

ANIMALS AS VULNERABLE SUBJECTS: BEYOND INTEREST-CONVERGENCE, HIERARCHY, AND PROPERTY

By
Ani B. Satz*

This Article presents a new paradigm, premised on the equal protection principle, for the legal regulation of human interactions with domestic animals: Equal Protection of Animals (EPA). EPA combines the insights of vulnerability theorists with the equal protection principle and capability theory to create a mechanism for recognizing the equal claims of human and non-human animals to protections against suffering. Under such an approach, domestic animals—like humans—have claims to food, hydration, shelter, bodily integrity (including avoiding pain), companionship, and the ability to exercise and to engage in natural behaviors of movement.

Existing animal welfare and anti-cruelty laws, despite their stated purposes, fail to protect animals adequately. This Article identifies the ontology of the problem as interest-convergence, famously described by Derrick Bell in the desegregation context. The privileged (humans in this case) protect the disadvantaged (animals) only when their interests align. Because humans profit economically and socially from the exploitation of animals, interests often diverge. When this divergence occurs, all protections for animals are placed in jeopardy. Unlike protections for other disadvantaged groups, there is no constitutional or other legal floor guarding the basic liberties of animals. Interest convergence results in what I term “legal gerrymandering for human interest,” or the redrawing of the natural baseline of

* © Ani B. Satz 2009. Ani B. Satz is an Associate Professor at Emory University School of Law, Rollins School of Public Health, and the Center for Ethics. She holds a J.D. from the University of Michigan School of Law and a Ph.D. in philosophy from Monash University, Melbourne, Australia, which she completed at Princeton University. The author is extremely grateful to Taimie Bryant, David Cassuto, Robert Schapiro, and Fred Tung for their detailed comments on earlier versions of this Article. In addition, this Article benefits from the input received at Yale University, University of California–Los Angeles, Emory University, and Florida State University Law Schools as well as at the Law and Society, Southeastern Association of Law Schools, and International Research Group in Animal Law Conferences. In particular, the author would like to thank the following individuals who have influenced the development of this work: David Bederman, Dorothy Brown, Bill Buzbee, David Favre, Martha Fineman, Rebecca Huss, Nancy Levit, Joel Marks, Tom McAfee, Jonathan Nash, Michael Perry, Polly Price, Bill Reppy, Julie Seaman, Charlie Shanor, Marianne Sullivan, and David Wolfson. The author is deeply indebted to Peter Singer, whose long-term mentorship influences this and other related scholarship. The author would also like to thank Vanessa King for her excellent library assistance as well as Meg Kochuba and Sarah McKenney for their fine research assistance.

protections for animals to further human use of animals. In addition to undermining fundamental protections for animals against abuse and suffering, legal gerrymandering creates inconsistencies that violate legal norms of precedent and procedure. Specifically, I address differential treatment of animals of the same legal and species classes as well as different treatment of scientific evidence in animal law as opposed to other legal contexts.

While some scholars seek to address the problem of inadequate animal protections, their proposals—treating animals as legal persons or quasi property—suffer two shortcomings. First, under traditional rights- and interests-based reforms, strong human rights or interests in using animals will always trump animal rights or interests, even with regard to avoiding some types of suffering. Second, existing scholarship is entrenched in a paralyzing debate about whether categorizing animals as “persons” instead of “property” will improve their legal protections. EPA does not have these limitations. EPA seeks to maximize the basic capabilities of human and nonhuman animals within the same population, addressing the hierarchy problem that human rights and interests are privileged over those of animals. Human claims to maximize basic capabilities cannot be valued above nonhuman animal claims for the same. Further, EPA directly considers animal capacities without regard to category; there is no need to categorize animals as persons or as a special form of property.

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I. INTRODUCTION

Human relations with domestic animals—companion, factory farm, and laboratory animals—are based on contradiction. We coddle them, eat them, leave our estates to them,¹ experiment on them, buy them designer collars and clothes, wear them, risk our lives for them,² and abandon and kill them. These contradictions are entrenched in a sprawling body of law regulating human use of animals as property.

Animals receive legal protections only when their interests align with human interests.³ Consider the following examples. Animals are not slaughtered prior to being “rendered insensible”⁴ because of the

¹ Leona Helmsley recently left \$12 million in trust to her Maltese, Trouble, and millions for her brother, Alvin Rosenthal, who is named in her will as Trouble’s caretaker. Washington Post, *Helmsley’s Dog Gets \$12 Million in Will*, <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/29/AR2007082900491.html> (Aug. 29, 2007) (last accessed Nov. 22, 2009). The Manhattan Surrogate Court reduced Trouble’s trust to \$2 million. *Leona Helmsley’s Dog Loses All but \$2 Million*, 157 N.Y. Times B6 (June 17, 2008) (available at <http://www.nytimes.com/2008/06/17/nyregion/17trouble.html> (June 17, 2008) (last accessed Nov. 22, 2009)).

² People in Louisiana and Mississippi who refused to evacuate their homes because shelters would not allow pets died during Hurricane Katrina. See e.g. Shaila Dewan & Janet Roberts, *Louisiana’s Deadly Storm Took Strong as Well as the Helpless*, 155 N.Y. Times Sec. 1, pp. 1, 46 (Dec. 18, 2005) (available at <http://www.nytimes.com/2005/12/18/national/nationalspecial/18victims.html> (Dec. 18, 2005) (last accessed Nov. 23, 2009)); Sewell Chan, *Portrait of Mississippi Victims: Safety of Home Was a Mirage*, 155 N.Y. Times A1, A18 (Sept. 27, 2005) (available at <http://www.nytimes.com/2005/09/27/national/nationalspecial/27mississippi.html> (Sept. 27, 2005) (last accessed Nov. 22, 2009)).

³ 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. See *Genesis* 1:26 (King James). 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. Richard Sorabji, *Animal Minds and Human Morals: The Origins of the Western Debate* 20–21 (Cornell U. Press 1993). Later philosophers, like René Descartes, believed animals were machines without consciousness that could be dismantled, reconstructed, and discarded. Rene Descartes, *Discourse on the Method of Rightly Conducting the Reason, and Seeking Truth in the Sciences* 58–62 (John Veitch trans., Open Court Publ. Co., n.d.). Immanuel Kant argued humans have only an indirect duty to animals to treat them humanely, as cruelty to animals undermines human moral character. Immanuel Kant, *Lectures on Ethics* 239–41 (Louis Infield trans., Methuen & Co. Ltd. 1979). On a less foundational level, contemporary commentators argue that it is the legal treatment of animals as property or the methods of efficient production of consumer goods that result in the use of animals for human interest. See *infra* Part V. These legal and economic arguments may have roots in religion or philosophy.

⁴ Humane Methods of Livestock Slaughter Act, 7 U.S.C. §§ 1901–1907, at § 1902 (2006 & Supp. 2008).

cruelty involved as well as the reduced hazard for slaughterhouse workers, efficiency in processing, and economic gains associated with decreased bruising of flesh foods.⁵ 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.⁶ Animals in laboratories are entitled to enough shelter and food to keep them alive to facilitate research.⁷ Companion animals are protected against cruelty in every state because of a desire to prevent harm to them⁸ as well as the value humans place on their relationships with them⁹ and the link between animal cruelty and violence against humans.¹⁰

Derrick Bell famously described this phenomenon—of a privileged group providing legal protections to a disadvantaged group when it

⁵ See H.R. Rpt. 95-1336 at 3 (July 10, 1978) (reprinted in 1978 U.S.C.C.A.N. 2650); see also Humane Methods of Slaughter Act, Hearings on S.R. 3092 before the Committee on Agricultural Research and General Legislation, 95th Cong., 2d Sess. 30 (1978) (statement of Temple Grandin). Rendering animals insensible prior to slaughter also benefits employers and consumers because it reduces bruising of meat. *Id.* at 20–29 (Livestock Conserv., Inc., *Livestock Safety is a \$61,000,000 Word*: “potential annual savings . . . of \$46,000,000 [for avoiding bruising alone]”).

⁶ 21 U.S.C. § 603 (2006 & Supp. 2007). Ill cattle are no longer slaughtered due to fear that disease will go undetected. See *infra* nn. 89, 210 and accompanying text.

⁷ 7 U.S.C. §§ 2131–2159 (2006 & Supp. 2008).

⁸ See e.g. Mass. Gen. Laws ch. 272 § 77 (current through 2009 Legis. Sess.) (outlawing “overdriv[ing], overload[ing] . . . overwork[ing], tortur[ing], torment[ing], depriv[ing] necessary sustenance, mutilat[ing] or kill[ing] . . . bait[ing] . . . and willfully abandon[ing]” companion animals); N.Y. Agric. & Mkts. L. § 353-a(1) (McKinney current through Oct. 28, 2009) (outlawing killing or physical injury to a companion animal that causes “extreme physical pain” or is done “in an especially depraved or sadistic manner”); Ohio Rev. Code Ann. § 959.131(B) (Lexis current through Nov. 10, 2009) (“No person shall knowingly torture, torment, needlessly mutilate or maim, cruelly beat, poison, needlessly kill, or commit an act of cruelty against a companion animal.”); 18 Pa. Consol. Stat. Ann. § 5511(c)(1) (current through 2009 Reg. Sess.) (“A person commits an offense if he wantonly or cruelly illtreats, overloads, beats, otherwise abuses . . . or neglects any animal as to which he has a duty of care, whether belonging to himself or otherwise, or abandons . . . or deprives any animal of necessary sustenance, drink, shelter, or veterinary care, or access to clean and sanitary shelter”); Tenn. Code Ann. § 39-14-202(a) (Lexis current through 2009 Reg. Sess.) (outlawing “tortur[ing], maim[ing], or grossly overwork[ing],” neglecting, abandoning, or cruelly “transport[ing] or confin[ing]” a companion animal).

⁹ Rebecca J. Huss, *Valuation in Veterinary Malpractice*, 35 Loy. U. Chi. L.J. 479, 526–27 (2004). Given the value of companion animals to humans, it is unsurprising that the law evolved to recognize loss of companionship and emotional distress claims to compensate humans for their loss. *Id.* at 517–20, 527.

¹⁰ See e.g. Frank R. Ascione, Claudia V. Weber & David S. Wood, *The Abuse of Animals and Domestic Violence: A National Survey of Shelters of Women Who Are Battered*, 5 Socy. & Animals J. Human-Animal Stud. 205 (1997) (Women in 85.4% of forty-eight domestic abuse shelters surveyed reported companion animal abuse by their abuser.). See also Am. Psychiatric Assn., *Diagnostic and Statistical Manual of Mental Disorders-IV* 94, 97 (4th ed., text rev. 2004) (discussing conduct disorder, a prerequisite to antisocial disorder, as involving cruelty to animals); Arnold Arluke et al., *The Relationship of Animal Abuse to Violence and Other Forms of Antisocial Behavior*, 14 J. of Interpersonal Violence 963 (1999) (discussing animal abuse as associated with antisocial behaviors towards humans, though not necessarily as a precursor to them).

supports the interests of the privileged—as interest-convergence.¹¹ Bell argued in the context of desegregation that whites opposed segregation “not simply [because of] the immorality of racial inequality, but [because of] . . . the economic and political advances at home and abroad that would follow abandonment of segregation.”¹² Whites knew that desegregation would aid U.S. foreign policy, black soldier morale in the wake of World War II, and the economic development of the South.¹³ When the interests of whites and blacks diverged, the reach of *Brown v. Board of Education* and school desegregation was limited.¹⁴ In 1977, a mere twenty-three years after *Brown*, the U.S. Supreme Court held that segregation could be justified if it was not intentional or condoned by the school.¹⁵ This decision undermined busing plans vital to the implementation of *Brown*, and desegregated schools began to re-segregate, black students faced higher rates of suspension and expulsion than white students, and school districts witnessed white flight from integrated schools as well as a dearth of black teachers and administrators.¹⁶

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;¹⁷ subject to invasive experiments without appropriate pain relief or sedation to prevent drug interference with experimental results;¹⁸ tethered on short leads without sufficient shelter, food, or

¹¹ Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 523 (1980).

¹² *Id.* at 524.

¹³ *Id.* at 524–25.

¹⁴ *Id.* at 525–26.

¹⁵ *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977); see also Bell, *supra* n. 11, at 527.

¹⁶ Bell, *supra* n. 11, at 531–32.

¹⁷ See e.g. Humane Socy. of the U.S., *How Do Fur Animals Die?*, http://www.hsus.org/furfree/news/how_do_fur_animals_die.html; select download the PDF (1998) (last accessed Nov. 23, 2009). Globally, 85% of “wild” animals used for furs are farmed. See Humane Socy. of the U.S., *Dying for Fur: Recent Investigation Shows Cruelty at Chinese Fur Farms*, http://www.hsus.org/about_us/humane_society_international_hsi/cruelty_issues_around_the_world/dying_for_fur_recent_investigation_shows_cruelty_at_chinese_fur_farms.html (last accessed Nov. 22, 2009). In China, animals are often skinned alive. *Id.*

¹⁸ See Animals and Animal Products, 9 C.F.R. § 2.36(b)(7) (2008) (requiring that research facilities annually report “the common names and the numbers of animals upon which teaching, experiments, research, surgery, or tests were conducted involving accompanying pain or distress to the animals and for which the use of appropriate anesthetic, analgesic, or tranquilizing drugs would have adversely affected the procedures, results, or interpretation of the teaching, research, experiments, surgery, or tests”); see

water for the entirety of their lives as guard animals;¹⁹ and intensively confined in dark, windowless warehouses for efficient meat production²⁰ after being routinely castrated,²¹ de-beaked,²² and de-toed without anesthesia.²³

In the animal law context, interest-convergence gives rise to a problem I term “legal gerrymandering for human interest.”²⁴ Legal gerrymandering is when the natural baseline for the legal protection of animals—premised on their inherent capacities—is redrawn to facilitate human use of animals. When human and nonhuman animal interests diverge, *all* protections for animals are placed in jeopardy. Unlike protections for other disadvantaged groups, there is no constitutional or other legal floor guarding the basic liberties of animals. For example, dogs are protected under state animal anti-cruelty statutes based on their capacity to suffer.²⁵ Due to their scientific and educational utility, however, dogs who are not pets²⁶ are routinely intensively con-

also Humane Socy. of the U.S., *Taking Animal Welfare Seriously: Minimizing Pain and Distress in Research Animals*, http://www.hsus.org/web-files/PDF/ARI/White_Paper_TakingAnimalWelfareSeriously.pdf (last accessed Nov. 22, 2009) (estimating 20–35% of laboratory animals suffer pain and distress due to withholding of drugs).

¹⁹ Only the most egregious cases are prosecuted. *See e.g. Ferrell v. Soto*, 2008 U.S. Dist. LEXIS 8250 at *8 (N.D. Ill. Feb. 5, 2008) (discussing dogs “restrictively chained” outside of a trailer in a used car lot who had neck sores and labored breathing and were surrounded by dried feces); *Ohio v. Jose Vasquez*, 1998 Ohio App. LEXIS 2389 at *6 (June 5, 1998) (“The testimony in the transcript, taken as a whole, shows that the dog was always seen chained to the tree, in varying degrees of mud, without access to food and water and without shelter.”).

²⁰ *See e.g.* Humane Socy. of the U.S., *An HSUS Report: The Welfare of Animals in the Broiler Chicken Industry*, http://www.hsus.org/farm/resources/research/welfare/broiler_industry.html (last accessed Nov. 22, 2009) (discussing the intensive confinement conditions of broiler chickens); *see also* Ian J.H. Duncan, *Animal Welfare Issues in the Poultry Industry: Is There a Lesson to Be Learned?*, 4(3) *J. Applied Animal Welfare Sci.* 207, 208 (2001) (discussing the conditions of egg-laying hens).

²¹ *See e.g. infra* nn. 124–26 and accompanying text.

²² *See id.* (The ends of their beaks are cut off.)

²³ *See id.* (The ends of their toes are removed.)

²⁴ The analogy to gerrymandering focuses on redefining a natural baseline to benefit a particular group. Redefining the baseline enables the lines of permissible use of animals to be redrawn in certain contexts. I do not intend to invoke other aspects of the term that are relevant in the voting context.

It is interesting to note that the etymology of “gerrymander” is a combination of the name of early Massachusetts Governor Elbridge Gerry and “salamander.” An election district redrawn in 1812 in Massachusetts was believed to resemble the appearance of a salamander. Gary Cox & Jonathan Katz, *Elbridge Gerry’s Salamander: The Electoral Consequences of the Reapportionment Revolution* 3 (Cambridge U. Press 2002).

²⁵ *See supra* n. 8 and sources contained therein.

²⁶ *See e.g.* Mass. Gen. Laws ch. 272 § 77 (current through 2009 Legis. Sess.) (outlawing cruelty by “owner, possessor, or person having the charge or custody of an animal”); Ohio Rev. Code Ann. § 959.131(C) (Lexis current through Nov. 10, 2009) (pertaining to animal “custodian or caretaker”); 18 Pa. Consol. Stat. Ann. § 5511(a)(2.1)(i)(A) (current through 2009 Reg. Sess.) (outlawing cruelty to dogs and cats “belonging to himself or otherwise”); Tenn. Code Ann. §§ 39-14-202(a)–(b) (Lexis current through 2009 Reg. Sess.) (referring to both animals in custody and other companion animals more generally).

fined and suffer invasive experiments in both laboratory and medical training contexts.²⁷

In addition to undermining fundamental protections for animals, legal gerrymandering creates inconsistencies. Animals with the same capacities, often within the same species or legal class, are treated differently. These inconsistencies undermine the form and function of animal laws, making it difficult for owners, users, and advocates of animals alike to understand the legal boundaries of human behaviors affecting animals.

Since legal gerrymandering alters the baseline upon which animal protections are premised, the problems it creates are not easily remedied. Interest divergence requires refocusing existing law on enforcing the interests of a protected, disadvantaged group.²⁸ For example, in the desegregation context, Bell argues against the backdrop of civil rights legislation that there is a need to refocus social and political institutions on the right to education.²⁹ As a result of legal gerrymandering to benefit humans, however, there is no baseline of rights for animals upon which to refocus. In order to address the damage of legal gerrymandering, it is necessary to reestablish fundamental legal protections for animals based on their inherent capacities.

Various scholars recognize that animal welfare laws do not adequately protect animals and propose frameworks to offer more meaningful protections.³⁰ Such scholarly efforts are unable to overcome significant problems, however. First, under rights- and interests-based approaches, a hierarchy problem arises: Due to the higher capacities of humans, their rights or interests in using animals will always trump those of animals, even with regard to avoiding suffering in some contexts. Second, existing scholarship is entrenched in a paralyzing debate about whether categorizing animals as “persons” instead of “property” will improve their legal protections.

Thus, current law and scholarship fail to provide mechanisms to protect animals sufficiently and to avoid legal inconsistencies in their treatment. In this Article, I propose a new legal paradigm for the regulation of human interaction with domestic animals based on the *principle* of equal protection that “like beings should be treated alike” to

²⁷ See e.g. Ohio Rev. Code Ann. § 959.131(D) (Lexis current through Nov. 10, 2009) (exempting companion animals used in scientific research from anti-cruelty provisions); Tenn. Code Ann. § 39-14-202(c) (Lexis current through 2009 Reg. Sess.) (same).

²⁸ Bell, *supra* n. 11, at 532–33.

²⁹ *Id.*

³⁰ See e.g. Carter Dillard et al., *Confronting Barriers to the Courtroom for Animal Advocates: Animal Advocacy and Causes of Action*, 13 *Animal L.* 87, 95 (2006) (animals as “living property”); Gary Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* 4 (Temp. U. Press 1996) (animals as legal persons); Tom Regan, *The Case for Animal Rights* 150–94 (3d ed., U. Cal. Press 2004) (animals have inherent value and universal rights); Peter Singer, *Animal Liberation* 8 (3d ed., HarperCollins 2002) (animals must have equal consideration of interests to avoid suffering); Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* 63–88, 179–238 (Perseus Bks. 2000) (animals as legal persons).

resolve these problems: the Equal Protection of Animals (EPA) paradigm.³¹ EPA combines the insights of vulnerability theorists with the equal protection principle and capability theory to create an approach that recognizes the equal claims of human and nonhuman animals to protections against suffering. To be clear, my paradigm does *not* invoke Equal Protection Clause arguments.³² Such arguments require that animals are recognized as persons, and I do not argue that the property status of animals should change.

EPA provides equal treatment of domestic animals with like capacities by recognizing that human and nonhuman animals have equal

³¹ My approach is premised on the concept of equality and fairness that has been embedded in Western culture for thousands of years—from the Biblical Golden Rule to the concepts of equality and fairness offered by Aristotle, Rousseau, and Locke. See Lawrence Schlam, *Equality in Culture and Law: An Introduction to the Origins and Evolution of the Equal Protection Principle*, 24 N. Ill. U. L. Rev. 425, 426 (2004).

³² Equal Protection Clause scholarship highlights the dangers of failing to consider directly the like interests of privileged and disadvantaged groups. As John Ely argued in his well-known interpretation of *Carolene Products* footnote four, malfunction in the political process occurs when “the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out” or those representing the privileged “are systematically disadvantaging some minority . . . [resulting in] a refusal to recognize commonalities of interest.” John Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harv. U. Press 1980) (citing *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 154 n. 4 (1938)). Judicial intervention may be necessary to promote equality when legislation “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,” or affects discrete and insular minorities for whom prejudice may “seriously [] curtail the operation of [] political processes” upon which they rely for protection. *Id.*

Unquestionably, legal gerrymandering excludes animals and their advocates from the political process. Animal capabilities and capacities to suffer are minimized by laws that favor agribusiness and pharmaceutical corporations that profit economically from animal use. See *e.g.* Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2006 & Supp. 2008); Humane Methods of Livestock Slaughter Act, 7 U.S.C. §§ 1901–1907 (2006 & Supp. 2008). Most animal welfare statutes do not contain a private right of action, preventing animal advocates from enforcing the limited protections that exist. See Cass R. Sunstein, *Standing for Animals*, 47 UCLA L. Rev. 1333 (2000). Further, human consumptive preferences and other actions indicate that humans refuse to recognize the interests they share with nonhuman animals, such as interests in not suffering and having basic needs fulfilled. As a result, the means of protecting animals—animal welfare and anti-cruelty statutes—and the ends of animal protection do not match.

If animals were treated as persons and not property under the law, one could argue that laws that seek to protect animals by allowing intensive confinement and invasive experimentation are not rational to achieve that purpose under the Equal Protection Clause. One could also argue that laws classifying animals based on their characteristics as nonhuman animals should be subject to strict scrutiny for the following reasons: Animals have a history of powerlessness and discrimination, they are subject to stereotypes about their cognitive abilities and their capacity to suffer is undervalued, and their species status is irrelevant to their capacity to suffer and is immutable. See Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 Geo. L.J. 89, 109–14 (discussing heightened scrutiny as applied to classifications). See also Ani B. Satz, *Would Rosa Parks Wear Fur? Toward a Nondiscrimination Approach to Animal Welfare*, 1 J. Animal L. & Ethics 139, 156–57 (discussing the underestimation of animals’ abilities and their capacity to suffer).

claims to realize certain basic capabilities. At a minimum, domestic animals must have the ability to intake necessary food and hydration, have necessary shelter and exercise and be able to engage in natural behaviors of movement, maintain bodily integrity (including avoiding pain inflicted on the body), and experience companionship. EPA requires that these basic capabilities of animals—human and nonhuman—are maximized within a given population,³³ whether it be a family, university, city, or state.³⁴ This entails a shift from the presumption that animals may be used for human purpose with some restrictions to a presumption against animal use absent justification. Animal use for human purpose is justified only if it also maximizes the enumerated basic capabilities for animals. This approach provides meaningful protections for animals and honors our moral obligations to them as vulnerable beings with the capacity to suffer. It also eschews legal inconsistencies by treating equally animals within legal and species categories as well as animals of different species with similar capacities.³⁵

In addition, EPA overcomes the hierarchy problem and moves past the debate over whether animals should be considered property. EPA seeks to maximize the basic capabilities of human and nonhuman animals within the same population. Thus, human claims to maximize basic capabilities cannot be valued above nonhuman animal claims for the same. Further, EPA directly considers animal capacities without regard to legal category, eliminating the need to recategorize animals as persons or as a special form of property to afford them greater protections. By focusing on sentient animals, or those with the capacity to suffer, the paradigm also avoids the practical difficulty of implementing theories that embrace a presumption against all animal use.

To develop EPA, Part II discusses as a threshold matter arguments for the moral status of animals and why laws must protect animals. Applying aspects of Martha Fineman's vulnerability thesis to nonhuman animals, it establishes a novel approach to the moral status

³³ But see Taimie L. Bryant, *Similarity or Difference As a Basis for Justice: Must Animals Be Like Humans to Be Legally Protected From Humans?*, 70 L. & Contemp. Probs. 207 (2007) (arguing for a nondiscrimination approach that does not entail the maximization of capabilities).

³⁴ My concept of populations is flexible, much like that of Michael Sandel's concept of community. Sandel argues that communities occur on "a continuum . . . tribes, neighborhoods, cities, universities, trade unions, national liberation movements and established nationalisms, and a wide variety of ethnic, religious, cultural, and linguistic communities with more or less clearly defined common identities and shared purposes." Michael J. Sandel, *Liberalism and the Limits of Justice* 31 (2d ed., Cambridge U. Press 1998). Sandel considers only humans as community members, however. *Id.*

³⁵ This approach does not, however, directly address animus or the cause of inequality. Rather, it speaks to a type of functional equality that recognizes interests in certain goods. This is a strategic move that I believe must be made in order to protect animals legally, as the vast amount of literature on animal suffering and four decades of extensive political activism have not prevented legal gerrymandering for human benefit and the exploitation of domestic animals.

of animals based on universal vulnerability to suffering. This approach has the advantage over other dominant approaches to grounding the moral status of animals because, combined with the equal protection framework developed later in the Article, it avoids the hierarchy problem of privileging human suffering over animal suffering. Thus, animal welfare laws should protect animals on two grounds: It is the stated purpose of the laws, *and* such protections follow from the moral status of animals as vulnerable subjects.

Parts III–V critique current animal welfare laws and proposed legal solutions. Part III argues that legal gerrymandering to benefit humans results in differential treatment of animals with the same capacities in three contexts: (1) the same legally-defined class, (2) the same species, and (3) across species. This Part discusses a particularly salient example of the effects of legal gerrymandering from the recent litigation over “humane” treatment of factory farm animals, where agricultural industry expert testimony about animal capacities is given greater weight than independent scientific opinions. Part IV discusses the failure of humane labeling and other compromises to afford equal treatment of morally relevant animal capacities. Part V examines existing proposals for law reform, ranging from changing the legal status of animals from property to persons or “living property,” to a nondiscrimination approach that recognizes the right of all animals to noninterference.

Working from the premise that animals are vulnerable subjects, Part VI presents a new paradigm for the legal regulation of domestic animals: Equal Protection of Animals. EPA combines the equal protection principle and capability theory to allow domestic animals equal claims to certain basic capabilities. EPA is a nondiscrimination approach that creates a presumption against use of animals who have the capacity to suffer. Prior to developing EPA, this Part discusses the capability approaches of Martha Nussbaum and Amartya Sen. Sen’s approach is ultimately extended to the nonhuman animal context and used to inform the proposed paradigm. This Part concludes by applying EPA to six basic capabilities: the ability to be fed, hydrated, sheltered, and “clothed” (maintain bodily integrity, including avoiding pain inflicted on the body); to exercise and to engage in natural behaviors; and to have companionship. Part VII addresses the implications of EPA for dominant social views and practices, the ability of the paradigm to address possible conflicts between human and nonhuman animal capabilities, and the changes to legal structures required by EPA.

II. MORAL OBLIGATIONS TO ANIMALS

The moral status of animals informs whether they should receive legal protections, and, if so, the nature of those protections. Moral status may be understood generally as the ability to be wronged by the

actions of others.³⁶ Laws such as the Animal Welfare Act (AWA)³⁷ and state anti-cruelty statutes operate from the premise that animals are part of our moral community, though they do not protect animals accordingly.

This Part underscores inconsistencies between the stated purpose of animal laws and the protections that they confer.³⁸ Section A highlights dominant approaches to conceptualizing human obligations to animals. Current animal protections fall short of realizing the obligations associated with any of these approaches. This Section indicates that a certain degree of moral status must be afforded to animals to overcome the hierarchy problem.³⁹ Section B provides a sketch of a novel approach to conceptualizing the moral status of animals based on the universal vulnerability of all sentient animals to suffer. This approach, combined with the equal protection principle and the capabilities framework developed in Part VI, addresses the hierarchy problem raised by theories appealing to the rights or interests of animals.

A. Current Approaches

There are a variety of ways to understand how animals may be wronged by human use and other human acts. It is helpful to view animals as possessing interests, rights, or vulnerabilities that entail something akin to negative and positive freedoms under Isaiah Berlin's classic account.⁴⁰ Animals may have a claim to freedom from interference as well as to affirmative obligations to assist them in achieving certain states.⁴¹ Affirmative obligations towards domestic animals stem from their inherent dependency on humans for survival.⁴²

The view that animals possess either interests or rights is premised on the notion that they have capacities that are morally relevant. In 1789, utilitarian Jeremy Bentham argued that: "The question is not, Can [animals] reason? nor, Can they talk? but, Can they suffer? Why should the law refuse its protection to any sensitive being?"⁴³ Contemporary utilitarian Peter Singer develops this view, arguing

³⁶ Dale Jamieson, *Morality's Progress: Essays on Humans, Other Animals, and the Rest of Nature* 122 (Oxford U. Press 2002).

³⁷ 7 U.S.C. §§ 2131–2159 (2006 & Supp. 2008).

³⁸ I want to emphasize that I am not speaking about the moral status of animals in detail; moral status is a controversial issue even with regard to humans, in the fetal context.

³⁹ I am grateful to Michael Perry for discussion on this point.

⁴⁰ Isaiah Berlin, *Four Essays on Liberty* 118–34 (Oxford U. Press 1969). Berlin, however, does not include animals under his account, as he does not believe them to be capable of "self-mastery" or "conceiving goals and policies . . . and realizing them." *Id.* at 131.

⁴¹ *Id.* at 131.

⁴² Similar obligations extend to humans who are episodically dependent—as infants or in old age—or permanently dependant through disability or illness.

⁴³ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* Ch. XVII, Section 1 (2d ed., 2d prtg., Gaunt, Inc. 2001).

that animals are sentient beings based on their capacity to suffer and thereby entitled to equal consideration of their interests.⁴⁴ 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.⁴⁵ The 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 these contexts. For example, human pleasure in consuming a ham sandwich cannot outweigh the profound suffering of a pig confined and immobilized in a gestation crate for the entirety of its life before slaughter.⁴⁶ To argue otherwise, Singer suggests, would be speciesist, or would unjustifiably privilege human suffering over that of other species.⁴⁷

Singer argues under a "properties view" that while all animals have the capacity to suffer, some animals have additional morally relevant interests because they possess higher capacities.⁴⁸ According to the properties view, animals with higher capacities or properties—such as the ability to see themselves existing over time, to be autonomous, to have conceptions of themselves, or to have relationships with others—possess interests that must be weighed within the utilitarian calculus.⁴⁹ As a result, not all sentient beings have lives of equal worth.⁵⁰

A common criticism of the properties view is that it results in the hierarchy problem because it privileges animals with the greatest capacities and may justify harmful human use of nonhuman animals.⁵¹ Although Singer argues that no animal's interest in avoiding suffering is to be displaced by a higher-order interest—such as an interest in eating a ham sandwich—humans have higher-order interests that may privilege their suffering over that of nonhuman animals. For example, the suffering of a human with cancer may be greater than that of a nonhuman animal with the same type of cancer, given the human's knowledge of the effect of cancer on long-term plans and com-

⁴⁴ Singer, *Animal Liberation*, *supra* n. 30, at 8.

⁴⁵ *Id.*

⁴⁶ *But see* Jan Narveson, *Animal Rights*, 7 *Can. J. Phil.* 161, 173 (1977) (arguing that it is possible that "the amount of pleasure which humans derive per pound of animal flesh exceeds the amount of discomfort and pain per pound which are inflicted on animals in the process, all things taken into account").

⁴⁷ Singer, *Animal Liberation*, *supra* n. 30, at 18–20.

⁴⁸ *Id.* at 20–21; *see also* Peter Singer, *Practical Ethics* 73–74, 110–11 (2d ed., Cambridge U. Press 1993). The "properties view" does not refer to the legal property status of animals.

⁴⁹ Singer, *Animal Liberation*, *supra* n. 30, at 20–21; *see also* Singer, *Practical Ethics*, *supra* n. 48, at 73–74, 110–11.

⁵⁰ Singer, *Animal Liberation*, *supra* n. 30, at 20–21; *see also* Singer, *Practical Ethics*, *supra* n. 48, at 73–74, 110–11.

⁵¹ Singer, *Animal Liberation*, *supra* n. 30, at 20–21; *see also* Singer, *Practical Ethics*, *supra* n. 48, at 73–74, 110–11.

plex familial relationships.⁵² If scientists must sacrifice 100 million mice to find a cure for a common cancer that affects 2.5 million people⁵³ (a proposition Singer believes to be untrue, given computer modeling and other alternatives to animal experimentation),⁵⁴ a balancing of interests could result in experimenting on and killing the mice.⁵⁵ Balancing interests may also deny nonhuman animals a right to continuous existence. Assuming some nonhuman animals do not have a concept of a future, if they could be raised without suffering and killed painlessly, they could be sacrificed for a greater human purpose.⁵⁶ Despite these possibilities, current uses of animals in factory farms and laboratories cannot be justified, according to Singer, because the suffering they cause outweighs inferior interests in experimentation and flesh food consumption.⁵⁷

Deontological or rights-based views are derived from the tradition of Immanuel Kant, a contemporary of Bentham, who believed that rights are possessed by, and duties are owed to, beings capable of mutual justification and reason-giving.⁵⁸ While nonhuman animals do not possess these capacities and therefore cannot themselves be rights-holders, Kant believed that humans have indirect duties to animals.⁵⁹ 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.”⁶⁰ 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.

Tom Regan offers a stronger rights-based view that animals’ inherent value situates them within our moral community and affords

⁵² Singer makes a similar point about differences in suffering. See Singer, *Animal Liberation*, *supra* n. 30, at 15–16.

⁵³ This is the approximate number of women living with breast cancer or in remission from breast cancer as of 2005. Natl. Cancer Inst., *Cancer Stat Fact Sheets: Cancer of the Breast*, <http://seer.cancer.gov/statfacts/html/breast.html> (last accessed Nov. 22, 2009).

⁵⁴ Singer, *Animal Liberation*, *supra* n. 30, at 25–94.

⁵⁵ This would depend on the amount that the humans suffer as compared to the amount that the mice suffer, given their different capacities.

⁵⁶ Singer, *Animal Liberation*, *supra* n. 30, at 17–20. Gary Francione argues, however, that sentience implies an interest in continued existence. See Gary L. Francione, *Equal Consideration and the Interest of Nonhuman Animals in Continued Existence: A Response to Professor Sunstein*, U. Chi. Leg. Forum 231, 239–40 (2006). He cites two grounds for this view: animals are aware of their bodies, and they will endure great pain to continue life. Animals caught in leg-hold traps, for example, will sacrifice their leg in order to free themselves.

⁵⁷ Singer, *Animal Liberation*, *supra* n. 30, at 25–158.

⁵⁸ See Immanuel Kant, *Grounding for the Metaphysics of Morals* 7–17 (James W. Ellington trans., 3d ed., Hackett Publ. Co. 1993).

⁵⁹ Immanuel Kant, *Lectures on Ethics* 239–41 (Louis Infield trans., Methuen & Co. Ltd 1979).

⁶⁰ *Id.* at 241.

them universal rights.⁶¹ Regan argues that humans have obligations of noninterference as well as affirmative duties to prevent harm to animals in most situations.⁶² Regan's framework requires vegetarianism for humans (since humans have alternative food sources) and the end of hunting, animal experimentation, and presumably most other uses of domestic animals except for companionship.⁶³ The problem with Regan's view is that conflicts will arise between humans and animals who possess inherent value and have competing rights claims. As with interests, rights may be weighed and protections for lower-order animals undermined.

Other arguments for including animals within our moral community are based on vulnerability. These approaches are not rooted in moral theory like utilitarianism or deontological approaches; rather, they provide independent moral arguments for the status of animals. One such view, which might be termed a holistic or ecological view, is that animals are part of our moral community because they are a constitutive part of our environment and contribute to its diversity.⁶⁴ Thus, animals within our ecosystem are vulnerable to disturbances and possess claims to noninterference regardless of sentience, or the ability to suffer.⁶⁵ 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. Applied to the domestic animal context, this view would prohibit almost all current uses of animals, with a possible exception for animals who are companions, so long as conflicts between the interests of domestic and wild animals could be minimized.⁶⁶

B. *Animals as Vulnerable Subjects*

I argue that animals are part of our moral community based on a different type of vulnerability approach. Human and nonhuman animals share universal vulnerability to suffering with respect to certain basic capabilities. In developing my position, I apply Martha

⁶¹ See Regan, *supra* n. 30, at 150–94.

⁶² *Id.*

⁶³ *Id.* at 150–94, 330–98.

⁶⁴ See e.g. Bryant, *Similarity or Difference*, *supra* n. 33, at 239–43; Taimie L. Bryant, *Animals Unmodified: Defining Animals/Defining Human Obligations to Animals*, 2006 U. Chi. Leg. Forum 137, 162–93 (2006).

⁶⁵ Bryant, *Similarity or Difference*, *supra* n. 33, at 239–43; Bryant, *Animals Unmodified*, *supra* n. 64, at 162–93.

⁶⁶ For example, domestic and feral cats are endangering wild birds. See e.g. Dominique Pontier, David Fouchet, Joel Bried & Narges Bahi-Jaber, *Limited Nest Site Availability Helps Seabirds to Survive Cat Predation on Islands*, 214 *Ecological Modelling* 316 (2008); Philip J. Baker, Amy J. Bentley, Rachel J. Ansell & Stephen Harris, *Impact of Predation by Domestic Cats *Felis catus* in an Urban Area*, 35 *Mammal Rev.* 302 (2005) (45–46% of some birds); Christopher A. Lepczyk, Angela G. Mertig & Jianguo Liu, *Landowners and Cat Predation Across Rural-to-Urban Landscapes*, 115 *Biological Conserv.* 191, 196 (2003) (“free ranging domestic cats depredated a minimum of 12.5% of the known breeding bird species”).

Fineman's concepts of universal vulnerability and the vulnerable subject to nonhuman animals.⁶⁷

Fineman understands vulnerability as the possibility of becoming dependent.⁶⁸ The vulnerable subject may have episodic or permanent dependency on others.⁶⁹ The potential for dependency is universal, and vulnerable subjects are interdependent in this way.⁷⁰ Vulnerability is also constant.⁷¹ Individuals may be vulnerable as a result of their own biology (for example, sickness) or environmental forces (such as natural disasters or war).⁷² Individuals who are vulnerable may avoid dependency through biological resilience, social supports, or, arguably, serendipity. When vulnerability is realized, individuals become dependent. Fineman argues that current legal structures privilege individuals whose vulnerability is not realized.⁷³

Social and legal institutions are also vulnerable to the extent that they may be controlled by the interests of individuals who are privileged.⁷⁴ As a result, substantive inequalities may be embedded within the institutions that seek to address vulnerability.⁷⁵ Fineman argues that the state must restructure its social institutions to "reflect[] . . . an affirmative obligation not to privilege any group . . . over others . . ."⁷⁶

Fineman's concepts are easily extended to domestic nonhuman animals. Domestic animals are vulnerable due to both their biology (limited capacities compared to most humans) and their environment (social and legal constructs that support their use for human benefit).⁷⁷ Further, domestic animals and humans are interdependent. Animals are dependent on humans to provide them care and shelter, and humans depend on animals in a variety of contexts including companionship, protection, and service. Unquestionably, our legal and social structures favor human capabilities over those of domestic animals and are susceptible to further control by human interests. As a result, domestic animals are vulnerable to severe deprivations of basic capabilities, like the ability to receive sufficient food and hydration, to en-

⁶⁷ See Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *Yale J.L. & Feminism* 1 (2008). Fineman's theory eschews formal equality or sameness treatment. I do not apply her theory in this regard but rather seek to use her concepts of vulnerability and the vulnerable subject to argue for the moral status of nonhuman animals.

⁶⁸ *Id.* at 9–10.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 8.

⁷² *Id.* at 9.

⁷³ Fineman, *The Vulnerable Subject*, *supra* n. 67, at 13–14.

⁷⁴ *Id.* at 12–13.

⁷⁵ *Id.* at 18–19.

⁷⁶ *Id.* at 21.

⁷⁷ Our society is, of course, structured to support human capacities rather than those of animals. In other environments, nonhuman animals may have greater capacities for survival than humans.

gage in natural behaviors of movement, and to maintain bodily integrity.

Unlike most human animals, however, the dependency of nonhuman domestic animals is permanent. Throughout their lives, domestic animals rely on humans to provide them nourishment, shelter, and other care. The permanent dependency of domestic animals is created and controlled by humans, rendering them uniquely vulnerable to exploitation. Domestic nonhuman animals are, for this reason, perhaps the most vulnerable of all sentient beings.

While a theory of animals as vulnerable subjects warrants development elsewhere, for present purposes it is sufficient to say that my argument for the moral status of animals is based on a number of premises that combine vulnerability concepts with long-standing views about animal capacities discussed in Section A. 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 responding to universal vulnerability affecting certain basic capabilities. As I argue in Part VI, these morally relevant animal capacities—human and nonhuman—must be maximized within a given population, such as a home, university, town, or other community.⁷⁸ This approach avoids the hierarchy problem experienced by utilitarian and deontological frameworks. Before developing Equal Protection of Animals, however, it is necessary to discuss the scope of current legal protections and existing proposals for furthering animal protection.

III. LEGAL GERRYMANDERING FOR HUMAN INTEREST

Animals are property under the law. As such, they are gifted, traded, sold, transported, stored, abandoned, and discarded.⁷⁹ They are valued at market price. They are owned by individuals as well as government and corporate entities.

Legal protections for animals are based primarily on their value to their owners. Animals are scientifically useful organisms and provid-

⁷⁸ See Sandel, *supra* n. 34 and accompanying text discussing the author's concept of "population."

⁷⁹ The situation is different for wild animals, who are essentially wards of the state. See *e.g.* Ohio Rev. Code Ann. § 1531.02 (Lexis current through Nov. 10, 2009) ("The ownership of and the title to all wild animals . . . is in the state, which holds such title in trust for the benefit of all the people."); see also Idaho Code Ann. § 36-103 (Lexis current through 2009 Reg. Sess.); Ind. Code § 14-17-4-6 (current through 2009 1st Reg. & Spec. Sess.); S.D. Codified Laws § 41-11-1 (current through 2009 84th Reg. Sess. 2004); Tex. Parks & Wildlife Code Ann. § 1.011(a) (current through 2009 Legis. Sess.).

ers of service, companionship, entertainment, and flesh food. Some prohibitions on uses of animals address the potential of animal bodies to affect human health negatively, as producers of dog bites, zoonoses,⁸⁰ tainted meat, etcetera. Unlike most other forms of property, however, animals have protections by virtue of being living organisms. For example, companion animals must be provided with food and hydration,⁸¹ laboratory animals with food and space to stand and turn around,⁸² and factory farm animals with blows or electric stunning to render them unconscious prior to slaughter.⁸³ The animal property holder thus determines the animal's use, operating under weak constraints imposed by animal welfare and anti-cruelty laws, and, in some cases, public health laws and regulations.

Animals may be the primary or secondary subjects of laws. Animals are the primary subjects of laws that purport to prevent human cruelty as well as those with the stated purpose of regulating human use of animals for animal welfare and human safety. Every state has statutes that criminalize the abuse and neglect of companion animals.⁸⁴ Federal statutes that address animal welfare pertain to animal dealing,⁸⁵ confinement of laboratory animals,⁸⁶ slaughter,⁸⁷ and, most recently, animal fighting.⁸⁸ Human uses of animals are also directly regulated to guard against threats to human health. The most notable example is the prohibition of the slaughter of diseased cattle for flesh food.⁸⁹

⁸⁰ "Zoonoses" are infectious diseases transmitted from nonhuman animals to humans. *See e.g.* Ctrs. for Disease Control and Prevention, Natl. Ctr. for Zoonotic, Vector-Borne, and Enteric Diseases, <http://www.cdc.gov/nczved> (last accessed Nov. 22, 2009) ("Approximately 75% of recently emerging infectious diseases affecting humans are diseases of animal origin; approximately 60% of all human pathogens are zoonotic."). Diseases transmitted from humans to nonhuman animals are often termed "reverse zoonoses." *See e.g.* Ctrs. for Disease Control and Prevention, *Primate Malaria* 8, http://www.dpd.cdc.gov/DPDx/HTML/PDF_Files/Primate%20Malarias%20Chapters/chap_01.pdf (last accessed Nov. 22, 2009).

⁸¹ *See e.g.* Ga. Code Ann. § 16-12-4(a)(3) (current through 2009 Reg. Sess.).

⁸² *See e.g.* 9 C.F.R. § 3.6(a)(2)(xi) (2008) (requirements for dogs and cats).

⁸³ 7 U.S.C. § 1902(a) (2006 & Supp. 2008).

⁸⁴ *See Animal Protection Laws of the United States of America* (Stephan K. Otto ed., 2d ed., Animal Leg. Def. Fund 2005). *See also* Ga. Code Ann. § 16-12-4 (current through 2009); Iowa Code § 717B.2 (current through 2008); Mich. Comp. Laws § 750.50 (current through 2009); Mo. Rev. Stat. § 578.012 (current through 2009 1st Reg. Sess.); Wis. Stat. § 951.02 (current through 2009).

⁸⁵ Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2006 & Supp. 2008).

⁸⁶ *Id.*

⁸⁷ Humane Methods of Livestock Slaughter Act, 7 U.S.C. §§ 1901–1907 (2006 & Supp. 2008).

⁸⁸ Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, §§ 1–3, 121 Stat. 88, 89 (2007).

⁸⁹ *See* Andrew Martin, *U.S. Moves to Prohibit Beef from Sick or Injured Cows*, 157 N.Y. Times C3 (May 21, 2008) (available at <http://www.nytimes.com/2008/05/21/business/21beef.html> (last accessed Nov. 22, 2009)). Prior to 2008, cattle too sick to stand, "downers," could be slaughtered for food after veterinary inspection. *Id.* The change occurred after 143 million pounds of beef were recalled from the Hallmark/Westland

Animals are also the secondary subjects of laws. In other words, laws with humans as primary subjects may affect animals. For example, animals may be used as disability accommodations under the Americans with Disabilities Act of 1990 (ADA),⁹⁰ the Fair Housing Act,⁹¹ and parallel state disability and housing statutes. Animals may also be police or military property.⁹²

A consequence of the property status of animals is that they do not have standing to sue.⁹³ Animal advocates have limited ability to bring suit on behalf of animals, and many federal animal cases are dismissed for lack of standing.⁹⁴ While standing may be statutorily granted, the Animal Welfare Act (AWA) and the Humane Methods of Livestock Slaughter Act (HMLSA) do not contain a private right of action.⁹⁵ Further, animal advocates experience difficulty demonstrating injury for abuses to animals they do not own.⁹⁶ Attempting to meet the constitutional requirements for standing of a concrete and particularized injury, advocates advance with limited success theories of economic,⁹⁷ aesthetic,⁹⁸ and informational harm.⁹⁹ Each of these arguments for standing is made from the viewpoint of promoting a human interest, even though animal advocates employ them to further animal protections.

Meat Co. in California, following the flesh of diseased cattle entering the human food chain. *Id.* Downed farm animals other than cattle may still be slaughtered after veterinary inspection. 21 U.S.C. § 603(a) (2006 & Supp. 2007).

⁹⁰ 42 U.S.C. §§ 12101–12213 (2006 & Supp. 2007).

⁹¹ 42 U.S.C. §§ 3601–3607 (2006 & Supp. 2007) (as amended 1988).

⁹² See e.g. Craig Ian Scheiner, *Statutes with Four Legs to Stand On?: An Examination of “Cruelty to Police Dog” Laws*, 5 *Animal L.* 177, 203–04 (1999) (discussing police dogs as property); 10 U.S.C. § 2583 (2006 & Supp. 2008) (categorizing spent military dogs as “obsolete, surplus, or unclaimed property”); Cal. Civ. Code Ann. §§ 3342(b)–(d) (Lexis current through 2009–2010 Reg. Sess.) (discussing government ownership and use of dogs for military and police work).

⁹³ Sunstein, *Standing for Animals*, *supra* n. 32, at 1334, 1359.

⁹⁴ Dillard et al., *supra* n. 30.

⁹⁵ There is also no private right of action under the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1423h (2006 & Supp. 2007).

⁹⁶ See e.g. *Animal Leg. Def. Fund v. Epsy*, 23 F.3d 496 (D.C. Cir. 1994); *Animal Lovers Vol. Assn. v. Weinberger*, 756 F.2d 937 (9th Cir. 1985). For a private party to sue under these acts in federal court, the case must be brought by a plaintiff who is injured (or is in imminent danger of injury) due to the defendant’s conduct, and the court must be in a position to redress the injury. *Bennett v. Spear*, 520 U.S. 154, 167 (1997).

⁹⁷ Economic harm might arise if the government does not enforce animal protection laws, and animal exploitation creates a market advantage. Sunstein, *Standing for Animals*, *supra* n. 32, at 1346–47. Consider cosmetic testing, where testing on animals may allow for a broader product line.

⁹⁸ Aesthetic injury occurs when humans are unable to observe animals in zoos, sanctuaries, or in the wild. *Id.* at 1347–52.

⁹⁹ Plaintiffs have standing to bring a claim for denial of a right to obtain information about the treatment of animals under the Administrative Procedure Act. *Id.* at 1344. This includes the ability to obtain information about animals in certain facilities when the injury is within the scope of the relevant statutory protections and is not too generalized. *Id.* at 1343–45.

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. This results in legal gerrymandering, which both undermines fundamental protections for animals and creates legal inconsistencies. The following sections address legal gerrymandering in the development and reinterpretation of laws. Human interest in using animals is perceived as so strong in some instances that it tips the scale to resolve competing legal rights of humans.

A. *Undermining Fundamental Protections*

The interest-convergence that gives rise to legal gerrymandering arises in three contexts. First, it occurs in the development of laws pertaining to animals. Second, it results when existing laws are reinterpreted to accommodate new or to maintain existing human uses of animals. Third, it occurs when human interest in using animals shifts the balance to resolve conflicts between other human legal rights. While animals receive some protection in the last situation, they are considered a means to an end rather than as beings who possess legally relevant capacities. Each of the three contexts results in legal gerrymandering because basic protections for animals based on their capabilities are undermined.

1. *Privileging Human over Animal Interests in the Development of Laws Pertaining to Animals*

Even a superficial examination of laws affecting animals reveals that, despite their terminology, they largely protect human rather than animal interests. For example, the AWA addresses the confinement of laboratory animals¹⁰⁰ with requirements only sufficient to sustain animal life to facilitate research.¹⁰¹ In addition, the AWA regulates animal dealing to protect owners of companion animals against theft of their property.¹⁰² The “Findings and Declaration of Policy” of the HMLSA addresses the conditions of slaughterhouse workers, improved flesh foods, economy of production, and other benefits to “producers, processors, and consumers.”¹⁰³ The prevention of “needless suffering”¹⁰⁴ is the sole reference to animal welfare in the statute, and this requires only that animals are “rendered insensible”

¹⁰⁰ 7 U.S.C. §§ 2131, 2143(a)(1)–(2), (4) (2006 & Supp. 2008).

¹⁰¹ *Id.* at § 2143(a)(2)(A) (“The standards . . . shall include minimum requirements—for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species . . .”). When humane treatment conflicts with scientific or other human interests, even these minimum standards are sacrificed. *Id.* at § 2143(a)(3)(D) (“[N]o animal is used in more than one major operative experiment from which it is allowed to recover except in cases of . . . scientific necessity . . . or other special circumstances . . .”).

¹⁰² *Id.* at § 2131(3).

¹⁰³ *Id.* at § 1901.

¹⁰⁴ *Id.*

prior to killing.¹⁰⁵ Greater balance between human and animal interests is seen in state anti-cruelty laws pertaining to companion animals, though the laws often support a desire to break the chain of violence leading to human harm.¹⁰⁶ Prosecuting crimes against animals creates a record of physical violence that identifies individuals posing a risk to humans and may deter violent individuals from committing future crimes.¹⁰⁷

Recent developments in animal law are clearly prompted by human need and are therefore also vulnerable to changing human uses of animals. For example, federal quality standards for pet food¹⁰⁸ were not proposed until contaminated food killed beloved companion animals, entered the human food chain, and threatened a \$16.9 billion industry.¹⁰⁹ Congress passed a law allowing pets in shelters during federal emergencies after people were killed during Hurricane Katrina when they refused to evacuate their homes without their companion animals.¹¹⁰ Similarly, some shelters for human victims of domestic violence allow companion animals because studies indicate that one-quarter to one-third of abused individuals are reluctant to leave their

¹⁰⁵ *Id.* at § 1902.

¹⁰⁶ See generally Natl. Conf. of St. Legis., Rita Thaemert, *Violence at Home: Pets and People*, <http://www.ncsl.org/programs/pubs/lbriefs/2001/legis918.htm> (Mar. 2001) (last accessed July 26, 2009) (discussing state anti-cruelty statutes as a means to address human violence and the desire of law enforcement to strengthen such laws based on evidence that “early intervention for animal abusers is more likely to reduce adult crime than later criminal penalties[.]”) (website no longer available); Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 *Animal L.* 69, 70 (1999) (noting that in light of studies linking human and animal abuse, 50% of states have strengthened anti-cruelty statutes making extreme animal cruelty a felony). See also *People v. Garcia*, 777 N.Y.S.2d 846, 849 (N.Y. App. Div. 1st Dep’t, Mar. 28, 2006) (construing “Buster’s Law,” N.Y. Agric. & Mkts. L. § 353-a (McKinney current through Oct. 28, 2009) and quoting its legislative history: “[T]he connection between animal abusers and violence towards humans shows that virtually every serial killer had a history of abusing animals before turning their attention to people.” (internal citations omitted)); *People v. Dyer*, 115 Cal. Rptr. 2d 527, 532–33 (Cal. App. 2d Dist. 2002) (construing Cal. Penal Code Ann. § 597(g) (Lexis current through 2009–2010 Reg. Sess.) and discussing its legislative history, which supports a desire to prevent human violence); Or. Rev. Stat. § 686.442 (current through 2007 Reg. Sess.) (“[Because] [t]he Legislative Assembly finds that there is a direct link between the problems of animal abuse and human abuse . . . it is necessary and in the public interest to require mandatory reporting of aggravated animal abuse by veterinarians.”).

¹⁰⁷ Animal Leg. Def. Fund, *No Boundaries for Abusers: The Link Between Cruelty to Animals and Violence Toward Humans*, <http://www.aldf.org/article.php?id=268> (last accessed Nov. 22, 2009).

¹⁰⁸ See Human and Pet Food Safety Act of 2007, Sen. 1274, H.R. 2108, 110th Cong. (2007).

¹⁰⁹ Am. Pet Prods. Assn., *Industry Statistics and Trends*, http://www.americanpetproducts.org/press_industrytrends.asp (last accessed Nov. 22, 2009) (citing APPA’s 2007/2008 National Pet Owners Survey).

¹¹⁰ See Pets Evacuation and Transportation Standards (PETS) Act of 2006, Pub. L. No. 109–308, 120 Stat. 1725 (Oct. 6, 2006) (amending the Roberts T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5207 (1988)).

animal companions behind.¹¹¹ 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.¹¹² The Animal Fighting Prohibition Enforcement Act¹¹³ stresses the risk to public safety posed by animal fighting operations (especially dog fighting, where animals are bred and trained for aggression and violence), the propagation of crime, and the culture of violence that surrounds the macabre sport.¹¹⁴

Even when animals are protected by law, many animal welfare laws contain exceptions for particular human uses of animals or deny protections to certain species altogether. Farm animals have no federal protections pertaining to their confinement or rearing because factory farms are the most efficient, and arguably the only, means to produce enough flesh foods to meet existing consumer demand.¹¹⁵ The AWA and anti-cruelty statutes in most states exclude farm animals.¹¹⁶ Factory farms could not comply with the minimum cage requirements of the regulations supporting the AWA, namely, room for each animal to stand up, turn around, sit, lie down, and walk normally.¹¹⁷ Similarly, the HMLSA contains exemptions for religious methods of slaughter, regardless of the additional suffering it may cause the animal.¹¹⁸

Companion animals, the most protected of all domestic animals, do not fare better when their interests clash with human interests. For example, the U.S. Supreme Court ignored animal cruelty laws to strike down city ordinances targeting the religious sacrifice of animals by the Santeria and the Church of Lukumi Babalau Aye.¹¹⁹ No restric-

¹¹¹ See e.g. Andrea Hsu, *Groups Move to Protect Women and Their Pets*, <http://www.npr.org/templates/story/story.php?storyId=10119810> (last accessed Nov. 22, 2009) (discussing animal safe havens).

¹¹² Haley's Act, H.R. 1947, 109th Cong. (Apr. 19, 2007).

¹¹³ Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88, 89 (May 3, 2007).

¹¹⁴ *Id.*; see also H.R. Jud. Comm., *Animal Fighting Prohibition Enforcement Act of 2007: Hearing Before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security*, 110th Cong. 45-55 (Feb. 6, 2007) (statement of Wayne Pacelle, Pres. & CEO of Humane Socy. of the U.S.).

¹¹⁵ Singer, *Animal Liberation*, *supra* n. 30, at 160.

¹¹⁶ See David Wolfson & Marianne Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, in *Animal Rights: Current Debates and New Directions* 212, 228 n. 20 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (discussing that farm animals are excluded to some extent in twenty-nine states); *but see* 7 U.S.C. §§ 2131-2159; N.Y. Agric. & Mkts. L. §§ 332-379, at §§ 350, 353 (McKinney current through Oct. 28, 2009) (for purposes of the anti-cruelty laws, "animal . . . includes every living creature except a human being"; exceptions exist for laboratory but not farm animals).

¹¹⁷ See e.g. 9 C.F.R. § 3.6(2)(xi) (2008) (requirements for dogs and cats); see *infra* nn. 198-207 and accompanying text discussing the intensive confinement of farm animals.

¹¹⁸ 7 U.S.C. §§ 1902(b), 1906 (2006 & Supp. 2008).

¹¹⁹ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). While legally this decision is sound as the ordinances targeted the religious

tions were imposed on the method of sacrifice. Working animals such as police, war, and drug- and explosive-detecting dogs have limited protections from their handlers under state anti-cruelty statutes.¹²⁰ They are routinely subjected to abusive negative reinforcement training practices such as shocking and prolonged muzzling, worked to the point of exhaustion and bodily degradation, and placed in life-threatening situations.¹²¹ These dogs are government property and may be categorized and treated as equipment.¹²² Legal protections for animals are weakened further and legal inconsistencies are exacerbated when animal laws are reinterpreted to support either emerging human uses of animals or existing uses threatened by law reform efforts.

2. *Reinterpreting Laws in Light of Human Uses of Animals*

Animal protection laws are frequently reinterpreted to accommodate new human uses of animals or to maintain existing ones. These constructions exacerbate legal gerrymandering to benefit humans, which disrupts fundamental protections for animals based on their natural capacities and further weakens animal protections. For some animals, prohibitions against mutilation and intensive confinement are placed in jeopardy.

For example, when state anti-cruelty laws conflict with human interest in efficient flesh food production, the protections they contain are minimized.¹²³ In one recent case, the Superior Court of New Jersey baldly and tautologically declared: "Routine husbandry practices are humane [under state anti-cruelty law] because of who teaches them

practices of the Santeria, it provides an important example of human interests creating an exception to the protection of the most basic interests possessed by nonhuman animals, namely, in not suffering and continued existence. Interestingly, the courts have imposed greater restrictions on Native Americans possessing bald eagle feathers for religious ceremonies. *See e.g. U.S. v. Hugs*, 109 F.3d 1375, 1378 (9th Cir. 1997) (limiting access to eagle feathers for religious purposes to members of federally recognized tribes); *see also* Kevin J. Worthen, *Eagle Feathers and Equality: Lessons on Religious Exemptions from the Native American Experience*, 76 U. Colo. L. Rev. 989, 992 (1995) (same). *But see U.S. v. Hardman*, 297 F.3d 1116, 1135 (10th Cir. 2002) (Despite a compelling interest to preserve the eagle population, the permit scheme enabling only members of federally recognized tribes to possess eagle feathers may not be the least restrictive means of achieving that interest.).

¹²⁰ *See e.g.* Craig Scheiner, "Cruelty to Police Dog" *Laws Update*, 7 *Animal L.* 141, 144 (2001) (discussing how current protections do not protect police dogs from being sacrificed as law enforcement tools).

¹²¹ *See e.g.* Dan Kane, *Video of Trooper Kicking Dog Released*, <http://www.newsobserver.com/front/story/1053732.html> (Apr. 29, 2008) (website no longer available) (last accessed Sept. 10, 2009) (dogs suspended and kicked, stunned with Tasers, swung by leashes, and hit with plastic bottles filled with rocks as part of training).

¹²² *See e.g. U.S. v. Garcia*, 909 F. Supp. 334, 339 (D. Md. 1995) (construing 10 U.S.C. § 372 (2006 & Supp. 2008) to include military dogs as equipment). Retired war dogs are routinely killed after their service, if their former handlers or other suitable parties do not wish to adopt them. *Promotion and Adoption of Military Working Dogs*, Pub. L. No. 106-446, 114 Stat. 1932 (2000) (codified at 10 U.S.C. § 2583) (2006 & Supp. 2008).

¹²³ *See supra* n. 116 and accompanying text discussing the exclusion of farm animals from state anti-cruelty statutes.

and who may perform them.”¹²⁴ The court reasoned that close confinement (resulting in extreme stress, neurotic behaviors, and insanity)¹²⁵ as well as de-beaking, toe trimming, and castration without anesthesia are warranted as a practical matter: “[I]t would be essentially impossible, and certainly impractical . . . to list every possible routine husbandry practice taught . . . and then create specific humane standards for every practice.”¹²⁶ While the New Jersey Supreme Court later overturned the holding that agricultural institutions (rather than the State Board of Agriculture) may determine whether their own practices are humane,¹²⁷ the court indicated that all but one of the practices at issue (tail docking)¹²⁸ could be humanely performed.¹²⁹

Similar legal gerrymandering occurred—this time by Congress—when the U.S. Department of Agriculture’s (USDA) Animal and Plant Health Inspection Service (APHIS) proposed regulations to protect rodents under the AWA, which covers “laboratory” and “warm-blooded” animals.¹³⁰ APHIS’ interpretation of the AWA was strongly contested by the National Association of Biomedical Research and other lobbies. A statutory amendment was ultimately passed *excluding* rodents and birds from the definitions of “laboratory” and “warm-blooded” animals, creating a legal fiction.¹³¹

While this Article focuses on domestic animals, the wildlife context provides a particularly poignant example of the ease with which laws may be reinterpreted to support human uses of animals. The Endangered Species Act of 1973 (ESA)¹³² protects wildlife whose species

¹²⁴ *N.J. Socy. for the Prevention of Cruelty to Animals v. N.J. Dept. of Agric.*, 2007 WL 486764 at *14 (N.J. Super. Ct. App. Div. Feb. 16, 2007). These individuals—veterinary and other agricultural school professors and their farming students—need only perform the practices as taught to engage in humane behavior. *Id.* This is an exception to the legal standard that routine practices or customs may be challenged in most contexts. See *The T.J. Hooper v. Northern Barge Corp.*, 60 F.2d 737, 740 (2d Cir. 1932) (treating custom as probative but not dispositive); *Restatement (Second) of Torts*, § 295A (1965) (“In determining whether conduct is negligent, the customs of the community . . . are factors to be taken into account, but are not controlling where a reasonable man [or woman] would not follow them.”). Exceptions are made for the human medical and some other professions. See e.g. *Jones v. Chidester*, 610 A.2d 964, 969 (Pa. 1992) (holding two accepted “schools of thought” are a complete defense to medical malpractice).

¹²⁵ See *infra* nn. 200–01 and accompanying text.

¹²⁶ *N.J. Socy. for the Prevention of Cruelty to Animals*, 2007 WL 486764 at *14.

¹²⁷ *N.J. Socy. for the Prevention of Cruelty to Animals v. N.J. Dept. of Agric.*, 955 A.2d 886, 889, 905–07 (N.J. 2008).

¹²⁸ Tail docking involves the removal of the end of the tail of dairy cows. The court disapproved of this as “humane” because it had “no [industry or other] support at all.” *Id.* at 908–09.

¹²⁹ *Id.* at 908–09. The Court focused on the abuse of discretion by the State Board of Agriculture in subdelegating authority to institutions teaching agricultural science, rather than assessing the cruelty of routine practices. *Id.* at 889.

¹³⁰ 64 Fed. Reg. 4356–67 (Jan. 28, 1999).

¹³¹ Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, §§ 10301, 10304, 116 Stat. 134, 491–92 (2002).

¹³² Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1534 (2006 & Supp. 2008).

are endangered (“in danger of extinction”)¹³³ or threatened (“likely to become endangered”).¹³⁴ The ESA is the product of interest-convergence in the sense that humans benefit from wild animals who inform scientific inquiry and are aesthetically appreciated.¹³⁵

Animals may not be protected under the ESA when doing so conflicts with human interest, however. In Alaska, gray wolves, who are protected as either endangered or threatened in other areas of the country,¹³⁶ are unprotected and subject to aerial shooting.¹³⁷ Wolves kill caribou and moose, thereby limiting human hunting of them.¹³⁸ The stated goal of the air raids is to “reduce wolf populations in each of the specified areas by as much as 80 percent annually, leaving a minimum number of wolves to ensure they are not wiped out.”¹³⁹ Remarkably, Alaska overrode two public referenda banning aerial hunting by passing a law that “allows the state to issue permits to qualified pilots and gunners in areas of ‘intensive management’ . . . important for human consumption.”¹⁴⁰

Occasionally, evolving human interest in using animals overlaps with animal well-being. The strongest example is the common law affecting companion animals. Historically, recovery for harm to companion animals was limited to the animal’s market worth or other pecuniary value, which for a shelter animal may be negligible.¹⁴¹ As the number of companion animals increases (71.1 million living within 63% of U.S. households)¹⁴² and human reliance on them grows, the common law is evolving to recognize greater recovery for owners who are injured by loss of companionship due to negligence or intentional

¹³³ *Id.* at § 1532(6).

¹³⁴ *Id.* at § 1532(20).

¹³⁵ *Id.* at § 1531(a)(3) (“[T]hese [protected] species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.”).

¹³⁶ Gray wolves are protected in the Western Great Lake region and in Wyoming. See U.S. Fish & Wildlife Serv., *Western Gray Wolf*, <http://www.fws.gov/mountain-prairie/species/mammals/wolf>; *select* Final Rule, Western Great Lakes (last accessed Nov. 22, 2009).

¹³⁷ Alaska Dept. of Fish & Game, *Alaska’s Non-Endangered Species*, <http://www.adfg.state.ak.us/special/esa/non-endangered.php> (last updated Aug. 11, 2008) (last accessed Nov. 22, 2009); Tim Mowry, *Wolf Control Effort Fails to Hit Target*, <http://friendsofanimals.org/news/2006/may/wolf-control-effort-.html> (May 3, 2006) (last accessed Nov. 22, 2009) (discussing aerial shooting).

¹³⁸ Mowry, *supra* n. 137.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See e.g. *Columbus R.R. Co. v. Woolfolk*, 58 S.E. 152, 154 (Ga. 1907) (“The value of a dog may be proved, as that of any other property, by evidence that he was of a particular breed, and had certain qualities, and by witnesses who knew the market value of such animal”); *Heiligmann v. Rose*, 16 S.W. 931, 932 (Tex. 1891) (“It may be either a market value, if the dog has any, or some special or pecuniary value to the owner, that may be ascertained by reference to the usefulness and services of the dog.”); *Melton v. South Shore U-Drive, Inc.*, 303 N.Y.S.2d 751, 752 (N.Y. App. Div. 1969) (\$7,000 award for loss of pedigree Collie show dog).

¹⁴² Am. Pet Prods. Assn., *Industry Statistics and Trends*, *supra* n. 109.

tort.¹⁴³ In some jurisdictions, recovery for emotional distress is allowed in veterinary malpractice actions,¹⁴⁴ and malicious injury to a pet may be considered when assessing emotional damages arising from intentional torts.¹⁴⁵ Some companion animal guardians may even be eligible for “petimony,” that is, money paid upon divorce by the non-custodial guardian to the custodial guardian for the care of a pet.¹⁴⁶

While these developments for companion animals may deter future veterinary or other harm, dangers exist. As the factory farm, laboratory, and wildlife contexts demonstrate, animals are rendered hyper-vulnerable to changing human desires, and their most fundamental protections may be undermined. The same concerns apply to the third area of legal gerrymandering, which occurs when human interest in using animals (and providing them limited protections to further such use) tips the balance to resolve conflicts between competing human legal rights.

3. *Using Human Interest in Animals to Resolve Legal Conflict*

Perhaps the best example of using animals to resolve legal conflict among humans arises in the housing context. Animals may be involved in housing disputes when humans are the primary subjects of the relevant laws. In this context, human use of animals may be privileged over other property claims, with little or no regard for animal welfare. A case from California, *Auburn Woods v. Fair Employment and Housing Commission*,¹⁴⁷ provides a salient example. *Auburn Woods* pit the no-dogs policy within the covenants, conditions, and restrictions (CCRs) of a condominium association against the rights of a disabled couple to keep in their residence Pooky, a small terrier, as an accommodation for emotional support.¹⁴⁸ Ed Elebiari, disabled from a car accident, was hydrocephalic and suffered from bipolar, obsessive-compulsive, and seizure disorders.¹⁴⁹ His wife, Jayne, experienced major depressive episodes involving insomnia and acts of self-mutilation.¹⁵⁰ Allegedly, Pooky enabled the couple to leave their home and Jayne to maintain employment.¹⁵¹ After the Elebiaris were forced to place

¹⁴³ Huss, *supra* n. 9, at 526–27.

¹⁴⁴ See e.g. *McAdams v. Faulk*, 2002 Ark. App. LEXIS 258 at **13, 14 (Ark. App. 4th Div. 2002), *overruled in part on other grounds*, *Hamilton v. Allen*, 267 S.W.3d 627 (Ark. App. 1st & 2d Div. 2007); *Johnson v. Wander*, 592 So. 2d 1225, 1226 (Fla. 3d Dist. App. 1992), *criticized*, *Kennedy v. Byas*, 867 So. 2d 1195 (Fla. 1st Dist. App. 2004).

¹⁴⁵ See e.g. *Womack v. Von Rardon*, 135 P.3d 542, 546 (Wash. 2006); Tenn. Code Ann. §§ 44-17-403(a)(1) (Lexis current through 2009 Reg. Sess.) (noneconomic damages up to \$5,000 for a domesticated dog or cat intentionally or negligently killed on owner’s property or while under owner’s control and supervision).

¹⁴⁶ See e.g. Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets*, 20 J. Am. Acad. Matrimonial L. 1, 8 n. 44 (2006).

¹⁴⁷ 18 Cal. Rptr. 3d 669 (Cal. App. 2004).

¹⁴⁸ *Id.* at 671–72.

¹⁴⁹ *Id.* at 673.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

Pooky in the care of a friend, Ed became home-bound, Jayne abandoned her job, and their marital relationship deteriorated.¹⁵²

The couple did not dispute knowledge of the no-dogs policy and ultimately moved to another state.¹⁵³ Nevertheless, they filed suit under the California Fair Employment and Housing Act (CFEHA), arguing that Pooky promoted their psychological well-being and that the condominium association, Auburn Woods, should pay damages for failing to accommodate them.¹⁵⁴ Auburn Woods argued that the Elebiaris were reasonably accommodated under the terms of the CCRs, which allowed residents to house other companion animals, such as rabbits or cats, for emotional support.¹⁵⁵ While the lower court found this argument compelling, the appellate court determined alternative animal companions to be ersatz and held that the Elebiaris were entitled to compensation for emotional distress.¹⁵⁶

This case is particularly interesting because the desired accommodation at stake for the Elebiaris was not a trained guide or service dog¹⁵⁷—an accommodation that would be upheld as a matter of civil right under the ADA¹⁵⁸—but rather a companion animal with no special skills. The court upheld the Elebiaris' accommodation under the CFEHA on the basis that Pooky enabled the Elebiaris to use and to enjoy their home.¹⁵⁹ While disability accommodations are decided on a case-by-case basis,¹⁶⁰ the decision notably extended the exception to CCRs beyond specially trained service and guide dogs.¹⁶¹ Further, by requiring a dog as a necessary accommodation, the decision expanded the range of required accommodations beyond that required by the ADA; that is, only a particular type of companion animal was recognized by the court as adequate to meet the Elebiaris' emotional needs.¹⁶² In fact, one could understand the opinion to say that only Pooky himself was a reasonable accommodation for the Elebiaris.¹⁶³

In no other context has conflict over a physical accommodation—conflict between property rights and adaptations for human impairment—been resolved in this way. In cases of accommodation for im-

¹⁵² *Id.*

¹⁵³ *Auburn Woods*, 18 Cal. Rptr. 3d at 673, 676.

¹⁵⁴ *Id.* at 676.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 682, 684.

¹⁵⁷ *Id.* at 682.

¹⁵⁸ 42 U.S.C. §§ 12101–12213, at § 12111(9)(A) (2006 & Supp. 2007); 28 C.F.R. § 36.104 (2008) (“Service animal means any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability . . .”).

¹⁵⁹ *Auburn Woods*, 18 Cal. Rptr. 3d at 677–79.

¹⁶⁰ 42 U.S.C. § 12102(2) (2006 & Supp. 2007); see also *Sutton v. United Airlines*, 527 U.S. 471, 480 (1999) (superseded by statute on other grounds) (construing the ADA to involve a case-by-case inquiry).

¹⁶¹ *Auburn Woods*, 18 Cal. Rptr. 3d at 679, 682.

¹⁶² *Id.* at 683.

¹⁶³ *Id.*

pairments rising to the level of disability under the ADA, which informs CFEHA jurisprudence,¹⁶⁴ accommodation from within a category of similar goods is sufficient. The ADA only requires that the accommodation is reasonable, not that it is what the plaintiff prefers.¹⁶⁵ For example, an electric company repair person with a clinical fear of heights might be provided additional safety belts for climbing or be relocated to a warehouse job, rather than receive her preferred accommodation of a much more costly truck with a mechanical arm and bucket in which to stand.¹⁶⁶ Under this reasoning, it is likely that a rabbit or another companion animal allowed by the condominium association would be considered a reasonable accommodation for the emotional needs of the Elebiaris. This is significant because it demonstrates how deeply human use of animals is embedded in current law. Claims involving the use of animals to promote human well-being may be legally recognized as stronger than claims for the use of inanimate tools of assistance.

Protections for animals based on this type of interest-convergence are extremely narrow. For example, while Pooky would be entitled to continued indoor shelter if the Elebiaris had stayed at Auburn Woods, the court was silent about the ability of the Elibiariis, who are often house-bound for long periods of time, to care for Pooky. The dog's needs are addressed only with regard to Jayne's well-being: "Jayne described how her depression and related symptoms improved after getting the dog. She no longer sat around the house brooding but instead paid attention to the dog's needs . . ." ¹⁶⁷ The CCR shelter exception would not apply to a dog whose life was in danger due to exhaustion, inclement weather, or human abuse. Further, protections resulting from such interest-convergence are vulnerable to legal gerrymandering. If human emotional needs or disability are temporary, so too may be the companion animal's home (or life).

Whether laws are directed at animals as primary or secondary subjects, their lives are controlled by human interests. Animals are afforded either no or limited protections, and exceptions are made to laws that purportedly protect animals to privilege human over animal well-being. Animals are protected only when human and nonhuman animal interests converge. For example, in *Auburn Woods*, Pooky's

¹⁶⁴ *Id.* at 677–78.

¹⁶⁵ 29 C.F.R. § 1630.9(d) (2008) ("If more than one of these accommodations will enable the individual to perform the essential functions [of her job] . . . the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide."). See also *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1177–78 (10th Cir. 1999) (describing ADA standard); *Keever v. Middletown*, 145 F.3d 809, 812 (6th Cir. 1998) (citing *Hankins v. The Gap*, 84 F.3d 797, 800–01 (6th Cir. 1996)) (same).

¹⁶⁶ These facts are based loosely on those of *Skerski v. Time Warner Cable Co.*, 527 F.3d 273, 285 (3d Cir. 2001).

¹⁶⁷ *Auburn Woods*, 18 Cal. Rptr. 3d at 679.

shelter was dependent on his utility to his disabled owners. When interests diverge, legal gerrymandering causes the disruption of fundamental protections, as seen in the factory farming, laboratory, working animal, and animal sacrifice contexts. Because animal law is defined by human interests, and humans use the same types of animals or animals with similar capacities in different ways, inconsistencies are created.

B. Creating Legal Inconsistencies

Inconsistencies created by legal gerrymandering undermine the form and function of the body of law pertaining to animals. Ignoring animal capacities such as the ability to suffer disrupts the foundations upon which fundamental legal protections for animals are premised and weakens the precedential value of animal law. Inconsistencies frustrate expectations about the duties owed to animals, which makes compliance with, and enforcement of, animal laws difficult.

This Section begins by discussing legal inconsistencies that arise due to the differential treatment of animals within the same legal or species categories as well as the unequal treatment of animals of different species with similar abilities. When animals with similar abilities are treated differently, the use of animal capacities as a relevant baseline for legal protection is undermined. In these instances, any of a number of human interests—including economic efficiency, scientific curiosity, and consumptive preferences—may be substituted for animal capacities to shape laws affecting animals. This changes the content and function of animal law on an ad hoc basis.

Even when the legal protections of animals are tied to their capabilities, their capacities are not assessed in an objective manner. This Section concludes by discussing recent case law indicating that unlike in cases involving human harm, courts may not appeal to objective, scientific evidence about the capacities of animals when doing so conflicts with human use of animals. When animal capacities are discounted, the use of capacities as a baseline for protection becomes almost meaningless.

1. Animals Sharing the Same Legally Created or Species Category

Animals within the same legally-constructed category, as well as animals within natural species categories, may be subject to differential treatment under law based on human use. Primary legal categories of domestic animals include: “companion animal,” “laboratory animal,” “livestock,” and “warm blooded animal.” Animals within these categories may receive different treatment, even if they are of the same species.

Consider the legal class “companion animals.” Animals who assist a disabled person may evade quarantine¹⁶⁸ and are allowed in places

¹⁶⁸ See e.g. *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996).

of public accommodation, including housing that would otherwise prohibit them.¹⁶⁹ Yet even animals within the subcategory of “service animals” may experience different treatment, depending on their owner’s impairment and whether the animal is a reasonable accommodation in a particular context. Animals used as accommodations for disability and emotional needs rely on fact-specific determinations, meaning that each individual and accommodation is assessed on a case-by-case basis.¹⁷⁰ Some individuals with service animals may not be legally defined as disabled and entitled to an accommodation. For others, a service animal may not be a reasonable accommodation. For example, a seizure-alert dog for a chef may be viewed as a public health hazard in areas of food preparation. Further, some building CCRs privilege one species of companion animal over another.¹⁷¹

Similar inconsistencies arise under the AWA and state anti-cruelty statutes with respect to “companion animals.” The AWA draws distinctions within the category of companion animals based on the party selling the animal. Companion animals who are sold in retail pet stores are not protected under the AWA,¹⁷² while animals originating from commercial breeders have protections concerning their confinement, care, and conditions of transportation.¹⁷³

Under state anti-cruelty statutes, prosecution of animal abuse cases may depend on the well-being of the abuser. Cruelty associated with pet hoarding is often seen as the product of a human illness rather than as a crime, or as a combination of both, warranting a lesser charge than in other circumstances where animals experience similar neglect and suffering.¹⁷⁴ The legal focus in hoarding cases is shifted from animal well-being and the consequences of human behavior to the current and future well-being of the human engaging in the behavior.¹⁷⁵

¹⁶⁹ 28 C.F.R. § 36.104 (2008).

¹⁷⁰ *Auburn Woods*, 18 Cal. Rptr. 3d at 679. *Compare Green v. Hous. Auth. of Clackamas County*, 994 F. Supp. 1253, 1257 (D. Or. 1998) (allowing dog to assist deaf child resident despite lease prohibiting pets) with *Nahrstedt v. Lakeside Village Condo. Assn.*, 33 Cal. Rptr. 2d 63, 80 (Cal. 1994) (prohibiting three indoor cats in violation of condominium association’s CCRs); *Villa de las Palmas Homeowners Assn. v. Terifaj*, 14 Cal. Rptr. 3d 67, 80–81 (Cal. 2004) (prohibiting dog in violation of condominium association’s CCRs).

¹⁷¹ See e.g. *Auburn Woods*, 18 Cal. Rptr. 3d at 673, 676 (condominium association allowing birds and cats but not dogs).

¹⁷² 7 U.S.C. §§ 2132(f)(i), 2133 (2006 & Supp. 2008).

¹⁷³ *Id.* at §§ 2132(f)(ii), 2133, 2143.

¹⁷⁴ See e.g. Emily Haile, *Pet Hoarding Called a Disorder: Experts Say Type of Animal Cruelty Is More an Illness Than a Crime*, Baltimore Sun 5G (Sept. 29, 2006); see also Colin Berry & Gary Patronek, *Long-Term Outcomes in Animal Hoarding Cases*, 11 Animal L. 167, 176 (2005) (reporting the results of a study of fifty-six animal hoarding cases in which most defendants received only misdemeanor charges, and eight individuals did not receive any charge, including one case where dead animals were discovered at the defendant’s residence).

¹⁷⁵ Haile, *supra* n. 174, at 5G.

Additional inconsistencies are found within other legal categories of animals. The AWA applies to “laboratory animals” who are “warm-blooded animals,” yet rodents and birds are excluded from the Act.¹⁷⁶ This is a sizeable omission, as the National Association of Biomedical Research estimates that 95% of animal experimentation is performed on rodents,¹⁷⁷ with rats and mice being used for experimentation more than all other vertebrate animals together.¹⁷⁸ While the exact number of rodents used is unknown, some studies place rat use alone as high as 23.6 million a year.¹⁷⁹ Differential treatment also arises under the AWA with regard to “laboratory animals” of the same species. The Act applies only to animals used in university or industry laboratories.¹⁸⁰ Animals used in primary or lower secondary education experiments are not protected.¹⁸¹ Thus, high school teachers may allow their students to confine and to experiment on animals without restriction, while college professors may not.

Under the AWA, “livestock” of the same species are treated differently depending on their human use.¹⁸² Transportation conditions of farm animals are regulated only for animals *not* used for flesh foods and clothing, which are the primary uses of such animals.¹⁸³ The AWA governs use of farm animals for laboratory experiments but excludes “livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber.”¹⁸⁴ Thus, a cow used for experiments at a university may be treated differently depending on whether it is housed in a laboratory or a university farm. Similar inconsistencies apply to horses. The AWA only covers horses used in laboratory research.¹⁸⁵ Horses who are kept on farms, exhibited, considered companion animals, or raced do not fall under the Act, despite evidence of particularly cruel practices in horse racing.¹⁸⁶

¹⁷⁶ 7 U.S.C. § 2132(g).

¹⁷⁷ Natl. Assn. of Biomedical Research, *Rats and Mice: The Essential Need for Animals in Medical Research*, <http://www.nwabr.org/research/pdfs/FBRRatsmice.pdf> (last accessed Nov. 22, 2009).

¹⁷⁸ U.S. Cong. Off. of Tech. Assessment, *Alternatives to Animal Use in Research, Testing, and Education* 25 (U.S. Govt. Printing Off. 1986).

¹⁷⁹ Phys. Comm. for Responsible Med., *Rats: Test Results That Don't Apply to Humans*, <http://www.pcrm.org/resch/anexp/rats.html> (last accessed Nov. 22, 2009).

¹⁸⁰ 7 U.S.C. § 2132(e) (2006 & Supp. 2008) (defining “research facility”).

¹⁸¹ *Id.*

¹⁸² *Id.* at § 2132(g) (defining the term “animal” under the Act to exclude most livestock).

¹⁸³ *Id.* Under the Twenty Eight Hour Law of 1877, however, animals transported across state lines for flesh foods are entitled to hydration, food, and rest outside of the transport car after twenty-eight consecutive hours of travel, with some exceptions. 49 U.S.C. § 80502 (as amended 2006).

¹⁸⁴ 7 U.S.C. § 2132(g).

¹⁸⁵ *Id.* at § 2132(g)(2).

¹⁸⁶ See e.g. William C. Rhoden, *Race's Aftermath Shows Sport's Brutal Side*, 157 N.Y. Times Sports Sunday 1 (May 4, 2008); William C. Rhoden, *An Unknown Filly Dies, and the Crowd Just Shrugs*, 155 N.Y. Times D1 (May 25, 2006); John Scheinman, *Horses*,

The HMLSA governs the slaughter of “livestock,” but it does not apply to poultry and fish.¹⁸⁷ As a result, birds and fish need not be rendered unconscious prior to dismemberment. Around nine billion chickens, turkeys, and ducks are slaughtered per year, which is more than 98% of terrestrial animals slaughtered for flesh foods.¹⁸⁸ Under the HMLSA, animals of the same species may be slaughtered in different ways depending on the downstream consumer of the flesh food. The Act’s requirement that animals are rendered insensible prior to killing¹⁸⁹ is usually met by “captive bolt stunning,” a process approved by the USDA whereby a bolt applies force to, or penetrates the head of, the animal to render it unconscious.¹⁹⁰ Exceptions exist for ritual religious killing and may entail animals having their carotid arteries slashed and being hung upside down to drain the blood from their bodies.¹⁹¹

Legal gerrymandering creates inconsistencies when animals with the same capacities—including those within the same legally created or species category—are treated differently. Two animals of the same legal class or species, with identical injuries, caused in the same manner, by the same person, may have different protections depending on the human interests at stake. The next section discusses inconsistent treatment of animals of different species and legal categories who share the same capacities.

2. *Animals of Different Species with Similar Abilities*

Inconsistencies arise across legal classes of animals when animals with similar abilities are treated differently. For example, a pig, who has similar or higher intelligence than a dog,¹⁹² may be immobilized and confined to a crate as “livestock” for the entirety of its life legally in almost every state, whereas like treatment of a dog as a “companion

Drugs Are Racing’s Daily Double: No Uniform Policy in Industry, 126 Wash. Post A1 (Apr. 27, 2003).

¹⁸⁷ See Notice, Treatment of Live Poultry Before Slaughter, 50 Fed. Reg. 187 (Sept. 28, 2005).

¹⁸⁸ See U.S. Dept. of Agric., *Poultry Slaughter*, <http://usda.mannlib.cornell.edu/usda/nass/PoulSlau/2000s/2008/PoulSlau-12-29-2008.pdf> (last accessed Apr. 11, 2009); U.S. Dept. of Agric., *Livestock Slaughter 2007 Summary*, http://usda.mannlib.cornell.edu/usda/nass/LiveSlauSu/2000s/2008/LiveSlauSu-03-07-2008_revision.pdf (last accessed Dec. 2, 2009) (reporting that about 146.9 million cattle, calves, hogs, sheep, and lambs were slaughtered in 2007).

¹⁸⁹ 7 U.S.C. § 1902(a) (2006 & Supp. 2008).

¹⁹⁰ 9 C.F.R. § 313.15 (2008); see also GAO, *Humane Methods of Slaughter Act: USDA Has Addressed Some Problems but Still Faces Enforcement Challenges*, <http://www.gao.gov/new.items/d04247.pdf>, at 7, 12 (last accessed Dec. 5, 2009) (providing photographs of captive bolt stunning).

¹⁹¹ 7 U.S.C. § 1902(b).

¹⁹² See e.g. James Collins, *Probing Questions: Are Pigs Smarter Than Dogs?*, <http://www.rps.psu.edu/probing/pigs.html> (last accessed Nov. 22, 2009) (discussing the twenty-year research of Pennsylvania State University researcher Ken Kephart and his colleagues and the tasks that pigs and dogs may complete).

animal” would result in prosecution for animal cruelty.¹⁹³ This is because the welfare of most livestock is legally relevant only during slaughter; protecting the well-being of livestock more robustly conflicts with efficient mass production of flesh foods. As human interests are less detached from companion animals, companion animal welfare is legally relevant throughout the life of the animal. These inconsistencies, like the ones discussed above, ignore the natural baseline at the foundation of animal law, namely, that animal capacities are relevant for determining legal protections.

Animals with like capacities are treated inconsistently in two notable areas: the conditions of confinement and the consequences of wrongful killing. Livestock are subject to different standards for confinement than companion, exhibition, and laboratory animals with similar capacities. Companion animals enjoy more protections against killing and with respect to the manner of their death than livestock and laboratory animals with like abilities.

Under the AWA, laboratory animals; companion animals subject to care and transportation by a dealer; and animals exhibited in licensed zoos, reserves, and sanctuaries, receive protections concerning their conditions of confinement, basic nutrition, handling, transportation, and veterinary care.¹⁹⁴ Animals must be provided with enough space to stand up, to turn around, to lie down comfortably, and to walk normally.¹⁹⁵ In addition, laboratories are required to minimize pain and distress and to provide analgesics, anesthetics, and tranquilizers when necessary.¹⁹⁶ Special provisions mandate the exercise of dogs and psychological enrichments for primates.¹⁹⁷

Animals legally recognized as “livestock” and other farm animals, such as poultry, have no such federal protections. On factory farms, animals are often housed in poorly ventilated, dark, and windowless facilities.¹⁹⁸ Pregnant sows weighing as much as 600 pounds are kept in gestation crates, two-foot wide barred boxes with a concrete floor,

¹⁹³ See e.g. *State v. Babcock*, 1999 Ohio App. LEXIS 3978 at **5–6 (Aug. 27, 1999) (citing Ohio Rev. Code Ann. § 959.13(A)(4): “No person shall: Keep animals other than cattle, poultry or fowl, swine, sheep, or goats in an enclosure without wholesome exercise and change of air”); *Tenn. v. Johnson*, 2002 Tenn. Crim. App. LEXIS 540 at *53 (June 26, 2002) (finding that animals confined in kennel, trailer, and residence violated Tenn. Code Ann. § 39-14-202(b)).

¹⁹⁴ 7 U.S.C. § 2143 (2006 & Supp. 2008).

¹⁹⁵ See e.g. 9 C.F.R. § 3.6(a)(2)(xi) (2008) (requirements for dogs and cats).

¹⁹⁶ 7 U.S.C. § 2143(3)(A)–(C).

¹⁹⁷ *Id.* at § 2143(a)(2)(B).

¹⁹⁸ See e.g. J.J.R. Feddes, E.J. Emmanuel, M.J. Zuidhof & D.R. Korver, *Ventilation Rate, Air Circulation, and Bird Disturbance: Effects on the Incidence of Cellulitis and Broiler Performance*, 12 *J. Applied Poultry Res.* 328 (2003); M.J. Zuidhof, J.J.R. Feddes & F.E. Robinson, *Effect of Ventilation Rate and Stocking Density on Turkey Health and Performance*, 22 *J. Applied Poultry Res.* 123, 124 (1993); Singer, *Animal Liberation*, *supra* n. 30, at 98–105, and sources contained therein.

where they are unable to turn around or to walk.¹⁹⁹ Pigs are intelligent and social animals who suffer severe physical injuries and psychosis from immobility.²⁰⁰ They have joint and muscle damage; infections; and engage in neurotic behaviors such as obsessive bar-biting, vacuum chewing (chewing nothing), head shaking and tossing, kicking, and pressing against water containers.²⁰¹ Veal calves are immobilized in crates of similar size and are chained at the neck.²⁰² Throughout the entirety of their twenty-week lives, they are fed an all-liquid diet to keep their flesh tender and white, rendering them anemic and often unable to stand.²⁰³

Ninety-eight percent of eggs produced in the U.S. come from 300 million hens so intensely confined—four hens in a cube with sides about the size of a standard sheet of paper—that they cannot raise their heads or spread their wings and often are unable to stand.²⁰⁴ The cages have limited ventilation and light due to severe crowding and the fact that they are stacked three or four high.²⁰⁵ Egg-laying hens are de-beaked to prevent the pecking, cannibalism, and feather-pulling that otherwise result from the stress of their confinement.²⁰⁶ Their nails may grow into their cages, rendering them unable to access food.²⁰⁷ They are frequently starved in a process called “forced molting” to produce additional egg-laying cycles.²⁰⁸ Hens no longer able to lay eggs and male chicks, both of no economic value, are commonly ground up alive, sometimes in wood-chippers, or thrown into garbage cans to die.²⁰⁹

Veterinary attention for all farm animals is provided at the discretion of farmers. Large animals too sick or injured to stand, “downers,” are often left for extended periods of time without food, water, or veterinary care, and then dragged to slaughter with chains or pushed by earth-moving equipment, which causes tearing and dislocation of

¹⁹⁹ Farm Sanctuary, *The Welfare of Sows in Gestation Crates: A Summary of the Scientific Evidence*, http://farmsanctuary.org/mediacenter/gestation_evidence.html (last accessed Dec. 11, 2009).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Farm Sanctuary, *The Welfare of Calves in Veal Production: A Summary of the Scientific Evidence*, http://noveal.org/sci_evidence.htm (last accessed Dec. 11, 2009).

²⁰³ *Id.*

²⁰⁴ Farm Sanctuary, *The Welfare of Hens in Battery Cages: A Summary of the Scientific Evidence*, http://farmsanctuary.org/issues/factoryfarming/eggs/bc_evidence.html (last accessed Dec. 11, 2009).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Bernard Rollin, *Farm Animal Welfare: Social, Bioethical, and Research Issues* 126 (Iowa St. U. Press 2003) (“Battery cages are responsible for a variety of injuries, as birds are sometimes trapped in cages by the head and neck, body and wings, toes and claws, or other areas.”). See also Farm Sanctuary, *The Welfare of Hens in Battery Cages*, *supra* n. 204 (discussing the “uncontrolled and excessive growth of the claws” of battery-caged hens).

²⁰⁸ Farm Sanctuary, *The Welfare of Hens in Battery Cages*, *supra* n. 204.

²⁰⁹ *Id.*

limbs.²¹⁰ Recall that the only federal restriction on the suffering of livestock is found in the HMLSA, which states that prior to slaughter livestock must be rendered insensible; the other provisions of the Act protect human consumers and slaughterhouse workers.²¹¹

Another significant distinction between farm and other domestic animals with the same capacities relates to the consequences of wrongful killing. All domestic animals are property under law and may be killed “humanely” at owner discretion, but legal remedies for wrongful killing are varied. If a third party kills a sheep in a farm or laboratory without owner permission, the owner is entitled to restitution.²¹² If the same person kills a dog who is a companion animal, some jurisdictions allow recovery for emotional damages in addition to compensation for the market value of the pet.²¹³

The only distinction between the legal treatment of the pig and the dog is human emotional attachment. The differential treatment has nothing to do with animal capacities or even *property status*. The latter point is worth emphasizing, as this example illustrates that changing the property status of animals alone would not remedy the effects of interest-convergence and the legal gerrymandering that follows. Rather, the differential treatment of animals mirrors social attitudes towards animals. Individuals who pamper their pets consume the flesh of equally or more intelligent animals suffering in factory farms. Consider another example. Millions of people order flesh foods over the Internet, including animals like lobsters who are shipped through the mail live,²¹⁴ often after being held in tanks for months with taped claws.²¹⁵ Despite studies indicating that lobsters feel pain, they are boiled alive prior to consumption.²¹⁶ Yet when an individual stated on an Internet site that he would cook and eat his pet rabbit,

²¹⁰ Due to fear of Bovine Spongiform Encephalopathy (“Mad Cow Disease”), infirm cattle may no longer be slaughtered for human consumption, though other diseased farm animals remain unprotected. *See supra* n. 89 and accompanying text discussing recent changes to the law affecting “downer” cattle.

²¹¹ *See supra* nn. 87, 103–05 and accompanying text.

²¹² *See e.g. Henley v. Octorara Area Sch. Dist.*, 701 F. Supp. 545, 547 (E.D. Pa. 1988) (discussing restitution paid by school boy who brutally murdered sheep and destroyed other farm property); *State v. Violet*, 1997 Tenn. Crim. App. LEXIS 451 at **1, 6 (Tenn. Crim. App. May 13, 1997) (discussing restitution for cow shot by a neighbor).

²¹³ *See supra* nn. 9, 144–45 and accompanying text.

²¹⁴ *See e.g. The Fresh Lobster Company LLC*, <http://www.thefreshlobstercompany.com> (last accessed Nov. 22, 2009). A Google search on December 9, 2009, using the terms “lobster shipping live,” revealed approximately 874,000 matching websites.

²¹⁵ *See e.g. Patrik Jonsson, Demise of Grocery-Store Lobsters Renews Animal Welfare Debate*, 98 *Christian Science Monitor* 2 (June 19, 2006) (available at <http://www.csmonitor.com/2006/0619/p02s01-ussc.html> (June 19, 2006) (last accessed Nov. 22, 2009)).

²¹⁶ *See e.g. Stuart Barr, Peter R. Laming, Jaimie T.A. Dick & Robert W. Elwood, Nociception or Pain in a Decapod Crustacean?*, 75 *Animal Behaviour* 745 (2008); *see also* Colin Barras, *Lobster Pain May Prick Diners’ Consciences*, *New Scientist* 14 (Nov. 10, 2007).

Toby, unless website readers paid him \$50,000, distraught readers world-wide paid to prevent Toby's demise.²¹⁷

Thus far the discussion has focused on the effects of legal gerrymandering on animal classifications and corresponding protections. The next section discusses the effects of legal gerrymandering on judicial practice, namely, the assessment of scientific evidence. It demonstrates another way in which fundamental protections for animals are undermined and legal inconsistencies are generated.

3. *Role of Scientific Evidence*

A striking example of the danger of legal gerrymandering is seen in the context of judicial reluctance to consider objective, scientific evidence about animal suffering when doing so conflicts with human interest in using animals. A recent case indicates that conflicts over scientific evidence between industry and public authorities (or authorities disassociated from animal industries) may be resolved in favor of industry standards.²¹⁸ In contrast, cases about human suffering stress the need to rely on objective, scientific evidence.²¹⁹

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,²²⁰ the U.S. Supreme Court interpreted Rule 702 of the Federal Rules of Evidence to hold that expert testimony must be "not only relevant but reliable." To be reliable, the expert's testimony must be based on more than his or her unproven assertion.²²¹ As a result, the trial judge is to act as a filter for the reliability of expert scientific and other technical testimony.²²² This principle is vital in cases challenging individual and industry uses of animals, where such expert scientific testimony may have an "*ipse dixit*" quality.²²³

Problems of reliability arise with respect to professional association interpretations of scientific evidence. This issue is poignantly illustrated in a pre-*Daubert* case, *Bragdon v. Abbott*,²²⁴ interpreting the

²¹⁷ *Toby Has Finally Been Saved!!!!*, <http://www.savetoby.com> (last accessed Dec. 5, 2009).

²¹⁸ *N.J. Socy. for the Prevention of Cruelty to Animals*, 2007 WL 486764 at *8, *overruled in part on other grounds*, *N.J. Socy. for the Prevention of Cruelty to Animals*, 196 N.J. 366, 401–02 (N.J. 2008).

²¹⁹ See *infra* nn. 224–27. See also *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 (1987), *superseded by statute on other grounds*.

²²⁰ 509 U.S. 579, 589 (1993).

²²¹ *Id.* at 591–92; see also *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

²²² See e.g. Julie A. Seaman, *Triangular Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 Geo. L. J. 827, 862 n. 180 (citing Fed. R. Evid. 702 Advisory Committee note to 2000 amendment: "In *Daubert* the Court charged district judges with the responsibility of acting as gatekeepers to exclude expert testimony that is not reliable."). The Supreme Court recognized this gatekeeper function with regard to technical testimony in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

²²³ *Gen. Elec. Co.*, 522 U.S. at 146; *Kumho Tire*, 526 U.S. at 157.

²²⁴ 524 U.S. 624, 652 (1998).

“direct threat” provision of the ADA.²²⁵ In *Bragdon*, the U.S. Supreme Court questioned the First Circuit’s use of a professional dental society statement about the dangers of HIV transmission.²²⁶ The Court remanded, indicating deference should be given to information from neutral public health authorities.²²⁷ When such reliability issues arise in the animal welfare context, however, courts do not apply the same standard.

In recent landmark litigation challenging regulations under a New Jersey statute mandating that farming be “humane,”²²⁸ expert testimony of groups that use animals for commercial profit was given greater weight than assessments by independent animal behavioralists.²²⁹ Defendant New Jersey Department of Agriculture relied heavily on farm industry and animal professional association statements about the suffering of farm animals.²³⁰ Plaintiff animal welfare groups, including the New Jersey Society for the Prevention of Cruelty to Animals, relied mostly on evidence produced by independent scientists.²³¹

The Superior Court of New Jersey acknowledged the inconsistencies among the experts and ultimately determined that it was proper to rely on the assessments of individuals involved in agribusiness and related professional associations about the cruelty inherent in their own practices.²³² To do so, the court argued that this was a matter of agency deference:²³³ “Where the technical and scientific data is in conflict, an agency is entitled to rely on its own [largely industry] expertise . . . ‘we will not interfere with the [agency’s] determination on

²²⁵ 42 U.S.C. §§ 12101–12213 (2006 & Supp. 2007).

²²⁶ 524 U.S. at 652 (“We note . . . the [American Dental] Association is a professional organization . . . not a public health authority. It is not clear the extent to which the Policy was based on the Association’s assessment of dentists’ ethical and professional duties in addition to its scientific assessment of the risk to which the ADA refers.”).

²²⁷ *Id.* at 652–55.

²²⁸ “Humane” is defined as “marked by compassion, sympathy and consideration for the welfare of animals.” N.J. Admin. Code Agric.: 2:8-1.2(a) (current through Nov. 16, 2009). “Animal welfare” is defined as “physical and psychological harmony between the animal and its surroundings characterized by an absence of deprivation, aversive stimulation, over stimulation or any other imposed condition that adversely affects health and productivity of the animal.” *Id.*

²²⁹ *N.J. Socy. for the Prevention of Cruelty to Animals*, 2007 WL 486764 at *1, *overruled in part on other grounds*, *N.J. Socy. for the Prevention of Cruelty to Animals*, 196 N.J. 366, 401–02 (N.J. 2008).

²³⁰ These statements include the American Veal Association Guide, the European Commission’s Report on the Welfare of Intensively Kept Pigs, reports of the American Association of Bovine Practitioners and National Pork Board, science curricula at veterinary schools, and the United Egg Producer Standards. *Id.* at **5–12.

²³¹ Plaintiff’s experts are addressed only summarily throughout the opinion. *See e.g. id.* at *8 (“[S]cientists who have reviewed the issue have concluded that castration has no benefit to animal welfare.”).

²³² *Id.* at *6.

²³³ *Id.*

these scientific matters.”²³⁴ This holding resulted in judicial recognition of pig gestation and veal crates and other methods of close confinement, castration of pigs without anesthesia,²³⁵ and de-beaking of poultry as “humane” under the terms of the statute, despite strong, objective scientific evidence to the contrary.²³⁶ Agency deference remained significant on appeal. While the New Jersey Supreme Court struck down the regulatory safe-harbor for all “routine husbandry practices” as vague and held that the State Board of Agriculture could not subdelegate its authority to institutions teaching agricultural science, the court was careful to note that it would not assess the scientific evidence to determine whether any of the practices at stake were “objectively[] humane.”²³⁷

The treatment of scientific evidence in the animal context is yet another indicator of the power of legal gerrymandering to undermine statutes with the stated objective of promoting animal well-being. The New Jersey case illustrates that the “humane” treatment of animals may be interpreted to include most agricultural industry practices. As in the animal classification context, legal gerrymandering in this instance generates inconsistencies by treating differently animals with the same capacities to suffer.

In sum, the disparate treatment of domestic animals may be understood in terms of legal inconsistencies that arise due to human interests dictating independent legal outcomes. These human interests result in legal gerrymandering, which undermines basic animal protections based on their legally recognized capacities. Animals within the same legally constructed classes, the same species, or with similar capacities are subject to varying treatment. This is illustrated vividly by the differential treatment of farm versus other domestic animals. Part IV examines one response to legal gerrymandering: moral compromises giving rise to humane labeling.

IV. LESSONS FROM HUMANE LABELING AND OTHER MORAL COMPROMISES

Daily consumer choices deny that the capacity of animals to suffer is morally relevant. The reason for this is obvious: If animal capacities are morally relevant, current use of domestic animals for food, experimentation, exhibition, entertainment, and some forms of service must end, or people must acknowledge engaging in daily, immoral practices. Flesh foods are undoubtedly the most contentious. According to the

²³⁴ *Id.* (quoting *In re Adoption of N.J.A.C. 7:26E-1.13*, 377 N.J. Super. 78, 101 (N.J. Super. App. Div. 2005)).

²³⁵ The Department of Agriculture acknowledges that castration has no benefit to the animal. *N.J. Socy. for the Prevention of Cruelty to Animals*, 2007 WL 486764 at *9. The benefit is economic, in that it prevents “tainting pork with foul odors and off flavors.” *Id.*

²³⁶ *Id.* at **9–10.

²³⁷ *N.J. Socy. for the Prevention of Cruelty to Animals*, 955 A.2d at 889, 905–07, 916–17.

U.S. Department of Agriculture (USDA) National Agriculture Statistics Service, in 2008, over 9.5 billion animals including cattle (34,369,000), chickens (9,069,382,000), ducks (24,165,000), hogs (116,458,000), sheep and lambs (2,555,000), and turkeys (271,625,000) were slaughtered for flesh foods; the average person consumes more than 216 pounds of flesh and 252 eggs per annum.²³⁸

While the cruelty of factory farms is well documented, flesh foods and eggs cannot be mass produced without factory farming, and consumers are unwilling to abandon flesh and egg consumption.²³⁹ Given the schism between those who consider animal capabilities morally relevant and those who do not (or choose to ignore them), it is unsurprising that social practice and law reflect some element of compromise.

One notable example of a moral compromise arises in the context of factory farming and the emergence of “humane labels.” These labels, and the underlying reforms that accompany them, are an effort to respond simultaneously to animal advocates exposing the cruelty of factory farming practices and to the demands of flesh food producers and consumers.²⁴⁰ The practices labeled as “humane” represent the least amount of suffering necessary to serve the economic goals of agribusiness and to fulfill human demand for flesh foods.

Intermediate steps addressing animal suffering, like humane labeling, fail to further the basic capabilities of most farm animals and to alleviate their suffering. In practical terms, humane labeling means marginal improvements to intensive confinement of animals at a slightly higher cost to producers.²⁴¹ The first shift came with regard to chickens, when colleges and universities nation-wide eliminated all or part of their egg purchases from farms confining chickens to battery cages.²⁴² Whole Foods and Wild Oats grocery chains followed suit along with Bon Appetit food service company, Wolfgang Puck restaurants, Omni Hotels, Ben and Jerry’s ice cream, and Burger King (only 2–4% of the eggs used by the latter corporation).²⁴³ In addition, the State of California and some municipalities passed resolutions calling

²³⁸ Humane Socy. of the U.S., *Farm Animal Statistics: Slaughter Totals*, <http://www.hsus.org/farm/resources/pubs>; *select* U.S. Slaughter Totals, then *select* Per Capita Consumption of Meat, then *select* Per Capita Consumption of Dairy and Eggs (Jan. 1, 2009) (last accessed Nov. 11, 2009) (website also provides 2009 slaughter numbers through August).

²³⁹ Singer, *Animal Liberation*, *supra* n. 30, at 95–158.

²⁴⁰ See Jeff Leslie & Cass R. Sunstein, *Animal Rights Without Controversy*, 70 L. & Contemp. Probs. 117, 126–36 (2007).

²⁴¹ Most businesses have agreed to bear the additional cost of cage-free egg production—about twice as much as traditional eggs—rather than pass it along to the consumer. See e.g. Allison Wickler, *U Switches to Cage-Free*, <http://www.mndaily.com/2007/04/26/u-switches-cage-free> (last accessed Nov. 22, 2009).

²⁴² Humane Socy. of the U.S., *The HSUS’s Campaign to Ban Battery Cages*, <http://www.hsus.org/farm/camp/nbe> (last accessed Nov. 22, 2009).

²⁴³ *Id.*

for an end to battery cages.²⁴⁴ Alternative methods of confinement provide two and a half to three times more space for hens, allowing them some room to move and to spread their wings. They remain densely penned, however, and may not have exposure to sun (or other light) or grass to engage in natural behaviors, and many are still de-beaked.²⁴⁵

Similar compromises are seen in the pork industry. Smithfield Foods, the world's largest pork producer, agreed to eliminate gestation crates by 2017, and to require the farms with which it contracts to do so "eventually."²⁴⁶ In addition, fast food corporations such as Wendy's and Burger King vowed to reduce their reliance on pork from farms using gestation crates.²⁴⁷ Pigs will remain closely confined indoors, though not in crates.²⁴⁸ Firms have long periods for compliance or are making only small reductions—such as Burger King, which will reduce purchases from farms using gestation crates by 10–20%—due to the current lack of supply of "cruelty-free" pork.²⁴⁹

Like animal protection laws, these reforms are the product of interest-convergence and are therefore vulnerable to changing human interests. The businesses involved frequently and publicly acknowledge that their willingness to alter their practices is based on consumer demand, rather than attention to animal well-being. Widely circulated articles such as *Veal to Love Without the Guilt*, discuss larger pens for veal calves as motivated by economies of production, taste, human psychological well-being (that is, the guilt of flesh consumers), desires to support local agriculture, and human health.²⁵⁰ The article quotes a veal farmer who claims: "I did raise factory veal—all the chemicals, antibiotics, steroids We wouldn't let our friends eat what we used to raise. For our own use we were raising humane

²⁴⁴ *Id.* California's Proposition Two also eliminates veal and sow gestation crates. See California Farm Animal Cruelty Act, Cal. Health & Safety Code Ann. §§ 25990-25994 (Lexis current through 2009-2010 Reg. Sess.) (amending Division 20).

²⁴⁵ Humane Socy. of the U.S., *A Brief Guide to Egg Carton Labels and Their Relevance to Animal Welfare*, http://www.hsus.org/farm/resources/pubs/animal_welfare_claims_on_egg_cartons.html (last updated Mar. 2009) (last accessed Nov. 22, 2009).

²⁴⁶ Marc Kaufman, *Largest Pork Processor to Phase Out Crates: Va.-Based Smithfield to End Practice of Keeping Pregnant Pigs in Small Cages*, 130 Wash. Post A6 (Jan. 26, 2007) (available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/25/AR2007012501785.html> (Jan. 26, 2007) (last accessed Nov. 22, 2009)).

²⁴⁷ See Andrew Martin, *Burger King Shifts Policy on Animals*, 156 N.Y. Times C1, C4 (Mar. 28, 2007) (available at <http://www.nytimes.com/2007/03/28/business/28burger.html> (last updated Mar. 28, 2007) (last accessed Sept. 18, 2009)); Humane Socy. of the U.S., *Wendy's Encouraging Suppliers to "Move Away" from Gestation Crate Confinement Systems for Breeding Pigs*, http://www.hsus.org/farm/news/pressrel/wendys_gestation_crates.html (Apr. 26, 2009) (last accessed Nov. 22, 2009).

²⁴⁸ See Martin, *supra* n. 247; Humane Socy. of the U.S., *Wendy's Encouraging Suppliers*, *supra* n. 247.

²⁴⁹ Martin, *supra* n. 247.

²⁵⁰ Marian Burros, *Veal to Love, Without the Guilt*, 156 N.Y. Times F1, F4 (Apr. 18, 2007), (available at <http://www.nytimes.com/2007/04/18/dining/18veal.html> (last accessed Oct. 13, 2009)).

veal.”²⁵¹ A distributor of fine flesh foods states, “[v]eal becomes more flavorful if it’s allowed to walk around.”²⁵²

Only five states have outlawed cruelty for its own sake, and, in four of those states, battery cages are not forbidden.²⁵³ The future of these measures is also uncertain. Following the public referendum in Arizona, several bills were introduced to impede future citizen initiatives.²⁵⁴

A partial boycott of flesh food consumption through purchase of “humane” farm products fails to address the legal and moral inconsistencies in the treatment of farm animals. As long as flesh foods must be produced on a large scale in factory farms, farm animals with the same capacities as other legally protected animals will continue to receive different treatment. At best, over ten years some farm animals will have slightly more space in which to live before slaughter. At worst, the false perception that factory farming practices are humane will prevail, and the volume of flesh food consumption will remain the same or increase.²⁵⁵

Perhaps the most pessimistic indicator of the results of moral compromise is changing views about foie gras. Under the traditional yet controversial method of foie gras production, geese and ducks are force-fed by a hard tube until their livers become ten or more times their usual size and burst, which causes sepsis and death.²⁵⁶ Some view this practice as inhumane. Production of foie gras with a softer tube, where all other elements remain the same, is now accepted as humane.²⁵⁷

Further, as the product of interest-convergence, humane labeling relies on changes to farm practices that promote flesh food flavor, otherwise enhance marketability of flesh foods, or soothe the conscience of flesh food consumers. Thus, humane labeling amounts to a continuation of policies and legal structures that support human interests over

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ These states include Arizona, California, Colorado, Florida, and Oregon. *See* Ariz. Rev. Stat. Ann. § 13-2910.07 (West current through 2009 1st Reg. Sess. & 3d Spec. Sess.) (veal and sow gestation crates); Colo. Sen. 201, 66th Gen. Assembly, 2d Reg. Sess. (Mar. 6, 2008) (veal and gestation crates); Fla. Const. art. X, § 21 (gestation crates); Or. Sen. 694, 74th Leg., 2007 Reg. Sess. (2007) (veal and gestation crates). *See also supra* n. 244 and accompanying text (California).

²⁵⁴ *See e.g.* Ariz. H. Con. Res. 2009, 49th Leg., 1st Reg. Sess. (Jan. 15, 2009) (limiting ballot initiatives to three per election); Ariz. H. Con. Res. 2033, 49th Leg., 1st Reg. Sess. (Feb. 10, 2009) (requiring ballot initiatives to be filed at least four months before the election); Ariz. Sen. Con. Res. 1023, 49th Leg., 1st Reg. Sess. (Jan. 27, 2009) (changing the required vote to initiate a ballot referendum from a majority to two-thirds).

²⁵⁵ *See e.g.* Burros, *supra* n. 250 (discussing increased consumption of “humane” veal).

²⁵⁶ Farm Sanctuary, *The Welfare of Ducks and Geese in Foie Gras Production: A Summary of Scientific and Empirical Evidence*, http://www.nofogiegras.org/FGscience_report.html (last accessed Nov. 22, 2009).

²⁵⁷ Juliet Glass, *Foie Gras Makers Struggle to Please Critics and Chefs*, 156 N.Y. Times F9 (Apr. 25, 2007).

animal well-being. If human interest in these aspects of food production wanes, perhaps in the wake of rising food prices and a troubled economy, so too will the limited protections offered to animals by the humane labeling movement.

Similar conclusions may be drawn about other moral compromises that appear to protect animal well-being. Some animal research institutions voluntarily seek review of their practices from independent firms, allowing the institutions to claim a “gold standard” of care.²⁵⁸ Such inspections serve to quiet some opposition to experimentation, though these institutions are agreeing only to adhere to minimal legal protections for animals.²⁵⁹ In addition, when the institutions have foreknowledge of site inspections, observed laboratory practice may not represent usual procedure.

New racing track surfaces for horses provide another example of a false compromise. Costly polymer tracks are purchased to quell concerns about the cruelty of horse racing, as it is believed that these tracks cause fewer bone fractures.²⁶⁰ Yet racehorses remain subject to both breeding practices and cruel training regimes that increase the propensity for fractures, including racing at a young age before their bodies are able to sustain the stress.²⁶¹ Horses who are injured on the track are frequently killed on site or sent to foreign slaughterhouses.²⁶²

As these examples indicate, “humane” labeling and other moral compromises will likely result in minimal improvements for some animals and abusive practices for most. Worse, such compromises may arrest larger social change required to eliminate the causes and perpetuation of the exploitation of animals for human use. A paradigm shift is necessary to promote animal well-being.

V. CRITIQUE OF OTHER LEGAL SOLUTIONS

Legal scholars propose a number of solutions to address the dearth of protections for domestic animals. Proposals typically either

²⁵⁸ See Assn. for Assessment and Accreditation of Laboratory Animal Care Intl., *What is AAALAC?*, <http://www.aaalac.org/about/index.cfm> (last accessed Nov. 22, 2009).

²⁵⁹ See Assn. for Assessment and Accreditation of Laboratory Animal Care Intl., *Rules of Accreditation*, <http://www.aaalac.org/accreditation/rules.cfm> (last accessed Nov. 22, 2009).

²⁶⁰ See e.g. Bill Finley, *New Synthetic Surface for Thoroughbreds Hits Pay Dirt*, 157 N.Y. Times D3 (Feb. 8, 2006) (available at <http://select.nytimes.com/search/restricted/article?res=F10911FD3F5A0C7B8CDDAB0894DE404482> (Feb. 8, 2006) (last accessed Nov. 22, 2009)).

²⁶¹ See e.g. William C. Rhoden, *Filly's Death Raises Issues and Ire*, 157 N.Y. Times D1, D3 (May 7, 2008) (available at <http://www.nytimes.com/2008/05/07/sports/othersports/07rhoden.html> (May 7, 2008) (last accessed Nov. 22, 2009)) (discussing various cruelties associated with horse racing).

²⁶² Humane Socy. of the U.S., *Get the Facts on Horse Slaughter*, http://www.hsus.org/horses_equines/issues/get_the_facts_on_horse_slaughter.html (last accessed Nov. 22, 2009) (“Horses commonly slaughtered include unsuccessful race horses . . .”).

suggest changing the legal status of domestic animals—from property to “living property”²⁶³ or “persons”²⁶⁴—or altering the allowable uses of animals regardless of whether they are classified as property.²⁶⁵ This Part argues that current proposals cannot overcome deeply entrenched inequalities in current law that result from legal gerrymandering or the hierarchy problem of human rights or interests being privileged over those of animals.

Gary Francione has long argued in seminal works that, in a legal world divided between persons and property, nonhuman animals should be treated as persons.²⁶⁶ A “person,” according to Francione, is one who has “morally significant interests.”²⁶⁷ The problem with the current legal treatment of animals, as he sees it, is that “we balance animal interests unprotected by claims of right against human interests protected by claims of right in general and, in particular, by claims of human property rights in those animals.”²⁶⁸ He argues that even under acts such as the Animal Welfare Act (AWA), which purport to focus on animal welfare, human property interests in laboratory and other animals covered under the Act result in animal exploitation.²⁶⁹ Researchers are allowed to treat animals as tools for scientific inquiry, so long as very basic needs are met—supplying merely enough food, hydration, and space to sustain life.²⁷⁰

A move toward personhood, as Francione suggests, would entail a dramatic departure from current legal treatment of animals as property. While personhood certainly does not equate with being human, it usually requires the recognition of higher-order cognitive properties.²⁷¹ As persons, animals would have legal rights to avoid suffering

²⁶³ Dillard et al., *supra* n. 30, at 95.

²⁶⁴ See Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?* 100–02 (Temple U. Press 2000) (arguing for the legal treatment of animals as “persons”); Francione, *Rain Without Thunder*, *supra* n. 30, at 177–89 (same); Gary L. Francione, *Animals, Property, and the Law* 14 (Temple U. Press 1995) (same); see also Wise, *supra* n. 30, at 63–88, 179–238 (explaining the similarities of chimpanzee, bonobo, and human minds).

²⁶⁵ See e.g. Bryant, *Similarity or Difference*, *supra* n. 33, at 239–43 (articulating a nondiscrimination approach to the well-being of all animals); Bryant, *Animals Unmodified*, *supra* n. 64, at 162–94 (same).

²⁶⁶ See Francione, *Introduction to Animal Rights*, *supra* n. 264, at 100–02; Francione, *Rain Without Thunder*, *supra* n. 30, at 177–89; Francione, *Animals, Property, and the Law*, *supra* n. 264, at 14.

²⁶⁷ Francione, *Animals, Property, and the Law*, *supra* n. 264, at 100. Francione appeals to equal consideration yet eschews Singer’s properties model as a device for identifying morally relevant capacities other than suffering. It is unclear how other morally relevant capacities are identified as well as how inevitable conflicts under his rights-based model are resolved between persons.

²⁶⁸ *Id.* at 91.

²⁶⁹ *Id.* at 165–250.

²⁷⁰ *Id.*

²⁷¹ The notable exception is for corporations, which are recognized as “persons” under the law. 1 American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* § 1.28(b)–(c) (2005) (“‘Person’ means . . . any form of organization, including a corporation, a partnership or any other form of association, any form of trust

and to continued existence. Recognizing personhood could afford domestic animals something akin to Constitutional Equal Protection.²⁷²

The personhood model has a number of limitations. The move to legal personhood simply pushes the issue of conflicting capacities and interests to a higher level, demanding resolution of the same conflicts among *persons*. Further, the exploitation of animals runs deeper than our legal system and whether we legally call animals “persons” or “property.” Animal use is entrenched in religious and philosophical thought and thereby embedded in social practice.²⁷³ It is possible to call animals “persons” and not to consider their capacities to suffer, when recognizing such capacities conflicts with individual or state interests in animal use. For example, children are no doubt persons, yet their interests are routinely sacrificed by those with whom they have a dependency relationship.²⁷⁴ In addition, legal personhood does not equate with being a member, let alone an equal member, of a moral community; laws recognize corporations as persons, for instance.²⁷⁵ Lastly, for personhood status to be meaningful under Francione’s terms, sentient animals of all abilities would have to be granted personhood under law, and lower animals, such as mice, are unlikely to receive this status.

One solution would be to develop a property model where animal interests are adequately considered, that is, the suffering of animals and their interest in continued existence are appreciated. A thoughtful proposal by David Favre advocates such a paradigm, where owners of domestic animals would retain legal title over animals who enjoy a form of “equitable self-ownership.”²⁷⁶ Through self-ownership, animals could hold equitable interests in other property (such as the house in which they live) and have standing to sue on their own behalf.²⁷⁷ Equitable self-ownership recognizes that animals have intrinsic worth.²⁷⁸ In addition, it acknowledges that the dependency relationship between particular human and nonhuman animals imposes duties on human guardians to care for animals, as defined by existing anti-cruelty stat-

or estate, a government or any political subdivision, or an agency or instrumentality of government, or any other legal or commercial entity.”).

²⁷² See *supra* n. 32 and accompanying text.

²⁷³ See *supra* n. 3 and accompanying text. See also Satz, *Would Rosa Parks Wear Fur?*, *supra* n. 32, at 141–45.

²⁷⁴ See e.g. Martha Albertson Fineman, *Dependency, Companion to the Child* (forthcoming) (on file with author) (discussing how dependency makes children vulnerable to parental interests); Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* 4–54 (N.Y. Press 2004) (discussing the inequalities within families affecting children’s welfare); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*, 14 *Cardozo L. Rev.* 1747, 1748–49 (1993) (“[P]arents’ rights, as currently understood . . . undermine those values of responsibility and mutuality necessary to children’s welfare.”).

²⁷⁵ See *supra* n. 271 and accompanying text.

²⁷⁶ David Favre, *Equitable Self-Ownership of Animals*, 50 *Duke L.J.* 473 (2000).

²⁷⁷ *Id.* at 501–02.

²⁷⁸ *Id.* at 495.

ues.²⁷⁹ In more recent work, Favre simplified and renamed this paradigm, treating animals as “living property.”²⁸⁰ This paradigm creates the same duties of care on behalf of human guardians of animals, though it does not support animals holding equitable interests in property or having standing to sue.²⁸¹

In response to such expanded property views, Francione argues—invoking slavery by analogy—that property status prevents the recognition of rights and results in devaluation and degradation.²⁸² The analogy is at best a loose one, however. Unlike human slaves, domestic animals are permanently and completely dependent on human care. Granting personhood status does not change animal dependency. The solution lies with understanding this dependency relationship and guarding against exploitation of the vulnerable subject based on that dependency. It is difficult to imagine that if we considered seriously animal interests in avoiding suffering and continued existence, and abolished factory farms and the killing of livestock for flesh foods, for example, that farm animals would still be devalued and degraded.

The expanded property approach faces other more difficult challenges, however. It is unlikely to resolve moral or legal inconsistencies resulting from the unequal treatment of animal suffering, as protection relies on a case-by-case assessment under current laws, which entrench unequal treatment.²⁸³ Further, recognizing animals as possessing intrinsic worth does not translate into equal treatment of their capacities, given the hierarchy problem of rights-based (and interests-based) approaches.²⁸⁴

An alternative property approach is used in the wildlife context. Animal life is viewed as an intrinsically important part of the ecosystem. Under the Endangered Species Act of 1973 (ESA)²⁸⁵ and other statutes, animals are held in trust.²⁸⁶ There is no individual title to wild animals, and the state controls access to them.²⁸⁷ While animals are treated as nonpersons, a trustee or guardian has standing to seek protections on their behalf.²⁸⁸

While this approach does not require a case-by-case analysis, the obvious limitation is that the ESA and other wildlife statutes do not

²⁷⁹ *Id.* at 497–501.

²⁸⁰ Dillard et al., *supra* n. 30, at 95; *see also* David Favre, *Living Property: A New Status for Animals within the Legal System* (forthcoming Marq. L. Rev., Spring 2010).

²⁸¹ Dillard et al., *supra* n. 30, at 95; *see also* David Favre, *Living Property*, *supra* n. 280.

²⁸² Francione, *Introduction to Animal Rights*, *supra* n. 264, at 131–34. *See also id.* *Foreword*, at xii.

²⁸³ *See supra* nn. 74–76 and accompanying text discussing Fineman’s view of substantive equality.

²⁸⁴ *See supra* nn. 58–63 and accompanying text.

²⁸⁵ 16 U.S.C. §§ 1531–1544 (2006 & Supp. 2008).

²⁸⁶ *Id.*; *see also Geer v. Conn.*, 161 U.S. 519, 529 (1896) (Wildlife is held in “trust for the benefit of the people.”).

²⁸⁷ 16 U.S.C. §§ 1531–1544.

²⁸⁸ *Id.*

speak to individual animals who may need protection. They do, however, embrace the intrinsic value of animals, which translates into the domestic animal setting. As under Favre's approach, individual domestic animals could be recognized as having intrinsic value rather than value relative to human interest.²⁸⁹ The problems of hierarchy and operating under existing laws that fail to consider equally animal capacities remain, however.

The legal personhood, expanded property, and trustee proposals rely on a change in legal status to generate greater animal protections. Granting animals personhood would give them access to existing legal protections for persons, but it is unclear how the human-nonhuman animal dynamic would change, given the hierarchy problem. Deeming humans trustees or other types of guardians of animals would allow greater enforcement of existing animal protections, which entrench inequalities.

Another approach is to argue for a more foundational legal paradigm shift that removes the presumption of animal use for human interest. Such an approach is based on both animals' rights to noninterference and affirmative obligations of care, stemming from the human-nonhuman animal dependency relationship. Taimie Bryant has adeptly moved the discussion in this direction. In *Animals Unmodified*, Bryant appeals to a right to noninterference for all living animals, including bacteria, and argues that advocates should develop alternatives to animal use to meet human needs.²⁹⁰ Bryant's approach encapsulates some elements of the wildlife paradigm, in the sense that humans live in an ecosystem where organisms are mutually dependant.²⁹¹ Under Bryant's view every animal, even one who is non-sentient, is part of our moral community.²⁹²

Bryant argues that legal paradigms that afford animals protections based on certain properties or capacities should be abandoned.²⁹³ Under the properties view, there is an inevitable hierarchy of interests, and some animals will always have fewer properties and be

²⁸⁹ The concept of intrinsic value is misunderstood by courts. See e.g. *Bueckner v. Hamel*, 886 S.W.2d 368, 375 (Tex. App. 1st. Dist. 1994) (Intrinsic value requires human attachment, "usefulness," or "special value to the owner.") (Andell, J., concurring).

²⁹⁰ Bryant, *Animals Unmodified*, *supra* n. 64, at 162–94 (embracing a nondiscrimination approach to animal well-being); see also Bryant, *Similarity or Difference*, *supra* n. 33, at 239–43 (same).

²⁹¹ Bryant, *Animals Unmodified*, *supra* n. 64, at 162–94 (embracing a nondiscrimination approach to animal well-being); see also Bryant, *Similarity or Difference*, *supra* n. 33, at 239–43 (same).

²⁹² Bryant, *Animals Unmodified*, *supra* n. 64, at 162–94 (embracing a nondiscrimination approach to animal well-being); see also Bryant, *Similarity or Difference*, *supra* n. 33, at 239–43 (same). This claim is similar to claims about the rights of nature. See Roderick Frazier Nash, *The Rights of Nature: A History of Environmental Ethics (History of American Thought and Culture)* (U. Wis. Press 1989) (documenting the history of thought that extends moral claims to nature).

²⁹³ Bryant, *Similarity or Difference*, *supra* n. 33, at 211–26.

treated as inferior.²⁹⁴ Recall, for example, the problem with Singer's argument that all sentient animals require equal consideration of their interests to avoid suffering. Animals with higher-order capacities may suffer in greater ways than animals with lower order capacities, which may prevent the recognition of the interests of the latter.²⁹⁵

It is difficult to know how Byrant's approach would operate in practice, however. If every animal has moral significance and one cannot create a hierarchy based on sentience, how are conflicts among interests resolved? Without criteria to resolve such conflicts, the default position has been to resolve them in favor of human interests. As demonstrated by environmental regulations affecting wild animals, human interests outweigh all but the interests of endangered species (and sometimes even those interests).²⁹⁶ It seems that the recognition of animal capacities matters for meaningful and sustainable protections.

While I seek to address the hierarchy problem in another manner, and resist extending moral status to nonsentient beings, Bryant's work contributes to my own. Drawing on Bryant's arguments for a presumption against exploitation, it is possible to advance another framework that recognizes animal capabilities as morally relevant.

VI. EQUAL PROTECTION OF ANIMALS PARADIGM

This Part advances a new paradigm to regulate human use of animals that better responds to animal suffering: Equal Protection of Animals (EPA). EPA combines vulnerability and capability theory and the principle of equal protection. Section A addresses why human and non-human animals have equal claims to basic capabilities. Section B discusses theoretical approaches to capabilities. Section C extends Amartya Sen's conception of capabilities as functionings to nonhuman animals and provides examples of how EPA would work in practice.

A. *Equal Claims to Basic Capabilities*

Many scholars argue that since animals are part of our moral community, we should consider them equally on certain grounds. Recall Singer's equal consideration of interests principle, which states that the interests of sentient animals (animals with the capacity to suffer) in avoiding pain and suffering are to be considered equally with human interests stemming from the pleasure derived from animal use. Regan's rights theory holds that animals should be protected universally because of their inherent value.

The difference between these conceptions of equality lies with how the claims—interests or rights—are enforced. Singer's view is an out-

²⁹⁴ *Id.* at 216–20.

²⁹⁵ *See supra* nn. 51–56 and accompanying text.

²⁹⁶ *See supra* nn. 136–40 and accompanying text discussing the lack of protection for timber wolves in Alaska.

come-oriented (consequentialist) view that weighs the interests of animals and humans. Regan's view is deontological and imposes on humans a duty that prohibits the use of animals in certain ways.

EPA invokes equality in a different manner. The paradigm supports the view that animals have equal claims to basic capabilities based on their capacity to suffer and their status as vulnerable subjects. These basic capabilities are to be equalized to the greatest extent possible within a given population of human and nonhuman animals.²⁹⁷ EPA is outcome-oriented but not utilitarian; it focuses on maximizing basic capabilities (not utility) within a given population.

B. *Capability Approaches and Equal Protection*

EPA is based on a capability approach to well-being that values what an individual can do or be in a lifetime. As recently recognized by Martha Nussbaum, capabilities are enabled by the equal protection principle. In the civil rights context, Nussbaum claims that courts essentially ask the question: "[W]hat are these people actually able to do and to be . . . [in order to] unmas[k] [] device[s] for the perpetuation of hierarchy."²⁹⁸ "Doing and beings" are how capabilities are generally defined.²⁹⁹

Nussbaum and Amartya Sen each offer a capability approach stemming from different philosophical traditions. Nussbaum's theory draws from Aristotelian, utilitarian, and social contract theory to articulate a threshold level of capabilities to promote human dignity. Sen's theory is consequentialist and seeks to maximize capabilities within a given population. Though Sen's theory was developed first, I begin with Nussbaum's work, as Sen's theory is the one that informs EPA.

1. *Capabilities as Dignity*

Martha Nussbaum's theory of capability equality has evolved over time.³⁰⁰ In her most recent work, she describes her approach as based on the notion of human dignity.³⁰¹ Capabilities are distributive units that contribute to human dignity by allowing people to realize what they "are actually able to do and to be."³⁰² Nussbaum makes an analogy to human rights concepts and argues that there is a minimum level of capabilities that must be provided to all humans.³⁰³ She identi-

²⁹⁷ Amartya Sen, *Equality of What?*, in *Liberty, Equality, and Law: Selected Tanner Lectures on Moral Philosophy* 369 (Sterling M. McMurrin ed., U. of Utah & Cambridge U. Press 1987).

²⁹⁸ Martha C. Nussbaum, *Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 *Harv. L. Rev.* 4 (2007).

²⁹⁹ Amartya Sen, *Capability and Well-Being*, in *The Quality of Life* 31 (Martha Nussbaum & Amartya Sen eds., Clarendon Press 1993).

³⁰⁰ Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* viii–ix (Belknap Press 2006).

³⁰¹ *Id.* at 70.

³⁰² *Id.*

³⁰³ *Id.*

fies a working list of ten capabilities, including life, health, bodily integrity, “[s]enses, [i]magination, and [t]hought,” emotions, “[p]ractical [r]eason,” affiliation, other species relations, play, and “[c]ontrol over [o]ne’s [e]nvironment” (political and material).³⁰⁴

Unlike Amartya Sen, Nussbaum applies her theory directly to animals.³⁰⁵ She argues that animals may be part of our moral community based on sentience³⁰⁶ or other morally relevant capacities, such as those for movement, emotion, or affiliation.³⁰⁷ Using “sympathetic imagining” of animal behavior,³⁰⁸ she applies her ten capabilities developed in the human context to nonhuman animals.³⁰⁹

One problem with Nussbaum’s theory is that it is unclear how capabilities that support dignity are identified. She argues that relevant capabilities for animals are “important and good,”³¹⁰ but it is difficult to know what that means, since she rejects human or other animal nature as good.³¹¹ Peter Singer rightly suggests that the difficulty of conceptualizing what is important and good under Nussbaum’s theory tempts one to argue that what is good is “be[ing] able to satisfy some of [one’s] strongest considered preferences,” and this collapses Nussbaum’s theory into utilitarianism.³¹²

The primary difficulty with Nussbaum’s model, however, is that she recognizes species distinctions for flourishing.³¹³ For this reason, it seems that her theory cannot avoid dominance of human over animal capabilities. She argues that animals should have “adequate opportunities” for flourishing,³¹⁴ but what if opportunities—such as roaming free in territory that is now developed as residential—conflict with human notions of flourishing? Nussbaum presents morally dictated vegetarianism and animal experimentation as tough issues,³¹⁵ but these are exactly the difficult issues for which we must have answers. As discussed with regard to the limits of humane labeling, a more radical approach is required to advance animal well-being significantly.

³⁰⁴ *Id.* at 392–401.

³⁰⁵ *Id.* at 346–407.

³⁰⁶ Nussbaum, *Frontiers of Justice*, *supra* n. 300, at 351, 392–401.

³⁰⁷ *Id.* at 362.

³⁰⁸ *Id.* at 355.

³⁰⁹ *Id.* at 392–401.

³¹⁰ *Id.* at 193, 347.

³¹¹ *Id.* at 366–72.

³¹² Peter Singer, *A Response to Martha Nussbaum*, <http://www.utilitarian.net/singer/by/20021113.htm> (Nov. 13, 2002) (last accessed Nov. 22, 2009).

³¹³ Nussbaum, *Frontiers of Justice*, *supra* n. 300, at 362–66, 383–84.

³¹⁴ *Id.* at 384.

³¹⁵ *Id.* at 401–05.

2. *Capabilities as Functionings*

Amartya Sen's theory of basic capability equality³¹⁶ seeks to maximize capabilities across given populations.³¹⁷ Unlike Martha Nussbaum, Sen does not speak of promoting dignity through a set of capabilities believed to be universally significant, but rather of enabling certain types of functional outcomes or "functionings" depending on an individual's biology and other limitations.³¹⁸ As a result, individuals choose a capabilities set that speaks to their biological capacities as well as external limitations, such as financial, legal, or other restrictions.³¹⁹ The capabilities set chosen by a given population is maximized.³²⁰ Basic capability equality is egalitarian, as members of a population have the same potential for having their chosen capabilities maximized.³²¹ The ability to consider various levels and means of functioning, as well as to provide equal chances that the valued capabilities of every individual will be maximized, is paramount to extending Sen's theory to nonhuman animals.

Sen expresses his model formally, and I interpret his theory in other work.³²² What is important for present purposes is the fact that the model is flexible enough to consider a spectrum of basic capabilities. Capabilities may be very general, such as the ability to have health, to exercise, or to have intellectual stimulation. They may also be specific, like the ability to breathe freely, to metabolize food, or to sleep. The capabilities mentioned thus far may all be considered vital goods. Basic capabilities may also include less significant goods, such as the ability to be entertained, to possess certain material goods, or to live in a particular location. Within a given population, then, basic capability equality may be applied to various levels of the functionings that individuals seek to maximize.

Sen does not apply his model to nonhuman animals. It does not, however, seem too much of a stretch to apply his theory in this way. Almost any population of human animals will be one in which nonhu-

³¹⁶ Sen discusses his theory in a variety of works. See Amartya Sen, *Commodities and Capabilities* (Oxford U. Press 1999); Amartya Sen, *Inequality Reexamined* (Harv. U. Press 1992); Sen, *Capability and Well-Being*, *supra* n. 299; Sen, *Equality of What?*, *supra* n. 297; Amartya Sen, *On the Foundations of Welfare Economics: Utility, Capability and Practical Reason*, in *Ethics, Rationality and Economic Behaviour* (Francesco Farina et al. eds., Clarendon Press 1996); Amartya Sen, *The Standard of Living: Lecture I, Concepts and Critiques* and *The Standard of Living: Lecture II, Lives and Capabilities*, in *The Standard of Living* (Geoffrey Hawthorn ed., Cambridge U. Press 1987); Amartya Sen, *Well-Being, Agency, and Freedom: The Dewey Lectures 1984*, 82 *J. Phil.* 169 (1985).

³¹⁷ This means that the framework is consequentialist—concerned with consequences—but nonutilitarian, as the "units" to be maximized are capabilities, not utils.

³¹⁸ Sen, *Capability and Well-Being*, *supra* n. 299, at 31.

³¹⁹ Sen, *Commodities and Capabilities*, *supra* n. 316, at 6–11.

³²⁰ *Id.*

³²¹ *Id.*

³²² Ani B. Satz, *Toward Solving the Health Care Crisis: The Paradoxical Case for Universal Access to High Technology*, 8 *Yale J. Health Policy L. & Ethics* 93 (2008).

man animals reside. Consider the national population, or populations of states or municipalities, universities, laboratories, farms, zoos, military or police units, or households. All sentient animals have basic capabilities pertaining to suffering and perhaps other higher-order capabilities as well. While nonsentient beings might share capabilities with sentient animals, such as the ability of plants to be nourished, I leave the possibility of extending Sen's theory in this manner to others. Like Singer, I draw a moral line at sentience, possibly somewhere in the animal kingdom "between a shrimp and an oyster."³²³

The egalitarian premise of basic capability equality—that the valued capabilities of every individual have equal potential to be maximized—could be extended to nonhuman animals. Human and nonhuman animals within a population would have equal chances to maximize their capabilities. Combined with the equal protection principle and vulnerability theory, this gives rise to EPA.

Sen's capabilities approach offers two significant benefits over Nussbaum's approach. First, it avoids species distinctions, which, as discussed below, allows for equal protection of animal capabilities at least at the most basic level. Second, it does not assume that all organisms will benefit from the capabilities Nussbaum identifies. Some human and nonhuman animals may not be able to attain these capabilities.³²⁴ These individuals have claims to maximizing other basic capabilities under EPA.

C. *Extending Capabilities to Nonhuman Animals*

Sen's capabilities approach informs EPA to the extent that human and nonhuman animals with like capacities must be treated alike. Under Sen's model, relevant capabilities depend on the abilities of a given organism to function in particular ways. For example, animals with higher mental capacities will have different capabilities than animals with lower intellectual abilities. These differences are not confined to species variations *per se*, but rather result from variations in human and nonhuman animal biology. This Section focuses on the most basic capabilities important to human and nonhuman animals alike.

Consider the capabilities to be fed, hydrated, "clothed" (have bodily integrity, including avoiding bodily pain), and sheltered; to exercise and to engage in natural behaviors of movement; and to have companionship. Now contemplate the current legal treatment of factory farm animals. Nourishment and hydration of farm animals is at the discretion of the farmer. Remember that veal calves are provided only milk until they are too anemic to stand, and chickens are starved to force molting to stimulate egg production. While nonhuman animals obviously do not wear clothes, they may have bodily integrity, giving rise to

³²³ Singer, *Animal Liberation*, *supra* n. 30, at 174.

³²⁴ Michael Ashley Stein, *Disability Human Rights*, 95 Cal. L. Rev. 75, 77 (2007) (discussing disabled humans).

an analogy about maintaining animals' natural protective coverings. Farm animals experience tail docking, de-beaking, and mulesing.³²⁵ Sheep may be sheared prematurely, a practice that ensures that wool is collected before sheep start to shed, which may result in death.³²⁶ Factory farm animals cannot exercise or engage in natural behaviors of movement, as they are confined to battery cages, gestation crates, or veal crates. They do not experience companionship.

The same exercise can be performed with regard to laboratory and companion animals. Minimal protections exist for laboratory animals for food, hydration, and shelter, but they do not maximize these capabilities. There is a spectrum of well-being between not starving and being well-fed; similar arguments may be made about hydration and shelter. Having enough room to stand, turn around, and lie down does not constitute maximal shelter. Further, only dogs and primates have exercise requirements.³²⁷ As for bodily integrity, laboratory animals' natural coats are damaged during invasive surgical experiments, where portions of their fur and skin are removed for better observation or manipulation of their internal organs and tissues, and some experiments are directed at animals' skin, eyes, or nails.³²⁸ It is unlikely that many laboratory animals experience companionship.

Companion animals come closest to having these very basic capabilities maximized. A well-cared-for pet may have proper nourishment, hydration, exercise, and shelter; possess a healthy coat and nails; and have companionship. In fact, some companion animals may have higher-order capabilities maximized, like the capability to travel, to be

³²⁵ "Mulesing" is when the skin and flesh near the posterior of sheep is cut (often without painkillers) to prevent maggot infestation in the wool. See e.g. U.S. Dept. of Agric. Ctr. for Med., Agric. & Veterinary Entomology, *Research and Extension Needs for Integrated Pest Management for Arthropods of Veterinary Importance* 231 (Christopher J. Geden & Jerome A. Hogsette eds.), <http://www.ars.usda.gov/sp2UserFiles/Place/66151020/downloads/lincoln.pdf> (last updated Oct. 2001) (last accessed Nov. 22, 2009).

³²⁶ I.W. Lugton, *Cross-Sectional Study of Risk Factors for the Clinical Expression of Ovine Johne's Disease on New South Wales Farms*, 82 *Aust. Vet. J.* 355, 360, 364 (2004).

³²⁷ 7 U.S.C. § 2143(a)(2)(B) (2008); see also 9 C.F.R. § 3.8 (2008) (exercise for dogs).

³²⁸ See e.g. P.B. Lavenex, D.G. Amaral & P. Lavenex, *Hippocampal Lesions Prevent Spatial Relational Learning in Adult Macaque Monkeys*, 26 *J. Neuroscience* 4546 (2006) (discussing surgery to expose monkeys' brains to inject them with acid). The Draize test has been used since 1944 to test chemicals in the eyes and on the skin of animals. John H. Draize, Geoffrey Woodard & Herbert O. Calvery, *Methods for the Study of Irritation and Toxicity of Substances Applied Topically to the Skin and Mucous Membranes*, 82 *J. Pharmacol. & Exp. Therapeutics* 377, 379–83 (1944). The skin tests are performed on immobilized and unanesthetized animals on a shaven and abraded surface, and the area is covered with rubber or plastic after the chemical is applied. *Id.* at 379–83; see also Natl. Antivivisection Socy., *Animals in Product Testing: Animal Tests*, http://www.navs.org/site/PageServer?pagename=ain_pt_animal_tests (last accessed Nov. 22, 2009). During the ocular tests, animals are immobilized and not anesthetized, and their eyes are clipped open, often for days. Draize, Woodard & Calvery, *Methods for Study of Irritation and Toxicity of Substances*, *supra* at 384–87; Natl. Antivivisection Socy., *Animals in Product Testing: Animal Tests*, *supra*. These tests may cause severe burning, bleeding, itching, and ulceration. Natl. Antivivisection Socy., *Animals in Product Testing: Animal Tests*, *supra*.

educated through positive reinforcement training or other mental stimulation (compare this to “enrichments” for laboratory animals to keep them sane),³²⁹ and to have entertainment or to play. As the common horrors of puppy mills, animal hoarding, and animal cruelty and neglect cases indicate, however, basic capabilities are not maximized by current legal structures. Animal cruelty statutes come into play only in the worst cases, and they may not be enforced when resources are devoted to human causes.³³⁰

Laws maximizing even the most basic capabilities of domestic animals, such as the ability to have nutrition, hydration, shelter, bodily integrity, companionship, and exercise and to engage in natural behaviors of movement, would dramatically reshape animal protections. Factory farms would be abolished, though one could imagine some small-scale farming operations. It is doubtful that most animal experimentation could continue. Certainly invasive procedures would interfere with one or more of these basic capabilities, and behavioral research involving intensive confinement fails to maximize the capability to exercise and to engage in natural behaviors of movement. Alternatives to invasive animal experimentation such as research on non-sentient beings like fruit flies, computer or math modeling, chemical analyses, and consensual human experimentation could be employed. Behavioral research on domestic animals would require significant alterations to confinement. Studies of wild animals, whose natural territory usually spans tens of miles, would likely take place through human observation of animals in the wild. Companion animals could be kept in certain conditions.

Since the populations at stake include humans who also have claims to the maximization of these basic capabilities, my arguments for nonhuman animals rest on a couple of key assumptions. First, humans do not need to consume flesh to have proper nourishment. Second, animal experimentation does not improve the enumerated basic capabilities for humans. These assumptions are disputed, though many compelling studies and reports support their validity. For decades, a vegetarian diet has been considered at least as healthy as a carnivorous one,³³¹ and, for some medical conditions such as diabetes,

³²⁹ 9 C.F.R. § 3.81 (2008).

³³⁰ See Taimie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans*, 39 Rutgers L.J. 247, 296 (2008); Frasci et al., *State Animal Anti-Cruelty Statutes*, *supra* n. 106, at 70.

³³¹ See e.g. Am. Dietetic Assn., *Position of the American Dietetic Association and Dietitians of Canada: Vegetarian Diets*, 103 J. Am. Dietetic Assn. 748 (2003) (concluding that “[a]ppropriately planned vegetarian diets have been shown to be healthful, nutritionally adequate, and beneficial in the prevention and treatment of certain diseases. Vegetarian diets are appropriate for all stages of the life cycle.”); Johanna T. Dwyer, *Health Aspects of Vegetarian Diets*, 48 Am. J. Clinical Nutrition 712 (1988) (reviewing studies indicating similar or lower mortality rates as well as decreased risks for obesity, hypertension, heart disease, type II diabetes, gallstones, and other diseases for vegetarians as compared to omnivores).

it may be recommended.³³² Further, more resources are consumed to raise flesh than grain for food, and fewer people are fed as a result.³³³ In addition, factory farms are significant producers of greenhouse gas emissions world-wide.³³⁴ With regard to animal experimentation, studies suggest we gain little if any information that translates into clinical use (in part due to the difference between animal and human physiology), and information could be obtained by other means.³³⁵ It is also difficult to imagine animal experimentation benefiting the very basic capabilities that we are discussing. However, even if one rejects these assumptions, maximizing human and nonhuman animal capabilities within the same population will require the abolition of many current practices, like factory farming and animal research as it is currently performed, because continuing them would ignore basic animal capabilities altogether.

VII. IMPLICATIONS OF EXTENDING EQUAL PROTECTION

A nondiscrimination approach to animals like the one described in Part VI will likely meet criticism. First and foremost, it could be argued that animals are not part of our moral community, and, as a result, they do not need stronger legal protection. In Part II, I suggested that the arguments of Singer and others are compelling on this point, namely that animals have properties, such as the capacity to suffer, which are morally relevant. These properties give rise to the universal vulnerability of human and nonhuman animals discussed in that Part and aid in the identification of the shared basic capabilities of animals addressed in Part VI. To argue that animal capabilities such as those related to suffering do not matter morally, one must proffer and defend a speciesist argument. Such an argument violates a fundamental postulate of equality, by treating some animals with the same capacities differently. The sections that follow address additional possible objections to maximizing human and animal capabilities and the implications of applying EPA to existing law.

³³² See e.g. Andrew Nicholson, *Diabetes: Can a Vegan Diet Reverse Diabetes?*, <http://www.pcrm.org/health/clinres/diabetes.html> (last updated Feb. 15, 2005) (last accessed Nov. 22, 2009).

³³³ See e.g. Frances Moore Lappé, *Diet for a Small Planet* (4th ed., Random House 1991); Erza Klein, *The Meat of the Problem*, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/28/AR2009072800390.html> (July 29, 2009) (last accessed Dec. 16, 2009) (discussing a 2006 United Nations report and studies conducted at the University of Chicago and Carnegie Mellon University).

³³⁴ See e.g. Sharon Friel et al., *Global Health Equity and Climate Stabilisation: A Common Agenda*, 372 *Lancet* 1677, 1680 (2008) (“Livestock production (including transport of livestock and feed) accounts for nearly 80% of the agricultural sector’s greenhouse gas emissions.”).

³³⁵ See e.g. Pandora Pound et al., *Where Is the Evidence that Animal Research Benefits Humans?*, 328 *Brit. Med. J.* 514 (2004); see also Phys. Comm. for Responsible Med., *Animal Experimentation Issues*, <http://www.pcrm.org/resch/anexp> (last accessed Nov. 22, 2009).

A. *"They are just animals, and, without us, they would not exist."*

One possible objection to EPA is that humans created the domestic animals at stake, and, as a result, should be able to use them as they please. In other words, domestic animals would not exist independently of human action, so humans should be able to use them for their benefit. While it is true that domestic animals are introduced by humans, it is tautological to argue that therefore they may be forced to suffer for human desire. Human creation does not justify unbounded human use. A human child may be created for many reasons—to feel fulfilled, to combat loneliness, to try to save or to encourage a marriage, to create an heir, or to provide a blood or tissue donor for a different child—but it is illegal (and immoral) to cause that child suffering in particular ways. One cannot legally neglect, indenture, or otherwise abuse children.

Another related argument is that the creation of domestic animals, even for human use, results in greater happiness. This total utility argument is that there is greater happiness in greater numbers.³³⁶ This leads to a related question about the benefits of existence versus nonexistence—would a veal calf on a factory farm be better off if it had not been born at all?³³⁷ To address these questions, it is necessary to consider suffering. Arguments for breeding most domestic animals are weak, as the lives of factory farm, laboratory, and abused companion animals are miserable from birth to death. For domestic animals who do not suffer cruel treatment and whose dependency needs are addressed, such as well-cared-for companion animals, the issue becomes more difficult. However, I am inclined to believe that, all things equal, it is better not to hold animals in captivity due to the frustration of natural behaviors of movement, and greater numbers of domestic animals should not be created.³³⁸

B. *Inevitable Conflicts and the Need to Start with Basic Capabilities*

Perhaps the greatest hurdle for EPA—or any paradigm that recognizes certain capacities or properties of animals as morally relevant—is the inevitable conflicts that arise between the maximization of human and nonhuman capabilities within a given population. Conflicts arise when human capabilities are furthered by using animals, for example, when the ability to be entertained is supported by animal fighting, circuses, or zoos. Bryant and others argue we must not appeal to hierarchies of capacities, or nonhuman animals will always lose.³³⁹

³³⁶ J.J.C. Smart & Bernard Williams, *Utilitarianism: For and Against* 27–28 (Cambridge U. Press 1973).

³³⁷ Singer, *Animal Liberation*, *supra* n. 30, at 228.

³³⁸ It is my view that the harms of captivity outweigh the harms of domestic animal species endangerment or extinction, but that is a subject for another time.

³³⁹ Bryant, *Similarity or Difference*, *supra* n. 33, at 216–20.

Francione argues, with regard to domestic animals, that these are “false conflicts.”³⁴⁰ Humans create domestic animals for their use and control and then act as if they are balancing their human interests with those of animals.³⁴¹ The classic example is animal husbandry, which as a matter of routine, professional practice involves intensive confinement, castration and de-beaking without anesthesia, and other cruel practices.³⁴² In this context, where some animals are never allowed to take one step after birth, it is argued that the well-being of the animals is considered and balanced against human interest in consuming flesh foods.³⁴³

Recall that Francione argues that it is the property status of animals that causes the hierarchy problem.³⁴⁴ If animals are property, their interests and capacities will always be given less weight than human interests and capacities. A pig’s capacity to suffer and to have a continued existence will never outweigh the farmer’s property (and economic) interest in intensively confining and killing her. The latter, in fact, would be considered moral under Singer’s view, if animals could be raised without suffering and killed painlessly.³⁴⁵

The solution to the issue, I believe, lies in the application of the capabilities model to nonhuman animals. First, while it is certainly true that most humans have more capacities for which to account, the capabilities involved in preventing the cruelty and suffering at stake—having necessary food and hydration, maintaining bodily integrity, being sheltered, and having the ability to exercise/engage in natural behaviors of movement and to experience companionship—are universal and very basic to life. Thus, it is likely these capabilities will be chosen by humans to be maximized within a given population of human and nonhuman animals. Second, the egalitarian principle embedded within Sen’s model requires equal potential to realize these capabilities. Under his framework, animals will have equal claims to having the six basic capacities maximized.

Third, under the capabilities model, the conflict between human interest in using animals to realize “higher” capabilities and very basic animal capabilities is a weak one. While it is true that maximizing the very basic capabilities of human and nonhuman animals will undermine some higher human capabilities—such as the ability to consume flesh-foods, to benefit from new beauty and household products tested on animals, and to wear the skins of animals for fashion—the per-

³⁴⁰ Gary Francione, *Equal Consideration and the Interest of Nonhuman Animals in Continued Existence: A Response to Professor Sunstein*, *supra* n. 56, at 247.

³⁴¹ *Id.*

³⁴² See *supra* nn. 22–23, 124–26, 198–211, 245–48, 256–57 and accompanying text discussing husbandry practices.

³⁴³ See *supra* n. 46 (discussing balancing) and nn. 198–211 (discussing intensive confinement).

³⁴⁴ See *supra* nn. 266–70 and accompanying text.

³⁴⁵ See *supra* n. 56 and accompanying text. While EPA could support a right to continued existence, that argument requires further development elsewhere.

ceived conflict embodies a misperception. These capabilities are framed in terms of the use of animals to realize them, rather than the realization of the capabilities themselves. The capabilities to eat, clean, wear make-up, and dress fashionably do not require the use of animals. The same is true for entertainment, companionship, police work, medical and veterinary school training, scientific research, and the many other contexts in which animals are exploited. In other words, capabilities may be realized in various ways.³⁴⁶

Thus, it is possible to focus on maximizing the most basic capabilities associated with avoiding suffering across a population. Only after these capabilities are maximized does it make sense to discuss possibly competing claims of human and nonhuman animals to higher-order capabilities. Practically speaking, emphasis should be placed on shaping legal and social institutions to recognize animals as vulnerable subjects and to support alternatives to animal use.

C. *Equality and the Decline of Human Exploitation of Animals*

EPA is a nondiscrimination approach to animal welfare. Such an approach relies on a presumption against the use of nonhuman animals. Currently, the opposite is true, as animal use is presumed legal absent exception.

The paradigm has a number of advantages over other proposals. It moves beyond the historically paralyzing discussion about whether animals are persons or property and attacks the legal and social sources of animal suffering. EPA demonstrates that property status need not determine the level of protection for animals; under EPA, animals experience equality in the consideration of their capabilities regardless of their legal characterization.³⁴⁷

EPA also avoids speciesism and other problems of hierarchy. Animals are included within our moral community based on their universal vulnerability with respect to their basic capabilities. This vulnerability is addressed under my extension of Sen's capabilities framework, when capabilities are maximized across populations inclusive of human and nonhuman animals. The basic capabilities of human and nonhuman animals are promoted on equal terms. As the capabilities at stake are the most basic to life, humans representing their own interests as well as those acting as advocates for animals will choose to maximize them across the relevant population. While including animals in this way may undermine some "higher-order" human capabilities focused on the use of animals, these human capabilities may be realized in other ways.

³⁴⁶ For a database of alternatives for veterinary school training, see Assn. of Veterinarians for Animal Rights, *Alternatives in Education Database*, <http://alted.aavar.org> (last accessed Oct. 13, 2009) (including synthetic and computer models).

³⁴⁷ Cass Sunstein has also argued that viewing animals as property need not undermine their protection. See Cass R. Sunstein, *Slaughterhouse Jive*, *The New Republic* 40, 43-44 (Jan. 29, 2001).

As addressed in Part VI, Section C, EPA requires the end to many of the current uses of domestic animals. Factory farming and laboratory experimentation infringe on a number of the six enumerated basic capabilities. In practical terms, EPA requires that the laws affecting animals as primary subjects in these contexts (the laws addressed in Sections III.A.1–2 and B) are altered to account directly for these capabilities. For example, the Animal Welfare Act (AWA) and the Humane Methods of Livestock Slaughter Act (HMLSA) could be amended to mandate the maximization of the six enumerated basic capabilities. These laws might be applied to small-scale farming operations as well as to researchers conducting investigations of animals in their natural habitats. Enforcement mechanisms could remain the same, with the U.S. Department of Agriculture providing oversight through on-site inspections of domestic operations and approval of research protocols for experimentation occurring overseas. Statutory violations could be subject to civil penalties, unless the deprivation of basic capabilities rises to animal cruelty, in which case individuals would be subject to prosecution and criminal penalties would apply.

Legal changes to laws affecting animals as secondary subjects are more complex. In Section III.A.3, I discuss the use of domestic animals as accommodations for disabled individuals and those in need of emotional support under disability and fair housing statutes. While the six basic capabilities at stake may be realized by some animals used for these purposes, they are not currently legally protected unless human behavior amounts to animal cruelty. Civil statutes could be created to protect these basic capabilities. Severe deprivations of basic capabilities could still be prosecuted under state animal anti-cruelty statutes.

VIII. CONCLUSION

When interest-convergence frames the laws affecting domestic animals, they receive minimal protections and are rendered hyper-vulnerable to changing human use. Legal gerrymandering for human benefit occurs when the natural baseline for animals—their inherent capacities—is ignored to support human uses of animals, and the most fundamental protections for animals against suffering are disrupted. Often animals within the same legal classes and natural species are treated differently, as are animals with the same capacities from different species. This undermines animal protections and creates legal inconsistencies.

EPA seeks to regulate human use of domestic animals in a legally consistent and ethical manner. The paradigm creates a presumption against animal use, with the goal of maximizing the basic capabilities of sentient beings—human and nonhuman—within a given population. Under this paradigm, the basic capabilities of having necessary food and hydration, maintaining bodily integrity, being sheltered, ex-

ercising and engaging in natural behaviors of movement, and experiencing companionship are realized. Animal use is warranted only when it does not interfere with these basic capabilities.