Emotions and Standing for Animal Advocates after *ASPCA v. Ringling Bros. & Barnum & Bailey Circus*

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Introduction

A popular perception exists that advocates of animal rights are irrational or emotional.[1] Though advocates acknowledge that emotions motivate their activism, many rely on scientific or philosophical justifications for animal protection.[2] In fact, many activists believe that emotions do not "win arguments."[3] This belief is well-founded in the legal context, as U.S. courts generally do not recognize claims based on emotional injuries involving animals.[4]

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1. *See, e.g.*, Harold Herzog et al., *Social Attitudes and Animals, in* THE STATE OF ANIMALS 2001 55, 60 (Deborah J. Salem & Andrew N. Rowan eds., 2001) (recounting the perception created by biomedical interests that animal activists are "at best, emotional Luddites"); Andrew Herrmann, *Circus is in Town, With a Chip on Its Shoulder*, CHI. SUN-TIMES, Nov. 5, 2003, *available at* http://www.suntimes.com/output/news/cst-nws-circus05.html (quoting publicist for Ringling Bros. claiming that activists "use emotional rhetoric in an attempt to mislead the public").

2. *See* Julian McAllister Groves, *Animal Rights and the Politics of Emotion: Folk Constructs of Emotions in the Animal Rights Movement, in* PASSIONATE POLITICS: EMOTIONS AND SOCIAL MOVEMENTS 212, 220-23 (Jeff Goodwin et al. eds., 2001). *Cf.* HELENA SILVERSTEIN, UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT 58-61 (4th ed. 1999) (surveying movement literature and finding that most literature is descriptive, assuming that animals have rights rather than arguing for such rights).

3. *See* Groves, *supra* note 2, at 215-26; John A. Fisher, *Taking Sympathy Seriously: A Defense of Our Psychology Toward Animals, in* THE ANIMAL RIGHTS/ENVIRONMENTAL ETHICS DEBATE: THE ENVIRONMENTAL PERSPECTIVE 227 (Eugene Hargrove ed., 1992) (observing that animal rights proponents distance themselves from "sentimental appeals to sympathy").

4. *See* Lynn A. Epstein, *Resolving Confusion in Pet Owner Tort Cases: Recognizing Pets' Anthropomorphic Qualities Under a Property Classification*, 26 S. ILL. U. L.J. 31, 39-40 (2001) (noting that litigants suing under negligent infliction of emotional distress statutes under a bystander theory have been "uniformly unsuccessful"); Steven M. Wise, *Recovery of Common Law Damages for Emotional*

Gaining standing to sue is one area where this lack of recognition has hindered activists. The issue of standing on behalf of animals goes to the heart of the inequality between humans and nonhumans in the law. Because federal statutes preclude an animal from having standing to sue,[5] humans must bring the suit on the animal's behalf.[6] In order to prove standing, a human plaintiff must show she or he is injured.[7] Although courts have found injury to aesthetic interests cognizable for standing purposes,[8] until recently, no court recognized emotional injuries.[9]

In *American Society for the Prevention of Cruelty to Animals (ASPCA) v. Ringling Bros. & Barnum & Bailey Circus*,[10] the Court of Appeals for the District of Columbia broke new ground by finding that a plaintiff had standing to sue based on an emotional attachment to an elephant formerly in his care.[11] This Article will argue that the *ASPCA* court's consideration of emotional factors in its standing analysis is a small but significant step toward remedying the lack of legal standing accorded to animals. Part I of this Article will discuss the state of the law regarding standing on

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Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of a Companion Animal, 4 ANIMAL L. 33, 69 (1998) (noting that "[h]istorically, owners of companion animals were denied common law damages for emotional distress and loss of society for the wrongful deaths of their companion animals . . ."). A few state courts, however, have found valid claims for intentional infliction of emotional distress when a companion animal was killed. *See infra* Part II.A.

5. Two federal statutes frequently used to advocate for animals are the Animal Welfare Act (AWA), 7 U.S.C. §§ 2131-2159 (2000), and the Endangered Species Act of 1973 (ESA), 16 USCS §§ 1531-1543 (2000). The ESA contains a citizen-suit provision, 16 U.S.C. § 1540(g), while plaintiffs seeking to challenge the enforcement of the AWA use the "right of review" provision of the Administrative Procedure Act (APA), 5 USCS § 702 (2003). Actions under the APA require that the injury be within the "zone of interests" covered by the statute. Bennett v. Spear, 520 U.S. 154, 162 (1997). The scope of this Article is limited to constitutional standing.

Courts have applied the same constitutional standing principles regarding other animal-related statutes. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230-31 n.4 (1986) (suit under the Pelly Amendment to the Fishermen's Protective Act and the Packwood Amendment to the Magnuson Fishery Conservation and Management Act); Ala. Fish & Wildlife Fed'n v. Dunkle, 829 F.2d 933, 934 (9th Cir. 1987) (suit under the Migratory Bird Treaty Act); Animal Lovers Volunteer Ass'n v. Weinberger, 765 F.2d 937, 937 (9th Cir. 1985) (suit under the National Environmental Policy Act); Animal Welfare Inst. v. Kreps, 561 F.2d 1002, 1003-04 (D.C. Cir. 1977) (suit under the Marine Mammal Protection Act).

6. *See* Cass R. Sunstein, *A Tribute to Kenneth L. Karst: Standing for Animals*, 47 UCLA L. REV 1333, 1359 (2000) (stating that standing is available insofar as it is granted under applicable statutes). Thus far, Congress has only granted standing to "persons." *Id.* at 1335.

7. *See infra* Part I.

8. *See infra* Part I.A.

9. *See infra* Part I.B.

10. 317 F.3d 334 (D.C. Cir. 2003).

11. *Id.* at 338.

behalf of animals prior to *ASPCA*.[12] Part II will offer legal and theoretical frameworks for understanding emotions.[13] Part III will state the holdings of *ASPCA*.[14] Part IV will show that the court was right to recognize emotional interests, but wrong in characterizing the injury as aesthetic.[15] It will argue that an accurate theory of standing based on emotional injury will acknowledge the voice of advocates, distinguish environmental standing cases from animal standing cases, and answer several criticisms made against the aesthetic theory.

I. Injury in Fact on Behalf of Animals Before *ASPCA*

A plaintiff must satisfy three requirements to have standing under Article III of the U.S. Constitution: 1) the plaintiff must have personally suffered an actual or threatened injury; 2) the injury must be fairly traceable to the defendant; and 3) a favorable decision must be likely to redress the injury.[16] Many of the problems faced by animal advocates in gaining standing are related to fulfilling the "injury in fact" requirement. The injury in fact element of standing requires the plaintiff to have a concrete and particularized interest.[17] By requiring plaintiffs to possess an actual stake in the litigation, judges can make decisions in specific contexts and with a realistic appreciation of the impact of the outcome.[18]

A. Courts Have Recognized Injury to Aesthetic Interests

In order to establish injury in fact, animal advocates rely on a theory of aesthetic injury first recognized in 1972 in the *Sierra Club v. Morton*[19] decision. In *Sierra Club*, an environmental advocacy group sought declaratory and injunctive relief to prevent a ski resort from being built on land maintained by the National

12. *See infra* notes 16-49 and accompanying text.

13. *See infra* notes 50-78 and accompanying text.

14. *See infra* notes 79-91 and accompanying text.

15. *See infra* notes 92-145 and accompanying text.

16. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 472 (1982). The federal Constitution limits the judicial powers of federal courts to "cases" and "controversies." *See* U.S. CONST. art. III, § 2. *Valley Forge* held that the requirements of injury, causation, and redressability are the "irreducible minimum" of what the Constitution demands. 454 U.S. at 472.

17. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The Supreme Court has glossed the injury in fact requirement to mean that an "injury must affect the plaintiff in a personal and individual way." *Id.* at 560 n.1.

18. *Id.* at 581 (Kennedy, J., concurring).

19. 405 U.S. 727 (1972).

Forest Service.[20] The Supreme Court recognized that "aesthetic and environmental well-being" is a cognizable interest,[21] but denied standing because the plaintiffs produced no evidence that the resort would affect them personally.[22] The exact dimensions of what constitutes an aesthetic injury were not delineated in the majority opinion, but Justice Douglas's dissent imagined possible plaintiffs and their correspondent interests in using the park for recreational purposes.[23] The *Sierra Club* court did not address animals as anything other than part of the environment.[24]

After *Sierra Club*, litigants on behalf of animals successfully asserted injury based on government laws and regulations that limited plaintiffs' interests in studying and observing animals.[25] Courts have disagreed, however, as to whether people have cognizable interests in seeing animal species as a whole or individually.[26] A related question is whether the context of the environment in which the animal is observed is relevant to

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20. *Id.* at 729-30.

21. The invocation of general aesthetic and environmental values, without further explanation, echoes the Court's early dicta that injury may reflect "aesthetic, conservational, and recreational" values. *See id.* at 738 (citing Data Processing Serv. v. Camp, 397 U.S. 150, 154 (1970)).

22. *Id.* at 734-35. By requiring a personal injury, the Court eschewed litigation aimed at finding judicial approval to a value preference. *See id.* at 740.

23. *Id.* at 744-45 (Douglas, J., dissenting). Plaintiffs having an interest in an undeveloped park would include those "who hike it, fish it, hunt it, camp in it, frequent it, or visit it merely to sit in solitude and wonderment . . . ." *Id.*

24. *See id.* at 728. The majority does not mention animals except to note that the area in question was designated by Congress as a game refuge. *See id.* The dissent quotes Aldo Leopold approvingly: "The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land." *Id.* at 752 (Douglas, J., dissenting) (quoting ALDO LEOPOLD, A SAND COUNTY ALMANAC 204 (1949)).

25. *See, e.g.*, Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230-31 n.4 (1986) (finding injury when agency action would adversely affect plaintiff's ability to watch and study whales). Many courts directly associate aesthetic interests with the act of observation. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-63 (1992) ("[T]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."); Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 433 (D.C. Cir. 1998) (plaintiff suffers an aesthetic injury when he sees "with his own eyes" animals allegedly mistreated); Animal Def. Fund, Inc. v. Espy, 23 F.3d 496, 504 (D.C. Cir. 1994) (Williams, J., dissenting in part) (arguing that plaintiff's "interest in not seeing animals mistreated before her very eyes" is sufficient).

26. *See, e.g.*, Animal Legal Def. Fund v. Glickman, 154 F.3d 426, 438. In *Glickman*, a plaintiff successfully gained standing to sue for aesthetic injuries resulting from observing mistreated animals on repeated trips to the zoo. *Id.* The majority found language of specificity in previous cases to support interests in particular animals. *Id.* at 433. The dissent would have limited standing to those challenging regulations that would decrease the number of members of a given species. *See id.* at 447 (Sentelle, J., dissenting).

aesthetic interests. In *Animal Legal Defense Fund, Inc. v. Glickman*,[27] the D.C. Circuit court found an aesthetic interest in viewing animals under humane conditions.[28] The *Glickman* dissent criticized the majority's position as too subjective and emotional, potentially allowing a sadist to sue for insufficiently *inhumane* treatment.[29] One scholar also notes the "obvious oddity" of describing the injury of observing a mistreated animal as an issue of aesthetics instead of one of ethics or morality.[30]

B. Courts Have Not Recognized Injury to Emotional Interests

Historically, courts have refused to find emotional interests in animals cognizable.[31] Courts' reluctance to recognize emotional injury perhaps arises from the fear that people will claim emotional injury from knowledge of a perceived unjust act,[32] even

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27. *Id.* at 426.

28. *Id.* at 438. In a 1979 decision, the D.C. Circuit suggested that humane considerations might constitute an independent basis for standing, but decided the case on different grounds. Animal Welfare Inst. v. Kreps, 561 F.2d 1002, 1007, 1014 (D.C. Cir. 1977). *Glickman*, however, misconstrued *Kreps* as finding that the court found recognizable interests in injuries to the quality of a viewing experience. *See* Aaron Wesley Proulx, *Animal Legal Defense Fund, Inc. v. Glickman: A Common Law Basis for Animal Rights*, 29 STETSON L. REV. 495, 515 (1999) (arguing that the *Glickman* majority relied on dicta in *Kreps*). *See also Glickman*, 154 F.3d at 447 (Sentelle, J., dissenting) (contending that the *Kreps* court was not clear on what grounds standing was found).

29. *See Glickman*, 154 F.3d at 448-49 (Sentelle, J., dissenting). The dissent focused on the finding of aesthetic injury due to *inhumane* conditions, finding that "[h]umaneness, like beauty, is in the eye of the beholder: one's individual judgment about what is or is not humane depends entirely on one's personal notions of compassion and sympathy." *Id.* at 448. *Cf.* Robert D. Dodson, *Rethinking Private Nuisance Law: Recognizing Aesthetic Nuisances in the New Millennium*, 10 S.C. ENVTL. L.J. 1, 16 (explaining judicial unwillingness to find aesthetic nuisances because aesthetic judgments are too subjective). The *Glickman* dissent also forcefully criticized the aesthetic injury theory with regard to how such injuries can be redressed. *See* 154 F.3d at 453-54 (Sentelle, J., dissenting). The dissent argues that if an injury is predicated on a person's attitude about the conditions in which an animal is kept, the court could not possibly anticipate what would meet his or her taste, and thus redress the problem. *Id.* at 454.

30. *See* Sunstein, *supra* note 6, at 1349.

31. *See, e.g.*, Humane Soc'y of the United States v. Babbitt, 46 F.3d 93, 98 (D.C. Cir. 1995) (pleading of general emotional injury rejected). *See also* Humane Soc'y of the United States v. Hodel, 840 F.2d 45, 49 (D.C. Cir. 1988) (quoting Humane Soc'y of the United States v. Clark, No. 84-3630 (D.D.C. July 25, 1986) (finding standing when the plaintiffs suffered no more than the "emotional distress at the knowledge that animals and birds are being hunted for sport")). Though the D.C. Circuit reversed the denial of standing, the court agreed that "mere emotional injuries" were not cognizable. *Id.*

32. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 485-86 (1986) (finding that psychological

though they have little connection to the allegedly illegal action.[33] But even when plaintiffs alleged sufficient firsthand experience with animal mistreatment to have aesthetic interests injured, courts have refused to recognize emotional injuries.[34] In 1992, the Ninth Circuit came closest to acknowledging emotional interests by finding that plaintiffs' distress from seeing bison killed was a sufficient injury for standing.[35]

Advocates who claimed injury on the basis of interests in personal relationships with animals were also unsuccessful. In similar cases brought by the International Primate Protection League (IPPL) in 1986 and 1990, two circuits rejected the disruption of a personal relationship with laboratory monkeys as an injury sufficient to allow standing.[36] The courts held that, even if animal welfare laws were to be enforced, no right existed to see the animals.[37] The Fifth Circuit also distinguished between

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consequences from observing disagreeable conduct is not sufficient to meet Article III standing). *But see* Karen L. McDonald, *Creating a Private Cause of Action Against Abusive Animal Research*, 134 U. PA. L. REV. 399, 413-16 (arguing that courts should enjoin activities violating animal cruelty statutes because such violations offend morality and, in doing so, constitute a public nuisance).

33. Sierra Club v. Morton, 405 U.S. 727, 751-52 (1972) (Douglas, J., dissenting). In his *Sierra Club* dissent, Justice Douglas distinguished between granting standing for people who actively use an area and those "merely caught up in environmental news or propaganda." *Id.*

34. *See Hodel*, 840 F.2d at 52 (stating that "mere emotional injuries" are not cognizable when the court later found an aesthetic injury). In *Glickman*, one plaintiff pled "aesthetic harm and emotional and physical distress," but the court only addressed an injury to his aesthetic interest. 154 F.3d at 430, 431-38. The dissent, however, noted that an injury to someone's sense of humaneness is based on his or her emotional response. *Id.* at 449 (Sentelle, J., dissenting.)

35. Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1396-67 (9th Cir. 1992). Whether the court considered psychological injury as part of an aesthetic analysis or as a separate interest is unclear. A close reading of the case indicates that the interest being injured was environmental, rather than a humane one. *See* Proulx, *supra* note 28, at 507. The dissent in one D.C. Circuit case would have found "injury to a plaintiff's sensibilities" for a scientist who pled personal distress at viewing mistreatment of animals. Animal Legal Def. Fund, Inc. v. Espy 23 F.3d 496, 505 (D.C. Cir. 1994) (Williams, J., dissenting in part).

36. Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 895 F.2d 1056, 1059 (5th Cir. 1990) *rev'd on other grounds*, 500 U.S. 72, 89 (1991), *dismissed*, No. 91-2966, 1992 U.S. Dist. LEXIS 17021, at *7-8 (E.D. La 1992) (deferring to the Fifth Circuit's analysis on standing); Int'l Primate Prot. League v. Inst. for Behavioral Research, Inc., 799 F.2d 934, 938 (4th Cir. 1986).

37. *Inst. for Behavioral Research*, 799 F.2d at 938; *Adm'rs. of Tulane*, 895 F.2d at 1059. In *Institute for Behavioral Research*, the Fourth Circuit found that the plaintiffs' relationship with the monkeys was primarily based on the litigation, despite the fact that the lead plaintiff had a relationship with the animals pre-dating the litigation. *Inst. For Behavioral Research*, 799 F.2d at 935-37. The IPPL apparently sought to avoid a similar fate in *Administrators of Tulane* by pleading that the relationship was "established prior to any previous litigation in related matters and which continued during such litigation." *Adm'rs. of Tulane*, 895 F.2d

decisions that found injury on the basis of interests in wild animals and the case of privately owned laboratory monkeys.[38] The court reasoned that plaintiffs could "freely enjoy" wild animals if their cases succeeded, whereas they could not with privately owned animals.[39] In a 1995 decision, the D.C. Circuit found that "no court has yet considered whether an emotional attachment to a particular animal (not owned by a plaintiff) based upon the animal being housed in a particular location could form the predicate of a claim of injury."[40]

C. *Courts Have Rejected Otherwise Cognizable Injuries for Being Insufficiently Imminent*

The injury in fact requirement is not fulfilled if the alleged injury is insufficiently imminent, even if cognizable interests are found.[41] In *Lujan v. Defenders of Wildlife*,[42] the Court found that the plaintiffs' past visits to habitats of endangered species "proved nothing," and that the lack of concrete plans to return to the habitats failed to meet the injury in fact requirement.[43] Subsequently, the D.C. Circuit rejected standing for a psychobiologist who claimed that lack of regulations for rats and mice under the Animal Welfare Act would force her to endure abuses in future research.[44] Despite the fact the doctor had witnessed past abuse of the animals, the court found that the doctor suffered no immediate injury.[45] Four years later, in *Glickman*, however, the D.C. Circuit found injury when a plaintiff previously observed primates in inhumane conditions and had every intention of seeing the animals again.[46] The United States

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at 1059. The Fifth Circuit did not specifically respond to that pleading.

38. *Adm'rs of Tulane*, 895 F.2d at 1059.

39. *Id.* at 1059.

40. Humane Soc'y of the United States v. Babbitt, 46 F.3d 93, 98 (D.C. Cir. 1995).

41. Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992).

42. *Id.* at 555.

43. *Id.* at 564. In his concurring opinion, Justice Stevens suggested that plans might not be necessary if the plaintiff previously visited a habitat. *Id.* at 584 (Stevens, J., concurring). He characterized the interest as "comparable, though by no means equivalent, to the interest in a relationship among family members that can be immediately harmed by the death of an absent member, regardless of when, if ever, a family reunion is planned to occur." *Id.*

44. Animal Def. Fund, Inc. v. Espy, 23 F.3d 496 at 500. By considering the "imminence" requirement first, the court did not consider the sufficiency of the doctor's plea of professional injuries and personal distress. *Id.* at 504 (Williams, J., dissenting in part).

45. *Id.* at 500.

46. Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 430-31 (D.C. Cir. 1998). The plaintiff pled that he planned to visit the animals in "the next several

Supreme Court, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services,*[47] also found future plans to visit a river sufficient in the environmental context.[48] Still, it is not clear whether future plans could succeed where, as in the IPPL cases,[49] the plaintiffs have no right of access to animals.

II. Emotions in Law and Theory

A. Emotions in the Law

Scholars increasingly recognize the role emotions play in the law.[50] The criminal system is most noticeably infused with emotion: judges instruct juries on the role of mercy in their decisions; "heat of passion" is a recognized criminal defense; and certain crimes, such as racially motivated violence, are considered more disgusting than others.[51] Emotions also play a role in civil law; for instance, one scholar argues that legislation banning same-sex marriage reflects a socially constructed understanding that gays and lesbians are incapable of feeling romantic love.[52] More on point, tort law recognizes damages for emotional distress on the death or injury of a loved one.[53]

One early judicial recognition of emotional interests in animals was the 1964 decision of *La Porte v. Associated Independents, Inc.*[54] In *La Porte*, the Florida Supreme Court allowed recovery by the human companion of a dog that was killed when a sanitation worker threw a garbage can at her.[55] In

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weeks." *Id.* at 30. Neither the majority nor the dissenting opinions discussed the imminence of the injury.

47. Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167 (2000).

48. *See id.* at 184-85. The Court found that the conditional nature of the plaintiffs' statements—that they would use a nearby river if the defendant ceased discharging pollutants—could not be equated with the "some day" intentions of the plaintiffs in *Defenders of Wildlife*. *Id.* at 184 (citing *Defenders of Wildlife*, 504 U.S. at 564).

49. *See supra* notes 36-38 and accompanying text.

50. For a brief survey of law and emotion scholarship, see Laura E. Little, *Negotiating the Tangle of Law and Emotion*, 86 CORNELL L. REV. 974, 976-79 (2001) (reviewing THE PASSIONS OF LAW, *infra* note 51).

51. Susan Bandes, *Introduction* to THE PASSIONS OF LAW 4, 6 (Susan Bandes ed., 1999).

52. Cheshire Calhoun, *Making Up Emotional People: The Case of Romantic Love*, *in* THE PASSIONS OF LAW, *supra* note 51, at 236.

53. *See* Bruce I. McDaniel, Annotation, *Recovery for Mental or Emotional Distress Resulting from Injury to, or Death of, Member of Plaintiff's Family Arising from Physician's or Hospital's Wrongful Conduct*, 77 A.L.R.3D 447 (2003).

54. La Porte v. Associated Indeps., Inc., 163 So. 2d 267 (Fla. 1964).

55. *Id.* at 268-69.

rejecting the prevailing market value approach to assessing value,[56] the court found that "the affection of a master for his dog is a very real thing and that the malicious destruction of the pet provides an element of damage for which the owner should recover."[57] More recently, in a suit for the tort of outrage,[58] the Kentucky Court of Appeals recognized the emotional relationship between a human and her horses as one of love.[59] Some courts have also recognized emotional relationships between animals and humans in the context of marital dissolution.[60] Significantly, however, courts have been very reluctant to recognize a tort for loss of animal companionship.[61]

B. Emotions in Cognitive Theory

Despite instances of emotion in the law, no consensus exists among scholars as to what exactly constitutes an emotion.[62] One helpful approach is to consider emotions as having cognitive content.[63] Cognitive theorists argue that emotions reflect beliefs and value judgments about their objects, specifically those values that a person finds intrinsic to a complete life.[64] Anger, for example requires several beliefs: that a person or someone close to that person was damaged, that the damage is significant, and that the damage was done by someone, probably willingly.[65]

Emotions are shaped by both individual experience and social

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56. The dominant approach to estimating the value of an animal is its market value at death. *See* Robin Cheryl Miller, *Damages for Injuring or Killing a Dog*, 61 A.L.R.5TH 635 (2003) (listing cases adopting market value approach).

57. *La Porte*, 163 So. 2d at 269.

58. Burgess v. Taylor, 44 S.W.3d 806 (Ky. Ct. App. 2001).

59. *Id.* at 811-12.

60. *See, e.g.*, Arrington v. Arrington, 613 S.W.2d 565, 569 (Tex. Civ. App. 1981) (noting "genuine love" felt by divorced couple for dog).

61. *See* Elaine T. Byszewski, *Valuing Companion Animals in Wrongful Death Cases: A Survey of Current Court and Legislative Action and a Suggestion for Valuing Pecuniary Loss of Companionship*, 9 ANIMAL L. 215, 223, 223 n. 60 (2003) (noting one recent exception to general rule rejecting cause of action).

62. *See* Bandes, *supra* note 51, at 10 (stating that "[e]motional theorists have never come close to agreeing on a definition of *emotion*; indeed, there seems to be widespread agreement on the impossibility of finding one").

63. Cognitivists dominate the study of emotions as a philosophical discipline. *See* John Deigh, *Cognitivism in the Theory of Emotions*, 104 ETHICS 824, 824 (1994). In contrast, feeling-centered theories relate emotions to physical sensations. *Id.* at 825.

64. MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT 28-30 (2001). *See also* Thomas G. Kelch, *The Role of the Rational and the Emotive in a Theory of Animal Rights*, 27 B.C. ENVTL. AFF. L. REV. 1, 31 (1999) (arguing that emotions reveal what is morally valuable).

65. *See* NUSSBAUM, *supra* note 64, at 28-30.

norms.[66] Social norms affect how different emotions are valued, as well as what are considered appropriate emotional objects.[67] Some areas of law reflect such normative valuing. For instance, criminal law relies on the "reasonable person" standard as to when the emotion of violent anger is acceptable and when it is not.[68] Thus, emotions can be legally relevant when they are based on normatively valued beliefs.[69] In addition, emotions can be both general and concrete, background and situational.[70] Unlike situational emotions, which occur in particular circumstances, background emotions are characterized by longstanding attachments that are an integral part of one's life.[71]

Many of the terms used to describe experiences with nature or animals are treated differently in emotional theory than they are by the courts. For instance, theorists treat pleasure as a feeling, without independent cognitive content.[72] Pleasure alone is

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66. *See id.* at 140. A cognitive understanding of emotions is not required to recognize that emotions are, at least partially, shaped by normative values. *Id.* But by focusing on the beliefs and experiences underlying emotions, cognitive theory provides a way to explain differences in normatively shaped emotions. *Id.*

67. *See id.* at 157-65. *See also* AARON BEN-ZE'EV, THE SUBTLETY OF EMOTIONS 189 (2000) (arguing that "emotions are rational in the normative sense of being an appropriate response in the given circumstances"). Inappropriate emotional experiences are obviously not limited to instances when they are directed towards animals. MARY MIDGLEY, ANIMALS AND WHY THEY MATTER 36-37 (1983).

68. *See* NUSSBAUM, *supra* note 64, at 162. In the above example, the prohibited act is not having the emotion of anger but acting on it. Still, a criminal act motivated by a normatively unacceptable emotional response is treated differently than one by a normatively acceptable one. Emotions almost always contain motivational components. *Id.* at 135.

69. *See* Martha C. Nussbaum, *"Secret Sewers of Vice:" Disgust, Bodies, and the Law*, *in* THE PASSIONS OF LAW, *supra* note 51, at 45 (arguing that emotion-beliefs based on compelling reasons create a prima facie case for legal regulation).

70. *See* NUSSBAUM, *supra* note 64, at 67-71. A single situation may elicit both general and concrete emotional responses. *Id.* The grief that follows the death of a parent includes both judgments about the importance and good qualities of the deceased, as well as the more general idea that the mourner has lost a parent. *Id.* at 68.

71. *See id.* at 71 ("Once one has formed attachments to unstable things not fully under one's own control, once one has made these part of one's notion of one's flourishing, one has emotions of a background kind toward them . . . that persist in the fabric of one's life."). Nussbaum's distinction between situational and background emotions parallels another theorist's discussion of emotion (e.g., falling in love) and sentiment (e.g., being in love). *See* BEN-ZE'EV, *supra* note 67, at 83.

72. *See* BEN-ZE'EV, *supra* note 67, at 65. *See also* NUSSBAUM, *supra* note 64, at 63 (arguing that pleasure is a feeling or a way of doing something and is not tied to any emotion). Ben-Ze'ev demonstrates the distinction between emotion and feeling by comparing sexual desire and sexual pleasure. *See* BEN-ZE'EV, *supra* note 67, at 65. While sexual pleasure consists of a pleasant feeling, sexual desire is complex, containing evaluative and motivational aspects. *Id.* at 65, 144.

not an emotion.[73] Theorists also distinguish emotional experiences from aesthetic ones. Whereas aesthetic experiences are routinely directed towards inanimate objects, such as a painting, emotional experiences typically are not.[74] Aaron Ben-Ze'ev demonstrates the difference between emotional and aesthetic experiences by differentiating between the character of the love directed toward animate and inanimate objects.[75] He observes that the love of a painting lacks many of the features associated with loving another person, such as the desire for reciprocal feelings and wishes for the beloved's future development.[76] Other theorists hold that emotions can attach to abstract objects,[77] but that certain emotional experiences, such as compassion, can only take sentient beings as their objects.[78] Emotion theory thus offers a compelling framework for understanding emotions that is sometimes at odds with the legal understanding of emotion.

III. ASPCA v. Ringling Bros. & Barnum & Bailey Circus

In *ASPCA*, a former circus worker named Thomas Rider[79] alleged that the mistreatment of elephants by Ringling Brothers employees violated a provision of the Endangered Species Act.[80]

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73. Pleasure is contained in other emotions, as when it is directed towards another's misfortune in the German concept of "Schadenfreude." *See* BEN-ZE'EV, *supra* note 67, at 355.

74. *See id.* at 44-45.

75. *See* BEN-ZE'EV, *supra* note 67, at 30. "Inanimate" and "animate" are used broadly to differentiate agents from non-agents; the object of an emotion must be an "agent" insofar as it is capable of emotions. *Id.* This explains why the story of the financial problems of a particular person has a much greater emotional effect than that of a large company's collapse. *Id.*

76. BEN-ZE'EV, *supra* note 67, at 45. *See also* ANDREW ORTONY ET AL., THE COGNITIVE STRUCTURE OF EMOTIONS 167 (1988) (stating that the object of love is normally constrained to an animate being). One thinker argues that, whereas concern involves abstract principles, sympathy involves particular individuals or groups. *See* Fisher, *supra* note 3, at 229-30. Because attitudes towards ecosystems are abstract, they cannot be said to be sympathetic. *Id.* at 245-46 n.8.

77. For instance, Nussbaum finds that emotions can be tied to beliefs about systematic wrongs. *See* NUSSBAUM, *supra* note 64, at 70.

78. A person feeling compassion for an animal, for example, recognizes a common vulnerability to suffering. *Id.* at 319. Trees do not suffer similarly (or really suffer at all). *See* MIDGLEY, *supra* note 67, at 91 ("The Golden Rule does not . . . seem to apply to forests."). Nussbaum discusses extending compassion to animals, but does not discuss it encompassing nature as whole. NUSSBAUM, *supra* note 64, at 317.

79. Other plaintiffs were named in the action, but the court held that standing can be found on the basis of one plaintiff when all plaintiffs seek the same relief. ASPCA v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334, 338 (D.C. Cir. 2003).

80. *Id.* The complaint alleges an unlawful "taking" of the elephants: "harming, harassing, and wounding endangered elephants." 2d Am. Compl. at 1-2 (No. 00-

Specifically, the plaintiff pointed to the beating of elephants with sharp hooks, keeping them in chains for long periods of time, and weaning baby elephants from their mothers prematurely.[81] Rider quit his job with Ringling Brothers because of the mistreatment, but expressed his desire to visit or work with the elephants again in another setting.[82] He claimed he could not stand to see the elephants again in their current setting because he would suffer "aesthetic and emotional injury" from such a visit.[83] Rider sought an injunction against additional violations, forfeiture of the elephants, and other relief.[84] The district court found no standing under Article III, holding that neither Rider's desire to work with the elephants nor his emotional unrest with their mistreatment were sufficient to meet the injury in fact requirement of standing.[85] Rider appealed.[86]

The D.C. Circuit Court of Appeals reversed and found all of the elements of standing satisfied.[87] The court stated that the injury requirement of standing is met when a defendant "adversely affects a plaintiff's enjoyment of flora or fauna, which the plaintiff wishes to enjoy again upon the cessation of the defendant's actions."[88] The decision also marked the first time an "emotional attachment" was recognized as a cognizable interest. The court drew its rationale directly from the *Laidlaw* case. Specifically, the court reasoned that:

> A person may derive great pleasure from visiting a certain river; the pleasure may be described as an emotional

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1641).

81. *ASPCA*, 317 F.3d at 335.

82. *Id.*

83. *Id.*

84. *Id.* at 335-36.

85. *Id.* at 336. The complaint was dismissed at the pleading stage. *Id.* The court considered the case's procedural posture as a ground for distinguishing *ASPCA* from *Humane Society of the United States v. Babbitt*, 46 F.3d 93 (D.C. Cir. 1995). *See ASPCA*, 317 F.3d at 338 (considering, in addition to factual differences, the lesser standard for showing on a motion to dismiss).

86. *ASPCA*, 317 F.3d at 334.

87. *Id.* at 338-39.

88. *Id.* at 337. The court found the general rule to be based on the *Friends of the Earth, Inc. v. Laidlaw Environmental Servs.*, 528 U.S. 167 (2000) and *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998) cases. *See ASPCA*, 317 F.3d at 337. The court interpreted Rider's plea of wanting to visit the elephants to include watching them perform as a member of the public, where he could detect the effects of the mistreatment. *Id.* The *ASPCA* court also analogized to *Laidlaw* in finding standing for Rider despite the fact that, as an audience member, he would likely not view mistreatment on future visits to the elephants. *See id.* at 337. Just as the plaintiffs in *Laidlaw* could not see the pollution but only its effects, Rider could detect the effects of mistreatment. *Id.*

> attachment stemming from the river's pristine beauty . . . . We can see no principled distinction between the injury that person suffers when discharges begin polluting the river and the injury Rider allegedly suffers from the mistreatment of the elephants to which he became emotionally attached during his tenure at Ringling Bros.—both are part of the aesthetic injury.[89]

Based on its analogy, and with little further analysis,[90] the court found a sufficient injury on which to base standing.[91]

IV. *ASPCA* Establishes the Foundation for a New and Better Theory of Injury

There are questions as to whether *ASPCA* is limited to its facts or whether it can be used in different contexts.[92] From a pragmatic perspective, however, advocates should appreciate *ASPCA* as adding a new theory of standing. Both precedent and emotion theory provide bases for articulating and critiquing the dimensions of the holding and its effect on future animal rights litigants.

A. The ASPCA *Court Acknowledges the Voice of Advocates*

The D.C. Circuit's finding of an emotional attachment between a human and nonhuman accurately describes the injury sustained by Rider. Rider pleaded that, during more than two years of working with the elephants, he formed a "strong, personal attachment" to them and that he has a "personal and emotional attachment" with them.[93] Animal advocates should appreciate the *ASPCA* court's reiteration of the stated injury, especially in light

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89. *See id.* at 337-38 (citations omitted). The court's invocation of beauty has historical pedigree. Aldo Leopold included the human-centered trait of beauty, along with integrity and stability, in formulating the key teaching of his land ethic. J. Baird Callicott, *Animal Liberation: A Triangular Affair*, *in* THE ANIMAL RIGHTS/ENVIRONMENTAL ETHICS DEBATE, *supra* note 3, at 43.

90. *ASPCA*, 317 F.3d at 338. The court found Rider's desire to visit the animals sufficiently imminent. *Id.* It also distinguished the facts in *ASPCA* from those in *Babbitt*, where the plaintiff's interest in viewing elephants generally was not diminished by the loss of an opportunity to see one individual elephant. *Id.* Because Rider had an attachment to specific elephants, the opportunity to see other elephants would presumably not diminish his injury. *See id.*

91. *Id.* The court easily found causation between the defendant's alleged actions and Rider's injury. *Id.* The court also inferred from the complaint that an end to mistreatment would change the elephant's behavior, permitting Rider to attend the circus, and allowing the redressability requirement to be satisfied. *Id.*

92. While the *ASPCA* court announced a general principle regarding the enjoyment of "flora or fauna," it did not assert criteria for finding emotional attachments in future cases. *Id.* at 337.

93. 2d Am. Compl. at 6, 7 (No. 00-1641).

of the law's previous unwillingness to find such emotional injuries cognizable.[94] The *ASPCA* court could easily have found an injury to an aesthetic interest without mentioning emotions, as it did in previous cases.[95] By using the language of "attachment," the D.C. Circuit acknowledged Rider's injury on his terms.[96] The court's use of the complaint language also has a valuable educational effect. Animal activists praise litigation because it allows them a chance to educate the public, judges, and government officials.[97] By recognizing the plaintiff's voice, the court has given advocates an opportunity to articulate the important message that emotional relationships with animals are significant in the eyes of the law.

B. Despite the Court's Misplaced Reliance on Laidlaw, *Emotional Injuries Are Consistent with Rationale Behind Standing*

While the *ASPCA* court's acknowledgment of advocate concerns is significant, it will not be of any use, however, if such concerns are not consistent with the principles of standing. Though the D.C. Circuit analogized Rider's injury to the one in *Laidlaw*,[98] the Supreme Court's decision in that case mentions neither "emotion" nor "attachment."[99] In *Laidlaw*, the Court examined various individuals' claims that pollution will prevent them from fishing, camping, swimming, picnicking, and hiking.[100] These interests are the same as those aesthetic and recreational interests recognized long ago in *Sierra Club v. Morton*.[101] Thus,

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94. *See supra* Part I.B.

95. *See supra* Part I.A.

96. One fact slightly undercutting this argument is that Rider's complaint was likely drafted with the court's holding of *Babbitt* in mind. The term "emotional attachment" was used by the D.C. Circuit to deny standing to the plaintiffs there. *See* Babbitt, 46 F.3d at 98. The complaint's references to aesthetic interests also indicate an attempt to explain the injury in terms of Supreme Court and circuit precedent. *See supra* Part I.A. This tailored pleading, however, makes it even more remarkable that the D.C. Circuit did not simply follow precedent, but instead found a new underlying interest.

97. *See* SILVERSTEIN, *supra* note 2, at 197-201. The persuasiveness of the framing of an injury in standing cases can influence the effectiveness of public interest litigation. *See* Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 936 (1998) (arguing that a human-centered focus in standing for environmental litigation could better persuade fact finders, members of the government and media, defendants, and the general public).

98. *See supra* text accompanying note 89.

99. *Laidlaw*, 528 U.S. at 173-95.

100. *Id.* at 181-83.

101. 405 U.S. 727 (1972). *See supra* notes 21-23 and accompanying text. The *ASPCA* court characterizes the plaintiffs in *Laidlaw* as recreational. *ASPCA*, 317 F.3d at 336-37.

both the context (a circus) and the underlying injury (an emotional one) make *ASPCA* novel.

Nonetheless, emotional injury, viewed in light of emotion theory, is consonant with previous teachings on standing. Injury in fact focuses on personal and individual harm,[102] and emotions are intensely personal, implicating values that a person finds intrinsic to a complete life.[103] Additionally, courts' previous rejection of emotional injuries can be reconciled with *ASPCA* by the notion of normative valuing of emotions.[104] Whereas emotional injuries related to knowledge of violations of a law from afar are not normatively construed as constituting legal injury, those relating to firsthand experience of violations can claim injury.[105]

The distinction between background and situational emotions also explains why *ASPCA* is consistent with previous cases rejecting emotional injuries.[106] By requiring an "emotional attachment," the court has implicitly rejected those plaintiffs whose emotional responses are merely situational.[107] If an attachment means that an object must become part of the fabric of one's life, it is not surprising that courts have recognized emotional attachments with animals in the two places where most humans spend their lives: at work (in *ASPCA*) and at home (in the companion animal tort cases and in marital dissolution cases).[108]

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102. *See supra* note 17.

103. *See supra* note 64 and accompanying text.

104. *See supra* note 69 and text accompanying notes 68-69.

105. *See supra* notes 32-33. The D.C. Circuit has found aesthetic, but not emotional, injury when a plaintiff had firsthand experience of a violation. *See* United States v. Hodel, 840 F.2d 45, 52 (D.C. Cir. 1988). In that case, however, the court construed the emotional claim to be in reaction to poor enforcement of environmental laws, not in reaction to the dead animals that helped constitute the aesthetic injury. *Id.*

106. *See supra* note 71.

107. *See supra* notes 33, 71.

108. This requirement of attachment also provides a better explanation of why the *Animal Defense Fund, Inc. v. Espy*, 23 F.3d 496 (D.C. Cir. 1994), case was dismissed. *See supra* note 44 and accompanying text. Given the mechanistic approach to pleading since *Lujan v. Defenders of Wildlife*, 504 U.S. 560 (1992), the doctor's claim that she would be required to engage in future research should have met the imminence component of injury. *See* Animal Defense Fund, Inc. v. Espy, 23 F.3d 496, 505 (D.C. Cir. 1994) (Williams, J., dissenting in part). A better way to distinguish *Espy* from *ASPCA* is that the *Espy* plaintiff did not plead a personal attachment to one animal or group of animals. *Id.* at 496-504. This view, which *ASPCA* appears to adopt, limits a cognizable emotional object to an individual, rather than a species. The court's invocation of *Laidlaw*, though misguided as to the nature of the injury, vindicates the notion that the particularity of the object is crucial to meeting the injury requirement of standing.

By limiting the cognizable objects of emotion and requiring an emotional attachment, *ASPCA* should allay fears that allowing emotions to provide standing would greatly expand the pool of litigants.[109] Even if all the people who work with animals regulated by federal statutes could potentially become plaintiffs under the *ASPCA* theory of standing, each would have to allege emotional attachments to individual animals. This formulation of emotional injury would likely exclude plaintiffs who witness one instance of animal mistreatment or are emotionally injured by viewing the products of animal industries.[110] Instead, *ASPCA* empowers those whose knowledge and experience with animals makes them the best spokespersons for eliminating or reducing their suffering.[111]

C. *ASPCA Highlights the Inappropriateness of Environmental Theories of Standing in Some Animal Cases*

The *ASPCA* court's characterization of Rider's suffering as "part of the aesthetic injury"[112] undercuts the power of its finding of emotional attachment as a cognizable interest. Like courts before it,[113] the court considered animals as part of nature, finding interests in the "enjoyment of flora or fauna" and analogizing the viewing of the pollution of a river with the viewing of mistreatment of animals.[114] But, by the court's own terms, pollution and mistreatment implicate different values; pollution offends the "pleasure" of "pristine beauty,"[115] while mistreatment offends a sense of humaneness.[116] Considering the theoretical

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109. *See Sierra Club v. Morton*, 405 U.S. 727, 751-52; *supra* note 33 and accompanying text. The *ASPCA* court acknowledges the novelty of its holding regarding emotional attachment by contrasting it with *Valley Forge*. ASPCA v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334, 338 (D.C. Cir. 2003).

110. In this way, the Ninth Circuit's recognition of interests in not seeing the killing of wild animals (with whom the plaintiffs presumably had no prior attachment) could reach a different pool of plaintiffs than *ASPCA*. *See* sources cited *supra* note 35 and accompanying text. In the absence of knowledge of a species, however, claims based on viewing animal mistreatment have a greater chance of being denied. *See infra* note 140.

111. *See* Sierra Club v. Morton, 405 U.S. 727, 743 (1972) (Douglas, J., dissenting) (arguing that "[t]hose people who have a meaningful relation to that body of water . . . must be able to speak for the values which the river represents and which are threatened with destruction").

112. *ASPCA*, 317 F.3d at 338.

113. *See supra* note 24.

114. *See supra* Part III.

115. *ASPCA*, 317 F.3d at 338.

116. *See id.* (stating that viewing inhumane treatment of elephants is the source

distinction between pleasure and emotion, a person's pleasure at viewing a certain object does not always involve an emotional experience.[117] In the absence of underlying judgments, the pleasure of viewing a river, or, in some cases, an animal,[118] then can be best categorized as aesthetic.[119]

It could be argued that the *Laidlaw* plaintiffs' reaction to the pollution involves the claim that waterways are best enjoyed when kept in pristine condition.[120] This claim appears to be a matter of preference rather than a judgment related to one's life.[121] In contrast, animals can be distinguished from nature as a whole because they are capable of emotions, a key attribute that allows them to be more than a mere aesthetic object.[122] This conclusion does not imply that all interests in animals are emotional ones or that humans cannot have cognizable aesthetic interests in animals. An aesthetic interest in an animal still seems appropriate when the injury affects seeing an animal in its native habitat.[123] In such a situation, the interest in viewing the animal would be akin to the pleasure in viewing a waterfall.[124] In

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of Rider's aesthetic injury).

117. *See supra* notes 72-73 and accompanying text.

118. That would be the case when animals are construed of as part of nature, i.e., as part of a scene. *See infra* text accompanying notes 123-124.

119. *See supra* text accompanying notes 74-76. A river is not an agent and thus viewers cannot compare its situation to the human situation. In the absence of agency, something cannot be an emotional object. *See supra* note 75.

120. The averments made by the plaintiffs in *Laidlaw* concern injury to plaintiffs' recreational interests—activities that are avowedly human-centered. *See supra* text accompanying note 100. Some environmentalists might argue that the plaintiffs felt disgust, containing the belief that rivers should not be polluted, regardless of whether humans use them. Such a claim would complicate the distinction between animate and inanimate objects made by cognitive theorists. *See supra* text accompanying notes 74-76. Even if the underlying judgment accorded intrinsic value to nature as a whole, however, it would likely contain different judgments than those involving animals.

121. *See supra* note 64 and accompanying text. *See also* Humane Soc'y of the United States v. Babbitt, 46 F.3d 93, 99 n.7 (D.C. Cir. 1995) (characterizing aesthetic interest in seeing an animal in one place rather than another as a "preference"). The preference of one view over another—here, a pristine view instead of a polluted view—lacks dimensions beyond the experience itself. *See* Mark Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205, 209-12, 245 (1974) (arguing that natural beauty's only value is the pleasure it produces and that it is usually more pleasurable to exploit than to preserve). The personal injury requirement of standing cannot be met by litigants merely seeking support for their value preferences. *See supra* note 22. If a pleasurable experience is different than an emotional one (based on underlying humane judgments), the *Glickman* dissent's analogy between the two is wrong. *See supra* note 29.

122. *See supra* note 75.

123. *See, e.g.*, Japan Whaling Ass'n. v. Am. Cetacean Soc'y, 478 U.S. 221, 230 n.4 (1986).

124. *Cf.* MIDGLEY, *supra* note 67, at 90 ("Our duties to swarms of very small or

Humane Society of the United States v. Hodel,[125] plaintiffs were successful in gaining standing when a regulation would have forced them to witness animal corpses.[126] A plaintiff would not succeed on similar facts under an *ASPCA* theory, because they likely would not be able to prove an attachment. The unpretty picture created by hunting offends aesthetic interests. Such a construction undoubtedly denies the agency of wild animals, putting them on the aesthetic level of inanimate objects.[127] But by recognizing that people treat domestic and nondomestic animals differently, and thus sustain distinct injuries involving them, animal advocates could argue standing based on observation in two ways, depending on the context of the mistreatment.

D. A Theory of Emotional Injury, Unlike an Aesthetic Theory, Could Be Objectively Evaluated

The dissent in *Animal Legal Defense Fund v. Glickman* argued that aesthetic injuries depend too much on individual taste and could potentially justify standing based on a plaintiff's interest in inhumane treatment.[128] Emotions, like aesthetics, do indeed depend on the individual; it is precisely the personal nature of emotions that makes emotional injuries so appropriate for determining injury in fact.[129] Judgments about beauty, however, have a certain superficial quality, which makes their attempt at normative assessment arbitrary.[130] In contrast, emotions contain

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distant animals, or to whole species, seem to be partly of the ecological sort, resembling in many ways our duty to plants . . . .").

125. 840 F.2d 45 (D.C. Cir. 1988).

126. *Id.* at 52.

127. *But see* Calicott, *supra* note 89, at 52 (arguing that domestic animals are "living artifacts").

128. Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 448-49 (D.C. Cir. 1998) (Sentelle, J., dissenting). The majority's response, that only aesthetic interests that are "legally protected" by statutory authority or policy, confuses prudential and constitutional standing tests. *Id.* at 448-50 (Sentelle, J., dissenting).

129. *See supra* text accompanying notes 102-103.

130. Decisions based on aesthetic responses to animals would likely produce absurd results. An injury based on an emotional response to cruelty (e.g., that a social animal, such as a chimpanzee, should not be isolated) seems consistent with a public policy concern—namely, that cruelty to animals should be minimized. An injury based purely on aesthetics (e.g., that orange is a better color than black to paint a chimpanzee's cage) would be devoid of such public policy concerns. Some courts hearing nuisance cases have, however, evaluated aesthetic injury in a normative manner. *See* Dodson, *supra* note 29, at 19-20. In those decisions, the aesthetic inquiry is whether an "unaesthetic land use is reasonable in its location and surroundings." *Id.* at 20. The aesthetics of a particular viewing of an animal, especially outside of nature, lacks a similar context.

judgments that can be evaluated normatively.[131] Both the *ASPCA* court and companion animal tort and divorce cases recognize the normative value of emotional attachments between humans and animals.[132] The attachment between two creatures can be judged in specific normative terms. A court could consider, for instance, the length of the relationship, the number of visits, and how recent the visits had been.[133]

One could alternatively argue that a sadistic plaintiff does not simply prefer a sadistic view, but that she or he suffers from an emotional injury containing beliefs that animals should be treated cruelly.[134] That plaintiff would still not necessarily succeed under the *ASPCA* theory. Just as courts find that violent anger is a legally appropriate response to a punch in the face but not a less threatening attack, courts could find that a positive emotional attachment, but not a negative one, could form the basis for standing.[135] The court's recognition of one emotion does not necessarily require finding standing on the basis of another. Though society has found value in protecting animals from mistreatment, most notably through anti-cruelty laws, no legislature has advocated animal cruelty.[136] By rejecting a sadistic

131. *See supra* note 69 and text accompanying notes 68-69. *See also* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 183-84 (2000) (finding cognizable interests based on "reasonable concerns" of plaintiffs regarding pollution of river). A theory of standing based on emotional injury also withstands the criticism leveled at aesthetic injury with regard to the redressability requirement. *See supra* note 29. Consider an animal welfare suit where the plaintiff pled emotional injury based on an attachment to a dog being tested in a government laboratory and contended that $75,000 would redress his problem. The court would look to the judgment contained in the emotion (regarding the importance of the dog to the plaintiff's life and the dog's suffering) and deny standing on the basis of redressability. If a person saw an animal as truly part of the fabric of her or his life, a cash payout would not normatively redress the problem of the person's suffering on behalf of an animal's continuing suffering. The biblical story of King Solomon's decision in the case between two mothers claiming a baby follows a similar logic. *See* 1 *Kings* 3:16-27. If the lying party had truly felt love for the child, the remedy (splitting the baby) would not normatively redress her claim to being the mother.

132. *See supra* Parts II.A, III.

133. The *ASPCA* court, for instance, acknowledges that Rider worked for more than two years with the circus. ASPCA v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334, 335 (D.C. Cir. 2003).

134. A plaintiff with inhumane interests could establish a relationship with an animal through repeated visits as well as a plaintiff with compassionate interests could.

135. *See supra* note 68 and accompanying text.

136. Despite the low priority generally accorded to animals rights vis-à-vis other issues, researchers for the Humane Society of the United States found that Americans have a much greater concern for animal research when it caused pain or death. *See* Herzog et al., *supra* note 1, at 58, 63. Two polls from the early 1990s

plaintiff, the courts would be following pre-existing public policy.

The court's requirement of an emotional attachment, rather than a situational emotional interest,[137] further supports the possibility of an objective assessment of emotions involving animals. In both *Glickman* and *ASPCA*, the courts acknowledged the plaintiffs' experience with mistreated animals. In *Glickman*, the court recognized the plaintiff's past experience with animal relief organizations and that his injury at viewing an isolated chimpanzee stemmed from his knowledge that chimpanzees are social animals.[138] In *ASPCA*, the court noted the length of Rider's working relationship with the animals and that the elephants showed "stereotypic" stressful behavior.[139] If any emotion were cognizable, the court could have simply held that Rider had suffered an emotional injury without recounting the context within which he experienced it. By taking into account that some plaintiffs have particular knowledge and experience, the court evaluated the reasonableness of the underlying judgments constituting the emotion.[140]

E. An Injury Theory Based on Emotional Attachment Would Provide a More Realistic Approach to the Requirement that an Injury Be Imminent

Since *Lujan v. Defenders of Wildlife*, plaintiffs in animal rights cases have specified their future plans to visit a mistreated animal in order to meet the injury requirement of standing.[141] The requirement that a plaintiff plans to visit again appears to be based on the longstanding connection courts have found between aesthetic interests and the act of observation.[142] But if Rider indeed has a personal attachment to elephants and knows they are being mistreated, he is surely sustaining a current injury. In his

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found Americans felt that the pain and suffering of farm animals should be reduced as much as possible (even when animals were going to be slaughtered anyway) and that it was worth it to spend more money to ensure humane treatment. *Id.* at 65.

137. *See supra* note 71 and accompanying text.

138. Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 429 (D.C. Cir. 1998).

139. ASPCA v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334, 335 (D.C. Cir. 2003).

140. A theory allowing any perceived wrong to an animal to constitute standing would be overprotective. For instance, a person might object to a zoo's python having not eaten in over a year, not realizing that that is the natural eating pattern of that snake. *See* MIDGLEY, *supra* note 67, at 38. The propriety of a given emotion is best determined by "intelligent, informed observation." *Id.*

141. *See supra* Part I.C.

142. *See* cases cited *supra* note 37.

concurring opinion in *Defenders of Wildlife*, Justice Stevens argued that an injury could be immediate without future plans, analogizing the situation to the injury sustained when a family hears of the death to a relative, regardless of whether a family reunion was in the planning.[143] Under such a view, Rider's current emotional injury would be cognizable without pleading future plans.

This view of the injury requirement would be of particular advantage to advocates suing to protect animals not on public exhibition.[144] In the context of a private laboratory, or even a scrutinizing zoo or circus, a plaintiff's lack of ability to revisit could be fatal under the current imminence requirement.[145] Someone could presumably sustain an injury similar to Rider's, but be left without standing to sue. If courts were to adopt a standing requirement that accurately accounts for the injuries involved when humans form attachments to particular animals, like injuries could be treated alike, regardless of formulaically pled plans.

Conclusion

By recognizing that some emotions "win arguments,"[146] the court in *ASPCA* implicitly criticized those who would reject emotional interests in animals as irrelevant in the legal context. The court's finding of injury based on emotional attachments to animals, whatever its flaws, provides the foundation for a more workable, honest, and compelling theory of standing. The *ASPCA* basis for standing, even as understood in light of emotion theory, has its limitations. Advocates without an attachment to an animal, for instance, would not be able to allege standing.[147] Nonetheless, if future litigants use *ASPCA* as a starting point, they can both succeed in gaining standing and in advocating for their cause.

143. Lujan v. Defenders of Wildlife, 504 U.S. 555, 584 n.4 (1992) (Stevens, J., concurring in judgment).

144. *See supra* notes 36-39 and accompanying text.

145. *See supra* note 37 and accompanying text.

146. *See supra* note 3 and accompanying text.

147. In the case of a wild animal, though, they could still allege aesthetic injury. *See supra* text accompanying notes 123-127. Additionally, litigation in other venues based on situational emotions might be successful. *See supra* notes 35 and 110 and accompanying text.