

# How the Animal Welfare Act Harms Animals

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*The fiftieth anniversary of the Animal Welfare Act (“AWA”) was 2016. Most fiftieth anniversaries are cause for great celebration, but this one shouldn’t be because the AWA has caused more harm than good. In previous decades a wide range of sources have praised the Animal Welfare Act as a critical and noteworthy national legislative achievement that protects animals across the country. This Article, by contrast, demonstrates that animal protection efforts are affirmatively hindered by the AWA in both concrete, tangible applications and in a variety of more conceptual ways. Animal industries continually deploy the fact of an AWA license as an obstacle to transparency about the suffering of confined animals, as a soundbite in the media to quell public concern, and even as a basis for defamation and related litigation against animal protection groups who criticize the treatment of confined animals. In sum, the AWA’s prominence paired with its meagerness has set the stage for a powerful duality—the AWA is invoked as the centerpiece, even the exclusive source of restrictions on the treatment of many animals, but the protections it provides are actually quite few and almost never enforced. The very existence of the AWA reinforces norms that exacerbate animal suffering.*

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## INTRODUCTION

Last year was the fiftieth anniversary of the Animal Welfare Act (“AWA”). Most fiftieth anniversaries are cause for great celebration,<sup>1</sup> but this one should not be because the AWA has caused more harm than

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1. Scholars commemorating the recent fiftieth anniversary of the Voting Rights Act, 52 U.S.C. §§ 10301–10314, 10501–10508, 10701–10702 (2014), for example, have pointed to empirical evidence showing the diminishing gap between black and white voter registration in the south over the past fifty years. See DENNIS W. JOHNSON, *THE LAWS THAT SHAPED AMERICA: FIFTEEN ACTS OF CONGRESS AND THEIR LASTING IMPACT* 328–29 (2009). Likewise, Title IX’s protection against sex discrimination in education created a fundamental shift in the demographics of our population, tripling the percentage of women with a college education over the past 50 years. See, e.g., Peggy Williams, *Title IX’s Impact Measurable, 30 Years Later*, USA TODAY (June 23, 2002, 8:59 PM), <http://usatoday30.usatoday.com/news/education/2002-06-24-title-ix.htm> (discussing the impact of Title IX on sex discrimination in education and the workplace on the Act’s 30th anniversary). To illustrate, in 2009, approximately twenty-eight percent of women had a college degree, compared to eight percent in 1970, and since 1968 the percentage of women between the ages of twenty-five and thirty-four with a college education has more than tripled; see also Statement from Jacqueline A. Berrien, Chair, U.S. Equal Emp’t Opportunity Comm’n, Statement on 50th Anniversary of the Civil Rights Act of 1964 (July 2, 2014); Brooks Holland, *Miranda v. Arizona: 50 Years of Judges Regulating Police Interrogation*, 16 *INSIGHTS ON L. SOC’Y* 4, 4 (2015).

good. In previous decades, a wide range of sources have praised the AWA<sup>2</sup> as a critical and noteworthy national legislative achievement that protects animals across the country.<sup>3</sup> Professor Cass Sunstein has gone so far as to describe the AWA as “an incipient bill of rights for animals.”<sup>4</sup> This type of comment is always more of a statement of the ideal, than a reflection of the real. The Act’s fiftieth anniversary, as well as a number of recent AWA-related trends that harm rather than help animals, make this an appropriate occasion for a candid review of the animal protection movement’s seminal piece of federal legislation.

Previous scholarship has critiqued the AWA for failing to provide a comprehensive or readily enforceable set of protections for animals.<sup>5</sup> This Article breaks new ground by identifying much larger, structural problems with the AWA that show it is not only ineffective, but worse, counterproductive. Because of the vast exemptions to the law, many forms of institutionalized animal suffering have been exacerbated—the

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2. 7 U.S.C. §§ 2131–2159 (2012).

3. The AWA is referred to as the “country’s major animal protection law,” Mariann Sullivan, *The Animal Welfare Act—What’s That?*, 79 N.Y. ST. B.A. J. 17, 23 (2007); the “landmark” animal protection law, James F. Gesualdi, *Improve Administration of the Animal Welfare Act*, 79 N.Y. ST. B.A. J. 20, 20 (2007); the “most famous federal animal-protection law[.]” Gaverick Matheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade*, 70 LAW CONTEMP. PROBS. 325, 334 (2007). And it is credited with being “certainly the most ambitious attempt” of animal protection law in the U.S. *Id.*

4. Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1334 (2000) (citing the “gap between statutory text and real-world implementation” as making animal protection more “symbolic rather than real”).

5. See, e.g., Emily A. Beverage, *Abuse Under the Big Top: Seeking Legal Protection for Circus Elephants After ASPCA v. Ringling Brothers*, 13 VAND. J. ENT. TECH. L. 155, 165–67 (2010) (discussing problems with using the AWA to enforce humane treatment of circus elephants); Taimie L. Bryant, *Trauma, Law and Advocacy for Animals*, 1 J. ANIMAL L. ETHICS 63, 79–82 (2006) (considering how the AWA’s narrow definition of “animal” and lack of enforcement may affirmatively harm animals, rather than protect them); Steve Ann Chambers, *Animal Cruelty Legislation: The Pasado Law and its Legacy*, 2 ANIMAL L. 193, 193 (1996) (“The problem, however, especially with regard to the Animal Welfare Act, is the failure of the government to enforce these laws.”); Henry Cohen, *The Animal Welfare Act*, 2 J. ANIMAL L. 13, 25 (2006) (“The Animal Welfare Act’s failure to cover the more than 9 billion farm animals slaughtered annually in the United States, and failure to cover ninety or ninety-five percent of animals used in research, makes it an exaggeration to say that the United States has a general animal welfare act.”); Karen L. McDonald, Comment, *Creating a Private Cause of Action Against Abusive Animal Research*, 134 U. PA. L. REV. 399, 402–08 (1986) (discussing the AWA’s failure to ensure research animals are treated humanely); Carole Lynn Nowicki, *The Animal Welfare Act: All Bark and No Bite*, 23 SETON HALL LEGIS. J. 443, 463–76 (1999) (criticizing the AWA’s failures, including lack of protection for animals used in experimentation, lenient penalties, and gaps of protections and discussing the lack of governmental and judicial enforcement of the AWA); *Report of the Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York Regarding its Recommendation to Amend the Animal Welfare Act*, 9 ANIMAL L. 345, 346–53 (2003) (criticizing the USDA’s failure to enforce the AWA and faulting the AWA for lacking a citizen suit provision, resulting in many challenges brought under the law being dismissed); Valerie Stanley, *The Animal Welfare Act and USDA: Time for an Overhaul*, 16 PACE ENVTL. L. REV. 103, 111 (1998) (calling USDA primate regulations made under the AWA a “sham”); Katharine M. Swanson, *Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. MICH. J.L. REFORM 937, 949–62 (2002) (discussing the USDA’s failure to enforce the AWA).

welfare of most animals in this country is worse now than it was without the AWA. Moreover, animal industries continually deploy the fact that they possess an AWA license as an argument against providing transparency in their animal handling practices, as a sound bite in the media to quell public concern, and even as a basis for defamation actions and related litigation against animal protection groups who criticize the treatment of confined animals.<sup>6</sup>

With the AWA being employed to benefit those who exploit animals, the time has come to challenge the conventional inquiry. Rather than asking whether the AWA is insufficiently enforced, or even lacking a framework for adequate enforcement, this Article makes the case that the AWA is causing more harm than good for animal protection efforts.<sup>7</sup>

To the casual observer, this might seem like a cynical thesis, but from the perspective of a scholar considering the hurdles facing modern animal protection efforts, few obstacles are more insurmountable than the status quo. The AWA exemplifies and entrenches the peculiar American schizophrenia about animals—we love some like family, and treat many others like undifferentiated biomass that is well suited for food, entertainment, breeding, experimentation, and other uses that bring us pleasure or perceived benefits. In this way, the AWA is the ultimate wolf in sheep's clothing. It has legitimized a vast system of animal mistreatment, both through its exemptions and the way it is applied, and it has facilitated the hijacking of the concept of “welfare” by the industries and researchers that are regulated by the AWA. Effectively, the AWA has deprived the term “animal welfare” of any meaning.<sup>8</sup>

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6. The claim that legislation like the AWA would do more harm than good is not new to at least some rights-absolutist scholars. See GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 257 (1995) [hereinafter FRANCIONE, ANIMALS, PROPERTY, AND THE LAW]. Francione claims that if animal welfare legislation and litigation is a meaningful way of furthering the cause of animals as intrinsically valuable—as opposed to having mere utilitarian value—then we should see that over the past fifty years the US have moved “closer to recognizing the inherent value of nonhumans[.]” but observes that no such progress can be detected. Gary L. Francione, *Reflections on Animals, Property, and the Law and Rain Without Thunder*, 70 L. CONTEMP. PROBS. 9, 12 (2007).

7. The notion that an apparent advancement in the rights or protections provided to a group may have deleterious impacts on the long-term goals of the benefitted group is very familiar to the critique of rights scholars. See, e.g., Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 178 (Wendy Brown & Janet Halley eds., 2002); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363 (1984); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2187 n. 50 (2013). But the critique of rights scholarship does not address the animal rights situation, because animals simply do not have rights. The thesis of this Article is not that giving animals rights would be a mistake. The AWA was not about conferring additional rights to rights-holders, and indeed it cannot fairly be read as creating meaningful animal welfare, much less animal rights. On the other hand, to the extent Marxist theory underlying the critique of rights recognizes governmental efforts to appease the masses, then such a framework may in fact offer some important insights into the animal rights debate. This question of the overlap between Marxist theory and the AWA is not addressed in this project.

8. Paul Waldau has written about the concept of animal “welfare” and argued that in its most capacious articulation animal welfare is tantamount to animal rights. PAUL WALDAU, ANIMAL RIGHTS:

The AWA's prominence paired with its meagerness set the stage for a powerful duality—the AWA is invoked as the centerpiece, or even the exclusive source, of restrictions on the treatment of many animals, but the protections it provides are actually minimal and almost never enforced. In this way, the AWA has allowed the public to feel good about itself and its concern for animal welfare, but it has not improved the lives of most animals, and its existence reinforces norms that actually exacerbate animal suffering.<sup>9</sup>

Collectively, the nation takes pride in the existence of a federal animal protection law, and the AWA is often regarded as a turning point in the animal protection movement. But on the fiftieth anniversary of the AWA, this Article considers whether it would have been better to be an animal in 2016 or in 1966—have things gotten better or worse for non-human animals during the life of the AWA? This question is answered in three parts: First, Part I of this Article looks at the plight of farmed animals over the past fifty years. By juxtaposing farming practices from the 1960s with those of today, Part I explores an important and oft-ignored insight into the workings of the AWA—that is, by studying how the most common animals in this country (making up more than 90% of the domesticated animal population)<sup>10</sup> are treated, one can gain some insight into how the AWA has shaped our collective social thinking about the need to safeguard animal welfare.<sup>11</sup> Part II moves beyond the historical comparisons of animals that are exempted from the AWA's coverage and considers the possibility that the AWA's actual existence could be counterproductive to many animal protection efforts.<sup>12</sup> This Part

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WHAT EVERYONE NEEDS TO KNOW (2011).

9. This notion that by celebrating and participating in reforms that are far less than ideal one can entrench and even reify a broken system is central to the work of critical legal theorists. *See, e.g.*, ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 79 (1996) (“The distinctive characteristic of conservative reformism is the combination of commitment to programmatic aims with institutional conservatism.”). FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, *supra* note 6, at 257 (noting that there is “no empirical evidence to suggest that if we make animal exploitation more ‘humane’ now, we will be able to abolish such exploitation later” and explaining that so long as “animals are regarded as property under the law,” animal welfare will be subject to the capricious on-the-spot judgments of humans).

10. Ani B. Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 ANIMAL L. 65, 72 n.32 (2009) (describing the “legal gerrymandering” that occurs across animal protection statutes that works to exclude animals from otherwise applicable protections); *Id.* at 83 (“Whether animals are the primary or secondary subjects of laws, or regulated for their own or human welfare, their legal treatment is defined by human interest. This results in legal gerrymandering, which both undermines fundamental protections for animals and creates legal inconsistencies.”).

11. The failure of American attitudes to evolve during the period since the enactment of the AWA could simply be a coincidence—that is things got worse for animals while the AWA has been in effect. The argument advanced in this paper is a stronger version—the general mood about the well-being of animals has gotten worse, and the AWA is at least partly to blame.

12. *See generally* THE NATIONAL ACADEMIES, PRESS GUIDE FOR THE CARE AND USE OF LABORATORY ANIMALS (8th ed. 2011) (providing numerous examples of reforms inspired or required by the AWA).

illuminates a series of conceptual or abstract harms traceable to the AWA that undermine the efficacy of efforts to protect animals, and examples of the AWA being deployed by animal industries in order to defuse revelations of animal mistreatment are compiled and examined. Finally, in Part III, the Article moves beyond conceptual injuries and identifies a set of tangible, legalistic harms that the AWA is directly inflicting on animal protection efforts. This Article is the first to scrutinize the variety of ways that the AWA is being used as a tool to *support* animal industries in litigation and media campaigns against animal protection groups.

#### I. ANIMAL WELFARE FOR FARMED-ANIMALS IN POST-AWA AMERICA

The AWA does not purport to help all animals, much less help all animals equally. Indeed, the AWA expressly exempts animals raised for food from its coverage.<sup>13</sup> Nonetheless, a look at how the lives and deaths of farmed animals have evolved over the last fifty years is instructive as to whether, in general, the public's interest in animal well-being has improved or declined during the time period since the enactment of the AWA. Because animals raised for food comprise approximately ninety-eight percent of the animals interacting with humans in this country, any meaningful consideration of the evolution of animal welfare over the past fifty years must consider farmed animals.<sup>14</sup> Not only does the AWA's exemption of all animals raised for agricultural purposes raise questions about the efficacy of the AWA as an animal protection measure, but perhaps it also shapes the way that people conceive of animal

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The claim that the AWA has had injurious impacts is not meant to suggest that it has had no positive impacts. There is evidence that conditions in research facilities have improved in terms of the conditions of animal housing, the supply of food, and even the willingness to provide analgesics. Notably, however, even under the AWA researchers are not confined to the types or degree of pain by a need to show that their research is novel or of particular value.

13. 7 U.S.C. § 2132 (g) (2014) (excluding all "farm animals" from the definition of "animal").

14. The AWA's exemption for farmed animals means that the AWA applies to less than two percent of the animals in the U.S. See David Wolfson & Mariann Sullivan, *Foxes in the Henhouse: Animals, Agribusiness, and the Law: A Modern American Fable*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205, 206 (Cass R. Sunstein & Martha C. Nussbaum, eds., 2004) ("farmed animals represent 98% of all animals (even including companion animals and animals in zoos and circuses) with whom humans interact in the United States, [thus,] all animals are farmed animals; the number who are not is statistically insignificant."). Moreover, of the research animals that the AWA does apply to, ninety-nine percent of all research animals are rats, mice, and birds, which are also exempted from the coverage of the AWA. See U.S. DEP'T. OF AG., ANIMAL AND PLANT HEALTH INSPECTION SERVICE, ANNUAL REPORT ANIMAL USAGE BY FISCAL YEAR, June 2, 2015 (showing that in 2014, one million animals were used in research and experiments, excluding rats and mice, and an estimated 100 million rats and mice were used in research). So the AWA exempts most animals from its coverage, and it even exempts most research animals from its coverage. See Satz, *supra* note 10, at 87 (examining the exemption of rodents from the coverage of the AWA is fundamentally oriented towards protecting human, not animal interests); *Id.* at 83 ("[T]he AWA addresses the confinement of laboratory animals with requirements only sufficient to sustain animal life to facilitate research."); *Id.* at 83 n.101 (noting that "[w]hen humane treatment conflicts with scientific or other human interests, even these minimum standards are sacrificed.").

“welfare.” At the very least, from the perspective of seeing how general attitudes and actions towards the treatment of animals have evolved over the fifty years since the AWA was enacted, an examination of animals used for agriculture provides an important, if incomplete, point of analysis.

More generally, the AWA’s failure to address farm animal suffering is directly related to the failure of industrialization to take into account animal well-being. General legal doctrines in tort<sup>15</sup> and criminal law,<sup>16</sup> among others,<sup>17</sup> recognize that sometimes inaction can be the actual and legal cause of a harm. This Part’s comparison of food production in the 1960s and the present raises the possibility that the AWA’s omission of any standards for the protection of food-animal welfare has been a cause of great injury to animals. The discussion below is based on original research of trade journals and industry publications.

#### A. ANIMAL WELFARE FOR FARMED ANIMALS BY THE NUMBERS: 1966 TO 2016

Perhaps nothing says more about the change in status of animals during the period since the enactment of the AWA than the fact that exponentially more animals are killed in America today than before the enactment of the AWA. In 1965, the U.S. slaughtered an estimated 2.4 billion animals for food, and by 2015 that number was 9.2 billion, or nearly 400% greater.<sup>18</sup> The number of chickens alone went from about two billion killed per year to over eight billion per year.<sup>19</sup>

Of equal importance, the animals that are killed today live shorter, more brutal lives than they did at the time of the AWA’s enactment. In the 1960s, chickens reached their slaughter weight in twelve to fourteen weeks.<sup>20</sup> Today, because of specialized breeding, chickens are

15. RESTATEMENT (THIRD) OF TORTS: APPOINTMENT LIAB. § 14 (2000) (providing that a person can be liable for “failure to protect the other from the specific risk of an intentional tort. . .”).

16. See, e.g., 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.2 (2d ed.) (noting that crimes “may be committed either by affirmative action or by failure to act.”); *Lambert v. California*, 355 U.S. 225, 228 (1957) (recognizing that one can be criminally prosecuted for a failure to act); Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CALIF. L. REV. 547, 590 (1988) (“While initially it may seem odd to speak of an omission as the cause of a harm, there surely are omissions . . . that as a matter of common sense seem to have caused an ensuing harm,” but noting that the contours of omission liability are “murky”).

17. 3 STUART M. SPEISER ET AL, AMERICAN LAW OF TORTS § 11:6 (Monique C.M. Leahy ed., 2015) (explaining that for an “omission to have been a cause-in-fact of the harm, the . . . omission must have been a substantial factor in bringing about the harm,” and absent the omission the harm would not have occurred).

18. HUMANE SOC’Y OF THE U.S., FARM ANIMAL STATISTICS: SLAUGHTER TOTALS [http://www.humanesociety.org/news/resources/research/stats\\_slaughter\\_totals.html?credit=web\\_id100939526](http://www.humanesociety.org/news/resources/research/stats_slaughter_totals.html?credit=web_id100939526) (last visited Mar. 3, 2018).

19. *Id.* Over this same period of time the population of the U.S. increased by about 165% as compared to a roughly 380% increase in meat consumption. *Id.*

20. Cheryl L. Leahy, *Large Scale Farmed Animal Abuse and Neglect: Law and Its Enforcement*,

slaughtered at six to seven weeks, and yet they weigh about two-thirds more than the longer-lived chickens of the 1960s.<sup>21</sup> A recent poultry science publication introduced its research by noting that “[a] profound change in the productivity of the broiler chicken industry has been achieved via intentional genetic selection[,]” thus keeping the price of chicken low relative to other food products. It went on to state, “[t]his has likely been a major factor contributing to higher per capita consumption of chicken meat[.]”<sup>22</sup> To put the matter more plainly, “[f]rom 1957 to 2005, broiler growth increased by over 400%, with a concurrent 50% reduction in feed conversion ratio[.]”<sup>23</sup> Over the past 50 years, the amount a chicken grows each day has increased by more than 300%.<sup>24</sup>

Because of genetic manipulation for size and rapid growth of the breasts, these same chickens develop something that the industry calls “Green Muscle Disease,”<sup>25</sup> which is “a condition where the breast muscles hemorrhage and may even die and atrophy inside the body, turning purple, green, or brown.”<sup>26</sup> A lack of circulation and the death of muscle tissue in the chicken’s breast is a condition that causes discoloration and is assumed to be quite painful.<sup>27</sup> This is just one example of a surging scientific interest in developing technologies to more efficiently breed and raise chickens to maximize profit.<sup>28</sup> As part of this surge, numerous universities have newly designated “Poultry Sciences” departments.<sup>29</sup>

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4 J. ANIMAL L. ETHICS 63, 67 (2011).

21. *Id.*

22. M. J. Zuidhof et al., *Growth, Efficiency, and Yield of Commercial Broilers from 1957, 1978, and 2005*, 93 POULTRY SCIENCE 2970, 2970 (2014).

23. *Id.*

24. *Chickens Used for Meat*, FARM SANCTUARY, <http://www.farmsanctuary.org/learn/factory-farming/chickens/#MEAT> (last visited Mar. 3, 2018).

25. For an industry look at the causes of green muscle disease, see *Deep Pectoral Myopathy (Green Muscle Disease)*, POULTRY WORLD, [http://www.worldpoultry.net/Health/health\\_tool/Deep-pectoral-myopathy-green-muscle-disease/](http://www.worldpoultry.net/Health/health_tool/Deep-pectoral-myopathy-green-muscle-disease/) (last visited Mar. 3, 2018) (citing rapid growth, hereditary factors, and the handling of some birds during the artificial insemination process).

26. Bruce Friedrich & Stefanie Wilson, *Coming Home to Roost: How the Chicken Industry Hurts Chickens, Humans, and the Environment*, 22 ANIMAL L. 103, 110 (2015) (quoting AM. SOC’Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, *A GROWING PROBLEM: SELECTIVE BREEDING IN THE CHICKEN INDUSTRY: THE CASE FOR SLOWER GROWTH* (2015)); see also *id.* (retelling how agriculture reporter Christopher Leonard describes acute Green Muscle Disease in a story about a chicken farmer: “Their bodies were like soft, purple balloons by the time she gathered them. They fell apart to the touch, legs sloughing off the body when she tried to pick them up . . . She kept calling the Tyson field men, asking them to come and inspect the buckets of liquefying birds.”).

27. See *Deep Pectoral Myopathy (Green Muscle Disease) in Broilers*, POULTRY SITE (June 2, 2014) <http://www.thepoultrysite.com/articles/3142/deep-pectoral-myopathy-green-muscle-disease-in-broilers/>.

28. The University of Arkansas, for example, has a Center of Excellence for Poultry Science, which was formed in 1992. *Center of Excellence for Poultry Science*, UNIV. OF ARKANSAS (last visited Mar. 3, 2018). “With designation by the University of Arkansas Board of Trustees to make poultry science a center of excellence in the state’s university system, the department of poultry science became a reality in 1992.” *Id.*

29. *Id.*



Chickens suffer in the greatest numbers, but they are not the only animals whose plight has worsened under the AWA. In the years since the AWA was enacted, pigs—intelligent and highly social animals<sup>30</sup>—have been selectively bred to maximize, among other traits, growth rate and carcass leanness. “Beginning in the 1990s, ‘ultralean hybrid’ pigs”<sup>31</sup> became commonplace, but such selective breeding has had a number of deleterious side effects for the animals, including Porcine Stress Syndrome (“PSS”), which renders pigs unusually “sensitive to stress” and susceptible to other negative health consequences including “dyspnea (difficulty breathing), and cyanosis (discoloration of the skin).”<sup>32</sup> As with other industrial sectors of the U.S. economy, pork production has become much more efficient over the past fifty years.<sup>33</sup> Today, it takes only five pigs to produce the same amount of pork that required eight pigs in 1959.<sup>34</sup> However, the brunt of this efficiency falls on the animals, who are confined more densely in ever-smaller spaces, forced to reproduce more often, and bred so as to grow more quickly.

Cows have also seen drastic reduction in their general well-being over the past fifty years. Total beef production per year has doubled from about 13.2 billion to over 27 billion pounds.<sup>35</sup> Through various breeding and pharmaceutical interventions, the efficiency of beef production has increased by over eighty percent in the past fifty years.<sup>36</sup> Research has shown on average there was about 2.3 pounds (about 1.2%) of additional beef produced per head, per year over the past fifty years.<sup>37</sup> Cows simply grow at a much faster rate than they did fifty years ago—gaining about 3.5 pounds per day as compared to 2.2 pounds per day.<sup>38</sup> Although cows can live comfortably for up to twenty years, cows’ lives are much shorter now because they can grow so much faster. The cows are now slaughtered at about sixteen to twenty months of age as opposed to twenty-four to

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30. See, e.g., Marc Bekoff, *Pigs Are Intelligent, Emotional, and Cognitively Complex: A Recent Review of Research on Pigs Shows They Are Complex Sentient Beings*, PSYCH. TODAY (June 12, 2015), <https://www.psychologytoday.com/blog/animal-emotions/201506/pigs-are-intelligent-emotional-and-cognitively-complex>.

31. HUMANE SOC’Y OF THE U.S., AN HSUS REPORT: THE WELFARE OF ANIMALS IN THE PIG INDUSTRY 5.

32. *Id.*

33. “The U.S. swine industry produces pigs far more efficiently today (2009) than in 1959. The number of hogs marketed has increased 29% (87.6 million in 1959 to 112.6 million in 2009 after removing market hogs imported directly to harvest) from a breeding herd that is 39% smaller.” GARTH BOYD & ROGER CADY, CAMCO, A 50-YEAR COMPARISON OF THE CARBON FOOTPRINT & RESOURCE USE OF THE US SWINE HERD: 1959–2009 1 (2012).

34. *Id.*

35. THOMAS E. ELAM & RODNEY L. PRESTON, FIFTY YEARS OF PHARMACEUTICAL TECHNOLOGY AND ITS IMPACT ON THE BEEF WE PROVIDE TO CONSUMERS 1 (2004).

36. *Id.* at 3.

37. *Id.* at 2.

38. *Id.* at 1.

thirty-six months fifty years ago.<sup>39</sup> Despite their younger age, the average live weight of cows slaughtered in 2015 was 1360 pounds<sup>40</sup>, as compared to 1012 pounds in 1968.<sup>41</sup> As a result of these improved efficiencies in production, “since 1955 the consumer cost per pound of beef has decreased by 26% after adjusting for inflation.”<sup>42</sup>

The intensity and density of animal confinement has also changed dramatically in the past fifty years. Unsurprisingly, research has shown that increasing the size of one’s animal production facility reduces costs. One study found that raising 3000 or more pigs as opposed to 500 or fewer reduces the cost of production by at least one third.<sup>43</sup> “By the late 1990s, the meat packing industry had consolidated [in] such [a way] that the top four firms accounted for approximately 50 percent of all U.S. poultry and pork production and 80 percent of all beef production.”<sup>44</sup> Such shifts have dramatic consequences for the day-to-day lives of billions of animals. In the mid-1900s, small farms dominated the landscape, with the average farm holding a couple of dozen chickens.<sup>45</sup> Today, the typical industrial chicken farm kills 600,000 birds per year.<sup>46</sup> In the 1970s, roughly four times more pigs were raised on small farms than on mega-farms.<sup>47</sup> As of 2007, almost sixty-five times more pigs were raised on mega farms than on small farms.<sup>48</sup> Indeed, currently more than three-fourths of all pigs are raised on factory farms with at least 2000 pigs.<sup>49</sup> Closely related to the impact in mega farming is the decrease in each animal’s allotted space. Now, “most breeding pigs spend the duration of their lives in a gestation crate . . . . The industry standard for

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39. *Id.*

40. U.S. DEP’T. OF AG., LIVESTOCK SLAUGHTER 2015 SUMMARY 6 (2016).

41. *Id.*

42. ELAM & PRESTON, *supra* note 35, at 1.

43. DONALD D. STULL & MICHAEL J. BROADWAY, SLAUGHTERHOUSE BLUES: THE MEAT AND POULTRY INDUSTRY IN NORTH AMERICA 15 (2013).

44. *Meatpacking in the U.S.: Still a “Jungle” Out There?*, PBS (Dec. 15, 2006), <http://www.pbs.org/now/shows/250/meat-packing.html>.

45. Friedrich & Wilson, *supra* note 26, at 129 (“The success of vertical integration has led to near-complete concentration in the industry, so that, although there are about 33,000 chicken farms in the U.S., there are just a few integrators that control all of those farms and hatchlings.”).

46. “The size of individual operations has grown just as dramatically, and now the typical broiler chicken—a chicken raised for its meat—comes from a facility that produces more than 600,000 birds a year.” PEW REP. ENVIRO., *Big Chicken: Pollution and Industrial Poultry Production in America*, 1 (2011); see also Bruce Friedrich, *Still in the Jungle: Poultry Slaughter and the USDA*, 23 N.Y.U. ENVTL. L.J. 247, 250 (2015).

47. HUMANE SOC’Y OF THE U.S., *supra* note 31, at 2 (comparing farms that had between 1 and 99 animals to farms with 5,000 or more animals).

48. HUMANE SOC’Y OF THE U.S., *supra* note 31, at 2.

49. See *Industrial Livestock Production*, SUSTAINABLE TABLE (last visited Mar. 3, 2018), <http://www.sustainabletable.org/issues/factoryfarming>; see also U.S. DEP’T. OF AG., OVERVIEW OF THE UNITED STATES HOG INDUSTRY 1 (2015) (“For the 2014 production year, 93 percent of the annual pig crop was produced on operations with at least 5,000 head, up from 27 percent in 1994 and up from 88 percent in 2008.”).

these crates is a mere 2.0–2.3 feet by 6.6–6.9 feet in size, only slightly larger than the pigs that live in them,” making turning around, much less walking, impossible.<sup>50</sup>

The mechanization of factory farms has also created rates of killing so astronomical that they belie a claim of humane treatment. At the time of the AWA’s enactment, a Perdue chicken plant operated the so-called “eviscerating lines”—the lines where birds are hung by their feet then transported to their death via conveyor belt—these lines would move approximately six chickens per minute.<sup>51</sup> Managing to clip a bird to the execution line every ten seconds paints a grim picture, to be sure, but by 2016 these 1960s’ killing rates have come to look more like peaceful, hospice care. In 2016, the line speed for killing chickens in the U.S., as approved by the United States Department of Agriculture (“USDA”), is between 140 and 175 birds per minute—that is between 2.5 and 3 chickens per second.<sup>52</sup> As a result of the efforts to keep price down through more intensive confinement, genetic selection, and the animal rearing practices discussed above, consumers are purchasing and consuming far more meat than they were in the 1960s. Americans are eating close to 200 pounds of meat, poultry, and fish per capita per year (not including dairy and eggs), which food journalist Mark Bittman reports as “an increase of 50 pounds per person from 50 years ago.”<sup>53</sup>

In the shadow of the AWA, the factory farm was born and has come to be the almost exclusive source of meat. During the past fifty years a simple truism—aptly expressed by N.Y. Times journalist Nicholas Kristof, has emerged, “[t]orture a single [animal] and you risk arrest. Abuse hundreds of thousands of [animals] for their entire lives? That’s agribusiness.”<sup>54</sup> Torture under the AWA has skyrocketed.

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50. Rebecca Kristen Wrock, *Ignorance Is Bliss: Self-Regulation and Ag-Gag Laws in the American Meat Industry*, 19 CONTEMP. JUST. REV. 267, 268 (2016). “In 2012, a study by the National Pork Producers Council revealed that up to 83% of sows in the United States, approximately 3.6 million of 5.7 million, are kept in gestation crates.” *Id.*

51. Glenn E. Bugos, *Intellectual Property in the American Chicken Breeding Industry*, 66 BUS. HIST. REV. 127, 155 (1992). The article is somewhat vague noting that the Perdue Company “ran 18 birds per minute down three eviscerating lines.” *Id.* Based on the context and the surrounding text, it seems that the author was discussing the total chickens killed per minute across all three lines, but possibly the line speed was as high as 18 per minute in 1968.

52. 9 C.F.R. § 381.69(a) (2014). The line speed maximum seems to be 140 birds, which adds up to about 2.3 per second.

53. Mark Bittman, *Rethinking the Meat-Guzzler*, N.Y. TIMES (Jan. 27, 2008), <http://www.nytimes.com/2008/01/27/weekinreview/27bittman.html>. According to one source, “[e]ach American consumed an average of 7 pounds more red meat than in the 1950s, 46 pounds more poultry, and 4 pounds more fish and shellfish.” U.S. DEP’T. OF AG., PROFILING FOOD CONSUMPTION IN AMERICA, AGRICULTURE FACT BOOK 2001–2002 15 (2005) (“In 2000, Americans drank an average of 38 percent less milk and ate nearly four times as much cheese (excluding cottage, pot, and baker’s cheese) as in the 1950s.”). *Id.* at 16.

54. Nicholas Kristof, Opinion, *Abusing Chickens We Eat*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/opinion/nicholas-kristof-abusing-chickens-we-eat.html?ref=opinion>.

## B. CHANGES IN ANIMAL HUSBANDRY PRACTICES OVER THE PAST FIFTY YEARS

Without violating any provision of the AWA, over the last fifty years agricultural producers have adopted a number of husbandry practices designed to ensure maximum profit that are fundamentally inconsistent with basic animal welfare.<sup>55</sup> For example, since the enactment of the AWA, birds raised for food, such as turkeys and chickens, are now regularly kept in battery cages—cages that are so cramped that birds are unable to engage in many of their natural habits, including nesting, dust bathing, or even exercising.<sup>56</sup> The first battery cage was patented in 1967, the year after the enactment of the AWA.<sup>57</sup> Today it is estimated that upwards of ninety-five percent of egg-laying hens live their entire lives in battery cages.<sup>58</sup>

Another practice that largely post-dates the enactment of the AWA is the routine removal of an animal's appendage. For example, the debeaking of egg-laying hens or the tail docking of pigs and cows. Debeaking is the removal of a third to two-thirds of the young bird's beak,

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55. David J. Wolfson, *Beyond the Law: Agribusiness and the Systematic Abuse of Animals Raised for Food or Food Production*, 2 ANIMAL L. 123, 133 (1996) ("The great majority of animals used for food or food production are raised using intensive husbandry practices."). For example, day-old baby calves are transported from the dairy farm before they are able to walk, resulting in calves being thrown, dragged, or trampled. David DeGrazia, *Moral Vegetarianism from a Very Broad Basis*, 6 J. MORAL PHIL. 143, 160 (2009) ("[C]attle undergo dehorning through sensitive tissue, branding, and ear cutting for identification purposes. Both cattle and hogs are castrated."); see also Aurora Paulsen, *Welfare Improvements for Organic Animals: Closing Loopholes in the Regulation of Organic Animal Husbandry*, 17 ANIMAL L. 337, 338 (2011) ("Despite the significant number of animals involved in food production and a growing public interest in farm animal welfare, conventional farm animal husbandry is largely exempt from regulation."). Poultry are also victims of cruel husbandry practices, such as the removal of chicken's beaks. Additionally, the starvation of laying hens to make them enter the next laying cycle is a common practice. This is termed "forced molting." See *Forced Molting*, UNITED POULTRY CONCERNS (July 2, 2015), <http://www.upc-online.org/molting/>.

56. *Barren, Cramped Battery Cages*, HUMANE SOC'Y U.S., [http://www.humanesociety.org/issues/confinement\\_farm/facts/battery\\_cages.html](http://www.humanesociety.org/issues/confinement_farm/facts/battery_cages.html)? (last visited Mar. 3, 2018); Bruce Friedrich, *The Cruellest of All Factory Farm Products: Eggs from Caged Hens*, HUFFINGTON POST: THE BLOG (Jan. 14, 2013, 10:13 AM), [http://www.huffingtonpost.com/bruce-friedrich/eggs-from-caged-hens\\_b\\_2458525.html](http://www.huffingtonpost.com/bruce-friedrich/eggs-from-caged-hens_b_2458525.html).

57. See Animal Husbandry Drawer Caging, U.S. Patent No. 9,155,283 (filed Apr. 10, 2008), <https://www.google.com/patents/US9155283>.

58. See, e.g., TIM BIRKHEAD, BIRDSense: WHAT IT'S LIKE TO BE A BIRD 80 (2013) (discussing the sensitivity of bird beaks based on the density of nerve endings in the beak and analogizing to human fingertips).

a procedure generally performed without anesthetic.<sup>59</sup> Debeaking<sup>60</sup> is believed to be incredibly painful because the beak is a highly sensitive part of the bird's body, and has even been analogized to the human fingertip because it is so packed with nerve endings.<sup>61</sup> A website devoted to providing guidance for persons caring for pet birds explains that: "[t]he beak has nerve endings, and pain or the displacement of the beak may make eating difficult or impossible. All birds with beak injuries should be examined by a veterinarian."<sup>62</sup> And yet in the context of factory farming, the intentional searing off of large chunks of the beak is a matter of common practice. Debeaking is done in order to keep the birds from pecking each other while they are forced to live in a tightly confined space, and the practice became commonplace after the enactment of the AWA in the late 1960s.<sup>63</sup>

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59. Susan Adams, *Legal Rights of Farm Animals*, 40 MD. B.J. 19, 20 (2007) ("[M]ost egg factory farmers cut off parts of the birds' beaks when they are chicks. The tips of their sensitive beaks, which the birds use much like we use our hands, are seared off with a hot blade, a physical mutilation performed without painkiller and known to cause acute pain."); Wolfson, *supra* note 55, at 132; Amanda Wright, *Improving the Welfare of Egg-Laying Hens Through Acknowledgment of Freedoms*, 9 J. ANIMAL NAT. RESOURCE L. 169, 172 (2013) ("[P]roducers cut off three millimeters of the top beak and two and a half millimeters of the lower beak with a hot blade, to prevent the hens from pecking at each other in their close confines."); Veronica Hirsch, *Brief Summary of the Legal Protections for the Domestic Chicken in the United States and Europe*, ANIMAL LEGAL & HISTORIC CTR. (2003), <http://animallaw.info/topics/tabbed%20topic%20page/spuschickens.htm>.

60. Heng W. Cheng, *Morphopathological Changes and Pain in Beak Trimmed Laying Hens*, 62 WORLD'S POULTRY SCI. J. 1, 41–52 (2006) (to reduce injurious pecking in commercial egg production systems, the end third to half of the birds' beaks are routinely cut off with a heated blade); Adams, *supra* note 59, at 20 ("Severely overcrowded, the hens may act out their frustration from lack of environmental enrichment, intensive confinement, an inability to establish a stable social hierarchy by engaging in stress-induced aggression."); Wolfson & Sullivan, *supra* note 14, at 205, 206 ("In order to avoid the wounds that would be caused by the hens fighting, which, in these close conditions, is inevitable, their beaks are cut off."); D.C. Kennard, *Chicken Vices*, INTERNATIONAL REVIEW OF POULTRY SCIENCE, 1, 152 (1937).

61. Virginia Clark, *Debeaking*, 2 POULTRY PRESS NEWSLETTER 2, 2–3 (1992):

[D]ebeaking was fully explored by the Brambell Committee, a group of veterinarians and other experts appointed by Parliament to investigate animal welfare concerns arising from intensive farming in the early 1960s. The Committee wrote in 1965: "There is no physiological basis for the assertion that the operation is similar to the clipping of human finger nails. Between the horn and bone [of the beak] is a thin layer of highly sensitive soft tissue, resembling the quick of the human nail. The hot knife blade used in debeaking cuts through this complex horn, bone and sensitive tissue causing severe pain.

Whitney R. Morgan, *Proposition Animal Welfare: Enabling an Irrational Public or Empowering Consumer to Align Advertising Depictions with Reality?*, 26 U. FLA. J. L. PUB. POL'Y 297, 304 (2015) ("Although some farmers strangely compare beak-trimming to trimming a fingernail, the beak is a highly sensitive portion of the chicken because it is 'loaded with blood vessels, pain receptors, and sensory nerves that facilitate food detection in the wild.'").

62. Foster & Smith, *Bird Beaks: Anatomy, Care, and Diseases*, PET EDUC., <http://www.peteducation.com/article.cfm?c=15+1829&aid=2752> (last visited Mar. 3, 2018).

63. Technically, debeaking started during the 1930s and 1940s, by a San Diego, California farmer named T.E. Wolfe, who used a gas torch to burn off part of the upper beaks of his hen. *Debeaking Birds Has Got to Stop*, UNITED POULTRY CONCERNS (2007), <http://www.upc-online.org/>

Tail docking, another practice that has gained prominence after the enactment of the AWA, is the un-anesthetized removal of a pig or cow's tail.<sup>64</sup> If the tails are not removed, the animals will unnaturally bite each other's tails due to the boredom and stress of living in tightly-packed or otherwise confined spaces.<sup>65</sup>

A final word about the diminution in farmed-animal well-being over the past fifty years is in order. The decline in the protection of animals, particularly animals raised for food, since the enactment of the AWA is particularly striking when juxtaposed with the improved scientific understanding of the capacity for animals to think, feel, and fear over the same period of time. In the past fifty years, our scientific understanding of animals has radically shifted. As one recent article put it, “[h]ow times have changed: What once was considered anthropomorphic thinking is now mainstream science.”<sup>66</sup> No longer is it taboo to attribute thinking, feeling, emotion, or even religion to animals. These creatures communicate, think, plan for the future, live in communities, and mourn in ways that, increasingly, scientists have come to analogize with the emotional lives of humans.<sup>67</sup> As Frans De Waal has recently asked in the title of his great work of ethology, “[a]re we smart enough to know how

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winter07/debeaking.html; see also JIM MASON & PETER SINGER, *ANIMAL FACTORIES* 39 (1990); W.E. NEWLON & V.S. ASMUNDSON, *BROODING AND REARING CHICKENS* 127 (1943). The first “debeaker machine” was patented in 1942–1943 by the San Diego company Lyon Electric. See *Beak Caulterizer for Fowl and the Like*, U.S. Patent No. 2,359,569 (filed Dec. 7, 1943), <https://www.google.com/patents/US2359569>. So debeaking was occurring prior to the 1960s, but it did not become necessary as a regular practice until intensive confinement in battery cages became the norm in the late 1960s.

64. Morgan, *supra* note 61, at 305; see J.J. MCGLONE, ET AL., *CANNIBALISM IN GROWING PIGS: EFFECTS OF TAIL DOCKING AND HOUSING SYSTEM ON BEHAVIOR, PERFORMANCE AND IMMUNE FUNCTION* 69 (1990) (“Tail docking became a standard practice when pig housing systems moved from extensive dirt lots to confined buildings.”); Nicolette Hahn Niman, Opinion, *The Unkindest Cut*, N.Y. TIMES (Mar. 7, 2005), <http://www.nytimes.com/2005/03/07/opinion/the-unkindest-cut.html>.

65. Niman, *supra* note 64; see KAREN DAWN, *THANKING THE MONKEY: RETHINKING THE WAY WE TREAT ANIMALS* (2008). The list of established practices that cause considerable suffering discussed above is not an exhaustive list. Animals are also subject to dehorning without anesthesia, *Literature Review on the Welfare Implications of Dehorning and Disbudding Cattle*, AM. VETERINARY MED. ASS'N, (July 15, 2014), <https://www.avma.org/KB/Resources/LiteratureReviews/Pages/Welfare-Implications-of-Dehorning-and-Disbudding-Cattle.aspx> (“Disbudding and dehorning of cattle in the United States is not currently regulated.”); see Ian J.H. Duncan, *Animal Welfare Issues in the Poultry Industry*, 4 J. APPLIED ANIMAL WELFARE SCI. 207 (2001) (detailing the practice of forced molting and noting the “extreme” stress that such food deprivation causes to chickens), and forced, premature weaning, Rick Rasby, *Early Weaning Beef Calves Sometimes Makes Sense*, U. NEBRASKA-LINCOLN (2011), <http://beef.unl.edu/cattleproduction/earlyweaning> (discussing the pros and cons of weaning calves as early as 45 days old, among other things).

66. Brandon Keim, *Animal Minds*, CHRON. HIGHER ED. (Oct. 2, 2016) <http://www.chronicle.com/article/Animal-Minds/237915>.

67. E.g., Philip Low, *The Cambridge Declaration on Consciousness*, U. CAMBRIDGE (July 7, 2012), <http://fcmconference.org/img/CambridgeDeclarationOnConsciousness.pdf>.

smart animals are?”<sup>68</sup> Likewise, a leading ethologist Mark Bekoff has said that his research over the past several decades has convinced him:

When animals express their feelings they pour out like water from a spout. Animals’ emotions are raw, unfiltered, and uncontrolled. Their joy is the purest and most contagious of joys and their grief the deepest and most devastating. Their passions bring us to our knees in delight and sorrow.<sup>69</sup>

In short, an unfortunate feature of the increasingly inhumane treatment of animals over the past fifty years is the fact that this mounting cruelty corresponds in time with insurmountable evidence about the emotional sophistication and capacity for suffering of these animals. This juxtaposition makes the failures of the AWA all the more striking.

## II. CONCEPTUAL HARMS TO ANIMAL WELFARE CAUSED BY THE AWA

The previous section demonstrates that the amount of killing, the conditions of confinement, and the acceptability of uniquely cruel methods of farmed-animal husbandry have all gotten worse over the past fifty years. Most animals are doing worse, not better since the enactment of the AWA. But as noted in the previous section, the AWA does not cover animals farmed for food, and the diminishing welfare of farmed animals over this period could be written off as mere evidence that the AWA has failed to precipitate a generally favorable shift in attitudes about the way that *all* animals must be treated. This section takes the next step and argues that some of the blame for this failure of attitudes and actions can be laid at the feet of the AWA.

### A. WORDS MATTER: THE TITLE AND TEXT OF THE AWA

The Animal Welfare Act, by its very title, purports to provide for the welfare of all animals, and language matters. Even beyond its gaping exception for agriculture, the AWA fails to protect many animals, including most animals used for research.<sup>70</sup> At a conceptual, perhaps almost unconscious level, the AWA has the effect of making the work of animal protection groups more difficult insofar as the public believes that federal law is safeguarding animal welfare. As Professor Paul Waldau has explained, a truly robust conception of animal “welfare” goes beyond larger cages or more access to light and stimulation, and focuses on respecting the very essence of animals.<sup>71</sup> So conceived, animal welfare is actually quite compatible with or akin to animal rights. But through its narrow scope, the AWA has jeopardized any truly meaningful conception of animal welfare, and thus done damage to animal protection efforts.

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68. FRANS DE WAAL, ARE WE SMART ENOUGH TO KNOW HOW SMART ANIMALS ARE? (2016).

69. MARK BEKOFF, THE EMOTIONAL LIVES OF ANIMALS 44 (2007).

70. 7 U.S.C. § 2132(g) (2014) (exempting rats and mice from the definition of “animal”).

71. WALDAU, *supra* note 8, at 77.

Of course, arguing that the AWA promises too much and delivers too little by way of actual animal “welfare” has the look of a superficial challenge to the title of a statute. It would be rather strange to suggest that the problems caused by the AWA could have been avoided if the law had a different, more modest, title. Perhaps something truer to its purpose such as the “Prevent Dog Kidnapping for Research Law,” or just the “Animal Welfare in Research and Exhibition Act.” These titles—though still over and under inclusive—would be less likely to create a false promise of welfare for all types of animals and all types of human interactions with animals. A shift in the title would not be a panacea for animal protection efforts, but it would not be irrelevant to them either. To put the matter plainly, the title of the AWA does matter.<sup>72</sup> The title of this law is no coincidence; research has consistently demonstrated the centrality of wording in impacting how a question or statement is received and understood.<sup>73</sup>

Words have meaning, and as any politician knows, the title of government agencies or laws can be a powerful step in message control. Indeed, the very term “Orwellian” is meant to describe misleading or euphemistically titled government programs: for example, the “Ministry of Truth,”<sup>74</sup> which functions as the propaganda arm for Big Brother’s government, or the “Ministry of Peace” that has as its driving purpose the maintenance of a perpetual state of war.<sup>75</sup> In the U.S., we have had laws like the Patriot Act, which strip habeas corpus rights and provide the government with unprecedented power of surveillance.<sup>76</sup> We have a “War on Terror” and a “War on Drugs,” both of which have been used as justification for eroding civil liberties in the name of safety and tranquility.<sup>77</sup> The term “Tea Party” is employed so as to suggest that a

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72. It is not a response to hypothesize that the vast majority of Americans do not know that the AWA exists. Those persons who do come across the AWA—whether in a zoo brochure or a research lab’s assurances to the public—will assume that the law is a welfare ensuring law with the force of the federal government behind it. The title of the law may not matter to every person, but it will impact the thinking of many who are exposed to the law.

73. See *infra* text accompanying notes 87–89.

74. GEORGE ORWELL, NINETEEN EIGHTY-FOUR 102 (1949) (“The Ministry of Truth calls on one to realize that 2+2=5 if the ministry so ordains.”).

75. *Id.* at 7, 245, 272–73.

76. See, e.g., 8 U.S.C. §§ 1226a, 1379 (2002); 15 U.S.C. § 1681v (2015); 18 U.S.C. §§ 175b, 2717 (2001), 18 U.S.C. § 1993 (2006), 18 U.S.C. § 2339 (2002); 22 U.S.C. § 262p-4r (2001); 31 U.S.C. § 5318A (2006); 42 U.S.C. §§ 3714, 5195c (2017); 34 U.S.C. § 10286 (2017); 49 U.S.C. § 5103a (2008); 50 U.S.C. §§ 1861–1862 (2015); 50 U.S.C. §§ 3040, 3365 (2001).

77. See, e.g., Gerald G. Ashdown, *The Blueing of America: The Bridge Between the War on Drugs and the War on Terrorism*, 67 U. PITT. L. REV. 753, 755 (2006) (contending that prior to the “War on Terror, the country and Supreme Court already had been fighting another war for thirty years—the so-called ‘War on Drugs’—and it was every bit as devastating to civil liberties, although slower and more methodical, than our new ‘War on Terror’ promises to be.”); Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1452 (1993) (concluding that the war on drugs has engendered “an attitude that the ends justify the means” and if



particular political ideology has a uniquely strong connection to our nation's patriotic, founding fathers. And of course, from an international perspective, examples abound—national leaders routinely speak of their efforts to kill political dissidents as interventions to “protect human rights”<sup>78</sup> or to promote peace and stability.<sup>79</sup>

That words have a powerful impact on the public's reaction is also well established in the social sciences. Research has repeatedly shown that only slight variations in questions can dramatically change survey results.<sup>80</sup> In the context of the death penalty, there is “a consistent 15–20% decrease in support for capital punishment when life without parole is the explicit alternative.”<sup>81</sup> As one scholar summarized the general research on the question of wording, there can be no doubt about the “importance of subtle changes in wording. Sometimes changes of only a word or two. . . can profoundly affect how people” respond.<sup>82</sup> The AWA's conscription of the phrase “animal welfare” in its title, then, should not be written off as a harmless, unintended act of mis-titling.<sup>83</sup>

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that trend continues “[t]he toll of drugs will be higher than even the most pessimistic drug warriors contend; our Bill of Rights and our political freedom will be the ultimate casualties of our war on drugs.”); Benjamin Levin, *Guns and Drugs*, 84 *FORDHAM L. REV.* 2173, 2187 (2016) (“In short, much as commentators have focused on the deterioration of civil liberties in the context of the War on Terror, scholars and courts have identified the War on Drugs as a dangerous ‘state of exception’ in which state authority and official force operate largely unchecked.”).

78. Alex Alexiev, *Russia: Grozny May Be Graveyard of a Democratic Russia*, *L.A. TIMES* (Jan. 15, 1995), [http://articles.latimes.com/1995-01-15/opinion/op-20403\\_1\\_democratic-russia](http://articles.latimes.com/1995-01-15/opinion/op-20403_1_democratic-russia).

79. See, e.g., Emily Tamkin, *Sorry, Did We Invade Your Country?*, *SLATE* (Sept. 5, 2014, 1:37 PM), [http://www.slate.com/blogs/the\\_world\\_/2014/09/05/the\\_art\\_of\\_doublespeak\\_a\\_timeline\\_of\\_vladimir\\_putin\\_s\\_excuses\\_and\\_evasions.html](http://www.slate.com/blogs/the_world_/2014/09/05/the_art_of_doublespeak_a_timeline_of_vladimir_putin_s_excuses_and_evasions.html).

80. See, e.g., HOWARD W. SCHUMAN & STANLEY PRESSER, *QUESTIONS AND ANSWERS IN ATTITUDE SURVEYS: EXPERIMENTS ON QUESTION FORM, WORDING, AND CONTEXT* 275–96 (1981) (discussing how adding context to a survey question changes its results); Samuel R. Gross & Phoebe C. Ellsworth, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 *J. SOC. ISSUES* 19, 24–25 (1994) (noting that changing the question to provide context often radically changes results, for example “[i]f [another] situation like Vietnam were to develop,” should the United States “send troops” vs. should the United States “send troops to stop a communist takeover”); Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 *CORNELL L. REV.* 1448, 1452 (1998) (“[T]he precise wording of the questions or the answers offered may make a large difference in the percentages of respondents who give particular answers, or who say that they know enough to answer at all.”).

81. Gross, *supra* note 80, at 1455.

82. *HOW QUESTIONS AFFECT ANSWERS*, *supra* note 80, at 64; see also Graham Kalton & Howard Schuman, *The Effect of the Question on Survey Responses: A Review*, 145 *J. ROYAL STAT. SOC'Y SERIES* 42 (1982) (reviewing the effects of precise wording on survey question responses); Carl Bialik, *When Wording Skews Results in Polls*, *WALL ST. J.* (Sept. 25, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703384204575510272945083114> (discussing the effects of wording on political surveys).

83. At least one animal protection group has alleged under oath its need to redirect resources away from other projects to, in essence, educate the public that compliance with the AWA does not mean that animal welfare is assured. See *Complaint* at 4–5, *People for the Ethical Treatment of Animals, Inc. v. U.S. Dep't of Agric.*, 194 F. Supp. 3d 404 (E.D.N.C. 2016) (No. 5:15-cv-429).

Beyond the title of the law, the text<sup>84</sup> of the AWA reinforces the view that institutionalized torture occurs not just in spite of, but perhaps because of the social status quo endorsed by the AWA. In the vocabulary of the AWA, the definition of animal is:

[A]ny 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.<sup>85</sup>

So, the AWA offers no protection to farm animals, although it applies to dead dogs. It does not apply to any cold-blooded animals, but applies to all warm-blooded pets. A pig used for research is covered, but his sister in a pork-processing plant is not. Orwell famously promised that “ignorance is strength” and that the “best books . . . tell you what you already know.”<sup>86</sup> The AWA validates the preference of Americans to remain ignorant about what is happening to animals used for industrial or research purposes and confirms the American intuition—not all animals count as animals.<sup>87</sup> Under the plain terms of the AWA, only some

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84. The purpose of the AWA is also instructive. The AWA was not motivated by animal welfare concerns in general. The law as originally enacted had two principal goals: “protect owners of dogs and cats from the theft of those pets for research purposes, and to regulate the treatment of [just] six species of animals used in research: dogs, cats, monkeys, guinea pigs, hamsters, and rabbits.” Cohen, *supra* note 5, at 15. Initially, the AWA was not even called the AWA, it was not a bold law designed to address animal welfare, it was a modest, nameless measure driven by a desire to avoid pet theft and to protect particularly charismatic animals. Animal Welfare Act of 1966, Pub. L. No. 89-544, 80 Stat. 350 (1966). It was not until 1970 when the Act was amended that the phrase Animal Welfare Act was used and not until it was amended again in 1976 that the law was formally named the Animal Welfare Act. For a detailed history of the various amendments to the AWA, see Cohen, *supra* note 5, at 15.

85. 7 U.S.C. § 2132(g) (2014).

86. ORWELL, *supra* note 74, at 4, 229.

87. Another aspect of the law’s text warrants mention. The AWA traded the surgical precision of brevity and clarity for a lengthy enactment. Consider just one example. Title IX was designed to target a discrete problem—gender inequality in educational programs. The law’s central provision has fewer than 30 words and speaks directly to its point, reading in full: “No person shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational programs or activity receiving Federal financial assistance. . . .” 20 U.S.C. § 1681(a) (2014). 1 EDUCATION LAW § 4:3 (“Almost all, if not all, public schools in the country receive just such federal funding, making them subject to the prohibitions of Title IX.”). Rather than thirty rather clear words under a heading of “prohibition on discrimination,” the AWA employs nearly thirty separate statutory sections in the U.S. Code, ranging from 7 U.S.C. § 2131–2159, containing thousands of words. The reason that so much verbiage is needed in the AWA is that it is difficult to articulate an animal welfare standard that applies to so few animals and in such limited conditions. To tinker almost symbolically at the margins requires much more effort and a much more complicated statutory regime.

suffering by certain animals counts as abuse. These words matter. The AWA's language and title impose heavy conceptual costs on a movement that trades on public awareness and understanding of the harm imposed on animals.<sup>88</sup>

#### B. OTHER CONCEPTUAL, BUT SERIOUS HARMS CAUSED BY THE AWA

The AWA lends an imprimatur of humane animal care to every seller, exhibitor and research facility that holds an AWA license. One assumes that, if the federal government has sanctioned a zoo as AWA-compliant, the welfare of the animals at the facility is well attended. As one animal protection group explained in a pleading, an AWA license “creates the misperception among the public, and especially parents and their children, that these facilities are treating the animals in their possession lawfully and humanely.”<sup>89</sup> Indeed, animal protection non-profit organizations have affirmatively diverted resources away from other forms of animal protection litigation and advocacy in order to “educate the public that despite the fact that these facilities are operating under the auspices of an official USDA AWA ‘license,’” the animals may not actually be well-treated.<sup>90</sup>

The AWA, in short, has the perverse effect of providing the public with a false confidence that animal welfare is being rigorously overseen by the federal government. The public, relying on both the title of the law and, more broadly, the knowledge that the federal government has agreed to oversee animal protection, quite fairly believes that the animals they are viewing are well cared for. A barren pit filled with bears, or a small pool filled with dolphins will no doubt attract less scorn from visitors if the facility, through signs, brochures or oral presentations, notes that it is fully compliant with the AWA, or that it is operating under a license granted by the federal government pursuant to the AWA.

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Imagine if Title IX's mandate of gender equality only applied to children of certain socioeconomic standing, or if it contained a preference for children from certain states. Such a policy would be as inconceivable as it would be lengthy and cumbersome to write. The length and complexity of the AWA is not an accident.

88. Animal protection efforts turn in large part on publicity and transparency campaigns. As one veterinary science textbook put the matter, “[f]or modern animal agriculture, the less the consumer knows about what's happening before the meat hits the plate, the better. . . one of the best things modern animal agriculture has going for it is that most people in the developed countries are several generations removed from the farm and haven't a clue how animals are raised and processed.” PETER SINGER & JIM MASON, *THE ETHICS OF WHAT WE EAT* 11 (2007). The rise of Ag-Gag laws—laws criminalizing efforts to expose the conditions in factory farms—are consistent with the trend towards less transparency. See Justin F. Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991 (2016) (providing an overview of ag-gag laws).

89. Complaint at 4–5, *People for the Ethical Treatment of Animals, Inc. v. U.S. Dep't of Agric.*, 194 F. Supp. 3d 404 (E.D.N.C. 2016) (No. 5:15-cv-429).

90. *Id.*

The plain terms of the AWA, as well as the USDA's enforcement of the law, however, leave little doubt that animal welfare is far from guaranteed by the AWA. Indeed, the USDA has an official policy of "rubber-stamping" any and all requests for a license renewal, even if the facility requesting the renewal is known by the USDA to have patent violations of the AWA at the time they request a renewal.<sup>91</sup> Because of the dichotomy between the perception and the reality of what AWA compliance means, there is a very plausible concern among animal protection advocates that harmful, inhumane conditions have been legitimized because of the AWA.<sup>92</sup>

The lack of empirical data on this point does not undermine the thesis. Indeed, the theory that public outrage or discomfort with animal handling practices can be effectively quelled by invoking the AWA is well understood and exploited by the industries whose business model involves the use of animals for research, sale, or entertainment. The Ringling Brothers Circus, until its final show in May of 2017, was frequently accused of malfeasance with regard to the treatment of its animals, particularly elephants.<sup>93</sup> Ringling Brothers aggressively responded to all such accusations, and their responses always included an invocation of the fact that they were fully licensed under the AWA.

For example, in defending the way their elephants were treated, Ringling Brothers explained that "Ringling Bros. has never been found in violation of the federal Animal Welfare Act. We are routinely inspected by federal, state and local animal welfare officials, and we meet or exceed every regulation for animal care."<sup>94</sup> This is a particularly galling invocation of the AWA's prophylactic veneer because the circus had been "cited" for violations of the AWA on numerous occasions.<sup>95</sup> Apparently, the spokespeople and lawyers for Ringling Brother determined that they could claim as a legal matter to have never been "found" in violation of

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91. *Id.* For a detailed and rigorous discussion of the rubber-stamping policy see Delcianna Winders, *Administrative License Renewal and Due Process under the Animal Welfare Act—A Case Study*, FLA. ST. U. L. REV. (forthcoming).

92. Complaint, at 4–5.

93. *E.g.*, Jason Bittel, *Ringling Bros. to Retire Its Circus Elephants*, NAT. GEOGRAPHIC (Mar. 5, 2015), <http://news.nationalgeographic.com/news/2015/03/150305-ringling-bros-retires-asian-elephants-barnum-bailey/> (noting that HSUS and other animal welfare groups have filed complaints against Ringling Brothers); Lloyd Grove, *USDA Complaint Is PETA's Latest Salvo in War Against Ringling Bros.*, DAILY BEAST (Oct. 18, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/10/18/usda-complaint-is-peta-s-latest-salvo-in-war-against-ringling-bros.html>; Deborah Nelson, *The Cruellest Show on Earth*, MOTHER JONES (Nov./Dec. 2011), <http://www.motherjones.com/environment/2011/10/ringling-bros-elephant-abuse>.

94. Stephen Payne, Opinion, *Setting the Circus Record Straight*, U.S. NEWS (Dec. 23, 2014, 2:15 PM), <http://www.usnews.com/opinion/blogs/letters-to-the-editor/2014/12/23/ringling-bros-circus-does-not-abuse-elephants>.

95. *E.g.*, Grove, *supra* note 93 (noting that the USDA alleged that Ringling Brothers violated the AWA); Nelson, *supra* note 93 (stating that "the USDA charged Feld Entertainment with two willful violations" of the AWA after it made an elephant perform while ill).

the AWA because they defined “found” to require a formal judicial hearing.<sup>96</sup> In reality, the Ringling Brothers stipulated to the largest penalty under the AWA of any animal exhibitor.<sup>97</sup> Thus, even those companies that are paying enormous fines under the AWA have the luxury of advertising their shows as compliant with the AWA and appropriately licensed.

Animal protection groups know that the AWA has a distorting impact on the public’s perception, and these organizations expend considerable resources pointing out the disconnect between AWA licensure and true concern for animal welfare.<sup>98</sup> Likewise, the industry has and will continue to seize on the AWA as a crutch upon which it can prop up any questionable animal handling practices as consistent with the federal animal welfare statute. It would be quite difficult to measure the AWA’s precise impact on the public’s favorable perception of a facility, or the facility’s understanding that it need not resort to costlier and humane practices. But one would be hard-pressed to find a facility facing claims of abuse or misconduct in the handling of animals that would not point first and foremost to an AWA license.<sup>99</sup> For example, a “travelling zoo” that sets up in malls and shopping centers with tigers, monkeys and other popular animals defended itself against allegations

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96. This definition of “found” is a quite technical, apparently referring to a finding by an administrative law judge, but it is the only definition that allows Ringling Brothers, which stipulated to the largest penalty of any animal exhibitor ever, to claim complete compliance with the AWA.

97. Leigh Remizowski, *USDA Fines Ringling Bros. Circus over Treatment of Animals*, CNN (Nov. 30, 2011, 7:32 PM), <http://www.cnn.com/2011/11/29/us/ringling-bros-fine/> (“The U.S. Department of Agriculture has slapped the parent company of the ‘Greatest Show on Earth’ with a record penalty for alleged animal welfare violations.”); Press Release, U.S. Dep’t of Agri., USDA and Feld Entertainment, Inc., Reach Settlement Agreement (Nov. 28, 2011), <https://content.govdelivery.com/accounts/USDAO/bulletins/1e5ff4> (noting that the settlement did not require Ringling Brothers to admit fault).

98. See, e.g., *infra* note 121 (compiling examples).

99. The critique of rights scholarship, which seeks to problematize the American preoccupation with rights, is not directly relevant because the AWA, does not create any affirmative rights. *But see* Karen Bradshaw, *Animal Property Rights*, 89 U. COLO. L. REV. (forthcoming 2018) (arguing that certain “property rights” that limit the harm of animals or call for their protection in the interest of the public trust create “rights” for animals). However, the critique of rights provides a useful lens through which to understand some of the conceptual harms that may flow from the AWA. Tushnet, *supra* note 7, at 1364 (defining the critique of rights as the counterintuitive notion that the development of rights or benefits may actually “impede” greater advances by social movements). The critique of rights claim that the AWA is causing more harm than good is not an argument of true “but for” causation—the AWA did not directly cause factory farms to get bigger or people to eat more meat, or circuses to use bullhooks. Instead, the critique of rights might suggest that the AWA has had a legitimating power. The critique of rights response by Paul Butler to *Gideon v. Wainwright*, 372 U.S. 335 (1963), the case recognizing a right to counsel for indigent defendants, could be re-written so as to substitute AWA for *Gideon* and animal suffering for increased incarceration: “[The AWA] bears some responsibility for legitimating [exponential increases in animal suffering]. [The AWA] created the false consciousness that [Animal Welfare] would get better. It actually got worse. Even full enforcement of [the AWA] would not significantly improve the wretchedness of American [Welfare system].” Butler, *supra* note 7, at 2178–79.

that animals suffer when they are forced to participate in such exhibits by noting that it is regulated by the USDA pursuant to the Animal Welfare Act.<sup>100</sup> Nearly every roadside zoo or animal exhibitor in the country, when facing allegations of animal suffering, responds with assurances of AWA compliance.<sup>101</sup>

At a conceptual level the AWA is more than a failure; it is actually part of the animal protection problem.<sup>102</sup> The AWA has come to be celebrated by animal-related industries as imposing an exacting standard of federal oversight, but these same operations will then labor under a minimal set of standards that are rarely enforced. In this regard, the AWA can be seen as a metaphor for the comfortable position Americans have adopted with regard to animal welfare: animal welfare is celebrated in theory, but not in practice, if it requires personal sacrifice or a fundamental change in practices. The AWA has the effect of locking in a longstanding disregard for animal well-being outside of certain preferred categories, and in the process reassures the public that animal welfare is being looked after by the federal government. It is the ultimate bait and switch.

### III. TANGIBLE HARMS TRACEABLE TO THE AWA

Attributing fault to the AWA for increasing the suffering of animals during the past half-century may seem imprecise, or speculative. After all, the AWA coexists with increased animal consumption and factory farms, but perhaps it has not caused these developments. Likewise, the notion of abstract or conceptual harms discussed in the previous section may be sufficiently ill-defined such that some would argue that it should be disregarded. This Part sets out to demonstrate, however, that the AWA is also the direct cause of tangible harm to the animal protection movement. The AWA has become a trenchant weapon in the arsenal of groups seeking to undermine animal protection efforts—used as both a sword and a shield against animal protection groups.

#### A. THE AWA AS A SHIELD

In a variety of contexts, ranging from media talking points to political lobbying endeavors to litigation, the AWA is increasingly

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100. *Roadside Circus Causes Concern in Pekin*, 1470 WMDB 100.3, <http://www.1470wmbd.com/roadside-circus-causes-concern-pekini/>.

101. See Kuehl v. Sellner, 161 F. Supp. 3d 678, 698 (N.D. Iowa 2016).

102. See Karin Brulliard, *USDA Abruptly Purges Animal Welfare Information from Its Website*, WASH. POST (Feb. 3, 2017), [https://www.washingtonpost.com/news/animalia/wp/2017/02/03/the-usda-abruptly-removes-animal-welfare-information-from-its-website/?utm\\_term=.5aa52da519f5](https://www.washingtonpost.com/news/animalia/wp/2017/02/03/the-usda-abruptly-removes-animal-welfare-information-from-its-website/?utm_term=.5aa52da519f5) (“The U.S. Department of Agriculture . . . abruptly removed inspection reports and other information from its website about the treatment of animals at thousands of research laboratories, zoos, dog breeding operations and other facilities. . . . [The removed documents] also included records of enforcement actions against violators of the Animal Welfare Act . . .”).

invoked as a reason for rejecting additional scrutiny of current animal welfare practices. The AWA has come to be viewed as a vaunted ceiling, rather than a bare minimum set of animal welfare standards: The law is invoked to justify deference to the practices of any business that is licensed by the AWA.

### 1. *The AWA as Defensive Public Relations Strategy*

The paradigmatic use of the AWA as a shield is the reliance of zoos, animal exhibitors, and research facilities on the law in press releases, when these organizations come under scrutiny for seemingly unsavory animal handling practices. The identity of industries relying on animals for profit is now significantly tied to the fact that they can assure their consumers that they are monitored by the USDA for compliance with the AWA.

The identity of animal exhibitors is so closely tied to AWA compliance that news coverage of complaints is often overridingly colored by this fact. For example, a 2017 story about allegations of animal suffering at a small zoo in Winchester, Virginia, ran with a headline, “Winchester Zoo in compliance, but animal rights groups feel animal welfare is at risk.”<sup>103</sup> The “feelings” of animal rights persons are juxtaposed with compliance with a federal standard. Similarly, in the midst of a media frenzy surrounding the 2016 shooting of a beloved gorilla named Harambe, the Cincinnati Zoo had one primary defense: AWA compliance. In explaining that it could hardly be blamed for the shooting death followed by a child falling into the gorilla enclosure, the zoo’s response was simple: “the USDA had previously said the barrier in the gorilla exhibit was in compliance with Animal Welfare Act regulations.”<sup>104</sup> This is not an isolated example of the way that zoos respond to allegations of animal suffering.<sup>105</sup> As one zoo owner explained

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103. Kelly Rule, *Winchester Zoo in Compliance, but Animal Rights Groups Feel Animal Welfare Is at Risk*, DCW50, <http://dcw50.com/2017/08/22/winchester-zoo-in-compliance-but-animal-rights-groups-feel-animal-welfare-is-at-risk/> (last updated Aug. 22, 2017, 11:46 PM).

104. Pennly Conly Ellison, *Killing Harambe and the Conundrum of Captive Animals*, LEGAL INTELLIGENCER (June 21, 2016, 12:00 AM), <http://www.thelegalintelligencer.com/id=1202760589042/Killing-Harambe-and-the-Conundrum-of-Captive-Animals?slreturn=20161029161140>; see Dan Sewell et al., *Report: Cincy Zoo’s Gorilla Barrier Wasn’t in Compliance but . . .*, CINCINNATI ENQUIRER (Nov. 17, 2016, 12:38 PM), <http://www.cincinnati.com/story/news/2016/11/17/report-cincy-zoos-gorilla-barrier-wasnt-compliance/94025422/>.

105. See, e.g., Jake Ellison, *Updated: Woodland Park Zoo Dinged by USDA on Elephant Care*, SEATTLE PI (Nov. 3, 2014, 5:04 PM), <http://www.seattlepi.com/local/article/Woodland-Park-Zoo-dinged-by-USDA-on-elephant-care-5867226.php> (“Despite claims made by animal activists, the zoo was not found to be in violation of the Animal Welfare Act per the [USDA’s] Sept. inspection.”); James West, *Welcome to the Jungle: The Shocking Story of Another Animal Planet Reality Show*, MOTHER JONES (Mar. 18, 2016, 1:53 PM), <http://www.motherjones.com/media/2016/03/animal-planet-yankee-jungle-reality-canceled> (noting that after *Mother Jones* uncovered multiple allegations of DEW Haven, a zoo that was featured in an Animal Planet reality show, violating the AWA, the production company for the show responded that the USDA inspected the zoo in January of 2015 and

about a campaign against his facility, “[t]hey’re just trying to stir up controversy because we have no real problems with the USDA.”<sup>106</sup> Likewise, an Indiana zoo discounted allegations of mistreatment as specious because, as the owner explained, “I am state and federal licensed.”<sup>107</sup>

In a very practical sense, persons in the business of exhibiting animals rely on the existence of the AWA to prop up their business. If one looks at the pictures of tigers in metal cages with concrete floors, or other animals living in unfortunate conditions, as in the case at many of these facilities, it is difficult to imagine that the zookeepers would support a repeal of the AWA, the very law that lends federal credibility to their operation. AWA licensing is treated as tantamount to excellence in animal care. State regulators frequently rely on USDA inspections to ensure compliance with state law, and yet the standards required by the USDA do not require the best practices in protecting animal well-being. Moreover, many states have failed to adopt effective animal welfare laws because of their reliance on the AWA. Consequently, the AWA has become something of a silver bullet for quelling unease over the condition of confined animals. Compliance with the AWA is almost certainly the first and most forcefully pressed response to media coverage stemming from harms that befall an animal in the care of a zoo or exhibitor.

The same pattern of invoking the AWA as a get-out-of-jail-free card has also become commonplace in the animal research context. Although it seems clear that the lives of many research animals have been modestly bettered because of the existence of the AWA,<sup>108</sup> there can be no doubt that the AWA also provides researchers with a powerful shield from public scrutiny. Again, the AWA plays a paradoxical role, tremendously benefitting the very actors who opposed it most stridently. While the

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found no violations).

106. Laurence Hammack, *Another Inspection of Natural Bridge Zoo Leads to More Citations*, ROANOKE TIMES (Aug. 25, 2017), [http://www.roanoke.com/news/local/another-inspection-of-natural-bridge-zoo-leads-to-more-citations/article\\_181e6368-3961-5a5f-baf6-3d5e8b3f3474.html](http://www.roanoke.com/news/local/another-inspection-of-natural-bridge-zoo-leads-to-more-citations/article_181e6368-3961-5a5f-baf6-3d5e8b3f3474.html).

107. Adam Randall, *PETA Files Complaints Against Topeka’s Wildlife Farm*, GOSHEN NEWS (Aug. 23, 2017), [http://www.goshennews.com/news/local\\_news/peta-files-complaints-against-topeka-s-wildlife-farm/article\\_82d7bcc8-8854-11e7-b542-c3addbd3b2e3.html](http://www.goshennews.com/news/local_news/peta-files-complaints-against-topeka-s-wildlife-farm/article_82d7bcc8-8854-11e7-b542-c3addbd3b2e3.html).

108. It is not the case that no animals have been directly benefitted by the AWA. Mariann Sullivan has noted that without the AWA “the lives of millions of animals (who are covered by the Act) would be very much worse than they are.” Sullivan, *supra* note 3, at 17. Likewise, the dogs bred and raised for experimentation shown in the photos of the 1966 issue of *Life* magazine that galvanized support for AWA have greater legal protections today. It is unlikely in the extreme that large numbers of pets are still abducted for animal research as they were in the 1960s. See Ben Cosgrove, ‘Concentration Camps for Dogs’: Revisiting a Grisly LIFE Classic, TIME (Nov. 20, 2014), <http://time.com/3589751/concentration-camps-for-dogs-revisiting-a-grisly-life-classic> (discussing the 1966 LIFE Magazine article about dogs being used for experimentation and its impact on the U.S. population). There is also a degree of oversight and regulation that applies to zoos and persons possessing exotic animals that, even if radically under-enforced, was unimaginable fifty years ago.



animal research community and the USDA vehemently opposed the AWA's modest limits on how research animals could be treated as "unjustified indictments of scientists and doctors,"<sup>109</sup> the research community and the USDA now routinely benefit from the rhetorical power of informing the public that particular practices or facilities are in full compliance with federal law.<sup>110</sup> Thus, even though the AWA's protections for research animals continue to lag behind the standards of Britain from the 19th century, which had a "presumption against painful experiments on animals,"<sup>111</sup> supporters of animal research now routinely cite the AWA as support for the proposition that researchers are governed by a "stringent" law that has the "welfare" of all animals in mind.<sup>112</sup>

For example, Washington University's use of cats for certain training projects drew criticism for years, and in 2013 an undercover video released by People for the Ethical Treatment of Animals ("PETA")

109. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, *supra* note 6, at 189 (quoting statement of the AMA opposing the 1966 AWA).

110. When the USDA enforces the AWA and fines research facilities, news outlets treat its actions as ensuring research animals are protected. *See, e.g.*, Anna Mayer, *USDA Fines OU for Violations of Federal Animal Welfare Act*, OUDAILY (Jan. 21, 2016), [http://www.oudaily.com/news/usda-fines-ou-for-violations-of-federal-animal-welfare-act/article\\_35d27bb2-co63-11e5-b33b-d79e131651eb.html](http://www.oudaily.com/news/usda-fines-ou-for-violations-of-federal-animal-welfare-act/article_35d27bb2-co63-11e5-b33b-d79e131651eb.html) (detailing a \$19,143 fine issued against Oklahoma University for violating the AWA in 11 separate incidents); Sara Reardon, *US Government Issues Historic \$3.5-Million Fine over Animal Welfare*, NATURE (May 20, 2016), <http://www.nature.com/news/us-government-issues-historic-3-5-million-fine-over-animal-welfare-1.19958> (covering a \$3.5 million settlement reached between the federal government and Santa Cruz Biotechnology for its violations of the AWA).

111. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, *supra* note 6, at 189. If it is assumed that the primary animal-beneficiaries of the AWA are research animals, the Act even falls woefully short of providing meaningful protection to these animals insofar as it exempts more than ninety percent of all research animals (mice, rats and birds), and contains no presumption against painful experiments except when "no other feasible and satisfactory methods" can be found. The AWA even exempts researchers from using anesthetics, tranquilizers or any pain relief as might be appropriate whenever "specified by research protocol." 7 U.S.C. § 2143(a)(3)(E) (2011). And as legal scholars have emphasized, nothing in the AWA mandates that researchers "justify the infliction of suffering on animals," or to balance the significance of the potential scientific discoveries against the "amount of pain the experiment might cause." Cohen, *supra* note 5, at 16, 18. Instead, the history of the AWA is a series of enactments that leave no doubt that the law is not intended to impose any meaningful limits on actual experiments. Bryant, *supra* note 5, at 79–80 ("The AWA does not affect research design in any way, and even its husbandry requirements can be overridden if a scientist states that doing so is necessary for a research project."). Animals must be cared for before and between experiments and the animals must not be obtained, to quote Bob Dole in explaining the thrust of the AWA, via "dognapping," but the AWA essentially exempts research facilities from any humane standards "during actual experimentation." Even as a protection for laboratory animals, then, the AWA leaves much to be desired.

112. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, *supra* note 6, at 257. In this regard, Francione's stinging critique of the AWA is instructive. The numbers and types of experiments on animals conducted in the 1960s is difficult to obtain, so quantitative comparisons might be difficult to make. However, as Francione notes, "since 1966, animal experimentation shows no signs of ending," but rather its importance has been "fortified . . . through explicit congressional recognition of [its] legitimacy." FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, *supra* note 6, at 257.

showing the use of cats for intubation training at the university prompted large-scale protests.<sup>113</sup> In defending its practices, despite being one of the last laboratories in the country to use live animals for the medical training in question, the University invariably invoked its longstanding compliance with the AWA.<sup>114</sup> Likewise, research at the University of Missouri that involved pouring acid into the eyes of beagles—called one of the most troubling experiments on dogs in modern memory—became a public scandal.<sup>115</sup> But rather than promising to change, or even reconsider, its methods, the University simply released a statement noting that there is no evidence that any of the experiments in question violated federal law.<sup>116</sup>

Pet stores and dealers adhere to the same approach when the source of their animals is scrutinized. Bad press and negative attention invariably follows from revelations that the source of a store's animals is far from idyllic, but a pet store facing such scrutiny because, for example, they purchase dogs from a puppy-mill,<sup>117</sup> will invoke the AWA as a justification for its decision.<sup>118</sup> A prominent Beverly Hills pet store, famous for selling dogs to Paris Hilton and other celebrities, reported that it was “appalled” and “horrified” to learn that its animals may have come from puppy mills.<sup>119</sup> “To the best of our knowledge, our beautiful puppies purchased out-of-state are from USDA approved pet breeders,” explained the pet store owner, noting that they “rely on our governmental agency to be sure that these breeders are inspected.”<sup>120</sup> It is not difficult to understand how beneficial it is for a pet store to be able to reassure its

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113. PETA, *Exposed: Cat Cruelty at Washington University Caught on Video!*, PETA (Apr. 18, 2013), <http://www.peta.org/blog/exposed-cat-cruelty-washington-university-video>.

114. See, e.g., Blythe Bernhard, *Washington University Ends Use of Cats for Medical Training*, ST. LOUIS POST-DISPATCH (Oct. 17, 2016), [http://www.stltoday.com/lifestyles/health-med-fit/health/washington-university-ends-use-of-cats-for-medical-training/article\\_8d64ce2e-6832-5273-b809-58ec9b69467c.html](http://www.stltoday.com/lifestyles/health-med-fit/health/washington-university-ends-use-of-cats-for-medical-training/article_8d64ce2e-6832-5273-b809-58ec9b69467c.html) (“The USDA found no violations of the Animal Welfare Act at its most recent inspection of the school in May and after PETA’s complaint in 2009.”); Jim Salter, *Washington University Stops Intubation Training Using Cats*, ASSOCIATED PRESS (Oct. 18, 2016), <http://bigstory.ap.org/article/064e58c1018f464ca4cc4be2b4299130/washington-university-stops-intubation-training-using-cats> (“[U]niversity officials have said the lab consistently met federal Animal Welfare Act standards, including passing an inspection by the U.S. Department of Agriculture soon after the PETA video.”).

115. *Mizzou Researchers Sued for Blinding, Killing Beagles in Failed Experiment*, CBS (Aug. 30, 2016, 2:09 PM), <http://www.cbsnews.com/news/university-of-missouri-researchers-sued-for-blinding-killing-beagles-in-failed-experiment>.

116. *Id.*

117. “A puppy mill is a large-scale commercial dog breeding facility where profit is given priority over the well-being of the dogs.” *What Is a Puppy Mill?*, AM. SOC’Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <http://www.aspc.org/animal-cruelty/puppy-mills> (last visited Mar. 3, 2018).

118. *Pet Store ‘Horrified’ and ‘Appalled’ by Puppy Mills*, TMZ (Dec. 12, 2007, 6:53 PM), <http://www.tMZ.com/2007/12/12/pet-store-horrified-and-appalled-by-puppy-mills> (providing a statement from Pets of Bel Air in response to an HSUS investigation).

119. *Id.*

120. *Id.*

customers that it only buys animals from facilities certified by the federal government under the AWA. In this way, operating with an AWA license is presented to the public as tantamount to operating in a humane and animal-welfare oriented manner. And the USDA takes pains to maintain this perception.<sup>121</sup>

Despite the USDA's ethical posturing, the operations of pet stores, zoos, and research facilities is anything but humane. It is not in dispute that the USDA's system for reviewing licenses and determining eligibility for renewal is absolutely pro forma; all that is required is the completion of the necessary forms and the payment of the fee.<sup>122</sup> The amount and severity of any violations under the AWA is treated as irrelevant to the renewal of the license.<sup>123</sup> Moreover, the substantive requirements for AWA compliance are minimal. Take, for example, the constraints on an animal breeder: the AWA does not impose any limits on the number of dogs a single breeder can have, does not bar dogs from being kept in stacked cages only six inches larger than their body, and does not impose any limits on the frequency or total amount of breeding per animal.<sup>124</sup>

In effect, the system creates the worst of all worlds—researchers, zoos, and breeders are afforded something akin to a presumption of humaneness because they are licensed by the AWA, and yet the AWA has minimal substantive standards, trivial enforcement efforts, and a formal policy of rubberstamping all license renewal requests.<sup>125</sup> The AWA approaches the status of being all benefit and no burden for many of these operations. Simply by waving the flag of AWA-compliance, breeders, researchers, and exhibitors quell discontent and bypass the scrutiny that befalls them in the wake of a tragic accident or an undercover whistleblowing expose. The paradoxical effect of the AWA is that it creates a space for federal law to be deployed in defense of the mistreatment of animals.<sup>126</sup>

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121. Nat'l Research Council, *Regulation of Animal Research*, NCBI (2004), <https://www.ncbi.nlm.nih.gov/books/NBK24650> (describing how the AWA provides "careful review to research on animals" because of USDA and APHIS monitoring and inspections).

122. Winders, *supra* note 91 (noting that the USDA engages in a process known within the agency as "rubberstamping" when it comes to reviewing licenses granted under the AWA). At least two federal courts of appeals have refused to require the USDA to revoke or suspend licenses, or even engage in more searching scrutiny when considering a license renewal. Winders, *supra* note 91.

123. Winders, *supra* note 91.

124. See 7 U.S.C. § 2143(a)(1) (2006) ("The Secretary shall promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers . . ."); 9 C.F.R. §§ 3.1–3.19 (providing regulations for dog breeders); see also *Puppy Mills and the Law*, PUPPY MILL PROJ., <http://www.thepupymillproject.org/relevant-laws> (last visited Mar. 3, 2018) (listing behaviors that are allowed under the AWA).

125. Indeed, the USDA has litigated (and won) their claimed right to refuse to engage in any meaningful license renewal inquiries. Winders, *supra* note 91.

126. See *You and the USDA*, SIMIAN SOCIETY OF AM., INC., <http://www.simiansociety.org/articles/you-and-the-usda> (last visited Mar. 3, 2018) ("Submitting to USDA inspection and licensing demonstrates responsible ownership by those who are engaged in the activities of breeding, selling,

## 2. *The AWA as a Shield Against Other Animal Protection Litigation*

The negative effects of the AWA on animal protection are not limited to instrumental benefits in the realm of managing public perception. The AWA also serves as a shield for persons or organizations seeking to avoid liability under state cruelty laws, or even other federal legislation. In a series of cases discussed by Professor Ani Satz, courts have applied a form of preemption doctrine to preclude, for example, the prosecution for animal cruelty of someone who is engaged in activities regulated by the AWA.<sup>127</sup> By this logic, a dog breeder cannot be prosecuted for animal cruelty and potentially cannot be sued for unfair business practices because the regulation of breeders is the sole domain of the AWA. As Satz points out, this mistaken application of preemption doctrine has resulted in some horrific examples of animal cruelty going unpunished.<sup>128</sup> The “Silver Spring Monkeys” case—growing out of the first-ever raid of a U.S. research laboratory by police—is a notable example.<sup>129</sup> The prosecution of the researcher in charge of the lab, Dr. Taub, resulted in multiple convictions for animal cruelty,<sup>130</sup> but a state court of appeals reversed the convictions, holding that state animal cruelty laws did not apply to “a research institute conducting medical and scientific research pursuant to a federal program.”<sup>131</sup> Even in the face of extraordinarily inhumane research conditions, including monkeys gnawing on their own limbs and living in a dire stench,<sup>132</sup> the Maryland court of appeals rejected the application of the state’s cruelty code because of the existence and presumed supremacy of the AWA:

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brokering, transporting commercially, or exhibiting monkeys.”).

127. Ani B. Satz, *Animal Protection and the Myth of AWA Preemption* (draft on file with Author).

128. *Id.*

129. Peter Carlson, *The Great Silver Spring Monkey Debate*, WASH. POST (Feb. 24, 1991), [https://www.washingtonpost.com/archive/lifestyle/magazine/1991/02/24/the-great-silver-spring-monkey-debate/25d3cc06-49ab-4a3c-afd9-d9eb35a862c3/?utm\\_term=.5515b8ca705f](https://www.washingtonpost.com/archive/lifestyle/magazine/1991/02/24/the-great-silver-spring-monkey-debate/25d3cc06-49ab-4a3c-afd9-d9eb35a862c3/?utm_term=.5515b8ca705f).

130. *Id.*

131. *Taub v. State*, 463 A.2d 819, 819 (Md. 1983) (refusing to allow cruelty prosecutions for federally regulated facility).

132. Carlson, *supra* note 129.

[W]e are confident that the [Maryland] legislature was aware of the Federal Animal Welfare Act which was, in part, to insure that animals intended for use in research facilities would be provided humane care and treatment. Under the terms of that Act, a research facility is required to register with the Secretary of Agriculture (7 U.S.C.A. § 2136 (1973, 1976 Supp.)), to comply with standards promulgated by the Secretary to govern the humane handling, care, and treatment of animals (§ 2143 (1976 Supp.)), is subject to inspection of their animals and records (§ 2147 (1973)), and is subject to civil and criminal penalties, as well as a cease and desist order for any violation of the Act (§ 2149(b) and (c) (1976 Supp.)). Thus the Act provides a comprehensive plan for the protection of animals used in research facilities, while at the same time recognizing and preserving the validity of use of animals in research (§ 2146 (1973 and 1976 Supp.)) . . . Accordingly, we do not believe the legislature intended [the cruelty code] to apply to this type of research activity under a federal program.<sup>133</sup>

Relatedly, Professor Satz has noted that some prosecutors affirmatively avoid prosecution of persons whose activities are subject to the AWA for fear of intruding upon a domain of exclusive federal control.<sup>134</sup> The displacement of state cruelty laws is significant because state cruelty laws are generally more rigorous and stringent, particularly as applied to psychological, as opposed to physical, suffering.<sup>135</sup> The AWA, then, has had the effect of stripping state cruelty law protections from any animals that are covered by the federal law, and at the same time, it exempts farmed animals—who are already exempted from state cruelty laws—from any protection.

Compliance with the AWA has also been cited as a reason to deny relief in cases alleging Endangered Species Act (“ESA”) violations involving captive animals. For example, in granting a zoo’s motion to dismiss in a case challenging the confinement of bears in barren concrete pits, a federal judge relied on the lack of any license revocations under the AWA as a basis for dismissing claims that the bears were mistreated.<sup>136</sup> In so doing, the federal judge deliberately conflated the requirement under the ESA that an animal not be “harassed” with the

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133. *Taub*, 463 A.2d at 821–22.

134. One of Professor Satz’s insights is that the lawyers and courts invoking preemption are not actually wrestling with the reality of the preemption doctrine. That is to say, the “preemption” in this realm is a sort of loosely conceived preemption that has no real moorings in legal doctrine. Ani B. Satz, *Animal Protection and the Myth of AWA Preemption* (draft on file with Author).

135. *See, e.g.*, N.Y. AGRIC. & MKTS. L. § 353 (McKinney 2016) (making any person who “deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink” guilty of a class A misdemeanor, regardless of whether the animal suffered harm); STACY WOLF, ANIMAL CRUELTY: THE LAW IN NEW YORK 17 (2003), [http://www.potsdamhumanesociety.org/files/cruelty/ASPCA\\_NYlaws.pdf](http://www.potsdamhumanesociety.org/files/cruelty/ASPCA_NYlaws.pdf) (“While cases of emotional or psychological harm to an animal may be more difficult to prove, they are certainly within the purview of section 353.”).

136. *Hill v. Coggins*, No. 2:13-cv-00047-MR-DLH, 2016 WL 1251190, at \*14 (W.D.N.C. Mar. 30, 2016), *rev’d on appeal*, 867 F.3d 499, 509 (4th Cir. 2017); *see Holly Kays, Cherokee Bear Zoo Survives Lawsuit*, SMOKY MOUNTAIN NEWS (Apr. 13, 2016) <http://www.smokymountainnews.com/news/item/17458-cherokee-bear-zoo-survives-lawsuit>.

AWA requirement of holding a valid license.<sup>137</sup> The judge cited the absence of an AWA license revocation as compelling the conclusion that the facility was complying with the ESA.<sup>138</sup> The idea that one federal law cannot be violated if another independent federal law is satisfied, is a notion foreign to our federal system—Congress routinely provides overlapping spheres of regulation in a particular context.<sup>139</sup> But it is a concept that has become commonplace in cases alleging ESA violations for confined animals.<sup>140</sup> Particularly illustrative is the brief of Cricket Hollow Zoo in an Eighth Circuit case alleging “harassment” under the ESA, which goes so far as to argue that an AWA license provides a “safe harbor” against all other liability.<sup>141</sup> In the words of the zoo, “as a [AWA] licensed facility they [are] exempt from the ESA.”<sup>142</sup>

Whether any federal court of appeals ultimately accepts the zoo’s argument or not, these kinds of examples provide a critical insight into the modern usage of the AWA by persons profiting from the use of animals. The AWA has become the first and best line of legal defense to some of the most serious litigation alleging animal mistreatment in modern times. It is almost beyond controversy to recognize that penalties for violating the AWA are rarely issued,<sup>143</sup> yet as the above examples illustrate, AWA licensure is increasingly regarded as providing something approaching a conclusive presumption of compliance with all other state and federal laws. In this posture of under-enforcement and over-reliance, the AWA has emerged as a source of tangible harm to animal protection efforts.

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137. *Hill*, 2016 WL 1251190, at \*11–14.

138. *Id.* at \*14.

139. *See, e.g.*, Todd S. Aagaard, *Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities*, 29 VA. ENVTL. L.J. 237, 242–49, 302 (2011) (discussing how EPA and OSHA have overlapping regulatory functions and concluding that “Congress . . . intentionally created overlapping jurisdictions” for the two agencies); Brian Peterson, *Confusion in Regulating Coal Mine Water Pollution: Regulatory Overlap in SMCRA and the CWA*, 99 W. VA. L. REV. 595, 597–603 (1997) (discussing how the Clean Water Act and the Surface Mining Control and Reclamation Act of 1977 overlap to regulate discharge of acid mine drainage); Cary Coglianese, Opinion, *There’s an Easy Way to Untangle Regulatory Knots*, L.A. TIMES (Mar. 31, 2015, 6:46 PM), <http://www.latimes.com/opinion/op-ed/la-oe-0401-coglianese-regulations-20150401-story.html> (discussing how the FDA and USDA have overlapping food safety responsibilities and how that is one example of “long-lamented overlapping and redundant federal regulations”).

140. *See, e.g.*, *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 189 F. Supp. 3d 1327, 1355 (S.D. Fla. 2016) (dismissing an Endangered Species Act case and explaining that “[t]he conditions in which Lolita is kept, and the injuries the Plaintiffs have presented to the Court, are largely addressed under a different federal law—the Animal Welfare Act.”).

141. Brief of Defendants-Appellants at 35–40, *Kuehl v. Sellner* (8th Cir. Oct. 18, 2016) (Case Nos. 16-1624 & 16-3147).

142. *Id.* at 13 (“The AWA is the only Federal law that regulates the treatment of animals in exhibition and transport.”); *Id.* at 9 (declaring that only those who are outside of the licensing purview of the AWA are subject to ESA regulation).

143. *See, e.g., supra* note 13.

## B. THE AWA AS A SWORD AGAINST ANIMAL PROTECTION

Beyond general or merely conceptual harms flowing from the AWA, and even beyond the direct harm to animal protection efforts that the law presents when it shields animal injury from judicial review or public scrutiny, the AWA is also used as a sword by groups seeking to affirmatively hinder animal protection efforts. In effect, the AWA has emerged as an important tool for animal exploiters in their efforts to undermine animal protection efforts.

In the realm of legislation, the AWA is invoked as a significant reason to avoid further regulation of the treatment of animals. For example, the AWA featured prominently in the 2016 debate in New York City over whether the city should ban the use of animals in entertainment.<sup>144</sup> During a City Council hearing on the measure in October of 2016, a representative of Ringling Brothers testified against the ban, arguing primarily that the AWA rendered such a city law frivolous or duplicative.<sup>145</sup> The representative stated: “[t]his ban is legally unnecessary. The welfare of animals, as you’ve already heard, is already protected at multiple government levels including 300 pages of regulations with the USDA. . . . Ringling Brothers has never been found in violation of the Federal Animal Welfare Act.”<sup>146</sup> The AWA and its accompanying regulations, it is argued, render additional state protections superfluous, if not outright impermissible. It is in this way that the AWA is used to the detriment of animal protection efforts at the state and local levels.

But such reasoning is either egregiously misinformed or, more likely, deceptive. The reality, as explained above,<sup>147</sup> is that the AWA does not ban animal performances at all. Indeed, it explicitly anticipates that such businesses will exist. Instead, the AWA simply provides bare minimum restrictions on the persons or organizations who act as “exhibitors” of animals.<sup>148</sup> Legislation imposing *additional* barriers to the use of animals should not be called into question simply because the

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144. Jennifer Fermino, *Bill Banning Circus from Using Wild Animals Heads to City Council*, N.Y. DAILY NEWS (Oct. 11, 2016, 10:39 AM), <http://www.nydailynews.com/new-york/bill-banning-circus-wild-animals-heads-city-council-article-1.2825459>.

145. City Council of New York, Transcripts of the Committee on Health, Oct. 20, 2016 (on file with the Author).

146. *Id.* at 55. On January 16, 2017, Ringling Brothers Circus announced it was shutting down its operations in May of 2017. This was in part based on decreasing ticket sales due to the circus no longer using elephants because of “mounting criticism from animal rights groups.” Tony Marco & Azadeh Ansari, *Famed Ringling Bros. circus closing after more than 100 years*, CNN (May 21, 2017, 10:15 PM), <http://www.cnn.com/2017/01/14/entertainment/ringling-circus-closing>.

147. *Supra* note 128.

148. See 7 U.S.C. § 2143(a)(1) (2011) (“The Secretary shall promulgate standards to govern the humane handling, care, treatment, and transportation of animals by . . . exhibitors.”); 9 C.F.R. §§ 3.75–3.92; 3.100–3.118; 3.125–3.133; 3.136–3.142 (providing regulations for nonhuman primates, marine animals, and other warm blooded animals).

AWA exists<sup>149</sup>; nor does it undermine the purpose of more protective state legislation to argue that a particular circus or exhibition has not been found to be in violation of the minimal requirements of the AWA.<sup>150</sup>

A second and even more aggressive and perverse use of the AWA is the invocation of the federal legislation as a basis for animal enterprises to sue animal protection groups. One of the longest standing critiques of the AWA is its lack of a citizen suit provision, thus effectively barring individuals and animal protection groups from suing to enforce violations of the AWA.<sup>151</sup> Recently, however, organizations that hold animals captive have relied on licensure under the AWA as a basis for affirmatively suing persons and organizations who have criticized the conditions of the animals confined in their facilities. These zoos or animal-businesses assert that criticizing a facility that complies with the AWA is defamatory, *per se*.

By way of an example, in November of 2016, the Houston Aquarium and its parent corporation, Landry's, sued the Animal Legal Defense Fund ("ALDF") for defamation based on ALDF's threat to sue the aquarium for violations of the Endangered Species Act.<sup>152</sup> The complaint makes clear the theory of the case: AWA compliance is not only a defense to allegations of misconduct, but a sword in the arsenal of the animal exhibitors. There could not be a clearer example of the AWA's use as an affirmative mechanism for impeding animal protection efforts. Accordingly, it is worth considering the background of this sort of AWA litigation.

As relevant to the case against the Houston Aquarium, the Endangered Species act specifies that "[n]o action may be commenced . . . prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator . . ."<sup>153</sup> On September 19, 2016, ALDF sent a notice letter to the Houston Aquarium, informing the aquarium that the group planned to file suit under the Endangered Species Act, based on the conditions of four captive white tigers housed at the aquarium.<sup>154</sup> The notice letter specified that the aquarium had "deprived these tigers of access to sunlight, fresh air, natural surfaces, and species-appropriate environmental enrichment [in

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149. See 7 U.S.C. § 2152 (2012) (creating a savings clause and calling for state law to supplement federal law on AWA issues).

150. *Supra* note 77 (explaining the hyper-technical definition of "found" employed by Ringling Brothers that treats the investigative reports and even their settlement under the AWA as consistent with having never been found in violation of the AWA).

151. Sullivan, *supra* note 3, at 22–23 (proposing adding a citizen suit provision to the AWA); Swanson, *supra* note 5, at 943–44 (criticizing the AWA for lacking a citizen suit provision).

152. Plaintiffs' Original Petition and Request for Disclosure, Landry's, Inc. v. Animal Legal Def. Fund (Tex. Nov. 17, 2016) (No. 2016-79698) [hereinafter Landry's Complaint]. Relief was denied in a summary trial court order, and Landry's has appealed.

153. 16 U.S.C. § 1540(g)(2)(A) (2012).

154. Landry's Complaint, *supra* note 152, at Ex. B.



violation of the ESA].”<sup>155</sup> Summarizing ALDF’s assessment of the living conditions, the notice letter complained that the tigers have been relegated to “dungeon” like conditions: “the tigers spend their days in one of two enclosures: a garish concrete exhibit, supposedly designed to look like a maharajah’s temple with a Buddha at its center, . . . or one of several small metal holding cages out of public view.”<sup>156</sup> The notice letter also made clear that the lawsuit would not be filed if the tigers were relocated to a sanctuary, at no expense to the aquarium.<sup>157</sup>

Upon being served with notice, the aquarium did not acquiesce to the request that the tigers be relocated. Instead, the aquarium went on the offensive, using the AWA as its primary weapon. Less than a month after being served with the notice letter, the aquarium’s parent company filed a lawsuit against ALDF alleging, principally, a series of defamation claims based on the information in the notice letter.<sup>158</sup> The introduction of the aquarium’s complaint makes the gravamen of the case clear: claims of animal mistreatment are to be regarded as specious whenever the animals in question are “exhibited in complete and full compliance with all applicable laws, federal or state.”<sup>159</sup> Plaintiffs treat the claim that an animal is living in deplorable conditions as per se defamatory when the exhibition in question is licensed under and in compliance with the AWA. The matter is further clarified in the body of the complaint, “[d]efendants have no good faith basis to bring an Endangered Species Act case against the Plaintiffs where, as here, there are no Animal Welfare Act violations and no USDA findings of non-compliance.”<sup>160</sup>

The Plaintiff Aquarium invokes the AWA or USDA enforcement of the AWA more than a half-dozen times in its complaint as a basis for finding ALDF’s accusations defamatory. The Houston Aquarium’s lawsuit against the animal protection group brings the AWA full-circle. The law was initially decried by researchers and opponents as unduly restrictive and overly protective of animals.<sup>161</sup> As enforced, however, the law has been heralded by these same industries as a major success; its existence lends to them a level of credibility that would have otherwise been unattainable.<sup>162</sup> Indeed, an analogy might be drawn between the

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155. Landry’s Complaint, *supra* note 152, at Ex. B.

156. Landry’s Complaint, *supra* note 152, at Ex. B.

157. Landry’s Complaint, *supra* note 152, at Ex. B.

158. Landry’s Complaint, *supra* note 152, at 23–28.

159. Landry’s Complaint, *supra* note 152, at 1.

160. Landry’s Complaint, *supra* note 152, at 7.

161. *See, e.g.*, Daniel Engber, *Pepper Goes to Washington*, SLATE (June 3, 2009, 7:22 AM), [http://www.slate.com/articles/health\\_and\\_science/pepper/2009/06/pepper\\_goes\\_to\\_washington.html](http://www.slate.com/articles/health_and_science/pepper/2009/06/pepper_goes_to_washington.html) (providing the history of the AWA including the initial opposition to the law by animal researchers).

162. *See, e.g.*, Ellison, *supra* note 105 (quoting a press release by a zoo stating that because of the USDA and federal regulations it “is held to the highest standards in animal welfare.”); Nikki Leung, *Brief Summary of Medical Research Animals*, ANIMAL LEGAL & HISTORICAL CTR. (2014),

*Miranda* warnings that police officers are required to provide to persons in custody before they are interrogated.<sup>163</sup> These warnings, once decried by law enforcement agencies as an unworkable burden, are for the most part accepted, and even relished, because compliance with the warning gives any subsequent interrogation a presumption of permissibility.<sup>164</sup> Compliance with the AWA offers the regulated parties a similar claim to legitimacy and careful handling of the subjects in question.

On its fiftieth anniversary, the AWA is being employed as a basis for affirmatively suing animal protection groups. It is difficult to imagine a starker example of the AWA as a source of limitations and injury to animal protection efforts. The chill on litigation and advocacy in this realm, to say nothing of the potential liability, will indelibly alter the calculations of animal protection groups when deciding what cases to pursue. And while this sort of affirmative litigation predicated on an AWA license (as opposed to a mere defense to such litigation) is still rather novel and untested, the Houston Aquarium case is not unique.<sup>165</sup>

#### CONCLUSION

Fifty years ago the most sweeping federal legislation governing the protection of animals, the AWA, was signed into law by Lyndon Johnson. Over the past half-century, much has changed in the way animals are treated. Much of the change is for the worse. As compared to 1966, animal suffering has become more common, more acute, more accepted, and more easily defended. Much of the hardship forced on animals during this period happened in the shadow of the AWA, rather than being explicitly compelled by it. For example, animal agriculture, which is exempted from the protections of the AWA, has become much more industrialized and inhumane during the past fifty years. But this

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<https://www.animallaw.info/intro/medical-research-animals> (noting that the AWA combined with additional accreditations have “boost[ed] the reputation and credibility of individual research facilities”).

163. *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966).

164. Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1016–17, 1021–23 (2001) (noting that police initially reacted to *Miranda* with “anger,” but now the majority of law enforcement support it and have publicly supported the *Miranda* requirements); George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona: “Embedded” in Our National Culture?*, 29 CRIME JUST. 203, 252–53 (2002) (“For the most part, *Miranda* has helped, not hurt, law enforcement, and for the most part law enforcement supports *Miranda*.” (internal citation omitted)).

165. A somewhat similar case was filed against PETA by Soul Circus, Inc. in 2013. Complaint, Dkt. No. 1, *Soul Circus, Inc. v. People for the Ethical Treatment of Animals* (N.D. Ga. Mar. 6, 2013) (No. 2013-CV-228230) (suing PETA for defamation because, in part, the circus is “fully licensed” under the USDA”). Two cases along the same lines were filed within the past several months, see Complaint, Dkt. No. 1, *Deyoung Family Zoo v. People for the Ethical Treatment of Animals* (W.D. Mi Dec. 27, 2016) (No. 2:16-cv-00282), and Complaint, Dkt. No. 1, *Missouri Primate Foundation v. People for the Ethical Treatment of Animals* (E.D. Mo Dec. 30, 2016) (No. 4:16-cv-02163).

correlational story of industrialized farming practices taking hold during the life of the AWA is not the most revealing defect of the AWA.

Even more consequential are the conceptual and concrete harms that flow from the AWA, which have had the effect of freezing rather than facilitating animal protection reforms. Indeed, the AWA is now affirmatively used to the advantage of animal exploiters in media, legislative campaigns, and litigation. The AWA, counterintuitively, imposes relatively few burdens on businesses or persons regulated by it, but provides them a powerful rejoinder to claims of animal suffering. The AWA allows persons who are harming animals, even persons whose operations are routinely in violation of the AWA's requirements, to cite the existence and scrutiny of the federal regime as essentially dispositive proof that they are providing for the well-being of the animals in their care. In this way, the AWA codifies a concept of animal "welfare" that goes a great distance towards justifying a vast amount of animal suffering. Increasingly, the AWA is tactically deployed as a weapon against animal protection rather than a tool to support it.

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