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GIVING A VOICE TO THOSE WHO CAN’T SPEAK FOR THEMSELVES: TOWARD GREATER REGULATION OF ANIMAL EXPERIMENTATION

Lauren Magnotti*

"Vivisection is a social evil because if it advances human knowledge, it does so at the expense of human character."—George Bernard Shaw

I. INTRODUCTION

Vivisection, or the “act of operating or experimenting on living animals for medical or scientific research,” has often been described as a “necessary evil.” While the moral justification for medical research conducted on live animals can be debated, the animals used in such experiments should undoubtedly be spared from as much suffering as possible. To further that end, Congress passed the Animal Welfare Act ("AWA"), which, on its face, is meant “to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment.” While Congress may have passed the AWA with the best of intentions, the legal protections afforded to animals used in experimentation have proven to be inadequate.

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* J.D., 2006, St. John’s University School of Law; B.A., 1998, University of Pennsylvania. Many thanks to Professor Margaret Turano for her insightful comments.

1 GEORGE BERNARD SHAW, DOCTOR’S DILEMMA, preface (1906).


3 See, e.g., NAT’L ANTI-VIVISECTION SOCI’Y, ANIMALS AND SCIENTIFIC RESEARCH, available at http://www.navs.org/site/PageServer?-pagename=ain_sci_research_main (last visited May 24, 2006) (noting that the term “necessary evil” is derived from the competing notions that while it is evil to “inflict pain and suffering on sentient beings,” it is considered necessary by some to prevent human suffering).


5 Id. § 2131(1).
Vivisection must be viewed in a historical context to understand why researchers feel justified using animals in such great numbers and, oftentimes, in such brutal experiments. In the sixteenth century, René Descartes taught that animals are essentially machines—or *automata*—that do not feel pain. He endorsed experimentation on animals without anesthesia; the animals' screams were not due to pain, according to Descartes, but were merely mechanical reactions to the procedures performed on their bodies. Some of Descartes' contemporaries disputed this view of animals, and later scientists and philosophers who recognized that animals were not simply machines championed for animals as well. The Cartesian philosophy, however, continued to permeate the scientific community.

When Charles Darwin formalized the theory of evolution in the nineteenth century, it became nearly impossible for society to conceptualize non-human animals as separate and distinct from humankind; rather, humans were just one more link on the evolutionary chain. Instead of awakening a sense of camaraderie between humans and non-human animals, the theory of evolution became an incentive for scientists to conduct a greater number of experiments upon animals due to the apparent biological similarities they shared with humans.

Undoubtedly, large portions of the scientific community are morally and philosophically concerned with the welfare of the animals on which they experiment. Still, the callousness with which many scientists perform these tests on animals is striking.

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6 See Dale Jamieson, *Cognitive Ethology at the End of Neuroscience*, in *The Cognitive Animal: Empirical and Theoretical Perspectives on Animal Cognition* 69, 70 (Marc Bekoff et al. eds., 2002) ("[Descartes'] view was that while humans are minded creatures, non-human animals are organic automata who are not harmed when they are subjected to invasive procedures.").

7 See infra Part I(A).

8 See infra Part I(B).

9 See infra Part I(C)(1).

10 See infra Part I(B).

11 See id.

12 These tests are not recounted here gratuitously to stir the emotions; rather, it is essential to realize just what is being done to these animals behind laboratory doors to understand the depth of the need for greater regulation of the animals used in these experiments.
For example, one of the most common laboratory tests is called the "Lethal Dose Fifty Percent Test," commonly known as the "LD50 test." An LD50 test is an experiment whereby vivisectors administer increasing doses of potentially toxic substances to groups of animals, typically via a test tube inserted through the esophagus leading into the stomach, to determine the dose that kills fifty percent of the test subjects within a specified period of time. Thus, in this common form of experimentation, animals are provided potentially toxic substances until fifty percent of those animals die. Normally, over 200 animals are used in each LD50 test. After the experiment is completed, the surviving animals used in the experiment are also killed. These experiments often involve common household products, such as Procter & Gamble’s Comet bathroom cleaner.

Significantly, “animal toxicity studies do not necessarily extrapolate . . . to humans.” Indeed, the National Society of Medical Research has found that “the routine use of the quantitative LD50 test is not now scientifically justified.” Even if the

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15 See id.


17 See PROCTER & GAMBLE, MATERIAL SAFETY DATA SHEET—COMET CLEANER WITH BLEACH 4 (2001), available at http://www.buildsafe.ca/msds/-362.pdf#search='ld50%20oven%20cleaner:' (indicating that based upon an oral LD50 test conducted on rats, Comet Cleaner with Bleach has been found to have a low toxicity level).


volume of the substances that the animals are forced to consume would be an unreasonably high amount for any human to ingest, or even if the substances are relatively harmless to humans, the experiments are nonetheless routinely conducted.\textsuperscript{20}

Armed with the knowledge that animals undergo such brutal experiments, one would think that legislators and administrative officials would strive to ensure that these sentient beings are treated as humanely as possible. It is striking to note, however, that many species of animals are simply excluded from all legal protections. For example, § 2132(g) of the AWA completely excludes birds, mice, and rats from the definition of "animal."\textsuperscript{21} These animals, therefore, are entirely at the mercy of researchers who act completely without legal limitations on their treatment of these animals.

For those animals that do fall under the purview of the AWA, the government has established various safeguards to ensure that the standards of the AWA are upheld. Each institution that conducts research on animals must establish its own Institutional Animal Care and Use Committee ("IACUC") "to oversee and evaluate all aspects of the institution's animal care and use program."\textsuperscript{22} The IACUC must consist of "a Chairman and at least two additional members. . . . At least one shall be a Doctor of Veterinary Medicine, with training or experience in laboratory animal science and medicine...[and] [a]t least one shall not be affiliated in

\textsuperscript{20}See NAT'L ANTI-VIVISECTION SOC'Y, supra note 14.

\textsuperscript{21}Section 2132(g) states in relevant part: "(g) The term 'animal' means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes (1) birds, rats of the genus Rattus, and mice of the genus Mus, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes." 7 U.S.C. § 2132(g) (2000).

\textsuperscript{22}IACUC, General Information, available at http://www.iacuc.org/, click on hyperlink "purpose" (last visited May 27, 2006); see also 9 C.F.R. § 2.31(a) (2005).
any way with the facility other than as a member of the committee . . . . \(^{23}\)

In addition to this form of self-regulation, the AWA is administered through the United States Department of Agriculture ("USDA") via the Animal and Plant Health Inspection Service ("APHIS").\(^{24}\) APHIS ensures that all research facilities abide by the AWA before they are issued licenses and conducts "surprise inspections" at least once a year to ensure compliance.\(^{25}\) Furthermore, other administrative agencies have their own regulations regarding the use of animals in experimentation.\(^{26}\) While it is encouraging to witness these governmental efforts, many animals still fall through the cracks of these bureaucratic regulations. Animals are deserving of greater safeguards.

II. BACKGROUND

Animals do not have legal personhood and are legally treated as any other inanimate item of personal property.\(^{27}\) The legal regulation of animals used in medical and product research is just one component of a larger legal system that views animals as objects rather than as living creatures that can experience pain and fear.

Undoubtedly, animals are fundamentally different from lifeless pieces of property. Inanimate property, such as a piece of furniture or an automobile, clearly cannot feel pain. Outside of the legal context, it would be somewhat absurd to presume that a family's dog or cat is not distinguishable from that family's carpet or

\(^{23}\) 9 C.F.R. § 2.31(b).


\(^{25}\) See id.

\(^{26}\) See discussion infra Part III.A.3.

sofa. Within the confines of the law, however, sentient beings are equivalent to these material items.\(^{28}\)

Animals are alive, experience physical pain, and appear to form emotional bonds with both humans and other animals.\(^{29}\) Moreover, animals have, in varying degrees, the ability to rationalize; some, in fact, have the ability to communicate with others of their species and even with humans.\(^{30}\) Indeed, primates have communicated with their caretakers through sign language and have demonstrated a remarkable capacity to express themselves. For instance, when a chimpanzee named Lana became irritated with her caretaker, she signed a profane word.\(^{31}\) She also appeared to have an internal monologue; while paging through a magazine, to no one in particular, she signed “cat” when seeing a photo of a tiger and “drink” when viewing a Vermouth advertisement.\(^{32}\) In addition, a computer program monitored Lana’s sentences and put them on a display.\(^{33}\) Lana’s caretaker “mischievously and repeatedly interposed, from his separate computer console, a word that made nonsense of Lana’s sentence. She gazed at her computer display, spied her trainer at his console, and composed a new sentence: ‘Please, Tim, leave room.’”\(^{34}\)

Despite the sophistication of their sensory and cognitive abilities, animals are nonetheless utilized as means to an end in experiments to benefit humankind. Science has regrettably arrived at a point where reliance upon the use of animals in experimentation and the infliction of pain on innocent living creatures is a standard part of “doing business” in the research community.

\(^{28}\) See generally FRANCIONE, supra note 27; see also Lauren Magnotti, Note, Pawing Open the Courthouse Door: Why Animals’ Interests Should Matter When Courts Grant Standing, 80 St. John’s L. Rev. 455 (2006).


\(^{32}\) See id.

\(^{33}\) See id. at 119.

\(^{34}\) See id. at 119–20.
A. Early Philosophy: Animals as Automata

In the seventeenth century, René Descartes’ studies of anatomy led him to conclude that everything composed of matter "was governed by mechanistic principles." This perspective seemingly included human beings. Descartes, however, was a devout Christian, and such a viewpoint would have been seen as heretical. To reconcile his scientific findings with his religious beliefs, Descartes concluded that God endowed humans with a soul, which was not subject to these mechanistic rules. Conversely, animals were automata, having neither souls nor consciousness. Therefore, Descartes hypothesized, animals were fundamentally robotic and could not "experience pain, pleasure, or any other sensation or emotion."

Under Descartes’ tutelage, vivisection dramatically increased, and Cartesian physiologists performed brutal experiments on unanesthetized living animals. For example, conscious dogs were nailed to a board by their four paws and cut open so that their hearts could be observed, and animals were "burned, scalded, and mutilated... in every conceivable manner." Thus, Descartes’ teachings led to a philosophy of vivisection which found it “as senseless to talk about our moral obligations to animals, machines created by God, as it [would be] to talk about our moral obligations to clocks, machines created by humans.”

B. Softening the Cartesian Philosophy

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36 See id. at 200.
37 See Rachels, supra note 30, at 132.
38 See Singer, supra note 35, at 200.
40 See Singer, supra note 35, at 201–02.
41 See Francione, supra note 39, at 2.
42 See id.
Some of Descartes' contemporaries, however, viewed animals differently. Rather than perceiving animals as mere machines, these philosophers recognized the value of animals' lives and roundly criticized Descartes' characterization of animals as automata. For example, Voltaire (born François Marie Arouet) wrote:

How absurd, to say that beasts are machines, devoid of knowledge and feeling, which perform all their operations in the same manner, which learn nothing, which perfect nothing, etc! . . . Barbarians seize this dog, which surpasses man so greatly in his capacity for friendship; they nail him to a table, and dissect him alive to show you the mesenteric veins. You discover in him the same organs of feeling that are in yourself. Answer me, machinist, has nature arranged all the springs of feeling in this animal in order that he should not feel? Has he nerves in order to be unmoved? Do not suppose such a pointless contradiction in nature.43

Other philosophers continued to speak out for animals in a compassionate manner. For example, in the late 18th century Jeremy Bentham anticipated a time when "the rest of animal creation may acquire those rights which never could have been withheld from them but by the hand of tyranny."44 In addition, Arthur Schopenhauer, a vehement critic of vivisection, wrote in The Basis of Morality, "[A]nimals are seen as mere things. They can therefore be used for vivisection, hunting, [and other such abuses]. Shame on such a morality . . . which fails to recognise the eternal reality immanent in every living thing and shines forth with inscr-

44 JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 283 (Oxford University Press 1970) (1789).
table significance from all eyes that see the sun." These philosophers heightened the awareness of the plight of animals.

While the aforementioned philosophers were truly beneficial to the way in which animals were viewed, Charles Darwin's writings most fundamentally advanced society's view of animals. Until Darwin's time, humans were seen as one category of beings and nonhuman animals were seen as a separate and distinct category of beings. This was largely based on the Creation story found in Genesis. Genesis tells us that after creating the fish, birds, and "livestock," God created mankind in His own image and "let them rule over the fish of the sea and the birds of the air, over the livestock, over all the earth, and over all the creatures that move along the ground." 46

After Charles Darwin had popularized the theory of evolution, however, it was no longer feasible to see nonhuman animals as entirely dissimilar to humans. Humans were merely another link on the evolutionary chain, and thus the idea that humans had free reign over nonhuman animals became more difficult to justify morally or philosophically. "The reason Descartes's view of animals is not possible today... is that between him and us came Darwin. Once we see the other animals as our kin, we have little choice but to see their condition as analogous to our own." 47 When we learn to discard the Cartesian philosophy and instead recognize that the difference between humans and non-human animals is "one of degree and not of kind," 48 it becomes difficult to deny that animals must, at a minimum, be treated as humanely as possible. 49

46 Genesis 1:20–26 (emphasis added).
47 See RACHELS, supra note 30, at 131. Sadly, there are still some venues, such as "factory farming," in which "everything we've learned about animals at least since Darwin has been simply... set aside. To visit a modern [factory farm] is to enter a world that, for all its technological sophistication, is still designed according to Cartesian principles: animals are machines incapable of feeling pain." Michael Pollan, An Animal's Place, N.Y. TIMES, Nov. 10, 2002 § 6 (Magazine), at 58.
49 Charles Darwin's son, Francis Darwin, said of his father that "[h]e re- turned from his walk pale and faint from having seen a horse ill-used, and from
While Darwin’s developments may lend themselves to the idea that animals should be afforded increased respect and improved treatment, it was precisely the similarities Darwin found which led to increased mistreatment of animals. Inspired by the notion that animals and humans had biologically similar roots, scientists approached vivisection with a newly found enthusiasm. The numbers alone tell the tale of the increased utilization of animals in experimentation. Darwin’s *The Origin of Species* was published in 1860. In 1900, only several hundred animals were experimented upon for medical purposes; by 1986, however, the number of animals used in medical experimentation had climbed to 3.1 million.

**C. Present State of Affairs**

In the 21st century, vivisection has developed into a money-making industry, and Cartesian inhumanity continues to pervade medical and research science. For example, while vivisection may have originally been undertaken purely to generate medical advances, it now includes a great amount of product testing as well. Moreover, even within the world of medical experimentation, many vivisectors conduct experiments that seem unjustifiably cruel when compared with the scientific principles they are hoping to achieve.

Not all members of the medical community approve of the moral implications of using animals in experimentation; indeed, some question the soundness of scientific conclusions that are based upon vivisection. For example, Dr. Charles Mayo, co-

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52 See MSPCA, supra note 50.
founder of the world-renowned Mayo Clinic, has been quoted as saying, "I abhor vivisection. It should at least be curbed. Better, it should be abolished. I know of no achievement through vivisection, no scientific discovery, that could not have been obtained without such barbarism and cruelty. The whole thing is evil."  

1. Biological Experiments Still Bear Cartesian Elements

Descartes's means of experimenting on animals without regard to their physical sensations continue to pervade modern medicine, as is evidenced by looking to a recent study conducted at Columbia University. Researchers studied strokes by performing a surgical procedure on baboons. After removing the baboons' left eyes, vivisectors "drilled the bone at the back of their eye sockets, removed their brains' outer coverings, and clamped their blood vessels."  

Columbia employees reported that the baboons were grossly mistreated. They suffered in pain because of insufficient treatment by the vivisectors, resorted to eating their own feces, and were basically left to die in miserable conditions.

While this Article does not address the merits of scientific experimentation on animals, it proposes that the Cartesian philosophy that views animals as "nothing more than a machine [which] possesses no interests" continues to infuse the scientific community. Surely sentient creatures should be treated with a greater degree of compassion than that which the vivisectors showed during the course of these experiments.

2. The Fight Between Animal Rights and Vivisectors

Those who fight for the rights of animals have been in an ongoing conflict with members of the scientific community who support the use of animals in research. Some of those fighting on

55 See Nelson, supra note 54, at A33.
56 See FRANCIONE supra note 39, at 2.
behalf of animals, hope only to improve the situation of those animals that are experimented upon, but they believe that animal experimentation is morally justified.\textsuperscript{57} Others are entirely opposed to vivisection and are committed to ending the practice altogether.\textsuperscript{58}

Many animal rights activists have found their greatest contention with contract research organizations ("CROs"). CROs are private for-profit organizations that contract with academic and other institutions engaged in research.\textsuperscript{59} Clinical research has been "increasingly out-sourced to [CROs]... to reduce research costs" that would otherwise be incurred by universities or other institutions.\textsuperscript{60} CROs do not independently research medical questions or product issues of their own initiation; rather, they are commissioned to conduct experiments purely to provide the results to those institutions that hire them. The most notorious of these organizations—and the largest target of protestors fighting for animal rights—is Huntingdon Life Sciences ("HLS").

HLS is a CRO with two research centers in Great Britain and one research center in the United States.\textsuperscript{61} HLS professes it "ha[s] to respect the needs of the animals [used in experiments] and be fully aware of the welfare issues involved. [It is] committed to providing the highest levels of animal husbandry and welfare."\textsuperscript{62} Many believe, however, that HLS does not meet these standards. HLS has been accused, among other things, of "slam[ming] monkeys into cages, suspend[ing] monkeys in mid-air while pumping

\begin{thebibliography}{99}
\bibitem{58} See id.
\bibitem{60} Michael Baram, Making Clinical Trials Safer for Human Subjects, 27 AM. J.L. & MED. 253, 262 n.59 (2001).
\bibitem{61} See HUNTINGDON LIFE SCIENCES, CONTACTING HUNTINGDON LIFE SCIENCES, available at http://www.huntingdon.com/contact/contact.php?currentNumber=0&currentIsExpanded=0 (last visited May 28, 2006).
\end{thebibliography}
test substances into their stomachs, and scream[ing] and [shaking] their fists in frightened monkeys’ faces when they were strapped down for electrocardiograms." Moreover, according to members of the animal rights movement, HLS employees have “been caught on film punching puppies in the face, simulating sex with animals in their care, cutting open primates while they are still alive and falsifying experiments to get products on the market.”

Numerous organizations have forcefully protested HLS and have attempted to shut down its business. For example, the organization Stop Huntingdon Animal Cruelty, also known as “SHAC,” was formed in 1999 “with the sole aim of shutting HLS down.” In addition, the Animal Liberation Front, notorious for its sometimes-violent and otherwise illegal actions to fight for greater animal protection, has mounted a vehement campaign against HLS. These organizations have been able to thwart HLS’s progress in many respects. For example, HLS’s largest shareholder, Stephens, Inc., sold all of its shares and investments in HLS due to the unwavering efforts of the international campaign against HLS. Moreover, Fleet Securities, WMV Frankel & Co., and other market makers stopped serving HLS. On September 8, 2005, HLS was scheduled to be listed on the New York Stock Exchange. On the day HLS was to be listed, and with some of its executives present at the stock exchange, HLS’s listing was “delayed” at the last mini-

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63 PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, ANIMAL ABUSERS TAKE PETA TO COURT—AND LOSE! (2003). PETA reportedly captured these behaviors on videotape. See id.
65 Id.
68 See id.
The delay was attributed to the increased activity by animal rights groups in the United States. For example, shortly before HLS was to be listed on the New York Stock Exchange, the Animal Liberation Front painted a New York yacht club red because its members allegedly worked for a company that did business with HLS. Its website warned: “Let this be a message to any other company who chooses to court HLS in their . . . entrance into the [New York Stock Exchange] . . . . If you trade in [HLS] shares, make a market, process orders, or purchase shares you can expect far worse treatment. The message is simple, don't touch HLS!" The debate surrounding vivisection is, to put it mildly, a heated one.

III. The Helms Amendment: How Ninety-Five Percent of Animals Used in Research Were Excluded from the Animal Welfare Act

In 2002, a remarkable event occurred: Congress decreed that rats, mice, and birds are not animals. Senator Jesse Helms managed to include an amendment that excluded rats, mice, and birds from the definition of “animal” in the AWA to the Agriculture, Conservation, and Rural Enhancement Act of 2002. By passing this amendment, Congress erased ninety-five percent of all animals used in experimentation from any legislative protections.

A. History of the Law Before the Amendment

Before the Helms Amendment was introduced in 2002, the debate over whether to include rats, mice, and birds within the definition of “animal” in the AWA was well underway. The AWA

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70 Id.
71 See id.
72 Id. (quoting the Animal Liberation Front’s online bulletin board).
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is part of the United States Code ("U.S.C."), which is further developed by the Code of Federal Regulations ("C.F.R."). Thus, while the C.F.R. may expound upon the provisions found in the U.S.C., the C.F.R. cannot contradict the U.S.C.

At the time the Helms Amendment was introduced, the C.F.R. already contained a more restrictive definition of "animal" than that which was found in the U.S.C. One provision excluded rats, mice, and birds from the definition of "animal," thereby excluding them from the protections of the AWA. While rats, mice, and birds were excluded from the C.F.R., they were not excluded from the definition of "animal" in the AWA found in the U.S.C., and thus the regulations could still be amended to include rats, mice, and birds in the definition of "animal." There was a great amount of debate surrounding this exclusion in the C.F.R., and until the Helms Amendment, it appeared that those fighting on behalf of animals were making headway.

For example, on March 15, 1989, the USDA sought public comments on proposals to the regulations that would alter the definitions of "animal" under the AWA. Included in the numerous public comments received were 1017 comments relating to the possible inclusion of rats, mice, and birds within the AWA. Of these comments, only 322 commentators urged the continued exclusion of rats, mice, and birds, 297 of whom were members of the research community.

In 1991, the Animal Legal Defense Fund brought suit challenging the USDA's exclusion of rats, mice, and birds, but the suit was dismissed due to lack of standing. Then on April 29, 1998, the Alternatives Research and Development Foundation ("ARDF") filed a petition in federal court asking for a new rulemaking pro-

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77 See id.
78 Id.
ceeding to amend the AWA to include rats, mice, and birds. ARDF’s petition asserted that the “USDA’s regulation excluding 'birds, rats of the genus Rattus, and mice of the genus Mus bred for use in research is arbitrary and capricious, an abuse of agency discretion and otherwise not in accordance with law.’” On January 28, 1999, the USDA published the plaintiff’s petition and requested public comments.

Before the court reached a final decision on the plaintiff’s petition, the USDA moved to dismiss, arguing that the plaintiff lacked standing or, alternatively, that the Secretary of the USDA was within his right to pass the regulations excluding rats, mice, and birds. The U.S. District Court for the District of Columbia denied the motion. After deciding the standing issue in favor of the plaintiff, the court held that the AWA’s definition of “animal” “does not confer upon the Secretary the unbridled discretion to conclude that animals which are being used for research are not ‘animals’ within the meaning of the Act.” On September 28, 2000, the parties reached a settlement by which the USDA agreed to complete a rulemaking on the issue within a reasonable time, keep ARDF informed, and pay a portion of ARDF’s legal fees. This significant progress was jeopardized when Helms introduced his bill to be added to the Agriculture, Conservation, and Rural Enhancement Act of 2002.

B. Debate Surrounding the Helms Amendment

81 Id.; see also Alternatives Research & Dev. Found., 101 F. Supp. 2d at 10.
83 See id. at 9.
84 See id at 10.
85 See id. at 15.
A spirited debate surrounded the passage of the Helms Amendment. Senator Helms explained to the Senate that the amendment was necessary so that "none of the important work taking place in the medical research community will be delayed, made more expensive, or be otherwise compromised by regulatory shenanigans." Senator Helms specifically stated that the amendment will "follow Congressional intent," despite the fact that the district court in Alternatives Research & Development Foundation had recently stated that "the plain language of the statute does not support the defendants' argument that Congress has committed absolute discretion to the USDA to determine the meaning of the term 'animal.'" Helms continued to argue that by including rats, mice, and birds in the definition of "animal," the "USDA will force researchers out of the laboratory to spend their time filling out countless forms for yet another federal regulator." According to Helms, the USDA, "weary and browbeat into submission," had succumbed to this decision based upon the actions of "professional activists who delight in creating mischievous controversies."

Not surprisingly, Helms' main bastion of support came from the research community. In particular, the National Association of Biomedical Research ("NABR") "provided leadership" in lobbying for the passage of the bill. NABR argued that "new animal care standards are unnecessary, costly and would delay cures of diseases."

Concurrently with the congressional debates, People for the Ethical Treatment of Animals ("PETA") circulated a videotape among members of Congress of an undercover investigation conducted at the University of North Carolina at Chapel Hill to un-

90 Id.
92 Animal Welfare Act May Not Protect All Critters, supra note 74.
dermine the passage of the bill. In the video, "a researcher cuts open the skulls of squirming baby rats to remove their brains without first numbing the animals in a bucket of ice—a shortcut that the researcher concedes on tape is a violation of the experimental protocol." This information helped to spark an even more passionate response from those attempting to protect rats, mice, and birds. According to Frankie Trull, President of NABR, it was "abhorrent that [PETA] use[d] illegal tactics to affect public policy." According to one member of the scientific community, "as a result of quick and decisive action by the university officials, this situation was effectively diffused."

Unexpected allies joined groups such as PETA in their fight against the Helms Amendment. For instance, Colgate-Palmolive and Procter & Gamble—both companies that test their products on animals—wrote to Senator Helms to protest the passage of the amendment. In addition, Scott Plous and Harold Herzog, professors at Wesleyan University and Western Carolina University, respectively, conducted a survey of members of the Institutional Animal Care and Use Committees ("IACUCs"), internal committees formed by the research institution to oversee the animals it uses in research. The survey was conducted between September 1, 1998 and January 1, 1999, well in advance of the

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94 Id.
95 See *Animal Welfare Act May Not Protect All Critters*, supra note 74 ("Senator Helms should look at those videotapes if he thinks that lab animals are treated better [than mice fed to snakes]." (quoting John McArdle, former Director of the Alternatives Research and Development Foundation)).
96 Weiss, supra note 93.
99 For a full discussion of IACUCs, see discussion infra Part III.A.2.
Helms Amendment.\textsuperscript{101} Plous and Herzog found that 73.3 percent of the IACUC members surveyed believed that rats and mice should be protected under the AWA, and 69.0 percent felt that pigeons should also be covered.\textsuperscript{102} Despite this significant support from unlikely sources, the Helms Amendment passed.

Senator Helms introduced a second amendment that later passed, which gave some hope to those seeking to protect rats, mice, and birds. The amendment provided that "[n]ot later than 1 year after the date of enactment of this Act, the National Research Council shall submit ... a report on the implications of including rats, mice, and birds within the definition of animal under the regulations promulgated under the Animal Welfare Act."\textsuperscript{103} As a further disappointment to those trying to protect rats, mice, and birds, however, the Department of Health and Human Services, which was partly responsible for subsidizing the study, declined to provide funding.\textsuperscript{104} As a consequence, the National Academy of Sciences was unable to issue the follow-up report.\textsuperscript{105}

IV. OVERSEEING THE "LUCKY" FIVE PERCENT: ADMINISTRATIVE CONTROLS

The government has undoubtedly attempted to implement safeguards for those animals it has determined are covered by the AWA. The AWA, the main mode of animal protection, is administered primarily through the USDA. In addition, institutions conducting research must internally regulate animals used in experi-

\textsuperscript{101} See id.
\textsuperscript{102} See id.
\textsuperscript{105} See id.; see also Deborah Paulus-Jagric, Laboratory Animals: An Executive, Legislative, and Judicial Narrative & Research Guide, at VII.B. (2005), available at http://www.llrx.com/features/labanimals.htm. This point was confirmed in a telephone interview with Sue Leary, President, Alternatives Research and Development Foundation.
mentation. Moreover, other agencies have implemented their own regulations regarding the humane treatment of laboratory animals. A cursory look at these administrative protections is deceptively comforting. While the numerous layers of governmental oversight may lead one to believe that animals must be treated as humanely as possible, a closer examination reveals that despite these administrative controls and the best intentions of many individuals working for regulatory agencies, many animals often slip through these procedural safeguards and are subjected to unspeakable cruelties.

A. Governmental Safeguards

While rats, mice, and birds are not subject to any governmental regulation, the remaining animals used in experimentation—a mere five percent of the total number of animals used—are protected by the AWA. Among other regulations, the AWA requires that all dealers who sell animals to research laboratories be licensed, that no dog or cat be sold or otherwise disposed of within five days after coming into the possession of a dealer, that research facilities only purchase dogs or cats through licensed dealers, and that all research facilities be licensed with the USDA. In addition, the Secretary of Agriculture is “authorized to promulgate humane standards and recordkeeping requirements governing the purchase, handling, or sale of animals, in commerce, by dealers, research facilities, and exhibitors at auction sales and by the operators of such auction sales.”

1. Animal and Plant Health Inspection Service (“APHIS”)

Those animals that are covered by the AWA are brought under the auspices of the USDA, which enforces the AWA through the Animal and Plant Health Inspection Service (“APHIS”). APHIS in turn acts through its Animal Care unit. APHIS is divided

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107 Id. § 2135.
108 Id. § 2137.
109 Id. § 2136.
110 Id. § 2142.
into an eastern regional office and a western regional office.\footnote{111} Each research institution must allow APHIS officials access to its facilities to inspect the premises during unannounced visits.\footnote{112} Upon inspection, APHIS focuses on numerous aspects of animal care, such as the animals’ housing, ventilation, lighting, sanitation, food and water supply, and handling.\footnote{113}

The C.F.R. provides APHIS with specific guidelines that it may use to ensure that animals are treated within the confines of the law. For example, the C.F.R. requires that each research facility has an attending veterinarian and maintains adequate veterinary care.\footnote{114} APHIS is required to ensure that the “[h]andling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.”\footnote{115} Moreover, physical abuse and deprivation of food and water are not allowed except in certain approved short-term situations.\footnote{116}

2. Institutional Animal Care and Use Committee (“IACUC”)

Under federal law, every institution that conducts research on animals must establish an internal Institutional Animal Care and Use Committee (“IACUC”), the purpose of which is “to oversee and evaluate all aspects of the institution’s animal care and use program.”\footnote{117} Thus, in addition to the external controls administered through APHIS, the law provides that the research facilities be self-regulated.

\footnote{113} See U.S. DEP’T OF AGRIC., ANIMAL & PLANT HEALTH INSPECTION SERV., supra note 112.
\footnote{114} See 9 C.F.R. § 2.33.
\footnote{115} See id. § 2.38(f).
\footnote{116} See id.
\footnote{117} Id. § 2.31(a).
IACUCs must be comprised of at least one veterinarian who is trained in laboratory animal science and one member who is not affiliated with the research organization. At least once every six months, the IACUC must evaluate the institution's standards for humane treatment of animals and inspect the institution's animal facilities. If the IACUC receives complaints from the public or from laboratory employees, it must review those complaints and conduct an investigation if the circumstances compel such action.

Through the C.F.R., the IACUC is charged with ensuring that experiments are conducted in ways that minimize animal suffering. To further this end, methods of experimentation must minimize any discomfort, distress, and pain the animal may experience. The principal investigator must demonstrate that no alternative procedure was available when an experiment might cause more than transient or minor pain and must prove experiments are not unnecessarily duplicative.

The regulations cover specific methods of treating the animals during the experiments themselves. For example, procedures that "may cause more than momentary or slight pain or distress to the animals" require consultation with a veterinarian and the use of anesthesia or other sedatives unless they must be withheld for scientific purposes. In that case, the principal investigator must explain the withholding in writing, and may continue to deprive the animal of the anesthetic only for the least amount of time required by the experiment. The regulations also limit the number of procedures animals must undergo. Furthermore, if it appears that an animal will experience chronic pain that cannot be relieved, the animal must be "painlessly euthanized."

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118 See id. § 2.31(b).
119 See id. § 2.31(c).
120 See id. § 2.31(c)(4).
121 See id. § 2.13(d)(1)(i).
122 See id. § 2.13(d)(1)(ii).
123 See id. § 2.13(d)(1)(iii).
124 See id. § 2.13(d)(1)(iv).
125 See id. § 2.13(d)(1)(iv)(A).
126 See id. § 2.13(d)(1)(x).
127 See id. § 2.13(d)(1)(v).
3. Other Agencies

While the USDA is the main governmental agency charged with protecting animals used in laboratory experiments, other agencies have issued their own regulations governing the use of animals in experimentation. For example, the Department of Defense uses a great number of animals in its experiments, some of which involve chemical and biological weapons. The AWA binds the Department of Defense, but the agency has also promulgated its own guidelines for the treatment of animals. Other self-regulatory agencies include the National Institutes of Health, the Environmental Protection Agency, the Food and Drug Administration, and the Department of Veterans Affairs.

B. Inadequacies of the Regulatory Schemes—Case Study: IACUCs

With this wide array of laws, it may seem as though animals covered by the regulations would be relatively safe from abusive procedures unless the procedures are medically required. Unfortunately, despite the vast number of laws to protect animals and the good intentions of many members of both the scientific community and the regulatory agencies, many animals are not provided with the protections to which they are entitled under the law.

A September 2005 audit report published by the USDA’s Office of the Inspector General of the Animal Care Program’s In—

128 See Michael A. Budkie, Military Animal Research, Medical Research Modernization Committee (2001).
132 See U.S. Food & Drug Admin., Good Laboratory Practice for Nonclinical Laboratory Studies (2003); see also 21 C.F.R. § 58.
spection and Enforcement Activities makes it clear that animal protection is still inadequate.\textsuperscript{134} This report audited APHIS’s Animal Care unit and also evaluated the effectiveness of IACUCs. The audit begins by noting that “animal care and use is a highly controversial topic with varying points of view from the public, animal rights groups, breeders, research laboratories, and others.”\textsuperscript{135} In addition, and to their credit, “most... employees [of APHIS’s Animal Care unit] are highly committed to enforcing the AWA through their inspections and are making significant efforts to educate research facilities and others on the humane handling of regulated animals.”\textsuperscript{136} In looking to the Inspector General’s recommendations as well as APHIS’s responses, however, it is apparent that even those few animals covered by the AWA are not being adequately protected.

The Inspector General indicates that “[Animal Care’s] Eastern Region is not aggressively pursuing enforcement actions against violators of the AWA.”\textsuperscript{137} While the Eastern Region had reported an average of 209 suspected violators to the Inspector General in 2002–2003, only 82 cases were reported in 2004.\textsuperscript{138} Furthermore, regional management did not pursue enforcement actions against 126 of 475 violators that had been referred to the Inspector.\textsuperscript{139} This can be contrasted with the Western Region, which only failed to take action against 18 of 439 violators.\textsuperscript{140} Eastern Region inspectors complained that the lack of enforcement “undermined their credibility and authority to enforce the AWA,” thereby leading the Eastern Region to have a much higher number of repeat violators than those found in the Western Region.\textsuperscript{141}

Perhaps the most jarring observation provided by the audit report was that stipulated fines—defined as fines which are agreed

\textsuperscript{135} Id. at 4.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id. at 5.
\textsuperscript{139} Id. at 6.
\textsuperscript{140} Id.
\textsuperscript{141} Id. at 5.
to by the violator—are discounted by seventy-five percent "as an incentive for violators to settle out of court to avoid attorney and court costs." ¹⁴² Other concessions are also made to the violators, which converts the fines for violations into a "normal cost of conducting business rather than a deterrent for violating the law." ¹⁴³ For example, if APHIS fines an organization for having an inadequate facility, the violator may put part of the assessed fine toward bringing the facility into compliance with the AWA instead of paying both the full amount of the fine and the cost to repair the facility. ¹⁴⁴ The Inspector General’s recommendation states what should appear obvious: "[W]e recommend that APHIS eliminate the automatic 75-percent discount for repeat violators or direct violations . . . ." ¹⁴⁵

In addition to these remarkable failures to protect animals, the Inspector General found that the number of animals used in experiments was misreported at an overwhelming majority of laboratories; ¹⁴⁶ that the Licensing and Registration Information System, which records the histories of inspections and violations of breeders, exhibitors, and research facilities, "generates unreliable and inaccurate information, limiting its usefulness", ¹⁴⁷ and that most veterinary medical officers believe that the research concerning procedures that do not involve animals or that cause animal less pain is inadequate. ¹⁴⁸

The findings of the audit report are most disturbing. It is clear that while the bureaucratic web surrounding animal protection laws is expansive, animals are still not receiving the protections they deserve.

V. Conclusion

The use of animals in experimentation is highly controversial. While the merits of using animals in research is open to debate,
animals subjected to medical and product experiments must be treated as humanely as possible. Sadly, much more can be done to protect those who cannot speak for themselves. The overwhelming majority of animals used in research are without any legal safeguards whatsoever, and those animals that are protected find themselves within an ambit of bureaucratic regulations that often fail to protect them. It is imperative that these sentient creatures are at a minimum provided with humane treatment. For a society to advance scientifically at the expense of its moral character can hardly be deemed progress.