

Animal Victims and the Law: How Massachusetts Can Revise the Courtroom Animal Advocate Program to Better Protect Victims and Defendants

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INTRODUCTION

Sandra was thirty-four before she ever made a friend.¹ Born in Germany in 1986, she was raised by people who did not understand her, and when she became too much trouble, she was shipped off to Argentina.² While still in her teens, she gave birth to a son, but with no female role models to follow, she was baffled by motherhood.³ Eventually, her son was taken from her, and she returned to a life of solitude and boredom.⁴ As an orangutan, Sandra should have been living in the treetops of Borneo.⁵ But humans had invented zoos, and people were willing to pay money to see a creature like Sandra, who seemed at once so familiar and so foreign.⁶ Sandra remained on display for years until a Brazilian animal welfare group managed to get her case before a judge and argued for her release from captivity.⁷ In 2015, Judge Elena Liberatori found that Sandra was a “*persona no humana*” or “non-human person” who was entitled to be

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¹ See *Orangutan Granted ‘Personhood’ Turns 34, Makes New Friend*, AP NEWS (Feb. 16, 2020), <https://perma.cc/6WQ6-8XKP>.

² See *Sandra*, CTR. FOR GREAT APES, <https://perma.cc/5EZ2-J84F> (last visited Apr. 13, 2023).

³ See *id.*

⁴ See *id.*

⁵ See *About Orangutans*, ORANGUTAN OUTREACH, <https://perma.cc/VCC8-6PGY> (last visited Apr. 13, 2023).

⁶ See *id.*

⁷ *Orangutan Given Right to Freedom in Argentina*, BBC (Dec. 23, 2014), <https://perma.cc/43P9-PMSV>.

treated as something more than mere property.⁸ To no one's surprise, this apparent leap forward in animal rights was quickly reversed on appeal, and Sandra's liberation was eventually secured under a conventional animal mistreatment statute.⁹

Most animals who generate profit for humans do not get happy endings.¹⁰ Sandra is a rare exception, finding her way back to the trees at Florida's Center for Great Apes, where she and her orangutan friend Jethro now enjoy something like freedom.¹¹ However, it is unclear how much value the high-profile liberation of a single animal brings to the broader cause of animal rights.¹² On the one hand, Judge Liberatori's decision generated a great deal of publicity, and even the appellate court that overruled her opined that "non-human beings (animals) are entitled to rights, and therefore their protection is required by the corresponding jurisprudence."¹³ On the other hand, the Brazilian appellate court's pro-animal position was merely dictum, and the American public's interest in stories of individual rescued animals has yet to translate into a serious reckoning with humans' cruelty towards animals.¹⁴

Like Argentina, America is not yet ready to grant animals anything

⁸ See Shawn Thompson, *Read the Judge's Decision that the Orangutan Sandra is a "Non-Human Person,"* THE INTIMATE APE (Oct. 25, 2015), <https://perma.cc/8PLV-4EX3>.

⁹ See Steven Wise, *Sandra: The Plot Thickens*, NONHUMAN RTS. BLOG (Jan. 12, 2015), <https://perma.cc/69PY-KRBD>.

¹⁰ See, e.g., Jemima Webber, *Landmark Court Case Could Grant 'Happy' the Elephant Human Rights*, PLANT BASED NEWS (May 25, 2022), <https://perma.cc/TCE4-AEKB> (summarizing the legal fight to liberate an Asian elephant from over forty years of captivity at the Bronx Zoo); *Tilikum: The Whale Who Rebelled*, THE WHALE SANCTUARY PROJECT, <https://perma.cc/4JRP-KA6B> (last visited Apr. 13, 2023) (recounting Sea World's thirty-four-year exploitation of an orca, which included the animal's killing of its trainer and its eventual death in captivity from persistent lung infections).

¹¹ See *Sandra*, *supra* note 2.

¹² Compare Rachel Fobar, *A Person or a Thing? Inside the Fight for Animal Personhood*, NAT'L GEOGRAPHIC (Aug. 4, 2021), <https://perma.cc/H5VL-3TMW> (quoting a historian's view that the fight to liberate Happy the Elephant from the Bronx Zoo "is the way ultimately to open the floodgates for all creatures"), with Steven Wise, *Update on the Sandra Orangutan Case in Argentina*, NONHUMAN RTS. BLOG (Mar. 6, 2015), <https://perma.cc/5SG3-QNCT> (noting the Brazilian courts' refusal to grant Sandra the right to habeas corpus even as it appeared to recognize her rights as an individual).

¹³ Wise, *supra* note 9.

¹⁴ See *id.* See generally Camila Domonoske, *Jon Stewart and the Runaway Bull: A Tale in 5 Headlines*, NPR (Apr. 2, 2016, 1:57 PM ET), <https://perma.cc/3F2M-K3WT> (detailing the media's use of excessively humorous language to cover the "adorabull story" of a cow who escaped a slaughterhouse); Julia Shaw, *What the 'Meat Paradox' Reveals About Moral Decision Making*, BBC (Feb. 6, 2019), <https://perma.cc/4DCQ-499K> (examining how people deal with the "psychological conflict between [their] dietary preference for meat and their moral response to animal suffering" by creating "habits and social structures that make [them] feel better").

approaching legal personhood.¹⁵ It is still true that in every United States jurisdiction, animals are considered property, making them legally more akin to inanimate objects than living beings.¹⁶ However, it is also true that every state has a felony animal cruelty law, and as of 2019, extreme animal cruelty is a federal crime.¹⁷ Connecticut has recently taken a significant step forward in prosecuting animal cruelty with the 2016 passage of Desmond's Law, which allows a court to appoint an "animal advocate" in certain criminal animal abuse cases to advance the "interests of justice."¹⁸ The purpose of the Courtroom Animal Advocate Program ("CAAP") is to educate judges about the damage done to animals and human society by animal abusers.¹⁹ The law arose from a legislative recognition that, despite Connecticut's existing anti-cruelty laws, state courts are ill-equipped to fairly assess all the ramifications of animal abuse.²⁰

Part I of this Note will examine Desmond's Law's position in the history of American animal cruelty laws. Part II will identify CAAP's contributions to raising judicial awareness of the dangers of animal abuse, as well as its shortcomings as a judicial tool. Part III will analyze how the compromises required to pass Desmond's Law undermine the goals of animal advocates and endanger a defendant's right to a fair trial. Part IV will propose revisions to CAAP that Massachusetts should consider in adopting the program.

I. Background

A. History of Animal Cruelty Laws in America

1. Early Attempts to Address Animal Cruelty

Animal protection laws in America trace their roots to the Massachusetts Bay Colony's 1641 Body of Liberties, which included two provisions preventing animal cruelty.²¹ First, the authors created a general prohibition on cruel treatment: "No man shall exercise any Tirranny or Crueltie towards

¹⁵ See Verlyn Klinkenborg, *Animal 'Personhood': Muddled Alternative to Real Protection*, YALE ENV'T 360 (Jan. 30, 2014), <https://perma.cc/T7GX-N57W>.

¹⁶ See *How Animals Differ from Other Types of "Property" Under the Law*, ANIMAL LEGAL DEF. FUND, <https://perma.cc/Z72E-WFXR> (last visited Apr. 13, 2023).

¹⁷ *Extreme Animal Cruelty Can Now be Prosecuted as a Federal Crime*, HUMANE SOC'Y LEGIS. FUND (Nov. 5, 2019), <https://perma.cc/7M5Z-6LHY>.

¹⁸ Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)).

¹⁹ See Jessica Rubin, *Desmond's Law: Early Impressions of Connecticut's Court Advocate Program for Animal Cruelty Cases*, 134 HARV. L. REV. F. 263, 264-65 (2021) [hereinafter Rubin, *Court Advocate Program*].

²⁰ See *id.* at 264.

²¹ NATHANIEL WARD, THE MASSACHUSETTS BODY OF LIBERTIES (1641), reprinted in OLD SOUTH LEAFLETS 261, 273 (Boston: Directors of the Old South Work, n.d. 1900), <https://perma.cc/GN72-JMLE>.

any brute Creature which are usuallie kept for man's use."²² Second, the authors created a specific regulation for livestock: "If any man shall have occasion to leade or drive Cattel from place to place that is far off, so that they be weary, or hungry, or fall sick, or lambe, It shall be lawful to rest or refresh them."²³ While it is difficult to know how, or even if, any of the liberties were enforced, the authors clearly intended that the document should govern the colonists: "And such of [the passages] as shall not be altered or repealed they shall stand so ratified, That no man shall infringe them without due punishment."²⁴

A strong motivating force behind these provisions was likely the Colony's financial interest in maintaining healthy animals as breeders, both to maintain the food supply and to be used as a trading commodity.²⁵ Yet the language of both provisions suggests a degree of sympathy for animals, who like the colonists themselves, would not flourish under "tirranny."²⁶ The states of suffering to which animals' owners must attend—weariness, hunger, illness—are the same that any human colonist might feel.²⁷ Whatever the economic basis for these two protections, this earliest of Massachusetts laws spoke to an awareness of animals as beings who could suffer and to an acceptance of humans' responsibility to prevent such suffering.²⁸

The belief that animals should be legally protected from cruelty was the founding principle of New York's highly influential 1829 animal cruelty statute, which recognized not only cruelty towards another's animal as a property crime, but also cruelty towards any animal, whether owned or not.²⁹ In 1866, Henry Bergh built on the statute's foundation by chartering the nation's first official animal protection society in New York.³⁰ Bergh, like many in post-Civil War America, was troubled by the cruelty of which humans were capable, and he saw animal protection as a vehicle for improving Americans' morals.³¹ To work towards a better society, Bergh

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 277.

²⁵ See Craig S. Chartier, *Livestock in Plymouth Colony*, PLYMOUTH ARCHEOLOGICAL REDISCOVERY PROJECT, <https://perma.cc/36T9-XV3R> (last visited Apr. 13, 2023).

²⁶ See *Do Animals Have Feelings? Examining Empathy in Animals*, UWA ONLINE (Apr. 3, 2019), <https://perma.cc/29RE-XZNK>.

²⁷ See Fobar, *supra* note 12.

²⁸ See Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 387–88 (2003) (contrasting Immanuel Kant's view of animals as instruments for human use with Jeremy Bentham's position that humans should attend to animals' ability to suffer).

²⁹ Stephen Iannacone, *Felony Animal Cruelty Laws in New York*, 31 PACE L. REV. 748, 750–51 (2011).

³⁰ *History of the ASPCA*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <https://perma.cc/PXY5-R6GH> (last visited Apr. 13, 2023).

³¹ See Zach Williams, *The Evolution of Animal Rights*, CITY & ST. N.Y. (Aug. 1, 2019),

lobbied for two key changes in New York's 1829 statute, adding in a negligence component and a prohibition against abandonment of animals.³²

Two years after Bergh, George Angell and Emily Appleton formed the Massachusetts Society for the Prevention of Cruelty to Animals (MSPCA).³³ Like Bergh, Angell and Appleton saw animal welfare as a key element in improving human morality and lobbied the Massachusetts General Court to pass the Commonwealth's first animal cruelty statute.³⁴ They also reached out to ordinary citizens, with a particular focus on children, by publishing the magazine *Our Dumb Animals*, as a way "to speak for those who cannot speak for themselves."³⁵ The MSPCA also adopted a British invention, the "Bands of Mercy," which were groups of schoolchildren who met regularly to sing songs and hear stories celebrating kindness to animals.³⁶ Among the texts read to the children was George Angell's *Twelve Lessons on Kindness to Animals*, which explicitly linked humans' care for animals to God's love for all creation: "If God *made* the cattle, and *remembers* the cattle, and *causeth the grass to grow* for the cattle, . . . will He not remember those who cruelly treat the cattle, . . . those who, to save the cost of hay, give their cattle so little food in winter that they are half starved[?]"³⁷ Angell's lessons were meant not only to inspire empathy for animals, but also to motivate children to act as advocates, as the words of the group's pledge reflect: "I will try to be kind to all living creatures, and try to protect them from cruel usage."³⁸ The Bands of Mercy grew in popularity throughout the late 19th century, expanding beyond simple meetings to include merit awards, essay contests with cash prizes, and public recognition of individual children in their schools and communities.³⁹ By the early 20th century, the Bands of Mercy numbered nearly 30,000 nationwide.⁴⁰

John Locke articulated this same need to educate children in morality in his 1693 treatise on education, in which he identified the particular problem

<https://perma.cc/D8QY-WTTZ>.

³² See Iannacone, *supra* note 29, at 750–52.

³³ See *Historical Timeline*, MSPCA-ANGELL, <https://perma.cc/ER6A-4WPJ> (last visited Apr. 13, 2023).

³⁴ See Claire Priest, *Enforcing Sympathy: Animal Cruelty Doctrine After the Civil War*, 44 *LAW & SOC. INQUIRY* 136, 137 (2019); Janet M. Davis, *The History of Animal Protection in the United States*, *ORG. OF AM. HISTORIANS*, <https://perma.cc/77UF-8R87> (last visited Apr. 13, 2023); see also *Historical Timeline*, *supra* note 33.

³⁵ *Historical Timeline*, *supra* note 33.

³⁶ *Bands of Mercy - Be Kind: A Visual History of Humane Education*, BE KIND EXHIBIT, <https://perma.cc/D8DU-8DVA> (last visited Apr. 13, 2023) [hereinafter *Bands of Mercy*].

³⁷ GEO. T. ANGELL, *TWELVE LESSONS ON KINDNESS TO ANIMALS* 6 (1889).

³⁸ *Bands of Mercy*, *supra* note 36.

³⁹ See BERNARD UNTI & BILL DEROSA, *Humane Education Past, Present, and Future*, in *THE STATE OF THE ANIMALS II*: 2003 27, 29 (D.J. Salem & A.N. Rowan eds., 2003).

⁴⁰ *Bands of Mercy*, *supra* note 36.

of children's cruelty towards animals.⁴¹ He argued that any child "incline[d] to any such cruelty . . . should be taught the contrary usage."⁴² In post-Civil War America, humane societies joined temperance and child protection movements to reframe the education of children as a long-term response to the effects of "cruelty and violence [on] individuals, the family, and the social order."⁴³ By the late 19th century, as common schools and compulsory education laws spread across America, schools became the best place to deploy "humane education's utility for ensuring public order, suppressing anarchy and radicalism, smoothing relations between the classes, and reducing crime."⁴⁴ Thanks to the lobbying of George Angell, Massachusetts passed the first humane instruction mandate in 1886 as part of its existing moral education statute requiring "the teaching of humanity [and] universal benevolence."⁴⁵ By 1920, twenty states had humane education requirements, with three imposing sanctions on non-compliant schools.⁴⁶

The combined work of lawmakers and private organizations characterized America's early attempts to deal with animal cruelty.⁴⁷ Whether the motivation for awakening human sympathy for animal suffering was economic welfare or broad social improvement, both strains encouraged understanding animals as individuals who could be "learn[ed] about, watched and known for [their] own sake."⁴⁸ As the animal rights movement began to emerge in the later twentieth century, private groups' efforts to influence legislatures became more grounded in arguments of animal sentience and the push for animal legal personhood.⁴⁹

2. Modern Attempts to Address Animal Cruelty

Today, every state has a felony animal cruelty statute, but the specifics of what counts as cruelty and what punishments are available vary widely, from incarceration to diversionary programs.⁵⁰ Massachusetts has one of the nation's most comprehensive definitions of animal cruelty, covering not only general acts of cruelty to animals, but also specific types of conduct

⁴¹ See UNTI & DEROSA, *supra* note 39, at 27.

⁴² UNTI & DEROSA, *supra* note 39, at 27.

⁴³ UNTI & DEROSA, *supra* note 39, at 29.

⁴⁴ UNTI & DEROSA, *supra* note 39, at 28.

⁴⁵ MASS. GEN. LAWS ch. 71 § 30 (2022); UNTI & DEROSA, *supra* note 39, at 29.

⁴⁶ UNTI & DEROSA, *supra* note 39, at 30.

⁴⁷ See UNTI & DEROSA, *supra* note 39, at 30.

⁴⁸ UNTI & DEROSA, *supra* note 39, at 32.

⁴⁹ See, e.g., Nicole Pallotta, *Spain Poised to Recognize Animal Sentience Within Civil Code, Clarifying Animals Are Not "Things,"* ANIMAL LEGAL DEF. FUND (Aug. 18, 2021), <https://perma.cc/M73E-AY2Y>; *How Animals Differ from Other Types of "Property" Under the Law*, *supra* note 16.

⁵⁰ See ALLIE PHILLIPS & RANDALL LOCKWOOD, *INVESTIGATING & PROSECUTING ANIMAL ABUSE* 1, 7 (2013), <https://perma.cc/4SV6-WKTB>.

(e.g., live animals used as bait, abandonment of live animals) and conduct against specific kinds of animals (e.g., police dogs and horses, wild animals exhibited for profit).⁵¹ The statute provides for up to seven years in state prison and/or a fine of not more than \$5,000 for a first offense, and up to ten years in state prison and/or a fine of not more than \$10,000 for a second offense.⁵² Connecticut's statute addresses many of these same acts; however, convicted animal abusers face up to only one year in prison and/or a fine of up to \$1,000 for a first offense, and up to five years and/or a fine of up to \$5,000 for a second offense.⁵³

Connecticut is far ahead of the curve when it comes to animal advocacy in the courtroom.⁵⁴ In 2016, Connecticut passed Desmond's Law, becoming the first state "to give animals a voice [in the courtroom] and . . . provide courts with tools" to make informed rulings in criminal animal abuse cases.⁵⁵ The most significant of these tools is the power to appoint an "animal advocate" who represents "the interests of justice" in dog- or cat-abuse cases.⁵⁶ The advocate's role is to: (1) monitor the case; (2) provide information that could aid the fact finder and review records relating to the animal victim; (3) attend hearings; and (4) present recommendations to the court.⁵⁷ As the model for what is now known as the Courtroom Animal Advocate Program, Desmond's Law has drawn the outlines for an advocate who speaks for animal victims' unique needs, such as the need to foster offspring of an animal held as evidence or the need to find specialty rehabilitation facilities for dogs used in dog fighting.⁵⁸ The advocate's contributions help courts reach "fair and specific outcomes that focus on the defendant's accountability and the animal victim's experience."⁵⁹ Following the passage of Desmond's Law, Maine enacted its version called Franky's Law in 2019, which is nearly identical to Connecticut's law.⁶⁰ In New Jersey, a similar bill passed the Senate in February 2021 and is currently in Assembly.⁶¹

⁵¹ MASS. GEN. LAWS ch. 272 §§ 77, 77A, 77B (2018).

⁵² *Id.* § 77.

⁵³ CONN. GEN. STAT. § 53-247(a)-(e) (2016).

⁵⁴ See Rubin, *Court Advocate Program*, *supra* note 19, at 264.

⁵⁵ Rubin, *Court Advocate Program*, *supra* note 19, at 264.

⁵⁶ Desmond's Law, 2016 Conn. Pub. Acts No. 16-30(a) (codified as CONN. GEN. STAT. § 54-86n (2018)).

⁵⁷ *Id.*

⁵⁸ See *Courtroom Animal Advocate Programs (CAAP)*, ANIMAL LEGAL DEF. FUND, <https://perma.cc/N9BM-8XZY> (last visited Apr. 13, 2023) [hereinafter *CAAP*].

⁵⁹ Rubin, *Court Advocate Program*, *supra* note 19, at 267.

⁶⁰ See ME. REV. STAT. ANN. 7 § 4016 (2019).

⁶¹ See *Courtroom Animal Advocate Bill Passes New Jersey Senate*, ANIMAL LEGAL DEF. FUND (Feb. 19, 2021), <https://perma.cc/UA39-8P5S>.

II. While CAAP Raises Judicial Awareness of the Specific Social Threat of Animal Abuse, its Vague Outlines Undermine its Effectiveness

The last few decades have seen a growing awareness of the need for more thorough prosecution of animal abuse because of its demonstrated link to interpersonal violence.⁶² A 1997 study done by MSPCA found that “animal abusers are in fact five times as likely to also harm other humans.”⁶³ More recently, scholarly attention has turned to how abusers use animal cruelty as a way to control intimate partners and children.⁶⁴ As more and more studies have demonstrated these links, law enforcement has responded with better crime tracking and improved officer training on both the state and federal levels.⁶⁵

Adoption of CAAP keeps the courts in step with this trend.⁶⁶ Beyond merely ensuring that courts acknowledge an animal victim’s interests, CAAP advocates contribute legal analysis of a case’s specific facts that the prosecutor may not understand or have the resources to investigate.⁶⁷ Desmond’s Law requires that Connecticut’s Department of Agriculture “maintain a list of attorneys with knowledge of animal issues and the legal system,” as well as a list of law schools with students interested in animal law who would serve on a voluntary basis.⁶⁸ As a result, CAAP has the added practical benefit of providing “meaningful work and training for lawyers and law students who serve as [a]dvocates.”⁶⁹ Finally, courts’ use of CAAP advocates brings the topic of animal sentience into the discussion of animals’ legal status.⁷⁰ While legal personhood is still a very far-off goal, expanding the courts’ understanding of animal abuse as more than just a property crime is an important first step in changing legal attitudes.⁷¹

⁶² See NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, RESOLUTION REGARDING ANIMAL CRUELTY AND ITS LINKS TO OTHER FORMS OF VIOLENCE (2019), <https://perma.cc/72P4-WF5E>.

⁶³ *The Link Between Cruelty to Animals and Violence Toward Humans*, ANIMAL LEGAL DEF. FUND, <https://perma.cc/X628-27X9> (last visited Apr. 13, 2023); see Phillips & Lockwood, *supra* note 50, at 9.

⁶⁴ See BATTERED WOMEN’S JUST. PROJECT, UNDERSTANDING ANIMAL ABUSE AS INTIMATE PARTNER VIOLENCE (2017), <https://perma.cc/H932-UW55>.

⁶⁵ See NAT’L SHERIFFS’ ASS’N, ANIMAL CRUELTY AS A GATEWAY CRIME 21–22 (2018), <https://perma.cc/U4YQ-W4MN>; *Tracking Animal Cruelty: FBI Collecting Data on Crimes Against Animals*, FED. BUREAU OF INVESTIGATION (Feb. 1, 2016), <https://perma.cc/A2XJ-JCTU>.

⁶⁶ See CAAP, *supra* note 58.

⁶⁷ See Rubin, *Court Advocate Program*, *supra* note 19, at 265–66; Phillips & Lockwood, *supra* note 50, at 36.

⁶⁸ Desmond’s Law, 2016 Conn. Pub. Acts No. 16-30(c) (codified as CONN. GEN. STAT. § 54-86n (2018)).

⁶⁹ Rubin, *Court Advocate Program*, *supra* note 19, at 265.

⁷⁰ See Rubin, *Court Advocate Program*, *supra* note 19, at 265.

⁷¹ See Rubin, *Court Advocate Program*, *supra* note 19, at 265.

For all its potential benefits, Desmond's Law is not without its critics.⁷² Beyond the obvious—advocates are available only for cases involving abuse of dogs and cats—the law's language has carved out a dangerously imprecise space for advocates.⁷³ Speaking neither for the state nor for the animal as an individual victim, the advocates of Desmond's Law represent the ill-defined "interests of justice."⁷⁴ Critics have argued that such a vague definition of the advocate's role actually suggests a reluctance to recognize animals as having their own legal interests, even as CAAP as a whole tries to protect animals and hold abusers accountable.⁷⁵ Much like the story of Sandra the orangutan, CAAP may make people feel better about even fatal outcomes for animals in abuse cases, but it may not provide any significant advances for animals' legal status.⁷⁶

A second problem resulting from the advocate's unusual position as a general voice of justice is the danger such a voice poses to the defendant.⁷⁷ The advocate provides information to the judge in open court (and to the prosecutors in preparation for trial) but is not subject to cross examination by the defense.⁷⁸ Thus, the advocate has the potential to create another level of unconscious bias against the defendant.⁷⁹ In a system that still sees animals as property, framing them as crime victims may do nothing to advance their legal standing but may do quite a lot to contribute to more policing, felony convictions, and incarceration.⁸⁰

While Desmond's Law, and the Maine and New Jersey versions that followed, mark an important judicial step towards recognizing the unique legal position of sentient nonhuman animals—not fully legal "persons" but something more than mere property—any subsequent adoption of CAAP must grapple with the law's shortcomings if further progress is to be made.⁸¹ As the state historically positioned to build on Desmond's Law, Massachusetts must confront two problems of the current version of CAAP: (1) the limitation of CAAP representation to abuse cases involving dogs and

⁷² See, e.g., JUSTIN MARCEAU, *BEYOND CAGES: ANIMAL LAW & CRIMINAL PUNISHMENT* 25–26 (2019) (arguing that the modern animal rights movement has adopted criminal punishment as the cornerstone of its philosophy).

⁷³ See Nila Bala, *Desmond's Law: Imprecise Language Makes for Inadequate Advocacy*, HARV. J. ON LEGIS. (2018), <https://perma.cc/ZJ9V-HCM2>.

⁷⁴ Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)).

⁷⁵ See Bala, *supra* note 73.

⁷⁶ See Bala, *supra* note 73.

⁷⁷ See Elaine S. Povich, *Advocates Stand Up in Court for Abused Animals*, PEW CHARITABLE TRUSTS: STATELINE, <https://perma.cc/2MFF-YBQH> (last updated Feb. 25, 2019).

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See Justin Marceau, *Animal Rights and the Victimhood Trap*, 63 ARIZ. L. REV. 731, 734 (2021).

⁸¹ See Rubin, *Court Advocate Program*, *supra* note 19, at 274–75.

cats; and (2) the dangers posed to both animal victims and human defendants by the advocate's uncertain position in legal proceedings.⁸²

ANALYSIS

III. The Passage of Desmond's Law Required Compromises that Limit CAAP's Effectiveness at Protecting Animals and Endanger Defendants' Rights to a Fair Trial

A. *The Exclusion of Farmed Animals from CAAP Eligibility Excludes the Largest Group of Animals Subject to Wide-Scale Abuse*

In its initial form, Desmond's Law permitted the appointment of a CAAP advocate in cases involving abuse of any animal.⁸³ As the original bill progressed through the legislature, however, lawmakers from Connecticut's rural areas raised concerns about its broad scope.⁸⁴ The main concern was the impact Desmond's Law could have on animal agriculture, specifically the operations of Connecticut's dairy industry whose 2020 cash receipts totaled over \$70 million.⁸⁵ The dairy industry has long been a target of animal advocates who see it as among the most unnatural and abusive of all forms of animal farming.⁸⁶ Nearly wholly dependent on artificial insemination and selective breeding, dairy farms routinely treat cows like machines and newborn calves as impediments to a higher per-cow milk yield.⁸⁷ To protect the interests of dairy farmers and other producers of animal products in the state, legislators dramatically limited the eligibility for CAAP to abuse cases involving only dogs and cats.⁸⁸

Jessica Rubin, the Director of the University of Connecticut Law School's Animal Law Clinic and the driving force behind Desmond's Law, characterizes this limitation as a "frustrating shortcoming."⁸⁹ Frustrating indeed, as this limitation means that the animals most likely to be openly (and secretly) abused are those most openly excluded from even the limited legal voice granted by CAAP advocates.⁹⁰ This exclusion of farm animals

⁸² See Rubin, *Court Advocate Program*, *supra* note 19, at 274–75.

⁸³ Jessica Rubin, *Desmond's Law: A Novel Approach to Animal Advocacy*, 24 ANIMAL L. 243, 253 (2018) [hereinafter Rubin, *Animal Advocacy*].

⁸⁴ *Id.* at 253–54.

⁸⁵ *Cash Receipts by Commodity State Ranking: 2020*, U.S. DEP'T OF AGRIC., <https://perma.cc/3UHC-MNHB> (last updated Feb. 7, 2023).

⁸⁶ See, e.g., Deidre Wicks, *Demystifying Dairy*, 7 ANIMAL STUD. J. 45, 46 (2018).

⁸⁷ *Animal Legal Defense Fund Sues Tillamook for Deceptive Advertising*, ANIMAL LEGAL DEF. FUND (Aug. 19, 2019), <https://perma.cc/WA88-ZYEZ>.

⁸⁸ Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)).

⁸⁹ Rubin, *Animal Advocacy*, *supra* note 83, at 254.

⁹⁰ *Farmed Animals: Farmed Animals and the Law*, ANIMAL LEGAL DEF. FUND,

from CAAP eligibility has the same goal as traditional “ag-gag” laws that punish animal activists who go undercover on factory farms: to keep the public in the dark about the realities of animal agriculture.⁹¹ Had Desmond’s Law passed without an exemption for livestock, the number of lawsuits against dairy farms (or any animal product producer in Connecticut) would not have increased since CAAP does not change federal or state laws governing animal agriculture.⁹² Rather, CAAP’s danger to animal agriculture lies simply in what it suggests about animals’ status as victims.⁹³ If the legislature grants *every* animal the right to an advocate, society has moved one step closer to reassessing what is permissible treatment for livestock, and thus one step closer to rethinking current animal agriculture legislation.⁹⁴

That rethinking is already happening.⁹⁵ For example, California and New York City have passed bans on the sale of foie gras, which is made from the liver of geese or ducks that have been cruelly force-fed.⁹⁶ Ten states have passed laws banning the use of extreme confinement crates for pigs and hens, and Massachusetts and California now prohibit the sale of eggs and meat from animals held in extreme confinement, including products shipped from other states.⁹⁷ And perhaps most concerning to animal producers, the market for plant-based meats is only increasing in popularity, with nearly eighty million Americans purchasing meat alternatives in 2020.⁹⁸ The growing interest in animal welfare and the push to strengthen laws governing farmed animals’ living conditions are significant threats to animal agriculture; the explicit exclusion of livestock from Desmond’s Law is an attempt to keep those threats at bay by limiting judicial understanding of farmed animals as victims of abuse.⁹⁹

<https://perma.cc/BF37-72M7> (last visited Apr. 13, 2023).

⁹¹ *Ag-Gag Laws*, ANIMAL LEGAL DEF. FUND, <https://perma.cc/3VNE-28XQ> (last visited Apr. 13, 2023).

⁹² See, e.g., Humane Methods, 7 U.S.C. § 1902 (amended 1978) (requiring the complete sedation of a non-poultry animal prior to slaughter as a means of decreasing suffering).

⁹³ See Rubin, *Court Advocate Program*, *supra* note 19, at 266–67.

⁹⁴ See, e.g., *Farm Animal Confinement Bans by State*, ASPCA, <https://perma.cc/MK4B-TR82> (last visited Apr. 13, 2023).

⁹⁵ See *id.*

⁹⁶ Josh Voorhees, *The Final Days of Foie Gras?*, MOD. FARMER (June 11, 2021), <https://perma.cc/4GC2-NQMS>.

⁹⁷ Kenny Torrella, *The Fight Over Cage-Free Eggs and Bacon in California, Explained*, VOX (Aug. 10, 2021, 8:10 AM EDT), <https://perma.cc/4J9W-AXJF>; Christian M. Wade, *Baker Signs Tweaked Voter-Approved Chicken Cage Law*, GLOUCESTER DAILY TIMES (Dec. 22, 2021), <https://perma.cc/H2F4-3EZK>.

⁹⁸ Nils-Gerrit Wunsch, *Meat Substitutes Market in the U.S. - Statistics and Facts*, STATISTA (Nov. 29, 2021), <https://perma.cc/V8MQ-Q2LV>.

⁹⁹ See, e.g., *USDA to Proactively Post Slaughter Records to Settle Lawsuit by AWI, Farm Sanctuary*, FARM SANCTUARY (Jan. 4, 2022), <https://perma.cc/7D7P-WFM4> (summarizing a legal victory for

B. *The Limitation of CAAP Eligibility to Dogs and Cats Excludes Animals Used in Businesses Other Than Animal Agriculture*

The 2013 documentary *Blackfish* chronicled SeaWorld's practice of capturing orcas in the wild and the animals' subsequent cruel confinement that led to the deaths of several people, including an experienced SeaWorld trainer.¹⁰⁰ According to PETA, which has waged a years-long campaign against the company, "SeaWorld teaches the public the wrong lesson: that animals are ours to do with as we please."¹⁰¹ Of course, SeaWorld is not alone in teaching this lesson about captive animals forced to perform for human enjoyment.¹⁰² Rodeos are enormously popular in many states, with more than 600 rodeos recognized by the Professional Rodeo Cowboys Association.¹⁰³ Carriage horse rides are a staple of tourist entertainment in many cities.¹⁰⁴ More than 700 million people worldwide visit zoos and aquariums every year.¹⁰⁵

However, unlike livestock, some animals used in entertainment are protected by the federal Animal Welfare Act, which establishes minimal requirements for housing, food and sanitation.¹⁰⁶ In addition, states have created their own protections for animals used or exhibited for profit, such as New York's law prohibiting the use of carriage horses when the temperature exceeds ninety degrees Fahrenheit.¹⁰⁷ Despite these existing legal protections, Desmond's Law explicitly excludes captive animals and animals used or exhibited for profit from CAAP eligibility.¹⁰⁸

The reason for this exclusion is the same as that which motivated the livestock exclusion—the fear of judicial awareness of animal suffering—but the arguments are more nuanced.¹⁰⁹ Take for example the situation of New

animal advocates regarding transparency of inhumane conditions at U.S. slaughterhouses).

¹⁰⁰ BLACKFISH (CNN Films 2013).

¹⁰¹ *About PETA's Campaign to Save the Whales and Dolphins at SeaWorld*, PETA, <https://perma.cc/9F7V-NTJ6> (last visited Apr. 13, 2023).

¹⁰² See, e.g., Ron Beadle, *Why America's Most Famous Circus Was Destined to Fail*, THE CONVERSATION (Jan. 18, 2017, 7:21 AM EST), <https://perma.cc/HK3A-CE4J> (summarizing the history of Ringling Bros. and Barnum & Bailey and its reliance on exotic animal acts).

¹⁰³ JHREA, *The Economy of Rodeo*, W. RANCHES (Aug. 8, 2019), <https://perma.cc/6L9B-536Q>.

¹⁰⁴ Holly Cheever, *The Urban Carriage Horse Ride: A 21st Century Anachronism*, HUMANE SOC'Y VETERINARY MED. ASS'N (Feb. 19, 2014), <https://perma.cc/6YN6-VU5Z>.

¹⁰⁵ *WAZA Members*, WORLD ASS'N OF ZOOS & AQUARIUMS, <https://perma.cc/C4F3-7TEQ> (last visited Apr. 13, 2023).

¹⁰⁶ Animal Welfare Act, Pub. L. No. 89-544, 80 Stat. 350 (2018).

¹⁰⁷ *NYC Passes PETA-Backed Law That Protects Horses from Deadly Summer Heat*, PETA, <https://perma.cc/JRU8-JSNE> (last updated Nov. 30, 2022).

¹⁰⁸ Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)).

¹⁰⁹ See *Captive Animals*, ANIMAL LEGAL DEF. FUND, <https://perma.cc/42XM-H7SV> (last visited Apr. 13, 2023).

York City carriage horses, who are already protected by a number of specific regulations.¹¹⁰ In addition to general requirements for adequate food and water, the horses must be registered with the city and seen twice a year by a vet; their stalls must be at least sixty square feet so that the horses can safely turn around; they cannot work for more than nine hours a day; and they must get at least five weeks of furlough every year.¹¹¹ Yet, animal advocates argue that laws governing the physical care of carriage horses have no impact on the animals' psychological suffering.¹¹² For all their strength, horses are prey animals with a "highly developed and effective flight drive triggered when startled by an unexpected or threatening stimulus," such as loud traffic noises common in urban settings.¹¹³ Unlike police horses, who have large exercise rings, carriage horses are stabled individually and are not required to be turned out for relaxation periods with other horses.¹¹⁴ To provide CAAP protection for horses, or for any of the many kinds of animals that humans exploit for economic gain, is to prod people to think about animals as sentient beings who can suffer physical *and* psychological harms.¹¹⁵ A road that begins with understanding that some animals would never choose the life humans have created for them ends with people having to find new ways of earning a living.¹¹⁶

C. *The Limitation of CAAP Eligibility to Dogs and Cats Excludes Animals Routinely Kept as Pets Who Are Equally Likely to be Victims of Abuse*

The most nonsensical exclusion from CAAP eligibility is animals other than dogs and cats kept as pets in American homes.¹¹⁷ One reason for this exclusion could be that Desmond's Law always had the narrow goal of responding to the abuse and killing of a dog.¹¹⁸

Desmond was a boxer/pit bull mix who was surrendered to a Connecticut animal shelter in 2011 when his owner feared he might be

¹¹⁰ See N.Y.C. Admin. Code §§ 17-326–334.1 (2020).

¹¹¹ *Id.*; see also Natasha Daly, *The Bitter Controversy Surrounding NYC's Carriage Horse Industry*, NAT'L GEOGRAPHIC (Mar. 26, 2020), <https://perma.cc/2VRW-HQ2U>.

¹¹² See Daly, *supra* note 111.

¹¹³ Cheever, *supra* note 104.

¹¹⁴ Cheever, *supra* note 104; Daly, *supra* note 111; Anna Haines, *Why Should You Keep Your Horse in a Herd?*, HORSE & RIDER, <https://perma.cc/GA29-U3XV> (last visited Apr. 13, 2023).

¹¹⁵ See, e.g., *Commonwealth v. Duncan*, 467 Mass. 746, 747 (2014) (holding that "animals, like humans" deserve protection of emergency aid exception to constitutional warrant requirement).

¹¹⁶ See, e.g., Gordon Atkins, *22 Profitable Animals You Should Raise*, NEW LIFE ON A HOMESTEAD (Mar. 8, 2023), <https://perma.cc/WU7F-ZG2X> ("Alligators are super cute when tiny, so there's a hefty profit to be made by breeding them for this market. The animal meat, though, is where the real profit is.").

¹¹⁷ Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)).

¹¹⁸ Rubin, *Court Advocate Program*, *supra* note 19, at 263.

dangerous to her newborn baby.¹¹⁹ While she and the baby's father, Alex Wullaert, were fighting over custody and support, Wullaert found Desmond at the shelter and adopted him.¹²⁰ A year later, Desmond's body was discovered stuffed in a trash bag, with clear signs of long-term neglect and extreme physical abuse.¹²¹ Despite overwhelming evidence (including a confession) that Wullaert had tortured and killed Desmond, as well as abused his ex-girlfriend, the court ignored the prosecutor's request for jail time and sentenced him to a diversionary program.¹²² This light sentence was no fluke; "between 2008 and 2018, only one in five of those charged with animal cruelty in Connecticut had their cases prosecuted to a conclusion."¹²³ Desmond's Law was the first attempt in the nation to respond to the under-enforcement of anti-cruelty laws in general, but it arose out of the specifics of Wullaert's intentional and extreme abuse of an individual dog.¹²⁴

The limitation of CAAP to dogs and cats also could make sense given that dogs and cats are by far the most common household pets, with a 2017 survey estimating that American households kept over seventy million dogs and nearly sixty million cats as companion animals.¹²⁵ However, Americans are nothing if not adventurous in their pet possibilities; one recent survey reported ownership of huge numbers of pet fish (11.8 million), birds (9.9 million), small animals (6.2 million), reptiles (5.7 million), and horses (3.5 million).¹²⁶ There is no reason to assume that these types of animals would not equally be victims of the same kind of abuse as dogs and cats, and in fact they may be even more commonly abused because of their unique needs.¹²⁷ Dogs and cats have been living domesticated lives among humans for at least ten thousand years.¹²⁸ In that time, humans have learned how to feed and care for them in ways that extend their lifespans, and have even intentionally altered their very bodies and personalities to better suit human needs and preferences.¹²⁹ However, non-traditional pets, such as reptiles and

¹¹⁹ *The Story of Desmond and His Army*, DESMOND'S ARMY ANIMAL L. ADVOCs., <https://perma.cc/4P5K-7UNT> (last visited Apr. 13, 2023).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Rubin, *Court Advocate Program*, *supra* note 19, at 263.

¹²³ Rubin, *Court Advocate Program*, *supra* note 19, at 263.

¹²⁴ Rubin, *Animal Advocacy*, *supra* note 83, at 244–45.

¹²⁵ U.S. *Pet Ownership Statistics*, AM. VETERINARY MED. ASS'N, <https://perma.cc/2WXM-8L9X> (last visited Apr. 13, 2023).

¹²⁶ *Facts + Statistics: Pet Ownership and Insurance*, INS. INFO. INST., <https://perma.cc/D82T-G44Y> (last visited Apr. 13, 2023).

¹²⁷ See Allison Matyus, *Exotic Pets Require Different Types of Care*, CHI. TRIB. (July 1, 2015, 4:16 PM), <https://perma.cc/4P8X-AKUU>.

¹²⁸ Ed Yong, *A New Origin Story for Dogs*, THE ATL. (June 2, 2016), <https://perma.cc/R2YS-Q3EY>; David Zax, *A Brief History of House Cats*, SMITHSONIAN MAG. (June 30, 2007), <https://perma.cc/TUV9-6WSF>.

¹²⁹ Malcolm Weir & Lynn Buzhardt, *Designer Dog Breeds*, VCA ANIMAL HOSP.,

birds, often require more expensive and elaborate support, as well as vet care that can be hard to find.¹³⁰ Failing to provide an animal the conditions it needs to flourish does not rise to the level of intentional harm that prompted the passage of Desmond's Law, but it could result in the same kind of physical and psychological damage to the animal victim.¹³¹

Without the economic pressures that accompany treatment of livestock or entertainment-use animals, extending CAAP eligibility to non-traditional pets is an effective way of encouraging owners to educate themselves about what their particular pets need.¹³² However, extending that protection would require society to decide which companion animals it believes deserve inclusion.¹³³ Arguably, the more unusual the pet, the more useful the CAAP advocate would be to a court likely unfamiliar with the animal's unique needs.¹³⁴ At the same time, opening up eligibility to all of the many animals that could legally be owned as pets might drive courts down a rabbit hole of more and more specialized situations.¹³⁵ Nevertheless, there is simply no logical reason for CAAP to include cats but exclude ferrets; if a CAAP state permits a resident to keep both as a pet, it must also be willing to give both animals the same access to CAAP representation.¹³⁶

D. *The Imprecise Definition of the CAAP Advocate's Position Hinders Advancement of Animals' Legal Status*

Although Desmond's Law does not require the appointment of a CAAP advocate in eligible cases, it appears to be a popular choice for courts.¹³⁷ As

<https://perma.cc/7D3X-ULV2> (last visited Apr. 13, 2023) ("Intentional mixing of breeds optimizes the best characteristics of each parent.").

¹³⁰ *Caring for Reptiles and Other Exotic Pets*, RSPCA, <https://perma.cc/75GV-GENZ> (last visited Apr. 13, 2023).

¹³¹ See Laurie Hess, *10 Things You Should Know Before Getting a Ferret*, VETSTREET (Mar. 1, 2015), <https://perma.cc/VH6Z-YP83> (noting the extreme exercise and social needs of ferrets).

¹³² See *Which Animals Are Hardest to Treat?*, TUTTNAUER (Sept. 23, 2018), <https://perma.cc/PN4T-H9Y6>.

¹³³ See *The Animal Welfare Act: What It Does and Who It Protects*, THE HUMANE LEAGUE (Jan. 21, 2021), <https://perma.cc/TZF6-2GV2> (noting the many animals excluded from federal protections against inhumane treatment); see also Nicole Pallotta, *Animal Cruelty Charges Dropped Because Fish Are Not "Animals" Under North Carolina Law*, ANIMAL LEGAL DEF. FUND (June 11, 2019), <https://perma.cc/S652-B4RV>.

¹³⁴ See Rubin, *Court Advocate Program*, *supra* note 19, at 267 (explaining "[a]dvocates contribute expertise to recommend fair and specific outcomes").

¹³⁵ See, e.g., *Pet Ownership in Public Housing*, PIH 3 (HUD Dec. 2020), <https://perma.cc/4KLU-4DAG> ("[S]ome PHAs have defined common household pets to include domesticated animals such as a dog, cat, bird, rodent (including a rabbit), fish, or turtle, that is traditionally kept in the home for pleasure rather than for commercial purposes.").

¹³⁶ See Rubin, *Animal Advocacy*, *supra* note 83, at 254 (arguing that the limitation of Desmond's Law to dogs and cats is a "frustrating shortcoming").

¹³⁷ Rubin, *Animal Advocacy*, *supra* note 83, at 254.

of November 2020, student advocates from the University of Connecticut's Animal Law Clinic alone have appeared in forty animal abuse cases, and statewide, only one court to date has declined to appoint an advocate in a case where a party made the request.¹³⁸ It is certainly a law that would appeal to busy courts and prosecutors as it permits advocates to "consult any individual with information that could aid the judge," including "animal control officers, veterinarians[,] and police officers."¹³⁹ Advocates perform research, present written recommendations to the court, and appear in court to explain their findings, all at no cost to the state.¹⁴⁰

In its initial form, Desmond's Law precisely defined the advocate's job as representing the animal victim, but this wording was soon changed to representing the "interests of justice."¹⁴¹ The change was necessary to avoid creating legal standing for the animal victim, something no American court has ever permitted.¹⁴² Indeed, the Connecticut Veterinary Medical Association and the Connecticut Federation of Dog Clubs and Responsible Dog Owners strongly opposed the original wording.¹⁴³ These groups argued that allowing animals their own advocate would fundamentally change the relationship between pets and their owners, and potentially dilute humans' property rights over their pets.¹⁴⁴ Supporters of Desmond's Law dismiss worries about the changed wording and focus instead on how the law supports "vigorous enforcement of anti-cruelty statutes," regardless of the legal particularities of who represents whom and how far that representation extends.¹⁴⁵ In their view, "the interests of justice" phrasing may result in even more successful outcomes because it "allows an advocate and a court to consider a broader range of interests, including those of community safety and other potential victims."¹⁴⁶

Critics of Desmond's Law's compromised language argue that the imprecise definition of the advocate's role in legal proceedings undermines the larger project of securing animals' legal rights.¹⁴⁷ Framing the advocate's relationship to the animal victim in terms that elide the very presence of the victim reflects not an improvement to what can be accomplished for animals

¹³⁸ Rubin, *Court Advocate Program*, *supra* note 19, at 268; Rubin, *Animal Advocacy*, *supra* note 83, at 254.

¹³⁹ Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)).

¹⁴⁰ Rubin, *Animal Advocacy*, *supra* note 83, at 257.

¹⁴¹ Rubin, *Animal Advocacy*, *supra* note 83, at 254.

¹⁴² Rubin, *Animal Advocacy*, *supra* note 83, at 254.

¹⁴³ Bala, *supra* note 73.

¹⁴⁴ Jessica Rubin, *How Dogs and Cats Can Get Their Day in Court*, THE CONVERSATION (Nov. 2, 2017, 7:39 PM EDT), <https://perma.cc/2X22-N4F3>.

¹⁴⁵ *Id.*

¹⁴⁶ Rubin, *Animal Advocacy*, *supra* note 83, at 254.

¹⁴⁷ Bala, *supra* note 73.

but rather an “underlying fear of giving animals too much of a voice.”¹⁴⁸ In so doing, Desmond’s Law made a fatal compromise that has only strengthened the judicial perception of animals as a type of property.¹⁴⁹ While the animal victim’s interests may be intertwined to some degree with humans’ interests, it is the latter that governs.¹⁵⁰ The CAAP advocate represents the “interests of justice” in a case against a human being, and the animal’s suffering is relevant insofar as it helps a court determine what justice demands as punishment for the human defendant.¹⁵¹ This derivative value system, in which the animal’s value is tied to what it can do for people, may indeed result in more convictions and longer sentences for animal abusers, but it does little to advance a judicial valuing of an animal’s independent interests.¹⁵²

The criticism of Desmond’s Law’s limitations may be misplaced given the law’s purpose as an animal welfare statute rather than an animal rights statute.¹⁵³ In other words, it advocates for the humane treatment of animals without trying to convince courts that animals have “inherent, legal rights that are equal to humans’ legal rights.”¹⁵⁴ While the advocate’s work may raise judicial awareness of animals’ individual suffering, CAAP aims to increase convictions for abusers and fix sentencing imbalances.¹⁵⁵

There is an intermediate step that the authors of Desmond’s Law could have pursued to advance the goals of both animal rights and animal welfare groups: the creation of a guardian ad litem (“GAL”) for an animal victim.¹⁵⁶ While many news reports about Desmond’s Law initially defined CAAP advocates as guardians, the positions are not identical.¹⁵⁷ Both a CAAP advocate and a GAL can be appointed by the court to gather and report facts

¹⁴⁸ Bala, *supra* note 73.

¹⁴⁹ See Amie J. Dryden, Comment, *Overcoming the Inadequacies of Animal Cruelty Statutes and the Property-Based View of Animals*, 38 IDAHO L. REV. 177, 181 (2001).

¹⁵⁰ See *id.* at 191–92 (noting the many exemptions from cruelty statutes for types of animals or types of activities associated with animals).

¹⁵¹ See Kelsey Kobil, Comment, *When It Comes to Standing, Two Legs are Better Than Four*, 120 PENN ST. L. REV. 621, 626 (2015) (“Courts and lawmakers alike have long recognized that animals should be treated as property in accordance with the law.”).

¹⁵² See MARCEAU, *supra* note 72, at 79 (“[It] seems very likely that the presence of skilled . . . attorneys . . . will impact the disposition of many cruelty cases, if for no other reason than that the judge is forced to understand that members of the community, and even parties in addition to the prosecutor’s office, desire incarceration.”).

¹⁵³ See Kobil, *supra* note 151, at 623.

¹⁵⁴ Kobil, *supra* note 151, at 623.

¹⁵⁵ See Rubin, *Animal Advocacy*, *supra* note 83, at 245.

¹⁵⁶ See Rebecca J. Huss, *Lessons Learned: Acting as Guardian/Special Master in the Bad Newz Kennels Case*, 15 ANIMAL L. 69, 70 (2008).

¹⁵⁷ See Nicole Pallotta, *Unique Connecticut Law Allows Court-Appointed Advocates to Represent Animals*, ANIMAL LEGAL DEF. FUND, <https://perma.cc/5VMD-G42K> (last visited Apr. 13, 2023).

and research relevant to the case.¹⁵⁸ However, unlike a CAAP advocate, a GAL appointed as a “next friend,” can actually represent the interests of the protected person; for example, a GAL would represent the interests of a minor child in a custody or adoption case, reporting to the court on the advantages and disadvantages of courses of action affecting the child.¹⁵⁹ The standard in such cases is the best interests of the protected person.¹⁶⁰ The CAAP advocate, on the other hand, can never represent the animal victim’s interests, even if that animal has survived the abuse.¹⁶¹ Representing instead the “interests of justice” and speaking as a supposed neutral party, the CAAP advocate’s purpose is limited to helping the court decide what will happen to the human defendant.¹⁶²

This difference in neutrality between the GAL and the CAAP advocate is important because it maintains animals’ status as quasi property rather than legal persons.¹⁶³ However, there is a well-known and highly successful precedent for something like the GAL option in animal abuse cases: the appointment of a guardian/special master for the approximately fifty pit bulls seized in 2007 from Michael Vick’s Bad Newz Kennels.¹⁶⁴ Because of the case’s high profile and extremely disturbing facts, the dogs’ situation drew nationwide attention from respected animal organizations such as the American Society for the Protection of Cruelty to Animals (ASPCA) and Best Friends Animal Sanctuary; this attention, combined with the complexity of the federal criminal and civil charges, resulted in the unusual appointment of Rebecca Huss as the dogs’ guardian.¹⁶⁵ Huss’s goal was to ensure that “each dog be considered as an individual” and that each dog be matched with a rescue organization that fit the dog’s particular needs.¹⁶⁶ The court’s willingness to appoint a guardian in such a case suggested a concomitant willingness to see the dogs as individual victims with unique injuries that the court needed help to understand.¹⁶⁷

Had Desmond’s Law built on this precedent and framed the CAAP

¹⁵⁸ See SEAN M. DUNPHY, STANDARDS FOR CATEGORY F GUARDIAN AD LITEM INVESTIGATORS 2–3 (2005), <https://perma.cc/W87U-EXLJ>.

¹⁵⁹ MASS. GEN. LAWS ch. 190B, § 1-404 (2012); see also COURTNEY M. HOSTETLER & JAMIE A. SABINO, *Guardian Ad Litem*, in FAMILY LAW ADVOCACY FOR LOW AND MODERATE INCOME LITIGANTS 305, 306 (3rd ed. 2018).

¹⁶⁰ See HOSTETLER & SABINO, *supra* note 159, at 306.

¹⁶¹ See Pallotta, *supra* note 157.

¹⁶² See MARCEAU, *supra* note 72, at 80 (“[I]t is not clear whether the system entrenches greater respect for animal autonomy, or merely a greater likelihood of incarceration.”).

¹⁶³ See David R. Schmahmann & Lori J. Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 775 (1995) (“[O]ur legal system simply was not designed to resolve interspecies disputes.”).

¹⁶⁴ Huss, *supra* note 156, at 70.

¹⁶⁵ Huss, *supra* note 156, at 82–83.

¹⁶⁶ Huss, *supra* note 156, at 78.

¹⁶⁷ See Pallotta, *supra* note 157.

advocate in traditional judicial terms, it might have done more to “specifically position the advocates as prioritizing the needs of animal victims.”¹⁶⁸ Instead, the CAAP advocate inhabits an uncertain middle ground, “shar[ing] the same responsibility as prosecutors” without the prosecutor’s defined relationship to the proceedings.¹⁶⁹ This strange position results in part from the fact that the law generally does not recognize animals as victims since they are not legal persons.¹⁷⁰ A recent Washington case, *State v. Abdi-Issa*, illustrates the confusing effects of this exclusion.¹⁷¹ In that case, Abdi-Issa was charged with animal cruelty for abusing and killing his girlfriend’s dog, a chiweenie named Mona, during a violent argument in public.¹⁷² The vicious attack, which involved beating and kicking, was witnessed by a third party who was traumatized by the event.¹⁷³ The jury found that (1) both Mona and her owner were victims and (2) the foreseeable impact on someone other than the victim (i.e., the witness) permitted a sentencing enhancement under the state’s Sentencing Reform Act (“SRA”).¹⁷⁴ Abdi-Issa was convicted of first-degree animal cruelty and sentenced to eighteen months of confinement.¹⁷⁵ In addition, the judge found that the conviction could be assigned a domestic violence designation, which allowed the judge to issue a protection order for the owner.¹⁷⁶

The Appellate Court reversed, concluding that because state law defined “victim” as a “person,” Mona—despite having received the actual beating and kicking and having died as a result—could not be a victim.¹⁷⁷ The Court also concluded that the owner was not a victim of animal cruelty, since she had only a property interest in Mona and the state had not charged Abdi-Issa with destruction of personal property.¹⁷⁸ Since Mona, although quite dead, could not be a victim, and her owner could not be a victim under the applicable animal cruelty statute, Abdi-Issa’s contention that this was a

¹⁶⁸ Pallotta, *supra* note 157.

¹⁶⁹ Pallotta, *supra* note 157.

¹⁷⁰ *Contra* People v. Harris, 405 P.3d 361, 372 (Colo. App. 2016) (noting that the “unit of prosecution” in animal cruelty statutes is each individual animal victim); *State v. Fessenden*, 333 P.3d 278, 286 (Or. 2014) (concluding animals are victims under animal welfare statutes).

¹⁷¹ *State v. Abdi-Issa*, No. 80024-8-1, 2021 WL 595085, at *3, 5 (Wash. Ct. App. Feb. 16, 2021).

¹⁷² *Id.* at *1–2.

¹⁷³ *Id.* at *1.

¹⁷⁴ *Washington State Supreme Court Rules Animal Cruelty Can Be a Crime of Domestic Violence*, ANIMAL LEGAL DEF. FUND (Mar. 9, 2022), <https://perma.cc/8VGG-M76Q> [hereinafter *Domestic Violence*].

¹⁷⁵ *Abdi-Issa*, 2021 WL 595085 at *2.

¹⁷⁶ *Id.*; WASH. REV. CODE § 10.99.040 (1979).

¹⁷⁷ *Abdi-Issa*, 2021 WL 595085 at *3; *see also* WASH. REV. CODE § 9.94A.030 (2021) (confining definition of “victim” to “any person”).

¹⁷⁸ *Abdi-Issa*, 2021 WL 595085 at *4 (“[W]e consider pets personal property as a matter of law.”).

“victimless crime[]” appeared to have prevailed.¹⁷⁹ In addition, since there was no victim, no sentencing enhancement was allowed under the SRA.¹⁸⁰ In February 2022, the Washington Supreme Court reversed in part, concluding that Mona’s owner and the witness were indeed victims who suffered “emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.”¹⁸¹ Mona herself remained just as dead and just as unrecognized as a victim.¹⁸²

The back-and-forth of the Washington courts reveals an uncertainty among lawmakers and judges over how to deal with people who harm or kill animals and how to compensate others harmed by animal abuse.¹⁸³ It seems absurd to conclude that a dead dog cannot be a victim of a human’s cruel acts, especially when there are statutes that define corporations or governmental agencies as victims.¹⁸⁴ Yet, without that legally recognized status, a CAAP advocate cannot fully represent an animal, a defendant cannot fully take responsibility, and a court cannot fully adjudicate all the genuine interests at issue.¹⁸⁵ Until state legislatures confront the irrational results their statutory exclusion of animals produces, the CAAP advocate’s full value to animal cruelty proceedings will remain untapped.¹⁸⁶

E. *The Imprecise Definition of the CAAP Advocate’s Position Threatens the Defendant’s Right to a Fair Trial*

The CAAP advocate’s charge to represent the “interests of justice” may, as its supporters claim, allow a court to examine a broader range of interests, but it also comes up against a tenet of the American legal system: the prosecutor in a criminal animal abuse trial already represents the interests of justice.¹⁸⁷ The prosecutor can function as an impartial advocate for the concept of justice precisely because the prosecutor does not represent the victim, but rather the state’s interest in addressing a violation of the law.¹⁸⁸

¹⁷⁹ *Id.* at *2.

¹⁸⁰ *Id.* at *3.

¹⁸¹ *Domestic Violence*, *supra* note 174.

¹⁸² See *Domestic Violence*, *supra* note 174 (“The issue of whether or not an animal could ever be considered a victim was not an issue the Washington Supreme Court addressed in this case.”).

¹⁸³ See *Domestic Violence*, *supra* note 174 (noting the Washington Appellate Court’s “convoluted . . . line of logic”).

¹⁸⁴ See, e.g., DEL. CODE ANN. TIT. 11, § 9401(7) (2005).

¹⁸⁵ See Andrew N. Ireland Moore, *Defining Animals as Crime Victims*, 1 J. ANIMAL L. 91, 97 (2005) (“[T]he definition of a crime victim varies and is not solely limited to human beings. There is precedent for entities, other than natural persons, to be considered victims. This flexible approach leaves room for animals to be considered crime victims as well.”).

¹⁸⁶ See *id.* at 102–03 (“If animals are considered crime victims, animal advocates may pursue participation in plea bargains between the state and the defendant . . . [and have] the opportunity to oppose [a] plea bargain in front of the judge.”).

¹⁸⁷ Bala, *supra* note 73.

¹⁸⁸ Bala, *supra* note 73.

In the case of animal abuse, society has decided that the actual harm to animals and the potential harm to humans warrant legal punishment.¹⁸⁹ However, just as happens with human victims, the prosecutor's decision to proceed is obviously not dependent on the wishes of the animal victim.¹⁹⁰

It is not clear that the CAAP advocate is in the same impartial position.¹⁹¹ While the advocate's duties appear objectively neutral (e.g., investigating facts, reviewing records), the position itself is called an "animal advocate," and those who serve as advocates are all volunteers, motivated presumably by a desire to help animals get justice for their suffering.¹⁹² Desmond's Law itself was grounded in the public lobbying of Desmond's Army, a group of vocal animal law advocates who have pledged to appear in "every animal abuse court case" throughout Connecticut and to fundraise for an animal victim's medical needs or reward fund.¹⁹³ This lack of impartiality is built into the very foundations of CAAP; when faced with a need to help courts adjudicate animal abuse cases more effectively, "lawmakers did not provide an investigator, special prosecutor, or additional funding mechanism for the prosecutor's office; [they] created a separate advocate."¹⁹⁴

The CAAP advocate's status as a reporting voice but not a witness subject to cross-examination results in criticism that the advocate is, in truth, simply another arm of the prosecution seeking to punish the defendant.¹⁹⁵ Even if the advocate is accepted as an accurate interpreter of the animal victim's experience and needs, the advocate's under-defined role within the system feeds the suspicion that the advocate is "actually just a judicially sanctioned opportunity to advocate for the thoroughly human interest in maximal punishment."¹⁹⁶ While no data are yet available on the rate at which advocates recommend incarceration over diversionary programs for animal abusers, CAAP insists its advocates are "neutral resource[s] for the court."¹⁹⁷ However, in a promotional video for the program posted on the Animal Legal Defense Fund's website, supporters of the program encourage viewers to advocate for animals, and the interviews are interspersed with images of

¹⁸⁹ See Nancy Perry, *A Quarter of a Century of Animal Law: Our Roots, Our Growth, and Our Stretch Toward the Sun*, 25 ANIMAL L. 395, 398 (2019).

¹⁹⁰ See MARCEAU, *supra* note 72, at 80 (questioning whether humans can legitimately speak for nonhuman animals, who may "prefer forgiveness" to incarceration).

¹⁹¹ See Bala, *supra* note 73.

¹⁹² See Rubin, *Animal Advocacy*, *supra* note 83, at 257.

¹⁹³ *About*, DESMOND'S ARMY ANIMAL L. ADVOCES., <https://perma.cc/R77P-K9JQ> (last visited Apr. 13, 2023).

¹⁹⁴ Bala, *supra* note 73.

¹⁹⁵ See MARCEAU, *supra* note 72, at 82 ("It would be a terrible irony if by inserting a human 'voice' to speak for the animals, courtroom advocates would once again be using animals to serve characteristically human interests in revenge or in the name of preventing future violence against humans.").

¹⁹⁶ MARCEAU, *supra* note 72, at 81.

¹⁹⁷ Rubin, *Court Advocate Program*, *supra* note 19, at 268.

adorable dogs and cats set to melancholy music and footage of Desmond's abuser walking to court through a crowd of Desmond's Army supporters.¹⁹⁸ The student advocate who unsuccessfully argued for incarceration for Desmond's abuser remarked after the hearing that the CAAP's very presence "showed the animals do have a voice."¹⁹⁹ A third-year student advocate created the same level of suspicion about the advocates when she described having "jumped into the program because she has always been passionate about animal advocacy."²⁰⁰

It is difficult to imagine that lawyers and law students who want to *decrease* the severity of animal abusers' sentences would be volunteering for this program, especially given the program's initial impetus to address the dearth of prosecutions in animal abuse cases and its touting of research that ties animal abuse to later interpersonal violence.²⁰¹ That is not to say that advocates are, as one critic has suggested, part of a larger animal protection movement to "influence and infiltrate the prosecutorial ranks" in order to ensure harsher punishments.²⁰² In fact, both Connecticut's and Maine's CAAP statutes allow either party to request the appointment of an advocate.²⁰³ The threat to a fair trial does not result from which side requests an advocate since the court itself selects the advocate from a pre-approved list, and because the advocate is not called as a witness, no cross-examination by the opposing party is allowed.²⁰⁴ Rather, fairness to both sides is undermined by the advocate's murky relationship to the proceedings.²⁰⁵ Working under the imprecise "interests of justice" banner, CAAP advocates are a strange hybrid of neutral advocacy: they do not, because they legally cannot, actually advocate for the victim whose interests they legally cannot, but seem to, represent.²⁰⁶

¹⁹⁸ CAAP, *supra* note 58.

¹⁹⁹ Laurel Wamsley, *In a First, Connecticut's Animals Get Advocates in the Courtroom*, NPR (June 2, 2017, 5:46 PM ET), <https://perma.cc/T9PF-4SW7> (quoting Taylor Hansen).

²⁰⁰ Jeanne Leblanc, *UConn Law Team Pioneers Courtroom Advocacy for Animals*, UCONN TODAY (Sept. 15, 2017), <https://perma.cc/45XB-R2X5>.

²⁰¹ See Rubin, *Court Advocate Program*, *supra* note 19, at 264.

²⁰² MARCEAU, *supra* note 72, at 85.

²⁰³ Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)); ME. STAT. TIT. 7 § 4016 (2019).

²⁰⁴ 2016 Conn. Pub. Acts No. 16-30.

²⁰⁵ Compare MARCEAU, *supra* note 72, at 78-79 ("[Desmond's Law] treats animal advocates as official parties to a criminal case."), with Rubin, *Court Advocate Program*, *supra* note 19, at 268 ("[Advocates serve] as a resource not affiliated with either prosecution or defense.").

²⁰⁶ See Bala, *supra* note 73 ("The language of Desmond's Law demonstrates the continuing ambivalence in framing the status of animals in the law.").

IV. The Next Iteration of Desmond's Law Must Redefine CAAP's Two Key Provisions

A. Massachusetts Must Extend CAAP to Include Pets Other than Dogs and Cats

The most obvious flaw in Desmond's Law—the limitation of CAAP coverage to cases involving only dogs and cats—is the easiest to fix, since it does not involve extending any additional legal rights to animals.²⁰⁷ It merely requires a legislature to review its regulations on pet ownership and write that coverage into its CAAP statute.²⁰⁸ For example, Massachusetts, like every state, already restricts the kind and number of animals that residents can legally own as domestic pets.²⁰⁹ These include both animals that can be purchased from merchants (ferrets, koi, pythons, toucans) and those that can be taken directly from the wild (certain species of toads and frogs).²¹⁰ The Commonwealth places strict bans on ownership and possession of certain dangerous animals, such as crocodiles and wolf/dog hybrids, and on animals considered wild by nature, such as migratory birds.²¹¹ While the lists of permissible pets have lengthened as people have become more interested in keeping exotic animals, allowing CAAP advocates to appear in all cases involving legally-owned animals appears to demand nothing more than checking those lists, with no need for any legal hand-wringing over animal sentience and the legal rights it might confer.²¹²

For animal advocates working to extend legal rights to animals, expanding CAAP to animals that can be legally owned, but with whom people may have had little personal experience, functions as the sort of public outreach that farm animal sanctuaries have been doing for years.²¹³ A visit to any such sanctuary will likely offer a tour allowing direct physical contact with cows, sheep, and pigs, accompanied by a narrative of the animals' daily lives in sanctuary contrasted with the lives they would have faced on a factory farm.²¹⁴ Such experiences attempt to increase people's

²⁰⁷ See generally Schmahmann & Polacheck, *supra* note 163, at 747 (“[W]hat ‘rights’ for animals unavoidably entails as a matter of constitutional and civil law—raises issues that go to the core of our assumptions about ourselves and about the nature, aims, and limits of our institutions.”).

²⁰⁸ See, e.g., MASS. GEN. LAWS ch. 131, § 23 (2022) (outlining the procedure for establishing a special exemption list of “fish, birds, mammals, reptiles and amphibians” that may be owned).

²⁰⁹ See *Wildlife as Pets*, MASS.GOV, <https://perma.cc/H5E2-9WDL> (last visited Apr. 13, 2023).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See, e.g., *Exotic Animal Laws by State*, FINDLAW, <https://perma.cc/6Y3F-ADQZ> (last updated May 21, 2021).

²¹³ See *About Us*, FARM SANCTUARY, <https://perma.cc/6WR8-ZFWM> (last visited Apr. 13, 2023).

²¹⁴ See *The Power of Sanctuary*, FARM SANCTUARY, <https://perma.cc/DA3G-3NXV> (last visited Apr. 13, 2023).

empathy for all animals as individuals, and thus lead people to question their choices about what they eat, what they wear, and what they do for fun.²¹⁵ Similarly, allowing CAAP advocates to inform the courts about the abuse of bullfrogs and ostriches, as well as of dogs and cats—all of which Massachusetts allows to be kept as pets—has the potential to change how judges understand the broad reach of animal abuse and the specific damage done to animal victims.²¹⁶

The case of Claire Bilida's pet raccoon illustrates that judges may be open to such a change in attitude.²¹⁷ Bilida had found an orphaned baby raccoon in the wild and had raised it uneventfully as a pet for seven years until it was seized by the Warwick police (without a warrant) and destroyed by the Rhode Island Department of Environmental Management.²¹⁸ The First Circuit Court of Appeals rejected Bilida's § 1983 claim against the police for violation of due process, concluding that Bilida had no property interest in an animal she was not legally allowed to own under Rhode Island law.²¹⁹ However, the Court devoted a paragraph to its displeasure with the state's decision to euthanize the raccoon, allegedly for rabies testing, without providing Bilida an opportunity to object.²²⁰ Concluding that no state law required immediate euthanasia and no genuine emergency existed regarding that specific animal's behavior, the Court closed its opinion this way: "It need hardly be said that [the ruling against Bilida] is not an endorsement of the state's procedures for treatment of pet raccoons."²²¹

If Massachusetts elects to follow New Jersey and Maine in adopting a version of Desmond's Law, basic fairness and a recognition of the Commonwealth's statutes on pet ownership demand an extension of CAAP protection to all animals allowed as pets.²²² Building on its long history of recognizing people's ethical obligation to the animals over which they have dominion, Massachusetts is uniquely positioned among the states to take this logical step forward in animal protection.²²³

²¹⁵ See, e.g., Emily Scott, *8 Ethical Travel Tips for Your Next Vacation*, TWO DUSTY TRAVELERS, <https://perma.cc/Q6PF-8CQF> (last visited Apr. 13, 2023) (rejecting tourist activities that exploit wildlife, such as riding an elephant or swimming with captive dolphins).

²¹⁶ See Rubin, *Animal Advocacy*, *supra* note 83, at 245 ("Understanding animal sentience informs our treatment of animals, including the protections that we afford them and the concept of justice in cases where they have been harmed by humans.").

²¹⁷ See *Bilida v. McCleod*, 211 F.3d 166, 173 (1st Cir. 2000).

²¹⁸ *Id.* at 169.

²¹⁹ *Id.* at 173.

²²⁰ *Id.*

²²¹ *Id.* at 175.

²²² See Rubin, *Animal Advocacy*, *supra* note 83, at 254 (expressing frustration at the law's limitation to dogs and cats).

²²³ See WARD, *supra* note 21, at 273.

B. *Massachusetts Must Restructure CAAP to Increase Public Trust in the Program and Ensure Fairness to the Defendant*

Under the language of Desmond's Law, either party has the right to request the appointment of a CAAP advocate, and as a neutral party, the advocate is ethically bound not to favor either side.²²⁴ If, after researching the facts and circumstances of a case, the CAAP advocate determines that a diversionary program is the appropriate sentence, the advocate is ethically bound to make that recommendation to the court.²²⁵ Such a disinterested response is certainly possible.²²⁶ If, for example, a defendant is charged with leaving an animal in a hot car believing that the car was a safer place for the animal at the moment, education on the dangers of such behavior would seem to be a better alternative to incarceration.²²⁷ Even for cases where there was some level of intentional abuse, diversionary programs that give offenders insight into their behavior and the damage they have caused have the potential to protect people and animals from future abuse in ways that incarceration, with its narrower punitive scope, may not.²²⁸

Indeed, in cases requiring only better education or some cognitive behavioral therapy, the CAAP advocate's job to represent the "interests of justice" rather than the interests of the animal victim may be a benefit to the defendant.²²⁹ When the details of a particular instance of animal abuse evoke significant community outrage, as was the case with Desmond's torture and killing, a prosecutor may face considerable public pressure to overcharge or stretch the facts of a case to qualify for longer incarceration periods.²³⁰ As a volunteer who is neither paid by the state nor functions as the public face of the criminal justice system's response to animal abuse, the CAAP advocate may feel freer to recommend sentences that do not involve jail time.²³¹

²²⁴ Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)) (allowing also for the court to appoint the advocate *sua sponte*).

²²⁵ See Rubin, *Animal Advocacy*, *supra* note 83, at 259 ("[I]t is imperative that the advocate consider whether the charges are appropriate for the conduct alleged.").

²²⁶ *Contra* Marceau, *supra* note 80, at 774 (arguing that the history of Desmond's Law suggests that CAAP was never meant to benefit the defense and prosecution equally).

²²⁷ See *Animal Cruelty Diversion Programs - SAGE Counseling*, KNOW YOUR RIGHTS, at 17:40–18:10 (Know Your Rights podcast Nov. 22, 2021), <https://perma.cc/8C59-H6R9> (podcast).

²²⁸ See, e.g., BARK: Behavior, Accountability, Responsibility, and Knowledge: An Intervention Program for Animal Maltreatment Offenders, ANIMALS & SOC'Y INST., <https://perma.cc/8GGP-RZUL> (last visited Apr. 13, 2023).

²²⁹ See Marceau, *supra* note 80, at 776 (positing that Desmond's Law may actually have prompted more serious study of the need for rehabilitative sentences).

²³⁰ See AM. PROSECUTORS RSCH. INST., ANIMAL CRUELTY PROSECUTION: OPPORTUNITIES FOR EARLY RESPONSE TO CRIME & INTERPERSONAL VIOLENCE 32 (2006).

²³¹ See Marceau, *supra* note 80, at 776 ("[I]t is . . . possible that sentences are materially increasing . . . because of a more general awareness of the significance of animal abuse based on the media surrounding Desmond's Law.").

However, it is precisely this status as a volunteer, rather than as an expert witness or GAL, that raises questions about the CAAP advocate's impartiality.²³² Desmond's Law arose out of a case involving the extreme intentional abuse, torture, and killing of a dog.²³³ Despite the violence of the crime, Desmond's abuser was sentenced to the state's two-year "accelerated rehabilitation" program, which is usually available to defendants who have committed "certain non-serious crimes and who the court does not think are likely to offend again in the future."²³⁴ If Desmond's abuser completed the program, his conviction would be expunged.²³⁵ It is difficult to read the details of Desmond's death and believe that such a sentence served the interests of justice.²³⁶ Desmond's Law and the CAAP advocates grew out of a desire to ensure that courts would handle "animal cruelty cases more thoroughly and vigorously" than had happened in Desmond's case.²³⁷ State Representative Diana Urban and Professor Jessica Rubin collaborated for years prior to the law's passage studying statistics they believed proved that "the vast majority of cruelty cases [in Connecticut] were dismissed or not prosecuted."²³⁸ In addition, the University of Connecticut ensured that CAAP "would be sustainable because the law school would build an animal advocacy program to implement Desmond's Law."²³⁹ It is possible to understand this origin story as synonymous with the disinterested desire to ensure proper sentences for all defendants, but the more likely perception is that CAAP volunteers (many of whom are students in the University of Connecticut's Animal Law Clinic) are at best antagonistic to the defendant, and at worst working with the prosecutor to convey one message: "The more prison, the better."²⁴⁰

In adopting CAAP, Massachusetts must restructure the advocate's role to counter this perception of an unfair two-pronged prosecution.²⁴¹ Ideally,

²³² See Pat Eaton-Robb, *In One State, Abused Animals Get a Legal Voice in Court*, DENVER POST (June 3, 2017, 1:25 AM), <https://perma.cc/UPF6-2T67> (quoting a prosecutor on a CAAP advocate's work: "It has really assisted me in doing my job.").

²³³ Rubin, *Animal Advocacy*, *supra* note 83, at 250.

²³⁴ Rubin, *Animal Advocacy*, *supra* note 83, at 251.

²³⁵ Rubin, *Animal Advocacy*, *supra* note 83, at 251.

²³⁶ See, e.g., Suzana Gartner, *Desmond's Law: Giving a Voice for Abused Animals in Court*, ANIMAL ADVOC. - VOICE FOR THE VOICELESS (Feb. 22, 2019), <https://perma.cc/BS64-5Y3G> ("Desmond was brutally murdered . . . and did not deserve to die Desmond was a loving sentient being that needed a voice.").

²³⁷ Rubin, *Animal Advocacy*, *supra* note 83, at 250.

²³⁸ Rubin, *Animal Advocacy*, *supra* note 83, at 250. *But see* Marceau, *supra* note 80, at 775 (arguing that 80% of animal cruelty cases dismissed in Connecticut from 2007 to 2017 were dismissed only after the defendant successfully completed a diversionary program).

²³⁹ Rubin, *Animal Advocacy*, *supra* note 83, at 252.

²⁴⁰ MARCEAU, *supra* note 72, at 80.

²⁴¹ See Marceau, *supra* note 80, at 771 (arguing that modern animal advocacy does not help animals or people because it defines progress solely in terms of higher rates of prosecution,

the first step in delivering on the program's promise of a neutral advocate would be to establish public funding for the position.²⁴² Doing so would ensure that all eligible animal abuse cases would receive the same quality of input on the issues Desmond's Law has highlighted as unique to animal victims, such as veterinary care and foster placement.²⁴³ Unlike a GAL, who is paid by the Commonwealth only if a party meets indigency requirements, the CAAP advocate should be available in all cases so that the animal's interests, although not directly represented, are not undermined because of the defendant's financial situation.²⁴⁴

Alternatively, if funding is unavailable, Massachusetts could address the issue of potential bias by creating a more detailed screening process for volunteers.²⁴⁵ Under Desmond's Law, CAAP advocates can be drawn from a wide pool, as the law requires merely that attorneys and law students have knowledge of and interest in animal issues.²⁴⁶ Theoretically, this minimal standard should produce a group of advocates with a variety of legal philosophies about sentencing in animal abuse cases.²⁴⁷ However, as the history of Desmond's Law suggests, the nature of CAAP will likely always attract a majority of volunteers from animal rights groups or law school animal law clinics.²⁴⁸ To avoid such an imbalance, Massachusetts should actively encourage participation by the defense bar by developing a robust outreach program that educates defense attorneys on a CAAP advocate's potential contributions to a defendant's case (e.g., creating arguments based on relevant mitigating factors, such as the defendant's own history as an abuse victim or struggles with mental illness).²⁴⁹ In the absence of more active involvement by defense attorneys (in Connecticut at least) identifying volunteer advocates has fallen to decidedly non-neutral groups—such as

conviction and incarceration for animal abusers).

²⁴² See e.g., CT. APPOINTED SPECIAL ADVOC. FOR CHILD. BOSTON, <https://perma.cc/9XXV-L6KS> (last visited Apr. 13, 2023) (providing an example of a volunteer organization whose members advocate directly for the interests of children in the foster care system).

²⁴³ Rubin, *Court Advocate Program*, *supra* note 19, at 268.

²⁴⁴ See HOSTETLER & SABINO, *supra* note 159, at 308.

²⁴⁵ See Marceau, *supra* note 80, at 774 (describing CAAP advocates as acting more like "a party to the proceeding than a traditional victim advocate").

²⁴⁶ Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)).

²⁴⁷ See Phillips & Lockwood, *supra* note 50, at 53 (urging prosecutors to avoid seeking animal abuse convictions via no contest pleas when securing mental health treatment is appropriate).

²⁴⁸ See Rubin, *Animal Advocacy*, *supra* note 83, at 244 (noting the factors that led to Desmond's Law, such as under-enforcement of anti-cruelty laws and need for experiential opportunities for law students).

²⁴⁹ See, e.g., VOLUNTEER LAWS. PROJECT, <https://perma.cc/L6UM-FNBN> (last visited Apr. 13, 2023); see also Rubin, *Animal Advocacy*, *supra* note 83, at 258 (advising authors of future statutes modeled on Desmond's Law to "determine the best methods to enlist volunteer advocates").

animal law clinics and private citizen organizations like Desmond's Army.²⁵⁰

Second, to ensure a fair trial, Massachusetts should require the CAAP advocate to submit to cross-examination, as do traditional GALs.²⁵¹ Desmond's Law makes no provision for such questioning, or even for prior disclosure of the advocate's findings to the defendant.²⁵² As a result, the CAAP advocate functions like an expert witness without having to answer questions from the opposing party.²⁵³ Explicitly defining the advocate as an expert can begin with what Desmond's Law has already mandated, namely a "knowledge of animal issues," and can additionally require the advocate to demonstrate some degree of training or education in the specific details of a case.²⁵⁴ The real value of officially designating advocates as "experts" will be to enfold them into the traditional roles of an adversarial proceeding.²⁵⁵ Massachusetts courts already make widespread use of court-appointed experts to assist in determining a variety of issues, from a party's competency, to a corporation's value, to an electronic communication's reliability.²⁵⁶ Moreover, Massachusetts case law is clear that "a judge has broad discretion with respect to the admission of expert testimony."²⁵⁷ Promoting the CAAP advocate from a generalized voice, which too easily can become an echo of the prosecutor, to a full member of the proceeding better protects the defendant's due process rights to confront his or her accusers.²⁵⁸

CONCLUSION

CAAP is a novel and aggressive approach to exposing the ethical and environmental impact of humans' use and abuse of animals. However,

²⁵⁰ See Rubin, *Animal Advocacy*, *supra* note 83, at 258.

²⁵¹ See MASS. GEN. LAWS ch. 190B, § 5-106 (specifying that a protected person has the right to cross-examine any GAL).

²⁵² See Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)).

²⁵³ See, e.g., *Guidelines for Judicial Practice: Abuse Prevention Proceedings* (Oct. 2021), § 1:02 (f) ("[To satisfy due process, each] party must be given a meaningful opportunity to challenge the other party's evidence in any contested hearing.").

²⁵⁴ 2016 Conn. Pub. Acts No. 16-30.

²⁵⁵ See THE MASS. GUIDE TO EVIDENCE, art. VII, § 702-706.

²⁵⁶ See MASS. GEN. LAWS ch. 123, § 15(c) (requiring a court-appointed physician to report on clinical findings regarding defendant's competency to stand trial); *Brodie v. Jordan*, 447 Mass. 866, 867 (2006) (relying on court-appointed expert's valuation of plaintiff's shares in a corporation); *Munshani v. Signal Lake Venture Fund II, LP*, 60 Mass. App. Ct. 714, 717 (2004) (relying on the report of a neutral expert as to an email's authenticity).

²⁵⁷ *Commonwealth v. O'Brien*, 423 Mass. 841, 853 (1996).

²⁵⁸ See MASS. DECLARATION OF RIGHTS art. 12, <https://perma.cc/EG2F-YK8Z> (last visited Apr. 13, 2023) ("[E]very subject shall have a right to produce all proofs, that may be favorable to him [and] to meet the witnesses against him face to face.").

because animals in America remain a type of quasi-property, even a dedicated advocate cannot represent the animal as an individual victim. In order to make progress towards greater judicial appreciation of animals as legal persons, as well as to maintain due process protections for defendants in criminal animal abuse cases, Massachusetts should adopt a version of Desmond's Law that addresses the current law's shortcomings. By expanding the scope of animals eligible for CAAP representation to—at a minimum—all those the Commonwealth allows as pets, and by reframing the CAAP advocate's role as separate from the prosecutor's, Massachusetts can deliver on Desmond's Law's promise of justice for all animals, human and nonhuman alike.