DEVELOPMENTS IN THE LAW

ACCESS TO COURTS

Aesthetic Injuries, Animal Rights, and Anthropomorphism

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VI. AESTHETIC INJURIES, ANIMAL RIGHTS, AND ANTHROPOMORPHISM

Over the last forty years, federal law has conferred a wide range of rights on animals. This Part explores one way in which private suits to enforce these rights gain access to federal courts: by alleging that the unlawful treatment of animals is causing "aesthetic injury" to a human plaintiff. This type of suit has long been used to enforce regulatory

and statutory protections of ecosystems and species. But it is only in the last decade that courts have recognized this type of injury in suits aimed at protecting *individual* animals. If only individuals, and not groups, can have rights — as many rights theorists argue — this development may be significant, marking the beginning of a new form of judicial access for animals: via human proxy. However, there is a tension here, as the doctrinal development nominally pertains to persons alone. It is only through their transformation into harms to persons that violations of animal rights are remedied by the courts. Although classical animal rights theorists may see this as a crude legal device that fails to truly extend the protection of U.S. courts to animals, it is possible that such protection cannot, as these theorists suggest, be brought about by a change in the legal status of animals alone. What might also be necessary is a change in our human sensibilities. And this type of change might underlie the expansion of the "aesthetic injury" doctrine that can be seen in the cases discussed in this Part.

Section A provides an overview of the legal status of animals and the requirements for bringing suit in federal court that limit their access. Section B addresses a development in Article III standing jurisprudence: the recognition that human plaintiffs' aesthetic interests in the humane treatment of individual animals can provide the basis for claims of legal injury. Section C explores the ways in which this development relates to the rights of animals. Section D discusses its significance in the context of animal rights theory. Section E concludes.

A. Animals in Court: Causes of Action and Standing

In 1386, a female pig was put on trial in France for causing the death of a child by tearing his face and arms.[1] Trials such as this were not uncommon in medieval Europe.[2] The same procedural rules applied to human and animal defendants, and the defense counsel for animals often "raised complex legal arguments" on their behalf.[3] In this case, the sow was found guilty, and true to *lex talionis* — the law of "eye-for-an-eye" — the tribunal ordered that she be maimed in the head and upper limbs; after this, she was hanged in the public square.[4]

Today, animals hold a very different place in our law: as the subjects of extensive federal protection[5] and the beneficiaries of private

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[1] E.P. EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS 140 (The Lawbook Exchange 1998) (1906).

[2] *See generally id.* at 1–192 (providing detailed accounts of many of these trials).

[3] Jen Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals*, 9 ANIMAL L. 97, 99 (2003).

[4] EVANS, *supra* note 1, at 140.

[5] *See* Henry Cohen, *Federal Animal Protection Statutes*, 1 ANIMAL L. 153 (1995).

trusts,[6] they are no longer defendants, but rather, aspiring plaintiffs in U.S. courts. In *Palila v. Hawaii Department of Land & Natural Resources*,[7] for example, an endangered bird species brought suit, along with environmental organizations,[8] to enforce the Endangered Species Act.[9] On appeal, the Ninth Circuit stated: "As an endangered species under the Endangered Species Act . . . , the bird . . . has legal status and wings its way into federal court as a plaintiff in its own right."[10] Turtles,[11] bears,[12] squirrels,[13] and various other bird species[14] have likewise had their day in court. However, in these cases, human plaintiffs were also involved.

When courts have confronted cases in which animals were the sole plaintiffs, such as in *Cetacean Community v. Bush*,[15] they have often held that animals were not authorized to bring suit in their own right.[16] In *Cetacean Community*, the problem for the animal plaintiffs was that the statutes cited for causes of action authorize only "persons" to bring enforcement suits, and the court determined that animals do not fall into these statutes' definitions of "person."[17]

This conclusion was not tautological, for one need not be a human to be a legal person: corporations[18] and cities,[19] for example, can be le-

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6 *See* Jeffrey Toobin, *Rich Bitch: The Legal Battle over Trust Funds for Pets*, NEW YORKER, Sept. 29, 2008, at 38.

7 852 F.2d 1106 (9th Cir. 1988).

8 *Id.* at 1107.

9 16 U.S.C. §§ 1531–1544 (2006).

10 *Palila,* 852 F.2d at 1107. The court explained that the bird, "[t]he Palila (which has earned the right to be capitalized since it is a party to [the] proceeding)," was being "represented by attorneys for the Sierra Club, Audubon Society, and other environmental parties." *Id.*

11 Loggerhead Turtle v. County Council, 148 F.3d 1231 (11th Cir. 1998).

12 Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, 685 F.2d 678 (D.C. Cir. 1982).

13 Mount Graham Red Squirrel v. Yeutter, 930 F.2d 703 (9th Cir. 1991).

14 Marbled Murrelet v. Babbitt, 83 F.3d 1068 (9th Cir. 1996); N. Spotted Owl v. Lujan, 758 F. Supp. 621 (W.D. Wash. 1991).

15 386 F.3d 1169 (9th Cir. 2004).

16 In *Cetacean Community*, the court held that the global community of whales, dolphins, and porpoises were not authorized to sue under the citizen suit provisions of the Administrative Procedure Act and various animal protection statutes, including the Endangered Species Act. *Id.* at 1176–79; *see also* Citizens To End Animal Suffering & Exploitation, Inc. v. New England Aquarium, 836 F. Supp. 45, 49–50 (D. Mass. 1993) (holding that a dolphin lacked standing to sue under the Marine Mammal Protection Act); Hawaiian Crow v. Lujan, 906 F. Supp. 549, 551–52 (D. Haw. 1991) (holding that Hawaiian Crow is not a "person" within the meaning of the citizen suit provision of the Endangered Species Act). The *Cetacean Community* court concluded that its statements to the contrary in *Palila* were "little more than rhetorical flourishes." *Cetacean Cmty.*, 386 F.3d at 1174.

17 *Cetacean Cmty.*, 386 F.3d at 1177–79. On the status of animals as "legal things" that are often "invisible to civil law," see STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 4 (2000).

18 *See, e.g.*, Walker v. City of Lakewood, 272 F.3d 1114, 1123 n.1 (9th Cir. 2001).

19 *See, e.g.*, City of Sausalito v. O'Neill, 386 F.3d 1186, 1200 (9th Cir. 2004).

gal persons.[20] But so far, the only animals that are "persons" are humans.[21] Thus, although federal law recognizes "a wide range of animal rights,"[22] these rights are unlike the common law rights of humans in that animals cannot sue to enforce them. Enforcement is left primarily to governmental action, which may be supplemented by private claims when these are authorized by "citizen suit" provisions.[23]

In addition to having a cause of action, a plaintiff must meet the requirements of constitutional and prudential standing. Under the Supreme Court's interpretation of Article III, a plaintiff must demonstrate that he has "suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; that the injury is "fairly traceable to the challenged action of the defendant"; and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[24] The courts have also created "prudential" requirements, which Congress can eliminate when drafting a statute. The most important of these requires allegation of more than "a generally available grievance"[25] shared by all or most citizens, and that this injury "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for [the] complaint."[26]

B. Developments in the Law of Aesthetic Injury

In the past decade, the law of standing as it relates to claims about animal rights has undergone significant development through a series

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[20] Drawing on this fact, Justice Douglas famously suggested that ecosystems should be granted causes of action, or "statutory standing." *See* Sierra Club v. Morton, 405 U.S. 727, 741–43 (1972) (Douglas, J., dissenting) ("Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. . . . Inanimate objects are sometimes parties in litigation. . . . So it should be as respects valleys, alpine meadows, rivers, lakes . . . ."). This line of argument is further developed in Christopher D. Stone, *Should Trees Have Standing? — Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). Addressing the constitutional issues that might be raised, Professor Cass Sunstein argues that nothing in Article III limits Congress's power to grant animals statutory standing to bring suit to protect their legal interests. Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1360–61 (2000).

[21] Sunstein, *supra* note 20, at 1359.

[22] *Id.* at 1333–34. The Animal Welfare Act creates what Professor Sunstein has deemed "an incipient bill of rights for animals." *Id.* at 1334. *But cf.* GARY FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 185–249 (1995) (arguing that the Animal Welfare Act does not confer rights on animals).

[23] The statute creating the rights may contain such a provision. *See, e.g.*, Endangered Species Act, 16 U.S.C. § 1540(g) (2006). When it does not — as is the case with the Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2006) — plaintiffs may be able to rely on the citizen suit provision of the Administrative Procedure Act (APA), 5 U.S.C. § 702 (2006).

[24] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000).

[25] Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1992).

[26] Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (2000).

of appellate court cases. In *Animal Legal Defense Fund v. Glickman*[27] and *Animal Legal Defense Fund v. Veneman*,[28] the plaintiffs sued the U.S. Department of Agriculture on the grounds that its regulation of the treatment of particular primates in zoos violated the agency's statutory mandate under the Animal Welfare Act[29] (AWA). And in *American Society for the Prevention of Cruelty to Animals v. Ringling Brothers & Barnum & Bailey Circus*,[30] the plaintiffs sued a circus owner under the citizen suit provision of the Endangered Species Act[31] (ESA), alleging that the circus mistreated particular elephants in violation of the statute. On the issue of standing, the plaintiffs in all three cases alleged particularized and concrete injury by virtue of the fact that they had developed personal attachments to the specific animals at issue.[32] Thus, a central question in all of these cases was whether the plaintiffs could have a legally cognizable interest in the treatment of an individual animal.

In the core cases establishing the scope of aesthetic interests — cases building on the Supreme Court's 1972 holding in *Sierra Club v. Morton*[33] — species and ecosystems, not particular animals, were at issue. As a result, the legally cognizable aesthetic interest in observing animals established by these cases was one of observing species: plaintiffs gained access to the court by virtue of the injuries they incurred as the result of defendants' actions that threatened to significantly diminish the species of animal.[34] It was by characterizing their injury as "an increased probability of one kind or another," such as an increased chance that there would be fewer animals available for viewing, that the plaintiffs in these suits satisfied the standing requirement.[35] And

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27 154 F.3d 426 (D.C. Cir. 1998) (en banc).

28 469 F.3d 826 (9th Cir. 2006), *vacated en banc at the request of the parties*, 490 F.3d 725 (9th Cir. 2007). The parties requested the opinion be vacated as part of their settlement of the case, after a sua sponte call in which the court voted to rehear the case en banc. *See* 490 F.3d at 726.

29 7 U.S.C. §§ 2131–2159 (2006).

30 317 F.3d 334 (D.C. Cir. 2003); *see also* Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 246 F.R.D. 39 (D.D.C. 2007).

31 16 U.S.C. § 1540(g) (2006).

32 *See Veneman*, 469 F.3d at 832–33; *Ringling Brothers*, 317 F.3d at 337; *Glickman*, 154 F.3d at 431–32.

33 405 U.S. 727 (1972); *id.* at 734 ("Aesthetic and environmental well-being, like economic well-being, are . . . deserving of legal protection through the judicial process.").

34 *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 562–63 (1992) (noting that "the desire to use or observe an animal species . . . is undeniably a cognizable interest for purpose of standing"); Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 231 n.4 (1986) (holding that plaintiffs "alleged a sufficient 'injury in fact' in that the whale watching and studying of their members will be adversely affected"); *Sierra Club*, 405 U.S. at 734 (holding that plaintiffs alleged sufficient injury in claiming that a development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park" (internal quotation mark omitted)).

35 Sunstein, *supra* note 20, at 1356.

in the view of some judges, diminution of the species was the "touchstone" of the law.[36]

However, the courts in three recent cases reasoned that there could be no relevant distinction between harm to a species and harm to a particular animal. In the *Glickman* court's discussion of the standing of one plaintiff, it explained: "The key requirement . . . is that the plaintiff have suffered his injury in a personal and individual way — for instance, by seeing with his own eyes the particular animals whose condition caused him aesthetic injury."[37] Thus, the *Glickman* court held that the inhumane treatment of particular primates at the zoo could be the predicate of a legally cognizable aesthetic injury. And in *Veneman*, the court expressly articulated this point: "For purposes of injury-in-fact, a distinction between harm to individual animals, on the one hand, and harm to an animal species through diminution or extinction, on the other, is illogical. The injury at issue is not the animals' but the human observer's."[38]

While *Veneman* is primarily significant for its support of the *Glickman* holding,[39] the *Ringling Brothers* court made a further impact on federal standing jurisprudence in the context of what might be considered animal rights cases. Unlike the plaintiff at issue in *Glickman*, the plaintiff in *Ringling Brothers* did not have concrete plans to continue seeing the elephants whose treatment caused his injury.[40] He merely *wanted* to see them, and this fact is significant. When seeking injunctive relief, "harm in the past . . . is not enough to establish a present controversy, or in terms of standing, an injury in fact."[41] The D.C. Circuit concluded, however, that this difference in imminence was not an insurmountable obstacle. The court drew on *Friends of the Earth v. Laidlaw Environmental Services*,[42] a Supreme Court case holding that the plaintiffs suffered injury in fact when they desired to use and enjoy one of their favorite rivers for recreation but could not because it was polluted. The court concluded that "an injury in fact can be found when a defendant adversely affects a plaintiff's enjoyment of

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[36] *See, e.g.*, *Glickman*, 154 F.3d at 448 (Sentelle, J., dissenting).

[37] *Id.* at 433 (majority opinion).

[38] Animal Legal Def. Fund v. Veneman, 469 F.3d 826, 834 (9th Cir. 2006), *vacated en banc at the request of the parties*, 490 F.3d 725 (9th Cir. 2007).

[39] In *Veneman*, the Ninth Circuit followed the D.C. Circuit's reasoning, finding standing on the basis that the alleged injury was "virtually indistinguishable from the injury the D.C. Circuit found constitutionally sufficient in *Glickman*." *Veneman*, 469 F.3d at 833.

[40] Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334, 337 (D.C. Cir. 2003).

[41] *Id.* at 336.

[42] 528 U.S. 167 (2000).

flora or fauna, which the plaintiff *wishes* to enjoy again upon the cessation of the defendant's actions."[43]

As the following sections demonstrate, the development in the doctrine of aesthetic injury in these three cases can be read as providing judicial access to a new type of suit in which the rights of animals are adjudicated. But there are tensions in such a reading, as features of the cases cut against such a clear conclusion.

C. Animal Rights and Human Proxies

The fact that these cases involved individual animals, rather than species, is important, for it means that courts' doors are now open to citizen suits that might lead to the enforcement of animal rights. Although the aesthetic injury cases of the 1970s–1990s created and enforced new duties towards species and ecosystems — by either requiring the promulgation of new regulations or the enforcement of existing ones — these duties were not necessarily the correlatives of animal rights. The reason for this potential divergence is that a species, unlike an individual, is not an entity with coherent interests. For example, if an animal species will benefit from the selective killing of its members that are carrying a deleterious gene, the species and some of its members will have conflicting interests. In this case, as a practical matter, a duty to protect the species will not confer rights upon all of its members.[44] Moreover, as a conceptual matter, the idea of "species rights" is — according to many rights theorists — nonsensical, the problem being that "[s]pecies and ecosystems are the names for global entities, to which the theory of rights is inapplicable."[45] On this account, judicial enforcements of statutory duties to animals in the core aesthetic injury cases did not enforce animal rights. Seen in this context, *Glickman* and the cases following it are significant in that they open U.S. courts' doors to citizen suits in which animal rights are adjudicated. Whether this development should be seen as an advance in

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[43] *Ringling Brothers*, 317 F.3d at 337 (emphasis added).

[44] This is not to say that a law created with the intention of protecting a species cannot do so by conferring rights on individual animals. One might, for example, make it illegal to kill individual bald eagles as a way of protecting the entire species. But this approach would create group rights from individual rights, not vice versa. *See also* LISA H. SIDERIS, ENVIRONMENTAL ETHICS, ECOLOGICAL THEOLOGY, AND NATURAL SELECTION 159 (2003) (noting that when a species is protected, it is not the individual members of the species that are protected — although some of them will be protected indirectly — but rather the form of life that they represent).

[45] Mariachiara Tallacchini, *Human Right to the Environment or Rights of Nature?*, *in* 1 CHALLENGES TO LAW AT THE END OF THE 20TH CENTURY: RIGHTS 125, 131 (Rex Martin & Gerhard Sprenger eds., 1997) (citation omitted). For a general discussion of the problem of attaching rights to groups, see Christopher Heath Wellman, *Liberalism, Communitarianism, and Group Rights*, 18 LAW & PHIL. 13, 15–27 (1999).

animals' access to the courts, however, is arguable. There are two very different ways to conceptualize this development.

On one account, these cases speak only to human interests and their enforcement by the courts. As Professor Cass Sunstein notes, having a legal interest in a dispute can be thought of as having a property interest at stake.[46] Thus, one might suggest the legal effect of these cases is comparable to that of creating a new property right in animals that belongs not to the owner, but to the community — to those who view the animal (in the case of *Glickman*) and even to those who want to view the animal (in the case of *Ringling Brothers*). From this perspective, the development of the law in these cases is a further commodification of animals as legal things, not a shift to a recognition of them as rights-bearers. Given that these cases do not actually grant judicial access to animals, but rather to new classes of persons, one might argue that their only significance is that they expand the scope of the "aesthetic injury" field of the "injury in fact" test.

Although perhaps doctrinally correct, this formalistic view fails to recognize crucial functional aspects of the cases. If the development were truly comparable to an extension of property rights in animals, the origin of an owner's new duties to his animals — the ultimate source of law — would be his common-law or statutory duties to those persons who had aesthetic interests in them. However, the relevant laws in these aesthetic injury suits do not give rights to persons, but rather impose duties on agencies. The AWA, for example, requires that the Secretary of Agriculture promulgate standards governing the treatment of animals in order to "insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment."[47] The AWA and ESA are first and foremost public law. If these aesthetic injury suits are ultimately successful, they will result in the creation and enforcement of duties to animals, not persons. In the classic Hohfeldian framework,[48] this judicial enforcement of duties to animals involves the creation of animal rights. Thus, when seen functionally — with an eye to what is at stake and can be achieved — these cases impact not only the access of humans to courts, but also that of animals: through these developments in standing law, judges come to adjudicate a new class of claims about the statutory rights of privately owned animals and the adequacy of the regulations protecting them.

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[46] *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 191–92 (1992).

[47] 7 U.S.C. § 2131 (2006).

[48] *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–33 (1913) (arguing that rights and duties are "jural correlatives," so that owing a duty to an entity provides that entity with a right and vice versa).

There is, moreover, a sense in which the plaintiffs in these cases can be seen as proxies for the animals that they brought suit to protect. In all three cases, the court's recognition of injury in fact was predicated on the specificity not only of the harm to the plaintiffs, but also of that to the animals. In the *Glickman* court's extensive, eight-page analysis of injury in fact,[49] for example, it repeatedly emphasized the particularity of the animals whose harming gave rise to the plaintiff's aesthetic injuries: "At this particular zoo . . . he saw particular animals enduring inhumane treatment. He developed an interest, moreover, in seeing these particular animals living under humane treatment. As he explained, '[w]hat I observed . . . greatly impaired my ability to observe and enjoy *these captive animals.*'"[50] In *Ringling Brothers*, the D.C. Circuit went further, treating this particularity as the predicate of the legally cognizable injury.[51] As the district court made clear on remand, the plaintiff only had standing to challenge the treatment of the particular animals with which he had relationships: "[The plaintiff's] standing in this case is based on his emotional attachment to particular elephants — six of which are still at issue in this case."[52]

Although these courts' focus on the particularity of the animals does not make sense as a matter of law — for it is injury to the plaintiff, not the animal, that must be "concrete and particularized"[53] — it points to an important feature of these suits. What seems to be going on in these cases, which did not occur in the earlier aesthetic injury cases regarding species protection, is that the plaintiffs are acting as proxies by which harms suffered by individual animals are translated into human harms. Through the plaintiffs' capacity for empathy with the particular animals, violations of animal rights become violations of human interests, which can then be brought before the court.

D. Anthropomorphism, Facts, and Human Values

Although claims about animal rights might have gained access to court in these cases, it was only by being transformed into claims about human interests that this was possible. The plaintiffs gained

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[49] *See* Animal Legal Def. Fund v. Glickman, 154 F.3d 426, 431–38 (D.C. Cir. 1998) (en banc).

[50] *Id.* at 431–32 (alteration in original) (quoting Affidavit of Marc Jurnove at para. 17, Animal Legal Def. Fund v. Glickman, 154 F.3d 426 (D.C. Cir. 1998) (en banc) (Nos. 97-5009, 97-5031 and 97-5074)); *see also id.* at 433, 438 (noting plaintiff's concern for "a large male chimpanzee named Barney").

[51] Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334, 337 (D.C. Cir. 2003) (holding that "emotional attachment to a particular animal" can form "the predicate of a claim of injury" (quoting Humane Soc'y v. Babbitt, 46 F.3d 93, 98 (D.C. Cir. 1995)) (internal quotation marks omitted)).

[52] Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 246 F.R.D. 39, 42 (D.D.C. 2007).

[53] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180 (2000).

standing by turning the physical injury of animals into the aesthetic injury of persons. Thus, it was through a type of anthropomorphism — not of animals themselves, as in the medieval animal trials, but rather of the harms to them — that animal rights were adjudicated by the court. In this light, one might suggest that there are two senses in which the plaintiffs in these cases "represented" animal interests. They did so in the classic legal sense: they brought the animal interests before the court. But before doing so, they represented them in what could be considered an "artistic" sense: they reshaped their appearance, giving them a human form.

This transformation of animal suffering into the aesthetic injuries of humans in *Glickman*, *Ringling Brothers*, and *Veneman* may be troubling to many who advocate for animal rights and standing.[54] One cause for concern is the potentially significant limitations of aesthetic injury suits: plaintiffs might be able to gain standing to challenge only the treatment of animals that they can see[55] and will be able to continue seeing in the future.[56] Also troubling may be the fact that the animals at issue in these cases are in a sense legally irrelevant: the courts do not require proof of the injury to the animals, but rather proof of the harm that the plaintiffs experience as a result of their *perception* of this injury.[57] Thus, the transformation leaves the legally protected interests of animals outside the scope of the courts' concern.

Although the anthropomorphic feature of these cases may seem like a crude legal device from the perspective of classical animal rights theory,[58] there are other ways of thinking about our ethical duties to animals. Professor Cora Diamond, for example, urges that the solution to our society's unethical treatment of animals is not the granting of rights, but rather a reconfiguration of human beings' relationship to animals — a shift in the normative framework from which our rights-

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54 *See, e.g.*, Lauren Magnotti, Note, *Pawing Open the Courthouse Door: Why Animals' Interests Should Matter When Courts Grant Standing*, 80 ST. JOHN'S L. REV. 455, 455–56 (2006). The framing of the issues as "aesthetic" may also be duplicitous. *See* Sunstein, *supra* note 20, at 1349 ("[T]he plaintiff is likely to be concerned ethically or morally, not aesthetically.").

55 *Cf.* Animal Lovers Volunteer Ass'n v. Weinberger, 765 F.2d 937 (9th Cir. 1985) (holding that the plaintiffs, who sought to enjoin aerial shooting of goats on a military enclave, could not have suffered injury in fact because the public was not allowed access to the enclave).

56 *Cf.* Int'l Primate Prot. League v. Inst. for Behavioral Research, Inc., 799 F.2d 934, 938 (4th Cir. 1986) (holding that even though the plaintiffs had developed personal relationships with the monkeys at issue during the trial, they could not allege continued injury in fact in the future, because they could not continue seeing the monkeys if the defendants complied with the law).

57 *See, e.g.*, Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334, 337 (D.C. Cir. 2003). Here, the D.C. Circuit's reasoning was based on *Laidlaw*, in which the Supreme Court held that injury in fact could exist merely on the basis of a reasonable perception of an environmental harm regardless of the existence of a harm in fact. *See Laidlaw*, 528 U.S. at 167.

58 *See, e.g.*, FRANCIONE, *supra* note 22; WISE, *supra* note 17.

talk emerges — by which humans come to see animals as "fellow creatures."[59] In a related vein, Professor Laurence Tribe argues that facts alone cannot demonstrate that animals "have rights and must be allowed, through others as their spokespersons, to press moral claims."[60] Rather, he suggests, "[t]he secret to making that case may well reside at a level deeper than rational argument and deeper than provable fact, but, paradoxically, in a visceral appeal to our own common humanity."[61] From this perspective, *Glickman*, *Ringling Brothers*, and *Veneman* may have made a step in the right direction. To see the cases in this way, however, it is necessary to take a step back from these particular cases and look at the judicial concept of injury in fact that governs access to U.S. courts.

It is first important to recognize that this requirement is — in the form conventionally articulated by courts, as an inquiry *into fact alone* — essentially meaningless.[62] The problem, as identified by then-Professor William Fletcher, is that there cannot be a merely factual determination of whether a plaintiff is injured, "except in the relatively trivial sense of determining whether [the] plaintiff is telling the truth about her sense of injury."[63] If injuries in fact were merely facts about the world, and we "put to one side people who lie about their states of mind, we should concede that anyone who claims to be injured is, in fact, injured if she can prove the allegations of her complaint."[64] This result would not only be in conflict with the courts' standing jurisprudence, but also incoherent, negating its function as a limiting criterion.

Thus, it must be the case, as Professor Sunstein argues, that when courts apply the injury in fact test, they actually "rely on some standard that is normatively laden and independent of facts."[65] It is only in this way that one can differentiate between injuries in fact and noncognizable ideological harms. As Professor Sunstein notes,[66] blacks may feel injured when the government grants tax deductions to segre-

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[59] *See* Cora Diamond, *Eating Meat and Eating People*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 101–05 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

[60] Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1, 7–8 (2001).

[61] *Id.* at 8. For further analysis along these lines, see Laurence H. Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974) (suggesting that the extension of rights to new species entails enlarging the circles of human empathy and identification, *id.* at 1340–46, and that the "homocentric logic of self-interest leads finally not to human satisfaction," as one might expect, "but to the loss of humanity," *id.* at 1348).

[62] *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229–39 (1988) (discussing the "incoherence" of the injury in fact requirement); Sunstein, *supra* note 46, at 188–93 (discussing the impossibility of a solely factual inquiry into injury).

[63] Fletcher, *supra* note 62, at 231.

[64] *Id.*

[65] Sunstein, *supra* note 46, at 189.

[66] *See id.*

gated schools,[67] and a person might feel harmed by the destruction of a pristine area that she has visited and plans to visit again, regardless of whether these plans are finalized.[68] The Supreme Court may deny that these are injuries, and one may be inclined to agree. But in doing so, one must recognize that this denial is a judgment based not on fact, but rather on an inquiry into "our own value-laden ideas about what things ought to count."[69] With this recognition in mind, it is worth looking again at the holdings in *Glickman*, *Veneman*, and *Ringling Brothers*, and the norms on which they were based.

In the core aesthetic injury cases, the sources of the norms underlying courts' recognitions of injury in fact were not the statutes at issue,[70] but rather the foundational Supreme Court case on aesthetic injury, *Sierra Club v. Morton*, in which the Court stated:

> We do not question that this type of harm may amount to an 'injury in fact' sufficient to lay the basis for standing . . . . Aesthetic and environmental well-being, like economic well-being, *are important ingredients of the quality of life in our society*, and . . . deserving of legal protection through the judicial process.[71]

It was on the basis of this statement that the Court later concluded that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."[72] Combined, these statements have provided the basis for many of the aesthetic injury suits in the past thirty years. Thus, the foundations of legally cognizable aesthetic injuries are not positive laws or the scope of interests protected by them, but rather the Court's underarticulated conception of what is basic to human quality of life.

In this context, *Glickman*, *Veneman*, and *Ringling Brothers* take on new significance. What it means for the courts in these cases to con-

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[67] *But cf.* Allen v. Wright, 468 U.S. 737, 755–56 (1984) (finding this harm to be "abstract").

[68] *But cf.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 563–64 (1992) (holding that plaintiffs who had traveled to see an endangered species in the past but had not finalized their plans to do so again did not suffer injury in fact from an increased chance that the species would be lost).

[69] Sunstein, *supra* note 46, at 189.

[70] Because courts must rely on some normative source in deciding what counts as an injury in fact, they often look to the language of the statute in question and ask whether the interest is one protected by the statute (although this question technically conflates the "injury in fact" and "zone of interests" tests). *See* Sunstein, *supra* note 20, at 1353–54. The courts in these animal cases, however, did not base their conclusions on the AWA or on the ESA. Only the *Glickman* majority mentioned the language of the AWA to address the scope of legally cognizable injury, and this reference was only as part of a response to a hypothetical case posed by the dissent — not as part of its primary reasoning about the existence of an injury in fact. *See* Animal Legal Def. Fund v. Glickman, 154 F.3d 426, 434 n.7 (D.C. Cir. 1998) (en banc). In counter-response, the dissent correctly identified this move as confusing the inquiry into injury in fact with the inquiry into whether the plaintiff was arguably within the zone of protected interests. *See id.* at 449 (Sentelle, J., dissenting).

[71] Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (emphasis added).

[72] *Lujan*, 504 U.S. at 562–63.

clude that a person has an aesthetic interest in the humane treatment of animals is that this interest can be legally cognizable as something basic to one's human identity. When concern for animals in public spaces is seen not as a nonjusticiable ideological interest, but rather as an interest that can be constitutive of human quality of life and thus deserving of judicial protection, we might conclude that animals have entered further into our human world. And this change might be a precondition for true and meaningful access to U.S. courts.

E. Conclusion

The significance of the expansion from species-based to individual animal–based aesthetic injury claims has not yet been recognized — perhaps because in retrospect there appears to be no legally relevant distinction between them. The fact that this distinction is irrelevant as a doctrinal matter does not, however, mean that it is not of legal importance. Rather, the distinction, which the plaintiffs in these cases needed to dissolve in order to gain access to the courts, runs parallel to one that deserves attention. For as this Part demonstrates, it maps onto a real and important underlying philosophical difference. Attention to this difference reveals that these cases mark the beginning of a new form of representation and enforcement of animal rights. This development in the law of standing may appear crude from the perspective of traditional animal rights theory in that it fails to truly provide animal rights with judicial protection. However, it is possible that the troubled place of animal rights in our legal system cannot, as some theorists propose, be solved by positive law alone. What might also be necessary is a change brought about, as Professor Tribe suggests, by an appeal "to our own common humanity" — or in other words, the type of change seen in these cases.