Friends of Every Friendless Beast Carceral Animal Law and the Funding of Prosecutors*

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In the mid-nineteenth century, the founder of the American Society for the Prevention of Cruelty to Animals (ASPCA), Henry Bergh, saw criminal punishment as the lynchpin of the protection of animals. Bergh lobbied the New York legislature for the adoption of animal cruelty laws, and took it on himself to enforce those laws. Animal law has evolved considerably since then, but Bergh's tactics have experienced a renaissance. The animal protection movement's reliance on criminal law and incarceration to prop up animal status is the subject of a book-length critique by Justin Marceau in Beyond Cages: Animal Law and Criminal Punishment. *Picking up on the book's call for greater scholarly attention to the relationship between criminal justice and animal protection, this essay focuses scrutiny on three aspects of the modern animal protection's fixation with criminal justice: (1) the animal protection movement's renewed interest in privatizing the prosecutorial function; (2) the view that by framing the animal as a victim, social change will be more readily possible; and (3) more generally, the view that prosecutors will serve as catalysts for the sort of radical social change the animal protection movement is pursuing.*

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* From Henry Wadsworth Longfellow's *Tales of a Wayside Inn* (1863), written, according to Sydney Coleman's *Humane Society Leaders in America*, as a tribute to Henry Bergh:

> Among the noblest of the land,
> Though he may count himself the least,
> That man I honor and revere,
> Who, without favor, without fear,
> In the great city dares to stand
> The friend of every friendless beast.

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I. Introduction

In nineteenth century America, buyers and sellers of livestock would tie animals by their legs and pile them in carts like cords of wood. When a Brooklyn butcher was arrested for the practice in 1866, he became the first person convicted of animal cruelty in the United States, and some would point to the conviction as a turning point in the country's collective recognition that animals are not mere property.[1] The conviction was a direct result of the work of Henry Bergh, the founder of the American Society for the Prevention of Cruelty to Animals ("ASPCA"). Criminal prosecution, according to Bergh's vision, could serve as the non-human animal's first-best hope for legal protection.

Before Bergh came onto the scene, legislatures exhibited no great concern about cruelty to animals. The laws that did exist existed to protect valuable property; a man could be prosecuted for harming animals that belonged to someone else, but the law stopped there. Americans were free to abuse animals that belonged to them, or that belonged to no one. In David Favre and Vivien Tsang's overview of nineteenth-century anti-cruelty laws, the authors note: "[w]hat a man did in the privacy of his home to his animals, his children, and sometimes even his wife, was his

1. Sydney H Coleman, *Humane Society Leaders in America* (Albany: American Humane Association, 1924) at 42.

concern alone, not that of the legal system".[2] Throughout the country the scope of criminally prohibited harms to animals was narrow, and the punishment minimal.

Henry Bergh's ASPCA was instrumental in the development of New York's animal protection bill of 1866, which served as a template for modern criminal law reforms across the country.[3] The first of two key features in the Bergh-inspired law made it a misdemeanor offense to "over-drive, over-load, torture, torment, deprive of necessary sustenance, or to be unnecessarily or cruelly beaten, or needlessly mutilated, or killed as aforesaid any living creature".[4] As Favre and Tsang point out, this New York law applied regardless of the ownership of an animal, and it covered negligent as well as intentional acts.[5]

Of course, legal reforms alone do not always translate into meaningful change on the ground. These more expansive laws might have been meaningless if the ASPCA had no means of enforcing them. But Bergh's adept political sense had recognized as much, and a second notable element of the legislation he crafted was a novel mechanism for enforcement. Rather than relying on the state to police animal cruelty, Bergh's statute granted police powers to Bergh himself. That is, officially designated agents of the ASPCA were allowed to "make arrests and bring before any court…offenders found violating provisions of this act".[6] According to Favre and Tsang, "[t]his delegation of state criminal authority to a private organization was, and is, truly extraordinary".[7] Bergh's reforms are widely heralded as ushering in a turning point in the country's view of the legal status of animals. He expanded the criminal law and ensured its enforcement. Henry Bergh loved animals,

2. David Favre & Vivien Tsang, "The Development of Anti-Cruelty Laws During the 1800's" (1993) 1:1 Detroit College of Law Review 1 at 4.
3. As Coleman observed in 1924, "[e]very state in the Union has testified to the soundness of [Bergh's] work by passing legislation for animal protection modeled after the laws which he caused to be enacted in New York State" (Coleman, *supra* note 1 at 61).
4. NY Rev Stat ch 783 § 1 (1866).
5. Favre & Tsang, *supra* note 2 at 14.
6. NY Rev Stat, *supra* note 4 § 8.
7. Favre & Tsang, *supra* note 2 at 17.

and he spearheaded law reform efforts to codify criminal punishments for those who mistreated animals. It is beyond question that Bergh's advocacy for a criminal response to animal abuse — whether he sought criminal punishment for expressive or deterrent purposes — served as an entry point for society's increased awareness about animal suffering. Today, Bergh's model of animal protection continues to thrive and remains relatively unchallenged; the defining philosophy of many in the movement is animal protection through criminal enforcement. The dignity of animals is safeguarded, according to this view, by subjecting humans to incarceration.

While progressives elsewhere are pointing to data that demonstrate the criminogenic effects of stiffer criminal sanctions, and the debilitating inter-generational impacts of criminal prosecutions, the animal protection movement is stoking outrage and calling for more carceral responses to animal abuse. And while accounts of effective social change often document the need for the "outlaw" as vehicle for normalizing and legitimizing lawful efforts to obtain reform,[8] the animal protection lawyers have largely ignored, even shunned the outlaw-activists of the modern movement. A modern day animal lawyer is more likely to call for a juvenile to be prosecuted as an adult and sentenced to prison than she is to recognize value in defending someone who is charged with property crimes relating to the rescue of animals from a factory farm. But seeking incarceration is not apolitical, or irrelevant.[9] True social change requires dismantling the status quo, but the prosecuting state is the engine of a state's social repression. The movement is badly mistaken when it assumes, to paraphrase Audre Lorde, that it will be able to dismantle the master's house with the master's own tools.

8. Charlotte Montgomery, *Blood Relations: Animals, Humans, and Politics* (Toronto: Between the Lines, 2000).
9. Rachel Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* (Cambridge, Mass: Belknap Press, 2019).

II. The Paradoxical Idea of Teaching Empathy Through Criminal Punishment

Animal law has evolved considerably since the mid-nineteenth century with the emergence of numerous non-profits dedicated to the field and considerably more public awareness, yet Bergh's insight that criminal punishment was a lynchpin of animal protection has experienced a renaissance. Bergh's no-nonsense approach to animal cruelty predates by more than a century but perfectly embodies the modern-day slogan of 'tough on crime'. Bergh would literally knock heads to enforce the law. In a glowing biography of the man, Sydney Coleman observed that:

> When moral suasion failed to secure desired results, [Bergh] did not hesitate to use brute force. One day he found a cart loaded with calves and sheep. The legs of the poor creatures were bound and their heads hung over the sides of the vehicle. When the driver and helper refused to relieve them of their suffering, Mr. Bergh pulled the two men off the cart and holding them at arm's length brought their heads together with a thud. 'How do you like that exercise?' he inquired. 'Perhaps now you can feel how the heads of those poor sheep and calves feel.' [10]

More than a century and a half later, the same ethos courses through the veins of animal protection groups. One of the leading organizations in the country has spent the twenty-first century selling t-shirts and bumper stickers, and encouraging the public to embrace a straightforward slogan in support of animal protection: "Abuse an Animal Go To Jail". The campaign's widespread acceptance — it's very success — has enshrined the movement as a war-on-crime effort. People familiar with this sort of sloganeering across the movement likely cannot imagine animal law as having any more critical function than overseeing the incarceration of humans who mistreat high-status animals. Emblematic of this tendency is an anecdote: while writing this essay one of the authors worked from a café that was adorned with several "Abuse an Animal, Go to Jail" stickers and magnets, and that did not serve a single vegetarian option (though chicken was suggested as a pretty close alternative).

The mainstream movement seems to share the hope, as Bergh urged at a time when vigilante justice was ubiquitous, that people

10. Coleman, *supra* note 1 at 60.

might understand "how those poor sheep and calves feel".[11] Lambasting society's lack of empathy was in Bergh's day and remains today a central feature of the movement's rhetoric. But the notion that punishing humans will right the wrongs of animal abuse calls to mind HLA Hart's observation of punishment as "a mysterious piece of moral alchemy in which the combination of the two evils of moral wickedness and suffering are transmuted into good".[12] The movement's call to empathy is unnecessarily undermined by calls for tough-on-crime policies, and we doubt that much good will ever flow to the movement, the animals, or society more generally from this sort of eye-for-an-eye logic. Does one really imagine that we ought to permit and pursue capital punishment for animal abusers? And if not, upon serious reflection does anyone believe that when a person is released from prison for abusing an animal that they will emerge a kinder, gentler, and more empathic human?

The movement's reliance on criminal law and incarceration to prop-up animal status is the subject of a book length critique by one of the authors in *Beyond Cages: Animal Law and Criminal Punishment*.[13] Picking up on the book's call for greater scholarly attention to the relationship between criminal justice and animal protection, this essay focuses scrutiny on three aspects of the modern animal protection's fixation with criminal justice: (1) the animal protection movement's renewed interest in privatizing the prosecutorial function; (2) the view that by framing the animal as a victim, social change will be more readily possible; and (3) more generally, the view that prosecutors will serve as catalysts for the sort of radical social change the animal protection movement is pursuing. First, however, the essay will begin with a more laudatory point: the animal protection movement is ready for internal critique.

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11. *Ibid*.
12. HLA Hart, *Punishment and Responsibility* (New York and Toronto: Oxford University Press, 1968) at 234–35.
13. Justin Marceau, *Beyond Cages: Animal Law and Criminal Punishment* (Cambridge: Cambridge University Press, 2019).

III. The Movement Has Obtained a Status that Justifies Internal Critique

All social movements have periods of intense strategic disagreement that, with the benefit of hindsight, often turn out to be decisive moments in the success or failure of a movement. The animal protection movement is entering such a period. The movement is at a critical juncture with regard to one of its central platforms: the importance of criminal prosecutions for animal abuse as a tool for protecting animals and advancing the status of animals in the law. Does the increased criminalization of animal cruelty — more crimes, more enforcement, higher penalties, deportations, and offender registries, among other mechanisms — serve the goal of improving the status of animals in the legal system? Are animals better off when humans are relegated to cages, or instead are longstanding social hierarchies — among people and animals — reinforced and reified at the expense of a more general approach to anti-subordination?

As Henry Bergh's example makes clear, for as long as there has been an organized animal protection movement in the United States, the received wisdom has been that animals and humans are made safer through the establishment of a more punitive and carceral approach to animal mistreatment. Using existing cruelty codes, lobbying for enhanced penalties with legislatures, and pressuring prosecutors to bring maximalist charges have become mainstays of animal protection advocacy. The motives for such an approach to animal protection are complicated and multifaceted. In a sense, the movement's historical resort to criminal punishment is a common-sense reaction to the desperate lack of legal avenues for establishing status for animals in the legal system. The movement lacked a tangible foothold in the legal system other than criminal punishment for decades, and nothing in the pages that follow is meant to suggest that the sadistic animal abuser or poacher should avoid criminal opprobrium altogether. It was essentially criminal law, or nothing when it came to animal protection, and in many ways the pioneers of animal law, including Bergh and the ALDF, made possible the conversations and refinements suggested in this essay.

Nonetheless, by reflecting on the breadth of the modern criminal

justice 'successes' by the movement and juxtaposing them with the well-documented reality that by the turn of this century our "justice system was [already] the harshest in the history of democratic government",[14] people inside and outside the movement might be able to give a more clear-eyed assessment of the role that criminal law should play in advancing animal protection. As *Beyond Cages* painstakingly details, in the social sciences and criminal law literature it is no longer seriously disputed that longer sentences and more punishment often produce criminogenic consequences; indeed, a growing body of literature is acknowledging that the non-criminal public's 'self-interest' in safety, security, and a thriving community is best served by having a lower incarceration rate and a less punitive justice system.[15] Yet, operating in a vacuum where empathy appears to extend primarily to non-humans, these general insights have not been infused into the thinking or strategies of most animal protection advocates. One need not conclude that animal abuse should be decriminalized. Existing research shows that criminalization of certain conduct does lead to a decrease in the prevalence of that conduct. The question is whether incarceration produces a marginal benefit, or more whether the sort of increases in punishment or prosecution rates create more marginal harm than benefit. A rigid adherence to ever more severe criminal sanctions enforced ever more rigidly is not an obvious benefit to the long-term goals of the animal protection movement.

We acknowledge that the scholarly task of critiquing a social movement's operational strategies should not be taken lightly. There is always a risk that the proverbial Ivory Tower will overlook the necessities of on-the-ground advocacy. For much of this country's history, for

14. William Stuntz, *The Collapse of American Criminal Justice* (Cambridge Mass: Harvard University Press, 2011) at 3.

15. Paul Butler, *Let's Get Free: A Hip-Hop Theory of Justice* (New York: New York Press, 2009) at 29–30 (making the case that less punitive polices and policing are in the public interest). See also Stuntz, *supra* note 14 ("[n]o democratic society can incarcerate such a large fraction of its poor population and retain the goodwill of that population" at 13); Jeffrey Fagan & Tracey L Meares, "Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities" (2008) 6 Ohio State Journal of Criminal Law 173.

example, academics criticized protest as "an undemocratic intrusion into politics".[16] Not until the 1960s did researchers come to regard protest as an essential "adjunct to democratic politics".[17]

We are thus mindful that there is a danger that in making sweeping pronouncements about what constitutes a successful framing or model for social movements to employ, potentially effective approaches will be chilled or undermined. After all, the study of social movements and how they intersect with governance is a complex and relatively nascent field of study.[18] Some social movements are perhaps so under-developed and under-theorized that a pointed academic critique would simply be premature, if not unfair. At the same time, William Eskridge has recognized that social movements serve as a "moving force behind the big changes" in legal doctrine.[19] Accordingly, scholars — even scholars sympathetic to a particular cause — should not sit idly by and tolerate every tactic propagated by a social movement; the tactics employed by social movements simultaneously shape legal doctrine and social constructions. In a very pragmatic sense, the tactics employed define the movement; a movement is no better than the forms of advocacy it deploys in pursuit of its goals.

Until very recently, animal activists were more outlaws[20] than legal insiders and experts. Litigation to improve the lives of animals was almost inconceivable throughout the twentieth century; instead, civil

16. Pamela E Oliver et al, "Emerging Trends in the Study of Protest and Social Movements" (2005) 12 Research in Political Sociology 213 at 213.
17. *Ibid*.
18. For a comprehensive study of social change lawyering, see Alan K Chen & Scott L Cummings, *Public Interest Lawyering: A Contemporary Approach* (New York: Wolters Kluwer Law & Business, 2012).
19. For a thorough account of the impact of social movements on constitutional law, see William N Eskridge Jr, "Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century" (2002) 100 Michigan Law Review 2062.
20. At common law outlawry was defined as treating a person to the status of a wild animal. Frederick Pollick & FW Maitland, *The History of English Law Before the Time of Edward 1*, 3d (Indianapolis: Cambridge University Press, 1968).

disobedience and property crimes were a defining feature of activism in the field. Indeed, the largest domestic terrorism investigation in US history was the FBI's pursuit of animal rights and eco-rights groups in the late 1990s for a variety of property-related crimes.[21] In 1997, the Director of the FBI explained that animal-rights were among the "highest domestic terrorism priorities".[22] During this same period, animal law had virtually no place within the law school curriculum. In the early nineties, just one law professor in the US offered an animal law course.[23] In recent decades, animal protection has emerged as a topic of substantial scholarly and legal interest. Today nearly every accredited law school has at least one animal law course.[24] Several offer two or more animal law courses, and there are now animal law programs, professorships, and degree certifications. There is even a section of faculty within the Association of American Law Schools dedicated to animal law.[25] With animal law programs, chairs, and a diverse set of courses on the topic, it is fair to say that animal law has moved from the fringe to the mainstream. The movement's spokespeople have migrated from FBI wanted lists to

21. Will Potter, *Green is the New Red: An Insider's Account of a Social Movement Under Siege* (San Francisco: City Lights Books, 2011).
22. David Stout, "U.S. Indicts 11 for Acts of Domestic Terrorism" (20 January 2006), online: *New York Times* <www.nytimes.com/2006/01/20/politics/us-indicts-11-for-acts-of-domestic-terrorism.html>.
23. Joyce Tischler, "The History of Animal Law, Part I (1972-1987)" (2008) 1 Stanford Journal of Animal Law and Policy 1 at 10. See also Stephen M Wise, "The Evolution of Animal Law Since 1950" in Andrew N Rowan & Deborah J Salem, eds, *The State of the Animals II* (Washington: Humane Society Press, 2003) 99 at 104 ("The first American law school class in animal law was offered by the Pace University School of Law…in the mid-1980s" at 104).
24. "Animal Law Courses" online: *Animal Legal Defense Fund* <aldf.org/animal-law-courses> ("There are 167 law schools in the U.S. and Canada, and 11 in Australia and New Zealand, that have offered a course in animal law").
25. See the Section on Animal Law, online: *The Association of American Law Schools* <memberaccess.aals.org/eWeb/dynamicpage.aspx?webcode=ChpDetail&chp_cst_key=25b753df-26c8-4544-8e8b-36ac82e63e2e>.

positions of credibility and acclaim.[26]

Recognizing the mainstream acceptance of animal rights, the Dean of Harvard Law School Martha Minow recently observed that legal history is a story of an "ever-expanding circle of law — who's in and who isn't".[27] Animal law, she contends, represents the latest expansion of that circle such that "there's an opportunity now to contribute to the development of law reform in a way that hasn't always been the case".[28]

The maturation of the movement comes with many benefits, including heightened public acceptance and increased scholarly attention. But there is also an intellectual price. With progress and acceptance comes an expectation of introspection and rigorousness that was unnecessary when the movement was fledgling and ungrounded. The animal protection field must be self-confident enough to identify and examine its own quirks, hypocrisies, and defects. It is no longer sufficient for animal protection advocates to simply criticize their detractors and to engage in bumper-sticker advocacy. Rather, the movement must take seriously the need to affirmatively define its goals and to refine its methods. It is in light of this maturation that this essay and *Beyond Cages* offer a biting critique of carceral animal law. We do not purport to be the final or most important word in this debate, but the existence of debates such as this one are an explicit recognition that the movement has developed to a point where

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26. See *e.g. ibid*, explaining that "[i]t was not long ago that *animal rights* was all but an oxymoron"; Adam Cohen, "Can Animal Rights Go Too Far?" (14 July 2010), online: *Time* <content.time.com/time/nation/article/0,8599,2003682,00.html> (noting that animal rights has moved to the "mainstream"); Larry Copeland, "Animal Rights Groups Pick Up Momentum" (27 January 2008), online: *USA Today* <usatoday30.usatoday.com/news/nation/2008-01-27-animal-activists_N.htm>; Cody Switzer, "Animal-Welfare Charities Among the Most Popular Online" (9 November 2011), online: *Chronicle of Philanthropy* <philanthropy.com/article/Animal-Welfare-Charities-Among/227131> (detailing the traffic that websites related to animal welfare charities have received).
27. Cara Feinberg, "Are Animals 'Things'?: The Law Evolves" (2016), online: *Harvard Magazine* <harvardmagazine.com/2016/03/are-animals-things> (discussing the rise of animal law programs across the country).
28. *Ibid*.

it can withstand and even grow from critiques levelled by the pen of commentators sympathetic to its goals. Unlike in Bergh's era when the movement had few resources or allies, today animal law is increasingly creative, proactive, and sufficiently established to withstand the upheaval of an overdue critique.

It is in this spirit of growth through internal critique that this essay challenges certain aspects of the carceral posture of modern animal law. At the time of writing *Beyond Cages,* it was accepted as dogma across wide swaths of the movement that allowing an animal abuser to be sentenced to treatment or strict probation terms instead of incarceration was tantamount to disrespecting the entire animal protection agenda. Fundraising efforts frequently call on persons to be "compassionate" by calling for harsher prosecutions. Even deportation had emerged as a welcome and celebrated tool in the arsenal of animal protection advocates. Amicus briefs have been filed in support of deportation by animal protection groups as recently as 2018.[29] Allying with xenophobes, racists, and tough-on crime pundits and politicians is treated as accepted and as a necessary evil designed to protect animals. This essay builds on the substantially more detailed critique in *Beyond Cages* and argues that the carceral obsession is not good for the animals it seeks to protect, it is not good for society, and it should be regarded as a relic of a more desperate, darker period in the history of animal rights.

The animal protection movement seeks to achieve a monumental

29. American Legal Defense Fund (ALDF), "Amicus Brief Establishing Animals as Victims in Federal Case" (3 December 2018), online: *ALDF* <aldf.org/article/amicus-brief-establishing-animals-as-victims-in-federal-case/>. The ALDF celebrated its amicus brief in support of deportation filed with the immigration court by noting, "[h]umans can be crime victims because being subject to an assault or neglect or other criminal activity hurts them unlawfully. It is just the same with animals". One has to wonder whether the animal protection movement would support deporting or euthanizing all animals who cause harm to humans, or create "victims".

shift in the social understanding of the human-animal relationship,[30] but this essay argues that the prosecuting state is not the ally of radical social change, but rather the enforcer of the status quo. As a historical matter, police and prosecutors have been famously engaged in efforts to thwart social change, including through unlawful uses of force.[31] To take but one striking example, persons were prosecuted in the north and the south for assisting the Underground Railroad in the nineteenth century.[32] Prosecutions under the sweeping fugitive slave laws were a celebrated aspect of political maneuvering. Even after the civil rights laws were enacted and slavery formally abolished, at least one commission has documented the malfeasance of prosecutors during the civil rights era in trying to safeguard the social status quo.[33] Today persons are prosecuted as terrorists for liberating beagles or cats from research labs or farm animals from their cages. One need not believe that these illegal acts of political

30. As Steve Wise has explained in *Rattling the Cage*, there is an impenetrable wall between animal rights and present social understanding: "[f]or four thousand years, a thick and impenetrable legal wall has separated all human from all nonhuman animals. On one side, even the most trivial interests of a single species — ours — are jealously guarded. We have assigned ourselves, alone among the million animal species, the status of 'legal persons.' On the other side of that wall lies the legal refuse of an entire kingdom, not just chimpanzees and bonobos but also gorillas, orangutans, and monkeys, dogs, elephants, and dolphins. They are 'legal things'" (Steven M Wise, *Rattling The Cage: Toward Legal Rights for Animals*, (Cambridge, Mass: Perseus Books, 2000) at 4).

31. US Commission on Civil Rights, *Law Enforcement: A Report on Equal Protection in the South* (Washington, 1965) at 55–74 (summarizing frequent mass arrests and prosecutions for demonstrations and protests); also describing the trial and sentencing of protesters and noting that protesters were held for weeks without bail or trial and that protesters were routinely convicted and sentenced to the maximum penalty (at 77–78).

32. *Ibid* at 43–55 (documenting law enforcement's tacit approval of violence against African Americans by private citizens and the refusal of prosecutors to prosecute for racially motivated violence).

33. *Ibid* at 94 ("In many areas of Mississippi the failure of law enforcement officials to curb racial violence is largely attributable to the racially hostile attitudes of sheriffs, police chiefs, and prosecuting attorneys" at 97).

protest, spread across different eras, are morally equivalent to appreciate that the prosecution has not been a compelling engine for social change, but often the opposite. This essay highlights some of the reasons that social movements, particularly anti-subordination movements like animal protection, are most effective when they focus their attention on protecting their members and interests "against a brutalizing state", [34] rather than in support of it.[35]

IV. The Modern Animal Cruelty Prosecutor

Throughout most of American history, the overriding conception of the prosecutor as a neutral and independent actor prevailed, with the consequence being a limited role for animal protection groups in the prosecutorial office. By introducing the idea of prosecutions initiated or directed by private groups, Bergh introduced a paradigm shift. Scholars such as David Favre are quite correct to treat Bergh's triumphs in this regard as novel and extraordinary. But Bergh's triumph in this regard has not been dismissed as an antiquated relic of rough justice in the nineteenth century, a time period when vigilantism was often tolerated. Instead, the modern animal protection movement has heaped upon Bergh the greatest form of flattery: imitation. The modern animal protection movement regards private influence or control over prosecutions as one of the landmark achievements of the movement, and it treats that influence as a critical benchmark for measuring the future advancements of animal law.

One striking example of Bergh's nineteenth century playbook at work in modern America is the ALDF's 2013 agreement with the Oregon District Attorneys Association to fund the salary of an Animal Cruelty Deputy District Attorney ("AC-DDA"), dedicated to prosecuting

34. Eskridge, *supra* note 19 at 2390.

35. It is more common for social movements to regard their function as one of policing the police than one of assisting and strengthening the power of police and prosecutors. See Jocelyn Simonson, "The Criminal Court Audience in a Post-Trial World" (2014) 127:8 Harvard Law Review 2173 at 2175; Jocelyn Simonson, "Copwatching" (2016) 104:1 California Law Review 391 at 445.

exclusively animal cruelty across the state.[36]

A. The Success of the Private Prosecutor Position in Oregon

In many ways the modern-day delegation of the prosecutorial function to animal protection groups has been such a sweeping success that an outside observer would surely predict that the movement will fund more such positions in the near future. If the ability to purchase the services of a prosecutor in Oregon were viewed as a test case, the early results surely surpass expectations. If resources allowed for it, we doubt that the movement would oppose funding a prosecutor in every state, or even every county.

The creation in 2013 of Oregon's AC-DDA position also coincided with more robust animal cruelty legislation. Among other things, Senate Bill 6 amended Oregon Revised Statute Section 167.325 to make animal neglect a felony in certain circumstances.[37] In mid-nineteenth century New York, Favre and Tsang observe: "[r]equiring a person to care for an animal, imposing an affirmative act, had always been considered more burdensome than prohibiting an action".[38] Moreover, Favre and Tsang point to the problem of intent in the context of animal treatment, where "the primary motivation for human conduct is often other than to harm an animal, even though it is foreseeable that there is a risk of harm to that animal".[39]

Henry Bergh had anticipated that, as experience grew in the application of the New York's animal protection acts, "it would be possible to work out more carefully planned legislation".[40] But Bergh may not have imagined, even as the prospect likely would have pleased him, that states would one day be treating animal neglect as a felony. With the passage

36. Memorandum of Understanding between Oregon District Attorneys Association, Benton City District Attorney, & Animal Legal Defense Fund (21 January 2013) (on file with the authors) at 2 [MOU].
37. US, SB 6, 77th Leg Assem, Reg Sess, Or, 2013 [Senate Bill 6].
38. Favre & Tsang, *supra* note 2 at 10.
39. *Ibid* at 29.
40. Coleman, *supra* note 1 at 39.

of Oregon's Senate Bill 6,[41] it became possible to convict individuals of a felony even in the absence of any malicious intent, or without any knowledge of the consequences of their actions or inactions. The ability to treat omissions or defective animal care as felonious is a major advancement in the law of animal cruelty over the past century, even as it is a step in the wrong direction for proponents of criminal justice reform. On a federal level, members of Congress from both parties are working together to make it harder for "unsuspecting Americans to be sent to jail for conduct they had no idea was against the law".[42] While progressives and conservatives may have different motivations in advocating for *mens rea* reform, Benjamin Levin argues that "the reliance on criminal law as a regulatory tool to solve otherwise intractable or knotty social problems" should concern all those who are committed to criminal justice reform.[43]

Reflecting what might fairly be regarded as a return on investment, the first conviction for felony animal neglect in Oregon came in 2014 in a case brought by the AC-DDA when an alpaca ranch owner named Robert Silver was found guilty for the neglect of 175 malnourished and dying alpacas.[44] The case was prosecuted by Jake Kamins, the AC-DDA whose position is privately funded by an animal protection non-profit.[45] The State did not have to prove that Silver intentionally or knowingly neglected the alpacas — the animals may just have been victims of Silver's own ignorance, his lack of experience as a rancher — but under the animal neglect statute, criminal negligence was sufficient

41. Senate Bill 6, *supra* note 37.
42. Chuck Grassley & Orrin Hatch, "Mens Rea Reform & the Criminal Justice Reform Constellation" (19 July 2018), online: *Washington Examiner* <www.washingtonexaminer.com/opinion/sens-chuck-grassley-and-orrin-hatch-mens-rea-reform-and-the-criminal-justice-reform-constellation>.
43. Benjamin Levin, "Mens Rea Reform & Its Discontents" (2019) 109:1 Journal of Criminal Law & Criminology 1 (forthcoming 2019).
44. Joce Johnson, "Jury Finds Alpaca Ranch Owner Guilty of Neglect" (11 December 2014), online: *Statesman Journal* <www.statesmanjournal.com/story/news/2014/12/11/jury-finds-alpaca-ranch-owner-guilty-neglect/20276229>.
45. *Ibid*.

to constitute a felony.[46] More generally, Kamins regularly brings cruelty prosecutions, and advances broad readings of the criminal statute and narrow interpretations of the defendants' constitutional rights. By these measures, the funding of a prosecutor was an unmitigated success.

Beyond Cages highlights the ways that felony prosecutions make for good copy in fundraising campaigns by animal protection groups.[47] Our focus here is whether the movement's decision to fund the salary of public prosecutors is also normatively defensible. In many ways the funding of prosecutions is a microcosm of the larger themes and critiques developed in *Beyond Cages*.

B. The Terms of the Private Prosecution Arrangement

ALDF's Criminal Justice Program has promised for over a decade to provide "free legal assistance to prosecutors, law enforcement, and veterinarians".[48] The services offered include legal research, professional trainings, legislative assistance, and grant money "to help cover the costs of caring for seized animals, necessary forensic work, and obtaining expert witnesses".[49] It is a commitment to fund every aspect of the prosecution other than the work of the prosecutor him or herself. More recently, a Memorandum of Understanding with Oregon District Attorneys Association ("ODAA") and Benton County District Attorney ("BCDA"), obtained through open records requests, reveals that the movement has also undertaken to fully fund a prosecutor's salary. It is the natural culmination of years of efforts to further entrench the movement within the prosecution.

As the Memorandum establishes, ALDF sees the funding as part of its mission to further the vision of Bergh by "ensur[ing] that Animal

46. OR Rev Stat ch 167 § 167.325(3)(b) (2018).
47. Marceau, *supra* note 13 at 37 (noting that the passage of felony laws could be marketed to donors and the public as proof of the animal protection movement's progress and effectiveness).
48. Animal Legal Defense Fund, "Criminal Justice" (2018), online: *Animal Legal Defense Fund* <aldf.org/how_we_work/criminal-justice/>.
49. *Ibid*.

Cruelty cases are not compromised by…fiscal challenges".[50] The goal is to remove considerations of resources or prosecutorial priorities from the prosecution equation. But in so doing, the movement strives to make animal cruelty unique among all crimes — it seeks a platform of something like mandatory prosecution and maximum sentencing. The American prosecutor is unique precisely because of the independence the position is endowed with, and central to the notion of prosecutors as independent is their ability to exercise discretion about which cases to pursue and which violations of law to prioritize.

The language of the Memorandum itself gives lip-service to the command of neutrality, for example, by vesting "final and exclusive authority" in hiring decisions with the District Attorney's office.[51] In an interview with *Willamette Week*, Kamins took pains to emphasize this aspect of his arrangement and pointed out that he does not receive direction from ALDF: "[t]his is a prosecution position, it's not an advocacy position. I'm not trying to change laws or push the boundaries of existing laws".[52] But this assurance that the position is not linked to politics or advocacy is at once promising too little and too much.

Kamins' promise to avoid advocacy, as elaborated more in the next section, is not much of a promise at all because prosecutors are the very definition of the moral status quo. They are the enforcers of the already codified moral preferences of society. In this way, Kamins' prosecutions of, for example, persons who have abused dogs and cats are not threatening to mainstream society. His very position reinforces dominant morality. Kamins is celebrated by the public as a moral crusader precisely because he does not threaten the moral or economic status quo. The owner of a factory farm might fairly root for Kamins if the prosecutor was featured on a true-crime show called *Abuse an Animal, Go to Jail*.

But Kamins' promise of operating beyond advocacy also promises too much. His very position is the result of advocacy, and the goals of

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50. MOU, *supra* note 36 at 1.
51. *Ibid* at 3.
52. Nigel Jaquiss, "The Animal Lawyer" (2 December 2014) online: *Willamette Week* <www.wweek.com/portland/article-23626-the-animal-lawyer.html>.

influencing prosecutorial discretion reflect this advocacy. As stated in *Beyond Cages*: "by its plain terms, the agreement anticipates that the individual will be a fully-sworn state prosecutor, but he will also remain something of an outsider to the district attorneys, because he will make himself available to provide 'free help' with their cases".[53] Regardless of the independent views of the individual holding the position, ALDF has usurped the independence of prosecutorial discretion by funding the position and directly incentivizing the prosecution of certain crimes and the pursuit of maximalist sentences. Kamins claims to be above the fray of advocacy. But there may not be a more direct form of political advocacy in our democracy. Surely campaigning for certain prosecutors is political advocacy, and so is lobbying prosecutors on particular cases. Indeed, the movement has identified both practices as critical forms of political advocacy. It is inconceivable that funding a prosecutor's position and holding him accountable to satisfying the funder is somehow a lesser form of advocacy.

After all, funding for Kamins' position is made contingent on the movement's ability to implicitly alter prosecutorial priorities. As a lobbyist for the Oregon farm bureau put it: "[w]e have concerns about the policy implications of a private advocacy group funding prosecution", because such funding "has the potential to distort the legal process".[54]

On the other hand, even Farm Bureaus could eventually find something to love about the animal protection movement's advocacy in support of privately funded prosecutions. The AC-DDA position could change the rules of engagement in the criminal justice sphere in a way that serves big agriculture's own interests. Were the Oregon Farm Bureau to follow the lead of ALDF, the AC-DDA could find himself sharing an office with a Deputy District Attorney dedicated to prosecuting undercover activists and would-be whistleblowers who are working to reform factory farming practices. Such an arrangement is not as far off as

53. Marceau, *supra* note 13 at 248.
54. Jaquiss, *supra* note 52.

the movement likely anticipates.[55]

The discussion of private funding for prosecutors should not end with the animal protection movement. In an ongoing death penalty prosecution in Kansas, the family members of one of the victims has retained an attorney to act as "associate counsel" for the prosecution.[56] Kansas law allows third parties to employ private attorneys to assist county prosecutors "in any criminal action or proceeding under any of the laws of the state of Kansas".[57] While the justification may be, as with the Oregon AC-DDA, to provide support for resource-strapped government agencies, the stakes in the Kansas case are extraordinary. The defendant could be facing the death penalty, and the Kansas statute would be giving non-state actors a stake in determining the outcome.

The same tactic could be employed by militias along the US-Mexico border seeking to ratchet up the enforcement of immigration laws, or by political parties interested in high-profile prosecutions of alleged voter fraud. The tactic would not even need to be confined to certain types of crimes to be effective. Imagine a community like Ferguson, Missouri, where the US Department of Justice determined, in 2015, that bias against black citizens affected "nearly every aspect of Ferguson police and

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55. Of relevance, the California Farm Bureau Federation has a Rural Crime Prevention Program that "aims to improve the lines of communication between local law enforcement agencies and the agricultural community" (California Farm Bureau Federation, "Rural Crime Prevention" (218), online: *California Farm Bureau Federation* <www.cfbf.com/rural-crime-prevention>). The American Farm Bureau Federation endorses expansive criminal enforcement policies, including strict prosecution, and "[r]estitution to insurers, and others, incurring financial loss by parties found guilty of livestock, machinery or crop theft, fraud, vandalism, arson or bioterrorism" (American Farm Bureau Federation, "Farm Bureau Policies for 2018" (2018) at 28, online: *American Farm Bureau Federation* <texasfarmbureau.org/wp-content/uploads/2018/02/AFBF-Policy-Book-20180110-FINAL.pdf>).

56. Tony Rizzon & Savanna Smith, "Despite doubts, judge allows private prosecutors in case of two slain deputies" (January 9, 2019), online: *Kansas City Start* <www.kansascity.com/news/local/crime/article224079520.html#storylink=cpy>.

57. Kan Stat Ann § 19-717 (2018).

court operations".[58] Were an enterprising white supremacist group able to fund the salary of a prosecutor in St. Louis County, the prosecutor would not need to actively pursue a racist agenda, but only act as a bulwark against the changes being called for by the broader community.

The animal protection movement is now in the business of hiring public prosecutors. This should be cause for concern; it should prompt debate within the movement. Instead, like virtually all criminal justice interventions, it is celebrated. The movement's complacency in this regard is at war with its call to reject structural injustices.

C. Putting the Promise of Private Prosecutions in Context

Historical accounts of his life have been kind to Henry Bergh. By most accounts, Bergh was an upright and incorruptible man. "It is a testament to [his] character", write Favre and Tsang, "that this extraordinary power of the state, vested in one private individual, was apparently never abused".[59] The claim that his prosecutorial discretion was 'never' misused or unjustly applied seems fanciful in light of what criminologists have taught us about the implicit bias operating throughout our justice system. But even accepting the mythical notion of Bergh as immune from emotional irrationality or unfair bias, his storybook tale of prosecution should not serve as an endorsement of the practice of delegating prosecution to private interests.

In their foundational work *Prosecutorial Neutrality*,[60] two of the leading figures in legal ethics, Fred C Zacharias and Bruce A Green, considered the role prosecutors play in the modern criminal justice system, exploring the factors that inform decision-making in theory and in practice. They acknowledge that "there are no settled understandings"

58. US Department of Justice, Civil Rights Division "Investigation of the Ferguson Police Department" (4 March 2015), online: *US Department of Justice* <www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ ferguson_police_department_report.pdf>.
59. Favre & Tsang, *supra* note 2 at 18.
60. Fred C Zacharias & Bruce A Green, "Prosecutorial Neutrality" (2004) 2004:3 Wisconsin Law Review 837.

of the concept of prosecutorial neutrality,[61] but they emphasize the centrality of prosecutorial discretion, which "pervades every aspect of [the prosecutors'] work, including investigations, charging and plea bargaining, trials, sentencing, and responding to post-conviction events".[62] The authors note that the public face of prosecutorial work — "the number of convictions they obtain, the length of sentences, and prosecutors' behavior in public trials" — tends to obscure the "more momentous decisions that occur behind the scenes".[63] Among those momentous decisions is the allocation of resources, and how that allocation affects the enforcement. "Because prosecutorial resources are finite", the authors observe, "the decision to enforce a statute fully, by definition, constitutes a decision not to enforce other statutes fully".[64]

Scarcity of resources was mentioned in the recitals of the Memorandum of Understanding between ALDF and the Oregon prosecutors.[65] By offering to fund the salary of one prosecutor, ALDF has taken the question of which statutes to enforce out of the hands of the District Attorney's office, at least in part. The AC-DDA exists to prosecute a limited subset of crimes, and to protect only one class of victims. In no small measure, the AC-DDA resembles a private prosecutor, the use of which John D Bessler described as "unethical and violative of a defendant's constitutional rights".[66] Bessler points to *Marshall v Jerrico, Inc*,[67] in which the Supreme Court warned against any "scheme injecting a personal interest, financial or otherwise, into the enforcement process", for the potential affront such interests could pose to constitutional rights.[68] Even the "appearance of impropriety" inherent in private prosecution, Bessler suggests, violates defendants' due process

61. *Ibid* at 903.
62. *Ibid* at 840–41 [footnotes omitted].
63. *Ibid* at 903 [footnotes omitted].
64. *Ibid* at n 131.
65. MOU, *supra* note 36 at 2.
66. John D Bessler, "The Public Interest and the Unconstitutionality of Private Prosecutors" (1994) 47:3 Arkansas Law Review 511 at 514.
67. *Marshall v Jerrico, Inc*, 446 US 238 (USSC 1980) [*Marshall*].
68. *Ibid* at 249.

rights.[69]

The Supreme Court reached a similar conclusion in *Young v United States ex rel Vuitton Et Fils SA*,[70] where Vuitton's private attorneys had acted as special prosecutors in convicting the petitioners of criminal contempt for violating a court order that came out of a settlement with Vuitton.[71] The Court held that, regardless of whether the appointment of Vuitton's private counsel resulted in any actual impropriety, "that appointment illustrates the *potential* for private interest to influence the discharge of public duty".[72] The *Vuitton* case harkened back to a 1935 Supreme Court ruling that a government attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done".[73] It cannot be gainsaid that a prosecutor whose salary is paid on a recurring basis by the animal protection movement has a financial interest in enforcing zealously animal cruelty laws, which the Supreme Court warned "may bring irrelevant or impermissible factors into the prosecutorial decision".[74]

Zacharias and Green argue that "prosecutors should make discretionary decisions not only autonomously, but also indifferently to the preferences and objectives of interested third parties".[75] On a more common-sense level, it looks unseemly when a prosecutor brings charges against a political rival, or foregoes the prosecution of a political ally. The careful observer of American politics understands that money infects and corrupts political decision-making, including the prosecutorial decisions. The idea that the AC-DDA funded by the animal protection movement makes decisions indifferently to the preferences and objectives of the

69. Bessler, *supra* note 66 at 514.
70. *Young v United States ex rel. Vuitton Et Fils S. A.*, 481 US 787 (USSC 1987) [*Vuitton*].
71. *Ibid* at 780.
72. *Ibid* at 805 [emphasis in original].
73. *Berger v United States*, 295 US 78 at 88 (USSC 1935).
74. *Marshall*, *supra* note 67 at 249.
75. Zacharias & Green, *supra* note 60 at 862.

organization paying his salary and renewing his contract strains credulity. The fact that the state or county may retain final authority to make the actual hiring decisions[76] does not alter this conclusion.

In their analysis of what constitutes neutrality, Zacharias and Green bring up the notion of non-partisanship — not in a political sense, but in the broader sense of not choosing one side of an ideological battle. They describe the non-partisan prosecutor as one who "makes decisions independently of the police, the victim and the voting public, in order to give appropriate respect and weight to the legitimate interests of all of her constituents (including the defendant)".[77]

The opposite of this ideal — the detached, non-biased prosecutor — would be the prosecutor with an axe to grind, the type who turns the prosecution of animal cruelty into a moral crusade. Someone like Henry Bergh. Bergh may have been the kind of figure the animal protection movement needed in the nineteenth century, when animals had virtually no independent legal protections. But whatever else can be said about him, the head-knocker was not a neutral, independent prosecutor. In the contemporary landscape, with the increase in felony cruelty statutes and the heightened penalties associated with the crime, a prosecutor like Bergh could make an even bigger splash. He could put more people away for longer periods of time. We doubt that such victories are in the long-term interest of animal protection, and the funding of prosecutors threatens to undermine the very credibility of our justice system.

More generally, as animal protection groups make efforts to strengthen their bonds with the Association of Prosecuting Attorneys and the National District Attorneys Association, as well as individual prosecutors' offices, one can anticipate an animal protection movement that is increasingly limited in its scope of advocacy. The very alliances the movement is courting may impede, for example, the ability of the movement to facilitate criminal prosecutions against a corporation. The lack of a single corporate prosecution in the era of alliances with prosecutors is a striking blemish on the carceral strategy. One has

76. MOU, *supra* note 36 at 3.

77. Zacharias & Green, *supra* note 60 at 887.

to wonder whether the movement's leadership does not think the corporations overseeing factory farms are not culpable, or whether instead the movement's alliances with the prosecution are only effective in facilitating the prosecution of low-level defendants incapable of making campaign contributions. The movement appears to have purchased a lot of goodwill with prosecutors — it hires them, it funds their conferences, and it supports and celebrates their prosecutions — but insiders would be hard-pressed to find examples where the movement has called in a favor either to obtain a high-level corporate prosecution, or to provide aid to an activist who is facing criminal charges.

For prosecutors, then, the arrangement with the animal protection movement is entirely to their benefit; they receive support for cases that are publicly popular, and they do not make any concessions to the movement on politically fraught matters that enjoy less public support, or that challenge systemic abuse by corporations. Elected district attorneys and their trade associations will tolerate intrusions into their neutrality to a degree, but only at the margins where there is no popular or well-funded support to the contrary.

Even more damaging, it is likely that the threat of harm to the alliance with prosecutors also influences the range of activism and policy changes that the movement itself pursues. Having tied its identity to strong relationships of mutual affirmation with prosecutors, would the movement have the courage to stand up to prosecutors who object to campaigns or civil litigation that is oriented towards more radical social change? It is easy for prosecutors to support incarceration for poor persons, and even to tolerate cases that seek, for example, civil restitution cases in the name of an abused animal such as the famous case of Justice the horse in Oregon.[78] It is much more difficult for prosecutors to remain a quiet ally when the movement defends activists engaged in civil disobedience, or when the movement contemplates far-reaching social

78. Karin Brulliard, "Seeking Justice for Justice the Horse: Can a Neglected Animal Sue?" (13 August 2018), online: *The Washington Post* <www.washingtonpost.com/news/national/wp/2018/08/13/feature/a-horse-was-neglected-by-its-owner-now-the-horse-is-suing/?noredirect=on&utm_term>.

reform strategies. Is it cause for celebration or concern when a radical social change movement bends its agenda in order to appear non-radical, mainstream, and non-threatening to the status quo?

V. Animals as Victims and Criminal Justice

Early animal cruelty laws, in treating animals as property, ultimately functioned to protect human victims.[79] In an era when legislators might have been reluctant to extend rights to animals, animals still enjoyed some legal protections insofar as injury to them affected the rights of their owners. Another argument based on the legal primacy of human victims concerned the risk that animal abusers posed to larger society. As Favre and Tsang describe the issue: "[w]hile some did not believe moral duties were owed to animals, they did accept that cruelty to animals was potentially harmful to the human actor, as it might lead to cruel acts against humans".[80] Or, more succinctly, in the words of Henry Bergh: "[m]ercy to animals means mercy to mankind".[81]

The concern for potential human victims continues to be a driving issue for the modern animal protection movement. In the guidebook *Investigating & Prosecuting Animal Abuse*, published by the National District Attorneys Association, Allie Phillips and Randall Lockwood write: "[w]hen a human harms an animal, this is a strong *predictor and indicator* that additional animal and human victims may be next".[82] The collection of research supporting this claim is known in the movement as the Link, and it has been used successfully, beginning with Bergh, to demand expansive legislation and harsher punishment for animal cruelty offenses throughout the country.

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79. Favre & Tsang, *supra* note 2 at 4.
80. *Ibid* at 11.
81. Nancy Furstinger, *Mercy: The Incredible True Story or Henry Bergh, Founder of the ASPCA and Friend to Animals* (Boston: Houghton Mifflin, 2016) at vii.
82. Allie Phillips & Randall Lockwood, "Investigating & Prosecuting Animal Abuse" (2013), online: *National District Attorneys Association* <ndaa.org/wp-content/uploads/NDAA-Animal-Abuse-monograph-150dpi-complete.pdf> [emphasis in original].

One problem among many with this link-based approach to advocating for carceral policies is that it is predicated more on anecdote and urban myth than hard data. As explained in *Beyond Cages*, "the movement's reliance on the link is overstated and badly flawed",[83] and the belief that incarceration will correct the problem is "in considerable tension with empirical realities":[84]

> Though many studies tend to show that violent offenders have abused animals at a higher rate than non-violent offenders (sometimes at a much higher rate), the critical and oft overlooked common denominator in these studies is that they consistently show that most people who commit crimes of violence *do not have a history of animal abuse*.[85]

Beyond Cages goes into detail about the various studies that are invoked by Link advocates, and about what those studies do and do not demonstrate. The through-lines suggest that the conclusion relies on spurious and selective reasoning. It blurs or entirely ignores contributing factors, and provides a seductively simple solution to a complex, multi-faceted problem. The reliance on a weak correlation between behaviors to justify zero tolerance carceral policies is reminiscent of the 'Gateway Drug' language employed in the US War on Drugs. Most persons who use heroin may also have used marijuana, but that does not indicate that most marijuana users will eventually graduate to heroin. Most capital murderers may have a prior misdemeanor conviction, but the fact of a misdemeanor conviction is an extraordinarily poor predictor of murderous propensities.

No less important, when it comes to animal protection campaigns, the Link reinforces the very distinction between persons and animals that the movement is working to eradicate. *Beyond Cages* points out that this kind of anthropocentric approach fundamentally stifles long-term

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83. Marceau, *supra* note 13 at 339.
84. *Ibid* at 340.
85. *Ibid* at 340 [emphasis in the original], citing Emily Patterson-Kane, "The Relation of Animal Maltreatment to Aggression" in Lacy Levill et al, eds, *Animal Maltreatment: Forensic Mental Health Issues and Evaluations* (New York: Oxford University Press, 2016) 140 at 140–58.

animal protection efforts.[86] While side-stepping the issue of animals as property, the Link still relegates animals to a separate, lesser class. Animal cruelty matters not because of the animals' suffering, sentience, or dignity, but because the violence against animals is said to be a sentinel indicator or predictor of violence against humans. We punish animal abuse, the movement has taught legislators and the public, because doing so protects humans.

Having obtained felonies in every state and expanded sentencing ranges based explicitly on this link-think, the animal protection movement is now trying to reframe the debate around punishing humans. The punitive laws and procedures were borne of the dire warnings to human safety, but in a clever re-framing of the landscape, the movement now frames its carceral project in terms of animal victimhood. It is not about protecting humans, or not primarily about protecting humans, say many in the movement beginning around 2017. Increasingly, with the criminal laws firmly on the books, advocates speak about animals' victimhood as the driving rationale for their punitive logic.

Such thinking was presaged by Andrew N Ireland Moore in 2005, arguing for advancing the cause of animal protection independent of the potential risk to humans in *Defining Animals as Crime Victims*.[87] After providing a brief survey of crime victim statutes from various states, Moore notes that in animal cruelty cases "the animal could plausibly be listed as the victim of the crime in a police report or charging instrument because animals are directly protected by the anti-cruelty statute".[88] This same reasoning was employed by the Oregon Supreme Court in *State v Nix*,[89] concerning the neglect of dozens of animals, mostly horses and goats.[90] The court affirmed the conclusion that animals can be victims

86. *Ibid* at 348, citing Mark H. Bernstein, "Responding Ethically to Animal Abuse", in Andrew Linzey, ed, *The Link Between Animal Abuse and Human Violence*, (Sussex University Press, 2009).
87. Andrew N Ireland Moore, "Defining Animals as Crime Victims" (2005) 1 Journal of Animal Law 91.
88. *Ibid* at 97.
89. 334 P (3d) 437 (Sup Ct Or 2014) [*Nix*].
90. *Ibid* at 438.

of a crime, noting "the meaning of the word 'victim' will depend on the underlying substantive statute that the defendant violated".[91]

Among the benefits that animals' status as victims could afford them are pre-trial protections, including the right to a speedy trial. As Moore points out, in cases where an animal is still living with a defendant charged with neglect, a speedy trial could protect the animals "from further extended abuse".[92] Another recent Oregon case granting victim rights to animals involved the warrantless seizure by a sheriff's officer of an emaciated horse.[93] After being charged with animal abuse and neglect, the owners of the horse moved to suppress evidence obtained as a result of the seizure, including "any examination of the horse, photographs, body condition score, other observations of and statements about the condition of the horse".[94] The court held that the officer acted reasonably when he "determined that warrantless action was necessary to prevent an ongoing criminal act from causing further serious imminent harm to the victim of the crime".[95] This decision served to refute the defendants' claim that society's interest in protecting animals is derived "not from a recognition that animal life is inherently worthy of protection, but from various benefits that humans receive by protecting animals".[96]

Had the court chosen to characterize the horse as mere property, the 'exigent circumstances exception' may not have permitted the warrantless seizure. The officer in the case believed that the horse could have died before a warrant could be issued, and the court held that he behaved reasonably in entering the property and seizing the horse for emergency medical care.[97] Even in a world of smart phones where warrants can be issued in a matter of minutes, this horse might have been at such a great risk that even those minutes were too precious, making *Fesesnden* the cleanest possible example of the benefit to animals in being defined as

91. *Ibid* at 441.
92. Moore, *supra* note 87 at 102.
93. *State v Fessenden*, 333 P (3d) 278 at 279 (Sup Ct Or 2014) [*Fessenden*].
94. *Ibid* at n 3.
95. *Ibid* at 286.
96. *Ibid* at 282.
97. *Ibid* at 286.

crime victims.

But of course, the case did not stop with the rescuing of the horse. The subsequent examination of the horse led to the collection of evidence that was used to prosecute human defendants, which ultimately has much less to do the animal's status as a victim. Victimhood does not dictate that incarceration is the best means of breaking the cycle of violence. And a large body of sociology research suggests that a carceral approach to violence may actually increase violence in society. To echo language from *Beyond Cages*: "[a]s a practical matter, the case merely upholds an effort by police and prosecutors to obtain more criminal convictions with fewer constitutional constraints".[98]

Another case celebrated for advancing the status of animals as victims is *State v Nix*. The ultimate issue that gave rise to the State's insistence on treating animals as victims in *Nix* had to do with Oregon's 'anti-merger' statute, providing that when a criminal statutory violation involves two or more victims: "there are as many separately punishable offenses as there are victims".[99] The trial court had merged twenty counts of horse neglect into a single conviction and sentenced Nix to ninety days in jail.[100] The Oregon Supreme Court reversed the judgment and remanded the case for resentencing, reasoning that each animal was an individual victim for purposes of the anti-merger statute.[101] While at one time animal cruelty violations were considered in terms of harm to the general public, the court noted that "Oregon's animal cruelty laws have been rooted — for nearly a century — in a different legislative tradition of protecting individual animals themselves from suffering".[102]

The possibility of exposure to multiple counts of animal cruelty may

98. Marceau, *supra* note 13 at 82. The discussion there concerned a different case involving a warrantless search: *State v Newcomb*, 375 P (3d) 434 (Sup Ct Or 2016) (holding that police are not required to obtain consent or a warrant before extracting blood or other bodily fluids from a dog in support of a cruelty prosecution).
99. Or Rev Stat § 161.067(2) (2018).
100. *Nix, supra* note 89 at 438.
101. *Ibid* at 448.
102. *Ibid* at 447.

have some effect on the welfare of animals, but it is worth exploring how this tactic fits in with the larger goals of the animal protection movement. Increased punishment because of an animal's victim status does not necessarily serve the goals of the animal protection movement in combatting institutional violence and promoting empathy. The animal protection movement hopes to secure a moral good in the form of raising social consciousness about suffering and victimhood by causing more suffering for the human offenders. Victimhood for animals, in other words, seems to primarily operate as a thumb on the retributive scale used to calculate the offender's just deserts. Retributivism is an odd principle to endorse for any organization committed to the minimization of suffering.

It is also a principle invoked in *Defining Animals as Crime Victims*, where Moore proposes allowing "animal legal advocates" to make victim impact statements on behalf of abused animals.[103] The question of who gets to speak for animals is a fraught one, with the risk of projecting human concerns and values onto animals, but Moore suggests that an advocate could "provide some valuable insight" on the pain and suffering caused by animal abuse, leading a sympathetic judge to increase a defendant's sentence.[104]

In utilitarian terms, prolonged imprisonment will certainly incapacitate the actors, but there is good reason to doubt how effectively imprisonment will deter future acts of cruelty, either from the specific individual on release, or from the general public. Moore suggests that a victim impact statement from an animal advocate could "give a deterring effect on [defendants] in their future dealings with animals", but the hope is purely speculative. Educating animal abusers about the damage they do is certainly a worthy goal, but there is no reason to limit such efforts to sentencing hearings.

Defining animals as victims of crime may provide some legal protections for animals, but as a means of contributing to mass criminalization, it is as problematic as the Link. Even if one accepts

103. Moore, *supra* note 87 at 107.
104. *Ibid*.

the presumed Link between animal abuse and future human violence, nothing about this research would lend credence to the notion that incarceration is the most appropriate response to the problem. *Beyond Cages* points to "a growing body of research showing that incarceration has a desensitizing or hardening effect".[105] Classifying animals as victims, in our current legal landscape, could have the perverse result of causing more harm to animals in the future. Rather than breaking the cycle of violence, increased prison terms are more likely to lead to a "diminution of empathy", resulting in more violence and less sensitivity to the suffering of humans and animals.[106] Researchers have found that violence can be a product of the carceral system, rather than an explanation for its need.[107] As Alec Karakatsanis put it: "[i]n a society that requires prisoners to be treated humanely, American jails and prisons are cesspools of disease and trauma".[108]

The movement needs to reflect more on what it hopes to obtain by honoring animals with the title of victim; it should identify concrete benefits distinct from incarceration and harsher criminal justice response that would flow from such a status. The movement's historical reliance on criminalization to advance the status of animals reflects, at best, ignorance of the social costs of incarceration, and at worst an outright indifference to the suffering of fellow humans. Rather than viewing the welfare of living creatures as a zero-sum game, we should be looking for opportunities to elevate all of society's victims.

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105. Marceau, *supra* note 13 at 416, citing Dorothy E Roberts, "The Social and Moral Cost of Mass Incarceration in African American Communities" (2004) 56:5 Stanford Law Review 1271 at 1297.
106. *Ibid* at 417.
107. *Ibid* at 418, citing KM Morin, "Wildspace: The Cage, The Supermax, and The Zoo" in Rosemary-Claire Collard & Kathryn Gillespie, eds, *Critical Animal Geographies* (London: Routledge, 2015) 73 at 87.
108. Alec Karakatsanis, "Policing, Mass Imprisonment, and the Failure of American Lawyers" (2015) 128 Harvard Law Review Forum 253 at 266.

VI. Social Change and the Role of Prosecutors

The question of how to best advance a social justice cause is obviously not unique to the animal protection movement. Any group advocating for social change must determine the best strategies and methods for achieving that change. Lobbying for legislation is a logical way to demonstrate shifts in social norms, as well as to enshrine those norms with a gloss of permanence. Criminal statutes, then, reflect markers of success and progress for a movement. *Beyond Cages* also suggests that "fundraising campaigns and outreach efforts based on punishing animal abusers resonate with the public in a way that nuanced, multi-stage civil litigation efforts will not".[109]

Moreover, civil cases tend to be long and drawn-out, turning on points of law that might not seem as compelling to the larger public. Criminal law has seemed like the easiest intervention with the most public appeal to many persons in the animal protection movement. But the criminal justice system is a blunt instrument, and advocacy groups sacrifice their own nuanced and anti-subordination agenda when they rely too heavily on the criminal justice system to advance their goals. For a movement that often portrays itself as having an intersectional orientation, it must be noted that one would be hard-pressed to identify a single institution in the US that has done more than the criminal justice system to further subordination and create racial and class-based disparity in modern America.

The US Commission on Civil Rights reported on the inability of State Attorneys General and District Attorneys in the South to respond to violations of civil rights in the 1960s.[110] Even when law enforcement has investigated a crime and taken a suspect into custody, prosecutors resisted the pressure of social change, dropping cases or permanently adjourning trials in cases involving the murder of African-Americans.[111]

At the most basic level, the problem is that prosecutors are not a natural fit with social change movements. While there has been a wave

109. Marceau, *supra* note 13 at 36.

110. US Commission on Civil Rights, *supra* note 31, at 54–55.

111. *Ibid*.

in recent years of high-profile prosecutors running on campaigns of reform,[112] and while we do not doubt the importance of fair-minded prosecutors if our system of justice is ever going to improve, prosecutors ultimately serve the function of enforcing the law as it is, not as they hope it may be.

The case of Aramis Ayala against Rick Scott provides a good illustration of the limits of prosecutorial discretion in achieving social change. As a Florida State Attorney, Ayala announced publicly that she would not be seeking the death penalty in any cases handled by her office, asserting that the death penalty "is not in the best interest of th[e] community or in the best interest of justice".[113] Governor Rick Scott reassigned the prosecution of death-penalty eligible cases in Ayala's circuit to another State Attorney, leading Ayala to file a petition for a writ of *quo warranto* challenging Scott's authority.[114] The Supreme Court of Florida denied the petition, reasoning that by making a "blanket policy" not to pursue the death penalty, Ayala was not exercising prosecutorial discretion, but rather "no discretion at all".[115] The very prosecutors and elected officials who were celebrated by the animal protection movement for strengthening their animal cruelty laws in April of 2018, are so opposed to social change at the prosecutorial level as to strip from a prosecutor the authority to decide not to seek the death penalty.

112. See *e.g.* Eric Gonzales & Miriam Krinsky, "How a New Generation of Prosecutors is Driving Criminal Justice Reform outside of Congress" (26 February 2018), online: *The Hill* <thehill.com/blogs/congress-blog/judicial/375656-how-a-new-generation-of-prosecutors-is-driving-criminal-justice>; Eric Levitz, "Progressive Reformer Ousts St. Louis Prosecutor Who Didn't Charge Cop in Michael Brown Case" (8 August 2018), online: *Daily Intelligencer* <nymag.com/daily/intelligencer/2018/08/st-louis-election-prosecutor-wesley-bell-beats-bob-mcculloch-michael-brown-ferguson.html>; Hal Dardick & Matthew Walberg, "Kim Foxx Declares Win in Cook County State's Attorney's Race" (8 November 2016), online: *Chicago Tribune* <www.chicagotribune.com/news/local/politics/ct-cook-county-states-attorney-kim-foxx-election-met-1109-20161108-story.html>.

113. *Ayala v Scott*, 224 So (3d) 755 at 756 (Sup Ct Fla 2017).

114. *Ibid* at 757.

115. *Ibid* at 758.

Will Potter describes in detail how US attorneys have taken advantage of the sweeping powers granted to the government in the wake of 9/11 to prosecute activists as terrorists.[116] While animal rights groups have been lobbying for harsher penalties for animal abusers, the government has been simultaneously pursuing harsher penalties for individuals trying to protect animals from abuse.[117] Activists can face life sentences for property damage, and, even where they are not engaged in property damage, prosecutors file conspiracy charges, or dust off old unused laws like the Animal Enterprise Protection Act of 1992 to punish activists for causing corporations to lose profits.[118]

While certain US attorneys may stretch laws as they are written to prosecute animal rights activists, they are forbidden from bringing charges against persons where no laws have been violated. As obvious as this fact may seem, it presents a serious limitation on the capacity for Oregon's AC-DDA to have any meaningful impact on a huge number of his state's animals. Oregon's animal abuse statute, like those of most states around the country, carves out an exemption for "[a]ny practice of good animal husbandry".[119] As described in *Beyond Cages*, Jake Kamins "explicitly and unapologetically invoked the agricultural exemption…to explain why the forced impregnation of dairy animals by metal racks is not legal cruelty warranting prosecution".[120] Henry Bergh's famed first prosecution of animal cruelty described at the beginning of this essay would not be possible today in any state with an agricultural exemption if the practice of transporting animals was common or customary. These exemptions ensure that animal cruelty prosecutions will be targeted at individual random acts of cruelty, the perpetrators of which are already

116. Potter, *supra* note 21.
117. *Ibid* at 91.
118. *Ibid* at 98–104.
119. Or Rev Stat § 167.320(2) (2018).
120. Marceau, *supra* note 13 at 250.

disproportionately caught up in the criminal justice system.[121]

VII. Conclusion

Even as we emphatically agree that the mistreatment of animals should be discouraged by our laws, we must challenge the soundness of a criminal solution to the problem. Can criminal law catalyze social change, or does it merely calcify social norms? How does a movement that decries society's willingness to justify institutionalized suffering justify the subordination of individual human-defendants for instrumental ends? Unlike in Bergh's era, today one cannot feign blissful ignorance about destructiveness of mass incarceration in modern America.[122] A movement that embraces tough on crime policies aligns itself with the very principles of oppression that underlie and justify industrialized animal agriculture.

If the propensity for violence against animals is a symptom of deeper social issues, the welfare of animals would be better served by taking those deeper issues into consideration. Meaningful change may be achieved through "the fight against food oppression, unhealthy living conditions, and even inaccessibility of housing, education and healthcare".[123] The movement's leadership can build new alliances by being open to criticism and contention from outside voices. Resorting to methods that disproportionately punish individuals who are already marginalized, while insulating powerful institutions from real accountability, is not conducive to progress.

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121. As discussed in *Beyond Cages*, the animal protection movement has more culpability for the existence of these animal protection laws than the movement often acknowledges. But even if the movement had no responsibility for the rise of agricultural exemptions, the decision to devote significant resources to prosecution in the face of such exemptions is notable.

122. See *e.g.* Michelle Alexander, *The New Jim Crow* (New York: The New Press, 2010); Stephanos Bibas, "The Truth About Mass Incarceration" (16 September 2015) online: *National Review* <www.nationalreview.com/2015/09/mass-incarceration-prison-reform/>.

123. Marceau, *supra* note 13 at 287–88.