

*An Empty Gesture to Soothe the Conscience: Why We Pass Laws Protecting Chimpanzees and Other Animals from Cruelty*

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On February 17, 2009, a pet chimpanzee living in Connecticut violently attacked his owner's friend. The attack ended in horrifying injury to the friend and in the chimpanzee being shot by the police and eventually bleeding to death. In the wake of this disturbing event, the House of Representatives passed a bill called the "Captive Primate Safety Act," which would outlaw the interstate transport of nonhuman primates to be used as pets.<sup>2</sup> The matter is pending in the Senate.

The two stated rationales for the bill are to protect human beings from attacks by nonhuman primates, and to protect nonhuman primates – wild, rather than domestic, animals – from being held in captivity as pets. In this response, I will focus on the second rationale and note that this and most other "anti-cruelty" legislation does little to protect nonhuman animals from human cruelty. Moreover, I will propose that this inefficacy in curbing animal mistreatment is an essential, rather than accidental, feature of the legislation.

### **Animal Cruelty Legislation: Its History and Possible Purposes**

The Nineteenth Century marked the beginning of modern anti-cruelty legislation, with the passage in the U.K. of Richard Martin's Act, providing penalties for cruelty toward cows, sheep, and other similar domestic animals.<sup>3</sup> Following that law, there have been many others, protecting a variety of nonhuman species from specific forms of mistreatment within and outside of the food industry. It was under a law falling within this tradition, for example, that Michael Vick was sentenced to 23 months in federal prison for his participation in the brutal sport of dog-fighting.<sup>4</sup>

It is also under such laws that the production of paté de foie gras has been prohibited in some places, and that various animals raised in the food industry in California, starting in 2015, may no longer be kept in cages too small to allow the animals to lie down, stand up, or extend their limbs.<sup>5</sup> Finally, the Captive Primate Safety Act is, at least in part, similarly addressed to the prevention of cruelty to non-human animals through the ownership of a particular kind of animal, a nonhuman primate, for a pet.

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<sup>2</sup> Captive Primate Safety Act, H.R. 80, 111th Cong. (2009).

<sup>3</sup> Act to Prevent the Cruel and Improper Treatment of Cattle, 1822, 3 Geo. 4 (Eng.).

<sup>4</sup> See 7 U.S.C. § 2156 (2008).

<sup>5</sup> Cal. Sec'y of State, Proposition 2 (2008) (to be codified as CAL. HEALTH & SAFETY CODE § 25990 et seq.), available at <http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop2>.

In a fascinating article, Pace University law professor Luis Chiesa identifies and analyzes the various purposes that might potentially animate anti-cruelty laws.<sup>6</sup> He discusses four in particular and elaborates the degree of fit that he finds between these putative purposes and the laws in question. The four purposes are, roughly: (1) protection of property rights (of animals' owners); (2) apprehension of dangerous people (whose dangerousness to fellow human beings is made manifest in their mistreatment of nonhuman animals); (3) promoting the moral sensibilities of those who feel that animal cruelty is immoral; and (4) protecting potential animal victims from harm.

Recognizing that all four purposes have some explanatory power in understanding the motives of those who press for such legislation, Chiesa argues that the best account of modern anti-cruelty laws is the fourth: People view animals as beings with an entitlement to be free from harm (all things being equal), and the victims of the acts of cruelty prohibited by such laws are best understood to be the animals themselves (rather than the human beings who have affection towards, or proprietary interests in, the animals, or the human beings who might next be victimized by the dangerous animal-abuser, or the human beings who find animal cruelty morally offensive).<sup>7</sup>

There is an obvious question, which Chiesa anticipates, that one might pose in response to his thesis: Why, if the goal of these laws is to protect animals, are there so many exemptions to the laws, leaving them inapplicable within and throughout the meat, dairy, and egg industries, not to mention the use and killing of animals in clothing production, scientific experimentation, and hunting?

Chiesa's answer is that the exemptions of and within these industries (whether such exemptions are officially designated as "exceptions" to anti-cruelty laws or as falling outside the coverage of such laws altogether) reflects the view (a view with which Chiesa himself takes issue) that some acts of cruelty are "justified" by the benefits to human beings from the consumption of animal flesh and products, from the process of hunting, and from the information that is gained from the use of animals in research. Despite these benefits, however, anti-cruelty laws recognize and acknowledge that the brutal treatment by people of animals is a wrong suffered by the animals, even in cases in which the cost/benefit analysis permits such treatment to continue.

### **An Interesting Analogy to the Difference Between a Non-Homicide and a Justifiable Homicide**

Chiesa draws an analogy to the notion, in homicide law, that there is a difference between behavior that does not qualify as a homicide (such as shooting at a piece of paper), on the one hand, and behavior that does qualify as a homicide but that is nonetheless justifiable (such as shooting at a person who is about to shoot at you), on the other.<sup>8</sup> Like the person who kills a human being in justifiable self-defense, the person

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<sup>6</sup> Luis E. Chiesa, *Why Is It a Crime to Stomp on a Goldfish?--Harm, Victimhood and the Structure of Anti-Cruelty Offenses*, 78 MISS. L.J. 1 (2008).

<sup>7</sup> *Id.* at 64-65.

<sup>8</sup> *Id.* at 41-43.

who inflicts great suffering and death on nonhuman animals as a means of producing and consuming food or clothing is engaged in an act that the law recognizes as a harm (the same sort of harm that is prohibited in the absence of a justification) but nonetheless permits to go on because the benefits are perceived as outweighing the costs.

Chiesa's thesis is important because it implies that if one wishes to legislate more aggressively against the infliction of harm against nonhuman animals (for example, by outlawing the slaughter of nonhuman animals as food), one need only make the case that the benefits derived from a legally permissible activity – such as farming animals to meet the demand for meat, milk, and eggs – are in fact no greater than they are in the case of prohibited activities like bull-fighting or (in some jurisdictions) the production of *paté de foie gras*.

Given eventual recognition that the benefit is not so great, it will follow that the harm of animal cruelty – recognized as significant and worthy of prevention by the anti-cruelty laws – will motivate the passage of legislation that protects all animals from cruelty and slaughter. People will eventually understand the irrationality of prohibiting some cruelties but not other, equivalently harmful (and far more common) cruelties visited upon the same animals for different purposes.

To give an analogy from the women's rights area, a law that prohibited spousal abuse could live side by side with a law that allowed pay discrimination against married women, and the latter would not thereby negate the validity and value of the former. Indeed, the former could in time persuade people that the same concerns that animate the former would support the latter as well.

### **But What If Animal Cruelty Legislation Comes From a Different Source, Not Empathy, as Chiesa Postulates?**

In one sense, Chiesa is clearly right: People do pass animal cruelty laws to protect animals against cruelty (rather than purely to further other, unrelated interests of human beings). When people became outraged about the mutilation and torture of dogs within the dog-fighting industry (as exemplified by Michael Vick's notorious case), they were genuinely upset about cruelty to animals, and they truly wanted the law to punish offenders and thereby ensure that animals would be protected from such abuse. There is, in other words, sincere empathy for animals behind many of the votes that put into law our existing prohibitions against abuse and cruelty and that demand that the law be enforced. When there is no reason for the cruelty (or, at least, no reason that appears legitimate to the public), the suffering of animals elicits sincere regard from many people.

In my view, however, Chiesa is mistaken in suggesting that such empathy and regard offer the best account of anti-cruelty legislation. Most of the law involving human beings and nonhuman animals is one huge "exception" – allowing horrific treatment of farmed animals while they are alive (including unanaesthetized castration and branding, the early separation of calves from their mothers, starvation and dehydration for days on the trip to slaughter, upside-down hoisting for slaughter, and the list goes on) and a

terrifying and painful death at the end. That people enjoy the taste of meat, milk or eggs or the feel of leather does little to “justify” the misery of domestic animals, if the word “justify” is to have any moral content. When we consider what is still permissible under our law, the prohibitions begin to look more like irrational tics than a coherent recognition of what we owe to animals.

Imagine a loosely comparable reaction to the plight of women. In place of a legal system that prohibited spousal abuse and allowed pay discrimination, imagine a law that prohibited spousal battery but carried exceptions for cases in which: (a) the wife had prepared a dinner that did not please her husband; (b) the wife had failed to complete her household chores for the day; (c) the wife did not look pretty to her husband when he walked in the door; or (d) the wife gave birth to a girl instead of a boy. The combination of the law and its exceptions would appear (and would in fact be) so arbitrary as to require a psychological account of its purposes that went beyond the idea that physical injury to women is a very harmful thing, which should be prohibited, but it is sometimes better than the alternative, if the alternative is poor cooking, housework, appearance-maintenance, or reproduction.

Here is the psychological account that I propose: People grow up eating, wearing, and otherwise consuming sentient, nonhuman animals. Children, on occasion, feel confused and upset when they learn that their food was once a live animal, but parents counter the confusion with a combination of false information (such as “The animals have very good lives until they die” and “We need to eat and wear animals”) and majoritarian reassurance (“Look at all the people eating animals – it can’t be wrong if everyone does it”). Then parents might purchase (or even adopt from a shelter) a dog or cat and demonstrate to their children that they – and their children – really are good to nonhuman animals, because they feed and care for one in their own home and even consider the pet to be a part of their family.

Rutgers law professor Gary Francione has referred to this mix (of empathy and love directed at pets, while a knife and fork are directed at other animals) as reflecting a “moral schizophrenia.”<sup>9</sup> At some level, we have a deep knowledge that it is wrong to inflict suffering and death on animals, but we still want to continue enjoying the particular foods (meat, dairy, eggs), apparel (leather, wool, fur), and entertainment (circuses, zoos) that we have always enjoyed. We manage this conflict, at the present time, through an elaborate system of denial (exemplified by, but not limited to, the falsehoods we may tell our children). Anti-cruelty laws, properly understood, represent self-soothing gestures within that denial structure.

### **Why Would Vegans Support Anti-Cruelty Laws?**

Some readers might respond that not every proponent of anti-cruelty legislation consumes animal products himself or herself. Many vegans, for example, supported and promoted California’s Proposition 2, which will prohibit the use of tiny cages for a

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<sup>9</sup> GARY L. FRANCIONE, *ANIMALS AS PERSONS: ESSAYS ON THE ABOLITION OF ANIMAL EXPLOITATION* 25-28 (Columbia Univ. Press 2008).

variety of farm animals, starting in the year 2015.<sup>10</sup> Why would a vegan support such legislation if its only purpose is to soothe the troubled conscience of the many?

One answer is that some vegans take a “one step at a time” approach and believe, sincerely, that if the law requires the meat, dairy, and egg industries to make tiny, incremental changes for the better in their treatment of animals, then it might some day come to pass that there will no longer be meat, dairy, and egg industries. They may reason that, although larger steps might be desirable, such steps could not become law at this time, and prohibiting something is better than prohibiting nothing. At least those animals who will suffer horribly will now suffer slightly less than they did before.

This approach strikes me as well-meaning but mistaken. The overwhelming majority of people who support anti-cruelty legislation are strongly opposed to giving up the consumption of animals. Thus, rather than viewing the (several-years-in-the-future) modest enlargement of factory farm animal cages as a “first step” toward the dismantling of animal cruelty, many people are likely instead to view it as a reason to feel better about consuming animals. In other words, the symbolic gesture of anti-cruelty laws serves to calm some of the dissonance that people might have previously felt about eating, wearing, and otherwise using tortured and killed animals.

If this is the case, then the likely effect of such legislation is to inspire people to consume more, rather than less, of what the animal industry has to offer, because they can now tell themselves that what happens to animals is no longer objectionable. Perhaps the role of such legislation as a salve to the troubled conscience explains why various actors within the meat, dairy, and egg industries actually support measures that purport to curb their abuses. Laws that do little to change how business is done can provide free advertising for the idea of the so-called “conscientious omnivore.”

As I write this response, I wonder whether it would be better for non-human animals if there were no laws at all protecting them against cruelty. On the one hand, such laws, including the proposed Captive Primate Safety Act, reflect the desire to do right by our fellow, sentient earthlings, an impulse that is worthy of praise and encouragement. On the other hand, we might be better off directing our animal-friendly feelings to letting people know how easy, enjoyable, and healthy it is to be a vegan (not to mention how important it could be for the environment).

If we express our concern for animals with symbolic legal gestures, even as we consume more and more of the products of their suffering and death at our dinner tables, it is difficult to imagine that their lives will not worsen over time. It is sobering to reflect on the fact that factory farms emerged and grew during the modern era of anti-cruelty legislation.

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<sup>10</sup> Cal. Sec’y of State, Proposition 2 (2008) (to be codified as CAL. HEALTH & SAFETY CODE § 25990 et seq.), *available at* <http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop2>.