

Carceral Logics beyond Incarceration

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No one claims that prosecutions and longer sentences are the exclusive focus of animal law. For many animal advocates, criminal prosecution is not a central focus of their attention or work. Yet one would be remiss to ignore the salience of carceral strategies in animating the work, and in influencing the image of animal activists. Protecting animals, many believe, is gainfully pursued through a “war on animal cruelty” such that tough-on-crime politics has been a mainstay of modern animal advocacy.¹

In a very recent shift, however, certain pockets of the animal law movement have begun embracing what might be thought of as the logic of progressive prosecution. After years of public outreach and lobbying urging the view that incarceration is a pillar of animal protection, there is noticeable shift in recent years in the tone of the advocacy. Punishment is often now described as a necessary evil, and incarceration just one of the many responses that might be pursued against a person accused of harming animals. Indeed, many animal lawyers now oppose criminal registries, prosecuting juveniles as adults, and what might otherwise be called the most “grotesque flourishes” of carceral animal law.² To be sure, leading voices in animal law continue to insist that “incarceration has a valid place” in animal law, and to argue that diversions and treatment for felony charges of animal crimes generally are

¹ Jessica Rubin, *Desmond's Law: A Novel Approach to Animal Advocacy*, 24 ANIMAL L. 243, 275 (2018) (quoting *Why You Should Join the War on Animal Cruelty*, ANIMAL COALITION FOR ANIMAL JUST., accessed June 29, 2007), www.animal-justice.org/involved.html [site no longer available]).

² Alec Karakatsanis, *The Punishment Bureaucracy: How to Think about “Criminal Justice Reform”*, 128 YALE L.J. FORUM 848, 851 n.1 (2019) (describing progressive prosecution reforms as “making just enough tweaks to protect [the system’s] perceived legitimacy” and noting that such reformers often target only changes that will not transform the system, and instead will “curb only its most grotesque flourishes.”).

not tolerable.³ But there seems to be a deliberate effort on the part of movement lawyers to distance themselves from retributivists (or even deterrence) rationales for punishment, and instead incarceration is championed as something like a last-resort when needed for incapacitation.⁴ The appetite for incapacitation, however, is broader than it might seem, and underlies tough-on-crime enactments, including a recent increase in the statutory maximum sentence for animal cruelty crimes in Iowa, and a new federal felony cruelty law, the PACT Act.⁵ For years animal lawyers have pursued “Bella’s Law” in New York as a legislative priority, because the law promises “stronger sentences for animal cruelty.” Punishment for animal abusers is still very much en vogue.

Nevertheless, there is an emerging trend among animal lawyers that downplays incarceration and appears willing to prioritize noncustodial responses to at least some cases of animal abuse and neglect. Incarceration is being billed as something like a last resort response to particularly hardened abusers. I applaud the willingness of animal lawyers to consider other-than-incarceration approaches to animal crimes. But I worry that the animal lawyers have come to believe that policing and prosecution that lead to outcomes other than incarceration are largely beyond critique. More specifically, I fear that the animal protection movement ignores the broader umbrella of carceral logics, including the literature observing that “incarceration as a logic and method of dominance is not reducible to the particular institutional form of jails, prisons, detention centers.”⁶ There is a sense that carceral logics detached from a singular zeal for imprisonment are tantamount to a progressive approach to animal maltreatment, and one that is liberated from the baggage of

³ *Animal Legal Defense Fund Position Statement: Sentencing for Animal Cruelty Crimes*, ANIMAL LEGAL DEFENSE FUND 3, 10 (2019), https://aldf.org/wp-content/uploads/2019/09/Position-Statement_Sentencing-2019.pdf.

⁴ *Id.* at 3 (noting that the “foremost” reason to incarcerate is to remove “offenders from society” so as to prevent them from harming animals and humans). This logic has been called into question by research suggesting that longer sentences may actually increase recidivism—that is to say, it is possible that the incapacitation benefit is outweighed in the long term by the criminogenic consequences of increased incarceration. JUSTIN MARCEAU, *BEYOND CAGES* 270–73 (2020) (compiling research on this point); *Id.* at 29 (“any decrease in crime due to incapacitating an offender is offset [and surpassed according to some studies] by the increased criminal activity that follows longer terms of incarceration.”); Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 6 (2017) (placing significant blame for the problems of mass incarceration on the modern impulse to incapacitate dangerous persons, and noting that in fact crime may increase in the communities as the “return of traumatized and unemployable ex-prisoners to these neighborhoods creates additional risk of violent crime”); see also *Economic Perspectives on Incarceration and the Criminal Justice System*, COUNCIL OF ECON. ADVISORS 3–5 (2016), <https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/CEA%2BCriminal%2BJustice%2BReport.pdf>.

⁵ Preventing Animal Cruelty and Torture Act, Pub. L. No. 116-72, 133 Stat. 1151 (2019), <https://www.congress.gov/bill/116th-congress/house-bill/724/text>.

⁶ Dylan Rodriguez, *Abolition as Praxis of Human Being: A Foreword*, in *Developments in the Law—Prison Abolition*, 132 HARV. L. REV. 1575, 1578 (2019).

racial disparity that infects the criminal system more generally. In reality, there is a long history of reformist discourse in other areas of the criminal system serving as a mechanism for justifying and entrenching the central features of what many regard as a fundamentally broken system, and one that does not have the best interests of animals in mind.

This chapter argues that animal law is still far too carceral in its rhetoric and approach to law reform, and the pivot toward fines, fees, and probation is not nearly as salutary as the animal protection lawyers imagine. Leaders in the animal protection world will likely regard this argument as quite radical – the idea that even nonincarceration criminal interventions might be treated as undesirably harsh. But for many who study the criminal system, it is far more radical to take on faith and intuition that animals are protected through carceral logics (or that they are harmed by critiquing carceral logics).⁷ It is time to stop pretending that an uncritical acceptance of criminal responses to abuse and neglect help more than they hurt animals.

11.1 THE ANIMAL PROTECTION MOVEMENT'S SHIFT ON CARCERAL LOGICS IS MORE STYLE THAN SUBSTANCE

Many animal lawyers react to critiques of carceral animal law by contending that punishment is no longer a priority, and that there are only but a handful of anecdotes about overcharging.⁸ My prior work has been criticized for emphasizing specific examples of racism within the criminal enforcement of animal law on the perverse theory that such data points are “not helpful for analyzing the current state of animal law,” and for focusing on discrete examples.⁹ Modern animal law, one is assured, is distancing itself from its historically punitive origins.

But the death of carceral logics among animal lawyers has been greatly exaggerated. Despite the movement's avowed distancing from carceral approaches, felonies are still the primary metric by which animal protection lawyers mechanically

⁷ Recent research has shown that defendants who are not prosecuted for misdemeanor cases are almost 60 percent less likely to be charged with a crime in the next two years compared to those who were prosecuted. Michael Jonas, *Study Finds Not Prosecuting Misdemeanors Reduces Defendants' Subsequent Arrests*, COMMONWEALTH (Mar. 29, 2021), <https://commonwealthmagazine.org/criminal-justice/study-finds-not-prosecuting-misdemeanors-reduces-defendants-subsequent-arrests/>.

⁸ There is some irony in the movement's willingness to suggest that reforms to the carceral approach must await less anecdotal evidence. After all the movement has obtained felony laws and pursued harsher criminal responses based on nonrepresentative cases of extreme abuse and torture, and has never hesitated to link their efforts to broader efforts to combat serial killers or terrorists. I have personally seen animal protection legislation supported by reference to the need to combat violence, including terrorism, with the speaker showing a slide of the 9/11 attacks on the World Trade Center.

⁹ Rubin, *supra* note 1, 271 n. 50 (arguing as well that there is probably not a racially disparate impact in the enforcement of crimes like cockfighting and dogfighting).

measure the importance of animals in the law, and law reform efforts in animal law continue to prioritize incarceration as a critical element in gauging whether the law is being meaningfully enforced. Scholars still seem to believe that the movement can incarcerate its way to animal rights. For example, a recent article urges harsher, more “proportionate” sentences as a vehicle for acknowledging the sentience of nonhuman animals.¹⁰ This is consistent with the advocacy of animal protection groups that have long celebrated criminal prosecutions as first-steps in the march toward legal protections for sentient beings.

Similarly, when President Trump signed into law a federal animal cruelty statute in 2019, animal protection groups celebrated the accomplishment as long overdue and heralded it as one of the greatest legal victories in decades.¹¹ Likewise, Iowa amended its animal cruelty laws in 2020 so as to make criminal liability easier to prove, and the reforms were heralded by national groups as “upgrades” with lawyers for the movement taking credit for making the law as “impactful as possible.”¹² But many features of the celebrated Iowa law have the trappings of a traditional tough-on-crime approach. For example, the new statute reduces the required mental state for establishing criminal liability from “intentionally” to “recklessly,” which means that inadvertent abuse or neglect is now a crime in Iowa.¹³ The statute also increased the penalties for animal abuse and neglect, and expanded the range of criminalized conduct.

Perhaps even more notable is the impetus behind many reforms that expand criminal penalties. The local organization urging the passage of the Iowa law explicitly claimed that the goal behind the more punitive legislation was to improve the state’s ranking on the “Animal Protection Laws State Rankings.”¹⁴ As the Iowa

¹⁰ Mirko Bagaric, *A Rational Approach to Sentencing Offenders for Animal Cruelty: A Normative and Scientific Analysis underpinning Proportional Penalties for Animal Cruelty Offenders*, 71 S.C. L. REV. Vol. 4 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3585498 (urging reforms that would allow for harsher sentences based on animal sentience and noting that such “changes to the law would acknowledge animals’ moral status and the impact of cruelty offenses on them, and harmonize this area of the law with scientific knowledge regarding the physiology and psychology of animals”).

¹¹ *Extreme Animal Cruelty Can Now Be Prosecuted as a Federal Crime*, THE HUMANE SOCIETY OF THE UNITED STATES (Nov. 25, 2019), <https://www.humanesociety.org/news/extreme-animal-cruelty-can-now-be-prosecuted-federal-crime>.

¹² *Updating Iowa’s Animal Protection Laws (Iowa)*, ANIMAL LEGAL DEFENSE FUND (2021), <https://aldf.org/project/updating-iowas-animal-protection-laws-iowa/>.

¹³ H.J. 789, 88th Gen. Assembly (Iowa 2020), www.legis.iowa.gov/legislation/Billbook?Ga=88&Ba=HF737. Oliver Wendell Holmes famously distinguished intended from unintended crimes by quipping that “a dog distinguishes between being stumbled over and being kicked.” HOLMES, *THE COMMON LAW* 3 (1887). It is not clear that criminal liability in Iowa does so distinguish after the new amendments. Cf. *Bailey v. Bly*, 231 N.E.2d 8 (Ill. App. Ct. 1967) (involving civil litigation based on stumbling over a dog).

¹⁴ *The Community and Pet Protection Act (HF737): Why This Bill Is Important*, THE IOWA PET ALLIANCE (2021), <https://iowapetalliance.org/hf737/> (“Iowa is ranked 49th in the nation for our animal protection laws, according to Animal Legal Defense Fund’s 2019 U.S. Animal Protection Laws State Rankings”).

sponsor of the legislation emphasized, “What we’re trying to solve here is Iowa being one of the lowest-ranked states in regards to animal abuse.”¹⁵

There is an uncomfortable irony in seeing Iowa seek to improve its animal protection rankings by passing more punitive felony laws of this sort. The state with one of the highest concentrations of factory farms in the country seeks to improve its public standing with regard to animal issues, and it is able to use the animal protection movement’s own ranking system to facilitate this deception and distraction.¹⁶

Industrial agriculture and its supporters are happy to celebrate the hierarchy of animal suffering codified through the animal law rankings. Animal advocates have explained that they “hope this [rankings] report encourages states, especially those at the lower end of the ranking, to refocus their attention”¹⁷ to more carceral policies. Consider the movement’s own reporting on another state infamous for its factory farms, Kansas. Reporting on ranking-induced progress in Kansas, the Animal Legal Defense Fund explained,

When ALDF initially published the report, Kansas was ranked among the worst states because it did not have any statute that allowed for felony prosecution of animal abusers. In a happy update, after ALDF had been working with Kansas lawmakers for a year, a new law went into effect . . . that makes severe cruelty to animals a felony. The law, known as “Scruffy’s Law” after a terrier who was maliciously tortured in a gruesome 1997 killing, also includes mandatory minimum sentence.¹⁸

In publicizing these rankings, the lawyers framed the question underlying the rankings as “Best States to Abuse an Animal?”¹⁹

In this way, the rankings displace attention from systemic violence and keep the attention focused squarely on acts of individual abuse and neglect. The criteria used to rank states are one of the great symptoms of the persistence of carceral thinking within the animal protection movement. Ranking systems always present a risk of oversimplifying complicated matters. Can a list of a city’s top ten restaurants capture the nuance of a dining experience? Ranking state laws across multiple legal dimensions, moreover, is infinitely more subjective and fraught. Yet, at least in the case of animal law state rankings, the criteria for evaluation are transparent. These rankings categorically reward states that take more punitive measures. Looking at the publicly

¹⁵ Stephen Gruber-Miller, *Iowa Senate Passes Bill Increasing Penalties for Animal Abuse, Neglect*, DES MOINES REGISTER (Mar. 4, 2020), <https://www.desmoinesregister.com/story/news/politics/2020/03/04/iowa-senate-passes-bill-strengthening-penalties-animal-abuse-neglect-torture/4952238002/>.

¹⁶ For a map of animal agricultural density across the country, see <https://www.foodandwaterwatch.org/news/brand-new-see-americas-factory-farms-mapped-out>.

¹⁷ Animal Legal Defense Fund, *Best States to Abuse an Animal?* THE ANIMALS’ ADVOCATE 25 2, 2006, <https://aldf.org/wp-content/uploads/2018/06/Animals-Advocate-Summer-2006.pdf>.

¹⁸ *Id.*

¹⁹ *Id.*

available grading criteria, one can quickly see that the current rankings system incentivizes legislation on topics including: (1) mandatory arrest provisions; (2) the availability of felony penalties; (3) a broader scope of criminal liability (to include neglect and bestiality); (4) increased penalties for repeat offenders; and (5) mandatory reporting of suspected abuse to law enforcement.²⁰ Moreover, the rankings additionally make specific suggestions to states for improvement, including adding a felony penalty for abandonment, increasing sentences, enacting a broader felony provision, and treating animal cruelty as a predicate offense to trigger the sweeping and much-critiqued web of criminal liability under RICO.²¹ It would be an interesting experiment to run to see how a state would rank under the existing methodology if it had no felony laws relating to animal neglect or abuse, but prohibited all factory farming practices,²² all fur production, and all cruel animal exhibitions, while also providing financial support to low-income persons with pets. If the state would rank very near the bottom of all states, despite providing the best quality of life for the largest number of animals, what does this tell us about legal advocacy around animals?

I would be remiss if I failed to emphasize that among many well-intentioned animal advocates, there is a pervasive fear that critiquing the criminal focus of animal law prioritizes human interests above animal interests. We are animal lawyers, not human rights lawyers, one can almost hear them yelling. But the reality is much more complicated, and much less of a zero-sum situation. There is no data to support the proposition that harsher animal cruelty laws are reducing crime. Indeed, the movement has never commissioned research about the rates of crime before they started the tough-on-crime model, much less compared it to crime rates for animal crimes in the modern era. We assume that the harsher laws are reducing animal crimes, but what if research shows an inverse relationship, which is not unheard of in criminology?²³

Yet, there is a sense among many thoughtful persons in the movement that these legislative reforms, along with the rankings that drive them (at least in part), should

²⁰ *Animal Protection U.S. State Laws Rankings Report*, ANIMAL LEGAL DEFENSE FUND (2019), <https://aldf.org/wp-content/uploads/2020/02/2019-Animal-Protection-US-State-Laws-Rankings-Report.pdf>.

²¹ See Antonio Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805 (1990), <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=2524&context=vlr>; Peter Henning, *RICO Lawsuits Are Tempting, but Tread Lightly*, N.Y. TIMES (Jan. 16, 2018), <https://www.nytimes.com/2018/01/16/business/dealbook/harvey-weinstein-rico.html>.

²² Note that that under the state rankings, having an ag-gag law (generally criminalizing trespass and recording on animal agriculture facilities) warrants only an “asterisk,” as opposed to an actual legislative suggestion for improvement.

²³ There are examples where conduct targeted by criminal law has increased or at least not materially decreased in the face of harsher penalties. See, e.g., Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. R. 607–8 (2000) (explaining that enacting more severe criminal statutes does “nothing to reduce the incidence of these offenses. Indeed, they may even increase the incidence of such crimes.”).

be understood as largely unrelated to incarceration. Broader felony laws, a wider net of RICO liability, and longer maximum sentences are not necessarily aimed at more incarceration on the ground, it is argued. Animal lawyers have explained that these reforms simply provide prosecutors with more options, allowing for greater discretion in individual cases. According to this logic, enacting felony offenses into law is simply “a way of acknowledging that animal abuse is a violent crime.”²⁴

Apart from being ahistorical, prioritizing felony laws while pretending that one does not expect them to be used (or used often)²⁵ is a strained form of logic: why prioritize laws without actually intending to see them enforced? Why spend money lobbying for higher maximum sentences, or incentivizing them through rankings, only to claim that you don’t actually anticipate more incarceration? The suggestions of nonuse or only expressive or symbolic value are almost insulting to the intelligence of persons familiar with the criminal system. Prosecutors and the animal lawyers who seek legislation adopting new charges and longer sentences are smart people who would not waste their time pursuing the changes if the law reforms did not provide them tactical advantages. Put differently, pushing for increased penalties as a way of acknowledging the violence of harming animals, without expecting that the sentences will increase in actuality, is a form of deliberate ignorance. It is almost bizarre to suggest that the movement spend its limited resources seeking *more* felony laws and *higher* felony sentences (and penalize in rankings the absence of such felony provisions) without expecting any uptick in the number of felony charges or sentences. In 2021, a prominent animal lawyer made this point clear in an interview with the *Toronto Star* about an animal abuse case, “The law allows (a prison sentence of up to five years), so why not hand down the maximum?”

Consider the relatively recent enactment of Desmond’s Law in Connecticut. The law, which allows for victim advocates in animal cruelty cases, is now championed by its drafters as a reform that is not a “punitive approach.”²⁶ But the history of the law tells a different story. Desmond was a dog who was brutally abused, and the person who inflicted the injuries was not sentenced to incarceration. The sponsor of the bill, Representative Diana Urban, was understandably heartbroken over Desmond’s suffering, and was so outraged by the minimal sentence in Desmond’s case that she “immediately began her battle to write legislation that would make sure that this travesty of justice would never happen again.”²⁷ In other words, the law was

²⁴ ALDF *Position Statement*, *supra* note 3, at 4.

²⁵ It is beyond question that the tough-on-crime turn in animal law was motivated by a desire for more incarceration. As the executive director of one prominent organization explained, “our Criminal Justice Program is working with law enforcement agents and prosecutors to assure the successful prosecution of criminal animal abusers. This is the program that inspired our famous bumper sticker: ‘Abuse an Animal, Go to Jail!’ And we mean it.” (emphasis added), <https://aldf.org/wp-content/uploads/2018/06/Animals-Advocate-Summer-2006.pdf>.

²⁶ Rubin, *supra* note 1, at 270.

²⁷ *The Origin of Desmond’s Army*, DESMOND’S ARMY, <https://desmondsarmy.org/the-origin-of-desmonds-army/> (last visited Aug. 5, 2020).

always about incarceration. Lamenting the failure of the legal response to the Desmond case, Professor Jessica Rubin observes that the “owner was allowed to enroll in a diversionary program” called accelerated rehabilitation.²⁸ Even bracketing what it means for the animal protection movement to be openly opposed to a program called “accelerated rehabilitation,” it is striking that commentators now assert that the law has nothing to do with “trying to maximize incarceration.”²⁹

It cannot be doubted that the movement has pursued new felony laws and expanded sentencing regimes in recent years,³⁰ and the notion that one can pursue more felonies, longer sentencing provisions, advocate laws, and broader definitions of crimes *without* expecting longer sentences is both at war with the existing data from other fields and in tension with the movement’s own ongoing advocacy. Research has consistently shown what is common sense to most: when sentencing ranges are increased for a crime, the average length and frequency of incarceration will also increase.³¹

Passing more and harsher criminal penalties can be expected to produce more incarceration. Moreover, as already noted, many of the animal protection lawyers who favor prosecution point to the importance of incapacitation. But if the goal is to

²⁸ Rubin, *supra* note 1 at 263. Opposing something called Accelerated Rehabilitation is a pretty trenchant example of carceral exceptionalism in animal law. A person sentenced to accelerated rehabilitation is released to the custody of the Connecticut Court Services Division for a two-year term of supervision, during which time conditions such as restitution, community service, psychiatric or psychological counseling, alcohol or drug treatment, or even an animal cruelty prevention and education program may be imposed. See *Accelerated Rehabilitation Diversionary Program*, CONN. JUD. BRANCH (2017), <https://www.jud.ct.gov/Publications/CR137D.pdf>.

²⁹ *Id.* A reader might get whiplash if she reads too quickly Rubin’s argument that Desmond’s Law was necessary as response to allowing an abuser to enter accelerated rehabilitation, while noting that Desmond’s Law really has nothing to do with criminalization or punitiveness.

³⁰ Consider Bella’s Bill, one of the movement’s legislative priorities in recent years. As described in the movement’s own summaries, the law was an effort to update the New York cruelty laws by “allowing for stronger sentences for animal cruelty.” *Bella’s Bill: Overhauling New York’s Cruelty Laws*, ANIMAL LEGAL DEFENSE FUND (2021), <https://aldf.org/project/bellas-bill/>.

³¹ See, e.g., Rochelle Morton, Michelle Hebart & Alexandra Whittaker, *Increasing Maximum Penalties for Animal Welfare Offences in South Australia – Has It Caused Penal Change?* ANIMALS (Dec. 8, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6316723/> (analyzing animal cruelty prosecutions and convictions after enactments strengthening sentences, noting that the types of penalties have changed, moving from “less severe penalties” to “more severe penalties.”); *Id.* (“Fines and prison sentences handed down have doubled in magnitude since Parliament increased the maximum penalties.”); Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, THE SENTENCING PROJECT (Nov. 5, 2018), <https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/> (linking increased federal sentencing policies with increased prison and jail populations); Consensus Study Report, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, THE NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, MEDICINE 70 (2014), <https://www.nap.edu/read/18613/chapter/5> (noting that a driving force behind increases in incarceration rates was “the proliferation in nearly every state and in the federal system of laws and guidelines providing for lengthy prison sentences”).

create safer communities by incapacitating persons who harm animals, it would be odd to suggest that longer sentences are not an affirmatively good or necessary outcome based on that logic. If one believes in incapacitation, then five years of community safety should be better than one year, and much better than probation. And if one lobbies for a law based on the promise of “stronger sentences,” only to later claim that it is surprised by or uninterested in such sentences, the entire project begins to reek of duplicity.

Moreover, as a practical matter, if incarceration were not really the goal of punitive animal cruelty felony laws, then the movement would likely care very little about actual enforcement efforts on the ground after a symbolically significant law was passed. But it is simply not true that the movement passes new or expanded felony criminal laws and then turns a blind eye to their underenforcement. As one commentator recently summarized, “[t]he biggest problem with the effectiveness of animal abuse statutes involves their enforcement.”³² Another law review article essentially parrots the logic of the movement: “The most significant issue in dealing with animal cruelty, animal abuse, and dogfighting cases is an overall lack of enforcement.”³³ There is an overriding sense among the academic commentary that, “[e]ven when the abusers do face trial, many offenders are given ‘slap-on-the-wrist’ punishments.”³⁴ For decades the movement has lamented what it calls the “enforcement gap,” or underenforcement of animal cruelty crimes,³⁵ and in recent years the movement has made it a priority to respond to the alleged underenforcement of animal cruelty statutes through creative legislation, including animal advocates in criminal cases involving animal abuse and neglect.³⁶

Consistent with this agenda, one of the most lauded and pursued types of animal protection legislation among local lobbyists and some national organizations is the animal-victim advocate laws mentioned above. “Desmond’s Law” and others like it provide animal victims a human advocate in addition to the prosecutor to speak about the impact of the crime. The express purpose for pursuing these laws is to

³² Kirsten E. Brimer, *Justice for Dusty: Implementing Mandatory Minimum Sentences for Animal Abusers*, 113 PENN. ST. L. REV. 649, 650–51 (2008) (“infrequent enforcement of animal cruelty laws and relatively light penalties for animal abuse create the social message that injuring animals through neglect or deliberate cruelty is marginally acceptable or a minor criminal infraction”).

³³ Katie Galanes, *The Contradiction: Animal Abuse – Alive and Well*, 44 J. MARSHALL L. REV. 209, 221–22 (2010).

³⁴ Brimer, *supra* note 32, at 650; *see also* Jennifer H. Rackstraw, *Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes*, 9 ANIMAL L. 243 (2003).

³⁵ Penny Conly Ellison, *Time to Give Anticruelty Laws Some Teeth - Bridging the Enforcement Gap*, 3 J. ANIMAL L. & ETHICS 1 (2009); JOAN E. SCHAFFNER, AN INTRODUCTION TO ANIMALS AND THE LAW 69 (2010).

³⁶ Galanes, *supra* note 33, at 225 (“Thankfully, some of these criminal defendants were punished with significant jail time; more often, however, defendants receive light sentencing or find ways to escape proper sentencing.”). Rubin, *supra* note 1, 275 (2018) (arguing that the enforcement gap can be narrowed through the use of victims’ advocates in animal cruelty cases).

address the so-called enforcement gap. As the Animal Legal Defense Fund explained in its testimony supporting the legislation, prosecutors “lack the resources to pursue cases involving animal victims to the fullest extent possible ... [but Desmond’s Law] would help to fill that enforcement gap.”³⁷ An unused or under-enforced felony law is seen as an affront to justice, and an expanding prosecutorial bureaucracy is necessary to ensure robust enforcement. That same logic is also obvious from the legislative moves pursued in the wake of the enactment of the federal PACT Act, which created felony level liability for certain animal cruelty crimes. Leaving no doubt that they wish the new felony law to be aggressively prosecuted, just months after enactment of the PACT Act, animal protection advocates proclaimed that the new law is “only effective if enforced,” and called for the creation of Animal Cruelty Prosecution Unit at the Department of Justice.³⁸ Federal legislation creating this new unit of prosecutors, dubbed the Animal Cruelty Enforcement Act, has already been introduced with bipartisan support, and with the promise that the law will help the nation “to step up federal action against perpetrators.”³⁹

The animal protection movement is anything but monolithic, but the idea that the movement as a whole has distanced itself from a strongly carceral posture is greatly exaggerated. Commentators and advocates continue to signal that the creation of new felony laws is an affirmatively positive development, and treat the underuse of such felony laws as creating a presumption of malfeasance, or representing a lack of acknowledgment that animal suffering should be taken seriously.

11.2 THE PROBLEM IS WITH ANIMAL POLICING, NOT JUST INCARCERATION

The explicit historical support for incarceration among leading scholars and advocates in animal protection is deserving of critique, as noted above. But a critique of incarceration alone would actually let the movement off too easy. As Dorothy Roberts and other scholars have recognized, a narrow focus on the problems associated with incarceration might imply that investments in more policing⁴⁰ and

³⁷ Letter, Animal Legal Defense Fund, *Re: Testimony of Animal Legal Defense Fund in Support of H.B. 5344, An Act Concerning Support for Animals That Are Neglected or Treated Cruelly (“Desmond’s Law”)*, Judiciary Comm. 810 (Mar. 22, 2016), https://ctstatelibrary.org/wp-content/ih-bills/2016_PA30_HB5344.pdf. The sponsor of the legislation explained that the legislation was in response to the light punishments for animal abuse that were commonplace. *Id.*

³⁸ Press Release, Braun, Whitehouse, Kennedy, Other Senators Introduce Bill to Crack Down on Animal Cruelty, ANIMAL WELLNESS ACTION (Sept. 16, 2020), <https://animalwellnessaction.org/2020/09/16/braun-whitehouse-kennedy-other-senators-introduce-bill-to-crack-down-on-animal-cruelty/>.

³⁹ *Id.*

⁴⁰ The term *policing* here is used a broad sense to include all efforts to enforce animal cruelty-related crimes. In many areas of criminal law, enforcement and policing are roughly synonymous, but in the realm of animal protection there is a large cadre of unsworn animal control

prosecutions that result in punishments other than incarceration are desirable alternatives.⁴¹ In reality, however, incarceration is just the low-hanging fruit, not the root of the problem. The incarceration obsession that treats light sentences, proverbially referred to as slaps on the wrist, as immoral is a symptom of the belief that social and moral attitudes are appropriately shaped through criminal interventions. Prosecutions that do not result in sentences of imprisonment, under this logic, are examples of the merciful progression of animal law. In the remainder of this chapter, I focus attention on the other-than-incarceration efforts that might be incorrectly conflated with leniency and just outcomes by animal advocates.

11.2.1 *General Considerations beyond Incarceration*

The United States is the world leader in incarceration, and some animal rights activists are beginning to acknowledge the harms that might flow from contributing to this system. The animal movement, however, seems unaware that incarceration is far from the only example of American exceptionalism in criminal law. In his book *The Process Is the Punishment*, Malcolm Feeley argues that for many persons facing criminal charges, the worst thing about the criminal system is the likelihood of lost wages, lost employment, ruined relationships, commissions to bondsmen, and other fees and burdens that are commonplace even if charges are ultimately *dismissed* by the prosecution or by acquittal.⁴² Being charged with a crime, or even just being targeted by police efforts to intervene and educate, can manifest as punishments for many persons, particularly persons in marginalized communities.

Even for those who are ultimately convicted of crimes, a large body of work has shown that the fact of a conviction can be worse than any short custodial detention. As Alexandra Natapoff has explained in her path-marking book, “one of the great myths of our criminal system is that minor arrests and convictions are not especially terrible for the people who experience them.”⁴³ As Natapoff shows, these myths obscure the reality that arrests, much less charges (even without any incarceration), destroy families and lives. Indeed, the US system of collateral consequences has created systemic barriers that often exclude persons convicted of crimes from fully

officers (employed by animal protection groups) who are deputized to enforce the animal cruelty laws, and whose role in policing animal abuse is relevant to the critiques raised in this chapter.

⁴¹ See, e.g., DOROTHY E. ROBERTS, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1484 (2012) (critiquing the child welfare system’s willingness to prioritize policing and increased carceral interventions); *Id.* (“State intrusion is typically viewed as necessary to protect maltreated children from parental harm.”).

⁴² MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979); see also Nora V. Demleitner, *Collateral Sanctions and American Exceptionalism*, in *AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT* 487 (Kevin Reitz, ed., 2018).

⁴³ ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL*, 19 (2018).

reintegrating into society. For example, a felony conviction, even if it does not result in incarceration, will oftentimes trigger disenfranchisement, which as of 2016, resulted in more than 6 million Americans being ineligible to vote.⁴⁴ Collateral consequences can result in the loss of employment licensures, a loss of public housing, the loss of one's right to serve on a jury, deportation, and many other harms that are determined at a state or local level, in addition to the often lawful, private discrimination by employers, landlords, universities, and others reviewing applications. Even noncriminal fines and fees, including fees or fines relating to animal offenses like tethering, could result in the loss of one's driver's license in many states.⁴⁵ There are as many as 11 million people who have a suspended driver's license at any given moment in this country because of a fine or fee. As one commentator has observed, the "sheer number of collateral sanctions has become staggering, and it has been impossible to detail all the sanctions potentially befalling" any particular defendant.⁴⁶ Thus, the problem of carceral animal law defies any tidy calculations about the number of arrests or prosecutions for animal crimes.

I often hear animal lawyers remarking that probation is likely the most common punishment for animal crimes, and the assumption is that this places the carceral project beyond rebuke. But scholars outside of animal law have recognized that a myopic focus on incarceration as the sole marker of penal severity is at odds with the lived reality of supervision for the 4–5 million people on probation in the United States. In 2020, Human Rights Watch issued a report summarizing the ways that probation and parole are troubling symptoms of and contributors to the mass incarceration system in the United States.⁴⁷ The animal rights movement's working assumption that probation is the soft-on-crime approach to crimes ignores the reality that nearly 50 percent of persons enter the state prison system because of a (often technical) probation or parole violation.⁴⁸ Probation cannot be easily and cleanly cordoned off from the mass incarceration system in the United States.

⁴⁴ Jean Chung, *Felony Disenfranchisement Primer*, THE SENTENCING PROJECT (June 27, 2019), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>.

⁴⁵ The failure to pay a court-imposed fine or fee is a frequent reason for the suspension of one's driver's license. Nonpayment of court costs and fees from criminal cases can result in suspension of driver's license in forty-four states. And nonpayment of civil fees or fines appears to be a basis for suspending one's driver's license in approximately a dozen states, some of which allow for the suspension even if the civil fine is not related to a traffic offense. *See, e.g.*, ARK. CODE ANN. § 16-13-708 (Arkansas); ME. REV. STAT. TIT. 14, § 3141; ME. REV. STAT. TIT. 29-A § 2608 (Maine); VA. CODE ANN. § 46.2-395 (Virginia); WIS. STAT. WIS. STAT. § 345.47, 800.095 (Wisconsin).

⁴⁶ Demleitner, *supra* note 42, at 488.

⁴⁷ *Revoked: How Probation and Parole Feed Mass Incarceration*, HUMAN RIGHTS WATCH (July 31, 2020), www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states#.

⁴⁸ *Id.* ("People under supervision, lawyers, and even some judges and former supervision officers recognize that supervision often sets people up to fail. People must comply with an array of wide-ranging, sometimes vague, and hard-to-follow rules, including rules requiring them to pay

The animal movement does not exist apart from this background of severe collateral consequences resulting from other-than-incarceration criminal sanctions. When a movement focused on humanizing the suffering of animals cannot fathom the hardship imposed on marginalized communities flowing from increased policing and prosecution, it betrays a kind of naivete or, worse, arrogance. For the persons and their families caught up in the web of policing, probation, and fines, it is the height of privilege to suggest that these movement-inspired police interventions do not impose serious hardships. The lived reality of persons impacted by increased policing and prosecution, even when incarceration does not ensue, is very different from what the animal lawyers might imagine.

I recognize that for many persons invested in animal protection, it is difficult to appreciate how police-dominated interventions that are not focused on incarceration could oftentimes actually be bad for animals.⁴⁹ To many of our readers, it will sound ridiculous to suggest that police interventions that do not lead to incarceration can ever be an *overreaction* to animal crimes. That is why the remainder of this section comprises short vignettes that describe the role of police in animal protection efforts that *do not involve incarceration*. These stories are based on events spread across the country, spanning blue and red states, and they are not meant to be exhaustive; rather, they are merely illustrative examples of the systemic problems resulting from a harsh policing approach to animal crimes, even in the absence of criminal convictions. These examples provide a foundation for thinking about how policing and prosecution that does not result in incarceration or even a conviction can be affirmatively bad for animals.

11.2.2 *When Poverty and Pets Can Mean Deportation: Texas*

A number of assumptions undergird the carceral turn in animal protection efforts. The defining and most prominent assumption is that increased policing and criminal interventions will ultimately reduce animal suffering. Implicit in this assumption is the conclusion that marginalized communities will not cease reporting or underreport animal crimes out of a fear of immigration or criminal consequences. Another animal protection assumption, and one that has historically been disconnected from the carceral turn in animal law, is the overriding belief that animal shelters and animal service agencies exist to protect animals, and should be viewed

steep fines and fees, attend frequent meetings, abstain from drugs and alcohol, and report any time they change housing or employment.”).

⁴⁹ There are countless ways that the imposition of fines and fees on persons with pets can be devastating for the animals. For example, the economic pressure that fines create for persons who are already struggling financially are passed down to the animal in terms of fewer available resources for animal care. And the cost of rehoming an animal, even bracketing the emotional costs to the animal and the person, are much higher than keeping the pet in the home that they already know and love. In addition, some percentage of confiscated animals are euthanized when they cannot be adopted.

as critical resources for communities. A recent case in Dallas reveals the tension between these assumptions.⁵⁰

In January 2020, Maria Flores brought her Maltese dog, Muffy, to a veterinarian to have a recent limp checked out. The veterinarian observed severe matting across the dog's body, which was likely the source of the limp, and prescribed a treatment plan that included sedation, shaving, and antibiotics. Maria paid the fee for the vet visit. Unfortunately, however, Maria could not afford the proposed \$1,500 treatment plan. After a few weeks of monitoring the dog and hoping she would get better, Maria realized that Muffy's limp was getting worse. Maria made the difficult decision to surrender Muffy to Dallas Animal Services (DAS), so that the dog could receive treatment.

Like other animal service programs across the country, DAS promises an important service to community members; it agrees to accept "pet surrenders" from any person within the city limits.⁵¹ Muffy was surrendered by her family because they could not afford the medical care she needed.

The veterinarian at DAS who examined Muffy discovered that the matted hair had caused a set of serious injuries, including muscle loss and the tearing of an Achilles tendon, and because of these injuries contacted the Dallas Police Department. In conjunction with the Texas Society for the Prevention of Cruelty to Animals, the Dallas Police arrested Maria in August 2020, and she was charged with felony animal cruelty, which carries a maximum of ten years in prison (based on "updates" to the law urged by animal groups). Maria was booked in the Dallas jail and remained there without bond, away from her husband and kids, until September, at which point she was taken into custody by Immigration and Customs Enforcement officers and moved to an immigration detention facility.

Maria, who is undocumented, faced years in prison and a felony record. She still faces likely deportation – all because she turned her dog over to the Dallas Animal Services after she could not afford a veterinarian's suggested treatment plan. It is true that a grand jury subsequently refused to indict her on the criminal cruelty charges, and she was eventually released on bond from the immigration detention center. But irrevocable damage had already been done: Maria was detained for more than a month, and now faces a daunting challenge in immigration court to her ability to remain in the country.

There is a growing body of research documenting the fact that persons living in marginalized communities, particularly undocumented persons, are reticent to

⁵⁰ Rebecca Lopez, *Dallas Woman Faces Deportation after Taking Sick Dog to Animal Shelter*, WFAA (Sept. 26, 2020), <https://www.wfaa.com/article/news/local/dallas-woman-faces-deportation-after-taking-sick-dog-to-animal-shelter/287-99474cbl-e977-4ae1-9116-7aabbao35eed>.

⁵¹ Dallas Animal Services, *Can't Keep Your Pet?* CITY OF DALLAS (2021), <https://dallascityhall.com/departments/dallas-animal-services/Pages/CantKeepYourPet.aspx>.

report crimes in their neighborhoods.⁵² The reasons for such underreporting are varied, but an ACLU report makes clear that a fear of deportation is a leading reason that many immigrant communities might underreport crime.⁵³

The animal protection movement wrongly assumes that more aggressive policing and intervention will help animals, but research suggests that the carceral turn in animal law may actually deter persons from reporting abuse in their community, impeding efforts to intervene and help animals. Police officers have reported that crimes like sexual assault, human trafficking, and domestic violence are harder to investigate because immigrant communities are less likely to use local resources out of fear it will result in harm to their community. The notion that marginalized communities might fear animal protection groups and community shelters because of the carceral turn is illustrated perfectly by a close friend of Maria, who said of her case: “They’re committing many injustices and it’s unfortunate that where people go seek help, they’re attacked.”⁵⁴ And this is precisely the point.

The involvement of police and immigration officials has become routine for many groups concerned with animal protection, rather than focusing on processes that might help the injured animals. For example, many states have “mandatory reporting” laws that require veterinarians or other professionals who suspect animal crimes to report the matters to law enforcement. Indeed, the state rankings of animal protection laws value such measures, which appear innocuous, even obvious. But this is all part of a logic that treats police intervention as an affirmatively good and necessary part of a commitment to animal protection. Stories like Maria’s problematize this narrative by showing that increased policing, even in the absence of a conviction, can produce negative impacts for individuals, communities, and the animals themselves.

For many in the animal protection movement, Maria’s story will be uncomfortable, and rightfully so, but there is no reason to believe it is unusual. In fact, many in the animal protection movement might react to Maria’s story by lamenting that she came to the shelter too late, when the dog’s condition had deteriorated badly enough to warrant police intervention. If only she had come sooner, they will say, all of these consequences could have been avoided. But for those living in marginalized communities, there is a sad futility in the suggestion that more frequent or earlier interactions with animal protection groups would ameliorate the problems resulting from circumstances such as this one. As Maria’s lawyer observed, the

⁵² Stefano Comino, Giovanni Mastrobuoni, and Antonio Nicolo, *Silence of the Innocents: Illegal Immigrants’ Underreporting of Crime and Their Victimization*. IZA DISCUSSION PAPER NO. 10306, <https://ssrn.com/abstract=2861091>.

⁵³ *Freezing Out Justice*, ACLU (2018), <https://www.aclu.org/report/freezing-out-justice>.

⁵⁴ Stella Chávez, *A Dog Owner Couldn’t Afford Her Pet’s Treatment, Now She’s in an Immigration Detention Center*, KERA News (Sept. 8, 2020), <https://www.keranews.org/news/2020-09-08/a-dog-owner-couldnt-afford-her-pets-treatment-now-shes-in-an-immigration-detention-center>.

groups involved seem to prefer throwing her in jail instead of exploring alternatives in circumstances where a person may not be able to afford resources for their pet.⁵⁵

Equally important, Maria's case will never end up in a database compiling the overuse or abuse of the criminal justice system in animal cases because her case was ultimately dismissed. In the eyes of many animal protection advocates who might want to track data about the system, this case will be invisible. It is a nonevent. Cases that do not result in a conviction, much less a sentence of incarceration are well beyond the universe of data that anyone is talking about when conversations about the utility of a carceral response to animal suffering are being undertaken. A suffering animal whose case brings a small punishment or no conviction is the very sort of slap on the wrist that seems to justify the need for more felonies and policing. But the reality, as Maria's case illustrates, is considerably more complicated.

Many cases that never result in incarceration or a conviction (or as in Maria's case a formal charge from, for example, a grand jury) still have devastating impacts on the accused's life, as well as on the way that communities perceive animal protection efforts. Cases like Maria's show that the harms of the propolicing agenda extend well beyond the easily counted cases and quantitative data that will emerge from FBI databases. The impacts on the safety of animals in a community from a carceral animal law posture is probably best understood by looking to qualitative accounts like those in Maria's case. Would anyone really fault Maria if she fails to report to animal protection groups or authorities a dog she thinks is being neglected in her neighborhood after her experience? Maria may not even be in the country to report the abuse, since she still faces deportation because of the chain of events triggered by her efforts to obtain costly medical care for her dog. As a result of policing and fear of prosecution, more animals may actually suffer.

11.2.3 *The Quintessential "Slap on the Wrist," a Sentence of Home Arrest: Florida*

The case of Tammy Brown from Florida is illustrative of the sort of prosecution effort that might be written off as *de minimus* by many in the animal movement because she was ultimately sentenced to house arrest and probation.⁵⁶ But the ultimate sentence only tells part of the story.

⁵⁵ *Id.* (quoting her attorney as saying that there is a "disconnect between the agencies charged with protecting animals and the families who may need help caring for their pets.").

⁵⁶ In a podcast discussing the carceral impulses in animal law, leading animal law commentator Mariann Sullivan appeared skeptical of the critique because, as she observed, it seems that relatively few persons are sentenced to incarceration for animal abuse. *Animal Law Podcast #50: Justin Marceau on Animal Law and Criminal Punishment*, OUR HEN HOUSE (July 24, 2019) <https://www.ourhenhouse.org/2019/07/animal-law-podcast-50-justin-marceau-on-animal-law-and-criminal-punishment/>.

Tammy has a disability and lived on about \$500 per month from social security, of which she spent about \$300 on the mortgage and utilities for her mobile home, leaving her about \$200 for food and all personal expenses.⁵⁷ In 2011, an animal control officer seized Tammy's elderly dog, Harley, and Tammy was charged with animal abuse for failing to treat a variety of medical conditions that the dog was suffering from. Explaining the need for criminal charges, the local prosecutor conceded a lack of malice but noted that "[t]he problem is that she allowed things to get to a point where the dog suffered." As a means of protecting the animals in our community, the dog was seized, and Tammy was tried and convicted of animal neglect. The dog was promptly euthanized.

No one disputed that the problem was really one occasioned by poverty, because Tammy simply could not afford to take the dog to a veterinarian. Nevertheless, Tammy became a victim of the animal policing system, and now she is also registered felon. Ultimately, she was sentenced to probation, house arrest, and a thousand dollars in fees, which on her income might take years to pay off. And based on general criminology statistics, one might surmise that Tammy will end up incarcerated because she may fall behind on her fine payments. But equally striking, because she could not afford bail, Tammy spent more than a month incarcerated before she was sentenced. A month of incarceration was far less than the one year of imprisonment sought by the prosecutor, but the combination of the loss of her dog, fees, and probationary terms that may well lead to future incarceration, and a felony record that will make future employment or housing opportunities even more limited for persons like Tammy, present challenges that are almost unimaginable to most of us who live comfortably.

The point is not to diminish the suffering of the dog, though it should be noted that it seems unlikely that this type of prosecution will meaningfully prevent persons living in poverty from perpetrating animal neglect in the future, whenever the cost of care goes beyond their financial means. Rather the point is to note that cases like this one pose a risk of increasing animal suffering across the country. What is a person living in poverty to do when she hears of cases like Tammy's? A rugged neoliberal approach might suggest that future persons should seek out better employment or not have pets when they are poor. But the reality is that persons who learn about this case might be advised by peers to abandon their pets when they realize the prohibitive cost of medical care, lest they risk prosecution either after bringing the animal to the shelter (as in Maria's case above) or a police seizure of the animal.

Maria, Tammy, and others similarly situated could not be blamed for feeling as though they were being targeted because they were poor. Indeed, incidents of

⁵⁷ *Pasco Woman Who Couldn't Afford Vet Is Convicted of Animal Cruelty*, TAMPA BAY TIMES (Apr. 25, 2013), www.tampabay.com/news/courts/pasco-woman-who-couldnt-afford-vet-is-convicted-of-animal-cruelty/2117238/.

conduct labeled as animal neglect and cruelty are often higher in communities suffering from poverty.⁵⁸ But relying on the punitive criminal justice system to address this kind of harm results in more harm for the humans involved, often further enmeshing already marginalized people in cycles of poverty, incarceration, and societal exclusion. Moreover, such prosecutions make persons involved in animal protection seem elitist by sending a message about the incompatibility of poverty and pet companionship. Animal lawyers have previously taken appeals in criminal cases urging courts to refuse a poverty-type defense to animal neglect.⁵⁹ As the sentencing judge told Tammy, to the delight of many animal advocates, in adding a condition to her sentence, “I don’t want you to own any animals. Not even a goldfish.” Harley was “rescued” from Tammy and treated to a prompt death, and now an impoverished woman whose only friend may have been that dog is a registered felon saddled with fines. And before we dismiss such cases as aberrational, it is necessary to reflect on the fact that most animal crime cases are for neglect rather than affirmative abuse.

11.2.4 Citations, Fines, and Fees, All across the United States

For many persons who support better protection for animals in the law, a police response to animal suffering is commonsense. The focus is on high-profile cases of horrific abuse, and these cases seem to necessitate a larger and more aggressive police force dedicated to animal protection. But as in other areas of law, the incidence of increased policing is felt most acutely in low-income neighborhoods and among marginalized communities.⁶⁰ Animal well-being is ultimately not well served by an aggressive system of policing with fines and fees, even when no criminal conviction is obtained.

⁵⁸ E.g., David Vognar, *Animal Welfare, Human Welfare Linked*, HUFFPOST (Aug. 1, 2012), https://www.huffpost.com/entry/animal-welfare-poverty-b_1560440; see also Vanessa Alva, Matthew Causey, and Abbey Reddig, *High Number of Animal Cruelty Cases Linked to Poverty, Says Expert*, THE TELEGRAPH (Jan. 29, 2018), www.macon.com/latest-news/article117995063.html.

⁵⁹ Scott Heiser & Niki Caferti, *Prosecuting Animal Abuse: Common Issues and Hot Topics*, YOUTUBE (Feb. 2, 2016), <https://www.youtube.com/watch?v=mlbjAQN5mk> (transcript on file with the Author) (“The defense in that case was justification. The defendant claims he was justified because he didn’t have any money, so he didn’t feed his dog because he had no money. Laura Dunn and Virginia Coleman did a fantastic job on that brief and we were victorious and it changed the course of events for me.”); *Id.* (deriding as foolish a defense argument against prosecution based on poverty, “The defendant said, ‘I couldn’t afford to feed him,’ so he never claimed that the dog somehow was sick or there was some other underlying physical problem that made the dog so skinny”).

⁶⁰ Although the criminology data regarding animal-related offenses is nascent, the limited data that exists confirms that, as with other offenses, animal related offenses appear to be disproportionately enforced in low-income, vulnerable neighborhoods. For example, research has shown that pit bull bans have been enforced primarily in communities of color. Sloane M. Hawes et al., *A Quantitative Study of Denver’s Breed-Specific Legislation*, 26.2 ANIMAL L. 195 (2020).

Although based on good intentions, the push to police animal crimes more aggressively fosters what a Human Rights Watch report describes as a “devastating cycle of poverty and arrest.”⁶¹ In some jurisdictions 40 percent or more of police arrests are based on warrants, a large percentage of which are issued based on an unpaid fine. Thus, the proverbial slap on the wrist – a fine or fee, perhaps for tethering one’s dog in violation of an ordinance – will often be a precursor to a warrant and arrest for a low-income family. Policing actions that result in fines for vaccine violations, tethering violations, or other animal welfare violations may seem so trivial to privileged animal lawyers as to not even register as carceral interventions.⁶² And yet these fines can have life-altering impacts for the impacted family, including the animal. As the American Bar Association reported in 2019, it is not uncommon for the parents of dogs or children to be unable to purchase their release from jail, leaving the animal or the family to suffer; every day across the country people “cycle in and out of jail because they can’t afford to pay old fines as their debt grows from new ones.”⁶³ This often-unseen part of animal law is the reality caused by fines and fees relating to animal crimes.

There are countless stories exemplifying an approach to everyday animal policing that produces a lose-lose situation for the humans and the animals. As one investigation revealed, animal control officers across the country are aggressively enforcing animal offenses such as registration laws, anti-tethering laws, and vaccine laws against poor and marginalized communities.⁶⁴ The resulting fines and fees often mean that a family is separated from a companion animal, and sometimes the animal is killed. For example, in 2013, Gerilynn Afleje’s dog was impounded, and when Gerilynn could not come up with the money to pay the fees, her dog was euthanized.⁶⁵ A 2015 investigation of just fifteen cities and counties across the country revealed “thousands of outstanding arrest warrants for small pet-related offenses.”

For those familiar with the critiques of overpolicing, these findings should not be surprising. Criminal law has been criticized for its consistent disparate impacts on poor, disadvantaged, and marginalized communities. As the punishment bureaucracy is expanded and celebrated by the animal protection movement, it is inevitable that cases other than the high-profile examples of sadistic abuse will comprise the bulk of many animal enforcement officer efforts. Thus, even setting aside the question of whether a carceral response is the best course of action in cases of

⁶¹ John Raphline, *Interview: How Policing in One U.S. City Hurts Black and Poor Communities*, HUMAN RIGHTS WATCH (Sept. 12, 2019), <https://www.hrw.org/news/2019/09/12/interview-how-policing-one-us-city-hurts-black-and-poor-communities>.

⁶² Natapoff, *supra* note 43, at 25–26.

⁶³ John Mathews II & Felipe Curiel, *Criminal Justice Debt Problems*, AMERICAN BAR ASSOCIATION (Nov. 30, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/criminal-justice-debt-problems/.

⁶⁴ Blake Ellis & Melanie Hicken, *Dogs Killed over Unpaid Fines*, CNN MONEY (Apr. 6, 2015), <https://money.cnn.com/interactive/pf/pet-fines/>.

⁶⁵ *Id.*

extreme violence to animal victims, framing animal police as central to animal protection efforts has resulted in an expanding enforcement system for animal offenses, and one that functions in ways that are similar to the traditional criminal system. When the policing bureaucracy is expanded, it should not be surprising that the outcomes impact certain communities more than others – in the view of leading scholars like Paul Butler, “the system is working the way it is supposed to.”⁶⁶ In some low-income neighborhoods, there are documented reports of animal police going door to door and providing citations for failing to sterilize, license, vaccinate, or untether an animal.⁶⁷ Fines and fees for misconduct associated with animals, including citations for tethering a dog or failing to vaccinate the animal, are part of the carceral animal law bureaucracy.

11.3 CONCLUDING THOUGHTS ABOUT ANIMAL ENFORCEMENT

The point of this chapter is not to suggest that animal suffering should be treated as an illegitimate or trivial concern. On the contrary, the lives of animals in this country are afforded too little value and protection in the law. Animals are deserving of legal protection, and I share the same ultimate goals as the activists pursuing criminal law reform in the name of animals. The only disagreement concerns whether increased policing and prosecution is a realistic vehicle for reducing the suffering of animals. As the discussion above makes clear, in many instances animal policing causes more harm than good. Even when the focus is on animal policing that does not result in convictions, or even incarceration, the outcomes for animals and humans are often more harmful rather than helpful. It cannot be assumed that policing of animal crimes in circumstances such as those described in this chapter is actually improving animal well-being.

In this chapter, I cannot offer anything approaching a blueprint for next steps, but I think the priority should be interventions targeting the protection of animals *without* an increase in policing, fines, or prosecution. Subsidies and direct services to animals, and perhaps programs aimed at something more like restorative justice for animals, promise to protect animals better than punitive and regressive systems of police intervention. Some private organizations, for example, the Pets for Life Program at the Humane Society of the United States, invest in veterinary care and subsidies for families with pets as opposed to defaulting to a punitive response, and

⁶⁶ Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, FREEDOM CENTER JOURNAL, Vol. 2019, Iss. 1, 75, 81 (2020) (“It is possible for police to selectively invoke their powers against African-American residents, and, at the same time, act consistently with the law.”).

⁶⁷ Ellis & Hicken, *supra* note 64.

they are already recognizing the benefits for communities and animals from this type of intervention.⁶⁸

Unlike the stories told above, there are countless examples emerging from the program with great outcomes. Dogs that might have been euthanized have been treated and returned to their homes. Persons who might have been incarcerated, or fined and separated from their animal, continue to enjoy the companionship of a beloved animal friend, free from collateral consequences of criminal charges. Cases that very likely would have led to felony charges have been handled as issues of poverty and met with resources, resulting in the animal and the family now living out their lives together happily.

There is no silver-bullet that will end animal suffering. But it is time to think seriously about diverting the resources devoted to policing and prosecution to programs aimed at building up communities and protecting animals. Protecting animals or reducing their suffering might be costly, but in truth so is the enforcement and policing bureaucracy that has developed in support of conventional approaches to combating cruelty and neglect. We should seek opportunities to redeploy resources away from policing, so as to avoid outcomes where a dog is taken from her home and either euthanized or rehomed.

For much of the animal protection movement's history, there has been an implicit assumption that incarceration was a vehicle for vindicating the rights of animals. I reject the notion that society can ever punish or prosecute its way to animal rights. But in the interest of animal well-being and human well-being, I would go one step further.

That is to say, it is time for the movement to appreciate that increased policing and prosecution should not be celebrated as an unmitigated good simply because incarceration may not always (or even often) be obtained. Law-and-order approaches to social problems tend to ignore systemic abuse and may create more problems than they solve. We applaud those within the movement who are looking to deescalate the tough-on-crime rhetoric by seeking punishments less than incarceration, but we also caution against increased policing and enforcement even when the stated goal is not incarceration. These more subtle forms of carceral thinking warrant closer scrutiny.

⁶⁸ Animal Sheltering, *Pets for Life*, THE HUMANE SOCIETY OF THE UNITED STATES (2021), <https://www.animalsheltering.org/programs/pets-for-life>.