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WHY IS IT A CRIME TO STOMP ON A GOLDFISH? — HARM, VICTIMHOOD AND THE STRUCTURE OF ANTI-CRUELTY OFFENSES

*Luis E. Chiesa**

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INTRODUCTION

Animal cruelty is considered a crime in all fifty states, the District of Columbia, Puerto Rico and the Virgin Islands.¹ Although the punishment for abusing animals differs widely among jurisdictions, all but five states make it a felony offense.² Some states, like New York, only make it a felony if the acts of cruelty are performed on a *companion* animal.³ Others, like Pennsylvania, aggravate punishment if harm is caused to a dog, cat or zoo animal.⁴ The criminalization of cruelty to animals is by no means an American phenomenon. Comprehensive anti-cruelty legislation has been adopted in many countries, including the United Kingdom, Holland, Australia and Argentina, to name a few.⁵

Even though most countries seem to believe that it is desirable to criminalize cruelty to animals, the reasons that justify prohibiting such conduct are unclear. Whereas some jurisdic-

¹ See The Humane Society of the United States, *State Animal Anti-Cruelty Law Provisions*, June 2008, http://www.hsus.org/web-files/PDF/state_cruelty_chart.pdf.

² *Id.* Animal cruelty is a misdemeanor in Arkansas, Idaho, Mississippi, North Dakota and South Dakota. *Id.* It should be noted that Mississippi has a special statute making it a felony to engage in cruelty to livestock. MISS. CODE ANN. § 97-41-15 (2006). Companion animals and wildlife fall outside the purview of the law. *Id.* See *infra* note 81-82 and accompanying text (describing companion animals).

³ N.Y. AGRIC. & MKTS. LAW § 353-a(1) (McKinney 2004).

⁴ 18 PA. CONS. STAT. ANN. § 5511 (West 2000 & Supp. 2007).

⁵ For information on animal protection laws in these countries, see Law No. 14346, Sept. 27, 1954 (Arg.); Queensland Government, http://www.dpi.qld.gov.au/cps/rde/dpi/hs.xsl/27_10422_ENA_HTML.htm (last visited Oct. 31, 2008) (providing links to various Australian state's or territory's animal welfare legislation); Consulate General of New York, <http://www.cgny.org/article.asp?articleref=AR00000200EN> (last visited Oct. 31, 2008) (describing the Netherland's 1992 Animal Health and Welfare Act); Animal Welfare Act, 2006, c. 45 (Eng.) (enacting animal welfare legislation in the United Kingdom).

tions seem partially motivated to enact the statutes because people who harm animals are more likely to inflict suffering on human beings, others seem to have been moved into action by a deeply felt conviction that inflicting harm on a sentient being is morally wrong. Moreover, some state laws are drafted in a manner that suggests that one of the preeminent reasons for adopting such legislation was the protection of property.

Ascertaining the reasons that justify punishing people for engaging in acts of cruelty against animals is not merely of theoretical concern. As the recently decided case of *People v. García*⁶ demonstrates, it is difficult, if not impossible, to determine the proper scope of anti-cruelty statutes without first answering the question of why it is that such conduct is a crime in the first place. In *García*, the Appellate Division of the Supreme Court of New York had to determine whether the defendant's act of stomping on a pet goldfish, in the presence of Juan, the nine year old custodian of the fish, constituted a felony.⁷ In order to do so, the court needed to decide whether instantaneously killing a fish by stepping on him constituted an act of "aggravated cruelty."⁸

Since the fish died instantly, the defendant contended that he did not suffer extreme pain and that his death was caused without special depravity or sadism.⁹ Thus, he asserted that the killing was not carried out with a heightened level of cruelty.¹⁰ The court rejected the defendant's contention by pointing out that, in view of the legislative history of the statute, whether an act demonstrates aggravated cruelty depends on "the state of mind of the perpetrator."¹¹ The court's holding also seemed to be heavily influenced by the fact that the killing of a household pet in front of a child constitutes a "sadistic and depraved act" be-

⁶ 812 N.Y.S.2d 66 (App. Div. 2006).

⁷ *Id.* at 69-71.

⁸ *Id.*

⁹ *Id.* at 71.

¹⁰ *Id.*

¹¹ *Id.*

cause it is intended to “inflict[] emotional pain on . . . the boy.”¹²

By concluding that a finding of aggravated cruelty depends on whether the actor intended to make the owner of the animal suffer,¹³ the court suggests the purpose of anti-cruelty statutes is to deter people from engaging in acts that cause emotional harm to human beings and not protecting animals from unjustifiable inflictions of pain. Thus, according to *García*, the real victims in these cases are not the animals who are being mistreated, but the humans who suffer when living creatures are harmed.

This article will show the court’s reasoning in *García* cannot withstand careful scrutiny. Concluding that anti-cruelty statutes were enacted for reasons other than protecting animals from the unwarranted infliction of pain is in tension with basic criminal law principles. Furthermore, the best way to account for the most salient features of anti-cruelty statutes is by acknowledging that the victims to be protected by the enactment of such laws are animals, not human beings.

Part I will provide a brief recount of the history of Anglo-American statutes prohibiting harm to animals. This historical analysis will show that many of these statutes were originally enacted as a way to protect private property. However, it will also reveal that there has been a marked trend, especially in recent times, to punish animal cruelty regardless, and sometimes despite, the property interests involved.

In Part II, the notions of victimhood, consent and harm will be explored in order to lay the groundwork for the claims that will be put forth in the remainder of the article. It is difficult to have a meaningful discussion about the interest the law seeks to protect by criminalizing cruelty to animals without first understanding the intricate interrelationship that exists between these concepts. In light of the issues raised by animal cruelty statutes, particular attention will be paid to discussing John

¹² *People v. García*, 777 N.Y.S.2d 846, 852 (Sup. Ct. 2004) (Trial court description of defendant’s act.).

¹³ *People v. García*, 812 N.Y.S.2d 66, 71 (App. Div. 2006).

Stuart Mill's and H. L. A. Hart's conception of the "harm principle." The legitimacy of enacting victimless crimes and the ways in which consent can negate both harm and victimhood will also be considered.

Part III will examine five different theories advanced to explain the interest society seeks to promote by punishing acts that are harmful to animals, namely: (1) protection of property, (2) protection against the infliction of emotional harm to those who have ties to the injured animal, (3) prevention of future harm to humans, (4) enforcement of a moral principle, and (5) protection of the animals themselves.

Part IV will explain why it is not necessarily the case, as some animal law scholars have argued, that because animal cruelty statutes allow for the infliction of harm to animals as a result of hunting, scientific activities and farming, the interest primarily sought to be protected by these laws is something other than the protection of animals. Although seductive at first glance, this argument is ultimately flawed because it is premised on a misunderstanding of the structure of criminal offenses in general and of anti-cruelty statutes in particular. Properly understood, the existence of privileges that allow people to infringe the prima facie norm against harming animals merely reveals society's belief (right or wrong) that countervailing reasons justify harming the interest sought to be protected. However, this does not mean the prohibitory norm was not really designed to protect animals in the first place.¹⁴

In conclusion, this article will argue society has decided to criminalize harm to animals primarily out of concern for the wellbeing of such creatures, not because doing so furthers some

¹⁴ In criminal law terms, this can be restated in the following manner: the existence of a justification (i.e. self-defense or choice of evils) provides the actor with reasons that allow him to infringe the prima facie norm against engaging in such conduct (i.e. the "offense"). This does not mean, however, that the existence of a justification (self-defense in a homicide case, scientific tests in an animal cruelty case) *cancel*s the reasons the offense provides us for not engaging in the conduct (protecting human life in homicide, protecting animals [arguably] in animal cruelty laws). See generally John Gardner, *Fletcher on Offences and Defences*, 39 TULSA L. REV. 817 (2004).

other human interest. Finally, the court's analysis in *People v. García* will be reexamined in light of the conclusions advanced in this article.

I. ANIMALS AND THE CRIMINAL LAW: HISTORY AND CONTRADICTIONS

The first statute criminalizing abusive conduct towards animals was enacted in Great Britain in 1822. The law, commonly known as "Martin's Act," made it a crime to cruelly beat or otherwise mistreat horses, mules, cows, sheep or other cattle.¹⁵ At that time, cruelty to animals did not constitute an indictable offense at common law.¹⁶ Prior to the enactment of Martin's Act, cruelty to animals was only deemed criminal if it satisfied the elements of some other offense made punishable at common law, such as breaches of the peace or malicious mischief.¹⁷ By adopting this statute, the English Parliament filled this perceived gap in the law, representing a substantial shift in the state of animal cruelty law. Whereas at common law, acts that inflicted unjustifiable pain on animals were considered legal wrongs only if the creature harmed was the property of another, after the passage of Martin's Act such conduct was a crime even when the injured animal was not owned by anyone.¹⁸

In the United States, as in England, mistreatment of animals was first made a crime through legislation. However, in contrast with the early statutes adopted in Great Britain, some of the anti-cruelty laws initially enacted in America only made it a criminal offense for someone to engage in abusive acts against animals owned by another person. For example, an 1846 Vermont statute made it a crime to "willfully and maliciously kill, wound, maim or disfigure any horse, or horses, or horse kind,

¹⁵ David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1993 DET. C. L. REV. 1 (discussing Martin's Act).

¹⁶ *State v. Bruner*, 12 N.E. 103, 104 (Ind. 1887).

¹⁷ *Id.* See also *Republica v. Teischer*, 1 Dall. 335 (Pa. 1788).

¹⁸ Favre & Tsang, *supra* note 15, at 4.

cattle, sheep or swine, *of another person*.”¹⁹ By limiting the scope of the prohibition to acts that cause harm to animals belonging to someone else, the Vermont General Assembly was making it clear that the purpose of the statute was to protect property rights, not animals. Furthermore, by only punishing cruelty against animals of commercial value, the legislature revealed that its preeminent reason for prohibiting the conduct was to proscribe acts that were perceived to adversely affect important economic interests.²⁰

Not all anti-cruelty laws adopted in America during the nineteenth century were solely inspired by an interest to protect property rights. Some early statutes criminalized the malicious mistreatment of animals regardless of whether they were the property of someone else. For instance, an 1829 New York law made it a crime to “maliciously and cruelly beat or torture any horse, ox or other cattle, or any sheep, *whether belonging to himself or another*.”²¹ By making the ownership question irrelevant, this law signified an important change in the legal discourse undergirding the anti-cruelty movement. Whereas laws like the 1846 Vermont statute clearly regarded the owner of the animal as the victim of the offense, statutes like the 1829 New York law seemed to turn this conception of anti-cruelty legislation on its head by implying the animal, not the owner, was the legally protected interest.

It should be noted, however, that the 1829 New York law only criminalized abusive conduct towards commercially valuable animals. This brings to light a tension in anti-cruelty statutes that remains unresolved to this day. It is not easy to reconcile the status of animals as victims with the idea that only commercially valuable creatures are worthy of protection from wanton acts of cruelty. If the purpose of prohibiting the conduct is to protect animals from the unjustifiable infliction of pain, it

¹⁹ 1846 VT. ACTS & RESOLVES 34 (emphasis added).

²⁰ See generally Favre & Tsang, *supra* note 15.

²¹ N.Y. REV. STAT. tit. 6, 26 (1829) (emphasis added), available at <http://www.animallaw.info/historical/statutes/sthusny1829.htm>.

is difficult to understand why economic value should condition the scope of the statutes.

Unfortunately, albeit for different reasons, most modern anti-cruelty statutes are plagued by similar incongruities. While a majority of jurisdictions have expanded the scope of anti-cruelty statutes to encompass the protection of animals that are not generally considered to be of significant economic value,²² most state anti-cruelty statutes discriminate between those individuals who harm a domesticated or companion animal and those who injure non-domesticated animals.²³ Thus, the killing of a rodent with a mousetrap inside private property is generally not considered a crime.²⁴ However, causing the death of a pet hamster is.²⁵ Another salient feature of modern anti-cruelty statutes is the tendency to afford heightened legal protection to dogs and cats. In the State of Alabama, for example, engaging in acts of cruelty in the first degree towards a dog or cat is a felony.²⁶ Nonetheless, performing identical acts on horses, cows, rabbits, rodents or any other animal is merely a misdemeanor.²⁷

In view of these considerations, modern anti-cruelty statutes, much like their nineteenth century counterparts, are fraught with contradictions. On the one hand, the push to ex-

²² See, e.g., ARK. CODE ANN. § 5-62-102 (2005) (making it a crime to unjustifiably harm any animal in custody of a human being regardless of its economic value).

²³ See, e.g., N.Y. AGRIC. & MKTS. LAW §§ 332-378 (McKinney YEAR); N.Y. PENAL LAW § 130.2 (McKinney 2004). A couple of states have gone as far as arbitrarily excluding livestock from the definition of "animals" protected by their anti-cruelty laws. See, e.g., IOWA CODE ANN. § 717B.1(1)(a) (West 2003); UTAH CODE ANN. § 76-9-301(11)(b)(ii) (2003).

See Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69 (1999), available at <http://www.animallaw.info/articles/arus5animall69.htm> (last visited Oct. 20, 2008).

²⁴ See, e.g., WIS. STAT. ANN. § 951.06 (West 2005) (prohibiting cruelty to rodents except when poison is used on one's own premises and designed for the purpose of rodent or pest control).

²⁵ *Id.*

²⁶ ALA. CODE § 13A-11-241 (2008).

²⁷ ALA. CODE § 13A-11-14 (LexisNexis 2005).

pand the number of animals protected by anti-cruelty statutes and the increasing tendency to protect animals irrespective of questions of ownership suggests that the purpose of adopting these laws is to safeguard animals from unnecessary suffering. On the other hand, the different treatment that non-companion animals receive as opposed to domesticated creatures indicates that the aim of these laws is something other than the protection of animals from harm. If the objective of anti-cruelty statutes is to keep animals free from unnecessary suffering, why should it matter whether the animal is domesticated? A rodent killed by a mousetrap feels as much pain as a pet hamster killed in a similar manner. However, only harm to the latter is deemed criminal under the typical anti-cruelty law.²⁸

New York's current statute prohibiting abusive conduct towards animals, commonly known as "Buster's Law," exemplifies many of the contradictions that have been described here.²⁹ For starters, even though it is considered a crime to perform acts of cruelty against any animal, it is only a felony to engage in aggravated cruelty towards a "companion animal."³⁰ Moreover, Buster's Law contains an exemption that allows people to engage in harmful acts against animals during the course of several activities, such as fishing and hunting.³¹ As a result of this provision, the killing of a trout during a recreational fishing trip does not constitute a punishable crime, whereas the killing of a pet goldfish does. In light of these considerations, it is unclear whether the chief purpose of Buster's Law is to protect animals from the unjustifiable infliction of pain or to deter people from engaging in acts that harm individuals with strong emotional ties to a particular animal or animals.

Unsurprisingly, in *People v. García*, the Appellate Division of the Supreme Court of New York struggled to come to grips with the conflicting rationales that seem to have underpinned

²⁸ See *supra* notes 24-25 and accompanying text.

²⁹ N.Y. AGRIC. & MKTS. LAW § 353-a(1) (McKinney 2004).

³⁰ *Id.*

³¹ *Id.*

the adoption of Buster's Law in particular and the enactment of anti-cruelty statutes in general.³² While on several occasions the court seemed to suggest that the victim of the offense was the boy who suffered the loss of his beloved pet, on other occasions it appeared to suggest that the real victim was the fish who was unjustifiably harmed by the defendant.³³ Complicating the matter is the fact that the court's ruling was also influenced by the contention that cruelty to animals should be prohibited because "man's inhumanity to man often begins with inhumanity to those creatures that have formed particularly close relationships with mankind."³⁴ Consequently, the court in *García* elaborated three distinct (and sometimes conflicting) theories of the harm that is sought to be prevented by anti-cruelty statutes: (1) harm to those who have developed emotional ties to the animal, (2) harm to the animal, and (3) the possibility of future harm to humans on the basis of a correlation between violence against animals and violence against people.³⁵

The purpose of the remainder of this article is to evaluate which of these differing conceptions of anti-cruelty statutes better explains and justifies our practices of blaming and punishing people for engaging in abusive conduct against animals. Before doing so, however, it is necessary to briefly examine the notions of victimhood, consent and harm.

II. VICTIMHOOD, CONSENT AND HARM

A. Victimhood

1. Preliminary Considerations

Generally speaking, a victim is a party against whom a per-

³² *People v. García*, 812 N.Y.S.2d 66, 68, 69-71 (App. Div. 2006).

³³ *Id.* at 69-71.

³⁴ *Id.* at 68 (citing N.Y. Assembly Memo in Support of 1999 N.Y. Sess. Laws 1585).

³⁵ *Id.* at 69-71.

son has committed a crime.³⁶ Therefore, the notions of “victimhood” and harm are intertwined. Someone is considered a victim only if he has been harmed by another person. Usually, criminal statutes prohibit conduct that causes harm to some important interest of the victim. Thus, the typical penal code contains sections that prohibit “crimes against the person,” “crimes against property,” “crimes against sexual autonomy,” and “crimes against liberty.” In each of these instances, a crime is committed when someone unjustifiably interferes with the fundamental interests of another person. In the crime of theft, for example, the offender unlawfully interferes with someone else’s right to private property. When someone commits homicide, he is unjustifiably interfering with the victim’s right to life. “In the case of rape, . . . the [perpetrator] seeks pleasure by violating the victim’s fundamental right to decide how and when [he or]she wants to engage in sexual intercourse.”³⁷

It should be noted, however, that there are many crimes whose consummation does not entail causing harm to a victim. Most drug possession offenses represent paradigmatic examples of these types of crimes. Take, for example, the offense of possessing marijuana for personal consumption. Note that this conduct in no way interferes with another person’s fundamental interests. The person who commits this offense has not denied the value of someone else’s life, nor has he interfered with the rights of others. Thus, there is no victim whose interests are vindicated by punishing the offender.³⁸ The perpetrator in these cases has violated a norm, to be sure, but in doing so he or she has not victimized anyone.

When, as in the case of drug possession offenses, the perpetrator’s criminal conduct does not interfere with the interests of another person, he is said to have engaged in a “victimless

³⁶ MARKUS DIRK DUBBER, *VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS’ RIGHTS* 158 (2002).

³⁷ Luis E. Chiesa, *Taking Victims Seriously: A Dworkinian Theory of Punishment*, 76 *REV. JUR. U.P.R.* 117, 125 (2007).

³⁸ *Id.*

crime.” Additional examples of offenses traditionally regarded as victimless crimes are prostitution, driving while intoxicated, and engaging in consensual sodomy.

The government may have various reasons for prohibiting victimless crimes. Sometimes these types of offenses are created as a way of enforcing moral principles. This is most often the case when the state prohibits certain types of consensual sexual conduct. The criminalization of consensual sodomy constitutes a prime example. Even though engaging in such conduct harms neither the persons who perform the act nor third parties, it has been prohibited because many individuals consider sodomy to be an act that contravenes their religious and moral beliefs.³⁹

Occasionally a state decides to create a victimless crime as a way to deter people from engaging in acts that may harm someone in the future. This tends to be the purpose of prohibiting the act of driving under the influence of intoxicants. Although driving while intoxicated is not harmful *per se*, those who engage in such conduct are more likely to injure someone than those who do not. In these cases, the objective of the criminal sanction shifts from exacting retribution for a harm done to preventatively neutralizing dangerous individuals before they engage in harmful conduct.

Sometimes, as in the case of environmental crimes, it is unclear whether the government has created a victimless crime. Consider the offense of knowingly releasing hazardous pollutants into the air.⁴⁰ Engaging in this conduct does not directly interfere with the interests of others. Thus, at first glance, this offense seems to constitute a victimless crime. However, the aggregate effect of pollution will almost certainly result in harm to our health. Hence, in the long run, we are all going to be victims of the pernicious consequences of this conduct. Due to the resulting future harm, it can be coherently argued that the offense of releasing a hazardous pollutant into the air is not a victimless

³⁹ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴⁰ 42 U.S.C.A. § 7401 (West 2003).

crime despite the fact that such conduct does not directly harm anyone at the time the act occurs.

The legitimacy of creating victimless crimes has been increasingly called into question. As time has passed, societies have become more democratic and government less authoritarian, and the focus of the criminal law has shifted from the safeguarding of the State to the protection of persons.⁴¹ Once it is accepted that the chief purpose of penal statutes is to vindicate the rights of those that have been harmed by the perpetrator's harmful conduct, it is difficult to justify punishing people for engaging in acts that do not interfere with the rights of individuals. Taking this contention seriously should lead us to question the legitimacy of creating victimless crimes, particularly when the only reason for doing so is to enforce a particular conception of morality by way of the criminal law.

This is not to say, however, that prohibiting conduct that does not cause harm to a victim is necessarily illegitimate. No one seriously believes, for example, that criminalizing the act of driving while intoxicated is injudicious or unjustifiable. Although such conduct does not entail interference with the interests of others, the undeniable dangerousness of the act seems to provide a more than adequate reason for its prohibition. Nevertheless, in the absence of compelling reasons that point to the contrary, victimless crimes are generally considered to be at least *prima facie* or presumptively illegitimate. However, this presumption of illegitimacy can be rebutted by demonstrating that there are sound reasons for prohibiting the conduct.

2. Victimhood and Anti-Cruelty Statutes

It is unclear whether anti-cruelty statutes prohibit victimless crimes. If one considers that the chief purpose of these laws is to protect property rights, then it should follow that there is a legally protected victim—the owner of the harmed creature. If conceived in this manner, animal cruelty statutes would be con-

⁴¹ DUBBER, *supra* note 36, at 152.

sidered a species of the more general crime of criminal damages.

On the other hand, if one conceives laws criminalizing the mistreatment of animals as enactments that purport to deter people from inflicting suffering on those who have strong emotional ties to the creatures, the victim of the offense would be the person whose sensibilities were affected by the act of the perpetrator. This conception of victimhood seemed to partially inform the reasoning of the court in *People v. García*.⁴² By implying that the defendant's act revealed a heightened level of cruelty because the killing of the goldfish caused Juan much suffering, the court seemed to be suggesting the victim in these cases is the individual who suffers when someone harms a creature that he holds dear.⁴³

It can also be argued that cruelty to animals is a crime because those who mistreat animals are more likely to harm human beings than those who do not. If this were the case, the purpose of punishing those who unjustifiably make animals suffer would be to neutralize dangerous individuals before they engage in conduct that could harm a human being. Under this conception, cruelty to animals would constitute a victimless crime, since the conduct is considered criminal in light of the fact that it reveals the dangerous nature of the offender and not because the act interferes with the rights of persons. In *People v. García*, the court seemed to have had this conception of anti-cruelty statutes in mind when it asserted that these laws were enacted in recognition that "man's inhumanity to man often begins with inhumanity to [animals]."⁴⁴

Legislation proscribing the infliction of harm on animals can also be defended on the grounds that a majority of the population considers such conduct to be immoral.⁴⁵ If the perceived immorality of unnecessarily harming animals is the

⁴² 812 N.Y.S.2d 66 (App. Div. 2006).

⁴³ *Id.* at 69-71.

⁴⁴ *García*, 812 N.Y.S.2d at 68 (citing N.Y. Assembly Memo in Support of 1999 N.Y. Sess. Laws 1585 (McKinney)).

⁴⁵ PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 17 (1965).

sole basis for criminalization of animal cruelty, offenses prohibiting such conduct would clearly constitute victimless crimes.

Finally, it might be argued that the purpose of laws that make cruelty to animals a crime is to protect the creatures from unjustifiable inflictions of pain. Under this conception of anti-cruelty statutes the victim of the offense is the animal harmed by the wrongful conduct of the perpetrator. This approach necessarily requires that we interpret the notion of "victimhood" in a broad manner so as to allow for non-humans to qualify as victims. Some criminal law theorists object to this expansion of the concept noting that only autonomous beings can have their rights violated in such a manner that it is appropriate to label them as "victims."⁴⁶

B. Consent

1. Preliminary Considerations

The notions of consent and victimless crimes are intertwined. As a general rule, someone is considered a victim only when he has been forced to do something that he would otherwise not wish to do. If the person consents to the act that the alleged offender wanted him to perform, we would be hard-pressed to believe that he was victimized by the offender. Therefore, a victim's consent changes what initially appears to be an unjustifiable act of forceful subjugation into a permissible act of self-determination.⁴⁷ As Professor Dubber aptly points out: "By consenting, the apparent victim rebuts the presumption of victimhood. He indicates that another's act that facially satisfies the elements of a crime does no harm to his autonomy in fact. In the light of consent, an apparent act of heteronomy is revealed as an act of autonomy."⁴⁸ The transformative effect of consent is

⁴⁶ DUBBER, *supra* note 35, at 257-59.

⁴⁷ *Id.*

⁴⁸ *Id.* at 264.

apparent in cases involving the alleged commission of a rape. In these cases, the consent of the victim transforms what would otherwise be considered a deplorable act of sexual imposition into an unobjectionable act of lovemaking.⁴⁹ By consenting to the conduct the person is making a conscious decision about what types of acts make his life a life worth living. Therefore, in the absence of coercion or of legal capacity to acquiesce to the act, the consenting victim is suffering no interference with his rights that need to be vindicated by the infliction of punishment.⁵⁰ Upon closer inspection, it turns out that punishing someone for performing an act to which the alleged victim consented is tantamount to punishing someone for committing a victimless crime. The reason for this is that if the victim consents to the act, he is not really a victim at all. Consequently, punishing the supposed offender for engaging in the consented act is as objectionable as inflicting punishment on a person who committed an act that did not cause harm to a victim.⁵¹

Despite the undeniable transformative effects of consent, courts have been slow to recognize the acquiescence of the victim as a defense to criminal liability. The reticence has been more palpable in cases involving the infliction of physical injury or death. Thus, courts have been reluctant to allow defendants to plead consent as a defense to the crime of assault.⁵² More controversially, many jurisdictions have refused to recognize an individual's informed consent to euthanasia as a defense to the crimes of murder and assisting in suicide.⁵³

Although courts have been generally unwilling to recognize the assent of the victim as a defense to a violent offense, consent

⁴⁹ See generally Heidi M. Hurd, *Blaming the Victim: A Response to the Proposal that Criminal Law Recognize a General Defense of Contributory Responsibility*, 8 BUFFALO CRIM. L. REV. 503, 504-505 (2005) (discussing the morally transformative nature of consent).

⁵⁰ *Id.*

⁵¹ Chiesa, *supra* note 37.

⁵² See, e.g., *People v. Gray*, 224 Cal. App. 2d 76, 79-80 (Dist. Ct. App. 1964).

⁵³ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997) (discussing state laws banning assisted suicide).

is widely accepted as a defense to crimes against property. It has consistently been held that taking property does not constitute theft if the owner of the item consented.⁵⁴ Similarly, a defendant cannot be found guilty of criminal mischief if the owner of the property consented to its damage or destruction. Furthermore, since the owner has the right to do what he wishes with his property, he cannot be convicted of committing the offense of criminal mischief if he decides to damage his own property.⁵⁵

2. Consent and Anti-Cruelty Statutes

The consent doctrine raises two important issues in the context of anti-cruelty statutes. The first matter warranting consideration is whether an animal owner's decision to inflict pain on a creature that rightfully belongs to him is (or should be) considered criminal. Also meriting consideration is whether someone who harms or kills an animal is (or should be) guilty of a crime if the owner of the creature consented to the act. The way in which we approach these issues will depend on the conception of anti-cruelty statutes that we adopt. On the one hand, the owner's decision to allow his animal to be harmed or killed should not generate criminal liability if one considers that the purpose of anti-cruelty statutes is to protect property rights. On the other hand, if one believes that the purpose of proscribing animal abuse is to protect animals from unjustifiable inflictions of pain, the owner's consent to the harmful conduct should be irrelevant.

⁵⁴ See, e.g., *People v. Smith*, 120 Cal. Rptr. 2d 831 (Ct. App. 2002); *State v. Fahlk*, 524 N.W.2d 39 (Neb. 1994).

⁵⁵ N.Y. PENAL LAW § 145.00 (McKinney 1999).

C. The Harm Principle

1. Preliminary Considerations

Closely related to the question of whether it is legitimate to punish people for committing a victimless crime is the doctrine that has come to be called the "harm principle." First elaborated by the famous philosopher John Stuart Mill, this principle has been employed as a means to limit the government's power to criminalize conduct. According to his formulation of the doctrine, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."⁵⁶ As a result of this, Mill concluded that the government could not legitimately prohibit an act solely to promote the physical or moral wellbeing of the person engaging in the conduct.⁵⁷ Furthermore, he asserted that the fact that most people consider the performance of a particular act to be wrong or unwise is not a sufficient reason to warrant criminalizing the conduct.⁵⁸

Mill's thesis was later echoed and further developed by the legal theorist H. L. A. Hart. Hart believed that to prohibit conduct merely because it is considered immoral is illegitimate because doing so would contradict fundamental liberty interests.⁵⁹ He also stated that the distress people feel when others conduct themselves in what they consider to be an immoral fashion cannot constitute a punishable harm, since this would be "tantamount to punishing them simply because others object to what they do; and the only liberty that could coexist with this extension of the utilitarian principle [{"harm principle"}] is liberty to do those things to which no one seriously objects. Such liberty plainly is quite nugatory."⁶⁰ In other words, according to Hart,

⁵⁶ JOHN STUART MILL, ON LIBERTY 10-11 (Elizabeth Rapaport ed., Hackett 1978).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ H. L. A. HART, LAW, LIBERTY AND MORALITY 47 (Stanford Univ. Press 1963).

⁶⁰ *Id.*

criminalizing acts because of their immorality is illegitimate because it assigns only trifling importance to the fundamental right of individual autonomy.⁶¹

One important consequence of the harm principle is that it casts doubt on the propriety of criminalizing an act merely because of its dangerousness. Prohibiting such conduct is problematic because “[t]hese offenses do not proscribe harm itself, but rather the *possibility* of harm—a possibility that need not (and typically does not) materialize when the offense is committed.”⁶² There are myriad examples of non-harmful acts that are considered criminal solely because they create risks of harms. Perhaps the most prevalent one is the criminalization of the unauthorized possession of a weapon. Although the mere possession of a weapon is not harmful to anyone, it presumably increases the risk that the possessor might use it to injure someone. The justifiability of making use of this type of offense as a way of neutralizing dangerous offenders before they engage in harmful conduct is unclear. It is safe to say, however, that the more concrete the risk sought to be prevented by the offense is, the more justifiable it is to criminalize the conduct. Conversely, as the inherent dangerousness of the conduct decreases, the reasons in favor of criminalizing the act get progressively weaker. Compare, for example, the relative merits of the decision to criminalize the possession of tools commonly used for criminal purposes with the prohibition of the possession of weapons. Whereas most people seem to believe that criminalizing the latter is justifiable, there are considerable doubts with regards to whether prohibiting the former is proper. The key to explaining this distinction lies in the inherent dangerousness of the items involved. Thus, it has been asserted that an “account of the difference between weapons . . . and burglary tools . . . is that the former are dangerous or thought to be dangerous to all

⁶¹ Luis E. Chiesa, *Normative Gaps in the Criminal Law: A Reasons Theory of Wrongdoing*, 10 *NEW CRIM. L. REV.* 102, 131 (2007).

⁶² Douglas Husak, *Crimes Outside the Core*, 39 *TULSA L. REV.* 755, 771 (2004) (emphasis added).

those who might come in contact with them [whereas the latter are not].”⁶³ Since weapons pose a more serious risk of causing grave harm to others than tools, the decision to criminalize their possession is more defensible than the choice to prohibit possessing tools.

While the harm principle initially afforded courts and commentators with an effective tool with which to condemn the enactment of laws that were adopted to enforce public morality, the principle has been criticized because of the malleability and vagueness of the concept of “harm.”⁶⁴ Many statutes that appear to prohibit conduct solely as a way of enforcing moral principles can be easily recast as enactments that aim to prevent the causation of indirect harm. Thus, Professor Catharine MacKinnon has argued that governmental regulation of pornography, once thought to be at odds with the harm principle, can be justified on morally neutral grounds because it is harmful to women since it perpetuates sexism, promotes the subjugation of women and fosters inequality.⁶⁵ In a similar fashion, former New York City Mayor Rudolph Giuliani justified his crackdown on sex shops and peep shows in Times Square by focusing on the indirect societal harm that they cause, not on their immorality.⁶⁶

Despite its shortcomings, the harm principle serves to limit the government’s power of criminalization by requiring that the state provide reasons for prohibiting conduct other than the fact that it is generally considered to be immoral. In some cases, the state can justify prohibiting conduct by pointing to its evident

⁶³ GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 200 (Oxford Univ. Press 2000).

⁶⁴ See generally Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

⁶⁵ Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 7 (1985).

⁶⁶ See Mike Allen, *Giuliani Tells Sex-Based Shops That the End is Drawing Near*, N.Y. TIMES, July 20, 1998, available at <http://query.nytimes.com/gst/fullpage.html?res=9406E4D61030F933A15754C0A96E958260&sec=&spon=> (stating that Mayor Giuliani believed sex-based shops to be “corrosive institutions’ that destroy neighborhoods and discourage what he calls ‘legitimate business.’”).

dangerousness (drunk driving, for example) or by demonstrating that the long term benefits of proscribing what would otherwise appear to be an innocuous act justifies criminalizing such conduct (banning certain pornographic materials as a way of curbing sexism and discrimination, for example). However, the government will occasionally not be able to provide reasons for criminalizing conduct besides its perceived immorality. The prohibition of certain sexual acts provides a case in point. In the landmark decision of *Lawrence v. Texas*⁶⁷, for example, the United States Supreme Court had to decide whether a law making consensual sodomy a crime violated the liberty interests protected by the Fourteenth Amendment's Due Process Clause.⁶⁸ In language that closely mirrors Mill's formulation of the harm principle, the Court justified striking down the statute by pointing out that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."⁶⁹

2. The Harm Principle and Anti-Cruelty Statutes

The famous English jurist Lord Devlin once argued that anti-cruelty statutes were solely enacted as a way of publicly enforcing the widely shared view that unjustifiably inflicting pain on an animal is immoral.⁷⁰ If Lord Devlin's characterization of such laws is correct, criminalizing the mistreatment of animals would seem to violate the harm principle. This would cast doubt on the legitimacy of enacting such legislation.

Lord Devlin's conception of anti-cruelty statutes is by no means universally held. In a famous reply to Devlin, H. L. A. Hart pointed out that:

It is too often assumed that if a law is not designed to protect

⁶⁷ 559 U.S. 558 (2003).

⁶⁸ *Id.*

⁶⁹ *Id.* at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986)).

⁷⁰ DEVLIN, *supra* note 45 at 17.

one man from another its only rationale can be that it is designed to punish moral wickedness or, in Lord Devlin's words, "to enforce a moral principle." Thus it is often urged that statutes punishing cruelty to animals can only be explained in that way. But it is certainly intelligible, both as an account of the original motives inspiring such legislation and as the specification of an aim widely held to be worth pursuing, to say that the law is here concerned with the *suffering*, albeit only of animals, rather than with the immorality of torturing them. Certainly no one who supports this use of the criminal law is thereby bound in consistency to admit that the law may punish forms of immorality which involve no suffering to any sentient being.⁷¹

Thus, anti-cruelty legislation does not violate the harm principle, as long as we interpret the principle as one that allows for the justifiable imposition of punishment whenever the actor's conduct causes harm to *another sentient being*, that is, a human or animal.

III. THE INTERESTS SOUGHT TO BE PROTECTED BY ANTI-CRUELTY STATUTES: FIVE PLAUSIBLE THEORIES

A. Protection of Property

1. The Case in Favor of Conceiving Anti-Cruelty Statutes as a Way of Protecting Property Interests

Professor Gary Francione recently stated that, "as far as the law is concerned, . . . animals are nothing more than commodities."⁷² This has led him and many others⁷³ to conclude that, for all relevant legal purposes, animals are treated as

⁷¹ HART, *supra* note 59, at 34 (footnote omitted).

⁷² Gary L. Francione, *Reflections on Animals, Property, and the Law and Rain Without Thunder*, 70 LAW AND CONTEMP. PROBS. 9, 9 (2007).

⁷³ See, e.g., David N. Cassuto, *Bred Meat: The Cultural Foundation of the Factory Farm*, 70 LAW AND CONTEMP. PROBS. 59, 77 (2007).

property. As a result, this tempts the conclusion that the purpose of anti-cruelty statutes is to protect humans' property interests in animals.

The contention that the purpose of prohibiting abusive conduct against animals is to protect property rights finds some historical support. As was discussed in Part I of this article, cruelty to animals was not a crime at common law.⁷⁴ At the time, killing or harming an animal would be considered an offense only if doing so satisfied some other crime punishable at common law.⁷⁵ If any such offense were to be infringed, it would typically be a crime against property such as trespass or criminal mischief. Similarly, the first American anti-cruelty statute only made it punishable for someone to mistreat animals belonging to another person.⁷⁶ Therefore, the owner of the creature was originally free to inflict as much pain on the animal as he saw fit.

Recent enactments have generally broadened the scope of anti-cruelty offenses to nominally encompass the protection of most animals, including those that are not owned by anyone.⁷⁷ This might suggest that, contrary to their nineteenth century counterparts, modern anti-cruelty statutes protect interests other than property. It should be noted, however, that some aspects of these laws do seem to perpetuate the notion that anti-cruelty statutes are enacted primarily as a way of protecting private property. Consider, for example, how the protection afforded to certain animals, such as fish or birds, depends on whether they belong to someone or not. Most statutes generally authorize people to harm fish or birds if they do so while fishing or hunting.⁷⁸ Since no one has a claim of right over these animals while they are living in the wild, at least until they catch, trap or kill them, harming them does not affect any property interest. However, the legal protection afforded to these creatures

⁷⁴ See *supra* Part I.

⁷⁵ See *supra* Part I.

⁷⁶ See *supra* note 14 and accompanying text.

⁷⁷ See, e.g., N.Y. AGRIC. & MKTS. LAW § 353-a(1) (McKinney 2004).

⁷⁸ See, e.g., IOWA CODE ANN. § 717B.2(5) (West 2003).

substantially increases once the animal belongs to someone. Thus, the acquisition of property rights over these kinds of animals has a significant transformative effect. Before they become private property, many people are free to harm them. However, once someone has a claim of right over the creature, no one, with the possible exception of the owner, can lawfully mistreat the animal.

It is worth mentioning that if the intended protection of anti-cruelty statutes is a property interest, the victim of such crimes would be the owner of the animal, not the creature itself. If conceived in this manner, these statutes should not be regarded as enacting a victimless crime. Furthermore, if the reason for criminalizing the mistreatment of animals is to avoid harm to property, the enactment of anti-cruelty statutes also satisfies the harm principle.

2. The Case Against Conceiving Anti-Cruelty Statutes as a Way of Protecting Property Interests

Even though a property-based conception of anti-cruelty statutes adequately explains certain features of these laws, it fails to account for some of their most distinctive characteristics. Consider the significant protection given to dogs and cats in most jurisdictions (mistreating a dog or cat is considered a felony in many states, whereas mistreating some other animal is not).⁷⁹ The increased degree of protection provided to these animals does not depend on whether someone owns them. Thus, torturing a stray dog is considered a felony in most states regardless of whether someone has a claim of right over the animal.⁸⁰

Property-based conceptions of anti-cruelty laws are also difficult to reconcile with statutes that make it a crime to encourage dog or cockfighting. Such conduct is considered an offense

⁷⁹ See *supra* note 18.

⁸⁰ *Id.*

in all fifty states.⁸¹ Interestingly, the act remains criminal even if the owners of the animals voluntarily decide to engage in the activity.⁸² Since these laws protect animals in circumstances in which doing so will be detrimental to the pecuniary interests of their owners, the protection conferred in this context is incompatible with the position that anti-cruelty statutes are primarily enacted as a way to advance property interests.

It should also be noted that every jurisdiction makes it criminal for the owner of a pet to mistreat his animal.⁸³ The adoption of this type of legislation is at odds with a property-based conception of anti-cruelty statutes because the unqualified protection afforded to pets against harmful acts of their owners is contrary to the general principle of property law that an owner has a right to do what he wishes to his property, including destroying or damaging it.

B. Protection Against Emotional Harm

1. The Case in Favor of Conceiving Anti-Cruelty Statutes as a Means of Protecting Humans Against the Infliction of Emotional Harm

It might be cogently argued that the chief purpose of anti-cruelty statutes is to prevent people from causing harm to persons with strong emotional ties to a mistreated animal. The “emotional harm” conception dovetails in several important respects with the property-based approach to animal cruelty laws.

⁸¹ 7 U.S.C.A. § 2156 (2006). See, e.g., N.Y. AGRIC. & MKTS. LAW § 351 (McKinney 2004 & Supp. 2007). The only U.S. jurisdiction in which cockfighting is not considered a crime is Puerto Rico. The reason for this seems to lie in the cultural and historical significance that cockfighting has for many people on the island, particularly those who are over sixty and live in rural areas. *Id.*

⁸² See, e.g., IOWA CODE ANN. § 717B.3.A(1) (West 2003) (stating that a person is guilty of animal torture, regardless of whether the person is the owner of the animal).

⁸³ For information on the animal cruelty laws in each state, see Michigan State University College of Law, <http://www.animallaw.info/statutes/topicstatutes/sttoac.htm> (last visited Oct. 31, 2008).

Since the owners of animals often develop strong emotional ties to their animals, they will typically be the ones who suffer the most when someone unjustifiably harms their pets. Ownership, however, is not necessarily determinative of whether someone has developed a close emotional relationship with the animal. One can easily imagine instances in which the owner of the creature has no affective attachment to his pet. By the same token, one can conceive many instances in which someone other than the owner has cultivated a close sentimental link with the animal. As a result, ownership is typically, though not necessarily, indicative of a significant emotional bond with the animal. However, under this conception of anti-cruelty statutes, the ultimate purpose of these laws is to protect people from suffering emotional harm, not to safeguard their property interests.

The emotional harm approach to animal cruelty laws is particularly apt for explaining the heightened level of legal protection that is traditionally afforded to companion animals. According to the American Society for the Prevention of Cruelty to Animals (ASPCA), companion animals are “domesticated or domestic-bred animals whose physical, emotional, behavioral and social needs can be readily met as companions in the home, or in close daily relationship with humans.”⁸⁴ This definition is similar to the ones adopted in the majority of jurisdictions in the United States.⁸⁵ Thus, by definition, companion animals are those creatures that are more likely to have close and significant ties with human beings.⁸⁶ Consequently, if one believes that the principal aim of anti-cruelty statutes is to prevent people from engaging in conduct that can sever the strong link that unites

⁸⁴ ASPCA Policies and Positions 2.2, (2008), http://www.asPCA.org/site/PageServer?pagename=pp_cn_definition (last visited Oct. 20, 2008).

⁸⁵ See, e.g., CONN. GEN. STAT. ANN. § 22-351a (West 2001 & Supp. 2007); 510 ILL. COMP. STAT. ANN. § 70/2.01-a (West 2004); MINN. STAT. ANN. §343.20 (West 2004); N.Y. AGRIC. & MKTS. LAW § 350 (McKinney 2004 & Supp. 2007).

⁸⁶ *People v. García*, 777 N.Y.S.2d 846, 851-52 (Sup. Ct. 2004) (stating that one of the reasons why a goldfish is a companion animal is because such pets are beloved by their owners and are not to be killed or eaten).

animals and humans, it makes sense to protect companion animals more than other creatures.

So conceived, animal-cruelty statutes would seem to satisfy the harm principle, for the principal reason that criminalizing the conduct would avoid emotional harm to others. Furthermore, these statutes would not create victimless crimes, since there is a victim whose interests are vindicated by punishing those who infringe the norm against harming animals—the human with close ties to the creature.

This appeared to be the conception of animal cruelty laws that the lower court had in mind in *García*, when it seemed to suggest that the defendant's actions evinced an increased degree of cruelty because they were calculated to inflict suffering on the person with the closest emotional ties to the pet goldfish—Juan.⁸⁷ By focusing on the impact that the perpetrator's conduct had on the boy instead of the harm that the act caused to the animal, the court was clearly implying that the principal aim of the statute is to prevent human suffering, not to protect animals from unjustifiable inflictions of pain.

2. The Case Against Conceiving Anti-Cruelty Statutes as a Means of Protecting Humans Against the Infliction of Emotional Harm

The proposition that the purpose of anti-cruelty statutes is to protect humans from emotional harm cannot be easily reconciled with the broad scope of typical animal cruelty laws. Take, for example, South Dakota's animal cruelty statute.⁸⁸ This law makes it a crime to harm any "mammal, bird, reptile, amphibian or fish"⁸⁹ by engaging in any "act or omission whereby unnecessary, unjustifiable or unreasonable physical pain or suffering is caused, permitted or allowed to continue including acts of muti-

⁸⁷ *People v. García*, 812 N.Y.S.2d 66, 71 (App. Div. 2006).

⁸⁸ S.D. CODIFIED LAWS § 9-29-11 (1995).

⁸⁹ § 40-1-1(2) (2002).

lation.”⁹⁰ The statute protects many animals, like reptiles and amphibians, that typically do not have close, daily relationships with humans.⁹¹ Giving legal protection to such animals is difficult to explain under an emotional harm approach to animal cruelty statutes. Furthermore, harming stray dogs or cats is considered a crime even if no one has developed a strong emotional bond with the animals. This is the case even if most or all members of the community despise the creature harmed. As far as the law is concerned, animals are deemed worthy of legal protection whether or not they are liked.

Finally, the emotional harm approach to animal cruelty statutes cannot satisfactorily account for the widespread prohibition of dog fighting and cockfighting.⁹² Most of the people who participate in this type of activity treat the animals involved either as a source of income or as entertainment. Moreover, they are evidently aware of the fact that many of the animals will suffer great pain and/or death as a result of the fights. Since the people involved in these sports treat the animals involved as disposable objects that exist solely to generate money or pleasure, it cannot be said that the principal reason for criminalizing dog or cock fighting is to prevent psychological harm to those who have developed close ties to the animals. In these cases conduct is made criminal, *despite* the fact that the people generally associated with these events do not suffer when the animals are in pain. Typically, the opposite seems to be true: they *enjoy* watching the creatures suffer.

⁹⁰ § 40-1-2.2 (2002).

⁹¹ § 40-1-1(2) (2002).

⁹² For a list of animal fighting statutes enacted in the United States, see Michigan State University College of Law, <http://www.animallaw.info/statutes/topicstatutes/sttoaf.htm> (last visited Oct.31, 2008).

C. Prevention of Future Harm to Humans

1. The Case in Favor of Conceiving Anti-Cruelty Statutes as a Means of Preventing Future Harm to Humans

Perhaps the mainstream belief with regard to animal cruelty statutes is that they are enacted as a way of identifying and neutralizing presumptively dangerous individuals before they engage in acts that are harmful to human beings.⁹³ The philosophical roots of the “future harm” view can be traced back to Immanuel Kant, who once famously stated, “he who is cruel to animals becomes hard also in his dealing with men. We can judge the heart of a man by his treatment of animals.”⁹⁴

Defenders of this approach to anti-cruelty statutes believe that criminalizing the mistreatment of animals is warranted because “[t]here is ample evidence to suggest that individuals who engage in acts of animal cruelty have a greater probability of committing acts of violence against people as compared to individuals who have no history of committing acts of violence against animals.”⁹⁵ This conception is so prevalent that many organizations devoted to the protection of animals have defended it in an effort to justify the enactment of broader anti-cruelty legislation. The First Strike campaign of the Humane Society constitutes one such example. The purpose of this program is to reduce animal abuse by “rais[ing] public and professional awareness about the connection between animal cruelty and other violent crime violence and to help communities identify some of the origins of violence, predict its patterns, and prevent its escalation.”⁹⁶

⁹³ See, e.g., *García v. People*, 812 N.Y.S.2d 66, 68 (App. Div. 2006) (stating the concern with the connection between animal abusers and violence towards humans as a reason for enacting anti-cruelty statutes).

⁹⁴ Immanuel Kant, *Duties in Regard to Animals*, in *ANIMAL RIGHTS AND HUMAN OBLIGATIONS* 23, 24 (Tom Regan & Peter Singer eds., 2d ed. 1989).

⁹⁵ Charlotte A. Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 *Animal L.* 1, 8 (1998).

⁹⁶ The Humane Society of the United States, *First Strike: The Connection Between*

There is significant evidence tending to demonstrate that a correlation between animal cruelty and interpersonal violence exists. Anecdotal confirmation of this link abounds. Some of the most famous serial killers, including Jeffrey Dahmer, the Son of Sam, the Boston Strangler and Ted Bundy had a history of abusing animals.⁹⁷ Empirical evidence also seems to substantiate the correlation. According to some studies, “animal abusers are five times more likely to commit violent crimes . . . [and] four times more likely to commit property crimes” than those who do not mistreat animals.⁹⁸

Adoption of the future harm conception of animal-cruelty statutes should lead to punishing only those acts showing a correlation to interpersonal violence. This might explicate why it is typically not considered criminal to harm animals during the course of certain activities, such as fishing, hunting and farming. Since there is no significant link between engaging in these activities and violence against people, those who believe that animal-cruelty statutes should be adopted as a way of preventing future harm to humans do not have legitimate reasons for punishing this conduct.

The *García* court expressly recognized that one of the considerations that motivated the adoption of New York’s anti-cruelty statute was the connection between animal abuse and violent crimes.⁹⁹ This was such a preeminent concern of lawmakers that then Governor Pataki defended the proposed amendments to the anti-cruelty statutes by pointing out that “gruesome acts [of torture endured by animals], coupled with recent studies that reveal a correlation between violence against animals and future acts of violence against humans, underscore

Animal Cruelty and Human Violence,
http://www.hsus.org/hsus_field/first_strike_the_connection_between_animal_cruelty_and_human_violence/ (last visited Oct. 15, 2008).

⁹⁷ Lacroix, *supra* note 95, at 8; Joseph G. Sauder, *Enacting and Enforcing Felony Animal Cruelty Laws to Prevent Violence Against Humans* 6 *Animal L.* 1, 14 n.114 (2000).

⁹⁸ Sauder, *supra* note 97, at 13.

⁹⁹ *García v. People*, 812 N.Y.S.2d 66, 68 (App. Div. 2006).

the need to enhance penalties for animal cruelty.”¹⁰⁰

2. The Case Against Conceiving Anti-Cruelty Statutes as a Means of Preventing Future Harm to Humans

According to the future harm conception of anti-cruelty statutes, the purpose of enacting laws criminalizing animal abuse is to identify dangerous individuals before they decide to harm a human being. If this were the case, the justifiability of adopting such laws would be questionable because doing so would violate the harm principle. Since the aim to prevent possible harm—future injury to humans—by criminalizing animal cruelty does not always transpire, it cannot be held that such conduct is prohibited because it causes direct harm to others, as the harm principle would require.

Furthermore, a legislature would be creating a victimless crime if it proscribed animal mistreatment solely because of its correlation with interpersonal violence. By ascertaining that the purpose of animal cruelty statutes is to avoid injury to a victim *in the future*, the legislature is implying that the perpetrator’s present conduct does not yet interfere with personal interests. As was previously discussed, the legitimacy of prohibiting conduct that does not violate the rights of a victim is unclear.¹⁰¹

The future harm conception of anti-cruelty statutes inevitably leads to shifting the focus of these laws from avoiding harm to animals to neutralizing presumptively dangerous individuals. Therefore, as one commentator has suggested, the decision to criminalize abusive treatment of animals as a way to prevent possible future harm to humans is grounded on the “recognition that the solution to a violent society does not lie in the characterization of the victim but in the characteristics of the offender.”¹⁰² This might explain why the *García* court suggested

¹⁰⁰ Jennifer S. Rosa, *Recent Development in New York Law*, 74 ST. JOHN’S L. REV. 287, 297 (2000) (quoting Governor George E. Pataki’s Approval Memorandum 3, A. 8338-A signed as Chapter 118, 222nd Legis. Sess. (June 28, 1999)).

¹⁰¹ See *supra* note 25 and accompanying text.

¹⁰² Lacroix, *supra* note 95, at 3.

that the key to determining whether the defendant should be convicted of a felony because his act evinced a heightened degree of cruelty required an examination of his state of mind instead of an assessment of the amount of pain inflicted on the pet goldfish.¹⁰³ If the principal purpose of anti-cruelty laws is to prevent future harm to humans, the gradation of punishment for animal abuse should be dependent on the perceived dangerousness of the offender and not on the actual anguish endured by the creature. This is somewhat counterintuitive. Why should a finding of aggravated cruelty depend on anything other than an evaluation of the degree and extent of the suffering of the victim?

It is also worth mentioning that the future harm conception of laws proscribing animal abuse cannot satisfactorily account for two distinctive features of modern anti-cruelty legislation, namely, the criminalization of negligent mistreatment of pets and the prohibition of cockfighting. Empirical studies demonstrate that there is a correlation between intentional acts of cruelty against animals and interpersonal violence.¹⁰⁴ Thus, researchers have been quick to point out that many murderers have a history of intentionally harming animals by, for example, setting them on fire.¹⁰⁵ However, no proven link exists between negligent mistreatment of pets and future acts of violence against humans.¹⁰⁶ The person who carelessly forgets to arrange to have her pet fed during a vacation is guilty of animal abuse, despite the fact that performing such conduct does not substantially increase the likelihood that the pet owner will harm a human being in the future.

Similarly, participating in cockfighting is a crime although

¹⁰³ Garcia, 812 N.Y.S.2d at 71.

¹⁰⁴ See *supra* note 60 and accompanying text.

¹⁰⁵ Sauder, *supra* note 97, at 14.

¹⁰⁶ Stephen R. Kellert & Alan R. Felthous, *Childhood Cruelty Toward Animals Among Criminals and Non-Criminals*, in *CRUELTY TO ANIMALS AND INTERPERSONAL VIOLENCE* 194, 208 (Randall Lockwood & Frank R. Ascione eds., 1998). This study discusses intentional acts of violence against humans and the link with violent behavior towards animals, but does not suggest negligent treatment of animals has a link with future harm to humans.

the people involved in it are typically no more likely to engage in violent interpersonal crime than those who do not partake in such activities. The absence of a correlation between participation in cockfighting and violence against humans is particularly evident in the case of the many Latinos who view the practice of breeding and training fighting cocks as a family and cultural tradition.¹⁰⁷ It would be absurd to argue that the Latinos who participate in cockfighting are more prone to inflicting harm on humans than the average person. Thus, the future harm conception of anti-cruelty statutes is a particularly weak basis upon which to ground the criminalization of cockfighting. It seems obvious that such spectacles are banned in order to avoid unjustifiable harm to animals, not as a means of preventing future possible harm to humans.

D. Enforcement of Moral Views Held by a Majority of the Population

1. The Case in Favor of Conceiving Anti-Cruelty Statutes as a Means of Enforcing a Moral Principle

Various courts and commentators (most notably, Lord Devlin) have posited that the chief purpose of anti-cruelty legislation is to promote a moral view held by a majority of the population.¹⁰⁸ Proponents of the “public enforcement of morality” conception argue the perceived immorality of the conduct justifies its criminalization.¹⁰⁹

This conception is appealing because most people *do* believe that unjustifiably inflicting harm on an animal is immoral. Thus, the elegance of this view lies in its simplicity. Why should

¹⁰⁷ See *Cockfighting Still Popular in Puerto Rico*, WASHINGTON POST, Jan. 25, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/25/AR2007012500500.html> (discussing cock fighting as a tradition and considered a gentleman's sport in country of Puerto Rico).

¹⁰⁸ Gary L. Francione, *Animals, Property, and Legal Welfarism: “Unnecessary” Suffering and the “Humane” Treatment of Animals*, 46 RUTGERS. L. REV. 721 (1994).

¹⁰⁹ *Id.*

we not criminalize that which most, if not all, deem to be a morally objectionable course of action?

Another advantage of the public enforcement of morality conception is that it can satisfactorily explain why it is generally not considered criminal to harm animals during the course of certain activities such as fishing and hunting. Since most people consider that fishing and hunting constitute instances of morally acceptable behavior, no moral principle would be promoted by proscribing such conduct.

This view of animal cruelty legislation also succeeds where most other approaches fail. The criminalization of dog fighting and cockfighting is easily explicable under this conception. These activities were not considered criminal in the past because at that time there was no clear consensus with regard to whether or not engaging in such behavior was deemed immoral. However, as time has passed and societal values have changed, different groups of people have coalesced in decrying the immorality of animal abuse. The crystallization of this moral consensus paved the way for the proscription of the conduct in modern times.

2. The Case Against Conceiving Anti-Cruelty Statutes as a Means of Enforcing a Moral Principle

The principal objection that can be leveled against the public enforcement of morality view of animal cruelty statutes is that most courts and commentators believe that the fact that a majority of the population believes that a certain act is immoral is not in itself a sufficient reason for criminalizing the conduct. The principle laid down by the Supreme Court in *Lawrence v. Texas* is worth repeating: “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”¹¹⁰

¹¹⁰ *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

Furthermore, this conception of anti-cruelty legislation is wholly incompatible with the harm principle.¹¹¹ Taking this principle seriously requires that we only proscribe conduct that interferes with the rights of others. However, no one has a right to have his own moral views publicly enforced by way of the criminal law. This is the case even when a person's moral principles coincide with those held by a substantial portion of the population. People should not have to endure punishment and the deprivation of liberty and/or property that it entails just because many object to his conduct on purely moral grounds. In a tolerant and pluralistic society, something in addition to the perceived immorality of the actor's conduct must be shown before we deem that person a criminal.

E. Prevention of Harm to Animals

1. The Case in Favor of Conceiving Anti-Cruelty Statutes as a Means of Preventing Harm to Animals

Perhaps the interest sought to be protected by anti-cruelty statutes is the prevention of harm to animals. After all, these laws are typically referred to as *animal* cruelty statutes. The view that these laws aim to protect animals from the unjustifiable infliction of pain has much to commend it. For starters, it seems to explain the most salient features of modern anti-cruelty legislation. The decisions to criminalize the negligent mistreatment of pets and to proscribe dog fighting and cockfighting can easily be accounted for under this conception. Since negligently mistreating animals causes them to suffer unnecessarily, it is perfectly sensible to proscribe such conduct in order to protect the creatures. Similarly, given that dogs and cocks used in fights endure incredible amounts of pain, there are legitimate reasons to prohibit the fights as a means of furthering the protection of the animals involved.

¹¹¹ See *supra* Part II.C (discussing harm principle).

Moreover, contrary to the public enforcement of morality view, the conception of anti-cruelty statutes discussed in this section is compatible with the harm principle.¹¹² As H. L. A. Hart has rightly pointed out, criminalizing animal abuse does not violate this principle as long as we construe it in such a way that allows for the criminalization of conduct that harms a *sentient being*.¹¹³ The proscription of conduct that interferes with the fundamental interests of others is universally held to be legitimate. Thus, provided that we consider animals to have interests worthy of legal protection, there should be no objection to prohibiting animal abuse. Fortunately, most people now believe animals have an interest in being held free from unnecessary suffering. This basic interest stems from an animal's *sentience*, that is, from their capacity to experience pain. Since our experience has led us to conclude that feeling pain is an unpleasant occurrence, we have good reason to abstain ourselves from causing pain to other beings, human or not.

As long as anti-cruelty statutes are conceived as laws that protect animals from enduring direct suffering, they would not constitute victimless crimes. So conceived, the legally protected victim would be the creature harmed by the perpetrator's conduct. Some would object to this conceptualization of victimhood by pointing out that only human beings should qualify as victims.¹¹⁴ This argument would only hold, however, if there were some distinctive human characteristic beyond the capacity to feel pain that might justify affording humans more legal protection than animals. Professor Dubber believes human capacity for exercising meaningful autonomy over their lives warrants such a differentiated treatment.¹¹⁵ The problem with this contention is that humans are considered victims *even if they lack the capacity to meaningfully exercise their autonomy*. A newly born child, for example, has no more capacity for autonomy than

¹¹² *Id.*

¹¹³ HART, *supra* note 59, at 34.

¹¹⁴ See generally, DUBBER, *supra* note 36, at 158.

¹¹⁵ *Id.*

a dog or a monkey. Nevertheless, if someone were to harm such a child, no one would seriously contend that he should not be considered a victim of a crime. So it would seem that, in cases such as these, the defining characteristic of victimhood is sentience, not autonomy.

Nonetheless, this does not mean there are never sound reasons for legally discriminating between humans and animals. It could be coherently argued, for example, that in light of their unique capacity for autonomy, humans should never be considered the property of anyone else. However, since animals presumably do not understand or care about notions of ownership, their interests in not being considered property are arguably weaker than interests humans have regarding the same issue.

Some scholars, like Gary Francione, argue there *is* such a thing as “animal autonomy” that should be considered worthy of legal protection.¹¹⁶ If this were the case, the reasons for discriminating between animals and humans, at least with regard to questions about the legitimacy of owning such beings, disappear. However, one need not agree with this proposition in order to defend the notion that animals should qualify as victims. For this limited purpose, their capacity to feel pain appears to suffice.

2. The Case Against Conceiving Anti-Cruelty Statutes as a Means of Preventing Harm to Animals

The conception that anti-cruelty statutes are enacted as a way of protecting animals against the unjustifiable infliction of pain appears to conflict with certain features of these laws. Particularly difficult to explain under this view is the fact that it is not a punishable crime to harm an animal during the course of fishing or hunting activities. If these statutes really aim to prevent harm to animals, what superior interest might justify harming them during the course of fishing or hunting activities?

¹¹⁶ STEVEN M. WISE, *DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS* 43-45 (2002).

While it may be argued the economic and entertainment interests furthered by these activities justify harming animals, many will find these reasons for engaging in the conduct unsatisfying. However, one would be mistaken to conclude that, in light of these considerations, the purpose of animal cruelty statutes is not to protect animals. It might be argued that although these laws do in fact protect animals, they assign too much weight to countervailing interests that might justify an infraction of the prohibition. Thus, the problem does not lie with the purpose of the statute, which is by and large a salutary one, but with the scope of the reasons that might justify what would otherwise constitute a nominal infraction of the law. In order to fully understand this argument, a discussion of the structure of criminal offenses, generally, and of anti-cruelty statutes, in particular, is warranted.

IV. ACTIVITIES HARMFUL TO ANIMALS EXEMPTED FROM PUNISHMENT AND THE STRUCTURE OF CRIMINAL OFFENSES AND ANTI-CRUELTY STATUTES

A. The Claim

Since anti-cruelty statutes are riddled with exceptions allowing people to harm animals, animal law scholars frequently claim this demonstrates these statutes are enacted to ensure humans continue to exploit rather than protect animals.¹¹⁷ Acceptance of this proposition typically leads to odd interpretations of animal cruelty laws. Take, for example, the views espoused by Professor Taimie Bryant in a recent article. In discussing the way in which the criminal law deals with cases involving harm caused to egg-laying chickens, she stated that:

[T]he law does not identify as "cruel" the practices that directly cause their suffering. If the suffering of these hens is deemed

¹¹⁷ See, e.g., GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 131-32 (1996).

“necessary” for the eggs they supply to humans, then that suffering simply doesn’t count in legal terms, nor does the suffering of the humans who care about that suffering.”¹¹⁸

This reading misapprehends the conceptual structure of criminal offenses by confusing the inculpatory (whether the suffering of the hens “counts” as legally relevant harm) and exculpatory (whether there are reasons that justify the infliction of legally relevant suffering) dimensions of animal cruelty statutes. This, in turn, leads to a failure to grasp the communicative meaning of the exceptions that plague the laws prohibiting animal abuse.

In the remainder of this section, the structure of punishable crimes is explored in an attempt to (1) substantiate my contention the aforementioned reading of animal cruelty offenses is misguided and (2) demonstrate why it is not true that the exceptions that plague these laws reveal that they are primarily enacted to further human wellbeing rather than to protect animals from unjustifiable harm.

B. A Primer on the Conceptual Structure of Criminal Offenses

1. The Inculpatory vs. Exculpatory Dimension of Punishable Crimes and the Offense/Justification Distinction

Punishable crimes have both an inculpatory and an exculpatory dimension.¹¹⁹ A person that engages in conduct that satisfies the elements of an offense inculpates himself.¹²⁰ Thus, David incriminates himself if he kills a human being, that is, he satisfies the elements of the offense of homicide. Furthermore, a person who has performed an act that satisfies the elements of an offense has engaged in conduct that is *prima facie* wrongful. Consequently, David’s act of killing a human being is, all things

¹¹⁸ Taimie L. Bryant, *Trauma, Law and Advocacy for Animals*, 1 J. ANIMAL L. & ETHICS 63, 76 (2006) (emphasis added).

¹¹⁹ See, e.g., FLETCHER, *supra* note 63, at 562.

¹²⁰ *Id.*

being equal, prima facie unlawful.¹²¹

This, of course, does not mean that conduct that satisfies the elements of an offense is necessarily wrongful. An actor may escape liability, despite having inculpated himself by infringing the elements of an offense, if he can successfully plead a justification defense.¹²² Therefore, if David can demonstrate that he acted in justifiable self-defense, he will not be punished even though he engaged in conduct that was prima facie wrongful. The presence of justificatory conditions such as self-defense or necessity transforms the actor's prima facie wrongful act into conduct that is, all things being considered, *not wrongful*.¹²³

It should be noted that conduct may be considered lawful either because it does not inculpate the actor, that is, it does not satisfy the elements of an offense, or because it should be exculpated in light of the presence of circumstances which provide the actor with reasons for engaging in the prima facie wrongful act, namely, a justification defense. It would be a mistake, however, to conclude the actor's acquittal in both of these instances means the same thing. The next subsection will demonstrate the fundamental difference between conduct that is not wrongful because it does not satisfy the elements of an offense and conduct that is lawful because it is justified. This distinction proves to be crucial to a proper analysis of the structure and meaning of anti-cruelty offenses.

¹²¹ See Luis Ernesto Chiesa Aponte, *Normative Gaps in the Criminal Law: A Reasons Theory of Wrongdoing*, 10 NEW CRIM. L. REV. 1, 117-18 (2007).

¹²² An actor can also avoid liability by pleading an excuse defense such as insanity.

¹²³ Albin Eser, *Justification and Excuse: A Key Issue in the Concept of Crime*, in 1 JUSTIFICATION AND EXCUSE: COMPARATIVE PERSPECTIVES 17, 37 (George P. Fletcher & Albin Eser eds., 1987).

2. The Communicative Significance of the Offense/Justification Distinction

a. Harmful vs. Non-Harmful Legal Conduct

The communicative significance of the offense/justification distinction can be illustrated by examining the difference between the acts of shooting at a piece of paper and shooting at a person in self-defense.¹²⁴ The act of shooting at a piece of paper is lawful because it does not satisfy the elements of an offense made criminal by our laws. Since this conduct is not prohibited, engaging in it does not cause harm to an interest protected by law. Thus, the act of shooting at a piece of paper, like any other conduct that does not satisfy the elements of an offense, is irrelevant for the criminal law.

Shooting at a human being in self-defense is also lawful. However, in contrast with the act of shooting at a piece of paper, this conduct satisfies the elements of assault.¹²⁵ Given that this conduct is prohibited, performing it interferes with a physical integrity interest that is otherwise protected by the law. Obviously, the injury caused to the person who was shot counts as harm as far as the law is concerned. Therefore, the act of shooting at a person is *relevant* for the criminal law, *even though it is not wrongful* since self-defense is a *justificatory circumstance*.

As one can see, these acts are lawful due to very distinct reasons. The act of shooting at a piece of paper does not satisfy the elements of an offense, because it does not cause harm to an interest the law seeks to protect. Hence, the law does not provide us with reasons to abstain from engaging in the act. Contrarily, the act of shooting at a person in self-defense satisfies

¹²⁴ This is a variation of an example proposed by Hans Welzel, one of the greatest German criminal law scholars of the twentieth century, as a way to illustrate the offense/justification distinction. HANS WELZEL, *DERECHO PENAL ALEMÁN* 97-98 (Juan Bustos Ramírez & Sergio Yáñez Pérez trans., Editorial Jurídica de Chile 4th ed. 1997).

¹²⁵ This, of course, assumes that the person did not die as a result of the conduct. If he had died, then the act would satisfy the elements of the offense of homicide.

the elements of the offense of assault and injures one of the most important interests protected by criminal law. Since this conduct is harmful, the law provides us with sound reasons not to engage in the act (protecting life or physical integrity), *even if doing so would be justified*.

b. Reasons and the Offense/Justification Distinction

Another way of making sense of the offense/justification distinction is by examining the different manner in which these categories seek to mold human conduct. By criminalizing offenses, society aims to provide people with reasons against engaging in the prohibited course of action.¹²⁶ Take, for example, the offense of arson. When the act of setting property of another on fire without his consent is prohibited, the citizenry has a sound reason against engaging in this type of conduct. Thus, if Randy were to ask Ralph whether he should burn down Sasha's cornfield, Ralph could coherently point to the fact that doing so would satisfy the elements of a criminal offense as a sound reason for Randy not to engage in the conduct.

Contrarily, the law provides no reason against engaging in conduct that does not constitute of an offense. Thus, the law provides no reason that can be advanced against Sasha's decision to burn down his own cornfield in order to build a barn, for this conduct does not satisfy the elements of an offense.¹²⁷ Although people might have a myriad of grounds for opposing Sasha's decision to burn down his cornfield, they cannot claim that such grounds make Sasha's decision to perform the conduct illegal.

Justifications, on the other hand, do not provide us with reasons to abstain from performing a given act. When we recog-

¹²⁶ Gardner, *supra* note 14, at 822 (stating that prohibitory norms provide us with reasons "not to perform the prohibited act" and, by way of example, that the "norm that prohibits promise-breaking . . . is [among other things] a reason not to break promises").

¹²⁷ The conduct satisfies neither the elements of the offense of arson nor criminal mischief, for both of these offenses require that the property that is destroyed (criminal mischief) or set on fire (arson) belong to another.

nize the existence of a justification, we aim to provide people with sound reasons *in favor* of engaging in conduct that satisfies the elements of an offense. Hence, justifications provide us with “legally admissible reason[s] in favour of [acting in] nonconformity with the norm.”¹²⁸

Suppose, for example, that Randy now asked Ralph whether he could burn down Sasha’s cornfield in order to create a firebreak that will prevent three homes from being engulfed by flames. This time, Ralph could respond by stating that the existence of justificatory circumstances (necessity/choice of evils) provide Randy with sound reasons to burn down the cornfield, even if engaging in such conduct infringes the elements of the offense of arson.

It should be noted, however, that the fact that justifications provide us with good reasons for engaging in the conduct does not mean that the reasons that the offense provides against performing the conduct magically disappear.¹²⁹ Thus, it has been stated that:

When someone pleads a justification, she is claiming that the reasons in favour of doing as she did stand undefeated by the reasons against. The reasons against are those that make what she did an offence. *They have not gone away. They still make it an offence.* But the reasons in favour prevail and make it a justified offence (and hence one of which she should be acquitted).¹³⁰

Since the reasons that the offense provides for abstaining to engage in the act are not swept away by the existence of justificatory circumstances, some residual reasons for not performing the conduct remain *even if the act is ultimately justified*. Consequently, although necessity provides Randy with good reasons for burning down Sasha’s cornfield, the fact that doing so in-

¹²⁸ Gardner, *supra* note 14, at 822.

¹²⁹ Kenneth Campbell, *Offence and Defence*, in *CRIMINAL LAW AND JUSTICE: ESSAYS FROM THE W.G. HART WORKSHOP*, 1986 73, 83 (I.H. Dennis ed. 1987).

¹³⁰ Gardner, *supra* note 14, at 819 (emphasis added).

fringes the elements of the offense of arson still provides us with some residual reasons against performing the justified conduct. However, given that these residual reasons (saving the cornfield) are not of sufficient force to outweigh the reasons in favor of engaging in the conduct that the existence of justificatory circumstances provide (saving three homes), burning down Sasha's cornfield in such a case cannot be considered criminal.

C. Regrettable vs. Non-Regrettable Lawful Acts

While residual reasons against performing an act that constitutes an offense do not afford us with sufficient grounds to criminalize the conduct if it is justified, they do provide us with sound reasons to feel regret for having engaged in the conduct. We have cause to regret the conduct because, all things being considered, “[i]t would have been better . . . had there been no occasion to commit [the act], . . . whether its commission was justified or not.”¹³¹ Therefore, justified conduct, although lawful, is regrettable, for the harm that the infraction represents is not wiped away merely by the existence of justificatory circumstances.

In a recent article, Professors Michelle Dempsey and Jonathan Herring convincingly argued that “[j]ustified prima facie wrongdoing leaves a moral residue of regret” and that regret produced has significant “rational force.”¹³² This regret has rational force because it generates reasons “to prefer less wrongful alternatives to securing the values that justify the prima facie wrongful conduct.”¹³³

Suppose, for example, that the law does not impose a duty to retreat as a prerequisite to the use of justifiable force in self-defense. In such a jurisdiction, Sandra could justifiably kill Laura in order to repel her unlawful deadly attack, even if she

¹³¹ *Id.* at 820.

¹³² Michelle Madden Dempsey & Jonathan Herring, *Why Sexual Penetration Requires Justification*, 27 OXFORD J. OF LEGAL STUD. 467, 488 (2007).

¹³³ *Id.*

could have avoided injury by retreating to a safe place. However, since the act of killing Laura satisfies the elements of the offense of homicide, Sandra has a good reason (saving Laura's life) to abstain from the justifiable conduct. Although the reasons against engaging in the conduct that the offense represents are not of sufficient weight to make Sandra's justifiable use of deadly force criminal, these reasons do provide her with motives to regret killing Laura. Furthermore, these residual "regret-causing motives" afford Sandra with reasons to attempt to avert the unlawful attack by retreating, *although it would not be criminal for her to repel the attack by killing Laura in self-defense*. Curiously, the reason that the offense provides against killing Laura in self-defense in the first place—the protection of human life—is the same reason that counsels in favor of attempting to avert the attack by less harmful alternatives.¹³⁴

Conversely acts that do not satisfy the elements of an offense do not generate reasons to regret the conduct. As a result, a person who engages in conduct that does not constitute an offense has no reason for seeking less injurious alternatives in order to achieve whatever it is that he or she aims to accomplish by performing the act. For instance, the law does not afford someone who shoots at a piece of paper reasons to feel regret for having engaged in the conduct. Accordingly, there is no reason for a person to attempt to make use of other, less harmful means in order to achieve whatever he or she aims to accomplish by shooting at the piece of paper (target practice, for example).

¹³⁴ Dempsey and Herring illustrate the rational force of regret by way of the following example:

Surgical cutting into a patient's body is a *prima facie* wrong, but one that may be justified in virtue of reasons generated *inter alia* by the value of the patient's life and well-being. Despite its justification, however, cutting into a patient's body is still to be regretted. This regret generates reasons for medical personnel to seek less wrongful alternatives to securing the values sought by the surgery. If, for example, the purpose of the cutting is to perform exploratory surgery in hopes of diagnosing a source of the patient's abdominal pain, it is rationally incumbent upon the surgeon to seek less wrongful alternatives to diagnosing the source of the pain before cutting into the patient's body.

Id. at 488-89.

3. The Supra-Statutory Nature of the Offense/Justification Distinction

On some occasions, the positive law clearly distinguishes between offenses and justifications. This is typically the case with regard to conduct that is regulated in the comprehensive penal codes of most jurisdictions. Usually, criminal codes are divided into a “special part” and a “general part.” The special part contains offenses, the commission of which is regarded as *prima facie* wrongful. The general part, on the other hand, contains a series of general doctrines of criminal responsibility that, in principle, apply to every commission of an offense.¹³⁵ Here, one can typically find provisions that deal with the exculpatory dimension of criminal offenses and, consequently, with justification defenses.

Since the special part of penal codes contains a long list of offenses and the general part usually contains a catalogue of justification defenses (self-defense, necessity, law enforcement duties, etc.), the offense/justification distinction is often clearly reflected in the statutory law of any given jurisdiction. The New York Penal Law, for example, distinguishes between “general provisions” (i.e. the “general part”) and “specific offenses” (i.e. the “special part”).¹³⁶ Thus, the list of acts that are deemed to be *prima facie* illegal are regulated in the “specific offenses” part of the Penal Law, whereas the justificatory circumstances that permit what would otherwise constitute an unlawful act are provided in the “general provisions” section of the code.¹³⁷

Such an organizational structure of penal laws typically

¹³⁵ Thus, the general part of many criminal codes contains provisions with regard to basic doctrines of criminal law, such as the “act requirement,” the forms of culpability (i.e. intent and negligence), attempt liability, perpetration and complicity, etc. See generally FLETCHER, *supra* note 63, at 393-95.

¹³⁶ N.Y. PENAL LAW pts. I, III (McKinney 2004). New York Penal Law contains an additional part that is intended to regulate sentencing practices. See N.Y. PENAL LAW pt. II (McKinney 2004).

¹³⁷ § 35 (defenses of justification listed in “general provisions”); §§ 120-275.45 (illegal acts listed in “specific crimes” section of code)

makes it easier to differentiate between offenses and justifications. As an example, an examination of New York law reveals that whoever kills a human being in self-defense has committed the offense of homicide.¹³⁸ Given that this conduct constitutes an offense, there are sound reasons against engaging in the act. In spite of this, the use of force in self-defense is not criminal pursuant to New York law because it is justified.¹³⁹ Thus, although the fact that such conduct satisfies the elements of an offense provides reasons to abstain from engaging in the act, the existence of justificatory circumstances makes this conduct, on balance, not wrongful.

Unfortunately, legislative appearances can sometimes be deceiving, for criminal statutes do not always clearly differentiate between conduct that is legal because it does not satisfy the elements of an offense and conduct that is legal because it is justified. The California Penal Code provision defining murder is a chief example. According to the code, “[m]urder is the *unlawful killing* of a human being . . . with malice aforethought.”¹⁴⁰ What makes this provision problematic is that it infelicitously conflates the inculpatory and exculpatory dimensions of the crime by specifying that murder is an “unlawful killing.”¹⁴¹ Since justified killings are, by definition, lawful, it follows that deaths that are produced as a result of the justifiable use of force do not satisfy California’s definition of murder. At first glance, one might be tempted to conclude that, in California, causing the death of a person in self-defense *is lawful because it does not satisfy the elements of murder*. Therefore, it might be argued that a person who kills another in self-defense has committed no prima facie wrong that is in need of justification.¹⁴²

¹³⁸ §125.00.

¹³⁹ §35.15.

¹⁴⁰ CAL. PENAL CODE §187(a) (West 2008) (emphasis added).

¹⁴¹ *Id.*

¹⁴² According to this reading, justifications (i.e. self-defense) would constitute *negative elements of the offense*, rather than independent defenses that negate the wrongfulness of the conduct without negating the elements of the offense. Some European scholars maintain this is the best way to interpret criminal statutes. See, e.g., DIEGO MANUEL

Although seductive, this understanding of the offense/justification distinction is either wrong or profoundly unilluminating. If the distinction is to be of any consequence, offenses and justifications ought to be understood as conceptual categories that help us to better appreciate the general structure of punishable crimes, not as labels that can be legislatively defined in such a way that distinguishing between these categories would be a worthless endeavor. The reason so much attention has been paid to the offense/justification dichotomy in this article is because we can learn something about the law, morality and society by understanding the distinction. Thus, by using the terms "offense" and "justification," I am making broad claims about the nature and structure of punishable crimes in our society, not about the particular way in which legislatures such as California have sloppily drafted their murder statutes (or any other criminal statutes).

Therefore, the offense/justification distinction is supra-statutory in nature. According to this understanding of the distinction, which is widely shared by criminal theorists and legal philosophers, the way in which a statute has been drafted is not determinative when ascertaining whether conduct should be considered lawful because it does not constitute an offense or because it is justified.¹⁴³

Since the statutory formulations of crimes can sometimes be misleading, it is necessary to elaborate supra-statutory standards that allow us to distinguish between conduct that is lawful because it does not satisfy the elements of an offense and

LUZÓN PEÑA, CURSO DE DERECHO PENAL PARTE GENERAL I 302-03 (Universitas 1996). This position, however, has been convincingly criticized by numerous scholars. See generally FRANCISCO MUÑOZ CONDE & MERCEDES GARCÍA ARÁN, DERECHO PENAL PARTE GENERAL 252-53 (Tirant Lo Blanch 2004).

¹⁴³ This view was forcefully defended by the leading German criminal theorist Hans Welzel, who stated that whether the legislature decides to incorporate the criteria of justification into the definition of a crime is "irrelevant" to distinguishing between the offense and the justification. WELZEL, *supra* note 124, at 96 (asserting that "even if self-defense were to be included [as part of the definition of the crime of homicide] . . . the non-existence of the defense would not be transformed into a 'negative' element of the offense" (translation by author)). *Id.*

conduct that is lawful because it is justified. In my opinion, this can be accomplished by appealing to the ideas that undergird the different ways of understanding the offense/justification distinction that have been elaborated in this section.

Previously, the communicative significance of the “offense” and “justification” categories was demonstrated by appealing to three different notions—harmful versus non-harmful lawful acts, reasons against and in favor of performing an act, and regrettable versus non-regrettable lawful conduct.¹⁴⁴ These notions can serve as heuristic devices that aid us in the sometimes difficult endeavor of distinguishing between offenses and justifications, particularly when the statutory law does not provide much guidance.

Thus, regardless of how legislatures decide to draft their criminal statutes, a useful way of distinguishing between different types of non-wrongful acts is by asking ourselves the following questions:

- (1) Is the conduct lawful because: (a) no harm has been caused, or (b) although harm has been caused, the benefits that result from the conduct outweigh the harm produced by the conduct?

- (2) Is the conduct lawful because: (a) there are no reasons to refrain from performing it, or (b) although there are reasons against engaging in the conduct, they are outweighed by reasons in favor of performing the conduct?

- (3) Do we have reasons to attempt to make use of other, less harmful means in order to achieve what we aimed to accomplish by engaging in the lawful act?—(a) no, because there are no reasons to regret having engaged in the act, or (b) yes, because there are reasons to regret having engaged in the act?

If the answer to the three questions is (a), then the conduct is lawful because it does not satisfy the elements of an offense. On the other hand, if the answer to these questions is (b), the

¹⁴⁴ See *supra* Part IV.B.2.

conduct is lawful because it is justified.

These questions provide guidance when determining whether a killing in self-defense is not wrongful because it does not satisfy the elements of an offense or because it is justified. As was previously stated, the California murder provision suggests that such killings are lawful because they do not satisfy the elements of an offense.¹⁴⁵ This conclusion, however, is misguided, given that:

- (1) The conduct is lawful because, although harm has been caused (death of the aggressor), the evil wreaked by the conduct is outweighed by the evil avoided by the conduct (death of person unlawfully attacked).
- (2) The conduct is lawful because, although there are reasons against engaging in the conduct (protecting the life of the aggressor), they are outweighed by reasons in favor of performing the conduct (protecting the life of the person attacked).
- (3) We have reasons to attempt to use other, less harmful means in order to achieve what we aimed to accomplish by killing the aggressor in self-defense (by retreating, for example) because there are reasons to regret having killed the aggressor.

C. The Structure of Anti-Cruelty Offenses

1. The Ambiguity of Animal Cruelty Laws

Now that we have explored the general structure of punishable crimes, we are in a better position to understand the particular structure of anti-cruelty statutes. Anti-cruelty laws, like other criminal statutes, have an inculpatory and exculpatory dimension. Thus, a reading of these laws reveals that they purport to both describe conduct that society considers to be *prima facie* wrongful and to illustrate circumstances in which engaging

¹⁴⁵ See *supra* note 140-42 and accompanying text.

in such conduct is, all things being considered, non-wrongful. In other words, anti-cruelty statutes contain both definitions of offenses and a catalogue of justifications. The problem, however, as anyone who has read up to this point would probably suspect, is that these laws do not clearly differentiate between conduct that is not wrongful because it does not satisfy the elements of an offense and acts that are lawful because they are justified.

Take, for example, the Montana anti-cruelty statute which criminalizes a variety of acts, such as “injuring” or “killing” an animal.¹⁴⁶ However, it also states that “[t]his section does not prohibit [injuring or killing an animal as result of] . . . commonly accepted agricultural . . . practices.”¹⁴⁷ The combined effect of these two provisions is unclear. There are a couple of plausible interpretations of this statute:

(1) Injuring or killing an animal as a result of lawful agricultural practices is not prohibited (i.e., is “lawful”) because doing so does not satisfy the elements of an offense; or

(2) Injuring or killing an animal as a result of lawful agricultural practices is not prohibited because, although doing so satisfies the elements of an offense, it is justified.

Similar ambiguity plagues the Texas anti-cruelty statute which holds intentionally or knowingly torturing livestock a crime.¹⁴⁸ However, “[i]t is a defense to prosecution . . . that the actor [harmed the animal as a result of being] engaged in bona fide . . . scientific research.”¹⁴⁹ Once again, there are two possible interpretations of this statute:

(1) Torturing an animal for bona fide scientific experimentation is not prohibited because doing so does not satisfy the elements of an offense, or

¹⁴⁶ MONT. CODE ANN. § 45-8-211(1)(a) (2007).

¹⁴⁷ § 45-8-211(4)(b).

¹⁴⁸ TEX. PENAL CODE ANN. § 42.09(a)(1) (Vernon Supp. 2007).

¹⁴⁹ *Id.* §42.09(e).§42.09(e).

(2) Torturing an animal for bona fide scientific experimentation is not prohibited because doing so is justified.

How should we determine which of the plausible readings of the Texas and Montana statutes¹⁵⁰ represents the best interpretation of animal cruelty laws?¹⁵¹

One possible way to tackle this matter would be to look for answers by parsing the statutory text. Some might believe, for example, that the fact that the Texas statute states that "it is a defense" to prosecution when the harm was caused as a result of scientific experimentation implies that this conduct is justified, for justifications are defenses to crimes. Furthermore, it might be argued that since the Montana statute asserts that it does not prohibit injuring animals as a result of common agricultural practices, engaging in such conduct does not even satisfy the elements of the offense.

This type of analysis strikes me as formalistic and unenlightening. It is clear these statutes purport to exclude certain activities that are harmful to animals (scientific experiments and agricultural practices) from the reach of the criminal law.¹⁵² However, that much should not be read into the specific way in which legislatures have drafted such exceptions. Whether a statute declares the lawfulness of such conduct by asserting that it is a defense to the crime or by claiming that the act is not prohibited by the law is immaterial to the question about whether the legality of the conduct stems from the fact

¹⁵⁰ Since the Montana and Texas anti-cruelty statutes are representative of most animal cruelty laws in the United States, additional examples of the problems of interpretation that these statutes entail are not needed.

¹⁵¹ Some might argue the answer to this question is of little significance, for, in any case, the aforementioned conduct is lawful regardless of whether it does not constitute an offense or is justified. This argument fails to grasp the communicative significance of the offense/justification distinction. It surely is not trivial whether society considers that injuring an animal as a result of scientific or agricultural practices has more in common with the act of shooting at a piece of paper (conduct that does not constitute an offense) than with the act of shooting a person in self-defense (justifiable conduct). Therefore, it seems to me that attempting to find an answer to this question is warranted.

¹⁵² See *supra* notes 146-49 and accompanying text.

that it does not constitute an offense or from its justifiable nature.

Since the offense/justification distinction is supra-statutory in nature, a more satisfying answer to this question can be obtained by appealing to the heuristic devices described in the previous subsection.

2. Harm, Reasons and Regret in Anti-Cruelty Statutes

a. Harmful Legal Acts and Anti-Cruelty Statutes

As this article has discussed, there is clearly a difference between non-harmful and harmful legal acts. Conduct that does not satisfy the elements of an offense does not typically cause harm (e.g., shooting at a piece of paper). However, justified conduct usually causes harm, although the harm avoided by engaging in the act is greater than the one inflicted (e.g., shooting at a person in self-defense). Thus, the first question when examining the nature of the exemption from punishment for persons who injure animals (e.g., pursuant to scientific or agricultural practices) is whether those acts are lawful because they do not cause harm or because the harm inflicted is outweighed by the benefits reaped from engaging in the conduct. The following examples might help us to answer this question.

(1) Judy dislocates a rabbit's neck because she enjoys seeing animals suffer.

(2) Judy dislocates a rabbit's neck pursuant to a bona fide scientific experiment.

(3) Judy dislocates a rabbit's neck in order to slaughter the creature and sell it in a commercial establishment pursuant to local laws.

The conduct in example (1) is clearly criminal under most, if not all, modern anti-cruelty statutes. Thus, the harm that is caused to the rabbit is most certainly relevant in the criminal law. The conduct in example (2), on the other hand, is almost

undoubtedly lawful under traditional animal cruelty statutes. It would be misguided, however, to believe the legality of such conduct stems from the fact that the harm caused to the rabbit is legally irrelevant. As example (1) demonstrates, the infliction of harm to rabbits matters in the criminal law. It would thus be odd to assume that if the rabbit was injured pursuant to a bona fide scientific activity that magically erases the harm caused to the creature.

Consequently, it makes better sense to conclude that the exemption from punishment afforded in example (2) is the product of a determination that the conduct is lawful because the harm endured by the animal is outweighed by the potential benefits of engaging in the scientific experimentation. Of course, one might disagree with the relative value that the law assigns to the interests in conflict in such cases. Many, including myself, believe the harm caused to the rabbit should be given much more weight than is currently the case.¹⁵³ However, this disagreement does not prove that the injury caused to the rabbit in such cases does not "count" as harm under the criminal law. It merely demonstrates that such harm does not "count" as much as I, and most animal law scholars, believe that it should.

The conduct in example (3) should be treated in much the same way as the conduct in example (2). There is nothing magical about food production that makes the harm caused to the rabbit in example (3) any different from the harm caused to the animal in example (1). The harm caused in both cases is identical: the dislocation of a rabbit's neck. The infliction of this harm, *qua* harm, remains unwelcome. However, the conduct in example (3) is lawful because the benefits generated by the conduct (production of food) are deemed to outweigh the harm caused to the animal.

An examination of these hypotheticals reveals that the reason why injuring an animal pursuant to agricultural or scientific activities is lawful is *not* because doing so does not constitute an

¹⁵³ See generally Bryant *supra* note 118.

offense, for such acts harm an interest protected by the criminal law. These acts are legal because they are justified, for, even though the harm they cause matters in the criminal law, it is (rightly or wrongly) outweighed by countervailing considerations.

b. "Reasons" and Anti-Cruelty Statutes

Another way of probing the structure of animal cruelty statutes is by examining whether persons who harm animals pursuant to certain enumerated activities act lawfully because there are no reasons for prohibiting such conduct or because, despite there being reasons against performing such conduct, they are outweighed by the reasons in favor of engaging in the conduct. If the former explanation for the lawfulness of the conduct is accurate (i.e., there are no reasons against performing the act), then it should be concluded that harm to animals as a result of scientific or agricultural activities does not constitute an offense. However, if the latter explanation for the lawfulness of the conduct is correct (i.e., the reasons in favor of performing the act outweigh the reasons against), then engaging in such acts is lawful because it is justified. An examination of the examples put forth in the previous subsection is once again useful to a discussion of these matters.

Example (1) demonstrates that animal cruelty statutes provide reasons against injuring animals.¹⁵⁴ If Judy were to ask Andy whether she should dislocate a rabbit's neck, Andy would be able to point out that anti-cruelty statutes give her good reasons to abstain from doing so. In other words, such statutes provide us with *prima facie* reasons against injuring an animal. On the other hand, examples (2) and (3) show that animal cruelty statutes also provide us with reasons in favor of harming animals (scientific experiments and food production) that might outweigh the *prima facie* reasons that the law provides against

¹⁵⁴ See examples *supra* Part IV.C.2.a.

engaging in such conduct (keeping animals free from harm).¹⁵⁵

It should be noted, however, that it invites confusion to state that the presence of reasons in favor of performing the conduct wipes away the reasons against engaging in it. It would be misleading to assert that the law provides no reasons against dislocating a rabbit's neck if such harm takes place as a result of scientific experimentation or food processing practices. It makes better sense to conclude that, despite the fact that we have good reasons not to dislocate a rabbit's neck, those reasons are outweighed if the injuries occur pursuant to certain lawful activities.

These reflections corroborate that engaging in conduct that falls within an exception to an anti-cruelty statute is lawful because it is justified, not because it does not constitute an offense. Consequently, although the law affords Judy with valid grounds to injure an animal pursuant to scientific or food processing activities, the fact that doing so constitutes an offense still provides her with residual reasons against performing the justified conduct. However, given that these residual reasons (e.g., keeping the animal free from harm) are not of sufficient weight to counterbalance the reasons in favor of engaging in the act, which the presence of justificatory circumstances provides (e.g., scientific advancement, food processing), dislocating the rabbit's neck is considered legal in such circumstances.

C. Regret and Anti-Cruelty Statutes

The residual reasons that remain against harming an animal even in circumstances when doing so would be justified pursuant to some lawful activity provide sufficient motives to regret causing the harm, even if doing so was justifiable. The rational force of such regret should lead persons to seek other, less harmful alternatives to achieving the ends that they aimed to accomplish by injuring animals.

Thus, Judy should first attempt to obtain whatever knowl-

¹⁵⁵ *Id.*

edge she wishes to attain by injuring the rabbit by engaging in scientific experiments that do not involve harm to animals. I think that this belief is shared by most people. Even if the majority of the population believes that it is justifiable to harm animals in order to advance science, many people are disturbed by the suffering that such activities cause to animals. It is fair to say, the bulk of the populace regrets the harm inflicted on these animals and would thus prefer that, if possible, other less injurious alternatives be used in order to achieve scientific advancement. Similarly, we have reason to regret harm to animals pursuant to food processing activities. As a result, most people would probably prefer that those in charge of engaging in such activities seek the least harmful methods to achieve the desired end.

The fact that we have good reason to regret harming animals pursuant to scientific and agricultural activities buttresses the conclusion that engaging in such conduct is lawful because it is justified, not because it does not satisfy the elements of an offense. As stated before, conduct that is lawful because it does not satisfy the elements of an offense (e.g., shooting at a piece of paper) is typically not regrettable. However, conduct that is lawful because it is justified (e.g., shooting a person in self-defense) is generally regrettable. Thus, it makes more sense to conclude that injuring an animal in order to advance scientific knowledge or to produce food has more in common with the act of shooting at a person in self-defense than with the act of shooting at a piece of paper.

As has been discussed, both the acts of harming an animal pursuant to an exempted activity and of shooting a person in self-defense inflict harm that is relevant for the criminal law. Furthermore, these acts are lawful because the reasons in favor of performing them outweigh the reasons against performing them, not because there are no reasons to abstain from performing the acts in the first place. As a result, there are reasons to regret both harming animals and shooting human beings, even if doing so would be justifiable. This, in turn, generates reasons to choose less injurious alternatives in order to attain the end sought by persons engaging in the justified conduct.

The following table summarizes the conclusions that have been advanced up to this point:

Table 1. The Structure and Communicative Meaning of Anti-Cruelty Statutes

Categories	Act-Description	Communicative Significance
The Offense	Causing injury to a non-human animal.	A person who commits the offense has: <ul style="list-style-type: none"> • harmed an interest that the criminal law seeks to protect; • performed conduct that is, all things being equal, wrongful; • engaged in conduct that he or she has reasons to refrain from performing; • performed conduct that we have reason to regret.
The Justifications	<ul style="list-style-type: none"> • Bona fide • Scientific Experimentation; • Farming, Agricultural and Food Processing Practices; • Hunting, Fishing, and Trapping Practices; • Pest Control; • Others. 	A person who justifiably commits the offense has: <ul style="list-style-type: none"> • harmed an interest that the criminal law seeks to protect, but the harmed caused is outweighed by the benefits generated by the conduct; • performed conduct that is, all things being considered, not wrongful; • reasons for engaging in the conduct that outweigh the reasons against performing the conduct; • performed lawful conduct that he or she nevertheless has reasons to regret.

D. Why the Animal Law Scholars' Claims Are Wrong

An understanding of the conceptual structure of anti-cruelty offenses reveals that the interpretation of such laws typically espoused by animal law scholars is misguided. Once one differentiates between the inculpatory (the offense) and exculpatory (the justifications) dimensions of these laws, one can see why it is not true that, as Professor Bryant has argued, the harm caused to animals as a result of the activities that are exempted from punishment under the typical anti-cruelty statute "simply does not count in legal terms."¹⁵⁶

As has been argued, acts that are considered lawful pursuant to one of these exemptions remain harmful even though they are justified. It is thus unfounded to conclude that the harm inflicted on animals pursuant to justifiable activities does not "count" as legally relevant harm. The presence of justificatory circumstances (such as the advancement of agricultural or scientific activities) *does not* wipe away the harm caused by the conduct. What these exemptions actually reveal is that there are countervailing reasons that society considers to be of sufficient weight to justify engaging in *prima facie* wrongful conduct that causes harm to animals, not that the offense was not designed to protect animals in the first place. Therefore, the thesis advanced in this article—that the chief reason why society creates anti-cruelty offenses is to protect animals from the infliction of harm—is not incompatible with the exemptions contemplated in the typical animal cruelty statute.

E. Why All of This Should Matter to an Animal Rights Activist

Up to this point, this article has demonstrated that many animal law scholars' interpretations of the exemptions in anti-cruelty statutes are misguided because their interpretations conflate the inculpatory and exculpatory dimensions of such laws.

¹⁵⁶ Bryant, *supra* note 118.

Now, this section will briefly sketch why such an interpretation is also objectionable on pragmatic grounds.

The reading of anti-cruelty statutes criticized here is probably the product of the fundamental disagreement that many animal law scholars have with the myriad of reasons that such laws provide as justifications for committing the offense. For them, the fact that the exemptions throughout these statutes leave an inordinate number of acts that are harmful to animals unpunished demonstrates that the real purpose of these laws is to protect human activities that cannot be accomplished without injuring animals.¹⁵⁷

Although I am also outraged by many of the justifications these statutes provide for inflicting harm to animals, I believe that those who defend the position that I have attempted to debunk here have failed to understand what seems intuitively obvious to most people—that society has called for the creation of anti-cruelty offenses as a way of protecting animals, not as a vehicle for perpetuating the exploitation of them.¹⁵⁸ In my opinion, it is a strategic blunder to ignore that, as Jerrold Tannenbaum has correctly pointed out, people “virtually universally” accept the proposition that “the primary purpose of [anti-cruelty] laws is to protect animals.”¹⁵⁹ Thus, instead of decrying statutes that criminalize animal abuse as another example of how animals are treated as “fungible” and “disposable” goods,¹⁶⁰ we should argue against the existence of the many exemptions that plague such laws by tapping into the basic sentiment that has led people to call for the enactment of anti-cruelty statutes in the first place.

¹⁵⁷ See *id.*

¹⁵⁸ Robert Garner, *Animal Welfare: A Political Defense*, 1 J. ANIMAL L. & ETHICS 161, 171-72 (2006).

¹⁵⁹ Jerrold Tannenbaum, *Animals and the Law: Property, Cruelty, Rights*, 62 SOC. RES. 539, 580 (1995).

¹⁶⁰ Bryant, *supra* note 118, at 76.

CONCLUSIONS

A. Statutes Criminalizing Harmful Conduct Against Animals Do Not Primarily Seek to Protect Property Interests

The conclusion that anti-cruelty statutes do not primarily seek to further property interests will strike some as provocative. Many, if not most, animal law scholars have accepted Professor Francione's contention that "as far as the law is concerned, . . . animals are nothing more than commodities."¹⁶¹ Thus, the proposition that animals are, for all relevant legal purposes, treated as property is generally accepted.

While this might very well be the case in the non-criminal context, it does not ring true as far as the penal law is concerned. Although a property-based conception of anti-cruelty statutes prevailed during much of the nineteenth century, since then, there has been a steady trend toward criminalizing animal abuse, regardless of questions of property. Under modern animal cruelty statutes, pet owners are generally not free to harm their animals. Furthermore, pet owners typically cannot consent to letting their animals be harmed by someone else. These propositions are at odds with a property-based conception of such laws.

Some believe the only way to give animals the protection they deserve lies in changing their legal status from property to persons. In an attempt to convince people that this shift in the juridical status of animals is necessary, scholars have traditionally appealed to extra-legal philosophical arguments. While these theoretical avenues are certainly worth pursuing, the seeds of the "personhood" of animals can already be found in modern animal cruelty laws. As far as anti-cruelty statutes are concerned, animals are being treated like persons in a very important way—they qualify as victims worthy of being protected by the criminal laws *irrespective of their property status in the*

¹⁶¹ Francione, *supra* note 72, at 9.

non-criminal law context.

*B. Harm to Animals is Not Criminalized Primarily
as a Means of Enforcing Morality*

A second conclusion that can be drawn from the foregoing discussion is that, although mistreating animals is certainly immoral, it should not be contended that this is the principal reason for criminalizing the conduct. If there is one thing that the venerable harm principle stands for, it is the fact that an act should not be proscribed solely because it is deemed to be contrary to a moral principle. This contention is both compatible with the Supreme Court's decision in *Lawrence*¹⁶² and with the position held by most criminal law theorists.

*C. Criminal Statutes that Prohibit Harm to Animals Primarily
Seek to Protect Animals from Being Harmed*

The view that animal cruelty statutes seek to prevent harm to animals is both normatively appealing and descriptively illuminating. From a normative viewpoint, conferring legal protection to non-human sentient beings is a welcome development. If we can all agree that experiencing pain is something worth avoiding and that non-human animals have the capacity to be cognizant of such feelings, it follows that we should also protect them from the unjustifiable infliction of suffering.

From a descriptive standpoint it is also preferable to conceive anti-cruelty statutes as laws that are designed to prevent harm to animals. Both domestically and internationally, governments are banning activities that cause harm to animals despite the fact that these activities sometimes command considerable support from the populace. Thus, all state jurisdictions in the United States have criminalized dog and cock fighting over the objections of many.¹⁶³ Similarly, bullfighting is banned

¹⁶² See *supra* note 43 and accompanying text.

¹⁶³ Ed Anderson, *Louisiana's ban on cockfighting takes effect Friday; But adherents say practice won't die*, Times Picayune, Aug. 13, 2008, at Nat'l 1.

in several countries once associated with the Spanish crown, despite its rich historical roots.¹⁶⁴ These recent trends in anti-cruelty legislation are difficult to explain unless one believes the chief purpose of criminalizing animal abuse is to prevent the unjustifiable suffering of animals. No alternative conception of animal cruelty laws comes close to explaining this trend in anti-cruelty legislation.

This does not necessarily mean, however, that anti-cruelty statutes were enacted *solely* for the purpose of protecting animals from harm. Undoubtedly, these laws, like many other criminal statutes (i.e. rape and murder statutes), also exist in partial recognition of the fact that most people consider that engaging in the prohibited conduct is morally reprehensible. Furthermore, it is likely that the decision to criminalize cruelty to animals was motivated to some extent by an interest in preventing emotional pain to those with close ties to the creatures harmed or curbing future harm to humans.¹⁶⁵ It might also be argued that some features of animal cruelty laws promote the preservation of certain property interests.

Nevertheless, I believe that the conclusion that the primary purpose of animal cruelty statutes is to protect animals from harm is inescapable. This conclusion is not contradicted by the fact that these laws contain exemptions that allow for the causation of harm to animals pursuant to certain lawful activities (scientific experimentation, agriculture, hunting, etc.). An examination of the structure of anti-cruelty statutes reveals the exempted activities promote interests that justify inflicting suffering on animals, not that laws criminalizing animal abuse were not designed to protect the creatures in the first place.

¹⁶⁴ In Latin America, bullfighting has been banned in Uruguay, Argentina, Chile and Cuba. People for the Ethical Treatment of Animals, *Legislation Prohibiting or Restricting Animal Acts* (2005), <http://www.wildlifepimps.com/AnimalActsLeg.pdf> (last visited Oct. 31, 2008).

¹⁶⁵ See *supra* Parts III.B-C.

D. People v. García: A Second Look

Once it is understood that the principal purpose of anti-cruelty statutes is to prevent injury to animals, one can see why the decision in *People v. García*¹⁶⁶ cannot withstand close scrutiny. The court in *García* asked all of the wrong questions because it seemed to conceive animal cruelty statutes as laws that are designed either to prevent future harm to humans or to prevent emotional harm to those with close ties to the animal abused. The former conceptualization of animal cruelty statutes led the court to focus on the state of mind of the perpetrator in order to determine whether his act evinced a heightened level of cruelty.¹⁶⁷ The latter characterization led the court to focus on the emotional harm caused to the custodian of the pet.¹⁶⁸

By misapprehending the nature and purpose of anti-cruelty statutes, the court gave short shrift to the only being whose interests were sought to be protected by such legislation—the animal harmed—in this case, Junior the goldfish. Therefore, the question that should have been asked in *García* is whether the instantaneous killing of a goldfish by stomping on it constitutes an act of simple or aggravated cruelty. The decisive consideration should thus be the amount of pain and suffering endured by the fish. As the amount of pain inflicted increases, the arguments in favor of considering the act to be one of aggravated cruelty get stronger. Conversely, as the amount of pain and suffering decreases, the case in favor of finding aggravated cruelty weakens.

Reasonable minds might disagree with regard to whether the suffering endured by Junior was of such a degree to warrant a determination of aggravated cruelty. On one hand, the defendant's contention that the fish did not suffer because it was killed instantly seems to point in the direction of not considering this act to be one of aggravated cruelty. On the other hand, it

¹⁶⁶ See *supra* note 26.

¹⁶⁷ *People v. García*, 777 N.Y.S.2d 846, 852 (Sup. Ct. 2004).

¹⁶⁸ *Id.*

might be argued the killing of a being constitutes the supreme act of cruelty. If this view prevailed, a finding of aggravated cruelty would be warranted.

Regardless of whether one believes the defendant should have prevailed in his arguments, there is little doubt with regard to who was the real victim of the court's analysis in *García*—a little goldfish named Junior.

