

# UW School of Law Transcript

## Visiting Professor Luis Chiesa: *Why is it a Crime to Stomp on a Goldfish: Harm, Victimhood and the Structure of Anti-Cruelty Offenses*

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### Kellye Testy:

Well, good afternoon, everyone. I think I'll go ahead and get us started. It's wonderful to see so many of you here this afternoon. I'm Kellye Testy, your dean, and I'm just so pleased that so many of you have come here to hear Professor Chiesa. Really appreciate your great turnout. So, welcome. What we have in store for you today is the Rembe Distinguished Lectureship. Each year we have a visiting professorship that was established by Arthur Rock, in honor of his wife, Toni Rembe. Ms. Rembe graduated from the School of Law in 1960. So, a terrific alum and a wonderful visiting professorship established in her honor by her husband.

Ms. Rembe was a partner at the firm Pillsbury Winthrop from '71 until the time that she retired, which was in 2004. And this distinguished visiting professorship at the law school is one that brings in a scholar to also be a teacher in the school, as part of his or her work in teaching and in scholarship, to deliver a public lecture during the term of their visitorship with the school.

One of the reasons that I think this kind of a professorship is so important to the School of Law is that it really gives us a chance to have people come get to know us and for us to get to know them. It's important, I think, for the growth of any institution that we not become too insular, just talk to ourselves, so to speak, too much. So having this kind of an opportunity, to have a distinguished visitor with us, is really a wonderful one, and it's certainly very enriching to our community.

And today, as you know, the professor that has been visiting with us, and who we'll hear from today, is Professor Luis Chiesa. And I want to extend a very warm thank you to you for being with us. We have so enjoyed, already, your time with us this fall. Professor Chiesa has enriched our community in so many ways. I have heard from so many of his students about how very much they're enjoying his classes. And I know that all of my faculty colleagues are also just so enjoying the time and getting to know you and talk about scholarly projects and teaching along with you.

So let me give you just a little bit of background about Professor Chiesa. He's visiting our law school, as I said, this year, from Pace School of Law, where he's been a member of that faculty since 2007. And prior to that, he was a clerk for the Honorable Federico Hernandez Denton, chief justice of the Federico Supreme Court. Professor Chiesa has been a visiting professor not only here at UW but also at the University of Ottawa, the University of Puerto Rico School of Law, and the Inter-American University of Puerto Rico School of Law.

Professor Chiesa serves as editor in charge of book reviews for the "New Criminal Law Review," and his research interests, of course, span that subject as well as comparative

law and animal-cruelty laws. And it is on that latter topic that his lecture today is focused. The title is "Why is it a Crime to Stomp on a Goldfish? Harm, Victimhood, and the Structure of Anti-Cruelty Offenses."

So, with great pleasure, let me introduce, then, to you Professor Chiesa. And please join me in extending a very warm welcome to him.

[applause]

**Luis**

Well, thank you so much, Dean Testy, for your kind introduction. And what a great honor it is to be visiting here at the UW School of Law, and to be able to do so as a result of Arthur Rock's contribution to the school in honor of his wife, Toni Rembe. Before I begin, I just want to say that these past couple of months have been wonderful in many ways. This law school has given a lot to me in a very short period of time.

Just to give you a flavor of what I've been up to, I've had enlightening conversations with Professor Ngugi, Kang, and Mayerfield, who's here, about the morality of torture in ticking-time-bomb cases, engaging debates with Professor O'Connor on whether we have free will or not--I believe we don't; he believes we do--to helping Associate Dean Nicolas plan his recent trip to my hometown of Puerto Rico, and to going to the Jazz Alley with Professors Cobb and Anderson. All members of this incredible faculty have gone out of their way, as you can see, to make me feel at home.

Now, this, of course, is no easy task, given that it hasn't stopped raining since what seems like an eternity for a Puerto Rican who was used to basking in the sun whenever he had the chance. In spite of this, you have all done the unimaginable. You have made me feel at home. And you have made me feel so at home that when it rains, I no longer think that it's all lost for the day, week, or weeks. Instead, like a true Seattle-ite, I rationalize the weather, by saying to myself, "All is well. Just remember: if it's raining here, it means that it's snowing like hell up in the mountains, and this surely means that you'll be skiing up at Crystal Mountain this weekend."

[laughter]

And, by the way, I did ski Crystal Mountain this past Friday. Conditions were wonderful. So I think the rain was actually worth it. And before I begin, I also want to thank my tort students for doing the unimaginable as well. Thanks to their frequent and insightful contributions to class--and I see many of them here today--they make me wake up every morning eager to teach that day's class. And this, as well, is no easy task, given that UW has marathonic seven-credit torts course that meets four times a week for two hours, except on Wednesday when it meets for only one hour.

But my students definitely make investing so much time in this course worth the effort. Gracias. And I guess one of you may translate that after the lecture.

[laughter]

OK. I think it's time to talk about what you've all been waiting for so long, and that is anti-cruelty offenses. And by anti-cruelty offenses, I mean offenses of cruelty against animals. Not against human beings, of course, but offenses against animals. And as you

all know, the title of my lecture is "Why is it a Crime to Stomp on a Goldfish? Harm, Victimhood, and the Structure of Anti-Cruelty Offenses." Now, after attending Associate Dean, and now recently installed Charles I. Stone Professor of Law, Steve Calandrillo, who's sitting right here, I actually wanted to change the title of my lecture to "Why Animal Advocates Need a Lesson in Criminal-Law Theory."

As you might recall, his lecture was "Why the Supreme Court Needs a Lesson in Law and Economics." I actually think it's always cool to give lessons to people, especially when they think that they don't need lessons, as is usually the case with the Supreme Court and with many animal advocates in this regard. But unfortunately, the brochures for the lecture went to press before Professor Calandrillo's lecture, so I had to stick to my original title, which I still hope is not that shabby.

OK. So I guess many of you might be wondering why I came up with the title. It's a long story, but it all begins and ends with a little pet goldfish called Junior. Although, as you will find in three and a half minutes, Junior's fate was rather unfortunate. I still believe it happened for a good cause, because, were it not for Junior's sad story, I probably wouldn't have decided to write about anti-cruelty statutes and this lecture would never have happened.

So, since I know you're all eager to find out what happened to Junior and why I decided to write about his life, let me tell you something about the last few minutes of the life of this very noble fish.

On August 2, 2003, Michael Garcia assaulted Emily Martinez in her New York home. And besides physically beating her, he also hurled a fish tank into a 47-inch TV. And then what happened is that the three fish that were peacefully living in the fish tank started wiggling on the floor. And then Mr. Garcia called out, "Little Juan." And Little Juan was the owner of one of the three pet goldfish. And actually, the goldfish, Junior, his name was Little Juan's nickname: Junior.

So then, Mr. Garcia said to Little Juan, and I'm citing, "Hey, Juan, do you want to see something cool?" And then Mr. Garcia proceeded to stomp on Junior, and of course, Junior died instantaneously when he was crushed by Mr. Garcia's heels. Subsequently, Michael Garcia was charged with assault, criminal damages, endangering the welfare of a child, and, to add insult to injury, aggravated cruelty to animals, which in New York is a felony offense.

After the celebration of the bench trial, Mr. Garcia was convicted on all counts. He appealed to the Appellate Term of New York's Supreme Court, arguing, among other things related to the other charges, that his aggravated animal cruelty conviction should be overturned, for two reasons. And by the way, I know that Mr. Garcia's lawyer is not attending this lecture. Maybe he'll hear it eventually, by way of the podcast. But that was really a great piece of lawyering, after you hear the claims that Mr. Garcia put forth to overturn his animal cruelty conviction.

The first one was, well, the aggravated animal cruelty statute requires that the cruelty be directed at a companion animal, whatever that might mean. And then Mr. Garcia's lawyer claimed, "The problem is that Junior was not a companion animal." And when asked why, Mr. Garcia's lawyer said, "Well, actually"--and I'm almost citing--"if you were to drop Junior in a pond, he would never come back." "And he wouldn't even look back,

without hesitation," he said. So how can he actually be a companion animal if he doesn't want your company?

[laughter]

That was his first argument.

Second argument:

Even if you conclude, wrongly, of course, Judge, that he was a companion animal, the lawyer also contended that the defendant did not meet another element of the aggravated cruelty offense. And that other element was that the defendant needed to act with a heightened level of cruelty, an aggravated level of cruelty. And the defendant, again, very creatively, contended that there was no heightened level of cruelty because the fish died instantaneously, as a result of the stomp. Now, with regard to the first issue, which is not the one that will concern me for the rest of this talk, not to be outdone, the court, very creatively, as well, asserted that goldfish had been companion pets since at least the Ming Dynasty in China.

[laughter]

I kid you not. That's what they said. They also cited the Tang Dynasty. They also stated that they came to the common-law jurisdictions for the first time, as pets, in 1853, as a result of the London Aquarium, and so on and so forth. So, it was obvious to him that goldfish were clearly companion animals, at least since the Ming Dynasty. And this is what really caught my eye. With regard to the second question, about whether the defendant, Mr. Garcia, exhibited a heightened level of cruelty, the court concluded, very interestingly, that he did, for two reasons.

One, because Little Juan suffered incredibly when Mr. Garcia stomped on Junior. And number two, because, according to the judge's reading of the statute and the legislative history, the purpose of the statute was to identify individuals who might cause harm to human beings in the future, and that Mr. Garcia's depraved and sadistic conduct--those are the terms used by the court--revealed that he would clearly be one of those individuals that ought to be identified as individuals who might very well engage in violent conduct in the future.

OK. Now, the court's answer to the second question--I'll leave the question of companion animals without really discussing it. I guess I agree. I've had goldfish. I think they're companions. But I don't know. It may be debatable. But what I'm really interested in is the second question, and that's the question that gives rise to the title of my article: "Why is it a Crime to Stomp on a Goldfish?" Because, again, the court seemed to suggest that it was a crime to stomp on a goldfish because Juan suffered. And that struck me, at least initially, to be rather odd.

So, what I am going to do during the course of the rest of this lecture is elaborate five theories that I came up with. And I actually think that this is probably the most novel claim that I put forth here. The most novel aspect of my talk is that I think this is the first time that someone has tried to identify the different interests that might be furthered as a result of animal-cruelty offenses and examine the pros and cons of each one of those approaches.

This is a question that I think has remained under-theorized. People either believe that it's clearly the animal is the protected interest, or animal advocates, as I will mention later on, actually believe that anti-cruelty statutes protect property. Anyway, let me first mention the five theories, and then I'll discuss each one of them separately.

OK. So one possible theory is that what anti-cruelty or animal cruelty statutes seek to protect is property. We protect animals because animals are our property.

The second theory, and this seemed to be the one defended by the court in *People v. Garcia*. The second theory would be, actually, animal cruelty statutes are not designed to protect property, but rather designed to protect those with emotional ties to the creature. In this case, Little Juan.

The third theory, also suggested by the court in *People v. Garcia*, is that, actually, the purpose of anti-cruelty statutes is neither to protect property or those with emotional ties to the animal, but rather to prevent future violence against human beings. Why? Well, the theory holds that if you are cruel to animals today, that might indicate that you will be violent to humans tomorrow.

A fourth possible theory is that animal cruelty offenses actually seek to enforce a moral principle, that engaging in this conduct is just immoral, and because it's immoral that's a sufficient reason to criminalize the conduct. So, under this theory, animal cruelty would be very much like indecent exposure, for example. We criminalize it not because someone is directly harmed, but rather because we just think that this is immoral.

And finally, the fifth theory that I suggest may explain why it is a crime to be cruel to animals is because we actually want to protect the animal itself from unjustifiable inflictions of pain.

Now, I will, in a couple of minutes, proceed to examine each one of these theories, the pros and cons to each one of these theories, and eventually will explain which one I think more adequately explains why we criminalize cruelty against animals.

But before doing so, I want to say a couple of things, very briefly, about two concepts that are important in order to understand the rest of the lecture. One is the concept of victimhood. Now, I think the concept of victimhood is worth exploring briefly here today because, in a sense, the question that I'm asking, these five theories, the question is, who's the victim? Right? If we conclude that we are protecting property, then the victim is the owner of the property. So on and so forth. If we conclude that we're protecting the animal, then the victim is the animal itself.

So I think that's another good vehicle with which to understand the kind of question that I'm asking here today. So I will explain, more or less, what I mean by victimhood. I will also explain what I mean by victimless crimes, which will become relevant eventually. And then, after discussing victimhood, I'll discuss the notion of consent, which is also relevant because, as we will see, consent sometimes negates victimhood, so it's directly related to victimhood.

OK. First, a couple of comments on victimhood. Basically, a victim, in a nutshell, is a person whose interests are harmed by another person. Now, this is a rather strict definition of victimhood. You could conceive more, I guess, broader definitions of victimhood. But I think it's better to reserve victimhood to a class of people or beings, not

necessarily human beings, but beings that are directly harmed as a result of the conduct of another.

Now, many crimes, of course, involve the infliction of harm to victims, and basically all of our core offenses involve the infliction of harm to a concrete and direct victim. So, homicide protects, of course, a person who is killed. That would be the victim. In cases of theft, the owner of the property would be the victim. In cases of rape, the person unjustifiably hurt by the rape would be the victim, and so on, and so forth.

So, in most of the court crimes, we have a person that is directly harmed by the conduct. I would like to point out, however, without going into much detail with regard to this concept that scholars, and sometimes courts, have also talked about the existence of so-called victimless crimes. Victimless crimes are crimes that do not directly harm a particular individual or a particular being.

I think paradigmatic examples of victimless crimes might be, for example, possession offenses. So drug possession does not directly harm any human being. Maybe consuming drugs might, but the drug possession in and of itself does not directly harm any human being. And weapon offenses are another great example, or the possession of tools for a burglary, for example, which is a crime in many jurisdictions.

These offenses are criminalized despite the fact that no individual is directly harmed as a result of engaging in this type of conduct. And what I will ask you to do while I am discussing the five different theories of why it is a crime to be cruel to animals is identify who the victim is in each one of these cases, or whether, if we adopt this theory, the offense of cruelty to animals becomes a victimless crime.

OK. And then, before examining the theories, let me say a little bit about consent. Now, consent is very interesting, because the law usually is not very much concerned with magic, but consent actually does have magical properties. It does because consent actually is transformative of the moral quality of an act.

And as Heidi Hurd, the great philosopher so eloquently stated once, "Consent turns what would otherwise be rape into a beautiful act of lovemaking. It turns theft into a sale, battery into a handshake, a trespass into a dinner party, an invasion of privacy into an intimate moment, and a commercial appropriation of name and likeness into a biography." Right?

So, consent is magical. It turns forms that would seem to be at first glance an act of subjugation to an act that is desirable for all of the parties involved. And then the reason why I find consent to be relevant to my subsequent discussion is because consent, what it seems to do is, it demonstrates that what at first glance appears to be an act that harms an individual victim, upon closer inspection, it doesn't harm that person at all.

So, eventually, when we say that the victim consented to the harm, what we seem to be saying ultimately is that there actually is no victim. So that's for example why the now unconstitutional offenses of consensually engaging in anal intercourse with another human being, now unconstitutional of course after "Lawrence v. Texas," in that offense we would say that the consent actually negates the existence of a victim.

No one has been victimized by the conduct. Right? So as long the parties are capable of consent, and there was no coercion, it would actually seem that consent negates

victimhood and thus it might be relevant when examining who the victim is in the different theories that I will now discuss.

OK. So, now let me discuss the five different theories. First one -- the protection of property, anticruelty statutes intend to protect property. Well, first the question would be, "Who's the victim here?" Clearly the victim would be the owner of the animal.

What are the pros of this approach? Well, I think the pros of this approach is that it helps to understand, it adequately explains a couple of aspects of anticruelty laws, and the one that I will focus on today is the fact that animals in the wild typically can be harmed up until the point when they become the property of someone else.

Once you acquire property over that animal, magically that animal is more protected by the criminal law, and then harming that animal or killing that animal would interfere with the owner's interest. So, if the fish is lying there in the river, there's no problem, but once you catch the fish and put him inside your boat, then the fish is protected as property, right?

What are the cons? Well, the cons for me basically are that owners, as you probably know, can't mistreat their animals, especially their companion animals. If you have a dog and a cat, or even you have a snake, you can't kill them at will. You can't set them on fire. You can't say, "Well, it's my property." Right?

So consent in a property offense negates victimhood. Consent turns theft into a sale. Consent turns criminal damages into lawful destruction of my own property. I can set fire to my own property as long as it doesn't harm others. I can destroy a wall in my house, but I can't - even if I want to - I can't mistreat my animals under many circumstances. So, that's a con. It can't explain why mistreating your own animals is criminalized.

And the other con is that it can't explain that other very important context in which animal cruelty laws have a big influence, and that is dog fighting and cock fighting statutes. Statutes that prohibit this type of conduct prohibit it despite the fact that the owner of the creature is actually more than willing to have that creature suffer harm at the expense of some other animal.

Michael Vick...think of it. Right? Michael Vick didn't care that much about the dogs. He was the owner, but who cares? It's irrelevant. The owner's consent is irrelevant. It doesn't negate the harm, so the owner can't be the real victim in these cases.

OK. That's briefly about the protection of property. The second theory - the protection of those with emotional ties to the animal. Who's the victim? Well, the person with emotional ties to the animal. In the "People v. Garcia" case the victim would be little Juan.

What's the pros of this approach? Well, this approach adequately explains the fact that companion animals receive more protection than non-companion animals. I think probably the best way of making sense of this is, that since they keep you company, you are in part a victim of the offense when someone harms that animal.

So, I think it explains that quite nicely. It might also explain quite nicely why killing or harming animals as a result of fishing or hunting is permissible, because we don't have

strong emotional ties to that fish that's swimming in that pond. We don't have close emotional ties to that wolf that we kill.

Now, about the cons, well, again, think of that stray dog that everyone hates, all right? Smelly, you don't like him. He rummages through your garbage. You actually can't kill him. You have to go by way of the procedures for disposal of animals that are being dangerous to the community, but you can't set him on fire, for example.

Actually that is what spurred the New York anticruelty statute that someone fire on a stray dog. You can't do it, even if no one likes him, even if no one cares about his existence. You can't do it.

Same thing again, same problem here arises with dog fighting statutes and cock fighting statutes. You can't, even if you have no emotional ties to the animal as would think that many of the people who engage in dog fighting and cock fighting, even if they don't have strong emotional ties to the animal, even if ultimately they don't care whether the animal dies as long as they are able to engage in the activity that they like, it's irrelevant. The conduct is still criminalized. The existence of a strong emotional link is not a prerequisite for prosecution of these cases.

OK. Let me briefly discuss the third one - prevention of future harm. This one is interesting. Are animal cruelty statutes designed to prevent future harm? Well, in this case, who's the victim? And the answer is "No one." If we conceive of animal cruelty statutes in this way, animal cruelty statutes would become a victimless crime because the killing of the animal will not harm anyone other than themselves.

We would only be criminalizing it because we fear that harming the animal today might mean that you are more willing to harm a human tomorrow. So, there is no direct victim that is harmed as a result of concealing the offense in this way, of harming the animal.

OK. So, what are the pros of this approach? The pros of these approach is that it actually can explain as well why we are allowed to harm animals as a result of fishing, hunting and factory farming practices. It would seem to be the case that usually fishermen, hunters, and people who engage in factory farming are not particularly violent to other human beings.

Those seems to be - and as far as I know and I tried to read the literature - there seems to be no link, no proven scientific link between hunting and certainly between farming and fishing and being violent to animals in the future. So, that is a problem. Actually that's a good reason to believe that this is a purpose of anticruelty statutes.

Another good reason to believe that this is anticruelty status is we actually do have studies that demonstrate that people who intentionally harm animals are more likely to intentionally harm human beings in the future. So, that seems to be true.

OK. What are the cons? Well, one of the cons is that, as you may know, the negligent mistreatment of many companion animals is criminalized pursuant to most, if not all, US anticruelty statutes. However, there has been absolutely no empirical study demonstrating a link between negligent and mistreatment of animals and future violence towards human beings. So, here it would seem that the rationale could not explain why we criminalize negligent and mistreatment of animals.



Another big con is, again, that big elephant in the room of dog fighting statutes and cock fighting statutes. It just is not the case that people who engage or in some ways support dog fighting activities or at least it hasn't been demonstrated, that they're more likely to be more violent against humans in the future, and certainly in the case of cock fighting, which is prohibited in every state, and unfortunately, is not in my hometown in Puerto Rico. But there certainly is no link between participating in cock fighting activities and future violence to human beings.

I can actually confirm that, anecdotally. Personally, I know many people in Puerto Rico who engage in cock fighting and they appear to be peaceful citizens and do not seem to be predisposed to violence in the future. So, I think this really can't explain this prevention of future harm theory. It can't explain many significant aspects of anti-cruelty laws.

What about enforcement of a moral principle? Who would the victim be here? Again, no one. There is no victim. We're just criminalizing the conduct because it is contrary to morality, not because it harms concrete individual.

The pros, again, I think it can explain adequately why fishing, hunting and factory farming are not considered unlawful under anticruelty statutes. Why? Well, because we actually at this point, a majority of the population - rightly or wrongly - but a majority of the population seems to believe that fishing, hunting, and factory farming is not particularly immoral. Whereas a majority of the population does seem to believe that dog fighting and cock fighting is immoral.

So, this theory can actually explain why we criminalize dog fighting and cock fighting, but don't criminalize fishing, hunting and factory farming practices.

The cons. The problem is that saying that the fact that the conduct is immoral is enough. It's a sufficient reason to criminalize the conduct proves too much. I think that there's a general principle of criminal law that holds to the mere fact that a majority of the population believes that conduct is immoral is not a sufficient reason to criminalize the conduct.

Now this principle can be traced back to the harm principle defended by John Stuart Mill and on liberty and defended later on by H.L.A. Hart in "Law, Liberty, and Morality," stating that the state can only prohibit conduct. More specifically, the state should only criminalize conduct if it causes harm to others. The mere fact that conduct is immoral is a thing in itself not a reason to criminalize the conduct. So, again, this conception of anti-cruelty statutes would seem to run a foul the harm principle. I personally think that is a bad thing.

By the way, it's also worth mentioning that the Supreme Court in *Lawrence v Texas* also suggested that due process, substance due process, may not allow the state to criminalize conduct solely because it is immoral.

Actually, in *Lawrence v Texas*, the court stated that and aside the fact that the majority of the population believes that it is not a sufficient reason to criminalize a practice. That's what the Supreme Court said in *Lawrence v Texas*, so there is some authority there to also state that the harm principle is in some way intermingled with US constitutional law.

Another con of the enforcement of morality as a reason for animal cruelty statutes is that it is odd to claim that animal cruelty statutes are victimless of crimes. It is odd to claim that no one, that is no discreet being or individual, is harmed and that this crime is similar to indecent exposure, for example.

That's not the way that I think we intuitively - at least it is not the way that I intuitively think - about animal cruelty statutes. I don't think it's a victimless crime. I don't think that most people believe that it's a victimless crime. So, I think that the fact that it doesn't jive well with the conventional intuitions about the interest out to be protected by animal cruelty offenses is a problem for this approach.

Finally, it might very well be the case that the purpose of anticruelty status is to protect the animal itself from unjustifiable infliction of pain. Who's the victim here? The animal. The animal would be the victim here.

Then the pros would be well, this can actually explain what most other theories fail to explain. It can explain why dog fighting, for example, and cock fighting are criminalized. Well, because, of course, the dogs suffer serious and unjustifiable inflictions of pain as a result of dog fighting, same thing as a result in the case of cock fighting. It can also explain quite easily why negligent, mistreatment of animal is a crime.

We don't care whether there's a link between the negligent and mistreatment and future violence. We don't care about whether someone loves the animal or not. We care about the animal itself. You unjustifiably cause harm to the animal, that's enough reason to criminalize the content.

OK. But what's the con? What's the argument against this theory? Well, the argument against this theory is that there are many exceptions to anticruelty statutes. The argument against the theory is, as we already know, that you can harm animals pursuant to hunting activities. You can harm them pursuant to fishing. You can harm them pursuant to factory farming. You can harm them pursuant to animal research.

This is what animal law advocates or many, not all, but Gary Francione for example, the champion of animal rights has repeatedly argued these exceptions to anticruelty statutes actually reveal that we don't really care about animals, but rather that we care about protecting our property interest in animals.

So, again the argument is all of the exceptions that animal cruelty statutes actually demonstrate that the purpose of anticruelty statutes is not to protect the animal, but rather to protect our property interests in the animal.

I'm just going to cite from Professor Bryant who teaches in UCLA here, a west coast animal law advocate. She is an animal rights scholar who follows Gary Francione's hard-line approach to animal law. She states, she's discussing, the way in which the criminal laws deals with cases involving harm cause to egg-laying chickens.

This is what she states and I cite, "The law does not identify as cruel the practices that directly cause their suffering. If the suffering of these hens is deemed necessary for the eggs they supply to humans, then" and this is what really matters to me. Professor Bryant claims, "then that suffering simply doesn't count in legal terms. Nor does the suffering of the humans who care about that suffering."

OK. And I think this position is a position widely shared by many animal rights advocates. And I think the position is wrong. I think it's confusing because it fails to take into account certain foundational aspects of the structure of criminal offenses, so this is why I say at the beginning of this talk that I think that many animal law advocates need a lesson in criminal law theory.

What I think is going on here is that people like Professor Bryant and Gary Francione and others confuse the exceptions that justify the infraction of the elements of the offense or the prohibition with the offense itself.

In other words, they claim that because there are a lot of exceptions or a lot of justifications to infringe the elements of the offense that that demonstrates that the offense is not really intended to protect animals. And I think that is a non sequitur, but let me explain this in a little bit more detail.

In order to drive my point home...this is the last part of my talk...in order to drive this point home, what I need to do now is briefly talk to you about the structure of criminal offenses generally. Now, this argument that I will defend now is a conceptual argument about the structure of all criminal law offenses in the U.S. and Puerto Rico, China, Germany, Japan, doesn't matter.

And basically, what I want to share with you...and you're probably may know this...is that there are two very distinct reasons why conduct may be considered lawful. One is because it doesn't satisfy the elements of an offense. The other is that because even though it satisfies the elements of the offense, it's justified pursuant to a permissive norm.

Now, this is what animal law advocates miss, and this is just true of every single law in every single jurisdiction. You have a general rule that that's the whole debate between [Inaudible 37:27] or no vehicles in the park. Of course you have a law prohibiting vehicles in the park, but you may have other norms, either judicially or created by way of the legislature, that allow you to have vehicles in the park in exceptional circumstances.

And that's what's going on here. You always have laws that explain what the elements of the offense are, and laws that basically put forth justifications to engage in the elements of the offense. And in both cases, either both when your conduct does not satisfy the elements of the offense, and when your conduct is justified, your conduct is lawful, but for different reasons.

In order to illustrate this, I want to borrow an example from a great 20th century German, probably the greatest criminal law scholar of the 20th century. His name was Hans Velsel. And Hans Velsel illustrated the difference between the offense and the justification by pointing out that it just simply is not the same thing to kill a fly than to kill a human being in self-defense. It just simply isn't the same thing, right?

And Velsel pointed out, if you kill a fly, you engage in conduct that doesn't satisfy the elements of the offense. If you kill a human being in self defense, you engage in conduct that satisfies the elements of the offense, but it's justified. Both of them are lawful, but both of them are lawful for different reasons, OK?

In my talk, instead of talking about the fly, I'll talk about shooting at a piece of paper, because a fly is an animal, and I don't want to confuse animal law people by trying to

state that killing a fly is not a crime. I think it probably isn't, but we can debate that later. I don't want that to be a distraction, so I'll substitute the killing a fly with shooting at a piece of paper vis-à-vis -vis, shooting and killing a human being.

My claim is that shooting at a piece of paper is lawful, obviously, because it's not an offense, unless it's someone else's piece of paper, but I don't think that matters either. It's a minimus infraction in any case. OK. So, if this is my piece of paper, and I shoot at it, no offense. But, vis-à-vis -vis shooting and killing a human being in self-defense, both are lawful, but for different reasons.

In a nutshell, why are they lawful for different reasons? Well, number one, conduct that does not satisfy the elements of the offense causes no legally relevant harm. So, you can't say that you harmed an interest that's protected by the criminal law. No, the piece of paper is not protected by the criminal law or by any other law. So, you don't harm a legally relevant interest.

Vis-à-vis -vis, when you're justified, you engage in conduct that harms a legally protected interest. After all, you have the dead body lying there of the person, and just by the mere fact of that person being an aggressor, it doesn't mean that his life no longer is of value for the law. That's not what it means.

It means that given that there is a conflict here between the life of the aggressor and the life of the defender, we choose the life of the defender over the life of the aggressor if it comes to that. But it doesn't mean the life of the aggressor is of no value. So, there still is harm. However, the harm is outweighed by the benefits reaped by the conduct.

Another way of looking at the difference between the defense and the justification has to do with reasons. The offense provides you, and the offense provides me with reasons -- legally relevant reasons - with reasons to abstain from engaging in certain conduct.

So, the offense of homicide provides me a very legally relevant reason to abstain from killing someone else. There might be other reasons, moral, social but clearly provides me with a legally relevant reason to abstain from killing someone else.

Justifications, on the other hand, do not provide reasons to abstain from engaging in conduct. What they provide, actually, are reasons that may outweigh the reasons represented by the offense in order to abstain from engaging in the conduct.

So, when you say, for example, that I can...the famous criminal law textbook example...that I can set fire to a farm in order to create a firewall to save the whole town. Well, the justification afforded as a result of necessity or choice of the lesser evils is grounded on the fact that the reasons for engaging in the conduct outweigh the reasons represented by the offense for abstaining to engage in the conduct.

In other words, saving the town provides you with reasons that outweigh the reasons against engaging in the conduct which would be saving the farm. But these reasons that justify conduct do not wipe away the existence of an offense. They do not wipe away the existence of reasons that exist there in favor of abstaining from engaging in the conduct.

Just ask the farm owner. His farm is destroyed. That's still a reason that's there for abstaining to engage in the conduct, but it's overridden. It's outweighed by other more important reasons.

And finally, regret. What does regret have to do with all of this? Well, it has something to do with it. When you engage in conduct that satisfies the elements of the offense, you have reason to regret what you have done, I think, even if your conduct turns out to be justified.

So, if Professor Calandrillo kills Professor Nicholas for whatever reason, right...let's say that Professor Nicholas...there he is...that Professor Nicholas was attacking him because he wanted to be the Charles I. Stone Professor of Law.

So, if Professor Nicholas was attacking him, and Professor Calandrillo kills him in self-defense, we would...I think...and at least up to this attack, they were friends...one would think Professor Calandrillo even though he acts justifiably, and he doesn't act unlawfully when he kills Professor Nicholas, because Nicholas is an aggressor, Professor Calandrillo still has valid reasons to regret having done what he did, right? Certainly.

Why? Because the reasons that make the killing of a human being an offense are still there. They're overridden by the justification, but they're still there. So, they give us reason to regret the conduct. Professor Calandrillo has reasons to regret having killed Professor Nicholas. He can say, "It would have been better if I never had the opportunity to do this." That would have been a better outcome, right? So, there are still things to regret.

And that regret some scholars have argued...and I agree...that regret always provides us, provides Professor Calandrillo with good reasons to look for alternative, less intrusive means of repelling the aggression, because there's something to regret in killing that person. Whereas of course, when there is no offense, there is no reason to look for less intrusive means. If you step in a piece of grass, it is not legally relevant. There is no harm, no foul, you don't have to look for less intrusive means to harm the grass, it is irrelevant. OK.

Now, finally, why is this essentially important for determining why it is a crime to stomp on a goldfish. Why is it a crime to harm egg laying hens?

Well, it is important because we understand why conduct is a crime by examining the offense, not by examining the justification. So, for example, it would be wrong headed. Well, it would just be plain wrong to say that because the law allows Professor Calandrillo to kill Professor Nicholas in self defense, that reveals that the purpose of the law of homicide is not to protect human life. That doesn't make any sense. It doesn't follow it. It is a non sequitur.

The fact that there is an exception that allows you in some circumstances to infringe the elements of the offense doesn't mean that the offense was not designed to do whatever it is that it was assigned to do in the first place. It just means that there are in this case, reasons that outweigh the reasons represented by the offense as reasons to obtain and engage in the conduct.

OK. And this is exactly the mistake committed that I argue that many animal law advocates commit, right? What they say, for example, the excerpts that I read some minutes ago. What they say is well, egg laying chickens, right, if you inflict pain on them for egg production, necessary for egg production, the argument goes that the means that they're suffering and I site again, their suffering doesn't count as legally relevant suffering. Well, that is wrong. It does.

It is legally relevant suffering just like Professor Nicholas death is legally relevant. It just outweighed by the competing considerations that justify the conduct. So, the fact that the hen that you are entitled, your justified inflicting harm on the hand that is necessary for egg production doesn't mean that harm that you inflict doesn't count.

It doesn't mean that it is irrelevant and it certainly doesn't mean as animal law advocates hold that it proves that the purpose of anticruelty statutes is not to protect animals in general or hens in particular. It just means that rightly or wrongly, we have decided to include a whole host of justifications that actually justify satisfying the elements of the offense.

What we are really taking issue with, I argue, is not with the offense of cruelty to animals but rather with the many justifications that allow us to inflict pain on animals. What we want to prove then is that if these justifications are unwarranted that they are too broad. We should fight against the justification not against the offense. The purpose of the offense is to protect animals from pain, but we might just be wrong about the different instances that actually justify inflicting pain. That is my argument. Now, finally before I conclude why does it matter?

Well, I think it matters for several reasons. The first one is purely conceptual. I think the animal law advocate here is confusing certain concepts. They are conflating the offense justification distinction and this is conceptually unsound. I think it is good in a pure sense to be conceptually sound even if no practical implications follow from it.

But in this case, practical implications do follow from it. First, if the judge in Garcia were to have to determine whether there was aggravated cruelty, one of the possible ways of answering the question is what is the purpose of the statute? Why do we advocate punishment when there is a heightened level of cruelty?

And of course, the animal law advocates claim: well the purpose of the statute is to protect property interests, really doesn't help a lot. Whereas the position we all know, the purpose of this statute is actually to protect the animal from unjustifiable infliction of pain helps because it shifts the inquiry from the perpetrator to the animal and the suffering inflicted on the animal.

And the last the reason why it matters is purely strategic and this is my main beef with animal law advocates or many of them. Again, not all, I don't want to generalize. But my main beef is: look, the problem here is that we all want the same thing. I want factory farming to be either intensely regulated or eliminated.

I want unjustifiable infliction of pain of inflicted to animals to be eliminated and you do, too. Now, the difference is that the animal law advocates claim that animal cruelty statutes are not intended to protect animals, holds a very cynical position. And it is a position that I believe is not appealing to main stream America, main stream people in other countries are saying, OK, so you are telling me that we enacted statutes when we believe we were concerned with dogs and cats but we didn't do it because we were concerned with animals, but rather we did it to protect some sort of property interest? That I think is somewhat cynical and off putting for a lot of people.

And the other reason is: look, why not if there are a lot of arguments as I have argued here today, in favor of claiming that the purpose of anticruelty statutes is to protect animals from pain. Why not tap in to that basic sentiment and explain to people, look

there is a basic incoherence here. If you actually enacted animal cruelty statutes to protect animals, why do you allow so many justifications to afford you permission to inflict pain on animals for rather trivial reasons, for the entertainment value of hunting or fishing or for the fact that meat tastes good. But Tyson is the best chicken on earth, right? Is that a sufficient justification to inflict incredible amounts of pain on animals?

I think it is better to engage the public that way to say I know you care about animals that is why you enacted animal cruelty statutes than to hold the more cynical view. Actually, you have never cared about animals in the first place so let us scrap the whole anticruelty statutes and start from scratch. I don't think that will work strategically.

OK. So let me just conclude. Let me just get back to junior. I think that once it is understood that the principle purpose of anti cruelty statutes is to prevent injury to animals. One can see why the decision in Garcia cannot withstand careful scrutiny.

The court asked in my opinion all the wrong questions because it seemed to conceive animal cruelty statutes as laws that are designed either to prevent future harms to humans or to prevent emotional harm to those with close ties to the animal. [Inaudible 50:20] . The former concept to all this statute of animal cruelty statutes lead the court to focus on the state of mind of a perpetrator in order to determine whether his act has been to a heightened level of cruelty. The later, emotional harm conceptualization of these statutes led the court to focus on this emotional harm caused to little Juan, the custodian of the pet.

I believe that by misapprehending the nature and purpose of anticruelty statutes, the court gave short shrift to the only being whose interest were thought to be protected by such legislation. The animal harmed in this case, Junior, the goldfish. Therefore, the question that should have been asked in Garcia is whether the instantaneous killing of the goldfish by stomping on him 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 the aggravated cruelty gets stronger. Contrarily, if the amount of pain and suffering decreases, the case in favor of finding of aggravated cruelty gets weaker.

Now, I actually believe that reasonable minds might disagree with regard to whether the suffering endured by Junior was of such degree to warrant a termination of aggravated cruelty and the felony status of the crime that this entails. On the one hand, I believe that the defendant's contention that the fish did not suffer because he was killed instantly, seems to point in the direction of not considering this act to be one of extreme cruelty.

I agree. Usually, dying instantly is not as bad as dying a slow and painful death. On the other hand, it might be argued that the killing of a being constitutes a supreme act of cruelty. Especially when the killing of a human being is not independently criminalized in animal cruelty statutes.

If that were the case, a finding of aggravated cruelty would be warranted. Now, regardless, of whether one believes that the defendant should have prevailed in these arguments, I believe there is little doubt about who was the real victim of the court's analysis in Garcia, a little goldfish named Junior. Thank you.

[applause] .

**Luis Chiesa**

I think I will take questions now for a brief time here. Yes?

**Man 1:**

I'm curious, how would you classify the [inaudible 52:46] statutes?

**Luis Chiesa**

OK. This is a good opportunity for me to advertise my blog. I co-host a blog dealing with animal law related issues. It is <http://www.animalblawg.WordPress.com> and there I actually have a post that I believed is titled "Why is a crime to have sex with an animal." And I addressed that question. It is very controversial as you expect because it is charged with moral arguments and the like. But my opinion is some scholars like Gary Francione for example and many other scholars believe that bestiality is a crime because it looks like a lot of raping a child because the animal is incapable of consent. I think this misses the point. I think animals and humans are just different species and the concept of consent doesn't make sense in the context of animals.

I think that they consent to acts in their own way. I am not going to explain how but I think they consent to acts on their own way and I think the analogy is just not sound. If not, in theory, every animal, whenever they engage in sex with each other is raping the other animal because they can't consent.

That doesn't make any sense and if there is no actual infliction of pain in cases of having sex with an animal, I actually think that it's unclear why it is criminalized and I think that the reason why it is criminalized is because it is immoral. I think it is criminalized because most people believe that engaging in sex with an animal is immoral and it just violates a very basic fundamental moral principle that has been with us for a long time.

Again, if the act causes harm, physical harm, to an animal then it satisfies the element of animal cruelty and that's it but if it doesn't, I really think that the reason underlying the criminalization of that conduct are unclear. Yes?

**Woman:**

Hi. I really enjoyed this. There is one area that I can't quite reconcile which is a lot of the anti-cruelty laws depend on the species. There's like there is one site here that requires the companion animal. Certainly, sometimes, entire species that are [inaudible 54:59] front. It is not [inaudible 55:03], chicken sometimes. [inaudible 55:08] has really a broad one. I wonder how you can sort of explain that [inaudible 55:15].

**Luis Chiesa**

OK. That is a great question and I think one thing that I always think is in need of clarification is that criminal offenses generally may protect different interests. There is no reason why a criminal offense only has to protect one interest. Let me give you an example. In rape statutes in many jurisdictions, engaging in non-consensual sexual intercourse has a punishment of X. But if the sexual intercourse is achieved by way of force or violence, the punishment is increased. Now, what explains this? Well, what I think explains is that there is two distinct legal interests that are being protected. One is



sexual autonomy, just the base, the interest protected by the offense of rape. And the other is physical integrity and they combine and when they combine then the punishment increases. I think that's what explains why companion animals are usually protected more than non-companion animals.

And I find that to be legitimate. The reasoning here under my theory is that there is X amount of punishment usually the one that gives rights to misdemeanor charge, just because you are cruel to an animal. But then if the animal is a companion animal that kind of demonstrates that you humans have close emotional ties with the animal and then the additional punishment is imposed for that emotional distress caused to the human.

So, I think that in many of these offenses, we have two distinct interests that explain the level of criminalization. But with regard to the question of why are some animals are excluded, well, that is a complicated question. I think that sometimes they are excluded because it is another way of phrasing the justification.

If the animal is to be used for farming purposes and so on and so forth, they are excluded not really because it is not in offense to harm them but rather because that is a very weird way of looking at the justification. So, that is one way of looking at it. And in other cases, I just think that is plain wrong and I can't explain it. Yes, Dawn?

#### **Man 2:**

Well, I was wondering if this [inaudible 57:10] we are trying to do explains best positive fit over the doctrine. I am wondering if there might be some more of juice left with this argument about looking on emotional harm on human and I do like to [inaudible 57:31] explain the [inaudible 57:33] animal quite well. And I am wondering if maybe this action is also considering broad dispersed emotional harm as well as well as proximate emotional harm. That the reason why we [inaudible 57:36] . [inaudible 58:38]. Then there is the inclusion of emotional harms of the entire dog loving community and that might help explain why certain animals that people generally like and they think they are attractive, fuzzy even if I don't find work hazards [inaudible 57:47] . They get protected whereas other animal, people don't enjoy as much don't get protected. And I am wondering if this is as good as the harmed animals to explain the patterns of the doctrine.

#### **Luis Chiesa**

Well, that's a good point. I think it is a pretty good theory. I actually think the best way of looking at it is it complements the protection of the animal theory. Why? Well, first of all, it's...I think for example cock fighting, I don't think we have any particular interest in the animals. It is not because it is warm or fuzzy and it is prohibited in every state. I think that if that's the case, that probably is due to the fact that we just believe that it's wrong to cause harm to these animals. And if so, then I believe the same rationale can be extended to dog fighting statutes even though in that case of dog fighting statutes today involve the infliction of harm and a warm fuzzy animal.

And the other one is that in many jurisdictions, it is a crime to harm animals that are not warm and fuzzy so there are several specific exceptions: hunting, fishing, factory farming, scientific research. But you just can't go ahead and kill whatever animal, an owl, whatever animal you might think is the jersey devil, I don't know, whatever animal you might want to harm.

You can't do it just because you want to and it is not warm and fuzzy and people don't particularly like it. In a sense, I partially agree with you. I think it is a good way of complementing the protection of the animal theory. I think why it explains and definitely here, I think you are definitely right.

It is one way of explaining why companion animals are especially protected but I don't think it is the whole story. I think it needs to be complemented by the other theory.

**Man 3:**

There are animals that are protected [inaudible 50:47] . Some are protected and property of the state. Everyone think [inaudible 59:55] where a harm a game animal battle. Truly short of that game animal. There are several rules regarding how you fish and do other things to protect the property interest of the general public.

**Luis Chiesa**

No, yeah. I think that is fair. Actually, I once talked about this thing in a class and I had a student from Mexico. In Mexico, the theory is that all animals including dogs and cats are property of the state. So, you are harming the state whenever you harm them and not necessarily the human being. And I think that is a nice metaphor and I think that is right to some extent that they are considered to be property of the state and that is why they have some protection. And of course, other animals are protected because they are endangered species for example and we have environmental reasons for protecting them.

So, I agree. I think there are other additional reasons for criminalizing this conduct but I think the limits imposed as a result of being a property of this state if that metaphor works are quite weak as opposed to limits imposed in the case of the run of the mill anticruelty statutes.

**Kellye:**

Well, let me thank you all for being here. And thanks for giving a great presentation.

[applause]

**Luis Chiesa**

Thank you.