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Chapter 231: Putting Swap Meet Animal Vendors in the Dog House: Regulating the Sale of Animals at Swap Meets

Robert Binning

Code Sections Affected

Health and Safety Code §§ 122370–122374 (new).
AB 339 (Dickinson); 2013 STAT. CH. 231.

I. INTRODUCTION

Animal rights groups generally oppose the sale of animals at swap meets,¹ which are events providing private individuals with a venue to buy, sell, or trade personal property. Because swap meet vendors typically face little oversight from both local government and venue owners, animals sold at swap meets often experience poor living conditions and receive inadequate care.² One southern California swap meet attendee reports finding a lovebird with an exposed skull bone, a macaw with no feathers below its neck, and an azure kingfisher missing substantial portions of its beak, all in the same visit to a local swap meet.³

Swap meets also threaten human health.⁴ According to the Centers for Disease Control and Prevention (CDC), anyone exposed to animals is at risk of catching a zoonotic disease, and contact with a sick animal housed in unsanitary conditions greatly increases the likelihood of contracting such a disease.⁵ Zoonotic diseases are responsible for a large percentage of human ailments: “[a]bout 75% of recently emerging infectious diseases affecting humans . . . and approximately 60% of all human pathogens are zoonotic.”⁶ The emergence of

1. See *California: Stop Sales of Animals in Cruel, Unsanitary Conditions*, HUMANE SOCIETY OF THE U.S. (last visited July 3, 2013), <https://secure.humanesociety.org/site/Advocacy?cmd=display&page=UserAction&id=5974> (on file with the *McGeorge Law Review*) (calling on readers to encourage their representatives to support AB 339); SENATE PUBLIC SAFETY COMMITTEE, COMMITTEE ANALYSIS OF AB 339, at 1 (June 12, 2013) (listing the American Society for the Prevention of Cruelty to Animals (ASPCA), Paw Pac, and numerous regional humane societies as supporters of AB 339). *But see Swap Meet Sales Targeted by Animal Rights Fanatics*, TIME 4 DOGS (Mar. 21, 2013, 10:59 AM), <http://time4dogs.blogspot.com/2013/03/swap-meet-sales-targeted-by-animal.html> (on file with the *McGeorge Law Review*) (claiming the sale of animals at swap meets is not abusive and the market will effectively regulate the sale of animals).

2. *California: Stop Sales of Animals in Cruel, Unsanitary Conditions*, *supra* note 1.

3. *Swap Meet Birds*, TAILFEATHERS (Mar. 25, 2007, 4:29 PM), <http://www.tailfeathersnetwork.com/community/showthread.php/40649-Swap-meet-birds> (on file with the *McGeorge Law Review*).

4. Nat’l Ass’n of State Pub. Health Veterinarians, *Compendium of Measures to Prevent Disease Associated with Animals in Public Settings, 2011*, CTRS. FOR DISEASE CONTROL AND PREVENTION (May 6, 2011), <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr6004a1.htm> (on file with the *McGeorge Law Review*).

5. *Zoonotic Disease: When Humans and Animals Intersect*, CTRS. FOR DISEASE CONTROL (last updated Aug. 7, 2011), <http://www.cdc.gov/24-7/cdcfastfacts/zoonotic.html> (on file with the *McGeorge Law Review*). “Zoonotic diseases are contagious diseases spread between animals and humans.” *Id.*

6. *Id.*

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new zoonotic diseases has the potential to cause global pandemics, and states must take steps to protect their populations from the spread of zoonotic diseases.⁷

Chapter 231 protects the welfare of animals and insulates the public from the spread of zoonotic diseases by effectively banning the sale of animals at swap meets.⁸

II. LEGAL BACKGROUND

Prior to Chapter 231, California banned “the sale of animals in most unregulated public venues.”⁹ However, the law did not ban the sale of animals at swap meets,¹⁰ creating a loophole exploited by “irresponsible and unscrupulous breeders.”¹¹ Penal Code Section 597.4 banned the transfer of animals “as part of a commercial transaction . . . on any street, highway, public right-of-way, parking lot, carnival, or boardwalk.”¹² These venues raise similar concerns as swap meets because they usually lack internal vendor oversight.¹³ While “swap meet operator[s]” could exercise their own discretion by prohibiting the sale of certain goods at their own swap meets,¹⁴ there was no statute or regulation—beyond the laws applying to all businesses—addressing the type of goods swap meet vendors

7. See David Quammen, *Anticipating the Next Pandemic*, N.Y. TIMES (Sept. 22, 2012), http://www.nytimes.com/2012/09/23/opinion/sunday/anticipating-the-next-pandemic.html?pagewanted=all&_r=0 (on file with the *McGeorge Law Review*) (predicting a zoonotic disease will cause the next great pandemic); *Management of Zoonotic Disease Emergencies*, COMMONWEALTH SCI. AND INDUS. RES. ORG., <http://www.zoonoses.csiro.au/Theme.aspx?theme=1> (last visited July 18, 2013) (on file with the *McGeorge Law Review*) (identifying “SARS, Nipah virus and H5N1 HPAI” as recently emerging zoonotic diseases, and warning governments to build “strong framework[s] of national preparedness,” in order to combat zoonotic diseases); see generally *Plague: The Black Death*, NAT’L GEOGRAPHIC (last visited July 14, 2013), <http://science.nationalgeographic.com/science/health-and-human-body/human-diseases/plague-article/> (on file with the *McGeorge Law Review*) (noting the most deadly zoonotic disease outbreak of all time, the Black Death, “kill[ed] an estimated 25 million” Europeans in the fourteenth century, and new cases of the plague are reported each year).

8. See *infra* Part III (describing the provisions of Chapter 231).

9. CA: *Let’s Put an End to Swap Meet Animal Sales*, BEST FRIENDS ANIMAL SOC’Y, <http://capwiz.com/bestfriends/issues/alert/?alertid=62526796> (last visited July 3, 2013) (on file with the *McGeorge Law Review*).

10. California defines a “swap meet” to “include[] a flea market or an open-air market and means an event at which two or more persons offer merchandise for sale or exchange and that meets one of the following conditions: (1) A fee is charged for the privilege of offering or displaying merchandise for sale or exchange. (2) A fee is charged to prospective buyers for parking or for admission to the area where merchandise is offered or displayed for sale or exchange. (3) The event is held more than six times in any 12-month period.” CAL. BUS. & PROF. CODE § 21661(a) (West 2008).

11. CA: *Let’s Put an End to Swap Meet Animal Sales*, *supra* note 9.

12. CAL. PENAL CODE § 597.4 (West 2008).

13. See *California: Stop Sales of Animals in Cruel, Unsanitary Conditions*, *supra* note 1 (characterizing swap meets as “chaotic, unregulated . . . [, and offering] little oversight of vendors”); Kelly Zhou, *Antiques, Furniture, and . . . Parrots? Why Animals Don’t Belong at Swap Meets*, TAKE PART (Feb. 26, 2013), <http://www.takepart.com/article/2013/02/26/ban-animal-sales-flea-markets-proposed-california> (on file with the *McGeorge Law Review*) (offering a primary account of violations against animals occurring at swap meets).

14. CAL. BUS. & PROF. § 21666(b) (West 2008).

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could sell.¹⁵ Ultimately, given their limited resources, law enforcement has struggled to administer animal cruelty laws,¹⁶ along with other laws, consistently at swap meets.¹⁷

III. CHAPTER 231

Chapter 231 closes the loophole in California Penal Code Section 597.4, making it illegal for vendors to sell animals at swap meets in the absence of a local ordinance regulating such a sale.¹⁸ It further provides minimum requirements that a local ordinance must include in order to properly authorize the sale of animals at swap meets.¹⁹ These minimum requirements are similar to the requirements pet stores must meet.²⁰ Violators of Chapter 231 are subject to a \$100 fine for their first infraction and \$500 for subsequent violations.²¹ Chapter 231 does not prohibit the sale of animals by youth agriculture groups, animal control agencies, or rescue organizations.²² Further, it does not apply to vendors at animal shows and fairs, or to the sale of fish and shellfish.²³ Chapter 231 is not enforceable until January 1, 2016.²⁴

15. *See generally id.* at §§ 21660–21669.1 (enumerating the general laws regarding swap meets, flea markets, and open-air markets).

16. *See generally* PENAL § 597 (enumerating California’s cruelty to animals law).

17. *See* Donna Evans, *Illegal Turtle Sales in Chinatown Leave Some Shell-Shocked*, L.A. DOWNTOWN NEWS (Aug. 28, 2013, 5:00 AM), http://www.ladowntownnews.com/news/illegal-turtle-sales-in-chinatown-leave-some-shell-shocked/article_3c03d034-0c4d-11e3-9cf7-0019bb2963f4.html (reporting California’s Department of Fish and Wildlife lacks the resources to perform more “than a handful of surprise inspections a year” of vendors known to sell illegal turtles, which pose a serious public health risk); *see generally* Chris Stein, *As Cities Lay Off Police, Frustrated Neighborhoods Turn to Private Cops*, CHRISTIAN SCI. MONITOR (Apr. 5, 2013), <http://www.csmonitor.com/USA/2013/0405/As-cities-lay-off-police-frustrated-neighborhoods-turn-to-private-cops> (noting that generally since 2007 city revenues have dropped nationwide, leading cities to employ fewer police officers).

18. CAL. HEALTH & SAFETY CODE § 122370 (enacted by Chapter 231).

19. *See id.* § 122371 (enacted by Chapter 231) (stating that local standards allowing for the sale of animals at swap meets must, in part, require vendors to: “(a) Maintain the facilities . . . in a sanitary condition. . . (b) Provide proper heating and ventilation. . . (c) Provide adequate nutrition for, and humane care and treatment of, all animals. . . (d) Take reasonable care . . . animals . . . are free of disease or injuries. . . (e) Provide adequate space [for the animals]. . . [and] (f) Have a documented program . . . established and maintained by the vendor in consultation with a licensed veterinarian”).

20. SENATE PUBLIC SAFETY COMMITTEE, COMMITTEE ANALYSIS OF AB 339, at 6 (June 12, 2013); *see generally* HEALTH & SAFETY §§ 122350–122361 (West 2012) (enumerating the standards for “Pet Store Animal Care”).

21. HEALTH & SAFETY § 122372(a) (enacted by Chapter 231).

22. *Id.* § 122373 (enacted by Chapter 231).

23. *Id.* (enacted by Chapter 231).

24. *Id.* § 122374 (enacted by Chapter 231).

IV. ANALYSIS

Chapter 231 only allows swap meet vendors to continue selling animals if local laws establish minimum standards of care and the vendor complies with those standards.²⁵ Meeting the minimum standards required by Chapter 231 will put all but “the most vigilant vendors” out of business, protecting animals from inhumane conditions.²⁶ However, Chapter 231 exempts numerous public spaces from its requirements,²⁷ leaving the public vulnerable to zoonotic diseases in those venues.²⁸ Additionally, Chapter 231 imposes a less severe punishment on vendors who continue to sell animals illegally at swap meets than violators who sell animals in other banned public spaces, as requested by the California District Attorneys’ Association and California’s Senate Public Safety Committee.²⁹

A. Shielding Animals from Inhumane Swap Meet Conditions

Campaigns against the sale of animals at swap meets often focus on the atrocious conditions animals endure and the resulting animal health problems.³⁰ Animal rights advocate Monica Engebretson documented the conditions at swap meets throughout California and found, “[v]ery frequently . . . the animals didn’t have food or water, even when it was really hot out.”³¹ Furthermore, swap meets often function as an outlet for so-called puppy mills,³² which subject dogs to unhealthy breeding patterns and unsanitary living conditions, producing dogs prone to illness and disease.³³ While the state could prosecute vendors who subjected animals to inhumane conditions under prior animal cruelty laws,³⁴ the

25. *Id.* § 122371 (enacted by Chapter 231).

26. Press Release, *Dickinson Bill to Restrict the Sale of Animals at Swap Meets and Flea Markets Advances to State Senate*, ASSEMBLYMEMBER TOM DICKINSON (May 23, 2013), <http://www.asmdc.org/members/a07/press-releases/dickinson-bill-to-restrict-the-sale-of-animals-at-swap-meets-and-flea-markets-advances-to-state-senate> (on file with the *McGeorge Law Review*).

27. HEALTH & SAFETY § 122373 (enacted by Chapter 231).

28. Nat’l Ass’n of State Pub. Health Veterinarians, *supra* note 4.

29. E-mail from Kate Dylewsky, Program Assistant, Born Free USA, to author (July 12, 2013, 7:22) (on file with the *McGeorge Law Review*).

30. *See California: Stop Sales of Animals in Cruel, Unsanitary Conditions*, *supra* note 1 (“Puppies, kittens, reptiles, and exotic birds are crammed in crowded pens or cages, often in extreme temperatures and without adequate care.”).

31. Zhou, *supra* note 13. A video documenting Ms. Engebretson’s findings can be found at <http://www.youtube.com/watch?v=ybGOVQ4kbUY>.

32. *Puppy Mill FAQ*, ASPCA, <http://www.aspca.org/fight-cruelty/puppy-mills/puppy-mill-faq> (last visited July 18, 2013) (on file with the *McGeorge Law Review*) (defining a puppy mill as “a large-scale commercial dog breeding operation where profit is given priority over the well-being of the dogs”).

33. *Id.*

34. *See generally* CAL. PENAL CODE § 597 (West Supp. 2013) (defining California’s animal welfare provisions).

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enforcement of those laws and the threat of punitive actions failed to protect animals adequately.³⁵

By enacting a blanket ban on the sale of animals at swap meets, unless the local jurisdiction enacts local “standards for the care and treatment of those animals,”³⁶ unscrupulous animal vendors are barred from exposing animals to inhumane swap meet conditions. A blanket ban is also easier for law enforcement to administer, as a blanket ban on the sale of animals does not require specialized knowledge of animal cruelty laws.³⁷ Even where local jurisdictions enact new local standards allowing swap meet vendors to sell animals, because Chapter 231 requires local standards to meet extensive requirements³⁸ similar to those applied to pet stores, animals sold by complying vendors are unlikely to face inhumane conditions.³⁹

Animals in poor health sold at swap meets also harm the people who buy the animals.⁴⁰ Poor living conditions and genetic disorders heighten the risk animals might become sick and require “expensive veterinary care.”⁴¹ Because swap meet vendors may only intermittently attend a specific swap meet, customers who unknowingly purchase sick animals may have no way to contact negligent vendors and no way to attain retribution for undue veterinary costs.⁴² While Chapter 231 does not directly address this concern, it requires vendors to provide buyers with contact information for the supplier of the animals to the vendor.⁴³

B. Protecting the Public from Zoonotic Diseases

Interactions between the public and animals can increase the public’s chances of contracting diseases, creating a public health threat.⁴⁴ Between 1996 and 2011,

35. Zhou, *supra* note 13.

36. CAL. HEALTH & SAFETY § 122370 (enacted by Chapter 231).

37. Animal cruelty statutes under California Penal Code Section 597 fail to provide objective parameters for what treatment or conditions affecting animals violate the law, and thus requires law enforcement officers to subjectively evaluate each case, increasing the burden of administering such laws. *Compare* PENAL § 597.1(a)(1) (West 2013) (“Every owner . . . , of any animal who permits the animal to be in any building . . . , without proper care and attention is guilty of a misdemeanor.”), *with* HEALTH & SAFETY § 122372(a)(1) (enacted by Chapter 231) (“A swap meet vendor who offers animals for sale at a swap meet in a local jurisdiction that has not adopted an ordinance authorizing that sale, is guilty of an infraction.”).

38. HEALTH & SAFETY § 122371 (enacted by Chapter 231).

39. SENATE PUBLIC SAFETY COMMITTEE, COMMITTEE ANALYSIS OF AB 339, at 6 (June 12, 2013).

40. Zhou, *supra* note 13.

41. CA: *Let’s Put an End to Swap Meet Animal Sales*, *supra* note 9.

42. Zhou, *supra* note 13. *But see* CAL. BUS. & PROF. CODE § 21666(a) (West 2008) (“Upon request, a vendor shall provide the purchaser a written receipt disclosing the vendor’s name and address for any items purchased which has a selling price in excess of fifteen dollars.”).

43. HEALTH & SAFETY § 122371(i) (enacted by Chapter 231).

44. *See* Nat’l Ass’n of State Pub. Health Veterinarians, *supra* note 4 (“[A]n inadequate understanding of disease transmission and animal behavior can increase the likelihood of infectious diseases, rabies exposures, injuries, and other health problems among visitors, especially children.”).

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the public reported to the CDC “approximately 150 human infectious disease outbreaks involving animals in public settings.”⁴⁵ Prior to Chapter 231, swap meets exposed attendees to potentially dangerous zoonotic diseases, creating serious threats to public health.⁴⁶ Swap meets also served as a prime venue for the sale of smuggled birds, which spread disease and parasites.⁴⁷ These venues were ideal for selling smuggled birds given their lack of oversight.⁴⁸ A recent study found “3,000 to 9,400 parrots are smuggled from Mexico into the United States annually.”⁴⁹ By providing smugglers a market for their birds, swap meets facilitated illegal activity and exposed the public to foreign diseases and parasites.⁵⁰

While Chapter 231 will effectively end the sale of animals at swap meets by all but “the most vigilant vendors” (therefore effectively ending the spread of zoonotic diseases from animals to humans at swap meets⁵¹), its exceptions allow vendors to continue selling and displaying animals in other public spaces.⁵² Fairs, auctions, 4-H events, and other public venues often subject animals to poor conditions and expose the public to zoonotic diseases, such as rabies.⁵³ However, Chapter 231 explicitly exempts children’s farm clubs and fairs from its enumerated requirements, allowing these events to continue without limitation.⁵⁴ As millions of interactions between humans and animals occur each year, public policy must strike a balance between the educational, entertainment, and commercial benefits of these interactions, and the dangers they pose to the public.⁵⁵

As Chapter 231’s stringent requirements will likely ensure that the public largely only encounters *healthy* animals at swap meets, the legislation limits the “parasites and diseases that may be transmitted to people.”⁵⁶ While the exempted

45. *Id.*

46. *Id.*

47. *California: Stop Sales of Animals in Cruel, Unsanitary Conditions*, *supra* note 1. The importation of birds is regulated by the federal Wild Bird Conservation Act. 16 U.S.C. §§ 4901–4916 (2012).

48. *California: Stop Sales of Animals in Cruel, Unsanitary Conditions*, *supra* note 1.

49. *Dickinson Bill to Restrict the Sale of Animals at Swap Meets and Flea Markets Advances to State Senate*, *supra* note 26.

50. See *Pandemic Bird Flu Emergency Plans in the USA*, VET CONTACT (Mar. 7, 2006), <http://www.vetcontact.com/en/art.php?a=1103&t=> (on file with the *McGeorge Law Review*) (positing smuggled birds sold at swap meets are a potential cause of the next pandemic).

51. *Dickinson Bill to Restrict the Sale of Animals at Swap Meets and Flea Markets Advances to State Senate*, *supra* note 26.

52. See CAL. HEALTH & SAFETY § 122373 (enacted by Chapter 231) (exempting youth farm clubs, fairs, and cat, dog, bird, and reptile shows from Chapter 231).

53. Nat’l Ass’n of State Pub. Health Veterinarians, *supra* note 4.

54. HEALTH & SAFETY § 122373(a)–(b) (enacted by Chapter 231).

55. See generally Nat’l Ass’n of State Pub. Health Veterinarians, *supra* note 4 (providing recommendations for government agencies and education measures).

56. *Dickinson Bill to Restrict the Sale of Animals at Swap Meets and Flea Markets Advances to State Senate*, *supra* note 26.

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venues will continue to allow humans to interact with animals—potentially leading to threats to public health—Chapter 231 takes an important step towards mitigating the threat the sale of animals in public venues poses to public health by establishing appropriate standards, protecting the health of animals, and promoting hygiene and sanitation at swap meets.⁵⁷

C. Imposition of a Different Punitive Structure

The punitive consequences for violations of Chapter 231 are significantly different from punitive actions imposed against violators of previously enacted bans on selling animals in public spaces.⁵⁸ First, violators of Section 597.4 of the California Penal Code, which bans the sale of animals in public spaces, are subject to base fines of \$250 for their first offense, and \$1,000 for each subsequent offense.⁵⁹ However, because of California’s “high fine enhancements,” the Senate Public Safety Committee requested Chapter 231 impose a smaller fine.⁶⁰ As a result, violators of Chapter 231 face base fines of \$100 for their first violation, and \$500 for each subsequent violation.⁶¹ However, as fines imposed in California are subject to “high fine enhancements,” also known as penalty assessments,⁶² which increase the base fines by 310% and add an additional seventy-nine dollars in “flat fees,” vendors violating Chapter 231 may pay \$489 for their first violation, and \$2,129 for each subsequent violation.⁶³

Secondly, repeat violators prosecuted under Section 597.4 of the California Penal Code are guilty of misdemeanors,⁶⁴ while repeat violators of Chapter 231 only face infractions.⁶⁵ The author of Chapter 231 wrote the law to impose infractions on its violators, not misdemeanors, at the request of the California District Attorneys’ Association in order to eliminate violators’ right to jury trials,⁶⁶ potentially reducing California courts’ significant backlog of cases.⁶⁷

57. See A. Roug, et al., *Zoonotic Fecal Pathogens and Antimicrobial Resistance in County Fair Animals*, 36 COMP. IMMUNOLOGY, MICROBIOLOGY AND INFECTIOUS DISEASES 303 (2013) (finding preventative measures related to “humans, animals, and their environments” may mitigate dangers to the public).

58. Compare HEALTH & SAFETY § 122372 (enacted by Chapter 231) (imposing a maximum of a \$100 fine for first time offenders and a \$500 maximum fine for repeat offenders), with CAL. PENAL CODE § 597.4(b)–(c) (West Supp. 2013) (imposing a maximum of a \$250 fine for first time offenders and a \$1,000 maximum fine for repeat offenders).

59. PENAL § 597.4(b)–(c).

60. E-mail from Kate Dylewsky to author, *supra* note 29.

61. HEALTH & SAFETY § 122372(a)(1)–(2) (enacted by Chapter 231).

62. Penalty assessments are state fines of a prescribed amount added to fines and penalties resulting from criminal offenses, and transferred to the county, various state agencies, and state programs. CAL. GOV’T CODE § 76000 (West 2008); PENAL § 1464 (West 2011).

63. SENATE PUBLIC SAFETY COMMITTEE, COMMITTEE ANALYSIS OF AB 339, at 6 (June 12, 2013).

64. PENAL § 597.4(b)(3) (West Supp. 2008).

65. HEALTH & SAFETY § 122372(a)(2) (enacted by Chapter 231).

66. E-mail from Kate Dylewsky to author, *supra* note 29.

67. See Stephen Stock, *California Superior Courts in Crisis*, NBC BAY AREA (July 24, 2013, 10:05 AM),

V. CONCLUSION

Prior to Chapter 231, the sale of animals at swap meets was largely unregulated.⁶⁸ Animals sold at swap meets were often in overcrowded and unsanitary environments, increasing the likelihood they would develop diseases and expose the public to an increased risk of contracting zoonotic diseases.⁶⁹ Chapter 231 effectively ends the sale of animals at swap meets, except when local government authorizes their sale and when vendors meet similar standards of care required of pet stores by state law.⁷⁰ By preventing all but the most attentive vendors from selling animals at swap meets, Chapter 231 helps prevent animal abuse and protects the public from zoonotic disease.⁷¹

<http://www.nbcbayarea.com/news/local/California-Superior-Courts-in-Crisis-216668081.html> (on file with the *McGeorge Law Review*) (finding delays exist in every California Superior Court system).

68. See SENATE PUBLIC SAFETY COMMITTEE, COMMITTEE ANALYSIS OF AB 339, at 5 (June 12, 2013) (explaining swap meets “provide little oversight of the seller”).

69. *Dickinson Bill to Restrict the Sale of Animals at Swap Meets and Flea Markets Advances to State Senate*, *supra* note 26; Nat’l Ass’n of State Pub. Health Veterinarians, *supra* note 4.

70. *Dickinson Bill to Restrict the Sale of Animals at Swap Meets and Flea Markets Advances to State Senate*, *supra* note 26.

71. *Id.*