

## Carceral Progressivism and Animal Victims

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Over the course of the past decade, critiques of the criminal system have proliferated in left and progressive circles.<sup>1</sup> Rhetoric and structural critiques once relegated to corners of academia or radical activist circles have been incorporated into popular discourse. Indeed, the last year has seen a shift in the Overton window of criminal policy debates as calls to defund, dismantle, and abolish prisons, police, and other institutions of the prison-industrial complex have entered the mainstream.<sup>2</sup> In short, being anti-mass incarceration has become a veritable requirement of establishing one's left bona fides and being committed to some vision or version of social justice.<sup>3</sup>

But what does it mean to be against mass incarceration, to support criminal justice reform, or even to call for abolition? The uncertainty of each of these positions complicates the current cultural understanding of the left (broadly conceived) as anticarceral. It's easy to oppose criminalization and its abuses in the abstract, particularly when these institutions operate as stand-ins for white supremacy, heteropatriarchy, capital's subjugation of labor, and so forth. It's much harder when confronted with conduct that seems particularly egregious, harm that seems staggering, victims who appear extremely vulnerable, or defendants who appear extremely unsympathetic. In many areas we see a retrenchment. Or, more

<sup>1</sup> In this chapter, I use "criminal system" or "criminal legal system" advisedly – the administration of criminal law in the United States varies dramatically jurisdiction to jurisdiction and hardly represents a "system" in the sense of a single entity driven by a set of unified theories, politics, or principles. See, e.g., Monica Bell et al., *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1528 n. 7 (2020); Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419, 421 (2018); Sara Mayeux, *The Idea of "The Criminal Justice System"*, 45 AM. J. CRIM. L. 55, 65 (2018).

<sup>2</sup> See, e.g., Introduction, 132 HARV. L. REV. 1568 (2019); Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES, Apr. 17, 2019, <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html>.

<sup>3</sup> See generally Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018).

accurately, we see activists, advocates, and academics who are otherwise critical of prosecutorial politics turn to criminal law and the institutions of the carceral state as the solution or response to a pressing social problem.

In this chapter, I focus on that turn to criminal law and use the criminalization of animal abuse as a case study or window into a phenomenon that I describe as “carceral progressivism.”<sup>4</sup> My argument proceeds in two parts. First, I outline my theory of “carceral progressivism,” arguing that the link between anticarceral politics and (certain corners of) the left may be more tenuous than it initially appears. Next, I look to the case study of harm to nonhuman animals. Focusing specifically on the language of advocates and its resonance with expressive theories of punishment, I examine the ways in which the criminal turn in this context rests on a vision of the state as speaking for vulnerable victims and sending a message about society’s values and social inclusion.<sup>5</sup> I conclude by critiquing this progressive criminalization project and highlighting the limits of criminal law as a vehicle to advance left causes or interests.

### 5.1 CARCERAL PROGRESSIVISM

Conventional explanations of mass incarceration and the rise of the carceral state tend to lay blame at the feet of the political right.<sup>6</sup> The explosion in prison and jail populations beginning in the 1970s and the dramatic racial disparities in that expansion are described as outgrowths of ideologies explicitly hostile to racial and distributive justice. In these accounts, the criminal system has operated as an engine of social control, and mass incarceration stands as a manifestation or fortification of the dominant social order.

Whether framed in terms of neoliberalism, white supremacy, or social conservatism, these accounts generally downplay the role of the political left (broadly conceived). Maybe we should view mass incarceration as a New Jim Crow – in this account, commentators frame the carceral state as an explicit extension of racist social control; whether exclusively anti-black, a descendant of chattel slavery, or also tied to the marginalization of Native, Latinx, and other populations, this account

<sup>4</sup> See Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415 (2021); Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV. 1429 (2021).

<sup>5</sup> Here and throughout, I use “victim” advisedly. As Anna Roberts has argued, “victim” occupies a peculiar place in criminal law and legal discourse, and its use often obscures important political determinations about what is or isn’t a crime and whether, or to what extent, someone has committed a crime. See generally Anna Roberts, *Victims, Right?* 42 CARDOZO L. REV. 1449 (2021), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3569623](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3569623).

<sup>6</sup> See, e.g., MARY LOUISE FRAMPTON ET AL., EDS., *AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION* (2008); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2007).

suggests that the logic of criminal institutions is one of white supremacy.<sup>7</sup> Alternatively, maybe we should understand mass incarceration as a construction or manifestation of neoliberal penalty – in this account, punitive impulses and carceral solutions operate as necessary adjuncts to theories of individual responsibility and free markets; the “weak state” favored by neoliberalism actually rests on a belief in a state with strong carceral dimensions.<sup>8</sup> Or, maybe mass incarceration is a pathology of capitalism – in this account, criminal law operates as a means of managing surplus labor, and the violence of law enforcement serves a necessary function in preserving class hierarchy.<sup>9</sup>

These explanations are compelling and fair as far as they go, particularly if taken together or understood as complementary frames for understanding hierarchy, marginalization, and state violence (rather than as clear, unassailable accounts of causation and intentionality).<sup>10</sup> But what about the left? What about progressives and leftists committed to issues of distributional justice?

One need not conclude that actors on the political left were the primary drivers of mass incarceration in order to recognize that punitive politics are and have been a bipartisan problem in the United States.<sup>11</sup> From hate crimes to intimate partner violence and rape to white-collar crime, activists, academics, and lawmakers on the left have put aside anticarceral commitments when confronted with conduct they viewed as particularly objectionable. Legal scholar Aya Gruber has described this phenomenon as a “carve out” (i.e., the commentator has demonstrated a willingness to “carve out” one area of criminal law as acceptable, if not desirable), while I have described it as “carceral exceptionalism” (i.e., the commentator has demonstrated a willingness to treat one area of criminal law as exceptional and therefore worthy of support).<sup>12</sup> Confronted with a particularly concerning or unforgivable class of conduct, the progressive move remains a return to the state as a solver of problems and a wielder of expressive moral force.

<sup>7</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

<sup>8</sup> See, e.g., BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011).

<sup>9</sup> See, e.g., GEORG RUSCHE & OTTO KIRCHHEIMER, *PUNISHMENT AND SOCIAL STRUCTURE* 5 (Russell & Russell 1968) (1939); Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society*, 37 *ARIZ. ST. L.J.* 759, 790 (2005).

<sup>10</sup> Put differently, any monocausal explanation for mass incarceration always will be unsatisfactory, in part because of the complex politics and institutional structure(s) of US criminal policy.

<sup>11</sup> See NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 12–13 (2014).

<sup>12</sup> See Aya Gruber, *#metoo and Mass Incarceration*, 17 *OHIO ST. J. CRIM. L.* 275, 279 (2020); Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 *J. CRIM. L. & CRIMINOLOGY* 491, 548–57 (2019).

We might explain this turn as one of political expedience or the result of what Derrick Bell famously described as interest convergence.<sup>13</sup> According to Bell's thesis, marginalized or less powerful groups are more likely to gain legal or political victories when their interests converge with a socially dominant or more powerful group.<sup>14</sup> Applying this reasoning to US criminal policy might help explain bipartisan support for a range of criminal statutes or punitive policies. That is, the realities of US political economy (particularly in an era of neoliberalism) mean that the most realistic regulatory option is criminal law.<sup>15</sup> To get legislation passed, activists on the left might need to find willing partners on the right or among centrists by appealing to common ground; more often than not, that common ground might be an appeal to law-and-order politics.<sup>16</sup> For example, progressive gun control proponents have struggled for decades to pass gun control legislation; however, many of their victories have come in the form of harshly punitive criminal statutes and policies, which have received the backing of conservative politicians and advocates concerned about "the wrong people" getting their hands on guns. Even when forging a liberal or progressive coalition was unsuccessful or insufficient, an appeal to conservative carceral politics allowed for the passage of certain punitive approaches to gun control.<sup>17</sup> That is, "governing through crime" and the use of criminal law as the dominant vehicle for addressing social problems might be the result of convergent interests of pro-regulation forces and procriminalization forces.<sup>18</sup>

But, pragmatism or interest convergence is just one possible frame through which to view these procriminalization moves by those on the left. It is plausible and at times quite likely that the preference for criminal law as a solution to certain problems reflects not just an acceptance of a least-worst alternative;<sup>19</sup> rather, the selective embrace of criminal law on the part of academics and activists might reflect true enthusiasm for criminalization and the institutions of criminal punishment. That is, the calls for more prosecutions of "white-collar criminals," demands for longer sentences of individuals convicted of sex crimes, or the push to pass more hate crime bills all might represent a belief that those defendants *truly deserve* the full force of state violence. And, relatedly, the failure to punish those defendants or

<sup>13</sup> See DERRICK A. BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 165–79 (2004).

<sup>14</sup> See *id.*

<sup>15</sup> See generally LISA L. MILLER, *THE MYTH OF MOB RULE: VIOLENT CRIME & DEMOCRATIC POLITICS* (2016).

<sup>16</sup> See Aya Gruber, *Equal Protection under the Carceral State*, 112 NW. U. L. REV. 1337, 1365 (2018).

<sup>17</sup> I have made this argument at length elsewhere. See generally Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173 (2016).

<sup>18</sup> On governing through crime, see generally JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

<sup>19</sup> In such a view, the state failing to address the problem altogether presumably would represent the greater evil.

criminalize their conduct might represent a failure by society not only to hold them accountable but to signal its resistance to taking the underlying issues (economic inequality, gender subordination, and bigotry) seriously.

In other words, the carceral turn might be explained (at least in part) by the same impulse that leads progressives to the state in other noncriminal contexts: a desire to see the state definitively address social problems. To the extent that the United States has representative democracy and a state apparatus, shouldn't those institutions be there to protect the powerless? To the extent that criminal law and punishment represent (or purport to represent) public morality and public values, shouldn't they reflect the right values?<sup>20</sup> To the extent that the criminal system might serve a distributive function, shouldn't it advance the distributive ends that we (whoever "we" may be) favor?<sup>21</sup>

Those are questions that might – in both theoretical and practical terms – lead many to embrace criminal law as a suitable regulatory tool to address inequality, injustice, and a host of social problems. But, to be clear, this answer is an answer that suggests the evil of the carceral state is not the violence it does or the fundamental cruelty of cages, surveillance, and social control. Rather, it is one of scale, of choosing the deserving worst of the worst, and of the right distributive values that institutions of state violence should enhance.<sup>22</sup> It rests on a belief that the institutions of mass imprisonment and policing might be repurposed for good and might be a means to a more desirable end. Or, more pointedly, it suggests that incarceration and institutions of state violence are not incompatible with egalitarian ends; rather, they are important and at-times-necessary vehicles for achieving those ends.

## 5.2 HARM TO NONHUMAN ANIMALS

Which brings us to nonhuman animals and the common preference for using criminal law to address abuse by humans. As legal scholar Justin Marceau recounts, criminal law took on a greater role in the animal rights advocate's toolkit in the 1990s when "the movement hitched its wagon . . . to the star of mass criminalization."<sup>23</sup> By the midnineties, activists had "declared war on cruelty . . . by launching a nationwide campaign for stiffer laws [and] more vigorous prosecution of animal abusers, and [by] making available the tools to win convictions."<sup>24</sup> Indeed, a ubiquitous

<sup>20</sup> On criminal law as reflective (or constitutive) of public values, see, e.g., ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 102 (W.D. Halls trans., 2014) (1893); MICHEL FOUCAULT, *DISCIPLINE & PUNISHMENT* 138 (Alan Sheridan trans., 2d ed. 1995).

<sup>21</sup> On criminal law as redistributive, see, e.g., Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 1 (2010); Kate Levine & Benjamin Levin, *Redistributing Justice* (manuscript on file with author).

<sup>22</sup> See generally Levin, *The Consensus Myth*, *supra* note 3 (describing and critiquing this position).

<sup>23</sup> JUSTIN MARCEAU, *BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT* 22-23 (2019).

<sup>24</sup> *Id.* at 14.

bumper sticker produced by the Animal Legal Defense Fund reads, “Abuse an Animal, Go to Jail!”<sup>25</sup> And Marceau describes this slogan as “fairly representative as a motto for the entire disparate [animal protection] movement.”<sup>26</sup>

All fifty states criminalize animal abuse in some form or other.<sup>27</sup> Over the past twenty years, at least twenty-one states have increased criminal penalties for individuals convicted of abusing nonhuman animals or have redefined conduct as felonious that previously constituted only a misdemeanor.<sup>28</sup> Additionally, numerous states have passed new criminal statutes addressing animals left or tethered in hot cars or sexually abused.<sup>29</sup> And, in November 2019, President Donald Trump signed into law the Preventing Animal Cruelty and Torture Act (“PACT Act”), a statute passed *unanimously* by Congress that made certain acts of animal abuse federal crimes punishable by up to seven years in prison.<sup>30</sup> Put simply, criminal responses to animal abuse and neglect aren’t new, but they appear to have gained significant traction.

Without wading too deeply into the legal architecture or advocacy ecosystem of animal protection’s criminal turn,<sup>31</sup> I suggest that this turn reflects the sort of “carceral progressivism” described above. Importantly, many of the activists and advocates supporting criminal law and criminal legal institutions in this area have articulated positions generally hostile to the use of cages and inhumane punishment. Indeed, many of the specific targets of critique from the animal advocacy community are well-documented features of the US penal system, from denial of self-determination to confinement in cages to failure to provide necessary food and medical care. In short, the case of criminalizing mistreatment of animals represents the exact sort of carve-out or carceral exceptionalism that recurs in various corners of the US left (broadly defined). A general condemnation of society’s inhumane institutions somehow comes to excuse, or perhaps justify, the much-maligned

<sup>25</sup> See, e.g., Stephen Wells, *Letter from the Executive Director: Putting Animals behind Bars*, ANIMALS’ ADVOC., Spring 2013, p. 2.

<sup>26</sup> MARCEAU, *supra* note 23, at 2.

<sup>27</sup> See L.S. Stegman, *Do We Need to Make a Federal Case Out of It? The Preventing Animal Cruelty and Torture Act as Over-federalization of Criminal Law*, 57 AM. CRIM. L. REV. ONLINE 135, 137 (2020).

<sup>28</sup> See, e.g., 72 DEL. LAWS 417 (West); GA. CODE ANN. § 4-11-16 (West); NY CLS AGR & M § 353-a; TEX. PENAL CODE § 42.092 (West); OR. REV. STAT. ANN. § 167.320 (West); MD. CODE ANN., CRIM. LAW § 10-606 (West); W. VA. CODE § 61-8-19 (West); TENN. CODE ANN. § 39-14-202 (West); R.R.S. NEB. § 28-1009 (West); WYO. STAT. ANN. § 6-3-203 (West); A.C.A. § 5-62-103 (West); MISS. CODE ANN. § 97-41-16 (West); UTAH CODE ANN. § 76-9-301.7 (West); H R S § 711-1109 (West); SDCL § 40-1-2.4 (West); 3 PA. STAT. ANN. § 459-602 (West); N.D. CENT. CODE ANN. § 36-21.2-01 (West).

<sup>29</sup> See, e.g., 2006 CAL STATS. CH. 489 (West); 510 I.L.C.S. 70/3.01 (West); 11 DEL.C. § 1325 (West); WASH. REV. CODE ANN. § 16.52.205 (West); FLA. STAT. ANN. § 828.126 (West); OR. REV. STAT. ANN. § 167.333 (West); TEX. PENAL CODE ANN. § 21.09 (West); MASS. GEN. LAWS ANN. ch. 272, § 77C (West).

<sup>30</sup> See Mihir Zaveri, *President Trump Signs Federal Animal Cruelty Bill into Law*, N.Y. TIMES, Nov. 25, 2019, <https://www.nytimes.com/2019/11/25/us/politics/trump-animal-cruelty-bill.html>.

<sup>31</sup> Other chapters and authors provide much richer interventions than I could offer here.

institutions of mass incarceration and the carceral state. Or, as one commentator puts it in advocating for sweeping criminal punishment for defendants convicted of animal abuse, “attitudes about animal cruelty and neglect are changing, and society is moving slowly toward realizing that a truly civilized community must care for all of its vulnerable members, including the impoverished, the elderly, children, and domesticated animals.”<sup>32</sup> Put differently, caging abusers is the way that society signals its status as “truly civilized.”

The story of the animal protection movement’s embrace of criminal law has been told elsewhere,<sup>33</sup> and it (or aspects of it) certainly might reflect interest convergence and a grudging acceptance of the criminal system as the appropriate regulatory framework. But here I suggest that it also reflects the sort of enthusiasm for or embrace of criminal legal institutions that characterizes carceral progressivism and the turn to criminal law to advance left, redistributive, or egalitarian ends elsewhere. We might identify a host of common strands, themes, or arguments in any of these progressive criminalization projects.<sup>34</sup> In the context of carceral animal law, though, two familiar justifications or points of rhetorical emphasis stand out: (1) the presence of a particularly vulnerable class of victims; and (2) the claim that criminal law can send a message about society’s respect for that class of victims and condemnation of harm done to them. In this part, I take those two features in turn as a means of illustrating the troubling (and potentially unbounded) carceral logic that underpins the turn to criminal law as regulatory paradigm for advancing animal welfare.

### 5.2.1 *Vulnerable Victims*

Progressive proponents of criminal law tend to emphasize victims’ vulnerability and the role of the prosecution in vindicating the rights and interests of those victims. The victim of a hate crime is presumably more sympathetic and more in need of the state’s protection because she belongs to a historically marginalized group. The victim of rape, intimate partner violence, or some other form of gender-based harm requires additional assistance in overcoming the structures of heteropatriarchy and gender subordination that might make noncriminal alternatives insufficient. And, the victim of wage theft might be precariously employed, an undocumented immigrant, or lacking the legal, political, and economic status to hold her boss accountable in civil or administrative proceedings.

<sup>32</sup> Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law’s Role in Prevention*, 87 IOWA L. REV. 1, 72 (2001).

<sup>33</sup> See generally MARCEAU, *supra* note 23.

<sup>34</sup> For various characterizations of such arguments see, e.g., Ely Aharonson, “Pro-Minority” Criminalization and the Transformation of Visions of Citizenship in Contemporary Liberal Democracies: A Critique, 13 NEW CRIM. L. REV. 286, 287 (2010); Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*, 68 BUFF. L. REV. 199, 199 (2020); Levin, *Wage Theft Criminalization*, *supra* note 4.

Often in these accounts, the vulnerable victims are particularly deserving of or in need of state (criminal) assistance because they have been harmed by the state's long-standing failure to protect them.<sup>35</sup> This claim is a particularly powerful theme in the literature and advocacy regarding gender-based violence, but it also recurs in work around hate crimes and violence against racial, religious, and sexual minorities.<sup>36</sup> If freedom from violence represents the "first civil right," then the prosecution of individuals who use violence to subordinate marginalized communities can be seen as a means of vindicating rights and leveling the societal playing field.<sup>37</sup>

In some sense, the nonhuman animal stands as the apotheosis of the progressive's ideal victim: nonhuman animals lack a host of civil and political rights and, outside of human allies and advocates, have no meaningful vehicle to advance their interests via the legal system or political process. As a result, it should come as no surprise that the same rhetoric of helpless or vulnerable victims and crusading and protective prosecutors takes center stage in this context. For example, in celebrating the passage of the PACT Act, the vice president of field services at the Humane Rescue Alliance argued that absent a federal criminal statute (to reach conduct already criminalized in most jurisdictions), his organization had "been unable to truly bring justice for the animals in instances when the cruelty occurs across multiple jurisdictions."<sup>38</sup>

There's something intuitively appealing about this logic. Indeed, that's probably why it is so ubiquitous in mass cultural representations of prosecutors and in the advocacy supporting harsh criminal policies. But that ubiquity is part of the problem: if prosecutors are so good at vindicating the interests of victims and if criminal law and punishment are the ways to advance the interests of victims, why embrace critiques of the criminal system in the first place? There appears to be an implicit assumption that drives the carceral progressive carve-out for vulnerable victims – some assumption that most crimes (or most crimes committed by defendants worthy of sympathy) are victimless or involve victims who aren't vulnerable. That assumption would be consistent with a narrative in certain liberal or progressive circles that the War on Drugs and nonviolent or victimless crimes have been the drivers of mass incarceration. But that narrative gets it wrong;<sup>39</sup> the majority of people are incarcerated for crimes categorized as "violent," and victims are often from marginalized

<sup>35</sup> See, e.g., Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2328 (1989).

<sup>36</sup> See, e.g., RANDALL KENNEDY, *RACE, CRIME AND THE LAW* (1997); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1717 (2006).

<sup>37</sup> See generally MURAKAWA, *supra* note 11.

<sup>38</sup> Caitlin O'Kane, *Trump Signs Bill Making Animal Cruelty a Federal Felony*, CBS NEWS. Nov. 25, 2019, <https://www.cbsnews.com/news/animal-cruelty-felony-president-trump-signs-animal-cruelty-pact-act-bill-making-it-a-federal-felony-2019-11-25/>.

<sup>39</sup> See, e.g., MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2014); JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017).



communities.<sup>40</sup> In other words, if we need criminal law whenever a vulnerable or marginalized victim is harmed, we need a lot of criminal law, and decarceration is hardly an achievable goal.

Much contemporary anticarceral and abolitionist scholarship and advocacy focuses on critiquing those assumptions (i.e., that prosecutors serve victims' interests and that criminal punishment is the best way to make victims whole). Further, the assumption that prosecutors serve to shield the powerless victim from the powerful defendant is undercut by an extensive literature that deconstructs the victim/offender binary, stressing that people charged with crimes are themselves often victims of state and/or interpersonal violence. And, to the extent that the criminal system is embedded in a culture wracked with deep structural and institutional biases, there's good reason to think that the defendants selected for prosecution and punishment are themselves often relatively powerless or marginalized, even if they enjoy some power or advantage over a given victim. Maybe that's still an acceptable or desirable outcome for animal welfare advocates – maybe prosecuting and incarcerating the poor person of color who has harmed a nonhuman animal reflects the state at its protective and progressive best. But it's important to recognize that the progressive goal is being advanced on the backs of relatively powerless actors. And, the procarceral logic advanced by animal welfare advocates in this context would justify much of what goes on in the criminal system: the poor person with a gun may have relatively more power than the unarmed poor person, but does prosecuting the former really constitute a redistribution of power and a move to shield the weak? And, even if it does, at what cost?

So much of the activism and scholarship that have led to the contemporary moment of reckoning with mass incarceration has stressed the tremendous social cost and harms associated with arrest, prosecution, and incarceration. That is, even if it's fair to say that the human who has harmed a nonhuman animal has done something bad (even extremely bad) and has done it to a relatively powerless victim, turning to criminal law and institutions of state violence should require a reckoning with how much additional harm will be done and to what end. Those questions have become essential components of the discussion about dismantling the carceral state. Thus, they should be a part of any conversation about criminal law, even if that conversation is focused on conduct or defendants that progressives or leftists find particularly objectionable.

### 5.2.2 *Sending a Message*

Progressive criminalization projects often rely on an expressive theory of punishment or an account of criminal law as sending a message about society's values. That

<sup>40</sup> See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POLICY INITIATIVE, Mar. 19, 2019, <https://www.prisonpolicy.org/reports/pie2019.html>.

is, prosecuting the boss who steals her workers' wages or the racist who hurts a neighbor because of her race sends a message about what society should look like: work is valued, and greedy bosses are unacceptable; communities should welcome diversity, and racism is anathema to multicultural values.<sup>41</sup> Criminal law, in this frame, serves to signal inclusion of the victim in the polity by signaling deep disapproval of the harm done to that victim (or class of victims).<sup>42</sup> Or, as criminologist Dario Melossi describes it, “[p]unishment functions as a sort of ‘gazette of morality[,]’ announcing what is allowed and what is forbidden at a specific place at a specific time.”<sup>43</sup>

This rhetoric of criminalization, prosecution, and punishment “sending a message” recurs throughout the advocacy and literature on animal welfare. For example, in 2010 when Suffolk County, New York, moved to create a registry of people convicted of crimes against animals, the bill’s Democratic sponsor argued that “[a] society is judged by the way it treats those who are most vulnerable, and the creation of this registry sends a strong message that all of God’s creatures deserve protection from torture and abuse.”<sup>44</sup> Similarly, the lead prosecutor in the animal protection unit of Atlanta’s District Attorney’s office has argued that “[a]llowing animal cruelty to go uncharged, uninvestigated and unprosecuted sends a message . . . that violence is acceptable so long as it’s not to a human.”<sup>45</sup>

Notably, the passage of the PACT Act was accompanied by much fanfare highlighting its expressive value. Kitty Block, the president and chief executive of the Humane Society of the United States, argued that the announcement of federal penalties for conduct already criminal under state law “makes a statement about American values.”<sup>46</sup> Further, the Humane Society put out a press release stating that “PACT makes a statement about American values. Animals are deserving of protection at the highest level.”<sup>47</sup>

<sup>41</sup> See, e.g., Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 860 (2014); Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL’Y 13, 34 (2011).

<sup>42</sup> See, e.g., Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1265 (2000).

<sup>43</sup> Dario Melossi, *Gazette of Morality and Social Whip: Punishment, Hegemony and the Case of the USA, 1970–92*, 2 SOC. & LEGAL STUD. 259, 262 (1993).

<sup>44</sup> *Historic Vote in Suffolk County, New York Creates Nation’s First Registry for Animal Abusers*, ANIMAL LEGAL DEF. FUND (Oct. 12, 2010), <http://aldf.org/press-room/press-releases/historic-vote-in-suffolk-county-new-york-creates-nations-first-registry-for-animal-abusers-2/>; see also Danielle K. Campbell, *Animal Abusers Beware: Registry Laws in the Works to Curb Your Abuse*, 48 VAL. U. L. REV. 271, 328 (2013).

<sup>45</sup> Allie Phillips, *The Few and the Proud: Prosecutors Who Vigorously Pursue Animal Cruelty Cases*, PROSECUTOR, July/Aug./Sept. 2008, at 20, 26.

<sup>46</sup> Zaveri, *supra* note 30.

<sup>47</sup> Press Release, The Humane Society of the United States, *Extreme Animal Cruelty Can Now Be Prosecuted as a Federal Crime* (Nov. 25, 2019), <https://www.humanesociety.org/news/extreme-animal-cruelty-can-now-be-prosecuted-federal-crime>.

As a general matter, there is good reason to be skeptical about claims of criminal law's expressive force or justification. To whom does criminal law speak and how does it speak? Why should we believe that people are aware of every criminal statute, of every prosecution, or of every punishment? Further, even if criminal law is properly understood as advancing expressive ends, how exactly can or should we judge its success? If few defendants are prosecuted for harming animals, does that send a message that nonhuman animals don't really matter or that harm to them isn't a serious problem? It's well documented that the federal government has not been particularly aggressive in prosecuting crimes defined by explicitly expressive statutes (e.g., hate crimes and gender-based violence), which raises the question of whether the expressive function relies on a certain optimal rate of enforcement. And how much punishment sends the right message? As noted above, much recent advocacy involves amping up punishment for already-criminal conduct, which suggests that the existent punishments are insufficient to satisfy advocates.

All of which is to say that once we start down the road of expressive justifications, it seems hard to step off the gas. The logic appears to demand more prosecutions and more punishment, or else the expressive function withers away. And, if that's an acceptable approach, why should we stop with crimes against animal victims? There are many other values that progressives and leftists believe that the state should advance. Why isn't it acceptable to use criminal law to advance each of those values? I hope it's clear that such a line of reasoning opens the door to (or preserves) a massive criminal and prosecutorial apparatus. Additionally, there's something striking about celebrating the PACT Act at the same time that the Trump administration has been widely criticized for incarcerating immigrant children and supporting police violence against protestors demanding racial justice. The logic of expressivism and community values presumes that the state and, particularly, its prosecutorial arm(s) have a certain moral legitimacy and high ground from which to dispense public justice. That may be a view that some commentators hold. But it's fundamentally at odds with left and progressive critiques of the carceral state. And, even if one doesn't share those sweeping critiques of carceral institutions, there's something deeply problematic about suggesting that the way the state signals that society believes caging and abusing animals is wrong is by caging and abusing people.<sup>48</sup>

### 5.3 CONCLUSION: THINKING BEYOND CAGES AND CARCERAL LOGICS

Marceau ends his book on the problems with a carceral approach to animal protection with a quotation from critical theorist Audre Lorde: "there is no such

<sup>48</sup> Cf. Chad Flanders, *Shame and the Meanings of Punishment*, 54 CLEV. ST. L. REV. 609, 622 (2006) ("Although imprisonment can be equated with putting people in small boxes with bars, it is closer to the truth if it is equated with putting people in cages like animals.").

thing as a single issue struggle.”<sup>49</sup> That is, cordoning off discussions of animal protection and liberation from conversations about mass incarceration would be a mistake. Lorde is also widely cited for her observation that “the master’s tools will never dismantle the master’s house.”<sup>50</sup> This claim is reflected and embodied in a growing abolitionist discourse and praxis that treat carceral institutions as fundamentally at odds with egalitarian, redistributive projects. Cages, criminal punishment, surveillance, and social control are markers of an inequalitarian state or society. In other words, the institutions of the US criminal system are inherently regressive and cruel, regardless of the goals they are used to achieve. And, more pointedly, it is a mistake to think they ever could achieve those ends, because they will always entrench, legitimate, and reify the same troubling hierarchies, inequalities, and injustices.<sup>51</sup>

Despite the appeal of that radical frame, despite the fact that it resonates with many who advocate for left and progressive causes, and despite the increasing prevalence of the rhetoric of abolition, I see the case study of animal victims as revealing a selective application of that principle.

The carceral state and the structures of mass incarceration have resulted from “a series of small decisions, made over time, by a disparate group of actors.”<sup>52</sup> And, the suggestion that one area of criminal policy might be distinguished easily from another area of criminal policy would be a mistake. Legal and policy arguments migrate; that is, once raised or introduced, procarceral rhetoric may take root in the cultural consciousness(es) and may be mobilized by different thinkers and advocates

<sup>49</sup> AUDRE LORD, *SISTER OUTSIDER* 130 (2020) (1984) (quoted in MARCEAU, *supra* note 27, at 283).

<sup>50</sup> Audre Lorde, *The Master’s Tools Will Never Dismantle the Master’s House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES BY AUDRE LORDE* 110, 112 (1984); see also I. Bennett Capers, *Reading Michigan v. Bryant*, “Reading” *Justice Sotomayor*, 123 *YALE L.J. FORUM* 427, 445 (2014) (collecting uses of the “master’s tools” adage in Critical Race Theory scholarship).

<sup>51</sup> To be clear, I see this sort of abolitionist critique as reflecting (at least) two different impulses or concerns. On the one hand, perhaps the problem with the carceral state and the institutions of the prison industrial complex are their distributive consequences – they serve to harm or marginalize already-marginalized communities. See, e.g., Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 *GEO. L.J.* 1419 (2016); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 *HARV. L. REV.* 1 (2019). On the other hand, perhaps the problems would exist regardless of the distributive realities – the institutions fall afoul of some set of first-principles or deontological concerns, whether rooted in humanitarian, religious, or ethical commitments, etc. See, e.g., THOMAS MATHIESEN, *THE POLITICS OF ABOLITION REVISITED* (2015); Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 *HARV. L. REV. F.* 42 (2020). In discussions of the US criminal system, the turn to abolitionism (at least in activist and legal policy and academic circles) appears to reflect the first or distributive frame. While a discussion of these alternate strands of abolitionist theory and praxis falls largely outside of the scope of this chapter, this distinction might ultimately be significant in assessing the limits of abolitionism and in understanding the continuing allure of criminal law to at least some radical commentators.

<sup>52</sup> JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 229 (2017).

in very different realms.<sup>53</sup> The turn to criminal law as acceptable in one “exceptional” context is not necessarily exceptional; instead, it risks normalizing and legitimating the same moves and institutions in other contexts. In this chapter, I haven’t offered a solution to wide scale mistreatment of nonhuman animals. Instead, I have stressed the ways in which a criminal turn here legitimates a host of deeply objectionable institutions and arguments. Protecting vulnerable victims and sending a message about the way that society should value the lives and dignity of nonhuman animals are worthwhile goals. That said, by turning to the institutions of the criminal system to achieve those goals, activists and academics risk falling into the trap of carceral progressivism and excusing state violence, its inequities, and its inhumanities in the name of the “right” politics, causes, or victims.

<sup>53</sup> See Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193 (2010).

