PART I

Carceral Thinking in Animal Protection: Justifications and Repudiations

Introduction

Lori Gruen and Justin Marceau

This section seeks to tell the contested story about the history and practice of criminal enforcement in the service of animal protection goals. Competing normative and historical accounts are juxtaposed so as to provide a robust background for understanding various concerns about pursuing animal protection through criminal enforcement.

For this section we sought out and are delighted to include some of the most prominent voices in support of policing and prosecution, and their chapters have given us much to think about. Even in the midst of massive societal shifts in attitudes about the value of punitiveness and policing, many voices in the animal protection community continue to view carceral animal law as an important, even indispensable, part of legal advocacy on behalf of animals. In this section we are reminded in striking, visceral terms that animals can be victims of horrific violence, and many readers will likely take comfort in a prosecutor's explanation that she became a prosecutor in order to vindicate the value of "acknowledging right from wrong and enforcing penalties" (Beck). There is an unmistakable instinct to seek accountability, to send a message about the value of animal lives, and to deter future animal maltreatment, and these are the defining goals of the carceral animal law agenda (Beck and Frasch). As Ashley Beck says, in words that one can imagine would resonate with most Americans, she feels an obligation as a prosecutor to "ensure that justice is done, and that those who perpetrate crimes against animals are not given a pass," and this leads her to the conclusion that in serious cases "incarceration may be the only effective way to guarantee . . . the perpetrator cannot victimize another animal."

The history and practice of criminal animal law is often closely associated with a problem that has become well documented - "police bias." But in this context, legal commentators are referring not to the disparate impacts of policing on marginalized communities, but rather the "Oh, it's-just-a-dog response to abuse" (Frasch). There

https://doi.org/10.1017/9781108919210.002 Published online by Cambridge University Press

is a bit of a paradox here. Commentators in animal law seem ready to credit anecdotal accounts of police and prosecutorial bias when it comes to underenforcement of animal crimes – that is, they assume both the veracity of the "link," which treats animal violence as a reliable predictor of co-occuring crime or future violence, and simultaneously take for granted that there is an ongoing and historical bias in favor of underenforcement of animal crimes by prosecutors. But some of these same commentators are deeply skeptical that the enforcement of animal crimes might suffer from some of the same problems of racial disparity that plague the criminal system more generally. It would be striking for many experts in criminal law who understand the criminal system as being permeated with problems of race and class bias to learn that animal lawyers suspect that such claims would have little or no relevance to animal crime enforcement areas. Fears of racially disparate outcomes are written off as small data sets or anecdote, whereas studies with only dozens of people are accepted as demonstrating a link between, among other things, domestic violence and animal abuse.

But whatever the data might eventually say about bias or racism, under the prevailing view, "the expansion of felony anticruelty laws marked" progress for animals in law (Frasch). Until there are broad social shifts that might allow for systemic changes, some leading commentators urge us to view criminal cruelty law enforcement as the "most effective way to address" violence against animals (Frasch), or at least to accept the view that "believing in human evil reflects a view that not all incarceration of humans is unjustly oppressive" (Cupp). Whether it is viewed as an outright victory for animals and affirmative good, or just the least-bad option for vindicating animals' sentience, there is a widely shared view that incarcerating humans might be an important part of protecting the status of animals in law. The ubiquity of punishment as a metric for right and wrong, for some thoughtful commentators, serves in some measure to justify or at least excuse a carceral approach to animal law. As Cupp writes: "I have applauded, and will continue to applaud, the rapid evolution among states to raise animal abuse to a felony-eligible offense."

Not all scholars agree that the history of carceral animal law is so beneficent, or that its practice is fairly described as advantageous to animals. Countering the logic of the procarceral chapters are those who say, "it is impossible to understand . . . any . . . development in American criminal justice without taking account of race."[1] One historian reveals that crime and punishment in the animal law realm is not as exceptional as animal advocates often assume in this regard. In the animal law realm, "the carceral turn . . . [had] racist and civilized underpinnings that diverted scrutiny away from structural inequities" (Tarankow). Animal advocates often assert

[1] David Skalansky, Violent Crime and Violent Criminals 61 (2021); *Id.* at 65 (describing the "center-left position on criminal justice throughout the 1990s and 2000s [as] d-escalate the war on drugs, but give no quarter to violent crime.").

that the criminal enforcement of animal crimes is truly color-blind, a sort of bastion of racial equality. But theories of Black persons as possessing a dispositional inclination toward violence and inhumanity and the original narratives about the need for state power and punishment in the animal realm can be uncomfortably juxtaposed with modern narratives of urban criminals and superpredators whose characters, not their contexts, are the best explanation for the crime. This is a history that is not often told, but one that should be part of conversations seeking to justify or explain carceral animal law. Moreover, animal protection efforts of the nineteenth century underwent a carceral turn that simultaneously degraded and animalized Black persons, and humanized proslavery voices of America by allowing, for example, a founder of the United Daughters of the Confederacy to be celebrated as a hero of animal protection for serving as a vice president of a local Humane Society (Tarankow). The carceral turn in animal law, according to these accounts, looks like a form of humane-washing that served to excuse and justify the legacy of increased policing, prosecution, fines (leading often to indentured servitude), and confinement of Black Americans.

Moving beyond history, the modern focus on carceral animal law serves as a salient reminder that while it is "easy to oppose criminalization and its abuses in the abstract," it is harder to disparage criminal entanglements that relate to and purport to advance one's own, progressive ideologies (Levin). Hate crimes, the prosecution of police for abuse, domestic violence, and animal abuse are all examples of what is aptly called "progressive carceralism" (Levin). While it is popular to blame the political right for mass incarceration, carceral politics and narratives about unnaturally dangerous humans and uniquely vulnerable victims have played a central role in the left's political agenda in recent decades. The willingness of progressives to tolerate carceral carve-outs in order to achieve expressive ends is a symptom of the American approach to solving difficult social problems through the criminal system. Rational minds might disagree about whether one should celebrate or condemn the criminal system, but it is a mistake of animal lawyers to pretend that it is a different "system" when it comes to animals.

Some of the commentators in Part I warn that a retreat from carceral animal law could undo "the animal welfare progress of the last two decades" (Frasch). Others in this section question what "progress" means and how to understand its bundling with modern policing and prosecution. To quote a leading criminal law scholar, "With millions of people in prison and jail, we have become numbed to the violent quality of criminalization" and convictions.[2] And while some of the chapters in Part I worry that critiques of carceral animal law may be prioritizing human interests above those of animals, others emphasize that criminal prosecutions may actually be good for those *persons* who are prosecuted. After all, we are reminded, persons charged with crimes may be eligible for treatment or other public services, and thus

[2] Alexandra Natapoff, Punishment without Crime 188 (2018).

the fact of a conviction is framed as a learning opportunity, and a chance to get treatment and services. But it is a uniquely carceral logic that would tempt us to believe that the provision of needed public services might be gainfully allocated through a system of policing and prosecution. When our public safety net is contingent on the imposition of imprisonment or convictions, there is reason to worry. And this is no less true in the realm of criminal animal law. More generally, this notion of criminal enforcement as beneficial – this idea that we will be helping individuals gain the treatment or services they need through arrests and convictions – betrays an understanding of just how terrible the criminal process is for the persons involved.

The two of us don't think prosecution is generally an effective way to help humans, and we doubt very much that it is helping animals. But this section's chapters will challenge all readers, as it has us, to think more carefully about what the criminal law might do for animals.

https://doi.org/10.1017/9781108919210.002 Published online by Cambridge University Press