

## Humanizing Animals, Dehumanizing Humans

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### 9.1 LIBRE'S LAW

On a summer afternoon in 2017, Pennsylvania governor Tom Wolf gathered supporters and advocates to join him in an outdoor public bill-signing ceremony. The crowd assembled to watch Wolf enact “Libre’s Law,” a popular bipartisan piece of legislation. The mood was celebratory, as the governor had planned a festival of sorts, with the media, social media fans, and community members in attendance. Libre, the legislative namesake, was of course part of the spectacle. And due to his celebrity and the high-profile nature of his cause, Libre did something that nonlawmakers rarely get to do. He signed the bill. Libre, a Boston terrier, bore a quizzical look as his rescuer-owner, Janine Guido, guided his paw to a bowl of black ink, dipped it in, and pressed it firmly on the document. The moment elicited cheers from the crowd and barks from the dogs Wolf had invited as special “canine advocate guests.”<sup>1</sup>

Animal rights groups and social media commentators heaped praise on Wolf for showing “compassion” and “caring” by supporting Libre’s Law, a tough-on-crime bill that created a barrage of new and strengthened misdemeanors and felonies for animal abuse and neglect. Wolf characterized it as a “landmark” piece of legislation that brought “long overdue” justice to dogs.<sup>2</sup> After signing the bill, the Democratic governor made several appearances with the photogenic pup, including organizing an anniversary celebration where Libre “got his own puppy cake.” A Wolf aide

<sup>1</sup> *Governor Wolf Invites Public to Attend Animal Protection Overhaul Bill Signing*, GOVERNORPA.GOV (June 27, 2017), <https://www.governor.pa.gov/newsroom/governor-wolf-invites-public-to-attend-animal-protection-overhaul-bill-signing/> [<https://perma.cc/7A9N-9P9T>]; Mike Straub, *Gov. Wolf Signs Anti-Animal Cruelty Bill Libre’s Law into Law*, WGAL8 (June 28, 2017, 5:47 PM), [<https://perma.cc/GVC3-FDU9>].

<sup>2</sup> *Governor Wolf Celebrates Landmark Animal Protection Legislation Becoming Law Today*, GOVERNORPA.GOV (Aug. 28, 2017), <https://www.governor.pa.gov/newsroom/governor-wolf-celebrates-landmark-animal-protection-legislation-becoming-law-today/> [<https://perma.cc/FJ6Z-YK7A>].

called Libre “a beloved and valued member of our team.”<sup>3</sup> When Wolf came up for reelection in 2018, his campaign ran an advertisement featuring Libre during peak prime-time slots on Pennsylvania channels. The “feel-good” and “smart” ad began with pictures of a sickly and starved Libre—pictures that had sparked international outrage – and moved to video of the healthy “bug-eyed miracle boy”<sup>4</sup> licking the smiling politician. “People say a dog is man’s best friend,” the actor voicing Libre proclaimed. “I say a Wolf is mine.”<sup>5</sup>

The pictures of a near-dead Libre shocked the world and enabled his whirlwind transformation from sick puppy to social-media influencer, gubernatorial team member, and poster dog for zero tolerance of animal cruelty. One would expect the tale of his abuse would be similarly spectacular and involve horrific and malicious cruelty by his caretaker. However, Libre’s caretaker’s behavior was not shocking and gleefully cruel; in fact, it was questionably neglectful.

On July 4, 2016, Dextin Orme was making deliveries to an Amish farm in Lancaster county when he spied a nearly lifeless puppy in a dog cage. Orme convinced the farmer, thirty-three-year-old Benjamin Stoltzfus, to allow him to take the sixteen-week-old dog to a friend and former humane society employee. She, in turn, brought the dog to a pet hospital and contacted the Speranza Animal Rescue. Janine Guido, Speranza’s director, immediately took an interest in the puppy, whom she named Libre.<sup>6</sup> Guido was shocked at the puppy’s condition. Libre was suffering from severe mange, which left him hairless, covered in sores, and so malnourished and dehydrated that he could barely hold his head up. Normally, a dog so far gone would be euthanized, and Guido discussed that possibility with the vet. However, she decided to adopt the dog and give medical treatment a try.<sup>7</sup>

Guido took to social media and posted pictures of the pathetic-looking little guy under the handle “Justice for Libre.”<sup>8</sup> The pictures provoked immediate and strong

<sup>3</sup> Linda Fuoco, *Pet Tales: Famous Dog Comes to Gov. Wolf’s Aid in Political Commercial*, PITTSBURGH POST-GAZETTE (Oct. 26, 2018, 6:00 AM), <https://www.post-gazette.com/pets/pet-tales/2018/10/26/Pet-Tales-Libre-Boston-terrier-animal-abuse-law-PA-Governor-Tom-Wolf-commercial/stories/201810260016> [<https://perma.cc/8PNX-94SW>].

<sup>4</sup> Jan Murphy, *Libre’s Law on Its Way to Gov. Tom Wolf for Enactment*, PENNLIVE.COM: POL. (Jan. 5, 2019), [https://www.pennlive.com/politics/2017/06/libres\\_law\\_on\\_its\\_way\\_to\\_gov\\_t.html](https://www.pennlive.com/politics/2017/06/libres_law_on_its_way_to_gov_t.html) [<https://perma.cc/YDC8-UFEL>]; Abby Zelko, *From the “Brink of Death,” Libre the Dog Now Inspires Others*, YORK DAILY REC. (June 28, 2017, 5:32 PM), <https://www.ydr.com/story/life/2017/06/28/brink-death-libre-now-inspires-others/430841001/> [<https://perma.cc/6X5X-8Z2R>].

<sup>5</sup> Fuoco, *supra* note 3.

<sup>6</sup> Tom Knapp, *Rescuer Decides to Adopt Libre, the Puppy Found Near Death on a Lancaster County Farm*, LANCASTER ONLINE (July 21, 2016), [https://lancasteronline.com/news/local/rescuer-decides-to-adopt-libre-the-puppy-found-near-death-on-a-lancaster-county-farm/article\\_273ada82-4f69-11e6-9578-1bce449d7453.html](https://lancasteronline.com/news/local/rescuer-decides-to-adopt-libre-the-puppy-found-near-death-on-a-lancaster-county-farm/article_273ada82-4f69-11e6-9578-1bce449d7453.html) [<https://perma.cc/TM86-8SV5>].

<sup>7</sup> Liz Evans Scorforo, *Libre Likely Gets to Go Home Soon, to the Rescuer Who Saved His Life*, YORK DISPATCH (July 22, 2016, 3:40 p.m.), <https://www.yorkdispatch.com/story/news/2016/07/22/libre-dog-home-puppy-mill-speranza/87438340/> [<https://perma.cc/9V5W-PMKR>].

<sup>8</sup> *Justice for Libre, Groups*, FACEBOOK, <https://www.facebook.com/groups/h1662998610691890/> [<https://perma.cc/992U-RL98>].

reactions and garnered Guido and Libre tens of thousands of followers. Libre's story was featured in news outlets around the world. Throughout Libre's treatment, Guido and Justice for Libre posted photos and updates, which fans reposted to a public rapidly becoming emotionally invested in Libre's plight. As one local paper noted, "Videos of Libre went viral as his road to recovery was documented every step of the way."<sup>9</sup> Instagrammers and Facebookers demanded justice in the form of Stoltzfus's arrest and criminal prosecution.

Libre's legions of supporters were accordingly crestfallen when Susan Martin, the Lancaster County SPCA director and an appointed animal control officer, declined to bring criminal charges. Outraged voices on social media and in the community demanded Martin's ouster and the immediate commencement of a criminal case against the farmer. County District Attorney Craig Stedman was listening. He charged Stoltzfus with neglect – a summary offense punishable by a \$750 fine and up to ninety days in jail – and commenced proceedings to strip Martin of her license to operate as a law enforcer.<sup>10</sup> This took Martin by surprise. She explained to the press that she made her charging decision in Stoltzfus's case as she did in all her other cases: in consultation with the prosecutor's office. Nevertheless, an exasperated Martin surrendered her policing license, noting that it would "allow more time for me to focus on the SPCA's mission of caring for animals in need."<sup>11</sup> Stedman, the prosecutor, subsequently transferred animal control enforcement to the police.<sup>12</sup> On July 25, 2017, just under a month after Governor Wolf signed Libre's Law, the Lancaster County SPCA, still under scrutiny and out of funds, announced its closing.<sup>13</sup>

Martin was obviously dedicated to animals. She saw that Libre was in terrible shape and must have been aware of the high-profile nature of the case. Why would she decline to charge Stoltzfus, and why would the DA's office initially agree? According to Martin, there was simply not enough proof that the farmer had neglected the puppy. Shortly after Libre's birth, Stoltzfus sold him to a buyer. The pup had been vaccinated and was healthy at the time of sale. However, two weeks

<sup>9</sup> David Weissman, *Libre's Law Passes Senate Committee*, YORK DISPATCH (Mar. 22, 2017, 10:52 AM), <https://www.yorkdispatch.com/story/news/politics/2017/02/09/libres-law-reintroduced-pa-senate/97686138/> [<https://perma.cc/9AZK-J8UJ>].

<sup>10</sup> Jonas Fortune, *Lancaster County DA to Seek Suspension of Animal Cruelty Officer Who Didn't Pursue Libre Case*, LANCASTER ONLINE (Aug. 11, 2016), [https://lancasteronline.com/news/local/lancaster-county-da-to-seek-suspension-of-animal-cruelty-officer-who-didnt-pursue-libre-case/article\\_c3ac8f70-5fef-11e6-913a-1fcf1edfe84.html](https://lancasteronline.com/news/local/lancaster-county-da-to-seek-suspension-of-animal-cruelty-officer-who-didnt-pursue-libre-case/article_c3ac8f70-5fef-11e6-913a-1fcf1edfe84.html) [<https://perma.cc/95ZL-EM7R>].

<sup>11</sup> Lizzy Hardison, *DA Was Unwilling to File Charges Early in Dog Abuse Case, Embattled SPCA Director Says*, PENN LIVE (Jan. 5, 2019), [https://www.pennlive.com/news/2016/08/lancaster-sPCA\\_director\\_respon.html](https://www.pennlive.com/news/2016/08/lancaster-sPCA_director_respon.html) [<https://perma.cc/7HHZ-KAEX>].

<sup>12</sup> Fortune, *supra* note 10.

<sup>13</sup> Nora Shelly, "Devastating": *SPCA Closing Leaves Lancaster with a Void to Fill*, PENN LIVE (Jan. 5, 2019), [https://www.pennlive.com/news/2017/07/devastating\\_sPCA\\_closing\\_leave.html](https://www.pennlive.com/news/2017/07/devastating_sPCA_closing_leave.html) [<https://perma.cc/R67Z-9PLV>].

later, Libre started showing signs of mange, and the buyer brought him to the vet.<sup>14</sup> When the vet confirmed a diagnosis of demodectic mange, the buyer returned Libre to Stoltzfus. The farmer took the afflicted pooch to his own vet for treatment. Martin and the SPCA confirmed that at the time Orme discovered Libre, the puppy was in fact under veterinarian care, but he was not responding well to treatment.<sup>15</sup>

Advanced cases of demodectic mange or demodicosis can be deadly. The condition is caused by the mite *Demodex canis*. Demodectic mange is not contagious, and many dogs harbor the mite in small quantities. *Demodex canis* typically causes only mild symptoms, but it can cause serious illness in dogs with malfunctioning or immature immune systems. Because of their underdeveloped immune systems, puppies under eighteen weeks old are particularly vulnerable to demodicosis. Puppies with compromised immune systems are at risk of developing generalized demodectic mange,<sup>16</sup> a very serious condition where “the entire body may be covered with redness, infections, scaling, swelling, and crusts [and] the dog loses most, if not all, hair.”<sup>17</sup> In addition to the hairlessness and sores that made Libre look so pitiful, dogs with the severe condition “may lose their appetite, become lethargic and develop a fever.”<sup>18</sup> Breeders take note of puppies who contract generalized demodectic mange because it indicates genetic vulnerabilities in the parent.<sup>19</sup> Libre’s mom in fact also had a case of demodicosis, although much milder.<sup>20</sup> Experts note that “Generalised demodicosis can be very difficult to treat and requires persistent intervention and dedicated owner’s cooperation, since it is multifactorial and often complicated by concurrent infections.”<sup>21</sup>

Stoltzfus pled guilty to the summary offense and paid a fine, and now he no longer keeps dogs. But the riled-up public was yet unsatisfied with what they

<sup>14</sup> Myles Snyder, *SPCA: No Charges against Sick Puppy’s Breeder*, SENTINEL (July 8, 2016), [https://cumberlandlink.com/news/local/capital\\_region/spca-no-charges-against-sick-puppy-s-breeder/article\\_fcb64be6-039f-5cdf-b4aa-1f902660e589.amp.html](https://cumberlandlink.com/news/local/capital_region/spca-no-charges-against-sick-puppy-s-breeder/article_fcb64be6-039f-5cdf-b4aa-1f902660e589.amp.html) [https://perma.cc/MT3R-ETV7].

<sup>15</sup> *Id.* (“The Lancaster County SPCA confirmed the puppy was under veterinarian care when it was obtained by the rescue group.”) Libre’s supporters dispute that Stoltzfus had Libre under veterinary care, given his condition; See Sue Long, *The Band Libre*, LANCASTER CNTY. MAG. <https://www.lancastercountymag.com/the-band-libre/> [https://perma.cc/8J8K-2X1T].

<sup>16</sup> Ernest Ward & Amy Panning, *Demodectic Mange in Dogs*, VCA HOSP. <https://vcahospitals.com/know-your-pet/mange-demodectic-in-dogs> [https://perma.cc/5ZPP-2XGR].

<sup>17</sup> Mara Bovsun, *Mange in Dogs: What You Need to Know*, AM. KENNEL CLUB (Jan. 23, 2019), <https://www.akc.org/expert-advice/health/mange-what-you-need-to-know/#:~:text=Symptoms%20of%25>.

<sup>18</sup> *Id.*

<sup>19</sup> Gemma Gaitskell, *Demodectic Mange in Dogs: A Science-Based Guide*, NEXTGEN DOG, <https://nextgendog.com/demodectic-mange-in-dogs/> [https://perma.cc/AQ8Z-FXDM].

<sup>20</sup> Stoltzfus surrendered her too, and she was adopted.

<sup>21</sup> OLUDUNSI ET AL., *DEATH OF A FOUR-YEAR-OLD GERMAN SHEPHERD DOG DUE TO DEMODEX CANIS IN IBADAN, SOUTHWEST NIGERIA: A CASE REPORT*, LABOME (June 15, 2014), <http://www.labome.org/research/Death-of-a-four-year-old-German-shepherd-dog-due-to-Demodex-canis-in-Ibadan-Southwest-Nigeria-a-case.html> [https://perma.cc/42YN-N5QC].

considered a “slap on the wrist.”<sup>22</sup> They protested that Libre deserved better. Republican state senator Richard Alloway took note of the high-profile story, as did lobbyists from the Humane Society of the United States, Humane Action Pittsburgh, and Humane PA PAC.<sup>23</sup> Alloway, a conservative who had in the past sponsored antiabortion bills, was also pro-animal life.<sup>24</sup> He was moved to sponsor Libre’s Law because “no living creature should have to endure that kind of abuse.”<sup>25</sup> And thus was born the tough-on-animal-crime bill. Had Libre’s Law been in effect, Stoltzfus’s neglect charge would have been a serious felony.

Under the preexisting legal regime, animal abuse and neglect were summary offenses; repeat offenses were misdemeanors; and the main animal cruelty felony involved promoting animal fighting.<sup>26</sup> Libre’s Law changed things dramatically.<sup>27</sup> It established a duty for people who keep animals to maintain them by, among other things, providing “necessary veterinary care” and “clean and sanitary shelter.” Any failure to do so is “neglect,” punishable as a summary offense. Neglect is presumed when a dog has been tethered outside and there is “excessive waste or excrement where the dog is tethered,” the dog has “open sores or wounds,” or the dog has worn a “choke, pinch, prong or chain collar.”<sup>28</sup> Libre’s Law also created the crime of “cruelty” for when a person “recklessly illtreats, overloads, beats, abandons or abuses an animal.” Neglect or cruelty resulting in an animal’s serious bodily injury or death is a felony carrying seven years in prison. The law preserved the animal fighting felony and added a crime of possession of “animal fighting paraphernalia.” The legislation set forth a slew of other animal-related crimes like being the owner of an animal who attacks a service dog and transporting an animal “in a cruel or inhumane manner” and “work[ing]” an animal for more than 15 hours a day or 90 hours a week.<sup>29</sup> That’s a lot of carceral intervention to put on the shoulders of one little terrier.

<sup>22</sup> Fuoco, *supra* note 3.

<sup>23</sup> *Id.*

<sup>24</sup> See Legislative History of Richard A. Alloway, LEGIS. TRACKER, <https://rewirenewsgroup.com/legislative-tracker/person/richard-a-alloway/> [<https://perma.cc/D9B6-D5KK>]; see also *Pennsylvania Senate Bill 3*, LEGISCAN <https://legiscan.com/PA/bill/SB3/2017> [<https://perma.cc/87EM-K8GU>].

<sup>25</sup> Vicky Taylor, *Puppy Inspires Effort to Toughen Animal Abuse Law*, GREAT FALLS TRIB. (July 27, 2016, 4:10 A.M.), <https://www.greatfallstribune.com/story/news/2016/07/26/puppy-inspires-effort-toughen-animal-abuse-law/87566270/> [<https://perma.cc/T2MC-YR8Q>].

<sup>26</sup> 18 PA. CONS. STAT. § 5511(m)(1), (c)(2)(ii), (h.1) (2015) (repealed 2017).

<sup>27</sup> 18 PA. CONS. STAT. §§ 5531–5561 (2017).

<sup>28</sup> The law has also been widely characterized by criminalizing the act of tethering a dog outside for more than nine hours, or for more than thirty minutes, in temperatures over 90 degrees and below 32 degrees. However, the statutory language allows for a “rebuttable presumption that a dog has not been the subject of neglect” if it is has “not been tethered for longer than 30 minutes in temperatures above 90 or below 32 degrees,” and satisfies other conditions. 18 PA. CONS. STAT. § 5536(a)(a).

<sup>29</sup> *Id.* §§ 5535, 5538, 5540, 5541, 5542 (2017).

Libre's Law supporters were thoroughly convinced that Libre and pets like him unconditionally supported the bill, despite that its sole aim was to broaden the state's ability to cage human animals. Libre's Law carried no other puppy benefits – no lifetime supply of kibble or free vet care. During the Libre saga, there was a distinct absence of advocacy for providing underresourced pet owners with the financial means to keep animals in sanitary and safe shelter. No one suggested a public option for people who could not afford the costly veterinary care required by animals who contract serious medical conditions like demodectosis. Indeed, Libre is alive today only because he received \$27,000 worth of veterinary treatment. But luckily for Guido, Libre's social media fame made it possible for her to cover the exorbitant medical bills by donations from supporters and online followers.

Since Libre's Law 2017 passage, the state has prosecuted thousands of human animals – 21,206 to be exact. In 2017, the number was 967 cases, which spiked to 11,836 filings in 2018, and 8,405 in 2019. The majority of the cases (52 percent) were for neglect; 41 percent were for cruelty; and 7 percent were for aggravated cruelty.<sup>30</sup> That was the charge leveled against Eliezer Carballo-Ocasio in 2018. Carballo kept his dog outside in a penned area with access to a shed. However, August 2018 saw unusually high ninety-degree temperatures in Pennsylvania. A neighbor called the police to report a dead dog in Carballo's yard, and officers went to Carballo's home, where they found him digging a grave for the dog. Carballo explained that he fed and watered the seven-year-old pit bull every day, but perhaps did not provide enough water given the weather. The police did find a food dish with food in it, but the water dish was dry. The authorities noted that the dog had access to a shed but the air conditioner in it was turned off. Because the dog had perished, prosecutors charged Carballo with a felony carrying seven years in prison.<sup>31</sup>

Libre's Law was always meant to be tough and punitive, and it substantially broadened the reach of the Pennsylvania penal system. What is striking is that that everyone – staunch conservatives, progressive socialists, and libertarians alike – agreed that the appropriate way to address animal mistreatment was to put more human animals in cages. Press in Pennsylvania and around the world celebrated the bill's unopposed passage as justice for dogs *and* proof of possibility of functional government. Senator Alloway remarked at the signing, "It's great, because this issue brings Democrats and Republicans together. Maybe we can take the good will of today and spill it over onto the budget process."<sup>32</sup> Indeed, despite stark political

<sup>30</sup> *Animal Abuse Cases Pass 20,000 Following Passage of "Libre's Law,"* LANCASTER ONLINE (July 28, 2020), [https://lanasteronline.com/news/local/animal-abuse-cases-pass-20-000-following-passage-of-libre-s-law/article\\_eca81a52-d0e6-11ea-a2f6-f3a7cd30b24e.html](https://lanasteronline.com/news/local/animal-abuse-cases-pass-20-000-following-passage-of-libre-s-law/article_eca81a52-d0e6-11ea-a2f6-f3a7cd30b24e.html) [https://perma.cc/S2PV-JJAS].

<sup>31</sup> *Police: Owner Faces Charges after Dog Dies from Being Left in Heat in Silver Spring Township,* SENTINEL (July 31, 2018), [https://cumberlink.com/news/local/crime-and-courts/police-owner-faces-charges-after-dog-dies-from-being-left/article\\_2e233e54-dfb8-589c-8b38-06ad2b5c1f95.html](https://cumberlink.com/news/local/crime-and-courts/police-owner-faces-charges-after-dog-dies-from-being-left/article_2e233e54-dfb8-589c-8b38-06ad2b5c1f95.html) [https://perma.cc/9X5G-HA92].

<sup>32</sup> Katie Meyer, *With PA's Pooches Looking On, "Libre's Law" Signed,* NAT'L PUB. RADIO: WSKG (June 29, 2017), <https://wskg.org/news/with-pas-pooches-looking-on-libres-law-signed/> [https://perma.cc/CCT9-KUDW].

polarization in Pennsylvania and the country as a whole, not one reporter could find someone with a bad word to say about Libre's Law. One animal-rights lobbyist explained simply, "Compassion is not a political party issue. Both parties have huge supporters on animal issues."<sup>33</sup>

However, Democratic governor Wolf's support for this tough-on-crime bill seems more fitting of the tough-on-crime era of 1990s, when Democrats vied against Republicans for the title of strongest general in the war on crime. It feels somewhat out of sync with today's brand of incarceration-skeptical liberalism. Libre's Law was enacted in 2017, years after many liberals and a growing number of conservatives had come to see mass incarceration as one of the most pressing problems in US society. "Smart on crime" was replacing tough on crime as the popular politics du jour.<sup>34</sup> While Alloway and animal rights advocates were advancing the tough-on-abuse law, Republicans elsewhere were promoting "criminal justice reform" bills to reduce the number of people incarcerated and under penal supervision.<sup>35</sup> Even self-proclaimed "law and order" president Donald Trump boasted about signing the 2018 First Step Act, which the Brennan Center has called "the most substantial criminal justice reform legislation in a generation."<sup>36</sup>

By the time Governor Wolf signed Libre's Law, the country had already witnessed several shocking viral videos of horrific police killings of unarmed Black men and boys, including Michael Brown, Laquan McDonald, Eric Garner, and Tamir Rice. Black Lives Matter protesters and others had taken to the streets to protest the deeply entrenched racism of American policing, prosecution, and imprisonment.<sup>37</sup> In the summer and fall of 2020, another rash of high-profile police brutality cases, including the slayings of George Floyd, Ahmaud Arbery, Breonna Taylor, and Rayshard Brooks and the shooting that left Jacob Blake paralyzed, galvanized protests

<sup>33</sup> Fuoco, *supra* note 3.

<sup>34</sup> Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018)

<sup>35</sup> *Id.* See also Osita Nwanevu, *The Improbable Success of a Criminal-Justice-Reform Bill under Trump*, NEW YORKER (Dec. 17, 2018), <https://www.newyorker.com/news/news-desk/the-improbable-success-of-a-criminal-justice-reform-bill-under-trump> [<https://perma.cc/KLV6-EQNV>]; Arthur Rizer & Lars Trautman, *The Conservative Case for Criminal Justice Reform*, GUARDIAN (Aug. 5, 2018), <https://www.theguardian.com/us-news/2018/aug/05/the-conservative-case-for-criminal-justice-reform> [<https://perma.cc/H4A7-VDCG>].

<sup>36</sup> First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018), <https://www.govinfo.gov/content/pkg/PLAW-115publ391/pdf/PLAW-115publ391.pdf> [<https://perma.cc/3TM2-Q7PM>]; see also Tim Lau, *Historic Criminal Justice Reform Legislation Signed into Law*, BRENNAN CTR. (Dec. 21, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/historic-criminal-justice-reform-legislation-signed-law> [<https://perma.cc/2GEN-AQVR>].

<sup>37</sup> Darran Simon, *Trayvon Martin's Death Sparked a Movement That Lives on Five Years Later*, CNN (Feb. 26, 2017), <https://www.cnn.com/2017/02/26/us/trayvon-martin-death-anniversary/index.html> [<https://perma.cc/2EU6-6FUF>]; *Herstory*, BLACKLIVESMATTER.COM <https://blacklivesmatter.com/herstory/> [<https://perma.cc/6X99-RQC5>]; Houston A. Baker, Jr., *The Black Bottom Line: Reflections on Ferguson, Black Lives Matter, and White Male Violence in America*, 28 AM. LITERARY HIST. 845 (2016).

involving millions of concerned citizens around the world.<sup>38</sup> Much of the public watched in horror as state officers and federal paramilitaries brazenly used weapons of war, engaged in wanton violence, utilized terroristic tactics like “disappearing” protesters, and targeted reporters.<sup>39</sup> These events elevated police reform to the top of the liberal political agenda.

Still, by 2017, many progressive policy makers already recognized that aggressively policing socially, racially, and economically marginalized communities and prosecuting people for crimes associated with social vulnerability and poverty perpetuated, rather than interrupted, cycles of violence and community dis cohesion.<sup>40</sup> Commentators regularly decried the US carceral system that disenfranchised and imposed onerous collateral consequences on people of color and the impoverished, operatively fomenting their “civic death.”<sup>41</sup> Legal scholars and sociologists had produced study after study demonstrating that social services and economic empowerment are key to reducing intrafamily abuse and neglect and that interposing violent and life-ruining policing and punishment often exacerbates the underlying stressors that lead to harm.<sup>42</sup>

And yet here was Libre’s Law entangling tens of thousands of people in the carceral web where they faced imprisonment, some like Carballo for many years.

<sup>38</sup> Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [https://perma.cc/LW67-PSA8].

<sup>39</sup> Francine Prose, Opinion, *Watching Trump’s Paramilitary Squads Descend on Portland, It’s Hard Not to Feel Doomed*, GUARDIAN (July 21, 2020), <https://www.theguardian.com/commentisfree/2020/jul/20/trump-shock-troops-portland-doomed> [https://perma.cc/3NRZ-BJR3]; Laurence Tribe, “A Profoundly Un-American Attack on Civil Society”: *Why Trump’s Paramilitary Force Is Unconstitutional*, WBUR: COGNOSCENTI (July 23, 2020), <https://www.wbur.org/cognoscenti/2020/07/23/trump-federal-police-portland-laurence-tribe> [https://perma.cc/CGH8-F2X5]; Jonathan Levinson & Conrad Wilson, *Federal Law Enforcement Use Unmarked Vehicles to Grab Protesters Off Portland Streets*, OR. PUB. BROAD. (July 16, 2020), <https://www.opb.org/news/article/federal-law-enforcement-unmarked-vehicles-portland-protesters/> [https://perma.cc/NRG8-ATAY]; Harmeeet Kaur, *The Military Is Banned from Using Tear Gas on the Battlefield, but Police Can Use It on Crowds at Home. Here’s Why*, CNN (June 8, 2020), <https://www.cnn.com/2020/06/08/us/military-tear-gas-protesters-tmd/index.html> [https://perma.cc/M9LJ-66P5].

<sup>40</sup> *Criminal Justice Fact Sheet*, NAACP, [www.naacp.org/criminal-justice-fact-sheet/](http://www.naacp.org/criminal-justice-fact-sheet/) [https://perma.cc/GX9Q-PUSA]; Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, THE ATL.: POL. (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> [https://perma.cc/ZH79-LPMV]; Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENT’G PROJECT (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/> [https://perma.cc/K4QN-8KF2]; Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

<sup>41</sup> Loic Wacquant, *From Slavery to Mass Incarceration: Rethinking the “Race Question” in the US*, 13 (Jan.–Feb. 2002); see generally MEDA CHESNEY-LIND & MARC MAUER, *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (2003).

<sup>42</sup> See AYA GRUBER, *THE FEMINIST WAR ON CRIME* 76–78, 84–85 (2020) (discussing studies).



Under the law, *the* mechanism of ensuring that people provided “clean and sanitary shelter” and “necessary [medical] care” to pets was to imprison a subset of marginalized pet owners who drew the attention of the police. These human animals went to jails that, as the coronavirus crisis has shown, are anything but “clean and sanitary” and fall woefully short of minimum medical standards. Just across the Susquehanna River from Lancaster, where Libre was rescued, lies a large penal institution, York County Prison. On September 14, 2020, the prison was the site of a massive coronavirus outbreak.<sup>43</sup> Nick Lake was set to be released when he caught the virus and had to remain detained. Due to the virus ripping through the institution, the prison halted all in-person visitation, requiring inmates’ loved ones to use costly telephone services. Lake’s fiancée, Taylor George, explained that “she can speak to her fiancé on the phone, but . . . worried about other families who cannot afford that luxury.” The overall impact on her family was severe: “George said she had been counting on her fiancé coming home and help[ing] out. His children, she said, have asked questions including, ‘Is my dad going to die?’”<sup>44</sup>

One would think that progressives would have questioned whether ratcheting up criminal punishment, rather than using other tools of contemporary governance, really did serve the interests of animals, including the marginalized pet owners for whom animal companionship was a small raft of joy in a sea of misery. But one would be wrong. Few justified Libre’s Law on the ground that criminal punishment would transform the neglectful into better future pet owners. To the contrary, advocates argued that abusive owners must surrender their pets and *never* have any again. Libre’s Law supporters made it clear that punishment is the point. For the law’s supporters, inflicting the pain of carceral confinement on human offenders evened the score and provided “justice” to animal victims. Jennifer Niels, cruelty officer for the Lancaster County Animal Coalition, remarked plainly, “This won’t stop cruelty but it will put an emphasis on the importance of justice for their suffering. The laws are recognition of their pain and what they *deserve*.”<sup>45</sup>

## 9.2 VICTIMS IN THE WAR ON CRIME

It may seem surprising that in the midst of a decarceral sea-change, liberals and libertarians alike reflexively embraced Libre’s Law, a punitive bill that broadened the reach to criminal law and substantially increased prison time for conduct so

<sup>43</sup> Dylan Segelbaum, “*The Unknown Is Scary*”: York County Prison COVID-19 Outbreak Tests Prisoners, Loved Ones, YORK DAILY REC. (Sept. 14, 2020), / [<https://perma.cc/822C-ZCPY>].

<sup>44</sup> *Id.*

<sup>45</sup> Tom Knapp, *Libre’s Law Goes into Effect Today: Here’s What the New Animal-Cruelty Statutes Mean for Pennsylvania*, LANCASTER ONLINE (Aug. 28, 2017), [https://lanasteronline.com/news/local/libres-law-goes-into-effect-today-heres-what-the-new-animal-cruelty-statutes-mean-for/article\\_9fe0f7d4-5c0e-11e7-b014-ebfc0d03542a.html](https://lanasteronline.com/news/local/libres-law-goes-into-effect-today-heres-what-the-new-animal-cruelty-statutes-mean-for/article_9fe0f7d4-5c0e-11e7-b014-ebfc0d03542a.html) (emphasis added) [<https://perma.cc/8NG6-BBBJ>].

readily traced to economic precarity and social marginality. But for those who study the American crime victims' movement during the tough-on-crime era of the 1980s and 1990s, the phenomenology and trajectory of Libre's Law looks like familiar territory.

Victims' rights and victim-speak have long galvanized politicians and people on both sides of the political aisle to support zero-tolerance criminal policies. The peculiarly American institution of mass incarceration was built upon a foundation of victims' rights. Spectacular narratives of suffering at the hands of monstrous offenders have repeatedly united Americans in the abandonment of reasoned analysis of how to prevent harm in favor of an unreflective, punitive, but emotionally satisfying impulse to inflict severe pain on the evil criminals who harm innocent victims. Legal sociologist Jonathan Simon remarked in 2000, "Victims' rights has emerged over the past 25 years as one of the most important social movements of our time" due "in part because of the enormous appeal of victimization to television media."<sup>46</sup>

Marshaled by prosecutors committed to high conviction rates and savvy politicians committed to reelection, victim narratives fomented public demands for more criminal prohibitions, weaker constitutional protections for defendants, and higher – even exorbitant – sentences. The sheer number of crimes that became life offenses during that era led to a 500 percent increase in the number of people serving life sentences between 1984 and 2016,<sup>47</sup> and a current prison system ill-equipped to meet the needs of its large and growing geriatric population.<sup>48</sup> A key principle of victims' rights is that victims' interests in justice-as-punishment should trump defendants' interests in liberty and due process. Scholar Lynne Henderson observed, "Victims' rights' were – and are – used to counter 'defendants' rights' and to trump those rights if possible. In an argument that traces back to at least the early 20th Century, people accused of crimes are probably 'guilty as sin' and undeserving of so much legal protection."<sup>49</sup>

Centering the victim in advocacy and law reform is not inexorably punitive. Such is evidenced in recent times by the heartening surge of survivor-led movements calling for restorative justice, alternatives to incarceration, and even penal

<sup>46</sup> Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 LAW & SOC. INQUIRY 1111, 1136 (2000).

<sup>47</sup> Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences*, SENT'G PROJECT (May 3, 2017), <https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/#III.%20Life%20by%20the%20Numbers> [<https://perma.cc/U6GN-PR8H>] (showing an increase of from 34,000 "lifers" to 206,268, between 1985 and 2016 (including "virtual life"), a 506.7 percent increase; without "virtual life," lifers were approximately 161,957.)

<sup>48</sup> Michael Olove, *Elderly Inmates Burden State Prisons*, PEW CHARITABLE TRUSTS: HEALTH (Mar. 17, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/03/17/elderly-inmates-burden-state-prisons> [<https://perma.cc/E49K-D57H>].

<sup>49</sup> Lynne Henderson, *Co-opting Compassion: The Federal Victims' Rights Amendment*, 10 ST. THOMAS L. REV. 579, 582–83 (1998).

abolition.<sup>50</sup> Although, in theory, victim-centered lawmaking and advocacy is not inherently carceral, the American victims' rights movement, in practice, has always been. That movement was a key driver of the shift toward tough-on-crime politics in the 1980s and proved invaluable to the policy architects of the modern American penal state. Those in the victims' rights movement and their allies insisted that "justice for victims" meant one thing, and one thing only: "meaningful," as in long, imprisonment of the offender. As such, centering the victim fueled the carceral sentiments that culminated in the United States' dishonorable distinction of most punitive nation on earth.

In the late 1970s, nascent victims' rights organizations arose around the country with a stated goal of reforming "the poor response of the criminal justice system to victims' needs."<sup>51</sup> Early in the movement, many victims' rights were about protecting victims from *prosecutors* who mistreated or ignored them. Not content to be cogs in a prosecutorial wheel, victims championed legal provisions to require prosecutors to give them notice of relevant dates, seek their input before making major decisions, and help them obtain monetary compensation.<sup>52</sup> But even in those early days, the movement had no tolerance for victims who wanted to avoid the criminal punishment system altogether.<sup>53</sup> Sociologist Marie Gottschalk notes that "activists in victims' organizations tended to be overwhelmingly white, female, and middle-aged – a group demographic that is hardly representative of crime victims in general."<sup>54</sup> They "were more supportive of the death penalty and of the police, prosecutors, and judges than were victims not active in these organizations."<sup>55</sup>

Ronald Reagan, who swept into office in 1981 with a pledge to take on crime, took notice of the fledgling movement. Reagan had emphasized the crime issue as part of his larger socioeconomic plan to shift the United States away from social welfare toward the "free market" by cutting taxes on the wealthy, gutting aid programs,

<sup>50</sup> See, e.g., IMPACT JUST., <https://impactjustice.org/> [<https://perma.cc/ZC8A-BUZL>]; see also DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR (2019).

<sup>51</sup> Marlene Young & John Stein, *The History of the Crime Victims' Movement in the United States*, OFF. FOR VICTIMS OF CRIME ARCHIVE (Dec. 2004), [https://www.ncjrs.gov/ovc\\_archives/ncvrv/2005/pg4c.html#f](https://www.ncjrs.gov/ovc_archives/ncvrv/2005/pg4c.html#f) [<https://perma.cc/RBN8-WX9F>].

<sup>52</sup> MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS 88–90 (2006); see generally MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS (2002); Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights*, 76 TEMP. L. REV. 645 (Dec. 2003).

<sup>53</sup> Arizona's Victims' Rights Amendment confers the "right" to "refuse an interview, deposition, or other discovery request by the . . . defendant's attorney," a right all people *already have*. It does not confer the right to refuse to cooperate with police or prosecutors, which is far more compulsory. AZ. CONST., art. II, § 2.1, cl. (A)(5).

<sup>54</sup> Gottschalk, *supra* note 52, at 90 (quoting KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA 161 (2000) (internal quotation marks omitted)).

<sup>55</sup> *Id.*

deregulating financial institutions, and curtailing labor protections.<sup>56</sup> The so-called Reagan Revolution “changed the trajectory of America,” as President Obama remarked in 2008,<sup>57</sup> and it set the stage for today’s exorbitant levels of wealth inequality.

Reagan and his allies sold a program tailor-made for the 1 percent to the other 99 in part by recasting the problems of poverty as products of criminality. Reagan observed, “Individual wrongdoing, they told us, was always caused by a lack of material goods, and underprivileged background, or poor socioeconomic conditions. And somehow . . . it was society, not the individual, that was at fault when an act of violence or a crime was committed.”<sup>58</sup> He concluded, “Is it any wonder, then, that a new privileged class emerged in America, a class of repeat offenders and career criminals who thought they had the right to victimize their fellow citizens with impunity.”<sup>59</sup> Reagan’s narrative reversed the moral order, transforming the “underprivileged” poor into a “privileged class” of criminals and society’s victims of poverty into “victimizers.” He strategically publicized the image of scary criminals to frighten voters into believing that crime control, rather than employment, health, or other services, was the only legitimate form of federal domestic governance.

Still, scare ads about criminals may inspire fear, but narratives and images of brutalized innocent victims inspire the loathing that drives punitivity.<sup>60</sup> Elayne Rapping observes that “[b]eneath the compelling emotion that informs the demands of victims, there is all too often an ugly and irrational cry for blood.” Drawing on Lauren Berlant’s critique of the “sentimentality” of Reagan-era conservatism,<sup>61</sup> Rapping asserts that the victim’s rights movement, which involves “the valorization of ‘surplus’ or excess feeling, the tendency to substitute passion for reason in determining political and legal policy,” serves as a prime example of political sentimentality.<sup>62</sup> The innocent victim/monstrous offender narrative in “television, in fiction, in docudrama, in tabloids, and now in trials” effectively triggers our

<sup>56</sup> See MICHAEL ALLEN MEEROPOL, *SURRENDER: HOW THE CLINTON ADMINISTRATION COMPLETED THE REAGAN REVOLUTION* (2000); MELINDA COOPER, *FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM* (2017).

<sup>57</sup> *In Their Own Words: Obama on Reagan*, N.Y. TIMES: THE CAUCUS (captured April 21, 2019), <https://archive.nytimes.com/www.nytimes.com/ref/us/politics/2iseelye-text.html?module=inline> [<https://perma.cc/4LJ6-GTED>].

<sup>58</sup> Ronald W. Reagan, *Remarks at the Annual Conference of the National Sheriff's Association in Hartford, Connecticut*, RONALD REGAN PRESIDENTIAL LIBR. & MUSEUM ARCHIVES (June 20, 1984), <https://www.reaganlibrary.gov/archives/speech/remarks-annual-conference-national-sheriffs-association-hartford-connecticut> [<https://perma.cc/SU8G-V6A4>].

<sup>59</sup> *Id.*

<sup>60</sup> Henderson, *supra* note 49, at 584.

<sup>61</sup> LAUREN BERLANT, *THE QUEEN OF AMERICA GOES TO WASHINGTON CITY* (1997).

<sup>62</sup> ELAYNE RAPPING, *Television, Melodrama, and the Rise of the Victims' Rights Movement*, 43 N.Y.L. SCH. L. REV. 665, 680 (2000).

“melodramatic imagination” where we crave “moral simplification, [and] reassuring fantasies.”<sup>63</sup>

Sentimental images of this sort are particularly effective – and dangerous – because they “seem to be superpolitical” and “beyond ideology,” when they are in fact “deployed in the service of an agenda which is intensely political and ideological,” Rapping observes.<sup>64</sup> She concludes that “a political movement based on such precepts must be viewed with grave suspicion.”<sup>65</sup> Reagan indeed knew the power of sentimentality, and in the first week of his presidency and every April thereafter, he pronounced “Victims’ Rights Week.”<sup>66</sup> In 1982, his administration formed the President’s Task Force on Victims of Crime.<sup>67</sup> Asserting that the criminal system had lost “essential balance,”<sup>68</sup> the Task Force advocated nothing less than a reversal of the due-process regime put in place by the liberal “Warren Court.”<sup>69</sup> The Task Force’s recommendations, which included abolishing parole, limiting pretrial release, and limiting judges’ sentencing discretion, became the very laws that paved the path to mass incarceration.<sup>70</sup> Of course, the Task Force did not recommend addressing the endemic poverty and inequality that impacts the marginalized people who constitute the bulk of actual crime victims.

That’s because the movement was never about the heterodox class of actual crime victims. “To maintain its fever pitch of hatred, the war on crime need[ed] ever more, and ever more sympathetic, victims,” Markus Dubber remarks.<sup>71</sup> The victim images that drove carceral policies were very specific. First, victims were *innocent*. Within the rhetoric, victims were “blameless, innocent, usually attractive, middle class, and white.”<sup>72</sup> These images stood in contrast to images of criminals, who were “subhuman . . . monsters” or alternatively “the ominous, if undifferentiated, poor, angry, violent, Black, or Latino male.” Such imagery relieved the public of the burden of grappling with the contested ethical questions of criminality and state-imposed pain, rendering penal management akin to pest management. “The

<sup>63</sup> *Id.* at 678 (quoting Lynn Joyrich, *All That Television Allows*, in PRIVATE SCREENINGS: TELEVISION AND THE FEMALE CONSUMER 227, 233 [Lynn Spiegel & Denise Mann eds., 1992]).

<sup>64</sup> Rapping, *supra* note 62, at 681 (quoting BERLANT, *supra* note 61, at 37).

<sup>65</sup> Rapping, *supra* note 62, at 280.

<sup>66</sup> Ronald W. Reagan, *Proclamation 4831 – Victims’ Rights Weeks, 1981*, RONALD REAGAN PRESIDENTIAL LIBR. MUSEUM ARCHIVES (April 8, 1981), <https://www.reaganlibrary.gov/archives/speech/proclamation-4831-victims-rights-weeks-1981> [<https://perma.cc/YG7M-7R4J>].

<sup>67</sup> In 1987, Reagan appointed Herrington as “Chairman” and Executive Director of the White House Conference for a Drug Free America; see LOIS HAIGHT HERRINGTON ET AL., PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, *Recommendations for Government Action*, NAT’L CRIM. JUST. REFERENCE SERV. at 32 (Dec. 1982), <https://www.ncjrs.gov/pdffiles1/ovc/87299.pdf> [<https://perma.cc/FF4N-ESLQ>].

<sup>68</sup> *Id.* at 114.

<sup>69</sup> The “Warren Court Era” lasted from 1953 to 1969, when Earl Warren presided as Chief Justice. The Court is remembered for rulings with a distinctly civil libertarian bent.

<sup>70</sup> HERRINGTON ET AL., *supra* note 67.

<sup>71</sup> DUBBER, *supra* note 52, at 192.

<sup>72</sup> Henderson, *supra* note 49.

identification with the victim at the expense of identifying with the offender provides an additional benefit to the onlooker,” Dubber observes. “By denying any similarities with the offender upon which identification could be based, the onlooker transforms the essentially ethical question of punishment into one of nuisance control.”

Second, victims were *devastated*. Berlant specifies that it is “traumatized subjectivity” that “replaces rational subjectivity as the essential index of value for personhood and thus for society.”<sup>73</sup> To be sure, the victim label confines people to one identity – the harmed object of a private wrongdoer. “Any richer sense of the person undermines the claim of victimhood, because victimhood depends on a reductive view of identity,” Martha Minow remarks.<sup>74</sup> Of course, this one-dimensional vision of a ruined victim sometimes ran up against harmed people’s self-conception, and they chose instead the more empowering label of “survivor.” Nevertheless, the devastated victim image tapped into “an almost religious view of suffering, empowering those who suffer with . . . reverence from others,” as Minow notes.<sup>75</sup> President Bill Clinton’s attorney general Janet Reno, in a speech supporting the federal Victims’ Rights Amendment, called victims “but little lower than the angels.”<sup>76</sup> Decades later, candidate Donald Trump picked up on this theme and featured “Angel Moms,” the mothers of children killed by immigrants, at his rallies.<sup>77</sup> Through such reverential veneration, Dubber asserts, the public can “[purge] itself of deviant elements and thereby heal itself as it salves the victim’s pain.”<sup>78</sup>

Finally, and perhaps most importantly, victims were *vengeful*. Forgiveness, when mentioned at all, was a concept appropriate for consideration only in addition to, not in lieu of, punishment. Only after the defendant accepted responsibility, apologized, and received his life sentence (or death sentence) could victims say, “I forgive you – may God forgive you too.” Law professor Elizabeth Joh observes that victims’ rights ideology could not “generate[ ] or tolerate[ ] narratives in which victims’ families can exercise mercy, kindness, or forgiveness towards defendants.”<sup>79</sup> These vengeful victims invariably desired *more* involvement with police, prosecutors, and the criminal process.<sup>80</sup> Their primary targets of disapprobation were

<sup>73</sup> BERLANT, *supra* note 61, at 35.

<sup>74</sup> Martha Minow, *Surviving Victim Talk*, 4 UCLA L. REV. 1433 (1993).

<sup>75</sup> *Id.* at 1434.

<sup>76</sup> Janet Reno, *Remarks of the Honorable Janet Reno, Attorney General of the United States, to the Child Welfare League of America*, U.S. DEPT. OF JUST. ARCHIVES (Mar. 13, 1998), [https://www.justice.gov/archive/ag/speeches/1998/0313\\_agcwl.htm](https://www.justice.gov/archive/ag/speeches/1998/0313_agcwl.htm) [<https://perma.cc/WR42-3BU7>].

<sup>77</sup> Michelle Goldberg, *Trump’s “Angel Moms” Deserve Our Sympathy. But Their Message Is a Lie*, SLATE (Sept. 1, 2016), <https://slate.com/news-and-politics/2016/09/trumps-angel-moms-deserve-our-sympathy-but-not-our-vote.html> [<https://perma.cc/GZX2-R27D>].

<sup>78</sup> Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3, 8 (1999).

<sup>79</sup> Elizabeth E. Joh, *Narrating Pain: The Problem with Victim Impact Statements*, 10 S. CAL. INTERDISC. L.J. 28 (2000).

<sup>80</sup> Lynne Henderson, *Revisiting Victims’ Rights*, 1999 Utah L. Rev. 383, 408 (arguing that victim participation in criminal litigation may not help their healing process).

insufficiently zealous prosecutors, defense attorneys, due process protections, and lenient judges. Victims' rights discourse thereby situated victims' interests as necessarily separate from and adverse to those of defendants. Victims' and defendants' interests were also zero-sum: the more the defendant suffered, the more the victim healed.<sup>81</sup>

These attributes made idealized victims formidable weapons in prosecutors' and politicians' anti-crime arsenals. First, the combination of innocence and devastation fomented a strong sentimentality, such that the public always sided with the victim. Henderson remarks, "The symbolic strength of the term 'victims' rights' overrides careful scrutiny: Who could be anti-victim?"<sup>82</sup> Sentimental reverence generated near-total deference to victims' purported wishes. Minow notes that "there is a strong tendency for people to couple a claim of victimhood with a claim of incorrigibility – that the victim knows better than anyone else about the victimization, and indeed, the victim cannot be wrong about it."<sup>83</sup> Second, with the victim now lionized and beyond challenge, the presumption of vengefulness came in to establish the victim as inalterably in opposition to the defendant. Thus, victims' interests always overlapped with prosecutors' interests, unless of course the prosecutor was lenient, in which case the victim's interest overlapped with whomever was most punitive.

This highly specific victim image, carefully curated by tough-on-crime prosecutors, profit-seeking media, and opportunistic politicians, actively excluded the marginalized men and women who disproportionately suffer from crime but view prosecution with a jaundiced eye.<sup>84</sup> Indeed, many crime victims, and especially victims of color, have had contacts with the criminal system as defendants, witnesses, or even pedestrians subjected to invasive stop-and-frisk policies, which make them wary of involvement with the state's penal apparatus and its functionaries. Moreover, victimhood and criminality narratives have always had distinctly racist overtones, situating innocent whiteness as the foundation of the victim image and blackness and brownness as the foundation of criminality. Stephen Carter notes that victims' rights rhetoric's "[e]motive power would be lost were one to conjure instead an image of 'innocent blackness' surrounded by 'threatening whiteness.'"<sup>85</sup>

In 2007, the Bureau of Justice Statistics released a telling report on Black victimization between 2001 and 2005.<sup>86</sup> It found that Black people were victimized at significantly higher rates than white people and were about twice as likely to be

<sup>81</sup> See generally Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1 (2010).

<sup>82</sup> Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 952 (1985).

<sup>83</sup> Minow, *supra* note 74, at 1434.

<sup>84</sup> Henderson, *supra* note 49, at 585 (quoting President Clinton's announcement in support of a Victims' Rights Amendment) ("[W]e sure don't want to give criminals like gang members, who may be victims of their associates [any rights].").

<sup>85</sup> Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 428 (1988).

<sup>86</sup> ERIKA HARRELL, BUREAU OF JUST. STAT., NCJ 214258, BLACK VICTIMS OF VIOLENT CRIMES (2007), <https://www.bjs.gov/content/pub/pdf/bvvc.pdf> [<https://perma.cc/MzQU-KD8F>]. This

victims of sexual assault, robbery, and aggravated assault.<sup>87</sup> Moreover, in 2005, African Americans made up approximately 13 percent of the US population but 49 percent of the country's homicide victims.<sup>88</sup> Among the Black population, victimization correlated with being male, young, low-income, and residing in an urban area.<sup>89</sup> However, in victims' rights parlance, the poor, young, Black, urban teen was never a victim but the ultimate criminal – a “superpredator,” as some nineties Democrats infamously declared.<sup>90</sup> Victims' rights supporters were quite open that not all people harmed by crime merited the victim label. Supporting a federal Victims' Rights Amendment in 1996, President Bill Clinton added a seemingly obvious caveat: “[W]e sure don't want to give [rights to] criminals like gang members, who may be victims of their associates.”<sup>91</sup>

As much as they were racialized, victimization narratives were also deeply gendered and classed. They centered on nonpoor white women, along with children, as the category of people against whom violence – especially sexual violence – was particularly intolerable and disgusting. *America's Most Wanted* was a long-running television crime series created by John Walsh, the father of a murdered child, who turned anti-crime warrior. The show aimed to deputize all Americans in catching “antisocial loners and lunatics [who] prey[ed] on women and especially children.”<sup>92</sup> The show's producer, Michael Linder, was surprisingly honest about which victims counted: “A drug dealer who shoots another drug dealer is not as compelling as a child molester or murderer . . . If a man brutalizes innocent children, that definitely adds points.”<sup>93</sup> The fascination with white women's and children's vulnerability to extreme violence persists even in this incarceration-skeptical era through the

appears to be the only report of its kind, although there are other victimization surveys, but those focus on general victimization. See *infra* note 87.

<sup>87</sup> *Id.* at 3. But see RACHEL E. MORGAN & JENNIFER L. TRUMAN, U.S. DEPT. OF JUST., NCJ 255113, CRIMINAL VICTIMIZATION, 2019 (2019), <https://www.bjs.gov/content/pub/pdf/cv19.pdf> [<https://perma.cc/PLN5-AGKY>] (showing similar rates of victimization among white people and Black people when based on survey results, but a much higher rate for Blacks when based on police reports; Black victims constitute a higher percentage of the overall Black population than white victims in the white population.).

<sup>88</sup> HARRELL, *supra* note 86, at 1.

<sup>89</sup> *Id.*

<sup>90</sup> Beth Caldwell & Ellen C. Caldwell, *Superpredators and Animals – Images and California's Get Tough on Crime Initiatives*, 11 J. OF INST. OF JUST. & INT'L STUD. 61 (2011); see also Anne Gearan & Abby Phillip, *Clinton Regrets 1996 Remark on “Super-Predators” after Encounter with Activist*, WASH. POST (Feb. 25, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/02/25/clinton-heckled-by-black-lives-matter-activist/> [<https://perma.cc/LU2C-PFW7>].

<sup>91</sup> Online News Hour, *Clinton's Announcement in Support of a Victims' Rights Amendment*, PUB. BROAD. SERV. (June 25, 1996), [https://www.pbs.org/newshour/politics/law-jan-june96-victim\\_06-25](https://www.pbs.org/newshour/politics/law-jan-june96-victim_06-25) [<https://perma.cc/GMF7-4H5G>].

<sup>92</sup> Rapping, *supra* note 62, at 675.

<sup>93</sup> *Id.* at 675–76 (citing Van Gordon Sauter, *Rating the Reality Shows and Keeping Tabs on the Tabloids* at 18, TV GUIDE (May 2, 1992); Anna Williams, *Domesticity and the Aetiology of Crime in “America's Most Wanted”* at 97–98, CAMERA OBSCURA [Jan.–May 1993]).



proliferation of true-crime broadcasts that, as Monika Bauerlein notes, tell “stories largely about white victims, based on uncritical accounts of police and prosecutors.”<sup>94</sup>

### 9.3 VICTIMS’ RIGHTS AND POLICY WRONGS

The tough-on-crime era produced a glut of laws created in the image of – and often named after – victims. Because the laws were based on narratives of victimhood carefully curated by political actors, they often reflected a distorted picture of the problem and exceedingly narrow view of how to remedy it. For example, in the 1980s and 1990s, advocates pressed for laws to take domestic violence [DV] seriously by mandating that police arrest and prosecutors pursue cases against all alleged DV offenders. These reforms were propelled by stories, both real and fictionalized, of white women who had been abused and wanted to separate from the abuser, but were ignored and left to be brutalized (and even die) by indifferent police officers and lenient prosecutors. In the 1990s, as Laurie Levenson notes, Nicole Brown Simpson became “synonymous with the image of the battered wife – a young, beautiful woman, unable to escape her abuser, and unable to get the criminal justice system to respond to her pleas.”<sup>95</sup>

Once these spectacular and racialized narratives established battering as a function of the absence of policing and punishment, law enforcement became the solution *in and of itself*. With leniency defined as injustice, every tough-on-crime reform became an instance of gender justice, regardless of the consequences. This rendered the questions of whether such reforms in fact deterred violence, were more beneficial than harmful, or even satisfied victims totally beside the point. And, as it turned out, the tough-on-DV program was no panacea for battered women, in large part because the marginalized women of color who made up a substantial portion of the DV victim population had been excluded from the prevailing narrative. From the beginning, Black women warned advocates of carceral DV policy that Black victims often bore a very different relationship to the criminal system from white victims and did not invariably desire more involvement with it or even for the defendant to have more involvement with it. As one activist of color put it, “I think white women talked more as if the courts belonged to us [all women] and therefore should work for us where we [women of color] always saw it as belonging to someone else and talked more about how to keep it from hurting us.”<sup>96</sup>

<sup>94</sup> Monika Bauerlein, *True Crime Is Cathartic for Women. It’s Also Cop Propaganda*, MOTHER JONES (May/June 2020), <https://www.motherjones.com/media/2020/06/true-crime-podcasts-white-women/> [<https://perma.cc/XK3S-YzZD>].

<sup>95</sup> See Laurie L. Levenson, *Stereotypes of Women in the O.J. Simpson Case*, 1994 WL 681370 (O.J. Commentaries).

<sup>96</sup> Ellen L. Pence & Melanie F. Shepard, *An Introduction: Developing a Coordinated Community Response*, in COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS

Indeed, activists of color had argued that money, services, shelter, job opportunities, childcare, and the like would go a long way in aiding abused women. But such welfare and social services would not be of much use to nonpoor white victims because of their “reluctance to reduce their’s [sic] or their children’s standard of living” and the “welfare stigma” that “prevented [them] from considering AFDC payments as a potential solution,” as one advocate noted frankly in 1978.<sup>97</sup> For such women, arrest might be the most promising avenue toward reforming her husband or creating favorable divorce conditions. Of course, arrest would do little for poor women, for whom divorce money would be like getting blood from a turnip. Indeed, DV studies in the late 1980s confirmed that arrest reduced violence among white, employed men but aggravated violence among Black, unemployed men.<sup>98</sup> Researchers warned, “If three times as many [Black people as white people] are arrested in a city like Milwaukee, which is a fair approximation, then an across-the-board policy of mandatory arrests prevents 2,504 acts of violence against primarily white women at the price of 5,409 acts of violence against primarily Black women.”<sup>99</sup>

The ideal victim narrative obscured the fact that victims of DV also engaged in violence, even if mostly defensive, which made them vulnerable to arrest under strict enforcement policies. The state of California compared DV arrest data from 1988, before mandatory arrest policies, to data from 1998. It found that the arrests of men rose by 60 percent, but women’s arrests rose by 400 percent.<sup>100</sup> Stripping police of discretion, it turned out, countered their masculinist instinct *not* to arrest women. And of course, this newfound willingness to arrest women disproportionately impacted Black women.

Moreover, the innocent yet vengeful victim narrative hid many other reasons why DV victims did not want to interact with police and prosecutors. In 2015, the ACLU published the results of a survey of more than 900 DV service providers. The survey asked them to, among other things, “identify the primary reasons survivors do not call or cooperate with law enforcement.”<sup>101</sup> Providers responded that most victims were rightly afraid that police would call in Child Protective Services to investigate them for “failure to protect.” In addition, the providers noted that some “clients were committing crimes (using illegal substances, participating in sex work, had a taser in

FROM DULUTH AND BEYOND 7, Melanie F. Shepard Ellen L. Pence eds., ) (quoting a legal advocate interview from Sept. 19, 1995).

<sup>97</sup> U.S. COMM’N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY 30–31, 172 (1978), <https://www.ncjrs.gov/pdffiles1/Digitization/53356NCJRS.pdf> [<https://perma.cc/EE3R-MFUW>, 172].

<sup>98</sup> Lawrence Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. OF CRIM. L. & CRIMINOLOGY 137 (1992).

<sup>99</sup> *Id.* at 160.

<sup>100</sup> Mekha Rajan & Kathy A. McCloskey, *Victims of Intimate Partner Violence: Arrest Rates across Recent Studies*, 15 J. AGGRESSION, MALTREATMENT & TRAUMA 37 (2007).

<sup>101</sup> *Responses from the Field: Sexual Assault, Domestic Violence, and Policing*, AM. CIV. LIBERTY UNION 10 (2015) [https://www.aclu.org/sites/default/files/field\\_document/2015.10.20\\_report\\_-\\_responses\\_from\\_the\\_field.pdf](https://www.aclu.org/sites/default/files/field_document/2015.10.20_report_-_responses_from_the_field.pdf) [<https://perma.cc/VXU2-DHCW>].

their possession, etc.) while they were being abused” and were “afraid of being prosecuted.”<sup>102</sup> Indeed, one respondent observed that in her community, “checking victims for warrants is so encouraged, it is part of institutionalized policy.”<sup>103</sup> These were just some of the many ways that carceral policies harmed victims who had been excised from the idealized narratives that drove DV policy.

These costs to victims came on top of the costs to the defendants – disproportionately men of color – and their families and communities. The vengeful victim narrative presumed that what was bad for the abuser was necessarily good for the victim, but the ACLU survey makes clear that in the DV context, the lives of the victims and defendants are intertwined and arrest is not a zero-sum game. One provider observed:

A lot of victims don't want to call the police because they don't want the abuser to be incarcerated or deported, and they don't want to bring DSS down on their families and lose their kids. In communities of color and immigrant communities these concerns are paramount. Victims are afraid that if they call the police, the abuser will be subjected to a racist system of “justice” that leaves black families devoid of fathers (if he's in prison that also means no child support, no help raising the kids, etc.) and Latino families [are] in fear of having loved ones deported (often back to places they left because of violence and/or economic hardship).<sup>104</sup>

Perhaps the clearest examples of idealized victims' rights narratives propelling terrible policy is the war on sex offenders. In the 1980s and 1990s, media relentlessly covered child kidnappings, rapes, and killings that represented “every parent's worst nightmare.” The names Adam Walsh, Jacob Wetterling, Polly Klaas, and Megan Kanka were seared into public consciousness and memorialized in the titles of federal anti-sex offender legislation.<sup>105</sup> Legislatures capitalized on this fear and scored political points by passing sex offender punishment and management regimes that tested the limits of constitutional powers, including mandatory registration and community notification, strict residency restrictions, and for some offenders, indefinite civil commitment.<sup>106</sup>

In fact, however, such brutal serial child murders were exceedingly rare, and the common assaults involved lower-level sexual touching perpetrated by familiars, often by other children.<sup>107</sup> In 2009, “juveniles account[ed] for more than one-third

<sup>102</sup> *Id.* at 28.

<sup>103</sup> *Id.* at 29.

<sup>104</sup> *Id.* at 30.

<sup>105</sup> See William J. Clinton, *Remarks on Signing Megan's Law and an Exchange with Reporters at 763*, GOV. INFO: ADMIN. OF WILLIAM J. CLINTON (May 17, 1996), <https://www.govinfo.gov/content/pkg/PPP-1996-book1/pdf/PPP-1996-book1-doc-pg763.pdf> [<https://perma.cc/PFD9-92L2>].

<sup>106</sup> See, e.g., S.C. CODE ANN. § 23-3-430 (2018); WASH. REV. CODE § 9A.44.130 (2018); MISS. CODE ANN. § 45-33-25 (2018).

<sup>107</sup> See *Child Sex Abuse Statistics: Perpetrators*, DARKNESS TO LIGHT (Dec. 22, 2015), [https://www.d2l.org/wp-content/uploads/2017/01/Statistics\\_2\\_Perpetrators.pdf](https://www.d2l.org/wp-content/uploads/2017/01/Statistics_2_Perpetrators.pdf) [<https://perma.cc/MP3U-EKWD>]; Sarah W. Craun & Matthew T. Theriot, *Misperceptions of Sex Offender*

(35.6 percent) of those known to police to have committed sex offenses against minors,” according to a Bureau of Justice Statistics report.<sup>108</sup> The report further notes, “Early adolescence is the peak age for offenses against younger children.”<sup>109</sup>

In 2006, John Walsh of *America’s Most Wanted* fame successfully lobbied the US Congress to pass the “Adam Walsh Child Protection Act” on the twenty-fifth anniversary of his son’s death. Federal sex offender law was already exceedingly harsh by that time, but the Walsh Act symbolically increased already exorbitant penalties and broadened eligibility for registration and civil commitment. These draconian provisions were irrelevant to nearly all sex-crime arrestees, whose cases were governed by state, not federal, law. Federal law on violent crime has limited jurisdiction, generally affecting only defendants in federalized areas, including at the time Indian territory. The federal public defender had warned that Native Americans would bear the brunt of these laws.<sup>110</sup> In 2006, “[n]early three-quarters of federal sex abuse defendants were American Indian or Alaska Native,” according to the Department of Justice.<sup>111</sup> These suspects “tended to be younger . . . and less educated” than other offenders.<sup>112</sup>

The Walsh Act also required states to register juveniles as sex offenders. The irony is painful: Children, so revered as angels when used as symbols of the horrors of abuse, lost all claims to innocence when accused of sex crimes, so much so that few were troubled about subjecting them to state-sanctioned brutality and sexual abuse. A 2016 *New Yorker* article profiled child registrants’ gut-wrenching tales of homelessness, inability to attend school, public shaming, violence, humiliating “medical

*Perpetration: Considering the Impact of Sex Offender Registration*, 24 J. OF INTERPERSONAL VIOLENCE 2057 (2009); Naomi J. Freeman & Jeffrey C. Sandler, *The Adam Walsh Act: A False Sense of Security or an Effective Public Policy Initiative?* 21 CRIM. J. POL’Y REV. 46, — (2010) (“[S]everal recent studies . . . have found registration and notification laws to be ineffective methods of reducing sexual victimizations . . . [T]here is some evidence to suggest that these types of laws are increasing recidivism.”).

<sup>108</sup> David Finkelhor et al., *Juveniles Who Commit Sex Offenses against Minors* 1–2, U.S. DEP’T OF JUST.: OFF. OF JUV. JUST. & DELINQ. PREVENTION (2009), <https://www.ncjrs.gov/pdffiles1/ojjdp/227763.pdf> [<https://perma.cc/C93A-P9WR>].

<sup>109</sup> *Id.* at 2.

<sup>110</sup> Jon M. Sands, *Re: Adam Walsh Child Protection and Safety Act of 2006*, Pub. L. 109-248 at 12–13, FED. PUB. DEF. DIST. OF ARIZ. (November 16, 2006), [https://www.fd.org/sites/default/files/criminal\\_defense\\_topics/essential\\_topics/sentencing\\_resources/defender\\_recommendations/sex-offense-issues-addressed-by-letter-on-11-16-06-to-ussc.pdf](https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/defender_recommendations/sex-offense-issues-addressed-by-letter-on-11-16-06-to-ussc.pdf) [<https://perma.cc/CU6M-S358>]; see also Robert Ecoffey et al., *Report of the Native American Advisory Group on the Organizational Sentencing Guidelines* 32, U.S. SENT’G COMM’N (2003), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20031104\\_Native\\_American\\_Advisory\\_Group\\_Report.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20031104_Native_American_Advisory_Group_Report.pdf) [<https://perma.cc/QQY8-JV4B>].

<sup>111</sup> Mark Motivans & Tracey Kyckelhahn, *Federal Prosecution of Child Sex Exploitation Offenders*, 2006, U.S. DEPT. OF JUST.: BUREAU OF JUST. STAT. BULLETIN (2007), <https://www.bjs.gov/content/pub/ascii/fpcse006.txt> [<https://perma.cc/6H25-5DCB>]; Sarah Stillman, *The List*, NEW YORKER (Mar. 14, 2016) <https://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes> [<https://perma.cc/42EB-B7R2>].

<sup>112</sup> Motivans & Kyckelhahn, *supra* note 111.

treatment,” and suicide.<sup>113</sup> There is Charla, who was placed on the registry at ten for pulling a boy’s pants down at school and whose photo still appears online under the banner “Protect Your Child from Sex Offenders.” There is Anthony, convicted under “statutory rape” laws for consensual sex as a teenager. Years later, the conditions of his sex-offender status prohibited him from living with his newborn daughter, and his violations of those conditions landed him a ten-year sentence. There is Leah, who at age ten, was convicted of molesting her siblings. During college, she and her boyfriend drove out of state and stopped at the local police station so that she could fulfill her sex-offender notification requirement. The front-desk officer said, “We don’t serve your kind here. You better leave before I take you out back and shoot you myself.”<sup>114</sup>

The government intervention imposed on these children is Kafkaesque, involving “youth shaming”<sup>115</sup> treatments like masturbation logs and penile plethysmography—a process utilizing a machine that physically measures the subject’s erection upon viewing sexual images, which was once used in the military to ferret out homosexuals. One pediatric psychologist derided them as “coercive techniques of doubtful accuracy, untested benefit, and considerable potential for harm.”<sup>116</sup> Today, the expert consensus is that the draconian sex offender laws did not reduce, and may have increased, child sex offenses.<sup>117</sup>

#### 9.4 HUMANIZED ANIMALS VS. SUBHUMAN HUMANS

When Libre’s story broke on social media, a concerned citizen wrote a letter to the editor of a Lancaster newspaper stating the photos of the sickly pup “rip my heart apart.”<sup>118</sup> The writer insisted that “the owner, *whoever he or she is*, needs to pay for this horrific, draconian crime.”<sup>119</sup> The letter urged authorities to mete out meaningful punishment to the human to demonstrate that state authorities “are kinder, more compassionate people than to allow this cruelty to continue” and to “find[ ] justice for Libre.”<sup>120</sup> “I have never seen such sadness on a puppy’s little face,” the writer lamented. Notice the contrast. The author humanized and sentimentalized Libre,

<sup>113</sup> Stillman, *supra* note 111; see also Hal Arkowitz & Scott O. Lilienfeld, *Once a Sex Offender, Always a Sex Offender? Maybe Not.*, SCI. AM.: SCIS. (Apr. 1, 2008), <https://www.scientificamerican.com/article/misunderstood-crimes/> [<https://perma.cc/2FUM-VWU7>].

<sup>114</sup> Stillman, *supra* note 111.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* (quoting psychologist Mark Chaffin).

<sup>117</sup> Puck Lo, *Sex-Offender Laws are Ineffective and Unfair, Critics Say*, AL JAZEERA AM. (Oct. 17, 2004) <http://america.aljazeera.com/articles/2014/10/17/challenges-to-sexoffenderregistries.html> [<https://perma.cc/KN7S-Y46A>]; Wayne Logan, *Challenging the Punitiveness of “New-Generation” SORN Laws*, 21 NEW CRIM. L. REV. 426 (2018).

<sup>118</sup> Ann L. Carter, *Letter to the Editor*, LANCASTER NEWSPAPERS (July 21, 2016), 2016 WLNR 22341505.

<sup>119</sup> *Id.* (emphasis added).

<sup>120</sup> *Id.*

describing the look on his face as one, not of pain, but of *sadness*.<sup>121</sup> At the same time, the person responsible was totally devoid of any description – indeed any identity or gender. The only relevant information given was that the unnamed person did something “horrific” and “draconian.” The more the animal was humanized, the more subhuman the human became.

The rhetoric of advocates and policy makers who support tough-on-animal abuse reforms like Libre’s Law mirrors victims’ rights rhetoric. Advocates pit innocent, devastated animals against evil, monstrous human animals. One of the key features of animal rights’ rhetoric is contrasting animals’ inherent innocence with human animals’ sinful and guilty nature. Applauding Libre’s Law, the editorial board of an Erie, Pennsylvania, paper stated, “Animal cruelty is sickening in its own right because animals are so unevenly matched with human strength and capacity for evil.”<sup>122</sup> Within the discourse, animals are innocent, by definition. They can entertain the human emotions of sadness, love, longing, loyalty and the like, but they do not have a “capacity for evil.” The sex animals impose on other animals is never rape. The harms, even deaths, they cause are never assaults and murders. Within the narrative, animal-caused harm is either the fault of the bad human owner or a product of the animal’s morally neutral instincts.

While animals have no capacity for guilt, human animals who offend against them have no capacity for innocence. Consider the 2019 case of Heidi Lueders, who ran “Bully Breed Rescue” and was charged with several counts of misdemeanor animal cruelty when five dogs in her care died. Photos that depicted the dogs as little more than skeletons surrounded by feces, piles of trash, and drug paraphernalia circulated on the internet. Protesters from “Desmond’s Army,” named after another dog who was abused and killed, rallied outside the Bridgeport, Connecticut, courthouse in the dead of winter on the day of Lueders’s hearing. Holding signs supporting the “Fairfield Five” (the deceased dogs), the group demanded that Lueders be

<sup>121</sup> This anthropomorphic projection (puppy-dog eyes) is not an accident—it is a product of thousands of years evolution. Researchers observe:

The evidence is compelling that dogs developed a muscle to raise the inner eyebrow after they were domesticated from wolves. We also studied dogs’ and wolves’ behaviour and, when exposed to a human for two minutes, dogs raised their inner eyebrows more and at higher intensities than wolves. The findings suggest that expressive eyebrows in dogs may be a result of humans’ unconscious preferences that influenced selection during domestication. When dogs make the movement, it seems to elicit a strong desire in humans to look after them. This would give dogs that move their eyebrows more a selection advantage over others and reinforce the ‘puppy dog eyes’ trait for future generations.”

Juliane Kaminski et al., *Evolution of Facial Muscle Anatomy in Dogs*, PROC. OF THE NAT’L ACAD. OF SCI. OF THE U.S.A. (June 17, 2019), <https://www.pnas.org/content/116/29/14677> [<https://perma.cc/LWH7-BLM3>].

<sup>122</sup> *Our View: Pa. Finally Gives Abused Animals the Protection They Deserve*, GOERIE (June 23, 2017), <https://www.goerie.com/opinion/20170623/our-view-pa-finally-gives-abused-animals-protection-they-deserve> [<https://perma.cc/HG6Y-DBG3>].

charged with felonies. Protester Anette Matthews told the press, “This is one of the most horrendous cases of animal cruelty. Knowing that she disguised herself as an animal rescuer . . . makes her the worst kind of *monster*.”<sup>123</sup>

The prosecutor heard Desmond’s Army’s clarion call and during the hearing upgraded Lueders’s charges to felonies. The judge appointed the five dead dogs a victim advocate, as required under the 2016 “Desmond’s Law.”<sup>124</sup> Lueders’s lawyer explained to the press that his client “is not a bad person but a victim of the opioid epidemic. And this situation is a direct result of an addiction to opiates.” Protester Nicola Improta was unmoved: “I’m here for justice and to show support. This woman needs to be taken down with the fullest extent of the law . . . Drug abuse is no excuse.”<sup>125</sup> There was no chance that Lueders’ drug addiction would elicit sympathy because, within the activist narrative, the animal cruelty is just the tip of the defendant’s larger violence iceberg. Animal advocates regularly remind us that defendants charged with animal abuse are rotten to the core. If a person is cruel to animals, the argument goes, it is likely they also engage in violence against people. They may even go on to commit a mass atrocity.<sup>126</sup>

A critical component of Desmond’s story, for example, was that the man who beat and killed Desmond did so as part of a larger pattern of abusing and harassing his ex-girlfriend. Indeed, the idea that animal cruelty correlates with domestic violence against human women frequently came up in discussions of Libre’s Law, although Libre’s case had nothing to do with DV. The “animal cruelty predicts DV” argument is an odd argument from a substantive criminal law standpoint. Even if there were clear evidence that animal cruelty (in all its forms) predicts violence against humans – which there isn’t<sup>127</sup> – the law punishes people for the crimes they committed, not for uncharged acts that might correlate with future crime. The claim that we need to toughen animal abuse laws to get at batterers completely ignores that there are already a plethora of laws that criminalize – even

<sup>123</sup> *Animal Cruelty Charges Upgraded to Felonies for Heidi Lueders*, GREENWICH FREE PRESS (Feb. 13, 2019) (emphasis added), <https://greenwichfreepress.com/dogs/charges-upgraded-to-felonies-for-heidi-lueders-118687/> [<https://perma.cc/EZ8G-38QG>].

<sup>124</sup> *History of Desmond’s Law*, UNIV. OF CONN.: THOMAS J. MESKILL L. LIB., <https://libguides.law.uconn.edu/c.php?g=923213&p=6653929> [<https://perma.cc/AGF2-HB5J>].

<sup>125</sup> *Animal Cruelty Charges Upgraded to Felonies for Heidi Lueders*, *supra* note 123.

<sup>126</sup> JUSTIN MARCEAU, BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT 199–204 (2019); see also Matthew Kemeny, Column, *Libre’s Law Might also Help Stop Domestic Abuse*, YORK DAILY REC. (June 28, 2017), <https://www.ydr.com/story/opinion/columnists/2017/06/28/libre-law-might-also-help-stop-domestic-abuse-column/436137001/> [<https://perma.cc/ET8L-V3T8>]; Our View: Pa. Finally Gives Abused Animals the Protection They Deserve, *supra* note 123; *Cold Hard Facts about Animal Abuse Offenders*, NAT’L COAL. ON VIOLENCE AGAINST ANIMALS: ANIMAL ABUSE FACTS, <https://ncovaa.org/facts/> [<https://perma.cc/L3J8-W7B6>].

<sup>127</sup> One cannot imagine a more thorough analysis than the one provided by Justin Marceau of all the major studies linking animal cruelty and violence against humans. He comes to the unsurprising conclusion that there is no clear consensus that a person who commits an act of “animal cruelty,” as defined by heterogeneous laws, is significantly more likely than anyone else to commit violence against humans. See MARCEAU, *supra* note 126, at 205–27.

overcriminalize – domestic violence against humans. And, of course, the harsh penalties in Desmond’s Law and Libre’s Law apply with equal force to defendants who, like Lueders and Stolzhus, have no connection to domestic abuse. In the end, the argument that animal cruelty correlates to violence against humans seems like a ploy to make the non-animal rights camp comfortable with punitive animal cruelty. They justify animal cruelty laws as getting at “real” bad guys who harm humans too.

In his groundbreaking book critiquing carceral animal law, *Beyond Cages*, Justin Marceau discusses cases similar to Lueders’s where activists invoke images of innocent devastated animals and juxtapose them with perpetually culpable, monstrous offenders. He tells a tale involving a severely neglected and sick dog, Sammy, who like Libre and Desmond, drew widespread public sympathy and calls for the owners, a couple, to be prosecuted to the fullest extent of the law. At the time of Sammy’s neglect, the couple was going through a terrible divorce, and the husband was dying of kidney disease. Both struggled with depression and considered suicide. Sammy had been residing with the husband when he degenerated, and the wife remarked, “I should have foreseen that Sammy wouldn’t have been safe with my husband, but I didn’t know [my husband] was going to get so sick . . . If I had foreseen it, I would have taken Sammy with me. . . I’m sorry it turned out the way it did.” Marceau describes the disturbing details of the couple’s day in court:

More than 250 people filed into the municipal courtroom wearing shirts demanding justice for Sammy. At one hearing a woman was removed from the courtroom for yelling “go kill yourself” at the man dying of kidney disease and suffering from depression. The prosecuting attorney explained that he was “very satisfied” with obtaining incarceration for both parties. . . . Indeed, the local SPCA called the maximum sentence for the ill, suicidal man “admirable” insofar as it reflected a strong stand against animal cruelty, even though the cruelty took the form of an omission rather than a set of brutalizing, malicious acts. Many other animal protection groups were involved in urging a maximum sentence, and their advocacy likely had a direct impact on the judge, who explained at sentencing that justice would not be served “[u]nless the defendants are sentenced to [maximum] imprisonment for their depraved acts toward Sammy.”<sup>128</sup>

Animal cruelty activists and zealous prosecutors urge judges to condemn human animals to prisons – sites of domination, discrimination, and dehumanization – as an act of “compassion” and “kindness.” Advocates’ strategy of selectively anthropomorphizing animals as innocent victims produces the exact kind melodramatic sentimentality that Rapping and Berlant warn enables “irrational” demands for blood.<sup>129</sup> Jungian psychologist Marie-Louise von Franz’s remarks that “where there is sentimentality there is also a certain amount of brutality” and provides this example: “Goering [a high-ranking Nazi] without a qualm . . . could sign the death

<sup>128</sup> MARCEAU, *supra* note 126, at 49–50.

<sup>129</sup> *Id.* at 29 and accompanying text.



sentence for three hundred people, but if one of his birds died, then that fat old man would cry. He was a classic example! Cold brutality is very often covered up by sentimentality.”<sup>130</sup>

Having sentimentalized the animal victim, advocates have no qualms about imprisoning vulnerable human animals of all kinds. To be sure, the Libre conversation left little room for thoughtful analysis of not just the costs of widespread incarceration for pet-related offenses but also the simple issue of whether Stoltzfus *deserved* to be imprisoned. Instead, the images of Libre’s sad, hairless pink snout and swollen-shut eyes on his otherwise adorable floppy-eared puppy body were enough to dethrone anyone’s reason in favor of the basest desire of a pound of flesh from the identity-less “monster who did that.” It should thus come as no surprise that animal rights activists even support imprisoning children who run afoul of animal abuse laws and treating those children as adult offenders.<sup>131</sup> In animal victims’ rights rhetoric, juvenile defendants are not vulnerable, troubled, and traumatized kids but “ticking time bombs” of mass violence.<sup>132</sup> Activists are content to be unaware of or indifferent to the suffering of vulnerable youths caged in adult facilities.<sup>133</sup> Marceau criticizes the “paradoxical notion . . . that the caging of children will liberate animals.”<sup>134</sup>

Indeed, activists give no quarter to defendants who are *definitionally* innocent. Criminal law principles dictate that unintentional and accidental harm generally does not merit punishment. Nevertheless, activists have agitated for “strict liability” animal cruelty laws. Strict liability crimes are rare and disfavored because they land people in jail who are *without fault*. Strict liability animal cruelty laws dictate that if a pet is harmed, the owner can be imprisoned even if she did not intend the harm and took reasonable steps to prevent it. Prosecutors are forthright that they like strict liability because it eases their burden to prove the owner acted intentionally or unreasonably.<sup>135</sup> Activists similarly believe that defendants should “have no excuses” for animal harm. They are content to sacrifice well-intentioned people whose pets’ deaths are tragic accidents on the altar of zero-tolerance. Marceau concludes that the strict liability issue demonstrates “how far the animal protection movement has treaded outside of mainstream thinking on fairness in criminal law.”<sup>136</sup>

As with human victims in victims’ rights discourse, animal victims are, or at least look, devastated. Many of the high-profile animal cruelty cases involve descriptions

<sup>130</sup> MARIE-LOUISE VON FRANZ, *THE PROBLEM OF THE PUER AETERNUS* 13 (2000).

<sup>131</sup> MARCEAU, *supra* note 126, at 61–63.

<sup>132</sup> *Id.* at 62.

<sup>133</sup> *Id.* at 61 (“Some 10,000 children are housed in adult jails and prisons on any given day in America. Children are five times more likely to be sexually assaulted in adult prisons than in juvenile facilities and face increased risk of suicide.”) (quoting Children in Adult Prison, EQUAL JUST. INITIATIVE, <https://eji.org/children-prison> [<https://perma.cc/VYA4-CRZL>]).

<sup>134</sup> *Id.* at 63.

<sup>135</sup> *Id.* at 56–58.

<sup>136</sup> *Id.* at 57.

of brutal, deviant, and intentional acts of violence. This is despite the fact that, as the Libre's Law statistics demonstrate, few animal cruelty cases involve deliberate torture. Narratives of rare but spectacular brutality have always been an essential ingredient of victims' rights, as the sex-predator panic example demonstrates.<sup>137</sup> In our social-media era, disturbing pictures can substitute for sadistic stories as proof of animal victims' devastation. There are a variety of ailments that cause dogs to sicken, suffer, and die, but few *appear* as horrible as generalized mange, which was Libre's affliction. Even though, "[s]urprisingly, a dog with demodectic mange usually does not itch severely," as veterinarian Ernest Ward remarks,<sup>138</sup> mange is tailor-made for evocative Instagram posts. The American Kennel Club notes, "If you follow news about dogs, you know what an extreme case of mange looks like. It's a common skin disease in dogs and puppies that are strays, neglected, or abused. These dogs appear to be beyond hope – hairless, with skin covered in sores or with thickened, hard, crusty patches . . . [But] as you've seen in the many 'miracle dog' stories in the news, even serious cases can be treated effectively."<sup>139</sup> One blogger put it succinctly, "Dog mange often looks scarier than it is."<sup>140</sup>

The final characteristic of the ideal victim is vengefulness. Recall the simple polar logic of the victims' rights movement that punishment is in itself justice for victims, regardless of the larger consequences. In the DV context, focusing on prosecution victims obscured the interests of many other victims who were not eager to pursue retribution through the state penal apparatus. In the sex offender context, the laws driven by the vengeance narrative were so broad that they captured defendants (i.e., nine-year-old kids) who were nothing like the "monsters" against whom the parents of murdered children sought retribution.<sup>141</sup> Nevertheless, there were plenty of vocal victims who made clear that they were, in fact, out for blood. Of course, it is another question altogether whether harmed victims or grieving family members *should* dictate criminal law policy in a civilized society. One Oklahoma City bombing victim, Bud Welch, testified to the Senate committee on the Crime Victims' Rights Amendment that after the bombing, he "wanted McVeigh and Nichols killed without a trial" and warned that "victims are too emotionally involved in the case and will not make the best decisions."<sup>142</sup>

The carceral animal camp similarly presumes that punishment serves animals' interests in "justice." In a recent article, Mary Maerz makes an interesting "animal rights" case in favor of "pro-carceral" animal laws and policies, and in particular, the

<sup>137</sup> See *supra* notes 90, 105, 107, 108.

<sup>138</sup> Ward & Panning, *supra* note 16.

<sup>139</sup> Mara Bovsun, *Mange in Dogs: What You Need to Know*, AM. KENNEL CLUB (Jan. 23, 2019), <https://www.akc.org/expert-advice/health/mange-what-you-need-to-know/>.

<sup>140</sup> Jean Marie Bauhaus, *Dealing with Dog Mange*, HILL'S (Nov. 25, 2018), <https://www.hillspet.com/dog-care/healthcare/what-is-dog-mange> [<https://perma.cc/23LU-5L24>].

<sup>141</sup> See *supra* notes 92–93.

<sup>142</sup> SENATE COMM. ON THE JUDICIARY, S. REP. NO. 108-191, REPORT ON CRIME VICTIMS' RIGHTS AMENDMENT at 82 (2003) (quoting Bud Welch).

prosecution of slaughterhouse workers for animal cruelty.<sup>143</sup> Maerz concedes a lot to the anticarceral camp: First, that the “individual deterrent abilities of these prosecutions on factory farm or slaughterhouse workers remains doubtful”; second, that “criminal prosecution of anticruelty laws in factory farms and slaughterhouses . . . undoubtedly forms part of the system of mass-incarceration in the United States”; and third, that prosecutors target “workers – mostly Hispanic, increasingly undocumented, and impoverished – perpetuat[ing] the criminal justice system’s unbalanced targeting of minorities and those of low socioeconomic class.”<sup>144</sup> Despite these concessions, Maerz concludes that such carceral interventions are nevertheless warranted. She argues, “While pro-carceral animal law likely cannot be justified by empirical or criminological bases, criticism of these criminal prosecutions asks the animal protection movement to place anthropocentric social movement concerns above the interests of animals.” Such a demand is inconsistent with “the animal rights movement which, at its foundation, refuses to compromise the interests of animals over human interests.”<sup>145</sup>

The idea that animals’ interest in punishment necessarily trumps defendants’ and society’s interest in reducing ineffective, painful, and racist mass incarceration tracks victims’ rights rhetoric, although most victims’ rights advocates, unlike Maerz, do not openly concede that the penal system is racist and ineffective. Maerz does not explain but simply presumes that animal victims have a unique “interest” in racist and ineffective punishment of humans, so much so that to believe otherwise is “anthropocentric.”<sup>146</sup> Human victims can speak for themselves, as conditioned and constrained as that speech may be. With animal victims, it is not just a matter of advocates choosing *which* vengeful victims speak – the advocates speak *for* a class of victims who can never speak for themselves. In the Justice for Libre movement and elsewhere, activists make the conclusory assumption that animals invariably feel like Bud Welch in the immediate aftermath of the bombing or devastated vengeful dad, John Walsh – they want justice through strict punishment.

Gayatri Spivak has famously asked, “Can the subaltern speak?”<sup>147</sup> And at the risk of oversimplifying a question with many components and valences, let me focus on Spivak’s caution about description and historiography. Spivak asserts that when the scholar, even a sincere anti-imperialist, “subaltern studies” scholar, undertakes to represent an as-yet-unrepresented or “insurgent” consciousness of a subaltern group,

<sup>143</sup> Mary Maerz, *In Defense of Pro-carceral Animal Law: Understanding the Dichotomy between Empirical Criminological Perturbation and Social Movement Values and Development*, 9 *BRAZ. J. PUB. POL’Y* 173 (2019).

<sup>144</sup> *Id.* at 188.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 186–89 (raising arguments about social movements and their use of criminal law as an important step in raising awareness, although such arguments are phrased here as *incidental* to animals’ presumed interest in seeing abusers punished).

<sup>147</sup> GAYATRI CHAKRAVORTY SPIVAK, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 24 (Cary Nelson & Lawrence Grossberg eds., 1988).

“what the work *cannot* say becomes important.”<sup>148</sup> Given the risks of essentializing and interposing one’s own consciousness on the group, even the “texts of insurgency can only serve as a counterpossibility for the narrative sanctions granted to the colonial subject in the dominant groups.”<sup>149</sup> If sympathetic scholars representing the consciousness of a subaltern group that *has* language and texts is “consistently troublesome,” then what of representing the consciousness of a group incapable of language?<sup>150</sup> In other words, we might ask, “Can the subhuman speak?”<sup>151</sup>

I do not feign deep knowledge of the philosophical literature on animal consciousness and how it grapples with epistemological limitations, essentialism, and colonialism. And intervention into this area is well beyond the scope of this chapter and competency of its author. I invoke Spivak’s work to highlight that “our thinking on [animal’s] behalf is presumptuous,” as Joyce Chaplin puts it.<sup>152</sup> If, as Spivak observes, the deep dives into histories of colonized people’s texts carried out by scholars with clear-eyed views of the limitations of their disciplinary methods are consistently troublesome, then certainly claims about animal consciousness are freighted with heavy uncertainty. Chaplin opines, “We do not know whether animals are like us, and may never know, and it should not matter. Animals may think (and therefore speak) in ways we may never comprehend.”<sup>153</sup> Anticruelty activists’ claims about animal consciousness are not epistemologically privileged but just functions of the human emotions and thought patterns that have for centuries driven state-backed punishment, which is itself an essentially human endeavor.

In other words, the claim of animal rights commentators like Maertz that there is a unique animal interest in punishment is no less anthropocentric than any other claims about animals and criminalization. And, if we are to anthropomorphically invest animals with human sentiments, why not invest them with more nuanced ones?<sup>154</sup> Perhaps animals’ thoughts about the wrongs done to them and appropriate redress are heterodox and conflicting. Perhaps some animals who have been caged are not so sanguine about policies that put human animals in cages, much in the way that formerly incarcerated victims are not often eager to participate in prosecutions. Perhaps some abused pets, like humans abused by parents or other loved ones,

<sup>148</sup> *Id.* at 28.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> This is not a normative judgment on the relative moral worth of humans and animals, and I ask for literary license to use the term in this sentence.

<sup>152</sup> Joyce E. Chaplin, *Can the Nonhuman Speak? Breaking the Chain of Being in the Anthropocene*, 78 *J. OF HISTORY OF IDEAS* 509, 524 (2017).

<sup>153</sup> *Id.* at 523.

<sup>154</sup> Kim A. McDonald, *Scientists Rethink Anthropomorphism*, *CHRON. OF HIGHER ED.* (Feb. 24, 1995), [https://www.chronicle.com/article/scientists-rethink-anthropomorphism/?cid2=gen\\_login\\_refresh&cid=gen\\_sign\\_in](https://www.chronicle.com/article/scientists-rethink-anthropomorphism/?cid2=gen_login_refresh&cid=gen_sign_in) [<https://perma.cc/332T-Z2DB>]; Scott Sleek, *Why Anthropomorphism Is Not a Scientific Sin*, *ASS’N FOR PSYCH. SCI.* (Apr. 30, 2019), <https://www.psychologicalscience.org/observer/why-anthropomorphism-is-not-a-scientific-sin> [<https://perma.cc/EzZ4-E4FK>].

want better treatment but prefer to remain with their human companions. These are of course, just “counterpossibilities” that stand in distinction to the presumption of animal-victim vengeance. And it is certainly possible that many harmed animals see criminal punishment as justice. Nevertheless, it should be evident that with so many limitations to accessing animal consciousness, the purported subjective desires of the animal victim should not be the foundation of law, especially law that contributes to inhumane racialized mass incarceration.

## 9.5 CONCLUSION

Over the past several years, many Americans have come to see racialized policing and mass incarceration as among the most pressing human rights issues of our time. Despite the growing radical awareness of the grave costs of addressing social problems, community dysfunction, and individual harmful behavior through state-sanctioned violence and detention, the animal victims’ rights lobby continues to push for more and stronger criminal laws – ones that go to the very edge of constitutionality and long-standing criminal liability principles. Marceau observes that the animal rights movement has become a “single-issue” movement pushing for criminal law reform by “pursuing mandatory minimums, the prosecution of juveniles as adults, more felony prosecutions, offender registries, and similar crime-based [reforms].”<sup>155</sup>

History has shown that activist groups concerned with larger social change can find success with criminal law, especially when they tap into the simplistic, racialized, and sentimentalized victim-versus-offender narratives that provoke the public’s punitive zeal. But advancing within a system that can do little more than impose inhumane treatment on human animals is a hollow success. When animals, including human animals, are subjected to brutality and rigid confinement, they do not become more pacifistic and well adjusted. They become wounded, traumatized, and even violent. History has also starkly shown that investment in the criminal apparatus often comes at the expense of noncriminal aid that prevents abuse and neglect in the first place. Consequently, when privileged human activists expand the carceral state by creating sentimentalized narratives about idealized pets who demand justice through the suffering of humans – primarily underprivileged humans – it is not an act of compassion and kindness, but one of cold brutality.

<sup>155</sup> Marceau, *supra* note 126, at 151.