Beastly Dead

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

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

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

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

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

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

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

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

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

Among philosophers there has been occasional dissent from the view

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Such persons might appreciate that the animals whose dead bodies

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

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

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

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

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

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

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

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

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

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

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

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

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

41. True, in the case of the sled dog cull, the killer was convicted for causing unnecessary pain or suffering to nine of the dogs: *Fawcett*, *supra* note 10. However, this was due to the manner in which those nine dogs were dispatched. The public denunciation of the killings went far beyond this and focused on the deaths of all the dogs, even those slain painlessly.

42. The Dutch artist Tinkebell caused outrage by proposing to kill 60 day-old chicks in a performance: "Tinkebell" (30 October 2018), online: *Wikipedia* <en.wikipedia.org/wiki/Tinkebell>.

been unsuccessful.[43]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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