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Science at Any Cost: The Ineffectiveness and Underenforcement of the Animal Welfare Act

Melanie L. Vanderau*

I. Introduction:

*Then God said, 'Let us make humankind in our image, according to our likeness; and let them have dominion over the fish of the seas, and over the birds of the air, and over the cattle, and over all the wild animals of the earth, and over every creeping thing that creeps upon the earth.'*¹

Humans use animals for a variety of reasons, including companionship, entertainment, labor, and food. These uses have existed for thousands of years. More recently,² however, humans have begun to use animals in their pursuit of knowledge—in the course of scientific research. The U.S. Congress passed the Animal Welfare Act (“AWA”) in an attempt to ensure that humans use animals humanely. The AWA regulates the use of animals in experiments. In fact, one of the Act’s principle purposes is “to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment.”³ It is doubtless a well-intentioned goal, but does the AWA always live up to this standard? Scientific research on animals, particularly in the medical field, is important, but there are instances when experiments performed in the name of science actually

* J.D., The Dickinson School of Law of the Pennsylvania State University (2006); B.A., Philosophy, Susquehanna University (1999). The author would like to thank her parents, Don and Nancy Vanderau for providing the foundation necessary to get to this point, Charles Morgan for his tireless support, and JBF, along with those who came before and after, for inspiring this piece.

1. *Genesis* 1:26 (New Revised Standard).

2. Animals have been used in research since the third century B.C.E. Katharine M. Swanson, *Carte Blanche for Cruelty: the Non-Enforcement of the Animal Welfare Act*, 35 U. MICH. J.L. REFORM 937, 939 (2002).

3. 7 U.S.C. § 2131(1) (1999).

do little to advance scientific knowledge.

The principle problem with the AWA is that it is so narrow that experiments that kill and maim animals, yet serve no legitimate scientific purpose, are legal under the act, leading to a great deal of suffering for no valid reason. These experiments slip through the cracks because of the broad exceptions built into the AWA. To make matters worse, when given the opportunity, courts show almost complete deference to the stated purpose of the experiments. This deference stems from two notions, held by both the law and society at large: (1) animals are property and (2) science is unquestionable.

This comment will examine the laws regulating experimentation on animals, focusing on how much deference is paid to the stated purpose or alleged necessity of the experiments. Part II examines the background and history of animal law. Part III looks at the law regarding animal experiments including the Animal Welfare Act, state animal cruelty statutes, and case law. Part IV analyzes the way this law is actually applied and enforced. Part V addresses counter arguments to limitations on animal experiments. Part VI considers society's attitude toward science, which causes both courts and laymen to be very deferential to science. Finally, part VII examines potential solutions to the problem.

II. Background: Animals and the Law

*Until, and unless, a nonhuman animal becomes a legal person, she will remain invisible to civil law. She will not count.*⁴

In American law, animals are property.⁵ This notion is not unique to America; in fact, the Old Testament suggests this idea.⁶ Additionally, the Stoics of Ancient Greece, the laws of the Old Testament and the Byzantine Empire, and the teachings of St. Augustine all express this notion.⁷ This idea came into the American legal tradition from the English common law.⁸

Property has no rights.⁹ Steven Wise, one of the foremost legal scholars on this issue says that, "Generally, law divides the physical universe into persons and things. Things are objects over which a person exercises a legal right. . . . Humans can freely be tyrants over things.

4. STEVEN M. WISE, DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS 21 (2002).

5. See, e.g., *Ctr. Westchester Humane Soc'y v. Hilleboe*, 116 N.Y.S.2d 403 (App. Div. 1952).

6. *Genesis*, *supra* note 1.

7. WISE, *supra* note 4, at 9.

8. *Id.* at 20.

9. Cass. R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 398 (2003).

Personhood is the legal shield that protects against human tyranny; without it, one is helpless. Legally, persons count, things don't."¹⁰ This belief that animals serve no purpose beyond what humans can do with them leads to some sad stories¹¹ and staggering statistics; tens of millions of animals are killed each year in biomedical research alone.¹² However, although individual animals may not matter, laws still exist that regulate the use of animals generally. These laws demonstrate that there is at least some limit to the notion that animals have no value beyond what humans can do with them.

III. The Law Regarding Animal Welfare:

*All in the name of money, the United States has failed in providing the most innocent and defenseless of creatures any protection against mutilation, burning, cutting, injecting, overdosing, dissection, and other horrors.*¹³

A. Law Prior to the AWA

Many of the cases dealing with animal welfare prior to the passage of the AWA indicated why it was necessary. In *Central Westchester Humane Society v. Hilleboe*, the court found constitutional a statute that provided that after three days retention in the pound, an animal could be surrendered for scientific research in lieu of destruction.¹⁴ The Central Westchester Humane Society, as one of the organizations that would be surrendering animals for scientific research, felt that the statute went against the society's purpose.¹⁵ The court acknowledged that individuals

10. WISE, *supra* note 4, at 21.

11. An illustration of animals existing strictly as property is the story of Queso, a cat in Texas who was shot, beaten with a club, decapitated and skinned by a Baylor University student. During the criminal animal cruelty trial, the defendant was acquitted of the crime, not because Queso did not suffer, but because Queso was no one's pet. Queso was named by a local restaurant owner because he fed the cat spicy cheese, which it loved. Associated Press, *Former Baseball Player Acquitted of Animal Cruelty; Group Mad*, ABILENE REPORTER-NEWS, Mar. 21, 2002, available at <http://web.reporter-news.com/1998/2002/texas/cat0321.html>. TEX. PENAL CODE ANN. § 42.09(a) (2003) provides that while torturing any animal constitutes animal cruelty, killing or seriously injuring an animal only constitutes animal cruelty when the animal belongs to someone. The jury had to find that Queso was either tortured or someone's pet. It found neither.

12. WISE, *supra* note 4, at 9.

13. Stephanie J. Engelsman, *World Leader—at What Price? A Look at Lagging American Animal Protection Laws*, 22 PACE ENVTL. L. REV. 329, 333 (2005).

14. *Ctr. Westchester Humane Soc'y. v. Hilleboe*, 116 N.Y.S.2d 403, 406 (App. Div. 1952).

15. *Id.* at 405.

do have a property right in animals, but said that it was a limited property right that was subject to the police power of the state.¹⁶ The court held that the statute in question was necessary and served the purpose of advancing medical science.¹⁷ The court added as dicta that the plaintiffs had no standing to challenge the statute, and, furthermore that injunctive relief would not have been appropriate in this situation, because injunctions should only be granted under circumstances when harm is imminent.¹⁸

When faced with a similar statute which provided for the surrender of impounded animals for scientific research after five days, a majority of the California Supreme court found it constitutional as well.¹⁹ The majority upheld the statute despite arguments from the petitioner that the five day time period provided in the statute coupled with no required notice to the animal's owner constituted a taking of private property.²⁰

B. *Early Versions of the AWA*

Congress passed the AWA as a result of concerns that one's pet would be lost or stolen and used for scientific research. The AWA also reflects the notion of animals as solely property. The purpose of the AWA at its introduction in 1966 as the Laboratory Animal Welfare Act was to stop the theft of domesticated pets for the ultimate use in animal research.²¹ The legislation specified that its purpose was not to deter medical research in any way; as a result, this legislation only applied to certain animals and expressly provided that handling, care or treatment of animals during experiments could not be altered by the Secretary.²² When Congress amended the AWA in 1970, it expanded the act to

16. *Id.* at 406.

17. *Id.* The court further added that the statute "seem[ed] well written" and included "reasonable safeguards against the taking of any animal contrary to the rights of the owner and looking toward the use of the animals in as humane a manner as possible." *Id.* See also *N.Y. State Voters League against Vivisection v. Hilleboe*, 114 N.Y.S.2d 805 (App. Div. 1952) (rejecting a constitutional claim regarding a similar statute; the court reiterated the animals as property notion, said that the statute was not too broad and no rights of any person were affected by the statute).

18. *Westchester*, 116 N.Y.S.2d at 407.

19. *Simpson v. Los Angeles*, 253 P.2d 464 (Cal. 1953).

20. *Id.* at 471. The court noted that the organizations that the impounded animals would be surrendered to would be "reputable institutions of learning, hospitals and laboratories which will use animals humanely in medical research for the good of mankind." *Id.* The court shows a tremendous amount of deference to the researcher's purpose here, taking completely for granted that the purposes will benefit mankind. The dissent in this case argued that the lack of notice provided in the statute and broadness of the statute constituted a Due Process violation. *Id.* at 284-285 (Carter, J., dissenting).

21. Swanson, *supra* note 2, at 939.

22. *Id.* at 940.

provide for basic humane treatment of laboratory animals; however, the act retained its express prohibition on the law causing a disruption or interference with research or experimentation.²³ A second revision occurred in 1975, which, sounding somewhat like a broken record, still expressed complete deference to scientific research.²⁴

C. The Current Version of the AWA

Congress amended the AWA in 1985 as a result of high profile cases in petitioners alleged animal abuse within a research context.²⁵ This amendment resulted in the AWA that exists today, complete with requirements that dictate under what sort of conditions research facilities must keep laboratory animals.

Congress passed the AWA under its Commerce Clause Power,²⁶ with a threefold purpose:

- (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
- (2) to assure the humane treatment of animals during transportation in commerce, and
- (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.²⁷

Congress further found that in order to meet these goals it was necessary to regulate the transportation, purchase, sale, housing, care, handling, and treatment of animals used for exhibition, sale as pets, experimental purposes or “for any such purpose or use.”²⁸ The AWA, as a result, has a fairly wide reach and theoretically can cover a wide range of animal uses.

Furthermore, the definition of “research facility” is broad as well. The definition covers schools (excluding elementary and secondary schools), institutions, organization and individual persons that use or intend to use animals for research, tests or experiments, when they either purchase the animals through commerce or receive funds from the United States for the purpose of animal research.²⁹ However, this

23. *Id.*

24. *Id.* at 941.

25. *See infra* notes 90-93 and accompanying text.

26. *See* 7 U.S.C. § 2131 (1999), which provides that “Congress finds that animals and activities which are regulated under this chapter are either interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce.”

27. *Id.*

28. *Id.*

29. *Id.* § 2132(e).

definition contains one rather substantial but loosely defined exception; the Secretary of Agriculture (“Secretary”) may exempt any organization or individual that does not use live dogs or cats in its experiments when, in the Secretary’s estimation, granting the exemption does not impair the purpose of the statute.³⁰ The decision to grant this complete exemption to the statute is solely at the Secretary’s discretion, and the only requirements are that (1) the Secretary cannot grant the exception when dogs and cats are involved, reflecting the AWA’s sole real concern for pets, and (2) the somewhat ambiguous notion that the exemption must not impair the statute’s purpose.

Another key part of the AWA is its surprisingly narrow definition of animal. It includes live and dead dogs,³¹ cats, monkeys,³² guinea pigs, hamsters, rabbits, and other such warm blooded animals that the Secretary determines individuals or organizations use as pets or for exhibition or research purposes.³³ The AWA, however, specifically exempts from the definition of the term animal: (1) birds, rats and mice specifically bred for research, (2) horses used outside of the research context, and (3) other farm animals.³⁴ The exemption from any of the albeit limited protections of the AWA for birds, rats and mice specifically bred for research was the result of a 2002 amendment.³⁵ This amendment has “gutted” the AWA and “left it essentially useless,” since now, the AWA only covers 5% of the animals used in research, leaving 95% completely unprotected by any laws.³⁶

Noticeably absent from the definition section is the term “humane.” There are sections dictating that humans treat research animals humanely,³⁷ but the statute offers no guidance as to what actually constitutes “humane” treatment of animals. In fact, two of the three stated purposes of the AWA involve treating animals humanely,³⁸ but the

30. *Id.*

31. *Id.* § 2132(g). The definition of dog includes those used for breeding, hunting and security.

32. The term “monkey” is defined by Section 2132(g) as a “nonhuman primate mammal.”

33. *Id.*

34. *Id.* The definition of “farm animal” includes livestock and poultry used or intended to be used for food or fiber, for improving the quality of food or fiber, or for improving animal nutrition, breeding, management, or production efficiency. This exemption for farm animals means that the AWA ignores the welfare of literally 10 billion animals slaughtered annually in the United States. *See generally* PETER SINGER, ANIMAL LIBERATION 57 (HarperCollins Publishers 2000) (1975); Engelsman, *supra* note 13.

35. Engelsman, *supra* note 13, at 333.

36. *Id.* at 332-333.

37. *See, e.g.*, 7 U.S.C. § 2142 (“Humane standards and recordkeeping requirements at auction sales.”).

38. *See, e.g., id.* § 2131, providing that animals used in experiments and transported

statute is silent as to what humane treatment actually entails.

The AWA regulates the licensing of dealers and exhibitors,³⁹ the requirements for an exhibitor or dealer to sell or transport animals,⁴⁰ and the time period that a dealer or exhibitor must hold a dog or a cat prior to disposition.⁴¹ The act further provides that in addition to handlers, carriers and exhibitors, all research facilities not licensed must register with the Secretary.⁴² The AWA prohibits research facilities from purchasing any dog or cat that is not from an auction sale⁴³ or from a licensed dealer or exhibitor.⁴⁴ Furthermore, no department of the United States that uses animals for research, experimentation, or exhibition may purchase a dog or a cat, unless it conforms with these conditions.⁴⁵ Provisions such as these again reflect the AWA's concern for lost pets being sold or given to research facilities.

Under the AWA, any violation by an employee of one of the regulated organization will be viewed as a violation by the organization itself.⁴⁶ The AWA additionally regulates recordkeeping, providing that dealers and exhibitors must keep records regarding purchase, sale, transportation, identification and prior ownership of the animals, while research facilities must keep records "only with respect to the purchase, sale, transportation, identification and previous ownership of live dogs and cats."⁴⁷ Though the AWA requires "humane" treatment for animals used in research, it does not require that researchers keep records on the treatment of animals during the course of experiments. Furthermore, a dealer or exhibitor must humanely mark or identify all animals it delivers or sells; for research facilities, however, this only applies to cats and dogs.⁴⁸

One of the most important parts of the AWA is Section 2143. This

in interstate commerce receive humane treatment and that animals intended for exhibition and research receive humane treatment.

39. *Id.* § 2133, providing that the Secretary will issue licenses to dealers and exhibitors upon their application, as long as a demonstration is made that the exhibitor or dealer's facilities comply with the AWA.

40. *Id.* § 2134. Dealers or exhibitors can only sell animals to research facilities provided that they are licensed by the Secretary.

41. *Id.* § 2135 (providing that dealers or exhibitors must wait five days prior to disposing of an animal.).

42. *Id.* § 2136.

43. The regulations for this auction sale are set forth in Section 2137.

44. *Id.* § 2137.

45. *Id.* § 2138.

46. *Id.* § 2139.

47. *Id.* § 2140. Facilities must maintain this information for a reasonable time as the Secretary establishes, and these records will be available at all reasonable times as the secretary requests for inspection and copying. *Id.* This again shows the AWA's primary concern for lost pets.

48. *Id.* § 2141.

section provides the standards that cover the humane care and treatment of animals research facilities use. It sets forth minimum requirements for general humane care and treatment of animals,⁴⁹ requiring that, research facilities keep animal pain and distress at a minimum and that the facilities provide proper veterinary care, including when appropriate, anesthetic, analgesic, tranquilizers, and euthanasia.⁵⁰ The principle investigator must consider alternatives to a procedure that is likely to cause pain or distress to a research animal.⁵¹ Furthermore, in any practice that could cause pain to animals, research facilities should consult a veterinarian and should provide pre and post-surgical care in accordance with established veterinary procedures.⁵² Another provision provides that facilities must not use an animal in more than one major operative experiment from which recovers, unless the case is one of "scientific necessity." This is another key term that the AWA does not define.⁵³

Nothing in the AWA, however, is to be construed as authorizing the Secretary to create rules, regulations, or other orders pertaining to the design, outlines or guidelines of the facilities' actual research or experimentation.⁵⁴ No part of the AWA is to be read to require a research facility to publicly disclose trade secrets, or privileged or confidential commercial or financial information.⁵⁵

Any organization of the United States having laboratory animal facilities must comply with these requirements for the humane treatment of animals.⁵⁶ Furthermore, the Secretary may confer with other federal departments involved with animal welfare; in fact, the Secretary is required to consult with the Secretary of Health and Human Services before issuing regulations.⁵⁷

Enforcement of the AWA provides that the Secretary may make "such investigations or inspections as he deems necessary" in order to determine if any of the individuals or organizations the AWA covers

49. *E.g.* § 2143(2)(B) provides that dogs should be exercised in accord with proper veterinary care, and that primates should be kept in a physical environment which is adequate to promote their psychological well being.

50. *Id.* § 2143(3)(A).

51. *Id.* § 2143(3)(B).

52. *Id.* § 2143(3)(C)(i), (iii).

53. *Id.* § 2143(3)(D)(i). The AWA also provides that withholding tranquilizers, anesthesia or euthanasia when scientifically necessary can only continue for the necessary period of time. *Id.*

54. *Id.* § 2143(6)(A)(i).

55. *Id.* § 2143(6)(B).

56. *Id.* § 2144.

57. *Id.* § 2145. The Secretary is also authorized to act in accord with states so that the corresponding state statutes purpose can be met.

have violated it.⁵⁸ Under the Act, the Secretary must have access to the business and facilities “at all reasonable times,” must inspect all such facilities at least once a year, and must conduct follow up inspections as needed until the facility corrects all violations.⁵⁹

The purpose of the AWA has little to do with the alleviation of the suffering of animals used in research facilities, or what one might call “animal welfare.” While one of the AWA’s stated purposes is insuring that researchers treat animals humanely, most restrictions on research facilities apply to cats and dogs.⁶⁰ Many animals are excluded by definition, like farm animals, birds, rats and mice, showing that the intent is not so much “animal welfare” as the welfare of people who may have their pets stolen. While the Secretary must perform inspections, the AWA does not require that the facilities keep or produce records on what they do to the animals.

B. Enforcement of the AWA.

Under the AWA, there are limitations on who can bring actions and how these plaintiffs can bring actions. The serious issues that limit the effectiveness of the AWA are the problem of standing and the protected, confidential nature of what actually occurs behind the closed laboratory doors. These problems are so damaging that they render the AWA powerless to protect animal welfare in many situations.

1. The Problem of Standing.

Because the AWA creates no private cause of action, only an administrative remedy,⁶¹ historically, private parties had sued under the Administrative Procedure Act,⁶² claiming that the Secretary did not meet the minimum requirements provided by the AWA.⁶³ Courts generally

58. *Id.* § 2146(a).

59. *Id.* During the course of these inspections if any animal is found to be suffering, that animal should be confiscated and humanely destroyed.

60. *E.g., id.* § 2141.

61. *See Int’l Primate Prot. League v. Inst. for Behavioral Research*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987) (holding that the case could have alternatively been dismissed for a lack of standing).

62. 5 U.S.C. § 702 (Supp. 2004) provides that “a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” This judicial review allows the court, among other things, to “compel agency action unlawfully withheld or unreasonable delayed.” *Id.* § 706(1). The reviewing court must decide all relevant legal questions, interpret any applicable constitutional and statutory provisions, and determine the meaning or application of the terms of agency action. *Id.* § 706.

63. Swanson, *supra* note 2, at 945.

rejected these cases for a lack of standing.⁶⁴ Because no private cause of action existed and private parties had no standing, the AWA was essentially an unenforceable statute. This situation changed after *Animal Legal Defense Fund v. Glickman*,⁶⁵ which held that an individual plaintiff did have standing to sue for suffering aesthetic injury under United States Department of Agriculture regulations for the conditions of animals kept in a zoo.⁶⁶ According to the D.C. Circuit, the plaintiff had claimed:

far more than an abstract, and unrecognizable interest in seeing the law enforced . . . [he] has made clear that he has an aesthetic interest in seeing exotic animals living in a nurturing habitat. . . . This interest was allegedly injured when [he] witnessed the actual living conditions of the primates.⁶⁷

Despite arguments that there was no congressional intent to create this standing, the court said that the only test was a determination of whether the injury asserted by the plaintiff falls into the zone of interests protected or regulated by the applicable statute.⁶⁸ Subsequent courts adopted this reasoning and were willing to find standing under similar circumstances.⁶⁹

Glickman and its progeny were a victory for anyone who wanted to see animals receive humane treatment. However, these cases are not as helpful as they appear when they are considered within the context of animal experimentation. First, the holdings of the cases finding standing are relatively dependent upon the facts of each case. For example, the plaintiff in *Glickman* was a frequent visitor to the zoo and the court stressed that fact.⁷⁰

In *Ringling Brothers*, the plaintiff was a former elephant handler who had standing to sue for the mistreatment of elephants at a circus.⁷¹ Similarly, in *Alternative Research & Development Foundation v. Glickman*,⁷² an individual plaintiff challenging the exclusion of birds,

64. See, e.g., *Animal Legal Defense Fund v. Espy*, 23 F.3d 496 (D.C. Cir. 1994); *Animal Legal Def. Fund v. Espy*, 29 F.3d 720 (D.C. Cir. 1994); *Int'l Primate*, 799 F.2d 934.

65. *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998).

66. *Id.* at 432.

67. *Id.*

68. *Id.* at 444.

69. See, e.g., *Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum Bailey Circus*, 317 F.3d 334 (D.C. Cir. 2003) (holding that a former elephant handler had standing to sue under a provision of the Endangered Species Act when a circus mistreated its elephants and could show injury in fact).

70. *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 443 (D.C. Cir. 1998).

71. *Ringling Bros.*, 317 F.3d at 338.

72. *Alternative Research & Dev. Found. v. Glickman*, 101 F.Supp.2d 7 (D.D.C.

mice and rats from the AWA was found to have standing because she had worked in a laboratory, and thus had a special interest in the rodents' well being.⁷³

When courts find standing, they require some causal connection to the harm and that specific plaintiff. Again, the AWA is concerned with human welfare rather than animal welfare. This creates a problem establishing standing in situations where the person bringing the action has merely a concern for animal welfare on a more broad level. If the petitioner needs to prove some direct connection to animal experimentation or the research facility, this rules out individuals who simply do not want to see animals needlessly suffer. The laboratory animals that lack a human champion will never see violations of the AWA remedied.

2. The Problem of Confidential Information

Another fundamental problem with enforcement of the AWA with regard to scientific experiments on animals is that unlike a zoo or a circus, where people can freely walk in and out and observe the conditions in which animals live, laboratory animals suffer behind closed doors. Finding out exactly what goes on behind those closed doors is often highly complicated.

In *American Society for the Prevention of Cruelty to Animals v. Board of Trustees of State University of New York*, the Supreme Court Appellate Division of New York State held that under New York law, a state university's laboratory animal user's committee was not an agency subject to the Freedom of Information Law.⁷⁴ As such, the research facility did not have to disclose to the public the information as to what experiments researchers performed on animals.⁷⁵ Similarly, in *Robinson v. Indiana University*, under Indiana Law, information pertaining to the use of and care for animals at the university in connection with proposed research projects was "information concerning research" and was exempt from disclosure under the Public Records Act.⁷⁶ Furthermore, researchers have even brought suits for libel against concerned citizens who have attempted to stop animal experiments.⁷⁷

2000).

73. *Id.* at 13.

74. *Am. Soc'y. for the Prevention of Cruelty to Animals v. Bd. of Tr. of State Univ. of N. Y.*, 184 A.2d 508, 509 (N.Y. App. Div. 1992).

75. *Id.*

76. *Robinson v. Ind. Univ.*, 659 N.E.2d 153, 155 (Ind. Ct. App. 1995).

77. *See, e.g., Adey v. United Action for Animals*, 361 F.Supp 457 (S.D.N.Y 1973) (Holding that researcher was a public official and as a result, the burden was on the plaintiff to prove that the documents were published with actual malice—knowledge of

If the public can gain no knowledge of the violations of the AWA occurring behind closed doors, the only hope is that people working within the laboratories will report violations. Even this is not as simple as it sounds, because the law offers little protection from retaliation against people who speak out in this way. In *Moor-Jankowski v. Board of Trustees of New York University*, the former director of the laboratory for Experimental Medicine and Surgery affiliated with New York University sued after he was fired for alleging violations of the AWA.⁷⁸ The court found that the AWA offered no protection to the whistleblowers, and further, the general federal law that protects whistleblowers offered no protection to AWA whistleblowers.⁷⁹

The problems of standing and confidential information leave a statute that is very difficult to enforce. Standing is difficult to establish. Even if one can establish it, a potential plaintiff still has to be able to learn what is going on behind the closed laboratory door, and no incentive exists for whistleblowers to come forward and report violations of the AWA; in fact, they have no recourse if research facilities retaliate against them for speaking out.

C. State Statutes

The AWA does not preempt state laws. The federal District Court of Kansas held that "it is clear that the [AWA] does not evince an intent to preempt state regulations of animal welfare."⁸⁰ The court cited Section 2143(a)(8)⁸¹ and Section 2145(b)⁸² of the AWA as anticipating that the states would remain active in passing legislation relating to the welfare of animals.⁸³

State statutes criminalize cruelty to animals. Each state legislature defines animal cruelty and crafts exceptions to the law as it sees fit. For example Kansas' Animal Cruelty statute defines animal cruelty as, among other things, "intentionally killing, injuring, maiming, torturing or

falsity or reckless disregard for truth or falsity.).

78. *Moor-Jankowski v. Bd. of Tr. of N.Y. Univ.*, No. 96 CIV. 5997(JFK), 1998 S.D.N.Y. WL 474084 (S.D.N.Y. Aug. 10, 1998).

79. *Id.*, citing, 31 U.S.C. § 3730.

80. *Kerr v. Kimmell*, 740 F.Supp. 1525, 1530 (D. Kan. 1990).

81. 7 U.S.C. § 2143(a) (1999) provides that the act "shall not prohibit any state (or a political subdivision of such state) from promulgating standards in addition to those standards promulgated by the Secretary."

82. *Id.* § 2145(b) provides that "the Secretary is authorized to cooperate with the officials of the various States or political subdivisions thereof in carrying out the purposes of this chapter and of any State, local, or municipal legislation or ordinance on the same subject."

83. *Kerr*, 740 F.Supp. at 1530.

mutilating any animal,”⁸⁴ a definition which would certainly criminalize many experiments but for subsection (b)(2), which provides that the section does not apply to “bona fide experiments carried on by commonly recognized research facilities.”⁸⁵ The legislature leaves what actually constitutes a “bona fide” experiment undefined.

Consider also the New York statute, which provides that any one who, among other things, unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame has committed a misdemeanor punishable by no more than one year in prison or a fine or no more than one thousand dollars, or both.⁸⁶ What constitutes a justifiable injury is not clear. However, the statute is explicit that “nothing herein contained shall be construed to prohibit or interfere with any properly conducted scientific tests, experiments or investigations, involving the use of living animals, performed or conducted in laboratories or institutions, which are approved for these purposes by the state commissioner of health.”⁸⁷

In the few cases in which state animal cruelty statutes are litigated in an animal experimentation context, courts show almost complete deference to the researcher. In *New Jersey Society for the Prevention of Cruelty to Animals v. Board of Education of the City of East Orange*, the court held that, because there was a truly useful motive and a real and valid purpose, a high school student’s experiment in which he infected chickens with a virus did not violate the animal cruelty statute.⁸⁸ The court focused on the motives of the teacher and school district involved and found they were purely educational and scientific, and as a result the statute did not control the defendant’s behavior.⁸⁹

A much more controversial case was *Taub v. Maryland*, in which the court reversed the criminal conviction of the chief scientific investigator of a research institution.⁹⁰ The experiment involved surgically abolishing all sensation in a monkey’s limb in order to test the effect of strokes.⁹¹ The trial court found Dr. Taub guilty of failing to

84. KAN. STAT. ANN. § 21-4310(a)(1) (Supp. 2003).

85. *Id.* § 21-4310(b)(2). This is only one of eight broad exceptions to the statute, which include, but are not limited to, the humane killing animals for population control—“humane” is not defined—rodeo practices, killing an animal not on its owner’s property which is posing a threat to persons, farm animals, or property, and accepted practices of animal husbandry. *Id.*

86. N.Y. AGRIC. & MKTS. LAW § 353 (Supp. 2004).

87. *Id.*

88. N.J. Soc’y for the Prevention of Cruelty to Animals v. Bd. of Educ. of East Orange, 219 A.2d 200, 209 (N.J. Essex County Ct. 1966). The statute in question prohibited the infliction of unnecessary cruelty upon a living animal, but provided an exception for properly conducted scientific experiments. *Id.* at 202-203.

89. *Id.* at 208.

90. *Taub v. Maryland*, 463 A.2d 819, 819 (Md. 1983).

91. *Id.* at 819-820.

provide veterinary care for six of seventeen monkeys; the court of special appeals found him guilty of failing to provide care for only one monkey.⁹² The Appellate Court completely reversed, holding that the legislature never intended the animal cruelty statute to proscribe this type of activity under a federal program.⁹³

The intent, therefore, is for the AWA to exist alongside the state anti-cruelty statutes rather than preempt them or control them. This intent is normally achieved, especially when one considers that many state statutes have exceptions specifically for scientific research, leaving AWA the sole controlling law on animals used in research. Unfortunately, the AWA is largely ineffective at its task.

IV. Practical Enforcement of the AWA

*It doesn't take a Ph.D. in the sciences to grasp the fact that rodent exposure to the saccharin equivalent of 1,800 bottles of soda pop a day doesn't relate well to our daily ingestion of a few bottles of the stuff.*⁹⁴

Certainly a great many of the experiments on Animals have a valid purpose, especially in biomedical research. But what really *is* going on behind the laboratory doors? This is the real problem: cruel, and worse yet, unjustified experiments are slipping through the rather substantial cracks in the AWA. Consider an experiment in which dogs are strapped down with harnesses and subjected to electric shocks which they cannot escape; later when the same dogs are placed in a shuttlebox in which they are shocked through a steel grid on the floor causing the dogs to defecate, urinate and howl, rather than escape over a barrier to freedom, the dogs passively accept the shock.⁹⁵ Or, take experiments in which female monkeys reared in isolation were impregnated. Since they did not react normally sexually to male monkeys, the monkeys were placed on something that the scientists called the "rape rack."⁹⁶ Or, consider an experiment in which rhesus monkeys were taught to administer cocaine directly into their own bloodstream whenever they wanted and subsequently restrained in chairs. The monkeys became addicted to the

92. *Id.* at 820.

93. *Id.* at 822. The court held this because of language in the statute that said, "[i]t is the intention of the General Assembly that all animals shall be protected from intentional cruelty, but that no person shall be liable for criminal prosecution for normal human activities to which the infliction of pain to an animal is purely incidental and unavoidable." *Id.* at 821, quoting, MD. CODE ANN. § 59 (1976).

94. Dr. Elizabeth Whelan, quoted in, Singer, *supra* note 34, at 57. Dr. Whelan is a scientist and executive director of the American Counsel on Science and Health. *Id.*

95. *Id.* at 47.

96. *Id.* at 33.

cocaine and hit the button again and again, even in the midst of convulsions. They forwent sleep, ate five to six times their normal amount and still became emaciated. They engaged in self mutilation before ultimately dying of cocaine abuse.⁹⁷ Or think about thirty-six year old chimpanzee Donna's death at the Coulston Foundation, a federally funded research laboratory. She died after she carried her dead fetus in her uterus for nearly two months. She had a liter of pus in her peritoneal cavity and the head of the partially decomposed fetus showed through the tear in her ruptured uterus.⁹⁸

Certainly these experiments caused a great deal of pain and suffering for the animals involved, but one would hope that a very good scientific purpose inspired or justified them. Any person who dismays in seeing living beings suffer, but still believes that some suffering in medical and scientific research is justified when it leads to gains in human knowledge, would trust that these animals suffered for good reasons. The truth is unfortunately a bit different. The dogs in the electrified shuttlebox underwent that procedure in a psychological experiment on "learned helplessness" in hopes of learning about human depression.⁹⁹ However, Steven Maier, one of the proponents of the learned helplessness model admits that it appears "unlikely that learned helplessness is a model of depression in any general sense," effectively admitting that thirty years of animal experimentation which resulted in intense amounts of physical pain as well as taxpayer money have been wasted.¹⁰⁰ The anti-social female monkeys on the "rape rack" who carried fetuses to term had behavior which ranged from ignoring to crushing the infant's skulls with their teeth, and smashing their heads into the ground and then rubbing the face back and forth.¹⁰¹ The experimenter in charge of the monkeys who self-administered cocaine until they died admitted that "few people could afford the massive doses of cocaine these monkeys were able to obtain."¹⁰² And regarding Donna, whose reviewing veterinarian said that it was clear that she "suffered excruciating pain" before dying, her grisly death brought absolutely no scientific knowledge, as she did not die in the course of an experiment. She was used solely for breeding at the research facility.¹⁰³

What is the scientific community learning from these experiments? One example is quoted at the beginning of this section: that it is a bad

97. *Id.* at 66.

98. Swanson, *supra* note 2, at 937.

99. SINGER, *supra* note 34, at 47.

100. *Id.*

101. *Id.* at 34.

102. *Id.* at 67.

103. Swanson, *supra* note 2, at 937.

idea to ingest 1,800 bottles of soda in one day.¹⁰⁴ The pain these animals suffer at the hands of science is bad enough when researchers inflict it to make leaps in scientific knowledge. It is all the more gruesome when it actually leads to no helpful scientific gains.

Necessity and purpose is not the only problem with these experiments. Sometimes, even in an experiment with a bona fide purpose, non-human animals are simply not the correct test subject. Experiments on animals may fail to detect chemicals that cause cancer in people.¹⁰⁵ Exposure to arsenic increases the risk that a human will develop cancer, but does not have the same effect on animals.¹⁰⁶ Indications are that research on malaria and AIDS vaccinations would yield better results if it was performed on human volunteers than on animals.¹⁰⁷

Are more experiments legitimate than illegitimate? It is certainly possible. However, the undeniable fact that experiments like the ones discussed above are slipping through the cracks of the legislation indicate that there are serious flaws in the current law and the way that it is enforced.

V. Why Should Animals Count at All?

*When a man's love of his finery clouds his moral judgment, that is vanity. When he lets a demanding palate make his moral choices, that is gluttony. When he ascribes the divine will to his own whims, that is pride. And when he gets angry at being reminded of animal suffering that his own daily choices might help avoid, that is moral cowardice.*¹⁰⁸

In a televised exchange between Harvard philosopher Richard Nozick and several scientists involved in animal experimentation, including a Nobel laureate, Nozick asked if the fact that researchers expect that an experiment would kill hundreds of animals is ever regarded as a reason not to go forth with the experiment.¹⁰⁹ The answer was no. When Nozick asked, "Don't the animals count at all?" The response was, "Why should they?"¹¹⁰

The answer to that question is simple: because they have the

104. See *supra* note 94 and accompanying text.

105. SINGER, *supra* note 34, at 89.

106. *Id.*

107. *Id.*

108. MATTHEW SCULLY, DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY 121 (2002).

109. SINGER, *supra* note 34, at 75,

110. *Id.*

capacity to suffer.¹¹¹ Proponents of the use of animals in scientific experimentation cannot deny that animals suffer during the course of experimentation. In fact, to do so actually undermines their argument, because for the experiment to have scientific value, they must stress the similarities between the animal species and human beings.¹¹² This creates a sort of “Catch-22” in which proponents of experiments on animals must argue that animals are different from humans and, as a result of that difference, animals do not suffer in the same meaningful way, but simultaneously argue for enough similarities so that the results of the experiments have value in their application to humans. So, they argue instead that the utility of experiments on animals makes the suffering inflicted upon them worthwhile, that harming animals is necessary for human gain.¹¹³ It is odd that this argument, essentially a utilitarian one, would be made to justify animal experiments when it was Jeremy Bentham, one of the foremost utilitarian philosophers who uttered the famous and frequently quoted comment regarding animal cruelty, “[T]he question is not, Can they reason? Nor, Can they talk? But, Can they suffer?”¹¹⁴ One of the other foundational utilitarian philosophers, John Stuart Mill analogized the manner in which humans treat animals to human slavery.¹¹⁵

One of the arguments against giving animals greater rights than they actually have is that allowing greater rights to animals devalues the rights of humans.¹¹⁶ David R. Schnahann and Lori J. Polacheck argue that the concept of animal rights is linked to the idea that human beings have “a moral, legal or custodial duty to treat animals humanely,” and that this is a “gloss [that] allows the notion of rights for animals to appear mainstream and to elicit support across a broad spectrum.”¹¹⁷ Schnahann and Polacheck argue that the doctrine of “animal rightism” pays no heed to the importance with which we view human life, which

111. This is to a large degree a determination of ethical philosophy. Singer writes that during the course of Professor Nozick’s interview of the research scientists, one made the comment that he did not feel that experimenting on animals raised a moral issue at all. Singer comments that while these researchers may be excellent scientists, they are “philosophical ignoramuses.” *Id.* at 75-76. He goes on to write that he knows “of not a single professional philosopher writing today who would agree that it is meaningless or impossible to include animals in our ethical system or that experimenting on animals raises no moral issue. Such statements are, in philosophy, comparable to maintaining that the earth is flat.” *Id.* at 76.

112. *Id.* at 40.

113. David R. Schnahann & Lori J. Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 755 (1995).

114. *Quoted in*, Sunstein, *supra* note 9, at 388.

115. *Id.*

116. Schnahann & Polacheck, *supra* note 113, at 755.

117. *Id.* at 747.

“enables society to function in an orderly fashion,” and that this lack of regard takes away the value of human rights.¹¹⁸ They accuse those who favor animal rights of misanthropy, and ask that if animal life is sacred just as human life is, what is one to make of the arbitrary nature of animal life and death in the wild in which animals kill each other in accord with the doctrine of survival of the fittest.¹¹⁹

This argument that better treatment of animals actually devalues the lives of humans is a curious one, especially considering that those who are proponents of increased animal rights frequently make the exact opposite argument. Exposure to and acceptance of suffering of any kind makes one desensitized to suffering in general. One of the most renowned ethical philosophers, Immanuel Kant, hardly an animal rights activist, regarded animals as “man’s instruments,” but even he acknowledged that “he who is cruel to animals becomes hard in his dealings with men.”¹²⁰ Violations of animal cruelty statutes have a correlation to crime. In areas where animal humane officers and police have compared numbers, the correlation between domestic violence and violations of cruelty to animal statutes is anywhere from 50 to 100 percent.¹²¹ Authorities use abuse of animals to determine a propensity to violence against humans. There has long been a suggestion that serial killers begin by torturing and killing animals.¹²² And as prosecutor Joshua Marquis says, “If we don’t draw the line at animal cruelty, where do we draw the line at smacking our kids?”¹²³

Am I suggesting that scientific researchers who perform experiments on animals will become serial killers or abuse their spouses or children? Of course not; there is however, a suggestion that people simply become less receptive to suffering when they inflict it on a day to day basis. Let’s go back to the “rape rack.” Bear in mind that this was used in a psychology experiment that was testing effects on mothering abilities when the mother was raised in isolation.¹²⁴ For the experiment to have value from a psychological standpoint one has to accept the fact that the psychological states produced in the monkeys are similar to

118. *Id.* at 753.

119. *Id.* at 754. This argument fails to note, however, that in the year 2000, 15,517 humans were arbitrarily killed by other humans in the United States alone. Press Release, U.S. Department of Justice, Federal Bureau of Investigation, Crime Report 2000 (Oct. 22, 2001), <http://www.fbi.gov/pressrel/pressrel01/cius2000.htm>. Using Schmahmann and Polacheck’s argument, it is not clear if this fact decreases the value of human life or increases the value of animal life.

120. Sunstein, *supra* note 9, at 388.

121. Jacqueline Tresl, *The Broken Window: Laying down the Law for Animals*, 26 S. ILL. L.J. 277, 292 (2002).

122. *Id.*

123. *Quoted in, id.* at 293.

124. SINGER, *supra* note 34, at 33.

those in humans. It is bad enough that researchers have created a “clever” name for a procedure which involves forcibly impregnating a primate, who is presumably in a depressed psychological state. But more, beyond the individual animal, the procedure’s nickname undervalues the effects and seriousness of all rape in general. Furthermore, consider experiments done at the University of Pennsylvania’s Head Injury Clinical Research Laboratory, which involved accelerated impacts of animals’ heads in order to cause brain damage.¹²⁵ Videotapes take on the experiments showed the researchers neglectfully severing a baboon’s ear when trying to remove a helmet, smoking and using dirty equipment during surgery, and teasing and mocking the animals while conducting the experiments.¹²⁶ Instances such as these indicate that when people inflict suffering on living beings day in and day out, they become less receptive to it and less affected by it.

VI. Science as Sacred

*Science is . . . the talisman of truth, the means of finding the empirical Holy Grail.*¹²⁷

As mentioned above, tens of millions of animals die every year in biomedical research. Peter Singer asks,

How can these things happen? How can people who are not sadists spend their working days driving monkeys into lifelong depression, heating dogs to death, or turning cats into drug addicts? How can they remove their white coats, wash their hands, and go home to dinner with their families? How can taxpayers allow their money to be used to support these experiments? How did students carry on protests against injustice, discrimination, and oppression or all kinds, no matter how far from home, while ignoring the cruelties that were—and still are—being carried out on their own campuses?¹²⁸

Certainly the lack of enforcement and the inadequacy of existing laws and the notion of animals as property are part of the answer to Mr. Singer’s questions, but they are not the only answer. Beyond the law and society’s attitude about animals is the fundamental way society views science itself.

There is of course a question of the appropriateness of having

125. Swanson, *supra* note 2, at n.35.

126. *Id.*

127. Thomas G. Kelch, *Animal Experimentation and the First Amendment*, 22 W. NEW ENG. L. REV. 467, 492 (2001).

128. SINGER, *supra* note 34, at 69.

government officials assess the validity of science. The AWA has an exception written into it for this.¹²⁹ Furthermore, who are judges, whose domain is the law, to assess the validity of the choices of scientists? Some argue that because of the nature and importance of science, it is not, nor should it be, regulated in the same manner as other conduct; therefore, behavior that would be considered illegal animal cruelty for most is not only non-criminal for a scientist, but actually is viewed as laudable and necessary for the advancement of society.¹³⁰ The public tends to view science as a means for finding the "Ultimate Truth," the be-all, end-all answer to life's questions. As a result, when science is involved, the ends always justify the means.¹³¹

This view of science, however, may be an inaccurate oversimplification. According to Law Professor Thomas Kelch, science is actually "a human process," and the results of these processes are affected by all the human decisions that go into them.¹³² As a result of these choices, there is a degree of arbitrariness to the results.¹³³ Science is ultimately a sociological process "infected with personal and social prejudices, as well as the uncertainty common to all human endeavors."¹³⁴ There is nothing about science and its methods that make it somehow better and more laudable than all other human endeavors. It is no more a noble pursuit of the "Ultimate Truth" than law, philosophy, faith, or other human endeavors. As a result, it is no more worthy of being placed on a pedestal away from the rulings of judges and legislators as any other pursuit. As Peter Singer succinctly writes, "there is nothing sacred about the pursuit of knowledge."¹³⁵

VII. What Can We Do to Actually Promote Animal Welfare?

*Suppose we could reach a point at which the interests of animals really were given equal consideration with the similar interest of human beings. That would mean the end of the vast industry of animal experimentation as we know it today.*¹³⁶

129. 7 U.S.C. § 2143(6)(A) (1999) provides that nothing in the AWA should be construed as authorizing the Secretary to create regulations regarding the actual research at the facility. Furthermore, the Secretary is not authorized to interrupt the actual research or experimentation. *Id.* The statute is extremely deferential to science in general.

130. Kelch, *supra* note 127, at 469.

131. *Id.*

132. *Id.* at 493.

133. *Id.*

134. *Id.* at 498.

135. SINGER, *supra* note 34, at 92.

136. *Id.* at 87.

There are certainly delicate interests that need to be balanced here, making articulation of a solution difficult at best. Alleviation of animal suffering must be weighed against scientific and medical advancements. First and perhaps foremost, existing law must be enforced, but also, changes should be implemented to current federal and state laws.

The first change is that rather than focusing solely on the humans involved in the lives of the animals, the AWA should focus on the suffering of animals.¹³⁷ While the AWA provides for humane treatment of animals, none of its stated purposes involve alleviation of animal suffering. As a result, the law's concern is only for animals that have a connection to a human. It is the human's suffering—for example the pet owner whose dog is stolen for research purposes—that concerns the law. An animal that is not someone's pet can suffer needlessly, and as long as there is no human being to care about it, the legislature and judiciary will sit idly by. In order to change this, one of the purposes of the Animal Welfare Act should actually be Animal Welfare.

Furthermore, federal law should require that researchers justify their experiments on animals by demonstrating in front of a committee or board that first, the experiments proposed are actually necessary or promising and second, that the researchers will make every effort they can to insure that the animals will suffer the least amount possible.¹³⁸ Under the AWA, there is a provision requiring that each research facility establish a committee appointed by the chief executive officer of the research facility.¹³⁹ This committee exists to serve society's concerns regarding the welfare of animals used in the facility.¹⁴⁰ The problem with the current law is threefold: First, the committee is concerned only with society's interest and has no concern for the interest of the animal; second, the CEO of the research facility appoints the committee, rather than a party outside of the facility; and finally, the committee's purpose is merely to insure compliance with the AWA. Ideally, parties not affiliated with the facility should appoint the committee. Additionally, it should be created to serve the interests of society and the animals. Finally, its purpose should be to insure the validity of the purpose of the experiment and that researchers use the least painful methods, rather than merely insuring compliance with the AWA.

137. Sunstein, *supra* note 9, at 393.

138. *Id.* at 392.

139. 7 U.S.C. § 2143(1) (1999). This committee must have at least one doctor of veterinary medicine and at least one member not affiliated with the facility. The appointed members should possess adequate abilities to assess animal care, treatment and practices in research. *Id.* The committee must inspect at least "semiannually" practices involving pain to animals and the condition of the animals, in order to insure compliance with the AWA. *Id.*

140. *Id.*

The law needs to address the problems of standing and non-disclosure. More petitioners, beyond those who have some causal connection to animals in research facilities, should be able to establish standing. Furthermore, companies involved in research should have to disclose exactly what experiments are done to animals.¹⁴¹ That way, companies that protect animals from suffering might experience an increase in market share, and accordingly, companies that are needlessly cruel would potentially suffer from protesting consumers.¹⁴² Professor Sunstein writes that part of the problem is the “sheer ignorance” of the public at large regarding what is actually happening to animals.¹⁴³ Professor Sunstein is “confident that much greater regulation would be actively sought if current practices were widely known.”¹⁴⁴

VIII. Conclusion

*We are in the midst of an emergency in which appalling suffering is being inflicted on millions of animals for purposes that on any impartial view are obviously inadequate to justify the suffering.*¹⁴⁵

In the United States alone, millions of animals are suffering yearly, and the law turns a blind eye to them. In theory, this suffering is to promote scientific knowledge; in practice, many of these experiments serve no valid purpose. Current animal welfare law is more concerned with the welfare of human beings than the short and grim lives of many research animals. This suffering can, and should, be avoided with better laws that focus on the actual welfare of the animals. Society needs to reshape its attitude toward both animals and science. Animals are not mere property, and science is not sacred. The sooner we as a society accept this, the sooner we can have animal welfare laws that actually regulate the welfare of animals. If the law pays less deference to science, animals won't have to needlessly suffer at the hands of researchers conducting pointless experiments. After all, alleviation of pointless suffering is always a noble end.

141. Sunstein, *supra* note 9, at 393.

142. *Id.*

143. *Id.*

144. *Id.*

145. SINGER, *supra* note 34, at 85.