

VOLUNTARY PROSECUTION AND THE CASE OF ANIMAL RESCUE

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On October 3, 2022, two animal rights activists — one of whom, Wayne Hsiung, is an author of this Essay — faced a felony trial and up to ten years in prison for “stealing” two piglets from the largest pig farm in the nation.¹ The activists had entered the facility in March 2017 to document the suffering of animals.² They found endless rows of sows locked in metal pens roughly the size of their bodies, unable to move or even turn around; piglets covered in blood, birthing fluid, and feces, starving because their mothers’ teats were mangled and bloody; and dead piglets, some of whom were being cannibalized by their siblings.³ The air was thick with the smell of sewage and decay.⁴ The activists rescued two piglets and published the dramatic footage in the *New York Times*.⁵ Soon they were facing felony charges.⁶ But what came next was a surprise, even to the defendants themselves: a rural, conservative jury, motivated in part by the lack of enforcement of animal cruelty laws against the factory farm, acquitted the activists of all charges.⁷ The stunning outcome generated international headlines⁸ and highlighted an upside-down legal regime in which those who might save animals from a cruel death are treated as criminals while the industry inflicting the

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¹ Marina Bolotnikova, *Activists Acquitted in Trial for Taking Piglets from Smithfield Foods*, THE INTERCEPT (Oct. 8, 2022, 11:33 PM), <https://theintercept.com/2022/10/08/smithfield-animal-rights-piglets-trial> [<https://perma.cc/39XV-E2V4>].

² *Id.*

³ Direct Action Everywhere — DxE, *Operation Deathstar with Wayne Hsiung and DxE — Virtual Reality*, YOUTUBE (July 6, 2017), <https://www.youtube.com/watch?v=wlSE1X-hSqQ> [<https://perma.cc/8ZSY-ZC9K>]; see also Andy Greenberg, *Meet the Activists Risking Prison to Film VR in Factory Farms*, WIRED (Dec. 5, 2019, 6:00 AM), <https://www.wired.com/story/direct-action-everywhere-virtual-reality-exposing-factory-farms> [<https://perma.cc/URS4-EFCF>] (describing footage firsthand).

⁴ Direct Action Everywhere — DxE, *supra* note 3; Greenberg, *supra* note 3.

⁵ Stephanie Strom, *Animal Welfare Groups Have a New Tool: Virtual Reality*, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/06/dining/animal-welfare-virtual-reality-video-meat-industry.html> [<https://perma.cc/FGM9-68DA>].

⁶ Greenberg, *supra* note 3.

⁷ Bolotnikova, *supra* note 1.

⁸ See, e.g., *id.*; Andrew Jacobs, *Animal Rights Activists Are Acquitted in Smithfield Piglet Case*, N.Y. TIMES (Oct. 18, 2022), <https://nytimes.com/2022/10/08/science/animals-rights-piglets-smithfield.html> [<https://perma.cc/RMA9-44R6>].

suffering is protected by law.⁹ What happened inside the southern Utah courtroom, we argue, was not an aberration but a historical pattern. For at least 150 years, social movements have used “voluntary prosecution” as a lever to drive legal and social change when other avenues for reform have been blocked.

Though undertheorized, the impacts of voluntary prosecution are canonical in American history, from the women’s suffrage movement to the civil rights movement. For example, even if Rosa Parks was violating a law when she refused to give up her seat, her arrest and prosecution mobilized the Montgomery bus boycotts, which have been rightly viewed as politically monumental. Criminal cases like Parks’s can provide a powerful opportunity to “rally the troops” and mobilize marginalized groups. And they can reverse the traditional accountability rationale of the criminal law, which counsels, “Don’t do the crime, if you can’t do the time.”¹⁰ If the public views the charges (or even the criminal statute itself) as unjust or unlawful, then accountability may come, but in the form of a backlash against the legal system.¹¹ The prosecutor, the judge, and even the law itself will be held to account when the injustice of a prosecution — or its tension with other, more important principles of law — becomes apparent.

In developing this theory of voluntary prosecution, we juxtapose two seemingly disconnected scholarly frames about the criminal law and argue that bridging them can reveal an important strategy for social movements. First, we note the salience of criminal law narratives in the media and politics; the criminal law has emerged as a “genuine American civic religion” that is culturally enshrined and celebrated in politics, news coverage, and entertainment.¹² The public has a seemingly insatiable interest for stories of malfeasance being met with “accountability” and increased public safety and security.¹³ The public also views itself as competent to evaluate issues of criminal liability, unlike other areas of law that are deemed technical and perhaps less newsworthy, and compelling storylines can attract major audiences.¹⁴ Second,

⁹ See Farhad Manjoo, Opinion, *Rescuing Farm Animals from Cruelty Should Be Legal*, N.Y. TIMES (Feb. 14, 2023), <https://www.nytimes.com/2023/02/14/opinion/foster-farms-chicken-slaughterhouse-animal-cruelty.html> [<https://perma.cc/8Z4N-T9WE>].

¹⁰ The accountability rationale is perceived by some as important even in cases of political protest or civil disobedience advocacy. Michael Patrick Wilt, *Civil Disobedience and the Rule of Law: Punishing “Good” Lawbreaking in a New Era of Protest*, 28 GEO. MASON U. C.R. L.J. 43, 45 (2017) (arguing that “part of living in an orderly society involves obeying and adhering to the rule of law”).

¹¹ Indeed, even the jurors themselves in a case may react against the legal system. See *infra* notes 126–29 and accompanying text.

¹² Jonathan Simon, *Losing Our Punitive Civic Religion*, BRENNAN CTR. FOR JUST. (Apr. 13, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/losing-our-punitive-civic-religion> [<https://perma.cc/9LNP-XJM2>].

¹³ See Stephen Mann, *Crime and the Media in America*, OXFORD U. PRESS: BLOG (Apr. 5, 2018), <https://blog.oup.com/2018/04/crime-news-media-america> [<https://perma.cc/74B7-K73X>].

¹⁴ See *id.*

there is a body of scholarship that recognizes that oftentimes it is the “indirect effects” of legal cases rather than the cases themselves that are most likely to generate social change — *including* shifts in legal doctrine or legislation.¹⁵ For example, Professor Michael Klarman has argued that major Supreme Court decisions recognizing criminal procedure rights for Black Americans largely failed to “affect the actual treatment of [B]lack criminal defendants in the South,” but this litigation may still have prompted a variety of “more intangible consequences” that “indirectly contributed to the modern civil rights movement.”¹⁶ This movement, in turn, was crucial to cementing genuine change in both legal and social institutions where courtroom decisions had failed, and it did so by engaging with a wider and more democratic set of stakeholders about the decisions made in court.¹⁷

It is through the lens of these two scholarly frames — the salience of the criminal process, and its movement-building impacts — that we propose a theory of “voluntary prosecution.” Prosecution has long been feared as the worst possible outcome for activists, or, at best, as a regrettable tool for generating public sympathy.¹⁸ But we argue that the aforementioned features of criminal litigation make criminal prosecutions and trials a potentially viable element of long-term law reform strategies. The argument, of course, is not that criminal charges are unequivocally good. It would be callous to overlook the hardships that prosecutions impose on the persons being prosecuted, particularly those from communities that have historically been targeted by the police. We do not attempt to rehabilitate prosecutors who pursue politicized prosecutions, nor do we seek to undermine public skepticism of prosecutions more generally. We argue, however, that in the right context activists can leverage prosecutions and the platform of a criminal trial as a powerful mobilization tool, with the goal of large-scale law reform. High-profile, politicized prosecutions may be a necessary, even desirable ingredient of long-term legal change because they expose the public to defects in the law that might otherwise be ignored.

In advancing this novel theory of voluntary prosecution, this Essay proceeds in three parts. Part I defines voluntary prosecution. Part II

¹⁵ See, e.g., Gregory Briker, Note, *The Anatomy of Social Movement Litigation*, 132 YALE L.J. 2304, 2312–17 (2023) (describing scholarship on “indirect effects” of social movement litigation, *id.* at 2312); Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 62–66 (2011) (discussing the “internal and external effects of litigation,” *id.* at 63).

¹⁶ Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 49–50 (2000).

¹⁷ *Id.* at 90 (quoting Charles Hamilton Houston as saying that the objective of the litigation was “to arouse and strengthen the will of the local communities to demand and fight for their rights”).

¹⁸ See, e.g., Shalini Bhargava Ray, *The Law of Rescue*, 108 CALIF. L. REV. 619, 623 (2020); WILL POTTER, GREEN IS THE NEW RED: AN INSIDER’S ACCOUNT OF A SOCIAL MOVEMENT UNDER SIEGE 31 (2011) (discussing the FBI’s repression of the animal rights and environmental movements of the early aughts).

then provides an in-depth analysis of two historically significant voluntary prosecutions: the trial of Susan B. Anthony for “unlawfully” voting and the trial of gay rights activist Dale Jennings for “lewd conduct.” Finally, Part III discusses voluntary prosecution in the context of the animal rights movement — where it is currently being used to great effect — and considers lessons for that movement and other social movements.

I. DEFINING VOLUNTARY PROSECUTION

Voluntary prosecution is part of what social change scholars in political science have termed a “political jiu-jitsu,” or an effort to turn political “repression into weakness for those in power.”¹⁹ Commentators have observed that police crackdowns on protests can do more to undermine the legitimacy of the status quo than the protest itself.²⁰ The governmental enforcement of norms through heavy-handed tactics may mobilize support for the protesters’ cause.²¹ In this way, the so-called “backlash” to civil disobedience by government officials can itself generate a public backlash against the government in the form of support for an otherwise marginalized social movement.²² In a similar way, but without the risk or need for physical violence by police, social movements can attract public attention to their cause by leveraging the fact of a criminal prosecution against activists.²³ To date, the power of criminal trials as a tool for garnering “public sympathy”²⁴ has gone underappreciated in the legal literature.²⁵ Instead, it has often been assumed that a criminal prosecution will be crippling to efforts to mobilize.²⁶ We

¹⁹ MARK ENGLER & PAUL ENGLER, THIS IS AN UPRISING: HOW NONVIOLENT REVOLT IS SHAPING THE TWENTY-FIRST CENTURY 6 (2016).

²⁰ ERICA CHENOWETH & MARIA J. STEPHAN, WHY CIVIL RESISTANCE WORKS: THE STRATEGIC LOGIC OF NONVIOLENT CONFLICT 50–51 (2011).

²¹ *Id.*

²² *Id.*

²³ Proponents of an accountability model of criminal law insist on prosecution because they argue that without the threat of prosecution the act of “disobedience” loses its defining character. *See, e.g.*, Wilt, *supra* note 10, at 53 (arguing that such persons must “accept their punishment” as “part of their protest.” (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 22.03 (4th ed. 2006))).

²⁴ *See* ENGLER & ENGLER, *supra* note 19, at 109–11 (discussing research showing that widespread public sympathy is essential to movement success).

²⁵ There are some notable examples of commentators arguing that the fact of a conviction (though less so the trial itself) is an important part of advocacy. *See, e.g.*, CARL COHEN, CIVIL DISOBEDIENCE: CONSCIENCE, TACTICS, AND THE LAW 88 (1971) (suggesting that pursuing acquittals would be “tactically unwise”). Our view is that acquittals are, in fact, terrifically helpful for mobilizing activists. But efforts to consistently avoid trials would, we think, be strategically unwise.

²⁶ *See, e.g.*, Karl-Dieter Opp & Wolfgang Roehl, *Repression, Micromobilization, and Political Protest*, 69 SOC. FORCES 521, 540 (1990) (arguing that repression is a cost that has a direct deterrent effect on protest); Jennifer Earl, *Repression and Social Movements*, in 3 WILEY-BLACKWELL

argue here, in contrast, that voluntary prosecution has played an essential role in movement mobilization.

But we should start by candidly acknowledging the basic reality that for most people, most of the time, being prosecuted is horrible and life-altering in all the wrong ways. As Professor Alexandra Natapoff has noted, “One of the great myths of our criminal system is that minor arrests and convictions are not especially terrible for the people who experience them.”²⁷ There is both power and privilege in courting prosecution. For our part, we are not feckless advocates of prosecution who are unaware of or willing to overlook the myriad problems with the criminal system. Quite the contrary, it is precisely the fact that we live in an era where the phrase “the New Jim Crow” resonates with the public and concerns about politicized prosecutions are nearly daily headlines that makes this strategy so potent. Put differently, we agree with — and one of us has contributed to — the scholarly literature rightly focusing enormous attention on the defects of our prosecutorial system, from racial bias and overcriminalization, to mass incarceration and procedural unfairness.²⁸ What is true of the criminal system more generally will likely be true of voluntary prosecutions as well: the harms will be felt most acutely by those who already experience social disadvantage.

We also want to emphasize at the outset that we are sympathetic to the critiques of an expressivist approach to criminal punishment, which might celebrate criminal trials as opportunities to create a public soapbox on matters of great concern.²⁹ Some scholars have advocated for the use of criminal trials as a powerful tool of communicative disapproval.³⁰ We do not generally endorse the criminal system as the only,

ENCYCLOPEDIA OF SOCIAL AND POLITICAL MOVEMENTS 1083, 1087–88 (David A. Snow et al. eds., 2013) (discussing scholarship on the effects of repression on social movements). The one exception is the literature that has advocated for a discrete innovation in the legal doctrine to accommodate a more robust use of the so-called necessity defense. *See, e.g.*, John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 PIERCE L. REV. 111, 111 (2007) (arguing that the use of the necessity defense allows persons “not so much to gain acquittal . . . [but] to advance the more important objective of publicly airing the moral and political issues that inspired their act”); Steven M. Bauer & Peter J. Eckerstrom, Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1173 (1987).

²⁷ ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 19 (2018).

²⁸ *See, e.g.*, Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585, 587 (2020) (discussing racial disparities in the death penalty); JUSTIN MARCEAU, BEYOND CAGES: ANIMAL PROTECTION AND CRIMINAL PUNISHMENT (2019) (arguing for a paradigm shift away from prosecution within the animal protection movement due to the manifold defects of the criminal legal system).

²⁹ We are even critical of the idea that more prosecutions or convictions for animal maltreatment will meaningfully advance the status of animals in law or society. *See generally* MARCEAU, *supra* note 28; CARCERAL LOGICS: HUMAN INCARCERATION AND ANIMAL CAPTIVITY (Lori Gruen & Justin Marceau eds., 2022).

³⁰ *See, e.g.*, CARSTEN STAHN, JUSTICE AS MESSAGE: EXPRESSIVIST FOUNDATIONS OF INTERNATIONAL CRIMINAL JUSTICE 25–26 (2020).

or even the best, way to communicate moral messages, because, among other reasons, sending moral messages through criminal punishments — as drug prosecutions often seek to do — is often both ineffectual and regressive.³¹ The power dynamics of the criminal system tend to obscure the moral message the government seeks to communicate through high-profile trials or anticrime campaigns.³² Yet, ironically, it is precisely because we agree that there are problematic power dynamics and hierarchies present in criminal trials that we think that the overzealous prosecutions of marginalized activists engaged in sympathetic, nonviolent conduct can provide a promising avenue for public advocacy. It is not that criminal trials are incapable of expressing messages, but that the most profound message is not one of law and order, as is often assumed. Voluntary prosecution works because it inverts the narrative and uses the system against itself to show that power is impeding social progress.

Another defining and yet paradoxical aspect of voluntary prosecution is its explicit reliance upon courts and formal proceedings. Social change experts have criticized the lawyer-centered notion that social change occurs primarily through litigation or connections to officials in high office.³³ We applaud and agree with the recognition that those who often get the credit — a Supreme Court litigator or a legislator — are not the actors who generally make transformative social change possible. In the public imagination, it is Supreme Court cases that give rise to social movements.³⁴ But in reality, the reverse is often true.³⁵ The movements that made the litigation or legislation possible are often made invisible by lawyers, or the books and movies about lawyers winning civil rights and social justice.³⁶ We accept this critique of the

³¹ See, e.g., Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between The Moral Limits of the Criminal Law and The Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 145, 168 (2001).

³² See *id.*

³³ See ENGLER & ENGLER, *supra* note 19, at 97–98; William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 467 (2001) (noting that “once the lawyers get involved, legal reform comes to dominate other kinds of action more than before, and the movement as a whole tends to assume an increasingly lawyerly aura”); SCOTT L. CUMMINGS, *BLUE AND GREEN: THE DRIVE FOR JUSTICE AT AMERICA’S PORT* 4 (Robert Gottlieb ed., 2018) (discussing scholarship in law and social science that “paint[s] a skeptical picture of the power of law and lawyers to promote fundamental social change”).

³⁴ In some instances, iconic lawyers were at first wary of, even hostile to, the direct-action campaigns that made their litigation possible, even if they later formed alliances to recognize strategic gains. See, e.g., CHRISTOPHER W. SCHMIDT, *THE SIT-INS: PROTEST AND LEGAL CHANGE IN THE CIVIL RIGHTS ERA* 47–64 (2018) (documenting the hostility of famed lawyers like Thurgood Marshall to direct action).

³⁵ See *id.*; see also Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do for, And to, Social Movements: An Introduction*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS* 1, 6 (Austin Sarat & Stuart A. Scheingold eds., 2006) (“[A]lthough a civil rights *social movement* did eventually take shape and is generally credited with success in ending de jure segregation and in advancing integration, it did so in spite of, and in conflict with, the cause lawyers of the NAACP.”).

³⁶ See Sarat & Scheingold, *supra* note 35, at 3–4, 6.

top-down approach to law reform, but we still posit that courts and criminal trials are important levers of social change. But they are not important for their own sake, and certainly not because of the inherent justice that a fairytale version of litigation presents. The criminal trials in voluntary prosecutions are valuable because they provide an opportunity to spotlight the work of the movement. It has been said that if social movements “win the battle over public opinion, the courts and legislatures would ultimately fall in line.”³⁷ Voluntary prosecution is a strategy that deploys the courts as a vehicle for winning public support, which in turn can be parlayed into legislative and doctrinal victories.

As we will discuss below, individual jurors from across rural America have been voting to acquit activists who have rescued animals, and the jurors have done so in part because they found the prosecutions to be unseemly and unnecessary. In turn, the acquittals by these jurors have attracted additional public attention and support for the movement. A prosecution may not always, as has been lamented, result in “Muzzling a Movement.”³⁸ Rather, the fact of the prosecution may serve as a megaphone, amplifying activist messages to the public, particularly for causes that might otherwise struggle to attract consistent media attention.

In sum, voluntary prosecution is the idea that in certain circumstances the platform of a criminal trial can provide a valuable arena for showcasing and popularizing progressive social reform projects, especially when other avenues for dialogue and institutional change have been blocked. It is the idea that in some instances activists may better advance their goals if they *are* prosecuted. A defining feature of voluntary prosecution is that it flips the cultural script of trial. Criminal trials are culturally salient morality plays in which the righteous accuser singles out the villainous lawbreaker for condemnation.³⁹ Voluntary prosecution uses this cultural script by turning it on its head: the activist-defendant is unapologetic about the righteousness of their cause and effectively puts the government on trial for the failures of the legal system; the accused becomes the accuser.

Of course, no prosecution is truly and fully “voluntary,” since a criminal defendant cannot force a prosecution.⁴⁰ But the prosecutions we discuss here are categorically different from other prosecutions because the defendants ultimately embraced their prosecutions and used them

³⁷ ENGLER & ENGLER, *supra* note 19, at 89.

³⁸ See generally DARA LOVITZ, MUZZLING A MOVEMENT: THE EFFECTS OF ANTI-TERRORISM LAW, MONEY, AND POLITICS ON ANIMAL ACTIVISM (2010).

³⁹ See Milner S. Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81, 83–97 (1975).

⁴⁰ See Ara Lovitt, *Fight for Your Right to Litigate: Qui Tam, Article II, and the President*, 49 STAN. L. REV. 853, 869–70 (1997); see also *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379–81 (1973) (holding that courts ordinarily cannot review prosecutorial charging decisions, including the decision not to prosecute).

for movement ends. In some cases, the activists even set the stage for their own prosecution, aware that an overzealous carceral state made a criminal trial a near certainty.⁴¹ There is thus a crucial attitudinal difference between an ordinary prosecution and a voluntary prosecution; the former is to be avoided while the latter can be intentionally provoked and instrumentalized. But even voluntary prosecution exists on a spectrum, from actively inviting prosecution to avoiding prosecution but then embracing it once it becomes inevitable. In the most extreme cases, an activist may seek prosecution to such a degree that they avoid filing certain motions lest they result in a dismissal of their case. In other cases, an activist may not want to be arrested in the first place but then welcome a public trial once prosecution becomes unavoidable. The key commonality — and thus the essence of voluntary prosecution — is a desire to harness the publicity and cultural salience of a trial to put the law at issue in a stark and undeniable way. Whether this desire precedes arrest is not the key criterion; what matters is that the activist-defendant eventually embraces a trial and deploys it as a means of furthering movement aims.

There are two further definitional points that warrant clarification at this stage. Voluntary prosecution should not be conflated with either civil disobedience or jury nullification. First, the concept of civil disobedience tends to locate social resistance in the morally justifiable but technically illegal acts themselves.⁴² Civil disobedience centers the act of disobedience itself, and pressure is placed on the prosecutor to refuse charges and avoid interfering with these political protests.⁴³ The focus is on the provocative and attention-grabbing nature of the act done

⁴¹ In the Foster Farms Trial, discussed *infra* Part III, pp. 228–35, activist-defendants relied in part on a legal opinion written by a law professor *before* the action. The legal opinion stated that people have a right to rescue sick and injured animals, even on a factory farm. See Karen Lapizco, *Jury Finds Actress Alexandra Paul & Alicia Santurio “Not Guilty” for Rescuing Two Sick Chickens from a Foster Farms Slaughterhouse*, WORLD ANIMAL NEWS (Mar. 21, 2023), <https://worldanimalnews.com/jury-finds-actress-alexandra-paul-alicia-santurio-not-guilty-for-rescuing-chickens-outside-of-a-foster-farm-slaughterhouse> [<https://perma.cc/3D2Q-DDPT>].

⁴² See Candice Delmas & Kimberley Brownlee, *Civil Disobedience*, STAN. ENCYCLOPEDIA PHIL. ARCHIVE (June 2, 2021), <https://plato.stanford.edu/archives/fall2023/entries/civil-disobedience> [<https://perma.cc/C9MM-HJ85>]. A common element of the definition of civil disobedience is the idea that the acts are “deliberately unlawful.” COHEN, *supra* note 25, at 39; HOWARD ZINN, *DISOBEDIENCE AND DEMOCRACY: NINE FALLACIES ON LAW AND ORDER* 39 (2002). By contrast, voluntary prosecutions may involve acts taken without regard for whether they are legal, or even with a sincere belief that they are legal.

⁴³ JOHN RAWLS, *A THEORY OF JUSTICE* 339 (Harvard Univ. Press rev. ed. 1971) (“Courts should take into account the civilly disobedient nature of the protester’s act, and the fact that it is justifiable (or may seem so) by the political principles underlying the constitution, and on these grounds reduce and in some cases suspend the legal sanction.”); Matthew R. Hall, *Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 *CARDOZO L. REV.* 2083, 2102–06 (2007) (discussing the view that the state should treat civil disobedience leniently or not punish it at all).

by persons in the movement, not the prosecution that might follow.⁴⁴ Voluntary prosecution, by contrast, treats the trial and prosecution, and not just the acts of disobedience, as the focus. It treats the act of resistance as merely a means of furnishing a dramatic legal political platform — the criminal trial — for exposing the unfairness or irrationality of the existing law.⁴⁵ When well-coordinated, the impact of the trial and prosecution can be just as powerful — if not more so — than the act of disobedience itself.

Likewise, there is a long history of activists celebrating the possibility of jury nullification as a tool for protecting activists from overzealous prosecutors.⁴⁶ The success of a voluntary prosecution strategy, by contrast, does not turn primarily on efforts to get the jury to ignore the technical requirements of the law.⁴⁷ Indeed, in some voluntary prosecutions, the activist-defendants have raised good faith, meritorious defenses rather than relying on nullification. Instead, the focus in a voluntary prosecution is on the trial as an act of repression and a tool to encourage mobilization and media attention, and secondarily an opportunity for convincing the jury that the law must be read as permitting the conduct in question. Nullification is a call to ignore the law. Voluntary prosecution is a call to make the law, or redefine it.

The point is not that jury nullification or civil disobedience is irrelevant to the concept of voluntary prosecution; in many instances a voluntary prosecution will follow an act of civil disobedience, and it is possible that jury nullification may be one strategy in a voluntary prosecution. But there is a conceptual distinction, and the point here is to emphasize the unique value of a criminal prosecution as an opportunity to disrupt or critique the legal system.

II. HISTORICAL CONTEXT FOR VOLUNTARY PROSECUTIONS

We certainly did not invent the idea that criminal trials are important points of focus for social mobilization. For example, Nelson Mandela's trial for terrorism-related offenses based on his opposition to apartheid has been described as one of the most important moments in South African history.⁴⁸ Our contribution is to highlight the way that movements might affirmatively locate criminal trials as one of their

⁴⁴ Hall, *supra* note 43, at 2087–92 (discussing the “elements” of civil disobedience, *id.* at 2087, all of which center the act, not the prosecution that may or may not follow).

⁴⁵ Dale Jennings's trial for lewd behavior, discussed *infra* section II.B, pp. 225–28, is an example of a voluntary prosecution that was not the result of civil disobedience.

⁴⁶ Steven M. Warshawsky, Note, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 191, 192–94 (1996).

⁴⁷ Cf. Michael Huemer, *The Duty to Disregard the Law*, 12 CRIM. L. & PHIL. 1, 4–6 (2018) (defining and arguing for jury nullification).

⁴⁸ Melissa Jane Cook, “*I Am Prepared to Die*” — Nelson Mandela, SA PEOPLE NEWS (Apr. 23, 2014, 9:30 AM), <https://www.sapeople.com/fab-south-african-stuff/prepared-die-nelson-mandela> [<https://perma.cc/V37E-7DFE>].

potential vectors for mobilization *ex ante*, as opposed to merely recognizing a trial as coincidentally significant after the fact. Prosecutions can serve communicative and mobilizing ends well beyond the acts of civil disobedience themselves, and trial victories provide an opportunity for recognizing that legal elites may be lagging behind the views of an informed public. To make this point, we will provide a brief overview of some historical prosecutions of nonviolent direct action that have been crucial to consolidating and growing their respective movements. No prior scholarship has considered these prosecutions as part of a unified theory for social change.

In the annals of American social change, few legal cases are more notable than Rosa Parks's. But what is often mythologized as a spontaneous act of resistance that culminated in legal charges was, in fact, an orchestrated effort to harness voluntary prosecution to create change. Parks herself had attended an activist training course just a few months earlier, and the local NAACP chapter had been opportunistically awaiting the right case.⁴⁹ They had declined to organize around two previous arrests of Black women who had also refused to give up their seats, only months before Parks's arrest, because the women's personal circumstances were viewed as likely to generate less favorable press coverage.⁵⁰ But after Parks was arrested, instead of paying the fine and moving on — as the two previous arrestees had done — Parks and the NAACP decided to fight the case.⁵¹ The rest, of course, is history, as Parks's case launched a campaign led by a local minister named Martin Luther King, Jr., that would end segregation on Montgomery buses — and launch the civil rights movement into national prominence.⁵²

The arrest of Parks is understood as an iconic example of a mobilizing event. What is less known, however, is the significance of legal cases — and specifically criminal cases — in the development of other prominent movements in the United States and around the world. The repeated trials and incarcerations of socialist leader Eugene Debs were among the most important events in the history of American labor.⁵³ The 1958 arrest of a pacifist former Navy Commander, who attempted to sail to a nuclear test site, became a national story that helped launch the environmental movement — and inspired another ship years later

⁴⁹ TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–63*, at 127–28 (1989).

⁵⁰ *Id.* at 127.

⁵¹ *Id.* at 130; see also Margot Adler, *Before Rosa Parks, There Was Claudette Colvin*, NPR (Mar. 15, 2009, 12:46 AM), <https://www.npr.org/2009/03/15/101719889/before-rosa-parks-there-was-claudette-colvin> [<https://perma.cc/BSX8-ZM8A>]

⁵² Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 *YALE L.J.* 999, 1020–24 (1989).

⁵³ David Ray Papke, *Eugene Debs as Legal Heretic: The Law-Related Conversion, Catechism and Evangelism of an American Socialist*, 63 *U. CIN. L. REV.* 339, 347, 367–71 (1994).

called the *Golden Rule*.⁵⁴ And recently, the trials of climate activist “valve turners” have invigorated the climate justice movement⁵⁵ and established a “climate necessity defense” in at least one jurisdiction.⁵⁶

For purposes of this Essay, we will focus on just two cases in American history that are illustrative of the power of voluntary prosecution: the trial of Susan B. Anthony, for “unlawfully” voting in the election of 1872, and the trial of gay rights activist Dale Jennings in 1952, for “lewd conduct” with an undercover male police officer in a Los Angeles park.

A. *The Trial of Susan B. Anthony*⁵⁷

In the nineteenth century, women possessed few formal legal rights. Though not monolithic in their treatment of women, most state legal regimes denied married women the ability to autonomously contract, manage property, and sue and be sued.⁵⁸ While unmarried women could exercise a variety of legal rights, including contracting, managing property, and suing in court, they were generally derided as “spinsters” and often faced significant social costs for flouting traditional gender roles.⁵⁹ Importantly, neither married nor unmarried women could vote.⁶⁰

Strikingly, however, the disenfranchisement of women was not made explicit in the law; it was an unspoken and unwritten assumption of the

⁵⁴ *Restoring the Golden Rule*, GREENPEACE (Jan. 23, 2015), <https://www.greenpeace.org/usa/restoring-the-golden-rule> [https://perma.cc/2XM5-GAMG]; Jane Braxton Little, *Restored Anti-nuke Sailboat Launches Again on a Peace Mission*, NAT’L GEOGRAPHIC (June 19, 2015), <https://www.nationalgeographic.com/culture/article/150619-golden-rule-ketch-restoration-nuclear-weapons> [https://perma.cc/7W8H-KD97].

⁵⁵ See TED HAMILTON, BEYOND FOSSIL LAW: CLIMATE, COURTS, AND THE FIGHT FOR A SUSTAINABLE FUTURE 1–8 (2022) (discussing how the trials of valve turners are combatting “fossil law” and calling into being a new, climate-just regime). Indeed, the Climate Defense Project, which defends frontline climate activists and uses their trials as a means of furthering movement aims, is often engaged in concerted voluntary prosecutions. See CLIMATE DEFENSE PROJECT, <https://climatedefenseproject.org> [https://perma.cc/8UQ7-YJK5].

⁵⁶ *State v. Spokane Cnty. Dist. Ct.*, 491 P.3d 119, 127–28 (Wash. 2021).

⁵⁷ There is a modern recognition that the fight for women’s suffrage often unjustly excluded Black women and denigrated Black men. See Brent Staples, Opinion, *How the Suffrage Movement Betrayed Black Women*, N.Y. TIMES (July 28, 2018), <https://www.nytimes.com/2018/07/28/opinion/sunday/suffrage-movement-racism-black-women.html> [https://perma.cc/Z8G4-PX76]. On the other hand, a great deal has been written about Anthony’s stridently antiracist views. See Linda Lopata, Opinion, *If Susan B. Anthony Was Racist . . .*, NAT’L SUSAN B. ANTHONY MUSEUM & HOUSE, <https://susanb.org/if-susan-b-anthony-was-racist> [https://perma.cc/4N79-J79U]. In any event, our goal is not to create a hagiographic account of Anthony’s efforts or to condemn her as irredeemably racist; rather we seek to document the role of her prosecution in one particular movement.

⁵⁸ Rayne L. Hammond, Comment, *Trial and Tribulation: The Story of United States v. Anthony*, 48 BUFF. L. REV. 981, 991–92 (2000) (noting the disabilities of coverture faced by nineteenth-century women); Angela Fernandez, *Tapping Reeve, Nathan Dane, and James Kent: Three Fading Federalists on Marital Unity*, in MARRIED WOMEN AND THE LAW 192, 192–208 (Tim Stretton & Krista J. Kesselring eds., 2013) (highlighting the contested and at times fictitious nature of coverture’s “one-person-in-law principle”).

⁵⁹ Hammond, *supra* note 58, at 983–95.

⁶⁰ *Id.* at 995.

common law.⁶¹ When the Fourteenth Amendment was ratified in 1868, suffragists, including Susan B. Anthony, seized on the Amendment's expansive language.⁶² The Amendment extended citizenship to every person born in the United States and protected the "privileges and immunities" of all citizens from state infringement.⁶³ Anthony believed that the Fourteenth Amendment conclusively gave women the right to vote, as a privilege of citizenship, and that no state could infringe on that privilege.⁶⁴ She even convinced a lawyer and former judge named Henry Selden to endorse this position.⁶⁵ But unfortunately, suffragists could not convince judges or Congress to affirmatively adopt their construction of the Amendment.⁶⁶ So Anthony decided to force the system to address the question via voluntary prosecution — that is, by attempting to vote, despite the near certainty of criminal liability for the act.⁶⁷

In Susan B. Anthony's prosecution for unlawfully voting, three points are key. The first is that Anthony knew before she voted that she was unlikely to succeed with her case, but she proceeded with it anyway because she knew the platform provided by a trial would be crucial to the movement's future success.⁶⁸ The goal was a "high-profile forum"⁶⁹ for Anthony's constitutional argument and, as one suffragist put it, a "popular verdict."⁷⁰ In fact, to encourage the election inspectors to let her break the law and vote on Election Day, Anthony promised to indemnify the inspectors if they too were prosecuted.⁷¹ And when she was jailed for voting, she refused to pay bail in the hopes that it would set up a habeas petition to the Supreme Court.⁷² When her attorney posted bail without her permission, Anthony launched a speaking tour that used her upcoming trial to educate thousands of New Yorkers about women's suffrage.⁷³ Even after she was convicted, Anthony distributed three thousand copies of her trial proceedings to activists, politicians, and libraries.⁷⁴

The second notable aspect of Anthony's prosecution is that Anthony, despite engaging in an act that was legally disruptive, grounded her

⁶¹ *Id.* at 990.

⁶² *Id.* at 996–97.

⁶³ U.S. CONST. amend. XIV, § 1.

⁶⁴ Hammond, *supra* note 58, at 996.

⁶⁵ *Id.* at 1005–06.

⁶⁶ Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution,"* 76 N.Y.U. L. REV. 1456, 1506 (2001).

⁶⁷ *Id.* at 1506–07.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1507.

⁷⁰ *Id.* at 1506.

⁷¹ *Id.* at 1507.

⁷² Douglas Linder, *The Trial of Susan B. Anthony for Illegal Voting* 4 (Oct. 20, 2007) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022997 [<https://perma.cc/9C2U-3MB2>].

⁷³ *Id.* at 5.

⁷⁴ *Id.* at 11.

defiance in constitutional and legal principles. While the Constitution and common law had not been tested on the question of sex discrimination, the text was, in theory, quite clear: no person should be denied “equal protection of the laws.”⁷⁵ Anthony could thus plausibly argue that her act of voting was an affirmation, rather than violation, of the law. Anthony also had technical legal arguments to buttress her case even if the judge and jury refused her constitutional argument; most notably, she argued that her good faith belief in the legality of her vote undermined the charges against her because violation of the voting act required a “knowing” illegal vote.⁷⁶

The third and most important point, however, is that Anthony realized that her prosecution and trial would directly bring law or legal proceedings into the question of suffrage. By using a courtroom, she was able to place the decision of women’s suffrage in the hands of decision-makers who had not been captured by the status quo: jurors in the courtroom and, when her case rocketed into national attention, the court of public opinion would be made aware of her legalistic arguments.⁷⁷ She lost the trial, but she succeeded in making the right to vote a legal issue. And both the jurors in the case — who were effectively denied their right to render a verdict after the judge in the case entered a directed verdict of guilty — and major newspapers announced their sympathy for Anthony’s cause.⁷⁸ As one New York paper wrote, “If it is a mere question of who got the best of it, Miss Anthony is still ahead. She has voted and the American constitution has survived the shock.”⁷⁹

Anthony lost her legal case at trial when the judge directed a guilty verdict.⁸⁰ But in the courtroom that mattered — the court of public opinion — she won. By inviting prosecution and presenting her constitutional argument for women’s suffrage, Anthony won a national forum for her cause and opened the door for legal reform.⁸¹

B. *The Trial of Dale Jennings*

The trial of Dale Jennings, who the *New York Times* described as the gay rights movement’s “first hero,” provides another important example of our thesis.⁸² Despite Jennings’s relative obscurity today, his trial for criminal solicitation was instrumental in launching the gay rights

⁷⁵ See *id.* at 8–9.

⁷⁶ *Id.* at 9.

⁷⁷ Winkler, *supra* note 66, at 1506.

⁷⁸ Linder, *supra* note 72, at 9.

⁷⁹ *Id.* at 11–12.

⁸⁰ *Id.* at 9.

⁸¹ Hammond, *supra* note 58, at 1033.

⁸² Dudley Clendinen, *William Dale Jennings, 82, Writer and Gay Rights Pioneer*, N.Y. TIMES (May 22, 2000), <https://www.nytimes.com/2000/05/22/us/william-dale-jennings-82-writer-and-gay-rights-pioneer.html> [https://perma.cc/9Q9J-DTSK].

movement.⁸³ Like Susan B. Anthony's prosecution, his case was a form of voluntary prosecution. But unlike iconic figures like Anthony or Rosa Parks, Jennings was not engaged in anything close to civil disobedience. His decision to go to trial was entirely about the trial itself, and not about the act of resistance.

In the early 1950s, most gay men led relatively isolated existences, wary of social ostracization and legal punishment.⁸⁴ To combat this repression and build consciousness among gay men and women as an oppressed minority, Jennings and a few other radical gay men founded a gay rights organization.⁸⁵ Called the "Mattachine Society" in reference to a medieval masked society and the "masked" nature of gay life, this new organization largely conducted its business in secret, despite its sweeping political goals.⁸⁶

The voluntary prosecution of Dale Jennings was a turning point for the Mattachine Society and the gay rights movement. In the 1950s, gay men were commonly targeted by undercover stings.⁸⁷ As the *New York Times* later reported:

Entrapment by vice detectives posing as gays in the bars, public parks and restrooms where gay men went to find each other was common . . . and those charged with soliciting police officers commonly pleaded guilty rather than face an accusation of homosexual conduct in open court.⁸⁸

Jennings was the target of such a sting. One night, a plainclothes police officer arrested him for engaging in lewd behavior in a public park.⁸⁹ No one had ever fought such a charge.⁹⁰ Typically, defendants charged with such conduct either paid their bail and never returned for trial, pled guilty to lesser charges, or relied solely on procedural defenses.⁹¹

But Jennings, unlike the countless men who had been entrapped in similar stings, was urged by his friend Harry Hay to openly and voluntarily face prosecution and trial.⁹² Hay reportedly said to Jennings:

⁸³ *Id.*

⁸⁴ JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES* 65 (2d ed. 1998).

⁸⁵ *Id.* at 62.

⁸⁶ *Id.* at 67.

⁸⁷ Clendinen, *supra* note 82.

⁸⁸ *Id.*

⁸⁹ D'EMILIO, *supra* note 84, at 70.

⁹⁰ Craig J. Konnoth, *Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s–1970s*, 119 *YALE L.J.* 316, 332 (2009).

⁹¹ *Id.* at 332–33; Gregory Briker, *The Right to Be Heard: One Magazine, Obscenity Law, and the Battle over Homosexual Speech*, 31 *YALE J.L. & HUMAN.* 49, 58 (2020); Douglas M. Charles, *From Subversion to Obscenity: The FBI's Investigations of the Early Homophile Movement in the United States, 1953–1958*, 19 *J. HIST. SEXUALITY* 262, 266 (2010).

⁹² D'EMILIO, *supra* note 84, at 70–71.

“Look, we’re going to make an issue of this thing. We’ll say you are a homosexual but neither lewd nor dissolute.”⁹³

Jennings’s case differs from Susan B. Anthony’s in that Jennings did not actively seek prosecution.⁹⁴ But once arrested and charged, he embraced his public prosecution as a means of movement-building.⁹⁵ For that reason, his case is another notable voluntary prosecution. And again, three factors were key in the success of his voluntary prosecution.

The first was that Jennings and his allies at the Mattachine Society recognized that the nascent movement for gay rights was at an impasse. Given the severe social and legal consequences for living openly as a gay person, most members of the gay community hid their actual beliefs about gay rights.⁹⁶ Jennings and others believed that this mass self-deception — or what social scientists call “preference falsification”⁹⁷ — was one of the fundamental stumbling blocks for change.⁹⁸ A public trial in which a gay man unabashedly defended his identity was perhaps the best way to force the issue, even if it could end in defeat.⁹⁹ For this reason, the Mattachine Society sent press releases to broadcast media and newspapers, circulated flyers throughout Los Angeles, and distributed leaflets in areas frequented by gay men.¹⁰⁰ The goal was to use Jennings’s trial as a mobilizing platform.

Second, Jennings and his lawyers believed they had legal and factual grounds upon which they could win.¹⁰¹ Jennings openly admitted that he was gay, but he also successfully presented an entrapment defense, arguing that the police detective had “practically demanded” to enter his apartment.¹⁰² Framing this state persecution in distinctly legal terms — the entrapment defense — provided the jury with a legal hook that was ultimately crucial to its verdict.¹⁰³ Importantly, the entrapment defense also provided a legal mechanism for flipping the script on the government, demonstrating that the state, not Jennings, had acted wrongfully.¹⁰⁴ Persons who were gay were often treated unjustly by government officials, but the public was not fully aware of the circumstances, and

⁹³ Jim Burroway, *An Innocent Man: The Surprising Trial of Dale Jennings*, [EMPHASIS MINE] BLOG (Aug. 5, 2018), <http://jimburroway.com/history/an-innocent-man-the-surprising-trial-of-dale-jennings> [<https://perma.cc/LUJ4-JL8A>].

⁹⁴ D’EMILIO, *supra* note 84, at 70–71.

⁹⁵ *Id.* at 71.

⁹⁶ *See id.* at 65.

⁹⁷ *See generally* TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION 7, 18 (1997).

⁹⁸ D’EMILIO, *supra* note 84, at 66.

⁹⁹ *See id.* at 70.

¹⁰⁰ *Id.*

¹⁰¹ *See* Konnoth, *supra* note 90, at 332.

¹⁰² Jeffrey Kosbie, *How the Right to Be Sexual Shaped the Emergence of LGBT Rights*, 22 U. PA. J. CONST. L. 1389, 1401 (2020).

¹⁰³ *See* Konnoth, *supra* note 90, at 332.

¹⁰⁴ *See* Kosbie, *supra* note 102, at 1401.

Jennings's case provided an opportunity to put government practices on trial.

Perhaps the most important factor, however, was that Jennings believed that a jury could, in fact, be convinced. After thirty-six hours of deliberations, eleven jurors voted to acquit.¹⁰⁵ With the hung jury missing an acquittal by only a single vote, the district attorney's office dropped the charges.¹⁰⁶ Even in an era that was rabidly antigay, the deliberative setting of a jury allowed for an unprecedented legal outcome. Conventional institutions could hardly have predicted this. Jennings himself wrote of his shock at the outcome: "Walking out of the courtroom free was a liberation that I'd never anticipated. It didn't happen in our society. You went to jail for that sort of thing. And so I was numb for some time, and it began to dawn on me that we did have a victory."¹⁰⁷ Not only was the acquittal a victory for Jennings, it was the movement's first legal victory, and it led to a surge in membership for Mattachine Society.¹⁰⁸ Membership doubled from one meeting to the next, and new chapters spread across California.¹⁰⁹

As with the other examples, Jennings's victory did not singlehandedly change the course of history for a social movement. But it was a turning point. Jennings's case was a crucial step in overcoming the paralyzing fear pervasive in the gay community — fear stemming from the possibility of prosecution just like Jennings's. By subjecting himself to prosecution, Jennings forced the issue of gay rights into the public consciousness and legal discourse, mobilized a generation of gay activists, and helped launch the gay rights movement.

III. VOLUNTARY PROSECUTIONS IN THE ANIMAL RIGHTS MOVEMENT

The prior Parts define the concept of voluntary prosecution and identify it as a historical phenomenon. When the law is out of step with public sentiment, voluntary prosecution can be an important tool for forcing the law (or at least the legal system) to reconcile with shifting public values. In this Part, we highlight the concept of voluntary prosecution as it applies to recent animal rescue prosecutions. Indeed, some leading members of the animal rights movement, including one author of this Essay, have invited prosecution as a means of bringing more public attention to the plight of animals and the state's complicity in their abuse.

Central to voluntary prosecutions in the animal rights context is the growing movement for open rescue. In an open rescue, animal activists

¹⁰⁵ D'EMILIO, *supra* note 84, at 71.

¹⁰⁶ *Id.*

¹⁰⁷ Burroway, *supra* note 93.

¹⁰⁸ D'EMILIO, *supra* note 84, at 71.

¹⁰⁹ *Id.*

enter an animal-abusing facility (usually a factory farm), document its deplorable conditions via photos and videos, and rescue a small number of sick and dying animals.¹¹⁰ These rescues are “open” because the investigators do not conceal their identities or the nature of their activities, and they widely disseminate footage of the rescue.¹¹¹ Open rescues perform the legal right demanded — namely, the right to rescue. By their very performance, they envision a world in which the profit concerns of a corporation do not override the suffering of sentient animals. Open rescues also invite prosecution. Because open rescuers bare their identities and widely publish their rescues, they become easy targets for zealous prosecutors in rural counties. And the prosecutions provide a platform for illustrating the failures of the law when it comes to protecting animals, especially those raised for food in factory farms.

One prominent voluntary prosecution of animal activists was the so-called Smithfield Trial.¹¹² The trial had as its basis an open rescue in March of 2017 from a factory farm owned by Smithfield Foods.¹¹³ Several animal activists, including one author of this Essay, entered this farm — one of the largest industrial pig farms in the United States¹¹⁴ — and removed two injured and ill piglets.¹¹⁵ No one disputes that the pigs would have died if they had not been taken by the activists and given immediate veterinary care. And no one disputes that the entry and the removal of the piglets was done entirely without consent from Smithfield. However, the pig production facility was so large, with approximately 1.2 million pigs raised every year,¹¹⁶ that the removal of the pigs was not noticed until the activists released footage of their rescue to the *New York Times*, which ran a feature story on the conditions of the pig farm and the animals’ rescue.¹¹⁷ The work of these activists served the goal of promoting transparency by showing that the largest pig production company in the world was breaking a pledge it had made ten years earlier to phase out the use of so-called gestation crates,¹¹⁸ two-by-seven-foot cages where mother pigs live for up to seven years with

¹¹⁰ See *Open Rescue*, HUMANEMYTH.ORG: DECONSTRUCTING THE MYTH OF HUMANE ANIMAL AGRICULTURE, <https://www.humanemyth.org/glossary/1061.htm> [<https://perma.cc/P4HF-JRTQ>].

¹¹¹ *Id.*

¹¹² Marina Bolotnikova, *The Fight Against Factory Farming Is Winning Criminal Trials*, VOX (Mar. 21, 2023, 7:30 AM), <https://www.vox.com/future-perfect/23647682/factory-farming-dxe-criminal-trial-rescue> [<https://perma.cc/3AGV-GB5L>].

¹¹³ Bolotnikova, *supra* note 1.

¹¹⁴ Jacobs, *supra* note 8.

¹¹⁵ Bolotnikova, *supra* note 1.

¹¹⁶ Dawn House, *Utah Hog Farm Part of \$7.1 Billion Chinese Deal*, SALT LAKE TRIB. (July 12, 2013, 8:08 AM), <https://archive.slttrib.com/article.php?id=56583018&itype=CMSID> [<https://perma.cc/26V6-TZYT>].

¹¹⁷ Jacobs, *supra* note 8.

¹¹⁸ Dawn House, *Utah Farm Among 460 U.S. Operations to Phase Out Controversial Pig Cages*, SALT LAKE TRIB. (Aug. 2, 2013, 8:57 AM), <https://archive.slttrib.com/article.php?id=56671811&itype=CMSID> [<https://perma.cc/N26V-SF5A>].

severely limited freedom of movement.¹¹⁹ But more importantly for the purposes of this project, having rescued two baby piglets and openly filmed and published the entire event, the activists also invited prosecution.

For the activists, the prosecution and eventual trial was the plan. It was an effort to force a legal discourse about factory-farming conditions. Indeed, the two activists who ultimately went to trial declined pleas to substantially reduced charges that would have resulted in no jail time. The activists planned to use the criminal trial as a way of exposing and challenging the prevailing legal norms toward farmed animals. It was not an act of civil disobedience; it was an attempt to make law and to focus attention on the abuse of animals. The activists used the government's aggressive and overzealous prosecutorial tactics against them, effectively putting Smithfield — and the law enforcement officials who did its bidding — on trial. Indeed, this reversal was so effective that the trial became known as the “Smithfield Trial” in media coverage.¹²⁰

More generally, the trial that unfolded in October of 2022 provided a dramatic stage for highlighting one of the core features of modern animal law: the law punishes those who attempt to save animals from cruelty and protects the industry that inflicts the cruelty. A stunning rebuke of the legal norms governing animals was effectuated by the very court system that entrenches and vindicates the diminished legal status of animals. Through the juxtaposition of criminal charges for rescuers and immunity for the farm itself, the dysfunction of the law was laid bare. The act of rescue was a powerful protest, but the critique of law was made salient by the trial itself. This juxtaposition was perhaps most poignantly illustrated when the prosecutor, in his closing argument, unartfully compared rescuing injured piglets to removing a dented can of soup from the grocery store.¹²¹ The prosecutor was not trying to be extreme. Animals are generally viewed as property by the law, and the prosecutor simply believed he was providing a concrete example of this reality. But the trial provided an opportunity to undermine this cramped understanding of the law by putting this assessment into the hands of a noncaptured decisionmaker, the jury.

The trial provided other moments for accomplishing the moral and political role reversal central to voluntary prosecution. For example, during cross-examination, the investigating FBI agent admitted that he

¹¹⁹ Wayne Hsiung, *The Piglet Who Made It in the New York Times*, DIRECT ACTION EVERYWHERE (Oct. 27, 2021), <https://www.directactioneverywhere.com/dxe-in-the-news/the-piglet-who-made-it-in-the-new-york-times> [https://perma.cc/UM45-GHMD].

¹²⁰ See, e.g., Bolotnikova, *supra* note 112.

¹²¹ ANIMAL L. PROGRAM, UNIV. OF DENVER STURM COLL. OF L., SMITHFIELD TRIAL JUROR INTERVIEWS 34, https://www.law.du.edu/sites/default/files/2023-03/SCOL_ALP_Smithfield%20Trial%20Juror%20Interview%20Transcripts_March%202023.pdf [https://perma.cc/B4M6-3E6M] (interviewing Juror #5, who said that when the prosecutor “compared [the piglets to] the dented can . . . [that] was ludicrous”).

could not think of a single instance in which multiple FBI agents investigated a theft case involving less than \$100 worth of property — and yet the FBI had assigned *eight agents* to investigate the case of a pig rescue.¹²² Or when the defense attempted to admit a picture of one of the rescued piglets, the prosecution objected and the judge ordered the outline of the piglet cut from the photo so that jurors could not see the bloody teat of the piglet's mother or other aspects of the factory farm in the background.¹²³ These moments showcased the extraordinary lengths to which the government would go to punish the rescuers and protect the animal-abusing industry — a takeaway that was not lost on jurors, media, and spectators.¹²⁴

The Smithfield Trial ended with a stunning outcome: the acquittal of the activists by a conservative jury in southern Utah.¹²⁵ Interviews with the jurors revealed that the prosecution's aggressive and overbearing tactics backfired, allowing for the role reversal in which the state became the object of suspicion rather than the activists.¹²⁶ Some jurors reported feeling manipulated, even lied to, by the prosecution because of the constant evidentiary objections, the scissor-cut image of the piglets, and the refusal to show video footage of the rescue.¹²⁷ Many of the jurors also expressed disgust and horror over the conditions at the Smithfield facility.¹²⁸ It is difficult to study the transcripts of interviews with the jurors after the trial and fail to see that they left the case feeling like the wrong people were put on trial.¹²⁹

Less than six months later, in March of 2023, two more activists were unanimously acquitted of theft by a jury in the heavily agricultural county of Merced, California, even though there were videos of them removing chickens from a truck heading to a slaughterhouse.¹³⁰ This trial, dubbed the “Foster Farms” trial, similarly turned the tables on law enforcement. The two activist-defendants refused multiple plea deals, including one that came with no jail time and would have eventually cleared the charge from their records.¹³¹ The activists welcomed prosecution as an opportunity to spotlight cruelty against farmed animals and make the case for the right to rescue. Jurors again unanimously acquitted the defendants, and in a remarkable turnabout, jurors from

¹²² Bolotnikova, *supra* note 1.

¹²³ *Id.*

¹²⁴ See, e.g., ANIMAL L. PROGRAM, *supra* note 121, at 6, 33.

¹²⁵ See Jacobs, *supra* note 8.

¹²⁶ ANIMAL L. PROGRAM, *supra* note 121, at 6, 33. For a social science study of the interviews, see generally FIONA ROWLES ET AL., FAUNALYTICS, JURORS' REFLECTIONS ON THE SMITHFIELD PIGLET RESCUE TRIAL (2023), <https://osf.io/t9fxy> [<https://perma.cc/B44Z-SMZ6>].

¹²⁷ See ANIMAL L. PROGRAM, *supra* note 121, at 16.

¹²⁸ See *id.* at 28.

¹²⁹ See *id.*

¹³⁰ Bolotnikova, *supra* note 112.

¹³¹ *Id.*

both cases have now written op-eds supporting animal activists and spoken at animal rights conferences.¹³²

These landmark cases mark the first time in U.S. history that activists were acquitted for giving aid to farmed animals.¹³³ But only a few years earlier, a Canadian court acquitted an animal rights activist, Anita Krajnc, of criminal mischief for giving water to thirsty pigs en route to a slaughterhouse.¹³⁴ Krajnc's trial garnered international attention,¹³⁵ and the activist network with which Krajnc is affiliated grew from 50 to approximately 150 chapters across the world after she was charged.¹³⁶ Krajnc's trial, and its effect in Canada and across the world, suggest that voluntary prosecution for animal rights may find purchase beyond the United States.

In these landmark cases, the activists used the trial not just to illustrate the cruelties of modern factory farming or to showcase an act of disobedience, but also to test the standing of animals under the law.¹³⁷ Numerous lawsuits have tried — and failed — to establish nonhuman animals as legal persons.¹³⁸ But the “defensive” posture of recent voluntary prosecutions has elevated the personhood legal argument in novel ways that have received significant receptivity in trial courts.¹³⁹ The ability to say that activists were rescuing “someone” instead of merely “something,” as part of a criminal defense, is a more subtle entry ramp for courts to consider questions of personhood or the legal status

¹³² See, e.g., R. Lynn Carlson, Opinion, *Bill Would Undermine Utah's Jury System*, SALT LAKE TRIB. (Jan. 31, 2023, 10:00 AM), <https://www.sltrib.com/opinion/commentary/2023/01/31/r-lynn-carlson-bill-would> [<https://perma.cc/DP24-YQ2F>]; Panel of Smithfield Trial Jurors at Sturm College of Law Summit on the Smithfield Trial (Jan. 13, 2023); Panel of Foster Farms Trial Jurors at the University of California, College of the Law, San Francisco (Apr. 22, 2023).

¹³³ Bolotnikova, *supra* note 1.

¹³⁴ Merrit Kennedy, *Canadian Court Clears Activist Who Gave Water to Pigs*, NPR (May 4, 2017, 3:16 PM), <https://www.npr.org/sections/thetwo-way/2017/05/04/526898750/canadian-court-clears-activist-who-gave-water-to-pigs> [<https://perma.cc/4GA2-DAL6>].

¹³⁵ *Id.*

¹³⁶ Megan Easton, *The Trial of Anita Krajnc*, U. TORONTO MAG. (May 26, 2017), <https://magazine.utoronto.ca/people/alumni-donors/the-trial-of-anita-krajnc-animal-rights-activist-toronto-pig-save> [<https://perma.cc/2DWQ-QAVZ>].

¹³⁷ See, e.g., *id.* (noting that Krajnc's lawyers focused their argument, among other things, on “the fact that pigs are sentient beings and not property,” even though the judge ultimately rejected that argument).

¹³⁸ See, e.g., Ed Shanahan, *Happy the Elephant Isn't Legally a Person*, *Top New York Court Rules*, N.Y. TIMES (June 14, 2022), <https://www.nytimes.com/2022/06/14/nyregion/happy-elephant-animal-rights.html> [<https://perma.cc/N6L6-73ZD>].

¹³⁹ See, e.g., *id.* (describing the trial court judge's feeling of regret in denying an elephant's habeas petition, as she recognized that the elephant was “more than a just a legal thing, or property”). For a critical discussion of the affirmative personhood litigation, see Recent Case, Nonhuman Rights Project Inc. *ex rel.* Happy v. Breheny, *No. 52, 2022 WL 2122141 (N.Y. June 14, 2022)*, 136 HARV. L. REV. 1292, 1295 (2023) (arguing that “the utilization of precedent involving enslaved persons likely contributed to NHRP's loss”).

of animals. These are baby legal steps toward a more formal legal recognition of animals as more than property.¹⁴⁰

The activism, in short, is just as much *the legal trial* and the formal legal arguments as it is the acts of rescue. These are personhood cases in another, more sympathetic posture. The goal is not a publicity stunt that might result in a trial, but rather an act that provides a trial where legal conceptions of personhood, rescue, and the power of industrial corporations are tested.

The trials allow for public engagement with the reality that the law — either by its letter or by its selective enforcement — might tolerate massive suffering through industrial production, while criminalizing the rescue of animals who face abuse. The vast majority of Americans of all political perspectives (83% of Democrats, 77% of Republicans) say cruelty to farm animals is a “personal moral concern.”¹⁴¹ Yet the vast majority of farm animals are raised in situations that are not just cruel but constitute “torture” according to the *New York Times* Editorial Board.¹⁴² Voluntary prosecution aims to force a government response to animal cruelty by highlighting the deficiency of state action to protect animals. Moreover, by placing the decision in the hands of a jury, a noncaptured decisionmaker,¹⁴³ the strategy also avoids the problem of regulatory capture, whereby well-organized industries or interest groups can frustrate efforts at popular change.¹⁴⁴ Corporations such as Smithfield, which have contributed millions of dollars to political campaigns nationwide, have significantly less ability to influence a randomly drawn panel of citizens from the community.¹⁴⁵

¹⁴⁰ For an argument that animals could enjoy legal protections through a status that is more than property but perhaps different than personhood, see generally Angela Fernandez, *Animals as Property, Quasi-property or Quasi-person*, BROOKS U. ANIMAL L. FUNDAMENTALS SERIES, <https://thebrooksinsitute.org/animal-law-fundamentals/animals-property-quasi-property-or-quasi-person> [<https://perma.cc/TJ8V-YDFA>] (arguing that the law already recognizes animals as occupying a status different from other forms of property).

¹⁴¹ Julia Jeanty & Grace Adcox, *Voters Demand Farm Animal Protections from Both Politicians and Companies*, DATA FOR PROGRESS (Aug. 3, 2022), <https://www.dataforprogress.org/blog/2022/8/2/voters-demand-farm-animal-protections-from-both-politicians-and-companies> [<https://perma.cc/6Y3L-C24X>].

¹⁴² Editorial Board, *Exposing Abuse on the Factory Farm*, N.Y. TIMES (Aug. 8, 2015), <https://www.nytimes.com/2015/08/09/opinion/sunday/exposing-abuse-on-the-factory-farm.html> [<https://perma.cc/2K5D-L8GU>].

¹⁴³ See Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377, 1393–97 (1994) (discussing the jury's independence and ability to speak as the “conscience of the community,” *id.* at 1396).

¹⁴⁴ See Bruce Friedrich, Note, *When the Regulators Refuse to Regulate: Pervasive USDA Underenforcement of the Humane Slaughter Act*, 104 GEO. L.J. 197, 210–11 (2015) (discussing regulatory capture in the animal context).

¹⁴⁵ *Mona Lisa Wallace on the Case Against Smithfield Foods*, CORP. CRIME REP. (Oct. 4, 2022, 8:48 AM), <https://www.corporatecrimereporter.com/news/200/mona-lisa-wallace-on-the-case-against-smithfield-foods> [<https://perma.cc/V6J3-CG4L>] (noting that “the lack of regulations and controls [on Smithfield and the pork industry] are directly related to the industry practice of lobbying, and just having so much influence”).

These landmark animal rights acquittals, as well as the historical phenomenon of voluntary prosecution more generally, present important lessons for activists and movement lawyers. Most obviously, these case studies overturn the common wisdom that views prosecutions as antithetical to social change. They also indicate the importance of incorporating legal strategy into direct actions, even if activists are not explicitly courting prosecution. The likelihood of prosecution for direct action is often high, and legal preparation and counsel beforehand can create the conditions for a successful movement-oriented trial. For example, evidence of the piglets' poor health was crucial in the Smithfield Trial, and that evidence was only obtained because the activists immediately provided veterinary care to the rescued piglets and kept the documentation of their health problems.¹⁴⁶ Lawyers can integrate themselves into movements by helping set the conditions for voluntary prosecutions, albeit with the usual caveat that lawyers must comply with the ethical rules prohibiting lawyers from assisting or furthering crimes themselves.¹⁴⁷ Lawyers are also especially well equipped to translate movement arguments into distinctly legal terms — like Susan B. Anthony's constitutional argument¹⁴⁸ or Dale Jennings's entrapment defense¹⁴⁹ — thereby making these movement arguments fit for trial.

Importantly, movement organizing is almost always a precondition for a successful voluntary prosecution. Suffragist groups amplified Susan B. Anthony's constitutional argument,¹⁵⁰ the Mattachine Society rallied gay persons around a common cause,¹⁵¹ and animal rights organizations raised the salience of the Smithfield Trial and Foster Farms Trial.¹⁵² Lawyers integrated into these movements must be comfortable going on the public-relations offensive as much as providing a legal defense. To that end, courting journalists, using social media savvily,¹⁵³ and framing arguments in terms both legal and popularly digestible can be indispensable. For example, the Smithfield Trial and Foster Farms Trial told a consistent story of the “right to rescue” — a right articulated in legal terms but also understandable by the public at large.¹⁵⁴

¹⁴⁶ See Carlson, *supra* note 132; Bolotnikova, *supra* note 1.

¹⁴⁷ See MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS'N 2024).

¹⁴⁸ See Winkler, *supra* note 66, at 1507.

¹⁴⁹ See D'EMILIO, *supra* note 84, at 70.

¹⁵⁰ Winkler, *supra* note 66, at 1506.

¹⁵¹ See D'EMILIO, *supra* note 84, at 68.

¹⁵² See Bolotnikova, *supra* note 112.

¹⁵³ In fact, activists tweeted live coverage of both trials from Twitter accounts devoted solely to covering each trial. See @SmithfieldTrial, TWITTER, <https://twitter.com/SmithfieldTrial> [<https://perma.cc/2EBF-9GAE>]; @FosterFarmTrial, TWITTER, <https://twitter.com/FosterFarmTrial> [<https://perma.cc/SD4J-38LT>].

¹⁵⁴ Journalists have adopted the term of art “right to rescue” in their coverage of the trials. See, e.g., Rachel Fobar, *Activists Call It Rescue. Farms Call It Stealing. What Is “Open Rescue”?*, NAT'L GEOGRAPHIC (Aug. 7, 2023), <https://www.nationalgeographic.com/animals/article/activists-call-it-rescue-farms-call-it-stealing-what-is-open-rescue> [<https://perma.cc/US8K-4QQ7>]; Bolotnikova, *supra* note 112.

For decades, litigation on behalf of animals has occurred within narrow legal frameworks,¹⁵⁵ even as the number of animals raised and slaughtered each year has grown precipitously.¹⁵⁶ Animal lawyers have sometimes championed trivial law reform projects that have done nothing to improve the lives of most animals, while the deeply embedded problems with the law remain invisible to the public, and largely undebated.¹⁵⁷ Some of the key law reform projects pursued by animal lawyers have resulted in no demonstrable progress for animals and may even leave lawmakers and the public confused about the most important legal obstacles to animal protection.¹⁵⁸ Voluntary prosecution, by contrast, puts the core problems of animal law directly at issue. It forces ordinary citizens — and the public at large — to confront a legal regime in which animals can be tortured and killed while their rescuers are punished. When a movement is at an impasse, voluntary prosecution has the potential to take a case directly to the public and to highlight the disconnect between the law as enforced and the law as it ought to be.

CONCLUSION

When it comes to social change or civil disobedience, scholars have frequently assumed that the best legal outcome is for prosecutors to “decline to charge defendants” or to refuse to take their case to trial.¹⁵⁹ This is an understandable, even laudable approach to respecting activists as individuals, but we argue that there is more to the story. We also argue that the boundary between lawyering and activism is more subtle than often assumed.

Our claim is not that all criminal trials are good, or even that the prosecution of an activist will inevitably generate momentum for a movement or necessarily recast legal arguments in novel or more accessible frames. Rather, our claim is that voluntary prosecution is often an integral or even necessary part of social change efforts, especially when there is a disconnect between the enforcement of law and public attitudes, or when the responsible institutional actors are nonresponsive. For this reason, voluntary prosecution is especially relevant in the animal rights context, in which both conditions obtain but the law remains unconcerned about animal suffering. If animal rights efforts are to gain momentum *in law*, they may need help from activists who are willing to test the boundaries of the law, and even risk being deemed *outside*

¹⁵⁵ See Andrew Schwartz, *Animal Rights Activists Rescued Two Piglets from Slaughter. They Wanted to Get Caught.*, NEW REPUBLIC (Feb. 23, 2022), <https://newrepublic.com/article/165468/animal-rights-dxe-smithfield> [https://perma.cc/YF4B-U59N].

¹⁵⁶ FOOD & WATER WATCH, FACTORY FARM NATION: 2020 EDITION I (2020).

¹⁵⁷ See Justin Marceau, *Palliative Animal Law: The War on Animal Cruelty*, 134 HARV. L. REV. F. 250, 250–51, 255 (2021).

¹⁵⁸ See *id.* at 251.

¹⁵⁹ See Bhargava Ray, *supra* note 18, at 671.

the law. Such projects are important not only to test the bounds of existing positive law, but also to elevate the status of the animal rights law agenda more generally.

Though we are not qualified to speak on behalf of other movements, we hazard that voluntary prosecution could be a valuable tactic for other causes too, such as ones seeking legal protections for reproductive rights, aid to migrants, and harm reduction for drug use (such as testing strips). In all these cases, institutional actors have proven captured or unresponsive to activist demands, and individuals may face criminal prosecution despite significant public support for their cause.¹⁶⁰

It is impossible to fully predict the likelihood of success for any individual activist tactic. Indeed, there will always be some uncertainty about whether a prosecution muzzles a movement or mobilizes it. But a mobilizing prosecution — that is, a prosecution deemed successful from the activist perspective — is possible, and such prosecutions have played essential roles in many movements. This Essay indicates that the conditions that make for a successful, movement-furthering prosecution are an important and overlooked object of study. And just as importantly, this Essay suggests a degree of humility for movement lawyers and activists alike. What some reject as a dead end — or even counterproductive — for a movement may actually prove to be an essential ingredient for social change.

Voluntary prosecution can highlight the defects of existing legal norms and generate a public affirmation of behavior that pushes the boundaries of respectability. The public attention that a criminal trial can command serves as a megaphone for messages that might otherwise seem marginal; it provides a novel set of outreach opportunities; and, in the context of animal rights, it recasts legal arguments about animals as beings who matter in defensive, anticarceral postures that may resonate with the public more strongly than conventional tools of legal reform. By inviting charges for breaking the law, voluntary prosecution is a crucial tool for making it.

¹⁶⁰ See Farah Diaz-Tello & Sara Ainsworth, *The End of Roe and the Criminalization of Abortion: More of the Same for Too Many*, A.B.A. (Apr. 12, 2023), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-issues-in-criminal-justice/the-end-of-ro-and-the-criminalization-of-abortion [<https://perma.cc/U69S-Y4X4>] (discussing the criminalization of abortion); Bobby Allyn & Michel Marizco, *Jury Acquits Aid Worker Accused of Helping Border-Crossing Migrants in Arizona*, NPR (Nov. 21, 2019, 2:59 PM), <https://www.npr.org/2019/11/21/781658800/jury-acquits-aid-worker-accused-of-helping-border-crossing-migrants-in-arizona> [<https://perma.cc/A6CX-P2X8>]; AMNESTY INT'L, PUNISHING COMPASSION: SOLIDARITY ON TRIAL IN FORTRESS EUROPE 39–44 (2022), <https://www.amnesty.org/en/documents/euro11828/2020/en> [<https://perma.cc/UP7U-A5ZW>] (discussing trials of those who aid migrants and refugees in Europe); Jeffrey A. Singer & Sophia Heimowitz, *Drug Paraphernalia Laws Undermine Harm Reduction: To Reduce Overdoses and Disease, States Should Emulate Alaska*, CATO INST. (June 7, 2022), <https://www.cato.org/policy-analysis/drug-paraphernalia-laws-undermine-harm-reduction-reduce-overdoses-disease-states> [<https://perma.cc/YZV7-SFBS>] (discussing the criminalization of harm reduction strategies).