

ANIMAL RIGHTS AND THE VICTIMHOOD TRAP

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Legal academics recognize that as a general rule, there is no concept so novel and original that it is not a subset of some other well-established, preexisting academic debate. The legal questions that seem most pressing for one social movement are never entirely unique to that movement or that moment. In this sense, animal rights law has more to teach general legal fields than may seem obvious at first blush, and likewise animal lawyers have much more to learn from fields that predate and have nothing to do with animals than they might want to acknowledge. Framing crime victim advocacy as an engine of social change is a topic of import for many modern animal lawyers, but the idea of victimhood as a tool for progressive social change is no more original than it is politically neutral.

This Article examines the work of a notable segment of the animal-law field, which has prioritized law and policy achievements that recognize animals as victims of crime. On the one hand, animals are unquestionably victims. They endure considerable suffering at the hands of humans, and civil liability or non-carceral recognition of this victimhood is a distinct topic. The question this Article takes up, by contrast, is whether the crime victims' rights framing—imbued as it is with the rhetoric and logics of a tough-on-crime movement—represents a material gain for animals. Is the victims' rights turn in animal law exclusively or primarily rhetorical or expressive, or are there concrete, measurable gains for animals? This Article situates the animal rights movement's crime-victim efforts within broader conversations about how victims' rights narratives advance or impede social change, and provides a detailed examination of what victims' rights advocacy for animals has meant for animals to date. The point is not that the "victim" label is always injurious to efforts to advance the standing of animals in law. Rather, the claim is that pursuing a victims' rights agenda in animal law is not as unique as is often imagined, and the socio-legal and political history of crime victim advocacy outside of the animal realm must be taken into consideration. On this question,

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animal lawyers have much to teach other areas of law, and perhaps even more to learn about whether crime victim advocacy is more a trap than a panacea.

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INTRODUCTION

Humans cause a vast amount of suffering to nonhuman animals each day. We overwork animals; we force them to perform for us; we cut body parts like beaks and testicles without anesthesia; we separate families; we confine in small cages; we kill for fur, fun, and food, and cause other emotional and physical suffering. Our legal system is not just oblivious to these harms; it often codifies permissions for these very behaviors.¹ Conduct that could give rise to felony liability is oft exempted from opprobrium if it is done for profit.² For those who seek to value the dignity and

1. See, e.g., William A. Reppy, Jr., *Broad Exemptions in Animal-Cruelty Statutes Unconstitutionally Deny Equal Protection of the Law*, 70 L. & CONTEMP. PROBS. 255, 255 (2007).

2. See, e.g., Justin Marceau, *Palliative Animal Law: The War on Animal Cruelty*, 134 HARV. L. REV. F. 250, 252 (2021); see also Dylan Anderson, *Ranchers Say Proposed Animal Cruelty Ballot Measure Would Be "Death Knell" for Colorado Agriculture Industry*, STEAMBOAT PILOT & TODAY (Mar. 23, 2021), <https://www.steamboatpilot.com/news/ranchers-say-proposed-animal-cruelty-ballot-measure-would-be-death-knell-for-colorado-agriculture-industry/> [<https://perma.cc/R4GZ-5M9J>] (noting opposition by ranchers to a law that would not exempt them from bestiality and cruelty provisions).

autonomy of nonhuman animals, the functioning of the legal system stands as a stark reminder of the failures of law to undermine anthropocentrism.³

Accepting that litigation losses need not be treated as inconsistent with mobilizing social change efforts⁴ but unwilling to wait for judicial pronouncements of progress, some scholars have advanced what they see as a gap-filling set of political interventions on behalf of animals. Leading animal studies scholar Will Kymlicka, for example, emphasizes the socio-legal power of including animals within “legal categories such as ‘workers’ or ‘members of the family.’”⁵ According to this theory of so-called social recognition, an important incremental step in advancing animal rights is recognizing that many domestic animals should be included in the existing “categories of social membership” and should be afforded the rights appurtenant to such membership.⁶ For example, some animals should be considered to have the social status of “family members,” which might make a difference in cases of pet custody disputes and tort liability for harm to a pet. Other animals might be recognized as “coworkers,” because doing so might assist efforts to impose limits on working conditions and working hours.⁷ There is value to animals in recognizing them as part of our community, and as existing within certain categories of human life.

To this end, a notable segment of the animal law field has emphasized a different relational category: animals as victims of crime.⁸ There is a growing call among some notable animal advocates for law reform projects that center animal victimhood as a key part of their social membership. If human victims have victims’ rights, so the argument goes, then the plight of animals will be materially advanced by formally advocating for the legal recognition of animals as victims.⁹

This Article is critical of the notion that a victims’ rights framework, borrowed in large part from the rhetoric and rights associated with the human victims of crime protections, will generally serve the best interests of animals. But

3. See generally Will Kymlicka, *Social Membership: Animal Law Beyond the Property/Personhood Impasse*, 40 DALHOUSIE L.J. 123, 124 (2017) (“[T]hese efforts at reform have reached an impasse, and . . . beneath the dizzying array of change there is actually a great deal of stability and immobility: the basic legal foundations of animal oppression are largely unchanged.”).

4. See generally NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/> [<https://perma.cc/XJU7-XFLM>] (last visited July 11, 2021).

5. Kymlicka, *supra* note 3, at 125 (acknowledging a sort of dualism in animal law such that lawyers are either proposing welfarist reforms or full personhood, and concluding that “working within the property framework is politically feasible but ineffective, and struggling for legal personhood would generate real change but is politically unfeasible.”).

6. *Id.*

7. *Id.* at 136–40, 147.

8. The animals-as-victims turn is explicitly grounded in the rationales that motivate the human victims’ rights movement. See Andrew N. Ireland Moore, *Defining Animals as Crime Victims*, 1 J. ANIMAL L. 91, 98 (2005) (noting with admiration that human victims “have been able to obtain a number of additional protections in the criminal justice system,” including influence in charging decisions, offender registries, and sentencing statements); see also *infra* note 205.

9. See *infra* Part II.

at the outset, I want to be clear that animals are victims.¹⁰ They are frequently victimized by humans in countless ways, and the law should respond to this mistreatment. The question presented here is what the victims' rights orientation provides to animals that goes beyond the rhetorical and expressive. And more specifically, what has it meant to advocates who have sought to achieve victories for animals as victims of crime? Through the use of historical context and doctrine, this Article takes aim at the popular notion that victims' rights advocacy for animals is politically neutral and not generally associated with a carceral politics. But the point is not that all victimhood language needs to be eschewed—animals are victims! Rather, the point is that animal advocacy centered around the notion of establishing animals as victims of crime has been too readily associated with calls for more policing, prosecution, convictions, and longer sentences. This Article argues that the dominant victimhood framing has forced animal lawyers to hitch their wagons to amorphous and unstable concepts such as “justice” and “violence,”¹¹ and the payoff has been surprisingly slight, though the costs are high.

Many readers may be tempted to reflexively react to the above by asserting that the critiques levelled in this project are too speculative or that they let the perfect, or as Voltaire put it, the “best [be] the enemy of good.”¹² But such reactions reveal a great deal about modern animal law. The view that diverting scarce resources to the carceral animal law project should proceed unless there is a better or perfect solution assumes the critical question: are victimhood reforms achieving reasonably good, long-term ends for animals? Should we take for granted that increased felony laws, more convictions, and more policing will net positive gains for animals, or should that financially and morally costly assumption be scrutinized?

This Article is the first to carefully examine animal advocacy's victims' rights turn. The project is primarily descriptive insofar as its goal is to situate the animal-as-victim turn within the larger American victims' rights movement, and to provide concrete examples of what victim advocacy for animals has looked like in recent years. Future projects can and should explore more fully the empirical and normative underpinnings of victim advocacy in animal law. But this Article does challenge the long unexamined conception that recognizing animals as crime victims is an unmitigated, incremental benefit for animals. It should not be assumed that any law that claims to help animals is better than no law. Put differently, as the animal rights movement seeks to avoid the problem of letting the perfect be the

10. Throughout this Article, when I critique victim advocacy for animals or the victim turn in animal law, I am speaking exclusively about the pro-carceral version of this advocacy, which links policing, convictions, and longer sentences with progress. There may be forms of victim protection work for animals that are not wedded to concepts of innocence and guilt. See Fitzgerald, *infra* note 45 (advocating for a recognition of animals as victims that is less wedded to notions of increased sentencing and convictions).

11. See DAVID SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIME AND WHAT IT MEANS FOR JUSTICE 8, 13–40 (2021) (exploring the ways that the concept of violence is more “slippery” and more “complicated” than we often assume; also challenging the trend of treating “violence as characterological rather than situational”).

12. See Deep Patel, *Why Perfection is the Enemy of Done*, FORBES (June 16, 2017, 9:00 AM), <https://www.forbes.com/sites/deeppatel/2017/06/16/why-perfection-is-the-enemy-of-done/?sh=509d52924395> [<https://perma.cc/VJU8-B7XL>].

enemy of the good, it should not fall into the trap of assuming that what is legislatively possible is always good. Sometimes a pyrrhic victory is just that—a perceived step forward that may actually be counterproductive.

To date, many animal lawyers have remained largely nescient or indifferent about crime control data. The carceral animal law campaigns frequently claim that justice will be better served and animals will be safer in our communities if longer sentences are imposed. In April 2021, for example, a national organization lamented that an animal abuser was “sentenced to just one year in prison,” which was an “inadequate” sentence, and it called for legislative reforms that would ensure a more vigorous criminal response.¹³ Commentators have argued that longer sentences are necessary in order to communicate the relative severity of animal crimes¹⁴ and have argued—without data—that for animal crimes “[p]unishment can be a strong deterrent.”¹⁵ Insufficiently severe sentences and low conviction rates serve as a drumbeat for the steady march forward with carceral interventions in the field.

Missing from this conversation is recognition that a longstanding body of research has shown that increased punishments do not generally increase the safety of a community or increase deterrence.¹⁶ These lawyers seem to take for granted that a criminal intervention and a conviction are valuable tools for spurring deterrence and rehabilitation. But this is not a well-founded assumption. As progressive prosecutors have experimented with greater leniency, never-before-possible research is providing some important insights. For example, at least one study from 2021 has shown that decreasing the use of the criminal system by dismissing charges, rather than pursuing convictions, may actually reduce crime.¹⁷ Research is beginning to show that convictions, even without incarceration, make it more difficult for persons to thrive and live a law-abiding life, and thus, perhaps counterintuitively to many, nonprosecution may actually reduce recidivism in ways that animal lawyers have not yet grappled with.

The majority of animal lawyers support or have failed to distance themselves from the antiquated notion that justice for animals is linked to

13. Fundraising e-mail from David B. Rosengard (Apr. 17, 2021) (on file with author) (sent on behalf of the Animal Legal Defense Fund, subject line: Justice for Franky and Bella).

14. Mirko Bagaric et al., *A Rational Approach to Sentencing Offenders for Animal Cruelty: A Normative and Scientific Analysis Underpinning Proportionate Penalties for Animal Cruelty Offenders*, 71 S.C. L. REV. 385, 413–18 (2019).

15. Jessica Rubin, *Desmond's Law: A Novel Approach to Animal Advocacy*, 24 ANIMAL L. 243 (2018) (citing to no data).

16. See, e.g., Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 155 (2003); Amanda Y. Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution* 1, 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28600, 2021), https://www.nber.org/system/files/working_papers/w28600/w28600.pdf [<https://perma.cc/M4H4-5YLJ>] (finding that the nonprosecution of misdemeanors may result in a significant reduction in the risk of reoffending).

17. See Doob & Webster, *supra* note 16.

prosecution, and even incarceration in cases of serious abuse.¹⁸ It is taken for granted that the dismissal of charges, for example, following a term of probation or a diversionary program¹⁹ in cases of serious neglect or abuse are a symptom of the system's inadequate protections for animals.²⁰ Indeed, Professor Jessica Rubin poignantly captures the sentiment of many animal lawyers in a striking essay when she observes that a law named after an abused dog was necessary in order to combat inadequate rates of conviction.²¹ Prosecutions and convictions are treated as "restorative" interventions by the modern animal lawyer, and as teachable moments that allow a person to receive services and treatment.²² More policing, prosecution, and convictions, in short, are assumed to reduce harm to animals. But these are assumptions at war with the work of leading scholars who are focused on misdemeanor-only policing and prosecution.²³ It is simply not the case that the aggressive enforcement of misdemeanor crimes, or the pursuit of incarceration for felonies, makes our communities safer for animals. This is the central myth of animal law's victimhood narrative—that is, we are protecting animals and reducing crime.

Equally important and closely related, this Article examines the overarching question of the positionality of animals in the proposed victim reforms. The reforms pursued under the victims' rights agenda purport to be a type of direct action for animals in the form of prosecuting and policing humans.²⁴ But upon closer observation, particularly considering the unfounded claims of deterrence in this sphere, the impact on the ground may do very little to benefit animals (either the specific victim or the animal species more generally). Carceral animal law reminds us of a lesson about social change efforts in the criminal space more generally. The

18. See *ALDF Position Statement*, *infra* note 106 (rejecting the use of diversionary programs for all felonies or other serious crimes, while also working to expand the scope of felony laws); Jessica Rubin, *Desmond's Law: Early Impressions of Connecticut's Court Advocate Program for Animal Cruelty Cases*, 134 HARV. L. REV. F. 263, 273 (2021).

19. Defining diversionary programs, the Prison Policy Institute has explained:

We envision the criminal justice system as a highway on which people are heading toward the possibility of incarceration; depending on the state or county, this highway may have exit ramps in the form of diversion programs and alternatives to incarceration. Diversion is a broad term referring to any means of exiting the criminal justice system without a criminal conviction, while an alternative to incarceration can be offered to someone who has been convicted.

Leah Wang & Kate Rose Quandt, *Building Exits Off the Highway to Mass Incarceration: Diversion Programs Explained*, (July 20, 2021), <https://www.prisonpolicy.org/reports/diversion.html> [<https://perma.cc/BS3E-39WR>].

20. Rubin, *supra* note 18, at 263–64 (noting that it was a court order permitting a "diversionary program" that served to catalyze Desmond's Law in Connecticut).

21. *Id.* at 264; Rosengard e-mail, *supra* note 13 (remarking that in cases of serious abuse "more could have—and should—been done to ensure that [animal victims] receive justice.").

22. Rubin, *supra* note 18, at 269.

23. See generally ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018).

24. See *infra* Part II.

victimhood turn in animal law risks having far too little to do with animals and all too much to do with the uniquely human interest in punishment. As explained in the remainder of the paper, the animals-as-victims-of-crime project blurs the line between tough-on-crime politics and recognizing the sentience of animals. The former is treated as a palatable means of achieving the latter.

This reality is obscured for many animal advocates because critiquing criminal animal law looks like human rights masquerading as an animal rights project. But in truth, the claim that the lives of animals are being improved by the criminal prosecution of individuals (as opposed to corporations²⁵) is a pernicious fallacy. The point here is not to villainize any lawyers or commentators; rather, I readily accept their good faith and best intentions. Instead, the point is to ask whether the advocacy in support of prosecutions and policing (or even the complicity of silence in the face of such advocacy)²⁶ is helping or hurting the cause of protecting animals.

This Article is divided into three parts. First, to provide a context for the law reform efforts aimed at achieving recognition for animals through criminal prosecution, Part I offers a brief overview of the carceral posture of many animal lawyers. Among a contingent of modern animal lawyers, it is nearly canonical that the recognition of animals as victims of crime is an unmitigated good and a necessary step in the gradual progression of animal law. Many such lawyers eschew the idea that they are seeking punishment for its own sake, and argue instead that through policing and prosecution they are able to acknowledge victims' rights, reduce future crime, and hold persons who harm animals accountable. However, as Part II explains, there is a fine line between vindicating victims' rights and pursuing vengeance. Specifically, Part II examines the existing scholarly literature on the role of victims' rights discourse outside of animal law in perpetuating a tough-on-crime ideology. Understanding the shortcomings of a victims' rights approach to animal law—the notion that criminal law can serve as a cudgel for social change—can help inform the persons considering how best to mobilize a movement's limited resources. This Part examines the longstanding disconnect between victim advocacy and successful systemic change.

Finally, Part III consists of a qualitative and doctrinal summary of the legal strategies pursued in the name of animal—victim advocacy. What exactly does a “victory” for animal rights look like when the chosen means is advocacy for animals as victims of crime? This Part will consider four concrete examples of the types of advocacy undertaken in recent years in the name of recognizing animals as victims: (1) the prosecution of children as adults; (2) assisting with the deportation of

25. I flag the prosecution of corporations here just to note that this is a separate topic from the prosecution of individuals. The question of whether multinational corporations who participate in factory farming should be prosecuted is a timely topic deserving of research. While I support such prosecutions in theory, the details are beyond the scope of this project.

26. Many animal lawyers may shrug at the suggestion that they support carceral animal law by pointing to the work they do outside of the criminal system. But these lawyers should examine the silence or support for such policies by their organizations and contemplate the role that the movement's refusal to publicly oppose such measures has had over time.

noncitizens; (3) developing the law so as to permit charge stacking; and (4) court-appointed victims' advocates for animals. Each of these topics has been celebrated by multiple leading groups as a major victory for animals in recent years, and no major group has categorically condemned each of these practices. The analysis of these efforts, however, reveals that animals may not derive direct or even peripheral advantages from the law reforms achieved in service of the victims' rights crusade.

I. A BRIEF OVERVIEW OF ANIMAL LAW'S PROSECUTION COMPLEX

Important segments of the animal law movement have long believed that justice for animals can and must be pursued through the criminal system. This approach champions slogans like "lock 'em up"²⁷ and in 2018 described a sentence of four months' incarceration and five years' probation as "a distressingly light sentence, amounting to a mere slap on the wrist."²⁸

As a general matter, expansions of the criminal law have been viewed as a symbol of the rising tide of animal law. More criminal law means more status in law for animals. Thus, it came as no surprise in late 2019 when the animal protection movement heralded as a landmark achievement the enactment of a federal felony animal cruelty offense. Flanked on all sides in the Oval Office by the officers of various animal protection nonprofits, then-President Trump signed the PACT Act into law in November 2019.²⁹ Even though every state already had felony cruelty laws and there is no evidence of a reduction in animal cruelty based on the enactments (in fact, no evidence that animal crimes have not increased), the then-President, who makes no secret of his appetite for fast-food and factory farming, delighted in the recognition during the ceremony that with "one stroke of the pen, the President has done more to protect animals and stop animal cruelty in America than anyone in history."³⁰ This sentiment is not radically different from rhetoric pushed by animal lawyers more generally who, for example, argued that state enactments of felony laws were an integral part of the project of bringing "America's laws in line with the humane values of the 21st Century."³¹

In short, it has long been a goal to emphasize the need to avoid "slap on the wrist" punishments and to decry the paltry "legal consequences" facing animal abusers.³² The reflexive force of the strong version of carceral animal law is still very much part of the movement. But it also cannot be gainsaid that in the wake of

27. *Locking 'Em Up, Closing 'Em Down & Pushing Boundaries: PETA's Legal Work for Animals*, PETA (Apr. 8, 2021), <https://support.peta.org/page/27540/data/1?locale=en-US> [<https://perma.cc/PK9M-JA3A>] (celebrating "[l]ocking 'em up.").

28. Stephen Wells, *Animal Cruelty is a Clear Predictor of Future Violence, So Why are Perpetrators Merely Slapped on the Wrist?*, ALL CREATURES (Jan. 2018), <https://www.all-creatures.org/articles/lit-slap-on-wrist.html> [<https://perma.cc/B62T-KDM9>].

29. Marceau, *supra* note 2, at 250–51 (compiling responses to the PACT Act).

30. Rory Diamond, *Remarks by President Trump in a Signing Ceremony for H.R. 724, The Preventing Animal Cruelty and Torture (PACT) Act*, TRUMP WHITE HOUSE ARCHIVES (Nov. 25, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-signing-ceremony-h-r-724-preventing-animal-cruelty-torture-pact-act/> [<https://perma.cc/CTD9-DER9>].

31. Wells, *supra* note 28.

32. *See id.*; MARCEAU, *infra* note 66, at 44–63.

nationwide protests and increasing attention on tough-on-crime policies both within and outside of animal law, many animal-protection groups and scholars have embarked on a project of reframing their criminal agendas. Describing the criminal law as a mere tool for recognizing animals as victims, these lawyers claim that they do not view criminal law as fundamentally or primarily about punishment. Laws that were enacted because of a perceived problem of underenforcement, low conviction rates, or under punishment are, in this telling, “not aimed at increasing punishment for humans.”³³ In the parlance of victims’ rights during a period of social awakening about the criminal system, the movement’s leaders have even begun to shy away from once popular campaigns like the “War on Animal Cruelty,”³⁴ which borrowed shamelessly from the logic and rhetoric of the War on Drugs.

The focus on criminal law, it is often now explained, is about vindicating animals as victims of crime. In this posture, animal lawyers describe themselves as pursuing a kinder, gentler approach. Prosecutions and convictions are celebrated as “restorative” and recommended as important interventions to help persons. It has even become commonplace to talk about treatment, healthcare, and other public benefits available to persons who are forced into the criminal system.³⁵ One might find the criminal process framed as something that is fundamentally good for the defendant. Under this theory of animal rights, we are assured that it is not the sentence that matters so much as the fact of a conviction; indeed, commentators can be heard championing victim advocacy as noncarceral when it results in other-than-

33. Rubin, *supra* note 15, at 272 (noting specifically that Marceau errs by linking certain laws to a punitive history or focus). Throughout history, when an important critique is advanced, skeptics often respond that the critic is too radical or that he or she is overstating the problem. But facts matter. To give but one illustrative example, after reading the legislative history for Desmond’s Law, I inquired by email with one of the law’s leading proponents about whether it was conceivable that the law could be used to combat rather than contribute to mass incarceration: “I was wondering whether you have ever seen a situation (or anticipate one) where an advocate would seek appointment in order to argue for a more lenient sentence?” E-mail from Author to Jessica Rubin (June 3, 2017, 3:48 PM) (on file with author). The response was a blunt rejection of the idea: “Regarding your question, right now, with our few cases, I know each advocate. It is possible that future advocates could argue for lenient sentences but I *would hope* that a prosecutor would be the safety net to *ensure that wouldn’t succeed*.” E-mail from Jessica Rubin to Author (June 3, 2017, 8:16 PM) (emphasis added).

34. See Cynthia Hodges, *The Link: Cruelty to Animals and Violence Towards People*, ANIMAL LEGAL & HIST. CTR. (2008), <https://www.animallaw.info/article/link-cruelty-animals-and-violence-towards-people> [<https://perma.cc/L3YC-UFKW>] (citing *Why You Should Join the War on Animal Cruelty*, COALITION FOR ANIMAL JUST., <http://www.animal-justice.org/involved.html> [<https://perma.cc/CG8N-4WYT>] [<https://web.archive.org/web/20070206165016/http://www.animal-justice.org/involved.html>] (last visited June 29, 2007).

35. Among scholars actually focused on human well-being, it is nothing short of perverse to imagine that the most efficient or effective vehicle for deploying public benefits is the conviction process. That large segments of a movement imagine convictions as potentially beneficial for the defendants might help explain why large segments of the population incorrectly view animal protection as an almost exclusively white, privileged group. NATAPOFF, *supra* note 23, at 200 (noting that because of the consequences of a conviction, the criminal system is actually a “reverse welfare program”).

incarceration sentences.³⁶ It appears that in the eyes of animal lawyers, these gentler penalties make a criminal prosecution focus nearly unassailable.

But this view of policing and prosecutions as effective for animals and relatively harmless for humans is a myth. Overlooked on this rosy view of noncustodial sentences is the fact that in jurisdictions across the country it can take weeks for a misdemeanor case to go to trial, meaning that lower income persons who cannot make bail might spend a month in jail for misdemeanor neglect based on what the animal lawyers would call the soft-on-crime approach.³⁷ Likewise, persons seem to forget that arrests (even for fine-only offenses) do occur³⁸ and can result in the person being booked and held in jail pending bail or a guilty plea. Research has shown that pretrial detention can have negative effects in as little as twenty-four hours, and longer detentions in these so-called noncarceral³⁹ cases often lead to “evictions, towed cars, the loss of food stamps,” deportations, and contribute to the bitter reality that more than five million children have had at least one parent in jail.⁴⁰ Moreover, millions of persons are jailed for probation violations, including technical violations such as the loss of “paperwork proving . . . attendance” at a court-ordered program or moving without filling out the correct forms.⁴¹ Dr. Martin Luther King Jr. was himself sentenced to imprisonment based on the violation of a probation term stemming from a motor vehicle violation.⁴² More generally, in a country where almost half of all people report being unable to come up with \$400 for an emergency, fines and fees imposed on marginalized communities simply obscure the blame for incarceration.⁴³ Persons unable to pay the fines will be subjected to a warrant and often jailed—thousands of persons are incarcerated each

36. Rubin, *supra* note 18, at 270 (celebrating as “noncarceral” prosecutions that do not lead to incarceration).

37. NATAPOFF, *supra* note 23, at 87 (noting that it can take a month in jail for one to get a trial in Baltimore).

38. Not only do they occur, the Supreme Court has recognized this reality and held that it is constitutional to arrest and jail a person for an offense that does not allow for incarceration as a penalty. *See, e.g., Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001).

39. Rubin, *supra* note 18, at 270.

40. NATAPOFF, *supra* note 23, at 22–23. Although beyond the scope of this Article, future research should consider the risk of wrongful convictions in cases of animal maltreatment. Whereas the movement lawyers pat themselves on the back for their pivot towards tolerating more misdemeanor charges, Natapoff has lucidly illustrated how the procedural shortcomings of misdemeanor cases, particularly when paired with pretrial detention, result in a “nearly perfect system for convicting the innocent.” *Id.* at 88–89 (quoting Albert Alschuler).

41. *Id.* at 23–24 (reporting on a case in which a woman sentenced to probation lost paperwork and was then incarcerated for a month, which resulted in her losing “her new job”).

42. *Martin Luther King, Jr. - Arrests*, THE MARTIN LUTHER KING, JR. RSCH. AND EDUC. INST., <https://kinginstitute.stanford.edu/mlk-topic/martin-luther-king-jr-arrests> [<https://perma.cc/AVL8-KGP3>] (last visited June 14, 2021) (describing King as in “jail for violating the terms of a suspended sentence he received for his May traffic violation”).

43. Soo Youn, *40% of Americans Don't Have \$400 in the Bank for Emergency Expenses: Federal Reserve*, ABC NEWS (May 24, 2019, 10:25 AM), <https://abcnews.go.com/US/10-americans-struggle-cover-400-emergency-expense-federal/story?id=63253846> [<https://perma.cc/PLW8-6JHZ>].

year in this country because of the inability to pay their misdemeanor fines or fees.⁴⁴ Only in a society numbed by the sheer scale of our incarceration practices would a set of progressive lawyers come to regard convictions, fines, fees, and probation as merciful—much less restorative.

In short, the victims' rights promise of a pivot away from "carceralism" is less than it seems at first blush. The resulting legislative priorities are strikingly similar to the bygone days of punitiveness. In many ways, the victims' rights framing promises little more than a rhetorically sanitized version of the preexisting tough-on-crime logics. It is retribution masquerading as animal rights.

To put the matter plainly, narratives of victimhood have taken an oversized role in modern animal law,⁴⁵ and the downsides of the vulnerable-victim narrative have not been adequately weighed against the perceived benefits.⁴⁶ For those making instrumentalist calculations about the plight of animals in the law, the animals-as-victims narrative illustrates a longstanding truth about social change and release valves—that is, if the focus is directed towards addressing the most egregious examples of harm (say pet abuse), then there is a high likelihood that the incentive and political will to address the structural forces that lead to that harm in the first place will be diminished. In other words, focusing on the proverbial low-hanging fruit is not always an incremental benefit to the animal cause, and to the contrary may serve to calcify the movement, and directly impede progress.⁴⁷

44. NATAPOFF, *supra* note 23, at 26.

45. Not all rhetoric describing animals as victims is designed with prosecution in mind, or at least not with it primarily in mind. Amy Fitzgerald has attempted to deploy a "social recognition strategy" in support of animals by deploying the victim vocabulary, and her analysis is thoughtful and considerably less focused on the criminal system. See Amy J. Fitzgerald, *Social Recognition of Animals in the Context of Domestic Violence: A Strategic Avenue for Broader Socio-legal Change?* 2 (2020) (unpublished manuscript) (on file with author) (noting that "companion animals are vulnerable to being victimized in homes where there is domestic violence" but not calling for increased criminal punishment for any humans).

46. For its part, the movement counts among its victories increased alliances with prosecutors and judges. But these alliances are too often one-sided. Rarely has the movement stepped in and leveraged its hard-forged alliances to prevent an activist prosecution or to present prosecutorial opposition to anti-animal laws such as ag-gag laws.

47. There is a literature on law and social change theory recognizing the role of moderate reforms in tempering efforts for radical change. See, e.g., Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481–82 (2017) (noting the possibility for reforms to serve as a "release valve" that provide an "expressive release that may disincentivize systemic reform"); Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* 128 YALE L.J.F. 848, 852 (2019); *id.* at 851 (calling reform efforts "deceptive because those who want largely to preserve the current punishment bureaucracy—by making just enough tweaks to protect its perceived legitimacy—must obfuscate the difference between changes that will transform the system and tweaks that will curb only its most grotesque flourishes"); see also ANGELA Y. DAVIS, *FREEDOM IS A CONSTANT STRUGGLE: FERGUSON, PALESTINE, AND THE FOUNDATIONS OF A MOVEMENT* 138–39 (2016) (arguing that "focusing on the individual as if the individual were an aberration" only serves as a means of "reproducing the very violence that we assume we are contesting").

II. VICTIMS' RIGHTS AND THE WAR ON CRIME

A. Respecting Animal Victims Through Carceralism

It has become unpopular in both conservative and progressive political circles to speak of increased punishment as an unmitigated social good.⁴⁸ It was not long ago that “tough on crime” was a campaign slogan for politicians on the left and the right. But mass incarceration and over-criminalization are facing long overdue scrutiny. Efforts to perpetuate the notion of the criminal law as a crucial tool for addressing social problems have, therefore, adopted a variety of reformist narratives that tend to downplay the role of retribution and emphasize the presumed benefits of criminal prosecutions. For example, despite mounting evidence that a more punitive approach to a problem does not reduce the incidence of the conduct,⁴⁹ animal advocates continue to assume that increased prosecution will reduce the rate of animal crimes.⁵⁰ It is an accepted shibboleth of the movement that seeking deterrence is not only distinct from (and morally superior to) seeking punishment, but that punishing to obtain deterrence is not really about punishing at all.⁵¹

The animal law movement has arrived at a moment where it claims to seek prosecutions and convictions not for the sake of punishment. Never mind that the Supreme Court itself has proclaimed that the very essence of the distinction between criminal and civil law is the infliction of punishment,⁵² the trope that carceral animal law has almost nothing to do with punishment is growing in popularity. And a central part of this analytic posturing is the claim by members of the animal movement that convictions are actually about victim acknowledgment. Campaigns to recognize animals as victims of crime have been dubbed essential and “revolutionary” legal developments.⁵³ Commentators have argued that law reform

48. For analyses of the presumed bipartisan support for criminal justice reform, see Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125, 127 (2017); Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 265–66 (2018); *id.* at 312 (noting that, for groups seriously interested in addressing the problem of mass incarceration, it is preposterous to conclude that the problem could be best, or even substantially, addressed by focusing on “nonviolent” offenders).

49. See, e.g., Doob & Webster, *supra* note 16, at 143.

50. It has been said that mass incarceration is the product of “a series of small decisions, made over time, by a disparate group of actors.” JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 229 (2017).

51. See, e.g., Rubin, *supra* note 18, at 270 (describing criminal prosecutions as having a focus that was “not on punishing the defendants, but on preventing and deterring future cruelty”).

52. The Court has explained that the distinction between civil and criminal charges turns on the “character and purpose” of the sanction. *Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994) (citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911)); *United States v. Two Gen. Elec. Aircraft Engines*, 317 F. Supp. 3d 516, 521 (D.D.C. 2018) (“If the sanction is punitive . . . , it is criminal, but if it is remedial and for the benefit of the complainant, it is civil.” (citing *Int’l Union, United Mine Workers of Am.*, 512 U.S. at 827–28)).

53. *Animals as Crime Victims: Development of a New Legal Status*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/article/animals-as-crime-victims-development-of-a-new->

projects focused on treating animals as crime victims accomplish the goal of valuing animals in law.

For example, the enactment of animal-cruelty felony laws in every state was celebrated as a set of “baby steps” necessary, but not sufficient, to establish legal recognition of animals as victims of crime.⁵⁴ Likewise, an animal-abuse offender registry was identified as an “example of the criminal law providing increasing consideration to the importance of animals” as crime victims.⁵⁵ Even more recently, victim-centered advocates have focused their sights on the creation of an Animal Cruelty Prosecution Unit at the Department of Justice (“DOJ”).⁵⁶ This literal expansion of the punishment bureaucracy⁵⁷ is celebrated as a victory for animal victims because it could help ensure that authorities “step up federal action against perpetrators.”⁵⁸

Victim advocacy creates a striking binary. There are the good guys supporting prosecution and policing, and there are animal abusers and their sympathizers. For example, a victim-advocacy campaign explained that the “only people who would oppose” new criminal laws or new prosecution units at the DOJ “are those who are abusing animals.”⁵⁹ There has been no room for nuance or data in these visceral conversations.

B. Lessons from Outside of Animal Advocacy

The animal-protection movement is not writing the history of victim advocacy in support of social change on a blank slate. It is not the first movement to reify policing as a response to a social problem. To date, however, animal lawyers have been heedless of the downsides for social change that inhere in a victims’ rights

legal-status/ [https://perma.cc/4JMT-FZL4] (last visited Aug. 3, 2021) [hereinafter *ALDF Position on Animals as Crime Victims*].

54. Corwin R. Kruse, *Baby Steps: Minnesota Raises Certain Forms of Animal Cruelty to Felony Status*, 28 WM. MITCHELL L. REV. 1649, 1671 (2002) (calling for more felonies and stiffer penalties as part of the “blueprint for the future” of animal law); see also Douglas E. Beloof, *Crime Victims’ Rights: Critical Concepts for Animal Rights*, 7 ANIMAL L. 19, 32–33 (2001).

55. David S. Favre, *Five More Years for the Animals*, 25 ANIMAL L. 341, 347 (2019).

56. See Press Release, Animal Wellness Action, Braun, Whitehouse, Kennedy, Other Senators Introduce Bill to Crack Down on Animal Cruelty (Sept. 16, 2020), <https://animalwellnessaction.org/2020/09/16/braun-whitehouse-kennedy-other-senators-introduce-bill-to-crack-down-on-animal-cruelty/> [https://perma.cc/M3GN-QL7H].

57. Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About “Criminal Justice Reform,”* 128 YALE L.J.F. 848, 852 (2019) (noting that many criminal reformers continue to view the “punishment bureaucracy [a]s an attempt to promote social well-being and human flourishing under a dispassionate system of laws” whose expansion keeps us safe).

58. Press Release, *supra* note 56.

59. “Ann Church, then HSUS senior director of government affairs, encapsulated this rhetorical framework in 1999 when she stated, “The only people who would oppose a law against sexual abuse are those who are abusing the animals.” Gabriel Rosenberg, *How Meat Changed Sex: The Law of Interspecies Intimacy After Industrial Reproduction*, 23 GLQ: J. LESBIAN & GAY STUD. 474, 482 (2017).

model. “Who could object” to animals being labelled victims, the fundraising emails and calls to action often ask.

Scholars from other fields, however, have documented that the legacy of the victims’ rights movement in the United States is in no small part an origin story for tough-on-crime policies and mass incarceration more generally. Victims’ rights and the war-on-crime mentality have emerged as nearly inextricable in modern political discourse, as two sides of the same carceral coin. In his book *Victims in the War on Crime*, for example, Markus Dubber recounts the long history of politicians instrumentalizing victims’ rights discourse in order to expand punitive laws and policies.⁶⁰ Dubber demonstrates that victim advocacy in the criminal law realm has long been exploitative, serving the interests of tough-on-crime policymakers and nonprofits and providing primarily symbolic benefits to actual victims.⁶¹ It is nothing less than rent-seeking behavior by politicians or nonprofits seeking credit for “victories” for a vulnerable group, without doing the work to actually provide a real change. For decades, prosecutors and police have forged “a conservative victims’ rights movement premised on a zero-sum vision of justice that pitted victims against offenders.”⁶² In this worldview, victims of violent crime have been tokenized as vulnerable beings whose innocence can only be recaptured through swift and severe criminal punishments.⁶³ In order to maintain the momentum of the war on crime as an urgent matter deserving of ever more aggressive policing and prosecution, lawmakers are in constant need of “ever more sympathetic[] victims.”⁶⁴

The instinct behind the crime victim turn is commendable, but the logic is flawed. The under-policing and under-prosecution of a particular crime may very well reflect animus towards the victim group—e.g., women, marginalized racial and ethnic groups, gays and lesbians, animals, etc—but increasing prosecution does not address the underlying prejudices that negatively impact the victim-group’s social standing. In one of the most important books on victims’ rights in decades, legal

60. See generally MARKUS DIRK DUBBER, *VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS’ RIGHTS* (2006).

61. *Id.*

62. Marie Gottschalk, *Bring It On: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559, 575 (2015); see also MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 77–164 (Alfred Blumstein & David Farrington eds., 2006); AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION* 96 (2020) (describing the use of victims to prop up criminal law reforms a “dangerous tactic”); Bilz, *infra* note 83, at 389 (calling for empirical research regarding the potential for restoring or honoring a “victim without having to denigrate the value of the offender.”). There are doubtless many animal lawyers who want to imagine the criminal system as providing win-win opportunities, such that it is not a zero-sum game. The literature on the criminal system’s impacts on persons charged with crimes, however, tends to undermine the conclusion that there are not clear winners and losers in the system. NATAPOFF, *supra* note 23, at 19–20.

63. Gottschalk, *supra* note 62, at 575.

64. DUBBER, *supra* note 60, at 192. This is a feature of crime victim advocacy that animal rights groups have fully embraced. It is commonplace for animal cruelty laws to be named after abused pets, whose stories of victimization are deployed as though they represent a self-evident explanation for an expanding carceral approach.

scholar Aya Gruber deconstructs and critiques the prevailing feminist obsession with victims' rights and documents the harms to the feminist movement flowing from these efforts.⁶⁵ Gruber faults feminist legal scholars for weaponizing victimhood in the service of carceral politics, and the reasoning and rhetoric she identifies as supporting the carceral turn among feminists maps almost perfectly on to the logics of modern animal rights lawyers.⁶⁶ One could substitute the phrase "animal lawyers" for "feminists" in large swaths of Gruber's writing and come away with an apt and largely historically accurate critique of animal rights activism. For example, by substituting the words "animal" and "animal lawyer" for "feminist" and "women," consider this pithy encapsulation of the animal protection movement's criminal motivations, "[animal lawyers] painted the poor response of the criminal justice system as a potent illustration[] of a[n] [animal's] lack of status, power, and influence."⁶⁷

This is precisely the framing provided by many modern animal rights lawyers. When animal lawyers confront a nonprosecution (or a "sentence[] of just one year")⁶⁸ in a case of serious abuse or neglect, the response is to lament that animal victims are getting "short shrift in our judicial system" and to note that the lack of aggressive sentencing is tantamount to "a license to resume" abuse.⁶⁹ A lack of criminal prosecution serves as a potent proxy for the animals' disadvantaged status, one that we are assured can be cured through pro-carceral education and advocacy.

In this vein, feminists and animal lawyers alike have mounted campaigns for large, expensive judicial trainings and education programs geared toward emphasizing the importance of prosecution to the public and the legal community as a response to a group's disadvantaged social and legal standing.⁷⁰ But these judicial trainings and Continuing Legal Education ("CLE") opportunities are often heavy on anecdote and light on evidence for the claim that a carceral turn will produce benefits for the victim class. Missing from the conventional educational programs for lawyers in these fields is a recognition that although underenforcement—e.g., a lack of arrests, nonconvictions, or short sentences—may be a symptom of gender bias or species bias, a stronger criminal response is not a cure for the underlying cultural ailments. Sexism and anthropocentrism have been exhibited by prosecutors and police, but a lack of carceral success is not the cause

65. See generally GRUBER, *supra* note 62.

66. JUSTIN MARCEAU, *BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT* 44–96 (2019) (providing a descriptive account of the law reform efforts pursued by animal law advocates).

67. GRUBER, *supra* note 62, at 98.

68. Rosengard e-mail, *supra* note 13.

69. Robert Ferber, *Let the Punishment Fit the Crime*, ANIMAL WELLNESS ACTION, <https://animalwellnessaction.org/2020/08/21/let-the-punishment-fit-the-crime/> [https://perma.cc/RM78-75W6] (last visited Nov. 4, 2020).

70. Animal groups frequently sponsor conferences for prosecutors, and routinely host event talks at their own conferences promoting prosecutions and policing as a solution to the disadvantaged status of animals in the law. See, e.g., Recap: 9th National Animal Cruelty Prosecution Conference, ANIMAL LEGAL DEF. FUND (NOV. 19, 2019), <https://aldf.org/article/ Recap-9th-national-animal-cruelty-prosecution-conference/> [https://perma.cc/9ZB3-NE6N].

of anthropocentrism or sexism. And it is a fallacy to imagine that an upswing in policing and prosecution practices is a viable path towards ending sexism or anthropocentrism. The question of whether criminal charges are effective in protecting victims or preventing future crime has long ago fallen “out of the equation as society obsessed over victims’ trauma and desire for vengeance.”⁷¹

Moreover, scholars have observed that often victim voices are assumed to be monolithic and lacking in nuance.⁷² The efforts to empower victims have almost never amplified victim demands for greater mercy or forgiveness. The victims of crime are expected to seek harsh punishments against the victimizers, and those victims who fail to do so may themselves be stigmatized and rendered invisible by the legal protections created for victims. The victim of interpersonal violence who wants something other than an arrest or, by extension, the animal who might want to avoid further injury but does not want to be removed from a household (much less see her companion incarcerated), are themselves viewed as deviant and perhaps naive. Put differently, the victories pursued in the name of victims are simplistic, one dimensional, and border too close to vengeance. Animal lawyers often argue that they reject the tough-on-crime logics of the 1990s, yet it cannot be gainsaid that the advocacy around animals as victims has inspired movements geared towards increasing prosecutorial aggressiveness.⁷³ There is a general sense among the compassionate carceralists that the failure to obtain convictions, or longer sentences in cases of serious abuse, is a marker of insufficient prosecutorial aggressiveness.⁷⁴ But this overlooks or ignores the research showing that prosecutorial aggressiveness has been identified by modern criminologists as one of the leading contributors to mass incarceration.⁷⁵

Central to victims’ rights advocacy have been efforts to expand the exceptions to the Fourth Amendment, to create offender registries, to increase the maximum penalties for crimes, to limit the availability of diversions or dismissals, to permit the charging of juveniles as adults, and to demonize undercharging or case dismissals. For one familiar with the war-on-crime literature, it is striking how many of these reforms took hold in the criminal system.⁷⁶ And for those familiar with

71. GRUBER, *supra* note 62, at 99; *see also id.* at 100 (“Victims also took on an almost deific quality, making the war on crime something of a holy war.”).

72. *See generally id.*

73. Animal protection groups have asserted that ensuring more “vigorous prosecution” is an important part of their mission. MARCEAU, *supra* note 66, at 14.

74. *See* Wells, *supra* note 28; *see also* Rubin, *supra* note 18, at 263 (emphasizing that the person who abused Desmond the dog was allowed into a diversionary program that permitted the possibility that his conviction “would be wiped from his record after two years”). *See generally* ALDF *Position Statement*, *infra* note 106 (recognizing a role for incarceration and rejecting diversionary programs for any cases deemed to present “serious” charges).

75. *See* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 72–73, 104 (2017) (faulting the scholarly and political attention focused on things like the War on Drugs as opposed to mechanisms and structures that facilitate prosecutorial “aggressiveness”). *See generally* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019).

76. *Cf.* GRUBER, *supra* note 62, at 101.

animal law, it is revealing how many of these same reforms have been pursued in the name of recognizing animals as victims.⁷⁷

C. *Sending a Message About Animal Victimhood*

Another aspect of victims' rights advocacy that warrants mention because of its strong connections to justifications for carceral advocacy in the animal law realm is the "message sending" or expressive function of a criminal response.⁷⁸ Animal-protection groups sometimes claim that the prosecution is not so much about punishment as it is about acknowledging the victimhood of the animal. Creating a victim status in the animal law is regarded as "common sense" and an important part of animal advocacy, even if the consequences in terms of "longer jail or prison sentences" and less ability to "expunge such convictions off of their criminal record" are the practical consequence of the efforts.⁷⁹ It is a logic of double-effect, where the benefit of victim status is pursued as a positive end, and punishment is just the necessary legal vehicle for achieving the goal.⁸⁰

By this logic, the war on domestic violence should be celebrated insofar as it sent a "clear message that domestic violence is criminally unacceptable."⁸¹ Moreover, it is assumed that a stiff punishment for animal cruelty or neglect is necessary in order to "send a message."⁸² One prominent animal law scholar recently argued that victim advocacy in the criminal realm is "symbolically important" and plays an important educational function.⁸³ There is an intuitive appeal to such claims. But the boundaries of this "message sending" logic are far from clear. In the view of some scholars, the symbolic importance of the message has provided lawmakers carte blanche to create any criminal law, no matter how disproportionate, misguided, or ultimately ineffective.⁸⁴ Lawmakers "simply say, 'This law creates

77. MARCEAU, *supra* note 66, at 44–150.

78. The seminal article declaring that punishment can be justified based on its expressive function is JOEL FEINBERG, *The Expressive Function of Punishment*, in DOING AND DESERVING 95 (1970); see also J. G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988).

79. Aimee Green, *Animals Can be 'Victims' Just Like People*, *Oregon Supreme Court Says*, *The OREGONIAN* (Aug. 22, 2014), https://www.oregonlive.com/pacific-northwest-news/2014/08/animals_can_be_victims_just_li.html [https://perma.cc/6VYW-TK7Z].

80. For a discussion of the principle of the double-effect and its relevance to the infamous trolley car hypothetical, see Alison McIntyre, *Doctrine of Double Effect*, *STAN. ENCYCL. PHIL.* (July 28, 2004), <https://plato.stanford.edu/entries/double-effect/> [https://perma.cc/BBH9-DWLA].

81. GRUBER, *supra* note 62, at 107.

82. Ferber, *supra* note 69.

83. Peter Sankoff & Camille Labchuk, *Animals as Victims of Crime*, *ANIMAL JUST.*, at 52:00 (Aug. 21, 2020), <https://animaljustice.ca/podcast/61-animals-as-victims-of-crime> [https://perma.cc/8HBA-C9JZ]. Co-Host Peter Sankoff, to be fair, went out of his way to say that efforts to secure longer sentences or punitive responses are not valuable. See Kenworthy Bilz, *Testing the Expressive Theory of Punishment*, 13 *J. EMP. LEG. STUD.* 358, 366 (2016) (reporting on experiments designed to test whether punishment can increase the social standing of a victim and concluding that at least in certain circumstances among human victims this result can be achieved).

84. GRUBER, *supra* note 62, at 109 n.84.

the penalty of [insert exorbitant sentence] to send a message against [insert behavior of contemporary concern],” and any opposition is framed as unsupportive of the victim.⁸⁵

But from a historical and practical perspective, it is far from clear that policing and prosecution are the only or most effective mechanisms for communicating a message of moral importance. Indeed, prosecutorial efforts to secure a conviction or harsher sentence at a penalty phase by arguing that the fact-finder should “send a message” to the community are disfavored—even prohibited, in many jurisdictions.⁸⁶ More generally, the aggressive use of criminal prosecutions will often not be up for the task of sending a unifying or straightforward moral message.⁸⁷ The point here is not necessarily that there should be a complete abandonment of the criminal sanction for animal abuse.⁸⁸ Rather, the point is much more modest. Moral messages about the status of animals as victims are often lost or confused through criminal prosecutions; it is difficult to “calibrate [a] moral message” that is delivered through the criminal system.⁸⁹

Thus, although victims’ groups can proclaim that higher penalties and more convictions shape public morality by acknowledging victim suffering, it is far from obvious that this descriptive account is accurate, much less normatively desirable. In fact, the extent to which the criminal law is capable of conveying any “moral message[] is likely to be shaped in large part by perceived legitimacy of the criminal justice system.”⁹⁰ As legal scholar Bernard Harcourt has explained, “[i]t is not clear . . . that the expressive dimension of punishment is exclusively, primarily, or even importantly moral opprobrium.”⁹¹ Even the most overt efforts to communicate a moral message by prosecutors are often lost in the translation of criminal sanction.

85. *Id.* at 107.

86. *See* *United States v. Solivan*, 937 F.2d 1146, 1157 (6th Cir. 1991) (reversing a conviction when the jury was asked to send a message about the War on Drugs); *Commonwealth v. Mitchell*, 165 S.W.3d 129, 132 (Ky. 2005) (compiling case law holding that “send a message” closing arguments are not permitted); *see also* James Joseph Duane, *What Message Are We Sending to Criminal Jurors When We Ask Them to “Send A Message” with Their Verdict?*, 22 AM. J. CRIM. L. 565, 675 (1995) (explaining the harm done to the criminal system when it is deployed as a tool to express “revulsion and outrage” or “teach an important lesson”).

87. *See* Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between the Moral Limits of the Criminal Law and the Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 145, 168 (2001) (“The meaning of punishment is not so coherent or simple.”).

88. Perhaps future work will more boldly call for abolition in the animal realm. But for these purposes, I simply note that relatively few people dispute that, at least initially, legalizing a conduct would increase the incidence of that conduct. *See, e.g.*, SANDFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 118 (10th ed. 2016) (acknowledging a literature that “crime” would increase, perhaps dramatically, if persons were never punished).

89. Harcourt, *supra* note 87, at 169.

90. *Id.*

91. *Id.* at 168. *But see* Bilz, *supra* note 83, at 373 (conducting experiments and finding that hypothetical victims “gained social standing and offenders lost social standing when the offender was punished”); *id.* at 370, 386 (recognizing the imperfection of “roleplaying” as a victim and acknowledging potential limitations).

Take a straightforward example. It seems unlikely in the extreme that doubling the penalty for animal cruelty will create a social consensus that animal suffering is twice as important (or even marginally more important) than it was before the enactment or sentencing hearing.⁹² Do higher sentences (or even just the authority to impose them) mark a moral awakening with regard to animal well-being?⁹³

Based on examples from other contexts, the answer seems to be surely not. Consider how a federal judge sentenced three nonviolent men who had helped launder drug money during the 1990s to five centuries each in prison in order to send a clear message about the War on Drugs.⁹⁴ It is almost laughable to speculate that this sentence (and the countless other extreme war-on-drugs sentences)⁹⁵ changed the *moral* conversation about drugs in the United States. These sentences spark more conversation about the morality of the criminal system than they do about the crime at issue. Moreover, with the benefit of hindsight, we now know that drug possession and related crimes did not slow in the wake of sentences like this during the War on Drugs in general. These same critiques might be leveled against the call for high sentences in the realm of animal cruelty. The ability of more prosecutions or longer sentences to communicate meaningful moral messages and shape attitudes in a direct or measurable way seems beyond speculative.

And even if a message could be sent, what costs are the animal movement willing to tolerate in order to make its point? Consider an admittedly extreme example. Slavery codes included animal cruelty as one of the capital offenses for which a person held as a slave could be executed.⁹⁶ If the same code provided that the punishment was necessary as a means of recognizing animals as victims who are “sentient beings capable of . . . feeling pain and pleasure,”⁹⁷ should the moral

92. History shows that even a constitutional prohibition on conduct does not necessarily force a change in norms. Cf. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 473 (1997) (“The passage and subsequent failure of National Prohibition shows the law’s limited ability to change norms even when the change is supported by a significant portion of the public.”).

93. Even researchers who conclude that expressive punishment might increase the social standing of human victims have cautioned that it would be a mistake to “reflexively embrace” calls for greater punishment. Bilz, *supra* note 83, at 387.

94. Scott Glover, *These Men Received 505-Year Prison Sentences Each. Now Their Cases Are Under New Scrutiny*, CNN (Aug. 22, 2020, 5:52 AM), <https://www.cnn.com/2020/08/22/us/505-year-drug-war-sentence-invs/index.html> [<https://perma.cc/TB27-YL7W>] (detailing a case in which a “federal judge in California sent an unmistakable message in the ‘War on Drugs’ when he sentenced four men convicted of laundering cocaine cartel cash to more than 500 years each in prison”).

95. For a thorough review and critique of sentencing in the realm of drug crime, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 47–57 (2010).

96. GEORGE M. STROUD, *A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA* 116 (2nd ed. 1856) (providing that the penalty is death for the killing of certain animals, though for persons who were white the penalty was a fine).

97. There is a modern push to recognize explicitly that animals are sentient beings. Accordingly, new criminal provisions or victim advocate bills are often drafted to include a

repulsion to such a provision be any less? If such a provision would be deemed unacceptable by the animal lawyers of today, the question is why? Is it because the *system* imposing the penalty was grounded in institutional racism? And if so, perhaps it is relevant that even animal lawyers invested in the criminal system have recently conceded that “[n]o one can deny that systemic racial bias pervades our criminal justice system.”⁹⁸ Are animal lawyers prepared to pick and choose between systems operating within the confines of overt systemic racism and tolerate bias so long as the system is less explicit about it? Or is the problem with the slave-code system simply that the punishment (death) was too extreme? Either way, the point of this example is that at a certain point presumably any animal advocate would recognize that the cost of treating an animal as victim is simply too high. At a certain point, entanglements with a fatally flawed system would be acknowledged as doing more harm than good for the movement’s credibility and general outreach. The question for modern animal lawyers is simply where on that continuum does the ongoing push for more felony laws and the reduced use of diversion programs fall when the system they are working in, by their own admission, is filled with “pervasive racial disparities.”⁹⁹

Well-intentioned efforts to send moral messages through criminal prosecution or punishment are complicated.¹⁰⁰ And the expressive-normative message of the law should not be so fetishized as to justify ignoring harmful practical consequences flowing from the law.¹⁰¹ For example, if research were to show that increased criminal prosecutions in the animal law realm lead to no detectable deterrence gains, increased recidivism, and lower rates of reporting, then we might very well question whether the law is a good idea, even if we value the expressive function of the law. As Cass Sunstein has put it, “expressive approaches to law verge on fanaticism where effects on norms are unlikely and where the

sentence provision. See *Enshrining Animal Sentience into Law: Global Developments and Implications*, AM. BAR ASS’N (Jan. 22, 2020), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/committee-newsletters/enshrining_animal_sentience_into_law/ [<https://perma.cc/F7TC-YF9G>].

98. Rubin, *supra* note 18, at 271 n.49.

99. *Id.* at 271. The animal advocates say that they are combatting violence against animals, and the criminal system is the best tool available. But former federal prosecutor and legal scholar David Sklansky provides some necessary context for the idea that animal lawyers are pursuing progressive reforms, “The story of the legal system’s response to violence cannot be disentangled from racism and America’s long history of dealing with racial subordination.” Claudia Nmai & Tenzin Namgyal, *The Legal System’s Response to Violence Cannot Be Separated from Racism*, *Says Stanford Law School Professor*, STANFORD DAILY (Apr. 12, 2021), <https://www.stanforddaily.com/2021/04/12/the-legal-systems-response-to-violence-cannot-be-separated-from-racism-says-stanford-law-school-professor/> [<https://perma.cc/Q8YD-BJ3Z>] (discussing SKLANSKY, *supra* note 11); see also SKLANSKY, *supra* note 11, at 1, 53 (critiquing the view of “violent” crime as a determinate, objective category).

100. See Lynne N. Henderson, *The Wrongs of Victim’s Rights*, 37 STAN. L. REV. 937, 949 (1985) (recognizing the instrumentalization of victims as political symbols).

101. See Cass R. Sunstein, *On the Expressive Function of the Law*, 144 U. PA. L. REV. 2021, 2045–48 (2021).

consequences of the ‘statement’ are bad.”¹⁰² There is, then, an important set of empirical questions that are relevant even to a generally expressive stance in favor of animal crime prosecutions. Do more felony laws, more deportations, registries, and other apparatus of a tough-on-crime agenda risk effects that undermine the social norms that the movement is pursuing? Will the animal protection movement thrive in the coming decades if it is viewed as an arm of the tough-on-crime agenda?

III. WHAT ARE “VICTORIES” FOR ANIMALS AS VICTIMS?

This Part examines how the advocacy in favor of treating animals as victims of crime manifests on the ground—that is to say, what exactly do “victories” for animals as victims look like in law? As this Part shows, pursuing carceral strategies under the cover of a victims’ rights agenda does not inoculate the investments in the criminal system from mass incarceration critiques.

But before turning to these specifics, it is worth noting that in addition to a raft of empirical questions, there are also a number of under-theorized background questions regarding whether the framing of animals as vulnerable victims does more conceptual harm than good. Scholars need to untangle questions about whether the vigorous pursuit of a social recognition of animals as victims by focusing on their vulnerability might risk further subjugating them, even stigmatizing them as different and less than humans.¹⁰³ In the realm of human law, leading scholars have recognized that the term victim is reductive and can be demeaning and paternalistic, which has led many to prefer the term survivor.¹⁰⁴ The very use of the term victim, some have observed, creates a simple binary in which the world is divided into victims and victimizers, and in the process, structural culpability or systemic violence is subtly disappeared, as is the reality that many victimizers are themselves victims.¹⁰⁵

This insight about the occluding power of a victim narrative is a central feature of this section. The analysis that follows challenges advocates to confront the possibility that positioning animals as victims in the law tends to justify or elide the reality that the vast majority of animal victimhood is a product of systemic and legally sanctioned violence. It is pernicious fallacy that all lawmaking in the name of protecting animals will ultimately produce greater net protection for animals. Accordingly, this Part considers the sorts of “victories” that have accrued in the

102. *Id.* at 2047 (noting that in the context of flag-burning, a ban on it might not have the desired social effects and might be counterproductive). The question of whether norms about animal law are likely to be shaped by law is an empirical question that subsequent work should take up.

103. *Cf.* Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 269 (2010) (noting that vulnerability “is both universal and particular; it is experienced uniquely by each of us”).

104. *See, e.g.*, Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1414 (1993) (“[V]ictimhood is attractive in the sense that it secures attention in an attention-taxed world.”); *id.* at 1427, 1433 (describing the use of the term victimization as reductive and explaining that “[t]alk of victims seems to divide the world into only two categories: victims and victimizers”).

105. GRUBER, *supra* note 62, at 97.

name of recognizing animals as victims.¹⁰⁶ Specifically, four concrete examples of law reform pursued in furtherance of the goal of recognizing animals as victims of crime are analyzed.¹⁰⁷

A. Prosecuting Youth as Adults: Animal Lawyers & the Logic of Superpredators

A revealing first example of legal advocacy pursued in the name of establishing animals as victims is the prosecution of children as adults. Even in a criminal system rife with abuses and overreach, charging youth as adults and incarcerating them in adult prisons stands out. The juvenile justice system is far from perfect, but it was created more than a century ago during the late 1800s in Cook County, Illinois, precisely because experts recognized that a different set of standards should be applied to children: prioritizing rehabilitation over punishment—a desire “not to crush but to develop.”¹⁰⁸

Even for those who question whether the juvenile system ever effectively rehabilitated children, there is no doubt that the system succeeded in a more modest goal: keeping children out of the adult system.¹⁰⁹ Children are subjected to countless forms of harm when they are imprisoned with adults.¹¹⁰ When children are imprisoned with adults, they are five times more likely to commit suicide.¹¹¹ Hundreds of 12-year-old and younger children are confined in this country,¹¹² the majority of whom are held for more than six months.¹¹³ When juveniles have their cases transferred to the adult system, even acquittals can manifest as lifelong defeats because the youth might miss school and be held in pretrial detention with adults for

106. *Animal Legal Defense Fund Position Statement: Sentencing for Animal Cruelty Crimes*, ANIMAL LEGAL DEF. FUND 1 (Sept. 2019), https://aldf.org/wp-content/uploads/2019/09/Position-Statement_Sentencing-2019.pdf [<https://perma.cc/CL3Y-JFGK>] [hereinafter *ALDF Position Statement*] (advocating for criminal sentencing so as to “acknowledge the animal victim’s experience”); see, e.g., Amicus Brief of Animal Legal Defense Fund, *Ortega-Lopez v. Lynch*, 834 F.3d 1015, 1016 (9th Cir. 2016) (No. 17-02-02) [hereinafter *Amicus Brief ALDF Ortega-Lopez*] (analogizing to the role that vulnerability plays in necessitating a denial of relief from deportation for crimes involving domestic violence).

107. The point here is not to suggest that these are the only forms of victim advocacy on behalf of animals. These four examples, however, are a fair cross section of the victims’-rights-for-animals movement insofar as each example represents a celebrated modern strategy.

108. SKLANSKY, *supra* note 11, at 158 (quoting Judge Julian Mack).

109. *Id.*

110. Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Dec. 19, 2019), <https://www.prisonpolicy.org/reports/youth2019.html> [<https://perma.cc/556S-G9YF>]. This is not meant to suggest that the juvenile justice system is beyond rebuke. For a critique of the system, see generally NANCY DOWD, *A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM* (2015).

111. *The State of America’s Children 2020—Youth Justice*, CHILDREN’S DEF. FUND, <https://www.childrensdefense.org/policy/resources/soac-2020-youth-justice/#:~:text=Risks%20are%20heightened%20for%20children,held%20in%20juvenile%20detention%20centers> [<https://perma.cc/4J3W-HTYC>] (last visited June 14, 2021).

112. Sawyer, *supra* note 110.

113. *Id.* at n.4.

weeks or months if they cannot afford bail.¹¹⁴ A misdemeanor charge against a juvenile can mean days or weeks of incarceration, even if the sentence is ultimately probation or a fine and even if the charges are ultimately dropped.

In recent years, the push to incarcerate juveniles and to punish them as adults has slowed. This is likely due to several factors, including increasingly clear science demonstrating that the brain development of youth makes it impossible to treat them as fully culpable for their misdeeds.¹¹⁵ Moreover, data has consistently shown that incarcerating young persons does not lead to greater societal safety or lower crime.¹¹⁶ Quite the contrary: recidivism increases, and the social and financial costs of juvenile incarceration are well documented. As a 2016 report from the National Institute of Justice explains, “[i]t is difficult to find an area of U.S. policy where the benefits and costs are more out of balance, where the evidence of failure is clearer, or where we know with more clarity what we should be doing differently.”¹¹⁷ A steady flow of research has urged the conclusion that as a normative matter, punishing kids as adults was a humanitarian problem, and as a crime control matter, punishing kids as adults caused more—and not less—crime in communities.¹¹⁸

Yet in 2017, the Animal Legal Defense Fund heralded their legal briefs and support of efforts to have juvenile animal abusers punished as adults.¹¹⁹ Among animal lawyers urging the victims’ rights agenda for animals, prosecuting juveniles as adults has been treated as a necessary step towards recognizing animals as

114. Donna M Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 127 (2000) (“It is a strange and awkward irony that youths are held in jail as adults but are essentially dependent children for purposes of bail.”); *Children in Adult Prison*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/children-in-prison/> [https://perma.cc/9LB8-5PX9] (last visited Sept. 9, 2021) (“Many kids who are transferred to adult court for criminal prosecution are automatically placed in adult jails and prisons.”); Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, OFF. JUV. JUST. & DELINQUENCY PREVENTION 22 (Juvenile Offenders and Victims: National Report Series, Sept. 2011) (noting that the use of adult jails is mandated in some states).

115. See, e.g., Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 LAW & INEQ. 263, 286–87 (2013).

116. There are more normative reasons that counsel against incarcerating youth. See GIDEON YAFFE, *THE AGE OF CULPABILITY: CHILDREN AND THE NATURE OF CRIMINAL RESPONSIBILITY* 3 (2018) (arguing for an underlying philosophy that recognizes that because they are not part of the political process and are unable to vote, among other things, kids should be “given a break”).

117. Patrick McCarthy et al., *The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model*, NEW THINKING CMTY. CORR. BULL., (Oct. 2, 2016), <https://permanent.fdlp.gov/gpo83081/250142.pdf>.

118. See Reginald Dwayne Betts, *What Break Do Children Deserve? Juveniles, Crime, and Justice Kennedy’s Influence on the Supreme Court’s Eighth Amendment Jurisprudence*, 128 YALE L.J.F. 743, 756 (2019) (“[W]as a swing vote ever a good reason to fail to develop other arguments for why young people who have committed serious crimes deserve a break?”).

119. See, e.g., Amicus Brief for Animal Legal Defense Fund, at 16, *Commonwealth v. J.A.*, 85 N.E.3d 684 (Mass. 2017) (No. SJC-12277) [hereinafter *Amicus Brief ALDF Commonwealth*] (on file with author).

victims. The animal movement seemed to endorse the popular notion that if one is “old enough to do the crime, they are old enough to do the time.”¹²⁰ As a distinguished animal protection commentator lamented in a monograph for the American Prosecutors Research Institute, “no states have provisions for automatic waiver and transfer from juvenile to adult court of even the most violent, repeated or egregious of acts of animal cruelty.”¹²¹ Refusing to give up, the author urged animal lawyers to take up the challenge and ensure the “aggressive” prosecution of juveniles as adults, because that is the “response that provides the best protection of the community.”¹²² Similarly, a prominent resource for prosecutors in Canada urges that when it comes to juvenile prosecutions, the “acceptance of animal abuse as an ‘exceptional circumstance’ . . . opens the door to the availability of a custodial sentence.”¹²³

Following the advice of such commentators, animal lawyers argued to the Massachusetts Supreme Judicial Court that, because animals are victims, an offender’s youth should not preclude them from being sentenced to adult prison rather than treatment.¹²⁴ The Massachusetts case is a compelling example of victims’ rights advocacy in the animal law realm both because it is a recent and celebrated effort and because it illustrates the de-centered positioning of the animals in law when it comes to these law reform efforts.¹²⁵ Emphasizing the statutory standard for allowing a juvenile to be prosecuted as an adult (or a “youthful offender” in the

120. See generally G. LARRY MAYS AND RICK RUDELL, *DO THE CRIME, DO THE TIME: JUVENILE CRIMINAL AND ADULT JUSTICE IN THE AMERICAN COURT SYSTEM* (2012).

121. RANDALL LOCKWOOD, AM. PROSECUTORS RSCH. INST., *ANIMAL CRUELTY PROSECUTION: OPPORTUNITIES FOR EARLY RESPONSE TO CRIME AND INTERPERSONAL VIOLENCE* 34 (2006), https://www.aspcapro.org/sites/default/files/apri_animal_cruelty_prosecution_06.pdf [<https://perma.cc/VF8T-2XF2>].

122. *Id.* Lockwood recognizes that incarceration may not be appropriate for all juveniles, explaining that “[c]harging and related decisions should be based on the nature of the offense, the availability of alternative approaches and the community resources for dealing with young offenders.” *Id.* at 33. However, he seems to think that most cases of intentional abuse should be considered appropriate for adult charges. See *id.* at 35 (“[V]iolent or intentional acts of cruelty should not be considered candidates for diversion.”).

123. Tara Dobe, *Sentencing in Cases of Animal Abuse*, NCPAC (May 22, 2020), <https://ncpac.ca/wp-content/uploads/2020/07/sentencing-primer.pdf> [<https://perma.cc/3CXP-UB6U>].

124. *Commonwealth v. J.A.*, 85 N.E.3d 684, 685–86 (2017). While the animal lawyers did not succeed in this effort, they have succeeded in advancing other punitive positions in law for the sake of recognizing animals as victims. For example, in a 2016 lecture at Harvard Law School, animal lawyers celebrated a victory in a case in which the defendant argued he “didn’t have any money,” and thus failed to feed his dog. Harvard Animal Law, *2/19/16 – Scott Heiser & Niki Cafferri “Prosecuting Animal Abuse: Common Issues and Hot Topics,”* YOUTUBE (Dec. 4, 2018), <https://www.youtube.com/watch?v=ml1bjaQn5mk> [<https://perma.cc/B8MS-XHPJ>] [hereinafter Harvard Animal Law]; see also *id.* (“Laura Dunn and Virginia Coleman did a fantastic job on that brief, and we were victorious.”).

125. The animal lawyers made clear that they were looking for a categorical rule allowing juveniles to be punished as adults, because in their brief they argued they were “uniquely positioned” to opine on the import of forcing a juvenile to be charged as an adult while conceding they had only incomplete and “sketchy” information about the proceedings, which were under seal. *Amicus Brief ALDF Commonwealth*, *supra* note 119, 1–2.

parlance of the statute), animal lawyers explained that “serious bodily harm may be inflicted on a nonhuman animal just as it may be inflicted on a human and stands on the same footing . . . as serious bodily harm done to a human.”¹²⁶ In the view of the animal lawyers, “the longstanding strong public policy of animal protection” justifies “permitting indictment as an adult,”¹²⁷ and the failure to permit adult punishment would indicate that animal crimes were not being treated with the “severity that protection of the public required.”¹²⁸

As David Sklansky has observed, the push to incarcerate juveniles flows from a superpredator logic that predicts a wave of crime by these kids if swift and severe adult punishment is not permitted for violent juvenile crimes.¹²⁹ These kids “are not normal,” argued the animal lawyers, pointing to their potential for future violence and echoing the logic of prosecutors who had identified a “whole new breed” of juvenile superpredators in the 1990s.¹³⁰ In pursuing victims’ rights for animals, animal lawyers fully embrace the logic and rhetoric of the superpredator approach to punishment, arguing that the kids who harmed animals are “ticking time bombs whom society needs to address.”¹³¹ But in doing so, the animal movement showed its punitive hand and diminished the movement’s credibility by pressing narratives that have been debunked as myths. As one scholar put it, the ever-present narrative of an abnormal kid who lacked any conscience and was uniquely prone to violence was a fable used to justify a moral panic: “The time bomb never went off.”¹³² It is a chilling reminder of the way that victim advocacy and mass incarceration are two sides of the same coin, with the former driving the latter based on exaggerated narratives and anecdotes. That a movement premised on empathy would be so quick to adopt this rhetoric and deploy it to incarcerate children teaches us something important about the volatile nature of advocating for animals as victims. Even for those animal lawyers who now reject the practice, it is worth observing that the logic of animals as victims of crime justified and fueled the race to incarcerate youth as adults.

The stakes of arguing that kids should be punished as adults were always well known to the movement. No one argued that there was an increased risk to any animal by allowing the youth to be treated as juvenile rather than punished as an adult.¹³³ In fact, all parties before the Massachusetts Supreme Court conceded that

126. *Id.* at 5–6.

127. *Id.* at 12.

128. *Id.* at 16–19 (arguing that the presumed link between human and animal violence justified removing “many of the protections prior law had provided to juveniles”); *id.* at 18 (arguing that it is appropriate to consider kids who abuse animals as eligible for up to seven years imprisonment).

129. SKLANSKY, *supra* note 11, at 161.

130. Compare SKLANSKY, *supra* note 11, at 161, with *Amicus Brief ALDF Commonwealth*, *supra* note 119, at 19.

131. *Amicus Brief ALDF Commonwealth*, *supra* note 119, at 19.

132. SKLANSKY, *supra* note 11, at 160.

133. Indeed, recidivism research would suggest that forcing a child to be incarcerated might increase, not decrease, the net risk of harm to animals. Cf. Ellie D. Shefi, Note, *Waiving Goodbye: Incarcerating Waived Juveniles in Adult Correctional Facilities*

the State could proceed with a complaint for juvenile delinquency.¹³⁴ If charged as a juvenile, the allegations and charges would have been the same, but the key difference was that if the defendant could be charged as an adult, then and only then would he be eligible for imprisonment for years (even in adult prison).¹³⁵ As the Court put it, “[u]nlike a delinquent child, who is subject to *rehabilitative penalties and remedies*, a ‘youthful offender’ is subject to *penalties* that may include an adult sentence in the *State prison*.”¹³⁶

This point warrants reiteration. The only functional difference between the criminal intervention that was clearly permitted under existing law and the criminal law reform sought in the name of recognizing animals as victims of crime was the possibility of punishing and possibly incarcerating a child in adult prison. The reason for a legal intervention by animal lawyers was to secure the right to incarcerate a juvenile and to have juvenile animal abusers recognized as a type of superpredator.¹³⁷

The careful reader might ask, then, how does this help animals? No one in animal law has proffered data suggesting that violence towards animals is on the rise or, more importantly, that existing levels of such violence will be reduced if incarceration is more commonly imposed as a penalty. The animals-as-victims framing, instead, is used as a tool to secure imprisonment, without any obvious or data-supported conclusions that such law reform would directly benefit the harmed animal. In this perverse world, the suffering of the animal victim is treated as relevant primarily as an instrument for obtaining more or longer sentences, and no evidence of direct benefits to animals is expected or even sought in order to justify the move. Like much of victim advocacy, the litigation was expressive or symbolic; the lawyers argued that failing to allow a child to be indicted as an adult for animal maltreatment would “trivialize the crime in a way which cannot be reconciled with public policy.”¹³⁸

But if the goal is education or expressive acknowledgement, the Massachusetts Supreme Court’s decision need not be viewed as a stinging defeat. In terms of judicial recognition of sentience, the decision is a victory. As the court explained in its holding, “[a]lthough the juvenile will not be treated as an adult and face criminal penalties,” the court does not “wish to downplay the suffering the dog went through during and after the attack.”¹³⁹ The court unequivocally did what the

Will Not Reduce Crime, 36 MICH. J.L. REFORM 653, 667 (2003) (“When juveniles incarcerated in adult facilities become recidivists at a higher rate than those confined to juvenile facilities, the temporary ‘gains’ achieved by their incarceration are quickly offset by the increase in crime.” (citation omitted)).

134. Commonwealth v. J.A., 85 N.E.3d 684, 685 (Mass. 2017).

135. Under Massachusetts law, the key difference between trying a youth as an adult or a juvenile is the penalty. A person tried as a juvenile may only be sentenced to the Department of Youth Services, but a “youthful offender” can receive the same sentence as an adult offender for the crime. See MASS. GEN. LAWS ch. 119, § 54 (2020).

136. J.A., 85 N.E.3d at 685 n.1 (emphasis added).

137. SKLANSKY, *supra* note 11, at 165 (noting that the superpredator theory had been “discredited” by the 2000s).

138. *Amicus Brief ADLF Commonwealth*, *supra* note 119, at 21.

139. See J.A., 85 N.E.3d at 687–88.

advocates argued was only possible by punishing the child as an adult: it recognized that, unlike property, an animal is vulnerable and capable of suffering.¹⁴⁰

The animal lawyers involved in the case would no doubt respond that this was a hollow or meaningless recognition of animal victimhood by the court, because the advocates' argument that a juvenile animal abuser was eligible for adult punishment did not prevail.¹⁴¹ But perhaps what is hollow is the notion that criminal sentencing is a proper yardstick for measuring progress in animal law. Under the punitive approach to animal law, the law's expressive function requires more than judicial statements and explicit recognitions of sentience but rather requires heightened criminal sentencing. Animals are treated as victims not for the sake of obtaining public or judicial recognition of this fact but for instrumental (victories) purposes that have very little to do with the animal or the animal's suffering.

Put differently, it is not a radical position to argue that the law should express an understanding of the ability for animals to suffer. Animals are victimized, and the law provides woefully inadequate protection to animals, and animal lawyers are righteous in their efforts to make this point.¹⁴² But when the movement falsely insists that such legal recognition or acknowledgment is often or best tethered to convictions or incarceration, for example by treating juvenile offenders as superpredators who warrant punishment as adults, it shows more interest in expanding the criminal system than in animal well-being.¹⁴³ Yet in April 2020, a national animal-rights group published an alert calling for persons to urge adult charges against two teenagers in North Carolina who tortured a dog.¹⁴⁴

140. *Id.*

141. *Id.* at 685.

142. See generally Kymlicka, *supra* note 3.

143. As of late 2019, at least one prominent group has suggested that they will generally no longer support juvenile incarceration. See *ALDF Position Statement*, *supra* note 106, at 10 (“[T]he Animal Legal Defense Fund supports primarily rehabilitative efforts in juvenile cases.” (emphasis added)). But this tentative renouncement of advocacy that was celebrated and actively pursued in briefs at least through 2017 is itself telling. No one disputes that the advocacy in favor of punishing children as adults is an outgrowth of the very project analyzed in this paper—that is, treating animals as victims of crime. That the best minds in animal law supporting the victims-of-crime model of advocacy concluded in recent history that the imprisonment of children was an important win for animals might itself be a reason to revisit the law and policy architecture of victim advocacy in the field.

Moreover, as commentators have noted, some groups are willing to make a few “tweaks” in their policy in the hopes of further entrenching the carceral system. Karakatsanis, *supra* note 57, at 851 (“The emerging ‘criminal justice reform’ consensus is superficial and deceptive It is deceptive because [of] those who want largely to preserve the current punishment bureaucracy—by making just enough tweaks to protect its perceived legitimacy . . .”).

144. *Hold Teens Who Tortured Dog and Laughed Accountable for Their Violent Act*, IN DEF. OF ANIMALS (Apr. 3, 2020), <https://www.idausa.org/campaign/justice-for-animals/latest-news/hold-teens-who-tortured-dog-and-laughed-accountable-for-their-violent-act/> [<https://perma.cc/PAN3-THEM>] (“Unfortunately, these abusers are being charged in juvenile court, and won’t face the toughest penalties possible for committing a felony.”).

More generally, a logic of equalizing down rather than up permeates the criminal law thinking of too many animal law commentators. In a formal position statement on criminal interventions, one animal-protection organization treats as canonical the notion that the harshest punishments are reserved for “those crimes which society has deemed most reprehensible” and uses this claim to prop up a syllogism that concludes that the public is failing animals if we do not demand sentences for animal abuse that are “*at least* as punitive as those” issued for property crimes.¹⁴⁵ Even accepting the notion that the myth of proportionality animates the workings of the current system (it does not),¹⁴⁶ the claim that animals are helped by punishing children as adults is a telling insight into the victimology of animal law.¹⁴⁷ A victims’ rights campaign is not and never has been politically neutral; it is, rather, inexorably linked to the regressive War on Crime.¹⁴⁸

B. Immigration Enforcement

In 2018, animal lawyers participated in a case they herald to this day as *Establishing Animals as Victims in [a] Federal Case*.¹⁴⁹ The federal case was an immigration proceeding in federal immigration court, and the brief was an amicus brief that aided the Board of Immigration Appeals in deporting a person named Agustin Ortega-Lopez.¹⁵⁰

145. *ALDF Position Statement*, *supra* note 106, at 1–2.

146. Criminologists have long observed that the legal status of particular conduct and whether it is deemed criminal or celebrated as culturally normative is not so much a question of the conduct itself but rather turns on the dominant group’s responses to the behavior or to the persons who participate in the behavior. *See, e.g.*, Roger A. Shiner, *Theorizing Criminal Law Reform*, 3 *CRIM. L. & PHIL.* 167, 168 (2009) (noting that “crime does not exist independently of the social structures and processes”). *See generally* John Hagan, *The Social and Legal Construction of Criminal Justice: A Study of the Pre-Sentencing Process*, 22 *SOC. PROBS.* 620 (1975). For an example of the social construction of the criminal law in the realm of animal law, consider the crime of bestiality and its exemption for agricultural practices. *See Rosenberg, supra* note 59, at 479–82.

147. By similarly troubling logic, one might expect animal protection commentators to champion mandatory minimums and other regressive reforms, and they do. *See, e.g.*, Kirsten E. Brimer, *Justice for Dusty: Implementing Mandatory Minimum Sentences for Animal Abusers*, 113 *PENN ST. L. REV.* 649, 665 (2008) (“Overall, mandatory minimums prove extremely useful to prosecutors and coercive to defendants While mandatory minimums are not guaranteed to solve all of the many problems with prosecuting animal abusers, they will give the prosecution a significant bargaining chip.”).

148. Animal rights groups celebrate their claimed political neutrality and ability to work with politicians of any party. Setting aside the question of whether any truly objective framing of advocacy is possible, what cannot be doubted is that the victim turn in animal law is highly politicized, and thus causing the sort of isolation that is feared to be unhelpful to animals. *See Henderson, supra* note 100, at 951. *See generally* DUBBER, *supra* note 60.

149. *Amicus Brief Establishing Animals as Victims in Federal Case*, ANIMAL LEGAL DEF. FUND (Dec. 3, 2018), <https://aldf.org/article/amicus-brief-establishing-animals-as-victims-in-federal-case/> [<https://perma.cc/AAZ9-SLKH>] [hereinafter *ALDF Amicus Brief Announcement*].

150. *Matter of Ortega-Lopez*, 27 *I. & N. Dec.* 382, 398 (B.I.A. Aug. 6, 2018).

The advocates filed a brief urging the court to recognize animal maltreatment as “not a victimless crime.”¹⁵¹ The case, in the words of the advocates, “offered a rare opportunity for the federal justice system to consider whether the sort of harms endured by animals . . . rise[] to a level where those animals *are victims* whose suffering is unacceptable in our society.”¹⁵² Seizing on this “opportunity,” the animal lawyers argued that animal abuse is a violent crime of moral turpitude, the legal consequences of that determination being that Mr. Ortega-Lopez would be automatically deported.¹⁵³ Crimes of moral turpitude, the animal lawyers explained in their brief, are crimes that involve “more than just breaking a law” but rather involve conduct that is “inherently vile, depraved, or morally reprehensible.”¹⁵⁴ Making the point that animals can be victimized, in the view of the animal lawyers, justified submitting a brief that would benefit the government’s deportation efforts.

Experts on mass incarceration in the United States have observed that the celebrated binaries of criminal law—violent versus nonviolent or victimless versus victim—lack nuance and serve as placeholders that rather arbitrarily justify more aggressive policing and prosecution.¹⁵⁵ But in the eyes of movement lawyers, the case was important because it presented a court with an occasion to recognize animal cruelty as among the crimes that are singled out as deserving of heightened social opprobrium such that deportation is mandatory rather than discretionary.¹⁵⁶

The facts and legal argumentation in the case are illustrative of animal law’s victim focus. Mr. Ortega-Lopez entered the United States without permission in 1992, and he had resided in the country for nearly three decades at the time of the appeal. Mr. Ortega-Lopez had three children, each with U.S. citizenship.¹⁵⁷ In 2008, he played what the government described as a “relatively minor” role in a single cockfighting event (presumably as a spectator) and pled guilty to a single misdemeanor count, for which he was sentenced to probation rather than

151. *ALDF Amicus Brief Announcement*, *supra* note 149. The animal advocates acknowledge that they filed the brief at the request of the Department of Justice, but they emphasize that their “expert attorneys responded with an amicus brief, in favor of neither party.” *Id.* But this is deceptive titling, because there is no doubt about which party in the case was aided by their brief. By deciding not to write in support of immigration officials in form, while doing so in substance, the movement might be accused by some of appreciating how alienating an alliance with ICE could be for social change advocates.

152. *Id.*

153. While the animal lawyers focused on the violent character of the crime, the historical definition of “moral turpitude” is considerably more opaque and has never been about “whether it was violent.” SKLANSKY, *supra* note 11, at 50 (detailing the history of term moral turpitude and noting an example where allegations relating to homicide did not qualify, but allegations relating to poisoning a neighbor’s animal did).

154. *ALDF Amicus Brief Announcement*, *supra* note 149.

155. See SKLANSKY *supra* note 11, at 3 (“The category of violence does a lot of work in American Criminal law. And the story of mass incarceration in America, it turns out, is in part a story about the growing importance of this category.”).

156. Missing from the animal lawyers’ summary of their litigation efforts is any recognition that arguably victimless crimes, including being a sex worker, have also been shoehorned into the rather capacious category of crimes of moral turpitude. *ALDF Amicus Brief Announcement*, *supra* note 149.

157. *Ortega-Lopez v. Lynch*, 834 F.3d 1015, 1016 (9th Cir. 2016).

incarceration based on his limited culpability.¹⁵⁸ Perhaps because the sentence of probation was viewed as too lenient, or perhaps simply to make an expressive legal point about victimhood, the animal lawyers (at the urging of U.S. immigration officials) filed a brief with the Board of Immigration Appeals (“BIA”) arguing that Ortega-Lopez’s crime must be characterized as a crime involving moral turpitude.¹⁵⁹ The lawyers filed the brief with full knowledge that the resolution of this legal question would determine whether Mr. Lopez-Ortega would be definitively prohibited from remaining in the United States with his children.

One might say that this is just one case, and thus it looks like an anecdote. But briefs in these cases are generally under seal (as they are in juvenile cases), so it is nearly impossible to know how frequently animal groups have taken similar actions in recent years. And more importantly, this brief stands as an example of the practical outputs that flow from a strong victims’ rights orientation. It is a striking warning sign about how the animals-as-victims legal framework contributes to racialized and punitive frameworks. To be blunt, there is no question about why the brief was filed. The brief’s central concern was to convince the courts that animal abuse is not a “victimless crime.”¹⁶⁰ The lawyers explained that the federal crime of animal fighting makes it “clear that birds and mammals constitute a protected class of victims.”¹⁶¹ In other words, it is precisely because animals are entitled to be recognized as victims of crime that the harm to the animals necessitates deportation. If nothing else, it should give movement lawyers and external observers pause to recognize that their own view of animals as victims leads lawyers to think that briefs like this one are central to modern animal law efforts. If leading organizations could be lured into supporting ICE’s policies during the Trump presidency, what else can be justified under the punitive algorithm for defining animals as victims?

The lawyers and advocates who supported ICE’s argument that Ortega-Lopez should be deported framed this as a path-marking opportunity for our legal system to recognize animals as victims. But the less sanguine and more pragmatic lawyer would understand that the lawyers at U.S. Immigration and Customs Enforcement (“ICE”) were not genuinely interested in elevating the status of animals but rather in using all available arguments to remove undocumented persons from the country. “Did the animals win or did ICE win,” advocates might ask themselves. And in answering this question, one might note that if Ortega-Lopez was a manager of a massive factory farm and he was overseeing the violent death of thousands of chickens per week (as opposed to the ones he watched fighting), he would not face criminal liability, much less be prioritized for deportation.

Facing critiques of carceral animal law logics, animal lawyers frequently lament that they are misunderstood and that the crime-victims approach to animal rights is not about punishment. But advocacy in cases such as this one reveals the lack of imagination that drives a vision of what victory would look like for animals and demonstrates the punitiveness that underlies these projects. As of this writing, the BIA decision forcing the deportation of Mr. Ortega-Lopez is cited by animal

158. *Id.*

159. *ALDF Amicus Brief Announcement, supra* note 149.

160. *Amicus Brief ALDF Ortega-Lopez, supra* note 106, at 2.

161. *Id.* at 3.

advocates as “an important step forward in improving the legal status of animals,” because the court’s order advances the so-called animal crime victim movement.¹⁶²

As with all of the litigation mentioned in this Article, it is not that every animal lawyer (or every organization) supports these methods of advancing the status of animals. But what can be said is that animal rights organizations and lawyers have virtually never spoken up against these tactics. At best, there is a tacit acceptance that this kind of work falls within the umbrella of acceptable animal advocacy.¹⁶³ This silence is almost as problematic as the advocacy when it comes to the ability of civil rights groups to generalize about animal lawyers. Lawyers in the field often feel that the movement is unfairly painted with a broad-brush of punitiveness. But why are they surprised? No animal lawyer that I am aware of has come out publicly against the advocacy in support of deporting Mr. Ortega-Lopez. Tactics such as pursuing deportation in an effort to help animals have persisted for decades with virtually no public criticism, and even today there are very few groups or organizations that publicly disavow carceral logics in animal law. For scholars and advocates to sit idly by, deferring to the conventional wisdom that immigration and criminal actions are helping animals, is no less striking than the participation of some animal lawyers in these cases. One should not be surprised when persons outside of the movement perceive all major animal groups—none of whom object to such cases—as clumped together.

Moreover, as with the prosecution of children as adults, the role of the animal is quite de-centered in immigration proceedings. It seems reductive—even absurd—to imagine that the interests of the animal can be so readily distilled to such a punitive logic. One might challenge critiques of carceral animal law because they do not lend themselves immediately to alternative law reform projects. But this risks being a facile objection unless there is some general agreement about the animal-centered goals that are being pursued through carceral animal law. What goals are the movement lawyers achieving when they ensure the deportation of someone like Ortega-Lopez? Does the literature showing that punitive responses may cause more community upheaval and increases in crime impact how we measure victories in cases like this one?¹⁶⁴ And to what extent should lawyers focused on animal well-being care about research suggesting that harsh criminal responses or immigration enforcement breeds distrust in the system and may lead to a reduction in reporting?¹⁶⁵ The expressive function of the law may be important, but should it

162. See *ALDF Amicus Brief Announcement*, *supra* note 149.

163. See, e.g., MARCEAU, *supra* note 66, at 17 (quoting a speech in which Professor Pachirat asked the audience when the animal liberation movement became an appendage of U.S. immigration enforcement); *id.* at 41 (noting the movement’s use of immigration charges against factory farm workers as a basis for fundraising); *id.* at 83–85 (compiling other immigration-related examples).

164. See, e.g., BRENT MCCALL & MICHAEL LIEBOWITZ, *DOWN THE RABBIT HOLE: HOW THE CULTURE OF CORRECTIONS ENCOURAGES CRIME* 5 (2017) (writing as inmates in Connecticut and noting that when it comes to “turning one’s life around,” it can be done in prison, but it is “likely in spite of the system, not because of it”).

165. There is a body of research documenting reluctance among immigrant communities to report crime, even violent crime, based on a fear of deportation. See *generally*

override data about the practical consequences of more vigorous reliance on the immigration and criminal law to enforce contested social norms?¹⁶⁶

Carceral animal law may be about more than punishment, but is the cost of legal recognition of victim status ever too high, and does it do more to de-center than to prioritize animals in the law and policy narrative? There is no proof that successful litigation declaring that animal cruelty is the sort of crime that mandates deportation will lead to systemic reforms that benefit animals. A serious movement must ask some hard questions about whether the victimhood litigation is actually producing discernable short- or long-term benefits for animals. Consequences, not just intuition, ought to matter. It is striking how little effort has been made to study the costs and benefits of victimhood litigation undertaken in the name of animals.

C. Charge Stacking

In recent years it has been revealed that the ability of prosecutors to stack charges is one of the potent forces driving mass incarceration.¹⁶⁷ The ability to layer multiple charges arising out of a single incident or set of incidents allows prosecutors to present defendants with a much longer potential sentence, which in turn serves as powerful leverage to force a plea bargain. Commentators concerned with over-criminalization and unfairness in the system decry charge stacking and note the potential for abuse.¹⁶⁸

The animal movement has championed the ability to charge multiple offenses of, for example, neglect based on a single failure to provide adequate food or water to multiple animals as one of the landmark victories for animals in recent years. In a lecture at Harvard Law School in 2016, a leading animal lawyer described the ability to charge separately each instance of neglect—known as the *Oregon v. Nix* rule¹⁶⁹—as a monumental shift in animal law and the “first toehold in the notion that animals qualify as victims.”¹⁷⁰ Such thinking is illustrative of the way that the victim turn in animal law is all too often synonymous with punitiveness. In this reductive view of justice and victimhood, animals are honored by ensuring that separate charges are laid for each harmed animal. More convictions are equal to more justice for animals under this view. As one astute animal lawyer put it in

Debra J. Robbin, *When Undocumented Immigrants Don't Report Crimes, We All Suffer*, WBUR (Sept. 22, 2017), <https://www.wbur.org/cognoscenti/2017/09/22/undocumented-immigrants-report-crimes-debra-j-robbin> [<https://perma.cc/E89C-UH3Z>].

166. See, e.g., GRUBER, *supra* note 62; Sunstein, *supra* note 101, at 2046 (considering objections to purely expressive uses of the law and opining that such an “objection [lacks] much force,” but noting that practical consequences of the law should be considered).

167. See, e.g., Phil Locke, *Prosecutors, Charge Stacking, and Plea Deals*, WRONGFUL CONVICTIONS BLOG (June 12, 2015) (using an animal crime as an example of the way that charge stacking can force unexpected and unfair results).

168. *Id.*

169. *State v. Nix*, 355 Or. 777, 798 (2014), is the case celebrated with first recognizing the nonmerger rule for multiple charges in animal cruelty cases.

170. Harvard Animal Law, *supra* note 124.

bumper-sticker-ready phrasing, *Nix* ensures that a person cannot “abuse one, get the rest for free.”¹⁷¹

Few people who care about the status of animals would dispute that recognizing individual animals as capable of suffering is valuable. The suffering of an animal—of each distinct animal being—should be acknowledged. But the very persons who are creative and empathetic enough to endeavor to protect nonhumans ought to be able to imagine ways of recognizing the dignity of an animal in a document other than an indictment. A starting point for exploring options might be the websites that recognize the value of naming and identifying animal victims.¹⁷² These online lists are far from perfect memorials to animal victims, but it is also far from clear that a victimized animal, or animals in general, would find considerably more comfort by being named victims in a criminal case.¹⁷³ Surely animals do not care about any particular deployment of legal terminology, and the term “victim of crime” is no different.¹⁷⁴

171. *Criminal Justice Program Attorneys Speak on the Importance of Considering Animals as Victims*, ANIMAL LEGAL DEF. FUND (July 27, 2018), <https://aldf.org/article/criminal-justice-program-attorneys-speak-on-the-importance-of-considering-animals-as-victims/> [<https://perma.cc/4NF6-8XW8>].

172. See, e.g., Lori Gruen, *THE FIRST 100*, <http://first100chimps.wesleyan.edu/> [<https://perma.cc/3ZE9-YZHY>] (last visited Jan. 10, 2021); Lori Gruen, *THE LAST 1,000*, <https://last1000chimps.com/> [<https://perma.cc/G5SJ-E7WD>] (last updated May 28, 2020).

173. Some will respond that the more punitive form of recognition will deter or incapacitate animal abusers. But the research on deterrence in animal crimes is nonexistent, and the literature does not suggest that increased punishments yield the best means of creating deterrence. See, e.g., Doob & Webster, *supra* note 16, at 143. (“Most reviews conclude that there is little or no consistent evidence that harsher sanctions reduce crime rates in Western populations A reasonable assessment of the research to date—with a particular focus on studies conducted in the past decade—is that sentence severity has no effect on the level of crime in society. It is time to accept the null hypothesis.”); see also Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 46 (2017) (placing significant blame for the problems of mass incarceration on the modern impulse to incapacitate dangerous persons, and noting that in fact crime may increase in the communities as the “return of traumatized and unemployable ex-prisoners to these neighborhoods creates additional risk of violent crime”); *id.* at 5–6 (rejecting the myth that past offenses are the best predictors of future criminals and noting that this “prevalent image of the intractable offender was inflected with racial connotations”); *id.* at 21 (noting that the idea of reducing crime through incapacitation is in tension with the fact that “studies have found a net increase in crime as a consequence of high incarceration rates”); Henderson, *supra* note 100, at 947 (“According to the conservative argument, deterrence often doesn’t work, rehabilitation doesn’t work, and retribution and incapacitation are the only tenable justifications for punishment of criminals.”).

174. Animals do not care about labels for their own sake. They care about the practical consequences of the label. In his book *Respecting Animals*, animal law scholar David Favre pretends to have a conversation with his ram, Jet, during which he asks Jet whether he minds being considered property. DAVID FAVRE, *RESPECTING ANIMALS* 60 (2018) (“Are you troubled by your status as property?”). To the satisfaction of Favre and the surprise of perhaps no reader, Jet is interpreted by Favre as not objecting to being considered Favre’s property (“No, I had not noticed that I was property.”). *Id.* But of course, what Jet would presumably

According to the logic of the movement, to permit only one count when multiple animals are harmed is to demean the other animals and ignore their victimhood.¹⁷⁵ In an Oregon case subsequent to *Nix*, the nonmerger of charges principle was celebrated by animal lawyers as providing a basis for charging a mentally ill woman who was accused of hoarding cats with seven counts of felony animal neglect and thirty-eight counts of misdemeanor animal neglect.¹⁷⁶ The ability to charge a person with dozens of counts as opposed to a single crime has been advertised as one of the movement's most noteworthy law reform projects.¹⁷⁷

To appreciate the significance of this legal development for victims' rights even as a doctrinal matter (bracketing questions of deterrence and recidivism), one has to understand the underlying double-jeopardy context. The Double Jeopardy Clause of the Fifth Amendment prohibits a state from attempting multiple prosecutions or imposing multiple punishments for the same crime.¹⁷⁸ For purposes of multiple punishment, double jeopardy issues can arise either when a single act results in multiple charges under different criminal statutes or, as more relevant to the animal cruelty and neglect cases, when an individual is convicted of multiple violations of the same criminal statute.¹⁷⁹ The analysis in both situations, however, is simply one of assessing legislative intent. Multiple punishments do not violate double jeopardy if the statutory scheme is intended to permit more than one charge.¹⁸⁰ In other words, so long as the legislature authorizes cumulative punishment, double jeopardy does not serve as a barrier to punishing for multiple counts of the same offense, whether there are multiple victims or no victims.

object to is the fact of being property, which allows a person to kill him for meat or sell him or his offspring. Animals do not care about the labels we attach to them in our human language—property or victim. These terms do not by themselves help animals. It is a question of what work the terms do in our legal system

175. See *Criminal Justice Program Attorneys Speak on the Importance of Considering Animals as Victims*, *supra* note 171.

176. See *State v. Hess*, 273 Or. App. 26, 28 (2015).

177. See, e.g., *Harvard Animal Law*, *supra* note 124 (describing these cases as a “big deal because that’s the first toehold in the notion that animals qualify as victims”).

178. *Brown v. Ohio*, 432 U.S. 161, 165 (1977).

179. *Missouri v. Hunter*, 459 U.S. 359, 366 (1983) (“With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.”).

180. *Id.* at 367 (citing *Whalen v. United States*, 445 U.S. 684, 693 (1980)). In assessing whether a defendant can be punished for multiple counts of violating the same statute, the question of legislative intent is often defined as the unit of prosecution. See, e.g., *State v. Brown*, No. A-1-CA-35598, 2019 WL 1230420, at *2 (N.M. Ct. App. Feb. 11, 2019) (“The relevant inquiry in unit-of-prosecution cases is whether the Legislature intended punishment for the entire course of conduct or for each discrete act.”); see also Carissa Byrne Hessick & F. Andrew Hessick, *Double Jeopardy as A Limit on Punishment*, 97 CORNELL L. REV. 45, 55 (2011) (“Thus, the limit on multiple punishments is not a substantive constitutional limitation; legislatures may authorize multiple punishments through legislation.”).

Put differently, the grand legal triumph of recognizing animals as victims in *Nix* is ultimately just a question of legislative drafting and intent.¹⁸¹ If a set of actions or omissions cause harm to a dozen animals, then, if the legislative intent permits it, the individual may be punished for a dozen counts of animal abuse. By the same token, if the criminal statute permits it, a shoplifter who steals twelve candy bars can be punished for twelve acts of larceny rather than one. Or, to use a classic law school hypothetical, if a shoplifter steals a twelve pack of beer, should she be charged with one count of theft or a dozen?¹⁸²

It is also rather crushing to the narrative that multiple counts in an indictment honor individual victims when one considers that victimless crimes will also allow for multiple counts under the logic of *Nix*. For example, there is a circuit split as to whether 18 U.S.C. § 924(c) allows for multiple charges or a single charge. The statute prohibits during any drug crime “us[ing] or carr[ying] [of] a firearm, or . . . in furtherance of any such crime, possess[ing] a firearm.”¹⁸³ Several circuits have held that this provision defines only one crime, but several others have “read the provision as defining two separate crimes, one for use of a firearm during a crime and another for possession of a firearm in furtherance of a crime.”¹⁸⁴ The point here is not to get deep into the weeds of statutory interpretation but rather to note that if possessing and carrying a firearm can be two charges, or if the theft of candy bars or beer could lead to punishment for multiple crimes, then it is a bit of an exaggeration to describe *Nix* as a nearly unrivaled “important step forward for animals and for justice.”¹⁸⁵ Rather this criminal law reform looks like the generic type of doctrinal innovation that invites the sort of charge stacking that occurs throughout the criminal system, whether it is drugs, guns, candy bars, or animals.¹⁸⁶

181. Consider that a victory analogous to that in *Nix* might be expected for every statute that uses the article “a” to describe the harm. See *McKnight v. State*, 906 So.2d 368, 371 (Fla. Dist. Ct. App. 2005) (“When the article ‘a’ is used by the Legislature in the text of the statute, the intent of the Legislature is clear that each discrete act constitutes an allowable unit of prosecution.”).

182. Cf. *United States v. Dunford*, 148 F.3d 385, 390 (4th Cir. 1998) (holding that multiple convictions for simultaneous possession of six guns violated the Double Jeopardy Clause based on statutory interpretation).

183. 18 U.S.C. § 924(c)(1)(A).

184. F. Italia Patti, *Maybe Once, Maybe Twice: Using the Rule of Lenity to Determine Whether 18 U.S.C. § 924(c) Defines One Crime or Two*, 81 U. CHI. L. REV. 1261, 1262 (2014).

185. Cf. *ALDF Position on Animals as Crime Victims*, supra note 53 (“Animals are increasingly achieving crime-victim status, particularly as it relates to which victims count at sentencing.”).

186. There is a well-developed scholarly critique of overly broad criminal statutes and the ability to stack charges. And the prevailing account for the dominance of plea bargains and the absence of constitutionally promised jury trials is that prosecutors are able to coerce pleas by charge stacking. See, e.g., Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1940 (2006); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 531 (2001). The Pew Research Center found that only about two percent of federal prosecutions end in trials. John Gramlich, *Only 2% of Federal Criminal*

Perhaps the real reason *Nix* is viewed as an unmitigated good is precisely because so many animal lawyers take for granted mass incarceration in the United States (or at least mass prosecution).¹⁸⁷ The movement has urged that “the sentences for harming an animal should be at least as punitive as those in place to protect inanimate objects,”¹⁸⁸ and have lamented the claimed “Historic Underenforcement of Anti-Cruelty Laws.”¹⁸⁹ But the notion that animal law is in a statutory and judicial race with all other crimes such that victory means catching up with the punitiveness of other crimes is tantamount to assuming the virtue of being the “world leader in per capita incarceration.”¹⁹⁰ And the “tidy mathematical notion of proportionality has always been a criminal law myth;” it is not less so in the realm of animal law.¹⁹¹

For those who are skeptical that the quintupling of the U.S. incarceration rate in the past few decades is a virtue, it is fair to question whether the ability to layer punishments so that an individual can face dozens of counts as opposed to a single count really amounts to an important victory for animals in law.

The logic of *Nix*—this idea that we must not allow one to go unpunished or “get the rest free”—is the logic of the animal victims’ rights movement.¹⁹² But the ability to secure multiple consecutive sentences does not reflect a view of the law that positions the *interests of the animals* as central. Animals undoubtedly want to avoid pain, but victories like *Oregon v. Nix* seem to perpetuate a division between what the animal victims want and what the law reforms being pursued actually deliver. As we seek to blur the lines between human and nonhuman, it might be worth considering that in the context of human victims, the 2016 National Survey of Victims Views suggests that overincarceration and longer prison sentences fail to help victims.¹⁹³ Specifically, after surveying 800 victims from around the country, the Alliance for Safety and Justice found that crime survivors want a criminal justice

Defendants Go to Trial, and Most Who Do Are Found Guilty, PEW RES. CTR. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/> [<https://perma.cc/FAS8-7DSQ>].

187. In one of the most careful studies of the drivers of mass incarceration, James Pfaff emphasizes the central role of increased prosecutorial leverage that is provided by opportunities for multiple charges and harsher penalties. PFAFF, *supra* note 75, at 127.

188. *ALDF Position Statement*, *supra* note 106, at 2.

189. Rubin, *supra* note 15, at 245.

190. Kevin R. Reitz, *Introduction: American Exceptionalism in Crime and Punishment: Broadly Defined*, in *AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT* 2–3 (Kevin R. Reitz ed., 2018).

191. Marceau, *supra* note 2, at 253.

192. *Criminal Justice Program Attorneys Speak on the Importance of Considering Animals as Victims*, *supra* note 171; *ALDF Position on Animals as Crime Victims*, *supra* note 53 (“[T]hose who commit criminal cruelty against animals no longer receive an ‘abuse one, get the rest free’ sentence.”).

193. *See Crime Survivors Speak: The First-Ever National Survey of Victims’ Views on Safety and Justice*, ALL. FOR SAFETY & JUST. 26 (2016), <https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf> [<https://perma.cc/U6DS-J748>] (“Victims believe we send too many people to prison, for too long, and that our current incarceration policies make people more—not less—likely to commit another crime.”).

system that punishes less and focuses more on rehabilitation and treatment.¹⁹⁴ Whereas victims' rights legislation has overwhelmingly favored tough-on-crime approaches, the survey found that actual victims were three times more likely to want to hold offenders accountable through rehabilitation, mental health treatment, community service, and similar interventions.¹⁹⁵ Stacking charges has never been the recipe for a rehabilitative system.

Paradoxically, then, the very persons arguing that animals should be treated more like persons seem to assume that animal victims would prefer something entirely different from their human-victim counterparts.¹⁹⁶ Victims of violent crime deserve accountability, and it has become increasingly common to honor victims by focusing on them as individuals.¹⁹⁷ For example, there have been "say their names" exhibits across the country as part of the effort to focus attention on the individual victims of police violence.¹⁹⁸ These efforts to identify the injured party and seek structural change as a form of atonement are laudable efforts to give an individual face to systemic violence. While these efforts may not seem like adequate tools for honoring victims, it would be a serious mistake to assume that vulnerable victims—

194. *Id.* ("Victims prefer a wide range of investments and new safety priorities including more spending on education, job creation programs, and mental health treatment. Importantly, victims support reducing sentence lengths to pay for these investments.").

195. *Id.* at 20.

196. One might respond that the goal of *Nix*-type reforms is not necessarily to secure longer sentences. After all, an animal lawyer might say, prosecutors do not have to charge each count or pursue incarceration for each separate count. But this is a logic similar to that deployed in explaining the urgent need for more and stronger felony cruelty laws. It is often said that the felony sentence is rarely imposed, thus implying that the new felony laws do not work. The reality, of course, is that the ability to charge felonies and stack felonies has a monumental impact on the way criminal cases are resolved in terms of the frequency of guilty pleas, the terms of pleas, and the sentencing discretion enjoyed by judges. The urgency with which reforms like charge stacking are pursued betrays the claim that these changes are not directly relevant to understanding how punitive animal law has become. Moreover, prosecutors are smart people, skilled lawyers, and rational actors. If redundant charging were innocuous, prosecutors would not waste their time doing it. "In fact, prosecutors know or intuit that bringing multiple, duplicative, and overlapping charges provides several tactical advantages." Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for A Law of Counts*, 109 PENN ST. L. REV. 1107, 1125 (2005).

197. Even the most progressive legal responses to animal victimhood—such as mandatory relinquishment or pet forfeiture laws and bans on possessing animals—might be viewed as heavy-handed and demeaning based on emerging scholarship from the realm of interpersonal violence. There is a growing critique of the so-called state-imposed separation solution when it comes to intimate partner violence. *See, e.g.*, Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 11 (2006); *see also* Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1489 (2008) (explaining that many human victims of domestic violence do not want to separate from their partners but rather seek interventions that protect the relationship and eliminate the violence). These more costly interventions might be more likely if the money saved by incarcerating less is redeployed to such projects.

198. *See, e.g.*, #SAY THEIR NAMES, <https://sayevery.name/> [<https://perma.cc/LD8M-4D49>] (last visited Jan. 10, 2021). In the animal realm, a prominent example is Lori Gruen's work to name chimpanzees. *See* Gruen, *supra* note 172.

human or nonhuman—speak with a monolithic voice endorsing more prosecutions or additional charges. For the same reason, it is a mistake to imagine that the *Nix* rule represents an unmitigated gain for animal law any more than the ability to stack charges in other contexts could be confused with a human rights victory.¹⁹⁹ Additionally, there is no evidence that such laws are reducing the rate of animal crimes.

D. Victims' Advocates or Court Appointed Animal Advocates

Victims' rights for animals are often urged as essential ingredients of justice. But terms like justice and accountability are much vaguer than we often admit. As a result, legislation and reform pursued in the name of these goals risk being similarly inchoate or disconnected from concrete objectives.²⁰⁰ If the goal is more justice for animals, we ought to ask for concrete metrics by which we could measure the outcomes of a particular program, lest we risk celebrating programs that achieve rhetorical, but not practical, effects.

Courtroom Animal Advocate Programs (“CAAPs”) are an example of the collision of vague, lofty ideals and policymaking.²⁰¹ The laws were originally justified as measures that “ensure animal victims get the justice they deserve” and as laws that vindicate the belief that “abusers must be held accountable.”²⁰² But a shrewd donor or a student of social change might ask what exactly are the legal outcomes that warrant CAAPs? When an animal is killed, for example, aside from longer incarceration terms or more convictions, what exactly does it mean to pursue concepts like justice and accountability? In a recent email urging support for CAAPs, one advocacy group proclaimed that these new laws are a response to “inadequate and ineffective sentences” and argue that CAAPs will help “to hold animal abusers fully accountable for the suffering they cause.”²⁰³

Is the commitment to accountability and justice a promise to the public of deterrence or a general reduction of animal crime based on incapacitation? If so, how should advocates and lawmakers respond if it turns out that the enactment of CAAPs correlates with increasing rates of animal abuse and neglect in a state? Would this signal that CAAPs were not yielding justice? And what if data from other areas of the criminal law suggests that more convictions and longer sentences might have a criminogenic effect, such that reducing conviction rates in some areas might actually better reduce recidivism rates than a rigid insistence on convictions of

199. See generally GRUBER, *supra* note 62 (explaining that punitive approaches may do more to change the movement than they do to reshape fundamental social values about topics such as feminism).

200. SKLANSKY, *supra* note 11, at 5 (describing the related term “violence” in similar ways).

201. *Courtroom Animal Advocate Programs (CAAP)*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/article/courtroom-animal-advocate-programs-caap/> [<https://perma.cc/N26T-5LWZ>] (last visited Sept. 9, 2021).

202. Rosengard e-mail, *supra* note 13; see also Rubin, *supra* note 15, at 273 (“Advocates add *more* justice to the mix.”) (emphasis in original).

203. Rosengard e-mail, *supra* note 13; fundraising e-mail from Steve Wells (Apr. 28, 2021, 1:04 AM) (on file with author) (“You don’t have to be an animal lover to feel outrage at seeing violent animal abusers get off easy just because their victim was a dog or cat.”).

record?²⁰⁴ If the animal protection movement is pursuing something other than a symbolic recognition by courts that animals are victims, there may need to be a reckoning with the growing, though admittedly counterintuitive, literature showing that more convictions and longer sentences may do more harm than good. Advocates should care about the impact their investments in animal law are having on the ground, be attentive to unexpected externalities, and be mindful of the human and nonhuman costs of their well-intentioned efforts.

1. *An Abridged History of Recent CAAP Efforts*

Any full and fair review of CAAPs must consider the historical motivations and aspirations for these legal projects. History is never wholly irrelevant to the actual operation and power dynamics of a policy.²⁰⁵ Similarly, if a policy was designed with one goal in mind but is being used for other or alternative ends, it may be doing so imperfectly and in ways that can be improved. Thus, while CAAPs are championed in some circles as nonpunitive and primarily “restorative,”²⁰⁶ this account leaves the legislative history and potentially practice²⁰⁷ a bit to the side.

The reality is that these laws were not motivated by a desire to see more rehabilitation—the first such law was a direct response to an abuser being sentenced to accelerated rehabilitation and lower-than-desired conviction rates.²⁰⁸ The notion that public services, including mental health treatment, are best delivered through a record of conviction—that welfare services ought to be allotted based on convictions rather than need—is worth more than a moment of reflection.²⁰⁹ It is a symptom of how deeply engrained a mass incarceration (and inegalitarian) mindset has become that we now imagine criminal convictions and human welfare services as inextricably linked. In recent months I have heard people defend CAAPs (and the accompanying criminal process) as beneficial “teachable moments” for abusers and as a wonderful “opportunity to get poor people government benefits” and services,

204. Agan, Doleac & Harvey, *supra* note 16, at 7.

205. See, e.g., Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (treating as relevant the Jim Crow origins of a modern state rule that allowed for nonunanimous jury verdicts).

206. Rubin, *supra* note 16, at 269 (“[T]he Advocate is often restorative and forward looking.”).

207. In truth, I cannot know for sure whether prosecutions are more or less punitive under Desmond’s Law because the data regarding sentencing rates, conviction rates, and other metrics have never been shared publicly in spite of repeated requests. However, based on media accounts and the motivating purposes for the law, it is not unreasonable to expect fewer diversions that do not result in a “conviction of record.” *Id.* (emphasizing the value of “certainty” in obtaining a “record of conviction”); see also *e-mail from Jessica Rubin, supra* note 33 (explaining that the “hope” behind the law was that the law would not allow the possibility of lower sentences to “succeed”).

208. Rick Rojas, *Abused Cats and Dogs Now Have a (Human) Voice in Connecticut Laws*, N.Y. TIMES (Aug. 27, 2017), <https://www.nytimes.com/2017/08/27/nyregion/animal-abuse-connecticut-court-advocates.html> (“The advocates view their role as reinforcing prosecutors who are overburdened.”); *id.* (explaining that advocates for animals worry that the animal crimes “result in punishments they contend are too lenient, such as rehabilitation programs that can end with charges being expunged.”).

209. The notion that social values are effectively or best addressed when actors seek to “govern[] through crime” has oft been rebuked by leading scholars in recent years. E.g., NATAPOFF, *supra* note 23, at 196.

such as treatment.²¹⁰ But to understand this rather paradoxical shift whereby we find many advocates describing CAAPs as primarily humanitarian, nonpunitive tools for providing civil services, a bit of historical context is necessary.

One jumping off point for a discussion of the modern origins of CAAPs is the Animal Law Review's invited essay in 2000 from Douglas Beloof, a celebrated victims' rights commentator with no apparent prior connection to animal law. Beloof was one of the architects of the human victims' rights movement, and he was tasked with translating his work into avenues for animal law progress.²¹¹ Beloof jumped at the opportunity, and the animal movement seized on the advice to once again deploy the discourse of criminality, superpredators, and violence that undergirds the mass incarceration for victims project.²¹² By framing animals as victims, Beloof observed, the two movements could "work together to address the problem of criminally violent humans" and in doing so aspire to replicate the successes of the "feminist arm of the [victim] movement."²¹³ Research shows that the victims' rights movement, spurred along by scholars like Beloof, has been one of the most influential legal movements in U.S. history, in part because of its "enormous appeal" to television audiences.²¹⁴ But what exactly was Beloof selling?

Beloof offered many pieces of practical advice for animal lawyers, including his urging that it was critical to "wak[e] the law enforcement dragon" and direct it towards animal abusers.²¹⁵ But Beloof was clear that adding a victim voice to criminal proceedings is the "brass ring of dignity" and the hallmark of victims' rights' success.²¹⁶ The victims' rights movement, under the guidance of scholars like Beloof, has prioritized opportunities for active "victim participation in the criminal process."²¹⁷ The dignity of individual victims is best recognized, it has been argued, by allowing a victim to be an "active participant" in the criminal process.²¹⁸

It did not take long for these suggestions to foment an academic article from an animal law commentator titled *Defining Animals as Crime Victims*, which argued that the movement should prioritize creating victim advocates who could

210. *Id.* at 201 (noting the general trend of treating the criminal system as an appropriate vehicle for distributing social benefits).

211. *See* Beloof, *supra* note 54, at 29.

212. SKLANSKY, *supra* note 11, at 41–88 (explaining in detail how the definition of violence has been distorted and contorted in ways that are arbitrary, but nonetheless fuel the tough-on-crime era).

213. Beloof, *supra* note 54, at 29. *But see* GRUBER, *supra* note 62, at 192 (concluding that feminism was harmed more than it was helped by the victims' rights alliance and noting that it is possible to more effectively respond to gender violence without accepting "feminism's victimization narrative").

214. Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 L. & SOC. INQUIRY 1111, 1136 (2000).

215. GRUBER, *supra* note 62, at 29.

216. Beloof, *supra* note 54, at 21.

217. Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 289 (1999).

218. Beloof, *supra* note 54, at 24.

provide the voice of the victim animal to the court.²¹⁹ This was necessary because some courts might not be good at understanding animal suffering.²²⁰ Thus, according to Andrew Ireland Moore, allowing “animal legal advocates” to make victim impact statements on behalf of abused animals would provide critical benefits to the field of animal law; the advocates would, for example, “sway the judge to increase a defendant’s sentence after hearing a more detailed and expanded account of the pain that the animal suffered.”²²¹ The origins of the advocate model from Beloof to Ireland are unequivocally and unabashedly linked to an approach in animal law that views increased prosecutorial intensity as a mark of progress. Subsequent scholarship and advocacy in support of animals have crystallized around the notion that animal protection efforts require the creation of laws allowing court-appointed advocates who “represent animals” in neglect and cruelty cases.²²²

The first such law, “Desmond’s Law,”²²³ was enacted in 2016 in Connecticut and its sponsor and supporters were no less explicit in connecting CAAP laws and the ambition to achieve more aggressive prosecutions for animal abuse and neglect.²²⁴ The legislation was conceived as a response to the perceived failure of the system to produce sufficiently punitive responses. Named after Desmond, a dog who was brutally killed in the state, the catalyst for the legislation was the fact that Desmond’s abuser was sentenced to accelerated rehabilitation through a diversion program rather than incarceration.²²⁵ In the advocacy supporting Desmond’s Law, Beloof’s influence is readily identifiable. Supporters argued that the sentence in Desmond’s case confirmed that a “third voice” in the court was a necessary measure in order to avoid this sort of “slap on the wrist” punishment going

219. Andrew N. Ireland Moore, *Defining Animals as Crime Victims*, 1 J. ANIMAL L. 91, 107 (2005).

220. On the other hand, advocates for CAAPs have noted that it “takes no special insight to recognize that animals do not want to be starved, tortured, beaten or killed,” but arguing that giving a voice to these experiences is an important accomplishment for animals. Rubin, *supra* note 15, at 274.

221. Moore, *supra* note 219, at 107.

222. Nicole Pallotta, *Unique Connecticut Law Allows Court-Appointed Advocates to Represent Animals*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/article/unique-connecticut-law-allows-court-appointed-advocates-to-represent-animals/> [https://perma.cc/XYJ9-KAYE] (last visited Aug. 5, 2020); see also Rubin, *supra* note 15.

223. Desmond’s Law, 2016 Conn. Acts 216 (codified at CONN. GEN. STAT. ANN. § 54-86n (West 2016)).

224. Rojas, *supra* note 208 (describing legislative history as demonstrating outrage over a rehabilitative sentence).

225. *Id.*; see also Rubin, *supra* note 15, at 250–51 (noting that the court in Desmond’s case allowed the abuser to “avoid a prison sentence and instead use an accelerated rehabilitation program”).

forward.²²⁶ Avoiding the dismissal of a criminal case has always been central to justifying these laws.²²⁷

The sponsor of the bill, then-Representative Diana Urban, was understandably heartbroken over Desmond's suffering and was so outraged by the minimal sentence in Desmond's case that she "immediately began her battle to write legislation that would make sure that this travesty of justice (a sentence of accelerated rehabilitation) would never happen again."²²⁸ She explained the need for the law, as did many of the law's supporters, by emphasizing that without a victim's advocate, only about 18% of reported animal abuse cases had resulted in a conviction.²²⁹ As legal scholar Jessica Rubin has explained, prior to Desmond's Law "animal cruelty offenses in Connecticut were not vigorously prosecuted."²³⁰ Likewise, in reflecting on the success of Desmond's Law three years after the law's enactment, Representative Urban wrote a column in a local newspaper explaining

226. See, e.g., Samantha Schoenfeld, *Desmond's Law, Providing a Voice for Abused Animals in Courtrooms, Signed into Law*, FOX 61 (May 3, 2016, 10:08 PM), <https://www.fox61.com/article/news/local/outreach/awareness-months/desmonds-law-providing-a-voice-for-abused-animals-in-courtrooms-passes-legislature/520-651ebab8-2b8a-416e-8bcd-38b9f26de278> [<https://perma.cc/2LPM-634W>]; Suzana Gartner, *Desmond's Law: Giving a Voice for Abused Animals in Court*, SUZANA GARTNER'S BLOG (Feb. 22, 2019, 10:16 AM), <https://www.suzanagartner.com/desmonds-law-giving-a-voice-for-abused-animals-in-court> [<https://perma.cc/LP6U-QGCG>]; Elaine Povich, *A Law Named After a Brutally Murdered Boxer-Pit Bull Becomes a Model for Fighting Animal Abuse*, HUFFPOST (Mar. 12, 2019), https://www.huffpost.com/entry/animal-abuse-desmond-advocate_b_5c704ffee4b0677c715a7692 [<https://perma.cc/P7J2-8SHA>] ("Animal groups lobbying for the laws say prosecutors often are well-intentioned but have little time to research the animal cases themselves, meaning that alleged animal abusers often get light sentences or have their cases dismissed for lack of evidence.").

227. As one of the early advocates for the law explained, "[m]y job is to get the judiciary to treat animal cruelty as a serious crime." Rojas, *supra* note 208.

228. *The Origin of Desmond's Army*, DESMOND'S ARMY, <https://desmondsarmy.org/the-origin-of-desmonds-army/> [<https://perma.cc/JA2Q-V94A>] (last visited Aug. 5, 2020).

229. It is unclear whether the prosecution and clearance rates for animal cruelty crimes are lower at each stage of a case than for other types of crimes. For example, a study from 2019 posted on the National Criminal Justice Reference Service examined sexual assault reported by female victims. See MELISSA S. MORABITO ET AL., DECISION MAKING IN SEXUAL ASSAULT CASES: REPLICATION RESEARCH ON SEXUAL VIOLENCE CASE ATTRITION IN THE U.S. (2019), <https://www.ncjrs.gov/pdffiles1/nij/grants/252689.pdf> [<https://perma.cc/N8WG-UV2W>]. The research found that of the total number of reported sexual assault charges (2,887) were only filed in 363 cases, or roughly 12.6% of the total reported cases. *Id.* at 118 tbl.II.3. *But see id.* (noting a rate of prosecution *after arrest*—72%—that appears to be much higher than similar figures in Connecticut for animal cruelty).

230. Rubin, *supra* note 15, at 245; *see also id.* at 265 app. B (providing an appendix with documents submitted in support of Desmond's Law, including a letter from Professor Rubin explaining that the "bill would help facilitate animal cruelty prosecutions by ensuring appropriate representation for victims").

that: “Preliminary empirical evidence is very clear. The courts are taking animal cruelty much more seriously. There is no ‘get out of jail free’ card anymore.”²³¹

Today, victim advocate legislation is among the most sought after pieces of animal victimhood legislation, and several states are expected to enact such laws in the coming years.²³² Maine enacted a Desmond-styled law in 2019 following the recommendation of leading animal law experts who opined that such provisions prevent the “under-enforcement” of animal cruelty laws by providing “free assistance” to overburdened prosecutors.²³³ Like Desmond’s Law, the victims’ advocate law enacted in Maine (“Franky’s Law”) was heralded by the sponsor as a necessary tool for holding animal abusers accountable,²³⁴ and concerns over small sentences and under-prosecution pervade the legislative history.²³⁵ More generally, it cannot be gainsaid that the origin story of victim advocate laws is one of pursuing more aggressive prosecutions and more punitive sentences for animal abusers. The laws have always been laser focused on solving the “problem” of underprosecution, minimal sentences, or low conviction rates.²³⁶ As Professor Rubin explained, the goal for the law was “to provide additional resources to courts and prosecutors to allow them to handle animal cruelty cases more thoroughly and vigorously.”²³⁷

As a matter of statutory drafting, it is also notable that the Desmond-style advocates for animals are afforded more authority than human victim advocates.²³⁸

231. Diana Urban, *Opinion: A Legal Movement to Address Animal Cruelty and Prevent Mass Shootings*, CT EXAMINER (Nov. 4, 2019), <https://ctexaminer.com/2019/11/04/opinion-a-legal-movement-to-address-animal-cruelty-and-prevent-mass-shootings/> [https://perma.cc/BFS9-5YZX].

232. Maine has already enacted a Desmond’s Law. See ME. REV. STAT. ANN. tit. 7, § 4016(1-A) (2020); ME. REV. STAT. ANN. tit. 17, § 1031(3-C) (2020). There have also been efforts to “give wildlife a voice” with victim impact statements in Hong Kong. See Pavel Toropov, *Giving Wildlife a Voice in Hong Kong’s Courts*, CHINA DIALOGUE (July 17, 2020), <https://chinadialogue.net/en/nature/giving-wildlife-a-voice-in-hong-kongs-courts/> [https://perma.cc/NL87-YSAK].

233. Memorandum from Jessica Rubin, Assistant Clinical Professor, Univ. of Conn. Sch. of Law, to Members of the Me. Judiciary Comm. 1 (Apr. 29, 2019), <http://legislature.maine.gov/bills/getTestimonyDoc.asp?id=121678> [https://perma.cc/PFY6-A746].

234. *Maine Bill Would Give Neglected and Abused Animals a Voice in Court*, 13 WGME (May 1, 2019), <https://wgme.com/news/local/maine-bill-would-give-neglected-and-abused-animals-a-voice-in-court> [https://perma.cc/ZL2G-T67P].

235. See Rojas, *supra* note 208; Lori Ennis, *Connecticut Animals Have a Voice with Desmond’s Law*, PETGUIDE (Aug. 30, 2017), <https://www.petguide.com/blog/dog/connecticut-animals-voice-desmonds-law/> [https://perma.cc/65GB-JZ94].

236. Rubin, *supra* note 15, at 250.

237. *Id.* Paradoxically, these efforts to make prosecutions more *vigorous* are conceived of as entirely inconsistent with characterizations of the system as punitive. See Rubin, *supra* note 15, at 270 (asserting that “Marceau mischaracterizes” the laws by describing them as “punitive”).

238. CAAP advocates can do much more than (human) victims or their advocates in criminal proceedings and act significantly more like parties (or like private prosecutors). The rights afforded to human victims under 18 U.S.C. § 3771(d)(1), for example, are considerably more limited, including generally, the right to be reasonably informed of

The volunteer advocates appointed to speak for the animal enjoy the power to file briefs, make arguments in court, and generally present more as a party to the proceeding than a traditional victim advocate.²³⁹ As one leading advocate, David Rosengard, has explained, the law allows for a new “third voice” in the courtroom that supplements that of the prosecutor and allows for the court to hear more about the suffering endured by the animal victim.²⁴⁰ But, consistent with the purpose of the laws, the third voice risks functioning like an additional prosecutor if the initial vision for the law is taken seriously. Consider the fact that the prosecutor in the Desmond case had made a “strong recommendation . . . for a sentence that included incarceration.”²⁴¹

The case that provoked the legislation was not about *prosecutorial indifference*; instead, the logic seems to have been that if another party was in the courtroom arguing in support of incarceration—a party deemed by law eligible to speak for the dog—the judge would not have disregarded the prosecution and would have rejected a sentence of rehabilitation.²⁴² Professor Rubin’s persuasive written testimony in support of Desmond’s Law laconically summarizes the need for an animal advocate: “Punishment can be a strong deterrent and accelerated rehabilitation is not adequate punishment to deter animal abuse.”²⁴³ Two voices calling for incarceration (or “adequate punishment”) in a case like Desmond’s are more likely to succeed than one, or so goes the logic.

It is not fatal to efforts to expand CAAPs, but it would be disingenuous to suggest that defense lawyers and prosecutors were intended to benefit equally from Desmond’s Law.²⁴⁴ Neither the historical purpose nor the operation of the statutes suggests such equivalence. That does not disqualify the law from being valuable, but its history and purpose is relevant to understanding the current operation of such laws.

proceedings, *id.* § 3771(a)(2), and the “right to be reasonably heard” in proceedings “involving release, plea, sentencing, or any parole proceeding,” *id.* § 3771(a)(4). *See also* CONN. CONST. art. XXIX. Desmond advocates can interject themselves at multiple points in the criminal process, well beyond the traditional “victim-impact” advocacy associated with human victims. They are permitted to file pleadings and make legal arguments in court in a way that is beyond traditional victim advocacy in the human realm. Moreover, whereas a human victim is typically only permitted to describe the impact of the crime on them at sentencing, a Desmond advocate can (and does) make specific sentencing recommendations. Beloof, *supra* note 217.

239. Beloof, *supra* note 217.

240. Ennis, *supra* note 235.

241. Rubin, *supra* note 15, at 251.

242. *Id.*

243. *Id.* at 267. The author’s research has not revealed any published research documenting the theorized deterrence that occurs if one is not permitted to partake in accelerated rehabilitation.

244. Indeed, in preparing for the law to take effect, prosecutors (not defense attorneys) were notified of its enactment and asked to take advantage of the new opportunity. *See id.* at 255.

2. Data Driving the CAAP Decision

The support for the first CAAP law was frequently distilled down to purely quantitative terms. The sponsor for the legislation explained that a lack of convictions was a salient motivation for the law, and subsequent commentary has argued that “[t]he [one] data point that is important to justifying Desmond’s law is the small percentage of cases” resulting in a conviction.²⁴⁵ Under this telling, the law was needed because only one in five animal abusers were convicted of animal abuse.²⁴⁶

But this highly touted figure, showing that prosecutors dismissed about 80% of their animal cruelty cases, is misleading. While it appears that roughly 80% of cases brought under the animal cruelty statute from 2007 to 2017 were “either dismissed or not prosecuted,” the data further shows that about 80% or more of the cases that were dismissed were set aside only after the accused had “successfully completed a diversionary program.”²⁴⁷ So more than three out of four animal abuse cases that were dismissed were dismissed after judicial involvement and the completion of a diversionary program. This is a reality that CAAP advocates have been careful to elide or ignore, but it is central to the history of these laws. The law is premised on a normative assumption about the inappropriateness of diversionary programs. Although reasonable minds might disagree about whether diversions are warranted in cases of severe abuse, as a legal matter it is inaccurate to suggest that prosecutors were simply dismissing 80% of all animal cruelty cases with no legal response. Yet this narrative of high rates of dismissal served as a prominent motivation for Desmond’s Law²⁴⁸ and a pervasive post hoc explanation for how the CAAP laws are effecting important legal change.²⁴⁹

As noted above, the sponsor of the legislation has taken a victory lap, declaring proudly that Desmond’s Law has served its intended purpose.²⁵⁰ But when it comes to CAAPs, unless the appropriate yardstick for measuring victory is really

245. Rubin, *supra* note 18, at 272–73.

246. *Id.* at 263.

247. MICHELLE KIRBY, CONN. GEN. ASSEMBLY OFF. LEGIS. RSCH., 2018-R-0111, ANIMAL CRUELTY CASES IN CONNECTICUT (2007–2017), at 1 (Apr. 19, 2018), <https://www.cga.ct.gov/2018/rpt/pdf/2018-R-0111.pdf> [<https://perma.cc/D4LD-PWME>]. More recent data is even more striking. *See also* MICHELLE KIRBY, CONN. GEN. ASSEMBLY OFF. LEGIS. RSCH., 2019-R-0154, ANIMAL CRUELTY CASES IN CONNECTICUT (2008–2018), at 1 (Sept. 12, 2019), <https://www.cga.ct.gov/2019/rpt/pdf/2019-R-0154.pdf> [<https://perma.cc/L4BX-HYGK>] (reporting that 1,013/1,190 (85%) of cases dismissed during this period were dismissed after the offender successfully completed a diversionary program such as the Accelerated Rehabilitation Program) [hereinafter Kirby 2019].

248. *See also* J. Comm. on the Judiciary, Feb. Sess., at 848 (Conn. 2016) (showing support for Desmond’s Law premised on the finding that 80% of cruelty cases were not prosecuted); *id.* at 843 (“Often cases result in sentences that are not truly reflective of severity of their crime and may not be a deterrent of future cruelty.”); *id.* at 963 (“Abusers should get maximum penalties in court, instead of getting probation or just a slap on the wrist. This bill is a step in the right direction for abused animals.”).

249. Rubin, *supra* note 18, at 272–73 (explaining that Desmond’s Law “helps with this shortfall” in conviction rates).

250. Urban, *supra* note 231 (celebrating the end of the proverbial get out of jail free card).

the presumed dwindling number of “jail free” cases, as the sponsor suggested,²⁵¹ the claims of victory may be a little confusing to those who look at the numbers on the ground. It is possible (though there is no data that has been shared with me to support it yet) that Desmond’s Law is causing persons convicted of animal abuse to receive mental health treatment or other public services at a rate that is much higher than before the enactment of Desmond’s Law. It is also possible that Desmond’s Law has accelerated an overdue conversation about the need for investment in rehabilitative sentences. Furthermore, it is also possible that sentences are materially increasing in the wake of the law’s enactment either because of the work of the CAAPs or because of a more general awareness of the significance of animal abuse based on the media surrounding Desmond’s Law.

But there are some preliminary numbers that cast doubt on broad claims about CAAPs as “revolutionary.”²⁵² If the laws, as claimed by their advocates, are tackling one “important data point” problem—low conviction rates—then these reforms may be missing the mark. For example, based on records obtained from the state judicial branch, the rate of case dismissal for animal crimes in 2019 was 47.6% (165/346), compared to 50% in 2015 (174/345), the year before Desmond’s Law was introduced.²⁵³ Moreover, the rate of persons who were found guilty of animal crimes in 2019 was also roughly the same (13%) for both 2015 and 2019.²⁵⁴ Even for those who champion conviction rates as a mark of justice, it is striking that in 2018, by way of a further example, with the benefit of Desmond’s Law, out of 352 total cases under the general cruelty/neglect provision, 129 cases were dismissed and 182 were nolle prosecutions—that is, 311 out of 352 cases did not culminate in the stated benchmark for the law, being “prosecuted to conclusion.”²⁵⁵

Equally striking, the enactment of Desmond’s Law cannot be equated with a consistent decline in the rates of abuse and neglect in the state. During the 12-year period from 2008 through 2019, the rates of abuse from 2016 to 2019 (after the CAAP enactment) were higher in three of those four years than almost any other year from 2008 to 2015.²⁵⁶ The number of malicious or intentional acts of abuse documented in Connecticut were higher in 2018 and 2019 than in any year between 2009 and 2014 in the state, and the numbers were higher in 2019 than in eight out of the nine years preceding the law’s enactment (2009–2016).²⁵⁷ Moreover, the only year that saw a higher number of animal crimes according to the state judicial branch

251. *Id.*

252. *ALDF Position on Animals as Crime Victims*, *supra* note 53.

253. Connecticut Judicial Branch records request (on file with author).

254. *Id.*

255. Rubin, *supra* note 18, at 263 (lamenting that only “one in five” cases were “prosecuted to a conclusion”).

256. *Id.*

257. I don’t mean to overread these numbers. Deterrence studies are notoriously hard to design. And although the State’s judicial records show animal crime rates increasing, it could be that arrests (though not necessarily prosecution rates, as noted above) for animal crimes are up because of the high-profile nature of Desmond’s Law. It is possible that the enactment of the law has led more persons to report animal crimes. The point is simply that one cannot claim that animal crimes have obviously decreased, or that the law has spurred a radical new level of deterrence.

was 2016, when the press and media coverage surrounding Desmond's Law was at its peak.²⁵⁸

Reasonable minds can disagree about what CAAPs will accomplish or should accomplish, but, given that the laws' advocates have promised "more justice," it is fair to ask what this justice looks like.²⁵⁹ Should we expect a radical drop in animal crime rates? A dramatic increase in animal crime conviction rates? More frequent use of diversionary programs? After all, the law, by its terms, does not apply to create personhood or to help animals other than dogs and cats, so one might hope that the amount of dog and cat abuse in the state was going down or that the conviction rate would be much higher. But Desmond's Law is not obviously connected to such events, and in fact by some measures animal crimes have gone up while conviction rates have remained roughly steady in the wake of the law's enactment.

It is too early to say anything definitive, but early data does not predict that animal crimes are radically reduced through the implementation of Desmond's Law. A more complete study of the workings of Desmond's Law will help fill out this quantitative picture, but the early returns seem to suggest that the law has been heavy on the media and public expressive side of the equation and light on the promise of big picture shifts in trends regarding how animals are treated in the state. Of course, sometimes narrative accounts from individual cases are at least as revealing and provide an indication of how the law is really working on the ground.²⁶⁰ Here too, however, initial accounts based on publicly available information of how the appointed advocates have assisted animals indicate an appeal to a carceral form of animal law. As a Desmond Army volunteer summarized the program: "We want prison time for people who knowingly harm an animal."²⁶¹ There are certainly important early examples of animal advocates pursuing more serious penalties in cases of serious abuse.²⁶²

258. To be sure, the numbers do not tell the entire story, and there is some strange reporting within these numbers. For example, the year 2020 lists only 110 total animal crimes, which likely reflects either a glitch in reporting or a COVID-19 impact on enforcement. Notably, even with these low numbers, the rate of conviction was strikingly low (only about 10.9%) compared to 13% in the year prior to Desmond's Law being enacted. The numbers for 2017 are also anomalously low (around 178 total cases) but jump to more than double that figure (359 and 361) in 2018 and 2019 respectively. KIRBY 2019, *supra* note 247. Data for 2018–2020 were obtained through a records request and are on file with the author.

259. Rubin, *supra* note 18, at 274.

260. Again, my access to first-hand accounts is limited because multiple requests to review case outcomes under the CAAP law have been rebuffed.

261. Michelle Tuccitto Sullo, *Animal Advocates Help to Bring Justice for Abused Cats and Dogs*, NEW HAVEN REG. (Jan. 27, 2019, 1:23 PM), <https://www.nhregister.com/news/article/Animal-advocates-help-to-bring-justice-for-abused-13565197.php> [<https://perma.cc/7VWU-LSF9>].

262. See, e.g., Daniel Tepfer, *Accused Fairfield Dog Abuser Goes to Jail*, NEW HAVEN REG. (Oct. 11, 2018, 4:54 AM), <https://www.nhregister.com/local/article/Accused-Fairfield-dog-abuser-goes-to-jail-13297156.php> [<https://perma.cc/3KVZ-LUEA>] (noting that, in the case of Raymond Neuberger, the Desmond advocate "insist[ed] that he get jail time").

Consider the case of Caitlin Fogerty, a former dog groomer who was accused of mistreating a dog kept in her care. The prosecutor requested a “pretrial diversion program” known as accelerated rehabilitation, under which Fogerty would repay veterinary bills of \$1,125 and promise not to work with dogs again for two years.²⁶³ Fogerty, in other words, was willing to forego her professional livelihood, stay away from animals, and pay a fine. Two clinical students, however, advocated in Hartford Community Court for stricter punishment, detailing the physical and emotional impact of Fogerty’s abuse.²⁶⁴ Presumably influenced by the advocacy of the appointed victims’ advocates, the judge lived up to the drafter of the law’s greatest hope by denying the prosecutor’s request for accelerated rehabilitation.²⁶⁵ In effect, Fogerty faced two separate teams, both tasked with representing the interests of justice, one purporting to justify a more punitive approach that rejected accelerated rehabilitation by speaking for the animal. This is only one case, yet it paints a picture of the law being used precisely as its sponsor imagined—to achieve a more punitive outcome than was suggested by the prosecutor. Once more complete data regarding the use of Desmond’s Law becomes available, it will be interesting to see how often a victim represented by a Desmond advocate has argued for a more lenient sentence or charge than the duly appointed state prosecutor. Are advocates more creative or more lenient than the prosecutors in the eyes of defense lawyers? Will the advocate ever seek leniency in a case of serious abuse or neglect? Will the advocates pursue the sort of diversionary programs and rehabilitation that were deemed an inadequate expression of social condemnation and which served to justify the CAAP laws in the first place?

3. *The Problem of Speaking for Animals*

When it comes to speaking for animals in court, there is an obvious problem. The problem is not in trying to imagine whether animals want more or less suffering. Presumably every animal, all things being equal, prefers less physical suffering or pain. Thus, it is hardly a stretch to imagine that animals might have strong opposition to intensive confinement, or their use for entertainment, or their killing for food. Advocates can fairly be said to be speaking for the best interest of an animal in trying to conserve wild spaces or limiting confinement.

But intuiting the wishes of an animal in a criminal proceeding, such as a sentencing hearing is a very different matter. The persons who are legally entitled to speak for the animal cannot communicate with the animal in any meaningful way about judicial proceedings or prosecutions. It might be tempting to assume that in a criminal proceeding inferring animal interests will be an easy task and that an animal’s interest in being safe will translate rather seamlessly into a set of default practices or recommendations by the court appointed advocates. However, such logic over-simplifies the emotional lives of animals and creates a very real risk that animals will become the ventriloquist puppets for criminal advocates with a political

263. Elaine S. Povich, *Advocates Stand up in Court for Abused Animals*, CT MIRROR (Feb. 24, 2019), <https://ctmirror.org/2019/02/24/advocates-stand-up-in-court-for-abused-animals/> [<https://perma.cc/QM3L-RK6G>].

264. *Id.*

265. State records indicate that Fogerty was eventually sentenced to one year of incarceration, and the sentence was suspended for two years.

agenda. The interests of an animal in avoiding harm seem straightforward enough, but would one really imagine that animals are given a voice if in a particularly conservative jurisdiction, advocates consistently call for convictions and often incarceration in serious cases, while in another jurisdiction facing similar types of abuse or neglect the advocates argue for no convictions and treatment in every case? One need not align with either normative perspective to recognize that the different modes of advocacy, driven by the good-faith efforts of persons (or clinics) administering the program and selecting the advocates, would have relatively little to do with the actual interests of the animals. Both jurisdictions may assume they have the best interests of the animals in mind, while approaching sentencing hearings with diametrically opposed perspectives.

As with true ventriloquism, it is the person in charge of the puppet whose voice and political views are actually being heard. And, although some persons might be able to animate the interests of animals by, for example, describing what suffering a broken rib feels like for a dog, it is fair to ask whether lawyers are best suited for this kind of advocacy. Might a veterinarian or ethologist or behaviorist provide a perspective that is truer to the animal's interest? The danger to guard against is the animal becoming a mere prop used for effect (either comedic or political). If the jurisdiction favors prison abolition, perhaps the dog's advocate would speak up about the harms of community policing, zero-tolerance policies, and the myths of superpredator logic. Moreover, if the jurisdiction has a more traditional orientation to crime and punishment, one would not be surprised if the animals (through their lawyers) ended up sounding like staunch advocates of rigorous broken-windows policing, prosecutions, and more convictions (and fewer diversions) in order to incapacitate and protect us.²⁶⁶ Both of these jurisdictions, we can assume for these purposes, share the goal of finding ways in law to express social condemnation for animal maltreatment, and in both jurisdictions these two very different approaches are attributed to interests of the animal victim.

On one hand, this potential flexibility in the application of CAAPs is laudable proof of their dynamic and adaptive potential. Future laws could enhance or limit the degree of flexibility afforded to advocates, depending on the goals of animal lawyers. On the other hand, it reveals the fallacy of believing that one approach or another to the handling of a criminal case is uniquely linked to the best interests of the animal. Unlike preserving habitat or removing an animal from injurious confinement, the interests of animals when it comes to outcomes in criminal cases (sentences, parole, convictions, etc) may not always be easy to discern. Indeed, once we candidly acknowledge that animals are unique individuals and eschew the myth that there is an overriding preference for any particular set of criminal outcomes by animals themselves, it becomes clear that CAAPs can function to further the political preferences of the advocates, whether or not those preferences serve the ultimate interests of animals or not.

266. It has been said that "in hell there will be lawyers without clients," who are thus free to pursue their own "unchecked self-interest" through the courts. Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 167 (2001). The notion of a lawyer purporting to speak for an animal might be law's closest engagement with this thought experiment about lawyers without clients.

We should agree that animals, all things being equal, would prefer a world with less animal maltreatment. But they certainly do not have an opinion about how this should (or could) best be pursued. Nor is it clear how they would weigh psychological suffering (say the separation from a caregiver) against physical pain. More pointedly, given that there is scholarly concern about allowing lawyers to decide which victims to speak for and what to say when it comes to human victims, that hubris risks being amplified dramatically when it comes to animals as crime victims.²⁶⁷ Josephine Donovan has written persuasively about the reality that animals do attempt to communicate with us, and she has posited that we should strive to be better at “listening to animals” and caring about what they are communicating.²⁶⁸ Yet, whatever the merits of listening to animals in other contexts, it seems clear that animals are never themselves going to voice clear opinions about matters such as deterrence or conviction rates.²⁶⁹

Nor are animals in a position to argue with the emerging research showing that soft-on-crime approaches may actually reduce crime, both felonies and misdemeanors.²⁷⁰ It is far from clear that Desmond, the namesake of the original modern CAAP law, would oppose the accelerated rehabilitation programs that allow for convictions to be expunged from one’s record after a period of supervision and compliance with terms. Accelerated rehabilitation has been villainized by the animal movement as proof positive that the system was failing animals. But why should the animal movement, in the middle of an evolving social conversation about the role of punitiveness, take for granted that diversionary programs are bad for animals? What data supports such a conclusion, and should we invest more, not less, in diversionary programs if in other areas of criminal law, they are linked to reduced levels of crime? Could CAAPs eventually provide a path toward more and better diversionary programs?

Social work scholars relish the opportunity to deploy rehabilitative and restorative programs within a diversionary setting. One could even imagine the use of animal law courts, designed with expertise in animal well-being as a central

267. Catharine A. MacKinnon, *Of Mice and Men: A Feminist Fragment on Animal Rights*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 263, 264 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (examining other forms of animal rights advocacy and worrying that the lawyerly assertion of rights sometimes ignores the real interests of animals). Some have suggested that speaking for animals will be “far more intuitive” than speaking for humans, Rubin, *supra* note 15, at 274, but this risks essentializing and oversimplifying the emotional and cognitive lives of animals, and also begs the question of why a separate advocate should be viewed as essential.

268. Josephine Donovan, *Feminism and the Treatment of Animals: From Care to Dialogue*, 31 J. WOMEN CULTURE & SOC’Y 305, 305 (2006).

269. Future research should take up the challenge of imagining what a court appointed advocate (or team of advocates) should ideally look and sound like. Might the advocacy include veterinarians and behaviorists, among other experts? Who might best approximate the voice of animals in a court of law? It is not clear that it would be law students.

270. Agan, Doleac & Harvey, *supra* note 16 (studying the impact of nonprosecution on subsequent criminal arrests and finding that nonprosecuted persons are less likely to be rearrested for both nonviolent and violent crimes); *id.* at 14 (reporting a “significant reduction[] in subsequent criminal complaints” for violent crime in the years following a nonprosecution).

concern. Perhaps we could have CAAPs in animal courts, which are primarily nonpunitive. Would this be a bad thing for animals? It is conceivable that animals might benefit from the types of programs that served as the catalyst for Desmond's Law, diversionary programs, and accelerated rehabilitation.²⁷¹ Maybe in a paradoxical way, Desmond's Law can spur the kind of thinking that brings us full-circle by generating interest in nonpunitive diversion programs that are focused on vindicating animal interests and reducing rates of animal violence. There is no reason to assume that effective animal advocacy in the courtroom needs to be linked, to quote the sponsor of Desmond's Law, with removing the "jail-free" card from the deck of possible interventions.

Upon reflecting on the need for advocates in court to have a toolbox different from that deployed by traditional prosecutors, one might wonder whether the problem of speaking for an animal can be addressed simply through a redrafting of the statute such that it clarifies that the advocate is there not just for the prosecution but for justice. Consequently, the language of the statute in Connecticut might seem like an ideal template because it in fact requires advocates to seek out the "interests of justice."²⁷² Still, the question is what are the "just" outcomes being pursued—what does justice mean in this context?²⁷³

The phrase "interests of justice" used in the statute appears to be intentionally or inadvertently cribbed from the ethical duties of prosecutors "to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice."²⁷⁴ The initial bill in Connecticut provided explicitly for the appointment of an animal advocate who would speak for the "interests of the animal" and, in a case like Desmond's, amplify the prosecution's call for incarceration. But this language attracted legislative opposition on the theory that it threatened to "create legal standing for animals" or some more monumental shift in the law that might, for example, facilitate the work of groups like the Nonhuman Rights Project.²⁷⁵ The interests of justice language was eventually settled on, but the focus is still on helping prosecutors. As a leading animal protection group explained, although advocates are appointed to represent the "interests of justice" rather than those of

271. Shirin Sinnar & Beth A Colgan, *Revisiting Hate Crimes Enhancements in the Shadow of Mass Incarceration*, 95 N.Y.U. L. REV. ONLINE 149, 154 (2021) (calling for consideration of civil victim compensation and restorative justice in place of sentencing enhancements for hate crimes).

272. Commentators have argued that it is a misperception to believe that Desmond's Law will have a punitive orientation because the statute "specifically defines the Advocate's role" as one of pursuing not punitiveness, but the "interests of justice." Rubin, *supra* note 15, at 271.

273. The Animal Legal Defense Fund's formal position statement provides that the Organization does not support diversionary programs in cases involving felonies or misdemeanors that it deems "other serious crimes." *ALDF Position Statement, supra* note 106. If all felonies and "serious" nonfelonies are deemed categorically ineligible for diversions and rehabilitation, then the role of advocates in pursuing less punitive sentences becomes quite constrained, and it seems fair to worry that "add[ing] more justice to the mix," Rubin, *supra* note 15, at 273, would mean more convictions and longer sentences.

274. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-1.9 (AM. BAR ASS'N 2017).

275. Rubin, *supra* note 15, at 254-55.

the animal, this just means that “Desmond’s Law advocates share the same responsibility as prosecutors.”²⁷⁶

In fact, the semantic shift has been heralded as an “excellent change” by the law’s proponents because it allows for an even wider range of punitive considerations to be advanced by the animal advocate than were initially imagined, such as interests beyond those of the animal including “community safety.”²⁷⁷ If one is appointed only to speak for the interests of the animal, it might be frowned upon to advocate for the consideration of human safety. Now, however, the animal advocate enshrined by statute can play a rather paradoxical role. A lawyer will be appointed because the court agrees that input from the *animal* might be valuable, but the appointed *person* might argue for a longer sentence or more convictions in order to protect future *human* victims.²⁷⁸ At this extreme, the ventriloquism effect risks being too transparent. By filtering the animal’s voice in court through the elusive phrase “interests of justice,” the law has amplified the role that the animal advocate can play in arguing for convictions and longer, more punitive sentences based on human or community interests that might very well be irrelevant to the well-being of animals.

As with the other examples of reforms discussed in this Article, it is far from clear that the appointment of victims’ advocates will categorically amplify the voice of animals. In fact, one of the paradoxes of CAAPs is that at least on some occasions, the advocate could argue for interventions that are directly contrary to the actual interests of the victim animal. Consider that even when the noncustodial interventions that the advocates can achieve are emphasized, the focus is on seizures and possession bans as models of nonpunitive, progressive reform. When it comes to accounting for animal interests, the application of overly simple heuristics might hurt more than it helps. As Aya Gruber and Jeannie Suk Gersen have observed in the human realm, the legal system’s fixation on responses that separate families in the interpersonal violence context are not always in the best interest of the victim.²⁷⁹

276. *Id.* (“Initially, this change seemed to weaken the advocate’s role; in practice, however, this has proven to be an excellent change.”); Pallotta, *supra* note 222.

277. Rubin, *supra* note 15, at 254.

278. There is a longstanding presumption that violence to animals predicts violence against humans. The interests of justice language allow an animal advocate to consider this link between human and animal violence when considering the merits of a longer sentence. For a detailed discussion of the uses and misuses of the research regarding this so-called link, see MARCEAU, *supra* note 66, at 193–250.

279. *E.g.*, Suk, *supra* note 197, at 8. Animal advocates tend to imagine that a conviction “without incarceration” is a minor event, even an example of progressive law reform. Rubin, *supra* note 18, at 270 n.43. Such statements are inconsistent with available research. *See also* NATAPOFF, *supra* note 23, at 19–20 (rejecting the notion that misdemeanor convictions without incarceration are noncarceral). *Compare* Sally Deng, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States*, HUM. RTS. WATCH (July 31, 2020), <https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states> [<https://perma.cc/6YQD-TNCT>] (noting that studies show that nearly half of all prison admissions stem from violations, often technical violations of probation or parole), *with* Rubin, *supra* note 18, at 270 (explaining that Desmond’s Law is not fairly characterized as punitive because advocates sometimes pursue “noncarceral” sentences).

If a teenage boy living with a foster family abuses a family pet, is it clear that a rule categorically requiring the parents to choose between the child or the dog is in the interest of animals or humans? An approach to animal advocacy that treats the interests of animals as obvious or intuitive risks flattening and stripping of nuance the emotional lives of animals. That is not to say that CAAPs cannot function in ways that do not over-simplify the notion of animal interests. However, it is, to use the example of family separation or forfeitures from above, overly simplistic to assume that animals categorically would prioritize a “state imposed de facto divorce.”²⁸⁰ Animals may very well prefer, as we could learn from a team of experts appointed by a court, avoiding the emotional harm of a state-mandated separation in some cases, over the potential for future physical neglect or abuse.

Moreover, even if an animal victim might otherwise equate safety with forced distance from a past abuser, the court appointed lawyer will not always help with this goal. A potentially far-fetched hypothetical illustrates the problem. Imagine that police officers maliciously injure a dog while on patrol, but provide perjured testimony, false evidence, or an inaccurate police report²⁸¹ in order to make it seem like the pet’s caretaker caused the injury.²⁸² The Desmond advocate is tasked with compiling police reports and interviewing the police, and it is unlikely that she will often have a motivation for challenging the veracity of an officer who claims to have discovered evidence of abuse or neglect. In such circumstances, it is conceivable that the dog (through the advocate) would be put in the position of speaking in favor of the punishment of the dog’s closest and completely innocent human friend. That is to say, the animal advocate may actually increase rather than decrease the potential for wrongful convictions by simply providing another prosecution voice in the courtroom in a way that seems less likely in the context of a human victim who is given a voice in a criminal proceeding.²⁸³

Consider another, perhaps less far-fetched, scenario that suggests victim advocates may not always work in the best interest of the animal or the human

280. Suk, *supra* note 197197, at 8. In the eyes of progressive animal law reformers forfeiture and fines are obvious and uncontroversial “remedies” to neglect or abuse. Rubin *supra* note 18, at 270.

281. In other areas of law, progressives readily acknowledge the problems associated with attaching too much weight to a police officer’s unverified police report. See Erica D. Rosenbaum, *Relying on the Unreliable: Challenging USCIS’s Use of Police Reports and Arrest Records in Affirmative Immigration Proceedings*, 96 N.Y.U. L. Rev. 256, 280 (2021).

282. The notion that cops might plant evidence or falsify claims of wrongdoing should not be treated as absurd. See *Cops Planting Evidence: A Curated Collection of Links*, THE MARSHALL PROJECT (June 21, 2021, 8:25 AM), <https://www.themarshallproject.org/records/4692-cops-planting-evidence> [<https://perma.cc/EN3Q-KM5H>] (compiling coverage of cases on the topic).

283. Structures and systems to screen and train the appointed animal advocates could potentially screen out applicants who would make this mistake and endorse a flawed prosecutorial effort. But this begs the question of what fair approach to training in this context would look like.

defendant. Imagine a beloved dog under the care of a homeless man.²⁸⁴ Is it conceivable that a dog might be heard through the dog's court-appointed advocate to deride and dismiss a poverty or mental illness defense to charges of serious neglect for failing to provide sufficient food or adequate veterinary care?²⁸⁵ At the risk of being too emotive, does one who really speaks for dogs believe that the animal herself would not urge a defense for a loving but impoverished, addicted, or ill caretaker?

The purpose of Desmond's Law is touted as twofold: avoid dismissals and drive up conviction rates.²⁸⁶ CAAPs are celebrated as victories because the rate of conviction goes up. The nonpunitive framing of these laws emphasizes that sometimes the advocate may "support a sentence without incarceration in exchange for the certainty of a record conviction."²⁸⁷ But what looks to many in the animal movement as a progressive reform may actually be increasing animal crimes both because of the research showing convictions are criminogenic,²⁸⁸ and because of the distrust for the animal protection system more generally that flows from a carceral approach to animal abuse and neglect. And while the tough-on-crime era thinking that gives rise to equating felony laws and convictions as markers of progress for animals is far from defunct, public perceptions on punitiveness have shifted dramatically in recent years.²⁸⁹ Animal lawyers and the cause itself will be judged by how it responds to this moment, and insisting on establishing a permanent criminal record and conviction will not be viewed as indicative of progressive law

284. For a careful analysis of the relationship between pets and persons who are homeless, see generally LESLIE IRVINE, *MY DOG ALWAYS EATS FIRST: HOMELESS PEOPLE AND THEIR ANIMALS* (2015); see also Hongwei Yang et al., *Understanding the Attachment Dimension of Human-Animal Bond Within A Homeless Population: A One-Health Initiative in the Student Health Outreach for Wellness*, 2020 J. APPLIED ANIMAL WELFARE SCI. 1, 1-15 (2020) (compiling research regarding the bond between pets and homeless persons); *id.* at 2 ("Many homeless pet owners were so attached to their pets that they would, even during natural disasters, choose not to be separated from their companion animals and accordingly refuse sheltering or evacuation options unless their pets were also allowed entry into the facility. . . .").

285. This is not a far-fetched hypothetical. Animal lawyers have argued repeatedly that poverty is not an excuse or justification for charges of animal neglect. See, e.g., Harvard Animal Law, *supra* note 124 (touting a prosecutorial victory in a case in which "[t]he defendant claims he was justified" in not feeding his dog "because he didn't have any money").

286. Any notion that higher rates of conviction among persons arrested is, standing alone, a marker of greater "justice," ignores the Supreme Court's own admonition that "[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct." *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 241 (1957); see also Rosenbaum, *supra* note 281, at 270 ("[U]nderstanding arrest reports as evidence of wrongdoing leads to racially skewed results.").

287. Rubin, *supra* note 18, at 269.

288. Agan, Doleac & Harvey, *supra* note 16.

289. Sinnar & Colgan, *supra* note 271, at 151 (noting a "shifting national conversation on the need to restrict the scope and punitive approach of criminal legal systems" and citing national, bipartisan efforts in this regard).

reform efforts that benefit animals or humans.²⁹⁰ Alexandra Natapoff's path-marking book illuminates the "myth" that small punishments or fines are "not especially terrible for the people who experience them," and catalogues the ways in which a permanent criminal record makes one more susceptible to crime by making their employment, relationships, and housing more unstable.²⁹¹

Debating the merits of CAAPs as victories for animals requires a clear-eyed assessment of what goals the movement hopes to achieve and what to do about the reality that these laws may not decrease rates of abuse or neglect. They may not even materially increase conviction rates. Is the goal a reduction in the use of diversionary programs? Beyond rhetoric and expressivist goals, what measurable outcomes should animal advocates expect when they pursue CAAP laws?

CONCLUSION

There has long been a paradox at the heart of certain progressive law reform projects: the belief that more policing, convictions, and longer sentences will further justice. Forged in the era of tough-on-crime politics, these approaches force terms like "justice," "violence," and "victims" to do a lot of work. Influenced by a conservative view of victims' rights and justice, animal advocates embraced carceral feminism, hate crimes, and other expansions of the punitive bureaucracy. Increasingly, however, advocates outside of the animal protection realm are realizing that an expanding criminal system "may do little to achieve deterrence, rehabilitation, or restoration of safety for victims."²⁹² Animal advocates, by contrast, have called for more vigorous prosecution as a means of recognizing animal victimhood and protecting animals from future abuse. But research shows that inducing prosecutors "to be more lenient in their prosecution decisions," including by dismissing more cases, can "yield net social benefits" in terms of crime reduction.²⁹³

The time has come for animal advocates to recognize the instability of terms like "justice" and to consider the possibility that reforms pursued in the name of animal victims are hurting more than they are helping. What exactly do advocates hope to achieve through more convictions, more charges, or longer possible sentences? Is it deterrence, or an expressive acknowledgment, or incapacitation? And the stated goals should be rigorously and empirically studied, not taken for granted. This Article does not purport to prove that all victim strategies, or even all crime victim approaches, are inconsistent with any and every desired goal of animal protection, but it does caution that sweeping claims of efficacy unmoored from precise goals is a recipe for bad outcomes. More generally, this Article attempts to

290. *Id.* (noting an example of an LGBTQ group who opposed hate crimes designed to protect LGBTQ groups on the grounds that such laws do not better protect the groups and instead are a "strategic mistake of significant proportion"). For an insightful critique of the view that there is a bipartisan consensus in favor of criminal justice reform, see Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 318 (2018) ("[G]lossing over disagreement and nuance risks losing the power of the critiques that got us to this moment of possibility . . .").

291. NATAPOFF, *supra* note 23, at 19–20.

292. Sinnar & Colgan, *supra* note 271, at 153.

293. Agan, Doleac & Harvey, *supra* note 16.

show that it is far from clear that the interests of animals are well-served by the rising tide of carceral interventions pursued in name of animal victimhood. It is not even clear that animals are directly or indirectly benefitting from many of the law reform projects that center victim advocacy in animal law. Is it right to treat deportations or child prosecutions as progress for animals, and if so under what set of metrics? In concrete terms, what work do we want the idea of legal victimhood to do for animals? Does the animals as victims of crime movement risk undermining the very relevance and credibility of the animal law field, isolating animal advocates from civil rights allies, and reducing the likelihood that animal crimes will be reported, particularly among marginalized communities?

Not all animal law organizations or advocates have tied their brand to tough-on-crime interventions. But almost no lawyers have spoken up in opposition or asked how such interventions help animals. As the social conversation shifts towards recognizing punitive approaches to social problems as ineffective, the silence of these advocates cannot be treated as neutral. Animal lawyers need to decide how they want their movement to be framed to the public, and whether they are willing to tolerate and celebrate efforts to achieve justice through more convictions and longer punishments.

The point here is not to suggest bad faith or malicious intent on the part of any animal lawyers.²⁹⁴ Quite the contrary, the advocates for animals are earnestly pursuing law reform to help animals. But it is far too common to dismiss skeptics of carceral law as ivory tower elites, disconnected from the realities of everyday practice. There are no silver bullets or obvious answers, but to take an easy example, how much animal suffering would be reduced if every group in the United States diverted half of its pro-criminal prosecution budget toward veterinary care for low-income neighborhoods? Would a year of prosecutions or a year of advocating for free veterinary care vouchers for low-income persons prevent more animal suffering? In a resource scarce climate, choosing convictions is a zero-sum game. How different would the field of animal law look if we halved the investment in carceral strategies and re-invested in simple, commonsense interventions to help animals? It is becoming untenable to argue that increased penalties or convictions reduce crime,²⁹⁵ so the movement should reflect on what concrete benefits it hopes to achieve through criminal interventions. Careful reflection may reveal that insisting upon treating animals as victims of crime is doing more to victimize than

294. Cf. David Rangaviz, *Locked in: The True Causes of Mass Incarceration and How to Achieve Real Reform*, 101 MASS. L. REV. 54, 55 (2020) (book review) (noting that, if leading criminologists were “to attribute motive to the system,” “they might say it is one of well-intentioned good faith,” and that “[t]hose setting criminal justice policy are simply too reliant on their errant assumptions instead of what years of data have shown to be true”); *id.* (emphasizing that their “goal is to bring the facts to the fore, and empower empiricism over intuition”).

295. Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 AM. CRIM. L. REV. 1579, 1586 (2019) (“Research supports the common-sense notion that spending years in very close quarters with other convicted felons has a criminogenic effect, particularly when more dangerous inmates are mixed in with less dangerous ones.”); *see also* Binder & Notterman, *supra* note 173.

to help animals. It is possible that the victimhood narrative is a trap for animal advocates.
