

What harmful practices? The material scope of animal protection legislation

Commentary on [Birch](#) on *Precautionary Principle*

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Abstract: Jonathan Birch proposes a criterion for the subjective scope of animal protection legislation. He says nothing about its material scope: which harmful practices it should regulate. I argue, first, that most moral views would agree that the worst forms of animal exploitation should be legally forbidden, even if there will inevitably be disagreement about some cases of animal experimentation. I also argue that, when feasible, there should be legal provisions to help wild animals.

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Jonathan Birch (2017) claims that when there is adequate evidence about the sentience of a nonhuman animal species, it should be brought under the scope of animal protection legislation. In that sense, Birch's Animal Sentience Precautionary Principle (ASPP) functions as the criterion for determining the *subjective scope* of such legislation: to which individuals it applies. Nevertheless, as Birch (2017) himself admits (p. 8), his proposal needs to be further specified regarding the *material scope* of that legislation. It is necessary to develop a criterion to identify which harmful practices must be covered by its provisions. In that regard, I will defend two claims: (a) because only morally unjustified harmful practices should be restricted, there will inevitably be some disagreement about which ones fall within the law's scope; (b) animals should also be protected against unjustified harmful omissions.

1. Not all harmful practices. In a *wide sense*, all possible harmful practices towards animals fall under the scope of animal protection legislation. This is because even with those for whom there need be no specific provision, their legal status can be inferred from the general legal principle that everything that is not forbidden is allowed. Here, however, I am concerned with the material scope of animal law in a *narrow sense*: which harmful practices should be restricted, either by permitting them only under some circumstances or by completely prohibiting them.

According to Birch, the purpose of animal protection legislation is to prevent "serious, negative animal welfare outcomes." It must deal with practices that may, on aggregate, result in predictably high negative well-being for the animals concerned. If they are to be restricted, that is presumably because there is a risk that they are not morally justified. Thus, only practices that are morally unjustified should fall under the purview of these laws.

Nevertheless, whether a harmful practice is morally justified depends, on most views, on the size of the expectable positive well-being that may be derived from it. For example, on the basis of utilitarianism, it suffices that the result of causing serious harm to nonhuman animals is, on aggregate, net positive. Other moral views, both consequentialist and non-consequentialist, will require larger benefits (sometimes, much larger) for a harmful practice to be justified. Inevitably, then, when determining the material scope of animal protection legislation, we will find reasonable disagreement about which practices fall under it, and whether they should be prohibited or, alternatively, permitted, provided that certain conditions are met.

A case in point is animal experimentation for biomedical purposes, which Birch frequently uses to illustrate his principle. From a utilitarian perspective, if the expected results are net positive, taking into account the benefits for both humans and nonhumans, such experiments would be justified (e.g., de Lazari-Radek & Singer, 2014). Other views, however, would oppose using animals for such experiments unless the benefits are much greater. On some deontological accounts, even, the constraint not to harm a sentient individual may never be overridden, or only in order to prevent some moral catastrophe (Regan, 2004; Korsgaard, 2005). However, it is worth noting that such disparate moral theories can agree about the need to establish strict legal requirements to minimise the pain and deprivation suffered by these animals. That would include a preference to use those individuals whose sentience is more uncertain. These are indeed the kinds of legislative measures Birch seems to have in mind (Birch, 2017, pp. 8 and 12).

It is important, however, not to overstate the disagreement among different moral views. Although the justifiability of animal experimentation may be, in this sense, controversial, that is not the case regarding those human practices which are most harmful to animals. Animal exploitation in the food industry, including factory farming and aquaculture, is much worse, because of the larger number of animals subjected to it and the seriousness of the harms the animals suffer. Provided that they reject speciesism, most moral theories would agree that these forms of exploitation are morally unjustified, because the marginal benefit human beings derive from them is minimal. For similar reasons, most moral theories would agree that animal exploitation for other trivial purposes (clothing, entertainment, manufacture and testing of cosmetic or household products) is likewise unjustified. There is widespread agreement, then, that animal protection law should forbid practices such as those involving nonhuman animals who meet Birch's ASPP standard.

2. Serious harm by omission and a legal requirement of assistance. Harmful practices affecting nonhuman individuals do not consist solely of human-bred animal exploitation or experimentation. Wild animals are also harmed by human action. This is sometimes done for sport, but on many occasions, by human interference in the wild for conservationist purposes. An example of these negative interventions is killing individuals of 'invasive' species to preserve autochthonous ones or as a method of population control. An animal protection law which fully considered the interests of these animals would never condone harmful practices of environmental management except to promote the overall well-being of the nonhuman animals affected, and only insofar as less harmful methods were not available.

On the other hand, human non-interference with wild animals can be, arguably, even more harmful for them. Life in nature is not idyllic. Because of the natural harms nonhuman animals undergo, most of them have lives of net suffering (Ng, 1995; Horta, 2010; Tomasik, 2015; Faria, 2016). Presently, there is little that human beings can do about wild animal

suffering on a large scale. In that respect, other pieces of legislation may incentivise research on this issue. Yet many small- and medium-scale positive interventions on behalf of wild animals are currently possible. These include providing them with some medical care against injuries, as well as vaccination and feeding campaigns. It may eventually be possible technically to extend to other animals welfare-state institutions we now take for granted for humans in many countries. From an antispeciesist standpoint, such assistance should be legally required.

References

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