

PALLIATIVE ANIMAL LAW: THE WAR ON ANIMAL CRUELTY

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In 2019 President Donald Trump signed into law the Preventing Animal Cruelty and Torture (PACT) Act.¹ Although every state already permitted felony animal cruelty liability, animal lawyers hailed the PACT Act as a “defining moment” for animal law because it allowed acts of animal cruelty to be charged as federal felonies.² In the wake of the enactment, one of the most influential animal protection organizations in the world revealed that it had been working to pass the legislation for decades,³ and described the new felony law as one of the organization’s “highest priorities,”⁴ and “one of the largest victories for animals in a long time.”⁵ During the signing statement, President Trump was flanked by leaders of the animal protection movement, one of whom proclaimed that with “one stroke of the pen, the President has done more to protect animals and stop animal cruelty in America than anyone in history.”⁶ The President responded that this was “really a very nicely put statement.”⁷

The circumstances surrounding the PACT Act — the efforts to obtain it, the celebration of it, and its effects — represent a microcosm of animal-law efforts in the realm of carceral animal law more generally.⁸ It is a high-profile palliative intervention that provides a sense of accomplishment without addressing any of the underlying causes of ani-

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¹ Pub. L. No. 116-72, 133 Stat. 1151 (2019) (codified at 18 U.S.C. § 48).

² Press Release, Humane Soc’y of the U.S., 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> [https://perma.cc/9ZP9-E5G3].

³ *Id.* (“For decades, a national anti-cruelty law was a dream for animal protectionists.”).

⁴ Kitty Block & Sara Amundson, *HSLF and HSUS Deliver Big Wins for Animals in 2019: Our Banner Year in the Nation’s Capital*, A HUMANE WORLD: KITTY BLOCK’S BLOG (Dec. 13, 2019), <https://blog.humanesociety.org/2019/12/hslf-and-hsus-deliver-big-wins-for-animals-in-2019-our-banner-year-in-the-nations-capital.html> [https://perma.cc/L6N3-UA7Q].

⁵ Patrick Eckerd, *Senate Unanimously Passes PACT Act Against Extreme Animal Cruelty*, JURIST (Nov. 7, 2019), <https://www.jurist.org/news/2019/11/senate-unanimously-passes-pact-act-against-extreme-animal-cruelty> [https://perma.cc/7ALP-9CVX].

⁶ Remarks on Signing the Preventing Animal Cruelty and Torture Act, 2019 DAILY COMP. PRES. DOC. 2 (Nov. 25, 2019), <https://www.govinfo.gov/content/pkg/DCPD-201900823/pdf/DCPD-201900823.pdf> [https://perma.cc/M9X3-Y65L].

⁷ *Id.*

⁸ See generally JUSTIN MARCEAU, *BEYOND CAGES* (2019).

mal suffering. Politicians and advocates celebrate the efforts as landmark victories, but in fact, as this Essay argues, the efforts tend to do more harm than good by reinforcing, and even exaggerating, the invisibility of most animal suffering in law.⁹

This Essay situates animal law's exaltation of vigorous prosecutions within the emerging body of academic scholarship examining so-called "progressive carceralism."¹⁰ Scholars of progressive carceralism have shown that criminal responses to social problems not only fail to achieve radical change, but worse, they ultimately impede it. Aya Gruber, for example, has methodically dismantled the pro-carceral narratives in the realm of interpersonal violence, and shown that rather than facilitate incremental social change, as is often assumed, these law reforms set feminist goals back.¹¹

The PACT Act and other tough-on-crime measures are celebrated by many animal lawyers because they provide symbolic proof of the increasingly strong "public concern for animal welfare."¹² Adopting the mindset that social problems are solved through criminal law, animal law commentators assume that the absence of a sufficiently punitive response signals a lack of social standing for animals. Thus, as one group celebrated, "PACT makes a statement about American values."¹³

Rather than catalyze change in American values, however, these war-on-crime approaches create a distracting sideshow that diverts public scrutiny away from matters of the most urgent concern. Carceral animal law consumes resources and scarce public attention. It is not a symbolic or incremental victory for animals — it is legal escapism. Put differently, this is not a paper advocating that animal lawyers should prioritize the rights and suffering of humans, as my critics will no doubt allege. Rather, the point is that the prioritization of felony laws amounts to a grand mirage. The promise of incremental progress in favor of general animal protection is a false one, not because incrementalism can never work, but because this is not an incremental gain for animals.

⁹ Some commentators would argue that even a focus on systemic forms of animal oppression ignores some of the greatest threats to species preservation. *See generally* Carter Dillard, *Fundamental Illegitimacy*, WILLAMETTE L. REV. (forthcoming 2021) (on file with the Harvard Law School Library) (arguing that patriarchy-driven population growth has caused, and will continue to fundamentally cause, the majority of human and nonhuman suffering).

¹⁰ *See, e.g.*, Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337, 1364–83 (2018); Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 529 (2019).

¹¹ Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 801–20 (2007) (exploring feminism's reliance on carceral logic, specifically in the domestic violence context, and the patriarchal patterns such reliance reinforces); *see generally* AYA GRUBER, *THE FEMINIST WAR ON CRIME* (2020) [hereinafter GRUBER, *THE FEMINIST WAR ON CRIME*].

¹² Courtney G. Lee, *The PACT Act: A Step in the Right Direction on the Path to Animal Welfare*, JURIST (Dec. 1, 2019), <https://www.jurist.org/commentary/2019/12/courtney-lee-pact-act> [<https://perma.cc/EY8W-UKUC>].

¹³ Press Release, *supra* note 2.

Contrary to the conventional narrative, more prosecutions and longer sentences are not paving a path to animal rights.

The carceral animal lawyers imagine themselves as realists, proceeding incrementally on behalf of animals. This commentary challenges that framing by shining a spotlight on the text of the PACT Act, and by considering the on-the-ground work of lawyers and advocacy groups at the intersection of animal law and criminal law. Specifically, I will use two states, New York and Iowa, as case studies for showing how the criminalization impulse does more to hinder than to advance animal protection efforts in law. This Essay is not a blueprint for next steps, but a deliberate call for a reallocation of resources away from the carceral, and toward corporate or systemic accountability.

I. THE PLAIN LANGUAGE OF THE PACT ACT

As a quick primer on how criminal law connects with animal law, it is worth examining the recently enacted and much-celebrated PACT Act. The centerpiece of the statute is the criminalization of conduct in which an animal is “purposely crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury.”¹⁴ But the real story is the range of conduct that is exempted from the law’s coverage, and the efficiency with which the law reaffirms social hierarchies through the use of criminal prosecutions.¹⁵ Prioritizing the suffering of *very few* animals, by excluding others, this law creates and strengthens animal hierarchies; thus, the very reforms championed by animal lawyers may reinforce the painful irony at the core of animal law — that is, as a historical matter, the law of animals has been a vehicle for the protection of institutionalized animal abuse.¹⁶ Rather than serving as a gateway to greater protection for all species, legally entrenched hierarchies degrade the socio-legal status of animals as a group, and allow for the infliction of horrific animal suffering under the “mantle of complying with state and federal laws that purport to protect animals.”¹⁷

¹⁴ Preventing Animal Cruelty and Torture Act, Pub. L. No. 116–72, 133 Stat. 1151, 1552 (2019).

¹⁵ See generally DONALD BLACK, *THE BEHAVIOR OF LAW* (1976). “If the offense was committed against someone of sufficiently high status,” Professor Donald Black writes, a team of detectives might “be directed to work around the clock until a suspect is found and charged with the offense,” but if the victim is “low status,” the investigation will likely be minimal and soon abandoned. DONALD BLACK, *THE MANNERS AND CUSTOMS OF THE POLICE* 14–16 (1980).

¹⁶ Piers Beirne, *For a Nonspeciesist Criminology: Animal Abuse as an Object of Study*, 37 *CRIMINOLOGY* 117, 129 (1999) (identifying law as a “structural and historical mechanism [promoting] the consolidation of institutionalized animal abuse”); see also Taimie L. Bryant, *Denying Animals Childhood and Its Implications for Animal-Protective Law Reform*, 6 *L. CULTURE & HUMANS* 56, 62 (2010).

¹⁷ Bryant, *supra* note 16, at 62; see also Ani B. Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 *ANIMAL L.* 65, 79 (2009).

Among animal lawyers and commentators, the need for harsher sentences for animal cruelty is often justified in terms of an interest in proportionality.¹⁸ Because there is an interest in recognizing animal abuse as serious, it is argued that the penalties should be proportionately severe.¹⁹ But this tidy mathematical notion of proportionality has always been a criminal law myth. In the realm of human victims, there is a large body of research documenting the fact that the most severe punishments are imposed on persons with low social status who harm a high-status victim.²⁰ For example, Black men who are convicted of killing white victims are considerably more likely to be sentenced to death, and to be executed.²¹ These divergent results among human victims are the result of human biases that are baked into the system rather than explicitly mandated by statute. Generally speaking, scholars have approached disparities in the treatment of human victims as one of the indicia that the criminal justice system operates arbitrarily and unfairly.

Yet, when it comes to animal victims, the plain text of the PACT Act mandates a hierarchy that all but guarantees inequitable treatment and suffering among animals.²² The law explicitly creates categories of exemptions for animals whose victimhood is often invisible to the law and therefore beyond criminal opprobrium. Consider the list of conduct that is lawful even if it involves purposeful crushing, burning, drowning, suffocating, impaling, or otherwise subjecting an animal to serious bodily injury:

- (A) a customary and normal veterinary, agricultural husbandry, or other animal management practice;
- (B) the slaughter of animals for food;
- (C) hunting, trapping, fishing, a sporting activity not otherwise prohibited by Federal law, predator control, or pest control;
- (D) medical or scientific research;
- (E) necessary to protect the life or property of a person.²³

¹⁸ Mirko Bagaric et al., *A Rational Approach to Sentencing Offenders for Animal Cruelty: A Normative and Scientific Analysis Underpinning Proportionate Penalties for Animal Cruelty Offenders*, 71 S.C. L. REV. 385, 413–18 (2019).

¹⁹ ANIMAL LEGAL DEF. FUND, ANIMAL LEGAL DEFENSE FUND POSITION STATEMENT: SENTENCING FOR ANIMAL CRUELTY CRIMES 1–2, https://aldf.org/wp-content/uploads/2019/09/Position-Statement_Sentencing-2019.pdf [<https://perma.cc/HN7U-HQ7J>] (concluding that the criminal system “ranks crimes by their perceived severity, ascribing the harshest sentences” to the most reprehensible crimes).

²⁰ Joshua Kleinfeld, *A Theory of Criminal Victimization*, 65 STAN. L. REV. 1087, 1151–52 (2013).

²¹ See generally DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990); Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 1, 56–57 (2020).

²² See Preventing Animal Cruelty and Torture Act, Pub. L. No. 116–72, 133 Stat. 1151, 1552 (2019) (codified at 18 U.S.C. § 48(d)).

²³ *Id.*

The breadth of these exemptions in a law heralded as one of the most important developments for animal law in decades is striking. Animals raised for food make up well over 90% of the domestic animals in this country, and yet the corporations operating slaughterhouses are arguably inoculated from prosecution unless a prosecutor can show beyond a reasonable doubt that the pain and suffering they might cause is not “customary and normal.” Likewise, corporate dairies in the United States that confine up to 36,000 animals per facility for constant cycles of impregnation and milking are shielded from liability, as long as they can attest that their animal management or husbandry practices are customary among their competitors, and perhaps as long as they can find a veterinarian that will endorse the practice.²⁴ Moreover, it is not a violation of the statute to beat or drown to death a raccoon that is deemed a pest, or an opossum or stray cat that otherwise threatens one’s flower garden.

In sum, when it comes to the much-heralded PACT Act, it is difficult to imagine a clearer way of perpetuating the existing hierarchies among animal victims. Suffering matters, and animal victimhood is recognized up until the point when it would become morally or commercially relevant to most Americans.²⁵ There is no evidence of a trickle-down theory of animal rights, and the creation of victim hierarchies in other realms has created lasting barriers to substantive progress.²⁶

²⁴ The American Veterinary Medical Association approves, for example, the use of blunt force trauma to euthanize an animal. AM. VETERINARY MED. ASS’N, AVMA GUIDELINES FOR THE EUTHANASIA OF ANIMALS: 2020 EDITION 100 (2020), <https://www.avma.org/sites/default/files/2020-01/2020-Euthanasia-Final-1-17-20.pdf> [https://perma.cc/8KCY-GXUY]. Moreover, drowning birds in foam is among the “preferred methods” for depopulating “confined poultry,” and electrocution is a preferred method for depopulating pigs. AM. VETERINARY MED. ASS’N, AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS: 2019 EDITION 53 (2019), <https://www.avma.org/sites/default/files/resources/AVMA-Guidelines-for-the-Depopulation-of-Animals.pdf> [https://perma.cc/9DA8-S2UM] [hereinafter AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS].

²⁵ Other federal statutes are similarly tailored to a predominantly Eurocentric approach to protecting animal suffering. For example, while federal law permits whales, primates, and elephants to be held in captivity and displayed for entertainment, the law criminalizes animal fighting, which is often associated with nonwhite cultures. Similarly, while the PACT Act permits cruel treatment and the killing of animals in the course of hunting or fishing, federal law prohibits the humane slaughter of dogs and cats for consumption. Dog and Cat Meat Trade Prohibition Act of 2018, H.R. 6720, 115th Cong. (2018); see also MARCEAU, *supra* note 8, at 175–76.

²⁶ See GRUBER, THE FEMINIST WAR ON CRIME, *supra* note 11, at 96.

II. ENFORCEMENT PRACTICES IN CRIMINAL ANIMAL LAW: A STORY OF TWO STATES

Some may read the description of the PACT Act above and wonder, “Isn’t some animal protection better than no protection?” A dog and cat felony must be better than no felony. This is the myth of incrementalism through criminal law, which turns not on empirical data, but rather on assumptions about social progress occurring one felony enactment at a time. A focus on felonies and prosecutions is treated as imperfect progress, but progress nonetheless.

To challenge this narrative as overly sanguine, if not willfully blind, this section juxtaposes recent events in two different states. Lawyers make a spectacle out of the few (individual abusers), and in the process miss the forest (of systemic abuse) for a few rotten trees. Movement lawyers and organizations often overstate the benefits to animals of a war-on-crime approach, while simultaneously understating (or obfuscating) the role of grassroots activism and civil disobedience. The refusal to acknowledge the law-reform potential in activism, and the dogmatic faith in the power of felony,²⁷ are two sides of the same carceral coin.

A. New York: Focusing on Individuals as Bad Apples

Even relatively small acts of violence against animals by individuals can become international media sensations, particularly if the accused can be portrayed as a low-status offender because of poverty, race, or prior criminal record. The animal protection movement has mastered the art of fanning these flames of retribution, even when doing so also stokes narratives about racialized justice and inequality.²⁸

Illustrative is the Andre Robinson case from New York.²⁹ Robinson was a young Black man who in 2014 lured a stray cat and kicked it into the air near the housing project where he lived in Brooklyn.³⁰ The cat was not seriously injured; indeed, even before the cat was adopted out to a caring home, lawyers argued over whether there was any proof of injury at all. Moreover, no one seriously disputes that if Robinson had kicked a person and caused similar injuries, or even a couple of people, he probably would not have been charged with a crime.

²⁷ See generally Alice Ristroph, *Farewell to the Felony*, 53 HARV. C.R.-C.L. L. REV. 563 (2018) (arguing for the eradication of the category of “felon”).

²⁸ Professor Gary Francione warns that the animal protection movement’s obsession with favorable press coverage puts it at risk of becoming superficial and inattentive to the interests of most animals. See GARY FRANCIONE, *RAIN WITHOUT THUNDER* 72, 112 (1996).

²⁹ Stephanie Clifford, *He Kicked a Stray Cat, and Activists Growled*, N.Y. TIMES (Sept. 29, 2014), <https://www.nytimes.com/2014/09/30/nyregion/animal-abuse-gains-traction-as-a-serious-crime-with-jail-more-often-the-result.html> [<https://perma.cc/T7WY-TF44>].

³⁰ *Id.*

Because of the involvement of animal lawyers and advocates, however, the case became an international media sensation. Not only were charges filed, but all parties agreed that the Robinson case was handled differently by prosecutors because of the intense and sustained involvement of animal protection groups and the pressure campaign they mounted.³¹ Animal lawyers celebrated the fact that a petition calling for the maximum punishment gathered more than 60,000 signatures,³² and the media attention focused on Robinson and the animal lawyers seems to be exactly the goal. It is a high-profile, sensationalized case of individualized violence against a beloved animal.

The Robinson case is not an anomaly. On their websites and in lectures, animal lawyers describe prosecutorial pressure campaigns and amicus briefs in support of longer sentences as ideal forms of grassroots activism. Animal lawyers fetishize policing and prosecution as unmitigated advancements.³³ But perhaps the most important detail about the Robinson case is just how differently it was handled as compared to cases of widespread animal violence. In stark contrast to the proactive efforts to pursue prosecutions in Robinson-like cases, many of the movement's lawyers have been surprisingly quiet when it comes to pressing for the prosecution of corporate animal abuse, even when the abuse seems to meet the statutory definition of cruelty. When it is not a broken window such as an attack on a single animal, but a broken system such as factory farms filled with abuse, the public outreach and prosecutorial pressure are considerably muted.

Consider, for example, that about one hundred miles north of the Brooklyn courthouse where Andre Robinson was prosecuted is the Hudson Valley Foie Gras facility, which unnaturally fattens the livers of hundreds of thousands of animals per year using a production process that experts across the world have avowed causes suffering.³⁴ Unlike

³¹ *Id.* The *New York Times* story detailing the case noted that interviews with lawyers revealed a persistent trend favoring incarceration, and a number of successes in obtaining it. *Id.*

³² Animal Advocates, *Punish Andre Robinson, Man Accused of Kicking Stray Cat in Brooklyn, NY to Full Extent of the Law*, CARE2 PETITIONS, <https://www.thepetitionsite.com/554/529/298/punish-andre-robinson-man-accused-of-kicking-stray-cat-in-brooklyn-ny-to-full-extent-of-the-law/> [<https://perma.cc/86PV-92EW>].

³³ Policing continues to be celebrated even as research shows that companies generally viewed as anathema to animal protection, like Chevron and Shell, are corporate sponsors and featured “partner[s]” of local police departments across the country. Gin Armstrong & Derek Seidman, *Fossil Fuel Industry Pollutes Black & Brown Communities While Propping Up Racist Policing*, EYES ON THE TIES (July 27, 2020), <https://news.littlesis.org/2020/07/27/fossil-fuel-industry-pollutes-black-brown-communities-while-propping-up-racist-policing/> [<https://perma.cc/JKH9-2HKS>].

³⁴ See HUMANE SOC’Y OF THE U.S., AN HSUS REPORT: THE WELFARE OF ANIMALS IN THE FOIE GRAS INDUSTRY 1 (2012), <http://www.humanesociety.org/assets/pdfs/farm/HSUS-Report-on-Foie-Gras-Bird-Welfare.pdf> [<https://perma.cc/7Q8G-NLBD>] (“[S]ubstantial scientific evidence suggests that force-feeding . . . is detrimental to [the birds’] welfare.”); see also HUMANE SOC’Y OF THE U.S., SCIENTISTS AND EXPERTS ON FORCE-FEEDING FOR FOIE GRAS PRODUCTION AND DUCK AND GOOSE WELFARE 1, <https://www.humanesociety.org/sites/>

the Robinson case, which involved an animal victim with high social status and a human perpetrator who was perceived as low status, Hudson Valley Foie Gras is a well-established corporation making high-end food for the wealthy, its avian victims are not nearly as beloved, and yet there is no evidence that the movement has leveraged its celebrated relationships with prosecutors to force a corporate prosecution of these factory-farming practices. To put a finer point on the issue, if criminal prosecution is treated as valuable, and if animal lawyers can argue that horses have a freestanding right to sue in court for restitution,³⁵ or that an Orca has a claim under the Thirteenth Amendment,³⁶ surely such creativity could identify a colorable argument that the production of foie gras is a corporate crime.³⁷

Corporate prosecutions are vanishingly rare, and the focus of carceral animal law has been on individual actors as opposed to systemic accountability. One might worry that in the criminal realm, the amount of focus and fury surrounding a case is inversely linked to the amount of animal suffering that actually occurred.

*B. Iowa: Disavow Civil Disobedience and
Celebrate Expanding Felony Liability*

Recent events in Iowa provide a second case study in the way that carceral animal law operates on the ground. The state of Iowa expanded the definition of animal cruelty offenses and increased the maximum penalty for the crime of animal cruelty, accomplishments that were celebrated by many in the movement as major advances for the status of animals under Iowa law. Within weeks of these legislative changes, Iowa also passed its third Ag-Gag law,³⁸ and it was the site of a groundbreaking undercover investigation at a factory farm. Juxtaposing the

default/files/docs/hsus-expert-synopsis-force-feeding-duck-and-geese-welfare.pdf
[<https://perma.cc/XQ6G-B3KH>].

³⁵ Karin Brulliard, *Seeking Justice for Justice the Horse*, WASH. POST (Aug. 13, 2018), <https://www.washingtonpost.com/news/national/wp/2018/08/13/feature/a-horse-was-neglected-by-its-owner-now-the-horse-is-suing/> [<https://perma.cc/LUC9-G4YQ>].

³⁶ Tilikum, Katina, Corky, Kasatka, & Ulises, *Five Orcas*, *ex rel.* PETA v. SeaWorld Parks & Ent., 842 F. Supp. 2d 1259 (S.D. Cal. 2012).

³⁷ N.Y. AGRIC. & MKTS. LAW § 353 (McKinney 2005) (making it a crime to “cruelly beat[] or unjustifiably injure[], maim[], mutilate[], or kill[] any animal,” and refusing to provide an explicit agricultural practices exemption); *see* *People v. Voelker*, 658 N.Y.S.2d 180, 183 (N.Y. Crim. Ct. 1997) (“Whether or not the People can prove that defendant ‘unjustifiably’ committed these acts is a matter best left to the trier of fact.”). It does not seem radically far-fetched to believe that a jury might find that according to the “moral standards of the community,” *id.*, the injuries caused by force-feeding a bird with a funnel multiple times per day could constitute unjustified injuring, maiming, mutilation, or torture.

³⁸ Ag-Gag laws are “agriculture security legislation . . . that . . . restricts — or ‘gags’ — methods used to gather and disseminate information about the conditions” of animal agricultural production. Shaakirrah R. Sanders, *The Corporate Privacy Proxy*, 105 CORNELL L. REV. 1171, 1172

reaction of many animal lawyers to these contemporaneous events in the same state provides an insight into the way that law-and-order thinking is impacting efforts to advance animal status in law and policy.

Iowa has been home to some of the most strident efforts to sweep systemic animal abuse under the rug. The state was among the first to pass an Ag-Gag law criminalizing whistleblowing investigations in agricultural facilities, and following a federal injunction of the law, passed a second such law, which was also enjoined.³⁹ In June of 2020, Iowa's governor signed into law a third attempt to provide unique protection against investigations to agricultural facilities.⁴⁰ Around that time, activists engaged in civil disobedience by trespassing and placing hidden cameras in the largest pig farm in Iowa. The cameras captured footage of a "ventilation shutdown" to kill all of the pigs. The factory farm's management had decided that because of the COVID-19 downturn in pork sales, feeding their pigs was no longer profitable. To avoid further lost profits, management decided to kill all of the pigs by, as summarized by a Pulitzer Prize-winning journalist, "sealing off all airways to their barns and inserting steam into them, intensifying the heat and humidity inside and leaving them to die overnight."⁴¹ According to the American Veterinary Medical Association Guidelines, which approve this method of killing, "[i]n realistic terms, death may result from any combination of excessive temperature, CO₂, or toxic gases from slurry or manure below the barn."⁴² In short, pigs were killed by the thousands in Iowa by essentially cooking them to death.

Confronted with such abject and incontestable cruelty, the same community of lawyers that urged charges against Andre Robinson, and commented favorably to journalists for the *New York Times* on the case, was, by comparison, quite restrained in their responses to these events in Iowa. Unlike cases involving a single, high-status animal victim, there has been no public statement demanding charges, no mailers urging constituents to reach out to their elected officials, and no grandstanding about the injustice of no criminal charges in this case. A mailer

(2020) (documenting legislative history showing that the laws were a reaction to animal activists "running out to a news outlet," *id.* at 1175 (citation omitted)).

³⁹ *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 816–17, 827 (S.D. Iowa 2019).

⁴⁰ S.F. 2413, 88th Gen. Assemb. (Iowa 2020). The newest Ag-Gag law is unquestionably less of a direct affront to free speech rights insofar as it targets certain trespasses for higher penalties, as opposed to criminalizing pure speech. But the legislative debate provides strong evidence that the motive for the law was similar.

⁴¹ Glenn Greenwald, *Hidden Video and Whistleblower Reveal Gruesome Mass-Extermination Method for Iowa Pigs Amid Pandemic*, INTERCEPT (May 29, 2020, 12:08 PM), <https://theintercept.com/2020/05/29/pigs-factory-farms-ventilation-shutdown-coronavirus/> [<https://perma.cc/9WFS-N7VU>].

⁴² AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS, *supra* note 24, at 45.

sent out by one organization in 2019 reminded supporters that it is important to tell their elected officials that, when it comes to animal cruelty, “the punishment . . . [should] fit[] the crime.”⁴³ Cases like Andre Robinson’s illustrate what the lawyers mean when they demand that the punishment fit the crime, and the silence in the face of revelations like those at the Iowa farm reveal the other side of the carceral animal law coin.⁴⁴

The animal lawyers’ complete silence about the need for a criminal response to the systemic animal abuse documented in the undercover investigation in Iowa might justify generalizations about the impacts of tough-on-crime thinking. One could extrapolate that the law-and-order culture among animal lawyers has conditioned them to believe that, as a policy matter, they should not pursue legal actions or public outreach based on video evidence obtained through civil disobedience or illegality. The law-and-order lawyers of the movement, it appears, want to create a clear demarcation between their work and that of activists on the ground who will risk jail time to expose animal suffering on a massive scale. Indeed, the animal lawyers rarely even suggest that the criminal defense of such activists, who are literally saving animal lives and documenting abuse, has a home in the realm of animal law. Prosecutions of individual abusers is treated as somehow directly serving the interests of animals, but the defense of a person who is engaged in activism that does in fact directly save animals is rejected. It is a policy of disavowing the “radical flank,” and refusing to defend them or even rely on their work product and video footage, much less celebrate them as part of the law-reform effort.⁴⁵

Animal lawyers might respond that, while deplorable, the actions at the Iowa pig farm are not deserving of intervention because the cruelty exposed may not have been criminally prohibited. But even if the abuse in Iowa did not fit the definition of corporate criminality, again, it is telling that the movement did not leverage its connections or call upon its members to demand law reforms that would hold the corporation responsible for the abuse revealed in Iowa. A rigid belief in the need for adherence to existing law may be limiting social change, and causing movement lawyers to fail to imagine possibilities beyond the status quo.

⁴³ Petition from Animal Legal Def. Fund to Jared Polis, Governor of the State of Colorado (Summer 2019) (on file with the Harvard Law School Library) (petitioning the governor to support laws that “guarantee animal abusers are punished harshly”).

⁴⁴ The willingness of animal lawyers to prioritize incarceration cannot be fairly disputed. As one prominent group framed the agenda for years to come, “[our Criminal Justice P]rogram . . . inspired our famous bumper sticker: ‘Abuse an Animal, Go to Jail!’ And we mean it.” Stephen Wells, *Letter from the Executive Director, THE ANIMALS’ ADVOC.*, Summer 2006, at 1, 2.

⁴⁵ See Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 898 (2013) (book review) (noting that social movement research has shown that the “moderate movement factions benefit from their radical counterparts”).

When courts decide cases recognizing the sentience of animals as a justification for a harsher criminal justice response, commentators declare that the practical value to the movement of such holdings “cannot be overstated,”⁴⁶ and yet, when it comes to systemic suffering uncovered by “outlaw” activists,⁴⁷ the response of many animal lawyers is silence. The reason for this disconnect is the law-and-order orientation of the animal protection movement.

Even more stunning than these failures, animal lawyers and advocates were actually working with legislators in Iowa on amendments to the Iowa cruelty code during this precise legislative session. During the 2020 legislative session, Iowa’s legislature amended its criminal code to diminish the mens rea required for guilt, expand the scope of criminal liability, and increase the maximum sentence for certain animal offenses.⁴⁸ According to the sponsor of these amendments, the Iowa legislature acted in response to national ranking systems generated by animal lawyers that rank states based on their legal protections for animals.⁴⁹ The sponsor explained that “[w]hat we’re trying to solve here is Iowa being one of the lowest-ranked states in regards to animal abuse.”⁵⁰ This is proof positive that lawmakers consider the movement’s rankings and input. But it turns out that this only compounds the problem.

The animal law ranking system rewards things like first-offense felonies and higher sentences, but it does not penalize exemptions for cruelty to farm animals or the apparent absence of corporate liability for video-captured abuse.⁵¹ The ranking system allows a state like Iowa to

⁴⁶ Lora Dunn & David B. Rosengard, Comment, *A Dog Is Not a Stereo: The Role of Animal Sentience in Determining the Scope of Owner Privacy Interests Under Oregon Law*, 23 ANIMAL L. 451, 456 (2017).

⁴⁷ See G. Alex Sinha, *Virtuous Law-Breaking*, WASH. U. JURIS. REV. (forthcoming) (manuscript at 17–24) (on file with the Harvard Law School Library).

⁴⁸ H.F. 737, 88th Gen. Assemb. (Iowa 2020).

⁴⁹ E.g., ANIMAL LEGAL DEF. FUND, ANIMAL PROTECTION: U.S. STATE LAWS RANKINGS REPORT (2019), <https://aldf.org/wp-content/uploads/2020/02/2019-Animal-Protection-US-State-Laws-Rankings-Report.pdf> [<https://perma.cc/M4RC-XPAD>] [hereinafter ANIMAL LEGAL DEF. FUND, RANKINGS REPORT].

⁵⁰ Stephen Gruber-Miller, *Iowa Senate Passes Bill Increasing Penalties for Animal Abuse, Neglect*, DES MOINES REG. (Mar. 4, 2020, 9:08 PM), <https://www.desmoinesregister.com/story/news/politics/2020/03/04/iowa-senate-passes-bill-strengthening-penalties-animal-abuse-neglect-torture/4952238002> [<https://perma.cc/9WA2-JWU8>]; see also Gov. Reynolds Signs Bill to Strengthen Iowa’s Animal Cruelty Laws, KCRG (June 30, 2020, 9:06 AM), <https://www.kcrg.com/2020/06/30/gov-reynolds-signs-bill-to-strengthen-iowas-animal-cruelty-laws> [<https://perma.cc/8XDD-M24M>].

⁵¹ ANIMAL LEGAL DEF. FUND, RANKINGS REPORT, *supra* note 49, at 26, 33. The rankings report provides only a cursory summary of its methodology, so it is not possible to replicate the findings or assess how the categories of evaluation are weighted or compared. Notably, however, none of the recommendations for improving rankings include, for example, abandoning standard agricultural exemptions. By contrast, the list of suggested improvements suggests a common theme.

be celebrated in 2020 as incrementally improving its protections for animals, when in fact nothing could be further from reality. Notably, within weeks of the investigation in Iowa revealing pigs being overheated to death by the thousands and the state enacting a new Ag-Gag law, animal protection groups across the country took to the press to applaud Iowa for its “necessary” upgrades to the cruelty code.⁵² At the very moment when the Iowa Select Farms abuse was making headlines, instead of bemoaning the absence of corporate accountability in the criminal law, the movement lawyers shifted the narrative to Iowa’s successes by noting that their ranking system was relied on by the “legislative drafters, as well as advocates” in order to “ensure the bill addressed the state’s biggest shortcomings” and was “as impactful as possible.”⁵³ The animal movement deploys its pro-carceral agenda in ways that affirmatively distract attention away from systemic abuse.

To celebrate Iowa’s animal protection efforts in the spring of 2020 was nothing short of public obfuscation. This was not a time of “impactful” change for the animals in Iowa — it was a year of horrific policymaking and absenteeism when it came to corporate accountability. Understanding how the lawyer-created rankings work, recognizing the community’s triumphant celebration of the expanding criminal provisions for individuals, and examining the nonresponse of some lawyers to factory-farm abuse exposed by activists all underscore the extent to which the carceral focus distracts from and undermines the interests of animals. It is not a neutral or incrementally beneficial set of policy preferences; it is affirmatively harmful.

* * *

A tough-on-crime logic operates across large segments of the animal law world. Animal law commentators and practitioners overwhelmingly embrace criminal law as a salient example of the rising tide of animal law. The focus may be unduly limited now, they argue, but the benefits of the criminal law’s narrow focus will trickle down and benefit all animals over time. By this logic, an expanded criminal code or a new mandatory minimum today is a foothold toward animal rights (perhaps on factory farms) tomorrow. But the logic of increased attention to crimes and penalties for individual animal abusers actually reinforces

The surest path to a higher ranking, as Iowa recognized, is more felonies and higher criminal penalties.

⁵² Several animal law groups released statements celebrating the amendments to Iowa’s code, and praising the increased penalty provisions. See, e.g., *Updating Iowa’s Animal Protection Laws (Iowa)*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/project/updating-iowas-animal-protection-laws-iowa/> [https://perma.cc/5FVF-6DDY].

⁵³ *Id.*

hierarchies and perpetuates larger-scale animal abuse and exploitation caused by corporations.⁵⁴ One need not focus on the damage to human communities from increased policing and prosecution to realize that criminal animal law is not a harmless sideshow.

More prosecution will never lead to greater animal rights. Longer sentences have not incrementally advanced the standing of animals in society. Like other palliative treatments, the carceral agenda provides pain relief for the humans disturbed by animal violence, but it masks rather than cures the structural violence involved in the ordinary commercial exploitation of animals. As societal concern for animal protection increases,⁵⁵ one should expect that the public will be hungry for this sort of palliative treatment; instead, I hope that animal lawyers will be up to the task of providing interventions aimed at a cure.

⁵⁴ See Alec Karakatsanis, *Why "Crime" Isn't the Question and Police Aren't the Answer*, CURRENT AFFS. (Aug. 10, 2020), <https://www.currentaffairs.org/2020/08/why-crime-isnt-the-question-and-police-arent-the-answer> [<https://perma.cc/L8XW-T228>] (explaining how a focus on individualized incidents of "crime" distracts from more systemic problems and reinforces social power structures already in place); see also MARCEAU, *supra* note 8, at 6 ("Cruelty prosecutions allow for a collective transference or displacement of guilt from mainstream society onto the 'other,' the socially deviant animal abuser.").

⁵⁵ See Rebecca Riffkin, *In U.S., More Say Animals Should Have Same Rights as People*, GALLUP (May 18, 2015), <https://news.gallup.com/poll/183275/say-animals-rights-people.aspx> [<https://perma.cc/2STM-WGCP>].