

Criminal Animal Abuse, Interconnectedness, and Human Morality

Richard L. Cupp Jr.

2.1 INTRODUCTION

Arguing that all oppressions are related, and that to end oppression of humans we must also support ending oppression of animals, is in vogue among many who wish to abolish the property status of nonhuman animals.¹ Professor Justin Marceau's 2019 book, *Beyond Cages*, begins with a quote extolling this argument: "All movements seem to start out with a relatively narrow focus, which then widens in response to the recognition of the interconnectedness of oppression."²

Some animal rights activists employ the term "intersectionality" in relation to this argument. For example, while interviewing me in a discussion hosted by the Cambridge Centre for Animal Rights Law in 2020, Professor Raphael Fassel noted:

There is quite an influential strand in animal rights scholarship that emphasizes the intersectional nature of oppression. . . . [T]he argument is roughly that we shouldn't see animal rights and human rights as a sort of zero sum game, where the more we push for animal rights the more human rights are going to lose out. In fact, different

I owe thanks to Don Buffalo, Tanner Hendershot & Matan Neuman for their outstanding research assistance, to my Pepperdine Caruso School of Law colleagues who provided helpful feedback on an early draft of the chapter, and to Professors Lori Gruen and Justin Marceau; both for inviting me to contribute a chapter to this deeply interesting book, and for their thoughtful editing insights.

¹ Hereafter "animals." The absence of the commonly employed [in animal rights literature] word "mere" before the word "property" in this sentence is intentional; although we need to evolve toward more thoughtful protection of animals within the property paradigm, sentient animals of course already have some degree of legal protections, and our legal system does not treat them the same as if they are tables, chairs, or other "mere" property.

² JUSTIN MARCEAU, *BEYOND CAGES 1* (2019) (quoting pattrice jones, *Afterword to SISTAH VEGAN: BLACK FEMALE VEGANS SPEAK ON FOOD, IDENTITY, HEALTH, AND SOCIETY* 187, 188 [A. Breeze Harper ed., 2010]).

oppressions are related, and we can only achieve more protection for human rights if we also protect animal rights better, and visa-versa.³

Marceau also refers to “the intersectionalist perspective on animal protection” in *Beyond Cages*.⁴

The term “intersectionality” is often attributed to Professor Kimberle Crenshaw, who introduced it in highlighting the intersection of race and gender, noting that when one is concerned about the oppression of African Americans, Black women’s particular concerns are often overlooked. When one is concerned about the oppression of women, Black women’s particular concerns are also overlooked. Black women experience specific forms of oppression at the axis of race and gender, rather than experiencing racial oppression and gender oppression as completely separate and unrelated wrongs.⁵

Appropriately or otherwise, the term has evolved in the usage of many beyond its original meaning. In 2019 a trio of scholars wrote of intersectionality that “[r]arely has one term been asked to do so much. It has been described as a lived experience, an aspiration, a strategy, a way to analyze inequality, and even a movement.”⁶ Applying intersectionality to mistreatment of animals may represent one of the most ambitious evolutions away from the term’s original meaning related to civil rights. Using intersectionality language in relation to animals frequently seems intended to reference simply a broad interconnectedness between different manifestations of oppression, including mistreatment of animals. The original meaning of oppression intersectionality – oppression at the intersection of multiple bases of discrimination – seems inapplicable to many discussions about the mistreatment of nonhuman animals. Thus, to limit any contribution I might otherwise make to overextending intersectionality’s meaning, I will henceforth refer to “interconnectedness/intersectionality” regarding oppression and compassion as they relate to how treatment of humans influences treatment of animals, and visa-versa.

Observing that various oppressions are in some manner interconnected has some merit. However, this point is significantly overplayed by many seeking to stretch it into an argument for a “strong” animal rights paradigm, such as applying legal

³ Raffael Fasel, Cambridge Centre for Animal Rights Law, *Richard Cupp in “Animal Rights Law: For or Against,”* interview, July 8, 2020 (beginning at 21:23, available at <https://animalrightslaw.org/>).

⁴ MARCEAU, *supra* note 2, at 157.

⁵ Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

⁶ Hajer Al-Faham, Angelique M. Davis, & Rose Ernst, *Intersectionality: From Theory to Practice*, 15 AN. REV. L. & SOC. SCI. 247, 248 (2019). For an interesting discussion of how understanding and uses of the term have evolved from what Professor Crenshaw intended, see Jane Coastan, *The Intersectionality Wars*, VOX (May 28, 2019), <https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination>.

personhood to animals.⁷ In this chapter, I will first focus on some of the agreements, and then disagreements, I have with arguments made by those, such as Justin Marceau, who are critical of pressing for increases in criminal prosecutions and sentencing of humans guilty of animal abuse or neglect. Next, I will address the manner in which attitudes toward humans' moral distinctiveness or the absence of human moral distinctiveness may influence reactions to these sorts of anticarceral arguments. Finally, I will explore challenges for basing animal legal personhood arguments on intelligent animals' cognitive capacities.

2.2 SEEKING AN UNEASY MIDDLE GROUND REGARDING CRIMINAL JUSTICE REFORM RELATED TO ANIMAL ABUSERS

Although multiple scholars have criticized perceived overemphasis by the animal protection movement on criminal punishment to address animal abuse, I will pay special attention to Marceau's groundbreaking *Beyond Cages* book as a recent and prominent illustration. I am intentionally emphasizing the "animal protection" movement as a broader description than the "animal rights" movement; the animal protection movement includes those who advocate for animals from a welfare/human responsibility perspective, rather than from a "strong" animal rights perspective. I advocate for increasing animal welfare protections, while rejecting animal legal personhood as an unjustified and harmful step too far.⁸ Thus, I am an example of someone who supports the broader animal protection movement but not the "strong" animal rights movement.

⁷ Like intersectionality, the term "animal rights" means different things to different people. Some argue that most or all captive sentient animals in the United States already possess legal rights, because animal welfare laws exist that are designed to provide them at least some degree of protection from suffering. However, some animal rights activists believe that legal rights only exist if the holder of the rights is empowered, directly or through a guardian, to assert them. This "strong" definition of legal rights would require courts and/or legislatures to confer legal personhood on animals before they could truly hold rights. As most animal rights scholars seem to support assigning "strong" legal personhood rights to animals, I will henceforth use the term "animal rights" with this meaning.

⁸ I elaborate on legal reforms that would enhance animal welfare without creating animal legal personhood in: Richard L. Cupp, Jr., *Considering the Private Animal and Damages*, 98 WASH. U. L. REV. 1313 (2021); Richard L. Cupp, Jr. *Edgy Animal Welfare*, 95 DENVER L. REV. 865 (2018); and Richard L. Cupp, Jr., *Animals as More Than "Mere Things," but Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm*, 84 CINN. L. REV. 1023 (2016). Some of my concerns about animal legal personhood are addressed in *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 216 A.3d 839, 845 (Conn. App. Ct. 2019), *mot. recons. en banc denied*, AC 192411 (Conn. App. Ct. 2019), *cert. denied*, 217 A.3d 635 (Conn. 2019); *Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73, 78 (1st Dep't 2017), *lv denied*, 31 N.Y.3d 1054 (2018); and *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 151 (3d Dep't 2014), *lv denied*, 26 N.Y.3d 902 (2015). *See also, e.g.*, Richard L. Cupp Jr., *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood*, 68 FL. L. REV. 465 (2017).

As an animal welfare advocate, I have supported some aspects of enhanced criminalization of animal abusers – for example, I have applauded, and will continue to applaud, the rapid evolution among states to raise animal abuse to a felony-eligible crime in egregious circumstances. Marceau and other critics have not dissuaded me from my view of enhanced sentencing options as a positive development, but they have compelled me to be more thoughtful and concerned about aspects of our criminal justice system’s approach to animal abuse and neglect.

In other words, *Beyond Cages* lands some legitimate and heavy blows in its attack on the animal protection movement’s obsession with enhanced criminalization of animal abuse and neglect. For example, although it is no great revelation that racial injustice plagues our criminal justice system in general, Marceau convincingly argues that animal protection “is seen as a white thing,” and that racial justice is directly in play in our current approach to animal harm prosecutions.⁹ I endorse Marceau’s condemnation of trying children, whose brains are not fully developed, as adults, either in animal abuse cases or in any other cases.¹⁰ Further, the United States’ exceptionally high rate of imprisonment overall is deeply troubling.¹¹

But Marceau is vague regarding some specifics, and, at least in tone, the breadth of his condemnation can be read as extreme. He acknowledges that his position is radical, and perhaps that is comforting, in that he may be seeking to jolt our awareness rather than jettison incarceration for animal abuse altogether. This may explain his assertion that incarceration is a form of oppression.¹² Incarceration is doubtless a form of unjust oppression in some circumstances, but certainly in many circumstances it is appropriate rather than unjustly oppressive. Imagine, for example, a sadistic criminal with a long record of torturing animals. An argument that any incarceration of such a person constitutes unjust oppression would be difficult to stomach. Even Sweden, which is often looked to by progressives as a source of enlightened social policies, provides for prison sentences of up to two years for criminal animal abuse.¹³

Similarly, eliminating all felonies for animal abuse, which would make even the most egregious cases of animal abuse misdemeanors, would be misguided. *Beyond Cages* references a “timely” proposal by a criminal law scholar to eliminate all felonies, and Marceau seems to consider the proposal favorably, at least with regard to animal abuse crimes.¹⁴ As a scholarly work intended to raise provocative questions, *Beyond Cages* is effective. But literally moving “beyond cages” – disallowing

⁹ See MARCEAU, *supra* note 2, at 151–92.

¹⁰ *Id.* at 29–30, 60–62.

¹¹ *Id.* at 27–30.

¹² *Id.* at 273. I am assuming that “oppression” in confinement is viewed as inappropriate confinement.

¹³ See Animal Protection Index, Sweden, *Laws against Causing Animal Suffering, Enforcement Mechanisms*, available at <https://api.worldanimalprotection.org/country/sweden#:~:text=>.

¹⁴ MARCEAU, *supra* note 2, at 38–39.

any incarceration or felony possibilities for animal abusers, regardless of the egregiousness of the abuse – would be deeply problematic.

Focusing on human moral responsibility for mistreatment of animals does not mean we may be unconcerned about substantial flaws in our justice system. These are flaws that must be addressed, rather than necessarily constituting a refutation of any form of criminal justice that entails enhanced prosecution or punishment for certain crimes. Favoring criminal punishment for animal abuse – even favoring the trend toward increasing punishment for severe animal abuse, as I do – is not the same thing as saying throw the book at every criminal and give them the longest sentence possible.

There is no comfortable middle ground regarding our criminal system, only difficult decisions.¹⁵ Ending all imprisonment and the possibility of felony status for animal abuse is a bad idea. Repeat offender sadistic animal torturers, for example, are amply deserving of felony convictions. But Marceau is persuasive in arguing that unmitigated enthusiasm for maximum prosecutions and punishment is also a bad idea.

2.3 HOW ATTITUDES REGARDING HUMANS' MORAL DISTINCTIVENESS OR THE ABSENCE OF HUMAN MORAL DISTINCTIVENESS MAY INFLUENCE REACTIONS TO ANTICARCERAL ANIMAL PROTECTION EFFORTS

An acquaintance who is an ardent animal rights supporter once shared with me that she feels much more compassion for animals than for humans, including human children. Her reasoning: most humans are evil, and all animals are morally innocent. Even if human children are morally innocent, they are likely to become evil as adults. This kind of thinking may not be exceptionally rare among people who are intensely focused on animal rights – I imagine that most readers know multiple people with similar perspectives. In 2020, a celebrity who had just broken up with her fiancé apparently sent a message by wearing a T-shirt bearing the words “Dogs

¹⁵ Another issue Marceau raises that I view as a difficult decision is whether courts should allow volunteer attorneys and law students to serve as advocates in animal abuse and neglect trials. *Id.* at 78–83. Although I respect Marceau's criticism, I have written in cautious support of this potential trend, provided that the advocates are directed to pursue justice rather than the interests of the animal. See Cupp, *Edgy Animal Welfare*, *supra* note 8. If the advocates are directed to pursue justice and follow this direction, they should advocate against conviction in appropriate cases. However, I recognize if only particularly egregious animal abuse and neglect cases are prosecuted, or if advocates in fact only focus on animals' interests rather than a broader focus on justice, such occurrences may be merely hypothetical. At present, Marceau's thoughtful arguments on this issue have not persuaded me against appropriately drafted and applied legislation enabling advocates for justice in animal abuse and neglect cases, but I have serious concerns about how bills currently pending in some states are worded, as well as how they might be applied.

over People.”¹⁶ The celebrity may well have been employing hyperbole, but likely few people would fail to recognize the sentiment as something they have observed or experienced. Indeed, a Google search of “Dogs over People” reveals a plethora of shirts, coffee mugs, plaques, buttons, bumper stickers, baby clothes, wineglasses and other merchandise with variants of this animals-first message.¹⁷

Further, much more extreme illustrations, not representative of typical animal rights activists, are also available to emphasize the point that compassion for animals does not necessarily coincide with fondness for humans. Professor Martha Nussbaum reminds us that “[t]he Nazis, we know, were great naturalists and animal lovers. What they appear to have lacked was a sense of the sanctity of human life.”¹⁸

As a criminal justice scholar and an animal law scholar, Marceau is distinctively positioned to recognize the benefits of highlighting interconnectedness/intersectionality in seeking to expand both animal rights and human criminal law reform. However, he is also distinctively positioned to recognize challenges posed by the attitudes of many animal rights activists toward humans – at least toward human criminals who have abused or neglected animals – and perhaps toward other humans as well. *Beyond Cages* exposes and questions the failure of many animal rights activists to care much about lessening perceived oppression of criminals who cause harm to animals. Far from not having much active concern for compassionate treatment of humans who harm animals, many passionate about animal rights doubtless feel – understandably – searing hatred toward such humans. Marceau asserts that animal rights activists need to evolve beyond such hatred, complaining that “it is rather remarkable that a movement predicated on notions of empathy holds the prospect of caging humans in such high regard.”¹⁹

Encouraging an embrace of interconnectedness/intersectionality as applied to animal protection may be viewed as having a “giving” aspect and a “receiving” aspect. The giving aspect is expanding the concern of animal activists such that they provide support for protecting the rights of oppressed humans. The receiving aspect is gaining support from activists who focus primarily on advocating for oppressed humans. In theory, embracing interconnectedness/intersectionality may enhance

¹⁶ Liz Calvario, *Demi Lovato's Ex Max Ehrich Says He Learned Their Relationship Was Over Through a Tabloid*, KVUE ABC ENTERTAINMENT TONIGHT (Sept. 26, 2020), <https://www.kvue.com/article/entertainment/entertainment-tonight/demi-lovatos-ex-max-ehrich-says-he-learned-their-relationship-was-over-through-a-tabloid/603-0609c4fo-166a-4ac3-898b-b897b113b060>.

¹⁷ One particularly creative T-shirt has the message: “DOGS > PEOPLE JOHN 3:30.” In the Christian Bible, chapter 3 of the Book of John portrays John the Baptist teaching his followers that they must prioritize Jesus rather than John himself. chapter 3 verse, 30 quotes John as stating regarding Jesus, “He must become greater, I must become less.” John 3:30, THE BIBLE, NEW INTERNATIONAL VERSION.

¹⁸ Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506, 1511 (2001).

¹⁹ MARCEAU, *supra* note 2, at 8.

resources and energy in struggles against all forms of oppression by joining advocates for all oppressed groups together.

The fly in the ointment with this theory is that, as Marceau acknowledges, “[t]here is a stereotype of people concerned with protection of animals as misanthropes.”²⁰ Marceau seems concerned that the movement’s general enthusiasm for harsh criminal punishment of humans who are often themselves oppressed encourages this stereotyping as misanthropic. If animal rights activists are perceived as not playing well with others, they are unlikely to generate enthusiastic responses to their pleas for support from other types of rights activists, such as activists pressing for criminal justice reform. Following Claire Jean Kim, Marceau insists that only “mutual avowal” can bring about change, “as opposed to subordination of humans in the service of animals.”²¹

Particularly in the context of animal abuse, this is asking a lot of animal rights activists. Perhaps ironically, it seems likely that so many animal rights activists support “throwing the book” at humans who commit crimes harming animals precisely because the activists recognize that humans are dramatically different from other animals. When in 2012 an adult chimpanzee smashed the head of another chimpanzee’s baby at the Los Angeles Zoo, killing it, media reports about the incident of course did not include information about the “murderer” chimpanzee being charged with a crime.²² Most activists would not lose their compassion for the well-being of the murderer chimpanzee, because they would appropriately view the chimpanzee as outside the realm of human moral judgments. Chimpanzees may have a degree of moral agency, but virtually no one would argue today that they have sufficient moral agency to be held justly accountable under our human legal system.

As many animal rights activists implicitly recognize, humans are unique. Our human criminal justice system assumes a norm among human adults and older minors of sufficient moral agency to be held justly accountable for crimes. When we are enraged at humans who abuse animals, we are affirming that they presumably possess sufficient moral accountability to merit our outrage.

The concept of free will – free will in the sense of one bearing ultimate personal moral accountability for an individual human’s actions – is important to this analysis.²³ Specifically, the question of how committed we are (or are not) to

²⁰ *Id.* at 275.

²¹ *Id.*, quoting CLAIRE JEAN KIM, DANGEROUS CROSSINGS: RACE, SPECIES, AND NATURE IN A MULTICULTURAL AGE 276 (2015).

²² *Adult Chimpanzee Kills Baby Chim in Front of Shocked Los Angeles Zoo Visitors*, CBS NEWS (June 27, 2012), <http://www.cbsnews.com/news/adult-chimpanzee-kills-baby-chimp-in-front-of-shocked-los-angeles-zoo-visitors/>.

²³ Some philosophers may assert that there may be moral accountability without free will, for example if a person makes a moral choice but has no power to effectuate that choice. In this chapter I will use the term “free will” more loosely, assuming that if it exists, humans typically have some power to effectuate their moral decisions regarding personal behavior.

humans generally possessing a strong degree of moral accountability may have a powerful impact on our views regarding criminal punishment of animal abusers.

Marceau implies a view that “free will” is at least nuanced by experiences and other factors.²⁴ He complains that “[t]he movement balks . . . at the idea that animal abuse might be mitigated or treated as less than an act of utter free will, the defendant’s upbringing or culture or other mitigating factors that might militate in favor of a reduced sentence are treated as irrelevant.”²⁵ He also complains that the animal rights movement would have sympathy for an abused dog who is conditioned to violence and who thus engages in violence, but many in the movement would not have empathy for a human conditioned to violence who abuses an animal.²⁶

Scientists and philosophers have gone much further in challenging our traditional assumption that humans act with free will.²⁷ Many neuroscientists are firm determinists who “express deep skepticism about free will.”²⁸ For example, Professor Robert Sapolsky, a primatologist and neuroscientist at Stanford University, opined in 2004 that neuroscience should dramatically transform criminal law by discounting the notion that humans possess free will.²⁹ He argued that the function of a human brain’s prefrontal cortex, which may be damaged or underdeveloped in the brains of many criminals, is a more likely explanation of much criminal behavior than the assumption that such criminals are capable of controlling their behavior.³⁰ A criminal’s brain may be comparable to “a broken car.”³¹

If human moral responsibility for criminal behavior is illusory or weak, such that what society has traditionally viewed as “evil” is in actuality closer to a machine malfunction, perhaps one might think that our compassion for a criminal should be as great as our compassion for the being that suffered because of the crime – except that we would have no true choice in any actions we might take in relation to compassion. Stated in a less extreme manner, the less one believes that moral accountability for criminal behavior is generally strong, the more attractive arguments against strong criminal prosecution and punishment for animal abuse may appear.³² If our decisions are viewed as fully or in large part unavoidable due to some

²⁴ Of course, perceiving nuances in free will does not imply altogether rejecting human moral accountability.

²⁵ MARCEAU, *supra* note 2, at 13.

²⁶ *Id.* at 26.

²⁷ See *infra* notes 28–37 and accompanying text.

²⁸ See Morris B. Hoffman, *Nine Neurolaw Predictions*, 21 *NEW CRIM. L. REV.* 212, 222 (2018) (citing sources).

²⁹ See Robert M. Sapolsky, *The Frontal Cortex and the Criminal Justice System*, *PHILOS. TRANS. R SOC. LOND. B BIOL. SCI.* 1787 (2004); see also Hoffman, *supra* note 28, at 222.

³⁰ Sapolsky, *supra* note 29, at 1794.

³¹ *Id.* Presumably noncriminals would, under this view, also lack free will, and would perhaps be comparable to acceptably functional cars.

³² Of course, this does not imply that Marceau or other critics of the animal protection movement’s emphasis on criminalization and prosecutions reject human moral accountability.

mix of our genetics and environment, enthusiasm for blaming criminals who abuse or neglect animals is likely to lessen. And if humans are not really to blame, punishment is out of the equation as a goal of criminal law, and we need only to look to deterrence, which is more readily challenged with regard to the effectiveness of incarceration.

However, the hard determinism asserted by many neuroscientists is challenged by many or most legal philosophers. Many philosophers are “soft determinists, also called compatibilists (no free will, but responsibility).”³³ Also, many legal philosophers “reject the proposition that neuroscience will one day prove, or otherwise justify, hard determinism.”³⁴

Despite scientific advances, the human brain may be too complex to ever fully understand like a machine.³⁵ In any event, even if ultimate moral accountability does not exist, many believe that it may be necessary for us to act as if it does. Professor Sapolsky acknowledges that “[w]hereas it is true that, at a logical extreme, a neurobiological framework may indeed eliminate blame, it does not eliminate the need for forceful intervention in the face of violence or antisocial behaviour.”³⁶ Completely abandoning human responsibility would wreak havoc on social order. Research indicates that undermining belief in free will leads to increased cheating and aggression, reduced helping behaviors, and less gratitude.³⁷

Of course, one need not *completely* reject the assumption of free will to accept the significance of mitigating factors, such as environmental conditioning or neurological limitations. However, relevant to the issue of enhancing compassion, it may be telling that one consequence of lessening emphasis on free will may be a reduction in helping behaviors.

Although I disagree with my acquaintance discussed above who feels more compassion for animals than for humans (even children), she is correct in pointing out the humanity of what we perceive as evil behavior. Regardless of neuroscientists’ and academic philosophers’ theories, on the ground our society, including the animal protection movement that supports criminal prosecution of abuse, is deeply committed to the belief that humans are responsible for evil actions. In the Abrahamic faiths, Adam and Eve’s encounter with the tree of knowledge of good and evil is included in the story of creation,³⁸ and illuminates the foundational nature of Western society’s conviction that humans are distinctive moral beings. Thus, the view that society needs to deter evil human behavior, and that it needs to

³³ Hoffman, *supra* note 28, at 222 (citing sources).

³⁴ *Id.* (citing sources).

³⁵ *Id.* at 243–44. Professor Hoffman predicts that courts will never abolish the concept of human responsibility. *Id.*

³⁶ Sapolsky, *supra* note 29, at 1794.

³⁷ See Peter Gooding, *The Psychology of Believing in Free Will*, THE CONVERSATION (July 2, 2018), <https://theconversation.com/the-psychology-of-believing-in-free-will-97193>.

³⁸ *Gen.* 2–3.

punish evil human behavior, cannot be understated; it has the deepest of roots in our history.

Believing in human evil reflects a view that not all incarceration of humans is unjustly oppressive. Given our societal underpinnings, even-handedly imposed societal punishment, including incarceration in particularly serious cases, of people who engage in what is perceived as evil misconduct is likely to be viewed by most as justice rather than as inappropriate oppression. The ubiquitous employment of incarceration systems throughout the world's societies demonstrates how powerfully we believe that incarceration is just in some circumstances. Thus, one may assert that all animals should be freed from their cages – or disagree with that assertion – and still support some form of jail time, and in some cases even felony prosecution, for criminals who engage in sufficiently egregious harm of animals.

2.4 INTERCONNECTEDNESS/INTERSECTIONALITY AND ANIMAL RIGHTS ARGUMENTS BASED ON COGNITIVE CAPACITIES

Critics of the animal protection movement's emphasis on criminal punishment call on the movement to care more about humans, with an apparent hope or assumption that more thoughtfulness and discussion can bring about this change. But arguments such as those presented in *Beyond Cages* seem unlikely to upend the animal protection movement's deep commitment to strong criminal prosecution and imprisonment of criminal animal abusers. It seems reasonable to hope that *Beyond Cages* and other critiques will encourage the animal movement to be more thoughtful and nuanced in its advocacy for enhanced criminalization, but an about-face on encouraging criminal prosecutions is probably not, nor should it be, in the cards.

But there is something else in *Beyond Cages*. The book has the effect – perhaps unintentionally – of illustrating in some depth uncomfortable problems with the caring-for-animal-rights-further-caring-about-human-rights argument, at least with regard to arguments that this compassion should lead to legal personhood for animals. In other words, although the book is helpful in calling for change regarding criminal justice, it also shows that passion for animal rights is not always connected to strong compassion for humans. This has significant implications for current animal rights issues. Although many animal rights activists believe that all sentient animals should be legal persons, some activists are focused, at least in the short term, on arguing for legal personhood for particularly intelligent animals based on their cognitive capacities. Under this cognitive capacities approach, a chimpanzee or an elephant might be assigned legal personhood, but less intelligent animals, such as cows and chickens, might remain sentient property. Advocates for the cognitive capacities approach may hope that eventually all sentient animals will become legal persons, and may view an initial focus on cognitive capacities as the best way to steer

courts in the direction of breaking down legal barriers between humans and animals.

But disability rights advocates and others have voiced concern that considering a being's cognitive abilities as a measuring tool for determining personhood would be dangerous for the most vulnerable humans.³⁹ Reliance on the argument from marginal cases to attain personhood for intelligent animals could weaken enthusiasm for strong rights protection of humans who lack strong cognitive abilities. Focusing instead on humans' norm of sufficient capacity to be justly accountable under our legal system protects vulnerable members of the human community – regardless of whether they as individuals meet the norm – because their personhood is anchored in meaningful belonging as part of the human community rather than in individual cognitive abilities).⁴⁰

³⁹ See, e.g., Joshua Rothman, *Are Disability Rights and Animal Rights Connected?* THE NEW YORKER (June 5, 2017), <https://newyorker.com/culture/persons-of-interest/are-disability-rights-and-animal-rights-connected> (noting that although disability rights advocate Sunaura Taylor favors a form of animal rights, her book *BEASTS OF BURDEN* is “an extended argument with the philosopher Peter Singer, who bases his case for animal rights in part on the fact that some animals are more cognitively capable than the intellectually disabled people to whom we already extend our empathy”); Gerald V. O'Brien, *People with Cognitive Disabilities: The Argument from Marginal Cases and Social Work Ethics*, 48 SOC. WORK 331, 335 (2003) (“[a]s it is described in the writings of animal rights scholars, the [argument from marginal cases] is in opposition to core social work values. . . . The dignity and worth of people living on the margins of society is diminished when we bestow quasi-human status on them or suggest that their moral standing is comparable to animals.”); Stephen Drake, *Connecting Disability Rights and Animal Rights – A Really Bad Idea*, NOTDEADYET.ORG, Oct. 11, 2010 (“When disabled people are equated with animals, it never works out well for us.”), <https://notdeadyet.org/2010/10/connecting-disability-rights-and-animal.html>; CARL COHEN & TOM REGAN, THE ANIMAL RIGHTS DEBATE 36–37 (2001) (philosopher Carl Cohen asserting that the argument [from marginal cases] deserves “to be permanently set aside”); Douglas MacClean, *Is “Human Being” a Moral Concept?*, 30 PHIL. & PUB. POL'Y Q. 16, 20 (2010) (among other concerns, “[a]s life is farther removed from human beings and human society, moral reasons cease to govern our relationships with it”); Richard Posner, *Animal Rights*, in ANIMAL RIGHTS: LEGAL, PHILOSOPHICAL, AND PRAGMATIC PERSPECTIVES 55–59 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (among other concerns, an argument for animal rights referencing the moral entitlements of children and humans with cognitive limitations is based on an intuition and does not give a reason for ignoring strongly contrary intuitions); Richard A. Epstein, *The Dangerous Claims of the Animal Rights Movement*, 10 THE RESPONSIVE COMMUNITY 28, 33 (2000) (“[t]hese human beings, whatever their impairments, are the fathers, mothers, sisters, and brothers of other human beings in ways that chimpanzees and bonobos are not”).

⁴⁰ See *Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73, 78 (1st Dep't 2017), *lv denied*, 31 N.Y.3d 1054 (2018) (emphasizing that although not all humans are capable of bearing duties or responsibilities, they are still “members of the human community”). This is not irrational speciesism; rather, this is acknowledging connections and characteristics that uniquely exist within the human community. Individuals with significant cognitive limitations are humans first, and no humans are less human due to limitations in abilities. Further, concern for vulnerable humans is serious regardless of whether strong cognitive capacity is viewed as a sufficient but not necessary condition for legal personhood, in that embracing this change

Promoting interconnectedness/intersectionality regarding animal and human rights does not negate concerns about dangers to vulnerable humans created by inventing animal personhood based on cognitive capacities. In 2010, Professor Massimo Filippi, a supporter of “fundamental rights” for animals,⁴¹ and his coauthors performed a functional MRI study of 20 omnivore subjects, 19 vegetarian subjects, and 19 vegan subjects.⁴² The subjects’ brain activation was measured as the subjects were shown pictures of human beings and animals suffering (“mutilations, murdered people, human/animal threat, tortures, wounds, etc.”).⁴³ According to Filippi’s study, the brains of the vegetarians and the vegans reflected greater empathy than the brains of the omnivores.⁴⁴ Curiously, although perhaps a bit to the side, a strong preponderance of other studies suggest that vegans and vegetarians are more likely to experience mental health challenges than are omnivores.⁴⁵

These sorts of studies are interesting, but, particularly in light of other evidence and experiences, they are not persuasive regarding capacities-based animal legal personhood. Peter Singer supports animal legal personhood based on cognitive capacities.⁴⁶ But rather than being applauded as an interconnected/intersectional ally, he is an ongoing target of protests by disability rights advocates. The advocates are angry that Singer has asserted that parents of babies with significant disabilities should be permitted to euthanize them.⁴⁷ This position doubtless does not strike these disability rights advocates as empathetic to vulnerable humans.

The parade of antihuman or insensitive-to-human actions and sentiments by animal rights activists highlighted in *Beyond Cages* should provide a wake-up call

would focus courts’ and society’s attention on a being’s cognitive capacity as a legitimate form of distinction regarding personhood.

⁴¹ Massimo Filippi, *Brief Notes on Speciesism and Antispeciesism*, Nov. 27, 2008, available at <http://serenoregis.org/2008/11/27/brevi-note-su-specismo-e-antispecismo-massimo-filippi/> (English translation).

⁴² Massimo Filippi et al., *The Brain Functional Networks Associated to Human and Animal Suffering Differ among Omnivores, Vegetarians and Vegans*, PLOS ONE (May 26, 2010), available at <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0010847>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See Hal Herzog, *The Baffling Connection between Vegetarianism and Depression*, PSYCHOLOGY TODAY (Dec. 4, 2018), available at <https://www.psychologytoday.com/us/blog/animals-and-us/201812/the-baffling-connection-between-vegetarianism-and-depression>. A 2017 study found vegans to be less likely to have a higher educational level compared to meat-eaters, and vegetarians likely to have a higher educational level compared to meat-eaters. Benjamin Allès et al., *Comparison of Sociodemographic and Nutritional Characteristics between Self-Reported Vegetarians, Vegans, and Meat-Eaters from the NutriNet-Santé Study*, 9 NUTRIENTS 1023, 1023 (2017).

⁴⁶ See Peter Singer, *Chimpanzees Are People Too*, N.Y. DAILY NEWS (Oct. 21, 2014).

⁴⁷ See, e.g., John Pring, *Outrage over Left-Wing Media Website’s Singer Interview*, Disability News Service (March 18, 2021), <https://www.disabilitynewsservice.com/outrage-over-left-wing-media-web-sites-singer-interview/>; Naaman Zhou, *Peter Singer Event Cancelled in New Zealand after Outcry over Disability Stance*, THE GUARDIAN (Feb. 18, 2020), <https://www.theguardian.com/world/2020/feb/19/peter-singer-event-cancelled-in-new-zealand-after-outcry-over-disability-stance>.

for any who believe that more compassion for some always leads to more compassion for all. As noted above, Marceau states that animal activists have been stereotyped as misanthropes – not as broadly compassionate people-lovers. He references the *Non-Humans First Declaration*, a document that seeks to govern the behavior and priorities of animal activists.⁴⁸ The document captures “the notion that the oppression of humans must be ignored, and everywhere treated as irrelevant.”⁴⁹ Further, Marceau shares that “it is not hard to find racist comments on the blogs and Facebook pages of leading animal protection groups,”⁵⁰ and he provides illustrations of hateful or insensitive racist behavior by animal activists.⁵¹ Marceau appropriately acknowledges that these particularly disturbing views are not representative of most animal activists, but his emphasis on these illustrations demonstrates his broader concern for inadequate human compassion in the movement.

Less extreme manifestations of discounting humans are perhaps representative of a broader cross-section of animal activists. Marceau relates that in 2015, when a wealthy American hunter killed a lion named Cecil in Zimbabwe, widespread outrage led to protests that grabbed headlines across the nation.⁵² This led to a backlash in minority communities, as many sensed society expressing much more anger at the killing of a lion than it expresses over the unjustified killing of oppressed humans. Marceau discusses a *New York Times* op-ed written by a Black feminist, in which the author joked [her description] that “I’m personally going to start wearing a lion costume when I leave my house so if I get shot, people will care.”⁵³

Those who were outraged over Cecil the Lion’s killing but who do not fret much over the wrongful deaths of humans are probably, for the most part, not sufficiently sensitive to human suffering rather than misanthropic. Even if animal activists’ reputation for misanthropy is mostly undeserved, which I believe is so, comparing intelligent animals with the least cognitively capable humans is fraught with danger.

We have been in a somewhat comparable situation before, with some similarities and some differences, and in that situation our society failed vulnerable people more through insensitivity or apathy regarding their rights than through hatred. In the early-twentieth century, the eugenics movement was viewed by many intellectuals as a cutting-edge concept to better society, supported by enlightened understanding of modern science, rather than simply as a tool to oppress weak humans. Dozens of

⁴⁸ MARCEAU, *supra* note 2, at 157.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 156–66.

⁵² *Id.* at 158.

⁵³ *Id.* (quoting Roxanne Gay, *Of Lions and Men: Mourning Samuel DuBose and Cecil the Lion*, N.Y. TIMES [July 31, 2015]).

Nobel Prize winners, as well as world leaders such as Winston Churchill, Theodore Roosevelt, and Woodrow Wilson supported the eugenics movement.⁵⁴ The movement included progressive liberals as well as conservatives.⁵⁵

The movement was not motivated by misanthropy; its supporters were simply not sufficiently sensitive to the rights of vulnerable humans, particularly humans with significant cognitive limitations. It was no less a figure than Oliver Wendell Holmes who infamously pronounced “three generations of imbeciles is enough” in approving the forced sterilization of seventeen-year-old Carrie Buck due to her and her family’s perceived lack of intelligence in the 1927 case of *Buck v. Bell*.⁵⁶ His appalling reasoning:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.⁵⁷

It was not until after the dramatically worse violations of human rights in World War II that the most blatant eugenics policies fell out of favor, and we still often fail to care as much as we should about effectively voiceless humans with significant cognitive limitations. The eugenics movement’s popularity among elites who thought of themselves as enlightened, science-based visionaries, but who embraced treating vulnerable humans more like we treat animals, calls for hard reflection. Of note in addressing interconnectedness/intersectionality, eugenics was often promoted in terms of *compassion*; it was seen as saving the weak from “predetermined lives of misery and immorality.”⁵⁸ Particularly given our history of “compassionate” callousness to vulnerable humans, focusing on legal personhood for particularly capable animals, and comparing the capacities of animals and humans with limited capacities in doing so, is a profoundly dangerous undertaking. Although seeking animal legal personhood based on sentience is also problematic, it may present fewer dangers to the most vulnerable humans than does the animal cognitive capacities approach, as it does not ask us to make a judgment about a being’s intelligence as a path to animal personhood.

⁵⁴ Ana Romero-Bosch, *Lessons in Legal History – Eugenics & Genetics*, 11 MICH. ST. J. OF MED. & LAW 89, 98–99 (2007).

⁵⁵ *Id.* at 99.

⁵⁶ *Buck v. Bell*, 274 U.S. 200, 207 (1927). A fascinating backstory to the *Buck* case is provided in Shankar Vendantam, *Emma, Carrie, Vivian: How a Family Became a Test Case for Forced Sterilizations*, NPR (Feb. 18, 2019), www.npr.org/transcripts/695574984.

⁵⁷ *Id.*

⁵⁸ Jennifer S. Geetter, *Coding for Change: The Power of the Human Genome to Transform the American Health Insurance System*, 28 AM. J.L. & MED. 1, 11–12 (2002). The article’s author appropriately describes this as “frightening.” *Id.* at 11.

Finally, zero-sum game theory observations regarding rights can be a bit depressing to contemplate, perhaps because they are so harshly (but ironically) Darwinian. We would all prefer to contemplate only win/win scenarios, with rights in a utopian state of perpetual expansion, so long as we feel love for other beings, which will in turn make us feel even more love for other beings.

But then there is reality. Rights are often in competition, and new rights mean new competition. For example, assuming expansive views of rights were accepted, the rights of humans and animals to the best medical care available would compete with the rights of those animals whose use in experiments enable human medicine and veterinary medicine advances.⁵⁹ The proponents of the *Nonhumans First Declaration*, like my acquaintance discussed above who loves animals for their innocence and has disdain for humans due to our immorality, understand and embrace this competition. Their insistence that animals' interests be put first, ahead of humans' interests, recognizes that there is a zero-sum game aspect of rights.

There are also, sadly, zero-sum implications of active compassion. Presumably those like the *Nonhumans First Declaration* advocates want animals to come first in our hearts, as well as in our laws. As noted above, there is some truth to interconnectedness/intersectionality arguments regarding compassion, but the paradigm has its limits. For example, the more time and money one contributes to causes specifically promoting human rights protection, the less time and money one has available to contribute to causes specifically promoting protection of animals. This does not mean a person cannot feel compassion for and take active steps to further protection of both vulnerable humans and animals – it simply means that the principle of scarcity places some limits on the practical steps a person takes in response to their compassion for multiple beings or groups of beings. This may be so regarding feelings of compassion – we are not likely capable of being intensely focused on every specific manifestation of oppression in the world – and it is clearly so regarding active manifestations of compassion.

2.5 CONCLUSION

A final issue I will note regarding interconnectedness/intersectionality in the context of animal rights and criminal prosecutions relates to the need for caution regarding assumptions related to oppression, compassion, and animals. Supporters of strong animal rights may assume that most or all human uses of sentient animals that cause the animals pain or restrict their liberty constitute immoral oppression. But animal welfare supporters would likely disagree, embracing instead an ongoing process of

⁵⁹ The Foundation for Biomedical Research reports that “of the 222 [Nobel Prize] award recipients in the Physiology or Medicine category, 186 used animal models in their research.” *Lab Animals Have Made Important Contributions to Nearly Every Nobel Prize in Medicine*, FOUNDATION FOR BIOMEDICAL RESEARCH, available at <https://fbresearch.org/medical-advances/nobel-prizes/> (website last visited Oct. 17, 2020).

balancing human and animal interests. Advocates of an evolving animal welfare paradigm are focused on human responsibility as moral and legal persons for appropriate treatment of animals rather than on animal legal personhood. In practical terms, this may mean that eating meat or allowing biomedical research on animals would be viewed as immoral “oppression” of the animals eaten or experimented upon by many advocates of a strong rights paradigm, whereas animal advocates who support the welfare paradigm would likely utilize the term less broadly while still caring about animal suffering.

Although strong animal rights supporters and animal welfare supporters may have differing views regarding what constitutes unacceptable oppression of animals, both groups embrace cultivating more compassion for animals. This is another answer to those who claim that interconnectedness/intersectionality of compassion should lead to strong animal rights. Interconnectedness regarding compassion may lead people to stronger interest in appropriate animal protections through a welfare paradigm; it need not push them into support of a strong rights paradigm. It may be that seeking to expand the breadth of our compassion is a good fit with a healthy interest in increasing protection of animals as we learn more about their capacities and become more sensitive regarding their suffering. But militant or extreme devotion to an isolated focus of compassion for animals may not be a good recipe for enhanced interconnected/intersectional compassion or rights, and indeed may, as addressed above, in fact create a real (if not short-term) threat to vulnerable humans.

Marceau’s deep concern both for animals and for humans is laudable, but, unfortunately, he is not the animal rights everyman. As an advocate for an evolving animal welfare paradigm, I applaud his call for more thoughtfulness and compassion in criminal adjudication in conjunction with more compassion for mistreated animals, but I also view it as illustrating challenges for, rather than providing a path to support for, animal legal personhood – particularly animal legal personhood based on cognitive capacities. Supporting active evolution of animal welfare protections is an uncomfortable but appropriate middle ground balancing of compassion for animals and concern for humans. Similarly, encouraging appropriate reforms of animal abuse prosecutions without completely rejecting incarceration in particularly serious cases is an uncomfortable but appropriate middle ground for enhancing compassion for humans who commit crimes harming animals, while still insisting that these humans are moral beings and subject to justice.