The Failure to Enforce Criminal Law: Does it Impede the Development of Social Discourse on Important Policy Issues?

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> [A] synthesis [of the desire for change and the idea that there is something sacred in nature] requires the sanctification neither of the present nor of the progress but of evolving processes of interaction and change – processes of action and choice that are valued for themselves, for the conceptions of being that they embody, at the same time that they are valued as a means to the progressive evolution of the conceptions, experiences and ends that characterize the human community in nature at any given point in its history.[1]

Over the past Century, reform of the criminal law has been a consistently high priority for the Canadian federal government.[2] Interest in such reform has intensified over the past decade, with the

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1 Laurence Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 Yale L.J. 1315, 1338 (1974).

2 In Canada, criminal law is a federal area of responsibility, and only the federal government can enact legislation of this type: Morris Manning and Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law* 8-15 (4th ed., Lexis Nexis, 2009).

Conservative government led by Stephen Harper showing a particular determination to revamp and toughen Canada's criminal justice system.[3] Almost every year, a raft of new crimes has been added to the *Criminal Code*,[4] sentences for existing crimes have been augmented,[5] and a number of particularly controversial minimum mandatory penalties have been enacted.[6]

The government has made no secret of the fact that it sees the criminal law as a useful tool to reduce the incidence of undesirable practices across the Canadian landscape.[7] Not surprisingly, criticism of

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3 The Conservative Party of Canada has made criminal justice reform and "getting tough" on crime a key part of its political agenda: Helping Keep Our Streets Safe (February 5, 2013), Conservative Party of Canada (available at http://www.conservative.ca/?p=2430). See also Carla Cesaroni and Nicholas Bala, *Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges*, 34 Queen's L.J. 447-481 (2008) (describing "tough on crime" policies of the Conservative Party).

4 See, for example, *The Protecting Children from Sexual Predators Act,* Bill C-54, which if enacted will create new offences making it a crime to provide sexually explicit material to a child for the purpose of committing a sexual offence and using any means of telecommunications (e.g. the internet) to make arrangements with another person to commit a sexual offence.

5 Most notable of these initiatives was the *Tackling Violent Crime Act,* S.C. 2008, c. 6, which raised penalties for a host of offences including those involving firearms, impaired driving and sexual misconduct. See also *The Protecting Children from Sexual Predators Act, id.,* which will raise penalties for certain sexual crimes even further.

6 See Peter Sankoff, "The Perfect Storm: Section 12, Mandatory Minimum Sentences and the Problem of the Unusual Case", 22 Constitutional Forum, forthcoming (2013).

7 This increase in criminalization of conduct is not simply a Canadian trend, of course. See for example Kaaryn Gustafson, *The Criminalization of Poverty* (2009), 99 J. Crim. L. & Criminology 643 (2009); Ellen S. Podgor,

this approach has come from a range of different perspectives. Some suggest that the criminal law is ineffective as a means of controlling behavior.[8] Others have reacted negatively to the economic costs of these policies.[9] Still others attack the so-called "war on crime" as a challenge to the liberty of citizens through the way it encroaches on the right to act freely where one's act does not cause harm to others.[10]

All of these are legitimate areas of debate. I wish to raise a different sort of critique about these developments however, one that focuses more upon whether it is a good idea to use the criminal law as a "first response" to address certain types of social problems, especially where public opinion is divided about the legitimacy of the activity being addressed and there are scant resources to enforce the law being

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Overcriminalization: New Approaches to a Growing Problem, 102 J. Crim. L. & Criminology 529 (2012); Stephen F. Smith, *Overcoming Overcriminalization,* 102 J. Crim. L. & Criminology 537.

8 Raymond Paternoster, *How much do we really know about criminal deterrence?*, 100 J. Crim. L. & Criminology 767 (2010); Paul H. Robinson, *How Psychology is Changing the Punishment Theory Debate,* 4 in *Law and Psychology: Current Issues* (Belinda Brooks-Gordon & Michael Freeman, eds., Oxford University Press, 2006).

9 Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008) at 12, points out that "our expanding criminal justice system incurs massive opportunity costs… Money and manpower are diverted from more urgent needs when police, prosecutors and courts enforce laws that our best theory of criminalization would not justify. These resources could be used to reduce taxes, improve schools or prevent the crimes we really care about".

10 Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York: Oxford University Press, 2007); Eric D. Blumenson and Eva S. Nilsen, *Liberty Lost: The Moral Case for Marijuana Law Reform,* 85 Ind. L.J. 279 (2009).

enacted. In a nutshell, my hypothesis is that use of the criminal sanction in these circumstances is ineffective because it tends to diminish or even shut down public discussion about the legitimacy of the activity in question, and eliminates discourse that is essential to change the societal ethic surrounding a particular practice.

The analysis I wish to pursue is rooted in the work of political and legal theorists who have raised questions about the way in which different types of law impact upon undesirable activity over the long-term. Law, they suggest, is not a static, fixed structure, but is instead a dynamic interface best served through interaction and dialogue. In this article, I build on this analysis and suggest that reliance on the criminal law as a means of spurring positive changes in public behavior has the potential to backfire. Because of numerous limitations on the way in which the criminal sanction can be used, including the high cost of prosecution, public discourse that is essential to the long-term effectiveness of the law is stunted. As a result, such laws may inhibit, rather than improve, the creation of acceptable standards surrounding a troublesome form of activity. In short, the criminal law is too blunt, too unmalleable and too dependent on a host of complex factors to be useful in regulating many types of social conduct. Most of the time, it is better to use other forms of legal control or incentives that allow for wider forms of discussion and community input.

Using the federal government's prohibition against the causing of cruelty to animals as an example, I hope to demonstrate that questions need to be raised about the federal government's consistent resort to the criminal sanction as a means of "controlling" behavior. Instead of changing the behavior in question, the law risks normalizing it and pushing it outside of society's gaze, with sanctions only being utilized in

extreme circumstances that fail to reflect the law's primary objective.

Law and Social Discourse.

The criminal law has long been regarded as a convenient way to repair matters perceived as problematic within society. A prohibition suggests that the government is taking steps to address a matter of public concern, and doing so in a way that stresses the seriousness of the issue. In many ways, use of a ban is regarded as the easiest, most expedient "solution" to a problem. As Husak suggests:

> [No] political party has been willing to allow [others] to earn the reputation of being tougher on crime. Legislators hope to be perceived as "doing something" to combat unwanted behaviours… Policies are enacted most easily when they are unopposed, and no significant organization wants to represent the "crime lobby" by protesting our eagerness to resort to criminalization and punishment.[11]

Whether the criminal law actually "works" to diminish the incidence of societal problems is a difficult matter to address. There are numerous areas of concern. Questions have been posed about the degree to which enactment of a criminal law actually changes the behavior of those inclined to commit the offence.[12] Others study the value of the criminal

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11 Husak, *supra* n. 9, at 16.

12 Paul H. Robinson and John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation,* 24 Oxford Journal of Legal Studies (2004).

law and its ability – or inability – to deter. Economic studies look at the costs and benefits of imposing such laws.[13]

More recently, some political and legal scholars have taken a different tack, measuring the efficacy of laws of this type by looking at the way a measure is able to generate a new "ethic" about the practice in question. They are motivated by the realization that the law alone is rarely enough to change societal behavior. Instead, for laws to have real impact, they must be accompanied by a measure of social discourse and discussion and the long-term building of collective norms. The best of these norms arise when there is a form of democratic discursive practice between those creating the laws and those who are the subject of it. Through discourse, collective ethics have a chance to form.

This approach draws in large part upon the ideas of German philosopher Jürgen Habermas, one of the world's most influential philosophers and social theorists,[14] who has published over 25 books touching on, amongst other topics, political theory, communicative rationality, epistemology and law.[15] Habermas's work is highly complex,

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13 See, for example, David D. Friedman, *Law's Order: What Economics has to do with Law and Why it Matters* (New Jersey: Princeton University Press, 2000); Kenneth Glenn Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy,* 1 Duke L.J. 114 (1990).

14 His influence is undeniable. See, for example, Michel Rosenfeld, *Law as Discourse: Bridging the Gap Between Democracy and Rights,* 108 Harv. L. Rev. 1163, 1164 (1995), who referred to one of Habermas's major works as "a monumental achievement …that provides a systematic account of major issues in contemporary jurisprudence, constitutional theory, political and social philosophy, and the theory of democracy".

15 Amongst his most notable works are Jürgen Habermas, *The Theory of Communicative Action, Vol. 1* (Polity Press 1984); Jürgen Habermas, *The Structural Transformation of the Public Sphere* (MIT Press 1989); Jürgen

and a comprehensive explanation of his theories on law and democracy here is impossible, as his ideas on this topic span several books. As a result, my discussion of his work here is, of necessity, going to be sketchy and general. For the purposes of simplicity, I will draw more upon summaries of Habermas's theories than from the original texts, as the latter are fairly dense and make it difficult to extract general points concisely. Obviously, in a paper of this nature, it is not possible to prove the truth or discuss the merits of Habermas's theories. Plenty of debate on this topic exists elsewhere.[16] My objective is simply to observe how Habermas's theory on discourse might apply to the use of the criminal sanction.

A central theme in Habermas's work is the importance of ensuring that individuals continue to have a role in the governance of modern democratic society, and his belief that "a stronger form of democracy is still a genuine and achievable goal, even in complex and pluralist societies".[17] According to Habermas, a key element in obtaining the "emancipation" of free individuals who might otherwise become victims of governance by institution is through a vision of "deliberative democracy". To put it another way, "the political system… must not become an independent system, operating solely according to its own

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Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996).

16 See, for example, Rosenfeld, *supra* n.14; Hugh Baxter, *Habermas's Discourse Theory of Law and Democracy,* 50 Buff. L. Rev. 205 (2002); Symposium, *Exploring Habermas on Law and Democracy,* 76 Denv. U. L. Rev. 927 (1999).

17 James Bohman, *Complexity, Pluralism and the Constitutional State: On Habermas's Faktizität und Geltung,* 4 Law and Society Rev. 897, 930.

criteria of efficiency and unresponsive to citizen's concerns".[18]

Habermas applies the same approach to his ideal vision of the way in which law is enacted, with him concentrating on the procedures necessary to give law a form of moral authority. In his view, the law requires constant legitimacy gained through a complex set of discourses entrenched in the political arena. According to Habermas, the process in which laws are made is as important as the results achieved. As Carlsson has written:

> To cope with changing structures… and to deal with ordinary people's experience, it is sufficient according to Habermas's communicative ethics to set up a procedure which will enhance the mutual understanding and learning process. Law should install or correct the channels of communication in a self-regulated democratic process of decision-making. On the other hand, when law is employed not as a mechanism to enhance mutual understanding but as an instrumental steerage, [society] suffers from systematically distorted communication and becomes colonized by system.[19]

In today's society, the real evil is law that operates by rote – law that is no longer subject to review or dialogue through the democratic process. Laws of this sort amount to a "colonization by system", in which

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18 William Rehg, *Translator's Introduction to Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy, supra* n.15, at xxxi.

19 Bo Carlsson, *Jürgen Habermas and the Sociology of Law* in *An Introduction to Law and Social Theory* 77, 83 (Reza Banaker and Max Travers eds., Hart 2002).

the individual becomes enslaved to a process beyond his or her control, to which he or she cannot contribute to and reform. Ideally, laws will be made in a manner that conforms to an active conception of the democratic process, and while voting on every law would be impractical, the ordinary citizen must be guaranteed an ability to participate through a discursive process of legislative decision-making.[20] In Habermas's own words, for a true discourse in law-making to exist:

> The desired political rights must guarantee participation in all deliberative and decisional processes relevant to legislation and must do so in a way that provides each person with equal chances to exercise the communicative freedom to take a position on criticizable validity claims.[21]

Vibrant communication surrounding the process of legislating is thus critical to an effective rule of law. In this regard:

> Formally institutionalized deliberation and decision must be open to input from informal public spheres. This means that Habermas's model places considerable normative responsibility for the

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20 See Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy, supra* n.15, at 437, who notes that "the discourse theory of law conceives constitutional democracy as institutionalizing – by way of legitimate law… the procedures and communicative presuppositions for a discursive opinion… that in turn makes possible legitimate lawmaking".

21 Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy, supra* n.15, at 127.

> democratic process on those public forums, informal associations, and social movements in which citizens can effectively voice their concerns. [For the public sphere to fulfill its democratic function there must be] channels of communication that link the public sphere to a robust civil society in which citizens first perceive and identify social issues; a broad range of informal associations… and agenda-setting avenues that allow broader social concerns to receive formal consideration within the political system.[22]

Discourse of this sort does more than ensure that lawmaking is reflective of an appropriate standard of modern democracy. Increasingly, scholars are suggesting that Habermas's approach is also a useful way of ensuring that laws are both *effective* and well-informed by policy. There are two main reasons for this. First, allowing the public to participate in an ongoing process of law-making is conducive to the way in which social norms tend to evolve,[23] and ensures that the results have a higher degree of legitimacy. Strand, who likens the process of long-term law reform and the communication between governments and citizens to a type of ongoing "legal story", describes the circular nature of law-making as follows:

> People's actual experiences provide the basis for the articulated

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22 Rehg, *supra* n.18, at xxxii.

23 That said, the government has a role to play "in shaping the social meaning that forms the basis of the norm", and attempting to guide a growing consensus: Hope Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm,* 33 Harv. Env. L. Rev. 117, 155 (2009).

> legal stories that meld into the told legal story… If the community accepts the legal story, people internalize its lessons and act accordingly; in this case, a social norm grows along with and reinforces the legal story. If, however, the community does not accept the legal story, adjustments occur to bring word and deed into alignment.[24]

She goes on to note how important appropriate vehicles of discourse are to this type of legal growth:

> All the individuals in the society are responsible for the content of law – through the collaborative emergence of frames and laws and through the eventual immergence of norms and roles…Recognizing this leads to a heightened awareness of the importance of providing avenues of communication and enactment for everyone.[25]

In effect, the concept of deliberative democracy draws upon the insight that legitimate laws reflect the 'general united will of the people', but asserts that "laws can be understood as reflective of that will when

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24 Palma Joy Strand, *Law as Story: A Civic Concept of Law (with Constitutional Illustrations),* 18 S. Cal. Interdisc. L. J. 603, 613 (2009). See similarly John Morison, *How to Change Things With Rules* 5, 6 in *Law Society and Change,* (Stephen Livingstone and John Morison eds, Dartmouth Publishing 1990), who notes that "law can tinker with the housekeeping of the legal system… but if the final point of impact of such change is within the legal system itself this does not count. Social change through law refers to change, originating from either outside the legal system or, more rarely, from within it, which moves through the legal system to make an impact outside it".

25 *Id.* at 627.

those laws arise from a democratic process of public reasoning – that is, from deliberation".[26] As Woolley puts it:

> Theoretical models of deliberative democracy assert the necessity for, and the importance of, determining the public will through a discussion in which participants identify a consensus view on legitimate reasons and on the state action that follows from those reasons…
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> Deliberative democracy may be a source of democratic legitimacy, but it is also, and perhaps primarily, the proper democratic process because it will, if designed to encourage critical thinking, reduce social pressure, enhance information sharing, and thus lead to better decisions.[27]

In short, these theorists suggest that public discourse is an essential aspect of encouraging democratic change in the law, and equally important in letting the law develop in a way that reflects a deeper societal consensus. A static law permits little dialogue, while a vibrant legal system possesses the intrinsic ability to evolve over time and be accepted as part of the wider social ethic through public discussion and debate.

My personal experience with Canada's law governing the

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26 Alice Woolley, *Legitimating Public Policy,* 58 University of Toronto L.J. 153, 166-67 (2008), summarizing Jürgen Habermas, *Popular Sovereignty as Procedure* in *Deliberative Democracy: Essays on Reason and Politics* 35, 48 (James Bohman and William Rehg eds., MIT Press 1997).

27 *Id.* at 167, 169.

prevention of cruelty to animals suggests that these theorists may well be correct. In a nutshell, my hypothesis is that animal welfare laws that encourage discourse surrounding animal use and contain opportunities for public consultation are more likely to provide long-term benefit than laws that create fragmented discourse or obscure it altogether. To illustrate what I mean, I will examine Canada's laws in this area and contrast them with the legal regime from New Zealand, which has reduced its reliance on penal sanctions in favour of a regulated approach that encourages public input at several points in the law-making process.

A Model for Silence and Fragmented Discourse: Canadian Animal Protection Legislation

Though it has a long-held reputation for being progressive on social issues, especially when compared to its neighbour to the South,[28] Canada is no haven for animals. Judging from the criticism the country receives for both its approach to animal welfare generally,[29] and in respect of

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28 See Michael Adams, *Fire and Ice: The United States, Canada and the Myth of Converging Value,* 10 (Penguin 2003) (Canada more socially liberal than the United States); John Myles, *How to Design a "Liberal" Welfare State: A Comparison of Canada and the United States,* 32 J. of Social Policy and Admin. 341 (1998) (lesser degree of income inequality in Canada than United States).

29 Elaine Hughes and Christiane Meyer, *Animal Welfare Law in Canada and Europe,* 6 Animal L. 23, 73 (2000)(strong need to reform Canada's laws); John Sorenson, *About Canada: Animal Rights* 40-58 (Fernwood Publishing 2010) (detailing Canada's animal welfare laws and concluding that in the agricultural context the law disregards the animal's interest almost entirely); Lesli Bisgould, *Animals and the Law* 67-87 (Irwin Law 2011)

specific issues of concern,[30] one could argue that Canada's animal protection legislation is amongst the worst in the Western world. In Canada, the protection of animals falls largely to the federal government.[31] Indeed, where farm animals are concerned, it is – with minor exceptions – only the federal legislation that matters.[32] For the

(criticizing Canada's cruelty provisions).

30 Perhaps the best known of these is the seal hunt. Canada has the world's largest commercial sealing industry and is consistently under scrutiny for, amongst other things, the manner in which the seals are slaughtered. Some jurisdictions, including the European Union, have banned the import of seal products on grounds of the cruelty imposed. Canada has responded by threatening litigation through the World Trade Organization. See Bruce Wagman & Matthew Liebman, *A Worldview of Animal Law* 96-97 (Carolina Academic Press 2011); Sorenson, *id.* at 85-88.

31 Canada's federal system allocates responsibility for lawmaking between the federal and provincial/territorial governments: *supra* n.2. Most of Canada's provinces and territories have enacted their own animal welfare legislation which, on balance, are more "animal-friendly" than the federal legislation. See, for example, Wagman and Liebman, *id.* at 158-159 (Ontario reforms provide "stiffer penalties", expanded coverage and better sentencing options for judges). That said, as discussed below, they are directed almost exclusively to companion animals. Moreover, the country's second most populated province has declined to enact animal welfare legislation altogether. Quebec has enacted legislation providing for the creation of bodies to look after animals, but nothing that provides standards of caring for them. In this province, the protection of animals is restricted to what is provided in the federal legislation. See *An Act Respecting Societies for the Prevention of Cruelty to Animals,* RSQ c. S-32 (Quebec).

32 Most provincial legislation avoids regulating agriculture through one of two mechanisms. Some provinces expressly restrict the application of the legislation to companion animals (see, for example, Prince Edward Island, *Companion Protection Act,* RSPEI 1988, c C-14.1, ss. 1(2)-(4)). The more common approach is to exclude scrutiny of agricultural practices altogether (see, for example, Manitoba, *The Animal Care Act,* CCSM cA84, ss. 2-3), or in

purposes of this paper, given the extent to which it dominates the field in this area, I intend to focus exclusively on the federal legislation.

It does not take very long to peruse Canada's federal animal protection laws. The provisions designed to prevent cruelty to animals can be found in the *Criminal Code,*[33] the country's primary source of penal legislation. After a number of unsuccessful attempts at reform,[34] it remains true that this "legislation has not been thoroughly reviewed since the advent of modern animal rights philosophies",[35] and, to put it charitably, the clauses are "horribly antiquated".[36] In Part XI of the *Code,* which addresses forbidden acts against property, sections 445.1(a) and 446(1)(b) set out the primary protections for animals in captivity:[37]

445.1(a) – Every one commits an offence who willfully causes or,

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any situation where the practice is "reasonable and generally accepted" (see, for example, Alberta, *Animal Protection Act,* RSA 2000 c A-41, s. 2(2), Ontario, *OSPCA Act,* R.S.O. 1990, c. O.36, s. 11.1(2)). For the effect the latter type of language has in allowing cruelty to proliferate on the farm, see David Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production,* 2 Animal Law 123, 135-139 (1996)(effect of exemption is to allow treatment that would otherwise be cruel).

33 RSC 1985, c. C-46.

34 For detail of Canada's unsuccessful attempts at reform in the late 1990s, see Bisgould, *supra* n.29, at 87-96.

35 Hughes and Meyer, *supra* n.29, at 40-41.

36 Manning and Sankoff, *supra* n.2, at 1069.

37 These offences are punishable by a maximum prison term of five years. Sections 444 to 447 contain a number of additional, very specific, prohibitions involving animals that are almost never used. They include offences such as baiting animals with poison, conducting or attending a cockfight or being involved in competitions involving the shooting of captive birds.

> being the owner, willfully permits to be caused unnecessary pain, suffering or injury to an animal or bird;
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> 446(1)(b) – Every one commits an offence who being the owner or the person having the custody or control of a domestic animal or a bird… fails to provide suitable and adequate food, water, shelter and care for it.

The shortcomings of the federal framework for animal protection have been well documented. In a 2000 article, Hughes and Meyer conducted a detailed examination of Canadian legislation and noted its many flaws, concluding that it is "overly narrow in scope, unduly technical to prosecute, and overly reliant on the subjective state of mind of the offender".[38] Bisgould cites three major problems with the federal legislation,[39] concluding "crimes against animal property are minimized throughout the justice system, resulting in the withdrawal of charges, high acquittal rates, or weak sentences".[40]

Nonetheless, from the perspective of generating and providing avenues for public discourse, these are hardly the law's most egregious defects. After looking closely at the governing legislation, it comes as no

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38 Hughes and Meyer, *supra* n.29, at 63. See also Manning and Sankoff, *supra* n.36, at 1068-1078 (Canada's provisions do not function well; wording of the Code has proven highly problematic in practice).

39 These are: (1) the provisions are rarely applied in the industrial context; (2) the underlying assumption that the crimes are never serious; and (3) the courts' approach to sentencing leaves animals in a vulnerable position: Bisgould, *supra* n.29, at 71-87.

40 Bisgould, *id.* at 87.

surprise that sustained debate about animal welfare standards rarely seems to resonate across the Canadian landscape. Though it is difficult to measure a "negative" of this sort, it is remarkable how rarely animal welfare concerns manage to occupy the media or generate wide interest. Since the attempt at federal reform collapsed prior to 2000, serious discussion in the media about the need for wide-scale change regarding animal treatment has been rare. Instead, questions are entirely issue specific and driven by whatever event grabs the media's interest. One day, it's the needless killing of sled dogs in British Columbia.[41] Months later, it's the misdeeds of a companion animal shelter in Montreal.[42] No issue seems capable of generating enough traction to provoke a sustained discussion of legal standards.[43] Moreover, questions involving agricultural practices – where the vast majority of animals in captivity are subjected to pain and suffering[44] – are virtually never raised. In my view, this lack

41 Petti Fong, *100 Sled Dogs Killed in B.C. Massacre,* Toronto Star (February 1, 2011)(available at http://www.thestar.com/news/canada/article/930749--100-sled-dogs-killed-in-b-c-massacre). This event gene-rated headlines internationally because of the brutality involved to the animals.

42 An undercover investigation into a Montreal shelter named Berger Blanc grabbed media attention in early 2011. The investigation revealed inadequate euthanasia practices that resulted in needless pain and suffering for stray cats and dogs. See *Montreal Shelter Practices Raise Alarm,* CBC News (April 20, 2011)(available at http://www.cbc.ca/news/canada/montreal/story/2011/04/20/montreal-animal-pound-euthanasia.html).

43 The killing of sled dogs did promote discussion of animal welfare standards in the province where the killing took place. British Columbia's existing legislation has been modernized as a result. See Stephen Otto, *Sled Dog Massacre Leads to Government Proposal to Improve B.C.'s Animal Protection Laws,* ALDF Blog (June 1, 2011)(available at http://www.aldf.org/article/article.php?id=1670).

44 David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House, Animals,*

of discourse stems, at least in part, from the current state of Canadian animal protection law.

The problem originates as much from the law's framework as from any of the specific flaws listed above. Canadian cruelty law, like most anti-cruelty provisions, operates on the basis of a simple binary equation that has not changed for over 100 years. On the surface, the law separates matters into strict categories of "right" and "wrong", with little grey area. Suffering is either "necessary" or "unnecessary", with very few clues offered within the legislation – or elsewhere, for that matter – regarding what constitutes cruelty in the abstract. In terms of legal discourse, the Code's long-standing approach suggests that the matter of animal protection has been resolved with a corresponding "closure of the public debate".[45]

Behind the scenes, of course, what constitutes cruelty against animals is anything but resolved. In factual operation, the law is almost entirely "grey", albeit a shade of grey that is rarely discussed in public. By creating a standard that notionally governs the treatment of all animals the law operates a mile wide and an inch deep with an approach so vague that it fails to provide any guidance for meaningful public debate. Are battery hen cages "cruel"? What about the use of horses to

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Agribusiness and the Law: A Modern American Fable in Animal Rights: Current Debates and New Directions 205, 206 (Cass Sunstein & Martha Nussbaum, eds., Oxford University Press, 2004)("From a statistician's point of view… farmed animals represent 98 percent of all animals (even including companion animals and animals in zoos and circuses) with whom persons interact").

45 Timothy Caulfield, *Politics, Prohibitions and the Lost Public Perspective: A Comment on Bill C-56: The Assisted Human Reproduction Act,* 40 Alta. L. Rev. 451, (2002)(bans stifle public discourse by offering a complete answer).

drag "caleches" – old-fashioned carriages used in the 19th Century – around the cobblestone streets of old Montreal, a matter currently under discussion?[46] In any discussion of this kind, one must first set the parameters of what the law means, and attempt to settle upon common assumptions. Do economic concerns trump the interests of animals? Which animals should be protected? Do animals truly suffer? By the time these questions have been fully aired, the public has usually lost interest. In terms of guiding any surrounding social discourse, the law is simultaneously too certain – "cruelty is wrong" – and too uncertain to be helpful.

The statute is not the end of the story, of course. As any lawyer knows, vague statutory phrasing can become vital and discursive through judicial decision-making.[47] Nonetheless, there is little reason to believe that the judicial decisions emanating from Canada's cruelty standards are adding substantially to the discourse. To begin with, the number of prosecutions going forward in a given year sound more like an occasional whisper than a vibrant conversation. For dialogue to

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46 An issue recently raised by the Montreal SPCA, who claims the practice puts horses at extreme risk of collision with cars and harms them physically: SPCA de Montreal, http://www.spca.com/?p=783&lang=fr.

47 In contrast, take Canada's provisions on sexual assault. Over the past thirty years, Canadian courts have been involved in a vibrant discussion about the way in which sexual violence should be addressed under the criminal law. Judicial decisions from the Supreme Court of Canada, coupled with legislative intervention, have crafted a public dialogue about these issues that continues to resonate. See Joanne Wright, *Consent and Sexual Violence in Canadian Public Discourse: Reflections on Ewanchuk,* 16 Can. J. of L. and Soc. 173, 201 (2001); Janine Benedet and Isabel Grant, *Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief,* 52 McGill LJ 243, 259-260 (2007).

emanate from court decisions, it's useful to actually have cases – ideally at the appellate level, where the law can actually be discussed in some detail – reviewing the standards that animate the law in question. It is here that Canada's prosecution "deficit" – a feature consistently remarked upon by critics of the legislation[48] – becomes a major factor of concern. Given how many different agencies are involved in the investigation and prosecution of cruelty cases, it is difficult to obtain precise numbers, but even a search of the reported case law indicates that very few prosecutions go forward in a given year.[49]

Second, where prosecutions do occur, they are not on the types of cases that are likely to start a discussion about the standards in which animals – and especially farm animals - are commonly kept. A number of reasons exist for this. First, complex cases that require a court to look deeply into the heart of the industrial agricultural framework and ask questions about how society should balance competing values are not the types of cases judicial bodies are well-sited to delve into. As Strand has suggested, "traditional judicial decision-making does not do a good job of accommodating [the idea of complex causation]. Smaller bodies are in a better position to consider a complex and specific historical, factual and political landscape.[50]"

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48 Hughes and Meyer, *supra* n.29, at 69-72; Bisgould, *supra* n.29, at 86-87.

49 A Westlaw Canada search conducted by the author in February 2012 concentrating on cases decided in 2011 located only three reported cases nationwide that dealt with charges involving cruelty against animals, all at the Provincial Court level, Canada's lowest trial jurisdiction. Obviously, there must be unreported decisions as well, but it would be difficult to contend that the courts were stimulating intense discourse on animal protection standards in 2011.

50 Strand, *supra* n.24, at 646.

Moreover, as a practical matter, prosecutors have little interest in taking controversial cases forward. Bound by a mandate to act in the "public interest" and only take cases with a "reasonable prospect of conviction",[51] prosecutors commit the meager ration of time allotted for animal cases to fact scenarios they can win: cases involving the most egregious type of violence against animals imaginable. These include cases like *R. v. Connors*,[52] where a man pleaded guilty to beating a 3 month old puppy to death with his bare hands, and *R. v. Munroe*,[53] where two dogs were tortured over a prolonged period with heat, electricity and blunt force.[54]

Without question, the offenders in these cases needed to be punished, but it is difficult to see how these types of prosecutions do much for animals in the long-term. Even in the unlikely event media coverage brings these cruelty prosecutions to the wider public, the

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51 See, generally, Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* 52-55 (Queen's Printer 1993). For a discussion of Canadian prosecutorial discretion, see Steven Penney, Vincenzo Rondinelli & James Stribopolous, *Criminal Procedure in Canada* 449-453 (Lexis Nexis 2011).

52 2011 BCPC 24 (available at http://www.canlii.com/en/bc/bcpc/doc/2011/2011bcpc24/2011bcpc24.html).

53 2010 ONCJ 226 (available at http://www.canlii.com/en/on/oncj/doc/2010/2010oncj226/2010oncj226.html).

54 In terms of stimulating discourse surrounding animal standards, there have probably been less than ten meaningful cases in Canada decided during the last sixty years. In writing my book on criminal law in 2008 – Manning and Sankoff, *supra* n.36 – I located only three cases of note decided by appellate courts. The most recent, probably the most important decision on animal cruelty ever decided in Canada, was released in 1978: *R. v. Menard* (1978) 43 C.C.C. (2d) 458 (Que. C.A.).

resulting dialogue is likely to be of the same "right and wrong" discussion promoted by the legislation. A member of the public reading about these cases is likely to sit back and condemn how some "nuts" are sadistic towards animals and perhaps feel good that some vague progress in cracking down on animal cruelty is being made. In fact, coverage of these cases may actually inhibit the process of systemic long-term reform. If a person were to judge Canada's animal protection law on the basis of the cases that actually make it to court, he or she would undoubtedly assume that sadistic animal abusers were the main proponents of animal suffering. In effect, the law perpetuates the myth that malicious offenders are the "problem" when, in fact, these persons impose only a tiny fraction of the suffering that animals across Canada are forced to endure.[55]

Laws that focus exclusively on this sort of conduct are unlikely to stimulate much in the way of public discourse. If a high profile case achieves a conviction, little is gained, as public discussion is almost unanimously condemnatory of the offender. If an acquittal is obtained, there is the possibility of some discourse, though it generally surrounds the flaws in the legislation, and may become subsumed in wider discussion surrounding the way by which offenders escape through "technicalities" in the criminal law. Either way, prosecutions of this sort seem ineffective as a means of creating consequential dialogue. What is there to talk about when a deranged offender decides to torture his animals for sadistic pleasure? Leaving aside the sadists, who's likely to

55 See, generally, Babcock, *supra* n.23, at 126 (proposition that laws can facilitate certain types of myth that impede the development of more sophisticated norms for regulating a problem).

argue that this sort of conduct does not deserve condemnation?

In summary, the operation of Canadian law provides little impetus for sustained public discourse on animal issues. To be clear, I am not suggesting that discourse surrounding animal issues does not happen in Canada. The horrific killings of sled dogs in British Columbia highlighted earlier is a good example of a situation where an event was so shocking to the public consciousness that it prompted discussion and, eventually, legal reform.[56] Nonetheless, the question engaged by this article is what *the law* can do to increase and improve societal discourse surrounding the suffering endured by animals, and it is in this regard that Canadian law must be regarded with suspicion.

Another Way Forward: New Zealand and Opportunities for Dialogue

As recently as 1999, New Zealand's regime governing the protection of animals from cruelty mirrored Canada's. Today, however, New Zealand has centralized all of its provisions on animal treatment within one statute: the *Animal Welfare Act 1999* (The AWA) – and has chosen a model that focuses on regulation and discourse between stakeholders.

In contrast to Canada, New Zealand has adopted a detailed regulatory approach that leaves much less flexibility to prosecutors and

56 Kim Pemberton, *B.C. Introduces Tougher Animal Cruelty Laws,* Vancouver Sun (May 12, 2011)(available at http://www.vancouversun.com/news/introduces+tougher+animal+cruelty+laws/4766943/story.html)(discussing British Columbia's law reforms in wake of sled dog killings).

judges. Codes of Welfare relating to particular types of animal treatment are designed to provide specificity about desirable practices and drafted to ensure that animals are provided with what they need in accordance with "good practice and scientific knowledge". The Codes play a critical function within the AWA framework. Compliance with a Code amounts to a complete defence against any charge of failing to fulfill a duty of care or causing ill-treatment to an animal.[57] Thus, in practical terms the Codes are more important than the substantive provisions of the AWA. So long as a person acts in accordance with what the Code mandates, it makes no difference whether an offence under the AWA has technically been committed, as the Code effectively overrides every section of the legislation.

The legislation is designed in a way so as to promote – directly or indirectly-dialogue between the government, animal users and the wider public. To begin with, New Zealand's law is designed to be an ongoing discussion instead of a "one-way shout". The perpetual nature of this dialogue is guaranteed by section 78 of the AWA, which provides that "the National Animal Welfare Advisory Committee [NAWAC][58]… must at intervals of not more than 10 years, review every code of welfare for the time being in force".[59]

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57 The AWA, ss.13(2)(c), 30(2)(c).

58 The NAWAC is a quasi-independent body composed of experts on animal care who provide recommended Codes of Welfare to the Minister of Agriculture and Forestry, who has the legal power to enact them. In practice, the Minister almost always adopts the recommendations, though this is not always the case. See Arnja Dale, *Animal Welfare Codes and Regulations—The Devil in Disguise?,* in *Animal Law in Australasia* 333, 178-79 (Peter Sankoff & Steven White eds., Fedn. Press 2009).

59 Section 78(4) of the AWA, in conjunction with section 79A, permits the

In terms of discourse, it would be difficult to draft a more useful legislative provision. The requirement creates at least three major benefits. First, section 78 puts discussion regarding the needs of animals on the legislative agenda *in perpetuity*. In contrast to the Canadian position, where Parliamentary discussion regarding standards for animal care is left to the whim of legislators, New Zealand's governing statute mandates a review of *every* Code regulating the treatment of animals at least once each decade. This time period may be extended, but not indefinitely, and only where justified. It means that so long as New Zealanders are farming sheep, pigs and chickens, there will be a national discussion about how that farming should take place. We may not always like the results, but I find it hard to see how one can be unhappy about the fact that such discussion is taking place. I'd direct such a person to Canada, where the silence on animal related issues is deafening, and simply getting a discussion started amongst government officials, who seem to think that there's 'nothing to see here', is a major endeavour.

The ongoing discussion leads to a second benefit. Ten years may seem like a long time between reviews, but not when put in the context of the number of animal practices being regulated by Codes of Welfare. There are currently fourteen Codes of Welfare in place[60] with plans for

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government – on the recommendation of the Minister of Agriculture – to extend the time available for review where necessary. This section was added in 2002, when it became apparent that reviewing Codes of Welfare was going to be a more complicated and lengthy process than originally anticipated. For further discussion this point, see Peter Sankoff, *Five Years of the "New" Animal Welfare Regime: Lessons Learned from New Zealand's Decision to Modernize Its Animal Welfare Legislation,* 11 Animal L. 7, 17-18 (2005).

60 Ministry of Agriculture and Forestry, *Codes of Welfare (Alphabetically),*

at least six more to be enacted over the next five to ten years.[61] Effectively, this means that the NAWAC will be revising two Codes a year, every year, into infinity. Not only are animal standards going to be discussed perpetually, but the sheer quantity of Codes being revamped means that animal law is *always* on the agenda, and, in relative terms, the next chance to reform a practice is just around the corner.

What this means is that an opportunity to challenge a given practice or end a particular type of suffering is never limited to one special occasion when legislators show a willingness to engage on an issue. In effect, the creation of a permanent system of review means that legislators have given up their ability to set the agenda and dictate when animal issues will be considered – a power delay strategy common in many jurisdictions – in favour of a mandatory reform process. Consider the example of layer hen cages, a farming technique New Zealand animal activists have been fighting for decades.[62] In 2004, the NAWAC released its recommended Code of Welfare on layer hens,[63] and somehow reached

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http://www.biosecurity.govt.nz/regs/animal-welfare/codes/alphabetically.

61 Currently, these areas are governed by voluntary codes of "recommendations and minimum standards" that have no legal effect. The Ministry has indicated these will be replaced by formal Codes of Welfare over the next five to ten years: Ministery of Agriculture and Forestry, http://www.biosecurity.govt.nz/regs/animal-welfare/stds/min.

62 Save Animals From Exploitation (SAFE), one of New Zealand's largest and most effective animal advocacy group, has been demanding an end to battery cages since 1987: SAFE, http://safe.org.nz/Campaigns/Battery-hens/.

63 The Code was enacted, as recommended, by the Minister in 2005: Ministry of *Agriculture and Forestry, Animal Welfare (Layer Hens) Code of Welfare, 2005,* (available at: http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/layer-hens/layer-hens-code-of-welfare.pdf).

the conclusion that battery hen cages complied with the requirements of the AWA. The Committee used some rather tortured logic to get there:

> Welfare must be considered holistically. NAWAC is unable to recommend replacement of current cage systems with alternatives systems until such time as it can be shown that, in comparison to current cage systems, alternative systems, in the context of supplying New Zealand's ongoing egg consumption needs, would consistently provide better welfare outcomes for birds and be economically viable.[64]

The reasoning was justly ridiculed, as it suggested that economic concerns are decisive of animal welfare questions.[65] Nonetheless, it was at least a conclusion! Forced to come up with a reason for keeping existing cages, the NAWAC utilized logic that jeopardized the very credibility of the AWA. In the process, the NAWAC unintentionally augmented the national dialogue on battery cages,[66] and it was not long, in relative terms, before layer hens were back up for review.

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64 NAWAC, *Animal Welfare (Layer Hens) Code of Welfare 2004 Report* 10 (April 21, 2004)(available at http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/layer-hens/lhc-report.pdf).

65 See, for example, Dale, *supra* n.58 at 189 (NAWAC taking overly conservative approach in implementing beneficial welfare standards where economic productivity impeded); Michael Morris, *The Ethics and Politics of the Caged Layer Hen Debate in New Zealand,* 19 J. of Env. Ethics 495, 504 (2006)(threats by egg producers may have caused the NAWAC to ignore the law).

66 This dialogue was furthered by various challenges to NAWAC's practice. See the discussion on "Layers of Dialogue", below.

Today, layer hens are once again being discussed. With the NAWAC's 2004 reasoning now discredited, it seems inevitable that at least the use of traditional battery hen cages will be abolished.[67] What the process demonstrates is that a temporary failure, unsettling as it is for campaigners and damaging as it is for the animals, can sometimes be regarded as successful in commencing a public dialogue about a practice that would otherwise be ignored. Moreover, the requirement that the government publicly state its position sets the stage for future challenges and precludes any attempt to shift justifications for keeping a troubling practice in place. At the very least, advocates of a more animal-friendly approach know what to target – whether it be "custom", flawed science, or economic arguments, and can plan accordingly.

Finally, though it is merely a subjective perception, I believe the review process provides a subtle, yet critical third benefit: the creation of a public recognition that animal law is *important*. Every year, regardless of whatever other pressing issues might arise, animal welfare remains on the legislative agenda. The government, usually through the Minister of Agriculture and Forestry, is involved and engaged in the process.

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67 The *Draft Code of Welfare for Layer Hens,* which is still undergoing revisions and awaiting final Ministerial approval, recommended a phase-out for traditional battery hen cages, though consideration is being given to use of "colony cages" similar to those used in Europe: The NAWAC, *Feedback Sought on Draft Code of Welfare for Layer Hens* (Feburary 8, 2011) (available at http://www.biosecurity.govt.nz/media/08-02-2011/draft-code-of-welfare-for-layer-hens). The use of colony cages has been strenuously attacked by a united coalition of animal welfare groups: RNZSPCA Press Release, *Pressure on Minister to Ban Cruel Cages Intensifies* (October 3, 2011) (available at http://www.scoop.co.nz/stories/PO1110/S00024/pressure-on-minister-to-ban-cruel-cages-intensifies.htm).

Leaders of industry are called to account for their treatment of animals, and the media has responded by covering these events and publicizing most aspects of the Code process. I cannot help but think that the unmistakable message is that New Zealanders *should* care about animal welfare.[68] Even if the short-term results sometimes belie this conclusion, the message over the long-term must be that this is a matter of importance, and one to be taken seriously.

Though I have described the schedule that determines when Codes of Welfare are reviewed, I have not provided much detail about the process by which each Code is updated. It involves multiple stages and allows the public to have a real say in the outcome. In and of itself, this has the potential for significant benefit. As Timothy Caulfield has noted, albeit in a different context, "regulatory approaches have the flexibility necessary to respond to diverse and changing social attitudes and provide forums for ongoing public dialogue".[69] In contrast to legislative bans that are static and stifling of dialogue, the discourse surrounding regulatory decision-making can have benefits that go well beyond whatever law results from the process.

Enactment of a new Code of Welfare involves a six-stage process that can take up to two years to complete.[70] First, the NAWAC annually

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68 See similarly Michael P. Vandenbergh, *The Social Meaning of Environmental Command and Control,* 20 Va. Env. L.J. 191, 200-01 (law is expressive in the sense that it can signal, reinforce or change social meaning).

69 Caulfield, *supra* n.45 at 457-58.

70 National Animal Welfare Advisory Committee, *Process for the Development of Codes of Welfare,* Guideline 4(3), (approved February 11, 2004; updated to July 11, 2011)(available at http://www.biosecurity.govt.nz /files/regs/animal-welfare/pubs/nawac/guideline04.pdf). Much of this consultation is also mandated by The AWA directly, ss. 70-72.

identifies its Code priorities for the coming year, which indicates to the public the practices and categories of animals that are next in the queue for review. This list is made publically available through the NAWAC's annual report.[71] Second, the NAWAC creates an internal committee to decide how the Code will be drafted. Normally, this involves notifying the public and industry stakeholders that it intends to review a particular Code, and convening a writing group from these parties. This effectively commences a pre-consultation process in which welfare advocates and those most seriously affected by the Code are able to raise issues with the NAWAC and, where appropriate, start a public discussion about controversial procedures being addressed by the Code.[72]

Eventually, a draft Code of Welfare is produced. An internal process follows, whereby the NAWAC reviews the draft Code and any submissions that have been received. Once the NAWAC is satisfied with the Code, it is time for the fourth stage: a public submission process. While the draft Code provides an indication of the NAWAC's preliminary conclusions, and has considerable weight, nothing is firmly settled when this draft is released.[73] The public process usually results in thousands of

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71 See, for example, National Animal Welfare Advisory Committee, *2010 NAWAC Annual Report* 10 (April 2011) (available at http://www.biosecurity.govt.nz/files/regs/animal-welfare/pubs/nawac/nawac-ar-10.pdf).

72 Strand, *supra* n.24, at 647, believes that public consultation and discussion on legal issues plays a vital role in making long-term change. She notes that "[l]ocal institutions… are in the best position to instigate and sustain the kind of dialogic and creative processes that will engage people in rethinking the shared reality… It is when individuals change their stories, their roles, and their interactions that the system level pattern… that emerge[s] from those interactions will change".

73 See, for example, MAF Press Release, *Feedback Sought On Draft Code of*

public submissions from individuals and groups interested in commenting on the draft Code.[74] Submissions are normally written, but the NAWAC will occasionally hear from witnesses orally as well.[75] The submissions themselves provide further opportunity for continued public dialogue, as they are often posted online. Many of the submissions are extremely detailed and contain an array of facts about the animals in question, going on to discuss policy, scientific points and even legal concerns.[76]

When the public consultation process is completed, the NAWAC takes time to consider whether to make changes to the Draft Code. After a lengthy period of internal revision, the NAWAC delivers its version of the Code of Welfare, along with a detailed report explaining its reasoning, to the Minister of Agriculture and Forestry, who makes the final decision regarding whether to enact the Code as a regulation. The Minister will normally adopt the Code as recommended, though, as we shall see, this does not always occur. Approval of the Code, normally accompanied by a Ministerial statement, represents the final stage. All of

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Welfare for Layer Hens (February 8, 2011)(available at http://www.biosecurity.govt.nz/media/08-02-2011/draft-code-of-welfare-for-layer-hens).

74 The draft Layer Hens Code of Welfare received over 36,000 submissions: SAFE, http://safe.org.nz/Campaigns/Battery-hens/. Not every Code attracts this level of attention, of course.

75 See, for example, NAWAC, *Animal Welfare (Commercial Slaughter) Code of Welfare* 2 (April 22, 2009)(available at http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/commercial-slaughter/commercial slaughter-code-of-welfare-report.pdf (noting oral submissions received during consultation).

76 See for example, Gillian Coombe (Barrister), *Submission on Draft Code of Welfare for Layer Hens* (April 27, 2011)(available at http://safe.org.nz/images.php?oid=13060)(addresses legal aspects of the NAWAC's power under the AWA).

the reports, Ministerial statements and the Code itself are posted online.

Remarkably, there is publicity at virtually every point in the process. It is now common for the NAWAC, industry stakeholders and animal advocacy groups to engage in public discussion at the pre-consultation stage, once a draft Code has been released, after the NAWAC's version has been sent to the Minister, and, of course, once the Code has been enacted.

Consider the example of layer hens, discussed earlier. Eight years after the NAWAC concluded that battery cages complied with the AWA, the matter is being re-considered. The public mindset towards cages has developed considerably in the interim and, in contrast to the situation in 2004, the debate is not about battery cages at all. It seems inevitable that these will be banned under the new Code, and the sole question to consider is whether the industry's desire for "colony cages" will be accepted.[77]

The public attention to the process has been remarkable. As a review of the Code for Layer Hens approached, animal advocacy groups began a concerted campaign to drum up interest and promote the need for change. Throughout 2010 and 2011, there was consistent media attention and discussion of the merits and drawbacks of cages that accompanied every stage of the review process.[78] Even run of the mill protests by animal activists that, in the past, would never get a sniff of

77 *Supra* n.67.

78 The media coverage, once again, has been extraordinary, with a consistent stream of news items and investigative reports on radio, television and in newspapers. For a review of the media on this issue, see SAFE Media Centre (Battery Hen Campaign), http://www.safe.org.nz/Campaigns/Battery-hens/In-the-media/.

public attention, were reported in some detail by the media. In part, that's because the protests were not "random" events scheduled on a whim, but instead were methodically planned to coincide with significant events in the legislative process, such as the close of public submissions on a particular Code of Welfare.[79] The overall result was an astonishing amount of media coverage for a single animal welfare issue, much of it prompted by the fact that each new stage of the Code process gave the media a fresh angle to report.

The foregoing demonstrates that the Code review process is detailed, lengthy and designed so as to engage multiple parties, and structured in a way that allows the story to unfold slowly for the media. The richness of different voices expressing their points of view in a public forum is edifying for all concerned. Moreover, by diversifying the way in which conclusions are reached, the process takes the power to resolve issues away from a single branch of government and ensures deeper, richer decision making. As Braithwaite has noted:

> Checking of power between branches of government is not enough. The republican should want a world where different branches of business, public and civil society are all checking each other…. The

79 See *Women End Hen Protest Early After "Achieving Goal",* New Zealand Herald (February 21, 2011)(protest designed to "get people talking about battery hens" in light of call for public submissions to the Draft Code of Welfare)(available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10707782); *Cage Protest Against Battery Farms,* New Zealand Herald (March 31, 2011) (protest of sitting in cage would end on day that submissions on Draft Code of Welfare closed)(available at http://www.nzherald.co.nz/nz/news/ article.cfm?c_id=1&objectid=10716084)

> nuts and bolts of checks and balances, of independence and interdependence, require contextual deliberation for any given source of power.[80]

The Code process is not the only way of generating discussion over the treatment of animals. As aforementioned, one of the difficulties of working within the Canadian framework is the paucity of avenues available for creating legal debate. Within a binary, criminal-based structure, advocates wishing to "push" the envelope are limited in the types of legal discussion they are able to create. The public prosecutor has almost complete control over the types of litigation that moves forward,[81] and more creative types of challenges face difficulties in obtaining standing.[82] Especially where the industrial usage of animals is

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80 John Braithwaite, *On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republication Separation of Powers,* 47 Univ. of Toronto. L.J. 305 at 344. Braithwaite also notes, *id.* at 341, that "separations of powers both within and between the private and public sectors are important to controlling… abuses of power, as is countervailing power from institutions of civil society that muddy any simple public-private debate".

81 It may be possible in some circumstances to bring a "private prosecution", however. See Sophie Gaillard, *Guide to Private Prosecution of Animal Welfare Offences under the Federal Health of Animals Act* (Lawyers for Animals 2010)(available at http://www.lawyersforanimalwelfare.com/). See also Sophie Gaillard and Peter Sankoff, *Bringing Animal Abusers to Justice on Our Own Terms: Private Prosecutions and the Enforcement of Canadian Animal Protection Legislation,* forthcoming (paper presented at Lewis and Clark conference, October 2011).

82 See, for example, *Reece v. Edmonton (City)* (2011), 335 D.L.R. (4th) 600 (Alta. C.A.)(attempt to obtain declaration that City was in breach of animal protection law by keeping lone African elephant in poor conditions quashed on grounds that advocacy group lacked standing to bring challenge).

concerned, it is virtually impossible to contest the "informal" decision-making that results in the law becoming stagnant: the government's refusal to prosecute any common, but nonetheless questionable, agricultural practice.[83]

The beauty of a complex legislative framework like the one that exists in New Zealand, is that it provides avenues for challenging decisions made in relation to animals. Thus, in addition to the dialogue created through the regulated process, further opportunities for discourse exist if one is able to contest the outcomes generated. In other words, as Morison has noted, this type of structure is useful, as it "provide[s] a framework through which individuals and interest groups… can pursue issues through the courts or other related mechanisms of arbitration or conciliation".[84]

While New Zealand advocates have been slower to utilize mechanisms of this sort, a few external challenges have demonstrated the possibilities that exist to generate discourse by contesting the decisions made when a Code is enacted. In 2005, the Animal Rights Legal Advocacy Network (ARLAN)[85] brought a challenge to the *Animal Welfare (Layer Hens) Code of Welfare* utilizing a special procedure that permits any individual "aggrieved at the operation of a regulation" to contest such

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83 In Canada, the prosecutor's discretion regarding which prosecutions to bring forward is extremely difficult to challenge in Court: *Krieger v. Law Society of Alberta,* [2002] 3 S.C.R. 372 (decisions of whether prosecution should be brought only reviewable where there has been a flagrant impropriety, bad faith, or clear lack of objectivity).

84 Morison, *supra* n.24, at 10.

85 As a matter of disclosure, I was the Co-Executive Director of ARLAN between 2001-2005, and participated in this challenge.

regulation before a panel of Members of Parliament.[86] ARLAN contended that battery cage systems failed to comply with the requirements of the AWA and that the Minister had acted improperly in enacting regulations that conflicted with legislation passed by the House of Representatives.

Though it did not accept every aspect of the complaint, the Regulations Review Committee - comprised of sitting members of four different political parties – agreed that the government had acted improperly.[87] Just as importantly, it convened a day of hearings where it closely questioned members of the NAWAC. The public hearings were extremely useful in revealing the manner in which the NAWAC reached decisions and balanced competing priorities. Although the government ultimately refused to adopt the Committee's recommendations,[88] it was forced to issue an official response that clearly defined its position on cages.[89] This position has been useful to advocates in framing arguments

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86 This stems from Standing Order 316 of the New Zealand House of Representatives: See Regulations Review Committee (NZ), *Final Report on Complaint about Animal Welfare (Layer Hens) Code of Welfare 2005* 4 (on file with author).

87 The Committee concluded that the Minister's failure lay in the failure to order a phase-out of battery cages. The Committee felt that the Code itself recognized that these cages were problematic, but simply deferred the decision of how to address them to a later date. The Committee concluded that this was not an option available to the Minister under the AWA: *Final Report on Complaint about Animal Welfare (Layer Hens) Code of Welfare 2005,* id. at 16-17.

88 The Committee only has the power to "draw the attention of the House" to any problems with the regulation. It cannot compel the House or the Executive to act. See Ryan Malone and Tim Miller, *Regulations Review Committee Digest,* 3d. ed., 15 (New Zealand Center for Public Law 2009) (available on line at http://victoria.ac.nz/nzcpl/RegsRev/Index.aspx).

89 Hon. Jim Anderton, *Government responds to Parliament on Layer Hens* (July

during the revamped Code process of the last two years.[90]

The process, while unsuccessful in changing the government's position on battery cages, provided yet another useful layer of dialogue, for it resulted in oral testimony from government officials about the types of choices they made, and why they made them, and necessitated a detailed response from the Minister of Agriculture and Forestry. Moreover, it provided a clear statement from a governmental committee to the effect that battery cages did not comply with the AWA and should be abolished. For the first time, New Zealanders had the opportunity to talk about something other than the merits of a particular decision regarding animals; they could discuss the legality of the route by which the decision was made. All of these points have undoubtedly helped improve the discussion on battery cages that has subsequently taken place.

Judicial challenges may prove even more fruitful in the long run. Because of New Zealand's administrative law regime, it has never been entirely clear whether an interested party or organization can challenge regulations in court on the grounds that they do not comport with statutory legislation.[91] In 2010, however, we received a partial answer

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26, 2006)(available at http://www.beehive.govt.nz/node/26587).

90 See, for example, the *SAFE Submission on the Draft Code (Layer Hens) of Welfare* 6 (April 29, 2011)(available at http://safe.org.nz/images.php?oid=13059).

91 A challenge of this sort would essentially proceed along the lines of the now famous Israeli decision of *Noah v. Attorney General,* HCJ 9232/01 [2002-2003] IsrSC 215, 215 (an English translation can be found on the High Court website: http://elyon1.court.gov.il/eng/home/index.html), which successfully contended that the Israeli government's regulations on foie gras production permitted cruelty, and were in conflict with the governing

when the Minister of Agriculture and Forestry imposed a ban on kosher slaughter, on the ground that the practice was cruel. A coalition of Jewish groups immediately challenged the decision on judicial review,[92] arguing that the Minister's decision had been affected by a "mistake of fact; that there has been a failure properly to consult; and that regard has been had to irrelevant considerations and proper regard not had to relevant considerations".[93]

Unfortunately, the kosher slaughter challenge did not fully address the legitimacy of this sort of judicial review, as a settlement was reached before the case was heard.[94] Still, it is worth nothing that the court took the case seriously and did not dismiss it on the grounds that the party lacked standing or that challenges of this sort to a Ministerial decision were impossible. While there is reason to be wary of this case's

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legislation. For a discussion of this case, and the procedural route it followed, see Mariann Sullivan & David J. Wolfson, *What's Good for the Goose … The Israeli Supreme Court, Foie Gras and the Future of Farmed Animals in the United States,* 70 L. & Contemp. Probs. 139, 143-52 (2007).

92 An overview of the dispute is outlined in *Auckland Hebrew Congregational Trust Board v. Minister of Agriculture,* CIV-2010-485-1423 (H.C.)(Nov. 25, 2010) (available at http://www.nzlii.org/nz/cases /NZHC/2010/2185.html). The decision addresses an evidentiary matter related to the challenge.

93 *Id.* at para. 7.

94 David Carter, the Minister of Agriculture, reconsidered his decision to ban the kosher slaughter of chickens when he reached an agreement with the Jewish community about the ways in which such slaughter could take place. The challenge to the Code of Welfare was immediately dropped as a result: David Carter, *Inclusion of a further minimum standard in the Animal Welfare (Commercial Slaughter) Code of Welfare 2010* (December 10, 2010) (available at http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/commercial-slaughter/commercial-slaughter-code-of-welfare-amendment.pdf).

applicability to attempts to challenge the Minister for *failing* to enact a regulation sufficient to protect animals,[95] it does show that judicial review of a decision regarding Codes of Welfare may be possible.

These examples show how decisions made within a regulated framework can be exposed to judicial scrutiny in a much easier fashion than the decision to *abstain* from making decisions that is the primary problem with an offence based system. Obviously, challenges are useful in their own right, in that substantive change may be effected, but their secondary benefit should not be overlooked: they are yet another means of encouraging meaningful public dialogue around animal issues. In the long run, external challenges that bring in government bodies and the judiciary will help diversify the types of voices discussing the manner in which animal treatment is regulated. Continued questioning will help to expose inconsistencies, and hopefully prompt the public to think more deeply about the kinds of barriers that leave animals vulnerable to long-term suffering and abuse.

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95 The difficulty is that the kosher slaughter decision would have affected a group of persons directly, by notionally infringing upon their freedom of religion. Animal advocacy organizations arguing that a particular Code was underinclusive would face challenges premised on standing, in that they would have no direct interest in the proceeding, and could not benefit from it. That said, New Zealand law takes a fairly generous approach to public interest standing, and there is no reason to believe a challenge of this type could not be brought: *New Zealand Consumers Cooperative Society (Manawatu) Ltd v Palmerston North City Council* [1984] 1 NZLR 1 (CA)(citizens should be able to challenge laws without being precluded from doing so by technical rules).

Conclusion

> According to the discourse principle, just those norms deserve to be valid that could meet with the approval of those potentially affected, insofar as the latter participate in rational discourses. Hence, the desired political rights must guarantee participation in all deliberative and decisional processes relevant to legislation and must do so in a way that provides each person with equal chances to exercise the communicative freedom to take a position on criticizable validity claims. Equal opportunities for the political use of communicative freedoms require a legally structured deliberative praxis in which the discourse principle is applied.[96]

As recently as 1999, Canada and New Zealand shared animal cruelty laws that looked almost identical, and, not surprisingly, the discussion in both countries surrounding various animal uses was similar. In 2000, New Zealand moved to a regulatory structure that provided multiple opportunities for societal discourse, while Canada eschewed a chance to modernize its law, and retained a penal approach. Over the past few years, New Zealand has started moving ahead of Canada in setting better standards for animals, and there is every reason to believe that gap will widen substantially in the next decade. New Zealanders today have embraced discussion of the way animals should be treated as a serious subject, deserving of ongoing scrutiny. Common assumptions are now being questioned, inconsistencies in treatment are being noted,

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96 Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy, supra* n.15, at 127.

and – one hopes – attitudes towards animals are changing as a result. This discourse may play a significant role in transforming the country, turning New Zealand into a place where one can legitimately point to welfare standards that have made meaningful improvements in the lives of animals.

In contrast, Canada's increased use of the criminal sanction as a mechanism for resolving matters of public concern is troublesome, as the foregoing analysis raises questions about the use of the tool as a means of influencing behavior in society. While the jury remains out on the ability to control crime through punishment and criminal sanction, questions are now being raised about the effectiveness of the criminal law in helping to develop a much-needed public discourse on controversial topics.

To be clear, this article is not suggesting that use of the criminal law is always flawed. For conduct involving matters such as murder, rape, the production of child pornography, etc., there exists in society a strong social consensus on the "wrongness" of these actions. In other areas where social consensus is still emerging, a well-defined law with a clear enforcement policy can help to stimulate public conversation over time.[97] But the criminal law is hardly restricted to punishing these sorts

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97 A good example of this are Canada's increased attention to impaired driving, a matter that was of only moderate concern in the 1970s and 1980s. Through the creation of a clear law, repeated prosecutions and a strong "no tolerance" enforcement policy, public attention turned to this issue, and a new social ethic is in the process of being created. See Karla Koles, *Impaired Driving in the Criminal Code: A Brief History,* 61 Advocate 213 (2003); Rick Linden et al, *Research, Policy Development and Progress: Anti-Social Behaviour and the Automobile,* 36 Can. Pub. Policy J. 81 (2010).

of activities. Today, use of the criminal sanction has been extended to an incredibly wide swath of activity, and it touches upon many different forms of conduct whose legitimacy is more debatable.

In future, the country would be well-served to consider eschewing the criminal sanction in regard to controversial activities, and leaving judges and lawyers on the margins of creating a new social ethic. In order to build a strong and effective law, it is useful to have avenues for public discourse that the criminal law simply cannot provide. In the end, use of the criminal sanction may simply obscure important questions surrounding the value of particular acts, and deflect difficult resolutions to a prosecution service and judiciary that is ill-suited to handle them.