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Cass R. Sunstein

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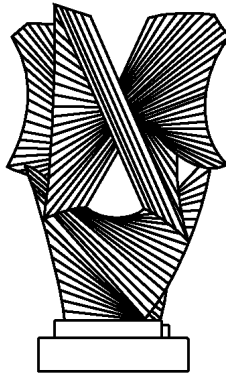
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# CHICAGO

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## Standing for Animals

*Cass R. Sunstein*

THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

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## Standing for Animals

Cass R. Sunstein<sup>\*</sup>

In the last decades, the protection of animals has become a pervasive goal of federal statutory law. Indeed, Congress has enacted more than fifty statutes designed to protect the well-being of animals.<sup>1</sup>

Of these the most prominent is the Animal Welfare Act (AWA),<sup>2</sup> which contains a wide range of safeguards against cruelty and mistreatment, and which creates an incipient bill of rights for animals.<sup>3</sup> If vigorously enforced, the AWA, alongside other enactments, would prevent a wide range of abusive practices. As often, however, there is a large gap between statutory text and real-world implementation. Many people have criticized the national government's enforcement efforts under these statutes, contending that the executive branch has violated the law by issuing weak and inadequate regulations, making the relevant statutes symbolic rather than real.<sup>4</sup> These complaints raise a central and largely unexplored question,<sup>5</sup> one that will inevitably increase in prominence over time: Under what circumstances will standing be available for those,

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<sup>\*</sup> Karl N. Llewellyn Distinguished Service Professor, Law School and Department of Political Science, University of Chicago. I am grateful to Brooke May for superb research assistance, to Jill Hasday and Adrian Vermeule for valuable comments, and to Martha Nussbaum for helpful discussions.

<sup>1</sup> For an already dated overview, see Henry Cohen, *Federal Animal Protection Statutes*, 1 *Animal Law* 143 (1995). Of course human beings are animals too, and there is an oddity, and perhaps a pernicious one, in the linguistic convention of distinguishing between human beings and animals. See James Rachels, *Created From Animals* (1990). For simplicity I use the convention at several points here.

<sup>2</sup> 7 USC 2131 et seq.

<sup>3</sup> See 7 USC 2131 et seq. I use the word "incipient" because many qualifications are necessary to the view that the AWA creates a genuine animals' bill of rights. See Gary Francione, *Animals, Property, and the Law* 185-248 (1995), for an extended and highly critical discussion.

<sup>4</sup> See, e.g., *Animal Legal Defense Fund v. Espy*, 23 F.3d 496 (DC Cir 1994); *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426 (DC Cir 1998).

<sup>5</sup> Valuable discussion can be found in Francione, *supra* note, at 65-89.

human and non-human, who seek to challenge unlawful mistreatment of animals?<sup>6</sup>

Current doctrine is exceptionally confusing on this question.<sup>7</sup> One of my chief goals here is to dispel some of the confusion, in a way that, I hope, will illuminate the law of standing and the question of “animal rights” as a whole. My principal conclusion is that human beings, invoking their own injuries as a predicate for the action, are entitled to sue to protect the interests of animals in a variety of settings. More particularly, three categories of persons—those deprived of legally required information, those facing “aesthetic” injury, and those suffering competitively—have standing to protect the legal interests of animals.

This conclusion is part of a more general one: the question of standing is mostly for legislative resolution, and both people and animals have standing to protect animals to the extent that Congress has said that they have standing. Under existing law, this means (in my view unfortunately) that animals lack standing to sue in their own right, for Congress has restricted standing to “persons.” But it also means that Congress can accord standing to animals if it chooses to do so.

As we will see, these conclusions about animal and human standing raise a number of questions about existing law and suggests some promising directions for rethinking it, not only in the context of standing to protect animals but more generally. In the process of discussing the standing question, I also offer a few notes on the much-debated topic of animal rights.<sup>8</sup> My plea here is for disaggregation. From the legal point of view, there is nothing at all

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<sup>6</sup> A famous article urged that standing should be accorded to non-human objects. See Christopher Stone, *Should Trees Have Standing?*, 45 S. Cal. L. Rev. 450 (1972). The principal difference between that article and this one has to do with the conception of the law of standing. In my view, the standing question is for legislative resolution. The claim that people have standing to protect the rights of animals, and that animals may be given standing to have suit brought on their behalf in their own name, is a claim about the nature of legislative power.

<sup>7</sup> See, e.g., *Animal Legal Defense Fund v. Glickman*, 154 F.2 426 (DC Cir. 1998) (7-4 division on en banc court); *Japan Whaling Association v. American Cetacean Society*, 478 US 221 (1986).

<sup>8</sup> See Peter Singer, *Animal Liberation* (1976); Gary Francione, *Animals, Property, and the Law* (1995).

new or unfamiliar in the idea of “animal rights”; on the contrary, it is entirely clear that animals have legal rights, at least of a certain kind.<sup>9</sup> An investigation of the question of standing helps show that the real issues involve problems of enforcement and scope. Much illumination can be gained by dividing the question of “animal rights” into its component parts. For those who believe (as I do) that any general attack on the notion of “animal rights” is implausible,<sup>10</sup> and who notice that a growing commitment to animal welfare is an unmistakable part of modern public law, the strategy of disaggregation seems best suited toward producing both analytical clarity and future progress. To this end I offer a recommendation that is modest but that would do considerable good; animal welfare statutes should be amended to grant a private cause of action against those who violate them, so as to allow private claimants to supplement agency enforcement efforts.

### I. Animal Rights in Action

Without much fanfare or advance foresight, American law has come to recognize a wide array of protections for animals.<sup>11</sup> Indeed, it would not be too much to say that federal and state law now guarantee a set of “animal rights.”<sup>12</sup> Some people believe that while

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<sup>9</sup> Thus there is disagreement here with the sharp distinction drawn in Gary Francione, *Animals, Property, and the Law* (1998), between “animal rights” and “animal welfare.” Statutes protecting animal welfare protect a form of animal rights, and there is nothing in the notion of “rights” or “welfare” that calls for much, or little, protection of the relevant interests. Rights can be defeasible, and an interest in “welfare” may create a strong presumption. Francione convincingly shows, however, that the interests of animals are given remarkably and indefensibly little weight under many state and federal laws.

<sup>10</sup> See James Rachels, *Created From Animals: The Moral Implications of Darwinism* (1990), for general discussion.

<sup>11</sup> Remarkably little academic attention has been given to this development. Relevant discussion can be found in Dichter, *Legal Definitions of Cruelty and Animal Rights*, 7 BC Env'tl. Aff. L. Rev. 147 (1978); Susan Godkin, *The Evolution of Animal Rights*, 18 Colum. Human Rights L. Rev. 259 (1987).

<sup>12</sup> American law thus rejects Kant's view that animals are mere things and that any duties owed to them really involve duties owed to people. “But so far as animals are concerned we have no direct duties. Animals . . . are there merely as means to an end. That end is man.” The reason to avoid cruelty to animals is that “He who

animals lack rights, human beings have duties to them.<sup>13</sup> It is not clear what turns on this distinction, a point to which I will return. But it is clear that as a matter of positive law, animals have rights in the same sense that people have rights, at least under those statutes that are enforceable only by public officials.<sup>14</sup>

#### A. State Law: Cruelty, Expansively Construed

The common law contained a good deal of uncertainty about cruelty to animals. Courts generally suggested that such cruelty was not unlawful unless it worked an injury to the owner, who was the

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is cruel to animals becomes hard also in his dealings with man.” Immanuel Kant, *Lectures on Ethics* 239-40.

<sup>13</sup> Thus Kant believed that “indirect duties” were due to animals only for the sake of human beings; see *id.* See also John Rawls, *A Theory of Justice* 512 (1971), suggesting, in a qualified way, that animals are not due justice but are due consideration: “While I have not maintained that the capacity for a sense of justice is necessary in order to be owed the duties of justice, it does seem that we are not required to give strict justice anyway to creatures lacking this capacity. But it does not follow that there are no requirements at all in regard to them . . . . Certainly it is wrong to be cruel to animals and the destruction of a whole species can be a great evil. The capacity for feelings for pleasure and pain and for the forms of life of which animals are capable clearly impose duties of compassion and humanity in their case. I shall not attempt to explain these considered beliefs. They are outside the scope of the theory of justice . . . .” This is a brief passage, almost an aside, and it is not clear what Rawls means by “strict justice.” An obvious problem is why “the” theory of justice should find the question of fairness to animals outside of its scope. See also the emphasis on “moral persons,” with among other things an ability to have a sense of justice, as those to whom “equal justice” is owed, *id.* at 505, a suggestion that raises obvious problems for, eg, the mentally retarded. My suspicion, though I cannot establish the point here, is that the evident problems with entirely excluding animals from the topic of justice raises difficulties for contractarian theories in general.

<sup>14</sup> This is true, for example, of many criminal and regulatory statutes that do not create private rights of action. Of course the words “at least” are important; duties created by the criminal law are generally accompanied by parallel common law rights, so that people ordinarily have rights to protect themselves in the event that the prosecutor fails to act. But this is not always the case; under the Federal Trade Commission Act, to take one of many examples, there is no private right of action. It is important here to avoid purely semantic disagreements; the only point is that animals have rights in the same sense that people have many rights that they cannot enforce on their own.

essential rights holder<sup>15</sup>; but they sometimes concluded that cruelty could count as a common law misdemeanor.<sup>16</sup> The common law has of course been superseded by state statutes, and every state now purports to provide significant safeguards against cruelty or mistreatment of animals. Hence it is now said, in many jurisdictions, that “animals have rights, which, like those of human beings, are to be protected.”<sup>17</sup> The relevant provisions are broadly phrased and seem to offer significant safeguards; but in practice, enforcement activity is sporadic and unreliable.<sup>18</sup>

What is perhaps most striking is that the relevant statutes go well beyond beating, injuring, and the like, and impose affirmative duties on people with animals in their care. Omissions may count as cruelty; so too for overworking or underfeeding animals, or for depriving them of adequate protection.<sup>19</sup> Owners must offer adequate sustenance and shelter.<sup>20</sup> As a matter of statutory text, defenses and excuses are quite limited. Protection of life or property is a defense against a charge of unlawful killing of an animal, but there must be a reasonable proportion between the danger presented and the action taken<sup>21</sup>; and anger, intoxication, and impulse provide neither defense nor excuse.<sup>22</sup>

New York contains a representative set of provisions. Anyone who has impounded or confined an animal is obliged to provide good air, water, shelter, and food.<sup>23</sup> Criminal penalties are imposed on anyone who transports an animal in a cruel or inhuman manner,

<sup>15</sup> *Allen v. Commonwealth*, 77 Pa. Super. 244 (1921); *McCausland v. People*, 145 P 685 (1914); *Waters v. People*, 46 P 112 (1896).

<sup>16</sup> *Stage Horse Cases*, 15 Abb Pr. N.S. 51; *Ross's Case*, 3 City Hall Rec. 191.

<sup>17</sup> *State v. Karstendiek*, 22 So 845 (1897); *Hodge v. State*, 79 Tenn. 528 (1883).

<sup>18</sup> See Francione, *supra*, at 119-133.

<sup>19</sup> See 3A *Corpus Juris Secundum* 101, p. 586.

<sup>20</sup> *State v. Gorsoclose*, 171 P2d 863, 67 Idaho 71(1946); *Ames v. Ohio*, 11 Ohio NPNS 385; *State v. Goodall*, 175 P 857; 90 Or. 485.

<sup>21</sup> See *Grizzle v. State*, 707 P2d 1210 (1985); *Rushin v., State*, 267 SE2d 473 (Ct. App. Ga. 1980); *State v. Libby*, 556 A.2d 1099 (1989). On the relation between statutes preventing cruelty to animals and medical or scientific experimentation, see 42 ALR4th 860.

<sup>22</sup> 3A *Corpus Juris Secundum* 106, pp. 590-91.

<sup>23</sup> NY Agri & Mkts 356.

or in such a way as to subject it to torture or suffering, conditions that can come about through neglect.<sup>24</sup> People who transport an animal on railroads or cars are required to allow the animal out for rest, feeding, and water every five hours.<sup>25</sup> Those who abandon an animal, including a pet, face criminal penalties.<sup>26</sup> A separate provision forbids people from torturing, beating, maiming, or killing any animal, and also requires people to provide adequate food and drink.<sup>27</sup> Indeed it is generally a crime not to provide necessary sustenance, food, water, shelter, and protection from severe weather.<sup>28</sup> New York, like most states, forbids overworking an animal, or using it for work when it is not physically fit.<sup>29</sup> Compare in this regard the unusually protective California statute, which imposes criminal liability on negligent as well as intentional overworking, overdriving, or torturing of animals.<sup>30</sup> “Torture” is defined not in its ordinary language sense, but to include any act or omission “whereby unnecessary or unjustified physical pain or suffering is caused or permitted.”<sup>31</sup>

There are three noteworthy points about state prohibitions on cruelty to animals. First, enforcement can occur only through public prosecution; the state has a monopoly on implementation.<sup>32</sup> The point is important because prosecution occurs only in a subset of the most egregious cases; there is a great deal of difference between what these statutes ban and what in practice is permitted to occur.<sup>33</sup>

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<sup>24</sup> NY Agri & Mkts 379a.

<sup>25</sup> NY Agri & Mkts 359.

<sup>26</sup> NY Agri & Mkts 355.

<sup>27</sup> NY Agri & Mkts 353.

<sup>28</sup> See *Griffith v. State*, 43 SE 251 (1903); *Commonwealth v. Lufkin*, 7 Allen 579; *State v. Groseclose*, 171 P2d 863 (1946); *Reynolds v. State*, 569 NE2d 680 (1991).

<sup>29</sup> See *Commonwealth v. Wood*, 111 Mass 408 (1873); *State v. Goodall*, 175 P 857; *State v. Prince*, 94 A 966.

<sup>30</sup> Cal. Penal Code 597b.

<sup>31</sup> Cal Penal Code 599b.

<sup>32</sup> The only exception is that animal owners also have actions in property or tort to recover the monetary equivalent of damage done to all objects within their possession, including animals.

<sup>33</sup> See Francione, *supra* note.



Private enforcement would obviously make a great deal of difference.<sup>34</sup> Second, duties to animals, and the correlative rights of animals, exist largely by virtue of a particular relationship voluntarily assumed by human beings—that of owner, transporter, driver, and so forth. There are no obligations of good samaritanship, for example, or of affirmative obligations to animals not within one's domain or care. In these ways the network of duties to animals tracks the corresponding network for duties to human beings, many of which are enforced publicly rather than privately, and which generally do not include obligations of good samaritanship. Third, state law protections do not apply to the use of animals for medical or scientific purposes, or for use as food, or for cruelty in connection with the production of animals as food; here cruel and abusive practices are generally unregulated at the state level.<sup>35</sup>

It would be an overstatement to say that the relevant provisions are entirely symbolic. But because they are vulnerable to prosecutorial decisions, and because few prosecutors have them a high priority, they have a largely expressive dimension. They say much more than they do. They express an aspiration, but one that is routinely violated in practice, and violated without reprisal.

#### B. Federal Law: Species, Mammals, Horses, Others

In the last several decades, a remarkable number of federal statutes have been enacted to protect species, animals, and animal welfare. Over fifty such statutes are now in place, and the number is growing.<sup>36</sup> The most famous of these statutes is the Endangered Species Act,<sup>37</sup> designed to protect against extinction of threatened or endangered species, enforced publicly rather than privately, and raising a number of knotty standing problems.<sup>38</sup> A great deal of

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<sup>34</sup> This is an evident motivation for the recommendation in Steven M. Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of A Companion Animal*, 4 *Animal Law* 33 (1998).

<sup>35</sup> See Francione, *supra* note.

<sup>36</sup> See Cohen, *supra* note.

<sup>37</sup> 16 USC 1531

<sup>38</sup> See *Lujan v. Defenders of Wildlife*, 504 US 555 (1992).

litigation has involved the meaning of the Marine Mammal Protection Act,<sup>39</sup> which imposes a selective moratorium on the taking and importation of marine mammals and marine mammal products.<sup>40</sup> A particular provision outlaws commercial whaling.<sup>41</sup> It also requires the Secretary of the Interior to issue regulations to protect marine mammals from unlawful activity.<sup>42</sup>

Federal law contains a number of more specialized provisions. An important statute is specifically designed to protect horses from cruel treatment and in particular from the exploitation of injured horses.<sup>43</sup> The key statute involving game parks provides, “no person shall kill any game in said park except under an order from the Secretary of the Interior for the protection of persons or to protect or prevent the extermination of other animals or birds.”<sup>44</sup> Another statute is designed to protect migratory bird habitat and also to protect habitat for mammals, including bears, moose, and wolves.<sup>45</sup> Federal law imposes a moratorium on the importation of raw and worked ivory, as a way of helping to protect the African elephant.<sup>46</sup> It is a federal crime to shoot birds, fish, or mammals from an aircraft, or to use an aircraft to harass birds, fish, or animals.<sup>47</sup> It is also a federal crime to kill or harass wild horses or burros<sup>48</sup> and to possess, sell, buy, or transport any bald or golden eagle, alive or dead.<sup>49</sup> The Secretary of Agriculture is charged with ensuring that slaughtering of animals must be “humane,” and Congress lists two methods that are designed to ensure “rapid and effective” killing.<sup>50</sup>

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<sup>39</sup> 16 USC 1372(a)(2)(A).

<sup>40</sup> 16 USC 1371 et seq.

<sup>41</sup> 16 USC 1372(f).

<sup>42</sup> 16 USC 1373

<sup>43</sup> 15 USC 1822. See *Thornton v. U.S. Dept. of Agriculture*, C.A.11 1983,

<sup>44</sup> 16 U.S.C.A. 352

<sup>45</sup> 16 USC 676.

<sup>46</sup> 16 USC 4201 et seq.

<sup>47</sup> 18 USC 742j-1.

<sup>48</sup> 16 USC 1331 et seq.

<sup>49</sup> 16 USC 668 et seq.

<sup>50</sup> 7 USC 1901 et seq.

### C. A Federal Bill of Rights for Animals (?)

In terms of animal protection, however, by far the most important measure is the Animal Welfare Act, which imposes, on those who deal in or with animals, a wide range of negative constraints and affirmative duties.<sup>51</sup> The Act begins with an elaborate statement of purposes, emphasizing the need for “humane care and treatment” in exhibition of animals, transportation of animals, and “use” of animals “as pets.”<sup>52</sup> There is a flat ban on commercial ventures in which animals are supposed to fight.<sup>53</sup> Licenses are required for all those who sell animals for exhibition or for “use” as a pet.<sup>54</sup> The Secretary is also asked to issue “humane standards” with respect to “the purchase, handling, or sale of animals” by “dealers, research facilities, and exhibitors at auction sales.”<sup>55</sup>

The key provision of the statute requires the Secretary to issue “standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors.”<sup>56</sup> These are supposed to include “minimum requirements” governing “handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care.”<sup>57</sup> A separate provision requires minimum requirements for “exercise of dogs”<sup>58</sup> and “for a physical environment adequate to promote the psychological well-being of primates.”<sup>59</sup> Animals in research facilities must be protected in addition through requirements “to ensure that animal pain and distress are minimized.”<sup>60</sup> In “any practice which could cause pain to

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<sup>51</sup> 7 USC 2131 et seq.

<sup>52</sup> Id. at 2131.

<sup>53</sup> 7 USC 2156.

<sup>54</sup> 7 USC 2134.

<sup>55</sup> 7 USC 2142.

<sup>56</sup> 7 USC 2143.

<sup>57</sup> 7 USC 2143(a)(2)(A).

<sup>58</sup> See *Animal Legal Defense Fund v. Secretary of Agriculture*, 813 F Supp 882 (DDCC 1993), vacated, 29 F.3d 720 (DC Cir 1993).

<sup>59</sup> 7 USC 2143(a)(2)(B).

<sup>60</sup> *Lesser v Espy*, 34 F.3d 1301 (7th Cir. 1994).

animals,” a veterinarian must be consulted in planning, and tranquilizers, analgesics, and anesthetics must be used.<sup>61</sup> An independent provision requires compliance by the national government with the Secretary’s standards.<sup>62</sup> Breeders of dogs and cats must allow inspections and may not transport underage dogs.<sup>63</sup> The Act also contains a set of recordkeeping requirements, designed to ensure that dealers, exhibitors, research facilities, and handlers provide records, evidently designed to allow federal monitoring of the treatment of animals.<sup>64</sup>

Most state statutes do some of the work of the Animal Welfare Act by forbidding cruelty and requiring adequate nutrition and shelter. But the Act goes beyond state law by imposing a federal presence and also by imposing numerous requirements not contained in state law. These include requirements of exercise for dogs, minimizing pain and distress to animals used in research, adequate veterinary care in general, recordkeeping, and a physical environment that will promote the psychological well-being of primates.

By virtue of its scope, the Animal Welfare Act promises an ambitious set of safeguards against cruel or injurious practices; taken together with other federal statutes, above all the Marine Mammal Protection Act, it suggests that national law is committed to something not very different from a bill of rights for animals.<sup>65</sup> But here too there is a question whether statutory law is not largely expressive and symbolic, a statement of good intentions, delivering far more on paper than in the world.<sup>66</sup> Many people have complained that these statutes have been indifferently or even unlawfully enforced, not least via regulations that do far less than the statute requires.<sup>67</sup> The Department of Agriculture has hardly been eager to enforce the AWA, and neither citizens nor animals have

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<sup>61</sup> 7 USC 2143(a)(3)(C)(i); 7 USC 2143(a)(3)(C)(ii)

<sup>62</sup> 7 USC 2143.

<sup>63</sup> *Cox v. US Dept of Agriculture*, 925 F.2d 1102 (8th Cir. 1991).

<sup>64</sup> 7 USC 2140; 7 USC 2142.

<sup>65</sup> A notable exception involves animals raised for use as food or clothing.

<sup>66</sup> See Francione, *supra*, at 185-248.

<sup>67</sup> See, e.g., *Animal Legal Defense Fund v. Espy*, 23 F.3d 496 (DC Cir 1994); *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426 (DC Cir 1998).

been given an express cause of action against facilities that are in violation.<sup>68</sup> An important question therefore becomes: Who has standing to bring suit to require compliance with law governing animal welfare?

## II. Standing:

### Human Beings, Human Rights, and Animal Welfare

Under current doctrine, Article III is understood to require plaintiffs to show: (1) an injury in fact that (2) is a result of the action of the defendant and that (3) would be redressed by a decree on the plaintiff's behalf.<sup>69</sup> There are also "prudential" requirements, that is, standing rules that can be eliminated if Congress does so expressly. The most important of these require (1) that the injury be "arguably within the zone of interests" protected or regulated by the statute in action<sup>70</sup> and (2) that the injury not be widely generalized, that is, it must not be shared by all or most citizens.<sup>71</sup> Under what circumstances do these requirements permit or bar an action brought to prevent unlawful injury done to an animal? The most general question is when human beings may invoke their own "injuries in fact" to challenge harms done to animals. I suggest here that three kinds of injuries are relevant: deprivation of information, competitive injury, and aesthetic harm. My major interest here is in unpacking the implications of current standing doctrine in this unusual context; I deal below with further complexities.

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<sup>68</sup> See *IPPL v. IBR*, 799 F.2d 934 (4th Cir 1986).

<sup>69</sup> See, e.g., *Lujan v. Defenders of Wildlife*, 504 US 555 (1992); *FEC v. Akins*, 118 S Ct 1777 (1998).

<sup>70</sup> See *Clarke v. SIA*, 479 US 388 (1987); *Data Processing v. Camp*, 397 US 150 (1970); *National Credit Union Admin. v. First National Bank* 118 S Ct 927 (1998).

<sup>71</sup> See *FEC v. Akins*, 118 S Ct 1777 (1998). There the Court held that Congress could give standing to "any person" to require disclosure of information about an alleged "political committee."

### A. Existing Law: Informational Standing

It is now established that Congress can confer on citizens—even on citizens as a whole—a right to obtain information.<sup>72</sup> It is also established that Congress can give citizens—even all citizens—a right to bring suit to vindicate that interest.<sup>73</sup> If Congress says that people have a right to information of a certain kind, and if that information is denied, Congress is permitted to say that the deprivation of information counts as an “injury in fact” for which suit may be brought.

These points suggest the first route by which people might have standing to protect the rights of animals. Suppose, for example, that a statute obliges laboratories and zoos to provide to the government, or even the public at large, information about their treatment of animals within their care. Suppose that it is urged that under the government’s legally insufficient regulations, far less information is forthcoming than would be available under a legally sufficient regulation. If Congress has granted standing to “any person” to contest violations of this duty of disclosure, there should be no constitutional obstacle to the suit; The deprivation of the requisite information counts as the “injury in fact.”

The “if” in the preceding sentence is an extremely important qualification, for Congress has not given citizens standing to seek information that bears on animal welfare.<sup>74</sup> Neither the Animal Welfare Act nor the Marine Mammal Protection Act contains any such grant. When Congress has not spoken clearly, plaintiffs must therefore rely on the Administrative Procedure Act, which requires them to show as well (a) that their injury is arguably within the zone of interests protected or regulated by the statute and (b) that their injury is not too “widely generalized.” Thus, for example, if a citizen is unable to distinguish himself from any other citizen complains of

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<sup>72</sup> See *FEC v. Akins*, 118 S Ct 1777 (1998). For general discussion, see Cass R. Sunstein, *Informational Standing and Informational Regulation: Akins and Beyond*, 147 U Pa L Rev 613 (1999).

<sup>73</sup> *Id.*

<sup>74</sup> The only exception is the Endangered Species Act, which does give standing to “any person,” but not to receive information. Of course the opportunity to see a member of an endangered species may provide information, but that is a different matter. See *Lujan v. Defenders of Wildlife*, *supra*.

unlawful deprivation of information involving treatment of animals, his injury will probably be held too widely generalized to be cognizable.<sup>75</sup> And in some cases, the plaintiffs' interests might be deemed too far afield of the interests protected or regulated by the statute.

Consider in the latter regard *Animal Legal Defense Fund v. Espy*.<sup>76</sup> There the Animal Legal Defense Fund and the Humane Society of the United States challenged what they saw as an unduly narrow definition of "animal" for purposes of the Animal Welfare Act, a definition that would exclude birds, rats, and mice from the category "animal." The plaintiffs claimed injury from the fact that the narrow definition of animal, which would undermine "their attempts to gather and disseminate information on laboratory conditions for those animals."<sup>77</sup> With a broader definition, laboratories would be required to provide more information about their treatment of animals, and the plaintiffs contended that they would use that information in "public education and rulemaking proceedings."<sup>78</sup> The narrow definition of "animal" would also make it harder for plaintiffs to educate the laboratories about the "humane treatment of birds, rats, and mice."<sup>79</sup>

It is clear that the plaintiffs would have had standing if Congress had expressly said that they have standing. But under the APA, the court held otherwise. Its central claim was that the informational injury did not fall within the zone of interests of the statute. The Animal Defense Fund was not attempting to protect its members' own legal rights, but "simply to educate all those who desire to promote the statute's substantive purpose."<sup>80</sup> Informational standing would require not merely a "general corporate purpose to promote the interests to which the statute is addressed" but also "a congressional intent to benefit the organization" or some evidence that the organization is "a peculiarly suitable challenger of

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<sup>75</sup> See *Akins*, 118 S Ct at 1791.

<sup>76</sup> 23 F.3d 496 (DC Cir 1994).

<sup>77</sup> 23 F.3d at 501.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> 23 F.3d at 503.

administrative neglect.”<sup>81</sup> In this regard the court emphasized that the Animal Welfare Act creates an oversight committee consisting of private citizens designed to ensure compliance with the Act. Thus “the organizations are not the intended representatives of the public interest in animal welfare.”<sup>82</sup>

The general approach suggested in *Espy* is quite sound; sometimes those who invoke rights under a statute protected animal welfare will not be within the statutory zone of interests. But the particular holding is quite doubtful. As the Supreme Court has made clear, the zone of interests test is not meant to be demanding,<sup>83</sup> and if any group is within the zone of interests of the Act, members of the Animal Legal Defense Fund count as such. The strongest argument for the court’s conclusion would be that the existence of the oversight committee should be taken to negate standing for other private organizations concerned about inadequate enforcement.<sup>84</sup> But this is a fragile argument. It would be at least as plausible to say that private lawsuits do not displace but complement the work of the oversight committee. For present purposes what matters is less the particular evaluation than the general suggestion that for actions brought under the APA, those who complain of a deprivation of information may suffer injury in fact but fall outside the zone of statutorily protected interests.

### B. Existing Law: Competitive Injuries

It has become a platitude to suggest that many apparently public-spirited statutes are enacted, or take the form they do, because of the competitive benefits they provide to individuals or companies with self-interested states in the outcome.<sup>85</sup> If

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<sup>81</sup> 23 F.3d at 503, quoting *Hazardous Waste Treatment Council v. EPA*, 274 U.S. App. D.C. 44, 861 F.2d 277, 283 (D.C. Cir. 1988), cert. denied, 490 U.S. 1106, 104 L. Ed. 2d 1020, 109 S. Ct. 3157 (1989).

<sup>82</sup> 23 F.3d at 503.

<sup>83</sup> See *Clarke*, supra; *National Credit Association Admin.*, supra.

<sup>84</sup> See *Block v. Community Nutrition Inst.*, 467 US 340 (1984) (holding that creation of specific standing for some negated standing for others not specifically granted standing).

<sup>85</sup> For the classic demonstration in the context of environmental law, see Bruce Ackerman and William Hassler, *Clean Coal/Dirty Air* (1981).



government enforces such statutes inadequately, competitors might be injured “in fact.” The Supreme Court has been quite willing to allow competitors to challenge unlawful governmental action adverse to their interests.<sup>86</sup> For example, the Court has allowed a set of individual banks, and also the American Bankers Association, to challenge agency action allowing credit unions to create multiple unrelated employer groups, an action that, in the banks’ view, would give credit unions an unlawful competitive advantage.<sup>87</sup>

This line of cases raises legitimate (though not yet explored<sup>88</sup>) possibilities for human standing to protect animal welfare. Suppose, for example, that the statute at issue places certain companies at a competitive disadvantage, by forbidding those companies from engaging in practices that would help them in the marketplace. The proposed ban on the importation of products made with dog or cat fur is an example; the ban would plainly help companies that sell ordinary or synthetic fur coats. The existing cases on competitor standing suggest that such companies would be entitled to sue to create legally required enforcement action. Or suppose that a statute designed to protect animal welfare is obeyed by some commercial actors but not by others; suppose too that compliance is costly and hence that those who disobey are at a competitive advantage (as is highly likely). At first glance, a company that complies with the Animal Welfare Act (in testing pain-relief products, for example) would seem to have standing to challenge governmental practices that allow its competitors to do whatever they wish.

There are two obstacles to competitor standing in this context. First, the competitor must be arguably within the zone of interests protected by the statute, and in some cases, it is easy to imagine an argument that the competitor’s interests are simply too far afield.<sup>89</sup> Whether the argument is convincing depends on the particular

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<sup>86</sup> See *Association of Sata Processing Service Org. v. Camp*, 397 US 150 (1970); *Clarke v. Securities Industry Assn.*, 479 US 388 (1987); *National Credit Union Adm. V. First National Bank*, 118 S Ct 927 (1998).

<sup>87</sup> See *National Credit Union*, *supra*.

<sup>88</sup> I have been unable to find any case in which a litigant invoked competitive injuries in challenging violations of a statute designed to protect animals. But as the text explains, there should be many opportunities.

<sup>89</sup> See *Air Courier Conf. v. American Postal Workers Union*, 498 US 517 (1991).

statute and on whether its background reveals a lack of concern with the plaintiff's interests. The cases suggest that courts are quite willing to presume that statutes do show such an interest and hence that competitor standing is highly likely.<sup>90</sup> Second, a competitor might have problems along the dimension of redressability. If, for example, a statute is applied to forbid the importation of coats lined with cat fur, how, exactly, will any particular competitor be helped? The cases suggest that competitor standing will be presumed in cases of this kind,<sup>91</sup> but the issue raises a number of complexities. I return to this point below.

### C. Existing Law: Aesthetic Injuries

In many cases, a plaintiff objecting to harm done to an animal seeks to claim an "aesthetic injury." In a number of these cases, standing is available. But there is considerable conflict in the lower courts, and the outcomes seem quite unruly and even odd. Let us begin with some polar cases.

1. *No injuries and no plans.* Suppose that a citizen, activist, or researcher objects to the unlawful and inhumane treatment of animals in a certain facility; the facility may be a zoo, or it may be a laboratory engaged in experimentation. Suppose that the citizen, activist, or researcher attempts to bring suit. On the facts as stated, the outcome is clear: Standing is unavailable, for there is no injury in fact. The plaintiffs have only an ideological interest in the dispute, and they are attempting to enforce the law for its own sake. Under current law, there is universal agreement on this point.<sup>92</sup> The key holding is *Lujan v. Defenders of Wildlife*, where the plaintiffs, including people interested in seeing and studying members of an endangered species, challenged a federal decision not to apply the Endangered Species Act extraterritorially. The Court held that the plaintiffs lacked standing because they had no plan to visit the members of the species; whether they had a concrete interest of this

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<sup>90</sup> See note *supra*.

<sup>91</sup> See note *supra*.

<sup>92</sup> See *Lujan v. Defenders of Wildlife*, 504 US 555 (1992) (199); *Sierra Club v. Morton*, 405 US 727, 734 (1972); *Humane Society v. Bobbitt*, 46 F.3d 93 (DC Cir 1995)

kind was, on a reasonable reading of the complaint, purely speculative. Thus they failed to show an injury in fact. Along the same lines, consider *Animal Lovers Volunteer Association v. Weinberger*,<sup>93</sup> in which the plaintiffs sought to enjoin aerial shooting of goats on a military enclave for which public access is unavailable. The court held that standing was unavailable because the members did not visit the enclave and hence lacked any concrete injury.

2. *Plans, scientists, visitors.* Now assume that certain scientists and researchers are attempting to see and study members of a particular species; that their desire to see and study the relevant animals is imminent and definite rather than conjectural; and that they challenge government action that, on their view, will reduce the supply of animals available for study. Under current law, it appears clear that the scientists and researchers have standing.<sup>94</sup> In *Defenders of Wildlife*, the Court acknowledged as much, suggesting that if the plaintiffs had procured a plane ticket, the injury in fact requirement would be met.<sup>95</sup> The injury in fact consists of the reduced likelihood that they will be able to engage in the relevant research.

As we will see, questions might be raised about this analysis; but the law appears settled on the point. The key case is *Japan Whaling Assn. v. American Cetacean Soc.*<sup>96</sup> There several wildlife conservation groups, including members who were committed to watching and studying whales, objected to the failure of the Secretary of Commerce to certify that nationals in Japan were engaged in acts diminishing the effectiveness of the International Convention for the Regulation of Whaling. The consequence of certification of Japan by the Secretary of Commerce would be to require the Secretary of State to reduce, by at least 50%, Japan's fishing allocation within the United States.<sup>97</sup> In a brief discussion in a footnote, the Court held that the wildlife organizations had standing. "They undoubtedly have alleged a sufficient 'injury in fact' in that the whale watching

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<sup>93</sup> 765 F.2d 937 (9th Cir. 1985).

<sup>94</sup> See *Humane Society v. Babbitt*, 46 F.3d 93, 97 (DC Cir. 1995).

<sup>95</sup> Note, however, that a plurality of the Court doubted that the redressability requirements would be met even in that event. See below.

<sup>96</sup> 478 US 221 (1986).

<sup>97</sup> *Id.* at 236.

and studying of their members will be adversely affected by continued whale harvesting.”<sup>98</sup> Indeed, the same conclusion applies not only to scientists and researchers, but also to everyone with an interest in observing members of the relevant species, even if the interest is “for purely esthetic purposes.”<sup>99</sup> Thus in *Animal Welfare Institute v. Krepes*,<sup>100</sup> the court held that members of the plaintiff organization had standing to challenge a waiver of the moratorium on marine mammal importation under the Marine Mammal Protection Act. The court referred to the ability of the members “to see, photograph, and enjoy Cape fur seals alive in their natural habitat under conditions in which the animals are not subject to excessive harvesting, inhumane treatment and slaughter of pups that are very young and still nursing.”<sup>101</sup>

3. *Visitors and observers, with a species that is unthreatened and unendangered.* The intermediate cases, and the difficult ones under current law, arise when there is no argument that the species will dwindle in number, but when a plaintiff alleges that the difficult conditions faced by the animal will cause, to the plaintiff, an injury in fact, defined in “aesthetic” terms. An obvious oddity here is that the plaintiff is likely to be concerned ethically or morally, not “aesthetically”—at least if the notion of the “aesthetic” is taken to refer to judgments, not ethical or moral in character, about beauty or ugliness. Nonetheless, it is the aesthetic injury that is the basis for the suit.

The leading case is *Animal Legal Defense Fund v. Glickman*,<sup>102</sup> in which an en banc panel for the D.C. Circuit was sharply divided. In

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<sup>98</sup> Id. at 231 n. 4.

<sup>99</sup> Defenders of Wildlife, 504 US at 562-63.

<sup>100</sup> 561 F.2d 1002 (DC Cir 1977).

<sup>101</sup> Id. at 1007. See also *Alaska Fish & Wildlife Fed’n v. Dunkle*, 829 F.2d 933 (9th Cir. 1987), granting standing to those “who wish to hunt, photograph, observe, or carry out scientific studies on migratory birds,” in the context of a challenge to agreements that would permit the hunting of such birds in Alaska); *Humane Society of the United States v. Hodel*, 840 F.2d 45 (DC Cir 1988) (allowing society members who visited wildlife refuges standing to challenge ruling expanding hunting, on the ground that members would be subjected to environmental degradation, fewer numbers of animals, and corpses).

<sup>102</sup> 154 F.3d 426 (1998).

that case, Marc Jurnove, an employee and volunteer for animal relief and rescue organizations, complained about what he believed to be the unlawful treatment of many animals at the Long Island Game Farm Park and Zoo. Jurnove contended that he had visited the park at least nine times between May 1995 and June 1996, and that the unlawful and inhumane treatment caused “injury to this aesthetic interest in observing animals living under humane conditions.”<sup>103</sup> Thus Jurnove did not urge that he had special interest in the decent treatment of animals by virtue of his service as employee and volunteer for animal relief and rescue organizations. What mattered was that he was a visitor to the zoo.

The court held that the aesthetic interest counted as an injury in fact and that Jurnove had “far more” than an abstract interest in law enforcement in its own sake.<sup>104</sup> In the court’s view, Jurnove established an aesthetic interest that he had repeatedly attempted to promote by “visiting a particular animal exhibition to observe particular animals there.”<sup>105</sup> Thus the court concluded that an injury in fact could be established “to a plaintiff’s interest in the quality and condition of an environmental area that he used.”<sup>106</sup> The court also concluded that Jurnove could satisfy the two causation requirements. The current USDA regulations allegedly permitted the conditions of which Jurnove complained; thus the injury was due to the government’s action. Standing would be found for “plaintiffs who claimed aesthetic injury . . . based on the government’s failure to adequately regulate a third party.”<sup>107</sup> In addition, the injury would be redressed by a decree in Jurnove’s favor, for “more stringent regulations . . . would necessarily alleviate [his] aesthetic injury during his planned, future trips to the Game Farm.”<sup>108</sup>

The dissenting judges contended that none of the Article III requirements had been met. They contended that for those complaining of an injury to the aesthetic interest in observing

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<sup>103</sup> Id. at 431.

<sup>104</sup> Id. at 432.

<sup>105</sup> Id. at 432.

<sup>106</sup> Id. at 436.

<sup>107</sup> Id. at 440.

<sup>108</sup> Id. at 443.

animals, standing was limited to “diminution-of-the-species.”<sup>109</sup> By itself aesthetic injury, “a matter of individual taste,” could not justify standing.<sup>110</sup> “Aesthetic injury,” thus understood, was no different from the interest in law enforcement of its own sake. In their view, Jurnave’s claim would allow standing for those seeking to view “animals in any manner that does not comport with” the plaintiff’s “individual taste.” Thus “a sadist with an interest in seeing animals kept under inhumane conditions” would have standing to contest the inhumane treatment.<sup>111</sup> In other words, this was a purely “subjective” interest, not a legally cognizable one.

The dissenters urged as well that Jurnave could not show sufficient causation. The inhumane treatment was not caused by government; it was caused by the zoo. Thus the dissenters found it “frightening at a constitutional level” to suggest “that the government causes everything that it does not prevent.”<sup>112</sup> A judicial order invalidating the regulation and directing the USDA to promulgate a new regulation would mandate new conditions at parks and zoos, but “it would require sheer speculation to presume that any enrichment devices specified in a future regulation would satisfy Jurnave’s aesthetic tastes.”<sup>113</sup> Thus it was far too conjectural to connect the decree sought to protection of the interests invoked by Jurnave.

If the goal is simply to describe current law, the majority view seems correct. In *Japan Whaling*, and in cases that follow it, courts did not say that an “injury in fact” would exist if and only if the action at issue would diminish the number of members of the species at issue. Nor is it clear why “diminution of the species” should count as an injury in fact and harms of the sort invoked by Jurnave should not. If the question is whether the plaintiff has suffered an “injury,” why are the two different? At the same time, there are serious problems in the majority’s analysis, a point to which I will return below.

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<sup>109</sup> Id. at 448.

<sup>110</sup> Id.

<sup>111</sup> Id. at 448-49.

<sup>112</sup> Id. at 452.

<sup>113</sup> Id. at 454.

### D. Evaluation

1. *Injuries without injuries?* As noted, those without an “injury in fact” are not entitled to bring suit. But what is an “injury in fact”? In the environmental area, it is well known that people are willing to pay a certain amount, sometimes a very large amount, to ensure the “existence” of endangered species. The United States government takes account of “existence value” in calculating the costs and benefits of certain courses of action.<sup>114</sup> If someone is willing to pay for the existence of some animal or set of animals, in what sense is that person not “injured” when the animal is killed?

I do not mean to suggest that this question cannot be answered. Perhaps it could be said that someone who is willing to pay for some state of affairs wants that state of affairs to exist, but that the injury that comes from the disfavored state of affairs is not something that the legal system should, or constitutionally may, treat as an injury “in fact.”<sup>115</sup> On the conventional understanding, this person is interested in law enforcement for its own sake, or in a state of affairs that he supports for merely ideological reasons. What is important for present purposes is to recognize that the legal system is denying that people suffer injury “in fact” for reasons that involve not “facts” but judgments about what facts, and what harms, ought to count for legal purposes. I will return to this point below.

2. *Morals and aesthetics.* The *Animal Legal Defense Fund* case raises fresh questions about the nature of the “injury in fact” requirement. Many people wish to see animals; many people wish to see animals treated in certain ways. Do all such people always have

<sup>114</sup> *Ohio v. Department of Interior*, 880 F.2d 432 (DC Cir 1989).

<sup>115</sup> The “injury in fact” test has been criticized on grounds of this kind in many places. See, eg, William Fletcher, *The Structure of Standing*, 98 Yale LJ 221, 229 (1988); David Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 42; Cass R. Sunstein, *What’s Standing After Lujan*, 91 Mich L Rev 163 (1992). See also *International Primate Protection League v. Administrators of Tulane*, 500 US 72, 77 (1991), where the Court says that “standing is gauged by the specific common law, statutory, or constitutional claims that a party presents,” and notes that standing “should be seen as a question of substantive law, answerable by reference to the statutory and constitutional provision whose protection is invoked.” *Id.* at 77. See also *Lujan*, *supra*, 504 US at 560, where the Court says that “the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest.”

standing, when their wishes are violated? One puzzle of the court's holding is that it seems to offer an affirmative answer to this question. Another puzzle is that the real objection of the relevant plaintiffs seems ethical or moral, not aesthetic. And a final puzzle is the court's suggestion that Jurnave, unlike a sadist, has standing because his interest is "legally protected": "[N]ot every aesthetic interest can form the basis for a lawsuit; our injury-in-fact test protects only those aesthetic interests that have been 'legally protected.'"<sup>116</sup> Let us attempt to sort out these puzzles.

Of course people do not have standing whenever they have an "aesthetic injury"—if this term refers to a subjective perception of disgust or distaste or offense. The requirement of "injury in fact" is designed to bar suits based on perceptions of this sort. People in California might well feel disgust or distaste or offense if they hear of racial discrimination, or a commercial development, on Long Island; but this does not give them standing. Under current law, it is necessary for them to be victims of discrimination, or materially affected by it. If their complaint involves commercial development, they must visit the relevant area. But this point raises a genuine problem about the conception of "injury in fact." Surely the *Animal Legal Defense Fund* dissenters are correct to doubt whether a sadist would have standing to contest regulations that make conditions more humane for animals—even though there is no doubting that a case can be imagined in which the sadist suffers no less, "in fact," than Jurnave. This point leaves the court's decision open to the objection that it really depends on sympathy for Jurnave on the merits. But something else is at work. Recall that the court's answer is that any injury in fact must be "legally cognizable"; it objects that the sadist would have no legally cognizable interest. To this the dissenting opinion, naturally enough, objects that the response confuses the "injury in fact" inquiry with an inquiry whether the plaintiff is arguably within the zone of protected interests.

The objection is correct, but it does not count against the court's decision. There is no way to inquire into "injury in fact" without making inquiries into law as well. People suffer injuries "in fact" every day, not least aesthetic injuries, and these injuries do not

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<sup>116</sup> 154 F.3d at 434 n. 7.



provide the basis for a suit in federal court.<sup>117</sup> The question is whether some source of law recognizes those injuries. Before the enactment of the Animal Welfare Act, a person who complained of mistreatment of animals in a zoo would have no cognizable injury, no interest protected by law. After the enactment of the Animal Welfare Act, such mistreatment may well be unlawful, and someone who complains about it will count as a proper plaintiff if he can show a particular interest in its prevention. *Jurnave* certainly was able to show this interest. The case would be different if a plaintiff never visited the animals at all, not because such a nonvisitor would have no injury at all, but because Congress has not given members of the general public a right to bring suit to ensure law enforcement. A possible objection would be that Congress conferred no cause of action on *Jurnave*. But under the APA as it has come to be understood, someone who suffers a material injury is permitted to bring suit so long as he is within the zone of protected interests and stands apart from members of the general public. Of course Congress can deny standing to such people if it chooses to do so.

The basic conclusions are therefore as follows. If Congress seeks to give standing to people to protect interests relating to the well-being of animals, it must comply with the injury-in-fact requirement. That requirement is met if a person has a nonspeculative plan to visit, study, or see the animals in question. Under the Administrative Procedure Act, the same conclusion follows, with two qualifications: Plaintiffs must show that they fall within the zone of interests protected by the Act, and they must also show that in terms of their interests and concerns, they are different from citizens generally.

3. *Redressability*. The issue of redressability raises further puzzles. On the authority of *Japan Whaling*, it seems generally agreed that those who fear the loss of an animal or of animals may bring suit to prevent governmental action that threatens to create the loss. But there is some tension in the cases, particularly because the *Japan Whaling* Court did not deal with the redressability problem, which, to get slightly ahead of the story, seems quite severe: How,

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<sup>117</sup> See Fletcher, *supra* note; Sunstein, *supra* note.

exactly, would a decree in favor of the American Cetacean Society benefit its members?

In *Lujan v. Defenders of Wildlife*, the Supreme Court did not merely hold that those without a particular plan to see or visit members of an endangered species lacked standing. A plurality also said that the redressability requirements were not met, for even if there was such a plan, the injury was not a result of the government's action, nor would it be redressed by a decree on the plaintiffs' behalf.<sup>118</sup> For example, the United States was funding under 10% of the disputed development project; if the United States withdrew funding, would there be any effect on the species that the plaintiffs sought to preserve? "Respondents have provided nothing to indicate that the projects they have named will either be suspended, or do less harm to the listed species, if that fraction is eliminated."<sup>119</sup> In addition, the Court noted that the defendant was the Secretary of the Interior, not the relevant funding agencies. It was not clear that the funding agencies were funding, in law or in fact, by the decision of the Secretary, even if he concluded that the EDA applied extraterritorially.

On this count, the plurality view in *Defenders of Wildlife* is in conspicuous tension with the majority view in both *Akins* and *Japan Whaling*, where it was also contended that a decree in the plaintiffs' favor would not redress their injury. How do these cases bear on the redressability issue when human beings are attempting to guard against harms to animals?

Consider first cases in which people seek to observe a species whose numbers will allegedly be reduced as a result of government action. This was the situation in *Japan Whaling*, where the Court stated, in its footnote discussion, that continued whale harvesting would impair the members' interest in whale watching and studying. This was a statement about injury in fact; the Court did not discuss the redressability problems. Now it seems clear that if the action under review would result in the elimination or near-elimination of whales, the redressability requirements would be met. But there were several problems in the case. First, a decision to "certify" Japan would

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<sup>118</sup> 505 US at 567-69.

<sup>119</sup> 505 US at 568.

not necessarily result in compliance, by Japan, with international conventions with respect to the killing of whales. Perhaps the only consequence would be that Japan would face sanctions from the Secretary of State. Second, it is not at all clear that compliance with Japan would have any material consequences for any member of the American Cetacean Society. Even if fewer whales were killed, how, concretely, would that redress the members' injury. In short, the difficulty here is that the reduced number of total whales will not necessarily cause any harm to the plaintiff; for this reason, there is a possible objection to standing on grounds of both redressability and injury in fact.

These problems suggest that in order to know whether the causation requirements are met, it is necessary to know how to characterize the relevant injury. If the injury is characterized as an adverse effect on the desire to see a particular whales at particular times, the plaintiffs will have a very difficult time in establishing standing. But if the injury is characterized as an increased probability of one kind or another, the causation requirements are plainly met. *Japan Whaling* must be understood as holding that the decreased availability of whales is itself a legally cognizable injury, and also that the increased likelihood of decreased availability, brought about by the failure to certify Japan, counts as a legally cognizable injury. This holding, to be defensible as such, must depend on some kind of characterization of the injury that the underlying source of law is designed to prevent.

Compare, for example, the Court's decision that white construction contractors had standing to challenge a racial set aside program, even though they could not show that they would have received a contract without the program; the equal protection clause protects the opportunity to compete on equal terms, and that injury would be redressed by a decree in the plaintiffs' favor.<sup>120</sup> Similarly, the cases recognizing standing for competitors must be taken to have held that the redressability requirements were, not because any particular plaintiff would necessarily have benefited materially, but because the injury consists of the inability to compete on the terms prescribed by Congress. From these points we can see the weakness

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<sup>120</sup> *Northeastern Florida Chapter v. Jacksonville*, 508 US 658 (1993).

in the plurality's view on the redressability issue in *Defenders of Wildlife*. The plaintiffs were complaining, not that particular species members would die, but that there was an increased risk of death as a result of the unlawful use of federal funds to sponsor the relevant program. If the plaintiffs were correct on the law—and that was an issue for the merits—the statute was designed to prevent American funds from being used in programs that might result in the death of members of an endangered species. The injury, so characterized, would have been redressed by a decree in their favor.

Two conclusions follow. First, competitors who suffer “injury in fact” need not worry about the redressability requirements. Second, plaintiffs claiming “aesthetic” injuries will probably have standing if they are complaining about the government's failure to issue or enforce regulations that, if issued or enforced, would eliminate those injuries.

4. *Competitors within the zone?* The thrust of the discussion thus far has been that the standing question should be focussed on legislative instructions. Injuries qualify as such if a statute qualifies them as such; whether an injury is redressable depends on how it is characterized, and the best way to characterize it is to examine the relevant source of law. But all this does raise a puzzle for at least some competitors. Perhaps some statutes protecting animal rights or welfare are enacted in part because of their beneficial effects for competitors; but others are designed to protect animals, and have nothing to do with competitors at all, whose economic advantage is entirely incidental. This point suggests that an inspection of some statutes will show that competitors are not even arguably within the zone.<sup>121</sup> The best response would point to the fact that competitive advantages, for those who comply with the relevant laws, are a means to the end sought by the statute. In most cases, this response should be sufficient, though reasonable people will differ in assessing statutes that are usually unclear on the point.

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<sup>121</sup> *Air Courier Conf. v. American Postal Workers Union*, 498 US 517 (1991).

### E. Summary

The discussion is best summarized with a set of stylized cases.

1. A group of citizens concerned about animal suffering or about threats to the continued existence of a species challenge government action that, on their view, leads to unlawful harm to animals. On the facts as stated, no standing is available, even if Congress has conferred a cause of action on “any person.” The reason is that there is no injury in fact.

2. Same as case 1, but the group alleges that it has members who wish to see, enjoy, or study the relevant animals. No standing is available, even if Congress has conferred a cause of action of “any person,” because on the facts as stated, no member has a sufficiently concrete plan in mind, and hence there is no injury in fact.

3. A group of citizens seeks information bearing on the treatment of animals under the Animal Welfare Act; the group contends that the information must be both compiled and disclosed. If Congress has granted a cause of action to “any person,” standing is available. If Congress has not conferred such a cause of action, standing is unavailable—unless the group can establish that it has a special interest in the information that distinguishes it from citizens generally and that it is within the zone of interests protected by the statute.

4. Someone who regularly visits a zoo challenges violations of the Animal Welfare Act at that zoo. Standing is available if Congress has conferred a cause of action on “any person.” The case is somewhat more difficult without such a special grant of standing, but the suit should be justiciable in that case as well, because the injury in fact test is met, because the plaintiff is within the zone of protected interests, and because the plaintiff has an interest that distinguishes him from members of the public as a whole.

5. Company A, a producer of certain medicines challenges commercial practices by Company B; company A contends that the practices of Company B are violative of the Animal Welfare Act and led to the production of medicines that serve as competition for Company A’s products. Standing is probably available, because Company A suffers an injury in fact, and because Company A is at least arguably within the zone of interests protected by the statute in question.

### III. Do Animals Have Standing?

#### A. A Simmering Dispute With A Simple Answer

Do animals have standing? Several cases so suggest. In *Palila v. Hawaii Dept. of Land and Natural Resources*,<sup>122</sup> the court said that “[a]s an endangered species under the Endangered Species Act, . . . the bird (*Loxioides bailleui*), a member of the Hawaiian honey-creeper family, also has legal status and wings its way into federal court as a plaintiff in its own right.”<sup>123</sup> In a remarkably large number of cases in the federal reports, animals appear as named plaintiffs.<sup>124</sup> But some courts have held that animals cannot bring suit in their own name.<sup>125</sup> Of course any animals who are entitled to bring suit in this way would be represented by counsel, who would owe guardian-like obligations and make decisions, subject to those obligations, on their clients’ behalf. But this type of proceeding is hardly foreign to our law; consider suits brought on behalf of children or corporations.

From the discussion thus far, it should be clear that the question whether animals have standing depends on the content of positive law. If Congress has not given standing to animals, the issue is at an end. Generally, of course, Congress grants standing to “persons,” as it does under the general standing provision of the APA,<sup>126</sup> the Marine Mammal Protection Act,<sup>127</sup> and the Endangered Species Act.<sup>128</sup> Indeed I have not been able to find any federal statute that allows animals to sue in their own name. As a rule, the question is therefore quite clear: Animals lack standing as such, simply because no relevant statute confers a cause of action on animals.

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<sup>122</sup> 852 F.2d 1106, 1107 (9th Cir. 1988).

<sup>123</sup> *Id.* at 1107.

<sup>124</sup> See, e.g., *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (WD Wash 1988); *Northern Spotted Owl v. Lujan*, 758 F. Supp 621 (WD Wash 1991); *Mt. Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir 1991).

<sup>125</sup> See *Hawaiian Cow v. Lujan*, D. Hawaii, Sept 13, 1991; *Citizens to End Animal Suffering and Exploitation v. New England Aquarium*, 836 F. Supp. 45 (D Mass 1993).

<sup>126</sup> See 5 USC 702 (referring to “any person suffering legal wrong”).

<sup>127</sup> 16 USC 1374.

<sup>128</sup> 16 USC 1531.

### B. The Question of Legislative Power

It seems possible, however, that before long, Congress will grant standing to animals to protect their own rights and interests. Congress might do this in the belief that in some contexts, it will be hard to find any person with an injury in fact to bring suit in his own name. Consider, for example, a proposed statutory ban on the importation of goods made with dog or cat fur<sup>129</sup>—a statutory ban that if disregarded, might not be easily enforceable by human beings. And even if statutes protecting animal welfare might be enforceable by human beings, Congress might grant standing to animals in their own right, partly to make a public statement about whose interests are most directly at stake,<sup>130</sup> partly to increase the number of private monitors of illegality, and partly to bypass complex inquiries into whether prospective human plaintiffs have injuries in fact.

Suppose that Congress does grant a cause of action to animals directly, to allow them to prevent actions harmful to their interests, such as extinction or suffering. Is there anything problematic in this course of action? The only serious question is constitutional in nature: whether the grant of standing would violate Article III's requirement of a "case or controversy."<sup>131</sup> Perhaps it could be argued that Congress could not constitutionally confer standing on animals. On this view, the modern understanding of what qualifies as a "case or controversy" should be based on an inquiry into what the founding generation understood to count as such. To say the least, the founding generation did not anticipate that dogs or chimpanzees could bring suit in their own name. Ideas of this kind have been used to limit the class of disputes that Congress can place in an Article III court<sup>132</sup>; perhaps they could be used to forbid Congress from giving standing to animals.

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<sup>129</sup> The impetus for the ban is that dogs and cats are often cruelly treated and a ban would reduce the market for the cruel treatment.

<sup>130</sup> See Cass R. Sunstein, *The Expressive Function of Law*, 144 U Pa L Rev 2021 (1996).

<sup>131</sup> U.S. Const. Art. III, section 1.

<sup>132</sup> See *Lujan v. Defenders of Wildlife*, 504 US 555 (1992); see also Antonin Scalia, *The Doctrine of Standing As An Essential Element of the Separation of Powers*, 17 Suffolk L Rev 881 (1983).

A central problem with this objection is that Congress is frequently permitted to create juridical persons, and to allow them to bring suit in their own right. Corporations are the most obvious example. But legal rights are also given to trusts, municipalities, partnerships, and even ships.<sup>133</sup> In an era in which slaves were not “persons,” it was acceptable to allow actions to be brought on behalf of slaves. In the same way, Congress might say that animals at risk of injury or mistreatment have a right to bring suit in their own name. Nothing in the requirement of a “case or controversy” should be read to forbid Congress from treating animals as owners of legal rights. The “case or controversy” requires means that courts may not hear cases in which there is no cause of action, and it imposes other limitations on judicial power, including, under current doctrine, prohibitions on mootness, political questions, and merely ideological claims. To be sure, the framers anticipated that plaintiffs would ordinarily be human beings. But nothing in the Constitution limits Congress’ power to give standing to others. The conclusion is that if Congress wants to give animals standing to bring suit to protect their legal interests, it is permitted to do so.

#### IV. Implications and Speculations

This is not the place for a general treatment of the law of standing of the question of “animal rights.” But the discussion does bear on those issues, and it may therefore be useful to offer a few brief speculations here.

##### A. Standing and the Problem of Injury in Fact

The area of standing to protect animals suggests (yet again) the extreme awkwardness of continuing to proceed as if “injury in fact” is a necessary or sufficient condition for standing.<sup>134</sup> Many people have injuries “in fact” in connection with the suffering of others, human or nonhuman, but they do not have standing for that reason. If Jones sees an act of abuse directed against a child, a friend, or a horse, he may well suffer injury, indeed he may well be willing to pay a great deal to avoid that injury; but by virtue of that injury, he is not

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<sup>133</sup> See Stone, *supra* note, at 452.

<sup>134</sup> Many people have raised this concern. See, e.g., Fletcher, *supra* note.



entitled to bring suit in federal court. Some source of law must make that injury legally cognizable. In the three sorts of cases I have discussed—informational, competitive, and aesthetic injury—standing exists to the extent that it makes sense to interpret the relevant source of law as giving particular persons a right to bring suit. The most important point to recognize is that Congress has control over that question.

The second most important point to recognize is a corollary: When the cases seem hard, it is because it is not clear, from those statutes that have been enacted, whether the plaintiff has been given a right to bring suit. Hence the information cases are easiest when Congress has spoken unambiguously on the question. Competitor standing is generally easy too, for the Court has suggested that when a competitor is injured “in fact,” it should be assumed that Congress sought to prevent that injury. The aesthetic injury cases are harder if it is unclear whether, in enacting the statutes protecting animal welfare, Congress should be taken to have granted a private cause of action to people who are distressed by seeing mistreated animals. It is for this reason that the two Animal Legal Defense Fund cases could have gone the other way; the real dispute involved the best reading of the underlying statute. It is important to recognize these points partly because they clarify a topic that is otherwise quite confusing, partly because they make it possible to see what reasonable people might be disagreeing about, and above all because they place control of the standing question in the hands of the democratic process, which is where it belongs.

### B. Disaggregating Animal Rights

What about the question of “animal rights”<sup>135</sup>? Many people reject the idea that animals can have “rights,” often on the theory that rights belong along to those with certain cognitive capacities, limited to human beings. Some people think that it is important to say that animals lack “rights” even if people have duties to animals. Without answering the largest questions about the nature of rights, we might suggest that for certain purposes, at least, it is most useful

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<sup>135</sup> See James Rachels, *Created From Animals: The Moral Implications of Darwinism* (1990).

to treat “rights” as legally enforceable claims of one kind or another. If rights are understood in this mundane and pragmatic way, there is nothing novel or unfamiliar about the notion of animal rights. Indeed, animals have long had a wide range of “rights” against cruelty and mistreatment under state law, and these rights have recently been growing in both state and national legislatures.

For purposes of knowing whether animals “have rights,” it is not sufficient to know whether animals are able to vindicate these rights in their own name. Many of the most familiar and celebrated of human rights are enforceable only by public authorities. We have seen that mere neglect of animal welfare counts as a criminal violation, and people are under an affirmative obligation to expend resources for the care and protection of animals. In many states, a failure to feed or shelter an animal can amount to, in practice, to a violation of an animal’s rights; the Animal Welfare Act creates national rights to food, shelter, even adequate ventilation and medical care. Indeed, animals have, under current law, a remarkable set of legal entitlements, including property rights of various sorts,<sup>136</sup> and they enjoy these rights against their “owners.” The reason that the relevant rights do not matter in the world—to the extent that they do not—is that little enforcement activity is directed against violations. The real question, and the question on which much future debate is inevitable, is the extent and dimension of animal rights, not their existence.

In an instructive discussion of the general problem Gary Francione makes a sharp distinction between “animal welfare” and “animal rights.” He contends that American law is committed to preventing infliction of “unnecessary” pain on animals and to ensuring that animals are treated “humanely.”<sup>137</sup> This commitment results in a form of balancing in which animals, generally treated as mere property, end up losing whenever human interests can be found on the other side. “To label something property, is, for all intents and purposes, to conclude that the entity so labeled possesses no interests that merit protection and that the entity is solely a means to

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<sup>136</sup> These are not rights to exclusive possession, of course.

<sup>137</sup> Francione, *supra*, at 253.

the end determined by the property owner.”<sup>138</sup> Francione seeks to replace “legal welfarism” with a system of animal rights, in which ultimately animals are regarded as having “inherent worth and value” and are not treated as property at all.

Much of what Francione argues seems convincing. Often animals have been regarded as means to human ends, and often the status of animals as mere property has helped to ensure this unjust state of affairs. Of course animals should not be treated as mere means to human ends, if only because they are capable of suffering, and in any case both state and federal law are firmly committed against the notion of animals as mere means. But there is nothing magical in the notions of “animal welfare” and “animal rights”; what matters is not the abstractions but the concrete meanings given to them. It is possible to imagine a regime of animal “rights” in which the permissible justifications for intrusions are so numerous, and so undemanding, that animals are hardly protected at all. It is possible to imagine a regime of animal “welfare” in which the interest in avoiding pain and suffering is taken extremely seriously, so much so that it overcomes many significant human interests. In fact it is reasonable to think that all or most legal rights qualify as such because of their beneficial effects on welfare, however understood; on this view, legal rights are instrumental to well-being, suitably defined.<sup>139</sup> Francione seems wrong to contrast “welfare” and “rights” so sharply.

What about the notion of animals as property? Here the stakes are a mixture of substantive and rhetorical. If the status of property means the status of means to the ends of others, or a status of human domination and control, animals should not have the status of property. But even inanimate objects are protected against domination and control; you may not burn down your house, and if you have certain kinds of property, you are prevented from destroying it. Animals currently count as property, but on the law as it is on the books, they are nonetheless protected against a wide range of injuries. We can imagine a situation in which animals are

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<sup>138</sup> Id.

<sup>139</sup> This general view is defended in Stephen Holmes and Cass R. Sunstein, *The Cost of Rights* (1999).

“owned” but in which the right of ownership does not include rights to inflict suffering; indeed that is not far from the law as it now stands. But the rhetoric may matter. In the long term it may well make sense to think of animals as something other than property, partly in order to clarify their status as beings with rights of their own.<sup>140</sup>

Let me conclude, however, with a more modest suggestion. A serious problem under the principal national protection against animal suffering—the AWA—is that the Department of Agriculture lacks sufficient resources to enforce it adequately. At a minimum, the Act should be amended so as to create a private cause of action by affected persons and animals, to bring suit against facilities that are operating in violation of the Act. A serious problem with current animal welfare statutes, including the AWA, is an absence of sufficient enforcement activity, a problem that stems at least partly from limited federal resources. At least when a violation of the statute is unambiguous, private parties should be permitted to bring suit directly against violators. This system of dual public and private enforcement would track the pattern under many federal environmental statutes; there is no reason that it should not be followed for statutes protecting animal welfare.

## V. Conclusion

There is nothing new or unfamiliar in the idea of animal rights. In the last thirty years, protection of animal “rights”—in the form of protection of animal welfare—has become an unmistakable part of federal law. The serious issues are ones of definition (what kinds of rights do animals have?) and of enforcement (who is entitled to enforce existing rights and duties?).

My principal topic here has involved that aspect of enforcement that comes under the rubric of standing. The conclusions for which I

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<sup>140</sup> Nothing I have said here deals with the question how to resolve serious conflicts between animal well-being and human well-being—conflicts that might arise when, for example, laboratory experiments on animals are necessary to combat illnesses in human beings. I am suggesting that a great deal could be done to reduce animal suffering—sometimes a product of cruelty, often a product of simple negligence—without attempting to answer the hard questions involving serious conflicts.

have argued are best divided into two categories—when Congress has power to confer standing, through explicit statement, and when standing exists under existing law. We have seen that Congress can give people standing to bring suit to obtain information bearing on the treatment of animals. Congress can also give people standing to bring suit to vindicate aesthetic interests in ensuring the humane treatment of animals, so long as such people have an actual plan to see the relevant animals. Congress can give people standing to bring suit to prevent an increased likelihood that members of certain species will decrease in number, so long as such people have an imminent, nonspeculative plan to see or study the relevant animals. Finally, Congress has the authority to grant animals standing to protect their interests, in the sense that injured animals might be counted as juridical persons, to be protected by human plaintiffs initiating proceedings on their behalf.

Under the APA as it now stands, a person has standing to obtain information involving the well-being of animals, unless the statute gives rise to a contrary inference or the plaintiff cannot distinguish his interest from that of the public at large. Under the APA, a person has standing to protect animals that she likes to see or to study, if the action at issue threatens to diminish the population of the relevant species. The principal qualification to this claim is that the law has a degree of uncertainty with respect to when the relevant injury will be attributed to the government's conduct.<sup>141</sup> Under the APA, a person has standing to protect animals that she likes to see or study, if the plaintiff has an imminent and not merely speculative plan to see or study the relevant animals.

Under existing statutes, animals do not have standing as such to protect their own interests. But Congress is entitled to grant them standing if it chooses to do so. Building on these claims, I have suggested that Congress should grant a private cause of action, to injured persons and to animals themselves, to prevent practices that are already unlawful. Legislative decisions on such questions will have considerable symbolic importance. But they will not be only symbolic, for they will help define the real-world meaning of

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<sup>141</sup> Compare *Lujan v. Defenders of Wildlife*, 504 US 555 (1992), with *Akins v. FEC*, 118 S Ct 1777 (1998).

statutory texts that attempt to protect animal welfare—statutes that now promise a great deal but deliver far too little.

Appendix: Major Federal Statutes Protecting Animals

Endangered Species Act, 16 USC 1531-1543

Animal Welfare Act, 7 USC 2131-2159

Humane Slaughter Act, 7 USC 1901-1906

Marine Mammal Protection Act, 16 USC 1361-1407

Airborne Hunting Act, 16 USC 742j-1

Wild Free-Roaming Horses and Burros Act, 16 USC 1331-1340

Dolphin Protection Consumer Information Act, 16 USC 1385

Bald and Golden Eagle Protection Act, 16 USC 668-668d

Readers with comments should address them to:

Cass R. Sunstein  
Karl N. Llewellyn Distinguished Service Professor of Jurisprudence  
The University of Chicago Law School  
1111 E. 60th Street  
Chicago, IL 60637