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## COMMENT

# THE ANIMAL ENTERPRISE TERRORISM ACT: THE NEED FOR A WHISTLEBLOWER EXCEPTION

### INTRODUCTION

Congress enacted the Animal Enterprise Terrorism Act (AETA or the Act) with the belief that certain commercial and institutional enterprises were in need of increased protection from violent attacks. The purpose of the Act was a limited one: to increase protections against perceived threats of terrorism. The statute's language, however, is broad, and the bill was passed against a backdrop of concerns that its language would be used to curb traditionally protected activities, including whistleblowing. Because no court has extensively analyzed the Act, these concerns persist.

The scope of this Comment is limited.<sup>1</sup> It argues that, as AETA's opponents have pointed out, a literal reading of AETA's terms may force the conclusion that AETA prohibits certain acts of whistleblowing. A more scrutinizing analysis, however, reveals that the Act was never intended to halt acts of whistleblowing. AETA's drafters, rather, were concerned solely with prohibiting domestic-terrorism threats. Courts interpreting AETA must effectuate its full legislative intent by narrowing its application and resisting the temptation to apply the Act to whistleblowing, even if those actions fall within the technical language of the statute.

In addition to effectuating the legislative intent of the statute, other factors also compel an interpretation of the Act that goes beyond its plain terms. First, United States Department of Agriculture (USDA)

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<sup>1</sup> I have performed a more exacting analysis of the Animal Enterprise Terrorism Act elsewhere. See Michael A. Hill, Note, *United States v. Fullmer and the Animal Enterprise Terrorism Act: "True Threats" to Activism*, 61 CASE W. RES. L. REV. (forthcoming 2011).

inspectors, animal enterprise employees, and the American public rely on whistleblowers to aid the enforcement of state and federal anti-cruelty laws. Second, there is an extensive and growing record of animal-cruelty and food-safety-law violations by factory farms, slaughterhouses, and processing plants. Because of the USDA's poor record of enforcement,<sup>2</sup> a history of retaliation against insiders who speak out, and an industry-wide refusal to self-regulate,<sup>3</sup> the American public is dependant on whistleblowers to protect the integrity of America's food supply.<sup>4</sup>

## I. THE ANIMAL ENTERPRISE TERRORISM ACT

### A. *Brief History of the Animal Enterprise Terrorism Act*

Critics have questioned the Act's scope and breadth since its inception.<sup>5</sup> In 1992, after approximately two decades of antagonistic relations between animal-protection advocates and medical researchers, Congress enacted the Animal Enterprise Protection Act (AEPA).<sup>6</sup> AEPA made it a federal crime to use interstate commerce to cause a physical disruption to the functioning of an animal enterprise.<sup>7</sup> The legislative intent was clear: to protect certain commercial and institutional enterprises from threats of domestic terrorism.<sup>8</sup> The language used to carry out this aim was less clear, however. AEPA defined an "animal enterprise" as any organization classifiable as either:

(A) a commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing;

<sup>2</sup> See discussion at *infra* notes 170–90.

<sup>3</sup> See discussion at *infra* notes 190–201.

<sup>4</sup> See discussion at *infra* notes 202–219.

<sup>5</sup> See Laura G. Kniaz, Comment, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 Buff. L. Rev. 765, 819–21 (1995) (noting that an earlier version of AEPA, entitled the Farm Animals and Research Facilities Protection Act, met resistance on various fronts when it was introduced to Congress, including that it was duplicative of state criminal laws, and that its breadth and scope of application were undefined).

<sup>6</sup> Pub. L. 102-346, 106 Stat. 928 (1992) (codified as amended at 18 U.S.C. § 43 (2006)).

<sup>7</sup> 18 U.S.C. § 43(a)(1)–(2) (2006).

<sup>8</sup> See H.R. REP. NO. 102-498(II), at 2 (1992), *reprinted in* 1992 U.S.C.C.A.N. 816, 816 (“The purpose is to protect enterprises using animals from domestic terrorism by individuals or groups who object to the use of animals by medical researchers or commercial enterprises.”); see also H.R. REP. NO. 102-498(I), at 4 (1992), *reprinted in* 1992 U.S.C.C.A.N. 805 (“[The Act] is intended to . . . protect[] persons employed at such facilities from acts of violence and destruction.”).

(B) a zoo, aquarium, animal shelter, pet store, breeder, furrier, circus, or rodeo, or other lawful competitive animal event; or

(C) any fair or similar event intended to advance agricultural arts or sciences.<sup>9</sup>

This expansive definition did not include any additional qualifications, like a requirement that the enterprise employ a threshold number of employees or devote a certain percentage of their efforts to the use of animals.<sup>10</sup> Because of the lack of clarifying language, AEPA was potentially applicable to individuals or companies who use animals or animal products in only a limited capacity.<sup>11</sup>

In addition to broadly defining an animal enterprise, Congress further complicated the statute's interpretation by relying on the ambiguous term "physical disruption" as the triggering conduct.<sup>12</sup> Despite the fact that AEPA's legislative history had previously established that whistleblowers were not the bill's target, the term "physical disruption" left room for interpretation.<sup>13</sup> Specifically, the House Judiciary Committee recognized that the term was susceptible to multiple, conflicting interpretations.<sup>14</sup> The Committee expressed concerns that, without greater clarification, AEPA could be used to prosecute whistleblowers.

Regulators, humane societies, and labor unions rely on whistleblowers and legitimate undercover investigations to police conditions at food and fiber processing facilities and determine compliance with animal welfare and labor laws. . . . The ambiguous term "physical disruption" is not defined, and could be construed to make criminal whistleblowing activity that results in a facility being shut down by regulators or protests. At best, this would have chilled whistleblowing; at worst, it could have resulted in actual prosecutions of whistleblowers. The bill reported by the Judiciary Committee is intended to avoid criminalizing

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<sup>9</sup> 18 U.S.C. § 43(d)(1)(A)-(C).

<sup>10</sup> *Id.*

<sup>11</sup> See H.R. REP. NO. 102-498(II), at 2 (1992), as reprinted in 1992 U.S.C.C.A.N. 816 (seeking to amend the bill to restrict coverage to specific entities most likely to be subjected to acts of violence).

<sup>12</sup> Animal Enterprise Control Act, Pub. L. 102-346, 106 Stat. 928 (1992).

<sup>13</sup> See H.R. REP. NO. 102-498(I), at 3 (1992), as reprinted in 1992 U.S.C.C.A.N. 805 ("Nothing in this subtitle shall be construed to affect or limit the exercise of any right granted by State or Federal whistleblower protection laws").

<sup>14</sup> H.R. REP. NO. 102-498(II), at 4 (1992), reprinted in 1992 U.S.C.C.A.N. 816.

whistleblowing activity and legitimate undercover investigations.<sup>15</sup>

As a result, Congress followed the Committee's recommendation and defined "physical disruption."<sup>16</sup> But the definition failed to fully remedy the statute's ambiguity.<sup>17</sup> The definition provided only that "the term 'physical disruption' does not include any lawful disruption that results from lawful public, governmental, or animal enterprise employee reaction to the disclosure of information about an animal enterprise."<sup>18</sup> Congress, however, did not include any illustration of what constituted a "lawful disruption."<sup>19</sup> Thus, the definition failed to provide the necessary clarity, and concerns about the statute's scope remained.<sup>20</sup>

On November 27, 2006, President George W. Bush signed AETA<sup>21</sup> into law. AETA is a controversial amendment that expands AEPA in three fundamental ways. First, it replaces the term "physical disruption" with the broader term "interfering."<sup>22</sup> Second, it increases the number of entities covered by AETA to include not only the animal enterprise itself but also "any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise."<sup>23</sup> Third, it creates an independent source of liability for any individual who, by interfering with an animal enterprise, places a person in reasonable fear of death or bodily injury.<sup>24</sup> AETA also retains the broad definition of "animal enterprise."<sup>25</sup>

### *B. The Potential Effect on Whistleblowers*

Prior to AETA's enactment, critics feared that a plain, technical reading of AETA would convert traditional acts of whistleblowing

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

<sup>16</sup> Animal Enterprise Control Act, Pub. L. 102-346, 106 Stat. 928 (codified at 18 U.S.C. § 43(d)(2)).

<sup>17</sup> *See id.*

<sup>18</sup> *Id.*

<sup>19</sup> The Animal Enterprise Protection Act has withstood a facial constitutional challenge on vagueness grounds, however. *See United States v. Fullmer*, 584 F.3d 132, 153 (3d Cir. 2009) ("[T]he term 'physical disruption' has a well-understood, common definition.")

<sup>20</sup> *See generally* Kniaz, *supra* note 5 (discussing debates regarding AEPA's scope and breadth).

<sup>21</sup> 18 U.S.C. § 43.

<sup>22</sup> *Id.* § 43(a)(1).

<sup>23</sup> *Id.* § 43(a)(2)(A).

<sup>24</sup> *Id.* § 43(a)(2)(B). The statute's language does not specifically require that the person placed in reasonable fear of death or bodily injury have any connection to an animal enterprise. *See id.*

<sup>25</sup> *Id.* § 43(d)(1)(A)–(C); *see also supra* text accompanying note 9.

into a federal offense.<sup>26</sup> Like the term “physical disruption,” the term “interfering” is capable of multiple, conflicting interpretations. Courts have concluded that “[t]o ‘interfere’ is to ‘oppose, intervene, hinder, or prevent.’”<sup>27</sup> The legal-dictionary definition of “interfere” is equally broad. To interfere is “[t]o check; hamper; hinder; infringe; encroach; trespass; disturb; intervene; intermeddle; interpose. To enter into, or take part in, the concerns of others.”<sup>28</sup> Moreover, courts have interpreted “interfere” as pertaining to both conduct and speech.<sup>29</sup> Under any of the above interpretations, it is plausible that an individual who exposes the wrongdoings of an animal enterprise for the purpose of imposing sanctions has intentionally “interfered” with the enterprise.

AETA provides that whoever interferes with an animal enterprise and causes damage in excess of ten-thousand dollars to property, which includes the removal of animals or records, has satisfied the elements of the Act.<sup>30</sup> In many instances, the only evidence of criminal or regulatory violations exists in these records, which a whistleblower must then remove to prove that a violation has occurred.<sup>31</sup> In other cases, the best evidence of wrongdoing lies in the physical condition of the animal itself.<sup>32</sup> If an individual removes property in the form of records or animals from an animal enterprise for the purpose of exposing wrongdoing, it is conceivable that the elements of the Act have been met.<sup>33</sup>

Concerns that AETA would be used by law enforcement to prohibit well-intentioned acts dominated congressional hearings.

<sup>26</sup> See, e.g., 152 CONG. REC. H8593–94 (2006) (statement of Rep. Dennis Kucinich) (arguing that AETA’s language chills speech and potentially prohibits whistleblowing that interferes with an animal enterprise).

<sup>27</sup> *United States v. Willfong*, 274 F.3d 1297, 1301 (9th Cir. 2001) (citing WEBSTER’S NEW WORLD DICTIONARY 704 (3d College ed. 1998)).

<sup>28</sup> BLACK’S LAW DICTIONARY 814 (6th ed. 1990).

<sup>29</sup> See, e.g., *Dorman v. Satti*, 678 F. Supp. 375, 381 (D. Conn. 1988), *aff’d* 862 F.2d 432 (2d Cir. 1988) (invalidating a portion of the Hunter Harassment Act that prohibited interfering with the lawful pursuit or preparation or hunting because it encompassed both acts and speech).

<sup>30</sup> See 18 U.S.C. § 43(a)(2)(A).

<sup>31</sup> See, e.g., TOM L. BEAUCHAMP ET AL., *Head Injury Experiments on Primates at the University of Pennsylvania*, in THE HUMAN USE OF ANIMALS: CASE STUDIES IN ETHICAL CHOICE 177, 178 (2d ed. 2008) [hereinafter *Head Injuries*] (describing the theft of documents at the University of Pennsylvania that revealed callous researchers performing experiments on baboons, which was a major impetus for the 1985 amendments to the Animal Welfare Act).

<sup>32</sup> See, e.g., *Int’l Primate Prot. League v. Inst. for Behavioral Research, Inc.*, 799 F.2d 934, 936 (4th Cir. 1986) (noting that the physical condition of the monkeys used in experiments indicated numerous violations of animal cruelty laws); see also James J. Kilpatrick, *Caged in Poolesville*, WASH. POST, May 12, 1986, at A15 (describing the conditions in the *Int’l Primate Prot. League* case); Robert Reinhold, *Fate of Monkeys, Deformed for Science, Causes Human Hurt After 6 Years*, N.Y. TIMES, May 23, 1987, at A8 (relating issues of cruelty in the *Silver Springs* case).

<sup>33</sup> 18 U.S.C. § 43(a)(1)–(2).

Members of the press argued, “[t]his legislation . . . will force Americans to decide if speaking up for animals is worth the risk of being labeled a ‘terrorist,’ either in the media or in the courtroom.”<sup>34</sup>

Dennis Kucinich (D-OH) argued that AETA

paint[s] everyone with the broad brush of terrorism who might have a legitimate objection to a type of research or treatment of animals that is not humane. . . . This bill is written in such a way as to have a chilling effect on the exercise of peoples’ first amendment rights.<sup>35</sup>

Long after the debates and the congressional hearings have ended, concerns regarding the potential enforcement of AETA against whistleblowers remain. After an undercover investigator associated with the Humane Society of the United States videotaped nonambulatory cows so diseased that they could not stand being forced to slaughter in violation of USDA regulations, the USDA recalled 143 million pounds of ground beef, the largest recall in American history.<sup>36</sup> The author of a *New York Times* article expressed concern that because of the size of the recall and the economic harm it caused, AETA would be used to prosecute the investigator.<sup>37</sup>

### *C. Effectuating the Legislative Intent of AETA*

A literal reading of AETA’s terms alone may proscribe the removal of records or animals for the purpose of whistleblowing.<sup>38</sup> To date, no court has had the opportunity to interpret the Act as it pertains to whistleblowing, but when the opportunity arises, courts should read beyond AETA’s terms in order to effectuate the statute’s purpose.<sup>39</sup> It is a maxim of statutory interpretation that where

<sup>34</sup> *Animal Enterprise Terrorism Act: Hearing on H.R. 4239 Before the Subcomm. on Crime, Terrorism and Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. (2006) (statement of William Potter, Journalist).

<sup>35</sup> 152 Cong. Rec. H8593 (2006) (statement of Rep. Dennis Kucinich).

<sup>36</sup> See BETTY FUSSELL, RAISING STEAKS: THE LIFE AND TIMES OF AMERICAN BEEF 269 (2008) (discussing the recall of beef due to health concerns arising from animal rights activists’ undercover operations).

<sup>37</sup> See Kim Severson, *Upton Sinclair, Now Playing on YouTube*, N.Y. TIMES, Mar. 12, 2008, at F1 (discussing the possibility of AETA litigation).

<sup>38</sup> See *supra* text accompanying notes 26–33.

<sup>39</sup> See *Gulf States Steel Co. v. U.S.*, 287 U.S. 32, 45 (1932) (“When possible, every statute should be rationally interpreted with the view of carrying out the legislative intent.”); *Hodges v. Rainey*, 533 S.E.2d 578, 581 (S.C. 2000) (“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.”); Arthur W. Murphy, *Old Maxims Never Die: The “Plain-Meaning Rule” and Statutory Interpretation in the “Modern” Federal Courts*, 75 COLUM. L. REV. 1299, 1299 (1975) (“the function of a court when dealing with a statute is to ascertain and effectuate the intention of the legislature.”).

Congress has used language that is susceptible to multiple, conflicting meanings, courts must effectuate the intent of the legislature by reading beyond the statute's plain language.<sup>40</sup> From its inception, AETA was concerned solely with prohibiting violence against animal enterprises and their employees.<sup>41</sup> Congress never intended to prohibit whistleblowing. In fact, it specifically addressed and attempted to remedy those portions of the statute that tended to inhibit whistleblowing.<sup>42</sup> After recognizing that the term "physical disruption" was ambiguous and "could be construed to criminalize whistleblowing activity that results in a facility being shut down by regulators or protests," Congress responded by including a limiting definition.<sup>43</sup> Hence, the statute was never aimed at hindering whistleblowing, whatever its form.

The debates and testimony surrounding the 2006 amendments were equally unconcerned with prohibiting whistleblowing. Rather, the promoters of the bill argued that the increased scope was aimed specifically at thwarting "domestic terrorism threats"<sup>44</sup> and "multi-state campaigns of intimidation."<sup>45</sup> AETA's promoters argued that its sole purpose was preventing violent attacks by extremists, which could one day result in the loss of a human life.<sup>46</sup> There is simply no evidence that Congress amended AEPA to inhibit whistleblowing or other traditionally protected activities.<sup>47</sup> The Department of Justice emphasized this point when, in the course of lobbying for the

<sup>40</sup> See *U.S. v. McNab*, 331 F.3d 1228, 1238 (11th Cir. 2003) (finding that because the word "law" in the Lacey Act was susceptible to competing, reasonable interpretations, the court must look to the legislative history of the statute to determine Congress's intended purpose in enacting the law to determine the proper meaning of the term).

<sup>41</sup> H.R. REP. NO. 102-498(I), at 3 (1992), reprinted in 1992 U.S.C.C.A.N. 805 ("Nothing in this subtitle shall be construed to affect or limit the exercise of any right granted by State or Federal whistleblower protection laws . . .").

<sup>42</sup> H.R. REP. NO. 102-498 (II), at 4 (1992) (stating that the Bill was not meant to encompass whistleblowing).

<sup>43</sup> *Id.*

<sup>44</sup> *Eco-terrorism Specifically Examining the Earth Liberation Front and the Animal Liberation Front, Hearing Before the S Comm. on Env. and Pub. Works*, 109th Cong. 41 (2005) (statement of John E. Lewis, Deputy Assistant Director, Federal Bureau of Investigation) ("The written testimony provided to the Committee Referred to eco-terrorism as one of the most serious domestic terrorism threat in the United States today . . .").

<sup>45</sup> *Id.* at 13. Mr. Lewis elaborated: "[O]ne of our greatest challenges has been the lack of Federal criminal statutes to address multi-state campaigns of intimidation. . . . Therefore, the existing statutes may need refinements. . . ." *Id.* at 39-40.

<sup>46</sup> *Id.* at 3 (statement of Sen. James M. Inhofe) [hereinafter *Inhofe Statement*] ("Experts agree that although they have not killed anyone to date, it is only a matter of time until someone dies as a result of ELF and ALF criminal activity.")

<sup>47</sup> *Animal Enterprise Terrorism Act: Hearing on H.R. 4239 Before the Subcomm. On Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 5-7 (2006) (statement of Brent McIntosh, Deputy Assistant Attorney General, United States Department of Justice).

amendments, it assured Congress that the amendments were not intended to “prohibit or discourage the protected activities of whistleblowers, protestors, and leafleters.”<sup>48</sup>

Despite legitimate concerns that AETA’s language renders it susceptible to abuse and misinterpretation, Congress did not intend to hinder whistleblowing or other traditionally protected activities. A reviewing court seeking to effectuate AETA’s intent must read beyond the bare terms and apply its penalties cautiously. Aside from the legislative intent, the fact that the USDA, animal-enterprise employees, and the American public rely on whistleblowers to ensure compliance with anti-cruelty laws and maintain the integrity of the food supply compels the conclusion that AETA should not be enforced against whistleblowers.

## II. THE ANIMAL WELFARE ACT, USDA ENFORCEMENT, AND THE PROBLEM OF STANDING

### *A. Brief History of the Animal Welfare Act*

The Animal Welfare Act<sup>49</sup> is the core piece of federal legislation aimed at regulating the use of millions of animals. In the early 1960s, the public became increasingly aware that animal dealers were stealing family pets and researchers were subsequently using those pets in experimentation. Two closely occurring events spurred the federal legislative push for tighter restrictions on the use of animals. In 1965, a United States Representative contacted an animal dealer about a missing Dalmatian believed to be on the dealer’s property.<sup>50</sup> Troubled by the dealer’s lack of concern for the animal’s welfare and whereabouts, he introduced a bill into Congress aimed at prohibiting the theft of companion animals for research.<sup>51</sup> Then, in 1966, *Life* magazine profiled Lucky, an emaciated and frightened English Pointer who was purchased at auction for three dollars.<sup>52</sup> Lucky was sold to a laboratory for experimentation<sup>53</sup> and was one of approximately two-million dogs used for research each year,<sup>54</sup> An astonishing half of these dogs were, like Lucky, family pets stolen by

<sup>48</sup> *Id.* at 10.

<sup>49</sup> 7 U.S.C. § 2131 (2006).

<sup>50</sup> Joseph Mendelson, III, *Should Animals Have Standing? A Review of Standing Under the Animal Welfare Act*, 24 B.C. ENVTL. AFF. L. REV. 795, 796 (1997).

<sup>51</sup> *Id.*

<sup>52</sup> Stan Wayman, *Concentration Camps for Dogs*, LIFE, Feb. 4, 1966, at 22 (prior to the publication Congress had eight bills pending).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

professional “dognappers.”<sup>55</sup> The article described in vivid detail the deplorable conditions in which dealers “simply dispose of their packs at auction where the going rate for dogs is 30 cents a pound. Puppies, often drenched in their own vomit, sell for 10 cents apiece.”<sup>56</sup> The article generated more letters to Congress than any other issue at the time, including the Vietnam War.<sup>57</sup>

The legislature generally conceded that state laws were incapable of regulating the mass quantity of animals demanded by the federal government’s research program.<sup>58</sup> Fueled by public outcry and the pervasiveness of abuse revealed during Congressional hearings,<sup>59</sup> Congress enacted the Laboratory Animal Welfare Act (LAWA).<sup>60</sup> LAWA’s stated objective was to protect owners of companion animals by requiring animal dealers to obtain licenses and imposing penalties on laboratories that purchase animals from unlicensed dealers.<sup>61</sup> Ensuring minimum standards of humane treatment was a secondary purpose.<sup>62</sup>

Four years after initial promulgation, Congress revisited LAWA to respond to the public’s concerns that it did not sufficiently protect animal welfare.<sup>63</sup> That year, Congress passed the Animal Welfare Act of 1970 (AWA),<sup>64</sup> which amended LAWA. In enacting the AWA, Congress recognized that animals have a right to certain basic necessities.<sup>65</sup> To ensure that these needs were met, the Secretary of

<sup>55</sup> *Id.* (citing estimates provided by the Humane Society of the United States).

<sup>56</sup> *Id.*

<sup>57</sup> EMILY STEWART LEAVITT, *ANIMALS AND THEIR LEGAL RIGHTS: A SURVEY OF AMERICAN LAWS FROM 1641 TO 1968*, at 48–49 (1968).

<sup>58</sup> *See* S. REP. NO. 89-1281, at 4–6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2635, 2636 (“The demand for research animals has risen to such proportions that a system of unregulated dealers is now supplying hundreds of thousands of dogs, cats, and other animals to research facilities each year. . . . Stolen pets are quickly transported across State lines, changing hands rapidly . . . [and] State laws . . . proved inadequate both in the apprehending and conviction of the thieves who operate in the interstate operation . . . .”); *see also* Mendelson, *supra* note 50, at 797 (discussing the inadequacy of state laws).

<sup>59</sup> *See* S. REP. NO. 89-1281 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2635, 2635.

<sup>60</sup> Laboratory Animal Welfare Act, Pub. L. No. 89-544, 80 Stat. 350 (1966) (codified as amended at 7 U.S.C. § 2131 (2006)) (authorizing the Secretary of Agriculture to regulate the transportation, sale, and handling of animals intended to be used for research or experimentation).

<sup>61</sup> *See* 7 U.S.C. §§ 2133–34.

<sup>62</sup> § 2131, 80 Stat. at 350 (noting that primary purpose was to protect theft of companion animals).

<sup>63</sup> *See* 116 Cong. Rec. 40,159 (1970) (statement of Rep. Wilmer Mizell).

<sup>64</sup> Pub. L. No. 91-579, 84 Stat. 1560 (1970) (codified as amended at 7 U.S.C. § 2131 (2006)).

<sup>65</sup> *See* H.R. REP. NO. 91-1651 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5103, 5104. The Act provides that “animals should be accorded the basic creature comforts of adequate housing, ample food and water, reasonable handling, decent sanitation, sufficient ventilation, shelter from extremes of weather and temperature, and adequate veterinary care including the appropriate use of pain-killing drugs.” *Id.*

Agriculture was required to issue regulations establishing that animals receive “adequate housing, ample food and water, reasonable handling, decent sanitation, [and] sufficient ventilation.”<sup>66</sup> The amendment was a self-proclaimed embodiment of Congress’s continuing commitment “to the ethic of kindness.”<sup>67</sup> Despite this commitment, however, Congress remained reluctant to place significant limitations on the actual use of animals in research and experimentation. Under the bill, regulators did not have the power to interfere with research or experimentation because “the research scientist still holds the key to the laboratory door.”<sup>68</sup>

Following the 1970 amendments, Congressional hearings continued to demonstrate widespread animal abuse.<sup>69</sup> As a result, Congress further amended the AWA in 1976.<sup>70</sup> The 1976 amendments had three objectives: (1) to prevent animal abuse during transportation; (2) to expand the scope of the term “animal”; and (3) to curtail animal fighting for sport.<sup>71</sup>

The last meaningful revisiting of the AWA occurred in 1985, after whistleblowers removed videotapes of experiments performed on baboons at the University of Pennsylvania Head Injury Clinic.<sup>72</sup> The videotapes revealed that researchers had developed a contraption designed to produce head injuries in baboons.<sup>73</sup> Video footage depicted the contraption striking the skulls of alert baboons at two thousand times the force of gravity as researchers mocked the animals.<sup>74</sup> Congress enacted the Improved Standards for Laboratory Animals Act (ISLAA)<sup>75</sup> in the direct aftermath of the events.<sup>76</sup>

<sup>66</sup> *Id.*

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

<sup>68</sup> *Id.*

<sup>69</sup> 122 CONG. REC. 2860 (1976) (statement of Rep. Thomas Foley) (arguing that, despite the 1970 law, “no substantial progress has been made toward the solution of [the animal abuse] problem”).

<sup>70</sup> See Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, 90 Stat. 417 (1976).

<sup>71</sup> *Id.* § 2131, 90 Stat. at 417.

<sup>72</sup> See *Head Injuries*, *supra* note 31, at 177–80.

<sup>73</sup> *Id.* at 178.

<sup>74</sup> See *id.*

<sup>75</sup> Improved Standards for Laboratory Animals Act, Pub. L. No. 99-198, § 1759, 99 Stat. 1645 (1985) (codified as amended at 7 U.S.C. § 2131 (2006)) (clarifying and amending the Animal Welfare Act in an attempt to improve the treatment of laboratory animals).

<sup>76</sup> See *Animal Legal Defense Fund v. Glickman, Inc.*, 204 F.3d 229, 231 (D.C. Cir. 2000) (“In 1985 Congress passed the Improved Standards for Laboratory Animals Act amending the Animal Welfare Act of 1966.”) (citation omitted); DEBORAH RUDACILLE, *THE SCALPEL AND THE BUTTERFLY: THE CONFLICT BETWEEN RESEARCH AND ANIMAL PROTECTION* 157 (2001) (“The 1985 amendments (Improved Standards for Laboratory Animals Act), passed in the wake of the University of Pennsylvania Head Injury Clinic debacle . . .”).

The ISLAA broadened the definition of “animal” and reflected Congress’s goal of promoting the three R’s of research: “reduction in the number of animals used, refinement of cruel techniques, and replacement of animals with plants and computer simulations.”<sup>77</sup> The amendments sought to meet these goals by requiring: (1) the use of tranquilizers, analgesics, and anesthetics; (2) the principal researcher to consider any technique likely to cause pain or distress; (3) veterinary consultation regarding research protocols likely to cause pain; and (4) the performance of only one major operation on an animal, unless further operations were considered a scientific necessity.<sup>78</sup> The ISLAA also created Institutional Animal Care and Use Committees (IACUC), an internal review mechanism aimed at increasing the oversight and welfare of animals used in research.<sup>79</sup>

### *B. The Challenges of USDA Regulation*

Since its inception, the AWA has been underenforced. Though the USDA is the lead federal agency charged with enforcing the AWA,<sup>80</sup> it has never felt fully suited for this role.<sup>81</sup> As Secretary of Agriculture Orville Freeman expressed in a 1966 letter:

In respect to animals, the functions of this Department relate basically to livestock and poultry. Accordingly, there is a question as to whether it would not be desirable that a law such as that in question be administered by a Federal agency more directly concerned and having greater expertise with respect to the subject than this Department.<sup>82</sup>

In response to the proposed 1970 amendments, the USDA supported the impending legislation, but again expressed concerns about its role as the lead enforcement agency.<sup>83</sup> The USDA attempted to have the Department of Health, Education, and Welfare act as

<sup>77</sup> 137 CONG. REC. 8533 (1991) (statement of Rep. Lee Hamilton).

<sup>78</sup> See S. REP. NO. 99-145, at 593 (1985), *reprinted in* 1985 U.S.C.C.A.N. 731, 746.

<sup>79</sup> See *infra* text accompanying notes 130–42.

<sup>80</sup> 7 U.S.C. § 2131 (2006).

<sup>81</sup> Letter from Secretary of Agriculture Orville L. Freeman to Senator Warren G. Magnuson, Chairman of the Committee on Commerce (Mar. 25, 1966) *in* S. REP. NO. 89-1281 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2635, 2643. (“[T]he application of this bill should be limited to the care and handling of dogs and cats by dealers. The care and use of such animals within research facilities pose more difficult problems.”).

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

<sup>83</sup> See Letter from J. Phil Campbell, Under Secretary of Agriculture, to Rep. W.R. Poage, Chairman of the House Committee on Agriculture (June 9, 1970), *in* H.R. REP. NO. 91-1651, *reprinted in* 1970 U.S.C.C.A.N. 5103, 5105–06.

enforcer of the AWA.<sup>84</sup> However, Congress had considered and rejected this idea in the previous LAWA proposals.<sup>85</sup> Congress believed that the Department of Health, Education, and Welfare was incapable of enforcing the AWA because to do so would result in self-regulation by researchers.<sup>86</sup>

In addition to reluctantly adopting its role as regulator of animal welfare, the USDA has consistently been understaffed and inadequately funded.<sup>87</sup> Thus, the USDA's lack of internal motivation is not the sole reason for the poor record of AWA enforcement; it is also the result of insufficient resources.<sup>88</sup> There are approximately twenty regulated laboratories for each USDA inspector, resulting in fewer inspections than are necessary to sufficiently regulate the industry.<sup>89</sup> The USDA recommends that each facility be inspected at least four times per year, but due to strained resources, facilities are inspected just once every one to two years.<sup>90</sup> On the rare occasions when laboratories are randomly inspected, they are frequently cited for AWA noncompliance.<sup>91</sup> Strained resources have contributed to the under enforcement and ineffectiveness of the AWA.<sup>92</sup>

<sup>84</sup> *Id.* at 5106 (“[W]e believe that the Department of Health, Education, and Welfare is the appropriate agency to administer such an activity.”).

<sup>85</sup> See S. REP. NO. 89-1281, *reprinted in* 1966 U.S.C.C.A.N. 2635, 2648.

<sup>86</sup> *Id.*

<sup>87</sup> In a 1976 article, Paula Rosen stated: “[i]nspections carried out by the Department have often been either ineffective or nonexistent. This inadequacy is not only due to lack of motivation within the Department to establish a strict enforcement policy, but is also the result of insufficient funding to implement the necessary procedures.” See Paula Rosen, *Federal Regulation of Zoos*, 5 ENVTL. AFF. 381, 395–96 (1976) (footnote omitted). A decade later, a government accountability audit revealed that the AWA often went unenforced due to insufficient funding, inadequate training, and simply too few inspectors. See GEN. ACCOUNTING OFFICE, GAO/RCED-85-8, THE DEPARTMENT OF AGRICULTURE’S ANIMAL WELFARE PROGRAM (1985).

<sup>88</sup> See Joshua E. Gardner, Note, *At the Intersection of Constitutional Standing, Congressional Citizen-Suits, and the Humane Treatment of Animals: Proposals to Strengthen the Animal Welfare Act*, 68 GEO. WASH. L. REV. 330, 331–32 (2000) (citing congressional testimony regarding the inadequate inspection of research facilities); Madhusree Mukerjee, *Trends in Animal Research: Increased Concern for Animals, Among Scientists as Well as the Public, Is Changing the Ways in Which Animals Are Used for Research and Safety Testing*, SCI. AM., Feb. 1997 at 92 (discussing the limited resources available to investigate these matters).

<sup>89</sup> See Mukerjee, *supra* note 88, at 92. (noting that under enforcement of laboratories is well known and is illustrated by the fact that there are only sixty-nine inspectors for 1,300 regulated laboratories). The USDA’s shortcomings are not limited to the regulation of laboratories. Rather, it is merely symptomatic of a general plague of under-funding. See Valerie Stanley, *The Animal Welfare Act and USDA: Time for an Overhaul*, 16 PACE ENVTL. L. REV. 103, 109 (1998) (“[The] USDA only has 87 inspectors for the entire country and there are at least 10,000 entities it regulates.”).

<sup>90</sup> Collette L. Adkins Giese, Comment, *Twenty Years Wasted: Inadequate USDA Regulations Fail to Protect Primate Psychological Well-Being*, 1 J. ANIMAL L. & ETHICS 221, 242–43 (2006).

<sup>91</sup> In 1992, twenty-six laboratories were selected at random and inspected by the USDA. Mukerjee, *supra* note 88, at 92. The Office of the Inspector General’s audit of the USDA’s

*B. The Problem of Standing and the Lack of a Citizen-Suit Provision*

Private plaintiff's inability to demonstrate standing to enforce the AWA against violators has further hampered AWA enforcement. Standing is a threshold determinant for seeking judicial intervention in the federal courts.<sup>93</sup> Article III of the United States Constitution limits federal jurisdiction to circumstances in which an aggrieved party can articulate a "case or controversy."<sup>94</sup> In *Lujan v. Defenders of Wildlife*,<sup>95</sup> the Supreme Court held that a plaintiff seeking to demonstrate standing must satisfy three elements. First, the plaintiff must have suffered an injury in fact, which is an invasion of a legally protected interest that is both actual and imminent, as well as concrete and particularized.<sup>96</sup> A legally protected interest can be created by constitution, statute, or common law.<sup>97</sup> In addition, the party seeking redress must be amongst the parties seeking judicial review.<sup>98</sup> Second, the plaintiff's injury must be causally connected, that is, fairly traceable, to the alleged illegal actions of the defendant.<sup>99</sup> Third, and closely related to the second element, it must be likely that a favorable decision will redress the plaintiff's injuries.<sup>100</sup> Generally, this is a determination of whether the plaintiff has a legitimate stake in the outcome of the litigation.<sup>101</sup>

enforcement activities revealed that twelve of the twenty-six laboratories selected were not in compliance. *Id.*

<sup>92</sup> See USDA, OFFICE OF INSPECTOR GENERAL, AUDIT REP. NO. 33002-4-SF, ANIMAL AND PLANT HEALTH INSPECTION SERVICE ANIMAL CARE PROGRAM INSPECTIONS OF PROBLEMATIC DEALERS 3 (2010), available at <http://www.usda.gov/oig/webdocs/33002-4-SF.pdf> (reporting the USDA's acknowledgement that the Animal Welfare Act is under enforced and ineffective).

<sup>93</sup> See *Warth v. Seldin*, 422 U.S. 490, 517–18 (1975) (noting that standing is a "threshold determinant[] of the propriety of judicial intervention").

<sup>94</sup> U.S. CONST. art. III, § 2.

<sup>95</sup> 504 U.S. 555 (1992).

<sup>96</sup> *Id.* at 560.

<sup>97</sup> See Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1076 (1994) (discussing the requirements of standing and differentiating Article III from prudential standing). On numerous occasions, the Supreme Court has held that the legally protected interest required for Article III standing may exist solely by virtue of a statute. See e.g., *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."); accord *Warth*, 422 U.S. at 500 (noting that the only "injury" which exists may be solely a product of statute).

<sup>98</sup> See *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972) ("[T]he injury in fact test . . . requires that the party seeking review be himself among the injured.").

<sup>99</sup> *Lujan*, 540 U.S. at 560 (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976)).

<sup>100</sup> *Id.* at 561.

<sup>101</sup> See *Baker v. Carr*, 369 U.S. 186, 204 (1962) (noting that whether a party has standing is a question of whether the party has "alleged such a personal stake in the outcome of the

In addition to Article III standing, a plaintiff seeking to challenge the decisions of a federal agency must demonstrate that she has prudential standing.<sup>102</sup> To demonstrate prudential standing, a plaintiff usually must show that she is a member of the class of individuals Congress intended to have the ability to challenge the agency's decisions, which is generally a question of whether the potential plaintiff is within the "zone of interests" intended to be protected by the statute or regulation.<sup>103</sup>

Traditionally, animals have been unable to satisfy the first element required to prove Article III standing; a legally protected interest.<sup>104</sup> Under the common-law approach to animals, courts treated animal ownership virtually the same as property ownership.<sup>105</sup> In addition, animals cannot establish a procedural right to file suit because no

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controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends").

<sup>102</sup> See Administrative Procedure Act, 5 U.S.C. § 702 (2006) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the statute, is entitled to judicial review thereof."); see also *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 524 (1991); *Humane Soc'y of U.S. v. U.S. Postal Serv.*, 609 F. Supp. 2d 85, 94 (D.D.C. 2009) ("A plaintiff must show that it has suffered injury-in-fact and that it falls within the zone-of-interests intended to be protected by the governing statute.").

<sup>103</sup> See *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (for prudential standing, a plaintiff demonstrate that the injury "arguably fall[s] within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit."); *Judicial Watch, Inc. v. U.S. Senate*, 432 F.3d 359, 365 (D.C. Cir. 2005) ("[T]he 'zone-of-interests' requirement of prudential standing poses the question whether the plaintiff's interest is so incongruent with the statutory purposes as to preclude an inference that Congress might have intended such a party as a challenger.").

<sup>104</sup> See Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1359 (2000) (discussing the elements of standing).

<sup>105</sup> GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* 35 (Tom Regan ed., 1995) ("for all intents and purposes, [animal ownership is] no different from the ownership of other sorts of personal property."); see also *Kaufman v. Langhofer*, 222 P.3d 272, 274 (Ariz. Ct. App. 2009) ("The majority of jurisdictions in the United States classify pets as personal property."); Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 535 (1998) ("[s]ince animals are property and have no rights, representatives of animals cannot assert the interest of animals in the judicial system."). In addition, numerous laws identify specific animals as property. See, e.g., CAL. PENAL CODE § 491 (West 2010) ("Dogs are personal property, and their value is to be ascertained in the same manner as the value of other property."); W. VA. CODE 19-20-11 (2009) ("In addition to the head tax on dogs provided for in this article, the owner of any dog above the age of six months shall be permitted to place a value on such dog and have such dog assessed as personal property in the same manner and at the same rate as other personal property."). The view of animals as property is also well-established in our common law tradition. See *Sentell v. New Orleans & Carrollton R.R. Co.*, 166 U.S. 698, 700 (1897) ("By the common law, as well as by the law of most, if not all, the States, dogs are so far recognized as property that an action will lie for their conversion or injury . . ."); *Gluckman v. American Airlines, Inc.*, 844 F. Supp. 151, 158 (S.D.N.Y. 1994) (holding that loss of consortium for the death of an animal was not a legally cognizable claim because animals maintain a status of property under the law).

federal statute permits an animal to bring suit in its own name.<sup>106</sup> Property cannot suffer a cognizable legal injury.<sup>107</sup> Hence, animals have no standing in the federal courts through statute or common law.

Nonetheless, animals have been named as individual plaintiffs in several high-profile cases,<sup>108</sup> and courts have, on occasion, suggested that animals can have standing. Most notably, in *Padila v. Hawaii Dept of Land and Natural Resources*,<sup>109</sup> the court stated that “[a]s an endangered species under the Endangered Species Act . . . the bird (*Loxioides bailleui*), a member of the Hawaiian honey-creeper family, also has legal status and wings its way into federal court as a plaintiff in its own right.” In *Padila*, the defendants challenged the plaintiffs’ standing, however, and thus the Ninth Circuit did not have occasion to address the issue.<sup>110</sup> But irrespective of isolated suggestions to the contrary, animals currently do not have standing to enforce animal-protection laws.<sup>111</sup> Therefore, neither an animal nor a person can seek judicial redress on an animal’s behalf.

Animals are left to rely on people to sue for enforcement of animal-protection statutes.<sup>112</sup> Several animal-protection statutes do include a citizen-suit provision, which allows people to do just that.<sup>113</sup> Courts, when interpreting these statutes, have found that Congress intended to encourage private citizens to enforce these laws and provided, as a measure of legislative enactment, standing to enforce the laws through the citizen-suit provisions.<sup>114</sup> While citizen-suit

<sup>106</sup> Sunstein, *supra* note 104, at 1359.

<sup>107</sup> See *Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45, 49–50 (D. Mass. 1993) (concluding and citing cases for the proposition that “cases in each state indicate that animals are treated as property of their owners, rather than entities with their own legal rights,” and finding that a dolphin did not have standing to proceed as a party in interest because it is property).

<sup>108</sup> *E.g.*, *Mt. Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir 1991); *N. Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991); *N. Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988).

<sup>109</sup> 852 F.2d 1106, 1107 (9th Cir. 1988).

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

<sup>111</sup> See, *e.g.*, *Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45, 48–49 (D. Mass. 1993) (holding that the citizen-suit provisions of Endangered Species Act and Marine Mammal Protection Act provided for suits brought by people and not animals); *Haw. Crow v. Lujan*, 906 F. Supp. 549, 552 (D. Haw. 1991) (holding that the bird was not a “person” under the meaning of the Endangered Species Act’s citizen-suit provision and that it therefore did not have standing to sue).

<sup>112</sup> See *Am. Soc’y for Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus*, 317 F.3d 334, 336 (D.C. Cir. 2003) (holding that plaintiff had standing under the citizens’ suit provision of Endangered Species Act but noting that any alleged injury must be the plaintiff’s own injury as continuous harm to animals is insufficient to prove standing).

<sup>113</sup> See, *e.g.*, Endangered Species Act, 16 U.S.C. § 1540(g)(1) (2006) (providing a citizen suit); Marine Mammal Protection Act, 16 U.S.C. § 1377 (2006) (same).

<sup>114</sup> See, *e.g.*, *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1300 (8th Cir. 1989) (finding that Congress, in including the citizen suit provision as part of the Endangered Species Act, intended to encourage private citizens to enforce its provisions and holding that the plaintiffs’

provisions do not dispose of Article III standing altogether, they expand standing to the outer boundaries of the case or controversy requirement of Article III by including individuals who would otherwise be unable to demonstrate the injury requirement.<sup>115</sup>

In addition, the Supreme Court of the United States has held that citizen-suit provisions “negate[] the zone of interest test.”<sup>116</sup> That is, by virtue of a citizen-suit provision, plaintiffs acquire prudential standing.<sup>117</sup> In *Animal Welfare Institute v. Kreps*,<sup>118</sup> the court was asked to determine whether plaintiffs had standing to enforce the Marine Mammal Protection Act under its citizen-suit provision. Finding that the plaintiffs had standing, the court declared, “[w]here an act is expressly motivated by considerations of humaneness toward animals, who are uniquely incapable of defending their own interests in court, it strikes as eminently logical to allow groups specifically concerned with animal welfare to invoke the aid of the courts in enforcing the statute.”<sup>119</sup>

Even though the AWA was motivated by considerations of the humaneness towards animals, courts have consistently concluded that *Kreps* was inapposite in AWA suits because, unlike the other animal-protection statutes, the AWA does not expressly provide for citizens’ suits.<sup>120</sup> A major consequence of Congress’s failure to provide a

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had standing to challenge the EPA’s use of strychnine); *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002, 1007 (D.C. Cir. 1977) (holding that private citizens and environmental and animal protection groups had standing to challenge a moratorium on the Marine Mammal Protection Act); *Fund for Animals, Inc. v. Fla. Game and Fresh Water Fish Comm.*, 550 F. Supp. 1206, 1208 (S.D. Fla. 1982) (“Under the citizens’ suit provisions of the Endangered Species Act, the Plaintiffs have standing to sue in their own names to seek the protection of this Act for an endangered species.”). The individual seeking to enforce a citizen suit provision must still satisfy the irreducible elements of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); see also *Am. Soc’y for Prevention of Cruelty to Animals v. Feld Entm’t, Inc.*, 677 F. Supp. 2d 55, 100 (D.D.C. 2009) (holding that an informational injury not a legally protected interest enforceable under the Endangered Species Act’s citizens’ suit provision).

<sup>115</sup> See *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2001) (finding that citizen-suit provisions do not do away with constitutional requirements for standing altogether by extending but, rather, that it extends the Article III to maximum constitutional limit).

<sup>116</sup> *Bennett v. Spear*, 520 U.S. 154, 164 (1997) (holding that the citizen-suit provision of the Endangered Species Act sufficiently broad to negate the zone of interest test).

<sup>117</sup> See *Cape Hatteras Access Pres. Alliance v. U.S. Dept. of Interior*, 731 F. Supp. 2d 15, at \*4 (D.D.C. 2010) (“Plaintiffs acquire prudential standing in relation to their ESA claims pursuant to the citizen-suit provision of the ESA.”) (citing *Bennett v. Spear*, 520 U.S. 154, 164 (1997)).

<sup>118</sup> 561 F.2d 1002.

<sup>119</sup> *Id.* at 1007.

<sup>120</sup> See *Int’l Primate Prot. League v. Inst. for Behavioral Research, Inc.*, 799 F.2d 934, 936 (4th Cir. 1986) (rejecting plaintiff’s attempts to become legal guardians of animals rescued from National Institutes of Health funded laboratory after whistleblowers revealed documented animal abuse that resulted in dozens of animal cruelty charges and the elimination of federal

statutory right to file suit in the AWA is that private plaintiffs are generally not considered to be within the zone of interests that Congress sought to protect.<sup>121</sup> Likewise, plaintiffs have generally been unable to demonstrate that they have suffered a cognizable injury as a result of an AWA violation, which is also necessary for Article III standing.<sup>122</sup> Thus, third parties lack standing to seek judicial review for the researchers' violations of the AWA.<sup>123</sup> Individual plaintiffs have been more successful in challenging the promulgation of USDA rules than enforcing the AWA.<sup>124</sup>

Reviewing courts generally agree that enforcement of the AWA is solely within the discretion of the USDA.<sup>125</sup> Because third parties do not have standing to enforce AWA, private plaintiffs, including with personal knowledge of AWA violations, must rely on the USDA inspection process. Understaffing and inadequate funding, however, have prevented meaningful compliance with the inspection requirements.<sup>126</sup> The result of the USDA's inefficacy and third parties' inability to enforce the AWA is that animal enterprises are left to self-regulate, directly contravening the intent of the AWA.<sup>127</sup>

### C. The Failure to Self-Regulate

The biomedical-research industry has opposed the AWA since its earliest stages.<sup>128</sup> It has disputed each amendment and every attempt

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funding for the project).

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

<sup>122</sup> *Id.*

<sup>123</sup> *See id.* at 938. Numerous courts have followed this line of reasoning and come to the same determination. *See, e.g.*, In Def. of Animals, et al. v. Cleveland Metroparks Zoo, 785 F. Supp. 100, 101 (N.D. Ohio 1991) (concluding that animal protection workers seeking to challenge a zoo's moving a gorilla did not have standing to enforce the provisions of the AWA); *see also* People for the Ethical Treatment of Animals v. Inst. Animal Care and Use Comm. of Univ. of Or., 794 P.2d 1224, 1227 (Or. Ct. App. 1990), *aff'd* 817 P.2d 1299 (Or. 1991) (no standing to enforce alleged violations of the AWA).

<sup>124</sup> *See* Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 32 (D.C. Cir. 1998) (holding that plaintiff had Article III standing based on aesthetic injury as a result of observing primates housed in isolated conditions); Alt. Research and Dev. Found. v. Glickman, 101 F. Supp. 2d 7, 12 (2000) (“[I]t necessarily follows that a researcher who witness the mistreatment of rats in her lab must have standing.”).

<sup>125</sup> *See, e.g.*, Animal Legal Def. Fund, Inc. v. Espy, 23 F.3d 496, 496 (D.C. Cir. 1994) (holding that the animal welfare groups and individual citizens did not have standing to challenge the USDA's enforcement of the AWA); *Int'l Primate Prot. League*, 799 F.2d at 941 (holding plaintiffs did not have standing under AWA).

<sup>126</sup> *See supra* text accompanying notes 87–92.

<sup>127</sup> *See* S. REP. NO. 89-1281 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2635, 2648 (rejecting the idea that the Department of Health, Education, and Welfare enforce the AWA because such an arrangement would lead to self-regulation by medical researchers).

<sup>128</sup> *See* Stanley, *supra* note 89, at 110 (noting that the National Association of Biomedical Research, the main lobbying group for the biomedical industry, and its predecessors consistently

to strengthen its provisions.<sup>129</sup> In the first two decades, the AWA gave researchers substantial discretion to regulate their uses of animals.<sup>130</sup> But after highly publicized violations of state and federal anti-cruelty laws, Congress created the Institutional Animal Care and Use Committee (IACUC or Committee).<sup>131</sup> Modeled after Institutional Review Boards, which ensure the ethical nature of research protocols in which humans are subjects,<sup>132</sup> the IACUC is a self-regulating entity that oversees all aspects of the institution's animal care and use program for animal research.<sup>133</sup> Federal law mandates that institutions using laboratory animals create an IACUC.<sup>134</sup> The chief executive officer of the institution must appoint this Committee,<sup>135</sup> and the Committee must have at least one member who is a non-scientist and another who is unaffiliated with the institution and capable of serving as a representative of the community.<sup>136</sup> The USDA requires the IACUC to approve procedures before they are conducted on animals.<sup>137</sup> In addition, the IACUC must establish appropriate channels for researchers and other members of the institution to express grievances regarding animal mistreatment, investigate all complaints, and take appropriate remedial measures.<sup>138</sup>

Nonetheless, it is widely understood research institutions have devoted little energy to IACUCs.<sup>139</sup> They are rarely used and quite

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opposed animal protection laws).

<sup>129</sup> See, e.g., Estelle A. Fishbein, *What Price Mice?*, 285 JAMA 939, 941 (2001) (arguing that proposed amendments to the AWA seeking to include mice, rats, and birds within the AWA's definition of "animal" must be thwarted and further arguing that laboratories coming under the jurisdiction of the Public Health service should be exempted from the AWA); Stanley, *supra* note 89, at 110.

<sup>130</sup> 7 U.S.C. § 2143(a) (1976) (describing the minimum standard requirements for researchers).

<sup>131</sup> Animal Welfare Act, Pub. L. No. 99-198, § 1759, 99 Stat. 1650 (1985) (codified as amended at 7 U.S.C. § 2131 (2006)).

<sup>132</sup> See generally The Belmont Report: Protection of Human Subjects of Biomedical and Behavioral Research, 45 C.F.R. pt. 46 (1979).

<sup>133</sup> See 9 C.F.R. § 2.31 (2010) (listing the requirements for the IACUC).

<sup>134</sup> *Id.*

<sup>135</sup> See *id.* at § 2.31(b) ("The members of each Committee shall be appointed by the Chief Executive Officer of the research facility").

<sup>136</sup> See *id.* at 2.31(a)-(c).

<sup>137</sup> See Garrett Field & Todd A. Jackson, *THE LABORATORY CANINE* 48 (2007) (describing the IACUC's functions and requirements); see Pierce Chow, *The Functions of the Institutional Animal Care and Use Committee*, in *USING ANIMAL MODELS IN BIOMEDICAL RESEARCH: A PRIMER FOR THE INVESTIGATOR* 31, 31-37 (Pierce Chow, et al. eds., 2008) (describing a functioning IACUC in the Singapore Health Services).

<sup>138</sup> See PIERCE, *supra* note 135, at 36 (discussing the purpose and role of the IACUC in the biomedical research industry).

<sup>139</sup> See Rosamond Rhodes & James J. Strain, *Whistle Blowing in Academic Medicine*, 30 J. MED. ETHICS 35, 35 (2004) (noting that these committees are often ineffective due to the lack of institutional energy devoted).

often remain ineffective as a vehicle to express grievances.<sup>140</sup> Among the major flaws is that the Chief Executive Officer of an IACUC appoints all members. This has led to criticisms that only those individuals willing to agree to the research are appointed to the IACUC.<sup>141</sup> Moreover, while the Committees are designed to implement regulations, “[t]he regulations the [C]ommittees apply . . . are minimal and can be waived if a majority of IACUC members believe such action will enhance the experiment.”<sup>142</sup> Research institutions more often view the Committees as an impediment to research that must be circumvented, rather than a means to effective research.<sup>143</sup> Both progressive and conservative groups, including those that are supportive of the use of animals in biomedical research, have recognized that the IACUC is an inadequate means of ensuring animal welfare.<sup>144</sup>

Because IACUCs rarely perform the function for which they are designed, individual researchers must ensure that proper protections are in place, and the USDA relies on individual researchers or other private parties to act as individual whistleblowers.<sup>145</sup> However, researchers face enormous pressures not to come forward when they are aware of unethical uses of animals.<sup>146</sup> They are acculturated to be loyal and not to blow the whistle on colleagues and other researchers.<sup>147</sup> This is not to imply that researchers never come forward. There are always individuals who resist external and internal pressures in an attempt to alert the public to the existence of

<sup>140</sup> See *id.* (noting that due to the minimal amount of effort devoted by these committees, they often remain ineffective).

<sup>141</sup> See TOM L. BEAUCHAMP ET AL., *What Does the Public Have a Right to Know?*, in *THE HUMAN USE OF ANIMALS: CASE STUDIES IN ETHICAL CHOICE* 197 (2d ed. 2008) (providing examples where full committee review has been avoided).

<sup>142</sup> DAVID NIBERT, *ANIMAL RIGHTS/HUMAN RIGHTS: ENTANGLEMENTS OF OPPRESSION AND LIBERATION* 178 (2002).

<sup>143</sup> See *id.* (noting that the members often regulate themselves).

<sup>144</sup> See FRANCIONE, *supra* note 105, at 218 (“[N]ot only do more progressive organizations regard USDA enforcement as ineffective, but so do organizations that, by and large, supported biomedical research using animals.”); 1 *THE EXPERIMENTAL ANIMAL IN BIOMEDICAL RESEARCH* 46 (Bernard E. Rollin & M. Lynne Kesel eds., 1990) (noting that the public remains skeptical of the 1985 amendment to the Animal Welfare Act because of its “ineffective enforcement”).

<sup>145</sup> See Mukerjee, *supra* note 88, at 92 (noting that under this framework, USDA inspectors must rely on whistleblowers).

<sup>146</sup> See Rhodes & Strain, *supra* note 139, at 35 (noting that whistleblowers are often punished for coming forward).

<sup>147</sup> See T. Faunce et al., *Supporting Whistleblowers in Academic Medicine: Training and Respecting the Courage of Professional Conscience*, 30 *J. MED. ETHICS* 40, 41 (2004) (arguing that despite legislative and other measures, many researchers feel that they must adhere to a code of silence with respect to misconduct or they will be viewed as traitors to their colleagues); Rhodes & Strain, *supra* note 139, at 37 (noting that to disclose is often to betray).

wrongdoings.<sup>148</sup> When these researchers do come forward as whistleblowers, however, they “are ostracised, pressured to drop allegations, and threatened with counterallegations. They lose desirable assignments, have their research support reduced and their promotions and raises denied. Their contracts are not renewed, and they are fired.”<sup>149</sup> Although retaliatory acts for disclosure of AWA violations are prohibited by law,<sup>150</sup> the USDA rarely enforces these protections.<sup>151</sup> Adding to the problem, courts have held that, because the AWA was not enacted for the special benefit of whistleblowers, whistleblowers do not have a private cause of action for retaliation.<sup>152</sup> Thus, the protections afforded by law are illusory.<sup>153</sup>

As a result, animal-protection advocates play a unique role as whistleblowers under this framework.<sup>154</sup> The USDA is incapable of adequately investigating research institutions.<sup>155</sup> The USDA, therefore, relies on whistleblowers to come forward with knowledge of AWA abuses.<sup>156</sup> In order to come forward with information that can change the misdirection of research, researchers are often forced to go outside of the institution itself “because their own institutions prefer[] sweeping their dirt under the rug.”<sup>157</sup> One of the principle

<sup>148</sup> See Stefan P. Kruszewski, Commentary, *Why We Whistleblowers Are Passionate in Our Convictions*, 2 PLOS MED. 811, 811 (2005), available at <http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.0020281> (“For me, whistleblowing . . . has a human face and tangible features. It is the face of children and adults who have been injured or killed by misrepresented pharmaceuticals.”); Usman Jaffer & Alan E.P. Cameron, *Deceit and Fraud in Medical Research*, 4 INT’L J. SURGERY 122, 125 (2006) (noting that most instances of fraud are detected by colleagues and arguing for greater whistleblower protections in medical research).

<sup>149</sup> Rhodes & Strain, *supra* note 139, at 35; see also Mukerjee, *supra* note 88, at 92 (discussing the fact that the U.S.D.A. can offer few assurances to those who come forward with complaints against researchers for violations of the Animal Welfare Act and detailing examples of researchers at top institutions who were discharged after revealing violations of colleagues).

<sup>150</sup> Animal Welfare Act, 9 C.F.R. § 2.32(c)(4) (2004) (“No facility employee, Committee member, or laboratory personnel shall be discriminated against or be subject to any reprisal for reporting violations or standards under the Act.”).

<sup>151</sup> See FRANCIONE, *supra* note 105, at 214 (noting that while the USDA recommends four visits to each laboratory each year, it is only able to visit a facility around once per year, and that this undermines enforcement); Mukerjee, *supra* note 88, at 92 (noting that due to the USDA’s shortage of investigators, “inspectors rely on whistleblowers” to come forward and reveal incriminating information).

<sup>152</sup> See *Moor-Jankowski v. Bd. of Tr. of N.Y. Univ.*, No. 96 CIV. 5997(JFK), 1998 WL 474084, at \*10 (S.D.N.Y. Aug. 10, 1998) (holding that no private cause of action existed for retaliation after researcher revealed AWA violations).

<sup>153</sup> *Id.*

<sup>154</sup> See Mukerjee, *supra* note 88, at 92 (explaining that the possibility provides an outlet for researchers to act as whistleblowers and prevents researchers from violating the AWA).

<sup>155</sup> *Id.*

<sup>156</sup> See Mukerjee, *supra* note 88, at 92 (noting that inspectors rely on whistleblowers).

<sup>157</sup> Rhodes & Strain, *supra* note 139, at 38; see also *id.* (describing a number of instances of research misconduct and then discussing the manner in which the institutions chose to conceal rather than correct the information).

manner by which researchers are able to act as whistleblowers without placing their reputation at risk is to provide information to animal-welfare organizations.<sup>158</sup> The prospect of this type of announcement to animal-rights organization provides an incentive for researchers follow protocols because once the information is revealed to animal-rights organizations, unannounced inspections are soon to follow.<sup>159</sup> Violations revealed during these unannounced inspections can spell the end for all funding on the project.<sup>160</sup> Very frequently it is the animal-protection groups who provide information to the USDA inspectors, who then enforce the AWA.<sup>161</sup> USDA inspectors, individual researchers, and the American public have come to rely on animal-protection groups to reveal detailed information.<sup>162</sup> If the court applied AETA to whistleblowers because they are in possession of property that interferes with the operation of an animal enterprise it would cut off the flow of vital information and have ruinous consequences.

### III. FACTORY FARMS, SLAUGHTERHOUSES, AND POULTRY PROCESSING PLANTS

#### A. *Humane Methods of Slaughter Act*

The Humane Methods of Slaughter Act (HMSA)<sup>163</sup> is the primary federal law charged with regulating the inner workings of factory farms, slaughterhouses, and processing plants. Congress passed the HMSA in 1958, at the height of public concern regarding slaughterhouse cruelty.<sup>164</sup> During four days of congressional

<sup>158</sup> See *id.* at 35 (noting the IACUC model allows “outside forces to support the desired behaviour”); Alex Nixon, *Animal-Rights Issues at MPI Have Been Fixed, USDA Says*, KALAMAZOO GAZETTE, July 25, 2008, at A7, available at <http://www.mlive.com/business/kzgazette/index.ssf?base/business-5/1216997435311050.xml&coll=7> (describing how animal rights organization alerted USDA of suspected violations after activists were tipped off by whistleblowers within the company).

<sup>159</sup> See Rhodes & Strain, *supra* note 139, at 37 (noting that a complaint by an outside researcher to a whistleblower organization can have ruinous consequences).

<sup>160</sup> See, e.g., *id.* (discussing loss of funding); *Head Injuries*, *supra* note 31, at 181 (noting that funding for a major research project was cut after whistleblowers revealed videos of documented animal abuse); Kilpatrick, *supra* note 32, at A15 (discussing the loss of National Institutes of Health funding after whistleblowers revealed inhumane conditions at a laboratory).

<sup>161</sup> See, e.g., Mukerjee, *supra* note 88, at 92 (quoting Harvey McKelvey of the USDA as stating that the USDA and NIH rely on groups like PETA to infiltrate labs and produce detailed histories of the noncompliance with research mandates); Nixon, *supra* note 158, at A7 (discussing an animal-rights group’s report to the USDA regarding a research facility’s AWA violations).

<sup>162</sup> See generally Mukerjee, *supra* note 88 (detailing the concern for animals among the public and scientific community).

<sup>163</sup> Pub. L. No. 85-765, 72 Stat. 862 (codified as amended 7 U.S.C. §§ 1901–1907 (2006)).

<sup>164</sup> *Id.*; see also William M. Blair, *Humane Appeals Swamp Congress: Senate Hearing on*

testimony on the proposed humane methods of slaughter, the conditions of a typical American slaughterhouse were described in harrowing detail:

a long line of helpless, healthy, fully conscious hogs [and] sheep, cruelly shackled and dangling from one leg, twisting, squirming, and screaming in agony as they approach the executioner . . . [A] close observer might have noticed a hideously gruesome elongation of that poor shackled leg as a bone snapped, or the joint pulled from its socket. . . [T]heir agonized screams smothered as they dropped mercilessly, still conscious into a vat of scalding water.<sup>165</sup>

The testimony regarding cattle was similar.<sup>166</sup> Before they were shackled and taken to slaughter, cattle were struck in the skull with a sledgehammer.<sup>167</sup> Sometimes the cattle were rendered unconscious. Often, however, the blows were misdirected and the animal was merely disfigured or maimed.<sup>168</sup> Those animals that remained conscious through bludgeoning were gouged with meat hooks and hoisted, left to have entire limbs ripped from their bodies as they writhed in agony.<sup>169</sup> On August 27, 1958, over strong objections from the slaughter industry, President Dwight D. Eisenhower signed the HMSA into law.<sup>170</sup> The HMSA's primary requirement was that "animals [be] . . . rendered insensible to pain" before slaughter.<sup>171</sup>

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*Livestock Slaughter Bill Stirs Wide Interest and Mail Deluge*, N.Y. TIMES, May 4, 1958, at 84 (like the AWA in 1966, during the period that the HMSA was pending, Congress received more letters about it than any other issue). The issue had been alive for several years. Humane slaughter bills had circulated in Congress since 1955. See 85 CONG. REC. 15,381 (1958) (statement of Sen. Hubert Humphrey) (noting that he had introduced the first humane slaughter bill into Congress in 1955).

<sup>165</sup> *Humane Slaughtering of Livestock: Hearings on S. 1213, S. 1497, and H.R. 8308 Before S. Comm. of Agric. and Forestry*, 85th Cong. 67 (1958) [hereinafter *HMSA Hearings*] (statement of Madeline Bemelmans, President, Society for Animal Protection Legislation) (reading the letter of W.P. Holcombe, a retired meat inspector, into the record).

<sup>166</sup> *Id.* at 67.

<sup>167</sup> See *HMSA Hearings*, *supra* note 165, at 30 (statement of Fred Myers, Executive Director, Humane Society of the United States) (discussing the prevalence of the sledgehammer as the primary mechanism for "stunning," which often fails to render the animal unconscious and stating that many of the animals were struck as many as ten times); see also *id.* at 78 (statement of Christine Stevens, President, Animal Welfare Institute) (stating that she had personally witnessed thirteen blows from a sledgehammer delivered to a single animal).

<sup>168</sup> See *id.* at 68 (statement of Madeline Bemelmans, President, Society for Animal Protection Legislation) (describing that haphazard swinging of the sledgehammer often failed to render the animal unconscious and often left the animal with a "preliminary broken snout, an ear sheered off, or an eye gouged out").

<sup>169</sup> See *id.* at 78 (statement of Christine Stevens, President, Animal Welfare Institute) (describing the torturous conditions she witnessed at slaughterhouses).

<sup>170</sup> See 104 CONG. REC. 19,717 (1958) (record of signing the bill into law); *HMSA*

### B. USDA Enforcement of the HMSA

The USDA's Food Safety and Inspection Service (FSIS) is responsible for regulating the inner workings of factory farms, slaughterhouses, and processing plants.<sup>172</sup> Enforcement of the HMSA often overlaps enforcement of federal food safety regulations, both of which are regulated by FSIS.<sup>173</sup> The FSIS has recently been the subject of increased scrutiny for its failure to consistently enforce the HMSA and food safety regulations.<sup>174</sup> Sixty years after it was enacted into law, the HMSA is still not regularly enforced, and slaughterhouse conditions remain similar to those described during the 1958 congressional hearings.<sup>175</sup> The HMSA's mandate that animals be rendered "insensible to pain" often goes unenforced.<sup>176</sup> Reports reveal that animals have remained conscious during slaughtering, sometimes moving their eyes and attempting to walk as the flesh is stripped from their bodies.<sup>177</sup> There are further indications that these occurrences happen "on a daily basis" in "plants all over the United States."<sup>178</sup>

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*Hearings, supra* note 165, at 175 (statement of L. Blaine Liljenquist, Vice President, Western States Meat Packers Ass'n, Inc.) (noting that slaughterhouses are "strongly opposed to the compulsory features of these bills"); *see generally HMSA Hearings, supra* note 165, at 131–42 (statement of C.H. Eshbaugh, Consultant, American Meat Institute) (defending slaughterhouse techniques and stating opposition to the bills).

<sup>171</sup> 7 U.S.C. § 1902 (2006).

<sup>172</sup> *See* 21 U.S.C. § 603(b) (2006) (requiring the USDA to make humane slaughter inspections). *See also Humane Methods of Slaughter Act: Weaknesses in USDA Enforcement Before the H. Subcomm. on Domestic Policy, Comm. on Oversight and Gov't Reform*, 111th Cong. (2010) (statement of Lisa Shames, Director, Natural Resources and Environment) [hereinafter *Enforcement*], available at [http://oversight.house.gov/images/stories/Hearings/Domestic\\_Policy/2010/030410\\_Horse\\_Slaughter/030110\\_111th\\_DP\\_Lisa\\_Shames\\_GAO\\_030410.pdf](http://oversight.house.gov/images/stories/Hearings/Domestic_Policy/2010/030410_Horse_Slaughter/030110_111th_DP_Lisa_Shames_GAO_030410.pdf) (discussing the USDA and FSIS's role in enforcing the HMSA).

<sup>173</sup> *See Enforcement, supra* note 172, at 2 (noting that FSIS "cannot track HMSA inspection funds separately from the inspection funds spent on food safety activities").

<sup>174</sup> *See, e.g., Humane Methods of Slaughter Act: Weakness in USDA Enforcement, Before the H. Subcomm. on Domestic Policy, Comm. on Oversight and Gov't Reform*, 111th Cong. (2010) (statement of Wayne Pacelle, the Humane Society of the United States) [hereinafter *Pacelle Testimony*], available at [http://oversight.house.gov/images/stories/Hearings/Domestic\\_Policy/2010/030410\\_Horse\\_Slaughter/030310\\_111th\\_DP\\_Wayne\\_Pacelle\\_030410.pdf](http://oversight.house.gov/images/stories/Hearings/Domestic_Policy/2010/030410_Horse_Slaughter/030310_111th_DP_Wayne_Pacelle_030410.pdf) (describing undercover inspections performed by the Humane Society of the United States and proposing regulatory reforms).

<sup>175</sup> *See id.* at 2 (describing hidden video that showed animals being kicked, electrocuted, and skinned alive).

<sup>176</sup> *See* Joby Warrick, *'They Die Piece by Piece': In Overtaxed Plants, Humane Treatment of Cattle Is Often a Battle Lost*, WASH. POST, Apr. 10, 2001, at A1 [hereinafter *Piece by Piece*] (detailing repeat violations at dozens of slaughterhouses); Joby Warrick, *An Outbreak Waiting to Happen: Beef-Inspection Failures Let in a Deadly Microbe*, WASH. POST, Apr. 9, 2001, at A1 (describing how USDA failures allow microbes such as E-Coli to enter meat packages and sicken those that consume it).

<sup>177</sup> *See Piece by Piece, supra* note 176, at A1 (describing how a slaughterhouse worker strips off flesh from the bodies of cattle as they move their eyes and attempt to walk).

<sup>178</sup> *Piece by Piece, supra* note 176, at A10 (quoting Lester Friedlander, a former

Recent investigations have revealed an abundance of HMSA violations at major American slaughtering facilities. These include cows being rammed with forklifts, electrocuted, chained and dragged behind heavy machinery, prodded in the eyes, tortured with high-pressure hoses to simulate drowning, as well as calves less than a week old shocked with electrical prods as many as thirty times and doused with water to increase electrical shocks.<sup>179</sup> Other videos obtained by animal-welfare and animal-rights organizations clearly revealed that animals were not rendered insensible to pain before slaughter, including one instance where a calf remained vocal after its head had been halfway removed.<sup>180</sup>

In response to numerous reports of abuse, the government recently commissioned a study to determine the cause behind FSIS's poor enforcement record.<sup>181</sup> The study analyzed the responses of randomly selected USDA inspectors at 257 slaughter plants and a sample of FSIS noncompliance reports for the 2005 through 2009 fiscal years.<sup>182</sup> The results of the study confirmed that the HMSA is inconsistently enforced.<sup>183</sup> The report also revealed that inconsistent enforcement is, in part, the result of inspector ignorance and a lack of training.<sup>184</sup> According to the government's data, only a minority of inspectors would take appropriate regulatory action "in response to excessive beating or prodding," which, according to FSIS guidelines, may warrant suspension of plant operations.<sup>185</sup> A majority of inspectors considered themselves undertrained in identifying and responding to "double stunning," "beating," electrical prodding," "electrical stunning failure," and "slips and falls."<sup>186</sup> In addition, more than forty

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government inspector and veterinarian). *See also* U.S. GEN. ACCOUNTING OFFICE, GAO-04-247, HUMANE METHODS OF SLAUGHTER ACT: USDA HAS ADDRESSED SOME PROBLEMS BUT STILL FACES ENFORCEMENT CHALLENGES 4 (2004), available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=gao&docid=f:d04247.pdf> (finding 553 violations of federal law at 272 facilities).

<sup>179</sup> *See Pacelle Testimony*, *supra* note 174, at 1–2 (describing undercover investigations that documented horrendous conditions at slaughterhouses).

<sup>180</sup> *Id.* at 2.

<sup>181</sup> *See Enforcement*, *supra* note 172, at 1 (indicating that, due to recent violations, Congress held hearings on March 4, 2010, to probe efforts taken by the United States Department of Agriculture to enforce the HMSA).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* Other government-produced reports have come to the same conclusion. *See, e.g.*, GEOFFREY S. BECKER, CONG. RESEARCH SERV., NONAMBULATORY LIVESTOCK AND THE HUMANE METHODS OF SLAUGHTER ACT, 4–5 (2009), available at <http://www.nationalaglawcenter.org/assets/crs/RS22819.pdf> (noting that previous studies concluded that HMSA enforcement was inconsistent).

<sup>184</sup> *Enforcement*, *supra* note 172, at 2.

<sup>185</sup> *Id.* at 3.

<sup>186</sup> *Id.* at 4 & fig.2.

percent of inspectors considered themselves undertrained and in need of additional guidance in the humane-handling enforcement of “animal sensibility” and “sensible animal on bleed rail,” which is whether the animal is sensible during slaughter.<sup>187</sup> Thus, in some respects, poor HMSA enforcement is simply the result of inspector and USDA incompetence.

While underenforcement of the HMSA is partially the result of ignorance, other contributing factors are less benign. On numerous occasions, inspectors have been observed directly participating in the animal abuse.<sup>188</sup> Undercover video investigations revealed USDA inspectors laughing as sick calves, covered in their own excrement, were mocked and thrown against trailer walls.<sup>189</sup> Other footage has revealed USDA inspectors failing to act when faced with serious violations. In one instance, a USDA inspector observed a worker attempting to skin a live calf but failed to intervene.<sup>190</sup> The inspector simply watched the abuse and informed the worker that if another inspector saw the abuse the plant would have to be shut down.<sup>191</sup> In other footage, the FSIS inspector instructed the undercover investigator not to tell him if a live calf was in a pile of dead calves because, “I’m not supposed to know. I could shut them down for that.”<sup>192</sup>

### C. Retaliation for Disclosure

Individuals within the industry who attempt to reveal violations are frequently met with swift and strong retaliatory actions. Laborers in these industries cannot be expected to regularly step forward and reveal instances of cruelty because of increased deportation threats.<sup>193</sup> These industries have, in many respects, effectively shielded themselves from exposure by almost exclusively hiring undocumented workers who persist in illegal conduct under the constant threat of deportation.<sup>194</sup> The enterprises with the worst

<sup>187</sup> *Id.*

<sup>188</sup> See *Pacelle Testimony*, *supra* note 174, at 1–2 (recounting examples of USDA inspectors engaging in animal cruelty).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* (internal quotations omitted).

<sup>193</sup> See David Griffith, *Food Processing*, in IMMIGRATION IN AMERICA TODAY: AN ENCYCLOPEDIA, 127 (James Louckey et al. eds., 2006) (noting that since 2001, factory farms, meatpacking plants, and poultry facilities, all of which depend heavily on undocumented laborers, have increased threats of deportation against those who seek to speak out against the company).

<sup>194</sup> See 2 CRITICAL FOOD ISSUES: PROBLEMS AND STATE-OF-THE-ART SOLUTIONS WORLDWIDE 35 (Lynn Walter ed., 2009) (noting that labor laws are consistently broken and the

records of food-safety and animal-cruelty violations have long been the target of immigration officials.<sup>195</sup> Workers in these industries who attempt to come forward often face the risk of retaliation in the most extreme form.<sup>196</sup>

USDA inspectors also have strong incentives not to come forward with reports of violations.<sup>197</sup> Dr. Dean Wyatt, the supervisory public health veterinarian for FSIS<sup>198</sup> and the supervisory veterinarian at Seaboard Farms in Oklahoma, witnessed serious violations, including “[c]onscious pigs shackled to the conveyor line, having their throats slit while kicking and squealing” and animals crushed to death as they were unloaded from trucks, and numerous unprovoked beatings.<sup>199</sup> When Dr. Wyatt attempted to enforce compliance, he was reprimanded by the USDA, instructed to devote less time to humane handling, temporarily demoted, and ultimately transferred to Bushway Packing, a calf slaughtering plant in Western Vermont.<sup>200</sup>

Dr. Wyatt witnessed similar abuses at Bushway Packing. Cattle were chaotically shot numerous times in the head with bolt guns, leaving them writhing in pain; animals less than a week old and too dehydrated to stand were dragged on the ground or thrown across rooms or into stalls; and infant calves were haphazardly stunned with electrical prods and unnecessarily beaten.<sup>201</sup> When Dr. Wyatt protested the abuses, he was again reprimanded.<sup>202</sup> While the USDA

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threat of deportation consistently reinforced in so that undocumented laborers will accept illegally low wages, will not speak with union reps, and will acquiesce to the status quo).

<sup>195</sup> See, e.g., Brad Knickerbocker, *Egg Recall: Supplier Reported to Have History of Health, Safety Violations*, CHRISTIAN SCI. MONITOR, Aug. 22, 2010, available at 2010 WLNR 16748714 (noting that the supplier of eggs and chickens in the 14-state recall of 450,000 eggs believed to be contaminated with salmonella has a long history of citations for health, safety, and employment violations, including the hiring of undocumented immigrants, which resulted in immigration raids). In 2003, just months after paying a \$130,000 fine for animal cruelty, the egg supplier pled guilty to knowingly hiring illegal immigrants. *The Today Show: Congressional Investigation Now Under Way into Egg Recall: Former Labor Secretary Robert Reich Weighs in*, (NBC television broadcast Aug. 24, 2010).

<sup>196</sup> See CRITICAL FOOD ISSUES, *supra* note 192, at 35 (detailing the retaliation threats against workers who come forward with information about violations).

<sup>197</sup> See *Humane Methods of Slaughter Act: Weakness in USDA Enforcement, Before the H. Subcomm. on Domestic Policy, Comm. on Oversight and Gov't Reform*, 111th Cong. (2010) (statement of Dr. Dean Wyatt, FSIS Supervisory Public Health Veterinarian) [hereinafter *Wyatt Testimony*], available at <http://www.gao.gov/new.items/d10487t.pdf> (testifying about retaliatory actions taken against FSIS officials for revealing food safety and criminal violations).

<sup>198</sup> See *Slaughterhouse Whistleblower Reveals Inhumane Animal Treatment, Food Integrity Violations*, GOV'T ACCOUNTABILITY PROJECT (Mar. 04, 2010), <http://www.whistleblower.org/press/press-release-archive/381-slaughterhouse-whistleblower-reveals-inhumane-animal-treatment-food-integrity-violations> [hereinafter *Whistleblower*].

<sup>199</sup> *Id.*; see also *Wyatt Testimony*, *supra* note 197, at 2–5 (describing the same events).

<sup>200</sup> *Whistleblower*, *supra* note 198; *Wyatt Testimony*, *supra* note 197, at 6–8.

<sup>201</sup> See *Whistleblower*, *supra* note 198.

<sup>202</sup> *Id.*

refused to bring charges against the plant for its numerous, severe violations, the USDA retaliated against Wyatt for disclosing the violations by requiring him to attend remedial training, which was made public in a newsletter circulated throughout the industry that caused substantial damage to Wyatt's reputation.<sup>203</sup>

#### *D. The Link Between Animal Abuse and Food Safety*

Concerns about FSIS's enforcement record have risen sharply in light of increased awareness of the link between animal cruelty and food safety. Downed cattle, those too sick to stand, have a significantly increased risk of bovine spongiform encephalopathy infection, or "mad cow disease," and food-borne pathogens, including *E. Coli.* and Salmonella.<sup>204</sup> After a downer cow in Washington State tested positive for mad cow disease in early 2004, the USDA began implementing regulations prohibiting the slaughter of downed cows for human consumption.<sup>205</sup> The meat industry has challenged those regulations that seek to remove downer cows or other diseased animals from the food supply.<sup>206</sup> While industry officials were unable to overturn the laws and regulations, they found inventive ways to circumvent enforcement.<sup>207</sup> Cattle too sick to stand have routinely been electrically prodded and stunned, pushed, sprayed with hoses, kicked, or rammed with forklifts, or chained and dragged behind heavy machinery to cause temporary movement to avoid a

<sup>203</sup> See *Wyatt Testimony*, *supra* note 197, at 7 (discussing that the plant manager filed formal complaints against him for harassment and that he was forced to undergo remedial measures); *Whistleblower*, *supra* note 198 (discussing the retaliatory acts taken by the USDA against Wyatt following his disclosure of the plant's violations).

<sup>204</sup> See C. M. Byrne, Characterization of Escherichia Coli O157:H7 from Downer and Healthy Dairy Cattle in the Upper Midwest Region of the United States, 69 APPLIED & ENVTL. MICROBIOLOGY 4683, 4683 (2003) (300% greater prevalence of *E. Coli.* in downer cattle than healthy cattle); *BSE (Bovine Spongiform Encephalopathy, or Mad Cow Disease)*, CTNS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/ncidod/dvrd/bse/> (discussing the causes of BSE); Press Release, USDA, FSIS Publishes Final Rule Prohibiting Processing of "Downer" Cattle (Jul. 12, 2007) available at [http://www.fsis.usda.gov/News\\_&\\_events/NR\\_071207\\_01/index.asp](http://www.fsis.usda.gov/News_&_events/NR_071207_01/index.asp) (discussing USDA final rule on prohibition against downer cows entering the food supply).

<sup>205</sup> See Prohibition of the Use of Specified Risk Materials for Human Food Requirements for the Disposition of Non-Ambulatory Disabled Cattle, 9 C.F.R. pts. 309-11, 318-19 (outlining the regulation changes made in response to the events in Washington); see also *Baur v. Veneman*, 352 F.3d 625, 628 (2d Cir. 2003) (holding that plaintiff had standing to challenge USDA regulations permitting introduction of downer cows into food supply because plaintiff suffered injury-in-fact based on increased risk of contracting illness from diseased animals).

<sup>206</sup> See, e.g., *Nat'l Meat Ass'n. v. Brown*, No. 1:08-cv-01963 LJO DLB, 2009 WL 426213 (E.D. Cal. Feb. 19, 2009) (challenging California law prohibiting the use of downed cows for human consumption), vacated, 599 F.3d 1093 (9th Cir. 2010).

<sup>207</sup> See *Humane Soc'y of the U.S. v. Schafer*, No. 1:08-cv-00337-HHK (D.D.C. 2008) (challenging regulation based on the lack of public notice under 5 U.S.C. §§ 551 et. seq.).

determination that the cow is a downer unfit for human consumption.<sup>208</sup>

Federal and state governments have tried to remove downer cows from the food supply in a two-fold attempt to promote humane treatment to animals and create a safer food supply for the American public.<sup>209</sup> Recognizing that slaughterhouses and processing plants used these tactics to circumvent the rule, the federal government, as well as several states, issued new regulations and enacted additional legislation aimed at closing this loophole.<sup>210</sup> Once again, the factory farming, slaughtering, and processing industries have opposed these measures.<sup>211</sup>

### *E. The Role of Whistleblowers*

Because the meat industry has refused to self-regulate, laborers face an uncertain future if they come forward, and inspectors are retaliated against for properly revealing violations. Thus, it is incumbent upon whistleblowers unaffiliated with the facility to preserve the integrity of America's food supply and reveal instances of animal cruelty. News reports of large-scale food recalls and plant closures as a result of substandard conditions are common.<sup>212</sup> In the months of April and May of 2008 alone, undercover investigators revealed egregious violations in Texas, Pennsylvania, New Mexico, and Maryland.<sup>213</sup> In August 2009, undercover investigators at Bushway Packing in Vermont revealed violations so extreme that, upon release of the footage, the plant was closed.<sup>214</sup> Then in May 2010, undercover investigators revealed similar violations in Ohio.<sup>215</sup>

<sup>208</sup> See Complaint at 3–4, *Humane Soc'y of the U.S. v. Schafer*, No. 1:08-cv-00337-HHK (D.D.C. 2008).

<sup>209</sup> See, e.g., Press Release, USDA, Agric. Sec'y Ed Schafer Announces Plan to End Exceptions to Animal Handling Rule (May 20, 2008), available at <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2008/05/0131.xml> (announcing proposed rule to ban all non-ambulatory cattle from food supply).

<sup>210</sup> See, e.g., Prevention of Farm Animal Cruelty Act, Cal. Health & Safety Code § 25990 (West 2010) (removing all downer cows from the food supply).

<sup>211</sup> See Nat'l Meat Assoc., 2009 WL 426213 (challenging California law prohibiting the use of downed cows for human consumption), see also Press Release, Humane Soc'y of the U.S., Meat Indus. Seeks to Overturn Cal. Law Barring Sick, Disabled Farm Animals from Food Supply, (Jan. 27, 2009) [hereinafter Humane Soc'y Press Release] available at [http://www.hsus.org/press\\_and\\_publications/press\\_releases/meat\\_industry\\_seeks\\_to\\_overturn\\_downer\\_ban\\_012709.html](http://www.hsus.org/press_and_publications/press_releases/meat_industry_seeks_to_overturn_downer_ban_012709.html) (describing the meat industry's attempts to overturn legislation aimed at prohibiting the use of downer cows).

<sup>212</sup> See Fussell, *supra* note 36, at 269 (noting that in June 2007, the California based Vernon Food Group recalled 5.7 million pounds of E. Coli. contaminated beef after reports of illnesses surfaced in six Western states).

<sup>213</sup> See *Pacelle Testimony*, *supra* note 174, at 1.

<sup>214</sup> See *Slaughterhouse Co-Owner Surrenders on Animal Cruelty Charge*, Burlington (Vt.)

No events generated more publicity than the video footage obtained when an undercover investigator associated with the Humane Society of the United States gained access to the Hallmark/Westland plant in Chino, California.<sup>216</sup> When footage of the abuse surfaced, the USDA recalled 143 million pounds of ground beef, the largest recall in American history.<sup>217</sup> Had this video never surfaced, the impact on the food supply could have been disastrous. Hallmark/Westland is one of the top two suppliers of beef to the National School Lunch Program.<sup>218</sup> The 143 million pounds of recalled meat was destined for children's lunches in forty-seven states.<sup>219</sup> Following the video's release, journalists and citizen watch groups speculated that had the whistleblower been affiliated with an organization less prominent or mainstream than the Humane Society of the United States, charges might have been brought under AETA.<sup>220</sup> Clearly, these and similar activities, regardless of the economic harms they might cause to the industry or the enterprise, are not the activities that AETA's drafters intended to prohibit.<sup>221</sup>

#### CONCLUSION

While AETA's terms alone could conceivably prohibit certain acts of whistleblowing, this was not its intended purpose. Congress's

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Free Press, Aug. 10, 2009, available at 2010 WLNR 15986965 (reporting that co-owner of Bushway Packing Company surrendered to Vermont law enforcement after undercover Human Society videos revealed that he was excessively electrocuting calves prior to slaughter, which led to the plant's closing); see also Pacelle Testimony, *supra* note 174, at 2–3. (discussing Bushway videos) and Wyatt Testimony, *supra* note 197, at 6–8 (discussing the cruelty he witnessed as FSIS veterinarian at Bushway).

<sup>215</sup> See Holly Zachariah, Farm Owner Won't Face Animal Abuse Charges, Columbus Dispatch, Jul. 6, 2010, at A1, available at [http://www.dispatch.com/live/content/local\\_news/stories/2010/07/06/cow-abuse-charges.html](http://www.dispatch.com/live/content/local_news/stories/2010/07/06/cow-abuse-charges.html) (describing how an activist went undercover on a dairy farm in Marysville, Ohio captured images of an employee "viciously beating and abusing cows and calves," which led to 12 counts of animal cruelty).

<sup>216</sup> See Carla Hall, Career Ark of an Animal Defender, L.A. Times, Jul. 19, 2008, at A1 (discussing the undercover investigations at Hallmark/Westland).

<sup>217</sup> See Fussell, *supra* note 36, at 269.

<sup>218</sup> Humane Soc'y Press Release, *supra* note 211.

<sup>219</sup> See Fussell, *supra* note 36, 269; USDA Announces Ban on Downer Cattle, Closing Loophole, Humane Soc'y of the U. S. (May 20, 2008), [http://www.hsus.org/farm/news/our/news/usda\\_announces\\_downer\\_ban\\_052008.html](http://www.hsus.org/farm/news/our/news/usda_announces_downer_ban_052008.html) (noting that on January 31, 2008, the USDA urged schools in 36 states to stop serving the contaminated meat but further noting that without identification and early notice the meat would have effected 47 states).

<sup>220</sup> See Severson, *supra* note 37, at F3 (questioning whether the tremendous economic damages caused by the recall would lead to prosecution and suggesting that had the activist been tied to PETA or with less public support than the Humane Society of the United States, prosecutions under AETA might have ensued).

<sup>221</sup> See text accompanying *supra* notes 34–44 (discussing the scope of AETA's prohibitions).

stated objective in enacting AETA was to eliminate domestic terrorism threats. AETA's legislative history clearly reveals that it was never intended to inhibit whistleblowing, and its drafters attempted to clarify those aspects of the statute most likely to deter whistleblowing. A court seeking to effectuate the full intent of the statute must be mindful of this history and apply its penalties cautiously. Any restrictions on whistleblowers could have far-reaching consequences. The USDA, animal-enterprise employees, and the American public rely on whistleblowers to ensure that anti-cruelty laws are complied with and that the integrity of the American food supply is preserved.

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