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LEGAL STANDING FOR ANIMALS AND ADVOCATES

Panelists:

David Cassuto, Jonathan Lovvorn, and Katherine Meyer*

Moderator:

Joyce Tischler†

For animal advocates, one of the most significant barriers to the courtroom is standing. In order to litigate on behalf of an animal's interests in federal court, the advocate must first establish standing by meeting three requirements: (1) the plaintiff must have suffered an injury in fact, (2) the injury must be causally connected to the act about which the plaintiff is complaining, and (3) the court must be able to redress the injury. When it comes to non-human animals, how does an advocate demonstrate an injury to establish standing? In this panel, experts in animal litigation discuss the concept of establishing legal standing for animals and animal advocates; the panelists' own experiences, including specific cases and creative methods used; and the future of legal standing for animals.

Sandeep Kandhari: So that brings us to our next panel. This panel is going to be about standing, at both the state and federal level. Standing is one of those vital issues, one of those big barriers to actually helping and furthering this cause. Today, we will discuss why it has been an issue, as well as possible solutions or strategies for overcoming standing. To moderate this panel, I would like to reintroduce Joyce Tischler, who will take it away from here.

Tischler: Good afternoon. This panel is on legal standing for non-human animals and their human advocates. When I was in law school, I can remember my contracts professor summarized standing with a surprisingly simple conclusion. "Either you have it, or you don't."

Our panelists are three people who know of what they speak. David Cassuto, to my right, is a professor at Pace Law School, where

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© Katherine Meyer 2006. Katherine Meyer is a partner at the law firm Meyer, Glitzenstein & Crystal. She received her J.D. from the Columbus School of Law, Catholic University of America in 1973.

† © Joyce Tischler 2006. Joyce Tischler is a Founding Director of the Animal Legal Defense Fund. She earned her J.D. from the University of San Diego in 1977.

he began teaching in July 2003.¹ He teaches in the areas of property, professional responsibility, animal law, water law, and legal and environmental theory.² Prior to that, he was with Coblenz, Patch, Duffy & Bass in San Francisco, where he practiced complex civil litigation.³ His published work includes *The Law of Words: Standing, Environment, and Other Contested Terms* and *Bred Meat—A Look at the “Nature” of Factory Farms*, which is coming out in the Duke journal, *Law & Contemporary Problems*, in Winter 2007.⁴

Katherine Meyer is a founding partner of the public interest firm of Meyer, Glitzenstein & Crystal in Washington, D.C.⁵ Ms. Meyer has litigated numerous cases involving standing and animal advocates, including the *American Society for the Prevention of Cruelty to Animals v. Ringling Bros.*⁶ She is one of the most experienced attorneys in the United States when it comes to the issue of standing for animal advocates.

Jonathan Lovvorn directs the Animal Protection Litigation program at The Humane Society of the United States (HSUS), where he is focused on developing novel legal theories.⁷ He also runs the animal law clinic at George Washington University Law School,⁸ is a lecturer on animal law at George Washington University Law School,⁹ and is an adjunct professor of animal law at Lewis & Clark Law School.¹⁰

I will ask you, Kathy [Meyer], to start off by telling us more than my law school professor did. What is standing and how does it relate to animal protection and animal rights cases?

Meyer: Actually, I thought what you said was good. “You either have it, or you don’t,” and you know it when you see it. I will start with one of Justice Douglas’ quotes from *Assn. of Data Processing Service Organizations* in 1970, when he said “generalizations about standing

¹ Pace L. Sch., *The Faculty: David N. Cassuto*, <http://www.law.pace.edu/facbios/cassuto.html> (accessed Nov. 11, 2006).

² *Id.*

³ *Id.*

⁴ David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 Harv. Envtl. 79, 79–128 (2004); David N. Cassuto, *Bred Meat—A Look at the “Nature” of Factory Farms*, 70 L. & Contemp. Probs. ____ (forthcoming 2007) (copy on file with *Animal L.*).

⁵ Meyer Glitzenstein & Crystal, *About Us*, <http://www.meyerglitz.com/aboutus.html> (accessed Nov. 11, 2006).

⁶ 317 F.3d 334, 335 (D.C. Cir. 2003).

⁷ HSUS, *Animal Protection Litigation Section*, http://www.hsus.org/in_the_courts (accessed Nov. 11, 2006); HSUS, *The HSUS Launches Litigation Section*, http://www.hsus.org/press_and_publications/press_releases/the-hsus-launches-litigation-section.html (Dec. 1, 2004).

⁸ George Washington U. L. Sch., *Academics: Clinical Programs: Animal Law Litigation Project*, <http://www.law.gwu.edu/Academics/Clinical+Programs/Animal+Law+Litigation+Project.html> (accessed Nov. 11, 2006).

⁹ George Washington U. L. Sch., *GW Law Profiles: Jonathan R. Lovvorn*, <http://www.law.gwu.edu/Faculty/profile.aspx?id=3935> (accessed Nov. 11, 2006).

¹⁰ Lewis & Clark L. Sch., *Summer School: Professor Jonathan Lovvorn*, http://www.lclark.edu/dept/summer/prof_lovvorn.html (accessed Nov. 11, 2006).

to sue are . . . worthless.”¹¹ That about sums it up. It is hard to put it all into a nice little package. Basically, in the federal context, it is a constitutional requirement that the person who is actually bringing the lawsuit is the proper person to be complaining about the illegal act that is being complained about.¹² It stems from those three little words in Article III of the Constitution which give federal courts jurisdiction over “cases or controversies.”¹³ Believe it or not, those words, “case or controversy,” have been construed over the years by such strict constructionists as Justice Scalia to create a whole slew of barriers to getting into court.¹⁴

There are three basic requirements for standing. The first is that the plaintiff has to have an “injury in fact”: some kind of an injury that is caused by the illegal act that is being complained about.¹⁵ The second is the “causation” requirement: the injury that is being complained about must be fairly traceable to the illegal act that is being complained about.¹⁶ The third requirement is that the court can redress that injury in some fashion: what you are asking the court to do is likely to give you some “redressability” of your injury.¹⁷ Those are the three basic requirements for standing. In addition, there is the prudential requirement when you are suing under a statute that your claim also be within the zone of interests that Congress intended the statute to protect.¹⁸ That is not a constitutional requirement, but one that courts can apply at their discretion if they want to kick you out of court, even though you have shown that you meet all of the constitutional requirements.¹⁹ Basically, you have to be the proper person. The idea is to make sure that the court is resolving an actual concrete controversy: something that will be presented in an adversarial way by the parties, something that is capable of judicial resolution, not some hypothetical situation.

Tischler: David [Cassuto], can you talk about injury in fact? You have called the requirement of injury in fact a sham. Would you explain that critique and start by telling us what injury in fact is?

Cassuto: Well, interestingly, if I could tell you what injury in fact was, I would not be quite so harsh about it. The problem with injury in

¹¹ *Assn. Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151 (1970).

¹² See e.g. *Allen v. Wright*, 468 U.S. 737, 755 (1984) (stating that respondents lacked standing to litigate their claim based on injury of racial discrimination).

¹³ U.S. Const. art. III, § 2, cl. 1.

¹⁴ See *Lujan v. Defenders Wildlife*, 504 U.S. 555, 564 (1992) (stating that “‘some day’ intentions . . . do not support a finding of the ‘actual or imminent’ injury that our cases require”) [hereinafter *Lujan II*]; *Friends Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 199 (2000) (Scalia, J., dissenting) (quoting *L.A. v. Lyons*, 461 U.S. 95, 107, n. 8 (1983) (stating that “ongoing ‘concerns’ about the environment are not enough, for: ‘it is the reality of the threat of repeated injury that is relevant to the standing inquiry’”)).

¹⁵ *Laidlaw*, 528 U.S. at 180.

¹⁶ *Id.*

¹⁷ *Id.* at 181.

¹⁸ *Allen*, 468 U.S. at 751.

¹⁹ *Id.*

fact, and the reason I think it is a sham, is because it means whatever the judge on that particular day says it means. Essentially, in order to be a case or controversy, the Supreme Court has opined that an adverse party, the person bringing the suit, has to be injured in some way or another.²⁰ That is what the Court means by injury in fact, but I wish it were that simple.

Let me just step back for a second, because the case or controversy requirement in the Constitution is not defined. Over time, the Supreme Court has said plaintiffs have to be injured in order for there to be a case or controversy, in order for the litigants to be truly adverse.²¹ We can say, "Well, of course it makes sense that the litigant should be injured. That's why she is suing." But that is not what injury in fact means. First of all, what is "in fact"? I do not know. You might say, "I see somebody tormenting their dog, and I find that profoundly disturbing, and I lose sleep about it. I have become clinically depressed. I cannot function. I cannot work." This is a very real scenario.

Can you sue that person? No, you cannot, because you are somehow not within the zone of interests of that statute. Have you been injured? Heck yeah, you have been injured. You cannot sleep. You are losing your hair. You are tormented and clinically depressed. If someone says they are injured, unless they are lying, they have been injured. When the court says you have to really be injured in order to bring a suit, what is it saying? It is saying something tautological (i.e., that you have to be injured to be injured), or it is saying something else and not telling us what that is.

If I see a dog being tormented and I cannot sue, it is not because I am not injured. It is because the court has decided that my injury is not a kind it feels is judicially cognizable. So that is an entirely different question. That is a normative question. If it is a normative question, that goes to the merits. It has nothing to do with whether somebody is injured or not. That is why I think it is a sham.

Tischler: What would you replace it with?

Cassuto: Let me restrict my answer to what I would replace it with in the environmental or animal related context. It seems to me if a statute has a citizen suit provision, that is to say, if there are private Attorneys General capable of enforcing a particular law, that means Congress has decreed that if the law is violated, there is injury. Congress has created injury by stating that if the law is violated, someone can sue to enforce it. To me, that ends the discussion about whether injury exists. There is legal injury, because the legislature has created it. The court's prudential standing requirements and their rather

²⁰ *Lujan II*, 504 U.S. at 560.

²¹ *Orr v. Orr*, 440 U.S. 268, 290-91 (1979) (Rhenquist, J., dissenting). "The architects of our constitutional form of government . . . consciously limited the Judicial Branch's 'right of expounding the Constitution' to . . . actual 'cases' and 'controversies' between genuinely adverse parties. . . . To demonstrate the 'personal stake' in litigation necessary to satisfy Art. III, the party must suffer 'a distinct and palpable injury'" (citations omitted).

lengthy and obfuscatory expositions on whether or not there is injury only serve to muddy the waters rather than to clarify. The result is that people with perfectly viable causes of action cannot sue.

Meyer: It is pretty clear that Congress can create an injury that would suffice for purposes of Article III standing. If I were going to leave with one statement for this crowd, I would say that the work really has to be done in the legislature. We have to get these statutes passed. We have to get these private rights of action, as David [Cassuto] said. We have to get Congress to create legal rights and legal injuries by law and then go one step further and designate who the proper person is to bring those lawsuits. Some state animal cruelty codes allow humane agents to bring those lawsuits on behalf of the animals.²² There is no reason why Congress could not do that in the federal arena as well. That is where the work really needs to be done in order to expand standing law for animals. It is a matter of getting the legislature to start creating these injuries and designating the proper entities to bring those lawsuits.

Tischler: Is that not easier said than done?

Meyer: Ah, that is why we leave it to the lobbyists.

Tischler: Do you agree?

Cassuto: I do agree, but if it were up to me, and if we could go back and retrofit some of these laws, I would like to take a look at standing in general. As a concept, it is quite problematic. It is based on these court created notions of what amounts to a case or controversy. I would like us to go back—actually I have got stuff to do—I would like the *Court* to go back and reexamine what it means by a case or controversy, because it got off on the wrong track.

Meyer: It was a way for the conservative judges to keep people like us out of court. That is exactly why they did it. That is why Justice Scalia wrote the *Lujan* decision. You get conservative judges in the courts creating these rules that apply, and at the same time, they are claiming they do not legislate. These judges are devotees of judicial restraint out of one side of their mouths, but out of the other side of their mouths, they are taking the words “case or controversy” and creating all kinds of rules that are not found in the Constitution, precisely to keep these kinds of lawsuits out of court.

Tischler: Kenneth Davis, in his administrative law treatise, implied that standing is one of the most complex areas of the law.²³ Not because it needs to be, not that it is inherently complex, but because it is so political, and—this goes well beyond animal law cases—the decisions are woefully inconsistent. Is that basically what you are saying?

Meyer: Definitely.

²² See generally 18 Pa. Consol. Stat. Ann. § 5511(i) (2004) (stating that “an agent of any society or association for the prevention of cruelty to animals, incorporated under the laws of this Commonwealth, shall have standing to request any court of competent jurisdiction to enjoin any violation of this section”).

²³ Kenneth Culp Davis, *Handbook on Administrative Law* 676 §199 (West 1951).

Tischler: In a sense, standing decisions are a reflection of judges' social values and political views.

Meyer: It is a complete barrier to the courtroom. If you do not have standing, you do not get through the door. You may have a cause of action and a door may exist, but if you do not have standing, you cannot get through it. So that is the end of the ballgame. In a lot of the cases we handle, the first round is a motion to dismiss on standing—that is if you are lucky. Otherwise, it is a motion for summary judgment, and then you have to actually prove each of those three standing requirements.²⁴ For a motion to dismiss, you just have to allege those three requirements in your complaint.²⁵ That is inevitably the first round of litigation in all of these cases. It takes a long time to get those issues resolved. You may lose that first round in the district court and then have to appeal to the court of appeals. Five years may go by before you get down to the merits of your claim, assuming you prevail on standing. It is a huge problem and a formidable barrier to having your merits litigated.

Lovvorn: Since we are in the phase of offering a critical analysis of standing, because I do think we are stuck with it and do not expect the legislature or the courts to radically change it any time soon, it is important to point out that the reason given for these standing requirements—the need for a gatekeeping function—does not hold up under scrutiny.²⁶ The theory is that federal courts cannot be flooded with cases by wild-eyed radicals trying to change the system, therefore we need a strict standing requirement, et cetera. But no one seems to stop to consider the amount of time that is spent litigating these issues, both at the trial court and appellate level, versus just having an open system. It would be interesting for someone to add up the amount of attorney hours and judge hours spent fighting over these arbitrary little standards.

We need to remember how unique the federal system is in this respect. Many states have taxpayer standing, which essentially means that anyone who pays taxes in that state and can challenge an unlawful expenditure by a government entity and can bring suit.²⁷ Humane societies and humane agents are also authorized to bring litigation to protect animals without a standing requirement in many states.²⁸

²⁴ Standing has three requirements: "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Laidlaw*, 528 U.S. at 180–81. For summary judgment requirements, see Fed. R. Civ. P. 56(c).

²⁵ Fed. R. Civ. P. 12(b)(6).

²⁶ See e.g. *Utah v. Babbitt*, 137 F.3d 1193, 1201 (10th Cir. 1998) (discussing the gatekeeping function of Article III standing).

²⁷ See e.g. *Citizens Preservation Buehler Park v. City of Rolla*, 187 S.W.3d 359, 362–63 (Mo. App. S. Dist. 2006); *Shamsian v. Dept. Conserv.*, 39 Cal. Rptr. 3d 62, 73 (Cal. App. 2d Dist. 2006), *Ex parte Chem. Waste Mgt.*, 929 So. 2d 1007, 1010 (Ala. 2005).

²⁸ See generally 18 Pa. Consol. Stat. Ann. § 5511(i).

For these jurisdictions, the absence of Article III standing has not flooded the courts with a situation that cannot be handled. So I think that we are stuck with standing at the federal level. I do not see the legislature changing it, and I do not see the Supreme Court reversing itself, although I agree that once Congress says, "Here is your citizen suit provision," that should be sufficient.²⁹ In short, there is a real problem with the justification for the federal standing test, and if the Supreme Court wanted to, there is nothing that would stop it from watering the test down significantly.

Cassuto: That is entirely right. Since the courts made it up, they can make up its replacement.

Meyer: Not with the way the federal judiciary is going.

Cassuto: On one hand, there is certainly a lot of danger to going back and retrofitting. On the other hand, Jonathan [Lovvorn] is absolutely right. Look at the number of states that have taxpayer standing or far more relaxed standing requirements, and then look at this canard the federal judiciary has created where it is simply too great a burden. If the doors to the courtroom were thrown open, it would be a potentially entropic experience, and there is no way the system could handle it. I sympathize with the fact that the judiciary is significantly understaffed, but there is the little matter of it being their job to hear these cases. If there are not enough people to do the job, then the solution is hiring more people to help them. It does not mean that members of the judiciary should not have to do their jobs.

I teach a course that compares the environmental laws of the United States with those of Brazil. One of the things that continually leaves my students' mouths agape is the number of cases the Brazilian Supreme Court decides every year—something in the neighborhood of sixty to one hundred thousand.³⁰ If you do the math, it means the Brazilian Supreme Court spends just minutes per case.³¹ I am not exactly sure how this works, to be honest with you. It does present an alternative, in that clearly, for them, it is more an issue of openness and access than it is about case management. I am not saying that the

²⁹ *Lujan II*, 504 U.S. at 571–72 (holding that Congress's authorization that "any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter" in section 1540(g) of the Endangered Species Act did not relieve plaintiffs of the need to prove an independent basis for Article III standing).

³⁰ See *Brazil Travel: Brazil - Supreme Court*, <http://www.v-brazil.com/government/judiciary-branch/supreme-court.html> (accessed Nov. 11, 2006) ("[T]he Brazilian Supreme Court is one of the busiest in the world. In 2004, the Court received 62,273 cases, down from 109,965 in 2003.").

³¹ See Supremo Tribunal Federal, *Calendario de Julgamentos*, <http://www.stf.gov.br/processos/calendario/calendariojulgamento.asp> (accessed Oct. 10, 2006) (This website, the official site of Brazil's Federal Tribunal Calendar Page, is written in Portuguese and was translated by Micheline D'Angelis. The Brazilian Supreme Court hears cases on sixty-eight days per year. With over sixty thousand cases in a year, the court would have to hear a case approximately every two minutes.).

Brazilian way is the answer, but I am saying that the American way is not.

Tischler: Back to another basic. Kathy [Meyer], would you describe what informational standing is and how that relates to some of the cases you have dealt with over the years?

Meyer: Informational standing is one of those creations of Congress. It is an example of what I was talking about. Congress can, by statute, create a legal right to which someone is entitled, and if the person is denied that legal right, she has an injury in fact and Article III standing.³² The classic example for informational injury is the Freedom of Information Act (FOIA).³³ Congress passed a statute that said every citizen has a right to request information from the federal government, and the federal government must disclose that information unless it is exempt from disclosure under one of nine exemptions.³⁴ If you submit a FOIA request and the government says, "See you later, we are not responding," you can go to court.³⁵ There is no question about standing. You have Article III standing simply by virtue of the fact that you requested the information, and the request was denied.³⁶ The Supreme Court made that clear in the *Public Citizen v. Department of Justice* case, which was actually a case under the Federal Advisory Committee Act.³⁷ In the course of explaining why infor-

³² See *Assn. Data Processing Serv. Orgs., Inc.*, 397 U.S. at 151-52 ("[T]he question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to 'cases' and 'controversies.' . . . The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."); see also *Lujan v. Defenders of Wildlife*, 497 U.S. 871, 883 (1990) ("[T]he party seeking review . . . must show that he has 'suffer[ed] legal wrong' because of the challenged agency action, or is 'adversely affected or aggrieved' by that action 'within the meaning of a relevant statute.' . . . [t]he plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.") [hereinafter *Lujan I*].

³³ 5 U.S.C. § 552 (2002 & Supp. 2004).

³⁴ See 5 U.S.C. §§ 552(a)(3)(A)-(B) ("(A) . . . each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person. (B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section."); see also 5 U.S.C. § 552(b)(1)-(9) (regarding types of information and matters to which FOIA disclosure requirements do not apply).

³⁵ See *Natl. Lab. Rel. Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 238 (1978) ("[A]n agency's denial of a FOIA request is immediately reviewable in the district court.").

³⁶ See 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); *Pub. Citizen v. Dept. Just.*, 491 U.S. 440, 449 (1989).

³⁷ 491 U.S. at 443.

mational injury existed under that statute, the court used FOIA as an example.³⁸

Animal law attorneys have been trying to use informational injury to establish injury in fact and get into court in a number of other instances. There was another very important Supreme Court case a few years ago called *Federal Election Commission v. Akins*.³⁹ In that case, some voters were complaining about the fact that a particular entity was not deemed a "political committee" within the meaning of the Federal Election Campaign Act.⁴⁰ The Federal Election Commission (FEC) decided that this entity was not a political committee, and therefore, it did not have to file all the reports that are required of political committees⁴¹ or limit its campaign contributions.⁴² The court found the plaintiffs had standing by virtue of the informational injury they suffered as a result of the FEC not deeming this entity a political committee.⁴³ The voters—the plaintiffs in the case—were denied information that, by statute, would have to be submitted by the entity if in fact it were a political committee.⁴⁴ That was enough for Article III standing.

Meyer & Glitzenstein has a case pending for HSUS, Defenders of Wildlife, and some other groups that is really tricky.⁴⁵ It involves three species of African antelopes the Fish and Wildlife Service (FWS) recently listed as endangered under the Endangered Species Act (ESA).⁴⁶ If an animal is listed as an endangered species under the ESA, it is entitled to all the protections of that statute.⁴⁷ When the FWS listed the three wild populations of the antelope species as endangered, it simultaneously issued a special rule exempting any captive-bred animals of those species that are born and bred in the United States.⁴⁸ The reason it issued this special rule was to exempt the

³⁸ *Id.* The Court noted: "[A]s when an agency denies requests for information under the Freedom of Information Act, refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue. Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records."

³⁹ 524 U.S. 11 (1998).

⁴⁰ *Id.* at 13., Federal Election Campaign Act of 1971, 2 U.S.C. § 431(4) (2000).

⁴¹ *Akins*, 524 U.S. at 13.

⁴² *Id.* at 14.

⁴³ *Id.* at 20-21.

⁴⁴ *Id.*

⁴⁵ Pl.'s Compl. at 1-2, *Cary v. Hall*, No. 05 CV 04363 (N.D. Cal. filed Oct. 26, 2005).

⁴⁶ *Id.* at 3.

⁴⁷ See Endangered Species Act of 1973, 16 U.S.C. § 1531(c)(1) (2006) ("It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.").

⁴⁸ HSUS, *Wildlife Protection Coalition Files Suit to Protect Endangered African Antelope from "Canned" Hunts*, http://www.hsus.org/press_and_publications/press_releases/wildlife_protection_coalition_Files_Suit_To_Protect_Endangered_African_Antelope_From_Canned_Hunts.html (Oct. 26, 2005); 70 Fed. Reg. 5117 (Feb.

antelopes that are used on canned hunting ranches, basically in Texas, from all the requirements of the ESA. It was basically a gift to the Texas canned hunting operations, which pull in a lot of money and draw people from around the world.

Canned hunting operations are enclosed ranches;⁴⁹ people visit because they want to acquire the head of one of these exotic species as a "trophy." These are beautiful antelope species. They have beautiful horns and are just gorgeous. People pay thousands of dollars for the privilege of riding around in a truck, shooting one of these animals, and then taking it home as a "trophy" and putting it on their wall.⁵⁰ This is the first time in the history of the FWS' implementation of the ESA that it has ever crafted an exemption like this for an otherwise endangered species,⁵¹ so HSUS, Defenders of Wildlife, and other organizations wanted to bring a lawsuit. It was very difficult to establish that anyone had Article III standing. We had some theories, and we had a plaintiff, for example, who studies these antelope species in the wild in Africa. We alleged that this whole scheme is going to increase poaching and the illegal black market in the wild species, and that this will injure our plaintiff for purposes of Article III standing.⁵²

We also made an informational injury argument. Normally, the only way to get an exemption from the otherwise strict requirements of the ESA is by going through the permitting process under Section 10 of the statute.⁵³ Section 10 states that anyone who wants an exemption from the ESA has to apply for the exemption and make certain showings.⁵⁴ All of that information has to be made available by the FWS to the public at every phase of the proceeding, and the public is entitled to comment on the information.⁵⁵ If the FWS grants the exemption, it has to issue certain findings; these are also published in the Federal Register.⁵⁶

Our argument—as in the FOIA context and the *Akins* case—is that our clients, HSUS and Defenders of Wildlife, who regularly follow these kinds of regulatory actions, regularly comment on them, and disseminate that kind of information to their members, are being deprived of the information that they normally would obtain pursuant to

1, 2005) (proposed regulation providing for the hunting of captive-bred populations of the scimitar-horned oryx, addax, and dama gazelle in the United States).

⁴⁹ HSUS, *Facts about Canned Hunts*, http://www.hsus.org/wildlife/stop_canned_hunts/facts_about_canned_hunts.html (accessed Nov. 11, 2006).

⁵⁰ HSUS, *Sample Prices for Canned Hunts*, http://www.hsus.org/wildlife/stop_canned_hunts/sample_prices_for_canned_hunts.html (accessed Nov. 11, 2006).

⁵¹ HSUS, *Trophy Hunting Group Asks Federal Court to Endorse "Canned" Hunting of Endangered Animals Trapped Behind Fences*, http://www.hsus.org/press_and_publications/press_releases/trophy_hunting_group_asks.html (Dec. 29, 2005).

⁵² Pl.'s Compl. at 19–20, *Cary*, No. 05 CV 04363.

⁵³ 16 U.S.C. § 1539.

⁵⁴ *Id.* at § 1539(a)(2)(A)–(B).

⁵⁵ *Id.* at § 1539(c).

⁵⁶ *Id.* at § 1539(d).

the statute. Instead of going through the case-by-case permitting process required by the statute, the FWS has created this broad exemption.⁵⁷ That is an example of a creative way of trying to use informational injury. The case is pending right now on a motion to dismiss on standing grounds in the Northern District of California. We will see what happens.⁵⁸

Lovvorn: I do not want to make David [Cassuto]'s argument for him, but I find the informational injury issue to be fascinating. Courts are very hostile to this approach, because it represents a potential shift in the separation of powers. If informational standing is given its broadest interpretation, it means things really shift to Congress to determine who is going to be able to get into court under Article III, rather than the court deciding itself. In some cases, the courts have been somewhat hostile to the information injury approach.⁵⁹ However, as Kathy [Meyer] points out, under the FOIA,⁶⁰ courts have said that if you are denied information to which Congress says you have a right, informational injury may exist.⁶¹ Regarding the situation with Section 10 in the ESA, obviously, if you have a right to the permit and information but are denied access, that should constitute an informational injury, and that is the basis for the endangered species canned hunting suit HSUS has filed, and which Kathy [Meyer] discussed earlier.⁶² The *Akins* case and the political committee is probably the biggest stretch of this theory.⁶³ And remember, just because Congress says you have a right to the administrative record and to challenge an agency decision in court under the Administrative Procedure Act,⁶⁴ that does not mean you have an informational injury.

But to return to the idea of Congress changing the laws to fix standing, every time I talk to our lobbying staff about trying to do something to change these statutes at the federal level, they laugh me out of the room. They say, "We can't even ban cock fighting at the national level."⁶⁵ Since the judiciary is getting more and more hostile to

⁵⁷ *Id.* at § 1539 (providing for case-by-case permitting); see generally 70 Fed. Reg. 52310 (Sept. 2, 2005) (exceptions granted from the Endangered Species Act for certain captive populations of specific antelope species).

⁵⁸ On September 30, 2006, the District Court for the Northern District of California upheld the plaintiffs' informational injury theory for purposes of standing. *Cary v. Hall*, 2006 U.S. Dist. LEXIS 78573 at *28, 40 (N.D. Cal. Sept. 30, 2006).

⁵⁹ *ALDF v. Espy*, 23 F.3d 496, 501-02 (D.C. Cir. 1994) (rejecting Article III standing based on informational injury under the AWA).

⁶⁰ 5 U.S.C. § 552.

⁶¹ *Pub. Citizen*, 491 U.S. at 449.

⁶² *Supra* nn. 45-48.

⁶³ *Akins*, 524 U.S. at 20-21.

⁶⁴ 5 U.S.C. § 706 (2000).

⁶⁵ See *Animal Fighting Prohibition Enforcement Act* Sen. 382, 109th Cong. (May 2, 2005); H.R. 817, 109th Cong. (Feb. 15, 2005); see also Daniel W. Reilly, *Face-off over Green's bill: Sensenbrenner blamed for holdup*, Milw. J. & Sent. (Sept. 27, 2006) (available at <http://www.jsonline.com/story/index.aspx?id=503696>) (describing how a bill to toughen penalties for cockfighting and dogfighting sponsored by Rep. Mark Green is being held up in the House Judiciary Committee by Chairman Jim Sensenbrenner).

our positions in general, we also probably should not be looking there for a major expansion. What is going to carry the day, if anything, is looking at creative theories on competitive injury or trying to expand informational injury, among other things. That is where the activity has to be, at least for the short term, because we are unlikely to find relief in these other venues.

The reality of high fences and closed doors is also problematic, such as the canned hunting facilities that nobody sees, because nobody is there; animal research labs—no access; factory farms—no access. Those challenges are very difficult for purposes of Article III, because animal advocates do not see it, and therefore cannot claim a traditional Article III injury. The only way we are going to get there is by using creative theories or by reaching out to people who do see it. For example, we have a case right now on the federal Humane Slaughter Act (HMSA).⁶⁶ We have added, as plaintiffs, workers in poultry facilities who have come forward, believe it or not, risking their jobs and potential physical violence, to try to do something about the fact that the HMSA has not been applied to poultry.⁶⁷ As animal protection organizations, our ability to overcome these hurdles is going to depend on our ability to reach out beyond our community to other social movements and organizations in order to find people who can provide the Article III standing we need.

Meyer: Jonathan [Lovvorn] is saying, "If you cannot see it, you cannot be injured by what is happening." That is the dilemma to which he is referring. Under the law, you cannot be injured if you cannot show that you had some sensory impact as a result of what you saw.⁶⁸ Just knowing about it or reading about it in the newspaper and knowing it is happening is not enough for Article III.⁶⁹

Tischler: What about shifting the focus to state courts? Are the standing requirements less onerous there?

Lovvorn: Certainly, that is something people are looking into. The state court system, at least in some states, does not have the same Article III standards as the federal system. Although those courts see us coming and want to raise the standing bar as high as they can. We have a taxpayer standing case in the Pennsylvania Supreme Court right now challenging canned hunting.⁷⁰ We also have a taxpayer

⁶⁶ See Pl.'s Compl. at 3, *Levine v. Johanns*, No. C 05 4764 (N.D. Cal. Nov. 21, 2005) (challenging the exclusion of poultry from the definition of "livestock") (available at http://www.hsus.org/web-files/PDF/HMSA_complaint.pdf).

⁶⁷ Compare 70 Fed. Reg. 56624, 56624–25 (Sept. 28, 2005) (informing slaughterhouses and the public that the HMSA does not require "humane methods" for "handling and slaughter of poultry") with the Humane Methods of Slaughter Act, 7 U.S.C. § 1902 (directing that all "cattle, calves, horses, mules, sheep, swine, and other livestock" be "rendered insensible to pain" before being processed for slaughter).

⁶⁸ *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

⁶⁹ *Id.* at 734–35.

⁷⁰ HSUS, *Current Docket: The Fund for Animals v. Pennsylvania Game Commission*, http://www.hsus.org/in_the_courts/docket/tioga_canned_hunting.html (accessed Nov. 11, 2006).

standing case in a California superior court challenging a state subsidy for the confinement of hens in battery cages.⁷¹ There may be a lot of action in the state court system in the future, but then again, there are limitations. Federal court is more difficult to get into, but presumably, once you get there, things are better—although I put a big emphasis on presumably.

Meyer: That is how we were able to end the Hegins Pigeon Shoot—through a state court action.⁷² Pennsylvania's animal cruelty code, unlike most animal cruelty codes, actually has a civil action provision that can be invoked by a humane agent, such as a humane society.⁷³ On behalf of The Fund for Animals and the Pennsylvania Society for the Prevention of Cruelty to Animals, we were able to put together that lawsuit and bring a case to enjoin future pigeon shoots.⁷⁴ But those are rare situations. I do not even know how many state laws have those kinds of provisions; not very many.

Lovvorn: That is what I mean about the need to branch out. There is a tremendous residual amount of law enforcement authority residing with humane agents and humane societies at the state level that really needs to be activated, because the draconian federal standing requirements do not exist.⁷⁵ Certainly at the federal level, there is nothing that would necessarily—if you want to talk about really radical changes—prevent the appointment of national humane societies to enforce animal protection laws the way they do at the state level. It will not happen for a long time, but it should.

Meyer: The Animal Welfare Act (AWA)—that is where we need a private right of action. We need designated people to bring those cases; otherwise, that statute is not worth the piece of paper it is written on, unfortunately.

Tischler: In the *Glickman* case, Kathy [Meyer], the court held that standing was based on an injury to an aesthetic interest.⁷⁶ What about *Ringling Bros.*?

Meyer: The *American Society for the Prevention of Cruelty to Animals v. Ringling Bros.* case is actually pending right now in federal court.⁷⁷ We are representing another coalition of groups—the American Society for the Prevention of Cruelty to Animals, the Animal Welfare Institute, The Fund for Animals, the Animal Protection Institute,

⁷¹ HSUS, *The HSUS et al. v. California State Board of Equalization (battery cage tax breaks)*, http://www.hsus.org/in_the_courts/docket/ca_battery_cages.html (accessed Nov. 11, 2006).

⁷² *Hulsizer v. Lab. Day Comm., Inc.*, 734 A.2d 848, 848 (Pa. 1999).

⁷³ 18 Pa. Consol. Stat. Ann. § 5511(i).

⁷⁴ *Hulsizer*, 734 A.2d at 848.

⁷⁵ More than a dozen states provide a method for humane societies, humane agents, or citizen eyewitnesses to initiate enforcement actions for violations of the cruelty code without any type of injury in fact requirement. See Jennifer H. Rackstraw, *Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes*, 9 Animal L. 243 (2003).

⁷⁶ *ALDF v. Glickman*, 154 F.3d 426, 431 (D.C. Cir. 1998).

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

and a former circus employee, Tom Rider.⁷⁸ That case was also tricky, because in *Animal Legal Defense Fund v. Glickman*, the D.C. Circuit Court held that an individual who went to the zoo repeatedly to see particular animals was injured aesthetically by seeing primates in solitary confinement without any enrichment.⁷⁹ That plaintiff had standing to challenge the United States Department of Agriculture (USDA) for its failure to carry out the congressional mandate in the 1985 AWA amendments, requiring that the USDA promulgate standards for the psychological well being of primates.⁸⁰ Another requirement of "injury in fact" is that it cannot be a *past* injury.⁸¹ It has to be either a continuing injury or a threatened injury—an injury that is on the horizon, about to happen.⁸²

Past injuries will not suffice. In the *Glickman* case, we were able to establish standing because Mark Jurnove, who had gone to the zoo repeatedly to see these particular animals, alleged in his affidavit that he kept going back and was going to continue to go back, because he had bonded with these particular primates.⁸³ He could not abandon them, he felt compelled to go back and continue to fight for them and see them, and therefore he had continuing aesthetic injuries.⁸⁴

In the *Ringling Bros.* case, our main argument for Article III standing was that Tom Rider had been a barn man for the elephants and had seen the mistreatment of the Asian elephants.⁸⁵ This case challenges the treatment of Asian elephants under the ESA, because Asian elephants are an endangered species.⁸⁶ Rider had left the circus, because he could not bear to see the mistreatment of the Asian elephants anymore.⁸⁷ The trick for Rider was, how do you show a continuing injury or a future injury, when the circus is going to argue that the plaintiff only has past injuries, and therefore, those injuries are not cognizable for Article III purposes?

Luckily for us, right before we brought that case, the *Laidlaw* decision was issued by the Supreme Court.⁸⁸ *Laidlaw* held that individuals who used to canoe in a river forty years ago—and would like to canoe in the river again, but who feared that the river was polluted,

⁷⁸ *Id.* at 335.

⁷⁹ *Glickman*, 154 F.3d at 438.

⁸⁰ *Id.* at 428.

⁸¹ See *Steel Co. v. Citizens Better Env.*, 523 U.S. 83, 109 (1998) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495–96) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.").

⁸² See *Lujan II*, 504 U.S. at 560 (stating that to qualify as a constitutionally sufficient injury in fact, the asserted injury must be "concrete and particularized," as well as "actual or imminent, not 'conjectural' or 'hypothetical.'").

⁸³ *Glickman*, 154 F.3d at 431.

⁸⁴ *Id.* at 430.

⁸⁵ *Ringling Bros.*, 317 F.3d at 336.

⁸⁶ *Id.* at 335.

⁸⁷ *Id.*

⁸⁸ *Laidlaw*, 528 U.S. at 167.

and therefore had to avoid using the river that they otherwise would have liked to use—had Article III standing⁸⁹—their apprehension about using the river in a recreational way was valid. Even though the district court had found that the river was not in fact polluted in that case, the majority, led by Ruth Ginsberg, held that this did not matter.⁹⁰ The plaintiffs had Article III standing because they had to make the choice to avoid using the river that they otherwise would have liked to use.⁹¹

When that decision was issued, we saw an opening for Rider to have standing. What we alleged in that case, and will have no problem proving, is that Rider fell in love with the Asian elephants with whom he worked. He really did bond with them. He knows them all by name and spent a lot of time with them. He could not bear seeing them mistreated. He left the circus, because he could not take it anymore. He would like to go back and visit them and see them again, but he is in this position of having to make the choice to avoid going back to see them, because that is the only way he can avoid subjecting himself to more aesthetic injury. These are the kinds of hoops through which we must jump; this is what you have to do to come up with these standing theories.

So we used *Glickman* plus *Laidlaw*, a 2000 Supreme Court decision under the Clean Water Act,⁹² and came up with the novel argument that Rider was suffering Article III injury because he had to avoid going back to see his “girls,” as he calls them, whom he loved so much.⁹³ We lost on this theory on a motion to dismiss in the district court, on the grounds that Rider would never suffer that kind of injury again, because he is not allowed to come back and see the elephants.⁹⁴ We said, “Well, all he has to do is buy a ticket to the circus,” and we prevailed on appeal.⁹⁵ We had to go up to the D.C. Circuit to get the trial court reversed.⁹⁶ Now we are back down on the merits of that case. We lost three years on the standing issue, but that is how we established standing.

Cassuto: There are a couple of really interesting threads to this whole actual or imminent injury thing. According to the courts, if you do not know you are injured, then how can you be injured? There is a certain rhetorical attractiveness to that idea. But on the other hand, if you extrapolate: if you put a child in a dark room and never let light

⁸⁹ *Id.* at 183–84.

⁹⁰ *Id.* at 183–85.

⁹¹ *Id.* at 181–82.

⁹² *Glickman*, 154 F.3d at 431 (plaintiff claimed injury from seeing animals at a zoo treated inhumanely); *Laidlaw*, 528 U.S. at 181 (actual injury to the plaintiff is enough to establish standing for Art. III); 33 U.S.C. § 1365(a), (g) (2000) (granting authorization for citizen suits).

⁹³ *Ringling Bros.*, 317 F.3d at 335.

⁹⁴ *Id.* at 336.

⁹⁵ *Id.*

⁹⁶ *Id.* at 339.

into the room, the child will never know anything about sunlight or what it is like to live outside of the dark. Will that child be injured? The child will never know that there is a light-filled world out there, but will that child be injured? I would argue that, of course, that child will be injured. This idea that if you do not know exactly what is happening—if you are not privy to it, if you are not allowed to see it—that somehow protects you from injury, is specious. It gets back to the idea of actual or imminent injury, which this is. Sorry to ride this particular hobby horse, but since it is made of wood, I guess that is okay.

If we are talking about actual injury, we get back to “What is an injury?” Is it actual? Yes, it is actual. Then you get to imminent. This gets into an area of the law that, again, leads to a lot of problems: not just in animal law, not just in standing, but elsewhere. What is an imminent injury? Exactly how soon does something have to occur before it is imminent? The Supreme Court has said you have to have a plane ticket to go and see the problem before it is imminent.⁹⁷ How did it come up with that? How do judges get away with making this stuff up?

Extrapolate this to a criminal law context. Assume we have a battered spouse who has been continually beaten over a period of years by her abusive, psychotic husband. He is drunk, and he says to her right before he passes out, “When I wake up, I’m going to kill you.” Then he goes to sleep. He is not going to kill her any time soon. He may be passed out for hours. Can she act in self-defense right then? Can she take some kind of preemptive action? Or does she have to wait until he wakes up and goes and gets himself the weapon which he is going to use to kill her? Is the injury imminent right before he passes out, or during that time he is passed out? I suggest it is. The court apparently would disagree with me, because she has not yet seen him come toward her with the loaded weapon. What sense does this make in a practical context? What sense does it make in a human to human interactive context? And what sense does it make in a civil litigation context when what we are trying to do is protect? If we are dealing with an animal protection statute and trying to protect animals, why must we have these silly arguments about imminence?

Tischler: I have one problem with that analogy: a battered woman has a third option—to get out, to leave—and the animals do not have this option.

Cassuto: Yes, I think that is a valid point. But again, what if we are talking about somebody who, for whatever reason—because of psychological or physical injury; because there is a child in the house; or because there is a pet in the house, which is a recurring theme with respect to battered spouses—cannot leave? What are the alternatives?

Lovvorn: Part of what is lurking here that we have not really hit head on is the double standard that exists with regard to animal protection versus environmental, commercial, or any other type of litigation.

⁹⁷ *Lujan II*, 504 U.S. at 592 (Blackmun, J., dissenting).

tion in which the plaintiff may have to deal with Article III. We have known for years that the bar is set higher for animal protection advocates. Injury in fact, causation, and redressability are going to be scrutinized a lot more. The problem is that the courts do not really think the injury about which we are talking is a real injury. It is just an emotional subjective preference. It is not the same as somebody losing money. It is not the same as someone seeing a mountaintop sheared off where they have hiked for twenty years, although obviously it is.

This is interesting, because we finally, after all these years of knowing this, got a ruling from the D.C. Circuit a few years ago essentially holding that it is okay to just assume that people who are financially affected have standing.⁹⁸ For those people, the courts do not have to look at the details, but for everyone else, they do. In my opinion, the court finally just came out and said it was going to do this on a double standard.

As advocates, it is our role to try to figure out these secret rules. We talk about standing being a big game; it certainly is. We have to figure out how to make whatever injuries we are talking about, be they informational, aesthetic, emotional, or otherwise, sound plausible to a judge trained in looking at commercial litigation. The question of standing comes down to this: Does the injury you are articulating make sense in the context of an auto accident or commercial dispute? One of the reasons why courts will not accept, for Article III purposes, merely knowing or hearing about animals being treated inhumanely without being there and witnessing it is because it sounds a whole lot like negligent infliction of emotional distress.⁹⁹ Thus, a lot of the standards that you see applied in Article III are just a rough game of, "Does whatever you are putting forward sound similar enough to the common law causes of action that I was taught in law school?" All the other factors for Article III tend to fall into place after that. You can look at the injury someone is arguing and determine whether or not it is going to pass the test, based on how much it sounds like a common law theory. I agree that the Article III standing test is largely a sham in most cases, but it also shows that there is a method by which you can play and win this particular game. And cases like *Laidlaw* certainly help in that regard.¹⁰⁰

Tischler: There is dicta that the purpose of standing is to ensure that plaintiffs will pursue the litigation to its conclusion. A presumption exists that if the plaintiffs have a financial interest, they are likely

⁹⁸ *Fund for Animals, Inc., v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003).

⁹⁹ See e.g. *Restatement (Second) of Torts* § 313 (1965) (for the definition of negligent infliction of emotional distress); see also *Averbach v. Vnesheconombank*, 280 F. Supp. 2d 945, 960 (N.D. Cal. 2003) (discussing how California courts do not recognize the tort).

¹⁰⁰ *Laidlaw*, 528 U.S. at 183 (holding that environmental plaintiffs have injury in fact based on their concerns that the river they use might be polluted).

to follow through, because their own financial well being is at stake.¹⁰¹ However, if animal advocates allege that they are harmed because animals owned by some third party are suffering, the presumption is that these advocates will somehow not follow through. As we all know, animal advocacy organizations, whose mission and goals are to protect animals, are highly likely to follow through on litigation. What can these plaintiffs do to convince judges that they will go the distance?

Lovvorn: You hear it a lot, this idea that public interest advocates will not follow through in the same way as people who are concerned about financial loss. But go down to the superior court in whatever town you live one morning when it is hearing law in motion, and just listen to what is going on there. A good portion of it involves people who have not pursued their cause of action for more than two years after filing it. The judge is often on the bench saying, "Is anyone here today for this case? Is anyone going to show up and actually argue it? Okay, we're going to finally dismiss it." The idea that private litigants are somehow going to more fully pursue their rights than public interest organizations or advocates is totally false. I have never heard of a public interest group not bothering to send counsel to court when it has a hearing. If you watch the civil docket, you will see major corporations that do not bother to send a lawyer. That whole idea that public interest advocates will not follow through is something that we really need to attack.

Cassuto: There is a certain moral schizophrenia, and what we have here is a sort of legal schizophrenia. One of the reasons that mediation has come to the forefront as a method of alternative dispute resolution is because people have finally started to recognize as a sociological phenomenon what we, as lawyers, see all the time: the fact that people say, "I don't care about the money. I just want the bastard to apologize." That is so often true. Mediation allows a dispassionate, disinterested professional to say, "You know, I think we can make this go away if you will just acknowledge that you did something wrong and/or stop doing this thing that's wrong. It is not about the money. You can get away without a very onerous civil judgment if you will just discuss the root causes for the plaintiff's upset." The idea that money has to be involved is a smokescreen. More often, litigation involves things about which people care deeply. Most people do not care deeply about money. They want it; they like it; they would like more of it, but it is not the thing that drives them on a visceral level.

Tischler: In 1972, Professor Christopher Stone published an essay titled: *Should Trees Have Standing?*¹⁰² I recall the first time I

¹⁰¹ For a list of federal circuit cases that have recognized economic interests in standing, see *General Principles Governing Standing to Maintain Action*, 61 A.L.R. Fed. 87, 99-101 (1983).

¹⁰² Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450, 450-501 (1972).

read that essay; it was wonderful and inspiring. I called it "legal poetry." But, has it influenced either the literature or the courts?

Lovvorn: The interesting thing about Stone's piece is that it was very influential in the environmental movement and was actually cited in Justice Douglas' famous dissent in the *Sierra Club* case.¹⁰³ But that was thirty years ago when Sierra Club attorneys managed to get at least one Supreme Court Justice to say, more or less, "Why don't we just forget about all this and acknowledge that trees and rocks and beautiful places should have Article III standing in their own right."¹⁰⁴ As a practical matter, after thirty years of significant work on environmental protection, the fact is that this theory has really gone nowhere in terms of working for the environmentalists. The lesson is that this kind of change in the test for access to federal courts is probably somewhat impractical at this phase. It is a wonderful piece. For anyone who loses a standing case, probably one of the most therapeutic things to do is go and read Justice Douglas's dissent afterwards.

Maybe Stone's theory will be the future of animal law, but in terms of environmental protection, it has not been the case. Maybe it influenced the *Laidlaw* decision. Maybe judges who decide they are not going to apply these Article III standards too strictly have Christopher Stone in their back pocket.

Tischler: Let us take some questions from the audience.

Question: Kim Stallwood, Animals & Society Institute. Is there not a cliché that the definition of insanity is someone who keeps repeating something and expecting a different outcome? Why am I thinking of that when I hear what you are saying about standing? If it is such an impediment, why have we, as the animal movement, not actually tried to do something about it? It seems to me, how can we expect to get existing laws enforced for animals, how can we get better laws passed for animals, if we cannot sue on their behalf?

Meyer: I totally agree with you. As I said in the beginning, it is a legislative problem. A lot of this can be cured by legislative fixes. The problem is that the current legislature is apparently packed with anti-animal representatives. Thinking about Douglas's dissent in *Sierra Club v. Morton*, one of the things he said, which I think is very telling, was that there should be legitimate spokespersons for the trees, otters, and biodiversity, and that Congress can, in theory, designate those legitimate spokespeople.¹⁰⁵

Congress can say that it is against the law to pollute the environment, it is against the law to torture an animal, and it is against the law to neglect an animal. Congress can decide that certain individuals may go to court and assert the interests of those injured entities, in the same way as Rule 17 of the Federal Rules of Civil Procedure allows the

¹⁰³ *Sierra Club*, 405 U.S. at 742 (Douglas, J., dissenting).

¹⁰⁴ *Id.* at 742-43 (Douglas, J., dissenting).

¹⁰⁵ 405 U.S. at 745.

designation of a next friend for incapacitated individuals.¹⁰⁶ That is a congressional designation of a particular person to represent the interests of the injured. The same thing can happen here. We need some kind of a concerted plan, and we can start one statute at a time. My priority is the AWA. We need to get that statute amended, figure out a way to do it so that when the statute is violated, people can go in and sue. It may not happen with this Congress or the next Congress, but we have to start working to ensure that it happens eventually. Otherwise, we are counting on the USDA to enforce that statute, which it rarely does.¹⁰⁷ People are very limited in what we can do, in terms of bringing lawsuits. We can sue the governing agency if it issues a decision we do not like, but we cannot sue the actual violators.¹⁰⁸ That is the problem. I totally agree with you, it is something we need to focus on and start strategizing about. I know people are already doing so. I am not suggesting this is a novel idea. People have been grappling with this for years.

Cassuto: Let me just add one caveat, even though I endorse what both of you have been saying. There is something that nags at me when I think about why we are not enacting laws about this stuff. Part of it comes back to, if you will, the chicken or the egg phenomenon with respect to whether laws codify norms, or vice versa. If we are making laws in order to create norms, then what we are doing is sort of anticipating that people will agree with us, rather than assuming that these laws will arise organically from a sense of outrage about a status quo.

My favorite example: you go to a restaurant—every restaurant you have ever been in—you go to the bathroom, and there is a sign in the bathroom that says, “Employees must wash their hands with warm water and soap before returning to work.” Well, I do not know about you, but I want to live in a world where people already know that, where you do not have to legislate that kind of behavior. It is just one of those things that you do, because you know it is right; it is normative phenomenon before it is codified into law.

Here, we have the mistreatment of animals, which is, as yet, not recognized as normatively outrageous. I fear that enacting a law about it prior to the creation of that outrage will be counterproductive. That is my fear.

Question: I am going to play the devil’s advocate, having tried these civil cases and tried to prosecute cases in rural areas. We are talking a lot about human standing. There is always a way to find human standing, the public health issue being one great way. But we are not talking about what I see as the longer-term problem of standing for animals. What I think it is—and I am wondering how you feel

¹⁰⁶ Fed. R. Civ. P. 17(c).

¹⁰⁷ Animal Welfare Act, 7 U.S.C. §§ 2132, 2133, 2142 (2006) (stating that Secretary of Agriculture is authorized to promulgate humane standards under the Act).

¹⁰⁸ *Id.* at § 2146; 16 U.S.C. § 1540(g) (compare the enforcement provisions of the Animal Welfare Act, which does not allow for citizen suit, with the Endangered Species Act, which does contain a citizen suit provision).

about this—is confusion over the definition of property. What are we doing as a large movement to be a force and say, “Look, we need to reclassify this as guardianship, not property.” I do not see a big change happening until we get the standard of chattel and property changed over to guardianship. Someone like a *guardian ad litem* could say, “Look, this animal cannot speak English, but I’m going to speak for it.”

What can we offer to the farming community, to the meat packing industry, to the animal breeders; the dog breeders who make a livelihood out of this, to say, “Yeah, we know you make a livelihood out of this, and we’re going to take your property away, because we don’t like how it looks.” We have art galleries with chicken heads, and it looks distasteful to us. But is it not true that the fundamental problem we are having as a movement is that we want to take away people’s property, and that is how it is seen? Until we do that, we can find individual human standing in every place in the world, but the animals are never going to have it the way we are going about it. I was just wondering if anybody had thoughts on this. Am I totally out of touch with things? I feel frustrated going through individual case to individual case and having judges make their decisions before I even walk in and say hello. As long as there are farmers and people with livelihoods and a lot of money saying, “this is my property, damn it,” I don’t see a very large change taking place. What are we doing for that larger view of what animals are, as property versus our friends over whom we have stewardship?

Meyer: Everything everybody is doing is helpful to that cause. This is a movement. We would all like it to go faster. There is a lot to do, but Steve Wise’s books, and the works of other people who are writing about these issues, are very important.¹⁰⁹

All of the cases that Jonathan [Lovvorn] is handling, cases we are handling for groups, all of it adds up to what David [Cassuto] was saying: we need to make these actions politically incorrect, we have to generate that public outrage. We have to make it politically incorrect to do these things, such as considering animals as property. Until we change the way people think, we are not going to reach that point. You have got to admit—I know it is slow going and people are frustrated—but there has been a lot of change. Joyce [Tischler] has been at the forefront of it. There has been tremendous change. It is becoming gradually more and more politically incorrect to do some of these things.

With these farming issues—it is very important what HSUS is doing,¹¹⁰ as are other groups—we are talking about billions of animals.

¹⁰⁹ See e.g. Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Perseus Bks. 2000) (discussing fundamental legal rights for animals); *Animal Rights: Current Debates and New Directions* (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004) (exploring the legal and political issues of animal rights).

¹¹⁰ HSUS, *Litigation for Farm Animals*, <http://www.hsus.org/farm/camp/lit-leg/litigation.html> (accessed Nov. 3, 2006); see also HSUS, *News: USDA Reverses Decades-Old Policy on Farm Animal Transport*, http://www.hsus.org/farm/news/ournews/usda_reverses_28_hour_policy.html (Sept. 28, 2006) (announcing the USDA decision

You have to do it incrementally. This is not going to divulge any great secret, but a lot of us here in this room are looking for the right sets of facts to bring those first *guardian ad litem* cases. That is where we are going. The way you get there is by bringing other cases first. It is like *Brown v. Board of Education* in the civil rights context,¹¹¹ which was not the first case brought to establish that principle; there were other incremental cases leading up to *Brown*.¹¹² Everything that everybody is doing—writing about it, talking about it, having conferences, bringing cases—all of that adds collectively to the movement. I agree that it is frustrating and there is a lot more to do, but we are going in the right direction.

Cassuto: I would add that the point you raise about the property status of animals is, of course, very disturbing and very urgent. It is part of a larger issue within the notion of property status and private property in general that it is okay to allow a taking of private property to give to another private entity in order for there to be urban renewal.¹¹³ Now, whether or not one agrees with that concept, whether or not one thinks that is a good idea, the fact is that, in the *Kelo* decision, the Supreme Court stated something that has been the case for over one hundred years.¹¹⁴ It did not make any new law. Pretty much no urban redevelopment could take place without that law. But what happened? Congress, virtually every state legislature, and property rights advocates all over this nation became hysterical, and now there is a backlash against this idea of the state exercising its right of eminent domain.¹¹⁵

When we talk about whether or not we have to change the property status of animals—yes, of course, we have to change the property status of animals. But the whole notion of private property is so problematic and so visceral that if Congress passed a law tomorrow saying animals are not property, the only thing that would happen is you would have the kind of backlash that would set this movement back

that the Twenty-Eight Hour Law covers the long-distance transportation of animals on trucks).

¹¹¹ 347 U.S. 483, 483 (1954).

¹¹² See *Mo. ex rel. Gaines v. Can.*, 305 U.S. 337, 349 (1938) (stating the “basic consideration is not as to what sort of opportunities other States provide . . . but as to what opportunities Missouri itself furnishes to white students and denies to negroes”); *Sweatt v. Painter*, 339 U.S. 629, 636 (1950) (holding that a university must admit a black student); *McLaurin v. Okla. St. Regents*, 339 U.S. 637, 642 (1950) (holding that the university could not segregate students once they had been admitted).

¹¹³ *Kelo v. City New London, Conn.*, 545 U.S. 469, 2005 U.S. LEXIS 5011 (June 23, 2005).

¹¹⁴ *Id.*

¹¹⁵ See generally Richard Stradling, David Bracken & Janell Ross, *Property Ruling Fuels Concern*, Raleigh NC News & Observer B1 (Oct. 24, 2005) (commenting that the “recent U.S. Supreme Court decision . . . has some . . . residents worried the same thing could happen to them”); Kevin Collison & Warren Erdman, *Eminent Domain and TIF Reforms Needed Some Say, Others Advise Caution*, Kan. City Star D16 (Jan. 24, 2006) (commenting that “opponents of eminent domain . . . have begun lobbying lawmakers to introduce bills that would ban the use of condemnation for economic development”).

probably 150 years. We have to be cognizant of that backlash as we agitate for the kind of important changes you are noting.

Lovvorn: Certainly, the situation with regard to the property status of animals, the courts, Article III, and our ability to get what we want is very frustrating. The problem is, right now, no member of Congress would even introduce a resolution saying that animals are not property. No member of Congress would suggest—well, maybe one or two somewhere might—a citizen suit provision for the AWA. It is not viable. The key is to look at that political climate and remember that the courts are people, and they are political. They are not the objective institutions people think they are. If we cannot succeed with the limited changes we are attempting right now, we need to work on changing the public perception and doing other things. Thus, with respect to the question about simply giving up on trying to make standing work and just focusing on eliminating the property status of animals, I do not agree with the theory that if we are not succeeding with what we are doing now, the solution is to attempt something more radical, because we are unlikely to prevail on such endeavors.

Question: Would you comment on the whole concept of *guardianship ad litem*, where it is not your human standing at issue, but the animal's standing?

Tischler: In 1980, I filed a lawsuit against a veterinarian who allegedly committed malpractice on a standard poodle.¹¹⁶ The first listed plaintiff was the poodle, whose name was Sterling Berg.¹¹⁷ I moved for an order appointing Sterling's owner to serve as his *guardian ad litem*.¹¹⁸ I was lucky I did not get involuntarily committed. It is something that I would think long and hard about before attempting again. The timing, the judge, and the facts would have to be just right.

Question: What about the substitution of a chimpanzee, instead of a dog or cat?

Tischler: I understand where you are heading, but my experience has been that when I speak to a general audience about dogs and cats, people seem to understand and embrace my points more readily than when I talk about chimpanzees. That is because dogs and cats are members of our families, and more people relate to them as emotional beings. Most people are emotionally more distant from chimpanzees, because they are not raised with chimpanzees. We may see chimpanzees on a National Geographic television special, but most people, including judges, have never actually met or spent time with them. For that reason, chimpanzees do not necessarily make a more compelling plaintiff.

Meyer: It is a great idea though. The problem is you have to do it at the right time with the right judge. We spend a lot of time figuring

¹¹⁶ *Berg v. Gunn*, No. 258590, slip op. at 3 (Cal. Super. Ct. San Mateo Cty. Oct. 27, 1981).

¹¹⁷ *Id.* at 1.

¹¹⁸ *Id.* at 1.

out which case to bring, where to bring it, and how to allege standing. What we are worried about is going backwards. With every case we bring, we run the risk that not only might we lose that case, but the judge might issue a decision that takes the entire movement two steps backwards. People in this room have been thinking about this a lot. It is a question of when, under what circumstances, and exactly how to get there.

Lovvorn: We not only have to think about steps backwards, but also steps forward. The theory that drives people to say “it should be a chimpanzee rather than a bull” is the same tactical, strategic thinking that makes us think long and hard about the net result of our actions. No matter what we convince a lower federal court of, anywhere in America, whatever novel theory, we have the United States Supreme Court as currently constituted waiting for us. Even if we got everything in our wildest dreams in a federal court case, the last place we would stop is the United States Supreme Court. We need to think about who is there waiting for us.

Meyer: The state of the judiciary is so important. That is the answer to all of these questions. Unfortunately, it never becomes a political issue. The only issue the public talks about is abortion, when we are discussing who should be on the Supreme Court. There are many other federal courts that are making laws out there. We never talk about these other very important issues, that these judges—young judges, appointed for life—are deciding as the laws of this country. They are making these decisions. As Jonathan [Lovvorn] says, you can win the greatest case as *guardian ad litem* on behalf of a chimpanzee, but then you are eventually going to have to deal with judges like Justices Scalia and Roberts, and it can become a lost cause. Obviously, animal rights might not be the best issue to discuss for the judiciary debate, but environmental laws might be. In recent debates, we did not hear much discussion like, “Well, if Judge Alito is appointed to the Supreme Court, what is he going to do to the environment? If it’s Judge Roberts, what about that decision under the Endangered Species Act?”¹¹⁹ Much of the debate was about abortion.¹²⁰ That myopic focus is a crime, frankly. People need to focus on other issues, and we need to focus on judicial selection as part of the presidential election: Who is this person going to put on the courts? Who is going to be making the laws that will govern our lives? Those are very important issues.

¹¹⁹ See *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J. dissenting) (stating that the “panel’s approach in this case leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating ‘Commerce . . . among the several States’”).

¹²⁰ See generally Robin Toner, *Court in Transition: Abortion*, N.Y. Times A22 (July 21, 2005) (“Cold paper trail leads some to scrutinize nominee’s past words on abortion.”); Nancy Benac, *Abortion Focus of Nominations, Again*, Centre Daily Times A3 (Nov. 13, 2005) (stating “Abortion was the first question out of the box at the Supreme Court confirmation hearing”).

Question: When we talk about the private right of enforcement, the argument has been bandied about that instead of putting the onus with law enforcement or the government and saying that we must hold them accountable to pursue these cases, we are saying, "Clearly you're not going to do it, so we're going to have to do it." I want to know your perspective on that argument.

Meyer: The only way to hold government officials accountable is to vote out the President who appointed them. There is no way to hold them accountable—in the federal context, there is no way—there is nothing I can do about the fact that the USDA does not enforce the AWA, other than go out and vote for somebody next time for President who is going to put different people in charge of that agency. Citizens cannot bring a lawsuit against the USDA for not enforcing a statute.¹²¹ The Supreme Court has made that clear in *Heckler v. Chaney*.¹²² I do not think a lot of people understand that we cannot bring a lawsuit against a federal agency for failing to enforce the statute it is obligated to enforce.¹²³ There is no way to hold these agencies accountable, other than to complain loudly and write editorials. Our clients have written reports about how the USDA is not enforcing the AWA.¹²⁴ There is nothing you can do about it. That is why having a private right of action is so important.

Of course that is not the reason we give when we are lobbying or advocating for a private right of action. We say that we should take these government officials at their word that they are overworked, that they do not have enough resources. We say that we want to help them by having private Attorneys General appointed to bring these lawsuits, to supplement the agencies' enforcement authority. It is not that the agencies are completely sympathetic to the industries they are regulating—which is often really what is going on—it is that they are overworked and need help. We are volunteering to help them.

Lovvorn: There is also something very practical lurking in your question. Look at the *Woodley* case that the Animal Legal Defense Fund brought in North Carolina under that state's private enforcement statute.¹²⁵ It was one of the biggest successes that the movement has seen in the last decade. What you do not see, however, is twenty-five similar actions being filed, because no animal protection organization has the resources necessary to take on those animals. It is very expensive to care for and house hundreds of animals for years while a case winds its way through the courts, not to mention that animal

¹²¹ *Heckler v. Chaney*, 470 U.S. 821, 831–33 (1985).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See Am. Socy. Prevention Cruelty Animals, Fund Animals & Animal Welfare Inst., *Government Sanctioned Abuse: How the United States Department of Agriculture Allows Ringling Brothers Circus to Systematically Mistreat Elephants*, <http://www.animalwelfare.com/wildlife/elephants/fullrpt.pdf> (Sept. 2003).

¹²⁵ *ALDF v. Woodley*, No. 04 CVD 1248, slip op. at 7–8 (N.C. Super. 11th Dist. Apr. 12, 2005); N.C. Gen. Stat. § 19A (2003).

groups do not enjoy any immunity from civil suits the way public prosecutors do. Thus, the point about making sure that prosecutors and others actually do their government appointed jobs is very important. We cannot just privatize enforcement and hope that it is going to get done. It would certainly help to have those private rights of actions, if they were politically feasible, but they are not a silver bullet. The people who are charged with doing these enforcement jobs need to do them, because no one else can.

Cassuto: I offer a flip side to that. With respect to whether or not it is crying uncle, I would cry uncle, I would cry aunt, I would sing *Waltzing Matilda* if it would just get some of these laws strengthened and enforced. I do not really care who is doing it. I want there to be a reasonable and expected method of enforcement, such that it would create a deterrent and make it less likely that these abuses would occur. I am cautiously optimistic that if there were more private rights of action, there would also be more state enforcement. There would be both the shame phenomenon—states would not want private citizens always doing the work of the government—and there would also be an understanding that this is an important issue to the voters and taxpayers of this state or nation. That combined set of pressures stemming from the private right of action would, one hopes, create an enforcement priority within the state.

Tischler: I would like to thank this group of lively, passionate, and experienced lawyers for sharing their insights.

Kandhari: Thank you Jonathan Lovvorn, Katherine Meyer, David Cassuto, and Joyce Tischler.