ANIMAL WELFARE LAW IN CANADA AND EUROPE

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The idea that animals are entities that deserve protection, irrespective of their utility to man, is firmly grounded in the Enlightenment. The principle that a creature's need for considerate treatment did not depend on the possession of a soul or the ability to reason, but on the capacity to feel pain was formulated and debated at that time. The debate continues today—Canada is in the midst of examining its own ethical, philosophical and legal beliefs about animal welfare and cruelty. This article examines the current state of animal welfare and cruelty laws and recent attempts through federal legislation to modernize the animal welfare provisions of the Canadian Criminal Code. Comparisons are drawn with European animal welfare and cruelty laws, which tend to be more concerned with an animal's welfare than Canadian laws, which tend to be more concerned with the economic interests of humans.

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I. INTRODUCTION

On September 1, 1914 the last passenger pigeon died. The extinction of the species was front-page news and generations later dozens of articles, books, and Internet sites still decry its passing. On January 6, 2000, as this article was being written, the last Spanish ibex died.[1] The extinction of this sub-species occurred virtually without notice.

Do we care so little about other animals, other life forms? Perhaps it is simply that species extinctions operate on a scale that is somehow beyond our emotional and intellectual grasp. Certainly, whenever media reports individual cases of harm to animals, headlines abound and the public expresses vast outrage.[2] In fact, the level of concern sparked by the repeated publicity on animal cruelty cases, in Canada, led to pressure for law reform. In 1998, the Canadian government began public consultations on new anti-cruelty legislation, and in December 1999 it introduced a draft bill into Parliament.[3] These proposals form the subject of the present study.

Part II outlines the history of the animal welfare movement in Canada. Part III provides an overview of the various theories about how humans should treat animals. Part IV provides a brief description of current Canadian animal welfare legislation and Part V reviews European standards to glean from them some future directions for Canadian laws. Part VI critically assesses the current Canadian approach to animal welfare laws, including an assessment of the new Canadian

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1 *Spanish Ibex Extinct*, VANCOUVER SUN, Jan. 15, 2000, at B2.

2 DEP'T OF JUSTICE CANADA, CRIMES AGAINST ANIMALS: A CONSULTATION PAPER 1 (1998) [hereinafter CONSULTATION PAPER].

3 *Id. See also* Bill C-17, An Act to Amend the Criminal Code, 36th Parl., 2nd Sess., 48 Eliz. II (1999) (Can.).

legislative proposals. Finally, Part VII concludes with suggestions for areas where further progress can be made.

II. THE CANADIAN ANIMAL WELFARE MOVEMENT

The animal welfare movement, and the use of law to protect animals from human harm, a fairly recent development, traces its origins to nineteenth century England.[4] Although the moral status of animals had been debated since the time of the ancient Greeks,[5] and early law either held animals accountable for their actions or treated them as property,[6] the notion of animals as entities that deserved protection emerged from eighteenth century philosophical debates and the associated social reforms of the Enlightenment.[7] Cruelty to animals developed as a social cause along with the abolition of slavery, child welfare, prison reform, and "better care for the old, the sick, the orphan, and the insane."[8] Especially influential on the animal welfare debate was the writing of Jeremy Bentham. Bentham, a utilitarian, developed the notion that the morally relevant criterion for kind consideration was the capacity to suffer pain, rather than the presence of an immortal soul[9] or the capacity to speak or reason.[10] Spurred on by the scientific view of animals developed by Charles Darwin, which emphasized their relationship to and similarities with humans,[11] public debate began to move from theory to action.[12]

While pre-1800 acts of cruelty had, in Britain, been prosecuted as malicious destruction of another's property,[13] the idea began to emerge in the nineteenth century that animals deserved protection for their own sakes.[14] At least four bills were introduced into the British Parliament between 1800 and 1821 attempting to address cruelty issues; however, each was defeated.[15] Finally, in 1822, the British Parliament passed Martin's Act, the first-ever anti-cruelty statute.[16] The act was

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4 SIMON BROOMAN & DEBBIE LEGGE, LAW RELATING TO ANIMALS 1, 39 (1997).

5 *Id.* at 6; ANDREW N. ROWAN, OF MICE, MODELS, AND MEN 251 (1984).

6 BROOMAN & LEGGE, *supra* note 4, at ch. 2.

7 *Id.* at ch. 1; GERALD CARSON, MEN, BEASTS AND GODS ch. 5 (1972).

8 CARSON, *supra* note 7, at 48. *See also* BROOMAN & LEGGE, *supra* note 4, at 40.

9 BROOMAN & LEGGE, *supra* note 4, at 13. Jeremy Bentham lived from 1748-1860. *Id.*

10 ROWAN, *supra* note 5, at 256.

11 *Id.* at 257. *See also* BROOMAN & LEGGE, *supra* note 4, at 15-16. Charles Darwin lived from 1809-1882. *Id.*

12 CARSON, *supra* note 7, at 49.

13 BROOMAN & LEGGE, *supra* note 4, at 40. At common law (at least since the early 1100s) animals have been considered chattels or personal property. *See generally* J. Tannenbaum, *Animals and the Law: Property, Cruelty, Rights*, 62:3 SOCIAL RESEARCH 539 (1995). There is no common law wrong of "cruelty." Charles E. Friend, *Animal Cruelty Laws: The Case For Reform*, 8 U. RICH. L. REV. 201 (1974); CARSON, *supra* note 7, at 50.

14 BROOMAN & LEGGE, *supra* note 4, at 17.

15 *Id.* at 41; C. NIVEN, HISTORY OF THE HUMANE MOVEMENT 57-65 (1967).

16 BROOMAN & LEGGE, *supra* note 4, at 42.

originally directed toward protecting livestock,[17] however, it was amended several times between 1835 and 1854 to broaden its scope, and was consolidated in 1911 as the Protection of Animals Act.[18] As amended, the Protection of Animals Act remains the principal anti-cruelty statute in the United Kingdom.

The French were the first Europeans to emulate England, passing anti-cruelty legislation in 1850.[19] Nova Scotia passed the first North American anti-cruelty statute in 1822.[20] Along with the formation of the Dominion of Canada, the first Canada-wide anti-cruelty provision was enacted in 1869.[21]

Unfortunately, enforcement of the initial animal welfare legislation was poor; the attitude of the British judiciary following the passage of Martin's Act has been described as "professional torpor."[22] Concerned individuals quickly organized and formed the original Society for the Prevention of Cruelty to Animals (SPCA) in England in 1824.[23] Known since 1840 as the Royal SPCA after endorsement by Queen Victoria, it is the oldest animal welfare organization still in existence.[24] Branch societies and similar organizations quickly followed in Europe.[25] The earliest Canadian SPCA was founded in 1869 in Montreal.[26] Humane societies (which sometimes operate under the "SPCA" rubric and sometimes have other names)[27] now operate throughout the developed world, and a World Society for the Protec-

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17 Martin's Act applied to "horses, mares, geldings, mules, asses, cows, heifers, steers, oxen, sheep and other cattle." *Id.* The expression "other cattle," as a matter of common law, would include economically valuable chattels such as chickens, goats and donkeys, but not domestic pets such as cats and dogs. Tannebaum, *supra* note 13, at 550, 560. Bulls were not included. BROOMAN & LEGGE, *supra* note 4, at 43; CARSON, *supra* note 7, at 50. It was not until 1835 that bull-baiting (chaining up bulls and bears and allowing bulldogs to tear at them) was made illegal. BROOMAN & LEGGE, *supra* note 4, at 43-46.

18 Protection of Animals Act, *reproduced in* BROOMAN & LEGGE, *supra* note 4, at 47-50.

19 *Id.* at 50.

20 NIVEN, *supra* note 15, at 108. The first state in the United States to pass an anti-cruelty law was New York in 1828. *Id.* at 50; Tannenbaum, *supra* note 13, at 565.

21 CANADIAN FEDERATION OF HUMANE SOCIETIES, THE HUMANE MOVEMENT IN CANADA 6 (n.d.) [hereinafter CFHS 1]; An Act Respecting Cruelty to Animals, S.C., ch. 27 (1869) (Can.), *amended in* 1870.

22 CARSON, *supra* note 7, at 51.

23 *Id.* at 53. Two earlier attempts to form welfare societies had failed. BROOMAN & LEGGE, *supra* note 4, at 1.

24 CARSON, *supra* note 7, at 53-54.

25 Ireland, Germany, Austria, Belgium, and Holland were some of the earliest countries to form these organizations. *Id.* at 54.

26 CFHS 1, *supra* note 21, at 6. The first American SPCA was organized in New York in 1866. ALBERTA SPCA, THE ANIMAL WELFARE MOVEMENT (n.d.) [hereinafter ASPCA 1].

27 Many humane societies have adopted the "SPCA" title while others have not. "SPCAs" are not necessarily affiliated with the British RSPCA; in North America, most are independent non-profit corporations. *Id.*

tion of Animals (WSPA) exists to address transboundary welfare issues.[28]

In Canada, SPCAs and humane societies operate primarily at the local or regional level, although there is one organization—the Canadian Federation of Humane Societies—that represents national animal welfare concerns.[29] In one of their pamphlets, the Alberta SPCA (the humane society responsible for enforcement of welfare rules in rural areas of the province of Alberta) explains the "structure" of the Canadian humane movement:

> There is no governing body that dictates the function or direction of individual SPCAs or Humane Societies. Some provincial societies (e.g. the B.C. SPCA) have local "branch" societies that are guided by the provincial body. Other provincial societies, like the Alberta SPCA, offer local societies "member society" status, although this in no way interferes with their autonomy. Many provincial and local SPCAs and Humane Societies are supporting members of the Canadian Federation of Humane Societies (CFHS), a national body that represents animal welfare concerns at the federal level.
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> In the province of Alberta there are many local SPCAs and Humane Societies, as well as several special interest groups. The Alberta SPCA is the provincial society. The largest local SPCAs are the Edmonton SPCA and the Calgary Humane Society. They are also the oldest, dating from the early 1900s. They operate large animal shelters and conduct cruelty investigations within their respective cities. Neither is a "branch" of the Alberta SPCA, nor are any of the smaller societies within the province. Each is an independent organization with its own board of directors, its own policies, and its own funding. A number of smaller Alberta communities also have local societies, most of which operate small animal shelters.[30]

The focus of such humane societies from their inception until the first World War was primarily on working animals and blood sports intermixed with issues relating to the welfare of children.[31] Thus, early efforts were directed towards issues such as beating and overdriving of horses and cattle, or on banning bull-baiting and cockfighting.[32] However, in North America, once mechanization eliminated horses as the primary "work engine" of society, the urban visibility of livestock-related cruelty issues disappeared, and public sentiment

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[28] The WSPA was formed by the 1981 merger of the International Society for the Protection of Animals and the World Federation for the Protection of Animals. For more information see WSPA, *World Society for the Protection of Animals* (visited Apr. 25, 2000) <http://www.wspa.org.uk/home.html>.

[29] ASPCA 1, *supra* note 26. The Canadian Federation of Humane Societies (CFHS) was organized in 1957. CFHS 1, *supra* note 21, at 9.

[30] ASPCA 1, *supra* note 26.

[31] *Id.*; Canadian SPCA, *A History of the CSPCA* (visited Apr. 17, 2000) <http://www.spca.com/english/pages/history.htm>. Children's issues were eventually taken over by government social welfare agencies.

[32] BROOMAN & LEGGE, *supra* note 4, at 46; NIVEN, *supra* note 15, at 108; J.G. HODGINS, AIMS AND OBJECTS OF THE TORONTO HUMANE SOCIETY 12 (1888).

turned to the plight of companion animals.[33] By the mid-twentieth century, the North American humane movement had, in the view of many, "lapsed more and more into a dog and cat concern."[34] In part, this was exacerbated by rapid post-war urbanization; pet owners within cities became the primary financial supporters of humane societies and farm animals became "out of sight, out of mind."[35]

In North America, social changes in the 1960s, including the civil rights, peace, and environmental movements, led to a second "stream" of animal welfare advocacy by the 1970s. Philosophers such as Peter Singer, Bernard Rollin, and Tom Regan revived the debate over animal welfare and the morality of many accepted forms of human treatment of animals.[36] The animal rights (or animal liberation) movement went beyond the traditional focus of humane societies, which advocate the humane use and treatment of animals, asserting that animals have an inherent right to their natural lives.[37] As with the humane movement of the nineteenth century, the animal rights movement of the twentieth century has been led by concerned individuals organized through non-profit groups, ranging from moderate activist organizations like the Animal Legal Defense Fund[38] to People for the Ethical Treatment of Animals,[39] to much more radical groups that engage in sometimes illegal direct action, such as the Animal Liberation Front.[40] Animal welfare issues such as factory farming and vivisection[41] brought animal rights advocates into front-page conflict with the modern agri-business, scientific and medical establishments, and once again aroused public interest and debate.

Although traditional humane societies have tended to keep a careful distance from such animal rights organizations, the revival of public interest in animal welfare issues seems to have aided them in making progress on their own agendas, such as the passage of new provincial anti-cruelty statutes.[42] Perhaps the most notable examples

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33 ASPCA 1, *supra* note 26; NIVEN, *supra* note 15, at 109.

34 NIVEN, *supra* note 15, at 109.

35 *Id.* at 109-11.

36 ROWAN, *supra* note 5, at 257.

37 ASPCA 1, *supra* note 26.

38 The Animal Legal Defense Fund (ALDF) was started in 1981 and is the foremost U.S. animal rights law organization. Laura Wilenski, *Animal Legal Defense Fund* (visited Apr. 17, 2000) <http.www.aldf.org>.

39 People for the Ethical Treatment of Animals, *PETA Online* (visited Apr. 17, 2000) <http://www.peta-online.org>. People for the Ethical Treatment of Animals (PETA) was founded in 1980. Its philosophy is, "[A]nimals are not ours to eat, wear, experiment on or use for entertainment." *Id.*

40 Started in the mid-1970s, ALF's goals include "to liberate animals from places of abuse [and allow them to] live out their natural lives, free from suffering" and "to inflict economic damage to those who profit from the misery and exploitation of animals." *Animal Liberation* (visited Apr. 17, 2000) <http://www.hedweb.com/alffaq.htm>.

41 *See* NIVEN, *supra* note 15, at 128-35.

42 For example, Alberta passed its first Animal Protection Act in 1967 and the Alberta SPCA began to receive government operating grants that same year. The legislation was replaced in 1988-89. ASPCA 1, *supra* note 26.

of legal progress during this era were made in Europe. Between 1968 and 1987, the Council of Europe enacted six Conventions addressing animal welfare issues.[43] In addition, the European Union has passed numerous Regulations and Directives addressing animal welfare issues,[44] and is a party to some of the Council Conventions.[45]

Unfortunately, Canadian progress has been less satisfactory. Although most provinces and territories succeeded in establishing or updating general anti-cruelty legislation by the 1990s, the two most populous provinces (Ontario and Quebec) remain without basic anti-cruelty laws.[46] Thus, in most of the country,[47] prosecutions of animal abuse can take place only through the federal Criminal Code provisions, which in large part have not been amended since 1953-54.[48]

Entering the twenty-first century, many animal welfare issues remain unresolved. Some are old debates, such as the use of leg-hold traps in the fur trade.[49] Others are new concerns, such as cross-species (xeno-) transplantation, cloning, and genetic engineering.[50] Around the world, law reform initiatives are once again underway, ranging from overdue modernization efforts (such as Canada's new proposals to amend the Criminal Code)[51] to innovative developments (such as attempts to secure some civil rights for non-human great apes).[52] Accordingly, the time seems ripe for a more detailed examination of contemporary social and ethical attitudes toward animal welfare issues and the legal developments that might flow from changing social views.

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43 Caroline Jackson, *Europe and Animal Welfare*, *in* ANIMAL WELFARE AND THE LAW 222 (Derek E. Blackman et al., eds., 1989). The six Conventions cover transport (1968), farm animals (1976), slaughter (1979), wildlife (1979), experimentation (1986), and pets (1987). *Id.*

44 *Id.* CHRISTIANE MEYER, ANIMAL WELFARE LEGISLATION IN CANADA AND GERMANY: A COMPARISON 91 (1996).

45 Jackson, *supra* note 43, at 222.

46 Quebec passed the Animal Health Protection Act in 1977 but it has never been proclaimed in force. R.S.Q., ch. P-42 (1977) (Can.). In Ontario, under the Ontario SPCA Act, animal distress can be alleviated but there are no actual cruelty offences for which prosecution can be commenced. R.S.O., ch.O-36 (1990) (Can.).

47 Manitoba, New Brunswick and the NWT/Nunavut are also primarily or wholly reliant on the Criminal Code, R.S.C., ch. C-46 (1985), §§ 444-447 (Can.), for prosecution.

48 The exception is § 446 of the Criminal Code. *Id.* This section was amended by S.C. 1974-75-76, § 35 (Can.).

49 For a history of the campaign against the steel trap from the 1920s to the present, see NIVEN, *supra* note 15, at 111.

50 BROOMAN & LEGGE, *supra* note 4, at 62.

51 CONSULTATION PAPER, *supra* note 2; Bill C-17, An Act to Amend the Criminal Code, 2nd Sess., 36th Parl., 48 Eliz. II (1999) (Can.).

52 Tom Robbins, *Chimpanzees Not Just Dumb Animals Any More*, EDMONTON JOURNAL, Apr. 4, 1999, at A2; William Glaberson, *Legal Pioneers Seek to Raise Lowly Status of Animals*, N.Y. TIMES, Aug. 18, 1999, at A1; Great Ape Legal Project, *Animal Legal Defense Fund* (visited Apr. 4, 2000) <http://www.aldf.org>.

III. The Theories Behind Animal Welfare Movements

In early British common law, economically valuable domestic livestock specimens (generically called "cattle")[53] were an important form of personal property. Indeed, "because of their transportability, value and fungibility, cattle became an early form of money."[54] As with any other fungible chattel, cattle were not considered unique or irreplaceable, but rather were interchangeable with money or with other equivalent livestock.[55] If cattle were stolen, harmed, or destroyed, the owner would not receive the return of the chattel, but instead would be compensated for its monetary value.[56] Theft or destruction of such valuable property was rated as a social concern, and thus criminalized.[57]

As with all other personal property, domestic animals had no rights and could be owned, sold, stolen, inherited, taxed or bailed.[58] Over time, "because of their importance and value to their owners," dogs and cats are now "domestic" animals.[59] Nevertheless,

> until the emergence of animal cruelty laws in the 1800s the law did not recognize that animals had any interests which their owners, or anyone else, were legally obligated to respect. All conditions placed on the ability of people to possess, use or dispose of their animal property were based on human interests. What was good or bad for the animals themselves was irrelevant. It was not a crime to subject one's own animal to considerable suffering, just as it was not a crime to mutilate one's own book or blanket. One could be prosecuted for injuring or killing an animal belonging to someone else, but the injury the law considered to be done in such cases was not to the animal but to its owner.[60]

Thus, there was "no common law crime of cruelty"[61] and owners could torture or neglect animals for sport, to make them work harder, to save money, or simply to dispose of them.[62] The rationalist philosophers such as René Descartes, who asserted animals were mechanical beings incapable of thought or sensation, reinforced this thinking throughout the seventeenth century.[63]

Writers such as John Locke and Immanuel Kant were also challenging such attitudes, however. Locke's focus was on the similarities between people and animals, and in particular, the effect that ill treatment of animals could have on human behaviour. His fear was that people who observed or delighted in the mistreatment of animals

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53 *See* discussion *supra* note 17.

54 Tannenbaum, *supra* note 13, at 551.

55 *Id.*

56 *Id.* at 552.

57 David S. Favre & Murray Loring, Animal Law 122 (1983).

58 Tannenbaum, *supra* note 13, at 562. Wild animals were categorized separately; the Crown had the right to control use and possession of wildlife. *Id.* at 560-61.

59 *Id.* at 559, 563.

60 *Id.* at 564.

61 Favre & Loring, *supra* note 57, at 122.

62 *See generally* Friend, *supra* note 13.

63 Brooman & Legge, *supra* note 4, at 8-9. René Descartes lived from 1596-1650. *Id.*

would "not be apt to be very compassionate or benign to those of their own kind."[64] In short, such persons would be inhumane. Kant too found that the primary reason to abhor cruelty was in the effect it had on humanity, as duties to animals were seen as indirect duties to other persons.[65] Cruelty to animals was therefore not merely a private property or civil matter, but a social concern with broader implications that fell within the purview of the criminal law.

This anthropocentric view of animal cruelty still holds sway in modern times. Animals continue to be treated in tort, contract, and other non-criminal law primarily as personal property, and criminal "offences involving animals are largely treated as property offences."[66] In addition, one of the main arguments in favour of anti-cruelty legislation is the need to promote the welfare of humans.[67] A 1997 study found seventy percent of animal abusers had committed other crimes; in addition, thirty-eight percent had committed violent offences against other people—five times as often as non-abusers.[68] FBI studies have found that many serial killers and mass murderers also have a history of animal cruelty.[69] A 1991 study showed that eighty-seven percent of child abusers "had previously or simultaneously abused animals."[70] There are broad correlations with other types of crime as well. For example, abusers are three times more likely than non-abusers to be arrested for drug offences and disorderly behaviour.[71] Other studies have shown strong links to spousal and elder abuse.[72] In the increasingly violent modern world, such statistics support a 300 year-old rationale for effective anti-cruelty legislation.

This human-centred thinking has not been rejected. The advent of the humane movement in the eighteenth century simply added a second notion—that in addition to anthropocentric reasons to act against cruelty, there are also compelling moral arguments that people have a duty to protect animals for the animals' sake.[73] In short, it is wrong *per se* to cause animals to suffer. The subsequent debate—from the passage of Martin's Act to the present day—has focussed on the difficult question of what specific activities are "right or wrong in our treat-

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64 *Id.* at 12. John Locke (1632-1704) and Immanuel Kant (1724-1804). *Id. See also*, FAVRE & LORING, *supra* note 57, at 122.

65 BROOMAN & LEGGE, *supra* note 4, at 12.

66 Frances Rodenburg, *Crimes Against Animals*, ANIMAL WELFARE IN FOCUS 1 (1998). Wild animals are the property of the Crown or government. *See supra* note 58.

67 BERNARD E. ROLLIN, ANIMAL RIGHTS AND HUMAN MORALITY 78 (1981).

68 Gene R. Sower, *Study Proves Link Between Animal Cruelty and Crime - Part 2* (visited Apr. 10, 2000) <http://dogs.about.com/pets/dogs/library/weekly/aa112197.htm>; Charlotte A. Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 ANIMAL L. 1 (1998).

69 CONSULTATION PAPER, *supra* note 2, at 1; R. Fife, *Minister to Target Animal Abusers*, NATIONAL POST, Jan. 15, 1999, at A1.

70 Fife, *supra* note 69.

71 Sower, *supra* note 68.

72 CONSULTATION PAPER, *supra* note 2, at 1; *see generally* Lacroix, *supra* note 68.

73 BROOMAN & LEGGE, *supra* note 4, at 13.

ment of animals in light of what we know or, indeed, have yet to find out about them,"[74] and the related struggle of how to incorporate moral concerns for animal suffering into law, while still protecting legitimate human interests and activities.[75]

From this debate two major theories or streams of thinking have emerged, which Brooman and Legge[76] refer to as the equal consideration theory of utilitarianism and the inherent value theory.

A. Utilitarianism

Utilitarianism advocates decision-making based on the notion that "any act should be undertaken having given due consideration to all competing interests and recognising the best possible equilibrium between the satisfaction and frustration of the [equally significant] interests of those affected . . . ."[77] Under this theory, if animals' interests in being free from pain and suffering are included along with human interests in the moral equation, one must weigh the human benefit to be obtained against the potential harm to the animal.[78] Thus, the traditional humane movement attitude that "animal welfare takes an approach that accepts the use of animals by humans, provid[ed] that use is carried out humanely"[79] reflects the prevailing utilitarian social attitude "that society feels able to say that the benefits we gain from using animals for food, experimentation or whatever outweigh the disadvantages to the animals themselves."[80]

However, questions remain as to what interests of animals should be taken into account in the cost/benefit analysis of utilitarianism,[81] and whether this theory truly gives animals' interests equal consideration.[82] Do we abhor only the infliction of pain or physical suffering? Do we consider mental suffering and behavioural or instinctive needs of animals? Can we weigh animal pain and suffering only against human suffering (e.g., in medical experiments)? Do human economic interests and consumer desires "count" (e.g., in cosmetic testing)? How much suffering is necessary or acceptable, or should there be zero tolerance of preventable distress?

As more modern broadly-utilitarian thinkers such as Peter Singer point out, humans have a "prejudice or attitude of bias in favour of the interests of [our] own species and against those of members of other species."[83] If, it is argued, animals' interests in not suffering were

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74 *Id.* at 27.

75 *Id.* at 56.

76 *Id.* at 74-75.

77 *Id.* at 91.

78 *Id.* at 91-92.

79 ASPCA 1, *supra* note 26.

80 BROOMAN & LEGGE, *supra* note 4, at 91. The ethics of the notion that it is acceptable to harm some for the "greater good" is clearly problematic. *Id.* at 94.

81 *Id.* at 94-95.

82 *Id.* at 91-92.

83 *Id.* at 94 (quoting PETER SINGER, ANIMAL LIBERATION (rev. ed. 1990)).

given truly equal weight in the decision-making process (and if human power over other animals is not mistaken for human superiority), many "acceptable" practices such as farming, slaughtering and eating animals might fall on shaky moral ground.[84]

B. Inherent Value Theory

In addition to the range of thinking based on utilitarian balancing of human interests and animal welfare, there is a second, more controversial set of views. These are the ideas set forth by animal rights advocates such as Tom Regan—that some animals have inherent value.[85]

In short, this theory holds that animals have a right to lead their natural lives without abuse and interference by people. Animals have a "right to life" and a right to be treated properly in our dealings with them, regardless of their value to humans as resources.[86] Thus, animals, as possessors of "beliefs, desires, perception, memory, self-consciousness and a sense of future," are "deserving of protection in their own right."[87] Unlike utilitarianism, individual welfare is not to be sacrificed for the "needs of the many,"[88] as:

> we are each of us the experiencing subject of a life, a conscious creature having an individual welfare that has importance to us whatever our usefulness to others. We want and prefer things, believe and feel things, recall and expect things. And all these dimensions of our life, including our pleasure and pain, our enjoyment and suffering, our satisfaction and frustration, our continued existence or our untimely death—all make a difference to the quality of our life as lived . . . .[89]

These theorists argue that "the legal system has drawn the line in the wrong place between humans . . . [as] animals with rights, and [other] animals without rights."[90] According to this view therefore, virtually all human exploitation of animals is morally questionable and human-animal interactions should be fundamentally changed.[91]

C. Theory in Practice

Moving from the realm of the theorist to the world of the public policy-maker, a sample of modern public opinion seems to jumble these various attitudes together in uncertain proportion. A journalist can be against bull fighting, fox hunting, and circus acts but find nothing

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84 *Id.* at 91, 94.
85 *Id.* at 74.
86 *Id.* at 77.
87 *Id.*
88 *Id.* at 76.
89 *Id.* (quoting TOM REGAN, THE CASE FOR ANIMAL RIGHTS (1983)).
90 William Glaberson, *Will Koko be Called to Give Evidence?*, EDMONTON JOURNAL, Sept. 26, 1999, at F5.
91 BROOMAN & LEGGE, *supra* note 4, at 85.

wrong with rodeo.[92] While the bludgeoning of two dogs outraged the public,[93] only four percent of those surveyed know that 250,000 to 300,000 seals are killed in the annual Canadian commercial seal hunt.[94] Outrage can be expressed over insufficient food and rest being given to animals in transport, while the use of animals in medical experimentation goes virtually unremarked.[95] As Brooman and Legge note, "[t]he moral perceptions of the public differ quite widely, sometimes inexplicably, from one manifestation of our interaction with animals to another, and a coherent underlying principle is often difficult to find."[96] In fact, there may not be a single moral theory that can explain our complex attitudes towards animals, and it may be pragmatic to recognize this.[97] Yet, without some vision of social consensus, and without some objective in mind, how can improvements in policy and law take place?

The Canadian federal government is presently engaged in the process of reforming the Criminal Code anti-cruelty provisions.[98] Their stance on the issue is that:

> Our society clearly does not take a single, consistent approach to the way we regard and treat different animals. Some are adopted into our homes as pets and beloved companions . . . . Other animals are regarded as sources of food, clothing, or entertainment, or as subjects of scientific research. Some are majestic wild creatures that inspire wonder and respect, while others are seen merely as pests that ought to be eradicated . . . .
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> Not surprisingly, there is also a broad spectrum of attitudes and opinions in our society about how people should treat animals. Some people view animals as independent beings capable of feeling pain and emotion and therefore worthy of consideration in every way that people are, while others view animals as little more than machines or products to use in any way that benefits humans, regardless of the process. Falling somewhere between these two extremes is the great majority who generally feel that it is acceptable to use animals in some circumstances and for some purposes, but that every reasonable effort should be made to reduce or eliminate unnecessary animal suffering and pain.[99]

While this summarizes the many theories of animal welfare, and reflects the prevailing lack of social consensus, it reveals no empirical evidence for the government's common sense assertion that "[m]ost Canadians clearly agree [that however animals are used they] should

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92 Susan Ruttan, *The Kinds of Lives That Animals Deserve*, EDMONTON JOURNAL, July 11, 1998, at F2.

93 G. Kent, *Charges Stayed in Baseball Bat Killings of Two Dogs*, EDMONTON JOURNAL, Nov. 17, 1998, at B3.

94 *Canadians and the Commercial Seal Hunt*, ANGUS REID GROUP INC., Sept. 4, 1997, at 3 [hereinafter ANGUS REID].

95 BROOMAN & LEGGE, *supra* note 4, at 27, 73 (U.K. data).

96 *Id.* at 27.

97 *Id.* at 96.

98 *See* Bill C-17, An Act to Amend the Criminal Code, 36th Parl., 2nd Sess., 48 Eliz. II (1999) (Can.).

99 CONSULTATION PAPER, *supra* note 2, at 3.

be treated humanely [and protected from] needless cruelty."[100] However, all available anecdotal evidence, such as outpourings of public outrage when the media reports animal abuse,[101] and the limited statistical data available on specific issues, uniformly supports the government's assertion of strong public support for anti-cruelty efforts.[102] American statistics show that nearly sixty percent of households contain pets, eighty-seven percent of pet owners consider their pet "a member of the family," and seventy percent of pet owners view their pets "as children."[103] Therefore, it is entirely possible that the degree to which the majority of the public supports anti-cruelty initiatives is underestimated.

IV. PRESENT LAW IN CANADA

The topic of "animal welfare" is a broad one, spanning issues relating to pets, livestock, research animals, and wildlife. People capture, house, feed, transport, wear, ride, eat, slaughter, train, breed, and experiment on animals. Animals are used for companionship, sport, research, food, clothing, therapy, entertainment, work, and other cultural activities.[104] Simultaneously, society struggles to preserve endangered species and to eradicate "pests."

In all of these human-animal interactions, there is the potential for suffering or abuse. Yet, while some activities, such as the operation of abattoirs, are specifically regulated,[105] others, such as medical research in universities, are primarily controlled through voluntary codes of practice.[106] Since the statutes governing such specific aspects of animal welfare have been described elsewhere,[107] the focus of this article is the general or overarching anti-cruelty legislation which applies to all human-animal interactions, regardless of the degree of reg-

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100 *Id.*

101 *See* Kent, *supra* note 93.

102 About 80% of Canadians oppose the use of leghold traps. THE FUR BEARERS, "FUR IS BACK? NO WAY" (Winter 1997/98 News release). Nearly 85% of Canadians oppose the hunting of baby seals for fur. ANGUS REID, *supra* note 94. Additionally, 70% to 78% of Canadians oppose the spring bear hunt. INTERNATIONAL FUND FOR ANIMAL WELFARE (IFAW), "MANITOBANS OPPOSE SPRING BEAR HUNT" (Press release, June 1999). IFAW, "ONTARIANS AGREE WITH TORIES ON BEAR HUNT BAN" (Press release, Feb. 1999); *see* IFAW, *International Fund for Animal Welfare* (visited Apr. 25, 2000) <http://www.ifaw.org>.

103 Lacroix, *supra* note 68, at 7 (U.S. data). Older Canadian statistics show 45% of households with at least one pet. MEYER, *supra* note 44, at 18.

104 For example, there is ongoing debate about uses such as Aboriginal whaling. *See* Rick Eichstaedt, *Save the Whales vs. Save the Makah: The Makah and the Struggle for Native Whaling*, 4 ANIMAL L. 145 (1998).

105 MEYER, *supra* note 44, at 51-55. Ontario has a provincial statute dealing with research animals in that province: Animals for Research Act, R.S.O., ch. A-22 (1990) (Can.).

106 MEYER, *supra* note 44, at 86-88, 100-07.

107 *Id.*

ulatory detail otherwise surrounding the activity.[108] Such laws exist in Canada, a federal state, at both the national and provincial levels.[109]

A. Federal Law

At present, the primary federal anti-cruelty statute in Canada is the Criminal Code,[110] sections 444 to 447. In its broadest sense, it criminalizes intentional harm and neglect of animals. However, not all animals or uses of animals are treated the same:

> These sections describe offences that involve killing, maiming, wounding, injury, or endangering cattle (444); or other animals that are kept for a lawful purpose (445); or more generally causing unnecessary pain, suffering or injury to an animal by any means (446); or causing unnecessary suffering by various specific acts, such as baiting an animal, transporting an animal in an unsafe manner, releasing a bird from captivity for the purpose of being shot, and neglecting to provide adequate food, water, shelter or care (446). Section 447 concerns the keeping of a cockpit.[111]

The Criminal Code sections reflect their historical roots. The provisions are in Part XI of the Code, "Wilful and Forbidden Acts in Respect of Certain Property." They deal specifically with activities such as baiting[112] and cockfighting.[113] Injury to cattle[114] is dealt with much more harshly than injury to "animals that are not cattle."[115] The majority of the offences are directed toward harm to domestic animals or animals in captivity.[116] Available defences are also outlined in the part of the Code governing property offences.[117]

Of the various statutory provisions, the most general anti-cruelty section in the Code reads, "[E]very one commits an offence who (a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird . . . ."[118] Proof

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108 There are legislative exemptions for certain activities.

109 To the extent that examples of a more specific legal regime are needed, transportation rules are also examined.

110 *See supra* note 47. The new proposals to amend the Criminal Code are discussed later in this article. *See* discussion *infra* Part VII.

111 CONSULTATION PAPER, *supra* note 2, at 3.

112 Criminal Code, R.S.C., ch. C-46, § 446(1)(d) (1985) (Can.).

113 *Id.* § 447.

114 *Id.* § 444. Injury to cattle is an indictable offence carrying a maximum penalty of five years imprisonment. *Id.*

115 *Id.* § 445. Injury to other animals "without [lawful] excuse" is a summary conviction offence ($2000 fine and/or six months imprisonment).

116 *Id.* § 444 "cattle"; *id.* § 445 "kept for a lawful purpose"; *id.* § 446(1)(b) "being driven or conveyed"; *id.* § 446(1)(c)(e) "domestic animal" or "in captivity"; *id.* § 446(1)(f) "captive birds"; *id.* § 447 cockpits.

117 CONSULTATION PAPER, *supra* note 2, at 9. The defences discussed are "legal justification, excuse and colour of right." *Id.*

118 R.S.C., ch. C-46, § 446(1) (1985) (Can.).

of the "wilfulness" of such harm or neglect can be shown by evidence of a "failure to exercise reasonable care or supervision" of the animal.[119]

Notably, although section 446(1) applies to animals that are property, it also applies to those that are not. Accordingly, this provision, along with an ownership ban that can be imposed,[120] gives an "indication that the law is already at least partly concerned with the welfare of animals in and of themselves,"[121] rather than having an exclusive concern with the issue as a crime against human property interests. However, this section only prohibits "unnecessary" suffering. As such, it explicitly adopts the utilitarian calculus that "activities that are sufficiently beneficial [should] allow for some pain and injury to be caused to the animals involved."[122]

In addition to the general anti-cruelty provisions of the Criminal Code, the federal government has largely restricted its legislative activity to public health issues related to the use of animals in agriculture. The main statutes are the Health of Animals Act[123] and the Meat Inspection Act.[124] In particular, the former statute deals with diseases and toxic substances that can affect animals, establishing rules for humane treatment of livestock in interprovincial or international transit.[125] It also authorizes a degree of federal regulation over stockyards, animal sales, zoos, game farms, and bird hatcheries, although that authority is largely unexercised.[126] Regulations pursuant to the Meat Inspection Act contain the federal rules for abattoirs.[127]

Although these federal statutes and regulations contain detailed rules regarding specific activities, they tend to reflect the same general attitude as the Criminal Code provisions. For example, the Health of Animal Regulations prohibit transportation of any animal "if injury or *undue* suffering is likely to be caused" by the construction of the vehi-

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119 *Id.* § 446(3). Also, section 446(1)(c) prohibits persons in control of captive or domestic animals from abandoning them, or failing to provide them with adequate food, water or shelter. *Id.* § 446(1)(c).

120 *Id.* § 446(5). In addition to the usual sentences of fines and/or imprisonment (*see* discussion *supra* notes 114-15), an order prohibiting ownership of animals for up to two years can be made if § 446(1) is breached.

121 CONSULTATION PAPER, *supra* note 2, at 11.

122 *Id.* at 9. In addition, any lawful excuses and justifications relating to property crimes remain available. *See supra* note 117.

123 Health of Animals Act, R.S.C., ch. H-3.3 (1985) (Can.).

124 Meat Inspection Act, R.S.C., ch. M-3.2 (1985) (Can.). Other federal statutes such as the Fisheries Act, R.S.C., ch. F-14 (1985) (Can.), touch on animal welfare issues by regulating activities such as whaling.

125 Health of Animals Regulations, SOR/91-525, S.2 Part XII: Transportation of Animals (1991) (Can.).

126 Health of Animals Act, R.S.C., ch.H-3.3 § 64 (1985) (Can.).

127 Meat Inspection Regulations, SOR/94-683, § 4 Part III: Inspection, Humane Treatment and Slaughter, Packaging and Labelling (1994) (Can.). Meat Inspection Act, *supra* note 124, applies in provinces without equivalent provincial legislation. MEYER, *supra* note 44, at 51.

cle or container.[128] Again, this reflects the utilitarian calculus that some suffering is acceptable if the (human) end justifies the means.

B. Provincial Law

Canada has ten provincial and three territorial governments that can enact legislation dealing with a broad range of animal welfare issues. The level of regulation actually exercised varies widely. Ontario, for example, has limited legislation[129] establishing a SPCA and permitting officials to supply food, care, or treatment to animals in distress.[130] However, the Ontario Act does not prohibit cruelty and contains no criminal penalties for those who cause distress.[131] Thus, in Ontario, cruelty cases can only be prosecuted using the federal Criminal Code.

At the other end of the spectrum are provinces like Alberta, which have fairly extensive anti-cruelty statutes.[132] Alberta's statute contains a general prohibition against causing or permitting an animal to be in "distress."[133] Distress includes the deprivation of "adequate food, water, care or shelter;" injury, sickness, pain or suffering; or abuse or subjection to "undue hardship, privation or neglect."[134] In addition to authorizing care for the animal, prosecutions under the Alberta Act can result in fines,[135] and ownership prohibitions.[136]

Other provinces' protections fall in between these two positions. For example, Manitoba, like Ontario, lacks strong anti-cruelty legislation.[137] However, embedded in its animal disease-prevention legislation (the provincial equivalent of the Health of Animals Act) is a general prohibition against transporting or keeping animals without adequate "food, water, shelter or attention," or subjecting animals to "wanton, cruel or inhumane treatment."[138] The primary objective of the Manitoba Act is to prevent disease by requiring adequate care. The Act also provides a means to prosecute those who violate the statute.[139] In addition, Manitoba's general livestock husbandry statute

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128 Health of Animals Regulations, SOR/91-525 (1991) (Can.) (emphasis added). Somewhat surprisingly, the Meat Inspection Regulations, SOR/94-683, § 62(1) (1994) (Can.) contain a higher *prima facie* standard, prohibiting handling animals "in a manner that subjects the animal to avoidable distress or avoidable pain." *Id.*

129 Ontario SPCA Act, R.S.O., ch. O-36 (1990) (Can.).

130 *Id.* §§ 12-14.

131 The "owner or custodian" is civilly liable for the expenses of caring for the distressed animal. *Id.* § 15.

132 Animal Protection Act, S.A., ch. A-42.1 (1989) (Can.).

133 *Id.* § 2(1).

134 *Id.* § 1(2).

135 *Id.* § 12(1) (amended 1998) ($20,000 maximum fine).

136 *Id.* § 12(2).

137 MANITOBA LAW REFORM COMMISSION, ANIMAL PROTECTION (Report #93, 1996).

138 Animal Diseases Act, C.C.S.M., ch. A85 § 13 (1987) (Can.).

139 *Id.* § 17. Penalties include low fines ($50-$500 for individuals; $1000 for corporations) or two months imprisonment.

was similar to the Ontario legislation.[140] The act empowered enforcement officials to interfere in cases of neglect, beating, torture, abuse, pain, overcrowding or exposure,[141] by providing care to the animal. However, there was no ability to prosecute those whose treatment of the animal created the need for intervention.

As with the federal legislation, the provincial efforts tend to reflect their historical roots, and focus primarily on domestic or captive animals.[142] Often livestock are treated differently than cats, dogs, or other pets.[143] Animals are treated as property, and provisions are generally made for their seizure, custody, treatment, and sale, or destruction.[144] Animals, which are clearly owned, are often treated differently than strays.[145]

In addition, provincial legislation frequently includes exemptions. For example, Nova Scotia's anti-cruelty statute has a general prohibition against causing animals "unnecessary pain, suffering or injury."[146] However, the statute does not apply to wildlife, laboratory animals,[147] any animal if its "distress, pain, suffering or injury result[s] from an activity carried on in accordance with reasonable and generally accepted practices of animal management, husbandry or slaughter,"[148] or to any activity that might be exempted by the regulations.[149]

Additional details of the various provincial regimes are examined during subsequent analysis. At this juncture, it is sufficient to note that provincial legislation adopts the same sort of utilitarian calculus as the federal law. Thus, even in those provincial statutes which purport to be exclusively dedicated to the goal of animal protection and welfare, human use of animals is seen to justify some necessity for (or acceptable level of) pain and injury.

In addition to general anti-cruelty legislation, the provinces have, to varying degrees, enacted legislation regarding transportation, abattoirs, livestock markets, strays, research animals, fur and game farms,

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140 Animal Husbandry Act, C.C.S.M., ch. A90 (1987) (Can.) (*repealed by* The Statute Law Amendment Act, 1999 (1999) (Can.)). No equivalent provisions have been reenacted.

141 *Id.* § 67.

142 British Columbia Prevention of Cruelty to Animals Act, R.S.B.C., ch. 372, § 2 (1996) (Can.) ("This Act does not apply to wildlife . . . that [is] not in captivity.").

143 For example, under the Saskatchewan Animal Protection Act, animals raised "for the purpose of producing . . . animal products" may be designated as "protected" and any dog pursuing a protected animal may be killed. Saskatchewan Animal Protection Act, S.S., ch. A-21, §§ 13.1, 14 (1978)

144 *See* Animal Health and Protection Act, S.P.E.I. ch. 11, §§ 14-15 (1998) (Can.).

145 For example, the Yukon Animal Protection Act, S.Y.T. ch. 5 (1986) (Can.) sets a ten day time limit before tattooed or branded animals can be disposed of by a humane society, while unidentified animals can be given away or sold within three days.

146 Animal Cruelty Prevention Act, S.N.S., ch. 22, § 11(1) (1996) (Can.).

147 *Id.* § 3.

148 *Id.* § 11(4).

149 Presently, there are no regulations exempting additional activities.

captive wildlife and hunting and trapping.[150] Again, the degree of regulation of any specific activity varies widely. For example, Ontario has legislation to control the use of animals in research.[151] Elsewhere in Canada, the field is controlled largely through a voluntary code of practice.[152] Voluntary codes are also very important in the agricultural industry, specifying the requisite degree of basic care expected when keeping and handling most livestock species.[153]

The details of these many regimes are beyond the scope of this article. To the extent any specific examples might be useful, livestock transportation rules are considered later. Once again, the degree to which provinces have actually exercised their jurisdiction over intra-provincial transport varies considerably with Alberta and Saskatchewan having by far the most detailed regimes.[154] However, notwithstanding any specific rules on loading, feeding, watering, and vehicle design, the general attitude of these statutes is consistent with other Canadian legislation. For example, the Alberta Livestock Transportation Regulation specifies, "[n]o shipper or operator shall load or transport livestock that . . . would suffer *unduly* during transport."[155] As with other legislation, if the human rationale for transportation is sufficiently important, it is implicit in the prohibition of undue or unnecessary suffering that some degree of suffering is due or necessary.[156]

C. Modernizing the Canadian Approach

At present, an effort is underway in Canada to reform the Criminal Code anti-cruelty provisions.[157] Section 446 (the main anti-cruelty prohibition) has not been amended since the mid-1970s, while the other sections have not been updated since the mid-1950s.[158] As discussed above,[159] in much of Canada, this is the only statute containing a general prohibition on cruelty. Accordingly, it is quite significant

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150 MEYER, *supra* note 44, at 43-76.

151 Animals for Research Act, R.S.O., ch. A-22 (1990) (Can.).

152 Alberta has limited rules for animals used in University research. Major granting agencies will not approve research funding without compliance, but there is no legislative framework for enforcement of specific rules. MEYER, *supra* note 44, at 66. CANADIAN COUNCIL ON ANIMAL CARE, GUIDE TO THE CARE AND USE OF EXPERIMENTAL ANIMALS (Vol. 1. 2d ed. 1993) (voluntary code which has been made legally binding in Prince Edward Island).

153 MEYER, *supra* note 44, at 77-84. There are also some voluntary measures adopted by the pet industry. *Id.* at 84-86.

154 Livestock and Livestock Products Act, R.S.A., ch. L-24 (1985) (Can.) and Livestock and Livestock Products Act, R.S.S. ch. L-23 (1978) (Can.).

155 Alberta Regulation 22/99 – Livestock Transportation Regulation, § 2(1) (1999) (Can.) (emphasis added).

156 The regulation goes on to permit transportation "notwithstanding subsection 1" if the animal is being transported to a veterinarian or to slaughter, so long as this can be done "humanely." *Id.* § 2(2).

157 Criminal Code, R.S.C., ch. C-46 (1985) (Can.).

158 *See supra* note 48.

159 *See supra* note 47 and accompanying text.

that this central legislation has not been thoroughly reviewed since the advent of modern animal rights philosophies.

Unfortunately, the proposed Criminal Code amendments are not based on any real re-examination of the philosophy of animal welfare legislation. In fact, in its Consultation Paper describing proposed changes,[160] the government is quick to say:

> It is therefore essential to note that the offence of cruelty to animals is not intended to forbid conduct that is socially acceptable or authorized by law. The current provisions do not restrict or otherwise interfere with normal and regulated activities involving animals, such as hunting, fishing, and slaughter for food, and the same would be true of a reformed law. Criminal prohibitions are directed at conduct that falls outside of normally accepted behaviour.[161]

Thus, although the government proposes to prohibit cruelty to animals under the reformed law because they have the capacity to suffer,[162] and not because of their status as property, the notion of protecting animals because they have inherent value and rights to lead their natural lives is not even open for discussion. The morality of the list of current "uses" of animals will also not be questioned. Perhaps unsurprisingly, a path of careful avoidance of the many difficult and controversial issues surrounding the modern animal welfare debate seems to have been deliberately chosen, even at the early stage of consulting the public for their opinions.

The Canadian reform proposals are set firmly within the context of utilitarianism, reflecting no fundamental change in philosophy from the current law. It is a given that some harm to animals is socially acceptable. Yet, as discussed previously, there is a great range of opinion as to what constitutes the "best possible equilibrium"[163] between animals' interests in not suffering and human interests in using animals for their own gain.

Therefore, it is necessary to ascertain whether current and proposed Canadian law sits at a defensible point on the utilitarian spectrum. Major referents for our assessment are the standards established by European nations in animal welfare law. One might presuppose that Canada and Western Europe share some notion of what uses of animals might be considered socially acceptable. Even if that supposition is incorrect, a wealthy, democratic, western industrialized nation such as Canada should be able to meet or surpass the level of care for animals that European nations have agreed is socially and economically possible. In addition, if European standards of social

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160 CONSULTATION PAPER, *supra* note 2. The new legislation is proposed as Bill C-17, An Act to Amend the Criminal Code, 36th Parl., 2nd Sess., 48 Eliz. II (1999) (Can.), *reprinted in* Department of Justice Canada, 36th Parl., 2nd Sess. at *Parlimentary Internet Parlementaire* (visited Mar. 17, 2000) <http://www.parl.gc.ca>.

161 CONSULTATION PAPER, *supra* note 2, at 5.

162 *Id.* at 7.

163 BROOMAN & LEGGE, *supra* note 4, at 91.

acceptability are more welfare-oriented than Canadian standards on any given issue, then that issue is identifiably one where the cultural acceptability of the activity might need more systematic examination within Canada.

V. PRESENT LAW IN EUROPE

Each individual nation of Europe has the jurisdiction to enact domestic anti-cruelty laws. As a generalization, the northern European laws are more strictly concerned with animal welfare while southern and eastern European laws, are aimed primarily at protecting human proprietary interests in animals.[164] However, European nations have reached supra-national agreement on certain animal welfare standards, which have been influential on domestic efforts, through both the Council of Europe and the European Union.

Early attempts by the European Community to establish uniform animal management rules were based solely on economic interests, because animal welfare was not considered a community objective.[165] There were large differences in the animal welfare philosophies of the various participant nations; therefore, animal welfare law was left as the sovereign member states' own responsibility. However, the issue was constantly debated, and the participating nations finally agreed on their "desir[e] to ensure improved protection and respect for the welfare of animals as sentient beings."[166] Thus, European agreements reflect a politically and economically viable compromise amongst a variety of potential welfare standards, based on the notion that "an improvement in the quality of [human] life also entails respect for animals in the member states."[167]

A. European Law-Making Organizations

The Council of Europe is an international organization established by treaty.[168] Member states use the organization as a forum for examining common social problems and reaching agreement on common standards and harmonized policies.[169] Since 1989, the council has greatly increased its focus on human rights and promotion of "democratic security" and "social cohesion," as eighteen central and eastern European nations joined the organization.[170] Prior to the end of the Cold War, however, the Council consisted of the twenty-three western

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164 Jackson, *supra* note 43, at 221.

165 *Id.* at 227.

166 Preamble of Protocol #33, annexed to the Treaty of the European Union. For Consolidated Treaties establishing the European Union in its current form, see Europa, *Treaties* (visited Apr. 25, 2000) <http://europa.eu.int/eur-lex/en/treaties/index.html>.

167 Jackson, *supra* note 43, at 224.

168 Council of Europe Treaty Office, *Statute of the Council of Europe, Europ. T.S. No. 1* (visited Apr. 13, 2000) <http://conventions.coe.int/treaty/en/cadreinfo.htm>.

169 *Id.* Art. 1.

170 *Council of Europe* (visited Oct. 2, 2000) <http://www.coe.fr>.

European democracies and focused on a variety of other issues, including animal welfare.[171] During the period from 1968 to 1987, Council members reached consensus on a number of animal welfare issues, resulting in six treaties (five directed toward anti-cruelty standards and one on wildlife conservation).[172] Significantly, member states usually choose to ratify the treaties only once they are in a position to ensure domestic compliance with the agreed standards.[173]

The European Union (EU) is:

> a much more fully developed and integrated political and economic entity than the Council of Europe. In the sectors of policy delineated in the Treaty of Rome, now supplemented by the single European Act of 1987, the 12 [now 15] member states operate within a common framework of laws, initiated by the European Commission, debated, possibly amended, and approved by the European Parliament, and adopted by the Council of Ministers.[174]

In addition to the core institutions of the Commission, Parliament, and Council, the Union has grown into a body large enough to support a large number of additional institutions, including the Court of Justice (which interprets EU law) and the Economic and Social Committee (which frequently issues advisory opinions to the Commission, Council and Parliament before legislation is adopted).[175]

The EU can use three types of legal instruments: regulations, directives, and decisions.[176] If a regulation is passed, it becomes binding law within all member states and prevails over conflicting domestic legislation.[177] Directives are not internalized in the same way as regulations. When a directive is issued, it binds the governments of member states without automatically becoming national law.[178] Member states are then obliged to enact domestic laws of their choice to implement the standard set out in the directive. Decisions are of somewhat unclear effect, but if a decision is made by the Council to join an ex-

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171 *Id.*

172 *European Convention for the Protection of Animals During International Transport*, Europ. T.S. No. 65 (1968) *as amended by Additional Protocol* Europ. T.S. No. 103; *European Convention for the Protection of Animals Kept for Farming Purposes*, Europ. T.S. No. 87 (1976) and *Protocol of Amendment*, Europ. T.S. No. 145; *European Convention for the Protection of Animals for Slaughter*, Europ. T.S. No. 102 (1979); *Convention on the Conservation of European Wildlife and Natural Habitats*, Europ. T.S. No. 104 (1979); *European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes*, Europ. T.S. No. 123 (1986) and *Protocol of Amendment*, Europ. T.S. No. 170; and *European Convention for the Protection of Pet Animals* (Europ. T.S. No. 125) (1987).

173 Jackson, *supra* note 43, at 222.

174 *Id.* at 223.

175 For more information on EU structure, see *Europa* (visited Apr. 13, 2000) <http://europa.eu.int>.

176 Jackson, *supra* note 43, at 223.

177 *Id.*

178 *Id.*

isting treaty, the EU member states arguably should bring their national laws into compliance with the treaty provisions.[179]

All fifteen EU member states are also members of the Council of Europe. The EU Council has issued decisions making the Union a party to the Council of Europe Conventions on farming, slaughter, and research.[180] It has also issued a directive adopting the Transportation Convention.[181] Any historical concerns about the legal effect of the EU becoming a party to a treaty that a member state had not yet ratified[182] have largely become moot, since the EU has issued directives that overlap with the Conventions in farm animal (calves, pigs and laying hens), slaughter, research animal, and animal transport areas. All member states have ratified the treaties regarding those topics.[183] There are also some EU resolutions on research animals, traps, and seals, and a directive on zoo animals.[184] Thus, the only area in which the Council of Europe has been active, and the EU has not yet acted, is in the protection of pets, where a few EU member states have not yet ratified the Pet Protection Treaty.[185]

B. Sample European Laws

1. The Pet Protection Treaty

As the most recent Convention, the pet protection treaty[186] provides an interesting window into the dominant European attitudes toward animal welfare. Article 3 of the Convention sets out the "Basic Principles for Animal Welfare:"

1) Nobody shall cause a pet animal unnecessary pain, suffering or distress; and
2) Nobody shall abandon a pet animal.[187]

On the surface, this provision seems to be identical in philosophy to statutes such as Canada's Criminal Code or the various provincial animal welfare acts, by contemplating that pain, suffering or distress might sometimes be necessary. However, even a cursory reading of the European provisions suggests that the treaty, at least on paper, is far more focussed on animal welfare than Canadian legislation.

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179 *Id.* at 226.

180 *Europa* (visited Apr. 14, 2000) <http://europa.eu.int.>. The EU is also a party to the Council of Europe Convention on wildlife. *Id.*

181 *Id.*

182 Jackson, *supra* note 43, at 226.

183 *See generally* MEYER, *supra* note 44; Jackson, *supra* note 43.

184 *Id.*

185 *See* SEDAC, *Socioeconomic Data and Applications Center* (visited Apr. 25, 2000) <http://sedac.ciesin.org>. The EU normally will not enact a Directive until all member states have ratified a Convention. *Id.*

186 European Convention for the Protection of Pet Animals, 1987, Europ. T.S. No. 125.

187 *Id.* at Art. 3.

For example, the economic interests of human owners are not to be considered under the European treaty. The Preamble to the treaty notes that "man has a moral obligation to respect all living creatures,"[188] looking at the value of pets to society as a consequence of their contribution to human quality of life. It is also noted that wide variations in attitudes toward pets are sometimes due to "limited knowledge and awareness;" thus, the treaty looks at "a basic common standard of attitude and practice which results in responsible pet ownership" as being a realistic (as well as desirable) goal. The provisions of the treaty are then directed toward the "keepers" of pets or the "persons responsible" for them, not to animal "owners."[189] Activities such as the use of animals in entertainment, exhibitions and competitions are prohibited unless the pets' "health and welfare are not put at risk."[190]

The convention also provides that human preferences and convenience are not to be placed ahead of animal welfare. For example, docking of tails, cropping of ears, devocalising, declawing, and defanging are all prohibited by the treaty in Europe,[191] but permissible in most of Canada.[192] A pet in Europe is not to be trained in any way "detrimental to its health and welfare," especially not by exceeding its natural capacities or employing techniques that can cause injury or unnecessary distress.[193] Professional animal trainers, as well as ordinary dog or cat keepers training their animals, are required to pay full regard to animals' capacities such as physical strength, learning ability, and ethological needs.[194] In Canada, on the other hand, it is common to exempt persons from liability if they cause distress or injury through "reasonable and generally accepted practices of animal management."[195] Additionally, in Europe pets cannot be sold to persons under the age of sixteen,[196] euthanasia methods are regulated,[197] and stray animals must be handled so as to "not cause avoidable pain, suf-

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188 This statement seems to recognize an inherent value in animals.

189 European Convention for the Protection of Pet Animals, 1987, Europ. T.S. No. 125, at Art. 3.

190 *Id.* at Art. 9.

191 *Id.* at Art. 10. In practice, several countries entered reservations to the Convention so as to allow tail docking to remain legal, so it does continue in some states, serving as an example of some of the enforcement difficulties with the treaty. *See* D. WILKINS, ANIMAL WELFARE IN EUROPE: EUROPEAN LEGISLATION AND CONCERNS 87-89 (1997).

192 Tail docking of horses and ear cropping of dogs is considered illegal "mistreatment" in Newfoundland. Animal Protection Act, R.S.N., ch. A-10, § 4 (1990) (Can.).

193 European Convention for the Protection of Pet Animals, 1987, Europ. T.S. No. 125, at Art. 7.

194 *Id.* at Art. 4.

195 Animal Protection Act, S.A., ch. A-42.1, § 2(2) (1989) (Can.).

196 European Convention for the Protection of Pet Animals, 1987, Europ. T.S. No. 125, at Art. 6. Some countries have entered reservations to the treaty on this point, and continue to allow sales to minors. WILKINS, *supra* note 191, at 89.

197 European Convention for the Protection of Pet Animals, 1987, Europ. T.S. No. 125, at Art. 11. There are Canadian laws dealing with aspects of this issue, both in

fering or distress."[198] All these provisions lack equivalents in most Canadian jurisdictions.

In short, although the European pet protection treaty is clearly utilitarian in that it contemplates the use of animals by people (as household pets, in breeding facilities, exhibitions, and competitions), it aims to strike a different balance between human desires and the animals' interests than the Canadian laws.[199] The mere fact that some EU nations still hesitate to ratify the treaty means that it is taken seriously.

2. *The Convention for the Protection of Animals during International Transport*

Another example of European animal welfare law is the Convention for the Protection of Animals During International Transport.[200] The Convention applies to horses, livestock, pets, other non-domestic birds and mammals, and cold-blooded animals.[201] There is no general anti-cruelty provision regarding the transport of these animals, although there are specifications on veterinary inspections, space, ventilation, food, watering, restraint, loading, and sanitation.[202] However, the general tone of the treaty is familiar. For example, it states, "animals that become ill or injured during transport" are to receive veterinary care as soon as possible and "if necessary be slaughtered in a way which avoids unnecessary suffering."[203]

Perhaps because of the age of the treaty, or its emphasis on transporting livestock, there is a greater gap between the ideals of the treaty ("to safeguard, as far as possible, animals in transport from suffering")[204] and the rather pragmatic recognition of on-the-ground conditions ("dead animals . . . shall be removed [from vehicles] as soon as possible").[205] Thus, although the rules are clearly focussed on providing for some minimum level of animal care, without explicit regard for cost, the underlying human enterprise remains unquestioned. The Preamble, states that the parties are "convinced that the requirements

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relation to euthanasia generally and other forms of killing, such as livestock slaughter. *See* MEYER, *supra* note 44, at 38, 51.

198 European Convention for the Protection of Pet Animals, 1987, Europ. T.S. No. 125, at Art. 12.

199 Interestingly, the new balance seems to be gaining ground even in European agribusiness: a recent EU Council Directive (1999/74/EEC) enacts a ban on battery cages for laying hens starting in 2012, despite furious opposition by Portugal, Spain, France and Italy (due to fear of increasing costs and competitive disadvantages in international trade). Deutsches Tieraezteblatt (DTBl) 11 (1998) (Germany) at 1129.

200 European Convention for the Protection of Animals During International Transport, (1968) Europ. T.S. No. 65 as amended by Additional Protocol Europ. T.S. No. 103.

201 *Id.* at Art. 12.

202 *Id.*

203 *Id.*

204 *Id.* at Preamble.

205 *Id.* at Art. 13.

of the international transport of animals are not incompatible with the welfare of the animals."[206]

3. Directive on the Protection of Animals During Transport

As previously noted, EU Council Directives cover much of the same ground as the Council of Europe Conventions. One example is the Directive on the protection of animals during transport.[207] The Directive is similar in scope to the Convention on transportation and adopts a prohibition on transportation that would cause "unnecessary suffering" as its default standard.[208] Detailed Annexes have been developed setting out transportation standards for livestock, poultry, domestic birds, rabbits, dogs, cats, "other mammals and birds," and "other vertebrate animals and cold-blooded animals."[209] The Directive proceeds on much the same complacent premise as the Convention in regard to the acceptability of the routine practice of long-distance transportation in the livestock industry.

In fact, there has been a great deal of recent controversy in Europe questioning the need to transport live animals (rather than transporting meat and animal products post-slaughter) within the European market.[210] The debate has been aggravated by the fact that member states are no longer authorized to set higher national standards for animal transportation within their own boundaries than those set out in the European Union agreements. Thus, some member states were even forced to give up tight national laws on long-distance transport in favour of the European Directive. Austria, for example, had to stop enforcement of a national regulation that restricted transport of animals for slaughter to a maximum of six hours and one hundred-thirty kilometers.[211] The feeling of many, particularly in northern Europe, is

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206 *Id.* at Preamble.

207 Council Directive 91/628/EEC of Nov. 19, 1991 on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC, amended by Council Directive 95/29/EC of June 29, 1995. There is also a Council Regulation on additional animal protection standards applicable to road vehicles used for the carriage of livestock on journeys exceeding eight hours. (EC) No. 411/98 (Feb. 16, 1998).

208 European Convention for the Protection of Animals During International Transport, 1968, E.T.S. #65, as amended by Additional Protocol E.T.S. #103, at Arts. 3 and 5(1)(c).

209 *Id.*

210 J. Bonner, *Roads to the Abattoir*, 1968 NEW SCIENTIST, 1995, at 30; British Veterinary Association, *Comment: The Devil in the Detail*, 138:3 VETERINARY RECORD 49 (1996); British Veterinary Association, *Veterinarians and animal transport*, 136:11 VETERINARY RECORD 253 (1995).

211 DTB1 07 (1999) (Germany) at 673; Council Directive 91/628/EEC, *supra* note 207, specifies a maximum journey time in livestock transport vehicles of twenty-four hours for pigs and horses; nine hours, followed by one hour rest, followed by a further nine hours travel for unweaned animals; and fourteen hours followed by a one hour rest, then a further fourteen hours transit for all other animals. *Id.* Thereafter animals must be unloaded and rested for twenty-four hours before the journey can resume. There is no distance restriction. *Id.* However, if ordinary trucks are used, there is an eight hour maximum journey time. *Id.*

summed up by the British Veterinary Association (BVA), which states that animals in transit should be "treated as passengers not as commodities."[212] The BVA also recognized that "the necessity of some journeys should be questioned," and "if animals are required to make a journey, the *highest priority* must be given to their welfare."[213] However, at the same time some European nations remain reluctant to accept any journey duration limits.[214] Thus, the European Directive again reflects a compromise between extremely divergent attitudes, rather than being a mirror of a united European opinion on animal transport. Nevertheless, even in an area such as livestock transportation, there are signs that attitudes may be changing, and that the public is ready to debate the question of whether "economic dogma should give way to compassion and common sense."[215]

VI. Assessment of the Current Approach in Canada and Europe

The approach in both Canada and Europe is based on a utilitarian notion that human use of animals is acceptable, but should be balanced against the need for humane treatment. There is, however, a broad range of ideas as to what constitutes an acceptable balance between human and animal interests. 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 *per se*.

The European trend toward greater protection of animals is desirable and should be continued in Europe and emulated in Canada. Even if Western societies are not yet prepared to consider animal "rights" (which is arguable),[216] there has been a clear move away from a Cartesian view of animals as insensate property. There is broad acceptance of the notion that animals should be protected "in their own right because they have the capacity to suffer."[217] If humans happen to have a proprietary interest in an animal, law already protects those rights.[218] Therefore, the purpose of animal welfare provisions should be the protection of animal (not human) interests.[219] Thus, anthropocentric laws (i.e. laws that protect human interests in animals, such as economic or

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212 British Veterinary Association (1995), *supra* note 210.

213 *Id.* (emphasis added).

214 Spain, Italy, and Portugal refused to accept any limit on total journey times. British Veterinary Association, *Ministers Fail to Agree on Journey Times*, 135:19 Veterinary Record 443 (1994).

215 British Veterinary Association, *Comment: Deregulate and be Damned*, 134:2 Veterinary Record 25 (1994).

216 *See generally*, *supra* note 52.

217 Consultation Paper, *supra* note 2, at 7.

218 One such example are the laws against theft of property. *Id.* at 8.

219 *Id.*

proprietary interests) are less desirable than laws designed to protect the animals themselves.

This view has a number of implications, which are explored below. The discussion that follows is organized on the basis of eight criteria that have been developed by other publicists to aid in the discussion of the adequacy of animal welfare legislation.[220]

A. What Animals Are Protected?

If there is a moral obligation not to inflict harm on animals, animals should receive consistent legal treatment. There would seem to be no reason, for example, to give better protection to an owned cat than to a stray cat or a lynx, or to give better protection to a cow (due to its economic value) than to a dog. To do so, one rather dramatic author noted, would be to proceed on the notion that "only a valuable animal is capable of screaming in agony."[221] Thus, this article proceeds on the basis that the differential treatment of various species, merely because they are assigned different economic values, cannot be justified.

Similarly, it is not acceptable to provide different levels of protection to animals simply because they are attributed with different "intelligence, beauty, loyalty, utility or any other quality."[222] An ugly dog is not less deserving of protection than a cute dog, nor is a turkey less deserving of protection than a peacock. Perceived social value—whether an animal is favoured or seen as a pest—should also not exempt animals from the same level of protection.[223] Thus, the euthanasia or slaughter of a gopher should be no less humane than the same activity carried out on a pet rabbit.

Finally, there is the more controversial question of whether vertebrate animals deserve a higher level of protection than invertebrate animals. Currently, it remains acceptable to boil lobsters alive, while most people would be sickened to kill a pig using the same method.[224] While scientists seem clear that mammals, birds, and other vertebrates are anatomically similar enough to humans to feel and perceive pain in a similar manner, the different anatomy of mollusks, crustaceans, insects, and other invertebrates makes the case for their suffering less clear. There is certainly controversy over practices such as live crab declawing, pearling of live oysters, and lobster boiling resulting in the creation of humane slaughter practices and other alter-

220 *See* FAVRE & LORING, *supra* note 57, at ch. 9; DANIEL S. MORETTI, ANIMAL RIGHTS AND THE LAW ch. 1 (1984).

221 Friend, *supra* note 13, at 204 (emphasis omitted).

222 MANITOBA LAW REFORM COMMISSION, *supra* note 137, at 14.

223 Tannenbaum, *supra* note 13, at 576 (noting that most cruelty prosecutions are for household pets, and are almost unheard of for "pests" such as rats and mice).

224 A practice which apparently was fairly common in the U.S. until the 1970s. Friend, *supra* note 13, at 210 n. 56.

natives.[225] Proponents of the inherent value theory would see no reason to treat vertebrates and invertebrates differently, yet, many utilitarians could argue that a different "balance" should be struck between the two classes of animals depending on their capacity for suffering. In the end, it may be that the strongest arguments for including invertebrates within the purview of anti-cruelty measures is the anthropocentric one—the kind of person who might torture a pet tarantula is not the kind of person society wishes to cultivate. Accordingly, we recommend the broadest possible definition of "animal" should be included in anti-cruelty legislation. This should be coupled with sufficient flexibility on the part of the judiciary to determine on a case by case basis whether distress or suffering can occur, based on the most current scientific and veterinary advice available.

Present Canadian law is much more restrictive. The federal Criminal Code makes reference to "cattle," "dogs," "birds, or animals that are not cattle," "cocks" and "animals and birds" in different sections, setting different standards for different species.[226] Distinctions are also made between wild, domestic, and captive animals.[227] However, the definition will be broadened substantially if the proposed amendments take place. "Animal" would include all non-human vertebrates and "any other animal that has the capacity to feel pain."[228]At the provincial level, when "animal" is defined, the anti-cruelty legislation varies in content, with some provinces excluding wild animals[229] and others expressly including them.[230] It seems typical to either limit the definition of "animal" to "all non-human vertebrates"[231] or to have a definition that is not comprehensive (i.e., "animal includes . . ."[232]) but which lists various mammals and birds, and sometimes cold-blooded vertebrates. The broadest definition is found in the Alberta statute, which simply states that animal "does not include a human being."[233]

The European treaties and EU legislation are generally broader. The pet protection treaty applies to any animal "kept or intended to be kept by man . . . for private enjoyment and companionship,"[234] which

225 Shellfish Network, *The Shellfish Network (UK)* (Aug. 22, 2000) <http://www.enviroweb.org/arc/shellfish/>. The Shellfish Network is an activist group working on these issues. *Id.*

226 Criminal Code, R.S.C., ch. C-46, §§ 444-447 (1985) (Can.).

227 *Id.* § 446.

228 Bill C-17, An Act to Amend the Criminal Code, 36th Parl., 2nd Sess., 48 Eliz. II (1999), proposed § 182.1(8) (Can.).

229 British Columbia Prevention of Cruelty to Animals Act, R.S.B.C., ch. 372 , § 2 (1996) (Can.); Yukon Animal Protection Act, S.Y.T., ch. 5, § 1 (1986) (Can.).

230 Animal Health and Protection Act, S.P.E.I., ch.11, § 1(a) (1988) (Can.).

231 Animal Protection Act, R.S.N., ch. A-10, § 2(a) (1990) (Can.); Animal Cruelty Prevention Act, S.N.S., ch. 22, § 2(1) (1996) (Can.).

232 Animal Health Protection Act, R.S.Q., ch. . P-42, § s.2(1) (1977) (Can.); Saskatchewan Animal Protection Act, S.S., ch. A-21, § 2(a) (Can.); Animal Health and Protection Act, S.P.E.I., ch. 11, § 1(a) (1988) (Can.).

233 Animal Protection Act, S.A., ch. A-42.1, § 1(1)(a) (1989) (Can.).

234 European Convention for the Protection of Pet Animals, 1987, Europ. T.S. No. 125, at Art. 1(1).

could include invertebrates. The transportation treaty[235] and the EU Council Directive on transport both have detailed definitions that include not only all vertebrates but also all "cold-blooded animals,"[236] although, the most detailed standards of care have been developed for livestock and domestic species.

The American experience suggests a broad definition is workable. Most jurisdictions in the United States define an animal as "any living creature."[237] This would cover all animals,[238] including invertebrates. In practice, courts exercise a certain amount of discretion in determining what the "intention of the legislature" was when a statute was passed.[239] One problem with this approach, therefore, is judicial conservatism. Courts may be reluctant "to make previously acceptable activity criminal, except by legislative amendment,"[240] and could interpret a statute narrowly in the absence of a sufficiently detailed definition.[241] This suggests that a definition should be included in law that is "explicitly broad," including invertebrates as well as cold- and warm-blooded vertebrates within the protective provisions.

B. What Persons Are Subject to the Rules?

Although cruelty laws originally arose because owners could not be held responsible for misconduct toward their property, "often persons other than the owner cause or permit cruel acts."[242] Cruel behaviour is also not directed only toward owned animals. Perhaps self-evidently, no one should be cruel to any animal, and thus a statute that applies to "any person"[243] or "everyone," or which admonishes "nobody"[244] or "no one" to engage in cruel behaviour, would seem desirable. Even if the definition is this broad, the specific acts or omissions precluded, and the level of intent required by law, can be used to broaden or narrow the scope of legal responsibility as needed.

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235 European Convention for the Protection of Animals During International Transport, 1968, Europ. T.S. No. 65, *as amended*, at Art. 2.

236 Council Directive 91/628/EEC of Nov. 19, 1991 on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC, *amended by* Council Directive 95/29/EC of June 29, 1995, at Art. 1(1).

237 MORETTI, *supra* note 220, at 3; FAVRE & LORING, *supra* note 57, at 127.

238 FAVRE & LORING, *supra* note 57, at 127.

239 *Id.*

240 *Id.* at 139.

241 Courts have sometimes mistakenly taken the word "animal" to be synonymous with "mammal," thus excluding birds, reptiles, amphibians and invertebrates. *Id.* at 130.

242 Letter from Canadian Federation of Humane Societies, responding to the *Consultation Paper*, *supra* note 2, entitled "Re: Crimes Against Animals" 9 (Dec. 3, 1998) (on file with author)[hereinafter CFHS 2].

243 This is typical of American anti-cruelty legislation. FAVRE & LORING, *supra* note 57, at 124.

244 European Convention for the Protection of Pet Animals, 1987, Europ. T.S. No. 125, at Art. 3.

C. What Acts or Omissions Are Included?

1. Defining Cruelty and Distress

Anti-cruelty statutes include a wide variety of terms to describe prohibited conduct. For example, the original Martin's Act prohibited persons from "wantonly and cruelly" beating, abusing or ill-treating any cattle.[245] In contrast, typical American legislation prohibits overriding, overdriving, overloading, torture, torment, unjustifiable injury, deprivation of necessary sustenance, food or drink, and "cruelly" beating or "needlessly" mutilating or killing animals,[246] or maliciously or mischievously killing, maiming, wounding, or injuring livestock.[247] Sometimes specific activities are also prohibited, such as fighting or baiting of animals, administering poison, or owning a cockpit.[248]

One difficulty with this "listing" approach is that it often fails to be comprehensive in prohibiting undesirable acts. Perhaps physical pain or injury will be prohibited but other physical distress (e.g. excessive heat or cold) is not included. Alternatively, the terms in the list may overlap or be ambiguous (e.g. the distinction between torture and torment).[249] Thus, more modern statutes often seek to have a broader definition of cruelty, centered on the notion of "distress." Distress is defined fairly broadly to include not only injury, pain, and suffering but also deprivation of food, water, shelter or care, untreated illness, "abuse," or subjecting an animal to undue "hardship, privation or neglect."[250] Nevertheless, the focus is primarily on preventing physical distress; the legal notions of distress and cruelty have traditionally included neither the failure to meet ethological needs nor the failure to ensure the animal is happy.[251] There is also the potential for lack of consistency between jurisdictions, since the concept of cruelty is a statutory, not common law, creation.[252]

In Canada, the federal Criminal Code largely follows the "listing" approach, prohibiting activities such as killing, maiming, wounding, poisoning, or injuring of animals,[253] as well as "wilfully" causing or permitting "unnecessary pain, suffering or injury."[254] It also applies to abandonment of animals in distress or wilfully failing "to provide suitable and adequate food, water, shelter and care."[255] Provincial enact-

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245 BROOMAN & LEGGE, *supra* note 4, at 42.

246 FAVRE & LORING, *supra* note 57, at 123-24.

247 *Id.* at 127-28.

248 Criminal Code, R.S.C., ch. C-46, §§ 446-447 (1985) (Can.).

249 FAVRE & LORING, *supra* note 57, at 124.

250 Animal Protection Act, S.A., ch. A-42.1, § 1(2) (1989) (Can.).

251 Tannenbaum, *supra* note 13 at 572.

252 *Id.* at 568. As Tannenbaum notes, "legislatures have virtually unbridled discretion to define what cruelty is," and this appears to have been a problem in the United States.

253 Criminal Code, R.S.C., ch. C-46, § 444 (1985) (Can.).

254 *Id.* § 445.

255 *Id.* § 446. The new Bill C-17, An Act to Amend the Criminal Code, 36th Parl., 2nd Sess., 48 Eliz. II (1999) (Can.), would follow much the same approach, focusing on "un-

ments have, more often than not, adopted a fairly uniform definition of distress that is keyed to notions of deprivation, injury, sickness, pain, suffering, abuse and neglect, as described previously.[256] However, since some jurisdictions have no legislation and others adopt different definitions, there remains a patchwork of prohibitions within the country. As a generalization, both positive acts (cruelty) and omissions (neglect) are prohibited, and the focus is primarily on physical harm.

In Europe, on the other hand, a more expansive notion of what misconduct constitutes cruelty is evident, at least in relation to companion animals. Under the pet protection Convention, not only are unnecessary pain, suffering, distress, and abandonment prohibited,[257] but persons keeping animals are required to "provide accommodation, care and attention which take account all of the ethological needs of the animal."[258] Concepts such as "mental suffering" are expressly considered,[259] as is the ability of an animal to "adapt itself to captivity."[260] Clearly, the modern trend is to move beyond prohibiting only pain or injury to a law that prohibits a wide range of physical suffering (e.g. hunger, lack of exercise) and includes the concept of behavioural or mental distress.

While virtually all prosecutions in Canada involve the physical abuse of animals, there are recent indications that a broader definition of abuse is required. Three cases illustrate this trend. In *R. v. Michelin*[261] a dog suffered a fatal heart attack due to the trauma of having his head stuffed down a hole in the yard.[262] His eyes, nose, and mouth were bruised and bleeding and several blows had also been struck.[263] Although there was some physical injury, the judge's concern was clearly with the extreme stress and fear suffered during his death.[264] The accused was incarcerated for twenty days, prohibited from owning animals for three years, and required to attend anger management

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necessary pain, suffering or injury" as well as various forms of killing, poisoning, baiting, fighting and abandonment.

256 British Columbia Prevention of Cruelty to Animals Act, R.S.B.C., ch. 372, § 1(2) (1996) (Can.); Animal Protection Act, S.A., ch. A-42.1, § 1(2) (1989) (Can.); Saskatchewan Animal Protection Act, S.S. ch. A-21, § 2(b) (Can.); Ontario SPCA Act, R.S.O., ch. O-36, § 1 (1990) (Can.); Animal Cruelty Prevention Act, S.N.S., ch. 22, §2(2) (1996) (Can.); Animal Protection Act, R.S.N., ch. A-10, § 2(b) (1990) (Can.); Animal Health and Protection Act, S.P.E.I., ch.11, § 8 (1988) (Can.); Yukon Animal Protection Act, S.Y.T. ch. 5, § 1 (1986) (Can.).

257 European Convention for the Protection of Pet Animals, 1987, Europ. T.S. No. 125, at Art. 3.

258 *Id.* at Art. 4.

259 *Id.* at Art. 12, with reference to the distress involved in capturing stray animals.

260 *Id.* at Art. 4.

261 *R. v. Michelin* (June 19, 1995, Calgary, Alberta), *reported in* D. OKO, ALBERTA DECISIONS (undated Alberta Department of Justice document); D. Slade, *SPCA Praises 20 Day Jail Term*, CALGARY HERALD, June 1995 (date illegible), at B2.

262 *R. v. Michelin*, *reported in* D. OKO, ALBERTA DECISIONS, *supra* note 261.

263 *Id.*

264 *Id.*

counselling.[265] In *R. v. Smyth*[266] the accused attempted to strike two dogs with his cane. As noted in the digest of the case, "in the absence of any real pain and suffering the judge found himself unable to conclude that the criminal offence had occurred."[267] The judge, however, was clearly concerned with the threat posed by someone capable of such an attack, and required the accused to enter into a $500 peace bond which required him to stay fifty feet away from the dog's owner for a year.[268]

In the third case, *R. v. Kohut & Melmoth*,[269] two men beat two dogs to death with baseball bats, killing them almost instantly by crushing their skulls.[270] Veterinary testimony showed that pain or physical suffering was unlikely.[271] The judge concluded that in the absence of suffering, the act was morally reprehensible and socially unacceptable but not illegal, and the charges were stayed.[272] Unsurprisingly, public outcry to change the law to include such behaviour was widespread.[273] Cases such as these underscore the need for a broad definition of "cruelty."

2. *Vicarious liability*

One concern with having a broad definition of cruelty combined with a broad range of responsible persons is that people too remote from the actual event might be liable. It should be recalled that there is no vicarious liability in Canadian penal law.[274] In a true criminal prohibition, such as the federal Criminal Code, where causing cruelty is prohibited, "the mere fact that a person is an employer, a principal or a family member of someone guilty of an illegal act does not make that person liable."[275] Only if an employer, family member, or other person intentionally participated in the act as a party, or if the statute also prohibits permitting the cruelty, could such others be liable for their own role in the case.

In provincial legislation, prohibitions on causing or permitting distress are "regulatory," "public welfare," or strict liability offences.[276] An individual who causes or permits cruelty is responsible for the act unless he or she took all reasonable care to prevent the harm from

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265 *Id.*

266 *R. v. Smyth* (July 31, 1997, Oshawa, Ontario) *reported in* Ontario SPCA Inspectors Gazette, No. 16 (May 1998).

267 *Id.*

268 *Id.*

269 *R. v. Kohut*; *R. v. Melmoth* (unreported, 1997, Edmonton, Alberta), described in Kent, *supra* note 93.

270 *Id.*

271 *Id.*

272 *Id.*

273 This particular problem is to be addressed in Bill C-17, An Act to Amend the Criminal Code, 36th Parl., 2nd Sess., 48 Eliz. II (1999) (Can.), proposed § 182.1(1)(b), by prohibiting the brutal or vicious killing of animals, even if they die immediately.

274 *Canadian Dredge & Dock Co. Ltd. v. R.* [1985] 1 S.C.R. 662 (Can.).

275 FAVRE & LORING, *supra* note 57, at 130.

276 *R. v. Sault St. Marie* [1978] 2 S.C.R. 1299 (Can.).

occurring. Although there is no vicarious liability here either, a wide range of actions by various people could be found to constitute a "failure to prevent" the harm.

3. Necessity

A second concern with a law of broad definition and applicability is that human practices which currently enjoy majority social support, such as slaughtering animals for food, could become prohibited as cruelty. In short, there is a perceived need to define the balance that should be struck between human use and animal suffering. In current legislation, this is accomplished by prohibiting only "unnecessary"[277] or "undue"[278] suffering or neglect, and by exempting certain activities.[279]

In the United States, the statutory equivalent of "unnecessary" cruelty is "needless" or "unjustified" cruelty.[280] It is unclear whether:

> "needlessly" should be construed to require that the actions were being done under unjustified circumstances, or under otherwise justifiable circumstances but in an unjustifiable manner. It is not clear whether the term "needless" should be judged relative to the interest of the animal or the interest of the human in question. Is the health of the animal or the economic efficiency of the owner the standard?[281]

In determining what is meant by unnecessary or unjustified pain or suffering several additional questions can arise. Was there some type of legal justification or excuse?[282] What was the severity and duration of the pain or other distress?[283] What is the "perceived legitimacy (by society as a whole) of the particular activity?"[284] Was the pain completely avoidable, or the level of pain greater than required?[285] As Tannenbaum notes:

> speaking of "necessity" in the context of cruelty prosecutions is not terribly helpful. It is not strictly speaking necessary for any animals to experience pain because of human activity .... Typically to claim that a given amount or kind of animal pain or distress is "necessary" is to make two judgements: (1) that a human aim for which the pain (distress, and so on) is imposed is legitimate or is sufficiently important to justify the animal pain; and (2) that the amount or kind of pain in question is in fact required for the achievement of that aim.[286]

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277 Criminal Code, R.S.C., ch. C-46, § 446(1)(a) (1985) (Can.); European Convention for the Protection of Pet Animals, 1987, Europ. T.S. No. 125, at Article 3(1).

278 Animal Protection Act, S.A., ch. A-42.1, § 1(2)(c) (1989) (Can.).

279 *See* discussion *infra* Part VI.E.

280 FAVRE & LORING, *supra* note 57, at 126; Tannenbaum, *supra* note 13, at 572-77.

281 FAVRE & LORING, *supra* note 57, at 126.

282 Tannenbaum, *supra* note 13, at 574 (one example is self-defence).

283 *Id.* at 575.

284 *Id.*

285 *Id.* at 576.

286 *Id.* at 577.

Accordingly, such legislative language clearly "contemplates and permits the infliction of a certain amount of pain,"[287] which is consistent with the entire utilitarian approach. In contrast, inherent value proponents could argue that human activity becomes illegitimate if animal suffering is a requisite component of the activity.

Unfortunately, there is a certain lack of precision inherent in the notion of "necessity." A clear definition of necessity would require a social consensus on the legitimacy and importance of various human uses of animals; however, this is lacking.[288] Clarity would also require a great deal of scientific certainty about the physical and ethological responses of various species of animals; however, this field of study is constantly changing. In the presence of such uncertainty, the result is an extremely vague legal standard.

a. Canadian Case Law

An early Canadian case illustrates the difficulty that can result from the vagueness of the law. In *R. v. Pacific Meat Co.*,[289] hogs were slaughtered by shackling one hind leg, hoisting them into the air and slitting their throats without anaesthetic.[290] Notwithstanding arguments that more humane slaughter methods were in use in Europe (and by then were also being instituted in the U.S.), the court held that the animals' pain and suffering was necessary because it "involve[d] the necessity of slaughtering hogs to provide food for mankind."[291] In short, to show that suffering was necessary one simply had to show that one had a "good reason"[292] for inflicting pain. Providing food to people happened to be a good reason, even if much of the pain was avoidable.

Twenty years later, in *R. v. Menard*,[293] the Quebec Court of Appeal took steps toward clarifying the meaning of "necessity" in Canadian law, establishing more explicitly the balance that should be struck. In *Menard*, the operator of an animal shelter euthanised unclaimed strays by gassing them with automobile exhaust.[294] The evidence showed that more humane euthanasia methods were available and that even small, inexpensive modifications to the accused's system would have prevented pain, suffering, and burns.[295] The accused was found guilty. The court's reasoning elaborated its views on the mean-

287 *Id.* at 573 (quoting People v. Freel 136 N.Y.S. 442, 445-46 (N.Y. Mag. Ct. 1911)).
288 *See* discussion *supra* note 99 and accompanying text.
289 [1957]119 C.C.C. 238 (Can.).
290 *Id.*
291 *Id.* at 239-40.
292 *Id.* at 240.
293 [1978] 43 C.C.C. (2d) 458 (Can.).
294 *Id.*
295 *Id.*

ing of the Criminal Code prohibition against "unnecessary" pain and suffering.[296]

First, the court found that the provision was not intended to prohibit "the causing to an animal of the least physical discomfort."[297] However, if there was any real pain involved, the court held that "the amount of pain is of no importance in itself" if done wilfully, "without necessity" and "without justification, legal excuse or colour of right."[298]

Next, the court turned to the question of what was meant by necessity. Interestingly, by the late 1970s, the court was prepared to hold that it might be "necessary to make an animal suffer for its own good or again to save a human life,"[299] but not to neglect an animal "for reasons of profit."[300] While embracing a hierarchical view of nature in which animals are "inferior" and "subordinate," and where "it will often be in the interests of man to kill and mutilate" them, the court nevertheless suggests that from our "privileged position in nature" we "rational beings" should "impose on ourselves behaviour which will reflect in our relations with [animals] those virtues we seek to promote in our relations among humans."[301]

The test developed by the court was to suggest that both the purpose of the actions and the means used must be taken into account, and that the two must be proportionate.[302] Thus, even if a "desirable and legitimate object" is sought, the magnitude of the pain involved in the chosen means must not be excessive.[303] In the end, the court decided that although man-as-superior-being need not abandon activities that cause suffering, it was illegal to cause pain unless it could be justified by the "choice of means employed."[304] The court stated, "[people are] obliged not to inflict on animals pain, suffering or injury which is not *inevitable* taking into account the purpose sought and the circumstances of the particular case."[305]

Menard, therefore, suggests an objective standard where "suffering which one may reasonably avoid for an animal is not necessary."[306] Factors used to determine necessity include the legitimacy of the objective, the "social priorities," and the availability and accessibility of the possible means to the end.[307]

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296 As per the decision of Lamer J.A., later to become a member of the Supreme Court of Canada.

297 *R. v. Menard*, [1978] 43 C.C.C. (2d) 458, at 463.

298 *Id.*

299 *Id.* at 464.

300 *Id.*

301 *Id.*

302 *Id.* at 465.

303 *Id.* (quoting *Ford v. Wiley* (1889) 23 Q.B. Div. 203 (U.K.)).

304 *Id.*

305 *Id.* (emphasis in original).

306 *Id.* at 466.

307 *Id.*

b. Reform Possibilities

Twenty years post-*Menard*, little has changed in Canadian law. In its 1998 proposals for the reform of Canada's Criminal Code, the federal government suggested only that:

> it might be appropriate for Parliament to provide a greater measure of direction to the Courts by defining some terms or setting out certain factors that must be taken into account in balancing the interests of the animal against the objective of the activity and the means used.[308]

However, it is unclear what this means, as the government never put forward proposals for any such definitions or "factors."[309] The new legislation neither requires the use of the least cruel means to accomplish an objective, nor prohibits "avoidable" (rather than unnecessary) harm. Thus, it remains possible that the cost of a least-cruel method could potentially equate to "inaccessibility" of the option. This would render the suffering necessary within the meaning of *Menard*. Unfortunately, the government has not attempted to clarify what is considered a socially legitimate objective. Similarly, it is not clear how the government would do so in the absence of any public agreement about the social importance of many activities (such as hunting, rodeo or cosmetics testing) and given that cruelty within an "accepted" industry would still need to be illegal.[310]

Arguably, if pain or suffering by an animal in the course of human activity is avoidable it should be avoided.[311] If causing pain and suffering to animals is morally wrong, it does not become acceptable because avoiding the suffering might be more expensive. If human activities are not economically viable using current practices without causing avoidable animal suffering, then alternatives must be developed. The notion that avoidable distress resulting from "reasonable and generally accepted practices"[312] should be legal must be rejected. Instead, legal regimes should require that the least-cruel means of performing human activity must be used. Unnecessary suffering should be suffering without alternative.

In addition to a stricter "means" test, a more systematic and comprehensive examination of the social legitimacy of human objectives or ends is required. Given the many serious ethical issues raised by human uses of animals, it is unacceptable to simply side-step controversy by failing to even discuss or question our social priorities. To try

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308 CONSULTATION PAPER, *supra* note 2, at 9.

309 Bill C-17, An Act to Amend the Criminal Code, 36th Parl., 2nd Sess., 48 Eliz. II, § 182.1(1)(c) (1999) (Can.) continues to rely primarily on the concept of necessity and would make little, if any, change to the law on this point. It does suggest prohibiting the killing of animals "without lawful excuse."

310 *Id.* at 9.

311 *See* Meat Inspection Regulations, SOR/94-683, § 62(1), which uses this standard.

312 Animal Protection Act, S.A., ch. A-42.1, § 2(2) (1989) (Can.).

to create a viable law in an information vacuum[313] borders on the ludicrous.

For example, in 1987, the Law Reform Commission of Canada suggested a number of changes to the animal cruelty prohibitions in the Criminal Code as part of an ongoing review of the criminal law.[314] The Commission's suggestion would have prohibited unnecessary suffering, but exempted any "serious" pain or injury caused in the process of achieving a number of listed purposes, considered to be "customary and accepted practices" involving animals. Amongst their other ideas, the Commission suggested that scientific research be exempted, unless the risk of injury or pain was disproportionate to the benefit expected.[315] In other words, if a great human benefit were expected, the infliction of serious injury would be legal under this proposal. Yet the Canadian Council on Animal Care, which sets the voluntary standards by which scientific research is conducted in Canada, had already decided that some research, such as burn and trauma infliction on unanesthetized animals, was unacceptable irrespective of the significance of the anticipated results.[316] In short, the Commission's proposal suggested a far lower standard of conduct than the scientific community had already set for itself.

The question of legislative exemptions is discussed in additional detail shortly.[317] For now it is sufficient to note that the lack of objective data surrounding the social acceptability of most animal uses in Canada would, at best, turn any attempt to apply the *Menard* test into an *ad hoc* opinion or guessing game. Nothing in the proposed amendments will improve this situation.

D. What Level of Intent is Needed?

As noted by the Canadian Department of Justice, "[i]n principle, offences against animals fall into two categories: intentional and malicious hurting or killing of an animal either generally or in specific ways that are deemed to be cruel; and neglect in the provision of necessary food, water, shelter or care."[318]

As a general rule, Canadian provincial legislation requires only that an offender be negligent to be found responsible for animal cruelty.[319] Strict liability offences, such as causing or permitting distress, are established if the defendant cannot show he or she took all reasonable care to prevent the harm from occurring. Such statutes are, there-

313 The lack of data on public opinion was previously discussed. *See supra* note 100 and accompanying text.

314 LAW REFORM COMMISSION OF CANADA, RECODIFYING CRIMINAL LAW (Report 31, 1987).

315 *Id.* proposed § 20(2)(f).

316 CANADIAN COUNCIL ON ANIMAL CARE, *supra* note 152.

317 *See infra* Part VI.E.

318 CONSULTATION PAPER, *supra* note 2, at 5.

319 *See* Animal Protection Act, S.A., ch. A-42.1, § 2(1) (1989) (Can.).

fore, much broader than the federal Criminal Code[320] which requires proof of an offender's *mens rea* by showing that he or she committed the act "wilfully" or with "wilful" neglect.[321]

1. Mens Rea Offences

The main distinctions between *mens rea* and strict liability offences are that the former are generally seen to govern a much narrower range of behaviour, and are much more difficult to prove.[322] Given that prosecutions of cruelty cases are rare (less than 0.2 of 1% of complaints),[323] they tend to involve intentional acts of "reprehensible conduct,"[324] regardless of the specific statute allegedly contravened.[325]

The American experience suggests that where *mens rea* is a statutory requirement, acquittal is more likely due to evidentiary problems.[326] There is some Canadian law to support this view. For example, in *R. v. Higgins*[327] the accused chased his cat through the house "shooing" him with a broom until it hid in the basement.[328] The next day it was discovered that the cat's leg was broken.[329] The accused argued that he had not "wilfully" injured the cat and that, accordingly, he was not guilty.[330] In deciding the case, the court specifically examined two sections of the Criminal Code that are designed to help clarify the concept of wilfulness. First, the court examined section 429(1), which states that wilfulness can be established by proof of reckless disregard about whether ones acts or omissions led to the illegal event. Second, the court interpreted section 446(3),[331] which provides that,

> evidence that a person failed to exercise reasonable care or supervision of an animal or bird thereby causing it pain, suffering, damage or injury is, in the absence of any evidence to the contrary, proof that the pain . . . was caused or was permitted to be caused wilfully or was caused by wilful neglect.[332]

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320 Criminal Code, R.S.C., ch. C-46, §§ 444, 445, 446(1) (1985) (Can.). Federal statutes other than the Criminal Code contain, like their provincial counterparts, strict liability offences.

321 Wilfulness means the accused acted "intentionally and voluntarily." MORETTI, *supra* note 220, at 4.

322 *Id.* at 4-5; FAVRE & LORING, *supra* note 57, at 131-33.

323 CFHS 2, *supra* note 242, at 10.

324 *Id.*

325 Most complaints are resolved by "the use of education and on-the-spot discussions." *Id.*

326 MORETTI, *supra* note 220, at 5.

327 [1996] 144 Nfld. & P.E.I.R. 295 (Can.).

328 *Id.*

329 *Id.*

330 *Id.*

331 Which only applies to offences under the Criminal Code, R.S.C., ch. C-46, § 446(1)(a)(b) (1985) (Can.).

332 Criminal Code, R.S.C., ch. C-46, § 446(3) (1985) (Can.).

In relation to section 429, the court held that both knowledge that the actions undertaken will probably cause harm, as well as recklessness regarding whether an injury occurs or not, are needed because these are subjective elements (i.e., the question is whether the accused had the awareness of danger and willingness to proceed, not whether a reasonable person would have been so aware).[333] Also, the accused need not be aware of the specific type of injury that might result. Nevertheless, the court found Higgins was unaware of the potential for injury to his cat.[334]

Regarding section 446(3), the court merely noted that it only applied "in the absence of evidence to the contrary" standard to show that lack of care leading to suffering amounts to wilfulness.[335] Here, there was uncontradicted evidence by the accused explaining his actions and showing lack of intent, which rendered section 446(3) functionless.[336]

Therefore, the court upheld Higgins' acquittal on the basis that his wilfulness had not been proven beyond a reasonable doubt.[337] On these facts, however, a conviction is more likely for similar misconduct under a strict liability regime, as the onus would have been on the accused to prove on a balance of probabilities that he had taken all (objectively reasonable) due care to prevent the cat from being injured.

The case of *R. v. Heynan*[338] provides a second example of the difficulties of proving *mens rea*. The accused was charged with wilful neglect after several of his horses starved to death in a winter pasture.[339] The horses were unattended and received no supplementary feed.[340] The accused contended he honestly believed the horses had adequate food in the pasture, and although the court found his belief was "incredibly naïve," it was held to be genuine.[341] Accordingly, while the court found the accused's conduct was "doubtless cause for censure" and that it could "constitute an offence under other statutes," it held that "wilfulness" had not been proved and that the Criminal Code charge had to be dismissed.[342] Although *Heynan* took place in Alberta, where provincial legislation could have been used to lay charges,[343] in much of Canada the Criminal Code is the only enforcement tool.[344]

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333 *R. v. Higgins*, 144 [1996] Nfld. & P.E.I.R. 295 (Can.).

334 *Id.*

335 *Id.*

336 *Id.*

337 As an interesting aside, the Court questioned whether the fear caused to the cat might constitute "suffering" and whether the "disciplinary tactics" employed by the accused would be considered "unnecessary," suggesting it might have entertained such arguments. *Id.*

338 [1992] 136 A.R. 397 (Can.).

339 *Id.*

340 *Id.*

341 *Id.*

342 *Id.*

343 Animal Protection Act, S.A., ch. A-42.1 (1989) (Can.)

344 *See* discussion *supra* Part IV.B.

Thus, *mens rea* requirements can create a real barrier to the successful prosecution of offenders.[345]

2. *Necessity vs. Wilfulness*

A second issue related to the use of *mens rea* offences is the periodic confusion between those parts of the offence which relate to the accused's mental state (wilfulness) and those parts of the offence which "qualify the circumstances of the act" (necessity).[346] An example is *R. v. Paul*,[347] where the accused was given a starving cat and asked to kill it.[348] He made five attempts to stab it to death; when that failed, he stomped on its head and crushed its skull.[349] He pleaded guilty to wilfully causing unnecessary pain, suffering, or injury pursuant to the Criminal Code.[350] In sentencing, the court looked at whether the accused had acted "cruelly." After noting that the Criminal Code no longer prohibited "cruel" acts, the court decided that "the issue of cruelty remains an important factor in determining what sentence is appropriate."[351] Here, the court was "not convinced that the accused, Mr. Paul, in killing this cat in the manner in which he did had the intention of inflicting cruelty . . . [r]ather, his purpose was to put a starving cat out of its misery."[352] The fact that the accused was not "subjectively cruel" was a mitigating factor in sentencing him to one day in prison and a two-year ownership ban.[353]

Paul thus serves as a classic example of the confusion of intention/culpability (was the act wilful?) with the *actus reus* (was the act a prohibited one because it caused unnecessary suffering?). If Mr. Paul had not acted wilfully he should have been acquitted. The fact that his wilful purpose was euthanasia rather than sadism relates only to the balancing of the legitimacy of his objective with the means he used, to determine whether the animal's pain was necessary. Since the court elsewhere suggested that the Crown had no proof that "better or other means" were available to kill the cat,[354] it is at least possible that the defendant might have been acquitted if a trial had been held, notwithstanding the lack of social acceptability of his conduct. Under a strict liability statute, on the other hand, failure to investigate humane eu-

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345 In similar fact situations under strict liability statutes, convictions are fairly routine: *R. v. Sabo* (1993, 855 chickens); *R. v. Barkley* (1993, 38 cows); *R. v. Jacquet* (1995, pigs and goats); *R. v. Dorin* (1996, 60 cattle); *R. v. Nunns* (1997, 39 dogs and livestock), all *reported in* OKO, *supra* note 261; *see also*: *R. v. Sparshu* (1996) 44 Alta. L.R. (3d) 304 (cattle); and *R. v. Komarnicki* (1991) 116 A.R. 268 (cats) (Can.).

346 FAVRE & LORING, *supra* note 57, at 131.

347 *R. v. Paul* [1997] B.C.J. No. 808 (Can.).

348 *Id.*

349 *Id.*

350 *Id.*

351 *Id.*

352 *Id.*

353 *Id.*

354 *Id.*

thanasia options could constitute lack of reasonable care, and a conviction would be warranted.

Overall, legislation such as the Criminal Code, which penalizes only intentional acts of cruelty, seems overly narrow in scope, unduly technical to prosecute, and overly reliant on the subjective state of mind of the offender. On the other hand, the European treaties, like Canadian provincial statutes, impose a broader and more desirable standard of objective reasonableness. Not only is a policy of obligation to provide due care more enforceable, but it is also "directly concerned with the interest of the animal" instead of focusing on human misconduct.[355] In short, what is important is that animal welfare legislation ensures due care for animals, regardless of whether offenders breach that duty through carelessness or wilfulness. To that end negligent, as well as intentional, harm to animals should be included in all anti-cruelty measures.[356]

E. What Activities Are Exempt?

Another method used to distinguish what is legally cruel from what is not, is to deem certain activities to be acceptable and therefore exempt from anti-cruelty provisions. Sometimes a specific act or animal is exempted (e.g. dehorning cattle),[357] but more often an entire category of activity (e.g. hunting or fishing) is exempted.[358]

In Canada, the exemption approach is fairly common at the provincial level, but there is little agreement on what exemptions are appropriate. However, the most common exemption is the statutory "acceptability" of causing distress during activities "carried on in accordance with reasonable and generally accepted practices of animal management, husbandry or slaughter,"[359] even when such distress is avoidable. Exemptions have also been enacted which remove non-cap-

355 FAVRE & LORING, *supra* note 57, at 144, 148.

356 Bill C-17, An Act to Amend the Criminal Code, 36th Parl., 2nd Sess., 48 Eliz. II (1999) (Can.), has eliminated the use of the word "wilful" but the misconduct would still require *mens rea* as a general rule of criminal law. Recklessness, as well as wilful misconduct, might now be included. A second offence has also been suggested [s.182.1(2)] for "failure to exercise reasonable care or supervision of an animal," thereby causing suffering. However, even for such "criminal negligence" the Crown must prove the accused acted intentionally and voluntarily. *Id.*

357 This type of exemption is common in U.S. statutes. FAVRE & LORING, *supra* note 57, at 134.

358 *Id.* at 135.

359 Animal Protection Act, S.A., ch. A-42.1, § 2(2) (1989) (Can.); Animal Cruelty Prevention Act, S.N.S., ch. 22, § 11(4) (1996) (Can.); British Columbia Prevention of Cruelty to Animals Act, R.S.B.C., ch. 372, § 24(2) (1996) (Can.).

tive wildlife,[360] "vicious" dogs,[361] and research animals[362] from the purview of protective provisions.

In addition, there exists support to include exemptions in the federal Criminal Code. One particularly poor proposal came from the Law Reform Commission of Canada, which suggested there be no culpability for injury or serious pain inflicted on animals during: identification, medical treatment, spaying and neutering, provision of food or other animal products (to people), protection of persons or property, discipline, training, and scientific research.[363]

The purpose of the exemption approach is to distinguish between acts banned as cruel and those that are deemed socially acceptable. However, the entire approach has been rejected by analysts in both Canada and the United States as "flawed"[364] and "unjustifiably broad."[365] Furthermore, no exemptions are used in European treaties. The central problem, as noted above, is that:

> even within the context of an accepted industry or activity, acts of cruelty can occur. For example, even if a person has a valid hunting licence, it would still constitute cruelty to torture and mutilate an animal that could otherwise have been lawfully shot with a bullet. The law must still have a means of prohibiting unjustifiable cruelty, even within the realm of accepted activities.[366]

Unfortunately, instead of entering into detailed study and comprehensive dialogue about what conduct is or is not acceptable in our dealings with animals, governments have tended to make non-decisions. There may be significant social consensus about the acceptability of causing a degree of unavoidable pain to animals in some circumstances (e.g. during veterinary treatment for curable illnesses). There may even be a similar consensus about the lack of acceptability of using animals for certain other purposes (e.g. military weapons testing). However, in the absence of any objective data, there is no rational foundation upon which government proposals or, for that matter, judicial decisions might be based. Until such work is done, the exemption approach remains unworkable, *ad hoc*, and seemingly unprincipled. Sensibly, the notion was rejected when formulating Canada's most recent reform proposals.

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360 British Columbia Prevention of Cruelty to Animals Act, R.S.B.C., ch. 372, § 2 (1996) (Can.); Animal Cruelty Prevention Act, S.N.S., ch. 22, § 3(1) (1996) (Can.); Yukon Animal Protection Act, S.Y.T. ch. 5, § 1 (1986) (Can.).

361 Saskatchewan Animal Protection Act, S.S. ch. A-21, §§ 13.1, 14 (Can.); Animal Protection Act, R.S.N., ch. A-10, § 15 (1990) (Can.).

362 Animal Cruelty Prevention Act, S.N.S., ch. 22, § 3(3) (1996) (Can.).

363 LAW REFORM COMMISSION OF CANADA, *supra* note 314. A similar proposal was put forth in Manitoba. MANITOBA LAW REFORM COMMISSION, *supra* note 137.

364 CFHS 2, *supra* note 242, at 12.

365 FAVRE & LORING, *supra* note 57, at 135.

366 CONSULTATION PAPER, *supra* note 2, at 9-10.

F. What Defences are Available?

The question of available defences arises only under legislation that creates penalties for animal abuse. In Canada, this includes the federal Criminal Code but only some provincial statutes. In Europe, individual countries deal with such questions in the domestic legislation by which the treaties and EU Directives are implemented. Accordingly, defences vary between nations.

In Canada, for strict liability offences (e.g. neglect),[367] the primary defence is to show that an accused person took all due care to prevent the offence from occurring. This is usually done by showing the accused exercised due diligence (i.e. was not negligent).[368] For Criminal Code offences, the primary defence is to raise a reasonable doubt about the Crown's case, either by raising doubt about the commission of the act (whether the suffering was unnecessary) or about the proof of *mens rea* (was the conduct wilful).

However, other defences are available.[369] There are a number of legal justifications and excuses that might apply to crimes against animals. The most obvious is having a "statutory authorization" or permit which justifies the act.[370] The use of reasonable force in self-defence during an animal attack is another example.[371]

There has been dissatisfaction with the defence of "colour of right," which under sections 429(2) of the Criminal Code means an honest but mistaken belief that one had the right to deal with property in a particular way (which was in fact illegal). Nevertheless, if the defence is made out, an acquittal can result even if the Crown proved the elements of the offence. Similarly, there have been problems with the "mistake of fact" defence, which in Canadian criminal law means an honest belief in a mistaken set of facts which, if true, would have rendered the actions legal. Unfortunately, there is no requirement that the belief be objectively reasonable; the subjective state of mind of the accused constitutes lack of *mens rea*. The *Heynan* case discussed previously,[372] in which an accused was acquitted after his horses starved because he ignorantly, but honestly, believed they had sufficient food, is a clear example. One method of addressing this concern would be to include a requirement for objective reasonableness in the Criminal

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367 Most provincial offences, and most federal offences apart from those in the Criminal Code. MANITOBA LAW REFORM COMMISSION, *supra* note 137, at 37.

368 Due care can also be shown by proof of a reasonable mistake of fact.

369 *See* Criminal Code, R.S.C., ch. C-46, § 429(1) (1985) (Can.).

370 CONSULTATION PAPER, *supra* note 2, at 6. This notion appears to have been incorporated into Bill C-17, An Act to Amend the Criminal Code, 36th Parl., 2nd Sess., 48 Eliz. II (1999) (Can.), by § 182.1(1)(c), which would prohibit the killing of an animal "without lawful excuse."

371 FAVRE & LORING, *supra* note 57, at 137-38; *R. v. Fusell*, *described in* CONSULTATION PAPER, *supra* note 2, at 6.

372 *R. v. Heynan*, *supra* note 338.

Code offences.[373] Like their provincial strict liability counterparts, such offences could then only be defended if the accused had a reasonable belief in a mistaken set of facts which, if true, would have made his or her conduct legal.[374]

G. What Punishment is Provided?

As with the issue of defences, the issue of punishment is relevant only under certain statutory schemes. The present Criminal Code provides for a maximum of five years imprisonment for injury to cattle, while all other cruelty offences are summary conviction offences, punishable by a maximum of six months in prison and/or a $2000 fine.[375] Courts may also impose a two-year ownership ban.[376]

Penalties, if any, under provincial legislation are wildly variable. Newfoundland, for example, provides for a $50 fine and/or three months imprisonment for a first offence.[377] Alberta, on the other hand, provides for a $20,000 fine, but no imprisonment.[378] In addition, courts have limited jurisdiction to craft a more "creative" sentence by ordering probation, conditional discharges and suspended sentences, which have been used to order everything from anger management counselling to SPCA donations.[379] Several provinces also authorize the courts to issue restraining orders imposing an ownership ban for a period of time entirely in the court's discretion.[380]

The primary goal of such sentencing for offenders is deterrence. As such, courts strive for specific deterrence of the individual so that he or she does not reoffend, and general deterrence of all others who might be tempted to harm animals for profit or pleasure. Studies of Canadian criminal law suggest that deterrence be achieved primarily through adequate enforcement (certainty of apprehension), not by severity of

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373 The new offence of failing "to exercise *reasonable* care or supervision" of an animal may, in some cases, address this concern. Bill C-17, An Act to Amend the Criminal Code, 36th Parl., 2nd Sess., 48 Eliz. II § 182.1(2) (1999) (Can.) are described *infra* Part VII.

374 *R. v. Chapin*, [1979] 2 S.C.R. 121 (Can.).

375 CONSULTATION PAPER, *supra* note 2, at 10-11.

376 Penalties under the proposed Bill C-17, An Act to Amend the Criminal Code, 36th Parl., 2nd Sess., 48 Eliz. II (1999) (Can.). *See* discussion *infra* Part VII.

377 Animal Protection Act, R.S.N., ch. A-10, § 20 (1990) (Can.).

378 Animal Protection Act, S.A., ch. A-42.1, § 12 (1989) (Can.); imprisonment is available in default of payment of the fine.

379 *See R. v. Michelin*, (June 19, 1995, Calgary, Alberta), *reported in* D. OKO, ALBERTA DECISIONS (*supra* note 261) (court orders psychiatric assessment and anger management counselling); *R. v. Watson* [1991] Ontario SPCA Inspectors Gazette #5 (offender ordered to perform ninety hours community service); *R. v. Gallant* [1991] Ontario SPCA Inspectors Gazette #5 (offender required to take dog to vet every three months); *R. v. Grills*, (accused ordered to pay monies to SPCA). *Id.*

380 Animal Protection Act, S.A., ch. A-42.1, § 12(2) (1989) (Can.); British Columbia Prevention of Cruelty to Animals Act, R.S.B.C., ch. 372, § 24(3) (1996) (Can.); Animal Cruelty Prevention Act, S.N.S., ch.22, § 18(2) (1996) (Can.).

penalty.[381] Thus, enforcement efforts are of key importance in preventing harm to animals.

However, to the extent that penalties have an impact, it is important that those penalties be crafted in a way which benefits animals directly. Larger maximum fines and more severe terms of imprisonment can influence prosecutors and judges by showing the seriousness of the offences, helping to prevent the trivialization of the issue.[382] Also, larger penalties provide at least the possibility of commanding the attention of those engaged in large commercial operations, which might otherwise systematically profit from animal neglect.[383] The financial penalties imposed could then be directed toward humane societies, rather than going into general government funds.[384] Ownership bans, and bans upon animals being kept upon the premises of an offender, are a direct way of separating offenders from animals for an indefinite period of time, and are therefore very important.[385] Flexibility in creating conditional discharges and probation orders is also highly desirable. For example, courts could require psychiatric treatment where abuse stems from mental illness.

In addition to criminal sentencing provisions, most provincial legislation also provides for the seizure and care of distressed animals and reimbursement for any costs incurred in this process.[386] The ability to order payment of such costs in restitution as part of the sentencing process under the Criminal Code would allow similar cost-recovery for federal offences.[387] However, such measures are not necessarily a substitute for other penalties, since seizure of an animal is primarily relevant to its owner and does not affect an abuser who targets unowned animals or the animals of others.[388]

Most cases of animal abuse are not prosecuted. Only those that are particularly serious proceed to the courts. Notwithstanding the vile nature of these cases, which involve starvation, abandonment, torture, beatings, and mutilations, in our sample data the most serious penalties imposed to date are as follows: a $5000 fine for a second offence of neglecting sixty head of cattle by leaving them without food or veterinary care;[389] a lifetime ban on the care, custody and control of animals

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381 CANADIAN SENTENCING COMMISSION, SENTENCING REFORM: A CANADIAN APPROACH (1987).

382 CFHS 2, *supra* note 242, at 13.

383 MANITOBA LAW REFORM COMMISSION, *supra* note 137, at 37.

384 Newfoundland pays half of its fines to the SPCA. Animal Protection Act, R.S.N., ch. A-10, § 20(2) (1990) (Can.).

385 CFHS 2, *supra* note 242, at 15.

386 *See* Animal Protection Act, S.A., ch. A-42.1, § 5(3) (1989) (Can.); Society for the Prevention of Cruelty Act, R.S.N.B., ch. S.-13, § 8(2) (1973) (Can.).

387 CONSULTATION PAPER, *supra* note 2, at 12. This is proposed in Bill C-17, An Act to Amend the Criminal Code, 36th Parl., 2nd Sess., 48 Eliz. II (1999) (Can.), as § 182.1(5)(b).

388 MANITOBA LAW REFORM COMMISSION, *supra* note 137, at 35-36.

389 *R. v. Sparshu* [1996] 44 Alta. L.R. (3d) 304.

after severe neglect of a dog for nearly a year;[390] and one sentence of four months imprisonment (with a two year ownership ban) for a repeat offender's neglect of one hundred thirty dogs in a "puppy mill" operation;[391] as well as one five month prison sentence (with a two year ban) in a case of neglect of cattle by a repeat offender who had also breached probation and been convicted of obstruction of justice after earlier prosecutions.[392]

Less severe penalties are much more common and are often criticized as "totally inadequate."[393] In a 1996 fundraising letter, the CFHS outlined some of the cases at the low end of the spectrum.[394] These cases are as follows: a $50 fine and one year ban for abandoning seven one-week-old puppies in a garbage dumpster; a $300 fine for beating a cat with a pipe and a board, then drowning it; and the acquittal of a man who, in front of the police, threw a kitten to the ground and crushed its skull under his foot.[395] In the view of humane societies, "all too often" abusers either get off entirely or receive a toominor penalty.[396] Clearly, a certain level of frustration with current penalty provisions is evident in Canadian law.

Unfortunately, most cases of abuse are unreported and there is no national database or report series from which to garner or analyze data. News clippings and summary data are kept by most humane organizations to help obtain some consistency of treatment within each jurisdiction, but no comprehensive study or analysis of Canadian sentencing information is presently available.[397] Thus, no national picture can be made readily apparent to the public, to the judiciary, or to those in charge of legal reform.

Canadian research would surely reveal interesting data, similar to that found in other countries. For example, one German study revealed that imprisonment was used fifty percent less often in animal welfare cases than for other crimes.[398] The proportion of persons not convicted (36.6%) was 94.6% higher than for other crimes, and the per-

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390 *R. v. Pitts* [1995], *reported in* D. OKO, ALBERTA DECISIONS (*supra* note 261).

391 David Kuxhaus, *Puppy Mill Owner Jailed Four Months*, LAW COURTS REPORTER, undated news clipping provided from CFHS archives, referencing *R. v. Hiebert* (Manitoba).

392 *R. v. Prince* [1995] Ontario SPCA Inspectors Gazette #32, provided by the CFHS.

393 Fundraising letter from CFHS (March 1996) (on file with author) [hereinafter CFHS 3].

394 *Id.*

395 *Id.* The acquittal was based on the lack of evidence that the animal was a pet, and therefore "kept for a lawful purpose" within the meaning of the Criminal Code, R.S.C., ch. C-46, § 445(a) (1985) (Can.).

396 CFHS 3, *supra* note 393. In Alberta, for example, the average fine in 1995 was only $500. ALBERTA SPCA, 1995 ANNUAL REPORT, at 5 (1995).

397 Our sample data was obtained from the Alberta SPCA and the Ontario-based CFHS. Information supplied by the Alberta SPCA primarily reflects their work in rural areas of that province, while the CFHS information was primarily compiled by the Ontario SPCA for its in-house publication entitled *The Inspectors Gazette*, from 1981-1998.

398 Petra Maria Sidhom, Eine statistische Untersuchung der gerichtlichen Sanktionspraxis tierschutzrelevanter Straftaten anhand des Datenmaterials der

centage of female offenders (12.3%) was 25% lower than the average for criminal offences.[399] In addition, in Germany, 79.5% of prison sentences are for less than six months, and in only 5% of convictions are additional measures, such as ownership bans, imposed.[400]

H. How Successfully are the Laws Enforced?

Studies indicate that deterrence of crimes is achieved primarily by ensuring certainty and consistency of enforcement efforts.[401] Similarly, with other types of public welfare legislation, a credible enforcement regime dramatically increases compliance rates.[402] Accordingly, a vigorous and vigilant enforcement effort is a prerequisite for a successful prevention regime.

Unfortunately, enforcement data in Canada is nearly as piecemeal as sentencing data. Again, individual SPCA's keep local statistics, at least on an annual basis, but no national picture is readily available. However, examining a sample of data from any given jurisdiction is illustrative. In its 1997 Annual Report,[403] the Alberta SPCA provides the following statistics on its operations (which cover rural Alberta not including the two major cities of Edmonton and Calgary):[404]

Strafverfolgungsstatistik der Jahre 1980 bis 1991 in der Bundesrepublik Deutschland (1995) (doctoral thesis, Hanover Veterinary School).

399 *Id.* These statistics do not include youth crimes. Also, the percentage of acquittals was 2.6 times higher than for other crimes. The GERMAN MINISTRY OF FOOD, AGRICULTURE AND FORESTRY, ANIMAL WELFARE REPORT 1999 (1999) reports the following raw data:

	No. of Trials	No. of Convictions
1996	545	391
1995	577	404
1994	611	389
1993	588	402
1992	631	403

Similar statistics are available back to 1987, revealing an overall ten year total of 3936 convictions out of 5992 trials, or 65.7%. *Id.* The other cases resulted in acquittals, stays of proceedings, or suspended sentences (available to young offenders). *Id.*

400 *Id.* Eighty-six percent of those receiving a prison sentence are in fact put on probation.

401 CANADIAN SENTENCING COMMISSION, *supra* note 381; James Flagal, *AMPs: The Next Logical Step in Environmental Regulatory Law* 10:3 LEGAL EMISSIONS 7 (1998), at 10.

402 D. Saxe, *Voluntary Compliance vs. Enforcement? Why the Threat of Legal Action is Important*, HAZARDOUS MATERIALS MANAGEMENT 62 (June-July 1996).

403 ALBERTA SPCA, 1997 ANNUAL REPORT 6 (1997).

404 ALBERTA SPCA, ABOUT THE ALBERTA SPCA (n.d.) [hereinafter ASPCA 2].

Initial investigations	1,649
Animals involved	68,029
Kilometres traveled	389,386
Seizures	66
Number of animals seized	445
Voluntary Surrenders	30
Number of animals surrendered	104
Charges laid	27
Convictions	19
Cases pending	4
Total Inspections	219[405]

These figures reflect accomplishments in a year of budget cutbacks during which the organization's complement of special constables shrank from six to four.[406] Statistics averaged from a five-year period show this organization handles 1608 investigations a year, involving 72,094 animals with only 22 cases in which charges are laid.[407] The organization also has an extensive education program.

This low charging rate is typical of the way in which animal abuse cases, and indeed regulatory offences in general, are approached in Canada. An overview of the enforcement process and policies is, accordingly, in order.

1. The Canadian Enforcement Process and Policies

Virtually all animal abuse investigations are the result of calls from the public that report their concerns to their local SPCA.[408] A process of discretionary decision-making then takes place. Each province's animal welfare legislation designates some category of agent, peace officer, or inspector with the investigatory, entry, inspection, seizure, and other powers (e.g. treatment or euthanasia) needed to alleviate distress in animals and to lay charges (either under provincial law or the Criminal Code).[409] The investigator attends the scene of the complaint to assess the situation and conduct an initial investigation. If a problem is found, the investigator has the discretion to either help the owner provide care for the animal, or take steps to seize or treat the animal and possibly lay charges.[410] In more serious cases, a veterinarian assists in determining how to proceed.[411] In some provinces, the investigator has the power to order that specific actions be taken to

405 Facilities inspected include auctions, kennels, pet shops, packing plants, pounds, rodeos, stables, assembly yards and the like. ALBERTA SPCA, 1997 Annual Report (1997), at 6.

406 *Id.* at 5.

407 ALBERTA SPCA, 1993-1997 ANNUAL REPORTS (1993-1997) (in the 1994 statistics, a case involving 1 million goldfish was excluded from the calculations).

408 ALBERTA SPCA, 1994 ANNUAL REPORT 4 (1994); ALBERTA SPCA, REPORTING ANIMAL ABUSE IN ALBERTA (n.d.) [hereinafter ASPCA 3].

409 For an overview see MEYER, *supra* note 44, at 110-14.

410 ASPCA 3, *supra* note 408.

411 *Id.*

alleviate distress,[412] but in no cases are inspectors authorized to impose fines or other administrative penalties.

There are a number of critical determinations that need to be made to decide a course of action. The Alberta SPCA notes:

> Our first priority in cases, which involve severe distress, is [the animal's] immediate relief. However, many of our investigations do not involve obvious abuse and our constables must then decide whether to assume the role of educator or take a more stern approach. Was there intent on the part of the owner or abuser? Does the owner have a history of failing to provide adequate care? And perhaps the most important question of all: what is most likely to result in a permanent, satisfying solution?[413]

Accordingly, the philosophy behind enforcement activities is that "it is the ability to relieve many kinds of animal suffering permanently and legally with a minimum of reliance on the judicial system that generally distinguishes a highly effective enforcement program."[414] When dealing with owners, enforcement should "induce [the owners] to act in positive ways to improve the lives of their animals" by getting them to "listen to the humane message."[415] Thus, education, coupled with follow-up visits to monitor the situation (and the threat of additional action if the problem persists), is usually sufficient to ensure adequate care.[416] However, charges are filed if the neglect or abuse is sufficiently "severe," if the actions were intentional, or if the owner is a repeat violator.[417] In addition, "violent acts of cruelty always warrant prosecution."[418]

In practice there are few problems with this general approach, although specific details can prove unwieldy in some jurisdictions.[419] Many problems have obvious solutions. For example, problems exist with enforcement officers lacking the necessary training or expertise to ensure they can formulate a credible plan to alleviate distress.[420]

If, however, deterrence is to be achieved, the low charging rate is a major issue that needs to be addressed. Experience in other areas, such as environmental protection, has demonstrated that it can be difficult to encourage compliance when "the staff of an agency is left simply writing warning letters and threatening that a prosecution may result,"[421] while the parties wait to see whether the Attorney General

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412 Ontario SPCA Act, R.S.O., ch. O-36, § 13(1) (1990) (Can.); Animal Health and Protection Act, S.P.E.I., ch.11, § 12(1) (1988) (Can.).

413 ALBERTA SPCA, 1994 ANNUAL REPORT 4 (1994).

414 *Id.*

415 *Id.*

416 ASPCA 3, *supra* note 408.

417 *Id.*; ALBERTA SPCA, 1994 ANNUAL REPORT 4 (1994).

418 *Id.*

419 For example, if owners must be consulted before care is provided, or veterinarians consulted before a seizure, unnecessary delay can result. MANITOBA LAW REFORM COMMISSION, *supra* note 137, at 19-21.

420 MEYER, *supra* note 44, at 111-12.

421 Flagal, *supra* note 401, at 9.

actually proceeds with charges and, if successful, whether any meaningful penalty results.

2. *The European Enforcement Model*

In Europe, this enforcement problem has been partially overcome by providing for administrative penalties in domestic animal welfare legislation. In Germany, competent veterinary officers are authorized not only to treat or seize animals, but also to impose substantial fines and ownership bans.[422] No trial is necessary to impose such administrative directives.

Administrative penalties have been used in Canada, albeit outside of the animal protection field. Initial assessments suggest that they are an "innovative, timely and responsive" way of dealing with violators, which is efficient and cost-effective as well.[423] Although experience with such tools is limited in Canada, it seems that regimes that use administrative penalties can increase compliance rates while saving costs.[424] These penalties also have the advantage of increasing the certainty that misconduct will be penalized, which greatly increases the deterrent effect of the enforcement activity.[425] Thus, the amendment of animal protection regimes to include administrative penalty options seems desirable.

Even if such changes were enacted, however, the main difficulties with vigorous enforcement of animal welfare provisions in Canada continue to stem from understaffing and associated underfunding.[426] For example, the Winnipeg Humane Society has only one special constable who responds to over one thousand complaints per year.[427] Like most humane organizations, the Society is not fully funded by the government and relies heavily on volunteers and on financial donations from the general public.[428] Demands for services have increased, as have accompanying costs, during an era of government cutbacks and fierce competition for charitable donations.[429] Many humane organizations have found themselves in financial crises.[430] The likelihood of increased enforcement activity in such circumstances is, obviously, extremely remote.

Similar resource shortages have also proved detrimental to European efforts. In news reports relating to the implementation of transportation requirements, the European Commission admitted that it has neither "enough manpower" to carry out adequate checks of ani-

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422 MEYER, *supra* note 44, at 112-14.

423 Flagal, *supra* note 401, at 11.

424 *Id.* at 9.

425 *Id.* at 10.

426 MORETTI, *supra* note 220, at 6-7.

427 MANITOBA LAW REFORM COMMISSION, *supra* note 137, at 11.

428 *Id.*

429 ALBERTA SPCA, 1997 ANNUAL REPORT 2-3 (1997).

430 *Id.*

mals in transit, nor "a budget to increase" the number of inspectors.[431] The result, unfortunately, is that the rules are "rarely, if ever, respected," even amongst western European states.[432] In one study, "inspectors found that major European frontier points seldom or never carry out inspections of livestock."[433] More than a quarter of the frontier points do not have the facilities for unloading, feeding, and watering livestock that are demanded by existing welfare legislation.[434] Since the addition of virtually unregulated eastern European transport to the Union, it is clear that enforcement of the rules is likely to decline before it improves. At present, enforcement proves to be nearly impossible.[435]

Cash-strapped governments struggling to retain their own enforcement capacity[436] seem unable to either take over enforcement, or provide full funding in order to provide a solution in the animal welfare context. Nevertheless, if "poor enforcement equals poor welfare,"[437] somehow more resources must be devoted to staffing and inspections. Suggestions such as financial incentives programs[438] have yet to be tried in the animal welfare field in Canada, and experiments with industry partnerships are in their infancy.[439] A solution to the problem remains elusive.

VII. CONCLUSIONS: THE STATUS OF ANIMAL WELFARE REFORM

Much of Canada's animal welfare legislation has not been updated since the 1970s and 1980s. Most of the federal Criminal Code provisions date to the 1950s. Even the European treaties dealing with animal welfare are now over a decade old. In light of the modern scientific knowledge about animals and the modern philosophical and ethical debates about the treatment of animals, the need for reconsideration of the adequacy of Canadian statutes seems overdue.

In late 1999, the federal government introduced Bill C-17 in an attempt to modernize the Criminal Code animal welfare provisions.[440] The suggested changes to the law are a blend of old and new ideas. The basic prohibitions are familiar. Section 182.1(1)(a) of the proposed

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431 *EC Lacks Resources to Monitor Welfare*, 134:14 VETERINARY RECORD 340 (1994).

432 Bonner, *supra* note 210, at 31; WILKINS, *supra* note 191, at 3; Jackson, *supra* note 43, at 231.

433 *Id.*

434 A. Birchall, *The Rough Road to Slaughter*, 128 NEW SCIENTIST 33 (1990). In addition, there have been problems enforcing journey length restrictions and humane slaughter rules. JACKSON, *supra* note 43, at 232-34.

435 Bonner, *supra* note 210, at 31.

436 STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT, ENFORCING CANADA'S POLLUTION LAWS: THE PUBLIC INTEREST MUST COME FIRST! (1998).

437 British Veterinary Association, *Animal Transport Proposals Less Than Satisfactory* 138:3 VETERINARY RECORD 50 (1996).

438 Bonner, *supra* note 210, at 31.

439 ALBERTA SPCA, 1997 ANNUAL REPORT 2 (1997).

440 Bill C-17, An Act to Amend the Criminal Code, 36th Parl., 2nd Sess., 48 Eliz. II (1999) (Can.).

Code will prohibit causing or permitting to be caused "unnecessary pain, suffering or injury to an animal," while sections 182.1(2) (a) and (b) will prohibit "failure to exercise reasonable care or supervision of an animal" that leads to pain, suffering or injury, and abandoning or failing "to provide suitable and adequate food, water, air, shelter and care" for animals. Without distinguishing between species, the brutal or vicious killing of animals, killing animals without "lawful excuse," and the poisoning, fighting, and baiting of animals or releasing captive animals to be shot, will all be prohibited.[441] Negligent injury of animals during transportation will also be banned.[442] "Animal" is defined as a "vertebrate, other than a human being, and any other animal that has the capacity to feel pain."[443]

Further, the provisions will be moved out of the portion of the Criminal Code dealing with property crimes, and into Part V of the statute which will then deal with "Sexual Offences, Public Morals, Disorderly Conduct and Cruelty to Animals." The offences are to be enacted as hybrid offences, where the Crown can elect to proceed by indictment in more serious cases, or use summary conviction procedures in less serious situations. If proceeding by indictment, section 182.1(1) *mens rea* offences carry a maximum penalty of five years imprisonment, while section 182.1(2) neglect provisions can result in a maximum of two years imprisonment.[444] When the summary conviction process is elected, however, the maximum penalty for breach of section 182.1(1) will be eighteen months imprisonment and/or a $2000 fine. Breaches of section 182.1(2), in contrast, will be "ordinary" summary conviction offences resulting in six months imprisonment and/or a $2000 fine.[445]

Courts will be authorized to impose an ownership or co-habitation ban for "any period that the court considers appropriate."[446] For second and subsequent offences, the ban will be for a minimum of five years.[447] Courts will also be able to order restitution of the costs of care for the animals.[448] Breach of such an order will constitute a separate summary conviction offence.[449]

Overall, Canadian animal welfare law will be improved. Distinctions amongst species and between owned and unowned animals have been eliminated. The definition of "animal" is sufficiently broad to include invertebrates, if proof of their capacity to feel pain is available. The proposed legislation applies to "everyone," and exempts only the

441 *Id.* [proposing §§ 182.1(1)(b)-(f) and (h)-(i)]. Keeping cockpits or other fighting arenas will also be banned. *Id.* §182.1(g).

442 *Id.* § 182.1(2)(c).

443 *Id.* § 182.1(8).

444 *Id.* §§ 182.1(3)(a), (4)(a).

445 *Id.* §§ 182.1(3)(b), (4)(b).

446 *Id.* §182.1(5)(a).

447 *Id.*

448 *Id.* § 182.1(5)(b).

449 *Id.* § 182.1(1)(b).

killing or poisoning of animals where the person has a "lawful excuse" (e.g., a hunting, fishing, trapping or pest extermination license).[450] Prohibiting brutal or vicious killing expands control over euthanasia methods, even if instantaneous.[451] Cost-recovery measures and ownership bans can benefit animals during the sentencing process. Thus, the new bill moves toward focusing primarily on the welfare of the animals, rather than on human economic interests in their property.

Nevertheless, problems remain. Perhaps unsurprisingly, the most complex problems are the ones that remain unaddressed by the proposal. The bill remains clearly utilitarian in outlook and, as mentioned previously, debate about the acceptability of any particular human uses of animals was foreclosed.[452] As a result, it also continues to forbid only "unnecessary" suffering, which is an unclear and overly broad standard that is capable of interpretation in such a way so as to allow avoidable pain to continue unchecked.[453] The bill also fails to include non-physical distress.

In addition, given that many provinces lack strict liability regimes, the *mens rea* offences will continue to cause problems of proof. In particular, the subjectivity of the "mistake of fact" defence was not addressed,[454] which may cause problems in cases where neglect has not also been charged. However, the "lawful excuse" provisions remain a larger problem. Even under a utilitarian regime,[455] no systematic examination has ever been made of what are socially acceptable uses of animals. Therefore, it is unclear what kind of conduct should be expressly permitted.

While the penalty options have been expanded, additional provisions are probably needed. Given the nature of the Criminal Code, which can prohibit and penalize but not regulate conduct due to constitutional concerns, a gap remains in Canadian law in all provinces without dedicated legislation. In particular, the inability of enforcement officials to impose sanctions such as administrative penalties suggests that experimentation with cost-effective enforcement measures will be difficult in some jurisdictions. Such constitutional constraints also suggest that provincial and territorial governments need to join in the process of modernizing Canadian legislation to bring it into the twenty-first century.

The time has come for the Canadian government to set aside its political fears and open up the philosophical debate over animal rights. Certainly, even if one accepts utilitarian balancing, courts and citizens

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450 *Id.* §§ 182.1(1)(c), (d).

451 *Id.* § 182.1(1)(b). Also, a lawful excuse (e.g., a licence to practice veterinary medicine) is needed to kill animals by *any* method. *Id.* § 182.1(1)(c).

452 *See supra* note 160 and accompanying text.

453 *See supra* Part VI.C.3.

454 *See supra* Part VI.F. However, by moving the cruelty provisions out of Part XI of the Criminal Code (regarding property offences), the "colour of right" defence will no longer be available.

455 *See supra* notes 100, 293 and accompanying text.

require information and some objective sense of the social consensus that exists, to determine what ends animals may legitimately serve in our society and what means of use are acceptable. Even if Canadians are not yet willing to abandon all uses of animals, experience with issues such as environmental protection suggests that the public is prepared to debate the relationship between human culture and non-human nature, considering the merits of developing less harmful ways of leading our lives. After all, isn't this what being "humane" has always entailed?

Eventually, if we can live in a world where we think and talk about the legitimacy of our use of animals in food, agriculture, research, sport, and other endeavours, we can begin to think more deeply about our use of all of nature as a commodity. Perhaps our concern for a battered dog or an abandoned cat can lead us toward a reconsideration of our treatment of "pests" and "renewable resources." Maybe, we can even return to an era where the death of an entire species at the hands of humanity will spark both outrage and pressure for additional law reform.