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Animal Legal Defense Fund, Inc. v. Glickman: A Common Law Basis for Animal Rights

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NOTE

ANIMAL LEGAL DEFENSE FUND, INC. v. GLICKMAN: A COMMON LAW BASIS FOR ANIMAL RIGHTS*

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I. THE INJURY

Mark Jurnove worked with wild and exotic animals his entire adult life.[1] For recreational and educational purposes, Jurnove visited various parks and zoos, including the Long Island Game Farm Park and Zoo.[2] He visited the Game Farm nine times between May 1995 and June 1996, and during these visits he was disturbed to see several animals living in inhumane conditions.[3] Upon observing these conditions, Jurnove contacted the United States Department of Agriculture (USDA) to alleviate the suffering of the animals at the Game Farm.[4] However, the USDA found the Game Farm to be in compliance with all standards and took no action.[5]

During Jurnove's subsequent eight visits, he documented the conditions of the animals at the Game Farm with photographs and

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This Note is dedicated to those without a voice. I thank Professor J.J. Brown, whose interest in this piece was inspiring, and whose understanding of it uncanny. I thank the members of the *Stetson Law Review* for seeing this piece through publication. Finally, I thank my parents for allowing me to choose my own path.

1. *See* Animal Legal Defense Fund v. Glickman, 154 F.3d 426, 429 (D.C. Cir. 1998) (en banc).

2. *See id.*

3. *See id.* Some of the conditions included primates housed in isolation from other primates, inadequate cage enrichment devices, and arrangement of animals that improperly placed different species next to each other, thus frightening and agitating the animals. *See id.*

4. *See id.* at 429–30.

5. *See id.* Standards included providing an environment "to promote the psychological well-being of primates." *Id.*

videotape, and submitted them to the USDA.[6] The USDA inspected the Game Farm on three more occasions, but still found it complied with the relevant standards.[7]

With regard to all animals kept by exhibitors, such as the Game Farm, the Animal Welfare Act (AWA) requires the USDA to adopt "minimum requirements . . . for a physical environment adequate to promote the psychological well-being of primates."[8] In response to this mandate, the USDA promulgated the following regulation:

> *[E]xhibitors . . . must develop*, document, and follow an appropriate plan for environment enhancement adequate to promote the psychological well-being of nonhuman primates. *The plan must be in accordance with the currently accepted professional standards* as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian.[9]

The Administrative Procedure Act (APA) allows a reviewing court to "decide all relevant questions of law, interpret . . . statutory provisions, and determine the meaning or applicability of the terms of an agency action,"[10] and gives the reviewing court the power to "compel agency action unlawfully withheld or unreasonably delayed."[11]

In accordance with these provisions, Jurnove and the Animal Legal Defense Fund, filed a complaint in the District of Columbia Circuit Court alleging that the USDA failed to adopt specific minimum requirements for the psychological well-being of primates, as mandated by the AWA, and instead, delegated such authority to the regulated entities themselves.[12] Jurnove also alleged that the inhumane conditions at the Game Farm, which complied with USDA regulations, caused him aesthetic injury,[13] whereas lawful regulations (i.e., regulations in accordance with the AWA mandate) would

6. *See id.*
7. *See Glickman*, 154 F.3d at 430.
8. 7 U.S.C. § 2143(a)(2)(B) (1994).
9. 9 C.F.R. § 3.81 (1999) (emphasis added).
10. 5 U.S.C. § 706 (1994).
11. 5 U.S.C.A. § 706(1) (1994).
12. *See Glickman*, 154 F.3d at 430. The Animal Legal Defense Fund is an animal welfare organization. *See id.* at 429.
13. *See id.* For this allegation, the plaintiffs relied on *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society . . . .").

have protected Jurnove by prohibiting the conditions that caused his injury.[14]

The United States District Court held that Jurnove had standing to sue, noting that he properly alleged injury-in-fact by claiming to have an aesthetic interest in observing wild and exotic animals kept in humane environments, and in seeing these animals treated humanely.[15] On appeal, the majority, in an opinion written by Judge David B. Sentelle, held that all plaintiffs lacked standing.[16] The appellate court granted rehearing in banc, and Judge Patricia M. Wald, who wrote the dissent for the panel decision, delivered the majority opinion. The court held Jurnove satisfied the injury, causation, and redressability elements of constitutional standing, as well as prudential standing, and consideration of the merits is left for a future panel of the court.[17]

This Note will focus entirely on injury-in-fact.[18] First, it will discuss what appears to be two separate parts of injury-in-fact, what will be called "basis" and "requirements."[19] Next, it will analyze how Judge Wald justified her creation of a new "basis," and submit that the justification was grounded in misinterpretations of precedent, and reliance on precedent which had, itself, misinterpreted authority.[20] This Note concludes with an attempt to provide a more thorough justification for the creation of the new "basis," one that will better withstand Supreme Court scrutiny, and allow other circuits to adopt the new "basis."[21]

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14. *See Glickman*, 154 F.3d at 430.

15. *See* Animal Legal Defense Fund, Inc. v. Glickman, 943 F. Supp 44, 54–55 (D.D.C. 1996), *vacated and remanded en banc*, 130 F.3d 464 (D.C. Cir. 1997), *reh'g en banc*, 154 F.3d 426 (D.C. Cir. 1998).

16. *See Glickman*, 130 F.3d at 466.

17. *See Glickman*, 154 F.3d at 445.

18. Excluding background information, roughly 11 of the 21 pages of the in banc decision were designated to injury-in-fact analysis. *See id.* at 428–55.

19. *See infra* Part II.

20. *See infra* Part III.

21. *See infra* Part III.E. Prior to the present case, there was an entirely distinct question regarding third party standing under the AWA. *See* Joseph Mendelson, III, *Should Animals Have Standing? A Review of Standing Under the Animal Welfare Act*, 24 B.C. ENVTL. AFF. L. REV. 795 (1997). Early cases established that third parties would not be able to bring legal action against individual violators of the AWA because the USDA has a discretionary right of enforcement. *See id.* at 817. Later cases established that third parties could sue the federal government concerning its promulgation of regulations under the AWA, if the plaintiffs fulfilled the ordinary constitutional standing requirements. *See id.* Thus, Jurnove could not bring suit directly against the Game Farm for any violations, but could bring suit against the USDA.

II. INJURY-IN-FACT JURISPRUDENCE

Article III of the United States Constitution limits the federal judicial power to "cases and controversies."[22] Federal courts have always required that a litigant have standing to sue before adjudicating the merits of the case.[23] At an irreducible minimum, Article III requires that the hopeful litigant show an actual or threatened injury resulting from the allegedly wrongful act (injury-in-fact),[24] that the allegedly wrongful act was a cause of the injury (causation), and that the injury is redressable by a favorable decision (redressability).[25]

A. Foundation for Debate

To facilitate the clearest possible presentation of the court's reasoning, and this Note's analysis thereof, it is necessary to clarify an issue that the courts have greatly complicated.[26] In actuality, this amounts to a far more ambitious task than a mere clarification of an issue. Rather, because the courts have been incoherent in their discussions of injury-in-fact, it is necessary, to cut through the incoherent clutter and establish a clear-language format based on interpretations of judicial dialogue about injury-in-fact. Once established, this clear-language format will act as a simplistic contextual foundation for this Note.

Though courts do not usually so articulate, injury-in-fact has itself been dissected into two separate analyses.[27] First, the alleged injury must be cognizable.[28] A cognizable injury is one for

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22. U.S. CONST. art. III, § 2, cl. 1; *see also* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982) (citing Chicago & Grand Trunk R. v. Wellman, 143 U.S. 339 (1892)) ("The power to declare the rights of individuals and to measure the authority of governments . . . 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.'").

23. *See Valley Forge Christian College*, 454 U.S. at 471.

24. *See id.* at 472 (citing Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)).

25. *See id.* (citing Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 41 (1976)).

26. Injury-in-fact jurisprudence is characterized by rapidly evolving concepts and incoherent application of such concepts, creating a schizophrenic judicial spew. *See, e.g.*, *infra* note 101 and accompanying text.

27. *See* Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972) ("But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.").

28. *See id.*

which the courts have or will fashion a remedy.[29] There is no test for cognizability,[30] but courts do use perceived social values to establish precedent, then rely on and extend that precedent.[31] The second part of injury-in-fact requires that the cognizable injury also be "concrete and particularized" and "actual or imminent."[32] These concepts ensure that the plaintiff himself is among the injured.[33]

It was Justice Antonin Scalia, in *Lujan v. Defenders of Wildlife*,[34] who espoused these injury-in-fact elements. Specifically, Justice Scalia defined injury-in-fact as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[35]

Interpreting "legally protected interest" is a source of confusion. In determining what constitutes a "legally protected interest," the courts often slip into circular reasoning, because one of the questions for injury-in-fact is whether the plaintiff has a legally protected interest. But that question is really a conclusion, because a plaintiff with standing necessarily has a legally protected interest.[36] Indeed, at least one court claimed that *Lujan* intended "le-

29. *See* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 266 n.252 (1990).

30. *See id.*

31. *See* William Burnham, *Injury for Standing Purposes When Constitutional Rights Are Violated: Common Law Public Value Adjudication at Work*, 13 HASTINGS CONST. L.Q. 57, 58 (1985) (coining this the "'common law public value interest' model of injury analysis"). Interestingly, the article proceeded to describe congressional legislation as an alternative track for establishing cognizability. *See id.* Today, however, there is some doubt about whether legislation could substitute for Article III injury-in-fact cognizability. "By superimposing standing's injury-in-fact . . . onto cases in which plaintiffs rely upon federal statutes, the Court has signaled a serious intrusion into Congress's power to define new judicially cognizable injuries." Maxwell L Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 392 (1995). Perhaps it was in recognition of this trend that Judge Wald avoided any attempt to use the "legislative track" in her analysis of the cognizability portion of injury-in-fact. *But see infra* note 236 and accompanying text. Because Judge Wald so limited her analysis, and because the recently-made-incoherent issue of the "legislative track" for cognizability could comprise an entire Note in itself, this Note is limited to the debate within the "common law" track.

32. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

33. *See id.* at 563 (quoting *Morton*, 405 U.S. at 734 ("But the injury-in-fact test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.")).

34. 504 U.S. 555 (1992).

35. *Id.* at 560 (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); Allen v. Wright, 468 U.S. 737, 756 (1984); Warth v. Seldon, 422 U.S. 490, 508 (1975); *Morton*, 405 U.S. at 740–41 n.16)).

36. *See* Scanwell Lab., Inc. v. Shaffer, 424 F.2d 859, 861 (D.C. Cir. 1970) (citing KENNETH C. DAVIS, 3 ADMINISTRATIVE LAW TREATISE 217 (1958)).

gally protected interest" to have the same meaning as what courts often refer to as the "cognizability" of an injury.[37] The "cognizability" interpretation will be adopted for all discussion hereafter.[38] Further, except when quoting an opinion, this Note will not use either term from this point forward. Rather, where courts have traditionally stated that the alleged injury is "cognizable," or that the alleged injury impacted a "legally protected interest," this Note will state that the alleged injury is an adequate "basis." The term "basis" has two minor advantages. First, the term is truer to the concept it is intended to represent: a foundation or threshold for the remaining inquiry. Second, its use is more concise and comprehensible in a sentence.

Justice Scalia's remaining elements of injury-in-fact require a properly alleged injury to be "concrete and particularized" and "actual or imminent."[39] These concepts will be referred to as the two "requirements" of injury-in-fact, thereby completing the contextual foundation for the remainder of this Note. The following outline may help solidify the reader's understanding of this foundation.

<u>INJURY-IN-FACT</u>

Step 1 Basis

Synonyms	1) Cognizable injury 2) Legally protected interest
Issue	Is the alleged injury the type of injury for which courts have or will fashion a remedy?
Adequacy Determined By	1) Common Law — precedent and extensions thereof, based on perceived social values 2) Legislation — outside scope of this Note

Step 2 Requirements

Issue	Is the plaintiff among those who are

37. *See* Claybrook v. Slater, 111 F.3d 904, 907 (D.C. Cir. 1997). This interpretation is logical, because it is inconceivable that the *Lujan* Court intended to do away with the concept of cognizability. Thus, the most coherent view is that "legally protected interest" is a different expression for the same concept.

38. This interpretation will have a negative effect on one of the majority's arguments. See *infra* Part III.D.

39. *See supra* note 35 and accompanying text.

	actually injured?
Elements	1) concrete and particularized, and 2) actual or imminent

Subsection B defines the elements of the "requirements" of injury-in-fact.[40] Subsection C traces the historical path of cases which led to the development of the "basis" alleged in *Glickman*.[41]

B. "Requirements" of Injury-in-Fact

Because the relevant cases cite *Lujan* as the authority for the "requirements" of injury-in-fact,[42] and because Judge Sentelle's dissent in *Glickman* accepted the majority's factual analysis of the case, which used the *Lujan* "requirements," there is little else necessary by way of background for the "requirements," other than to more clearly define the key terms.

In *Lujan*, environmental groups sued the Secretary of the Interior to enjoin a revised regulation that was allegedly improperly promulgated under the Endangered Species Act (ESA) because it limited the geographic scope of a particular section of the ESA to the United States and high seas.[43] The allegation was that by so limiting the geographic scope of the ESA, some funded activities abroad would increase the rate of extinction of protected species in other countries, thereby injuring the plaintiffs who wished to observe these species in their natural environment outside of the United States.[44]

Plaintiffs lacked standing because their alleged injury was neither "actual" nor "imminent."[45] The injury was not "actual," because this was not a situation in which the plaintiffs could not observe members of a species because that species' population had already been reduced. Thus, plaintiffs were obliged to establish that there was an "imminent" threat of such a reduction of an endan-

40. *See infra* Part II.B.

41. *See infra* Part II.C.

42. *See supra* note 35 and accompanying text.

43. *See Lujan*, 504 U.S. at 558–59.

44. *See id.* at 562–63. The projects included the rehabilitation of the Aswan High Dam, and the development of Egypt's Master Water Plan. *See id.* at 563.

45. *See id.* at 564. The court did, however, acknowledge that such an allegation can form an adequate "basis." "Of course, the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for the purpose of standing." *Id.* at 562–63 (citing *Morton*, 405 U.S. at 734).

gered species, and an attempt to observe said species.[46]

"Imminent," although itself an expansion of "actual," is a concept meant to ensure that an alleged injury is not too speculative, that the injury is "certainly impending."[47] But plaintiffs alleged only an uncertain plan to revisit the place of observation at some indefinite future time, when they would presumably be deprived of an opportunity to observe certain endangered species because of the revised regulation.[48] For Justice Scalia, this injury was not "imminent."[49]

An example of the second requirement of *Lujan*, "concrete and particularized," can best be illustrated by *Glickman*. Jurnove satisfied this "requirement" because he allegedly witnessed, with his own eyes, particular animals living in inhumane conditions.[50] Thus, although the *Lujan* plaintiffs failed to satisfy the "imminence requirement," they did properly allege a "concrete and particularized" injury, by planning to observe, with their own eyes, members of the endangered species which they alleged would be affected by the improperly revised regulation.[51]

C. "Basis" of Injury-in-Fact

Jurnove alleged the aesthetic injury of witnessing animals living in inhumane conditions.[52] The primary issue was whether the allegation was an adequate "basis."[53] This subsection traces the historical development of the aesthetic injury from witnessing environmental degradation, the aesthetic injury of a diminished opportunity to observe animals, and the aesthetic injury from witnessing animals treated inhumanely.

1. *Animal Cases*

The Supreme Court has stated that an injury to an aesthetic or environmental interest is an adequate "basis,"[54] and that observ-

46. *See id.* at 563–64.
47. *See id.* at 564 n.2 (citing *Whitmore*, 495 U.S. at 158).
48. *See id.* at 564.
49. *See Lujan*, 504 U.S. at 564. ("Such 'some day' intentions . . . do not support a finding of the 'actual or imminent' injury that our cases require.").
50. *Glickman*, 154 F.3d at 431–33.
51. *See Lujan*, 504 U.S. at 563.
52. *See supra* note 3 and accompanying text.
53. *See Glickman*, 154 F.3d at 433–38.
54. *See Morton*, 405 U.S. at 734.

ing animals is a bona fide aesthetic interest.[55] In *Sierra Club v. Morton*, after the United States Forest Service accepted Walt Disney Enterprises' bid to build a resort in the Mineral King Valley of the Sierra Nevada Mountains,[56] the Sierra Club sought an injunction, alleging that the proposed development contravened federal laws and regulations limiting the development of national parks, forests, and refuges.[57]

In determining that plaintiff did not have standing, Justice Stewart recognized aesthetic injury as a new "basis."[58] The alleged injury was that the development would "adversely affect the scenery, natural and historic objects and wildlife of the park."[59] Aesthetic well-being, like economic well-being, is important to the quality of life, and therefore, an injury to either interest is an adequate "basis."[60]

In *Japan Whaling Ass'n v. American Cetacean Society*,[61] plaintiffs alleged an adequate "basis," because "whale watching . . . will be adversely affected by continued whale harvesting."[62] Japan had exceeded the International Whaling Commission's quota for sperm

55. *See Lujan*, 504 U.S. at 562–63; Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 n.4 (1986).

56. *See Morton*, 405 U.S. at 729.

57. *See id.* at 730.

58. *See id.* at 734. The Court denied standing, not because the Sierra Club's "basis" was inadequate, but because the Sierra Club did not allege an injury to any individual members of the group, but instead attempted to use its status as a qualified organization with a bona fide interest in environmental degradation as a route to a day in court. *See id.* at 739–40.

59. *Id.* at 734.

60. *See id.* ("We do not question that this type of harm may amount to an injury-in-fact. . . .").

61. 478 U.S. 221 (1986).

62. *Id.* at 230 n.4 (relying on *Morton*, 405 U.S. 727). Notice that the Court's open language allows for three possible explanations of why plaintiffs' "basis" was adequate. One explanation is that the whale harvesting will diminish the plaintiffs' opportunity to observe animals by reducing the *number* of animals available for observation (this will later be titled the "quantitative basis"). *See infra* note 112 and accompanying text. The second explanation is that because whales are a part of the natural environment, to witness dead or dying whales is to witness environmental *degradation* (this will later be titled the "despoliation basis"). *See infra* note 113 and accompanying text. The third explanation is that whale harvesting, occurring contemporaneously to plaintiffs' attempt to observe whales, will subject plaintiffs to witnessing whales treated *inhumanely* (this will later be titled the "qualitative basis"). *See infra* note 114 and accompanying text. However, since this case involved a conservation statute, most courts interpret *Japan Whaling* as establishing the "basis" of a diminished opportunity to observe animals. *See, e.g.*, *Glickman*, 154 F.3d at 437.

whales.[63] Wildlife conservation groups sued, seeking to compel the Secretary of Commerce to act in accordance with the Pelly and Packwood Amendments.[64]

The foregoing Supreme Court cases established the foundation for standing based on witnessing environmental and wildlife degradation, death, and suffering. The next three cases interpreted and refined these "bases," but are widely misinterpreted,[65] and must be presented to clear the confusion. In these cases, plaintiffs tried to use the following three different "bases": (1) plaintiff's opportunity to observe animals was diminished; (2) plaintiff, in witnessing dead animals, witnessed environmental degradation; and (3) plaintiff witnessed animals treated inhumanely.[66] In all three cases, plaintiffs' injury was an adequate "basis," but none of the opinions stated explicitly that the injury resulting from witnessing animals treated inhumanely was an adequate "basis" by itself.[67]

Animal Welfare Institute v. Kreps[68] involved the Marine Mammal Protection Act (MMPA),[69] which imposed a moratorium on taking marine mammals that could be waived if done in a procedurally and substantively correct manner.[70] In 1976, an importer of baby seal skins was granted such a waiver.[71] Environmental groups sought an injunction, alleging several injuries, the importance of which, for analysis of the present case, requires precise documentation here.

> The decision . . . will contribute to the death and *injury of marine mammals and injury to the ecosystem* of the South Atlantic Ocean ["basis" = extension of witnessing environmental degradation es-

63. *See Japan Whaling*, 478 U.S. at 228.

64. *See id.* at 229 n.3. The Pelly and Packwod Amendments to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1821 (1985), direct the Secretary to periodically monitor the activities of foreign nations, and to certify to the President if foreign nations conduct fishing operations so as to diminish the effectiveness of a conservation program. *See id.* at 225–26.

65. *See infra* Part III.A.

66. *See* Animal Welfare Institute v. Kreps, 561 F.2d 1002 (D.C. Cir. 1977); Humane Soc'y of the U.S. v. Hodel, 840 F.2d 45 (D.C. Cir. 1988); Fund for Animals, Inc. v. Lujan, 962 F.2d 1391 (9th Cir. 1992). Note that these are the same three "bases" referred to in the discussion of *Japan Whaling*. *See supra* note 61.

67. *See infra* notes 68–93 and accompanying text. This lack of explanation will weaken the majority's argument. *See infra* Part III.A.

68. 561 F.2d 1002 (D.C. Cir. 1977).

69. 16 U.S.C. §§ 1361–1407 (Supp. V 1998).

70. *See Kreps*, 561 F.2d at 1004.

71. *See id.*

> tablished in *Morton*] . . . . [T]he Defendant's decision impairs the ability of members of the plaintiff organizations to see, photograph, and enjoy Cape fur seals alive in their natural habitat under conditions in which the animals are not subject to *excessive harvesting* ["basis" = plaintiffs' opportunity to observe animals was diminished], *inhumane treatment* and slaughter of pups that are very young and still nursing . . . . The decision impairs their [plaintiff organizations] efforts to assure *humane treatment* of marine mammals in conformity with the Act ["basis" = plaintiffs witnessed inhumane treatment of animals]. The MMPA was enacted in response to public outcry against the commercial exploitation of very young and still nursing marine mammals, particularly seals.[72]

In concluding that plaintiffs alleged an adequate "basis," Judge Skelly Wright, in dicta, recognized that the purpose of the MMPA was to provide for the humane treatment of animals, and suggested that because these animals were incapable of protecting themselves in court, it would be logical to allow animal welfare groups to ask the court to enforce the statute.[73] However, Judge Wright did not decide the case on this logic, but instead opted for the "traditional test."[74] Without defining the "traditional test," Judge Wright cited *Morton*, and treated the allegations of injury to the aesthetic, scientific, and educational interests of plaintiffs in observing marine mammals and their ecosystem as adequately similar to the interests of the plaintiffs in *Morton*.[75] Thus, whether an aesthetic injury to a plaintiff's interest in observing animals free from inhumane treatment was itself an adequate "basis" was not decided.

In *Humane Society of the United States v. Hodel*,[76] the organization and one of its members sought an injunction against the United States Fish and Wildlife Service (Service).[77] The Humane Society noted that the Service violated several environmental statutes by opening refuges to hunting for the first time, and expanding permissible hunting in other refuges without proper environmental

72. *Id.* at 1007 (emphasis added).

73. *See id.* The MMPA explicitly forbids seals to be taken in an inhumane manner. *See* 16 U.S.C. § 1372(b)(4) (Supp. V 1998).

74. *See Kreps*, 561 F.2d at 1007 ("But we need not rely on this observation, because appellants allege injury in fact which satisfies the traditional test.").

75. *See id.* at 1007–08. The plaintiffs witnessed environmental degradation. *See Morton*, 405 U.S. at 734.

76. 840 F.2d 45 (D.C. Cir 1988).

77. *See Hodel*, 840 F.2d at 47.

impact analyses.[78]

The alleged injury was that "[m]any [Humane Society] members utilize the refuge system for recreational purposes, including the observation of wildlife protected by the refuges, and the *killing* and *maiming* of such wildlife severely impacts on these activities."[79] Judge Wald dissected the injury into the following two "bases": first, plaintiff witnessed environmental degradation;[80] and second, plaintiff's opportunity to observe animals was diminished.[81] Both injuries are "classic aesthetic interests, which have always enjoyed protection under standing analysis."[82] The adequacy of the first "basis," that plaintiffs witnessed environmental degradation, is supported by *National Wildlife Federation v. Hodel*,[83] which involved allegations of degraded landscapes "strikingly analogous to [the *despoliation of animals*] involved in this case."[84] In *Hodel*, Judge Wald did not even consider the third possible interpretation of the allegation, that plaintiff witnessed animals treated inhumanely.

In *Fund for Animals v. Lujan*,[85] an animal rights group sought an injunction against the Department of the Interior and several state departments for violating federal and state environmental statutes by adopting a plan to kill bison leaving Yellowstone National Park without first preparing an environmental impact statement.[86] The Fund alleged the following two injuries: (1) the plan resulted in a "*diminished opportunity* for its members to view bison

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78. *See id.* at 49.

79. *Id.* at 51 (emphasis added).

80. *See id.* at 52 ("[T]he existence of hunting on wildlife refuges forces [Humane] Society members to witness *animal corpses* and *environmental degradation* . . . ." (emphasis added)).

81. *See id.* ("[T]he existence of hunting on wildlife refuges . . . *deplete[s] the supply of animals* and birds that refuge visitors seek to view." (emphasis added)).

82. *Id.* (relying on *Morton*, 405 U.S. at 734.)

83. 839 F.2d 694 (D.C. Cir. 1988).

84. *Hodel*, 840 F.2d at 52 (citing *National Wildlife Federation*, 839 F.2d at 704 *passim* (emphasis added)). This is the first explicit attempt to justify the extension of the *Morton* environmental degradation "basis" to include individual animals, as opposed to entire landscapes. This extension seems warranted for two reasons. First, animals are part of the environment. Second, the alleged injuries in *Morton*, which were an adequate "basis," included adverse impacts on wildlife. *See supra* note 59 and accompanying text. In this sense it may be more accurate to view this "basis," not as an extension of *Morton*, but merely as the wildlife portion of *Morton*.

85. 962 F.2d 1391 (9th Cir. 1992).

86. *See id.* at 1394.

in Yellowstone,"[87] and (2) the Fund's members "suffered emotional distress . . . after viewing the *shooting* of bison."[88]

Both injuries were adequate "bases."[89] The first "basis" was established in *Alaska Fish & Wildlife Federation & Outdoor Council, Inc. v. Dunkle*,[90] which involved a diminished opportunity to observe migratory birds.[91] The second "basis," that plaintiffs witnessed the shooting of bison, was established in *Hodel*, in which Judge Wald stated that "'witness[ing] animal corpses and environmental degradation'" is an adequate "basis."[92] Judge Alarcon made it clear that he categorized the shooting of bison under the "basis" that plaintiff witnessed environmental degradation, and not under the "basis" that plaintiff witnessed animals treated inhumanely, when he stated that plaintiffs suffered a "'direct sensory impact of a change in [their] physical environment'" as a result of the shooting.[93]

As presented, none of the three cases (*Kreps*, *Hodel*, and *Fund for Animals*) provided an explicit justification for the adequacy of the "basis" that plaintiff witnessed animals treated inhumanely.[94] Instead, they used the "basis" that plaintiff's opportunity to observe animals was diminished, and the "basis" that plaintiff witnessed environmental degradation.[95] However, the dissent in the later decision of *Animal Legal Defense Fund, Inc. v. Espy*[96] attempted to provide such a justification for the "basis" that plaintiff witnessed

87. *Id.* at 1395 (emphasis added).

88. *Id.* (emphasis added). Note that "shooting," like the allegation in *Japan Whaling* could be interpreted under all three "bases." *See supra* note 62. Note under which "basis" Judge Alarcon interprets "shooting." *See infra* note 92 and accompanying text.

89. *See id.* at 1396–97.

90. 829 F.2d 933 (9th Cir. 1987).

91. *See id.* at 937. This case concerned the hunting of migratory birds in Alaska. *See id.* at 935.

92. *Fund for Animals*, 962 F.2d at 1396 (quoting *Humane Soc'y of the U.S.*, 840 F.2d at 52).

93. *Id.* at 1397 (citing Animal Lovers Volunteer Ass'n, Inc. v. Weinberger, 765 F.2d 937, 938 (9th Cir. 1985)). The quoted language clearly conveys the belief that killing bison creates an environmental change, thus supporting the reasoning for *Hodel's* extension of *Morton*. *See supra* notes 83–84 and accompanying text. Further, Judge Alarcon was compelled to support the plaintiffs' position by clarifying that they suffered an injury "beyond a generalized concern for the bison's *welfare*." *Id.* (emphasis added). This latter statement indicates that Judge Alarcon was taking pains to avoid the "basis" that plaintiffs witnessed animals treated inhumanely in order to find injury-in-fact satisfied.

94. *See supra* notes 68–93 and accompanying text.

95. *See supra* notes 68–93 and accompanying text.

96. 23 F.3d 496, 503 (D.C. Cir. 1994) (Williams, J., concurring in part and dissenting in part).

animals treated inhumanely.[97]

In *Espy*, a USDA regulation defined "animal" inconsistently with the AWA definition of "animal," the result being that the USDA definition did not provide the protection the AWA intended for birds, rats, and mice.[98] One plaintiff, Knowles, a psychobiologist who used rats and mice for research, alleged that the inadequate definition deprived her of any right to ensure that the institutions for which she worked would provide humane treatment of rats and mice, and that inhumane treatment would impair her ability to properly carry out her duties.[99]

The majority's analysis, authored by Judge Sentelle, focused entirely on the issue of the "requirement" of "actual or imminent" injury, and concluded that Knowles did not satisfy this "requirement."[100] Judge Stephen F. Williams dissented, reasoning that the "requirement" of "imminence" was satisfied, and, more relevant to the present discussion, making two explicit arguments for the adequacy of the "basis" that plaintiff witnessed animals treated inhumanely.[101] First, *Japan Whaling* stated that an injury to the interest in watching animals in their natural habitat is an adequate "basis," but the difference between seeing experimental subjects treated humanely instead of inhumanely is greater than the difference between seeing animals enjoying their natural habitat and not seeing them at all.[102] Second, *Kreps* and *Hodel* represent the D.C. Circuit's previous recognition of the adequacy of the "basis" that plaintiff witnessed animals treated inhumanely.[103] Judge Williams interpreted *Kreps* to embrace plaintiffs' right to view seals under conditions in which they were not subject to inhumane treatment,[104] and *Hodel* recognized the interest of avoiding exposure to

97. *See id.* at 504–05.

98. *See id.* at 498.

99. *See id.* at 499–500.

100. *See id.* at 500.

101. *See id.* at 504–05. Unfortunately, Judge Williams proceeded as though this analysis was part of the "concreteness requirement." *See supra* Part II.B. This proposition is an example of the schizophrenic judicial spew coating injury-in-fact jurisprudence. *See supra* note 26 and accompanying text.

102. *See Animal Legal Defense Fund, Inc.*, 23 F.3d at 505 (D.C. Cir. 1994) (Williams, J., concurring in part and dissenting in part).

103. *See id.* Judge Williams is wrong about both cases. *See supra* notes 68–84 and accompanying text; *see also infra* notes 104–05.

104. Such an interpretation is incorrect, because in *Kreps*, Judge Wright did not decide whether an interest in viewing an animal free from inhumane treatment was an adequate "basis." *See supra* notes 73–75 and accompanying text.

animals killed by hunters.[105]

The same mistakes made in Judge Williams' *Espy* dissent were made in Judge Laurence H. Silberman's dicta in *Humane Society of the United States v. Babbitt*.[106] In analyzing the alleged injury,[107] Judge Silberman stated that *Kreps* and *Hodel* each recognized the injury from witnessing animals treated inhumanely as an adequate "basis."[108] Further, relying on *Morton*, *Defenders of Wildlife*, and *Japan Whaling*, Judge Silberman also recognized that an injury to the aesthetic interest in observing endangered species can form an adequate "basis," but cautioned that all of these cases involved conduct that threatened to diminish the overall supply of the endangered species available for observation.[109]

These five cases, *Kreps*, *Hodel*, *Fund for Animals*, *Espy*, and *Babbitt*, comprised Judge Wald's strongest support for her decision in the Note case.[110] She used them for the proposition that the "basis" that plaintiff witnessed animals treated inhumanely had previously been recognized.[111] What some of the cases contemplated, in one form or another, yet failed to answer conclusively, is whether a plaintiff has standing where the "basis" involves the inhumane treatment of animals, but not a diminished opportunity to use or observe animals, nor environmental degradation.[112]

Although these cases used many different terms to express this issue, the rest of this Note will use broad language, and will refer to the key question as follows: Where the allegation is an injury involving the observation of animals, is the plaintiff required to

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105. *See id.* The fact statement referring to *Hodel* is correct, but an injury based on exposure to dead animals does not necessarily imply the "basis" that plaintiff witnessed animals treated inhumanely. In fact, Judge Wald's analysis in *Hodel* had nothing to do with humane treatment. *See supra* notes 80–84 and accompanying text.

106. 46 F.3d 93, 99 n.7 (D.C. Cir. 1995); *see infra* note 108 and accompanying text.

107. An Asian elephant, Lota, an endangered species, was designated exempt from the Endangered Species Act restrictions on import and export of endangered species. *Babbitt*, 46 F.3d at 95. The exemption allowed Lota to be moved from the zoo, in which she had lived for 36 years, to a corporation that would exhibit Lota at a circus. *See id.* An individual plaintiff sued along with the Humane Society. *See id.* at 97.

108. *See id* at 99 n.7. Judge Silberman is inaccurate about both cases. *See supra* notes 103–05 and accompanying text (explaining why the commonly accepted interpretations of *Kreps* and *Hodel* are erroneous).

109. *See id* at 97. Judge Sentelle, dissenting in the Note case, used this argument to suggest that Judge Wald, writing for the majority in the Note case, departed from precedent. *See infra* notes 181–82, 231 and accompanying text.

110. *See infra* Part III.A.1.

111. *See infra* Part III.A.1.

112. *See supra* notes 68–93.

allege either a *quantitative* diminished opportunity to observe animals because of a reduction in the number of animals available for observation,[113] or environmental degradation due to the *despoliation* of wildlife?[114] Or, as Judge Wald suggested, has a plaintiff properly alleged an injury where the complaint contained only a *qualitative* allegation involving the manner in which animals were treated, such treatment being considered humane or inhumane?[115] In short, the question is whether a *qualitative* injury can itself form an adequate "basis" without a contemporaneous *quantitative* injury or *despoliation* injury.

In the Note case, both the majority and the dissent describe the cases as supporting their own answer to the question, but, both misinterpret the cases to some extent.[116] Thus, it seems necessary to summarily clarify exactly what the cases said about the question. Accordingly, the following template was designed to so clarify these cases.

Kreps, 561 F.2d 1002 (D.C. Cir. 1977).
Allegation: Quantitative, qualitative, and despoliation.
Injury-in-fact: Satisfied.
Reasoning: The allegations were sufficiently similar to the allegations of landscape degradation in *Morton* (i.e., despoliation basis).
Dicta: Qualitative allegations are sufficient by themselves.

Hodel, 840 F.2d 45 (D.C. Cir. 1988).
Allegation: Quantitative and despoliation.
Injury-in-fact: Satisfied.
Reasoning: Both allegations have always been adequate bases. For quantitative, used *Morton*. For despoliation, extended *Morton* via analogy.

Fund for Animals, 962 F.2d 1391 (9th Cir. 1992).
Allegation: Quantitative and despoliation.

113. This involves the "quantitative basis." For example, a plaintiff has a diminished opportunity to see an endangered species of whale in its natural environment, because members of the species have been killed. This "basis" reflects society's acceptance of conservation principles spawned from an anthropocentric worldview. *See infra* Part III.E.

114. This involves the "despoliation basis." For example: while hiking in the woods, plaintiff witnesses dead bison lying on the ground. This "basis" seems to move slightly beyond the animal-as-resource touchstone. *See infra* Part III.E.

115. This involves the "qualitative basis." For example: the plaintiff witnesses a depressed and unhealthy monkey in a poorly maintained cage in a zoo. This "basis" reflects society's emerging recognition of the intrinsic value of animals apart from their usefulness to humans. *See infra* Part III.E.

116. *See infra* Parts III.A.2., III.A.4.

Injury-in-fact: Satisfied.
Reasoning: For quantitative, used circuit precedent case. For despoliation, found the facts of *Hodel* similar, and supported the extension of *Morton*.

Espy, 23 F.3d 496 (D.C. Cir. 1994).
Allegation: Qualitative.
Injury-in-fact: Not satisfied.
Reasoning: The injury didn't satisfy the imminence requirement.
Dissent: Argued that *Kreps* and *Hodel* recognized the qualitative basis by construing the dicta in *Kreps* as though it was the reasoning, and misunderstanding the type of basis used in *Hodel*.

Babbitt, 46 F.3d 93 (D.C. Cir. 1995).
Allegation: Irrelevant to the present discussion.
Injury-in-fact: Irrelevant.
Reasoning: Other aspects of Article III standing were not satisfied.
Dicta: Suggested that *Kreps* and *Hodel* recognized the qualitative basis by construing the dicta in *Kreps* as though it was the reasoning, and misunderstanding the type of basis used in *Hodel*.

2. *Environmental Analogy Cases*

Judge Wald, borrowing from *Kreps*, *Hodel*, and *Fund for Animals*, wanted to strengthen the argument that the "qualitative basis" is adequate by analogizing animal treatment with environmental quality.[117] For clarity, then, a review of a distinct but analogous line of cases involving injury to the aesthetic interest of observing or using an environmental area is necessary.

In *Morton*, the adequate "basis" was that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment [and use] of the park for future generations."[118] The United States Forest Service had accepted the bid to build a resort in the Mineral King Valley of the Sierra Nevada Mountains.[119]

In *Lujan v. National Wildlife Federation*,[120] the allegation that the federal action would "'threaten [] the aesthetic beauty and

117. *See infra* Part III.B.1.
118. *Morton*, 405 U.S. at 727, 734. Standing was denied in *Morton* for a totally distinct reason from the issue of "basis." *See supra* note 58.
119. *See id.* at 728–29.
120. 497 U.S. 871 (1990).

wildlife habitat potential of these lands [around the South Pass-Green Mountain area of Wyoming],'" was an adequate "basis."[121] The Bureau of Land Management had decided to open such lands to mining interests.[122]

In *Mountain States Legal Foundation v. Glickman*,[123] the aesthetic and environmental interests in hiking, camping, observing wildlife, and finding solitude were sufficient "bases."[124] The Forest Supervisor had instituted a policy for the Kootenai National Forest that would increase the risk of catastrophic wildfire.[125]

In *Montgomery Environmental Coalition v. Costle*,[126] the interest in the "preservation and enhancement of the natural environment situated along the Potomac estuary," was an adequate "basis."[127] The Environmental Protection Agency had issued permits to two sewage treatment plants which discharged pollutants into the Potomac River.[128]

In *National Wildlife Federation v. Hodel*,[129] the past and potential future environmental degradation caused by mining operations was an adequate "basis."[130] Federal regulations had increased the opportunity for environmental degradation caused by mining operations.[131]

The importance of these cases is that they suggest that an aesthetic injury to the interest of observing an environmental area does not require the total destruction of the area, but only a change in the ecology and aesthetics of that area.[132] This will be a crucial element in Judge Wald's reasoning.[133]

Equipped with the precedent from the Supreme Court (*Morton*, *Japan Whaling*, and *Lujan)*, the circuit courts (*Kreps*, *Hodel*, *Fund for Animals*, *Espy*, and *Babbit)*, and the environmental analogy cases, Jurnove entered the court to alleviate the suffering of animals at the Game Farm.

121. *Id.* at 886 (quoting Appellant's Pet. for Cert. at 191a).
122. *See id.* at 875–76.
123. 92 F.3d 1228 (D.C. Cir 1996).
124. *See id.* at 1234.
125. *See id.*
126. 646 F.2d 568 (D.C. Cir. 1980).
127. *Id.* at 576–78.
128. *See id.* at 572–73.
129. 839 F.2d 694 (D.C. Cir. 1988).
130. *See id.* at 707.
131. *See id.* at 701–02.
132. *See Glickman*, 154 F.3d at 437.
133. *See infra* Part III.B.1.

III. JUDGE WALD'S REASONING, JUDGE SENTELLE'S RESPONSE, AND CRITICAL ANALYSIS

There is no controversy with Judge Wald's analysis of the "requirements" of injury-in-fact.[134] She relied on *Lujan*, which requires that an injury be "concrete and particularized" and "actual or imminent."[135] Jurnove suffered his injury in a personal way by seeing, with his own eyes, the suffering of particular animals at the Game Farm.[136] The injury is "concrete and particular." Jurnove already suffered the injury by observing, in the past, the suffering of the Game Farm animals, and plans to continue visiting the Game Farm in the near future.[137] The injury is "actual."

The controversial portion of the majority's injury-in-fact analysis involved the "basis" of the injury.[138] The following discussion first presents Judge Wald's justifications for her determination that the "qualitative basis" is adequate.[139] Throughout this section, this Note provides dissenting Judge Sentelle's responses, and the Author's critical analysis of both Judge Wald's and Judge Sentelle's arguments.[140] Next, this section presents Judge Sentelle's affirmative argument against the "qualitative basis,"[141] and follows with critical analysis of that argument.[142] Finally, this Note concludes with a simple justification for the determination that the "qualitative basis" is adequate.[143]

The majority's analysis contains three basic reasons justifying its holding that Jurnove's allegations satisfy Article III injury-in-fact.[144] First, precedent has recognized the "qualitative basis."[145] Second, an analogy can be drawn between the aesthetic injury sustained by witnessing degradation of environmental areas and that sustained by witnessing inhumane treatment of animals; and such

134. The dissent's arguments are limited to the issue of "basis." *See infra* Parts III.A., III.D.

135. *See supra* note 35 and accompanying text.

136. *See Glickman*, 154 F.3d at 433. Jurnove referred to the animals, whose suffering comprised his injury, by name. *See id.* at 429.

137. *See id.* at 431.

138. *See id.* at 433–38.

139. *See infra* Parts III.A–C.

140. *See infra* Parts III.A–D.

141. *See infra* Part III.D.1.

142. *See infra* Part III.D.2.

143. *See infra* Part III.E.

144. *See Glickman*, 154 F.3d at 433–38.

145. *See id.* (citing to *Kreps, Hodel, Fund for Animals, Espy*, and *Babbitt*).

analogy clarifies that Jurnove was not required to show that particular animals had died or that an entire species had been eliminated to satisfy Article III injury-in-fact.[146] Third, there is no explicit authority requiring the "quantitative basis," and those cases stressing quantitative allegations and facts were guided by statutes that dealt with such qualifications.[147]

A. Precedent Recognized the "Qualitative Basis"

1. *Wald for the Majority*

First, *Morton*, *Japan Whaling*, and *Lujan* established that an injury to aesthetic well-being is an adequate "basis,"[148] and observing animals is such an aesthetic interest, so that a diminished opportunity to observe animals is an adequate "basis."[149] Next, five cases (*Kreps*, *Hodel*, *Fund for Animals*, *Espy*, and *Babbit*) have already recognized the "qualitative basis."[150]

Kreps involved both "quantitative" and "qualitative" injuries, but never distinguished between the two in finding that the allegation was adequate.[151] Thus, *Kreps* stands for the proposition that the "qualitative basis" is adequate.[152]

In *Hodel*, the court divided the allegation into two parts, one dealing with a "qualitative basis," and the other dealing with a "quantitative basis."[153] Because *Hodel* did not distinguish between the two types of "bases" when stating that both were classic interests that had always been recognized, the implication was that the "qualitative basis" was well established.[154]

Fund for Animals found that viewing the slaughter of bison outside of Yellowstone National Park was an adequate "basis."[155] The dissent in *Espy* stated that *Kreps* and *Hodel* had established the "qualitative basis."[156] *Babbit*, in dicta, interpreted *Kreps* and

146. *See id.* at 434–38.
147. *See id.* at 437–38.
148. *See id.* at 432.
149. *See id.* at 437.
150. *See Glickman*, 154 F.3d at 433–34.
151. *See id.* at 434 n.5 (citing *Kreps*, 561 F.2d at 1007).
152. *See id.* at 433–34.
153. *See id.* at 434 n.6 (citing *Hodel*, 840 F.2d at 52).
154. *See id.* (citing *Hodel*, 804 F.2d at 52).
155. *See id.* at 434 (citing *Fund for Animals*, 962 F.2d at 1396).
156. *See Glickman*, 154 F.3d at 433 ("Our own cases have indicated a recognition of people's interest in seeing animals free from inhumane treatment." (quoting *Espy*, F.3d at 505)).

Hodel the same way.[157]

2. *Analysis of Wald*

Judge Wald's analysis of *Kreps* failed to recognize that it was merely dicta in which Judge Wright suggested that the "qualitative basis" should be adequate.[158] Ultimately, *Kreps* held injury-in-fact was satisfied by the "despoliation basis."[159] Therefore, Judge Wald's reliance on *Kreps* is based upon a misinterpretation.

Judge Wald's analysis of *Hodel* is inherently unsettling because she quoted *Hodel* for the proposition that the allegations in *Hodel* were "classic aesthetic interests, which have always enjoyed protection under standing analysis."[160] If the "qualitative basis" is a "classic" means of satisfying injury-in-fact,[161] then the present case would not have involved such exhaustive argumentation, from both Judge Wald and Judge Sentelle, on whether the "qualitative basis" was adequate.

The solution to the paradox begins with recognizing that in *Glickman*, Judge Wald's premise, that *Hodel* involved a "quantitative basis" and a "qualitative basis,"[162] is incorrect. The actual allegation was that, "the *killing* and *maiming* of . . . wildlife severely impacts on [the interest]" of observing wildlife.[163] Just like *Japan Whaling*, this allegation could be interpreted through any of the three "bases."[164] However, unlike *Japan Whaling*, the interpretive openness of this allegation was closed when, using its own words, not plaintiff's, the *Hodel* majority dissected the allegation to clarify its "gist," which is as follows: the killing of wildlife "forces Society members to witness animal corpses and *environmental degradation*," and "*deplet[es] the supply of animals* . . . that refuge visitors seek to view."[165] *Hodel* then quoted *Morton* for the authority that

157. *See id.* (citing *Babbit*, 46 F.3d at 99 n.7).

158. *See Kreps*, 561 F.2d at 1007 ("Where an act is expressly motivated by considerations of humaneness toward animals . . . it strikes us as eminently logical to . . . invoke the aid of the courts . . . .").

159. *Id.* at 1114 ("But we need not rely on this observation, because appellants allege injury in fact which satisfies the traditional test.").

160. *Glickman*, 154 F.3d at 433–34 (quoting *Hodel*, 840 F.2d at 52, and implying that the "qualitative basis" is classic).

161. *Hodel*, 840 F.2d at 52.

162. *See supra* note 153 and accompanying text.

163. *Hodel*, 840 F.2d at 51 (emphasis added).

164. *See supra* note 62 and accompanying text.

165. *Hodel*, 840 F.2d at 52 (emphasis added). *Hodel* equated the allegation's term,

environmental well-being is an adequate "basis," and argued that it was proper to analogize degraded landscapes with the despoliation of animals.[166] This is the outline of the "despoliation basis."[167]

Thus, it is clear that *Hodel* did not actually involve the "qualitative basis" at all. Therefore, when *Hodel* concluded that both "bases" were "classic aesthetic interests, which have always enjoyed protection,"[168] it could only have been referring to the "quantitative basis" and the "despoliation basis," not the "qualitative basis." This is the only interpretation that makes sense, because if the "qualitative basis" was "classic" at the time of *Hodel*, there would have been no need for the analysis of the "basis" portion of injury-in-fact in *Glickman*. Clearly, Judge Wald misinterpreted *Hodel*.

Seeing now how Judge Wald misinterpreted *Kreps* and *Hodel*, the problem with her use of the remaining three cases will be easy to illustrate. In actuality, *Fund for Animals* found the "despoliation basis" adequate, specifically borrowing the analogy introduced in *Hodel*,[169] and the "quantitative basis" adequate, following circuit precedent.[170] Thus, much like *Hodel*, the analysis in *Fund for Animals* did not even contemplate the "qualitative basis." Thus, Judge Wald misinterpreted *Fund for Animals*. In *Espy*, Judge Williams made the same mistake as Judge Wald; he interpreted *Kreps* and *Hodel* as if they had established the "qualitative basis."[171] *Babbit* also made the same mistake.[172]

In reviewing these cases, it is clear that some of them "recognized" the "qualitative basis," insofar as humane treatment of animals was a part of the allegations.[173] But, if Judge Wald meant "recognized" to mean that these cases stand for the proposition that the "qualitative basis" had already been found adequate, then she placed an intolerable burden of semantic credibility upon these precedents.

"killing" with "depletion of animals" (the "quantitative basis") in the court's "gist"; and the allegation's term "maiming," with "environmental degradation" (the "despoliation basis") in the court's "gist." *Id.*

166. *See id.* at 52.
167. *See supra* note 84.
168. *Hodel*, 840 F.2d at 52.
169. *See supra* notes 92–93 and accompanying text.
170. *See supra* notes 90–91 and accompanying text.
171. *See supra* notes 104–05 and accompanying text.
172. *See supra* note 108 and accompanying text.
173. *See supra* notes 68–93 and accompanying text.

3. Sentelle's Dissent

Judge Sentelle, who claimed that the majority misused precedent,[174] argued that these cases relied on the "quantitative basis" in satisfying injury-in-fact.[175] Contrary to Judge Wald's efforts, *Kreps* and *Hodel* do not support the argument that a diminution of the species is not required for injury-in-fact.[176] The inhumane treatment alleged in *Kreps* was directly related to the manner in which the seals were being killed, and plaintiffs were unsuccessful in arguing on the merits that defendants did not meet the required level of humaneness.[177] Thus, the remaining allegation was one of death of members of a species, which means that *Kreps* falls within the line of cases recognizing only the "quantitative basis."[178] *Hodel* specifically recognized "'the deplet[ion] [of] the supply of animals and birds that refuge visitors seek to view,'"[179] and therefore, also comes within the line of cases recognizing only the "quantitative basis."[180]

In short, all cases involving animal observation depend on the diminished opportunity to observe animals — the "quantitative basis."[181] Therefore, by abandoning this requirement, Judge Wald departed from aesthetic injury jurisprudence.[182]

4. Analysis of Sentelle

Judge Sentelle, correct that Judge Wald misinterpreted precedent, proceeded to make more egregious errors in using the exact same precedent. Where Judge Wald attempted to use the cases to say more than they could, even though she did not have to do so, Judge Sentelle tried to use the cases to say more than they could, because he had to do so.[183]

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174. *See Glickman*, 154 F.3d at 447 (Sentelle, J., dissenting).

175. *See id.* According to Judge Sentelle, the only adequate "basis" is the "quantitative basis." *Id.* Apparently Judge Sentelle was not aware that *Kreps* and *Hodel* both found the "despoliation basis" adequate. *See supra* notes 73–75, 80–84 and accompanying text. This misunderstanding will produce some vacuous attacks on Judge Wald. *See infra* notes 176–91 and accompanying text.

176. *See Glickman*, 154 F.3d at 447–48 (analyzing *Kreps*, 561 F.2d at 1007, and *Hodel*, 840 F.2d at 52) (Sentelle, J., dissenting).

177. *See id.* at 448 (citing *Kreps*, 561 F.2d at 1012–13).

178. *See id.* (citing *Kreps*, 561 F.2d at 1007).

179. *Id.* (quoting *Hodel*, 840 F.2d at 52).

180. *See id.*

181. *See id.* at 447.

182. *See Glickman*, 154 F.3d at 447 (Sentelle, J., dissenting).

183. The majority did not have to say that the precedent explicitly recognized the

Judge Sentelle's analysis of *Kreps* suffered from two errors. First, he assumed that injuries involving the killing of animals necessarily imply that the analysis must involve the "quantitative basis."[184] This is a faulty assumption.[185] Plaintiffs were disturbed, not only by the reduced opportunity to observe members of the species as a consequence of the killing, but also by the manner of the killing.[186] Second, there is an obvious fallacy in attempting to use the failure of the "qualitative basis" on the merits to show that the "qualitative basis" is inadequate for standing.[187] This argument is frivolous because whether the plaintiffs were successful in litigating the "qualitative" injuries on the merits says nothing about whether the "qualitative basis" was adequate to confer standing.[188]

Judge Sentelle's interpretation of *Hodel* is self-serving. *Hodel* contained a "quantitative basis" and a "despoliation basis," both of which were explicitly and independently found adequate.[189] But Judge Sentelle exclusively cited the particular portion of *Hodel* legitimizing the "quantitative basis," and completely ignored the analysis supporting the "despoliation basis,"[190] then concluded that *Hodel* is merely another acknowledgment of the "quantitative basis".[191]

In summary, Judge Wald, hoping to establish that there was precedent for the "qualitative basis," claimed that previous cases used the "qualitative basis" when it is clear they actually used the "despoliation basis."[192] Judge Sentelle, needing to establish that only the "quantitative basis" is adequate, claimed that previous cases used only the "quantitative basis" when it is clear they also explicitly and independently used the "despoliation basis."[193]

"qualitative basis," only that the precedent did not explicitly state that the "qualitative basis" was inadequate. *See infra* Part III.C.

184. *See supra* note 176 and accompanying text.

185. *See, e.g.*, *Hodel*, 840 F.2d at 52; *Fund for Animals*, 561 F.2d at 1395 (explicitly and independently finding the "despoliation basis" adequate under facts involving death of animals).

186. *See Glickman*, 154 F.3d at 434 n.5 (citing *Kreps*, 561 F.2d at 1012–13).

187. *See supra* note 177 and accompanying text.

188. *See Lujan*, 504 U.S. at 561 (defining the different presumptions, burdens, and analyses at each stage of a trial).

189. *See supra* Part III.A.2.

190. *See supra* note 179 and accompanying text.

191. *See supra* note 180 and accompanying text.

192. *See supra* Parts III.A.1–2.

193. *See supra* Parts III.A.3–4.

B. Environmental Analogy Cases

1. *Wald for the Majority*

Interestingly, after attempting to use precedent to clarify that the "qualitative basis" *has been* explicitly acknowledged, Judge Wald analogized to several environmental cases to establish that the "qualitative basis" *should be* acknowledged.[194] First, the aesthetic interest in observing animals is analogous to the aesthetic interest in observing an environmental area or ecosystem.[195] Second, the cases dealing with the aesthetic interest in observing or using an environmental area do not require that the entire area be destroyed, but merely qualitatively altered or weakened.[196]

For example, plaintiffs were not required to allege that the Mineral King Valley, at issue in *Morton*,[197] would "disappear" as a result of Disney's proposed development, but only that its scenery and ecology was subject to significant alteration.[198] In *Lujan*,[199] the South Pass-Green Mountain area of Wyoming was not subject to destruction from the proposed mining, but such mining did threaten the existing aesthetic beauty and potential for wildlife habitat.[200] In *Mountain States Legal Foundation*,[201] the Kootenai National Forest was not subject to total destruction, but only a significant alteration and degradation.[202] In *Montgomery Environmental Coalition*,[203] the pollutants would not destroy the Potomac River, but merely degrade the quality of its water.[204] Finally, in *Hodel*,[205] the mining caused a degradation of the aesthetic beauty of the surrounding landscapes, not an elimination of the landscape.[206] Thus, by analogy, Jurnove was not required to show a quantitative diminished opportunity to observe animals, because the injury of observing the qualitative inhumane treatment of the

194. *See Glickman*, 154 F.3d at 434–37.

195. *See id.* at 434 (noting that the analogy between environmental cases and animal cases was first made in *Hodel*).

196. *See id.* at 437.

197. *See supra* notes 118–19 and accompanying text.

198. *See Glickman*, 154 F.3d at 434–37.

199. *See supra* notes 120–22 and accompanying text.

200. *See Glickman*, 154 F.3d at 435.

201. *See supra* notes 123–25 and accompanying text.

202. *See Glickman*, 154 F.3d at 434–35.

203. *See supra* notes 126–28 and accompanying text.

204. *See Glickman*, 154 F.3d at 435.

205. *See supra* notes 129–31 and accompanying text.

206. *See Glickman*, 154 F.3d at 435.

Game Farm animals is an adequate "basis."[207]

2. *Analysis of Wald*

There are two problems with this analogy. The first problem, the conceptual incongruity, even applies to the original use of the analogy in *Hodel*,[208] and proceeds as follows: While it is possible to alter an animal through inhumane treatment without killing that animal,[209] it is nearly impossible to imagine a case in which an environmental area could be significantly altered without effectively being destroyed.

For example, contrary to the majority's premise, the landscape in *Morton* would effectively be destroyed by the proposed development, because the development would have significantly altered the pristine landscape to contain human made items.[210] Thus, practically speaking, this environmental case does involve a "quantitative" change; the pristine landscape is not there anymore.[211] In this sense, one could argue that the environmental cases, contrary to Judge Wald's efforts, actually do require a "quantitative" change.[212] Judge Wald attempted to avoid this conceptual problem by stating that the plaintiffs were not required to "allege that the Mineral King Valley would *disappear*" because of the development.[213] But this does not save the analogy because it is not the argument against the "qualitative basis" that plaintiffs should be required to show that the animal will disappear either. Rather, the opponent of the "qualitative basis" argues that there must be a diminished opportunity to observe the desired object, whether the object is an animal or a landscape.[214] Thus, the conceptual incongruity in the analogy is that an altered landscape inherently dimin-

207. *See id.* at 437.

208. *See supra* note 84 and accompanying text.

209. The Note case is an example.

210. *See supra* note 56 and accompanying text.

211. It may just be a matter of semantics. Either the "valley" was qualitatively altered to contain man-made objects, or the "pristine valley" was quantitatively destroyed when man-made objects appeared.

212. It is surprising that Judge Sentelle did not argue this point to rebut Judge Wald's use of the analogy.

213. *Glickman*, 154 F.3d at 437 (emphasis added). This is a form of intellectual cheating, because it is merely a truism that plaintiffs did not allege the valley would disappear. Of course, the valley would not "vanish," but its pristineness would be destroyed; and that is all that is necessary to expose the incongruity in the analogy.

214. *See supra* notes 181–82 and accompanying text.

ishes a plaintiff's opportunity to observe that landscape as it was, a pristine wilderness, while an animal treated inhumanely at the Game Farm does not diminish a plaintiff's opportunity to observe the animal.

The question should be raised, since *Hodel*, *Kreps*, and *Fund for Animals* all used this exact analogy to extend *Morton* to include wildlife — the "despoliation basis" — and since the conceptual incongruity did not halt those courts from finding the "despoliation basis" adequate, why did Judge Wald avoid simply using the "despoliation basis" in *Glickman*? Why was the argument between Judge Wald and Judge Sentelle based solely on whether the "qualitative basis" was adequate without the "quantitative basis," with neither judge acknowledging the existence of the "despoliation basis"? The answers to these questions leads to the second problem with the analogy.

The second problem, the factual distinction, is specific to the attempt to use the analogy for the facts of *Glickman*. There is a critical distinction between the facts of *Glickman* and those of *Hodel*, *Kreps*, and *Fund for Animals*. The "despoliation basis," because it spawned from *Morton*, requires degradation of the natural environment.[215] *Hodel*, *Kreps*, and *Fund for Animals* all involved the observation of wildlife in its natural habitat, making the wildlife part of the habitat, meaning their death altered the habitat that plaintiffs wished to observe.[216] This is the blueprint of the "despoliation basis";[217] and is the furthest any court had extended *Morton*.[218] *Glickman*, on the other hand, involved a demoralized animal in a cage.[219] Jurnove could not say that the quality of the natural environment he wanted to observe had been degraded because of the suffering of the animals at the Game Farm.

Perhaps, Judge Wald, realizing that the "despoliation basis" did not apply to Jurnove's injury because of this factual distinction, attempted to utilize the same environmental analogy to simply lend support to the all new "qualitative basis." Perhaps it was the same realization which prompted Judge Wald to claim that *Hodel*, *Kreps*, and *Fund for Animals* all recognized the "qualitative basis."[220]

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215. *See supra* note 84 and accompanying text.

216. *See supra* notes 68–93 and accompanying text.

217. *See supra* notes 80–84 and accompanying text.

218. *But see supra* note 84 (acknowledging that it may be inappropriate to view the "despoliation basis" as an *extension* of *Morton*).

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

220. It is a near impossibility that Judge Wald was unaware that the analysis

Having said this much in opposition to the analogy, it should be made clear that these distinctions are hypercritical. Why should *Morton*, and the three cases extending *Morton*, *Kreps*, *Hodel*, and *Fund for Animals*, end with what we deem the "natural environment?" Why cannot Jurnove allege an injury from witnessing the degradation of the Game Farm environment due to the suffering of the animals comprising a portion of that environment? Might the analogy be appropriate, after all, because there really is a similarity between an ecosystem that has been significantly altered, and thus in a state of suffering, and a particular animal that is in a state of suffering, and thus, significantly altered?

C. Quantitative Basis Not Explicitly Required

1. *Wald for the Majority*

The final argument offered by Judge Wald to justify her finding that the "qualitative basis" was adequate proceeds as follows: While it is true that many cases involving an aesthetic injury based on observing animals involved action which threatened to diminish the number of animals available for observation — the "quantitative basis" — no case explicitly held that the death of particular animals or the elimination of a species is an actual requirement.[221] In fact, the cases that did stress death of individuals or elimination of a species were guided by statutes whose purpose was preserving animals,[222] which means that plaintiffs who proceed under these statutes will necessarily allege injuries related to a reduction in the quantity of animals available for observation or use.[223] However, the present case was brought under the AWA, a statute requiring the humane treatment of animals to enhance the quality of their lives, meaning that plaintiffs litigating under this statute will necessarily allege injuries related to a reduction in the quality of the lives of animals being observed or otherwise used.[224]

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involving the environmental analogy in *Hodel* was support for the "despoliation basis," and not the "qualitative basis." 840 F.2d at 51–52. After all, Judge Wald was the person doing the analysis; she wrote the *Hodel* opinion, legitimizing the "despoliation basis." Thus, it appears that Judge Wald was merely changing her tune to harmonize with the new performers.

221. *See Glickman*, 154 F.3d at 437 (citing *Lujan*, 504 U.S. at 562; Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 231 n.4 (1986)).

222. *See Glickman*, 154 F.3d at 437.

223. *See id.* at 438.

224. *See id.* (quoting *Kreps*, 561 F.2d at 1007 ("Where an act is expressly motivated

2. *Analysis of Wald*

Given the nature of the portion of injury-in-fact called "basis,"[225] it really would require a prior absolute rejection of the "qualitative basis" by the Supreme Court to foreclose the considerations undertaken by Judge Wald.[226] While the cases relied on do not explicitly find standing under the "qualitative basis," they do involve qualitative allegations and court analysis that appears to favor the "qualitative basis."[227] This is particularly true of *Kreps*,[228] where Judge Wright may simply have declined the difficult task of arguing for the validity of the "qualitative basis" when there existed a more commonly acknowledged "basis" at his disposal, fitting the allegations.[229]

D. Purely Subjective Injury is a Departure from Precedent

1. *Sentelle's Dissent*

Judge Sentelle's affirmative argument against Judge Wald's opinion was as follows: First, Jurnove's alleged injury was purely subjective; second, in recognizing a purely subjective injury, Judge Wald departed from a rule of precedent requiring objective, readily discernible standards for determining whether the "basis" is adequate.[230] By removing the diminishment-of-animals-available-for-observation foundation, Judge Wald founded a purely subjective "basis."[231] Aesthetic injury is itself a subjective injury, so it requires an objective element, such as the diminishment rationale, to keep the floodgates closed.[232] But instead of an objective aid, Judge Sentelle indicates the present case is guided by the subjective term, "humane."[233]

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by considerations of humaneness toward animals, who are uniquely incapable of defending their own interests in court, it strikes us as eminently logical to allow groups specifically concerned with animal welfare to involve the aid of the courts in enforcing the statute.").

225. *See supra* notes 27–38 and accompanying text.

226. *See supra* text accompanying note 31.

227. *See supra* Part II.C.1.

228. *See supra* notes 68–75 and accompanying text.

229. Plaintiffs alleged different injuries calling upon all three "bases" discussed in this Note. *See supra* note 62. Judge Wright had three "bases" to choose from; he chose the "despoliation basis." *Kreps*, 561 F.2d at 1007.

230. *See Glickman*, 154 F.3d at 447–50.

231. *See id.* at 448.

232. *See id.*

233. *See id.* ("I find it difficult to imagine a more subjective concept than this.").

The result is that a plaintiff could allege a boundless array of aesthetic interests with regard to the conditions of animals at the Game Farm, the denial of which would amount to inhumane treatment of animals.[234] In fact, Judge Wald's analysis, to be consistent, would have to acknowledge a sadist's interest in seeing animals kept under inhumane conditions.[235] Judge Wald attempted to rebut this argument by stating that the sadist's interests are not "legally protected," while Jurnove's interests are.[236] But in so arguing, she conflated "legally protected" with an entirely distinct "zone-of-interests" analysis which does not help distinguish the sadist.[237]

Further, in recognizing a purely subjective injury Judge Wald departed from a rule of precedent requiring discernible objective standards.[238] In *Metcalf v. National Petroleum Council*,[239] a senator alleged that the National Petroleum Council membership was not balanced as required by the Federal Advisory Committee Act, and that he therefore was not able to formulate the "best possible legislative product" in his role as a subcommittee chairman.[240] Judge Wilkey refused to recognize "purely subjective" injuries incapable of quantitative analysis by "readily discernible standards."[241] Similarly, Jurnove's allegations depend on his own subjective view of what is inhumane.[242]

2. *Analysis of Sentelle*

Judge Sentelle's response to the majority's attempt to distinguish the sadist has some merit. As discussed, "legally protected

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234. Among the aesthetic interests which the dissent suggests would be recognized, on the majority's reasoning, are viewing primates kept alone, viewing primates in brightly colored cages, or in cages playing Mozart. *See id.*

235. *See id.* at 448–49.

236. *See Glickman*, 154 F.3d at 448–49.

237. *See id.* Worse, it appears Judge Wald was dabbling in the "legislative track" for "basis," *see* Burnham, *supra* note 31, at 58, if only for the limited purpose of distinguishing the sadist. "Legally protected interest," may have originated as a term to describe "basis" arrived at by the "legislative track." *See supra* note 31.

238. *See Glickman*, 154 F.3d at 449–50.

239. 553 F.2d 176 (D.C. Cir 1977).

240. *Glickman*, 154 F.3d at 449 (quoting *Metcalf*, 553 F.2d at 185–86).

241. *See id.* (quoting *Metcalf*, 553 F.2d at 187). *Metcalf* specifically stated, "There are no objective standards to determine when a legislative product is the 'best' that it can be; such a determination necessarily rests on each legislator's individual view of the countless variety of factors which go into the formulation of legislation." 553 F.2d at 188.

242. *See Glickman*, 154 F.3d at 449.

interest" is the equivalent of "basis,"[243] and if we substitute the term "basis" for "legally protected interest," the majority's attempt to distinguish the sadist becomes circular; Jurnove's injury is an adequate "basis," but the sadist's is not.[244] Of course, this is the question we were trying to answer in the first place.

However, this is not the only argument that could be offered to distinguish the sadist. Another argument is to attack the dissent's premise, that Jurnove's injury is entirely subjective.[245] "Humane," defined as "marked by compassion, sympathy, or consideration for other human beings or animals,"[246] is not nearly as subjective a term as Judge Sentelle would have it. This definition, alone, should retire any entertainment of the idea that Judge Wald's analysis requires, for the sake of consistency, standing for the sadist as well. Further, it is not uncommon for a court to apply broad statutory language to particular claims by looking at the every day use of words.[247] If "humane" can be used as a "basis" for a sadist, then the English language does not work.[248]

Furthermore, contrary to Judge Sentelle's intent, *Metcalf* can be used to support the argument that "humane" is not as subjective as Judge Sentelle assumed. Accepting the rule requiring readily discernible standards,[249] Judge Sentelle's argument can be rebutted by distinguishing *Metcalf*. There is a difference between "best" and "humane." To be sure, it is only one of degree, but it is significant. "Best" is defined as "the greatest degree of good or excellence."[250] "Humane" is defined as "marked by compassion, sympathy, or consideration for other human beings or animals."[251] Where it is clear that "best" does not give any guidance about what a legislative product should look like, "humane," by definition, creates sufficient guidelines of what it would mean for an animal to be living in inhumane conditions.

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243. *See supra* notes 37–38 and accompanying text.

244. *See supra* note 36 and accompanying text.

245. *See supra* note 230 and accompanying text.

246. *Glickman*, 154 F.3d at 448 (Sentelle, J., dissenting) (quoting WEBSTER'S NEW COLLEGIATE DICTIONARY 556 (7th ed. 1973)).

247. *See id.* at 434 n.7.

248. While "humane" is clear enough to distinguish the sadist, it should be admitted that there may still be problems in determining precisely what would qualify as inhumane. *See, e.g.*, *supra* note 234.

249. *See supra* note 238 and accompanying text.

250. WEBSTER'S NEW COLLEGIATE DICTIONARY 145 (9th ed. 1987).

251. *Id.* at 586.

E. Final Justification

Judge Wald created a new "basis," at least to the extent that no earlier court ever found a plaintiff to have satisfied Article III injury-in-fact with only a "qualitative basis." The bold decision is historically and culturally important because law, particularly as pronounced by the judiciary, is an epistemology and because the decision makes a statement about humanity's sense of expanding ethical obligations in the universe.[252] I strongly agree with the decision, therefore I would like to provide a simple foundational justification for the proposition that the "qualitative basis" is adequate.[253]

Our sources of knowledge of the universe are limited, and include the broad categories of religion, science, law, and common sense. There may be others, but, in any event, law comprises a large portion of what we know, believe, and use to make personal, professional, and ethical decisions. This means that a lay person, hearing the news about a recent Supreme Court decision, will, at some level, incorporate the principles and conclusion of the decision in her life. The decision becomes a part, if only a small part, of her understanding of the world, and may accordingly affect her decisions. How does this relate to *Glickman* and standing based on an aesthetic injury derived from observing animals treated inhumanely?

In cases involving the issue of standing, the epistemological power of the court is all the more apparent, because in these cases the court makes a statement about whose and which concerns, grievances, and rights will be adjudicated, and thereby makes clear some of our culture's most fundamental beliefs and assumptions about the universe.[254] Hence, to the more radical environmentalists, the legacy of *Morton* is an exposure of our culture's most

252. *See infra* notes 262–66 and accompanying text. Law is more than a profession, comprised of so many games to be won or lost. Law is an ultimate creature, an epistemology.

253. In light of the extensive analysis of Judge Wald and Judge Sentelle, and the analysis in this Note, the justification will seem overly simplistic. However, the justification possesses the contemporaneous benefits of conceding that the decision is an extension of precedent, while demonstrating that the extension was compelled by injury-in-fact jurisprudence. *See infra* notes 268–72 and accompanying text. It is out of a concern that the Supreme Court or other circuit courts, upon discovering the inadequacies in the reasoning discussed in this Note, will uncritically conclude that the holding must therefore be overruled or not followed, that this final justification is offered.

254. The court becomes an epistemological cathedral.

deeply rooted assumptions about nature and the human place in it.[255] *Morton* represents our society's failure to recognize that ecosystems and landscapes have intrinsic value.[256] The requirement that individual club members be injured from the degradation of the environment, illustrates that we believe nature is here for human use and consumption, and, accordingly, that the mistreatment of nature will be remedied only to the extent that humans can demonstrate a direct injury to themselves as a result of such mistreatment.[257]

Environmentalists are the great paradigm shifters of the twentieth century. To the more radical environmentalists it was not enough that *Morton* created the aesthetic/environmental "basis," because it is conceptually grounded in the prevailing anthropocentric paradigm, they wanted the Court to acknowledge an entirely different paradigm in which nature is intrinsically valued, apart from its benefits to humans.[258]

Glickman takes a step in the direction that the more radical

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255. For reactions to *Morton*, see Joseph L. Sax, *Standing to Sue: A Critical Review of the* Mineral King *Decision*, 13 NAT. RESOURCES J. 76 (1973) (theorizing that environmental groups should be granted standing without showing individual injury); Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972) (moving beyond *Morton*'s theory by suggesting that the environmental feature, in a given case, be granted standing).

256. The "basis" was adequate, but the Sierra Club did not have standing because the court required individual humans to allege injuries to themselves, in addition to the valley's injury, based on the proposed changes to the valley. *See supra* note 58.

257. *See, e.g.*, Jonathan Poisner, *Environmental Values and Judicial Review After* Lujan: *Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335, 342 (1991) (describing *Morton* as a loss for proponents of liberalized standing). For an illustration of the legal practicality of valuing nature intrinsically, see *Morton*, 405 U.S. at 743 (Douglas, J., dissenting).

258. For examples of environmentalists' description of dualing paradigms, see CAROLYN MERCHANT, THE DEATH OF NATURE: WOMEN, ECOLOGY, AND THE SCIENTIFIC REVOLUTION (1989) (tracing the death of the "organic" paradigm, and the rise of the "mechanistic" paradigm); VAL PLUMWOOD, FEMINISM AND THE MASTERY OF NATURE (1993) (describing the "mechanistic" and "holistic" paradigms); STEPHEN R. STERLING, *Towards an Ecological World View*, *in* ETHICS OF ENVIRONMENT AND DEVELOPMENT: GLOBAL CHALLENGE, INTERNATIONAL RESPONSE (J. Ronald Engel & Joan Gibb Engel eds., 1990) (outlining the "mechanistic/Cartesian" and "ecological/holistic" world views); Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 935–36 (1998) (suggesting that the environmentalists' mission to see the courts acknowledge the "resource-centered" paradigm, as opposed to the "human-centered" paradigm, is unnecessary); Alan Drengson, *Shifting Paradigms: From the Technocratic to the Person-Planetary*, 3 ENVTL. ETHICS 221 (1980) (outlining the "technocratic" and "person-planetary" paradigms); Arne Naess, *The Shallow and the Deep, Long Range Ecology Movement: A Summary*, INQUIRY 16 (1973) (outlining the "shallow ecology" and "deep ecology" paradigms).

environmentalists wanted to see in *Morton*. *Glickman* reflects part of our culture's current perception that non-human animals are intrinsically valuable.[259] Of course, one could argue that, like *Morton*, the requirement that an individual human allege an injury resulting from the suffering of the Game Farm animals reflects that the court was operating under the same anthropocentric paradigm, and thus, *Glickman* is not a step in the direction environmentalists sought to take the Supreme Court in *Morton*. However, Jurnove sustained an injury only because non-human animals were subjected to inhumane conditions.[260] Thus, if psychological egoism is wrong,[261] then Jurnove sued the USDA to alleviate the suffering of non-human animals, not merely to do away with an image at the Game Farm that was aesthetically displeasing to him. When the lay person hears about this decision, perhaps she will conclude, "So, animals have rights too."

The preceding philosophy merely established the meaning and possible effects of *Glickman*. Why is Judge Wald's expansion of aesthetic injury jurisprudence, to include the "qualitative basis," justified? One could easily trace a path of human ethical obligations and note that the areas to which humans extend their ethical obligations has consistently expanded through time.[262] The earliest ethical obligation was to one's self.[263] This continually expanded to include the immediate family, then clans, then communities, and eventually, all members of the same race.[264] More recently, humans recognized a kinship, and thus an ethical responsibility towards humans of all races; and the term, "racism," is used to describe the cultural problem created by individuals and groups that refuse to recognize this recent expansion.[265] Most recently, humans have begun to recognize a kinship with, and an ethical responsibility for other, non-human animals; and the term,

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259. *See infra* notes 268–71 and accompanying text.

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

261. *See* LOUIS P. POJMAN, ETHICS: DISCOVERING RIGHT AND WRONG 40–46 (1990) (defining psychological egoism as a theory of human nature which denounces the possibility of altruism, and concluding that the theory fails).

262. *See* R. Nash, *The Rights of Nature: A History of Environmental Ethics*, *in* INTERNATIONAL ENVIRONMENTAL LAW 281, 281–82 (Laksham D. Guruswamy et al. eds., 1994); *see also* ALDO LEOPOLD, A SAND COUNTY ALMANAC (1949) (describing the "land ethic" as an expansion of our perceived "community" to include animals, plants, water, and soil).

263. *See* Nash, *supra* note 262, at 282.

264. *See id.*

265. *See id.*

"speciesism," is beginning to be used to describe the cultural problem created by individuals and groups that refuse to participate in this current expansion.[266]

In determining the adequacy of a given "basis," the courts have always used perceived social values to establish precedent, and extensions thereof.[267] Now, consider that animal rights theory, based on the intrinsic value of non-human animals,[268] is a bona fide part of contemporary American culture.[269] In fact, there is already a legislative mandate for the humane treatment of non-human animals, indicating legislative action based on the theory and acceptance of the expansion of our ethical obligations to include other animals.[270] Furthermore, there currently exists respected organizations committed to defending the rights of non-human animals through our legal system.[271] Thus, given the epistemological power of the judiciary, humanity's expanding sense of ethical responsibilities, and contemporary acceptance of animal rights theory in American philosophy, it is undeniable that consistent application of the methodology by which courts have always determined which injuries comprise an adequate "basis"[272] must lead to the acceptance of the "qualitative basis."

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266. *See id.*

267. *See supra* note 31 and accompanying text.

268. If the "animal rights" theories were all based on the anthropocentric worldview — valuing animals as a resource — then this argument would not support Judge Wald, because the "quantitative basis" already protects this interest. To support the reality that a growing segment of our culture values animals intrinsically, the "qualitative basis" is needed.

269. *See Preface* to STEPHEN R.L. CLARK, ANIMALS AND THEIR MORAL STANDING (1997) ("Over the last decade or more, animal rights has become an issue of genuine and outspoken public concern . . . ."). The animal rights movement owes much of its momentum to Peter Singer and Tom Regan. *See generally* ANIMAL RIGHTS AND HUMAN OBLIGATIONS (Tom Regan et al. eds., 1976); TOM REGAN, THE CASE FOR ANIMAL RIGHTS (1983); PETER SINGER, ANIMAL LIBERATION (2d ed. 1976).

270. *See, e.g.*, 7 U.S.C. § 2143(a)(2)(B) (1994); 16 U.S.C. § 1361(6) (1994). This is not to suggest that Jurnove's "basis" is adequate via the "legislative track." *See* Burnham, *supra* note 31, at 58. Rather, the existence of legislation for animal rights is merely evidence of social values favoring animal rights. *See Kreps*, 561 F.2d at 1007.

271. For example, the Animal Legal Defense Fund's mission is to "defend animals from abuse and exploitation." *See* Laura Wilensky, *Animal Legal Defense Fund: Working for Justice for Animals* (visited Mar. 7, 1999) <http://www.aldf.org/>. Again, the language supports the intrinsic valuation of non-human animals. Other animal rights groups using the courts include, Animal Protection Institute of America, Animal Welfare Institute, The Fund for Animals, Greenpeace, U.S.A., The Humane Society of the United States, International Fund for Animal Welfare, and Defenders of Wildlife.

272. *See supra* text accompanying note 31.

IV. CONCLUSION

Judge Wald recognized a new "basis" for aesthetic injury. Although her reasoning was grounded both in misinterpretations of precedent, and legitimate interpretations of precedent which had, itself, misinterpreted authority, she reached the right decision. Perhaps the proper historical context of the decision is that it represents the court's ability to reflect and act as an epistemology for our most foundational assumptions about humanity's expanding ethical obligations. In this context, the decision supports the view that we now have a responsibility to prevent the inhumane treatment of other animals, for their sake, exclusive of our own.