

THE ANIMAL RIGHTS DEBATE AND THE EXPANSION OF PUBLIC DISCOURSE: IS IT POSSIBLE FOR THE LAW PROTECTING ANIMALS TO SIMULTANEOUSLY FAIL AND SUCCEED?

By
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This Article uses the theory of deliberative democracy, as developed by Jürgen Habermas and others, to suggest that public discourse is essential to encouraging democratic change in animal welfare law. The author examines the legal regimes of Canada and New Zealand to determine which country better facilitates a public dialogue about the treatment of animals. The Article concludes that, while Canada has a number of laws that ostensibly protect animals, New Zealand's regime is much better at creating the public discourse required to meaningfully advance animal protection. The author does not suggest that New Zealand's regime is perfect; rather, New Zealand's model is preferable to Canada's because it allows the public to meaningfully engage in laws affecting animals at regular intervals. In Canada, generating discussion in government about animal welfare is too often left to the whim of legislators. Due to New Zealand's model of encouraging and requiring public discourse, its protection laws have begun to surpass those of Canada, and there is reason to believe this will continue. Encouraging public discourse about our assumptions about animals fosters hope for meaningful progress in their lives.

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I. INTRODUCTION

[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 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

Not long ago, I was fortunate to attend one of the growing number of conferences devoted to the topic of “animals and society,” where speakers from diverse backgrounds talked about issues concerning the treatment of animals.² Seminars on subjects ranging from “the animal’s current place in film” to “genetic modification of breeding sows” made for a very interesting weekend, but one particular moment from the conference remains fixed in my memory. It occurred during the presentation of a study designed to examine the extent to which workers on factory farms became emotionally attached to the animals, and whether these attachments differed from those that developed with animals kept in a “free-range” environment. At the end of the presentation, speakers responded to questions from the audience, many of which focused on the results of the study, its methodology, and the like. Eventually, however, a member of the audience posed a question—or, more accurately, a series of questions—that I had heard many times before. It went something like this: “Why should we care at all about this study? Doesn’t it simply entrench the governing ideology, and suggest that free-range is a desirable alternative when it really isn’t? How does doing that further abolitionist goals?”³ The question came with a dismissive tone and left the speakers backpedaling. For the next twenty minutes, discussion in the room abandoned the study and its findings and transformed into a passionate debate among audience members and speakers alike regarding the merits of *any* initiative that fails to propound the objective of abolishing animal usage altogether.

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

² Brock U., Conference, *Thinking About Animals* (Pond Inlet, Ontario, Can. Mar. 31–Apr. 2, 2011).

³ The quote is paraphrased, although it accords with my personal recollection; see Bruce Wagman & Matthew Liebman, *A Worldview of Animal Law* 1 (Carolina Academic Press 2011) (defining “abolitionist” as a person “who seeks to do away with all nonconsensual human uses of animals”).

What happened that day was no isolated incident. I have frequently witnessed exchanges of this sort at conferences and seminars dealing with animal issues and have personally had discussions of this sort with lawyers and students on a host of occasions. Intentionally or otherwise, the conversation about a specific aspect of the human–animal relationship transformed into an argument about one of the most divisive questions about animals possible: Is there good reason to enact laws protecting animals if those laws inherently recognize the continued exploitation of the subjects of the protection?

The framework of this debate is well known to just about anyone with even a basic familiarity of animal law.⁴ In a recent book entitled *The Animal Rights Debate*, Professors Gary Francione and Robert Garner address the question directly, describing its significance as follows:

One of us (Francione) argues in favor of the animal rights approach which . . . maintains that we have no moral justification for using nonhumans at all, irrespective of the purpose and however “humanely” we treat them, and that we ought to abolish our use of nonhumans . . . Further, welfare regulation makes people think that animal exploitation has been made more “humane” and causes them to become more comfortable with animal exploitation, which perpetuates and may even increase the use of animals. The animal rights position that will be defended here focuses on . . . [veganism] . . . as the foundation of a political movement that will support measures consistent with the ultimate goal of abolition.

The other author (Garner) argues in favor of the protectionist approach, which maintains that although the traditional animal welfare approach has failed, this does not mean that it cannot be . . . used more effectively in a practical sense . . . [W]e should better regulate our treatment of animals consistent with the recognition that . . . [animals] have a morally significant interest . . . Further, even if we think that abolition is the desired long-term goal, we should pursue welfare regulation as a means to that end as part of a diverse approach to the problem.⁵

As this excerpt makes clear, the debate is more about strategy than philosophy⁶ and asks those interested in advancing the cause of

⁴ Debates of this sort have been around for at least fifteen years. See Gary L. Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Temple U. Press 1996) (outlining the animal welfare movement and its positions on animal use); Steven M. Wise, *Thunder Without Rain: A Review/Commentary of Gary L. Francione’s, Rain Without Thunder: The Ideology of the Animal Rights Movement*, 3 *Animal L.* 45 (1997) (outlining the basic framework of the animal rights debate).

⁵ Gary L. Francione & Robert Garner, *The Animal Rights Debate* x–xi (Colum. U. Press 2010) (providing a concise overview of the animal rights debate).

⁶ Indeed, many proponents of animal welfare concede quite readily that the propositions they put forth have aspects of moral inconsistency, in that they recognize a type of exploitation that conflicts with the primary rationale for imposing welfare laws in the first place. They accept this compromise on the ground that it is the only practical way of proceeding. See e.g. David Favre, *Integrating Animal Interests into Our Legal System*, 10 *Animal L.* 87, 94 (2004) (positing generally that building up the legal system “will not be obtained by revolution, but by the evolution of the status of animals”); Alexander Gillespie, *Animals, Ethics and International Law*, in *Animal Law in Australasia* 333,

law reform on behalf of animals to consider the best way of achieving that goal. On the surface, the question seems highly relevant. Despite the existence of animal protection laws in virtually every jurisdiction and a constant parade of initiatives designed to reform them, humans continue to impose suffering and death upon nonhuman animals in an ever-increasing spiral.⁷ The suggestion that animals today are effectively protected from even extreme types of “unnecessary” suffering—let alone death—is difficult to support in *any* jurisdiction.⁸ Advocates working in this area are well aware of the loopholes and exceptions that plague the law and the political forces that condemn animals to continued exploitation.⁹ Questions about how we should proceed seem both pertinent and desirable.

Nonetheless, many advocates seem tired of this discussion and disinclined to address the animal rights debate at all. Indeed, they believe that spending time pondering the best way forward is wasteful and counter-productive. As Jonathan Lovvorn has written:

I do not doubt that it is far easier to spend one's time theorizing about a society without animal exploitation—or commiserating about the abhorrent state of the nation's animal laws—than doing the hard un-glamorous work of protecting animals. But as we pine away for a court-imposed silver bullet for animals, or a paradigm shift in a legal system that has classified animals as property for centuries, billions of animals are enduring suffering that we have the power, and the societal support, to prevent today.

...

The bottom line is that we need foot soldiers, not philosophers, and the handful of scholars who are already devoted to exploring what a future world with animal rights might look like are more than sufficient for that particular task. Far too many of the rest of us are trapped in their seduc-

333 (Peter Sankoff & Steven White eds., Fedn. Press 2009) (stating that necessity rather than philosophical purity should be the approach).

⁷ Katrina Sharman, *Farm Animals and Welfare Law: An Unhappy Union*, in *Animal Law in Australasia*, *supra* n. 6, at 35–40 (outlining an increase in the number of animals farmed and a growth in suffering resulting from industrial methods of farming); 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, 139–40 (2007) (outlining difficulties of reforming the modern industrial farming of animals).

⁸ See generally Lesli Bisgould, *Animals and the Law* 279–80 (Irwin L. 2011) (summarizing Canada's anti-cruelty law as being unable to protect interests animals have in living their own lives and in not being made to suffer for human purposes); Graeme McEwen, *Animal Law: Principles and Frontiers* ch. 1, <http://www.bawp.org.au/animal-law> (June 1, 2011) (accessed Apr. 7, 2012) (describing an animal welfare legal regime manipulated to advance producer self-interest; animal suffering and cruelty on enormous scale permitted); 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, 14–24 (2005) (outlining loopholes in New Zealand's legislative framework to protect animals).

⁹ See Wayne Pacelle, *Law and Public Policy: Future Directions for the Animal Protection Movement*, 11 Animal L. 1, 1–3 (2005) (describing exploitation of animals such as puppy mills and canned hunting ranches).

tive web of animal rights theory—unable, or perhaps unwilling, to roll up our sleeves and set to work helping animals the hard way.¹⁰

I certainly understand Lovvorn's position, as well as his apparent frustration. As the example I provided illustrates, the debate can be divisive and polarizing, and it often impedes action on measures that may provide some benefit to animals. Nonetheless, as someone who has at least occasionally "rolled up his sleeves" and set to work on animal issues,¹¹ I find it difficult to dismiss the question so easily.¹² As desirable as it might be to focus exclusively on improvements to animal treatment that are immediately obtainable, I share Francione's view that resources are limited¹³ and believe it is worth taking the time—at least occasionally—to think about the *types* of advances that will be the most beneficial strategically. I am often asked by those new to the movement about what actions they can take that would be the most useful and, aside from the obvious suggestion to change their own eating habits, I wish to be able to answer.

With this Article, I hope to contribute to the animal rights debate by considering whether its binary nature has overstated the extent to which one must accept one side or another to advance the interests of animals. As the title of this Article suggests, I believe that some laws designed to protect animals from unnecessary suffering—the legal framework that provides the governing paradigm for the regulation of the interests of animals in modern times—can simultaneously fail and succeed. Although abolitionists are correct to point out that most protection law fails to make a meaningful difference to the lives of animals today, they may be undervaluing the extent to which certain types of laws provide room for the public dialogue that makes more ambitious reform possible in the long-term. One key to advancing the interests of animals more quickly, as I see it, is to begin to understand what types of laws have this potential.

¹⁰ Jonathan Lovvorn, *Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform*, 12 *Animal L.* 133, 147–48 (2006); see also Bruce Wagman, *Voiceless Law Talk* (transcript available to students in Australia and New Zealand at <http://lawtalk.voiceless.org.au/forum/index.php/topic,111.0.html>) (copy of transcript on file with *Animal Law*) (supporting an incremental approach that improves the daily lives of farm animals).

¹¹ From 2001 to 2005, while teaching at the University of Auckland, I was Co-Director of the Animal Rights Legal Advocacy Network in New Zealand and, amongst other initiatives, worked directly on legislative reform involving battery hens, abused dogs, pigs, and research animals through the consultation process that I discuss in more detail later in this Article. In addition to helping directly with the training of prosecutors engaged in animal issues and providing free advice on prosecuted cases, I also participated directly in two legal challenges. Since returning to Canada, I have worked on one abortive prosecution involving a factory farm.

¹² I must of course acknowledge the fact that, as Steven Wise points out, I may simply be "[un]qualified to devise the tactics and strategies necessary to implement a broad social and legal reform program over a period of decades." Wise, *supra* n. 4, at 54.

¹³ See Francione & Garner, *supra* n. 5, at 222 (noting that "resources allocated to welfare reform are resources that are not directed to abolitionist or vegan education . . . [and] pursuing both approaches comes at a cost").

I proceed by first introducing certain theoretical constructs that promote the idea of facilitating social change through public dialogue, and the idea that discourse surrounding legal issues can have important long-term ramifications for such reform. I then build on this idea by considering what types of animal protection laws are capable of creating public dialogue about the way in which animals are treated. In part, I undertake this goal by comparing the laws of the two jurisdictions with which I am most familiar: Canada and New Zealand.¹⁴ This analysis will reveal that Canada's legal regime produces little in the way of sustained discourse around animal issues, while New Zealand's framework of laws, in contrast, creates a rich and persistent discussion. While I believe neither country does enough to protect the intrinsic interests of animals, I ultimately conclude that New Zealand is much better suited to evolve in a positive direction, as the country's existing system of animal protection law is encouraging the public to engage in meaningful discussion on questions relating to the "correct" treatment of animals over the long term.

II. REFOCUSING THE DEBATE

For many people, the most frustrating aspects of the animal rights debate are its indeterminate nature and the fact that the argument at its core is virtually impossible to resolve with any conviction. Both sides are able to point to the weaknesses of the other's platform, and to do so with merit. Francione is at his most convincing when he attacks the failures of "welfarists,"¹⁵ noting that they have achieved little in the way of effecting meaningful change for animals.¹⁶ He can justifiably point to the current conditions in which animals are kept and show how most welfare initiatives fail to account for animal needs.¹⁷ Moreover, Francione can make a good case for the proposition that "we are using more [animals] in horrific ways than at any time in human history."¹⁸

¹⁴ Though I am a Canadian citizen currently working and researching in Canada, I spent ten years as a Professor at the University of Auckland, New Zealand.

¹⁵ Rob Johnson, *Defining a Movement*, <http://www.theabolitionist.info/article/defining-a-movement> (accessed Apr. 7, 2012) (defining "welfarist" as a person who believes that "we should be able to use other animals for our own benefit so long as we treat them 'humanely'").

¹⁶ See Francione & Garner, *supra* n. 5, at 26–27 (arguing that "humane" torture is still torture).

¹⁷ See *id.* at 2, 5 (stating that animals are still being killed and eaten at an astounding rate and that the welfarist position continues to treat animals as though they are morally inferior).

¹⁸ *Id.* at 49. The claim is certainly defensible. Use of animals for food and related purposes is increasing. See World Health Org. (WHO), *Global and Regional Consumption Patterns and Trends*, http://www.who.int/nutrition/topics/3_foodconsumption/en/index4.html (accessed Apr. 7, 2012) (projecting that "annual meat production [will] increase from 218 million tonnes in 1997–1999 to 376 million tonnes by 2030," with similar rises in milk and egg production). Moreover, much of this new production is occurring on factory farms, where suffering is greatest. See Worldwatch Inst., *Global*

But those demanding slow, progressive change and interaction with governments and animal use industries also have a point to make, and it is one based primarily on pragmatism. As Garner notes in the *Animal Rights Debate*:

I honestly do not think we have much of a choice but to accept the need to campaign for more effective animal welfare. I would regard as unlikely the assumption that “many people” will give up eating animals if they are made aware of the horrendous suffering they endure.¹⁹

It is equally difficult to argue with Garner on this point, and my personal experience—as well as that of many animal advocates—squares with the reality Garner mentions.²⁰ As much as we may wish for attitudes surrounding animal use to change, there is little indication significant headway is being made towards abolition.²¹ Nor is there historical evidence to support the idea that moral arguments alone are likely to prompt this sort of paradigm shift in the public consciousness.²² Globally, consumption of animal products is increasing²³—as if the current numbers are not staggering enough—and the amounts of money these industries generate make it difficult to believe that drastic change is coming any time soon.²⁴ Although there has been a rise in vegetarian consumption in recent years,²⁵ in absolute terms, the movement is progressing at a glacial pace.

It is fair to say that at present neither the “abolitionist” nor the “welfarist” side can claim a decisive victory in this debate. Effectively, proponents of both viewpoints are most convincing in showing why the

Meat Production and Consumption Continue to Rise, <http://www.worldwatch.org/global-meat-production-and-consumption-continue-rise-1> (accessed Apr. 7, 2012) (noting an increase in meat production due to a rise in industrial agriculture).

¹⁹ Francione & Garner, *supra* n. 5, at 223–24.

²⁰ See Mike Jaynes, *Farm Animal Manifesto*, <http://www.all-creatures.org/articles/ar-farmanimal.html> (accessed Apr. 7, 2012) (arguing that frustration of animal rights activists occurs because people refuse to change their habits).

²¹ Clearly, however, there is *some* progress. Recent surveys surrounding vegetarian and vegan preferences in North America suggest these lifestyles are increasing in popularity. Vegetarian Times, *Vegetarianism in America*, http://www.vegetariantimes.com/features/archive_of_editorial/667 (accessed Apr. 7, 2012) (describing a 2008 study that shows 3.2% of Americans are vegetarian, while 0.5% are vegan). While I do not wish to demean this progress, it would be folly to suggest vegetarians—let alone vegans—are likely to constitute a majority of the population within the next decade (or even century, barring some drastic event).

²² See Jerry L. Anderson, *Protection for the Powerless: Political Economy History Lessons for the Animal Welfare Movement*, 4 *Stan. J. Animal L. & Policy* 1, 49–50 (2011) (stating that moral arguments alone are insufficient without an additional economic component).

²³ See WHO, *supra* n. 18 (projecting that “annual meat production [will] increase from 218 million tonnes in 1997–1999 to 376 million tonnes by 2030,” with similar rises in milk and egg production).

²⁴ See Siobhan O’Sullivan, *Animals, Equality and Democracy* 55 (Palgrave MacMillan 2011) (discussing the power of the agricultural lobby); see also Eric Schlosser, *Fast Food Nation* 267 (Houghton Mifflin Co. 2001) (stating that lobbyists make it difficult to change food-based regulations).

²⁵ Vegetarian Times, *supra* n. 21, at ¶ 7.

other's argument cannot lead to meaningful change for animals, and this stalemate may be responsible for the frustration many feel with the discussion. For those looking for the "best" way forward, interaction on the terms proposed above seems to lead mostly to paralysis and stagnation. Neither path seems to provide an unassailable answer regarding what we should do now.

Perhaps one way of proceeding is to change the nature of the conversation and focus on something upon which both sides agree: that it will take time to achieve significant change in the way animals are treated. Switching focus to a longer frame of reference offers some promise, for it opens the door to different ways of assessing the success of particular endeavors.²⁶ If everyone agrees that time is required to shift the public consciousness towards change, it may be productive to think about concrete ways in which animal welfare legislation can advance this long-term objective.²⁷

This sort of progress is beginning to occur. As the animal protection movement continues to evolve, greater attention is being paid to the way in which particular gains might be achieved, and to what role the law can play in creating the social conditions necessary for change

²⁶ Francione would undoubtedly reply by asserting, as he has on numerous occasions, that the animal welfare movement has already had between 100 and 200 years to establish its position and yet has failed to make any real headway. Gary Francione, *Introduction to Animal Rights: Your Child or the Dog* 181 (Temple U. Press 2000) (noting that although animal welfare laws have been popular for over 100 years, more animals are being treated cruelly than ever before); see Gary Francione, *Animals—Property or Persons?*, in *Animal Rights: Current Debates and New Directions* 113, 116 (Cass Sunstein & Martha Nussbaum eds., Oxford U. Press 2004) (stating that the fact that animal interests have become increasingly commodified despite 200 years of animal welfare law is proof of failure of such law); Francione & Garner, *supra* n. 5, at 221–22 (noting that despite 200 years of animal welfare, there has been no practical change to animal status). In my view, the 200-year figure is overstated. The early animal protection reforms of the 1800s were tepid and applied exclusively to malicious acts of cruelty against companion or working animals. Changes to a more "modern" system of animal law that recognizes the importance of safeguarding animal interests in the industrial contexts Francione correctly decries has, at best, a fifty-year history. See Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* 262 (Oxford U. Press 2001) (noting that animal welfare did not emerge as a factor influencing public policy in the United Kingdom until the latter part of the 1960s). In most jurisdictions, a case can be made that acceptance of the idea that the welfare of animals must be protected and enhanced is of even more recent vintage. Sankoff, *supra* n. 8, at 13 (noting that New Zealand law changed philosophy in 2000 to a modern animal welfare approach); see Stephen K. Otto, *State Animal Protection Laws—The Next Generation*, 11 *Animal L.* 131, 132–33 (2005) (describing a tremendous surge in animal protection laws in the U.S. since 1993); Amanda Whitfort, *Advancing Animal Welfare Laws in Hong Kong*, 2 *Austral. Animal Protec. L.J.* 65, 65–68 (2009) (documenting the need for change to a welfare-oriented approach in Hong Kong and the government's willingness to institute reform in 2007).

²⁷ In this, I mean something more than the abstract benefit that is often cited by welfare advocates: that every little gain for animals has the ability to promote long-term change through public exposure.

to take place.²⁸ In a recent article, Professor Jerry Anderson conducted this sort of analysis by comparing the animal welfare movement with the historical fight against child labor.²⁹ Anderson's conclusion was that "it is possible to achieve protection for powerless groups, even when such protection is detrimental to society's economic self-interest," even though this sort of change does not happen overnight.³⁰ In order to get there, one has to accept the long-term nature of the endeavor and realize that multiple elements must be developed to reach a solution. Thus, there is rarely a magic bullet that will advance social change quickly. As Anderson puts it:

The history of child labor reform indicates that protection for powerless groups occurs only when sufficient societal pressure arises to overcome entrenched economic interests. Change occurs through a complex mixture of ingredients, the most important of which is the development of a new ethical imperative.³¹

This complex mixture includes the efforts of moral entrepreneurs,³² who "disseminate stories that resonate in the societal conscience," the collaborative efforts of activists, and the continued development of symbolic and structural resources.³³ Without question, all of these are important and have a part to play in moving a new construct forward. But the law is integral to spurring change as well, and what I wonder about is the types of laws that are best suited to help prompt the social pressure Anderson describes. In other words, how can the law best advance the long-term cause of nonhuman animals, even where it fails on its own merits *today*?

III. LAW AND SOCIAL DISCOURSE

The answer to this question may lie, at least in part, in looking at the law's potential for utility in a slightly different way.³⁴ Instead of

²⁸ See generally Andrew Bartlett, *Animal Welfare in a Federal System: A Federal Politician's Perspective*, in *Animal Law in Australasia*, *supra* n. 6, at 376 (addressing the political and legal landscape); Elizabeth Ellis, *Collaborative Advocacy: Framing the Interests of Animals as a Social Justice Concern*, in *Animal Law in Australasia*, *supra*, n. 6, at 354 (addressing the political and legal landscape).

²⁹ Anderson, *supra* n. 22, at 1.

³⁰ *Id.* at 61.

³¹ *Id.* at 50.

³² See *id.* at 38 n. 151 (citing Howard S. Becker, *Moral Entrepreneurs: The Creation and Enforcement of Deviant Categories*, in *Deviance: A Symbolic Interactionist Approach* 169 (Nancy J. Herman ed., General Hall 1995)) (using the term "moral entrepreneurs").

³³ *Id.* at 61.

³⁴ Analysis of this sort is hardly revolutionary, but it is something that lawyers and legal academics often eschew. We prefer generally to focus on flaws in statutory construction or the results of decided cases, often at the expense of what the law might be achieving outside of the courtroom or legislature. See Anderson, *supra* n. 22, at 5 ("Remarkably, legal scholars traditionally pay little attention to the process of how law is made, or how reform may be achieved, preferring instead to examine the effectiveness of laws after they are enacted.").

considering how well the law operates—the focus of normative legal analysis—this approach recognizes that legal standards are part of a wider process rather than a comprehensive, self-contained system. Such a shift in thought requires accepting that law is not the stable, unchanging mass it sometimes appears to be, but rather “the subject of a dynamic process, a cycle, and [something that is] continually in the process of renewal, refreshment, renovation and revolution.”³⁵

The approach I suggest draws upon the ideas of German philosopher Jürgen Habermas, one of the world’s most influential philosophers and social theorists,³⁶ who has published over twenty-five books touching on, among other topics, political theory, communicative rationality, epistemology, and law.³⁷ Habermas’s work is highly complex, and a comprehensive explanation of his theories on law and democracy is impossible here, as his ideas on this topic span several books. As a result, my discussion of his work is, of necessity, going to be general.³⁸ Thus, 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.

Central themes in Habermas’s work include the importance of ensuring that individuals have a role in the governance of modern democratic society and a belief that “a stronger form of democracy is a genuine and achievable goal, even in complex and pluralist societies.”³⁹ According to Habermas, a key element in obtaining the “emancipation” of free individuals who might otherwise become victims of governance by institution is a vision of “deliberative democracy.”⁴⁰ Put

³⁵ Palma Joy Strand, *Law As Story: A Civic Concept of Law (with Constitutional Illustrations)*, 18 S. Cal. Interdisc. L. J. 603, 605 (2009); see Wagman & Liebman, *supra* n. 3, at 6 (suggesting that “[t]he relationship between law and society is bidirectional: as law defines society, so does it follow popular progression of thought . . .”).

³⁶ His influence is undeniable. See e.g. Michel Rosenfeld, *Book Review: Law As Discourse: Bridging the Gap Between Democracy and Rights*, 108 Harv. L. Rev. 1163, 1164 (1995) (referring 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”).

³⁷ E.g. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1998) [hereinafter Habermas, *Between Facts and Norms*]; Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (MIT Press 1989); Jürgen Habermas, *The Theory of Communicative Action* (Beacon Press 1984).

³⁸ Obviously, in an article of this nature, it is not possible to prove the truth or discuss the merits of Habermas’s theories. However, plenty of such critique exists elsewhere. See e.g. Hugh Baxter, *Habermas’s Discourse Theory of Law and Democracy*, 50 Buff. L. Rev. 205 (2002); Rosenfeld, *supra* n. 36; Symposium, *Exploring Habermas on Law and Democracy*, 76 Denv. U. L. Rev. 927 (1999).

³⁹ James Bohman, *Complexity, Pluralism, and the Constitutional State: On Habermas’s Faktizität und Geltung*, 28 L. & Socy. Rev. 897, 928 (1994).

⁴⁰ See Habermas, *Between Facts and Norms*, *supra* n. 37, at 451 (“A moral dimension first appears in the autonomy that enfranchised citizens as co-legislators must exercise in common so that everyone can equally enjoy individual liberties.”); see also Bo Carlsson, *Jürgen Habermas and the Sociology of Law*, in *An Introduction to Law and Social Theory* 77, 79 (Reza Banaker & Max Travers eds., Hart 2002) (stating that the

another way, “the political system . . . must not become an independent system, operating solely according to its own criteria of efficiency and unresponsive to citizen’s concerns.”⁴¹

Habermas applies the same approach to his ideal vision of the way in which law is enacted, concentrating on the procedures necessary to give law a form of moral authority.⁴² In his view, the law requires constant legitimacy gained through a complex set of discourses entrenched in the political arena.⁴³ According to Habermas, the process by which societies make laws is as important as any results achieved.⁴⁴ 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.⁴⁵

Thus, in today’s society, the real evil is law that operates by rote and is no longer subject to review or dialogue through the democratic process. Laws of this sort amount to a “colonization by system,” in which the individual becomes enslaved to a process beyond his or her control, without the possibility of contribution or reform.⁴⁶ Ideally, laws should be enacted 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 should be guaranteed an ability to participate through a discursive process of legislative decision making.⁴⁷ 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

cornerstone of Habermas’s social theory is a struggle for emancipation from structural constraints).

⁴¹ William Rehg, *Translator’s Introduction*, in Habermas, *Between Facts and Norms*, *supra* n. 37, at xxxi.

⁴² See Habermas, *Between Facts and Norms*, *supra* n. 37, at 104–09 (discussing the relation between law and morality).

⁴³ See Rehg, *supra* n. 41, at xix (stating that “Habermas proposed a more complex set of discourses that underlie legitimate lawmaking”).

⁴⁴ See Habermas, *Between Facts and Norms*, *supra* n. 37, at 296–97 (describing the importance behind the discourse theory of ideal procedure for deliberation and decision making).

⁴⁵ Carlsson, *supra* n. 40, at 83–84.

⁴⁶ *Id.* at 48.

⁴⁷ See Habermas, *Between Facts and Norms*, *supra* n. 37, at 437 (noting that “the discourse theory of law conceives of 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”).

that provides each person with equal chances to exercise the communicative freedom to take a position on criticizable validity claims.⁴⁸

Vibrant communication surrounding the process of legislating is thus critical to an effective rule of law. Formally institutionalized deliberation and decision making must be open to input from informal public spheres. Consequently, Habermas's model places considerable normative responsibility for the democratic process on those public fora, informal associations, and social movements in which citizens can effectively voice 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.⁴⁹

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.⁵⁰ There are two main reasons for this suggestion. First, allowing the public to participate in an ongoing process of law making is conducive to the way in which social norms tend to evolve⁵¹ and ensures that the results have a higher degree of legitimacy.⁵² 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 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.⁵³

⁴⁸ *Id.* at 127.

⁴⁹ Rehg, *supra* n. 41, at xxxi–xxxii.

⁵⁰ See e.g. Rehg, *supra* n. 41, at ix–xii (discussing Habermas's deliberative democracy approach regarding the tension between "social reality" and a "claim of reason" in modern law); Alice Woolley, *Legitimizing Public Policy*, 58 U. Toronto L. J. 153, 167–68 (2008) (discussing Habermas's deliberative democracy approach, noting that when such an approach is executed, the accepted laws are legitimate, and arguing that "[s]ound and well informed public policy will arise only where policy decisions follow from a process of public deliberation").

⁵¹ 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 M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm*, 33 Harv. Envtl. L. Rev. 117, 155 (2009).

⁵² Woolley, *supra* n. 50, at 167.

⁵³ Strand, *supra* n. 35, at 613; see John Morison, *How to Change Things with Rules*, in *Law Society and Change* 5, 6 (Stephen Livingstone & John Morison eds., Dartmouth Publ. 1990) ("[L]aw 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

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.⁵⁴

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 those laws arise from a democratic process of public reasoning—that is, from deliberation.”⁵⁵ 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 Deliberation may be a source of democratic legitimacy. . . . But it is also, and perhaps primarily, the proper democratic process because it will, if designed to encourage critical thinking, reduce social pressure and enhance information sharing, and thus lead to better decisions.⁵⁶

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, whereas 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 animal welfare law 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 benefits than laws that create fragmented discourse or obscure it altogether. To illustrate what I mean, I propose to examine the animal welfare models of two legal regimes: Canada and New Zealand.

system or, more rarely, from within it, which moves through the legal system to make an impact outside it.”).

⁵⁴ Strand, *supra* n. 35, at 627.

⁵⁵ Jürgen Habermas, *Popular Sovereignty As Procedure*, in *Deliberative Democracy: Essays on Reason and Politics* 35, 48 (James Bohman & William Rehg eds., MIT Press 1997) (“[I]n the affairs of society, a unity of aims is a necessity. The majoritarian production of a unified will is compatible with the ‘principle of the equal validity of the personal will of each’”); Woolley, *supra* n. 50, at 166–67 (summarizing Jürgen Habermas’s ideas).

⁵⁶ Woolley, *supra* n. 50, at 167, 169.

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

Although Canada has a long-held reputation for being progressive on social issues, especially when compared to its neighbor to the south,⁵⁷ the country is no haven for animals. In fact, judging from the criticism the country receives for both its approach to animal welfare generally⁵⁸ and to specific issues of concern,⁵⁹ one could argue that Canada's animal protection legislation is among the worst in the Western world. In Canada, the protection of animals falls largely to the federal government.⁶⁰ Indeed, where farm animals are concerned, it is—with minor exceptions—only federal legislation that matters.⁶¹ For the

⁵⁷ See Michael Adams, *Fire and Ice: The United States, Canada and the Myth of Converging Value* 10 (Penguin 2003) (arguing that Canada is more socially liberal than the U.S.); John Myles, *How to Design a "Liberal" Welfare State: A Comparison of Canada and the United States*, 32 J. Soc. Policy & Administration 341, 346 (1998) (showing a moderately lesser degree of income inequality in Canada than the U.S.).

⁵⁸ See Bisgould, *supra* n. 8, at 67–87 (criticizing Canada's cruelty provisions); Elaine L. Hughes & Christiane Meyer, *Animal Welfare Law in Canada and Europe*, 6 Animal L. 23, 73 (2000) (noting a strong need to reform Canada's laws); John Sorenson, *About Canada: Animal Rights* 40–58 (Fernwood Publ. 2010) (detailing Canada's animal welfare laws and concluding that in the agricultural context the law disregards the animal's interest almost entirely).

⁵⁹ Perhaps the best known of these issues is the seal hunt. Canada has the world's largest commercial sealing industry and is consistently under scrutiny for, among 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 Sorenson, *supra* n. 58, at 85–88 (explaining how Canadian seal hunting is actually detrimental to the economy of Canada because of international opposition); Wagman & Liebman, *supra* n. 3, at 96–97 (describing the manner in which seals are slaughtered, the banning of seal products, and the threat of Canadian litigation through the WTO).

⁶⁰ Canada's federal system allocates responsibility for lawmaking between the federal and provincial or territorial governments. Most of Canada's provinces and territories have enacted their own pieces of animal welfare legislation which, on balance, are more animal-friendly than the federal legislation. See *e.g.* Wagman & Liebman, *supra* n. 3, at 158–59 (noting that Ontario reforms provide "stiffer penalties," expanded coverage, and better sentencing options for judges). That said, as discussed below, these laws are directed almost exclusively towards companion animals.

⁶¹ Most provincial legislation avoids regulating agriculture through one of two mechanisms. Some provinces expressly restrict the application of the legislation to companion animals. See *e.g.* *Companion Protection Act*, R.S.P.E.I. 1988, c. C-14.1, ss. 1(2)–(4). The more common approach is to exclude scrutiny of agricultural practices altogether. See *e.g.* *The Animal Care Act*, C.C.S.M. 2010, c. A84, ss. 2–3 (containing such a generalized exclusion), or in any situation where the practice is "reasonable and generally accepted." See *e.g.* *Animal Protection Act*, R.S.A. 2000 c. A-41, s. 2(2) (containing this narrow exclusion); *Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, s. 11.1(2) (containing this narrow exclusion); see also David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 Animal L. 123, 135–39 (1996) (arguing that the effect of such an exemption is to allow treatment that would otherwise be illegal, thus allowing cruelty to proliferate on the farm).

purposes of this Article, given the extent to which it dominates the field in this area, I 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*,⁶² the country's primary source of penal legislation. After a number of unsuccessful attempts at reform,⁶³ it remains true that this "legislation has not been thoroughly reviewed since the advent of modern animal rights philosophies,"⁶⁴ and, to put it charitably, the clauses are "horribly antiquated."⁶⁵ 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.⁶⁶

445.1(a) – Every one commits an offence who willfully causes or, being the owner, willfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird[.]

...

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.⁶⁷

Although the *Code* is the most significant source of animal protection law in Canada and the only statute that applies to all animals, the federal government has also assumed responsibility over a few aspects of the handling, transport, and slaughter of animals in two pieces of legislation governing food safety. For example, regulations enacted under the authority of the *Health of Animals Act*⁶⁸ make it an offense to transport injured animals or transport or load animals in a manner likely to cause undue suffering.⁶⁹ Other regulations passed pursuant

⁶² R.S.C. 1985, c. C-46, ss. 444–47.

⁶³ See Bisgould, *supra* n. 8, at 87–96 (detailing Canada's unsuccessful attempts at reform in the late 1990s).

⁶⁴ Hughes & Meyer, *supra* n. 58, at 40–41.

⁶⁵ Morris Manning & Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law* 1069 (4th ed., LexisNexis 2009).

⁶⁶ These offenses 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 offenses such as baiting animals with poison, conducting or attending a cockfight, or being involved in competitions involving the shooting of captive birds. R.S.C. 1985, c. C-14, ss. 445.1, 446.

⁶⁷ R.S.C. 1985, c. C-46, ss. 445.1(1)(a), 446(1)(b).

⁶⁸ S.C. 1990, c. 21, ss. 5–50. One should not be fooled by the statute's title into thinking that this law augments animal welfare. A careful study of the legislation, even by looking at its long title—*An Act respecting diseases and toxic substances that may affect animals or that may be transmitted by animals to persons, and respecting the protection of animals*—reveals its primary purpose: preventing disease in animals that might be passed to humans through the food chain. Bisgould, *supra* n. 8, at 174–75.

⁶⁹ *Health of Animals Regulations*, C.R.C., c. 296, ss. 139–144, 152–59. The regulations also provide specific rules for certain types of transport, such as for sea carriers carrying livestock. See Bisgould, *supra* n. 8, at 174–79 (noting regulations about conduct such as overcrowding or beating an animal that is being loaded or unloaded).

to the *Meat Inspection Act*⁷⁰ control aspects of the slaughter process⁷¹ and prohibit certain practices, such as the use of electric prods to the genital or facial region of an animal.⁷²

These provisions create an additional layer of regulation over certain aspects of the industrial use of animals, but they are limited in application. To begin with, they apply exclusively to particular practices and do not extend to cover the entirety of an animal's care.⁷³ Moreover, the standards are vague, and judicial interpretations of the terminology are extremely rare. As Bisgould has concluded, "[v]ery few cases [under these pieces of legislation] concern animal welfare issues, and of those that do, fines are low, amounting to the cost of doing business."⁷⁴

The shortcomings of Canada's 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."⁷⁵ Bisgould cites three major problems with the federal legislation,⁷⁶ concluding that "crimes against animal property are minimized throughout the justice system, resulting in the withdrawal of charges, high acquittal rates, or weak sentences."⁷⁷

Nonetheless, from the perspective of providing avenues for public discourse, the problems mentioned above are hardly the law's most egregious defects. After looking closely at the governing legislation, it comes as no surprise that sustained debate about animal welfare standards rarely seems to resonate across the Canadian landscape. Although 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 an attempt at federal reform collapsed prior to 2000, I have not seen any serious discussion in the media about the need for wide-scale change regarding animal treatment. Instead, questions are entirely issue-specific and driven by whatever event grabs the media's interest. For example, one day it is the need-

⁷⁰ *Meat Inspection Act*, R.S.C. 1985, c. 25.

⁷¹ See *id.* at 62(1) (providing that no animal shall be handled in a manner that subjects the animal to avoidable distress or pain).

⁷² *Meat Inspection Regulations*, S.O.R. 1990, c. 90-288, s. 62(2).

⁷³ See *id.* (prohibiting specific practices such as use of electric prods on the face).

⁷⁴ Bisgould, *supra* n. 8, at 180.

⁷⁵ Hughes & Meyer, *supra* n. 58, at 63; see also Manning & Sankoff, *supra* n. 65, at 1068-78 (arguing that Canada's provisions do not function well and that wording of the *Code* has proven highly problematic in practice).

⁷⁶ Bisgould, *supra* n. 8, at 71-87 (These problems 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.).

⁷⁷ *Id.* at 87.

less killing of sled dogs in British Columbia.⁷⁸ Months later, it is the misdeeds of a companion animal shelter in Montreal.⁷⁹ No issue seems capable of generating enough traction to provoke a sustained discussion of legal standards.⁸⁰ Moreover, questions involving agricultural animals—the vast majority of captive animals to endure pain and suffering⁸¹—are virtually never raised. In my view, this lack of discourse stems, at least in part, from the current state of Canadian animal protection law.

The problem originates as much from the law's framework as from any of the specific flaws listed above. Canadian anti-cruelty law operates on the basis of a simple binary equation that has not changed for over 100 years. On the surface, anti-cruelty law separates matters into strict categories of "right" and "wrong," with few gray areas. Animal suffering is either "necessary" or "unnecessary," but the law provides very few clues regarding what constitutes cruelty in the abstract. In sum, anti-cruelty legislation amounts to an inflexible prohibition whereby necessary suffering is legal, whilst unnecessary suffering is illegal. In terms of legal discourse, the *Code's* long-standing approach suggests that the matter of animal protection has been resolved.⁸²

Behind the scenes, of course, what constitutes cruelty against animals is anything but resolved. In operation, the law is not black and white, but rather almost entirely gray—albeit a shade of gray that is

⁷⁸ Petti Fong, *100 Sled Dogs Killed in B.C. 'Massacre,'* Toronto Star (Feb. 1, 2011) (available at <http://www.thestar.com/news/canada/article/930749—100-sled-dogs-killed-in-b-c-massacre> (accessed Apr. 7, 2012)). This event generated headlines internationally because of the brutality involved with the animals' treatment. No prosecution for cruelty to animals has occurred in relation to this event, despite widespread calls for action. *Id.*; *Sled Dogs Killed in Whistler—52, Not 100, Killed,* Vancouver Sun Staff Blogs (Aug. 16, 2011) (available at <http://blogs.vancouversun.com/2011/08/16/sled-dogs-killed-in-whistler-52-not-100-killed/> (accessed Apr. 7, 2012)).

⁷⁹ 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. *Montreal Animal Shelter Practices Raise Alarm,* CBC News (Apr. 20, 2011) (available at <http://www.cbc.ca/news/canada/montreal/story/2011/04/20/montreal-animal-pound-euthanasia.html> (accessed Apr. 7, 2012)).

⁸⁰ The killing of sled dogs did promote discussion of animal welfare standards in the province where the killing took place. British Columbia has modernized that legislation 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> (accessed Apr. 7, 2012)).

⁸¹ David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House, Animals, Agribusiness and the Law: A Modern American Fable,* in *Animal Rights: Current Debates and New Directions* 205, 206 (Cass R. Sunstein & Martha C. Nussbaum, eds., Oxford U. Press 2004) ("From a statistician's point of view . . . farmed animals represent 98% of all animals (even including companion animals and animals in zoos and circuses) with whom humans interact.").

⁸² See Timothy Caulfield, *Politics, Prohibitions and the Lost Public Perspective: A Comment on Bill C-56: The Assisted Human Reproduction Act,* 40 Alberta L. Rev. 451, 460–61 (2002) (arguing that a simple ban stifles discourse by offering a complete answer).

rarely discussed in public. The law imposes a standard that notionally governs the treatment of all animals, but does so through an approach so vague that it fails to provide any guidance for meaningful public debate. For example, are battery hen cages cruel under Canada's laws? What about using horses to drag *caleches* around the cobblestone streets of old Montreal, a practice currently being scrutinized?⁸³

The difficulty is that answering these questions first requires unpacking several assumptions upon which the term "necessary" is measured, and establishing some common parameters. Do economic concerns trump the interests of animals? Which animals should be protected? Do animals truly suffer? Without any statutory guidance, resolving these issues is both difficult and time-consuming, and by the time these questions have been fully aired, the public has usually lost interest in the original issue. In terms of guiding any surrounding social discourse, the law is simultaneously too certain—"cruelty is wrong"—and too uncertain to be helpful.

Canada's statutes are not the whole problem, of course. As any lawyer knows, vague statutory phrasing can become vital and discursive through judicial decision making.⁸⁴ Nonetheless, there is little reason to believe that the judicial decisions emanating from Canada's anti-cruelty standards are adding substantially to the discourse. To begin with, for dialogue to emanate from court decisions, it is 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 legislation⁸⁵—comes into play. 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.⁸⁶

⁸³ Animal welfare groups in Montreal recently raised this issue, claiming that the practice puts horses at extreme risk of collision with cars and harms them physically. Horses Without Carriages Intl., *Montreal: Anti-Caleche Defense Coalition*, <http://www.horseswithoutcarriages.org/montreal.shtml> (2011) (accessed Apr. 7, 2012).

⁸⁴ In contrast, consider 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 the criminal law should address sexual violence. 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 Janine Benedet & Isabel Grant, *Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief*, 52 McGill L.J. 243, 259–60 (2007) (explaining the review and revision the Canadian Criminal Code has gone through in relation to sexual assault and the effects these revisions had on victims with disabilities); Joanne Wright, *Consent and Sexual Violence in Canadian Public Discourse: Reflections on Ewanchuk*, 16 Can. J. of L. & Soc. 173, 201 (2001) (discussing Canada's revolutionary reforms of sexual assault law and the dialogue responding to these reforms).

⁸⁵ Bisgould, *supra* n. 8, at 86–87; Hughes & Meyer, *supra* n. 58, at 70–72.

⁸⁶ 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, Ca-

Second, where prosecutions do occur, they do not involve 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 lack of discussion. 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 suited to delve into. As Strand has suggested: “traditional judicial decision-making does not do a good job of accommodating [the idea of complex causation] [Other bodies] are in a [better] position to consider a complex and specific historical, factual and political landscape.”⁸⁷

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 take only cases with a reasonable prospect of conviction,⁸⁸ prosecutors commit the meager ration of time allotted for animal cases to fact scenarios they can win: cruelty involving the most egregious type of violence against animals imaginable. These include cases like *R. v. Connors*, in which a man pleaded guilty to beating a puppy to death,⁸⁹ and *R. v. Munroe*, in which the defendant tortured two dogs over a prolonged period with heat, electricity, and blunt force.⁹⁰

Without question, the offenders in those cases needed to be punished, but it is difficult to see how such prosecutions do much for animals in the long-term. Even in the unlikely event that media coverage brings cruelty prosecutions to the wider public, the resulting dialogue is likely to be of the same discussion of right and wrong that the legislation itself promotes. Thus, a member of the public reading about these cases is likely to sit back and tut-tut about how some “nuts” are sadistic towards animals while feeling good that some vague progress against animal cruelty is being made. But coverage of these cases may actually inhibit the process of systemic, long-term reform. Those who judge Canada’s animal protection law on the basis of the cases that

nada’s lowest trial jurisdiction. Obviously, there must be unreported decisions as well, but it is difficult to contend that the courts were stimulating intense discourse on animal protection standards in 2011.

⁸⁷ Strand, *supra* n. 35, at 646.

⁸⁸ See generally Ontario, *Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* 52–55 (Queen’s Printer 1993); see also Steven Penney et al., *Criminal Procedure in Canada* 449–53 (Lexis Nexis 2011) (discussing Canadian prosecutorial discretion).

⁸⁹ *R. v. Connors*, [2011] BCPC 24 at par. 2 (CanLII).

⁹⁰ *R. v. Munroe*, 2010 ONCJ 226 at par. 21 (CanLII). 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 & Sankoff, *supra* n. 65, I located only three cases of note decided by appellate courts. The most recent, and probably the most important, decision on animal cruelty ever decided in Canada was released in 1978. *R. v. Menard* [1978] 43 CCC (2d) 458 (Que. C.A.).

actually make it to court 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 endure.⁹¹

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, because public discussion is almost unanimously condemnatory of the offender. If the defendant obtains an acquittal, there is the possibility of some discourse, but even in this instance, discussion is likely to focus upon flaws in the legislation and become subsumed in wider questioning of the way by which offenders can escape punishment by exploiting technicalities in the criminal law. In either case, anti-cruelty prosecutions of this sort seem ineffective at 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 is likely to 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.⁹² 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.

B. A Model for Greater Discourse: The New Zealand Legislation

The weaknesses of the Canadian model become more apparent when compared with a framework that actually promotes discourse around animal issues. In this regard, notwithstanding its many functional shortcomings, New Zealand animal welfare legislation feels like a breath of fresh air. The suggestion here is not that the New Zealand legislation currently results in outcomes that are better for animals than in Canada—although that seems to be the case, at least in some situations.⁹³ Rather, as indicated earlier, my focus is on whether the

⁹¹ See generally Babcock, *supra* n. 51, at 126 (proposing that laws can facilitate certain types of myth that impede the development of more sophisticated norms for regulating a problem).

⁹² 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> (accessed Apr. 7, 2012)) (discussing British Columbia's law reforms in the wake of sled dog killings).

⁹³ *Infra* pt. III(B)(3) (New Zealand has made progress on two of the more controversial processes in industrial farming where Canada remains stalled: imposing bans on the use of sow stalls and traditional battery hen cages.).

law encourages the public to become engaged on questions of animal treatment and provides opportunities for these questions to become part of a national discussion on animal care.

In contrast to Canada's fragmented legislation, New Zealand has centralized all of its provisions on animal treatment within one statute: the *Animal Welfare Act* of 1999 (AWA). Parts of the legislation are extremely detailed, and the AWA enumerates more than forty distinct offenses. In addition to the basic cruelty offenses that mirror the Canadian legislation, New Zealand has followed the modern approach to welfare pioneered in the European Union.⁹⁴ Thus, New Zealand has significantly expanded the range of obligations owed by owners to their animals, requiring them at all times to provide proper food and water, proper handling, adequate shelter, protection from and treatment of injury and disease, and an opportunity to display normal patterns of behavior.⁹⁵ Moreover, the AWA specifically bans a range of distasteful practices.⁹⁶

Even at first glance, New Zealand's law has benefits in comparison to the Canadian system. Among other rules, the AWA provides for duties of care that apply to every animal in a person's charge⁹⁷ and removes the need to prove "ill-intent" where a person harms an animal unnecessarily.⁹⁸ Codes of Welfare relating to particular types of animal treatment are designed to provide specificity about desirable practices and drafted to ensure that animals receive what they need in accordance with "good practice and scientific knowledge."⁹⁹

The codes of welfare play a critical function within the AWA framework. Compliance with a relevant code amounts to a complete defense against any charge of failing to fulfill a duty of care or causing ill treatment to an animal.¹⁰⁰ Thus, in practical terms, the codes are more important than the substantive provisions of the AWA. As long as a person complies with the dictates of a particular code, it makes no difference whether that person has technically committed an offense under the AWA, because the code effectively overrides every section of the legislation.

⁹⁴ See Radford, *supra* n. 26, at 261–66 (discussing background of the welfare approach developed in Europe).

⁹⁵ *Animal Welfare Act* 1999, § 4.

⁹⁶ One good example relates to surgical procedures that farmers often performed themselves. Under the AWA, most procedures now require the assistance of a qualified veterinarian. See *id.* at §§ 15–19.

⁹⁷ See *id.* at §§ 4, 10 (imposing obligations to provide animals with food, water, shelter, opportunity to display normal patterns of behavior, physical handling that minimizes suffering, and protection from and rapid diagnosis of disease).

⁹⁸ See *id.* at §§ 29, 30 (rendering the ill treatment of animals—causing unnecessary suffering—a strict liability offense); see also *id.* at §§ 28, 28A (defining aggravated versions of this offense for reckless and willful ill treatment causing serious harm or death, which merit increased penalties).

⁹⁹ See *id.* at § 10 (imposing obligation to ensure animal needs are met in a way that complies with good practice and scientific knowledge).

¹⁰⁰ *Animal Welfare Act* 1999, at §§ 13(2)(c), 30(2)(c).

Although the New Zealand law is unquestionably more detailed and sophisticated than its Canadian counterpart,¹⁰¹ there is little evidence to suggest that the situation on the ground for animals—and especially for farmed animals—is markedly better. The enactment process surrounding the codes of welfare is part of the reason for this lack of progress. In particular, there are several hidden loopholes in the legislation that permit industrial users to maintain traditional standards of husbandry, with the most significant being created directly by the purpose section of the AWA. As I noted in an earlier article:

In a clever twist of legislative drafting, the Act does not demand that the . . . codes . . . adhere to the [obligations owed by owners to their animals]. Instead, the standards enunciated in these codes must be the “minimum necessary to ensure that the purposes of this Act will be met.” The key purpose of the *Animal Welfare Act 1999* is “to reform the law relating to the welfare of animals and the prevention of their ill-treatment.” In other words, it is to prevent the infliction of ‘unreasonable’ or ‘unnecessary’ suffering.¹⁰²

Given this structural formulation, it is understandable that the code-enactment process is regarded by the government as a way to balance human and animal needs.¹⁰³

This is not my only criticism of the codes process. I have argued in the past that the government is exceptionally conservative with its approach to codes¹⁰⁴ and that the process is replete with features that make significant reform difficult to obtain.¹⁰⁵ Looking at these flaws, I

¹⁰¹ The sophisticated nature of the New Zealand framework, while not a conclusive point, is a strong indicator of the system’s confluence with Habermas’s suggestion that law aims to produce a “communicatively achieved understanding” rather than a “normatively ascribed agreement,” because a system “becomes more rational as its complexity increases, that is, as its range of adaptation to environmental changes is enhanced.” Stephen K. White, *The Recent Work of Habermas: Reason, Justice and Modernity* 104 (Cambridge U. Press 1998).

¹⁰² That article first explained that the definition of “ill-treatment” in New Zealand is suffering imposed on an animal that is unreasonable or unnecessary, with those terms defined—as in all cruelty statutes—by measuring the animal’s need to be protected from harm against the human’s need to impose it. Peter Sankoff, *The Welfare Paradigm: Making the World a Better Place for Animals?*, in *Animal Law in Australasia*, *supra* n. 6, at 31 [hereinafter Sankoff, *The Welfare Paradigm*].

¹⁰³ *Id.*

¹⁰⁴ As I noted in 2005, “the [code process] is simply a method of refining accepted means of animal production to ensure that [the government] balance economic needs with some forms of restraint The [code process] does not attempt to identify and eliminate ranges of practice that are objectionable or even unnecessary. At its best, it is an attempt to refine and excise certain of the *worst* parts of existing practices.” Sankoff, *supra* n. 8, at 24.

¹⁰⁵ Among the most serious obstacles is the fact that most codes are drafted by industry and enacted by individuals with ties to agricultural concerns. In addition, the body responsible for developing codes has created its own set of guidelines that seem likely to entrench the status quo and inhibit aggressive reform. Arnja Dale, *Animal Welfare Codes and Regulations—The Devil in Disguise?*, in *Animal Law in Australasia*, *supra* n. 6, at 183–96.

can understand why I concluded in 2009 that the codes were more of a “minor upgrade than a revolutionary step forward” for animals.¹⁰⁶

In retrospect, I believe I may have been too harsh on the code process, probably because my focus was on the law’s effectiveness in improving standards for animals, a point on which the jury remains out. Nonetheless, I have started to see some previously unrecognized value in the New Zealand framework. Although that framework is currently failing as a means of providing suitable short-term outcomes for animals, the process of enacting codes is an invaluable mechanism for promoting societal discourse on issues relating to the proper treatment of animals, which are normally glossed over or ignored. A careful examination of the New Zealand legislation reveals at least four features that are useful in stimulating positive long-term dialogue on animal issues. I examine these features as a means of showing how societal discourse can be effectively augmented—perhaps even unintentionally—through certain types of legislative action.

1. *Consistent and Predictable Review*

Occasionally, people ask me to identify the “best” feature of the AWA, the one I believe should be a part of any well-designed animal welfare law. While my answer has varied over the years, my current response is steadfast. The most important clause in the AWA is buried deep in the middle of the statute and provides no protection that an animal advocate would immediately identify as being significant. Still, I have great admiration for section 78 of the AWA, which provides that “the National Animal Welfare Advisory Committee [NAWAC or the Committee]¹⁰⁷ . . . must at intervals of not more than [ten] years, review every code of welfare for the time being in force.”

In terms of discourse, it would be difficult to draft a more useful legislative provision. The requirement creates at least four 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. The legislature may extend the time period, but not indefinitely, and only where justified.¹⁰⁸ It means that so long

¹⁰⁶ Sankoff, *The Welfare Paradigm*, *supra* n. 6, at 32.

¹⁰⁷ *Animal Welfare Act* 1999, at § 78. 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. Dale, *supra* n. 6, at 178–79.

¹⁰⁸ Section 78(4) of the AWA, in conjunction with section 79A, permits the 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 of this point, see Sankoff, *supra* n. 8, at 17–18.

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 could be unhappy about the fact that such discussion is going on. I would direct such a person towards 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 is “nothing to see here,” is a major endeavor.

The ongoing discussion leads to a second benefit. Ten years may seem like a long time between reviews, but not in the context of the number of animal practices being regulated by codes of welfare. There are currently fourteen codes of welfare in place,¹⁰⁹ with plans for the enactment of at least six more over the next five to ten years.¹¹⁰ Effectively, this means that the NAWAC will be revising two codes a year, every year, indefinitely. 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 to 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 favor of a mandatory reform process. Consider the example of keeping layer hens in battery cages, a farming technique New Zealand animal activists have been fighting for decades.¹¹¹ In 2004, the NAWAC released its recommended code of welfare on battery cages, somehow reaching the conclusion that battery hen cages complied with the requirements of the AWA.¹¹² The Committee used some rather tortured logic to get there:

¹⁰⁹ Ministry of Agric. & Forestry, *Codes of Welfare (Alphabetically)*, <http://www.biosecurity.govt.nz/regs/animal-welfare/codes/alphabetically> (updated Sept. 15, 2011) (accessed Apr. 7, 2012).

¹¹⁰ 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. *Id.*

¹¹¹ Save Animals From Exploitation (SAFE) has been demanding an end to battery cages since 1987. SAFE, *Battery Hens*, <http://www.safe.org.nz/Campaigns/Battery-hens/> (accessed Apr. 7, 2012). SAFE is one of New Zealand’s largest and most effective animal advocacy groups. SAFE, *About Safe*, <http://safe.org.nz/About-Safe/> (accessed Apr. 7, 2012) (“With a history spanning more than seven decades of campaigning on behalf of animals, SAFE continues to be at the forefront of exposing animal abuse within New Zealand and around the globe . . . [and] has over 10,000 members and supporters.”).

¹¹² The code was enacted, as recommended, by the Minister of Agriculture in 2005. Ministry of Agric. & 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> (accessed Apr. 7, 2012)) [hereinafter Ministry of Agric. & Forestry, *Layer Hens*]; NAWAC, *Animal Welfare (Layer Hens) Code of Welfare 2004 Report* 10 (Apr. 21, 2004) (available at <http://www.biosecurity.govt.nz/files/regs/>

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.¹¹³

The reasoning was justly ridiculed because it suggested that economic concerns are decisive of animal welfare questions.¹¹⁴ 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,¹¹⁵ and it was not long, in relative terms, before battery cages were back up for review.

Today, as I describe in more detail below, the welfare of layer hens is once again being discussed. With the NAWAC's 2004 reasoning now publicly discredited, it seems inevitable that at least the use of traditional battery hen cages will be abolished.¹¹⁶ 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 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.

The consistency of the code process leads to an unintended third benefit: it allows for a focused dialogue. One of the greatest challenges

animal-welfare/req/codes/layer-hens/lhc-report.pdf (accessed Apr. 7, 2012)) [hereinafter NAWAC, *Layer Hens*].

¹¹³ Ministry of Agric. & Forestry, *Layer Hens*, *supra* n. 116, at 19; NAWAC, *Layer Hens*, *supra* n. 116, at 10.

¹¹⁴ See e.g. Dale, *supra* n. 6, at 189 (arguing that the NAWAC was taking an overly conservative approach in implementing beneficial welfare standards where economic productivity would be impeded); Michael Morris, *The Ethics and Politics of the Caged Layer Hen Debate in New Zealand*, 19 *J. of Env. Ethics* 495, 504 (2006) (arguing that threats by egg producers may have caused the NAWAC to ignore the law) (available at: <http://www.springerlink.com/content/b06881p12556214h/> (accessed Apr. 7, 2012)).

¹¹⁵ This dialogue was furthered by various challenges to NAWAC's practice. See *infra* pt. III(B)(2).

¹¹⁶ The draft *Animal Welfare (Layer Hens) Code of Welfare*, 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. Press Release, NAWAC, *Feedback Sought on Draft Code of Welfare for Layer Hens*, <http://www.biosecurity.govt.nz/media/08-02-2011/draft-code-of-welfare-for-layer-hens> (Feb. 8, 2011) (accessed Apr. 7, 2012). The use of colony cages has been strenuously attacked by a united coalition of animal welfare groups. Press Release, Royal NZ Socy. for the Prevention of Cruelty to Animals (RNZSPCA), *Pressure on Minister to Ban Cruel Cages Intensifies* (Oct. 3, 2011) (available at <http://www.scoop.co.nz/stories/PO1110/S00024/pressure-on-minister-to-ban-cruel-cages-intensifies.htm> (accessed Apr. 7, 2012)).

for animal activists lies in the fact that so many different kinds of animals are being treated badly in so many different ways. At times, the challenge of explaining the myriad of improper practices to the public becomes overwhelming, leading to a form of information fatigue. Ironically, the code review process has proved to be a boon in organizing the animal advocacy movement and letting the public come to grips with animal issues in bite-sized pieces. Advocates can now plan campaigns around the codes.

They can also target particular practices they wish to abolish, such as the use of sow stalls for pigs, a practice that is widespread in New Zealand.¹¹⁷ In 2009, an animal advocacy organization landed a media coup when Mike King, a former pig industry spokesperson and popular media personality, agreed to visit an intensive pig farming operation in the dead of night, unannounced.¹¹⁸ Not surprisingly, King was horrified by what he saw.¹¹⁹ The visit was recorded by one of New Zealand's most popular news programs,¹²⁰ and it generated publicity that persisted for several weeks.¹²¹

The public pressure stemming from the broadcast eventually coalesced around the *Animal Welfare (Pigs) Code of Welfare* that sanctioned the horrifying conditions New Zealanders had watched with disgust on television. Indeed, just three days after the television program first aired, the focus of the story—which the pig industry and the Minister had tried, unsuccessfully, to turn towards the more conventional narrative of this having been the fault of one farmer “gone

¹¹⁷ See SAFE, *LovePigs Campaign: Latest News*, <http://www.lovepigs.org.nz/Latest-news/> (accessed Apr. 7, 2012) (noting that while sow stalls are already being phased out, “over 15,000 sows will continue to suffer in sow stalls until 2016”).

¹¹⁸ TVNZ, *Mike King Tackles Pig Welfare*, <http://tvnz.co.nz/national-news/mike-king-tackles-pig-welfare-2742475> (updated May 18, 2009) (accessed Apr. 7, 2012).

¹¹⁹ Press Release, SAFE, *Mike King Latest Celebrity Kingpin to Condemn New Zealand Pig Cruelty* (May 18, 2009) (available at <http://issues.co.nz/freedomforpigs/Mike%20King%20Latest%20Celebrity%20Kingpin%20to%20Condemn%20NZ%20Pig%20Cruelty> (accessed Apr. 7, 2012)).

¹²⁰ The program was broadcast on *Sunday*, a TV magazine show focused primarily on investigative journalism. OVGuide *Watch Sunday Free Online*, <http://www.ovguide.com/sunday-9202a8c04000641f800000000be80e9> (updated 2012) (accessed Apr. 7, 2012). To watch the story, see *Sunday, Comic Tackles Pig Welfare* (May 17, 2009) (available at <http://tvnz.co.nz/sunday-news/sunday-may-17-comic-tackles-pig-welfare-2741960/video> (accessed Apr. 7, 2012)).

¹²¹ The amount of media coverage generated from this event, by New Zealand standards, was staggering. For a list of stories published on this issue, see SAFE, *Pigs in the Media*, <http://www.lovepigs.org.nz/Latest-news/Mike-King-story/Media/> (accessed Apr. 7, 2012) (listing stories from May 18, 2009 through December 19, 2010).

bad”¹²²—was steered to a legal process: a review of the pig code that was suddenly “the top priority” for the NAWAC.¹²³

Two months later, after an intense public discourse surrounding the treatment of pigs, the Minister of Agriculture and Forestry effectively decided to give up trying to save sow stalls. In a speech directly to the pork industry, widely reported in the media, he made the following eye-opening comments:

I believe it is time for you to take a good, long, hard look at yourselves You have a real opportunity here to . . . take the high ground. Stop letting other people lecture you about your industry and demonstrate your ability to lead As an industry you haven’t done well enough.

New Zealanders [are] demanding real restrictions on the use of dry sow crates, or the eventual elimination of them altogether I have made it clear that I personally feel that the 2015 date [to review sow crates] needs to come forward significantly.

Your industry can treat these welfare issues as an opportunity or as a challenge. I suggest opportunity. Because one thing is for sure: this issue “ain’t going away any time soon.”¹²⁴

I have read that excerpt several times, and it is sometimes difficult to believe the comments are not coming directly from an animal welfare group. Frankly, I have never seen such strongly worded comments about an agricultural practice in any jurisdiction from a sitting member of a government executive. Without question, it was clever advocacy and good media work that pushed the Minister towards this position. But it was the code process that ultimately made the Minister conclude that the issue “ain’t going away any time soon.”¹²⁵ It was not simply something that could be deflected by a pattern of stalling and investigations, while waiting for the media to move on to other interests. The Minister recognized that one way or another, pigs would eventually return to the agenda, and to his credit, he seized the initia-

¹²² The Ministry first took the unusual step of attacking the messenger, suggesting that SAFE “seems more intent on playing publicity games than assisting the animals on this farm.” NZ Herald Staff, *Carter Slams SAFE as MAF Investigates Piggery*, NZ Herald (May 19, 2009) (available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10573191 (accessed Apr. 7, 2012)). The ploy backfired when government inspectors found that the piggery, despite how horrible it appeared on television, indeed complied with the existing code of welfare, and consequently, a prosecution was impossible. NZ Herald Staff, *MAF Inspection Found Nothing Wrong with Pig Farm: Owner*, New Zealand Herald (May 20, 2009) (available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10573273 (accessed Apr. 7, 2012)). Shortly thereafter, focus turned to the code.

¹²³ *Pig Code Review Should Be a Top Priority: Carter*, Otago Daily Times (May 20, 2009) (available at <http://www.odt.co.nz/news/politics/57054/pig-code-review-should-be-priority-carter> (accessed Apr. 7, 2012)).

¹²⁴ David Carter, Minister of Agric. & Forestry, *Speech to the NZ Pork Industry Conference*, <http://davidcarter.co.nz/index.php?archives/189-NZ-Pork-Industry-Conference.html> (July 20, 2009) (accessed Apr. 7, 2012).

¹²⁵ *Id.*

tive and forced the industry to shape up.¹²⁶ Again, this sort of dialogue, from a government official responding to the deluge of concerns expressed by ordinary New Zealanders, is invaluable.

Finally, though it is merely a subjective perception, I believe the review process provides a subtle, yet critical fourth benefit: the creation of a public recognition that laws protecting the interests of animals are important. Every year, regardless of whatever other pressing issues might arise, animal welfare remains on the legislative agenda. New Zealand's government, usually through the Minister of Agriculture and Forestry, is involved and engaged in the process. 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.¹²⁷ Even if the short-term results sometimes belie this conclusion, the message over the long-term must be that animal welfare is a matter of public importance, and one to be taken seriously.

2. *Layers of Dialogue*

Though I have described the schedule that determines the review of the codes of welfare, the process for updating these codes is also important, as it involves multiple stages and allows the public to have a real say in the outcome. 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 a] forum for ongoing public dialogue.”¹²⁸ In contrast to legislative bans that stifle discussion through their permanent nature, 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.¹²⁹ First, the NAWAC annu-

¹²⁶ While problems remain in the pig industry, sow stalls have been banned from New Zealand, with the ban to take effect in 2015. NAWAC, *Animal Welfare (Pigs) Code of Welfare* 21 (Dec. 3, 2010) (available at <http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/pigs/pigs-code-of-welfare.pdf> (accessed Apr. 7, 2012)). The code itself signals that farrowing crates also do not meet the requirements of the AWA, and it is these confinement devices that will undoubtedly be targeted in the next round of the code process. See SAFE, *Victory! Sow Stalls Banned in Five Years!*, <http://www.lovepigs.org.nz/Latest-news/?PHPSESSID=4aeec3398cf0f92292ae496c7b8d4cf7> (accessed Apr. 7, 2012) (describing plan to focus attention on farrowing crates).

¹²⁷ See Michael P. Vandenberg, *The Social Meaning of Environmental Command and Control*, 20 Va. Envtl. L.J. 191, 200–01 (arguing that law is expressive in the sense that it can signal, reinforce, or change social meaning).

¹²⁸ Caulfield, *supra* n. 83, at 457–58.

¹²⁹ NAWAC, *NAWAC Guideline 04: Process for the Development of Codes of Welfare*, Guideline (3), (July 18, 2011) (available at <http://www.biosecurity.govt.nz/files/regs/animal-welfare/pubs/nawac/guideline04.pdf> (accessed Apr. 7, 2012)) [hereinafter *NAWAC, Process*]. Much of this consultation is also mandated by the AWA directly. *Animal Welfare Act*, at §§ 70–72.

ally 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.¹³⁰ The NAWAC's annual report makes this list publicly available.¹³¹ Second, the NAWAC creates an internal committee to decide how the code will be drafted.¹³² Normally, this process involves notifying the public and industry stakeholders that it intends to review a particular code, and then convening a writing group from these parties. This second step 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 that the code will address.¹³³

Eventually, a draft code of welfare is produced.¹³⁴ The NAWAC next commences an internal process whereby it reviews the draft code and any submissions that have been received.¹³⁵ Once the NAWAC is satisfied with the code, it is time for the fourth stage: a public submission process.¹³⁶ 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.¹³⁷ The public comment process usually results in thousands of public submissions from individuals and groups interested in commenting on the draft code.¹³⁸ Submissions are normally written, but the NAWAC will occasionally hear oral testimony from witnesses, as well.¹³⁹ The submissions themselves provide further opportunity for continued public dialogue, as they are often posted online. Many of the submissions are extremely

¹³⁰ NAWAC, *Process*, *supra* n. 133, at Guideline (3)(a).

¹³¹ NAWAC, *2010 NAWAC Annual Report* 10 (Apr. 2011) (available at <http://www.biosecurity.govt.nz/files/regs/animal-welfare/pubs/nawac/nawac-ar-10.pdf> (accessed Apr. 7, 2012)).

¹³² NAWAC, *Process*, *supra* n. 133, at 1.

¹³³ Strand 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.” Strand, *supra* n. 35, at 647.

¹³⁴ NAWAC, *Process*, *supra* n. 133, at 1.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See e.g. Press Release, Ministry of Agric. & Forestry, *Feedback Sought on Draft Code of Welfare for Layer Hens* (Feb. 8, 2011) (available at <http://www.biosecurity.govt.nz/media/08-02-2011/draft-code-of-welfare-for-layer-hens> (accessed Apr. 7, 2012)) (explaining that even though NAWAC had released a draft on welfare for layer hens, nothing is final until after public consultation).

¹³⁸ See e.g. SAFE, *Join the Nocages Campaign*, <http://safe.org.nz/Campaigns/Battery-hens/> (accessed Apr. 7, 2012) (noting that the draft Layer Hens Code of Welfare received over 33,000 submissions, while not every Code attracts this level of attention).

¹³⁹ See e.g. NAWAC, *Animal Welfare (Commercial Slaughter) Code of Welfare 2* (Apr. 22, 2009) (available at <http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/commercial-slaughter/commercial-slaughter-code-of-welfare-report.pdf> (accessed Apr. 7, 2012)) (noting oral submissions received during consultation).

detailed and contain an array of facts about the animals in question, going on to discuss policy, scientific points, and even legal concerns.¹⁴⁰

When the public consultation process is complete, the NAWAC takes time to consider whether to make changes to the draft code.¹⁴¹ After a lengthy period of internal revision, the NAWAC delivers its proposed 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.¹⁴² The Minister will normally adopt the code as recommended, although, as we shall see, this does not always occur. Approval of the code, normally accompanied by a Ministerial statement, represents the final stage.¹⁴³ The reports, Ministerial statements, and the code itself are then posted online for public viewing.¹⁴⁴

Remarkably, there is publicity at virtually every point in this process. It is now common for the NAWAC, industry stakeholders, and animal advocacy groups to engage in public discussion at several stages: at the pre-consultation stage; once a draft code has been released; after the NAWAC has sent its version to the Minister; and, of course, once the Minister has enacted the code.¹⁴⁵

Consider the example of layer hens, discussed earlier. Eight years after the NAWAC concluded that battery cages complied with the AWA, the matter is receiving renewed consideration.¹⁴⁶ The public mindset toward cages has developed considerably in the interim, and, in contrast to the situation in 2004, the debate is no longer about whether to keep battery cages. It seems inevitable that these will be banned under the new code, and the sole question to consider is whether the Code will adopt the industry's desire for colony cages.¹⁴⁷

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 accompa-

¹⁴⁰ See e.g. Gillian Coombe, *Supplementary Submission on Behalf of SAFE Addressing Legal Issues Relating to the Public Draft of the Animal Welfare (Layer Hens) Code of Welfare 2011 2* (Apr. 27, 2011) (available at <http://safe.org.nz/images.php?oid=13060> (accessed Apr. 7, 2012)) (addressing legal aspects of the NAWAC's power under the AWA).

¹⁴¹ NAWAC, *Process*, *supra* n. 133, at 1–2.

¹⁴² *Id.* at 1, 2, 5.

¹⁴³ Ministry of Agric. & Forestry, *The Animal Welfare Act: A Framework for the 21st Century*, <http://www.biosecurity.govt.nz/legislation/animal-welfare-act/index.htm> (updated May 13, 2011) (accessed Apr. 7, 2012).

¹⁴⁴ *Id.*; Ministry of Agric. & Forestry, *Codes of Welfare*, <http://www.biosecurity.govt.nz/regs/animal-welfare/stds/codes> (updated Apr. 27, 2011) (accessed Apr. 7, 2012).

¹⁴⁵ See NAWAC, *2009 NAWAC Annual Report 4* (available at <http://www.biosecurity.govt.nz/files/regs/animal-welfare/pubs/nawac/nawac-ar-09.pdf> (accessed Apr. 7, 2012)) (graphically representing all of the myriad organizations involved in the consultation process).

¹⁴⁶ Ministry of Agric. & Forestry, *Layer Hens*, *supra* n. 116, at 2.

¹⁴⁷ *Id.*

nying every stage of the review process.¹⁴⁸ The media reported in some detail on even run-of-the-mill protests by animal activists that, in the past, would never get a sniff of public attention. In part, that new level of attention occurred because the protests were not random events scheduled on a whim. Instead, they 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.¹⁴⁹ 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 end of the code process, which occurs when the NAWAC releases its recommended code to the Minister, where it is normally approved, is not really an end at all, because it simply sets the table for future discussion. Advocacy groups can assess the final product, highlight areas of scrutiny, decide whether to take further action, and plan for the next round of review.¹⁵⁰ On rare occasions, however, this formal end process can explode into yet another round of public discourse.

Such an explosion occurred in 2010, when the Minister of Agriculture and Forestry shocked the country—and much of the world, as the event caused a minor international media sensation¹⁵¹—by refusing to adopt the *Animal Welfare (Commercial Slaughter) Code of Welfare* as presented by the NAWAC,¹⁵² demanding instead that it be strength-

¹⁴⁸ The media coverage, once again, has been extraordinary, with a consistent stream of news items and investigative reports on radio, television, and in newspapers. SAFE, *Boycott Cage Eggs*, <http://www.safe.org.nz/Campaigns/Battery-hens/In-the-media/> (accessed Apr. 7, 2012).

¹⁴⁹ See e.g. NZ Herald Staff, *Women End Hen Protest Early after 'Achieving Goal,'* NZ Herald (Feb. 21, 2011) (available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10707782 (accessed Apr. 7, 2012)) (describing a protest designed to “get people talking about battery hens” in light of a call for public submissions to the Draft Code of Welfare); NZ Herald Staff, *Cage Protest against Battery Farms*, NZ Herald (Mar. 31, 2011) (available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10716084 (accessed Apr. 7, 2012)) (noting that a protest of sitting in a cage would end on the day that submissions on Draft Code of Welfare closed).

¹⁵⁰ *Infra* pt. III(B)(4).

¹⁵¹ See e.g. Haaretz Service, *New Zealand Outlaws Kosher Slaughter*, Haaretz (May 30, 2010) (available at <http://www.haaretz.com/jewish-world/new-zealand-outlaws-kosher-slaughter-1.293017> (accessed Apr. 7, 2012)); Stuart Rintoul, “Anti-Jews” Behind Kosher Kill Ban, <http://www.theaustralian.com.au/news/nation/anti-jews-behind-kosher-kill-ban/story-e6frg6nf-1226080882403> (June 24, 2011) (accessed Apr. 7, 2012); Pete Wedderburn, *Is New Zealand's Ban of No-Stun Slaughter Anti-Semitic?*, <http://blogs.telegraph.co.uk/news/peterwedderburn/100041922/is-new-zealands-ban-of-no-stun-slaughter-anti-semitic/> (updated June 2, 2010) (accessed Apr. 7, 2012).

¹⁵² The NAWAC proposed that slaughter without stunning be permitted where it was for “religious reasons.” NAWAC, *Animal Welfare (Commercial Slaughter) Code of Welfare Report 20–23* (Apr. 22, 2009) (available at <http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/commercial-slaughter/commercial-slaughter-code-of-welfare-report.pdf> (accessed Apr. 7, 2012)) [hereinafter NAWAC, *Commercial Slaughter*].

ened to protect animal welfare.¹⁵³ In particular, the Minister objected to the process of slaughter without stunning and inserted a clause banning the practice, which had the effect of rendering traditional Jewish kosher slaughter in breach of the AWA.¹⁵⁴

A coalition of Jewish groups immediately went to the courts and obtained an interim injunction, preventing the commercial slaughter code from coming into force.¹⁵⁵ They next challenged the Minister's decision on judicial review.¹⁵⁶ Six months later, the Minister relented, settling the case by amending the code to allow for the kosher slaughter of chickens.¹⁵⁷ Again, to those who had championed the Minister's initial stand, the turnabout was "disappointing,"¹⁵⁸ but attention to the practice yielded a tremendous amount of public discourse over what is normally regarded as a somewhat taboo subject.¹⁵⁹ The details of how slaughter is conducted were put under public scrutiny and explained in painstaking detail.¹⁶⁰ One can only imagine that the next review of the *Animal Welfare (Commercial Slaughter) Code of Welfare* in 2020 will be a spirited—and informed—affair.

¹⁵³ Mark Hotton, *Kosher Rules May Pull Chicken Off the Menu*, Fairfax News (Feb. 6, 2010) (available at <http://www.stuff.co.nz/national/3765477/Kosher-rules-may-pull-chicken-off-the-menu> (accessed Apr. 7, 2012)).

¹⁵⁴ The process of "shechita," the traditional Jewish method for kosher slaughter, is described in some length in NAWAC, *Commercial Slaughter*, *supra* n. 156, at 21–22. Four European countries have banned the practice: Switzerland, Iceland, Norway, and Sweden, as well as parts of Austria. Florence Bergaud-Blackler, *Nouveaux enjeux autour de l'abattage rituel musulman: une perspective européenne*, 73 *Cahiers d'économie et sociologie rurales* 6, 9 (2004) (available at <http://www.inra.fr/sae2/publications/cahiers/pdf/bergeaud.pdf> (accessed Apr. 7, 2012)).

¹⁵⁵ David Zwartz, *Ritual Slaughter Is About Rights for Humans As Well As Animals*, <http://www.stuff.co.nz/dominion-post/comment/4388970/Ritual-slaughter-is-about-rights-for-humans-as-well-as-animals> (updated Nov. 25, 2010) (accessed Apr. 7, 2012).

¹⁵⁶ An overview of the dispute is outlined in *Auckland Hebrew Congregational Trust Board v. Minister of Agriculture* [2010] NZHC 2185 (available at <http://www.nzlii.org/nz/cases/NZHC/2010/2185.html> (accessed Apr. 7, 2012)) (addressing an evidentiary matter related to the challenge).

¹⁵⁷ David Carter, *Inclusion of a Further Minimum Standard in the Animal Welfare (Commercial Slaughter) Code of Welfare 2010*, <http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/commercial-slaughter/commercial-slaughter-code-of-welfare-amendment.pdf> (Dec. 28, 2010) (accessed Apr. 7, 2012).

¹⁵⁸ SAFE, *Humane Slaughter?: Killing Animals Fully Conscious*, <http://www.safe.org.nz/Campaigns/Religious-slaughter/> (accessed Apr. 7, 2012).

¹⁵⁹ See e.g. Paul Harper, *Animal Welfare Groups Slam Shechita Reversal*, NZ Herald (Nov. 29, 2010) (available at http://www.nzherald.co.nz/agriculture/news/article.cfm?c_id=16&objectid=10690864 (accessed Apr. 7, 2012)); Paul Harper, *Jewish Spokesman Defends Kosher Poultry Killing*, NZ Herald (Nov. 30, 2010) (available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10691059 (accessed Apr. 7, 2012)); Otago Daily Times Staff, *Carter Apologises for Upsetting Jewish Community*, Otago Daily Times (June 21, 2010) (available at <http://www.odt.co.nz/news/politics/111750/carter-apologises-upsetting-jewish-community> (accessed Apr. 7, 2012)).

¹⁶⁰ See e.g. TV3 News, *Ban Kosher Killing of Poultry—SPCA*, <http://www.3news.co.nz/Ban-kosher-killing-of-poultry—SPCA/tabid/419/articleID/188575/Default.aspx> (Nov. 28, 2010) (accessed Apr. 7, 2012) (describing the details of shechita slaughter).

The foregoing demonstrates that the code review process is detailed, lengthy, designed to engage multiple parties, and structured to allow 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 New Zealand reaches conclusions, 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 nuts and bolts of checks and balances, of independence and interdependence, require contextual deliberation for any given source of power.¹⁶¹

3. *Applicable to All Animals*

A third positive feature of New Zealand's legislative regime stems from the fact that its design provides protection to every type of animal¹⁶² in captivity.¹⁶³ As a consequence, codes of welfare have included a wide range of species and practices, including some that involve companion animals.¹⁶⁴ This inclusiveness has two effects. First, increasing the overall number of codes in existence augments the quantity of animal-related discourse. The second and more significant impact, however, relates to a potential increase in the quality of discourse. It is possible—albeit speculative—that the enactment of comparable codes for companion animals, who lack commercial significance, may lead people to question the validity of codes governing the treatment of agricultural animals.

¹⁶¹ John Braithwaite, *On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republication Separation of Powers*, 47 U. Toronto. L.J. 305, 344 (1997). Braithwaite also notes that “[s]eparations of powers both within and between the private and public sectors are important to controlling such abuses of power, as is countervailing power from institutions of civil society that muddy any simple public-private divide.” *Id.* at 341.

¹⁶² The term “animal,” as defined in section 2 of the AWA, is exceptionally broad and extends to any live member of the animal kingdom that is a: mammal; bird; reptile; amphibian; fish; or any octopus, squid, crab, lobster, or crayfish (including freshwater crayfish). *Animal Welfare Act*, s. 2 (available at <http://www.legislation.govt.nz/act/public/1999/0142/latest/DLM49669.html#DLM49669> (accessed Apr. 7, 2012)).

¹⁶³ Sadly, wild animals are almost entirely excluded from protection under the AWA; I believe this is a mistake that desperately needs correcting. See generally Peter Sankoff, *Wildlife and the Animal Welfare Act 1999: Can “Cruel” Acts of Hunting Ever Be Prosecuted?*, 15 NZ J. of Env'tl. L. 213 (2011) (ms. at 213, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793157 (accessed Apr. 7, 2012)).

¹⁶⁴ See e.g. *Animal Welfare (Companion Cats) Code of Welfare 2007* (Mar. 2, 2007) (available at <http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/companion-cats/companion-cats.pdf> (accessed Apr. 7, 2012)) (covering companion cats); *Animal Welfare (Dogs) Code of Welfare 2010* (June 11, 2010) (available at <http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/dogs/dogs-code-of-welfare.pdf> (accessed Apr. 7, 2012)) (covering companion dogs).

The point that concern for the welfare of domestic animals may lead to protections for farm animals is premised on a theory formulated by Professor Siobhan O'Sullivan of the University of Melbourne, who suggests that advancing the long-term interests of farm animals requires us to vary the use of the equal consideration principle commonly found in animal rights discourse.¹⁶⁵ Instead of arguing that the interests of human and nonhuman animals should be similarly respected, O'Sullivan suggests that a more fruitful way forward—and one more palatable to the general public—is to focus upon equality between animals: “by applying the basic liberal democratic principle of equal consideration to the way we manage the lives of animals we would be able to improve the situation of many animals, especially those animals who are economically productive but rarely seen.”¹⁶⁶

New Zealand's regulatory framework is ideal for exposing inequity between different animal species. Largely unencumbered by commercial interest and drafted by coalitions of animal friendly agencies,¹⁶⁷ New Zealand's companion animal Codes stand in stark contrast to their agricultural counterparts. The *Animal Welfare (Dogs) Code of Welfare*, for example, is animal-focused throughout.¹⁶⁸ With respect to shelter, the code sets the following legal standard:

- (a) Dogs must be provided with sheltered and dry sleeping quarters.
- (b) Measures must be taken to enable dogs to keep warm in cold weather.
- (c) Sleeping quarters must be large enough to allow the dog to stand up, turn around and lie down comfortably.
- (d) Dogs must be able to urinate and defecate away from the sleeping area.
- (e) Ventilation and shade must be provided in situations where dogs are likely to experience heat distress.¹⁶⁹

¹⁶⁵ Anderson, *supra* n. 22, at 37 (supporting this approach by noting how “accepted norms against cruelty to companion animals can be called upon to make regulation of food animals more persuasive”). For discussion of the use of the equal consideration principle in animal ethics, see Scott Wilson, Internet Encyclopedia of Philosophy, *Animals and Ethics*, <http://www.iep.utm.edu/anim-eth/> (Oct. 23, 2001) (updated Jan. 13, 2010) (accessed Apr. 8, 2012).

¹⁶⁶ O'Sullivan, *supra* n. 24, at 4. According to O'Sullivan: “animal welfare laws would sit more comfortably within a liberal democratic political environment if they were internally consistent and non-discriminatory in the protections they afford animals (and animals only). Why shouldn't the law treat two rabbits in the same way? Why do we tolerate discrimination against chickens in favour of dogs?” Siobhan O'Sullivan, *Australian Animal Protection Laws and the Challenge of Equal Consideration*, in *Animal Law in Australasia*, *supra* n. 6, at 125.

¹⁶⁷ The code for cats, for example, was drafted by the New Zealand Companion Animal Council, an umbrella group for charities and veterinary associations. *Animal Welfare (Companion Cats) Code of Welfare 2007 Report 2* (July 25, 2006) (available at <http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/companion-cats/companion-cats-report.pdf> (accessed Apr. 7, 2012)).

¹⁶⁸ See generally *Animal Welfare (Dogs) Code of Welfare 2010* (describing in some detail the welfare conditions that must be provided for dogs).

¹⁶⁹ *Id.* at s 4.2, Minimum Standard No. 5.

The protections required by the code of welfare for dogs are a far cry from what is currently permitted for pigs, chickens, and cows.¹⁷⁰ Over time, pointing out these distinctions could help provoke public discussion about why it is permissible to treat farm animals so poorly in contrast to companion animals, especially in situations where both, as a matter of science, demonstrate similar needs and desires.¹⁷¹ O'Sullivan, who supports an incremental approach to welfare standards, suggests that a key objective is to achieve

[a] set of standards . . . adhered to across the entire spectrum. It would mean that the state would be acting illegitimately if it required an animal exhibitor to provide an animal with x amount of space, while a farmer was required to provide the same species of animal with y amount of space It would mean that by popular agreement a decision would have to be made about what is socially acceptable This model would allow for the possibility of positive discrimination, or additional protection for animals most in need. But it would not allow for the removal of protection from some animals on the basis that the suffering occurs beyond the impartial community's gaze.¹⁷²

The development of codes for a wide variety of animals may assist in getting the public to come to grips with these sorts of internal inconsistencies. The public nature of the process, combined with the fact that codes are widely available and publicized, is a useful way of showing how different species of animals (as well as animals of the same species in different regulated settings) can receive such different levels of protection from the law. In contrast to other jurisdictions, where broadly worded standards appear to afford similar treatment to different species, but actually discriminate wildly through a manipulation of the necessary harm standard, New Zealand's disparate treatment is open for all to see. Hopefully, in time this visibility will provoke the kind of societal discussion that O'Sullivan advocates.

4. *New Channels of Dialogue*

One of the aforementioned frustrations 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. Public prosecutors have almost complete control

¹⁷⁰ Consider, to take just one comparison, what is provided for pigs kept in farrowing crates, which only have to be big enough to allow the animal to lie down; moreover, the pig can be kept there for four weeks without exercise, which would violate several aspects of the Dog Code. See NAWAC, *Animal Welfare (Pigs) Code of Welfare 2010* at 19 (available at <http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/pigs/pigs-code-of-welfare.pdf> (Dec. 3, 2010) (accessed Apr. 7, 2012)) (explaining *Minimum Standard No. 10*).

¹⁷¹ See e.g. Grace Clement, "Pets or Meat"?: *Ethics and Domestic Animals*, 1 J. of Animal Ethics 46, 46-48 (2011) (providing examples of the similarities between pigs and dogs).

¹⁷² O'Sullivan, *supra* n. 24, at 167-68.

over the types of litigation that move forward,¹⁷³ and more creative types of challenges face difficulties in obtaining standing.¹⁷⁴ Especially where the industrial usage of animals is 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.¹⁷⁵

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 regulatory 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 because 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."¹⁷⁶

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)¹⁷⁷ brought a challenge to the *Animal Welfare (Layer Hens) Code of Welfare* by utilizing a special procedure that permits any individual "aggrieved at the operation of a regulation" to contest such regulation before a panel of Members of Parliament.¹⁷⁸ ARLAN contended that battery cage systems failed to comply with the requirements of the AWA and that the Minister had acted

¹⁷³ It may be possible in some circumstances to bring a "private prosecution," however. See Sophie Gaillard, *Lawyers for Animal Welfare: Guide to Private Prosecution of Animal Welfare Offences Under the Federal Health of Animals Act 4*, <http://www.lawyersforanimalwelfare.com/app/webroot/files/LAW%20Guide%200002%20Private%20Prosecution%20of%20Animal%20Welfare%20Offences%20under%20the%20Health%20of%20Animals%20Act%20100820.pdf> (accessed Apr. 7, 2012) (noting this possibility).

¹⁷⁴ See e.g. *Reece v. Edmonton (City)* 2011 ABCA 238 at ¶¶ 36–37 (describing how an attempt to obtain a declaration that the city of Edmonton was in breach of animal protection law by keeping lone African elephant in poor conditions was quashed on the grounds that the advocacy group lacked standing to bring the challenge).

¹⁷⁵ In Canada, the prosecutor's discretion regarding which prosecutions to bring forward is extremely difficult to challenge in court. See *Krieger v. L. Socy. of Alberta* [2002] 3 S.C.R. 372, 372–73 (available at <http://scc.lexum.org/en/2002/2002scc65/2002scc65.html> (accessed Apr. 7, 2012)) (holding that decisions of whether prosecution should be brought are reviewable only where there has been flagrant impropriety, bad faith, or clear lack of objectivity).

¹⁷⁶ Morison, *supra* n. 53, at 10.

¹⁷⁷ As a matter of disclosure, I was the Co-Executive Director of ARLAN between 2001 and 2005 and participated in this challenge.

¹⁷⁸ This stems from Standing Order 316 of the New Zealand House of Representatives. See Regs. Rev. Comm. (NZ), *Final Report on Complaint About Animal Welfare (Layer Hens) Code of Welfare 2005 [2006]* 4 (available at http://www.parliament.nz/NR/rdonlyres/AEA9B78E-DC45-4063-870D-B9AD87A1BA42/27428/DBSCH_SCR_3418_35091.pdf (accessed Apr. 7, 2012)).

improperly in enacting regulations that conflicted with legislation passed by the House of Representatives.¹⁷⁹

Although it did not accept every aspect of the complaint, the Regulations Review Committee—composed of sitting members of four different political parties—agreed that the government had acted improperly.¹⁸⁰ Just as importantly, it convened a day of hearings where it closely questioned members of the NAWAC.¹⁸¹ The public hearings were extremely useful in revealing the manner by which the NAWAC reached decisions and balanced competing priorities. Although the government ultimately refused to adopt the Committee's recommendations,¹⁸² it had to issue an official response that clearly defined its position on battery cages.¹⁸³ The official response stating that position has been incredibly useful to advocates in framing arguments during the revamped code process of the last two years.¹⁸⁴

While unsuccessful in changing the government's position on battery cages, the process of review provided yet another useful layer of dialogue, as 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.¹⁸⁵ Moreover, review resulted in acknowledgement by a governmental committee that battery cages do not comply with the AWA and should be abolished.¹⁸⁶ For the first time, New Zealanders had the opportunity to talk about something other than the merits of a particular decision regarding animals. Rather, 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.

Legal 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

¹⁷⁹ *Id.* at 10.

¹⁸⁰ The NAWAC 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. *Id.* at 4, 16–17.

¹⁸¹ *Id.* at 32–41 (providing the testimony of Dr. Peter O'Hara, the chairman of NAWAC in 2005).

¹⁸² 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 & Tim Miller, *Regulations Review Committee Digest* 14 (3d ed., N.Z. Ctr. for Pub. L. 2009) (available at <http://victoria.ac.nz/nzcpl/RegsRev/Index.aspx> (accessed Apr. 7, 2012)) (noting this limited power).

¹⁸³ Jim Anderton, *Government Responds to Parliament on Layer Hens*, <http://www.beehive.govt.nz/node/26587> (July 26, 2006) (accessed Apr. 7, 2012).

¹⁸⁴ See e.g. *SAFE Submission on the Draft Code (Layer Hens) of Welfare* 6–7, <http://safe.org.nz/images.php?oid=13059> (Apr. 29, 2011) (accessed Apr. 7, 2012) (responding to this official position).

¹⁸⁵ Anderton, *supra* n. 187, at ¶¶ 2–8; Regs. Rev. Comm. (NZ), *supra* n. 182, at 13.

¹⁸⁶ Regs. Rev. Comm. (NZ), *supra* n. 182, at 4, 17.

challenge regulations in court on the grounds that they do not comport with legislation.¹⁸⁷ In 2010, however, we received a partial answer when the Minister of Agriculture and Forestry imposed a ban on kosher slaughter, as discussed earlier.¹⁸⁸ A coalition of Jewish groups immediately challenged the decision on judicial review,¹⁸⁹ arguing first that the Minister's decision had been affected by a "mistake of fact; second that there has been a failure properly to consult; and third that regard has been had to irrelevant considerations and proper regard not had to relevant considerations."¹⁹⁰

The arguments made by the coalition of Jewish groups are not much different from what animal advocacy groups contend when a code falls short of protecting the interests of animals. It would be interesting to see whether a challenge can succeed when the argument rests on the fact that the code is under-inclusive, as opposed to over-inclusive, as was the case in the kosher slaughter case. Unfortunately, the kosher slaughter challenge did not fully address the legitimacy of this sort of judicial review, because the parties settled before trial.¹⁹¹ Still, it is worth noting 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.¹⁹² While there is reason to be wary of this case's applicability to attempts to challenge the Minister for *failing* to enact a regulation sufficient to protect animals,¹⁹³ the outcome does show that judicial review of a decision regarding codes of welfare may be possible.

¹⁸⁷ HCJ 9232/01, *Noah v. Atty. Gen.*, IsrSC 215, 215. (English translation available at http://www.animallaw.info/nonus/cases/cas_pdf/Israel2003case.pdf (accessed Apr. 7, 2012)). Such a challenge in New Zealand would essentially proceed along the lines of this famous case from Israel, which successfully contended that the Israeli government's regulations on foie gras production permitted cruelty, and were in conflict with the governing legislation. For a discussion of this case, and the procedural route it followed, see Sullivan & Wolfson, *supra* n. 7, at 143–54.

¹⁸⁸ See *Auckland Hebrew Congregational Trust Bd. v. Minister of Agric.* [2010] NZHC 2185, ¶ 7 (Mackenzie J.) (available at <http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZHC/2010/2185.html?query=%22Auckland%20Hebrew%20%22>. (accessed Apr. 7, 2012)) (providing an overview of the dispute and specifically addressing an evidentiary matter related to the challenge).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ 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* (Dec. 10, 2010) (available at <http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/commercial-slaughter/commercial-slaughter-code-of-welfare-amendment.pdf> (accessed Apr. 7, 2012)).

¹⁹² *Auckland Hebrew Congregational Trust Bd. v. Minister of Agric.* [2010] NZHC 2185, para. 7.

¹⁹³ 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 under-inclusive would face chal-

The examples above 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 offense-based system. As animal law advocates continue to increase in confidence and strength, it is likely that further challenges of these types will come. Obviously, challenges are useful in their own right, in that they may effect substantive change, 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 regulation of animal treatment. 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.

III. 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.¹⁹⁴

When someone concerned about animals looks at the state in which so many of these beings suffer today, it is undoubtedly difficult to accept that the answer to the problem is simply more talk. Surely the facts are available for all to see, and action, not discussion, is what is required. Unfortunately, as Anderson has demonstrated,¹⁹⁵ social movements with objectives as substantial as this one need enriched dialogue as much as they need action. Convincing the public of the necessity of adopting a new social norm and obtaining the consensus to enact the changes required is going to be a long, slow process.

lenges 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. *E.g. NZ Consumers Cooperative Socy. (Manawatu) Ltd. v. Palmerston N. City Council* [1984] 1 NZLR 1, 15–16 (McMullin J.) (holding that citizens should be able to challenge laws without being precluded from doing so by technical rules).

¹⁹⁴ Habermas, *Between Facts and Norms*, *supra* n. 37, at 127.

¹⁹⁵ See Anderson, *supra* n. 22, at 15, 23 (“Civic republicans would certainly emphasize the role of such leaders, who can help lead dialogue ‘to make the citizenry more virtuous by chang[ing] individual preferences.’”).

What I hope this Article demonstrates is that animal welfare law has the potential to make a real impact where its structure promotes vibrant and ongoing discourse. 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 subject that is serious and deserving of ongoing scrutiny. In New Zealand, members of the public are now questioning some common assumptions, noting inconsistencies in treatment, and—one hopes—changing their attitudes towards animals 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.