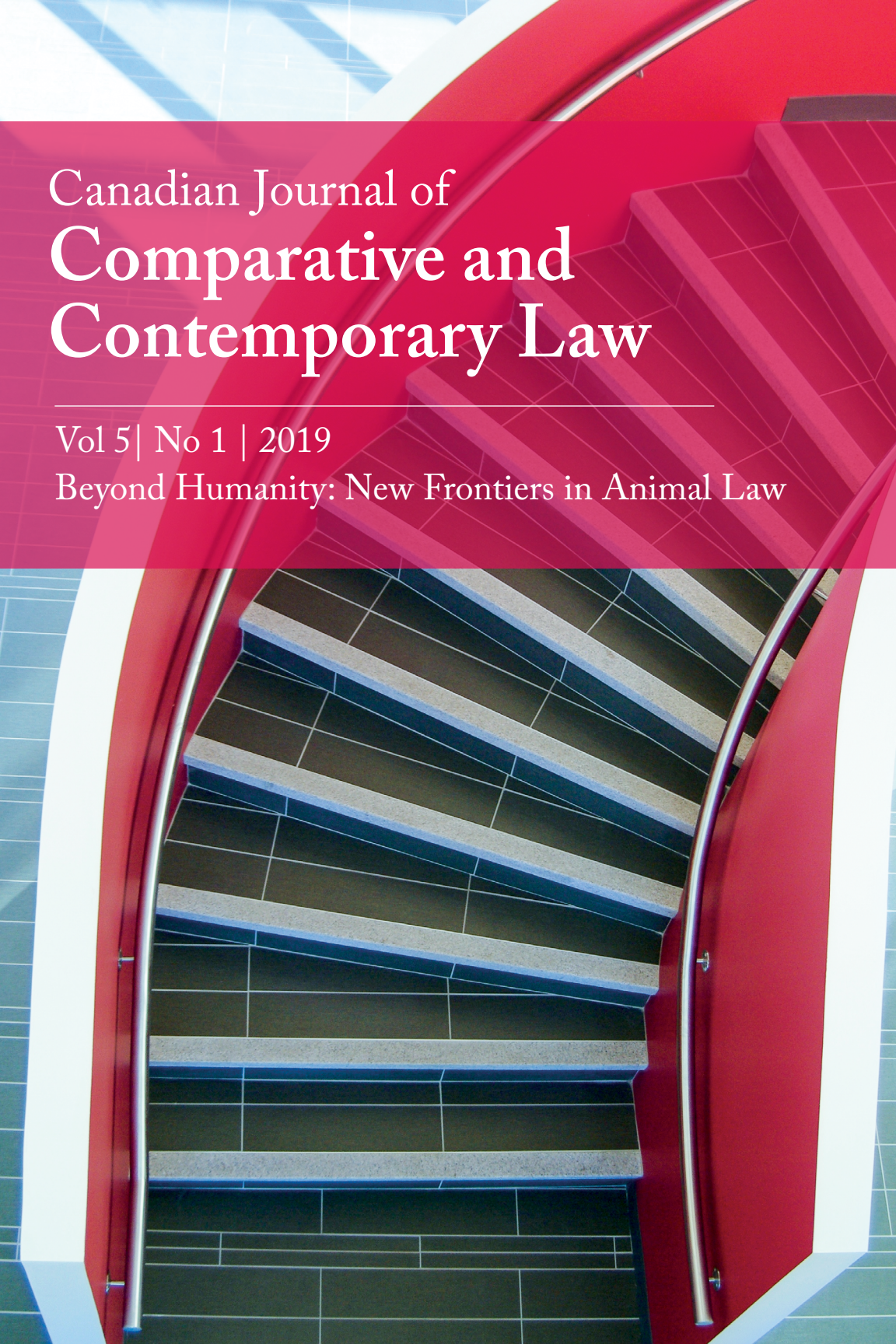

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Beyond Humanity: New Frontiers in Animal Law

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The front cover depicts the main stairwell that leads to the atrium of Thompson Rivers University, Faculty of Law. The back cover depicts the distinct exterior of the Faculty of Law. The curved design of the roof was inspired by the natural beauty of the mountains visible from the building.

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Beyond Humanity: New Frontiers in Animal Law

Foreword

Honourable Senator Murray Sinclair
Senate of Canada

I. Introduction & Indigenous Worldview of Relationship to Animals

It is said among the Ojibway that 'in the beginning before the beginning', Anishinaabe was weak and lost and unable to come to terms with their existence; finding the daily challenges of life difficult to manage and suffering from inner turmoil and sicknesses they did not know how to cure. They mistreated each other, bickered constantly, saw all outsiders as threats, and were even unable to feed themselves properly.

It is said that at that time the animal beings of Creation, who had been observing all of this, called a Great Council to discuss one question: 'What shall we do to help Anishinaabe'? They agreed on one thing at the outset: something must be done, for if Anishinaabe failed to survive and thrive, then all of Creation was threatened, including them. After long discussion, it is said that one by one, each of the Animal leaders stepped forward to announce its commitment to help Anishinaabe and what they would do.

The Bear stated that because he walked constantly in the woods, he would protect Anishinaabe from outside attack. He further announced that because he spent so much time among the plants, he knew where all the medicines were and he would show them to Anishinaabe and help him learn how to use them for healing. The deer and other hoofed creatures offered themselves as a source of food for Anishinaabe to consume in times of hunger. The Eagle promised to fly over Anishinaabe's territory each morning to see how he was doing and watch over him. One by one, each of the animal beings of Creation committed to do what was within his ability to do to keep Anishinaabe alive.

That teaching was repeated over many millennia and generation after generation of children understood its importance: that we are all related,

not just you and I, but you and I and all life forms of Creation. As living things, we are connected to each other. We depend upon one another. Everything we do has an effect on other life forms and on our world. That is why we use the term '*nii-konasiitook*', all of my relations, when addressing each other.

Indigenous peoples as a hunter-gatherer societies were always careful to respect the natural life cycles of the animals with which they shared the earth. Efforts were made not to overfish, over-hunt or over-harvest. Every part of the animal was used and there were celebrations and ceremonies of appreciation for the taking and use of the animal. This has been the attitude in many Indigenous traditions. It is one of stewardship and respect.

Most of those beliefs were taken or withheld from the several generations of Indigenous children who were placed in Residential Schools. In addition, the demeaning treatment of Indigenous cultures as inferior, paganistic, and shameful, drove many Indigenous children away from them even if they did not attend Residential schools. Their loss of pride stopped them from wanting to know on a massive scale.

But now, those teachings are enjoying a revival that far exceeds the pace of loss, limited only by the low numbers of those who know. Yet the depth of belief and commitment to them is strong and is embraced by many the world over who sense the wrong-headedness of ignoring the beauty of life in all its forms.

II. Animals and the Law in 42nd Session of Parliament

Canada is a country where several legal systems operate simultaneously. Canadian laws regarding animals are based on Euro-centric legal concepts that view them as property, objects that can be bought, sold, killed and sold for profit, experimented on, used as entertainment or even created. The relationship is that of superiority and ownership rather than interdependence and interconnectedness. In such a system, animals are not beings, for beings have rights, and animals have no rights.

In considering natural law, Indigenous traditional knowledge and scientific evidence, we know that animals are sentient beings with social

systems, complex means of communication, and emotions, yet they are legally marginalized and vulnerable to maltreatment and exploitation.

When I was appointed to the Senate, I accepted the role with the goal to advance the work of reconciliation through the law. During the 42nd session of Parliament, there was an exciting and emerging development in the alliance between Indigenous rights and values, environmental protection and animal welfare.

I had the honour to take over sponsorship of Bill S-203 *an Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)* after the original sponsor Senator Wilfred Moore retired. This was an opportunity to look at reconciliation with the natural world.

With the help of many respected academics, scientists, human rights advocates, Indigenous groups, the legal community and stakeholders, legislative and regulatory gaps in animal welfare and the law were addressed. Other legislation followed S-203's introduction and legislative influences. Bill S-238, called for a ban on shark fin importation and exportation and Bill C-84, addressed legislative amendments related to bestiality and animal fighting. All of these Bills have now become part of the law of Canada and publicly focus the thinking of the public and the courts on the fact that maybe—just maybe—animals have rights too. This is quite a significant development because, other than laws relating to the prevention of overhunting and extinction, animal related legislation has changed little since cruelty offences were enacted in the *Criminal Code of Canada* in 1892.[1]

As the world's population continues to grow we must consider what the impact is on the environment and the natural world. A 2019 Global Assessment Report on Biodiversity and Ecosystems Services states that:

> our world is losing biodiversity, and fast. …[U]p to one million species could face extinction in the near future due to human influence on the natural world. Such a collapse in biodiversity would wreak havoc on the interconnected ecosystems of the planet, putting human communities at risk by compromising

1. House of Commons, "Legislative Summary of Bill C-84: An Act to amend the Criminal Code (bestiality and animal fighting)" by Julian Walker (Legal and Social Affairs Division) Legislative Summary, 42-1, No 42-1-C84-E (28 December 2018).

food sources, fouling clean water and air, and eroding natural defenses against extreme weather such as hurricanes and floods.[2]

III. Conclusion

We are at a critical time where the inter-related goals of environmental protection, Indigenous rights and animal welfare can help to combat climate change, mass extinction and cultural loss in Canada and beyond.

Overpopulation forces us to rethink how land is shared and how to protect limited natural habitats. It is time to seek and establish appropriate policy and laws based on current knowledge for the future. The following articles challenge us to relate and bring about change in our relationship with birds, fish and other animals. Respect and reconciliation between humans and animals is as much for our welfare, as it is for theirs.

So bear in mind why we are here. We are here to take care of our universe, to take care of our land, to take care of the people and to take care of all that is part of this Creation. So *n'gwamazin*: Be strong and steadfast in your beliefs. Take care of all of our relations and be mindful that reconciliation includes our relationship with animals.

2. Maddie Burakoff, "One Million Species at Risk of Extinction, Threatening Human Communities Around the World, U.N. Report Warns" (6 May 2019), online: *Smithsonian* <www.smithsonianmag.com/science-nature/one-million-species-risk-extinction-threatening-human-communities-around-world-un-report-warns-180972114/>.

Beastly Dead

Vaughan Black*

This article explores whether the core concept in Canadian animal welfare law, the prohibition against causing unnecessary suffering, should be augmented by a bar against unnecessary killing. Where humans are involved, the law regards both their suffering and their death as harms to them. However, where animals are concerned, although pain is viewed as injurious to them, their death, at least in the eyes of the law, is not. This paper suggests that asymmetry may be unjustified, both in terms of what we are coming to know about animals (namely that some of them may regard themselves as persisting subjects who are wronged by an early death) and in light of public reaction to some recent incidents of the killing of animals by humans. A recent law reform in one Canadian province has opened the door just a crack to the notion of a proscription against unnecessary killing of animals. This paper suggests that consistency and coherence of the legal order require further expansion of such an offence and points to resources that can guide legislators and judges in that task.

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> How can it be explained that we are not allowed to kick farmed animals, while we are allowed to kill them?[1]

As with most western countries, in Canada the question of animal welfare has focused on minimizing suffering. The duties humans owe to animals, or perhaps just owe to ourselves with respect to animals,[2] centre on not inflicting bodily pain. When this concern came to be expressed in criminal law it was first put in terms of a prohibition of wantonly or cruelly abusing or torturing animals.[3] Later, the notion of cruelty was sidelined and the *Criminal Code*'s focus shifted to forbidding the infliction of pain, suffering or injury.[4] More recently, there has been the addition of a ban on causing animals distress.[5] These terms — cruelty, pain, distress and so on — are not synonymous. They are related, however. The various legal bars on imposing suffering on animals are founded on the thinking that conscious pain is an evil that should be reduced and the acknowledgement — once contested, but now not

1. Tatjana Višak, *Killing Happy Animals: Explorations in Utilitarian Ethics* (London: Palgrave Macmillan, 2013) at 2.
2. The suggestion that in Canadian law duties to animals might only be derivative of duties owed to humans is occasioned by the Supreme Court of Canada's judgment in *R v Malmo-Levine*, 2003 SCC 74. There, at para 117, the court took the view that criminalizing cruelty to animals rested on "offensiveness to deeply held social values" rather than on deterring harm to an entity to whom direct duties were owed. This reflects a position associated with Immanuel Kant, "Duties Towards Animals and Spirits" in Benjamin Nelson, ed, *Lectures on Ethics*, translated by Louis Infield (New York: Harper & Row, 1963) 239 at 239–41.
3. *An Act respecting Cruelty to Animals*, SC 1869, c 27, s 1.
4. RSC 1985, c C-46, s 445.1(1)(a). It was sidelined rather than eliminated, in that, although the *Code*'s substantive offences regarding animals no longer employ the term 'cruelty', that word lingers vestigially in the heading of the part in which those offences are contained. This does not stop courts and scholars from referring to s 445.1(1)(a) as the animal cruelty offence (*e.g. R v Malmo-Levine*, *supra* note 2 at para 117, Gonthier & Binnie JJ; *R v W (DL)*, 2016 SCC 22, at paras 77 and 92, Cromwell J).
5. This term is found in a number of provincial animal welfare statutes: *e.g. Animal Protection Act*, SNS 2018, c 21, s 26(1); *Animal Protection Act*, RSA 2000, c A-41, s 2(1); *Animal Welfare and Safety Act*, SQ c B-3.1, s 6.

much disputed — that humans are not the only creatures that experience it. This recognition of nonhuman sentience is undergirded by a growing consensus that animals, or at least the sentient ones among them, have some moral status and so their suffering is objectionable.

In this respect, many nonhumans have come to be regarded as similar to humans. With humans, bodily injury and the pain and suffering that typically accompany it have long been regarded as harms, the intentional and careless infliction of which the state should seek to combat. It does this through criminal prohibitions and civil law, both of which bar the infliction of physical injury on humans. Of course there are exceptions; circumstances where the infliction of injury and pain are permitted or excused, and sometimes even encouraged. Current examples include consent, self-defence and war. In not-too-distant times other exceptions applied, such as disciplining slaves. But in all these instances, the badness of pain was acknowledged and its infliction stood in need of justification. The same is now true of causing pain to nonhumans. Of course, due to the subsidiary moral significance that is accorded to animals, their pain, though worthy of concern, is regarded as less significant than human suffering, even less important than human interests. Since animal pain and human interests often conflict, this hierarchy has meant that bringing about the suffering of animals is legally wrong only where it does not conflict with legitimate human objectives.

In Canadian law, this takes the form of saying that the proscription on causing pain to animals only applies to *unnecessary* pain, or that the prohibition does not apply when the suffering flows from generally accepted practices of animal husbandry. This subordination of nonhumans' pain to human interests — even frivolous ones — means that enormous animal suffering remains legally permissible so long as it is judged to be efficient or convenient, as it generally is in intensive animal agriculture. Accordingly, many critics have pointed out that the legal bars on causing pain to animals are woefully weak, and in practice, only criminalize the infliction of gratuitous suffering — a feature of the legal system that is crucial to facilitating humans' oppression and exploitation of animals. While I share this assessment, what I draw attention to here is the way in which the law treats animal pain and human pain similarly,

at least from a structural standpoint. In the case of both humans and nonhumans, infliction of pain is a legal wrong, at least when doing so is not subordinate to other values or objectives. Pain matters. It should be taken seriously. Sentient animals are objects of moral and legal regard, and so their interest in not suffering must be given voice. Utilitarianism, which as the dominant strain in our ethical relations with animals over the last two centuries, has underwritten most gains in animal welfare law, and requires that nonhumans' interests in not suffering be given some vindication.

However, where death is involved things are different. In the case of humans, death is viewed as a harm, in most instances a calamitous one. The permanent cessation of life functions, which many view as personal annihilation, is a terrifying spectre. When it happens in childhood, youth or the prime of life, it is regarded as a massive misfortune. Moreover, through its side effects, both emotional and economic, death can be an injury to persons other than the one who dies, for instance, the deceased's family. Of course there are exceptions; situations where ending life seems preferable to continued survival and where voluntary death presents itself as the best option. But these circumstances are infrequent. Even where they exist, death is still usually regarded as a bad thing, albeit the lesser of two evils.

Among philosophers there has been occasional dissent from the view

that the death of a human is a misfortune to the one who suffers it.[6] But this has always been a minority stance. The mainstream view is quite different. People have long-range objectives they plan to pursue, and in foreclosing the pursuit of those goals, death injures the one who desires to achieve them. Certainly the view that death is not an injury to the human who suffers it is not the view of the Canadian legal order. Both private law and criminal sanctions treat a human's death as a misfortune to that person, at least in most instances, and hence view killing a human as a great wrong. In addition, the law has long regarded a human's death as having side effects that may amount to injuries to others. This finds its current expression in fatal injuries legislation, which grants a right of action to family members of a person who is wrongfully killed.[7]

By way of contrast, the death of an animal — at least when it appears to be painless, or as pain free as practicable — has not been regarded as a legal wrong, either to the animal that stops living or to its kin. Of course the law is concerned with the process of *killing* sentient animals — that is, with the suffering and distress that commonly accompany that practice. Thus, both federal and provincial statutes dealing with farmed animals seek to ensure that slaughter methods are quick and painless,

6. For example, Epicurus and his disciple (at least on this point) Lucretius took the view that death was not bad for humans: Epicurus, *Epicurus*, *Letters, Principal Doctrines, and Vatican Sayings*, translated by Russel M Geer (Indianapolis: Bobbs-Merrill, 1964) at 54–55; Cyril Bailey, ed, *Lucretius*, *De Rerum Natura*, vol 1(Oxford: Clarendon Press, 1947) at 344–59. For fine discussion, see James Warren, *Facing Death: Epicurus and His Critics* (Oxford: Clarendon Press, 2004). This view is not confined to the ancients: Amélie Oksenberg Rorty, "Fearing Death" (1983) 58:224 Philosophy 175 at 175–88; Stephen E Rosenbaum, "How to Be Dead and Not Care: A Defense of Epicurus" in John Martin Fischer, ed, *The Metaphysics of Death* (Stanford: Stanford University Press, 1993) 119; Galen Strawson, "I Have No Future" in G Strawson, *Things that Bother Me: Death, Freedom, the Self, Etc.* (New York: New York Review of Books, 2018) 71 at 73–91.

7. See *e.g. Fatal Accidents Act*, RSNB 2012, c 104; *Fatal Accidents Act*, RSA 2000, c F-8.

at least where that is consistent with efficiency.[8] Legislators have also extended the need to minimize the death-related suffering flowing from such peripheral matters as transportation from farm to slaughterhouse and confinement at abattoirs pending slaughter.[9] In addition to these specific statutes both the *Criminal Code*'s general bar on causing animals needless suffering and provincial prohibitions on permitting distress have been brought to bear on persons whose methods for killing animals are perceived to involve too much pre-death pain or stress.[10]

However, apart from this concern with the process of animals' dying at human hands, Canadian law has not worried about the cessation of the animal's life *per se*. Rather, its concern with the circumstances

8. The federal provisions regarding slaughter methods for agricultural animals are found in the *Meat Inspection Act*, RSC 1985, c 25 (1st Supp) and *Meat Inspection Regulations, 1990*, SOR/90-288, s 62(1). Other federal statutes prescribe methods for killing specific types of animals. For example, a regulation under the *Fisheries Act*, RSC 1985, c F-14 sets out in detail the method and implements that must be used for killing seals: *Marine Mammal Regulations*, SOR/93-56, s 28. Provincial examples include: *Meat Inspection Regulation*, Alta Reg 42/2003, ss 21–22.1; *Meat Inspection Act*, SNS 1996, c 6, s 16. Sometimes these statutes even specify the obligation to minimize pre-slaughter anxiety: *Animal Welfare and Safety Act*, CQLR c B-3.1, s 12. Of course, the law only requires the quick and painless death of animals where that can be accomplished cheaply and easily. Thus, as Will Kymlicka has pointed out, it is not required for fish: Will Kymlicka, "Social Membership: Animal Law beyond the Property/Personhood Impasse" (2017) 40:1 Dalhousie Law Journal 123 at 126.
9. *Health of Animals Regulations*, CRC 296, ss 136–59.
10. For cases involving the *Criminal Code*'s application to painful animal slaughter see *R v Menard* (1978), 43 CCC (2d) 458 (QCCA) [*Menard*] and *R v Pacific Meat* (1957), 24 WWR 37 (BC Co Ct). For a decision in which a provincial animal welfare statute was brought to bear see *R v Fawcett*, 2012 BCPC 421 [*Fawcett*]. In Canada, *Criminal Code* prosecutions arising from animal slaughter methods have sometimes seemed motivated less by protecting animals from painful death than by persecuting marginalized humans: see David Fraser, *Anti*-Shechita *Prosecutions in the Anglo-American World, 1855-1913: "A major attack on Jewish freedoms…"* (Brighton, MA: Academic Studies Press, 2018) at 1–27.

leading up to an animal's death has simply been one facet of its regard for animal pain. This accords with the generally accepted view in animal welfare science that "[t]he animal welfare issue is what happens before death…".[11] While the manner, experience and process of animals' dying — as opposed to their ceasing to live — has been seen as a welfare question, a nonhuman's demise has not been regarded as affecting its wellbeing. Accordingly, the killing of an animal, when sudden and painless, has not been a legal wrong.

Some qualifications leap to mind. Apart from slaughter methods, there are other ways in which the law might appear to be concerned with animal death, even when free from pain.[12] One is when that animal's death results in an unwished-for reduction of the species of which it is a member. Legislation dealing with endangered species includes prohibitions on killing an animal when that death might contribute to the extinction or even extirpation of its species.[13] Likewise, some laws have moved beyond concern with species and sought to counter the demise of certain breeds of animal within a species — so-called heritage breeds.[14] In addition, provincial wildlife legislation dealing with hunting imposes bag limits and seasonal prohibitions on killing, in part to preserve wildlife populations at desired levels. But the rationale for these various proscriptions does not rest on a concern for the death of an individual

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11. Donald M Broom, "A History of Animal Welfare Science" (2011) 59:2 Acta Biotheoretica 121 at 126 (Broom distances himself from this claim but reports it as the dominant view in current thinking on animal welfare).
12. From this point on I will refrain from undue repetition of qualifiers such as 'painless' and 'sudden'. When I speak of death, I am talking not of the process of dying but rather of the fact of ceasing to be alive.
13. *Species at Risk Act*, SC 2002, c 29, s 32(1).
14. Newfoundland and Labrador has a statute which limits the killing of the Newfoundland Pony on the ground that it is a heritage animal: see *Pony Designation Order, 2012*, NLR 40/12 under the *Animal Health and Protection Act*, SNL 2010, c A-9.1. Section 49(1) of that statute provides that "[a] person [which includes owners] shall not, except with the consent of the minister or his or her designate, destroy, interfere with, or dispose of a heritage animal".

for that individual's sake.[15] It is true that their prohibitions on killing may be breached by the death of an individual animal. However, those laws are not derived from a concern for the intrinsic value of a particular animal in the way that injunctions on killing humans are. Rather, they regard those individuals as means, not ends, and so when threatened populations recover, as they may be doing with the northern cod, the killing can resume.

Secondly, since nearly all animals are property,[16] killing them is a violation of their owners' rights, at least where the owner does not consent. The harm caused by this sort of death has long been addressed

15. It is interesting to note that the failed Liberal attempts to strengthen the *Criminal Code*'s animal welfare provisions starting in 1999 featured an amendment that would appear to touch on animal death. Each of those thirteen bills introduced over a nine-year period would have made it an offence to kill an animal brutally. The following is the text of Bill C-10, *An Act to amend the Criminal Code (cruelty to animals and firearms) and the Firearms Act*, 2nd Sess, 37th Parl, 2002, cl 8 (as passed by the House of Commons 9 October 2002):

    > Everyone commits an offence who, wilfully or recklessly…kills an animal… brutally or viciously, regardless of whether the animal dies immediately;

    This proposed offence appears to criminalize killing animals even when it is painless and unconnected with extinction. Moreover, it would apply even to owners of animals. However, the gravamen of the offence is that the killing is judged to be brutal or vicious. It is far from clear what this means, but it does seem concerned with the manner of the killing — namely, that it not be of a sort that a human observer would regard as gruesome — and not with the fact of the animal's ceasing to live. In any event, none of these bills ever became law.

16. Domesticated animals are not the only ones who are owned. Most provincial wildlife legislation claims that the province owns the wildlife within it: *e.g. The Wildlife Act, 1988*, SS c W-13.12, s 23(1). Even animals not covered by such provisions, either because they are found in a province that does not assert such a property right (Newfoundland and Labrador does not) or because they do not fall within the definition of 'wildlife' (invertebrates are commonly excluded), would by common law be owned by the person who has title to the land on, in or above which they might be found. Probably the fish in the ocean beyond Canada's 12 nautical mile territorial sea are not owned by anyone, at least until such time as they might be caught by a human.

both by public and private law.[17] However, in this respect, the legal wrong in question is just a side effect of the animal's death; one dependent on the property relation. It is a wrong to the owner, or perhaps in the case of criminal sanctions, a wrong to society at large, namely society's interest in the sanctity of private property. It is true that in recent years there have been some legal advances in this area. Tort damages awards in respect of wrongly-killed pets have been edging upward. They have moved beyond the traditional measure based on the animal's pre-death market value and have begun to take into account the emotional consequences a companion animal's death might have for its owner.[18] This development may be viewed as an advance in humans' legal relationship with nonhumans; it acknowledges that animals' worth to people extend beyond their market price and into the affective realm. In addition, a 2015 amendment to the *Criminal Code* imposed tougher sentences on persons who kill law enforcement animals or military animals while those animals are on the

17. The prohibitions in the *Criminal Code*, *supra* note 4, on killing animals that are property are curiously structured. Two provisions make it an offence to kill animals: s 445 (other animals kept for a lawful purpose) and s 445.01 (law enforcement animals). These prohibitions make no mention of exceptions for owners, so on their surface they would appear to criminalize the action of a farmer slaughtering her chickens for meat. However, section 429(2) provides that no person shall be convicted under those provisions where he proves he acted with legal justification. The common law pertaining to property provides that justification: owners of property are entitled to destroy it.

18. See Jessica Dellow, "Valuing Companion Animals: Alternatives to Market Value" (2008) 17:1 Dalhousie Journal of Legal Studies 175 at 177. It is possible to make too much of this development. Some types of inanimate property have value beyond that which might be placed on them by the market — for instance, one's wedding ring or the ashes of a deceased loved one. Those can be tortiously damaged or lost, and when that happens, tort law is becoming increasingly willing to recognize the emotional loss to the owner through higher damages awards. Obviously, this recognition does not indicate a concern for the ring or ashes for their own sake, but only a willingness to vindicate the full range of an owner's interests in her belongings.

job, and some provincial animal welfare statutes have done this as well.[19] However, none of these developments alters the underlying fact that what the law is valuing is the animal's worth to humans.

While the killing of a beloved pet or a police dog may today attract tougher legal sanctions than it used to, the killing of a feral dog does not. Indeed, while the killing of a police dog in the line of duty has been singled out as a great wrong, nothing in the new *Criminal Code* provision on that matter prevents a police department which decides to phase out its canine unit from killing all its dogs. Likewise, pet owners who tire of their animal companions remain entitled to kill them. We may have a growing appreciation of the harm that pets' deaths can bring to their owners, but that does not mean that we extend to those animals anything resembling the core entitlement to life that the law grants to people. In short, as with the prohibitions on killing animals found in endangered species acts, wildlife statutes and some environmental legislation, the higher fines and awards in respect of police dogs and canine companions do not signify a legal acknowledgment that the killing is a wrong *to that animal*. Those legal changes are based on the value of the animal to humans, or in the case of provisions on killing police dogs, in part just on the goal of assisting law enforcement.[20] While we may not like to be reminded of animal slaughter, so that activity generally takes place out of

19. The *Justice for Animals in Service Act (Quanto's Law)*, SC 2015, c 34 [*Quanto's Law*] added section 445.01 to the *Criminal Code*, *supra* note 4. That same year Prince Edward Island enacted a comparable provision: *Animal Welfare Act*, RSPEI 1988, c A-11.2, s 5(3), as amended by SPEI 2015, c 2, s 5. See also *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O.36, s 11.2(5).

20. There is an obvious parallel between *Quanto's Law*, *supra* note 19, which imposes higher penalties for killing a police dog than for killing, say, one's neighbour's dog, and the provision in criminal law that makes the killing of a serving police officer first degree murder even when it would not otherwise be so: *Criminal Code*, *supra* note 4, s 231(4)(a).

sight — an invisibility sometimes reinforced by law[21] — as a matter of legal right, killing is not regarded as a wrong to any creature other than a human.

To bring this into higher relief, it is pertinent to note that sometimes the law goes so far as to *require* the killing of a nonhuman. Canadian negligence law has generally held that where the driver of a car is faced with the sudden appearance of a small animal in the road ahead — a squirrel, cat or duck, for example — and swerving to avoid it or braking to a stop would imperil the driver's passengers or those in other vehicles, the driver's duty is to continue on course and kill the small animal. It is negligent to do otherwise.[22] In other words, where a person is confronted with alternative courses of action, one of which involves certain death to an animal, while the other entails augmented risks of injury to a human, legal duty mandates the former; the driver is obliged to kill the animal. In the words of the Chief Justice Wilson of the British Columbia Supreme Court, "[i]f the choice is between an animal and human safety then…

21. *An Act respecting the Marine Mammal Regulations (seal fishery observation license)*, SC 2015, c 28, s 1, dealt with observers of the seal hunt, who must obtain a license to conduct that observation. It increased the distance that those observers must maintain to one nautical mile from the person doing the killing, effectively rendering the hunt invisible to all but those engaged in it.

22. *Birk v Dhaliwhal* (1995), 13 BCLR (3d) 291 (CA); *Gill v Bains*, [1985] BCJ No 510 831070 (SC); *Bujold v Dempsey* (1996), 181 NBR (2d) 111 (QB); *Harrison v Pacific GMC Ltd*, [1977] BCJ No 528 (SC). Steering to avoid killing a small animal has been described as presumptively negligent: *Olsen v Barrett*, 2002 BCSC 877 at para 52. Presumably, the advent of self-driving vehicles, and in particular the question of how their programs should respond in certain emergency situations, will require explicit discussions and decisions about the appropriate course of action in such situations. That is, should the governing algorithm dictate that if there is a choice between two courses of action, one of which involves a slight risk of injury to a human but spares a nonhuman, while the other involves no augmented risk to human but kills the nonhuman, then the program must cause the vehicle to adopt the second option? Will humans, who own such vehicles, have a choice about which options their cars should pursue in such situations, or will the relevant algorithms be legally mandated?

there is no real choice".[23] Drivers have even been held liable for damage to physical property when they swerve to avoid hitting a cat that has run in front of their car.[24]

Of course this disparity — the law's great concern with the killing of humans and its comparative lack of regard for killing of nonhumans — can be expressed as following logically from fundamental legal relations. Humans are persons (at least once they cease to be fetuses); nonhumans are not. Humans have a right to life (a constitutional one, no less); nonhumans do not. Humans cannot be property (at least these days); animals can be and usually are, with the consequence that their owners' right to destroy their own possessions translates to a right to kill. Such statements have legal authority, and accordingly might be sufficient for a court issuing reasons for a judgment.[25] Reflective persons, however,

23. *Molson v Squamish Transfer Ltd* (1969), 70 WWR 113 (BCSC) at 114. An interesting feature of these cases is that drivers of cars, who cause injury by unwisely swerving to avoid a small inanimate object in the roadway ahead, are often excused on the grounds that their instinctive reactions should not be too harshly judged. For example, in *Sturm v Gagne Gravel Co* (1966), 57 WWR 344 (Man QB) the driver occasioned serious personal injury when she lost control swerving to avoid a harmless wooden stake in the road ahead. Although the court found that the stake "no doubt could have been run down without injury to the vehicle or its occupants" (at para 16) it went on to exonerate her, saying: "[t]he average motorist will flinch from driving over a cardboard box or even a large sheet of paper; there is something in all of us that prompts reaction, by braking or swerving to avoid any unnatural material in the road". It is strange that courts would be willing to excuse drivers who, in a sudden emergency, swerve to avoid a cardboard box but unwilling to do so for drivers who swerve to avoid killing a cat.
24. *Falkenham v Zwicker* (1978), 93 DLR (3d) 289 (NSSC).
25. As, for example, they recently were in *Association for the Protection of Fur Bearing Animals v British Columbia (Minister of Environment and Climate Change Strategy)*, 2017 BCSC 2296; aff'd 2018 BCCA 240. Although much of the reasoning in those decisions was concerned with procedural matters, the substantive judgment came down to a holding that since legislation gave the government property rights over wildlife, that entailed a general right to kill those animals, even in the absence of a more specific statutory authorization to do so.

will view concepts such as personhood and property status, as contested constructs that have shifted over time and which do not — at least not merely through their invocation — provide sound answers to why robbing animals of life does not appear to matter. These notions simply reframe the question. As explanations for the disparate treatment of human and nonhuman death, they are hardly more helpful than accounts resting on some claimed metaphysical superiority of humans to animals, such as the great chain of being, the scriptural proclamation that God gave humans dominion over all other creatures, or the assertion that humans have souls and brute animals do not.[26]

Thus, the law's differing treatment of human and animal death, especially in light of its regard for both human and animal pain, poses a puzzling asymmetry. Humans would generally view the infliction on themselves of quite a lot of pain as a lesser evil than ceasing to be alive. For example, they regularly opt for chemotherapy in hopes of curing a fatal cancer. When we shift the focus from death to killing, we see that most people think that it is obviously, uncontestably and extremely wrong to kill humans. Putting aside circumstances such as war, self-defence and mercy killing, we have a nearly inviolable obligation not to deprive other persons of life. Intentionally doing so breaches a longstanding taboo and carries the heaviest mandatory sentence. However, when it comes to other animals, humans appear to consider their pain to be a greater misfortune than their death. The human obligation of nonmaleficence to animals entails not needlessly bringing about their suffering, but apart from derivative obligations (to their owners, their species, etc.) does not bar bringing about their death.

A telling illustration of this asymmetry can be seen in the categories of invasiveness promulgated in the Guidelines of Canadian Council on

26. In what is regarded as the leading case on the *Criminal Code*'s animal cruelty offence, the court took the view that there was an immutable natural hierarchy in which animals were subordinate to man *Menard*, *supra* note 10 at para 49.

Animal Care.[27] These bear on the treatment of animals in biomedical and commercial experimentation. While they do not have the direct force of law, various funding mechanisms render them important norms in Canadian research practice. Moreover, through their mention in some provincial animal welfare statutes, they can have indirect legal effect.[28] According to the categories of invasiveness by the Canadian Council on Animal Care ("CCAC"), capturing a wild animal, holding it in captivity for a period of time while measurements are taken and then releasing it back into the wild would be classed as level D: "[m]ethods which cause moderate to severe distress or discomfort".[29] This would accordingly attract a measure of close scrutiny in the assessment of whether a given proposed experiment would be approved. By way of contrast, an experiment in which a pig is anesthetized and killed without regaining consciousness would fall within level B, "[e]xperiments which cause little

27. Canadian Council on Animal Care, "CCAC guidelines on: the care and use of wildlife" (2003) at 62, online (pdf): Canadian Council on Animal Care <www.ccac.ca/Documents/Standards/Guidelines/Wildlife.pdf> [Canadian Counsil on Animal Care, "CCAC guidelines"].
28. See *e.g. Animal Protection Act*, SNS 2018, c 21, s 47(2); *Animal Care Regulation*, Man Reg 126/98, s 4(4).
29. Canadian Council on Animal Care, "CCAC guidelines", *supra* note 27.

or no discomfort or stress".[30] A protocol, which proposed such a course of action, would encounter a lower level of scrutiny than one involving the capture and release of, say, a wild salmon. My point here is not that the CCAC's ranking of harms to animals is necessarily wrong, only that it contrasts with how we would view harms to ourselves and other humans.

At least on the surface, all this amounts to a curious disproportion, even against a background of animal/human relations that is replete with inconsistencies. Animals are regarded by the law as being like humans in that pain, suffering and distress are bad things. Those who inflict them without justification or excuse may be subject to penal sanction. But animals are unlike us in that death is not regarded as an evil, at least not to them. The difference is not just a matter of animals having a moral and legal status inferior to that of humans, something that has long been obvious in the law's treatment of those who inflict pain and suffering on them. Rather, with respect to killing, we owe them no direct duties whatsoever.

30. Canadian Council on Animal Care, "Categories of Invasiveness in Animal Experiments" (1991) at 1, online (pdf): Canadian Council on Animal Care <www.ccac.ca/Documents/Standards/Policies/Categories_of_invasiveness.pdf>. It might be thought that the '3 R's' — replace, reduce and refine — that are so central to justification of research on animals, both in Canada and elsewhere, reflect a concern for not killing animals. Since most animals subjected to experimentation are killed right after the experiment ends, the injunctions to replace (*i.e.* employ research methods which do not rely on animals, where possible) and reduce (*i.e.* use fewer animals, where possible) might appear to be motivated by a wish not to kill nonhumans. However, when Russell and Burch originated the 3 R's sixty years ago, their motivation, to the extent that it rested on animal welfare concerns at all, was to reduce suffering, not death: William MS Russell & Rex L Burch, *The Principles of Humane Experimental Technique* (London: Methuen & Co, 1959). The CCAC's focus is to reduce inhumanity in the use of sentient animals in science and that touches on the stress animals experience either before, during or after use, and euthanasia is regarded as a humane endpoint. Of course, nothing prevents a new, progressive interpretation of the 3 R's, in which the injunctions to eliminate, or failing that, reduce animal use in scientific experimentation are grounded both on reduction of suffering and a belief in the inherent value of animal life.

Possibly this asymmetry is justifiable because it is in correct accord with the underlying reality. Perhaps there really is an enormous gulf between humans and all other animals. Nonhumans may be like us in that suffering is bad for them, but unlike us in that a quick and painless death is not, for them, a misfortune. Possibly animals lack "the capacity to be a subject of the misfortune of death".[31] If this is true, then Canadian law has got things exactly right: a death, while it would usually be a harm to the well-being of a human, might not be one for any other species. From the point of view of the one who dies, this could be because of a qualitative difference between the mental lives of most humans and all nonhumans.[32] Perhaps nonhuman animals do not possess the capacity for the sophisticated psychological states and complex cognition necessary for death to be a misfortune for them. They may not enjoy the sort of mental link with their future selves that most humans have, and such a link might be necessary to make death's elimination of possible future pleasures a loss. If their want of higher-order cognitive processes — in particular, the absence of a sense of their lives being an extended narrative potentially stretching into the distant future — means that they have only a minimal interest in continued life, then their ceasing to live thwarts few desires and is not for them a bad thing.

The view that nonhumans have little stake in their future lives finds support from some ethical philosophers, even a couple whose work has underwritten important legal reforms regarding animals. For instance, Jeremy Bentham, whose 1823 remarks about suffering of animals are a

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31. Ruth Cigman, "Death, Misfortune and Species Inequality" (1981) 10:1 Philosophy and Public Affairs 47 at 47. Bernard Williams is another who has argued along these lines. He thought that death could only be a misfortune to one who had the capacity to form categorical desires, in particular "the desire that future desires…will be born and satisfied", and that animals could not do that: Bernard Williams, "The Makropulos Case: Reflections on the Tedium of Immortality" in *Problems of the Self: Philosophical Papers 1956-1972* (Cambridge: Cambridge University Press, 1973) 82 at 86–87.

32. The qualifier 'most' is important. Many humans lack a mental link with their future selves — infants and the comatose, for example. Yet the law generally regards their deaths as injuries to them.

turning point, did not appear to believe that a painless death was very bad for animals. In the same footnote that contains his oft-quoted phrase "the question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?", Bentham argued that painless killing of nonhumans was not wrong since "they have none of those long-protracted anticipations of future misery which we have…and they are never the worse for being dead".[33] Even Peter Singer, whose *Animal Liberation*[34] has been such a crucial catalyst for the growth of the animal protection movement over the past forty years, is uncertain about the significance of animal death. Singer has expressed the view that under certain conditions — namely that they lead happy lives, are killed without pain or fright, and are replaced by another animal that would not otherwise have existed and which also leads a life which is as enjoyable as the future life of the killed

33. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, 2d (London: W Pickering, 1823) 235–36 at n * [emphasis in original]. Schopenhauer was another notable pro-animal philosopher who held that view that death was no harm to them: Arthur Schopenhauer "On Religion" in Arthur Schopenhauer, ed, *Pererga and Paralipomena: Short Philosophical Essays*, translated by EFJ Payne (Oxford: Clarendon Press, 1974) vol 2, 324 at 373–74.

34. Peter Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals* (New York: New York Review, 1975).

animal would have been — the painless killing of an animal is not bad.[35]

Of course this stance is not shared by all thinkers whose views have

35. Singer did not deal with this point in *Animal Liberation*, *ibid*. However, four years later he expressed guarded support for it, at least with respect to many species: Peter Singer, *Practical Ethics* (Cambridge: Cambridge University Press, 1979) at 99–105. He expressed stronger support for that view in the next edition: Peter Singer, *Practical Ethics*, 2d (Cambridge: Cambridge University Press, 1993) at 123–31, and developed the point even further in his 2011, 3rd edition: Peter Singer, *Practical Ethics*, 3d (Cambridge: Cambridge University Press, 2011) at 107. Recently Singer appears to have modified his views yet again: Katarzyna de Lazari-Radek & Peter Singer, *The Point of View of the Universe: Sidgwick and Contemporary Ethics* (Oxford: Oxford University Press, 2014) at 244–48. Another prominent utilitarian who is similar to Singer on this point is: Richard M Hare, "Why I Am Only a Demi-Vegetarian" in Dale Jamieson, ed, *Singer and His Critics* (Oxford: Blackwell Publishers Ltd, 1999) 233 at 233–46. Others have argued that utilitarians need not hold this view: Tatjana Višak "Do Utilitarians Need to Accept the Replaceability Argument?" in Tatjana Višak & Robert Garner, eds, *The Ethics of Killing Animals* (Oxford: Oxford University Press, 2016) 117; Shelly Kagan, "Singer on Killing Animals" in Tatjana Višak & Robert Garner, eds, *The Ethics of Killing Animals* (Oxford: Oxford University Press, 2016) 136.

been foundational for the modern animal liberation movements.[36] The notion that one must have categorical desires for the future in order to be injured by the loss of that future seems based on the belief that one can only be injured when she knows she is injured, and that is debatable. Even if the point about categorical desires is accepted, the notion that animals lack such desires with respect to the future may, at least with respect to some of them, be an empirical error. Those debates will not be pursued here, where the point is simply that a measure of philosophical support for the view that death does not make animals less well-off, lends credibility to popular views that appear based on that belief. For instance, something like this view seems to be held by many persons who champion animal-friendly husbandry. They decline to eat factory-farmed meat and eggs on the ground that production of those foods involves great animal suffering. However, they are content to consume so-called humanely-raised animal products — that is, meat from animals whose lives are mostly pleasant, or at least not unpleasant, and whose deaths involve neither pain nor fear.

Such persons might appreciate that the animals whose dead bodies

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36. Most notably, this view is not shared by the philosopher whose work stands second to Peter Singer in its influence on the modern animal protection movement: Tom Regan, *The Case for Animal Rights* (Berkeley: University of California Press, 1985). Regan thinks that all animals we would regard as being the subject of a life have a right to life, in part because he believes such creatures do have a sense of their own future. Martha Nussbaum's teleological capabilities approach takes the view that an early death is a misfortune to humans and (at least some) nonhumans alike, since it curtails a being's flourishing: Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, Mass: Harvard University Press, 2006) at 384–88. For other arguments that death can be a misfortune for some nonhumans see Steve F Sapontzis, *Morals, Reasons and Animals* (Philadelphia: Temple University Press, 1987) at 159–75; Gary Steiner, *Animals and the Moral Community: Mental Life, Moral Status, and Kinship* (New York: Columbia University Press, 2008) at 110; David DeGrazia, *Taking Animals Seriously: Mental Life and Moral Status* (New York: Cambridge University Press, 1996) at 264–68; Christine M Korsgaard, *Fellow Creatures: Our Obligations to the Other Animals* (Oxford: Oxford University Press, 2018).

they are eating have suffered deaths that are premature in that they are killed very early in their lives. They might further understand that, just as in intensive animal farming, so-called humane agriculture typically entails the killing of so-called useless animals (*e.g.* male laying chicks, male dairy calves) very soon after their birth. However, they do not see any of those early deaths as misfortunes to those creatures.[37] Under that view, it is objectionable to inflict suffering on animals but not wrong to deprive them of most of their normal expected life span — again always on the assumption that their deaths involve neither pain nor terror. Some persons even assert, by way of seeking to justify omnivorism, that raising and killing animals for their flesh does farmed animals a good turn: bringing them into existence and giving them life in exchange for killing them early.[38] This may be cast as the form of a welfare maximizing transaction between humans and farmed animals — a mutually beneficial exchange that animals killed in the prime of life should view as a welcome bargain.[39]

Of course, there is doubt as to whether foods marketed as having been humanely produced do come from animals which enjoyed pleasant (albeit brief) lives. Even if they did, the view that an early death does not affect the welfare of those creatures might be a deluded one; a self-serving rationalization that wildly underestimates the capacities of some animals. At the least it seems to infringe a precautionary principle in failing to give (at least some) animals the benefit of the doubt that, in these still early days of serious study of nonhuman cognition, is considerable. Be that as

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37. Of course, there is another explanation for this asymmetry — namely, that persons recognize the inconsistency and, out of self-interest, overlook it.

38. For a book-length examination of this claim, see Tatjana Višak, *Killing Happy Animals: Explorations in Utilitarian Ethics*, *supra* note 1.

39. Temple Grandin holds this view, which she strangely terms a "symbiotic" relationship between animals and humans, and not just for animal-friendly farming, but even for cattle in intensive feeding operations, so long as the slaughter methods and other husbandry practices live up to the standards she recommends: Temple Grandin & Catherine Johnson, *Animals Make us Human: Creating the Best Life for Animals* (New York: Houghton Mifflin Harcourt, 2009) at 297.

it may, for the moment the view seems sufficiently plausible to many to justify the legal status quo outlined above.

However, the edifice described above is starting to show some cracks. It has long been the case that many persons regarded the death of their companion animals as a misfortune to that animal, especially when it happened in the prime of life. Such creatures' deaths can provoke human grief of a nature and calibre comparable to the sorrow arising from the death of a family member. We mourn the curtailing of the dead pet's potential and at least part of our sadness comes from a sense that the premature end to their life was a loss to them. Likewise, many have responded that way to animal death in the imaginative arena, even when quick and painless — for example, the slaying of Bambi's mother or the mercy killing of Old Yeller.

Historically these private and fictional realms have had little impact on legal policy, but lately this reaction toward animal death, and especially human killing of animals, has begun to gain greater purchase in public culture. Though many examples might be offered, two will suffice. Both come from British Columbia. The first is the Whistler sled dog cull of 2010. There, a company that had offered dog sled tours to visitors who came for the Olympic games experienced a downturn in business after the games concluded. The operation decided to downsize its workforce. After a veterinarian declined to kill the 56 healthy dogs, the company required one of its employees to shoot them.[40] The second is the case of Molly, the Nanaimo potbellied pig. There, two persons, who had obtained Molly from an SPCA shelter, decided they no longer wished to have her as a pet, so they killed and ate her. Both instances gave rise to public clamour

40. Sam Cooper & Sean Sullivan, "Massacre Horrifies B.C.: Man Shoots 100 Sled Dogs 'Execution-style' After Olympic Slowdown" (31 January 2011), online: *National Post* <www.nationalpost.com/m/massacre+horrifies+shoots+sled+dogs+execution+style+after+olympic/4197145/story.html>; Sunny Dhillon, "As Sled Dogs Quietly Exhumed, Public Response is Muted" (5 May 2011), online: *Globe and Mail* <www.theglobeandmail.com/news/british-columbia/as-sled-dogs-quietly-exhumed-public-response-is-muted/article578836/>.

and denunciation. This was not principally due to any pain the animals might have experienced when being killed. Rather, it was because those killings were perceived as wrongs to those animals.[41] Other instances of public concern for the killing of animals might be offered: culls to zoo animals when the zoos close down or decide that they have too many of a particular species; the shooting of the gorilla Harambe at the Cincinnati zoo and Cecil the lion in Zimbabwe; outrage at performance artists who kill animals in public display;[42] and perhaps even the growing distaste for sport hunting.

It is difficult to tell how wide or deep these objections run, and of course it must be noted that they do not arise — or at least do not garner much press coverage — with respect to the millions of animals slaughtered for food, but rather in connection to charismatic species and, moreover, often where the animals' killing may be characterized as a breach of trust or a betrayal. Nevertheless, what is new and notable is that for the first time in Canadian law there has been a legislative reaction to this public outcry. The killing of the Whistler sled dogs prompted the government of British Columbia to add a special sled dog regulation to its animal welfare legislation. In addition to new requirements dealing with tethers, grooming and exercise, breeding, working conditions, transportation and so on — all of which are based on traditional, pain-centered concerns for animal suffering — the regulation features the following prohibition:

> An operator must not permit a sled dog to be killed unless the operator
>
> (a) reasonably believes that the sled dog is in critical distress […] or
>
> (b) has made reasonable efforts to rehome the sled dog, but those efforts have

41. True, in the case of the sled dog cull, the killer was convicted for causing unnecessary pain or suffering to nine of the dogs: *Fawcett*, *supra* note 10. However, this was due to the manner in which those nine dogs were dispatched. The public denunciation of the killings went far beyond this and focused on the deaths of all the dogs, even those slain painlessly.
42. The Dutch artist Tinkebell caused outrage by proposing to kill 60 day-old chicks in a performance: "Tinkebell" (30 October 2018), online: *Wikipedia* <en.wikipedia.org/wiki/Tinkebell>.

been unsuccessful.[43]

In enacting a right to life, or at least a right not to be killed by humans, the BC sled dog regulation is genuinely revisionary. To be sure, the entitlement it creates is far from indefeasible. Perhaps all this regulation requires of a sled dog owner who wants to eliminate his dogs is that before shooting them, he should first post them on Kijiji for a few days to see if anyone will take them off his hands. Nevertheless, in providing that the owner of a healthy sled dog cannot kill that animal, even painlessly, without first making efforts to sell or even give it away, the provision rests on the conviction that the death of a sled dog is a wrong *to that animal*. Or, if a derivative explanation is preferred, it rests on a belief that we owe it to ourselves not to deprive some animals of life.

In proclaiming a right not to be killed, however circumscribed, that seems founded neither on concerns about the time, place or manner of the killing nor on the pain or distress that might accompany it, and that furthermore does not appear to be based on species preservation or protection of property, British Columbia has taken an innovative step in Canadian law. It has opened up a second front in the legal push for better treatment for animals. True, the regulation is limited to a slim sliver of nonhumans: sled dogs. However, it should be recalled that Martin's Law, which initiated cruelty-based animal protection law nearly two centuries ago, was initially limited to cattle (not including bulls) and only through later legislation was it incrementally extended to apply to other animals.[44] It is easy to imagine the same happening with the sled dog regulation. Sled dogs could be the wedge. It is easy to envisage the right not to be killed where rehoming is a reasonable alternative being expanded to encompass all companion canines, possibly on the basis that, in terms impressively elaborated by Sue Donaldson and Will Kymlicka, they are already quasi-citizens of our human community.[45] Further extensions are easily imagined, either on the basis that the species in question holds great

43. *Sled Dog Standards of Care Regulation*, BC Reg 21/2012, s 21(1) made under the *Prevention of Cruelty to Animals Act*, RSBC 1996, c 372.
44. *Cruel Treatment of Cattle Act 1822* (UK), 3 Geo IV, c 71.
45. Sue Donaldson & Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford, Oxford University Press, 2011) at 73–155.

symbolic value for humans (horses, for instance) or because members of certain species are thought to be somewhat "like us" in their cognitive complexity (*e.g.* the great apes, dolphins and elephants).[46] At the end of this road, one might contemplate the existing *Criminal Code* provision against causing any animal unnecessary suffering being expanded to include causing unnecessary death to an animal.[47]

But is this an attractive avenue for legal reform? One reservation that might be raised to the prospect of devoting energy to advocating an

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46. As with legal regulation based on a concern for suffering, there is much to be said about why a right to life started with cute, charismatic animals, like sled dogs and, if extended, would likely continue with the sorts of animals mentioned in the text. Any such incremental change on the question of which species should benefit from such a right would likely be influenced both by the sometimes romantic views held about certain species and by the great attachments humans feel toward their pets, which in extreme cases can veer toward the pathological. Ultimately one would hope that decisions about which animals would be accorded such a legal right would draw on good scientific inquiry into the mental lives of nonhumans, but in early stages it will not be surprising if pets lead the way. In this connection, Martha Nussbaum has argued that when it comes to animals we might like to eat, self-interest can contaminate our views about the harm death might pose to them, prompting us to underestimate that harm. But she notes that when such self-interest is absent, our view of the situation might be clearer: "[p]eople's treatment of animals whom they love, whether dogs or cats or horses, usually displays appropriate judgment about the harm of death and the related harm of killing…" (Nussbaum, *supra* note 36 at 385).

47. Virginia appears to have done this: that state made illegal for anyone who "unnecessarily beats, maims, mutilates, *or kills* any animal, whether belonging to himself or another…": *Agriculture, Animal Care, and Food*, 65 VA § 3.2–6570 (2016) (US) [emphasis added]. It is even conceivable, though just barely, that this development could take place in Canada judicially, through interpretation of existing legislation. The *Criminal Code*'s animal cruelty provision, *supra* note 4, makes it an offence to cause unnecessary injury to an animal. Were a court to construe 'injury' in this provision as including death, then Canada would already have an offence of causing unnecessary death to nonhumans. Killing a healthy companion animal, who would readily be welcomed into another home, might easily be considered unnecessary.

enlargement of the categories of animals, who might enjoy the sort of right currently granted to sled dogs, is that any advance along this new front is bound to be trivial. Line-drawing problems will arise and no matter where the line is drawn it is bound to stop far-short of benefitting the hundreds of thousands of chickens slaughtered daily in this country. A *Criminal Code* provision against needlessly causing death to animals would surely be given the judicial interpretation that those chickens' deaths were necessary (just as the torment farmed fowl currently experience throughout their lives is legally regarded as necessary).

Gary Francione has condemned the legal welfarism that focuses on marginal gains for animal welfare associated with reducing the most egregious instances of their suffering. In his view, reforms of this nature can never amount more than a fruitless distraction from the core problem: the legal thinghood of animals.[48] Arguing that animals deserve bigger cages to reduce their suffering is counterproductive in that it concedes it is permissible to place them in cages in the first place. Francione's critique, formulated in the context of a world in which the focus of ethical concern for animals is suffering, can easily be brought to bear on any reform initiative based on a right not to be killed. Extending the sled-dog right to life to, say, all companion dogs or all chimpanzees, might be said to legitimize a legal order in which humans daily kill millions of other animals to furnish food. Those who are receptive to Francione's analysis in the context of pain-centered legal welfarism are likely to be sympathetic to it in the context of legal initiatives based on incrementally expanding a right not to be killed in circumstances when you can easily be rehomed. The sled-dog regulation might seem to open up a second front in the struggle to end legal oppression of animals, but if it is destined to be a second front that is doomed to be as counterproductive as the first then what's the use?

Answers to tactical questions like this are contingent on many factors and necessarily provisional. I tentatively suggest that pro-animal advocates might find it worthwhile to push for incremental expansion of

48. Gary L Francione, *Animals, Property, and the Law* (Philadelphia: Temple University Press, 1995).

a bar against unnecessary killing of animals, however low that bar might initially be set. This is an area where the law's lag behind popular ethical belief seems unusually great. Part of the public reaction to the Whistler sled-dog slaughter and the case of Molly the pig was simple incredulity that the killings in question were legally permissible. Some members of the public were simply aghast to learn that these killings violated no legal prohibition. These sentiments could be mobilized and might contribute to a legal order that, while it may continue to respond to concerns with the suffering of sentient animals, it may go beyond that to engage with disquiet with killing. If nothing else, this might serve to render the legal system more coherent in its orientation to demonstrated public regard for what is due to animals.

The discourse that might emerge in a debate about the scope of a right not to be killed might be usefully broader than that associated with pain and suffering. The utilitarian thinking that for the past two centuries has played such an essential role in initiating and extending prohibitions on causing suffering to animals was radical in its early days. It now seems simplistic, or at least incomplete. Policy discussions about the end of human life, while sometimes consequentialist, also readily engage with notions that fall outside the Benthamite box, concepts such as dignity, flourishing, respect, natural rights and the relational nature of our lives. Meanwhile, due to their overriding focus on suffering, questions of legal change involving animals have remained rooted in utilitarian calculus. Discussions of a right not to be unnecessarily killed offer the opportunity to bring discussion of human/animal relations closer to the mainstream of Canadian public policy discourse.

Any such conversation would be likely to bring about increased involvement with the ongoing scientific study of the mental lives of sentient animals, and that too would represent an advance in public discourse. When pain is the sole focus of concern about animal protection there seems little need to engage with the work of biologists and ethologists, for with the exception of fish there is now little debate that the animals that humans deal with — that is, mammals and birds — feel pain. But debates about a right not to be killed require inquiry into nonhuman mentation.

Notions such as dignity and fundamental entitlements still fall within the mainstream of political liberalism but granting some sentient animals a right not to be killed when they can easily be rehomed has the potential to broaden the policy conversation beyond that. In particular, the debate might come to include First Nations points of view. Will Kymlicka and Sue Donaldson have argued that, despite the difficulties posed by a strong commitment to the right to hunt, Aboriginal perspectives, which accord animals a right to respect, must be engaged with. Such an engagement presents the possibility of coalitions and analysis that can advance the cause of animal well-being.[49] In the years since they did so, the report of the Truth and Reconciliation Commission has given greater weight to calls for increased attention to Indigenous law in formulating Canadian law and public policy.[50]

While this is not the place to explore the breadth and subtleties of Indigenous conceptions of nonhuman animals, one example might serve to gesture toward the sort of discursive shift that might arise from examining those outlooks. Half a century before the Whistler dog cull, there was another sled dog slaughter. Although it was little noted at the time, at least in mainstream Canada, in the 1950s and 60s the Royal Canadian Mounted Police ("RCMP") shot and killed hundreds, perhaps thousands, of Inuit dogs. The facts are contested. The killings may have been motivated by a policy of depriving the Inuit of their means of

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49. Will Kymlicka & Sue Donaldson, "Animal Rights and Aboriginal Rights" in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) 159. In that same book, Constance MacIntosh showed that in its wildlife legislation, the government of Nunavut had already begun to do this: Constance MacIntosh, "Indigenous Rights and Relations with Animals: Seeing Beyond Canadian Law" in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) 187 at 205.

50. Truth and Reconciliation Commission of Canada, *Final Report of the Truth and Reconciliation Commission of Canada, Volume One: Summary: Honouring the Truth, Reconciling the Future* (Toronto: James Lorimer & Co, 2015) at 319–37 (see especially calls to action 27, 28, 42, 44, 45(iv) and 50).

hunting, thus ending their nomadic way of life and forcing them into sedentism. On the contrary, the RCMP's sled dog cull may have taken place after that centralization was a *fait accompli*, when dogs running loose in larger communities were becoming dangerous to human inhabitants.

In 2006, in response to political pressure, the RCMP produced a report on its role in the dog massacre.[51] Eight years later, in reaction to the limitations and exculpatory conclusions of the Mounties' account, the Qikiqtani Inuit Association came forth with a study of its own. In it, they objected to the RCMP claim that the reason the Inuit retained their sled dogs even after they had become settled and no longer needed them for hunting was "prestige". The Qikiqtani Inuit Association offered an alternative explanation, one based on Inuit conceptions of what is due to animals.[52] They pointed to studies that showed that, in the understanding of the Inuit of the time, dogs, like people, had an *atiq*, or name soul. Dogs were members of the community with both intrinsic worth and important kinship relations to other members of the community, including humans.[53]

None of this is to suggest that the Inuit never killed their dogs. They did, and in times of hardship ate them too. A sled dog who got sick on a journey and could not continue would almost certainly be killed.

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51. Royal Canadian Mounted Police, "Final Report: RCMP Review of Allegations Concerning Inuit Sled Dogs*"* (2006), online (pdf): *Government of Canada* <publications.gc.ca/collections/collection_2011/grc-rcmp/PS64-84-2006-eng.pdf>.
52. Qikiqtani Inuit Association, *Qikiqtani Truth Commission: Thematic Reports and Special Studies, 1950-1975: Analysis of the RCMP Sled Dog Report* (Toronto: Inhabit Media Inc, 2014) at n 38.
53. The study referenced Francis Lévesque, *Les Inuit, Leurs Chiens et L'Administration Nordique, de 1950 á 2007* (PhD Dissertation, Department of Anthropology, University of Laval, 2008) [unpublished]. Lévesque's account of Inuit attitudes to their dogs is found at 110–75. For an English language account that covers some of the same ground, see Francis Lévesque, "An Ordinance Respecting Dogs: How Creating Secure Communities in the Northwest Territories Made Inuit Insecure" in Michelle Daveluy, Francis Lévesque & Jenanne Ferguson, eds, *Humanizing Security in the Arctic* (Edmonton: CCI Press, 2011) 77 at 91–92.

Even so, such killings were perceived as significant and were sometimes marked by ceremony. Importantly for the discussion here, for the Inuit, killing a dog stood in need of adequate justification. More importantly still, simply asserting 'this animal is my property and thus I am at liberty to destroy it' did not qualify as a sufficient reason.

Doubtless, this is too cursory. It addresses only one type of animal and the understanding of one Indigenous group. For the present, the point is simply that in the legal and ethical traditions of its Aboriginal people, Canada may already have perspectives which recognize that, quite apart from considerations of pain and property, killing some species of animals is a serious matter that requires a satisfactory reason.

Consensus around justice for nonhumans is a long way off. Advocating that, due to their intrinsic worth or their relations with human communities, some animals should enjoy a measure of immunity from being killed seems unlikely to generate harmony in the short term. Even more than restrictions on causing pain to animals, limitations on killing them point a dagger at the heart of the meat industry and would be certain to ignite resistance from that quarter. In addition, the continuing effect of Western religious traditions stands in the way of restrictions on killing nonhumans. While the sacred texts of Christianity and the other Abrahamic creeds can be drawn on to forbid cruelty to animals, where painless killing is involved those books demonstrate no comparable concern.[54] They stipulate that so long as we do not make them suffer needlessly we are entitled to use animals and that this is justified by humans' ontological superiority (*i.e.* our greater proximity to God).

While the tenor of scientific study of animals has, at least since Darwin, countered that orientation and stressed continuity between human and nonhuman animals, enlisting science to support a right not to be killed by humans poses challenges. First, there is no general consensus about which features of mental life make death a harm. Secondly, there is little consensus about which sentient animals possess those cognitive

54. Though for what it may be worth, those do not require that humans kill animals.

features. Thirdly, since many animals which could be shown to display such features that might only have them to a lesser degree than most humans, it is not clear how this problem of scale should be handled. Given that short-term self-interest distorts human ability to respond sensibly to matters about which scientific consensus is overwhelming — anthropogenic global warming, for example — it is difficult to imagine the nascent and fractious study of animal mentation having much purchase on public debate over which nonhumans might be granted a limited right not to be killed.

None of those obstacles should be minimized. Nevertheless, pushing for a legal right not to be killed by humans is appealing, regardless of how narrowly that entitlement might be defined at the outset. It can be justified by the value of bringing greater consistency to the law bearing on nonhumans — consistency in the sense of greater fidelity and responsiveness to demonstrated public attitude to some instances of animal death. The puzzling asymmetry referred to above, whereby with humans the law is attentive to the harms both of pain and of death, but with animals it limits its concern to pain, represents a substantial incoherence in the legal order's engagement with nonhumans. Through its sled dog regulation, British Columbia has accorded legal force to the belief that, due to the intrinsic worth of some animals, killing them inflicts a harm that, if it is to be countenanced, stands in need of justification. This disruption of a longstanding status quo, while narrow in scope, might be widened — by British Columbia itself, other provinces, the federal government and even by judges interpreting existing legislation.

You Don't Need Lungs to Suffer: Fish Suffering in the Age of Climate Change with a Call for Regulatory Reform

David N Cassuto* & Amy M O'Brien**

Fish are sentient — they feel pain and suffer. Yet, while we see increasing interest in protecting birds and mammals in industries such as farming and research (albeit few laws), no such attention has been paid to the suffering of fish in the fishing industry. Consideration of fish welfare including reducing needless suffering should be a component of fisheries management. This article focuses on fisheries management practices, the effects of anthropogenic climate change on fisheries management practices, and the moral implications of fish sentience on the development and amendment of global fishing practices. Part I examines domestic and international fisheries, including slaughter practices for wild-caught and farmed fish. Part II discusses the impact of climate change on global fisheries management. Part III outlines recent scientific discoveries that reveal that fish have sentient capabilities. Part IV analyzes psychological and economic roadblocks to acknowledging fish harm. Part V discusses strategies to incorporate concerns over fish harm into current practices. Part VI discusses the United States' Public Trust Doctrine, arguing that: (1) it exists at both the state and federal levels; and (2) it requires stricter fisheries management practices that impose humane requirements on commercial fisheries. Part VII concludes that (1) anthropogenic climate change is inflicting an enormous amount of suffering on fish populations, and (2) fisheries management practices must mitigate these harms by incorporating moral considerations.

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I. Introduction

Fish are a vital commodity in global markets and a food source for billions of people. But they also have intrinsic value unrelated to the human food supply that is not contemplated in fisheries management systems. Furthermore, fish are sentient — they feel pain and suffer like birds and mammals. Yet, while there are some laws and increasing interest in protecting birds and mammals in industries such as farming and research,[1] no such attention has been paid to the suffering experienced by fish in the fishing industry.

If we accept the principle that inflicting needless suffering is wrongful (as we do with humans and other mammals), there arises a moral obligation not to do so. Absent a morally relevant difference between aquatic and land animals, that same moral obligation afforded to land animals should apply equally to fish and other aquatic animals. It hardly bears stating that human activity, particularly fishing, has a substantial impact on the lives of aquatic animals. Consequently, consideration of fish welfare — including reducing needless suffering — should be a standard component of fisheries management.

This article focuses on current domestic and international fisheries management practices, the effects of anthropogenic climate change

1. See *e.g. Animal Welfare Act*, 7 USC § 2131 (1966) [*AWA*], (regulating the treatment of animals in research and exhibition); *Humane Slaughter Act*, 7 USC § 1901 (1958) [*HSA*], (regulating the treatment of livestock during slaughter). This legislation, however, has been pitifully inadequate to protect animals from harm and suffering. See Courtney G Lee, "The Animal Welfare Act at Fifty: Problems and Possibilities in Animal Testing Regulation" (2016) 95:1 Nebraska Law Review 194 (discussing the inadequacies of the *AWA* in protecting laboratory animals); see also Lauren S Rikleen, "The Animal Welfare Act: Still a Cruelty to Animals" (1978) 7:1 Boston College Environmental Affairs Law Review 129 (discussing the United States Department of Agriculture failure to effectively implement and enforce the *AWA*).

on fisheries management practices, and the moral implications of fish sentience on the development and amendment of global fishing practices. Part II of this article examines the role of domestic and international fisheries, including current slaughter practices for wild-caught and farmed fish and the laws governing them. Part III outlines recent scientific discoveries that reveal that fish have sentient capabilities — *i.e.* they are able to feel, perceive, and experience subjectively. Part IV discusses current fishing practices, both domestically and internationally. Part V analyzes the impact of climate change on global fisheries management practices. Part VI analyzes the current psychological and economic roadblocks to acknowledging fish harm in domestic and international fisheries management practices. Part VII discusses strategies to incorporate fish harm mitigation into current practices, including reframing principles of fisheries management systems, encouraging more humane practices, and incorporating moral considerations into international maritime treaties. Part VIII discusses the United States' Public Trust Doctrine, arguing that: (1) it exists at both the state *and* federal levels; and (2) it requires stricter fisheries management practices that contemplate fish harm and impose humane requirements on commercial fisheries. Part IX of the article concludes that (1) anthropogenic climate change is currently inflicting an enormous amount of suffering on fish populations, and (2) fisheries management practices must mitigate these harms by incorporating moral considerations.

II. Role of Domestic & International Fisheries

A fishery is the "occupation, industry, or season for catching fish".[2] More broadly, fisheries refer to an area of the ocean where fish are caught.[3] Under either definition, fisheries management is an enormous subject. Humans kill a lot of fish. Every year between 0.97 and 2.7 trillion fish are

2. "Understanding Fisheries Management in the United States" (2017), online: *National Ocean and Atmospheric Administration, Fisheries* <www.fisheries.noaa.gov/insight/fisheries-management-united-states> [NOAA].
3. *Ibid*.

caught from the wild and killed globally.[4] This number does not include farmed fish or those caught for recreational purposes.[5] The market for human consumption of fish is expanding, and fish products account for approximately 39% of animal products consumed globally.[6] Moreover, farmed fish account for 70% of all farmed animals worldwide[7] and the fish farming industry has been expanding at a rate of 8% per year since the 1980s.[8]

A. International Fisheries

Fish migrate through international waters as well as the territorial waters of scores of nations, making it impossible to regulate fisheries without cooperation among nations. Few treaties address fisheries management practices. Among those that do, none integrate management principles that contemplate sentience, suffering, and welfare.

Fisheries management in the European Union is guided by the *Common Fisheries Policy* ("*CFP*").[9] The principal goals of the *CFP* include: maximizing sustainable yield for all fish stocks, reducing unwanted

4. *Ibid*, see also Michael P Rowland, "Two-Thirds Of The World's Seafood Is Over-Fished — Here's How You Can Help" (24 July 2017), online: *Forbes* <www.forbes.com/sites/michaelpellmanrowland/2017/07/24/seafood-sustainability-facts/#6c8dba604bbf> ("[w]e now have a fifth more of global fish stocks at worrying levels than we did in 2000. The global environmental impact of overfishing is incalculable and the knock-on impact on coastal economies is simply too great for this to be swept under the rug anymore" at 3). This number varies so greatly due to the vast amount of catch dumped back into the ocean, as well as the unreported and illegal fishing that occurs globally.
5. *Ibid*.
6. *Ibid* (comparing the statistics as opposed to pigs (26%), chickens (20%), and cows (14%)).
7. *Ibid*.
8. Stephanie Yue, "An HSUS Report: The Welfare of Farmed Fish at Slaughter" (2008), online (pdf): *The Humane Society of the United States* <www.humanesociety.org/assets/pdfs/farm/hsus-the-welfare-of-farmed-fish-at-slaughter.pdf>.
9. European Commission, "Managing Fisheries" (2018), online: *Common Fisheries Policy* <ec.europa.eu/fisheries/cfp/fishing_rules>.

bycatch, reducing wasteful commercial fishing practices, and striving for environmental and economically sustainable practices.[10] In 1993 the United Nations Conference on Straddling Fish Stocks and Migratory Species convened to draft an agreement ("*Agreement*") "to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks".[11] The *Agreement* aims to protect the biodiversity of migrating fish species and minimize pollution in international waters.[12] Moreover, the *Agreement* integrates the precautionary approach,[13] incorporating language to protect fish species and habitats against adverse environmental impacts, both known and unknown.[14]

Similarly, the International Commission for the Conservation of Atlantic Tunas ("ICCAT") is an oversight organization of 48 participating countries, including the United States. ICCAT oversees the conservation

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10. *Ibid*.
11. United Nations, "Documents of the Conference" (1995), *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks* online: <www.un.org/depts/los/fish_stocks_conference/fish_stocks_conference.htm>.
12. *Agreement For The Implementation Of The Provisions Of The United Nations Convention On The Law Of The Sea Of 10 December 1982 Relating To The Conservation And Management Of Straddling Fish Stocks And Highly Migratory Fish Stocks,* 4 August 1995, 2167 UNTS 37924 (entered into force 11 December 2001), online: <www.un.org/depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm> [*UN Agreement*].
13. David Kriebel, et al, "The Precautionary Principle in Environmental Science" (2001) 109:9 Environmental Heath Perspectives Commentaries 871 (the precautionary principle "encourages policies that protect human health and the environment in the face of certain risks" at 871). It has four central components, which include: "taking preventive action in the fact of uncertainty; shifting the burden of proof to the proponents of an activity; exploring a wide range of alternatives to possibly harmful actions; and increasing public participation in decision making" at 871.
14. *UN Agreement*, *supra* note 12.

and management of a variety of marine species[15] found in the Atlantic Ocean.[16] In addition to focusing on overfishing, sustainability, and conservation, ICCAT adopts measures to minimize bycatch of marine mammals in commercial fishing practices.[17] Unfortunately, these international efforts to preserve sustainable populations of marine species have failed. Shark populations are declining rapidly, with approximately 100 million disappearing each year.[18] Furthermore, in the past 40 years, global tuna and mackerel populations have declined by 75%.[19] These rapid decreases result primarily from overfishing, bycatch, and the effects of climate change, including ocean acidification.[20] Since current fishing practices do not prioritize humane practices, the above-mentioned mortality increase correlates to an increase in fish suffering as well.

In addition to attempts at conservation and management, international fisheries laws and agreements also focus on preventing illegal, unreported, and unregulated fishing ("IUU fishing").[21] Often referred to as 'pirate fishing', IUU fishing undermines international and domestic efforts to manage fish stocks, implement conservation practices, and achieve long-term sustainability goals.[22] The United States has entered

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15. "International Commission for the Conservation of Atlantic Tunas" (2018), online: *National Oceanic and Atmospheric Administration* <www.fisheries.noaa.gov/national/international-affairs/international-commission-conservation-atlantic-tunas>. The ICCAT oversees the following species: tunas, swordfish, marlin, and sharks.
16. *Ibid*.
17. *Ibid*.
18. JoAnn Adkins, "Fishing Leads to Significant Shark Population Declines, Researchers Say" (1 March 2013), online: *Florida International University News* <news.fiu.edu/2013/03/100millionsharks/52935>.
19. Fiona Harvey, "Tuna and Mackerel Populations Suffer Catastrophic 74% Decline, Research Shows" (16 September 2015), online: *The Guardian* <www.theguardian.com/environment/2015/sep/15/tuna-and-mackerel-populations-suffer-catastrophic-74-decline-research-shows>.
20. *Ibid*; *see* Part III, *infra*.
21. UNFAO, "Illegal, Unreported and Unregulated (IUU) Fishing" (2018), online: *Food and Agriculture Organization of the United Nations* <www.fao.org/iuu-fishing/en/>.
22. *Ibid*.

into international agreements with Russia[23] and the European Union,[24] among others, to attempt to combat IUU fishing. Although it is difficult to measure the total yield of IUU fishing, it is estimated that these illegal practices account for 20–30% of global catch.[25] IUU fishing practices clearly contribute to the global depletion of fish stocks and provide a steep obstacle to preventing widespread, global fish suffering.[26]

Overall, treaties, laws and agreements fail to acknowledge and manage fish suffering. In addition, drastic levels of bycatch, overfishing, and IUU fishing contribute to increased rates of mortality, thereby increasing the harm to marine species.

B. Domestic Fisheries

The United States marine fisheries are the largest in the world, covering 4.4 million square miles of ocean.[27] These include commercial,[28] recreational,[29] and subsistence[30] fishing. Commercial fishing is responsible for the majority of fish deaths,[31] followed by recreational fishing. While

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23. *Agreement between the Government of the United States of America and the Government of the Russian Federation on Cooperation for the Purposes of Preventing, Deterring and Eliminating Illegal, Unreported, and Unregulated Fishing*, (11 September 2015), TIAS 15-1204 (entered into force 4 December 2015), online (pdf): <2009-2017.state.gov/documents/organization/250927.pdf>.
24. *Joint Statement Between the European Commission and the United States Government on Efforts to Combat Illegal, Unreported, and Unregulated (IUU) Fishing*, (7 September 2011), online (pdf): <ec.europa.eu/archives/commission_2010-2014/damanaki/headlines/press-releases/2011/09/20110907_jointstatement_eu-us_iuu_en.pdf>.
25. See Rowland, *supra* note 4.
26. "Illegal Fishing" (2013), online: *World Ocean Review* <worldoceanreview.com/en/wor-2/fisheries/illegal-fishing/>.
27. See NOAA, *supra* note 2.
28. *Ibid*, commercial fishing is defined as "catching and marking fish and shellfish for profit".
29. *Ibid*, recreational fishing is defined as "fishing for sport or pleasure".
30. *Ibid*, subsistence fishing is defined as "fishing for personal, family, and community consumption or sharing".
31. See Part II.A, *infra*.

this article focuses primarily on commercial fisheries management and practices, recreational and subsistence fishing significantly increase the stress on global fish populations and contribute to fish suffering.

1. Domestic Fisheries Management

The National Oceanic and Atmospheric Administration ("NOAA") is the United States government agency responsible for regulating, implementing, and enforcing domestic fisheries management at the federal level.[32] NOAA has jurisdiction over fishing occurring between two to three-hundred nautical miles off of the coast, an area known as the US Exclusive Economic Zone ("EEZ").[33] Individual coastal states manage fisheries from the coastline out to three miles.[34] NOAA's stated objective is:

> (1) sustain, protect, and increase domestic food supply; (2) maintain and enhance recreational and subsistence fishing opportunities; (3) protect ecosystem health and sustainability; and (4) create jobs, support related economic and social benefits, and sustain community resilience".[35]

However, failing to account for fish welfare means that the goals of ecosystem health and protection have not been met.

i. Current Statutory Framework

The principal enabling statute guiding NOAA is the *Magnuson-Stevens Fishery Conservation and Management Act* ("*MSA*") of 1976.[36] The *MSA* sets national standards for domestic fisheries to prevent overfishing, reduce bycatch, and ensure a sustainable seafood supply.[37] It authorizes NOAA to establish and maintain catch limits to reduce overfishing and

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32. See NOAA, *supra* note 2.
33. *Ibid*.
34. *Ibid*.
35. *Ibid*.
36. *Magnuson-Stevens Fishery Conservation and Management Act*, 16 USC § 1801 (1976).
37. *Ibid*, § 1851 (establishing guidelines that aim to prevent overfishing, bycatch, and incorporate social and economic concerns associated with fisheries management).

restore depleted populations.[38] Towards that end, NOAA works closely with eight regional fishery management councils to regulate commercial and recreational practices in each geographical area of the United States.[39]

The *Marine Mammal Protection Act* ("*MMPA*")[40] and the *Endangered Species Act* ("*ESA*")[41] play fragmented roles in fisheries management practices. The *MMPA* was enacted to protect dolphins, whales, porpoises, seals, and sea lions.[42] It regulates interactions between commercial fishing exploration and protected marine mammal species.[43] Furthermore, the *MMPA* requires that seafood exported to the US come from fisheries with measures in place to reduce the bycatch of marine mammals.[44] The *ESA* protects endangered and threatened species and their habitats from harm, harassment, and interference.[45] Although the *MMPA* and *ESA* do not directly regulate fisheries management and sustainable commercial fishing practices, the requirements of the two laws impact the regulatory

38. *Ibid*, § 1853(a)(15) (requiring all fishery management plans to establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability).
39. See NOAA, *supra* note 2 (the regional councils include: North Pacific, Pacific, Western Pacific, Gulf of Mexico, Caribbean, South Atlantic, Mid-Atlantic, and New-England).
40. *Marine Mammal Protection Act*, 16 USC § 1361 (1972) [*MMPA*].
41. *Endangered Species Act*, 16 USC § 1531 (1973) [*ESA*].
42. *MMPA*, *supra* note 40 ("marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat" § 1361(a)(6)).
43. See *MMPA*, *supra* note 40, § 1372 (prohibitions regarding interactions with protected marine species).
44. *Ibid*, § 1372(c)(3).
45. *ESA*, *supra* note 41, § 1538.

process.

ii. Failure of Current Methods

NOAA and its eight regional councils seek to foster, promote, and enforce sustainable fishing practices. However, these efforts have been unsuccessful. Over 31.4% of fish stocks are either fished to capacity or overfished, a percentage that continues to increase.[46] Aquatic biodiversity studies reveal that if current trends continue, the seafood supply could be eradicated by 2048.[47]

Not only have current management practices failed to preserve fish stocks, they have also done little to protect fish welfare. Instead, they exacerbate suffering, a reality that has been wholly overlooked not just in the United States, but throughout the world. So, while the United States has attempted — largely unsuccessfully — to incorporate conservation and economic considerations into fisheries management practices, it has done nothing to protect wild-caught fish from inhumane treatment.

III. Why Fish Suffering Matters: Scientific Evidence of Fish Sentience

For hundreds of years, it was assumed that fish could not feel pain or suffer.[48] Laws, regulations, and morality followed this logic and excluded fish from animal welfare standards.[49] However, those assumptions were flawed. Fish feel pain and perceive their environment. Thus, any moral or

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46. "Oceans Threats" (2018), online: *National Geographic* <www.nationalgeographic.com/environment/habitats/ocean-threats/>.
47. Chris Crowley, "A New Warning Says We Could Run Out of Fish by 2048" (14 December 2016), online: *Huffington Post* <www.huffingtonpost.com/grub-street/a-new-warning-says-we-cou_b_13615338.html>.
48. Brian Key, "Fish Do Not Feel Pain and its Implications For Understanding Phenomenal Consciousness" (2015) 30:2 Biology & Philosophy 149.
49. As discussed above, fish have not been included in animal welfare legislation as other land animals have, due to the belief that they cannot feel pain or suffer.

normative standard aimed at protecting animals from needless suffering should similarly protect fish.

A. Fish Feel Pain

Historically, the notion that fish do not suffer was simply based on a lack of scientific research. Indeed, it seems a counterintuitive proposition since fish have central nervous systems, are biologically sophisticated, and in general, pain and suffering serve an important evolutionary function.[50] All of these factors point to an ability to experience pain and recent studies bear this out. Furthermore, the pain fish experience is more than simple nociception (the unconscious, reflex-driven response when pain receptors send information about an injury).[51] It is rather a subjective, conscious experience. The upshot: fish experience physical pain and suffering. That fact alone seems worthy of moral consideration. However, there is also strong evidence suggesting that fish experience emotional anguish as well.

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50. See Ferris Jabr, "It's Official: Fish Feel Pain" (8 January 2018), online: *Smithsonian* <www.smithsonianmag.com/science-nature/fish-feel-pain-180967764/> (fish have central nervous systems); see also Orsola R Salva, et al, "What Can Fish Brains Tell Us About Visual Perception?" (2014) 8:1 Frontiers in Neural Circuits 119 (discussing the complexity of fish anatomy and perception); Ann Gibbons, "Human Evolution: Gain Came With Pain" (16 February 2013), online: *Science* <www.sciencemag.org/news/2013/02/human-evolution-gain-came-pain>.

51. Jabr, *ibid* ("[fish] brain activity during injury is analogous to that in terrestrial vertebrates: sticking a pin into goldfish or rainbow trout, just behind their gills, stimulates nociceptors and a cascade of electrical activity that surges toward brain regions essential for conscious sensory perceptions (such as the cerebellum, tectum, and telencephalon), not just the hindbrain and brainstem, which are responsible for reflexes and impulses".

B. Fish Have Emotions

Fish have emotions. Indeed, certain species of fish serve as animal models for anti-depressant medications.[52] For example, researchers have conducted studies on zebrafish through the "novel tank test".[53] The test involves dropping the zebrafish into a tank for approximately five minutes.[54] If the fish sinks to the bottom after five minutes, it is deemed depressed.[55] If it swims along the top of the tank, it is not.[56] The longer the fish stays at the bottom, the more depressed it is, and vice versa.[57] "Depressed people are withdrawn, the same is true for fish".[58]

The success of the novel tank test revolves around the hypothesis that fish are in a positive state of mind when they are swimming along the top of the tank because they are exploring new environments.[59] Similar studies have found that depressed fish lose interest in food and toys.[60] Studies such as these raise their own ethical issues regarding the intentional infliction of suffering. We cite them not to indicate approval of the methodologies but rather to note that even under the current ethically questionable methods for demonstrating animal sentience, fish merit protection.

Since the nervous systems, physicality, and mental capacities of fish render them susceptible to pain and suffering, it triggers a moral obligation to avoid inflicting unnecessary suffering. Consequently, domestic and international fisheries management practices should identify the barriers

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52. Heather Murphy, "Fish Depression Is Not A Joke" (16 October 2017), online: *The New York Times* <www.nytimes.com/2017/10/16/science/depressed-fish.html>.
53. *Ibid*.
54. *Ibid*.
55. *Ibid*.
56. *Ibid*.
57. *Ibid*.
58. "Do Fish Suffer From Depression Too? Experts Say Yes" (18 October 2017), online: *CBS New York* <newyork.cbslocal.com/2017/10/18/fish-depression/>.
59. Murphy, *supra* note 52.
60. *Ibid*.

to incorporating the lessening of fish harm into current best practices and develop strategies to overcome them.

C. Moral Considerations

Once we accept that fish are capable of feeling, we must then determine which moral obligations are implicated by that reality. What follows is by no means an exhaustive discussion of the case for moral consideration of animal suffering. Those arguments have been ably made elsewhere and at length.[61] We merely observe that if suffering is morally relevant (and we have yet to see any convincing argument that it is not), then that relevance crosses the species barrier. And, if suffering crosses the species barrier and there is no morally relevant distinction between land and water animals, then the moral relevance of suffering crosses the land barrier as well.

The argument may be summarized as follows: moral consideration is typically afforded to species possessing some level of intelligence, interpersonal communication abilities, and overall consciousness.[62] Because fish were traditionally assumed to lack these characteristics, they were excluded from the moral considerations afforded to other

61. See Marian Stamp Dawkins, *Animal Suffering: The Science of Animal Welfare* (London: Chapman & Hall, 1980); Andrew Linzey, *Why Animal Suffering Matters: Philosophy, Theology, and Practical Ethics* (New York: Oxford University Press, 2009); Jonathan Safran Foer, *Eating Animals* (New York: Little, Brown & Co, 2009); Hal Herzog, *Some We Love, Some We Hate*, *Some We Eat: Why It's So Hard to Think Straight About Animals* (New York: Harper Perennial, 2011); Lee, *supra* note 1; Rikleen, *supra* note 1.

62. See *e.g. AWA*, *supra* note 1 and *HSA*, *supra* note 1 (the legislation designed, however poorly, to protect warm-blooded mammals) see *e.g. MMPA*, *supra* note 40, or those seen as intelligent. The debate over whether these are or should be the sole criteria is important but not our focus here.

animal species.[63] Yet, the recent recognition that fish feel and perceive pain mandates that this exclusion be reevaluated. That reevaluation has significant practical implications.

On a macro level, the global community faces the same questions that arise with all animal exploitation: whether to continue to permit nonhuman suffering in furtherance of commercial, economic, and personal gain. That debate, however, is not imminent. More immediately, the global community and individual nations must decide whether and how to acknowledge the suffering that current practices cause, that climate change exacerbates that suffering, and that mitigation measures exist that can at least lessen the scale and severity of the torment that the fish experience.

IV. Current Fishing Practices

Fishing practices — both domestic and international — fail to incorporate any consideration for pain or suffering. Instead, they prioritize profit and efficiency.

63. As Cassuto and others have argued elsewhere, the rights and protections — both legal and moral — that nonhuman animals have been afforded are inadequate and often serve to camouflage systemic, deliberate torture. See David N Cassuto, "Meat Animals, Humane Standards, and Other Legal Fictions" (2014) 10:2 Law Culture and the Humanities 225; David N Cassuto & Cayleigh Eckhardt, "Don't Be Cruel (Anymore): A Look at the Animal Cruelty Regimes of the United States and Brazil with a Call for a New Animal Welfare Agency" (2016) 43:1 Boston College Environmental Affairs Law Review 1. Nevertheless, the very fact that we have laws protecting (some) land animals and we have continuing efforts to strengthen and better enforce those laws indicate that the discussion about our moral duties is vigorous and continuing. The fledgling efforts to extend that discussion into the aquatic are in need of significant expansion, particularly in the legal and regulatory realm. These efforts have been spearheaded by organizations like the Lewis & Clark Law School Animal Law Clinic in Portland, Oregon and the Animal Legal Defense Fund.

A. Domestic Fishing Practices

Domestic fishing practices vary depending on (1) the venue — *i.e.* aquaculture or at sea; and (2) the purpose of the catch — *i.e.* recreational, commercial, etc. Although this article focuses on wild-caught fish in commercial fisheries, the treatment of farmed fish is equally relevant. Aquaculture — *i.e.* the farming of fish and other aquatic animals for food — will likely supplant wild-caught fish as the principal source of food fish by 2021.[64] Fish suffering will run parallel with this shift, arguably making aquaculture the greatest source of fish suffering by 2021. Therefore, the section that follows provides an overview of the methods and impacts of fish-farming.

1. Farmed Fish

Common practices for killing fish depend on the type of fishery.[65] *Slaughter* is the primary term used by agricultural and commercial fisherman to describe the killing of fish for human consumption.[66] With farmed fish, slaughter generally involves a two-step process.[67] First, the animal is stunned to render it unconscious prior to killing it. This is known as the 'stun-to-kill' time and ideally should be as brief as possible.[68] Second, various techniques, including: asphyxiation, live chilling, carbon dioxide ("CO_2") stunning, gill cutting, and percussive and electrical stunning are used to cause death.

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64. See Rowland, *supra* note 4.
65. Roy PE Yanong, et al, "Fish Slaughter, Killing, and Euthanasia: A Review of Major Published US Guidance Documents and General Considerations of Methods" (2007), online (pdf): *Institute of Food and Agricultural Sciences* <www.esf.edu/animalcare/documents/yanong-fisheuth_fa15000_b.pdf>.
66. *Ibid*, the term *killing* is most commonly used to refer to recreational fisheries, fishing for population control, and educational and research uses.
67. David D Kuhn, et al, "Fish Slaughter" (2017), online (pdf): *Virginia State University* <vtechworks.lib.vt.edu/bitstream/handle/10919/80713/FST-276.pdf>.
68. *Ibid*.

Asphyxiation — *i.e.* the deprivation of oxygen — can occur in air or over ice.[69] When asphyxiated in air, the gills of fish slowly collapse, causing a physical stress response and violent response behaviors.[70] A study conducted on immature gilthead seabream[71] revealed an average of four minutes in air before the fish exhibited spastic, uncontrollable behaviors.[72]

Asphyxiation on ice — 'live chilling' — is also common and involves immersing the fish in a mixture of ice and water.[73] Although live-chilling immobilizes and often sedates the fish, it does little to desensitize them.[74] In fact, the 'cold-shock' effect caused by live-chilling can prolong the time of consciousness and increase the duration of suffering.[75] Extreme changes in body temperature cause intense stress responses and reactive behaviors.[76] The same study on gilthead seabream revealed a loss of self-initiated behavior only after five minutes of submersion in ice.[77]

CO_2 stunning involves saturating the water with CO_2, thereby creating a highly-acidic environment leading to narcosis.[78] Similarly to asphyxiation, this technique involves a period of adverse stress reactions, including vigorous shaking and mucus production.[79] With CO_2 stunning, different species of fish have demonstrated upwards of two to three minutes of stress signals and signs of suffering.[80] CO_2 stunning can

69. Hans Van De Vis, et al, "Is Humane Slaughter of Fish Possible for Industry?" (2003) 34:3 Aquaculture Research 211.
70. Yue, *supra* note 8.
71. European Commission, "Gilthead Seabream" (2018), online: Fisheries <ec.europa.eu/fisheries/marine_species/farmed_fish_and_shellfish/seabream_en> (gilthead seabream were extensively cultured in coastal lagoons and brackish ponds and are now one of European aquaculture's main fish species. They are identified by the golden band on their heads).
72. Van De Vis, *supra* note 69 at 214.
73. Yue, *supra* note 8 at 4.
74. *Ibid* at 4.
75. *Ibid*.
76. Van De Vis, *supra* note 69 at 214.
77. *Ibid* at 214.
78. Yue, *supra* note 8 at 5.
79. *Ibid*.
80. *Ibid*.

also be done after live-chilling.[81] However, since live-chilling prolongs consciousness, this process may actually increase the duration of the fish's suffering in the acidic environment.[82]

Other fish slaughter techniques including bleeding (gill-cutting) without prior stunning,[83] and percussive and electrical stunning.[84] The latter two methods both require physical force to the body of the fish.[85] The time between impact and death depends on the accuracy of the stun blow.[86] Percussive stunning (which involves a rapid blow to the head) can render the fish immediately unconscious.[87] However, efficient quick death requires a degree of accuracy that is difficult to achieve.

Similarly, electrical stunning can also kill the fish immediately but accuracy remains an issue.[88] Incorrect voltages, frequencies, and durations of electric current can result in the fish regaining consciousness.[89] Percussive and electrical stunning are the more efficient slaughter methods in terms of reducing the duration of suffering. However, they are not commonly used in commercial aquaculture because they require great precision to work effectively. These are not considered feasible in the context of killing hundreds of thousands, if not millions, of fish.[90] Commercial practices, while different in style and scope, similarly do not contemplate the pain inflicted on their catch.

2. Wild-Caught Fish

Currently, no humane slaughter requirement exists for fish caught at sea (wild-caught fish). Generally, wild-caught fish are caught in nets by

81. *Ibid* at 5–6.
82. *Ibid* at 6.
83. *Ibid*.
84. *Ibid* at 5–6.
85. Van De Vis, *supra* note 69.
86. *Ibid*.
87. *Ibid.*
88. Yue, *supra* note 8.
89. *Ibid*.
90. *Ibid*.

trawlers and then dumped on board to suffocate.[91] Impaling live bait (smaller fish used to attract larger fish) on hooks is also common. Long-line fishing is another common practice and uses hundreds or thousands of hooks on a single line that may stretch 50–100 kilometres and are used for catching bluefin tuna, swordfish, and marlins.[92] Fish often remain caught and dragged for hours before the line is hauled in.[93]

The use of gillnets in commercial fishing poses major moral concerns.[94] A gillnet is a flat net suspended vertically.[95] They create an invisible netting wall, either stationary or drifting. The fish swim directly into the nets and become ensnared.[96] Mesh size varies with species size; gillnets are crafted to ensure that the head of the fish can pass through, but its body cannot.[97] The fish may remain trapped for many hours before the nets are pulled in, resulting in gill constriction and slow suffocation.[98] Fisherman often tie individual nets together to create walls of netting that are between 10 and 50 feet high and can stretch as far as several miles.[99] Because gillnets are not species specific, they often snare fish and

91. Mark Schrope, "Fishing Trawlers Have Double the Reach" (7 March 2008), online: *Nature* <www.nature.com/news/2008/080307/full/news.2008.658.html>.
92. UNFAO, "Industrial Tuna Longlining" (2018), online: *Food and Agriculture Organization of the United Nations* <www.fao.org/fishery/fishtech/1010/en>.
93. *Ibid*.
94. National Oceanic and Atmospheric Administration, "Bycatch - Fishing Gear: Gillnets" (2018), online: *NOAA Fisheries* <www.fisheries.noaa.gov/national/bycatch/fishing-gear-gillnets>.
95. *Ibid*.
96. UNFAO, "Gillnets and Entangling Nets" (13 September 2001), online: *Food and Agriculture Organization of the United Nations* <www.fao.org/fishery/geartype/107/en>.
97. Elizabeth Brown, "Fishing Gear 101: Gillnets" (6 June 2016), online (blog): *Safina Center* <safinacenter.org/2015/03/fishing-gear-101-gillnets-entanglers/>.
98. *Ibid*.
99. *Ibid*.

marine mammals that the fishermen do not seek (bycatch).[100] Bycatch represents over 40% of marine catches worldwide.[101] Commercial net fishing is a substantial cause of death among small marine mammals.[102]

In sum, the processes by which wild fish are caught for human consumption pose serious ethical concerns. These concerns are multiplied when coupled with the detrimental effects of climate change.

V. Effects of Climate Change & Ocean Acidification

Climate change significantly affects marine ecosystems and amplifies fish suffering.[103] Among other impacts, it causes coral bleaching, fish migration, rising sea levels, changes in weather patterns, and ocean acidification.[104] Of particular concern to fish populations are ocean acidification and drastic changes in weather and migration patterns.

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100. Andrew J Read et al, "Fine-scale Behavior of Bottlenose Dolphins Around Gillnets" (2003) 270:1 Proceedings of the Royal Society B: Biological Sciences 90 (discussing the factors leading to the entanglement of dolphins and other species in gillnets).
101. RWD Davies, et al, "Defining and Estimating Global Marine Fisheries Bycatch" (2009) 33:4 Marine Policy 661.
102. *Ibid* (discussing the issues in defining 'target' and 'non-target' by-catch).
103. "Summary for Policymakers. In: Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change" (7 June 2013), online (pdf): *Intergovernmental Panel on Climate Change* <www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_SPM_FINAL.pdf>.
104. *Ibid* (discussing changing atmosphere, rising sea levels, and increasing levels of CO_2 in the atmosphere); see also Ove Hoegh-Guldberg, et al, "Coral Reefs Under Rapid Climate Change and Ocean Acidification" (2007) 318:5857 Science 1737.

A. Ocean Acidification

Simply put, ocean acidification means the ocean becomes more acidic.[105] This process is caused by increasing levels of CO_2 in the atmosphere.[106] CO_2 combines with saltwater to produce carbonic acid, which increases the acidity of the water.[107] This results in the binding of carbonate ions, reducing their availability in the natural environment. As a result, many marine organisms including shellfish, crabs, lobsters and corals cannot build calcium carbonate shells.[108] Their populations are diminished and — in the case of corals — their habitats and physical frameworks are destroyed.[109]

Since the Industrial Revolution, the concentration of CO_2 in the environment has risen exponentially and that surplus has been absorbed by the ocean.[110] Over the past 250 years, since the Industrial Revolution, CO_2 levels in the natural environment have increased by over 40%.[111] That increase has caused a 30% increase in the ocean's acidity — a

105. Hoegh-Guldberg, *supra* note 104 (discussing the detrimental effects of climate change on the world's coral reefs); see also Nicola Jones, "How Growing Sea Plants Can Help Slow Ocean Acidification" (12 July 2016), online (blog): *Yale Environment 360* <e360.yale.edu/features/kelp_seagrass_slow_ocean_acidification_netarts>.

106. Hoegh-Guldberg, *supra* note 104 ("[d]uring the 20th century, increasing CO_2 has driven an increase in global oceans' average temperature…and has depleted acidity by 0.1 pH unit" at 1737).

107. "Ocean Acididication" (27 April 2017), online: *National Geographic* <www.nationalgeographic.com/environment/oceans/critical-issues-ocean-acidification/>.

108. *Ibid*.

109. Hoegh-Guldberg, *supra* note 104 at 1737–38.

110. Joana Haigh, "A Brief History of the Earth's CO2" (19 October 2017), online: *BBC News* <www.bbc.com/news/science-environment-41671770>.

111. David Adam, "World Carbon Dioxide Levels Highest for 650,000 years, U.S. Report Says" (13 May 2008), online: *The Guardian* <www.theguardian.com/environment/2008/may/13/carbonemissions.climatechange> (citing study conducted at the Mauna Loa observatory in Hawaii which found that CO_2 levels in the atmosphere have reached 387 parts per million); see also Hoegh-Gulberg, *supra* note 104 at 1737.

decrease of approximately 0.1 pH units.[112] If current emissions trends continue, the pH of the ocean could decrease by an additional 0.3–0.5 units.[113]

B. Change in Weather Patterns

Some species only thrive in certain habitats.[114] As the oceans warm, the places where the various species can find their ideal water temperature shifts. As a result, the habitats of many aquatic species are compromised.[115] Unpredictable extreme weather with storms, and heavy-rainfall cause damage to coastal ecosystems, communities, as well as coral reefs.[116] Rising sea levels will cover wetlands and other low-lying habitats — where fish reproduce — and destroy mangroves, the nurseries for many commercially important fish species.[117] Moreover, coral reefs and sea grass — habitats for many species — can only photosynthesize in shallow

112. Jones, *supra* note 105.
113. Rebecca Albright, "Reviewing the Effects of Ocean Acidification on Sexual Reproduction and Early Life History Stages of Reef-Building Corals" [2011] Journal of Marine Biology 36.
114. New South Wales Government, "Aquatic Habitats" (2018), online: *Department of Primary Industries* <www.dpi.nsw.gov.au/fishing/habitat/aquatic-habitats/about-aquatic-habitats> (discussing the differences in water flow, water quality, and water temperature for fish species).
115. Lise Comte & Julian D Olden, "Climatic Vulnerability of the World's Freshwater and Marine Fishes" (2017) 7:10 Nature Climate Change 718.
116. Hoegh-Guldberg, *ibid* at 1742 (discussing loss of coastal barriers and concluding the 'devastating ramifications' that climate change will/has caused for coral reefs).
117. *Ibid* ("we can anticipate that decreasing rates of reef accretion, increasing rates of bioerosion, rising sea levels, and intensifying storms may combine to jeopardize a wide range of coastal barriers. People, infrastructure, and lagoon and estuarine ecosystems, including mangroves, seagrass meadows, and salt marshes, will become increasingly vulnerable to growing wave and storm impacts" at 1742).

water and drown in the rising tides.[118]

Dramatic weather patterns and ocean acidification caused by climate change have degraded the lives and habitats of all marine species, including fish. Yet, amidst all the discussions of the declining health of the world's oceans, there has yet to be any meaningful discussion of mitigation measures to ease the impacts on the well-being of fish.

VI. Current Barriers to Fish Harm Contemplation and Incorporation

A number of barriers exist to incorporating fish pain and suffering into domestic and international fisheries management practices. These include: anthropocentric motivation, overconcern with charismatic megafauna, and attention paid to stock and fish population numbers.

A. Anthropocentric Motivation

Humans often disregard the needs of other species. This anthropocentric orientation underlies a wide range of environmental degradation and harms, including global warming, ozone depletion, and water scarcity.[119] Much of this disregard arises from a "[t]ragedy of the [c]ommons"[120] mentality.

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118. See generally A Arias-Ortiz, et al, "A Marine Heatwave Drives Massive Losses From The World's Largest Seagrass Carbon Stocks" (2017) 8:4 Nature Climate Change 33 (discussing the degradation of seagrass in the face of climate change).
119. 'Anthropogenic' is defined as "resulting from the influence of human beings on nature", *Merriam-Webster Dictionary* (Springfield: Merriam-Webster, 2018) sub verbo "anthropogenic". It is often used to refer the human degradation to the planet resulting from climate change, pollution, etc.
120. See Garret Hardin, "The Tragedy of the Commons" (1968) 162:3859 Science 1243.

B. Charismatic Megafauna

Charismatic megafauna, also known as flagship species, are large animal species with widespread popular appeal.[121] While conservationists and environmentalists often use these species to appeal to human sympathies, there is much doubt as to this strategy's effectiveness.[122] Some argue that using charismatic megafauna for research has an 'umbrella effect' and results in the preservation of less-glamorous species.[123] However, some studies have concluded that the 'umbrella effect' theory is essentially useless in protecting biodiversity.[124] Furthermore, since so few aquatic animals fall into the megafauna category, whatever gains such species might reap offer little protection to aquatic ecosystems.

C. Attention to Stock Numbers

Fish stock numbers pose obstacles on both an ecological and moral level. Ecologically, fish stocks are rapidly decreasing due to climate change and

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121. Jeffrey C Skibins, et al, "Charisma and Conservation: Charismatic Megafauna's Influence on Safari and Zoo Tourists' Pro-conservation Behaviors" (2013) 22:4 Biodiversity and Conservation 959 (discussing the connection between tourism and flagship species).
122. See Franck Courchamp, et al, "The Paradoxical Extinction of the Most Charismatic Animals" (2018) 16:4 Public Library of Science Biology 1 (discussing threats to the ten most charismatic species: tiger, lion, elephant, giraffe, leopard, panda, cheetah, polar bear, gray wolf, and gorilla).
123. See James M Dietz, LA Dietz, & Elizabeth Y Nagagata "The Effective Use of Flagship Species for Conservation of Biodiversity: The Example of Lion Tamarins in Brazil" in Peter JS Olney, Georgina M Mace, & Anna TC Feistner, eds, Creative Conservation: Interactive Management of Wild and Captive Animals (London: Chapman & Hall, 1994); see also Farid Belbachir, et al, "Monitoring Rarity: The Critically Endangered Saharan Cheetah as a Flagship Species for a Threatened Ecosystem" (2015) 10:1 Public Library of Science One 1.
124. See Robin Meadows, "No Link Between Flagship Species and Other Biodiversity in Belize" (29 July 2008), online: *Conservation Magazine* <www.conservationmagazine.org/2008/07/no-link-between-flagship-species-and-other-biodiversity-in-belize/>.

overfishing, resulting in massive population and habitat destruction.[125] Commercial fisheries remain heavily focused on the quantity of fish caught, rather than the morality of the methods of capture. As noted earlier, commercial fisheries catch fish by the hundreds and thousands using gillnets and trawlers. These practices do not account for the sentience and mortality of each individual fish. Instead, they group fish in large numbers, focusing on quantity over the quality of the catch. Combatting the systemic indifference to the suffering caused by fishing and climate change will require a global cultural shift.

VII. Strategies to Overcome Moral Inadequacies

The multivalent barriers to acknowledging and managing for fish suffering mean that any solutions must be wide-ranging and multi-layered. First and foremost, those tasked with developing management practices must recognize that moral inadequacies exist. Second, the regulations directing these practices must be reformed to acknowledge and mitigate fish suffering.

A. Recognizing Moral Inadequacies

Wild-caught fisheries do nothing to incorporate fish harm into practices and regulatory schemes. For that to change, the harm and suffering inflicted on fish must move to the fore of the fisheries management discussion. That will involve critically reevaluating current best practices with an eye toward lessening the suffering caused by fishing as well as —

125. See Allister Doyle, "Ocean Fish Number Cut in Half Since 1970" (16 September 2015), online: *Scientific American* <www.scientificamerican.com/article/ocean-fish-numbers-cut-in-half-since-1970/>; Claire Leschin-Hoar, "Fish Stocks Are Struggling to Rebound. Why Climate Change is on the Hook" (14 December 2015), online: *National Public Radio* <www.npr.org/sections/thesalt/2015/12/14/459404745/fish-stocks-are-declining-worldwide-and-climate-change-is-on-the-hook>.

when possible — mitigating the impacts of climate change.[126]

B. Recommended Regulatory Reforms

Essential regulatory reforms include: limiting stun-to-kill time, redesigning gillnets to eliminate suffocation and bycatch, and increasing monitoring and reporting requirements for commercial fisheries.

1. Limit Stun-to-Kill Time

To reduce suffering during the slaughter process, stun-to-kill time must be minimized. Scientific research as well as casual observation reveal that fish exhibit extensive stress signals within seconds of being stunned.[127] If not stunned properly, fish can suffer for upwards of 14 minutes *after* being removed from water.[128] We therefore propose that stunning occur immediately, with the goal that fish become insensible to pain less than one second after the application of the stun.[129] Commercial fisheries should stun the fish upon catch, rather than throwing them on deck to suffocate. Regulations must reflect this change in priorities and must be accompanied by increased enforcement.

Stunning practices must also account for physical differences and reactions among species. For example, electric stunning is the most humane slaughter method for trout and eels[130] while percussive stunning

126. Although farming practices often fail to adequately protect the welfare of farmed animals, many of the regulations contemplate some element of suffering. See *AWA*, *supra* note 1 (regulating the transportation and treatment of animals in research and exhibition, including size of enclosure, food and water, care during transit, etc.); *HSA*, *supra* note 1 (setting forth acceptable methods for killing and rendering livestock insensible to pain, as well as techniques for slaughter and stunning).
127. See above, Part III.B.
128. Jeff A Lines, et al, "Electric Stunning: A Humane Slaughter Method For Trout" (2003) 28:3-4 Aquacultural Engineering 141.
129. See above Part III.B.
130. Lines, *supra* note 128 at 141.

is more effective for other species.[131] Consequently, regulatory reforms must be detailed enough to account for these differences. Such reforms should also incorporate considerations of the effects of climate change on the most heavily fished species. The latter may involve heightened protections for species whose lives and numbers are threatened by shrinking habitat and an increasingly stressful marine environment.

2. Gillnets

As discussed in Part IV.A, gillnets pose the most pressing concern with regard to mitigating fish suffering. Although banning gillnets may not succeed in the short term, their use and design can be reformed to reduce the harmful effects of bycatch and entrapment.[132] Specifically, the nets should be modified to allow fish to swim into them without getting trapped. On a global scale, gillnets should be redesigned to allow the targeted catch to swim into the nets, while releasing those that would otherwise become bycatch. This change can be accomplished through international agreements that incorporate and standardize net mesh sizes. Commercial fisherman should also be required to check for bycatch on a regular basis, and to release any inadvertently trapped marine species.

3. Increased Enforcement

As with any successful regulation, proper enforcement is key to its success. In the case of commercial fisheries, increased patrol of high traffic areas, as well as increased monitoring at busy ports can ensure that commercial fisherman comply with humane slaughter and fishing practices. This enforcement should include mandatory inspections and reporting requirements for commercial fishing vessels to ensure strict

131. Bjorn Roth, et al, "Percussive Stunning of Atlantic Salmon (Salmo Salar) and the Relation Between Force and Stunning" (2007) 36:2 Aquacultural Engineering 192.

132. Gillnets could indeed be eliminated if there were international will. But to date, there have been no indications that it is on any international or domestic agenda.

compliance.[133] These regulatory requirements should also incorporate heavy fines for noncompliance.

4. Recommended Reform

While current treaty obligations are inadequate to address the safety of the world's fish, the framework for such protections does exist. It is simply a matter of making the requisite modifications. The 1995 *United Nations Agreement* seeks "long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks".[134] With respect to limiting stun-to-kill time, redesigning gillnets, and enforcing new and existing regulations, the General Principles in Article V of the *UN Agreement* should be modified to include the following language:

> In order to conserve and manage straddling fish stocks and highly migratory fish stocks, coastal States and States fishing on the high seas shall, in giving effect to their duty to cooperate in accordance with the Convention:[135]
>
> (m) take appropriate measures in accordance with this Agreement and best scientific evidence to incorporate fish suffering into fisheries management practices;
>
> (n) adopt slaughter practices, including stun-to-kill limits, in accordance with humane practices;
>
> (o) reduce the use of and work towards redesigning gillnets with the purpose of reducing bycatch, fish entrapment, suffocation, and unnecessary death; and
>
> (p) implement and enforce humane slaughter and fishing practices through effective monitoring, control, and surveillance.

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133. Compliance is always an issue with respect to fishing practices. See Jonas Hentati-Sundberg, et al, "Does Fisheries Management Incentivize Non-compliance? Estimated Misreporting in the Swedish Baltic Sea Pelagic Fishery Based on Commercial Fishing Effort" (2014) 71:7 International Council for the Exploration of the Sea Journal of Marine Science 1846. However, oversight has improved in recent years and further improvement remains possible.
134. *UN Agreement*, *supra* note 12.
135. This language already exists in the *UN Agreement* but is included for clarity purposes.

Within each Article relating to the above principles, the *UN Agreement* should set forth the specific requirements necessary to achieve the above objectives. As discussed above, stun-to-kill time should be limited to one-second and should be accomplished through accurate percussive or electrical stunning.[136] Member states should be required to redesign gillnets in a manner that will reduce bycatch and suffocation. Finally, states should develop individual enforcement procedures that ensure strict compliance with all of the suggested reforms. Through this proposed amendment, the UN and its 193 member states have the ability to protect the welfare of fish on a global scale. More specific international agreements, such as ICCAT,[137] should be similarly amended to contemplate humane practices relating to the specific species they aim to protect.

The US should also reform the *MSA* to incorporate humane practices for wild-caught fish. This reform should also include rigid enforcement by each of NOAA's eight regional councils to ensure that all commercial fisheries within the EEZ comply with humane fishing practices. Specifically, the *MSA* should mirror the US *Humane Slaughter Act*[138] with respect to setting forth stun-to-kill and slaughter requirements for wild-caught fish species.[139] As with the *UN Agreement*, the *MSA* should require percussive or electrical stunning with a one-second stun time.

These legislative changes will represent the first steps to providing fish with the same legal protections that exist for land mammals and livestock. Underlying the need for these regulatory and legal reforms is more than just a moral obligation. The responsibility to safeguard the commons also derives from the Public Trust Doctrine ("PTD"),[140] a principle derived from Roman law and enshrined in the jurisprudence and statutes of many countries, including the United States.

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136. See Part IV.A.
137. *Ibid*.
138. *HSA*, *supra* note 1.
139. *Ibid* (setting forth acceptable methods for killing and rendering livestock insensible to pain, as well as techniques for slaughter and stunning).
140. See Peter Birks & Grant McLeod, *Justinian's Institutes* (Ithaca: Cornell University Press, 1987).

VIII. Implications of the Public Trust Doctrine

The PTD has its roots in the Justinian Code, which first articulated the principle that: "[b]y the law of nature, these things are common to mankind: the air, running water, the sea, and consequently, the shores of the sea".[141] Migrating from civil to common law, the PTD became part of the laws of medieval England and spread across the Atlantic to the United States and many other countries.[142] While most environmental statutes rely on the police power, the PTD is founded in property law.[143] The state is the designated trustee of natural resources held in trust for the public. As with any other trust, the trustee must manage the corpus of the trust for the benefit of the beneficiaries. The beneficiaries of the PTD are present and future generations of citizens.[144] Traditionally, the PTD

141. Thomas Cooper, *The Institutes of Justinian*, 2d (New York: Halsted & Voorhies, 1841); *See also* David C Slade, *Putting the Public Trust Doctrine to Work: The Application of the Public Trust Doctrine to the Management of Lands, Waters, and Living Resources of the Coastal States* (Washington, DC: Coastal States Organization, 1990).
142. Michael C Blumm, "The Public Trust Doctrine and Private Property: The Accommodation Principle" (2010) 27:3 Pace Environmental Law Review 649.
143. Joseph L Sax, "Liberating the Public Trust Doctrine from Its Historical Shackles" (1980) 14:2 University of California Davis Law Review 185 [Sax, "Liberating PTD"].
144. See Mary C Wood, "Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift" (2009) 39:1 Environmental Law 43 ("[a]t the core of the doctrine is the antecendent principle that every sovereign government holds vital natural resources in 'trust' for the public — present and future generations of citizen beneficiaries" at 45); Melissa K Scanlan, "Implementing the Public Trust Doctrine: A Lakeside View into the Trustee's World" (2012) 39:123 Ecology Law Quarterly 1174.

applied to tidal uplands and other coastal areas[145] but in recent centuries it has expanded to include other public goods, including fisheries.[146]

In the sections that follow, we examine the United States PTD, arguing first that it applies to fisheries. We then turn to whether the PTD applies solely to the states or whether it also binds the federal government. Though traditionally a state doctrine, there is ample support for the PTD's application at the federal level. If the federal government is obliged to safeguard natural resources for present and future generations, fish (in addition to other wildlife) form one of those resources and merit protection. That does not mean that the United States (or individual states) or other countries must ban fishing in order to comply with the PTD. It does mean, however, that fish are a protected resource whose value is not solely economic and that the state and federal governments are obliged to act in a manner that acknowledges and protects that value.

Last, we briefly survey the PTD in other countries to show that there is a growing awareness that public goods must be protected. Fish are a public good and, in order to protect them, we must safeguard not just

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145. *Illinois Central Railroad v State of Illinois*, 146 US 387 (1892) [*Illinois Central*] ("[i]t is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties" at 452); see also Sax, "Liberating PTD", *supra* note 143 ("[i]t [the PTD] deals with lands beneath navigable waters, with constraints on alienation by the sovereign and with an affirmative protective duty of government—a fiduciary obligation—in dealing with certain properties held publicly" at 185); Joseph L Sax, "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention" (1969) 68:1 Michigan Law Review 471 [Sax, "The Public Trust Doctrine"]; see also Blumm, *supra* note 142 at 657; Richard M Frank, "The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future" (2012) 45:3 University of California Davis Law Review 665.

146. See Joshua B Fortenbery, "The Public Trust Doctrine Adrift in Federal Waters, Fishery Management in the Exclusive Economic Zone off Alaska" (2015) 5:1 Seattle Journal of Environmental Law 227; Kevin J Lynch, "Application of the Public Trust Doctrine to Modern Fishery Management Regimes" (2007) 15:2 New York University Environmental Law Journal 285.

their habitat (through mitigating the impacts of climate change) but also their well-being by protecting them from unnecessary suffering.

A. The PTD Applies to Fisheries

The original United States PTD cases involved aquatic wildlife. *Arnold v Mundy*[147] and *Martin v Waddell*[148] were both about oysters. However, both cases turned on ownership of submerged lands and thus did not stand for the principle that fish and other aquatic life formed part of the corpus of the trust.[149] In addition, the common law of property in the US with respect to wildlife and other natural resources was founded on the right of capture.

Mortally wounding or killing a wild animal established occupancy and ownership of the animal.[150] This proved problematic as the unfettered right to take wild animals led to widespread species extinctions. This in turn led to the creation of the progressive movement in the US, which sought to protect wildlife from further decimation by looking to English common law. Plaintiffs suing to protect wild animals argued that, as successors to the British sovereign, states owned the wildlife and were

147. *Arnold v Mundy*, 6 NJL 1 (NJ Sup Ct 1821) [*Arnold*].
148. *Martin v Waddell's Lessee*, 41 US 367 (1842).
149. *Ibid*; *Arnold*, *supra* note 147.
150. See *Pierson v Post*, 3 Caines 175 (1805) ("[w]e are the more readily inclined to confine possession or occupancy of beasts *feræ naturæ*, within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation" at 179); see also *Keeble v Hickeringill*, [1707] 103 ER 1127 (QB); *Mullett v Bradley*, 53 NYS 781 (NY Sup Ct 1898).

obligated to protect it.[151]

In later years, states 'republicanized' the idea of sovereign ownership,[152] recognizing it as a legal fiction that enabled the state to act as guardian of public resources.[153] This recognition brought wildlife management squarely within the realm of the PTD. Individuals could no more take wildlife to the detriment of the public good than they could expropriate public water, coastal lands, or any other part of the trust corpus. In addition, the state's inalienable responsibility to manage the trust for the public good supersedes private property rights. Private property emerged out of state ownership; since the state never possessed an unfettered right to destroy the public trust, neither does anyone else whose property right descends from state ownership.

As the Supreme Court observed in *Illinois Central Railroad v State of Illinois*, "[t]he State can no more abdicate its trust over property in which the whole people are interested…than it can abdicate its police powers…".[154] The responsibilities of the state as trustee extend beyond maintaining the economic viability of the trust property (or 'res'). With respect to wildlife, those responsibilities extend to safeguarding the well-

151. Michael C Blumm & Mary C Wood, *The Public Trust Doctrine in Environmental and Natural Resources Law*, 2d (Durham: Carolina Academic Press, 2015) [Blumm & Wood, *The Public Trust Doctrine*]. This formulation and much of the ensuing discussion of the PTD and wildlife draws heavily on the outstanding work of Professors Blumm and Wood especially at 217–56.

152. See Dale D Goble, "Three Cases/Four Tales: Commons, Capture, the Public Trust, and Property in Land" (2005) 35:4 Environmental Law 807 at 831. See also *Magner v People*, 97 Ill 320 333 (1881); *State v Rodman*, 59 NW 1098 (Minn 1894).

153. See *Toomer v Witsell*, 334 US 385 (1948) ("[t]he ownership language… must be understood as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate an important resource" at 402).

154. *Illinois Central*, *supra* note 145.

being of the animals themselves.[155]

We have already established that fish have the same right to moral consideration as any other animal.[156] In addition, the public waters (in which the fish dwell) are one of the oldest and best recognized components of the public trust.[157] It therefore stands to reason that fish, as wildlife and as a resident of the nation's waters, form part of the public trust as well. This concept is also well established in American case law.

In *State Department of Fisheries v Gillette*, for example, the Court of Appeals of the State of Washington declared that:

> [T]he state's proprietary interest in animals *ferae naturae* dates at least from the common law of England. Our courts have incorporated this concept in cases upholding the state's authority to regulate fish and game…In addition to recognizing the state's proprietary interest in its fish, our courts have also held

155. See *e.g. Barrett v State*, 116 NE 99, 101 (NY 1917) (in which the New York Court of Appeals observed that "[beaver] are one of the most valuable of the fur-bearing animals of the state…But apart from these considerations, their habits and customs, their curious instincts and intelligence, place them in a class by themselves" at 101).
156. See above, Part II.
157. See Sax, "Liberating PTD", *supra* note 143 ("[t]he source of modern public trust law is found in a concept that received much attention in Roman and English law — the nature of property rights in rivers, the sea, and the seashore" at 475).

that the state holds it title as trustee for the common good".[158]

Under the PTD, the state therefore has an obligation to act to protect them. It remains but to show that the federal government is similarly bound.

B. There is a Federal Public Trust and it Applies to Fish

The existence of a federal public trust obligation has both historical and practical roots. It is also recognized obliquely in federal jurisprudence.

1. Powers Were Ceded to the Federal Government by the States

When the American colonies gained independence from the British Crown, there did not yet exist a unified United States of America. The Articles of Confederation represented a first effort to unify the fledgling states into a nation. However, entrenched resistance to a strong federal authority meant that the document offered little meaningful power to the federal government.[159] The chaos that resulted, both domestically and in

158. *State Department of Fisheries v Gillette*, 621 P2d 764, 767 (Wash App Ct 1980) (internal citations omitted). See also *People v Truckee Lumber*, 48 P 374 (Cal 1897) ("[t]he dominion of the state for the purposes of protecting its sovereign rights in the fish within its waters, and their preservation for the common enjoyment of its citizens, is…not restricted to their protection only when found within what may in strictness be held to be navigable or otherwise public waters" at 375; *California Fish and Game Code*, § 711.7(a) ("[t]he fish and wildlife resources are held in trust for the people of the state by and through the department [of Fish & Game]"); see also *State Fisheries cf Bacich v Huse*, 59 P2d 1101 (Wash 1936) ("[b]ut it is equally true, and is uniformly held, that, while the state owns the fish in its waters in its proprietary capacity, it nevertheless holds title thereto as trustee for all the people of the state and for the common good, and therefore regulations made for the use of this common property must bear equally on all persons similarly situated with reference to the subject-matter and purpose to be served by the regulation" at 1104).

159. See Articles of Confederation.

international relations, led to the Constitutional Convention of 1787.[160]

In the ensuing debates about the need for and scope of federal authority, the central question was always how much power the States would delegate to the federal government.[161] The document that emerged from those negotiations represented a compromise that satisfied neither those who favored a strong federal government nor those wishing to preserve state autonomy.[162] However, all agreed that the States would permit the federal government only those powers specifically enumerated in the *Constitution*.[163]

The 10th Amendment memorialized that understanding, stating that those "powers not delegated to the United States by the *Constitution*, nor prohibited by it to the States, are reserved to the States respectively, or to the people".[164] It is thus clear that the limited powers of the federal government derive from the States. It remains to be determined whether the powers ceded to the federal government by the States were encumbered by a public trust obligation.

160. See US State Department, "Constitutional Convention and Ratification, 1787–1789" (2018), online: *United States Office of the Historian* <history.state.gov/milestones/1784-1800/convention-and-ratification> (discussing radical movements, demand for a central government, and economic troubles that triggered the Convention).

161. James Madison, "Federalist No. 45. The Alleged Danger From the Powers of the Union to the State Governments" (1788), online: *Project Gutenberg* <www.gutenberg.org/files/1404/1404-h/1404-h.htm#link2H_4_0045> ("[having] shown that no one of the powers transferred to the federal government is unnecessary or improper, the next question to be considered is, whether the whole mass of them will be dangerous to the portion of authority left in the several States. The adversaries to the plan of the convention, instead of considering in the first place what degree of power was absolutely necessary for the purposes of the federal government, have exhausted themselves in a secondary inquiry into the possible consequences of the proposed degree of power to the governments of the particular States").

162. US Const.

163. US Const art I, § 8.

164. US Const amend X. We return to the concept of powers reserved to the people in our discussion of the Reserved Powers Clause and the Federal Public Trust Doctrine in Part VIII.B.2.

The States won their powers from the British Crown, entitling them to exercise over themselves the sovereignty that the Crown once exercised. However, the British Crown was itself bound by the PTD. It held the natural resources of the colonies in trust for the people — present and future. Therefore, when the colonies won independence, they won what the Crown possessed — a sovereignty constrained by the PTD.

It is a foundational principle of law and of civil society that one can only give (or sell) what one actually possesses.[165] The States' sovereignty was constrained by a public trust obligation. It is only logical that any powers ceded to the federal government by the States would be similarly constrained.

2. The Federal Trust Obligation Is Recognized in Jurisprudence

To date, there has been no explicit recognition of a federal public trust obligation by either the legislature or the courts, and there is a robust debate about whether one exists.[166] Nevertheless, there is much in federal jurisprudence and statutes that seems to implicitly recognize the PTD's existence and necessity. *Illinois Central*,[167] the seminal PTD case, addressed the validity of an 1869 grant by the Illinois Legislature of an extensive amount of valuable and important submerged lands along Lake Michigan to the Illinois Central Railroad. Several years later, the legislature recognized the magnitude of its error and sued to invalidate

165. Brian A Garner & Henry Campbell Black, eds, *Black's Law Dictionary* (St. Paul: Thompson Reuters, 2014) sub verbo "nemo dat quod non habet".

166. See Sax, "Liberating PTD", *supra* note 143; Michael C Blumm & Lynn S Schaffer, "The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad" (2015) 45:2 Environmental Law 399 (arguing that the public trust doctrine is an "inherent limit on all sovereign authority, not just states" at 399); Cathy J Lewis, "The Timid Approach of the Federal Courts to the Public Trust Doctrine" (1998) 19:1 Public Land & Resources Law Review 51; Hope M Babcock, "Using the Federal Public Trust Doctrine to Fill Gaps in the Legal Systems Protecting Migrating Wildlife from the Effects of Climate Change" (2017) 95:3 Nebraska Law Review 649.

167. *Illinois Central*, *supra* note 145.

the original grant. The US Supreme Court agreed that the grant was invalid because the conveyance of public trust lands in such a manner represented an abdication of the state's police power and its authority over navigation.[168]

There are many important threads in the Court's opinion, and the literature about it is vast and important.[169] For present purposes, we merely note that *Illinois Central* invalidated an action of the state legislature on the grounds that the state did not have the authority to divest itself of state-owned submerged lands even though there was no state statute with which the legislature had failed to comply. Indeed, the Court made no attempt to ground its decision in state law. Rather, it invalidated the grant because it determined that the legislature had failed to act in accordance with the Court's own vision of the state's PTD responsibilities. Thus, the Court recognized a federal right to exercise supervisory authority over state compliance with the PTD.

Some scholars argue that the Court was relying on the Reserved Powers Doctrine, which is derived from the 10th Amendment's acknowledgement of inherent limits on state powers.[170] The Amendment declares that powers not granted to the federal government are reserved to the States *and the people*.[171] Since certain powers reside with the people, some actions and decisions lie outside the state's authority. For example, a legislature cannot abdicate its responsibilities to its citizens nor can

168. *Ibid* ("such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public" at 453).

169. See Sax, "Liberating PTD", *supra* note 143; see also Sax, "The Public Trust Doctrine", *supra* note 145; Joseph D Kearney & Thomas W Merrill, "The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central" (2004) 71:3 Chicago Law Review 799; Blumm & Schaffer, *supra* note 166.

170. See Blumm & Schaffer, *supra* note 166 at 412.

171. US Const, *supra* note 162 ("[t]he powers not delegated to the United States by the *Constitution*, nor prohibited by it to the States, are reserved to the States respectively, or to the people" at amend X).

it bind future legislatures to any such abdication.[172] Federal courts may determine if and when those limits are breached.[173]

The federal government is similarly bound by its responsibility to manage public resources for the people. As Blumm and Schaffer argue, US Courts have acknowledged that the federal government acts as "trustee for the people of the United States"[174] and that "the United States do[es] not and cannot hold property as a monarch may, for private and personal purposes".[175] As recently argued by the plaintiffs in a potentially groundbreaking case in federal court in Oregon, the federal government's obligations arise from the Due Process and Equal Protection Clauses of the *Fifth Amendment* of the *Constitution*.[176]

3. The *Juliana* Case

In *Juliana v United States*,[177] a group of young people sued the United States, arguing that the government had breached its obligations to safeguard the atmosphere so as to provide a habitable environment for present and future generations. Their claims are founded in the constitutional rights to life, liberty, and property, as well as the government's public trust obligations located in the due process and equal protection clauses

172. Blumm & Schaffer, *supra* note 166; see also *Illinois Central*, *supra* note 145.

173. See *e.g.* Karl S Coplan, "*Public Trust Limits on Greenhouse Gas Trading Schemes: A Sustainable Middle Ground?"* (2010) 35:2 Columbia Journal of Environmental Law 287, ("[s]ince [the] public trust doctrine is a pre-existing limit on the scope of state sovereignty ... the pre-existing rights of the people in trust assets — at a minimum, rights to navigation and fishing — are reserved by the Tenth Amendment" at 311–12).

174. See Blumm & Schaffer, *supra* note 166 at 422 (citing *Canfield v United States*, 167 US 518 at 524 (1897)).

175. *Ibid* (citing *Light v United States*, 220 US 523 at 527 (1911)).

176. *Juliana v United States*, 217 F Supp 3d 1224 (D Or 2016) [*Juliana*]; see also US Const amend V ("[n]o person shall…be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation").

177. *Ibid*.

of the *Constitution*.[178] In denying the government's motion to dismiss, Judge Aiken agreed with the plaintiffs that there was a fundamental right to a climate and atmosphere capable of sustaining human life and that the government did indeed have a public trust obligation founded in the *Fifth Amendment*.[179] The forthcoming trial will determine if those rights have been violated.

Juliana is still in its preliminary stages, but the case has already demonstrated that arguments for a constitutional basis for a federal public trust doctrine have traction in federal court. The burgeoning scholarship on the issue[180] will only strengthen this position over time. When this is combined with the already strong implicit support for the federal PTD in federal case law, as well as the growing recognition of this sovereign obligation in countries around the world, it appears increasingly likely that the expansion of the scope and authority of the PTD will eventually contain a clearly articulated federal component.[181]

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178. See *Juliana v United States* (12 August 2015), Oregon, Wash CA 6:15-cv-01517-TC (complaint for declaratory and injunctive relief), online (pdf): <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180509_docket-615-cv-1517_motion-3.pdf>

179. *Ibid* ("[e]xercising my 'reasoned judgment,' I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society" at 1250).

180. See Michael C Blumm & Mary C Wood, "'No Ordinary Lawsuit': Climate Change, Due Process, and the Public Trust Doctrine" (2017) 67:1 American University Law Review 1; see also Don C Smith, "'No Ordinary Lawsuit': Will *Juliana v United States* Put the Judiciary at the Centre of US Climate Change Policy?" (2018) 36:3 Journal of Energy & Natural Resources Law 259; Melissa Powers, "*Juliana v United States*: The Next Frontier in U.S. Climate Mitigation?" (2018) 27:2 Review of European Comparative & International Environmental Law 199.

181. Numerous scholars have noted that the federal obligation to maintain public resources for the people is already clearly spelled out in statutory law, even without explicit mention of the PTD. See *National Park Service Organic Act*, 16 USC §§ 1–4; *Wilderness Act*, 16 USC §§ 1131–1136; *Redwood National Park Act*, 16 USC §§ 79a–79q; Blumm & Wood, *The Public Trust Doctrine*, *supra* note 151; Blumm & Schaffer, *supra* note 166.

4. The Federal PTD Applies to Fish

If a federal PTD exists, then the scope of the obligations it confers must be federal as well. The beneficiaries of the trust include all United States citizens and the federal government has an obligation to safeguard the public trust for the benefit of present and future generations of citizens. As Judge Aiken opined in *Juliana*, the PTD places constitutional limits on sovereignty by mandating that future legislatures not be foreclosed from providing for their citizens or exercising their police powers.[182]

As discussed above, wildlife form an important part of the national trust. Fish are wildlife and thus equally subject to the trust's protections. The federal government controls far more fish habitat than any individual state, giving federal laws and treaties much more influence on fish habitat and well-being. Furthermore, although state actions are important and necessary, it ultimately falls to the federal government to coordinate a national response to climate change. It therefore seems clear that fish well-being falls within the purview of federal trust obligations. In the following section, we note that the PTD is found by other nations either by locating the obligation in natural law, or finding it in their constitutions and jurisprudence. We look at its presence in several countries around the world and in Canada. Unsurprisingly, there is ample overlap. Treaties and other international agreements could easily reflect the shared value of protecting the world's resources.

182. *Juliana*, *supra* note 176 ("[t]he [public trust] doctrine conceives of certain powers and obligations — for example, the police power — as inherent aspects of sovereignty. Permitting the government to permanently give one of these powers to another entity runs afoul of the public trust doctrine because it diminishes the power of future legislatures to promote the general welfare" at 1253).

C. The PTD Internationally

When we consider that the PTD derives from ancient Roman law, it is not surprising that it has made its way into many legal regimes.[183] It shapes environmental decision-making, protects vulnerable resources and populations, and requires that future generations be considered in the formation of policy. No other environmental doctrine has such overarching and general applicability.

In India, for example, the 1997 Supreme Court decision in *MC Mehta v Kamal Nath*[184] established the PTD as a foundational principle of Indian law. The Court invalidated a lease that would have enabled the defendant to dredge and reshape a riverbed in order to protect its resort. The Court opined that the "laws of nature…must inform all of our social institutions"[185] and that the PTD's scope was expansive, including navigation, commerce, fishing and environmental protection.[186] In later cases, the Court found further basis for the PTD in the Indian Constitution.[187]

The Filipino PTD is similarly broad although its enforcement has

183. This discussion of the PTD internationally once again owes an enormous debt to Professor Blumm, whose scholarship on the PTD is extraordinary in its scope and depth. See Michael C Blumm & Rachel Guthrie, "Internationalizing the Public Trust: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxian Vision" (2012) 45:3 University of California Davis Law Review 741.

184. *MC Mehta v Kamal Nath* (1997), [1997] 1 SCC 388 (India) in 1 United Nations Environment Project Compendium of Judicial Decisions in Matters Related to the Environment, National Decisions 259 (1998).

185. *Ibid* at 269.

186. *Ibid*.

187. Blumm & Guthrie, *supra* note 183 at 762 (citing *MI Builders Private Ltd v Radhey Shayam Sahu* [1999] 6 SCC 464 at 466 (India)); see also *Formento Resorts & Hotels v Minguel Martins*, [2009] INSC 100 (India).

not matched the force of its rhetoric.[188] The 1977 Environmental Policy declares that the nation will "fulfill the responsibilities of each generation as trustee and guardian of the environment for succeeding generations".[189] The *Constitution* also expresses that the state had a duty to "protect and advance the right of the people to a balanced and healthful ecology…".[190] In *Oposa v Factoran*,[191] the Court held that the PTD includes fisheries.[192]

Several African countries (*e.g.*, South Africa, Kenya, & Uganda)[193] have similarly expansive doctrines and a number of South American countries, including Brazil, Bolivia, and Ecuador recognize a constitutional right to a healthy environment. That latter right includes a state obligation to safeguard the health and well-being of the marine ecosystems.[194]

188. See *The Water Code of the Philippines, A Decree Instituting a Water Code, Thereby Revising and Consolidating Laws Governing the Ownership, Appropriation, Utilization, Exploitation, Development, Conservation and Protection of Water Resources*, Pres Dec No 1067 art 3 (Dec. 31, 1976); see also *Philippine Environmental Policy*, Pres Dec No 1151 § 2 (June 6, 1977); Philippine Const. (1987), art II, § 16, ("[t]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature").
189. *Philippine Environmental Policy*, Pres Dec No 1151 § 2 (June 6, 1977); Blumm & Guthrie, *supra* note 183 at 771.
190. Philippine Const (1987), art II, § 16
191. *Oposa v Factoran*, [1993] 224 SCRA 792 (Philippines).
192. *Ibid* ("[s]uch a right, as hereinafter expounded, considers the "rhythm and harmony of nature". Nature means the created world in its entirety. Such rhythm and harmony indispensably include, *inter alia*, the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife…" at 792).
193. Blumm & Guthrie, *supra* note 183 at 777–86. See also *The National Environmental Act of 1995* (Uganda) (requiring "prior environmental assessments of proposed projects which may significantly affect the environment or use of natural resources" at § II(i)); *Advocates Coalition for Development & Environment v Attorney General*, Misc Cause No 0100 of 2004 (11 July 2005) (Uganda); Ugandan Const art 27 (directing the state to "promote sustainable development and public awareness of the need to manage land, air, and water resources in a balanced and sustainable manner of the present and future generations"); *Waweru v Republic*, (2006) 1 KLR 677, 677 (HC) (Kenya); Kenyan Const (2010), art 62.
194. See Ecuador Const, art 395.

In Canada, a number of cases recognize the state's stewardship over navigable waters and public access. For example, in *Prince Edward Island v Canada (Minister of Fisheries and Oceans)*,[195] the trial court refused to dismiss a suit against the government for failure to maintain the Atlantic fishery. The court noted that if the government could sue in its capacity as guardian of the public interest, it was only logical that "a beneficiary of the public interest ought to be able to claim against the government for failure to protect [that] interest…".[196] The court's reasoning seems to draw both from the government's public trust obligations as well as its duty to exercise its police power.

The foregoing cursory overview shows that the PTD is well-ensconced in the laws and jurisprudence of countries around the world. And recent decades have witnessed a marked momentum toward broadening and strengthening the breadth and power of the doctrine.[197] Among countries that embrace the PTD, protecting marine resources from harm is nearly universally acknowledged to form part of the state's stewardship obligations. Suffering is undeniably a harm. While it has yet to be raised in legal proceedings as a public trust obligation, it seems clear that protecting marine resources from suffering should be recognized and integrated into any approaches that aim to protect fish and marine ecosystems.

IX. Conclusion

Emerging science demonstrates that fish are sentient — they feel pain and suffer like birds and mammals. Although fish suffering is systemic, fisheries management practices have yet to incorporate or contemplate the idea of mitigating it. The great majority of pain inflicted upon

195. *Prince Edward Island v Canada (Minister of Fisheries and Oceans)*, [2005] 256 Nfld & PEIR 343 (NLCA).

196. *Ibid* at para 37; See also Blumm & Guthrie, *supra* note 183 at 805.

197. See Rebecca LaGrandeur Harms, "Preserving the Common Law Public Trust Doctrine: Maintaining Flexibility in an Era of Increasing Statutes" (2015) 39:1 University of California Davis Law Review 97 at 98 (discussing the increased flexibility of the public trust doctrine in protecting natural resources); see also *Juliana*, *supra* note 176.

fish results from human activity, particularly commercial fishing and anthropogenic climate change. Current fishing practices fail to incorporate humane slaughter practices and lack any regulations to protect fish from unnecessary harm. Moreover, climate change and ocean acidification have warmed the world's oceans, destroyed critical habitat, and decimated species. To be sustainable, fisheries management systems must account for the effects of climate change, ocean acidification, and depletion of fish stocks while also taking steps to reduce suffering.

The PTD further imposes an obligation on the federal government to protect fish. Federal and state governments, as trustees, must act to ensure the well-being of fish; not because they are food but rather because they form part of the natural world whose safety is entrusted to the state. The reforms suggested are both practical and necessary. The alternative to reform is immoral and unsustainable.

The Save Movement and Farmed Animal Suffering: The Advocacy Benefits of Bearing Witness as a Template for Law

Maneesha Deckha*

This paper critically analyzes the practices and legal regulation of the growing global phenomenon of the Save Movement, a (human) social movement directed at bearing witness to and raising awareness of the suffering of animals brutalized in intensive farming. Save activists typically hold vigils as animals are transported from the warehouses in which they were raised to their deaths in a slaughterhouse. Through the lens of feminist relational theory and critical animal legal studies, the paper considers the benefits of the Save Movement for farmed animals as well as the capacity of the law to participate in the act of bearing witness to farmed animal suffering that the movement advocates. I argue that bearing witness is not only a productive activity for animal advocates to engage in, but also serves as a model for how the law can respond to animals. Put differently, I argue that the law should strive to bear witness to animal suffering, and that this subversive and partly socially subjectifying move for animals can occur even in the present anthropocentric legal culture where animals are legal property and clearly non-subjects.

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I. Introduction

Bearing witness to suffering as a form of social and political protest as well as personal transformation is not a new concept for social justice movements seeking to disrupt violent orthodoxies regarding power and subjectivity. Bearing witness, however, as a form of organized and collective protest to *animal* suffering is a relatively new phenomenon and growing worldwide. The Save Movement, as it is called, comprises animal activists who gather together in their communities to bear witness to animals in their actual experiences of suffering, typically in their last moments before death en route toward a slaughterhouse kill floor. The suffering involved generally stems from the violent uses of animals in normative, lawful industries, most often intensive animal agriculture, and part of the aim of the Save Movement is to raise awareness of the

horrors of this now routine and legal treatment of farmed animals.[1]

As a form of social and political protest, the acts of bearing witness are not meant to be socially exhibitionist, directly connected to law reform or even always legally transgressive. Save activists are often not attempting to rescue the animals, whose suffering and lives they have come to bear witness to, from their eventual fates. They are also not trying to capture public attention through graphic images, provocative displays, or conversational exchange. The movement is also not directed at circulating petitions for eventual distribution to legislators or policymakers (although leaflets and pamphlets might be distributed, and the public verbally engaged at an individual level).[2] Given that Save activists do not usually seek to break the law or verbally or vividly call attention to their cause, but rather highlight *and respond in the moment to* the suffering inherent in practices and industries the law deems lawful through peaceful, primarily silent, and reflective observation and connection, we can understand the Save Movement as qualitatively different from traditional forms of animal advocacy protest.[3] Critical analysis of the benefits of the movement through its central trope of bearing witness as well as legal responses to such acts can help us evaluate this emerging form of animal advocacy.

In what follows, I analyze the benefits of bearing witness to normative violence against farmed animals within animal advocacy and law. I argue that bearing witness is not only a productive activity for animal advocates to engage in, but also serves as a model for how the law can respond to animals, namely with compassion and empathy. Put differently, I argue that the law should aspire to bear witness to animal suffering, and that this partly socially subjectifying move for animals can occur even in the

1. Ian Purdy & Anita Krajnc, "Face Us and Bear Witness! 'Come Closer, as Close as You Can…and Try to Help!': Tolstoy, Bearing Witness, and the Save Movement" in Atsuko Matsuoka & John Sorenson, eds, *Critical Animal Studies: Towards Trans-species Social Justice* (London: Rowman & Littlefield, 2018) 45 at 45; Alex Lockwood, "Bodily Encounter, Bearing Witness, and the Engaged Activism of the Global Save Movement" (2018) 7:1 Animal Studies Journal 104 at 107.
2. Purdy & Krajnc, *supra* note 1 at 48; Lockwood, *supra* note 1 at 107–08.
3. Lockwood, *supra* note 1 at 107–08.

present system where animals are legal property and clearly non-subjects.

After outlining the basic features of the Save Movement in Part I of this article, Part II reviews the nascent academic literature on bearing witness stemming from Levinasian-inspired and feminist approaches to refashioning ethical responsibility. Part III applies and extends the analytical insights in this literature about what bearing witness means and why it is of value to the context of farmed animal advocacy in the Save Moment. This Part discusses why bearing witness as typically practised in the Save Movement is a beneficial activity for animal advocates to pursue. Here I also endorse the value of bearing witness as an element in the overall repertoire of critical animal intervention strategies because of its ability to subvert the ideologies of the animal agricultural industrial complex. I assess the Save Movement's benefits for the individual animals to whom the activists are bearing witness as well as for animals in general, emphasizing the socially subjectifying nature of bearing witness in the Save Movement for the animals and the ability of activists' practices to transgress species binaries and represent farmed animals as agentic beings. In Part IV, I briefly explore how the concept of bearing witness as practised by the Save Movement can serve as a model of how legal actors can try to intervene discursively in favour of animals despite their entrenchment as property in the dominant colonial legal systems in Canada.

II. The Save Movement: An Overview

Anita Krajnc founded Toronto Pig Save in December 2010,[4] an organization that "exists to erect glass walls at slaughterhouses, encourage plant-based vegan living, and bear witness to the pigs during vigils".[5] Krajnc situates the Save Movement in a "nonviolent love-based" social movement paradigm that takes its conceptual purposes and strong belief in the value of community organization from "Leo Tolstoy, Mahatma Gandhi, Martin Luther King, community organizer Saul Alinksy, United Farm Workers cofounder Cesar Chavez, environmental justice

4. Purdy & Krajnc, *supra* note 1 at 46.
5. "Toronto Pig Save" (2018), online: *Toronto Pig Save* <www.torontopigsave.org>.

campaigner Lois Gibbs, and others".[6] The organization started off with weekly vigils but now typically holds three vigils in the Toronto area each week to bear witness to animals en route to slaughterhouses.[7] At these vigils, activists assemble as close as they can get to the animals while in a transport truck, sometimes trying to touch the animals inside, giving water or watermelon, issuing soothing and comforting messages, or connecting with them eye-to-eye.[8]

In its purposes and activities, Toronto Pig Save is not unique, but it is credited with being the organization that launched the Save Movement, a movement that now encompasses over 200 Save groups globally although primarily in countries of the global North.[9] The website of the Save Movement defines bearing witness as the main purpose of the movement and further defines "bearing witness" as "…being present in the face of injustice and trying to help. Tolstoy says we all have a duty to bear witness".[10] Indeed, Krajnc, along with her co-author Ian Purdy, cite Tolstoy's definition of bearing witness in their recent work on the Save Movement's purpose and love-based organizational strategies to grow the movement.[11] They point to the following definition from Tolstoy as to what bearing witness means: "[w]hen the suffering of another creature causes you to feel pain, do not submit to the initial desire to flee from the suffering one, but on the contrary, come closer, as close as you can to him [or her] who suffers, and try to help him [or her]".[12] In their own words

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6. Purdy & Krajnc, *supra* note 1 at 46.
7. *Ibid*; The Save Movement "List of Save Groups" (2017), online: *The Save Movement* <thesavemovement.org/list-of-save-groups/> [The Save Movement, "List of Save Groups"].
8. Lockwood, *supra* note 1 at 109–11.
9. The Save Movement, "What is the Save Movement?" (2017), online: *The Save Movement* <thesavemovement.org/the-save-movement/>; The Save Movement, "List of Save Groups", *supra* note 7; Lockwood, *supra* note 1.
10. The Save Movement "What is Bearing Witness?" (2017), online: *The Save Movement* <thesavemovement.org/bearing-witness/>.
11. Purdy & Krajnc, *supra* note 1 at 46.
12. *Ibid* at 45 citing Leo Tolstoy, *A Calendar of Wisdom: Daily Thoughts to Nourish the Soul*, translated by Peter Skirin (New York: Scribner, 1997) at 214.

they define bearing witness as "a duty to be present at the darkest sites of injustice, to let others know of this injustice, and to do all one can to stop the injustice, as an individual and together with one's community".[13]

Purdy and Krajnc identify vigils at slaughterhouses as a "very partial form" of bearing witness because the animals continue onto slaughter; in contrast, "fuller forms of bearing witness" occur when organizers are able to secure an animal's release through speaking with the animal's owner (*i.e.* the slaughterhouse and its agents) or through acts of civil disobedience (such as stalling the trucks carrying the animals for several minutes).[14] Alec Lockwood, who has participated in vigils with Toronto Pig Save, states that the Save Movement has the following four "core practices" that encapsulate this "very partial form" of bearing witness (hereinafter referred to simply as "bearing witness"):

1. collective witnessing of the process of animal slaughter
2. providing momentary solace and succour, including with water and fruit, to the animals
3. making visible the spaces where killing takes place and the structural means by which consumer cultures aid and abet that killing…
4. to share audio and visual recordings from the vigils via social media to broader audiences.[15]

Purdy and Krajnc further state that bearing witness is meant to inspire vigil attendees to become vegan and take up leadership activities in

13. Purdy & Krajnc, *supra* note 1 at 48.
14. *Ibid* at 46, 52–53 (Purdy and Krajnc write that "[b]earing witness is the main strategy used by (Toronto Pig Save) and most groups in the Save Movement… There are many purposes in bearing witness for the attendees and the community. The first is to be present for the animals in their hour of need and show them compassion, to tell their story, to try and help them, and to intervene and attempt to stop the injustice. There are fuller forms of bearing witness that involve truly freeing the animals, as Chinese activists have done in freeing dogs from slaughterhouse trucks on multiple occasions. TPS' form of bearing witness is only partial, as the animals still go to slaughter" at 48).
15. Lockwood, *supra* note 1 at 109.

organizing and expanding the movement.[16] As Sue Donaldson and Will Kymlicka have recently pointed out in their critical evaluation of the advocacy model within farmed animal sanctuaries, it is instructive to critically assess animal advocacy measures no matter how well-intentioned and well-designed in favour of animals to explore their actual impacts on animals and how humans relate to animals.[17] To apply a critical lens to bearing witness to animals in the Save Movement, then, I turn next to the critical literature on the concept of bearing witness in general.

III. Bearing Witness, Response-ability, and Subjectivity

A. What is Bearing Witness and Why is it Beneficial?

Fuyuki Kurasawa states that the literature on bearing witness exhibits four points of focus: "bearing witness as an exercise in truth-telling (its historical accuracy), a juridical outcome (its legal and institutional pre-conditions), a psychic phenomenon (a subjective response to trauma) or a moral prescription (the communicative responsibility of eye-witnesses)…".[18] Kelly Oliver engages with all four in her influential treatise discussing the act of bearing witness or witnessing as concepts to aid our thinking of how we envision the purposes and goals of social movements and the development of subjectivity.[19] As an alternative to the often elusive project of recognition, whereby social movements seek Hegelian recognition of various types from dominant institutional actors, Oliver

16. Purdy & Krajnc, *supra* note 1 at 48.
17. Sue Donaldson & Will Kymlicka, "Farmed Animal Sanctuaries: The Heart of the Movement?" (2015) 1:1 Politics and Animals 50, online (pdf): *Open Journals at Lund University* <journals.lub.lu.se/index.php/pa/article/view/15045/14797>.
18. Fuyuki Kurasawa, "A Message in a Bottle: Bearing Witness as a Mode of Transnational Practice" (2009) 26:1 Theory, Culture & Society 92 at 94.
19. Kelly Oliver, *Witnessing: Beyond Recognition* (Minneapolis: University of Minnesota Press, 2001) [Oliver, *Witnessing*]. See also Kelly Oliver, *Animal Lessons: How They Teach Us to Be Human* (New York: Columbia University Press, 2009) [Oliver, *Animal Lessons*].

offers us the idea of witnessing, a concept that combines the juridical notion of acting as an eyewitness to an event or incident with the concept of bearing witness.[20] Bearing witness in this sense of witnessing is an act that proceeds from the understanding that some experiences of trauma and suffering cannot be tangibly accessed through sight or other sensory experiences insofar as there are contextual aspects of an experience that visual observation of that experience will not necessarily convey.[21] Such contextual aspects are the social, economic, political, and historical relations that shape the power relations structuring the subjectivity (or denial thereof) and agency (or subordination thereof) of the subject to whose experience we are bearing witness.

Oliver presents her theory of witnessing as a framework through which we may engage with visual images and representations without forgetting about what we cannot see, *i.e.* the power relations structuring the images.[22] For Oliver, witnessing is an alternative and corrective to the current mode of pornographic viewing of (often racialized and imperial) violence and suffering. Pornographic viewing permits viewers to view events and incidents without critical analysis or reflection, receiving them primarily as spectacle. Such pornographic viewing fails to teach viewers about the partiality of images and perspectives, to critically read, for example, the 'frame' of the image and its particular social construction, reflecting on what the image leaves out and the relations of power surrounding and underlying the making of the image and the acts that are represented. Instead, pornographic viewing encourages us to see every image as unmediated, as truth, and as naturalized, and as existing primarily for our viewing pleasure and or other consumerist desires. Any empathy that may be stirred is merely 'empty' in that it requires no responsibility from us, no action, and also does not cultivate within us

20. Kelly Oliver, *Women as Weapons of War: Iraq, Sex, and the Media* (New York: Columbia University Press, 2007) [Oliver, *Women as Weapons of War*].
21. Kelly Oliver, "Witnessing and Testimony" (2004) 10:1 Parallax 78 at 78 [Oliver, "Witnessing and Testimony"].
22. Oliver, *Witnessing*, *supra* note 19.

or within the Other we regard visually the ability to respond to others.[23]

Witnessing, as an alternative, compels attention to what may be "beyond recognition" visually even through eye-witnessing, namely "the subjectivity and agency, along with the social and political context or subject positions, of the 'objects' of our gaze, and our own desires and fears, both conscious and unconscious, that motivate our actions in relation to others".[24] It is this aspect of witnessing (exploring subjectivity, agency, and social context while being aware that we have knowledge gaps and that our desires and fears motivate us) that Oliver denotes as "bearing witness". Bearing witness or witnessing understood in this fashion serves a vital supplement to the juridical sense of eye-witnessing and it is a process that requires continual "critical analysis and perpetual questioning".[25] Oliver is keen to stress that this deep and sustained questioning is the method by which we can account for our unconscious and repressed "motives and desires"[26] that we can never fully know, but nonetheless are our drivers of our "actions, attitudes and beliefs",[27] and thus how we behave ethically.

Oliver argues that witnessing "in its full and double sense"[28] is fundamental to generating human subjectivity and undermining the effects of oppression and domination.[29] This is because to bear witness is not simply to recognize another as a being in pain who is suffering or has been victimized in the past and may be presently vulnerable. Going beyond recognition, bearing witness is to engage in a specific type of relation with that being, namely a relationship of address and response. A being who is capable of address and response, but also, critically, is *addressed by and responded to* by others in a meaningful and favourable way, is able to acquire subjectivity and agency. Indeed, a being in an oppressed state or subject position *requires* another to address and

23. Oliver, *Women as Weapons of War*, *supra* note 20 at 9–10.
24. *Ibid*; Oliver, *Witnessing*, *supra* note 19 at 106.
25. Oliver, *Women as Weapons of War*, *supra* note 20 at 106.
26. *Ibid* at 107.
27. *Ibid*.
28. *Ibid* at 106.
29. Oliver, "Witnessing and Testimony", *supra* note 21 at 81.

respond to them to properly move toward agency and a position of less oppression. It is therefore through responsive relationships with others that we acquire our subjectivity.

Conversely, part of the dynamics of oppression or domination we may experience arises from exclusion or marginalization from witnessing structures of being responded to by others. This relational development of subjectivity thus morally calls upon us to enter an address and response relationship with those who are marginalized. As Oliver affirms:

> [t]his brings us to an ontological level on which subjectivity is essentially relational and dependent, always formed through a primordial 'we'. From this primordial we, follows an ethics of response-ability that entails an ethical obligation to our founding possibility, which is responsivity.[30]

We need to facilitate responses from others and we are also responsible for those responses.

In this, Oliver follows Levinas, but as she also states, she goes further than Levinas (as well as Derrida) in connecting our concern with difference and Othering to an integration of the unconscious.[31] For Oliver, for capable humans to act ethically, is to be mindful of how our words and actions make others feel, but we must also realize that our address or response (or lack thereof) also shapes our "motives, desires and fears unknown to us"[32] as well as, of course, those subjects whose peripheral social positioning may deny their subject status.[33] In short, acknowledging the unconscious helps us consciously grasp that there are aspects of lived experiences we can never know, a knowledge that should impel us to engage in continual interrogation of the norms we abide by, the principles of justice we espouse, and our feelings and motivations for doing so.[34]

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30. *Ibid* at 85.
31. *Ibid*.
32. *Ibid*.
33. *Ibid*.
34. *Ibid* at 85–86.

B. Witnessing Impediments: Humanitarian Logics, Imperial Saving, and Shallow Sentiments

If bearing witness, as Oliver writes, is to engage in "perpetual questioning" of our own unconscious emotions and responses and how those condition our favourable or exclusionary attitudes and behaviours toward others, bearing witness is a compassionate, responsive, and, thus ultimately, a subjectifying act. In this capacity, bearing witness is valued for its role to heal, remember, and understand, as well as bring just relations into eventual being through instigating meaningful empathy.[35] While scholars seeking to respond to violence and injustice extol the potential of bearing witness, they are not oblivious to its shortcomings in striving for social change. In this section, I want to consider some of these criticisms and explore the extent to which they obtain in the context of bearing witness to animal suffering.

To begin with, Jennifer Rickel has pointed to the problematic humanizing and colonial qualities of attempts by audiences in the global North to ethically witness the suffering of socioeconomically distant Others in the global South given the enormous disparities in material and representational privileges between them.[36] Rickel states that, too often, bearing witness creates a cathartic, consumerist feel-good moment for those in the position to bear witness safely ensconced in material comforts and geopolitical stability without a corresponding change in the political, social, and material realities of the victims.[37] Rickel also observes that when humanitarian logics and humanism shape the encounter of bearing witness to an Other's suffering, that the subaltern Other must conform to a certain notion of being human, performing a certain type of victimized dehumanized subjectivity, in order to have their experience validated.[38]

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35. Kurasawa, *supra* note 18 at 97.
36. Jennifer Rickel, "'The Poor Remain': A Posthumanist Rethinking of Literary Humanitarianism in Indra Sinha's *Animal's People*" (2012) 43:1 ariel: A Review of International English Literature 87.
37. *Ibid* at 93.
38. *Ibid* at 98.

Rickel is concerned with humanitarianism-molded witnessing between disparately-placed humans (those whose humanity is recognized and those whose humanity is called into question) in the context of ongoing postcolonial capitalist global relations. Her critique revolves around the neoliberal investments that attend to literary humanitarianism in particular (bearing witness to suffering through postcolonial diasporic literature), where the humanitarian desire to rescue the human subaltern to restore her humanity through 'giving voice' provides the discursive structure of the narration. As such, the critique does not immediately obtain in the context of bearing witness to animal suffering where the goal, arguably, is not to give voice to animals, and certainly not to restore humanity to dehumanized victims. Notwithstanding this crucial difference, the ethos of Rickel's concerns can pertain to the context of bearing witness to animals given that the gulf in privileged positions between a human bearing witness to an animal's suffering is also expansive, if not wider, than that between human and human despite enormous socioeconomic disparities that separate the global poor from the global rich. Thus, the dynamic of restoring dignity, subjectivity, and respect to animals through Save Movement practices can also be fraught with the potential for misunderstanding and distortion.[39] We need to weigh the benefits of bearing witness to animal suffering (to be assessed in the next section) against this potential for anthropocentric misunderstanding and distortion.

Further, the eclipsing of agency that can occur when those in privileged positions attempt to 'save' the Other must also be of paramount concern in thinking of the ethical position of animal advocacy in general

39. It is, of course, important not to fetishize the gulf in communication between humans and animals as unassailable given the resonance of such thinking in foreclosing human attempts to listen to animals and hear what they may be trying to tell us as a core practice in a caring interspecies relationships. See Josephine Donovan, "Feminism and the Treatment of Animals: From Care to Dialogue" (2006) 31:2 Signs: Journal of Women in Culture and Society 305.

and, given its name, the *Save* Movement in particular.[40] As Dinesh Wadiwel has discussed in relation to questioning mainstream but also pro-animal representations of fish within industrial fishing systems, the postcolonial question of "epistemic injustice" is also germane to animal advocacy.[41] Here, Western human advocates are cautioned to abide by the postcolonial insight that interventions by Westerners into the affairs of non-Westerners in order to "save" them from various forms of real and imagined violence,[42] can enact their own type of violence in terms of how issues are framed, understood, and productively resolved.[43] Wadiwel emphasizes that the answer is not, then, to refrain from political action or refuse to engage and work through global solidarity on issues where the victims occupy less privileged spaces, but to recognize that the subjectivities of those we see as 'victims' are complex and that we should consider them as active and resistant rather than simply passive and victimized. I say more in the next Part as to how the Save Movement meets this standard.

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40. Erica Weiss, "'There are no Chickens in Suicide Vests': The Decoupling of Human Rights and Animal Rights in Israel" (2016) 22:3 Journal of the Royal Anthropological Institute 688.
41. This question was famously raised by Gayatri Spivak in the context of questioning the binary and contested representations that framed understandings of the debate regarding British legislative reform against the practice of *sati*, or the burning of a widow along with her dead husband on his funeral pyre, that occurred in some Hindu communities in select parts of India. As the iconic example of civilizing missions invoking gender relations and the condition of women in the colonies to justify colonialism and its rampant violence, the British outlawing of *sati* was explained as 'saving Indian women' from patriarchal religious practices, an explanation contested by native Hindu men who sought to defend the practice by nationalistically claiming that the widows wished to die along with their husbands. See Gayatri Chakravorty Spivak, "Can the Subaltern Speak?" in Cary Nelson & Lawrence Grossberg, eds, *Marxism and the Interpretation of Culture* (Basingstoke: Macmillan Education, 1988) 271 as discussed in Dinesh Wadiwel, "Do Fish Resist?" (2016) 22:1 Cultural Studies Review 196 at 205–07.
42. Rajeswari Sunder Rajan, *Real and Imagined Women*: *Gender, Culture, and Postcolonialism* (New York: Routledge, 1996).
43. Spivak, *supra* note 41.

Those humans who seek to bear witness to animal suffering must also worry about the triad of concerns that Michalinos Zembylas reviews in relation to bearing witness in the human-to-human context, namely sentimental, resentful, or desensitized reactions and effects.[44] Zembylas raises his concerns in the context of teaching students in classrooms how to productively witness suffering that occurred in the past in a way that moves those bearing witness toward self-transformation and political action rather than encouraging them to accept fixed narrations of past violence as atrocious yet completed and resolved events.[45] This temporal context differs from the one in which the Save Movement is located since the Save Movement involves bearing witness to current, ongoing, and routine violence of an exceptional magnitude.[46] The Save Movement's intended audience of the wider mainstream omnivore and carnist public also differs from the classroom environment Zembylas highlights. Yet, the Save Movement's goal of exposing humans otherwise not familiar with animal suffering to the brutalities of intensive farming in the hope that they will adopt a practice of bearing witness in relation to farmed animals aligns with the same Levinasian ethical dynamic that Zembylas draws from, *i.e.* that of an infinite responsibility to the Other. It is reasonable to suggest that the Save Movement also needs to guard against the "strong grip of sentimentality, resentment or desensitization" Zembylas highlights,[47] responses all of which impede openness to the call of the Other which needs a responsive response.

This awareness of the dangers of bearing witness lapsing into apolitical and self-gratifying gestures as Rickel observes, or sentimentalized,

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44. Michalinos Zembylas, "Bearing Witness to the Ethics and Politics of Suffering: J.M. Coetzee's Disgrace, Inconsolable Mourning, and the Task of Educators" (2009) 28:3 Studies in Philosophy and Education 223.
45. *Ibid* at 224.
46. In terms of bodies killed per second, the title of Timothy Pachirat's monograph referring to the rate at which a cow is slaughtered in the United States is chilling: Timothy Pachirat, *Every Twelve Seconds: Industrialized Slaughter and the Politics of Sight* (New Haven: Yale University Press, 2011); David Sztybel, "Can the Treatment of Animals Be Compared to the Holocaust?" (2006) 11:1 Ethics & the Environment 97.
47. Oliver, *Animal Lessons*, *supra* note 19 at 234.

resentful, and desensitized responses as Zembylas highlights, or even imperial impulses as Wadiwel warns against, however, should not lead to jettisoning the practice in relation to farmed animals. As discussed in the next Part, bearing witness has significant potential as a socially subjectifying practice for farmed animals that subverts their normative erasure and bodily appropriation in the current food system that counsels its growth despite the above pitfalls to which it can succumb.

IV. Bearing Witness to Farmed Animals: What is in it for the Animals?

Scholarship on the concept of bearing witness has developed and globally matured in the context of analyzing human atrocities and trauma in relation to the Nazi Holocaust, South African apartheid, settler-colonialism, rape and other forms of torture during wartime, and quotidian domestic violence against women.[48] This body of scholarship has further centered the visual act of seeing the violence as well as the aural act of listening to testimony and narrations of violence from the human victims and related actors.[49] Through this presumption of speaking agents who communicate in a language accessible to humans, and other often unsaid presuppositions of whose suffering matters and thus compels us to bear witness, much of the scholarship on bearing witness adopts humanist parameters that go unquestioned.[50] How, then,

48. This is not to suggest that attention to human trauma has been even across race, gender or geopolitical region. For a critique of the Eurocentric biases of attention to human trauma, see: Stef Craps, *Postcolonial Witnessing: Trauma Out of Bounds* (Basingstoke: Palgrave Macmillan, 2013); Nicola Henry, "The Impossibility of Bearing Witness: Wartime Rape and the Promise of Justice" (2010) 16:10 Violence Against Women 1098; Stephanie L Martin, "Bearing Witness: Experiences of Frontline Anti-Violence Responders" (2006) 25:1/2 Canadian Woman Studies 11.
49. Kurasawa, *supra* note 18 at 93.
50. See *e.g. ibid*; Rickel, *supra* note 36; Jennifer Rickel, "Speaking of Human Rights: Narrative Voice and the Paradox of the Unspeakable in J.M. Coetzee's Foe and Disgrace" (2013) 43:2 Journal of Narrative Theory 160. Rickel's work is a clear exception, discussing the posthumanist dimensions of witnessing in relation to the literary texts she examines.

can we understand the concept of bearing witness and appreciate its subversive potential in the context of farmed animal suffering?

A. A Socially Subjectifying and Multispecies Embodied Cultivation of Response-ability

1. Emotional Entanglements: "Feeling With" and Sharing Burdens as an Ethico-Political Act

The recent work of Kathryn Gillespie reflecting on the suffering she witnessed firsthand on dairy farms and farm auction halls in the Pacific North-West US illuminates how bearing witness to farmed animal suffering is a possible pathway to subjectification through the cultivation of response-ability. Gillespie's work illustrates the applicability of Oliver's insights about witnessing and its generative impact for subjectivity, agency, and the undermining of oppression in the actions of the Save Movement. Following Oliver, Gillespie connects witnessing to "a Levinasian moment of coming face-to-face that requires a response"[51] and observes that "witnessing…has the potential to reveal and document hierarchies of power and inequality that affect the embodied experiences of marginalized individuals and populations".[52] This is what distinguishes witnessing in its visual iteration from voyeurism or observation, a distinction others have also made.[53]

Gillespie then applies the concept to farmed animals:

> Witnessing the nonhuman other in spaces of farming is important because animal agriculture is an insidious and hegemonic institution, and the domestication and commodification of farmed animals are social and economic processes deeply implicated in the suffering and appropriation of animal bodies.[54]

Gillespie provides a harrowing first-person account of the animals she

51. Kathryn Gillespie, "Witnessing Animal Others: Bearing Witness, Grief, and the Political Function of Emotion" (2016) 31:3 Hypatia 572 at 576.
52. *Ibid* at 572–73.
53. Naisargi N Dave, "Witness: Humans, Animals, and the Politics of Becoming" (2014) 29:3 Cultural Anthropology 433 at 440.
54. Gillespie, *supra* note 51 at 574 [citations omitted].

witnessed coming through the auction hall on sale for their flesh and reproductive capacities, describing the horrifying sights, sounds, and trauma of newborn calves with placentas still attached taken from their mothers, the frenetic bellowing of their mothers desperate to find them, and four-year-old dairy cows completely spent, almost unable to stand up, auctioned for slaughter.[55] She tells also of the social function the auction plays in the lives of humans in attendance as part of their links to the farming world. In describing the ability of human attendees to enjoy the auction despite the suffering that surrounds them, Gillespie writes that "[a]nimals' lives and bodies in this space are thoroughly commodified, their suffering illegible to the accustomed observer, the violence against them made mundane through its regularity".[56]

Gillespie maintains that in this brutalizing context where animals' needs and desires are vacated, mother-child bonds severed, and females appropriated en masse for their reproductive capacities, trying to *acknowledge the presence* of each individual animal and remembering each as an individual, is an act of political and ethical significance. In the same vein, "feeling-with" animals, "…of *sharing the emotional burden* of their suffering or offering some relief", Gillespie argues, is a core element and type of witnessing.[57] Gillespie locates her concept of "feeling-with" animals within Lori Gruen's framework of "entangled empathy", which is a kind of empathy that is meant to cultivate our response-ability toward empathizing with animals and mobilizing in their favour.[58] Relying intensely on emotions, witnessing productively assigns value to this realm (the emotional realm) of human and farmed animal experience that has long been suppressed in Western culture to normalize eating and commodifying animals.[59] Witnessing also resists the dominant view in Western animal advocacy that providing rational argumentation

55. *Ibid* at 575.
56. *Ibid*.
57. *Ibid* at 578–79 [emphasis added].
58. Lori Gruen, *Entangled Empathy: An Alternative Ethic for Our Relationships with Animals* (New York: Lantern Books, 2015).
59. Kate Stewart & Matthew Cole, "The Conceptual Separation of Food and Animals in Childhood" (2009) 12:4 Food, Culture & Society 457.

rather than discussing emotional responses to animals is a better route to convince people to care about animals and transform their behaviours.[60]

"Feeling-with" and sharing emotional burdens through witnessing the suffering of farmed animals also combats the pernicious dualism of reason over emotion that is a root cause of inequality and hierarchy in Western ontologies and epistemologies more generally.[61] Writing in the feminist journal *Hypatia*, Gillespie further argues that witnessing the suffering of animals in this way connects with feminist projects for politicized transformation because "…witnessing necessarily entails an emotional engagement and a recognition of the political function of emotion".[62] Put differently, witnessing productively recuperates emotion in general, and empathy and compassion in particular, as valid political acts, that ascribe the subjectivity that animals are otherwise denied.

2. "Close Bodily Encounters", Multispecies Subjectivity, and Agentic Representations

In reflecting on his own involvement in Toronto Pig Save and the Save Movement,[63] following critical animal scholars who extend empathy and compassion into the realm of physical and embodied connection with more-than-humans,[64] Alex Lockwood emphasizes the intense *embodiment* of the emotional entanglement that Gillespie discusses that he and other Save activists have experienced. For Lockwood, a proper apprehension of the empathy and compassion Save activists express

60. Karen J Warren, "Toward an Ecofeminist Ethic" (1988) 15:2 Studies in the Humanities 140; Josephine Donovan & Carol J Adams, *The Feminist Care Tradition in Animal Ethics* (New York: Columbia University Press, 2007).
61. *Ibid*.
62. Gillespie, *supra* note 51 at 573 (Gillespie advocates for this emotional-laden "feeling-with" farmed animals as a feminist ethnographic research method).
63. Lockwood, *supra* note 1.
64. Anat Pick, *Creaturely Poetics: Animality and Vulnerability in Literature and Film* (New York: Columbia University Press, 2011); Ralph R Acampora, *Corporeal Compassion: Animal Ethics and the Philosophy of Body* (Pittsburgh: University of Pittsburgh Press, 2006).

toward farmed animals highlights how embodied the feelings are, and the positive embodied impacts for the animals borne witness to as well as for mainstream understandings of multispecies connections.

Lockwood draws our attention to how human activists are transformed by bearing witness to living, breathing farmed animals who are moments from slaughter. He argues that when activists encounter live animal bodies on the trucks they cannot help but comprehend that these animals bodies are so constrained and confined and soon will be further violated, this time terminally, upon reaching the slaughterhouse. Lockwood attests that this experience of "close bodily encounters" is deeply moving and mobilizing for the human activists.[65] A possible benefit of this mobilizing aspect of bearing witness is not simply the power to stimulate critical praxis among humans bearing witness and thus catalyze, as more humans adopt a critical praxis, a material challenge to the current gross asymmetries of the food system, a possible outcome I say more about later. Rather, the emotionally moving and mobilizing aspects of bearing witness also have the power to *subvert bounded and animality-resistant notions of human subjectivity*. Naisargi Dave's interviews with animal advocates in India lead her similarly to suggest that witnessing involves the phenomenon of becoming-animal where the skin of human subjectivity unmediated by other species is shed and a new multispecies identity is forged.[66] As Dave details, this is a process that is catalyzed by the lifelong responsibility activists commit to as a matter of personal growth after bearing witness to animals in pain. This type of transformative effect and the compulsion to respond it creates connects with Oliver's call for a witnessing ethics based in "critical analysis and perpetual questioning".[67] More to the point here though, the transformative effect of close encounters encourages an interspecies sensibility to take shape, thus countering Western dualistic ontologies of species separation and hierarchy.

The "close bodily encounters" that bearing witness in the Save Movement's vigils can produce also hold the subjectifying promise of

65. Lockwood, *supra* note 1 at 111, 119.
66. Dave, *supra* note 53.
67. Oliver, *Women as Weapons of War*, *supra* note 20 at 103.

disrupting the passive representation of farmed animals. Like Gillespie, Lockwood elects to encapsulate the cross-species embodied connection as relational, including the animals as subjects within the encounter. Lockwood writes about how his experiences approaching the trucks, of looking in the wounded and feces-encrusted faces of the pigs so completely and violently confined, revealed to him that the pigs were his interlocutors. Not only did he feel that he observed an array of emotions that different pigs expressed,[68] but when he connected with a particular pig's gaze, he felt that the pig, acutely aware of their powerlessness to break free and avoid imminent death, is ashamed to be seen by Lockwood.[69]

Lockwood has no hesitation in arguing that the pigs were active in a relational exchange of bearing witness. He highlights the disruptive effect that bearing witness to animals' suffering can have on animals' typical erasure as speaking subjects. He writes:

> Bearing witness to the suffering of the pigs on the way to slaughter exposes the existing entanglements between humans and nonhumans: they are there because we desire their bodies as flesh. As an act of witnessing, attending these vigils reveals our means of perception and, importantly, the way we think about how we perceive others. To consider the animal him-or herself as a participant in the witnessing — as seeing me, or being too ashamed to be seen — is a powerful means of shifting those boundaries.[70]

Far from depicting the animals (problematically) as silent victims — a fallout that a humanist and depoliticized type of witnessing can produce as we saw the critiques of Rickel and Wadiwel target above — Lockwood ascribes an agency to the pigs he encountered in communicating with him and co-creating the meaning of bearing witness to their suffering. As Lockwood attests above, this constitutive practice of the Save Movement refutes the traditional perceptions we have of farmed animals as passive, non-social, or unaware.[71] Lockwood proceeds to connect his insights about the pig's gaze on him to Derrida's by now well-known reflections,

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68. Lockwood, *supra* note 1 at 111.
69. *Ibid* at 119.
70. *Ibid* at 118.
71. Andrew McGregor & Donna Houston, "Cattle in the Anthropocene: Four Propositions" (2018) 43:3 Transactions of the Institute of British Geographers 3 at 6.

inspired by his own cat companion seeing him naked, that animals observe us, too, and that they can know that we know they are doing so.[72] We can thus be seen by animals, but also the fact that we know animals can see us can *also* be registered or 'seen' by animals, a state of affairs Lockwood reminds us Derrida refers to as being "seen seen".[73]

Ascribing such cognitive awareness, but also communicative partnership to animals, points to how the Save Movement, despite its name, need not represent farmed animals as mute and passive victims in need of 'saving' by human activist heroes. Doubtless, some activists will adopt this frame in relation to the animals. But some at least will follow Lockwood's path. It is through Lockwood's application of Derridean insights to the relational exchange in bearing witness that we can understand the process to be a form of subjectifying address as per Oliver's appraisal of the concept discussed earlier.[74] It is an orientation toward animals that, as Derrida notes, challenges much of "the philosophical or theoretical architecture" of Western discourse.[75]

We must be careful, however, of not simply celebrating this subjectification in and of itself, but also remaining accountable to it. We might argue, for example, that if Lockwood intuited that the pig, whose gaze met his, was ashamed, then perhaps the responsive action at that point would have been to step away so that we could honour the pig's apparent desire not to be seen. To point this out is not to claim that the practice of approaching the confined animals is necessarily a fraught one, but to stress the need for animal advocacy, however well-intentioned,

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72. Jacques Derrida & David Wills, "The Animal That Therefore I Am (More to Follow)" (2002) 28:2 Critical Inquiry 369 at 372.
73. Lockwood, *supra* note 1 at 119; *ibid* at 382.
74. Derrida & Wills, *supra* note 72 at 383.
75. Oliver, *Animal Lessons*, *supra* note 19 at 303. The conceptualization of animals and their communities as relationally connected to larger ecosystems but also independent, autonomous sentient decision-makers existing in social relations and even political communities are uncontroversial in some non-Western cultural ontologies. See Paul Nadasdy, "First Nations, Citizenship and Animals, or Why Northern Indigenous People Might Not Want to Live in Zoopolis" (2016) 49:1 Canadian Journal of Political Science 1 at 7.

to take our cues from animals as best we can as to what they need and want rather than presuming our actions, motivated as they may by care, love, and non-violence, are always benign.[76] Bearing witness might be boundary-disrupting through creating multispecies embodiments but we need to ask, do animals want to be in multispecies encounters with us? After all, despite Save Movement activists' best intentions to live a vegan lifestyle, vegan activists are still part of the species that categorically oppresses farmed animals.[77] Similarly, the potential for bearing witness to generate agentic accounts of farmed animals is not to be discounted, but we must remain more than mindful that those same animals who are fleetingly represented as agents through an activist bearing witness will in a matter of mere minutes be dead. Bearing witness can be an ethical and political act as Gillespie suggests, with the further subversive effects above that Lockwood draws our attention to, but the fact that the animals die at the end of the vigil must accentuate the need for the response-ability and constant interrogation to which humans seeking to bear witness must commit.

To emphasize this need for caution should not obfuscate the considerable benefits bearing witness portends to emotionally connect with animals in an embodied way that is subjectifying for the animals. To recap the benefits Gillespie and Lockwood's accounts reveal, by coming to see the animals being transported from farm to slaughter, activists subjectify the animals at several levels. Their actions, even without providing water or fruit, may be understood as a "feeling-with" that "shares the burden" of the animals' immiserated existence and imminent death, considering them as social and sentient beings, but also addressing the pigs and responding to them as interlocutors and agents within

76. Donaldson & Kymlicka, *supra* note 17 at 55–56.

77. For why vegan lifestyles can never be completely non-violent but only aspirational in a global capitalist industrial culture where the appropriation of animal bodies is ubiquitous, see Lori Gruen & Robert C Jones, "Veganism as an Aspiration" in Ben Bramble & Bob Fischer, eds, *The Moral Complexities of Eating Meat* (New York: Oxford University Press, 2015) ch 9.

their own severely circumscribed lives.[78] The close physical proximity to farmed animals human activists may achieve may also be understood as a subversive embodied experience, which we might term a 'being-with', where human-animal boundaries are contested and multispecies subjectivities affirmed. These elements of bearing witness reject farmed animals' social (and legal) erasure.

3. The Social Signaling to Carnist Humans and Humanist Perceptions of Trauma

Of course, it is still possible that Lockwood's perceptions about the pigs he encountered and what they were feeling was wrong. Perhaps the pigs who were able to look out and see Save activists may not be able to understand the compassionate motivation shaping the human presence around them let alone the desire to bear witness.[79] This is where the act of giving water or fruit — an act that attracted legal scrutiny and generated a charge of legal mischief against Anita Krajnc[80] — acquires ethical significance. Not only can we understand the act of assuaging thirst or hunger as a form of "feeling-with", which Gillespie endorses as a form of witnessing,[81] but pigs themselves may also understand the gesture as a responsive, even caring, act of another who is addressed by their most basic needs. We can never know the pigs' interpretation for certain, and this embrace or at least acknowledgement of uncertainty and ambiguity in interrelations across species and otherwise is part of the importance of framing witnessing as Oliver would have us do as a project of "perpetual

78. Gillespe, *supra* note 51 at 578–79.

79. Then again, they may. Pigs, for example, are said to be among the most intelligent nonhuman animals in existence. For a discussion of the advanced cognitive and social abilities of domestic pigs see Jessica E Martin, Sarah H Ison & Emma M Baxter, "The Influence of Neonatal Environment on Piglet Play Behaviour and Post-Weaning Social and Cognitive Development" (2015) 163 Applied Animal Behaviour Science 69 at 70.

80. *R v Krajnc*, 2017 ONCJ 281 [*Krajnc*]. I discuss the disappointing nature of this case despite Krajnc's acquittal from an animal-centered perspective elsewhere.

81. Gillespie, *supra* note 51 at 579.

questioning".[82] Indeed, it is all too simple for humans to project what we want to see in animals in interpreting their behaviour and preferences. In understanding their encounters with animals and evaluating what animals are feeling in the exchange, human activists need to be cautious of the anthropocentric and imperial desire to know the Other and speak definitively about them;[83] a caring and compassionate stance toward animals holds many benefits but can also occlude awareness of residual anthropocentric dynamics.[84]

Yet, irrespective of whether the animals can understand the motivations of humans who approach them and thereby experience the momentary subjectifying effects themselves, expressing *publicly visible compassion* for animals can still serve to *socially signal* animals' value to other humans who encounter the silent acts of protest, vigil, grief, and compassion. This is an element of bearing witness that also helps to socially subjectify animals. Those humans who have never questioned the animal agricultural system, but who are eyewitnesses to, for example, Toronto Pig Save's protest in person or online, are forced to encounter a view of animals normally hidden from view. The transportation of animals to slaughter is just but one small component of a food system that raises and kills billions of animals out-of-sight in windowless warehouses where the public is forbidden to go and where even the architectural organization of large-scale industrial killing controls what the slaughterhouse workers

82. Oliver, *Women as Weapons of War*, *supra* note 20 at 103.
83. Lisa Jean Moore & Mary Kosut, "Among the Colony: Ethnographic Fieldwork, Urban Bees and Intra-species Mindfulness" (2014) 15:4 Ethnography 516 at 519–20, 535–36.
84. Donaldson & Kymlicka, *supra* note 17.

can see.[85] Add to this the reality that post-slaughter processing converts farmed animals into "absent referents"[86] by the time their bodies and bodily emissions appear in supermarkets, specialty stops or butcher stores, and we quickly perceive that there is precious little opportunity for farmed animals to become publicly visible as live and vulnerable bodies *except* en route to slaughter.[87]

Opportunities to empathize with these animals and mourn for them are equally rare. Whereas some advocates may mourn for animals routinely in witnessing their dismembered bodies in the grocery store, such acts may pass unnoticed by other shoppers or, where the "feeling-with" takes the form of visible distress, be misunderstood as arising from a personal problem. As James Stanescu writes about mourning for animals in the grocery store in front of the packages and displays of dead animals, "[t]o tear up, or to have trouble functioning, to feel that moment of utter suffocation of being in a hall of death is something rendered completely

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85. Pachirat, *supra* note 46; Karen M Morin, "Carceral Space: Prisoners and Animals" (2016) 48:5 Antipode 1317 at 1322–24 (Morin observes, "carceral sites", including the spaces in which the animal-industrial complex houses billions of animals, "are 'hidden in plain view' in rural or remote locations, their color and architectures so innocuous and ordinary that they do not attract attention" at 1322); Morin also references Pachirat, a scholar who worked undercover at an American slaughterhouse as part of his doctoral research, who "discusses the 'banal insidiousness' of the slaughterhouse that hides in plain sight, its construction blending physically into the landscape" at 1322, citing Pachirat, *supra* note 46 at 23.

86. Carol J Adams, *The Sexual Politics of Meat: A Feminist-Vegetarian Critical Theory* (New York: The Continuum International Publishing Group Inc, 1990) at 66.

87. Animals may, increasingly, become visible as happy farm animals through the marketing effects of companies. For an analysis of how two Swedish dairy companies use social media to create "happy milk" brands through personifying their cows to their consumers, see Tobias Linné, "Cows on Facebook and Instagram: Interspecies Intimacy in the Social Media Spaces of the Swedish Dairy Industry" (2016) 17:8 Television & New Media 719.

socially unintelligible".[88] Where "mourning the unmournable"[89] occurs, however, in the face of live animals trapped in a truck en route to slaughter, no longer made into the absent referent, the reason for activists' emotions is arguably more intelligible to passersby with different worldviews on animals' value. However momentarily, registering that there are humans who socially convert animals from absent referents to socially relevant beings for whom we should grieve is not only important privately as an ethical and political act as Gillespie attests, but will cause at least some to reflect further upon the critique the Save Movement represents. As Lockwood argues, the pigs become slightly more visible when bearing witness occurs,[90] and the exchange is recorded and accessible for others near and far to watch.

Of course, there is also the chance that individuals will watch the videos of the Save activists bearing witness online and modify or even transform their eating to(ward) a vegan diet. Recall that convincing people to become vegan is a central goal of the Save Movement.[91] This possible change can also be seen as a benefit to animals when it occurs en masse by reducing the demand that drives the animal agricultural

88. James Stanescu, "Species Trouble: Judith Butler, Mourning, and the Precarious Lives of Animals" (2012) 27:3 Hypatia 567 at 568.
89. *Ibid*.
90. Lockwood, *supra* note 1 at 120.
91. *Krajnc, supra* note 80 at para 92 per Harris J.

industrial complex.[92] To be sure, there are limits to focusing on individual behavioural change toward plant-based living as a complete remedy to the present anthropocentric social and legal order and the ills it spreads. Donaldson and Kymlicka discuss the "significant levels of backsliding amongst vegans and vegetarians" that can occur when individuals do not have "supportive environments and institutions — the sense of being part of a like-minded community — to be able to develop and maintain an animal-friendly way of life in the face of the overwhelming power of the status quo".[93] But bearing witness to farmed animals en route to slaughter, and posting those images online, can help create the (local and virtual) advocacy community that Donaldson and Kymlicka call for, which can then support those who switch to vegan choices.

Arguably, though, veganism is a dietary preference that, given the larger context of pervasive carnism in which it occurs as resistance, holds political significance even if an individual eventually succumbs to

92. It may be objected that becoming vegan actually has no positive effect for animals in general because all it may do, even where individuals become vegan en masse, is to reduce the number of future animals killed in the farmed animal system. This actually, one may argue, does not benefit any future animals but merely stops them from being bred into existence and then suffering. Gruen and Jones have replied to this and other similar arguments about the purported lack of impact of an individual dietary vegan change by arguing that multiple individual efforts "increases the probability that others will become vegan, which increases the probability that the collective action of the aggregate more quickly brings about a reduction in the number of animals produced for food and other consumer goods, decreasing animal suffering and bringing about a decrease in violence, exploitation, and domination" (Gruen & Jones, *supra* note 77 at 165–67).

93. Donaldson & Kymlicka, *supra* note 17 at 53.

social pressure and reverts from veganism.[94] Importantly, however, we can leave this query aside regarding the industry impact of individual change without more broad-based support since the Save Movement does not need to succeed in stimulating widespread veganism for bearing witness to provide the immediate benefit of social subjectification of the pigs involved. The mere act of empathizing with these animals and marking their moment onward to death as grief or otherwise carries high potential, when seen by others in their everyday lives, to disrupt normative understandings of animals as 'food', eminently killable, and always available for human purposes.

V. The Save Movement's Bearing Witness as a Template for Law

The above has advanced the view that the practice of bearing witness to farmed animals is of value despite the material indifference to the animals who almost always end up on the kill floor. In other words, bearing witness is a social intervention that matters if not to the pigs themselves, then at least to their momentary subjectification, as well as the communication of this subjectification to others. While this subjectification may seem immaterial as the pigs will soon be slaughtered, it is a representational

94. Ophélie Véron, "(Extra)ordinary Activism: Veganism and the Shaping of Hemeratopias" (2016) 36:11/12 International Journal of Sociology and Social Policy 756. In terms of explaining the reasons that individuals revert back to meat-eating, recent research in the US suggests that when individuals were otherwise conservative in their political views in that they did not view their vegan or vegetarian diet as related to social justice concerns, their chances of reverting to meat-eating were higher. Further, the study found that individual conservatism/failure to understand veganism or vegetarianism as an animal rights or other social justice issue influenced whether one would revert to meat-eating at a rate four times greater than inadequate social support as a predictive factor. Their findings have caused the study's authors to suggest that "[f]raming meat consumption as a moral issue can therefore help personal resolve" (Gordon Hodson & Megan Earle, "Conservatism Predicts Lapses from Vegetarian/Vegan Diets to Meat Consumption (Through Lower Social Justice Concerns and Social Support)" (2018) 120 Appetite 75 at 79).

signification that interrupts dominant Western interspecies binary norms about how humans should think about, feel toward, and be with animals as well as how we should imagine and experience human identity and ultimately govern ourselves as proper human subjects. In terms of advocacy, bearing witness resists, but also in important ways subverts, the ideologies sustaining the animal-industrial complex.

This final point will consider how bearing witness in the form of the Save Movement can serve as a model for legal decision-making about animals by those decision-makers who are inclined to empathize with animals' suffering. Such legal decision-makers might be moved by the plight of animals generally or in a given legal situation but find their options to redress animals' suffering severely circumscribed by the current settler legal systems in Canada that classify animals as property and greatly amplify their vulnerability to exploitation as a result. I suggest in a similar vein that activists in the Save Movement can have a beneficial effect on animals through (partially) bearing witness to animal suffering despite the impending death of the animals they encounter, it is possible for the law to attempt to bear witness to animal suffering even as the dominant legal system classifies animals as property.

Before examining the basic contours of what this type of bearing witness would look like in legal reasoning, I want to pause to consider the relationship of law as an institution to the concept of bearing witness itself. I do so because I anticipate that Oliver as well as other poststructuralist-inspired scholars wary of law's capacity to deliver justice in general for marginalized beings, including animals, would contest the suggestion that the law can bear witness to animal suffering.[95] In the context of critiquing the ability of liberal rights discourses to work in favour of animals, Oliver states:

> Calculating rights or interests can turn ethics into moral rules that eliminate critical thought or soul-searching from the process. They risk replacing ethical responsibility with equations and legalisms. While laws may be necessary and may go some distance in making things right, they cannot approach the ethical responsibility engendered by our relationships with others. Indeed, these

95. Yoriko Otomo & Ed Mussawir, eds, *Law and the Question of the Animal: A Critical Jurisprudence* (Oxford: Routledge, 2013).

> calculations disavow the ambiguities and uncertainties of our experience; they disavow they ways in which we do not and cannot know for sure. They make man the measurer of all things—he is the measurer and the yardstick.[96]

Oliver's worry here appears to extend beyond repudiating the inherent anthropocentric and masculinist nature of liberal legal systems. She also wishes to doubt the ability of legalistic reasoning in the context of rights claims (Who has a right? What is the nature of that right? Has the right been violated? Was the violation proportional? How to balance interests?) to approach the position of "perpetual questioning" to which she analogizes bearing witness and witnessing, as discussed above.[97] Recall that in a relationship that cultivates response-ability in others and ourselves, Oliver says we must always leave open the possibility that we do not know everything, that some of our fears, beliefs, and motives are hidden from us, and escape cognitive excavation, which is why we must remain continually open to ethical questioning and the needs of others. The technicalities, universals, and absolutist pronouncements in liberal legal discourse appear to foreclose this type of openness.

I agree with Oliver that law's rationalist modalities eclipse the possibility of unknowability and that governing doctrine compels analyses that present individual actors and their rights as important and paramount rather than explicitly direct our attention to responsibilities or relationships.[98] On these metrics, we can see how the concept of witnessing and bearing witness as Oliver presents them do not match with conventional legal analysis. We can concede to Oliver the view that law is thus not capable of bearing witness in terms of the ethical connotation of this term that requires a much more immediate one-to-one relation between interlocutors. But acknowledging this disconnect between law and the ethical relation of bearing witness does not mean that legal decision-makers should remain silent when confronted with a factual

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96. Oliver, *Animal Lessons*, *supra* note 19 at 36.
97. See Oliver, *Women as Weapons of War*, *supra* note 20.
98. The law, to be sure, does structure relationships even though it advances a discourse of individualistic rights. See Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011).

landscape that involves animal exploitation and suffering. Law may not be able to bear witness in the important sense that Oliver intends, but it can, in the structural confines of its own institutional terrain, adopt the ethos of bearing witness and approximate this ethical posture. In other words, law can *aspire to or approach* the concept of bearing witness.

What would it mean, then, for law to "bear witness" in this qualified way? As a basic but meaningful response, where the facts implicated animal-use industries and the issues at stake affected animals' lives, legal decision-makers could take opportunities to recognize the inherent vulnerabilities that surround animals' lives due to their subordinating property classification. Indeed, this is a recognition that a high-level dissenting judgment already provides. In this landmark dissent of the Alberta Court of Appeal about a lone female Asian elephant languishing in poor health in the Edmonton Valley Zoo, Chief Justice Catherine Fraser outlined academic critiques of animals' legal status as property and affirmed animals' vulnerability because of this non-subjecthood status.[99] The *Reece* dissent is a landmark decision for several reasons. To briefly explain why, we can take note of how the decision emphasizes animals' sentience, sociality, and the vulnerability their property status creates for them. We can also note how Fraser CJ connected a question that she saw at issue in the case (government enforcement of anti-cruelty and animal welfare protection laws) to fundamental legal ordering principles of the common law, namely, the rule of law.[100] In short, Fraser CJ contextualized the issue of animal protection she believed was at stake, drawing out the broader power relations at play, as well as highlighting the characteristics and capacities of animals that normally go unmentioned in an otherwise anthropocentric legal order.

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99. See the full dissenting judgment of Fraser CJ in *Reece and Zoocheck v Edmonton*, 2011 ABCA 238, leave denied (2012) [2011] SCCA No 447 (QL) [*Reece*].

100. The majority treated this issue as ancillary to the main issues to be decided. For a detailed discussion of the case see Maneesha Deckha, "Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability Under a Property Paradigm" (2013) 50:4 Alberta Law Review 783.

To be sure, Fraser CJ made these comments in the context of a legal decision engaging an animal welfare law — a type of statute that despite its welfarist nature specifically implicates the needs and interests of animals at a level that almost every other area of law does not.[101] But bringing in the power-laden context applicable to animals and discussing their interests and needs need not be restricted to legal decisions directly involving only animal welfare laws. Such context can also be legitimately introduced into other legal issues where the facts and legal outcomes affect animal lives' and interspecies relations.[102] For now, I wish to note that this context taking can occur in a system that continues to treat animals as property. This type of commentary would not violate norms of judicial or administrative discourse since judges and administrative decision-makers could cite the *Reece* case for the general proposition that animals are vulnerable and could take judicial and administrative notice of the fact that humans exploit animals as property. And, certainly, lawmakers in Parliament, legislative assemblies, and municipal councils, who have broader leeway in the topics they raise in their work, can make frequent appeals to address the suffering of animals even when the issues at stake seem unrelated to visibilizing this suffering.

VI. Conclusion

As nonhumans in an anthropocentric legal and social culture, animals are oppressed;[103] that is their subject position, a term Oliver defines as "one's position in society and history as developed through various social relationships".[104] By classifying them as property, the law precludes the

101. For more about legal welfarism and what is flawed about it, see Gary L Francione, *Animals, Property, and the Law* (Philadelphia: Temple University Press, 1995); Maneesha Deckha, "Welfarist *and* Imperial: The Contributions of Anti-Cruelty Legislation to Civilizational Discourse" (2013) 65:3 American Quarterly 515.
102. For an example of the contextual type of reasoning I am referring to here, see the dissenting decision of Abella J in *R v DLW*, 2016 SCC 22.
103. Deckha, *supra* note 100; Erika Cudworth, "A Sociology for Other Animals: Analysis, Advocacy, Intervention" (2016) 36:3/4 International Journal of Sociology and Social Policy 242.
104. Oliver, "Witnessing and Testimony", *supra* note 21 at 81.

development of animals' subjectivity as a legal actor, which has direct effects as to whether they can emerge as social actors. But when we start to bear witness to farmed animals' suffering, even in a very partial form, and recognize animals as our interlocutors in that close bodily exchange, such witnessing contests the non-subject position of animals and the intense violence that it breeds in the animal-industrial complex. Legally, the animals remain as property, but socially they are perceived and represented as beings whose lives matter. They are made grievable.[105] Bearing witness, then, in the context of the Save Movement can thus qualify as a witnessing response as per various critical theoretical formulations. Further, it can be read as an ethical act that socially uncovers and signals an interruption of the commodified status of pigs as "food" or "commodities" — a move that works to question power and inequality — as well as individually affirm the intrinsic worth, agency, and mournability of the animals themselves. Despite the potential pitfalls of witnessing in the Save Movement to amount to reinforcement of privileged affective positions for the human activists without any material change for the animals involved, the act of bearing witness to farmed animals en route to slaughter that Save activists practice should be encouraged within animal activism. It has the potential to integrate farmed animals in emotional and bodily affective and material exchanges that socially subjectify farmed animals, however momentarily, in what has otherwise been a shortened, immiserated life of social and legal non-subjectivity.

The law can also try to bear witness to animals however provisionally or lacking in present significant material effect. Bearing witness to farmed animals in the Save Movement can yield subjectifying benefits for animals involved, albeit fleeting and futile in terms of preventing the animals' slaughter. Perhaps more permanently and thus more impactful for all farmed animals on a going-forward basis, the public visibility of imagining and responding to animals on a radically different social register contributes to the emergence of an alternative animal-friendly discourse

105. Chloë Taylor, "The Precarious Lives of Animals: Butler, Coetzee, and Animal Ethics" (2008) 52:1 Philosophy Today 60; Stanescu, *supra* note 88.

on how humans and corporations should treat animals. Similarly, despite the present colonial legal regimes in Canada that objectify animals as property, legal actors can foment an alternative legal discourse on animals that highlights the intensities in violence of what the law currently permits in animal-use industries, like farming, where these issues present themselves in legal debates, policy-making, and judicial cases. Given the nascent discourse on animal vulnerability that has emerged in current jurisprudence, the law can and should attempt to bear witness to animal vulnerability.

Feminist Jurisprudence for Farmed Animals

Jessica Eisen*

Feminism and animal advocacy share a long history of interconnections. The application of feminist insights and analyses to the study of human-animal legal relations, however, represents a more recent development. This article proposes to examine the ways that feminist jurisprudence, as a distinct branch of feminist theory, might contribute depth and nuance to our collective understanding of the ways that human beings relate to animals through law. As this article will demonstrate, there is already a vibrant, if nascent, scholarly community developing feminist analyses of animal law. This article aims to identify this scholarly community, take stock of its emerging lines of inquiry, and sketch a set of common themes. In so doing, this article will offer an account of how the lessons and insights of feminist legal theory might apply to the field of animal law, and will furnish examples of how this work is already being done. In particular, this article will focus on four themes within feminist jurisprudence that stand to enrich the study of animal law, namely: a) revealing the importance of legal method; b) rethinking 'sameness' and 'difference'; and c) troubling categories of analysis; and d) recognizing rights as relational.

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I. Introduction

Feminism and animal advocacy share a long history of interconnections. The majority of animal advocates have been women,[1] and feminist scholars have long drawn thematic and material connections between the exploitation of women and the exploitation of animals.[2] Most of the scholarship in this vein has taken the form of ethical and cultural studies, drawing on feminist themes developed in those same disciplines, with several edited collections and survey works gathering and taking

1. Emily Gaarder, *Women and the Animal Rights Movement* (Piscataway: Rutgers University Press, 2011) at 1, 7–13 (observing that "[f]rom its early stirring in Victorian England to contemporary times, one of the most striking characteristics of the animal rights movement is that the majority of its activists are women", and quoting a 1985 survey finding that "at all levels of participation…women constitute the single most important driving force behind the animal rights phenomenon" at 41).
2. Carol J Adams, *The Sexual Politics of Meat: A Feminist-Vegetarian Critical Theory* (New York: Continuum, 1990) is generally regarded as a foundational text in these explorations. For another early study of these interconnections, see Mary Midgley, *Animals and Why They Matter: A Journey Around the Species Barrier* (Athens: University of Georgia Press, 1983) at 74–88. These efforts have occasionally provoked controversy within the broader field of feminist theory. See Angela Lee, "The Milkmaid's Tale: Veganism, Feminism, and Dystopian Food Futures" (2019) 40 Windsor Review of Legal Social Issues 27 at 33–37 [Lee, "The Milkmaid's Tale"].

stock of their contributions.[3] The application of feminist insights and analyses to the study of human-animal *legal* relations, however, represents a more recent development.[4] This article proposes to examine the ways that *feminist jurisprudence*, as a distinct branch of feminist theory, might contribute depth and nuance to our collective understanding of the ways that human beings relate to animals through law. As the following survey will show, there is already a vibrant, if nascent, scholarly community developing feminist analyses of animal law. This article aims to identify this scholarly community, take stock of its emerging lines of inquiry, and sketch a set of common themes. In so doing, this article will offer an account of how the lessons and insights of feminist legal theory might enrich the field of animal law, and will furnish examples of how this work is already being done.

It bears emphasis at the outset that both animal legal theory and feminist jurisprudence are unruly fields — each beset by internal dissensions, terminological disputes, and competing orthodoxies and heterodoxies. It is decidedly not my intention here to suggest that either animal legal theory or feminist legal theory can be coherently bound by authoritative definitions. In particular, I want to avoid the implication that the argument presented here relies upon any one form or substance to feminist jurisprudence, or that there is any one set of lessons that feminist jurisprudence has to offer animal law. This is decidedly *not* a project about applying some canonical definition of feminism to a new

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3. See Carol J Adams & Josephine Donovan, eds, *Animals and Women: Feminist Theoretical Explorations* (Durham: Duke University Press, 1995) [Adams & Donavan, eds, *Animals and Women*]; Greta Gaard, ed, *Ecofeminism: Women, Animals, Nature* (Philadelphia: Temple University Press, 1993); Carol J Adams & Josephine Donovan, eds, *The Feminist Care Tradition in Animal Ethics* (New York: Columbia University Press, 2007).

4. See Maneesha Deckha, "Critical Animal Studies and Animal Law" (2012) 18:2 Animal Law 207 (describing the broader field of animal law as having a "strong liberal orientation" despite sustained critiques of liberalism as perpetuating various "exclusions," including on the basis of "gender and race" at 209–210).

material context.[5] In fact, much of the analysis that follows identifies areas of dispute and ferment within feminist theory and treats those conflicts and tensions as useful starting points for thinking through some parallel conversations and disputes that animal legal scholars might take up to enrich their approaches. Finally, I also want to avoid the implication that feminist theory is the best or only critical lens that might be applied to enrich animal legal theory. As will become clear, racial and postcolonial analyses offer particularly useful and distinct insights into the operation of law in the sphere of human-animal relations. Instead, my aim is to identify an emerging scholarly community and sketch an interpretation of its common prospects that is admittedly shaped by my own intuitions about valuable future directions for this field of inquiry.

This Article will begin by situating the emergence of feminist jurisprudence as a resource for the study of animal law within the broader field of feminist human-animal studies. To this end, Part II will examine the broader interrelationships between feminism and animal advocacy in those fields outside of legal scholarship where these themes have been more fully developed. Part III will argue that feminist *legal* theory offers a distinct set of contributions to the study of animal exploitation. This Part will set out some of the central contributions that feminist jurisprudence has made to the analysis of human-animal relations. The themes examined in this Part include a) revealing the importance of legal method; b) rethinking 'sameness' and 'difference'; c) troubling categories of analysis; and d) recognizing rights as relational. In the Conclusion, I will offer some brief thoughts on the seeds of divergence evident in the approaches canvassed, and reflections on how and why these differences in approach might be sharpened in ways that promise to enrich and deepen feminist analysis of animal law.

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5. To the extent that a definition of feminism is seen as necessary to this project, I would adopt Bell Hooks' big-tent version: "[s]imply put, feminism is a movement to end sexism, sexist exploitation, and oppression", Bell Hooks, *Feminism is for Everybody: Passionate Politics*, 2d (New York: Routledge, 2015) at 1.

II. Feminism and Animal Advocacy

Carol J Adams' pathbreaking work *The Sexual Politics of Meat*[6] shone a spotlight on the relationship between gender, violence, and animal consumption, and has since been taken up as a canonical text in the growing body of scholarship attending to these connections. Adams argues that cultural significations surrounding meat-eating "include association with the male role" operating "within a fixed gender system", and depend upon "patriarchal attitudes including the idea that the end justifies the means, that the objectification of other beings is a necessary part of life, and that violence can and should be masked".[7] Adams posits a common "cycle of objectification, fragmentation, and consumption, which links butchering and sexual violence in our culture".[8] On the other side of the coin, Adams argues that "our society equates vegetarianism with emasculation or femininity", and so proposes that a conscious rejection of meat-eating can constitute "a sign of autonomous female being" and "a rejection of male control and violence".[9] Adams is not the first to advance a feminist critique of animal consumption, and she observes that the "sexual politics of meat" is invoked in a host of existing texts, including by such celebrated feminists as Aphra Behn, Mary Shelly, Charlotte Perkins Gilman, Alice Walker, Marge Piercy, and Audre Lorde.[10] Adams' ambition, in part, is to expose as "comprehensive and cumulative" the "unrecognized" contributions of feminist theory to animal advocacy.[11]

Following Adams, a significant body of ethical, literary, and cultural criticism has explored the relationship between women, feminism, and

6. Adams, *supra* note 2.
7. *Ibid* at 27.
8. *Ibid* at 73.
9. *Ibid* at 27, 29.
10. *Ibid* at 29.
11. *Ibid* at 28, 29.

human-animal relations.[12] In some cases, this literature examines the way that common language usage reveals underlying gender dynamics infusing cultural conceptions of animality, with animality in turn infusing the construction of gender. Most obviously, "'animal' pejoratives" are frequently applied to women, who are alternately cast as "catty, shrew, dumb bunny, cow, bitch, old crow, queen bee, sow".[13] The most common insults invoke animals that are domesticated or farmed (bitches, dogs, cows, pigs, chicks and hens) — animals socially positioned as providers of comfort and service or as "mere bodies" to be consumed or exploited.[14] As Karen Davis suggests, the "analogy between women and nonhuman animals" is best understood with reference to the "more specifically crucial comparison between women and farm animals", given the casting of the latter as "creatures whose lives appear too slavishly, too

12. See Helena Silverstein, *Unleashing Rights: Law, Meaning and the Animal Rights Movement* (Ann Arbor: University of Michigan Press, 1996) (describing the "contemporary animal rights movement" as deriving mainly from natural rights theory and utilitarianism, but identifying "feminism and ecofeminism" as gaining "increasing prominence in the dialogue regarding animals" at 27).

13. Joan Dunayer, "Sexist Words, Speciesist Roots" in Adams & Donovan, eds, *Animals and Women*, *supra* note 3 at 11, 11–12. See also Ruth Todasco, ed, *An Intelligent Woman's Guide to Dirty Words: English Words and Phrases Reflecting Sexist Attitudes toward Women in Patriarchal Society, Arranged According to Usage and Idea* (Chicago: Loop Center YWCA, 1973) (identifying "Woman as Animal" as a common type of "patriarchal epithet" at 27). Of course, some animal descriptors are applied to men in gendered fashion, but these "usually…imply something more highly valued, even if ambivalently: Calling men studs or stags are examples": Lynda Birke, "Intimate Familiarities? Feminism and Human-Animal Studies" (2002) 10:4 Society and Animals 429 at 433, n 3.

14. Dunayer, *supra* note 13 at 12. Robert Baker observes that the few women-as-animals idioms that do not cast "women either as domesticated servants or as pets, or as both", tend to instead reference animals commonly hunted for sport, such as foxes or vixens: Robert B Baker, "'Pricks' and 'Chicks': A Plea for 'Persons'" in Robert B Baker, Kathleen J Wininger & Frederick Elliston, eds, *Philosophy and Sex*, 3d (Buffalo: Prometheus Books, 1998) 281 (elaborating that "[i]f women are conceived of as foxes, then they are conceived of as prey that it is fun to hunt" at 287).

boringly, too stupidly female, too 'cowlike'" to warrant justice or ethical concern.[15] The equation of women with animals is most commonly read as insulting to women, but the underlying dynamic works to reinscribe species hierarchies as well: "[w]hen your name is used to degrade others by attribution, it locates your relative standing as well, as 'girl' is an insult for boys".[16] The valorization of the masculine as *non*-animal operates according to related linguistic tropes, for example in the use of the "pseudogenerics *man* and *mankind*" to describe human beings.[17]

Material connections have also been drawn between the exploitation of women and animals, particularly in the farming context where control of female bodies for reproduction is so central to the lives of animals.[18] Kathryn Gillespie has, for example, explored the ways that dairy cows are subject to "sexualized violence" and "gendered commodification" in an industry that relies on tropes of (human) female sexuality to explain and normalize dairy practices requiring continual impregnation of cows

15. Karen Davis, "Thinking Like a Chicken: Farm Animals and the Feminine Connection" in Adams & Donovan, eds, *Animals and Women*, *supra* note 3 at 192, 196 [Davis, "Thinking Like a Chicken"].
16. Catharine A MacKinnon, "Of Mice and Men: A Feminist Fragment on Animal Rights" in Cass R Sunstein & Martha C Nussbaum, eds, *Animal Rights: Current Debates and New Directions* (New York: Oxford University Press, 2005) 263 at 266 [MacKinnon, "Of Mice and Men"]. See also Dunayer, *supra* note 13 at 12.
17. Dunayer, *supra* note 13 at 11, 19.
18. See Davis, "Thinking Like a Chicken", *supra* note 15 (remarking on "the exploitation of the reproductive system of the female farm animal, epitomized by the dairy cow and the laying hen" at 193); Syl Ko, "Black Lives, Black Life" in Aph Ko & Syl Ko, eds, *Aphro-ism: Essays on Pop Culture, Feminism, and Black Veganism from Two Sisters* (New York: Lantern Books, 2017) 1 (arguing that the casting of animals as "merely bodied" justifies "the gross manipulation of female nonhuman reproductive capacities for dairy and egg production" at 1–2) [Ko & Ko, eds, *Aphro-ism*].

through artificial insemination.[19] These include the use of "sexual humor" in intra-industry publications, with advertisements asking of cows, "if she can't stay pregnant, what else will she do?" and describing cows as having "youthful mammary systems that catch the eye" or being "the kind you can have fun with".[20] This sort of "ribald humor" surrounding the sexual and reproductive use of animals has also been observed and critiqued in other animal use contexts.[21] Donna Haraway, for example, recounts the "misogyny…deeply implicated in the dream structure of laboratory culture", quoting one scientist's sniggering description of insemination of primates for experimental purposes: "we resorted to an apparatus *affectionately* termed the rape rack, which we leave to the reader's imagination".[22]

A distinct set of material connections are commonly raised in the context of family and intimate partner violence and violence against companion animals. Such accounts often rely on a growing body of evidence suggesting that these forms of violence often occur at the hands of the same perpetrators, within the same households, and with threats and violence toward companion animals used by abusers to control the human family members who love those animals.[23] Emily Gaarder's study of women in the animal rights movement, moreover, finds that many

19. Kathryn Gillespie, "Sexualized Violence and the Gendered Commodification of the Animal Body in Pacific Northwest US Dairy Production" (2014) 21:10 Gender, Place and Culture 1321 at 1323 [Gillespie, "Sexualized Violence"]. Gillespie observes that both male and female farmed animals experience unique forms of exploitation, determined by human beings on the basis of the animal's sex, and often supported by images and rhetoric drawn from intra-human gender norms. See also Kathryn Gillespie, *The Cow with Ear Tag #1389* (Chicago: University of Chicago Press, 2018).
20. Gillespie, "Sexualized Violence", *supra* note 19 at 1329, 1331.
21. Donna Haraway, *Primate Visions: Gender, Race, and Nature in the World of Modern Science* (New York: Routledge, 1989) at 238.
22. *Ibid*, quoting Harry Harlow, Margaret K Harlow & Stephen J Suomi, "From Thought to Therapy: Lessons from a Primate Laboratory" (1971) 59:5 American Scientist 538 at 545 [emphasis added].
23. See *e.g.* Carol J Adams, "Woman-Battering and Harm to Animals" in Adams & Donovan, *Animals and Women*, *supra* note 3 at 55.

women animal activists draw connections between animal abuse and their own personal experiences of physical or sexual violence.[24]

These linguistic and material connections between the status of women and animals are often cast as expressive of a deeper shared ideological structure supporting women's oppression and animals' oppression.[25] Like women, animals have been cast in mainstream political theory as exploitable because they are irrational, governed by instinct, and more 'nature' than 'man'.[26] Criticism of this recourse to naturalized

24. Gaarder, *supra* note 1 at 148–49.
25. See *e.g.* Greta Gaard, *Ecological Politics: Ecofeminists and the Greens* (Philadelphia: Temple University Press, 1998) (describing the project of exploring "the interconnections among numerous forms of oppression in order to expose the structure and functioning of hierarchy itself" at 51).
26. See generally Carolyn Merchant, *The Death of Nature: Women, Ecology, and the Scientific Revolution* (New York: Harper & Row, 1980); Syl Ko, "Women, Beauty and Nature" in Ko & Ko, eds, *Aphro-ism*, *supra* note 18 at 33; Anne Peters, "Liberté, Égalité, Animalité: Human–Animal Comparisons in Law" (2016) 5:1 Transnational Environmental Law 1 ("[l]egal rules…were justified historically with reference to the supposed 'animalistic' nature of women, who were said to be at the mercy of their menstrual cycle and pregnancy, and thus moody, driven by instinct, sexually suggestive, insufficiently rational, and so on" at 8). Efforts to align the exploitation of women with that of animals and nature have been controversial within feminist theory. See Lee, "The Milkmaid's Tale", *supra* note 2; Barbara Noske, *Beyond Boundaries: Humans and Animals* (Montreal: Black Rose Books, 1997) at 110.

hierarchy ("man over beast, man over woman")[27] is a central theme in feminist human-animal studies, often bolstered by an underlying critique of philosophical and scientific 'objectivity'.[28] Accounts of intellect and rationality as objective and defining features of humanity have often been wielded so as to leave women and people of colour on the 'animal' side of the divide.[29] As Syl Ko has emphasized, this critique has implications for advocacy as well. The common rhetorical claim that

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27. Jessica Eisen, "Milk and Meaning: Puzzles in Posthumanist Method" in Mathilde Cohen & Yoriko Otomo, eds, *Making Milk: The Past, Present, and Future of our Primary Food* (New York: Bloomsbury Academic, 2017) 237 at 240 [Eisen, "Milk and Meaning"]. The particular Western identification of women with nature, and the devaluation of both, is not universal. As Huey-li Li notes, however, this "Western cultural perception" is arguably "more implicated in today's worldwide environmental degradation" than the cultural perceptions associated with other traditions: Huey-li Li, "A Cross-Cultural Critique of Ecofeminism" in Gaard, *supra* note 3 at 272–73). See also Maneesha Deckha, "Is Multiculturalism Good for Animals" in Luis Cordeiro Rodrigues & Les Mitchell, eds, *Multiculturalism, Race and Animals: Contemporary Moral and Political Debates* (London: Palgrave, 2017) 61 (identifying "European thought" as the source of certain "toxic epistemologies" including "[d]isavowal and abjection of the body and those beings associated with it — everyone other than the white propertied male," and therefore also as a source of resulting "social stratifications on multiple registers of difference" at 67–68); Angela P Harris, "Compassion and Critique" (2012) 1:3 Columbia Journal of Race and Law 326 at 339–40 [Harris, "Compassion and Critique"].
28. On the feminist critique of scientific objectivity, see Lynda Birke, "Exploring the Boundaries: Feminism, Animals and Science" in Adams & Donovan, eds, *Animals and Women*, *supra* note 3 at 32; Davis, "Thinking Like a Chicken", *supra* note 15 at 208. *Cf.* Haraway, *supra* note 21. On the feminist critique of philosophical objectivity, see Cathryn Bailey, "On the Backs of Animals: The Valorization of Reason in Contemporary Animal Ethics" (2005) 10:1 Ethics & Environment 1 at 11.
29. Maneesha Deckha, "The Subhuman as a Cultural Agent of Violence" (2010) 8:3 Journal for Critical Animal Studies 28 [Deckha, "Subhuman"]; Angela P Harris, "Should People of Color Support Animal Rights?" (2009) 5 Journal of Animal Law 15 at 21–24 [Harris, "Should People of Color Support Animal Rights"].

animals and oppressed human groups are relevantly similar to privileged groups is "motivated by the implicit assumption that these presumed differences are fueling the disparity in treatment" — an assumption that places too much credence in the justificatory rhetoric of hierarchy and exploitation.[30] Instead of accepting the benchmarks of 'rationality' and 'intelligence' at face value, and trying to prove that the oppressed meet the standard, Ko has urged strategies that "reveal, first, the source of the fiction" that objective difference explains social hierarchy and justifies violence, "and then, secondly, uproot the source by changing the terms of the conversation".[31]

Gender is just one of the many dimensions of human social hierarchy that find expression in our everyday conceptions of animality. Ko's work centers not only the role of gender, but also the role of race in co-constituting the debased status of animals and devalued humans. On Ko's account, the "notion of 'the animal'—construed under [a] white supremacist framework as 'subhuman', 'nonhuman', or 'inhuman'—is the *conceptual vehicle for justified violence*", or, in Maneesha Deckha's terms, a "violence producing category", on which racist logics depend.[32] White and colonial authorities have long equated racialized and colonized people with animals as a justification and symbolic referent for violence

30. Syl Ko, "Emphasizing Similarities Does Nothing for the Oppressed" in Ko & Ko, eds, *Aphro-ism*, *supra* note 18 at 37, 40–41 [Ko, "Emphasizing Similarities"] [emphasis omitted].

31. *Ibid* at 42.

32. Syl Ko, "Addressing Racism Requires Addressing the Situation of Animals" in Ko & Ko, eds, *Aphro-ism*, *supra* note 18 at 44, 46, citing Deckha, "Subhuman", *supra* note 29. See also Aph Ko, "Bringing our Digital Mops Home: A Call to Black Folks to Stop Cleaning up White Folks' Intellectual Messes Online" in Ko & Ko, eds, *Aphro-ism*, *supra* note 18 at 7 (describing "animality as a racialized weapon of white supremacy" at 11); see also Aph Ko, "#AllVegansRock: The All Lives Matter Hashtag of Veganism" in Ko & Ko, *Aphro-ism*, *supra* note 18 at 13 ("[t]he conceptual chains that oppress animals have been forged by race and gender constructs" at 19).

against them.[33] Ko's vision of "chang[ing] the terms of the conversation" therefore includes both conceptualizing white supremacy as "*the* fundamental threat to justice everywhere" and "de-centering whiteness" by "taking seriously non-white art, literature, music, systems of belief, and other rituals as a way of reimagining the world outside the constraints developed by white supremacy".[34] Scholarship in a postcolonial feminist vein sometimes emphasizes a related rejection of prevailing animal use

33. A Breeze Harper, "Introduction: The Birth of the Sistah Vegan Project" in A Breeze Harper, ed, *Sistah Vegan: Black Female Vegans Speak on Food, Identity, Health, and Society* (New York: Lantern Books, 2010) xiii ("Black Americans were *derogatorily* categorized *as* animals within a racist colonial context" at xv); Syl Ko, "By 'Human,' Everybody Just Means 'White'" in Ko & Ko, eds, *Aphro-ism*, *supra* note 18 at 20, 20–21 [Ko, "By 'Human,' Everybody Just Means 'White'"]; Michelle R Loyd-Paige, "Thinking and Eating at the Same Time: Reflections of a Sistah Vegan" in A Breeze Harper, ed, *Sistah Vegan: Black Female Vegans Speak on Food, Identity, Health, and Society* (New York: Lantern Books, 2010) 1 ("[i]n order to justify the brutality of slavery, the oppressors deemed Africans as less-than-human and undeserving of decent housing, education, food, health care, justice or respect" at 5); Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge, MA: South End Press, 2005) (arguing that "colonizers see animals as rapable and expendable" and that "[b]y extension, because colonizers viewed Indian identity as inextricably linked to animal and plant life, Native people have been seen as rapable, and deserving of destruction and mutilation" at 117).

34. Ko, "Emphasizing Similarities", *supra* note 30 at 42–43. See also Harris, "Should People of Colour Support Animal Rights", *supra* note 29 (noting that, "[t]here are certainly cultural resources in indigenous American, indigenous African, and African diasporic cultures for respecting animals, as there are such resources available for respecting nature. These cultural resources are linked with material and ideological economic practices that place stewardship and respect rather than exploitation and profit at the center. In this way supporting animal rights could be seen as a practice that is specifically identified with ethnic traditions, but from within those traditions rather than from without" at 28).

practices as a critical component of decolonial practice.[35]

III. Feminist Legal Theory for Animals

Law, while intersecting with and co-constituted by other aspects of social life, operates according to its own distinct languages and structures. Legal theorists are well-positioned to enrich, complicate or challenge the relationship between feminism and human-animal relations in this distinct sphere of material and political engagement. As the following survey will show, this work is already underway. In particular, feminist theorists of animal law have examined the specifically legal dimensions of a) the relationship between fact and method; b) the politics of sameness and difference; c) the social construction of categories; and d) the relational nature of law and society.

A. Fact and Method

Facts are critically important to legal analysis. Law students are taught to distill a concise statement of the facts — to read or listen to a complex story and boil it down to its legally-relevant essence. In short, legal method defines which facts are relevant to a dispute and how we know

35. Harper, *supra* note 33 (observing the practice of some "Black-identified females/females of the African Diaspora" of "actively decolonizing their bodies and minds via whole-foods veganism and/or raw foodism" at xix); Ko, "By 'Human,' Everybody Just Means 'White'", *supra* note 33 ("[d]ismantling racism might require dismantling our patterns of consumption, including our food practices" at 27). *Cf.* Margaret Robinson, "Veganism and Mi'kmaq Legends" (2013) 33:1 Canadian Journal of Native Studies 189 (acknowledging the traditionally meat-heavy diets of Mi'kmaq people, but finding that "[s]ince the consumption of animals for food, clothing and shelter is no longer necessary . . . the Mi'kmaq tradition, as manifested in our legends, suggests that hunting and killing our animal brothers is no longer authorized", and further arguing that "those who value only the preservation of an unchanging tradition join with the colonial powers in seeing no place for a contemporary Indigeneity" at 193).

"what counts as evidence and…what is taken as verification".[36] One of the most central insights of feminist legal theory has been that "Just the Facts, Ma'am" is never as simple a directive as it seems. What counts as a legal fact is instead a political question.[37] Building on a broader feminist commitment to 'standpoint' as a critical meta-project across a number of disciplines,[38] feminist jurisprudence has taken up the task of illuminating perspectives and experiences long presumed to be *legally irrelevant* and arguing that these exclusions represent a defect in prevailing legal methods.

One example has been the promotion of "consciousness raising" among women as a relevant source of legal knowledge: a methodological approach through which women's collective accounts of their own experiences are deployed to analyze and transform law and policy.[39] The #MeToo movement has been described as a digital-age recurrence or continuation of this foundational feminist praxis.[40] Kimberlé Crenshaw's pathbreaking article on "intersectional" analysis engaged a distinct

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36. Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) at 106 [MacKinnon, "Toward a Feminist Theory of the State"]. See also Kathryn Abrams, "Feminist Lawyering and Legal Method" (1991) 16:2 Law and Social Inquiry 373 at 373; Sandra Harding, "Introduction: Is there a Feminist Method?" in Sandra Harding, ed, *Feminism and Methodology* (Bloomington: Indiana University Press, 1988) 1 at 2.
37. See *e.g.* Mary L Shanley & Victoria Schuck, "In Search of Political Woman" (1975) 55:3 Social Science Quarterly 632 (remarking that, "[m]ethod is not neutral; it establishes the criteria by which one judges the validity of conclusions, and consequently carries with it not simply technical skills but deeper philosophical commitments and implications" at 638).
38. See Sandra Harding, ed, *The Feminist Standpoint Theory Reader* (New York: Routledge, 2004).
39. Katharine T Bartlett, "Feminist Legal Methods" (1990) 103:4 Harvard Law Review 829 at 863–67; MacKinnon, "Toward a Feminist Theory of the State", *supra* note 36 at 83–105.
40. Lauren Rosewarne, "#MeToo and Modern Consciousness-Raising" (19 October 2017), online: *The Conversation* <theconversation.com/metoo-and-modern-consciousness-raising-85980>.

methodological project, contrasting "Black women's experience" with prevailing anti-discrimination doctrines that work to "distort these experiences".[41] Another example is Mari Matsuda's proposal that legal scholars engage in the practice of "looking to the bottom" in developing legal theory and critique, drawing on the self-expression of those "who are uniquely able to relate theory to the concrete experience of oppression".[42] This feminist project of revising and politicizing legal method is necessarily fraught and always incomplete.[43] Feminist legal method is thus not conceptualized as a one-time corrective through which a new form of objectivity is achieved, but rather as a process through which relevance and background assumptions are continually reconstructed through contest and deliberation.

Animals face serious problems in the context of legal method. Their experiences, their consent, their desires, their pain, are almost never relevant facts, as far as the law is concerned. Even those laws which seem most clearly on their face to protect animals from harm — provincial and criminal anti-cruelty provisions, for example — generally contain blanket exemptions for common agricultural practices and bear traces of their historical origin in protecting human community morals, rather than animal well-being.[44] On the farm, violent or sexual use of animals

41. Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1989:1 University of Chicago Legal Forum 139 at 139.
42. Mari Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) 22:2 Harvard Civil Rights – Civil Liberties Law Review 323 at 325 (explaining that, "[l]ooking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice" at 324).
43. See Martha Minow, "Feminist Reason: Getting It and Losing It" (1988) 38:1 Journal of Legal Education 47.
44. Lesli Bisgould, *Animals and the Law* (Toronto: Irwin Law, 2011) at 58–67, 186–92. On "human-use typologies" as the dominant organizing principle in animal law, see Jessica Eisen, "Liberating Animal Law: Breaking Free from Human-Use Typologies" (2010) 17:59 Animal Law Review 59 [Eisen, "Liberating Animal Law"].

is perfectly legal as long as it is commonplace (which it is).[45] In such cases, the relevant legal facts do not relate to any animal's experience of being farmed, but rather to how usual a practice is, whether it harms humans, and whether it represents some kind of moralistic deviation that threatens human community life.

Feminist legal scholars have begun the work of exposing the erasure of animal experience from legal method and pressing for legal analyses that render those experiences relevant and cognizable. In some cases, the methodological erasure of animal experience is expressly linked to feminist methodological challenges, as in Yoriko Otomo and Cressida Limon's reflections on the legal statuses of dogs, pigs, and children in colonial Britain.[46] Otomo and Limon observe that dogs, pigs, and children were each "liminal" in the sense that, although highly valued and socially integrated in certain respects, their own experiences were not legally relevant: they were each "absent *as subjects* from the vast tracts of legal scholarship that purport to deal with topics such as domesticity, sexuality, criminality and responsibility".[47] Instead, Otomo and Limon posit, they have "lived through law in similar ways to women", as "the property of political actors, as half-subjects or as virtues" and caricatured according to dominant perceptions of their essential qualities: "like women who are too often discussed in terms of femininity, where dogs, pigs and children do appear as subjects of discussion, they are over-determined by ideas of

45. Bisgould, *supra* note 44 at 167–73; Jessica Eisen, "Milked: Nature, Necessity, and American Law" Berkeley Journal of Gender, Law and Justice (2019) 34:1 Berkeley Journal of Gender, Law and Justice 71 [Eisen, "Milked"]; Gillespie, "Sexualized Violence", *supra* note 19.
46. Yoriko Otomo & Cressida Limon, "Dogs, Pigs and Children: Changing Laws in Colonial Britain" (2014) 40:2 Australian Feminist Law Journal 163.
47. *Ibid* at 163–64 [emphasis added].

beastliness, abjection, innocence and breeding".[48]

Feminist analyses of animal law have tended to promote strands of jurisprudence, advocacy, and legal theory that center animal experience, often in contrast to strategies that seek to prove that animals deserve rights on account of their human-like capacities (a point that will be explored in Part III.B). Maneesha Deckha, for example, has observed the "disavowal of legal subjectivity for animals" as "a critical source of animals' overall vulnerability", and commended Alberta Chief Justice Catherine Fraser's disruption of this pattern of methodological erasure in her dissenting judgment in *Reece v City of Edmonton*.[49] By attending to the particular experience of Lucy, the elephant whose isolated captivity was at the center of this legal challenge, Fraser CJ is cast by Deckha as offering a rare "non-instrumentalist rendering of animals that is unprecedented in Canadian law".[50] Marie Fox has similarly approved of the New Zealand hominid rights amendment as "contesting the complete erasure of animal

48. *Ibid*. See also Yoriko Otomo, "Law and the Question of the (Nonhuman) Animal" (2011) 19 Society & Animals 383 (remarking that animal welfare legislation imposes a "double violence" on animals: "first, in their de-subjectivization through propertization, and second, in their designation as 'things' in the eyes of the law" at 387) [Otomo, "Law and the Question of the (Nonhuman) Animal"].

49. 2011 ABCA 238; Maneesha Deckha, "Vulnerability, Equality, and Animals" (2015) 27:1 Canadian Journal of Women and the Law 47 at 64 [Deckha, "Vulnerability, Equality, and Animals"]. See also Maneesha Deckha, "Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability Under a Property Paradigm" (2013) 50:4 Alberta Law Review 783 [Deckha, "Initiating a Non-Anthropocentric Jurisprudence"].

50. Deckha, "Vulnerability, Equality, and Animals", *supra* note 49 at 65. See also Deckha, "Initiating a Non-Anthropocentric Jurisprudence", *supra* note 49. Deckha has similarly approved of the centering of animal subjectivity in the litigation strategy of People for the Ethical Treatment of Animals in the unsuccessful US *Tillikum* suit. See Maneesha Deckha, "Humanizing the Nonhuman: A Legitimate Way for Animals to Escape Juridical Property Status?" in Atsuko Matsuoka & John Sorenson, eds, *Critical Animal Studies: Towards Trans-species Social Justice* (London: Rowman & Littlefield, 2018) 209 [Deckha, "Humanizing the Nonhuman"].

subjectivity, enshrined elsewhere in Western legal systems", including through incorporation of a "best interests" standard analogous to that applied to human children, whose experiences are legally valued despite the ill-fit between their communicative modes and formal legal settings.[51]

The challenges associated with representing animal subjectivity in legal settings are not taken lightly. Feminist legal theory has long urged caution in the risky enterprise of "speaking for the other".[52] My own work has observed the "real, embodied, experiential factors that make it particularly challenging for participants in human language communities—including those with posthumanist political orientations—to make knowledge claims about animal experiences",[53] and has explored the particular institutional challenges arising from animals' lack of access to "traditional constitutionalist checks of client instruction and democratic consent".[54] Deckha's analysis of Canadian regulation of animal experimentation takes up an instance of this challenge, advocating legal analyses that "foreground the laboratory rat's first person perspective", while also acknowledging that we have not resolved the problem of "how humans can know what animals are

51. Marie Fox, "Rethinking Kinship: Law's Construction of the Animal Body" (2004) 57:1 Current Legal Problems 469 at 493 [Fox, "Rethinking Kinship"].
52. MacKinnon, "Of Mice and Men", *supra* note 16 at 270. See also Jessica Eisen, "Animals in the Constitutional State" (2018) 15:4 International Journal of Constitutional Law 909 at n 137 and accompanying text (referencing feminist and other commentary highlighting "the deep challenges that inhere in efforts to imagine the lives and priorities of others across substantial power differentials") [Eisen, "Animals in the Constitutional State"].
53. Eisen, "Milk and Meaning", *supra* note 27 at 243; see also Jessica Eisen, "Beyond Rights and Welfare: Democracy, Dialogue, and the *Animal Welfare Act*" (2018) 51:3 University of Michigan Journal of Law Reform 469 at 504–507 [Eisen, "Beyond Rights and Welfare"].
54. Eisen, "Animals in the Constitutional State", *supra* note 52 at 953.

thinking and feeling".[55] As Catharine A MacKinnon notes, "[h]ow to avoid reducing animal rights to the rights of some people to speak for animals against the rights of other people to speak for the same animals" remains a serious challenge.[56]

These challenges, though acknowledged, are not taken by feminist theorists of animal law as a reason to abrogate the responsibility to find ways of repairing the methodological erasure of animals. Art, literature, science, and direct communications from animals are all taken as resources in the exercises of "imagination" that are necessary, despite their risks, to "[a]ll our ethical life", including human-animal legal relations.[57] Particularized storytelling and emotional appeals grounded in animal experience are taken up as valid and necessary tools in projects of legal transformation. Angela Lee, for example, argues that "[n]arrative methods, especially those that focus on the particular lives of individual nonhuman…can transcend the constraints of dominant ideology to

55. Maneesha Deckha, "Non-Human Animals and Human Health: A Relational Approach to the Use of Animals in Medical Research" in Jennifer J Llewellyn & Jocelyn Grant Downie, eds, *Being Relational: Reflections on Relational Theory and Health Law* (Vancouver: UBC Press, 2012) 287 at 306 [Deckha, "Non-Human Animals and Human Health"]. See also Fox, "Rethinking Kinship", *supra* note 51 (quoting Donna Haraway's desire "to use the beady little eyes of a lab mouse to stare back at my fellow mammals, my hominid kin, as they incubate themselves and their human and nonhuman offspring in a technoscientific culture medium" and contending that this "shift in perspective" reveals important features of the governing legal regime (at 484)); Marie Fox, "Animal Rights and Human Wrongs: Medical Ethics and the Killing of Non-Human Animals" in Robert Lee & Derek Morgan, eds, *Death Rites: Law and Ethics at the End of Life* (London: Routledge, 1994) 133. See also Deckha, "Humanizing the Nonhuman", *supra* note 50 (commenting that, "of course, the legal system is a human institution that depends upon human interpretation and reasoning to operate. The injustice of thwarting animal capacities that human jurists can relate to will resonate more with them. This is an anthropocentric element of legal architecture that is very difficult to eliminate" at 221–22).
56. MacKinnon, "Of Mice and Men", *supra* note 16 at 270.
57. Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge: Harvard University Press, 2007) at 354.

illuminate a more emotional — and perhaps more convincing — basis for addressing non-human animal suffering" through law.[58] The ongoing tasks of identifying and elaborating excluded animal standpoints and finding ways to incorporate animal experience into legal method, are taken as necessary, though necessarily fraught, enterprises.

B. Rethinking Sameness and Difference

The centrality of 'standpoint' in feminist theory supports a broader feminist critique of legal forms that claim to assign rights and entitlement through objective analyses of whether an *out group* is relevantly *the same* as those in the *in group*. The basic structure of the classical analysis at which feminists take aim is this: that rights are defined by nature, not politics; that they can be discerned from the nature of man; that the nature of man is that he is rational, intelligent, and independent; and that those who are not rational, intelligent, and independent are therefore not rights-holders. Feminist and critical theorists have attacked many aspects of this formulation, but here I will focus on feminist criticism of one outgrowth of this classical construction, namely the strategy of seeking legal and political recognition for *out groups* on the basis that they meet the criteria by which the idealized 'man' is defined.

Feminist legal argument has sometimes advocated for women's inclusion in public life on the basis that women are relevantly 'like men', although such arguments are now widely believed to have serious limitations. The proposition that women should be recognized in social and political life because they are the same as men seems most starkly to run out when dealing with questions relating to pregnancy. Calls for access to maternity leave or abortion seem only to make sense as justice problems through a lens that acknowledges women's lives and bodies as important *even if* they are different from men's lives and bodies. In other words, feminist legal argument has largely come around to the proposition that women's lives ought to matter, not because women are

58. Angela Lee, "Telling Tails: The Promises and Pitfalls of Language and Narratives in Animal Advocacy Efforts" (2017) 23:2 Animal Law Review 241 at 264 [Lee, "Telling Tails"].

like men, but on "their own terms".[59] (I will, for the moment, bracket the thorny questions this proposition implicates respecting the category of 'women' and who is empowered to define 'their own terms', but will return to these problems in the next Part).

Mainstream animal legal advocacy often centers on efforts to 'prove' as a matter of 'fact' that animals are 'like' people. This legal argument parallels a long-standing two-stage analytic focus on animal status and entitlement identified by Tzachi Zamir within the field of animal ethics.[60] In Zamir's view, this two-stage analytic structure arises from a perceived need to respond to the prevailing view that animal experience lacks moral significance because animals have no moral status.[61] In the legal iteration of this debate, animal advocates may feel compelled to respond to prevailing assumptions that animals do not qualify as persons because they lack relevant capacities, and are thus properly consigned to the rightlessness that flows from their legal status as 'property'.[62] The most direct counterargument has been that opponents of animal rights make a category error grounded in factual mistake. For example, in Canada, Animal Justice has advanced an "Animal Charter of Rights and Freedoms", expressly "premised on the recognition that animals experience suffering and pleasure in a way that is not biologically distinguishable from that of humans".[63] This emphasis on biological similarity and the arbitrariness of species distinctions echoes a strand of American legal advocacy that has sought recognition of animals as 'persons' under the law, including through recourse to extensive scientific briefs on the intellectual capacities

59. MacKinnon, "Of Mice and Men", *supra* note 16 at 265.
60. Tzachi Zamir, *Ethics and the Beast: A Speciesist Argument for Animal Liberation* (Princeton: Princeton University Press, 2007) at 16–17.
61. *Ibid* at 17.
62. On animals' status as property, see Gary Francione, *Animals, Property, and the Law* (Philadelphia: Temple University Press, 1995).
63. Animal Justice, "Animal Charter of Rights and Freedoms" (2015), online: *Animal Justice* <www.animaljustice.ca/charter> (elaborating, in support of their proposed Charter, that "discrimination on the basis of arbitrary characteristics, such as species, is a violation of equity, natural justice and the rule of law…").

of chimpanzees, among other species.[64]

The force of these assertions of animal-human 'sameness' is evident. The rhetorical need Zamir perceives within analytic philosophy has a clear analogue in law and politics: as long as animal advocates are confronted with the widespread view that, as a matter of 'fact', animals are mindless, empty vessels lacking meaningful experiences of their own lives, there will be a need for some strands of advocacy that meet this argument on its own terms.[65] But feminist theory teaches us that there are real dangers in letting conversations about justice slip into apparently factual disputes about how 'similar' or 'different' members of exploited or disadvantaged groups are with reference to benchmarks designed to reflect what powerful groups most value in themselves. This critique has generally taken two interrelated approaches, each of which has been adopted by feminist theorists of animal law. The first is to point out that sameness arguments structurally replicate oppressive logics of domination that are inseparable from their historical use to exclude women and people of colour from moral and legal concern on the basis of their perceived inferiority along the same set of metrics.[66] The second is that a focus on sameness and difference obscures the reality that power relations, not factual similarities and differences, define social hierarchies — that women and animals *are* different (from men/humans, who also differ amongst themselves, and from each other), but that facts about difference do not explain why

64. See *e.g.* Steven M Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Cambridge, MA: Perseus Books, 2000); Steven M Wise, *Drawing the Line: Science and the Case for Animal Rights* (Cambridge, MA: Perseus Books, 2002). See also Paola Cavalieri & Peter Singer, eds, *The Great Ape Project: Equality Beyond Humanity* (New York: St Martin's Press, 1993).

65. But see Taimie L Bryant, "Similarity or Difference as a Basis for Justice: Must Animals Be Like Humans to be Legally Protected from Humans" (2007) 70:1 Law and Contemporary Problems 207 at 253 [Bryant, "Similarity or Difference"].

66. *Cf.* MacKinnon, "Toward a Feminist Theory of the State", *supra* note 36 at 215–34.

powerful groups exploit and harm less powerful groups.[67]

Yoriko Otomo relies on Jaques Derrida's concept of "carnophallogocentrism" in her critique of efforts to seek personhood status for some animals, like chimpanzees, on the basis of their sameness to human persons. Although strategically useful in the short term, Otomo protests that this form of argument relies upon animals meeting the standards developed in contractarian liberal theory, in which the subject of rights is defined as a "free, whole, and delineated individual" whose "reflection is guaranteed by the all-seeing gaze of the law, with which the subject has a contractual relation".[68] In Otomo's view, this legal construction is irredeemably linked to:

> …language and the exchange of words, from which nonspeaking beings are excluded. This onto-theological structure is further maintained through a sacrificial economy of exclusionary relations: what Jacques Derrida describes as "carnophallogocentrism" (Derrida, 1990, p. 953). Through the symbolic act of eating and speaking, those identified as they-who-are-eaten (animals) and they-who-do-not-speak, or those who do not have language (historically "women" and "animals"), enable the founding of a masculinized, rightsbearing, speaking subject of law. The use of such an oppressive logic to argue for so-called "animal rights" risks perpetuating an identity politics that at best leads to an endless exercise in line-drawing.[69]

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67. *Cf.* Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990) (arguing that social choices, not factual differences, define which differences matter in law and politics, and how). See also Lori Gruen, *Entangled Empathy: An Alternative Ethic for our Relationship with Animals* (Brooklyn: Lantern Books, 2015) ("[a] focus on similarities can…run the risk of unwittingly projecting our human preoccupations onto other animals and engaging in arrogant anthropocentrism" at 24).
68. Otomo, "Law and the Question of the (Nonhuman) Animal", *supra* note 48 at 388.
69. *Ibid*. See also Fox, "Rethinking Kinship", *supra* note 51 (remarking that, "[a]lthough I would concede its strategic and symbolic value, I have reservations about a campaign [seeking rights for great apes], whose strategy is basically to encompass certain animals as honorary humans, and then accord them limited legal rights. The main problem with this tactic is that it does little to destabilise the boundary itself, and runs the risk of entrenching it more firmly, by bringing certain privileged animals within its moral compass" at 480–81 (citations omitted)).

There are, moreover, real, embodied, and experiential differences between humans as a group and any given species of non-human animal.[70] For this reason, Taimie Bryant has argued that "[t]he focus should not be on those qualities of women or animals or excluded others which, if documented, would qualify them for entrance to the community of those worthy of respect".[71] Instead, advocates should seek to focus public attention on "exploitative, oppressive acts and thoughts" and "seek changes in those assumptions, thoughts, and acts that are completely incompatible with respect for others".[72]

Challenges to the use of sameness arguments often emphasize the extent to which the terms of 'sameness' are defined by those in power for the purpose of preserving hierarchical relations, with the result that goalposts will always shift as needed to serve those ends. Fox, for example, posits that "once animals are shown to possess any of the qualities we have hitherto designated as a mark of humanness, such as speech, we immediately refine our notion of what does constitute human qualities and revise that account upwards".[73] In a similar vein, Bryant points out that the discovery that chimpanzees make and use tools may be taken as grounds to shift the definition of "what it means to be human" rather

70. See Bryant, "Similarity or Difference", *supra* note 65 (noting that, "[a]dvocacy based on similarity proceeds with great difficulty when differences are obvious" at 249); Harris, "Compassion and Critique", *supra* note 27 (remarking that "despite the just-so story of species difference and repeated attempts to stabilize the story with scientific proof, the color line is much more difficult to maintain than the line between human and animal" at 341–42).
71. Taimie Bryant, "Animals Unmodified: Defining Animals / Defining Human Obligations to Animals" (2006) 2006:1 University of Chicago Legal Forum 137 at 161–62 [Bryant, "Animals Unmodified"]. See also Fox, "Rethinking Kinship", *supra* note 51 (proposing that "the key project lies, not in arguing about who falls within which category, whether that category be 'human' or 'ape', but in seeking to break these traditional categories apart as too simplistic" at 489).
72. Bryant, "Animals Unmodified", *supra* note 71 at 162.
73. Fox, "Rethinking Kinship", *supra* note 51 at 479.

than grounds to "redefin[e] animals as part of the human community".[74] The foundations of 'sameness' arguments are thus always premised on what powerful humans value in themselves: "[i]t is simply raw power, not justice, that makes humans the center of value definition".[75] Citing Catharine A MacKinnon's feminist legal theory, Bryant thus proposes that "[j]ust as…women should not be defined by, or be defining themselves by, reference to the achievements and desires of men, animals should not be defined by the abilities and preferences of humans".[76]

Arguments that animals deserve rights because they are 'the same' as people have also given rise to troubling advocacy campaigns that seem to threaten or misunderstand other justice struggles. Animal advocates, for example, have attracted significant criticism for drawing blunt comparisons between the oppression of animals and racial slavery in the United States, particularly where those campaigns give the false impression that racial justice struggles in that country have come to their successful completion.[77] This "dreaded comparison", as it has famously been termed by Marjorie Spiegel,[78] has been deployed in unnuanced campaigns that have been charged with ignoring "the dynamic relationship between people of color and animals given their historic linkages in the white western mind".[79] Angela P Harris links racial, gender, and species politics in explaining the need for care in drawing comparisons between

74. Bryant, "Similarity or Difference", *supra* note 65 at 210. See also Bryant, "Animals Unmodified", *supra* note 71 (observing that "when scientists suggested that fish feel pain, others responded that, while fish may appear to experience pain like humans experience pain, fish do not cognitively process pain the same way that humans do" at 164).
75. Bryant, "Animals Unmodified", *supra* note 71 at 168 ("[a]s MacKinnon has noted with respect to women, '[d]ifferences are inequality's post hoc excuse.' Because it serves human interests to treat animals without respect, differences can be identified to support that treatment" at 170).
76. Bryant, *ibid* at 168.
77. Harris, "Should People of Color Support Animal Rights", *supra* note 29 at 25.
78. Marjorie Spiegel, *The Dreaded Comparison: Human and Animal Slavery* (Philadelphia: New Society Publishers, 1988).
79. Harris, "Should People of Color Support Animal Rights", *supra* note 29 at 27.

oppressions:

> [i]n some ways, animals are to people of color — particularly African Americans — as prostitutes (Margaret Baldwin has argued) are to women. The existence of the prostitute creates a dynamic in which the woman, to achieve dignity, must always and constantly dissociate herself from that abject figure. She is set up to seek respectability, to make clear, "I am not that".
>
> Animals — and for African Americans, especially primates — activate, I think, this urge to disassociate on the part of people of color, based on the intuition that our dignity is always provisional. [Campaigns invoking the 'dreaded comparison' often] assume a comfort in associating oneself with animals and animal issues that people of color can only assume with difficulty… It is, of course, the opposition between woman and prostitute, animal and African that needs itself to be destroyed. But to assume that this opposition-identification is unproblematic, as the dreaded comparison does, is to implicitly code the campaign itself as white.[80]

At first blush, this hesitation to analogize oppressions might seem at odds with the tendency within feminist analysis of animal law to draw connections between the oppression of women and animals. With some exceptions, however, the thrust of this analysis has not been to directly analogize the harms experienced by women and animals, but rather to illuminate similarities in the institutional and ideological structures of oppressive systems.[81] The strongest claims of feminist legal theorists analyzing animal exploitation do not take the strict analogical form that 'doing x to animals is bad because we have already agreed it is bad to do x (or something analogous to x) to women or people of colour'. Instead, they offer the more complex suggestion that there are shared ideological, legal and material forces shaping the experiences of humans and animals, which in turn shape many diverse experiences of harm.

For this reason, Harris proposes that, as an alternative to "identity-based comparisons and analogies,…anti-racist activists should embrace

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80. *Ibid*.

81. For an interesting and unusual comparison running in the opposite direction, see Sherry Colb, "'Never Having Loved at All': An Overlooked Interest that Grounds the Abortion Right" (2016) 48:3 Connecticut Law Review 933 (taking the harms of dairy calf separation as illuminating human women's interest in access to abortion before they develop a bond with their offspring).

animal rights as a practice of justice and love" — an approach that renders identity "irrelevant, except insofar as the grounded experience of identification teaches us the necessity of compassion".[82] In Harris' view, compassion does not require fraught comparisons, line-drawing and projection, but rather allows us to develop ethical postures that "reduce the suffering of animals and of humans" in ways that avoid "reducing one to the other".[83] The result, then, is an overall caution against simple analogies — either to the dominant norms of liberal theory, or to the unique experiences of oppression that have characterized other justice struggles.

In this vein, Bryant has drawn on the advocacy experiences surrounding family medical leave and disability accommodation to highlight the limits of sameness arguments (since both forms of advocacy necessarily demand respect despite difference from the dominant norm), and has identified endangered species protections and wildlife corridors as forms of animal protection that are not predicated on proving animals' sameness to humans.[84] Deckha similarly approves of a litigation campaign on behalf of captive marine mammals that emphasizes the harms of captivity with reference to the animals' own "bodies, social relationships, autonomy, and natural dispositions" rather than those animals' similarities to human beings.[85] The campaign in question was brought under the 13th Amendment to the US Constitution, prohibiting involuntary servitude. Deckha considers the "dreaded comparison", and concludes that the comparison in this case amounts to "drawing parallels between oppressions" in a way that "is not the same as comparing animals to humans so that we care about them".[86] This is arguably only a partial answer to Harris' concerns about this particular form of analogical

82. Harris, "Should People of Color Support Animal Rights", *supra* note 29 at 31.
83. *Ibid* at 32.
84. Bryant, "Similarity or Difference", *supra* note 65 (remarking that "[n]either advance was premised on the argument that animals are similar to humans, and, in fact, diversity is affirmatively supported" at 251).
85. Deckha, "Humanizing the Nonhuman", *supra* note 50 at 227.
86. *Ibid* at 229.

reasoning in animal legal advocacy. Regardless of where one lands on this question, however, it is clear that Deckha and Harris are united both in their desire to focus animal advocacy on animal experience, not human 'sameness', and to exercise care in the use of analogies that risk imperiling human justice struggles or re-enacting oppressive tropes of racial animality.

The lesson of feminist theory for animal justice struggles is not that animals' problems or solutions are the same as women's, but rather that attention to the particulars of oppression matter: "[n]ot that women's solution is animals' solution. Just as our solution is ours, their solution has to be theirs".[87] In short, a crucial theme is that justice for animals must be defined "on their own terms".[88] As promised, we now tread back into the troubled territory bracketed at the beginning of this discussion of sameness and difference: who are 'they', what are 'their terms', and who decides?

C. Troubling Categories

The project of learning to respect and recognize animal lives on 'their own terms' is bound to be endlessly complex, not only because of the challenges already raised respecting method, but also because of what we ought to have learned from feminist debates over the use of categories and labels in describing women's experiences. In the previous Part, we uneasily bracketed the problem of defining women and animals and determining who should be empowered to articulate 'their own terms'. Here, we return to that set of puzzles and a related lesson that feminist jurisprudence brings to animal law: to be careful with categories, and to attend to diverse particular circumstances.

The story of Catharine A MacKinnon and her critics is instructive here. In short, MacKinnon developed a theory of sexuality as the linchpin of women's oppression, emphasizing the hierarchy of men over women (as expressed through the eroticization of dominance) as a basic process of

87. MacKinnon, "Of Mice and Men", *supra* note 16 at 270.
88. *Ibid* at 265.

social life.[89] Importantly, MacKinnon described her theory as being based on the experiences of "all women".[90] This claim to base her theory on the experiences of "all women" prompted a quick succession of feminist critics protesting that MacKinnon's theory was wrong or incomplete when it came to them. Angela P Harris explained that MacKinnon's approach failed to attend to the ambivalence that many Black women feel about rape laws, which are deeply implicated in histories of racial terrorism in the United States.[91] Carol Vance argued that MacKinnon's account of sexuality failed to capture many women's more nuanced experiences of their own sexuality as more than pure oppression, in the introduction to *Pleasure and Danger*.[92] And Patricia Cain identified the problem of the "invisible lesbian" in the accounts of "women's experience" offered by radical feminists among others.[93] At the same time as this debate was unfurling (and sometimes in the same articles), a similar battery of criticism was being leveled at a distinct body of feminist legal theory, termed "cultural" or "difference" feminism, that purported to identify women's positive attributes, for example as caregivers.[94] In sum, many feminist scholars simply did not see themselves in the vision

89. MacKinnon, "Toward a Feminist Theory of the State", *supra* note 36.
90. *Ibid*. MacKinnon acknowledges the tension within this claim, explaining that "[f]eminism aspires to represent the experience of all women as women see it, yet criticizes antifeminism and misogyny, including by women" (at 115). MacKinnon argues that the claim to develop theory on the basis of the experiences of "all women" does not depend upon the false assumption that differences between women are irrelevant or nonexistent: "[f]eminism's search for a ground is a search for the truth of all women's collectivity in the face of the enforced lie that all women are the same" (at 38).
91. Angela P Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42:3 Stanford Law Review 581 [Harris, "Race and Essentialism"].
92. Carol S Vance, "Pleasure and Danger: Toward a Politics of Sexuality" in Carol S Vance, ed, *Pleasure and Danger: Exploring Female Sexuality* (Boston: Routledge, 1984) 1.
93. Patricia Cain, "Feminist Jurisprudence: Grounding the Theories" (1989) 4:2 Berkeley Women's Law Journal 191 at 191.
94. See Robin West, "Jurisprudence and Gender" (1988) 55:1 University of Chicago Law Review 1.

of 'women' being expounded in much of the most celebrated feminist literature — a critique crystalized in Harris' claim that these accounts were premised upon "gender essentialism", or the incorrect "notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience".[95]

In the face of all these challenges to "White Feminist" accounts of women's experience, it became necessary for all feminists to confront questions about who defines the terms by which women's experiences are understood (with varying degrees of commitment and success),[96] and, more fundamentally, to ask whether and when 'women' was even the most important category for understanding the social relationships that critical scholarship seeks to describe and challenge.[97] In the context of feminist legal theory, the main challenge was that straight, white women were claiming to speak for all women in ways that did not ring true for many people whose lives they claimed to describe. For animals, the problem is not one of a relatively well-resourced group of non-human animals claiming to speak for others, but of human beings speaking for animals in a way that fails to take seriously the specificity of animal lives and exploitation. In the case of animals, the inability to speak in the human languages that are elemental to dominant legal and political institutions contributes to a discourse on 'animals' that treats this dazzlingly diverse array of lives and beings as though their suffering and struggles are all essentially the same. This challenge is exacerbated by the absence of public and legal spaces where animals' actual lives might be articulated, even in mediated forms.[98]

Legal theory pertaining to animals often treats 'animals' as a

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95. Harris, "Race and Essentialism", *supra* note 91 at 585. See also Elizabeth B Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Boston: Beacon Press, 1988).
96. See Mariana Ortega, "Being Lovingly, Knowingly Ignorant: White Feminism and Women of Color" (2006) 21:3 Hypatia 56.
97. See Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton: Princeton University Press, 2006).
98. See Part III.A.

monolithic category.[99] Feminist theorists of animal law have worked to reveal the apparently 'obvious' and 'natural' categorical distinction between humans and animals as a social and legal construction.[100] These studies build upon a broader project within human-animal studies across the disciplines to reveal the prevailing distinction between 'humans' and 'animals' as a social choice by which humans purport to distinguish themselves from all other life, despite our continuities with some of them and their discontinuities amongst each other.[101] Deckha, for example, argues that "[h]uman as a category is no more a natural fact of science

99. Some specificity is acknowledged through recognition of varying legal regimes for farmed animals, research animals, companion animals or wildlife, and, of course, we have seen that some analysis occurs at the level of 'species', for example examining the legal status of chimpanzees irrespective of use-context. On human-use legal typologies and alternatives, see Eisen, "Liberating Animal Law", *supra* note 44.

100. See Cressida Limon, "Inventing Animals" in Yoriko Otomo & Ed Mussawir, eds, *Law and the Question of the Animal: A Critical Jurisprudence* (New York: Routledge, 2013) 54 [Limon, "Inventing Animals"]; Fox, "Rethinking Kinship", *supra* note 51 ("[l]aw thus reflects dominant societal attitudes in presuming the existence of a self-evident dividing line between human and non-human animals, according to which humans are designated as persons and animals as their property. I contend that such a position is fundamentally incoherent given the problematic and unstable nature of the human/animal binary. First, the existence of certain 'boundary animals' (such as primates and whales) trouble distinctions conventionally drawn between humans and animals, and secondly, recent techno-scientific developments (such as genetic engineering and xenotransplantation) further blur this supposed dichotomy, by calling into question what we mean by the categories 'human' and 'animal'" at 469).

101. See Otomo, "Law and the Question of the (Nonhuman) Animal", *supra* note 48 (identifying Jaques Derrida, Martin Heidegger, Donna Haraway, Bernard Stiegler, Giorgio Agamben, Matthew Calarco, Mark Rowlands, and Carey Wolfe as scholars advocating "attention to the economic, historical, linguistic, and social forces that engender the separation of 'human' from 'animal,' and broadly interrogat[ing] the technologies and discourses through which the 'human' is constructed" at 385).

or divinity than are ideas of gender, race, class, or sexuality".[102] Fox, moreover, has proposed that law not only reflects but actively works to "police" the presumed "boundaries" between human and animal, for example through regulations that allow a wide range of reproductive technologies crossing elements of various species, while drawing a strict line preventing the placement of human gametes and embryos in animals, or the mixing of human and animal gametes.[103]

Other feminist theorists of animal law have observed that the legal categories by which animals are defined are almost exclusively determined by the ways human beings use or value them.[104] Taimie Bryant explicitly links the significance of human naming of animal categories to feminist theory, drawing on MacKinnon's work in concluding that animals do not get to define or categorize themselves, and are "prevented from having anything to say".[105] Animals' overarching legal status as "potential or current property" are "the grandparents of all specific legal definitions of animals",[106] but lower-order categories also reflect human-use interests, defining animals (even sometimes animals of the same species) as pets, pests, research subjects, or food — with each category giving rise to

102. Maneesha Deckha, "The Salience of Species Difference for Feminist Theory" (2006) 17:1 Hastings Women's Law Journal 1 at 37.
103. Fox, "Rethinking Kinship", *supra* note 51 at 486 (remarking that this legal regime "clearly betrays a fear of hybridity, which seems to evoke a deep-rooted fear and repulsion. Significantly it is also suggestive of law's key role in boundary maintenance — a concern to police boundaries which prevent the destablilisation of the notion 'human'" at 486).
104. Bryant, "Animals Unmodified", *supra* note 71 (remarking that "as a general legal matter, animals have no consistent legal identity separate and apart from the various statutes that regulate or allow humans to use them" (at 153) and that "[d]efinitions of animals change at the convenience of humans who want to use them or destroy them" at 142). See also Eisen, "Liberating Animal Law", *supra* note 44.
105. Bryant, "Animals Unmodified", *supra* note 71 at 144.
106. *Ibid* at 153.

distinct legal regimes governing those animal lives.[107] Bryant explains, for example, that as a matter of statutory definition, a chicken is an 'animal' for the purpose of US cockfighting prohibitions, but *not* an 'animal' for the purposes of the *Humane Slaughter Act*.[108]

Despite these complexities, however, it remains understandable that 'animal' emerges as a central category of legal theory and analysis. As with the term 'woman' within feminist legal theory, there is something critically important about developing theories that recognize and respond to socially and legally relevant categories, even while protesting the naturalization of these categories and their contents in the same breath.[109] And 'animal' is certainly a socially and legally relevant category. As Fox explains, despite the persistence of preferential treatment of companion animals, the overarching structure of the human-animal property divide has the effect of "subsuming all non-human species into a single essentialist category of otherness or beastliness".[110] In such a context, it is understandable that scholars and advocates seek to address the

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107. Ani Satz, "Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property" in Martha Albertson Fineman & Anna Grear, eds, *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (London: Routledge, 2013) 171 at 183; Bryant, "Animals Unmodified", *supra* note 71 at 143, 149–51; Fox, "Rethinking Kinship", *supra* note 51 (discussing Martha Minow's treatment of Harold A Herzog's description of "the impact of labelling on moral responses to mice," and in particular the observation that the same mouse may be subject to very different social and legal protections depending on whether she is categorized as a pest, or a laboratory research subject, or a pet, or snake food (at 471–72)).
108. Bryant, "Animals Unmodified", *supra* note 71 at 151.
109. See Sumi Cho, Kimberlé Williams Crenshaw & Leslie McCall, "Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis" (2013) 38:4 Signs 785 (criticizing the deployment of "intersectionality" analysis by some scholars to "repudiate any potential embrace of social categorization", and instead supporting the "reconstructive move" of resisting "an easy cynicism about all identities per se and, thus, about politics in general" at 800).
110. Marie Fox, "Taking Dogs Seriously?" (2010) 6:1 Law, Culture and the Humanities 37 at 38 [Fox, "Taking Dogs Seriously"].

circumstances and legal position of 'animals' as a category. But feminist theory has important lessons for an emerging body of theory that rests at high levels of generality: that generalizations can efface important differences in context and experience, obstructing a full understanding of the practical social dynamics at play — that we lose sight not only of the particulars, but also of the big picture, when we try to define theories 'from above' without attention to the granular facts of the material context under consideration.

The fact that animal legal theory is an endeavour engaged in by more powerful humans seeking to describe and understand the experiences of less-powerful and non-verbal animals means that the risks of misapprehension and projection are significant.[111] Our theories will necessarily be further limited if our explorations remain at the level of the 'animal' — or even at the level of the 'farmed animal'. The intersection of species and use context *within* farming is critically important to understanding the multitude of justice contexts embraced by this term. The life of a breeding sow and a dairy bull and a broiler hen are certainly conceptually, legally, and socially linked by the fact that all are classed as agricultural animals, but the experience of feminist jurisprudence should caution us to develop more nuanced accounts of these diverse contexts. Even within a single species the differences in these animals' lives is pronounced, including according to the animal's assigned sex (dictating, for example, whether a given being will be raised as a veal calf or a dairy cow)[112] and the social and economic structure of the farms and supply chains into which they are born.

Feminist legal scholarship has begun the work of exposing the ways that public institutions prevent legal attention to the individual stories of animals' lives, and the work of developing legal analyses that attend to the circumstances of particular groups of animals whose life experiences are shaped in particular ways by human laws.[113] My own study of the US *Animal Welfare Act*, for example, observes that several elements of

111. See Part III.A.

112. Gillespie, "Sexualized Violence", *supra* note 19.

113. See Lee, "Telling Tails", *supra* note 58 and accompanying text.

the statutory scheme work together to conceal the individual lives of laboratory animals from public view and debate.[114] My research on the US dairy industry similarly revealed the operation of legal tropes of 'privacy' and the 'private sphere' to keep the lives of dairy cattle out of public and legal view — a theme that resonates with feminist animal law research more broadly.[115] In this vein, many feminist legal scholars have sought to illuminate the relationship between law and animals' experiences in greater detail than the term 'animal' would seem to allow — for example in Deckha's analyses of the legal status and lived experience of the laboratory rat,[116] Fox's efforts to "take dogs seriously" as a matter of legal concern,[117] Cressida Limon's inquiry into the legal position of transgenic goats,[118] and

114. Eisen, "Beyond Rights and Welfare", *supra* note 53.
115. Eisen, "Milked", *supra* note 45; Eisen, "Milk and Meaning", *supra* note 27. See also Mathilde Cohen, "Of Milk and the Constitution" (2017) 40:1 Harvard Journal of Law and Gender 115 (remarking that, although "milk has become an increasingly public, masculinized substance, milk producers, i.e., cows, have remained hidden from the public gaze, confined to the 'privacy' of their farms under the dominion of their owners, much like generations of women before them were confined to the privacy of their home under the dominion of their husbands" at n 238) [Cohen, "Of Milk and the Constitution"]; Yamini Narayanan, "Dairy, Death and Dharma: The Devastation of Cow Protectionism in India" (18 June 2017), online: *Animal Liberation Currents* <animalliberationcurrents.com/dairy-death-dharma/> (describing dairying as "completely institutionalised, and thus invisibilised"); Dinesh Wadiwel, *The War against Animals* (Boston: Brill, 2015) (drawing on feminist legal analysis of rape in concluding that "[f]or animals, the inadequacy of anti-cruelty and protection laws to prevent violence toward some animals (for example 'livestock' and experimental animals) is an explicit strategy of law to create a space where systemic violence might be enacted" and that "the micropolitics of large scale violence requires a 'privatisation' of the sovereign right to violence" at 186).
116. See Deckha, "Non-Human Animals and Human Health", *supra* note 55 and accompanying text.
117. Fox, "Taking Dogs Seriously", *supra* note 110. See also Vanja Hamzić, "The (Un)Conscious Pariah: Canine and Gender Outcasts of the British Raj" (2014) 40:2 Australian Feminist Law Journal 185.
118. Limon, "Inventing Animals", *supra* note 100.

the growing cluster of feminist scholars attending to the legal and social lives of dairy cows across a number of jurisdictions.[119] Together, this work aims to flesh out the legal abstraction of the 'animal'. It demonstrates that animal law has something to learn from the feminist experience that — while categories like 'woman' and 'animal' are useful, particularly insofar as they are legally operative — we risk missing much of how these categories actually operate when we treat them as monoliths. Attention to the logics and mechanics of exploitation, as they arise across a range of more particular contexts, stands to enrich our analysis of 'animals', both in terms of their particular histories and legal constructions, and in terms of the ways these particularities engage with broader analytic categories such as 'animal' or 'farmed animal'.

D. Rights and Relationships

Taken together, these insights from feminist jurisprudence point to a final, overarching theme informing feminist scholarship pertaining to animals and the law: that legal relations and social relations are always, already intertwined. Feminist legal theorists, along with other critical and realist scholars, have worked to challenge the classical liberal image of rights as hard, historic boundaries, discernible through logic.[120] Patricia J Williams describes this project as unsettling the presumption that law arises from "inanimate, unemotional, unbiased, unmanipulated" principles, "solid as rocks" and "frozen against the vicissitudes of life".[121] Even rights —

119. Mathilde Cohen, "Animal Colonialism: The Case of Milk" (2017) 111 American Journal of International Law Unbound 267 [Cohen, "Animal Colonialism"]; Mathilde Cohen, "Regulating Milk: Women and Cows in France and the United States" (2017) 65:3 American Journal of Comparative Law 469; Cohen, "Of Milk and the Constitution", *supra* note 115; Eisen, "Milk and Meaning", *supra* note 27; Eisen, "Milked", *supra* note 44; Yoriko Otomo, "The Gentle Cannibal: The Rise and Fall of Lawful Milk" (2014) 40:2 Australian Feminist Law Journal 215 [Otomo, "Gentle Cannibal"].

120. See Eisen, "Beyond Rights and Welfare", *supra* note 53 at 516–17; Silverstein, *supra* note 12 at 81–122.

121. Patricia J Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge: Harvard University Press, 1991) at 11–12.

often cast in the language of boundary — are in fact arrived at through debate and dialogue, interacting with, reflecting, and constituting dense networks of social relationships.[122] The contestability of categories, the construction of 'sameness' and 'difference', and the politics of method all converge on this central cluster of feminist insights: that law and rights are "relational", that their forms are best explained by the relationships that generate them, and that they are best evaluated through attention to the relationships they support.[123]

Feminist analyses of animal law have taken up these insights in their expository and prescriptive projects — attending to actual relationships rather than mere legal form in assessing both the origins of animals' legal status and the possibilities for reform. While the centrality of animals' status as 'property' has long been a theme in the animal law literature,[124] scholars operating in critical and feminist traditions have exposed this legal structure as reflecting and consolidating a dense web of power relationships. Angela P Harris, for example, has traced the ideological underpinnings of property, with race and 'humanity' operating in tandem to support "the violent Euro-American seizure of the means of agricultural mass production in the New World", and with property continuing to play various "ideological function[s]", including defining "animals…as objects that can be bought, sold, and transferred".[125] My own work on US dairy farming has sought to reveal other elements of the social construction of legal property, illustrating the colonial construction of land rights through the vectors of land 'improvement' and animal ownership, and demonstrating the role of regulatory interventions in shaping the ostensibly private choices that contemporary dairy farmers make respecting their animal property.[126]

Yoriko Otomo and Mathilde Cohen have offered complex portraits of the social and relational forces that characterize contemporary

122. Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011) at 5–7.
123. *Ibid*.
124. See *e.g*. Francione, *supra* note 62.
125. Harris, "Compassion and Critique", *supra* note 27 at 341–45.
126. Eisen, "Milked", *supra* note 44.

dairy practices, including through law. Cohen, for example, traces the development of the modern dairy economy, including its expansion into food systems with no Indigenous dairy traditions as a function of colonialism and international law.[127] Observing the ideological drive to masculinize and medicalize infant feeding, Cohen concludes that "[b]y taking milk from animals and feeding it to humans, particularly human babies, dairying severs the nursing relationship twice: between lactating animal mothers and their offspring and between human mothers and their offspring".[128] For her part, Otomo weaves together histories of growing regulatory control and prohibition of wet nursing in France, the rise of industrial milk production and marketing boards in the United Kingdom, and the colonial and postcolonial introduction of industrial dairying in India to illustrate the political and legal dimensions of questions regarding "*who* controls the circulation of (*whose*) milk in our economies, and *how*".[129] Otomo proposes that the state's interest in promoting an isolated and industrial dairy economy is linked to its interest in controlling human female bodies, producing "[t]he city" as "a masculine, clean, rational and pure space, transcendent from the body that is coded dirty, irrational and impure: female and animal".[130] Detailing the suffering produced by industrial dairy processes, and the "juridical work of drawing consumers into" the attendant "regulatory and ideological system", Otomo provocatively asserts that "[t]he violence of this process is not incidental, nor is it accidental. Sanitising the agony of making life, and then the agony of losing it — to the slaughterhouse, to the state — is a deliberate expression of masculinised political power".[131]

127. Cohen, "Animal Colonialism", *supra* note 119.
128. *Ibid* at 270.
129. Otomo, "Gentle Cannibal", *supra* note 119 at 227 [emphasis in original].
130. *Ibid* at 224. See also Marc Trabsky, "Institutionalising the Public Abattoir in Nineteenth Century Colonial Society" (2014) 40:2 Australian Feminist Law Journal 169 (describing the colonial legal and regulatory establishment of public abattoirs in Melbourne as exemplifying "the civilising process of colonial society" (at 171) and implicating the colonial ambitions of "domesticating nature and subjugating the Aboriginal inhabitants of the land" at 175).
131. Otomo, "Gentle Cannibal", *supra* note 119 at 225.

In each of these accounts, the legal status of animals is presented with depth, specificity, and attention to the various values, constituencies and power relationships that give property status its meaning.

Operating in this same tradition of exposing the social and ideological relations underpinning legal rules, Cressida Limon has detailed the ways that the legal patentability of non-human animals (even in jurisdictions where human life cannot be subject to patent) manifests and expresses "control of the means of biological reproduction" of animals.[132] Her study of the patent specifications respecting transgenic goats, bred to produce spider silk in their milk, emphasizes the underlying acknowledgment that these animals have preferences and subjectivities: Dwarf goats, she observes, were selected for this project in part because of their "personable nature".[133] Limon proposes that these legal and material relations reveal "a paradoxical state" in which "biotechnology signals the demise of the ontological divide between humans and non-humans", while at the same time supporting "ever greater (neo-liberal) freedom of the human to (be) come (healthier, smarter, longer-lived, etc.)".[134] This paradox, however, dissolves, in Limon's view, when we move away from considering the problem "from the perspective of an abstract, universal human", and instead attend to how these legal structures enforce social power and status: "[f]rom a feminist perspective, the paradox looks more like an old enforcement and control of the means of reproduction".[135] Again, explorations of power, values, material relations and social choice are preferred to abstract, universalizing theory.

When it comes to legal prescriptions, feminist theorists of animal law retain this focus on the social dimensions of law and rulemaking. Several feminist legal theorists have reacted critically to the common 'animal rights' advocacy focus on creating hard prohibitions and formal boundaries. These scholars posit that substantial changes in underlying material relationships might be achieved in a number of different ways, and that changing relations matter more than the legal form of 'rights'.

132. Limon, "Inventing Animals", *supra* note 100 at 56.
133. *Ibid* at 64–65.
134. *Ibid* at 65.
135. *Ibid*.

Bryant, for example, relates the story of a United States *Animal Welfare Act* rule that required researchers to 'consider' alternatives to animal research. Bryant explains that his formally weak directive was supplemented by an advocacy campaign by the Association of Veterinarians for Animal Rights to produce a substantial decrease in terminal uses of animals by veterinary medical schools.[136] Bryant concludes that the rule that worked to effect this change could not reasonably be cast as a 'right' protecting animals, or even as a duty to use alternatives, but nonetheless partially achieved "the same pragmatic result that rights advocates would seek" through a combination of legal rules and their interaction with social context.[137] I have similarly pointed out the achievement of rights-like outcomes in the phasing-out of experimental use of chimpanzees in the United States as a result of a confluence of regulatory provisions, none of which constitutes a ban.[138] Deckha has also taken up the question of chimpanzee-human relations, relying on an empirical survey of caregivers at a chimpanzee sanctuary to support "the critique of the animal rights movement lodged by feminists who advocate for an ethic of care toward animals rather than rights-oriented personhood claims".[139] The focus, on this approach, is not on creating clear legal boundaries, but rather on developing rules, regardless of form, that foster sound ethical relations in practice.[140]

To this end, feminist legal theorists have often preferred more social analyses to those offered by mainstream animal rights and welfare discourse, for example taking up such analytic frames as "vulnerability",[141]

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136. Bryant, "Animals Unmodified", *supra* note 71 at 184–85.
137. *Ibid* at 184–87.
138. Eisen, "Beyond Rights and Welfare", *supra* note 53 at 520–24.
139. Deckha, "Humanizing the Nonhuman", *supra* note 50 at 216, citing Julietta Hua & Neel Ahuja, "Chimpanzee Sanctuary: 'Surplus' Life and the Politics of Transspecies Care" (2013) 65:3 American Quarterly 619. *Cf.* Fox, "Taking Dogs Seriously", *supra* note 110 (positing that "complete non-intervention in the lives of dogs is an impossible ideal" at 53).
140. Deckha, "Humanizing the Nonhuman", *supra* note 50 at 216.
141. Deckha, "Vulnerability, Equality, and Animals", *supra* note 49; Deckha, "Initiating a Non-Anthropocentric Jurisprudence", *supra* note 49; Eisen, "Animals in the Constitutional State", *supra* note 52; Satz, *supra* note 107.

"relationality",[142] "kinship",[143] "connexion",[144] "capabilities"[145] and "compassion".[146] As with feminist and critical legal theory more broadly, these projects are invested in shifting praxis,[147] and are conscious of the complexities this kind of scholarship requires. Otomo, for example, observes Derrida's skepticisim of the "miracle of legislation", but she insists that "we must believe in, or make-believe, the miracle, since there is, in the ontological sense, no outside of law as such", and since transformation is urgently needed.[148] The mapping of animals' legal status, and advocacy projects that aim to improve that status, cannot be taken in isolation, but must always acknowledge and confront the many registers of status and hierarchy engaged by animality — from race, to colonialism, to gender,

142. Deckha, "Non-Human Animals and Human Health", *supra* note 55; Eisen, "Beyond Rights and Welfare", *supra* note 53; Nedelsky, *supra* note 122 (sketching a "relational approach" to animals, premised on an initial inquiry into "how human actions are currently structuring patterns of relations among the diverse entities of our world and where these can be easily identified as harmful" at 194–99).
143. Fox, "Rethinking Kinship", *supra* note 51 at 492.
144. John Enman-Beech, "Connexion: A Note on Praxis for Animal Advocates," (2017) 40:2 Dalhousie Law Journal 545.
145. Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge: Harvard University Press, Belknap Press, 2006); Martha C Nussbaum, "Human Capabilities and Animal Lives: Conflict, Wonder, Law: A Symposium" (2017) 18:3 Journal of Human Development and Capabilities 317 (introducing a symposium on application of the "capabilities" approach to animals).
146. Harris, "Compassion and Critique", *supra* note 27; Harris, "Should People of Color Support Animal Rights", *supra* note 29; Sabrina Tremblay-Huet, "Should Environmental Law Learn from Animal Law? Compassion as a Guiding Principle for International Environmental Law Instead of Sustainable Development" (2018) 1:1 Revue Quebecoise de Droit International 125 (drawing on ecofeminist theory in arguing that environmental law should develop compassion as a value, and thus accord value to animals' subjective experiences).
147. See *e.g.* Bryant, "Animals Unmodified", *supra* note 71 (emphasizing the need to seek and generate "advocacy spaces" at 188); Eisen, "Beyond Rights and Welfare", *supra* note 53.
148. Otomo, "Law and the Question of the (Nonhuman) Animal", *supra* note 48 at 389.

and beyond.[149] The problems of animal exploitation implicate a range of values and interests, and are properly understood with reference to a range of institutional contexts, from the interpersonal to the international, and from the distributive to the identarian.[150] A consistent theme is the need to arrive at legal frameworks that advance broad social dialogue and create room for viable progress, rather than discerning logical 'correctness' as a matter of abstract theory. Harris, calling for "compassion" as a guiding principle urges that "the goal is a dialogue between law and ethics, love and justice".[151] Emotion and affective appeals are recognized as critical forces for transforming human-animal relations, unruly and dynamic as those forces may be: "[t]he goal is not to control or direct fugitive currents of affect, but to watch where they go, and watch out".[152]

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149. Some vectors that have been explored in the wider fields of Human-Animal Studies and Critical Animal Studies, but not yet, to my knowledge, in animal legal scholarship, include class and disability. See Jason Hribal, "'Animals Are Part of the Working Class': A Challenge to Labor History" (2003) 44:4 Labor History 435; Sunaura Taylor, *Beasts of Burden: Animal and Disability Liberation* (New York: The New Press, 2017). But *cf.* Sue Donaldson & Will Kymlicka, "Rethinking Membership and Participation in an Inclusive Democracy: Cognitive Disability, Children, Animals" in Barbara Arneil & Nancy Hirschmann, eds, *Disability and Political Theory* (Cambridge: Cambridge University Press, 2016) 168.
150. Eisen, "Milked", *supra* note 45 at 71.
151. Harris, "Should People of Color Support Animal Rights", *supra* note 29 at 31, citing Robin West, *supra* note 100.
152. Harris, "Compassion and Critique", *supra* note 27 at 352. See also Eisen, "Beyond Rights and Welfare", *supra* note 53 (commending an "evolving ethic" that acknowledges that "shifts in values and legal rules build upon each other, often in ways that are not entirely controllable or predictable in advance" at 516); Otomo, "Law and the Question of the (Nonhuman) Animal", *supra* note 48 (casting animals as "as animated subjects for whom politics, or a polis, emerges out of the aporia of the human/animal binary" at 389–90).

IV. Conclusion

What I hope to have shown here is that feminist legal theory has a good deal to contribute to our understanding of human-animal relations, and that the complex work of bringing these contributions to fruition is already underway. In this exposition, I have largely focused on common trends and themes, but careful readers will already have detected the splits tenuously held in place by this structure. The scholars canvased in this article are situated within distinct feminist traditions, with some invoking feminist care ethics, some aligning more clearly with radical feminism, some hewing to relational or vulnerability-based approaches, and some more clearly aligning with postcolonial, postmodern or posthumanist scholarship. A parsing of these distinct strands is beyond the scope of this article, whose main objective is to identify a common community of scholarly interest and highlight some of its members' key contributions to the broader discipline of animal law. But the presence of these potential sources of tension is remarkable, and stands to enrich the field if explored. A hallmark of the most productive forms of feminist legal theory has been this: saying what is difficult to say, and hearing what is difficult to hear, even (perhaps especially) in dialogue with those who share both deep commitments and deep divisions. The hope is not that feminist legal theory for animals will split into camps that align with those that characterize feminist theory more broadly. Instead, the hope is that the field grows richer and deeper and more persuasive as it develops its own contours and complexities.

Not Quite Property, Not Quite Persons: A 'Quasi' Approach for Nonhuman Animals

Angela Fernandez*

This paper challenges an assumption central to animal law, namely, that the legal category 'property' must be abolished for nonhuman animals. It argues that it would be better (and more likely to gain traction with judges, legislatures, and the public at large) to reformulate the status of nonhuman animals in terms of both property and personhood, an approach I call quasi-property/quasi-personhood. Nonhuman animals as quasi-property/quasi-persons captures the gains of each concept, namely, securing for nonhuman animals (some of) the rights of persons and validating the (admittedly weak) ones they already have while leaving intact their current legal categorization as property, recognizing and emphasizing that they are a nuanced form of property that trigger certain duties and responsibilities in the humans who own them or come into contact with them. This approach has the virtue of working with existing and familiar legal categories in a way that is true to their inherent flexibility, rejecting the binary, black/white thinking that has characterized animal law in favor of a pragmatic compromise that has the virtue of being acceptable today and leaving room for the future growth of more progressive attitudes towards nonhuman animals.

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* I have referenced a number of the papers presented at the Oxford Summer School, organized by the Deputy Director of the Oxford Centre for Animal Ethics, Clair Linzey, who put together an outstanding four-day program, which I am so happy to have attended. I would like especially to thank the following people who I interacted with there: Kathy Hessler of the Lewis and Clark Law School (for providing me with the text of not one but two of her presentations, which I rely on here); Justin Marceau (for pressing me on the semantics point addressed in the last section of the article); Steve Wise and David Favre (for their company and discussions); and Camille Labchuk Executive Director of Animal Justice Canada (not just for her company at the Summer School but for all the work she does for nonhuman animals in Canada, including sending law professors like myself on the organization's Board of Advisors materials allowing us to keep up on what is happening with the group's cases and other activities). Thank-you also to Bruce Chapman for sending the Oxford call for papers my way and to my Dean Edward Iacobucci for making funds available through an institutional SIG Grant to attend. Katie Sykes straightened me out on some important points relating to corporations and, more importantly, said yes when I suggested to her that we approach the *Canadian Journal of Comparative and Contemporary Law* about doing a special issue on animal law. It is wonderful when things you think are a good idea actually happen.

I. Introduction

In an article "Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property", Ani B Satz wrote that "existing [animal law] scholarship is entrenched in a paralyzing debate about whether categorizing animals as 'persons' instead of 'property' will improve their legal protections".[1] I agree with Satz that dichotomous thinking about nonhuman animals as either property or persons is unhelpful. However, given that both of these categories are so central to legal thinking, this paper argues that we should move towards and into both of those categories, using them creatively and expansively rather than trying to avoid or supersede them as Satz argued we do. I propose we do just this by adopting the category of quasi-property/quasi-persons as the legal status for nonhuman animals, a concept which this paper explores.

Claude Lévi-Strauss famously wrote that animals were "good to think"[2] with. I start from the position that the categories we use (*e.g.* property and person) structure and channel much of what we think and, importantly, movement and change in our thinking (and our legal structures) can come from approaching those categories differently *but not so differently* that they will be difficult to identify with (for lawyers and non-lawyers). This paper is motivated by where things currently are in animal law scholarship, specifically from a pragmatic perspective but also from the truth, which seems to go under acknowledged, that nonhuman animals already have some rights, and so are arguably legal persons of a sort, yet they remain property, even if they are a unique form of property due to their status as living sentient beings.

Work like what I propose here has been done on the property side by long-time American animal law scholar David Favre.[3] Favre has

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1. Ani B Satz, "Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property" (2009) 16:1 Animal Law 65 at 71.
2. Claude Lévi-Strauss, *Totemism* (Boston: Beacon Press, 1965) at 89.
3. See David Favre, "Time for a Sharper Legal Focus" (1995) 1:1 Animal Law 1. This was the inaugural issue of the American journal.

proposed using a "concept of living property"[4] for nonhuman animals as well as an idea of equitable self-ownership. I believe we should move in the direction Favre recommends but also, crucially, simultaneously expand our thinking on the personhood side using the notion of a quasi-person who has moral and legal interests that deserve legal protection. We should then combine both categories into one blended concept: a quasi-property/quasi-person status for nonhuman animals. In this paper I explain why this proposal makes sense in light of the recent history of animal law in North America, roughly the last twenty or twenty-five years, *i.e.* since the mid-1990s. I offer it as a think piece, gathering together insights from historical work on animals alongside debate in philosophical scholarship and advocacy-oriented writing in the field of animal law. The article argues that quasi-property/quasi-person is a good temporary heuristic to help us organize our rapidly changing ideas about how to structure human relationships with nonhuman animals. 'Quasi' is not a qualifier that many animal ethicists and advocates will like, as it has to them a sense of 'less than' or inferior built into it; it is a kind of diminishment insofar as it attaches to 'persons' and some want to see a complete break with property conceptions. Slaves were in fact a hybrid form of property.[5] And so, especially to Americans for whom human slavery is not ancient history, 'quasi' might sound like a bid to keep animals in a slave status or something not much better (as in the spirit behind the three-fifths compromise in which African Americans counted for only three-fifths of a persons for Congressional representation). 'Quasi' does not, I think, have that resonance for Canadians and others

4. See David Favre, "Living Property: A New Status for Animals within the Legal System" (2010) 93:3 Marquette Law Review 1021 [Favre, "Living Property"]; David Favre, "Animals as Living Property" in Linda Kalof, ed, *The Oxford Handbook of Animal Studies* (New York: Oxford University Press, 2017) 65. See also David Favre, "Equitable Self-Ownership for Animals" (2000) 50:2 Duke Law Journal 473; David Favre, "A New Property Status for Animals: Equitable Self-Ownership" in Cass R Sunstein & Martha C Nussbaum, eds, *Animal Rights: Current Debates and New Directions* (New York: Oxford University Press, 2004) 234.
5. Richard A Epstein, "The Dangerous Claims of the Animal Rights Movement" (2002) 10:2 The Responsive Community 28 at 30.

outside of the United States, or even for many inside of it.

'Quasi' is, as the *Oxford English Dictionary* puts it, "prefixed to a noun",[6] such as property or person, with the sense "resembling or simulating, but not really the same as, that properly so termed; having some but not all of the properties of a thing or substance; a kind of".[7] This seems to me to capture exactly what we are talking about in relation to nonhuman animals, who are not *merely* property (while they do remain property for many purposes) but are not persons in the same way that human beings are persons. They legitimately fall *in between* two categories, partaking in each and not reducible to either. Our legal way of thinking about nonhuman animals (not just the cognitively advanced nonhuman animals) should be able to capture that truth.

Also, given that we do not yet have a consensus about using an unqualified or non-tiered notion of personhood for nonhuman animals, even for the most cognitively complex nonhuman animals, a qualified conception might do for the time being. This is especially so for nonhuman animals where the goal behind recognizing their interests and legally protecting them is allowing them to have autonomy and lives worth living, not to provide them with equality, as it was in other civil rights movements, *e.g.* for women and male and female members of racialized

6. John Simpson & Edmund Weiner, *Oxford English Dictionary* (Oxford: Oxford University Press, 2000) sub verbo "quasi-".
7. *Ibid*.

groups, for whom 'quasi' would certainly be an insulting diminishment.[8] This article seeks to highlight the basic point that nonhuman animals already have a 'quasi' status on the personhood side, since they *already* have some legal rights, and they are *already* treated as more than mere property.

There are examples of personhood being used without a qualifier for nonhuman animals. Sandra the orangutan in Argentina was given a judicially declared personhood status in 2015.[9] A court in the state of Uttarakhand in India has very recently ruled that "all members of the animal kingdom [including birds and fish]"[10] should qualify as a 'legal person or entity' with similar rights as human beings.[11] Citizenship is a

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8. The Canadian *Indian Act*, SC 1876, c 18, excluded Indigenous persons from the category of legal personhood, with the revision, *Indian Act*, RSC 1927, c 98, decreeing that "'person' means an individual other than an Indian" at 2(i). This stipulation remained in the Act until 1951. See Janine Brodie, "White Settlers and the Biopolitics of State Building in Canada" in Smaro Kamboureli & Robert Zacharias, eds, *Shifting the Ground of Canadian Literary Studies* (Waterloo: Wilfred Laurier University Press, 2012) 87 at 105, as cited and quoted in Kelly Struthers Montford & Chloë Taylor, "(Bey)On(d) Edibility: Towards a Nonspeciesist Food Ontology" (Presented at "Veganism and Beyond: Food, Animals, Ethics", Queen's University, Kingston, Ontario, Canada, 10 June 2017; "Animal Law Lab", Faculty of Law, University of Toronto, Toronto, Ontario, Canada, 21 January 2019 and forthcoming in Kelly Struthers Montford and Chloë Taylor, eds, *Decolonizing Critical Animal Studies*). "Aboriginal people in Canada did not enjoy the full array of legal rights until 1960, when they became eligible to vote in federal elections": David R Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (Toronto: ECW Press, 2017) at 49.
9. See Emiliano Giménez, "Argentine Orangutan Granted Unprecedented Legal Rights" (4 January 2015), online: *Cable News Network* <edition.cnn.com/2014/12/23/world/americas/feat-orangutan-rights-ruling/>.
10. See Vineet Upadhyay, "Animals Have Equal Rights as Humans, says Uttarakhand High Court"(5 July 2018), online: *The Times of India* <timesofindia.indiatimes.com/city/dehradun/members-of-animal-kingdom-to-be-treated-as-legal-entities-ukhand-hc/articleshow/64860996.cms>.
11. Giménez, *supra* note 9.

broad idea and there is no reason why *primae facie* it cannot be used for nonhuman animals, as Canadian philosopher Will Kymlicka and Sue Donaldson have explored in a nuanced way in their book *Zoopolis*.[12]

Steven Wise and the Nonhuman Rights Project ("NhRP") have been urging American state courts to recognize the legal personhood of chimpanzees and elephants since 2013.[13] The NhRP argues that the law gives legal personhood to corporations, to rivers, and to important religious artefacts. This is done as a matter of public policy and moral principle, not because any of these entities resemble human beings.[14] Legal personhood is a legal fiction that is 'already artificial'.[15] No heartbeat is required. Personhood is a recognition that the entity is capable of holding rights, which rights will depend on the kind of person (*e.g.* a corporation, a ship, a municipality). In that sense, 'person' is a mask or a social role

12. Sue Donaldson & Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford: Oxford University Press, 2013).
13. "Who We Are" (2018), online: *Nonhuman Rights Project* <www.nonhumanrights.org/who-we-are/>.
14. Steven M Wise, "The Struggle of the Nonhuman Rights Project to Attain Legal Rights for Nonhuman Animals" (Fifth Annual Oxford Animal Ethics Summer School on Animal Ethics and Law: Creating Positive Change for Animals delivered at St Stephen's House, University of Oxford, 24 July 2018) [unpublished].
15. See Angela Fernandez, "Already Artificial: Legal Personality and Animal Rights" in Jody Greene & Sharif Youssef, eds, *Human Rights after Corporate Personhood: An Uneasy Merger* [Toronto: University of Toronto Press, forthcoming] [Fernandez, "Already Artificial"].

and should not be considered to be synonymous with a human being.[16]

So far, the NhRP litigation on behalf of chimpanzees and elephants has met with one judge, Justice Barbara Jaffe, a New York Supreme Court judge who understands what they are saying on the legal personhood point. She wrote, summarizing the NhRP's arguments, that "the law accepts in other contexts the 'legal fiction' that nonhuman entities, such as corporations, may be deemed legal persons".[17] This "is a matter of policy and not a question of biology".[18] Justice Jaffe discussed legal personhood in the terms the NhRP urges, namely, that this is about "who counts under our law".[19] And she examined the point that the NhRP always urges, namely that slaves, women, and children were also historically excluded from the category of legal personhood.[20] "[T]he

16. Merriam-Webster Inc, *Webster's Third New International Dictionary* (Merriam-Webster, 2000) sub verbo "person" ("an individual human being" as the first definition of 'person' but notes that the word comes from *persona* or mask) [*Webster's*]. See Mary Midgley, "Persons and Non-Persons" in Peter Singer, ed, *In Defense of Animals* (Oxford & New York: Oxford University Press & Blackwell, 1985) 52–62 at 54 [Singer, *In Defense of Animals*], reproduced in David Favre, *Animal Law: Welfare, Interests, and Rights* 2d (New York: Wolters Kluwer Law & Business, Aspen Elective Series, 2011) 401 at 403 (relying on the *Oxford English Dictionary* to make the mask point) [Favre, *Animal Law*]. See Saru M Matambanadzo, "Embodying Vulnerability: A Feminist Theory of the Person" (2012) 20:45 Duke Journal of Gender Law & Policy 45 (Saru Matambanadzo points out that the connection between masks and person was made by both Max Radin in 1932 and Lon Fuller in his book *Legal Fictions* (Palo Alto: Stanford University Press, 1967), who argued that "personhood was originally metaphorical because it meant 'mask'" at 65 nn 119, 120).
17. Barbara Jaffe, *The Nonhuman Rights Project, Inc, on behalf of Hercules and Lep v Samuel L Stanley Jr, MD, as President of State University of New York at Stony Brook a/k/a Stony Brook University and State University of New York at Stony Brook a/k/a Stony Brook University* (NY Sup Ct 2015) at 21–22, online (pdf): *Nonhuman Rights Project* <www.nonhumanrights.org/content/uploads/Judge-Jaffes-Decision-7-30-15.pdf> [*Jaffe Decision*].
18. *Ibid* at 22.
19. *Ibid* at 23.
20. *Ibid*.

issue of a chimpanzee's right to invoke the writ of habeas corpus is best decided, if not by the Legislature", Jaffe J writes, "then by the Court of Appeals, given its role in setting state policy".[21]

Since Jaffe J wrote her opinion in 2015, the New York Court of Appeals has twice denied the NhRP leave to appeal in the chimpanzee cases.[22] The most recent time this happened, in May 2018, one of the judges, Justice Eugene Fahey, expressed doubts about whether it had been correct to deny leave three years earlier and wrote some very strong words of support for the organization's mission.[23] Calling the question whether "an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her…a deep dilemma of ethics and policy that demands our attention".[24] He wrote that relying on the "simple either/or proposition"[25] whether a party is a 'person' or a 'thing' "amounts to a refusal to confront a manifest injustice".[26] Yet even Fahey J was not keen on the personhood argument.[27]

I think the judges, with the exception of Jaffe J, are hearing 'human being' when they hear 'person'. And in fairness to them, much of the NhRP expert evidence has to do with how cognitively complex and very

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21. *Ibid* at 31.
22. Mot for leave to appeal, *The People, The Nonhuman Rights Project Inc, on behalf of Tommy v Patrick C Lavery,* 2014 NY Slip Op 083136 (NY App Div 2015), online: *New York Courts* <www.nycourts.gov/reporter/motions/2015/2015_83136.htm>.
23. Mot for leave to appeal, *In the Matter of Nonhuman Rights Projects, Inc, on Behalf of Tommy, Appellant, v Patrick C Lavery, Respondents; In the Matter of Nonhuman Rights Project, Inc, on Behalf of Kiko, Appellant, v Carmen Presti, Respondents*, No 2018–268 (NY Ct App 2018), online (pdf): *New York Courts* <www.nycourts.gov/ctapps/Decisions/2018/May18/M2018-268opn18-Decision.pdf> [*Fahey Concurrence*].
24. *Ibid* at 5.
25. *Ibid* at 6.
26. *Ibid.*
27. See *ibid* ("[t]he better approach in my view is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus" at 4).

much like human beings chimpanzees are. Even though the judges, and all of us, especially those who are legally trained, should be able to hear the personhood argument and think about nonhuman entities like ships, rivers, trusts, and corporations, I think an emotional part of the brain kicks in, creating a negative reaction, a kind of outrage factor, 'no, they are not like us'.

In the future, speciesism may come to look no different than the bigotry of racism or sexism. I do not discount that possibility. Justice Fahey, for instance, did call out one of the New York lower court rulings for its speciesism, writing that their "conclusion that a chimpanzee cannot be considered a 'person' and is not entitled to habeas relief is in fact based on nothing more than the premise that a chimpanzee is not a member of the human species".[28]

Human specialness or distinctiveness is a deeply divisive issue, notwithstanding the ascendency of post-humanism and growing awareness of the Anthropocene and the need to fundamentally change how we think about the earth, including our attitudes towards its nonhuman animals. This shift in scientific and moral thinking is fundamentally about recognizing the interconnectedness of life, the devastating extent of the impact of human activity, and ultimately conceptualizing the human as *inside* and part of nature rather than *outside* and superior to everything else in it.[29] As David R Boyd puts it: "Geologists, a group hardly known

28. *Ibid* at 4.

29. See *e.g.* Jedediah Purdy, *After Nature: A Politics for the Anthropocene* (Cambridge: Harvard University Press, 2015) (defining the revolution in ideas that the Anthropocene represents "the end of the division between people and nature" at 3; "[t]he history of environmental imagination shows recurrent aliveness to the ways in which the world is full of consciousness, experience, and pattern that are distinct from ours but, in imperfect ways, available to us. How to behave in relation to the vital opacity of other life and of nonhuman order is one of the basic questions for a politics of the Anthropocene. The world we make expresses our alertness or insensibility to these things, and, in turn, shapes us for greater sensitivity or blunts us into indifference. Imperfect as democracy still is as a human thing, part of its challenge now is to make space, in the imagination and sympathy of people, for the nonhuman world" at 50).

for hyperbole, have named this geological era the Anthropocene because of the scope and scale of human impacts on the Earth".[30] As Fahey J wrote about the "profound and far-reaching"[31] issue of a nonhuman animal's liberty interest: "It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it".[32]

Charlotte Montgomery has written about the ambiguity in thinking about being "only human".[33] On the one hand, "we are able to recognize only ourselves and not ourselves in other species",[34] insisting on our position as the ones who rule the planet. Only humans have this special place, a view associated with anthropocentrism, "the widespread human belief that we are separate from, and superior to, the rest of the natural world".[35] On the other hand, Montgomery asks, might we be able to accept "a different kind of *only*" — in which we "are only one version of life on Earth".[36] 'Only' in this sense connotes a demotion in which we are *merely* human, a move that those who oppose the expansion of animal rights fear.

As the Assistant State Attorney General representing SUNY University in one of the NhRP chimpanzee cases argued, "I worry about the diminishment of these [*habeas corpus*] rights in some way if

30. Boyd, *supra* note 8 at xxii.
31. *Fahey Concurrence*, *supra* note 23 at 7.
32. *Ibid*.
33. See Charlotte Montgomery, *Blood Relations: Animals, Humans, and Politics* (Toronto: Between the Lines, 2000) at 297–98.
34. *Ibid*.
35. See Boyd, *supra* note 8 at xxiii; Montgomery, *supra* note 33 at 298 [emphasis in original].
36. Montgomery, *supra* note 33 at XX.

we expand them beyond human beings".[37] Both Richard Posner and Martha Nussbaum raised the concern in their reviews of Stephen Wise's book *Rattling the Cage: Towards Legal Rights for Animals*[38] that giving nonhuman animals better rights may result in better treatment of those animals or worse treatment of human beings.[39] Nussbaum, who is friendly to the animal agenda in a way that Posner is not, wrote at that

37. Transcript of the Hearing, *The Nonhuman Rights Project, Inc, on behalf of Hercules and Leo v Samuel L Stanley, Jr, MD, as the President of State University of New York at Stony Brook a/k/a Stoney Brook University and State University Of New York At Stony Brook a/k/a Stony Brook University,* No 152736/15 at 51 (NY Sup Ct 6 October 2015), online (pdf): *Nonhuman Rights Project* <www.nonhumanrightsproject.org/wp-content/uploads/2015/06/Transcript-of-5.27.15-Hearing-Hercules-and-Leo.pdf>. See also *Unlocking the Cage*, 2016, DVD (New York City: First Run Features, 2017) at 01h:23m:03s [*Unlocking the Cage*] (Christopher Coulston making the point before Justice Jaffe).

38. Steven M Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Boston: De Capo Press, 2000, 2d 2014).

39. See Richard A Posner, "Animal Rights" (2000) 110:3 Yale Law Journal 527 ("if we fail to maintain a bright line between animals and human beings, we may end up by treating human beings as badly as we treat animals, rather than treating animals as well as we treat (or aspire to treat) human beings" at 535); Martha C Nussbaum, "Animal Rights: The Need for a Theoretical Basis" (2001) 114:5 Harvard Law Review 1506 ("[w]e might treat chimpanzees better, or we might treat humans worse" at 1522).

time that she wants to be able to say that human beings are 'special'.[40]

My thinking here is that, at least for the present time, 'quasi' (especially in relationship to 'person') has the advantage of not setting off this particular fistfight, namely, whether human beings are special or different from other animals such that those differences (linguistics, rationality or some other feature) entitle humans to use those other animals in ways that would amount to cruelty absent customary and legal exemptions for that treatment.

Justice Jaffe relied on a law review article to discuss the idea of 'quasi-person', which suggests she thinks that there is something promising in it.[41] The legal scholar who wrote that article, Saru Matambanadzo, argues that:

> In threshold disputes concerning the recognition of novel classes of legal persons…those individuals and entities whose existence mirrors that of an embodied human being should be treated to a presumption of legal recognition…that accords them *at least* the status of quasi-personhood.[42]

Her proposal takes nonhuman mammals out of being considered property; however, other animals, who do not give birth to live young, would still be considered property.[43] In other words, property would still

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40. See Nussbaum, *ibid* at 1521. But see Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge: Harvard University Press, 2009) 325 (writing that "there seems to be no good reason why existing mechanisms of basic justice, entitlement, and law cannot be extended across the species barrier" at 326; stating that because "[a]ll of our ethical life involves…an element of projection… It does not seem impossible for the sympathetic imagination to cross the species barrier" at 354–55 (quoted in Jessica Eisen, "Animals in the Constitutional State" (2017) 15:4 International Journal of Constitutional Law 909 at 952) [Eisen, "Animals in the Constitutional State"]). This chapter of *Frontiers of Justice* is a revised version of Martha C Nussbaum, "Beyond 'Compassion and Humanity'": Justice for Nonhuman Animals" in Sunstein & Nussbaum, *supra* note 4, ch 14, first published in 2004).
41. See Matambanadzo, *supra* note 16 ("[a]nimals occupy the status of quasi-persons, being recognized as holding some rights and protections but not others" at 61); See *Jaffe Decision*, *supra* note 17 at 25.
42. Matambanadzo, *ibid* at 76 [emphasis in original].
43. See *ibid* at 82.

be considered appropriate for some animals, even if that property status is not inconsistent with the animal having some rights, similar to the current legal treatment of pets or companion animals, for whom there are limited rights against willful cruelty or neglect or who may be the subject of pet trusts (*e.g.* in New York) or be thought of as belonging to guardians rather than owners in some jurisdictions (*e.g.* Rhode Island).[44]

'Quasi' is something lawyers resort to when referring to legal phenomena that are between (often overly) rigid categories. We have the category of quasi contract, the not-quite-contract, which turned into the law of unjust enrichment or restitution, which does not require a promise and is not based on intention.[45] There are quasi-judicial bodies like the National Labour Relations Board and quasi-legislative agencies such as the Interstate Commerce Commission.[46] There are many other legal concepts such as 'quasi admission' (usually an extra-judicial utterance creating an inconsistency with entered evidence); 'quasi estoppel' (where there has been legitimate reliance, a person may not assert a claim inconsistent with a claim previously taken); and 'quasi in rem jurisdiction' (a personal action based on a party's interest in property within the jurisdiction of the court).[47] The famous property case by the United States Supreme Court *International News Service v Associated Press*[48] invoked the idea of 'quasi-

44. See *ibid* at 61–62. See *Jaffe Decision*, *supra* note 17 at 25 (Justice Jaffe discusses pet trusts in New York). On pet trusts in Canada, see Lesli Bisgould, *Animals and the Law* (Toronto: Irwin Law, 2011) at 157–60 [Bisgould, *Animals and the Law*]. On guardianship, see Susan J Hankin, "Making Decisions about Our Animals' Health Care: Does it Matter Whether We are Owners or Guardians" (2009) 2:1 Stanford Journal Animal Law & Policy 1 [Hankin, "Making Decisions"].
45. Henry Campbell Black, ed, *Black's Law Dictionary*, 6d (New York: Springer Publishing, 1994) sub verbo "quasi contract" [*Black's*].
46. Both of these American examples provided in *Webster's*, *supra* note 16, sub verbo "quasi-judicial" and "quasi-legislative".
47. *Black's*, *supra* note 45, sub verbo "quasi admission", "quasi estoppel", "quasi in rem jurisdiction", "quasi-public corporation", "quasi-traditio". The entry sub verbo "quasi" lists twenty-three other instances of use in legal doctrines that include quasi-corporation, quasi-delict, quasi-crime, quasi-tort, quasi-trustee, and quasi-usufruct.
48. 248 US 215 (1918).

property' to characterize a valuable interest, *i.e.* the news, intangible yet deserving of protection. And, 'quasi', this paper will argue, is the term that best captures what we are talking about with nonhuman animals, who are importantly different from inanimate property, but it would not be appropriate for them to have the full rights of human persons. As *Black's Law Dictionary* puts it, 'quasi' is a term "used to mark a resemblance"[49] *but it also* "supposes a difference".[50]

This route would be a way of securing for nonhuman animals (some of) the rights of persons and validating the (admittedly weak) ones they already have while leaving intact their current legal categorization as property, recognizing and emphasizing that they are a nuanced form of property that triggers duties and responsibilities in the humans who own them or come into contact with them. This approach has the virtue of working with existing and familiar legal categories in a way that is true to their inherent flexibility, rejecting the binary black and white thinking that has plagued much of the recent history of animal law.

II. Other Dichotomies — Welfare versus Rights & Pure versus Impure

Closely related to the black and white thinking of property versus persons is the dichotomy between animal welfare versus animal rights. These two ideologies arose at different times and have very different contexts, roughly speaking, the 1860s and 1870s in the United States (the 1820s

49. *Black's*, *supra* note 45, sub verbo "quasi".
50. *Ibid*.

in England) versus the 1960s and 1970s hippie or peace movements.[51]

The opposition between those approaches — improving existing conditions (welfare) and rejecting any use of animals (rights) has created and continues to create much division amongst those who want a better situation for nonhuman animals.[52] Gary Francione stands out on this point, going as far as objecting to welfare-based initiatives. Francione explained in the introduction to the second issue of *Animal Law* in 1996, after he wrote both *Animals, Property, and the Law*[53] and *Rain Without*

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51. Hilda Kean, *Animal Rights: Political and Social Change in Britain since 1800* (London: Reaktion Books, 1998). See Richard D Ryder, *Animal Revolution: Changing Attitudes Towards Speciesism* (Oxford: Bloomsbury Academic, 1989) at 59–60 [Ryder, *Animal Revolution*] (Ryder suggests that the humane movement flourished in England because the English were the worst in Europe to animals; he also points out that unlike other social movements where Europe followed the United States (*e.g.* the women's movement and the Civil Rights movement), the United States followed England on animal rights at 4; this was also true of the earlier movement of animal welfare). See David Favre & Vivien Tsang, "The Development of Anti-Cruelty Laws During the 1800's" (1993) 1:1 Detroit College Law Review 1 (Favre & Tsang write that "[t]he British set the stage" at 1; they explain that New Yorker Henry Bergh visited England, learned about the RSPCA, and successfully approached the New York legislator for a charter for the ASPCA in 1866 (at 13)). See Elaine L Hughes & Christiane Meyer, "Animal Welfare in Canada and Europe" (2000) 6:1 Animal Law 23 at 26 (the earliest SPCA organized in Canada was in Montreal in 1869, the same year as the first Canada-wide anti-cruelty provision, although apparently Nova Scotia was the first to pass an animal cruelty statute in North America in 1822 with New York following in 1828).

52. Lesli Bisgould, "Animal Oppression and the Pragmatist" (1997) 3:1 Animal Law 39 (Canadian animal lawyer Lesli Bisgould, described the conflict between advocates for rights and those for welfare as a "pernicious" one in 1997, "where disagreement is the rule rather than the exception" and animal rights movement as "in a stage of well-acknowledged and lamented in-fighting, which occurs both among and between groups" at abstract, 40).

53. Gary L Francione, *Animals, Property, and the Law* (Philadelphia: Temple University Press, 1995) at 122 [Francione, *Animals, Property, and the Law*].

Thunder.[54] His position is based on his view that there is no evidence that anti-cruelty laws lead to the abolition of animal abuse and instead reassure society that exploited animals are treated well and there is no cause for concern.[55]

The book Francione co-authored with Anna Charlton in 2015, *Animal Rights: The Abolitionist Approach*, a short manifesto, contains a sustained attack on welfare reforms and 'single issue campaigns',[56] which they call "SICs". These include anti-fur campaigns, lobbying to end the force feeding of geese or ducks to make foie gras from their livers, pushing to ban gestational crates for pigs, and requiring larger cages for laying hens.[57] Francione and Charlton write:

> For the most part, SICs encourage people to consume *other* animal products or engage in *other* forms of animal exploitation. If people stop eating *foie gras*, they may help the geese used to make *foie gras* but they will not help the cows, pigs, chickens, and fish that people consume when they don't consume *foie gras*. When people stop wearing fur, they may help the animals who are used to make fur coats. They do not help the sheep, cows, and other animals used to make the products that people buy when they don't buy fur.[58]

As one of the flashing banners on The Abolitionism Project website puts it: "Animal Welfare Reforms Are Not Baby Steps; They Are Big Steps in

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54. Gary L Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Philadelphia: Temple University Press, 1996) [Francione, *Rain Without Thunder*].
55. See Gary L Francione, "Animals as Property, Introduction" (1996) 2:1 Animal Law i at v [Francione, "Animals as Property"].
56. See Gary L Francione & Anna Charlton, *Animal Rights: The Abolitionist Approach* (Exempla Press, 2015) ("Principle Two: Abolitionists maintain that our recognition of this one basic right [of a nonhuman animal to be a moral person and not a thing] means that we must abolish, and not merely regulate, institutionalized animal exploitation, and that abolitionists should not support welfare reform campaigns or single-issue campaigns" at 31).
57. *Ibid.*
58. *Ibid* at 62 [emphasis in original].

a Backward Direction".[59]

An important problem with the purist or absolutist view is that many people who care about nonhuman animals do not divide neatly between welfare and rights in terms of their thinking and practical interventions (nor do they think much I suspect about whether their position is utilitarian or deontological). One must wonder if the effort parsing utilitarian (welfare) versus deontological (rights and inherent value) is the best way to focus one's energy.[60] As Richard Ryder pointed out when he wrote *Animal Revolution: Changing Attitudes Towards Speciesism* in 1993, "animal liberation is possibly unique among the liberation movements in the extent to which it has been led and inspired by professional philosophers".[61] That might be a good or a bad thing. Both rights and welfare are intermingled in current-day concerns about the treatment of non-human animals. For example, advocates routinely speak of rights (as well as justice) when referring to improvements. And consequences are important even if they are not everything. Changing the conversation is difficult to do because welfare versus rights comes up in very practical ways (even if people are not thinking explicitly in those terms).

Francione has called law and the legal systems of most Western nations the "primary culprits"[62] in facilitating the exploitation of nonhuman animals. And he thinks that it is "folly" to look to the legal system to lead the way in eradicating the property status of nonhuman

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59. See "Animal Rights: The Abolitionist Approach" (2018), online: *Abolitionist Approach* <www.abolitionistapproach.com/>. The comment also appears in *ibid* at 67. See also Gary L Francione & Robert Garner, *The Animal Rights Debate: Abolition or Regulation* (New York: Columbia University Press, 2010).

60. See *e.g.* Gary L Francione, "Rights Theory and Utilitarianism: Relative Normative Guidance" (1997) 3:1 Animal Law 76 [Francione, "Rights Theory and Utilitarianism"] (attacking Peter Singer's utilitarianism).

61. Ryder, *Animal Revolution*, *supra* note 51 at 6. See Bernard Williams, *Ethics and the Limits of Philosophy* (Oxford: Routledge, 1993) (Williams wrote persuasively about the problems with using just one of the frames, utilitarian or deontological, for ethical problems generally, what he called the limits of philosophy).

62. See Francione, "Animals as Property", *supra* note 55 at ii.

animals because neither the common law nor legislated law will ever view animals as having "non-tradeable" interests.[63] When the leader of an animal rights organization rejects the all-or-nothing approach of abolition ("[i]f you push for all or nothing, what you get is nothing"[64]), Francione dismisses this as "new welfarism".[65] Yet many animal lawyers are (sensibly I think) not willing to walk away from law as a strategy that they can use to challenge that belief system, which like any entrenched belief system is strong but not impenetrable to change. Cass Sunstein has stated that he thinks Francione draws too sharp a distinction between rights and welfare.[66]

Related to welfarism and rights is a disagreement as to whether initiatives must protect animals for their own sake or whether it is acceptable for initiatives to line up with human interests. Satz calls projects that protect animals in a way that lines up with human interests examples of "interest convergence", [67] a term borrowed from Derrick Bell who used it in the context of race theory to describe situations where the dominant group protects the interests of the subordinate group only when their interests happen to align.[68] This is not ideal. Satz calls it

63. *Ibid* at iv–v.
64. See Francione, "Rights Theory and Utilitarianism", *supra* note 60 at 76 (quoting Henry Spira of Animal Rights International). See Francione, *Rain Without Thunder*, *supra* note 54 at 3 (Francione argues that the long and short-term goals of new welfarism hopelessly conflict). For a more recent statement, see Francione & Charlton, *supra* note 56 ("[v]irtually the entire animal 'movement', as represented by the large new welfarist organization, disagrees with me about the structural problems with animal welfare reform and the need for an abolitionist vegan baseline" at 142; setting out disagreements with animal rights organizations at 82–93).
65. *Ibid*.
66. Cass R Sunstein, "Standing for Animals (With Notes on Animal Rights)" (2000) 47:5 University of California Los Angeles Law Review 1333 at 1335, n 9, 364 [Sunstein, "Standing for Animals"].
67. Satz, *supra* note 1 at 68–69.
68. Derrick A Bell Jr, "*Brown v. Board of Education* and the Interest-Convergence Dilemma" (1980) 93:3 Harvard Law Review 518.

"legal gerrymandering for human interest".[69] Yet convergence continues to be important in terms of achieving practical and real improvements, raising awareness and motivating people, specifically building resilience in animal advocates, who have thought about the trade-off and need to take wins where they can find them or risk taking home nothing rather than something.

Animal law legal scholar Taimie Bryant has argued that a convergence between human and nonhuman animal interests is not necessarily a bad thing. She provides two examples. First, wildlife corridors that might well be primarily motivated by the desire to reduce human automobile collisions with nonhuman animals.[70] And, secondly, legislation to protect animals against species extinction motivated by human interest in the animal or their environment rather than preservation of the animals as individuals seen as having individual moral worth.[71] Bryant's argument is that animal protection is reinforced even if those initiatives were not motivated primarily by the desire to protect animals for their own sake. She writes "it is not true that *only* actions undertaken explicitly to protect animals can reinforce such norms [of animal protection]".[72]

Another example of 'interest convergence' can be found in scholarship on the connection between human-to-human abuse and nonhuman animal abuse. This topic was a mainstay in the first decade or so of

69. Satz, *supra* note 1 at 70. See Francione, *Animals, Property, and the Law*, *supra* note 53 at 122 (Francione described a similar contrast in terms of direct duties (owed directly to the animal) versus indirect duties (that concern more than the animal).
70. Taimie L Bryant, "Similarity or Difference as a Basis for Justice: Must Animals Be like Humans to Be Legally Protected from Humans" (2007) 70:1 Law and Contemporary Problems 207 at 243–47 [Bryant, "Similarity or Difference"].
71. *Ibid* at 242–43.
72. *Ibid* at 243 [emphasis in original].

the American journal *Animal Law*.[73] The American group "Link"was established in 2001 and it is now the "National Link Coalition".[74] Director of the Oxford Centre for Animal Ethics, Andrew Linzey, published an edited collection on the topic in 2009.[75] By 2010, writing and resources on this issue (books, articles, and websites) warranted the appearance of an annotated bibliography.[76]

Director of the Islamic Legal Studies and Animal Law and Policy Programs at Harvard Law School, Kristen Stilt, has written about the role that the link between cruelty towards animals and domestic violence played in the successful efforts of local animal advocates to have a Quran-based "kind treatment of animals"[77] provision included in the 2014 Egyptian Constitution. The correspondence between animal abuse and human abuse was also invoked in Canadian debate in the late 1990s around changes to the *Criminal Code*[78] provisions dealing with offences against animals and one of the many (unsuccessful) attempts to move animals out of a property section of the Statute and in later legislative discussion of proposed changes to the Ontario anti-cruelty legislation.[79]

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73. See *e.g.* Charlotte A Lacroix, "Another Weapon for Combatting Family Violence: Prevention of Animal Abuse" (1998) 4:1 Animal Law 1; Randall Lockwood, "Animal Cruelty and Violence Against Humans: Making the Connection" (1999) 5:1 Animal Law 81; Joseph G Sauder, "Enacting and Enforcing Felony Animal Cruelty Law to Prevent Violence against Humans" (2000) 6:1 Animal Law 1; Caroline Forell, "Using *A Jury of her Peers* to Teach about the Connection between Domestic Violence and Animal Abuse" (2008) 15:1 Animal Law 53.
74. See "Home" (2018), online: *National Link Coalition* <nationallinkcoalition.org/>.
75. See *The Link Between Animal Abuse and Human Violence*, ed by Andrew Linzey (East Sussex: Sussex Academic Press, 2009).
76. See Sharon L Nelson, "The Connection between Animal Abuse and Family Violence: A Selected Annotated Bibliography" (2010) 17:2 Animal Law 369.
77. Kristen A Stilt, "Constitutional Innovation and Animal Protection in Egypt" (2018) 43:4 Law and Social Inquiry 1364.
78. *Criminal Code,* RSC 1985, c C-46 [*Criminal Code*].
79. *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO, c 0-36 (1990) [*Ontario SPCA Act*].

Charlotte Montgomery describes how animal activists in the late 1990s campaigned for changes to the criminal law by stressing the link between animal cruelty and domestic abuse of humans and that "this theme – histories of violent criminals repeatedly showed a background of animal abuse – was credited with pushing the Justice Department into its discussion paper"[80] and into proposing changes to the law in the fall of 1998. The summer of 1999 saw a series of very public incidents in Ontario of dogs sustaining terrible injuries as a result of being dragged behind their owners' cars. Public opinion was galvanized when it became known that one of the men who did this would have his dog returned to him if he was willing to pay the high vet bills.[81] While the amendments to the *Criminal Code* did not pass, the government's discussion paper has been cited authoritatively in subsequent case law involving animal protection.[82] And members of the Ontario legislature invoked the link between human and animal abuse in legislative debate in 2008 over amendments to the *Ontario SPCA Act*.[83]

The connection between human-to-human and human-to-nonhuman animal abuse has come under increasing scrutiny from feminist literatures on domestic violence, as well as those critical of what Justin Marceau calls "carceral animal law".[84] Marceau argues that we should move away from the 'link' for purposes of policy and law-making

80. See Montgomery, *supra* note 33 at 225; Canada, Department of Justice, *Crimes Against Animals: A Consultation Paper* (Book) (Ottawa: Department of Justice, 1998).
81. Montgomery, *ibid* at 225.
82. See *e.g. R v White*, [2012] 326 Nfld & PEIR 225 (PC) at para 9.
83. See *e.g.* Ontario, Legislative Assembly, *Official Reports of Debates (Hansard)*, 39th Parl, 1st Sess, (5 May 2008) (MPP (Brant) Dave Lavac, speaking of individuals who harm animals — "and research tells us the next step is people" at 1586; and MPP (Dufferin-Caledon) Sylvia Jones who said "if an individual is inclined to abuse their animal, they are more likely to abuse their spouse or child" at 1589) as cited in *Bogearts v AG Ontario* [2013] Court File No 749–13 (ONSC) at para 164 [*Bogearts* (Applicant Factum)].
84. See Justin Marceau's piece in this issue and his book *Beyond Cages: Animal Law and Criminal Punishment* (Cambridge: Cambridge University Press, 2019).

given what we know about tough-on-crime initiatives (offender registries, mandatory arrests, harsher sentences) and the resulting social injustices and ineffectiveness of such approaches. Marceau argues that the "Link" research has not just been oversold; it is deliberately misleading because it is not true that a person who hurts animals will hurt humans. Even if individuals who harm animals or set fires, or set fire to animals, are reliable red flags to social workers and others who work in the criminal justice system, Marceau argues that putting people who do those things in jail does not solve the problem. Incarceration will strip an individual of empathy rather than building it up and so it will not break a chain of violence in much the same way that imprisoning those who commit domestic abuse often makes a bad situation worse. He also points out that in the area of American animal law state legislatures explicitly traded agricultural farming exemptions for felony laws for animal cruelty and so the history of those harsher laws is sordid indeed.[85]

Notwithstanding, the "Link" example shows just how prone we are to 'interest convergence' when it comes to nonhuman animals and concerns on the human agenda and these are the issues that have some chance of being legislatively addressed. The idea that cruelty to animals is bad because that cruelty hurts us (de-sensitizes us, leads to a loss of empathy, habituates cruelty and leads to its denial), found its classic

85. Justin Marceau, "Against Animal Carceral Law" (Fifth Annual Oxford Animal Ethics Summer School on Animal Ethics and Law: Creating Positive Change for Animals delivered at St Stephen's House, University of Oxford, 24 July 2018) [unpublished]. See *e.g.* Mary Louise Peterson & David P Farrington, "Types of Cruelty: Animals and Childhood Cruelty, Domestic Violence, Child and Elder Abuse" in Linzey, *supra* note 75 (concluding that "the existing research is methodologically poor" and "tends to be based on small, unrepresentative samples, with no or poor sample controls, and it relies on retrospective accounts which may be biased by knowledge of more recent events" at 30); Jack Levin & Arnold Arluke, "Reducing the Link's False Positive Problem" in Linzey, *supra* note 75 at 164 (acknowledging in other words that there is a false positive problem, namely that many people who harm animals do not go on to harm humans).

expression in Lord Erskine's *Cruelty to Animals Bill* in 1809.[86] It has in fact been a mainstay long before this and ever since. Mary Midgley summarizes this view by saying that "it is only because cruelty to animals may lead to cruelty to humans, or degrade us, or be a sign of a bad moral character, that we have to avoid it".[87] It is not the most inspiring message. As Montgomery put it in relationship to the Canadian experience in the late 1990s: "It was as if there had to be something in this for humans".[88]

It is certainly possible to take the purist/Francione view — only initiatives with purely animal-based interests, only rights, and only persons, no property. Yet one must wonder if *contra* Francione perfection is the enemy of the good. As Favre has put it, "[i]t is a burden of the animal rights movement that so many of its leaders will support only the purest philosophical position, regardless of political feasibility".[89]

Francione would say that any association with property is a mistake, especially in an American context where property is constitutionalized under the Fifth Amendment.[90] That known quantity is irredeemably corrupted and impure or compromised. Think of Audre Lorde's famous claim that the master's tools will never dismantle the master's house.[91]

I think for lawyers the tools are the lawyer's tools; but they can be refitted and repurposed. This is especially true in Canada where property

86. See Andrew Linzey, "Does Animal Abuse Really Benefit Us?" in Linzey, *supra* note 75 at 1 (quoting from the preamble to the Bill, cited to Lord Erskine, Second Reading of the Bill for Preventing Malicious and Wanton Cruelty to Animals, Hansard, House of Lords (May 15, 1809) at 277).
87. Mary Midgely "Persons and Non-Persons" in Singer, *In Defense of Animals*, *supra* note 16 at 57 (in the context of discussing Kant's view of nonhuman animals).
88. Montgomery, *supra* note 33 at 225.
89. David Favre, "A New Property Status for Animals" in Sunstein & Nussbaum, *supra* note 4, ch 10 at 236.
90. See Francione, *Animals, Property, and the Law, supra* note 53 at 46–48 (on property and the American Constitution).
91. Audre Lorde, "The Master's Tools Will Never Dismantle the Master's House" in Cherrie Moraga & Gloria Anzaldúa, eds, *This Bridge Called My Back* (New York: Third Woman Press, 1983) reprinted in Reina Lewis & Sara Mills, eds, *Feminist Postcolonial Theory: A Reader* (New York: Routledge, 2003) at 25.

is not explicitly part of our constitutionally protected liberty.[92] Depriving a person who is treating an animal inappropriately of their 'property' does not sound in the same register it does in the United States.[93] When Canadians are thinking about the constitution, American-style original intent bends to the idea of the constitution as a 'living tree,' an idea (appropriately enough) introduced in Canadian constitutional law in 'the Persons case,'[94] which gave women the right to sit in the Canadian senate. Flexibility, growth, a pragmatic balancing approach to rights has characterized Canadian jurisprudence since the 1980s, including our rules on standing as these might apply to nonhuman animals and their human representatives. Chief Justice Catherine Fraser of the Court of Appeal of Alberta wrote the following, in a footnote in her dissent, in *Reece v City of Edmonton*,[95] a case brought on behalf of an elephant named Lucy in the Edmonton Zoo: "[I]t arguably remains an open question whether the common law has now evolved to the point where, depending on the circumstances, an animal might be able to sue through its litigation

92. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982 [*Charter*] (Section 7 protects life, liberty, and security of the person except where this is incompatible with the principles of fundamental justice).

93. But see Bisgould, *Animals and the Law*, *supra* note 44 at 49 (pointing out that the property arguments are nonetheless analogous in Canada and adding that property comes in at another level because most harm to animals is happens on private property).

94. See *Edwards v Canada (AG)* [1930] AC 124 (UK PC); Robert J Sharpe & Patricia I McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: University Toronto Press, 2007).

95. *Reece v Edmonton (City),* 2011 ABCA 238 [*Reece*].

representatives to protect itself".[96]

There have been so many attempts to amend the cruelty provisions of the Canadian *Criminal Code*, they are difficult to count. The provisions have not been successfully amended since the 1950s and really have not changed appreciably since 1892, with the exception of dramatic changes in sentencing in 2008 from the previously available six months summary conviction.[97] A ten-fold increase in the available penalties has been taken as a signal of Parliament acknowledging that "the *Criminal Code* provisions concerning cruelty to animals had fallen drastically out of step with current social values".[98]

Canadian animal rights advocate and animal law scholar Lesli Bisgould counts thirteen attempts to modernize the provisions between

96. See *ibid* at para 179, n 143. See Leah Edgerton of Animal Charity Evaluators "What is the Most Effective Way to Advocate Legally for Nonhuman Animals" (29 August 2016), online: *Animal Charity Evaluators* <animalcharityevaluators.org/blog/what-is-the-most-effective-way-to-advocate-legally-for-nonhuman-animals/> [Wise, Deckha, Pippus Debate] (Edgerton posted a debate between Steven Wise, Maneesha Deckha, and Anna Pippus; Anna Pippus of Animal Justice Canada notes since the *Reece* case the Supreme Court of Canada has expanded its concept of standing in *Canada (AG) v Downtown Eastside Sex Workers United Against Violence*, 2012 SCC 45).

97. See Bisgould, *Animals and the Law*, *supra* note 44 at 58, 68, 282. The change in 2008 was from summary convictions to hybrid offences, which can include imprisonment as an indictable offence (the Canadian equivalent of an American felony offence) up to five years and a fine up to $10,000, and/or up to eighteenth months imprisonment as a summary conviction).

98. *R v Munroe*, 2010 ONCJ 226 at paras 1–2. See Bisgould, *Animals and the Law*, *supra* note 44 at 66 (Bisgould notes that the amendments were passed over widespread public objection because there was not much point increasing penalties for crimes for which few were ever convicted).

1999 and 2011.[99] The most recent, Bill C-246 *The Modernizing Animal Protection Act*[100] a private member's bill introduced by Liberal MP Nathaniel Erskine Smith, failed in 2016 when Liberal party leader Prime Minister Justin Trudeau failed to support it.[101]

Section 445.1 of the Canadian *Criminal Code*, which contains the animal cruelty provisions, are in a section entitled "Wilful and Forbidden Acts in Respect of Certain Property".[102] Moving them out of this section has come to be seen as very important to animal activists, who want to see the link between nonhuman animals and property broken. However, Canadian animal use industries (including agriculture, hunting and fishing groups, and fur groups) lobby hard against making this proposed change every time it is made given how significant they also see the continued connection to property to be.[103] In other words, it is a serious sticking point, even a lightning rod issue, which both sides see as a game changer. We might do well here to look at what the experience has been delinking property and nonhuman animals in other jurisdictions.

Spain, for example, has seen a very successful recent campaign around 'animals are not things' (*animales non cosas*).[104] Countries like

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99. See Bisgould, *ibid* at 58, 87–91 (reviewing some of the thirteen attempts). See also Christina G Skibinsky, "Changes in Store for the Livestock Industry? Canada's Recurring Proposed Animal Cruelty Amendments" (2005) 68:1 Saskatchewan Law Review 173 (giving what turned out to be an overly optimistic forecast of Bill C-22 in 2004 and explaining that it was the fourth attempt to amend the provisions in four years).
100. Bill C-246, *Modernizing Animal Protections Act*, 1st Sess, 44nd Parl, 2015 (Bill defeated on 5 October 2016).
101. See Ryan Maloney, "Nathaniel Erskine-Smith's Animal Cruelty Bill Defeated" (6 October 2016), online: *The Huffington Post Canada* <www.huffingtonpost.ca/2016/10/06/nathaniel-erskine-smith-animal-cruelty-bill-c-246_n_12371614.html>.
102. *Criminal Code*, *supra* note 78, s 445.1.
103. See Bisgould, *Animals and the Law, supra* note 44 at 94–96.
104. Teresa Giménez-Candela & Nuria Menéndez, "The Changing Legal Paradigm for Animals in Spain: From Things to Sentient Beings" (Fifth Annual Oxford Animal Ethics Summer School on Animal Ethics and Law: Creating Positive Change for Animals delivered at St Stephen's House, University of Oxford, 24 July 2018) [unpublished].

Portugal and Columbia have adopted sentient statutes since France used the language of "living beings endowed with sensibility"[105] in their Civil Code in 2015. 2015 also saw Quebec and New Zealand recognizing the sentience of nonhuman animals.[106] Switzerland uses a dignity concept in relation to nonhuman animals in its Constitution (and India has the dignity concept in its jurisprudence).[107] Germany, Switzerland, and Austria (all of which protect animal welfare in their constitutions) have

105. *Ibid*. See also "Animals in France Finally Recognized as 'Living Sentient Beings'" (29 January 2015), online: *Russian Times* <www.rt.com/news/227431-animals-sentient-furniture-parliament/>.

106. See *e.g.* Sophie McIntyre, "Animals are Now Legally Recognized as 'Sentient' Beings in New Zealand" (17 May 2015), online: *Independent* <www.independent.co.uk/news/world/australasia/animals-are-now-legally-recognised-as-sentient-beings-in-new-zealand-10256006.html>. In Quebec, Agriculture Minister Pierre Paradis said he was inspired by the French law. See Boyd, *supra* note 8 at 29.

107. See Jessica Eisen & Kristen Stilt, "Protection and Status of Animals" in Rainer Grote, Frauke Lachenmann & Rüdiger Wolfrum, eds, *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford: Oxford University Press, 2017) at paras 31–32 (Switzerland), 17, 70 (India), online: <oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e71?prd=MPECCOL>.

also included a 'not things' provision in their Civil Codes.[108] Nonhuman animals continue to be treated as property in these jurisdictions. What is happening is probably best understood as social and legal (specifically legislative) expressions of the idea, which finds widespread and popular support given the attachment people have to their pets, namely, that animals are not *merely* things. They have sentience, they have dignity even as they continue to be treated as property. Yet they should not be treated *as if* they are mere property. As Fahey J put it in the closing words of his concurrence: "While it may be arguable that a chimpanzee is not a 'person', there is no doubt that it is not *merely* a thing".[109]

Many advocates will say they cannot live with the continued connection to property, as the pitched Canadian debates over the *Criminal Code* section placement routinely demonstrate. However, if reforms that break the link to property (in a similarly symbolic way) have not really managed to avoid a continued property status for nonhuman animals, should there not be some continued recognition of that fact in

108. See *ibid* at paras 18–25 (Germany), 26–35 (Switzerland), 42–45 (Austria). See also Gieri Bolliger, "Legal Protection of Animal Dignity in Switzerland: Status Quo and Future Perspectives" (2016) 22:2 Animal Law 311 [Bolliger, "Legal Protection"] (explaining that the Swiss Civil Code was amended in 2003 to explicitly state "animals are not objects" but stating that they are still subject to the provisions pertaining to objects when no "special provisions" exists, *i.e.* animal welfare legislation (at 359); Austria's amendment happened in 1988 — "[a]nimals are not things; they are protected by special laws. The provisions in force for things… apply to animals only if no contrary regulation exists" (at 359); Germany's happened in 1990 — "[a]nimals are not things. They are protected by special statutes. They are governed by the provisions that apply to things, with the necessary modifications, except insofar as they are modified otherwise" at 359–60, n 356). The Quebec *Civil Code* adopted in 2015, strikes a similar compromise ("[a]nimals are not things. They are sentient beings and have biological needs" at Art 898.1 CCQ; however, the article goes on to state that the provisions of the *Civil Code* and any other act concerning property nonetheless apply to animals, in addition to the provisions of special acts. It also must be noted that the article appears in the book on Property). See French and English, online: *Espace CAIJ* <elois.caij.qc.ca/CCQ-1991/article898.1>.

109. *Fahey Concurrence*, *supra* note 23 at 7 [emphasis in original].

the way that we refer to the status of nonhuman animals? Would 'living property' or 'quasi-property' be better to use as a reminder of the reality that the property status has not really changed unless or until it does in fact change?[110] Do we not need some kind of conception of property in order to establish a relationship of connection and responsibility or obligation to a domesticated animal? Or would it be better to trade in ownership for a notion like guardian?[111]

The worry with sentience statutes or successful campaigns to break the explicit link to property is that people think they have accomplished something significant for nonhuman animals but everything actually stays exactly the same.[112] Nothing really follows from the recognition that animals feel pleasure and pain, which is probably why legislatures feel comfortable giving a declaration of sentience. Peter Singer's

110. 'Living' does not work very well for religiously or environmentally significant objects or for sophisticated artificial intelligence systems, which would be living in metaphor only, as in full of life or meaning or significance (either to themselves or human groups) in a way that distinguishes them from inert objects. Quasi-property/Quasi-personhood would leave open the possibility of including those kind of entities if it comes to be thought that they should be legally protected as a kind of person (*i.e.* an entity with legally protectable interests).

111. See Favre, *Animal Law*, *supra* note 16 ("it is not clear to this author that a paramount interest of animals is to not be the property of human beings. For what is the alternative for their continued existence within our community… It will be in the interest of animals for humans to acknowledge that unlike other personal property, an owner of an animal has a legal obligation to the animal, thus creating a relationship closer to the nature of a guardianship" at 417).

112. Switzerland has probably gone the furthest here, recognizing the dignity of animals in their Constitution, explicitly adopting that animals are 'not things' in the *Civil Code*, and moving beyond the parameters of pain and sentience ("pathocentric") considerations to include the "biocentric," e,g, disrespectful or humiliating treatment of living and dead animals, which violates their inherent worth. See Bolliger, "Legal Protection", *supra* note 108 at 354–55. Despite all this, Bolliger writes that "no essential change in the human-animal relationship has been observed in practice" at 314.

enormously influential *Animal Liberation*[113] focused on sentience and suffering following Jeremy Bentham's famous observation that what is important about animals is not whether they can reason or speak but that they suffer.[114] Bryant points out that a focus on suffering carries a negative association that can either invoke compassion or disdain.[115] Indigenous perspectives in which nonhuman animals figure as powerful actors arguably command more respect.[116] Dignity would imply certain treatments would become illegal; but it does not itself make them so. And worse, legislatures now think they have dealt with 'the animal issue' and whatever limited attention there was evaporates along with a feeling that the work is done. Jessica Eisen and Kristen Stilt note with regard to animal protections at a constitutional level that countries with some

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113. Peter Singer, *Animal Liberation: A New Ethics for our Treatment of Animals* (New York: Random House, 1975).

114. See Bisgould, *Animals and the Law*, *supra* note 44 at 25–26 (placing Bentham's famous quote in context).

115. See *e.g.* Bryant, "Similarity or Difference", *supra* note 70 (pointing out that using the capacity to suffer runs "the risk of provoking disdain, since the capacity to suffer is a quality that many see as a source of weakness in themselves or in humans generally" at 222).

116. See *e.g.* John Borrows (Kegedonce), *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) at 40–41 (describing animals in his family scrolls as the otter, snakes, water lion, bear, and thunderbird); John Borrows, "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill Law Journal 795 at 827–28 (describing some Anishinaabe heroes such as the turtle who gave his back to house the earth and the muskrat who sacrificed himself to bring up soil to lodge on the turtle's back; referring to heroic deeds by eagles, cranes, robins, seagulls, woodpeckers and other birds at 830); Struthers Montford & Taylor, *supra* note 8 at 13–16 (describing Indigenous perspectives on nonhuman animals as kin, as person, not object, who speak, are able to change into humans, marry and have children with humans and are powerful and deserve respect); Heidi (Kiiwetinepinesiik) Stark, "Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada" (2010) 34:2 American Indian Culture and Research Journal 145 at 145–47, 157 (explaining the story of *The Woman Who Married a Beaver* and how it applies to treaty-making).

of the strongest *de facto* legal animal protections have no constitutional animal protection provision (Chile and the Netherlands); while Egypt, which does have constitutional protection has some of the weakest *de facto* protections.[117]

Canada is light years behind the European Union in terms of animal welfare and is generally lumped in with the United States in terms of its approach to nonhuman animals, specifically on the tendency to defer to industry practice for farm animals.[118] According to one source:

> As a generalization, existing Canadian law tends to place relatively heavy weight on human proprietary and economic interests, and the convenience of generally accepted practices. In Europe (especially in more recent times) the law tends to put greater weight on maintaining animal health and welfare

117. See Eisen & Stilt, *supra* note 107 at para 8.

118. See *e.g.* David J Wolfson & Mariann Sullivan, "Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable" in Sunstein & Nussbaum, *supra* note 4 (quoting from the Israeli Supreme Court "[o]ne tendency, dominant in the US and Canada, is to exempt accepted farming practices from the applicability of cruelty to animals" at 223).

per se.[119]

Unlike the United States, Canada has no equivalent of the federal *Animal Welfare Act*.[120] Federal criminal law is the only prosecutorial force operating in many provinces, specifically the most populated provinces of Ontario and Quebec.[121] The *Ontario SPCA Act* [122] sets out no cruelty offences, so officers can move in to alleviate distress but cannot prosecute.[123] With the exception of British Columbia, which has a special prosecutor for animals, animal cases, which may be diligently prepared by the Society for the Prevention of Cruelty to Animals ("SPCA") officers, are sent to the regular prosecutor, for whom nonhuman cases are

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119. See Hughes & Meyer, *supra* note 51 at 48. See also Elaine Hughes, *Animal Welfare Law in a Canadian Context* (Edmonton: University of Alberta Faculty of Law, 2006). Montgomery is more openly critical than Hughes. See *e.g.* Montgomery, *supra* note 33 (describing the Canadian Council on Animal Welfare, which is not subject to Federal access to information law as "a public relations ploy", and the Animal Care Committees used to regulate animal research, concluding that these bodies are an easily manipulated and industry dominated system that are the best that any business or researcher could hope for, operating as the equivalent of "an off-shore tax shelter" for animal research (at 80–127); describing the norms of cost-saving and partnership that result in an agricultural regulation system in which industry is regarded as a collection of clients for whom rules are tailored and fees collected and which relies heavily on voluntary self-policing with limited regulation on transport to slaughter and conditions in the abattoirs, which is hands-off, after-the-fact surveillance rather than on-site monitoring, policies that emerged in the national codes adopted in the 1980s and in the 1990 federal *Health of Animals Act* (at 128–74)). See also Bisgould, *Animals and the Law, supra* note 44 at 174–86 (on the Canadian Council on Animal Care at 208–14; on the *Health of Animals Act* and the *Health of Animals Regulations*).
120. *Animal Welfare Act*, 7 USC §2132–2159 (2015).
121. Hughes & Meyer, *supra* note 51 at 29. See *Criminal Code*, *supra* note 78, s 444–447.
122. *Ontario SPCA Act*, *supra* note 79.
123. Hughes & Meyer, *supra* note 51 at 29, n 46. Manitoba, New Brunswick, the Northwest Territories/Nunavut are also primarily or completely reliant on the *Criminal Code* for prosecution. The other provinces passed anti-cruelty acts in the 1990s. See Hughes & Meyer, *supra* note 51 at 29, n 47.

a low priority.[124] Camille Labchuk, Executive Director of Animal Justice Canada, argues that the dominance of industry written codes for farm animals and reliance on the diligence of a charitable organization like an SPCA in Ontario results in an unacceptable level of privatization of animal protection in Canada.[125]

One solution here would be to focus on legislative reform that would give animal protection groups the ability to bring civil actions on behalf of nonhuman animals or private prosecutions of the criminal law when the state authority refuses to act.[126]

The majority of the Alberta Court of Appeal in the case of Lucy the elephant did not reach the standing issue because they could not get (or would not go) past the point that the proceedings were an abuse of process for usurping the authority of the Humane Society of Edmonton (charged with enforcing the Alberta *Animal Protection Act*[127]), the Attorney General (who is ultimately responsible for criminal prosecutions), the jurisdiction of the criminal courts, and zoo licensing bodies.[128] Zoocheck and People

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124. Alexandra Janse, Ari Goldkind & Crystal Tomusiak, "Crimes Against Animals: The Value of Specialized Cruelty Prosecutors" (Program delivered at Ontario Bar Association Animal Law Section, Twenty Toronto Street Conferences and Events, Toronto, Ontario, 26 May 2015) [unpublished]. Alexandra D Janse, Crown Counsel for the Ministry of Justice in the Province of British Columbia, has been the animal cruelty resource Crown in Kamloops, British Columbia since 2011.
125. Camille Labchuk, "The Creeping Privatization of Animal Protection Lawmaking and Enforcement" (Fifth Annual Oxford Animal Ethics Summer School on Animal Ethics and Law: Creating Positive Change for Animals delivered at St Stephen's House, University of Oxford, 23 July 2018) [unpublished]. See also Bisgould, *Animals and the Law, supra* note 44 at 197–200 (describing the industry written codes, which endorse intensive agriculture including many of its most harmful practices).
126. See Sophie Gaillard & Peter Sankoff, "Bringing Animal Abusers to Justice Independently: Private Prosecutions and the Enforcement of Canadian-Animal Protection Legislation" in Peter Sankoff, Vaughan Black & Katie Sykes in eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) 307.
127. *Animal Protection Act*, RSA 2000, c A-41 [*Animal Protection Act*].
128. See *Reece*, *supra* note 95 at paras 30–32.

for the Ethical Treatment of Animals ("PETA") were asking for a civil declaratory judgment ordering Lucy to be transferred to an elephant sanctuary in a warmer climate where she could be with other elephants, something akin to the NhRP litigation, at least in terms of the desired outcome for the animal.

The two judges who disagreed with Chief Justice Catherine Fraser of the Alberta Court of Appeal expressed concerns about granting civil declarations based on the violation of a penal statute at the request of a non-state actor. The worries included circumventing the criminal burden of proof, a lower standard of proof, loss of rights such as the presumption of innocence and other evidentiary and procedural protections.[129] Chief Justice Fraser pointed out that "a private citizen can bring an action to enforce the criminal law" [130] and to the extent that this was the rationale for finding an abuse of process it was an error in the chambers judge's decision to strike the pleadings. She noted that the Attorney General may stay the proceedings or elect to participate.[131] It is also worth emphasizing that Zoocheck and PETA were not asking for the City of Edmonton to be punished as per the anti-cruelty statute, *The Animal Protection Act*.[132] They were using the prohibition against causing "distress" to an animal in the Act to justify an order to have Lucy removed and relocated to a better environment.[133]

Where nonhuman animal interests are not being effectively protected by the criminal anti-cruelty enforcement due to scarce resources, a failure to value nonhuman animals' interests or for whatever other reason, something else is needed. David Favre explains that North Carolina has

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129. See *ibid* at para 29.
130. *Ibid* at para 142.
131. *Ibid* at n 115.
132. *Animal Protection Act*, *supra* note 127, s 2(1), 2(1.1) ("[n]o person shall cause or permit an animal of which the person is the owner or the person in charge to be or to continue to be in distress" at s 2(1)).
133. *Ibid* (which sets out that a person contravening the act is guilty of an offence and liable to a fine of not more than $20,000 and if found guilty "the Court may make an order restraining the owner from continuing to have custody of an animal for a period of time" at s 12).

a statute that gives standing to any "real party in interest"[134] to bring an action based on harm to the animal. Relief is limited to injunctive remedies, under which ownership of the harmed animal may be severed without compensation.[135] The scope of the law was successfully tested at the trial and appeal level in a hoarding case by the Animal Legal Defense Fund.[136] Favre categorizes this statute as an example of a *strong* legal right (as opposed to the *weak* legal right that exists when only the state may assert or protect animal interests, or *preferred* legal rights where the interests can be asserted directly by the animal — through its human representatives, as the Chief Justice alluded to in her now famous footnote in Lucy's case).[137] Nonhuman animals who are given access to such a strong legal right remain property, even if such a right nudges them further along towards legal (not human) personhood.

An Ontario Supreme Court judge has agreed that Ontario SPCA ("OSPCA") investigations violate section 7 of the *Canadian Charter of Rights and Freedoms* (protecting life, liberty, and security of the person and the right not to deprived thereof except in accordance with the principles of fundamental justice) and they cannot be saved by section 1.[138] The judge held that "law enforcement bodies must be subject to reasonable standards of accountability and transparency."[139] As a privately run charitable organization it lacks this and that is unacceptable, and unconstitutional.[140] The judge adopted intervenor Animal Justice Canada's argument that "although [it is] charged with law enforcement responsibilities, the OSPCA is opaque, insular, unaccountable, and potentially subject to external influence, and as such Ontarians cannot

134. Favre, *Animal Law*, *supra* note 16 at 342 (setting out the text of the statute).
135. See *ibid*.
136. *Ibid*. See also William Reppy Jr, "Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience" (2005) 11:1 Animal Law 39 (giving a history of changes to the statute up to 2005).
137. See Favre, *ibid* at 415.
138. *Charter*, *supra* note 92, s 7.
139. *Bogearts v Attorney General of Ontario*, 2019 ONSC 41 at para 86.
140. *Ibid* at para 90.

be confident that the laws it enforces will be fairly and impartially administered."[141] The government has been given one year to rethink its approach to animal protection in the province.[142]

III. Is Property the Problem?

Stephen Wise agrees with Gary Francione that "the interests of nonhuman animals can only be protected by the eradication of their legal property status".[143] However, Wise disagrees with the abolitionist perspective. Wise writes: "Today's New Welfarists can help alleviate the immediate suffering of nonhuman animals. This is itself a laudable goal".[144] For instance, Wise disagrees where Francione says water given on compassionate grounds to a thirsty cow on its way to slaughter is contributing to and helping to support that slaughter (for Canadians, think Anita Kranjc of Toronto Pig Save and the overheated pig she gave water to on its way to slaughter).[145] He points out that lawyers (and others we might add) must work within the (compromised) world as it exists, doing what they can.[146] Wise also disagrees with Francione's pessimism about the law, specifically on the notion of personhood and the role it can play in animal advocacy. Wise thinks that Francione is wrong to use a moral notion of personhood rather than a legal one.[147] It is indeed striking (to lawyers) that when Francione uses the idea of a person, in contrast to property, he almost

141. *Ibid* at para 91.
142. *Ibid* at para 98.
143. Stephen M Wise, "Thunder Without Rain: A Review/Commentary of Gary L Francione's Rain Without Thunder: The Ideology of the Animal Rights Movement" (1997) 3:1 Animal Law 45 at 47 [Wise, "Thunder Without Rain"].
144. *Ibid* at 54.
145. *Ibid* at 53. See *R v Kranjc*, 2017 ONCJ 281 (Kranjc was acquitted of the charge of mischief for giving the pig water). See Maneesha Deckha in this volume and Maneesha Deckha, "The 'Pig Trial' Decision: The Save Movement, Legal Mischief, and the Legal Invisibilization of Farmed Animal Suffering" (2019) 50:1 Ottawa Law Review 65.
146. Wise, "Thunder Without Rain", *supra* note 143 at 59.
147. *Ibid* at 47.

always means a moral rather than a legal person.[148] This is consistent with the position he and Charlton advocate that the way to move forward on animal issues is to adopt a vegan lifestyle and try to get others to do the same using grassroots nonviolent education.[149] Hence, the purism means only veganism, all the time, and no vegetarianism or 'happy meat'.[150] They also state that they think events like VegFest and Veggie Parade are confusing and should be avoided because they promote vegetarianism as well as veganism.[151]

Starting in the mid-1990s Wise began writing extensively in law review articles about the need to reject the property status of nonhuman animals, for example, referring to "the legal thinghood" of nonhuman animals and how it trapped them in "a nonexistent universe".[152] He called the distinction between property and persons rooted in Roman law the "Great Legal Wall", with every human a legal person possessing legal rights on one side and every other non-human thing with no rights on

148. See *e.g.* Francione & Charlton, *supra* note 56 (animals are not things, they "matter morally", "to be property is to be *something*, not *someone*" at 12; animals "have the right to be a moral person and not a thing" at 29). See also Gary L Francione, "Animal Welfare and the Moral Value of Nonhuman Animals" (2010) 6:1 Law, Culture and the Humanities 24. Sometimes legal personhood is discussed. See *e.g.* Francione, *Animals, Property, and the Law*, *supra* note 53 at 110. However, the work never advocates for the use of that status, as far as I can tell.
149. See Francione & Charlton, *supra* note 56 at 69–96.
150. See *ibid* and also Gary L Francione, "Animal Welfare, Happy Meat, and Veganism as a Moral Baseline" in David Kaplan, ed, *The Philosophy of Food* (Berkley: University of California Press, 2012) 169.
151. See Francione & Charlton, *supra* note 56 at 78.
152. See Steven M Wise, "The Legal Thinghood of Nonhuman Animals" (1996) 23:3 Boston College Environmental Affairs Law Review 471; Stephen M Wise, "How Nonhuman Animals were Trapped in a Nonexistent Universe" (1995) 1:1 Animal Law 15. See also Steven M Wise, "Hardly a Revolution – The Eligibility of Non-Human Animals for Dignity-Rights in a Liberal Democracy" (1998) 22:3 Vermont Law Review 793.

the other.[153] He used that idea again in the influential book he published in 2000, *Rattling the Cage: Toward Legal Rights for Animals*.[154] In 2013–14, Wise's organization, the Nonhuman Rights Project (NhRP), brought the chimpanzee law suits in New York State using writ of *habeas corpus* in state court with the following hope: if the statute and writ applies to chimpanzees then they are persons in some sense and this will have been recognized by an American court.[155]

The strategy is controversial. There is the risk (not insignificant) of creating adverse precedent, a risk Wise has acknowledged.[156] Others like Jesse Donahue point out that sanctuaries are not necessarily better places for animals to go to than (at least some) zoos and, in any case, sanctuaries cannot be an across-the-board solution for all captured exotic animals given the sheer number of these animals currently living in inappropriate

153. Steven M Wise, "Animal Thing to Animal Person – Thoughts on Time, Place, and Theories" (1999) 5:1 Animal Law 61 at 61 [Wise, "Animal Thing to Animal Person"].

154. Steven M Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Boston: De Capo Press, 2000, 2d 2014) at 4, 270.

155. See Fernandez, "Already Artificial", *supra* note 15 (discussing Wise's work, the NhRP approach in the chimp cases, and the 2016 documentary *Unlocking the Cage*); Angela Fernandez, "Legal History and Rights for Nonhuman Animals: An Interview with Steven M Wise" (2018) 41:1 Dalhousie Law Journal 197 [Fernandez, "Legal History and Rights for Nonhuman Animals"].

156. See *e.g.* Wise, "Animal Thing to Animal Person", *supra* note 153 ("[i] f these early cases are brought at the wrong time, in the wrong place, or before the wrong judges, they may strengthen the Great Legal Wall" at 68). See also Fernandez, "Legal History and Rights for Nonhuman", *ibid* (discussing the adverse precedent concern).

conditions.[157] Also, there are good and bad sanctuaries.[158] Then there is the moral issue of focusing on the cognitively advanced nonhuman animals, which draws criticism particularly from feminist animal scholars.

Catherine MacKinnon has argued that the 'like us' model of sameness is as bad an idea for animals as it was for women.[159] Bryant has written about how the 'similarity' approach "creates a hierarchy of worthiness"[160] in which "humans are the standard against which other animals are measured".[161] Bryant also points out that the cognition

157. Jesse Donahue, "Back to the Future: The New Politics of Elite Access to Exotic Animals" (Paper delivered at Zoo Studies and New Humanities: A Workshop, Hamilton, Ontario, 2–3 December, 2016) (pointing out that moving animals to sanctuaries is not a panacea when there are good and bad sanctuaries just as there are good and bad (or worse) zoos and there are pros and cons to sanctuaries). See Jesse Donahue, "Introduction: The Legal Landscape and Possibilities for Change" & Ron Kagan, "Sanctuaries: Zoos of the Future?" in *Increasing Legal Rights for Zoo Animals: Justice on the Ark*, Jesse Donahue, ed, (Lanham: Lexington Books, 2017) at xiii–xxv, 131–45 [Donahue, *Increasing Legal Rights for Zoo Animals*].

158. Kathy Hessler, "Legal and Ethical Issues for Sanctuaries" (Fifth Annual Oxford Animal Ethics Summer School on Animal Ethics and Law: Creating Positive Change for Animals delivered at St Stephen's House, University of Oxford, 23 July 2018) (distinguishing a 'true' sanctuary from a 'false' one on the grounds that a true one is: designed for animals, not people (as opposed to being designed for people to see or interact with animals as evidenced by things like rides, photo ops, and opportunities to touch animals); it does not breed animals (or sell or trade them); it commits to maintaining animals for the rest of their lives; it does not take animals to fairs or other events; it provides them with medical care; it maintains appropriate habitat, groupings, and food; habitat is not designed for easy viewing and interaction; and it protects animals from people by reducing contact with people to what is necessary for medical and other purposes).

159. See Catharine A MacKinnon, "Of Mice and Men: A Feminist Fragment on Animal Rights" in Sunstein & Nussbaum, s*upra* note 4, ch 12 ("[w]omen are the animals of the human kingdom, the mice of men's world" at 265).

160. Bryant, "Similarity or Difference", *supra* note 70 at 215–216.

161. *Ibid.*

studies used as evidence in such cases are often obtained from just the kind of confinement and experiments animal advocates are horrified by and wish to see end.[162]

Francione considers the focus on ape cognition, which he traces to Peter Singer's "Great Ape Project" in the early 1990s, to be an inappropriate 'SIC' and speciesist to boot.[163] The 'similar-minds' argument is, furthermore, he and Charlton claim "hopelessly elitist".[164]

My intervention here is a different one. 'The Great Legal Wall', while compelling for the sweeping (and in many ways accurate) nature of its description, misleads in the context of nonhuman animals in a particular way. Specifically, Wise's approach generally (like Francione's) draws too sharp a distinction between property and personhood, branding one as necessarily bad (underestimating what property can be and its flexibility), while simultaneously privileging personhood (which risks an over-promise in terms of what rights can or will bring without other things about the world changing).

First, property is not a simple concept. Our concept of ownership is not synonymous with absolute dominion, whatever William Blackstone

162. *Ibid* at 220–23.

163. See Francione & Charlton, *supra* note 56 ("SICs are speciesist in a particular way in that they create a hierarchy in which certain animals are favored over other animals… For example, campaigns that concern nonhuman great apes, dolphins and other marine animals, and elephants all focus on how similar these animals are cognitively and emotionally (and in the case of nonhuman great apes, genetically) to humans. This approach results in the creation of a hierarchy that privileges certain animals and falsely portrays them as being more worthy of consideration and protection" at 49); see also at 99–100.

164. *Ibid* at 103.

said.[165] Just because I own something does not mean I can do whatever I want with it. I can own an old dirty emissions-producing car but in order to drive it, I must bring it up to emissions-producing standards for vehicles in the jurisdiction in which I live. The state routinely interferes with property ownership. In the developed West, we live in a highly regulated environment in which the state imprints itself on countless aspects of our lives, a trade off that makes sense given our needs, as vulnerable individuals, for things like safety and communal care and responsibility (taxes for roads, public libraries, and social services). Property ownership exists against the background of those limitations and responsibilities. Property can permit abuse but property is also limited. There are many things you cannot do even when you have ownership of something (destroy and waste, abandon, etc).[166] So the status is not necessarily inconsistent with non-abuse and the status certainly does not necessarily involve or permit abuse.

Secondly, personhood and legal rights will not necessarily or automatically lead to better treatment of nonhuman animals. We need look no further than human rights, routinely violated with impunity *despite* the consensus that all human beings have equal moral worth and the enshrinement of that principle in various legal instruments, domestic and international. Vulnerability is a universal feature of the

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165. See "Book the Second: The Rights of Things – Chapter the First: Of Property in General" *Blackstone's Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765–69), online: *The Avalon Project* <avalon.law.yale.edu/18th_century/blackstone_bk2ch1.asp> ("[t]here is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" at 2).

166. In the context of animal law, there are cases having to do with owners who give directives in their wills for their animals to be destroyed after their death, which are voided by courts once they come to public attention. 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" (2008) 39:2 Rutgers Law Journal 247 at 301–10.

human condition.[167] It is accentuated for the weak and powerless, who have much less of a chance in having violations of their rights redressed. As Jessica Eisen has put it, echoing work like Satz's, the vulnerability of nonhuman animals is "radical" due to their "voicelessness"[168] As Fraser CJ of the Alberta Court of Appeal put it in Lucy's case, "[a]nimals over whom humans exercise dominions and control are a highly vulnerable group. They cannot talk — or at least in a language we can readily understand".[169] Simply giving legal personhood to nonhuman animals will not automatically make them less vulnerable.

Sandra the orangutan in Argentina after her court-acclaimed personhood designation in 2015 continues to languish in the now-closed zoo in Buenos Ares.[170] Donahue notes that despite the 2008 Spanish Parliament's declaration granting rights to nonhuman primates (specifically chimpanzees, orangutans, gorillas, and bonobos) and making it illegal to do experiments on them or confine them arbitrarily, apes can remain in captivity for conservation purposes and so the Barcelona Zoo continues to house orangutans.[171] Declarations of legal personhood will not, contrary to the sense one gets reading Wise's work (or watching the film *Unlocking the Cage*[172] about the NhRP 2013 chimpanzee cases), lead

167. Martha Fineman, "The Vulnerable Subject" (2008–2009) 20:1 Yale Journal of Law & Feminism 1.

168. See Eisen, "Animals in the Constitutional State", *supra* note 40 at 911, 942–46, 953. See also Satz, *supra* note 1 at 78–80; ("animals are rendered hyper vulnerable to changing human desires" at 89); Carter Dillard, "Empathy with Animals: A Litmus Test for Legal Personhood" (2012) 19:1 Animal Law 1 at 12 (referring to the theories of Fineman and Satz and the 'extreme' vulnerability of nonhumans) [Dillard, "Empathy with Animals"]; See also Maneesha Deckha, "Vulnerability, Equality, and Animals" (2015) 27:1 Canadian Journal of Women and the Law 47.

169. *Reece*, *supra* note 95 at 88.

170. See "Sad Plight of Sandra the Orangutan: Two Years After Being Granted Human Rights in a Landmark Ruling, She Still Remains Locked Up in her Cage Inside an Abandoned Zoo" (29 September 2016), online: *Daily Mail* <www.dailymail.co.uk/news/article-3812992/In-Argentina-freedom-distant-Sandra-orangutan.html>.

171. Donahue, *Increasing Legal Rights for Zoo Animals*, *supra* note 157 at 151.

172. *Unlocking the Cage*, *supra* note 37.

to an immediate or guaranteed unlocking of the cage.

A. Why Quasi-property?

A "pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property".[173]

It is routinely noted that nonhuman animals are very different than other forms of personal property like tables and chairs.[174] This makes intuitive sense to most people who, for example, do not think of their pets as being the same as their other possessions. Nonhuman animals move on their own power, communicate, and of course, feel pain and discomfort, as well as pleasure and comfort, and they can have significant emotional, psychological, and social lives that are bound up with their human owners.

Wild animals have long been thought of in terms of 'qualified property' not owned until reduced to possession.[175] Domestic animals are usually legally differentiated from wild animals given their "habit of

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173. *Corso v Crawford Dog and Cat Hospital*, 415 NYS 2d 182 (NY Civ Ct 1979), quoted in Favre, *Animal Law*, *supra* note 16 at 126.
174. See *e.g.* Cass R Sunstein, "Enforcing Existing Rights" (2002) 8:1 Animal Law i ("[m]ost people, on reflection, do not consider animals that they 'own' to be things or objects. People who have dogs, or horses, or cats are most unlikely to have the same attitude toward living creatures that they have towards books, tables, and chairs" at vii) [Sunstein, "Enforcing Existing Rights"]. See also Susan J Hankin, "Not a Living Room Sofa: Changing the Legal Status of Companion Animals" (2006–2007) 4:2 Rutgers Journal of Law and Public Policy 314 at 380, 369 (proposing the category of 'companion animal property' to reflect the way that judicial and legislative trends in estates and trusts, criminal law, and tort law demonstrate support for the idea that companion animals — primarily dogs and cats —are being treated less like property or at least less like inanimate forms of property) [Hankin, "Not a Living Room Sofa"].
175. See *Pierson v Post*, 3 Cai R 175 (NY Sup Ct 1805). See also Angela Fernandez, *Pierson v. Post*, *The Hunt for the Fox: Law and Professionalization in American Legal Culture* (New York: Cambridge University Press, 2018).

returning" (*animus revertendi*).[176] There has long been an interest in the property status of domesticated animals given the work and investment that goes into breeding and caring for them.[177] Historians have noted that domestication was the game-changer. As Morris Berman put it:

> The fundamental categories that presented themselves were now two – Wild and Tame – and eventually all forms of thought…came to be based on this model (the raw and the cooked, in Lévi-Strauss' terminology). It is a coarse model, and one lacking in subtlety, especially in the West.[178]

Domestic animals are those that humans own and control, either as pets or have been created or captured and are destined for industry use (research, entertainment, food, fur, etc.). Pets are 'favorites' and are thereby spared (if they are lucky) from abuse.[179] In many countries, pets are protected (to a limited extent) by anti-cruelty laws which prohibit harming them, at least gratuitously. The 'non-favored' are those nonhuman animals who are generally not being thought of and treated as individuals with moral worth (*e.g.* cows, chickens, pigs, sheep, goats, ducks, and geese). These are the animals raised to be eaten or used for their ability to produce commodities like milk, eggs, wool, feathers, etc. and are then used for human food or food for other animals. They vastly outnumber all other animals killed in research, testing, dissections, fur production, and

176. John H Ingham, *The Law of Animals: A Treatise on Property in Animals, Wild and Domestic, and the Rights and Responsibilities Arising Therefrom* (Philadelphia: T & JW Johnson & Co, 1900) at 6–8.

177. See *e.g.* Alan Mikhail, *The Animal in Ottoman Egypt* (New York: Oxford University Press, 2014) (emphasizing the way in which cattle, specifically the ox, operated as the most important form of capital in Ottoman Egypt given a restrictive land-owning regime).

178. Morris Berman, *Coming to Our Senses: Body and Spirit in the Hidden History of the West* (New York: Bantam Books, 1989) at 71.

179. See Katherine C Grier, *Pets in America: A History* (Chapel Hill: University of North Carolina Press, 2006) (Grier explains that 'pet' was originally used to describe "an indulged or spoiled child; any person treated as a favorite" and that in the eighteenth century writing about pet animals almost always used the word 'favorite' instead of 'pet'. Grier writes: "This usage suggests the most fundamental characteristic of pet keeping, the act of choosing a particular animal, differentiating it from other animals" at 6).

pounds.[180] Farm animals are usually exempt from anti-cruelty animal protection laws, either expressly or implicitly and great deference is given to industry custom, even where those practices would be considered cruel in the minds of many or most people (*e.g.* debeaking chickens, castration and tail docking large animals without anesthetic, conditions of extreme confinement and food and light deprivation to manipulate egg laying in chickens).[181] Great apes, elephants, and cetaceans are coming into their own and their status scientifically and in popular culture is changing. It is becoming more widely understood and recognized that private ownership of exotic animals such as lions and tigers must be prohibited or otherwise regulated (and perhaps also reptiles).[182] Fish are in a unique category, as they are both wild and tame, pet and food; however, they are sentient and can feel pain.[183] They are also the frontline animal (along

180. See the graph at Figure 9.1 for 2001 numbers in Wolfson & Sullivan, *supra* note 118 at 207.

181. See *ibid*.

182. In Canada, we have had at least two sad and tragic incidents that should have pushed this issue forward in the last decade or so — two young boys strangled by an escaped African Rock Python in New Brunswick and a woman mauled in front of her child by her boyfriend's Siberian tiger in British Columbia and who subsequently died of her injuries. See "Snake Kills 2 N.B. Boys after Escaping Store, RCMP say" (5 August 2013), online: *CBC News* <www.cbc.ca/news/canada/new-brunswick/snake-kills-2-n-b-boys-after-escaping-store-rcmp-say-1.1340560>; "Woman Mauled to Death by Tiger in B.C. Interior" (11 May 2007), online: *CBC News* <www.cbc.ca/news/canada/british-columbia/woman-mauled-to-death-by-tiger-in-b-c-interior-1.635094>. Incidents in the United States are manifold, the most large-scale in recent years being the man in Zanesville, Ohio, who hoarded large exotics, turned them loose and then shot himself. Law enforcement shot fifty or so of these animals. See "Muskingum County Animal Farm" (last edited 8 October 2018), online: *Wikipedia* <en.wikipedia.org/wiki/Muskingum_County_Animal_Farm>. See also Matt Ampleman & Douglas A Kysar, "Living with Owning" (2016) 92:1 Indiana Law Journal 327.

183. See David Cassuto in this issue arguing for fish sentience. See also Jonathan Balcombe, *What a Fish Knows: The Inner Lives of Our Underwater Cousins* (New York: Scientific American/Farrar, Straus and Giroux, 2017).

with other marine life) that face contamination and ultimately extinction due to the plastics crisis in our oceans, which international instruments are doing little to combat.[184]

In other words, quasi-property would resonate with how most people think about nonhuman animals — they are not like tables and chairs, whether favored or unfavored, wild or tame. They are something different. As Cass Sunstein has put it, "the rhetoric of ownership really does misdescribe people's conceptions of and relationships to other living beings".[185] Moreover, given the changes we have seen in how nonhuman animals are viewed, it becomes less and less plausible for the law to label all nonhuman animals property *tout court* and for that to be the end of the discussion.[186] 'Quasi' better captures that flux. If history teaches us anything, it tells us: firstly, ideas will continue to wax and wane; secondly, we do not know how this will unfold.

Think of cows. Virginia Anderson has written an extremely eye-opening book about the role that cattle and other domesticated animals of the European settlers played as agents of colonization.[187] While Pulitzer prize-winning *Guns, Germs, and Steel*[188] has brought the silent weapon perspective of conquest to some public consciousness, the view of cow-as-weapon is difficult to wrap one's head around. This is

184. Kimberly Moore, "Oceans in Crisis and Global Initiatives to Address Plastic Pollution" (Fifth Annual Oxford Animal Ethics Summer School on Animal Ethics and Law: Creating Positive Change for Animals delivered at St Stephen's House, University of Oxford, 23 July 2018) [unpublished].

185. Sunstein, "Enforcing Existing Rights", *supra* note 174 at vii.

186. See *e.g.* the Ikea Monkey case and discussion of it in Fernandez, "Already Artificial", *supra* note 15.

187. See Virginia DeJohn Anderson, *Creatures of Empire: How Domestic Animals Transformed Early America* (New York: Oxford University Press, 2004). Alan Greer explores the same phenomenon in New France drawing on Anderson's work. See Allan Greer, "Commons and Enclosure in the Colonization of North America" (2012) 117:2 American Historical Review 365 at 381–86. See also John Ryan Fischer, *Cattle Colonialism: An Environmental History of the Conquest of California and Hawaii* (Chapel Hill: University of North Carolina Press, 2015).

188. Jared Diamond, *Guns, Germs, and Steel: The Fates of Human Societies* (New York: WW Norton & Company, 1999).

especially so from an animal rights perspective in which the animal today is factory farmed (lives and is slaughtered) in horrible and very tightly controlled conditions (hence the need for all the antibiotics) and is for many an object of pity, artificially inseminated, destined to produce milk for another species rather than their own babies, from whom they are separated soon after birth to serve the veal industry.[189] However, in Anderson's work, we see that same animal being used to grab more land from Indigenous peoples in early America. In order to do this, Anderson explains, it was essential that European settlers *not* follow the English practices of good husbandry, *i.e*. fencing in and caring carefully for the animals but letting them roam and trample Indian fields and crops, as harassment was often an effective way to push Indigenous people further inland.[190]

Building on Anderson's work on animal colonialism, Mathilde Cohen expands the idea to focus on two other components: "milk colonialism" and "breastfeeding colonialism".[191] Cohen explains the way that cow milk was at the center of American global state-building projects, turning China, a non-dairy consuming culture, into what is now the third largest cow milk producer in the world.[192] International food aid programs that began in the 1960s "allowed Europe and the United States to dispose of their milk surpluses [to maintain] stable prices at home".[193] A program

189. The veal industry is a direct by-product of the dairy industry because the cows must be impregnated and give birth in order to produce milk. See Montgomery, *supra* note 33 at 140–42 (describing conditions for veal calves in Canada).

190. "Free-range style of husbandry" was year-round in the Chesapeake and seasonal, given the cold weather, in New England. See Anderson, *supra* note 187 (on the Chesapeake domestic animals that essentially went wild but colonists insisted on maintaining their status as private property through earmarks and legislating that they could not become *ferae naturae* at 114–40); on New England at 152–71; on the use of domesticated animals as weapons of colonization at 208–42).

191. See Mathilde Cohen, "Animal Colonialism: The Case of Milk" (2017) 111:1 American Journal of International Law Unbound 267 at 268.

192. *Ibid* at 269.

193. *Ibid*.

started in India in 1970 helped transform that country into the world's largest milk producer that resulted in the replacement of Indian bovine breeds with "quick fattening, high yield European breeds".[194] Cohen writes:

> By taking milk from animals and feeding it to humans, particularly human babies, dairying severs the nursing relationship twice: between lactating animal mothers and their offspring and between human mothers and their offspring.[195]

These varying historical (including global) contexts make us realize that we are not dealing simply with the biological entity and some essentialness, 'cow', but the role the animal plays in the human world, *e.g.* as mass produced hamburger, unthinkable not so long ago.[196] Long-view historians like Berman emphasize how enormous the change in our relationship to nonhuman animals has been in just a handful of generations, as animals have virtually disappeared from the lives of most Western urban people, *e.g.* no more pigs in the streets or horses for transport.[197] Children eat chicken without any sense that it is a chicken.[198] British historian Hilda Kean has emphasized the role of visibility in motivating nineteenth century British humane initiatives, specifically narrating how ordinary upper and middle class Londoners grew tired of stepping out of their houses and seeing neglected horses that desperately needed water and donkeys often brutally beaten by their owners whose cart of goods they pulled, and they formed protection societies and demanded mainstream politicians respond with protective legislation, *e.g.* water troughs for horses in the streets.[199] The most recent example of

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194. *Ibid* at 269–70.
195. *Ibid* at 270.
196. On the natural world generally and how our ideas of it are constructed by humans for human culture, see Keith Thomas, *Man and the Natural World: A History of the Modern Sensibility* (New York: Pantheon Books, 1983).
197. See Berman, *supra* note 178 at 85.
198. Jonathan Foer, *Eating Animals* (New York: Little, Brown and Company, 2009) (recounting an interaction with a babysitter who asked him and his brother when they were kids, "[y]ou know that chicken is chicken, right?" at 6).
199. Kean, *supra* note 51.

a personhood declaration from India came from a case brought on behalf of mules. It sets out that mules must not work in extreme temperatures or carry overly heavy loads, and they must receive veterinary care, pull carts that are marked safely for traffic, be given a right of way in traffic, and be given limited working hours with regular food and water.[200]

Cows in India have an especially complex status since they are considered a sacred animal by Hindus, who constitute the majority religion. However, buffalo meat is an enormous industry in India, eaten not just by the minority Muslim population but also by meat-eating Hindus, who see buffalo as an exception to the prohibition on beef or who do not follow the religious belief. The export of buffalo meat — many people are surprised to learn — makes India one of the largest beef exporters in the world.[201] There is a massive illegal slaughtering industry that is almost certainly killing cows that are supposed to be protected as sacred, including the purchase and mistreatment of sacred cows for the leather industry.[202] These questions have become extra-political, as Muslims in India claim that they are subject to ethnically-targeted discrimination due to the stricter enforcement of cow protections, there is a growing problem of 'sacred' cows who are simply abandoned when owners can no longer pay to keep them but are prohibited from killing them, and concerns are raised about adequate nutrition for poor children for whom

200. See Upadhyay, *supra* note 10.

201. Along with Brazil, which interestingly, like India, has constitutional protection for animals. See Eisen & Stilt, *supra* note 107 at paras 11–17 (India) 36–38 (Brazil).

202. See *e.g.* Sena Desai Gopal, "Selling the Sacred Cow: India's Contentious Beef Industry" (12 February 2015), online: *The Atlantic* <www.theatlantic.com/business/archive/2015/02/selling-the-sacred-cow-indias-contentious-beef-industry/385359/>. See Shaun Monson, "Earthlings" (2005) at 46:43–50, online (video): *YouTube* <www.youtube.com/watch?v=BrlBSuuy50Y> (to see how cows that are supposed to be protected as sacred are treated in order to obtain their skins for the leather industry).

beef is a cheap source of protein.[203] There are also the competing religious claims of Muslims and the ritual sacrifice of cows during the holiday of Bakr-Id.[204] Viewed through the lens of the Anthropocene "[t]he contrast between what is nature and what is not no longer makes sense".[205] There is no cow in nature separate from human uses and meanings, which are inescapably artificial and political.

According to Berman, we have come to have little reason to associate shrink wrapped meat in a supermarket with animal life because in the modern industrial West we have become so disconnected from organic nonhuman otherness.[206] Berman calls this "a psychic bombshell"[207] because we have lost our nonhuman other to see reflecting our humanness back to us. The two institutions that have developed in order to compensate

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203. See *e.g.* Annie Gowen, "Cows are Sacred to India's Hindu Majority. For Muslims Who Trade Cattle, That Means Growing Trouble" (16 July 2018), online: *The Washington Post* <www.washingtonpost.com/world/asia_pacific/cows-are-sacred-to-indias-hindu-majority-for-muslims-who-trade-cattle-that-means-growing-trouble/2018/07/15/9e4d7a50-591a-11e8-9889-07bcc1327f4b_story.html?utm_term=.b781ec540a56>; Annie Gowan, "Why India has 5 Million Cows Roaming the Country" (16 July 2018), online: *The Washington Post* <www.washingtonpost.com/world/2018/07/16/amp-stories/why-india-has-million-stray-cows-roaming-country/>; Sonia Faleiro, "Saving the Cows, Starving the Children" (28 June 2015), online: *The New York Times* <www.nytimes.com/2015/06/28/opinion/sunday/saving-the-cows-starving-the-children.html>.

204. See Aurélien Bouayad, "Law and Ecological Conflicts: The Case of the Sacred Cow in India" (2016) 12:2 Socio-Legal Review 105. In both Germany and Switzerland, in addition to animal advocacy groups, the constitutional protections for animals were supported by those motivated by anti-Semitic and anti-Muslim sentiment against kosher and halal slaughter in which animals are not stunned before slaughter. See Eisen & Stilt, *supra* note 107 at para 22 (Germany), 27 (Switzerland).

205. Purdy, *supra* note 29 at 15. Purdy explains how nature and different varieties of environmental imagination powered a peculiarly American anti-politics.

206. See Berman, *supra* note 178 at 85 (referring to Frederick Wiseman's film *Meat*, 1976, DVD (Cambridge: Zipporah Films, 1976).

207. *Ibid* at 84.

for the absence of nonhuman animal life — the zoo and pet keeping — are woefully inadequate. Berman writes: "The fallacy of the zoo is that a species can be removed from an ecosystem and still remain the same species… Once in captivity, wild animals get imprinted by their human keepers in such a way that makes it impossible for them to return to the wild, where they would die".[208] The pet also fails to work as a nonhuman mirror.[209]

Despite this, pet keeping is at an all-time high. A recent article in *The Guardian* newspaper reports that 90% of pet-owning Britons (an industry worth £10.6 billion) consider their pet to be a family member, "with 16% listing their animal in the 2011 census".[210] The same article cited a survey that found 12% of British pet owners love their pet more than they love their partner and 9% more than they love their children.[211] Yet the article goes on to explain that the more people think of their pets as people and equal (or higher order) family members, the more problematic it will become to keep them as pets, controlling every aspects of their lives. It quotes Hal Herzog, author of *Some We Love, Some We Hate, Some We Eat*, who predicts that "pet keeping might fall out of fashion; I think it is possible that robots will take their place, or maybe pet owning will be for small numbers of people. Cultural trends come and go. The more we think of pets as people, the less ethical it is to keep them".[212]

Yet the pet industry shows no signs of abating. Kathy Hessler of the Lewis and Clark Law School reports that in 2017, 84.6 million households in the United States had a pet — that is 68% of households, constituting 393.3 million animals on which US $86 billion dollars

208. *Ibid* at 89.
209. *Ibid* at 90–91.
210. Linda Rodriguez McRobbie, "Should We Stop Keeping Pets? Why More and More Ethicists Say Yes" (1 August 2017), online: *The Guardian* <www.theguardian.com/lifeandstyle/2017/aug/01/should-we-stop-keeping-pets-why-more-and-more-ethicists-say-yes>.
211. *Ibid*.
212. *Ibid*. See also Yi-Fu Tuan, *Dominance and Affection: The Making of Pets* (New Haven: Yale University Press, 1984).

was spent, which 91–99% of people consider to be family members.[213] Perhaps most striking here is the amount of money people now spend on their pets for items that include special food, clothing, bedding, housing, jewelry, advanced medical care, vacation, insurance, spa days, funeral/burial cremation, gifts, and parties.[214] Hessler describes how people now use activity trackers to monitor health, activity, and the location of their pet via internet video camera; treat dispensers that allow for care and interaction (including two-way communication) when the owner is not at home; and uber-like apps for pet sitting, walking, and boarding.[215]

If treatment of pets is becoming more intense and more humanized and something people are very enthusiastic about, the circus and the aquarium are moving in the other direction, falling into disfavour, at least insofar as they rely on large sentient and cognitively complex creatures like elephants and orcas for entertainment. Ringling Brothers announced in May 2017 that it would stop its elephant shows, thereby ending 146 years of "the Greatest Show on Earth."[216] A bi-partisan bill that would prohibit the use of nonhuman animals in travelling circuses in the United States was introduced just a few months earlier.[217] The aquarium is coming under more intense scrutiny, as the film *Blackfish*[218] on killer whales at Sea World so aptly demonstrates.

Susan Davis wrote her book about Sea World and the orca shows

213. Kathy Hessler, "Animal Custody: Alaska and Illinois and Beyond" (Animal Ethics and Law: Creating Positive Change for Animals delivered at Oxford Centre for Animal Ethics, Fifth Annual Oxford Summer School on Animal Ethics, 25 July 2018) at 5 [unpublished] [Hessler, "Animal Custody"].
214. *Ibid* at 6.
215. *Ibid* at 10.
216. See Carey Wedler, "Ringling Bros. and Barnum & Bailey Circus Just Officially Closed Down" (24 May 2017), online: *The Anti-Media* <theantimedia.com/ringling-bros-barnum-bailey-circus/>.
217. See US, Bill HR 1759, *Travelling Exotic Animal and Public Safety Protection* Act (TEASPA), 115th Cong, 2017, (introduced in Congress on 28 March 2017), online: *Congress.Gov* <www.congress.gov/bill/115th-congress/house-bill/1759/text>. On travelling circuses in Canada, see Bisgould, *Animals and the Law*, *supra* note 44 at 264–66.
218. *Blackfish*, 2013, DVD (Los Angeles: Magnolia Pictures, 2013).

there in 1997.[219] She describes the pleasure the corporation was able to successfully manufacture in its audiences by putting 'spectacular' nature on display, an underwater world that would be largely otherwise inaccessible to its human visitors. The killer whale filled "the grandiose novelty role elephants played in the nineteenth century",[220] Davis wrote, presented "just as Africa and Asia were for nineteenth-century Europeans".[221] She described in detail Sea World's success at bringing "parts of an invisible world into public view and elevat[ing] them to iconic status".[222] Yet now Sea World has announced that they are no longer going to breed their orcas.[223] Attendance has dramatically decreased, as people choose to put their entertainment dollars elsewhere. In other words, what looked like an iconic institution just ten years ago has bowed in the face of public opinion, to the point that a mainstream Top-40 pop radio host discussing the end of the breeding program pointed out how inhumane it is to keep animals that are meant to swim hundreds of miles a day in a swimming pool.[224]

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219. See Susan G Davis, *Spectacular Nature: Corporate Culture and the Sea World Experience* (Berkeley: University of California Press, 1997).
220. *Ibid* at 97.
221. *Ibid.*
222. *Ibid* at 98.
223. See Renee Montagne & Greg Allen, "SeaWorld Agrees to End Captive Breeding of Killer Whales" (17 March 2016), online (radio): National Public Radio <www.npr.org/sections/thetwo-way/2016/03/17/470720804/seaworld-agrees-to-end-captive-breeding-of-killer-whales>. See Davis, *ibid* at 78–81 (on attendance numbers; they are so important they are looked at hourly). I have heard anecdotally that the Shamu show at the California Park has changed considerably to try and make it less demeaning to the animals. I met a man in a waiting room who saw me reading the Davis book and asked if I had seen *Blackfish*. When I said yes, he reported to me that he had also and was just back from visiting the park in Florida the previous weekend and was shocked by how few people were there. It had not occurred to me until that moment that the film, as damning as it is of Sea World, might actually attract those interested in witnessing the demise of the park or perhaps in seeing where the tragic accident involving Dawn Brancheau occurred in 2010.
224. SiriusXM Hits 1 co-host Nicole Ryan of *The Morning Mash Up*.

The Park Board in Vancouver has voted to ban the Vancouver Aquarium from acquiring any new whales or dolphins and from using certain cetaceans in its live shows.[225] There is also a documentary, *Vancouver Aquarium Uncovered*, which has helped bring the situation at that aquarium to public awareness.[226] Ontario banned the possession or breeding of any new orcas in 2015.[227] The Canadian government has likewise passed a ban on further cetacean captivity.[228] Other documentary films, like Academy award-winning *The Cove* on the dolphin drive hunt in Taiji Japan (a source for dolphins sold to aquariums) and the Canadian director Rob Stewart's *Sharkwater* film on the illegal international shark finning industry (the fins are sold to be used for shark fin soup), have brought the plight of hunted marine animals to wide-spread public attention.[229]

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225. See Wendy Stueck, "New Whales, Dolphins Banned from Vancouver Aquarium" (16 May 2007), online: *Globe and Mail* <www.theglobeandmail.com/news/british-columbia/park-board-approves-bylaw-banning-whales-dolphins-at-vancouver-aquarium/article35004004/>.
226. "Vancouver Aquarium Uncovered" (10 April 2016), online (video): *Vancouver Aquarium Uncovered* <www.vancouveraquariumuncovered.com/vancouver-aquarium-uncovered/>. The documentary has been the subject of litigation, with the Vancouver Aquarium suing the filmmaker for breach of contract and copyright infringements. A court order resulted in excerpts of the film being clipped until those issues have been resolved. See *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2016 BCSC 625. The British Columbia Court of Appeal overturned the injunction. See *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017 BCCA 395. The edited version of the film can be viewed online: *Youtube* <www.youtube.com/watch?v=hs4FtZSLyc8 >.
227. See Bill 80, *Ontario Society for the Prevention of Cruelty Amended Act, 2015*, 1st Sess, 41st Leg, Ontario, 2015, online: *Legislative Assembly of Ontario* <www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=3213>.
228. See Laura Howells, "'A More Humane Country': Canada to Ban Keeping Whales, Dolphins in Captivity" (10 June 2019), online: *CBC News* <www.cbc.ca/news/canada/hamilton/whales-1.5169138>.
229. *The Cove*, DVD (Beverly Hills: Diamond Docs, 2007); *Sharkwater*, DVD (Glendale: DreamWorks Pictures, 2006) (created from footage Stewart shot before his death).

I have argued elsewhere that YouTube videos and other forms of documentary films widely available on services like Netflix are our new day-to-day equivalent of late eighteenth and early nineteenth-century street visibility when it comes to the abuse and mistreatment of nonhuman animals.[230] David Wolfson and Mariann Sullivan write that "farmed animals live out their short lives in a shadow world. The vast majority never experience sunshine, grass, trees, fresh air, unfettered movement, sex, or many other things that make up most of what we think of the ordinary pattern of life on earth".[231]

These unfair conditions of life can easily be seen in a range of documentary films, some of which draw connections between meat-eating and the environment (*e.g. Cowspiracy: The Sustainability Secret*[232]) and others between meat-eating and human health (*e.g. Food, Inc.* [233]). Some of the more animal-welfare/rights oriented films aim for shock value, showing very graphic cruelty towards animals considered normal industry practice (*e.g.* Mercy for Animals' *From Farm to Fridge*[234]). Others deliberately eschew showing too much graphic violence and instead harness the power of the aesthetic and the connective such as Liz Marshall's documentary, *The Ghosts in Our Machine*,[235] which follows animal rights photographer Jo-Anne McArthur. Other made-for-TV movies like *Animal Farm*[236] are fictional but can compellingly convince

230. See Fernandez, "Already Artificial", *supra* note 15.
231. Wolfson & Sullivan, *supra* note 118 at 217.
232. *Cowspiracy: The Sustainability Secret*, 2014, DVD (Santa Rose, Cal: AUM Films & Media, 2014).
233. *Food, Inc.*, 2008, DVD (New York: Magnolia Pictures, 2009).
234. Mercy for Animals, "Farm to Fridge" (3 February 2011), online (video): *Youtube* <www.youtube.com/watch?v=THIODWTqx5E>.
235. See *The Ghosts in Our Machine*, 2013, DVD (Toronto: IndieCan Entertainment, 2014); Jo-Anne McArthur, *We Animals* (New York: Lantern Books, 2013). See also Jo-Anne McArthur, *Captivity* (New York: Lantern Books, 2017).
236. *Animal Farm*, TV Film (Los Angeles: Hallmark Films, 1999) based on the 1945 novel by George Orwell. A young woman at the University of Essex conference reported when I presented an earlier version of this paper that this was her experience.

a person not to eat animals because they have emotions. Others harness celebrity talent such as *Earthlings*, in which narration by Joaquin Pheonix and music by famous artists such as Moby accompany very graphic footage of humans mistreating nonhuman animals across a wide variety of contexts.[237]

Academic books are now using some of the same strategies we see in the films. For instance, political scientist Timothy Pachirat's gut-wrenching book *Every Twelve Seconds*, documenting his experience of what it was like to work in an American slaughterhouse, has a graphic photograph of a white blood-covered factory worker's boots and coat on its cover.[238] Novelist Jonathan Foer's *Eating Animals*[239] uses a combination of personal memoir and investigative reporting to explore eating animals in a new and powerful way.

Not seeing has worked for slaughterhouses and industry for a long time because if people do not see what goes on, it does not exist for them in a very real way. The films and books drag that fantasy out into the light, gently and not so gently, forcing us to look at the 'shadow world' of nonhuman animals. What these authors, academics and artists all understand is how important a role emotion plays in the movement people make when they decide to no longer eat animals or substantially reduce their nonhuman animals use. As Foer puts it, "[f]acts are important, but they don't, on their own, provide meaning… But place facts in a story, a story…about the world we live in and who we are and who we want to be", [240] now that can prompt much needed reflection. In other words, it is not all emotion; but it is not all logic either. If it were all logic, all anyone would need to hear is the argument about the health impact or the environmental impact or what conditions are like once and that would be it. Most people though probably find themselves engaged in a multifaceted process evolving their position on their relationship to nonhuman animal use over a period of time. Some of the information used

237. *Earthlings*, *supra* note 202.
238. Timothy Pachirat, *Every Twelve Seconds: Industrialized Slaughter and the Politics of Sight* (New Haven: Yale University Press, 2011).
239. Foer, *supra* note 198.
240. *Ibid* at 14.

in this transitioning is visual, some classically factual, and those images and information probably need to be heard and seen multiple times in order to penetrate the many deep layers of custom, habit, convenient denial or outright disbelief, internal and external. Many people probably think, as I did before I became interested in animal issues, that the conditions for farm animals cannot be that bad because there must be laws and regulations that would prohibit cruel treatment. It is quite hard to believe, I mean really take it in, that cruel practices, things that could not legally be done to a companion animal, are perfectly legal to do to farm animals simply because those practices are industry custom.[241]

Morris Berman would call what is needed or required somatic or body-based, something that transcends the mind-body dualism we use to organize and understand so much in Western culture. When it rings true, it rings true to both mind and body, emotions and reason. Berman's book *Coming to Our Senses*[242] powerfully and convincingly describes how badly conventional history has accounted for the role of the body in Western thought, *e.g.* religious history.[243] When the time comes to write the history of the animal movement, it will have to be a somatic history that questions rather than accepts the mind-body distinction that I suspect cannot accurately account for why people make the switch when they do (and of course why they switch back, which many do, and then switch out again, much as it is with other damaging addictions or bad habits we engage in).[244]

Given the many and varied contexts and understandings of nonhuman animals and human relationships to them, it is too crude

241. See Wolfson & Sullivan, *supra* note 118 at 215–16 (discussing how people are misled in exactly this way).
242. Berman, *supra* note 178.
243. See *e.g. ibid* at 138–41 (explaining how heretical practice is "first and foremost a body practice" and without understanding this and how that direct access to transcendence challenges religious orthodoxy it is impossible to understand what was at issue in religious purges, wars, and doctrinal disagreements fought over fiercely for hundreds of years, which will otherwise appear to be about insignificant semantics).
244. See Foer, *supra* note 198 at 5–10 (for what is probably a fairly typical account of switching back and forth).

to gather all that together under the simple label 'property'. The law is often not good at nuance, but we can do better than that. It would be better to recognize that nonhuman animals are not like other forms of non-sentient property and make that explicit with a categorization shift: quasi-property. 'Quasi' is a good designator in terms of recognizing that the kind of property nonhuman animals are is constantly changing, as our ideas about what duties those lives are owed change and will continue to change. Property is probably an indelibly neo-liberal value but civil rights movements can successfully push it more to the margins, shrinking and decentering it where justice demands.[245]

B. Why Quasi-person?

"[A]t least some individuals presently within the legal system accept that animals have interests deserving of consideration by courts, whether or not they are full 'legal persons'. Perhaps it is helpful to think of animals as partial legal persons".[246]

There is a pragmatic reason to switch to quasi-person, which I discussed in the introduction, namely, the outrage factor: 'What, persons like us!' — driven by religious or cultural beliefs about human superiority to all other species and a long history of animal exploitation as normal.

The naming and now wide-spread use of the idea of the Anthropocene (in science and in the humanities, *e.g.* in post-humanism) to capture the catastrophic effects of human activity on the planet, along with serious doubts about the ability to keep (and the desirability of keeping) humans at the center of the universe raise 'inconvenient truths' have probably mitigated this sense of superiority and entitlement.[247] That sense has certainly has become more intense since the 1990s when animal law first starting finding its feet in the United States and when Berman wrote about the serious consequences of humans living without a genuine nonhuman

245. See *e.g.* AJ van der Walt, *Property in the Margins* (Portland: Hart Publishing, 2009).
246. Favre, *Animal Law*, *supra* note 16 at 347.
247. *An Inconvenient Truth*, 2006, DVD (Hollywood: Paramount Studios, 2006).

other that reflects back to humans who they are.[248] Yet there is no doubt that even with a heightened understanding of what kind of shape the world is in due to intensive human activity, *e.g.* agriculture (and, in this context, farmed animals, growing the grain needed to feed them and the damage done by their waste to rivers and oceans), the outrage factor persists. Understandably people resent being told, as Berman puts it, that the modern world has come to an end.[249]

I recall a visiting Spanish judge at my university reacting to a paper I presented to my faculty on Wise's work and the *Unlocking the Cage* documentary by saying "we are not animals; animals act on instinct", *i.e.* other animals cannot be persons (moral or legal). Even the qualifier 'quasi' would probably not satisfy the holder of such a view. However, there are other reasons, less strategic and more substantive, for thinking quasi-person, like quasi-property, might better capture what we are talking about in connection to non-human animals, *i.e.* it captures a set of important truths.

First, as Cass Sunstein repeatedly emphasizes, at least some nonhuman animals do indeed have rights under the legislatively passed anti-cruelty statutes.[250] These rights are routinely violated and are often more expressive than real but they are rights.[251] The issue is that enforcement of those statutes is at the discretion of the state or its delegated SPCA who are underfunded, often do not prosecute, or in the case of Canada press for the prosecution of cases, given the burden and standard of proof for criminal law cases and the need to prove intent,

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248. See Berman, *supra* note 178 (on the scenario "Why the Modern World Came to an End" at 98).

249. See *ibid*.

250. See *e.g.* Sunstein, "Enforcing Legal Rights" *supra*, note 174. See also Cass R Sunstein, "Introduction: What Are Animal Rights?" in Sunstein & Nussbaum, *supra* note 4 ("[i]f we understand 'rights' to be legal protection against harm, then many animals already do have rights" at 5). This point that animals do indeed already have some rights was affirmed in *Tilikum* ex rel *PETA, Inc v Sea World Parks and Entm't Inc*, 842 F Supp 2d 1259, 1264 (SD Cal 2012).

251. Sunstein, "Standing for Animals", *supra* note 66 at 1339.

or are all too willing to unnecessarily destroy seized animals.[252] Hence, the rights exist, at least for non-farmed animals and those caught under other anti-cruelty exceptions, *e.g.* research animals and entertainment animals, depending on the statute and jurisdiction. However, the rights, such as they are, are dependent on humans for their vindication, and those humans are not always thinking of the animals first.[253] In other words, the remedy is highly discretionary and not something the animals are in a position to assert on their own behalf. It would be appropriate to recognize what they do possess, a kind of in-between status with 'quasi' — they have a proto-right as it were, dependent on humans to realize it in terms of enforcement and advocacy. This situation is a feature of their voicelessness or extreme vulnerability — or as Carter Dillard, Senior Policy Advisor with the Animal Legal Defense Fund, put it, their relative weakness (to humans) and their unfortunate usefulness which makes their vulnerability extreme.[254] However, as Sunstein writes, "as a matter of positive law, animals have rights in the same sense that people do, at least under many statutes that are enforceable only by public officials".[255]

Second, 'quasi' is also the right kind of designator or qualifier given the fact that the rights of nonhuman animals are probably not going to be and should not be the same as humans. As Favre has noted, nonhuman animals cannot have complete freedom of movement.[256]

252. For one activist's account of the Chatham dog seizure in Ontario by the OSPCA and victory for most of the dogs, see Emily Mallet, "Rescued at Last: The Chatham Dogs are Saved" (26 July 2017), online (blog): *Indiana Jane* <indianajane.ca/2017/07/26/rescued-at-last-the-chatham-dogs-are-saved/>.

253. See *Naruto v Slater*, 888 F (3d) 418 (9th Cir 2018), online (pdf): *United States Courts* <cdn.ca9.uscourts.gov/datastore/opinions/2018/04/23/16-15469.pdf>.

254. Dillard, *supra* note 168 at 13.

255. Sunstein, "Standing for Animals", *supra* note 66 at 1337.

256. Favre, "Living Property", *supra* note 4 at 1050. But see Donaldson & Kymlicka, *supra* note 12 at 126–32 (arguing for freedom of movement and the sharing of public space for domesticated animals to the extent possible, pointing out that the human right to mobility is only a right to adequate or sufficient mobility, not unlimited mobility given international borders and the like).

Francione frequently points out that the rights will not be the same as humans', calling this a question of 'scope' – nonhuman animals will not get to drive, to vote, to obtain a scholarship to attend college.[257] He even concedes that when a human and a nonhuman life conflict in a true emergency, it is right to save the human.[258] As Wise has put it, "[s]ometimes people think we're trying to get human rights for chimpanzees. We're not. We're trying to get chimpanzees rights for chimpanzees."[259] Sue Donaldson and Will Kymlyka divide the kinds of citizenship rights they believe nonhuman animals could and should have based on whether the animal is wild, domestic, or what they term a "denizen",[260] *i.e.* living among humans. Donahue makes the pragmatic point that:

> [e]ven if animals are granted personhood, it is highly likely they will not be granted the exact same legal status as humans and will need additional and different laws that apply to them just as we apply different laws to children even though they are people. Thus, the animals are likely to remain in zoos or sanctuaries.[261]

Think Sandra. Or the NhRP chimps who, if the applications were successful, were going to go to Save the Chimps, a sanctuary in Florida.[262]

As animal lawyers have recognized, one relevant comparator for the kind of legal personhood that might be available to nonhuman animals is the corporation. Eric Glitzenstein, for instance, has argued that personhood is not:

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257. See Francione, "Rights Theory and Utilitarianism", *supra* note 60 at 86; Francione, *Animals, Property, and the Law, supra* note 53 at 110–12; Francione, *Rain Without Thunder*, *supra* note 54 at 179–80; Francione & Charlton, *supra* note 56 at 23.
258. Gary L Francione, "Animals – Property or Persons?" in Sunstein & Nussbaum, *supra* note 4, ch 5 at 133–34 [Francione, "Animals – Property or Persons?"]. See "Killing of Harambe" (page last edited 22 August 2018), online: *Wikipedia* <en.wikipedia.org/wiki/Killing_of_Harambe>. See also Gary L Francione, *Introduction to Animal Rights: Your Child or The Dog* (Philadelphia: Temple University Press, 2000).
259. Quoted in Boyd, *supra* note 8 at 39.
260. See Donaldson & Kymlicka, *supra* note 12.
261. Donahue, *Increasing Legal Rights for Zoo Animals*, *supra* note 171 at 151.
262. See "Save the Chimps, Inc" (2018), online: *Save the Chimps* <www.savethechimps.org/>.

> [a]n all or nothing proposition…[C]orporations [in the United States] have certain limited First Amendment rights, and certainly due process rights when it comes to property, but they obviously do not have the right to vote. Corporations do not have full liberty rights; there are all kinds of rights they do not have.[263]

As Dillard puts it, there are a variety of conceptions of legal personhood and being a person can be a matter of degree.[264] Minors have a bundle of rights that do not include voting; corporations also cannot vote but they can own property.[265]

Sunstein has written that he thinks that Wise and Francione are correct to reject the rhetoric of property because he thinks that it tends to undermine and undervalue the interests that we already acknowledge nonhuman animals possess.[266] Is property the problem? Yes and no. It is *a* problem and, indeed, classifying animals as property has facilitated their instrumental use and treatment as objects (rather than subjects) tremendously.[267] However, beyond classification, the bigger problem is the social attitude that normalizes nonhuman animal use (and abuse). In a legal system in which subjects generally need to be speaking subjects in order to be heard, the inability of the animals to speak for their own interests and to protect themselves creates another problem. De-classifying nonhuman animals as property will not in-and-of-itself solve those problems. And it will, at least in common law Canada,

263. See Dillard et al, "Animal Advocacy and Causes of Action: Third Panel of the New York University Symposium" (2006) 13:1 Animal Law 87 at 103 (in which Glitzenstein was one of the panelists) [Glitzenstein, "Panel"].
264. Dillard, "Empathy with Animals", *supra* note 168 at 2.
265. *Ibid* at 5.
266. Sunstein, "Enforcing Existing Rights", *supra* note 174 at vii.
267. See Wendy A Adams, "Human Subjects and Animals Objects: Animals as 'Other' in Law" (2009) 3:1 Journal of Animal Law and Ethics 29.

face tremendous resistance.[268] Given our dichotomous thinking about persons and property, the perception is that making nonhuman animals 'not property' would mean making them persons like human beings. We must transcend that dichotomous thinking in order to move forward.

I take inspiration from what Anna Pippus, Director of Farmed Animal Advocacy at Animal Justice Canada, has said in a debate with Wise and feminist animal law scholar Maneesha Deckha: "[W]elfare and rights, personhood and property exist on a spectra rather than as strict binaries".[269] As Pippus puts it, "[b]eing property and being persons aren't mutually exclusive".[270] Wise says in an interview that he agrees with Pippus: "[i]f a person is simply an entity that has the capacity for legal rights, it would be theoretically consistent for a nonhuman animal person to have say the right to bodily integrity but not the right not to be considered property, though the NhRP would hammer away at that property status".[271]

Wise and Favre were on a Roundtable at the Oxford Centre of Animal Ethics Summer School, and the two long-time advocates were delighted to find themselves agreeing that animals can have rights and be

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268. The fact that civil law jurisdictions have a category of law called 'the law of the person' and that civil codes based on the French Civil Code have a book on the person perhaps make manipulations of personhood, sentience, and dignity less strange to the legal mindset than it is for those steeped in the English common law system. See Angela Fernandez, "Albert Mayrand's Private Law Library: An Investigation of the Person, the Law of Persons, and 'Legal Personality' in a Collection of Law Books" (2003) 53:1 University of Toronto Law Journal 37, cited by Matambanadzo, *supra* note 16 at n 118.
269. Wise, Deckha, Pippus Debate, *supra* note 96. Like 'quasi', a 'spectrum' is a common legal device and idea in Canadian law. See *e.g. Transport North American Express Inc v New Solutions Financial Corp* [2004] 1 SCR 249 at paras 6, 40.
270. Wise, Deckha, Pippus Debate, *ibid*.
271. See Fernandez, "Legal History and Rights for Nonhuman Animals", *supra* note 155 at 210.

property.[272] Favre, for example, explains in his casebook that it may not be necessary to eradicate the property status of nonhuman animals in order to create legal rights in the sense of acknowledgement within the law of individual interests that deserve protection.[273] Sunstein also emphasizes that property can have rights.[274] We are beginning, in other words, to break down the binary approach and to climb 'the Great Legal Wall'.[275] As Pippus states, "[e]ven while non-human animals are still property, we must develop their personhood so that they can enforce, through their advocates, whatever legal protections are available to them".[276] So what we are talking about is less like a wall than a spectrum or a continuum.

Using 'quasi-property' ensures we do not forget that nonhuman animals still have the property status (it has not gone away) even while their capacity for legal rights increases due to the recognition by judges and legislatures that though they are not exactly like human beings, or even in the cases of many species sufficiently similar, their 'quasi-personhood' status makes it appropriate to render the rights that they do have explicit and to expand them where that would be appropriate. If nonhuman animals are property with some rights then we cannot keep referring to them as property, not persons, or holding that they cannot be persons until they are no longer property. That binary thinking is both unhelpful and untrue.

Glitzenstein points out that when corporations were recognized as

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272. Dillard, et al, "Roundtable: Property, Personhood and Rights" (Animal Ethics and Law: Creating Positive Change for Animals delivered at Oxford Centre for Animal Ethics, Fifth Annual Oxford Summer School on Animal Ethics, 25 July 2018) [unpublished].
273. Favre, *Animal Law*, *supra* note 16 at 417.
274. Sunstein, "Enforcing Existing Rights", *supra* note 174 at vi, vii.
275. Ironically, 'the Great Legal Wall', is based on Roman law, which has a much more direct connection to civil law than to the common law. Perhaps rigid common law thinking about the division between property and persons is an example of a transplant cut off from the original parent plant and the roots of its system, which makes it difficult to re-run the logic of that system for new categories or entity of beings.
276. Wise, Deckha, Pippus Debate, *supra* note 96.

persons in the United States in 1886[277] it was without much fanfare. It was done, as he puts it, "without almost any analysis or any argument".[278] As he puts it, "the courts for more than one hundred years have had no trouble having a fairly nuanced flexible notion of what personhood can mean".[279] "[C]ourts have proven themselves to be rather adept in engaging in that kind of fine line drawing when they regard it as necessary",[280] or desirable. The comparison of nonhuman animals with corporations is important and lends support to the idea that quasi-person/quasi-property is a concept that would track how we already carve up and use the legal personhood concept even if there are nuances over the use of the analogy of which we should be aware.[281] It would not be impossible in other words. It shows that we can handle mixing up the concepts of property and persons.[282] The problem of course is that unlike the corporation, nonhuman animal legal personhood goes against long-standing and convenient human use and interest.

Francione thinks a designation of "quasi-person" or "things plus" will not work because "the moral universe is limited to only two kinds of

277. *Santa Clara Co v South Pacific Railroad Co*, 118 US 394 (1886).

278. Glitzenstein, "Panel", *supra* note 263 at 102.

279. *Ibid* at 103–4.

280. *Ibid* at 104.

281. Animal law scholar and teacher of corporate law, Katie Sykes, points out that unlike nonhuman animals, corporations are not property and are not owned. Shareholders own shares, a form of intangible property made up of rights set out in the corporate documents. They do not, however, own the assets of the corporation (although they do have a residual claim on the assets if the corporation is dissolved once all the creditors are paid). Although we colloquially say that shareholders own the corporation; legally they do not own its assets. The corporation owns the assets and has a separate legal personality from the shareholders.

282. Thanks to Katie Sykes for making this and the point in the above note in reacting to an earlier draft of this article, specifically the claim which Pippus makes that corporations are a mix of property and persons. I suppose the better way to put it would be to say that corporations are persons, which exist for the purpose of distributing to their shareholders profits made from the corporation's assets or property.

beings: persons and things".[283] It is not clear that this is true. Even if it is true (or tends to be true) of the moral universe given the complicated way that the dualism of mind and body has pervaded Western thought and human psychology, it is certainly not true of the legal universe. The law has already shown long ago that it is perfectly prepared to abandon the dualism of property and person (as in human being) and work creatively with those concepts when there is a strong desire to do so. Shareholders are human beings. However, the legal entity that owns the property, which is used to make profits for the shareholders, the corporation itself is not a human being. It is a legal person with some (limited) rights.

Is the proposal for a quasi-property/quasi-person legal status for nonhuman animals simply a question of semantics? It is not merely semantics, as the concepts we use lead us to marshal and organize facts in a certain way.[284] The words we use channel our thought in some directions and not others, they point towards some truths and obscure others.

That is why many advocates want to leave property behind for nonhuman animals and shift to notions like dignity, sentience, and personhood, believing that such shifts will move things along in the right direction (and those who disagree oppose such changes). The guardianship idea for pets uses a similar logic. It leaves the legal status of a pet unchanged, the animal is still owned property, but the hope is that the 'symbolic language change'[285] will help educate people to think of their pets more like family members than pieces of (disposable) inanimate property. This proposal has been adopted by the legislature in Rhode Island and in twenty-one American cities since 2000 (as well as

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283. See Francione, "Animals – Property or Persons?", *supra* note 258 at 131. This essay is reprinted in Gary L Francione, *Animals as Persons: Essays in the Abolition of Animal Exploitation* (New York: Columbia University Press, 2008) 25.

284. See Purdy, *supra* note 29 ("[s]aying we live in the Anthropocene is not like saying the earth is 4.5 billion years old rather than 6,000. It's more like saying the United States is a secular country, or a religious one. It's not a statement of fact as much as a way of organizing facts to highlight a certain importance that they carry" at 2).

285. See Hankin, "Making Decisions", *supra* note 44 at 6.

one Canadian city, Windsor, Ontario).[286] The guardianship example is instructive, as it is not just those who want to see the change in language occur who believe it will have an impact on how nonhuman animals are viewed. Those who disagree with such a change (it must be said, on some very weak arguments), must also believe that there is power in the approach otherwise why would they put so much energy into opposing it.[287]

Changing up the concepts is a tricky strategy for animal advocates because our language should not get too ahead of where most people are in terms of their attitudes towards nonhuman animals (at least judges and legislatures, who tend generally to be conservative in the sense of leaning towards keeping things the same). If personhood is counter-intuitive given the conflation with human being or worse, causes an outraged shutdown, then it might be too much, too soon. Hence, the plethora of proposals to use categories like Favre's "living property",[288] *e.g.* "sentient property" (Carolyn Matlack) and "companion animal property"[289] (Susan Hankin), which disclaim personhood (as Hankin's does).

What might look like insignificant battles over semantics operate as proxies for very significant differences. For instance, Kathy Hessler explains the way that the language of 'custody' and 'best interests of the animal' are difficult for judges and legislatures to accept when thinking

286. See "Guardian Cities" (2018), online: *In Defense of Animals* <www.idausa.org/campaign/guardian-initiative/guardian-cities/>.

287. See Hankin, "Making Decisions", *supra* note 44 (explaining veterinary opposition to guardianship language (at 8–18), evaluating the arguments and concluding that "they often rely on scenarios that range from the unlikely to the extreme" at 9).

288. Favre, "Living Property", *supra* note 4.

289. Hankin, "Not a Living Room Sofa", *supra* note 174 at 379–88 (on 'companion animal property' and how it differs from Matlack's 'sentient property', which would apply to all warm blooded domesticated animals that live near those upon whom they are dependent rather than focusing on dogs and cats and perhaps other warm blooded pets — Hankin does not want to include domesticated farm animals that might live near who care for them, (disclaiming personhood at 320)). See Carolyn B Matlack, *We've Got Feelings Too: Presenting the Sentient Property Solution* (Winston-Salem: Log Cabin Press, 2006).

about issues surrounding pets and marital breakdown (including whether visitation of what was the family pet after spousal separation can be ordered).[290] Property is a strikingly inadequate way to decide which spouse should have the family pet in divorce disputes. Why? Because these disputes are not well resolved by giving the spouse who no longer lives with the dog half of the dog's dollar value (or worse having the animal sold and splitting the dollar value between the spouses).[291] The problem here is similar to how to arrive at appropriate damages in tort cases where pets are killed or injured and it is unsatisfactory to use the (often nominal) market value of the animal (some courts have expanded this to include reasonable veterinary expenses, or the intrinsic value of a dog, as measured by costs and time invested, and, very occasionally, damages for mental distress, easier to find where there has been an intentional killing of the animal).[292] Hessler explains that for situations of marital breakdown, something more like a 'best for all concerned' or a 'well-being of the animal' test is more promising and the latter has been used successfully legislatively (in Illinois and Alaska) precisely because it avoids connoting the comparison to children and 'the best interests of the child' test used for custody disputes involving children.[293]

The sensitivity around the comparison to children is worth pausing on. Historically, cruelty towards children and animals were fought by the same philanthropic organizations in both England and the United States given the very common idea that those who are cruel to one are

290. Hessler, "Animal Custody", *supra* note 213. See Bisgould, *Animals and the Law*, *supra* note 44 at 154–57 (canvassing Canadian cases).

291. Hessler, "Animal Custody", *ibid* at 14.

292. See Hankin, "Not a Living Room Sofa", *supra* note 174 at 325–42.

293. Hessler, "Animal Custody", *supra* note 213 at 15–16. But see Bisgould, *Animals and the Law, supra* note 44 at 112 (describing a case from British Columbia in 1997 in which 'custody' language in the statute led a court to apply a 'best interests' test to a dog named Jasper, who had been neglected and abandoned by his owners and the court held that he should remain in the custody of the SPCA with the owners having access or visitation rights until the case was resolved).

cruel to the other.[294] This was also true in Canada in the early days of the Toronto Humane Society, the Nova Scotia SPCA (which continued as late as 1932), and the Winnipeg Humane Society (which retained its focus on women in difficult domestic situations, children, and animals until 1911).[295] Leaving intervention and regulation to private charities rather than the police or the kind of specialized social services that would develop for these vulnerable human populations in the twentieth century, probably demonstrates the historical failure to prioritize violence against women and children. Separation from nonhuman animals was a way to signal women and children are more important, or at least different.

Yet today the kinds of augmented care for pets Hessler describes indicates that nonhuman companion animals are for many "surrogate children".[296] We all know what someone means when they say they have to get home to their 'fur baby'. There is research challenging the idea that only humans have language and so only humans are capable of symbolic interaction. Clifton Flynn writes:

> [T]his new perspective argues that animals are minded, social actors who have selves, can role-take, can create shared meanings with humans (and sometimes other animals) with whom they interact, and thus are also capable of interacting symbolically.[297]

Caregivers of the severely disabled construct a social identity for the disabled person, seeing them as minded and attribute personhood to them even though they are non-verbal based on features like their unique personalities and their ability to be reciprocating partners in the relationship who are afforded a social place in the family.[298] People who attribute personhood to their companion animals tend to see them as having this kind of 'mindedness', engaging in intentional, reciprocal, and thoughtful behaviour.[299]

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294. Sabrina Tonutti, "Cruelty, Children, and Animals: Historically One, Not Two, Causes" in Linzey, *supra* note 75.
295. See Bisgould, *Animals and the Law*, *supra* note 44 at 97–98.
296. Clifton P Flynn, "Women-Battering, Pet Abuse, and Human-Animal Relationships" in Linzey, *supra* note 75 at 117.
297. *Ibid* at 120.
298. *Ibid*.
299. *Ibid* at 121.

There is such a sensitivity around human specialness — whether that be invoking comparisons between nonhuman animals and children or the disabled who cannot speak or using the idea of 'personhood', even the nonhuman legal personhood of entities like corporations. The language we use for our legal ideas for animal protection matters for this reason (and others). Comparisons to human beings that are too explicit come too close for comfort and can simply cause shut down, which for people who are not vegetarians or vegans might be as basic as, "they can't be like humans; I eat them".[300] It is a lot to expect people to absorb the psychic dissonance caused by the thought that what they are doing at meal time is a kind of cannibalism, that classic and paradigmatic social taboo. Some people might stop eating meat; most will probably just stop listening (or in the case of a judge say no to what is being requested). 'Quasi' might be the way to avoid that shutdown, keeping property for the idea of a nonhuman animal to attach to, while tempering what is meant by person, to make it clear that it does not mean human being.[301]

300. People generally do not eat their pets and so pets are given more latitude in terms of human comparisons. But see the sad case of a Vancouver couple who ate their pet pig. See Lindsay William-Ross, "B.C. Couple Kill and Eat Adopted Rescue Pet Pig" (27 February 2018), online: *Vancouver Courier* <www.vancourier.com/news/b-c-couple-kill-and-eat-adopted-rescue-pet-pig-1.23186305>. I recently met a one-year-old pet pig named Truman being walked by his (vegan) owner at the beaches in Toronto, along with one of the dogs he lives with. This owner emphasized how different Truman is than her dogs, how he does his own thing most of the time and is very intelligent and affectionate and will live for thirty years. When we talked about what the pig owners in Vancouver did, she thought that this is probably more common than we would like to think especially given how long pigs live.

301. Purdy, *supra* note 29 (Purdy paraphrases Max Weber writing famously that "ideas are not generally the engines of history, but they are its switchmen" at 67). See also Bisgould, *Animals and the Law*, *supra* note 44 at 9 (I think it is fair to say that everyone offering ideas for how to legally classify nonhuman animals in what Lesli Bisgould calls "the second wave" of legal attention to animals (namely, going beyond the traditional limits of anti-cruelty legislation to recognize "the right of animals to have their own interests considered in law" at 9) is hoping to provide the thing that will be able to make the switch).

Perhaps the language we use or the categorization (property or person) at the end of the day matters much less than having a legal system in which nonhuman animals have legally cognizable and recognizable interests, *i.e.* a legal system in which they have standing (either in the preferred sense of an action brought in their own name by their human representative, or the strong sense of a private action or prosecution by someone other than the state, where the state is failing in its duty to adequately protect them).[302] Yet once there is standing, there has to be a way of thinking about the legal status of the animal that does not cause outrage (and be perceived as a threat to human specialness) but nonetheless recognizes the moral interests of the animal in question and its rights. 'Living property' or 'quasi-property' status pushes nonhuman animals closer to being the kind of entity that deserves legal standing and a representative to defend their interests (required by their voicelessness), nudging them further along the continuum between 'mere property' and 'full human person'. 'Quasi-personhood' makes it clear that there will be no conflation of nonhuman animals with human beings, if this is the reassurance that it seems people need.

Belief systems only continue their hold on us as long as we allow them too. If we keep saying over and over again that animals will never have non-tradeable interests as long as they are property or they have no rights unless they are persons in the same way (or close to the same way) as human beings, are we not helping to make it so, to further entrench those beliefs such that alternatives become unthinkable? Should we not be trying to make new ways forward thinkable rather than using overdrawn dichotomies to make things sound impossible when they are not, and, indeed, they are anyway already partly true when regarded in a slightly different light? Our human tendency is to see the world in black and white dichotomies rather than the shades of grey that are more true to reality.[303] And, culturally, we will defend codes or grids of discontinuities like masculine/feminine, animal/human tenaciously and even

302. Thanks to Nick Wright, Founder & Chair of the Board of Animal Justice Canada, for pressing me on this point.

303. Berman, *supra* note 178 at 54.

ferociously.[304] Indeed, it is just this tendency that probably contributes to the psychological resistance many people feel about moving towards less nonhuman animal use ('us/not them' and 'me/not it').

It is true that 'quasi' retains the binary categories while it simultaneously mixes them. One might say that this is not really leaving them behind, as Satz, for example, recommends.[305] I do not discount that we might be able to do that in our thinking about nonhuman animals one day. My thinking, however, is that quasi-property/quasi-person is a helpful short-term heuristic that can provide enough of a shake-up to create new ways of immediately moving forward. As Glitzenstein points out, nonhuman animals do not care what their legal status is or whether initiatives that benefit them are adopted for pure or mixed motives.[306] What they would care about (if they could speak) is that they be protected from harm — not just pain (although this is of course most immediate) but even if we could make their industry uses painless or more comfortable, being used or being eaten. I agree with Satz that a pure motive would be preferable; but I do not see it as essential.

As Foer puts it, there is no solution in going into one of "the logical extremes", [307] *e.g.* being a purist activist or a hater of activists, "rather than [living with] the practical realities".[308] If you are pescaterian, vegetarian, or vegan, think of all the times you have probably found yourself, in Foer's words, "defending a position far more extreme than you actually believe or could live by".[309] Whether pro or con using animals, we are usually, as Foer puts, thinking "only about the edges of the arguments".[310] This "all-or-nothing framework" [311] is "a way of thinking that we would never apply to other ethical realms".[312] And to that extent quasi-property/

304. *Ibid* at 78.
305. Satz, *supra* note 1.
306. Glitzenstein, "Panel", *supra* note 263 at 106; *ibid*.
307. Foer, *supra* note 198 at 32.
308. *Ibid*.
309. *Ibid* at 13–14.
310. *Ibid* at 32.
311. *Ibid*.
312. *Ibid*.

quasi-person will not be popular with either extreme. I am prepared to accept this, as I believe that there are probably fewer people living there than in the in-between, trying to do some good in their consumption habits but are not prepared, say, to always wear vegan shoes. Insofar as our thinking, including our moral and cultural thinking about this complex topic will certainly change and in ways that we cannot predict, quasi-property/quasi-person might be a temporary legal categorization. I offer it as a way to capture new thinking that we can use to get us out of the binary approach in which, as Satz pointed out, we have become stuck to the massive detriment to nonhuman animals and to ourselves as failed stewards of our environment and its living entities.

As Fraser CJ of the Alberta Court of Appeal put it, we must deepen the "understanding of our place in the universe. Humans may be at the top of the evolutionary chain. But…we are [also] stewards of the environment",[313] which includes the nonhuman animals "with whom we share the Earth".[314] We are only human, after all, one species amongst many; and only humans can do what needs to be done at this delicate juncture by creating the requisite shifts in thinking.

IV. Conclusion

This paper has argued that the property/persons and welfare/rights dichotomies tend to obscure the 'quasi' in between space, operating as if no rights exist until the full personhood status is won and this is just not true. Why should animal advocates surrender that important truth?

Neither pure or full property nor pure or full personhood map onto what most people think or, in the case of personhood, are probably prepared to accept. Nonhuman animals are not like standard inanimate forms of property that are interchangeable and replaceable as exchange commodities. Blunt declarations that they are simply forms of property are unconvincing and do not match onto our experience. On the other hand, other animals are not the same as humans and so it is difficult to argue in a sustained and across-the-board convincing way from the

313. *Reece*, *supra* note 95 at para 58.
314. *Ibid.*

counter-intuitive premise that they should be given a full personhood status like humans.

Quasi-person status akin to corporate status (*e.g.* partial but not full range of rights) could be recognized judicially or legislatively and advocated for politically. 'Quasi' is a perfectly inhabitable space even if it is not perfect in terms of what all animal advocates want. It accepts an imperfect state of existence, working with it. It is not pure but it might be good enough.

Perhaps when the heresy (caring about nonhuman animals other than our pets) becomes orthodoxy, the Francione-based heresy (it should not be on utilitarian grounds) will then become orthodoxy, and who knows what the new heresy from that orthodoxy will be. We only know there will be one.[315] There will be influx and change as ideas about what is right (*e.g.* around pet-keeping) and what is possible come and go. For example, lab-grown meat or 'clean meat' (currently possible but not yet commercially viable) might be the game-changer animal advocates are waiting for.[316] Once doing the right thing for animals does not require people who want to eat meat to give it up, it becomes much more likely that they will turn and really see what producing that food in the body and life of a living sentient creature costs those animals and the environment.

Two Oxford researchers released a report in June 2018 showing the

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315. Berman, *supra* note 178 at 147–50 (where Berman explains how the orthodoxy, heresy cycle works).

316. Jeff Sebo, "The Future of Meat" (Paper presented at "Veganism and Beyond: Food, Animals, Ethics", Queen's University, Kingston, Ontario, Canada, 10 June 2017) [unpublished]). See Director Liz Marshall's film *Meat the Future* (trailer available at <meatthefuture.com/>). The Oxford Summer School included two presentations on the topic of 'clean meat': Rebecca Jenkins, "Lab Grown Meat: The Final Frontier for Agricultural Animal Law" (Animal Ethics and Law: Creating Positive Change for Animals delivered at Oxford Centre for Animal Ethics, Fifth Annual Oxford Summer School on Animal Ethics, 24 July 2018) [unpublished]; Christopher Bryant, "Cellular Agriculture: The Future of Animal Products?" (Animal Ethics and Law: Creating Positive Change for Animals delivered at Oxford Centre for Animal Ethics, Fifth Annual Oxford Summer School on Animal Ethics, 25 July 2018) [unpublished].

incredible gap between the agricultural land used to produce calories and protein using meat and dairy (given all the land required to grow animal feed) and what would be required if humans were to meet those needs by eating plant-based products directly. The conclusion of this research is that the very best thing anyone can do to reduce their environmental impact is eat plant-based foods and eliminate meat and dairy (the very best cow's milk they found is worse than the very worst soy milk).[317]

The law needs to be able to move, grow, and change with these important scientific findings and cultural shifts in moral thinking. A conception like quasi-property/quasi-person will be able to grow with these changes as we search for sustainable and ethical ways to live a healthy and humane human existence. Yes, the categories are vague but this is, I suggest, a virtue given that we do not know yet what we will fill them with. Which animals and which rights, where human property rights must give way to the nonhuman animals' rights, and whether we need to embrace the idea that nonhuman animals are their own property in much the same way that human beings enjoy a kind of practical self-ownership. The goal would be for nonhuman animals to be treated *as if* they are persons, for the purposes of respecting the rights they have, which are appropriate to their situation; and *as if* they are not merely property, in the sense of having their own existence and interests.[318] This

317. The study showed that meat and dairy consumption provide just 18% of calories and 37% of protein use but use the vast majority of agricultural land — 83%, which produces 60% of agricultural greenhouse gas emissions. See Damian Carrington, "Avoiding Meat and Dairy is 'Single Biggest Way' to Reduce Your Impact on Earth" (31 May 2018), online: *The Guardian* <www.theguardian.com/environment/2018/may/31/avoiding-meat-and-dairy-is-single-biggest-way-to-reduce-your-impact-on-earth>. The study is by J Poore & T Nemecek, "Reducing Food's Environmental Impacts through Producers and Consumers" (1 June 2018) 360:6392 Science 987, online (pdf): <science.sciencemag.org/content/sci/360/6392/987.full.pdf>.

318. The first definition of "quasi" in Webster's is "as if". See *Webster's*, *supra* note 16, sub verbo "quasi" ("as if: as it were: in a manner: in some sense or degree"). See also *Black's*, *supra* note 45, sub verbo "quasi" (where 'as if' is the first definition).

is a set of legal fictions; but they are ones that track important under-acknowledged truths, specifically, that neither their property nor their personhood is an all-or-nothing affair.

Friends of Every Friendless Beast Carceral Animal Law and the Funding of Prosecutors*

Justin Marceau** & William Dewey***

In the mid-nineteenth century, the founder of the American Society for the Prevention of Cruelty to Animals (ASPCA), Henry Bergh, saw criminal punishment as the lynchpin of the protection of animals. Bergh lobbied the New York legislature for the adoption of animal cruelty laws, and took it on himself to enforce those laws. Animal law has evolved considerably since then, but Bergh's tactics have experienced a renaissance. The animal protection movement's reliance on criminal law and incarceration to prop up animal status is the subject of a book-length critique by Justin Marceau in Beyond Cages: Animal Law and Criminal Punishment. *Picking up on the book's call for greater scholarly attention to the relationship between criminal justice and animal protection, this essay focuses scrutiny on three aspects of the modern animal protection's fixation with criminal justice: (1) the animal protection movement's renewed interest in privatizing the prosecutorial function; (2) the view that by framing the animal as a victim, social change will be more readily possible; and (3) more generally, the view that prosecutors will serve as catalysts for the sort of radical social change the animal protection movement is pursuing.*

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* From Henry Wadsworth Longfellow's *Tales of a Wayside Inn* (1863), written, according to Sydney Coleman's *Humane Society Leaders in America*, as a tribute to Henry Bergh:

> Among the noblest of the land,
> Though he may count himself the least,
> That man I honor and revere,
> Who, without favor, without fear,
> In the great city dares to stand
> The friend of every friendless beast.

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I. Introduction

In nineteenth century America, buyers and sellers of livestock would tie animals by their legs and pile them in carts like cords of wood. When a Brooklyn butcher was arrested for the practice in 1866, he became the first person convicted of animal cruelty in the United States, and some would point to the conviction as a turning point in the country's collective recognition that animals are not mere property.[1] The conviction was a direct result of the work of Henry Bergh, the founder of the American Society for the Prevention of Cruelty to Animals ("ASPCA"). Criminal prosecution, according to Bergh's vision, could serve as the non-human animal's first-best hope for legal protection.

Before Bergh came onto the scene, legislatures exhibited no great concern about cruelty to animals. The laws that did exist existed to protect valuable property; a man could be prosecuted for harming animals that belonged to someone else, but the law stopped there. Americans were free to abuse animals that belonged to them, or that belonged to no one. In David Favre and Vivien Tsang's overview of nineteenth-century anti-cruelty laws, the authors note: "[w]hat a man did in the privacy of his home to his animals, his children, and sometimes even his wife, was his

1. Sydney H Coleman, *Humane Society Leaders in America* (Albany: American Humane Association, 1924) at 42.

concern alone, not that of the legal system".[2] Throughout the country the scope of criminally prohibited harms to animals was narrow, and the punishment minimal.

Henry Bergh's ASPCA was instrumental in the development of New York's animal protection bill of 1866, which served as a template for modern criminal law reforms across the country.[3] The first of two key features in the Bergh-inspired law made it a misdemeanor offense to "over-drive, over-load, torture, torment, deprive of necessary sustenance, or to be unnecessarily or cruelly beaten, or needlessly mutilated, or killed as aforesaid any living creature".[4] As Favre and Tsang point out, this New York law applied regardless of the ownership of an animal, and it covered negligent as well as intentional acts.[5]

Of course, legal reforms alone do not always translate into meaningful change on the ground. These more expansive laws might have been meaningless if the ASPCA had no means of enforcing them. But Bergh's adept political sense had recognized as much, and a second notable element of the legislation he crafted was a novel mechanism for enforcement. Rather than relying on the state to police animal cruelty, Bergh's statute granted police powers to Bergh himself. That is, officially designated agents of the ASPCA were allowed to "make arrests and bring before any court…offenders found violating provisions of this act".[6] According to Favre and Tsang, "[t]his delegation of state criminal authority to a private organization was, and is, truly extraordinary".[7] Bergh's reforms are widely heralded as ushering in a turning point in the country's view of the legal status of animals. He expanded the criminal law and ensured its enforcement. Henry Bergh loved animals,

2. David Favre & Vivien Tsang, "The Development of Anti-Cruelty Laws During the 1800's" (1993) 1:1 Detroit College of Law Review 1 at 4.
3. As Coleman observed in 1924, "[e]very state in the Union has testified to the soundness of [Bergh's] work by passing legislation for animal protection modeled after the laws which he caused to be enacted in New York State" (Coleman, *supra* note 1 at 61).
4. NY Rev Stat ch 783 § 1 (1866).
5. Favre & Tsang, *supra* note 2 at 14.
6. NY Rev Stat, *supra* note 4 § 8.
7. Favre & Tsang, *supra* note 2 at 17.

and he spearheaded law reform efforts to codify criminal punishments for those who mistreated animals. It is beyond question that Bergh's advocacy for a criminal response to animal abuse — whether he sought criminal punishment for expressive or deterrent purposes — served as an entry point for society's increased awareness about animal suffering. Today, Bergh's model of animal protection continues to thrive and remains relatively unchallenged; the defining philosophy of many in the movement is animal protection through criminal enforcement. The dignity of animals is safeguarded, according to this view, by subjecting humans to incarceration.

While progressives elsewhere are pointing to data that demonstrate the criminogenic effects of stiffer criminal sanctions, and the debilitating inter-generational impacts of criminal prosecutions, the animal protection movement is stoking outrage and calling for more carceral responses to animal abuse. And while accounts of effective social change often document the need for the "outlaw" as vehicle for normalizing and legitimizing lawful efforts to obtain reform,[8] the animal protection lawyers have largely ignored, even shunned the outlaw-activists of the modern movement. A modern day animal lawyer is more likely to call for a juvenile to be prosecuted as an adult and sentenced to prison than she is to recognize value in defending someone who is charged with property crimes relating to the rescue of animals from a factory farm. But seeking incarceration is not apolitical, or irrelevant.[9] True social change requires dismantling the status quo, but the prosecuting state is the engine of a state's social repression. The movement is badly mistaken when it assumes, to paraphrase Audre Lorde, that it will be able to dismantle the master's house with the master's own tools.

8. Charlotte Montgomery, *Blood Relations: Animals, Humans, and Politics* (Toronto: Between the Lines, 2000).
9. Rachel Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* (Cambridge, Mass: Belknap Press, 2019).

II. The Paradoxical Idea of Teaching Empathy Through Criminal Punishment

Animal law has evolved considerably since the mid-nineteenth century with the emergence of numerous non-profits dedicated to the field and considerably more public awareness, yet Bergh's insight that criminal punishment was a lynchpin of animal protection has experienced a renaissance. Bergh's no-nonsense approach to animal cruelty predates by more than a century but perfectly embodies the modern-day slogan of 'tough on crime'. Bergh would literally knock heads to enforce the law. In a glowing biography of the man, Sydney Coleman observed that:

> When moral suasion failed to secure desired results, [Bergh] did not hesitate to use brute force. One day he found a cart loaded with calves and sheep. The legs of the poor creatures were bound and their heads hung over the sides of the vehicle. When the driver and helper refused to relieve them of their suffering, Mr. Bergh pulled the two men off the cart and holding them at arm's length brought their heads together with a thud. 'How do you like that exercise?' he inquired. 'Perhaps now you can feel how the heads of those poor sheep and calves feel.' [10]

More than a century and a half later, the same ethos courses through the veins of animal protection groups. One of the leading organizations in the country has spent the twenty-first century selling t-shirts and bumper stickers, and encouraging the public to embrace a straightforward slogan in support of animal protection: "Abuse an Animal Go To Jail". The campaign's widespread acceptance — it's very success — has enshrined the movement as a war-on-crime effort. People familiar with this sort of sloganeering across the movement likely cannot imagine animal law as having any more critical function than overseeing the incarceration of humans who mistreat high-status animals. Emblematic of this tendency is an anecdote: while writing this essay one of the authors worked from a café that was adorned with several "Abuse an Animal, Go to Jail" stickers and magnets, and that did not serve a single vegetarian option (though chicken was suggested as a pretty close alternative).

The mainstream movement seems to share the hope, as Bergh urged at a time when vigilante justice was ubiquitous, that people

10. Coleman, *supra* note 1 at 60.

might understand "how those poor sheep and calves feel".[11] Lambasting society's lack of empathy was in Bergh's day and remains today a central feature of the movement's rhetoric. But the notion that punishing humans will right the wrongs of animal abuse calls to mind HLA Hart's observation of punishment as "a mysterious piece of moral alchemy in which the combination of the two evils of moral wickedness and suffering are transmuted into good".[12] The movement's call to empathy is unnecessarily undermined by calls for tough-on-crime policies, and we doubt that much good will ever flow to the movement, the animals, or society more generally from this sort of eye-for-an-eye logic. Does one really imagine that we ought to permit and pursue capital punishment for animal abusers? And if not, upon serious reflection does anyone believe that when a person is released from prison for abusing an animal that they will emerge a kinder, gentler, and more empathic human?

The movement's reliance on criminal law and incarceration to prop-up animal status is the subject of a book length critique by one of the authors in *Beyond Cages: Animal Law and Criminal Punishment*.[13] Picking up on the book's call for greater scholarly attention to the relationship between criminal justice and animal protection, this essay focuses scrutiny on three aspects of the modern animal protection's fixation with criminal justice: (1) the animal protection movement's renewed interest in privatizing the prosecutorial function; (2) the view that by framing the animal as a victim, social change will be more readily possible; and (3) more generally, the view that prosecutors will serve as catalysts for the sort of radical social change the animal protection movement is pursuing. First, however, the essay will begin with a more laudatory point: the animal protection movement is ready for internal critique.

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11. *Ibid*.
12. HLA Hart, *Punishment and Responsibility* (New York and Toronto: Oxford University Press, 1968) at 234–35.
13. Justin Marceau, *Beyond Cages: Animal Law and Criminal Punishment* (Cambridge: Cambridge University Press, 2019).

III. The Movement Has Obtained a Status that Justifies Internal Critique

All social movements have periods of intense strategic disagreement that, with the benefit of hindsight, often turn out to be decisive moments in the success or failure of a movement. The animal protection movement is entering such a period. The movement is at a critical juncture with regard to one of its central platforms: the importance of criminal prosecutions for animal abuse as a tool for protecting animals and advancing the status of animals in the law. Does the increased criminalization of animal cruelty — more crimes, more enforcement, higher penalties, deportations, and offender registries, among other mechanisms — serve the goal of improving the status of animals in the legal system? Are animals better off when humans are relegated to cages, or instead are longstanding social hierarchies — among people and animals — reinforced and reified at the expense of a more general approach to anti-subordination?

As Henry Bergh's example makes clear, for as long as there has been an organized animal protection movement in the United States, the received wisdom has been that animals and humans are made safer through the establishment of a more punitive and carceral approach to animal mistreatment. Using existing cruelty codes, lobbying for enhanced penalties with legislatures, and pressuring prosecutors to bring maximalist charges have become mainstays of animal protection advocacy. The motives for such an approach to animal protection are complicated and multifaceted. In a sense, the movement's historical resort to criminal punishment is a common-sense reaction to the desperate lack of legal avenues for establishing status for animals in the legal system. The movement lacked a tangible foothold in the legal system other than criminal punishment for decades, and nothing in the pages that follow is meant to suggest that the sadistic animal abuser or poacher should avoid criminal opprobrium altogether. It was essentially criminal law, or nothing when it came to animal protection, and in many ways the pioneers of animal law, including Bergh and the ALDF, made possible the conversations and refinements suggested in this essay.

Nonetheless, by reflecting on the breadth of the modern criminal

justice 'successes' by the movement and juxtaposing them with the well-documented reality that by the turn of this century our "justice system was [already] the harshest in the history of democratic government",[14] people inside and outside the movement might be able to give a more clear-eyed assessment of the role that criminal law should play in advancing animal protection. As *Beyond Cages* painstakingly details, in the social sciences and criminal law literature it is no longer seriously disputed that longer sentences and more punishment often produce criminogenic consequences; indeed, a growing body of literature is acknowledging that the non-criminal public's 'self-interest' in safety, security, and a thriving community is best served by having a lower incarceration rate and a less punitive justice system.[15] Yet, operating in a vacuum where empathy appears to extend primarily to non-humans, these general insights have not been infused into the thinking or strategies of most animal protection advocates. One need not conclude that animal abuse should be decriminalized. Existing research shows that criminalization of certain conduct does lead to a decrease in the prevalence of that conduct. The question is whether incarceration produces a marginal benefit, or more whether the sort of increases in punishment or prosecution rates create more marginal harm than benefit. A rigid adherence to ever more severe criminal sanctions enforced ever more rigidly is not an obvious benefit to the long-term goals of the animal protection movement.

We acknowledge that the scholarly task of critiquing a social movement's operational strategies should not be taken lightly. There is always a risk that the proverbial Ivory Tower will overlook the necessities of on-the-ground advocacy. For much of this country's history, for

14. William Stuntz, *The Collapse of American Criminal Justice* (Cambridge Mass: Harvard University Press, 2011) at 3.

15. Paul Butler, *Let's Get Free: A Hip-Hop Theory of Justice* (New York: New York Press, 2009) at 29–30 (making the case that less punitive polices and policing are in the public interest). See also Stuntz, *supra* note 14 ("[n]o democratic society can incarcerate such a large fraction of its poor population and retain the goodwill of that population" at 13); Jeffrey Fagan & Tracey L Meares, "Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities" (2008) 6 Ohio State Journal of Criminal Law 173.

example, academics criticized protest as "an undemocratic intrusion into politics".[16] Not until the 1960s did researchers come to regard protest as an essential "adjunct to democratic politics".[17]

We are thus mindful that there is a danger that in making sweeping pronouncements about what constitutes a successful framing or model for social movements to employ, potentially effective approaches will be chilled or undermined. After all, the study of social movements and how they intersect with governance is a complex and relatively nascent field of study.[18] Some social movements are perhaps so under-developed and under-theorized that a pointed academic critique would simply be premature, if not unfair. At the same time, William Eskridge has recognized that social movements serve as a "moving force behind the big changes" in legal doctrine.[19] Accordingly, scholars — even scholars sympathetic to a particular cause — should not sit idly by and tolerate every tactic propagated by a social movement; the tactics employed by social movements simultaneously shape legal doctrine and social constructions. In a very pragmatic sense, the tactics employed define the movement; a movement is no better than the forms of advocacy it deploys in pursuit of its goals.

Until very recently, animal activists were more outlaws[20] than legal insiders and experts. Litigation to improve the lives of animals was almost inconceivable throughout the twentieth century; instead, civil

16. Pamela E Oliver et al, "Emerging Trends in the Study of Protest and Social Movements" (2005) 12 Research in Political Sociology 213 at 213.
17. *Ibid*.
18. For a comprehensive study of social change lawyering, see Alan K Chen & Scott L Cummings, *Public Interest Lawyering: A Contemporary Approach* (New York: Wolters Kluwer Law & Business, 2012).
19. For a thorough account of the impact of social movements on constitutional law, see William N Eskridge Jr, "Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century" (2002) 100 Michigan Law Review 2062.
20. At common law outlawry was defined as treating a person to the status of a wild animal. Frederick Pollick & FW Maitland, *The History of English Law Before the Time of Edward 1*, 3d (Indianapolis: Cambridge University Press, 1968).

disobedience and property crimes were a defining feature of activism in the field. Indeed, the largest domestic terrorism investigation in US history was the FBI's pursuit of animal rights and eco-rights groups in the late 1990s for a variety of property-related crimes.[21] In 1997, the Director of the FBI explained that animal-rights were among the "highest domestic terrorism priorities".[22] During this same period, animal law had virtually no place within the law school curriculum. In the early nineties, just one law professor in the US offered an animal law course.[23] In recent decades, animal protection has emerged as a topic of substantial scholarly and legal interest. Today nearly every accredited law school has at least one animal law course.[24] Several offer two or more animal law courses, and there are now animal law programs, professorships, and degree certifications. There is even a section of faculty within the Association of American Law Schools dedicated to animal law.[25] With animal law programs, chairs, and a diverse set of courses on the topic, it is fair to say that animal law has moved from the fringe to the mainstream. The movement's spokespeople have migrated from FBI wanted lists to

21. Will Potter, *Green is the New Red: An Insider's Account of a Social Movement Under Siege* (San Francisco: City Lights Books, 2011).
22. David Stout, "U.S. Indicts 11 for Acts of Domestic Terrorism" (20 January 2006), online: *New York Times* <www.nytimes.com/2006/01/20/politics/us-indicts-11-for-acts-of-domestic-terrorism.html>.
23. Joyce Tischler, "The History of Animal Law, Part I (1972-1987)" (2008) 1 Stanford Journal of Animal Law and Policy 1 at 10. See also Stephen M Wise, "The Evolution of Animal Law Since 1950" in Andrew N Rowan & Deborah J Salem, eds, *The State of the Animals II* (Washington: Humane Society Press, 2003) 99 at 104 ("The first American law school class in animal law was offered by the Pace University School of Law…in the mid-1980s" at 104).
24. "Animal Law Courses" online: *Animal Legal Defense Fund* <aldf.org/animal-law-courses> ("There are 167 law schools in the U.S. and Canada, and 11 in Australia and New Zealand, that have offered a course in animal law").
25. See the Section on Animal Law, online: *The Association of American Law Schools* <memberaccess.aals.org/eWeb/dynamicpage.aspx?webcode=ChpDetail&chp_cst_key=25b753df-26c8-4544-8e8b-36ac82e63e2e>.

positions of credibility and acclaim.[26]

Recognizing the mainstream acceptance of animal rights, the Dean of Harvard Law School Martha Minow recently observed that legal history is a story of an "ever-expanding circle of law — who's in and who isn't".[27] Animal law, she contends, represents the latest expansion of that circle such that "there's an opportunity now to contribute to the development of law reform in a way that hasn't always been the case".[28]

The maturation of the movement comes with many benefits, including heightened public acceptance and increased scholarly attention. But there is also an intellectual price. With progress and acceptance comes an expectation of introspection and rigorousness that was unnecessary when the movement was fledgling and ungrounded. The animal protection field must be self-confident enough to identify and examine its own quirks, hypocrisies, and defects. It is no longer sufficient for animal protection advocates to simply criticize their detractors and to engage in bumper-sticker advocacy. Rather, the movement must take seriously the need to affirmatively define its goals and to refine its methods. It is in light of this maturation that this essay and *Beyond Cages* offer a biting critique of carceral animal law. We do not purport to be the final or most important word in this debate, but the existence of debates such as this one are an explicit recognition that the movement has developed to a point where

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26. See *e.g. ibid*, explaining that "[i]t was not long ago that *animal rights* was all but an oxymoron"; Adam Cohen, "Can Animal Rights Go Too Far?" (14 July 2010), online: *Time* <content.time.com/time/nation/article/0,8599,2003682,00.html> (noting that animal rights has moved to the "mainstream"); Larry Copeland, "Animal Rights Groups Pick Up Momentum" (27 January 2008), online: *USA Today* <usatoday30.usatoday.com/news/nation/2008-01-27-animal-activists_N.htm>; Cody Switzer, "Animal-Welfare Charities Among the Most Popular Online" (9 November 2011), online: *Chronicle of Philanthropy* <philanthropy.com/article/Animal-Welfare-Charities-Among/227131> (detailing the traffic that websites related to animal welfare charities have received).
27. Cara Feinberg, "Are Animals 'Things'?: The Law Evolves" (2016), online: *Harvard Magazine* <harvardmagazine.com/2016/03/are-animals-things> (discussing the rise of animal law programs across the country).
28. *Ibid*.

it can withstand and even grow from critiques levelled by the pen of commentators sympathetic to its goals. Unlike in Bergh's era when the movement had few resources or allies, today animal law is increasingly creative, proactive, and sufficiently established to withstand the upheaval of an overdue critique.

It is in this spirit of growth through internal critique that this essay challenges certain aspects of the carceral posture of modern animal law. At the time of writing *Beyond Cages,* it was accepted as dogma across wide swaths of the movement that allowing an animal abuser to be sentenced to treatment or strict probation terms instead of incarceration was tantamount to disrespecting the entire animal protection agenda. Fundraising efforts frequently call on persons to be "compassionate" by calling for harsher prosecutions. Even deportation had emerged as a welcome and celebrated tool in the arsenal of animal protection advocates. Amicus briefs have been filed in support of deportation by animal protection groups as recently as 2018.[29] Allying with xenophobes, racists, and tough-on crime pundits and politicians is treated as accepted and as a necessary evil designed to protect animals. This essay builds on the substantially more detailed critique in *Beyond Cages* and argues that the carceral obsession is not good for the animals it seeks to protect, it is not good for society, and it should be regarded as a relic of a more desperate, darker period in the history of animal rights.

The animal protection movement seeks to achieve a monumental

29. American Legal Defense Fund (ALDF), "Amicus Brief Establishing Animals as Victims in Federal Case" (3 December 2018), online: *ALDF* <aldf.org/article/amicus-brief-establishing-animals-as-victims-in-federal-case/>. The ALDF celebrated its amicus brief in support of deportation filed with the immigration court by noting, "[h]umans can be crime victims because being subject to an assault or neglect or other criminal activity hurts them unlawfully. It is just the same with animals". One has to wonder whether the animal protection movement would support deporting or euthanizing all animals who cause harm to humans, or create "victims".

shift in the social understanding of the human-animal relationship,[30] but this essay argues that the prosecuting state is not the ally of radical social change, but rather the enforcer of the status quo. As a historical matter, police and prosecutors have been famously engaged in efforts to thwart social change, including through unlawful uses of force.[31] To take but one striking example, persons were prosecuted in the north and the south for assisting the Underground Railroad in the nineteenth century.[32] Prosecutions under the sweeping fugitive slave laws were a celebrated aspect of political maneuvering. Even after the civil rights laws were enacted and slavery formally abolished, at least one commission has documented the malfeasance of prosecutors during the civil rights era in trying to safeguard the social status quo.[33] Today persons are prosecuted as terrorists for liberating beagles or cats from research labs or farm animals from their cages. One need not believe that these illegal acts of political

30. As Steve Wise has explained in *Rattling the Cage*, there is an impenetrable wall between animal rights and present social understanding: "[f]or four thousand years, a thick and impenetrable legal wall has separated all human from all nonhuman animals. On one side, even the most trivial interests of a single species — ours — are jealously guarded. We have assigned ourselves, alone among the million animal species, the status of 'legal persons.' On the other side of that wall lies the legal refuse of an entire kingdom, not just chimpanzees and bonobos but also gorillas, orangutans, and monkeys, dogs, elephants, and dolphins. They are 'legal things'" (Steven M Wise, *Rattling The Cage: Toward Legal Rights for Animals*, (Cambridge, Mass: Perseus Books, 2000) at 4).

31. US Commission on Civil Rights, *Law Enforcement: A Report on Equal Protection in the South* (Washington, 1965) at 55–74 (summarizing frequent mass arrests and prosecutions for demonstrations and protests); also describing the trial and sentencing of protesters and noting that protesters were held for weeks without bail or trial and that protesters were routinely convicted and sentenced to the maximum penalty (at 77–78).

32. *Ibid* at 43–55 (documenting law enforcement's tacit approval of violence against African Americans by private citizens and the refusal of prosecutors to prosecute for racially motivated violence).

33. *Ibid* at 94 ("In many areas of Mississippi the failure of law enforcement officials to curb racial violence is largely attributable to the racially hostile attitudes of sheriffs, police chiefs, and prosecuting attorneys" at 97).

protest, spread across different eras, are morally equivalent to appreciate that the prosecution has not been a compelling engine for social change, but often the opposite. This essay highlights some of the reasons that social movements, particularly anti-subordination movements like animal protection, are most effective when they focus their attention on protecting their members and interests "against a brutalizing state", [34] rather than in support of it.[35]

IV. The Modern Animal Cruelty Prosecutor

Throughout most of American history, the overriding conception of the prosecutor as a neutral and independent actor prevailed, with the consequence being a limited role for animal protection groups in the prosecutorial office. By introducing the idea of prosecutions initiated or directed by private groups, Bergh introduced a paradigm shift. Scholars such as David Favre are quite correct to treat Bergh's triumphs in this regard as novel and extraordinary. But Bergh's triumph in this regard has not been dismissed as an antiquated relic of rough justice in the nineteenth century, a time period when vigilantism was often tolerated. Instead, the modern animal protection movement has heaped upon Bergh the greatest form of flattery: imitation. The modern animal protection movement regards private influence or control over prosecutions as one of the landmark achievements of the movement, and it treats that influence as a critical benchmark for measuring the future advancements of animal law.

One striking example of Bergh's nineteenth century playbook at work in modern America is the ALDF's 2013 agreement with the Oregon District Attorneys Association to fund the salary of an Animal Cruelty Deputy District Attorney ("AC-DDA"), dedicated to prosecuting

34. Eskridge, *supra* note 19 at 2390.

35. It is more common for social movements to regard their function as one of policing the police than one of assisting and strengthening the power of police and prosecutors. See Jocelyn Simonson, "The Criminal Court Audience in a Post-Trial World" (2014) 127:8 Harvard Law Review 2173 at 2175; Jocelyn Simonson, "Copwatching" (2016) 104:1 California Law Review 391 at 445.

exclusively animal cruelty across the state.[36]

A. The Success of the Private Prosecutor Position in Oregon

In many ways the modern-day delegation of the prosecutorial function to animal protection groups has been such a sweeping success that an outside observer would surely predict that the movement will fund more such positions in the near future. If the ability to purchase the services of a prosecutor in Oregon were viewed as a test case, the early results surely surpass expectations. If resources allowed for it, we doubt that the movement would oppose funding a prosecutor in every state, or even every county.

The creation in 2013 of Oregon's AC-DDA position also coincided with more robust animal cruelty legislation. Among other things, Senate Bill 6 amended Oregon Revised Statute Section 167.325 to make animal neglect a felony in certain circumstances.[37] In mid-nineteenth century New York, Favre and Tsang observe: "[r]equiring a person to care for an animal, imposing an affirmative act, had always been considered more burdensome than prohibiting an action".[38] Moreover, Favre and Tsang point to the problem of intent in the context of animal treatment, where "the primary motivation for human conduct is often other than to harm an animal, even though it is foreseeable that there is a risk of harm to that animal".[39]

Henry Bergh had anticipated that, as experience grew in the application of the New York's animal protection acts, "it would be possible to work out more carefully planned legislation".[40] But Bergh may not have imagined, even as the prospect likely would have pleased him, that states would one day be treating animal neglect as a felony. With the passage

36. Memorandum of Understanding between Oregon District Attorneys Association, Benton City District Attorney, & Animal Legal Defense Fund (21 January 2013) (on file with the authors) at 2 [MOU].
37. US, SB 6, 77th Leg Assem, Reg Sess, Or, 2013 [Senate Bill 6].
38. Favre & Tsang, *supra* note 2 at 10.
39. *Ibid* at 29.
40. Coleman, *supra* note 1 at 39.

of Oregon's Senate Bill 6,[41] it became possible to convict individuals of a felony even in the absence of any malicious intent, or without any knowledge of the consequences of their actions or inactions. The ability to treat omissions or defective animal care as felonious is a major advancement in the law of animal cruelty over the past century, even as it is a step in the wrong direction for proponents of criminal justice reform. On a federal level, members of Congress from both parties are working together to make it harder for "unsuspecting Americans to be sent to jail for conduct they had no idea was against the law".[42] While progressives and conservatives may have different motivations in advocating for *mens rea* reform, Benjamin Levin argues that "the reliance on criminal law as a regulatory tool to solve otherwise intractable or knotty social problems" should concern all those who are committed to criminal justice reform.[43]

Reflecting what might fairly be regarded as a return on investment, the first conviction for felony animal neglect in Oregon came in 2014 in a case brought by the AC-DDA when an alpaca ranch owner named Robert Silver was found guilty for the neglect of 175 malnourished and dying alpacas.[44] The case was prosecuted by Jake Kamins, the AC-DDA whose position is privately funded by an animal protection non-profit.[45] The State did not have to prove that Silver intentionally or knowingly neglected the alpacas — the animals may just have been victims of Silver's own ignorance, his lack of experience as a rancher — but under the animal neglect statute, criminal negligence was sufficient

41. Senate Bill 6, *supra* note 37.
42. Chuck Grassley & Orrin Hatch, "Mens Rea Reform & the Criminal Justice Reform Constellation" (19 July 2018), online: *Washington Examiner* <www.washingtonexaminer.com/opinion/sens-chuck-grassley-and-orrin-hatch-mens-rea-reform-and-the-criminal-justice-reform-constellation>.
43. Benjamin Levin, "Mens Rea Reform & Its Discontents" (2019) 109:1 Journal of Criminal Law & Criminology 1 (forthcoming 2019).
44. Joce Johnson, "Jury Finds Alpaca Ranch Owner Guilty of Neglect" (11 December 2014), online: *Statesman Journal* <www.statesmanjournal.com/story/news/2014/12/11/jury-finds-alpaca-ranch-owner-guilty-neglect/20276229>.
45. *Ibid*.

to constitute a felony.[46] More generally, Kamins regularly brings cruelty prosecutions, and advances broad readings of the criminal statute and narrow interpretations of the defendants' constitutional rights. By these measures, the funding of a prosecutor was an unmitigated success.

Beyond Cages highlights the ways that felony prosecutions make for good copy in fundraising campaigns by animal protection groups.[47] Our focus here is whether the movement's decision to fund the salary of public prosecutors is also normatively defensible. In many ways the funding of prosecutions is a microcosm of the larger themes and critiques developed in *Beyond Cages*.

B. The Terms of the Private Prosecution Arrangement

ALDF's Criminal Justice Program has promised for over a decade to provide "free legal assistance to prosecutors, law enforcement, and veterinarians".[48] The services offered include legal research, professional trainings, legislative assistance, and grant money "to help cover the costs of caring for seized animals, necessary forensic work, and obtaining expert witnesses".[49] It is a commitment to fund every aspect of the prosecution other than the work of the prosecutor him or herself. More recently, a Memorandum of Understanding with Oregon District Attorneys Association ("ODAA") and Benton County District Attorney ("BCDA"), obtained through open records requests, reveals that the movement has also undertaken to fully fund a prosecutor's salary. It is the natural culmination of years of efforts to further entrench the movement within the prosecution.

As the Memorandum establishes, ALDF sees the funding as part of its mission to further the vision of Bergh by "ensur[ing] that Animal

46. OR Rev Stat ch 167 § 167.325(3)(b) (2018).
47. Marceau, *supra* note 13 at 37 (noting that the passage of felony laws could be marketed to donors and the public as proof of the animal protection movement's progress and effectiveness).
48. Animal Legal Defense Fund, "Criminal Justice" (2018), online: *Animal Legal Defense Fund* <aldf.org/how_we_work/criminal-justice/>.
49. *Ibid*.

Cruelty cases are not compromised by…fiscal challenges".[50] The goal is to remove considerations of resources or prosecutorial priorities from the prosecution equation. But in so doing, the movement strives to make animal cruelty unique among all crimes — it seeks a platform of something like mandatory prosecution and maximum sentencing. The American prosecutor is unique precisely because of the independence the position is endowed with, and central to the notion of prosecutors as independent is their ability to exercise discretion about which cases to pursue and which violations of law to prioritize.

The language of the Memorandum itself gives lip-service to the command of neutrality, for example, by vesting "final and exclusive authority" in hiring decisions with the District Attorney's office.[51] In an interview with *Willamette Week*, Kamins took pains to emphasize this aspect of his arrangement and pointed out that he does not receive direction from ALDF: "[t]his is a prosecution position, it's not an advocacy position. I'm not trying to change laws or push the boundaries of existing laws".[52] But this assurance that the position is not linked to politics or advocacy is at once promising too little and too much.

Kamins' promise to avoid advocacy, as elaborated more in the next section, is not much of a promise at all because prosecutors are the very definition of the moral status quo. They are the enforcers of the already codified moral preferences of society. In this way, Kamins' prosecutions of, for example, persons who have abused dogs and cats are not threatening to mainstream society. His very position reinforces dominant morality. Kamins is celebrated by the public as a moral crusader precisely because he does not threaten the moral or economic status quo. The owner of a factory farm might fairly root for Kamins if the prosecutor was featured on a true-crime show called *Abuse an Animal, Go to Jail*.

But Kamins' promise of operating beyond advocacy also promises too much. His very position is the result of advocacy, and the goals of

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50. MOU, *supra* note 36 at 1.
51. *Ibid* at 3.
52. Nigel Jaquiss, "The Animal Lawyer" (2 December 2014) online: *Willamette Week* <www.wweek.com/portland/article-23626-the-animal-lawyer.html>.

influencing prosecutorial discretion reflect this advocacy. As stated in *Beyond Cages*: "by its plain terms, the agreement anticipates that the individual will be a fully-sworn state prosecutor, but he will also remain something of an outsider to the district attorneys, because he will make himself available to provide 'free help' with their cases".[53] Regardless of the independent views of the individual holding the position, ALDF has usurped the independence of prosecutorial discretion by funding the position and directly incentivizing the prosecution of certain crimes and the pursuit of maximalist sentences. Kamins claims to be above the fray of advocacy. But there may not be a more direct form of political advocacy in our democracy. Surely campaigning for certain prosecutors is political advocacy, and so is lobbying prosecutors on particular cases. Indeed, the movement has identified both practices as critical forms of political advocacy. It is inconceivable that funding a prosecutor's position and holding him accountable to satisfying the funder is somehow a lesser form of advocacy.

After all, funding for Kamins' position is made contingent on the movement's ability to implicitly alter prosecutorial priorities. As a lobbyist for the Oregon farm bureau put it: "[w]e have concerns about the policy implications of a private advocacy group funding prosecution", because such funding "has the potential to distort the legal process".[54]

On the other hand, even Farm Bureaus could eventually find something to love about the animal protection movement's advocacy in support of privately funded prosecutions. The AC-DDA position could change the rules of engagement in the criminal justice sphere in a way that serves big agriculture's own interests. Were the Oregon Farm Bureau to follow the lead of ALDF, the AC-DDA could find himself sharing an office with a Deputy District Attorney dedicated to prosecuting undercover activists and would-be whistleblowers who are working to reform factory farming practices. Such an arrangement is not as far off as

53. Marceau, *supra* note 13 at 248.
54. Jaquiss, *supra* note 52.

the movement likely anticipates.[55]

The discussion of private funding for prosecutors should not end with the animal protection movement. In an ongoing death penalty prosecution in Kansas, the family members of one of the victims has retained an attorney to act as "associate counsel" for the prosecution.[56] Kansas law allows third parties to employ private attorneys to assist county prosecutors "in any criminal action or proceeding under any of the laws of the state of Kansas".[57] While the justification may be, as with the Oregon AC-DDA, to provide support for resource-strapped government agencies, the stakes in the Kansas case are extraordinary. The defendant could be facing the death penalty, and the Kansas statute would be giving non-state actors a stake in determining the outcome.

The same tactic could be employed by militias along the US-Mexico border seeking to ratchet up the enforcement of immigration laws, or by political parties interested in high-profile prosecutions of alleged voter fraud. The tactic would not even need to be confined to certain types of crimes to be effective. Imagine a community like Ferguson, Missouri, where the US Department of Justice determined, in 2015, that bias against black citizens affected "nearly every aspect of Ferguson police and

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55. Of relevance, the California Farm Bureau Federation has a Rural Crime Prevention Program that "aims to improve the lines of communication between local law enforcement agencies and the agricultural community" (California Farm Bureau Federation, "Rural Crime Prevention" (218), online: *California Farm Bureau Federation* <www.cfbf.com/rural-crime-prevention>). The American Farm Bureau Federation endorses expansive criminal enforcement policies, including strict prosecution, and "[r]estitution to insurers, and others, incurring financial loss by parties found guilty of livestock, machinery or crop theft, fraud, vandalism, arson or bioterrorism" (American Farm Bureau Federation, "Farm Bureau Policies for 2018" (2018) at 28, online: *American Farm Bureau Federation* <texasfarmbureau.org/wp-content/uploads/2018/02/AFBF-Policy-Book-20180110-FINAL.pdf>).

56. Tony Rizzon & Savanna Smith, "Despite doubts, judge allows private prosecutors in case of two slain deputies" (January 9, 2019), online: *Kansas City Start* <www.kansascity.com/news/local/crime/article224079520.html#storylink=cpy>.

57. Kan Stat Ann § 19-717 (2018).

court operations".[58] Were an enterprising white supremacist group able to fund the salary of a prosecutor in St. Louis County, the prosecutor would not need to actively pursue a racist agenda, but only act as a bulwark against the changes being called for by the broader community.

The animal protection movement is now in the business of hiring public prosecutors. This should be cause for concern; it should prompt debate within the movement. Instead, like virtually all criminal justice interventions, it is celebrated. The movement's complacency in this regard is at war with its call to reject structural injustices.

C. Putting the Promise of Private Prosecutions in Context

Historical accounts of his life have been kind to Henry Bergh. By most accounts, Bergh was an upright and incorruptible man. "It is a testament to [his] character", write Favre and Tsang, "that this extraordinary power of the state, vested in one private individual, was apparently never abused".[59] The claim that his prosecutorial discretion was 'never' misused or unjustly applied seems fanciful in light of what criminologists have taught us about the implicit bias operating throughout our justice system. But even accepting the mythical notion of Bergh as immune from emotional irrationality or unfair bias, his storybook tale of prosecution should not serve as an endorsement of the practice of delegating prosecution to private interests.

In their foundational work *Prosecutorial Neutrality*,[60] two of the leading figures in legal ethics, Fred C Zacharias and Bruce A Green, considered the role prosecutors play in the modern criminal justice system, exploring the factors that inform decision-making in theory and in practice. They acknowledge that "there are no settled understandings"

58. US Department of Justice, Civil Rights Division "Investigation of the Ferguson Police Department" (4 March 2015), online: *US Department of Justice* <www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ ferguson_police_department_report.pdf>.
59. Favre & Tsang, *supra* note 2 at 18.
60. Fred C Zacharias & Bruce A Green, "Prosecutorial Neutrality" (2004) 2004:3 Wisconsin Law Review 837.

of the concept of prosecutorial neutrality,[61] but they emphasize the centrality of prosecutorial discretion, which "pervades every aspect of [the prosecutors'] work, including investigations, charging and plea bargaining, trials, sentencing, and responding to post-conviction events".[62] The authors note that the public face of prosecutorial work — "the number of convictions they obtain, the length of sentences, and prosecutors' behavior in public trials" — tends to obscure the "more momentous decisions that occur behind the scenes".[63] Among those momentous decisions is the allocation of resources, and how that allocation affects the enforcement. "Because prosecutorial resources are finite", the authors observe, "the decision to enforce a statute fully, by definition, constitutes a decision not to enforce other statutes fully".[64]

Scarcity of resources was mentioned in the recitals of the Memorandum of Understanding between ALDF and the Oregon prosecutors.[65] By offering to fund the salary of one prosecutor, ALDF has taken the question of which statutes to enforce out of the hands of the District Attorney's office, at least in part. The AC-DDA exists to prosecute a limited subset of crimes, and to protect only one class of victims. In no small measure, the AC-DDA resembles a private prosecutor, the use of which John D Bessler described as "unethical and violative of a defendant's constitutional rights".[66] Bessler points to *Marshall v Jerrico, Inc*,[67] in which the Supreme Court warned against any "scheme injecting a personal interest, financial or otherwise, into the enforcement process", for the potential affront such interests could pose to constitutional rights.[68] Even the "appearance of impropriety" inherent in private prosecution, Bessler suggests, violates defendants' due process

61. *Ibid* at 903.
62. *Ibid* at 840–41 [footnotes omitted].
63. *Ibid* at 903 [footnotes omitted].
64. *Ibid* at n 131.
65. MOU, *supra* note 36 at 2.
66. John D Bessler, "The Public Interest and the Unconstitutionality of Private Prosecutors" (1994) 47:3 Arkansas Law Review 511 at 514.
67. *Marshall v Jerrico, Inc*, 446 US 238 (USSC 1980) [*Marshall*].
68. *Ibid* at 249.

rights.[69]

The Supreme Court reached a similar conclusion in *Young v United States ex rel Vuitton Et Fils SA*,[70] where Vuitton's private attorneys had acted as special prosecutors in convicting the petitioners of criminal contempt for violating a court order that came out of a settlement with Vuitton.[71] The Court held that, regardless of whether the appointment of Vuitton's private counsel resulted in any actual impropriety, "that appointment illustrates the *potential* for private interest to influence the discharge of public duty".[72] The *Vuitton* case harkened back to a 1935 Supreme Court ruling that a government attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done".[73] It cannot be gainsaid that a prosecutor whose salary is paid on a recurring basis by the animal protection movement has a financial interest in enforcing zealously animal cruelty laws, which the Supreme Court warned "may bring irrelevant or impermissible factors into the prosecutorial decision".[74]

Zacharias and Green argue that "prosecutors should make discretionary decisions not only autonomously, but also indifferently to the preferences and objectives of interested third parties".[75] On a more common-sense level, it looks unseemly when a prosecutor brings charges against a political rival, or foregoes the prosecution of a political ally. The careful observer of American politics understands that money infects and corrupts political decision-making, including the prosecutorial decisions. The idea that the AC-DDA funded by the animal protection movement makes decisions indifferently to the preferences and objectives of the

69. Bessler, *supra* note 66 at 514.
70. *Young v United States ex rel. Vuitton Et Fils S. A.*, 481 US 787 (USSC 1987) [*Vuitton*].
71. *Ibid* at 780.
72. *Ibid* at 805 [emphasis in original].
73. *Berger v United States*, 295 US 78 at 88 (USSC 1935).
74. *Marshall*, *supra* note 67 at 249.
75. Zacharias & Green, *supra* note 60 at 862.

organization paying his salary and renewing his contract strains credulity. The fact that the state or county may retain final authority to make the actual hiring decisions[76] does not alter this conclusion.

In their analysis of what constitutes neutrality, Zacharias and Green bring up the notion of non-partisanship — not in a political sense, but in the broader sense of not choosing one side of an ideological battle. They describe the non-partisan prosecutor as one who "makes decisions independently of the police, the victim and the voting public, in order to give appropriate respect and weight to the legitimate interests of all of her constituents (including the defendant)".[77]

The opposite of this ideal — the detached, non-biased prosecutor — would be the prosecutor with an axe to grind, the type who turns the prosecution of animal cruelty into a moral crusade. Someone like Henry Bergh. Bergh may have been the kind of figure the animal protection movement needed in the nineteenth century, when animals had virtually no independent legal protections. But whatever else can be said about him, the head-knocker was not a neutral, independent prosecutor. In the contemporary landscape, with the increase in felony cruelty statutes and the heightened penalties associated with the crime, a prosecutor like Bergh could make an even bigger splash. He could put more people away for longer periods of time. We doubt that such victories are in the long-term interest of animal protection, and the funding of prosecutors threatens to undermine the very credibility of our justice system.

More generally, as animal protection groups make efforts to strengthen their bonds with the Association of Prosecuting Attorneys and the National District Attorneys Association, as well as individual prosecutors' offices, one can anticipate an animal protection movement that is increasingly limited in its scope of advocacy. The very alliances the movement is courting may impede, for example, the ability of the movement to facilitate criminal prosecutions against a corporation. The lack of a single corporate prosecution in the era of alliances with prosecutors is a striking blemish on the carceral strategy. One has

76. MOU, *supra* note 36 at 3.

77. Zacharias & Green, *supra* note 60 at 887.

to wonder whether the movement's leadership does not think the corporations overseeing factory farms are not culpable, or whether instead the movement's alliances with the prosecution are only effective in facilitating the prosecution of low-level defendants incapable of making campaign contributions. The movement appears to have purchased a lot of goodwill with prosecutors — it hires them, it funds their conferences, and it supports and celebrates their prosecutions — but insiders would be hard-pressed to find examples where the movement has called in a favor either to obtain a high-level corporate prosecution, or to provide aid to an activist who is facing criminal charges.

For prosecutors, then, the arrangement with the animal protection movement is entirely to their benefit; they receive support for cases that are publicly popular, and they do not make any concessions to the movement on politically fraught matters that enjoy less public support, or that challenge systemic abuse by corporations. Elected district attorneys and their trade associations will tolerate intrusions into their neutrality to a degree, but only at the margins where there is no popular or well-funded support to the contrary.

Even more damaging, it is likely that the threat of harm to the alliance with prosecutors also influences the range of activism and policy changes that the movement itself pursues. Having tied its identity to strong relationships of mutual affirmation with prosecutors, would the movement have the courage to stand up to prosecutors who object to campaigns or civil litigation that is oriented towards more radical social change? It is easy for prosecutors to support incarceration for poor persons, and even to tolerate cases that seek, for example, civil restitution cases in the name of an abused animal such as the famous case of Justice the horse in Oregon.[78] It is much more difficult for prosecutors to remain a quiet ally when the movement defends activists engaged in civil disobedience, or when the movement contemplates far-reaching social

78. Karin Brulliard, "Seeking Justice for Justice the Horse: Can a Neglected Animal Sue?" (13 August 2018), online: *The Washington Post* <www.washingtonpost.com/news/national/wp/2018/08/13/feature/a-horse-was-neglected-by-its-owner-now-the-horse-is-suing/?noredirect=on&utm_term>.

reform strategies. Is it cause for celebration or concern when a radical social change movement bends its agenda in order to appear non-radical, mainstream, and non-threatening to the status quo?

V. Animals as Victims and Criminal Justice

Early animal cruelty laws, in treating animals as property, ultimately functioned to protect human victims.[79] In an era when legislators might have been reluctant to extend rights to animals, animals still enjoyed some legal protections insofar as injury to them affected the rights of their owners. Another argument based on the legal primacy of human victims concerned the risk that animal abusers posed to larger society. As Favre and Tsang describe the issue: "[w]hile some did not believe moral duties were owed to animals, they did accept that cruelty to animals was potentially harmful to the human actor, as it might lead to cruel acts against humans".[80] Or, more succinctly, in the words of Henry Bergh: "[m]ercy to animals means mercy to mankind".[81]

The concern for potential human victims continues to be a driving issue for the modern animal protection movement. In the guidebook *Investigating & Prosecuting Animal Abuse*, published by the National District Attorneys Association, Allie Phillips and Randall Lockwood write: "[w]hen a human harms an animal, this is a strong *predictor and indicator* that additional animal and human victims may be next".[82] The collection of research supporting this claim is known in the movement as the Link, and it has been used successfully, beginning with Bergh, to demand expansive legislation and harsher punishment for animal cruelty offenses throughout the country.

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79. Favre & Tsang, *supra* note 2 at 4.
80. *Ibid* at 11.
81. Nancy Furstinger, *Mercy: The Incredible True Story or Henry Bergh, Founder of the ASPCA and Friend to Animals* (Boston: Houghton Mifflin, 2016) at vii.
82. Allie Phillips & Randall Lockwood, "Investigating & Prosecuting Animal Abuse" (2013), online: *National District Attorneys Association* <ndaa.org/wp-content/uploads/NDAA-Animal-Abuse-monograph-150dpi-complete.pdf> [emphasis in original].

One problem among many with this link-based approach to advocating for carceral policies is that it is predicated more on anecdote and urban myth than hard data. As explained in *Beyond Cages*, "the movement's reliance on the link is overstated and badly flawed",[83] and the belief that incarceration will correct the problem is "in considerable tension with empirical realities":[84]

> Though many studies tend to show that violent offenders have abused animals at a higher rate than non-violent offenders (sometimes at a much higher rate), the critical and oft overlooked common denominator in these studies is that they consistently show that most people who commit crimes of violence *do not have a history of animal abuse*.[85]

Beyond Cages goes into detail about the various studies that are invoked by Link advocates, and about what those studies do and do not demonstrate. The through-lines suggest that the conclusion relies on spurious and selective reasoning. It blurs or entirely ignores contributing factors, and provides a seductively simple solution to a complex, multi-faceted problem. The reliance on a weak correlation between behaviors to justify zero tolerance carceral policies is reminiscent of the 'Gateway Drug' language employed in the US War on Drugs. Most persons who use heroin may also have used marijuana, but that does not indicate that most marijuana users will eventually graduate to heroin. Most capital murderers may have a prior misdemeanor conviction, but the fact of a misdemeanor conviction is an extraordinarily poor predictor of murderous propensities.

No less important, when it comes to animal protection campaigns, the Link reinforces the very distinction between persons and animals that the movement is working to eradicate. *Beyond Cages* points out that this kind of anthropocentric approach fundamentally stifles long-term

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83. Marceau, *supra* note 13 at 339.
84. *Ibid* at 340.
85. *Ibid* at 340 [emphasis in the original], citing Emily Patterson-Kane, "The Relation of Animal Maltreatment to Aggression" in Lacy Levill et al, eds, *Animal Maltreatment: Forensic Mental Health Issues and Evaluations* (New York: Oxford University Press, 2016) 140 at 140–58.

animal protection efforts.[86] While side-stepping the issue of animals as property, the Link still relegates animals to a separate, lesser class. Animal cruelty matters not because of the animals' suffering, sentience, or dignity, but because the violence against animals is said to be a sentinel indicator or predictor of violence against humans. We punish animal abuse, the movement has taught legislators and the public, because doing so protects humans.

Having obtained felonies in every state and expanded sentencing ranges based explicitly on this link-think, the animal protection movement is now trying to reframe the debate around punishing humans. The punitive laws and procedures were borne of the dire warnings to human safety, but in a clever re-framing of the landscape, the movement now frames its carceral project in terms of animal victimhood. It is not about protecting humans, or not primarily about protecting humans, say many in the movement beginning around 2017. Increasingly, with the criminal laws firmly on the books, advocates speak about animals' victimhood as the driving rationale for their punitive logic.

Such thinking was presaged by Andrew N Ireland Moore in 2005, arguing for advancing the cause of animal protection independent of the potential risk to humans in *Defining Animals as Crime Victims*.[87] After providing a brief survey of crime victim statutes from various states, Moore notes that in animal cruelty cases "the animal could plausibly be listed as the victim of the crime in a police report or charging instrument because animals are directly protected by the anti-cruelty statute".[88] This same reasoning was employed by the Oregon Supreme Court in *State v Nix*,[89] concerning the neglect of dozens of animals, mostly horses and goats.[90] The court affirmed the conclusion that animals can be victims

86. *Ibid* at 348, citing Mark H. Bernstein, "Responding Ethically to Animal Abuse", in Andrew Linzey, ed, *The Link Between Animal Abuse and Human Violence*, (Sussex University Press, 2009).
87. Andrew N Ireland Moore, "Defining Animals as Crime Victims" (2005) 1 Journal of Animal Law 91.
88. *Ibid* at 97.
89. 334 P (3d) 437 (Sup Ct Or 2014) [*Nix*].
90. *Ibid* at 438.

of a crime, noting "the meaning of the word 'victim' will depend on the underlying substantive statute that the defendant violated".[91]

Among the benefits that animals' status as victims could afford them are pre-trial protections, including the right to a speedy trial. As Moore points out, in cases where an animal is still living with a defendant charged with neglect, a speedy trial could protect the animals "from further extended abuse".[92] Another recent Oregon case granting victim rights to animals involved the warrantless seizure by a sheriff's officer of an emaciated horse.[93] After being charged with animal abuse and neglect, the owners of the horse moved to suppress evidence obtained as a result of the seizure, including "any examination of the horse, photographs, body condition score, other observations of and statements about the condition of the horse".[94] The court held that the officer acted reasonably when he "determined that warrantless action was necessary to prevent an ongoing criminal act from causing further serious imminent harm to the victim of the crime".[95] This decision served to refute the defendants' claim that society's interest in protecting animals is derived "not from a recognition that animal life is inherently worthy of protection, but from various benefits that humans receive by protecting animals".[96]

Had the court chosen to characterize the horse as mere property, the 'exigent circumstances exception' may not have permitted the warrantless seizure. The officer in the case believed that the horse could have died before a warrant could be issued, and the court held that he behaved reasonably in entering the property and seizing the horse for emergency medical care.[97] Even in a world of smart phones where warrants can be issued in a matter of minutes, this horse might have been at such a great risk that even those minutes were too precious, making *Fesesnden* the cleanest possible example of the benefit to animals in being defined as

91. *Ibid* at 441.
92. Moore, *supra* note 87 at 102.
93. *State v Fessenden*, 333 P (3d) 278 at 279 (Sup Ct Or 2014) [*Fessenden*].
94. *Ibid* at n 3.
95. *Ibid* at 286.
96. *Ibid* at 282.
97. *Ibid* at 286.

crime victims.

But of course, the case did not stop with the rescuing of the horse. The subsequent examination of the horse led to the collection of evidence that was used to prosecute human defendants, which ultimately has much less to do the animal's status as a victim. Victimhood does not dictate that incarceration is the best means of breaking the cycle of violence. And a large body of sociology research suggests that a carceral approach to violence may actually increase violence in society. To echo language from *Beyond Cages*: "[a]s a practical matter, the case merely upholds an effort by police and prosecutors to obtain more criminal convictions with fewer constitutional constraints".[98]

Another case celebrated for advancing the status of animals as victims is *State v Nix*. The ultimate issue that gave rise to the State's insistence on treating animals as victims in *Nix* had to do with Oregon's 'anti-merger' statute, providing that when a criminal statutory violation involves two or more victims: "there are as many separately punishable offenses as there are victims".[99] The trial court had merged twenty counts of horse neglect into a single conviction and sentenced Nix to ninety days in jail.[100] The Oregon Supreme Court reversed the judgment and remanded the case for resentencing, reasoning that each animal was an individual victim for purposes of the anti-merger statute.[101] While at one time animal cruelty violations were considered in terms of harm to the general public, the court noted that "Oregon's animal cruelty laws have been rooted — for nearly a century — in a different legislative tradition of protecting individual animals themselves from suffering".[102]

The possibility of exposure to multiple counts of animal cruelty may

98. Marceau, *supra* note 13 at 82. The discussion there concerned a different case involving a warrantless search: *State v Newcomb*, 375 P (3d) 434 (Sup Ct Or 2016) (holding that police are not required to obtain consent or a warrant before extracting blood or other bodily fluids from a dog in support of a cruelty prosecution).
99. Or Rev Stat § 161.067(2) (2018).
100. *Nix, supra* note 89 at 438.
101. *Ibid* at 448.
102. *Ibid* at 447.

have some effect on the welfare of animals, but it is worth exploring how this tactic fits in with the larger goals of the animal protection movement. Increased punishment because of an animal's victim status does not necessarily serve the goals of the animal protection movement in combatting institutional violence and promoting empathy. The animal protection movement hopes to secure a moral good in the form of raising social consciousness about suffering and victimhood by causing more suffering for the human offenders. Victimhood for animals, in other words, seems to primarily operate as a thumb on the retributive scale used to calculate the offender's just deserts. Retributivism is an odd principle to endorse for any organization committed to the minimization of suffering.

It is also a principle invoked in *Defining Animals as Crime Victims*, where Moore proposes allowing "animal legal advocates" to make victim impact statements on behalf of abused animals.[103] The question of who gets to speak for animals is a fraught one, with the risk of projecting human concerns and values onto animals, but Moore suggests that an advocate could "provide some valuable insight" on the pain and suffering caused by animal abuse, leading a sympathetic judge to increase a defendant's sentence.[104]

In utilitarian terms, prolonged imprisonment will certainly incapacitate the actors, but there is good reason to doubt how effectively imprisonment will deter future acts of cruelty, either from the specific individual on release, or from the general public. Moore suggests that a victim impact statement from an animal advocate could "give a deterring effect on [defendants] in their future dealings with animals", but the hope is purely speculative. Educating animal abusers about the damage they do is certainly a worthy goal, but there is no reason to limit such efforts to sentencing hearings.

Defining animals as victims of crime may provide some legal protections for animals, but as a means of contributing to mass criminalization, it is as problematic as the Link. Even if one accepts

103. Moore, *supra* note 87 at 107.
104. *Ibid*.

the presumed Link between animal abuse and future human violence, nothing about this research would lend credence to the notion that incarceration is the most appropriate response to the problem. *Beyond Cages* points to "a growing body of research showing that incarceration has a desensitizing or hardening effect".[105] Classifying animals as victims, in our current legal landscape, could have the perverse result of causing more harm to animals in the future. Rather than breaking the cycle of violence, increased prison terms are more likely to lead to a "diminution of empathy", resulting in more violence and less sensitivity to the suffering of humans and animals.[106] Researchers have found that violence can be a product of the carceral system, rather than an explanation for its need.[107] As Alec Karakatsanis put it: "[i]n a society that requires prisoners to be treated humanely, American jails and prisons are cesspools of disease and trauma".[108]

The movement needs to reflect more on what it hopes to obtain by honoring animals with the title of victim; it should identify concrete benefits distinct from incarceration and harsher criminal justice response that would flow from such a status. The movement's historical reliance on criminalization to advance the status of animals reflects, at best, ignorance of the social costs of incarceration, and at worst an outright indifference to the suffering of fellow humans. Rather than viewing the welfare of living creatures as a zero-sum game, we should be looking for opportunities to elevate all of society's victims.

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105. Marceau, *supra* note 13 at 416, citing Dorothy E Roberts, "The Social and Moral Cost of Mass Incarceration in African American Communities" (2004) 56:5 Stanford Law Review 1271 at 1297.
106. *Ibid* at 417.
107. *Ibid* at 418, citing KM Morin, "Wildspace: The Cage, The Supermax, and The Zoo" in Rosemary-Claire Collard & Kathryn Gillespie, eds, *Critical Animal Geographies* (London: Routledge, 2015) 73 at 87.
108. Alec Karakatsanis, "Policing, Mass Imprisonment, and the Failure of American Lawyers" (2015) 128 Harvard Law Review Forum 253 at 266.

VI. Social Change and the Role of Prosecutors

The question of how to best advance a social justice cause is obviously not unique to the animal protection movement. Any group advocating for social change must determine the best strategies and methods for achieving that change. Lobbying for legislation is a logical way to demonstrate shifts in social norms, as well as to enshrine those norms with a gloss of permanence. Criminal statutes, then, reflect markers of success and progress for a movement. *Beyond Cages* also suggests that "fundraising campaigns and outreach efforts based on punishing animal abusers resonate with the public in a way that nuanced, multi-stage civil litigation efforts will not".[109]

Moreover, civil cases tend to be long and drawn-out, turning on points of law that might not seem as compelling to the larger public. Criminal law has seemed like the easiest intervention with the most public appeal to many persons in the animal protection movement. But the criminal justice system is a blunt instrument, and advocacy groups sacrifice their own nuanced and anti-subordination agenda when they rely too heavily on the criminal justice system to advance their goals. For a movement that often portrays itself as having an intersectional orientation, it must be noted that one would be hard-pressed to identify a single institution in the US that has done more than the criminal justice system to further subordination and create racial and class-based disparity in modern America.

The US Commission on Civil Rights reported on the inability of State Attorneys General and District Attorneys in the South to respond to violations of civil rights in the 1960s.[110] Even when law enforcement has investigated a crime and taken a suspect into custody, prosecutors resisted the pressure of social change, dropping cases or permanently adjourning trials in cases involving the murder of African-Americans.[111]

At the most basic level, the problem is that prosecutors are not a natural fit with social change movements. While there has been a wave

109. Marceau, *supra* note 13 at 36.

110. US Commission on Civil Rights, *supra* note 31, at 54–55.

111. *Ibid*.

in recent years of high-profile prosecutors running on campaigns of reform,[112] and while we do not doubt the importance of fair-minded prosecutors if our system of justice is ever going to improve, prosecutors ultimately serve the function of enforcing the law as it is, not as they hope it may be.

The case of Aramis Ayala against Rick Scott provides a good illustration of the limits of prosecutorial discretion in achieving social change. As a Florida State Attorney, Ayala announced publicly that she would not be seeking the death penalty in any cases handled by her office, asserting that the death penalty "is not in the best interest of th[e] community or in the best interest of justice".[113] Governor Rick Scott reassigned the prosecution of death-penalty eligible cases in Ayala's circuit to another State Attorney, leading Ayala to file a petition for a writ of *quo warranto* challenging Scott's authority.[114] The Supreme Court of Florida denied the petition, reasoning that by making a "blanket policy" not to pursue the death penalty, Ayala was not exercising prosecutorial discretion, but rather "no discretion at all".[115] The very prosecutors and elected officials who were celebrated by the animal protection movement for strengthening their animal cruelty laws in April of 2018, are so opposed to social change at the prosecutorial level as to strip from a prosecutor the authority to decide not to seek the death penalty.

112. See *e.g.* Eric Gonzales & Miriam Krinsky, "How a New Generation of Prosecutors is Driving Criminal Justice Reform outside of Congress" (26 February 2018), online: *The Hill* <thehill.com/blogs/congress-blog/judicial/375656-how-a-new-generation-of-prosecutors-is-driving-criminal-justice>; Eric Levitz, "Progressive Reformer Ousts St. Louis Prosecutor Who Didn't Charge Cop in Michael Brown Case" (8 August 2018), online: *Daily Intelligencer* <nymag.com/daily/intelligencer/2018/08/st-louis-election-prosecutor-wesley-bell-beats-bob-mcculloch-michael-brown-ferguson.html>; Hal Dardick & Matthew Walberg, "Kim Foxx Declares Win in Cook County State's Attorney's Race" (8 November 2016), online: *Chicago Tribune* <www.chicagotribune.com/news/local/politics/ct-cook-county-states-attorney-kim-foxx-election-met-1109-20161108-story.html>.

113. *Ayala v Scott*, 224 So (3d) 755 at 756 (Sup Ct Fla 2017).

114. *Ibid* at 757.

115. *Ibid* at 758.

Will Potter describes in detail how US attorneys have taken advantage of the sweeping powers granted to the government in the wake of 9/11 to prosecute activists as terrorists.[116] While animal rights groups have been lobbying for harsher penalties for animal abusers, the government has been simultaneously pursuing harsher penalties for individuals trying to protect animals from abuse.[117] Activists can face life sentences for property damage, and, even where they are not engaged in property damage, prosecutors file conspiracy charges, or dust off old unused laws like the Animal Enterprise Protection Act of 1992 to punish activists for causing corporations to lose profits.[118]

While certain US attorneys may stretch laws as they are written to prosecute animal rights activists, they are forbidden from bringing charges against persons where no laws have been violated. As obvious as this fact may seem, it presents a serious limitation on the capacity for Oregon's AC-DDA to have any meaningful impact on a huge number of his state's animals. Oregon's animal abuse statute, like those of most states around the country, carves out an exemption for "[a]ny practice of good animal husbandry".[119] As described in *Beyond Cages*, Jake Kamins "explicitly and unapologetically invoked the agricultural exemption…to explain why the forced impregnation of dairy animals by metal racks is not legal cruelty warranting prosecution".[120] Henry Bergh's famed first prosecution of animal cruelty described at the beginning of this essay would not be possible today in any state with an agricultural exemption if the practice of transporting animals was common or customary. These exemptions ensure that animal cruelty prosecutions will be targeted at individual random acts of cruelty, the perpetrators of which are already

116. Potter, *supra* note 21.
117. *Ibid* at 91.
118. *Ibid* at 98–104.
119. Or Rev Stat § 167.320(2) (2018).
120. Marceau, *supra* note 13 at 250.

disproportionately caught up in the criminal justice system.[121]

VII. Conclusion

Even as we emphatically agree that the mistreatment of animals should be discouraged by our laws, we must challenge the soundness of a criminal solution to the problem. Can criminal law catalyze social change, or does it merely calcify social norms? How does a movement that decries society's willingness to justify institutionalized suffering justify the subordination of individual human-defendants for instrumental ends? Unlike in Bergh's era, today one cannot feign blissful ignorance about destructiveness of mass incarceration in modern America.[122] A movement that embraces tough on crime policies aligns itself with the very principles of oppression that underlie and justify industrialized animal agriculture.

If the propensity for violence against animals is a symptom of deeper social issues, the welfare of animals would be better served by taking those deeper issues into consideration. Meaningful change may be achieved through "the fight against food oppression, unhealthy living conditions, and even inaccessibility of housing, education and healthcare".[123] The movement's leadership can build new alliances by being open to criticism and contention from outside voices. Resorting to methods that disproportionately punish individuals who are already marginalized, while insulating powerful institutions from real accountability, is not conducive to progress.

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121. As discussed in *Beyond Cages*, the animal protection movement has more culpability for the existence of these animal protection laws than the movement often acknowledges. But even if the movement had no responsibility for the rise of agricultural exemptions, the decision to devote significant resources to prosecution in the face of such exemptions is notable.

122. See *e.g.* Michelle Alexander, *The New Jim Crow* (New York: The New Press, 2010); Stephanos Bibas, "The Truth About Mass Incarceration" (16 September 2015) online: *National Review* <www.nationalreview.com/2015/09/mass-incarceration-prison-reform/>.

123. Marceau, *supra* note 13 at 287–88.

Religious Slaughter and Animal Welfare Revisited: CJEU, *Liga van Moskeeën en islamitische Organisaties Provincie Antwerpen* (2018)

Anne Peters*

The article comments on a Grand Chamber judgment by the Court of the European Union on animal slaughter according to Islamic prescriptions. The relevant European Union laws prescribe that religious slaughter without stunning of the animal may only take place in approved slaughterhouses. This causes a shortage during the Muslim Feast of Sacrifice in the Belgian province of Antwerp. The EU law provisions are in conformity with the animal welfare mainstreaming clause of the Treaty on the Functioning of the European Union. *Moreover, the EU regulation and its application in the concrete case does not violate the fundamental right of free exercise of religion as guaranteed by the* EU Fundamental Rights Charter. *Finally, the refusal to make an exception for the peak demand for slaughter facilities during the Feast of Sacrifice does not constitute an indirect discrimination against Muslims. The paper agrees with the outcome of the judgment but criticises the Court for failing to consider the rights of religious minorities more broadly, and for not addressing the animal welfare point sufficiently.*

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I. Introduction

The tension between respect for religious and cultural practices on the one side and animal welfare on the other is particularly acute when it comes to slaughter. From a legal perspective, this tension translates into a juridic conflict between the fundamental rights of religious believers on the one hand and the legally recognised objective of animal protection on

the other.[1] The prevailing view — shared by this contribution — is that the conventional modern slaughter with prior or simultaneous stunning and killing, as routinely practiced in Europe, is better for the animals than un-stunned killing as practiced by various religious groups, notably Muslim and Jewish communities (see in detail on this point below Part II). The question then arises to what extent religious demands should nevertheless be satisfied — at the expense of animal welfare.

This question was recently examined by the Court of Justice of the European Union ("CJEU"). In *Liga van Moskeeën en islamitische Organisaties Provincie Antwerpen VZW v Vlaams Gewest*,[2] the CJEU (Grand Chamber) found to be valid an EU law prescribing that religious slaughter without stunning of the animal may only take place in approved slaughterhouses. According to the Court, the relevant provisions do not violate primary law, notably neither the freedom of religion as guaranteed in Article 10 of the *European Charter of Fundamental Rights* ("*EUCFR*") nor the animal welfare mainstreaming clause of Article 13 of the *Treaty on the Functioning of the European Union* ("*TFEU*").[3]

This article first contextualises the legal questions and gives some facts on slaughtering (Part II). It then agrees with the Court's conclusion in *Liga van Moskeeën* that the relevant secondary law and its application in a

1. See *e.g.* Johannes Caspar & Jörg Luy, eds, *Tierschutz bei der religiösen Schlachtung / Animal Welfare at Religious Slaughter* (Baden Baden: Nomos, 2010); Olivier Le Bot sees a trend towards a stronger protection of religious slaughter or sacrifice practices, to the detriment of animals: Olivier Le Bot, "The Limitation of Animal Protection for Religious or Cultural Reasons" (2016) 13:1 US – China Law Review 1 at 3–6; Stefan Kirchner & Nafisa Yeasmin, "Ein Recht auf Schächten? Tierschutz und Religionsfreiheit in der EMRK aus nordeuropäischer Sicht" (2018) 24:1 Kirche und Recht 114. On conflicts and synergies, see: Tom Sparks, "Protection of Animals Through Human Rights: The Case-law of the European Court of Human Rights" in Anne Peters, ed, *Global Animal Law* (Heidelberg: Springer, 2019).
2. *Liga van Moskeeën en islamitische Organisaties Provincie Antwerpen VZW v Vlaams Gewest* (29 May 2018), C-436/16, ECLI:EU:C:2018:335 (CJEU) [*Liga van Moskeeën*].
3. EU, *Charter of Fundamental Rights of the European Union of 7 December 2000* [2007] OJ, C 303/01 [*EUCFR*].

concrete context is in conformity with the animal welfare mainstreaming clause (Part III). This article will then discuss and confirm the regulation's compatibility with the fundamental right to the free exercise of religion (Part IV). It additionally enquires (which the Court did not) whether *Liga van Moskeeën* involves indirect discrimination against Muslims (Part V). The article finds that neither the existence of these European Union-law provisions nor their application in a concrete situation violates fundamental rights of members of the Muslim community. Ultimately, I do not disagree with the outcome of the case but criticize the Court (and to a lesser extent the Advocate General's opinion) for failing to consider the rights of religious minorities more broadly, and for not addressing the animal welfare point sufficiently. We need to remain wary *both* of vilifying socially disadvantaged groups of humans (such as Muslim residents in Northern European countries) and of brutalising animals, because, speaking with Theodor Adorno, both harms might in psychological and ethical terms be related and even intertwined (Part VI).[4]

II. Background, proceedings, and facts on slaughter

The Dutch speaking Court of First Instance of Brussels had requested a preliminary ruling under Article 267 of the *TFEU*. The request was triggered by a change in practice of the Flemish authorities on the issuance of permits for ritual slaughtering. Since 1998, the competent authorities had allowed slaughter in temporary slaughterhouses during the peak time of the Muslim holiday Eid al-Adha, or the Feast of Sacrifice. Following a Belgian constitutional reform, competences in matters of animal welfare were transferred to the regions in 2014. The new government of the Flemish region, elected in 2014, appointed a minister for animal protection (member of the Nieuw-Vlaamse Allantie). The new Flemish regional minister announced that he would stop issuing approvals for temporary slaughterhouses in 2015, relying on the strict requirement of Article 4(4) of Regulation No 1099/2009, in conjunction with Article

4. Theodor W Adorno, *Minima Moralia: Reflexionen aus dem beschädigten Leben,* 7d vol 4 (Frankfurt am Main: Suhrkamp, 2003) (original 1951), Aphorismus 68 (translation by the author).

2(k) of that same regulation.[5] The Flemish minister argued that the temporary slaughterhouses did not satisfy the hygienic requirements of EU law (laid down in Regulation No 853/2004) when referring to a 2015 report issued by the EU Commission's Directorate General Health and Food Safety ("DG SANTÉ Report").[6] That report was critical of groupings of 'home slaughtering' at public sites outside slaughterhouses.[7] However, the DG SANTÉ Report did not explicitly recommend the prohibition of such private slaughter.

The applicants in the original proceedings are a group of Muslim organisations in the Flemish region. They argued that Article 4(4) of Regulation No 1099/2009, in conjunction with Article 2(k), infringed their freedom of religion.[8] Article 4 of Regulation No 1099/2009, entitling 'stunning methods', provides:

> 1. Animals shall *only be killed after stunning* in accordance with the methods and specific requirements related to the application of those methods set out in Annex I. The loss of consciousness and sensibility shall be maintained until the death of the animal. ...
>
> 4. In the case of animals subject to particular methods of slaughter prescribed by religious rites, the *requirements of paragraph 1 shall not apply provided that the slaughter takes place in a slaughterhouse*.[9]

Article 2(k) of the same regulation says: "'[s]laughterhouse' means any establishment used for slaughtering terrestrial animals which falls within

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5. EC, *Council Regulation (EC) 1099/2009 of 24 September 2009 on the protection of animals at the time of killing*, [2009] OJ, L 303/1, art 4(4) [Regulation No 1099/2009].
6. EC, *Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin*, [2006] OJ, L 226/22.
7. EC, Directorate-General for Health and Food Safety (DG SANTÉ), *Final report of an audit carried out in Belgium from 24 November 2014 to 03 December 2014 in order to evaluate the animal welfare controls in place at slaughter and during related operations* (audit) at para 44, online (pdf): EC <ec.europa.eu/food/fvo/act_getPDF.cfm?PDF_ID=11804> [DG SANTÉ Report].
8. Regulation No 1099/2009, *supra* note 5.
9. *Ibid* [emphasis added].

the scope of Regulation (EC) No 853/2004".[10] The referring court had doubts as to the validity of the two provisions read together.

Although the case is superficially about places of slaughter, the real issue is the method of slaughter. The Halal slaughter during the Feast of Sacrifice (outside of approved slaughterhouses) occurs by cutting and bleeding without prior stunning. The welfare implications of un-stunned slaughter have been examined by the Scientific Panel on Animal Health and Welfare of the European Food Safety Agency resulting in a 240-page scientific report and a scientific opinion on welfare aspects of animal stunning and killing methods, as requested by the EU Commission.[11] The Panel took care to circumscribe its mandate by emphasising that it "did not consider ethical, socio-economic, cultural or religious aspects of this topic".[12] It reached the conclusion that "if not stunned, [the animals'] welfare will be poor because of pain, fear and other adverse effects".[13] The explanation is the following:

> Most animals which are slaughtered in the EU for human consumption are killed by cutting major blood vessels in the neck or thorax so that rapid blood loss occurs. *If not stunned, the animal becomes unconscious only after a certain degree of blood loss has occurred* whilst after greater blood loss, death will ensue. The animals which are slaughtered have systems for detecting and feeling pain and, as a result of the cut and the blood loss, if not stunned, their welfare will be poor because of pain, fear and other adverse effects. The cuts which are used in order that rapid bleeding occurs involve *substantial tissue damage in areas well supplied with pain receptors. The rapid decrease in blood pressure which follows the blood loss is readily detected by the conscious animal and elicits fear and panic.* Poor welfare also results when conscious animals inhale blood because of bleeding into the trachea. Without stunning, the time between cutting through the major blood vessels and insensibility, as deduced from behavioural and brain response, is up to 20 seconds in sheep, up to 25 seconds in pigs, up to 2 minutes in cattle, up to 2 1/2 or more minutes in poultry, and sometimes

10. *Ibid*, art 2(k).
11. EFSA Scientific Panel on Animal Health and Welfare, "Opinion of the Scientific Panel on Animal Health and Welfare on a Request from the Commission Related to Welfare Aspects of the Main Systems of Stunning and Killing the Main Commercial Species of Animals" (2004) 45 EFSA Journal 1.
12. *Ibid* at 1.
13. *Ibid* at 5.

> 15 minutes or more in fish.[14]

The Panel asserted: "Due to the serious animal welfare concerns associated with slaughter without stunning, pre-cut stunning should always be performed".[15]

Along the same lines, the professional association of the Federation of Veterinarians of Europe, pronounced:

> the opinion that from an animal welfare point of view, and out of respect for an animal as a sentient being, the practice of slaughtering animals without prior stunning is *unacceptable* under any circumstances, for the following reasons: Slaughter without stunning increases the time to loss of consciousness, sometimes up to several minutes. During this period of consciousness the animal can be exposed to unnecessary pain and suffering due to: exposed wound surfaces; the possible aspiration of blood and, in the case of ruminants, rumen content; the possible suffering from asphyxia after severing the *n. phrenicus* and *n. vagus*. Slaughter without prior stunning requires in most cases additional restraint, which may cause additional stress to an animal that is almost certainly already frightened.[16]

In conclusion, from a purely veterinarian standpoint, slaughter without stunning should be avoided. The relevant EU regulation nevertheless allows it under limited circumstances. The question in the *Liga van Moskeeën* case is whether the exception goes far enough.

III. Compatibility of the EU regulation with Article 13 *TFEU*

One benchmark for the regulation's provisions is Article 13 *TFEU*, the EU animal mainstreaming clause.[17] It did not play a big role for the case

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14. *Ibid* [emphasis added].
15. *Ibid* at 2.
16. Federation of Veterinarians of Europe (FVE), "Slaughter of Animals Without Prior Stunning: FVE Position" (2005) Paper FVE/02/104 at 1, online (pdf): *FVE* <www.fve.org/cms/wp-content/uploads/fve_02_104_slaughter_prior_stunning.pdf> [the opinion of the FVE] [emphasis added].
17. *Consolidated Version of the Treaty on the Functioning of the European Union*, of 13 December 2007 (version of the 'Treaty of Lisbon'), art 13 (OJ 2008 C 115/47) [*TFEU*].

but shall be mentioned for the sake of completeness.[18] Article 13 *TFEU* provides:

> In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.[19]

This mainstreaming clause addresses both the EU and Member States, but it does not relate to all EU policies (notably not to trade policy). The interesting questions are what 'paying full regard' exactly means, and also what 'animal welfare' is. But these questions were not at issue in *Liga van Moskeeën*. The proceedings were only about the second part of the clause, the exception ('while respecting'). The referring court opined that the EU Regulation No 1099/2009 did not sufficiently accommodate the relevant Belgian laws. However, it was not clear which laws in Belgium "relating in particular to religious rites, cultural traditions and regional heritage"[20] were concerned by the application of the controversial Regulation No 1099/2009.[21] Therefore, the CJEU did not find any disrespect of Belgian laws on religious slaughter, and hence no incompatibility with the savings clause of Article 13 *TFEU*.[22] This seems fully correct.

IV. Compatibility of the EU regulation with the freedom of religion

The centrepiece of the judgment is the examination of the validity of Regulation No 1099/2009 in light of Article 10 of the *EUCFR*.[23] The regulation interferes with freedom of religion by relegating ritual slaughter to approved slaughterhouses. Such a requirement constitutes interference because ritual slaughter is a manifestation of religion (*forum externum*).

18. *Liga van Moskeeën*, *supra* note 2 at paras 81–83.
19. *TFEU*, *supra* note 17, art 13.
20. *Ibid*.
21. *Liga van Moskeeën*, *supra* note 2 at para 81.
22. *Ibid* at para 83.
23. *Ibid* at paras 38–80; see Part V.C. for discussion on Article 9 of the *European Convention on Human Rights* ("*ECHR*").

Notably, during the Muslim Feast of Sacrifice, one of the holiest holidays of the Muslim Religion, the slaughter is an important component of the feast (however, it may not be compulsory). This means that a law which regulates the place for performing religious slaughter falls within the scope of Article 10(1) *EUCFR*.[24]

The next question is whether the regulation actually restricts the freedom of religion. At this point we need to distinguish between the mere existence of the rule as such (section A), and its application to the concrete case during the Feast of Sacrifice (section B).

A. No actual restriction of the fundamental right by the rule "as such"

The Court said that the rule "does not *in itself* give rise to any restriction on the right to freedom of religion of practicing Muslims",[25] because religious slaughter is not prohibited. On the contrary, the regulation contains an express derogation from the requirement of stunning, specifically for the purposes of ensuring respect for the freedom of religion and the right to manifest religion or belief in worship, teaching, practice, and observance.[26]

The obligation to use an approved slaughterhouse facially appears 'perfectly neutral'. As the Advocate General Nils Wahl stressed, it applies to any party irrespective of any connection with a particular religion.[27] It "concerns in a non-discriminatory manner all producers of meat in Europe", says the Court.[28] In sum, both Advocate General Wahl and the Court denied that the legislation at issue constituted any restriction of

24. *Ibid* at para 45.
25. *Ibid* at para 68 [emphasis added].
26. *Ibid* at para 57.
27. *Liga van Moskeeën en islamitische Organisaties Provincie Antwerpen VZW v Vlaams Gewest* (30 November 2017), C-426/16, ECLI:EU:C:2017:926, Opinion of AG Wahl at para 78 [Opinion of AG Wahl].
28. *Liga van Moskeeën*, *supra* note 2 at para 61.

the freedom of religion.[29]

This reasoning should be questioned. It could be argued that the regulation does indeed limit (or restrict) the freedom of religious practice of Muslims, as it in fact hinders the practice of religious slaughter. This was the view of the referring court.[30] The CJEU answered that it is a mere question of capacity. The approved slaughterhouses in the Flemish region do not have sufficient slaughter capacity during the four days of the Feast of Sacrifice. Additional slaughterhouses would require huge financial investments, and would not be viable, especially because they would be needed for only a few days per year. The validity of an EU law cannot depend on what the court called "retrospective assessments of its efficacy".[31] The capacity problem arises only in a limited number of municipalities in the Flemish region, and is not inherently related to the application of the regulation throughout the EU. However, the validity of a regulation must be examined taking into account the situation in the entire EU.[32] The CJEU concluded that the EU regulation, as such, "does not in itself create any restriction" of the freedom of religion.[33]

Indeed, Regulation No 1099/2009 specifically accommodates religious slaughter (in Article 4(4) cited above) but leaves a leeway to the Member States. The regulation's preamble puts it as follows:

> Since Community provisions applicable to religious slaughter have been transposed differently depending on national contexts and considering that *national rules take into account dimensions that go beyond the purpose of this Regulation*, it is important that derogation from stunning animals prior to slaughter should be maintained, leaving, however, a certain level of subsidiarity to each Member State. As a consequence, this Regulation respects the freedom of religion and the right to manifest religion or belief in worship, teaching, practice and observance, as enshrined in Article 10 of the Charter of

29. Opinion of AG Wahl, *supra* note 27 at para 89. Advocate General Wahl did not stop here but entered into a further discussion in case the Court should find that there had been a restriction of the fundamental right (at para 90 et seq).
30. *Liga van Moskeeën*, *supra* note 2 at para 69.
31. *Ibid* at para 71.
32. *Ibid* at paras 73–74.
33. *Ibid* at para 79.

Fundamental Rights of the European Union.[34]

Dimensions 'beyond the purpose' of the regulation seem to be, on the one hand, the accommodation of religious freedom and, on the other hand, heightened animal welfare sensibilities in some Member States.

The Regulation 1099/2009 therefore allows Member States to completely ban un-stunned slaughter. This is currently the state of the law, for example, in Slovenia and Denmark. In contrast, Germany follows the line of the regulation and allows short term electroshocks that run only through the head of the animal "if this is necessary to cater for the needs of members of specific religious communities where compelling rules of their religious community prohibit the use of other methods of stunning".[35] The explanation of this provision is that Muslim slaughter prescriptions allow stunning before bleeding the animal, provided that the animal is sure to be still alive when bleeding out, and therefore prefers this 'weaker' stunning method.[36] The member States' different modalities of implementing the regulation confirm the Court's finding that the mere existence of the regulation, with its explicit accommodation for religious demands and the leeway it gives to EU Member States on this point, does not in itself restrict the freedom of religion.[37] The Court's findings are sound.

B. Strict application of the provisions during the Feast of Sacrifice in Muslim populated areas

A different question is whether the application of the regulation in a concrete situation — during the Feast of Sacrifice — constitutes a

34. Regulation No 1099/2009, *supra* note 5 at preamble, para 18 [emphasis added].
35. Verordnung zum Schutz von Tieren im Zusammenhang mit der Schlachtung oder Tötung und zur Durchführung der Verordnung of 20 December 2012 at §13(3) (BGBl I 2012 S 2982) at §13(1)(3) [translation by the author].
36. See Part V.D.
37. Opinion of AG Wahl, *supra* note 27 (Advocate General Wahl even found it "paradoxical" to call into question the *validity* of the provisions from the perspective of religious freedom at para 70).

restriction, and possibly a violation, of the freedom of religion. This is a serious question, but it was not asked by the referring court. The First Instance Court of Brussels had only posed the question of *validity* of the regulation. Under Article 267 *TFEU*, the Court could have asked a different question, namely how the regulation must be *interpreted*. Only the question of interpretation, the second variant of the referral for a preliminary ruling, could have opened the way for examining the effects of applying the regulation in a specific context.

However, in this affair, the Advocate General Wahl had advised the Court *not* to give an answer on the interpretation of the relevant regulations because judicial interpretative guidelines could — in his opinion — ultimately undermine the precise rules and thus overstep the competence of the Court.[38]

I doubt this, because the CJEU is, as a matter of principle, allowed and even required "to reformulate the questions referred to it and, in that context, to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts".[39]

So the Court could have, without acting *ultra vires*, asked an interesting question: does the strict and across-the-board *application* of the prohibition of home slaughter (also during these four days and in Muslim-populated areas) constitute an interference with and a *de facto* restriction of a religious practice? Must we therefore read into this regulation an unwritten exception leading to non-application during the Feast of Sacrifice for reasons of freedom of religion and non-discrimination? These questions can be discussed under the heading of freedom of religion as a liberty, but it is rather the aspect of discrimination on religious grounds which stands out. In any case, the relevant considerations are similar (both for freedom of religion *tout court* and for non-discrimination on the basis of religion). This Article therefore shifts the focus on the latter

38. *Ibid* at para 140.

39. *Isabel González Castro v Mutua Umivale, ProsegurEspana SL, Instituto Nacional de la Seguridad Social (INSS)* (19 September 2018), C-41/17, ECLI:EU:C:2018:736 (CJEU) at para 54.

fundamental right — which was not discussed by the CJEU.

V. Indirect discrimination of a religious group through strict application of the regulation?

The case raises the spectre of a *de facto*, indirect discrimination of Muslims through the disproportionate impact on this specific group brought about by the application of Regulation 1099/2009. The benchmarks are the fundamental right not to be discriminated against (Article 21(1) *EUCFR*) and the anti-discrimination mainstreaming clause of Article 10 *TFEU*, which forms a guideline for the making, interpretation, and application of secondary legislation.[40]

How does discrimination come into play? The freedom of religion does not grant believers a positive legal entitlement to obtain a permission to perform slaughter without stunning.[41] But *if* a state decides to allow slaughter without stunning it must avoid the discrimination of members of particular groups in this context, for example, Muslim groups in comparison to Jewish communities.

A. The test for indirect discrimination

The requirement of slaughter in official, authorised slaughterhouses does not target any religious group. This requisite is facially neutral in its wording. However, it might deploy a disproportionate negative impact on Muslims, because this is the only group which needs or wants to slaughter during a feast and for whom this activity forms part of their belief. Only this group has the increased demand during four days of the year.

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40. *EUCFR*, *supra* note 3 ("Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited", art 21(1)); *TFEU*, *supra* note 17 ("In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation", art 10).
41. Kirchner & Yeasmin, *supra* note 1 at 121.

An inattention to specific demands of the Muslim community could *in extremis* even constitute a so-called passive discrimination which occurs by omission or neglect of the State (as opposed to active measures).[42] Sometimes, structurally disadvantaged groups need positive state measures, especially financial support, in order to *de facto* enjoy a fundamental right on an equal footing with groups which are socially better placed, for example, subsidies for minority schools. But in our case it would go too far to postulate an affirmative duty to provide for additional slaughter facilities so as to avoid the 'passive' discrimination of Muslims.[43]

However we conceptualise the issue (as potentially indirect discrimination through inflexible and strict application, or as potentially passive discrimination through lack of extra funding), such a verdict cannot be easily pronounced. On the contrary, the standard of justification for apparently neutral rules or practices, which put members of protected groups at a disadvantage, is fairly lenient.[44] According

42. Anne Peters & Doris König, "Das Diskriminierungsverbot" [comparative commentary on article 14 ECHR/article 3 para. 2 and 3 German Constitution] in Oliver Dörr, Rainer Grote & Thilo Marauhn, eds, *Konkordanzkommentar EMRK/GG*, 2d vol 2 (Tübingen: Mohr Siebeck, 2013) at 1335–37.

43. See *Association Les Témoins de Jéhovah c France* (30 June 2011) No 8916/05, ECLI:CE:ECHR:2011:0630JUD000891605 (ECtHR) at para 52 (a Strasbourg judgment involving tax measures against the French association of Jehovah's witnesses, in which the ECtHR stated that the freedom of religion does not require that churches or their members must be accorded a special fiscal status); Advocate General Wahl in *Liga van Moskeeën* read this judgment as saying that freedom of religion does not entail any obligation to financial support, see: Opinion of AG Wahl, *supra* note 27 at para 80.

44. See European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-Discrimination Law* (Luxembourg: Publications Office of the European Union, 2018) at 53–59, online (pdf): EU FRA <fra.europa.eu/sites/default/files/fra_uploads/fra-2018-handbook-non-discrimination-law-2018_en.pdf>.

to EU law,[45] and the case law of both the CJEU[46] and the European Court of Human Rights ("ECtHR"),[47] the disparate negative impact of a uniform state policy on members of a particular religious group, or on persons of a particular ethnic origin, does not constitute indirect discrimination if the policy is "objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary", to quote the wording of the EU Racial Equality Directive.[48] The test under

45. EC, *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* [2000] OJ, L 180/22, art 2(2)(b) [*Council Directive*]. The case law rarely relies on the *EUCFR* but rather on the more specific provisions of EU secondary law. The key provision is Article 2(2)(b) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. It defines indirect discrimination on the basis of racial or ethnic origin (but not on the basis of religion) as follows: "indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary" (art 2(2)(b)).
46. See *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* (16 July 2015) C-83/14 (CJEU) (special placement of electricity meters in Roma-populated district so that the metres cannot be manipulated or damaged) [*CHEZ Razpredelenie Bulgaria AD*].
47. See *DH v The Czech Republic* (13 November 2007) No 57325/00 (ECtHR) at paras 196–201 on the negative effects of the application of one and the same psychological test for schooling on Roma children. The tests were conceived for the majority population and did not take Roma specifics into consideration. The use of the test led to 80 to 90 percent of those children being sent to special schools.
48. *Council Directive*, *supra* note 45, art 2(2)(b).

the *EUCFR* is similar.[49] In the words of the ECtHR, "a failure to treat differently persons in relevantly different situations ... is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised".[50]

If we apply these principles to the case, we see that the non-attention to specific Muslim demands during those four days "works to the disadvantage of far more persons possessing the protected characteristic than persons not possessing it".[51] This is because it disadvantages those who wish to slaughter, and these are exclusively Muslims.

However, this disadvantage would only then violate the prohibition of (indirect) discrimination of Muslim believers if the state's across-the-board prohibition of 'free' slaughter would not satisfy the three-pronged test as established by the Strasbourg case law, namely, a sufficient legal basis, a legitimate aim, and proportionality.

The strictness of the proportionality test is heavily determined by the group that is placed at a disadvantage. In our case, it is not a specific racial or ethnic group but rather a religious group (although the characteristics overlap). Clearly, any potential direct or indirect discrimination on the basis of ethnic or racial origin must be strictly scrutinised. The CJEU stated in a case concerning Roma in Bulgaria: "where there is a difference in treatment on the grounds of racial or ethnic origin, the concept of

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49. *EUCFR*, *supra* note 3, art 52(1) contains the general principle for limitations/restrictions of fundamental rights (including the right not to be discriminated against: "[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".
50. See *Eweida v United Kingdom* (15 January 2013), Nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR) at para 88 on rules on employee clothing in state-held enterprise (British Airways) and the enterprise's failure to take into account special needs of religious groups.
51. *CHEZ Razpredelenie Bulgaria AD*, *supra* note 46 at para 101.

objective justification must be interpreted strictly".[52] Inversely, distinctions (or lacking distinctions) on the basis of religion are normally scrutinised more leniently, granting the state a broad margin of appreciation.[53]

Applying the three-pronged test shows that its first condition is met: the obligation to use authorised slaughterhouses has its formal basis in the EU regulations. The second prong is the legitimate aim. Here we need to distinguish two objectives of the regulation: food safety on the one hand and animal welfare on the other hand.

With regard to the first objective (food safety for public health), the Advocate General found the obligation to use approved slaughterhouses not to be necessary and proportionate.[54] Some of the rules, for example, on the refrigerated storage of the meat, are superfluous for meat that will be given directly to the final consumer during the Feast of Sacrifice.[55] Temporary slaughter plants with precise sanitary standards could offer sufficient health guarantees.[56] But the Advocate General discussed all this only *arguendo.* He had — followed by the Court — already denied any interference with fundamental rights.[57] We need not further comment on the public health considerations. Even if the application of the regulation were not necessary to protect public health, it could still be necessary to protect animal welfare and be justified on this ground. We therefore turn to the regulation's second objective, the protection of animal welfare, in more detail.

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52. *Ibid* at para 112.
53. See *Palau-Martinez v France* (16 December 2003) No 64927/01 (ECtHR) at paras 39, 41; *Ismailova v Russia* (29 November 2007) No 37614/02 (ECtHR) at para 62; *Religionsgemeinschaft der Zeugen Jehovas v Austria* (31 July 2008) No 40825/98 (ECtHR) at para 99; *Löffelmann v Austria* (12 March 2009) No 42967/98 at para 49; *Savez Crkava "Riječ* života*" v Croatia* (9 December 2010) No 7798/08 (ECtHR) at paras 85–86.
54. Opinion of AG Wahl, *supra* note 27 at paras 129–33; see also paras 97, 100.
55. *Ibid* at para 127.
56. *Ibid* at para 132.
57. *Ibid* at para 89.

B. The prohibition of home slaughter as a suitable and necessary measure to further animal welfare as a legitimate objective in the public interest

The regulation *inter alia* seeks to protect animal welfare. This goal has been recognised by the EU animal welfare mainstreaming clause (Article 13 *TFEU*) and in the settled case law of the CJEU as "a legitimate objective in the public interest" to be pursued by EU legislation.[58]

The next legal question is whether the regulation's prohibition of home slaughter is apt to further this legitimate goal. At first sight, a more pertinent and suitable measure would be a stunning requirement. As explained above (Part II), animal welfare is better protected in slaughter with stunning than in un-stunned slaughter.[59] Based on these veterinarian insights, it can quite safely be said that strict prohibitions of un-stunned slaughter are suitable measures for furthering animal welfare. On these grounds some EU Member States, for example, Slovenia and Denmark, do not allow slaughter without prior stunning and thus completely

58. *Viamex Agrar Handel and ZVK (C-37/06), Zuchtvieh-Kontor GmbH (ZVK) (C-58/06) v Hauptzollamt Hamburg-Jonas* (17 January 2008), in joined cases C-37/06 and C-58/06, EU:C:2008:18 (ECJ) at paras 22–23; *Nationale Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v Belgische Staat* (19 June 2008), C-219/07, EU:C:2008:353 (ECJ) at para 27; *Herbert Schaible v Land Baden-Württemberg* (23 April 2013), C-101/12, EU:C:2013:661 (ECJ) at para 35; *Zuchtvieh-Export GmbH v Stadt Kempten (Landesanwaltschaft Bayern intervening)* (23 April 2015), C-424/13, EU:C:2015:259 (ECJ) at para 35.

59. See in this sense also *Opinion of AG Wahl*, *supra* note 27 (reporting that the pleadings in the proceeding made it "difficult to challenge ... that the slaughtering of an animal that has not been stunned is undeniably likely to cause the animal greater pain and suffering" at para 102).

prohibit some forms of religious slaughter. [60]

Next, we need to enquire whether the prohibition or strict regulation of religious slaughter is *unnecessary* for securing animal welfare, because non-religious industrial slaughter with conventional stunning methods (such as electroshock through the heart of the animal or gassing) has deficits, by design and due to poor implementation, and causes enormous welfare problems.[61] This argument was formulated by the General Advocate in *Liga van Moskeeën* as follows:

> There is nothing to rule out the possibility that slaughtering without stunning, carried out in proper circumstances, will be less painful for the animal than slaughtering the animal after stunning it in circumstances in which, for obvious reasons of profitability, and given the widespread industrialisation of the production of food of animal origin, the stress and suffering experienced by the animal when it is killed are exacerbated.[62]

Indeed, cruel lengthy transports to slaughter plants, extreme time pressure during slaughter, faulty equipment, and untrained personnel cause immense suffering. In European slaughterhouses, frequent mishaps in the shooting of cattle is reported, and the asphyxiation of pigs and

60. In a recent judgment, the Slovenian Constitutional Court upheld this prohibition as being in conformity with freedom of religion (judgment (U-I-140/14) of 25 April 2018). See also Robert J Delahunty, "Does Animal Welfare Trump Religious Liberty? The Danish ban on Kosher and Halal" (2015) 16:2 San Diego International Law Journal 341; see also Christos Kypraios & Pallavi Arora, "Ritual Slaughter in Europe: Towards Reconciling Animal Welfare and religious Pluralism" (2018) 45:2 L' Observateur des Nations Unies: Revue de l'Association francaise pour les Nations Unies 44.

61. See also EFSA Panel on Animal Health and Animal Welfare (AHAW), "Guidance on the Assessment Criteria for Applications for New or Modified Stunning Methods Regarding Animal Protection at the Time of Killing" (2018) EFSA Journal 16:7 (which prescribes how to perform and document new or modified stunning methods that are not among the methods 'approved' by the EU Slaughter Regulation No 1099/2009).

62. Opinion of AG Wahl, *supra* note 27 at para 107 [footnotes omitted].

the electrocution of poultry are not quick and painless either.[63] These problems, however, cannot exonerate the practice of slaughter without stunning.

It remains the case that un-stunned slaughter is not equally suited to reach the objective of relative animal welfare. From the perspective of animal welfare, we need to compare the suffering caused by conventional stunning/killing and religious un-stunned slaughter in *real conditions*. Although the sheer number of killing in observation of religious rules is probably lower than the quantity of 'worldly' killing, it is not the case that religious slaughter is less industrialized and therefore inevitably performed with more care than other slaughter. Unfortunately, the problems owed to the logics of industrialisation, automatization, and pressure to lower the costs affect both 'worldly' slaughter and religious slaughter.[64]

It would therefore not be correct to compare apples with pears, and point to idealised religious practices in order to criticise the non-religious slaughter practices as they happen in the real world. The two types of slaughter practices (stunned and un-stunned) are not identical in their effect on animal welfare. Veterinarians agree that stunning is better for

63. The frequent scandals have led some countries to prescribe video recording in slaughterhouses, other states encourage voluntary video documentation. See for a comparative overview: Wissenschaftliche Dienste des Bundestages, "Videoaufzeichnungen in Schlachthöfen" (Academic Services of the German Parliament, expert opinion WD 5 - 3000 - 042/18) (27 March 2018).

64. See for welfare problems of current practices in the context of Islamic slaughter: Halal Slaughter Watch, *Compatibility between the OIE standards and the requirements of Islamic Law with special reference to the prevention of cruelty to animals during transport and slaughter*, at 5, online (pdf): <www.halal-slaughter-watch.org/wp-content/uploads/2013/11/OIE-Paper_A_Religious_slaughter.pdf>. Al-Hafiz Basheer Ahmad Masri identifies the "real problem" as "the general members of the Muslim public who buy their meat from the shops in their countries never get a chance to see for themselves the un-Islamic and inhumane scenes within some of their slaughter houses. If they knew what was happening there, they would stop eating meat or, at least, start lobbying the powers that be to have the Islamic rules implemented" in *Animals in Islam* (Petersfield: Athene Trust, 1989) at 57.

the animals.[65]

Short of a total ban against un-stunned slaughter, the strict requirement of slaughtering only in approved facilities helps to protect animal welfare (relatively speaking). Un-stunned slaughter that is done unprofessionally causes more pain and suffering than professionally performed killing.[66] If proper shackling facilities, trained personnel, and good equipment are lacking, animals will suffer more pain and anxiety.[67] It is therefore very important to continue the ongoing attempts to improve animal welfare in religious slaughter by developing best practices. Recommendations for best practices include post-cut stunning, reversible stunning, and better restraining methods.[68] The EU's prohibition of home slaughter helps to ensure a certain degree of professionalism and works towards establishing these best practices. It is therefore apt to further animal welfare. Concomitantly, a policy to minimise and professionalise un-stunned killing cannot be qualified as unnecessary.

C. Relevant case law of the ECtHR

In order to determine whether the refusal to relax the prohibition of home slaughter during the four days of the Feast of Sacrifice is not only a suitable and necessary but moreover a proportionate measure for protecting animal welfare at the expense of burdening Muslim believers, we should distinguish relevant prior case law. This comprises the case law of the ECtHR on the ECHR. In *Liga van Moskeeën,* the CJEU

65. See the opinion of the FVE, *supra* note 16.
66. *Cf.* on aspects of professionality in un-stunned slaughter: DG SANTÉ Report, *supra* note 7 at para 39 (finding that the training of the staff in Belgian slaughterhouses did not adequately cover the differences between slaughter with stunning and without stunning. The report concluded that "[t]he system of certificates of competence assures a good level of competence among operators, although the training and examination lacks elements on the important differences where slaughter without stunning is relevant" at 18).
67. See the opinion of the FVE, *supra* note 16.
68. See Antonio Velarde et al, "Improving Animal Welfare during Religious Slaughter", *Dialrel Reports* (Cardiff: Cardiff University School of City and Regional Planning, 2010).

completely left aside freedom of religion as codified in Article 9 ECHR, because the *Convention* is not binding on the EU as long as the EU has not acceded it.[69] However, Article 52(3) of the *EUCFR* prescribes that the *Charter* rights' "meaning and scope ... shall be the same as those laid down by the said Convention", and the *Charter*'s preamble reaffirms "the rights as they result, in particular, from ... the case-law ... of the European Court of Human Rights".[70] Following these prescriptions, the CJEU has frequently relied on the case-law of the ECtHR.

In a recent affair before the ECtHR, the Court had qualified the Turkish state's refusal to formally recognize the Alevi community as a religious denomination to be an unlawful discrimination of that group (in violation of Article 14 in conjunction with Article 9 of the ECHR).[71] The lack of recognition of the Alevi community was a targeted and an incisive state policy. In contrast, the incidental effect of the prohibition of slaughter in irregular slaughterhouses, within the framework of explicit and specific legal exemptions for religious Halal slaughter, is much less serious for the Muslim community in Belgium.

Another case to distinguish is *Cha'are Shalom*.[72] That judgment was about everyday religious slaughter following particularly strict rituals by a group of ultraorthodox Jews in France. The group had not been admitted to slaughterhouses, because the state did not consider the group to be sufficiently representative. The ECtHR had also (similarly to the CJEU in *Liga van Moskeeën*) denied any interference with Article 10 ECHR (alone and in conjunction with Article 14 ECHR), with the argument that there "would be interference with the freedom to manifest one's religion *only if* the illegality of performing ritual slaughter made it impossible for [the religious group] to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable"[73] which is

69. *Liga van Moskeeën*, *supra* note 2 at para 40.
70. *EUCFR*, *supra* note 3, art 52(3).
71. *İzzettin Doğan v Turkey*, (26 April 2016) No 62649/10 (ECtHR) at paras 155–85.
72. *Cha'are Shalom Ve Tsedek v France*, (27 June 2000) No 27417/95 (ECtHR) [*Cha'are Shalom*].
73. *Ibid* at para 80 [emphasis added].

not the case if such meat can be imported.[74] The alternative, namely, the importation of meat, is readily available because goods can freely circulate in the EU. So the open market helps to safeguard the fundamental right. As a side-note, it is doubtful whether reliance on meat importation is a more animal-welfare alternative. Rather, it simply outsources animal cruelty.

Can the reasoning of *Cha'are Shalom* then be transferred to the case at hand, namely, that barriers to slaughtering are acceptable as long as meat can be procured from elsewhere? Such transfer seems impossible, because *Liga van Moskeeën* is not about *eating* the meat but about performing the act of slaughter, specifically as a component of the high religious feast.[75] This feature of the case makes it impossible to dismiss the religious claim simply by pointing out that the believers can buy the meat elsewhere.

Another dictum of *Cha'are Shalom* might be applicable to our case. The ECtHR had taken "the view that the right to freedom of religion guaranteed by Article 9 of the Convention *cannot extend to the right to take part in person in the performance of ritual slaughter* and the subsequent certification process ...".[76] Admittedly, the Court made this statement with regard to completely different context in which the ritual of festive slaughter was not at issue. The issue in *Cha'are Shalom* was rather the need for the ultraorthodox group to rely on slaughter performed by other licensed slaughterers for them according to their rites, without being able to examine in person whether their stricter rites had been duly observed. So the Court's remark may not too easily be read as a plain statement that the freedom of religion does not comprise the right to slaughter with one's own hands. Nevertheless, it does show the proper direction, namely, that not every behaviour of an overall religious activity (such as celebrating the Feast of Sacrifice) is covered by the fundamental right.

74. *Ibid* at paras 80–81.
75. *Liga van Moskeeën*, *supra* note 2 at para 45.
76. *Ch'are Shalom*, *supra* note 72 at para 82 [emphasis added].

D. Proportionality of the refusal to make an exception

The key question is whether the *de facto* obstacle for the exercise of the religious rite created by the refusal to grant a temporary permission for home slaughter and the resulting failure to accommodate the unusually high demand for religious slaughter during the days of the Muslim Feast of Sacrifice is proportionate.[77]

Advocate General Wahl had opined — *arguendo* — that (should the Court find a limitation of the fundamental right) the requirement of using only approved slaughterhouses would *not* be proportionate to reach the objective of animal welfare, and would therefore have to be qualified as an unjustified limitation and thus as a violation of the freedom of religion.[78] The Advocate General thought that the use of temporary plants might even be better for animals, because they create less stress (although he did not make it clear why this should be the case).[79] Overall, the Advocate General was "of the opinion that the obligation for slaughtering to be carried out in an approved slaughterhouse may go beyond what is strictly necessary in order to attain the objective of protecting animal welfare pursued when it is a case of slaughtering an animal in the performance of a religious rite at a very precise time of the year".[80]

I respectfully disagree and submit that the strict requirement of slaughtering only in approved plants does not unduly curtail the free exercise of religion. Religious opinion diverges whether slaughter is compulsory during the Feast of Sacrifice or not.[81] Concomitantly, there seems to be a trend, particularly among younger practising Muslims, to consider that the slaughtering of an animal during the Feast of Sacrifice may be substituted by a monetary donation.[82] It is of course not the

77. *Cf. EUCFR, supra* note 3, art 52(1) (see the wording of the provision, *supra* note 49).
78. Opinion of AG Wahl, *supra* note 27 at paras 98–128; see also paras 91, 97, and 133.
79. *Ibid* at para 119.
80. *Ibid* at para 124.
81. *Cf. Liga van Moskeeën*, *supra* note 2 at para 50.
82. Opinion of AG Wahl, *supra* note 27 at para 54 (this point was intensely discussed in the hearings).

province of courts to determine this religious controversy. But courts may take into account that inside a religious community, various views exist on this point, and factor this into their balancing decision.

Numerous Islamic authorities have pronounced themselves in favour of pre-slaughter reversible stunning. According to a 1986 recommendation by the Muslim World League (Rabitat al-Alam-al-Islam) jointly with WHO, "[p]re-slaughter stunning by electric shock, if proven to lessen the animal's suffering, is lawful, provided that it is carried out with the weakest current that directly renders the animal unconscious, and that it neither leads to the animal's death nor renders its meat harmful to consumers".[83] The pioneering and most authoritative Muslim writer on animal welfare in the context of the Islamic tradition and expert on slaughter techniques, Al-Hafiz Basheer Ahmad Masri, established that "the main counsel of Islam in the slaughter of food animals is to do it in the least painful manner, and numerous Qur'anic and *Ahadith* injunctions have been cited to that effect".[84] According to Masri, pre-slaughter stunning which does not kill the animal is perfectly compatible with the Islamic method of slaughter as it does not affect the flow of the blood. Masri opines that had pre-slaughter stunning been

83. WHO, *Joint meeting of the League of Muslim World (LMW) and the World Health Organization (WHO) on Islamic rules governing foods of animal origin* (held on 5–7 December 1985), WHO Doc WHO-EM/FOS/1-E (January 1986) at 8, online (pdf): WHO <apps.who.int/iris/bitstream/handle/10665/116451/who_em_fos_1_e_en.pdf>. See the list of the 24 Muslim members of that committee in Masri, *supra* note 64, at 199. This recommendation had been preceded by a 1960 *Fatwa* (unanimous verdict) adopted by a committee of jurists of the Al-Azhar University in Cairo which held: "Muslim countries, by approving the modern method of slaughtering [i.e. with pre-slaughter stunning that is not lethal], have no religious objection in their way" (at 191). Masri cites further Islamic authors in favour of pre-slaughter stunning (at 191–92). See also Richard C Foltz, *Animals in Islamic Tradition and Muslim Cultures* (Oxford: One World, 2006) at 105–27. See for a critique of modern, ostensibly 'Halal' slaughter from the perspective of Islam scholars Lisa Kemmerer, *Animals in the World Religions* (Oxford: Oxford University Press, 2011) at 241, 259–60.

84. Masri, *supra* note 64 at 188.

invented during the time of the Holy Prophet Muhammad, he would have prescribed stunning.[85] Indeed, slaughter practices minimising suffering would seem to be encouraged by a modern reading of the Koran which shows that the holy text does not consider animals as inferior to humans and does not confer humans any authority over them.[86]

Also, the religious rule or custom apparently provides that meat should be shared with neighbours (which could be understood as implying that the neighbours themselves do not slaughter). Or, maybe believers could travel to other parts of Belgium where the slaughter facilities are not overcrowded.

Another aspect is that the products of slaughter are not fully consumed only by religious believers. It has been assessed that normally half of the animal slaughtered in observance of a religious prescription is sold on the ordinary meat market for consumption by people who do not care for the religious rule. Arguably, already this fact creates more animal suffering than necessary.[87] To conclude, taking these aspects into account, the burden on the exercise of the freedom of religion created by the application of the controversial regulation seems not too high in proportion to the objective of animal welfare.

E. Summary

Overall, the EU regulation seeks to assure proper and professional slaughter by relegating it to authorised slaughterhouses which offer more guarantees for using the right equipment and trained personnel than

85. *Ibid* at 189–90; see also 157–204 generally on slaughter.
86. Sarra Tlili, *Animals in the Qur'an* (Cambridge: Cambridge University Press, 2012) at 82–83, 91, 136–37.
87. See Jörg Luy, "DIALREL Ethics Workshop 1: Ethical Evaluation of Six Political Options for Religious Slaughter" in Caspar & Luy, *supra* note 1 at 203–209 (Luy constates a "violation of the principle of proportionality which is ethically not acceptable" at 209).

non-authorised facilities.[88] The weak point of the regulation is that the strict monopoly for authorised slaughter plants is not exactly tailored to the objective of animal welfare. A strict requirement of stunning would be a much better targeted rule. Such a requirement would, as explained, not necessarily offend Muslims, but it would trod further into the sphere of religious doctrine. In order to avoid this, reliance on professionalism, in different manifestations, seems to be a proper 'proxy' for making a contribution to improve animal welfare — both in religious and in non-religious slaughter.

All aspects considered, and based on the rather generous standard of justification that is pertinent for our case, the regulation and its application offers a sufficiently reasonable justification for tolerating the adverse impact on the Muslim population of the region during the four days of the Feast of Sacrifice. [89] In conclusion, no indirect discrimination of Muslims in the region is present.

Issues of Halal slaughter will continue to occupy the Court of Justice of the EU. In a recent proceeding upon question for reference by the Administrative Court of Appeals of Versailles (France), the Court decided that the European label 'organic farming' may not be conferred on products deriving from meat of animals that had been slaughtered without stunning.[90] The tension between freedom of religion and animal welfare will need constant readjustment.

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88. But see Advocate General Wahl who is "not convinced ... that the use of approved slaughterhouses is always an effective bulwark against animal suffering" (Opinion of AG Wahl, *supra* note 27 at para 109). This is of course correct. However, the requirement goes at least in the right direction.
89. *CHEZ Razpredelenie Bulgaria AD*, *supra* note 46 at para 112.
90. *Oeuvre d'assistance aux bêtes d'abattoirs (OABA) v Ministre de l'agriculture et de l'alimentation, Premier minister, Bionoor, Ecocert France, Institut national de l'origine et de la qualité (INAO)* (26 February 2019) C-497/17 ECLI (CJEU). The case concerned "Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, read in the light of Article 13 TFEU.

VI. Conclusion

In *Liga van Moskeeën,* Advocate General Nils Wahl duly noted that in debates about religious slaughter "the spectre of stigmatisation very swiftly appears. It is historically prevalent and care must be taken not to encourage it".[91] Indeed, the current political and societal climate in Europe is conducive to hostility towards Muslims. In this context, we must pay attention that concern for animal welfare is not played out against respect for human dignity and against religious and cultural pluralism.

Such easy but false antagonism can be avoided, because there is no necessary contradiction between the agendas of humanism and animal protection. Quite to the contrary, they can even be seen as aligned. The reason is that the de-humanisation of humans which can foreshadow discrimination, stigmatisation, and even extermination, finds its model and training-ground in the debasement of animals. When extreme violence against animals, as the prototypical 'other', is tolerated, condoned, and entrenched, it becomes difficult to uphold the cultural ban on violence against humans, especially against those groups that are likened to animals. In that sense, Theodor Adorno wrote that "the recurring stance about savages, blacks, or Japanese [or Muslim immigrants, we might add] resembling animals already contains the key to the pogrom. The defiance with which the perpetrator pushes aside this glance - '[i]t is only an animal' - repeats itself in his cruelty towards humans, in which the perpetrator constantly has to confirm 'only an animal' — because he could not fully believe it with regard to the animal either".[92]

Some readers might find that un-stunned slaughter constitutes extreme violence against animals. Could it be seen as a training ground for violence against humans as practised, for example, by soldiers of the Islamic State? Or rather, do not all forms of mass slaughter of animals ultimately constitute extreme violence which makes the consumers of such meat complacent towards the suffering of weaker members of society, which in turn could result in indifference towards the fate of

91. Opinion of AG Wahl, *supra* note 27 at para 106.
92. Adorno, *supra* note 4.

weaker humans or even fuel violence against them?

Awareness of the danger of demeaning and debasing humans, by condemning 'their' cruelty towards animals can be employed as a positive force for sharpening our consciousness and improving our consideration for the 'other'. Along that line, the way forward seems to be the inter-cultural and inter-religious dialogue on matters of slaughter — and an overall reduction or even abandonment of the consumption of animal meat where healthy and ethical alternatives exist. [93]

93. See *e.g.* Velarde et al, *supra* note 68.

Canada's Experiment with Industry Self-Regulation in Agriculture: Radical Innovation or Means of Insulation?

Peter Sankoff*

In Canada today, notwithstanding the existence of animal protection legislation at both the provincial and federal level, very few laws actually govern the daily treatment of animals on farms. Instead, the 'rules' explaining how these animals can be kept exist in the form of Codes drafted by a coalition of agricultural industry bodies and non-government organizations working under the aegis of an umbrella group: the National Farm Animal Care Council ("NFACC"). In this article, the author provides a preliminary examination of Canada's evolving experiment with industry self-regulation of animal protection standards. After outlining the legislative background that led to the development of the Codes, the author considers NFACC's institutional membership, the role the organization plays in creating national standards of animal welfare, how it drafts the Codes, and the legal status of these instruments. The strengths and weaknesses of Canada's code regime are then explored in detail.

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I. Introduction

To put the matter as charitably as possible, Canada has never been considered a world leader where animal protection law is concerned, especially insofar as farm animals are concerned. While its Commonwealth 'cousins' in the United Kingdom, Australia, and New Zealand were enacting dramatically enhanced animal protection laws through the 1990s and early 2000s, Canada's federal government stood pat, maintaining a 1950s-era framework that is normally referred to in uncharitable terms like 'outdated', 'antiquated', and 'woefully

inadequate'.[1] From 1999 through to 2015, a series of well-documented attempts to amend Canada's animal protection law in Parliament all met with failure, and there are no signs of anything changing in the immediate future.[2]

This is not to suggest that Canada's legislative situation is entirely stagnant, however. On the contrary, change is undoubtedly afoot for one of the world's biggest players in animal agriculture, and since 2005 new

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1. "Falling Behind: An International Comparison of Canada's Animal Cruelty Legislation" (2008), online (pdf): *International Fund Animal Welfare* <s3.amazonaws.com/ifaw-pantheon/sites/default/files/legacy/Falling%20behind%202008%20an%20international%20comparison%20of%20Canadas%20animal%20cruelty%20legislation.pdf> (the last of these terms comes from a study undertaken by the International Fund for Animal Welfare, which ranked Canada near the bottom of Western nations with animal protection laws). See also John Sorenson, *About Canada: Animal Rights* (Halifax: Fernwood, 2010) who notes that Canada's anti-cruelty laws are "antiquated, remaining basically unchanged since the nineteenth century" at 154).
2. In 1999, the federal government made a significant attempt to revamp the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*] provisions governing crimes against animals. The proposed reforms were widespread and fairly ambitious, modernizing the language of the *Code*, imposing certain duties, and narrowing the mental elements required to establish a conviction. The initiative could not get through a divided Parliament and eventually died. See Lesli Bisgould, *Animals and the Law* (Toronto: Irwin Law, 2011) at 87–96. The most recent attempt at reform was Bill C-246, a reasonably ambitious private member's Bill initiated by Liberal MP, Nathaniel Erskine Smith, in 2015. Facing vociferous resistance from the opposition Conservative party and many of Erskine-Smith's Liberal colleagues, the Bill was defeated at second reading. See Holly Lake, "Animal Cruelty Bill Defeated" (6 October 2016), online: *iPolitics* <ipolitics.ca/2016/10/06/animal-cruelty-bill-defeated/>. For a critique of the reasoning used to vote down the Bill, see Peter Sankoff, "Canada Still an Animal Welfare Laggard" (13 October 2016), online: *Policy Options* <policyoptions.irpp.org/magazines/october-2016/canada-still-an-animal-welfare-laggard/>. For an opposing view, see Robert Sopuck, "Animal Rights Bill Threatened Canadians' Way of Life" (7 November 2016), online: *Policy Options* <policyoptions.irpp.org/magazines/november-2016/animal-rights-bill-threatened-canadians-way-of-life/>.

measures designed to limit some of the ways in which farm animals can be treated have been emerging on a fairly regular basis. But in contrast to the developments taking place abroad, most of this change is being driven by the agricultural industry. And here I speak not metaphorically, in the sense of suggesting that industry is *pushing* for reform. Instead, most of the new rules governing the treatment of farm animals are being created by a coalition of agricultural industry bodies and non-government organizations working under the aegis of an umbrella group: the National Farm Animal Care Council ("NFACC"). As is the case with most animal protection mechanisms, the extent to which the model 'works' for animals depends greatly upon your perspective. Still, one thing is undeniable: the NFACC is now a major player on the Canadian law-making scene, and it has seized control of the regulatory agenda in farmed animal welfare for the foreseeable future.

Though the choice to cede regulatory decision-making to a private body that is tasked with the job of creating rules its members must then live by is not entirely unique,[3] it raises many questions — questions that are especially pronounced when the organization at issue is tasked with enacting rules that help define how criminal and quasi-criminal legislation will be interpreted, a situation that *is* unique.[4] The NFACC's process of decision-making also raises concerns about the moral validity of standards created by a group dominated by the very industries affected by those standards, and the overall democratic legitimacy of the process in light of the way public input is considered. The ambiguous legal status of the codes the NFACC creates is another matter to be apprehensive

3. Many institutions that are mostly private — albeit usually with some government oversight — have the ability to create their own guidelines for conduct, with law societies, who create the rules of professional conduct that govern how lawyers operate, being a prime example.

4. What is also different is that the power to self-regulate normally tends to be afforded to professional associations (*e.g.* lawyers, veterinarians, doctors) who have a clear and delineated group of members who are not permitted to operate their profession without adopting the set rules. The NFACC does not work that way. Farmers are not required to belong to any professional association, and the NFACC has no legal power to bind them.

about.

Despite the NFACC's significant role in creating farm animal protection standards, this 'delegation' of legal power by the Canadian government has largely gone unstudied to date. In place for over 13 years, NFACC Codes appear now to be a permanent fixture on the Canadian landscape, and scrutiny of their scope and impact is very much needed. This paper is intended as an initial foray into this lacuna. Its primary objectives are to explain the importance of the NFACC's role to animal protection law in Canada and demonstrate the need for further and deeper analytical inquiry. The NFACC refers to itself, not incorrectly, as the "national lead for farm animal care and welfare in Canada",[5] notwithstanding an organizational framework that lacks many of the traditional checks and balances of a legislative body, and the fact that what the group produces is not actually law, in the strict sense of the word. What this means for Canada's agricultural animals remains to be seen, but further analytical scrutiny of this organization is essential if the impact of relying upon the NFACC to effectively regulate protection standards in the animal farming industry is ever to be fully understood.

In this paper, I will provide a preliminary examination of Canada's evolving experiment with industry self-regulation of animal protection standards. In Part II, I outline the legislative background that led to the development of the NFACC Codes, and attempt to situate these Codes within the Canadian legal framework for animal protection. Part III introduces the NFACC and explains its objectives and rise to prominence. It then examines the NFACC Code-drafting process, and explores how these instruments are developed. In Part IV, I highlight some strengths of the new regimes, while Part V addresses a number of concerns.

II. Historical Background

In order to understand how the NFACC came to prominence in Canada, some historical background is required, as the farming industry's involvement in Code drafting is, to some extent, a result of the legislative

5. "About NFACC" (24 August 2018), online: *National Farm Animal Care Council* <www.nfacc.ca/about-nfacc> [NFACC, "About NFACC"].

vacuum that existed before the organization's inception.

Animal protection is a matter of shared federal-provincial responsibility in Canada.[6] The federal government has exclusive responsibility over criminal law, which includes acts against animals that are regarded as being immoral in nature.[7] As a result, the *Criminal Code*[8] contains the standard sort of anti-cruelty offences that should be recognizable to anyone with even a basic familiarity in this area, prohibiting wilful acts of cruelty that cause unnecessary suffering and certain egregious acts of

6. A constitutional challenge in Ontario heard in May 2018 suggests otherwise, contending that crimes against animals fall within the exclusive purview of the federal government, and that large parts of Ontario's *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O.36, is unconstitutional as a result. See the Notice of Application in *Bogaerts v Attorney General of Ontario* (13 October 2013), Perth 749/13 (Ont Sup Ct), online (pdf): *Fix the Law* <www.fixthelaw.ca/wp-content/uploads/2013/09/Notice-of-Application.pdf>. Though this application raises a number of interesting — and potentially meritorious — issues, this is not one of them, and the federalism challenge is likely to fail. The dominant theme in Canadian constitutional law over the past two decades has been a desire to leave coordinate provincial and federal schemes in place where it is possible to do so. See *e.g. R v Hydro-Québec*, [1997] 3 SCR 213 (use of federal criminal law power does not preclude provinces from exercising own power to regulate independently or supplement federal action). Animals legally qualify as property — a provincial area of responsibility. Given the high threshold required for the criminal act of cruelty against animals, there would seem to be plenty of room for the provinces to legislate to protect animals from distress and regulate in favour of their well-being.
7. By virtue of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(27), reprinted in RSC 1985, Appendix II, No 5.
8. *Criminal Code*, *supra* note 2.

neglect.[9] The provisions are not intended to address suffering of farmed animals,[10] but they do not exclude this either, which is problematic in its own right. The statute provides the *illusion* that animals are protected in every context, and is occasionally referred to as a safeguard when egregious farming practices are mentioned, often in response to complaints by animal advocates about there being no meaningful protection in place

9. S 446(1)(a) of the *Criminal Code*, *ibid*, provides that every one commits an offence who wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or bird. S 446(1)(b) of the *Criminal Code*, *ibid*, is the "neglect" offence, punishing anyone who, "being the owner or the person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it".

10. As Bisgould, *supra* note 2, puts it, while "there is no specific exemption, a *de facto* exemption is either presumed or effectively written in, because of the manner in which the provisions are interpreted" at 71. In *R v Pacific Meat Company* (1957), 24 WWR 37 (BC Co Ct), the court explicitly held that pain inflicted for the purpose of turning animals into food was always necessary, a decision that seemed to curtail the possibility of using the *Criminal Code* to prosecute farmers. As Bisgould, *supra* note 2, puts it, "since that time, criminal law has not generally been invoked in the context of the actual practices by which animals are used and much deference is given to those in industry to know best how to handle their animal property" at 74.

for farmed animals.[11] That said, it is generally understood by everyone involved that the *Criminal Code* is not the statute of choice where farmed animals are concerned.[12]

The *Criminal Code* is not the federal government's only contribution to animal management. Laws that address the handling and care of farm animals can be found in a variety of statutes addressing issues as diverse as food safety, disease prevention, and marketing of animal products.[13] However, there are very few statutes containing provisions that deal specifically with keeping farmed animals safe from harm. Only two pieces of federal law do this to any real extent: the *Health of Animals Regulations*,[14] enacted under the authority of the *Health of Animals Act*,[15]

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11. "A Summary Report on Farm Animal Welfare Law in Canada" (2013) at 2, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/resources/Farm_Animal_Welfare_Laws_ Canada.pdf> [NFACC, "A Summary Report"]; "How Do I Know Dairy Cows are Treated Humanely?" (29 August 2018), online: *Alberta Milk* <albertamilk.com/ask-dairy-farmer/how-do-i-know-the-animals-are-treated-humanely/> ("[w]e have zero tolerance for animal abuse or neglect… [A]nimal protection at the farm level is offered under both provincial and federal legislation. The two main laws protecting animals against abuse and neglect on the farm are the provincial *Animal Protection Act* (APA) and the federal *Criminal Code* of Canada"); "Animal Welfare" (29 August 2018), online: *Cara* <www.cara.com/animal_welfare/> ("[w]e take animal welfare seriously and we do not tolerate animal cruelty in our supply chain. Animal abuse is a criminal act in Canada, and violators should be reported and prosecuted").
12. See Sophie Gaillard & Peter Sankoff, "Bringing Animal Abusers to Justice Independently: Private Prosecutions and the Enforcement of Canadian Animal Protection Legislation" in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) 307 at 318 (discussing reluctance of authorities to use criminal provisions in farmed animal context); NFACC, "A Summary Report", *ibid* at 3.
13. See *e.g. Safe Food for Canadians Act*, SC 2012, c 24; *Canada Agricultural Products Act*, RSC 1985, c 20 (4th Supp). There are no provisions dealing with animal welfare in any of these pieces of legislation.
14. CRC, c 296.
15. SC 1990, c 21 [*Health of Animals Act*].

has a number of provisions designed to protect animals during transport; and, the *Safe Food for Canadians Regulations*,[16] enacted pursuant to the *Safe Food for Canadians Act*,[17] sets out a variety of standards respecting slaughter.

It would be wrong, thus, to say that the federal government and its inspectors play no role in setting and enforcing animal welfare standards in Canada. They do — but only during the processes of animal transport and slaughter.[18] Subject to the comments about the anti-cruelty law made above, and the possibility that it might eventually come to be used more

16. SOR/2018-108 (until the summer of 2018, these regulations were enacted pursuant to the *Meat Inspection Act*, SNS 1996, c 6, and most animal law publications refer to the *Meat Inspection Regulations*, NS Reg 46/1990, as governing the slaughter process).
17. SC 2012, c 24.
18. Even here, there is plenty to be critical of. See Bisgould, *supra* note 2 at 181, who decries the problems of under-enforcement in this area. See also World Society for the Protection of Animals, "Curb the Cruelty: Canada's Farm Animal Transport System in Need of Repair" (2010), online (pdf): *World Animal Protection* <www.worldanimalprotection.ca/sites/default/files/ca_-_en_files/curbthecrueltyreport.pdf>, a detailed study on the shortcomings of the Canadian Food Inspection Agency ("CFIA"), which is responsible for enforcing these laws. The CFIA has conducted only one major prosecution involving farmed animals, resulting in a conviction of a major chicken processor on 22 counts of inhumane transport of chickens under the *Health of Animals Act*, *supra* note 15, a fine of $80,000 and an agreement to spend $1 million on improvements to its transport facilities as part of a probation order. See *R v Maple Lodge Farms*, 2014 ONCJ 212.

widely,[19] in just about every other area of a farmed animal's life, regardless of the species, federal law provides no guidance and no protection. Legally, farmers are free to do *whatever they like to their animals*, so long as their conduct complies with relevant agricultural law on food safety and other non-welfare related requirements.[20]

In recent years, the more significant legislative developments have come from the provinces, which have shown some willingness to strengthen their own animal protection standards, even though these

19. See Katie Sykes, "Rethinking the Application of Canadian Criminal Law to Factory Farming" in Sankoff, Black & Sykes, *supra* note 12 at 33, who has argued that the *Criminal Code* permits such an interpretation and that a greater number of criminal prosecutions in the farming context should take place if the law was applied correctly. Nonetheless, recent experience shows continued prosecutorial reluctance to use the *Criminal Code* for this purpose. One of the worst recent documented cases of animal abuse took place at a Chilliwack dairy farm, where three workers were videotaped using chains and other implements to viciously beat a number of dairy cows, including downed and trapped cows who could not escape the abuse. Notwithstanding what seemed like a clear case of criminal level abuse, the workers were only charged and convicted of provincial offences. See "Chilliwack Dairy Farm Workers Sentenced to Jail in 'Precedent-Setting' Ruling" (29 May 2017), online: *BC SPCA* <spca.bc.ca/news/chilliwack-dairy-farm-workers-sentenced-jail-precedent-setting-ruling/> [BC SPCA]. But see also Keith Corcoran, "Cruelty case: Life-time Ban on Owning Animals for Farmer" (22 August 2018), online: *LighthouseNow* <lighthousenow.ca/article.php?title=Cruelty_case_ Life_time_ban_on_owning_animals_for_f> (Nova Scotia farmer convicted of *Criminal Code* offence for starving animals).

20. See Rachel Godley, *The Health of Animals Act and Regulations: An Example of How Canada Has Failed to Protect Farmed Animals* (Masters of Laws Thesis, University of Alberta, 2014) at 56–59, online: *Education & Research Archive* <era.library.ualberta.ca/items/a694308d-8be6-48a1-b964-3c8aabf0fb4f>.

efforts have varied in intensity by jurisdiction.[21] To be clear, farm animals are rarely a priority in these efforts, which are usually directed at specific issues involving companion animals such as puppy mills,[22] pet shop retailers,[23] catteries,[24] and the treatment of sled dogs.[25] Nonetheless, like the federal cruelty law, the legislation applies to *all* animals and extends beyond the protective, though hard-to-meet, standards of the criminal law, prohibiting anyone from causing 'distress',[26] necessary or otherwise. These laws also impose clear duties of care upon those responsible for animals. For example, Manitoba's legislation,[27] which is representative of that found in most of the major provinces, sets out the following:

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21. See "2017 Canadian Animal Protection Laws Rankings" (July 2017), online (pdf): *Animal Legal Defense Fund* <aldf.org/wp-content/uploads/2018/06/2017-Canadian-Rankings-Report-1.pdf> (ranking the revamped legislation enacted in Prince Edward Island, Manitoba, Nova Scotia and New Brunswick as being the best provincial animal protection legislation in Canada).
22. See Quebec, *Regulation respecting the safety and welfare of cats and dogs,* CQLR c P-42, r 10.1.
23. *Animal Care Act*, CCSM c A84, ss 26–34 (setting out detailed standards for pet shops and licencing procedures) [*Animal Care Act*].
24. See *Pet Establishment Regulation*, NB Reg 2010-74.
25. In response to the horrific killing of sled dogs in 2011 (see Sam Cooper & Sean Sullivan, "Massacre Horrifies B.C.: Man Shoots 100 Sled Dogs 'Execution-Style' After Olympic Slowdown" (6 February 2011), online: The Province <www.theprovince.com/Massacre+horrifies+shoots+sled+dogs+execution+style+after+Olympic+slowdown/4197145/story.html>) British Columbia enacted strict guidelines regarding the treatment of sled dogs: *Sled Dog Standards of Care Regulation*, BC Reg, 21/2012.
26. Though this term is still being defined by the courts, it does not refer to every level of discomfort endured by an animal. For example, the *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O.36 [*OSPCA Act*], defines it as "the state of being in need of proper care, water, food or shelter or being injured, sick or in pain or suffering or being abused or subject to undue or unnecessary hardship, privation or neglect" s 1. See also *R v Ryan*, 2017 ABPC 161, distress restricted to "great physical or mental strain or stress" at para 22.
27. *Animal Care Act*, *supra* note 23 at s 2(1).

> 2(1) A person who has ownership, possession or control of an animal
>
> (a) shall ensure that the animal has an adequate source of food and water;
>
> (b) shall provide the animal with adequate medical attention when the animal is wounded or ill;
>
> (c) shall provide the animal with reasonable protection from injurious heat or cold; and
>
> (d) shall not confine the animal to an enclosure or area
>
> (i) with inadequate space,
>
> (ii) with unsanitary conditions,
>
> (iii) with inadequate ventilation or lighting, or
>
> (iv) without providing an opportunity for exercise, so as to significantly impair the animal's health or well-being.

At first glance, these provisions unquestionably provide much stronger and clearer protection for farmed animals than the federal laws, and extend the potential to control improper or painful agricultural practices. Still, while provincial animal protection laws have undoubtedly proved useful in certain cases where animals are abused or the subject of extreme neglect,[28] they have not really affected the overall dynamic for farmed animals by guaranteeing better standards that can be applied universally. The reason is because of an additional clause, present

28. Notwithstanding the deficiencies, to be discussed, these offences are prosecuted on a strict liability standard, and easier to prove as a consequence. There is no need, in contrast to the criminal provisions, to show any *intention* to cause distress. For this reason, leaving aside the worst cases of intentional cruelty or neglect, it is now common for most charges involving animals to proceed under the provincial legislation. See *e.g.* BC SPCA, *supra* note 19; Julien Gignac, "'This is Not Normal': Ontario Mink Farm Charged with Animal Cruelty After Activists Go Undercover" (12 May 2018), online: *The Star* <www.thestar.com/news/canada/2018/05/12/undercover-investigation-behind-animal-cruelty-charges-at-ontario-mink-farm-us-based-rights-group-says.html> (investigation into mink farm results in provincial charges notwithstanding large scale deficiencies at farm).

in every jurisdiction, indicating that the causing of distress or breach of the standards of care is not punishable where it is the result of "an activity carried on in accordance with reasonable and generally accepted practices of agricultural animal care, management or husbandry".[29] As a consequence, a farmer is permitted, for example, to confine animals with 'inadequate space' — however that might be defined — so long as this is the common practice within the industry.[30]

It stands to reason that this clause, which exempts traditional farming practice from scrutiny even where such practices cause animals to suffer, limits the utility of provincial legislation in the agricultural context. It is worth noting, however, that the Ontario law set out above does say that the activity must be generally accepted *and* reasonable. This particular wording has given hope to some animal advocates,[31] who postulate that there might be room to bring prosecutions where a 'generally accepted' practice was nonetheless the cause of considerable harm to animals, by proving that the practice was not reasonable. This hope has been limited by unfavourable judicial interpretation of the provisions, however.[32] In the leading case of *R v Muhlbach*,[33] a farmer escaped conviction for mistreating cattle notwithstanding clear evidence that the animals

29. *OSPCA Act*, *supra* note 26 at s 11.2(6)(c).

30. As it is, for example, in layer hen facilities, where hens are confined to small cages as a regular practice. See *Code of Practice for the Care and Handling of Pullets and Laying Hens*, Ottawa: NFACC, 2017 at 12, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/pdfs/pullets_and_laying_hens_code_of_practice.pdf> [NFACC, *Laying Hen Code*].

31. See "Interview with Anna Pippus" (7 November 2016), online: *Vegan Creative* <vegancreative.ca/interview-with-anna-pippus/>, who notes that "I think there's a decent argument that even some of these standard industry practices ought not to comply with existing laws, because they aren't 'reasonable' (the legislation requires this)".

32. It is also limited by the way in which many of the provincial provisions are drafted, as not all of them require standards to be reasonable. For example, Manitoba's *Animal Care Act*, *supra* note 23, exempts every person whose conduct was "consistent with generally accepted practices or procedures for such activity" s 2(2). See similarly *Animal Welfare and Safety Act*, CQLR, c B-3.1, s 7 [*Animal Welfare and Safety Act*].

33. 2011 ABQB 9 [*Muhlbach*].

had not been provided with water, that they suffered from untreated injuries, and that downed animals in a state of suffering were present on various parts of the farm. The trial judge and appellate court accepted anecdotal evidence from fellow farmers that the accused's actions were not particularly egregious in the circumstances. Nor were they out-of-line with what others would have done, which was enough to warrant an acquittal. Throughout, the trial judge drew favourable inferences in favour of the farmer, ignoring evidence of dead cows, injured animals, and empty water troughs.

Part of the problem, of course, lies in defining what constitutes a 'reasonable' practice in the abstract, combined with the fact that the accused's evidence, supported by that of his next-door neighbour farmer or other friends, is entitled to weight in the courtroom, especially since an accused person gets the benefit of the doubt.[34] These issues of proof have helped to limit the utility of provincial legislation with respect to harms caused by traditional, albeit painful, farming practices, and made prosecutors reluctant to bring cases forward unless the evidence of abuse or cruelty is overwhelming.

In short, while Canada has no shortage of federal and provincial laws designed to address the protection of animals, the fact remains that with the exception of certain aspects of transport and slaughter, there is no legislation that directly addresses the daily treatment and care of animals, unless that treatment was malicious in nature or grossly inconsistent with the way those animals are treated on other farms.

III. NFACC: Organization and Code Processes

A. The Creation of the NFACC

Beginning in the late 1980s and accelerating through the next two decades, increasing public concern about the treatment of farm animals sparked significant legislative reforms in a host of countries around the globe. To take just three examples, Australia, New Zealand, and the UK

34. Part of the problem lies in the difficulty of getting farmers to testify against one another, unless the practices are truly abhorrent.

all repealed their archaic animal protection laws — which, at the time, looked a lot like Canada's laws do now — and enacted modern versions designed to provide better animal care standards and more effective methods for sanctioning those who ignored them.[35]

While Canadian legislators largely ignored this trend, farmers and other players in the agricultural industry showed a keen interest in what was happening. As had been the case in New Zealand, where a modern *Animal Welfare Act* was initiated by requests from the farming community,[36] Canada's farmers recognized that something needed to change. Beginning as early as 1987, groups of farmers and collective associations began meeting for the purpose of creating clearer standards of care. Their aim was partially altruistic. Most farmers believe strongly that animals must be properly cared for, and are disgusted by incompetent or lazy farmers who let animals die of thirst or suffer from a lack of medical treatment. But there were economic concerns in play, as well. Farmers also understand that negative publicity in the form of stories about animal mistreatment is bad for business, and that it was important, as an early NFACC publication made clear, to "delive[r] the message that

35. *Animal Welfare Act 1993*, 1993/63 (Tas); *Animal Care and Protection Act 2001*, 2001/64 (Qld); *Animal Welfare Act 2002*, 2002/33 (WA); *Animal Welfare Act 1999*, 1999/142 (NZ) [*Animal Welfare Act 1999*]; *Animal Welfare Act 2006*, c 45 (UK).

36. See Peter Sankoff, "Five Years of the 'New' Animal Welfare Regime: Lessons Learned from the New Zealand's Decision to Modernize Its Animal Welfare Legislation" (2005) 11:7 Animal Law 7 at 11–13 [Sankoff, "Five Years"].

farmers care for their animals and promot[e] responsible animal care".[37] The existing law did not do this. The problem was the disconnect between consistently 'winning' — farmers avoiding punishment even in cases where there was clear harm and a questionable rationale for imposing it — and the growing discontent expressed by the media reporting on horrible incidents that were going unpunished. In a sense, one could make the case that the law was almost *too* favourable to the farmers. Few people really want to encourage enforcement and prosecution of their industry, but if everyone is 'innocent', it tarnishes the reputation of all farmers equally.

These trends eventually drove the agricultural community and the government into each other's arms. Though the federal government had no apparent interest in creating or monitoring new legislation, it was happy to support initiatives designed to encourage better welfare.[38] Farmers were also happy to push this objective, especially when it could be conducted on their terms. It allowed for "real progress on responsible farm animal care, while helping to ensure animal agriculture is viable in a climate of increasing market demands".[39]

This desire for a national animal care organization led to the 'birth' of the NFACC in 2005, which launched with widespread involvement

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37. Gordon Coukell, "A Message from the Chair" in National Farm Animal Care Council, "Annual Report 2005–2006" (2006) at 3, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/pdfs/nfacc/Annual%20Report%202006.pdf>. See also Sefecon Management Consulting Inc., *A Discussion Paper Setting out a National Approach to Animal Care*, June 2004 (provided by NFACC to the author) at 16, which clearly links the two objectives, noting that "a proactive, rather than emergency response, to farm animal care is preferred. Elevating the level of professionalism within farm animal industries by raising the skill and competency levels of livestock producers is a means of ensuring the continued and future sustainability of livestock agriculture. Basic planning on farm animal health and care will result in a pay off. It is also important to recognize that this is being driven by consumers who have a strong opinion about animal care".
38. "A Message from the Chair", *ibid*.
39. *Ibid*.

from the leaders of every significant agricultural sector in Canada,[40] and support from at least one major animal protection group — the Canadian Federation of Humane Societies — as well as the Canadian Veterinary Medical Association. From the start, the endeavour has been funded by Agriculture Canada, a federal agency, though the government has no voting seat at the table, and no official role in the direction of the coalition. It funds the project and has observer status — nothing more. Other provincial agriculture ministries have also been involved, though government agencies are not permitted to vote on NFACC matters.[41]

The organization has come a long way from its early beginnings. The NFACC has full-time support staff, an extensive website, and a detailed YouTube channel,[42] with numerous videos explaining its procedures, work, and processes. It has grown from 22 original members to 27, the vast majority of whom are national organizations, and added 15 additional associate members, mostly companies or groups that are not national organizations, including restaurants, retailers, processors, and feed companies.[43]

The NFACC's Mission Statement is as good a place as any to gain an understanding of the group's approach. It states that: "We believe that by striving for consensus, realistic and lasting improvements to farm animal care can be made".[44] This statement of purpose is not just a guiding principle — it is an overarching theme discernible from every publication that emanates from the NFACC. As Edouard Asnong, Quebec Pork Producer and former Chair of the NFACC, has noted, "collaboration

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40. This includes organizations indirectly involved in the agricultural use of animals, like the Livestock Transporters Division and the Canadian Restaurant and Food Services Association.
41. "Membership" (23 August 2018), online: *National Farm Animal Care Council* <www.nfacc.ca/membership> [NFACC, "Membership"].
42. "National Farm Animal Care" (2018), online (video): *Youtube* <www.youtube.com/channel/UC9fPwxkNMqwNOd7SyGXNBHg>.
43. NFACC, "Membership", *supra* note 41.
44. See "Development Process for Codes of Practice for the Care and Handling of Farm Animals" (2018), online: *National Farm Animal Care Council* <www.nfacc.ca/code-development-process> [NFACC, "Development Process"].

amongst diverse stakeholder groups is the key to real progress".[45] This collaboration extends to support for the process. The NFACC's Code of Conduct[46] makes clear that all members must agree to support the Code development process and the Codes developed through it.[47]

B. The Codes

The NFACC's core task is the creation of Codes of Practice, "nationally developed guidelines for the care and handling of different species of farm animals".[48] The Codes are designed to be used "as guides and extension tools in promoting sound animal care practices" and also "form the basis of animal care assessment programs".[49] Not surprisingly, though the Codes include a series of 'requirements', they do not read like statutes or regulations. Instead, they look more like handbooks, serving the NFACC's primary purpose of establishing standards for its member organizations.

NFACC materials are ambiguous with respect to the legal force of the Codes. At times, the wording loosely refers to the Codes as 'guidelines' or 'standards', and it is very unusual to see any discussion of lawmaking, non-compliance or the potential for sanction. Instead, the focus is on "providing information and education" and "serving as the foundation for animal care assessment programs".[50] But at other junctures, the NFACC stresses how important the Codes are, suggesting that animal care includes certain "fundamental obligations" and "requirements"[51] for agricultural producers. At another, the legal force of the Codes is

45. "Advancing Animal Care and Addressing Market Expectations — Final Project Achievements Report — March 2014" (March 2014) at 6, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/pdfs/nfacc/NFACC_Final_Report_2014.pdf> [NFACC, "2014 Final Report"].
46. "Code of Conduct for NFACC Members, Partners, Directors and Support Personnel" (2018), online: National Farm Animal Care Council <www.nfacc.ca/membership#conduct>.
47. NFACC, "Membership", *supra* note 41.
48. NFACC, "Development Process", *supra* note 44.
49. *Ibid.*
50. *Ibid.*
51. *Ibid*.

recognized somewhat obliquely as "providing reference materials for regulations".[52]

As will be discussed in greater detail in the section outlining the shortcomings of the Code process below, the actual binding force of the Codes is unclear — perhaps deliberately so, but in some provinces, they unquestionably have a certain degree of legal status. Saskatchewan's animal protection legislation, for example, provides the following:

> (3) An animal is not considered to be in distress if it is handled:
>
> (a) in a manner consistent with a standard or *code of conduct*, criteria, practice or procedure that is prescribed as acceptable; or
>
> (b) in accordance with generally accepted practices of animal management.[53]

Most of the NFACC Codes have been prescribed as acceptable and, as such, they constitute legal standards of conduct in Saskatchewan.[54] Nonetheless, even in jurisdictions with enactments along these lines there remains some uncertainty about how the Codes operate. To be sure, as the provision indicates, anyone acting in compliance with Code requirements possesses a valid defence to a charge of causing distress to an animal, regardless of the animal's state. What is less certain is whether the Codes constitute a *comprehensive* guide to permissible conduct, as one might expect. The wording of the clause, which is fairly consistent with every province that uses this approach, suggests that one can escape liability *either* by complying with a Code or by acting in accordance with generally accepted practices of animal management.

As such, the Codes are not necessarily comprehensive, because the defences operate as alternatives. To put it another way, the prosecution in *Muhlbach* could have advanced the fact that an NFACC Code was not being complied with, but Muhlbach could legitimately respond that his action was nonetheless in accord with generally accepted practices in

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52. *Ibid.*
53. *Animal Protection Act 1999*, SS 1999, c A-21.1, s 2(3) [emphasis added] [*Animal Protection Act 1999*]. See similarly *Animal Care Act*, *supra* note 23 at s 2(2). Newfoundland and Labrador, Prince Edward Island and New Brunswick have taken this approach as well.
54. *Animal Protection Regulations, 2000*, Sask Reg 1/2000, s 3.

the community, securing an acquittal. Moreover, since compliance with a Code operates as a *defence* to charges of causing an animal distress in some manner, it is not clear that non-compliance means anything at all in terms of constituting an offence of any kind, so long as distress is not caused by the particular conduct at issue. In short, the Codes have some form of legal authority, but they are not — as the NFACC takes great pains to reiterate — regulatory standards that *must* be met by those in care of agricultural animals.

Whatever their legal status, it seems clear that creation and revision of the Codes is intended to be a long-term, continuing process with the NFACC acting as a permanent oversight body.[55] The NFACC guidelines insist that Codes will be reviewed every five years.[56] This timetable requires resources, as the Code process is a significant endeavour. The Code for

55. In the March 2018 report, "Market Relevant Codes and Communication Leadership — Project Achievements Final Report" (March 2018), online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/pdfs/NFACC_AR_2017-18.pdf>, NFACC Chairman Ryder Lee points out that "it's hard to imagine managing farm animal welfare without NFACC [as] the processes and approaches that NFACC has developed to address farm animal welfare are now cornerstones of Canada's animal welfare system and critical for maintaining public trust in how farmers care for their animals" at 2. Interestingly, NFACC's continued role is dependent on federal government funding, which does not appear to be fully guaranteed. Funding has tended to be provided through the AgriMarketing Program under Growing Forward 2, a federal-provincial-territorial initiative. See National Farm Animal Care Council, News Release, "New Code of Practice for the Care and Handling of Veal Cattle" (27 November 2017), online: *National Farm Animal Care Council* <www.nfacc.ca/news-releases?articleid=299>.

56. NFACC, "Development Process", *supra* note 44. The review process is not as robust as drafting a new Code. Effectively, it involves a technical committee providing a report to the entire membership of NFACC, mainly about the continued relevance of the Code. Ultimately, the NFACC must then decide whether to reaffirm the Code, initiate amendments, or engage in a full review.

Beef Cattle[57] took two and a half years to create, while the Pig Code[58] took three and a half. There were 18 Committee members meeting on the Pig Code over that time period, and they came from different regions of the country. This must have been costly.

Still, in terms of timeframes, the NFACC must be commended for the progress it has made with the Codes thus far. After a trial run with dairy cattle that resulted in a 2009 Code,[59] the process of full-scale revision began in 2010. Since then, the NFACC has managed to complete and issue eleven new Codes covering: Beef Cattle (2013),[60] Equines (2013),[61] Farmed Foxes (2013),[62] Mink (2013),[63] Sheep (2013),[64] Pigs (2014),[65]

57. *Code of Practice for the Care and Handling of Beef Cattle*, Calgary: NFACC, 2013, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/pdfs/codes/beef_code_of_practice.pdf> [NFACC, *Beef Cattle Code*].
58. *Code of Practice for the Care and Handling of Pigs*, Ottawa: NFACC, 2014, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/pdfs/codes/pig_code_of_practice.pdf> [NFACC, *Pig Code*].
59. *Code of Practice for the Care and Handling of Dairy Cattle*, Ottawa: NFACC, 2009, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/pdfs/codes/dairy_code_of_practice.pdf>.
60. NFACC, *Beef Cattle Code*, *supra* note 57.
61. *Code of Practice for the Care and Handling of Equines*, Ottawa: NFACC, 2013, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/pdfs/codes/equine_code_of_practice.pdf>.
62. *Code of Practice for the Care and Handling of Farmed Fox*, Moncton: NFACC, 2013, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/pdfs/codes/Farmed_Fox_Code.pdf>.
63. *Code of Practice for the Care and Handling of Farmed Mink*, Rexdale: NFACC, 2013, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/pdfs/codes/mink_code_of_practice.pdf> [NFACC, *Farmed Mink Code*].
64. *Code of Practice for the Care and Handling of Sheep*, Guelph: NFACC, 2013, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/pdfs/codes/sheep_code_of_practice.pdf>.
65. NFACC, *Pig Code*, *supra* note 58.

Handling of Poultry (2016),[66] Veal Cattle (2017),[67] Bison (2017),[68] Layer Hens (2017),[69] and Rabbits (2018).[70] In addition, the NFACC has adopted — presumably with plans to revise — three 'voluntary' Codes issued by the Canadian Agricultural Research Council, a predecessor agency, between 1996 and 2003.[71]

In terms of setting the standards themselves, the NFACC has enacted a number of guiding principles that, while not binding the group to any particular result, establish a few basic parameters. First, any Code instituted "should meet or exceed OIE standards",[72] though this is not a mandatory requirement. Second, the Codes should be based on the "best

66. *Code of Practice for the Care and Handling of Hatching Eggs, Breeders, Chickens, and Turkeys*, Ottawa: NFACC, 2016, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/pdfs/codes/poultry_code_EN.pdf>.
67. *Code of Practice for the Care and Handling of Veal Cattle*, Guelph: NFACC, 2017, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/pdfs/codes/veal_cattle_code_of_practice.pdf>.
68. *Code of Practice for the Care and Handling of Bison*, Regina: NFACC, 2017, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/pdfs/codes/bison_code_of_practice.pdf>.
69. NFACC, *Laying Hen Code*, *supra* note 30.
70. *Code of Practice for the Care and Handling of Rabbits*, Longueuil: NFACC, 2018, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/pdfs/codes/rabbit_code_of_practice.pdf>.
71. These address Deer (1996), Canadian Agri-Food Research Council, *Recommended Code of Practice for the Care and Handling of Farmed Deer*, Ottawa: NFACC, 1996, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/pdfs/codes/deer_code_of_practice.pdf> [NFACC, *Deer Code*]; Transport (2001), Canadian Agri-Food Research Council, *Recommended Code of Practice for the Care and Handling of Farm Animals: Transportation*, Ottawa: NFACC, 2001, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/pdfs/codes/transport_code_of_practice.pdf> (plans to update this beginning in 2018); and Goats (2003), Canadian Agri-Food Research Council, *Recommended Code of Practice for the Care and Handling of Farmed Deer*, Ottawa: NFACC, 2003, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/pdfs/codes/deer_code_of_practice.pdf> (plans to update this beginning in 2018).
72. NFACC, "Development Process", *supra* note 44.

available science and other acceptable knowledge sources",[73] the latter of which includes "anecdotal evidence and industry experience".[74] Still, the Codes require that sources for decisions be referred to whenever possible to provide a rationale for any standards imposed.[75]

Though science and international standards play a role, there is little question that another value of prominence in the Code process is taking things slowly, as a preference for gradual change — as opposed to any sort of radical one — is mentioned repeatedly. Codes should strive for "continuous improvement", with recommendations that are "defensible" and "changed as new and improved information is brought forward".[76] Not surprisingly, given the strong industry focus, there is also the mandate that "requirements should be defensible, practical, manageable and consider economic implications".[77]

The Codes themselves are extremely detailed, with sections governing a variety of matters ranging from feed to housing to health. For lawyers, perhaps the most important sections are those that are likely to have legal force. These are what are defined as 'Requirements', which outline "acceptable and unacceptable practices".[78] Given the somewhat uncertain legal status of the Codes, it is not surprising that the impact of a failure to comply with a requirement is not made clear by the NFACC, but it does note that a farmer who contravenes the Codes "may be compelled by industry associations to undertake corrective measures or risk a loss of market options".[79] In a rare mention of sanctions, the NFACC Development Guide also notes that transgressions "may be enforceable under federal and provincial legislation".[80] Every Code also includes a variety of Recommended Practices, but notes that these are

73. *Ibid.*
74. *Ibid.*
75. *Ibid.*
76. *Ibid.*
77. *Ibid.*
78. "Codes of Practice for the Care and Handling of Animals" (2018), online: *National Farm Animal Care Council* <www.nfacc.ca/codes-of-practice> [NFACC, "Codes of Practice"].
79. *Ibid.*
80. *Ibid.*

not obligations. Moreover, the NFACC makes clear that "a failure to implement them does not mean that acceptable standards are not being met".[81]

C. Process

The process of initiating or reviewing a new Code is fairly well-established. Once interest from the relevant commodity or industry group has been received, the NFACC will begin striking a Code Development Committee (the "Committee").[82] Where this occurs, the public will be notified that a new or revised Code process is underway via the NFACC website, at least 30 days before the first meeting of the Committee takes place.

The Committee's first task is to establish an evidentiary record, specifically by canvassing the relevant science. The NFACC requires that the Committee assemble a separate Scientific Committee of relevant experts, with the objective of obtaining a fairly broad band of opinion. The Scientific Committee, once assembled, is asked to present three to six topics of interest it considers "to be particularly important for animal welfare in the species being considered".[83] The relevant commodity group will then make a similar list, and the two groups will come together and "collectively identify a final list of priority welfare issues for the species".[84]

The Scientific Committee then provides a detailed review of the scientific literature on the issues selected, and compiles a report for the

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81. NFACC, "Development Process", *supra* note 44.
82. Review or initiation of the Codes is left entirely to the relevant industry, and its desire to have a Code developed. The NFACC, "Development Process", *supra* note 44, suggests that "Codes are not developed without the industry group stepping forward first". Though it is not a concern discussed below, it is strange that a body performing a government function of setting standards is so willing to defer to individual industry groups in this way. Some Codes are already well out of date. The NFACC, *Deer Code*, *supra* note 71, for example, was created in 1996 under the old Agri-Food Research Council, a government agency that no longer has responsibility for such matters. There do not appear to be any plans by the deer ranching community to press for change at the moment.
83. NFACC, "Development Process", *supra* note 44.
84. *Ibid*.

Committee. Using this as a reference tool, the Committee will then begin drafting the Code. All of the Committee's meetings are held *in camera*. Once a Code is completed, it is sent to the NFACC Executive, which has a limited oversight role. According to the NFACC Guidelines, "if the process was appropriately followed, NFACC will support the Code".[85]

At this point, the Code moves to a public consultation process. The rules surrounding public consultation are somewhat loose, but the draft Code must be made available to the public in some fashion for at least 60 days. At the conclusion of this period, the Committee considers the feedback received and makes adjustments to the Code, if required. Some time after this process concludes, a final Code is issued.[86]

IV. Strengths of the Code Process

A. The End of the Legislative Vacuum: The Start of Discourse

Whatever else they may have accomplished, or failed to accomplish, the initiation of the Code process ended Canada's dormant period of law-making in the area of farmed animal welfare. Advocates can debate the utility of these Codes at length and the extent to which they have made a meaningful change for farmed animals — as I will, below — but one thing is clear: having no governing standards in place is worse, for at least three reasons.

To begin with, in the absence of a strong government interest to develop clear legal standards for the treatment of animals, the primary alternative to Codes lies in hoping that beneficial standards will be developed through the common law, by considering whether conduct harmful to animals is 'generally accepted', 'reasonable', or 'necessary'. Unfortunately, Canada's experience with leaving open-ended standards to be advanced by prosecutors and interpreted by the judiciary has

85. *Ibid*.

86. "Your Guide to the Public Comment Period" (28 August 2018), online: *National Farm Animal Care Council* <www.nfacc.ca/public-comment-period> [NFACC, "Public Comment Period"].

been fairly dismal. Where animal protection is concerned, Canadian prosecutors have demonstrated little appetite for taking controversial or 'close to the line' cases forward.

This is not entirely surprising. After all, on the rare occasions when Canadian judges have been given the chance to consider whether a standardized farming practice meets the grade, they have shown a consistent tendency to decide the question in favour of the defendant.[87] The need to prove beyond a reasonable doubt that a particular distress-causing practice was not generally accepted in the community, which rests upon the prosecution, seems a bridge too far to cross in most cases. Without clear standards one can point to as a means of showing that, in fact, the particular practice does not meet with industry approval, it is very difficult to secure a conviction.

Second, if the objective is to generate change over the long-term, a flawed reform process is likely better than no reform process at all. In an earlier work,[88] I suggested that Canada suffered from a 'discourse deficit' arising out of the country's failure to engage in a national discussion about animal welfare. In comparison, I applauded the New Zealand Code process for reform, notwithstanding its significant flaws, mainly because I believed it encouraged meaningful public dialogue to be raised about animal protection, suggesting that in Canada, by contrast:

> [n]o issue seems capable of generating enough traction to provoke a sustained discussion of legal standards. Moreover, questions involving agricultural animals - are virtually never raised. In my view, this lack of discourse stems, at least in part, from the current state of Canadian animal protection law.[89]

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87. See *e.g. Muhlbach*, *supra* note 33; *Doyon v Canada (AG)*, 2009 FCA 152 (transportation of pig with severe leg fractures not unreasonable; relying upon evidence of producer with 29 years experience); *R v Chilliwack Sales Ltd*, 2013 BCSC 1059 (transportation of three cows with severe injuries not unreasonable; owner was "well qualified to decide whether a cow is fit for an expected journey without experiencing undue suffering" para 46).
88. Peter Sankoff, "The Animal Rights Debate and the Expansion of Public Discourse: Is it Possible for the Law Protecting Animals to Simultaneously Fail and Succeed?" (2012) 18:2 Animal Law 281[Sankoff, "The Animal Rights Debate"]. This paper was published shortly before the NFACC released its first revamped Codes for public consultation in late 2012.
89. *Ibid* at 297.

For reasons I will explore below relating to the Code process, the discourse on these issues remains less effective than it could be, but it has undoubtedly improved since 2012. The Pig Code,[90] first initiated in 2010, was released for public consultation in 2013. It generated over 4,700 submissions, representing 32,340 individual comments.[91] Newspapers covered several parts of the Code process, weighing in with editorials[92] — mostly about sow stalls — and Canadian actor Ryan Gosling even contributed to the debate through an opinion piece in the *Globe and Mail*.[93] This was unquestionably one of the most significant national discussions about a single agricultural animal welfare reform in the country's history.

Debates of this sort are important, particularly because they help to initiate a national dialogue on farm animal practices that is critically necessary if the suffering endured by these animals is ever going to change in any sort of meaningful way. As I suggested in a 2012 article on the importance of public discourse as a means of setting the groundwork for legal change,[94] regulatory mechanisms cannot be evaluated exclusively by the outcomes they produce. Instead, as Jürgen Habermas and others have suggested, legal mechanisms that allow for 'deliberative democracy' to take place help to ensure greater social legitimacy for any laws that are

90. NFACC, *Pig Code*, *supra* note 58.

91. National Farm Animal Care Council, News Release, "Overwhelming Number of Responses Received to Draft Pig Code of Practice" (23 August 2013), online: *National Farm Animal Care Council* <www.nfacc.ca/news-releases?articleid=205>.

92. See *e.g.* Laura Rance "Turning Point for Pig Producers: Must Adapt to New Code of Care" (10 August 2013), online: *Winnipeg Free Press* <www.winnipegfreepress.com/business/turning-point-for-pig-producers-219088481.html>.

93. Ryan Gosling "A Tiny Cage is Not a Life" (11 July 2013), online: *The Globe and Mail* <www.theglobeandmail.com/globe-debate/a-tiny-cage-is-not-a-life/article13117337/>.

94. Sankoff, "The Animal Rights Debate", *supra* note 88.

ultimately enacted.[95] As Alice Woolley put it, "laws can be understood as reflective of [a democratic will] when those laws arise from a democratic process of public reasoning—that is, from deliberation". [96]

Though it does not apply anything close to the purest form of deliberative democracy, the NFACC Code process nonetheless encourages a certain amount of public participation on farm animal issues, and the ongoing review of Codes permits for consistent scrutiny and discussion about how Canada's farm animals are being treated. This is valuable in and of itself, for as Alice Woolley suggests:

> [T]heoretical models of deliberative democracy assert the necessity for, and the importance of, determining the public will through a discussion in which participants identify a consensus view on legitimate reasons and on the state action that follows from those reasons. …[D]eliberation may be a source of democratic legitimacy…But it is also, and perhaps primarily, the proper democratic process because it will, if designed to encourage critical thinking, reduce social pressure and enhance information sharing, and thus lead to better decisions[.][97]

As this excerpt suggests, public discourse is an essential aspect of encouraging positive democratic change in the law, and equally important in letting the law develop in a way that reflects a deeper societal consensus. In contrast to a static law that provides little more than that animals should not be harmed 'unnecessarily', which creates little dialogue, the refinement of Code standards over time allows for an ongoing discourse to evolve and be accepted as part of a wider social ethic through public discussion and debate. If Canada is ever going to take steps to make meaningful advances in farmed animal welfare, this discourse is essential, and the more that our 'law-making' process encourages debate of this kind, the better.

Finally, the consistent review of NFACC Codes has the added

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95. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Boston: MIT Press, 1998) at 296–7 (describing the importance behind the discourse theory of ideal procedure for deliberation and decision making).
96. Alice Woolley, "Legitimating Public Policy" (2008) 58:2 University of Toronto Law Journal 153 at 166.
97. *Ibid* at 167, 169.

advantage of keeping animal protection for farm animals on the public agenda in perpetuity, and the opportunity to challenge a given practice or to end a particular type of suffering is never limited to one special occasion when legislators show a willingness to engage. In effect, the creation of a permanent system of review means that the ability to defer these issues to another day — a strategy common in many jurisdictions, and the Canadian approach to this matter for decades — has been abandoned in favor of a mandatory and consistent reform process.

B. Industry "Buy-in" to Certain Systemic Changes

In the 'concerns' section below, I will discuss certain problematic aspects of a process that is driven and controlled by industry. Nonetheless, the NFACC is clearly right about at least one aspect of an industry-led process like this one: "any decisions made have the weight and support of its membership as a whole".[98] By striving so strongly for a consensus-driven model that brings together every producer and player with a stake in the industry, it will be difficult — if not impossible — for dissenters to persist with unfavourable practices once a Code rebukes them.

This is not always the case where Codes are 'imposed' from above, no matter how much consultation with affected industries is undertaken. The notion of including industry in the regulatory development process is part of a strategy of 'responsive regulation' with the objective of investing industry with the incentive to comply. It was devised "in a bid to transcend the inflexible approach of adopting either 'deterrence' or 'compliance' as a stand-alone strategy [and] establish a synergy between punishment and persuasion".[99] Unquestionably, consensus driven Codes like the NFACC model are likely to be less ambitious and err on the

98. Gina Teel & Tracy Sakatch, "CCA in Action — Animal Care" *Canadian Cattleman's Association Action News* 5:4 (4 July 2011), online: *CCA Action News* <www.cattle.ca/action-news/07-04-11.html>.

99. Jed Goodfellow, "Animal Welfare Law Enforcement: To Punish or Persuade" in Peter Sankoff, Steven White & Celeste Black, eds, *Animal Law in Australasia: Continuing the Dialogue*, 2d (Sydney: Federation Press, 2013) 183 at 195.

side of caution, but what they achieve stands to be attained,[100] as every member has a stake in the outcome. It is no surprise that release of each Code has come with support and usually applause from the stakeholders most strongly affected by it.[101]

C. Precision

A major strength of the Codes is that owing to a desire for the standards to be "clearly articulated to ensure easy understanding by all users",[102] the NFACC has chosen to make them as precise as possible, and by and large has eschewed 'outcome' based standards that allow for arguments about interpretation on the enforcement end. It is easier to determine, for example, whether "a farrowing crate…allow[s] the sow enough room to move forward and backward, and to lie down unhindered by a raised trough or rear gate",[103] than it is to decide whether the crate provides "adequate space".[104]

The clarity of the Codes has other advantages. For critics of the status quo, precision is preferable to ambiguity — especially when it comes time to attempt to convince the public of the need for further

100. Compliance will never be universal, of course, which is why proper oversight is so critical. See Maria Weisgarber & Kendra Mangione, "Egg Farm Decommissioned After Disturbing Video Prompts Investigation" (12 July 2018), online: *CTV Vancouver* <bc.ctvnews.ca/egg-farm-decommissioned-after-disturbing-video-prompts-investigation-1.4011480> (egg facilities not complying with Laying Hen Code of Practice, *supra* note 30).

101. See *e.g.* Canadian Pork Council, Press Release, "Updated Pig Code of Practice Announced" (6 March 2014), online (pdf): *Canadian Pork Council* <manitobapork.com/wp-content/uploads/2014/03/CPC-Code_Release_Final_March_6_2014.pdf> (the new Code is a source of tremendous pride).

102. NFACC, "Development Process" *supra* note 44 at Appendix A.

103. NFACC, *Pig Code*, *supra* note 58.

104. This aim has not always been achieved, however. See *e.g.* NFACC, *Farmed Mink Code*, *supra* note 63 ("sheds must be designed to allow *adequate* space, light, and access for stockpeople to observe" at 8 [emphasis added]). Mink must have access to sufficient quantities of nutritional feed which meet their physiological needs (at 20).

change. While advocates working with Canadian law are well aware of the shortcomings of the basic cruelty law, and the nuances of the term 'unnecessary suffering', it is not always easy to explain these concerns as part of a public campaign advocating the need for legislative reform. The problem is that the wording of the law *sounds* reasonable, and it is only through a detailed exploration of case law and failed prosecutions that one discovers its flaws, and even in this context, many propositions remain contentious. It is arguably much easier to explain why a farrowing crate that barely permits enough room for a pig to move forward and backward and space to lie down is a form of torture against animals, especially when the Code permits this to occur for up to six weeks straight without interruption. To put it another way, the Codes provide clear reform targets and allow potential shortcomings to be identified with ease.[105] Clarity is a rare and welcome commodity in animal welfare law.

D. Elimination of the Worst Practices

As noted above in the discussion on process, the NFACC does not aim to be revolutionary. Still, the Codes at least take some much needed first steps towards bringing Canada closer to guidelines established in Europe, Australia, and New Zealand, by phasing out some of the very worst of the industrial agricultural practices that currently flourish here, with some hope of making real improvement in other areas as well.

The Pig Code offers a good example. There is nothing truly revolutionary about it, comparatively speaking, but for Canada, the changes were a needed improvement from the status quo. For the first time, use of analgesics for the common practices of castration and tail docking is mandatory.[106] Furthermore, the Codes recognizes that pigs are intelligent creatures in need of "multiple forms of enrichment… through the enhancement of their physical and social environments".[107] Perhaps, most importantly, the use of sow stalls will be reduced, although

105. To see the advantages of this for the prospects of long-term reform, albeit in the context of New Zealand's more fulsome Code enactment process, see Sankoff, "The Animal Rights Debate" *supra* note 88 at 308–13.
106. NFACC, *Pig Code*, *supra* note 58 at 33.
107. *Ibid* at 18.

not eliminated. New housing facilities built since 2014 must use group housing, as opposed to crates, as a primary form of confinement, though sows can still be kept in crates at the producer's discretion for up to five weeks — a lengthy period.[108] From 2024, all piggeries will need to comply with these requirements.

It is a long way from a comprehensive removal of crate housing, but it is an improvement over what is currently in place, as today, most of Canada's sows stay in crates for virtually their entire lives. For this reason, the Code received modest approval, albeit with calls for 'more', from even some of the more vocal critics of the agricultural industry.[109]

V. Concerns with the Code Process

A. The Ambiguous Nature of the Codes

Though each of the other concerns discussed below warrants careful consideration, one currently towers above the rest in terms of impact and importance. Without question, a major disadvantage of setting up a 'private' legal process of this type — or advantage, depending upon your point of view[110] — is that notwithstanding all the time, effort, and money

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108. Furthermore, the Pig Code permits the use of farrowing crates for six weeks post-pregnancy. The five-week grace period is also troubling, for it will be incredibly difficult to monitor in practice in order to see whether producers are complying.

109. "More Humane Rules for Breeding Pigs are Welcome", Editorial (30 March 2014), online: *The Star* <www.thestar.com/opinion/editorials/2014/03/30/more_humane_rules_for_breeding_pigs_are_welcome_editorial.html> ("Sayara Thurston of Humane Society International Canada says, '…it's not an end point. It's a first step.'"); Sophie Gaillard, "A Glimmer of Hope for Canadian Pigs" (10 March 2014), online (blog): *Animal Legal Defense Fund* <aldf.org/article/blog-authors/a-glimmer-of-hope-for-canadian-pigs/>.

110. This is undoubtedly a cynical viewpoint, but I would argue that there is value to the farming industry to have Codes that 'may' or 'may not' be legal. This approach provides maximum utility to these industries. It permits the argument that standards are set, but does not actually bind individuals to the standards if they are breached.

that has been poured into Code development, no one can say with any certainty, for lack of a better phrase, 'how legal' the Codes actually are, and what function they perform in the justice system.

Of the many wonderful Code phrases utilized in the NFACC lexicon, the best undoubtedly relate to enforcement. One can scour the Codes and the many publications scattered throughout the extensive NFACC website without running across the word 'prosecution' once. What you find instead are a number of vague references to what the Codes do, and how they "*may* be enforceable under federal and provincial regulation".[111] No one seems eager to specify the *legal* function that Codes provide, a fact exemplified well by a recent NFACC press release suggesting that:

> Codes support responsible animal care practices and keep everyone involved in farm animal care and handling on the same page. They are our *national understanding* of animal care requirements and recommended practices.[112]

As a practicing lawyer, it would undoubtedly be interesting to apply the term 'national understanding' in court while attempting to use a Code as a means of establishing that some form of animal cruelty or distress was inflicted. Other NFACC publications refer to the Codes as 'standards', 'guidelines' and 'requirements'.[113]

The ambiguous legal status of the Codes is complicated by Canada's federal framework. For better or worse, animal welfare matters are now prosecuted separately in every Canadian jurisdiction and are the responsibility of a host of different agencies, non-governmental

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111. NFACC, "Development Process", *supra* note 44 [emphasis added].
112. National Farm Animal Care Council, Press Release, "New Code of Practice for the Care and Handling of Sheep released" (18 December 2013), online: *National Farm Animal Care Council* <www.nfacc.ca/news-releases?articleid=216> [emphasis added].
113. "Implementing Codes of Practice: Canada's Framework for Developing Animal Care Assessment Programs" (2013) at 3, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/resources/assessment/animal_care_assessment_framework.pdf> [NFACC, "Implementing Codes of Practice"].

organizations, prosecutorial offices, and police forces.[114] The laws governing in each jurisdiction have distinctions, and each province uses Codes (or does not use them) in different ways.

As discussed above, some jurisdictions have incorporated the Codes explicitly, usually by recognizing that compliance with a Code constitutes a defence to charges of putting an animal in distress or failing to comply with certain duties of care.[115] This legitimizes the Codes, but it does so in a very unusual way, and, I would submit, an ineffective one. After all, compliance with the Codes is not the *only* way of escaping liability for putting an animal in distress, as the wording of the clause establishes that liability for causing distress can be avoided *either* by complying with a Code *or* by acting in accordance with generally accepted practices of animal management.

Given the way the courts have treated the latter phrase thus far — leaving a 'residual' defence available for 'generally accepted practices' that are not approved by a Code — has the potential to undermine the utility of the Codes entirely. To be sure, the most logical definition of Saskatchewan's provision, which accepts compliance with a Code and adherence to generally accepted practices as alternative defences, would avoid this approach by requiring adherence to the Codes in any situation where a valid Code is in place, and restricting the 'generally accepted practices' defence to residual scenarios that are not covered by any Code.

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114. To learn more about Canada's prosecutorial and investigative framework, see Canadian Federation of Humane Societies, "Prosecuting Crimes Against Animals" (2015), online (pdf): <d3n8a8pro7vhmx.cloudfront.net/cfhs/pages/106/attachments/original/1456761579/manual.pdf>.

115. *Animal Protection Act 1999*, *supra* note 53, s 2(3) [emphasis added]. See similarly *Animal Care Act*, *supra* note 23, s 2(2). Newfoundland and Labrador, Prince Edward Island and New Brunswick have taken this approach as well.

This interpretation is hardly guaranteed, however.[116]

In the jurisdictions that do not refer to the Codes, things are even murkier. Canada's four most populated provinces — and largest users of farmed animals — all take the same approach to this issue. Rather than refer to the Codes directly, they simply exempt any distress that was caused "in accordance with reasonable and generally accepted practices of agricultural animal care, management or husbandry".[117] There seems to be some sort of unexpressed expectation that clauses of this type will take strong notice of the NFACC Codes, and it is certainly logical to assume this will be the case.[118] But whether the Code standards will end up being *exhaustive* of what constitutes appropriate conduct remains anyone's guess at this stage.

How can this sort of ambiguity be good for farmed animals? Though the NFACC states quite emphatically that Code "requirements represent a consensus position that these measures, at a minimum, are to be implemented by all persons responsible for farm care", and that they

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116. One thing working against this approach is the fact that most of these statutes were recently enacted, and achieving the result I propose would have been incredibly easy to do. Clause (b) should simply begin by stating: "in any situation where the handling was not addressed by a standard or code of conduct, criteria, practice or procedure that is prescribed as acceptable".

117. *OSPCA Act*, *supra* note 26. See similarly *Animal Protection Act*, RSA 2000, c A-41, s 2(1)(2); *Prevention of Cruelty to Animals Act,* RSBC 1996, c 372, s 24.02(c); *Animal Welfare and Safety Act*, *supra* note 32, s 7. There are slight variations. British Columbia has expressly adopted one Code — the Code for Dairy Cattle. See the *Dairy Cattle Regulation*, BC Reg 132/2015. Quebec's *Animal Welfare and Safety Act*, CSQ, c B-3.1, s 7 only refers to "generally recognized rule".

118. A few lower court decisions have tentatively suggested this to be the case. See *R v Kowalik*, 2010 SKPC 58; *R v Tomalin*, 2011 NBPC 29. In contrast, see *R v Van Dongen*, 2004 BCPC 479 (Codes are voluntary guidelines and impose no legal obligation on farmers in Canada to comply with the recommended practices); *R v Hurley*, 2017 ONCJ 263 (industry standards may be proven to be the appropriate standard of care, but they are never automatic).

are "fundamental obligations",[119] this sounds more like an aspirational statement than a firm rule, in light of the way the laws themselves are drafted. There may well be strong industry pressure for individual producers to comply, and individual agricultural organizations may be able to apply commercial sanctions to those who do not, but this is not the same as imposing a legal requirement for the purpose of protecting animals from harm or distress.[120]

Of course, this raises a larger policy question. Let's assume for the moment that the distinction between specific mention of the Codes in some provinces and the reference to 'generally accepted practices' is unimportant, and that the Codes have a similar legal status in all Canadian jurisdictions. Why are the Codes treated as providing farmers with defences instead of operating as regulated standards, with non-compliance operating as demonstrated evidence of a breach of a provincial law?[121] This is no trivial distinction. As it stands, an inspector who finds evidence of non-compliance with a relevant Code would not automatically have grounds to lay charges. He or she would still need to be able to prove that the animal was in some degree of 'distress'.

This might not appear to be a significant problem, for proving that distress occurred requires satisfaction of a lower threshold than establishing that 'unnecessary suffering' occurred. Still, it is not always easy to do or even possible, and once again, the courts have made it challenging in this area. The *Muhlbach* case discussed above is an excellent example of the

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119. NFACC, "Development Process", *supra* note 44 [emphasis added].
120. Commercial sanctions are useful, but they cannot substitute for legal oversight. Amongst other things, they allow the private industry to completely self-regulate, and ignore the public interest in ensuring that animals are properly cared for.
121. New Zealand comes close to this position, providing that "evidence that a relevant code of welfare was in existence at the time of the alleged offence and that a relevant minimum standard established by that code was not complied with is rebuttable evidence that the person charged with the offence failed to comply with, or contravened, the provision of this Act to which the offence relates", see *Animal Welfare Act 1999*, *supra* note 35, s 13(1A).

distinction.[122] In that case, one of the charges was based on the fact that two cows had no access to water during the period of the inspector's visit. The Court dismissed the charge, holding that distress required proof of dehydration, which had not been established on the facts. Were proof of non-compliance with a Code enough however, the accused would have been convicted upon proof that water was not available for the animals, as there would be no need to prove 'distress' in these circumstances.[123]

Given that these Codes are industry approved and endorsed, it is not clear why the agricultural community should not feel secure enough to stand behind them. If the Codes are truly the "national understanding of animal care requirements"[124] in Canada, they should operate as such. Breach of a Code should be enough to warrant conviction for a provincial regulatory offence, as is the case with non-compliance in other regulated areas, where punishment follows proof of the wrong, regardless of whether harm was caused.[125] By all means, sentencing for an offence of this type should take into account the absence of distress, but given the difficulties that exist in enforcing animal protection legislation, including

122. In contrast, see *R v Dondale*, 2017 SKPC 58 (failing to follow the code of practice, in conjunction with other evidence, established that the animals were in distress for the purposes of the *Act*).
123. NFACC, *Beef Cattle Code*, *supra* note 57 (Requirement 2.2 states that operators must "ensure that cattle have access to palatable water of adequate quality and quantity to fulfill their physiological needs" at 13).
124. NFACC, "Codes of Practice", *supra* note 78.
125. For those concerned that this is too harsh, keep in mind that Canada always permits access to a due diligence defence, which would allow a farmer to escape liability if he or she could show that they took reasonable precautions to avoid committing the offence: See Morris Manning & Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 5d (Markham: Lexis Nexis, 2015) at 278–83. My point here is that there is no need to add the additional element of proving distress where it can be established that a Code standard was not followed.

the difficulty of even getting access to farms in the first place,[126] it is undesirable to set up an oversight system that cannot impose sanctions for non-compliance unless additional elements of proof are first met.

B. The Players at the Table: Making Value Decisions

The ambiguity of its output is not the only concern about Canada's chosen model for 'regulating' farmed animal welfare. Another questionable aspect of the framework is how it grants the industries who are the subjects of these standards an incredible level of control over the process. The decision of governments, the traditional representative of the public interest, to mostly opt-out of the process is troubling.[127] The NFACC Code process is a long way from the 'co-regulated' model favoured in jurisdictions like Australia and New Zealand, in which "government and

126. National Farmed Animal Health and Welfare Council, "A National Farm Animal Welfare System for Canada" (2012) at 30, online (pdf): *National Farm Animal Care Council* <www.ahwcouncil.ca/pdfs/animal-welfare-statement/NFAHWC%20animal%20welfare%20vision_cover%20page_2012.pdf>; Terry Whiting, "Policing Farm Animal Welfare in Federated Nations: The Problem of Dual Federalism in Canada and the USA" (2013) 3:4 Animals 1086, online: *National Center for Biotechnology Information* <www.ncbi.nlm.nih.gov/pmc/articles/PMC4494357/>.

127. It is not entirely clear why government has chosen to play such a limited role in governing this area, though it is quite possible that the concept of 'regulatory capture', provides the best explanation. See Jason MacLean, "Striking at the Root Problem of Canadian Environmental Law: Identifying and Escaping Regulatory Capture" (2016) 29:1 Journal of Environmental Law & Practice 111 (MacLean has examined a similar decision by governments to abdicate in the environmental sphere and goes so far as to conclude that "[s]ystemic corruption — regulatory capture [by industry] and its corollary, irresponsible government…blocks principled reforms and fuels unprincipled reforms in Canadian environmental law — it is at the root of every identifiable systemic weakness infecting Canadian environmental law today, both federally and provincially. We all know this, more or less. But we tend to ignore it. Or, to be fair, we tend to lament systemic corruption as a kind of analytical afterthought, something that is regrettable but seemingly insoluble" at 113–4. MacLean's conclusions about industry's impact on environmental law seem fully transposable to concerns about animal protection).

industry develo[p] cooperative arrangements where both play a formal role in regulatory processes to ensure compliance".[128] The absence of official oversight is no small matter. It stands to reason that no government representative — federal or provincial — is responsible for any aspect of the Code-making process. Questions in Parliament about choices made with respect to particular Codes can easily be deflected away, on the grounds that the value judgments being made were simply not of the government's doing.

Instead of government control, the NFACC is run by an executive committee, furthering the organization's objective of creating a "collaborative partnership of diverse stakeholders [to] facilitat[e] and coordinat[e] a consistent approach to farm animal welfare in Canada".[129] That said, the NFACC's view of relevant 'stakeholders' probably differs somewhat from that of the hard-core animal advocate. The goal is not a wide engagement with ordinary Canadians or people from across the animal welfare spectrum,[130] but rather, engagement with a diversity of stakeholders *within the industrial agricultural complex and the food supply chain*. This is not to say that welfare groups are excluded. Suffice it to say, however, that they constitute a small part of the overall NFACC organization.

Consider the NFACC executive, which has the following members:

- Chair — this has exclusively been a member of one of the larger agricultural industries. The current chair is from the Saskatchewan Cattleman's Association;
- Two members of National Commodity Associations (*e.g.* Chicken Farmers, Dairy Farmers, etc.);
- One member from a National Meat/Poultry Processor Association;
- One member of National Retail, Restaurant and Food Service

128. Goodfellow, *supra* note 99 at 192.

129. NFACC, "About NFACC", *supra* note 5.

130. The NFACC does not permit anyone to participate who takes the view that the use of animals in agriculture is morally wrong. Organizations that wish to be on NFACC Committees must agree as a precondition that the use of animals for this purpose is legitimate and acceptable.

Association;
- One member from a National Veterinary Association;
- One member of a National Animal Welfare Association;
- One member of a Provincial Farm Animal Care Council;[131]
- The federal government — ex officio (non-voting member); and
- A researcher — ex officio.

Depending upon how one views members of the veterinary profession,[132] that makes one voting member (or two) out of eight whose primary focus is animal protection. In a 2005 article, I considered the New Zealand Code-making process and expressed some skepticism about the assortment of voices around the Code table.[133] Let's just say that New Zealand's Code committee provided a rainbow of diversity in comparison to its Canadian counterpart.

The Executive Committee does not actually draft the Codes, but it runs the organization, establishes strategies for the future, and sets relevant policies to guide the drafting process. Moreover, NFACC procedures make clear that the same sort of 'balance' should be applied to committees tasked with writing the Codes themselves. Once again, the search for consensus that is so essential to the endeavour appears to involve a fairly limited inquiry amongst stakeholders from across the production chain, along with a few outsiders. Committees are ideally limited to fifteen, and the NFACC recommends the following balance:
- At least four producers from the affected industry;
- Transporter with expertise in the affected industry;
- Veterinarian;
- National animal welfare associations;

131. To be clear, this is not a body whose primary concern is animal welfare. It refers to the representative of a provincial farm animal association that promotes trade in these products. See *e.g.* Farm & Food Care Ontario (2018), online: *Farm & Food Care* <www.farmfoodcare.org/>, an association whose objective includes promoting the consumption of animal products.
132. The veterinary bodies selected tend to have very close ties to industry, as discussed below.
133. Sankoff, "Five Years", *supra* note 36 at 20–21.

- Processors;
- Retail and food service organization;
- Provincial animal protection enforcement authority; and
- Researcher/academic.[134]

It is arguably a broader variety of viewpoints than one is likely to obtain on the NFACC Executive, but again, the structure seems designed to keep industry very firmly in control, with a strong majority position at all times. The 2013 Pig Code Committee offers an instructive example. There were eighteen members on the Committee.[135] Ten had direct economic interests in the use of pigs, being members of the Canadian Pork Council, a provincial board of a similar type, transport groups, or processors. The other eight included four members of government, including two enforcement officers, one agricultural engineer, a scientist, a veterinarian, and one member of the Canadian Federation of Humane Societies.

The 2017 Layer Hen Committee was similarly constructed. A committee of eighteen had five representatives from the Egg Farmers of Canada, three members of the Canadian Poultry and Egg Processors Council, one from Maple Lodge Farms, one from Pullet Growers of Canada, and one from a chicken breeder. The lone veterinarian on the Committee worked exclusively with egg farmers, and was committed to "...cur[ing] the misinformation on egg farming".[136] In total, twelve of the eighteen members on the Committee were people whose livelihood was directly tied to the use of layer hens. Five members of the Committee came from government agencies, the Retail Council of Canada and the

134. See NFACC, "Development Process", *supra* note 44 (the problem of Committee representation is not unique to Canada, though it is arguably worse here given the lack of government oversight). See Arnja Dale & Steven White, "Codifying Animal Welfare Standards: Foundations for Better Animal Protection or Merely a Facade?" in Sankoff, White & Black, *supra* note 99 at ch 7, 163–65.

135. One member of the Canadian Pork Council did not have voting rights, however.

136. See Mike the Chicken Vet, "About" (2018), online (blog): *Wordpress* <mikethechickenvet.wordpress.com/about/>.

scientific community.[137] The final representative was appointed by the Canadian Federation of Humane Societies.

This unbalanced membership is a matter of real concern. To begin with, the composition of NFACC Committees is bound to have an impact on the overall legitimacy of any output produced. After all:

> [W]hen people perceive a governance process as fair they are more likely to obey the law and support government policies (Tyler 2006)—even when the outcomes are not in their interest (Miles 2014). Conversely, when people perceive a governance process as clearly unfair, prior attitudes are more likely to determine whether they support or oppose a decision (Doherty & Wolak 2012).[138]

Not surprisingly, a key aspect in determining whether a particular process was 'fair' involves the extent to which the collaborative decision-making that took place allowed for a sufficient degree of representation by affected stakeholders, and an equal chance for those involved to participate. As Chrislip and Larson have suggested, "the first condition of successful collaboration is that it must be broadly inclusive of all stakeholders who are affected by or care about the issue".[139] Moreover, it must "provid[e] for equal and balanced opportunity for effective participation of all

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137. Tina Widowski, a Professor at the University of Guelph, was the chair of the Scientific Committee. She is a director of the Campbell Centre for the Study of Animal Welfare at the University of Guelph and holds the Egg Farmers of Canada Chair in Poultry Welfare Research.

138. Jim Sinner, Mark Newton & Ronlyn Duncan, "Representation and Legitimacy in Collaborative Freshwater Planning: Stakeholder Perspectives on a Canterbury Zone Committee" in Cawthron Institute, Report No 2787 (November 2015) at 2, online (pdf): *Cawthron Institute* <www.cawthron.org.nz/media_new/publications/pdf/2015_12/CawRpt_2787_Representation_and_collaborative_freshwater_planning_Canterbury.pdf>.

139. David D Chrislip & Carl E Larson, *Collaborative Leadership: How Citizens and Civic Leaders Can Make a Difference*, 1d (San Francisco: Jossey-Bass, 1994) at 24. It is worth noting that the NFACC refuses to engage with all affected stakeholders as a matter of policy. , see NFACC, "About NFACC", *supra* note 5, committee members must "accept the use of farmed animals in agriculture".

interested/affected stakeholders".[140] In the absence of these factors, it is difficult to be convinced that any decisions reached possess a real democratic legitimacy.[141]

But this is not simply about ensuring public legitimacy. The search for the 'correct' answer of what constitutes a viable standard of animal protection through consensus and compromise — the core of what the NFACC does through the Code-making process — is undoubtedly affected by the way in which the drafting committees are composed. After all, determining the appropriate level of animal protection that should be afforded to a specific farm animal is not something that allows for an indisputable answer. NFACC materials sometimes try to suggest otherwise, indicating that the search for 'balance' is really the product of "a credible, science based-approach",[142] that focuses on treating animals humanely by "suppor[ting] approaches that are scientifically informed".[143] But anyone involved in animal welfare knows that matters are not this simple. In attempting to draw lines with respect to particular practices or procedures, there is often a clash of interests, a point at which choices need to be made about whether the animals' needs outweigh the need to use or treat the animals in a particular way. Though many of the NFACC's materials try to gloss this over — preferring to highlight the fact that its Codes are created by "taking into account the best science available for each species, compiled through an independent peer-reviewed process, along with stakeholder input"[144] — if one looks hard enough, it is possible to find clear recognition of the value-balancing that is, ultimately, at the heart of the process. A press release highlighting

140. Nick Cradock-Henry, "Evaluating a Collaborative Process" in Landcare Research Manaaki Whenua Policy Brief No 2 (October 2013), online (pdf): *Landcare Research Manaaki Whenua* <pdfs.semanticscholar.org/e414/16ddd0af0c9e206e44ebb993736459bf69f6.pdf>.

141. See Sinner, Newton & Duncan, *supra* note 138 (a study that considered the public's view of a particular collaborative decision-making exercise, concluding that committee composition was a key factor in reducing public comfort with the decisions reached).

142. NFACC, "About NFACC" *supra* note 5.

143. *Ibid*.

144. NFACC, "Development Process", *supra* note 44.

results from the Scientific Committee tasked with examining the Poultry Code, which, not surprisingly, reached some troubling conclusions about the way many of Canada's chickens are kept, is revealing:

> The reports focus on research conclusions; they do not make recommendations because science tells us what "is" but does not tell us what "ought to be." Value-based decisions reside with the Code Development Committees, whose multi-stakeholder composition allows for broad discussions of what is possible, when it is possible and how it is possible.[145]

The statement is both transparent and accurate. It also shows why some observers are so apprehensive about the fact that these value-decisions are being made by a group overwhelmingly dominated by people with a distinct financial interest in the outcome. To be sure, industry should have a place at the table. Its concerns are important, and the goal of ensuring 'buy-in' is admirable. Nonetheless, NFACC Codes will continue to lack real legitimacy until the organization widens the scope of its inquiries and is willing to loosen the grip on the Code writing process.

C. Public Input: Democratic Legitimacy

Since the NFACC is effectively a private entity that has no law-making authority, it technically owes no obligation to the wider public. Nonetheless, the NFACC is very interested in obtaining public input upon its work, viewing its interaction with the public as a "vital component" of the Code drafting process.[146] The public is engaged twice, first when work on a new Code begins through an announcement process, which alerts the public that a Code is being revised or initiated.[147] Later, once a draft Code is completed, there is a formal public submission period of 60 days, when anyone is permitted to submit comments regarding any

145. National Farm Animal Care Council, *Press Release*, "Poultry Scientific Committee Reports Released" (4 June 2014). See also NFACC, "Development Process", *ibid*, which notes that its way of drafting Codes "promises to bring real progress on responsible farm animal care, while helping to ensure animal agriculture is viable in a climate of increasing market demands".

146. NFACC, "Public Comment Period", *supra* note 86.

147. *Ibid* (this includes a "multi-component communication effort to support awareness of the Public Comment Period and encourage participation").

aspect of the Code.[148]

It is somewhat difficult to assess the validity and effectiveness of the public comment process when the entire point of having this type of input is so nebulous. The NFACC's explanation is that feedback of this sort "plays a vital role in providing a check and balance to the Code development process and in determining the direction set in the final document".[149] The organization reiterates that comments it receives have a real impact on the process:

> [Do the public comments matter?] The answer is an emphatic "Yes".
>
> No-one knows this better than the individuals who have served as Code Secretaries on each of the Code Development Committees that have been formed to carry out the development of the updated Codes of Practice.
>
> It is the Code Secretaries who are charged with receiving all of the feedback from the Public Comment Period and organizing and providing this to the Committee members they facilitate. Here is a small sampling of their comments on this process:
>
> "All of the comments we received were handled very carefully to make sure they were considered as part of the process. In the case of a Code with lots of feedback, such as the Pig Code, this involved a lot of painstaking work to organize, including categorizing and sub-categorizing the comments so they could be accessed and reviewed by the committee as efficiently as possible. Our commitment was to make sure all of the comments were considered as part of the process and I can unequivocally say that is what happened." – Betsy Sharples, [P]ig Code Secretary.[150]

Comments of this sort are difficult to unpack. At a basic level, the primary point being made is indisputable, as there is little reason to doubt that NFACC Committee members review the public comments provided and treat them seriously. Certain comments may indeed have an impact, in terms of providing useful information or insight to the Committee. But it is difficult to believe that relying on the public to 'improve' the Codes is the main objective of having the public comment process ("PCP"). In

148. Though it is not a major point, the 60-day period seems too short given the dense and somewhat controversial nature of the material that the Committee will have spent as much as two years pouring over.

149. NFACC, "Public Comment Period", *supra* note 86.

150. *Ibid*.

fact, other statements from the NFACC suggest a different purpose: that a process of this sort helps provide a degree of public legitimacy to the Codes and the Code development process. In a 2017 review designed to analyze the effectiveness of the NFACC PCP, Jeffrey Spooner commented that "[t]he main purpose of the review was to address…questions…about the transparency, and hence, legitimacy of the PCP process as it relates to public input".[151] Spooner's conclusion was that "[the] evidence indicates a high degree of integrity of the people and the process responsible for the management and administration of public feedback",[152] and that "there is reason to conclude that NFACC's PCP has been consistently managed in a highly impartial, thorough, and democratic manner".[153]

This conclusion is unlikely to convince everyone. Leaving aside the study's intrinsic limitations,[154] there are reasons to be skeptical about the public comment process and the extent to which it confers democratic legitimacy on the Codes themselves. To begin with, there is no specific requirement that Committees use or even *address* the feedback that is provided. All that the studies show is that the commentary is to be 'considered'. The comments are not public, as they would be if made, for example, to a parliamentary committee, and the NFACC does not release the commentary to public scrutiny, discuss why particular requests were accepted or denied, or even provide a summary of the commentary's overall gist and tone. The NFACC is very fond of speaking about the importance of public commentary on its website and in press releases,

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151. Jeffrey Spooner, "National Farm Animal Care Council Public Comment Period Review Final Report" (December 2017) at 1, online (pdf): *National Farm Animal Care Council* <www.nfacc.ca/pdfs/NFACC%20-%20PCP%20-%20%20Final%20Report%202018%20EN(1).pdf>.
152. *Ibid* at 3.
153. *Ibid* at 4.
154. *Ibid* (Spooner's conclusions do not really analyze the structure of the process and compare it to any other forms of democratic engagement. Instead, the sources for his very short report were restricted to a review of NFACC material and interviews with Code Managers. Spooner was not exactly an independent expert either. He has a long history of working with NFACC, and actually acted as a Code Manager for the review of the Bison Code).

perhaps as a way of justifying the 'inclusive' nature of the process, but no mention of this feedback seems to find its way into the Codes themselves. This is not to suggest that the feedback is ignored, and Committees undoubtedly discuss it during the deliberative process, but in the absence of any directives regarding its use, it is almost impossible to guess whether it plays any significant role in the decision-making process, beyond providing a veneer of public legitimacy.

In a detailed study of the Australian Code drafting process, Bethany Hender, an LL.M. candidate at the University of Sydney, expressed numerous concerns about the public consultation process in place there, suggesting that it failed to provide sufficient opportunities for democratic engagement.[155] Her work identified ten key features for effective public consultation drawn from the relevant academic literature, and considered the extent to which the Australian process measured up. The work is far too detailed to perform a similar analysis here, but it is worth noting that many of the criticisms raised in Hender's work apply with equal or greater force to the NFACC public commentary process.

Amongst other things, Hender was concerned that the scope and potential impact of Australian public consultation was not adequately explained, noting that "the facilitators must be honest about how the public's input will be used, and how it may influence the resulting regulation, if at all".[156] The NFACC guide on public commentary is anything but clear on this point. Is it trying to obtain public opinion? Is it looking for matters that might have been missed? The expectations are unclear and explained in a very broad and vague manner.

Hender's research indicated that other factors were also essential to ensuring a democratically legitimate exercise. Amongst these was the fact that public consultations should be run by neutral and independent facilitators who have no vested interest in the final outcome, and should occur early in the process, noting that "if consultation occurs too late ...

155. Bethany Hender, *The Treatment of Farm Animals in Australia: Are Legal Standards Set in Accordance with Democratic Principles?* (Masters of Laws Thesis, University of Sydney, 2015).

156. *Ibid* at 109.

the outcomes are often too narrowly defined or predetermined".[157]

Again, it is simply not possible to conduct the same sort of fulsome analysis that Hender performed in Australia, though this sort of analysis should be undertaken eventually. Suffice it to say that the NFACC's internally run comment period, which occurs very late in the process, does not seem to satisfy the majority of the requirements Hender identified as being essential to a legitimate democratic process of public input. In her study, she concluded that the Australian process, which was partly run by government, and far more robust than the NFACC equivalent, nonetheless failed eight of the ten criteria for effective public consultation.[158]

D. The Legal Branding Exercise: Controlling the Conversation

If animal welfare reform is truly a matter of creating societal pressure and helping to develop a new ethical imperative,[159] then establishing a conversation about animal use is an important part of that process. The NFACC appears to be well aware of the importance of controlling this conversation. The pages of its well-crafted documents are replete with a desire to "get the message of good welfare across", to make use of "opportunities", and to help "engag[e] with people outside of agriculture and [tell] our story".[160]

Ultimately, though the NFACC is not a government body, it takes great pains to look and sound 'official', like a body that is akin to, or operates with the approval of, government, which, in a sense, it does. Its publications are government financed and designed to allow the affected agricultural industries to put their message forward in a very positive way. Every aspect of the process talks with positivity about 'collaboration', 'engagement', and 'progress'. In contrast, words like 'non-compliance',

157. *Ibid* at 152.
158. *Ibid* at 175.
159. Jerry Anderson, "Protection for the Powerless: Political Economy History Lessons for the Animal Welfare Movement" (2011) 4:1 Stanford Journal of Animal Law & Policy 1 at 1.
160. NFACC, "2014 Final Report", *supra* note 45 at 3.

'prosecution', and 'lawmaking' are stridently avoided.[161] Everything is about gradual development, meeting consumer expectations, and making animal lives better.

On a certain level, it is hard not to think that the NFACC endeavour is as much about who gets to tell the story as it is about the story that is being told. To be clear, this is not to say there are not some good things happening here, or that animal welfare is not a priority; but, it does mean that sifting through the animal welfare narrative has in many ways become a more difficult endeavour than before. The industry has learned that engaging and narrating the claims of animal welfare is easier and more effective than rejecting these claims altogether, or fighting them tooth and nail.

VI. Conclusion

The Canadian experience with industry leading the way in defining the country's animal welfare standards is now well into its second decade, and there is nothing on the horizon to suggest that a replacement model is in the cards. As noted above, there are merits to the NFACC Code process. Engagement with industry brings certain advantages that cannot be achieved through a process of imposing standards from above, even if that were somehow regarded as a politically viable option. Nonetheless, the Canadian model has plenty of warning signs as well. For engagement to be effective for animals in any real way it must come with some degree of oversight and control. Experience in Canada and abroad has shown

161. To keep this paper to a manageable size, I have avoided providing a detailed analysis of NFACC's next endeavour: setting up a universal assessment framework that will minimize the traditional role of investigation and enforcement by government authorities. To ensure compliance with Codes, NFACC proposes a wide-scale 'verification framework', with internal assessment designed to proactively address animal welfare concerns and "provide assurances to buyers and consumers that animal care standards are being met". See NFACC, "Implementing Codes of Practice", *supra* note 113. This is a matter of some concern. Studies of similar self-regulating models in other jurisdictions have raised alarm, especially in the absence of government oversight, as is the case here. See Goodfellow, *supra* note 99; MacLean, *supra* note 127.

that simply trusting industry to 'do the right thing' is not an effective strategy where animals are concerned,[162] and raises problems from the regulatory process right through to enforcement. Hopefully, over time, the Canadian code making process will be regarded not as an end, but as a mechanism that also needs to evolve, in order to ensure that its core function — protecting the needs of the most vulnerable creatures in society — has a real chance of being fulfilled.

162. For an American example, see David J Wolfson & Mariann Sullivan, "Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable" in Cass R Sunstein & Martha Nussbaum, eds, *Animal Rights: Current Debates and New Directions* (New York: Oxford University Press, 2004) 191 at 205.

The Whale, Inside: Ending Cetacean Captivity in Canada*

Katie Sykes**

Canada has just passed a law making it illegal to keep cetaceans (whales and dolphins) in captivity for display and entertainment: the Ending the Captivity of Whales and Dolphins Act *(Bill S-203). Only two facilities in the country still possess captive cetaceans: Marineland in Niagara Falls, Ontario; and the Vancouver Aquarium in Vancouver, British Columbia. The Vancouver Aquarium has announced that it will voluntarily end its cetacean program. This article summarizes the provisions of Bill S-203 and recounts its eventful journey through the legislative process. It gives an overview of the history of cetacean captivity in Canada, and of relevant existing Canadian law that regulates the capture and keeping of cetaceans. The article argues that social norms, and the law, have changed fundamentally on this issue because of several factors: a growing body of scientific research that has enhanced our understanding of cetaceans' complex intelligence and social behaviour and the negative effects of captivity on their welfare; media investigations by both professional and citizen journalists; and advocacy on behalf of the animals, including in the legislative arena and in the courts.*

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"The whale's belly is simply a womb big enough for an adult. There you are, in the dark, cushioned space that exactly fits you, with yards of blubber between yourself and reality, able to keep up an attitude of the completest indifference, no matter *what* happens".

— George Orwell, *Inside the Whale*

I. Introduction: Inside the Whale

Canada has just passed landmark legislation that will phase out cetacean captivity except for limited purposes related to the protection of the animals themselves, not to their exploitation for human ends: Bill

S-203, the *Ending the Captivity of Whales and Dolphins Act*.[1] This is the beginning of the end for those who keep cetaceans[2] in captivity for display and entertainment. Leading animal law scholar and Nonhuman Rights Project President Steven Wise, speaking of the fight for legal recognition of animal personhood, paraphrases Winston Churchill's wartime speech to say that this is not the end, and it is not the beginning of the end, but it is the end of the beginning.[3] When it comes to cetacean captivity in Canada, however, we are already past the end of the beginning, and the end is actually in sight.

Keeping cetaceans in tanks for display has become an outdated practice that is out of keeping with this country's values. Canadians now

1. Bill S-203, *An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)*, 1st Sess, 42d Parl, 2018 [Bill S-203]. The Bill passed Third Reading in the House of Commons on June 10, 2019, and will now become law. The final formal step that will make the bill part of the law of Canada is Royal Assent, granted to legislation that has passed both Houses of Parliament in identical form.
2. The term 'cetaceans' is colloquially used to refer to marine mammals classified as members of Order Cetacea, which consists of 88 species of whale, dolphin and porpoise. See Cameron S G Jefferies, *Marine Mammal Conservation and the Law of the Sea* (Oxford: Oxford University Press, 2016) at 11. The cetaceans currently in captivity in Canada are mainly whales (orcas and belugas) and dolphins.
3. "Now this is not the end. It is not even the beginning of the end. but [sic] it is, perhaps, the end of the beginning". Winston Churchill, "The End of the Beginning" (10 November 1942) online: *The Churchill Society* <www.churchill-society-london.org.uk/EndoBegn.html>. This speech was delivered at the Lord Mayor's Luncheon following the victory at the Second Battle of El Alamein. For Steven Wise's use of the quotation, see his 2015 TED talk on the Nonhuman Rights Project's strategic litigation campaign for the recognition of legal personhood of certain nonhuman animals: Steven Wise, "Chimps Have Feelings and Thoughts. They Should Also Have Rights" (March 2015) at 14:05, online (video): *TED* <www.ted.com/talks/steven_wise_chimps_have_feelings_and_thoughts_they_should_also_have_rights/discussion#t-832610>.

oppose keeping cetaceans in captivity by a two-to-one margin.[4] Now, we have national law that reflects that widespread public condemnation of the practice. Vaughan Black has rightly observed that the animal welfare movement has not often seen the kind of legal-reform milestones that have been won by other social liberation movements.[5] But there are rare exceptions where real progress for animals is achieved. The end of cetacean captivity in Canada is one of them.

In George Orwell's essay "Inside the Whale", the image of a Jonah figure cocooned inside a whale's stomach is a metaphor for what Orwell saw as the moral and political quietism of his contemporaries.[6] Being inside the whale, Orwell argues, means being without responsibility for participation in (or even awareness of) what happens outside; it means "remaining passive, *accepting*".[7] Orwell was more concerned with

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4. See Angus Reid Institute, "Canadians See Value in Zoos, Aquariums, but Voice Support for Banning Whales and Dolphins in Captivity" (22 May 2018), online: *Angus Reid* <angusreid.org/cetacean-ban-marineland-vancouver-aquarium/> [Angus Reid Poll] (an Angus Reid poll in May 2018 found that 47% of respondents agreed with the statement "keeping cetaceans in captivity should be banned", 21% agreed with the statement "keeping cetaceans in captivity should be allowed", and 32% were not sure or did not express an opinion). By contrast, a 1992 Decima Research poll of Canadian public opinion on marine parks and whale captivity found 72% support for keeping beluga whales in captivity for education, 78% support for keeping beluga whales in captivity for research, and 61% support for keeping beluga whales in captivity for public viewing (but only 39% for keeping orcas in captivity for public viewing): Jon Lien, "A Review of Live-capture and Captivity of Marine Mammals in Canada" (Ottawa: Department of Fisheries and Oceans, 1999) at 21–22.
5. Vaughan Black, "Traffic Tickets on the Last Ride" in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) 57 at 57–58.
6. George Orwell, "Inside the Whale" in George Orwell, *Inside the Whale and other Essays* (Harmondsworth, Middlesex: Penguin, 1974) 9 [*Inside the Whale and Other Essays*]. "Inside the Whale" was originally published in 1940.
7. *Ibid* at 43 [emphasis in original].

humanity than with animals,[8] but his metaphor carries over aptly to social attitudes about animals. When it comes to the exploitation and suffering of animals, most of us, almost all of the time, are inside the whale: comfortable, passive, accepting, or simply (and complacently) unaware. But sometimes specific animal-use practices come into our consciousness in a much starker way than usual, and start to seem untenable. When that happens, significant changes in both social norms and law can result.

This article examines the phenomenon of cetacean captivity and relevant Canadian law (existing and proposed), as well as our evolving beliefs and understandings about how we should treat cetaceans. Our encounters with, and increasing knowledge of, cetaceans have moved us to start thinking — to invert Orwell's metaphor — *outside* the whale, to leave behind the complacency and acceptance that the metaphor describes, to question the justifications put forward for cetacean captivity, and even to begin facing the profound challenges of sustainable long-term cetacean conservation.

Captive cetaceans in Canada today include beluga whales and dolphins, but the central characters in the story are orcas (or killer whales): above all, the Southern resident population that lives in the Salish Sea off the coast of British Columbia and Washington State. The first orca kept in captivity, Moby Doll, was caught from this population, more or less by accident, by the Vancouver Aquarium in 1964.[9] Since then, our conception of orcas has changed profoundly — from savage, dangerous killer, to trainable and friendly entertainer, to symbol of a threatened natural world and a creature with intelligence and emotions — perhaps even rights — comparable to those of humans.

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8. John Griffin & George Orwell, *Animal Farm* (Harlow: Longman, 1989) may be the greatest animal-based allegory for human politics in English literature. In addition, Orwell's 1936 essay "Shooting an Elephant," describing a purportedly autobiographical episode from Orwell's time as a colonial official in Burma, exhibits compassion and respect for the dignity of the elephant, and equates killing the elephant to murder. George Orwell, "Shooting an Elephant" in *Inside the Whale and Other Essays*, *ibid* at 91.
9. See detailed discussion in Part III.A. below.

Recurring themes in the account set out here include advances in scientific knowledge about the characteristics of cetaceans and the adverse effects of captivity on them; media exposés, both professional and activist, that have raised public awareness of the disturbing aspects of cetacean captivity; and advocacy by animal protection organizations, in particular Animal Justice Canada ("Animal Justice"),[10] through legislative lobbying, public engagement, and participation in litigation.

II. Bill S-203: Outlawing Cetacean Captivity

Bill S-203 was introduced into the Senate in 2015 by Senator Wilfred Moore of Nova Scotia, who retired in 2017 on reaching the mandatory retirement age of 75. When Senator Moore retired, sponsorship of the bill in the Senate was taken over by Senator Murray Sinclair of Manitoba. Senator Sinclair is an eminent First Nations leader who was the first Indigenous judge to be appointed in Manitoba (the second in Canada) and chaired Canada's landmark Truth and Reconciliation Commission. Bill S-203 was sponsored in the House of Commons by Elizabeth May, Leader of the Green Party of Canada.

Senator Moore, the bill's original sponsor, first became committed to the cause of ending cetacean captivity after he and his family watched the 2013 documentary film *Blackfish*.[11] *Blackfish* exposes the detrimental effects of captivity on orcas, as well as injuries and fatalities suffered by some of the human trainers and staff who work with them, focusing on

10. Animal Justice, incorporated as a not-for-profit corporation in 2008, is Canada's only national animal law organization. It is made up of a charitable wing and a non-profit wing that focuses on legislative activity and lobbying. Its objectives include prevention of cruelty to animals through the enforcement of existing laws, education of the public on issues that affect animals, and advocating for the humane treatment of animals and for reform of Canada's animal protection laws. See *e.g. R v DLW*, 2016 SCC 22 (Affidavit of Nicholas dePencier Wright, attached to Notice of Motion for Leave to Intervene filed by Animal Justice Canada, online (pdf): *Animal Justice* <www.animaljustice.ca/wp-content/uploads/2015/09/Animal-Justice-DLW-Motion-To-Intervene.pdf>). The author is a member of the volunteer board of advisors of Animal Justice.

11. *Blackfish*, 2013, DVD (Los Angeles: Magnolia Pictures, 2013).

Tillikum, an orca who was held by SeaWorld of Orlando, Florida until he died in 2017.[12] After watching the film, Senator Moore's son Nicholas asked him to do what he could about the treatment of captive cetaceans in Canada. Senator Moore's response was Bill S-203. He also supports other initiatives to improve cetacean welfare, including a proposal to create an ocean sanctuary for whales and dolphins on the coast of British Columbia or Nova Scotia.[13]

A. What Bill S-203 Changes

Bill S-203 makes it illegal to hold cetaceans in captivity (except for those that are already captive); to breed them or acquire reproductive material; to put on shows involving performing cetaceans; to capture a live cetacean with the intent to keep it captive; and to import or export live or dead cetaceans and reproductive materials of cetaceans.

The legislation amends the *Criminal Code*[14] to make it an offence to own or have custody or control of a captive cetacean; to breed or impregnate a cetacean; or to possess or seek to possess reproductive material of cetaceans.[15] The captivity ban has exceptions for cetaceans which are already in captivity when the legislation comes into force, rehabilitation, keeping a cetacean in captivity for its own best interests pursuant to a permit, and research.[16] It is also an offence to promote, arrange, conduct,

12. Senator Sinclair told the story of Bill S-203's origins in his speech moving third reading of the bill on May 29, 2018. "Bill S-203, An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)" 3rd reading, *Senate Debates*, 42-1, Vol 150 No 210 (29 May 2018), online: *Senate of Canada* <sencanada.ca/en/content/sen/chamber/421/debates/210db_2018-05-29-e?language=e#85>.
13. For a description of this proposal, see Nina Corfu, "World's 1st Captive Whale Retirement Home could be in Nova Scotia or B.C." (17 November 2017), online: *CBC News* <www.cbc.ca/news/canada/nova-scotia/whale-sanctuary-project-retirement-facility-captive-whales-dolphins-cetaceans-1.3853957>. The sanctuary project is led by the Whale Sanctuary Project, online: <whalesanctuaryproject.org/>.
14. RSC 1985, c C-46 [*Criminal Code*].
15. Bill S-203, *supra* note 1, cl 2.
16. *Ibid*.

assist in, receive money for or take part in any meeting, competition, exhibition, pastime, practice, display or event at or in the course of which captive cetaceans are used for performance for entertainment purposes, except pursuant to a license.[17] This prohibition on cetacean performances does not have a built in 'grandfather' exception for cetaceans already in captivity (as the prohibition on keeping captive cetaceans does), but facilities that hold captive cetaceans now will presumably be able to apply for permission to show them in performances.

Further, Bill S-203 amends the *Fisheries Act*[18] to provide that "no one shall move a live cetacean…from its immediate vicinity with the intent to take it into captivity",[19] except if the cetacean is injured or in distress and is in need of assistance (in other words, rescue of sick or injured animals is still permitted). Finally, it amends the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*[20] to prohibit the import into Canada or export from Canada of cetaceans (whether live or dead) and sperm, tissue cultures and embryos of cetaceans.[21] There is an exception for permitted imports and exports for scientific research, or for keeping a cetacean in captivity if it is in the best interests of the cetacean's welfare.[22]

Bill S-203 is a landmark step for cetacean protection because it will completely phase out cetacean captivity for display purposes. There are already some legal provisions that regulate and limit *how* captive cetaceans can be acquired and kept, but there is nothing that goes as far as outlawing captivity completely. For example, there are existing rules about how cetaceans can be captured from the wild for display purposes. Controversy first arose on this question in about the 1980s, tied to concerns about the impact of hunting on the sustainability of vulnerable populations, especially the orcas of the Pacific Northwest. In Canada, live capture of wild cetaceans for display was not, before Bill

17. *Ibid*.
18. RSC 1985, c F-14 [*Fisheries Act*].
19. Bill S-203, *supra* note 1, cl 3.
20. SC 1992, c 52.
21. Bill S-203, *supra* note 1, cl 4.
22. *Ibid*, cl 5.

S-203, prohibited outright in primary legislation; it was possible to do it legally by permit, but in practice permits have not been granted since the early 1990s.[23]

Bill S-203 was introduced as a private member's bill, but the Liberal government was supportive of the legislation. The government also added provisions to its own sponsored legislation that would have furthered similar objectives. In 2018, the government introduced a suite of proposed changes to the *Fisheries Act* under Bill C-68, including stricter legislative limits on live capture of cetaceans. This amendment would prohibit capturing cetaceans with intent to take them into captivity, with authorizations allowed only if the Minister "is of the opinion that the circumstances so require, including when the cetacean is injured or in distress or is in need of care".[24] Even if it could not acquire cetaceans by hunting them in Canadian waters, however, the industry would still be able to replenish its supply through captive breeding and imports. The government's proposed *Fisheries Act* amendments would not have changed that; nor would they have changed very much in practical terms, given the reality that live capture in Canada for captivity purposes ended decades ago. Later, in 2019, when time appeared to be running out for Bill S-203 to pass before the end of the parliamentary session, the government also sponsored amendments to Bill C-68 incorporating the provisions of Bill S-203 restricting imports and exports of cetaceans (these amendments would also incorporate a ban on trade in shark fins that is proposed in another private member's bill, Bill S-238).[25] As this article goes to press, with Bill S-203 just having passed third reading, it is unclear what will become of the similar provisions in Bill C-68.

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23. See discussion in Part IV.B. below.
24. Bill C-68, *An Act to amend the Fisheries Act and other Acts in consequence*, 1st Sess, 42d Parl, 2018, cl 15.
25. Jolson Lim & Marco Vigliotti, "Shark finning, cetacean captivity amendments could be folded into C-68," (15 May 2019), online: *iPolitics* <ipolitics.ca/2019/05/15/shark-finning-cetacean-captivity-amendments-could-be-folded-into-c-68/>.

B. Scientists, Their Evidence, and Bill S-203

Scientific evidence and argument have played an important role in making the case for Bill S-203, both in the Senate process and in public discourse. The witnesses who testified before the Committee, in its many hearings, included internationally recognized cetacean scientists Lori Marino, President and co-founder of the Whale Sanctuary Project; Hal Whitehead, a marine biologist at Dalhousie University in Nova Scotia; and Naomi Rose of the Animal Welfare Institute, all of whom supported the bill.[26] Marino is one of the world's foremost experts on cetacean cognition and on the effects of captivity on cetaceans.[27] Whitehead is a globally renowned cetacean researcher who studies wild whales and dolphins. He has advanced (both through sole-authored research and with co-author Luke Rendell) the proposition that whales and dolphins, with complex behaviours and communicative abilities that are transmitted through social learning, have culture — and that humans are not the only species that do.[28] Rose has been a cetacean biologist for twenty-five

26. Marino and Whitehead were witnesses in the Committee hearing of March 30, 2017. Rose testified on April 4, 2017. The full list of Committee witnesses is available online: *Senate of Canada* <sencanada.ca/en/committees/pofo/studiesandbills/42-1>.

27. Lori Marino & Toni Frohoff, "Towards a New Paradigm of Non-Captive Research on Cetacean Cognition" (2011), online: *PLoS ONE* <journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0024121&type=printable> (summarizes scientific studies on the "large complex brains, impressive intelligence, and social and communicative sophistication" of cetaceans, indicating that "the complex sentience of other animals such as cetaceans must be recognized and their physical, psychological and behavioral needs appropriately protected" at 1). This article also surveys and summarizes the "copious scientific literature confirming the damaging effects of captivity on dolphin and whale physical health and psychological well-being" (at 3–4). The authors argue that "cetaceans possess a level of intelligence, awareness and psychological and emotional sensitivity that makes it unacceptable to continue to keep them in captivity if not necessary for their welfare, survival, or conservation" (at 2).

28. Hal Whitehead & Luke Rendell, *The Cultural Lives of Whales and Dolphins* (Chicago: University of Chicago Press, 2015).

years.

These witnesses described evidence of the harmfulness of captivity to cetaceans, and the mismatch between their welfare needs and the conditions they experience in captivity. Whitehead testified as follows:

> captive whales and dolphins live in a space that is less than a millionth — and, in the case of killer whales, less than a billionth — of the area of their natural home ranges. Rather than facing a wide range of living prey, they are typically fed dead fish. These are extremely acoustic animals. That is how they sense their world and communicate. Concrete tanks are debilitating echo chambers.[29]

Marino, similarly, stated that research shows cetaceans "are the type of animal that cannot thrive in a concrete tank":[30]

> [t]he evidence is building that animals, wild animals like dolphins and whales, who are kept in displays, exhibit all kinds of abnormal behaviours, like stereotypies, repetitive behaviours, going back and forth with the head, et cetera. It's something you see in humans all the time when they are emotionally disturbed and chronically stressed. We see this in dolphins and whales in concrete tanks all the time. We see them dying of infections that indicate or suggest that their immune systems are going down due to the chronic stress of living for years in a concrete tank.[31]

Rose explained that opposition to cetacean captivity in the early days was "largely ethical",[32] but with the increased information available from studies over the last few decades the arguments against keeping cetaceans in captivity are "science-based".[33]

The Committee also heard testimony opposing the bill from a scientist, Michael Noonan, Professor of Animal Behaviour, Ecology, and Conservation at Canisius College. However, Noonan also acknowledged that there had been poor welfare outcomes for some cetaceans in

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29. Senate, Standing Committee on Fisheries and Oceans, *Evidence*, 42-1, No 12 (30 March 2017), online: *Senate of Canada* <sencanada.ca/en/Content/Sen/Committee/421/POFO/12ev-53197-e> [30 March Standing Committee].
30. *Ibid*.
31. *Ibid*.
32. Senate, Standing Committee on Fisheries and Oceans, *Evidence*, 42-1, No 13 (4 April 2017), online: *Senate of Canada* <sencanada.ca/en/Content/Sen/Committee/421/POFO/13ev-53212-e>.
33. *Ibid*.

captivity, and supported tighter regulations with better enforcement to ensure better standards for captive cetaceans.[34]

The scientific evidence concerning cetacean intelligence, social lives, and welfare needs has played a significant part in the captivity debate because of the perceived authority and neutrality of science. Certainly, it would be fair to characterize researchers like Marino, Whitehead, and Rose, who have taken positions on normative questions like cetacean personhood[35] and cetacean culture, and who are actively involved in advocating for legal change, as not completely neutral participants in the debate themselves. But their positions are founded in their research, which is based on objective scientific methodology. Anti-captivity arguments are strengthened by their basis in the extensive and growing body of scientific knowledge about cetacean species.[36] Senator Sinclair's speech moving third reading of Bill S-203 referenced the evidence from the Committee witnesses concerning cetacean intelligence, emotions, social lives, family bonds and communication, and their almost incomprehensibly wide ranges in the wild; of the harms of captivity including "isolation, health problems, reduced lifespans, high infant mortality rates and extreme boredom, where they self-mutilate and end up with scars, wounds and damage to their teeth because they live in barren environments where everything of choice is removed";[37] and of the limited value of research on captive cetaceans.

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34. Senate, Standing Committee on Fisheries and Oceans, *Evidence*, 42-1, No 15 (9 May 2017), online: *Senate of Canada* <sencanada.ca/en/Content/Sen/Committee/421/POFO/15ev-53301-e>.
35. 30 March Standing Committee, *supra* note 29 (Marino supports the view that whales and dolphins are 'persons', defined, as she put it in her testimony before the Committee, as "any organism that has autonomy, self-awareness, emotions and a life to lead"). See further discussion of the international discussion concerning cetacean personhood in Part V.A. below.
36. *Ibid* (in his testimony, Whitehead described the abundance of research on wild dolphins and whales, especially the orcas of British Columbia — noting that "we have come to know those whales better than almost any other wild animals, and what we have learned is truly remarkable").
37. Sinclair, *supra* note 12.

C. Bill S-203's Stormy Voyage

The resemblance of the legislative process to the more unlovely types of industrial manufacture is well known, but it does seem that the process can be especially complex and dysfunctional when it comes to animal protection legislation.[38] That has been the case for Bill S-203. The legislation had strong popular and cross-party support from the start, and easily passed each legislative stage when it was put to a full vote. Nevertheless, it took four years for the bill to pass, and it passed only two weeks before Parliament was set to rise for probably the last sitting in the legislative session, meaning that it came very close to dying on the Order Paper. Bill S-203 faced long procedural delays during its slow progress through the Senate, and came close to expiration several times before its final triumph. The Conservative caucus critic on the bill, Senator Donald Plett of Manitoba, was especially vocal in his opposition to a captivity ban,[39] and has been accused by critics — including the well-known science broadcaster and environmental activist David Suzuki — of using procedural stratagems in an effort to delay and ultimately prevent the

38. A notorious example is the multi-year history of successive attempts to update the *Criminal Code* animal cruelty offences that ended in 2008 with no change in the substantive provisions but an increase in maximum sentences — a saga recounted in Lesli Bisgould, *Animals and the Law* (Toronto: Irwin Law, 2011) at 87–96.

39. "Bill S-203, An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)" 2nd reading, *Senate Debates*, 42-1, Vol 150 No 31 (3 May 2016), online: *Senate of Canada* <sencanada.ca/en/speeches/sen-plett-second-reading-bill-s-203-ending-captivity-whales-dolphins/> (speech of Senator Donald Plett on the second reading of Bill S-203, criticizing the ban on captivity as bad policy because it "denies us the opportunity to study and learn from a very small number of captive animals in a way that will permit us to understand and address those animals' unique and special needs in much larger populations in the wild").

adoption of Bill S-203.[40]

Senator Sinclair noted that Bill S-203 was in committee "longer than any bill in the last 20, 25 years",[41] with 17 hearings and over 40 witnesses (by comparison, the legislation that brought in medical assistance in dying had five pre-study hearings and two committee hearings). When the bill faced the risk of being killed by procedural delay, Animal Justice and other advocacy organizations encouraged their supporters to contact senators and express their desire to see the bill passed; senators' e-mail and voicemail inboxes were flooded with messages of support, and the bill survived.[42] In June 2018, when the Senate rose for the summer without Bill S-203 proceeding to a vote, Members of Parliament from four federal parties held a joint press conference (coordinated by Animal Justice) urging an end to the deadlock on this and other pending animal protection legislation.[43]

III. Cetacean Captivity in Canada

There are only two remaining facilities in Canada that have captive cetaceans: the Vancouver Aquarium, in Vancouver, British Columbia; and Marineland Canada ("Marineland"), in Niagara Falls, Ontario.

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40. David Suzuki, "Science Tells Us to End Whale and Dolphin Captivity. So What's the Holdup?" (28 September 2017), online: *The Globe and Mail* <www.theglobeandmail.com/opinion/science-tells-us-to-end-whale-and-dolphin-captivity-so-whats-the-holdup/article36430136/>. David Suzuki argued that Senator Plett had "mounted a ferocious effort to obstruct Bill S-203" and that his "zeal for cetacean captivity is bewildering and unfortunate".
41. Holly Lake, "'Free Willy' Bill Report Adopted in Senate" (27 April 2018), online: *iPolitics* <ipolitics.ca/2018/04/27/free-willy-bill-report-adopted-in-senate/>.
42. Holly Lake, "Wave of Support for Anti-Captivity Bill Swamps Senate E-mail System" (20 June 2017), online: *iPolitics* <ipolitics.ca/2017/06/20/wave-of-support-for-anti-captivity-bill-swamps-senate-email-system/>.
43. "Advisory: Animal Justice Joins MPs to Call for End to Senate Deadlock on Animal Protection Bills" (19 June 2018), online: *Animal Justice Canada* <www.animaljustice.ca/media-releases/advisory-animal-justice-joins-mps-to-call-for-end-to-senate-deadlock-on-animal-protection-bills>.

A. Vancouver Aquarium

Vancouver Aquarium, in Vancouver's Stanley Park, opened in 1956.[44] It is Canada's largest aquarium and one of the five largest aquariums in North America.[45] Vancouver Aquarium is a nonprofit organization whose mission includes research, conservation, education and the rescue and rehabilitation of marine mammals.[46] It is the headquarters of Ocean Wise, "a new global ocean conservation organization focused on protecting and restoring our world's oceans"[47] that started in 2017. According to Ceta-Base, a non-profit organization that maintains a global database of cetaceans in captivity,[48] Vancouver Aquarium currently holds only one cetacean as of September 8, 2018: Helen, a Pacific white-sided dolphin.[49] Until recently the Vancouver Aquarium had a quite significant collection of beluga whales. Several belugas died at the aquarium in recent years; the last two, Aurora and her adult calf Qila, died within a few days of each other in November 2016.[50] In addition, a false killer whale, Chester, died

44. Murray A Newman, *People, Fish and Whales: The Vancouver Aquarium Story* (Madeira Park: Harbour Publishing, 2006) at 19.
45. "The History of Canada's Largest Aquarium" (2018), online: *Vancouver Aquarium* <www.vanaqua.org/about/history>.
46. "About the Vancouver Aquarium" (2018), online: *Vancouver Aquarium* <www.vanaqua.org/about>; "Vancouver Aquarium Marine Mammal Rescue Program" (2018), online: *Vancouver Aquarium* <www.vanaqua.org/learn/aquafacts/the-aquarium/marine-mammal-rescue-program>.
47. "Ocean Wise 2017 Annual Report" (2018), online (pdf): *Ocean Wise Conservation Association* <static1.squarespace.com/static/59cac35632601e88dbb17696/t/5adf629e70a6ad662793e3bd/1524589247160/OceanWise_AnnualReport2017.pdf>.
48. "Our Mission" (2018), online: *Ceta-Base* <www.cetabase.org/site/mission>.
49. "Cetaceans: Vancouver Aquarium" (2018), online: *Ceta-Base* <www.cetabase.org/captive/cetacean/vancouver-aquarium/>.
50. Jon Azpiri, "Vancouver Aquarium Beluga Whale Aurora Dies at Age 30" (26 November 2016), online: *Global News* <globalnews.ca/news/3090310/vancouver-aquarium-beluga-whale-aurora-dies/>.

in November 2017, and a harbour porpoise, Daisy, died in June 2017.[51]

Vancouver Aquarium presents shows and educational programs involving live animals, including displays that are listed as "dolphin training"[52] but might be described by a naïve observer as dolphin shows. These sessions also appear to be captured by the prohibition on cetacean performances under the new legislation.[53]

Vancouver Aquarium was the first facility to capture and display a live orca. The extraordinary story of how that whale came to Vancouver is recounted in Mark Leiren-Young's 2016 book *The Killer Whale Who Changed the World*.[54] In 1964, Dr. Murray Newman, the aquarium's first director, wanted to have a life-size, anatomically accurate sculpture of an orca made for display at the aquarium. His idea originally was to have an orca killed so that its body could be used as a model for the piece. No one was thinking about bringing a live one back to the city. Orcas were known to be fearsome apex predators that would even kill and eat other whales; they were considered aggressive and terrifying, "bloodthirsty villains of the sea, dangerous to get near even in a boat".[55] The orca's impressive size, striking appearance, and fearsome reputation made it an ideal icon to attract and thrill visitors. Newman, who died in 2016, seems to have had a well-honed showman's instinct, and to have relished comparisons of himself to PT Barnum — the first showman to put whales on display.[56]

Newman hired a sculptor for the job: Samuel Burich, who was also an experienced fisherman. Burich and another local fisherman, Joe Bauer,

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51. The Canadian Press, "A False Killer Whale at the Vancouver Aquarium Has Died" (24 November 2017), online: *Huffington Post* <www.huffingtonpost.ca/2017/11/24/a-false-killer-whale-at-the-vancouver-aquarium-has-died_a_23287719/>.
52. "See A Show Today" (2018), online: *Vancouver Aquarium* <www.vanaqua.org/experience/today>; see also "Caring for Dolphins" (2018), online: *Vancouver Aquarium* <www.vanaqua.org/experience/shows/caring-for-dolphins>.
53. Bill S-203, *supra* note 1, s 2 (see also discussion in Part II above).
54. Mark Leiren-Young, *The Killer Whale Who Changed the World* (Vancouver: Greystone, 2016).
55. Newman, *supra* note 44 at 51.
56. *Ibid* at 21; Leiren-Young, *supra* note 54 at 83.

set out to the waters off Saturna Island to harpoon and kill a killer whale for the sculpture. After two months without success, they were ready to give up the attempt when an orca pod approached their camp and one small, curious member of the group came close enough for Burich to harpoon it. This whale was small because he was young, probably about five years old.[57]

Burich's harpoon strike did not kill the whale; it only pierced his skin and blubber.[58] He also tried shooting the orca, but still failed to kill him. Then something unexpected happened: Burich and Bauer watched as two larger orcas from the pod[59] lifted the injured young whale to the surface and supported him to prevent him from drowning, until he began to breathe and slowly swim on his own.[60] This behaviour had never been observed before. The orcas' gentleness and care for their hurt family member belied their reputations as vicious killers.

The young orca was still attached to the fishing boat by the harpoon and its line. Without intending to, Burich and Bauer had become the first people to capture a live orca. Watching the injured orca's pod-mates help and protect him had sparked their compassion; they had set out to kill him, but now they wanted to save his life.[61] Newman and the two fishermen decided that that the orca should be brought back to Vancouver. They saw that their captive would offer an unprecedented

57. Leiren-Young, *ibid* at 121.

58. *Ibid* at 43.

59. We understand far more now about orcas' social and kinship groups than was known in the 1960s. Based on current understanding of orca social groupings, it is very likely that the whales who rescued Moby Doll after he was harpooned and shot were his family members, including, probably, his mother and/or grandmother.

60. Lieren-Young, *supra* note 54 at 42–44. As Leiren-Young's account documents, the orca's relatives remained steadfastly vigilant and devoted until he died. Older members of the pod followed him to Vancouver harbour and stayed there to the end. The Canadian military donated a hydrophone, which captured the sound of Moby Doll communicating with another killer whale that seemed to be about two miles away (at 77). On the day Moby died, "several whales clustered outside the pen" and seemed to be communicating with him (at 114).

61. Leiren-Young, *ibid*.

opportunity for research, enabling scientists to study killer whale physiology, communication and behaviour by observing a live specimen for the first time. Having the world's first live-captured orca would also prove to be a powerful driver of publicity and interest for the aquarium.

When they arrived at Vancouver Harbour with Moby Doll in tow, the young whale was housed first in a drydock in North Vancouver and then in a specially constructed pen at Jericho Beach. Newman chose the name Moby Doll for him.[62] At the time, the consensus among the scientists who had observed him was that he was female, although after his death it was confirmed that he was in fact male — as Bauer, who had been able to get a good look at the relevant part of Moby's anatomy after harpooning him, had insisted all along.[63]

Moby Doll lived for 87 days before he succumbed to infections and exhaustion and died on October 9, 1964.[64] During that short time, he became an international celebrity, the subject of media attention locally and around the world. When his pen at the Burrard Drydock was opened to the public, 20,000 people came to look at him.[65] At the beginning, Moby Doll swam listlessly in circles in the tank and refused to eat. Later on, he began eating, taking food from his caretakers' hands, playing, and letting caretakers rub his stomach and scratch his fins.[66] The people who observed and cared for the young whale evidently were enchanted by this intelligent, docile, sociable creature, and developed a strong bond with him. The image of the killer whale changed profoundly, from a ruthless and bloodthirsty killer to a gentle, intelligent, and powerfully attractive animal. All things considered, this image makeover may not have been to

62. *Ibid* at 82.
63. *Ibid* at 119–120.
64. Newman, *supra* note 44 at 54.
65. *Ibid*.
66. Leiren-Young, *supra* note 54 at 110–113.

the benefit of the orcas.[67]

The Moby Doll episode started two developments, both of which are an important part of the historical background to the current legislative initiative to ban cetacean captivity. One of those developments is the phenomenon of cetacean captivity itself, which took off following Moby Doll's brief, tragic period of celebrity. The Vancouver Aquarium's experience with Moby Doll disproved the received wisdom that killer whales were aggressive and dangerous to humans, and demonstrated that these animals would bond with humans and could be trained to do entertaining tricks. It also proved that people were very, very interested in looking at them. As a 1987 *New York Times* story put it, "[a]quarium operators realized in 1964 that an orca on display meant money in the bank".[68] After Moby, there ensued what Leiren-Young calls a "blackfish gold rush".[69] Everyone wanted an orca. Seattle Aquarium got an orca, Namu;[70] then SeaWorld acquired its original Shamu;[71] and then Vancouver Aquarium got its first killer whale, Skana, who was at the aquarium for thirteen years.[72]

The second development was the beginning of opposition to captivity. The Vancouver branch of the British Columbia Society for the Prevention of Cruelty to Animals ("BC SPCA") and local animal activists criticized the aquarium for dragging the injured Moby Doll to shore from

67. Not everyone would agree with this assessment. See Newman, *supra* note 44, who captures what is probably the most commonly invoked rationales for captive cetacean displays (a version of an argument used to justify zoos more generally) when he writes that "exhibiting a few rescued [*sic*] whales is justified if it contributes to the betterment of all whales, as it did in BC" at 63. Whales may now be more beloved and revered than they once were, and it seems reasonable to surmise that there is a connection to the fascination and sense of connection people experience when they visit captive cetaceans on display. But whether the condition of whales has really been 'bettered' from the 1960s to now is far more questionable.
68. Wallace Turner, "For Once-Hated Killer Whales, Changing Attitudes Mean New Friends" *The New York Times* (20 September 1987) 26.
69. Leiren-Young, *supra* note 54 at 117.
70. *Ibid* at 126.
71. *Ibid* at 129.
72. *Ibid* at 129–130; Newman, *supra* note 44 at 55.

Saturna and for keeping it imprisoned for people to look at.[73] As Leiren-Young observes, "the first killer whale in captivity had launched the first anti-captivity activists".[74] In addition to these objections concerning the welfare of the animals, there were also environmental concerns. As the rush to capture orcas from the wild escalated, the destructive impact on the species eventually triggered widespread public opposition to taking cetaceans from the wild, which in turn led to legal restrictions on live-capture in both Canada and the US.[75] Greenpeace, one of the world's first (and still one of the most prominent) environmental non-governmental organizations, began in Vancouver and shifted its focus from nuclear testing to protecting whales in this period.[76] Some of the earliest Greenpeace activists had personal connections and experiences with captive whales that profoundly shaped their environmental consciousness — Paul Spong, for example, worked with the orcas at Vancouver Aquarium and was convinced by his interactions with them that they were profoundly intelligent creatures and deserved to be free.[77] Colby argues that the orca capture controversy shaped the ecological consciousness and values of the whole Pacific Northwest region.[78]

Vancouver Aquarium decided to discontinue taking orcas from the wild under a board policy adopted in 1992.[79] Acquiring them from other aquariums was prohibitively expensive, and attempts at in-house

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73. Leiren-Young, *supra* note 54 at 61–63, 93.
74. *Ibid* at 93.
75. Leiren-Young, *ibid* writes that as a result of the live-capture boom of the 1960s and 1970s the southern resident killer whales of the Pacific Northwest "lost a generation" (at 131). On the history of environmentalist protest against orca captures in British Columbia and Washington State, see Jason Colby, "The Whale and the Region: Orca Capture and Environmentalism in the New Pacific Northwest" (2013) 24:2 Journal of the Canadian Historical Association 425.
76. Leiren-Young, *ibid* at 140–143.
77. *Ibid* at 139–140.
78. Colby, *supra* note 75 at 427–429.
79. Newman, *supra* note 44 at 62. In any event, it is unlikely that it could have done so legally in Canada at that time; see discussion in Part IV.B below.

breeding were unsuccessful.[80] A few years later, Vancouver Aquarium decided to stop displaying orcas and transferred its last captive orca to SeaWorld.[81] The continuing controversy over the ethics of keeping and displaying cetaceans prompted Vancouver Aquarium to announce in February 2017 that it would phase out its beluga whale program, and to state in January 2018 that it planned in the future to stop housing and displaying all cetaceans.[82]

Cetacean captivity at Vancouver Aquarium has also been an ongoing source of friction with its effective landlord, the Vancouver Board of Parks and Recreation ("Parks Board"). Vancouver Aquarium's Marine Science Centre is situated in Stanley Park, which is administered by the Parks Board. The 1996 version of the licence agreement between the Parks Board and Vancouver Aquarium incorporated the aquarium's commitment not to keep wild-caught cetaceans, as does the 1999 version (which remains in force).[83] In 2017, the Parks Board voted to prohibit the possession of any captive cetaceans on park lands,[84] a decision which would make the Aquarium's voluntarily announced intention to phase out holding captive cetaceans into a legal obligation. Vancouver Aquarium challenged the by-law as invalid because it conflicted with the terms of the 1999 licence agreement, and initially succeeded in having it overturned on judicial review.[85] That decision was overturned in 2019 by the British Columbia Court of Appeal, which remitted the case to the Supreme Court of British Columbia for determination on whether the ban is invalid on additional grounds that were raised by the Aquarium

80. *Ibid*.
81. Leiren-Young, *supra* note 54 at 150.
82. Susan Lazaruk & Glenda Luymes, "Vancouver Aquarium Bows to Pressure to Ban Whales, Dolphins" (18 January 2018), online: *Vancouver Sun* <vancouversun.com/news/local-news/vancouver-aquarium-bows-to-pressure-to-ban-cetaceans>.
83. The relevant portions of the 1996 and 1999 agreements are excerpted in *Ocean Wise Conservation Association v Vancouver Board of Parks and Recreation*, 2018 BCSC 196 at paras 12, 34, respectively [*Ocean Wise*].
84. *Ibid* at para 14.
85. *Ibid.*

but not addressed in the Supreme Court's 2018 judgment.[86] As this article goes to press, the Vancouver Aquarium has just announced that it is dropping the lawsuit challenging the by-law.

Vancouver Aquarium has also been the target of some (although generally not mainstream) media criticism. In 2015, Vancouver documentary filmmaker, Gary Charbonneau, released *Vancouver Aquarium Uncovered* using online hosting services Vimeo and YouTube.[87] The film questioned the Vancouver Aquarium's public image as a benign conservation and research organization, and (in a manner reminiscent of *Blackfish*) highlighted the harms associated with cetacean captivity. Somewhat surprisingly, the Vancouver Aquarium responded by suing the filmmaker for copyright infringement, and succeeded in obtaining an interlocutory injunction ordering the removal from the film of some images and footage over which the Vancouver Aquarium asserted copyright.[88] That injunction was set aside by the British Columbia Court of Appeal,[89] in a decision that recognized the importance of not allowing copyright claims to "silence criticism" and "stifle public debate on a topic of great interest to the community".[90]

In both the *Ocean Wise* BC Supreme Court case that struck down the Parks Board by-law and the *Charbonneau* copyright case, Animal Justice was granted intervener status, giving it a unique ability to make arguments in court as an advocate for the interests of animals. In *Charbonneau*, Animal Justice highlighted the potential for aggressive copyright claims to be used by animal-use industries "to suppress production of unfavourable and critical publications"[91] and the heightened risks that would create for

86. *Ocean Wise Conservation Association v Vancouver Board of Parks and Recreation*, 2019 BCCA 58.
87. Gary Charbonneau, "Vancouver Aquarium Uncovered" (2015), online (video): *Vimeo* <www.vancouveraquariumuncovered.com/vancouver-aquarium-uncovered/>.
88. *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2016 BCSC 625.
89. *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017 BCCA 395.
90. *Ibid* at para 79.
91. *Ibid* at para 30.

an organization trying to expose animal abuse and change public opinion about the treatment of animals. In *Ocean Wise,* Animal Justice made submissions specifically with respect to Vancouver Aquarium's argument that shutting down its captive cetacean program would unconstitutionally limit its freedom of expression, on the premise that whale and dolphin displays are a form of expression.[92] The implications of that position for regulating animal-use industries would be very profound. Since the court decided in Vancouver Aquarium's favour on other grounds, it did not find it necessary to address the constitutional argument. In both cases, then, the effect of Animal Justice's presence as part of the proceedings was subtle — but, nevertheless, not insignificant. Because an animal advocacy organization was in the courtroom advocating on behalf of the animals, a novel development in Canadian litigation, the broader questions about cetacean captivity and human use of animals that formed the background and context of both cases were not forgotten.

B. Marineland

Marineland is a privately owned amusement park, zoo, and aquarium in the tourist town of Niagara Falls in Southern Ontario. In 1961, Marineland owner John Holer saw that there was a market for additional attractions for tourists to visit when they came to see the famous falls. Holder "welded two large steel tanks together on a one-acre plot on the current site of Marineland",[93] installed three sea lions, and charged admission to view and feed the animals. Marineland opened on the site 1963.[94] From those humble beginnings, it has grown into a large theme park and tourist attraction, with about 4,000 land and aquatic animals

92. *Ocean Wise*, *supra* note 83 at para 22.
93. Liam Casey, "The Man Behind Marineland: 50 Years of Controversy" (3 October 2011), online: *The Toronto Star* <www.thestar.com/news/gta/2011/10/03/the_man_behind_marineland_50_years_of_controversy.html>.
94. Liam Casey, "OSPCA Responds to Lawsuit: Marineland 'The Author of its own Misfortune'" (5 January 2018), online: *The Globe and Mail* <www.theglobeandmail.com/news/national/ospca-responds-to-lawsuit-marineland-the-author-of-its-own-misfortune/article37512576/>.

as well as rides.[95] Holer, a vivid and controversial character, remained the owner of Marineland until his death in June 2018.

Ceta-Base shows Marineland as having 60 cetaceans as of September 8, 2018: five bottlenose dolphins, 53 belugas (including five calves listed as born in 2018), and one orca (Kiska).[96] Marineland advertises "the largest collection of beluga whales in the world"[97] as one of its attractions. Shows featuring performing beluga whales, dolphins and walruses are presented at King Waldorf's Stadium.[98] For anyone who has been near a television or a radio in Southern Ontario in the last few decades, Marineland is indelibly associated with its slogan and jingle: "Everyone loves Marineland".

Public concern about the living conditions of the Marineland animals, including its cetaceans, may be the single most important force driving legislative action on captive cetaceans — both Bill S-203 at the federal level and (as set out in Part IV.C. below) law reforms at the provincial level in Ontario. Marineland has been the target of criticism by opponents of captivity since the 1990s.[99] But opposition to Marineland shifted into the mainstream much more recently, because of an extensive, multi-year investigation by *The Toronto Star* ("*Star*") newspaper beginning in 2012. The *Star*'s findings were revealed in a series of articles beginning with a disturbing exposé published in August 2012, which opens with the plight of a seal named Larry:

> Larry lies behind bars in a pen, his eyes red and swollen. The harbour seal with "an amazing little personality" who arrived at Marineland about eight years ago is now a shadow of his former self. After repeated exposure to unhealthy water,

95. *Ibid*.
96. "Cetaceans: Marineland Canada" (2018), online: *Ceta-Base* <www.cetabase.org/captive/cetacean/marineland-canada/>.
97. "Attractions" (2018), online: *Marineland* <www.marinelandcanada.com/attractions/arctic/>.
98. "Fun Filled Show" (2018), online: *Marineland* <www.marinelandcanada.com/attractions/shows/>.
99. Charlotte Montgomery, *Blood Relations: Animals, Humans, and Politics* (Toronto: Between the Lines, 2000) at 207–210.

he has gone blind.[100]

The *Star*'s Marineland coverage, led by reporters Linda Diebel and Liam Casey, was an exhaustive project that drew on whistleblower revelations from park employees and resulted in dozens of articles.[101] Diebel and Casey set out an overview of how the story unfolded in a *Star Dispatches* e-book published in 2013.[102]

Marineland was investigated both by the Ontario Society for the Prevention of Cruelty to Animals ("OSPCA") and the self-regulatory organization Canada's Accredited Zoos and Aquariums ("CAZA"), and agreed to make a number of changes to improve the living conditions of its animals.[103] It also fought back, suing the *Star* for libel,[104] the OSPCA for malicious prosecution,[105] and even a 19-year-old college student and seasonal Marineland employee who made an unreleased short film critical of cetacean captivity with some footage of Kiska the killer whale.[106]

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100. Linda Diebel, "Marineland Animals Suffering, Former Staffers Say" (15 August 2012), online: *The Toronto Star* <www.thestar.com/news/canada/2012/08/15/marineland_animals_suffering_former_staffers_say.html>.
101. A search for 'Marineland' in *The Toronto Star* online archive on August 25, 2018 yielded 217 results (not all are from the investigative series).
102. Linda Diebel & Liam Casey, *Marineland: Inside the Controversy* (Toronto: Star Dispatches, 2013).
103. See detailed discussion in Part IV below.
104. Ray Spiteri, "Marineland Files Libel Suit Against Toronto Star" (23 April 2013), online: *Toronto Sun* <torontosun.com/2013/04/23/marineland-files-libel-suit-against-toronto-star/wcm/036cbcd3-d097-4c18-a880-10b611449312>.
105. The Canadian Press, "Marineland Sues OSPCA for $21M, Alleges Agency Wanted to 'Destroy' Theme Park" (27 October 2017), online: *CBC News* <www.cbc.ca/news/canada/hamilton/marineland-sues-ospca-for-21m-alleges-agency-wanted-to-destroy-theme-park-1.4374712>.
106. The Current, "Marineland Sues College Student for $1M Over Unreleased Orca Film" (20 May 2016), online: *CBC Radio* <www.cbc.ca/radio/thecurrent/the-current-for-may-20-2016-1.3590817/marineland-sues-college-student-for-1m-over-unreleased-orca-film-1.3590829>.

C. Carnival and Conservation: The Meanings of Marine Parks

Susan G Davis has described the dichotomy of cultural forces shaping the modern nature theme park, with its historical roots connected to the amusement park, the circus and the carnival — combining thrills for the masses with the display of exotic animals — together with its more modern, salubrious, self-presentation as an institution concerned with science, protection of the natural world, and public education.[107] Like zoos, aquariums or marine parks, as places for displaying exotic and fascinating captive wild animals often from faraway lands, have their antecedents in the menageries of European royalty and the collections of animals that Roman emperors amassed for public games.[108] The modern zoo, displaying animals to the public for education and associated with learning and scientific inquiry, was first seen in Europe in the eighteenth century and became widespread in Europe and North America by the nineteenth.[109] Zoos and aquariums still present themselves as scientific, educational, and serious, as distinguished from mere pleasure-gardens. It remains true that the main reason people visit these places is pleasure, and the experience offered must be enjoyable (at least as much as it is scientific, educational, and serious) to keep people coming through the turnstiles.

With the rise of popular environmental consciousness in the last few decades, zoos and aquariums have also become associated with the preservation of threatened nature. They conduct captive breeding programs to augment the numbers of species that are depleted in the wild, carry out research intended to support conservation of animals in their natural habitats, and, by providing people with a personal

107. Susan G Davis, *Spectacular Nature: Corporate Culture and the SeaWorld Experience* (Berkeley: University of California Press, 1997) at 20–39.

108. Dale Jameson, "Against Zoos" in Peter Singer, ed, *In Defense of Animals: The Second Wave* (Malden, Massachusetts and Oxford: Blackwell, 2006) 132 at 132.

109. *Ibid* at 132–133; Susan Margulis, "Zoos as Venues for Research" in Jesse Donahue, ed, *Increasing Legal Rights for Zoo Animals: Justice on the Ark* (Lanham: Lexington, 2017) 49.

connection with animals they would not be able to see in their natural habitats, encourage the public to appreciate the intrinsic value of wild creatures and develop a sense of custodianship for threatened nature.[110] The environmentalist packaging of captive wildlife attractions is nowhere more emphasized than it is for captive cetaceans, probably because marine mammals generally, and whales and dolphins especially, have such powerful significance as symbols of a pristine and imperiled natural world.[111]

The two remaining Canadian facilities that have captive cetaceans, Marineland and Vancouver Aquarium, illustrate the two threads in the history of these attractions (and also how intertwined they are). Marineland is closer to the carnival side of the genealogy. It is an amusement park with added animals, and it does not really pretend to be anything else. Because it is a private company, it is under no obligation to provide disclosure to investors, as SeaWorld must,[112] nor to portray itself

110. *Ibid*.

111. See Lien *supra* note 4 (Lien's 1999 review for DFO of live-capture and captivity of marine mammals in Canada notes that marine mammals "are of passionate interest to much of the Canadian public who care deeply about their conservation and welfare" because they are "a symbol of man's abuse of nature, of the health of the ocean ecosystem and a frontier for exploring the relationship between humans, animals and nature" at 13). See also Davis, *supra* note 107 (noting that cetaceans are associated in New Age philosophy with "expanding consciousness" and thought of as "spiritual healers and helpers" that "connect humans to a 'more aware' way of being" at 227).

112. SeaWorld Entertainment, Inc., Annual Report (Form 10-K) (April 25, 2018). SeaWorld Entertainment, Inc. is a public company that trades on the New York Stock Exchange under the ticker symbol SEAS. Its communications to investors emphasize education, care for animals and environmental responsibility alongside the profit-generating enterprise of providing consumers with enjoyable experiences. In its 2017 Annual Report to shareholders, the company states that its attraction for visitors is "a compelling combination of entertainment, education, and our exceptional ability to connect people and wildlife" (at 1), and describes itself as "a global leader in animal welfare, training, husbandry, veterinary care and marine animal rescue" that is "committed to helping protect and preserve the environment and the natural world" (at 3).

to investors as a socially responsible corporation. Unlike the nonprofit Vancouver Aquarium, Marineland faces no pressure to justify its existence with reference to a public interest mission. Like many of the circuses and sideshows of earlier times, Marineland is closely identified with a single dominant and colourful figure, owner John Holer. Vancouver Aquarium, by contrast, creates an impression that entertainment and the attraction of paying customers are mere afterthoughts to its primary functions of saving and rehabilitating injured animals, conducting scientific research, and raising public consciousness about ocean life.

At the same time, Marineland's marketing copy does evoke an association with research, education, and the environment. The "Message from the Owner" on Marineland's website tells readers that since the attraction opened:

> we have hosted, educated and entertained literally millions of young people. We have heard from many marine biologists, veterinarians, conservationists and oceanographers that it was their childhood experience at Marineland that inspired them to learn more about the wonders of the ocean and its amazing aquatic life.[113]

And Vancouver Aquarium's financial disclosure suggests that attracting paying visitors is not an entirely subordinate priority to research, rescue, and conservation: the financial statement in its 2017 Annual Report indicates that 18% of total expenditures were for "conservation, research and education" and 11% for "animal care" (which would include all animals in the facility, not just those receiving rehabilitation). Other major expenditures include 9% for "retail operations", 12% for "marketing and external relations" and 14% for "general administration".[114]

In a way, the presentation of whales and dolphins to the public in displays and shows like those at Marineland and Vancouver Aquarium, although very successful and popular for many years, laid the foundations

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113. "A Message From The Owner" (2018), online: *Marineland* <www.marinelandcanada.com/general/general_information/>.

114. "Ocean Wise 2017 Annual Report" (2017), online (pdf): *Vancouver Aquarium* <static1.squarespace.com/static/59cac35632601e88dbb17696/t/5adf629e70a6ad662793e3bd/1524589247160/OceanWise_AnnualReport2017.pdf>, at 5.

for the anti-captivity movement and for the demise of these very practices. As Charlotte Montgomery observes in her account of the controversy over Marineland and other captive cetacean facilities:

> [t]here is a growing sentiment that the justification for keeping animals captive must include research, the conservation of rare species, or educational programs, all with natural settings and a consideration for the animals' behavioural needs, rather than simply showing them off to the curious. That conviction, moving beyond basic sympathy, has motivated demands for government regulation.[115]

Aquariums and marine parks that acquired and displayed cetaceans achieved what they wanted to: they made people fall in love with marine animals, and they made it possible for researchers to deepen our knowledge of them. And then people started asking hard questions about what was being done to these creatures whose intelligence and complexity we now understand so much more than we used to, and whom we have come to love and revere.

IV. Current Canadian Regulation

There are already some laws and regulations in Canada on cetacean captivity, having to do mainly with restricting the capture of cetaceans from the wild and regulating the conditions in which captive cetaceans are kept. The existing legal protections for cetaceans in captivity in Canada are limited, and weakened by regulatory gaps. The gaps are related partly to the division of powers in Canada's federal system of government, a division that animal protection straddles precariously,[116] and also partly to the semi-privatization of animal welfare law enforcement.

115. Montgomery, *supra* note 99 at 207.

116. On the allocation of constitutional jurisdiction over animals and animal protection, see Monique Herbert, "Animal Protection: An Overview" (Ottawa: Library of Parliament, 1984).

A. Criminal Law

Under Section 91(27) of the *Constitution Act, 1867*,[117] the federal government has jurisdiction to enact criminal law. The *Criminal Code*[118] includes several offences related to harming or killing animals, including the offence of causing unnecessary suffering to animals, set out in section 445.1(1)(a) of the *Code*. The offence is committed if a person "wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird".[119]

On the apparent meaning of this provision, it is possible — at least theoretically — that keeping cetaceans in captivity could be a criminal matter under the general animal cruelty provision, independent of the new amendment to the Code that specifically bans it. The scientific consensus at this time appears to be more or less clear that confinement in small spaces and isolation from normal social relationships does cause these animals to suffer.[120] Situations where animals endure painful health problems due to the conditions they are kept in — for example, the eye and skin injuries that numerous seals, walruses and belugas suffered at Marineland apparently because of water quality problems, revealed in the *Star* investigation — would yet more obviously meet the element of causing "pain, suffering or injury".[121] The question is whether in the

117. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].
118. *Criminal Code*, *supra* note 14.
119. *Ibid*, s 445.1(1)(a).
120. Marino & Frohoff, *supra* note 27. See also discussion in Thomas I White, "Dolphins, Captivity, and SeaWorld: the Misuse of Science" (2017) 122:1 Business and Society Review 119.
121. *Criminal Code*, *supra* note 14, s 445.1(1)(a).

circumstances suffering is unnecessary, and willfully caused,[122] within the meaning of the statute. In practice, these requirements are very difficult to establish on a criminal standard of proof, and criminal prosecutions for animal cruelty are usually limited to situations of gratuitous violence and sadistic abuse.[123] Use of animals in a commercial context rarely triggers criminal liability, even in situations where there is little argument that the animals suffer (and could suffer less with improvements in their treatment).

Although criminal law does theoretically set outer limits on how owners and custodians of captive cetaceans can treat the animals they are responsible for, practically speaking the criminal law as it stood before Bill S-203 was essentially irrelevant to the regulation of cetacean captivity.

B. Fisheries and Oceans

The federal government has jurisdiction over coastal waters and inland fisheries pursuant to section 91(12) of the *Constitution Act, 1867*.[124] The *Fisheries Act*[125] is the main piece of Canadian legislation that governs fishing, including of marine mammals (which are defined as 'fish' under the statute).[126] Regulations promulgated under the *Fisheries Act*, the *Marine Mammal Regulations*,[127] set out the rules for hunting and capture

122. Proving the mental element is challenging due to the legal complexity of the required *mens rea* standard of wilfulness. An opportunity to clarify the law on this question was, regrettably, not fully taken advantage of by the British Columbia Court of Appeal in *R v Gerling*, 2016 BCCA 72 (where some of the analysis may risk making it more difficult for the Crown to establish wilfulness than appears to have been intended by the legislator). See discussion in Peter Sankoff, "The Mens Rea for Animal Cruelty After R. v. Gerling: A Dog's Breakfast" (2016) 26 Criminal Reports (7th) 267, especially at 271.
123. Bisgould, *supra* note 38 at 71–75.
124. *Constitution Act, 1867*, *supra* note 117.
125. *Fisheries Act*, *supra* note 18.
126. *Ibid*, s 2 (the interpretation section provides that the term "fish" includes marine animals, any parts of marine animals, and the eggs and sperm of marine animals).
127. SOR/93-56.

of marine mammals. The federal government department responsible for these rules and for Canada's ocean policies is Fisheries and Oceans Canada, known by the acronym DFO (from its former title, the Department of Fisheries and Oceans).

The regime under the *Fisheries Act* and the *Marine Mammal Regulations* does not impose an outright ban on taking cetaceans from the wild to put them on display, but hunting or taking of marine mammals and transportation of marine mammals across provincial borders is legal only under a license granted by DFO.[128] DFO has not granted licenses to take cetaceans for captive maintenance in Canada since the 1990s.[129] But there are no prohibitions on importing live cetaceans or their reproductive material, or on captive breeding. Furthermore, DFO has no authority to monitor or direct the welfare conditions for cetaceans that are kept in captivity. This matter is really beyond the scope of federal jurisdiction over fisheries and, as discussed in Part IV.C, falls within provincial jurisdiction to regulate animal welfare standards. Thus, although DFO has the authority to regulate capture of cetaceans from the wild (and has effectively ended that practice in Canadian waters), it is not well equipped to address the ongoing ethical and animal welfare concerns that arise from keeping cetaceans in captivity.

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128. Section 5 of the *Marine Mammal Regulations* provides that no person may fish for marine mammals except under the authority of a licence issued under the regulations (with exceptions for fishing pursuant to Aboriginal rights). 'Fishing' is defined in section 2 of the *Fisheries Act* as "fishing for, catching or attempting to catch fish by any method". Section 16(1) of the *Marine Mammal Regulations* prohibits the transportation of marine mammals or marine mammal parts from one province to another except under a marine mammal transportation licence issued by DFO. Section 15(c) requires the issuance of a marine mammal transportation licence, upon application, "in respect of any marine mammal or marine mammal parts to be used for experimental, scientific, educational or public display purposes".
129. Lien, *supra* note 4 at 5.

C. Provincial Animal Welfare Law

Under section 92(13) of the *Constitution Act*, Canadian provincial governments have authority to legislate with respect to "property and civil rights in the province",[130] and under section 92(16) the provinces have jurisdiction over "matters of a merely local or private nature in the province".[131] Legally, nonhuman animals, including cetaceans, are property. Regulating the conditions in which animals are kept means regulating property and local concerns in the province and is thus a matter of provincial jurisdiction.[132] In Ontario (where Marineland is situated) the main provincial animal welfare law is the *Ontario Society for the Prevention of Cruelty to Animals Act* ("*OSPCA Act*").[133] In British Columbia (home of the Vancouver Aquarium) it is the *Prevention of Cruelty to Animals Act* ("*PCA Act*").[134]

A common feature of provincial animal welfare laws, which appears in both the Ontario and British Columbia statutes, is a generally applicable prohibition on subjecting animals to 'distress'. This typically includes keeping an animal in a situation where it does not have adequate space, food, water, or veterinary care, or is in pain or suffering, together with more specific regulatory standards of care for the conditions in which animals must be kept (which can vary considerably between provinces and depending on the type of animal and the context).[135] These provisions are typically coupled with exemptions from liability for animal husbandry practices that are commonly followed or are the industry norm.[136]

Section 11.2 of the *OSPCA Act* prohibits causing an animal to be in distress, or permitting an animal to be in distress if one is the owner or custodian. "[D]istress" is defined as "the state of being in need of proper care, water, food or shelter or being injured, sick or in pain or suffering or being abused or subject to undue or unnecessary hardship, privation

130. *Constitution Act, 1867*, *supra* note 117.
131. *Ibid*.
132. Herbert, *supra* note 116.
133. RSO 1990, c O.36 [*OSPCA Act*].
134. RSBC 1996, c 372 [*PCA Act*].
135. Bisgould, *supra* note 38 at 106.
136. *Ibid* at 107–109.

or neglect".[137] Section 11.1(2) exempts from the distress prohibition all activities "carried on in accordance with reasonable and generally accepted practices of agricultural animal care, management or husbandry"[138] and, where regulations are specified for a class of animals, activities carried out in accordance with the regulations.

The *OSPCA Act* was amended in 2015, in the aftermath of the *Star* investigation of Marineland, to prohibit possession and breeding of orcas in Ontario.[139] Possession of orcas that were already in captivity when the amendment came into force is exempt.[140] Effectively, the statute now requires that orca captivity will be phased out in Ontario — but it permits Marineland to retain the single orca (Kiska) who is still living there.

In addition, after the Marineland scandal, Ontario brought in new regulations[141] under the *OSPCA Act* establishing standards of care and administrative requirements specific to marine mammals kept in captivity ("Standards of Care"). These are the first, and so far the only, such standards to be adopted by a Canadian province.[142] In the wake of the *Star* investigative series, the Ontario Ministry of Community Safety and Correctional Services, which is responsible for administering the province's animal welfare laws, commissioned an expert report on captive marine mammal welfare from a panel chaired by University of British Columbia marine biologist, Dr. David Rosen.[143] The report was completed in 2014, and the government then drafted the new Standards of Care based on its recommendations. The new regulations were adopted in 2016.

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137. *OSPCA Act*, *supra* note 133, s 1.
138. *Ibid*, s 11.1(2).
139. *Ibid*, s 11.3.1(1).
140. *Ibid*, s 11.3.1(2), (3).
141. O Reg 60/09.
142. O Reg 438/15, amending O Reg 60/09 [Standards of Care].
143. Ontario Ministry of Community Safety and Correctional Services, *Developing Standards of Care for Marine Mammals in Captivity and Recommendations Regarding How Best to Ensure the Most Humane Treatment of Captive Cetaceans* (30 May 2014), online (pdf): <www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/ec167997.pdf>.

The Standards of Care require anyone in possession of a marine mammal to establish a committee with expertise, experience, and independence[144] to be responsible for developing and maintaining an animal welfare plan for each captive marine mammal. The plan is required to address such matters as food, social interaction, environmental enrichment, air, breeding, and euthanasia.[145] The Standards of Care also establish detailed requirements for appropriate enclosures with sufficient space and features to meet the animal's needs,[146] and for monitoring and maintaining proper water quality.[147]

In British Columbia, the basic statutory framework is similar, but there are no specific regulations tailored to the needs of marine mammals or cetaceans.

Section 9(1) of the *PCA Act* provides that "[a] person responsible for an animal must care for the animal, including protecting the animal from circumstances that are likely to cause the animal to be in distress",[148] section 9.1(2) provides that "[a] person responsible for an animal must not cause or permit the animal to be, or to continue to be, in distress",[149] and section 23.2(1) provides that no person may cause an animal to be in distress.[150] "[D]istress" exists if the animal is deprived of adequate

144. Standards of Care, *supra* note 142, s 7(3)–(4), (the committee must include a marine mammal veterinarian (who must chair the committee), a resident of the local community who is not an employee or independent contractor of the person in possession of the marine mammal, a person who has studied marine mammal biology and is not an employee or independent contractor of the person in possession of the marine mammal, a person who is responsible for the daily care of the marine mammal, and a person who is responsible for the maintenance of the location where the marine mammal is kept. For the relevant parts of the welfare plan the commitee must consult with a person or persons with expertise in the social and enrichment needs of the marine mammal's species (s 8(2)).
145. *Ibid*, s 8(1).
146. *Ibid*, s 17.
147. *Ibid*, s 18.
148. *PCA Act*, *supra* note 134, s 9(1).
149. *Ibid*, s 9.1(2).
150. *Ibid*, s 23.2(1).

food, water, shelter, ventilation, light, space, exercise, care or veterinary treatment; kept in conditions that are unsanitary; not protected from excessive heat or cold; injured, sick, in pain or suffering; or abused or neglected.[151] Section 24.02(c) exempts from offences, in relation to distress, activities "carried out in accordance with reasonable and generally accepted practices of animal management that apply to the activity in which the person is engaged".[152] Regulated activities are required to be carried out in accordance with the applicable regulations.[153]

British Columbia has not adopted regulations establishing standards of care specifically for captive cetaceans, and it seems unlikely that the government will look to do so given Vancouver Aquarium's announcement that it plans to phase out its captive cetacean holdings.

In British Columbia, therefore, the operative provincial legal standard concerning the conditions of cetacean captivity is by default the general requirement that animals not be subjected to 'distress' — meaning that they cannot be made to suffer, or kept without adequate food, space or veterinary care — but only if distress results from activities that diverge from the "reasonable and generally accepted practices"[154] followed in the activity of keeping captive cetaceans. This was also the relevant standard in Ontario before the adoption of the specific Standards of Care for captive marine mammals in 2016.

This imprecise legal standard, coupled with the exemption for reasonable and generally accepted practices, means that enforcing and applying the law is challenging. *Prima facie*, it may indeed seem that cetaceans kept in captivity experience distress, if they are subjected to poor welfare conditions (such as contaminated water or badly designed enclosures), or even because being in captivity in and of itself creates suffering — as the Committee witnesses on Bill S-203 argued — for animals who are used to swimming free over vast distances and being part of rich and complex social relationships. But, assuming there is suffering or distress, there would still be significant uncertainty about whether

151. *Ibid*, s 1.
152. *Ibid*, s 24.02(c).
153. *Ibid*, s 24.02 (b), (c).
154. *Ibid*, s 24.02(c).

legal liability would be triggered. There is only one entity in British Columbia that engages in the activity of keeping cetaceans in captivity: the Vancouver Aquarium. Arguably, whatever it does *is* the 'generally accepted practice' for that activity in the province (although that would not in itself establish that the practices in question are 'reasonable'). As David Wolfson and Mariann Sullivan have argued (with respect to farming, but the observation applies to other animal-use industries as well), statutory exemptions for 'customary' or 'generally accepted' practices can have the effect — quite remarkable from a rule-of-law standpoint — of allowing animal-use industries to define through their own practices what constitutes cruelty, thus "delegating enforcement power to the industry itself".[155]

Another limitation on the effectiveness of animal welfare laws is the unique system of investigation and enforcement of those laws. Police powers over inspections, assessment, investigations and enforcement are shared between the public authorities and private animal protection organizations. These private animal protection societies have primary responsibility for overseeing compliance with animal protection law, including federal criminal law as well as provincial legislation. [156] In Ontario, the relevant body is the OSPCA,[157] and in British Columbia it is the BC SPCA.[158]

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155. David J Wolfson & Mariann Sullivan, "Foxes in the Henhouse: Animals, Agribusiness and the Law: A Modern American Fable" in Cass R Sunstein & Martha C Nussbaum, eds, *Animal Rights: Current Debates and New Directions* (Oxford: Oxford University Press, 2004) 205 at 215.
156. Bisgould, *supra* note 38 at 110–111; Animal Justice Canada, *OSPCA Act: A Better Way Forward: A Report on the Ontario Society for the Prevention of Cruelty to Animals Act* (2013), online (pdf): <animaljustice.ca/wp-content/uploads/2014/02/Animal-Justice-OSPCA-Act-A-Better-Way-Forward-FINAL-140119.pdf> [*A Better Way Forward*].
157. Sections 2 through 10 of the *OSPCA Act*, *supra* note 133, provide for the continuation of the OSPCA (which was incorporated under earlier legislation), set out its constitutive rules, and establish its police powers.
158. Sections 3 through 9 of the *PCA Act*, *supra* note 134, continue the BC SPCA and establish its constitutive rules; its powers and duties are set forth in other provisions throughout the statute.

There is much about this enforcement system that is anomalous and troubling, and that arguably weakens the practical effectiveness of laws that are supposed to protect animals.[159] With respect to cetacean captivity, two points in particular are worth noting. First, the private animal protection societies have combined responsibilities for both investigation and enforcement of animal protection law, and for providing shelter for lost, abandoned and seized animals. This means that their expertise and resources naturally tend to focus on the kinds of animals that they are most often responsible for sheltering and rehoming: domestic pets, especially cats and dogs.

Second, private animal protection societies receive a significant amount of their funding from private donors. For this reason, too, it is to be expected that they prioritize caring for animals whose plight strikes an emotional chord with donors. Again, that typically means pets. Private animal protection societies do not have (and cannot reasonably be expected to have) much specialized understanding of whale and dolphin biology or of their natural behaviours, of the way they live in the wild or of their welfare needs. Accordingly, the ability of the OSPCA and the BC SPCA to oversee compliance with animal welfare law for captive

159. A full discussion of the weaknesses of a system of oversight and enforcement through private animal protection societies is beyond the scope of this article, but it bears noting that this has been a significant area of concern for animal advocates for many years. For further information, see *e.g. A Better Way Forward*, *supra* note 156, the proposals of Animal Justice Canada concerning separation of the OSPCA's shelter and investigatory functions, and improved legislative oversight of the OSPCA. The Ontario Superior Court of Justice recently ruled in *Bogaerts v Attorney General of Ontario*, 2019 ONSC 41, that certain aspects of enforcement of animal welfare law by the OSPCA were a violation of the principles of fundamental justice under section 7 of the Charter of Rights and Freedoms. The OSPCA has announced its intention to end enforcement work. It is unclear what the province will do about enforcement of animal welfare law going forward.

cetaceans is inherently limited.[160] Furthermore, one of the tools in their enforcement portfolio, seizure of animals who are kept in distress or suffering, is of no practical use here; the OSPCA or BC SPCA could not feasibly seize or care for such large animals with such specialized needs.[161]

This is not to suggest that the societies have played no role in the controversy over cetacean captivity. The BC SPCA, as noted above, took an active role from the start of the Moby Doll incident, and is an active participant in the current debate over captivity. It has issued a position statement on marine mammal welfare stating its opposition "to the capture, confinement and breeding of marine mammals for entertainment or educational display",[162] because captivity is detrimental to the welfare of "wild animals who require large and diverse aquatic habitats to live".[163] The OSPCA investigated allegations of abuse at Marineland, issued orders for changes at the park,[164] and later announced animal cruelty charges against Marineland (which were later dropped by prosecutors).[165] The argument is, rather, that this is not the system one would design, given a clean slate, for optimal monitoring and enforcement of legal standards for captive cetacean welfare. The animal protection societies are

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160. Diebel & Casey, *supra* note 102*, The Toronto Star* reporters who had the most significant roles in investigating and reporting on animal suffering at Marineland, observed that the OSPCA had "no expertise on sea mammals or captive wild animals" and that OSPCA chair Rob Godfrey had said in a phone interview in the wake of the exposure of problems at Marineland that the society was "in over its head" at 38.
161. Bisgould, *supra* note 38 at 263.
162. "Position Statement on Marine Mammal Welfare" (2018), online: *BC SPCA* <spca.bc.ca/programs-services/leaders-in-our-field/position-statements/position-statement-marine-mammal-welfare/>.
163. *Ibid*.
164. Linda Diebel & Liam Casey, "OSPCA Investigation Ends as Marineland Complies with Orders" (30 April 2013) online: *The Toronto Star* <www.thestar.com/news/canada/2013/04/30/ospca_investigation_ends_as_marineland_complies_with_orders.html>.
165. The Canadian Press, "Marineland Sees Animal Cruelty Charges Dropped" (10 August 2017), online: *The Toronto Star* <www.thestar.com/news/canada/2017/08/10/animal-cruelty-charges-dropped-against-marineland.html>.

not specialists in this area, and have had to take it on as a responsibility that is peripheral to their main roles.

D. Canadian Council on Animal Care Guidelines

The Canadian Council on Animal Care ("CCAC") is a peer review agency that establishes and maintains guidelines for the ethical use of animals in scientific research in Canada. It is not a government agency; it is a nonprofit corporation, independent of government, funded by public research programs (mainly the Canadian Institutes of Health Research and the Natural Sciences and Engineering Research Council of Canada) and by fees from research institutions that participate in the CCAC program.[166] Institutions are not legally bound to follow CCAC standards or to be assessed by the CCAC for compliance — but research institutions receiving federal public funding (mainly universities and government research institutions) must comply with the CCAC program as a condition of funding. In addition, private research facilities that are not publicly funded may opt into the program as a visible way of enhancing their legitimacy.

CCAC guidelines are for animals used in research, and do not apply to pure entertainment facilities like Marineland. But the Vancouver Aquarium collaborates with the University of British Columbia on marine mammal research and follows CCAC guidelines.[167]

In 2014, the CCAC adopted a detailed, 73-page guideline on care and use of marine mammals (including cetaceans).[168] At present, the CCAC guidelines are not directly relevant to any cetaceans in captivity;

166. Bisgould, *supra* note 38 at 208–214; Montgomery, *supra* note 99 at 96–112.

167. Memorandum from General Manager–Parks and Recreation to Board Members–Vancouver Park Board (23 July 2014) "Review of Captive Cetaceans in Stanley Park" online (pdf): <parkboardmeetings.vancouver.ca/2014/140726/documents/REPORT-ReviewofCaptiveCetaceansinStanleyPark-2014-07-26.pdf>.

168. "CCAC guidelines on: the care and use of marine mammals" (Ottawa: Canadian Council on Animal Care, 2014), online (pdf): *Canadian Council on Animal Care* <www.ccac.ca/Documents/Standards/Guidelines/CCAC_Marine_Mammals_Guidelines.pdf>.

the sole cetacean remaining at Vancouver Aquarium, Helen the white-sided dolphin, does not appear to be used for research. The guidelines are, however, a good indication of current expert opinion on best practices for keeping cetaceans in captivity. Similar to Ontario's Standards of Care, they require oversight by an animal care committee, and an animal husbandry regime based on current evidence on the conditions that best support a good quality of life for the animals.

E. Canada's Accredited Zoos and Aquariums

CAZA is a private industry association that accredits facilities that opt into following its standards and policies.

Vancouver Aquarium is a CAZA member. It was the first aquarium to be accredited by the American Zoo and Aquarium Association, in 1975.[169] It became accredited by CAZA in 1987.[170]

Marineland used to be CAZA-accredited, but is no longer. In 2012, CAZA inspected Marineland following complaints about low staffing levels and water quality problems by former Marineland trainer Phil Demers, who was one of the whistleblower sources for the *Star* investigative series.[171] CAZA's Accreditation Committee released a decision in which it stated that:

> at the time of the site inspection the animals in question in the Marineland collection, including the marine mammals were in overall good health and there was no evidence of animal abuse, that water quality in all the pools was very good, and it appeared that staffing levels were adequate.[172]

At the same time, the statement noted that the investigation had

169. "The History of Canada's Largest Aquarium" (2018), online: *Vancouver Aquarium* <www.vanaqua.org/about/history>.

170. *Ibid*.

171. "Marineland Bows Out of CAZA" (4 May 2017), online: *Niagara Falls Review* <www.niagarafallsreview.ca/news-story/8194517-marineland-bows-out-of-caza/>.

172. The 2012 accreditation decision is no longer available on CAZA's website, but the complete text of the decision is included in a statement by Marineland that is still up on Marineland's site: "Statement regarding Canada's Accredited Zoos and Aquariums (CAZA) Findings" (3 October 2012), online: *Marineland* <www.marineland.ca/general/media_releases/>.

raised questions about how well water quality systems in some pools were working, and announced that Marineland had agreed to work on improvements, undergo further inspections (including unannounced inspections) and report on its progress to CAZA.[173] CAZA accreditation is for a five-year period. Five years later (in 2017), when Marineland was coming up for re-accreditation, the park announced that it was voluntarily withdrawing from CAZA membership.[174] This episode illustrates the inefficacy of voluntary self-regulatory regimes like CAZA. The process is ultimately toothless because the option to exit is always available.

F. Summary: A Regulatory Gap

In 1999, Jon Lien, a whale expert based at Memorial University in Newfoundland, conducted a review for DFO of marine mammal captivity in Canada. He observed that there are "serious inadequacies in regulating the captive maintenance of marine mammals in Canada".[175] Lien summarized the inadequacies in a list:

> DFO, or other regulatory authorities, do not have adequate powers to enforce conditions of captive care and welfare of marine mammals.
>
> There are, at present, no recognized standards for captive marine mammal care for all holding facilities in Canada.
>
> There is no independent, transparent inspection programme that is publicly accountable for ensuring appropriate captive care of marine mammals.
>
> There are inadequate controls on the import and export of marine mammals to or from Canada.
>
> Captive breeding programmes for cetaceans are operating on a small genetic base without adequate planning or coordination.
>
> There are inadequate demonstrations of the educational value of exposure to captive marine mammals.[176]

Twenty years later, all of this is still true. It is also true that there have been

173. *Ibid*.
174. "Marineland Bows Out of CAZA", *supra* note 171.
175. Lien, *supra* note 4 at 78.
176. *Ibid*.

improvements. Ontario's new Standards of Care represent real progress in developing a regulatory framework tailored to the special needs of cetaceans in captivity based on scientific evidence. The restrictions on live capture of cetaceans for public display reflect environmentalist concerns about the destructive impact of the "blackfish gold rush"[177] on vulnerable populations.

Nevertheless, it is still the case that through a combination of the absence of law, ambiguity, or weakness in the laws that do exist, and inadequate oversight and enforcement, there is a lack of effective legal protection, and the whales and dolphins kept inside are for the most part at the mercy of their owners. Furthermore, apart from Ontario's ban on possessing captive orcas (limited to just that species), none of the laws, regulations and standards outlined above are concerned with limiting or prohibiting the practice of cetacean captivity itself. Experts like Whitehead, Marino, and Rose argue that it is inherently wrong to keep these large, cognitively and socially complex creatures in captivity for our enjoyment — and, as public opinion like the Angus Reid Poll[178] indicates, more and more Canadians agree. Until now, however, that position was not reflected in Canadian law. This is where Bill S-203 marks a fundamental change from the laws in place before.

In a sense, the significance of Bill S-203 could be said to be more symbolic than practical, measured by the number of animal lives it is likely to affect. Ontario has already enacted provincial legislation outlawing the captivity of orcas that is as strong (for those particular cetaceans) as Bill S-203, as well as groundbreaking legal standards to protect the welfare of marine mammals in captivity. Vancouver Aquarium has only one cetacean left and has announced its intention to voluntarily discontinue its captive whale and dolphin program. But this situation is contingent. Vancouver Aquarium could change its mind. Businesses in other provinces, where there are no rules like Ontario's, could look to acquire and display their own cetaceans, without any regulatory scheme forcing them to keep the animals in conditions designed with their welfare needs in mind. The

177. Leiren-Young, *supra* note 54 at 117.

178. Angus Reid Poll, *supra* note 4.

current regulatory gap leaves those possibilities open.

V. Global Context: Whaling, Captivity, and Controversy

The debate over cetacean captivity in Canada takes place against a background of discussion and evolving ideas about the moral and legal status of whales and dolphins around the world. The focus of this article is on Canada, so a full analysis of the developments in both international law and domestic law of other countries would be out of place here. A brief summary is, however, appropriate because it should illuminate how evolving public opinion and legislation on these matters in Canada connects to the global debate.

A. International Law: Cetacean Personhood?

The international discussion about cetaceans has foregrounded profound questions about the nature of these animals, their moral status, and how humans should treat them. At the heart of the debate is the question of whether cetaceans should be recognized as *persons*: beings endowed with innate moral or legal rights. The proposition that whales have an inherent right to life, inchoately expressed in public international law, was advanced by Antony D'Amato and Sudhir K Chopra in an influential 1991 law review article.[179] Neither the proposition that whales have the right to life nor the broader concept of cetacean personhood and rights is concretely reflected in law. But these ideas have gradually become more mainstream, at least as topics of debate and reflection.

At an interdisciplinary conference in Helsinki, Finland in 2010, a group of scientists, philosophers and legal scholars adopted a Declaration of Rights for Cetaceans, affirming that whales and dolphins are persons, that they have basic rights enumerated in the Declaration, and that "[n]o cetacean should be held in captivity or servitude; be subject to

179. Anthony D'Amato & Sudhir K Chopra, "Whales: Their Emerging Right to Life" (1991) 85:1 American Journal of International Law 21. For a critical view of D'Amato and Chopra's argument as based on limited and insufficiently rigorous science, see Jefferies, *supra* note 2 at 93.

cruel treatment; or be removed from their natural environment".[180] An introductory note on the Declaration published in the International Journal of Wildlife Law and Policy in 2011 contends that the "moral and legal status" of cetaceans "should undergo radical change" in light of increasing evidence that "cetaceans possess a capacity for self-consciousness and refined mental skills, and live in societies in which culture plays a vital role".[181] In 2012, the Annual Meeting of the American Association for the Advancement of Science in Vancouver included a panel on the Declaration and cetacean personhood,[182] indicating a degree of receptiveness to these ideas in mainstream scientific circles, at least as a topic of discussion.

If cetaceans have rights or personhood, then basic morality would require that the law concerning human interactions with them should go beyond merely reducing the ecological damage caused by taking them from the wild and mitigating the negative welfare impacts on cetaceans who are kept in captivity. Recognition of cetacean rights would require addressing the fundamentally normative question of whether it is inherently wrong to keep them in captivity for display and entertainment.

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180. For a brief background discussion and abstracts of the conference presentations, see "Introduction to the Declaration of Rights for Cetaceans: Whales and Dolphins" (2011) 14:76–77 Journal of International Wildlife Law & Policy 76 [Introduction]. See also "Short Abstracts from the Conference: 'Cetacean Rights: Fostering Moral and Legal Change,' Providing the Collective Rationale for the Decision Issued at the End of the Meeting" (2011) 14:76–77 Journal of International Wildlife Law & Policy 78. Participants in the conference included Lori Marino and Hal Whitehead. The Declaration itself is appended to the latter article beginning at 80, and is also available online: <www.cetaceanrights.org/>.

181. Introduction, *ibid* at 77.

182. "Declaration of Rights for Cetaceans: Ethical and Policy Implications of Intelligence" (Session at Annual Meeting, 19 February 2012), online: *American Association for the Advancement of Science* <aaas.confex.com/aaas/2012/webprogram/Session4617.html>.

B. The International Whaling Regime

Decades before the captivity debate, the original international controversy about human use of whales concerned lethal commercial whaling. The beginning of the practice of keeping cetaceans in aquariums and marine parks overlapped with the end of whaling as a commercially significant enterprise.[183] During that period, there was a significant change in public awareness of and attitude towards cetaceans, which probably contributed (along with a decline in demand for whale products) to the decline of commercial whaling. Whaling was not the subject of much mainstream public discussion or controversy until the emergence of the global anti-whaling movement in the 1970s and 1980s.[184] Although some populations of whales had been hunted almost to extinction in the nineteenth century and the first half of the twentieth, passionate and widespread popular opposition to whaling emerged only when the industry was already in decline because demand for its products had fallen away. It is probably not a coincidence that this was also the time when more and more people were 'meeting' cetaceans, or encountering emotionally powerful images of them, in the context of captivity and entertainment. For example (as discussed above), leaders of the anti-whaling movement like Vancouver's Paul Spong became convinced of the specialness of cetaceans because of personal experience with captive animals in aquariums.

The international legal regime regulating whale hunting has changed

183. Leiren-Young, *supra* note 54, highlights the contrast between the once-prevalent view in Vancouver of whales as a useful and unexciting natural resource, and the new romantic fascination with the creatures that began with Moby Doll (as well as the overlap in timelines between the end of the former and the start of the latter). For example, on the same day that Newman was appointed to head the Vancouver Aquarium, a local paper ran ads for fertilizer made from blue whale meal (at 27–28), and during the media frenzy over Moby Doll an editorial reminded people that cans of diced whale loin used to be available in local grocery stores for ten cents (at 84).

184. For an account of the clash between the whaling industry and the global anti-whaling movement written at the height of the conflict, see David Day, *The Whale War* (San Francisco: Sierra Club Books, 1987).

its focus over the years, from beginning as a mechanism for whaling nations to cooperate on sharing a finite resource in an organized way, then evolving over the years to reflect conservationist principles and, eventually, morally-grounded opposition to all consumptive whaling, as reflected in the International Whaling Commission's adoption of a moratorium on all commercial whaling in 1982. D'Amato and Chopra have argued that the international legal regime regulating whaling exhibits a series of five successive 'analytic stages', beginning with the 'free resource' stage (essentially without constraints on whaling) through "regulation, conservation, protection and preservation"[185] — possibly with a sixth, emergent stage reflecting on recognition of the whales' entitlement to basic rights.

Although the approach of much of the international community has shifted in the direction D'Amato and Chopra describe, the regulation of commercial whaling was still a matter of intense controversy when their article was written, and it remains so today.[186] Recently this conflict reached the International Court of Justice ("ICJ"), when Australia successfully challenged the legality of Japan's whaling program under the scientific research exemption to the moratorium under the *International Convention for the Regulation of Whaling*.[187] In that case, *Whaling in the*

185. D'Amato & Chopra, *supra* note 179 at 23. See also Werner Scholtz, "Killing Them Softly? Animal Welfare and the Inhumanity of Whale Killing" (2017) 20:1 Journal of International Wildlife Law & Policy 18 (arguing that animal welfare concerns have taken on increasing importance in the international whaling regime, potentially indicating a gradual paradigm shift towards an ethic of preservation and acknowledgment of the moral significance of animals).

186. See discussion of divergent ethical perspectives on whales and whaling in Cinnamon Pinon Carlane, "Saving the Whales in the New Millennium: International Institutions, Recent Developments and the Future of International Whaling Policies" (2005) 24:1 Virginia Environmental Law Journal 1 at 41–45.

187. *International Convention for the Regulation of Whaling of 1946*, 2 December 1946, 161 UNTS 74 (entered into force 10 November 1948).

Antarctic,[188] the ICJ found that the Japanese whaling program in place at the time exceeded the scope of the treaty exemption for research. The majority of the ICJ judges were careful to separate what they characterized as a fairly narrow legal and textual question from deeper, more far-reaching questions about the morality of whaling or the international community's policies regarding whales, which they declined to address.[189]

The international whaling regime does not expressly address the question of cetacean captivity for public display — and, aside from the capture of animals (which may happen in international waters and/or affect migratory populations), this does appear primarily a domestic rather than an international matter. In many countries where commercial lethal whaling is just a historical memory, domestic law has changed, or changes are proposed, to end or at least limit captivity. The controversy over captivity of live cetaceans is a new battleground where ideas and beliefs about the moral and legal status of cetaceans play out.

C. Captivity and Legal Reform in the United States

Probably the most relevant comparison for Canada is to the United States, our immediate neighbour, with whom we share border-straddling cetacean populations — including the Southern resident orca community that Moby Doll belonged to. The US acted sooner than Canada to end live-capture for captivity. The *Marine Mammal Protection Act*,[190] passed in 1972 to prevent extinction and depletion of marine mammals due to human activities,[191] imposed a moratorium on taking and importing marine mammals and marine mammal products.[192] However, under an

188. *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*, [2014] ICJ Rep 226, online (pdf): <www.icj-cij.org/docket/files/148/18136.pdf>.

189. *Ibid* ("[t]he Court observes that…it is not called upon to resolve matters of scientific or whaling policy. The Court is aware that members of the international community hold divergent views about the appropriate policy towards whales and whaling, but it is not for the Court to settle these differences" at para 69).

190. 16 USC § 1361 *et seq*.

191. 16 USC § 1361.

192. 16 USC § 1371.

exception to the moratorium, permits may be granted by the National Oceanic and Atmospheric Agency ("NOAA") to take or import cetaceans for public display.[193] The NOAA has not granted such a permit in twenty-five years.[194] Effectively (rather like in Canada) there is a *de facto* but not a *de jure* prohibition on live capture for public display.

In 2012, the Georgia Aquarium applied for a permit to import eighteen wild-caught beluga whales from Russia — the first such application in twenty years.[195] The NOAA received extensive public comments opposing the permit, indicating a high degree of public opposition to the cetacean display industry.[196] After a year of deliberations, the agency denied the application, citing potential adverse effects on the wild population.[197] That decision was upheld by the US District Court of Atlanta in 2015.[198] The Georgia Aquarium subsequently announced that it would not appeal the District Court decision and would cease seeking to import wild-caught belugas.[199]

There has been legislative action at the state level to restrict and

193. 16 USC § 1374.
194. Elizabeth Lewis, "Whale Wars: Reconciling Science, Public Opinion, And The Public Display Industry Under The Marine Mammal Protection Act" (2014) 66:4 Administrative Law Review 861.
195. *Ibid*; Kenneth Brower, "The Great White Whale Fight" (1 June 2013), online: *National Geographic* <news.nationalgeographic.com/news/2013/13/130531-beluga-whale-dolphin-marine-mammal-georgia-aquarium-capture-free-willie-narwhal/>.
196. Lewis, *supra* note 194.
197. "Georgia Aquarium Application to Import 18 Beluga Whales Denied (File No. 17324)" (5 August 2013), online: *National Oceanic and Atmospheric Administration* <www.fisheries.noaa.gov/national/marine-mammal-protection/georgia-aquarium-application-import-18-beluga-whales-denied-file-no-17324>.
198. *Georgia Aquarium, Inc v Pritzker*, 134 F Supp 3d 1374 (ND Ga 2014).
199. Bo Emerson, "Georgia Aquarium: Future of Belugas Questioned" (18 November 2015), online: *The Atlanta Journal-Constitution* <www.ajc.com/news/georgia-aquarium-future-belugas-questioned/mOVa0snqCw7BxVuFsEz2IL/>.

phase out cetacean captivity.[200] Notably, in 2016 California passed the *Orca Protection and Safety Act*,[201] which bans breeding captive orcas and presenting orca performances for entertainment. It does, however, permit 'educational presentations' of orca performance displays. An educational presentation is defined as "a live, scheduled orca display in the presence of spectators that includes natural behaviors, enrichment, exercise activities, and a live narration and video content that provides science-based education to the public about orcas".[202] Before this law was passed, SeaWorld (whose flagship location is in San Diego) had already announced a voluntary commitment to end its captive breeding program and phase out killer whale shows, following negative publicity and criticism in response to the *Blackfish* documentary.[203]

California's example inspired a move to enact federal legislation that would phase out orca captivity throughout the US. In 2015 and then again in 2017 Representative Adam Schiff introduced the *Orca Responsibility and Care Advancement (ORCA) Act*,[204] which would prohibit captive breeding, wild capture, and import and export of orcas, so that orca captivity would cease with the end of the current generation.[205]

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200. In addition to the California law summarized here, similar bills have been introduced (but have not passed) in Washington and New York, a non-binding resolution was introduced in Hawaii, and South Carolina has banned the display of cetaceans in the state. See "Cetacean Anti-Captivity Legislation and Laws" (2018), online: *Animal Welfare Institute* <awionline.org/content/cetacean-anti-captivity-legislation>.
201. Fish and Game Code § 4502.5 (West 2016). See also summary in Kaci Hohmann, "2016 State Legislative Review" (2017) 23:2 Animal Law 521 at 536–537.
202. *Ibid,* § 4502.5(d)(1) (West 2016).
203. David Kirby, "California Lawmakers Pass Bill Banning Orca Shows, Captive Breeding" (26 August 2016), online: *Takepart* <www.takepart.com/article/2016/08/26/california-lawmakers-pass-bill-banning-orca-shows-captive-breeding>.
204. US, Bill HR 1584, 115 Cong, 2017.
205. Congressman Adam Schiff, "Rep. Schiff Reintroduces ORCA Act to Phase Out Display of Captive Killer Whales" (17 March 2017), online: <schiff.house.gov/news/press-releases/rep-schiff-reintroduces-orca-act-to-phase-out-display-of-captive-killer-whales>.

D. Captivity Bans and Regulation in Other Countries

Some other nations have already taken more unequivocal steps to prohibit cetacean captivity. India's Central Zoo Authority issued a circular in 2013 announcing the government's decision not to allow dolphinaria in the country and advising state governments to reject all proposals involving "import, capture of cetacean species to establish for commercial entertainment, private or public exhibition and interaction purposes whatsoever" [*sic*].[206] The introductory clauses of this circular assert that:

> cetaceans in general are highly intelligent and sensitive, and various scientists who have researched dolphin behavior have suggested that the unusually high intelligence; as compared to other animals means that dolphin should be seen as 'non-human persons' and as such should have their own specific rights and is morally unacceptable to keep them captive for entertainment purpose [*sic*].[207]

Chile and Costa Rica banned cetacean captivity (with limited exceptions, not including public display) in the 2000s.[208] The United Kingdom adopted very strict standards for cetacean captivity in the early 1990s; because the cost of compliance made existing dolphin exhibits commercially unviable, the last one closed in 1993.[209] France banned captive breeding of orcas and dolphins in 2017, but the rule was overturned by the Conseil d'État, the highest administrative court, because the rule that the government brought in was stricter than the rule

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206. Government of India, Ministry of Environment and Forests, Central Zoo Authority, *Circular: Policy on establishment of dolphinarium – Regarding* (17 May 2013), online (pdf): <cza.nic.in/ban%20on%20dolphanariums.pdf>.
207. *Ibid*.
208. "Marine Mammals: Guidelines and Criteria Associated with Captivity" (September 2006), online (pdf): *Whale and Dolphin Conservation Society* <www.car-spaw-rac.org/IMG/pdf/OVERVIEW_CAPTIVITY_MARINE_MAMMALS_WCR.pdf>.
209. "Whale and Dolphin Captivity in the EU – United Kingdom" (2018), online: *Whale and Dolphin Conservation Society* <uk.whales.org/whale-and-dolphin-captivity-in-eu-united-kingdom>.

it had proposed for public consultation.[210]

The foregoing brief survey shows that many jurisdictions are grappling with the morality of cetacean captivity, and some have already taken more progressive and proactive steps than Canada.

VI. The Whale in Peril: Challenges Beyond Captivity

Bill S-203 and other similar existing and proposed legal reforms are really only following the changed situation on the ground (or in the water). Cetacean captivity is already on the way out, as illustrated by the dwindling numbers of captive cetaceans in Canada and the voluntary decision of one of the only two remaining captive facilities to discontinue the practice. But cetacean populations face threats much more challenging to their survival than the fact that a relatively immaterial number of them are still kept in tanks at aquariums and marine parks.

The main threats to marine mammals today include:[211] global climate change, with consequences including prey reduction and ocean acidification; by-catch from fishing operations, which is estimated to cause hundreds of thousands of global marine mammal deaths each year;[212] ship strikes, which appear to be going up as the amount of marine traffic and the size and speed of vessels increase;[213] environmental pollution, including contamination by persistent organic pollutants (which poses higher risks to marine mammals because they are long-lived apex predators who accumulate toxins in their bodies) as well as

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210. CE, 29 January 2018, "Conseil d'État, 29 janvier 2018, Société Marineland, Société Safari Africain de Port-Saint-Père", Nos 412210, 412256 (2018), online: <www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/Conseil-d-Etat-29-janvier-2018-Societe-Marineland-Societe-Safari-Africain-de-Port-Saint-Pere>. My thanks to Professor Olivier Le Bot for bringing this decision to my attention.
211. This brief summary is taken from the more detailed exposition in Jefferies, *supra* note 2 at 119–157. Jefferies proposes a new international management regime to address modern threats to marine mammal conservation.
212. *Ibid* at 125.
213. *Ibid* at 128.

anthropogenic noise pollution;[214] and whale watching, a well-intentioned form of interaction with marine wildlife which nevertheless can interfere with natural behaviours and cause disruption to reproduction, feeding, resting, and socializing.[215]

In a sense, viewed in the context of these complex and pervasive threats to the survival of wild cetaceans, acting to end cetacean captivity is picking low-hanging fruit. It is not much of a sacrifice for us to stop going to look at whales in tanks or watch live orca and dolphin shows. By contrast, the changes human society would have to make to curtail the activities that threaten wild cetaceans and their ecosystem, many of which are central to our economies and ways of life, would be genuinely transformational. Dealing with climate change alone may be the most complex problem humanity faces, and marine transport of people and goods is crucial to modern globally connected economies. Protecting the long-term survival of cetacean populations would probably require human societies to give up some forms of consumption and ways of living that we value very much. The question we face now is whether that is a price we are willing to pay.

The conflict between cetacean conservation and the economic benefit of activities that detrimentally affect them was sharply illustrated in the recent ruling by the Canadian Federal Court of Appeal invalidating the federal government's approval of the proposed expansion of the Trans Mountain pipeline system from Alberta to the British Columbia coast.[216] The Trans Mountain approval was voided in part because the process involved a "critical error":[217] failing to consider increased marine tanker traffic associated with the project and its impact on the

214. *Ibid* at 131–132.

215. *Ibid* at 138.

216. *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153. As this article went to press, the Canadian government had just re-approved the Trans Mountain pipeline expansion.

217. *Ibid* at para 5. The Court also found the approval invalid due to the government's failure to consult meaningfully with Indigenous peoples in accordance with constitutional requirements (at para 754).

endangered Southern resident orcas.[218] The National Energy Board, which approved the project, had in its own report noted the adverse impacts on the orcas' habitat from increased traffic, noise, risk of ship strikes, and the low-probability but potentially catastrophic risk of an oil spill.[219] But it had excluded the effects of increased marine traffic from its conclusion that the project would not be likely to cause significant adverse environmental effects.[220] This was held by the Federal Court of Appeal to be an "unjustifiable"[221] error. The Trans-Mountain pipeline is a highly economically and politically significant project, and the decision that it must be put on hold — in part because of the potential adverse effects on a small, struggling group of killer whales — has had profound repercussions.[222] This episode put into stark focus the profound change of course that would be needed to achieve meaningful protection for wild cetaceans.

Just a few weeks before the Trans-Mountain decision, a tragic story drew the world's attention to the plight of the Southern resident orcas.

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218. *Ibid* at paras 388–471.
219. *Ibid* at paras 423, 425, 427 (summarizing the National Energy Board's findings).
220. *Ibid* at paras 439, 468–470.
221. *Ibid* at para 468.
222. See *e.g.* Ainslie Cruikshank, David P Ball & Kieran Leavitt, "Federal Court of Appeal Quashes Trans Mountain Approval, Calling it 'Unjustifiable Failure,' in Win for First Nations, Environmentalists" (30 August 2018), online: *The Star Vancouver* <www.thestar.com/vancouver/2018/08/30/federal-court-of-appeal-calls-trans-mountain-approval-unjustified-failure-in-major-win-for-first-nations-environmentalists.html> (noting that the decision "will send ripple effects beyond British Columbia and Alberta, potentially forcing Trudeau's Liberal government to rethink its entire approach to pipelines, resource development, and reconciliation"); John Paul Tasker, "After Federal Court Quashes Trans Mountain, Rachel Notley Pulls Out of National Climate Plan" (30 August 2018), online: *CBC News* <www.cbc.ca/news/politics/trans-mountain-federal-court-appeals-1.4804495> (reporting that following the "bombshell" decision Alberta's Premier Rachel Notley announced her province's withdrawal from Canada's national climate plan).

A female from J Pod — the same kinship group that Moby Doll was taken from decades ago — gave birth to an emaciated calf who died only minutes after birth. The mother, known as J-50 or Tahlequah, carried her dead calf at the surface for 17 days, the longest documented such period, and was eventually helped by other members of the pod who took turns supporting the calf's body.[223] This moving display of behaviour — strikingly reminiscent of the efforts of Moby Doll's family to save that young whale when he was harpooned and shot back in 1964 — is also unignorably similar to manifestations of grief and family feeling in humans beings. Tahlequah's apparent mourning ritual symbolized the increasing peril to cetaceans in the damaged marine environment. The episode also highlighted the similarities between whale and human emotions and family bonds, the recognition of which has undermined human beings' confidence that we alone, of all the species that share the planet, are special because of our intelligence, feelings, communicative abilities, or other unique characteristics that mark us out as the sole bearers of rights.

VII. Conclusion: Outside the Whale

Keeping cetaceans in captivity has been justified as a way of enhancing our understanding of marine life, of bringing us delight in interacting with beautiful and charismatic animals, and of raising our environmental consciousness. But during the five decades since Moby Doll was harpooned, the knowledge we have acquired about cetaceans has increased so much that it is no longer possible for us, without willful blindness, to

223. See Susan Casey, "The Orca, Her Dead Calf and Us" (4 August 2018), online: *The New York Times* <www.nytimes.com/2018/08/04/opinion/sunday/the-orca-her-dead-calf-and-us.html>; Andrea Woo, "Off B.C. Coast, Grieving Mother Orca Risks her Own Life with Days of Devotion to Dead Calf" (1 August 2018), online: *The Globe and Mail* <www.theglobeandmail.com/canada/british-columbia/article-grieving-orca-off-bc-coast-that-wont-let-go-of-dead-calf-raises/>; Laura Geggel, "Orca Mother, Who Pushed Her Dead Calf for 1,000 Miles and 17 Days, Moves On" (13 August 2018), online: *Livescience* <www.livescience.com/63318-orca-mother-stops-pushing-dead-calf.html>.

ignore what it means for them: health problems, shortened life spans, and loss of the social connections, rich communications and extensive ranges that are the hallmarks of their life in the wild. The movement for anti-captivity legal reform comes from thinking beyond our own self-interest and facing sometimes uncomfortable facts about the suffering behind the cheerful public presentation of whales and dolphins in parks and aquariums. It comes from a different perspective from the kind of complacent quietism that Orwell described as being inside the whale.

In an opinion piece published in *The New York Times* in August 2018,[224] Martha Nussbaum — perhaps the leading contemporary American moral philosopher — argues that philosophical enquiry needs to move past thinking only about the meaning of human life and to grapple with the ethical implications of sharing the planet with "billions of other sentient beings", all of whom "have their own complex ways of being whatever they are".[225] She writes: "[a]ll of our fellow animal creatures, as Aristotle observed long ago, try to stay alive and reproduce more of their kind. All of them perceive. All of them desire. And most move from place to place to get what they want and need".[226]

Nussbaum refers to the work of Hal Whitehead and Luke Rendell as enriching our understanding of a philosophical question that we have hardly begun to think about: what it is to be a whale. Perhaps this is a question we can only really engage with if we can manage to think *outside* the whale of Orwell's metaphor, or beyond the anthropocentric narcisissm that Nussbaum criticizes. From such a perspective, we already know too much about what it is to be a whale to be able to justify keeping them for our use as spectacle and entertainment any more. In concluding his speech in support of Bill S-203, Senator Sinclair invoked a concept similar to Nussbaum's 'fellow animal creatures', as expressed in his own Anishinaabe culture:

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224. Martha Nussbaum, "What Does It Mean to Be Human? Don't Ask" (20 August 2018), online: *The New York Times* <www.nytimes.com/2018/08/20/opinion/what-does-it-mean-to-be-human-dont-ask.html>.
225. *Ibid*.
226. *Ibid*.

> [T]he Anishinaabe recognize that we are all related, not just you and I, but you and I and all life forms of creation. As living things, we are connected to each other. We depend upon one another. Everything we do has an effect on other life forms and on our world.[227]

We are a long way from fully changing our actions and our laws so as to reflect this kind of relationship between ourselves and other animals. Ending cetacean captivity in Canada is a step in that direction, perhaps a small one, but not insignificant.

227. Sinclair, *supra* note 12.

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