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A REGULATED REGARD: COMPARING THE GOVERNANCE OF ANIMAL AND HUMAN EXPERIMENTATION

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Résumé de l'article

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Vaughan Black[*]

Discussion about animal welfare often give rise to observations to the effect that animals are treated differently than humans. Typically these remarks take the form of noting that animals are treated worse than humans are and moreover that law and other regulatory mechanisms permit and facilitate this. In the context of research, however, one sometimes encounters assertions that animals are treated *better* than humans are and that regimes for the regulation and oversight of such research reinforce this. This paper looks at several examples of the latter form of assertion. It finds them grossly false and goes on to explore why such farcically inaccurate statements continue to proliferate.

La discussion à propos du bien-être animal donne souvent lieu à des observations à l'effet que les animaux soient traités différemment des êtres humains. Typiquement, ces remarques prennent la forme d'allusions au fait que les animaux soient moins bien traités que les êtres humains et que la loi et les autres mécanismes régulateurs le permettent et le facilitent. Cependant, dans un contexte de recherche, on rencontre parfois des affirmations selon lesquelles les animaux seraient *mieux* traités que les êtres humains alors que les régimes de régulation et de surveillance de ces recherches renforcent ces conclusions. Cet article se penche sur plusieurs exemples de ce dernier type d'affirmation. L'auteur conclut que celles-ci sont grossièrement fausses et explore les raisons pour lesquelles un tel type de déclarations grotesquement inexactes continuent de proliférer.

> "I do not question that a high degree of regard for animals is a good thing. But it must be a regulated regard. Cruelty [. . .] cannot be forgiven. It is indeed […] a penal offence at law. But it is impossible to apply the word cruelty to […] high-minded scientists who have devoted themselves to vivisection experiments for the purpose of alleviating human suffering."
>
> Lord Wright
> *National Anti-Vivisection Society v Inland Revenue Commissioners,* [1947] UKHL 4, 2 All E.R. 217 at 224 (H.L).

[*] Schulich School of Law, Dalhousie University, Halifax. Thanks to Andrew Fenton, Letitia Meynell and Sheila Wildeman for conversations on this subject, and to Bailey Duller for editorial comments on a draft. [1947] All ER 217 at 224 (HL).

Arguments about regulatory supervision of humans' behaviour toward other animals commonly start from the observation that animals are granted far less legal protection from ill-treatment than humans are. To take the most obvious example, humans are permitted to own and confine animals, and to kill the animals they own so long as they do not cause them unnecessary suffering. But humans are prohibited from treating other humans this way. They are neither allowed to own other humans nor, except in limited circumstances such as war and self-defence, are they authorized to kill them.

Those who think that this is an unsatisfactory state of affairs will point to similarities between humans and other animals – our shared capacity to feel pain, for instance, or common cognitive capacities – and argue that in light of the resemblances between humans and other animals, the great discrepancy in the legal protections those two groups are afforded cannot be justified. Others do not agree, and much of the debate that then ensues revolves around questions of whether humans are fundamentally different from other creatures, in which case the differential legal protections may be warranted, or in fact not importantly distinct from non-humans, in which case the enormous divergence between the legal regimes that affect the two groups is indefensible.

In the debates over how animals are legally permitted to be dealt with it is rare – indeed startling – to encounter claims that animals are accorded greater protection than humans are. Of course, a few animals are in fact treated better than many humans. Such observations go back at least to the 18th century, where it was pointed out that the nobility treated their lapdogs better than they did their servants. It remains true today that some companion animals are, at least in many respects, cared for better than many humans. They are provided with food, shelter, medical care and affection. Millions of humans are not so lucky. However, the focus here is on legal guarantees against maltreatment, and in that respect even those pampered pets are worse off than humans; they may still be killed by their owners if their owners tire of them.

In the field of scientific and industrial research one naturally encounters these observations of how the law protects humans better than it does animals. For example, an article discussing regulation of biomedical research and comparing how human and non-human research subjects fare begins with the standard, mainstream assertion, "No one is surprised to hear that human subjects of research are accorded greater protections than animal subjects of research."[1] What is unusual about the research field, however, is that there, unlike anywhere else, one also comes across the opposite claim–namely, that animals enjoy a degree regulatory protection that is superior to that granted to humans. Here are three instances:

> "The U.S. Department of Agriculture has set rigorous standards for the use of animals […] that are more stringent than those used for human studies "[2];

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1 Rebecca Walker, "Human and Animal Subjects of Research: The Moral Significance of Respect versus Welfare" (2006) 27:4 Theoretical Medicine & Bioethics 305 ¶ 1.

2 Johnson and Johnson inc., "Our Commitment to Ethical Animal Care and Use" (2005) at 7, online: Johnson & Johnson <http://www.jnj.com/wps/wcm/connect/b55f39804f5568019fa2bf1bb31559c7/our-

> "Federal regulations governing the care and use of animals in biomedical research are more extensive than those covering human subjects!"[3];
>
> "All animal research is subject to strict regulations. The United States Department of Agriculture (USDA) has set forth federal regulations governing the care and use of animals in biomedical research that are considered more extensive than those covering human research subjects."[4]

Those illustrations are all from the United States, but Canadian instances may be found as well: "Animals are more likely to have better protection as research participants than humans."[5]

Such assertions present a particularly strong challenge to the arguments of the animal liberation and animal welfare movements. Those groups commonly start from the position, noted above, that the legal and regulatory apparatus of the state offers animals far less security than it does humans; they then go on to make arguments that this state of affairs is unjust. Rather than confronting those arguments, as do most defenders of the status quo, statements like those above take issue with the initial premise. They maintain that animals in fact benefit from a regulatory regime that is better and provides them greater protection than the arrangements that are in place to safeguard humans. If that claim stands up to scrutiny then it should silence the animal liberation critics once and for all, for if animals benefit from more regulatory protection then humans do, then what could animals and their advocates have to complain about?

Of course the four statements quoted above are from websites of groups devoted either entirely or in part to ensuring that biomedical experimentation on animals can continue unhindered. The first is from the consumer products company Johnson & Johnson, maker of Tylenol, Band-Aids and other household products. That corporation engages in product testing on animals, a practice which attracts a measure of opprobrium or at least concern, and as a matter of public relations it has elected to use its website to pre-emptively defend itself. The other three assertions are from lobby groups dedicated to the promotion of research on animals, and in particular to opposition to any additional regulatory oversight of that activity.[6] It is understandable that such sources might make tendentious, exaggerated claims that would not

commitment-ethical-animal-care.pdf?MOD=AJPERES>.

3 Foundation for Medical Research, "Fact vs. Myth: About the Essential Need for Animals in Medical Research" (2001) at 9, online: Northwest Association for Biomedical Research, <http://www.nwabr.org/research/pdfs/FBRFactvsMyth.pdf>.

4 Research Saves Frequently Asked Questions, "Is Animal Research Regulated in Any Way?" (2010), online: Research Saves <http://www.researchsaves.org/TwoColumnWireframe.aspx?pageid=90>.

5 Douglas Kinsella, "Research Ethics Boards: A Historical Background", online: Canadians for Health Research <http://www.chrcrm.org/en/conference-proceedings/research-ethics-boards-historical-background> [Kinsella].

6 It is noteworthy that groups such as Research Saves, Americans for Medical Progress, and the Foundation for Medical Research, whose sole purpose appears to be to lobby for the continued use of animals in research and against any tighter regulation of that practice, have not adopted names that more accurately proclaim their goals. Associations which oppose research on animals – the National Anti-Vivisection Society or the British Union for the Abolition of Vivisection, for instance – typically assume names which state their orientation and objects in a forthright fashion. By way of contrast, pro-vivisection organizations opt for question-begging titles like Americans for Medical Progress.

withstand analysis. In short, such statements are either public relations or politics. So when one comes across claims on such websites that the regulatory scheme for animal research subjects is more rigorous and offers animals better safeguards than that in place for human research subjects one takes them with a grain of salt. If proclamations that animals benefit from more stringent regulatory protection than humans were limited to such sources, then they would barely be worth discussing.

However, they are not so limited. They appear in scholarly writing as well:

> "Ironically, in certain respects, animal research is more stringently regulated than is human subjects research."[7]

> "Even though the policies for protecting human [research] participants have been strengthened, the requirements for human subjects investigators and IRB members remain less stringent than those of many other regulatory compliance boards, such as those overseeing [. . .] animal research."[8]

Again those are American examples, but Canadian ones abound, including these from a study done for the Law Commission of Canada:

> "We believe that the Canadian public would be distressed to learn that the current situation is one in which national oversight of research involving animals is far more effective, better resourced and independent than that for research involving humans."[9]

> "It's extraordinary, in Canada that the government… investment in human research subject protection is less than half of its investment in animal protection through CCAC. So in Canada you are better protected as a lab rat than you are as a human research subject."[10]

Perhaps the prime Canadian example appears in an article by Catherine Schuppli and Michael McDonald which is devoted to contrasting the regulatory regimes governing scientific experimentation on humans and animals: "In this article, our argument will be that the governance of research involving animals in Canada is not only more stringent but better, in other respects, than the governance of research involving humans."[11]

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7 Mark Barnes & Patrik Florencio, "Financial Conflicts of Interest in Human Subjects Research: The Problem of Institutional Conflicts" (2002) 30:3 J.L. Med & Ethics 390 at 399, n. 2.

8 Christine Hansen, "Regulatory Changes Affecting IRBs and Researchers" (2001) 14:7 Observer 1 at 3, online: Association for Psychological Science <http://www.psychologicalscience.org/observer/0901/irb_changes.html>. One author even offers an explanation for this state of affairs: "Regulation of animal use in research is generally more advanced than that for humans in research, probably because of the activities of animal advocates against animal experimentation" in Clive Phillips, *The Welfare of Animals: The Silent Majority* (New York: Springer Science, 2009) at 10.

9 The Law Commission of Canada, *The Governance of Health Research Involving Human Research Subjects* (Ottawa: Government of Canada Publications, 2000) at xii (Principal investigator: Michael McDonald) [McDonald].

10 Anon, quoted approvingly in McDonald, *ibid*, at 187.

11 Catherine Schuppli & Michael McDonald, "Contrasting Modes of Governance for the Protection of Humans and Animals in Canada: Lessons for Reform" (2005) 13:2-3 Health Law Review 97 ¶ 1 [Schuplli & McDonald]. See also, Michael McDonald, "Canadian Governance of Health Research Involving Human Subjects: Is Anybody Minding the Store?" (2001) 9 Health L.J. 1 at 15.

Research–including both scientific experimentation and consumer product testing–seems unique in affording examples of claims that animals benefit from a better regulatory regime than humans do. In most areas such comparisons are not even possible since humans and animals are not both subject to the same practices. For example, while animals are routinely raised for food, humans are not. So it is barely coherent to make comparisons between the legal protections granted to farmed animals and those granted to comparably situated humans. There are no comparably situated humans. With biomedical and industrial research, however, both humans and non-humans are regularly and systematically the subjects of that practice, and there are regimes in place to oversee and police it. So comparative assessments may be possible. Still, while such comparisons are possible and indeed are a fertile ground for inquiry, it remains surprising to come across assertions that animals benefit from a regulatory protective regime that is better than the one that governs research on humans.

But is it so? By way of shedding light on the several statements quoted above, it is interesting to engage in a thought experiment. Imagine that humans were subject to the sort of treatment that animals are routinely subjected to in the practice of scientific experimentation carried on in Canadian universities, hospitals, and other institutions. That is, imagine that the three million or so non-humans[12] that are yearly the subject of such research and testing in Canada were not mice, rats, and fish but rather were humans – humans who were treated just as those rats, mice, and fish are. One can then make a catalogue of what regulatory responses might be engaged and then compare those to the responses that are in fact brought to bear in the real world when non-humans, rather than humans are subject to those research practices.

That catalogue might look something like this. If human research subjects were treated like animal research subjects then the researchers would be charged under the *Criminal Code* with murder.[13] This is simply because animal research subjects, by the millions, are routinely killed either in the course of the experiment or when the experiments are over. Moreover, since the killing is planned and deliberate the charge would be murder in the first degree. That charge could be brought against the person who actually performed the act of killing, but the *Criminal Code*'s provisions on parties to offences would also permit an indictment to be brought against members of the research team who aided and abetted that killing.[14] Numerous other *Criminal Code* offences would also be engaged, to name the most obvious:

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12 The Canadian Council on Animal Care (CCAC) gathers and publishes information on animal experimentation conducted by its member institutions. Its report for 2009-10 puts the number of animals used in Canada in 2008 at 2,272,815: Canadian Council on Animal Care, *Annual Report 2009-2010*, at 15, online: Canadian Council on Animal Care <http://www.ccac.ca/Documents/Publications/AnnualReports/2009-10.pdf>. The figure of three million is employed in the text because for some research institutions participation in the CCAC is optional and the CCAC's data does not reflect animal research carried in by non-member institutions. It is next to impossible to find out how many animals are used by non-CCAC bodies so my figure of three million is just a guess.

13 *Criminal Code*, R.S.C. 1970, c. C-34, s. 231.

14 *Ibid*, s. 21(1).

assault,[15] aggravated assault,[16] assault causing bodily harm,[17] assault with the weapon,[18] kidnapping,[19] forcible confinement,[20] and administering a noxious thing.[21] In addition, since these offences are among those designated in Part XXIV of the *Code* dealing with dangerous offenders,[22] and since many researchers engage in that practice repeatedly, those charged might also be liable to be classed as dangerous long-term offenders and incarcerated indefinitely.

In addition, under new *Criminal Code* provisions added in 2003 to impose liability on senior officers of corporations for crimes committed by those organizations, the sort of criminal liability just outlined would not be confined to the direct perpetrators and their assistants. It could be imposed on those with authority over them. So for example in the university context, where much research on animals takes place, criminal liability might be placed on university presidents, deans, and department chairpersons.[23] In addition, Canadian universities and other research institutions themselves might meet the *Criminal Code*'s new definition of "criminal organization".[24] Under s. 467.11 of the *Code*, which was added to deal with gangs such as the Hell's Angels, classification of an institution of a criminal organization would permit charges to be brought against every person who by act or omission contributed to the activity of the university.

Criminal liability could be imposed as well on those corporations which breed and sell experimental subjects. The current trade in non-human research subjects involves mainly mice and rats. However, if these companies began breeding and selling humans they would be committing a range of *Criminal Code* offences, including forcible confinement[25] and trafficking in persons.[26] Liability of the organizations which breed and sell research subjects would not be limited to the

15 *Ibid*, s. 266.
16 *Ibid*, s. 268.
17 *Ibid*, s. 267(b).
18 *Ibid*, s. 267(a).
19 *Ibid*, s. 279(1)(a).
20 *Ibid*, s. 279(2).
21 *Ibid*, s. 245. Of course, the *Criminal Code* has protections for non-humans too, chiefly the animal cruelty provision in s. 445.1. In theory it applies to scientific experimentation. However, no charge under that provision or its predecessors has ever been brought against persons using animals in the scientific or industrial experimental context. The leading case on that provision, *R. v. Ménard*, (1978) 4 C.R. (3d) 333, 43 C.C.C. (2d) 458 (Que. C.A.), goes out of its way to explain why the normal practice of scientific experimentation would not attract liability under the *Criminal Code*'s prohibition against causing unnecessary suffering. In practice neither the *Criminal Code* nor the cruelty offences in some provincial animal welfare legislation have any effect on the use of animals as research subjects in Canada.
22 *Ibid*, s. 752.
23 *Ibid*, s. 217.1. This revision was part of the so-called Westray Bill, which came into effect on 31st of March 2004.
24 *Ibid*, s. 467.1(1). One of a university's main activities is research, and this results in a financial benefit to the university and many of those who work in it. Accordingly, under the terms of s. 467.1(1), a university which regularly performed unconsented-to research on thousands of humans every year, which is precisely what many universities do to non-humans, would meet the definition of a criminal organization.
25 *Ibid*, s. 279(2).
26 *Ibid*, s.279.01(1).

Criminal Code. Such organizations commonly create and breed special genetic strains of those subjects. That is permissible where such subjects are non-humans, but if they were humans then it would be prohibited by the *Assisted Human Reproduction Act*.[27]

The legal provisions which afford humans protection from the potential abuses which can flow from some forms of scientific research are not limited to criminal and other forms of public law. As decisions such as *Halushka v. University of Saskatchewan and al.*[28] make clear, the law of tort also contains legal standards which help to constrain un-consented to research. If humans were subjected to the research practices which are currently inflicted on animals they would be able to bring claims for a broad range of civil actions. In the common law provinces, these would include the torts of assault, battery, wrongful imprisonment, and intentional infliction of emotional distress. The *Civil Code of Québec* would provide for comparable liability in that province. Since they would be killed at the conclusion of the experiments, as animals routinely are, those claims would be brought by their surviving family as wrongful death actions. These suits could lead to awards of damages against researchers and–through the doctrine of vicarious liability[29] – their employers. Moreover, since such practices are planned and deliberate and would be seen as egregious departures from community norms, they would give rise to claims for punitive damages. Furthermore, insofar as this activity involves the infliction of harms not adequately compensated by damages, the proposed research subjects would be able to obtain an injunction. Again, non-human animals have none of these protections.

If human research subjects were treated as animal research subjects are, a range of non-legal sanctions could also be brought to bear. For instance, doctors who experimented on humans without their consent, as they habitually do to non-humans, would find themselves suspended from the practice of medicine. Institutions which countenanced such research would find themselves ineligible for funding.

Nor would regulatory sanctions be confined to the domestic context. As the Nuremberg trials remind us, large-scale, state sponsored medical experimentation on populations of nonconsenting humans can attract responses at the international level. In addition to sanctions for violating these fundamental norms of international law, Canada has ratified a number of multilateral treaties whose provisions might be engaged if it permitted humans to be experimented on the way animals currently are. These include the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [30] and the *International Covenant on Civil and*

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27 *Assisted Human Reproduction Act*, S.C. 2004, c. 2, s. 5.

28 *Halushka v. University of Saskatchewan and al.*, (1965) 53 D.L.R. (2d) 436 (Sask C.A.).

29 See *Bazley v. Curry*, [1999] 2 S.C.R. 534.

30 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987). Art 1 provides, in relevant part: "For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person [. . .] for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

Political Rights.[31] Considerable research on animals is carried out by branches of the Federal Government, such as Agriculture and Agri-Food Canada, the Department of Fisheries and Oceans and the Department of National Defence. If that same research was carried out on humans then, following principles of international criminal law, liability could be imposed on the ministers of those departments, and on the Prime Minister.[32]

The foregoing catalogue of sources of legal regulation may have seemed to ramble far afield. It should be noted, however, that in an important respect it has in fact been very restrained. It was confined to those sources of law that seek to protect the sorts of interests that humans and animals have in common–principally interests in continued life, avoidance of pain, and freedom of movement. Humans, of course, have other sorts of interests that might be negatively affected by some research activities, such as dignity, the privacy of their health records and information, the sharing of research results with participants, and continued access to experimental drugs should those prove efficacious. A variety of statutes and other norms are in place to vindicate these interests. To offer just one example, were humans treated the way non-humans are in the practice of scientific research then there might be sanctions against the researchers under statutes such as the *Personal Information Protection and Electronic Documents Act*.[33] As noted, however, the inquiry here has been confined to governance regimes that protect interests that humans and non-humans share, such as pain avoidance, so the broader regulatory regimes that protect humans' other interests are not explored.

Even focussing on legal responses to unconsented-to confinement, pain, and premature death it would take little imagination to expand the foregoing catalogue. Yet it is worth pausing here to consider the objection that the foregoing thought experiment has set up a straw figure–that it is based on a disanalogy and moreover relies on an ungenerous and even wilfully distorted reading of what was really meant in the various quotations outlined at the start of this paper. It is worth exploring the ways in which this may be so.

First, it might be said that those maintaining that animal research subjects benefit from a better regulatory regime than human research subjects do were intending to exclude all consideration of things like criminal law, tort law, professional regulation, international law, and so on. They were meaning to confine their comparisons solely to the two dedicated research regimes connected with the

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31 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 6(1), CAN. T.S. 1976 No. 47, 6 I.L.M. 368, (entered into force 23 March 1976, accession by Canada 19 May 1976).

32 As at Nuremberg where those prosecuted for the Final Solution were its architects, not its henchmen. As a matter of prosecutorial discretion liability should be imposed on those at the top of the military chain of command, and on political leaders. For instance, The Special Court of Sierra Leone has, in article 1 of its founding statute, a direction to the court to prosecute "persons who bear the greatest responsibility for serious violations of international humanitarian law" (which includes crimes against humanity and war crimes). *Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone*, Sierra Leone and United Nations, 16 January 2002, 2178 U.N.T.S. 137, annexed (entered into force 12 April 2002).

33 *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.

major federal granting agencies–that is, for animals the arrangement administered by the Canadian Council for Animal Care (CCAC), and for human research subjects the system that falls under the Tri-Council Guidelines.[34] Moreover it might be said that readers of such claims would reasonably be expected to appreciate this understanding. So pointing out that human research subjects benefit from the additional protections of the *Criminal Code* and tort law should be regarded as beside the point.

There are problems with such a rejoinder, however. One is that some persons making such claims sometimes do explicitly acknowledge the existence of other forms of regulation, such as criminal law, that are outside the dedicated research regimes, yet even after doing so they continue to claim that animals benefit from superior regulatory protection.[35] So at least in some cases it is simply inaccurate to defend the claims that animals benefit from better regulatory protection by saying that such claims were intended to be confined to a comparison of the CCAC and Tri-Council schemes.

The more fundamental response to an objection of this sort is that it is simply standard academic practice, when comparing the regulation of any given fields of activity, to look at all the forms of regulation applicable to the activities in question. It makes little sense, when comparing two activities to point out that one is subject to a better licensing scheme than the other, and then go on to conclude that the activity with the superior licensing arrangement is the better regulated of the two. The regulation brought to bear on the other activity might be something other than licensing – the criminal law, for instance, or mandatory labelling. So even if it were the case that the CCAC scheme which regulates research on animals were better than the Tri-Council arrangement which governs research on humans, that provides no basis for larger comparative generalizations about regulation of those two activities. Put another way, the criminal law, the law of tort, international law and so on are, among other things, sources of regulation of the practice of research. They are sources of regulation which have a great deal to say about how scientific research on humans may be conducted, but next to nothing to say about research on non-humans. Any broad generalization about the comparative regulation of human and non-human research cannot ignore the regulatory role of these other sources of governance.[36]

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[34] Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada, and Social Sciences and Humanities Research Council of Canada, *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans*, (Ottawa: Interagency Advisory Panel on Research Ethics, 2010), online: Panel on Research Ethics <http://www.pre.ethics.gc.ca/pdf/eng/tcps2/TCPS_2_FINAL_Web.pdf>.

[35] Schuppli & McDonald, *supra* note 240 at 100.

[36] Yet most of the evaluations do exactly this, not only in their general remarks but also in their particular observations. Consider this assessment: "The regulations on housing of research animals are more stringent than those for human habitation", Donald McBurney & Theresa White, *Research Methods*, 8th ed. (Belmont: Wadsworth, 2009) at 65. That is true if one confines consideration to those housing requirements spelled out only in the dedicated research regimes. The CCAC scheme for animals has detailed provisions on cage sizes while the Tri-Council scheme for human research says nothing about how human research subjects must be housed. However, when one considers that regulations governing human housing are spelled out in civic building codes, which are typically very detailed and extensive, then it is simply not the case that regulations for housing animal research subjects are more stringent than those for human habitation.

There is a second way in which the thought experiment outlined above might be said to be rooted in a perverse misreading of the claims quoted at the beginning of this paper. The biggest single difference between the laws bearing research on animals as compared with those touching on experimentation on humans involves the research subjects' consent. Where non-humans are concerned, comparatively little of the research done on them is performed with their consent. Whereas when it comes to human research subjects, informed consent is normally required. The thought experiment above basically involved envisioning the legal consequences that would ensue if humans were the subject of invasive fatal research and testing carried on without their consent and then killed, also without their consent.

It might be thought that the consent distinction is so fundamental and, more to the point, so obvious that in any evaluative contrasting of the regulatory regimes affecting humans and non-humans it need not be expressly mentioned. That is, it might be said that all the claims at the outset of this paper should be understood not as asserting that "[a]nimals are more likely to have better protection as research participants than humans"[37] but rather something like "leaving aside the fact that human research subjects must grant their informed consent whereas animal research subjects may be subjected to painful, invasive procedures and unwanted early death without their consent, animals are more likely to have better protection as research participants than humans".

Yet an assertion like that seems almost bizarre, akin to asking, "apart from that Mrs Lincoln, how did you enjoy the play?" Perhaps stranger still, some persons making the claims for the superiority of the animal research scheme do take cognizance of the consent point, yet still maintain that animals have better protection. Schuppli and McDonald grant that the principle of free and informed consent need not be observed in animal research.[38] However, having made this acknowledgement they immediately seek to minimize its significance: "Yet it is worth noting that a significant portion of research involving humans deals with persons who lack in whole or in part the capacity for free and informed consent."[39]

In fact, in Canada only a small sliver of scientific research on human subjects is carried on without their consent.[40] Even in those cases, that research may involve only zero- or low-risk studies, usually with some chance of therapeutic benefit to the research subject.[41] It can be done only with the authorization of a substitute decision maker who typically must act in the best interests of the research subject. Perhaps most importantly, it does not permit killing the research subjects when the experiment is over.

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37 Kinsella, *supra* note 239.

38 Schuppli & McDonald, *supra* note 240 at 98.

39 *Ibid*.

40 Among humans, only the very young and some mentally incapacitated adults are subject to research without their consent.

41 Sheila Wildeman and al, "Substitute Decision Making about Research: Identifying the Legally Authorized Representative in Four Canadian Provinces" (2012) 6:1 McGill Journal of Law and Health 189.

There is a third sort of objection to the foregoing thought experiment, one that may hit closer to the mark. It might be said that the entire exercise of imagining what would be the law's response if research were conducted on humans the way it is on non-humans stems from a misrepresentation of what the statements quoted at the outset of this paper actually allege. Although some of those statements actually maintain that, compared with human research subjects animals benefit from "better protection"[42], most employ slightly different vocabulary. They assert that the regulation of research on animals is more rigorous, more stringent, and more extensive than the regulation of experimentation on humans. They do not actually contend that the circumstances in which research can be undertaken on animals are more restricted than those in which it can be undertaken on humans, or that the preconditions for research on animals are more numerous than those for research on people. Yet somehow the thought experiment treats those statements as if they did.

It does seem to be true that one regulatory scheme might permit a wider range of activity than another yet still be described as more rigorous and stringent. The claims to rigour and stringency might simply be said to connote that the standards of the former scheme are more consistently enforced than those of the latter, for instance because of a zero-tolerance policy. So perhaps the claims that animal research is more stringently controlled than is research on humans are only meant to say something about that way the animal regime is administered, and not say anything about the standards themselves (where, it might be said, everyone knows that those standards are not at all comparable).

The problem with such an objection is simply that, at least in most cases, the various statements about the superior rigour of the animal research governance scheme are not accompanied by any comparative analysis of how the competing research regimes are administered. In the absence of such analysis it is difficult to read claims about superior stringency as anything other than claims that non-human research subjects benefit from better protection than human subjects do.

As the thought experiment shows, that claim is grossly false. Indeed it is difficult to regard it as anything other than an instance of the *Big Lie* – a lie so enormous that no one who hears it could imagine that someone could disfigure the truth so monstrously.[43] As noted above, some of the claims regarding the superior regulatory protection accorded to animals are found in advertising and lobbying contexts where it is clear they are no more than propaganda efforts in the contested war over the permissible use of non-humans in scientific research.[44] There is a legitimate and difficult debate about the use of animals in research, but that debate has become notoriously polarised, with the result that those defending the status quo sometimes resort to exaggerated and indefensible claims.

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42 Kinsella, *supra* note 239.

43 Adolf Hitler, *Mein Kampf*, volume I, chapter X: "[I]n the big lie there is always a certain force of credibility [...] For the grossly impudent lie always leaves traces behind it, even after it has been nailed down."

44 The war metaphor is an exaggeration but it is a common one. Consider the following titles on the subject: P. Michael Conn & James Parker, *The Animal Research War*, 1st ed. (New York: Palgrave MacMillan, 2008); Deborah Blum, *The Monkey Wars* (Oxford: Oxford University Press, 1995).

Such an explanation, however, in no way applies to the work of scholars such as Schuppli and McDonald.[45] Their contrastive evaluation of the governance of animal and human research in Canada, filled with helpful insights, is in no way intended to be a defence or apology for current Canadian practices for research on animals. It does, however, have an argument to make, namely that the regulatory regime for scientific research on human subjects is in need of considerable improvement. And while its approach to that argument is in no way propagandistic that does not mean its claims are free from distortion. When humans suffer ill-treatment they may be inclined to draw attention to the fact by claiming they were treated "like an animal". It should not be forgotten, however, that such claims are hyperbolic. Someone who says, "I was forced to wait in line and treated like an animal," is forgetting that when animals finally get to the head of the line they are shot in the head and chopped up into meat.[46]

It is this forgetting that seems most explanatory of scholarly claims that animal research subjects benefit from better regulatory protection than human ones. Pain, deprivation, and early death are routinely inflicted by humans on non-humans, both in the research arena and–in numbers a hundred-fold larger–in food production. Yet the magnitude of those numbers, the hidden way in which these activities are carried out, and the linguistic practices that sustain them, combine to produce a sort of collective amnesia. This appears to foster a situation in which claims to the effect that lab rats benefit from greater protection than human research subjects can appear plausible. They are not, however, and assessments of the adequacy of the governance of both human and animal research would better if they proceeded in the absence of such unsustainable claims.

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45 Kinsella, *supra* note 239.

46 This does not mean that humans are never treated like animals. They were in the Holocaust.