ESTABLISHING (NON)HUMAN SIGNIFICANCE: THE CASE FOR ADMITTING ANIMAL CRUELTY EVIDENCE IN RESCUE TRIALS

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INTRODUCTION

Lily and Lizzie were near death—sick, starving, and surrounded by the screams of fellow pigs who were dead and dying.[1] Lily was barely able to stand, and Lizzie had been trampled and was covered in blood.[2] Lily and Lizzie were two of the more than one million piglets raised for slaughter at a Smithfield Foods farm until animal rights activists removed them.[3] The activists recorded their actions in order to document the cruelty at that facility and then posted the video recordings online.[4]

Like something out of a movie, it is no wonder that Lily and Lizzie's story made headlines for years.[5] The eleven-minute virtual reality video not only depicts the deplorable conditions of the farm but also provides viewers with hope by showing Lily and Lizzie living happily in an

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[1] *See* Glenn Greenwald, *The FBI's Hunt for Two Missing Piglets Reveals the Federal Cover-Up of Barbaric Factory Farms*, THE INTERCEPT (Oct. 5, 2017, 2:05 PM), https://theintercept.com/2017/10/05/factory-farms-fbi-missing-piglets-animal-rights-glenn-greenwald/ ("While filming the conditions at the Smithfield facility, activists saw the two ailing baby piglets laying on the ground, visibly ill and near death, surrounded by the rotting corpses of dead piglets.").

[2] *See id.* (quoting one of the rescuer's descriptions of finding Lily and Lizzie).

[3] *See id.* ("This single Smithfield Foods farm breeds and then slaughters more than 1 million pigs each year.").

[4] *See id.* ("The activists wrote about the rescue in social media postings that went viral, detailing the horrific conditions they witnessed at Smithfield and describing the suffering of the piglets.").

[5] *See* 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 (breaking the news of the rescue); Justin Wm. Moyer, *FBI Raids Animal Shelters, Searching for Piglets Rescued from Factory Farm, Activists Say*, WASH. POST (Sept. 14, 2017), https://www.washingtonpost.com/news/animalia/wp/2017/09/14/fbi-raids-animal-shelters-searching-for-piglets-rescued-from-factory-farm-activists-say/ (describing the subsequent FBI investigation); Wayne Hsiung, *I Did Not Steal Two Piglets. I Saved Them. A Jury Agreed.*, N.Y. TIMES (Oct. 16, 2022), https://www.nytimes.com/2022/10/18/opinion/animal-rights-factory-farming.html (describing, from one of the defendant's perspective, the trial's verdict).

animal sanctuary one week after the rescue.[6] Lily and Lizzie's safety was almost short-lived, though; several weeks after the investigation was released, FBI agents descended on animal sanctuaries, demanding DNA samples of pigs who matched the description of Lily and Lizzie.[7] Although the search was unsuccessful, it was only the beginning of the rescuers' worries.[8]

Two of the rescuers, Wayne Hsiung and Paul Picklesimer, were charged by the state of Utah with felonies of burglary and theft and faced up to ten years in prison if convicted.[9] Years later, while preparing for trial, the activists attempted to assert a necessity defense but were denied by the judge, apparently because the defense was not available in Utah.[10] Subsequently, the judge barred the video taken by the rescuers from being admitted in evidence, asserting that the conditions of the farm were not at issue in the case.[11] The defense was permitted to bring in evidence about Lily and Lizzie specifically because their health—and whether or not they had value to the farm—was relevant to the charges.[12] Even this evidence was restricted though; for example, a photograph of one of the piglets was cut in half so that only the piglet—and not the

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[6] *See* Direct Action Everywhere, *Operation Deathstar with Wayne Hsiung and DxE – Virtual Reality*, YOUTUBE (July 6, 2017), https://www.youtube.com/watch?v=wlSE1X-hSqQ&ab (showing the investigation of a Smithfield Foods farm).

[7] *See* Greenwald, *supra* note 1 ("To obtain the DNA samples, the state veterinarians accompanying the FBI used a snare to pressurize the piglet's snout, thus immobilizing her in pain and fear, and then cut off close to two inches of the piglet's ear.").

[8] *See* Claire Roberson, *Activists Found Not Guilty After Rescuing Pigs from Utah Farm*, ANIMAL EQUAL. (Aug. 20, 2023), https://animalequality.org/blog/2022/10/28/animal-activists-found-not-guilty-in-smithfield-rescue/ ("The federal government declined to press charges after the pigs were not found.").

[9] *See* Natasha Lennard, *Prosecutors Silence Evidence of Cruel Factory Farm Practices in Animal Rights Case*, INTERCEPT (Nov. 4, 2023, 12:02 PM), https://theintercept.com/2023/11/04/animal-rescue-wayne-hsiung-dxe/ (describing the charges the activists faced).

[10] *See* Mariann Sullivan, *Desperate Times and Desperate Measures: When Is Rescuing Animals "Necessary?"*, 109 CORNELL L. REV. 1905, 1919 (2024) (describing the activists' attempt at asserting a necessity defense).

[11] *See* Emily Ashcraft, *Judge Says Video Taken at Utah Pig Farm Will Not Be Allowed in Burglary Trial*, KSL (Feb. 24, 2022, 8:27 PM), https://www.ksl.com/article/50355590/judge-says-video-taken-at-utah-pig-farm-will-not-be-allowed-in-burglary-trial (reporting on the judge's decision to not admit the video taken by the rescuers).

[12] *See* Marina Bolotnikova, *Activists Acquitted in Trial for Taking Piglets from Smithfield Foods*, INTERCEPT (Oct. 8, 2022, 11:33 PM), https://theintercept.com/2022/10/08/smithfield-animal-rights-piglets-trial/ (reporting that a veterinarian testified at the trial that the prosecution's $42.20 estimate of the piglets' value did not apply to Lily and Lizzie because "[t]he veterinary care needed to keep them alive would have cost hundreds of dollars").

bloody teat of her mother—was shown.[13] Despite these obstacles, the jury acquitted the defendants.[14] In an interview after the trial, a juror revealed that the jury did not believe Lily and Lizzie had value, an element that was required for the charges.[15]

The Smithfield case resulted in an acquittal despite the evidentiary barriers presented by the prosecution and the judge.[16] In fact, Picklesimer speculated that the extreme lengths to which the prosecution went to prevent some evidence from being presented to the jury may have actually helped the defense's case.[17] However, rescuers in other cases have not been so fortunate.[18] Defendants in animal rescue trials are frequently prevented from showing animal cruelty evidence to the jury.[19] This is a part of a larger pattern of activists on trial for acts of civil disobedience being prevented from providing any type of motive testimony to explain to the jury their political motivations for breaking the law.[20] Climate activists, anti-war demonstrators, and other activists have attempted to bring in evidence about the movement of which they are a part, but for the most

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[13] *See* Sullivan, *supra* note 10, at 1919 (writing that the photograph was redacted).

[14] *See* Bolotnikova, *supra* note 12 (reporting that activists called the acquittal "a turning point for the animal rights movement").

[15] *See* Smithfield Trial Juror Interviews, UNIV. OF DENVER STURM COLL. OF L. ANIMAL L. PROGRAM 19, https://www.law.du.edu/sites/default/files/2023-03/SCOL_ALP_Smithfield%20Trial%20Juror%20Interview%20Transcripts_March%202023.pdf [hereinafter Smithfield Trial Juror Interviews] ("[I]t came down to did the piglets have value, right? We never saw anyone come forward with, to me, concrete evidence showing yes these pigs have value, this is what we do with them, if they do die we can still use them for other things. You know there was never, that wasn't given to us. And a lot of people were angry about that on the jury, that they didn't give what needed to happen.").

[16] *See* Bolotnikova, *supra* note 12 (writing that the judge blocked Picklesimer's attorney from describing Smithfield's facilities as "industrial").

[17] *See id.* (reporting that Picklesimer said that keeping evidence from the jury "'makes the jury feel like they are being treated like babies'").

[18] *See, e.g.*, Natasha Lennard, *Animal Rights Activist Convicted of Felony for Rescuing Sick Chickens*, INTERCEPT (Nov. 4, 2023, 12:02 PM), https://theintercept.com/2023/11/04/animal-rescue-wayne-hsiung-dxe/ (asserting that Hsiung's defense "was stymied from the jump" because the judge "barred almost all photo and video evidence of animal cruelty from the trial") (citation omitted).

[19] *See* Lennard, *supra* note 9 (describing the pattern of animal cruelty evidence being suppressed).

[20] *See* Martin C. Loesch, *Motive Testimony and a Civil Disobedience Justification*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1069, 1104–07 (detailing examples of activists attempting to bring in motive testimony in their civil disobedience trials).

part, judges have determined that this evidence is not relevant and thus decided that the evidence is not admissible.[21]

Animal rescuers face the same obstacle, but the unique nature of animal rescue compared to other forms of civil disobedience may present advantages in advocating for the admissibility of evidence pertaining to rescuers' motivations—specifically, evidence of the cruelty the animals were rescued from.[22] Since the start of the modern animal rights movement about fifty years ago, illegal animal rescue has been an integral part of the movement, and the tactic is not going anywhere.[23] In the rare event that rescuers go to trial for their actions, they have a right to present a complete defense.[24] Every time a judge blocks animal cruelty evidence in rescue trials, though, this right is undermined.[25] This Note will argue that animal cruelty evidence is relevant and should be shown to the jury as a critical component of the defense's case.[26]

Part I of this Note discusses the treatment of animals in farms and laboratories, the current legal landscape for animals, and the role investigations have played in the animal rights movement.[27] Part II discusses the legal barriers to admitting evidence, including the Rules of Evidence, the necessity defense, and current understandings of relevance, as well as a discussion

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[21] *See id.* (describing activists' attempts in the anti-war movement); Lance N. Long & Ted Hamilton, *The Climate Necessity Defense: Proof and Judicial Error in Climate Protest Cases*, 38 STAN. ENV'T L.J. 57, 63 (2018) (describing anti-pipeline activists who unsuccessfully attempted to offer evidence of environmental harm to support a necessity defense).

[22] *See* Lennard, *supra* note 9 (reporting on the difference between evidence suppressed in animal activist cases compared to other cases).

[23] *See* Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317, 1319–20 (2015) (describing how activists in the first wave of the modern animal rights movement took action by liberating confined animals).

[24] *See* Annabelle Wilmott, Note, *Protecting the Right to a Meaningful Defense: Criminal Trial Storytelling*, 111 CALIF. L. REV. 927, 929 (2023) ("In the context of a criminal trial, the defendant's ability to engage in meaningful storytelling arguably takes on constitutional status, enshrined in the right to present a complete defense).

[25] *See* Holmes v. South Carolina, 547 U.S. 319, 324 (2006) ("[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'")

[26] *See infra* Part IV (presenting an analysis of the relevance of animal cruelty evidence).

[27] *See infra* Part I (detailing the conditions that animals live in on farms and in laboratories, the inadequacies of current legal protections for animals, and the role investigations have played in advancing the movement).

of the right to present a complete defense to the jury.[28] Part III delves into three examples of animal rescuers on trial.[29] Part IV explores potential pathways to admitting evidence of animal cruelty at trial.[30]

I. ANIMAL LAW AND ADVOCACY

Fueled by an increasing public awareness of the treatment of nonhuman animals in industries such as animal agriculture and animal experimentation, the modern animal rights movement has grown substantially since it began in the 1970s.[31] Legal protections for animals, however, have not necessarily kept up with changes in public perception.[32] Animal rights activists have used both legal and illegal tactics to challenge the systems that they view as violating the inherent rights of animals.[33] Examining the inadequacies in the way the legal system currently protects animals allows for some insight into why activists are sometimes compelled to take matters into their own hands.[34]

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[28] *See infra* Part II (detailing the three biggest barriers to admitting evidence).

[29] *See infra* Part III (providing three examples of animal rescuers on trial).

[30] *See infra* Part IV (analyzing three solutions to the problem of animal rescuers not being permitted to present animal cruelty evidence at trial).

[31] *See* Michael Hill, United States v. Fullmer *and the Animal Enterprise Terrorism Act: "True Threats" to Advocacy*, 61 CASE W. RES. L. REV. 981, 981 (2011) ("The past three decades witnessed the emergence of animal law and a diffusion of animal welfare beliefs and practices throughout society. An increasing number of Americans adhere to vegetarianism and veganism, oppose the use of animals in research, and believe that animals have the right to an existence free from suffering.").

[32] *See* Justin Marceau et al., *Voluntary Prosecution and the Case of Animal Rescue*, 137 HARV. L. REV. F. 213, 232 (2024) ("Numerous lawsuits have tried—and failed—to establish nonhuman animals as legal persons.").

[33] *See* Marceau, *supra* note 23, at 1319–20 (describing the combination of legal and illegal tactics used in the animal rights movement).

[34] *See* Jenni James, *When is Rescue Necessary? Applying the Necessity Defense to the Rescue of Animals*, 7 STAN. J. ANIMAL L. & POL'Y 1, 49 (2014) ("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.").

A. The Lives of Animals in Farms and Laboratories

Nonhuman animals suffer at the hands of humans in innumerable ways, but two of the most pervasive sites for animal exploitation are farms and research laboratories.[35] Although it is difficult to calculate because the deaths of aquatic animals are measured in tons rather than in individual lives lost, the total number of land and sea animals who are killed for consumption by Americans each year is estimated to be more than fifty-five billion.[36] In the dairy industry, female cows are forcibly impregnated, and their babies are taken away shortly after birth; female calves suffer the same fate as their mothers, while males are slaughtered for veal after being confined in extremely small crates for the duration of their short lives.[37] Chickens in both the meat and egg industries are subjected to debeaking—a painful procedure in which the end of a chicken's beak is burned off—and are kept in conditions that are so cramped that they are unable to even spread their wings.[38] Farmed fishes are similarly overcrowded, causing the spread of diseases such as sea lice.[39] Entire books have been dedicated to detailing the suffering that animals experience on farms, but the foregoing offers a brief glimpse into the reality of animal agriculture.[40]

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[35] *See* PETER SINGER, ANIMAL LIBERATION 22 (Harper Collins 2009) (1975) (describing vivisection and animal farming as "central illustrations of speciesism in practice" and causing "more suffering to a greater number of animals than anything else that human beings do").

[36] *See* ANIMAL CLOCK, https://animalclock.org/ (last visited Jan. 20, 2025) ("To put this in perspective, during World War II--the deadliest conflict in human history--more than 60 million people were killed over 6 years. The same number of animals die in support of the American food supply every ten hours.").

[37] *See How the Dairy Industry Supports the Veal Industry*, ANIMAL EQUAL. (Mar. 16, 2020), https://animalequality.org/blog/2019/08/14/dairy-industry-supports-veal-industry/ (detailing the connection between the dairy and veal industries); CAROL J. ADAMS, THE SEXUAL POLITICS OF MEAT: A FEMINIST VEGETARIAN CRITICAL THEORY 35 (Bloomsbury 2015) (1990) ("[F]emale animals are forcibly impregnated, a reproductive slavery that is required to insure [sic] plentiful supplies of meat and cow's milk.").

[38] *See* SINGER, *supra* note 35, at 107 ("Like [chickens raised for meat], layers have to be debeaked, to prevent the cannibalism that would otherwise occur in their crowded conditions, but because they live much longer than broilers, they often go through this operation twice.").

[39] *See* Kenny Torrella, *The Next Frontier for Animal Welfare: Fish*, VOX (Mar. 2, 2021, 9:30 AM), https://www.vox.com/future-perfect/22301931/fish-animal-welfare-plant-based ("[T]hree of the biggest welfare problems are the same as those on factory farms: overcrowding, disease, and rapid growth.").

[40] *See, e.g.*, JONATHAN SAFRAN FOER, EATING ANIMALS 11 (2009) (describing why the author decided to write a book about eating animals).

The conditions in animal experimentation laboratories are likewise grim and treat the animals subjected to experimentation as objects rather than sentient beings.[41] An estimated fifty million animals are used for research each year in the United States, including cats, dogs, monkeys, rabbits, mice, rats, and other species.[42] These animals endure painful and invasive procedures, such as force-feeding pesticides to pregnant rabbits, cutting cats' spinal cords and forcing them to run on treadmills, and subjecting rats to prolonged inhalation of cigarette smoke.[43] When not enduring experimentation, animals are typically kept in small, barren cages.[44] If the experiment itself does not result in death, animals are killed when they are no longer needed for testing.[45] The suffering in laboratories and farms across the country is a direct result of the shortcomings of presently governing animal law.[46]

B. The Inadequacies of Legal Protections for Animals

The rights of nonhuman animals are largely unprotected by the American legal system.[47] This is because there are few laws that create legally enforceable protections for animals, and those that do exist often exclude entire species.[48] The most notable piece of animal protection legislation, the Animal Welfare Act, does not apply to mice, rats, and birds, even though these species make

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[41] *See* SINGER, *supra* note 35, at 69 ("Speciesism allows researchers to regard the animals they experiment on as items of equipment, laboratory tools rather than living, suffering creatures. In fact, on grant applications to government funding agencies, animals are listed as 'supplies' alongside test tubes and recording instruments.").

[42] *See Animal Testing and Experiments FAQs*, THE HUMANE SOC'Y OF THE U.S., https://www.humanesociety.org/resources/animals-used-experiments-faq (last visited Jan. 20, 2025) (explaining that "no accurate figures are available" because mice and rats "are not counted in annual USDA statistics").

[43] *See id.* (detailing the types of experiments conducted on animals).

[44] *See id.* (describing how animals are kept in cages).

[45] *See id.* ("Animals are typically killed once an experiment is over so that their tissues and organs can be examined, but it is not unusual for animals to be used in multiple experiments over many years.").

[46] *See* James, *supra* note 34, at 5 ("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.").

[47] *See id.* at 7 ("On the whole, laws protecting nonhuman animals are under-inclusive and under-enforced.").

[48] *See id.* at 3 ("Anti-cruelty laws are often limited in scope, and protection varies according to an animal's species and economic utility."); *Laws that Protect Animals*, ANIMAL LEGAL DEF. FUND, https://aldf.org/article/laws-that-protect-animals/ (last visited July 31, 2025) ("There are only a handful of federal animal protection laws.").

up the vast majority of animals who are the subjects of testing in laboratories.[49] One of the oldest animal protection laws, the Twenty-Eight Hour Law, prohibits certain vehicles from traveling for longer than twenty-eight hours without providing animals with exercise, food, and water; however, the most-farmed land animals—birds—are excluded from the scope of the statute.[50] Birds are similarly left unprotected by the Humane Slaughter Act; consequently, while cows, pigs, and other mammals must be stunned before slaughter, there are no such requirements for chickens, turkeys, and other birds.[51]

The existing laws are also notoriously underenforced.[52] For example, the vast majority of Animal Welfare Act violations are dismissed with nothing more than a warning.[53] In addition, the Twenty-Eight Hour Law has not been enforced for over sixty years.[54] Furthermore, the federal government itself has documented significant underenforcement of the Humane Slaughter Act, at

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[49] *See Laws that Protect Animals*, *supra* note 48 (describing the AWA as the "primary federal animal protection law"); David Favre, *Overview of U.S. Animal Welfare Act*, ANIMAL LEGAL & HIST. CTR. (2002), https://www.animallaw.info/article/overview-us-animal-welfare-act (explaining that the AWA regulations defined "animal" as excluding birds, rats, and mice used in research and that "upwards of 95 percent of the animals actually used in research are rats, mice and birds"); 7 U.S.C. § 2131.

[50] *See Laws that Protect Animals*, *supra* note 48 ("Birds like chickens and turkeys . . . are considered exempt by the federal government."); Kelly Anthis & Jacy Reese Anthis, *Global Farmed & Factory Farmed Animals Estimates*, SENTIENCE INST. (Feb. 21, 2019), https://www.sentienceinstitute.org/global-animal-farming-estimates ("We estimate that fish comprise around 78% of farmed animals globally, chickens raised for meat 12%, and chickens raised for eggs 5%, while cows and pigs each comprise only 1%."); 49 U.S.C. § 80502; SINGER, *supra* note 35, at 148 (explaining that the Twenty-Eight Hour Law did not mention animals being transported by truck when it was first written and that "the transportation of animals by truck is still not regulated at the federal level").

[51] *See Laws that Protect Animals*, *supra* note 48 ("Though chickens, turkeys and other birds feel pain just like other animals, they are not protected by [the Humane Slaughter Act]."); 7 U.S.C. 1901.

[52] *See id.* ("Enforcement of [The Humane Slaughter Act] has been found by government inspectors to be 'inconsistent.'").

[53] *See* Katharine M. Swanson, Note, *Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. MICH. J.L. REFORM 937, 956 (2002) ("[I]n 1992, APHIS documented 980 cases of violations, only 105 of which were reported to the Regulatory Enforcement Staff. APHIS dismissed 616 of these cases with only warnings; 115 were resolved through stipulation; and only 17 were issued formal civil or administrative complaints through the general counsel.").

[54] *See* Cheryl L. Leahy, *Large-Scale Farmed Animal Abuse and Neglect: Law and Its Enforcement*, 4 J. ANIMAL L. & ETHICS 63, 76 (2011) (explaining that even after the USDA changed its interpretation of "vehicle" to include trucks, the law has still not been enforced for decades).

least in part because many inspectors do not understand the duties that the law imposes upon them.[55] State laws also suffer from a lack of enforcement.[56]

Another barrier that thwarts an improved legal status for nonhuman animals is that, under current law, animals are typically considered property.[57] Given that surveys demonstrate that Americans do not view animals as merely property, the legal status of animals does not align with how people view animals in their everyday lives.[58] This extends beyond how people view their own pets; Americans want improved treatment for farmed animals, implying that they see a difference between farmed animals and property.[59] However, efforts by legal scholars and organizations have so far been unsuccessful in advocating for a move away from this legal designation.[60]

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[55] *See* Bruce Friedrich, *When the Regulators Refuse to Regulate: Pervasive USDA Underenforcement of the Humane Slaughter Act*, 104 GEO. L.J. 197, 204 (2015) (citing the Government Accountability Office's findings that inspectors were not always aware of regulatory requirements, and that fifty-seven percent of inspectors were unable to correctly identify signs of an animals' unconsciousness).

[56] *See* Leahy, *supra* note 54, at 78 (explaining that the enforcement of state laws is "largely dependent on a prosecutor agreeing to pursue the case"); *Enforcement of State Farmed Animal Welfare Laws*, ANIMAL WELFARE INST. 3 (July 2024), https://www.awionline.org/sites/default/files/uploads/documents/24-Enforcement-State-Farmed-Animal-Welfare-Laws.pdf (reporting that the organization only received records of enforcement for twelve of the forty-four state laws for which it submitted records requests).

[57] *See* GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 34 (2007) ("There is no question that animals are regarded as property under the law and have held the status of property for as long as anyone can recall."); DARA LOVITZ, MUZZLING A MOVEMENT: THE EFFECTS OF ANTI-TERRORISM LAW, MONEY, AND POLITICS ON ANIMAL ACTIVISM 24 (2010) ("All laws that pertain to animals are written with the underlying and fundamental premise that animals are our property to use and govern as we see fit.").

[58] *See* Anna Brown, *About Half of U.S. Pet Owners Say Their Pets Are as Much a Part of Their Family as a Human Member*, PEW RSCH. CTR. (July 7, 2023), https://www.pewresearch.org/short-reads/2023/07/07/about-half-us-of-pet-owners-say-their-pets-are-as-much-a-part-of-their-family-as-a-human-member/ ("[N]early all U.S. pet owners (97%) say their pets are part of their family, according to a new Pew Research Center survey. About half of pet owners (51%) not only consider their pets to be a part of their family but say they are *as much a part of their family as a human member*.").

[59] *See New Poll Shows Majority Uncomfortable with Animal Farming Despite Eating Turkeys for Thanksgiving*, SENTIENCE INST. (Nov. 20, 2017), https://www.sentienceinstitute.org/press/animal-farming-attitudes-survey-2017 (reporting that half of Americans support a ban on the factory farming of animals).

[60] *See* David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021, 1023 (2010) (proposing a new category of property, called "living property," for animals, which creates legal rights for animals while still having them "within a property status"); Thomas A. Leach & Doris Lin, *'Cocaine Hippos' and the Quest for Legal Personhood*, 344 N.J. LAW. 56, 59 (2023) (describing the advancements that the Nonhuman Rights Project has made in the field of legal personhood for animals through habeas corpus litigation).

Perhaps the most intimidating impediment to the advancement of rights for animals was the passage of the Animal Enterprise Protection Act (AEPA), which was followed by a broader version called the Animal Enterprise Terrorism Act (AETA).[61] The AETA authorizes the federal government to prosecute activists whose efforts lead to physical damage or economic injury to an animal enterprise.[62] The AEPA was successfully used to prosecute six activists involved in Stop Huntingdon Animal Cruelty (SHAC), an organization that employed a variety of tactics in an attempt to shut down an animal testing company.[63] In 2006, the activists were convicted of conspiracy to violate the AEPA despite the fact that their actions were legal independently.[64] Like other animal rights activists, the SHAC defendants also faced evidentiary barriers to discussing the animal cruelty motivating their actions.[65] The prosecution of the SHAC activists had a chilling effect on the animal rights movement, even among activists who did not participate in illegal forms

[61] *See* Animal Enterprise Protection Act of 1992, Pub. L. No. 102-346, 106 Stat. 928 (1992) (codified as amended at 18 U.S.C. § 43 (2006)) (making it a terrorism crime to cause "physical disruption to the functioning of an animal enterprise").

[62] *See* WILL POTTER, GREEN IS THE NEW RED 131 (2011) (describing the changes that the AETA made from the AEPA, including changing "physically disrupting" to "damaging or interfering with" and including "a new clause prohibiting actions that instill a 'reasonable fear' in people connected to animal enterprises").

[63] *See* Trent Davidson, *Learning from a Landmark Animal Rights Campaign*, FAUNALYTICS (Mar. 16, 2023), https://faunalytics.org/learning-from-a-landmark-animal-rights-campaign/ (exploring SHAC's tactics and what today's activists can learn from the campaign).

[64] *See U.S. v. SHAC 7*, CTR. FOR CONST. RTS. (Aug. 3, 2016), https://ccrjustice.org/home/what-we-do/our-cases/us-v-shac-7 ("All of the activity alleged against the defendants is protected by the First Amendment: publishing a website, advocating lawful and unlawful protest activity, organizing and attending protests, contacting companies by phone and mail, etc."); David Kocieniewski, *Six Animal Rights Advocates Are Convicted of Terrorism*, N.Y. TIMES (Mar. 3, 2006) ("Although federal prosecutors presented no evidence that the defendants directly participated in the vandalism and violence, they showed jurors that members of the group made speeches and Web postings from 2000 to 2004 that celebrated the violence and repeatedly used the word 'we' to claim credit for it.").

[65] *See* Lennard, *supra* note 9 ("During the trial, the SHAC activists were not allowed to even mention the horrifying treatment of animals at the Huntingdon Life Sciences testing laboratories.").

of activism.[66] In the absence of effective legal protections for animals, investigations have become an even more important tool for animal advocacy.[67]

C. Investigating Animal Cruelty

From the ancient religion of Jainism to Pythagoras' vegetarianism, the concept of animal rights has existed for thousands of years.[68] Although there are philosophical differences within the movement, particularly about how to achieve its goals, advocates are generally united in the belief that all exploitation of animals must end.[69] With many of its tactics, the animal rights movement follows in the footsteps of various social justice movements that have come before it.[70] However, animal advocates stand out among other movements as being particularly likely to incorporate illegal forms of activism.[71] Indeed, illegal activism characterized the early days of the movement.[72]

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[66] *See* LOVITZ, *supra* note 57, at 105 ("The sloppy and unfair use of the label terrorist in our modern society has harrowed a large group of would-be activists and discouraged them from participation in legal protests or from speaking out at all on behalf of nonhuman animals.").

[67] See Marceau, *supra* note 23, at 1344 (describing investigations as part of the "trinity of animal activism").

[68] *See* Jo Ann Davidson, *World Religions and the Vegetarian Diet*, 12 PERSPECTIVE DIG. 1, 5–6 (2007) ("[T]he Jains carry the doctrine of ahimsa to its ultimate. Ideally, one should not harm any kind of being . . . Meat, alcohol, honey, or any of the five kinds of figs are forbidden."); KERRY S. WALTERS & LISA PORTMESS, ETHICAL VEGETARIANISM: FROM PYTHAGORAS TO PETER SINGER 13 (1999) ("Pythagoras's belief in the kinship of all living creatures and the transmigration of souls served as the basis for his ethical condemnation of carnivorism.").

[69] *See* TOM REGAN, THE CASE FOR ANIMAL RIGHTS, IN ANIMAL EXPERIMENTATION: THE MORAL ISSUES 77 (Robert M. Baird & Stuart E. Rosenbaum eds., 1991) (writing that the animal rights movement is "committed to a number of goals, including: the total abolition of the use of animals in science; the total dissolution of commercial animal agriculture; [and] the total elimination of commercial and sport hunting and trapping"); Karol Orzechowski, *The Animal Rights Movement: History and Facts About Animal Rights*, FAUNALYTICS (Apr. 9, 2020), https://faunalytics.org/the-animal-rights-movement-history-and-facts-about-animal-rights/ ("The ultimate goal of the animal rights movement is to place animals 'beyond use' of human beings, putting an end to exploitative industries and practices including laboratory testing, whaling, and puppy mills.").

[70] *See* Max Carpendale, *Choosing Tactics: Evidence From Social Theory*, ANIMAL ASK (Apr. 5, 2024), https://www.animalask.org/post/choosing-tactics-evidence-from-social-movement-theory (describing tactics used in social movements); Marceau, *supra* note 23, at 1320 ("[A]nimal rights activists are not unique in their use of a variety of both legal and illegal methods to influence public opinion and advance their ends.").

[71] *See Eco-Violence: The Record*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/intelligence-report/2015/eco-violence-record (last visited Nov. 18, 2024) (writing that "extremists" within the environmental and animal rights movements "have committed literally thousands of violent criminal acts in recent decades — arguably more than those from any other radical sector, left or right").

[72] *See* Marceau, *supra* note 33, at 1320 ("[I]t is fair to say that the early years of the animal rights movement in this country were characterized by a substantial number of effective, illegal actions.").

Historically, evidence of animal cruelty—particularly in the form of investigations of farms, laboratories, and other sites of animal use—has been critical to the expansion of legal protections for animals and the growth of the animal rights movement.[73] Momentum increased for the passage of the Animal Welfare Act, for example, after the publication of an article describing the conditions at animal dealer facilities, including photographs of skeletal dogs and filthy pigeon coops.[74] Moreover, the 1975 publication of Peter Singer's *Animal Liberation*, which detailed hundreds of examples of animal suffering in farms and laboratories across the country, catalyzed the modern animal rights movement and inspired the formation of Animal Liberation organizations based on the philosophy espoused in the book.[75] Investigations remain a central tactic of the movement; today, over forty percent of vegetarians and vegans report that they changed their eating habits after watching disturbing or graphic footage of farmed animals.[76]

There are two types of illegal animal rescue: those in which rescuers remain anonymous to avoid arrest and those in which rescuers openly reveal their identities and actions, along with the conditions from which the animals were taken.[77] The latter is referred to as an "open rescue" and is rooted in the belief that there is nothing morally wrong about removing animals from places of

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[73] *See* Hill, *supra* note 31, at 984 ("The primary weapon in the animal rights movement's arsenal was evidence of animal abuse and legal violations obtained by undercover journalists and whistleblowers.").

[74] *See* Favre, *supra* note 49 (describing the "considerable public and media outcry over a story about how pet dogs and cats were being stolen and ultimately sold to research facilities"); *Concentration Camps for Dogs*, LIFE, Feb. 4, 1966, at 22–29; 7 U.S.C. § 2131.

[75] *See* Gonzalo Villanueva, *'The Bible' of the Animal Movement: Peter Singer and Animal Liberation, 1970–1976*, 13 HIST. AUSTL. 399, 399 (2016) ("*Animal Liberation* . . . is often described as 'the Bible' of the modern animal movement.").

[76] *See* Jo Anderson & Marina Milyavskaya, *Going Vegan or Vegetarian: Motivations & Influences*, FAUNALYTICS 15 (Dec. 2021), https://osf.io/37teb/ (concluding, based on the fact that forty-two percent of those surveyed saw unpleasant or graphic media of farmed animals, thirty-six percent watched a documentary, and twenty-one percent received information from an animal advocacy group, that "[e]xposure to animal advocacy experiences tended to increase people's consumption success on their new diets").

[77] *See* Sullivan*, supra* note 10, at 1914 (describing the differences between "masked rescuers from the Animal Liberation Front" and open rescuers who expose the conditions in which the animals were living as well as their own identities).

suffering and death.[78] Some advocates of open rescue see the tactic as a way to combat the current legal system's disregard for animal protection by campaigning for a right to rescue.[79] Trials present an opportunity to advance the legal standing of animals as well as challenge animal industries in the court of public opinion.[80] Open rescue also provides a platform for activists to share the stories of individual animals with the hope of having an impact on the public that exceeds the faceless statistics of animal suffering.[81] However, activists who risk their freedom to document animal cruelty and remove animals from horrific conditions face significant legal barriers when they stand trial.[82]

II. Legal Barriers to Admitting Evidence

Activists have several barriers that must be overcome in order to achieve the goal of admitting evidence of animal cruelty at trial.[83] The goal of overcoming these legal barriers is rooted in the belief that presenting this evidence is part of a defendant's right to presenting a complete defense at trial.[84] Guiding all decisions about what evidence is admitted at trials in United States District Courts are the Federal Rules of Evidence, which is often reflected in states' evidence rules

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[78] *See* Jessica Scott-Reid, *The Open Rescue Movement for Farm Animals, Explained*, Sentient (Oct. 19, 2023), https://sentientmedia.org/open-rescue-movement/ ("Showing your face is a requirement, signaling to the public that activists have nothing to hide, that they believe what they are doing is right.").

[79] *See Right to Rescue*, Direct Action Everywhere, https://righttorescue.com/ (last visited Feb. 24, 2025) (describing the Right to Rescue campaign as seeking to "build support for animal rescue and ultimately to establish a legal right to rescue animals from distress and exploitation").

[80] *See* Marceau et al, *supra* note 32, at 232 (writing that in rescue cases, the defendants "use[] 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").

[81] *See* Adrienne Matei, *A US Activist Took a Sick Goat from a Meat Farm – Now He Faces Seven Years in Jail*, The Guardian (Dec. 6, 2021, 7:42 PM), https://www.theguardian.com/world/2021/dec/06/wayne-hsiung-activist-goat-animal-welfare-trial (quoting open rescuer Wayne Hsiung as describing the "identifiable victim effect." "When you reduce some sort of global atrocity or suffering through the lens of a single individual, it suddenly becomes so much more vivid and powerful . . . We're trying to tell a story of individual animals in a way that really moves people.").

[82] *See* Lennard, *supra* note 9 (reporting on the evidentiary barriers that animal rescuers face).

[83] *See id.* ("U.S. courts have a perturbing history of excluding evidence of violence against animals in animal liberation cases.").

[84] *See* Wilmott, *supra* note 24, at 932 ("[E]vidence law, including the right to present a complete defense, cannot fulfill its goals if it ignores the importance of trial storytelling.").

as well.[85] Judges' interpretation of relevance is another barrier that defendants must overcome.[86] Finally, because rescuers routinely assert the necessity defense, a judge's decision to block the defense is another significant hurdle for animal rescuers.[87]

A. The Right to Present a Complete Defense to the Jury

Jury trials are a fundamental aspect of the country's history and founding.[88] Alexander Hamilton wrote about their importance in Federalist Number 83, and one of the colonists' grievances listed in the Declaration of Independence was being deprived of the right to a jury trial.[89] The jury system is not just a procedural safeguard; it is a critical mechanism for ensuring that laws align with evolving societal values.[90] One reason why juries are held to be so important is their inclusion of morality in their deliberations.[91] While the law and morality are distinct, the evolution of criminal law reflects the evolution of society's morals.[92] It used to be a crime, for example, for a woman to cast a ballot in an election for public office; as society's morals

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[85] *See Federal Rules of Evidence*, U.S. CTS., https://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-evidence (last visited Nov. 18, 2024) ("The Federal Rules of Evidence govern the admission or exclusion of evidence in most proceedings in the United States courts.").

[86] *See* Jessica L. West, *Is Injustice Relevant? Narrative and Blameworthiness in Protester Trials*, 86 TEMP. L. REV. 107, 111 (2013) (explaining that judges prohibit protesters "from introducing evidence of their motivations" because it is not relevant).

[87] *See* Sullivan, *supra* note 10, at 1921 (writing that none of the defendants described had been permitted the necessity defense).

[88] *See* West, *supra* note 86, at 138 (describing juries as "a fundamental component of the system of criminal law in the United States").

[89] *See* The Federalist No. 83, at 533–34 (describing the right to a jury trial in criminal cases as "a valuable safeguard to liberty" and the "very palladium of free government"); The Declaration of Independence para. 20 (U.S. 1776).

[90] *See* William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 67 (2003) ("The right to trial by jury was a cornerstone of this country; judges, as an appointee of government and naturally partisan to the prosecution, were intended to be kept in check by the jury.").

[91] *See* Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder*, 2005 U. CHI. LEGAL F. 91, 95 (2005) ("[T]he basic justifications for having a right to a jury trial always have relied in part on a sense that the jury is a proper and fair arbiter of a criminal defendant's moral blameworthiness."); JEFFREY ABRAMSON, WE, THE JURY 28 (1994) (arguing that juries were historically "our best assurance that law and justice accurately reflected the morals, values, and common sense of the people asked to obey the law").

[92] *See* ALISON S. BURKE ET AL., INTRODUCTION TO THE AMERICAN CRIMINAL JUSTICE SYSTEM 90 (2019) ("Criminal laws reflect a society's moral and ethical beliefs.").

progressed to encompass women's suffrage, however, so did the law surrounding it.[93] A layperson's understanding of criminal activity is inextricably linked with moral condemnation.[94] Despite the fact that jurors are expected to remove emotion from their decision-making process, these expectations run contrary to human intuition.[95]

The criminal trial of Dale Jennings, a gay man and activist in the 1950s, provides an example of how the jury can play a role in influencing a moral shift.[96] Jennings was the target of a sting operation designed to entrap gay men, but he fought the charge and went to trial.[97] The jury was hung, which caused the district attorney's office to drop the charges.[98] Jennings's acquittal was the first legal victory for the gay rights movement and led to a surge in membership for the Mattachine Society, a gay rights organization that Jennings co-founded.[99]

The opportunity for jury nullification, though controversial, is another aspect of the jury's role in assessing the defendant's blameworthiness.[100] Jury nullification is the ability of jurors to

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[93] *See* Marceau et al, *supra* note 32, at 223–25 (2024) (describing Susan B. Anthony's trial for unlawfully voting).

[94] *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) (arguing that people believe that a crime is "conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community").

[95] *See* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 353 (1996) (asserting that the belief that "intense emotions impair rational agency, making it difficult or impossible for actors to choose morally preferred outcomes" is "profoundly misleading"); Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 257 (2012) ("[B]laming is often intuitive and automatic, driven by a natural, impulsive desire to express and defend social values and expectations.").

[96] *See* Marceau et al, *supra* note 32, at 225–26 (describing Jennings' trial as "instrumental in launching the gay rights movement").

[97] *See* 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 ("Entrapment by vice detectives posing as gays . . . was common then and for years to come, and those charged with soliciting police officers commonly pleaded guilty rather than face an accusation of homosexual conduct in open court . . . No one had ever been known to fight such a charge.").

[98] *See* Marceau et al, *supra* note 32, at 228 (writing that the most important factor leading to Jennings' acquittal might have been that he believed a jury could be convinced to vote in his favor).

[99] *See id.* ("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.").

[100] *See* Michael Huemer, *The Duty to Disregard the Law*, 12 CRIM. L. & PHIL. 1, 6 (2016) (writing that judges have called jury nullification pernicious, intellectually bankrupt, and indefensible).

acquit a defendant, even if they believe that he is guilty of the charged conduct.[101] A famous example of jury nullification is the 1735 trial of John Peter Zenger, who was charged with libel for publishing articles criticizing the governor of New York.[102] The law at the time did not recognize the truth of the statements as a defense, so the judge essentially ordered the jury to find Zenger guilty.[103] The jury nonetheless returned a verdict of not guilty, which established the American tradition of freedom of the press and made history as one of the most notable instances of jury nullification.[104] It also likely does not take place as often as opponents fear.[105] Nonetheless, it is a power arising from Constitutional amendments and evidentiary rules, enabling the jury to reach a verdict that they find compatible with their moral standards.[106] Hearing the full context of the defendant's actions is one way that the jury fulfills its role as the conscience of the community.[107]

B. The Federal Rules of Evidence

According to Rule 402 of the Federal Rules of Evidence (or, in state cases, the state law equivalent of the federal rule), relevant evidence is presumptively admissible, while irrelevant

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[101] *See id.* at 2 (defining jury nullification as "the practice wherein a jury chooses to disregard the law and vote on the basis of their conscience").

[102] *See id.* at 1 (writing that Zenger's trial resulted from a series of articles the *New York Weekly Journal* had published, which Zenger was the publisher of).

[103] *See id.* (writing that the judge instructed the jury that "British law did not recognize truth as a defense to libel"); David Farnham, *Jury Nullification*, 11 CRIM. JUST. 4, 6 (1997) ("Zenger's attorney, Alexander Hamilton, made his argument directly to the jury that truth was a defense, despite the legal proposition to the contrary.").

[104] Huemer, *supra* note 100, at 2 (labeling *Zenger* as "one of history's most famous and consequential instances of jury nullification") (emphasis removed).

[105] *See id.* ("[I]t is likely that juries infrequently disregard judicial instructions in a manner that constitutes complete nullification of the law.").

[106] *See* Andrew J. Parmenter, *Nullifying the Jury: "The Judicial Oligarchy" Declares War on the Jury Nullification*, 46 WASHBURN L.J. 379, 417 (2007) (writing that the jury nullification power comes from the jury's "right to render a general verdict in criminal trials, the inability of criminal courts to direct a verdict, no matter how strong the evidence, and the Fifth Amendment's Double Jeopardy Clause, which prohibits the appeal of an acquittal"); David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 864–65 (1995) (proposing that jury nullification happens when jurors disregard the court's instructions and instead focus on "collateral issues" that reveal their unease with convicting the defendant).

[107] *See* West, *supra* note 86, at 138–40 (arguing that, because of the jury's role as the conscience of the community, "society, represented by the jury, should be able to assess the claim of blameworthiness of the civil disobedient").

evidence must be excluded.[108] Evidence is relevant if it has any tendency to make a fact more or less likely than it would be without the evidence and if that fact is important in deciding the case.[109] Evidence should be logically related to either an element of the charge or a defense raised by the defendant.[110] Generally, these rules are interpreted liberally, with a broad definition of relevance.[111] However, evidence pertaining to the motives of an activist defendant is typically determined to be irrelevant.[112]

C. Current Understandings of Relevance

In *Old Chief v. United States*, the Supreme Court of the United States expanded its definition of relevance beyond previous traditional understandings.[113] The defendant, Johnny Lynn Old Chief, was on trial for the offense of being a felon in possession of a firearm.[114] His prior felony was assault causing serious bodily injury, and rather than having this conviction revealed

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[108] *See* FED. R. EVID. 402 ("Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible."); GEORGE FISHER, EVIDENCE 2–3 (3d. ed. 2013) (explaining that most states "have adopted or mimicked the Federal Rules in whole or greater part," and that those states that have not still "adhere to similar evidence principles").

[109] *See* FED. R. EVID. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.").

[110] *See* Todd E. Pettys, *Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification*, 86 IOWA L. REV. 467, 474 (2001) ("A proposition is at issue if it is logically related, either directly or through an inferential chain of proof, to at least one of the formal elements of the charges made or defenses raised in the litigation.").

[111] *See* David Crump, *On the Uses of Irrelevant Evidence*, 34 HOUS. L. REV. 1, 8 (1997) ("[T]he definition includes evidence with the slightest degree of probative value, even that which is infinitesimally small.").

[112] *See* Steven E. Barkan, *Political Trials and Resource Mobilization: Towards an Understanding of Social Movement Litigation*, 58 SOC. FORCES 944, 950 (1980) (asserting that, in protest trials, "the defense often attempts for several reasons to discuss political and moral matters, although the judge more often than not will rule such matters irrelevant"); Long & Hamilton, *supra* note 21, at 80 (writing that judges incorrectly equate politics with irrelevance in protest cases, and that "activist defendants are effectively faced with a presumption of inadmissibility"); Loesch, *supra* note 20, at 1100 ("Evidence of the motive of the defendant in a criminal case is not generally admissible under the Federal Rules because it is not relevant under Rule 401.").

[113] *See* Pettys, *supra* note 110, at 477 (describing the analysis in *Old Chief* as "striking" when "[v]iewed against the backdrop of the traditional understanding of relevance").

[114] *See* Old Chief v. United States, 519 U.S. 172, 174 (1997) (citing 18 U.S.C. § 922(g)(1), which makes it unlawful for anyone "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to "possess in or affecting commerce, any firearm").

to the jury, Old Chief offered to stipulate that he was a felon.[115] The Court ruled in favor of Old Chief but wrote extensively about how relevance should be interpreted.[116] The Court gave weight to allowing the jury to hear the narrative of what happened rather than just the elements of the charged offense.[117] The Court also described the jurors' role not only as a fact-finder but as a moral decision-maker.[118] Finally, the Court discussed the importance of satisfying the jurors' expectations because leaving a gap in the story will affect the conclusions that jurors draw.[119] It is unclear how much trial courts' interpretation of relevance may have changed since the 1997 *Old Chief* decision, but scholars argue that, at a minimum, it equips trial lawyers with a new tool with which to argue for more expansive concepts of relevance.[120]

One such scholar, Professor Jessica L. West, has written that a more expansive concept of relevance should be applied in protester trials, arguing that the defendant should be permitted to

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[115] *See id*. at 175 (explaining that Old Chief "argued that the offer to stipulate to the fact of the prior conviction rendered evidence of the name and nature of the offense inadmissible under Rule 403 of the Federal Rules of Evidence, the danger being that unfair prejudice from that evidence would substantially outweigh its probative value").

[116] *See id*. at 187 (writing that evidence "has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict"); Pettys, *supra* note 110, at 481–83 (explaining why the Court agreed that Old Chief's stipulation was sufficient).

[117] *See Old Chief*, 519 U.S. at 187 ("The 'fair and legitimate weight' of conventional evidence showing individual thoughts and acts amounting to a crime reflects the fact that making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness.") (quoting Dunning v. Maine Cent. R. Co., 39 A. 352, 356 (1897)).

[118] *See id*. at 187–88 ("[T]he evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment.").

[119] *See id*. at 188–89 (1997) ("People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard."); Stephen A. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CALIF. L. REV. 1011, 1019 (1978) ("If [jurors'] expectations are not satisfied, triers of fact may penalize the party who disappoints them by drawing a negative inference against that party.").

[120] *See* West, *supra* note 86, at 133 (writing that it is difficult to determine *Old Chief*'s impact on trial courts but that the decision "lend[s] credibility to evolving concepts of relevance").

provide a full narrative regarding her motivations so that the jury has the full story.[121] This argument is rooted in the history of the human species as tellers and listeners of stories.[122] Stories are part of our history and our biology as a species.[123] Beyond the research that has been conducted demonstrating the impact of storytelling generally on humans, there has also been much interest in storytelling's effect on jurors specifically.[124] For example, cognitive experimental psychologists Nancy Pennington and Reid Hastie developed a theory about juror decision-making called the Story Model, based on the idea that jurors construct a story based on the information that they receive at trial.[125] Their research demonstrates that when evidence is presented in story order, jurors are more likely to find the story coherent and compelling.[126] Whether or not they intend to do so, jurors form a narrative in their minds in the process of developing opinions about the trial.[127] Experienced trial lawyers know that providing a beginning, middle, and end for the jury in the

[121] *See id.* at 113 ("Evidence regarding the motivations underlying protester actions allows the factfinder to develop a contextual narrative within which to fit the protesters' actions and intentions.").

[122] *See id.* at 134 ("[S]cholars have documented a human storytelling tradition dating back millennia.").

[123] *See* Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) Are As Important As IRAC*, 25 T.M. COOLEY L. REV. 267, 279 (2008) ("Looking back through time, scientists theorize that storytelling evolved as an adaptive, defense reaction to the expansion of human intelligence, which began about 40,000 years ago."); Carol A. Oliver, *The Social Brain and the Neuroscience of Storytelling*, TEACHING SCIENCE STUDENTS TO COMMUNICATE: A PRACTICAL GUIDE 31, 34 ("Experiments show that while reading, watching, or listening to a story physical changes in the chemistry of body occur impacting the brain's neural pathways and they are astoundingly common to all of us during storytelling.").

[124] *See, e.g.*, W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 4 (Quid Pro Books 2d ed. 2016) ("[I]n order to understand, take part in, and communicate about criminal trials, people transform the evidence introduced in trials into stories about the alleged criminal activities.").

[125] *See* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 521 (1991) ("The Story Model is based on the hypothesis that jurors impose a narrative story organization on trial information.").

[126] *See id.* at 527 ("[E]xpectations about the kinds of information necessary to make a story tell the juror when important pieces of the explanation structure are missing and when inferences must be made.").

[127] *See* Stefan H. Krieger & Jonathan D. Krieger, *Storytelling and Relevancy*, 99 OR. L. REV. 163, 166 (2020) ("[J]urors instinctively construct stories from the trial evidence in making their decisions, weighing the comparative credibility of the competing narratives.").

form of a story is more persuasive than other methods of trial presentation.[128] It is also not a new idea that storytelling belongs in the courtroom; in fact, American courts used to be more open to storytelling in the courtroom.[129] Providing a more complete narrative for the jury more closely aligns with jurors expectations, as the opinion in *Old Chief* emphasized.[130]

D. The Necessity Defense

The necessity defense is rooted in the idea that sometimes justice is better served by violating the law than by obeying it.[131] It allows the defendant to argue that her actions, even though they were illegal, were justified to combat a greater evil.[132] The decision regarding whether or not to allow the defense is made by the judge before trial.[133] The elements of necessity vary from jurisdiction to jurisdiction, but generally, the defendant must show that: 1) she acted to avoid imminent harm, 2) no legal alternatives were available, 3) her actions were the lesser evil than the evil sought to be avoided, and 4) there was a direct causal relationship between her actions and the harm avoided.[134]

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[128] *See* Phillip H. Miller, *Storytelling: A Technique for Juror Persuasion*, 26 AM. J. TRIAL ADVOC. 489, 489 (2003) ("Stories, when well conceived and executed, provide jurors a memorable and persuasive framework for their recollection of critical case facts.").

[129] *See* Krieger & Krieger, *supra* note 127, at 165–66 (explaining how courts, prior to the twentieth century, were "not so wary of witness storytelling").

[130] *See* West, *supra* note 86, at 133 ("The Court in *Old Chief* drew upon a deep body of work affirming the important role of narrative within the context of trials.").

[131] *See* Quigley, *supra* note 90, at 11 ("The basic theory of the necessity defense is that the defendant properly exercised her or his free will and violated a law in order to achieve a greater good or prevent a greater harm.").

[132] *See* Abigail J. Fallon, Comment, *Break the Law to Make the Law: The Necessity Defense in Environmental Civil Disobedience Cases and Its Human Rights Implication*, 33 J. ENV'T L. & LITIG. 375, 378 (2018) ("The necessity defense is a common law doctrine whereby defendants may argue that they had no choice but to violate the law.").

[133] *See* John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 PIERCE L. REV. 111, 120 (2007) ("[T]he judge will allow an offer of proof from which it may be determined, as a preliminary matter, whether the defendant has sufficient evidence to make out a valid necessity defense.").

[134] *See* 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, 1175 (1987) (outlining the elements of the necessity defense).

Allowing the jury to hear a necessity defense is one example of the jury fulfilling its role as a check on the government when the law and social values differ.[135] The jury can prevent unjust enforcement of the law by acquitting the defendant.[136] This is similar to the ability of the jury to nullify a verdict.[137] However, while the necessity defense outlines elements to be met for the jury to reach an acquittal, defendants are forbidden from informing jurors about nullification.[138] As courts continue to determine the applicability of the necessity defense in activist trials, their rulings shape what evidence might go to the jury.[139]

III. Animal Rescuers on Trial

Legal barriers to admitting evidence have shaped the outcomes of animal rescue trials.[140] For decades, courts have consistently prevented animal cruelty evidence from being shown to the jury.[141] Whether the rescuers were acquitted or convicted and whether they entered a laboratory or a farm, examining previous animal rescue trials reveals the real consequences of barring this evidence.[142]

A. Hawaii Dolphin Rescue

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[135] *See* Williams v. Florida, 399 U.S. 78, 100 (1970) (writing that the jury's purpose is "to prevent oppression by the Government"); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 59 (2003) (arguing that the jury "possesses the power to elaborate the governing norms underlying criminal law from the perspective of the community and its sense of moral blameworthiness").

[136] *See* Long & Hamilton, *supra* note 21, at 73 (describing acquittals in necessity cases).

[137] *See id.* at 71 ("The necessity defense is a principled and organized version of nullification, which requires juries to follow formal instructions before they can acquit a defendant in contravention of criminal law.").

[138] *See* West, *supra* note 86, at 145 ("[T]he Constitution does not expressly recognize a right of jury nullification.").

[139] *See* Sullivan, *supra* note 10, at 1920 (explaining that, in one animal rescue trial, because the necessity defense was denied, the evidence that was admissible "regarding the conditions within the facilities or the condition of the ducks and chickens" was "sharply limited").

[140] *See id.* at 1920–21 (writing that, in one animal rescue trial, after the evidence was limited, the defendant was convicted of a felony).

[141] *See, e.g.*, State v. LeVasseur, 613 P.2d 1328, 1332–34 (Haw. Ct. App. 1980) (limiting the evidence in an animal rescue trial in 1980).

[142] *See* Marceau, *supra* note 23, at 1321 n.17 (describing one animal rescuer's sentence, which was six months in jail and five years of probation).

The 1977 rescue that became the subject of *State v. LeVasseur* may have been the first open rescue to have taken place in the United States.[143] Kenneth LeVasseur was an employee of a marine laboratory in Hawaii that conducted experiments on two dolphins named Puka and Kea.[144] After working for the laboratory for about two years, LeVasseur became so upset about Puka and Kea's captivity that he, with the help of a fellow employee, removed the dolphins from the facility and released them into the ocean.[145] The rescuers left a message identifying themselves as the "Undersea Railroad" and called a press conference to announce the rescue.[146]

At the ensuing trial for first-degree theft, LaVasseur's attorney described in his opening statement the horrific conditions that Puka and Kea had experienced in the laboratory, as well as the intelligence of dolphins as a species.[147] However, when he sought to assert a necessity defense, citing the cruel conditions at the laboratory, the trial court rejected his proposed testimony about the conditions in the laboratory as irrelevant to the theft charges.[148] The appellate court affirmed, with its opinion focusing on why the necessity defense was unavailable to LaVasseur in this situation.[149]

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[143] *See id.* at 1320 (describing LeVasseur's rescue as "[t]he first documented animal liberation in this country").

[144] *See* GAVAN DAWS, *"Animal Liberation" as Crime: The Hawaii Dolphin Case*, *in* ETHICS AND ANIMALS 361, 361 (1983) (detailing the events leading up to the dolphins' rescue, including that the dolphins had both been experimental subjects for many years).

[145] *See id.* (describing the rescue, where the dolphins "were lifted from their circular concrete isolation tanks, carried on stretchers to a panel van fitted with foam padding, driven to a fishing and surfing beach an hour from the city, and turned loose before sunrise in the Pacific").

[146] *See id.* at 362 (writing that the rescuers "did not consider themselves to be criminals" and that "they took the view that if there was a crime, it was the crime of keeping dolphins—intelligent, highly aware creatures, with no criminal record of their own—in solitary confinement, in small concrete tanks, made to do repetitious experiments, for life").

[147] *See id.* at 366 (detailing the defense's opening statement, including the description of the dolphins' "punishing regimen": "overwork, reductions in their food rations," and "total isolation").

[148] *See id.* at 367 (describing one bench conference, during which LaVasseur's attorney said that his witnesses would speak to, among other topics, "conditions at the laboratory" and "evidence from experts as to self-damaging, self-destructive behavior in captive dolphins").

[149] *See* State v. LeVasseur, 613 P.2d 1328, 1332–34 (Haw. Ct. App. 1980) (holding that releasing the dolphins into the ocean was "at least as great an evil as a matter of law as that sought to be prevented" and that "a dolphin is not 'another'" under Hawaii's definition pertaining to the necessity defense).

B. Oregon Laboratory Raid

In *State v. Troen*, an animal rights activist named Roger Troen was on trial for assisting with the theft of laboratory animals.[150] Although Troen was not involved in the laboratory break-in itself, he drove the getaway car carrying monkeys, rabbits, hamsters, and rats and later took some of the animals to be examined by a veterinarian.[151] Troen was eventually arrested on charges of theft, burglary, and conspiracy to commit burglary after the veterinarian traced the animals' tattoos to the laboratory and contacted law enforcement.[152]

At trial, Troen attempted to assert a necessity defense.[153] In support of that defense, he proffered photos and video recordings as evidence of animal abuse in laboratories.[154] The trial court excluded this evidence, however, and the appellate court affirmed.[155] The appellate court determined that the necessity defense was unavailable to Troen because the laboratory's actions were not illegal.[156] The necessity defense is not available if it would be inconsistent with another law.[157] Thus, because the defense was unavailable, Troen was not permitted to bring in evidence

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[150] *See* Laura G. Kniaz, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 BUFFALO L. REV. 765, 812 (1995) (describing Troen's actions).

[151] *See* Dylan Forest, *Obituaries*, ANIMAL PEOPLE (Nov. 5, 2008), https://newspaper.animalpeopleforum.org/2008/10/01/obituaries-oct-2008/ (describing the raid at the University of Oregon psychology laboratory as "among the first high-profile actions attribute to the Animal Liberation Front").

[152] *See id.* (describing Troen's arrest); State v. Troen, 786 P.2d 751, 752 n. 1 (Or. Ct. App. 1990) ("Defendant was convicted of theft in the first degree, burglary in the second degree, and conspiracy to commit burglary in the second degree.").

[153] *See* Kniaz, *supra* note 150, at 812 (explaining Troen's attempt to assert a necessity defense).

[154] *See Troen,* 786 P.2d at 753 (quoting Troen as seeking to introduce "graphic photographic evidence of research practices and abuses, [and] graphic video-taped documentaries of other similar research practices and animal abuses").

[155] *See id.* ("Generally, a trial court should make a pretrial ruling on the admissibility of evidence only if the evidence carries an unusual potential for prejudice . . . [T]he nature of the evidence was such that the trial court did not abuse its discretion in ruling on its admissibility before trial."); James, *supra* note 34, at 29 ("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.").

[156] *See Troen*, 786 P.2d at 754 ("The decisive question, however, is whether defendant's use of the defense here would be "inconsistent with some other provision of law.").

[157] *See id.* at 753 ("[F]ederal law expressly allows what the victim of the crime was doing, so defendant may not offer a choice of evils defense when he interfered with that activity because of his belief that what the laboratory was doing is morally wrong.").

of animal cruelty because this evidence was only relevant to a necessity defense.[158] Troen's motive for participating in the rescue, along with the animal cruelty evidence supporting his motive, was not material outside of a necessity defense.[159]

C. New York Chicken Rescue

In 2004, an animal rights activist named Adam Durand decided to investigate an egg production facility in New York, which was one of the largest in the state.[160] Durand contacted the company that owned the facility, asking to observe the hens there, but his request was denied.[161] Durand then decided to enter the farm on three different occasions, documenting the conditions at the farm and rescuing several sick hens.[162] Durand produced a short documentary using the footage obtained, showing hens in cages alongside the corpses of other hens, feces, and urine dripping from higher cages onto lower cages, and the necks of hens wrapped around cage wire.[163]

Durand was charged with trespassing, burglary, and petit larceny.[164] The case went to trial and Durand attempted, unsuccessfully, to raise a necessity defense.[165] The trial judge determined that Durand's intent was to hurt the farm rather than help the hens, making the necessity defense

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[158] *See id*. ([T]he right to present a defense is subject to the requirements that the defense be one that the law recognizes and that it be proven by admissible evidence.")

[159] *See id.* at 754 ("[W]hy defendant did what he did has nothing to do with whether he acted intentionally or knowingly. The issue was *whether* defendant acted with a particular state of mind, not *why* he had that mental state. The proffered evidence would not tend to show that defendant did not know what he did or intend to do it.").

[160] *See* Michelle York, *Capturing Caged Hens on Video Brings a Charge of Burglary*, N.Y. TIMES (Mar. 16, 2006), https://www.nytimes.com/2006/03/16/nyregion/capturing-caged-hens-on-video-brings-a-charge-of-burglary.html (describing Durand's decision to investigate Wegmans after learning that "an overwhelming majority of the world's eggs are produced at farms where hens are caged").

[161] *See id*. (reporting that Wegmans denied Durand's request to tour the farm).

[162] *See id*. (describing three midnight visits to the farm).

[163] *See* Adam Durand, *Wegmans Cruelty*, YOUTUBE (Apr. 26, 2011), https://www.youtube.com/watch?v=u99T_xb9NTs (depicting footage taken from Durand's investigations).

[164] *See* York, *supra* note 160 (describing Durand's charges).

[165] *See* Sullivan, *supra* note 10, at 1918 (2024) (writing that Durand's "attempt to assert a necessity defense was denied").

unavailable.[166] The judge pointed to the fact that Durand had visited the farm on three different occasions but did not report the cruelty that he had observed to authorities.[167] However, Durand's attorneys argued that, because the hens rescued were so sick that they needed medical care, the value element of the burglary charge was not met.[168] Thus, the footage of the farm was admitted, although the sound from the video was not permitted to be heard by the jury.[169] Durand was convicted of criminal trespass but acquitted on the other charges because his attorneys successfully argued that the hens did not have value.[170] Given the challenges the aforementioned defendants have faced, it is necessary to explore the potential pathways to admitting evidence of animal cruelty, in hopes of securing better outcomes for animals and their rescuers.

IV. PATHWAYS TO ADMITTING EVIDENCE OF ANIMAL CRUELTY

In some states, the right to rescue certain animals has already been recognized in limited circumstances.[171] For example, private citizens are allowed to rescue animals from a hot car in three states.[172] These laws reflect a societal understanding that saving the life of an animal is more important than avoiding what would otherwise be a crime.[173] However, these laws do not extend

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[166] *See* James, *supra* note 34, at 29 (explaining that Durand was denied the necessity defense because the court "questioned his true motives").

[167] *See id.* (writing that the judge considered Durand a vigilante rather than a hero).

[168] *See id.* at 29–30 (explaining that Durand argued that he "lacked the intent to burglarize, since the hens removed had little commercial value").

[169] *See* Elizabeth L. DeCoux, *Toward a Necessity Defense for Animal Activists Accused of Property Crimes*, 50 CRIM. LAW BULLETIN 1, 1 (2014) ("The parties agreed to admission of the video images and agreed that the sound from the videos would not be admitted.").

[170] *See* James, *supra* note 34, at 29 (explaining that the value argument was successful).

[171] *See* Carter Dillard & Matthew Hamity, *From Social Justice to Animal Liberation*, 18 ANIMAL & NAT. RESOURCE L. REV. 57, 89–90 (2022) ("The notion that concerned individuals have a right to rescue sick or dying animals has basis in law, albeit in limited circumstances.").

[172] *See id.* at 89–90. ("California, Ohio, and Massachusetts each allow for private persons to rescue any animal victim in imminent danger from a vehicle."); Cal. Civ. Code § 43.100 (2017); Ohio Rev. Code Ann. § 959.133(a) (2016); Mass. Gen. Laws Ann. ch. 140, § 174F (West 2018).

[173] *See* James, *supra* note 34, at 33 (describing the tension between "tort cases that recognize only the replacement value of lost companion animals" and cases where someone rescues a dog from a hot car as demonstrating that "nonhuman animals do in fact have value beyond the cost of replacement").

to the rescue of animals from industries like animal agriculture and animal experimentation.[174] Thus, rescuers who save a piglet from a farm or a dolphin from a laboratory put their freedom on the line.[175] For those rescuers who find themselves in a courtroom defending their actions, they should be permitted to tell the jury about the animal cruelty that they had witnessed.[176]

This section explores three potential solutions that would allow evidence of animal cruelty to be shown to the jury: making the necessity defense available, expanding societal understanding of relevant evidence, and amending the Federal Rules of Evidence to address animal rescue cases.[177] Even with only a handful of animal activist cases to examine as precedent, some differences among the cases reveal possible frameworks within which to develop arguments for the admissibility of animal cruelty evidence.[178] There are numerous avenues through which courts could decide to admit animal cruelty evidence, with some situations presenting stronger arguments than others.[179] At the root of all three proposed solutions is an understanding of the crucial role juries play in the American judicial system.[180] None of the following solutions guarantee that a jury would acquit an animal rescuer, but they provide an opportunity for jurors to fulfill their role as the conscience of the community pertaining to animal cruelty.[181]

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[174] *See id.* (explaining how the law treats rescuing different species of animals differently).

[175] *See* DAWS, *supra* note 144, at 370–71 (explaining that LeVasseur was originally sentenced to six months in jail and five months of probation).

[176] *See* Wilmott, supra note 24, at 934 ("Because juries make decisions largely through the process of constructing stories, each party must be able to tell plausible and complete stories to the jury.").

[177] *See infra* Sections IV.A, IV.B, IV.C.

[178] *See* Sullivan, *supra* note 10, at 1913–21 (describing different open rescue cases).

[179] *See* Loesch, *supra* note 20, at 1107–08 (describing why amending the FRE is the best way to get motive testimony of civil disobedients into the courtroom).

[180] *See* Commonwealth v. Hood, 452 N.E.2d 188, 198 (Mass. 1983) (Liacos, J., concurring) ("That the defendants should be allowed to present their defense is required by a proper respect for the role of the jury in the criminal justice system.").

[181] *See* Witherspoon v. Illinois, 391 U.S. 510, 519 (1968) (writing that juries represent the "conscience of the community"); Youngjae Lee, *The Criminal Jury, Moral Judgments, and Political Representation*, 2018 U. ILL. L. REV. 1255, 1270–71 (2018) (describing how, since *Witherspoon v. Illinois*, the Supreme Court and lawyers alike have described juries as the "conscience of the community").

A. Amending the Federal Rules of Evidence to Address Animal Rescue Cases

One potential solution is amending the Federal Rules of Evidence (FRE).[182] This solution has been previously proposed for civil disobedience trials generally and is applicable in animal rescue trials as well.[183] Such an amendment would allow evidence of an animal rescuer's motive.[184] Because of how activists have been unsuccessful thus far with other methods of bringing in evidence of an activist's motivations, which largely depends on a judge's discretion, amending the FRE provides a more consistent way to address the problem.[185] It has been recommended that the FRE should be amended to include a civil disobedience justification.[186] Such a justification would encompass animal rescuers whose actions are motivated by a belief in animal rights.[187]

The biggest barrier to this proposed solution is that amending the FRE requires either legislation from Congress or rulemaking by the Judicial Conference of the United States.[188] Since their enactment in 1975, there have been few amendments.[189] The most controversial amendment was the addition of Rules 413-415, which passed despite strong opposition from the Judicial Conference.[190] These rules permit evidence of a defendant's past sexual conduct in sexual assault and child molestation cases.[191] The Judicial Conference's opposition was partly due to the

[182] *See* Loesch, *supra* note 20, at 1109–11 (proposing amendments to the Federal Rules of Evidence to permit motive testimony in civil disobedience trials).
[183] *See* James, *supra* note 34, at 10 (describing animal rescue as a form of civil disobedience).
[184] *See* Loesch, *supra* note 20, at 1110 (proposing an amendment that allows motive testimony for activist defendants "to show legitimacy and sincerity of belief, serious conflict of conscience, and the balancing of competing obligations that led to the decision to violate the law").
[185] *See id.* at 1107-08 (describing why other methods have failed).
[186] *See id.* at 1109. (describing a civil disobedience justification).
[187] *See* James, *supra* note 34, at 7 (explaining why animal advocates decide to participate in rescue efforts).
[188] *See* Eileen A. Scallen, *Proceeding with Caution: Making and Amending the Federal Rules of Evidence*, 36 SW. U. L. REV. 601, 612–13 (2008) (describing the two "routes" available to amending the FRE).
[189] *See id.* at 610 (describing changes to the FRE as "fairly minimal").
[190] *See id.* (describing the amendments as controversial).
[191] *See id.* (explaining the purpose of the amendments).

overwhelming opposition to the proposed Rules in public comments, as well as a concern for safeguarding defendants' rights.[192] Congress's ability to enact these Rules despite opposition from many groups and the Judicial Conference demonstrates that Congress need not have public support to amend the FRE.[193] However, the small number of amendments to the FRE in the fifty years since its inception demonstrates a lack of propensity for advancing evidence law through the FRE.[194] Additionally, an amendment to the FRE does not guarantee that states will follow suit, but many states likely would.[195] Regardless, an amendment to the FRE is probably the solution that is the least likely to occur, but would be the most encompassing improvement to this area of the law.[196]

B. Expanding Judges' Understanding of Relevant Evidence

Another possible solution that would allow for evidence of animal cruelty to be admitted at trial is a more expansive conception of relevant evidence.[197] It is not a new idea that juries should be presented with more evidence, not less.[198] Under the framework discussed in *Old Chief*, excluding evidence of animal cruelty in animal rescue trials creates a gap in the story, and this gap

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[192] *See id.* (describing the opposition to the amendments).

[193] *See id.* at 616 ("With increased public scrutiny and participation in the rulemaking process and lengthy periods for public comment and study by all participants in the process, it is somewhat surprising any proposals have survived to final form.").

[194] *See id.* (speculating that the Evidence Rules Committee "has exercised considerable restraint in promulgating new rules and amendments, perhaps because it is acutely aware of the failure of past attempts to engage in wholesale 'reform' of evidence law").

[195] *See* Edward K. Cheng, Erie *and the Rules of Evidence*, 65 VAND. L. REV. EN BANC 231, 328 (2012) ("The vast majority of states have adopted the Federal Rules of Evidence, and since American evidence law arises from a common tradition, federal and state law will seldom conflict.").

[196] *See* Scallen, *supra* note 188, at 616 (explaining the difficulties of amending the FRE).

[197] *See* West, *supra* note 86, at 143 (arguing for more expansive concepts of relevance for protester trials).

[198] *See* Karl H. Kunert, *Some Observations on the Origin and Structure of Evidence Rules Under the Common Law System and the Civil Law System of "Free Proof" in the German Code of Civil Procedure*, 16 BUFF. L. REV. 122, 127 (1966)) (describing the barriers that evidence rules pose to the quest for the truth).

affects how jurors interpret the defendant's actions.[199] While the justices in *Old Chief* were primarily focused on the prosecution's right to present its case how it wants to, much of the reasoning in the case can easily apply to defendants as well.[200] In fact, at one point in the opinion, Justice Souter refers more broadly to the offering party's right to bring in evidence.[201] When defendants have an interest in painting a full picture for the jury, judges should apply *Old Chief* to protect those interests.[202]

Interviews with jurors from the Smithfield trial demonstrate that omitting animal cruelty evidence—in this case, the footage of the rescue—causes confusion and frustration.[203] Every juror who was interviewed expressed concerns about not being able to see the video of the rescue.[204] They felt like something was being hidden from them and that they were not being told the whole story.[205] One juror even described keeping the video from the jury as backfiring on the prosecution.[206] The jurors expected to be presented with the entire story leading to the defendants'

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[199] *See* Old Chief v. United States, 519 U.S. 172, 188–89 (1997) (explaining that "gaps of abstraction" may cause confusion for jurors).

[200] *See id.* at 186–189 (agreeing with the standard that "the prosecution is entitled to prove its case by evidence of its own choice"); Wilmott, *supra* note 24, at 934–935 (2023) (arguing that defendants, like prosecutors, have a right to present a cohesive narrative).

[201] *See Old Chief,* 519 U.S. at 183 (writing that judges should appreciate "the offering party's need for evidentiary richness and narrative integrity in presenting a case").

[202] *See* United States v. Vallejo, 237 F.3d 1008, 1023 (9th Cir. 2001) (writing that the defendant should have been permitted to present evidence to "provide an answer to the question 'the jurors would naturally ask themselves'") (quoting United States v. Crosby, 75 F.3d 1343, 1347 (9th Cir. 1996)).

[203] *See* Smithfield Trial Juror Interviews, *supra* note 15, at 1 (describing the process of interviewing the jurors).

[204] *See id.* at 7 ("And the little information that we got from the video, which is another thing I didn't like, hey I'm old enough to – I can take the video. If it shows some crazy stuff let me see it, I want to know what's going on. I did not like how they would only let us see a little bit.").

[205] *See id.* at 33 ("Not being able to see the video, I don't know what others have said, but that was a big deal for us. We felt like we didn't have all the information. So, the prosecution to me looked like they were overreaching, trying to make a political statement more than – this wasn't really about a crime by the end, that's what I thought.").

[206] *See id.* at 18 ("I think it did bother me personally not to be able to see the video that kept being brought up continuously throughout [the trial]. But yeah, I understood his point of view on that because it was a theft case in that incidence. But I think in the end, withholding that and trying to hide certain things, you know, backfired.").

theft charges and instead were faced with a censored version of events that damaged the defense's narrative integrity.[207]

The defense in *LeVasseur* likewise attempted numerous times to bring in evidence of animal cruelty, resulting in many bench conferences—more bench conferences, in fact, than the court reporter had ever witnessed in his many years of experience.[208] Such a disruption in the defense's narrative is sure to fall short of the jurors' expectations, increasing the risk that the jurors will draw negative inferences about the defense.[209]

One aspect that most of the animal activist cases discussed above have in common is that the defendants sought to admit evidence of animal cruelty that took place during the crime in question.[210] For example, the defendants in the Smithfield trial, as well as Durand in the New York chicken rescue, sought to admit videos that they took depicting the condition of the farm on the night of the rescue.[211] In other cases, however, defendants sought to admit evidence of animal cruelty more generally.[212] For example, Troen sought to admit evidence demonstrating the violence animals in laboratories suffer, but no evidence from the specific laboratory that Troen was on trial for raiding.[213] The proximity of the animal cruelty likely matters in determining whether or not it should be admitted for the purpose of developing the defendant's narrative.

C. Making the Necessity Defense Available to Animal Rescuers

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[207] *See id.* at 4 (describing a juror's frustration with the number of objections from the prosecution that prevented the defense from continuing their "line of thought").
[208] *See* DAWS, *supra* note 144, at 365 ("The court reporter, a man of many years' experience, could not recall a trial in which the attorneys and the judge spent so much time in colloquy out of hearing of jury, spectators, and the press.").
[209] *See* Saltzburg, *supra* note 119, at 1019 (arguing that jurors may penalize the party that does not fulfill their expectations).
[210] *See* Lennard, *supra* note 9 (describing the video that the defendants sought to admit in the Smithfield trial).
[211] *See* York, *supra* note 160 (describing the video Durand sought to admit).
[212] *See* State v. Troen, 786 P.2d 751, 753 (Or. Ct. App. 1990) (referring to wanting to admit evidence of cruelty in laboratories, not but footage of the specific laboratory in question).
[213] *See id.*

A last possible solution to the problem of the exclusion of animal cruelty evidence is to make the necessity defense available in animal rescue cases.[214] While rescuers have consistently attempted this, it has yet to be successful.[215] The blocking of a necessity defense is the biggest barrier that rescuers currently face to bringing in evidence of animal cruelty, with judges deciding that such evidence would only be relevant if the defense were available.[216] Indeed, the necessity defense was blocked in every case examined in this Note.[217]

To examine why the defense should be available to animal rescuers, it is necessary to go through its elements.[218] First, the animal rescue must have occurred in order to avoid imminent harm.[219] The common thread in the previously discussed animal rescue cases is that they all involve imminent harm that would have come to the animals absent an intervention on the part of the defendants: the laboratory animals rescued in *LeVasseur* and *Troen* were experiencing ongoing cruel experiments that caused them to suffer physical and psychological harm.[220] Similarly, Lily and Lizzie—the piglets rescued from the Smithfield farm—were so severely sick that they likely would have died had the activists not intervened.[221] Lily and Lizzie, as well as the hens rescued by Durand in the New York chicken rescue, were so sick that the juries in both cases were not

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[214] *See* West, *supra* note 86, at 144 ("Because courts adopt the view that evidence of protester motivation is not directly relevant to most offense elements, protesters often attempt to assert claims or defenses that might make motivation relevant. Among the most common affirmative defenses attempted by protesters are the related claims of necessity and choice of evils.").

[215] *See* DeCoux, *supra* note 169, at 1 ("[A]nimal activists who have broken the law to rescue animals have, to date, found no refuge in the necessity defense.").

[216] *See, e.g.*, State v. Troen, 786 P.2d 751, 753 (Or. Ct. App. 1990) (writing that evidence of laboratory conditions was not relevant since the necessity defense was unavailable).

[217] *See infra* Section III (providing examples of cases where animal rescuers have been on trial).

[218] *See* James, *supra* note 34, at 18–19 (describing that, when a necessity defense is challenged on a motion in limine, "the court must make an initial determination and decide whether the defendant has proffered sufficient evidence to establish the elements of the defense").

[219] *See id.* at 23–24 (describing the elements of the necessity defense).

[220] *See* DAWS, *supra* note 144, at 261 (describing the psychological effects of confinement on the dolphins).

[221] *See* State v. Troen, 786 P.2d 751, 753 (Or. Ct. App. 1990); State v. LeVasseur, 613 P.2d 1328, 1332–34 (Haw. Ct. App. 1980); Greenwald, *supra* note 1.

convinced that the animals had the value required for the theft offenses.[222] This element might be more difficult to satisfy in rescue situations where it is not immediately obvious that the harm is imminent, such as a rescue of an animal from an industry where the animals are not killed and the conditions are relatively humane.[223] Unlike defendants in other civil disobedience cases, where showing imminent harm can be a significant hurdle, animal rescuers have stronger grounds for this element of the defense due to the visible and immediate suffering of the animals they seek to save.[224]

Next, the actions of the rescuer must have a direct causal relationship with the harm that is being avoided.[225] Like the imminence element, animal rescuers also have a more convincing argument to satisfy this element than other civil disobedience defendants because the rescuer is at the immediate location of the injustice, unlike an anti-war protester who might be an ocean away from the war against which she is protesting.[226] By taking a sick animal to a veterinarian, as seen in Troen and the Smithfield trial, or releasing a captive animal into the wild to experience freedom as in LeVasseur, the rescuer directly alleviates the harm that the animal was experiencing.[227]

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[222] *See* Sullivan, *supra* note 10, at 1919 (describing the outcome of the Smithfield trial).

[223] *See* James, *supra* note 21, at 25-26 (describing a possible exception to the imminence element where animals "are not overtly suffering").

[224] *See id.* at 25 (arguing that "the imminence requirement is rarely a hurdle"); William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 49 (2003) (lamenting, regarding anti-nuclear weapons protesters, that "reported cases consistently find no evidence supporting the element of imminent harm").

[225] *See* James, *supra* note 34, at 30 ("[T]o invoke the necessity defense a rescuer must also show a causal connection between the act taken and the harm he sought to avert.").

[226] *See* United States v. Kabat, 797 F.2d 580, 592 (8th Cir. 1986) ("[I]n political protest cases a sufficient causal relationship between the act committed by the defendants and avoidance of the asserted greater harm inevitably will be lacking.").

[227] *See* Forest, *supra* note 151 (describing animal rescuer Troen taking several of the rescued rabbits to a veterinarian after the rescue).

Rescuing the animal also must have been the lesser evil that was available to the rescuer.[228] Of course, in the eyes of the rescuer, saving the life of an animal is a lesser evil when compared to breaking the law or causing economic damage to an animal enterprise.[229] In fact, many states have recognized that this balancing test should favor the rescuer in situations when an animal is rescued from a hot car.[230] However, because of the economic power behind animal agriculture and vivisection, courts have thus far determined that it is a greater evil to cause economic damage to these industries.[231] The appellate court in *LeVasseur* found the necessity defense to be unavailable in part because committing theft by rescuing Kea and Puka was not a lesser evil than what LeVasseur was aiming to prevent.[232] The existence of the Animal Enterprise Terrorism Act, which deems efforts that cause economic damage to animal enterprises as terrorism, further illustrates the American legal system's position that protecting the industry is of the utmost importance.[233] Interestingly, this element seems to be easier for activists in other movements to show, even when the targets of activists' crimes are large corporations.[234] Just as courts have acknowledged for activists in other movements that their actions were a lesser evil, courts should evolve to apply the

[228] *See* James, *supra* note 34, at 32 ("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.").
[229] *See id.* (explaining the motivation behind animal rescues).
[230] *See id.* at 1 (comparing the rescue of a dog locked in a hot car to the rescue of a chick from a hatchery).
[231] *See id.* at 33 ("[J]udges 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.").
[232] *See* State v. LeVasseur, 613 P.2d 1328, 1334 (Haw. Ct. App. 1980) ("[R]emoving the dolphins from their tanks, transporting them to Yokohama Bay and there releasing them into the ocean, thereby committing the crime of theft, was at least as great an evil as a matter of law as that sought to be prevented.").
[233] *See id.* (arguing that the existence of the AETA supports the position that the interests of animal enterprises are more important than the right of an animal not to suffer).
[234] *See* Cohan, *supra* note 133, at 126 (2007) ("[N]o one seriously disputes that criminal trespass or unlawful entry is a lesser evil than the evils of a nuclear disaster.").

same principle in animal rescue cases.[235] This would more squarely align with public perceptions about the value of the lives of animals.[236]

Lastly, it must be that an animal rescuer had no legal alternative to rescuing the animal.[237] The court in *LeVasseur* held that this element was not met, criticizing LeVasseur for resorting to theft in lieu of reporting the laboratory to law enforcement.[238] The court in *Troen* similarly referenced the so-called extensive federal regulations covering animals used for experimentation.[239] These decisions appear to assume that the laws governing animals in laboratories are adequately enforced and that action would indeed be taken if only activists did report what they had observed at these facilities.[240] In reality, these laws are far from extensive and are stunningly unenforced.[241] However, courts do not seem to take the inefficacy of the laws into consideration, even for defendants in other movements.[242] If this element is presented as a barrier, one solution is to allow the jury to decide whether a reasonable alternative existed for the defendant.[243]

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[235] *See* State v. Diener, 706 S.W.2d 582, 585 (Mo. Ct. App. 1986) ("[O]n balance [the defendant's] trespass was trivial in the face of a possible nuclear disaster.").

[236] *See* Brown, *supra* note 58 (explaining that most Americans view their pets as an important part of their families).

[237] *See* James, *supra* note 34, at 35 (explaining the requirement that there must not have been a legal alternative to the defendant's actions).

[238] *See* State v. LeVasseur, 613 P.2d 1328, 1333 (Haw. Ct. App. 1980) ("[LeVasseur] offered no explanation as to why he never attempted to contact the federal government either by phone or mail to report the alleged life-threatening conditions at the laboratory. In other words, it is clear that the appellant consciously and deliberately chose 'theft' of the dolphins as that crime is defined by our statutes as the alternative to the "evil" of the alleged violation of the policy of the United States for the protection of laboratory animals.").

[239] *See* State v. Troen, 786 P.2d 751, 753 (Or. Ct. App. 1990) ("Extensive federal regulations govern the treatment of animals used in the experiments that the laboratories were performing.").

[240] *See id.* (describing the regulations as "extensive").

[241] *See* Swanson, *supra* note 53 (explaining that laws governing animal protection are underenforced).

[242] *See* Cohan, *supra* note 133, at 140 ("Courts have been unsympathetic to the argument that legal processes to redress grievances are inadequate or ineffective.").

[243] *See* Laura J. Schulking, Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79, 93 (1989) (arguing that, in cases where defendants believe that "history demonstrates the futility of legal action," "due process entitles them to jury consideration of whether their belief in the futility of legal action was reasonable and whether this established a reasonable belief that no legal alternative existed").

Some courts, including federal courts, make a distinction between direct and indirect civil disobedience.[244] Some of these courts have determined that the necessity defense is only available to activists who participated in direct civil disobedience.[245] Direct civil disobedience is when an activist violates the law against which they are protesting, such as when Black activists sat at white-only lunch counters in an effort to protest segregation.[246] Indirect civil disobedience is when an activist violates a law that is not directly related to their motivations, such as participating the blockade of a street.[247]

Because of this distinction, it is important to determine whether animal rescue is direct or indirect civil disobedience.[248] One scholar has argued that because animal rescue does not challenge an unjust law, it cannot be classified as direct civil disobedience.[249] However, most, if not all, open rescuers aim to help not just the individual animals in question but to challenge the legality of animal enterprises in general.[250] Rescuers challenge the laws that label animals as property rather than persons because such atrocities would not be permitted against legal persons.[251] Animal rescue should thus be considered as a prime example of direct civil disobedience.[252]

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[244] *See* Cohan, *supra* note 133, at 114–16 (explaining the difference between direct and indirect civil disobedience).

[245] *See* United States v. Schoon, 971 F.2d 193, 199–200 (9th Cir. 1991) (finding that the necessity defense is unavailable in indirect civil disobedience cases).

[246] *See* Cohan, *supra* note 133, at 114 ("Rosa Parks' famous refusal to move from her seat on a Montgomery, Alabama bus was an act of direct civil disobedience because she violated the actual segregation ordinance then in place.").

[247] *See id.* ("Indirect civil disobedience seeks to mobilize public opinion, typically through symbolic action.").

[248] *See id.* at 115. ("The distinction between direct and indirect civil disobedience is important because significant case law holds that the necessity defense is available only to defendants charged with direct civil disobedience.").

[249] *See* James, *supra* note 34, at 11 ("Open rescue . . . 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.").

[250] *See* Marceau et al, *supra* note 32, at 214–15 (arguing that the public's interest in criminal law and the movement-building impacts of legal cases "make criminal prosecutions and trials a potentially viable element of long-term law reform strategies").

[251] *See id.* at 229 ("Open rescues perform the legal right demanded--namely, the right to rescue.").

[252] *See id.* (By their very performance, [open rescues] envision a world in which the profit concerns of a corporation do not override the suffering of sentient animals.").

Despite these arguments, critics may question whether the necessity defense is a viable method for ensuring that evidence of animal cruelty reaches the jury.[253] One concern may be that the necessity defense is an unreliable tactic for activist defendants in other larger, more well-recognized social justice movements, so its application to animal rescuers is even more unsure.[254] Another concern may be that the necessity defense relies too heavily on an individual judge's discretion and is thus a risky strategy.[255]

Even with these challenges, the necessity defense is still a valuable tool to bring in evidence of animal cruelty to the jury.[256] Even though judges may be less familiar with the animal rights movement than other movements, this should not be a big enough barrier to prevent rescuers from trying the defense.[257] Animal rescuers, unlike activists in other movements, can point directly to laws that allow individuals to break the law to rescue animals and argue that the same reasoning behind the passage of those laws applies to their actions.[258] In addition, the fact that judges have enormous discretion in this area means that it is only a matter of time before a judge allows the defense in an animal rescue trial.[259] This is supported by the fact that judges have periodically, though somewhat inconsistently, allowed the defense for activists in other movements.[260] One day,

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[253] See Loesch, *supra* note 20, at 1099 (arguing against the efficacy of the necessity defense).

[254] *See id.* (arguing that the necessity defense, in the context of civil disobedience, "lacks universal applicability").

[255] *See* James, *supra* note 34, at 19 (describing the use of the necessity defense as "highly discretionary").

[256] *See* Kniaz, *supra* note 150, at 807 (arguing that "proper application of the necessity defense" in animal rescue cases would have enabled animal rescuers to "submit their claims to the jury").

[257] *See* Nonhuman Rts. Project, Inc. v. Breheny, 197 N.E.3d 921, 927 (2022) ("[N]o court of this State—or any other—has ever held the writ applicable to a nonhuman animal.").

[258] *See* James, *supra* note 34, at 20 ("[T]he person who breaks a car window to free a trapped dog may be lauded, not charged.").

[259] *See id.* (writing that discretion "works in both directions").

[260] *See* Joseph Rausch, Note, *The Necessity Defense and Climate Change: A Climate Change Litigant's Guide*, 44 COLUM. J. ENV'T L. 553, 568-71 (describing successful examples of the application of the necessity defense).

an animal-friendly trial judge will have a rescue case on her docket, and when that day comes it will be monumental for the advancement of legal rights for animals.[261]

CONCLUSION

Civil disobedience has been integral to the history of the United States as well as the advancement of social justice in every major political movement.[262] The animal rights movement follows this tradition, with animal rescues serving as both a direct challenge to the legal status of animals and a means of exposing the widespread cruelty that would otherwise remain hidden.[263] Yet, when rescuers go to trial, judges consistently block evidence of animal cruelty, depriving jurors of the full context necessary to evaluate the defendants' actions.[264]

Juries are meant to serve as the conscience of the community and balance both legal and moral considerations in their decisions.[265] When judges prevent the jury from seeing the conditions that motivated an animal rescuer's decision to break the law, they take away the jury's ability to make an informed verdict.[266] As public awareness of animal suffering grows, the legal system must evolve to reflect the view that nonhuman animals are more than property.[267]

This change can transpire through amending the Federal Rules of Evidence, by expanding judges' understanding of relevance, or by making the necessity defense available to animal

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[261] *See Nonhuman Rts. Project*, 197 N.E.3d at 968 (Rivera, J., dissenting) ("We are here presented with an opportunity to affirm our own humanity by committing ourselves to the promise of freedom for a living being.").
[262] *See* Carpendale, *supra* note 70 (describing the use of civil disobedience in social justice movements).
[263] *See* Marceau et al, *supra* note 32, at 229 ("Open rescues perform the legal right demanded--namely, the right to rescue.").
[264] *See* Sullivan, *supra* note 10, at 1924 (writing that, once the necessity defense is disallowed, defendants are "sharply curtailed in presenting evidence of the conditions in which the animals were living").
[265] *See* Witherspoon v. Illinois, 391 U.S. 510, 519 (1968) (writing that juries represent the "conscience of the community").
[266] *See* Wilmott, *supra* note 24, at 935 ("Despite the robust protection that the right to present a defense is supposed to offer, defendants' narratives are often constrained by trial judges who decide to exclude important and relevant evidence and appellate judges who validate those decisions on review.").
[267] *See* Brown, *supra* note 58 (explaining that people view pets as part of their family rather than their property).

rescuers.[268] The only way for the justice system to truly seek justice for nonhuman animals and the people who rescue them is to allow jurors to hear the full story and see the evidence of what the rescuers saw.[269] In *Old Chief*, the Supreme Court recognized that evidence of a defendant's thoughts and actions establishes a fact's human significance; now, it is time for juries to consider the nonhuman significance behind an animal rescuer's decision to risk their freedom for an nonhuman animal's life.[270]

[268] *See supra* text accompanying notes 174–265 (detailing the possible solutions for admitting animal cruelty evidence in rescue trials).

[269] *See* Wilmott, *supra* note 24, at 932 (arguing that storytelling is part of a defendant's right to a complete defense).

[270] *See* Old Chief v. United States, 519 U.S. 172, 187–88 (1997) ("When a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment.").