

Examining Anticruelty Enhancements

Historical Context and Policy Advances

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4.1 INTRODUCTION

The criminal justice system can be viewed as a proxy of sorts. A crime's severity – as evidenced, in part, by its maximum possible penalty – is seen by many as a direct reflection of society's values and norms: the higher the maximum possible penalty, the greater the value society places on securing justice for the victim by ensuring that the offender is held accountable for his conduct. There is a reason why armed robbery carries a much higher penalty than theft of the same item – society's disdain for violence is greater than its concern for the simple loss of property. Additionally, the greater the degree of an offender's malice, ill will, or premeditation, the greater the society's interest (as reflected in the exercise of its police power) in holding the offender accountable. This is why an intentional, premeditated homicide is treated far more seriously than a reckless killing.

For years, animal advocates have recognized these dynamics and have worked to reform criminal laws and procedures to elevate the status of animals to reflect more accurately their true standing in society as sentient beings rather than mere property. Many, if not most, of the animal welfare-specific criminal justice system improvements were inspired by, or borrowed from, other areas of the criminal code – such as, child abuse, elder abuse, crime victims' rights, domestic violence, and civil rights/hate crimes. For example, to overcome police bias in favor of treating domestic violence as a private family matter rather than a crime of violence committed against a true victim, state legislatures enacted mandatory arrest statutes that now require police to investigate and, on probable cause, make an arrest.¹ Similarly, in an effort to overcome widespread police bias in favor of viewing animal cruelty as a low-priority matter not worthy of the officer's time (the “Oh, it's just a dog” response)

¹ See E. BUZAWA & C. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 102 (2d ed. 1996); *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984).

rather than as a serious crime of violence committed against a voiceless victim, state legislatures have enacted mandatory arrest statutes that require an officer with probable cause to arrest an offender in animal abuse cases.² Mandatory arrest statutes do more than address police bias. They send a message to prosecutors as well, underscoring that viable cases of animal abuse are deserving of the prosecutor's and court's attention, just as it is now with viable cases of domestic violence.

Despite this work to elevate the status and lessen the suffering of animals, attorneys working in this space are not without their critics. Most commonly, these critics – many of whom seek to suppress and silence us³ – make their living off of animal suffering, oftentimes on a truly massive scale.⁴ Given their deeply rooted economic stake in the issue, these traditional critics are genuinely threatened by the strides animal protection attorneys have made in recent years.⁵ More recently, some who work to reform the criminal justice system are also questioning the motives and methodology of animal advocates working to enhance the status of animals in the criminal justice system.⁶ These criminal justice reform advocates are rightly seeking to address systemic racism and other ills that have historically and unfairly targeted marginalized people, and in particular Black men.⁷ However, there is a danger that the animal welfare progress of the last two decades will be compromised without any workable alternative approaches to take its place. Before taking any action that may unintentionally strip animals of the very few, and hard fought, advances they do enjoy, we must be willing to gather and analyze data to develop thoughtful and effective policy that addresses multiple concerns. We must be willing to understand the importance of criminalizing violence against animals, while simultaneously working to address the inherent problems in our criminal justice system. We must also be willing to make heavy investment in prevention programs and community-based reformation⁸ while still recognizing the reality that thoughtful application of

² See A. Ireland Moore, *Defining Animals as Crime Victims*, 1 J. ANIMAL L. 91, 98 (2005).

³ See S. French, *The Unaddressed Force of the First Amendment's Petition Clause Underlying Evolving and Expanding Ag-Gag Legislation*, 18 FIRST AMEND. L. REV. 167 (2020).

⁴ See, e.g., *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965 (2012) (meat producers trade association successfully challenged, on federal preemption grounds, a California statute designed to reduce suffering of animals destined for slaughter). As of 2016, the US meat and poultry industry accounts for \$1.02 trillion in total economic output, or 5.6 percent of gross domestic product (GDP). *The United States Meat Industry at a Glance*, NORTH AMERICAN MEAT INSTITUTE, <https://www.meatinstitute.org/index.php?ht=d/sp/1/47465/pid/47465> (last visited Apr. 21, 2021).

⁵ *8 Activist Strategies to Dismantle Animal Ag during COVID-19*, BEEF MAGAZINE (May 8, 2020), <https://www.beefmagazine.com/beef/8-activist-strategies-dismantle-animal-ag-during-covid-19>.

⁶ JUSTIN MARCEAU, *BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT* (2019).

⁷ *Id.*

⁸ B. WELSH, D. FARRINGTON, L. SHERMAN, *COSTS AND BENEFITS OF PREVENTING CRIME* (2018); Michael Rempel et al., *NIJ's Multistate Evaluation of Prosecutor-Led Diversion Programs: Strategies, Impacts, and Cost-Effectiveness* (April 2018), <https://www.ncjrs.gov/pdffiles1/nij/grants/251665.pdf> (prosecutor-led diversion programs within the scope of this study focused on a wide range of goals, not limited to rehabilitation and recidivism reduction, serving a mix of

criminal law remains a valuable and necessary option – never more so than when dealing with those offenders who harm victims who have no legal standing and, thus, no other operable recourse.

In Section 4.2 below, this chapter traces the recent evolution of substantive animal cruelty laws fueled in part by the work of the Animal Legal Defense Fund's (ALDF) Criminal Justice Program (CJP). Section 4.3 examines the historically pervasive nature of animal abuse and argues that the use of the anticruelty laws remains the most viable approach short of a major change in the legal status of animals. Section 4.4 discusses three areas in which some progress is being made for animals: (1) through an innovative project to collect detailed and relevant data on carceral outcome demographics upon which to make informed policy recommendations; (2) by the justice system's recognition of animals as crime victims, which is helping to reshape the status of animals in civil litigation as well as helping animal victims; and (3) through the substantial body of scholarship documenting the link between animal abuse and other forms of violence directed at human victims, which has been and remains important and relevant literature for policy development.

Through these sections, this chapter seeks to provide a historical perspective to a small handful of the issues underlying the arguments both for and against using the criminal justice system to address instances of criminalized animal abuse.

4.2 THE EVOLUTION OF SUBSTANTIVE ANIMAL ANTICRUELTY LAWS

The modern evolution of animal anticruelty statutes has a rich history that is interwoven with the inception and operation of the ALDF's CJP.⁹ In the 1980s, state criminal anticruelty laws were woefully lacking. The most heinous conduct was viewed as a minor event, a status offense against the peace and dignity of the state. It was not unheard of for judges, after conviction, to order the return of surviving

target populations – including felonies as well as misdemeanors; many programs allowed defendants with prior criminal records to participate. Diversion participants benefited from a reduced likelihood of conviction and incarceration; and in four of the five programs, pretrial diversion participation led to reduced rearrest rates).

⁹ Other nonprofit animal protection organizations have, along with ALDF, devoted substantial resources to strengthening anticruelty laws in the fifty states, and have worked closely with prosecutors and investigators on individual cases of animal abuse and neglect. These organizations include but are certainly not limited to: Humane Society of the United States, *Fighting Animal Cruelty and Neglect*, <https://www.humanesociety.org/all-our-fights/fighting-animal-cruelty-and-neglect> (last visited Apr. 21, 2021); American Society for the Prevention of Cruelty to Animals, *Cruelty Issues*, <https://www.aspc.org/animal-cruelty> (last visited Apr. 21, 2021); Best Friends Animal Society, *Take Action for Pets and People*, <https://bestfriends.org/advocacy> (last visited Apr. 21, 2021).

animals (under the guise of releasing the “evidence”) to the offender as part of the court’s sentence, often with tragic consequences to the animals.¹⁰

Before 1986, only four states had a felony-level provision within their anticruelty laws.¹¹ By 1993, six states had adopted some form of a felony anticruelty provision.¹² By 1999, animal advocates had convinced twenty-three states to add at least one form of a felony animal cruelty provision to their laws.¹³ In 2014, South Dakota became the last state to adopt a felony anticruelty law, so as of today, all fifty states have at least one form of a felony-level anticruelty law on the books.

There are many practical, positive impacts of sentencing for felony animal cruelty – impacts that profoundly influence the viability of community treatment and genuine reformation of offenders. For example, the duration of probation can be much longer in a felony case than a misdemeanor (but, of course, can be terminated early with judicial approval), giving the state ample time to work with an offender to ensure true reformation without using a prison bed. Equally important in the community-supervision-versus-prison dichotomy is the simple issue of whether an offender will actually have a probation officer to oversee and assist with his reformation at all.¹⁴ In many states, like Oregon, it is all too often the case that misdemeanor convicts are placed on “bench probation” or “case banked,” where the offender has no meaningful supervision at all, with the court assigning an actual probation officer only to offenders convicted of a felony offense.¹⁵

There are two additional and very real procedural benefits, namely: (1) independent review of a prosecutor’s charging decision by way of either a preliminary hearing or grand jury; and (2) with the advent of felony sentencing guidelines, a presumptive term of incarceration on a felony conviction can be capped at a much lower term than the misdemeanor in some jurisdictions – for example, in Oregon, aggravated

¹⁰ See, *Judge Orders Animals to Return to Convicted Abuser*, SPECTRUM NEWS MIDDLETOWN, NEW YORK (March 13, 2015), <https://spectrumlocalnews.com/nys/hudson-valley/news/2015/03/12/animals-ordered-to-return-to-convicted-animal-abuser>.

¹¹ See D. Campbell, *Animal Abusers Beware: Registry Laws in the Works to Curb Your Abuse*, 48 VAL. U.L. REV. 271, 276 (2013).

¹² Humane Society of the United States, *State Felony Cruelty Laws*, <http://www.humanesociety.org/sites/default/files/archive/assets/pdfs/abuse/state-felony-cruelty-laws.pdf> (last visited Nov. 6, 2020).

¹³ P. Frasch, S. Otto, K. Olsen, & P. Ernest, *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69 (1999).

¹⁴ See OR. REV. STAT. § 137.630(1)(f) (stating the duties of a probation officer include aiding and encouraging persons under their supervision and to effect improvement in their conduct and condition).

¹⁵ Interview with Benton County District Attorney John M. Haroldson, November 3, 2020, wherein he noted that, in those rare cases where Community Corrections does assign a probation officer to supervise a misdemeanor convict, it is understood by all parties that Community Corrections is doing the court a favor and cannot afford to manage misdemeanor offenders as a general rule. As a result, the vast majority of misdemeanor probationers go unsupervised and lack access to a probation officer who has a statutory duty, as noted above, to aid and encourage them with their reformation.

animal abuse under Oregon Revised Statute section 167.322 has a crime seriousness ranking of “six” under the felony sentencing guidelines with a presumptive maximum possible jail term is ninety days for a first-time offender, far less than the one-year jail term cap for misdemeanors, which are not subject to legislatively imposed sentencing guideline limitations.

While the expansion of felony anticruelty laws marked some evolution in the justice system (by helping to overcome some of the institutional bias against these cases), we found that these felony provisions were nevertheless relegated to the lowest levels for the worst possible type of violence (e.g., torture) within a given jurisdiction and were rarely, if ever, used by prosecutors. More troubling was our observation that police and other agencies tasked with enforcement routinely would ignore animal cruelty cases, even when the most brutal violence against animals was happening.

In my experience working in this space,¹⁶ a number of factors were responsible for this lack of enforcement, including limited resources, a failure to appreciate the level of suffering experienced by animal victims, incomplete or nonexistent police and prosecutor training on how to investigate and prosecute crimes against animals,¹⁷ and simply not caring about animals at a level that would motivate those in the system to take animal abuse seriously.

Compounding the problem is the legal reality that animals are property, do not have legal person status, and thus have no direct legal recourse available to them if they suffer harm.¹⁸ The only meaningful tools available to those working on their behalf were to legislatively prohibit harmful activity against animals, to create a penalty system to change social mores surrounding acceptable treatment of animals, to separate the abuser from the abused for some period of time, which (hopefully) acts as a deterrent.¹⁹

The principal focus of anticruelty laws is on violence against animals. There are also laws prohibiting neglect, abandonment, and other nondirect harmful activity, but those were, historically, rarely prosecuted. For large-scale hoarding cases in which dozens or even hundreds of animals suffer serious long-term neglect and abuse, the emphasis in some jurisdictions now tends to be more on accessing mental

¹⁶ I was Director of the CJP, and later General Counsel for ALDF between the years 1996 and 2008.

¹⁷ See Joshua Marquis, *The Kittles Case and Its Aftermath*, 2 ANIMAL L. 197, 197 (1996) (where the prosecutor of a complex hoarding case admitted he had never heard the term “animal collector” or hoarder prior to filing his case against Ms. Kittles).

¹⁸ Gary Francione, *Animals, Property and Legal Welfarism: “Unnecessary” Suffering and the “Humane” Treatment of Animals*, 46 RUTGERS L. REV. 721 (1994); Erica Tatioian, *Animals in the Law: Occupying a Space between Legal Personhood and Personal Property*, 31 J. ENVTL. L. & LITIG. 147 (2015).

¹⁹ Megan Boyd & Adam Lamparello, *Vulnerable Victims: Increasing Animal Cruelty Sentences to Reflect Society’s Understanding of the Value of Animal Lives*, 45 CONNTEMPLATIONS 31 (2013).

health support for the defendant, as opposed to jail time for those offenders who are amenable to treatment and reformation.²⁰

In these earlier days (and continuing today, although not as prevalently), some laws exhibited nonsensical priorities. For example, prior to 1995, under Oregon law, it was a misdemeanor to torture a dog,²¹ but a felony if you stole the dog and treated her better than her owner did.²² Another example of the grossly misaligned priorities, again using Oregon as an example: it was a felony to record the symphony and sell the recording without permission²³ but a misdemeanor to sexually torture a cat in front of one's child.²⁴ There needed to be a serious rebalancing of these priorities. Hence, animal protection advocates worked to enact felony laws for the worst offenses, which were and are, even with enhanced penalties, significantly weaker than the laws that apply to the same action if done against a human.²⁵

We soon learned that by engaging directly with prosecutors and investigators, we were able to educate the system about what the law says, why taking animal abuse seriously is important, and how to help them figure out appropriate approaches to managing individual cases. Sometimes that involved seeking incarceration, but oftentimes not. Out of this work was born the CJP, which was designed to provide police, animal control officers, and prosecutors with the support necessary to get the best possible outcomes for animals under existing law, which was often to remove the animal from her abuser, as well as to assist states with enacting the necessary statutory improvements to lead us to where we are today. Beyond its legislative work, the CJP embarked on a substantial training campaign, educating humane officers, animal control officers, police investigators, and prosecutors on the full spectrum of issues attendant to an animal cruelty case – from search warrant drafting to pre-conviction bonding/lien foreclosure proceedings designed to avoid revictimizing the

²⁰ Courtney Lee, *Never Enough: Animal Hoarding Law*, 47 U. BALT. L. REV. 23, 41–42 (2017).

²¹ OR. REV. STAT. § 167.320 (1993), https://archives.oregonlegislature.gov/ORS_Archives/1993-Chapter-167.pdf (stating first-degree animal abuse was a Class A Misdemeanor).

²² OR. REV. STAT. § 165.055(1)(e) (1993), https://archives.oregonlegislature.gov/ORS_Archives/1993-Chapter-164.pdf (defining theft of a companion animal as a Class C felony).

²³ OR. REV. STAT. § 164.869(2) (1993), https://archives.oregonlegislature.gov/ORS_Archives/1993-Chapter-164.pdf (making the unlawful recording of a live performance a Class C felony).

²⁴ OR. REV. STAT. § 167.075(4)(1993), https://archives.oregonlegislature.gov/ORS_Archives/1993-Chapter-167.pdf (making it a Class A misdemeanor to exhibit an “obscene performance” which includes “sexual conduct” between a human and an animal (OR. REV. STAT. § 167.060(10) (1993)); OR. REV. STAT. § 163.575(2) (1993), https://archives.oregonlegislature.gov/ORS_Archives/1993-Chapter-163.pdf (endangering the welfare of a minor when causing a child to witness “sexual conduct” was also only a Class A misdemeanor).

²⁵ Mississippi makes aggravated animal cruelty (i.e., the intentional torture) of a domesticated cat or dog a felony with a maximum possible penalty, on a first offense, of \$5,000 fine and not more than three years in prison, see MISS. CODE ANN. § 97-41-16(2)(b), while the same conduct involving a human victim qualifies for the death penalty, see *id.* § 99-19-101(5)(h)(i).

animals.²⁶ CJP did much of this work and in close collaboration the Association of Prosecuting Attorneys (APA).²⁷ CJP established grant programs to ensure: (1) that impounding agencies had the money necessary to cover the costs of caring for seized animals; (2) that law enforcement had access to forensic resources otherwise inaccessible to them – including DNA analysis; and (3) that prosecutors could hire the necessary expert witnesses, enabling them to meet their burden of proof at trial. Additionally, CJP embarked on a mission to establish a presence in the appellate courts by filing amicus briefs in support of the state on issues attendant to the prosecution of these cases and in the state legislature by drafting and lobbying new laws.²⁸

Finally, ALDF formed a partnership with a state district attorneys association and launched a pilot program to fund a fully sworn, dedicated, independent animal cruelty prosecutor who is available to all elected prosecutors in that state to litigate animal abuse cases that would not otherwise make it to court due to scarce resources.²⁹

4.3 ANIMAL ABUSE IS PERVASIVE, AND ENHANCING ANTICRUELTY LAW REMAINS THE BEST OPTION TO PROTECT ANIMALS ABSENT A CHANGE IN LEGAL STATUS OR OTHER SOCIETAL EVOLUTIONS

In American society, the harsh reality for animals is that cruelty and suffering are rampant, pervading every corner of American life, be it:

²⁶ See Press Release, ALDF (Oct. 30, 2018), <https://aldf.org/article/animal-cruelty-prosecution-conference-aims-to-train-prosecutors-law-enforcement-on-handling-animal-cruelty-cases-louis-ville-to-host-professionals-from-around-the-country/>.

²⁷ ALDF was instrumental in inducing the APA to adopt a statement of principles regarding the prosecution of animal cruelty cases that serves as a recommendation to all prosecutors across the country. October 19, 2020, Letter from CEO David LaBahn (on file with author); *Statement of Principles*, ASS'N OF PROSECUTING ATTORNEYS, <https://www.apainc.org/wp-content/uploads/2017/01/Resolution-regarding-Animal-Cruelty-Crime-Prosecution-2016.pdf>.

²⁸ Amicus examples include: *Commonwealth v. Duncan*, 467 Mass. 746 (2014) (regarding the emergency aid exception to the warrant requirement); *State v. Fessenden/Dicke*, 333 P.3d 278 (Or. 2014) (finding exigent circumstances to save an animal); *State v. Nix*, 334 P.3d 437 (Or. 2104), *vacated on procedural grounds*, 345 P.3d 416 (Or. 2015) (finding each animal counts as a victim for purposes of sentencing on separate convictions); *State v. Newcomb*, 375 P.3d 434 (Or. 2016) (finding a medically necessary blood draw to treat victim animal not a search); *People v. Basile*, 35 N.E.3d 849 (N.Y. 2015) (involving a jury instruction on culpable mental state); *State v. Peterson*, 301 P.3d 1060 (WA 2013) (finding animal cruelty statute not unconstitutionally vague); *Ortega-Lopez v. Lynch*, 834 F.3d 1015 (9th Cir. 2016) (holding that animal fighting qualifies as a crime involving moral turpitude); *United States v. Stevens*, 559 U.S. 460 (2010) (regarding the constitutionality of federal crime restricting depictions of animal cruelty).

Legislative examples include: S.B. 6, 77th Leg. (Or. 2013) (improving on Oregon's ability to respond to mass neglect cases) and H.B. 2888, 78th Leg. (Or. 2015) (creating a civil option for dealing with animal cruelty by creating a private cause of action for nuisance abatement).

²⁹ Memorandum of Understanding between: Oregon District Attorneys Association, Benton County District Attorney and Animal Legal Defense Fund (Jan. 21, 2013) (on file with author).

- In the family where the husband tries to maintain domination and control of his spouse by threatening, abusing, or killing the family pet. This was the case in *People v. Kovacich*,³⁰ where a Placer County Sheriff was convicted of murdering his wife based on circumstantial evidence. It was proven that his wife feared her husband for a host of reasons, including the fact that he had previously kicked the family dog to death.
- At the pet shop (or online), where the inventory of designer animals was acquired from cruel, greed-fueled puppy mills³¹ as exemplified by the “Puppy World Rescue” store in Tucson, Arizona, whose operator charged \$2,000 and up as a so-called adoption fee for purebred “rescue puppies,” while failing to reveal the true source of the dogs. This defendant was accused of sourcing from puppy mills and faces enforcement action in Arizona for consumer fraud.³² Another example comes from Mercer, Tennessee, where puppy mill operators were busted for the mass neglect of over 300 dogs.³³
- In towns and neighborhoods throughout the United States, where hoarding of animals is uncovered.³⁴

Beyond these three tip-of-the-iceberg examples, animal advocates must contend with institutionalized animal abuse, to wit, cruelty carried out by massive meat, dairy, and egg corporations, universities, pharmaceutical companies, colleges, and others, in pursuit of agriculture production, scientific/medical research, as well as hunting, trapping, rodeos, zoos, circuses, and other forms of recreation and entertainment. Institutionalized cruelty serves as stomach-turning examples of how most of our society still accepts a massive amount of animal suffering as either “necessary”

³⁰ 201 Cal. App. 4th 863 (2011).

³¹ “A puppy mill is an inhumane high-volume dog breeding facility that churns out puppies for profit, ignoring the needs of the pups and their mothers. Dogs from puppy mills are often sick and unsocialized.” *Stopping Puppy Mills* HUMANE SOCIETY OF THE UNITED STATES, <https://www.humanesociety.org/all-our-fights/stopping-puppy-mills>

³² See Carol Ann Alaimo, *New Pet Store at Marana Mall under Investigation*, ARIZONA DAILY STAR (Aug. 19, 2020), https://tucson.com/news/local/new-pet-store-at-marana-mall-under-investigation/article_f355853a-ee78-5fad-bb84-b27f82d39fd0.html.

³³ See Adam Friedman & Cassandra Stephenson, *Alleged Madison County Animal Abuser Indicted on 338 Counts of Animal Cruelty after June Raid*, JACKSON SUN (Aug. 7, 2020), <https://www.jacksonsun.com/story/news/2020/08/07/three-madison-co-residents-indicted-338-counts-animal-cruelty/3321170001/>.

³⁴ See Randy Frost et al., *The Hoarding of Animals: An Update*, PSYCHIATRIC TIMES (April 30, 2015), <https://www.psychiatristimes.com/view/hoarding-animals-update> (estimating from surveys of animal control agencies and humane societies suggest that there are approximately 3,000 reportable cases of animal hoarding annually in the United States). According to the Anxiety and Depression Association of America, at least 250,000 animals are affected each year. *Animal Hoarding*, ANXIETY & DEPRESSION ASS’N OF AM., <https://adaa.org/understanding-anxiety/obsessive-compulsive-disorder-ocd/hoarding-basics/animal-hoarding> (last visited November 7, 2020).

or “justifiable” – necessary to keep the price of meat and milk low; justifiable to ensure that our shampoo doesn’t burn our eyes; necessary to save more human lives; and justifiable as forms of entertainment operating under the guise of self-reliance. These are huge sectors of our economy that are, as with food production and research, regulated and subsidized by the government.³⁵ Consequently, to date, these latter categories of conduct are rarely, if ever, prosecuted, regardless of whether the criminal code contains an express exemption or not.

Further, in a consumer-based capitalistic market where “price is paramount,” market dynamics have yet to shift away from the production of animals as sources of protein, even though the system in which those animals live and die is inherently cruel and fails to provide even minimum standards of good care and treatment. One avenue to change that dynamic is the emergence of the vegan community, which currently comprises less than 3-percent of the US population.³⁶ While this segment of American consumers is growing, it has yet to reach a size where it has any true political power in Congress or state legislatures – the power necessary to effectively reduce the actual number of animals suffering. To be fair, there are examples of instances where the vegan community has cause to claim a technical win. For example, California’s ban on the production and sale of foie gras produced in the state went into effect in 2012. However, the practical impact of this ban was seriously undermined by a recent ruling that California’s ban does not reach sales of foie gras originating from sources and sellers located outside of the state.³⁷ Despite this discouraging reality, the sheer number of people, nonprofit, and for-profit organizations working on these systemic issues gives us cause to be hopeful, although that road remains very long. In the meantime, while animals continue to remain legal property, and other avenues to address harm done to animals remain elusive, anticruelty laws continue to offer one of the most effective ways to address individual instances of violence against animals.

4.4 MAKING PROGRESS FOR ANIMAL VICTIMS

Some advocates working to reform the criminal justice system argue that the significant racism and bias in many sectors of the system (and in particular drug arrests) exist in the same way and with the same carceral outcomes within the

³⁵ The US government spends up to \$38 billion each year to subsidize the meat and dairy industries. DAVID ROBINSON SIMON, *MEATONOMICS* (2013); 7 U.S.C. §§ 1902-1907 (Humane Methods of Livestock Slaughter); 7 U.S.C. §§ 2131-2160 (Animal Welfare Act [AWA]); 9 C.F.R. §§ 1.1-12.1 (regulations under the AWA, including Institutional Animal Care and Use Committee oversight of research animals); 21 U.S.C. §§ 601-695 (Federal Meat Inspection Act).

³⁶ Brandon Kirkwood, *New Study Reveals 9.6 Million Americans Are Vegan Now, A 300% Increase!* VEGAN NEWS (March 6, 2020), <https://vegannews.press/2020/03/06/vegan-america-study/>.

³⁷ *Association des Eleveurs de Canards et d Oies du Quebec et al. v. Harris*, No. 12-CV-05735, 2020 WL 5049182, at *5 (C.D. Cal. July 14, 2020).

anticruelty sphere. This overlap of concern may indeed be valid, but the current problem is that the argument is based on anecdotal evidence and (in a few rare instances) incomplete data from small sample populations. Even anticarceral critics acknowledge the lack of data upon which to draw conclusions about the anticruelty laws, let alone upon which to develop legislative priorities or policies that weaken criminal law protections for abused animals.³⁸

4.4.1 Data Collection

One way this problem is being addressed is through an innovative partnering between The Center for Animal Law Studies at Lewis and Clark Law School (CALs), ALDF, and the Criminal Justice Reform Clinic at Lewis and Clark Law School (CJRC). These organizations (all with unique missions that are not universally aligned as “proprosecution” or “prodefense”) have partnered on a first-of-its-kind project to gather detailed data on animal cruelty cases.³⁹ The goal of this project is to obtain comprehensive data on animal cruelty cases, including demographics of those arrested for and charged with animal cruelty and how cases are typically resolved within the criminal justice system (e.g., incarceration, probation, or diversion). Initially, this project will focus on animal cruelty cases in Oregon, but other states will also be surveyed.

Under the guidance of a neutral and experienced biostatistician, qualitative and quantitative data will be collected in the form of records requests in all Oregon counties and interviews with various stakeholders who have experience with animal cruelty cases, including defense attorneys, district attorneys, and animal control officers. These interviews will supplement the data obtained from the records request and provide background information, including how these stakeholders view animal cruelty (e.g., if it is viewed as a serious, victim crime); whether they have avoided prosecuting or defending these cases in the past and reasons why; and how they overcome the unique challenges animal cruelty cases pose.

Currently, there are two sources of data on animal cruelty cases: (1) attorneys – most often prosecutors – who provide anecdotal information based on their cases,⁴⁰ and (2) the FBI’s National Incident-Based Reporting System (NIBRS), which began tracking animal cruelty in 2016.⁴¹ While this data is helpful, there are limitations.

³⁸ *Animal Law Podcast #50: Justin Marceau on Animal Law and Criminal Punishment*, OUR HEN HOUSE (July 24, 2019), www.ourhenhouse.org/2019/07/animal-law-podcast-50-justin-marceau-on-animal-law-and-criminal-punishment/ (at 9:34 and at 24:19 minutes).

³⁹ For the purposes of this project, “animal cruelty” is used as shorthand for any crime committed against an animal, including abuse, aggravated abuse, neglect, and abandonment.

⁴⁰ Most cruelty cases are resolved at the trial level; thus, the published appellate level decisions do not account for or reflect what happens in the mass of lower-level cruelty proceedings.

⁴¹ The FBI collects data on “acts of animal cruelty, including gross neglect, torture, organized abuse, and sexual abuse.” Prior to 2016, crimes against animals “were lumped into an ‘All Other Offenses’ category.” *Tracking Animal Cruelty*, FED. BUREAU OF INVESTIGATION (Feb. 1, 2016).

First, the anecdotal data provided by attorneys is extremely narrow, as it is based on their individual caseloads. In addition, this information is further limited by the attorney's location and does not provide a detailed account of how animal cruelty cases are adjudicated outside of their immediate county or city. Second, the data provided by the FBI also has restrictions because not all jurisdictions report to NIBRS.⁴² Further, NIBRS tracks "incidents"⁴³ and "arrests" of animal cruelty but fails to track cases once they enter the criminal justice system.

Once all of the data is collected, a detailed report will be prepared (and shared widely) that interprets the data and provides policy recommendations, where appropriate.

4.4.2 *Animals as Separate Victims*

Some courts are beginning to recognize each animal as a unique and individual victim, at least as it relates to the issue of merging convictions at sentencing. Merger is a simple statutory concept derivative of the rule against double jeopardy – that is, that a defendant may not be twice punished for the same crime. In essence, convictions for multiple crimes consisting of the same elements committed during the same criminal episode will merge at sentencing, resulting in one punishable offense rather than several. However, when multiple crimes comprising differing elements are committed during the same criminal episode, they qualify as separately punishable offenses, because, by definition, they are not the same offense. An example of this latter dynamic: an offender fires a gun into a crowded bar, killing three patrons within seconds. At sentencing on three homicide convictions committed during the one criminal episode, the defendant would very much like to see just one homicide conviction entered on record. Because there are three separate victims, however, the identity of each victim being a material element of the crime, each count of homicide is not the same as the others. As such, the sentencing court would have the authority to enter separate convictions, one for each victim, and the option (though typically not the obligation) to impose consecutive terms of incarceration.

⁴² Data collected in 2016 and 2017 represented 31 percent and 32 percent of the US population, respectively. Greg Cima, *FBI Gathers Animal Cruelty Data, but Patterns Have Yet to Emerge*, AM. VETERINARY MEDICAL ASS'N (March 27, 2019), <https://www.avma.org/javma-news/2019-04-15/fbi-gathers-animal-cruelty-data-patterns-have-yet-emerge>.

⁴³ "Under NIBRS, an incident is any report of a suspected offense, either from a citizen or initiated by a law enforcement officer, animal control officer, or humane law enforcement official. To be 'counted,' there does not have to be an investigation or an arrest, simply an incident." Animal Welfare Institute, *Animal Cruelty Reporting Scorecard*, <https://awionline.org/content/animal-cruelty-reporting-scorecard> (last visited Nov. 7, 2020).

When applying these concepts to animal cruelty cases, Oregon is at the forefront of the issue as evidenced by *State v. Nix*,⁴⁴ *State v. Hess*,⁴⁵ and *State v. Setere*.⁴⁶ These cases make it clear that each animal who is subjected to criminal abuse or neglect is a unique victim and, as such, renders each count a separately punishable crime even when committed during the same criminal episode. Thus, there is no merging of the defendant's convictions in this context. Contrary to what some may assume, these cases do not stand for the proposition that the court must (or even will) impose consecutive (or "stacked") terms of incarceration. But it does honor the unique existence, identity, and intrinsic value of each animal victim.

Recognizing sentient nonhuman animals as victims is a major development in animal rights law that will, over time, necessarily lead to a safer world for animals and a meaningfully improved legal status for animals. ALDF is now building on these foundational cases with a groundbreaking civil lawsuit that is specifically designed to profoundly improve the legal status of animals by, if successful, giving animals legal standing to sue their abusers in civil court for damages in a case pending before the Oregon Court of Appeals.⁴⁷

4.4.3 *The "Link" and Policy Development*

The correlation between those who abuse animals and those who harm humans is the topic of hundreds of studies, reports, books, and papers. Phil Arkow, coordinator of the National Link Coalition and the Chair of the Animal Abuse and Family Violence Prevention Project (funded by the Latham Foundation) maintains the seminal database cataloging this massive body of scholarship.⁴⁸ One of the founding attorneys of the animal law movement, Joyce Tischler, provided this perspective in her two-part law review article documenting the history of this movement:

Through the work of Randall Lockwood, Frank Ascione, Phil Arkow, and others, a body of literature now exists to document "the Link," i.e., the close connection between abuse of animals, abuse of children, and domestic violence. These findings are regularly used to educate prosecutors and law enforcement about the interconnectedness of violence and the importance of prosecuting animal cruelty cases.⁴⁹

⁴⁴ 334 P.3d 437 (Or. 2104), *vacated on procedural grounds*, 345 P.3d 416 (Or. 2015).

⁴⁵ 359 P.3d 288 (Or. Ct. App. 2015).

⁴⁶ 476 P.3d 117 (Or. Ct. App. 2020).

⁴⁷ See Complaint at 2, *Justice v. Gwendolyn Vercher*, No. 18CV1760, 2018 WL 3997811 (Or. Cir. May 1, 2018), <https://aldf.org/article/advocating-for-justice-in-oregon-neglected-horse-sues-former-owner/>.

⁴⁸ Bibliography – The LINK, Therapy Animals, <https://www.animaltherapy.net/animal-abuse-human-violence/bibliography-the-link/> (last visited Nov. 7, 2020).

⁴⁹ Joyce Tischler, *A Brief History of Animal Law, Part II (1985–2011)*, 5 STAN. J. ANIMAL L. & POL'Y 27, 58 (2012) (citations and footnote omitted).

In a 2011 article in the *Journal of the American Veterinary Medical Association* (AVMA), the authors noted the correlation (not causation) – a link – between animal cruelty and violence against humans:

While this so-called progression thesis has been difficult to substantiate, the belief that violent individuals can harm many victims – both human and animal – is well accepted. Many studies have attempted to verify a link between animal cruelty and human-directed violence. For example, a survey of 38 women entering battered women's shelters found that 71% of the pet-owning women reported that their partner had threatened or actually hurt or killed one or more of their pets. Another study found that people with a history of violence toward animals were at higher risk for exhibiting violence toward people. A retrospective study that examined the histories of incarcerated violent offenders found that these subjects often had long histories of violence toward animals during childhood and adolescence. The authors of that study concluded that violent offenders were significantly more likely than non-violent offenders to have committed acts of cruelty toward animals as children. Although these studies do not prove a causal relationship between childhood violence toward animals and future violence toward humans, they do provide strong evidence that violence toward animals and violence toward people are often concurrent.⁵⁰

These fundamental concepts continue to have great sway with lawmakers. A recent example of this came late in the summer of 2020, when US Senators Sheldon Whitehouse (D-RI), Mike Braun (R-IN), John Kennedy (R-LA), Martha McSally (R-AZ), and Richard Blumenthal (D-CT) introduced the Animal Cruelty Enforcement (ACE) Act (S.4601/H.R.8052).⁵¹ The ACE Act contains some very compelling congressional findings, chief among them:

- There is a significant connection between animal cruelty and violence against humans, domestic violence, child abuse, sexual abuse, homicide, gang activity, drug trafficking, and other crimes.
- There is bipartisan and widespread public support for addressing animal cruelty.
- The lack of a dedicated animal crimes enforcement unit within the Department of Justice has resulted in unacceptable delays in prosecutions, and an overall lack of prosecution of animal crimes.

If passed, the ACE Act will create a dedicated Animal Cruelty Crimes Section within the Environmental and Natural Resources Division of the Department of

⁵⁰ Melanie Benetato, Robert Reisman, & Emily McCobb, *The Veterinarian's Role in Animal Cruelty Cases*, 238 J. OF THE AM. VETERINARY MEDICAL ASS'N 31 (2011) (citations and footnote omitted), <https://avmajournals.avma.org/doi/full/10.2460/javma.238.1.31>.

⁵¹ H.R. 8052, 116TH CONG. (2020), <https://www.congress.gov/bill/116th-congress/house-bill/8052/text?r=2&s=1>; S.4601, 116TH CONG. (2020), <https://www.congress.gov/bill/116th-congress/senate-bill/4601/text?q=%7B%22search%22%3A%5B%22s.4601%22%5D%7D&r=1&s=1>.

Justice to help with the investigation, enforcement, and prosecution of animal cruelty crimes. In addition, the act will require the Department of Justice to report the progress made on enforcing animal cruelty statutes on an annual basis. The importance of such federal recognition of the need to better protect animals from cruelty and abuse, as well as the enhancement of their status in our society, should not be glossed over. If animal advocates believe that nonhuman animals are deserving of such protection, we must understand and support the positive impact of such legislation, both practically and symbolically.

In language similar to that found in the ACE Act, Oregon's legislature has made some significantly compelling findings as well. In Oregon Revised Statute section 686.442, the legislature, while debating the merits of requiring veterinarians to report animal abuse, made the following statement:

The Legislative Assembly finds that there is a direct link between the problems of animal abuse and human abuse and further finds that for the purposes of identifying and prosecuting individuals who have committed crimes against animals, preventing further abuse of animals and preventing animal abuse from escalating to abuse against humans, it is necessary and in the public interest to require mandatory reporting of aggravated animal abuse by veterinarians.⁵²

As a general rule, the criminal defense bar's rejection of the key concepts embodied in established link scholarship is understandable, given that their clients are the ones on trial for animal abuse. After all, using this body of research, when a convicted animal offender stands before the court at sentencing, the prosecution is able to illustrate to the court how this person presents a threat to society and, as such, is worthy of more significant state supervision.

Interestingly, however, some critics who argue the Link is not real will, when it suits their needs, cite favorably to the existence of the Link when it will secure a reduced sentence. This dynamic is evident in *State v. Crow*,⁵³ where defense counsel conceded that the Link findings are valid, sound science and then tried to use them to mitigate his client's sentencing exposure.

The specifics in *Crow* are worthy of review. In *Crow*, the defendant had been previously convicted of multiple acts of animal neglect. Under Oregon's criminal code,⁵⁴ by operation of law, *Crow* was subject upon conviction to a five-year animal possession ban, the violation of which constituted a new misdemeanor crime. Within five years of this prior conviction, *Crow* was subsequently found to be in the possession of minihorses, cats, and a dog, in direct violation of the statute. *Crow* was convicted at trial of thirteen counts of unlawful possession of an animal.⁵⁵ At sentencing, *Crow* demanded that the trial court merge her thirteen convictions into

⁵² OR. REV. STAT. § 686.442.

⁵³ 429 P.3d 1053 (Or. Ct. App. 2018).

⁵⁴ OR. REV. STAT. § 167.332(1)(a).

⁵⁵ *Crow*, 429 P.3d at 1054.

one, rather than sentence each crime separately – claiming that the only victim here was society, not the animals whom she had abused. In support of her claim that society was the only victim here, Crow’s defense attorney cited the legislature’s reliance on the Link between animal abuse and violence against humans when it enacted this statute, section 167.332(1)(a).⁵⁶ The court characterized defense counsel’s argument this way: “Defendant contends that the link between animal abuse and violence against humans demonstrates that the legislature intended to protect the public when it enacted the provisions of ORS 167.332(1), which prevented a person with convictions for crimes against animals from possessing domestic animals.”⁵⁷ Of course, the court rejected the defendant Crow’s claim, ruling that each individual animal qualifies as a victim and, as such, prevented any merging of convictions. While relevant to the *Nix/Hess* merger issue discussed above, the *Crow* case stands as a clear example of how internally inconsistent critics of state intervention can be. Those who contest the correlation between violence against animals and humans often focus on challenging the Link studies’ numbers in an attempt to undermine the nonexistent “finding” of a one-to-one causative effect.⁵⁸

Assume for the sake of argument that these Link critics are right and that only 17 percent (rather than 70 percent) of all animal abusers will also commit (or have committed) violent crimes against humans. Rather than arguing that this finding should be ignored, perhaps a better approach is to recognize that 17 percent is not an inconsequential number⁵⁹ of offenders and that the courts, probation officers and

⁵⁶ *Id.* at 1057.

⁵⁷ *Id.*

⁵⁸ See, e.g., MARCEAU, *supra* note 6, at 193 and 224 (stating both that “the link is the theory that violence begets violence, and thus that violence against animals is predictive of violence against humans” and “at the very least, it is clear that the current narrative surrounding the link [‘clear predictor of violence’] is incorrect”); Emily Patterson-Kane, *The Relation of Animal Maltreatment to Aggression*, in ANIMAL MALTREATMENT: FORENSIC MENTAL HEALTH ISSUES AND EVALUATIONS 140, 143 & 150 (L. Level et al. eds., 2016) (faulting earlier link studies for not using control groups as part of those studies, Patterson-Kane reviewed thirteen link studies that did use control groups and found the prevalence of prior animal abuse in “non-violent” control groups was widely variable—from 0 percent to 72 percent due in part for varying definitions of “animal” with one study including bugs; Patterson-Kane went on to observe that 34 percent of offenders in fifteen other studies who committed acts of violence against a human victim had a history of prior animal abuse; based on this finding, Patterson-Kane used the obvious inverse fact – i.e., that the majority of offenders who committed crimes of violence against a human victim did not have a history of prior animal abuse – to support the view that is no link between the two types of violent conduct, suggesting that nothing short of majority, or perhaps even a one-to-one causal link, will qualify under her paradigm. To her credit, however, Patterson-Kane did concede that, “On the other hand, it may be difficult to accurately detect a prior history of animal abuse in some subjects because it was never detected or disclosed – leading to some underestimation of the real correlation.”).

⁵⁹ In fact, this is a gross underestimate when compared to findings of studies often cited by those who want to excuse animal abusers from judicial accountability. For example, Patterson-Kane found that 34 percent of all violent offenders have a prior history of animal abuse, Patterson-Kane, *supra* note 58, at 145, while another study documented that 43 percent of school shooters

counselors should factor this very real risk into their calculus when conducting threat assessments of offenders for purposes of sentencing, community supervision, and treatment. Further, the FBI acknowledges the significance of animal abuse in conducting a threat assessment of a suspect, characterizing abusing animals as “novel aggression warning behavior,” meaning “an act of violence which appears unrelated to any ‘pathway’ behavior and which is committed for the first time. The person of concern may be engaging in this behavior in order to test his ability to actually engage in a violent act and it could be thought of as experimental aggression.”⁶⁰ The risk-correlation embodied in the Link scholarship has repeatedly garnered the attention of, as noted above, lawmakers and the courts.⁶¹

In sum, the Link documents a relevant correlation between those who abuse animals and the subset of that same population who have previously, or who go on to, abuse humans. Dismissing the correlation between animal abuse and other forms of violence is to ignore an immense body of research (including the conclusion of the FBI’s Behavioral Analysis Unit), compelling legislative policy findings, and a growing body of judicial opinions.

4.5 CONCLUSION

While there is still much work to be done, the improvements to the substantive and procedural criminal code as applied to animal cruelty cases have resulted in significant advances for the benefit of animals and have not flooded our prisons and jails with abusers.

Enacting felony anticruelty laws properly elevates violent conduct inflicted upon voiceless victims to a level consistent with societal expectations while, at the same time, affording offenders independent review of the state’s charging decisions via grand jury or preliminary hearing – a safety stop that is simply not available in misdemeanor cases. Gathering data to address anecdotal claims of racial bias in the investigation and prosecution of animal cruelty cases will serve to elevate the conversation and provide the basis for sound policy reformation. Pursuing the advancement of the victim-status of animals subjected to abuse will only aid civil practitioners in overcoming standing issues and applying creative causes of action that will further advance the interests of animals in the legal system. Recognizing the

had a history of animal abuse; Arnold Arluke & Eric Madfis, *Animal Abuse as a Warning Sign of School Massacres: A Critique and Refinement*, 18 HOMICIDE STUD. 7, 7–22 (2014).

⁶⁰ Molly Amman et al., U.S. Dep’t of Justice, FBI Behavioral Analysis Unit, *Making Prevention a Reality: Identifying, Assessing, and Managing the Threat of Targeted Attacks* (2015)(endnote omitted), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjrgMP5o87sAhWDq54KHVc8ARoQFjACegQIAxAC&url=http%3A%2F%2Fwww.fbi.gov%2FPreventingTargetedViolence&usg=AOvVaw1V8uSa8_UdTayO7n7CjC9K.

⁶¹ See, e.g., *People v. Weeks*, 369 P.3d 699 (Col. Ct. App. 2015) (relying on link studies in support of court’s decision to reject defendant’s attempt to exclude prior bad acts evidence of animal abuse in the murder trial involving the death of defendant’s three-year-old daughter).

Link for what it truly is – an observation of a correlation between differing classifications of violent conduct with some predictive value (as are a host of other factors, including age, social history, and education level) – is, and remains, a helpful tool for courts and probation officers in assessing the threat an offender represents to society and should help shape outcomes at sentencing and parole hearings.

Underlying the work of anyone concerned about animal abuse should be a clear-headed focus on what is in the animals' best interests; ensuring that those interests are always considered in any case or proceeding; and reducing or eliminating animal abuse in the first instance. As animal advocates, we must never place the animals' needs in a secondary position, no matter how worthy competing interests may be. Animal advocates are the animals' last, and in many cases, only defense against invisibility within our established systems, so it is important to remember our primary obligation to protect animals and establish their legal rights while simultaneously supporting other movements to address the many layers of oppression. It is my hope that these important conversations on how best to serve all marginalized and harmed groups (including animals) will continue in a robust, yet respectful manner as we work together to make progress on these difficult issues.