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COMMENT

"FOUR LEGS GOOD, TWO LEGS BAD":¹ THE ISSUE OF STANDING IN *ANIMAL LEGAL DEFENSE FUND, INC. V. GLICKMAN* AND ITS IMPLICATIONS FOR THE ANIMAL RIGHTS MOVEMENT

"Mr. Wise, there are inmates on Death Row who have not received as complete a defense as Pup-Pup."²

"Though cloaked in the moral armor of self righteousness, animal rights activists show contempt for the lives of ordinary people. They are engaged in an elitist war against the common man . . . If we don't stand up to them now, there will be no one left to stand up for us later."³

These comments represent a view of the animal rights movement that is shared by people "from every continent on earth."⁴ In this view, the legal recognition of animal rights is either, as implied by the first comment, a frivolous and slightly contemptible waste of legal talent and resources, or, as posited in the second comment, a cruel rejection of the superior rights claims of human beings.⁵ Through its standing requirement

¹ GEORGE ORWELL, *ANIMAL FARM* 40 (1946). The connection between this phrase and the animal rights movement was made by Kathleen Marquardt in *ANIMALSCAM: THE BEASTLY ABUSE OF HUMAN RIGHTS* 8 (1993). Marquardt uses the phrase to demonstrate the folly of the characterization of human beings as evil and animals as innocent. Orwell's book supports her point, as the reader is meant to marvel at the prejudice of this chant. Yet the point of Orwell's satire is to ridicule the superior status the human race attaches to itself, a philosophy at odds with that of Marquardt.

² Alexander Stille, *Animal Advocacy*, NAT'L L.J., Apr. 16, 1990, at 1 (quoting a Massachusetts federal judge who rendered a decision to stay a death sentence given to a dog branded a public nuisance).

³ MARQUARDT, *supra* note 1, at 9.

⁴ MARQUARDT, *supra* note 1, at xvi.

⁵ See, e.g., MARQUARDT, *supra* note 1, at 4. Marquardt states, "Make no mistake about it: animal rights means no milk for our children, no insulin for diabetics, and no guide dogs for the blind." She continues, "The real agenda of this [animal rights] movement is not to give rights to animals, but to take rights from people" MARQUARDT, *supra* note 1, at 6.

for suits brought under animal protection statutes, the American legal system reinforces this perspective. In order to trigger statutory protection, plaintiffs suing under federal animal protection statutes must demonstrate that a human being or an animal organization, as well as an animal itself, has suffered harm.⁶ Simply put, if the only injury alleged is the injury done to an animal, there is no injury that the law will recognize and therefore no claim. Independent jural standing for animals does not exist in our law; indeed, it has been noted that "[n]o society . . . has ever politically empowered living animals, with the possible exception of Caligula's Rome."⁷ Nevertheless, while the granting of independent legal standing to animals may be an unrealistic goal given our present legal system, it is fair to state that the current climate in the United States is not as averse to animal protection as the above comments suggest.⁸

The recent Court of Appeals for the District of Columbia case of *Animal Legal Defense Fund, Inc. v. Glickman* ("ALDF")⁹ illustrates this favorable climate by broadly interpreting the requirements of jural standing under the Animal Welfare Act ("AWA"),¹⁰ thereby increasing the number of human plaintiffs able to bring AWA suits for animal mistreat-

⁶ See Tom Regan, *Progress Without Pain: The Argument for Humane Treatment of Research Animals*, 31 ST. LOUIS U. L.J. 513, 517 (1987) ("Time and time again, without exception, animals are denied the independent jural standing they deserve and are, instead, systematically treated as if they deserve the law's attention . . . only if some human interest is harmed or benefited.").

⁷ David R. Schmahmann & Lori J. Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 781 (1995) (referring to the emperor Caligula's deification of his favorite horse).

⁸ See, for example, Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531 (1998), in which the author states:

As science has altered what we know to be the facts of the relation of animals and humans, modern moral and social theory is altering the way that animals are perceived, and the value attached to them. The interests of animals are for the first time being legitimized, not only in academic circles, but in the minds of significant portions of the populace, in the judicial system and in legislative enactments.

Id. at 580.

⁹ 154 F.3d 426 (D.C. Cir. 1998) [hereinafter *ALDF*], *cert. denied*, National Ass'n for Biomedical Research v. Animal Legal Defense Fund, Inc., 119 S. Ct. 1454 (1999).

¹⁰ Animal Welfare Act of 1970, 7 U.S.C. §§ 2131-2156 (1994) (amended 1970, 1975, 1980, and 1990).

ment. Additionally, the decision suggests growing judicial sympathy towards the granting of independent jural standing to animals. When analyzed along with its previous D.C. Circuit panel decision ("*ALDF I*")¹¹ and the decision of the district court ("*ALDF P*"),¹² *ALDF* reveals that the standing requirement for AWA suits has now become significantly easier to satisfy. According to the opinion, the three factors of a constitutional standing analysis, (1) an injury in fact, (2) caused by the defendant, (3) that can be judicially redressed, are satisfied, in terms of an AWA suit, by a plaintiff who (1) observes an animal in a habitat unsatisfactory to his educated but personal concept of a proper animal environment, (2) demonstrates only negligent government supervision, rather than affirmative government requirement, of this inadequate environment, and (3) provides non-specific evidence that the requested relief will redress his injury.¹³ This holding substantially modifies the circuit's precedent.¹⁴ It removes the strict AWA standing interpretation that had become "a near insurmountable difficulty for third parties seeking a hearing on the substantive claims they have brought under the [AWA]."¹⁵ As a result, *ALDF*'s broad standing requirement is groundbreaking, for it portends that many more suits brought under the AWA will now be addressed on the merits.¹⁶

Part I of this Comment reviews both the factual background of *ALDF* and the standing requirements mandated by the Constitution and the AWA and summarizes the standing interpretations in *ALDF I* and *ALDF II*. Part II analyzes the *ALDF* opinion and concludes that it is a valid and necessary

¹¹ See *Animal Legal Defense Fund, Inc. v. Glickman*, 130 F.3d 464 (D.C. Cir. 1997) [hereinafter *ALDF II*].

¹² See *Animal Legal Defense Fund Inc. v. Glickman*, 943 F. Supp. 44 (D.D.C. 1996) [hereinafter *ALDF I*]. Note that this decision, after finding that the plaintiffs had standing to sue, proceeded to address the case on the merits. That portion of the decision is outside the scope of this Comment, and is therefore not discussed.

¹³ See *ALDF*, 154 F.3d at 430-45.

¹⁴ See *id.* at 449 (Sentelle, J., dissenting) (claiming that "the majority radically departs from our precedent").

¹⁵ See Joseph Mendelson, III, *Should Animals Have Standing? A Review of Standing Under the Animal Welfare Act*, 24 B.C. ENVTL. AFF. L. REV. 795, 796 (1997) (explaining that "[i]n virtually all AWA claims, legal failures result not from any deficiency on the merits of the cases brought before the courts, but rather from jurisdictional challenges to third parties").

¹⁶ See Mendelson, *supra* note 15, at 815.

interpretation of the standing requirements. Part III evaluates the extent to which animal rights groups and concerned individuals can use the decision as a means to safeguard animals from exploitation and abuse and suggests that *ALDF* supports even greater animal protection through the granting of independent jural standing to animals. Finally, Part III concludes that as independent jural standing for animals is unlikely to be adopted in light of this country's legal and economic systems, *ALDF* serves as an important bulwark in the fight against animal exploitation.

I. THE HISTORY OF *ANIMAL LEGAL DEFENSE FUND, INC. v. GLICKMAN*

A. *The Statutory Basis of the ALDF Claims*

"Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."¹⁷

This statement from *ALDF I* provides an insight into the origin of *Animal Legal Defense Fund, Inc. v. Glickman*. The AWA is the primary federal statute regulating animal use and governs federal animal research facilities as well as various other activities in which animal treatment is a factor.¹⁸ The AWA also regulates individuals who have extensive contact with animals, such as pet dealers, animal exhibitors, and federal medical research grant recipients.¹⁹ According to Congress, the AWA demonstrates "a continuing commitment . . . to the ethic of kindness to dumb animals."²⁰ However, the AWA, in and of itself, has no power to protect animals. Rather, the AWA requires the Department of Agriculture to "promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors."²¹ These standards must include "minimum requirements . . . for a physical environment adequate to pro-

¹⁷ *ALDF I*, 943 F. Supp. at 51 (quoting A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 98, 280 (P. Bradley Knoff ed., 1948)).

¹⁸ See Mendelson, *supra* note 15, at 795.

¹⁹ See *id.*

²⁰ H.R. REP. NO. 1651, 91st Cong., 2d Sess., at 2 (1970), reprinted in 1970 U.S.C.A.N. 5103, 5104.

²¹ AWA, 7 U.S.C. § 2143(a)(1) (1994) (amended 1970, 1975, 1980, and 1990).

mote the psychological well-being of primates."²² Unfortunately, the AWA is no more specific than this; it gives no guidelines as to what these "minimum requirements" for primates should be. Noting this, the author of the *ALDF I* opinion, Judge Richey, commented, "[T]oo often, Congress enacts generalized legislation and, thus, passes to an executive agency the responsibility to interpret and fill in gaps that Congress itself could not or would not specifically legislate."²³ Essentially, Congress was to blame for this suit. Its vague drafting of the AWA led to the confusion over what constituted appropriate animal housing standards, the crux of the plaintiffs' claims.²⁴

B. *The ALDF I Decision*

The circumstances behind *ALDF* are straightforward. The plaintiffs are four animal enthusiasts who were frequent visitors to local game farms and zoos.²⁵ During those visits, each individual personally observed primates kept in inhumane conditions like solitary, barren and dirty cages, which conditions they knew were likely to agitate and unsettle these sociable, sensitive animals.²⁶ As a result of these practices, and their powerlessness to remedy them, the plaintiffs contended that they suffered emotional anguish and psychological harm and asserted that, if the conditions persisted, they would be forced to discontinue their habit of visiting these facilities.²⁷ Therefore, each of the plaintiffs sought to compel the Secretary of Agriculture and his officials,²⁸ to whom Congress had dele-

²² *Id.* § 2143(a)(2)(B).

²³ *ALDF I*, 943 F. Supp. 44, 51 (D.D.C. 1996).

²⁴ *See id.* Judge Richey explained that it is because of such generalized legislation that the "courts remain to provide the last medium of hope for all Americans," and indicated that Congressional regulatory delegations such as these are "one of the basic reasons why the American people have lost faith in much of their government." *Id.* at 50. He also stated, "[w]ere either or both the Legislative and Executive Branches more successful in the lawful exercise of their responsibilities under Articles I and II of the Constitution, it would not be necessary for the Courts to intervene." *Id.* at 51.

²⁵ These four individual plaintiffs are Roseann Cirelli, Mary Eagan, Marc Jurnove, and Audrey Rahn. *See id.* at 51.

²⁶ *See ALDF I*, 943 F. Supp. at 54-55.

²⁷ *See id.*

²⁸ Specifically, those individuals are Dr. Lonnie King, Administrator of the Animal and Plant Health Inspection Service, and the United States Department of

gated the authority of enforcing the AWA, to revamp their current regulations so as to ensure that game farms placed primates in a physical environment "adequate to promote the[ir] psychological well-being" and "social grouping."²⁹ The plaintiffs contended that the promulgation of new, effective regulations would promote the well-being of the primates, and, as a result, assuage the injuries they sustained personally.

Animal Legal Defense Fund, Inc. ("Fund") became a plaintiff as part of its strategy to make the AWA an effective regulatory tool in the fight against animal mistreatment.³⁰ Specifically, Fund claimed that the Secretary of Agriculture denied it access to game farm plans for primate psychological well-being, thereby prohibiting it from monitoring and evaluating the efficacy of the government regulations.³¹ In the 1993 case of *Animal Legal Defense Fund v. Secretary of Agriculture*,³² Fund, along with another set of individual plaintiffs, mounted a similar challenge to the Secretary of Agriculture's regulations pursuant to the AWA, but its victory was vacated by the D.C. Circuit³³ on the grounds that both the individuals and Fund lacked standing.³⁴ Thus, Fund's purpose in instituting this current suit was twofold: it wished to protect primates from further abuse and it wanted to force the D.C. Circuit to re-consider its earlier decision.

In response to the plaintiffs' request that the court declare unlawful and set aside the Secretary of Agriculture's regulations, the defendants cross-moved for summary judgment

Agriculture generally.

²⁹ *ALDF I*, 943 F. Supp. at 51 (stating the five counts the plaintiffs alleged). The regulations promulgated by the Secretary of Agriculture are codified at 9 C.F.R. §§ 3.75-3.81 (1996). They require the game farm to "develop, document and follow an appropriate plan for environment enhancement adequate to promote the psychological well-being of non-human primates." *Id.* § 3.81. Additionally, the plan "must be in accordance with the currently accepted professional standards as cited in the appropriate professional journals or reference guides, and as directed by the attending veterinarian." *Id.*

³⁰ See *ALDF II*, 130 F.3d 464, 466 (D.C. Cir. 1997) (noting that the suit is part of FUND's "campaign to influence USDA's administration of the Animal Welfare Act").

³¹ See *ALDF I*, 943 F. Supp. at 53.

³² 813 F. Supp. 882 (D.D.C. 1993), *vacated by* Animal Legal Defense Fund, Inc. v. Espy, 29 F.3d 720 (D.C. Cir. 1994).

³³ See *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720 (D.C. Cir. 1994).

³⁴ See *id.* at 722.

based upon plaintiffs' lack of standing.³⁵ Although this argument had successfully vacated Fund's earlier victory in *Animal Legal Defense Fund v. Secretary of Agriculture*, the district court refused to change its position. Judge Richey wrote, "This case involves animals, a subject that should be of great importance to all humankind. It also involves the failures of our system of government"³⁶ The need for animal protection, coupled with the need to make the AWA achieve its intended purpose, made mere parroting of the previous circuit court holding unacceptable. According to the *ALDF I* court, the reanalysis of the plaintiffs' standing argument was a necessary and just exercise.³⁷

The *ALDF I* court based its decision upon the standing requirements enumerated by Justice Scalia in the Supreme Court's recent decision, *Lujan v. Defenders of Wildlife*.³⁸ Developed from the Constitution's Article III requirement that federal jurisdiction be extended only to those suits that exhibit a "case or controversy" between the plaintiff and the defendant, the standing doctrine demands that to merit judicial attention, a plaintiff must satisfy three requirements.³⁹ First, the plaintiff must show that he suffered an injury-in-fact, i.e., the invasion of a legally protected interest that is not only concrete and particularized, but also actual or imminent.⁴⁰ Second, the plaintiff must establish that there is a causal connection between the injury and the conduct giving rise to the complaint such that the injury can be reasonably traced back to the challenged action of the defendant.⁴¹ Third, the plaintiff must demonstrate that it is likely, and not merely speculative, that the injury will be redressed by a favorable decision.⁴² Under the AWA, plaintiffs must meet an additional require-

³⁵ See *ALDF I*, 943 F. Supp. at 51. The plaintiffs and the defendants also filed cross-motions for summary judgment on the merits. See *id.*

³⁶ *Id.* at 50.

³⁷ See *id.* Judge Richey called the defendants' rule-making lapses "egregious" and "one of the basic reasons why the American people have lost faith in much of their government." See *id.*

³⁸ 504 U.S. 555 (1992).

³⁹ See Mendelson, *supra* note 15, at 801-02 (citing *Family & Children's Center, Inc. v. School City of Mishawaka*, 13 F.3d 1052, 1058 (7th Cir. 1994)).

⁴⁰ See *Lujan*, 504 U.S. at 560.

⁴¹ See *id.*

⁴² See *id.* at 561.

ment, a prudential consideration that requires a plaintiff who has satisfied Article III standing requirements to demonstrate that his injuries fall within the "zone of interests" protected by the AWA.⁴³

The *ALDF I* court held that both Fund and the individual plaintiffs had standing to sue.⁴⁴ The logic and simplicity of its standing analysis contrasted with the troubled history of AWA suits. Addressing Fund first, the court ruled that Fund had standing under Article III because it had suffered what is termed an "informational" injury, stating "[t]here is no question that an organization may have standing in its own right to seek judicial relief and to vindicate the rights and immunities itself may enjoy."⁴⁵ The standing requirement for judicial recognition of an informational injury merely requires proof of a "concrete and demonstrable injury" to its activities caused by the government.⁴⁶ Here, the government's failure to implement regulations requiring game farms to issue periodic reports meant that Fund was unable to engage in one of its main purposes, the dissemination of information about AWA compliance in game farms.⁴⁷ Analysis of the three prongs was unnecessary—the District Court for the District of Columbia had previously held such injury constitutionally sufficient for standing, and this court would hold the same.⁴⁸

The bigger problem for the court was the prudential zone of interests test. The court explained that previous Fund suits directed at AWA implementation failures had not qualified for a zone of interests analysis because those suits were directed at abusive animal research facilities rather than at animal exhibitors.⁴⁹ According to the AWA, research facility monitoring is the province of designated oversight committees.⁵⁰ Thus, animals living in research facilities already have their

⁴³ The zone of interests test applies to all suits filed under federal statutes and is codified in the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1988).

⁴⁴ See *ALDF I*, 943 F. Supp. 44, 51-52 (D.D.C. 1996). The court did not grant standing to Rahn, nor to Fund as the representative of its members, for reasons irrelevant here. See *id.* at 52-55.

⁴⁵ *Id.* at 53 (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

⁴⁶ *Id.* (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).

⁴⁷ See *id.*

⁴⁸ See *ALDF I*, 943 F. Supp. at 53.

⁴⁹ See *id.*

⁵⁰ See AWA § 2143(b)(1) (1994) (amended 1970, 1975, 1980, and 1990).

interests protected, obviating the need for Fund monitoring and resulting in Fund exclusion from the collection of interests the AWA was created to protect.⁵¹ The court explained that animal exhibition facilities, on the other hand, were not the province of established oversight committees and therefore there was no general impediment to Fund's assertion that its injury fell within the AWA's zone of interests.⁵² However, in terms of whether Fund's injuries in this particular case were within the AWA's zone of interests, Fund had to show that there was either "a congressional intent to benefit [it] or some indication that [it] is a 'peculiarly suitable challenger of administrative neglect.'"⁵³ Although the court admitted that it was "less than clear" that Fund was an intended beneficiary of the AWA,⁵⁴ it did deem Fund to be a suitable challenger to the defendants' administrative neglect because of its high stake in the suit's outcome.⁵⁵ As the court explained, the defendants' failure to comply with the AWA mandate directly affected Fund's efforts and resources by preventing it from expending its resources on the investigation of and education about non-human primate well-being.⁵⁶ Thus, the court determined that Fund's claims did indeed fall within the zone of interests protected by the AWA, and, consequently, that Fund did have standing to sue.⁵⁷

The court next applied each prong of the standing requirement to the individual plaintiffs. With respect to the plaintiffs' injuries-in-fact, the court recounted the specific injuries alleged, namely, the aesthetic and emotional harm they suffered as a result of the continued inhumane primate housing at the local game farms.⁵⁸ Explaining that because the injuries were

⁵¹ See *ALDF I*, 943 F. Supp. at 53.

⁵² See *id.* at 54.

⁵³ *Id.* (quoting *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 503 (D.C. Cir.1994)).

⁵⁴ *Id.* The Court explained that the AWA's purpose, in the area of primate exhibition facilities, is to create and enforce standards that ensure that the primates are kept humanely. See *id.* As one of Fund's goals is to improve the living conditions for primates kept for public display and to counsel and inform the public about AWA compliance in this regard, the court held that it was "reasonable to assume" that an organization such as Fund was intended to benefit from the AWA. *ALDF I*, 943 F. Supp. at 54.

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *id.* at 54-55; see also Mendelson, *supra* note 15, at 815 (providing a

concrete, "the desire to . . . observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purpose of standing,"⁵⁹ and particular, "the injury . . . affect[s] the plaintiff[s] in a personal and individual way,"⁶⁰ the court concluded that the individual plaintiffs had indeed suffered an injury-in-fact. Noting that it is settled that in order for an injury to meet the injury-in-fact test it must be distinct from one that could be suffered by the general public,⁶¹ the court acknowledged that, had the plaintiffs alleged that their injuries stemmed from a generalized interest in the topic of animal welfare rather than from a personal experience of animal harm, the injury-in-fact requirement would not be satisfied.⁶² However, in this case, because the plaintiffs alleged specific repercussions and because they could demonstrate that they suffered in a concrete and individualized way, the court ruled that they had more than adequately satisfied the injury-in-fact standard.⁶³

Addressing causation, the court first reiterated the government's mandate under the AWA to promulgate standards to govern the humane handling of animals by exhibitors.⁶⁴ It pointed out that there was little doubt that game farms would act as the Secretary of Agriculture and his delegates directed them to, if for no other reason than fear that failure to comply would endanger their animal exhibition licenses.⁶⁵ Accordingly, the conditions witnessed by the plaintiffs in this case were fairly traceable to the government's failure to issue regulations that would satisfactorily govern the zoos' treatment of its primates.⁶⁶ Adequate regulations would have required more humane housing conditions, which in turn would have prevented the plaintiffs' injuries.

In terms of redressability, the court held that since the plaintiffs' injuries were caused by the defendants' inadequate

concise summary of the various plaintiffs' claims in the *ALDF I* case).

⁵⁹ *ALDF I*, 943 F. Supp. at 55 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992)).

⁶⁰ *Id.* at 56 (quoting *Lujan*, 504 U.S. at 560 n.1).

⁶¹ *See id.* at 55.

⁶² *See id.* at 55-56.

⁶³ *See id.*; see also Mendelson, *supra* note 15, at 816.

⁶⁴ *See ALDF I*, 943 F. Supp. at 56.

⁶⁵ *See id.*

⁶⁶ *See id.*

implementation of the AWA, it automatically followed that an appropriate implementation of the AWA mandate would redress the plaintiffs' injuries.⁶⁷ To hold that effective AWA implementation would not create humane animal habitats would be to render the statute meaningless because the statute necessarily requires facilities to ensure proper care for captive animals.⁶⁸ As for the zone of interests consideration, the court was particularly succinct. It noted that the Congressional statement as to the policy interests of the AWA provided that the statute was intended to ensure humane treatment for exhibition animals.⁶⁹ It was established that the plaintiffs had aesthetic interests in observing exhibition animals in humane conditions.⁷⁰ Therefore, the plaintiffs had a personal stake in the outcome of a suit regarding the treatment of exhibition animals and fell within the zone of interests protected by the AWA.⁷¹

Admittedly, the *ALDF I* court interpreted the individual plaintiffs' standing claims broadly, just as it had with the zone of interests analysis for Fund. The court held Fund to be an acceptable plaintiff according to the AWA's zone of interests simply because the government's inadequate regulations hampered its general institutional interest in the dissemination of information. With regard to the individual plaintiffs, the court's recognition of personal psychological trauma as a cognizable injury, its expansion of causation to include the failure to regulate, and its acceptance of non-specific assertions that the requested relief would redress the injury were all interpretations rejected by previous opinions as impermissibly expansive.⁷² In light of these controversial holdings, it was unre-

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See *ALDF I*, 943 F. Supp. at 57 (citing AWA, 7 U.S.C. § 2131(a)(1) (1994) (amended 1970, 1975, 1980, and 1990)).

⁷⁰ See *id.*

⁷¹ See *id.* at 56-57.

⁷² For injury-in-fact, see, for example, *Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982) ("[T]he psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III"). For causation, see, for example, *Freedom Republicans, Inc. v. Federal Election Commission*, 13 F.3d 412, 417 (D.C. Cir. 1994) (stating that a plaintiff must "adduce facts showing that the unfettered choices made by independent actors have been . . . made in such manner as to produce causation"). For

markable that upon appeal a panel of the D.C. Circuit vacated the lower court's decision. Most striking about the panel decision was the strong dissent penned by Judge Wald, in which she averred that the majority had abandoned reason in its narrow interpretation of the AWA standing requirements.⁷³ Her comments herald the demise of the restrictive standing analysis with regard to AWA suits.

C. *The Circuit Court Panel Decision*

"It is part of the price of living in society, perhaps especially a free society, that an individual will observe conduct that he or she dislikes."⁷⁴

This statement by the majority reveals the underlying philosophy of their decision, namely, that the AWA was not designed to remedy all injuries that human beings sustain through animal mistreatment, but only those sustained by individuals who meet the demanding threshold standing requirements for AWA suits.⁷⁵ As a result, the opinion is infused with an acerbic flavor, the panel keenly aware that it had established this ground rule in Fund's 1991 suit. Tellingly, the panel remarked, "[t]his appeal is but the latest chapter in the ongoing saga of Animal Legal Defense Fund Inc.'s . . . effort to enlist the courts in its campaign to influence USDA's administration of the Animal Welfare Act."⁷⁶ Right from the beginning of the opinion, the panel demonstrated little tolerance for the plaintiffs' arguments to expand standing.

Addressing the standing of the individual plaintiffs, the panel described the conditions under which the primates lived, noting that "Circelli saw an orangutan who could neither see nor hear other primates, and who sat quietly by himself in a

redressibility, see, for example, *Florida Audubon Society v. Bentsen*, 94 F.3d 658, 663-64 (D.C. Cir. 1996) (stating that plaintiffs must show that it is "likely" that the relief they seek will alleviate their injuries).

⁷³ See *ALDF II*, 130 F.3d 464, 471 (D.C. Cir. 1997) (Wald, J., dissenting) ("In my view, Mr. Jurnove's affidavit amply illustrates how far the majority opinion has strayed from a reasonable interpretation of the standing requirements under Supreme Court and our circuit's law.").

⁷⁴ *Id.* at 468.

⁷⁵ See *id.* at 467. The court devoted an entire section of its opinion to an explanation of the jurisdictional restrictions placed upon prospective federal plaintiffs. See *id.* at 467-68.

⁷⁶ *Id.* at 466.

corner Jurnove saw a large male chimpanzee . . . whose hands and feet were covered with scars and cuts . . . Eagan ha[d] seen primates housed in isolation . . . including one baby baboon.”⁷⁷ The panel admitted that “[u]nder some circumstances, interference with the observation and study of animals may constitute an injury in fact for standing purposes.”⁷⁸ However, this was but a fleeting nod to the plaintiffs, for the court then firmly elucidated its position with regard to the first standing requirement, injury-in-fact.

The panel reiterated the familiar definition for injury-in-fact, namely, that the injury must be cognizable and specific.⁷⁹ “General emotional harm,” the court stated, “no matter how deeply felt, cannot suffice for injury-in-fact for standing purposes.”⁸⁰ In a footnote, the court acknowledged that several Supreme Court cases had recognized general emotional harm as an injury-in-fact, but noted that they did so only when the challenged conduct threatened to reduce the number of animals available for observation.⁸¹

As the claims here did not allege that the game farms’ treatment of their primates would lead to the diminution of the primate population, the harm the plaintiffs’ alleged was not sufficient to satisfy the injury-in-fact requirement. The court viewed the plaintiffs’ injuries merely as non-specific psychological harms and ruled that they were, therefore, insufficient to confer standing.⁸²

In evaluating causation, the court focused on the fact that the plaintiffs’ injuries did not stem from any actual acts directly performed by the government.⁸³ The court stated that, where as here, the injuries resulted from the government’s unlawful regulation of a third party, the causation element of the standing analysis requires a “more exacting scrutiny” because the alleged government injury is indirect.⁸⁴ In this

⁷⁷ *ALDF II*, 130 F.3d at 468.

⁷⁸ *Id.* (citing *Humane Soc’y of the U.S. v. Babbitt*, 46 F.3d 93, 97 (D.C. Cir. 1995)).

⁷⁹ *See id.*

⁸⁰ *Id.*

⁸¹ *See id.* at 468 n.3.

⁸² *See ALDF II*, 130 F.3d at 468.

⁸³ *See id.* at 469.

⁸⁴ *Id.* at 468 (quoting *Freedom Republicans, Inc. v. Federal Election Comm’n*, 13 F.3d 412, 416 (D.C. Cir. 1994)).

case, the government could not be accused of issuing affirmatively harmful regulations. In fact, the government had not issued any regulations at all with respect to primate housing; all parties agreed that the housing was arranged and supervised entirely by the game farms' own experts.⁸⁵ The court averred that it knew of no cases in which the government was held to have caused an injury simply by failing to issue regulations which would have prevented injurious conduct.⁸⁶ Indeed, such a conclusion was, in the court's opinion, fundamentally illogical—the government does not “cause” an injury simply because it permits a third party to fashion particular regulations.⁸⁷ Therefore, absent actual compulsion on the part of the Secretary of Agriculture that forced the game farms to create harmful housing conditions, the connection between the defendants' failure to issue regulations and the plaintiffs' alleged injuries was too attenuated to establish causation.⁸⁸

With regard to the redressability standard, the court held that since the plaintiffs could not prove that the government's lack of regulations had caused their injuries, it logically followed that requiring the government to issue different regulations was unlikely to be an effective remedy.⁸⁹ Furthermore, the court noted that even if it did recognize plaintiffs' claims as government-caused, and therefore redressable, it would be too difficult to determine appropriate relief, as the plaintiffs' injuries consisted mainly of emotional scars.⁹⁰ It was less than clear that such indefinite harms would be remedied because of the promulgation of different regulations.⁹¹ Finally, the court explained that, in response to new regulations, the exhibitors might well cease to keep primates rather than comply,⁹² a decision that would eliminate the possibility of plaintiffs' relief because the game farms would contain no primates upon which to bestow this more humane housing. Thus, the court concluded that it was far from certain that ordering the govern-

⁸⁵ See *id.* at 469.

⁸⁶ *Id.*

⁸⁷ *ALDF II*, 130 F.3d at 469.

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See *id.* at 470.

⁹¹ See *id.*

⁹² See *ALDF II*, 130 F.3d at 470.

ment to perform the actions the plaintiffs demanded, namely the promulgation of new regulations, would redress the plaintiffs' injuries.⁹³

Passing over the prudential zone-of-interests inquiry entirely, the court quickly dismissed Fund's standing claim. Rejecting the *ALDF I* court's characterization of Fund's injury as informational and therefore adequate for Article III requirements,⁹⁴ the court characterized Fund's complaint as purely procedural.⁹⁵ It held that the crux of Fund's injury was its inability to participate in the drafting of the government's allegedly inadequate and illegal game farm regulations. In particular, Fund wanted to provide input on the regulations that governed the availability of those primate keepers' reports that detailed the plans for the psychological enrichment of primates.⁹⁶ The government's failure to allow them to do so meant that Fund could not take advantage of the notice and comment procedures of the Administrative Procedure Act.⁹⁷ Thus, Fund's injury was procedural only and was not based on an informational dearth that impeded its "watch-dog" activities.⁹⁸

The court explained that standing to sue for a procedural injury depends upon whether the plaintiff can show that the procedure in question was "designed to protect some threatened concrete interest" of the plaintiff.⁹⁹ Thus, in order to succeed on this claim, Fund had to show that its exclusion from participation in the notice and comment procedure harmed it in a specific and individualized way.¹⁰⁰ The court concluded that Fund could not make such a showing, as its predicament was "shared by many others, indeed by the world at large."¹⁰¹ Fund had failed to show that it had suffered a concrete injury distinct from the abstract, and universally shared, procedural right to submit comments to the Depart-

⁹³ See *id.*

⁹⁴ See *ALDF I*, 943 F. Supp. 44, 53 (D.D.C. 1996).

⁹⁵ See *ALDF II*, 130 F.3d at 470.

⁹⁶ See *id.* at 470-71.

⁹⁷ See *id.* at 470 (citing Administrative Procedure Act, 5 U.S.C. § 553 (1988)).

⁹⁸ See *id.*

⁹⁹ *Id.* (citations omitted).

¹⁰⁰ See *ALDF II*, 130 F.3d at 471.

¹⁰¹ *Id.*

ment of Agriculture. Thus, Fund did not establish that its procedural injury satisfied Article III standing.

* * *

With due respect to the panel opinion, there are several major flaws in its analysis, which may stem from its overarching concern about the preservation of Article III standing requirements as a shield against inappropriate federal claims. In terms of its injury-in-fact holding, the court mischaracterized the individual plaintiffs' injuries as general, rather than specific, instances of emotional harm. The plaintiffs' injuries of "personal distress, anguish and sadness,"¹⁰² are as personal as emotional injuries, by their nature, can be. As the court did not provide an example of what it considered was an adequately specific and personal harm, one is left to speculate as to what types of injury prospective AWA plaintiffs must suffer in order to possess standing. Is the only appropriate AWA plaintiff one who has suffered a diagnosed and meticulously documented bout of clinical depression? Such a requirement would certainly weed out many prospective plaintiffs, but, in light of the broad protective purposes contemplated by the drafters of the AWA, it does not seem to be a fair interpretation of the injury-in-fact requirement.

Additionally, the court did not provide an adequate basis for its causation analysis. Its analysis failed to address the argument that a regulation that permits parties to engage in injurious behavior, but does not require them to do so, may very likely "cause" an injury. It is reasonable to assert that a failure to regulate does have a coercive effect upon a game farm (and, therefore, makes the plaintiffs' injuries traceable to the government's act) because it forces the farms to implement their own animal treatment guidelines, which may result in inadequate animal habitats. Indeed, the government's failure to regulate is tantamount to affirmatively requiring the zoos to engage in injurious behavior, because without such regulations most game farms simply will not treat animals in a humane manner. If they did, there would have been no need for an animal welfare statute in the first place.

Even the court's exhaustively precise redressability analysis is unconvincing. One of the court's main concerns was that

¹⁰² *ALDF I*, 943 F. Supp. 44, 54 (D.D.C. 1996).

the non-specific injury alleged by the plaintiffs left the court without guidance as to the type of regulation that would redress their injuries. Essentially, the court would have to speculate as to what new guidelines the defendants should adopt. The court viewed such a requirement as a weakening of the purposefully stringent redressability standard, which demands that the plaintiff demonstrate that it is likely, and not merely speculative, that his injuries will be redressed by the requested relief.¹⁰³ This standard certainly does give courts a clear guideline as to what relief measures they should order. However, in its concern with the inviolability of the redressability standard, the majority failed to appreciate the fact that the plaintiffs in this case, and in similar suits, do not bring AWA lawsuits simply because they wish to facilitate the tailoring of game farm conditions to their specific tastes. Rather, their interest is in the enforcement of an already established standard, namely, that the Secretary of Agriculture promulgate "a physical environment adequate to promote the psychological well-being of primates."¹⁰⁴ Thus, the plaintiffs were not forcing the court to engage in a guessing game as to what type of regulation would redress their peculiar injuries. Rather, they were requesting judicial assistance in their effort to compel the Department of Agriculture to comply with established AWA principles. The court clung to a strict interpretation of redressability at the expense of common sense. While finding satisfaction of the redressability standard in this case does involve a broader interpretation of the doctrine than previous cases permitted, it does not follow that the standard is thereby threatened with extinction.

The strongly worded dissent by Judge Wald focused on some of these weaknesses. Concentrating solely on the standing of plaintiff Jurnove,¹⁰⁵ the dissent attacked the weakness of the panel's injury-in-fact argument, proffering a lengthy argument as to why Jurnove's injuries were personal and emotional, rather than general.¹⁰⁶ The dissent explained that

¹⁰³ See *ALDF II*, 130 F.3d at 469.

¹⁰⁴ AWA, 7 U.S.C. § 2143(a)(2)(B) (1994) (amended 1970, 1975, 1980, and 1990).

¹⁰⁵ See *ALDF II*, 130 F.3d at 471-76 (Wald, J. dissenting). The dissent stated that as it found Jurnove's claim "more than sufficient" for standing, it would not address the other plaintiffs' standing claims. *Id.* at 471 (Wald, J., dissenting).

¹⁰⁶ See *id.* at 471-73 (Wald, J., dissenting).

Jurnove, who had visited his local game farm at least nine times, was "[b]y virtue of [his] training in wildlife rehabilitation and [his] experience in investigating complaints about the treatment of wildlife very familiar with the needs of and proper treatment of wildlife."¹⁰⁷ It noted that on Jurnove's very first visit, he was confronted with the sight of a monkey in an unheated cage "shivering" and "huddled up with her head tucked in and her arms hugging herself."¹⁰⁸ It pointed out that Jurnove saw similarly troubling conditions on his other visits, prompting such concern about the animals' plight that he even chose to photograph the animals and send the pictures to the Department of Agriculture.¹⁰⁹ The dissent further explained that although inspectors were dispatched to the zoo on several occasions, no fault was found with the many conditions that disturbed Jurnove.¹¹⁰ After marshalling these facts, the dissent argued that such factors clearly constituted a concrete, specific emotional injury to Jurnove, as they were conditions which "directly impair[ed] his well-established and lifelong aesthetic interest in observing, studying and enjoying animals by preventing him from seeing these animals in a humane environment."¹¹¹ Consequently, the majority should have deemed the injury-in-fact standard satisfied.

The dissent further bolstered Jurnove's injury-in-fact claim by noting that the D.C. Circuit had consistently recognized that people have a significant interest in ensuring that animals live in humane habitats, an interest which has been held to satisfy the injury-in-fact requirement.¹¹² In a footnote, it addressed the majority's argument that the zoos' alleged infractions did not satisfy the injury-in-fact requirement because

¹⁰⁷ *Id.* at 472 (Wald, J., dissenting) (first and second alteration in original).

¹⁰⁸ *Id.* (Wald, J., dissenting).

¹⁰⁹ *See ALDF II*, 130 F.3d at 472 (Wald, J., dissenting).

¹¹⁰ *See id.* (Wald, J., dissenting).

¹¹¹ *Id.* at 473 (Wald, J., dissenting).

¹¹² *See id.* (citing *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002, 1007 (D.C. Cir. 1977) (holding that an aesthetic interest in seeing seals in humane environment is sufficient for standing); *Humane Soc'y v. Hodel*, 840 F.2d 45, 52 (D.C. Cir. 1988) (holding that an aesthetic interest in preventing hunting on wildlife refuge is sufficient for standing)).

they did not result in the diminution of a species.¹¹³ The dissent wondered why the majority found this distinction to be so compelling. In eloquent dicta, Judge Wald stated:

I cannot believe that constitutional standing actually turns on the difference between an observer's aesthetic injury from government action that threatens to wipe out an animal species altogether and government action that leaves some of the animals in a persistent state of suffering, which in all probability eventually will insure their demise. Indeed, the latter seems capable of causing more serious aesthetic injury in many instances.¹¹⁴

It was the quality of animal life that mattered for an injury-in-fact, not the quantity.

The dissent challenged the majority's causation analysis by pointing out that the Supreme Court has held that plaintiffs who allege aesthetic injury prove causation if they can show that the government failed to adequately regulate a third party.¹¹⁵ Turning to the even more recent case of *Lujan v. Defenders of Wildlife*, the dissent explained that in cases of alleged regulatory failure, the Supreme Court stated that all a plaintiff need do is "adduce facts showing that those choices [of the third party] have been or will be made in such manner as to produce causation and permit redressability of injury."¹¹⁶ Here, the government was lax on two regulatory fronts. First, the inhumane conditions at the game farm continued precisely because the government's inspectors repeatedly found the farm's conditions to be in compliance with their standards.¹¹⁷ If the inspectors had found the zoo to be in non-compliance, the inhumane conditions would have been fixed.¹¹⁸ Second, the government had failed to promulgate adequate rules in the first place, thus leaving the game farm to create its own guidelines.¹¹⁹ Had the government established adequate regulations, the game farm would have either conformed itself to such regulations or gone out of business

¹¹³ See *id.* at 473 n.1 (Wald, J., dissenting).

¹¹⁴ *ALDF II*, 130 F.3d at 473 n.1 (Wald, J., dissenting).

¹¹⁵ See *id.* at 474 (Wald, J., dissenting) (citing *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986)).

¹¹⁶ *Id.* (Wald, J., dissenting) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (alteration in original)).

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See *ALDF II*, 130 F.3d at 474 (Wald, J., dissenting).

entirely.¹²⁰ In either instance, the government's failure to properly regulate the game farm forced the farm to make the very choices that injured Jurnove.

The dissent further noted that to require Jurnove to show that the defendants affirmatively promulgated a regulation which caused injury, rather than simply requiring him to show that they failed to promulgate one, would place him "in a catch-22."¹²¹ In order to make such a showing, Jurnove would need access to the game farm's plans in the first place to see whether they contained any guidelines that were mandated by the defendants.¹²² However, even the majority acknowledged that the defendants did not require the game farms to make their plans available.¹²³ Thus, Jurnove had no way to discover whether the defendants affirmatively required the farms to engage in inhumane conduct.¹²⁴ Consequently, under the regulatory regime the defendants themselves created, the only recourse Jurnove had was to allege that the defendants had failed to issue adequate regulations.¹²⁵

Briefly addressing the redressability standard, the dissent contended that the majority's assertion that the plaintiffs' injuries could not be remedied was based upon a faulty understanding of Jurnove's claims.¹²⁶ The dissent argued that because Jurnove stated that he had a habit of visiting the game farm and intended to visit it again, the defendants' issuance of tighter regulations would necessarily improve his aesthetic experience during his future trips.¹²⁷ Either the game farm would comply with the required standards or close down, either of which would result in the protection of the primates and thereby redress Jurnove's injury.¹²⁸ Finally, unlike the majority, the dissent addressed the zone of interests test, noting that the D.C. Circuit had not made it especially demand-

¹²⁰ See *id.* (finding irrelevant the majority's contention that causation could not be shown because a zoo might close rather than comply, and stating that courts presume that agencies abide by judicial mandates).

¹²¹ *Id.*

¹²² See *id.*

¹²³ See *id.* at 470.

¹²⁴ See *ALDF II*, 130 F.3d at 474 (Wald, J., dissenting).

¹²⁵ See *id.* at 475.

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ See *id.*

ing.¹²⁹ The dissent explained that a finding of explicit intent to benefit a particular plaintiff was unnecessary when, as here, the plaintiff's interests in the regulation were sufficiently strong so as to make it reasonable to assume that Congress, if aware of the plaintiff, would have considered him an acceptable plaintiff.¹³⁰

After determining that Jurnove had satisfied both the Article III and zone of interests requirements, the dissent concluded with an important paragraph of dicta about the standing of inanimate beings.¹³¹ Although Judge Wald did not explicitly support the granting of independent jural standing to animals, her comments suggested that she believed it was not an unreasonable development. Specifically, Judge Wald cited Justice Douglas' famous dissent in *Sierra Club v. Morton*,¹³² in which he proposed that, with regard to environmental issues, the question of standing would be much simplified if a federal rule were developed which "allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers."¹³³

In *Sierra Club*, Justice Douglas argued for the recognition of independent standing for the environment, pointing out that "[i]nanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes . . . [t]he ordinary corporation is a 'person' for purposes of the adjudicatory process."¹³⁴ He concluded, "[t]he voice of the inanimate object, therefore, should not be stilled."¹³⁵ Relating *Sierra Club* to the issue of animal abuse, Judge Wald opined that "in a world in which animals cannot sue on their own behalf," the majority's standing interpretation made it unacceptably difficult for plaintiffs to bring suit under the AWA.¹³⁶ The Judge contended that "such a result offends the

¹²⁹ See *ALDF II*, 130 F.3d at 475 (Wald, J., dissenting).

¹³⁰ See *id.* (Wald, J., dissenting).

¹³¹ See *id.* at 476 (Wald, J., dissenting).

¹³² 405 U.S. 727 (1972).

¹³³ *ALDF II*, 130 F.3d at 476 (Wald, J., dissenting) (quoting *Sierra Club*, 405 U.S. at 741 (Douglas, J., dissenting)).

¹³⁴ *Sierra Club*, 405 U.S. at 742 (Douglas, J., dissenting).

¹³⁵ *Id.* at 749 (Douglas, J., dissenting).

¹³⁶ *ALDF II*, 130 F.3d at 476 (Wald, J., dissenting).

compassionate purposes of the [AWA]."¹³⁷ Although not a ringing endorsement of animal standing, these concluding statements, highlighted by the reference to the *Sierra Club* case, reveal that Judge Wald's dissent was based on more than her particular method of statutory interpretation.¹³⁸ Rather, her guiding concern was effective animal protection. Thus, both the *ALDF I* court's opinion and the *ALDF II* court's panel dissent foreshadowed a new method of standing analysis for AWA suits. While this method addresses the threshold requirements mandated by the Constitution and the AWA, it considers the furtherance of the AWA's goal of animal welfare to be a countervailing, and potentially more important, consideration. This new position was confirmed when the court granted a rehearing of the case en banc and then reversed its panel decision, holding that Jurnove unequivocally had standing to sue.¹³⁹

II. THE *ALDF* DECISION

A. *The Decision Explained*

"For that which befalleth the sons of men befalleth beasts; even one thing befalleth them: as the one dieth, so dieth the other; yea, they all have one breath; so that a man hath no pre-eminence over a beast"¹⁴⁰

Although not to the same degree as the above biblical pronouncement, the *ALDF* en banc decision demonstrates an unprecedented concern for animals, at least at the D.C. Circuit level, that portends meaningful legislative protection of their health and welfare. Judge Wald, the panel dissenter, who staunchly supported an expansive interpretation of AWA standing in order to protect animals, authored the opinion. In accord with that dissent, this opinion exhibits the same

¹³⁷ *Id.* (Wald, J., dissenting); see also *id.* at 476 n.4 (Wald, J., dissenting) (quoting a portion of the oral argument, in which the government conceded that its position effectively meant that the public had to rely solely on official enforcement mechanisms for the protection of animals).

¹³⁸ See *id.* at 476 (Wald, J., dissenting).

¹³⁹ See *ALDF*, 154 F.3d 426, 429 (D.C. Cir. 1998), cert. denied, National Ass'n for Biomedical Research v. Animal Legal Defense Fund, 119 S. Ct. 1454 (1999).

¹⁴⁰ *Ecclesiastes* 3:19 (King James). But see *Genesis* 1:26 (King James) ("God said . . . let [man] have dominion over the fish in the sea, and over the fowl in the air, and over the cattle, and over the earth, and over every creeping thing that creepeth upon the earth.").

overarching concern for animals.¹⁴¹ The decision is also significant in light of the fact that the D.C. Circuit Court had previously denied similar standing assertions.¹⁴² The expansive approach to the issue of standing, which had triumphed in the District Court for the District of Columbia, had now received the approval of the court of appeals. Although the dissent found this opinion "frightening,"¹⁴³ the majority calmly contended that their holding fell "well within [the standing] requirements."¹⁴⁴ It is this Comment's contention that *ALDF* should be regarded as the correct resolution of the issue of standing in AWA suits.

The *ALDF* majority prefaced its arguments with a lengthy explanation of Jurnove's injuries,¹⁴⁵ perhaps realizing that its decision was controversial and needed to be supported by as much evidence as possible. The court recounted each of Jurnove's many visits to the zoo, describing in detail the conditions he saw there, such as "a large male chimpanzee named Barney in a holding area by himself . . . [where] . . . he could not see or hear any other primate."¹⁴⁶ First addressing the question of whether Jurnove had suffered an injury in fact, the majority asserted that Jurnove has alleged "far more than an abstract, and uncognizable, interest in seeing the law enforced."¹⁴⁷ Rather, the fact that Jurnove had suffered "by seeing with his own eyes the particular animals whose condition caused him aesthetic injury,"¹⁴⁸ meant that he had satisfied the key requirement of injury-in-fact: a concrete injury particular to himself. The imprecise nature of an emotional injury, which had so disturbed the *ALDF II* court, was, according to this court, unimportant to an injury-in-fact analysis. Signifi-

¹⁴¹ See *ALDF*, 154 F.3d at 428.

¹⁴² See, e.g., *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720 (D.C. Cir. 1994); *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496 (D.C. Cir. 1994).

¹⁴³ *ALDF*, 154 F.3d at 452.

¹⁴⁴ *Id.* at 431.

¹⁴⁵ See *id.* at 429-30. The court explained that it would only consider Jurnove's claim to standing because, according to *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228 (D.C. Cir. 1996), "if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim." *Id.* at 1232.

¹⁴⁶ *ALDF*, 154 F.3d at 429.

¹⁴⁷ *Id.* at 432.

¹⁴⁸ *Id.* at 433.

cantly, while the court admitted that any regular visitor to the zoo could have experienced Jurnove's emotional injury, it explained that such a possibility did not make Jurnove's injury any less "distinct and palpable."¹⁴⁹ Quoting *Sierra Club v. Morton*, the court noted, "[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread government actions could be questioned by nobody."¹⁵⁰ So clear was the legitimacy of this type of injury that the court did not even discuss the possibility of a threat to the integrity of the doctrine of standing. Injury to an aesthetic interest in the observation of animals, when specifically defined and personally endured, was unquestionably sufficient for Article III standing.

In concluding its injury-in-fact analysis, the court articulated a "second principle of standing."¹⁵¹ It held that to establish injury-in-fact, there need not be depletion of the species concurrent with the harm caused to the plaintiff.¹⁵² While Judge Wald had previously proposed this idea in a footnote to her panel dissent,¹⁵³ in this opinion she made certain that it was judicially established. The court pointed out that the diminution-of-the-species standard had never been the law, nor were there any known cases that held that the elimination of a species was "an indispensable element of the plaintiffs' aesthetic injury."¹⁵⁴ Additionally, the court observed that the AWA was explicitly concerned with the quality of animal life, rather than the number of animals in existence.¹⁵⁵ Finally, the court argued that it was not logical to "suppose that people suffer aesthetic injury from government action that threatens to wipe out an animal species altogether, and not from government action that leaves some animals in a persistent state of suffering."¹⁵⁶ Thus the diminution-of-the-species standard

¹⁴⁹ *Id.* at 432.

¹⁵⁰ *Id.* (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)).

¹⁵¹ *ALDF*, 154 F.3d at 437.

¹⁵² *See id.*

¹⁵³ *See ALDF II*, 130 F.3d 464, 473 n.1 (D.C. Cir. 1997).

¹⁵⁴ *ALDF*, 154 F.3d at 437.

¹⁵⁵ *See id.* (explaining that the standing cases that stressed animal population devastation were cases that were "brought under conservation statutes whose mission is to preserve the number of animals in existence").

¹⁵⁶ *Id.* at 438.

was ruled a dispensable requirement that had no applicability to standing claims under the AWA. In so holding, the court removed a barrier that had successfully eliminated previous AWA suits from judicial consideration.¹⁵⁷

The court continued to depart from precedent in its causation analysis. It noted that the government regulation that was the cornerstone of the plaintiffs' suit required game farms to establish specific plans regarding the social needs of non-human primates—plans which should be in accord with current professional standards as well as subject to the direction of an attending veterinarian.¹⁵⁸ The Department of Agriculture's regulations also permitted game farms to choose which veterinarians to hire in order to implement those plans.¹⁵⁹ This latitude meant that game farms could shop around for veterinarians who would agree to whatever inferior standards they wished to establish.¹⁶⁰ Therefore, because the Department of Agriculture's lack of specific regulations permitted the game farms to engage in a practice that enabled animal abuse, it was logical to conclude they "caused" Jurnove's emotional injury.¹⁶¹ Furthermore, the Department of Agriculture's own inspectors repeatedly visited the game farm and found after every visit that conditions at the farm complied with Department regulations.¹⁶² Had the inspectors found the farm to be in non-compliance with Department regulations, or had the Department promulgated adequate rules in the first place, Jurnove's aesthetic interest in seeing animals treated humanely would never have been harmed.¹⁶³ The Department of Agriculture had failed to meet its mandate, which failure caused Jurnove's emotional injury.

This analysis appears straightforward, yet the court was relying on a controversial premise. As the *ALDF II* majority

¹⁵⁷ See *id.* at 447 (Sentelle, J., dissenting) ("Today's ruling is indeed a departure from existing aesthetic injury jurisprudence . . . the Supreme Court cases addressing aesthetic injury resulting from the observation of animals are limited to cases in which government action threatened to reduce the number of animals available for observation and study.").

¹⁵⁸ See *id.* at 438 (citing 9 C.F.R. § 3.81(a) (1997)).

¹⁵⁹ See *ALDF*, 154 F.3d at 439.

¹⁶⁰ See *id.*

¹⁶¹ *Id.*

¹⁶² See *id.* at 439-40.

¹⁶³ See *id.* at 440.

had argued, the Department of Agriculture's regulations simply permitted the game farms to create the kinds of conditions that injured Jurnove, rather than affirmatively requiring them.¹⁶⁴ The defendants did not actually compel the zoos to engage in any sort of inhumane practices. Yet the court dismissed this argument as based on a "false premise."¹⁶⁵ According to the court, the proper test for causation was not whether the government affirmatively caused the injury. Rather, courts should compare what the defendants actually did and what they should have done according to the statute.¹⁶⁶ Applying this test, the court noted that the defendants had issued regulations that gave game farms the authority to determine the standards for appropriate animal habitats, whereas the AWA required the Department of Agriculture itself to "promulgate standards to govern the humane . . . care . . . of animals."¹⁶⁷ Consequently, the defendants failed to abide by their AWA mandate and were responsible for Jurnove's injury. The logic of this analysis obscures the boldness of its implication. The Department of Agriculture's failure to prevent conduct outlawed by legislation was equivalent to forcing the conduct to occur.

Predictably, the court was expansive with its redressability analysis as well. The court argued that the relief Jurnove requested, more stringent regulations, would automatically alleviate his aesthetic injury upon any future visits to zoos, because this particular zoo would either comply or close, in which case its animals would be transferred to zoos which did adhere to tougher regulations.¹⁶⁸ The court did not require Jurnove to make a specific showing as to how the implementation of more stringent regulations would alleviate his emotional injury.¹⁶⁹ Nor did it demand that Jurnove demonstrate that the Department of Agriculture would actually enforce these new regulations should they be adopted.¹⁷⁰

¹⁶⁴ See *ALDF II*, 130 F.3d 464, 469 (D.C. Cir. 1997).

¹⁶⁵ *ALDF*, 154 F.3d at 441.

¹⁶⁶ See *id.*

¹⁶⁷ *Id.* (quoting AWA, § 2143(a) (1994)).

¹⁶⁸ See *id.* at 443.

¹⁶⁹ See *id.* at 443-44.

¹⁷⁰ See *ALDF*, 154 F.3d at 443-44.

As for the prudential zone of interests consideration, the court confidently proclaimed that "logic, legislative history, and the structure of the AWA, all indicate that Mr. Jurnove's injury satisfies the zone of interests test."¹⁷¹ First, as the very purpose of animal exhibitions was to educate people, it followed that it made no sense to maintain them unless the interests of their human observers were recognized.¹⁷² Second, Congress enacted the AWA with the intent to encourage outside monitoring of animal treatment.¹⁷³ Third, the AWA did not establish an oversight committee for animal exhibitions, as it had for research activities.¹⁷⁴ Given the anticipated monitoring by concerned animal lovers demonstrated in the legislative history, Congress must have meant for individuals like Jurnove to police the interests protected by the statute.¹⁷⁵ Consequently, Jurnove clearly fell within the zone of interests protected by the AWA.¹⁷⁶ Not surprisingly, the dissent was quick to capitalize on the controversial aspects of each of the majority's standing decisions.

Overlooking the zone of interests argument, the dissent contended that the majority's standing interpretations were a significant weakening of the Article III standing requirements.¹⁷⁷ Judge Sentelle, author of the panel opinion, warned the majority that it "should not lightly tinker with the constitutional source of federal judicial power, even when [it] may sympathize with the ideological goals of plaintiffs in a particular case."¹⁷⁸ As a result, the dissent advocated a much narrower interpretation of the standing requirements.¹⁷⁹

The dissent argued that the diminution-of-the-species touchstone was essential for an injury-in-fact analysis under

¹⁷¹ *Id.* at 444.

¹⁷² *See id.*

¹⁷³ *See id.* at 444-45 (citing several statements by Congress indicating its intent to have concerned animal lovers monitor the effectiveness of the AWA).

¹⁷⁴ *See id.* at 445.

¹⁷⁵ *See ALDF*, 154 F.3d at 445.

¹⁷⁶ *See id.*

¹⁷⁷ *See id.* at 446 (Sentelle, J., dissenting).

¹⁷⁸ *Id.* at 446-47 (Sentelle, J., dissenting).

¹⁷⁹ *See id.* at 446 (Sentelle, J., dissenting) (warning that a federal court that exercises powers beyond that permitted by Article III engages in extra-judicial activity that threatens the separation of powers).

the AWA.¹⁸⁰ The test avoided the creation of an overly flexible standing requirement that could be shaped to fit individual and subjective aesthetic preferences.¹⁸¹ According to the dissent, if one were to follow the majority's injury-in-fact logic, then "a sadist with an interest in seeing animals kept under inhumane conditions is constitutionally injured when he views animals kept under humane [ones]."¹⁸² There would no longer be any limits as to what could constitute an aesthetic injury. After all, "humaneness, like beauty, is in the eye of the beholder . . ."¹⁸³ Consequently, Jurnove's claim of aesthetic injury was too imprecise and subjective a harm upon which to base so important a finding as an injury-in-fact.

The dissent attacked the majority's causation analysis as the dangerous assertion that the government causes everything that it does not explicitly prevent.¹⁸⁴ It contended that such a holding forces federal courts to hear lawsuits against the government that allege nothing more than inadequate supervision of AWA implementation, a "wide-ranging" theory of causation inconsistent with divided government.¹⁸⁵ A proper causation analysis is one that requires a showing that the government affirmatively approved the injurious conduct.¹⁸⁶ As for redressability, it would require "sheer speculation" in order to determine what measures would adequately redress Jurnove's injuries.¹⁸⁷ The nature of Jurnove's injury was too fuzzy to find that it was likely, as opposed to merely speculative, that it would be remedied by a decision in his favor.¹⁸⁸

Analysis of the various opinions in the *ALDF* cases reveals that the ultimate problem in this case is a familiar one: the role of the federal courts in enforcing statutory compliance. The pro-standing camp believes that when a statute serves as compelling an interest as animal welfare, the standing require-

¹⁸⁰ See *ALDF*, 154 F.3d at 447 (Sentelle, J., dissenting).

¹⁸¹ See *id.* at 448 (Sentelle, J., dissenting) (contending that the elimination of the diminution of the species test would create "an expanse of standing bounded only by what a given plaintiff finds to be aesthetically pleasing").

¹⁸² *Id.* at 448-49 (Sentelle, J., dissenting).

¹⁸³ *Id.* at 448 (Sentelle, J., dissenting).

¹⁸⁴ See *id.* at 452 (Sentelle, J., dissenting).

¹⁸⁵ *ALDF*, 154 F.3d at 452 (Sentelle, J., dissenting).

¹⁸⁶ See *id.* at 453 (Sentelle, J., dissenting).

¹⁸⁷ *Id.* at 454 (Sentelle, J., dissenting).

¹⁸⁸ See *id.* (Sentelle, J., dissenting).

ments must be interpreted broadly so as to effectuate the underlying purpose of the statute. Thus, the *ALDF I* majority opinion, the *ALDF II* dissent, and the *ALDF* majority decision each emphasize the duty of the courts to make sure that the AWA, a statute designed to prevent animal abuse, actually does so.¹⁸⁹ In contrast, the anti-standing camp relies on strict adherence to traditional standing interpretations, fearful that any dilution will change the requirements from a shield against non-federal claims into a sword that forces the federal courts to become a forum for personal grievances. Thus, the *ALDF II* majority, and the *ALDF* dissent circumscribe their comments with outraged appeals to the continued integrity of the federal system.¹⁹⁰ The proper role of the judiciary creates a tension that forms a neat circle around the case. The *ALDF I* opinion began with a paean to the judiciary as the last bastion of hope for animals and the public confidence, in the face of vague legislation.¹⁹¹ The *ALDF* dissent concluded with an ominous warning that such broad judicial power would weaken the public confidence in government and facilitate a shift away from a democratic form of government.¹⁹² However, at least with regard to the AWA, it is the pro-standing camp that should win the argument.

¹⁸⁹ See, e.g., *ALDF I*, 943 F. Supp. 44, 50-51 (D.D.C. 1996) (arguing that not only are animals a subject of "great importance to all humankind," but also that the failure of the Legislative and Executive branches to reflect this reality in their animal protection statutes necessitates court intervention); see also *ALDF II*, 130 F.3d 464, 476 (D.C. Cir. 1997) (Wald, J., dissenting) (asserting that the strict standing analysis required by the majority "offends the compassionate purposes of the statute"); *ALDF*, 154 F.3d at 428-30 (reiterating the purposes of the AWA and the myriad violations Jurnove encountered as a result of the Secretary of Agriculture's inadequate implementation).

¹⁹⁰ See *ALDF II*, 130 F.3d at 467 (explaining the restrictive purpose of the standing requirements); see also *ALDF*, 154 F.3d at 454-55 (Sentelle, J., dissenting) (analogizing the *ALDF* plaintiffs to federal taxpayer plaintiffs and quoting Judge Powell's warning, "It seems to me inescapable that allowing unrestricted . . . standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government." (quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring))).

¹⁹¹ See *ALDF I*, 943 F. Supp. at 51.

¹⁹² See *ALDF*, 154 F.3d at 454.

B. *Evaluation of ALDF*

ALDF's interpretation of the standing requirements is the correct analysis of plaintiff standing under the AWA. Its statement that an acceptable AWA plaintiff is any concerned animal lover who (1) suffers emotional distress as a result of regular contact with an animal kept in conditions the plaintiff considers inhumane, (2) demonstrates that the Department of Agriculture neglected its AWA mandated duty to regulate the entity providing the inhumane conditions, and (3) specifies his requested relief as simply the general amendment of the regulation in question, is a logical and reasonable interpretation of the standing doctrine. Admittedly, the decision is uncharacteristically broad. It affirmed the sufficiency of personal emotional distress for an injury-in-fact, allowed the definition of causation to be expanded to include the absence, as well as the presence, of regulation and fashioned a definition of redressability that does not demand a specific showing as to how the harm will be alleviated. However, this broadness does not mean that the decision is incorrect. The AWA, long a focus of public criticism for its ineffectiveness,¹⁹³ may now, as a result of this decision, begin to do its job.

There are several factors that support the legitimacy of the *ALDF* decision. First, it is important to note that it was not until the 1920s that the standing doctrine emerged as a discrete doctrine in its own right.¹⁹⁴ Since that time, the courts have repeatedly altered the definitions of its various requirements, very often making them more inclusive.¹⁹⁵ For example, in 1973, the Supreme Court, in *United States v. SCRAP*,¹⁹⁶ substantially broadened the injury-in-fact requirement.¹⁹⁷ The Court held that five environmentally concerned

¹⁹³ See, e.g. Mendelson, *supra* note 15, at 795 (stating that there is a general consensus that the AWA has failed to fulfill its potential in fostering the humane treatment of animals); see also Bridget Klauber, *See No Evil, Hear No Evil: The Federal Courts and the Silver Spring Monkeys*, 63 U. COLO. L. REV. 501, 520 (1992) (stating that "[t]he AWA in its present configuration is impotent").

¹⁹⁴ See Klauber, *supra* note 193, at 511.

¹⁹⁵ See Klauber, *supra* note 193, at 511.

¹⁹⁶ 412 U.S. 669 (1973).

¹⁹⁷ See *id.* at 683-91. Klauber notes, however, that the Supreme Court has been trying to back down from this extreme position. See Klauber, *supra* note 193, at 511.

plaintiffs had satisfied the injury-in-fact requirement by alleging nothing more than an aesthetic injury caused by the potentially harmful environmental impact of a railroad surcharge that might discourage recycling.¹⁹⁸ Although those plaintiffs were not suing under the AWA,¹⁹⁹ the *SCRAP* decision supports the legitimacy of the *ALDF*'s expansive standing interpretation in AWA suits.

Second, it is possible to assert that the *ALDF* court's standing interpretation is not an expansion of the doctrine of standing per se, but simply a reflection of a standing conception that is not currently shared by a majority of jurists. It has been noted that an interest must be "comprehensible to the Court, nonidiosyncratic, and sufficiently accepted by society at large to be considered judicially cognizable"²⁰⁰ Thus, *ALDF*'s standing interpretation can be considered as merely a holding slightly ahead of its time, rather than a fundamental misconception of the nature of standing itself.

Finally, there is great merit to the contention that, since the protection of animals is of increasing national concern,²⁰¹ the courts should bolster the AWA by making good faith, legally supportable standing decisions in order to further its purpose. It is true that the doctrine of separation of powers forbids the judiciary to usurp the legislature's constitutionally delegated function to create the law. It is Congress, not the federal courts, which is directly accountable to the American people and should effectuate their concerns. However, for the courts to repeatedly dismiss suits based upon a rigid and detached standing analysis contrary to the recognized purposes of the AWA is equally unjust. Indeed, to engage in such action is an abrogation of the social responsibility of the courts to ensure that the statutes the citizenry helped to create fulfill their intended purpose.²⁰² As one commentator has noted, "stand-

¹⁹⁸ See *SCRAP*, 412 U.S. at 683-84.

¹⁹⁹ See *id.* at 670.

²⁰⁰ Klauber, *supra* note 193, at 509 (quoting Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915, 1934 (1986)).

²⁰¹ See Gary L. Francione, *Animals, Property and Legal Welfarism: "Unnecessary" Suffering and the "Humane" Treatment of Animals*, 46 RUTGERS L. REV. 721, 721 (1994).

²⁰² See, e.g., Klauber, *supra* note 193, at 520 ("To insure that our society acts responsibly now, the courts must allow the public to scrutinize the medical research community and its practices. Just because one refuses to hear the screams

ing law not only leads to bad decisions, it represents bad sociology and bad morality as well."²⁰³

It is wrong for the judiciary to use the separation of powers argument to insulate itself from legitimate AWA claims that happen to be controversial. Such behavior threatens the credibility of the federal courts and makes federal judges complicit partners in illegal government behavior—which arguably erodes democracy to a much greater degree than expansion of the standing doctrine.

III. *ALDF*'S IMPACT UPON ANIMAL WELFARE AND ANIMAL RIGHTS

"The greatness of a nation and its moral progress can be judged by the way its animals are treated."²⁰⁴

The *ALDF* case evidences the moral progress mentioned above. At the district court level, despite a previous reversal,²⁰⁵ the *ALDF I* court, motivated by its concern that the AWA be used to protect animals, persisted in holding that the standing doctrine had been satisfied.²⁰⁶ The *ALDF* court boldly contradicted its own precedent, over vehement dissent, in part because of its conviction that the AWA reflected a deep public concern for the humane treatment of captive animals.²⁰⁷ Significantly, on April 19, 1999, the Supreme Court denied certification of this case.²⁰⁸ Although the denial was not accompanied by explanation, the Court apparently was not concerned that the *ALDF* decision threatened the demise of Article III standing. Consequently, *ALDF*'s standing interpretation is good law, at least in the District of Columbia, and suits brought under the AWA may now achieve tangible, positive protection for animals living in captivity.

does not mean that the suffering does not exist.").

²⁰³ Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1511 (1988).

²⁰⁴ Rhonda Bennon, *Research Guide for Animal Welfare and Animal Rights*, 4 LEGAL REFERENCES SERVICES No. 3, at 3 (1984) (quoting Mahatma Gandhi).

²⁰⁵ See *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720 (D.C. Cir. 1994).

²⁰⁶ See *ALDF I*, 943 F. Supp. 44, 52 (D.D.C. 1996).

²⁰⁷ See *ALDF*, 154 F.3d 426, 445 (D.C. Cir. 1998), *cert. denied*, *National Ass'n for Biomedical Research v. Animal Legal Defense Fund, Inc.*, 119 S. Ct. 1454 (1999).

²⁰⁸ See *National Ass'n for Biomedical Research v. Animal Legal Defense Fund, Inc.*, 119 S. Ct. 1454 (1999).

However, proponents of animal rights, as opposed to animal welfare, are not likely to hail the decision as a long-awaited advance in animal protection.²⁰⁹ This is because, from an animal rights perspective, any decision that focuses on the question of human, rather than animal, standing in animal abuse suits misses the point. Animal rights advocates campaign for the recognition of rights inherent in animals themselves, which would mean that animal abuse suits could be brought on behalf of the animal directly, rather than through the medium of an injury done to a human being.²¹⁰ The more common animal welfare perspective, on the other hand, while concerned about animal mistreatment, does not propose that animals share "the moral respect and consideration" that we consider inherently due human beings.²¹¹ *ALDF* reflects the animal welfare perspective. The government was not sued because the primates themselves were injured by the inhumane conditions, although undoubtedly that was the plaintiffs' main concern. Rather, the plaintiffs sued on the grounds that *they* were injured by the inhumane conditions. Thus, from the animal rights perspective, this suit was merely the perpetuation of the status quo. Indeed, from the animal rights viewpoint, the AWA itself is meaningless. For as a "welfare" act, by its very definition, the AWA subscribes to the theory that human capture and use of animals is acceptable, as long as it is done humanely. Thus, the AWA does not protect animals from human use in all situations, but only those in which that use harmed the animal, and even then only if a human being was injured as a result of that animal mistreatment. Consequently, for animal rights advocates, *ALDF* is an unremarkable, and perhaps even unfortunate, decision. After all, if the courts are

²⁰⁹ See e.g., GARY L. FRANCIONE, *RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT* (1996).

²¹⁰ See, e.g., Roger W. Galvin, *What Rights for Animals? A Modest Proposal*, 2 PACE ENVTL. L. REV. 245, 246 (1985) ("[T]his article asserts the position that animals need legal recognition of their inherent rights and interests. They must have access to our courts, legislatures, and administrative agencies so they may have their rights and interests given the same consideration as that of any other legal entity.").

²¹¹ FRANCIONE, *supra* note 209, at 8.

making it increasingly easy for human standing to be established in animal abuse cases, the need for the recognition of independent jural standing for animals may become less pressing.

Nevertheless, *ALDF* suggests two reasons why independent standing for animals may be an idea whose time has come. The first reason stems from the circuit court's recognition that in order to effect the congressional intent behind the AWA, it had to interpret the Article III standing requirements more broadly than it had in the past. As mentioned earlier, this suggests that the court considered the threat of animal mistreatment to be more important than the maintenance of traditional standing principles. Furthermore, our own history shows that the concept of a "right" has changed over time—women and African-Americans today have rights, yet this has not been the case for much of America's history. In essence, society has evolved. As there is evidence that a pro-animal sentiment is shared by a significant portion of the public at large,²¹² it is plausible to assume that, in time, society, and by extension the judiciary, may continue this evolutionary process by determining that animals should be granted rights as well.

The second reason why *ALDF* supports the recognition of independent jural standing for animals is suggested by the *ALDF* dissent. The dissent contended that the majority had to engage in far-fetched arguments in order to find that Jurnove had standing.²¹³ While this Comment has shown that the *ALDF* decision was perfectly reasonable, the dissent did make

²¹² See, e.g., Galvin, *supra* note 210, at 245 ("[F]or many, limiting the applicability of the concepts of morality and legal responsibility to solely our fellow man seems right, proper, and grounded on a solid moral foundation A shift in awareness and perception has led many to the inevitable conclusion that justice only for man is a perverse distortion of any meaningful concept of justice."); see also FRANCIONE, *supra* note 191, at 721 ("There is increasing social concern about our use of nonhumans for experiments, food, clothing, and entertainment. This . . . reflects . . . our recognition that the differences between humans and animals are, for the most part, differences of degree and not of kind.").

²¹³ See *ALDF*, 154 F.3d 426, 451 (D.C. Cir. 1998) (Sentelle, J., dissenting), *cert. denied*, National Ass'n for Biomedical Research v. Animal Legal Defense Fund, Inc., 119 S. Ct. 1454 (1999) ("According to the majority, causation is established if a plaintiff demonstrates that challenged governmental action 'authorizes' the plaintiff's injuries. But the majority uses the term 'authorize' in a very loose way.").

an important point. There is a danger that this broadened standing analysis could create a "slippery slope" in which courts, in their efforts to give effect to the AWA, find standing to sue in situations where none should exist. For example, a court might use this expanded standing doctrine to find a legally redressable injury when primates were not kept "in cages in which recordings of Mozart piano concertos are played around the clock."²¹⁴ Such results would erode the doctrine of standing to the point where the federal courts would be flooded with frivolous, and constitutionally impermissible, claims.

One solution to this legitimate concern is to grant animals their own jural standing. Such a decision would relieve the courts of the burden of justifying their decisions with tortured explanations of how a human plaintiff was harmed by the animal mistreatment. The criticism that "the search for an actual human injury often leads to tangential inquiries into topics such as the plaintiff's vacation preferences and feelings about animals" would no longer be applicable.²¹⁵ Although granting standing to animals requires serious changes in our legal system, and brings up a new set of problems as to how to determine if an animal has been injured, independent standing would resolve the problem of the erosion of meaningful standing requirements. If courts are to continue to be responsive to the abuses inflicted upon animals, yet at the same time protect an important constitutional tenet from destruction, such a change might be warranted.

Yet independent jural standing for animals, no matter how great the public sympathy towards animal mistreatment, is unlikely to occur. One pamphlet characterized the controversy over animal rights as a choice between "Rats or Babies,"²¹⁶ and the characterization is relatively apt. While a protective sentiment towards animals is an increasingly popular viewpoint, for most people there is a stopping point, namely when the rights of an animal come into conflict with the rights of a

²¹⁴ *Id.* at 448 (Sentelle, J., dissenting).

²¹⁵ See Schmahmann & Polacheck, *supra* note 7, at 779.

²¹⁶ This phrase is from a donation solicitation pamphlet produced by a society called "The Nature of Wellness," based in Glendale, California (on file with *Brooklyn Law Review*). The organization is devoted to stopping animal experimentation in the name of science. For information regarding "The Nature of Wellness," see *The Nature of Wellness* (visited Feb. 18, 2000) <<http://www.animalresearch.org>>.

human being. "It is one thing to treat animals as mere resources if they are presumed to be little more than living robots, but it is entirely different if they are recognized as fellow sentient beings."²¹⁷ Thus the *human* standing approach, as broadened by *ALDF*, is perhaps the best method of animal protection available in our society. "They can't make or abide by agreements, can't learn to follow rules of ownership, can't do anything except what their instincts prompt. They cannot be a part of our society, period. They just don't get it."²¹⁸ Considering views like this, it is difficult to posit that independent jural standing for animals is a legitimate possibility.

Additionally, several logistical hurdles need to be overcome in order to grant animals standing. First, our courts, as presently configured, are not appropriate fora for the resolution of disputes between animals and humans.²¹⁹ Our legal system simply is not designed to resolve inter-species disputes. This is because our courts, run by human beings, can approach animal issues from only one perspective, the human one.²²⁰ Unlike humans, animals cannot explain the nature and source of their injuries. Thus, when animal rights activists seek judicial recognition of animal injuries that have not harmed any humans, they force courts to act as "guardians" for the animal and to independently ascertain whether an injury was inflicted.²²¹ This is an impossible task that clearly exceeds the scope of a court's duties. Our courts would become "free-ranging commissions of inquiry . . . if the requirements of human standing were removed and any advocate . . . purporting to speak for any animal [was] entitled judicial access to press the animal's rights and to argue the animal's case."²²² The judiciary simply is not qualified to make national animal policy.²²³

The second barrier to animal standing is related to the first. Although our legal system is not equipped to handle inter-species disputes, it does have a method of dealing with

²¹⁷ FRANCIONE, *supra* note 209, at 722.

²¹⁸ Per Malloch, *Animals Should be Eaten, Vegetarians Should Be Quiet*, COLUMBIA DAILY SPECTATOR, Oct. 13, 1998, at 4.

²¹⁹ See Schmahmann & Polacheck, *supra* note 7, at 779.

²²⁰ See *id.*

²²¹ *Id.*

²²² *Id.* at 760.

²²³ See *id.*

animals. Animals are defined as property and are thus subject to property law.²²⁴ This property classification essentially means that an injury inflicted upon an animal (however sentient) is no more significant than a dent inflicted upon a car. The only factor of legal significance is that a human being was harmed as a result. According to one commentator, the only way to remove this property classification from animals would be to dismiss as irrelevant "innate human characteristics, the ability to express reason, to recognize moral principles, to make subtle distinctions, and to intellectualize."²²⁵ While it is not necessarily true that every human exhibits these admirable qualities, it is true that no animal does. There is no escaping the truth that "[t]here is property and there are persons . . . if animals are not property, then they must migrate to the realm of entities with rights."²²⁶ Because animals can never share these uniquely human traits, which create the benefits (and burdens) of having rights, they must be classified legally as property (although a special, sentient kind). This negates the possibility of their independent jurial standing.

A third impediment to animal standing is American economic and research needs. An extremist viewpoint introduces it best. "If the animal rightists succeed, we will no longer be able to produce or consume animal products. No more hamburgers at McDonald's . . . [and it would be] rough on the poor people in Third World countries, who would have to suffer natural disasters, poverty, or war, without being able to count on American animal agriculture."²²⁷ Additionally, animal testing is an integral part of the American pharmaceutical industry, as well as a means of discovering life saving cures. "Spare the rat and kill the child" is a common refrain when animal testing bans are proposed.²²⁸ While very few people wish the animal kingdom to be a "spare parts supply house" for the drug industry, there is probably very little support for the saving of a rat's life at the expense of a dying child.²²⁹

²²⁴ See Kelch, *supra* note 8, at 535.

²²⁵ Schmahmann & Polacheck, *supra* note 7, at 752.

²²⁶ Kelch, *supra* note 8, at 581.

²²⁷ MARQUARDT, *supra* note 1, at 66-67.

²²⁸ MARQUARDT, *supra* note 1, at 35.

²²⁹ MARQUARDT, *supra* note 1, at 37-38. Interestingly, the author points out that even the diabetic director of research and investigations for People for the Ethical

Therefore, if animals had standing to sue, every animal slaughter, not just those of bunnies and puppy dogs, could potentially become a legally cognizable claim. Countervailing considerations such as economic duress or medical necessity would carry no weight, just as they do not with human homicide. It is unlikely that the American populace as a whole, no matter how concerned it becomes with animal abuse, will lobby Congress to implement a change with such massive and significant repercussions.

However, while the recognition of animal rights is an unlikely possibility, greater protection of their welfare is not. Jeremy Bentham famously argued, "The question is not can they reason? nor, can they talk? but, can they suffer?"²³⁰ If it is generally agreed that animals, because of their capacity for feeling, should be treated humanely, there is no reason why the denial of standing to animals should result in their oppression. In the case of *Corso v. Crawford Dog and Cat Hospital, Inc.*,²³¹ a court considered the issue of the damages appropriate for the maltreatment of a dog's euthanized body.²³² The court stated "a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property To say [a dog] is a piece of personal property and no more is a repudiation of our humaneness."²³³ In *Bueckner v. Hamel*,²³⁴ a concurring judge commented in dicta: "Society has long since moved beyond the untenable Cartesian view that animals are unfeeling automatons and, hence, mere property. The law should reflect society's recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live."²³⁵ Just because animals are not endowed with the same rights as humans does not mean that they can be maltreated and exploited with impunity. As *ALDF* demonstrated, our legal system is

Treatment of Animals ("PETA"), an animal rights (as opposed to welfare) group, uses synthetically manufactured insulin that contains some animal products. See MARQUARDT, *supra* note 1, at 37-38.

²³⁰ Schmahmann & Polacheck, *supra* note 7, at 750 (citation omitted).

²³¹ 97 Misc. 2d 530, 415 N.Y.S.2d 182 (N.Y. Civ. Ct. Queens County 1979).

²³² See *id.* at 530-31, 415 N.Y.S.2d at 182-83.

²³³ *Id.* at 531, 415 N.Y.S.2d at 183.

²³⁴ 886 S.W.2d 368 (Tex. App. 1994).

²³⁵ *Id.* at 377-78 (Andell, J., concurring).

adapting to society's evolving recognition of the importance of animal welfare. There is no reason not to develop and legally enforce this refinement of our collective animal consciousness.

CONCLUSION

It has been argued that, with regard to animal abuse, the doctrine of standing as it is currently interpreted "forces both litigants and courts to address situations involving animals from a human perspective, the only perspective from which any of us are truly qualified to analyze an issue."²³⁶ Without challenging that position, the *ALDF* decision has, through its expansive interpretation of the doctrine of standing, made suits under the AWA an effective means of achieving protection for the animals that come under its auspices. However, while the decision is a triumph for all who care about animal welfare, it does not foreclose the possibility of congressional and judicial recognition of rights inherent to animals. Rather, *ALDF* may serve as a catalyst for increased pressure on government to allow animals to have their own independent jural standing, for two reasons: first, because the court's broad interpretation of standing demonstrates judicial and societal recognition of the increasing necessity for animal protection, and second, because of the valid concern that a continued broadening of our standing requirements may lead to the erosion of any meaningful standing requirement for AWA suits. However, the recognition that animals have co-equal rights with human beings is unlikely to occur because of the structure of our legal system and the needs of our populace. Consequently, in order to extend as much protection as possible to animals, *ALDF*'s interpretation of AWA standing should be adopted as the standard in all courts. Now that the Supreme Court has denied certiorari for *ALDF*, this seems possible.

Fiona M. St. John-Parsons

²³⁶ Schmahmann & Polacheck, *supra* note 7, at 779.

