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BEYOND STANDING: A SEARCH FOR A NEW SOLUTION IN ANIMAL WELFARE

Shigehiko Ito*

I. INTRODUCTION

Imagine you are a researcher in an animal laboratory and you suspect that the treatment of the animals in your laboratory may violate federal law. What can you do? The extent of legal protection that can and should be afforded to animals against abuse, cruelty, pain, and suffering imposed by humans is an ongoing debate among legal scholars.¹ The traditional conception of animals as property has limited the extent of their protection under the American legal system.² However, at least one academic has suggested that suffering is the real issue, and is a sufficient reason to expand the current scope of legal protection for animals.³

The Animal Welfare Act (“AWA”) was enacted by Congress to promote animal welfare at the federal level,⁴ but there are numerous problems with this statute that have

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1. See, e.g., Joseph Mendelson, III, *Should Animals Have Standing? A Review of Standing under the Animal Welfare Act*, 24 B.C. ENVTL. AFF. L. REV. 795 (1997); Cass R. Sunstein, *A Tribute to Kenneth L. Karst: Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000) [hereinafter Sunstein, *Standing for Animals*]; Joshua E. Gardner, Note, *At the Intersection of Constitutional Standing, Congressional Citizen-Suits, and the Humane Treatment of Animals: Proposals to Strengthen the Animal Welfare Act*, 68 GEO. WASH. L. REV. 330 (2000).

2. See Harold W. Hannah, *Animals as Property-Changing Concepts*, 25 S. ILL. U. L.J. 571, 572 (2001); Thomas G. Kelch, *Article: Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 531-41 (1998); see also Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 398-400 (2003) [hereinafter Sunstein, *The Rights of Animals*].

3. See Sunstein, *The Rights of Animals*, *supra* note 2, at 401.

4. See Mendelson, *supra* note 1, at 795.

rendered it ineffective.⁵ First, its language and standards are unworkably vague.⁶ Second, it does not contain a private right of action provision, creating a barrier for plaintiffs attempting to access the federal courts.⁷ Third, the United States Department of Agriculture ("USDA") has been unable to enforce the AWA effectively.⁸ Finally, the formalistic requirements of the standing doctrine⁹ have prevented organizations and individuals from bringing animal welfare claims before a court of law.¹⁰

It is difficult to make claims concerning injuries to animals because courts are unwilling to grant standing to animals themselves.¹¹ Consequently, a human plaintiff must claim an injury suffered in association with an animal's injury.¹² Although controversial, a claim of aesthetic injury suffered as a result of observing animals in conditions that violate AWA standards is sufficient for standing purposes,¹³ and has proven to be the most effective way for a third party

5. See Karen L. McDonald, Comment, *Creating a Private Cause of Action Against Abusive Animal Research*, 134 U. PA. L. REV. 399, 402-05 (1986).

6. See Mendelson, *supra* note 1, at 795-96.

7. See Deawn A. Hersini, *Can't Get There From Here . . . Without Substantive Revision: The Case for Amending the Animal Welfare Act*, 70 UMKC L. REV. 145, 149 (2001).

8. McDonald, *supra* note 5, at 404-05.

9. Under the Supreme Court's interpretation of Article III of the United States Constitution, "the plaintiff must meet several requirements in order for a federal court to adjudicate the case." ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 62 (2d ed. 2002). The first set of requirements is constitutional, and cannot be overridden by statute. *Id.* First, the plaintiff must have suffered or imminently will suffer an injury. *Id.* Second, the plaintiff's injury must be fairly traceable to the defendant's conduct. *Id.* Third, a favorable court decision must be likely to redress the injury. *Id.* The prudential requirements are not based on the Constitution, but on prudent judicial administration. *Id.* at 63. In contrast to the constitutional requirements, Congress may override prudential limits by statute. *Id.* at 63. There are three requirements:

First, a party generally may assert only his or her own rights and cannot raise claims of third parties not before the court. Second, a plaintiff may not sue as a taxpayer who shares general grievances with all other taxpayers. . . . Third, a party must raise a claim within the zone of interests protected by the statute in question.

Id. See also *infra* text accompanying notes 77-82.

10. See Mendelson, *supra* note 1, at 801 (citing *Animal Legal Def. Fund v. Espy*, 23 F.3d 496, 498 (D.C. Cir. 1994)).

11. See *id.* at 804-06.

12. See, e.g., *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998).

13. See *id.*

plaintiff to ensure enforcement of the AWA.¹⁴ Unfortunately, while this type of claim gives plaintiffs access to the courts, it is ineffective for animal protection purposes because it only indirectly addresses the issue of injuries suffered by animals.¹⁵

This comment will discuss the history of the AWA and the various problems with the statute, as well as other legal mechanisms for promoting animal welfare.¹⁶ Effective protection of animals requires a change in the way our legal system regards animals. There are several possible solutions: (1) amend the AWA to include a private right of action provision;¹⁷ (2) relax the formalistic standards of the standing doctrine;¹⁸ or (3) amend the AWA to create and enforce more specific guidelines to protect animals by creating either a new subdivision within the USDA, or a new agency specializing in animal welfare issues.¹⁹

Given the historical difficulties in amending the AWA and in overcoming the standing doctrine,²⁰ the third solution

14. See Aaron W. Proulx, Note, *Animal Legal Def. Fund, Inc. v. Glickman: A Common Law Basis for Animal Rights*, 29 STETSON L. REV. 495 (1999); Rob Roy Smith, *Standing on Their Own Four Legs: The Future of Animal Welfare Litigation After Animal Legal Defense Fund, Inc. v. Glickman*, 29 ENVTL. L. 989, 996-99 (1999); Fiona M. St. John-Parsons, Comment, *"Four Legs Good, Two Legs Bad": The Issue of Standing in Animal Legal Defense Fund, Inc. v. Glickman and its Implications for the Animal Rights Movement*, 65 BROOK. L. REV. 895 (1999); *infra* note 188 and accompanying text.

15. See St. John-Parsons, *supra* note 14, at 932-33.

16. It will not, however, address the moral, philosophical and historical questions regarding animal rights in the context of the American legal system. See generally Kelch, *supra* note 2, at 531-41 (discussing the legal status of animals as property).

17. See Gardner, *supra* note 1, at 353-57; Hersini, *supra* note 7, *passim*; Katharine M. Swanson, *Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. MICH. J.L. REFORM 937, 963-65 (2002); Sunstein, *supra* note 1, at 1367 ("Congress should grant a private cause of action both to injured persons and to animals themselves . . ."); Adam Kolber, Comment, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163, 203-04 (2001).

18. Kolber, *supra* note 17, at 202-04 (proposing that animals, particularly great apes, should be granted standing); McDonald, *supra* note 5, at 426-30 (arguing that animal welfare groups in public nuisance actions should be granted standing); Sunstein, *Standing for Animals*, *supra* note 1, at 1367 (asserting that animals should be granted standing).

19. See Gardner, *supra* note 1, at 357-59.

20. See Smith, *supra* note 14, at 1026-27 (stating that proposed legislation in the 1980s to amend the AWA to include a citizen suit provision in order "to give individuals standing to sue for enforcement of the act" did not survive the House Subcommittee on Administrative Law and Government Regulations).

proposed would likely be the most effective. A new subdivision within the USDA or a new agency with rulemaking, adjudicatory, and investigative authority would be the most effective means of developing and enforcing a comprehensive program regulating animal treatment, particularly in the area of scientific research. Such an agency is necessary to replace or supplement the limited regulatory power of the USDA, which has proven ineffective in promulgating regulations and investigating violations of the law.²¹

II. BACKGROUND

A. *The Animal Welfare Act and its History*

The United States Congress originally enacted the AWA in 1966 as the Laboratory Animal Welfare Act ("LAWA").²² Its primary objective was to prevent companion animals from being stolen from their homes and sold to research facilities.²³ Prior to the LAWA, numerous attempts were made to introduce and pass bills in Congress that would have regulated the use of animals in experiments.²⁴ Such efforts were unsuccessful and were met by strong opposition from the scientific community.²⁵ The LAWA, the first successful piece of legislation on the subject of laboratory animals, had little relevance to these earlier attempts to regulate at the

21. Swanson, *supra* note 17, at 950-55.

22. Laboratory Animal Welfare Act, Pub. L. No. 89-544, 80 Stat. 350 (1966) (codified as amended at 7 U.S.C. §§ 2131-2159 (2000 & Supp. 2004)).

23. *Id.*

24. GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 187-90 (1995). The first significant attempt to regulate the use of animals in scientific research was proposed legislation aimed at banning vivisection in the District of Columbia. *See id.* at 187. The legislation consisted of the general goals of restricting painful experiments on animals and instituting a licensing procedure. *Id.*

25. *See id.* at 187-90. For example, opponents of the vivisection legislation contended that it would invade a researcher's traditional freedom not to be regulated. *See id.* at 188. The National Academy of Sciences argued that this legislation would impede scientific progress. *See id.* (citing S. Rep. No. 1049, at 127 (statement of Wolcott Gibbs, president of the National Academy of Sciences)). Two leaders in the opposition movement were William Welch of Johns Hopkins and Henry Bowditch of Harvard, who formed a committee of leading scientific organizations and gathered signatures of researchers around the country in support of their statement opposing the bill. *Id.* In addition, researchers were opposed to visits to their laboratories by inspectors. *Id.*

federal level.²⁶ Because animals were considered property under the common-law tradition,²⁷ the main purpose of the LAWA was to protect a person's property from theft.²⁸

The LAWA was opposed by the scientific community,²⁹ and doubts arose as to whether the USDA was the proper agency to administer this type of program.³⁰ Although the USDA did not oppose the legislation, the Secretary of Agriculture ("the Secretary") noted that the USDA's main function pertained to livestock and poultry and that "there is question as to whether it would not be more desirable that a program such as that in question be administered by a Federal agency more directly concerned."³¹ This statement suggested that perhaps from the start, another federal agency should have handled animal treatment issues in the context of scientific research.

The LAWA had four primary parts.³² First, the Secretary was authorized to "promulgate humane standards and record-keeping requirements governing the purchase, handling, or sale of dogs or cats by dealers or research facilities."³³ The Secretary could also "promulgate standards to govern the humane handling, care, treatment, and transportation of

26. *See id.* at 187-90.

27. *See* Kelch, *supra* note 2, at 533-35. First, holdings and statements of the courts reflect the conception of animals as property. *See, e.g.,* Bueckner v. Hamel, 886 S.W.2d 368, 370 (Tex. App. 1994) (finding that dogs are personal property). Second, the measurement of damages for injuring or killing an animal is measured in the same way as injury to inanimate property. *See, e.g.,* Peter Barton & Frances Hill, *How Much Will You Receive in Damages from the Negligent or Intentional Killing of Your Pet Dog or Cat?*, 34 N.Y.L. SCH. L. REV. 411, 411-12 (1989). Third, Stoic, Aristotelian, and Biblical beliefs of animals as "things" influenced the common-law view. *See* Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 518-29 (1996).

28. FRANCIONE, *supra* note 24, at 190-91.

29. *Id.* at 191. Opponents asserted that the bill originated from an exaggeration regarding the problem of stolen animals, and that federal regulation would increase the cost of acquiring animals, consequently decreasing the total output of research. *See id.*

30. *Id.* at 191-92.

31. *Id.* at 192 (quoting *Regulate the Transportation, Sale, and Handling of Dogs and Cats Used for Research and Experimentation: Hearings on H.R. 9743 et al. Before the Subcomm. on Livestock and Feed Grains of the H. Comm. on Agric.*, 89th Cong. 12 (2d Sess. 1966) (statement of Orville Freeman)).

32. *Id.* at 192.

33. *Id.* (quoting Laboratory Animal Welfare Act, Pub. L. No. 89-544, § 12, 80 Stat. 350 (1966)).

animals by dealers at research facilities.³⁴ Second, the Act required dealers to be licensed,³⁵ and research facilities to be registered.³⁶ The LAWA also required dealers to keep a dog or cat for at least five business days after acquiring one before selling it,³⁷ and prohibited research facilities from buying dogs or cats from anyone but a licensed dealer.³⁸ Third, the LAWA required research facilities to keep records of dogs and cats,³⁹ and dealers to mark or identify dogs and cats transported, delivered, purchased, or sold in commerce.⁴⁰ Fourth, the Secretary was permitted to impose various penalties for violations, including suspension or revocation of a dealer's license, and imprisonment of dealers for up to one year and a fine of up to \$1,000.⁴¹ Other penalties included civil fines of \$500 per day per violation for research facilities that knowingly violated a USDA order to cease and desist.⁴²

The LAWA was limited in scope in several ways. Due to its definition of "animal," it covered and regulated only the use of live dogs, cats, monkeys, guinea pigs, hamsters, and rabbits.⁴³ Importantly, the Secretary could not set standards regarding the handling and care of animals during the process of research or experimentation.⁴⁴ Although the LAWA required the Animal and Plant Health Inspection Service ("APHIS"), an enforcement division of the USDA, to inspect research facilities, it did not specify how often such inspections had to occur.⁴⁵

The Animal Welfare Act of 1970 (the "1970 Act") amended the LAWA and expanded the scope of its coverage to any warm-blooded animal that the Secretary determined "is being used, or is intended for use, for research, testing,

34. FRANCIONE, *supra* note 24, at 192 (quoting Laboratory Animal Welfare Act § 13).

35. *Id.* at 193 (citing Laboratory Animal Welfare Act §§ 3, 4).

36. *Id.* (citing Laboratory Animal Welfare Act § 6).

37. *Id.* (citing Laboratory Animal Welfare Act § 5).

38. *Id.* (citing Laboratory Animal Welfare Act § 7).

39. *Id.* (citing Laboratory Animal Welfare Act § 10).

40. FRANCIONE, *supra* note 24, at 193 (citing Laboratory Animal Welfare Act § 11).

41. *Id.* (citing Laboratory Animal Welfare Act §§ 19(a), (c)).

42. *Id.* (citing Laboratory Animal Welfare Act § 20).

43. Laboratory Animal Welfare Act, Pub. L. No. 89-544, § 2(h), 80 Stat. 350, 350 (1966) (codified as amended at 7 U.S.C. §§ 2131-2159 (2000 & Supp. 2004)).

44. *Id.* §§ 13, 18.

45. *Id.* § 16.

experimentation, or exhibition purposes, or as a pet.⁴⁶ It expanded the definition of "research facility" to include "any school (except an elementary or secondary school), institution, organization, or person that uses or intends to use live animals in research, tests, or experiments."⁴⁷ It also directed the Secretary to set standards for humane "handling, housing, feeding, watering, sanitation, ventilation [and] shelter" for laboratory animals.⁴⁸

The 1970 Act required the USDA to administer a licensing procedure whereby all exhibitors, research laboratories, and dealers were required to obtain a license before conducting activities involving the use of animals.⁴⁹ These facilities were required to undergo annual inspections and renew licenses.⁵⁰ The 1970 Act also increased penalties for interference with government inspectors⁵¹ and expanded discovery procedures for obtaining information.⁵² These amendments were part of a "continuing commitment by Congress to the ethic of kindness to dumb animals."⁵³ However, like the LAWA, the 1970 amendments made it clear that the Secretary could not affect the "design, outlines, guidelines, or performance of actual research or experimentation by a research facility as determined by such research facility."⁵⁴

Subsequently, amendments in 1976 (the "1976 Amendments") outlawed animal fighting⁵⁵ and established criminal penalties for violations.⁵⁶ They also extended

46. Animal Welfare Act of 1970, Pub. L. No. 91-579, 3(g), 84 Stat. 1560, 1561 (codified at 7 U.S.C. § 2132(g) (2000)).

47. FRANCIONE, *supra* note 24, at 193 (citing Animal Welfare Act of 1970 § 3(e) (codified at 7 U.S.C. § 2132(e) (2000))).

48. Animal Welfare Act of 1970 § 14 (codified at 7 U.S.C. § 2143(a)(2)(A)).

49. 7 U.S.C. § 2133 (2000).

50. *Id.* § 2143.

51. FRANCIONE, *supra* note 24, at 195 (citing Animal Welfare Act of 1970 § 17).

52. Mendelson, *supra* note 1, at 798 (citing H.R. REP. NO. 91-1651, at 2 (1970), as reprinted in 1970 U.S.C.C.A.N. 5103, 5105); see also Animal Welfare Act of 1970 §§ 14, 17 (codified at 7 U.S.C. §§ 2143, 2146).

53. H.R. REP. NO. 91-1651, at 2 (1970), as reprinted in 1970 U.S.C.C.A.N. 5104.

54. FRANCIONE, *supra* note 24, at 194 (quoting Animal Welfare Act of 1970 § 14).

55. Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, § 17, 90 Stat. 417, 421 (codified at 7 U.S.C. § 2156 (2000)).

56. See H.R. REP. NO. 94-801, at 6 (1976), as reprinted in 1976 U.S.C.C.A.N.

coverage of the Act to intermediate handlers and carriers.⁵⁷ These amendments emphasized Congress's commitment to "humane care and treatment" of animals in, or intended for, use in research.⁵⁸ However, Congress gave the scientific research community discretion in defining "humaneness."⁵⁹

In 1985, Congress enacted the Improved Standards for Laboratory Animals Act ("ISLAA"),⁶⁰ which further amended the AWA and resulted in the basic form of the statute in force today. The amendments created a system of internal review through the creation of Institutional Animal Care and Use Committees ("IACUCs").⁶¹ Under ISLAA, every facility covered by the AWA is required to create at least one IACUC consisting of at least three members, one of whom must be a veterinarian, and another individual who must not be associated with the facility.⁶² IACUCs are required to inspect facilities semi-annually and prepare reports on the inspections explaining any violations of standards and deviations from approved protocols.⁶³ The IACUC is required to notify the facility of any problems, and if the facility fails to correct the problem, the IACUC must notify APHIS and federal funding agencies.⁶⁴ No remedy is specified in the statute for cases in which IACUC does not comply with the internal review requirements of ISLAA.⁶⁵

In addition to IACUC regulations, each facility is also required to submit its own report to the Secretary, stating that the principal researcher considered alternatives to painful procedures and complied with § 2143, along with

796-97.

57. See H.R. REP. NO. 94-801. "Intermediate handler" is defined as "any person . . . who is engaged in any business in which he receives custody of animals in connection with their transportation in commerce," and "carrier" is defined as "the operator of any airline, railroad, motor carrier, shipping line, or other enterprise, which is the business of transporting any animals for hire." FRANCIONE, *supra* note 24, at 195 (quoting Animal Welfare Act Amendments of 1976 § 4).

58. Animal Welfare Act Amendments of 1976 § 1(b)(2) (codified as amended at 7 U.S.C. § 2131(1)).

59. See 7 U.S.C. § 2143(a)(6)(A) (2000).

60. See Food Security Act, 7 U.S.C. §§ 2131, 2158-2159 (2000).

61. See 7 U.S.C. § 2143(b)(1).

62. See *id.*

63. *Id.* § 2143(b)(3)-4(A).

64. *Id.* § 2143(b)(4)(C).

65. See *id.* § 2143.

explanations for deviating from any standard.⁶⁶ Under these requirements, painful procedures should not be permitted without anesthetic unless the pain is necessary to the experiment and the experimenter has considered alternatives.⁶⁷

Furthermore, the Secretary is required to set requirements for the exercise of dogs, a physical environment for primates that promotes their psychological well-being, and for the care, treatment, and minimization of pain and distress of experimental animals.⁶⁸ Specifically, Congress has directed the Secretary to establish standards for: (1) the use of anesthetics, analgesics, tranquilizing drugs, and euthanasia when appropriate;⁶⁹ (2) the consideration by the principal investigator of alternatives to any procedure likely to cause pain or distress to the animal;⁷⁰ (3) the consultation with a veterinarian in planning research protocols that could cause pain to animals;⁷¹ and (4) the use of animals in only one major operation, from which they are allowed to recover unless scientific necessity dictates otherwise, or the Secretary deems that special circumstances require further research to be conducted.⁷² The researcher, however, still retains much control over the use of animals because the Secretary is prohibited from interfering in the actual research design.⁷³

Under the AWA, Congress expressed commitment to the “three R’s”: reduction in the number of animals used, refinement of cruel techniques, and replacement of animals with plants and computer simulations,⁷⁴ and provided “that the work that’s done behind the laboratory door will be done with compassion and with care.”⁷⁵ With these goals in mind, Congress enacted the AWA, which remains in force today.

66. *Id.* § 2143(a)(7)(A)-(B).

67. 7 U.S.C. § 2143(a)(7)(A)-(B).

68. *Id.* § 2143(a)(2)(B)-3(A).

69. Mendelson, *supra* note 1, at 800 (citing S. REP. NO. 99-145, at 593 (1985), as reprinted in 1985 U.S.C.C.A.N. 1676, 2519).

70. *See id.*

71. *See id.*

72. *See id.*

73. *See* Food Security Act of 1985, Pub. L. No. 99-198, §§ 1751-1759, 99 Stat. 1354, 1645-50; 7 U.S.C. § 2143(a)(6)(A)(i) (2000).

74. Mendelson, *supra* note 1, at 800 (quoting 137 CONG. REC. E1295 (1991)).

75. H.R. REP. NO. 91-1651, at 2 (1970), as reprinted in 1970 U.S.C.C.A.N. 5103, 5104.

B. *The Standing Doctrine and Animal Welfare Cases*

The Constitution grants federal courts jurisdiction over a "case or controversy."⁷⁶ The Constitution does not explicitly recite the requirements of standing, but the doctrine has evolved through case law.⁷⁷

In order to qualify as a "case or controversy"⁷⁸ and thus have standing, a plaintiff's claim must satisfy three constitutional elements. First, the plaintiff must have suffered an "injury in fact," which is concrete and particularized and "actual or imminent, not 'conjectural' or 'hypothetical.'"⁷⁹ Second, the plaintiff must show that the injury is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party.⁸⁰ Third, it must be likely, and not speculative, that the injury will be redressed by a favorable decision.⁸¹ In addition, for causes of action brought under a statute, the injury suffered by the plaintiff must come within the "zone of interest" of the statute.⁸² Several cases illustrate how courts have applied this doctrine.⁸³

In *Sierra Club v. Morton*,⁸⁴ the Supreme Court held that an organization bringing an action in federal court must show that an individual, personal, particularized injury was suffered by one or more of its members to satisfy the "injury in fact" requirement for standing.⁸⁵ The petitioner was an

76. U.S. CONST. art. III, § 2, cl. 1.

77. See CHEMERINSKY, *supra* note 9, at 60.

78. U.S. CONST. art III, § 2, cl. 1.

79. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). *But see* Cass Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166 (1992) [hereinafter Sunstein, *What's Standing After Lujan?*] (arguing that the standing requirements recited in *Lujan* are a misinterpretation of the Constitution, have no support in the text or history of Article III, and are an invention of recent federal judges).

80. *Lujan*, 504 U.S. at 560-61.

81. *Id.* at 561.

82. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *Barlow v. Collins*, 397 U.S. 159, 164 (1970).

83. See *Lujan*, 504 U.S. 555; *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221 (1986); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Alaska Fish & Wildlife Fed'n v. Dunkle*, 829 F.2d 933 (9th Cir. 1987), *cert. denied*, 485 U.S. 988 (1988); *Animal Lovers Volunteer Ass'n, Inc. v. Weinberger*, 765 F.2d 937 (9th Cir. 1985); *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

84. *Sierra Club*, 405 U.S. 727.

85. See *id.* at 735.

organization with "a special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the country," and brought suit for declaratory relief and an injunction to prevent federal officials from approving a planned ski resort.⁸⁶ Although the function of the petitioner organization was to promote the preservation of the environment in this area and had demonstrated a long-term commitment, the Court dismissed its claim for lack of standing because the Sierra Club did not allege that any members of its organization would suffer individual, personal injuries.⁸⁷ This decision indicated that individual members must use the resource in question in order to satisfy the "injury in fact" requirement.⁸⁸

In his dissent, Justice William O. Douglas questioned why the natural resources themselves, such as trees, could not bring an action and why an action must be brought on behalf of a person.⁸⁹ He noted that ships and corporations were permitted as parties in certain cases.⁹⁰ Justice Douglas also reasoned that protection of environmental resources by federal agencies was not sufficient because these agencies "are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity . . . which in time develops between the regulator and the regulated."⁹¹ Under Justice Douglas's view, individuals or organizations that frequented the area and knew of its ecological value could serve as guardians, but the resources themselves should have standing.⁹²

In *Animal Welfare Institute v. Kreps*,⁹³ the U.S. Circuit Court of Appeals for the District of Columbia applied the *Sierra Club* rule and found that plaintiffs had standing to enjoin the Director of the National Marine Fisheries Service

86. *Id.* at 730.

87. *Id.* at 735, 741.

88. *See id.* at 735 ("Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less they use it in any way that would be significantly affected by the proposed actions of the respondents.")

89. *Id.* at 741-42 (Douglas, J., dissenting).

90. *Sierra Club*, 405 U.S. at 742 (Douglas, J., dissenting).

91. *Id.* at 745-46 (footnote omitted) (Douglas, J., dissenting).

92. *Id.* at 749-52 (Douglas, J., dissenting).

93. *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

from granting permits to kill Cape fur seals.⁹⁴ The court held that the plaintiffs satisfied the standing requirement "by alleging injury to the recreational, aesthetic, scientific, and educational interest of their members."⁹⁵

The aesthetic interest of members was also sufficient for standing purposes in *Japan Whaling Ass'n v. American Cetacean Society*.⁹⁶ In that case, the Supreme Court found that the plaintiffs had standing where the Secretary of Commerce was required to report to the President of the United States Japan's violation of a whaling moratorium contained in the International Convention for the Regulation of Whaling.⁹⁷ Had there been a violation, the President would have been required to impose sanctions on Japan.⁹⁸ The Court found that the plaintiffs had standing based on injury to their interest in whale watching and studying.⁹⁹

Similarly, in *Alaska Fish & Wildlife Federation v. Dunkle*,¹⁰⁰ wildlife conservation groups challenged cooperative agreements that permitted the hunting of migratory birds in Alaska by suing the United States Fish and Wildlife Service.¹⁰¹ The court relied on *Sierra Club* and held that the defendants' actions would injure "those who wish to hunt, photograph, observe, or carry out scientific studies on migratory birds."¹⁰²

Organizations have not always been successful in overcoming the standing requirement in their attempts to protect animals against abuse. In *Animal Lovers Volunteer Ass'n, Inc. v. Weinberger*,¹⁰³ the plaintiff organization, which

94. *Id.* at 1004.

95. *Id.* at 1007.

96. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 231 n.4 (1986). The Court determined that the plaintiffs had an aesthetic interest because they "undoubtedly have alleged a sufficient 'injury in fact' in that the whale watching and studying of their members will be adversely affected by continued whale harvesting, and this type of injury is within the 'zone of interests' protected by the Pelly and Packwood Amendments [regulating whaling]." *Id.*

97. *Id.* at 223.

98. *Id.* at 239.

99. *Id.* at 231 n.4.

100. *Alaska Fish & Wildlife Fed'n v. Dunkle*, 829 F.2d 933 (9th Cir. 1987), *cert. denied*, 485 U.S. 988 (1988).

101. *Id.* at 933.

102. *Id.* at 937.

103. *Animal Lovers Volunteer Ass'n, Inc. v. Weinberger*, 765 F.2d 937 (9th Cir. 1985).

dedicated itself to preventing the inhumane treatment of animals, brought an action to enjoin the Navy from shooting feral goats on Navy property.¹⁰⁴ The court reasoned that if the plaintiff was trying to protect the goats as endangered species or was trying to protect the plants endangered by the goats, the plaintiffs would have had a stronger argument for standing purposes.¹⁰⁵ Similarly, if the organization had shown that the Navy's program affected its members' aesthetic or ecological surroundings, the plaintiff's position might have been different.¹⁰⁶ The court asserted that there was "no such cognizable injury to [the organization's] members" and concluded that "[a] mere assertion of organizational interest in a problem, unaccompanied by allegations of actual injury to members of the organization, is not enough to establish standing."¹⁰⁷ The court held that because the organization "has not differentiated its concern from the generalized abhorrence other members of the public may feel,"¹⁰⁸ it failed to "demonstrate an interest that is distinct from the interest held by the public at large,"¹⁰⁹ a requirement for standing under *Sierra Club*.¹¹⁰

The legal concept of standing changed dramatically after the Supreme Court's 1992 decision in *Lujan v. Defenders of Wildlife*,¹¹¹ in which the Court narrowly construed the meaning of "injury."¹¹² The Supreme Court addressed the issue of whether plaintiffs had standing to challenge a rule interpreting the Endangered Species Act as being applicable only to government actions within the United States or on the high seas.¹¹³ The plaintiffs claimed that the lack of consultation involving the federal government's activities abroad would lead to an increased rate of extinction of endangered species in other countries.¹¹⁴

The Supreme Court held that the plaintiffs lacked

104. *Id.* at 937.

105. *Id.* at 938.

106. *Id.*

107. *Id.*

108. *Id.* at 939.

109. *Weinberger*, 765 F.2d at 939.

110. *Sierra Club v. Morton*, 405 U.S. 727, 736-41 (1972).

111. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

112. *Id.* at 560-61.

113. *Id.* at 557-58.

114. *Id.* at 558-59.

standing to sue.¹¹⁵ Although certain organization members may have visited and observed the habitats of endangered species, there was no “showing how damage to the species will produce ‘imminent’ injury”¹¹⁶ Further, the Court stated that

an “inten[t]” to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such “some day” intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the “actual or imminent” injury that our cases require.¹¹⁷

The Court observed that even if a statute authorizes a citizen-suit provision, it is insufficient for standing purposes without the satisfaction of the constitutional elements of standing.¹¹⁸ *Lujan* remains good law because no cases have yet altered its strict standing requirements.

C. *No Private Right of Action Under the AWA*

In addition to standing, another factor that has imposed a burden on plaintiffs attempting to bring suit in federal court is the lack of a private right of action under the AWA.¹¹⁹ One of the most significant cases regarding the issue of a private right of action and the AWA is *International Primate Protection League v. Institute for Behavioral Research, Inc.*¹²⁰ The issue was whether a group of private individuals could challenge a medical researcher’s compliance with federal

115. *Id.* at 578.

116. *Id.* at 564.

117. *Lujan*, 504 U.S. at 564.

118. *See id.* at 573-78. The Court was concerned that ignoring the concrete injury requirement would violate the separation of powers. *See id.* The Court explained that

[t]o permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an “individual right” vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to “take Care that the Laws be faithfully executed,” [as required by] Art. II, § 3.

Id. at 577.

119. *See Hersini, supra* note 7, at 149.

120. *Int’l Primate Prot. League v. Inst. for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986).

standards for the care of laboratory animals.¹²¹ The principal complainant, Alex Pacheco, worked in the laboratory of the principal defendant, Dr. Edward Taub.¹²² Taub was the head of the Behavioral Biology Center of the Institute of Behavioral Research ("IBR"), and the National Institutes of Health ("NIH") funded his work.¹²³ His research studied the capacity of monkeys to learn to use a limb after their nerves had been severed.¹²⁴

Pacheco concluded from his observations that IBR did not provide its monkeys with sufficient food or water, nor did it maintain a sanitary environment or adequate veterinary care.¹²⁵ Pacheco brought other researchers to IBR to confirm his observations.¹²⁶ He collected affidavits from these visitors, as well as his own statements and photographs, and asked the police department to investigate possible violations of state statutes.¹²⁷ The police obtained a warrant and seized seventeen monkeys involved in Taub's experiments.¹²⁸ The monkeys were transferred to an NIH facility under a court order.¹²⁹ Taub was convicted of six counts of animal abuse, which were later reversed.¹³⁰

In their attempt to prevent IBR from regaining custody of the monkeys, the plaintiffs argued that they would suffer financial and non-financial injuries if IBR regained custody.¹³¹ The court held that the plaintiffs did not have standing, rejected all of the plaintiffs' financial¹³² and non-financial¹³³

121. *Id.* at 935.

122. *Id.* at 935-36. Pacheco also worked for various organizations seeking protection of animals. *Id.*

123. *Id.* at 936.

124. *Id.*

125. *Id.*

126. *Int'l Primate Prot. League*, 799 F.2d at 936.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 936-37.

131. *Id.* at 937.

132. Plaintiffs asserted that first, their payment of taxes entitled them to assurance that the NIH and IBR both respect the law. *Int'l Primate Prot. League*, 799 F.2d at 937. The court stated that this argument was rejected by the Supreme Court in *United States v. Richardson*, 418 U.S. 166, 174-75 (1974), which held that payment of taxes does not give rise to the authority to enforce regulatory restrictions. *Int'l Primate Prot. League*, 799 F.2d at 937-38. Secondly, the plaintiffs argued that they contributed to the maintenance of the monkeys after the police seized them and before NIH took possession. *Id.* at 938. The court reasoned that such expenditure was wholly voluntary, and did

injury arguments and thus denied standing.¹³⁴ It noted that the exclusive jurisdiction of the AWA lies with the USDA, the administrative agency designated by Congress to enforce the AWA.¹³⁵ In its analysis regarding the purpose of the AWA,¹³⁶ the court stated that although the Act seeks to ensure that "animals intended for use in research facilities . . . are provided humane care and treatment,"¹³⁷ there is no indication that Congress intended the AWA to impede progress in medical research.¹³⁸

The court further emphasized that although the AWA directs the Secretary of Agriculture to "promulgate standards to govern the humane handling, care, treatment, and transportation of animals," it does not authorize the Secretary to regulate the design of experiments and the content of research.¹³⁹ Under the AWA, the extent of the Secretary's congressional authority in regulating the conditions of facilities is performing inspections to determine whether a research facility complies with standards.¹⁴⁰

The court recognized two purposes underlying the AWA.¹⁴¹ The first is "a commitment to administrative supervision of animal welfare" and the second is "the subordination of such supervision to the continued independence of research scientists."¹⁴² It noted that the Secretary is not authorized to regulate the design of

not give rise to an interest in the monkeys. *Id.*

133. The court stated that the plaintiffs' description of themselves as having "a personal interest in the preservation and encouragement of civilized and humane treatment of animals," was not a sufficient injury because the Supreme Court held in *Sierra Club* that "a mere interest in the problem" was not sufficient to satisfy standing. *Int'l Primate Prot. League*, 799 F.2d at 938 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)). The court also rejected a more specific argument that the plaintiffs would suffer injury from disruption of their personal relationships with the monkeys by their return to IBR, reasoning that the "plaintiffs have been with the monkeys primarily because of this litigation." *Id.* The court further stated that the "plaintiffs could not see the monkeys in the IBR laboratory if the defendants satisfied all requirements of care." *Id.*

134. *Int'l Primate Prot. League*, 799 F.2d at 937.

135. *See id.* at 939.

136. *See id.* at 939-40.

137. *Id.* at 939 (quoting 7 U.S.C. § 2131(1) (1986)).

138. *Id.*

139. *Id.* (construing 7 U.S.C. § 2143).

140. *Int'l Primate Prot. League*, 799 F.2d at 939 (referencing 7 U.S.C. § 2146).

141. *Id.*

142. *Id.*

experiments and that the Secretary's enforcement authority does not authorize him to confiscate animals in use.¹⁴³ Therefore, Congress intended the goals of the statute to be realized through administrative enforcement with a right of judicial review for an aggrieved facility, and not through private lawsuits.¹⁴⁴

The court finally concluded that because Congress intended the administrative remedy to be the exclusive remedy, it would be against the aims of Congress to grant the plaintiffs standing to sue through a private cause of action.¹⁴⁵ The Supreme Court denied certiorari in this case,¹⁴⁶ and subsequent attempts by Congress to amend the AWA to include a private cause of action have been unsuccessful.¹⁴⁷

D. Suing Under the Administrative Procedure Act as an Alternative

Because the AWA has no private right of action provision,¹⁴⁸ an alternative for plaintiffs is to sue the USDA under the Administrative Procedure Act (APA) for failure to promulgate and enforce regulations of the AWA.¹⁴⁹ A plaintiff suing under the APA must satisfy both constitutional and prudential requirements for standing.¹⁵⁰

In *Animal Legal Defense Fund v. Yeutter*,¹⁵¹ the plaintiffs sued the USDA asserting that the USDA failed to include birds, rats, and mice as "animals" within the meaning of the

143. *Id.*

144. *Id.*

145. *Id.*

146. *Int'l Primate Prot. League v. Inst. for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987).

147. *See Gardner, supra note 1*, at 354-55 (citing H.R. 2345, 101st Cong. (1989); H.R. 3223, 101st Cong. (1989); H.R. 1770, 100th Cong. (1987); H.R. 4535, 99th Cong. (1986)).

148. Swanson, *supra note 17*, at 943-44.

149. *Id.* at 945. Section 10(a) of the Administrative Procedure Act provides judicial review to any person "suffering a legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute." *Animal Legal Def. Fund v. Yeutter*, 760 F. Supp. 923, 926 (D.D.C. 1991) (quoting 5 U.S.C. § 702 (1988)).

150. *See Swanson, supra note 17*, at 945. *See also supra note 9* for a discussion of the standing requirements.

151. *Animal Legal Def. Fund*, 760 F. Supp. 923 (D.D.C. 1991), *vacated sub nom. Animal Legal Def. Fund, Inc. v. Espy (Espy I)*, 23 F.3d 496 (D.C. Cir. 1994).

AWA.¹⁵² In order to satisfy standing requirements under the APA, plaintiffs were required to show that they suffered an injury in fact and that the injury was within the "zone of interests" protected by the AWA.¹⁵³

The court held that the plaintiffs satisfied both requirements for standing.¹⁵⁴ First, because the primary function of the plaintiffs' organizations was to disseminate information concerning the number of animals used in experiments, their inability to obtain and convey this information to their members due to the AWA standard constituted an injury.¹⁵⁵ Second, because the plaintiffs wanted to provide information to their members, their interests were not tangential and thus fell within the "zone of interests" that the AWA sought to protect.¹⁵⁶ The plaintiffs' goal of disseminating information was the same as the goal Congress sought to achieve by requiring annual reporting by research facilities.¹⁵⁷

Similarly, in *Animal Legal Defense Fund v. Secretary of Agriculture*,¹⁵⁸ the plaintiffs proceeded under the APA and were also required to show that they had an injury in fact and that they were within the zone of interests protected by the AWA.¹⁵⁹ The plaintiffs challenged regulations concerning canine exercise and primate psychological well-being,¹⁶⁰ and

152. *Id.* at 926-27.

153. *Id.* at 926.

154. *Id.* at 927-28.

155. *Id.* at 927. This is similar to the informational injury alleged by the plaintiff in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). See also *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972). In *Havens*, an African-American woman inquired at an apartment complex as to whether apartments were available and was falsely told that none were available. *Havens Realty Corp.*, 455 U.S. at 368. She instituted a suit under the Fair Housing Act, and the defendants argued that she had no standing to sue because she had no intention of renting an apartment. *Id.* at 363. The defendants also argued that although the statute granted plaintiff the right to sue, it was defective because she could not be injured without any intent to rent an apartment. *Id.* at 373. The Supreme Court rejected these arguments and concluded that Congress gave the public a general right to information regarding racist housing practices. *Id.*

156. *Animal Legal Def. Fund v. Yeutter*, 760 F. Supp. 923, 927-28 (D.D.C. 1991).

157. *Id.* at 928.

158. *Animal Legal Def. Fund v. Sec'y of Agric.*, 813 F. Supp. 882 (D.D.C. 1993), *vacated sub nom.* *Animal Legal Def. Fund v. Espy (Espy II)*, 29 F.3d 720 (D.C. Cir. 1994).

159. *Id.* at 885.

160. *Id.* at 885-86.

the trial court held that the USDA had failed to comply with the congressional directives in the 1985 amendments to the AWA.¹⁶¹ Because the defendants did not challenge the plaintiffs' standing in this case, the court did not rule on the issue.¹⁶²

Following the aftermath of the Supreme Court's decision in *Lujan*,¹⁶³ the U.S. Court of Appeals for the District of Columbia vacated both *Yeutter*¹⁶⁴ and *Animal Legal Defense Fund v. Secretary of Agriculture*¹⁶⁵ on grounds of standing. In *Animal Legal Defense Fund, Inc. v. Espy (Espy I)*,¹⁶⁶ the court denied standing to two organizations and two individual plaintiffs.¹⁶⁷ The court distinguished *Havens*,¹⁶⁸ where Congress provided an explicit right to information regarding racist housing practices,¹⁶⁹ because no such right to information existed under the AWA.¹⁷⁰ The court found that the organizational plaintiffs did not fall within the "zone of interests" of the AWA because they did not assert any rights or interests that the AWA explicitly protected.¹⁷¹ Therefore, the court concluded that the organizations did not meet the requirements to satisfy standing.¹⁷²

One of the individual plaintiffs was Dr. Patricia Knowles, a psychobiologist who had previously worked in laboratories regulated by the AWA.¹⁷³ She argued that because rats and mice were not covered under the AWA, the inhumane treatment of these animals had affected her ability to obtain research results in the past and would continue to do so.¹⁷⁴ The court based its analysis on *Lujan's* determination that an

161. *Id.* at 891.

162. *See id.*

163. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *see supra* Part II.B.

164. *Animal Legal Def. Fund, Inc. v. Espy (Espy I)*, 23 F.3d 496 (D.C. Cir. 1994), *vacating as moot* *Animal Legal Def. Fund v. Yeutter*, 760 F. Supp. 923 (D.D.C. 1991).

165. *Animal Legal Def. Fund, Inc. v. Espy (Espy II)*, 29 F.3d 720 (D.C. Cir. 1994), *vacating as moot* *Animal Legal Def. Fund v. Sec'y of Agric.*, 813 F. Supp. 882 (D.D.C. 1993).

166. *Espy I*, 23 F.3d 496 (D.C. Cir. 1994).

167. *See id.* at 504.

168. *Havens Realty Corp. v. Coleman*, 454 U.S. 363, 373 (1982).

169. *Espy I*, 23 F.3d at 501.

170. *Id.* at 502.

171. *Id.* at 503-04.

172. *Id.*

173. *Id.* at 499-500.

174. *Id.* at 500.

"injury in fact" must be imminent for standing purposes.¹⁷⁵ Because Knowles was not currently involved in any research activities covered under the AWA, the court concluded that any injury that she might suffer in the future would be too speculative.¹⁷⁶ The Court stated in *Lujan* that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects."¹⁷⁷ For this reason, the court denied standing to Dr. Knowles.¹⁷⁸

A similar claim by an individual plaintiff was rejected by the appellate court in *Animal Legal Defense Fund, Inc. v. Espy (Espy II)*.¹⁷⁹ Dr. Roger Fouts, a primatologist and director of the Chimpanzee and Human Communications Institute at Central Washington University, argued that the vagueness of the USDA regulations prevented him from making plans for the design of his research institute because he feared being held liable as a result of inadvertent non-compliance with the USDA regulations.¹⁸⁰ The court held that if the institute did not comply, it would be the university, rather than Fouts himself, that would be liable; therefore, any injury incurred would not be suffered by Fouts.¹⁸¹ Further, the court held that Fouts's injury was too speculative because the USDA might determine that Fouts's plan was in compliance with the regulations, and therefore no injury would have occurred.¹⁸² Dr. Fouts thus lacked standing because he did not allege injury sufficient to satisfy the constitutional requirements.¹⁸³

175. *Espy I*, 23 F.3d at 500.

176. *Id.* at 501.

177. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)).

178. *Espy I*, 23 F.3d at 501.

179. *Animal Legal Defense Fund, Inc. v. Espy (Espy II)*, 29 F.3d 720 (D.C. Cir. 1994).

180. *Id.* at 725.

181. *Id.*

182. *Id.* at 725-26.

183. *Id.* at 725.

*E. Aesthetic Injury: Animal Legal Defense Fund, Inc. v. Glickman*¹⁸⁴

In *Animal Legal Defense Fund, Inc. v. Glickman*, individual plaintiffs alleged they suffered aesthetic injury during visits to animal exhibitions where they observed primates living under conditions that violated the AWA standards.¹⁸⁵ The Supreme Court had previously recognized similar injuries as sufficient to satisfy Article III standing requirements.¹⁸⁶

The U.S. Court of Appeals for the District of Columbia held that one of the plaintiffs, Marc Jurnove, had standing to sue to enforce the AWA.¹⁸⁷ Jurnove worked throughout his adult life as a volunteer and an employee for various human and animal relief and rescue organizations.¹⁸⁸ As a result, he was familiar with the needs and proper treatment of animals.¹⁸⁹ Between May 1995 and June 1996, he visited the Long Island Game Farm Park and Zoo (the "Game Farm") at least nine times.¹⁹⁰ Jurnove indicated in his affidavit that during his visits he observed primates in conditions that violated AWA standards.¹⁹¹ He subsequently contacted government agencies, including the USDA, to get help for these animals.¹⁹² Although Jurnove's efforts led to an inspection by the USDA, the inspectors found the Game Farm in compliance with all standards.¹⁹³

The plaintiffs alleged that the USDA failed to adopt

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

185. *Id.* at 430-31.

186. *Id.* at 432. In *Lujan*, the Court stated that "the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purpose of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992); see *supra* Part II.B. In *Japan Whaling Ass'n*, the Court recognized that the plaintiffs had "undoubtedly . . . alleged a sufficient 'injury in fact' in that the whale watching and studying of their members will be adversely affected by continued whale harvesting." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 231 n.4 (1986) (citing *United States v. SCRAP*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 727 (1972)).

187. *Glickman*, 154 F.3d at 429.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Glickman*, 154 F.3d at 429.

specific minimum standards to protect primates' psychological well-being under the AWA.¹⁹⁴ The plaintiffs also contended that although the "conditions that caused Mr. Jurnove's aesthetic injury complied with current USDA regulations[,] . . . lawful regulations would have prohibited those conditions and protected Mr. Jurnove from injuries that he described in his affidavit."¹⁹⁵

The court held that Jurnove satisfied the constitutional and prudential requirements for standing.¹⁹⁶ First, Jurnove satisfied the injury-in-fact requirement, because he suffered a concrete and particularized injury to his aesthetic interest in observing animals living under humane conditions.¹⁹⁷ The

194. *Id.* at 430.

195. *Id.* at 430-31.

196. *Id.* at 431. *But see id.* at 445-55 (Sentelle, J., dissenting). The dissent was concerned that expanding the standing doctrine would increase federal judicial power at the expense of that of the other political branches. *See id.* at 455. It criticized the majority with regard to the three elements required for constitutional standing. *Id.* at 447-55.

First, with regard to the injury-in-fact requirement, the dissent noted that "Supreme Court cases addressing aesthetic injury resulting from observation of animals have been limited to cases in which governmental action threatened to reduce the number of animals available for observation and study." *Id.* at 447 (citing *Humane Soc'y v. Babbitt*, 46 F.3d 93 (D.C. Cir. 1995)). Moreover, in this case, the plaintiff's injury is defined by what he found to be aesthetically pleasing and was therefore subjective. *Id.* at 448. The dissent stated that by recognizing a "purely subjective' claim of injury that cannot be measured by 'readily discernible standards,'" the majority "radically depart[ed] from [this Circuit's] precedent." *Id.* at 449 (quoting *Metcalf v. Nat'l Petroleum Council*, 553 F.2d 176 (D.C. Cir. 1977)). Therefore, Jurnove's injury was not "traditionally thought to be capable of resolution through the judicial process." *Id.* at 450 (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).

Second, with regard to causation, the dissent criticized the majority for assuming that "the government causes everything that it does not prevent." *Id.* at 452. Further, the dissent reasoned that "[w]hat matters, under our consistent case law, is whether the third party conduct follows directly on the heels of a government decision that affirmatively approved that conduct." *Id.* at 453. Therefore, Jurnove had not sufficiently proved causation. *Id.*

Finally, with regard to redressability, the dissent emphasized that constitutional standing requires it to "be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 454 (citing *Bennett v. Spear*, 520 U.S. 154 (1997)). The dissent doubted that any judicial order directing the USDA to set new regulations would redress Jurnove's asserted injury because it was unclear what improvements would satisfy Jurnove's aesthetic interests. *Id.* at 454. In addition, the dissent believed that if the Game Farm decided to sell its primates to other facilities, Jurnove's asserted injuries would not be redressed at all because he would no longer be able to see them at the Game Farm. *Id.*

197. *Id.*

court emphasized that Jurnove had a special interest in observing animals living in humane conditions, and his alleged injury was not merely abstract and uncognizable.¹⁹⁸ Moreover, Jurnove made clear that he had an aesthetic interest in seeing exotic animals living in a fostering environment by repeatedly visiting a particular animal exhibition to observe particular animals there¹⁹⁹ and, as a result, suffered a personal and individual injury.²⁰⁰

Second, the court cited Supreme Court precedent in explaining that a plaintiff satisfies "the causation requirement for constitutional standing by demonstrating that the challenged agency action authorizes illegal conduct that allegedly caused the plaintiff's injuries."²⁰¹ The court applied this rule and held that Jurnove satisfied the causation requirement. Accordingly, although the conditions were in compliance with USDA standards, if the regulations themselves were lawful, Jurnove would not have suffered his aesthetic injury.²⁰² According to the court, "the proper comparison is between what the agency did and what the plaintiffs allege the agency should have done under the statute."²⁰³

Third, the court determined that Jurnove met the redressability requirement because tougher regulations would either allow Jurnove to visit and observe animals in more humane conditions or, if the Game Farm's owners decided to close rather than comply with the new standards, give Jurnove an opportunity to observe the animals in more humane conditions elsewhere.²⁰⁴ Moreover, in *Federal Election Commission v. Akins*,²⁰⁵ the Supreme Court held that redressability does not require a plaintiff to establish that the defendant agency will actually enforce any new binding regulations against the regulated third party.²⁰⁶

198. *Id.* at 432 (citing *Allen v. Wright*, 468 U.S. 737, 754 (1984); *Schlesinger v. Reservists Comm. to Stop War*, 418 U.S. 208, 223 n.13 (1974); *Humane Soc'y v. Hodel*, 840 F.2d 45, 51-52 (D.C. Cir. 1988)).

199. *Glickman*, 154 F.3d at 432.

200. *Id.* at 433.

201. *Id.* at 440 (citing *Simon v. E. Ky. Welfare Rights Orgs.*, 426 U.S. 26 (1976)).

202. *Id.* at 439.

203. *Id.* at 441.

204. *Id.* at 443.

205. *Fed. Election Comm'n v. Akins*, 524 U.S. 11 (1998).

206. *Glickman*, 154 F.3d at 443 (citing *Akins*, 524 U.S. at 14-16).

Consequently, although Jurnove was required to show that new regulations, if promulgated and enforced, would redress his alleged injury, he was not required to show that the USDA would actually enforce the new regulations against the Game Farm.

Finally, the court held that Jurnove's claim fell within the "zone of interests" protected under the AWA's provisions on animal exhibitions.²⁰⁷ The court emphasized that the congressional purpose of the statute did not need to benefit the would-be plaintiff and that the issue was "whether the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected by the statute."²⁰⁸ Because the purpose of animal exhibitions was to entertain and educate people, they would not make sense unless the interests of human visitors were taken into account.²⁰⁹ Further, the intent of Congress in including animal exhibitions within the AWA was to encourage the monitoring of humane societies and their members.²¹⁰ Because Jurnove was a regular viewer of animal exhibitions regulated under the AWA, the court concluded that he fell within the "zone of interests" that the statute protects.²¹¹

The *Glickman* decision provided a new avenue by which plaintiffs could access the courts. Although the court did not recognize standing for animals themselves, this case demonstrated that standing was not an absolute barrier for animal welfare plaintiffs and that a plaintiff who is in a legal position to assert aesthetic injury can improve the treatment and conditions of animals in captivity.

F. Animals as Plaintiffs

There have been a number of cases brought under statutes other than the AWA where animals were named plaintiffs. For example, in *Palila v. Hawaii Department of Land & Natural Resources*, the Court of Appeals for the Ninth Circuit named a bird as a plaintiff under the Endangered Species Act.²¹² The court stated that "[a]s an

207. *Id.* at 444.

208. *Id.*

209. *Id.*

210. *Id.* at 445.

211. *Id.*

212. *Palila v. Haw. Dep't of Land & Natural Res.*, 852 F.2d 1106 (9th Cir.

endangered species under the Endangered Species Act . . . the bird (*Loxiodes bailleui*), a member of the Hawaiian honeycreeper family, also has legal status and wings its way into federal court as a plaintiff in its own right.²¹³ Other courts have recognized the Northern Spotted Owl,²¹⁴ the Mount Graham Red Squirrel,²¹⁵ and the Marbled Murrelet²¹⁶ as plaintiffs. However, as the court in *Hawaiian Crow v. Lujan* explained, “[i]n none of [these] cases did the defendants challenge the suing species’ standing or the propriety of naming those species as plaintiffs.”²¹⁷

In cases where defendants challenged an animal plaintiff’s standing, courts have denied standing to the animal plaintiff.²¹⁸ Similarly, the court in *Hawaiian Crow* commented that “in none of [these cases] did the species appear as the *only* plaintiff.”²¹⁹ Recently, the Court of Appeals for the Ninth Circuit denied standing to the sole animal plaintiff, Cetacean Community,²²⁰ where the defendants challenged standing of the plaintiff.²²¹ Therefore, although courts have permitted animals to remain named as plaintiffs, they have never explicitly granted standing to

1988).

213. *Id.* at 1107 (citation omitted).

214. *See* *N. Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991); *N. Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988).

215. *See* *Mt. Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir. 1991).

216. *See* *Marbled Murrelet v. Pac. Lumber Co.*, 880 F. Supp. 1343, 1346 (N.D. Cal. 1995) (“[A]s a protected species under the ESA [Endangered Species Act], the marbled murrelet has standing to sue ‘in its own right.’” (quoting *Palila*, 852 F.2d at 1107)).

217. *Hawaiian Crow v. Lujan*, 906 F. Supp. 549, 552 (D. Haw. 1991).

218. *See id.* The court interpreted the word “person” in the private suit provision of the ESA not to include animals and denied standing for the ‘Alala (*Hawaiian Crow*). *See id.* at 551-53; *see also* *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45, 46 (D. Mass. 1993) (concluding that a captive dolphin had no standing to challenge the Aquarium’s decision to transfer it to the Navy for testing).

219. *Hawaiian Crow*, 906 F. Supp. at 552.

220. “Cetacean Community is the name chosen by the Cetaceans’ self-appointed attorney for all of the world’s whales, porpoises, and dolphins.” *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1171 (9th Cir. 2004).

221. *See id.* The court concluded that neither Congress nor the President intended to authorize animals to sue under the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), the National Environmental Policy Act (NEPA), or the Administrative Procedure Act (APA). *Id.* at 1179; *see also* *Hawaiian Crow*, 906 F. Supp. at 551-52 (concluding that an animal plaintiff is not a “person” and does not have authority to sue pursuant to the ESA).

animals.²²²

Recently, the Ninth Circuit explained that the statements from *Palila* are nonbinding dicta,²²³ although the text of Article III does not explicitly limit the ability to bring a claim in federal court to humans.²²⁴ If this is true, then the question becomes whether Congress has passed a statute authorizing an animal to bring a lawsuit.²²⁵ Currently, no statute grants standing to animals.²²⁶ Without a private suit provision in a statute authorizing animals to sue, courts are likely to deny standing to animals.²²⁷

III. IDENTIFICATION OF THE LEGAL PROBLEM

Currently, our legal system does not offer an adequate solution to the problem of animal abuse and protection. The AWA has proven to be ineffective in achieving its purpose and greatly favors the interests of researchers. Moreover, it has been difficult for plaintiffs to litigate claims of possible AWA violations in federal court because of the requirements of the standing doctrine.²²⁸ For these reasons, alternative solutions are required in order to promote the larger goal of protecting animals against human abuse and ultimately to promote

222. See *Mt. Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir. 1991); *N. Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991); *N. Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988). *But see* *Marbled Murrelet, Env'tl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 880 F. Supp. 1343, 1346 (N.D. Cal. 1995).

223. *Cetacean Cmty.*, 386 F.3d at 1173. The court explained that “[a] statement is dictum when it is ‘made during the course of delivering a judicial opinion, but . . . is unnecessary to the decision in the case and [is] therefore not precedential.’” *Id.* (quoting *Best Life Assurance Co. v. Comm’r*, 281 F.3d 828, 834 (9th Cir. 2002)). The court reasoned that in the previous three opinions in this case, two by the district court, *Palila v. Haw. Dep’t of Land & Natural Res.*, 649 F. Supp. 1070 (D. Haw. 1986); *Palila v. Haw. Dep’t of Land & Natural Res.*, 471 F. Supp. 985 (D. Haw. 1979), and one by the Ninth Circuit, *Palila v. Haw. Dep’t of Land & Natural Res.*, 639 F.2d 495 (9th Cir. 1981), standing for most of the plaintiffs had been clear, and standing for the *Palila* was never disputed. *Cetacean Cmty.*, 386 F.3d at 1173-74. Therefore, there were no jurisdictional concerns as to whether the *Palila* had standing. *Id.* at 1174.

224. *Cetacean Cmty.*, 386 F.3d at 1175 (citing U.S. CONST. art. III; Sunstein, *Standing for Animals*, *supra* note 1, at 1333).

225. *Id.* at 1176.

226. See Sunstein, *Standing for Animals*, *supra* note 1, at 1359.

227. See *Cetacean Cmty.*, 386 F.3d at 1176-79.

228. See, e.g., *Animal Legal Def. Fund, Inc. v. Espy (Espy I)*, 23 F.3d 496 (D.C. Cir. 1994); *Animal Legal Def. Fund, Inc. v. Espy (Espy II)*, 29 F.3d 720 (D.C. Cir. 1994).

animal welfare.

Specifically, in the context of scientific research, it is important to weigh the benefits of animal research against the pain and suffering inflicted upon animals used in experiments. There are competing interests that support both sides. One can easily dismiss the interests of animals by regarding them as personal property and denying them any rights. If, however, our society is willing to protect animals, it must be done more effectively, efficiently, and vigorously.

IV. ANALYSIS

A. *Problems with the AWA*

There are numerous problems with the current AWA that render it ineffective in protecting the welfare of animals used for scientific research. Primarily, the AWA does not regulate the way in which animals are used in scientific research.²²⁹ The regulations that the AWA does impose concern husbandry issues, such as the transportation of animals, and the provision of food, water, and air to animals used in scientific experiments.²³⁰ Such limited regulation reflects the treatment of animals as the property of the research facility and shows that “the only concern of the AWA is to ensure that these resources are used efficiently, which, in this situation, means that they produce reliable scientific data.”²³¹ Congress, through its failure to pass the 1982 act that required ethical merit review by the granting agency, showed its intention to defer the regulation of the content of experiments to the research community.²³²

Congress has also specifically stated that the IACUC cannot interfere with or regulate the “design, outlines, or guidelines of actual research or experimentation by a research facility as determined by such research facility,”²³³ nor can it interfere in the conduct of actual research.²³⁴ The

229. 7 U.S.C. § 2143(a)(6)(A)(i)-(iii) (2000); Food Security Act of 1985, Pub. L. No. 99-198, §§ 1751-1759, 99 Stat. 1354, 1645-50. *See also* Swanson, *supra* note 17, at 943.

230. FRANCIONE, *supra* note 24, at 201.

231. *Id.*

232. *See id.* at 202 (citing H.R. 6245, 97th Cong. (1982)).

233. *Id.* at 204 (quoting 7 U.S.C. § 2143(a)(6)(A)(i)).

234. *Id.* (citing 7 U.S.C. § 2143(a)(6)(A)(ii)-(iii)).

IACUC does not evaluate animal use by a set standard, but by the "needs of the research facility,"²³⁵ and the approval of only one member of an IACUC is required to approve an experiment involving pain and distress.²³⁶ Consequently, the IACUC has no power or authorization to regulate the treatment of animals in the research context.

Another problem with the AWA is that the statute contains too many exceptions to its rules, which has resulted in a loose set of standards. For example, researchers can withhold tranquilizers, anesthesia, analgesia, or euthanasia when "scientifically necessary."²³⁷ Researchers can also use an animal in more than one major operative experiment from which it is allowed to recover if it is a "scientific necessity," or if the Secretary determines that it is a case of special circumstances,²³⁸ as long as the exceptions are specified in the research protocol and the researcher files a report with the IACUC.²³⁹ By permitting these exceptions, Congress has created loopholes for researchers at the expense of the pain and suffering of animals.

The AWA is also problematic because it is full of vague terminology and phrases.²⁴⁰ For instance, § 2143(a)(2)(A) uses the phrase "where the Secretary finds necessary."²⁴¹ Standards for the exercise of dogs depend on the "general standards promulgated by the Secretary," and the psychological well-being of primates is promoted through an "adequate" physical environment.²⁴² Research facilities are required to make sure that pain and distress are "minimized,"²⁴³ and the principal investigator is required to "consider[] alternatives" to procedures that are likely to produce pain or distress in an animal.²⁴⁴ As stated previously, the statute also uses phrases such as "scientific necessity," "necessary period of time," and "other special

235. *Id.* (quoting 7 U.S.C. § 2143(b)(1)).

236. FRANCIONE, *supra* note 24, at 205 (citing 9 C.F.R. § 2.31(d)(2) (1993)).

237. 7 U.S.C. § 2143(a)(3)(C)(v) (2000).

238. *Id.* §§ 2143(a)(3)(D)(i)-(ii).

239. *Id.* § 2143(a)(3)(E).

240. *See* Mendelson, *supra* note 1, at 795-96.

241. 7 U.S.C. § 2143(a)(2)(A).

242. *Id.* § 2143(a)(2)(B).

243. *Id.* § 2143(a)(3)(A).

244. *Id.* § 2143(a)(3)(B).

circumstances as determined by the Secretary.”²⁴⁵ These broad, vague provisions do not set objective standards, and either the Secretary or the researchers themselves have the discretion to do what they feel is needed. Although Congress has authority to give the Secretary discretion through legislation, it is dangerous to do so in this context because it involves the well-being of animate, living creatures. Such a decision requires scientific expertise, preferably in the form of a committee rather than an individual.

Another problem with the provisions of the AWA involves the lack of enforcement. Research facilities are required to “show upon inspection, and to report at least annually, that the provisions of this Act are being followed and that professionally acceptable standards governing the care, treatment, and use of animals are being followed by the research facility during actual research or experimentation.”²⁴⁶ However, this is simply a formality because the Secretary cannot impose penalties on facilities that do not comply with “professionally acceptable standards” during actual research.²⁴⁷ The reporting requirement and inspection thus have only a minimal effect in insuring compliance with the AWA and the well-being of animals.

The purpose behind provisions requiring the principal investigator to demonstrate that he or she has “considered” alternatives to procedures likely to produce pain or distress,²⁴⁸ and to provide an explanation for any deviation from standards²⁴⁹ is unclear. Such requirements also appear to be formalities, which are unlikely to have any practical effect in promoting the well-being of animals.

Finally, Congress’s and the Secretary’s understanding of the procedures involved in animal research is also questionable. For example, there is a fine line between what constitutes husbandry issues and actual experimental design. If an animal is required to be deprived of fluids in preparation for an experiment, is this part of the design? One can argue this constitutes a necessary procedure for the experiment.

245. See *supra* notes 240-41 and accompanying text.

246. 7 U.S.C. § 2143(a)(7)(A).

247. See *id.* § 2143(a)(6)(A).

248. *Id.* § 2143(a)(7)(B)(i).

249. *Id.* § 2143(a)(7)(B)(iii).

251. *Id.* § 2143(a)(2)(A).

However, one can just as easily argue that providing adequate water and food to animals are husbandry issues, which the Secretary is permitted to regulate.²⁵¹ In sum, although one may find at first glance that the AWA is well-structured and organized to protect the well-being of laboratory animals, a thorough analysis of the provisions reveals that much of its provisions are mere formalities without practicality.

B. Overcoming Standing

Currently the standing doctrine limits the types of animal protection cases that can be litigated.²⁵² Although some courts have recognized animals as plaintiffs, most courts have been reluctant to do so.²⁵³

The AWA does not provide for a private right of action and, consequently, plaintiffs have resorted to litigating claims under the APA.²⁵⁴ Meeting the constitutional and prudential requirements for standing has become difficult ever since the Supreme Court's narrow interpretation of the "injury in fact" requirement in *Lujan*, which noted that even if a statute included a citizen suit provision, a concrete and particularized injury was still required.²⁵⁵

1. The "Injury in Fact" Barrier

The court in *Espy I* found that Dr. Knowles did not have standing.²⁵⁶ Because she was not currently involved in research and her plans to engage in further research were for an undefined future time, the court concluded that her injury was not "imminent."²⁵⁷ However, the court failed to consider the interests of a scientific researcher. Judge Williams concurred with the majority opinion, but dissented with regard to the issue of Dr. Knowles's standing and considered the interests of a scientist engaging in research.²⁵⁸ Dr. Knowles explained that the AWA's exemption for birds, mice,

252. See Mendelson, *supra* note 1, at 801.

253. See *supra* Part II.F.

254. See Swanson, *supra* note 17, at 945.

255. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-78 (1992).

256. *Animal Legal Def. Fund, Inc. v. Espy (Espy I)*, 23 F.3d 496, 500 (D.C. Cir. 1994).

257. *Id.* at 500-01.

258. See *id.* at 504-57 (Williams, J., concurring in part and dissenting in part).

and rats impaired her ability to perform her professional duties “because the ill treatment of experimental animals in the institutions where she has worked has caused the loss of ‘hundreds of data points’ when her animal subjects were deprived of food, water, a clean cage or a temperate environment.”²⁵⁹ It was contrary to Dr. Knowles’s interests as a scientist to continue research using animal subjects that would not enable her to collect reliable data.²⁶⁰

In addition, Dr. Knowles asserted aesthetic injury, claiming that the mistreatment caused her “‘personal distress’ at ‘witnessing the plight of [mistreated] animals.’”²⁶¹ It is unclear why this asserted injury does not qualify as an “injury in fact,” especially when the Supreme Court has recognized the satisfaction of watching animals in their natural habitat as being concrete for Article III standing purposes.²⁶² According to Judge Williams, when evaluating whether an injury is an “injury in fact,” there is no difference between observing a wild animal in its natural habitat and a captive animal in a laboratory.²⁶³ Moreover, Dr. Knowles’s plans to return to research were not “speculative,” because she planned to do some follow-up research regarding her doctoral dissertation and to continue her career in psychobiology.²⁶⁴ Dr. Knowles’s asserted injuries could be addressed by an amendment to the AWA that would include birds, rats, and mice in the list of regulated species.

In *Espy II*, Dr. Fouts also made a strong argument for

259. *Id.* at 504 (Williams, J., concurring in part and dissenting in part).

260. *Id.* (Williams, J., concurring in part and dissenting in part).

261. *Id.* (Williams, J., concurring in part and dissenting in part) (alteration in original).

262. *Espy I*, 23 F.3d at 504 (Williams, J., concurring in part and dissenting in part). Judge Williams cited *Japan Whaling Ass’n v. American Cetacean Society*, 478 U.S. 221 (1986), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), as examples where the Supreme Court recognized aesthetic injury as an “injury in fact.” *Espy I*, 23 F.3d at 504.

263. *Espy I*, 23 F.3d at 505 (“The gulf between seeing experimental animals decently treated and seeing them cruelly treated seems every bit as great as that between seeing animals savoring their natural habitat and not seeing them at all.”).

264. *Id.* at 506. As Judge Williams noted, this assertion of future injury is much less speculative than that claimed by the plaintiffs in *Lujan* because she stated that she “will be required” to engage in future research that she has already planned and failure will require her to forfeit her past investment in psychobiological research. *Id.* (citing *Lujan*, 504 U.S. at 563-64).

standing, although the court ultimately rejected it.²⁶⁵ Fouts claimed that he suffered an injury because he was prevented from making plans to construct a research facility due to the vagueness of USDA regulations.²⁶⁶ The court's decision to deny standing in this case is questionable. Although the court stated that the university, and not Fouts, would be liable if the facility was found to be in violation of USDA regulations, Fouts was still responsible to the university as director of the research institute.²⁶⁷

Similarly, the court failed to recognize that Fouts asserted a "distinct and palpable injury to himself."²⁶⁸ There was imminent threat of injury, however, because Fouts likely would have been personally responsible to the university if it was found liable, and he therefore risked losing his position as director. In addition, the USDA arguably caused Fouts's hesitation to build the facility because its vague regulations discouraged him from taking a risk.²⁶⁹ Finally, his injury could have been redressed by clearer, definite, and more specific regulations. The reluctance of the court to grant standing to Dr. Fouts illustrates the difficulty that plaintiffs face in overcoming this judicial barrier.

2. *The Successful and Problematic Claim of Aesthetic Injury*

Currently, a claim of aesthetic injury resulting from violations of the AWA appears to be the best chance that an individual or an organization has to satisfy standing.²⁷⁰ However, asserting a claim of aesthetic injury can be problematic for two reasons. First, case law has not remained consistent.²⁷¹ A possible explanation for the inconsistency of

265. See *Animal Legal Def. Fund, Inc. v. Espy (Espy II)*, 29 F.3d 720, 725 (D.C. Cir. 1994).

266. *Id.*

267. *Id.* at 723.

268. *Id.* at 725 (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

269. *Id.*

270. See *Smith*, *supra* note 14, at 1028; *St. John-Parsons*, *supra* note 14, at 933; see also *Proulx*, *supra* note 14, at 530.

271. Compare *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998) (granting standing to a regular visitor of a zoo who observed animals in conditions allegedly violating the AWA standards), with *Animal Legal Def. Fund, Inc. v. Espy (Espy I)*, 23 F.3d 496 (D.C. Cir. 1994) (refusing to grant standing to a researcher plaintiff who observed laboratory animals under alleged inhumane conditions).

court decisions is that aesthetic injury is a subjective claim, as noted by the dissent in *Glickman*.²⁷² Second, aesthetic injury does not directly address the issue of injury to the animals themselves. A successful claim of aesthetic injury redresses the alleged injuries of human plaintiffs that prefer to observe the animals in more humane conditions rather than injuries suffered by the animals.²⁷³

Although the court found that Mr. Jurnove had standing in *Glickman*,²⁷⁴ the court's reasoning is questionable. First, Mr. Jurnove's assertion of aesthetic injury was based on his inability to observe the animals in the conditions that he desired for them.²⁷⁵ Because the Game Farm did not violate USDA rules,²⁷⁶ Jurnove's injury was based on his personal preference—a subjective rather than objective standard. It is questionable whether a claim of injury based on personal preference qualifies as “concrete and particularized” or “actual or imminent.”²⁷⁷ In addition, it can be argued that Jurnove did not clearly prove his intent to return to the Game Farm as required under *Lujan*.²⁷⁸ The fact that he visited the facility many times and expressed interest in observing animals did not necessarily mean that he had definite plans to return.²⁷⁹ Although Jurnove probably satisfied the injury requirement under Justice Blackmun's standard in *Lujan* based on past conduct,²⁸⁰ there is less certainty as to whether

272. See *supra* note 196.

273. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (stating that plaintiffs must show that “one or more of [the plaintiffs’ individual members] would thereby be ‘directly’ affected apart from their ‘special interest’ in the subject”).

274. *Glickman*, 154 F.3d at 430-31.

275. See *id.* at 429.

276. *Id.*

277. See *Lujan*, 504 U.S. at 560.

278. See *id.* at 564. The plurality emphasized that “[s]uch ‘some day’ intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.” *Id.*

279. See *id.* Justice Scalia stated that the fact that “the [respondents] ‘had visited’ the areas of the projects before the projects commenced proves nothing.” *Id.*

280. *Id.* at 591-92 (Blackmun, J., dissenting). Justice Blackmun reasoned that “[a] reasonable finder of fact could conclude, based not only upon their statements of intent to return, but upon their past visits to the projects sites, as well as their professional backgrounds, that it was likely that [the respondents] would make a return trip to the project areas.” *Id.* at 592.

he satisfied the plurality's narrower standard.²⁸¹ Second, there is doubt as to whether the government caused Jurnove's injury by failing to implement higher standards, particularly in light of the dissent, which criticized the majority for assuming that "the government causes everything that it does not prevent."²⁸² It is also debatable whether Jurnove satisfied the causation requirement any more than Dr. Knowles or Dr. Fouts, who both claimed that the government caused their injuries.²⁸³

Finally, it is also unclear what standards the USDA must set in order to redress Jurnove's injury adequately.²⁸⁴ As the dissent pointed out, this is also subjective and depends on what Jurnove finds to be aesthetically pleasing, satisfying, or humane.²⁸⁵ In contrast, Dr. Knowles's injury could have been redressed by including mice and rats as animals regulated under the AWA.²⁸⁶ Similarly, Dr. Fouts's injury could have been redressed by making USDA standards clearer so that he would know whether or not his plans would violate AWA standards.²⁸⁷ Although Fouts's case and Jurnove's case both involved changing standards, Jurnove's case required changing the standards completely and creating a new set of standards that would satisfy Jurnove's aesthetic taste.²⁸⁸ But would a court order directing the USDA to promulgate new standards redress Jurnove's injury? Even if new standards were promulgated, if the Game Farm decided to sell its animals to another exhibitor or facility, concluding that it

281. *Lujan*, 504 U.S. at 560-62.

282. *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 452 (D.C. Cir. 1998) (Sentelle, J., dissenting).

283. *Compare Glickman*, 154 F.3d 426 (D.C. Cir. 1998) (granting standing to lay zoo observer plaintiff who alleged that conditions of animals at a zoo permitted by the USDA caused his injury), *with Animal Legal Def. Fund, Inc. v. Espy (Espy I)*, 23 F.3d 496 (D.C. Cir. 1994) (denying standing to researcher plaintiff who alleged that the omission of mice and rats from the scope of coverage of the AWA caused her injury), *and Animal Legal Def. Fund, Inc. v. Espy (Espy II)*, 29 F.3d 720 (D.C. Cir. 1994) (denying standing to research facility director plaintiff who alleged that vagueness of the AWA caused his injury).

284. *Glickman*, 154 F.3d at 453-54 (Sentelle, J., dissenting).

285. *Id.* at 454 (Sentelle, J., dissenting). The dissent noted that it is unclear what improvements would satisfy Jurnove's aesthetic interests. *Id.*

286. *See Espy I*, 23 F.3d at 499-501.

287. *See Espy II*, 29 F.3d 722-23 (asserting that the regulations failed to include statutorily mandated "minimum requirements").

288. *See Glickman*, 154 F.3d at 454 (Sentelle, J., dissenting).

could not comply with the new standards due to financial or other constraints, Jurnove would not be able to observe the animals at the very place that he desired to observe them, undermining any claims of redressability.²⁸⁹ In contrast, Fouts's case merely involved clarifying current standards through specifying minimum requirements.²⁹⁰ The subjectivity of Jurnove's injury imposes a greater difficulty in terms of redressability than the injuries of Dr. Knowles and Dr. Fouts.

3. Conflict of Interest

A further problem related to litigating animal welfare issues in federal court is that an individual who satisfies standing requirements is often faced with a conflict of interest. For example, researchers, such as graduate students or post-doctoral fellows, who work in laboratories that violate AWA standards probably have standing to bring suit under the APA in a manner similar to Dr. Knowles's claim in *Espy I*.²⁹¹ They would be in an even stronger position than Dr. Knowles for standing purposes because they are presently engaged in research, whereas Dr. Knowles had left her research position at the time of the lawsuit. Although these individuals would be in the best position to bring suit, their primary interest as researchers is to conduct research and establish a positive reputation in their fields, not to litigate. Maintaining silence would do no harm to their careers, whereas bringing a lawsuit could involve significant risk. Not only would these researchers risk their current positions, they would also risk their careers in their respective fields. As a result, researchers are heavily pressed

289. See *id.* (Sentelle, J., dissenting).

290. See *Espy II*, 29 F.3d 722-23.

291. See *Espy I*, 23 F.3d at 499-500. The claim of such an individual would be even stronger than Dr. Knowles's claim because her injury, whether it be aesthetic or inability to engage in research, would be "actual" if she was working at the lab that violated AWA standards. Therefore, such an individual would satisfy the "injury in fact" requirement of *Lujan*. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Asserting that the USDA's failure to enforce AWA standards caused her injury would satisfy the causation requirement. *Espy I*, 23 F.3d at 499-500. Finally, redressability would also be satisfied because the USDA's enforcement of AWA standards would ameliorate the conditions of the animals, redressing aesthetic injury and also allowing the researcher to engage in research with animal subjects under conditions in compliance with AWA standards. See *id.* at 561.

not to bring a lawsuit, even if they suspect violations of AWA standards.

4. *Subjectivity and Lack of Predictability of Judges in Applying the Standing Doctrine*

The doctrine of standing is controversial and remains ambiguous. Whether one satisfies standing requirements seems to depend on the subjective interpretation of judges more than any other factor.²⁹² The disagreement among the Justices in *Lujan* as to the application of the standard is illustrative of this point.²⁹³ Justice Stevens, although concurring in the judgment, did not agree with the Court's conclusion that respondents lacked standing and that their injury was not redressable.²⁹⁴ In addition, Justice Blackmun, with whom Justice O'Connor joined, was critical of the plurality's formality in his dissenting opinion.²⁹⁵ In the future, the requirements for standing might change, depending on the Justices who sit on the bench.

This lack of predictability raises a barrier for animal welfare organizations and individuals seeking standing to protect animals. As Justice Blackmun asserted in *Lujan*, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."²⁹⁶ The present legal conception of the standing requirement, particularly as applied to animal welfare cases, prevents just that.

292. See *supra* note 196.

293. See *Lujan*, 504 U.S. at 581-82 (Stevens, J., concurring in the judgment); *id.* at 589-601 (Blackmun, J., dissenting).

294. *Id.* at 581-582 (Stevens, J., concurring in the judgment). Although he agreed with the judgment, Justice Stevens emphasized that he did not agree with "the Court's conclusion that respondents lack[ed] standing because the threatened injury to their interest in protecting the environment and studying endangered species was not 'imminent.'" *Id.* He also did not agree with the "plurality's additional conclusion that respondents' injury [was] not 'redressable.'" *Id.* Justice Stevens did not regard the respondents' asserted injury as speculative and concluded that the only speculative aspect of the claim was the genuineness of the respondents' intent to study or observe the animals. See *id.* at 583-84.

295. *Id.* at 592 (Blackmun, J., dissenting). The dissent stated that "[b]y requiring a 'description of concrete plans' or 'specification' of *when* the some day [for a return visit] will be, the Court . . . demands what is likely an empty formality." *Id.* (citation omitted).

296. *Id.* at 606 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

V. PROPOSAL

Protecting animals from abuse and cruelty requires solutions by Congress as well as the judicial system. One problem is that the APHIS has been unable to enforce AWA provisions properly due to budgetary constraints.²⁹⁷ In addition, the AWA gives great deference to researchers because it does not regulate the content of experiments.²⁹⁸ Furthermore, it is counterintuitive to think that a researcher seeking to obtain data from an experiment involving the infliction of pain on an animal will actually report when such pain becomes unnecessary. For researchers, it is both economically and technically more efficient to use a method that inflicts pain because alternative methods that would relieve or decrease pain would increase costs due to the need for more sophisticated techniques. It is therefore in the interest of a researcher to assert that the infliction of pain is "necessary."

Further, there is currently no person or organization that can legally and objectively disprove this assertion. The IACUC cannot interfere with the methods or content of research,²⁹⁹ and scientists familiar with and aware of violations lack the legal capacity to sue because of the standing requirement. In order to overcome these problems, Congress should amend the AWA in order to ensure that it is properly and effectively enforced. The judiciary must also reconsider the standing doctrine as it applies to animal welfare cases because of the difficulties the doctrine presents in protecting animals from cruelty and abuse.

A. Through Congress: Amending the AWA to Create a Private Right of Action Provision

To promote animal welfare, Congress should pass new legislation amending the AWA to include a private right of action provision³⁰⁰ enabling plaintiffs to sue directly under the AWA rather than the APA.³⁰¹ However, it is unlikely that

297. Gardner, *supra* note 1, at 353.

298. See *supra* note 73 and accompanying text.

299. 7 U.S.C. § 2143(a)(6)(A)(ii)-(iii) (2000).

300. See *Int'l Primate Prot. League v. Inst. for Behavioral Research, Inc.*, 799 F.2d 934, 940 (4th Cir. 1986) (holding that there is no private cause of action under the AWA).

301. A private right of action provision, however, will not allow animals

Congress will amend the AWA in this respect, as it has already passed up this opportunity on several occasions.³⁰² Even if Congress enacted such legislation, it would only help a plaintiff for standing purposes by removing the prudential requirement.³⁰³ Plaintiffs would still be required to meet the constitutional requirements for standing.³⁰⁴ Another solution is to amend the AWA and create a new agency or a subdivision of the USDA that specifically deals with animal welfare issues. This possibility is discussed below.

B. Through the Judiciary: Animal Plaintiffs and Broader Standing Requirements

Our judicial system has consistently served as a barrier for animal welfare plaintiffs seeking to bring their cases before a federal court.³⁰⁵ The judicial perception and approach toward animal welfare cases must change in order to protect animals effectively. The courts should either allow interested individuals or organizations to bring claims on behalf of animal plaintiffs or relax the narrow, formalistic standing requirement to permit claims brought by animal welfare organizations and interested individuals.³⁰⁶

The first option is similar to that of a parent or guardian bringing a suit on behalf of a minor³⁰⁷ or an incompetent individual. This status can also be compared to that of

themselves to bring suit and be named plaintiffs because such provisions have used the language "any *person* may commence a civil suit." *See, e.g.*, 16 U.S.C. § 1540(g) (2000) (emphasis added). Unless Congress defines a "person" to include animals or enacts private right of action provisions granting animals the right to bring suit, animals are precluded from bringing suit. *See supra* notes 225-27 and accompanying text.

302. *See Swanson, supra* note 17, at 964 (stating that amendments were proposed in 1986 and 1989 to allow "any person to commence a civil action on behalf of such person or on behalf of any animal protected by this Act to compel . . . enforcement"); Smith, *supra* note 14, at 1026-27 (citing H.R. 3223, 101st Cong. (1989)).

303. *See Gardner, supra* note 1, at 354.

304. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-78 (1992).

305. *See Hersini, supra* note 7, at 149.

306. *See Sunstein, Standing for Animals, supra* note 1, at 1367 (asserting that Congress should grant a private cause of action both to injured persons and to animals themselves).

307. *See Hannah, supra* note 2, at 576-79. Hannah states that "[s]ome lawyers in the animal rights field have advanced the theory that companion animals are not property but have rights akin to those of a child." *Id.* at 576. Moreover, a companion animal "has status for a minor member of the family and thus is entitled to the same protection." *Id.* at 582.

slaves, who were considered property,³⁰⁸ but nevertheless were able to bring suit through a third party.³⁰⁹ Justice Douglas proposed in his dissent in *Sierra Club* that courts should confer standing upon inanimate environmental objects, such as rivers and valleys, to sue for their own preservation.³¹⁰ With this approach, interested third parties having meaningful relations with animals could bring suit on their behalf.

The second option follows from the origin of the standing doctrine and the rule that the Court applied in *Lujan*.³¹¹ Historically, the American legal system granted standing to strangers.³¹² On its face, Article III of the Constitution does not address standing, nor does it mention injury in fact.³¹³ Traditionally, when Congress granted a right to sue, standing did not require injury in fact.³¹⁴ Only within the last thirty-five years has this phrase been used in relation to standing.³¹⁵ Consequently, injury in fact is neither a necessary nor a sufficient condition for standing purposes.³¹⁶ This formalistic requirement of standing, which prevents people from suing under congressionally authorized private right of action provisions, is a creation of judges and has no historical or textual basis.³¹⁷ In *Lujan*, Justice Kennedy asserted that "Congress has the power to define injuries and articulate

308. See generally *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (holding that slaves are not citizens, but property of the white race).

309. See Sunstein, *Standing for Animals*, *supra* note 1, at 1361 ("[S]laves were allowed to bring suit, often through a white guardian or 'next friend,' to challenge servitude." (citing ROBERT B. SHAW, A LEGAL HISTORY OF SLAVES IN THE UNITED STATES 110 (1991))).

310. See *Sierra Club v. Morton*, 405 U.S. 727, 741-43 (1972) (Douglas, J., dissenting). Justice Douglas used a river as an example, asserting that individuals with a meaningful relation to the environment, such as a fisherman, a canoeist, a zoologist, or a logger, could speak for its values. *Id.*

311. See *supra* notes 79-82 and accompanying text.

312. See Sunstein, *What's Standing After Lujan?*, *supra* note 79, at 168-78 (discussing the history of standing in American law from England, the American colonies, and early Congress).

313. See U.S. CONST. art. III.

314. See Sunstein, *What's Standing After Lujan?*, *supra* note 79, at 170 (noting that "if a source of law conferred a right to sue, 'standing' existed, entirely independently of 'concrete interest' or 'injury in fact.'").

315. See *id.* at 181-92. The first time the Supreme Court used the phrase "injury in fact" was in 1970 in *Barlow v. Collins*, 397 U.S. 159 (1970). Sunstein, *What's Standing After Lujan?*, *supra* note 79, at 169.

316. *Id.* at 235-36.

317. *Id.* at 166.

chains of causation that will give rise to a case or controversy where none existed before.”³¹⁸ Under this view, a plaintiff will have a cause of action as long as her injury qualifies as the type of injury that Congress sought to vindicate. Therefore, if Congress grants certain people a right to sue under the Animal Welfare Act, the formalistic requirements of standing have no basis to serve as a barrier.

C. Through a New Agency or Sub-Agency Specialized in Animal Protection

The final and potentially most effective solution is to create a new agency or a subdivision (“New Entity”) of the USDA that specializes in animal protection. Two main changes to the AWA are required.³¹⁹ First, the AWA should be amended to allow the New Entity to regulate the design and content of experiments.³²⁰ On an administrative level, Congress should grant the New Entity the authority to make rules and regulations concerning all aspects of animal care and treatment in the context of scientific research. Second, the AWA should be amended to limit the discretion of the Secretary or head of the New Entity.³²¹

318. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992).

319. The changes proposed here by no means reflect all of the changes necessary to the AWA, but illustrate changes that should be made, using amendments to 7 U.S.C. § 2143 (2000) as examples. It should be noted that the current statutory text is shown in plain font, while the proposed amendments to the text are shown in italics.

320. Amend 7 U.S.C. § 2143(a)(6)(A) by deleting subsections i, ii, and iii, replacing them with

(6)(A) This chapter—

(i) shall apply to the handling and care of animals during actual research and experimentation; and

(ii) shall authorize the Secretary, during inspection, to interrupt the conduct of actual research or experimentation, as long as the research facility has received notice regarding such inspection.

321. The following amendments to the AWA should be made:

1) Amend 17 U.S.C. § 2143(a)(3)(D) as follows:

(D) that no animal is used in more than one major operative experiment from which it is allowed to recover, except *where there is no feasible alternative; and*

(E) that exceptions to such standards indicated by the use of the words ‘necessary,’ and ‘except,’ but not limited to them, may be made only when specified by research protocol and that any such exception shall be detailed and explained in a report outlined in paragraph (7) and *upon approval by the head of the New Entity and advisory committee.*

2) Any provision granting the head of the New Agency authority to promulgate rules and determine standards shall require the consultation of and

These new rules and regulations would be promulgated by the head of the New Entity in consultation with an advisory committee.³²² In addition, principal investigators would be required to submit proposals to the New Entity regarding their intended use of animals in their projects.³²³ The New Entity would also be able to send an inspection committee to any facility both with and without notice.³²⁴ Facilities and principal investigators could then be given the opportunity to cure any violation within a reasonable time or face penalties.³²⁵

approval of the advisory committee. As part of this amendment, amend 17 U.S.C. § 2143(a)(5) as follows:

(a)(5) In promulgating and enforcing the standards established pursuant to this section, *the head of the New Agency shall consult experts, including outside consultants where indicated, and obtain approval of the advisory committee.*

322. The advisory committee would consist of nine members and include various individuals with different backgrounds, such as medical doctors, attorneys, scientists from various fields, veterinarians, other academics, and lay members of the public who have an interest. With a diverse group of individuals forming the committee, various perspectives can be taken into account and the result would be as unbiased as possible. At least three members would be required to have a background in veterinary medicine. At least half of the members would be required to have two years of experience either working with or scientifically researching animals.

323. This administrative procedure would be similar to that of the United States Patent and Trademark Office for examining patent applications. See ROGER E. SCHECHTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS* 422-30 (2003). Three examiners who could either approve or disapprove the proposals would evaluate them. Approval of the project by the New Entity will require approval by at least two out of the three examiners. If less than two examiners approve the project, the principal investigator will have the opportunity to amend the proposal and resubmit it. If resubmission results in another rejection, the principal investigator will have the opportunity to contest this decision before an administrative panel consisting of five members. Panel members would have the opportunity to question the investigator regarding possible violations of rules and regulations in light of the examiners' decisions, and the investigator would have the opportunity to respond to and rebut objections. Approval of the proposal would require a majority of the panel members' votes. Disapproval by the panel would constitute a final rejection. After a final rejection, the principal investigator would be prohibited from amending and submitting a new proposal for one year.

324. Amend 17 U.S.C. § 2143(b) to eliminate research facility committees. The New Entity should conduct all inspections.

(b) *Inspections*

Each research facility shall comply with all inspections by the inspection team of the New Entity, with and without notice.

325. Penalties should consist of monetary fines and/or suspension or termination of animal use in research as specified under current 7 U.S.C. §

The changes proposed here are only the beginning of a solution. These dramatic changes are necessary to effectively protect the welfare of animals, particularly in the scientific research context. It is dangerous to leave decisions completely in the hands of researchers without considering the interests of others in society.

VI. CONCLUSION

Advances and discoveries in science, technology, and medicine often come at the expense of animal pain and suffering. Currently, federal law is ineffective in protecting these animals, which are sacrificed for our own interests. Although the purpose of the AWA is to protect the welfare of animals under a federal statute, the USDA has been ineffective in achieving this goal. The courts have also been an ineffective means of enforcing the AWA due to the formalistic and rigid requirements of the standing doctrine. Similarly, Congress has also been unwilling to amend the AWA to include a private right of action provision. As a result, it has been difficult for individuals and organizations to protect the welfare of animals under our legal system.

A possible solution to these difficulties is to create a new entity with rulemaking, adjudicatory, and investigative authority. Such an entity with comprehensive functions would be most efficient and effective. Importantly, the AWA should be amended to allow the New Entity to monitor and regulate the use of animals during research and experimentation. The most desirable solution would be to permit plaintiffs with particularized interests in animal welfare and protection, such as animal welfare organizations, to represent animals and assert claims on their behalf before a court of law. This would be the most direct solution in protecting animals against abuse. However, as with many legal issues, the most desirable solution is far from realistic, and the only hope is that through the efforts of organizations, individuals, Congress, and the judiciary, society will become more educated, aware, and understanding of what must be accomplished to protect animals.