

**CALIFORNIA’S “BAN” ON FOIE GRAS: LET’S TAKE A GANDER  
AT ANIMAL PROTECTION LEGISLATION WHILE DUCKING  
ACCUSATIONS OF ANIMAL RIGHTS ZEALOTRY**

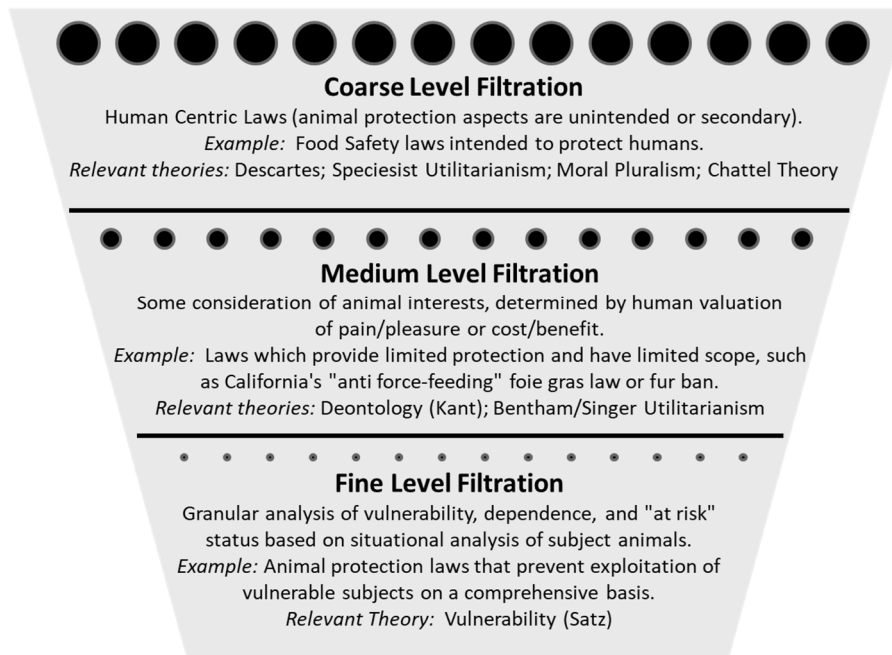
*Bradford P. Anderson\**

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## I. INTRODUCTION

In this Article, I offer a suggested taxonomy in the form of a filter (*see Figure A*) to aid in the productive discussion of animal protection legislation. The filter is designed to migrate discussions towards objective analysis and away from frenetic labels of animal rights zealotry. The filter is demonstrated in this Article using California's foie gras law as an exemplar.

**FIGURE A: A filter based review process for animal protection legislation**



California's prohibition on the sale of foie gras produced through force-feeding methods has been characterized as a "ban" on the product.<sup>1</sup> This law was crafted to address an inhumane force-feeding practices,<sup>2</sup> and continues to allow for the sale of foie gras that is *not* produced through force-feeding methods.<sup>3</sup>

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\*Associate Professor of Business Law, California Polytechnic State University, Orfalea College of Business, San Luis Obispo, California; Active Member of CA Bar (170669). The author extends his thanks to, and acknowledges his appreciation of, Jessica Stookey for her valuable input, comments, and assistance, as well as the Editorial Board of Seton Hall Legislative Journal.

<sup>1</sup>CAL. HEALTH & SAFETY CODE §§ 25980-25984 (2020); *see generally California Foie Gras Ban Goes Into Effect After Supreme Court Rejects Challenge*, LOS ANGELES TIMES (Jan. 7, 2019, 5:05 PM), <https://www.latimes.com/business/la-fi-foie-gras-prohibition-court-ruling-20190107-story.html>; Jonathan Kauffman, *California Foie Gras Ban Upheld Though Chefs Vow To Fight On*, SAN FRANCISCO CHRONICLE (Jan. 7, 2019, updated Jan. 8, 2019 7:03 AM), <https://www.sfchronicle.com/food/article/California-s-foie-gras-ban-upheld-though-chefs-13514763.php>; Lawrence Hurley, *U.S. Supreme Court Rejects Challenge To California Foie Gras Ban*, REUTERS (Jan. 7, 2019 11:11 AM), <https://www.reuters.com/article/us-usa-court-foiegras/u-s-supreme-court-rejects-challenge-to-california-foie-gras-ban-idUSKCN1P11LD>.

<sup>2</sup> *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra*, 870 F.3d 1140 (9th Cir. 2017), *cert. denied* 139 S.Ct. 862 (2019) ("California's law was designed to rectify what the state considered an inhumane feeding practice. *See* 2004 Cal. Legis. Serv. Ch. 904 (S.B. 1520) (Legislative Counsel's Digest) (seeking to establish provisions for force-feeding birds similar to those already in place for 'keeping horses or other equine animals'). According to the legislative analysis of the law, force-feeding commonly requires a worker to hold the bird between her knees, grasp the bird's head, insert a 10- to 12-inch metal or plastic tube into the bird's esophagus, and deliver large amounts of concentrated meal and compressed air into the bird. *See, e.g.*, Cal. Assemb. Comm. on Bus. & Professions, Analysis of S.B. 1520, 2003-2004 Reg. Sess., at 4-5 (June 20, 2004); Cal. Sen. Comm. on Bus. & Professions, Analysis of S.B. 1520, 2003-2004 Reg. Sess., at 5-6 (May 6, 2004). The bird is force-fed up to three times a day for several weeks and its liver grows to ten times the size of a normal liver. Cal. Assemb. Comm. on Bus. & Professions, Analysis of S.B. 1520, 2003-2004 Reg. Sess., at 5 (June 20, 2004). This process is apparently 'so hard on the birds that they would die from the pathological damage it inflicts if they weren't slaughtered first.' Cal. Assemb. Comm. on Bus. & Professions, Analysis of S.B. 1520, 2003-2004 Reg. Sess., at 2 (Aug. 17, 2004); Cal. Sen. Comm. on Bus. & Professions, Analysis of S.B. 1520, 2003-2004 Reg. Sess., at 3 (Aug. 25, 2004). In enacting the force-feeding ban, California also considered a study conducted by the European Union's Scientific Committee on Animal Health and an Israeli Supreme Court decision. The European Union study concluded that force-feeding is detrimental to the welfare of birds, and the Israeli Supreme Court similarly concluded that force-feeding causes birds pain and suffering. Cal. Assemb. Comm. on Bus. & Professions, Analysis of S.B. 1520, 2003-2004 Reg. Sess., at 6-7 (June 20, 2004); Cal. Sen. Comm. on Bus. & Professions, Analysis of S.B. 1520, 2003-2004 Reg. Sess., at 7-8 (May 6, 2004). In light of these and other factors, California decided to enact the ban, joining a growing list of countries around the world." *Id.* at 1143-1144.

<sup>3</sup> CAL. HEALTH & SAFETY CODE §§ 25980-25981 (2020). *See generally* Lauren Frayer, *This Spanish Farm Makes Foie Gras Without Force Feeding*, (August 1, 2016, 4:27 p.m.), <https://www.npr.org/sections/thesalt/2016/08/01/487088946/this-spanish-farm-makes-foie-gras-without-force-feeding>; *see also* *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, No. 2:12-CV-05735-SVW-RZ, 2020 WL 595440, at 3 (C.D. Cal. Jan.

Force-feeding is the predominant method of production,<sup>4</sup> and descriptions about the process are unsettling,<sup>5</sup> although proponents

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14, 2020) (“Neither this Court nor the Ninth Circuit has ever concluded that § 25982 constitutes a total ban on foie gras—that is a legal conclusion not ascertainable from a conclusory allegation.”).

<sup>4</sup> See CAL. HEALTH & SAFETY CODE § 25982 (2020) (“A product may not be sold in California if it is the result of force-feeding a bird for the purpose of enlarging the bird’s liver beyond normal size.”) See also, CAL. HEALTH & SAFETY CODE § 25980(b) (2020) (“Force-feeding a bird means a process that causes the bird to consume more food than a typical bird of the same species would consume voluntarily. Force-feeding methods include, but are not limited to, delivering feed through a tube or other device inserted into the bird’s esophagus.”) See generally Mariann Sullivan and David J. Wolfson, *What’s Good for the Goose . . . The Israeli Supreme Court, Foie Gras, and the Future of Farmed Animals in the United States*, 70 LAW & CONTEMP. PROB. 139, 144 (Winter 2007) (“Foie gras, the fatty liver of a goose or duck, can only be produced if birds are force-fed, since, on their own, birds would not eat enough to cause their livers to reach the desired state of fattiness.”); Ass’n des Éleveurs de Canards et d’Oies du Québec v. Becerra, 870 F.3d 1140, 1143 (9th Cir. 2017), cert. denied 139 S.Ct. 862 (2019) (“In the final stage of the feeding process, which lasts up to thirteen days, the birds are force-fed in a process called *gavage*, during which feeders use ‘a tube to deliver the feed to the crop sac at the base of the duck’s esophagus.’); and Michaela Anne DeSoucey, *Gullet Politics; Contentious Foie Gras Politics and the Organization of Public Morality in the United States and France* 28 (December 2010) (unpublished Ph.D. dissertation, Northwestern University) (on file with ProQuest LLC, UMI Number: 3419034) (“The process of feeding ducks and geese to produce foie gras, called *gavage* in French, is what is at the heart of international contention surrounding the morality of foie gras production.”).

<sup>5</sup> D.A. Jeremy Telman, *Is The Quest For Corporate Responsibility A Wild Goose Chase? The Story Of Lovenheim v. Iroquois Brands, Ltd.*, 44 AKRON L. REV. 479, 502 (2011) (“[T]he process of force-feeding usually begins when the birds are four-months old. At farms at which the process has been mechanized, the birds are placed in a metal brace and the neck is stretched so that a funnel may be inserted 10-12 inches down the bird’s throat. Four hundred grams of corn mash are then pumped into the birds’ stomachs, while an elastic band around its neck prevents regurgitation. Where the process is done by hand, the feeder uses a funnel and a stick to force the mash down the bird’s throat. The birds are force-fed for between 15 and 28 days, and shortly thereafter they are slaughtered. During the brief period of force-feeding, the geese double their weight, but their livers swell until they account for up to 10% of the bird’s total weight. An ordinary goose liver weighs about 120 grams; the liver of a force-fed bird weighs between 800 and 1000 grams. Up to 10% of the birds die before they can be slaughtered as a result of the forced feeding.”); see also Sullivan and Wolfson, *supra* note 4, at 144 (“The resulting swelling of the liver is commonly considered a pathological state called ‘hepatic lipidosis’ or ‘fatty liver disease’; and, presumably, the breakdown in liver function causes the birds to feel extremely ill. The dramatic increase in liver size also makes walking and breathing difficult. Mortality levels increase, and the birds would die if they were not taken for slaughter. The pre-slaughter mortality rate for foie gras production is up to twenty times the average rate on other bird farms.”); Yossi Wolfson, *Animal Protection Under Israeli Law*, in ANIMAL LAW AND WELFARE – INTERNATIONAL PERSPECTIVES 161 (Deborah Cao & Steven White eds., 2016) (“Fatty liver, the production of which is the *raison d’être* of the industry, is by definition a liver in pathological state of hypertrophy and steatosis—enlarged and fat. This pathological condition can only be reached by coercive process of forcibly introducing large quantities of food, high in carbohydrates, to the birds’ intestines. This is generally done by shoving a pipe into the bird’s esophagus, and compressing the food through it using mechanical, hydraulic or pneumatic pressure.

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argue that the lack of a gag reflex in ducks and geese helps justify the practice.<sup>6</sup>

Legislators built a grace period of over seven years into this law to allow for alteration of the prohibited force-feeding practices.<sup>7</sup> Prolonged litigation to defeat the law has not been fruitful,<sup>8</sup> but a July 2020 court determination clarified that the California foie gras law allows for import and consumption of restricted foie gras if the underlying sale occurs outside of the state.<sup>9</sup> New York City also recently

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The enlarged liver presses other organs, which causes difficulties in breathing and in walking—another problem which is inherent and unavoidable. While there may be some variations of technique, animal suffering cannot be substantially reduced while still producing the desired product.”)

<sup>6</sup> See Joshua D. Hodes, *2004 Legislative Review*, 11 ANIMAL L. 325, 362 (2005) (“A staff veterinarian for the California Department of Food and Agriculture has already said that ducks have no gag reflex . . .”); Kristin Cook, *Comment: The Inhumanity Of Foie Gras Production - Perhaps California And Chicago Have The Right Idea*, 2 J. Animal L. & Ethics 263, 265 (May, 2007) (“Producers also claim that the process is not injurious to the birds because the feeding only takes a short time and because the birds lack a gag reflex.”).

<sup>7</sup> CAL. HEALTH & SAFETY CODE § 25984(c) (2020). See also, *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Becerra*, 870 F.3d 1140, 1144 (9th Cir. 2017), *cert. denied* 139 S.Ct. 862 (2019) (“California’s legislature intended to ban not foie gras itself, but rather the practice of producing foie gras by force-feeding. The law’s author, Senator John Burton, made clear when he introduced the bill that it ‘has nothing to do . . . with banning foie gras’ and that it prohibits only the ‘inhumane force-feeding [of] ducks and geese.’ Then-Governor Arnold Schwarzenegger echoed this sentiment in his signing statement: ‘This bill’s intent is to ban the current foie gras production practice of forcing a tube down a bird’s throat to greatly increase the consumption of grain by the bird. It does not ban the food product, foie gras.’ Signing Message of Governor Arnold Schwarzenegger, Sen. Bill 1520, 2003–2004 Reg. Sess. (Sept. 29, 2004). The legislature provided more than seven and a half years between the passage of the law and its effective date to allow producers to transition to producing foie gras without force-feeding.”)

<sup>8</sup> See *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Becerra*, 139 S. Ct. 862 (2019) (denying review of the Ninth Circuit’s determination that California’s ban on force-feeding of birds for the production of foie gras was not pre-empted by federal law). See also, *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris*, 574 U.S. 932 (2014); *Ass’n des Eleveurs de Canards et d Oies du Quebec v. Harris*, No. 2:12-CV-05735-SVW-RZ, 2020 WL 595440, at 3 (C.D. Cal. Jan. 14, 2020).

<sup>9</sup> *Ass’n des Eleveurs de Canards et d Oies du Quebec v. Harris*, No. 2:12-cv-05735-SVW-RZ, 2020 U.S. Dist. LEXIS 131895 (C.D. Cal. July 14, 2020) (“Accordingly, the Court concludes the most reasonable interpretation of § 25982, in accordance with the intent of California and the plain language of the statute, does not encompass the factual scenario presented by Plaintiffs. The Court holds that a sale of foie gras does not violate § 25982 when:

- The Seller is located outside of California.
- The foie gras being purchased is not present within California at the time of sale.
- The transaction is processed outside of California (via phone, fax, email, website, or otherwise).
- Payment is received and processed outside of California, and

restricted sales of foie gras produced through force-feeding practices, effective in 2022.<sup>10</sup>

Supporters of the California foie gras law have been met with accusations of animal rights extremism, along with labels of zealotry and other sullyng terminology.<sup>11</sup> “Animal rights activists are often called nut jobs, wackos, and extremists—and that is by our friends and family members.”<sup>12</sup> Such labels and rhetoric are counterproductive to the discussion. “The willingness of humans to exploit animals for their benefit has been labeled homocentric, narcissistic, and parasitic, while animal advocates’ preoccupation with animal rights has been called fanatical and misanthropic.”<sup>13</sup>

All of the extensive legal battles surrounding this topic raise the specter of a larger issue: how should legislators, regulators, courts, and the public evaluate laws related to the treatment of animals?<sup>14</sup>

In order to help address this dichotomy, this Article offers a taxonomy for analyzing and discussing animal protection legislation in the form of a cone-shaped “filter” using associated theories within the

- The foie gras is given to the purchaser or a third-party delivery service outside of California, and “[t]he shipping company [or purchaser] thereafter transports the product to the recipient designated by the purchaser,’ even if the recipient is in California. Dkt. 218 at 5.

This judgement is limited to the circumstances described above, and does not encompass situations wherein the Seller is present in California during the sale, or the foie gras is already present in California when the sale is made.”) *Id.* at 12.

<sup>10</sup> N.Y.C., ADMIN. CODE, §§17-1901 THROUGH 17-1903; *see also*, Jeffery C. Mays and Amelia Nierenberg, *Foie Gras Served In 1,000 Restaurants in New York City Is Banned*, N.Y.TIMES, (October 30, 2019), <https://www.nytimes.com/2019/10/30/nyregion/foie-gras-ban-nyc.html>; Leah Asmelash, *New York City Will Ban Restaurants and Grocery Stores from Selling Foie Gras*, CNN (Oct. 31, 2019, 11:51 AM), <https://www.cnn.com/2019/10/30/us/foie-gras-new-york-ban-trnd/index.html>; *New York City lawmakers pass bill banning foie gras*, AP (Oct. 30, 2019), <https://www.cnn.com/2019/10/30/new-york-city-expected-to-pass-bill-banning-foie-gras.html>).

<sup>11</sup> *See generally* Kauffman, *supra* note 1 (referred to as “vegan extremists” by chef’s coalition opposing California foie gras law); Steve Cuzzo, *Opinion: Why Ban Foie Gras But Not Other Meats Rooted In Animal Cruelty*, NY POST (FEB. 4, 2019), <https://nypost.com/2019/02/04/why-ban-foie-gras-but-not-other-meats-rooted-in-animal-cruelty/> (“... count on animal-rights zealots . . .”); Elena Ferretti, *Chefs Say Foie Gras Ban Could Spread Beyond California*, FOX NEWS (MAY 18, 2012, updated Nov. 21, 2016), <https://www.foxnews.com/food-drink/chefs-say-foie-gras-ban-could-spread-beyond-california> (“... animal rights activists . . .”).

<sup>12</sup> Diane M. Sullivan, Holly Vietzke & Michael L. Coyne, *A Modest Proposal For Advancing Animal Rights*, 71 ALBANY L. REV. 1129 (2008).

<sup>13</sup> Stephen A. Plass, *Exploring Animal Rights As An Imperative For Human Welfare*, 112 W.VA.L.REV. 403, 405 (Winter, 2010).

<sup>14</sup> For purposes of brevity in this article, references to animals means non-human animals.

filter. This Article uses the California foie gras law as an exemplar. The proposed filter is intended to facilitate meaningful inquiry and dialogue in the debate surrounding rights and treatment of animals, as "the State has an interest in preventing animal cruelty . . . ." <sup>15</sup> The filter is designed to help analyze purported animal protection legislation and expose both the flaws and strengths in such laws.

## II. WHY SHOULD WE CARE ABOUT THE TREATMENT OF ANIMALS?

### A. *Our Contradictory Relationship With Animal Welfare*

Our relations with animals "are based on contradiction. We coddle them, eat them, leave our estates to them, experiment on them, buy them designer collars and clothes, wear them, risk our lives for them, and abandon and kill them."<sup>16</sup>

In the context of the California foie gras law, one might question the rationale for legislation regarding treatment of an animal whose ultimate fate is to be eaten. The short answer is that "determining what it means to treat animals humanely involves our [human] values, not just the qualities of any given animal."<sup>17</sup> Traversing the bridge to concerns about food animal treatment opens an important dialogue on the legality and ethics of raising and eating food animals, as well as the treatment of all animals.<sup>18</sup> Moreover, if the certainty of future death of animals destined for slaughter eradicates the need for concern over such animals, then every living thing (including humans) would be undeserving of any scintilla of concern, as future death is the only certainty.<sup>19</sup>

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<sup>15</sup> *Ass'n des Eleveurs de Canards et d Oies du Quebec v. Harris*, 729 F.3d 937, 952 (9th Cir. 2013). *See also*, *United States v. Stevens*, 559 U.S. 460, 469 (2010) ("[T]he prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies.").

<sup>16</sup> Ani B. Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy and Property*, 16 *ANIMAL L.* 65, 67 (2009).

<sup>17</sup> Craig A. Wenner, *Note: Judicial Review and the Human Treatment of Animals*, 86 *N.Y.U.L. REV.* 1630, 1631 (2011).

<sup>18</sup> *See generally* Joan MacLeod Heminway & Patricia Graves Lenaghan, *Safe Haven Conundrum: The Use of Special Bailments to Keep Pets Out of Violent Households*, 12 *TENN. J.L. & POL'Y* 79, 113 (2017) ("[A]nimals 'are either persons, beings to whom the principle of equal consideration applies and who possess morally significant interests in not suffering or things, beings to whom the principle of equal consideration does not apply and whose interests may be ignored if it benefits us.'"); *see also* Peter Singer, *All Animals Are Equal*, 1 *PHILOSOPHIC EXCHANGE* 103 (1974); *see also* Sherry Colb, *Subject of a Death*, 105 *CORNELL L. REV.* 205, 220 (2020).

<sup>19</sup> *See generally* Andrew Benton, *Personal Autonomy and Physician Assisted Suicide: The Appropriate Response to a Modern Ethical Dilemma*, 20 *OHIO N.U. L. REV.* 769, 778 (1994) ("[D]eath is certain." (quoting American Medical Association, Report B of the

A review of the historical and philosophical roots of the human contradictory relationship with animals sheds some light on how we have ended up in the current state of affairs.

The ontology of the human impetus to disregard animal interests is unclear. It may be attributed to early religious thought embracing human dominion over animals. Some early philosophers also disregarded animals. The Stoics, possibly shaping the development of religious views about animals, believed humans did not possess moral obligations towards animals lacking the ability to engage in ethical decision-making or virtuous activity.<sup>20</sup>

Viewing only humans as possessing a soul, morality, or intelligence<sup>21</sup> is an abrogation of the facts,<sup>22</sup> as well as a dereliction of duties, with regard to animal welfare.<sup>23</sup>

“And God said, let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping

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Council on Ethical and Judicial Affairs of the American Medical Association (1991)); Michael S. Greve, *Our Federalism is Not Europe's, It's Becoming Argentina's*, 7 DUKE J. CONST. L. & PUB. POL'Y 17, 42 (2012) (“As Thomas Hobbes taught, the fear of death never prompts individual action: death is certain, and fear of it is a constant.”); *Continental Assur. Co., Inc. v. United States*, 8 F. Supp. 474, 482 (Ct. Cl. 1934) (“While death is certain, the uncertain and contingent event is when the individual will die.”).

<sup>20</sup> Satz, *supra* note 16, at n. 3.

<sup>21</sup> Laura G. Kniaz, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 BUFFALO L. REV. 765, 770-771 (Winter, 1995) (“Despite the opposition's efforts, there is an increasing body of literature blurring the distinctions between humans and other animals, whether one looks to genetic differences, language capabilities, morality, intelligence, the ability to make and use tools, or possession of a soul. Thus, numerous studies persuasively demonstrate that at least some animals possess each of these allegedly unique human qualities.”).

<sup>22</sup> *Id.*; see also, Joyce Tischler, *Symposium: International Wildlife Trafficking: Law and Policy*, 33 QUINNIPIAC L. REV. 485, 505 (2015) (“During the Roman Empire, the slaughter of both Christians and animals was carried out as entertainment. Early Christian theologians emphasized the uniqueness of human beings, and placed great emphasis on humanity possessing immortal souls, as a way to separate humans from animals, and encourage greater compassion toward human beings. The idea that human life is sacrosanct stems from this early Christian theology. Sadly, greater compassion for animals was left out of this equation, and that dichotomy persists to the present day. Other religions have been more open to acknowledging that beings other than humans can possess souls. Some religions claim that plants and rocks have souls.”).

<sup>23</sup> See Plass, *supra* note 13, at n. 72 (“[W]e must care for animals and spare them unnecessary suffering.” (quoting *Statement of the Right Reverend Monsignor LeRoy E. McWilliams*, President of The National Catholic Society for Animal Welfare, 87th Cong. 2d Sess. At 63-65 (Sep. 28 & 29, 1962))); M. Varn Chandola, *Dissecting American Animal Protection Law: Healing the Wounds With Animal Rights and Eastern Enlightenment*, 8 WIS. ENVTL. L. J. 3, 6 (2002) (“A diverse array of groups generally agree with the concept of animal welfare which basically states that cruelty to animals should be minimized to the extent of not inflicting unnecessary pain and suffering upon them.”).



thing that creepeth upon the earth."<sup>24</sup> This sentiment lends some insight into how and why humans might disregard animal welfare.<sup>25</sup> But, perceived human domination over all other creatures in religious doctrine does not necessarily abrogate the human obligation to animals:

[T]he Qur'an classifies humans as superior to animals and as occupying a privileged status. As part of this privilege, as Earth's conscientious stewards, humans are responsible for protecting and serving each other as well as the ecosystem. This framework mandates to humans a responsibility to care for and protect animals as vicegerents.<sup>26</sup>

#### B. Concerns Of Mirrored Behavior

A sharp distinction is necessary between humans and 'animals' if we are to bend them to our will, make them work for us, wear them, eat them—without any disquieting tinges of guilt or regret. With untroubled consciences, we can render whole species extinct—for our perceived short-term benefit,

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<sup>24</sup> *Genesis* 1:26 (King James). *Contra*, *Ecclesiastes* 3:19-20 (King James) ("For that which befalleth the sons of men befalleth beasts; even one thing befalleth them: as the one dieth, so dieth the other; yea, they have all one breath; so that a man hath no preeminence above a beast: for all is vanity. All go unto one place; all are of the dust, and all turn to dust again."); *but see* Sullivan, Vietzke, and Coyne, *supra* note 12, at 1136.

<sup>25</sup> *See generally* Yossi Wolfson, *supra* note 5, at 157-158. ("The land between the Mediterranean Sea and the Jordan River saw some of the earliest centers of human civilization, including some of the first stages of the subordination of non-human animals. This was later also the site of development of some of the oldest laws protecting non-human animals from their human exploiters—the laws contained in the Bible. These laws took for granted hierarchy among humans and between humans and non-humans. Despite some dissenting voices in the Bible that view meat-eating negatively (*Genesis* 1, 29; *Numbers* 11, 4—35; *Deuteronomy* 12, 20-28; *Amos* 6, 4 and more), it generally approved of the exploitation of animals for labor and of their use and killing for food and for raw materials. Nevertheless, it perceived them as living beings, sharing the world (on a non-equal basis) with humans, according to an order dictated by God (*Genesis* 9, 8-17). True to this ideology, the Bible allows animal exploitation, but puts limits on it: Animals must be allowed to rest on the Sabbath (*Exodus* 20, 10; *Deuteronomy* 5, 14); an ox may not be muzzled while treading out cereals (*Deuteronomy* 25, 4); one must unload a donkey that fell under the weight of his burden (*Exodus* 23, 5); one may take a bird's eggs or fledglings—but not together with the mother and not while she is watching (*Deuteronomy* 22, 6-7).).

<sup>26</sup> Engy Abdelkader, *Animal Protection Theory in U.S. and Islamic Law: A Comparative Analysis with A Human Rights Twist*, 14 *UCLA J. ISLAMIC AND NEAR E. L.* 45, 51 (2015) (emphasis added); *Id.* at 57 ("On the one hand, the Qur'an draws similarities between the animal kingdom and its human counterpart; on the other, animals are subjugated to human control on an as-needed basis."); *Id.* at 56 ("According to the majority view, the Qur'an permits humans to dominate and benefit from animals for various purposes; the Hadith explicate that such objectives are necessary. Such purposes, the Qur'an indicates, include warmth and protection, derived from animals' wool and fur, food and drink (such as milk), and the transportation of humans and heavy cargo.").

or even through simple carelessness. Their loss is of little import: Those beings, we tell ourselves, are not like us.<sup>27</sup>

For those who do not subscribe to animal protection as an underlying obligation to fellow living beings with whom we share the earth, perhaps a purely human-centric justification will be persuasive.<sup>28</sup> In that realm, we know that abuse of animals by a human correlates closely to abuse of other humans by that same individual.<sup>29</sup>

Awareness of the correlation between animal cruelty and domestic abuse is growing. A survey of fifty of the largest women's shelters in the United States showed that eighty-five percent of women and sixty-three percent of children spoke of instances of animal abuse in their homes. Batterers often control and intimidate their victims by abusing or even killing the victims' companion animals. Furthermore, children witnessing animal and domestic abuse are more likely to become animal abusers themselves.

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<sup>27</sup> Kniaz, *supra* note 21, at 770, (quoting CARL SAGAN & ANN DRUYAN, SHADOWS OF FORGOTTEN ANCESTORS: A SEARCH FOR WHO WE ARE 365 (1992)).

<sup>28</sup> See Brieanah Schwartz, *Standing on Four Legs or Two?*, 4 MID-ATLANTIC J. L. & PUB. POL'Y 202, 226 (2018) ("This holding implies that the purpose of animal cruelty statutes is to determine whether the perpetrator meant to inflict harm on the owner. Therefore, *Garcia* stands for a human-centric approach to animal protection statutes, where the animal harmed can stand to benefit if there is a claim benefitting the human owner."); Darian M. Ibrahim, *The Anticruelty Statute: A Study in Animal Welfare*, 1 J. ANIMAL L. & ETHICS 175, 178 (2006) ("To determine whether an animal is subjected to unnecessary suffering, the human interests from animal exploitation must be balanced against the animal interests in not suffering. If the human interest prevails in any given situation, the animal suffering is permitted; if the animal interest prevails, the suffering is not permitted.").

<sup>29</sup> Plass, *supra* note 13, at 420 ("By collecting data about violent incarcerated men, individuals prosecuted for intentional cruelty to animals, serial killers, and violent juvenile offenders, among others, it was determined that these individuals abused animals at a much higher rate than their non-violent counterparts. Based on such studies, it is then suggested that animal abuse is part of the developmental history of violent adults, and so, in some sense, animal abuse is a dress rehearsal or training ground for later violence against other humans."); *see also* Chandola *supra* note 23, at 5-6 ("[S]tudies by behavioral scientists also reveal the correlation between cruelty to animals and violent crime. Studies have shown that a statistically significant number of criminals who committed acts of violence against humans have a history of cruelty to animals. Prosecutors are gradually realizing that violent acts directed towards humans and animals are not separate distinct forms of violence, but are part of a cycle. Although research concerning the relationship between violence against humans and animals is relatively recent, it is definitely not a novel idea. In 1887, the Supreme Court of Mississippi in an opinion delivered by Justice Arnold, stated that it was important for society to consider the welfare of animals. The Court noted that animals were probably capable of feeling as much pain and pleasure as humans.").

A study surveying women's shelters in Northern Utah substantiates the animal abuse and interpersonal violence correlation. The study found that seventy-four percent of the women entering the shelter had a companion animal or had owned one within the last twelve months. Of these women, seventy-one percent reported that their partner had either threatened to harm--or actually harmed--a companion animal. Many of the abusive partners were actively violent toward the animals: actual harm or killing of animals was reported by [fifty-seven percent] of the women with pets and included acts of omission (e.g., neglecting to feed or allow veterinary care) but most often acts of violence. Examples reported included slapping, shaking, throwing, or shooting dogs and cats, drowning a cat in a bathtub, and pouring lighter fluid on a kitten and igniting it.<sup>30</sup>

Cross-reporting laws also exist for animal cruelty and child abuse.<sup>31</sup> "These laws recognize the concept that if one member of a household is being neglected or mistreated, then it is possible that other members might be as well."<sup>32</sup> In this context, the fact that an animal member of the household is subject to neglect or mistreatment triggers concern that human members of the same household are suffering the same abuse.<sup>33</sup>

### C. Species Supremacy

The biased human tendency to discredit animal welfare rests upon a foundation of human superiority.<sup>34</sup> This perceived superiority is disquieting because it resembles, in so many ways, the same belief systems that support any other form of perceived supremacy and resultant oppression. The supremacist believes that anybody who does

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<sup>30</sup> Blair McCrory & Shannon Douglass, *2006 Legislative Review*, 13 ANIMAL L. 299, 312-313 (Marjorie A. Berger ed.) (2007). See also, Constance Lindner, *Domestic Abuse and Protecting Pets*, CATNIP (CUMMINGS SCHOOL OF VETERINARY MEDICINE AT TUFTS UNIVERSITY) 7-9 (October 2016).

<sup>31</sup> See Jonathan R. Lovvorn, *Animal Law In Action: The Law, Public Perception, And The Limits Of Animal Rights Theory As A Basis For Legal Reform*, 12 ANIMAL L. 133, 134-135 (2006); see also Berger, *supra* note 30, at 315 ("2. Cross Reporting. Protective orders for animals were not the only legislative acknowledgement of a correlation between domestic abuse and animal cruelty this year. West Virginia and Tennessee both passed laws that require the cross reporting of animal cruelty and child abuse.").

<sup>32</sup> Berger, *supra* note 30, at 315.

<sup>33</sup> Berger, *supra* note 30, at 315.

<sup>34</sup> See generally Colb, *supra* note 18, at 220 ("Singer has long demanded that we stop ignoring the moral implications of using animals. He has compared such speciesism to racism . . . . Regan also resisted speciesism.").

not align in certain designated traits with him/her is inferior.<sup>35</sup> This sort of species supremacy enables humans to justify condescension towards the animal kingdom.<sup>36</sup>

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<sup>35</sup> See Yxta Maya Murray, *From Here I Saw What Happened And I Cried: Carrie Mae Weems' Challenge To The Harvard Archive*, 8 UNBOUND: HARV. J. LEGAL LEFT 1, 65 (2012-13), ("In an almost eerie—but in hindsight, predictable—synchronicity, Trope and Echo-Hawk cite Samuel George Morton's head-hunting raids of Native American bodies as an impetus for the law. As noted above, Morton's policy of crania-collecting and measuring supposedly proved Indians' separate species genesis as well as their inferiority. Agassiz drew much inspiration from Morton's collection of 600 Native American crania and used Morton's measurements as support for his separate, inferior species theory. The resulting demotion of Native Americans led to their capture in reservations, and served as a justification for genocide."); see also Megan A. Senatori, *The Second Revolution: The Diverging Paths of Animal Activism And Environmental Law*, 8 WIS. ENVTL. L.J. 31, 36 (2002) ("In 1975, philosopher Peter Singer began a second revolution, this time challenging humankind's homocentric view of the worth of animals. Singer's controversial book, ANIMAL LIBERATION, emerged as another call to consciousness arguing that what allows human beings to completely disregard the worth of animals is a form of discrimination known as 'speciesism.' According to Singer, speciesism 'is a prejudice or attitude of bias in favor of the interests of members of one's own species and against those of members of other species.' Singer argues that even the most ordinary humans rationalize the inhumane treatment of animals by simply viewing the interests of their own species as superior to those of other life forms. Harvard Law Professor and animal law scholar, Steven M. Wise, calls this phenomenon 'teleological anthropocentrism,' or a notion that the universe was designed solely to serve human beings."). But see Maneesha Deckha, *Holding Onto Humanity: Animals, Dignity, and Anxiety in Canada's Assisted Human Reproduction Act*, 5 UNBOUND: HARV. J. LEGAL LEFT 21, 53-54 (2009) ("While the fluidity and constructedness of species are acknowledged in contemporary biology, the social construction of species difference persists and continues to be inflected by currents of race, gender, culture, sexuality and other seemingly anthropogenic concepts. There is a continuing impulse to articulate human identity as the marker for ethical consideration and animal identity as the excluded Other. The AHRA participates in this modernist narrative, defining human dignity in relation to animal commodification. In embodying commodification and species anxiety through its prohibitive provisions, the AHRA contributes to this long-standing narrative within Western cultures of articulating, with mixed success, human identity through juxtaposing it with imagined ideas of animality."), and Taimie L. Bryant, *Trauma, Law, And Advocacy For Animals*, 1 J. ANIMAL L. & ETHICS 63, 109 (May, 2006) ("For most of human history, other animals and humans were largely cohabiters - a reality conditioned by the foraging way of life. Changing climatic conditions facilitated the emergence of hunting. This change in the method of material accumulation was necessarily accompanied by ideas that assuaged human guilt, ideas that were embedded in social and religious practices and beliefs. The ascent of agricultural society gradually transformed human oppression of other animals into a mundane practice. Interhuman relationships also changed profoundly during these periods, and not for the better. The mistreatment of humans and other animals was not stimulated by prejudice; rather, prejudice resulted from the socially constructed ideological systems that legitimated oppression.").

<sup>36</sup> See Jay Shooster, *Justice For All: Including Animal Rights In Social Justice Activism*, 40 HARBINGER 39, 40-41 (OCTOBER 15, 2015) ("Social justice advocates recognize that treating someone differently solely because of their race, class, gender, nationality, sexual orientation, or disability is almost always wrong. That is because we know that for almost all decisions, these characteristics are morally irrelevant. Just like racism,

Animal protection ultimately relies upon the value that humans place upon the well-being of non-humans.<sup>37</sup> In order to engage in a rational, methodical, and ethical evaluation of animal treatment, we must avoid seeking some mythical convergence of an intersection between human and animal. Instead, the inquiry should ask who and

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sexism, and classism, speciesism focuses on one morally arbitrary characteristic: species, and uses that to justify violence and inequality. After all, what does a number of chromosomes or an opposable thumb have to do with whether or not someone should live or die?"); Daniel Mishori, *Environmental Vegetarianism: Conflicting Principles, Constructive Virtues*, 11 LAW & ETHICS HUM. RTS. 253, 263 (Nov. 2017) ("The common denominator between evolving ecological ethics and the animal rights movement was opposition to the idea of human supremacy over all other creatures, which in 1970 was termed by British psychologist Richard D. Ryder 'speciesism.' The biocentric claim that animals have 'rights', which was articulated in various ways (including utilitarian and deontological ethics), implied that humans have duties to animals, such as the obligation to shield them from harm and exploitation. Speciesism was seen as a form of discrimination and oppression, on par with other notorious types of prejudice such as racism, sexism and ageism."); Joseph Lubinski, *Screw The Whales, Save Me! The Endangered Species Act, Animal Protection, And Civil Rights*, 4 J. L. SOCIETY 377, 401-402 (Winter 2003) ("Other animal advocates have compared human 'speciesism' to invidious forms of discrimination such as racism and sexism. Gary Francione turns the degrading practice of treating humans as property on its head by equating it to the impropriety of treating animals as property. He further compares the historical exploitation of people with our current exploitation of animals.").

<sup>37</sup> See *infra* note 52 and accompanying text. See also, David S. Favre, *Judicial Recognition Of The Interests Of Animals - A New Tort*, 2005 MICH. ST. L. REV 333, 363-364 (Summer 2005) ("It is not expected that any animal has the capacity to call a lawyer and initiate a lawsuit. . . . The courts are capable of discerning when a particular human is the appropriate party to pursue the interests of an animal. In an indirect manner, two federal courts have allowed humans to pursue cases that furthered the interests of animals covered by federal law. In at least one case in Florida, a court appointed a guardian ad litem for a Chimpanzee Trust. The development of guidelines for the courts in resolving this issue will undoubtedly be the subject of future law review articles. Our legal system has a number of mechanisms such as guardianships, next friends, legal representatives and social workers to deal with this issue."); Antoinette Duck, *Welcome To Primates' Paradise, Human Rights Not Allowed: Unravelling The Great Ape Project*, 7 REGENT J. INT'L L. 165, 185 (2009) ("The responsibilities and duties that exist toward animals are uniquely and specifically human. Why? Because man is a moral being, and the animal is not. Animals do not protect other animals' rights. Animals are not subject to 'animal duties' toward one another. Rather, 'animals' rights' are asserted against humanity, against mankind. If being human is not what burdens man with the obligation to treat animals humanely, then nothing does. It is man's humanity that burdens him with his duty toward the animals. It is man's humanity that burdens him with the responsibility of stewardship."); Tischler, *supra* note 22, at 492-493 (2015) ("So, why do humans have legal rights? Do they descend from the heavens? No; legal rights come from us. As I mentioned earlier, human beings have been property. In the past 150 years in the U.S., the social contract about who gets rights, and who gets legal "personhood" protection, has expanded to include: people of color, women, children, gays, lesbians, transgender people, immigrants, Native Americans, people with mental and physical disabilities, and children. Legal rights are established by us to protect our lives, our families, our property, and our values. And they evolve.").

what we want to be as humans.<sup>38</sup> The answer to this question necessarily includes an underlying human obligation towards the welfare of other living creatures and our planet.<sup>39</sup>

Analyzing and viewing animal rights legislation in this context removes us from a confined perspective of human superiority and launches us in the direction of enlightened care and concern for those subjected to our collective human will.<sup>40</sup> Mere dominion need not equate to superiority:

Here is the myth to make human beings feel their supremacy and their power. Man alone is made in the image of God. Man alone is given dominion over all the animals and told to subdue the earth. . . . The influence of Judeo-Christian insistence on the God-like nature of human beings is nowhere more apparent than in the standard Western doctrine of the sanctity of human life: a doctrine that puts the life of the most hopelessly and irreparably brain damaged human being—of

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<sup>38</sup> See Favre, *supra* note 37, at 363-364; Duck, *supra* note 37, at 185. See also, Plass, *supra* note 13, at 404 (“It is contended, for example, that the criterion for legal protection should be a living entity’s ability to suffer, as non-human animals certainly can and do. It is further contended that non-human animals, like humans, are ‘subjects of a life’ with beliefs, desires, emotions, identity, and other attributes of personhood that support the recognition of rights, and in that sense are equal. Another perspective explains that animal rights theory is grounded in principles of ‘justice,’ which reject the use of animals as property. That is to say animals have equal inherent value as humans and therefore are entitled to the same considerations as humans when decisions that affect their interests are being made.”).

<sup>39</sup> See Wenner, *supra* note 17, at 1631 (“The law governing animal welfare is convoluted. Animals receive some protection from maltreatment through state anti-cruelty statutes. These statutes typically guard only against wanton abuse that has no societally legitimate purpose. They also tend to exempt common agricultural practices, meaning that as long as a particular method is standard within the industry, it is not cruel under the statute. On the other hand, under the regulatory system at both the federal and state level, specific animals are sometimes afforded a level of ‘humane’ protection that exceeds what would otherwise be provided under the anti-cruelty statutes. These laws prohibit activities that would not necessarily violate anti-cruelty statutes because they are not wanton—there is a purpose behind the pain and suffering inflicted on the animal—but they are characterized as inhumane nonetheless. Through the use of humane standards, the regulatory system provides certain limited chances to exceed the baseline protections offered under anti-cruelty statutes. However, if we are to ensure that regulations properly address relevant concerns and honestly represent our convictions and interests, courts must be willing to scrutinize agency regulations. Though states have different approaches to promulgating humane standards of care and different standards of review, one thing should remain clear: The humane treatment of animals is as much about us as it is about them. ‘Humane’ should not be defined without questioning the value we place on animal pain and suffering, and, consequently, judicial review of agency action should ensure that this value is actually determined.”).

<sup>40</sup> See Wenner, *supra* note 17, at 1631.

the kind whose level of awareness is not underestimated by the term 'human vegetable'—above the life of a chimpanzee.<sup>41</sup>

Service animals exemplify the idea of species supremacy. Service animals and companion animals have become valued by society, not because of their status as animals, but because of their ability to serve human needs and hold economic value by virtue of their training and knowledge.<sup>42</sup>

The fact that humans *own* animals necessarily implicates a linguistic bias regarding treatment. "Ownership implies entitlements to the owner [but] . . . it does not necessarily translate into a right to do as one pleases..."<sup>43</sup> Granting "person" status to animals does not address the underlying bias in ownership, however, because "[m]erely abolishing the property status of animals and granting them rights does not guarantee that they will cease to be exploited."<sup>44</sup>

#### D. Anthropomorphism Or Simply Respect For Another Living Being?

"Anthropomorphism" is the human trait of "[g]iving human characteristics to animals, inanimate objects or natural phenomena."<sup>45</sup>

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<sup>41</sup> Plass, *supra* note 13, at 415, (quoting PETER SINGER, *ANIMAL LIBERATION* 2-8 (2d. ed. 1990)).

<sup>42</sup> Sullivan, Vietzke, and Coyne, *supra* note 12, at 1129-1130 ("In any discussion concerning animal rights, the question often arises as to the need to distinguish companion animals, like dogs and cats, from other animals. Clearly, it is an easier argument to limit animal rights to our companion animals who occupy our homes and are near and dear to us. However, such a distinction is too great a strain on science and compassion for us to promote without exploring the issue a bit deeper. Although it would be easy to give into the distinction between companion animals and other animals, to do so ignores the fact that non-companion animals, like chimpanzees, have a genetic make-up very similar to ours. They also have the capacity to experience great pain. So to suggest that Rover or Kitty have rights and value beyond property, but a chimp does not, leads to an absurd conclusion: chimps can be seen as mere objects. Chimps can experience a broad array of emotions like joy, grief, and sadness. They are extremely intelligent and often serve as helpers to the disabled. Their genetic make-up is nearly identical to ours. So why should this living, breathing, and thinking being—sometimes thinking even more than we do according to Japanese researchers—be relegated to the equivalent of the chair we sit on? Cruelty and humane treatment of animals aside, tort law, contract law, wills and trusts law, and family law all deal with issues regarding companion animals (with the exception of actions for damages to livestock where the law actually grants more protection to the animals so long as it is part of one's livelihood)."). *Id.*

<sup>43</sup> Robert Garner, *Political Ideology And The Legal Status Of Animals*, 8 *ANIMAL L.* 77, 81 (2002).

<sup>44</sup> *Id.* at 80.

<sup>45</sup> Rick Nauert, *Why Do We Anthropomorphize?*, PSYCHCENTRAL (Mar. 1, 2010; last updated June 15, 2019), <http://psychcentral.com/news/2010/03/01/why-do-we-anthropomorphize/11766.html>. "[A]nthropomorphism was coined by the Greek philosopher Xenophanes when describing the similarity between religious believers and their gods—that is, Greek gods were depicted having light skin and blue eyes while

The notion that many humans attribute to animals the capacity to experience pain, happiness, and other feelings should not engender condescending proclamations from others that one's empathy towards another living being is a form of radical extremism and anthropomorphization.<sup>46</sup> Indeed, failure to consider how other living beings, including animals, are impacted by one's behavior appears to controvert the golden rule: "Do unto others as you would have them do unto you."<sup>47</sup>

Similar to humans, animals have subjective experiences and are conscious of the world around them. In discussing the commonalities of human and animal behavior, Professor Brian Frye argued:

Indeed, it is at least possible that all living things have some form of subjective experience and are conscious of the world in some way, even if we cannot possibly comprehend their subjective experience or consciousness. Not only mammals but also reptiles and fish can be trained to solve problems. Insects engage in complicated social behaviors. The lowly flatworm makes choices. And even plants respond to external stimuli.<sup>48</sup>

Is it possible that my cat engages in zoomorphism, the act of attributing animal traits to humans? To me, she may be attributing sensory abilities, hunting skills, and other aspects of existence based upon her capacities as a sentient living being. Perhaps this is why she will lay fearlessly in the middle of the floor at night, not realizing that my night vision skills are far short of her keen abilities. Does this mean that my cat's perceptions of me are entirely faulty? Of course not; although I may not possess the exact level of abilities that she attributes to me (but certainly am guilty of the numerous flaws that she observes

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African gods had dark skin and brown eyes." *Id.* See generally, Tischler *supra* note 22 at 504 ("And while I like to rely on scientific studies for support of my positions, I regret that scientists often seem unwilling to advocate for animals, out of a fear that they will be criticized by their colleagues. For example, certain scientists have witnessed animals exhibiting emotions, yet they refuse to compare that behavior to a human-like response in their published reports, because they don't want to be accused of being anthropomorphic. But when you read reports, such as the one I mentioned earlier, of an elephant flopping-down on the ground and weeping, what are you going to think? Why is the elephant doing that? I presume the elephant is doing it for the same reason I would; well, I don't flop down and cry too often, but isn't it rational to assume that the elephant is acting out frustration, anger, or exasperation? I can only assume that. Why else would she do that?").

<sup>46</sup> See Tischler, *supra* note 22, at 504.

<sup>47</sup> See generally Bill Puka, *The Golden Rule*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <https://www.iep.utm.edu/goldrule/> (last visited Nov. 13, 2020).

<sup>48</sup> Brian L. Frye, *The Lion, The Bat & The Thermostat: Metaphors On Consciousness*, 5 SAVANNAH L. REV. 13, 40 (2018).



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CALIFORNIA'S "BAN" ON FOIE GRAS

51

in me), there is a reasonable line of commonality that we share in our existence as living beings. Either of us attributing some sort of shared commonality of existence neither makes my cat a zoomorphist, nor I an anthropomorphist. We are simply applying our respective knowledge and experiences in an effort to understand and afford respect to each other as living beings. Labels of anthropomorphism evade the fact that "animals are sentient beings based on their capacity to suffer and thereby entitled to equal consideration of their interests."<sup>49</sup>

### III. COARSE, MEDIUM, OR FINE? A PROPOSED "FILTER" BASED TAXONOMY TO AID IN THE ANALYSIS OF LEGISLATION RELATED TO ANIMAL TREATMENT

#### A. An Overview

"Whether animals are the primary or secondary subjects of laws, or regulated for their own or human welfare, their legal treatment is defined by human interest."<sup>50</sup>

My proposed filter is intended as another tool to aid in revealing the strengths, weaknesses, and flaws in animal legislation. Envision a cone-shaped filter, like a coffee filter, but with three different stages of filtration. My proposal is that human-centric legislation is most appropriate for analysis at the coarse level; blended legislation that considers aspects of both animal and human protection is appropriate at the medium level of filtration; and animal-centric protective legislation proceeds into the fine level for additional analysis and discussion.

This coffee filter analogy provides an additional approach to help analyze, debate, and discuss animal rights legislation, regardless of where an individual resides on the spectrum of animal protection. Analyzing animal rights legislation under the coffee filter analogy may also help fuel continuing improvements in such legislation.

The proposed filter can also be used to help identify issues of interest convergence and legal gerrymandering. Borrowing from the helpful terminology of animal protection expert Dr. Ani Satz, for example, there is an interest convergence in the foie gras ban that brings together those opposed to consuming animals and those who do consume animal flesh, but oppose the force-feeding method of production.<sup>51</sup> Simultaneously, there is legal gerrymandering in the law

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<sup>49</sup> Satz, *supra* note 16, at 76.

<sup>50</sup> Satz, *supra* note 16, at 83.

<sup>51</sup> Satz, *supra* note 16, at 69.

that protects ducks and geese raised for foie gras, but does not protect those same animals when they are raised for meat sale or other purposes.<sup>52</sup> This legal gerrymandering potentially “both undermines fundamental protections for animals and creates legal inconsistencies.”<sup>53</sup> The filter is also intended to aid in identifying these types of issues.<sup>54</sup>

*B. Is There Really A Need To Discuss Animal Protection Legislation?*

Recognized animal protection proponent Jonathan Lovvorn has indicated that the key to humane treatment of animals may require sequestration into boundaries that the human masses can relate to.<sup>55</sup>

We can make a good start by jettisoning our own revolutionary rhetoric - such as granting animals ‘personhood’ or otherwise eliminating the property status of animals. It is an intellectual indulgence and a vice for animal lawyers to concern ourselves with the advancement of such impractical theories while billions of animal languish in unimaginable suffering that we have the power to change.<sup>56</sup>

Other than recognizing our duties as humans to be stewards and protectors of non-human animals, why is the discussion of animal rights legislation relevant? The answer is that modern technology, food production, and medical research continue to progress in a direction that demands and requires attention.<sup>57</sup>

High-tech factory farming techniques allow American agribusiness to raise and slaughter more than ten billion animals in the United States each year. By supporting the confinement of animals to factory floors, technology requires newer and more sophisticated interventions to maintain the confinement, such as antibiotics and hormones. Technology drives the use of millions more animals in biomedical research. At the same time, it is because of technological advances in research techniques that animal advocates can credibly press for substitutes for some experimental animals. New uses of animal organs in humans, as well as the cloning and genetic manipulation of animals, are likely to increase the

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<sup>52</sup> Satz, *supra* note 16, at 83.

<sup>53</sup> Satz, *supra* note 16, at 83. *See also infra* notes 123-125 and accompanying text.

<sup>54</sup> *See generally* Satz, *supra* note 16, at 83.

<sup>55</sup> *See* Lovvorn, *supra* note 31, at 139.

<sup>56</sup> Lovvorn, *supra* note 31, at 139.

<sup>57</sup> Ellen P. Goodman, *Animal Ethics and the Law*, 79 TEMP L. REV. 1291, 95-96 (2006) (reviewing CASS R. SUNDSTEIN AND MARTHA C. NUSSBAUM, *EDS.*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (2004)).

demand for animal exploitation while raising new questions about human duties to animals.<sup>58</sup>

### C. *The Filter In Action*

In order to exemplify application of the filter, below is a description of each filter stage, along with discussion of pertinent theories at each stage of filtration. It is impossible to cover all possible theories relevant at each level of the filter, but the examples below provide a foundational understanding of how the filter works. Why the filter? It would be unproductive and counterintuitive to analyze human-centric legislation (e.g. food safety) within the context of animal rights theories, or vice versa.

#### 1. Coarse Filtration: Human Centric

"I got no emotions for anybody else; You better understand I'm in love with myself; myself; my beautiful self; No feelings . . . for anybody else."<sup>59</sup> Coarse filtration involves regulation motivated entirely by human self-interest.<sup>60</sup> Legislation at this stage of the filter is based exclusively upon human benefit. Any benefit to animals at the coarse stage is purely an unintended secondary result.

The coarse level is relevant for inclusion in this analysis because laws related to animals often focus on human safety rather than animal treatment.<sup>61</sup>

Animals receive legal protections only when their interests align with human interests. Consider the following examples. Animals are not slaughtered prior to being 'rendered insensible' because of the cruelty involved as well as the reduced hazard for slaughterhouse workers, efficiency in processing, and economic gains associated with decreased bruising of flesh foods. Downed pigs and sheep (animals too sick to stand) are not dragged or hauled to slaughter unless an inspector deems them fit for human consumption. Animals in laboratories are entitled to enough shelter and food to keep

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<sup>58</sup> *Id.*

<sup>59</sup> SEX PISTOLS, *No Feelings, on NEVER MIND THE BOLLOCKS: HERE'S THE SEX PISTOLS* (Virgin Records 1977).

<sup>60</sup> See Satz, *supra* note 16, at 67-68.

<sup>61</sup> Satz, *supra* note 16, at 85 ("Farm animals have no federal protections pertaining to their confinement or rearing because factory farms are the most efficient, and arguable the only, means to produce enough flesh foods to meet existing consumer demand."). See also *id.* ("Haley's Act, named after a young woman killed by a Siberian tiger while posing for a high school senior photo, would ban the use of large cats outside of sanctuaries and zoos because of their danger to humans, not because of the cruelty involved in keeping a large cat outside of its native environment.").

them alive to facilitate research. Companion animals are protected against cruelty in every state because of a desire to prevent harm to them as well as the value humans place on their relationships with them and the link between animal cruelty and violence against humans.<sup>62</sup>

Food safety laws designed to protect human consumers of animal flesh or other animal food products appear at the coarse filtration level because these laws are about human interests, not animal protection.<sup>63</sup> Laws focused exclusively or primarily upon human safety in interacting with animals also fall within this category. Laws filtered at the coarse level do not actually constitute animal protection or animal rights laws, even though some humans may mischaracterize them as such.

A sample of theories associated with the coarse level of filtration include Descartes' Theory, Moral Pluralism, and Chattel Theory.

a. Descartes' Theory

It is well-settled that key philosophers, including Socrates, Aristotle, and Descartes, embraced the theory of absolute human superiority over animal welfare.<sup>64</sup> “[P]hilosophers, like Rene Descartes, believed animals were machines without consciousness that could be dismantled, reconstructed, and discarded.”<sup>65</sup> This brutal ideology, and

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<sup>62</sup> Satz, *supra* note 16, at 67-68. See also, Geoffrey C. Evans, Comment, *To What Extent Does Wealth Maximization Benefit Farmed Animals? A Law and Economics Approach to a Ban on Gestation Crates in Pig Production*, 13 ANIMAL L. 167, 170 (2006) (“Farmed animals in particular have very little protection in the United States. . . . Most states’ anticruelty statutes exempt ‘accepted,’ ‘common,’ ‘customary,’ or ‘normal’ farming practices. . . . [and] exclude poultry, which represent an estimated 95% of the . . . farm animals slaughtered annually.”).

<sup>63</sup> See Satz, *supra* note 16, at 69-70 (“Animal laws are also the product of interest-convergence. Despite their nomenclature, animal welfare and anti-cruelty statutes protect human as well as animal interests. The problem with providing animal protections in this manner is that when human and animal interests conflict, animal protections are reduced or eliminated to facilitate human use of animals. Even one of the most basic animal interests—avoiding suffering—is ignored. Animals are anally shocked to death, drowned, suffocated, or gassed, so as not to damage their furs for fashion garments; subject to invasive experiments without appropriate pain relief or sedation to prevent drug interference with experimental results; tethered on short leads without sufficient shelter, food, or water for the entirety of their lives as guard animals; and intensively confined in dark, windowless warehouses for efficient meat production after being routinely castrated, de-beaked, and de-toed without anesthesia.”).

<sup>64</sup> See Denise R. Case, *The USA Patriot Act: Adding Bite to the Fight Against Animal Rights Terrorism?* 34 RUTGERS L.J. 187, 190 n.12 (2003) (“In addition to religious sentiments against animals, well known philosophers, such as Socrates, Aristotle, and Descartes wrote about human superiority.”) (citing TOM REGAN, ALL THAT DWELL THEREIN: ANIMAL RIGHTS AND ENVIRONMENTAL ETHICS 5 (1982); STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 17 (2000)).

<sup>65</sup> See Satz, *supra* note 16, at 63 n.3.

lack of compassion towards animals, is perhaps rooted in the belief that animals are automatons that do not feel pain or other emotions; therefore, any abuse is "unfelt" by the animal.<sup>66</sup> Even if one is willing to adopt such underlying assumptions, the justification for Descartes' view still falls flat on its face as it fails to provide accountability for human behavior, regardless of how or what animals might perceive or feel.

Whether animals can experience pain would not have been a question were it not for the mechanistic views of philosopher Rene Descartes that led the way to wholesale abuses of animals in the name of science. Descartes contended that animals responded to stimuli the way a clock chimes—purely automatically and without sensation or the desire to communicate.<sup>67</sup>

Applying Descartes' views to the California foie gras law, there would be no reason to restrict the feeding methods, as the subject animal purportedly lacks the ability to feel any pain from such methods.<sup>68</sup>

Descartes' views about animal pain and emotion are unsound, however, when contextually analyzed by any person who has interacted with domestic or wild animals.<sup>69</sup> Why would any animal howl, squeal, or otherwise outcry specifically when subjected to pain stimuli if that animal did not feel pain? One cannot credibly argue that the animal is merely mimicking what a human would do in the same situation. Moreover, why would an animal inflict pain upon others (humans or

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<sup>66</sup> See Satz, *supra* note 16, at 63 n.3. See also Chandola, *supra* note 23, at 19-20 ("Rene Descartes, the great French philosopher and mathematician who did not deviate from traditional western religious thought regarding animals, established the precedent in modern thinking that animals were like machines or automata without souls or consciousness. During Descartes' period, in the seventeenth century, vivisection became widespread in Europe where many of the leading scientists referred to themselves as 'cartesians' in reference to Descartes' theory that animals were similar to mechanical entities. While painful experiments were starting to be performed on animals, vivisection also revealed the great similarity between animals and humans.").

<sup>67</sup> Taimie L. Bryan, *Trauma, Law, and Advocacy for Animals*, 1 J. ANIMAL L. & ETHICS 63, 109 n.124 (2006).

<sup>68</sup> See *supra* notes 64-67 and accompanying text.

<sup>69</sup> See Chandola, *supra* note 23, at 14 ("Tom Regan, who is credited with being the founder of the animal rights view, argues that those nonhuman animals which possess various attributes such as perception, memory, ability to feel pain and suffering, psychophysical identity, and an ability to act in accordance with beliefs and desires possess inherent value. All beings possessing inherent value who share interests based on a relevant similarity must have such interests treated equally. An interest in attending college is not a relevant similarity shared by human and nonhuman animals, but there exists a common interest in avoiding pain and suffering. Such relevant interests must be protected by rights in accordance with the respect principle or duty of justice.") See also, Tischler *supra* note 22, at 504.

animals) when defending itself through biting, scratching, or other conduct, if the subject animal did not conceptually understand the concept and feeling of pain?

b. Moral Pluralism

To eat animals, or not to eat animals; that is the question. Dr. Robert Garner has evaluated the perspectives that allow humans to eat animals, or not to eat animals, in the context of moral pluralism.<sup>70</sup> Dr. Garner posits that although there is room for animal rights in the theories of John Rawls, Brian Barry, and other leading political philosophers, traditional notions of animal welfare do not integrate into the framework of modern justice in our system of jurisprudence.<sup>71</sup> “[H]uman ‘conduct toward animals is not regulated by the principles of justice, because only “moral persons . . . [are] entitled to equal justice.””<sup>72</sup>

Rawls’ approach to the theory of justice requires those protected by justice to have “a conception of their good [as expressed by a rational plan of life] . . . and . . . a sense of justice, a normally effective desire to

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<sup>70</sup> Garner, *supra* note 43, at 89 (“It is very noticeable how much human choice is invoked in the debate about animal welfare. This illustrates the influence of the moral pluralism central to most liberal theories. From the moral pluralism viewpoint, we are free to choose whether to eat free-range meat or not to eat meat at all, free to avoid hunting or fishing, free to visit zoos, and free to resist drugs developed by using animals. What we are not entitled to do under this principle, however, is to prevent others from eating intensively produced meat, or going hunting and fishing, or visiting zoos, or partaking in drugs developed through animal testing, just because some of us find such activities morally repugnant. The state, therefore, must remain neutral when it comes to competing conceptions of the moral status of animals.”).

<sup>71</sup> Garner, *supra* note 43, at 87-88 (“The problem occurs where, as in the liberalism associated with Rawls, and other leading names in political philosophy such as Brian Barry, the harm principle does not apply because animals are excluded from a theory of justice . . . . Despite excluding animals from a theory of justice, Rawls, Barry, and others clearly accept that what is done to animals matters morally, and that there should be some restrictions on the way they are treated. This apparent contradiction can be explained by the fact that these thinkers seem to be making the point that justice is a much narrower area of inquiry than ethics . . . . Rawls is arguing that the treatment of animals should be discussed in the arena of morals rather than the arena of justice. However, the effect of excluding animals from a theory of justice is problematic for animals in a liberal society because a basic principle of most liberal theories is the assumption that it is no business of a liberal society to advocate one conception of the good over another. In other words, any genuine liberal political theory must include an anti-perfectionist principle of moral pluralism. This is the idea, derived from a wider theory of liberty, that it is no business of the state or society to interfere in individual moral codes or individual conceptions of the good life . . . . Taking this liberal theory to its logical conclusion, the treatment of animals becomes a matter of individual moral choice rather than a matter of justice.”).

<sup>72</sup> Garner, *supra* note 43, at 87.

apply and to act upon the principles of justice . . ."<sup>73</sup> Dr. Garner notes that under this rationale, "only those who can understand what it is to be just, and are able to claim it for themselves and respect the rights of others, are entitled to be beneficiaries of justice."<sup>74</sup> There are notable flaws in using the capacity to understand and respect the rights of others as the basis for justice. "[P]ersons who are senile may not have the capacity to use tools, language, or exhibit a high intellect; yet, they are still rights holders."<sup>75</sup>

Under Rawls' philosophy, objective notions of justice fall short of application to animals. Dr. Garner observes that justice is merely a small region contained within the greater realm of ethics and morals.<sup>76</sup> Within the context of ethics and morals, Rawls' theory, and other modern political theories, affords *individuals* the ability to choose to engage in animal protection but fails to afford broader *societal* protection of animals.

As a result of this moral pluralism,

we are free to choose whether to eat free-range meat or not to eat meat at all, free to avoid hunting or fishing, free to visit zoos, and free to resist drugs developed by using animals. What we are not entitled to do under this principle, however, is to prevent others from eating intensively produced meat, or going hunting and fishing, or visiting zoos, or partaking in drugs developed through animal testing, just because some of us find such activities morally repugnant. The state, therefore, must remain neutral when it comes to competing conceptions of the moral status of animals.<sup>77</sup>

Under Rawls' theory of justice, personal choice allows the *individual* to be vegetarian, to buy free range and organic meats, and to avoid consumption of veal, foie gras, or other arguably "cruel" forms of animal products.<sup>78</sup> "Taking this liberal theory to its logical conclusion,

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<sup>73</sup> Garner, *supra* note 43, at 87-88.

<sup>74</sup> Garner, *supra* note 43, at 88.

<sup>75</sup> Kniaz, *supra* note 21, at 771.

<sup>76</sup> Garner, *supra* note 43, at 87-89, 91 ("There is convincing evidence that differential animal protection achievements can be explained by the impact of political and social factors, backed by a dominant form of liberalism in the United States that excludes animals from a theory of justice. According to this liberal doctrine of moral pluralism, individuals should be left alone to pursue their own conceptions of the good life, and the state and society should not intervene to impose one particular moral code over another. As a result, the treatment of animals becomes subject to moral preferences rather than legal compulsion.")

<sup>77</sup> Garner, *supra* note 43, at 89.

<sup>78</sup> See Garner, *supra* note 43, at 87-88.

the treatment of animals becomes a matter of individual moral choice rather than a matter of justice.”<sup>79</sup>

The California foie gras legislation would be unnecessary under moral pluralism, as each individual could decide to eat, or not eat, foie gras or any other animal product. Although animal welfare may align with individual choices, moral pluralism lacks the pervasiveness of societal protection to qualify for use beyond the coarse level of filtration. In its human centric basis, moral pluralism is founded in individual choice, rather than societal obligation.

c. Speciesist Utilitarianism

I’ve elected to demarcate this category as “speciesist utilitarianism,” which is human centric, in order to clearly differentiate it from utilitarian theories that consider the suffering of animals.<sup>80</sup> A utilitarian analysis of any activity depends upon the cost-benefit formula used to appraise the underlying utility.<sup>81</sup> From the perspective of the animal used to produce foie gras, there is infinite cost and zero benefit. Since humans are the ones ascribing utilitarian value in a cost-benefit analysis, however, utilitarianism is rife with human-centric focus.<sup>82</sup> The subjectivity of such a cost-benefit analysis is problematic, as it can only be reconciled by agreeing upon some basic paradigm to guide the ascription of value. Speciesist utilitarianism, where only human desires are considered, is encompassed within the coarse level of filtration because the equation of utility is exclusively human focused.

Utilitarian analysis could be deployed in a non-speciesist manner to account for the suffering of other living creatures and value of life,

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<sup>79</sup> Garner, *supra* note 43, at 88.

<sup>80</sup> See generally PETER SINGER, ANIMAL LIBERATION: THE DEFINITIVE CLASSIC OF THE ANIMAL MOVEMENT (Harper Perennial ed. 2009); Colb, *supra* note 18; Barnaby E. McLaughlin, *A Conspiracy of Life: A Posthumanist Critique of Approaches to Animal Rights in the Law*, 14 U.MASS. L. REV. 150, 157-58 (2019).

<sup>81</sup> See generally Goodman, *supra* note 57, at 1293 (“Rights-based arguments compete with distinctly utilitarian traditions, which recognize in animals no inviolable rights . . .”).

<sup>82</sup> Goodman, *supra* note 57, at 1298-99 (“Epstein, among others, notes the problem of measuring pleasures and pains. The social utility in human-to-human interactions can in theory be measured by a person’s willingness to pay for pleasure or to avoid pain. According to this measure, an action causes more pleasure than pain if the winners still come out ahead after compensating the losers for their pain. Such a calculation is impossible across species.”); see also McLaughlin, *supra* note 80, at 158 (“While utilitarianism does a great deal to challenge the Cartesian world, it ultimately fails to escape a humanist discourse. Though never articulated specifically, utilitarian insistence on ‘suffering’ as the prerequisite, applied analytically and dispassionately, does little to articulate animals having interests in and of themselves that may be separate from simply a shared and identifiable human-like ‘suffering.’”).



thus producing an equation that is not a reflection of the pure pleasure or monetary interests founded in a human centric scheme.<sup>83</sup> Those alternative utilitarian influenced paradigms, allowing for some consideration of animal welfare, fall outside of the coarse level of filtration, and are further addressed later in this Article.

The Animal Enterprise Terrorism Act ("AETA") is an example of legislation within the realm of speciesist utilitarianism, as the law is purely for the protection of human interests, rather than animal interests.<sup>84</sup> The law is aimed at protecting the economic interests—and potentially human safety interests—of businesses and organizations that maintain animals in their operations, such as teaching hospitals, as well as the food industry, biomedical industry, and fur industry.<sup>85</sup> The AETA fails to account for the burdens, costs, and externalities (e.g. death, suffering) placed upon animal subjects. Food handling laws that are centered around human health and safety also come within the penumbra of speciesist utilitarianism and are appropriate for analysis at the coarse level of the filter.<sup>86</sup>

#### d. Chattel Theory

Under the views of James Madison, "Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man whatever is his own."<sup>87</sup>

Protection of animals as chattels only occurs when human ownership and human safety interests coincide with animal protection.<sup>88</sup> One difficulty in addressing humane treatment of animals can be attributed to the concept of ownership.<sup>89</sup> Ownership "implies

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<sup>83</sup> See generally Evans *supra* note 62, at 177-180 (discussing how a utilitarian could posit that humans must ascribe feelings and values, and therefore human utility, to all species in order for the utilitarian equation to function towards animal protection).

<sup>84</sup> 18 U.S.C. §43 (2020).

<sup>85</sup> Berger, *supra* note 30, at 301-302.

<sup>86</sup> See text and accompanying notes at 61-63, *supra*.

<sup>87</sup> Nick Dranias, *The Local Liberty Charter: Restoring Grassroots Liberty to Restrain Cities Gone Wild*, 3 PHOENIX L. REV. 113, 158-59 (2010) (quoting James Madison, Property, reprinted in JAMES MADISON: WRITINGS 515 (Jack N. Rakove ed., 1999)).

<sup>88</sup> Satz, *supra* note 16, at 67.

<sup>89</sup> See Garner, *supra* note 43, at 78-79 ("In the first place, not all animals are regarded as the property of private citizens, yet this has not prevented them from being mercilessly exploited. Wild animals, for example, fall into this category. While there are various ways in which ownership of wild animals can and has been conferred, without this confirmation, animals in the wild are not owned by private citizens. Despite this fact, wild animals are not regarded as possessors of rights. Conversely, it should be

entitlements to the owner” and consequently carries an implication that the owner may have the right to do as he or she pleases with the animal.<sup>90</sup>

If the chattel property status of animals were eliminated, this would beg the question of whether the legal status of “personhood” is—or should be—concomitantly conferred to animals. Indeed, if animals receive legal “person” status, it would be difficult to continue the practice of raising animals for slaughter and consumption, unless we conterminously adapt a standard of cannibalism as acceptable.

It is a strange state of affairs that corporations carry the rights of personhood,<sup>91</sup> despite not being sentient living beings. How can we call the paper fiction of a corporation a “person,” while simultaneously allowing living creatures mere property status as non-persons? Chattel theory directs us to the simple explanation that humans are ultimately more concerned with property and ownership rights than the legal status of other living creatures.

#### e. Coarse Filtration Applied To The California Foie Gras Law

The coarse level of the filter is appropriate for reviewing legislation impacting animals only where the animal protection component is a secondary result of human-centric legislation. The California foie gras law is focused on the treatment of the food animals during their lifetime,<sup>92</sup> rather than on food safety or other human safety. The purpose of this

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noted that there are cases where domestication, and therefore ownership, has had positive implications for wild animals. For instance, although contentious, it might be suggested that animal species with little or no chance of surviving in the wild, that are kept in zoos with very good records of environmental enrichment, benefit from human ownership.”); David Favre, *Living Property: A New Status For Animals Within The Legal System*, 93 MARQ. L. REV. 1021, 1044 (Spring 2010) (“Wild beings within natural ecosystems are not personal property. While governments assert the right to control access to wild animals, they do not have possessory rights or ownership of wild animals. The state does not possess these animals, and has little control over them and little responsibility for their well-being, at least at the present. While wild animals have many of the same sorts of interests as domestic animals and therefore a basis for legal rights, the legal context for acknowledging them will require a different analysis than is provided in this Article. For example, the concepts of living space and duty of care have to be different when the animals are not possessed by humans.”).

<sup>90</sup> Garner, *supra* note 43, at 81-84.

<sup>91</sup> See generally Konstantin Tretyakov, *Corporate Identity and Group Dignity*, 8 WASH. U. JURIS. REV. 171 (2016); Nick J. Sciuillo, *Reassessing Corporate Personhood in the Wake of Occupy Wall Street*, 22 WIEDENER L. J. 611 (2013); Stuart Kirsch, *Imagining Corporate Personhood*, 37 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 207 (Nov. 2014).

<sup>92</sup> See generally *Petition for a Writ of Certiorari, Ass’n des Éleveurs de Canards et d’Oies du Québec v. Becerra*, (No. 17-1285), 2018 WL 1315086, at\*22 (March 9, 2018) (“As Justice Sotomayor more recently put it, ‘The primary purpose of a food of any kind

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law is not for human protection and, thus, it must pass through and beyond the coarse level of filtration for proper evaluation and analysis. Indeed, theories at the coarse level actually would oppose and nullify this law, because it does not pertain to human protection. In this respect, the filter is useful in eschewing erroneous and misleading analysis of the underlying legislation.

## 2. MEDIUM FILTRATION

The medium level of filtration is best suited to analyze legislation that is designed to address some specific component of animal protection but countered with some underlying carve-out reflecting human self-interests that have been reserved. This level of filtration contains legislation based upon the whim of collective societal ethics implemented through legislation and regulation. Samples of relevant theories at this level of filtration include: Deontology, Bentham, and Singer Utilitarianism.

### a. Deontology (Kant):

Immanuel Kant recognized that humans have an obligation in their treatment of animals.<sup>93</sup>

Deontological or rights-based views are derived from the tradition of Immanuel Kant . . . who believed that rights are possessed by, and duties are owed to, beings capable of mutual justification and reason-giving. While nonhuman animals do not possess these capacities and therefore cannot themselves be rights-holders, Kant believed that humans have indirect duties to animals. Cruelty to animals, Kant argues, offends humanity: "A master who turns out his ass or his dog because the animal can no longer earn its keep manifests a small mind." Under Kant's view, it is likely that the cruelties of factory farming and animal experimentation would offend our humanity, though meat consumption could be justified if the raising and slaughtering of animals was performed humanely.<sup>94</sup>

Applying this theory to the California foie gras law reveals that the law inadequately fulfils human duties to animals because the law bans inhumane force-feeding practices but continues to allow the slaughter of animals for foie gras (and other purposes).

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is to be eaten.' Tr. of Arg. in No. 16-111, at 15:24-25."); Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra, 870 F.3d 1140, 1149 (9th Cir. 2017), *cert. denied* 139 S.Ct. 862 (2019).

<sup>93</sup> See Satz, *supra* note 16, at 77.

<sup>94</sup> Satz, *supra* note 16, at 77.

b. Bentham And Singer Utilitarianism

Allowing the pain and pleasure of other species to influence determinations of animal treatment can provide for some level of animal protection.

[T]he subjectivity inherent in the utilitarianism allowed Jeremy Bentham to argue for animal anticruelty laws. “Benthamites play the game of deriving public policy from the greatest-happiness principle without rules, and the set of public policies he proposed resembles nothing so much as his personal preferences (he was notoriously fond of animals, especially cats).”<sup>95</sup>

Animal rights commentator Peter Singer also challenges speciesist utilitarianism, and views animals as having the same ability to experience pain and other sensations as sentient beings.<sup>96</sup> “Under Singer’s view, the suffering (or happiness) of nonhuman sentient animals should be given equal consideration to the suffering (or happiness) of human animals.”<sup>97</sup> Using a utilitarian equation to register the pain of animals requires that humans not be speciesist bullies and that humans instead engage in assiduous analysis of animal pain, suffering, rights, and interests. Unfortunately, “the law measures nonhuman animals with a human yardstick.”<sup>98</sup> The resultant subjectivity of utilitarianism makes it difficult to harness and consistently apply meaningful parameters.<sup>99</sup> As Judge Posner has commented, this approach to animal rights is only functional when rational human actors are prepared to “value nonhuman animal interests to provide for those protections.”<sup>100</sup>

Under Singer’s utilitarian analysis,

[t]he suffering of animals in factory farms, laboratories, the entertainment industry, and households must be weighed against human satisfaction derived from the use of animals in

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<sup>95</sup> Evans, *supra* note 62, at 177-78.

<sup>96</sup> See generally PETER SINGER, ANIMAL LIBERATION (2d. ed. 1990); Satz, *supra* note 16, at 75-76.

<sup>97</sup> Satz, *supra* note 16, at 76.

<sup>98</sup> Evans, *supra* note 62, at 181.

<sup>99</sup> Evans, *supra* note 62, at 178 (“[W]hether they are included is entirely subjective.”).

<sup>100</sup> Evans, *supra* note 62, at 180; see also Goodman, *supra* note 57, at 1302 (“Posner’s alternative to rights or strictly utilitarian approaches is a ‘soft utilitarian’ commitment to take seriously the suffering of animals. Empathy, not moral duty, requires this commitment. Animal suffering matters because it debases humanity and causes (or should cause) human suffering. The sly importation of a prescriptive element here nearly unravels Posner’s humanist theory, since what humans should feel is a question of ethics—what they owe to animals-not empathy.”).

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these contexts. For example, human pleasure in consuming a ham sandwich cannot outweigh the profound suffering of a pig... To argue otherwise, Singer suggests, would be speciesist.<sup>101</sup>

Under Singer's approach, humans may make the decision that their lives have more value than animal life.<sup>102</sup> In the review of this concept by Professor Ani Satz, she begs the question as to whether the sacrifice of "100 million mice to find a cure for a common cancer that affects 2.5 million people" can be justified.<sup>103</sup> Applying Singer's theory, the ultimate conclusion depends on the details of each specific situation and a balancing of the interests *à la* non-speciesist utilitarianism, albeit determined by humans.<sup>104</sup>

Applying this type of utilitarianism, if a choice had to be made between saving an innocent rabbit<sup>105</sup> or a convicted child molester human, the rabbit should be the clear winner. This choice contradicts speciesist utilitarianism, where the human would be saved. Delving further into the discussion on the point raised by Professor Satz, many humans have no difficulty in killing "home invasion" mice in order to prevent prospective damage to homes and contamination through disease.<sup>106</sup> When the discussion turns to breeding laboratory mice for the purpose of experimentation, however, an entirely different set of questions arises. This raises the not so rhetorical question of how many "innocent" mouse lives equate to the value of a human life? What if we account for the character and value of each specific mouse sacrificed and each specific human benefited? Why sacrifice a kind, even-tempered, well groomed, healthy mouse to save the life of a despicable and violent human? Again, this level of inquiry is not intended to suggest that it is an easy task to commence moral inquiry into the lives of animals (doing so with humans is perplexing enough), but rather is intended to exemplify the challenge in balancing human versus animal interests at the medium stage of the filter.

### c. Medium Filtration Applied To The California Foie

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<sup>101</sup> Satz, *supra* note 16, at 76.

<sup>102</sup> Satz, *supra* note 16, at 76-77.

<sup>103</sup> Satz, *supra* note 16, at 77.

<sup>104</sup> See *supra* note 37 and accompanying text.

<sup>105</sup> I am unaware of, and my research has not revealed, any guilty rabbits.

<sup>106</sup> See generally CENTERS FOR DISEASE CONTROL AND PREVENTION, *Trap Up! Trap Rodents Around the Home to Help Reduce the Rodent Population*, [https://www.cdc.gov/rodents/prevent\\_infestations/trap\\_up.html](https://www.cdc.gov/rodents/prevent_infestations/trap_up.html) (last visited December 18, 2020).

### Gras Law

The medium level of filtration exposes the trade-off between human desires and some aspect of animal protection. The California foie gras legislation is designed to make humans feel virtuous by restricting force-feeding practices. Within this context, the legislation contains vast gerrymandering of rights and interests. Though the California law addresses treatment of birds.<sup>107</sup> The law continues to allow for the slaughter and sale of these birds;<sup>108</sup> it allows for the sale of foie gras raised through non-force-feeding methods;<sup>109</sup> and it fails to address any other aspect of the treatment of these animals.<sup>110</sup>

Embodied in the California foie gras legislation is an underlying legislative and utilitarian compromise: foie gras is an extravagant gourmet delicacy, and the pain/suffering of the *force fed* animal exceeds the benefit to those who consume such force-fed foie gras.<sup>111</sup> The law does not prohibit sale of non-force fed foie gras, or any other types of bird meat (excluding foie gras product) potentially raised through force-feeding or other adverse conditions.<sup>112</sup> At the medium stage of filtration, it becomes apparent that the California foie gras law is highly specific and delimited in scope. I interpret the focus on protection of force-fed birds as akin to a legislative moral carbon offset in the realm of animal protection; one particular type of animal is protected under a limited set of circumstances.<sup>113</sup>

### 3. Fine Filtration

The fine level of filtration moves away from utilitarian ascription of costs and benefits, and instead focuses upon the issue of vulnerability. Professor Ani Satz's vulnerable subject theory provides an appropriate method for analyzing legislation/regulation at the fine level of filtration.<sup>114</sup> Review at this level moves past utilitarian analysis of

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<sup>107</sup> CAL. HEALTH & SAFETY CODE § 25980(a) (2020).

<sup>108</sup> *Id.* at §§ 25980-25984.

<sup>109</sup> CAL. HEALTH & SAFETY CODE § 25981 (2020) ("A person may not force-feed a bird for the purpose of enlarging the bird's liver beyond normal size, or hire another person to do so.").

<sup>110</sup> *Id.* at §§ 25980-25984.

<sup>111</sup> CAL. HEALTH & SAFETY CODE § 25982 (2020) ("A product may not be sold in California if it is the result of force-feeding a bird for the purpose of enlarging the bird's liver beyond normal size.").

<sup>112</sup> CAL. HEALTH & SAFETY CODE §§ 25980-25984 (2020). *See infra* notes 121, 123-125, and accompanying text.

<sup>113</sup> CAL. HEALTH & SAFETY CODE §§ 25980-25984 (2020).

<sup>114</sup> Satz, *supra* note 16, at 78-80.

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human benefit versus animal cost, and instead focuses upon a situational analysis of the subject animal.

a. Vulnerability Theory (Satz):

In explaining her vulnerability theory, Satz notes that animals are part of our moral community because they are a constitutive part of our environment and contribute to its diversity. Thus, animals within our ecosystem are vulnerable to disturbances and possess claims to noninterference regardless of sentience, or the ability to suffer. This view is the most inclusive approach to the moral status of animals because it creates a presumption against harm to all animals regardless of mental properties.<sup>115</sup>

Satz further notes that "[t]he permanent dependency of domestic animals is created and controlled by humans, rendering them uniquely vulnerable to exploitation."<sup>116</sup> Humans are therefore ethically obligated to consider the health, safety, and welfare of nonhuman animals, as such creatures are vulnerable to the imposition of our destructive human will.

Vulnerability theory forces us to expand the level of inquiry without halting at the customary utilitarian cost-benefit border. Satz has referenced the application of Martha Fineman's concepts on the topic, where vulnerability is "the possibility of becoming dependent."<sup>117</sup> This means that the "vulnerable subject may have episodic or permanent dependency on others."<sup>118</sup>

First, animal capacities for suffering are morally relevant, as are higher-order capacities, such as the ability to see oneself existing over time. Second, it is speciesist to privilege human over nonhuman animal suffering. Speciesism gives rise to legal gerrymandering, undermining animal protections and creating legal inconsistencies. Third, human and nonhuman animals are universally vulnerable to suffering, and their most basic capabilities must be treated equally before nonhuman animals may be used to support higher-order human capabilities. State institutions must not privilege humans in

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<sup>115</sup> Satz, *supra* note 16, at 78.

<sup>116</sup> Satz, *supra* note 16, at 80. (This theory notes that the dependence of non-human domestic animals is permanent. Throughout their lives, domestic animals rely on humans to provide them nourishment, shelter, and other care.)

<sup>117</sup> Satz, *supra* note 16, at 79.

<sup>118</sup> Satz, *supra* note 16, at 79.

responding to universal vulnerability affecting certain basic capabilities.<sup>119</sup>

Exercising artistic license and taking the liberty of applying Satz's vulnerability theory, I offer some examples of how vulnerability theory can be useful in allowing granular level (hence, the fine filter stage) review of situational circumstances.

Let us assume that a lioness escapes from a zoo and roams a neighborhood full of humans. The lioness might not initially appear to be vulnerable. She is a powerful carnivore, capable of capturing and eating any human. Actions taken to stop the lioness, including terminal measures, might seem in order. Deeper examination within vulnerability theory, however, reveals that it is humans who placed the lioness in the zoo, and humans who failed to provide appropriate containment and allowed the lioness to escape. Humans being stalked by the escaped lioness are only at risk because other humans, those responsible for the care of the lioness, were negligent and created this risk. Does this mean that the lioness should be allowed to consume humans in the neighborhood? Not necessarily; however, the vulnerability analysis helps us to engage in this granular, fine level review.

As a second example, let us assume that a mountain lion is stalking a hiker on a trail as part of a delicious meal plan. Should the hiker have the right to kill the mountain lion? The hiker initially appears to be more vulnerable and at-risk. But what if the trail is part of a vast human encroachment upon the native habitat of this animal, and the construction of homes/parks/etc. has barricaded the mountain lion into a tiny, isolated space? The mountain lion may now appear to be vulnerable if penalized for stalking the human.

As a third example, assume that there is a healthy duck that has flown into a pond in a public park. This duck is vulnerable, with many natural predators, including humans. A law protecting such ducks would seem in order under these circumstances. If, however, the same duck is harboring a disease that adversely affects other animals (or humans), then this duck's diseased status could render others vulnerable, and at-risk.

These examples demonstrate that vulnerability theory provides an additional angle of analysis. Vulnerability analysis brings new light through old windows, by moving the inquiry away from customary

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<sup>119</sup> Satz, *supra* note 16, at 80.



utilitarian cost-benefit analysis, and evaluating animals within the same moral community as humans.<sup>120</sup>

b. Fine Filtration Applied To The California Foie Gras Law

When the vulnerability analysis is applied to the California's foie gras law it illuminates that the law only applies to sales within California, and that the law continues to allow sale of foie gras produced through methods other than force-feeding. The fine level of filtration further reveals the selectivity of the law in that it allows the same animals to be raised—and even force-fed—for meat sales (excluding foie gras).<sup>121</sup> Concomitantly, the fact that there is no human “need” to consume foie gras is also illuminated at this level.<sup>122</sup> Moreover, the fine level of filtration exposes the fact that the California foie gras law only partially addresses its purported purpose of protecting animal welfare, as the vulnerable subjects (namely birds),<sup>123</sup> if force-fed, may be sold as long as the liver is not sold,<sup>124</sup> and birds which are not force-fed are devoid of any such sales restrictions.<sup>125</sup>

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<sup>120</sup> Satz, *supra* note 16, at 78.

<sup>121</sup> See *Ass'n des Eleveurs de Canards et d Oies du Quebec v. Harris*, 729 F.3d 937, 944 (9th Cir. 2013). (“Plaintiffs contend that the district court correctly concluded that § 25982 prohibits the sale of all products from force-fed birds including duck breasts and down jackets. The State argues that § 25982 covers only products that are the result of force-feeding a bird to enlarge its liver beyond normal size, i.e., products made from an enlarged duck liver. We agree with the State's interpretation.”).

<sup>122</sup> See Sullivan and Wolfson, *supra* note 4, at 153 (“Of course, it is possible to distinguish between different foods produced from different animals according to how essential they are, and to argue that a culinary delicacy like foie gras does not deserve the same measure of consideration as other, more basic, foods. And yet, as we have said, making this distinction might open the door to the most microscopic distinctions. It seems obvious that Justice Grunis is correct, in that no animal-based food is actually necessary for human existence, at least in a society where numerous plant-based ‘substitute’ foods are available.”).

<sup>123</sup> CAL. HEALTH & SAFETY CODE § 25980(a) (2020) (“A bird includes, but is not limited to, a duck or goose.”).

<sup>124</sup> See *Ass'n des Eleveurs de Canards et d Oies du Quebec*, 729 F.3d at 944.

<sup>125</sup> CAL. HEALTH & SAFETY CODE § 25982 (2020) (“A product may not be sold in California if it is the result of force-feeding a bird for the purpose of enlarging the bird's liver beyond normal size.”) Although California does have a criminal law prohibiting enumerated types of animal cruelty, but obviously force-feeding of birds does not fall within the scope of this law or else those producing foie gras in California would have been subjected to criminal prosecution, and the legislature would not have deemed it necessary to enact the foie gras law. See CAL. PENAL CODE § 597 (2020).

## IV. CONCLUSION

My proposed filter-based analysis model is designed to provide an additional tool in analyzing animal protection legislation. It is neither intended to be a stand-alone analytic tool, nor to supplant the panoply of other methods and theories available to us in addressing animal protection. The underlying goal is to improve discussions and foster productive debate.

The filter can help to sort through a wide range of animal protection legislation by addressing human-centric laws (coarse filter), combined human and animal interests measured through human utility (medium filter), or legislation centered on vulnerability, dependence, and “at-risk” conditions (fine filter). This process is intended to aid in revealing strengths and weaknesses, including areas for improvement, in animal protection legislation.

Animals do not have a jury of peers determining their rights and protections. The way we treat and protect other animal beings is a massive reflection on who and what we are as humans. Such reflection must, *a priori*, extend to the humane care and treatment of animals, including the circumstances surrounding their life and death. By treating animals responsibly and properly, we become better humans.