DESPERATE TIMES AND DESPERATE MEASURES: WHEN IS RESCUING ANIMALS "NECESSARY?"

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INTRODUCTION

Sherry Colb and I didn't always agree about everything. One of the things I valued most about her friendship was that, partly because of that, she was the perfect person to talk to in order to hone ideas. But, of course, it also mattered immensely that she was always respectful and generous and, of course, extraordinarily intelligent. Admittedly, she was intimidating, and, let's face it, she did not suffer fools gladly. Though an extraordinarily kind person and never prone to unfairness or academic one-upmanship, she was as sure of herself as most vegan animal rights activists are, and her kindness could be accompanied by a wildly acerbic wit. It was a tough combo, but she managed to pull it off.

One of the things that we tended to disagree about, at least a bit, was the theory of change we brought to our own work on behalf of animals. Since no one has, as yet, developed a clearly effective (or, honestly, even promising) theory of change regarding how we end the horror that is committed by humans against animals, in the billions, constantly, it is a topic that is seeing some substantial attention. One reason for this is that the animal protection movement is starting to become sufficiently well-heeled such that observers can begin to witness practical applications of different theories of change being brought to bear in the real world. Another reason is the increasing

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awareness of the impact on climate of animal agriculture. In any case, for whatever reason, creating change for animals can no longer be characterized as a quixotic intellectual exercise, but may be seen as a movement that could lead somewhere. As a result, it has become more and more important to better imagine potential theories of change.

This is not to say that all those who care about animal protection will, or even should, move in the same direction. Consistency can hardly be expected, since people who work for animals may have different ultimate goals, as well as different attitudes about how to get there. For some, thinking about an ultimate goal is simply beside the point. Reducing suffering in the here and now is what matters, and the future can wait. For others, a vegan world, which could be defined, at the very least, as a world where animals' bodies are no longer needlessly exploited or carelessly discarded, may be desirable but is simply an unrealistic dream, and we should work toward what we can achieve in the real, not-very-vegan, world, i.e., less cruel systems of exploitation.[1] For others, a vegan world is the obvious long-term goal, and it doesn't matter if it seems quixotic now. It is not only important to know where you want to go, but also, as such advocates believe, it has become more and more possible to imagine getting close, at least regarding the use of animals' bodies as food. And some see the goal of animal protection, at least as it relates to those used for food, as a subset of a more global reform of the food system, including the treatment of workers, human health, ending hunger, the climate crisis, and environmental damage.

Theories of change can also depend on how one thinks about the world and one's disciplinary vantage point. Philosophy, law, psychology, biology, religion, sociology, and political science, for example, all offer different starting points for coming to the conclusion that something must be done about what we are doing to animals, but they don't necessarily all lead to the same conclusion about what that something is. And, of course, even within those disciplines, opinions vary.

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[1] See, for example, the work of the Animal Welfare Institute. *Who We Are*, ANIMAL WELFARE INSTITUTE, https://awionline.org/content/who-we-are [https://perma.cc/T86W-5DFM] (last visited Oct. 27, 2023) (describing AWI's mission as including goals such as "[a]bolishing factory farms, supporting high-welfare family farms, and eliminating inhumane methods used to slaughter animals raised for food" and "[e]nding the use of steel-jaw leghold traps and reforming other brutal methods of capturing and killing wildlife").

For lawyers who care about animals, the immediate impulse may be to seek to enforce what paltry laws exist to protect animals and/or try to improve them through legislative advocacy or litigation. However, given the scope of the problem, the uneven financial resources available to advocates for and users of animals, and the flawed nature of the relevant laws, it soon becomes obvious that this path is a difficult and uphill battle that leads to depressingly minor, if any, changes. Indeed, Sherry felt particularly strongly that "animal law" and the incremental welfare reforms that those who practice it seek to enforce or enact were ineffective in achieving real change, and were possibly, at least in certain instances, counterproductive. Thus, she wasn't particularly interested in how the Animal Welfare Act[2] or the Humane Methods of Slaughter Act[3] work (or in how they do not work) or in many of the things that animal lawyers do.

Instead, Sherry's theory of change, as I understand it, involved waking people up to what is happening. On a personal level, it involved using her prodigious skills to write, teach, and inform people about why they should care and why they should act on behalf of animals, or at least stop participating in their exploitation. Vegan advocacy has long been a pillar of the animal protection movement, and if there is one thing that Sherry, I, and most other animal advocates have believed it is that persuading other people to join us in seeing what is happening to animals, seeing who animals really are, and eschewing products made from their bodies is crucial.

And there was no one better at this than Sherry. From her masterwork, written for a mainstream audience, *Mind if I Order the Cheeseburger? And Other Questions People Ask Vegans*,[4] to the deeply moving passages in numerous law review articles and other writings[5] to her extraordinary and very popular course, carefully entitled "Animal Rights" and not "Animal Law," she was able to articulate the heart, soul, and intellectual basis of a movement that is undervalued on all those fronts by almost everyone.

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2 7 U.S.C. §§ 2131 et seq.

3 7 U.S.C. §§ 1901 et seq.

4 SHERRY F. COLB, MIND IF I ORDER THE CHEESEBURGER? AND OTHER QUESTIONS PEOPLE ASK VEGANS (2013).

5 *See, e.g.*, Sherry F. Colb, *"Never Having Loved at All": An Overlooked Interest that Grounds the Abortion Right*, 48 CONN. L. REV. 933 (2016); Sherry F. Colb, *Decoding 'Never Again,'* 16 RUTGERS J.L. & RELIGION 254 (2015).

Given Sherry's lack of faith in animal law, and her extraordinary and creative expertise in criminal procedure, she is the person with whom I most want to discuss the ramifications of a theory of change that has recently been brought to bear by animal rights activists. However, lacking her counsel, I will try to sort it out in this Article. In Part I, I will briefly discuss some of the major theories of change that have been adopted by activists regarding how to bring about real change in how humans treat animals. In Part II, I will examine one factor, i.e., transparency, that is a crucial aspect of all of them. In Part III, I will discuss a practice known as "open rescue," which has recently resulted in a number of criminal prosecutions of animal activists, and, finally, in Part IV, I will discuss the applicability of the necessity defense to criminal prosecutions resulting from such rescues. I will conclude by asking whether the risk of prison has become an important tool in a viable theory of change for many law-abiding citizens who are, in my view rightly, deeply horrified by what we do to animals and by wishing, once again, that I could talk this over with Sherry Colb.

I
Theories of Change

Although, as noted, Sherry's theory of change did not rely on fighting for minimal animal welfare reforms, that type of advocacy has grown by leaps and bounds in the past 10 years. Organizations rooted in effective altruism, particularly Open Philanthropy, the grantmaking foundation launched by Facebook cofounder Dustin Moskovitz, but others as well, are bringing substantial sums into the animal protection movement worldwide and applying their goal of reducing suffering, by the numbers, to farmed animals.[6] In particular, this has resulted in corporate campaigns to free egg-laying hens from cages and encourage the industry to adopt cage-free (albeit extremely crowded) housing conditions for these hens.[7] The

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6 *See Farm Animal Welfare*, Open Philanthropy, https://www.openphilanthropy.org/focus/farm-animal-welfare/ [https://perma.cc/ETD3-BNA4] (last visited Oct. 27, 2023) ("We support reforms to phase out the worst factory farm practices on land and sea.").

7 *See, e.g.*, Open Wing Alliance, https://openwingalliance.org/ [https://perma.cc/6C74-E72D] (last visited Oct. 27, 2023) ("Our coalition works together toward a shared goal: to end the abuse of chickens worldwide. Our first step toward achieving this ambitious goal is eliminating cruel battery cages from our world, and we're working toward achieving that vision, one cage-free policy at a time.").

goals of these organizations are based in the not illogical supposition that, of all the horrible things we do to animals raised for food, the crowded caging of billions upon billions of laying hens for their entire, drastically truncated, two or three years on earth might be the worst.

One criticism of this approach is that there is little clarity as to how an action like taking hens out of cages and placing them in overcrowded warehouses is going to lead to an end to factory farming, a vegan world, or even any further improvement in the living conditions of those laying hens, which remain quite brutal. Moreover, even if one removes the actual worst practices, such as keeping laying hens in crowded cages, animal farming will still be hideously cruel, and yet people may think it has been reformed.[8] As noted, skeptics of this type of approach included Sherry Colb. However, for many, this is the way forward. For some, the end of animal exploitation is not even the goal, either because they do not embrace it or because they believe it to be unrealistic. For others, the goal, at least for now, is to put animal welfare on the map as a legitimate policy, regulatory, and legislative issue, address the worst behaviors, and then go from there.[9]

Obviously, persuading people to stop exploiting animals includes supporting the growth of delicious, alternative food. It is hard to imagine anyone supporting any theory of change as not believing that that is important. Indeed, Sherry Colb regularly put theory into practice by baking vegan cookies and other treats for her students.[10] For some, the production of delicious food is not just a persuasive factor, but the whole ball game. Thus, another theory of change that has seen a good deal of attention and financial support in the past few years is represented by the Good Food Institute. This could be

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[8] The most prominent proponent of this idea is, perhaps, Gary Francione. For a brief summary of this position, see, for example, Gary L. Francione, *The Four Problems of Animal Welfare: In a Nutshell*, ANIMAL RIGHTS: THE ABOLITIONIST APPROACH (May 2, 2027), https://www.abolitionistapproach.com/the-four-problems-of-animal-welfare-in-a-nutshell/ [https://perma.cc/GQ29-N6MP].

[9] See, for example, this policy statement of The Humane League: "[w]e exist to end the abuse of animals raised for food by influencing the policies of the world's biggest companies, demanding legislation, and empowering others to take action and leave animals off their plates." THE HUMANE LEAGUE, https://thehumaneleague.org [https://perma.cc/M6KA-K7HQ] (last visited Oct. 27, 2023).

[10] Another way in which Sherry contributed to the discourse on the issue of increasing the availability and appeal of vegan food was her scholarship on the question of labeling of plant-based products that are simulacra of common animal-based foods. *See, e.g.*, Jareb A. Gleckel & Sherry F. Colb, *The Meaning of Meat*, 26 ANIMAL L. REV. 75 (2020).

characterized as the "build it and they will come" philosophy: Given the many harms of factory farming, we do not have to, and should not, waste our time trying to convince people one by one to go vegan or chip away at laws or regulations that purport to protect animals but do not. What we need to do is create truly delicious replicas of the foods people now derive from animals, make them less expensive and healthier than those animal-derived foods, as well as easily available, and the change will happen organically.[11]

Other theories of change include People for the Ethical Treatment of Animals' extremely successful use of attention-getting (and press-getting) techniques, which include a focus on very visible animals, such as those in zoos, circuses, and entertainment venues. It also includes provocative and, for some, occasionally offensive, high-profile tactics regarding less visible animals, such as those in laboratories and factory farms.[12] Another organization pursuing a very particular theory of change that has garnered substantial attention is that of the Nonhuman Rights Project, which, most notably, has brought petitions for habeas corpus on behalf of individual animals, such as Happy, an elephant living in the Bronx Zoo,[13] asserting that their imprisonment is a violation of their fundamental rights.[14]

Clearly, animal advocates differ on where they are headed and even more so on how to get there. And there is, of course, no need to think of these approaches as the only possible ways forward or as completely independent of each other. All these

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11 *See* GOOD FOOD INSTITUTE, THE BIG IDEA: 2022 YEAR IN REVIEW, 4 (2022), https://gfi.org/wp-content/uploads/2023/01/GFI22007_year-in-review-2022_spreads_WEB.pdf [https://perma.cc/P32U-M6J7] ("Given that taste and price determine what most people eat, GFI works around the world to make alternative proteins as delicious, affordable, and accessible as conventional meat.").

12 In addition to its efforts to attract attention to the plight of animals, PETA, which is certainly among the most well-known animal protection organizations, does a great deal of work for which it is less famous, which includes a good deal of policy, legal, and research work.

13 *See* Nonhuman Rts. Project, Inc. v. Breheny, 197 N.E.3d 921 (N.Y. 2022). While, to date, such petitions have been unsuccessful, the Project's legislative campaign has worked with at least one municipality, Ojai, California, to enact certain rights for elephants. Courtney Fern, *California City Passes Historic Animal Rights Legislation*, NONHUMAN RIGHTS PROJECT (Sept. 27, 2023), https://www.nonhumanrights.org/blog/ojai-animal-rights/ [https://perma.cc/QWL3-4BQQ].

14 While one of the ultimate goals of the NhRP is to change the fact that the law views animals as "legal 'things' with no rights," *About Us*, NONHUMAN RIGHTS PROJECT, https://www.nonhumanrights.org/about-us/ [https://perma.cc/DT75-WH9M] (last visited Oct. 27, 2023), some, including Sherry, have been skeptical that these efforts, even if successful, will ever result in attention for animals other than the charismatic megafauna these lawsuits and legislation have focused on.

theories have some overlap, and there is at least one factor that unites them. If the harms to animals remain hidden, it is very unlikely that any theory of change will ever be successful.

II
TRANSPARENCY

It is extraordinary how secret the process is by which we house, transport, and kill animals destined to be eaten each year in the United States. Clearly, when an industry wants to remain invisible and most people would very much prefer not to see what it is doing, it is possible to make billions of animals disappear from sight.

As a result, increasing transparency regarding animals raised to be eaten has been one of the major undertakings of the animal protection movement over the past 20 years. The ability to achieve such transparency increased exponentially with the widespread adoption and professionalization of undercover investigations. While people had been sneaking onto, and sneaking animals out of, laboratories, factory farms, and other sites of animal use for years,[15] one of the first more mainstream undercover investigations that garnered widespread attention was the Humane Society of the United States' 2008 investigation of the Westland/Hallmark Meat Company, which operated a slaughterhouse in Chino, California, where investigators obtained employment and then secretly filmed horrific abuse of sick and injured dairy cows.[16]

The adoption of undercover investigations exposed, to those who were willing to look, the cruelty of factory farms and modern slaughterhouses. One result of this success has been the rise of so-called "Ag-Gag" laws that have sought to criminalize

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15 Such efforts ranged from individuals surreptitiously removing a dog from an abusive situation in their neighborhood and finding her a new home to the actions of the Animal Liberation Front, which inflicted sometimes extensive property damage on laboratories and other sites of animal exploitation in addition to removing animals, and, while not revealing the identity of the perpetrators, publicly acknowledging their actions. *See* PETER YOUNG, ANIMAL LIBERATION FRONT: COMPLETE DIARY OF ACTIONS (2022).

16 See Matthew L. Wald, *Meat Packer Admits Slaughter of Sick Cows*, N.Y. TIMES (Mar. 13, 2008), https://www.nytimes.com/2008/03/13/business/13meat.html [https://perma.cc/4XDR-586D] ("Steve Mendell of the Westland/Hallmark Meat Company of Chino, Calif., said, 'I was shocked. I was horrified. I was sickened,' by video that showed employees kicking or using electric prods on 'downer' cattle that were too sick to walk, jabbing one in the eye with a baton and using forklifts to push animals around.").

such investigations and the ensuing legal fights by animal protection advocates to fend them off.[17]

Another, somewhat unappreciated, side of transparency involves information, not about the treatment of animals, but about who they are. Experiments have shown that people evaluate farmed animals as less intelligent, and, in their minds, therefore less worthy of care than they actually are.[18] One way that animal advocates have sought to fight this tendency and encourage people to see farmed animals as individuals capable of leading lives worth living is the sanctuary movement. Farmed animal sanctuaries, scattered throughout the United States and the world, seek to introduce people to cows, pigs, chickens, etc., living happy lives in beautiful settings, while gently reminding their visitors of the fate from which the animals were saved.[19] Indeed, another reason for Sherry Colb's role as an innovative and beloved professor was her yearly trip with her students to Farm Sanctuary, one of the oldest and largest farmed animal sanctuaries, to make sure that they were not merely thinking about farmed animals in the abstract, but actually encountering them in the real world, reality being a sometimes undervalued aspect of legal education.

Efforts to increase transparency have not gone unnoticed. In addition to the industry's efforts to reduce transparency through Ag-Gag laws, one result of the attention brought to factory farms and to the effort to inform people about the intelligence and other attributes of pigs, cows, and chickens has been what has come to be known as "humanewashing," i.e., actions by industry that are presented as systemic improvements in the way animals are treated in the food industry, when, in actuality, such improvements are pretense—either nonexistent or akin to window dressing. Recently, a number of successful false advertising cases have sought to address such humanewashing, mainly focusing on producers who have made claims that their animal products are "humane" (or something along those lines), and whose claims are then relied on by

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17 *Ag-Gag Laws*, Animal L. Def. Fund, https://aldf.org/issue/ag-gag/ [https://perma.cc/HX7P-HNSE] (last visited Oct. 28, 2023).

18 *See* Marta Zaraska, *Meet the Meat Paradox*, Sci. American (July 1, 2016), https://www.scientificamerican.com/article/meet-the-meat-paradox/ [https://perma.cc/98QC-UQS6]; Jared Piazza & Steve Loughnan, *When Meat Gets Personal, Animals' Minds Matter Less: Motivated Use of Intelligence Information in Judgments of Moral Standing*, 7 Soc. Psych. & Personality Sci. 867 (2016).

19 *See* Sue Donaldson & Will Kymlicka, *Farmed Animal Sanctuaries: The Heart of the Movement?*, 1 Pol. & Animals 50 (2015).

purchasers who later find out that the animals are living and dying in circumstances that cause suffering.[20] However, while false advertising litigation has proven to be an important and powerful tool for animal advocates, it is also limited, in that, at most, it can stop the industry from prevaricating about what it is doing to animals, but it cannot force it to tell the truth. Nor can it stop the industry from causing the suffering to begin with.

While many of these lawsuits have been successful; and while the revelation of what is going on in factory farms as a result of investigations and lawsuits has been, and continues to be, very disturbing to many; and while virtually all the meat, milk, and eggs eaten in the U.S. come from such factory farms;[21] and while people arguably appear to be more aware that what happens on factory farms is not something they are comfortable with; the message has not yet broken through in a way that has led to changes in mass purchasing behavior or systemic reform.

This kind of transparency is perhaps enough to reach a few people and change what they eat. But to reach others, transparency appears to be necessary, but not sufficient. This has led some to the conclusion that the information must be presented in a way that encourages people to look more closely. Arguably, something is needed beyond transparency—something that does not just make the information available but frames it in a way that people are willing to see.

III
Open Rescue

As noted,[22] there have undoubtedly always been people who have rescued, or at least tried to rescue, animals who are suffering. These rescues are, of course, frequently at least

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20 *See, e.g.*, Food Animal Concerns Trust, *FACT Resolves Consumer Protection Lawsuit Against Wendy's Regarding Animal Welfare Statements About Eggs*, PR Newswire (June 1, 2022), https://www.prnewswire.com/news-releases/fact-resolves-consumer-protection-lawsuit-against-wendys-regarding-animal-welfare-statements-about-eggs-301558300.html [https://perma.cc/6RY9-N8CC]; Hanna Brudney & Jonah Knobler, *New Decision on "Free Range" Hens Has Manufacturers Walking On Eggshells*, JD Supra (Apr. 14, 2022), https://www.jdsupra.com/legalnews/new-decision-on-free-range-hens-has-6111863/ [https://perma.cc/M8QB-F7GV].

21 Jacy Reese Anthis, *US Factory Farming Estimates*, Sentience Inst. (Apr. 11, 2019), https://www.sentienceinstitute.org/us-factory-farming-estimates [https://perma.cc/B94Q-9FBE].

22 *See* Young, *supra* note 15.

apparently against the law, as animals are generally personal property, and their suffering does not relieve them of that status.[23] As a result, the rescue of animals has often been surreptitious and, essentially, a private matter. A change came in the early days of the modern animal rights movement when masked rescuers from the Animal Liberation Front would sometimes rescue animals, usually from laboratories, and publicize their actions in a way that revealed what the animals had been experiencing but did not disclose the identities of the rescuers. Frequently such rescues were accompanied by deliberate property damage.[24]

However, some activists/theorists in the animal rights movement decided that, in order for a rescue story to have a greater impact, it needed to be "open." In "open rescue," animals are taken from a place where they are claimed to be at risk, along with the disclosure, generally via video, of the conditions in which the animals were living, their removal, and the identities of those who carried out the rescue. Frequently, there is also disclosure of some information regarding what happened to the animals after their removal. Arguably, this can be seen as combining the techniques of undercover investigations and sanctuaries since it highlights both the treatment of the animals prior to their rescue and the nature and personalities of the animals themselves as they emerge post rescue. The technique of using open rescue is generally attributed to Australian activist Patty Mark,[25] the founder of Animal Liberation Victoria, who began using it in the 1990s. It has since been used by activists in attempts to save animals from suffering while drawing attention to what is happening to them in industrial venues, in spite of the fact that it is generally a dangerous and traumatic effort, both because of the risk of arrest and prosecution that it entails and because of the horror of witnessing animals in conditions of substantial suffering, the vast, vast majority of whom cannot be saved.[26]

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23 GARY FRANCIONE, ANIMALS, PROPERTY AND THE LAW (1995).

24 *See* YOUNG, *supra* note 15.

25 Keri Cronin, *Fierce and Fearless: Patty Mark's Unique Approach to Animal Liberation*, UNBOUND PROJECT (Oct. 3, 2016), https://unboundproject.org/patty-mark/ [https://perma.cc/4F5U-BDLX].

26 *See* Taimie L. Bryant, *Trauma, Law, and Advocacy for Animals*, 1 J. ANIMAL L. & ETHICS 63, 105–106 (2006).

However, particularly after the passage of the federal Animal Enterprise Terrorism Act[27] in 2006, modern undercover investigators in the United States have generally eschewed rescue, open or not,[28] in an attempt to keep what they do clearly within the law by obtaining employment at factory farms and

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27 18 U.S.C. § 43. The Act, which replaced and strengthened the previously enacted Animal Enterprise Protection Act, provides, *inter alia*:

> (a) Offense.—Whoever travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce—
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> (1) for the purpose of damaging or interfering with the operations of an animal enterprise; and
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> (2) in connection with such purpose—
>
> (A) intentionally damages or causes the loss of any real or personal property (including animals or records) used by an animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise;
>
> (B) intentionally places a person in reasonable fear of the death of, or serious bodily injury to that person, a member of the immediate family (as defined in section 115) of that person, or a spouse or intimate partner of that person by a course of conduct involving threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation; or
>
> (C) conspires or attempts to do so;
>
> shall be punished as provided for in subsection (b).

An animal enterprise is defined broadly as

> (A) a commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing;
>
> (B) a zoo, aquarium, animal shelter, pet store, breeder, furrier, circus, or rodeo, or other lawful competitive animal event; or
>
> (C) any fair or similar event intended to advance agricultural arts and sciences;

Possible penalties under the Act for "economic damage" range up to 20 years' imprisonment for damage of $1,000,000. "Economic damage" is defined as follows:

> (A) . . . the replacement costs of lost or damaged property or records, the costs of repeating an interrupted or invalidated experiment, the loss of profits, or increased costs, including losses and increased costs resulting from threats, acts or vandalism, property damage, trespass, harassment, or intimidation taken against a person or entity on account of that person's or entity's connection to, relationship with, or transactions with the animal enterprise; but
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> (B) does not include any lawful economic disruption (including a lawful boycott) that results from lawful public, governmental, or business reaction to the disclosure of information about an animal enterprise.

28 One notable exception is the release of mink from fur farms, which, though the perpetrators have frequently not been apprehended, has also given rise to several prosecutions. *See, e.g.*, Jason Meisner, *Animal Activist Who Released Thousands of Minks Gets 3 Years in Prison*, CHI. TRIBUNE (Feb. 19, 2016), https://www.chicagotribune.com/news/breaking/ct-animal-activist-mink-sentencing-met-20160229-story.html [https://perma.cc/6T5C-M32K].

filming the conditions in which the animals are kept.[29] These efforts have seen enormous success in obtaining extensive evidence of horrific, systemic cruelty.

Recently, there has, once again, been a shift in tactics, at least by some, and open rescue has again become a focus, primarily through the work of animal protection organization Direct Action Everywhere ("DxE"). One of the primary ways DxE has chosen to inform people of what is happening to animals is by rescuing assertedly sick and dying animals from factory farms, tractor trailers, and slaughterhouses, treating their illnesses and injuries, and, if they survive, placing them in sanctuaries.[30] These efforts have been performed openly and on video, and have been successful in garnering press attention, particularly when they have resulted in charges being filed and activists being tried.[31]

DxE has rebranded open rescue as being rooted in the "right to rescue," which is often characterized by those who assert it as a moral right, rather than, or perhaps in addition

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29 As noted, *supra* note 17, the industry has attempted to counter this with Ag-Gag legislation, but such legislation has frequently foundered on constitutional grounds.

30 For an excellent extended examination of DxE strategy, tactics, motives, and practices, see Hadar Aviram, *Standing Trial for Lily: How Open Rescue Activists Mobilize Their Criminal Prosecutions for Animal Liberation*, in GREEN CRIMINOLOGY AND THE LAW (James Gacek & Richard Jochelson, eds., 2022). *See also* Hadar Aviram, *Facing Criminal Charges for Saving Animals, Part I: Open Rescue*, HADAR AVIRAM: COMPASSIONATE PERSPECTIVES (Sept. 6, 2019), https://www.hadaraviram.com/2019/09/06/facing-criminal-charges-for-saving-animals-part-i-open-rescue/ [https://perma.cc/NV29-Y4ET]; Hadar Aviram, *Facing Criminal Charges for Saving Animals, Part II: The Necessity Defense*, CAL. CORRECTIONAL CRISIS (Sept. 6, 2019), https://californiacorrectionscrisis.blogspot.com/2019/09/facing-criminal-charges-for-saving_6.html [https://perma.cc/XF9C-FSDZ]; Hadar Aviram, *Facing Criminal Charges to Save Animals, Part III: Planning Open Rescue in the Shadow of the Law*, CAL. CORRECTIONAL CRISIS (Sept. 6, 2019), https://californiacorrectionscrisis.blogspot.com/2019/09/facing-criminal-charges-to-save-animals.html [https://perma.cc/X4P2-2AP2]; Hadar Aviram, *Facing Criminal Charges to Save Animals, Part IV: Planning Legal Strategy*, CAL. CORRECTIONAL CRISIS (Sept. 9, 2019), https://californiacorrectionscrisis.blogspot.com/2019/09/facing-criminal-charges-to-save-animals_9.html [https://perma.cc/7U2A-59WK]; Hadar Aviram, *Facing Criminal Charges to Save Animals, Part V: The Meaning of Doing Time for the Animals*, CAL. CORRECTIONAL CRISIS (Sept. 9, 2019), http://californiacorrectionscrisis.blogspot.com/2019/09/facing-criminal-charges-to-save-animals_12.html [https://perma.cc/9BEB-UV7V].

31 *See, e.g.*, Rachel Fobar, *Activists Call It Rescue. Farms Call It Stealing. What Is 'Open Rescue'?*, NATIONAL GEOGRAPHIC (Aug. 7, 2023), https://www.nationalgeographic.com/animals/article/activists-call-it-rescue-farms-call-it-stealing-what-is-open-rescue [https://perma.cc/4RYL-JL26]; Wayne Hsiung, *I Did Not Steal Two Piglets. I Saved Them. A Jury Agreed.*, N.Y. TIMES (Oct. 18, 2022), https://www.nytimes.com/2022/10/18/opinion/animal-rights-factory-farming.html [https://perma.cc/V2KN-UQDC].

to, a legal one. According to DxE, their "Right to Rescue Campaign" "seeks to build support for animal rescue and ultimately to establish a legal right to rescue animals from distress and exploitation."[32]

However, while nowhere in the law are the words "right to rescue" mentioned, it is clearly already encompassed within the law by way of the application to animal rescue of a defense known by many different labels, including "lesser of two evils," "choice of evils," "emergency doctrine," "justification," or, probably most often, "necessity." Although this is not the only defense asserted by the defendants in such cases it is, perhaps, the one that most clearly represents the actual behavior and mindset of the defendants since it is the one that specifically centers the animals.[33]

Particularly in light of her dismissal of the ability of "animal law" to protect animals from horrific treatment, Sherry often said that the proper role of an activist lawyer, at least when acting in her capacity as a lawyer, is not to engage in activism herself but to secure the legal rights of activists.[34] She thus did not count her own activism as that of an "activist lawyer" even though she certainly engaged in scholarly work that touched on the law. Right-to-rescue cases have, however, created an opportunity for lawyers to be such activist lawyers in the sense that Sherry used that expression. For, once these rescues are done, the animals are cared for, the video goes out,

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32 *Right to Rescue*, Direct Action Everywhere, https://righttorescue.com/ [https://perma.cc/3VJ3-8TWP] (last visited Oct. 28, 2023). One notable factor regarding DxE's theory of change is that it involves a shift away from direct vegan advocacy, at least insofar as that entails attempting to persuade individuals to "go vegan." Instead, it focuses on exposing factory farming, open rescue, and seeking "systemic change" leading to the adoption of an Animal Bill of Rights. *See* Rose's Law: Animal Bill of Rights, https://www.roseslaw.org/ [https://perma.cc/D7LD-EQRW] (last visited Oct. 28, 2023); Wayne Hsiung, *The Vegan Movement Has Failed. It's Time to Build a Movement for Rescue*, Simple Heart (July 28, 2023), https://blog.thesimpleheart.org/p/the-vegan-movement-has-failed-its?utm_source=profile&utm_medium=reader2 [https://perma.cc/ZGG2-4WPB].

33 See the articles by Hadar Avarim, *supra* note 30, and, in particular, *Facing Criminal Charges for Saving Animals, Part II: The Necessity Defense*, Cal. Correctional Crisis (Sept. 6, 2019), https://californiacorrectionscrisis.blogspot.com/2019/09/facing-criminal-charges-for-saving_6.html [https://perma.cc/XF9C-FSDZ].

34 Sherry was, as she acknowledged, reiterating what others have said about the role of lawyers in social change. *See, e.g.*, Bert Stoop, *Francione on the State of the U.S. Animal Rights Movement*, Animal Freedom, https://www.animalfreedom.org/english/column/francione.html [https://perma.cc/EXR7-E923] (last visited Oct. 28, 2023), where Gary Francione expresses a similar sentiment, referencing a conversation with William Kunstler.

and the activists are arrested and charged, lawyers enter the picture[35] and try to get the courts and the public to see that a fair application of the law make what these activists have done not a crime.

Among the crimes open rescuers could be charged with as a result of an open rescue are trespass, theft, burglary, conspiracy, and the aforementioned terrorism charges for those who "interfer[e] with the operations of an animal enterprise," both at the federal level[36] and in some states.[37]

As noted, while DxE is a strong proponent of open rescue, it is not the first organization, or individual, to practice it. In addition to Patty Marks's work in Australia and other similar rescues,[38] one early open rescue case in the United States that resulted in charges was the prosecution of Adam Durand of the grassroots organization Compassionate Consumers for his videotaped rescue of eleven hens from an upstate New York egg factory farm.[39] His attempt to assert a necessity defense was denied, apparently on the ground that he did not have the proper intent, as the court noted that his actions following the rescue did not evince an intent to have the facility held responsible for animal cruelty.[40] In any case, he was acquitted of theft-related charges, but convicted of misdemeanor trespass, for which he was sentenced, as a first-time offender, to the unusually punitive sentence of a year in prison.[41]

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35 One caveat is that one of the major proponents of and participants in the right to rescue, Wayne Hsiung, is himself a lawyer and has represented himself in a number of cases, thus acting both as an activist and an activist lawyer.

36 18 U.S.C. § 43.

37 *See* Cynthia F. Hodges, *Brief Summary of State Animal Enterprise Interference Laws*, ANIMAL L. & HIST. CTR. (2011), https://www.animallaw.info/article/brief-summary-state-animal-enterprise-interference-laws [https://perma.cc/GCX7-TEQX].

38 *See* Jessica Scott-Reid, *The Open Rescue Movement for Farm Animals, Explained*, SENTIENT MEDIA (Oct. 19, 2023), https://sentientmedia.org/open-rescue-movement/ [https://perma.cc/P624-Z7DA].

39 Adam Durand, *Wegmans Cruelty*, YOUTUBE (Apr. 26, 2011), https://www.youtube.com/watch?v=u99T_xb9NTs.

40 Jenni James, *When Is Rescue Necessary? Applying the Necessity Defense to the Rescue of Animals*, 7 STAN. J. ANIMAL L. & POL'Y 1, 29 n.123 (2014).

41 Krestia DeGeorge, *Jailing a Cage-Free Activist*, CITY MAG. (May 24, 2006), https://www.roccitymag.com/news-opinion/jailing-a-cage-free-activist-2132486 [https://perma.cc/A39P-LXQW]; *see also* Krestia DeGeorge, *Of Food and Felonies*, CITY MAG. (May 10, 2006) https://www.roccitymag.com/news-opinion/of-food-and-felonies-2132409 [https://perma.cc/32UG-GH9P]. His conviction was later overturned, and his sentence cut short, on unrelated grounds. People v. Durand, 880 N.Y.S.2d 409 (App. Div. 2009).

More recently, in 2022,[42] Wayne Hsiung,[43] a cofounder of DxE,[44] and Paul Picklesimer were acquitted by a jury of theft-related offenses for taking two piglets, Lily and Lizzie, from a Smithfield facility housing hundreds of thousands of pigs in rural Utah. The defendants had been denied permission to pursue a necessity defense, apparently on the ground that the defense did not exist in Utah law,[45] and, as a result, the court barred the admission of evidence that would show the conditions in which the rescued pigs were living when they were rescued.[46] The defendants did argue that Lily and Lizzie, who were ill,[47] had no monetary value; as a result, the defendants were permitted to introduce evidence regarding the piglets' condition, though a photograph introduced for that purpose was redacted so that the jury saw only the piglets themselves and not their mother—whose teat was bleeding—or any of the surrounding conditions.[48]

In 2023, defendants Alicia Santurio and Alexandra Paul were acquitted of misdemeanor theft charges related to their removal of two chickens, Ethan and Jax, from a truck on the

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42 Several years earlier, Matt Johnson, also affiliated with DxE, had been charged with theft-related charges and violation of Iowa's agricultural interference law for taking Gilly, a piglet, from a facility owned by Iowa Select Farms in Wright County, Iowa. Early in 2022, the charges were dropped on the eve of trial. Unrelated charges for trespassing on a factory farm in Grundy County were also dropped. *See* Elizabeth Barber, *Standing Trial: Should We Care About Animal Liberation?*, HARPER'S MAG. (Oct. 2022), https://harpers.org/archive/2022/10/standing-trial-should-we-care-about-animal-liberation-ag-gag-laws-iowa-slaughterhouse/ [https://perma.cc/3LNC-KT5J].

43 Hsiung had previously been found guilty by a jury of theft and trespass-related offenses for taking Rain, a baby goat, from a ranch in Transylvania County, North Carolina. Hsiung was given a suspended sentence, 24 months of supervised probation, and required to make restitution. Conflicting evidence had been presented at trial regarding the condition of the goat. The necessity defense was not charged. *See* Natasha Lennard, *Prosecutors Silence Evidence of Cruel Factory Farm Practices in Animal Rights Cases*, INTERCEPT (Jan. 30, 2022), https://theintercept.com/2022/01/30/animal-rights-activists-dxe-trial-evidence/ [https://perma.cc/Z8YX-Q6KA].

44 Hsiung is no longer formally associated with the organization.

45 Marina Bolotnikova, *Activists Acquitted in Trial for Taking Piglets from Smithfield Foods*, INTERCEPT (Oct. 8, 2022), https://theintercept.com/2022/10/08/smithfield-animal-rights-piglets-trial/ [https://perma.cc/7HVD-AM32].

46 Leto Sapunar & Jordan Miller, *Animal Rights Activists Found Not Guilty on All Charges After Two Piglets Were Taken from Circle Four Farms in Utah*, SALT LAKE TRIB. (Oct. 8, 2022), https://www.sltrib.com/news/2022/10/08/animal-rights-activists-charged/ [https://perma.cc/3ZQX-6ZFY].

47 The prosecutor, probably unfortunately for his case, likened the removal of sick and injured piglets from the warehouse to taking dented cans from a supermarket. Hsuing, *supra* note 31.

48 Sapunar & Miller, *supra* note 46.

way to slaughter.[49] They attempted to argue a necessity defense based on testimony that the chickens were grievously ill, but it was denied on the ground that the defense could not apply to animals.[50] They were, however, allowed to assert the California defense of mistake of law as they had been advised by counsel that the necessity defense applied to their actions.[51]

In 2018, several activists were charged in Sonoma County, California with seven felonies related to two incidents in which a much larger number of activists openly entered two facilities and removed ducks and chickens, both alive and dead. Some of the activists chained themselves to slaughter equipment. Shortly before trial, charges related to a third facility were dropped, burglary and theft charges against all defendants were dropped, all charges were dropped against some defendants, and other defendants pled guilty to minor offenses with no prison time, which left charges for trespass and conspiracy to commit trespass as to one of the three events pending solely against Hsiung. The court denied defendant's motion to assert a necessity defense[52] and sharply limited the evidence that would be admissible regarding the conditions within the facilities or the condition of the ducks and chickens.[53] Hsiung was

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49 Christian Martinez, *Former TV Star, Now a Chicken 'Rescuer,' Found Not Guilty of Foster Farms Theft*, L.A. TIMES (Mar. 20, 2023), https://www.latimes.com/california/story/2023-03-20/former-tv-star-now-a-chicken-rescuer-found-not-guilty-of-foster-farms-theft [https://perma.cc/R6P5-6R6V].

50 Crescenzo Vellucci, *Judge Axes 'Necessity Defense' in Chicken Rescue Case, but Rules in Defense Favor Otherwise*, DAVIS VANGUARD (Mar. 10, 2023), https://www.davisvanguard.org/2023/03/judge-axes-necessity-defense-in-chicken-rescue-case-but-rules-in-defense-favor-otherwise/ [https://perma.cc/YGD6-4BXY].

51 Crescenzo Vellucci, *Jury Finds Baywatch Actress and Bay Advocate Not Guilty of Theft for Rescuing Injured Chickens from Outside Foster Farms Slaughterhouse*, DAVIS VANGUARD (Mar. 18, 2023), https://www.davisvanguard.org/2023/03/jury-finds-baywatch-actress-and-bay-advocate-not-guilty-of-theft-for-rescuing-injured-chickens-from-outside-foster-farms-slaughterhouse/ [https://perma.cc/D8YJ-3TEY].

52 The court also rejected a motion to submit an amicus curiae brief by Harvard Law professor Kristin Stilt. The brief argued for the submission to the jury of the necessity defense. *Harvard Law Professor Submits Brief Declaring Necessity Defense Applies to the Rescue of Animals*, HARV. L. SCH. (Aug. 31, 2023), https://animal.law.harvard.edu/news-article/the-rescue-of-animals/ [https://perma.cc/5RTE-683J].

53 Crescenzo Vellucci, *Court Watch: 'Open Rescue' Trial Underway–Lawyer/Activist Faces Felonies, Insists CA Law Allows Rescue of Injured Animals in Factory Farms; Judge Guts Defense, Imposes Gag Order*, DAVIS VANGUARD (Oct. 6, 2023), https://www.davisvanguard.org/2023/10/court-watch-open-rescue-trial-underway-lawyer-activist-faces-felonies-insists-ca-law-allows-rescue-of-injured-animals-in-factory-farms-judge-guts-defense-imposes-gag-ord/ [https://perma.cc/M9HZ-D5RY].

convicted of felony conspiracy and misdemeanor trespass and sentenced to 90 days' imprisonment and two years of probation, during which he was prohibited from, *inter alia*, interacting with "co-conspirators."[54]

Since, as noted, the defendants were not permitted to assert a necessity defense in any of these cases, juries were left to decide less central issues, such as the value of the rescued animals or whether the defendants were relying on bad advice of counsel. While, in some of these cases, the jury acquitted the defendants, the question remains, and will no doubt arise again, whether the failure to submit a necessity defense in such cases deprives the defendants of their due process right to a fair trial by not allowing the jury to determine an applicable defense which constitutes the primary issue in the case.

IV
The Necessity Defense

While not enacted into statutory law in over half the states or federally,[55] it seems obvious that a de facto necessity defense is actually brought to bear, as a practical matter, everywhere and all the time. When someone commits what would be a crime in order to avoid a greater harm, it frequently does not occur to anyone, including prosecutors, to charge them. To use a classic example, if someone rushes into a burning building, even running past "No Trespassing" signs, and runs out holding a child, prosecution for trespass or kidnapping is the last thing on anyone's mind. The more likely next step is an award ceremony. If it is a dog in that building, the same thinking almost certainly applies. For that matter, if it is a valuable antique, or treasured photographs, or a child's favorite stuffed animal, ditto. If it does occur to someone that there is no precedent directly on point that demonstrates that no crime was committed here, prosecutorial discretion would take care of most cases.

Of course, it is hardly conducive to the rule of law to rely completely on discretion to avoid injustice. Thus, the question arises—if, instead of a child in a burning building, rescuers are

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54 Colin Atagi & Madison Smalstig, *Direct Action Everywhere Co-Founder Wayne Hsiung Sentenced in Conspiracy Case Involving Petaluma Poultry Farms*, Press Democrat (Nov. 30, 2023), https://www.pressdemocrat.com/article/news/animal-activist-sentenced-in-conspiracy-case-involving-petaluma-poultry-far/ [https://perma.cc/4UST-F9HH].

55 *See* Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 Tul. L. Rev. 191 (2007).

removing sick pigs and chickens from a warehouse where they are actively suffering, probably near death, and not receiving any treatment, is there a defense for the rescuers to rely on if they are charged?

As a preliminary matter, one area of concern in determining whether prosecutorial discretion alone can satisfactorily resolve the issue is whether such discretion is clouded by the interests of influential local businesses, which may be large employers in the areas where such events take place. For example, in the *Durand* prosecution, 880 N.Y.S.2d 409 (App. Div. 2009), the owner of the egg facility in question was Wegmans, a large, popular supermarket chain originally founded and currently headquartered in western New York, where the trial took place. In Utah, the Smithfield facility involved was, by far, the largest business interest in the small town of Beaver, Utah, and, indeed, shortly before trial a change of venue was ordered.[56] Prosecutorial discretion should hardly be relied upon when alleged crimes are tied to the profits and the interests of major local businesses. Instead, we should turn to the rule of law—as it turns out, when charges are filed in such situations, prosecutorial discretion may not be needed to provide justice and an applicable defense may exist.

In many states,[57] necessity is recognized as a defense either by case law or by statute.[58] Taking New York's statute as an example, conduct that would otherwise constitute an offense will be subject to the defense (here called "Justification") where

> . . . [s]uch conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the

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56 Chris Reed, *Beaver County Pays Pig Farm Pioneer Day Protestors More Than $52K in Federal Civil Rights Settlement*, St. George News (Aug. 14, 2023), https://www.stgeorgeutah.com/news/archive/2023/08/14/cdr-beaver-county-pays-pig-farm-pioneer-day-protesters-more-than-52k-in-federal-civil-rights-settlement/ [https://perma.cc/6LSX-ERAZ].

57 There may be a federal defense as well. *See* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 501 (2001) (Stevens, J., concurring) ("[T]he Court gratuitously casts doubt on 'whether necessity can ever be a defense' to *any* federal statute that does not explicitly provide for it, calling such a defense into question by a misleading reference to its existence as an 'open question.' By contrast, our precedent has expressed no doubt about the viability of the common-law defense, even in the context of federal criminal statutes that do not provide for it in so many words.") (internal citations omitted).

58 For an excellent summary of the history of the application of the necessity defense to animal rescue cases, see James, *supra* note 40.

> desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.[59]

The version of the comparable defense set forth in the Model Penal Code[60] is entitled "Choice of Evils." There, as well as in most states where the defense exists, including California, necessity is an affirmative defense, and the defendant has the burden of proving it by a preponderance of the evidence. However, even in New York, where it is not an affirmative defense and thus prosecutors have the burden of disproving it beyond a reasonable doubt, the court has been given a special gatekeeping role. Thus, under the New York statute, the defendant is required to set forth proposed evidence warranting submission of the defense, and, before the defendant can introduce such evidence to the jury, the court must decide whether the defendant's showing demonstrates that "the claimed facts and circumstances would, *if established*, constitute a defense."[61] This is quite similar to the type of showing that must be made in order to offer evidence supporting necessity in jurisdictions where it is considered an affirmative defense, i.e., that it be sufficient to permit the defendant to "carry his *entry-level burden* of adducing competent proof of necessity."[62]

As noted, in animal rescue cases, courts have generally declined to allow defendants to assert the defense.[63] Perhaps this is because the court is worried that emotional appeals by animal rights activists might distract a jury from properly weighing

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59 N.Y. PENAL LAW § 35.05.

60 The defense is codified at MODEL PENAL CODE § 3.02:

> (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
>
> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
> (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
>
> (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

61 N.Y. PENAL LAW § 35.05 (emphasis added).

62 United States v. Maxwell, 254 F.3d 21, 26 (1st Cir. 2001) (emphasis added).

63 Aviram, *Facing Criminal Charges for Saving Animals, Part II: The Necessity Defense*, *supra* note 30.

the harm against the benefit that the defense requires and that it will instead place undue importance on the suffering of a pig. However, such a concern would be misplaced. Application of the defense is up to the jurors, not the defendant, and they are not required to apply the moral standards of an animal rights activist, or of the defendant, but instead are to apply, as the New York statute points out, "ordinary" ones. Thus, it seems entirely possible that one fear regarding the application of this defense in these cases is rooted in the reality that many people are deeply troubled by what happens on factory farms and that their moral compasses may not diverge substantially from the people who rescue animals. It would be ironic indeed if the defense were denied because too many people find what happens to animals on factory farms abhorrent. In any case, once the defense has been disallowed, defendants have been sharply curtailed in presenting evidence of the conditions in which the animals were living.

One reason for believing that reasons other than a fear of distracting the jury are at play here is that the rationales that have been given for denying the defense are not convincing. In a number of cases, courts have held that the defense does not apply simply because the harm that is meant to be avoided by the defendant is harm to an animal.[64] In the Santurio/Paul prosecution in California, the court said that because the pattern jury instructions used the word "someone" it did not apply to animal rescue because "someone" should be interpreted to not include animals.[65] However, aside from the fact that words used in pattern jury instructions should not be given the same authority as those found in a statute and should be adjusted to fit the particular facts of the case, it is hardly a given that the word "someone" is never used to apply to an animal.[66]

This rationale for not including animal rescue as a possible basis for a necessity defense, assuming other applicable

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64 *See, e.g.*, State v. LeVasseur, 613 P.2d 1328, 1333 (Haw. Ct. App. 1980); Brooks v. State, 122 So. 3d 418, 422 (Fla. Dist. Ct. App. 2013); Commonwealth v. Grimes, 982 A.2d 559, 562 (Pa. Super. Ct. 2009).

65 *Our Hen House Podcast: Transcript for Episode 693, Interview with Alexandra Paul & Alicia Santurio*, https://files.ourhenhouse.org/693InterviewTranscript.pdf [https://perma.cc/VRM8-S78N]; Marina Bolotnikova, *The Fight Against Factory Farming Is Winning Criminal Trials*, VOX (Mar. 21, 2023), https://www.vox.com/future-perfect/23647682/factory-farming-dxe-criminal-trial-rescue [https://perma.cc/X9GA-C4LU].

66 *See, e.g.*, Lori Marino, *Eating Someone*, AEON (May 8, 2019), https://aeon.co/essays/face-it-a-farmed-animal-is-someone-not-something [https://perma.cc/8AJU-8Y69].

requirements are met, is unconvincing. Harm to animals is quite obviously real harm. In fact, it is frequently illegal harm—so, even if there were a requirement in a certain state's law that, in order to avail oneself of the defense the harm one seeks to prevent must be illegal,[67] that would merely mean that the jury would have to determine whether the harm caused was in violation of the laws designed to protect animals from cruelty and other harms which exist in all 50 states.[68] Moreover, while some statutes may limit the defense to cases of "bodily" harm, it can hardly be denied that animals do, indeed, have bodies. Of course, if a legislature wished to remove cruelty to animals, or to certain animals, from the "harm," or "injury," or "evil," that triggers a necessity defense, it would be free to do so. If it has not done so, as a matter of due process, the defendants should not be precluded from invoking the necessity defense based on an arbitrary statutory interpretation, as a matter of law, that "harm" to animals is not harm, "injury" to animals is not injury, and that animals cannot be subjected to "evil."

Another area in which the courts appear to struggle in determining whether a defendant is entitled to invoke the defense is the evaluation of the defendant's intent. For example, in the *Durand* case, the court apparently denied the defense on the ground that the defendant did not take the opportunity to contact the authorities after the investigation and removal of the chickens was completed, but instead chose to create a video of the subject events and put it up on the internet. This suggests that the court found that the defendant's intent in entering the factory farm and removing the chickens was not proper because he intended to publicize the events (in addition to saving the lives of the chickens), rather than turn the matter over to the authorities.

Similarly, in the Sonoma case, the court did not permit the defendant to assert the defense or introduce evidence to support it.[69] The defendant had argued that he was entitled to

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67 *See* State v. Troen, 786 P.2d 751 (Or. Ct. App. 1990).

68 While farming practices in a majority of states may be exempt from cruelty laws if they are customary, *see* David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum, eds., 2005), this would only mean that a jury question would exist as to whether the horrific treatment of the particular animals in these cases was, in fact, a customary practice. It would certainly not mean that cruelty laws were necessarily inapplicable, as a matter of law, without regard to the particular facts.

69 Crescenzo Vellucci, *Court Watch: Prosecution Rests in California Farm Animal 'Open Rescue' Trial—Celebrity, Others Called by Defense to Explain*

the defense based on the pattern jury instructions defining the defense[70] and also argued that he was entitled to have the jury charged on a then-applicable California law that specifically allowed entry to provide an impounded animal with necessary food and water.[71] The court's denial appears to have been, at least to some extent, based on the ground that "the defendant's goal was to draw attention to the issue."[72]

Actions to Save Sick, Injured Animals, DAVIS VANGUARD (Oct. 12, 2023), https://www.davisvanguard.org/2023/10/court-watch-prosecution-rests-in-california-farm-animal-open-rescue-trial-celebrity-others-called-by-defense-to-explain-actions-to-save-sick-injured-animals/ [https://perma.cc/V25W-WKQC].

70 CAL. CRIM. CODE § 3403.

> The defendant is not guilty of <insert crime[s]> if (he/she) acted because of legal necessity. In order to establish this defense, the defendant must prove that:
> 1. (He/She) acted in an emergency to prevent a significant bodily harm or evil to (himself/herself/ [or] someone else);
> 2. (He/She) had no adequate legal alternative;
> 3. The defendant's acts did not create a greater danger than the one avoided;
> 4. When the defendant acted, (he/she) actually believed that the act was necessary to prevent the threatened harm or evil;
> 5. A reasonable person would also have believed that the act was necessary under the circumstances; AND
> 6. The defendant did not substantially contribute to the emergency.

71 Former CAL. PENAL CODE § 597e (2022).

> Any person who impounds, or causes to be impounded in any pound, any domestic animal, shall supply it during such confinement with a sufficient quantity of good and wholesome food and water, and in default thereof, is guilty of a misdemeanor. In case any domestic animal is at any time so impounded and continues to be without necessary food and water for more than 12 consecutive hours, it is lawful for any person, from time to time, as may be deemed necessary, to enter into and upon any pound in which the animal is confined, and supply it with necessary food and water so long as it remains so confined. Such person is not liable for the entry and may collect the reasonable cost of the food and water from the owner of the animal, and the animal is subject to enforcement of a money judgment for the reasonable cost of such food and water.

Subsequent to these events but prior to trial, this section was amended to apply to animals who were impounded in "animal shelters," rather than in "pounds."

72 According to a contemporaneous X/Twitter post that apparently, in light of its content, is referring to both defenses but only specifically mentions 597e, "Judge Passaglia rules that 597e does not apply as a legal defense for this trial. She states that if there was a risk of having a significant loss of life, such as a salmonella outbreak that led to illness, then maybe this [necessity] defense would be applicable, but at this point, the court believes that the defendant's goal was to draw attention to the issue. The court is willing to reopen this discussion if new facts come up, however, the defense is not allowed to open that door." @SonomaTrial, TWITTER (Sept. 14, 2023, 4:06 PM), https://twitter.com/SonomaTrial/status/1702458765315121553 [https://perma.cc/W2AH-3W45]. Thus, it appears that among the reasons the defense was denied was that the court found

It is certainly troubling that the courts in both of these cases found it appropriate to determine the evidence offered by the defendant relevant to his intent was insufficient as a matter of law and, as a result, deny the defendant the right to present his defense to a jury. But it is perhaps even more troubling that the courts, in doing so, appear to have imposed a particular intent requirement not found in the law that it then found the defendant had not established.

Thus, it is worth examining what the intent requirement is for a necessity defense. In this context, it is useful to turn to the work of Sherry Colb and, specifically, to her analysis of the relationship between the Doctrine of Double Effect ("DDE") and the law.

This philosophical and moral doctrine, rooted in Catholic moral theory, was the subject of one of Sherry's last scholarly works[73] in which she examined its relationship to the law and found that the traditional formulation of the doctrine was often not workable in a modern legal context. As Sherry described that formulation, "under DDE, some actions would be impermissible if the actor *intended* a bad result but permissible if the actor merely anticipated but did not *intend* the bad result."[74] As she cogently put it,

> Having endured twelve years of religious education, I was familiar with distinctions without a difference, and I viewed DDE in that light. Giving a dying person an overdose of morphine was somehow sinful if you are intending to help her die but virtuous (or at least permissible) if you are intending to relieve her pain? Either way, I figured, you are doing the same thing, but here comes religion to identify the correct "mental state" and condemn you for having the wrong one.[75]

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that the defense was precluded since the defendant's actual intent was to seek attention. After its initial ruling, the court allowed the defendant to argue a mistake of law defense regarding the applicability of Section 597e, but did not change its ruling regarding the necessity defense and it was not relied upon at trial.

73 Sherry F. Colb, *A New and Improved Doctrine of Double Effect: Not Just for Trolleys*, 55 CONN. L. REV. 533 (2023).

74 *Id.* at 535 (emphasis added) (citing Alison McIntyre, *Doctrine of Double Effect*, STAN. ENCYC. PHIL. (July 28, 2004), https://plato.stanford.edu/entries/double-effect/ [https://perma.cc/C4GH-3HWJ] (last updated Dec. 24, 2018) ("According to the principle of double effect, sometimes it is permissible to cause a harm as a side effect (or 'double effect') of bringing about a good result even though it would not be permissible to cause such a harm as a means to bringing about the same good end.") (crediting Thomas Aquinas with introducing the Doctrine of Double Effect (citing THOMAS AQUINAS, SUMMA THEOLOGICA, pt. II–II, q. 64, art.7)).

75 *Id.* at 535.

She thus expressed her initial skepticism of the relevance to the law of a doctrine that required parsing the difference between what the actor could foresee would be the negative results of their conduct and whether they actually intended those negative results. As she pointed out, the difference between knowledge and intent is exceedingly fine, and frequently legal outcomes, in her view wisely, do not depend on an actor's subjective intentions but only on an objective evaluation of the balance between the good caused and the harm done.[76]

She therefore proposed a reimagining of the DDE as a moral doctrine to better reflect how it operates within the law, by providing that "we can dispense with the inquiry into actual subjective intent and focus exclusively on whether one could plausibly invoke a justification for the action taken and whether that justification is proportionate to the harm caused."[77] Rather than the essentially mysterious workings of the actor's mind, which can be incredibly difficult for a fact-finder to be sure of, in a situation where the dual effects of their actions may make intent difficult to ascertain, the legality of their act should rest on that objective standard. "Thus, a narrower set of legally or morally permissible purposes[78] translates into many fewer opportunities to act, and it is that constriction—rather than limits on the correct state of mind—that controls our behavior under the legal and moral rules that bind us."[79] As a result, while some scholars limited the application of the DDE to moral questions such as wartime bombings that kill or injure civilians, physician assistance in dying, the trolley problems one encounters in moral philosophy, and abortion, Sherry found that, once reformulated, DDE explains and illuminates numerous areas of the law, including certain areas of evidence law, disparate impact analysis, jury nullification, the Fourth Amendment Exclusionary Rule, and the regulation of

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76 *Id.* at 543–44 ("In other words, the obligation to identify a permissible possible purpose operates mainly by constraining behavior rather than by mandating a correct state of mind or mens rea. When considering conduct that plainly causes harm, one must either identify a permissible purpose that can explain the action and that is significant enough to justify the harm, or one must refrain from engaging in the conduct. Having to identify a permissible purpose thus limits permissible conduct.").

77 *Id.* at 567.

78 "By 'permissible purpose,' I mean an objectively acceptable moral or legal goal that, under the circumstances known to the actor, the actor's conduct plausibly furthers, regardless of whether something altogether different might have motivated the actor." *Id.* at 536 n.5.

79 *Id.* at 536.

dangerous products. And, as she pointed out, "it helps determine the conduct we wish to encourage, independent of anyone's mental state."[80]

While Sherry did not consider the relationship between the Doctrine of Double Effect and the necessity defense, she did consider the doctrine briefly in regard to the closely related issue of self-defense and concluded:

> For example, one may kill another person in self-defense. When the circumstances that make self-defense an option are in place, then one can justify killing. What matters, as I have discussed above, is not the actor's "true" subjective motivation but instead the availability of a permissible and plausible purpose that objectively justifies the action (and of which the actor is at least aware). Perhaps the actor really wanted to kill the other person even absent a prior attack, but in the face of a threat of death from that person, the actor may kill in self-defense, regardless of his subjective intent.[81]

Returning to the analysis of the necessity defense with these insights, it is hard to avoid the conclusion that this defense is a quintessential expression of the DDE, as it always involves an action which is purported to have a dual effect, one of which is an apparent violation of the law and one of which is a beneficial effect which, the defendant hopes, will be seen to make that violation worth it. Moreover, carrying out Sherry's thesis concerning how the law sees, and should see, such matters, it is quite clear that this is another area of the law that, at least in some iterations, avoids delving into the actors' deepest thoughts and motivations to divine their true purpose. As it is defined in both New York and California, it reflects Sherry's proposed reformulation of the DDE quite precisely and bears out her thesis that, "[t]hus reconceived, DDE helps make sense of how the law resolves problems in a wide range of contexts."[82] Indeed, neither the statutory provision in New York nor the pattern jury instructions in California that set forth this defense include defendant's intent as an element.

First, clearly, the New York statute makes crystal clear that the defendant's own mental state is not relevant to the defense at all, by its statement that the jury is to judge the defendant's acts by "ordinary standards of intelligence and morality," and, thus, not by the defendant's inner state of mind or even the

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80 *Id.* at 537.

81 *Id.* at 557.

82 *Id.* at 533.

defendant's belief that the act was necessary to achieve the stated goal.

Nevertheless, in the *Durand* case, the court denied the defense on the ground that the defendant did not make any attempt after the crime was committed to hold the facility liable. While the court did not spell out why this had forestalled use of the defense, it certainly appears that what the court was getting at was that the defendant's intent was not to report a crime and he was therefore not entitled to the defense.[83] As noted, under New York statutory law, there is no requirement regarding the defendant's subjective intent. Instead, the statute imposes an objective standard, i.e., whether ordinary standards of intelligence and morality justified his entering the facility, saving the chickens, and exposing the truth, knowing what he knew about what he would find there. The application of ordinary standards of intelligence and morality is quintessentially a jury question, and the jury was entitled to make that judgment. However, it was precluded from doing so by the court's apparent findings that intent was an element of the defense, that the only legitimate intent the defendant could have had was to find and report evidence of a crime, and that he did not have that intent.

Similarly to New York's statute, California case law, as represented in its pattern jury instructions, requires the jury to apply an objective standard in finding whether a reasonable person would have believed that the act was necessary under the circumstances. It is true that California law goes further in delving into the defendant's state of mind by requiring proof that the defendant actually *believed* that the act was necessary to prevent the threatened harm and "acted . . . to prevent" it. But that is as far as it goes. Nowhere does it require the jury to find that the defendant's intent in so acting was solely, or arguably even at all, to prevent the harm.[84] As long as the defendant believed it was necessary to keep the harm from happening and took an action that prevented it from happening, the inquiry into the recesses of the defendant's mind may cease.

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83 Indeed, the court stated at sentencing, "[h]ad you truly cared about the hens at the Wegman's farm, you would have complained to local law enforcement, the District Attorney's Office, or the local affiliations for SPCA." James, *supra* note 40, at 29 n.123.

84 As in California, the Model Penal Code requires a belief on the part of the defendant that their actions are necessary to avoid a harm or evil to themself or to another.

In sum, according to the statute in New York and the pattern jury instructions in California, defendant's intent was not an element of the defense, but it was treated as if it were by the courts.[85] This, perhaps, would not have mattered if the defendants in these cases had been able to put forth the defense and assert that their actual intent was to rescue injured and suffering animals. And yet, in both of these cases, the court, when considering the mens rea needed for the offense, not only wrongly focused on the defendant's intent, and not only wrongly decided it as a matter of law rather than leaving it to the jury, but, crucially, did so in order to, as Sherry put it, "condemn [them] for having the wrong one" and use that supposed wrong intent as a rationale for preventing them from asserting the defense at all.

Moving on to the actual elements of the defense, it should be made clear that any objectively viewed negative consequences of a defendant's act (as opposed to defendant's subjective beliefs or attitude toward those negative consequences) are certainly not irrelevant to application of the defense. Indeed, the gravamen of the defense is that the benefits outweighed such foreseeable negative consequences.

Thus, applying the defense to the theft charges based on the loss of animals, clearly the prosecution could argue that the commercial value of those animals weighed in favor of conviction. Defendants who are allowed to assert the defense are then likely to introduce evidence that the value of the animals

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85 It is not the case in every jurisdiction that the defendant's intent is clearly not an element of the defense. For example, in Wisconsin, pattern jury instructions provide

> The law allows the defendant to act under the defense of necessity only if the pressure of natural physical forces caused the defendant to believe that his act was the only means of preventing [imminent public disaster] [imminent death or great bodily harm to himself (or to others)] and which pressure caused him to act as he did.

Wis. JI—Criminal 792 (2005), WIS. STATE L. LIBR. (citations omitted). An interpretation of this statute would have been relevant in a subsequent case involving the rescue of three dogs, Julie, Anna, and Lucy, from Ridglan Farms, a breeding facility for beagles who were slated to be used in biomedical research and who were allegedly subjected to substantial mistreatment. *See* Ridglan Farms, RIGHT TO RESCUE, https://righttorescue.com/ridglan/ [https://perma.cc/D442-UWNP] (last visited Apr. 30, 2024). Defendants, who were charged with felony burglary and felony theft, moved for, *inter alia*, permission to bring a necessity defense but while that motion was pending, one week before trial was scheduled to begin, all charges were dropped at the victim's request, over the defendants' objections. *See* Bill Lueders, *When Is It Permissible to Rescue a Dog in Peril?*, BULWARK (Mar. 21, 2024), https://www.thebulwark.com/p/when-permissible-to-rescue-dog-in-peril [https://perma.cc/7TTB-QCZ7].

whom they rescued was insubstantial, and, in light of their severe illness, quite possibly less than nothing, as it would have cost more to treat them than they were worth monetarily.[86] Notably, in both the *Smithfield* and *Durand* cases described above, it appears that the animals were not even missed until the videos were released. Another possible harm to the facility that prosecutors could assert would be that rescuers violated "sanitation protocols," putting the animals at risk of disease, particularly in light of the extensive prevalence of avian flu on factory farms. Frequently, defendants will have done their best to observe such protocols, but whether they have nevertheless caused harm by entering would be another question for the jury, should it be argued by the prosecutor. Again, however, this might open the door to information about the general sanitary conditions of the facility that its owners might be reluctant to make public.

As to the trespass charges, negative consequences to the facility and its owners obviously include the fact that their privacy was violated. While a jury in this type of case might consider that the warehouse was not a traditionally private space, such as a home, there would, undoubtedly, be no question that it was not open to the public and efforts were made to keep its contents private.

Without question, the most obvious and substantial harm that the facility and its owners would suffer from such a trespass is the fact that, while on the property, the defendants videotape the animals and the surrounding conditions and, as a result, bad publicity ensues from the publication of the video and the story of the rescue. However, crucially, any notoriety and attention the facility receives as a result of the way the animals are treated is not a harm caused by the trespass but by the actions of the facility itself.[87] It has been recognized

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86 In the Smithfield case in Utah, *supra* Part IV, while the necessity defense was not charged, the value of the piglets who were taken was relevant, as the theft charge had a value element of more than zero. This appears to have been one of the reasons for the defendants' acquittal, indicating that the lost value of the animals is unlikely to weigh substantially in favor of rejecting a necessity defense. *See* Chris Reed, *'You're Shooting Yourself in the Foot': Pig Trial Jurors Reveal What Went on in Deliberations*, ST. GEORGE NEWS (Jan. 20, 2023), https://www.stgeorgeutah.com/news/archive/2023/01/20/cdr-youre-shooting-yourself-in-the-foot-pig-trial-jurors-reveal-what-went-on-in-deliberations/ [https://perma.cc/Y7CX-8U6L].

87 *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 522 (4th Cir. 1999) (Defendant, a news organization, was held civilly liable for trespass but damages for the reputational harm caused by defendant's news report were disallowed and the plaintiff's damages for trespass were limited to a nominal amount.

that, at least in those circuits that deem news gathering to be an activity protected by the First Amendment, the news gathering performed by undercover investigators on factory farms is such a protected activity.[88] As the Fourth Circuit in its notable *Food Lion* decision observed, to penalize the defendants in such cases would be to create an "end-run around [the] First Amendment." Thus, the charge to the jury, had these cases ever gotten that far, would certainly have had to advise the jury of this.[89]

Moreover, it is likely that many jurors would find that the desire to shine a light on unacceptable, and almost certainly illegal, private behavior is an appropriate rationale, in and of itself, for invoking the defense against a charge of trespass.[90] Since, as noted, under *Food Lion*, damages from the bad publicity caused by the trespass would be necessarily nominal in order to comply with the First Amendment, it is difficult to imagine why this additional consequence of the defendant's actions would preclude submitting to the jury the question of whether the benefits of exposure outweighed the harms. Nevertheless,

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"What Food Lion sought to do, then, was to recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim. We believe that such an end-run around First Amendment strictures is foreclosed by *Hustler*."). It is submitted that an even more egregious end-run would result from the use of defamation-type damages to establish criminal liability without adherence to First Amendment defamation standards.

88 *See, e.g.*, Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1203 (9th Cir. 2018) ("We easily dispose of Idaho's claim that the act of creating an audiovisual recording is not speech protected by the First Amendment."); Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1228 (10th Cir. 2021) ("One type of First Amendment activity relevant to this case is the creation and dissemination of information."); Animal Legal. Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017) (While the First Amendment does not create a license to enter property for the purpose of news gathering, it prevents the government from imposing criminal penalties for videotaping on the property for such purpose.).

89 A somewhat different analysis would be required if, in a particular situation, defendants did not rescue an animal, but merely gathered evidence in order to expose the conditions in which the animals were living. Aside from any questions this might raise in a particular case about whether the positive results of the defendants' acts outweighed the harms, it would mean the jury might be confronted with a more difficult question as to whether it was an "emergency," as is also often required in order to assert the defense. While there certainly seems to be a strong argument that bringing attention to the fact that animals are regularly suffering and dying should qualify as an emergency, notably, in most cases where activists seek only to expose conditions but not to rescue animals, they have attempted to avoid criminal prosecution by obtaining employment in the subject facility rather than entering without permission.

90 Note, *And Forgive Them Their Trespasses: Applying the Defense of Necessity to the Criminal Conduct of the Newsgatherer*, 103 HARV. L. REV. 890 (1990).

one of the reasons for the Sonoma court's refusal to submit the defense appears to have been that the defendants' intention was to seek attention.[91]

As to the factors that defendants would bring to bear that would be balanced against those harms, they would certainly include the lives and suffering of the animals taken by the defendants. Clearly this would mean that evidence regarding the health of the animals, the conditions in which they were living, and the results of any medical treatment would be relevant.

As to trespass counts,[92] a somewhat different question regarding the necessity of the defendants' actions is presented since, at the point of entry into the warehouse when those acts were committed, the defendants have obviously not focused on particular animals and, in light of their condition, determined the "necessity" of rescuing them. However, these defendants have generally proffered evidence that, even before entering the facility, they had substantial, recently gathered evidence to believe that there were suffering, and dying, animals within it. For these particular defendants, and, more importantly, for the majority of people, as this is an objective standard, saving an animal from egregious suffering is an act of virtue, and, in the right circumstances, a moral imperative. That that animal may, at that point, be only one anonymous victim among thousands should hardly be a reason to discount her importance.

While not necessarily consistent from state to state,[93] among other common qualifications on use of the defense are that the defendant cannot have caused or contributed to causing the injury that he or she is trying to rectify and, where possible, the defendant must have tried other, more obviously

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91 The court may have been implying that the purpose of the defendant's behavior was to mount a protest. I believe that neither the rescue of animals nor the shining of a light on the conditions of the animals need be analyzed as pure civil disobedience, as they both have functional purposes beyond protest, *cf.* James, *supra* note 40 (arguing that these efforts constitute both direct and indirect civil disobedience), though the actions of the participants in the Sonoma incidents are somewhat more akin to civil disobedience. The question of whether and when civil disobedience is covered by the necessity defense is, although beyond the scope of this Article, clearly of substantial importance. William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3 (2003). This is particularly so in light of increasingly desperate efforts to mount effective protests of climate harm. *See* Joseph Rausch, *The Necessity Defense and Climate Change: A Climate Change Litigant's Guide*, 44 COLUM. J. ENV'T L. 553 (2019).

92 In the *Durand* case, the defendant was acquitted of theft-related charges but convicted of trespass.

93 For an exhaustive review of various state laws with reference to their applicability to animal rescue, see James, *supra* note 40.

legal, methods of rectifying the harm. While not included in the Model Penal Code, often there is a requirement, including in both New York and California, that the situation that the defendant is addressing be an emergency.

Applying this to an imaginary case of open rescue, let us say that the defendants enter a factory farm warehouse without permission. While there, they quite easily locate animals who, they say, appear to be very ill. They focus on one piglet who, according to the defendants, appears to be at death's door and name her Evangeline.[94] Videotaping themselves and what they assert are the surrounding conditions, they pick Evangeline up and leave with her, immediately seeking veterinary care, as well as, at some point in the future, posting the video, or, more likely, an edited version of it, online. The veterinarian attests that Evangeline, was, in fact, very ill and would likely have died without intervention, but, happily, after extensive and expensive treatment, she survived. The final chapter of the story includes the fact that Evangeline is now living her best pig life on a sanctuary for farmed animals.[95]

Could the defendants avail themselves of the defense? Questions that immediately might arise include:

> Did the defendants have reason to believe that potentially grievous harm against animals was being committed inside before they went in? If the defendants were charged with trespass or burglary, this would certainly be relevant to whether their entry was illegal or potentially justified.
>
> What other efforts did the defendants make prior to entering the warehouse to reduce or eliminate the harm?

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94 For DxE participants, naming the animals appears to be a crucial part of strategy, presumably to encourage people to see them as individuals.

95 In a rather extraordinary development, prior to charges being brought and not long after the video was made public, the Federal Bureau of Investigation became involved in the investigation of the Utah Smithfield rescue and were able to track down a sanctuary where they believed the two rescued piglets, Lily and Lizzie, had been placed. There, in order to ascertain what they believed was the true identity of two piglets named Lucy and Ethel, the agents, who arrived at the sanctuary in six cars and were wearing bullet proof vests and were armed with a search warrant, cut a 2-inch piece out of the ear of either Lucy or Ethel for DNA testing. She reportedly screamed so extensively in reaction to the pain that no attempt was made to do the same to the second piglet. There was no apparent subsequent attempt to recover Lily and Lizzie. However, the piglet who had been injured reportedly exhibited fear and depression for weeks after the incident. Glenn Greenwald, *The FBI's Hunt for Two Missing Piglets Reveals the Federal Cover-Up of Barbaric Factory Farms*, INTERCEPT (Oct. 5, 2017), https://theintercept.com/2017/10/05/factory-farms-fbi-missing-piglets-animal-rights-glenn-greenwald [https://perma.cc/Q2YA-S3SP].

> What was Evangeline's value to the facility? While this may or may not be relevant to the theft charges, depending on whether there is a value element, it is obviously relevant to the question of whether the harm sought to be prevented, i.e., Evangeline's suffering and imminent death, outweighed the harm being caused to the facility, which would include loss of her monetary value.
>
> What were the other harms to the facility?
>
> What is the evidence regarding the suffering of Evangeline that the defendants sought to rectify with their actions? Was it reliable? Was the edited version of the video misleading, or even an outright fabrication?
>
> Did the defendants cause any of that harm? While, at first glance, that would not seem to be relevant here, it is in fact frequently claimed by the subjects of undercover investigations on factory farms that the investigators stage photographs, use photographs from other facilities, or even cause the injuries that they are reporting.
>
> Were the harms defendants sought to rectify illegal? In some jurisdictions, this may be an additional condition of using the defense.[96] This would depend, *inter alia*, on the cruelty laws of the jurisdiction.[97]

All of these questions would appear to be well within the types of issues that juries are entrusted with resolving every day. They involve questions of fact, generally requiring the evaluation of credibility. And they are the very questions that, apparently, these defendants are eager to get before a jury.

Conclusion

It needs to be emphasized, and then re-emphasized, that the right to rescue defense is an extremely high-risk strategy.[98] Obviously, a major drawback of the reliance on a right to rescue is that, before a defendant can assert the defense, they have to do something that would otherwise be a crime, potentially a serious crime, and they have to admit to the essential facts of and be charged with that crime. The defendant then must leave it up to a judge as to whether they can even assert the defense and bring evidence to support it and then to a jury as to

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96 *See, e.g.*, State v. Troen, 786 P.2d 751 (Or. Ct. App. 1990).

97 *See* Wolfson & Sullivan, *supra* note 68.

98 For an extended analysis of the theoretical underpinnings of and potential efficacy of courting prosecution, including in the animal rights arena, see Justin Marceau, Wayne Hsiung & Steffen Seitz, *Voluntary Prosecution and the Case of Animal Rescue*, 137 Harv. L. Rev. F. 213 (2024).

whether they are entitled to it. That defendant must trust that people who are not animal rights activists, when confronted with what is happening on a factory farm, will agree that it was a greater evil to allow Evangeline to languish and likely die in misery than to take her from the agribusiness company that is her legal owner.

If the jury does not agree, defendants, some of whom are very young, risk going to prison, conceivably for a very long time.[99] Possibly, they are only willing to take this risk because they are uninformed. But even those who understand the risk may want to take it. For one thing, awareness of the constant enormity of the suffering of animals on factory farms is, for many, deeply haunting, and other avenues of redress do not seem to even make a dent. Indeed, as Sherry Colb knew better than anyone, while the widespread elimination of animal-based meat, milk, and eggs from the human diet is remarkably feasible, indeed, beneficial, to date it has proven equally remarkably difficult to achieve. Added to that is the fact that, in spite of heroic efforts by many activists, much of the public remains unaware of the reality of the lives of animals raised for food. As a result, some activists are moved to take substantial risks. Some may say that these are just "crazy kids" who simply don't understand what they are getting themselves into, but the fact is that throughout history, young people (and some old people as well) have often taken dire risks for what they believe in.

And, perhaps, there is another reason, other than their wish to at least save one animal from this horror or the awareness that they cannot live with the knowledge of what is happening to these animals without doing *something*. Perhaps there is a theory of change involved that makes these defendants see their actions as potentially effective in fomenting change in a way that transparency, on its own, has not been as yet. Perhaps the risk of prison for obviously well-meaning, thoughtful people is not a bug, but a feature, of this theory of change. Perhaps it is the very fact of the willingness of these defendants to risk being convicted (in their minds, unfairly) and going to

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99 On the same day that Hsiung was sentenced, Zoe Rosenberg, Conrad de Jesus, and Rocky Chau were arrested in Sonoma County in connection with similar activities. Rosenberg, 21, was charged with six misdemeanor trespassing charges and seven felonies. *See* Anna Merlan, *Three Animal Rights Activists Were Abruptly Arrested Following a Sentencing Hearing for One of Their Friends*, VICE (Dec. 1, 2023), https://www.vice.com/en/article/y3we9m/direct-action-everywhere-animal-rights-open-rescue-arrest [https://perma.cc/HUV5-CXYW].

prison (in their minds, wrongly), for a piglet, a piglet who is now living a happy life, that

> – makes some people who hear about it not just superficially aware, but emotionally aware, that what we are doing to animals might be wrong;
>
> – makes writers, reporters, and editors realize that this isn't just an unending stream of video revelations of sad looking animals that has no real story attached and no one wants to hear. It's a story, with heroes, and victims, and unpredictable endings;
>
> – and makes policymakers aware that factory farming, in addition to its environmental harms, is not only wrong, but holds the risk of becoming something that, framed in a way that brings clarity, shocks people's consciences and makes them wonder why the authorities have allowed it to happen behind closed doors.

I began this Article by pointing out that there are a variety of theories of change extant in the animal rights movement, and more and more funding to support them. If that is the case, why would it be necessary to use such an extreme method as part of the effort? Why is it so difficult to create change when factory farms create so many harms—to animals, to the climate, to fundamental decency—and there are so few costs to eliminating them now that animal-derived food can be replaced with an abundance and deliciousness that former generations of humans could only have dreamed of? Why is this so hard? What will it take? Is it such extreme actions that will finally get the world to pay attention? When ordinarily law-abiding people are willing to risk their freedom to reveal what is happening, because it is literally the only way they can be heard, will it work? When egregious harm to animals is so widespread within an industry that the willingness of individuals to risk their freedom to expose it runs the risk of shutting down, or, at least, causing huge disruption to that industry, is the solution for the courts to help hide it? Is risking prison the right way forward? Is it legally viable? It is at moments like this that the loss of one of the great theorists of both animal justice and criminal justice is felt so deeply. We need Sherry Colb right now. But we must muddle through without her.