

Against a “War on Animal Cruelty”

Lessons from the War on Drugs and Mass Incarceration

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7.1 INTRODUCTION

On November 25, 2019, President Trump signed into law the Preventing Animal Cruelty and Torture Act (PACT), the first federal law punishing animal cruelty. PACT makes it a crime, punishable by up to seven years in prison, to engage in “conduct in which one or more living nonhuman mammals, birds, reptiles, or amphibians is purposely crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury.”¹

While PACT is the first federal law on the topic, it is part of a broader move to criminalize harm to nonhuman animals throughout the nation. Often spurred on by animal advocacy groups, states are increasingly using their own criminal justice systems as a tool in combating the abuse of nonhuman animals. In fact, it is fair to say that an arms race has developed among the states, with organizations like the Animal Legal Defense Fund (ALDF) annually rating various state law regimes on their punitiveness toward animal abuse. For example, the ALDF gives higher rankings to states that criminalize the possession of animal-fighting paraphernalia than those that merely permit the seizure of such items, rewards states for imposing lifetime bans on pet ownership following an animal cruelty conviction, and credits mandatory reporting of abuse by veterinarians.² To qualify as a top-five state under the ALDF’s ranking, a state must not just criminalize, but impose felony punishments for cruelty, neglect, fighting, abandonment, and sexual assault.³ In other words, the more punitively a state deals with the problem of animal cruelty, the higher it will rate in the ALDF’s rubric.

¹ 18 U.S.C. § 48(f)(1).

² ANIMAL LEGAL DEFENSE FUND, ANIMAL PROTECTION US STATE LAWS RANKING REPORT, 2019 at 14–18.

³ *Id.* at 20.

Upon the passage of PACT, Kitty Block, the president and CEO of the Humane Society of the United States, praised the law, stating that “PACT makes a statement about American values.”⁴ Unfortunately, that statement may be far truer than Ms. Block intended – for PACT and its sister laws in the states are emblematic of America’s embrace of the criminal justice system as the principal means of addressing myriad societal harms. In this chapter I argue that the embrace of a punitive system of animal protection at both the state and federal levels will have unintended, but certainly foreseeable, negative consequences in the years to come.

Drawing on the related but distinct phenomena of mass incarceration, America’s fifty-year War on Drugs, this chapter warns that a carceral approach to animal cruelty will result in a net-widening effect whereby the criminal justice system extends its reach into the daily lives of more and more Americans. Perhaps more perniciously, the criminalization of animal cruelty is very likely to have a disproportionate impact on the poor and people of color, an impact that will go far beyond the number of people actually prosecuted or convicted under the raft of new state and federal criminal laws going into effect.

7.2 FACTS AND MYTHS ABOUT MASS INCARCERATION IN THE UNITED STATES

America’s mass incarceration problem is well documented. As of last count, more than 2 million people were currently being held in America’s prisons and jails.⁵ But while this number is a matter of public record, myths and misinformation about mass incarceration continue to persist. To understand this phenomenon properly, it is important to understand its relatively recent vintage. Between 1925 and 1975, the incarceration rate per 100,000 people in the United States was surprising flat, even as the country boomed and busted and its population exploded.⁶ From a low of 79 per

⁴ Richard Gonzales, *Trump Signs Law Making Cruelty to Animals a Federal Crime*, NATIONAL PUBLIC RADIO (November 25, 2019), <https://www.npr.org/2019/11/25/782842651/trump-signs-law-making-cruelty-to-animals-a-federal-crime>.

⁵ See, e.g., U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES (2017–2018), <https://www.bjs.gov/content/pub/pdf/cpus1718.pdf>. The release of information at the federal level has slowed significantly in recent years, meaning that most published data is now almost two years out of date. For example, the 2017–18 report just cited was not released until August 2020. See *Mass Incarceration: The Whole Pie*, THE PRISON POLICY INITIATIVE, 2020, <https://www.prisonpolicy.org/reports/pie2020.html> (“since 2017, government data releases have been delayed by many months - even years - compared to past publication schedules, and the data collected over two years ago have yet to be made public.”). Throughout I attempt to use the most recent data available in each category.

⁶ U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS 1925–81 at Table 1, <https://www.bjs.gov/content/pub/pdf/p2581.pdf>. Because the method of counting changed in 1977, it is difficult to compare years prior to 1977 with those after. However, the relative changes in each period are quite reliable. See *id.* at note 5.

Imprisonment Rates, U.S., 1925–1977

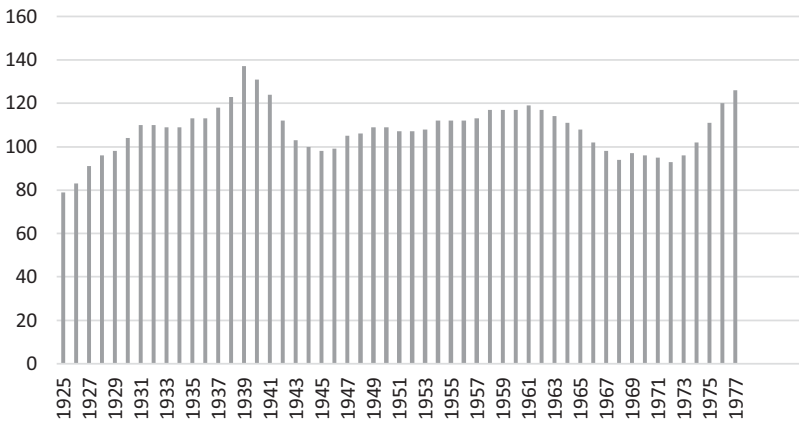


FIGURE 7.1 Imprisonment Rates, United States., 1925–1977.

Source: BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISONERS, 1925–1980

100,000 in 1925 to a high of 139 per 100,000 in the depression year of 1939, the national imprisonment rate oscillated around 100 people per 100,000 (0.1% of the population) for half a century (see Figure 7.1).⁷

Beginning in the late 1970s, however, the share of incarcerated Americans began to skyrocket. By its peak in 2007, 527 of every 100,000 people in the United States (more than one-half of one percent of the total population) were incarcerated.⁸ That is, on a percentage basis, approximately five times as many Americans were incarcerated in 2007 as were incarcerated on average during the middle fifty years of the twentieth century. And while that rate has shrunk slightly over the last several years, it is still at historically high numbers. Like a coronavirus curve that rises steeply and then declines gradually, the ascent of incarceration in America was swift and prolonged while the descent has been grudgingly slow (see Figure 7.2).

Sadly, this overall picture only tells part of the story of America's use of prisons, for it is impossible to separate mass incarceration in the United States from America's entrenched racial divide. As high as the American incarceration rate is overall, it is far higher for men, for ethnic minorities, and for those under forty. That is, the overall incarceration rate of 419 per 100,000 at the end of 2019 vastly understates the

⁷ I use imprisonment rates rather than prison populations throughout to control for changes in population over time and to be able to compare the extent of incarceration across different jurisdictions with differing populations. However, this choice obscures another aspect of prison growth. Because population has been growing as incarceration rates have, the total number of people incarcerated – and the number of prisons, the number of carceral employees, etc – have all gone up.

⁸ BUREAU OF JUSTICE STATISTICS, DATA ANALYSIS TOOL – CORRECTIONS (2021), <https://www.bjs.gov/index.cfm?ty=daa>.

US Imprisonment Rates, 1978–2019

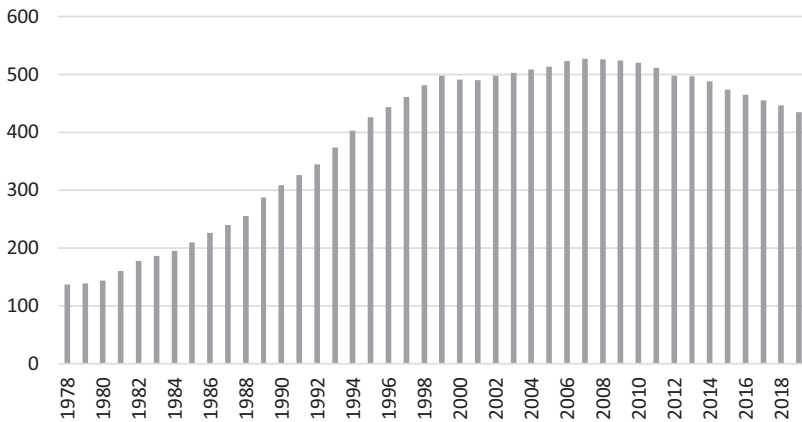


FIGURE 7.2 US imprisonment rates, 1978–2019.

Source: BJS, DATA ANALYSIS TOOL, TOTAL PRISON POPULATION RATES

impact that mass incarceration has on subgroups of the population.⁹ For Black men the rate was five times that figure; nearly 2.2 percent of Black men were incarcerated as of December 31, 2019, and nearly 4.5 percent of all Black men between the ages of 35 and 39 were in prison as of that date.¹⁰ What is more, mass incarceration, while widespread in the United States continues to have a strong regional valence as well. States in the American South and Southwest account for the eight highest incarceration rates in the nation;¹¹ those in the upper Midwest and Northeast are consistently among the lowest.¹² For example, the incarceration rate in Louisiana in 2019 was 680 per 100,000 while in Massachusetts it was “just” 133 per 100,000, less than one-fifth the rate in Louisiana.¹³ As with many things about mass incarceration, the overall picture, frightening though it may be, greatly understates the realities for many Americans.

It is also important to note that the explosion in America’s use of prisons is unparalleled among the nations to which the United States generally likes to compare itself.¹⁴ The Institute for Crime and Justice Policy Research at the

⁹ BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2019, Table 10, <https://bjs.ojp.gov/content/pub/pdf/p19.pdf>.

¹⁰ *Id.*

¹¹ The eight most incarcerating states are, in order: Louisiana, Oklahoma, Mississippi, Arkansas, Arizona, Texas, Kentucky, and Georgia. Prisoners in the United States, 2019, Table 7.

¹² The six states with the lowest incarceration rates are, in order: Massachusetts, Maine, Rhode Island, Minnesota, Vermont, and New Hampshire. *Id.*

¹³ *Id.* Because these figures include both state and federal prisoners, they actually understate the effect of different state policies on incarceration rates.

¹⁴ It is worth noting that in this and other ways, mass incarceration resembles America’s continuing use of the death penalty. The death penalty is also a uniquely American practice among

Incarceration Rates in G8 Countries, 2018

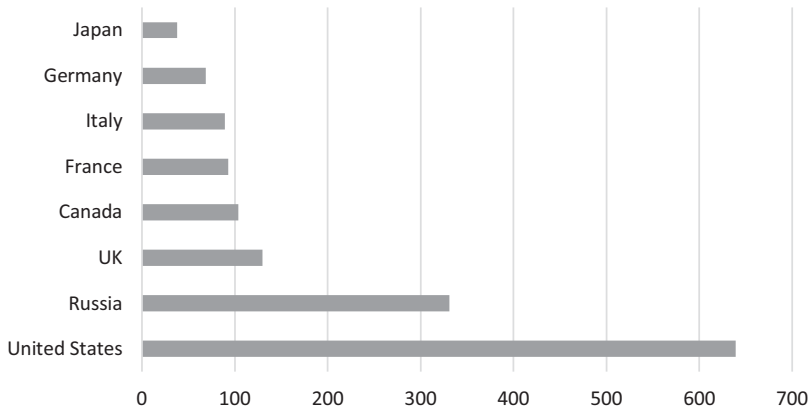


FIGURE 7.3 Incarceration rates in G8 countries, 2018.

Birkbeck, University of London, compiles statistics on prison populations around the world. It lists the United States as having the highest incarceration rate among the 223 nations surveyed, with an incarceration rate more than 10 percent greater than second-place El Salvador. Of the G8 nations, the United States stands alone – no other industrialized democracy uses incarceration even remotely akin to the way the United States does (see Figure 7.3).¹⁵

All of this is to say that mass incarceration is neither a necessary fact of life in either the United States or elsewhere in the world. Throughout modern American history, mass incarceration was not deemed a necessary fact of life and it is not seen as prerequisite to safety and security in any other industrialized democracy. Rather, it is rightly viewed as a uniquely American policy choice.

Western Democracy (with the lone exception of Japan) and is carried out largely in countries from which the United States generally tries to distance itself; the top countries carrying out executions since 2018 include China, Iran, Saudi Arabia, Iraq, Egypt, the United States, Pakistan, and Somalia. See DPIC, EXECUTIONS AROUND THE WORLD, <https://deathpenaltyinfo.org/policy-issues/international/executions-around-the-world>. For a discussion of the low-visibility use of the death penalty in Japan see DAVID T. JOHNSON, THE CULTURE OF CAPITAL PUNISHMENT IN JAPAN (2020). Like mass incarceration, the death penalty has disproportionate impact on people of color and is marked by strong regional differences. See, e.g., FRANKLIN ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT (2003) (demonstrating that states using the death penalty at the turn of the twentieth century were the states most likely to have experienced lynching at the turn of the nineteenth century).

¹⁵ Source, WORLD PRISON BRIEF, PRISON POPULATION TOTAL, <https://www.prisonstudies.org/highest-to-lowest/prison-population-total>. It should be noted that the World Prison Brief counts all people sentenced to prisons and jails, so the incarceration rate it reports for the United States is higher than that reported in charts 1 and 2, above. See WORLD PRISON BRIEF, UNITED STATES OF AMERICA, <https://www.prisonstudies.org/country/united-states-america> (last visited May 31, 2021) (reporting both prison and jail populations).

That said, it is often difficult to identify exactly which decisions were made or which actors were responsible for the decisions that led to mass incarceration. That is, no one policy maker decided in 1977 or 1978 that the proportion of Americans in prisons and jails should increase five-fold over the next twenty years. In fact there is no single person or entity that *could* have decided to achieve such a result; the American criminal justice system is diffuse, with millions of low-profile decisions made at the federal but primarily at the state and local levels. David W. Ball has identified as one of the fundamental drivers of mass incarceration what Franklin E. Zimring and Gordon Hawkins originally referred to as the prosecutor’s free lunch:¹⁶ local prosecutors can afford to be tough on crime by imposing long spells of imprisonment because prisons (as opposed to jails where shorter sentences are served) are paid for at the state rather than county level.

Even though counties use state prison resources at different rates, they do not typically pay the state based on this usage. State prisons are paid for out of general revenues: counties are not charged for heavy usage, nor are they reimbursed for light usage. Counties that choose to use state prison to address crime are, in essence, subsidized by counties that choose local programs such as probation and treatment instead, since the state typically pays for prison and the county pays for local dispositions. . .[U]nless the case could be made for the superiority of prison over other dispositions, the state should not subsidize prisons without subsidizing other responses to crime.¹⁷

Multiplying this perverse incentive structure over thousands of local prosecutors’ offices around the country helps us understand how mass incarceration happened without any prior planning.¹⁸

Two final, related points sum up the almost incalculable scale of the criminal justice system in the United States. First it is important to recognize that even this enormous prison and jail system in this country is swamped by those on probation and parole; nearly 4.4 million people are on probation or parole in this country, nearly twice as many people as are currently incarcerated.¹⁹ And though they are not incarcerated, those on probation and parole are subject to significant

¹⁶ FRANKLIN E. ZIMRING AND GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 140 (1991).

¹⁷ David W. Ball, *Defunding State Prisons*, 50 CRIM. L. BULL. 5 (2014).

¹⁸ See JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 142 (2017)

Prosecutors exploit, perhaps not even always intentionally, a gigantic moral hazard problem that arises from the way legal authority and financial responsibility are (poorly) allocated in the criminal justice system. Like jails and probation, prosecutor offices are either entirely or predominantly funded out of county budgets – unlike prisons, which are paid for by the state. . .[p]rosecutors get all the tough-on-crime political benefit of sending someone to prison, but the costs of the incarceration are foisted onto the state as a whole.

¹⁹ U.S. Department of Justice, BUREAU OF JUSTICE STATISTICS, *PROBATION AND PAROLE IN THE UNITED STATES, 2017–2018*, <https://www.bjs.gov/content/pub/pdf/ppus1718.pdf>.

curtailments of their liberty and are at risk for being quickly committed to prison or jail if they fail to live up to the terms of their supervised release.²⁰ Because the costs of such surveillance are generally borne by those subject to it, the risk of failure (and of the resulting incarceration) is more profound for the poor than the well-off.²¹

Second, the 2.3 million people incarcerated in the United States at any one time are themselves only a small fraction of those impacted by mass incarceration each year. While the average jail population during the year 2018 was 738,000, more than *10 million people* were admitted to jails throughout the country during that year.²² That is, almost 5 percent of Americans are brought into the carceral system every single year, and the total number of Americans passing through jails and prisons is more than *four times* the number inside the system at any one time.²³ Thus, it is the “churn” – the number of those processed through America’s jails after arrest – rather than the average population of county jails at any particular time that tells the true story of how vast America’s prison and jail system truly is. And once again, these costs are overwhelmingly borne by the poor. The American cash bail system means that our jails are mostly full of people who have been convicted of no crime, and who are incarcerated simply because they are unable to pay for their freedom.²⁴

In sum, the American criminal justice system – not just its prisons and jails, but its web of surveillance and supervision – is without parallel fantastically large. Ironically, the presence of more than 2 million people in our prisons and jails actually understates the scope of the problem. As I argue in the next section, the War on Drugs – which provides a cautionary tale for the criminalization of animal abuse – has been an important, though perhaps overestimated, ingredient in this phenomenon.

7.3 THE WAR ON DRUGS

Though the two are often conflated, the War on Drugs is a separate and distinct phenomenon from mass incarceration. And, though the two have overlapped and

²⁰ See generally MALCOLM M. FEELEY & JONATHAN SIMON, *New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 456 (1992)

Instead of treating revocation of parole and probation as a mechanism to short-circuit the supervision process when the risks to public safety become unacceptable, the system now treats revocation as a cost-effective way to police and sanction a chronically troublesome population. In such an operation, recidivism is either irrelevant or... is stood on its head and transformed into an indicator of success in a new form of law enforcement.

²¹ See, e.g., MICHELLE PHELPS, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 L. & POL’Y. 51, 56 (2013) (arguing that the well-off are able to negotiate the complicated demands of supervised release better than are the poor).

²² U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES, 2018 Table 1 (2020), <https://www.bjs.gov/content/pub/pdf/ji18.pdf>.

²³ *Id.*

²⁴ See, e.g., *The Whole Pie*, *supra* note 5 (Reporting that only 161,000 of the 631,000 people in America’s jails had been convicted of any crime).

fed on each other over the last fifty years, the relationship between them has often been shrouded with confusion.

The modern history of the drug war probably begins with the passage of the Controlled Substances Act (CSA) in 1970. Although the phrase “controlled substance” wouldn’t be used for the first time until President Richard Nixon coined it the following year, the CSA was designed to be a blow against the counterculture that had largely defined the previous decade. More than that, the War on Drugs was both racialized and partisan from the start.²⁵ The War on Drugs was a means to get back at the president’s enemies and to use the criminal law to target political opponents.

But it is important not to overstate the importance of the CSA or any other federal law – such as the infamous crack-to-powder-cocaine sentencing disparity²⁶ – in the day-to-day implementation of the War on Drugs. The role of the federal government in setting national criminal justice policy is far more symbolic than practical. More than 90 percent of those serving time in prisons and jails in the United States are under state and local rather than federal supervision. While the federal government plays a larger role in the prosecution of drug crimes – most of the crimes of violence that lead to long prison terms in the United States lack a federal nexus and are thus prosecuted almost exclusively at the state level – it remains true that even the vast majority of drug law enforcement is done at the state and local level. The importance of federal criminal justice policy serves primarily as an announcement of values to the states coupled in many instances with the provision of federal and

²⁵ See, e.g., Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPERS (June 2013), <https://harpers.org/archive/2016/04/legalize-it-all/>. Baum quotes John Ehrlichman, Nixon’s former domestic policy adviser as explaining the origins of the war on drugs:

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I’m saying? We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

The racist history of the war on drugs, particularly marijuana, is extensive. See, e.g., RICHARD J. BONNIE AND CHARLES H. WHITEBREAD II, *THE MARIJUANA CONVICTION* 40–52 (1999) (discussing the ways in which early efforts to eradicate marijuana use were motivated by antipathy toward African Americans and Mexican immigrants). Anti-immigrant bias was also a motivation for the national alcohol prohibition occurring at approximately the same time. See generally LISA MCGIRR, *THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATES* (2016).

²⁶ See Pub. L. No. 99–570 (1986) (creating mandatory minimums for crack and powder cocaine); U.S. SENTENCING COMMISSION, *REPORT TO THE CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010* (Aug. 2015), https://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf (reporting on the history and impact of the 100-to-1 crack to powder cocaine ratio).

assistance to states for their cooperation in federal initiatives.²⁷ Much as we saw that mass incarceration is largely attributable to individual decisions made by thousands of prosecutors in millions of cases around the country, so the War on Drugs was carried out primarily by the state legislatures and local law enforcement officials and prosecutors within those states.²⁸

In her groundbreaking and discussion-moving book on mass incarceration in the United States, Michelle Alexander makes the connection between mass incarceration and the War on Drugs explicit. “In less than thirty years, the US penal population exploded from around 300,000 to more than 2 million, with drug convictions accounting for the majority of the increase.”²⁹ The reality is, to say the least, more complicated. In his book *Locked In*, John Pfaff takes on the connection between these phenomena, arguing that the War on Drugs actually played a relatively minor role in the rise of mass incarceration.

When we look at the data more closely, it becomes increasingly difficult to defend the claim that the war on drugs is the main driver of prison growth. This is true for pretty much any definition of the “war on drugs,” from one that refers to just the incarceration of those convicted of drug offenses to broader perspectives that include anyone who would not have been in prison if the United States had not prohibited certain drugs or enforced their prohibition. No matter how we define the war on drugs, its impact appears to be important, but unequivocally secondary to other factors.³⁰

In fact, when we look at the state and federal prison system as a whole, we see that most people serving felony sentences are imprisoned for crimes of violence, while those convicted of drug crimes constitute only a tiny fraction of the overall prison population. According to the Bureau of Justice Statistics, 55.5 percent of all prisoners in state and federal custody were there for violent crimes,³¹ while only 14.1 percent of all prisoners in the United States were there for drug offenses, with just 3.7 percent imprisoned for possession alone. Thus, any political solution to mass incarceration that focuses primarily on so-called low-level or nonviolent drug offenders will

²⁷ See, e.g., Pfaff, *supra* note 18, at 30 (“[T]here is no single ‘war on drugs,’ but rather somewhere between 50 and 33,300 wars on drugs, fought with varying degrees of intensity at different times, in different jurisdictions, and in different ways.”).

²⁸ While it is true that marijuana (and other drug) law reform in the states has shaken the consensus between state and federal priorities in this area, it remains true that state and local law enforcement officials continue to make an enormous number of arrests for relatively minor drug offenses. The War on Drugs, in other words, did not stop with the legalization of marijuana, paradoxically, even in those states that chose to legalize the drug. Marijuana production and sale remains illegal outside of the taxed and licensed regulatory regime, and possession by minors and use in public remain illegal as well. Ironically, states that have “legalized” marijuana continue to see disparities in how those laws are enforced.

²⁹ MICHELLE ALEXANDER, *THE NEW JIM CROW* 6 (2012).

³⁰ Pfaff, *supra* note 18, at 23.

³¹ PRISONERS IN 2019, Table 13.

produce no more than baby steps toward solving America’s mass incarceration problem. Even if we were to release everyone whose most serious offense is a drug crime – including both large-scale drug dealers and those convicted of providing drugs to minors, for example – it would make only a small dent in America’s mass incarceration problem.³² Any meaningful reform will require us to confront the long prison sentences that we apply to violent crimes such as murder, robbery, and rape.

This is decidedly not to say, however, that the War on Drugs plays only an insignificant part in the American carceral state. We have seen, for example, that prison and jail populations in the United States – enormous though they are – vastly *understate* the size of the carceral state in America. For example, there were more than 10 million arrests in the United States in 2017 and nearly one in six of them was for what the FBI calls a drug-abuse offense.³³ In fact, there were almost as many arrests for drug crimes as for the eight major index crimes – murder, robbery, rape, aggravated assault, burglary, theft, auto theft, and arson – combined.³⁴ What is more, 85 percent of those arrested on drug offenses were arrested for possession rather than the more serious offenses of manufacturing or distributing drugs; while possession, sensibly, accounts for only a small percentage of the prison population, it makes up an outsized fraction of those arrested. And though few of these arrests lead to long prison terms, they are far from costless for those they sweep into the system. The fact of even a minor conviction (or even just an arrest) can have a profound negative impact on one’s life prospects. Criminal justice scholars have devoted great attention in recent years to the so-called collateral consequences of involvement in the criminal justice system, documenting how arrest and conviction can lead to deprivation of everything from voting rights to gun rights to access to federal benefits.³⁵ And of course, the burdens of the War on Drugs, like those of mass incarceration, have fallen disproportionately on Black and brown people. A report produced by ACLU found that although they use marijuana at similar rates, Black people were nearly four times more likely to be arrested for the use of that drug than were white people.³⁶ Studies in other jurisdictions, even those that have liberalized their marijuana

³² In fact, if we wanted to reduce mass incarceration by more than 50 percent, it would be necessary to begin releasing people convicted of violent crimes – homicide, rape, robbery, and assault – as they make up more than half of those incarcerated. In other words, even releasing every nonviolent criminal from prison would still not reduce America’s imprisonment rate to the same level as that in other Western democracies.

³³ See FEDERAL BUREAU OF INVESTIGATIONS, CRIME IN THE UNITED STATES 2019 Table 29.

³⁴ *Id.*

³⁵ MARGARET LOVE & DAVID SCHLUSSEL, THE MANY ROADS TO REINTEGRATION: A 50-STATE REPORT ON LAWS RESTORING RIGHTS AND OPPORTUNITIES AFTER ARREST OR CONVICTION (2020).

³⁶ ACLU, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* 5 (2018), <https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform> (“On average, a Black person is 3.64 times more likely to be arrested for marijuana possession than a white person, even though Black and white people use marijuana at similar rates.”).

laws, continue to report disparities in the rate at which Black people and white people are arrested.³⁷

7.4 IMPLICATIONS FOR ANIMAL LAW

What I hoped to show in the previous section is that the War on Drugs is both under- and overappreciated as a driver of the growth of the carceral state in this country. It is not responsible for the fact that more than 2 million people are in prisons and jails in this country, but it does adversely impact the lives of literally millions of Americans each year – disproportionately people of color – limiting both their liberty and their life choices in wide-ranging and significant ways. In this section, I argue that the War on Drugs has a lot to tell us about the trend toward criminalizing animal abuse in this country.

First, there is no reason to think that the enforcement of laws forbidding animal abuse is likely to be more equitable than any other sort of criminal law enforcement. In fact, the most prominent prosecution for animal cruelty is something of a cautionary tale for the racialized policing that may come with the criminal enforcement of PACT. Take, for example, the most high-profile animal cruelty prosecution of the last fifty years – that of Atlanta Falcons quarterback Michael Vick for running a dogfighting ring. Vick’s prosecution by both state and federal authorities was fraught with racist overtones. My colleague Justin Marceau, noting the fact that dog breeding and fighting had historically been associated with upper-class white people, wrote of the Vick prosecution: “It is notable that the most high-profile animal cruelty prosecution in decades turns on the prosecution of an African American for the very practice that was flaunted as a symbol of his racial inferiority during his grandparents’ lives.” The comedian Chris Rock put things more pithily on the David Letterman show in 2008 when Alaska governor Sarah Palin was running as John McCain’s running mate on the Republican presidential ticket. Rock imagined Michael Vick in his prison cell studying the widely circulated photo of Palin posing with a bloody moose she and her son had shot, wondering to himself “Why am I in jail? You let a white lady shoot a moose; Black man wanna kill a dog, that’s a crime.”³⁸ Behind the laugh line is a grim reality: the criminal enforcement of animal cruelty laws, like the enforcement of drug laws before them, and alcohol laws before those, will necessarily be filtered through a racial lens which defines which sorts of animal cruelty merit law enforcement intervention.

³⁷ See, e.g., COLORADO DIVISION OF CRIMINAL JUSTICE, IMPACTS OF MARIJUANA LEGALIZATION IN COLORADO, Table 3 (Oct. 2018), https://cdpsdocs.state.co.us/ors/docs/reports/2018-SB13-283_Rpt.pdf (showing that five years after the legalization of marijuana in Colorado, Black people were still twice as likely to be arrested for marijuana offenses as were white people).

³⁸ Chris Rock Letterman Palin vs Nick, YOUTUBE (Sep. 23, 2008), https://www.youtube.com/watch?v=OrxpOxkiOms&ab_channel=iCrazyUncle.

What is more, there is good reason to fear that the enforcement of animal cruelty laws will pose a deadly threat to all citizens (and particularly Black and brown ones) much as the enforcement of drug prohibition has long been a driver of police killings. Breonna Taylor was killed when police officers executed a warrant at her home in the middle of the night, believing that she was holding either cash or drugs for an ex-boyfriend. When the officers failed to identify themselves with sufficient clarity, Taylor’s current boyfriend opened fire and Taylor was killed in the violent police response. Cases such as Taylor’s are sadly common; given the judicially accepted presumption that drug trafficking involves the use of weapons;³⁹ nonviolent drug offenses are often treated by law enforcement as life-threatening. The vision, perpetrated by cases like Vick’s, of the fighting dog trainer as a violent, almost subhuman predator is likely to mean that warrants enforced against those suspected of animal cruelty will present the same kind of dangers we too often see with the enforcement of drug laws.⁴⁰

Another concern is the way that expansion of substantive criminal law impacts constitutional criminal procedure. The Supreme Court’s early Fourth Amendment cases – dealing with wiretaps⁴¹ and automobile searches⁴² – arose in the context of the nation’s failed experiment with alcohol prohibition. Prohibition made alcohol smuggling profitable, and the new federal bureaucracy that arose to enforce it required the Court to consider, often for the first time, the permissible means of criminal investigation and prosecution.⁴³ After Prohibition was repealed, other criminal statutes operated as a lever for law enforcement officers to access citizens’ persons, houses, papers, and effects. In this context, the prohibition of drugs has played a large part, influencing everything from the constitutionality of technological surveillance⁴⁴ to the use of dogs to detect controlled substances⁴⁵ to random checkpoints targeting the transportation of illicit drugs.⁴⁶ As noted above, the enforcement of drug laws impacts not just those who are investigated and prosecuted

³⁹ See, e.g., *Illinois v. Wardlow*, 528 U.S. 119, 122 (2000) (validating the search of a young man who ran at the sight of police because in the officer’s “experience it was common for there to be weapons in the near vicinity of narcotics transactions.”).

⁴⁰ See, e.g., *Commonwealth v. Santiago*, 452 Mass. 573 (2008) (holding that, while the mere presence of a dog in the home, even of a pit bull, was insufficient to justify a “no knock” warrant, that same warrant could be justified, at least in part by the fact that “the magistrate knew that the defendant possessed a type of dog which, in the officer’s experience, was known to be dangerous and aggressive, and could be used to confront the officers.”).

⁴¹ *Olmstead v. U.S.*, 277 U.S. 438 (1928).

⁴² *Carroll v. U.S.*, 267 U.S. 132 (1925).

⁴³ See, e.g., Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 117 (2006) (“prohibition sparked a virtual ‘doctrinal explosion’ of Fourth Amendment jurisprudence.”).

⁴⁴ *U.S. v. Jones*, 565 U.S. 400 (2012).

⁴⁵ *Illinois v. Caballes*, 543 U.S. 405 (2005).

⁴⁶ *Indianapolis v. Edmond*, 531 U.S. 32 (2000).

for trafficking drugs; the constitutional law made in drug trafficking prosecutions affects the rights of the law-abiding and the law-defying alike.⁴⁷

Those of us who teach criminal procedure or practice criminal defense are all too familiar with the almost mythical role that the odor of marijuana plays in the enforcement of criminal law in this country; the smell of marijuana is a kind of Fourth Amendment shibboleth, opening doors to officers who can assert that they have encountered it.⁴⁸ For example, in *U.S. v. Kizart*,⁴⁹ the defendant's car was pulled over for speeding and the officer testified that he smelled the unmistakable odor of burnt marijuana emanating from the passenger compartment of Kizart's car. The officer searched both Kizart and the passenger compartment but found no contraband. The officer then opened the trunk of the sedan and found both marijuana and methamphetamine wrapped in packages inside a trash bag, which was inside a backpack, inside the trunk. Although Kizart argued that the smell of burnt marijuana was consistent only with personal use of the drug and that therefore the officer had no probable cause to believe that bulk marijuana would be found in the trunk, the appellate court disagreed. The smell of marijuana, coupled with Kizart's anxiety when questioned by the police, the court concluded, justified a full search of the entire car as well as any closed containers therein. Similar examples are almost too numerous to choose from.⁵⁰

There is genuine risk that the barking dog will become the new smell of marijuana, the unquestionable evidence that entitles police officers to make a warrantless entry or search. This is not speculation; we have already seen cases litigated in which the government has argued that its interest in public safety includes concern for nonhuman animals as well as for human well-being. In one such case, *Commonwealth v. Duncan*,⁵¹ the Massachusetts high court extended the

⁴⁷ More recently, the prohibition of child pornography has allowed law enforcement to intrude into virtual spaces in much the same way prior prohibitions permitted searches and seizures of cars, persons, and packages. See, e.g., Thomas K. Clancy, *Digital Child Pornography and the Fourth Amendment*, 49 No. 3 JUDGES' J. 26, 26 (2010) ("Almost 70 percent of all reported appellate decisions involving the search or seizure of digital evidence are concerned with the recovery of child pornography.")

⁴⁸ The move to legalize marijuana for personal use has begun to chip away at the magical powers of the marijuana odor, however. Consider the Colorado case of *People v. Zuniga*, 372 P.3d 1052 (Co. 2016) decided after Colorado passed Amendment 64, authorizing the possession and use (as well as licensed production and sale) of marijuana by adults. Zuniga was stopped by Colorado highway patrol and a trained narcotics dog "alerted" on his car. The dog had been trained to detect the presence of a number of illicit substances, including both methamphetamine and marijuana. The Colorado Supreme Court concluded that because the dog was trained to detect marijuana, and because marijuana is a substance with both legal and illegal uses, the dog's alert could not be the basis of probable cause to search.

⁴⁹ 967 F.3d 693 (7th Cir. 2020).

⁵⁰ To name just a few, the Supreme Court has decided: *District of Columbia v. Wesby*, 138 S.Ct. 577 (2018) (smell of burnt marijuana); *Florida v. Jardines*, 569 U.S. 1 (2013) (dog trained to detect the odor of marijuana); *Kentucky v. King*, 563 U.S. 452 (2011) (odor of burnt marijuana outside defendant's apartment); *U.S. v. Sharpe*, 470 U.S. 675 (1985) (odor of raw marijuana during an automobile stop); *United States v. Johns* (odor of marijuana giving rise to probable cause).

⁵¹ 467 Mass. 746 (2014).

“emergency aid” exception to both the warrant and probable cause requirements to the protection of nonhuman animals, validating officers’ decision to enter Duncan’s property without a warrant after hearing feeble whimpering and barking from an animal apparently in distress on Duncan’s property. In reaching this conclusion, the court was supported by amici, including the ALDF, ASPCA, Humane Society, and Animal Rescue League, and law enforcement agencies who argued that Massachusetts’ decision to treat animal abuse as a serious crime justified the warrantless entry onto Duncan’s property:

The Commonwealth’s broad and comprehensive animal protection statutes reflect its citizens’ strong interest in the humane treatment of animals and the growing recognition that the prevention of animal suffering is both a moral imperative and in the public’s interest. Application of the emergency exception to the warrant requirement to the protection of animals in peril logically and necessarily flows from this statutory scheme and the community values it embodies. A contrary result would be anathema to the spirit of the Commonwealth’s existing animal protection laws and at odds with prevailing public sentiment.⁵²

The Duncan case has been cited favorably in Kentucky,⁵³ Ohio,⁵⁴ and Vermont.⁵⁵

Notice the connection between where we began and the holding in *Duncan*. This chapter started with a description of how ALDF and other advocacy groups reward states for making various animal abuse offenses felonious. Many of these same advocacy groups then argue that because a state has chosen to treat animal abuse as a serious felony, the state necessarily has a strong interest in the protection of animals sufficient to overcome a homeowner’s interest in avoiding warrantless searches and seizures.

7.5 CONCLUSION

It is easy enough to dismiss the failed alcohol prohibition of the last century as a moral panic, a moment of hysteria from the distant past. But this account overlooks the fact that Prohibition, for all its faults, was part of a broad progressive movement

⁵² Brief of Amicus Curiae the American Society for the Prevention of Cruelty to Animals, *Commonwealth v. Duncan* (Oct. 24, 2013), 2013 WL6051368, at *9.

⁵³ *Lawton v. Commonwealth*, No. 2019-CA-001282, 2020 WL 5083460, *5 (Ky. Ct. App. Aug. 28, 2020) (“[The officers] did not know there was a dog in need of aid until they observed her lying under the house. Under different circumstances, we would be inclined to extend the emergency aid exception to animals. Courts in other jurisdictions have extended this exception to render aid to animals in true emergency situations and further promote the public policy of the humane treatment of animals.”).

⁵⁴ *State v. Glowney*, Nos. 27896 & 27897, 2019 WL 3986353, *7 (Ohio Ct. App. Aug. 23, 2019) (Officer Davis’s entry into the backyard of 636 Cushing reasonably addressed the concerns raised by a loose dog, particularly one whose ownership was then unknown. In short, Officer Davis’s actions were reasonably necessary for the safety of both the public and Dyson. Her seizure of Dyson was thus a reasonable exercise of her community caretaking duties, and her actions did not violate the Fourth Amendment.

⁵⁵ *State v. Sheperd*, 170 A.3d 616, 624 (Vt. 2017) (“[W]e must take the animals’ welfare into consideration when determining the legality of a search or seizure.”).

that encompassed slavery prohibition and women's suffrage. Freeing men from the bondage of addiction was seen by many of Prohibition's proponents as the last great emancipation project of the period. In founding the Prohibition Party, the slavery abolitionist Gerrit Smith made the connection plain:

He suggested that this continuing form of bondage might be more miserable, and more dangerous, than the one recently abolished. "No outward advantages can bring happiness to the victim of alcohol – to him who has killed his own soul," Smith said. "The literal slave does harm to no one, whilst the self-made slave of whom we speak is a curse to his kindred, a burden upon all, and, in no small share of the cases, a terror to all."⁵⁶

One hundred years after Prohibition began, however, its progressive roots are largely forgotten. When Americans think of the period from 1920 to 1933, what they generally remember is failure, corruption, and discrimination. Prohibition gave rise not just to organized crime, but to a federal police force that enforced the law unevenly, singling out disfavored groups for sanction.

Prohibition policing differed by region, by rural or urban setting, and most especially by race, ethnicity and class. An unprecedented campaign of selective enforcement lurked beneath the surface glamor of the roaring twenties that left the urban elite sipping cocktails in swank, protected nightclubs, while [other men] died over a jug of whiskey.⁵⁷

The analogy from prohibitions – of alcohol and drugs – to the increasing punishment of animal abuse is obviously an imperfect one. The desire to alter one's consciousness is near universal, whereas the instinct to abuse animals is aberrational; prohibiting substances creates an illicit market for them in a way without a clear parallel to criminalizing animal abuse. But the prohibitions of alcohol and drugs can show us the dangers of relying on the criminal justice system to solve the nation's perceived ills. Prohibition didn't just fail. It created much of the infrastructure that supported mass incarceration.⁵⁸

The move to criminalize animal abuse is unlikely to so radically change society; the edifice of state power and control is already in place. But both Prohibition and

⁵⁶ Kelefa Sanneh, *Drunk with Power*, THE NEW YORKER (December 21 & 28, 2015). During this time, Americans were notorious for their drinking. One study indicated that Americans in the early-nineteenth century drank nearly three times as much as Americans do today. See Michael A. Lerner, *Going Dry: The Coming of Prohibition*, 32 HUMANITIES 5 (2011).

⁵⁷ LISA MCGIRR, THE WAR ON ALCOHOL 71 (2016).

⁵⁸ *Id.* at 192.

Overshadowed by high-profile art, literature, and public works agencies, and social provisioning projects from social security to labor rights, the unprecedented development of the federal government's law enforcement and punitive capacities contributed to the bone and sinew of the twentieth-century American state. Nothing did more than the nation's Prohibition war to build this less-examined side of state building in the first half of the twentieth century.

the War on Drugs teach us that the desire to use the criminal justice system to achieve even beneficent goals often harms the very communities they are ostensibly intended to protect. The negative effects of a carceral approach to animal protection, foretold by previous spasms of criminalization, are likely to be both far-ranging and unevenly distributed. To avoid these harms, it is not enough merely to moderate the impulse to create new categories of crime – to create misdemeanors rather than felonies. As Alexandra Natapoff has written, so-called decriminalization is often a trap that does the opposite of what it promises:

[D]ecriminalization represents the next generation of the “net-widening” phenomenon. Net-widening refers to reforms that make it easier to sweep individuals into the criminal process, and decriminalization does so in sophisticated ways. Primarily, it makes it possible to reach more offenders by simplifying the charging process and eliminating counsel, along with other forms of due process. But it also heightens the impact of the net by turning to supervision and fines as indirect, long-term constraints on defendant behavior, and by extending the informal consequences of a citation or conviction deep into offenders’ social and economic lives. The widening net, moreover, is not colorblind: decriminalization risks further racializing the selection process as police are empowered to stop and cite young Black men more freely without the constraints of criminal adjudication or the threat of defense counsel.⁵⁹

Only what she calls true decriminalization – not just decreasing criminal penalties but moving conduct entirely outside the criminal justice system – is likely to avoid the harms that system imposes.

⁵⁹ Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1059 (2015).