administrative supervision leaves no possibility of suit to compel enforcement under the AWA even if a private cause of action existed.

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52. *Int'l Primate Prot. League*, 799 F.2d at 940. The court also stated that the case could be dismissed on alternate grounds for lack of standing. *Id.* at 941.
53. *Id.* at 936.
54. *Id.* at 937.
55. *Id.* at 940.
56. *Id.* at 939.
57. *Id.*
58. The Secretary is not authorized to "promulgate rules, regulations, or orders for the handling, care, [or treatment of animals] during actual research or experimentation ..." LWAC, Pub. L. No. 89-544, § 13, 80 Stat. 350, 352 (1966) (codified as 7 U.S.C. § 2143(1994)).
With the possibility of suit under the AWA itself eliminated, private plaintiffs have turned to suing the USDA under the Administrative Procedure Act (APA) for failure to promulgate and enforce adequate regulations pursuant to the AWA. The AWA directs the Secretary to promulgate minimum requirements for the "humane handling, care, treatment, and transportation of animals." Until 1998, all such cases—Animal Legal Defense Fund v. Espy (Espy I), Animal Legal Defense Fund v. Espy (Espy II), and International Primate—failed due to summarily determined lack of standing for the plaintiffs to bring suit. In order to show standing, a plaintiff must show (1) "that she has suffered injury in fact;" (2) "that the injury is fairly traceable to the defendant’s actions;" and (3) "that a favorable judicial ruling will likely redress the plaintiff’s injury;" as well as ensuring that her grievance "must arguably fall within the zone of interests protected or regulated by the statutory provision . . . invoked in the suit." In Espy I, Animal Legal Defense Fund, an animal welfare organization, challenged the USDA’s exclusion of birds, rats, and mice from its regulations concerning laboratory animal welfare pursuant to the AWA. In Espy II, the Animal Legal Defense Fund condemned the USDA’s lack of specificity in promulgating regulations mandating the care of animals, exercise of dogs, the physical environmental enrichment of primates, and IACUC composition and duties. In both Espy cases, as in International Primate, the court failed to reach the merits. They dismissed the cases after fairly cursory discussions of standing, reiterating that such plaintiffs’ injuries are not "presently

60. 23 F.3d 496 (D.C. Cir. 1994) (Espy I).
61. 29 F.3d 720 (D.C. Cir. 1994) (Espy II).
63. See Espy I, 23 F.3d at 503; Espy II, 29 F.3d at 724; Int'l Primate Prot. League, 799 F.2d at 940.
64. Standing refers to the determination whether the plaintiff is the appropriate person or organization to bring suit, a necessary prerequisite to filing any lawsuit in a case governed by statute.
66. Espy, 23 F.3d 496 (1994); see infra notes 107–08 and accompanying text.
68. See infra notes 117–24 and accompanying text.
69. See infra notes 156–64 and accompanying text.
suffered or imminently threatened" by the speculative possibility of injury from vague regulations.70

In 1996, in Animal Legal Defense Fund v. Glickman (Glickman I), four individual plaintiffs and Animal Legal Defense Fund sued the USDA under the APA for failure to adequately promulgate specific minimum standards to compel a Long Island zoo to comply with the AWA.71 In this case, Animal Legal Defense Fund and three individual plaintiffs who were frequent zoogoers challenged the USDA's regulation concerning environments adequate to promote the psychological well-being of primates for failing to provide minimum requirements and impermissibly delegating its congressionally mandated responsibility to create such standards.72 The district court held that all plaintiffs had standing to sue.73 In Animal Legal Defense Fund v. Glickman (Glickman II), however, a panel of the circuit court vacated the decision and held that all plaintiffs lacked standing because "[i]t is part of the price of living in society . . . that an individual will observe conduct that he or she dislikes" and that such discomfort does not constitute injury in fact.74 In addition, the court held that the government's failure to promulgate regulations was too attenuated from the plaintiffs' injury to satisfy causation, and that redressability was similarly unsatisfied because plaintiffs did not "demonstrate that their painful memories are likely to be obliterated by compelling the Secretary to promulgate new legal regulations."75

In a landmark 1998 decision, Animal Legal Defense Fund v. Glickman (Glickman III), the D.C. Circuit Court reviewed the case en banc and determined that one of the individual plaintiffs, Marc Jurnove, did indeed have standing to sue.76 Citing the Supreme Court's explicit recognition of aesthetic interests in observing animals as "undeniably a cognizable interest for purpose of standing,"77 the

70. Id. at 500; see also Int'l Primate Prot. League v. Inst. for Behavioral Research, 799 F.2d 934, 937-40 (4th Cir. 1986) cert. denied, 481 U.S. 1004 (1987); Espy II, 29 F.3d 720, 723-26 (D.C. Cir. 1994).
73. See Glickman I, 943 F.Supp. at 53-57.
75. Id. at 469-70.
76. See Animal Legal Def. Fund v. Glickman, 154 F.3d 426, 429 (D.C. Cir. 1998) (Glickman III) (conferring standing on Jurnove, the court did not reach decisions on standing for the other individual plaintiffs).
court here held that Jurnove's injury satisfied all prongs of the standing inquiry. Jurnove fulfilled the injury in fact requirement by suffering in a "personal and individual way . . . by seeing with his own eyes the particular animals whose condition caused him aesthetic injury," whom he has visited frequently and regularly. The court considered Jurnove's injury particularly cognizable because he had worked for animal relief and rescue organizations throughout his adult life, so was particularly empathetic to animals' needs. The court found causation in that the USDA's "current regulations allow the conditions that allegedly caused Mr. Jurnove['s] injury," citing Supreme Court precedent that the causation prong is met when a plaintiff shows that his injury was caused by agency authorization of otherwise illegal conduct. Finally, Jurnove's injury was sufficiently redressable because "he has a current routine of regularly visiting the Game Farm [private facility for animals] and provides a finite time period within which he will make his next visit," so that USDA's promulgation of stricter regulations "would necessarily alleviate Jurnove's aesthetic injury during his planned, future trips to the Game Farm." Consequently, Jurnove was granted standing to proceed to the merits of his claim.

C. Glickman: Miracle or Mirage?

Animal Legal Defense Fund v. Glickman has been lauded as "[t]he decision [a]nimal [w]elfare [p]laintiffs [h]ave [w]aiting [f]or," and at first examination, it appears to be a complete breakthrough for such plaintiffs. However, the reasoning relied upon by the majority in granting standing to Jurnove is extremely narrow. The holding relies heavily on the fact that Jurnove was a frequent visitor to particular animals at the zoo and that he had concrete plans to continue those visits. Standing conferred by

78. See Glickman III, 154 F.3d at 429.
79. Id. at 433.
80. See id. at 429.
81. Id. at 439.
82. Id. at 440 (citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976)).
83. Id. at 443.
84. Id. at 429.
86. See Glickman III, 154 F.3d at 432, 443.
such criteria must necessarily extend to a fairly small class of potential plaintiffs because many people who encounter inhumane treatment of animals and seek to alleviate it do not have the time or resources to continue regular visits and make definitive plans to do so into the future.

Furthermore, instances of animal maltreatment in research laboratories and other private facilities that are not open for members of the public are probably beyond the scope of this decision. Within such settings, researchers, their staffs, and other IACUC members are the only individual citizens who are permitted easy access to animal subjects, and it is unlikely that they would seek stricter regulations when they are conducting experiments under inhumane conditions. IACUC members within research facilities seeking standing have been unable to persuade courts that the USDA's failure to promulgate adequate regulations to guide them makes them unable to fulfill their statutory duties of enforcing the AWA and is a sufficient injury in fact. This result is unlikely to change under the Glickman ruling unless IACUC members begin regular visitations with all individual animals whom they seek to protect, a very unlikely possibility based on the large numbers of animals in most facilities. Additionally, IACUC members have little incentive to act as whistleblowers because they are provided no protection from their facility's resulting retaliation.

Organizational plaintiffs are also not served by the Glickman ruling. The earlier Espy Court held that to pass the zone of interests standing hurdle, an organization "must show a congressional intent to benefit the organization or some indication that the organization is a peculiarly suitable challenger of administrative neglect." Although animal welfare organizations appear to be ideal challengers of the USDA's failure to protect animals, the court held that "[t]he evident congressional intent to entrust to the committees [IACUCs] the functions of oversight... precludes any inference that other private advocacy organizations" are ade-

88. See infra notes 173–87 and accompanying text.
89. An organization may have standing to sue on one of two bases. It may have representational standing on behalf of its members if it shows that "(1) the interests the organization seeks to protect are germane to its organizational purposes; (2) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit; and (3) its members would otherwise have standing to sue in their own right." Glickman I, 943 F.Supp. 44, 53 (D.C. Cir. 1996) (citing Automobile Workers v. Brock, 477 U.S. 274, 275 (1986)). Alternatively, an organization may claim standing "in its own right to seek judicial relief from injury to itself and to vindicate the rights and immunities itself may enjoy." Glickman I, 943 F.Supp. at 52 (citing Warth v. Seldin, 422 U.S. 490, 511 (1975)).
90. Espy I, 23 F.3d at 503 (internal quotations omitted).
quate challengers for the purpose of zone of interests determinations. The *Glickman* case does not detract from the earlier ruling, denying standing to the organizational plaintiff on the very similar basis of failing to state a violation of requirements which were "designed to protect some threatened concrete interest of the plaintiff." The case has been followed once, but its narrow holding was not expanded by the later case. In *Alternatives Research and Developments Foundation v. Glickman*, a non-profit organization, a private firm, and an individual plaintiff challenged the USDA's exclusion of birds, rats, and mice from the scope of the AWA. The court allowed the individual plaintiff, who worked in a laboratory with rats, to survive a motion for summary judgment because of her aesthetic interest in the rodents' treatment that stemmed from her personal contact with them, explicitly analogizing her situation to Jurnove's in *Glickman*. Because the court awarded standing to the individual plaintiff, it decided that "it need not address the prudential standing of the remaining plaintiffs." Therefore, a case that might have expanded *Glickman* instead became a straightforward application of the precedent with no further clarification.

As the law currently stands, only individuals who have developed personal connections to particular mistreated animals can bring suit in attempts to compel the USDA to enforce the AWA through promulgation of more specific regulations. Because litigation must be brought pursuant to the APA rather than the AWA, which has no private cause of action, concerned citizens may only adjudicate for enforcement of the AWA's mandate of humane treatment of animals through procedural attacks on the regulating agency, and cannot directly sue entities violating the AWA.

III. Problems With Administrative Enforcement

The agency's conduct in this and other cases that have come before this member of the Court not only is egregious . . . but

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91. Id.
94. See *id.* at 7; see, e.g., *infra* notes 98–114 and accompanying text.
96. *Id.* at 11.
represents, ... one of the basic reasons why the American people have lost faith in much of their government.\textsuperscript{97}

Without the serious threat of judicial enforcement, ensuring compliance with the AWA is left to APHIS inspections, the internal oversight of IACUCs, and institutional reporting requirements, all of which are conducted pursuant to the regulations promulgated by the USDA as guidance in enforcing the Act. These regulations are grossly inadequate and may even contravene the express purpose of the AWA.

A. USDA's Failure to Promulgate Adequate Regulations

The LAWA originally regulated only the use of "live dogs, cats, monkeys . . ., guinea pigs, hamsters, and rabbits,"\textsuperscript{98} but extended coverage only four years later to include "any live or dead dog, cat, monkey . . ., guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary [of Agriculture] may determine is used, or is intended for use, for research."\textsuperscript{99} Examining the plain meaning of the statutory text,\textsuperscript{100} such an expansion of coverage indicates a congressional intent for the Secretary to regulate the use of any warm-blooded animals used in research. Indeed, Senator Cranston, in proposing the amendment to the Senate, explained that "the bill . . . extends coverage to all warm-blooded animals," and then contended that "the unbelievable brutality we inflict on mammals and birds . . . is a national disgrace," indicating clear intent to include all warm-blooded animals, specifically including birds.\textsuperscript{101} However, the Secretary promulgated a regulation defining the scope of the term "animal" for purposes of coverage under the AWA in exactly the same language as the Act's, but explicitly excluding birds, rats, and mice.\textsuperscript{102} In response to the research community's petition that gerbils also be excluded from the regul-

\textsuperscript{97} Animal Legal Def. Fund v. Glickman, 943 F.Supp. 44, 51 (D.C. Cir. 1996) (Glickman I) (commenting on USDA's failure to promulgate adequate standards to ensure humane treatment of animals as required by the AWA).


\textsuperscript{100} "[T]he question for the reviewing court is whether the agency's construction of the statute is faithful to its plain meaning. . . ." Arent v. Shalala, 70 F.3d 610, 615 (D.C. Cir. 1995).


\textsuperscript{102} 9 C.F.R. § 1.1 (1993).
latory definition of animal, though, the USDA stated that gerbils were regulated under the Act and it did not have the authority to exclude them. Because neither gerbils, rats, mice, nor birds are explicitly listed in the AWA, the USDA's choice to exclude some of these animals while denying authority to exclude others appears extremely arbitrary and may simply be a response to perceived public views on the charismatic appeal of the species.

Because about eighty percent of the animals used in research are rats and mice, the Secretary's exclusion of these animals from regulation creates an enormous loophole in AWA enforcement. The USDA claims that it chose to exclude these animals for administrative ease—because they did not want to delay the other regulations while taking time to promulgate standards for birds, mice, and rats. Such an extensive exclusion for the goal of administrative ease contradicts the AWA's explicit purpose of existing to "insure that animals intended for use in research facilities...are provided humane care and treatment."

The Animal Legal Defense Fund challenged this exclusion in 1992. In Animal Legal Defense Fund v. Madigan, the judge found standing and declared the USDA's "glaring omission in analysis arbitrary and capricious." Nonetheless, on appeal, the case was declared barred for standing reasons without reaching the merits. In 2000, after Animal Legal Defense Fund v. Glickman removed the standing hurdle for a select group of plaintiffs, the challenge was renewed in Alternatives Research. The court held that an individual plaintiff with the requisite contact with rats to establish an aesthetic interest sufficient to create standing under Glickman survived the USDA's motion for summary judgment on standing

104. FRANCIONE, supra note 35, at 224 (approximately eighty percent of research animals are rats and mice) (citing ROWAN, supra note 11, at 67); see also Laura G. Kniaz, Animal Liberation and the Law: Animals Board the Underground Railroad, 43 BUFF. L. REV. 765, 788 n.120 (1995) (citing American Medical Association, Use of Animals in Biomedical Research: The Challenge and Response 1, 2 (1992 revised) (unpublished white paper) (stating that biomedical researchers use twelve to fifteen million animals every year, and seventy-five to ninety percent are rodents)).
105. FRANCIONE, supra note 35, at 224 (citing 54 Fed. Reg. 36112, 36113 (1989)).
108. See Espy I, 23 F.3d. at 498.
grounds. Although the court did not reach the merits of the case, its dicta echoed some of the views expressed in the vacated Madi
gan decision that the USDA does not have "the unbridled discretion to conclude that animals which are being used for re-
search are not animals within the meaning of the Act." |

Possibly based upon this language, the USDA settled the case in September 2000 by agreeing to amend its regulations to include birds, rats, and mice with those animals protected by the AWA. However, this apparent advance may be illusory. Under pressure from the research community, Congress passed a brief, well-
concealed rider to the USDA's unwieldy appropriations bill for the September 30, 2000–September 30, 2001 fiscal year that would not allow the USDA to use any of its funding that year "to issue a notice of proposed rulemaking, to promulgate a proposed rule, or to oth-
ewise change or modify the definition of 'animal' in existing regulations pursuant to the Animal Welfare Act." This Act effec-
tively requires the USDA to wait one year before adding these animals to those protected under the AWA. Finally, in May 2002, Congress passed a Farm Bill that, inter alia, explicitly excludes birds, rats, and mice from protection under the AWA.

There are also many instances in which the Secretary did not overstep its congressional mandate as it did in selecting species to protect, but rather failed to promulgate regulations sufficient to fulfill its statutory burden. The AWA requires the Secretary to promulgate standards including "minimum requirements . . . for exercise of dogs, as determined by an attending veterinarian in ac-
cordance with general standards promulgated by the Secretary, and for a physical environment adequate to promote the psycho-
logical well-being of primates." The plain language of this provision indicates that the Secretary is directed to promulgate some form of general minimum standard for the exercise of dogs from which a veterinarian can derive guidance. In addition, the Secretary must create minimum requirements, rather than general

111. See id. at 11.
112. Id. at 15 (citations omitted).
114. Making Appropriations for Agriculture Rural Development, Food and Drug Admin-
117. See supra note 101 and accompanying text.
standards, for primates' environments, as indicated by the presence of the "general standards" language only in the dog clause.

The USDA originally fulfilled its duty by promulgating regulations requiring at least thirty minutes daily exercise for dogs and establishing minimum psychologically enriched housing requirements for primates. However, pressure from the research community prompted the Secretary to soften these minimum requirements to performance standards without specific minimums. The current regulations delegate all responsibility to the regulated community by directing that "dealers, exhibitors, and research facilities must develop, document, and follow an appropriate plan to provide dogs with an opportunity to exercise. In addition, the plan must be approved by the attending veterinarian." The vague term "appropriate" leaves the creation of minimum requirements, a duty statutorily mandated to the USDA, entirely to the discretion of regulated entities.

Similarly, the regulation governing primates' environments uses the same language to direct facilities to create "appropriate" plans, but adds that "the plan must be in accordance with the currently accepted professional standards as cited in appropriate professional journals or reference guides." The USDA's duty of promulgation of minimum standards is passed down to the regulated community, whose experts can probably find "appropriate" journal articles to justify any deplorable standards they wish to utilize. In addition, plans for primates' environmental enhancement must at a minimum address each of the following: (1) social grouping, (2) environmental enrichment, (3) special considerations, and (4) restraint devices. However, in its requirement that research and other facilities address these issues, there is no directive that they must do any more than abstractly address the issue; they need not implement any results of this consideration. Furthermore, for both the dog exercise requirement and the primate environment requirement, as with most of the AWA's implementing regulations, if a researcher or IACUC determines "for scientific reasons" that a

118. See Francione, supra note 35, at 211–12.
120. See Francione, supra note 35, at 211.
122. Id. § 3.81.
123. Id.
requirement does not need to be followed, that determination is only subject to review by the facility's IACUC.\textsuperscript{124}

In the Glickman cases, plaintiffs challenged the USDA's failure to promulgate regulations specifying minimum requirements for environments adequate to promote the psychological well-being of primates.\textsuperscript{125} Although the district court in Glickman I agreed that the "complete absence of minimum requirements in [9 C.F.R. § 3.81] leaves the AWA susceptible to the interpretation of individual regulated entities,"\textsuperscript{126} and thereby invalid, the D.C. Circuit Court in Glickman IV upheld the regulation.\textsuperscript{127} The court decided to "accord agencies broad deference in choosing the level of generality at which to articulate rules" and that it is adequate that the "Secretary has begun to offer interpretations likely to assist both regulatees and enforcers."\textsuperscript{128}

Following the Chevron standard, the Court in Glickman IV found that because Congress had not spoken to the exact issue of standards of primate environmental enrichment, it must defer to a reasonable agency interpretation of the AWA.\textsuperscript{129} The D.C. Circuit then held that "[n]othing in the statutory mandate required greater specificity" than that supplied by USDA,\textsuperscript{130} entirely disregarding the statute's specific direction to the Secretary to promulgate "minimum requirements."\textsuperscript{131} Moreover, the court held that even if some of the promulgated regulations proved difficult to enforce, they were sufficient.\textsuperscript{132} In addition, the court cited two regulations as examples that would prove easy to enforce, thereby rendering all of the regulations beyond criticism:\textsuperscript{133} the requirement to not maintain primates in restraint devices (from which research facilities are exempt)\textsuperscript{134} and required minimum cage sizes (which are part of a regulation entirely separate from the envi-

\textsuperscript{124} See, e.g., 9 C.F.R. § 3.8 (d)(2); 9 C.F.R. § 3.81 (e)(2); see infra note 158 and accompanying text for discussion of IACUC unreliability.

\textsuperscript{125} See Animal Legal Def. Fund v. Glickman, 204 F.3d 229, 231-232 (D.C. Cir. 2000) (Glickman IV).

\textsuperscript{126} Glickman I, 943 F.Supp. 44, 59 (D.C. Cir. 1996).

\textsuperscript{127} See Glickman IV, 204 F.3d at 230-31.

\textsuperscript{128} Id. at 235.

\textsuperscript{129} See id. at 233 (citing Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-43 (1984), holding that when Congress has not spoken directly to the precise question raised in a current lawsuit, a court must defer to agency interpretation if it is a reasonable and permissible construction of the relevant statute).

\textsuperscript{130} Glickman IV, 204 F.3d at 235.


\textsuperscript{132} See Glickman IV, 204 F.3d at 235.

\textsuperscript{133} See Glickman IV, 204 F.3d at 235.

\textsuperscript{134} 9 C.F.R. § 3.81(d) (1993).
ronmental enrichment provision). This attempt to disprove a claim by citing one limited and one unrelated counterexample is highly questionable and undermines the court's attempt to find legitimate reasons for its holding. Following Glickman's extreme deference to agency interpretations despite fairly clear agency malfeasance, it seems unlikely that many such challenges of USDA regulations purporting to enforce the AWA would be successful even if they clear the difficult standing hurdle.

B. APHIS Inspections: Few and Far Between

Animal and Plant Health Inspection Services (APHIS) inspections of regulated facilities are supposed to provide a check on facility internal policing, but are not implemented in a manner so as to have much beneficial effect. The USDA is statutorily required to inspect each research facility at least once every year and to conduct follow-up inspections as necessary to correct violations. The USDA, however, recommends that APHIS visit every facility four times each year in order to maximize compliance, yet it inspects research facilities an average of just over one time each year, less than other kinds of facilities regulated under the AWA. In addition, because a research facility may have many sites that conduct animal research, inspecting every facility does not ensure that every site is visited. Besides conducting an insufficient number of annual inspections, APHIS frequently gives prior notice to research facilities of an inspection, if not the precise date and time, allowing facilities to modify their operations in anticipation of the visit.

In addition, regulations promulgated directly from language in the AWA give discretion to APHIS inspectors to confiscate animals found to be suffering and whose suffering will not be alleviated at the offending facility. However, if the animal is held by a research facility, inspectors may only confiscate it if it is no longer needed by

135. Id. § 3.80(b).
137. FRANCIONE, supra note 35, at 214. In 1992, APHIS reported 4839 inspections of 3205 research facilities—an average of 1.51 visits per facility. In 1991, 3987 inspections of 3495 research facilities were conducted, an average of 1.14 per facility. In 1990, 1989, and 1988, the averages were 1.40, 1.24, and 1.31 respectively. These averages do not reflect one visit to every facility every year. Id.
138. Id. at 217.
139. Id.
140. 9 C.F.R. § 2.129(a) (2001).
the research facility to carry out the research, test, or experiment.\textsuperscript{141} Therefore, inspectors who find suffering animals in a laboratory setting have no authority to remove them from that situation. The experiment is considered to be of more value than the animals' need to escape from suffering.

C. Punishments of Violations: Warnings and Agreements

When APHIS inspectors find AWA violations at facilities, they have complete discretion in how to handle the deficiency. Alternatives include a simple warning, the stipulation to pay a fee, license suspension, or the submission of the case to the regulatory enforcement staff.\textsuperscript{142} The regulatory enforcement staff may then similarly choose to simply warn the offending party or to levy a fine, or may also refer the case to the USDA's general counsel, who may then choose to pursue a civil or criminal penalty.\textsuperscript{143} Such civil penalties can vary between fines of up to $2,500 per violation, cease and desist orders, or license suspensions and revocations.\textsuperscript{144} Criminal penalties also involve fines of a maximum of $2,500 per violation as well as up to one year imprisonment.\textsuperscript{145}

Despite this elaborate gamut of possible penalties, few violations reach beyond the initial warning stage.\textsuperscript{146} Although APHIS claims that "when an investigation reveals apparent violations, a case report and documentation are forwarded to the the Regulatory Enforcement staff,"\textsuperscript{147} in 1992, APHIS documented 980 cases of violations, only 105 of which were reported to the Regulatory Enforcement Staff.\textsuperscript{148} APHIS dismissed 616 of these cases with only warnings; 115 were resolved through stipulation; and only 17 were issued formal civil or administrative complaints through the general counsel.\textsuperscript{149} Of the seventeen cases prosecuted, only one

\begin{enumerate}
\item[141.] 7 U.S.C. § 2146(a) (1994).
\item[142.] Id. §§ 2146, 2149.
\item[143.] Id.
\item[144.] Id. § 2149(a)–(b).
\item[145.] Id. § 2149(d).
\item[146.] FRANCIONE, supra note 35, at 214–15.
\item[148.] Id. at 215–16 (citing 1992 APHIS Report at 12).
\item[149.] Id. These numbers are typical. In 1991, 125 of 701 violations were reported to the Regulatory Enforcement staff; 75 complaints were issued, 2 of which were to research facilities. In 1990, of 27 complaints issued, 2 went to research facilities. See id.
involved a research facility. USDA's reluctance to vigorously enforce the AWA with the harsher penalties allowed by the statute, coupled with its extreme aversion to penalizing research facilities, signals to such facilities that they may violate the AWA and abuse their animals with almost certain impunity.

D. Judicial Sanction of USDA's Failure to Enforce

Courts have upheld the USDA's broad discretion in enforcement of the AWA in dicta of cases dismissed on standing grounds. When an animal welfare organization sued the USDA for failing to take corrective action against several elephant exhibitors' abuse of their animals, the court responded that "[t]he USDA has not completely failed to act.... [I]t has investigated the allegations of abuse, but has chosen not to avail itself of its enforcement powers.... The fact that violations may continue to occur ... is irrelevant." Similarly, in a case involving instances of animal abuse in a research facility, the court held that:

the language of the AWA ... does not provide any indication that Congress sought to curb [the Secretary's] discretion. It does not impose a duty to make a finding of a violation or to initiate enforcement activities. The statute does not even mandate that the agency penalize a regulated entity found to be in violation...

Such discretion means that frequent enforcement does not occur, or violators are punished with no more than a formal warning.

E. Internal Policing: Fueled by Bias and Coercion

In addition to the sporadic official inspections by the USDA, research facilities are required to file annual reports with the

150. Id. at 216.
USDA. In these reports, facilities must simply give assurances that they are complying with the AWA § 2143 and its regulations and must explain any deviations from those standards. The report must also include information about any procedures that are likely to cause pain or distress to an animal and assurances that the principal researcher considered alternatives. There is no need for the researcher to implement any less painful methods; it is sufficient that he think about them. Despite the AWA's purpose of assuring humane treatment of animals, requirements for minimizing pain inflicted upon research animals are extremely lenient. If a procedure will cause more than momentary pain or distress to an animal, the researcher must administer sedatives, analgesics, or anesthetics "unless withholding such agents is justified for scientific reasons, in writing, by the principal investigator" and submitted to the facility's IACUC.

IACUCs are supposed to ensure humane treatment of laboratory animals. However, they have no authority to "prescribe methods or set standards for the design, performance, or conduct of actual research." They may only suspend research activities if they determine that the research diverges from the original research protocol designed by the experimenter, but not for any AWA violations which arguably were alluded to in that protocol. IACUCs are instead supposed to police facilities to determine whether AWA standards of housing, feeding, care, and other requirements are being met. IACUCs are charged with inspecting their facilities semi-annually and preparing reports detailing their findings, including any minority views among the members, but these reports remain on file at the research facility.

If the IACUC finds violations of the AWA, it must give the facility "notification and an opportunity for correction" before informing APHIS of the problem. Instead of providing a time limit within which APHIS must be apprised of uncorrected violations, the regulations specify only that a plan must be drafted for correcting the deficiencies. If the facility fails to comply with that plan, the IACUC must notify APHIS within fifteen business days of when the IACUC

154. Id. § 2143(a)(7)(B)(ii)–(iii).
155. Id. § 2143(a)(7)(B)(i).
157. Id. § 2.31(a).
158. Id. § 2.31(d)(xi)(6).
159. Id. § 2.31(d).
161. Id. § 2143(b)(4)(C).
realizes the breach of the plan. This laxness in notifying the governmental enforcement authority applies even for a "significant deficiency" which "is or may be a threat to the health or safety of the animals." Because there is no remedy in the AWA or its regulations to prevent IACUC intractability or noncompliance, IACUCs may grant excessively long time frames for corrections or even ignore violations with no worry of possible sanctions.

The chief executive officer of each facility has unilateral discretion to appoint IACUC members such that the committee includes at least three members, one of whom is a veterinarian and one of whom is not otherwise affiliated with the facility to represent community interests. Because these are the only requirements for the composition of IACUCs, a CEO could appoint a committee consisting of fifty researchers and one outside party who could easily be silenced by the majority.

The AWA and pursuant regulations fail to provide any formal procedure for removing members and no oversight of selection of members of IACUCs, so that a facility can easily remove any committee members who prove too vocal in their minority opinions. Jan Polon-Novic had been the outside committee member on the Letterman Army Institute of Research IACUC. In her membership, she cast the only minority vote and was entirely overruled on ninety percent of committee matters, including care of animals used in experiments involving burning animals with lasers, bleeding them nearly to death, conducting eye surgery on rabbits without anesthetic, and allowing insects to feed on rabbits' skin.

When Polon-Novic complained to her congressional representative about committee procedures, she was summarily dismissed from the IACUC because "she went beyond her role."

In addition, the AWA does not bar the outside committee member from being a researcher from a different facility or an individual with sympathetic interests, so "IACUCs are often solely comprised of experimenter and their allies. For this reason, the committees often become rubber-stamping mechanisms for

162. 9 C.F.R. § 2.31(c)(3).
163. Id.
164. 7 U.S.C. § 2143(b)(1).
166. Id.
167. Id.
research activities instead of a means to protect animals from cruelty.’”

Dr. Edward Taub, the researcher whose experiments were at issue in *International Primate*, was charged with seventeen counts of violating Maryland’s anti-cruelty statutes after he kept monkeys in filthy conditions with inadequate food, allowed them to chew their own fingers off, and provided inadequate veterinary care after a nerve-deadening experiment. A primatological expert at court testified that he had “never seen a laboratory as poorly maintained,” but Taub’s IACUC had simply “assumed that the treatment of the monkeys was satisfactory” and taken no action to effect any changes in the monkeys’ condition.

Because all researchers on the IACUC will at some point have to submit their own research proposals to the committee, such leniency is encouraged.

If IACUC members who are also employees of the research facility become too diligent in attempting to enforce the AWA through their committee memberships, the facility may demote or fire them with impunity. Although a regulation forbidding retaliation against whistleblowers exists, it lacks enforcement mechanisms.

Dr. Jan Moor-Jankowski, the director of the Laboratory for Experimental Medicine and Surgery at New York University Medical Center (NYUMC), was a veterinary member of NYUMC’s IACUC from 1985 until 1995. In 1993, in his capacity as a committee member, Moor-Jankowski discovered that a fellow researcher, Dr. Wood, was depriving monkeys of water and had performed experiments on sick animals that resulted in the deaths of three subjects. Moor-Jankowski reported his findings to the IACUC, claiming that such practices violated the AWA and destroyed the

168. *Id.* at 791.
169. *Francione*, *supra* note 35, at 72–73. The experiment was designed to investigate the feasibility of training human stroke victims to regain use of atrophied limbs. Taub severed macaque monkeys’ nerves to end all sensation in the limb, then applied painful stimuli to sensate areas to provoke the monkeys to use the deadened limb. *Id.*
172. *Francione*, *supra* note 35, at 206. Francione suggests that “by transferring authority to the IACUC, federal law actually encourages continuation of the ‘old-boy’ system under which researchers protect one another from outside attacks.” *Id.*
173. *See infra* note 184–88 and accompanying text.
175. *Id.*
In December 1993, the USDA invited Moor-Jankowski to tell some of its inspectors his expert opinion of Wood's research, but the associate dean of NYUMC informed Moor-Jankowski that such discussions were forbidden by NYUMC. The following month, NYUMC told Moor-Jankowski that a subcommittee separate from the IACUC would investigate the Wood situation. The subcommittee found Wood's treatment of his animals adequate. Moor-Jankowski subsequently resigned from the IACUC.

In February 1994, Moor-Jankowski attempted to use funds he had raised personally to bring NYUMC's chimpanzee cages into compliance with the AWA regulations, but the NYUMC administration accused him of financial improprieties and did not allow the cage modifications, despite the IACUC's approval. NYUMC then decided to eliminate Moor-Jankowski's laboratory program by giving its animals to a different laboratory. When the administration learned of Moor-Jankowski's preferences, it actively sought out the laboratory that Moor-Jankowski most opposed—the Coulston Foundation, a facility with a long history of violating the AWA. In fall of 1994, Moor-Jankowski complained to the USDA that NYUMC was retaliating against him for his whistleblowing actions in violation of 9 C.F.R. § 2.32(c)(4), which states that "no facility employee, Committee member, or laboratory personnel shall be discriminated against or be subject to any reprisal for reporting violations of any regulation or standards under the Act." On August 9, 1995, NYUMC received a letter from the USDA informing them of Moor-Jankowski's allegations. On August 9, NYUMC terminated Moor-Jankowski and stationed a guard to bar him from entering the campus. Although the USDA's Regulatory Enforcement and Animal Care Division concluded that NYUMC "did in fact bring reprisals against an employee ... in direct violation of 9 C.F.R. part 2, Subsection 2.32(c)(4)," the USDA did not level charges against NYUMC for retaliation.

176. Id.
177. Id.
178. Id.
179. Id.
180. Id. at *2-*3.
181. See supra note 3-7 and accompanying text.
183. Id. at *4, *7.
184. Id. at *4.
185. Id. at *5.
When Moor-Jankowski sued NYUMC alleging retaliatory action in violation of 9 C.F.R. § 2.32(c)(4), the court held that the AWA was not enacted for the benefit of whistleblowers, so that regulation implies no private cause of action for them. The court dismissed the case, concluding that

Senators Robert Dole and Alphonse D'Amato expressed the view that the 1985 AWA amendments will ensure that AWA whistleblowers are protected from retaliation and discrimination . . . . [T]hese sentiments with regard to protecting whistleblowers against retaliation did not find their way into the statute . . . . By this determination the Court does not seek to encourage retaliation by employers against employees who "blow the whistle" or to discourage employees who have knowledge of such violations from coming forward.187

Under this sole case interpreting 9 C.F.R. § 2.32(c)(4), employers are prohibited from punishing whistleblowing, but victims of such retaliation have no possible recourse. With no administrative or judicial remedy for subsequent retaliation, employee members of IACUCs are naturally extremely likely to be deterred from taking any serious affirmative actions to enforce the AWA.

III. AVENUES FOR REFORM

[Concern for animals] is a matter of taking the side of the weak against the strong, something the best people have always done.188

The greatness of a nation and its moral progress can be judged by the way its animals are treated. . . . I hold that the more helpless a creature, the more entitled it is to the protection by man from the cruelty of man.189

186. Id. at *7.
187. Id. at *8, *10.
188. LALAND, supra note 2, at 49 (quoting Harriet Beecher Stowe).
189. LALAND, supra note 2, at 74 (quoting Mahatma Ghandi).
A. Judicial Solutions: Citizen Suits and Standing for the Animals

Compliance with the AWA could be greatly facilitated by the addition of a citizen suit provision to the AWA similar to such provisions in other environmental regulation statutes. Such a provision would allow individual or organizational plaintiffs to sue directly any facility which they found to be in violation of the AWA. Modeled after the Endangered Species Act's (ESA) fairly typical citizen suit provision, any plaintiff could bring a civil suit to enjoin an AWA violator directly or to compel the Secretary to perform statutorily mandated duties. Such plaintiffs would be required to notify the Secretary and the violator of the violation sixty days before commencing the action and could not proceed if the Secretary was already diligently pursuing a civil or criminal action against the potential defendant. A provision allowing courts discretion to award appropriate costs of litigation, as in the ESA, would help to alleviate plaintiffs' economic disincentives to litigate. In addition, if such a provision included trial judge discretion to award costs to the defendant in frivolous cases, plaintiffs would be deterred from becoming too litigious and suing too frequently or for the wrong reasons.

A citizen suit provision would remove much of the AWA enforcement responsibility from the administrative arena in which Congress originally placed it. Placing such authority in the hands of inexpert citizens might chill research, in that "the prospect of damage awards in excess of the prescribed statutory penalties might discourage scientists from entering many lines of medical inquiry," but allowing courts discretion to award costs would reassure researchers that they could recoup their expenses from any unfounded lawsuit. In cases in which researchers are actually violating the AWA, however, there should be no concern about chilling

190. See, e.g., Smith, supra note 85, at 1024–25.
192. 16 U.S.C § 1540(g)(2).
193. Smith, supra note 85, at 1026.
such "lines of medical inquiry", because their actions are illegal and therefore undeserving of protection under the law. In addition, if this concern caused hesitation in Congress, legislation could cap punitive damages. Because the AWA is intended to curb cruelty in all research, all researchers would be continually under threat of lawsuit, giving them incentive to comply with the law. As demonstrated above, current enforcement mechanisms simply do not produce any incentive to obey the dictates of the AWA.

Congress members have twice tried to add a citizen suit amendment to the AWA, realizing that "[t]here is little point in having a law on the books that is not enforced." These amendments, proposed in 1986 and 1989, envisioned a provision modeled after current environmental statutes allowing "[a]ny person to commence a civil action on behalf of such person or on behalf of any animal protected by this Act to compel . . . enforcement." These amendments received little support and died in committee, but social and political views have changed over the past decade, so the time may be near for another attempt at passing such an amendment. Nonetheless, a citizen suit provision would not allow plaintiffs to bypass the standing hurdles that pose such an obstacle to enforcement of the AWA, although they would remove the zone of interests prong of the standing inquiry.

Standing for animals themselves could also help better achieve the objectives of the AWA. The purpose of the AWA is to ensure humane treatment of animals, but if only those animals fortunate enough to have potential advocates visiting them frequently and regularly have any chance of seeing their interests directly litigated in court, unfortunately, the standing hurdle is too high to protect all targeted beneficiaries. Under the current standing law of Animal Legal Defense Fund v. Glickman, only a human plaintiff who has regularly visited a particular animal may sue on the animal's behalf; otherwise the plaintiff lacks sufficient injury. If animals themselves were allowed standing, then injury in fact could be judged on the basis of the injury suffered by the animal, caused by the researcher, and thereby redressable through cessation of the painful procedure.

With these standing hurdles cleared, any individual or organization could potentially sue on the animal's behalf. Even animals secluded from the public in laboratories and inaccessible to regu-

195. SMITH, supra note 85, at 1026 (quoting 132 CONG. REC. 6834 (statement of Rep. Chandler)).
196. Id. at 1027 n.308 (quoting H.R. 3223, 101st Cong. § 3 (1989)).
197. Id. at 1025.
198. See supra notes 85-97 and accompanying text.
lar visitation would have a possible legal remedy. Under the legal system, though, animals are conceived of as no more than property. Under this rubric, financial costs to the research facility of compliance and costs to the public of potentially losing knowledge gained in research are balanced against the benefit to the public of knowing that animals are treated humanely.\textsuperscript{199}

In this framework, there is no room for the costs and benefits to the animals themselves, the creatures whom the AWA is designed to protect. Granting animals standing would allow any citizen to challenge the USDA in court on their behalf in attempts to force the USDA to comply with statutory mandates. As Justice Douglas observed,

\begin{quote}
\textit{federal agencies \ldots are notoriously under the control of \ldots that natural affinity which in time develops between the regulator and the regulated \ldots. The voice of the inanimate object [or, in this case, the animal], therefore, should not be stilled \ldots. That is why these environmental issues should be tendered by the inanimate object [or animal] itself.} \textsuperscript{200}
\end{quote}

If such standing were explicitly limited only to cases involving the AWA, unforeseen spillover implications could be avoided. Although some inappropriate challengers might appear, even people with interests adverse to the animal’s rights, these causes of action that do not legitimately seek to compel enforcement of the AWA could easily be disposed of on summary judgment. In addition, with a discretionary allowance of awards of legal costs to appropriate parties, frivolous plaintiffs could be punished while defendants in such cases could be remunerated. Without co-requisite reforms to the extreme deference granted to USDA’s discretionary decision-making, such cases might have little result, but with the standing hurdle cleared, they would have a fighting chance.

\textsuperscript{199} FRANCIONE, \textit{supra} note 35, at 212–13.
\textsuperscript{200} Sierra Club v. Morton, 405 U.S. 727, 745–46, 749, 752 (1972) (Douglas, J., dissenting); \textit{see also} Animal Legal Def. Fund v. Glickman, 154 F.3d 426, 429 (D.C. Cir. 1998) (\textit{Glickman III}) (Wald, J., dissenting) (“But it is striking, particularly in a world in which animals cannot sue on their own behalf, how far the majority opinion goes toward making governmental action that regulates the lives of animals \ldots unchallengeable.”).
Giving whistleblowers a safe haven from retaliation for their efforts to protect their animal wards is essential to making IACUCs an effective enforcement mechanism. Although the AWA itself does not grant protection to whistleblowers, its pursuant regulations, which are legally binding, state that IACUC members and facility employees shall not be retaliated against for reporting AWA violations. This regulation is entirely superfluous if there is no way to enforce it, particularly when the USDA refuses to take action when it concludes that such retaliation has occurred. Therefore, whistleblowers must be allowed a private cause of action in order to ensure that they feel free to enforce the AWA, as they are charged to do, without fear that the fulfillment of their statutory duties will lead to retaliation.

Also, APHIS must be required to inspect every facility at least annually and without giving advance warning to the target facilities in order to adequately monitor compliance. Some of the USDA’s discretion in enforcement should be curtailed as well, such that the agency is required to penalize egregious violations and facilities that have repeatedly received warnings. In addition to directly aiding enforcement through deterrence, an increase in civil fines and serious prosecutions of violations, rather than warnings, would generate funds for the agency, which could then be channeled into more frequent inspections and prosecutions. Without reducing some of the agency’s discretion, the current statistics of only one or two research facilities being prosecuted each year will probably continue as they have in the past. In addition, protection must be extended to all animals who are used for testing, as Congress directed, not just the charismatic or convenient species.

201. 9 C.F.R. § 2.32(c)(4) (2001).
203. Civil and criminal penalties under the AWA can involve fines of up to $2500 per individual violation. 7 U.S.C. § 2149 (a)-(d) (1994). The vast majority of administrative prosecutions are brought against parties other than research facilities with only one or two each year against such facilities. See id. § 2146(a); FRANCIONE, supra note 35, at 214–15. Assuming the likelihood of multiple violations at any one repeat-offender facility, with the possibility of $2500 per violation, if investigators had less discretion to issue repeated warnings, as is general practice now, more fines could be collected, generating revenue that the agency could channel back into increased enforcement.
204. See PAWS v. USDA, No. 95-4719, 1996 WL 524333, at *2 (E.D. Pa., Sept. 9, 1996); FRANCIONE, supra note 35, at 216.
205. See 7 U.S.C. § 2132(g).
Most importantly, the provision that the USDA and IACUCs are forbidden from interfering in actual research must be removed.\textsuperscript{206} Although this mandate has been a fundamental tenet of the AWA since its passage, the fact that it allows exceptions to almost every requirement of the AWA based on “scientific necessity” frustrates the purpose of the Act to treat animals humanely. If research is cruel and counter to the standards imposed on other regulated facilities, researchers should be forced to modify it in order to eliminate all suffering of the animal through anesthetics or alternate procedures in accordance with the goals of the AWA. Research is indeed important to the general welfare, but it should not be furthered by creating blanket exceptions, refusing to enforce the laws, or subjecting innocent creatures to undeserved pain. Such “needless suffering . . . does nothing to advance science or human welfare, and a nation as idealistic as ours must not condone this cruelty . . . . [h]umane legislation . . . will in no way deter the advance of medical science. To the contrary, it will eliminate needless brutality. . . .”\textsuperscript{207} Under the current AWA and its underlying philosophies and enforcement procedures, it is too simple for a researcher to profess that a painful procedure is necessary to his experiment without any need to support his claim beyond that declaration. Such “needless brutality” cannot be allowed.

**Conclusion**

These animals bring us great pleasure, and ask for nothing in return. Surely we can see that to return pain for pleasure, even to animals, makes us all a little less humanitarian, and this we cannot afford.\textsuperscript{208}

The worst sin toward our fellow creatures is not to hate them, but to be indifferent to them. That’s the essence of inhumanity.\textsuperscript{209}

Animals, as sentient beings, have a fundamental right to be free from pain and suffering which has long been ignored in this

\textsuperscript{206} See 9 C.F.R. § 2.31(d)(iv)(a) (2001); Pepper, supra note 22, at § 13; Francione, supra note 35, at 212.


\textsuperscript{209} Laland, supra note 2, at 159 (quoting George Bernard Shaw).
The AWA is meant to shield them from inhumane treatment, but this purpose has too long been subordinated to Congress's and the USDA's aversion to interfering with research. Currently, this aversion has generated an impotent statute whose provisions and pursuant regulations are too vague to enforce or are rendered toothless through lack of enforcement. Too often, the calculus of costs and benefits of research ignore the animals themselves, those who have the largest stake in the equation. While this country continues to condone research on helpless animals, it must, as a civilized and morally upright nation, at least ensure that the victims of its policy be extended every possible protection from cruelty, pain, and suffering by enforcing the existing laws designed to protect animals used in research and by strengthening such laws in ways necessary to allow their meaningful enforcement.

210. See, e.g., Francione, supra note 35, at 3; Frasch, supra note 33, at 751 (referencing A Declaration on Great Apes); Laland, supra note 2, at 118 (quoting Albert Schweitzer); Peter Singer, Animal Liberation, 28–80 (1975); Steven M. Wise, Rattling the Cage (2000).