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WHEN IS RESCUE NECESSARY?
APPLYING THE NECESSITY DEFENSE TO THE RESCUE OF ANIMALS

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ABSTRACT

The necessity defense encourages citizens faced with untenable options to choose the action that generates the greatest social utility, even when that act is illegal. Reserved for the rarest occasions, the defense allows a person to argue that his otherwise illegal action should not just be excused, but that it was justified. The defense has the power to transform a criminal defendant into a community hero—but the line between hero and vigilante is thin. As a result, the defense has more vitality in the halls of academia than in courtrooms.

The defense proves particularly elusive when invoked by those who rescue nonhuman animals from abusive situations. Although the defense is seldom explicitly barred by the legislature, the defense is generally poorly defined and its application is highly discretionary. This ambiguity in application allows judges to place the defense beyond the reach of animal advocates.

This article argues that judges are overly cautious when denying the defense to those who rescue nonhuman animals. It concludes that a more robust application of the defense could ultimately conserve judicial resources while honoring the integrity of our judicial system. By allowing the defense to proceed in what appear to be close cases, judges would preserve their neutrality and allow juries to decide how best to resolve the tension in the law that simultaneously protects and exploits nonhuman animals.

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INTRODUCTION

A dog sits locked in a hot car, panting and panicked. Her energy flags as her temperature rises; shoppers walk by, oblivious to her suffering. At a hatchery, a chick is trapped in a plastic bag, gasping for breath. Buried under the bodies of his brothers, he waits for death. Each struggles for air, easily supplied by an observant passerby or a compassionate employee. Yet both rescues may be criminal: breaking a car window is vandalism, removing company property is theft. One rescuer is likely to be celebrated, the other prosecuted. Could both argue that rescue was necessary? If not, why not?

This article applies the necessity defense to the rescue of nonhuman animals, examining the variables that prove most dispositive when deciding a rescuer's fate. Although the application of the defense is highly discretionary and the inquiry is by its nature fact-specific, the exercise still proves enlightening. It reveals how a fundamental tension in the law that simultaneously protects and exploits animals is frequently resolved against the rescuer.

The analysis proceeds in three parts. Part I reviews the current status of nonhuman animals in society, including their exploitation and protection, which gives rise to opportunities for rescue. Part II examines the necessity defense, its purpose and its elements, applying these elements to animal rescue. Part III concludes, arguing that a more robust application of the defense would better balance the law's competing values, possibly causing the scales of justice to tip in the other direction.

I. THE EXPLOITATION, PROTECTION, AND RESCUE OF NONHUMAN ANIMALS

A. The Status of Nonhuman Animals Varies by Species

Nonhuman animals are sentient beings with the capacity to suffer. Many have significant cognitive abilities.[1] Yet legally nonhuman animals are little more than property, living widgets treated more like inanimate objects than sentient beings.[2] They are bought, sold, exploited, and destroyed at a staggering rate.

[1] *See, e.g.*, Marilyn Larkin, *'Animals Do Think'—Surprising Insights into the Evolution of Cognition and Communication*, ELSEVIER CONNECT, Dec. 19, 2013, *available at* http://www.elsevier.com/connect/animals-do-think-surprising-insights-into-the-evolution-of-cognition-and-communication.

[2] In fact, in some ways nonhuman animals are valued even less than certain personal property, as the law recognizes the intrinsic value of sentimental property but will not allow similar damages for the loss of a companion animal. See *Strickland v. Medlen*, 397 S.W.3d 184, 192 (Tex. 2013), where the Texas Supreme Court distinguished damages available for the destruction of sentimental

In the United States, nine billion farmed animals are killed and consumed annually.[3] Another thirteen million nonhuman animals are used in research.[4] Millions more are trapped or farmed for their fur.[5] Members of exotic species are commonly held captive, displayed in barren cages by zoos or aquaria. Some spend their lives travelling, forced to perform in circuses, races, or rodeos. Others are exploited on television or film. Although cats and dogs fare better, as many are treated more like family members than commodities, millions are still killed in shelters each year.[6] Unwanted horses face a worse fate. Well over one hundred thousand are sent across the border for slaughter annually, shipped in brutally crowded conditions, often going more than 24 hours without food, water, or rest.[7]

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heirloom property from impermissible "emotion-based liability" for the loss of a dog's life.

[3] *Farm Animal Statistics: Slaughter Totals*, THE HUMANE SOCIETY OF THE UNITED STATES, June 27, 2013, http://www.humanesociety.org/news/resources/research/stats_slaughter_totals.html.

[4] *Animals Used in Research*, AMERICAN ANTI-VIVISECTION SOCIETY, http://www.aavs.org/site/c.bkLTKfOSLhK6E/b.6446369/k.66FC/Animals_Used_in_Research.htm#.Up-OfI1Q0dc. The number may be much higher. The Humane Society places it at 25 million. *See Questions and Answers About Biomedical Research*, THE HUMANE SOCIETY OF THE UNITED STATES, Sept. 16, 2013, http://www.humanesociety.org/issues/biomedical_research/qa/questions_answers.html.

[5] *Fur Trade Facts*, LAST CHANCE FOR ANIMALS, http://www.lcanimal.org/index.php/campaigns/fur/fur-trade-facts; *see also USDA Statistics on the Mink Industry*, 2011 report *available for download* at http://www.furcommission.com/farming/about-mink-farming/.

[6] *Common Questions About Animal Shelters*, THE HUMANE SOCIETY OF THE UNITED STATES, May 3, 2013, http://www.humanesociety.org/animal_community/resources/qa/common_questions_on_shelters.html#.Up-PII1Q0dc.

[7] Nat T. Messer, *The Unwanted Horse and Horse Slaughter*, AMERICAN VETERINARY AND MEDICAL ASSOCIATION, Feb. 2012, https://www.avma.org/KB/Resources/Reference/AnimalWelfare/Pages/AVMA-Welfare-Focus-Featured-Article-Feb-2012.aspx; *US Horses Slaughtered (Yearly 1989-2014)*, EQUINE WELFARE ALLIANCE, Dec. 19, 2013, *www.equinewelfarealliance.org/uploads/00-Slaughter_Statistics.pdf*; *The Facts about Horse Slaughter*, THE HUMANE SOCIETY OF THE UNITED STATES, Oct. 1, 2013,

Although their status as property facilitates the systematic exploitation of nonhuman animals, many still enjoy protections denied inanimate property. Every state prohibits animal cruelty to some extent, with provisions dating back to the 19th century.[8] Citing the ubiquity of these protections, Justice Alito recently characterized the prevention of animal cruelty as a compelling state interest.[9] Actual protection, however, exists more in theory than in practice. Anti-cruelty laws are often limited in scope, and protection varies according to an animal's species and economic utility.[10] Farmed animals are particularly vulnerable, as many states condone cruel farming practices, exempting them from their anti-cruelty provisions.[11] Even when an anti-cruelty law squarely applies, punishment is far from certain and penalties are disproportionately weak.

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http://www.humanesociety.org/issues/horse_slaughter/facts/facts_horse_slaughter.html.

[8] *Anti-Cruelty: Related Statutes*, ANIMAL LEGAL & HISTORICAL CENTER, http://www.animallaw.info/statutes/topicstatutes/sttoac.htm. The oldest anti-cruelty code is from New York, N.Y. REV. STAT. ch. 375, §§ 1-10 (1867). *See Overview of the Historical Materials*, ANIMAL LEGAL & HISTORICAL CENTER, http://www.animallaw.info/historical/articles/ovushistory.htm.

[9] "But while protecting children is unquestionably *more* important than protecting animals, the Government also has a compelling interest in preventing the torture depicted in crush videos." U.S. v. Stevens, 559 U.S. 460, 495-96 (2010) (Alito, J., dissenting). The majority, without providing a compelling interest analysis, struck down as overbroad a statute banning the depiction of animal suffering. *Id.* at 482. *See also* Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 580 (1993) (Blackmun, J., concurring) (noting that "a State's interest in prohibiting cruelty to animals. . . . is not a concern to be treated lightly"); Humane Soc'y v. Lyng, 633 F. Supp. 480, 486 (W.D.N.Y. 1986) ("It has long been the public policy of this country to avoid unnecessary cruelty to animals. . . . Even the government's attorney conceded that if the avoidance of unnecessary cruelty to animals is not already government policy, it should be.").

[10] *Anti-Cruelty: Related Statutes*, ANIMAL LEGAL & HISTORICAL CENTER, http://www.animallaw.info/statutes/topicstatutes/sttoac.htm. South Dakota is the only state without a felony animal abuse provision. *See U.S. Jurisdictions With and Without Felony Animal Cruelty Provisions*, ANIMAL LEGAL DEFENSE FUND, http://aldf.org/resources/advocating-for-animals/u-s-jurisdictions-with-and-without-felony-animal-cruelty-provisions/.

[11] *See, e.g.*, Alaska, ALASKA STAT. § 11.61.140 (2014). Some states, on the other hand, supply additional protections for farmed animals. California, for example, prohibits tail docking for both horses and cattle. *See* CAL. PENAL CODE § 597n (West 2014).

Companion animals are treated most favorably. Most states supplement their basic cruelty codes with laws addressing forms of cruelty that affect companion animals exclusively, prohibiting, for example, dog tethering and fighting.[12] States also routinely care for stray cats and dogs, providing veterinary care and facilitating their adoption.[13] Some explicitly suspend private property rights under certain circumstances, authorizing entry to provide emergency care.[14] Federal law, passed in the wake of Hurricane Katrina, requires that state and local emergency plans consider the needs of pets and service animals.[15]

The favorable treatment of companion animals extends beyond state criminal codes. Civil courts commonly recognize companion animals as the beneficiaries of trusts, created by their caregivers.[16] Family courts sometimes resolve companion animal custody battles based on the best interest of the animal, rather than comparing the strength of the parties' claims to the animal's title.[17] These developments demonstrate that the law already recognizes, to some extent, that nonhuman animals are more than mere property. Still, companion animals

[12] *See* Animal Fighting: Related Statutes, ANIMAL LEGAL & HISTORICAL CENTER, http://animallaw.info/statutes/topicstatutes/sttoaf.htm.

[13] *See, e.g.*, KAN. ADMIN. REGS. 9-22-1-5 (2014); GA. CODE ANN. § 4-11-1 to 4-11-18 (2014).

[14] See, for example, Arkansas, ARK. CODE ANN. § 5-62-105 (West 2014), exempting from the cruelty code reasonable acts made in good faith, California, CAL. PENAL CODE § 597.1(a)(1) (West 2014), allowing an officer to seize an animal subject to cruelty, Illinois, 510 ILL. COMP. STAT. 70/16.5 (2014), insulating veterinarians from civil liability for providing emergency care to an animal, Kansas, KAN. STAT. ANN. § 21-6412 (2013), allowing officials and veterinarians to seize an animal subject to cruelty, Louisiana, LA. REV. STAT. ANN. § 3:2431 (2013), allowing officials to seize an animal subject to cruelty, and Vermont, 13 VT. STAT. ANN. § 354(3) (2014), allowing officers to seize without a warrant an animal whose life is in jeopardy.

[15] Pets Evacuation and Transportation Standards Act, 42 U.S.C. § 5196a-d (2006).

[16] *Wills & Trusts: Related Statutes*, ANIMAL LEGAL & HISTORICAL CENTER, http://www.animallaw.info/statutes/topicstatutes/sttowill.htm.

[17] *See, e.g.*, Juelfs v. Gough, 41 P.3d 593, 599 (Alaska 2002) (finding that the trial court's granting of custody of the family's Labrador to the husband because the wife's other dogs threatened the Lab's life was within the trial court's discretion); *see also* Zovko v. Gregory, No. CH 97-544 (Va. Cir. Ct. Oct. 17, 1997) (finding that, where title to Grady the cat was unclear, ownership should be resolved based on what was in the best interests of Grady).

remain undervalued in tort. Human caregivers are routinely denied noneconomic damages for their loss, leaving families undercompensated for acts of cruelty.[18]

Although companion animals enjoy considerable protection under state law, federal law is concerned mainly with wildlife, governing, for example, the treatment of endangered species,[19] marine mammals,[20] and migratory birds.[21] Generally federal law ignores, tolerates, or facilitates the exploitation of many other nonhuman species, particularly those used in laboratories or entertainment, and those farmed for food.[22] Federal law protection for animals used in research, for example, exempts rats, mice, and birds.[23] Federal protection for farmed animals is limited almost exclusively to the manner in which they are transported or killed.[24] With little agency oversight, entire industries are virtually self-policing.[25]

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[18] *See, e.g.*, Strickland v. Medlen, 397 S.W.3d 184 (Tex. 2013).

[19] Endangered Species Act, 16 U.S.C. §§ 1531-44.

[20] Marine Mammal Protection Act, 16 U.S.C. §§ 1361-89.

[21] Migratory Bird Treaty Act, 16 U.S.C. §§ 703-12.

[22] Although there are numerous federal laws, they grant surprisingly little protection. *See* Henry Cohen, *Brief Summaries of Federal Animal Protection Statutes*, CONGRESSIONAL RESEARCH SERVICE, 7-5700, 94-731, Apr. 2009, *available for download at* http://www.animallaw.info/statutes/stfedset.htm.

[23] See 7 U.S.C. § 2132(g), exempting rats, mice, and birds from the Animal Welfare Act, 7 U.S.C. §§ 2131-59.

[24] *See, e.g.*, Humane Methods of Slaughter Act, 7 U.S.C. §§ 1901-07; Twenty-Eight Hour Law, 49 U.S.C. § 80502. In fact, the existence of minimal federal standards has created preemption issues for states that want to improve the treatment of farmed animals. See Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 975 (2012), finding that CAL. PENAL CODE § 599f, protecting nonambulatory animals in slaughterhouses, was preempted by the Federal Meat Inspection Act, 21 U.S.C. §§ 601-25.

[25] The New England Anti-Vivisection Society reports that the government employs only 115 inspectors to enforce the Animal Welfare Act at more than 7,750 licensed facilities. *See Laws and Regulations*, NEW ENGLAND ANTI-VIVISECTION SOCIETY, http://www.neavs.org/research/laws. Also, after surveying 235 slaughterhouse inspectors over a period of three months, the U.S. Government Accountability Office determined that the Humane Methods of Slaughter Act was inconsistently enforced. *See* Statement of Lisa Shames, Director Natural Resources and Environment, Testimony Before the Subcommittee on Domestic Policy, Committee on Oversight and Government

Indeed, some state and federal laws explicitly insulate many exploitative industries from animal advocates. The Animal Enterprise Terrorism Act ("AETA") creates stiff federal penalties for interfering with those who exploit nonhuman animals for profit, food, fiber, agriculture, education, research, testing, display, sale, or sport.[26] Several states have enacted their own versions of the AETA, outlawing various forms of "ecoterrorism." Substantively, these laws are redundant, punishing acts that amount to little more than trespass or theft. Legally, they are significant as they impose harsher penalties for these already criminal acts when the acts target businesses that exploit nonhuman animals.[27]

Seven states also have "Ag Gag" laws, which prohibit activities commonly employed by undercover investigators and whistleblowers, such as videotaping or photographing on farms.[28] Two of these laws are currently facing constitutional challenges,[29] as they allegedly impermissibly criminalize the acts

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Reform, House of Representatives, *Humane Methods of Slaughter Act: Weakness in USDA Enforcement*, GAO-10-487T, Mar. 4, 2010, *available for download* at http://www.gao.gov/products/GAO-10-487T.

[26] Animal Enterprise Terrorism Act, 18 U.S.C. § 43.

[27] Nearly half the states have "ecoterrorism" laws, which prohibit certain forms of interfering with animal enterprises, including trespass. *See Animal Industry Interference ("ecoterrorism" / "agroterrorism") – Related Statutes*, ANIMAL LEGAL & HISTORICAL CENTER, http://www.animallaw.info/statutes/topicstatutes/sttoecot.htm. These "ecoterrorism" laws create harsher penalties for acts such as trespass or theft that are already prohibited under the regular criminal code. *See, e.g.*, ARK. CODE. ANN. § 5-62-201 to 204 (2014) (making it a Class D felony to deprive a research facility of an animal); *cf.* ARK. CODE. ANN. § 5-36-103 (2014) (making theft of property valued at less than $1,000 a Class A misdemeanor and theft involving livestock valued at more than $200 or other property valued between $1,000 and $5,000 a Class D misdemeanor).

[28] Kansas, KAN. STAT. ANN. § 47-1827 (1990); North Dakota, N.D. CENT. CODE § 12.1-21.1-02 (1991); Montana, MONT. CODE ANN. § 81-30-103 (1991); Iowa, IOWA CODE § 717A.3A (2012); Utah, UTAH CODE ANN. § 76-6-112 (2012); Missouri, MO. REV. STAT. § 578.013 (2012); Idaho, 2014 IDAHO SESS. LAW CH. 30 (Senate Bill 1337); *see* Dan Flynn, *Idaho Governor Signs 'Ag-Gag' Bill into Law*, FOOD SAFETY NEWS, Feb. 28, 2014, *available at* http://www.foodsafetynews.com/2014/02/governor-otter-should-reconsider-idaho-ag-gag-bill-says-chobani-founder/#.Uxzvz15kIdc.

[29] *See* Animal Legal Def. Fund et al. v. Herbert et al., Case No. 2:13-cv-00679-RJS (currently pending in the United States District Court for the District of Utah, Central Division); Animal Legal Def. Fund et al. v. Otter et al., Case No.

preparatory to whistle-blowing speech.[30] Ironically, some state "Ag Gag" bills are pitched as animal protection statutes, particularly those with prompt reporting requirements.[31] However, these provisions actually protect the businesses, not the animals, as they prevent investigators from gathering sufficient evidence to expose a pattern and practice of abuse.

On the whole, laws protecting nonhuman animals are under-inclusive and under-enforced. As a result, these laws frequently fail to deter abusive behavior, creating numerous opportunities for animal rescue. Yet those who rescue nonhuman animals face the risk of vigorous prosecution,[32] sometimes under laws specifically passed to protect industry. These rescuers are almost universally denied the necessity defense, further exacerbating the gap between the intended and actual effect of laws designed to protect nonhuman animals.

B. Prosecution May Advance or Chill Social Movements

Despite the risk of prosecution, advocates endeavoring to end the systematic exploitation of nonhuman animals take various actions to effect social change. Many employ strictly legal methods, such as staging peaceful protests, and distributing information to influence the decisions of consumers or lawmakers. Although protestors sometimes cross the line into illegal conduct, including blocking access to buildings or entering private property, protests are generally uncontroversial. This sort of civil disobedience, after all, is an integral part of our cultural history. Protests, however, are a slow vehicle for change.

Other animal advocates employ explicitly illegal actions to inspire social change. They target animal enterprises directly and aggressively, often using

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1:14-cv-00104-BLW (currently pending in the United States District Court, District of Idaho).

[30] When analyzing the extent to which the First Amendment protects video games, for instance, the Court noted that "[w]hether government regulation applies to creating, distributing, or consuming speech makes no difference." Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2734 n.1 (2011).

[31] *See* MO. REV. STAT. § 578.013 (2012).

[32] *See* Mark Hawthorne, *Murder Most Fowl: Gourmet Cruelty Shines a Light on Foie Gras*, Satya (Oct. 2005) *available at* http://www.satyamag.com/oct05/hawthorne.html (noting that the 2004 arrests of two activists who rescued birds from a foie gras farm were the first such arrests in 30 years). Felony burglary charges were dropped when the rescuers pled guilty to misdemeanor trespass. *Felony Charges Dropped Against Animal Rescuers After Foie Gras Court Battle*, GourmetCruelty.com press release (Dec. 3, 2004), *available at* PR Web http://www.prweb.com/releases/2004/12/prweb185251.htm.

vandalism and other mischief to create economic sabotage, aiming to make animal exploitation less attractive.[33] Although they endeavor to harm things and not people, some harass employees personally. Such extreme tactics are understandably controversial and have been criticized for their potential to undermine the legitimacy of the wider animal rights movement.[34]

Between these two poles lies a third form of activism, animal liberation (also called "open rescue"), which involves the removal of suffering animals from harm's way.[35] More proactive than protest but less subversive than sabotage, open rescue strikes a balance that proves attractive to many animal advocates. Often the animals rescued are near death, rendering them essentially worthless to the industries that exploited them. Prosecutors, however, sometimes disregard this detail and invest their limited resources trying to convict rescuers of relatively minor offenses, including trespass and theft.[36]

Prosecution is not reserved solely for those who plan their rescues. Those who stumble across an animal in need may also find themselves on the wrong side of the law. Some who rescue wildlife, for example, later learn they inadvertently broke federal law.[37] Others have faced conviction not for the act of rescue, but for the subsequent refusal to return a rescued animal to an abusive home.[38]

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[33] Laura G. Kniaz, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 BUF. L. REV 765, 773-74 (1995); *see also* Animal Liberation Front Primer at 2, *available at* www.animalliberationfront.com/ALFront/primer3.pdf ("Live animal liberations are the heart and soul of the ALF. . . . but acts of ethical vandalism or sabotage are quicker, require less follow-up, less people, less evidence, and get 'em where it hurts the most – their funding!").

[34] *Kniaz*, *supra* note 33, at 802.

[35] *Id*. at 797-98.

[36] See, for example, *People v. Durand*, 46 A.D.3d 1336 (N.Y. App. Div. 2007), where an activist and hen rescuer was convicted of criminal trespass but was also charged with felony burglary. Defense attorneys argued convincingly that the stolen hens, who were near death, did not have the requisite value to support the burglary charge. *See Of Food and Felonies*, ROCHESTER CITY NEWSPAPER, May 10, 2006, *available at* http://www.rochestercitynewspaper.com/rochester/of-food-and-felonies/Content?oid=2132409.

[37] *See, e.g.*, U.S. v. Eller, 2007 US Dist. LEXIS 41255 (N.D. Cal. 2007) (finding that necessity defense was not available to defendant who removed a harbor seal pup from a beach, citing no necessity defense under federal law and

While arrest may surprise the Good Samaritan, those who engage in organized advocacy must, to some degree, expect it. Animal advocates may assess their risk of liability for certain acts by examining the analysis applied to crimes of civil disobedience in other social movements. The Ninth Circuit, in *United States v. Schoon*, distinguished between acts of direct and indirect civil disobedience, finding the necessity defense could potentially apply to the former but could never apply to the latter.[39] The *Schoon* court explained that those who protest the existence of a law by breaking it or preventing its execution engage in direct civil disobedience.[40] For instance, those who participated in civil rights lunch counter sit-ins were directly "challenging the rule that prevented them from sitting at lunch counters," engaging in a form of direct civil disobedience that was arguably necessary. In contrast, indirect civil disobedience involves violating, for the purpose of social or political protest, a law or interfering with a government policy "that is not, itself, the object of protest."[41] The defendants in *Schoon* engaged in indirect civil disobedience when they occupied a government building

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noting that the defendant failed to satisfy the Good Samaritan provision of the Marine Mammal Protection Act, 16 U.S.C. § 1371(d)); Jason Cook, *Kennedy brothers change tune on turtles*, CAPE COD TIMES (July 17, 2013), *available at* http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20130717/NEWS/307170332 (last visited Mar. 9, 2014) (two Kennedy brothers violated the Endangered Species Act when they disentangled a leatherback turtle); Kristin Fisher, *Woodpecker-Saving Girl's Mother Gets Fined $500*, WUSA9 (Aug. 3, 2001), *available at* http://www.wusa9.com/news/article/161065/158/Woodpecker-Saving-Daughter-Costs-Mom-500 (transporting a baby woodpecker rescued from a cat attack violated the Migratory Bird Treaty); *Man Rescues Bald Eagle, Could Face Jail Time*, THE WASHINGTON FREE BEACON (June 19, 2013), http://freebeacon.com/man-rescues-bald-eagle-could-face-jail-time/ (a former Indiana Department of Natural Resources employee violated the Bald and Golden Eagle Protection Act after taking a bald eagle to his home after caring for the sick animal in the wild for several weeks).

[38] State v. Boyles, 2006 Wash. App. LEXIS 1949 (Wash. Ct. App. 2006) (a woman who rescued a wet dog from a snowy road was convicted of theft, in part because she could have taken the dog to the shelter, and also because she later refused to return the dog to his original owner).

[39] U.S. v. Schoon, 971 F.2d 193, 196 (9th Cir. 1991).

[40] *Id*.

[41] *Id*. at 196.

to protest a foreign policy position. Such attenuated actions may never, the *Schoon* court determined, satisfy the elements of the necessity defense.[42]

Like their counterparts in the civil rights movement, animal advocates risk arrest when they engage in both direct and indirect civil disobedience. Those who document farming activities in violation of state "Ag Gag" laws, for example, engage in direct civil disobedience. Although arrests for direct civil disobedience during the civil rights movement ultimately facilitated the adjudication of the underlying issue of segregation, the value of arrest for direct civil disobedience is overrated. Given the availability of pre-enforcement challenges, arrest is simply not a necessary step to correct injustice.[43] Those who protest animal exploitation, in contrast, engage in indirect civil disobedience. The *Schoon* court suggested that protestors challenged their arrests merely to "gain[] notoriety for a cause" and to "get their political grievances discussed in a courtroom," arrest is, again, far from a desired outcome for the average animal advocate.[44]

Interestingly, although the *Schoon* court determined that protestors should always be denied the necessity defense, at least one court has allowed protestors to argue necessity. In *People v. Gray*, defendants who participated in a protest blocking a roadway across a bridge in New York argued necessity and defeated the disorderly conduct charges brought against them.[45] The *Gray* defendants protested the elimination of a dedicated bicycle lane during rush hour. They argued that the additional automobile traffic occupying the former bike lane increased pollution and also raised the risk of injury to pedestrians and cyclists who continued to use the bridge during rush hour.[46] The *Gray* court found that the defendants met their burden of production, offering some evidence to establish each of the elements of the necessity defense, and that the prosecution failed to disprove these elements beyond a reasonable doubt.[47]

While the *Schoon* and *Gray* decisions provide somewhat conflicting guidance to animal advocates hoping to invoke the necessity defense after engaging in direct or indirect civil disobedience, advocacy is not limited to these two categories. Two common forms of animal activism—economic sabotage and open rescue—do not fall neatly into either category. Economic saboteurs, for example, do not claim that the laws protecting private property are unjust. They

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[42] *Id*.

[43] *See* ALDF's "Ag Gag" challenges, *supra* note 29.

[44] *Schoon*, 971 F.2d at 199.

[45] People v. Gray, 150 Misc. 2d 852 (N.Y. Crim. Ct. 1991).

[46] *Id*. at 857.

[47] *Id*. at 855, 871.

violate theses laws not to challenge a public policy but to put pressure on a private practice. Open rescue, similarly, is not meant to undermine property laws or to protest or interfere with a government policy. Rescue is merely a way to end an animal's suffering. Clearly, since neither sabotage nor rescue challenges an unjust law or public policy, they are not direct civil disobedience. Since sabotage and rescue are motivated by a desire to affect social change, it is tempting to characterize them as indirect civil disobedience. But neither is meant to influence a political outcome. Economic sabotage merely applies pressure to players in the commercial sector and open rescue relieves the pressure felt by living cogs in the commercial machine. Thus, sabotage and rescue are not definitively forms of indirect civil disobedience.

In both sabotage and rescue, arrest has limited value to those hoping to advance the social movement. Adjudication simply cannot resolve the core issue when the underlying problem is not an unjust law but an immoral practice. Instead, arrest only serves to deter future advocacy. Deterrence may arguably be an appropriate response to vandalism and economic sabotage, as the social utility of these acts is somewhat attenuated. Deterring open rescue, however, is far less useful. To the extent that reducing animal cruelty is socially beneficial, open rescue should be tolerated, if not encouraged. Yet, open rescue is sometimes vigorously prosecuted, reflecting an underlying tension in the law, which simultaneously protects and exploits nonhuman animals. Here the necessity defense has the potential to serve as a tiebreaker, allowing the jury to decide whether two wrongs make a right. In practice, however, the jury rarely gets to weigh in.

C. Placing Rescues in Context: Examining Intent and Outcome

Given the opportunity to decide whether a rescue was justified, a jury will no doubt consider two key variables (among others): the rescuer's intent and the rescue's outcome. These may vary according to the target animal's species and situation, or merely according to the rescuer's agenda.

The most common form of open rescue involves farmed animals. Kept on enormous secured industrial facilities, their suffering is anonymous, witnessed only by employees and the occasional government inspector. With no other hope for relief, farmed animals are attractive targets for advocates planning rescues. While some rescuers may initiate rescue based on specific tips of cruelty, others may enter blindly, aware only that animal suffering is endemic to a certain farming practice. Farmed animal rescues commonly involve the removal of birds, as birds are easier to carry away than larger farmed species. Common targets include egg-laying hens, who die of thirst when trapped between the wires of their crowded battery cages; ducks force-fed to produce foie gras, who struggle with a range of illnesses and injuries caused by the rapid onset of liver failure; and male

chicks, a byproduct of the egg industry, who are macerated or suffocated soon after hatching.

Although animal cruelty is commonplace at these facilities, rescuers generally remove only a few birds, in part so that they may retreat undetected. These birds then commonly receive veterinary care to alleviate and document their suffering. Often rescuers also collect video evidence to further document the conditions at the targeted facility. Since video is a powerful tool both for changing consumer behavior and inspiring official intervention, gathering this evidence is frequently an important part of the mission. Yet, as explained below, the act of videotaping sometimes complicates the court's analysis of a rescuer's intent. Ultimately, since the animals taken have little to no commercial value, they are seldom missed. In fact, these rescues often go undetected until the undercover video is released.[48]

Unlike those who liberate farmed birds, advocates who rescue animals farmed for their fur tend to focus more on freedom than mistreatment. They often release as many animals as possible, seldom retaining possession of the animals. Such rescues are sometimes criticized because a portion of the newly-freed animals are inevitably recaptured, run over by cars, or consumed by predators. While death for animals farmed for fur is certain either way, these deaths remain damning. Failure to secure or care for the rescued animals suggests these operations aim to disrupt the business more than alleviate suffering or document harm.

Research labs prove another popular target for animal advocates. Like farms, labs are highly secured facilities, and the need to escape undetected hinders the ability to remove large numbers of animals. Some species used in labs, particularly nonhuman primates, are nearly impossible to rescue as they are difficult to contain and conceal. Some who rescue animals from labs sometimes also opt to steal or destroy the equipment or notes needed to repeat or complete experiments. While these efforts are meant to halt harmful experiments, often the theft of animals and data only increases overall animal suffering as researchers are forced to repeat experiments to replace the lost data.

[48] For example, in 2004, Sarahjane Blum and Ryan Shapiro were arrested only after they released a film, *Delicacy of Despair: Behind the Closed Doors of the Foie Gras Industry*, which depicted their rescue of force-fed ducks. *See Animal Rescuers Face Seven Years in Prison*, GourmetCruelty.com, http://www.gourmetcruelty.com/legal.php. More recently, in 2013, prosecutors in New York pursued burglary and trespass charges against Amber Canavan based on testimony she provided in a civil suit, *ALDF, et al. v. Aubertine, et al.*, Supreme Court, Albany County, New York, Index No. 8330-10, authenticating video taken during a 2011 open rescue at a foie gras farm.

Others animal advocates rescue wildlife, disrupting hunting or trapping activities, despite laws that expressly prohibit hunter harassment.[49] Hunter harassment also occurs on the high seas as members of the Sea Shepherd Conservation Society actively pursue foreign whaling vessels, monitoring their activities and interfering when possible. Although the Ninth Circuit recently dubbed the Sea Shepherd's tactics piracy,[50] the group enjoys popular support and its efforts, which are often televised, have raised public awareness of the cruelty of whaling. In fact, the International Court of Justice recently sided with Australia, finding that Japan's whaling operations in the Antarctic—which the Sea Shepherd has disrupted—violate the International Convention for the Regulation of Whaling's moratorium on commercial hunts.[51]

While few animal advocates can afford to follow whaling vessels into icy waters, similar rescue opportunities exist locally. Many marine mammals, particularly dolphins and sea lions, are intentionally injured or killed just offshore. The motives for such cruelty may vary, but some fishermen view these animals as unwelcome competition for dwindling ocean resources. Without witnesses, these criminals go unpunished. Animal advocates could, at minimum, document these crimes. Actual intervention, however, could quickly run afoul of the law, as even scaring off the targeted animal could lead to a rescuer's prosecution for harassing the marine mammal.[52]

Although the intent and outcome of each of these rescue scenarios varies, they all share a common thread. Premeditated and planned, these well-orchestrated interventions seem a poor fit for a defense designed to apply to unpredictable events. While premeditation understandably gives a court pause, it should not necessarily function as an automatic bar to a defense designed to

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[49] *See, e.g.*, CAL. FISH & GAME CODE § 2009 (making it a misdemeanor to "willfully interfere . . . with . . . lawful . . . shooting, hunting, fishing, falconry, hunting dog field trials, hunting dog training, or trapping . . . ."). For a compilation of harassment laws see *Hunter Harassment / Interference Laws*, ANIMAL LEGAL & HISTORICAL CENTER, http://www.animallaw.info/articles/armpushunterharassment.htm.

[50] Inst. of Cetacean Research v. Sea Shepherd Conservation Society, 708 F.3d. 1099, 1102 (9th Cir. 2013).

[51] Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), 2014 I.C.J. ___, ¶ 247 (Mar. 31, 2014), *available at* www.icj-cij.org/docket/files/148/18136.pdf.

[52] 16 U.S.C. § 1362 (defining "take" to include harassment); 16 U.S.C. § 1372 (prohibiting taking of marine mammals); 16 U.S.C. § 1371(a)(5)(D) (authorizing permits to be issued for incidental harassment of marine mammals).

maximize social utility. Nor does the accidental nature of discovering a dog trapped in a car fully explain why that rescue would likely be justified while the rescue of a discarded chick might not. The following sections will explore additional variables and distinctions that matter when arguing to apply the defense to both premeditated and opportunistic rescues.

II. THE NECESSITY DEFENSE: POLICY AND PRACTICE

A. When Justifying Illegal Acts Maximizes Social Utility

The necessity defense embodies a simple edict: acts that serve the greater good should be encouraged, not punished. If a person breaks a law to avert a greater harm, the action, although otherwise criminal, is justified. Viewed strictly as a utilitarian equation, the defense is attractive. The necessity defense encourages those faced with untenable options to choose the one likely to cause the least harm. It is, in essence, an efficient breach of the criminal code.[53] The utilitarian explanation, however, is deceivingly simple. In practice, the defense proves more controversial and complex as comparing the relative harms is inherently value-laden and ultimately political.

The necessity defense may be argued to avoid liability in both civil and criminal courts. In civil cases, the defense is either complete or incomplete.[54] It is complete if the act taken was meant to prevent a public harm. For instance, the defendant who destroys a building to prevent the spread of fire to a town pays nothing, as his selfless actions served the greater good and were therefore completely justified.[55] In contrast, an act meant to prevent a private harm results in an incomplete defense. A person is still justified when, during a storm, he leaves his ship moored to a dock rather than risk losing it at sea. However, because his action serves only himself, he must later pay to repair the dock.[56] In essence, when opting to sacrifice the dock for his boat, the boat owner tacitly agrees to cover the cost of repairs, anticipating the expense will be lower than the cost of losing his boat.

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[53] Marc O. DeGirolami, *Culpability in Creating the Choice of Evils*, 60 ALA. L. REV. 597, 623 (2009) (citing Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CAL. L. REV. 235, 251-52 (2007)).

[54] John Alan Cohan, *Private and Public Necessity and the Violation of Property Rights*, 83 N.D. L. REV. 651, 655, 690 (2007).

[55] Surocco v. Geary, 3 Cal. 69 (Cal. 1853) (finding that the mayor of San Francisco was justified in destroying the plaintiff's home to prevent the spread of fire).

[56] Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910).

In criminal court, the defense is still available to avoid both public and private harms, but there is no equivalent mechanism to shift the burden if a defendant acted somewhat selfishly. There is no way to split the difference if the greater good has limited, idiosyncratic social utility. The defendant is either punished or not. The defense is either complete or it is denied.[57]

Essentially, the bar is raised in the criminal context, which reflects a tension between the defense and two sometimes competing functions of the criminal justice system: retribution and deterrence.[58] The necessity defense spares those whose wrongful acts averted a greater harm because retribution is not required when someone acts for the greater good. Without the defense, people would be punished for making socially beneficial choices, which is inconsistent with a theory of punishment that requires that those who harm society must be harmed in return. But if the defense is granted too liberally, it threatens to erode the deterrent effect of existing laws. People would feel free to disregard established social boundaries, provided they could offer a somewhat colorable claim that they acted for the greater good. If the defense extended to those who acted selfishly, yet claimed they acted for the greater good, these offenders would have no motivation not to offend again. Courts considering the necessity defense aim to strike a balance between retribution and deterrence, sparing heroes and discouraging selfish rogues.

Where judges once conjured the necessity defense to avoid harsh outcomes,[59] today they tend to narrow its application to prevent its abuse. This judicial caution may be explained in part by the fact that the necessity defense is

[57] Some have proposed an "imperfect" or "partial" necessity defense. *See* J.C. Oleson, *"Drown the World": Imperfect Necessity and Total Cultural Revolution*, 3 UNBOUND 19, 34-41 (2007); Leo Katz, *Harm and Justification in Negligence*, 4 THEORETICAL INQ. L. 397, 413-21 (2003).

[58] In theory, the defendants who acted only for the greater good should not require rehabilitation or incapacitation as their acts arose from a set of circumstances and not from a personal defect.

[59] *See* Gideon Yaffe, *A Procedural Rationale for the Necessity Defense*, 43 J. VALUE INQUIRY 369, 372 (2009) (discussing *United States v. Ashton*, 24 F. Cas. 873 (C.C.D. Mass. 1834) (No. 14,470), which found a crew's revolt was justified when their captain refused to return to port to make repairs after discovering the ship was not seaworthy); s*ee also* Shaun P. Martin, *The Radical Necessity Defense*, 73 U. CIN. L. REV. 1527, 1540-42 (2005) (noting that the necessity defense developed against "a keen sense of the continuing danger of unchecked governmental power").

fairly characterized as a justification, not an excuse.[60] This important distinction is often debated and sometimes conflated.[61] Some scholars distinguish the two by noting that an excuse focuses personally on the actor, while a justification applies more generally to the act.[62] For example, the insanity defense excuses a specific defendant who is not blameworthy because his impaired mental state renders him incapable of having the mens rea to commit the crime. The necessity defense, in contrast, justifies any defendant breaking into a house to survive a snowstorm. Although the freezing trespasser has the mens rea to infringe on another's property rights, society welcomes the intrusion because it prevents the greater harm of the intruder's death.[63] A court that finds a criminal act necessary is not merely allowing the otherwise illegal behavior, it is, in essence, encouraging it. The action is "more than merely non-harmful."[64] It is justified, not excused.

The necessity defense is also frequently conflated with two similar but distinct defenses: self-defense and duress. Necessity and self-defense vary in two key ways. Unlike self-defense, the necessity defense is not limited to acts taken to protect life and limb. Necessity may apply to acts taken to defend property. Thus necessity has a broader scope. However, since someone claiming self-defense is acting to protect human life, which is universally recognized as valuable, he is empowered to take more extreme measures. Homicide may be justified in

[60] *See* Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 TULSA L. REV. 191, 222 (2007) (noting that Glanville Williams, who authored the Model Penal Code's necessity defense, insisted that necessity should be a justification, not an excuse).

[61] *See, e.g.*, Arnold N. Enker, *In Support of the Distinction Between Justification and Excuse*, 42 TEX. TECH. L. REV. 273, 300 (2009) (examining, in part, the imperfect maxim that justifications are universal but excuses are individual). *See also* Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1349-50 (1989) (noting that scholars disagree about whether duress is a justification or an excuse, and determining duress should be characterized as an excuse).

[62] Monu Bedi, *Excusing Behavior: Reclassifying the Federal Common Law Defenses of Duress and Necessity Relying on the Victim's Role*, 101 J. CRIM. L. & CRIMINOLOGY 575, 607 (2011).

[63] *See* Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 725, 844 (2004).

[64] DeGirolami, *supra* note 53, at 626.

self-defense, but not in the name of necessity.[65] Thus self-defense has a deeper reach.

While self-defense and necessity differ in scope and reach, what distinguishes necessity from duress is the source of the coercion.[66] Both involve defendants who feel forced to commit a crime. Both could elect to do nothing, though inaction might result in a greater harm. Someone acting under duress, though, is compelled to break the law by another person's influence.[67] He functions as a puppet, a vehicle for another person's unlawful agenda. When the law looks to place blame, it is clear that the puppeteer is the most culpable actor. Someone who acts out of necessity, in contrast, acts relatively independently, responding to a set of unfortunate circumstances, not bending to the will of another person. A defendant asserting necessity, or the "choice of evils" defense, is a victim of circumstances and there is thus no other more culpable person to blame for any harm that results. One who argues duress is a victim; one who argues necessity is less a victim and more a bystander turned hero. Finding the line between hero and vigilante thin, however, courts are often reluctant to find necessity.

B. Pitfalls to Applying the Necessity Defense

Although the necessity defense is recognized in some form in every jurisdiction in the United States,[68] its availability is far from certain. The defense is codified in fewer than half the states, and these statutes show considerable variation.[69] Defendants in the remaining states may invoke the defense as part of the common law or as a matter of public policy. Federal judges, however, will look for a statutory basis for the defense, as it is unclear that the defense even exists in the federal common law.[70] Since federal statutes rarely, if ever, explicitly

[65] Regina v. Dudley & Stephens, 14 Q.B.D. 273 (1884) (necessity defense not available for homicide).

[66] U.S v. Bailey, 444 U.S. 394, 409-10 (1980).

[67] Milhizer *supra* note 63, at 818-19.

[68] Martin, *supra* note 59, at 1535.

[69] DeGirolami, *supra* note 53, at 610-11 (listing the states in which the defense is codified and distinguishing between the various models, including, primarily, states using variations of the Model Penal Code, those following New York's code, and a generic necessity defense). See also Hoffheimer, *supra* note 60, 234-42, for a similarly thorough analysis of the different versions of the defense, which is examined *infra* note 100.

supply the defense, animal advocates should not expect to be able to invoke it in federal court.[71]

In fact, the defense may not always be the wisest tactical choice, as a defendant arguing necessity essentially admits that his actions were, in fact, criminal. Although innocence and necessity can be argued in the alternative,[72] necessity is more commonly argued by those facing significant evidence of guilt. Once a defendant determines the defense is both attractive and available, he then bears the burden of production. The defendant must produce enough evidence to make a colorable claim that his actions align with the elements of the defense.[73]

The necessity defense is commonly challenged on a motion in limine.[74] In this posture, the court must make an initial determination and decide whether the

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[70] "We need not decide, however, whether necessity can ever be a defense when the federal statute does not expressly provide for it." U.S. v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001). *See also* Stephen S. Schwartz, *Is There a Common Law Necessity Defense in Federal Criminal Law?*, 75 U. CHI. L. REV. 1259, 1287-88 (2008) (distinguishing between mala prohibita and mala in se, and arguing that the necessity defense should not be available for federal regulatory crimes, in which Congress has struck a policy balance and for which the defenses of duress and self-defense exist); Hoffheimer *supra* note 60, at 232 (discussing that Jay S. Bybee, in his 2002 memorandum using necessity to justify the torture of terrorists, acknowledged that there was no federal statute recognizing the necessity defense, and ignored the fact that government lawyers had regularly persuaded federal courts not to adopt a general necessity defense).

[71] One exception is the Marine Mammal Protection Act, which provides immunity for Good Samaritans under certain conditions. 16 U.S.C. § 1371(d) (2003). The Endangered Species Act has no equivalent provision. *See* 16 U.S.C. §§ 1531-44.

[72] State v. Medley, No. E2012-00646-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 842, at *8 (Tenn. Crim. App. Oct. 17, 2012).

[73] In New York, although necessity is not an affirmative defense, defendants still bear the burden of production, which requires the defendant to produce "*some* evidence" of the elements of the defense. People v. Gray, 571 N.Y.S.2d. 851, 854 (N.Y. Crim. Ct. 1991). While most elements of the necessity defense are subject to a reasonable belief standard, defendants are held strictly liable for their choice of values, and the defense can never justify taking a life to protect property. *Id.* at 855.

[74] *See* Luke Shulman-Ryan, Note, Evidence - *The Motion in Limine and the Marketplace of Ideas: Advocating for the Availability of the Necessity Defense for Some of the Bay State's Civilly Disobedient*, 27 W. NEW ENG. L. REV. 299

defendant has proffered sufficient evidence to establish the elements of the defense. Whether reviewed by the judge or jury, the majority of the elements are measured against a reasonable person standard.[75] Thus, judges considering a motion in limine consider the defendant's subjective beliefs to determine if the defendant reasonably believed his actions were necessary. Similarly, they look not at what actually happened but what was reasonably likely to occur when the defendant was faced with his choice of evils. Thus the defense may still apply when an action was not actually necessary, when the act taken failed to prevent the perceived harm, or even when the act itself caused more damage than the harm the defendant attempted to thwart. However, one element of the defense is reviewed by a purely objective standard. When considering whether the harm of abstaining outweighed the harm of acting, fact finders do not yield to the defendant's subjective beliefs.[76] Essentially, when considering a choice of evils on a motion in limine, the judge decides as a matter of law whether the defendant chose correctly, based on the facts as the defendant perceived them. If the necessity defense survives the motion, the jury may also be given a chance to evaluate whether the defendant chose correctly, although the Model Penal Code suggests that this question should be left up to the judge.[77] As a result, the use of the defense proves highly discretionary.

In fact, judges sometimes enjoy discretion even when defining the contours of the defense. Under the common law, the elements of the defense are not strictly defined. Thus, in jurisdictions that have not codified the doctrine, judges are able to raise or lower the bar by recognizing more or less stringent standards. At times, the doctrine may be equally fluid even in jurisdictions that have codified the defense. At least one scholar worries that judges may read additional hurdles into unambiguous statutes.[78] Such creative statutory

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(2005) (describing Massachusetts cases dealing with "broad" motions in limine to prevent introduction of any evidence relating to a necessity defense).

[75] *Gray*, 571 N.Y.S.2d at 855.

[76] Hoffheimer, *supra* note 60, at 218-19 (noting that Glanville Williams suggested the review should be "subjective as to facts" but "objective as to values").

[77] *Id*. at 229 (noting that Glanville Williams wanted to reserve the question of competing values for the court, but the drafters did not decide whether the burden fell on the judge or jury).

[78] Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 3-4 n.8 (1985) (discussing the possibility that courts might read a fault requirement into Colorado's lesser evils statute, COLO. REV. STAT. § 18-1-702(1) (1978), which

interpretation is not always required to thwart an animal advocate's claim of necessity. Judges in at least three states have found categorically that their legislatures did not extend the defense to actions taken to protect nonhuman animals.[79]

Judges may have good reason to be leery of necessity claims, as truly worthy defendants should have theoretically been spared trial by the exercise of prosecutorial discretion. Given bloated dockets, crowded prisons, and mandatory sentencing schemes, prosecutors are generally motivated to dismiss or settle cases brought against meritorious defendants.[80] Thus, the person who breaks a car window to free a trapped dog may be lauded, not charged. In fact, since police enjoy similar discretion, the dog's rescuer may not even be arrested. Despite these incentives, prosecutors have still filed felony charges against those whose crime consisted only of rescuing some dying ducks.[81]

Discretion, of course, works in both directions and prosecutors frequently face political pressures. Unchecked discretion thus sometimes facilitates these selective prosecutions. Animal enterprises are particularly adept at securing prosecution of low-level crimes like trespass.[82] The employee who rescues the suffocating chick may thus be treated as a thief, or even a terrorist, if prosecuted under the federal AETA, which labels as terrorists those who interfere with businesses that exploit animals.[83] While selective prosecution itself reflects a

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permits the necessity defense "only when the situation was 'occasioned or developed through no conduct of the actor'").

[79] 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).

[80] Martin, *supra* note 59, at 1539; Hoffheimer, *supra* note 60, at 198; *see also* Kim Ring, *Cops: Smashing Windows to Save Hot Dogs Isn't Cool*, WORCESTER TELEGRAM & GAZETTE, Aug. 8, 2013, http://www.telegram.com/article?Date=20130808&Category=NEWS&ArtNo=308099972&Ref=AR&TEMPLATE=MOBILE ("'No ADA (assistant district attorney) in their right mind would prosecute that' . . . 'I don't think a reasonable DA would even prosecute it'").

[81] *See* Hawthorne, *supra* note 32 (the charges were dropped right before trial).

[82] *See* discussion of "Ag Gag" laws, *supra* note 28.

[83] *See* The Animal Enterprise Terrorism Act, 18 U.S.C. § 43 (2006); *see also* U.S. v. Buddenberg, No. CR-09-00263 RMW, 2009 U.S. Dist. LEXIS 100477 (N.D. Cal. Oct. 28, 2009) (denying a facial challenge to the AETA by four activists charged for protest activities opposing the use of animals in

certain societal norm, this norm may better reflect the preferences of a politically-connected minority rather than society at large.[84] This is when the necessity defense is most crucial and when the voice of the jury is key. Too often, this is also when the defense is withheld and the jury is silenced.[85]

When the defense does make it to the jury, it should theoretically fare well,[86] as the burden, though shared, is heavier for the prosecution.[87] Generally, once the defendant establishes his claim, usually by a preponderance of the evidence,[88] the prosecution must disprove it beyond a reasonable doubt.[89] Of course, although a court may be willing to entertain a defense, the jury may still find it unpersuasive. Indeed, both judges and juries have rejected the defense for a

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research), *dismissed without prejudice for pleading deficiencies*, 2010 U.S. Dist. LEXIS 78201 (N.D. Cal. July 12, 2010).

[84] Iowa's Ag Gag bill passed despite opposition by 65% of Iowans. Ted Genoways, *Gagged by Big Ag*, MOTHER JONES, July-Aug. 2012, at 2, http://www.motherjones.com/environment/2013/06/ag-gag-laws-mowmar-farms?page=2.

[85] *See, e.g.*, State v. Troen, 786 P.2d 751, 752 (Or. Ct. App. 1990) (upholding felony conviction of animal rights activist who was denied the necessity defense at trial); People v. Durand, 847 N.Y.S.2d 890 (N.Y. App. Div. 2007) (animal rights activist convicted of three counts of trespass).

[86] People v. Gray, 571 N.Y.S.2d. 851, 853 (N.Y. Crim. Ct. 1991) ("[W]hen the necessity defense is actually submitted to the trier of fact . . . defendants have usually been acquitted.").

[87] *Id.* at 854, 863 (noting that after the defendant produces some evidence for each element of the defense, the prosecution has the burden to disprove the defense beyond a reasonable doubt).

[88] *See* James O. Pearson, Jr., *"Choice of Evils," Necessity, Duress, or Similar Defense to State or Local Criminal Charges Based on Acts of Public Protest*, 3 A.L.R. 5th 521, § 2b (citing Am. Jur. 2d, Evidence § 156). In New York, however, because necessity is not an affirmative defense, the defendant needs only provide "some" evidence, not a preponderance of it. *Gray*, 571 N.Y.S.2d at 854. In fact, the *Gray* court criticized "the low standard of production which some courts have articulated in theory and the extraordinarily high standard ultimately imposed in many instances on civil disobedients who raise the necessity defense." *Id*. (citations omitted).

[89] *Gray*, 571 N.Y.S.2d. at 854.

variety of offenses including weapon possession,[90] drunk driving,[91] kidnapping,[92] animal hoarding,[93] and civil disobedience.[94] However, the failure of the defense in many of these cases may say more about the defendant's desperation than the health of the necessity doctrine.

As discussed above, the defense is apparently definitively foreclosed for only one of these crimes: indirect civil disobedience.[95] Indirect civil disobedience, as explained by the Ninth Circuit, involves breaking one law to protest another.[96] The attenuation between the illegal act taken and the desired effect proves a major pitfall for protestors seeking sanctuary in the necessity defense. Those who engage in direct civil disobedience, on the other hand, can show a stronger nexus between their illegal action and the socially beneficial outcome, as the law broken is the law challenged.[97]

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[90] *See, e.g.*, U.S. v. Newcomb, 6 F.3d 1129, 1130 (6th Cir. 1993) (overturning defendant's conviction where defendant was denied necessity defense by trial court).

[91] *See, e.g.*, Brooks v. State, 122 So. 3d 418, 422 (Fla. Dist. Ct. App. 2013) (upholding trial court's denial of necessity defense to defendant who drove drunk to take his friend's dying cat to a veterinary); State v. Haley, 667 P.2d 560, 562 (Or. Ct. App. 1983) (upholding trial court's denial of necessity defense to defendant who drove drunk to take his father to the hospital).

[92] *See, e.g.*, U.S. v. Salemi, 26 F.3d 1084, 1087 (11th Cir. 1994) (overturning trial court's downward departure based on the trial court's belief that the defendant was attempting to avoid a greater harm when he kidnapped an abused child); Eilers v. Coy, 582 F. Supp. 1093, 1093-95 (D. Minn. 1984) (deciding on a motion for directed verdict that abductors who attempted to deprogram a member of an extreme religious group were unable to make the necessary showing for a necessity defense).

[93] *See, e.g.*, People v. Youngblood, 109 Cal. Rptr. 2d 776, 781 (Cal. Ct. App. 2001) (upholding trial court's denial of the necessity defense to charges of animal cruelty); Holz v. State, 418 S.W.3d 651, 663 (Tex. Ct. App. 2009) (unpublished) (finding trial court did not err in denying hoarder necessity defense, because defendant did not admit she had committed criminal mischief).

[94] *See, e.g.*, U.S. v. Schoon, 971 F.2d 193, 195-96 (9th Cir. 1991) (holding necessity defense inapplicable in cases of indirect civil disobedience and upholding trial court's denial of the defense).

[95] *Id*.

[96] *Id.*

[97] *Id.* at 196.

Animal rescue, as discussed above, does not amount to direct civil disobedience because rescue involves breaking just laws (prohibiting trespass and theft) to prevent unjust practices (cruelty and neglect). This attenuation makes rescue more like indirect civil disobedience, which may explain why few animal advocates are able to invoke the necessity defense.[98] Still, this attenuation alone does not amount to a strict bar, as demonstrated in *People v. Gray*. Moreover, animal rescue falls outside of the direct / indirect civil disobedience dichotomy, because the rescuer's motivation is to end an animal's suffering, not to change a public policy. While abortion protestors, who have been denied the necessity defense,[99] might similarly argue that their disobedience is to spare a fetus suffering, not to effect social change, one crucial distinction exists. The act that abortion protestors seek to interrupt (abortion) is legal, and the act that animal rescuers interrupt (cruelty) is not. Thus, the current failure of the necessity defense to justify open rescue suggests a judicial reluctance to condone rescue. Effectively distinguishing open rescue from indirect civil disobedience may prove crucial for animal advocates hoping to maximize judicial discretion in favor of rescue.

C. Elements of the Necessity Defense

From the common law to the criminal code, the elements of the defense are articulated differently across jurisdictions, but the substance is essentially the same.[100] First, an otherwise criminal act must be taken to avert an imminent

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[98] *See* People v. Durschmid, Circuit Court of the 19th Judicial Circuit, Lake County, Ill., Case No. 96CM4119, 1997 (transcript on file with the author); *cf.* People v. Durand, 46 A.D.3d 1336 (Sup. N.Y. App. Div. 2007); State v. Troen, 100 Or. App. 442 (Or. Ct. App. 1990).

[99] *See, e.g.*, People v. Garziano, 230 Cal. App. 3d 241, 244 (Cal. Ct. App. 1991) ("A pregnant woman's decision to exercise her right under the Constitutions of the United States and of the State of California to terminate a pregnancy is not and cannot be held to be a "significant evil.").

[100] The defense is codified as the "Choice of Evils" 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

harm.[101] Second, the harm to be averted must be greater than the harm that is likely to be caused by the criminal act taken.[102] Third, the defense fails if there was a legal alternative to the criminal act taken.[103] Finally, many jurisdictions also impose what amounts to a clean hands requirement, withholding the defense from defendants who played a role in creating the emergency. When reviewed on a motion in limine, failure on any single element is sufficient to keep the defense from the jury. While these four elements are distinct, the facts that demonstrate them are often shared. Thus it is not uncommon to find the arguments of similarly situated defendants fail on different elements.

(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.

Only three states—Nebraska, Pennsylvania, and Hawaii—adopted the Model Penal Code's version of the defense, with Hawaii adding an express requirement that the threatened harm is imminent. Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 TULSA L. REV. 191, 234-345 (2007). Hoffheimer provides an extensive review of the various other codifications of the defense including three main variations:

First, those that are generic or open-ended (including Alaska and New Jersey); second, the Illinois model (which differs from the MPC because it requires that the actor reasonably believed his conduct was necessary to avoid a greater harm); and third, the New York model (which is both the most stringent and the most copied, which imposes five requirements not in the MPC or the Illinois model: 1) actual necessity, not just a reasonable belief; 2) the conduct must be an emergency measure; 3) the threatened harm must be imminent; 4) the harm avoided must "clearly outweigh" the harm prevented; and 5) the decision to act must accord with community standards of conduct.). *Id*. at 236-42.

[101] *Schoon*, 971 F.2d at 195.

[102] *Id*.

[103] *Id.*

1. Avoiding Imminent Harm

To determine if an act was necessary to avoid an imminent harm, a fact finder considers three main factors: imminence, intent, and causation. Some jurisdictions consider also a fourth: the significance of the harm.

a. Imminence

Imminence is a fairly simple concept that appears to plainly apply to the rescue of suffering animals, yet the imminence requirement may actually significantly narrow the availability of the defense for many animal rescues. There is no doubt that animal suffering is recognized as an imminent harm under the law. Several states expressly grant authorities the right to seize or care for animals who are neglected or cruelly treated.[104] At least one, Ohio, extends this authority to private citizens.[105] Ongoing or imminent animal suffering often provides the basis for a warrantless entry, though suffering alone may not create exigency.[106] In Oregon, in *State v. Fessenden*, for example, officers were able to seize a starving horse not because she was starving but because she might suffer a painful fatal collapse at any moment.[107]

Since most rescues involve animals that are or appear to be dying, and good faith mistakes are tolerable,[108] the imminence requirement is rarely a hurdle, except for when rescuing animals that are not overtly suffering, such as relatively

[104] For example, Louisiana allows seizure when animals are "bruised, wounded, crippled, abrased, sick, or diseased." LA. REV. STAT. ANN. § 3:2431. Meanwhile, some states require a warrant and opportunity for a hearing before a neglected animal can be seized. MISS. CODE ANN. § 97-41-2 (West 2014).

[105] OHIO REV. CODE ANN. § 1717.13 (West 2013) allows any person to care for or remove an animal confined without food or water for more than fifteen hours. Notice must be provided the owner, if known.

[106] Commonwealth v. Duncan, 467 Mass. LEXIS 746, 751-54 (Mass. 2014) (no warrant needed for police officers to rescue neglected, frozen and chained dogs).

[107] State v. Fessenden, 310 P.3d 1163, 1164 (Or. Ct. App. 2013) (finding no warrant necessary under the Fourth Amendment to enter a pasture to tend to a starving horse). This case is currently under review by the Oregon Supreme Court and is notable also for interpreting "other" to include nonhuman animals.

[108] "[T]he necessity defense is available if a person acted in the reasonable belief that an emergency existed and there were no alternatives available even if that belief was mistaken." Nelson v. State, 597 P.2d 977, 979 (Alaska 1979); *see also In re* Eichorn, 81 Cal.Rptr.2d 535, 539 (Cal. Ct. App. 1998).

healthy fur-bearing animals who only someday face a painful death. The source of an animal's suffering might also be relevant. In New York, in *Suss v. American Society for the Prevention of Cruelty to Animals*, a district court judge considering the rescue of a cat trapped between two walls questioned whether warrantless entry could ever be allowed when the threat to the animal's life occurred without human misconduct.[109] Of course, since most animals are rescued from cruelty or neglect, both of which are caused by human action or omission, the *Suss* decision, which may in fact be an outlier, should not cause rescuers great concern.

The larger hurdle comes not with the rescue, which is necessary in the moment, but with the disposition of the animal after the rescue. Retaining possession of the rescued animal may prove difficult to justify under the necessity defense, given that a person may not continue his illegal behavior once the exigency is removed. Inmates who escape prison to avoid physical harm, for example, must generally promptly return to custody to justify their escape.[110] However, in some jurisdictions the prompt return to custody is not necessarily required as a matter of law, but only speaks to the credibility of the escapee's testimony.[111] Rescuers may have a similar obligation to promptly return a rescued animal to the animal's original owner. In Washington, in *State v. Boyles*, a woman who found a lost dog on a snowy street committed theft not when she saved the dog from the cold but when she later refused to return the dog.[112] In denying the necessity defense, the court focused not on the act of rescue but on the days that followed.[113] Although the court noted that the defendant may have had a defense had she believed the previous owner's property interest was extinguished when

[109] Suss v. ASPCA, 863 F. Supp. 181, 187 (S.D.N.Y, 1993). The judge also doubted the exigency of the situation because six hours passed between the report and the rescue. Although a warrant could have been issued in the interim, the judge seemed to discount the fact that the cat's condition could have deteriorated significantly during that time. In fact, the cat did not survive.

[110] U.S. v. Bailey, 444 U.S. 394 (1980).

[111] People v. Unger, 66 Ill. 2d 333, 341-42 (Ill. 1977) (the timing of an escapee's return to custody goes "to the weight and credibility" of his testimony); *cf*. People v. Lovercamp, 43 Cal. App. 3d. 823, 831-32 (Cal. Ct. App. 1974) (prisoner must immediately report to authorities to argue the necessity defense).

[112] State v. Boyles, 2006 Wash. App. LEXIS 1949 (Wash. Ct. App. Sept. 7, 2006). Notably, the court acknowledged that if the defendant had a good faith belief that the original owner's title was severed when the dog was lost, she might have avoided the theft conviction. However, the court found sufficient evidence that the defendant was aware that the original owner had a claim to the dog.

[113] *Id.*

the dog was lost, her actions, which included seeking out the owner, proved she knew better.[114]

Despite the *Boyles* decision, rescuers could still argue that retaining control over a neglected animal was justified, particularly if the animal was in critical need of veterinary care or if it were clear that returning the animal would place him back in danger. In fact, the persistence of the ownership interest may prove least problematic for those who rescue farmed animals, since state shelters are not generally required or equipped to care for farmed animals. In the absence of a state-sanctioned alternative for placement, rescuers could argue that there is no requirement to surrender farmed animals. In fact, since these animals would face an uncertain future in facilities ill-equipped to care for them, again the rescuer could argue that it was necessary to maintain the animal in other, safer environs. Even accepting that advocates hoping to rely on the necessity defense might be wise to immediately surrender a rescued animal to the care of the state to prevent the commission of an ongoing crime, the surrender itself could expose the rescuer to arrest for the trespass and initial theft. Such a solution may prove too high a price to pay to plead a defense with a distinctly dismal track record. Moreover, the rescuer could argue that by surrendering a rescued animal, they would be providing the state evidence of their commission of a crime, in tension with the Constitution's Fifth Amendment right against self-incrimination.

In the alternative, a rescuer who wishes to maintain possession of a rescued farmed animal might argue that through neglect the animal had been constructively abandoned, and therefore could not have been stolen.[115] Abandonment could be best argued only for animals whose death or disposal was imminent, such as male chicks, who are commonly suffocated or macerated at hatcheries, or spent hens, who are discarded after their peak laying years. Here, however, the farm could argue that they maintained control over the discarded animals, indicating that it would not be reasonable to assume they were abandoned.[116] In fact, at least one court has found that owners may retain a

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[114] *Id*.

[115] In fact, given that the elements of the defense are judged according to the reasonableness of the defendant's belief, the rescued animal need not be legally abandoned for the defendant to plead necessity. *See* Commonwealth v. Liebenow, 997 N.E.2d 109 (Mass. Ct. App. 2013) (theft conviction was proper as the defendant's belief that metal construction materials were abandoned was not objectively reasonable).

[116] Sharpe v. Turley, 191 S.W.3d 362 (Tex. Ct. App. 2006) (trash maintained on private property and removed by a private waste disposal company was not abandoned); *cf*. Long v. Dilling Mech. Contrs., Inc., 705 N.E. 2d 1022

property interest in the body of their companion animal even after the animal's death. In Florida a judge presiding over a recent cruelty case excluded evidence gathered from the body of a puppy left at a veterinary clinic, finding the warrantless seizure violated the Fourth Amendment.[117] Notably, the defendant retained an interest in the dog's body even though he elected for a group cremation and would not return for the dog's ashes.[118] Should this decision withstand appeal, the case could still be distinguished from those involving farmed animals, however, as the Florida ruling was designed to protect the defendant's interest in his pet's final interment. Nonhuman animals in agricultural facilities are treated as commodities, not companions. They are discarded, not interred. Even so, agricultural facilities are sure to identify other interests served by their ongoing control of the animals they appear to have abandoned. In particular, farms are apt to argue that they must maintain control over dead and dying animals to control the spread of disease.

b. Intent

While judges look for imminence to ensure that a defendant lacked the luxury of deliberation, they consider a defendant's intent to ensure his motives were true. The intent requirement denies the necessity defense to both the accidental hero and the fraud. For example, in *State v. Hurd*, a Maryland man claimed he shot his neighbor's dog to protect a turkey the dog was allegedly chasing.[119] Although he argued necessity during his bench trial, Hurd was convicted of animal cruelty because he failed to produce any evidence that the dog was anywhere near a turkey. The appellate court upheld his conviction in part because he admitted to shooting another of the neighbor's dogs a year prior, this time allegedly in defense of a deer, making it reasonable for a jury to find he acted maliciously.[120]

(Ind. Ct. App. 1999) (removal of company trash removed from a dumpster was not theft, because the trash was abandoned).

[117] David Ovalle, *Judge bars key evidence – a puppy's remains – in Miami Beach animal abuse case*, MIAMI HERALD, Dec. 6, 2013, *available at* http://www.miamiherald.com/2013/12/06/3802064/judge-bars-key-evidence-a-puppys.html.

[118] *Id*. ("Pet owners have an ongoing interest in ensuring that their final wishes for an animals' interment be honored," [Judge] Colodny wrote. "Without a warrant, without consent, law enforcement should not be permitted to interfere with the rights and wishes of the property owner.")

[119] Hurd v. State, 190 Md. App. 479 (Md. Ct. App. 2010).

[120] *Id.*

While *Hurd* demonstrates that the intent to rescue is insufficient without evidence of the underlying exigency, intent alone is also insufficient without evidence of an underlying harm. For example, in Oregon, in *State v. Troen*, a man who removed animals from a university laboratory was not allowed to argue that he acted out of necessity because he failed to first establish that the conditions in the lab were illegal.[121] The court excluded as prejudicial graphic photographs and video of animals suffering in other labs because although this may have explained his motive, his motive was only relevant if he acted to prevent a recognized harm.[122] Since experimentation on animals is legal, the liberation of the lab animals was theft, not rescue.

Similarly, in New York, Adam Durand, a hen rescuer who produced and distributed an undercover video of the farm he infiltrated, was denied the ability to argue the necessity defense in part because the court questioned his true motives. Here the issue was not whether animals were suffering from illegal cruelty but whether suffering alone was the rescuer's concern. Since Durand removed birds from the Wegman's egg farm on three separate occasions without reporting the cruelty to the authorities, the judge found he acted to hurt the farm, not to help the birds.[123] He considered Durand a vigilante, not a hero.[124] Denied the necessity defense, Durand then argued successfully that he lacked the intent to

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[121] State v. Troen, 100 Or. App. 442 (1990)

[122] *Id.*

[123] See *Judge Kehoe Sentences Wegman's Egg Farm Trespasser to 6 Months in Jail*, THE TIMES OF WAYNE COUNTY, May 29, 2006, *available at* WEGMANS CRUELTY: AN UNOFFICIAL BLOG, May 31, 2006, wegmanscruelty.blogspot.com/2006/05/monday-may-29-2006-times-of-wayne.html ("Wegman's Sentencing"), including the entire sentencing statement, which reads in part,

> "During the trial, I noted that you testified that after entering the hen house illegally each time, you subsequently failed to contact any appropriate lawful authority about your concerns for the welfare of the hens at the Wegman's farm. Nor did you contact any lawful authority when your movie was produced or shown, or at any other time. Had 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. . . . You chose not to do that. Rather, you chose to attack Wegman's by your video, your website, and verbal attacks in the press. . . . Society rejected vigilantism many years ago, and I believe we should not return there any time soon."

[124] *Id.*

burglarize, since the hens removed had little commercial value. He was still convicted of trespass, however, because the value of the birds was not relevant to that charge.

c. Causation

While the imminence and intent requirements ensure that the rescuer was reacting to a true emergency with admirable intentions, to invoke the necessity defense a rescuer must also show a causal connection between the act taken and the harm he sought to avert. Although the act should be reasonably likely to succeed, success is not required. Usually the connection is obvious. A hiker breaks into a home to get out of the snow. A drunk drives an injured friend to the hospital to stop the bleeding. The connection is equally apparent with animal rescue. A window is broken to free a trapped dog. A cage is opened to remove a trapped bird. So long as an animal is removed from an unlawfully abusive situation, the causal nexus should be found—at least for those acts that were truly necessary to resolve the exigency.

As discussed above, later acts, such as refusing to return the animal to authorities or the rightful owner, may not prove justified because the causal relationship dissolves when the exigency ends. Also, relatively futile acts with only marginal benefits may not be justified. For example, in *United States v. DeChristoper*, a man entered numerous fraudulent bids in a public land auction to prevent oil development, winning 14 leases.[125] Although DeChristopher's actions ultimately caused the cancellation of 77 leases, the court denied him the right to argue necessity because this disruption could not reasonably avert the harms he sought to avert, including climate change and the destruction of natural resources.[126] His crime, described by the court as placing dirt in the path of a fire, was found not worthy of the necessity defense in part because of the lack of a causal connection.[127]

In light of *DeChristopher*, animal advocates must choose carefully when defining which harms they sought to avert when they rescued animals or when they videotaped farming practices in violation of state "Ag Gag" laws.

[125] U.S. v. DeChristopher, 2009 U.S. Dist. LEXIS 106869, *4-5 (C.D. Utah 2009).

[126] *Id*. at *5.

[127] "Unlike a person demolishing a home to create a firebreak, DeChristopher's actions were more akin to placing a small pile of dirt in the fire's path. The court finds that DeChristopher's necessity defense fails because he cannot establish that his actions would directly bring about the ends he claims to have sought." *Id*. at *12-13.

DeChristopher was essentially punished for framing his fight too broadly. A rescuer could easily establish that rescue averted the harm of one animal's impending death, but would have difficulty arguing that removing one force-fed duck somehow averted the harm of foie gras production generally. In contrast, assuming most "Ag Gag" violators would collect evidence over an extended period of time, they would likely need to argue that their actions were meant to avert the harm of future abuse at a particular facility. They could not argue that their videos prevented the abuse of the specific animals in the videos, as it would be nearly certain that those animals were either deceased or still suffering abuse by the time the evidence were exposed. While it may also be true that these undercover videos could ultimately lead to large scale change in consumer behavior or industry practices, defendants should be wary of making this connection for the court, as proving causation would be near impossible.

d. Significance

In addition to imminence, intent, and causation, which are central to every necessity defense, some jurisdictions also impose a significance requirement. There, the defense only applies to acts taken to avoid a significant harm. Some states specify what types of harm qualify as significant. For instance, courts have restricted the defense in some states to apply only to acts taken to protect humans.[128] One state, Wisconsin, restricts the defense to acts taken in response to harms caused by natural forces.[129] In jurisdictions that are not so specific, animal cruelty should clearly qualify as a significant harm. After all, as Justice Alito noted in dissent on an issue the majority did not consider, the prevention of animal cruelty is a compelling state interest.[130] Moreover, finding that the destruction of animals is contrary to public policy, probate courts have refused to honor the wishes of testators who ordered their dependent animals destroyed after their deaths.[131]

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[128] *See* Brooks v. State, 122 So. 3d 418 (Fla. Dist. Ct. App. 2013); State v. Le Vasseur, 613 P.2d 1328 (1980); Commonwealth v. Grimes, 982 A.2d 559 (Pa. Super. Ct. 2009)

[129] WIS. STAT. ANN. § 939.47 (West, Westlaw through 2013 Act 380).

[130] U.S. v. Stevens, 559 U.S. 460, 495-96 (2010) (Alito, J., dissenting)

[131] *See Re:* Estate of Howard H. Brand, Chittenden County, Vermont, Probate Court Docket No. 28473 (1999) (finding destruction of a testator's horses was contrary to public policy); *see also* Smith v. Avanzino, No. 225698 Super. Ct., S.F. County (June 17, 1980) (finding a testatrix's request to destroy her dog Sido contrary to public policy); *In re* Capers' Estate, 34 Pa. D. & C.2d 121 (Pa. Orph. 1964) (finding a request to destroy two Irish Setters contrary to public policy).

While animal suffering may be contrary to public policy, suffering alone will not amount to a significant harm if the cause of the suffering is actually legal. For this reason, the defendant in *Troen* was not allowed to argue necessity because he failed to establish that the targeted laboratory's practices violated any law. Similarly, protestors blocking access to an abortion clinic have been denied the defense because abortion is legal.[132] In fact, even if abortion were illegal, since an abortion can generally be rescheduled, the protest merely delays the harm, and does not prevent it.[133] Thus, the protestors failed to establish a causal connection as well. Rescuers who remove nonhuman animals from legally sanctioned situations, then, should expect to be denied the defense unless evidence of illegal cruelty is found. Thus the defense will likely be denied to those who rescue animals held in fur farms, legal traps, or research labs. The defense would also be difficult to establish for farmed animal rescue in states that provide broad agricultural exemptions to the cruelty code.

2. The Balancing Test: Choosing the Lesser Evil

Even if a rescuer acts virtuously to spare a nonhuman animal the pain of imminent illegal cruelty, the necessity defense may still be unavailable. At the heart of the necessity defense is a balancing test, which weighs the harm the defendant sought to avoid against the harm the defendant intended to cause. The defense applies only if the defendant chose the lesser of two evils. It is denied if the defendant chose poorly. Although the court considers only what was reasonably likely to occur, rather than what actually occurred, the balancing test itself is otherwise purely objective and is decided, ultimately, as a matter of law. Because the necessity defense is often raised first during a motion in limine, this test grants judges considerable discretion in determining what may or may not be necessary for purposes of the defense.

In theory this balancing test should favor the rescuer. Animal cruelty, after all, is a significant harm and the crimes committed to liberate suffering animals are generally minor. In fact, since courts generally recognize only the commercial value of nonhuman animals and dying farmed animals are theoretically economically valueless, the only crime at issue should be trespass, which is a

[132] *See, e.g.*, Commonwealth v. Markum, 541 A.2d 347 (Pa. Super. Ct. 1988).

[133] *See* James O. Pearson, Jr., *"Choice of evils," necessity, duress, or similar defenses to state or local criminal charges based on acts of public protest*, 3 A.L.R. 5th 521, 2a n.11 (citing Cleveland v. Anchorage, 631 P.2d 1073 (Alaska 1981)). Similarly, in *United States v. Ayala*, the First Circuit found that protestors who trespassed on a Naval bombing target were not preventing an imminent harm because the bombing could be rescheduled. 289 F.3d 16 (1st Cir. 2002).

fleeting harm that often goes undetected. In practice, however, judges frequently find that the privacy interest of an animal enterprise outweighs the right of an animal not to suffer, particularly if the business later suffered reputational harm from a related undercover exposé.[134] This position appears to be bolstered by the existence of the AETA[135] and state "Ag Gag" laws,[136] which insulate animal enterprises from animal advocates. Nevertheless, when rescue remedies an illegal cruelty—which it must for the necessity defense to apply—the privacy interest of the abuser should not be artificially elevated.

In practice, the choice of evils test is often less about balancing the harm than it is about defining it. Judges seldom have to overtly pit commercial privacy interests against an animal's right not to suffer. Instead, judges often assume the practice causing the animal's suffering was legal and thus not harmful for purposes of the necessity defense balancing of harms. Rescuers who wish to remove animals from industrial facilities, then, should be careful to select only animals suffering from clearly illegal activity, which, ideally, should also be documented. However, to avoid the appearance of vigilantism, rescuers might consider using this documentation sparingly and perhaps even sharing it with law enforcement promptly.

Since society has, in many ways, already tipped the scales in favor of institutionalized animal suffering, the balancing test may become more interesting when considering the rescue of a companion animal. When weighing the value of the dog trapped in a hot car, for example, a court would have to determine whether a rescuer was justified in breaking a potentially expensive car window to free a relatively inexpensive dog. It seems likely that most courts would find the rescuer was justified despite the fact that it would cost more to replace the window than the dog. While such a decision would be in tension with tort cases that recognize only the replacement value of lost companion animals, a decision to the contrary would seem absurd. This tension demonstrates that nonhuman animals do in fact have value beyond the cost of replacement.

In this scenario, however, it seems likely that dog and the car would have the same owner. Under the unified owner theory, a rescuer would reasonably assume that the owner did not intend to use the car as a tool to kill the dog. By breaking the car window, then, the rescuer is merely correcting the owner's error when he sacrifices one piece of property, which can easily be replaced, to save the other, which has unique qualities. The unified owner theory alone does not explain why rescue is justified, however. If, for example, the owner left a note on

[134] People v. Durand, 847 N.Y.S.2d 890 (N.Y. App. Div. 2007).

[135] 18 U.S.C. § 43.

[136] *See* "Ag Gag" laws, *supra* note 28.

the car expressing his intention to kill the dog, the laws prohibiting animal cruelty would still justify rescue. In fact, even if the dog were dying painlessly, rescue might still be justified for two reasons. First, although property rights have historically included the right to destroy one's own property, this right has recently been excluded from Black's Law Dictionary and may no longer be assumed.[137] Second, as probate courts have recognized, the destruction of nonhuman animals is contrary to public policy.[138]

The unified owner theory, however, works against those who hope to rescue farmed animals. There, by prohibiting trespass, the owner has essentially left a note on the fence of the farm asking would-be rescuers not to interfere with the destruction of the animals within. Presumably, farm owners are well aware that animals perish during production. In farms that house hundreds of thousands of laying hens, for example, some birds will inevitably become trapped in wire battery cages and die of thirst or starvation. Some portion of the ducks that are force-fed to produce foie gras predictably die from infection or injuries related to feeding. On industrial farms, loss is merely the price paid for volume. Death will continue to be the farm owner's choice so long as it costs less to lose a hen than it does to pay a person to find and free her.

The question then becomes whether public policy truly supports the farmer's cold calculus. In states that exempt common farming practices from the cruelty code, the answer appears to be yes. After all, these states have weighed the price of animal suffering against the benefit of animal consumption and decided in favor of consumption. Yet even in states that favor farming, rescue may still be justifiable when the animal's suffering is not truly the result of an exempt husbandry practice. While the loss of animal lives is commonplace and perhaps even economically desirable—assuming, as producers might, that the cost of preventing premature death raises the final price of the product and that keeping prices low benefits the consumer—this does not mean that all animal suffering is legal. Most laws that exempt farmed animal cruelty specifically exempt common husbandry *practices*. The law thus exempts intentional acts, such as debeaking or force-feeding. In contrast, losses caused by an animal's misfortune, such as when a hen becomes trapped in a battery cage, are not necessarily intentional practices, but are more like highly predictable accidents, the unfortunate byproduct of volume.

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[137] Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005); *See also* Black's Law Dictionary.

[138] *Re*: Estate of Howard H. Brand, Chittenden County, Vermont, Probate Court Docket No. 28473 (1999); Smith v. Avanzino, No. 225698 Super. Ct., S.F. County (June 17, 1980); *In re* Capers' Estate, 34 Pa. D. & C.2d 121 (Pa. Orph. 1964).

Even though the suffering of hens in battery cages could be considered intentional based on the farmer's knowledge of this likely outcome, overcrowding would not necessarily qualify as a specific husbandry practice that had been blessed by a state legislature. Thus, rescuing an egg-laying hen dying of thirst would likely be justified, as the exempt farming practice involves only caging the birds, not trapping them and depriving them of water. Rescuing a duck dying of injuries related to force-feeding, in contrast, would not be justified, as the practice of force-feeding itself would likely be an exempt practice, necessary to produce foie gras. Rescuing a force-fed duck who was suffering from other ailments not related to force-feeding, however, could be justified. For instance, a farmer would have difficulty arguing that a duck suffering from a necrotic wound caused by a wire cage floor but infected by the lack of veterinary care was suffering as a result of a common husbandry practice. To do so, the farmer would have to argue that denying ducks veterinary care was a common husbandry practice rather than a common cost-saving business practice.

Since society has no real interest in promoting a farmer's privacy right if this privacy is used to support aberrant suffering, a court should be comfortable finding that the harm of an undetected trespass is outweighed by the benefit of preventing animal suffering and death. Yet judges also strongly favor the rule of law and thus favoring intentional trespass may be difficult, particularly if a judge is or hopes to be elected. While some judges are comfortable overtly siding with institutionalized animal suffering, most judges, like most people, consider themselves animal lovers.[139] For these judges, it is far easier to deny the necessity defense on other grounds and avoid balancing the harms altogether.

3. No Legal Alternative: Preclusion and Exhaustion

One attractive avenue for a judge leaning towards denying the necessity defense can be found in the requirement that a defendant must have had no legal alternative to his illegal action. If a legal alternative exists, after all, the defendant did not truly face a choice of evils. If a legal alternative exists, the rule of law prefers a person exercise it. If a defendant chooses not to, he proves himself more vigilante than hero. Courts may find two different types of legal alternatives. One is essentially preclusion, as it occurs when the legislature has considered the choice and decided the defense can never apply. The other amounts to exhaustion, as courts consider other steps a defendant could have taken, no matter how futile they may ultimately be. Of the two, the latter generally presents the bigger obstacle for would-be animal rescuers.

[139] *See* Wegman's Sentencing, *supra* note 123.

a. Preclusion

The necessity defense is rarely explicitly foreclosed for animal rescuers, mainly because foreclosure first requires that the defense itself must be codified. In states that have codified the necessity defense, no legislature has specifically considered whether animal rescue itself is desirable. Instead, legislative preemption is often found in language that allows only for the defense of "another." Courts have found that "another" refers to other human beings or legal persons, and thus the defense has been denied those who broke the law in defense of nonhuman animals. In Hawaii, for example, in *State v. Le Vasseur*, a laboratory employee was convicted of theft after he released two captive dolphins held in allegedly unlawful conditions.[140] Ultimately, he was unable to rely on the necessity defense because the Hawaiian statute applied only to acts taken to protect "another," which the court found included corporations, who are legal persons, but not dolphins and other nonhuman animals.[141] Similarly, in Florida, in *Brooks v. State*, a drunk driver who was speeding to take a dying cat to the veterinarian was denied the necessity defense.[142] Although the cat did in fact die during the traffic stop or shortly thereafter, neither the driver's sincerity nor the cat's suffering was enough to trump the language of the statute, which again referred to the defense of "others" and was interpreted to apply only to human others.[143]

[140] State v. Le Vasseur, 613 P.2d 1328, 1333-34 (1980). Le Vasseur argued that it was necessary to steal the dolphins to prevent violations of the Animal Welfare Act, which governs the treatment of animals used in research. In a rare decision overtly balancing the harm of the animals' suffering against the harm of theft, the trial court found, and the appeals court agreed, that the harm of the AWA violations did not outweigh the harm of the theft. The court also discussed that the defendant did not call authorities about the dolphins' suffering, although he planned the rescue for a year.

[141] *Id.* at 1333.

[142] Brooks v. State, 122 So. 3d 418 (Fla. Dist. Ct. App. 2013).

[143] Compare *Brooks, id.*, which involved a cooperative defendant and animal in actual need with Mickell v. State, 41 So. 3d 960, 961 (Fla. Dist. Ct. App. 2010), where the drunk driver was denied the necessity defense despite his claim that he only took over control of the vehicle from a sober driver who had an asthma attack. Mickell's defense was denied in part because he delayed the traffic stop by giving a false name and thus the medical emergency was not plausible. Further, the sober driver had already found her inhaler before Mickell was pulled over.

These losses are particularly troubling for would-be rescuers, as both defendants could have been denied the defense on other more fact-specific grounds. By invoking legislative foreclosure to circumvent the defense, these courts ensured their decisions had the widest possible reach. Both basically foreclosed the defense for all animal rescues in their states.

Some argue that the necessity defense is barred on similar grounds in California. In *People v. Ghaderi* the court considered a cat hoarder's claim that he needed to violate a restraining order so that he could get his cats back before the humane society euthanized them.[144] The *Ghaderi* court cites to *Youngblood* to suggest that the necessity defense is not likely available in California to prevent harm to nonhuman animals.[145] The defendant in *Youngblood*, who was also a cat hoarder, argued that she maintained possession of the cats to spare them from euthanasia by the state.[146] Youngblood, however, was not allowed to argue the necessity defense because the state legislature, in providing for the care and control of stray cats, had decided that the euthanasia of homeless cats was the preferred lawful alternative to hoarding.[147] The *Youngblood* court did not explicitly foreclose the defense as applied to all acts meant to protect animals. In fact, the *Youngblood* court did not even consider whether the necessity defense was reserved only for those who protected humans, suggesting that the court assumed the defense could apply to protect nonhumans, just not when the legislature has clearly spoken.

Whether or not the *Ghaderi* court succeeds in creating controversy in California, the fact that other states have specifically foreclosed the defense based on an animal's lack of legal personhood only underscores the importance of the pursuit for personhood in order to protect animals under the law.[148] As troubling as the *Le Vasseur* and *Brooks* decisions are for their breadth, on the upside, should a court someday find that a necessity defense reserved for the defense of "others" reaches those who defend nonhuman animals, that decision could also have a

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[144] *See* People v. Ghaderi, 2004 Cal. App. Unpub. LEXIS 2484 (Cal. Ct. App. 2004).

[145] "This all assumes, of course, that the defense of necessity is available at all to prevent harm to animals, a most dubious proposition for which defendant cites no authority." *Id*. at 22 (citing People v. Youngblood, 109 Cal. Rptr. 2d 776 (Cal. App. Dep't Super. Ct. 2001)).

[146] *Youngblood*, 109 Cal. Rptr. 2d at 780.

[147] *Id*. at 781.

[148] Cass R. Sunstein, *Standing for Animals* (with Notes on Animal Rights), 47 UCLA L. REV. 1333 (2000).

wide reach, potentially proving persuasive to judges in states with similar statutes or those that have not yet codified the defense.

b. Exhaustion

Even when an animal's lack of legal personhood is not a problem, the need to exhaust legal alternatives poses a significant hurdle to rescuers hoping to invoke the necessity defense. Courts commonly deny the defense after identifying alternative actions the defendant could have taken, including some that are ultimately futile. Although few would consider a futile act a true alternative to rescue, would-be rescuers should be prepared to exhaust these avenues if they hope to plead the defense.

The most obvious and potentially most effective alternative to rescue is reporting the abuse to the authorities, usually to the police or animal control, so that they can rescue the animal themselves. If the suffering animal is in an area without phone service, however, a court might find that a rescuer reasonably believed it was not possible to exercise this alternative. Similarly, if the animal might die before help arrives, a rescuer would likely reasonably believe he was justified in commencing rescue immediately after calling, rather than waiting for authorities. Also, if the animal is on the verge of death, the rescuer would have a colorable claim that he reasonably decided he should act first and call later.

The risk of calling the authorities, however, is the possibility of under-enforcement and apathy. If the authorities respond and find no cruelty or abuse, the rescue would be much more difficult to justify. Even if presented with compelling evidence that the authorities were wrong, a court might still defer to the judgment of the experts in the field rather than second guessing the police.

A more interesting question is whether rescue could still be justified if the authorities never respond to the call at all. If the refusal to respond was merely a matter of resource allocation, a court should welcome private intervention, as the rescuer's actions would supplement the state's strapped budget and enhance the greater good. If the lack of funding, however, reflected a policy decision that intentionally elevated the needs of the business over the needs of the animals, the court may be tempted to discourage rescue. Even then, however, the court should hesitate before punishing the rescuer whose calls for help were ignored.[149]

[149] However, see *Commonwealth v. Grimes*, 982 A.2d 559 (Pa. Super. Ct. 2009), where, although the court determined the necessity defense was not available to defend property under 18 PA. CONS. STAT. § 503, when considering the defendant's rescue of a chained dog the court also identified as a legal alternative calling the humane society, who responded only after the dog was taken. Notably, the defendant also refused to return the dog to the authorities or

For example, if the policy decision was made at a local level and the cruelty was prohibited by the state, the court should not be complicit in facilitating the local government's lawlessness. Even if the policy came from the state level, the court should still favor the rescuer, as a state law prohibiting cruelty is clearly the product of the democratic process and budget and policy decisions are further removed from voter accountability. In a contest between the two, the law should win. At minimum, the court should allow the defense to advance and let the jury decide.

While calling for help is a logical step that even the most jaded rescuer must recognize is an option, some courts might also consider political participation as a lawful alternative that should have been exercised. This is particularly likely when, as in the Wegman's case, a rescue appears to be motivated more to advance a political agenda rather than to help an individual animal.[150] Courts have long avoided granting a win in the courtroom to parties who suffered a loss at the ballot box, thus the defense has been denied to those who broke laws protesting foreign policy[151] and abortion.[152] Animal advocates who hope to rely on the necessity defense, then, would be wise to act on behalf of animals who already have the law on their side. A court is much more likely to forgive a rescue that remedies under-enforcement than one that tries to create a higher standard than the legislature requires.[153]

When the legal standard is fuzzy, a would-be rescuer is wise to take steps first to clarify it. For example, in Illinois, Michael Durschmid successfully invoked the necessity defense to justify trespassing at a rodeo.[154] His trespass was aimed at preventing an event now called "mutton busting", which involves young

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the original owner. The rescued dog lived in foster homes for five and a half months before his death.

[150] *See* People v. Durand, 847 N.Y.S.2d 890 (N.Y. App. Div. 2007).

[151] *See, e.g.*, State v. Dorsey, 395 A.2d 855 (N.H. 1978) (finding that protestors of a nuclear power plant had other lawful means to protest and thus trespass was not necessary). Most foreign policy cases, however, are decided on the lack of imminent harm. *See, e.g.*, People v. O'Grady, 560 N.Y.S.2d 602 (N.Y. App. 1990) (trespassers protesting nuclear weapons did not face an imminent harm); U.S. v. Schoon, 971 F.2d 193, 196 (9th Cir. 1991).

[152] *See* Pearson, *supra* note 133, at 2a n.10 (citing People v. Garziano, 230 Cal. App. 3d 241, 244 (Cal. App. Dep't Super. Ct. 1991)).

[153] People v. Durschmid, Circuit Court of the 19th Judicial Circuit, Lake County, Ill., Case No. 96CM4119, 1997 (transcript on file with the author).

[154] *Id.*

children riding sheep. Though the event is apparently cruel, given the terror and physical harm experienced by the sheep, it was tolerated by authorities who found it was not explicitly illegal. The event was also dangerous to children, who would be thrown from the terrified animals on to hard surfaces where they could be trampled. Durschmid's defense, based on preventing harm to both the children and the sheep, was successful in part because he had first lobbied diligently to have the event banned.[155] Notably, the judge also inquired if Durschmid had engaged in a protest of the event before he resorted to trespass.[156] While the Durschmid decision was characterized as a clear win for the necessity defense applying to the prevention of cruelty to animals, in truth, the victory is slightly muddled.[157] The jury requested but did not receive additional instructions on the definition of the defense and their decision did not clarify whether they were swayed by the risk of harm to the sheep, the children, or both.[158] Of course, those who rescue farmed animals could make similarly muddled claims, arguing, for example, that by removing diseased and dying hens they reduced the risk of contamination of the egg supply.

Sometimes the existence of legal alternatives defeats the defense but results in a better outcome for animals. For instance, courts have denied the necessity defense to many who sought to justify the abuse of nonhuman animals. As discussed previously, in *People v. Youngblood* a hoarder in California was not justified in keeping ninety-two cats in crowded conditions simply because they would have otherwise been euthanized by the state.[159] The court determined the defense was not available because the law recognizes humane euthanasia as a preferred outcome for an unwanted companion animal.[160] Although the court's decision was based explicitly on the availability of a lawful alternative, in reaching a conclusion on these grounds the court arguably accepted that the defense may indeed be available to spare nonhuman animals from death, just not when the death is sanctioned by the state and the alternative to death is more suffering. Similarly, in *Holz v. State*, a Texas hoarder was denied jury instructions

[155] *Id.*

[156] *Id.*

[157] Hindi v. Gooch, 2003 U.S. Dist. LEXIS 4287 (N.D. Ill. 2003).

[158] People v. Durschmid, Circuit Court of the 19th Judicial Circuit, Lake County, Ill., Case No. 96CM4119, 1997 (transcript on file with the author).

[159] People v. Youngblood, 109 Cal. Rptr. 2d 776 (2001); *see also* People v. Ghaderi, 2004 Cal. App. Unpub. LEXIS 2484 (Ct. App. 2004) (citing to *Youngblood* to suggest that in California the necessity defense is not available to help animals).

[160] *Id.*

on the necessity defense because she could have remedied, by mending a broken fence, the conditions that allegedly required her to keep eighty-six dogs indoors.[161] Again, by focusing only on whether a true exigency existed, the court seemed to accept that under different circumstances the law might have been justifiably broken to protect animals from harm.

The defense has also been invoked based on a benefit to nonhuman animals when one animal is killed to protect another.[162] Again, courts considering the defense in this context have not dismissed necessity claims outright, suggesting the defense can indeed be invoked when laws are broken to protect animals. Rather, defeat for these defendants frequently followed a failure to produce evidence. Sometimes, as in *Hurd*, the evidentiary deficiency prevents a defendant from pleading necessity.[163] Other times, the defense is pled but defeated, as in *United States v. Carpenter*.[164] There the defendant argued he was justified in killing migratory birds to protect his farmed goldfish, but he failed to produce evidence that this lethal approach was in fact necessary.[165]

4. Clean Hands

The rescuer who acted reasonably to prevent a greater harm, after exhausting all legal alternatives, may still face one final hurdle: a clean hands requirement, also known as the created culpability bar. Where it exists, this requirement is usually explicitly imposed, barring the necessity defense to those who had some culpability in creating the emergency they later acted to remedy.[166]

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[161] Holz v. State, 481 S.W.3d 651 (Tex. App. 2009).

[162] Hurd v. State, 988 A.2d 1143 (Md. Ct. Spec. App. 2010); State v. Vander Houwen, 163 Wash. 2d 25 (2007) (en banc). Vander Houwen killed numerous elk to protect his orchard and argued successfully that he should have been allowed to justify the killing according to the Washington state constitution, which holds simply that killing wildlife is lawful if reasonably necessary to protect property. Rather, at the trial court, Vander Houwen was forced to argue necessity under the general necessity defense, which was more stringent, imposing a preponderance of the evidence standard.

[163] *Hurd*, 988 A.2d at 1151-52.

[164] U.S. v. Carpenter, 933 F.2d 748 (9th Cir. 1991).

[165] *Id.* at 752.

[166] *See* COLO. REV. STAT. ANN. § 18-1-702(1) (West 2014) (choice of evils situation must have developed through no conduct of the actor); DEL. CODE ANN. tit. 11, § 463 (West 2014) (choice of evils must have developed through no fault of the defendant); DeGirolami, *supra* note 53, at 609-10; Robinson, *supra* note 78, at 24 n.88; *see also* ARIZ. REV. STAT. ANN. § 13-417 (2014) (defense not

The requirement is often qualified, limited only to when the defendant acted recklessly or negligently, thus satisfying the mens rea element for the crime charged.[167] Other times it applies to knowing or purposeful acts. In some jurisdictions the created culpability bar is not stated but implied, rooted in the common law.[168] There its application is murkier and thus harder to predict.

The created culpability bar, by reserving the necessity defense to only the most deserving defendants, serves the law's retributive function. However, this reservation is in tension with the utilitarian roots of the defense.[169] If the defense exists to encourage people to maximize social utility in times of crisis, the source of the crisis should be irrelevant. Whether a fire begins by accident or arson, society is generally better served if the fire is stopped by whatever means are necessary. The clean hands requirement, in narrowing the scope of the necessity defense, also arguably serves the law's desire for deterrence. It suggests that sometimes choosing the greater evil in a single instance actually serves society better overall if multiple acts of lesser evil may later be deterred. However, in doing so, the created culpability bar takes the focus off the act and places it back on to the actor and thus blurs the line between justification and excuse. To the necessity defense purist, then, the created culpability bar could be seen as a messy compromise, unnecessarily muddying the waters. To those who find the necessity

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available to one who acted knowingly or purposefully if defendant put himself in the situation); KY. REV. STAT. ANN. § 503.030 (West 2013) (defense not available to one who acted wantonly or recklessly regardless of mens rea).

[167] *See* ARK. CODE ANN. § 5-2-604 (West 2014); ME. REV. STAT. ANN. tit. 17-A, § 103(2) (2013); NEB. REV. STAT. ANN. § 28-1407(2) (West 2013); N.H. REV. STAT. ANN. § 627:3 (2014); 18 PA. CONS. STAT. ANN. § 503(b) (West 2014); DeGirolami, *supra* note 53, at 612-13 (citing HAW. REV. STAT. § 703-302(2) (West 2014)) (choice of evils unavailable if the actor was reckless or negligent for an offense requiring recklessness or negligence).

[168] *See* Robinson, *supra* note 78, at 3 & n.8 (citing section 18-1-702(1) of the Colorado Code as reading a fault requirement into the statute, which only applied when the situation was "occasioned or developed through no conduct of the actor"); *see also* State v. Diana, 604 P.2d 1312 (Wash. Ct. App. 1979). The defense is also available in Florida and Maryland by way of the common law. *See* McCoy v. State, 928 So. 2d 503, 506 (Fla. Dist. Ct. App. 2006); State v. Crawford, 521 A.2d 1193, 1200-01 (Md. 1987); Peals v. State, 584 S.W.2d 1, 5 (Ark. 1979) (cited in DeGirolami, *supra* note 53, at 612 & n.79) (finding culpability bar in any conduct despite reference to negligence and recklessness in section 5-2-604 in the Arkansas Code).

[169] DeGirolami, *supra* note 53 (coining the phrase "created culpability").

defense inherently unsettling, it could be just the tool to find the line between the rule of law and the truly efficient breach.

Assuming the clean hands requirement is unavoidable, if not necessarily desirable, the would-be rescuer must determine whether or not it applies to the act of rescue. The bar exists to prevent bad actors from contributing to the creation of the greater harm. The bar would apply, then, to a drunk who broke his dog's leg just so he could justify driving to the veterinary hospital, perhaps because the hospital happens to be next to his favorite pub. It would not apply to a drunk friend who discovered the abuse and who drove drunkenly only to get the dog veterinary care. So long as those who engage in animal rescue have not first facilitated the abuse, the clean hands requirement should not apply. Even the employee of an abusive facility should have little problem, assuming he has reported the abuse or plans to when the exigency is over, since the animals being abused were presumably placed in their vulnerable position by the employer, not the employee.[170]

While the created culpability bar should clearly have little or no effect on the true Good Samaritan who happens upon a rescue, most animal rescues are planned, at least to some degree. Given the fact that the necessity defense is ordinarily reserved for unforeseen circumstances, a court may be tempted to find that preparation for rescue creates some sort of culpability. However, the court should note that preparation is a reasonable first step of the necessary act of rescue. After all, it would be reckless to attempt to rescue an animal without having a method to carry it off safely. Thus acquiring and bringing a cage to a rescue is just another part of the justified act. However, to a court, preparation may indicate that would-be rescuers intend to break the law, not just in the moment that they discovery cruelty but long before, making them appear more like vigilantes looking for trouble and less like heroes who happen to discover cruelty. But courts should be reluctant to confuse a rescuer's competence with created culpability. Since the defense requires that a rescuer exhaust all legal options, it makes sense that in many cases the rescuer would have ample notice of the animal's suffering and thus have time to plan accordingly. Since the defense exists to maximize social utility, the court should not punish a rescuer who took reasonable steps to ensure the success of his endeavor.

[170] Investigator Taylor Radig was charged with animal cruelty for failing to report abuses until two months after they were recorded. *See* Will Potter, *Undercover Investigator Charged with Animal Cruelty for Videotaping Farm Abuse*, GREEN IS THE NEW RED, Nov. 22, 2013, http://www.greenisthenewred.com/blog/colorado-cok-investigation-taylor-radig/7403/.

Likewise, a court should not be quick to punish those who intentionally stumble across cruelty. After all, those who place themselves in a position to discover cruelty have still not had a hand in creating that cruelty. Rather, those who intentionally ignore institutionalized suffering are complicit in allowing the cruelty to continue. Those who seek to expose it are not creating culpability, but shedding it. If a court chooses to punish those who go looking for cruelty in order to remedy it, it should not be on the grounds that the rescuer was a vigilante looking for trouble. Punishment, if merited, should occur only after balancing the harms and finding that society benefits more from discouraging trespass than discouraging cruelty. While their opinions seldom state so explicitly, courts that deny rescuers the necessity defense are effectively determining exactly this.

III. SOCIETY WILL BENEFIT FROM RECOGNIZING RESCUE IS NECESSARY

While the prevention of animal cruelty is admittedly a worthy cause, cruelty is a daunting topic for courts to tackle, in part because it is so prevalent. Judges have many avenues to avoid confronting cruelty directly. In civil cases, for example, more cases are decided on issues of standing than on the merits. In the criminal prosecution of an animal rescuer, the issue of cruelty would only be raised in furtherance of a necessity defense. Thus, denying the defense allows a judge to deflect the cruelty issue and focus solely on the narrow issue of the offenses charged. Judges looking for an exit are likely to make two arguments to avoid deciding directly whether rescue is necessary to remedy cruelty. Judges will argue first that the issue threatens to open the judicial floodgates and second that these floodgates would be opened for what is, in the end, a political question. When examined closely, neither argument is particularly convincing.

A. Finding Rescue Necessary Will Not Open the Floodgates

Courts might reasonably fear the opening of judicial floodgates if they find more frequently that rescue is necessary. In short, if rescuers are not punished, more rescues will occur and more prosecutions will follow. The matter is simply one of judicial efficiency, conserving judicial resources.

Just because an argument is reasonable, however, does not mean it is right. This judicial efficiency argument is likely not correct because a similar argument was used to prevent homeless defendants from arguing that sleeping on the streets was necessary for their survival. In 1998, a California appellate court, considering the necessity defense in *In re Eichorn*, finally acknowledged what many lawyers and law students already know: sleep deprivation is a significant evil.[171] This finding, that sleep deprivation was an evil worth avoiding, made the necessity defense available to homeless defendants charged with violating laws prohibiting

[171] *In re* Eichorn, 81 Cal. Rptr. 2d 535, 539-40 (Cal. Ct. App. 1998).

urban camping. Although many homeless people could then make the same argument, the court was not overwhelmed by thousands of similar cases.[172] Instead, the court's groundbreaking decision merely clarified the law and encouraged police and prosecutors to use their discretion to keep such cases out of the courtroom.

Of course *In re Eichorn* considered a case of true direct civil disobedience, as the homeless were prosecuted for violating the same law that was ultimately unjust. Thus, although it did not explicitly strike down the camping ban, the *Eichorn* court essentially settled the matter when it held that the law might not apply to the very targets of the legislation. Animal rescue, as discussed above, does not amount to direct civil disobedience. Thus determining whether a particular animal had the right to be rescued would not be as decisive a judgment as the ruling in *Eichorn*. Animals would continue to suffer on private property while trespass laws remained intact. However, by entertaining the necessity defense for animal rescue, a court would indicate its willingness to balance the right of an animal not to suffer against the privacy rights of an abuser, sending a message that the court is willing to take its state's anti-cruelty code seriously. Actually finding that a rescue was necessary might ultimately lighten the court's load, as this interpretation, that animal suffering is a significant evil, would inspire either legislative action or, more likely, would inspire the exercise of prosecutorial discretion, diverting activist defense out of the courtroom altogether.

Some might argue that in order to apply the necessity defense to animal rescue the court must engage in a resource-intensive review of the rescue and cruelty. This burden, however, is basically wholly self-imposed, as courts are not required to hold the bar high when deciding if sufficient evidence exists to argue the defense.[173] Rather, courts that insist that the balancing of the harms is an objective question that must be determined as a matter of law may actually be working harder to avoid allowing the defense than they would be if they simply passed the issue on to the jury. Given that those who drafted the Model Penal Code did not necessarily agree with Glanville Williams, who wished to impose

[172] One scholar proposed that the availability of the necessity defense would present a risk of judicial burden, which would force the legislature to amend the criminal code. *See* Antonia K. Fasanelli, In re Eichorn: *The Long Awaited Implementation of the Necessity Defense in a Case of the Criminalization of Homelessness*, 50 AM. U. L. REV. 323, 350-54 (2000). Instead, Santa Ana's anti-camping provision remains intact, and a search of Lexis shows there are no more recent decisions adjudicating the matter since *In re Eichorn*.

[173] *See* People v. Gray, 571 N.Y.S.2d 851, 855-56 (criticizing as inappropriate high standards of proof for the necessity defense).

this standard and burden on the court,[174] courts who accept this burden essentially do so sua sponte.

To determine whether this self-imposed burden is merited, it is best to compare the risk of allowing a more robust application of the defense against the risk of imposing a narrow application. In short, we must compare the error cost if the defense is argued more frequently against the transaction cost of making determinations on motions in limine. The error, should a meritless defendant successfully argue necessity to a sympathetic jury, would be acquittal where conviction was proper. Given that "[i]t is better that a thousand guilty people go free than that one innocent person suffer unjustly,"[175] this hardly seems a high price to pay. In contrast, whatever time courts now spend holding the necessity defense at bay is currently wasted, as it only serves to ensure that the trial will move forward and more prosecutions will follow. Rather than sending the message once that animal cruelty is, like sleep deprivation, a serious evil that trumps the relatively minor crime of trespass, courts are spending valuable time vigorously defending their floodgates from what is likely an imaginary enemy. Moreover, they do so by taking the decision away from the jury, despite the fact that the jury is the bedrock of the American judicial system,[176] and that the necessity defense was specifically designed to allow juries to protect citizens from the government.[177]

While the risk of jury nullification does surely undermine the law's retributive function, a more robust application of the necessity defense would not necessarily compromise the law's deterrent effect. After all, animal advocates continue to trespass on behalf of animals despite the imposition of redundant laws, such as the AETA, that aim to enhance the penalty for otherwise minor crimes. These laws have, quite simply, failed to derail what amounts to a social movement. In essence, these laws are inefficient as they seek to deter behavior

[174] Hoffheimer, *supra* note 60, at 229.

[175] Thurgood Marshall, The Sword and the Robe (May 8, 1981), *available at* http://www.thurgoodmarshall.com/speeches/sword_article.htm (speaking before the Second Circuit Judicial Conference).

[176] A "jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. . . . [T]he right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely." Duncan v. Louisiana, 391 U.S. 145, 157-58 (1968).

[177] Martin, *supra* note 59, at 1540-42.

that has proved undeterrable.[178] While certain animal advocates no doubt find their activities chilled, others continue to risk prosecution, no matter what the price, to expose the institutionalized cruelty that billions of animals suffer each year.

Moreover, the number of rescues that might actually be justified by the necessity defense is small. The defense, if properly applied, would still only justify the rare endeavor that was either opportunistic, involving a non-endangered species, or premeditated, but which involved a confluence of friendly factors. First, the rescue must occur in a state with a meaningful anti-cruelty code that does not have either a farming exemption or an "ecoterrorism" law. Next, the rescue must not take place in a state that has codified the necessity defense in such a way as to preclude animal rescue. Preferably the state would also not impose a clean hands requirement, though the imposition of such is arguably not insurmountable. The rescuer must also be sure to exhaust all legal alternatives and that no law specifically preempts the rescue. Further, the rescuer must be careful not to risk triggering the AETA, as the necessity defense is likely lacking in federal court.[179] Finally, the rescuer must act virtuously, not exploiting the evidence uncovered and promptly surrendering the rescued animal. In all other rescue cases, courts that invest considerable effort restricting the defense are wasting their time preventing the application of a defense that is likely doomed to fail.

B. To the Extent Animal Cruelty Is a Political Question, It Is Best Resolved by a Jury Rather than Through Abstention

If courts realize they have spent precious resources needlessly guarding their floodgates in the name of judicial economy, they may still argue that they should avoid applying the necessity defense to animal rescue because they lack the institutional competence or mandate to answer what is in the end a policy question. However, when followed to its logical conclusion, this position proves too much. There certainly is a policy question at stake in the necessity defense. The fact finder must determine which harm is greater: that of the illegal action taken or that which the illegal action sought to avert. But this balancing of the harms is central to the necessity defense generally. To suggest that a court should

[178] Fasanelli *supra* note 172, at 352 (noting that enforcement of anti-camping laws cannot deter homelessness and only an increase in services will reduce illegal camping). Similarly, only a decrease in institutionalized cruelty will reduce the frequency of open rescue.

[179] According to the author's analysis, these criteria eliminate all but four states: Massachusetts, Minnesota, Nevada, and Rhode Island.

not be making this sort of policy decision is to suggest the necessity defense should not exist at all.

Moreover, the mere presence of a policy issue does not justify abstention, as it falls short of the actual political question doctrine, which applies to matters that affect the core functioning of the other two political branches. The political question doctrine helps courts avoid deciding matters of foreign policy[180] or Congressional procedure.[181] When a court is asked to choose between two competing criminal codes, the stakes are much lower and the task is attainable. The court's chief function, after all, is to interpret and apply the laws that are the product of the legislative branch. The judicial branch is constantly influencing policy by either allowing laws to stand or striking them down on technicalities. If the court misses its mark in some way, the legislature finds a workaround. Essentially, court decisions are a conversation between the judicial and legislative branches.

C. Clarification of the Model Penal Code Could Unburden Courts, Restore the Role of the Jury, and Reduce Cruelty

Here, the legislature has asked the court to do the impossible. It has asked the court to uphold conflicting laws that simultaneously protect and exploit nonhuman animals. In a grand charade, courts ignore the reality of under-enforcement and protect agency reputations by starting from the assumption that animal industries operate in accordance with all applicable laws. Through open rescue, animal advocates expose this tension and the ugly reality of lax enforcement, giving courts and juries the opportunity to weigh in. If the necessity defense were successfully argued to justify the rescue of nonhuman animals, legislatures and agencies would be forced to admit that they cannot claim the glory for protecting both animals and industry, that they have chosen one over the other. In the end, it could very well be true that juries too will side with industry, but courts would be well within their competence to allow the jurors to take the heat rather than appearing as apologists for the industry.

Courts need not go at it alone. Nor do they need to wait for state legislatures to weigh in. Another body, the American Law Institute ("ALI"), has the power to issue a Restatement clarifying the proper role of the judge policing the boundaries of the necessity defense. In light of the analysis above, the ALI would be wise to set the bar low, requiring only that defendants present some evidence (rather than substantial evidence or a preponderance of the evidence) to establish a prima facie case before the burden shifts to the prosecutor. Moreover,

[180] Baker v. Carr, 369 U.S. 186 (1962).

[181] Nixon v. U.S., 506 U.S. 224 (1993).

the ALI should relieve judges of their self-imposed burden to balance the harms and should encourage them to allow the defense to proceed to the jury, except, of course, in the most obviously deficient cases.

CONCLUSION

If animal protection laws were adequate—and adequately enforced—animal rescue would not be necessary. So long as there remains a conflict between laws that simultaneously protect and exploit nonhuman animals, animal advocates will continue to remove animals from abusive situations. By artificially placing the necessity defense out of reach of rescuers, courts become complicit in the systematic cruelty that persists as a result of these competing codes. Courts would be better served to step back and allow animal advocates and juries to determine whether rescue is truly necessary. The only risk is that juries may confirm that animals have a right to life. If this is true, the current regime is doing society a great disservice by denying the defense to animal rescuers.