

THE ORIGINS AND EFFICACY OF PRIVATE ENFORCEMENT OF ANIMAL CRUELTY LAW IN BRITAIN

*Jerry L. Anderson**

I.	Introduction.....	263
II.	Martin's Act and its Progeny.....	269
III.	Private Enforcement of Martin's Act	277
	A. Statutory Authority for Private Enforcement	280
	B. Comparison with Child Abuse and Child Labor Enforcement	285
IV.	Advantages of Private Prosecution	288
	A. More Vigorous Enforcement.....	289
	B. Development of Specialized Knowledge	290
	C. Faster Norm Development	292
	D. Conservation of Public Resources.....	294
	E. Avoidance of Co-optation	295
	F. Summary of Advantages of Private Prosecution.....	296
V.	Disadvantages of Private Prosecution.....	296
	A. Unequal Treatment/Class Bias	297
	B. Limitations on Access to Private Property	302
	C. Threats of Violence	304
	D. Possibility of Retaliatory Suits	306
	E. Summary of Disadvantages of Private Prosecution	309
VI.	Conclusion	309

I. INTRODUCTION

In 1822, the British Parliament enacted “An Act to prevent the cruel and improper Treatment of Cattle,”¹ generally recognized as the first statute of any

* Richard M. and Anita Calkins Distinguished Professor of Law, Drake University Law School, jerry.anderson@drake.edu. The Article benefited from the helpful comments of Susan Anderson, Tony Gaughan, Mark Kende, and Jonathan Rosenbloom, as well as those of the participants at the British Legal History Conference 2011 at Cambridge University, where an earli-

nation specifically targeting animal cruelty.² Richard Martin, a colorful and eloquent member of the House of Commons from Galway, was the legislation's principal author and champion and after the law's enactment worked tirelessly to ensure its enforcement.³ Thus, this landmark statute is appropriately known as "Martin's Act." Martin's Act made it a crime, subject to a penalty of up to five pounds or three months in prison, for any person to "wantonly and cruelly beat, abuse or ill treat" various types of livestock, including horses, cattle, and sheep.⁴ In one simple sentence, the Act established an important new norm governing the relationship of human to animals.

The substance of Martin's Act has been thoroughly examined, with a deserved focus on the Act's departure from the traditional view of animals as property, subject to their owner's absolute power.⁵ The Act criminalized behavior that previously had been considered well within the rights of the animal owner. Nevertheless, the new legal norm would have become a mere footnote in history had it not been for the immediate, vigorous, and sustained enforcement of its provisions.⁶ Remarkably, the enforcement of Martin's Act crimes occurred largely through the efforts of private parties rather than public prosecutors.

The Act enabled private enforcement by specifically authorizing the magistrate⁷ to issue a summons or warrant to offenders upon the sworn complaint

er version of this Article was presented. Professor Anderson appreciates the able research assistance of Katherine Kowalczyk (Drake Law '11) and Clare Kernek. This research was supported by a grant from the Drake Endowment Trust.

1. Cruel Treatment of Cattle Act (Martin's Act), 1822, 3 Geo. 4, c. 71.

2. See MIKE RADFORD, ANIMAL WELFARE LAW IN BRITAIN: REGULATION AND RESPONSIBILITY 39 (2001). Despite general recognition as the first animal cruelty law of any nation, Radford notes earlier cruelty laws of Massachusetts Bay Colony and Irish laws prohibiting pulling wool from sheep and attaching ploughs to horses' tails. *Id.* at 39 n.29.

3. Stephen Farrell, *Member Biographies: Martin, Richard (1754–1834), of Dangan and Ballynahinch, co. Galway and 16 Manchester Buildings, Mdx.*, <http://www.historyofparliamentonline.org/volume/1820-1832/member/martin-richard-1754-1834> (last visited Sept. 24, 2012).

4. Martin's Act, 1822, 3 Geo. 4, c. 71, § 1.

5. See, e.g., RADFORD, *supra* note 2, at 38–40; David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800s*, 1993 DETROIT C. L. REV. 1–2 (highlighting Martin's Act as a challenge to the traditional view of domesticated animals as personal property subject to the owner's control); HILDA KEAN, ANIMAL RIGHTS: POLITICAL AND SOCIAL CHANGE IN BRITAIN SINCE 1800, at 34–35 (1998) (discussing Martin's Act).

6. Farrell, *supra* note 3 (describing Martin as "swift to use the new law to bring convictions" by "remonstrating with wrongdoers, [and] initiating unprecedented criminal proceedings" in efforts to bring animal abusers to justice). The first pair of convictions occurred within three weeks after passage of the Act. *Id.*

7. Martin's Act and its progeny typically refer to Justices of the Peace in addition to magistrates. This Article will use the term "magistrate" to refer to both officials, for simplicity.

of any person.⁸ Private enforcement was crucial because the abused animals could not speak for themselves and the animals' owner (or the owner's servant) was often the abuser. At the time Martin's Act became law, English crime victims typically carried out their own prosecutions and only the most egregious felonies were prosecuted by the Crown.⁹ In animal cruelty cases, however, victims could not prosecute or even lodge a complaint; instead, prosecution would rest with third parties who had only a general moral interest in halting animal abuse.

Martin himself brought many of the early prosecutions under his newly minted Act, and frequently patrolled the streets of London, on the watch for animal mistreatment.¹⁰ In 1824, he and other animal protection activists formed an organization—the Society for the Prevention of Cruelty to Animals—to take on the task of investigating and prosecuting abuse.¹¹ The Society began slowly, hiring a few inspectors to frequent the London livestock markets and bring prosecutions.¹² In the 1830s, it brought a total of 1357 prosecutions, mostly in London.¹³ In each subsequent decade, the Society added inspectors and increased prosecutions, so that by the 1890s it had a nationwide force of 120 inspectors and during that decade brought an astounding 71,657 prosecutions.¹⁴

Nearly two centuries after this beginning, the Society has retained its important role in the prosecution of animal abuse crimes, which now encompass cruelty to pets as well as livestock.¹⁵ In 2010, the Royal¹⁶ Society for the Prevention of Cruelty to Animals (RSPCA or “the Society”), which is self-described as “the largest non-governmental law enforcement agency in England and Wales,”¹⁷ fielded over a million telephone calls, investigated almost 160,000 complaints of animal cruelty, and secured convictions of 1086 offenders on 2441 charges.¹⁸

8. Martin's Act, 1822, 3 Geo. 4, c. 71, § 1. If the complaint turned out to be frivolous, however, the complaining party could be liable to pay the accused up to twenty shillings, for their “trouble and expense” in responding to the complaint. *Id.* § 5.

9. J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660–1800, at 35 (1986).

10. Farrell, *supra* note 3.

11. *Id.*

12. CAROL HARLOW & RICHARD RAWLINGS, PRESSURE THROUGH LAW 40 (1992).

13. Brian Harrison, *Religion and Recreation in Nineteenth-Century England*, PAST & PRESENT, 98, 102 (1967) [hereinafter Harrison, *Religion and Recreation*].

14. RADFORD, *supra* note 2, at 83 (citing RSPCA, 77TH ANNUAL REPORT 166 (1901)).

15. *Our Mission*, RSPCA, <http://www.rspca.org.uk/in-action/aboutus/mission> (last visited Sept. 24, 2012).

16. See *infra* note 108 (explaining addition of “Royal” to the Society's name).

17. RSPCA, 1998 ANNUAL REVIEW (1999). In Scotland, the Scottish Society for the Prevention of Cruelty to Animals (SSPCA) serves a similar function. See *About Us*, SCOTTISH SSPCA, <http://www.scottishspca.org/aboutus> (last visited Sept. 24, 2012).

18. PROSECUTIONS DEP'T, RSPCA, ANNUAL REPORT 2010, at 4 (2011).

Although the RSPCA (and in Scotland, the SSPCA) is now incorporated by statute,¹⁹ it has no special authority beyond that of any other citizen; yet, it has become and remains the *de facto* prosecutorial authority for many animal cruelty cases.²⁰ Thus, we have “something of a constitutional novelty for a significant body of law to be largely enforced through the efforts of a charitable organization, funded entirely by voluntary contributions.”²¹

In the United States, private prosecution of animal abuse began in New York City in 1866, after the American Society for the Prevention of Cruelty to Animals (ASPCA) was organized by Henry Bergh, using the RSPCA as his model.²² In some ways, the ASPCA enjoyed even greater powers than its British counterpart. For example, the New York legislature gave the society a right to issue its own arrest warrants in certain cases, a “truly extraordinary” delegation of criminal enforcement authority.²³ Ernst Freund noted that this “partial reliance upon voluntary associations for the enforcement of the law” was a “peculiar feature” of anti-cruelty legislation in the United States.²⁴ Several other states also gave enforcement powers to private humane groups during the last decades of the nineteenth century and early part of the twentieth century.²⁵ As historian Susan Pearson has noted, the deputizing of animal welfare groups in the Gilded Age “expanded state power through private means.”²⁶ Many states continue to allow

19. Royal Society for the Prevention of Cruelty to Animals Act, 1932, 22 & 23 Geo. 5, c. 39.

20. Gordon Hughes & Claire Lawson, *RSPCA and the Criminology of Social Control*, 55 CRIME, L. AND SOC. CHANGE 375, 384 (2011).

21. RADFORD, *supra* note 2, at 363.

22. Favre & Tsang, *supra* note 5, at 13; Timothy J. Gilfoyle, *The Moral Origins of Political Surveillance: The Preventive Society in New York City, 1867–1918*, 38 AM. Q., 637, 639 (1986). See generally SUSAN J. PEARSON, *THE RIGHTS OF THE DEFENSELESS: PROTECTING ANIMALS AND CHILDREN IN GILDED AGE AMERICA* (2011) (describing efforts to protect children and animals in the early years of the ASPCA).

23. Favre & Tsang, *supra* note 5, at 17 (citing N.Y. REV. STAT. § 375.8 (1867)); see also PEARSON, *supra* note 22, at 3 (noting that American animal cruelty organizations were delegated authority to “make arrests and bring cases before magistrates”); Gilfoyle, *supra* note 22, at 650 n.16 (citing ASPCA, SEVENTH ANNUAL REPORT 5–7 (1873) (“The ASPCA frequently made arrests without issuing warrants.”)).

24. ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 235, § 249 (1904).

25. *E.g.*, 14 PA. STAT. § 7783 (1920); VA. CODE ANN. §§ 4554–4567 (Michie 1913); 1881 N.H. LAWS 446; N.J. REV. STAT. §§ 64–82 (1873); 1871 MINN. LAWS 86; see also PEARSON, *supra* note 22, at 152 (noting that in some states, humane society agents could apply to the local sheriff or magistrate to be given powers of arrest; some state statutes directed peace officers to cooperate with these groups).

26. PEARSON, *supra* note 22, at 3. Pearson focuses exclusively on the American anti-cruelty organizations, calling the private enforcement approach “typically American.” *Id.* at 4. Pearson fails to note, however, that this American approach was copied directly and explicitly from

private enforcement of animal cruelty statutes, although in most states the power does not appear to be frequently used.²⁷ Although American private prosecutions of animal abuse cases never reached the prominence of RSPCA efforts, evidence shows that it arose from similar causes and suffered from similar disadvantages.²⁸ This Article, however, will focus on the British system of private enforcement, which was a precursor to the American approach and had a longer history, with some comparative references to the American experience.

Reliance on private prosecution of crimes was not unusual in early nineteenth-century Britain. The “prosecuting society” model had become well-established in Britain by the time the RSPCA began its activities. As early as the seventeenth century, interest groups formed to pool the resources necessary to prosecute criminal activity, in order to fill the vacuum created by a small or non-existent constabulary.²⁹ In most cases, these prosecuting societies aimed to protect the self-interest of their members—such as the groups of shop-owners organized by Henry and John Fielding to prosecute thievery.³⁰ Many of the societies were local, formed by groups of town citizens to provide adequate prosecution of crimes thought necessary to ensure public safety.³¹ In other cases, the groups formed to prosecute the type of moral offenses that public prosecutors were unable or unwilling to take on.³²

the British model, which had over forty years of experience with animal cruelty prosecutions before the American society was formed in 1866. *See id.*

27. *E.g.*, CONN. GEN. STAT. § 29-108(b) (2011); DEL. CODE ANN. tit. 3, § 7904 (2011); FLA. STAT. § 828.03(1) (2012); HAW. REV. STAT. § 711-1110 (2011); KY. REV. STAT. ANN. § 436.605(1) (LexisNexis 2010); MD. CODE ANN., CRIM. LAW § 10-609 (LexisNexis 2002); MASS. GEN. LAWS ch. 22C, § 57 (2010); MINN. STAT. ANN. § 343.01 (West 2012); NEV. REV. STAT. ANN. § 574.040 (LexisNexis 1997); N.H. REV. STAT. ANN. § 105:18 (2012); N.J. STAT. ANN. § 4:22-44 (West Supp. 2012); N.Y. AGRIC. & MKTS. LAW § 371 (McKinney 2004); OHIO REV. CODE ANN. § 1717.06 (West 2011); 18 PA. CONS. STAT. ANN. § 5511(i) (West 2000); R.I. GEN. LAWS § 4-13-33 (1998); TENN. CODE ANN. §39-14-210(a) (2010); VT. STAT. ANN. tit. 13, § 354 (2009); VA. CODE ANN. § 3.2-6558 (2012); WASH. REV. CODE ANN. §§ 16.52.015, .025 (West 2006); *see also* Jennifer H. Rackstraw, Comment, *Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes*, 9 ANIMAL L. 243, 260–62 (2003) (discussing a few of these statutes and “self-help prosecution”). For a recent case involving the private enforcement power in New York, see *Fabrikant v. French*, 722 F. Supp. 2d 249 (N.D.N.Y. 2010). A New Jersey study indicates that SPCA authority to arrest offenders is rarely exercised there. STATE OF N.J. COMM’N FOR INVESTIGATION, SOCIETIES FOR THE PROTECTION OF ANIMALS 8 (2000), available at <http://www.state.nj.us/sci/pdf/spca.pdf>.

28. *See* Gilfoyle, *supra* note 22 (describing prosecuting society activities in New York).

29. J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660–1800*, at 48–50 (Princeton Univ. Press 1985).

30. *1690 to 1800: Crime, Poverty and Social Policy in the Metropolis*, LONDON LIVES (Apr. 2012), <http://www.londonlives.org/static/ProsecutorsLitigants.jsp>.

31. *Id.*

32. *See* discussion of prosecuting societies *infra* Part III.A.

None of these prosecuting societies, however, enjoyed the extensive, widespread, sustained success of the RSPCA. Moreover, at least on the surface, the RSPCA differed from these previous societies in terms of its primary motivations, which were altruistic rather than self-interested. This society was formed, not to promote the security of its members, but rather to protect those who could not protect themselves. This difference may be overstated; below the surface, RSPCA prosecutions may have served very similar moral improvement and social control motives of the vice societies and thereby, at least indirectly, may have served the security interests of the Society's members. Nevertheless, the Society's stated goal of protecting the powerless—i.e., animals—has more in common with the altruistic societies formed to protect abused children. In fact, in the United States, anti-cruelty groups protecting animals were closely linked to those protecting children.³³

Although the Society engaged in educational campaigns and pursued Parliamentary objectives, vigorous prosecution of the law was an essential part of the organization's strategy from the beginning.³⁴ As Pearson notes, with regard to American anti-cruelty societies, the ability to prosecute made the educational efforts more effective, coupled as they were with the warning of prosecution in the future.³⁵ The prosecutions not only stopped the particular abuser accused of the crime, they also provided a more general deterrent and helped to inculcate the public, the police force, and the judiciary with the new norm of behavior toward animals.³⁶ In addition, the prosecutions helped define the contours of permissible treatment of animals, and in some cases expanded the accepted definition of animal cruelty.³⁷

The RSPCA's extensive campaign of prosecution provides modern reformers an opportunity to explore the implications of relying largely on private parties to enforce animal abuse crimes. In most criminal contexts, the victim sets the enforcement machinery in motion by complaining to the police and pressing the public prosecutor to pursue the case. In the case of powerless victims such as animals, however, that system does not work. Not surprisingly, animal welfare

33. PEARSON, *supra* note 22, at 2–3. Pearson notes that the New York Society for the Prevention of Cruelty to Children was founded in 1875 by Henry Bergh, who had founded the American Society for the Prevention of Cruelty to Animals in 1866; and by Eldridge Gerry, the ASPCA's lawyer. *Id.* at 2. Many other American humane associations were “dual” organizations that protected both animals and children. *Id.* at 3.

34. RADFORD, *supra* note 2, at 41–42. The Society prosecuted 149 cases in its first year of existence. *Id.* at 42 (citing EDWARD G. FAIRHOLME & WELLESLEY PAIN, *A CENTURY OF WORK FOR ANIMALS: THE HISTORY OF THE RSPCA, 1824–1924*, at 55 (1924)).

35. PEARSON, *supra* note 22, at 168–70.

36. *Id.*

37. *See id.*

laws have suffered from low public prosecution rates, which one critic has attributed to “differences in the values people place on prosecution, the costs involved in investigating cases, and the difficulties of proving the criminal violations.”³⁸ Private enforcement could overcome at least some of these obstacles, resulting in more vigorous enforcement of cruelty laws.³⁹ Thus, analyzing the advantages and disadvantages of private enforcement, including its particular historical context, could help us assess whether a similar method would be appropriate and useful in enforcing animal cruelty laws today.

This Article begins by setting out the details of Martin’s Act and subsequent amendments that expanded its reach. The Article then describes the RSPCA’s extensive campaign of animal cruelty prosecution and explores the historical conditions, both societal and legal, that motivated and enabled it. The Article places the activities of this prosecuting society in the larger context of the nineteenth century’s changing views of the role of criminal law and how it should be enforced. The Article then attempts to assess the efficacy of private prosecution in the context of animal abuse, in comparison to other types of crime. The Article concludes that private prosecution enabled the Society to more quickly inculcate the new norm of animal care and may have been necessary to ensure the anti-cruelty law’s effectiveness. Nevertheless, the private enforcement mechanism also had significant drawbacks that could never be completely eliminated. As modern animal welfare advocates search for the optimal methods of animal welfare reform, this remarkable history should prove instructive.

II. MARTIN’S ACT AND ITS PROGENY

As originally enacted in 1822, Martin’s Act was relatively brief, allowing magistrates to fine those who “wantonly and cruelly beat, abuse, or ill-treat” certain types of livestock, including cattle, horses, mules, and sheep.⁴⁰ The crime was a summary offense, meaning that anyone could make a complaint on oath and the magistrate could then issue a warrant for the offender to appear.⁴¹ After taking evidence from witnesses, the magistrate could convict and fine the offender between ten shillings and five pounds.⁴²

Although Martin was initially ridiculed in Parliament for his campaign to protect animals, once his Act became law, the concept gained favor, leading to

38. Francesca Ortiz, *Making the Dogman Heel: Recommendations for Improving the Effectiveness of Dogfighting Laws*, 3 STAN. J. ANIMAL L. & POL’Y 1, 27 (2010).

39. See, e.g., Rackstraw, *supra* note 27, at 264–65 (suggesting a model self-help prosecution statute for animal abuse crimes).

40. Martin’s Act, 1822, 3 Geo. 4, c. 71, § 1.

41. *Id.*

42. *Id.*

expansions of its coverage in subsequent years.⁴³ In 1833, Parliament enlarged the list of prohibited acts to include bear-baiting and badger- or cock-fighting.⁴⁴ Two years later, a more comprehensive revision expanded the list of protected animals to include bulls and dogs (including prohibitions against bull-baiting and dog-fighting), extended penalties to persons who assisted with cockfighting and bear-baiting, and required all keepers of confined animals to provide them with adequate nourishment.⁴⁵ The latter requirement was added to address cases in which animals were kept without food and water in London's Smithfield live-stock market. Prior to the 1835 amendments, courts held Martin's Act inapplicable to such cases because no "abuse" was deemed to have occurred.⁴⁶

The 1835 Act also included more powerful "self-help" enforcement provisions.⁴⁷ Where animals were confined without adequate nourishment for more than twenty-four hours, the Act empowered "any Person or Persons whomsoever" to enter the premises where the animals were kept and supply them with food, without liability for trespass, and to recover double the value of the food from the owner.⁴⁸ In order to make it easier for offenders to be apprehended, the Act authorized constables or even animal owners to make warrantless seizures of offenders and convey them directly to a magistrate.⁴⁹ Finally, the 1835 Act more specifically granted the authority to proceed "upon Information or Complaint made by any Person of any Offence against the Provisions of this Act."⁵⁰ Upon conviction, the Act directed the magistrate to distribute half of the penalty to the "Overseers of the Poor of the Parish" and the other half to the person who informed and prosecuted the case.⁵¹ Thus, the Act was a type of *qui tam* or inform-

43. Farrell, *supra* note 3.

44. Police Magistrates, Metropolis Act, 1833, 3 Will. 4, c. 19, § 29.

45. Cruelty to Animals Act, 1835, 5 & 6 Will. 4, c. 59, §§ 2-4. This Act reduced the maximum fine from five pounds to forty shillings (two pounds), although the amount was now to be imposed "per offense," raising the possibility of multiple counts of abuse. *Id.* § 2.

46. See, e.g., *Police*, TIMES (London), Aug. 25, 1825, at 3 (drover held not guilty of violating Martin's Act for failure to provide nourishment to sheep at Smithfield); Letter to the Editor, *The Cattle-Market*, TIMES (London), Aug. 23, 1825, at 3 (complaining about malnourishment of animals kept at Smithfield); Letter to the Editor, *Cattle-Market of London*, TIMES (London), Sept. 1, 1827, at 3 (arguing for improved conditions in the context of public health—that, because of the dietary significance of beef, improved conditions for cattle were necessary to ensure health of the animal and quality of the meat).

47. See Cruelty to Animals Act, 1835, 5 & 6 Will. 4, c. 59, §§ 4-5, 13, 17.

48. *Id.* §§ 4-5.

49. *Id.* § 9. Although animal owners were often the offenders, their animals might be abused by servants or others who used the animals.

50. *Id.* § 13.

51. *Id.* § 17.

er statute, which rewarded the person who championed the animal's cause.⁵² The 1849 Act continued these provisions with minor amendments, including specific authority for constables to take charge of the animals and place them in safe care when an offender was taken into custody.⁵³

The criminalization of animal cruelty was extremely unpopular in some quarters, especially where the law threatened traditional recreation involving animals, such as the running of bulls at Stamford.⁵⁴ Given the controversial nature of the Acts, attempts to enforce them could be thwarted by angry crowds or even reluctant constables. Thus, both the 1835 and 1849 Acts contained provisions designed to overcome this opposition. The 1835 Act included authority to impose a fine of up to five pounds on any constable who refused to serve a summons or warrant issued by the Justice of the Peace under the Act.⁵⁵ To deal with possible opposition, the 1849 Act made it illegal for anyone to obstruct a constable in the enforcement of the Act.⁵⁶

Martin's Act gave reformers a powerful tool for stopping public acts of cruelty. Prior to 1822, an owner or handler could openly mistreat his animals, his "property," with no fear of intervention from witnesses. The year prior to the Act's passage, Martin himself (perhaps to make the point) visited a London police station to complain about "brutal treatment" inflicted upon a horse by two men who were attempting to back their cart out of a narrow court.⁵⁷ A summons was issued and one of the two men appeared before the magistrate.⁵⁸ Ultimately, however, the magistrate was reluctant to pursue the matter, "there appearing to be some doubt how far [he] was authorized to punish for this offence, as the law now stands."⁵⁹ Accordingly, the accused was released upon his "expressing his contrition, and promising not to offend again."⁶⁰

52. See generally *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774–78 (2000) (describing history of *qui tam* actions in Britain and the United States). The term *qui tam* is typically used in the United States, while "informer's statute" is used in Britain.

53. An Act for the more effectual Prevention of Cruelty to Animals, 1849, 12 & 13 Vict., c. 92, § 19.

54. ROB BODDICE, *A HISTORY OF ATTITUDES AND BEHAVIOURS TOWARD ANIMALS IN EIGHTEENTH- AND NINETEENTH-CENTURY BRITAIN 186–97* (2008) (describing drunken crowds attending Stamford bull-running).

55. Cruelty to Animals Act, 1835, 5 & 6 Will. 4, c. 59, § 16.

56. An Act for the more effectual Prevention of Cruelty to Animals, 1849, 12 & 13 Vict., c. 92, § 20. In 1854, Parliament enacted a short statute clarifying several sections of the previous Act. An Act to amend an Act of the Twelfth and Thirteenth Years of Her present Majesty for the more effectual Prevention of Cruelty to Animals, 1854, 17 & 18 Vict., c. 60.

57. *Guildhall—Cruelty to Animals*, *TIMES* (London), June 16, 1821, at 3.

58. *Id.*

59. *Id.*

60. *Id.*

Lord Erskine, who had proposed bull-baiting legislation in 1809 which failed to pass, helped ensure the passage of Martin's Act in the House of Lords.⁶¹ He expressed the frustration of those who witnessed cruelty but were powerless to prevent it:

Nothing is more notorious than that it is not only useless, but dangerous, to poor suffering animals, to reprove their oppressors, or to threaten them with punishment. The general answer, with the addition of bitter oaths and increased cruelty, is, What is that to you?—If the offender be a servant, he curses you, and asks if you are his master? and if he be the master himself, he tells you that the animal is his own.⁶²

Changing this norm, which treated animals as merely another species of property, subject to abuse at the owner's whim, was one of the primary motivations for Martin's Act.⁶³ Both Erskine and Martin recognized, however, that normative change would not result merely from changing the law; instead, the norm would change only if bystanders were empowered to intervene to aid these animals. Thus, the Act included not only the substantive prohibition against cruelty, but also the procedural mechanism that would enable adequate enforcement by concerned private parties.⁶⁴

This historic shift in the legal norm governing the relationship of humans and animals arose from a complex background of social circumstances. Certainly, the tide of British public opinion condemning animal cruelty coincided with a more general opposition to violence. For example, Britain abolished the death penalty for crimes other than murder and treason by Peel's Acts of 1824–29; public executions were terminated in 1868.⁶⁵ As Macaulay wrote in his 1839 *History of England*: “It is pleasing to reflect that the public mind of England has softened while it has ripened, and that we have, in the course of ages, become,

61. 14 PARL. DEB., H.L. (1809) 554–71.

62. *Id.* at 554.

63. The most recent British legislation on animal cruelty, the 2006 Animal Welfare Act, 2006, c. 45, repealed the self-help provisions of the older laws, but private prosecution remains possible under the Prosecution of Offenses Act, 1985, c. 23. Section 6 preserves the right of individuals and other entities to bring prosecutions when the Crown Prosecution Service has declined to prosecute. Prosecution of Offenses Act, 1985, c. 23, §6. The *qui tam* portion of the Act was eliminated by the Protection of Animals Act, 1911, 1 & 2 Geo. 5, c. 27, sch. 2. Most remaining common informers incentives were eliminated by the Common Informers Act, 1951, 14 & 15 Geo. 6, c. 39.

64. Martin's Act, 1822, 3 Geo. 4, c. 71.

65. Peel's Act, 1824, 4 Geo. 4, c. 48; *see also* Colin Matthew, *Public Life and Politics*, in *THE NINETEENTH CENTURY: THE BRITISH ISLES: 1815–1901*, at 132 (Colin Matthew ed., 2000). Matthew notes also that while there were 312 executions in England and Wales in 1817–1820, the annual execution rate was always fewer than twenty-five from 1847–1890 and in 1871 there were only three executions. *Id.*

not only a wiser, but also a kinder people.”⁶⁶ Woodward also saw the animal cruelty legislation as an example of a more humane attitude taking hold in Britain, illustrated by changes in the penal code and reform of the prison system.⁶⁷ Pearson traces a similar change in attitude toward violence in postbellum America, placing anti-cruelty groups in a general movement toward “improv[ing] the social order by lessening acts of individual violence, relieving suffering, and inculcating a humane sensibility and sense of self-control in others.”⁶⁸

Coupled with this benignant explanation is a growing desire for more social control, arising from an upper- and middle-class anxiety about how to quell unrest among the laboring classes. The early nineteenth century saw frequent popular disturbances, rooted primarily in laboring class discontent.⁶⁹ Poor economic conditions, exacerbated by the enactment of the first Corn Law and the end of the Napoleonic Wars in 1815, gave fresh power to the radical reform movement, whose complaints included lack of suffrage for those without property.⁷⁰ The Industrial Revolution had caused for many “not merely material poverty but social pauperization: the destruction of old ways of life without the substitution of anything the labouring poor could regard as a satisfactory equivalent.”⁷¹ The result, in the early nineteenth century, was an almost continuous “sense of imminent social explosion.”⁷²

In 1819, a tragic example of this unrest occurred in Manchester, when cavalry charged into a mass meeting of radicals (crowds estimated at 50–

66. 1 THOMAS BABINGTON MACAULAY, *THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II*, at 394 (Harper & Bros. 1849) (1839).

67. LLEWELLYN WOODWARD, *THE AGE OF REFORM: 1815–1870*, at 467–71, 470 n.1 (Oxford Hist. of England, vol. XIII, George Clark ed., 2d ed. 1962) (animal cruelty legislation “another sign of this change of view”); *see also* DIX HARWOOD, *LOVE FOR ANIMALS AND HOW IT DEVELOPED IN GREAT BRITAIN* 341–42 (Rod Preece & David Fraser eds., 2002) (placing anti-cruelty act in context of other humanitarian reforms of the early nineteenth century, such as repealing the death penalty for pick-pockets).

68. PEARSON, *supra* note 22, at 7.

69. WOODWARD, *supra* note 67, at 79 (describing the popular disturbances in 1830 that resulted in the hanging of nine instigators and the transportation of about 450 others); JEREMY BLACK, *THE MAKING OF MODERN BRITAIN: THE AGE OF EMPIRE TO THE NEW MILLENNIUM* 13–15 (2001) (discussing late eighteenth and early nineteenth century popular economic unrest, including various assaults on industrial machinery and Luddite riots of 1812).

70. WOODWARD, *supra* note 67, at 60–63 (describing the unrest after 1815 and indicating that the reduction in military added to economic distress).

71. 2 E.J. HOBSBAWM, *INDUSTRY AND EMPIRE: THE MAKING OF MODERN ENGLISH SOCIETY* 74 (1968).

72. *Id.*

100,000), killing at least eleven people and injuring hundreds.⁷³ This “Peterloo Massacre” (so called because it took place in St. Peter’s Field and recalled the Battle of Waterloo four years earlier), combined with the discovery of the Cato Street conspiracy to murder the Cabinet shortly thereafter, caused a crackdown by government authorities on legislative reform efforts.⁷⁴ Similarly, the desire to ensure public order led to enactment of the County Police Act of 1839, which increased government surveillance and control in the countryside.⁷⁵

Thus, in addition to its moral virtues, Martin’s Act also imposed a measure of social control on the sort of unruly mobs found at badger fights and bull-baits.⁷⁶ The Act criminalized anti-social behavior that tended to make the upper classes nervous. Historians have linked the rise of vice societies to similar middle-class fears of an unrestrained working class.⁷⁷ In the United States, Pearson notes that historians have considered American anti-cruelty groups in the late nineteenth century to be “less concerned with suffering [of animals and more concerned about] condemning and controlling the behavior of working-class and immigrant populations.”⁷⁸

The motive behind anti-cruelty legislation could be described more positively as aimed toward social “improvement” rather than “control,” although the two motives are closely intertwined. During the legislative debates on Martin’s Act and similar animal cruelty measures, supporters felt that leisurely pursuits involving bull-baiting or cock-fighting, for example, were not only cruel to the animals, but also were detrimental to the proper moral development of the audience.⁷⁹ In addition to banning vulgar and violent behavior, the upper classes en-

73. WOODWARD, *supra* note 67, at 64–65; E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 682, 687 (1963). Thompson summed up Peterloo: “There is no term for this but class war.” *Id.* at 686.

74. For a full description of Peterloo, Cato Street, and the government reaction, see THOMPSON, *supra* note 73, at 669–710; WOODWARD, *supra* note 67, at 64–66.

75. BLACK, *supra* note 69, at 72 (citing the County Police Act as an example of efforts to “maintain[] law and order in what was seen as a disorderly society”).

76. RICHARD PRICE, *BRITISH SOCIETY 1680–1880: DYNAMISM, CONTAINMENT AND CHANGE* 200–01 (1999) (suggesting “working-class leisure always threatened to become a challenge to public order”); BODDICE, *supra* note 54, at 176 (claiming that “[p]reventing cruelty was therefore indistinguishable from civilising men”).

77. Gilfoyle, *supra* note 22, at 645–46 (describing middle class apprehension regarding the working class).

78. PEARSON, *supra* note 22, at 59.

79. See, e.g., 35 WILLIAM COBBETT ET AL., *THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO 1803*, at 202–03(1812) (describing bull-baiting as an activity that “drew together idle and disorderly persons; it drew also from their occupations many who ought to be earning subsistence for themselves and families; it created many disorderly and mischievous proceedings, and furnished examples of profligacy and cruelty”); BODDICE, *supra* note 54, at 180 (“The Acts, for all that they achieved for the welfare of animals, effectively served only to regulate

couraged the adoption of alternative, more “civilized” leisure activities, which could be regulated so that they would not “challenge the requirements of the established order.”⁸⁰ How much better that they attend a meeting of, for example, the Darlington Horticultural Society, which the Reverend H. Harries noted “was calculated to improve and elevate the taste of all classes, especially the poorer classes, by withdrawing them in their leisure hours from grosser indulgences to a pleasurable and improving pursuit.”⁸¹ Indeed, the formation of the RSPCA followed a long line of voluntary associations established to reform uncivilized behavior of the lower classes.⁸² The middle class, in particular, was inclined to use refinement of popular culture as a tool not only to “elevate[] the collective morality of the nation,” but also to civilize them in a way that reduced their potential threat to the middle class.⁸³ Thus, while Martin’s Act undoubtedly sprang from a humanitarian impulse, the law and its vigorous enforcement cannot be divorced from this larger societal background.

The emphasis on private enforcement resulted from the lack of faith the upper and middle classes placed in the law-enforcement ability of civil authorities. When Martin’s Act was enacted, in 1822, an organized, paid police force simply did not exist in Britain.⁸⁴ In the country, justices of the peace appointed parish constables, and many towns hired watchmen.⁸⁵ London had a more organized system of watch and ward, under which each of the city’s twenty-four

the behaviour of men according to the elite’s constructed principles of how English men *ought* to behave.”). Similarly, Pearson notes that American anti-cruelty groups shared with the vice societies “a fundamental revulsion at behavior that indulged base passions at the expense of self-control.” PEARSON, *supra* note 22, at 160.

80. BLACK, *supra* note 69, at 82; *see also* HUGH MILLER, MY SCHOOLS AND SCHOOLMASTERS (1852), *reprinted in* THE MASONS ON STRIKE AND AT PLAY *in* INDUSTRIALISATION AND CULTURE 1830–1914, at 104–06 (Christopher Harvie et al. eds., 1970). Miller’s story describes an instance of badger-baiting he witnessed in a working-class pub frequented by stonemasons. *Id.* The editors characterize his reaction of disgust as consistent with a middle-class attitude that attempted “to impose a ‘labour discipline’ attuned to the demands of industry,” mixed with genuine moral concern. Christopher Harvie et al., *Introduction to id.* at 104.

81. BLACK, *supra* note 69, at 82 (quoting the statement of Reverend H. Harries at the 1852 Annual Meeting of the Darlington Horticultural Society).

82. PRICE, *supra* note 76, at 194–204 (describing the central role of voluntary societies in moral reform during the nineteenth century).

83. DENNIS DENISOFF, THE CAMBRIDGE COMPANION TO VICTORIAN CULTURE 136–39 (Francis O’Gorman ed., 2010).

84. WOODWARD, *supra* note 67, at 465–67; DAVID BENTLEY, ENGLISH CRIMINAL JUSTICE IN THE NINETEENTH CENTURY 4 (1998) (“England in 1800 had no professional police”).

85. WOODWARD, *supra* note 67, at 465; BENTLEY, *supra* note 84, at 4.

wards appointed six watchmen to keep order.⁸⁶ The watch system in London in the early 1800s was very disorganized, with many areas left without security.⁸⁷ Even where constables did exist, in both city and country, they were typically irresponsible and could not be counted upon to effectively enforce the law.⁸⁸ Not until 1829 was an organized Metropolitan Police Force established, through the efforts of Sir Robert Peel, M.P.⁸⁹

Even when police forces became more organized, more widespread, and more effective, the actual prosecution of crimes remained mainly a private rather than a public undertaking.⁹⁰ This situation gradually changed during the middle of the nineteenth century, with prosecutions increasingly supervised by police or other public officials, but not until 1879 was a Director of Public Prosecutions appointed.⁹¹ Thus, it is no surprise that Martin and others interested in enforcement of the anti-cruelty to animals act could not leave the matter to the police and public prosecution.

In the United States, the reasons animal advocates distrusted police enforcement had a slightly different cast. When anti-cruelty acts were enacted in the last part of the nineteenth century, the police force and judicial system suffered from widespread public distrust.⁹² Partially, this was because the American police system was “in flux” and the officers’ responsibilities were evolving.⁹³ Beyond that, however, in cities like New York, the police and judiciary were perceived to be corrupted and co-opted by organized crime.⁹⁴ Thus, prosecuting societies arose to play a role similar to vigilantes, who “aggressively took control of local public authority . . . when they thought the process of law was inadequate.”⁹⁵

Britons, on the other hand, lacked faith in the government’s ability to enforce anti-cruelty law because an organized, effective police force simply did not exist. As noted below, even when the police force became more organized and

86. WOODWARD, *supra* note 67, at 465; BENTLEY, *supra* note 84, at 4–5; Mick Pearson, *The Police and the Black Country*, BLACK COUNTRY SOCIETY, <http://www.blackcountrysociety.co.uk/articles/policing2.htm> (last visited Sept. 24, 2012).

87. 2 LEON RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750: THE CLASH BETWEEN PRIVATE INITIATIVE AND PUBLIC INTEREST IN THE ENFORCEMENT OF THE LAW 194–99* (1957) [hereinafter RADZINOWICZ, *ENFORCEMENT OF THE LAW*].

88. *Id.* at 276–82.

89. WOODWARD, *supra* note 67, at 466; BENTLEY, *supra* note 84, at 5.

90. BENTLEY, *supra* note 84, at 7.

91. *Id.*

92. *See* PEARSON, *supra* note 22, at 159.

93. *Id.*

94. Gilfoyle, *supra* note 22, at 637–38.

95. *Id.* at 642.

available, and public prosecution of crimes became more typical, the unpopularity of anti-cruelty law made officials reluctant to enforce it. Therefore, private enforcement was the only way to ensure that the new norm created by Martin's Act would actually be implemented.

III. PRIVATE ENFORCEMENT OF MARTIN'S ACT

Private enforcement of Martin's Act began immediately upon its enactment in 1822.⁹⁶ As noted, Martin, who was already in the habit of patrolling the streets of London to watch for animal mistreatment, brought many of the first cases enforcing the provisions of the Act himself.⁹⁷ On August 12, 1822, less than a month after the Act became law, *The Times* reported that Martin had caused two men to be brought before a magistrate, who convicted them of cruelly beating horses at Smithfield market.⁹⁸ The newspaper's account illustrates how private enforcement of the Act worked even in its infancy:

Although the hon. member for Galway (Mr. Martin) has interdicted the reporting of his speeches,⁹⁹ we shall not, we presume, incur his displeasure by detailing his proceedings to prevent the late statute against cruelty to animals from remaining a dead letter. In furtherance of this laudable intention the hon. gentleman, it seems, took a turn into Smithfield, during the horse-market, on Friday evening, and, in consequence, two men, who by his direction had been taken into custody by the officers for offences under this act, were brought up on Saturday before Mr. Alderman Waithman.

The first, who gave his name Samuel Clarke, Mr. Martin said he had observed beating a horse in so cruel and violent a manner with a large whip, that the poor animal was completely wealed from its shoulder to its tail. The beast could have done nothing to merit such treatment, as he was standing quietly tied up to a rail. The barbarity of the prisoner was therefore most wanton and unprovoked.¹⁰⁰

96. See, e.g., *Guildhall—Cruelty to Animals*, TIMES (London), Aug. 12, 1822, at 3.

97. SHEVAWN LYNAM, HUMANITY DICK: A BIOGRAPHY OF RICHARD MARTIN, M.P. 1754–1834, at 232–33, 250–52, 258–59 (1975) (describing Martin's prosecution activities). Martin brought the first case under the act on August 12, 1822. RADFORD, *supra* note 2, at 40 n.36. *The Times* contains many articles describing Martin's cases alleging cruelty. See, e.g., *Guildhall—Cruelty to Animals*, *supra* note 96; *Police: Marlborough-Street*, TIMES (London), June 4, 1824, at 4; *Police: Marlborough-Street*, TIMES (London), July 27, 1824, at 3.

98. *Guildhall—Cruelty to Animals*, *supra* note 96.

99. *The Times* had often poked fun at Martin's Irish eloquence during Parliamentary debates, leading him to prohibit the paper from reporting his speeches. See LYNAM, *supra* note 97, at 250–57 (detailing Martin's stormy relationship with the press).

100. *Guildhall—Cruelty to Animals*, *supra* note 96.

Both prisoners testified that they had been whipping the horses to make them appear more lively, to present “a good appearance” for sale purposes.¹⁰¹ Upon hearing one of the two defendants state that he was a butcher by trade, Martin exclaimed: “I perceive that—a horse-butcher.”¹⁰² The magistrate fined each of the offenders twenty shillings, and the enforcement of Martin’s Act was underway.¹⁰³

The Smithfield Market case established a pattern for Martin’s enforcement efforts. The cases were simple to bring and the coverage in *The Times* provided Martin a forum for his colorful condemnations of the accused. *The Sporting Magazine* warned its readers a month later that Martin was actively pursuing offenders.¹⁰⁴ One biographer notes that Martin’s zeal was such that “he gradually became a menace to all who had dealings with animals. There was not a coachman or carter or knacker or dog-owner who was safe from his inquisition.”¹⁰⁵

But Martin soon had organized assistance for his enforcement campaign. In 1824, Martin, along with other influential activists like William Wilberforce MP, and Rev. Arthur Broome, formed the Society for the Prevention of Cruelty to Animals.¹⁰⁶ From the beginning, the fledgling organization recognized that the Act would be meaningless without adequate enforcement and therefore adopted prosecution of offenders as one of its main functions. At its first meeting, in fact, the new society appointed a committee to inspect livestock markets for violations.¹⁰⁷ It soon hired its own full-time inspectors to search for violations. In the mid-1830s, the Society started with just two or three inspectors, but the network gradually increased to a nationwide force of 120 by 1897.¹⁰⁸ The addition of inspectors naturally resulted in a corresponding increase in prosecutions. During the 1830s, the Society brought a total of 1357 prosecutions.¹⁰⁹ As shown in table

101. *Id.*

102. *Id.*

103. *Id.*

104. WELLESLEY PAIN, *RICHARD MARTIN* 79–80 (1925).

105. LYNAM, *supra* note 97, at 219; *see also* PAIN, *supra* note 104, at 78–79.

106. LYNAM, *supra* note 97, at 231–32. Radford states that, although Martin was present at the first meeting of the Society, Broome was the real founder of the organization. RADFORD, *supra* note 2, at 41 n.42. In 1840 the Society acquired the patronage of Queen Victoria and added “Royal” to its name. *Id.* at 47.

107. LYNAM, *supra* note 97, at 232.

108. Harrison, *Religion and Recreation*, *supra* note 13, at 102 (citing RSPCA, 77th ANNUAL REPORT 166 (1901)). Radford notes there were two inspectors in 1838, five in 1842, and eight in 1855; however, the number increased in the latter half of the century to 48 in 1878, 80 in 1886, and 120 in 1897. RADFORD, *supra* note 2, at 83.

109. Harrison, *Religion and Recreation*, *supra* note 13, at 102 (citing RSPCA, 77th ANNUAL REPORT 166 (1901)).

1, the number gradually increased each decade to reach 71,657 prosecutions in the 1890s.¹¹⁰

Table 1. RSCPA Prosecutions During the 1800s¹¹¹

DECADE	NUMBER OF PROSECUTIONS
1830s	1357
1840s	2177
1850s	3862
1860s	8846
1870s	23,767
1880s	46,430
1890s	71,657

Of course, the Society was not the only source of prosecutions; there were many other private prosecutions and some public prosecutions. All of these categories of animal cruelty arrests increased over the latter half of the century: in 1866, 4629 arrests for animal cruelty resulted in some sort of sanction, while in 1896 there were almost 13,000 such arrests.¹¹² In 1908, 13,843 persons were charged with animal cruelty violations.¹¹³ These were not frivolous claims: 10,389 were convicted and sentenced, while in about 1300 other cases the charges were proved, but the court's order did not include conviction.¹¹⁴ Most convictions resulted in fines, but in 220 more serious cases, the offenders were sentenced to prison.¹¹⁵ Even though the Society was not directly responsible for many of these prosecutions, the large volume of cases it prosecuted surely helped set the standard for cruelty and encouraged enforcement by others.

The extraordinary nineteenth-century animal abuse crime statistics dwarf the number of prosecutions for these crimes in recent decades. For example, in

110. *Id.*

111. *Id.*

112. *Id.*

113. *Cruelty to Animals*, 74 JUST. PEACE 278 (June 11, 1910).

114. *Id.*

115. *Id.*

1995, the RSPCA investigated 110,175 complaints, but prosecuted only 812 cases, resulting in convictions on 2201 charges.¹¹⁶ In 2010, it convicted 1086 offenders on 2441 charges.¹¹⁷ Some of this disparity could be explained by the fact that many of the early offenses involved mistreatment of horses or oxen, at a time when those animals were used extensively for transportation, farm, and other labor uses. Thus, the opportunities for abuse occurred much more frequently before engines replaced animal power sources. In addition, the early prosecutions occurred when criminal prosecution was the only method of implementing and publicizing the evolving standards for animal treatment. Modern methods rely more on government regulation, agency inspection, and administrative warnings or penalties, with criminal sanctions reserved for the most egregious cases. Thus, the straight comparison of number of prosecutions during various historical periods tells us little about the relative efficacy of the enforcement provisions.

A. Statutory Authority for Private Enforcement

Without question, the RSPCA's role in enforcing animal cruelty law during the nineteenth century was extraordinary. The Society's participation, however, cannot necessarily be traced to unique procedural aspects of the Act itself. At first glance, the Act does appear to provide for broad enforcement provisions to facilitate private action. For example, the Act enabled "any Person" to initiate prosecution by making a complaint to the magistrate or Justice of the Peace (JP), who would then issue a summons.¹¹⁸ As an additional incentive to initiate enforcement, the 1835 Act provided the "informer" with a reward of half of any collected penalty.¹¹⁹ Further, the 1835 Act allowed anyone to provide food to malnourished animals, wherever they were being kept, without liability for trespass.¹²⁰ Finally, the 1835 Act authorized warrantless seizure of animal cruelty perpetrators by constables or animal owners.¹²¹

Most of the enforcement provisions of the Act, however, were not unusual for criminal statutes of that period. At the time, private prosecution for all types of criminal offenses was still the norm in England;¹²² a comprehensive sys-

116. RADFORD, *supra* note 2, app.2 at 413 tbl.3. Each prosecution might result in more than one conviction. *Id.*

117. PROSECUTIONS DEP'T, RSPCA, *supra* note 18, at 4.

118. Cruelty to Animals Act, 1835, 5 & 6 Will. 4, c. 59, §§ 9, 13.

119. *Id.* § 17.

120. *Id.* §§ 4-5.

121. *Id.* § 9.

122. Daniel Klerman, *Settlement and the Decline of Private Prosecution in Thirteenth-Century England*, 19 LAW & HIST. REV. 1, 1, 8 (2001). Blackstone's view that crime was a public wrong that affected the entire community was influential in changing the system during the nine-

tem of public prosecution was not established until 1879 (although even then private prosecution remained important due to the limited power of public prosecutors).¹²³ In general, anyone could sue to enforce the criminal law in England, even someone who had not been harmed by the crime.¹²⁴

Moreover, it was common to offer an incentive to private prosecutors in the form of a reward for successful prosecution.¹²⁵ Martin's Act resembles the *qui tam* or informer's statutes long used in Britain for certain types of offenses.¹²⁶ This device appeared as early as the fourteenth century¹²⁷ and continued to be used until all such statutes were repealed in 1951.¹²⁸ For designated offenses, informers could bring an action and receive a portion of the penalty even though they themselves had not suffered any injury.¹²⁹ Many informer's statutes addressed offenses in which the harm was generalized (such as selling wares after the allotted time) or where the offense would otherwise be difficult to discover (such as horse-stealing).¹³⁰ Thus, Parliament was well aware of the usefulness—and potential drawbacks—of empowering and incentivizing the entire public as private prosecutors. The informer's incentive may not have made much of a difference to Martin's Act prosecutions. The RSPCA was motivated by ideology, not by a financial incentive, although monetary recovery may have enabled it to hire additional inspectors and bring a greater volume of prosecutions.¹³¹

Similarly, the authority in Martin's Act allowing magistrates to issue summons upon complaint or information of any person was not unusual.¹³² Be-

teenth century. See Danielle Levine, Note & Comment, *Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution*, 104 NW. U. L. REV. 335, 339 (2010).

123. Prosecution of Offenses Act, 1879, 42 & 43 Vict. c. 22.

124. 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 495 (William S. Hein & Co., Inc.) (1883); *Turner v. Meyers* (1808) 1 Hagg. Con. 414 (“The criminal suit is open to everyone, the civil suit to every one showing an interest.”).

125. Bentley, *supra* note 84, at 7. New York's first anti-cruelty statute awarded all fines collected under the anti-cruelty act to the ASPCA. See N.Y. Rev. Stat. § 375.8 (1866).

126. For a discussion of the history of informer's statutes in England, see *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774–78 (2000).

127. Sale of Wares After Close of Fair Act, 1331, 5 Edw. 3, c. 5.

128. Common Informers Act, 1951, 14 & 15 Geo. 6, c. 39 (listing informer statutes).

129. See *id.*

130. Sale of Horses Act, 1588, 31 Eliz. 1, c. 12.

131. Similarly, in the United States recovery of fines did not make up a large portion of ASPCA revenues. In 1866, the ASPCA received only 4% of its annual income from successfully prosecuting 66 cases. Favre & Tsang, *supra* note 5, at 17 n.81 (citing ASPCA, 1867 ANNUAL REPORT 47–54 (1867)). In 1889, only about 2% of the Society's \$100,000 income came from fines. *Id.* (citing ASPCA, 1890 ANNUAL REPORT 11 (1890)).

132. 2 EDWARD E. DEACON, A GUIDE TO MAGISTRATES OUT OF SESSION, INCLUDING A DIGEST OF THE POOR LAWS, WITH PRACTICAL FORMS OF ORDERS, COMMITMENTS, AND CONVICTIONS 1260–61 (1843); see, e.g., Retailers of Salt Act, 1698, 7 & 8 Will. 3, c. 31.

cause there was some dispute in the early nineteenth century about the extent of magistrates' powers, Parliament repeated this summons authority in numerous other statutes, to remove any doubt. In 1848, the Summary Jurisdiction Act ultimately set out this summons procedure for any crime subject to summary proceedings, which included Martin's Act offenses.¹³³ Thus, Martin's Act could not be said to have enabled private prosecution more than many other criminal statutes of the day.

Significantly, the 1835 Act empowered constables and animal owners to seize offenders without first obtaining a warrant, "for the more easy and effectual Apprehension of all Offenders against this Act,"¹³⁴ which significantly broadened standard practice. In a typical case, a constable had clear authority to apprehend a party without a warrant only upon occurrence of a felony or breach of the peace, although the exact contours of the latter category were not well-defined.¹³⁵ Similarly, the authority of private persons to arrest offenders for inferior offenses was the subject of some dispute, with some authorities arguing that private persons should be able to apprehend those committing offenses "scandalous and prejudicial to the public" especially where they would otherwise have an opportunity to escape.¹³⁶ So, the clarification of this authority in the 1835 Act was important; if a constable had to first seek a warrant when confronted with a cab driver whipping a horse, for example, many offenders would have escaped arrest. But in the main, the RSPCA's successful campaign of enforcement cannot be traced conclusively to a particular statutory empowerment.

Moreover, the formation of a "society" whose primary purpose was prosecution did not originate with the RSPCA. In fact, it appears to have been modeled on a number of societies that had been actively prosecuting over the previous century, primarily with regard to vice offenses.¹³⁷ For example, the Society for the Reformation of Manners (organized by the Methodists), the Society for the Suppression of Vice, and the Proclamation Society employed private agents to investigate and prosecute offenses relating to profanation of the Sab-

133. Summary Jurisdiction Act, 1848, 11 & 12 Vict., c. 43 § 1.

134. Cruelty to Animals Act, 1835, 5 & 6 Will. 4, c. 59, § 9.

135. See THOMAS STEPHEN, *THE BOOK OF THE CONSTITUTION OF GREAT BRITAIN* 204–05 (1835) (describing the powers of constables in the early nineteenth century).

136. 2 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* § 20, 121–22 (Thomas Leach ed., 6th ed. 1787).

137. See generally RADZINOWICZ, *ENFORCEMENT OF THE LAW*, *supra* note 87, at 14 (describing reform societies as a "voluntary police" force); 3 LEON RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750: CROSS-CURRENTS IN THE MOVEMENT FOR THE REFORM OF THE POLICE 166–74* (1957) [hereinafter RADZINOWICZ, *REFORM OF THE POLICE*] (describing the function of reform societies and informers as an informal police force).

bath, gaming law, disorderly houses, and obscene books.¹³⁸ John and Henry Fielding were instrumental in forming societies of tradesmen, shopkeepers, and pawnbrokers to prosecute theft and traffic in stolen goods.¹³⁹

The formation of a local “subscription association” was in fact a very common response to particular criminal problems in the early nineteenth century. For example, when labor unrest over increasing industrialization led to the destruction of machinery by angry mobs, the response of citizens in Huddersfield was typical—they called a meeting of magistrates, merchants, manufacturers, and other citizens, formed a committee, took up a subscription, and committed to using “their utmost endeavours, to detect and bring to Justice, not only the Perpetrators, but such as Countenance and Support them.”¹⁴⁰

The “vice” societies’ prosecution of moral crimes provided a model for the RSPCA. William Wilberforce, MP, a major supporter of Martin’s Act and the RSPCA, had founded the Proclamation Society in 1787, which aimed to improve society through a combination of education and law enforcement.¹⁴¹ Wilberforce was also a major force in the anti-slave trade movement, successfully obtaining passage of his Slave Trade bill in 1807.¹⁴² Thus, Wilberforce symbolizes those who supported anti-cruelty legislation as another aspect of improving the British moral character through government action. Moreover, his Proclamation Society, along with similar vice societies, taught reformers that vigorous enforcement of such laws would depend on private collective action.

The activities of the vice societies were highly controversial, however, because of the impact of overzealous prosecution on individual freedoms. In 1823, the House of Commons debated the clemency petition of Mary Ann Carlile, whom the Vice Society had prosecuted for blasphemy for the publication of

138. See RADZINOWICZ, REFORM OF THE POLICE, *supra* note 137, at 169.

139. *Id.* at 43–47.

140. Reward Poster, Feb. 27, 1812, *reprinted in* BLACK, *supra* note 69, at 14.

141. WILLIAM HAGUE, WILLIAM WILBERFORCE: THE LIFE OF THE GREAT ANTI-SLAVE TRADE CAMPAIGNER 105–10 (2007). The Proclamation Society’s full name was the “Society for Giving Effect to His Majesty’s Proclamation against Vice and Immorality.” *Id.* at 108. With Wilberforce’s encouragement, King George III issued a Proclamation in 1787 to encourage the prosecution of drunkenness, blasphemy, gambling and other “dissolute, immoral, or disorderly Practices.” *Id.* at 107–08 (citing Proclamation for the Encouragement of Piety and Virtue, and for Preventing and Punishing of Vice, Profaneness and Immorality, George III, June 1787). Wilberforce formed the Society to ensure that the Proclamation was given full effect. *Id.* at 108. In 1802, the Society for the Suppression of Vice formed to fill a similar role. *Id.* at 109; M.J.D. Roberts, *The Society for the Suppression of Vice and Its Early Critics, 1802–1812*, 26 HIST. J. 159, 159 (1983); see also KEAN, *supra* note 5, at 33–35 (discussing links among Wilberforce, vice and anti-slavery groups, and anti-cruelty supporters).

142. See generally HAGUE, *supra* note 141, at 513 (slave trade abolition was Wilberforce’s “central tangible achievement,” but he had a larger aim of changing moral climate).

“An Appendix to the Theological Works of Thomas Paine.”¹⁴³ The debate veered off the specific case into the more general question of the propriety of the Vice Society’s prosecutions. Joseph Hume, the Radical member who presented Carlisle’s petition, criticized the Society, arguing that the King’s Attorney or Solicitor General “were the only channels through which such prosecutions ought to be carried on.”¹⁴⁴ Instead, the Vice Society had “arrogated to themselves the right of fixing the mode and the time at which individuals should be put upon their trials, and of thereby subjecting them to great expense.”¹⁴⁵ Likewise, Sir Burdett rose to proclaim that he thought all of the Vice Society’s prosecutions were “vexatious,” even though the courts had not explicitly found them to be so:

[W]hen a number of individuals conspired together like the Vice or Constitutional Societies, they made a common purse; they were a sort of joint-stock company, to prosecute all the poor individuals in the country. In his . . . opinion, it was high time to put an end to such conspiracies, which in truth only augmented evils they professed to prevent.¹⁴⁶

Of course, some MPs were themselves members of these societies and spoke out in their defense. Mr. Wilberforce, in particular, noted that prosecuting societies were necessary for the type of crime for which no single person had a sufficient interest to act alone:

In ordinary cases of crime, the property or the persons of individuals were concerned, and the individual aggrieved appealed to the laws of the land; but in offences against public morals and religion . . . no injury was done to any particular party, and no one man liked to encounter the risk and odium of being a public prosecutor. In this country, therefore, societies for such a purpose ought to be especially called into action, and to deny their necessity was to deny the wisdom of all the institutions of antiquity.¹⁴⁷

Thus, although Martin’s Act did provide private parties with the opportunity to initiate criminal enforcement, such provisions were not unusual at the time. Moreover, the formation of a prosecuting society to undertake enforcement activities had ample precedent. Nevertheless, the vigor with which the Society used its prosecuting power over the next century was remarkable, and provides an interesting study of the efficacy of private enforcement. Because animal cruelty crimes involved victims who could not act or speak for themselves, the ques-

143. *House of Commons, Wednesday March 26*, TIMES (London), March 27, 1823, at 2; see *Mary Ann Carlisle for Blasphemous Libel, Court of King’s Bench, July 24*, 14 EDINBURGH ANN. REG. 42–43 (1821).

144. *House of Commons, Wednesday March 26*, TIMES (London), March 27, 1823, at 2.

145. *Id.*

146. *Id.*

147. *Id.*

tion arises whether the prosecuting society approach was a desirable, or even the only effective method of ensuring enforcement of anti-cruelty law.

B. Comparison with Child Abuse and Child Labor Enforcement

In two similar situations, child abuse and child labor, Parliament used a different enforcement mechanism, which provides an interesting contrast with the private prosecution method used in Martin's Act. Children, of course, are similar to animals in terms of their inability to seek protection from the legal system on their own. Historically, the law gave parents and guardians, as well as employers, relatively free rein in their relationships with children.¹⁴⁸ Just as the society was reluctant to interfere with an owner's treatment of his animals—his “property”—society treated the family relationship and the employer-employee relationship as private spheres which the public should not enter.¹⁴⁹ In extreme cases, however, the law had developed protection for children from abuse, and that protection increased during the nineteenth century, in accordance with the general movement to civilize society.¹⁵⁰ In addition, the nineteenth century saw a long march toward increased child labor regulation.¹⁵¹ In child abuse cases, the law allowed the appointment of a “next friend” to represent the minor's interests.¹⁵² In contrast, government inspection and enforcement was the norm for child labor laws. The use of a “next friend” to protect children has a long history. While the common law had always allowed infants to sue by their parent or guardian,

this rule was found inconvenient, it sometimes happening, that an infant was secreted by those having the legal custody of him, and so prevented from applying to have a guardian *ad litem* appointed. Hence was seen the necessity of permitting any person to litigate for the infant's benefit, who should be disposed to risk the expense.¹⁵³

The First Statute of Westminster (1275) included a clause allowing any person to sue as “*prochein amy*” or “next friend” to represent the claims of in-

148. *Child Abuse Background and History*, FINDLAW, <http://family.findlaw.com/child-abuse/child-abuse-background-and-history.html> (last visited Sept. 24, 2012).

149. *See id.*

150. *See id.*; Irwin Yellowitz, *Child Labor*, HISTORY.COM, <http://www.history.com/topics/child-labor> (last visited Sept. 24, 2012).

151. *See generally* Jerry L. Anderson, *Protection for the Powerless: Political Economy History Lessons for the Animal Welfare Movement*, 4 STAN. J. ANIMAL L. & POL'Y 1 (2011) (comparing the animal welfare movement to the child labor reform movement of the nineteenth century).

152. *Next Friend*, LEGAL INFO. INST. (Aug. 19, 2010), http://www.law.cornell.edu/wex/next_friend.

153. 1 SIR EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, OR, A COMMENTARY UPON LITTLETON*, ch. 11, § 201 (Charles Butler ed., 19th ed. 1832).

infants who were hindered from appearing by their guardians.¹⁵⁴ Even then, barrister John Reeves indicates the provision was “nothing more than a confirmation of common law.”¹⁵⁵ The Second Statute of Westminster (1285) extended this provision to allow suit by a next friend under any appropriate circumstance.¹⁵⁶ When a person applied to be appointed next friend in such cases, the court weighed carefully, “on the one hand, [the] danger of encouraging useless and expensive litigation . . . [and] on the other hand, [of] discourag[ing] interference, which very often is absolutely necessary for [an infant’s] protection.”¹⁵⁷ Thus, unlike Martin’s Act enforcement, third-party enforcement in children’s cases was not automatic; the court had to be convinced both that the matter appeared to be serious enough to overcome the privacy interests of the family unit and that the proffered “next friend” was an appropriate representative. This sort of threshold barrier was not present in animal cruelty prosecutions.

The “next friend” mechanism was in fact used mainly in Courts of Equity, where some property of the child was at issue. In cases of abuse, there was in general “a great repugnance towards interference in private relations.”¹⁵⁸ Many other abuse cases were never brought to the court in the first place, because no one knew about the abuse and “the young victims of cruelty were too helpless, or too ignorant, or too terrified, to seek redress.”¹⁵⁹ There were, however, at least some cases in which a *prochein ami* acted to protect children from ill treatment by parents, guardians or others.¹⁶⁰ It was not until 1889 that Parliament specifically empowered the government to act in cases of child abuse by parents.¹⁶¹ The

154. Statute of Westminster the First, 1275, 3 Edw. 1, c. 48.

155. 2 JOHN REEVES, HISTORY OF THE ENGLISH LAW FROM THE TIME OF THE SAXONS, TO THE END OF THE REIGN OF PHILIP AND MARY 180–81 (Augustus M. Kelley & Rothman Reprints, Inc. 1969) (2d ed. 1787). The spelling of the term later evolved to “*prochein ami*.”

156. Statute of Westminster the Second, 1285, 13 Edw. 1, c. 15; COKE, *supra* note 153, at ch. 11, § 201.

157. Cross v. Cross, (1845) 50 Eng. Rep. 179.

158. R. STORRY DEANS, THE LAW OF PARENT AND CHILD, GUARDIAN AND WARD, AND THE RIGHTS, DUTIES AND LIABILITIES OF INFANTS 107 (1895).

159. *Id.* at 108. For a fictional account of abuse during this time period, see 1 CHARLES DICKENS, THE LIFE AND ADVENTURES OF NICHOLAS NICKELBY 93–118, 176–92 (Charles Scribner’s Sons 1910) (1839) (detailing abuse of children by master of boarding school, with no apparent legal remedy).

160. See Wellesley v. Wellesley, (1828) 6 Eng. Rep. 481, 486, 1 Dow & Cl. 152, 163 (affirming power of court, upon petition by next friend, to “rescue the children from a parent who has disqualified himself from being a proper guardian”); Whitfield v. Hales, (1806) 33 Eng. Rep. 186, 12 Ves. Jun. 492 (petition granted to remove children from their father and appoint guardian, due to “gross ill treatment and cruelty”); Goodwin v. Moore, (1629) 79 Eng. Rep. 740, Cro. Car. 161 (allowing a *prochein ami* to sue for battery and false imprisonment).

161. An Act for the Prevention of Cruelty to, and better Protection of, Children, 1889, 52 & 53 Vict., c. 44; see also PRICE, *supra* note 76, at 202–04 (describing the Victorian attitude that

1889 Act also included a provision, very similar to Martin's Act, which allowed a magistrate to take action based on information provided by "any person . . . bona fide acting in the interest of any child."¹⁶² If such information gave reasonable cause to suspect abuse, the magistrate could issue a search warrant and authorize protective action, including removal of the child.¹⁶³

Thus, although the procedure in a case of cruelty to infants was somewhat different from that adopted for animal abuse cases, the "next friend" concept had already firmly established the principle of encouraging third parties to act on behalf of powerless victims. The appointment as "next friend," however, required a court to be convinced that such intervention was necessary and outweighed the privacy interests of the family. While that hurdle made intervention more difficult in cases of child abuse, it also may have prevented the overzealous use of this technique, a complaint that plagued RSPCA prosecutions, as described below.

In contrast, child labor laws enacted about a decade after Martin's Act contemplated government enforcement of criminal provisions. The Factory Act of 1833 provided for the appointment of government inspectors, under the supervision of the Home Secretary, to punish manufacturers for violations of the new labor protections.¹⁶⁴ Although opinion differs on the effectiveness of these prosecutions, inspector reports show that over the period 1834–1855, nearly 7400 charges were brought against 2700 offenders pursuant to this provision.¹⁶⁵ This government enforcement mechanism was unusual for its time, however. For example, Parliament created similar labor laws to protect chimney sweeps who, according to one commentator, "were employed in a barbarous manner as brooms for sooty chimneys."¹⁶⁶ Although Parliament adopted chimney sweep protections on a number of occasions, the lack of an enforcement mechanism undermined the laws' effectiveness.¹⁶⁷ Although prosecuting societies sprang up

prevailed until 1880s, that family should be a protected part of the private sphere and kept free from government intrusion).

162. An Act for the Prevention of Cruelty to, and better Protection of, Children, 1889, 52 & 53 Vict., c. 44, § 6(1).

163. *Id.* These powers could also be exercised by two Justices of the Peace. *Id.*

164. The Factory Act, 1833, 3 & 4 Will. 4, c. 103; *see also* A.E. Peacock, *The Successful Prosecution of the Factory Acts, 1833–55*, 37 *ECON. HIST. REV.* 197, 197 (1984).

165. Peacock, *supra* note 164, at 198. Peacock cites several sources for the view that early Factory Act enforcement was not successful. *Id.* at 197.

166. ERNST VON PLENER, *THE ENGLISH FACTORY LEGISLATION FROM 1802 TILL THE PRESENT TIME* 61 (Frederick L. Weinmann, trans., 2d ed. 1873).

167. *See id.*

in some localities to prosecute sweep employers, their activities were never as coordinated or as extensive as the RSPCA's campaign.¹⁶⁸

As described in more detail below, government enforcement has several advantages over private prosecution. Primarily, it is perceived to be more even-handed, because the government enforcers are not governed by wealthy subscribers and can adopt a more neutral plan of enforcement. In reality, of course, government inspectors may be influenced and subject to bias as well. History shows that government enforcement of child labor laws suffered from a significant lack of resources, and reformers fought for over three-quarters of a century to make the Factory Act protections more than merely symbolic.¹⁶⁹ Private enforcement avoided the tedious political process of convincing government officials to provide more funds and undertake more vigorous enforcement.

IV. ADVANTAGES OF PRIVATE PROSECUTION

The RSPCA's active campaign of private prosecution undoubtedly contributed significantly to the law's overall effectiveness and to the establishment of a new norm against animal cruelty. In the particular circumstances of animal abuse, the use of private prosecution by a charitable society had many advantages. Given the controversial nature of the Act and the opposition of many magistrates and constables, it is doubtful whether many prosecutions would have occurred without the Society's initiatives. Certainly, had public prosecutors brought the same number of prosecutions as the Society did in the latter half of the nineteenth century, it would have raised an outcry from citizens who had different priorities for prosecutorial resources. In fact, taking on the task of enforcement gave the Society a sense of empowerment that led to more donors and more support, as private citizens were called upon to continue to engage in the solution to the problem. Moreover, the RSPCA prosecutions allowed the development of a specialized group of attorneys, inspectors, and expert witnesses, whose knowledge of proper animal treatment went far beyond the comprehension of the typical magistrate, constable, or prosecuting attorney. The following sections detail these advantages.

168. *Id.* at 61–62. While the author states that, as of 1873, the law protecting sweeps was “disregarded on account of the want of authoritative supervision,” he contrasts the situation in Edinburgh and Glasgow, where licensing and government inspection had removed “the evils previously prevailing.” *Id.* at 62.

169. *See* Anderson, *supra* note 151, at 58.

A. More Vigorous Enforcement

Martin recognized from the beginning that enforcement of his Act would be rare without the intervention of private interested parties. Two aspects of the law made organized private enforcement desirable: the powerlessness of the victims and the controversial nature of the new law. In many jurisdictions, the perpetrators were powerful and popular, and their practices followed traditional, well-established norms. Given these circumstances, public authorities would be unlikely to pursue many animal cruelty crimes on their own accord.¹⁷⁰

In any context, private prosecution is one way to provide a check on the unjustified inaction of public prosecutors.¹⁷¹ The ability of any private citizen to invoke the machinery of the law has long been recognized as an important guarantee of equal treatment. As J.F. Stephen observed in 1883,

no stronger or more effectual guarantee can be provided for the due observance of the law of the land, by all persons under all circumstances, than is given by the power, conceded to everyone by the English system, of testing the legality of any conduct of which he disapproves, either on private or on public grounds, by a criminal prosecution.¹⁷²

In most criminal situations, private prosecution is unnecessary, because the victim generally can call upon the police, get the attention of prosecutorial officials, push for charges to be brought, and sometimes seek judicial review of an arbitrary refusal to prosecute.¹⁷³ When the victim is an animal, however, and is thus unable to pressure authorities to take action, private prosecution can provide a necessary substitute, especially in cases falling within the broad bounds of unreviewable prosecutorial discretion.

170. Similarly, the private enforcement provisions of New York's statute arose from doubt about whether the police would "seriously and vigorously enforce this new law." Favre & Tsang, *supra* note 5, at 17.

171. A similar motivation lies behind the citizen suit enforcement mechanisms in various environmental laws, although they provide for civil, rather than criminal, penalties. *See, e.g.*, 33 U.S.C. § 1365 (2006) (Clean Water Act's citizen suit provision); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 62 (1987) (explaining that the legislative history of citizen's suit provisions reveals "central purpose of permitting citizens to abate pollution when the government cannot or will not command compliance").

172. STEPHEN, *supra* note 124, at 496.

173. *See* Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 21, 59 (1999) (noting that, though the ultimate decision to charge a criminal is generally out of the victims' hands, they have significant input in the criminal process through their decision whether to report a crime).

When a new species of criminal conduct has been designated, and there is some doubt about its acceptance among the populace, public prosecuting authorities may be reluctant to invoke it. For example, many authors have documented the historic recalcitrance of both police and prosecutors in pursuing domestic violence cases, due to differing attitudes toward the crime.¹⁷⁴ More recently, the lower prosecution rate for acquaintance rape cases illustrates the problem.¹⁷⁵ In other words, the old norm treating animals as property was an example of what Dan Kahan has characterized as a “sticky” norm, which “occurs when the prevalence of a social norm makes decisionmakers reluctant to carry out a law intended to change that norm.”¹⁷⁶

Martin’s Act, giving “rights to brutes . . . against their masters,” was highly controversial, and its opponents included many of the magistrates who would enforce it.¹⁷⁷ For example, an RSPCA supporter noted that some of the magistrates in Stamford, called upon to stop the bull-running there, “do all they can to promote the continuance of the cruel custom.”¹⁷⁸ It was only when the Home Secretary threatened to hold the magistrates personally responsible that they changed their view on the matter.¹⁷⁹ The RSPCA, on the other hand, brought indictments against the chief participants, and obtained guilty verdicts and a unanimous declaration from the Queen’s Bench court that the sport was “decidedly illegal.”¹⁸⁰ Thus, private prosecution allows for enforcement of a law despite its unpopularity and the opposition of the local power structure.

B. Development of Specialized Knowledge

Public prosecutors typically take a broad range of cases, or specialize in cases that occur frequently, such as domestic violence or drug cases. A typical

174. See, e.g., Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46 (1992) (arguing prosecutors and police historically have not taken domestic violence seriously).

175. David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1214–18 (1997) (citing studies demonstrating that prosecutors less likely to file charges in acquaintance rape cases).

176. Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607 (2000).

177. KATHRYN SHEVELOW, FOR THE LOVE OF ANIMALS: THE RISE OF THE ANIMAL PROTECTION MOVEMENT 261 (2008).

178. BODDICE, *supra* note 54, at 191 (quoting RSPCA, CM/21, MINUTE BOOK 2, at 200–01 (1837)).

179. *Id.* at 196–97 (citing RSPCA, CM/21, MINUTE BOOK 3, at 235 (1840)); see also *Threatened Disturbance at Stamford*, TIMES (London), Nov. 13, 1838, at 4 (announcing the government had cancelled the annual bull-running).

180. *Bull-Baiting*, TIMES (London), Nov. 17, 1838, at 5.

public prosecutor or police officer of the time would have little experience in animal matters.¹⁸¹ In contrast, RSPCA prosecutors operated solely within the relatively narrow range of animal cruelty cases, which allowed them to develop significant expertise in the area. As Brian Harrison explained, the Society “steadily accumulated knowledge on animal questions, particularly in their legal aspects. By the 1860s its expertise was frequently being drawn upon by the public, by the police and by politicians.”¹⁸² The Society’s secretary during the latter part of the nineteenth century, John Colam, carried on many of the prosecutions personally, and assisted the lawyers in others.¹⁸³ In his long career, he not only became adept at litigation, but was also sought after for advice on animal care issues.¹⁸⁴

RSPCA prosecutions tended to use the same “stable” (so to speak) of barristers and expert witnesses, very similar to specialized litigators today. For example, in a highly publicized case challenging the practice of de-horning cattle, the RSPCA called about a dozen veterinary professors and “cattle doctors,” described by the court as “eminent men,” who were “disconnected with the case.”¹⁸⁵ One in particular, Professor William Pritchard, President of the Royal College of Veterinary Surgeons in London, appeared in other RSPCA cases, including controversial cases against sheep nose-branding in Wales and against members of the British Medical Association for animal experiments.¹⁸⁶ The

181. See, e.g., *State v. Thaxton*, 715 S.E.2d 480, 485 (Ga. Ct. App. 2011) (attributing significant pre-indictment delay to prosecutor’s lack of experience with dogfighting cases). It is often difficult to determine whether abuse is occurring without soliciting expert assistance. See, e.g., *Matus v. State*, No. 10-08-00149-CR, 2011 WL 1166383, at *2 (Tex. Ct. App. Mar. 30, 2011) (describing a police detective who sought out the assistance of a fellow detective who had some experience with animal cruelty cases to help determine whether abuse had occurred).

182. Brian Harrison, *Animals and the State in Nineteenth-Century England*, 88 ENG. HIST. REV. 786, 808 (1973) [hereinafter Harrison, *Animals and the State*]. The advice of the RSPCA was sought by a variety of professionals, from civil servants to entertainers and inventors. *Id.*

183. E.g., *Bowyer v. Morgan*, (1906) 95 L.T. 27 (K.B.) 29 (Colam shown assisting Queen’s Counsel in a sheep nose-branding case); *Benfield v. Simms*, (1898) 78 L.T. 718 (Q.B.) 719; *R v. Paget*, (1889) 53 J.P. 469 (Q.B.) 470; *Duncan v. Toms*, (1887) 56 L.T. 719 (Q.B.) 720; *Prosecution at Norwich: Experiments on Animals*, 2 BRIT. MED. J. 751, 751 (1874) [hereinafter *Prosecution at Norwich*].

184. See, e.g., John Colam, Letter to the Editor, *Slippery Roads and Falling Horses*, TIMES (London), Dec. 26, 1878, at 9 (providing advice to horse owners on ways to prevent slipping on icy roads).

185. *Ford v. Wiley*, (1889) 23 Q.B. 203, 212–14 (Lord Coleridge C.J.) (elaborating further that these cattle doctors were “not sentimentalists but men of the world, men of sense, men dealing with scientific matters in a scientific way”).

186. *Bowyer v. Morgan*, (1906) 95 L.T. 27 (K.B.) 28 (sheep branding); *Prosecution at Norwich*, *supra* note 183, at 751.

RSPCA's constant involvement in animal welfare issues allowed them to develop relationships with experts who could then be called upon to support prosecutions, in a way that public prosecutors would not be able to replicate. In fact, critics might argue that the RSPCA's powerful arsenal of expert witnesses gave it an unfair advantage over an individual defendant, who likely would not have similar resources to defend the case.

C. *Faster Norm Development*

Social change theorists note the importance of "moral entrepreneurs" in the development of new societal norms. These leaders push the case for the new standard to the forefront of public awareness and help give the new norm legitimacy.¹⁸⁷ The nineteenth century cases show that the Society was willing to use private prosecutions as a method of creating new standards of practice toward animals, in a way that public prosecutors presumably would not have felt justified in pursuing. For example, the Society brought a case, *Ford v. Wiley*, which condemned the practice of "de-horning" oxen as cruel, despite farmers' claims that the practice increased the value of the animals.¹⁸⁸ The case established that even a practice that had long been accepted as customary by farmers could be judged illegal under the new standard of cruelty, which the court determined to mean "unnecessary" infliction of pain.¹⁸⁹ It is difficult to imagine that a public prosecutor would be willing to prosecute a case pushing the envelope of a currently-accepted norm.

Similarly, in 1824 Martin challenged the method used to haul veal calves to market in London.¹⁹⁰ The calves were tightly jammed together in vans with their legs and necks bound by cords, and as a result, many died in transit.¹⁹¹ Although the drivers complained that the practice was necessary, the magistrate agreed that it constituted cruel treatment and warned the drivers to improve their handling of the calves or face prosecution.¹⁹² Again, a typical public prosecutor might not have brought a case condemning as "cruel" a practice long held to be necessary and proper by those in the industry. In contrast, many modern statutes

187. See Howard S. Becker, *Moral Entrepreneurs: The Creation and Enforcement of Deviant Categories*, in NANCY J. HERMAN, *DEVIANCE: A SYMBOLIC INTERACTIONIST APPROACH* 169 (1995); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996).

188. *Ford v. Wiley*, (1889) 23 Q.B. 203, 205–06 (Lord Coleridge C.J.).

189. *Id.* at 209–10 (Lord Coleridge C.J.).

190. PAIN, *supra* note 104, at 91–93.

191. *Id.* at 92.

192. *Id.* at 93.

prevent norm development by incorporating standard industry practices into the definition of cruelty.¹⁹³

Sometimes, even unsuccessful prosecution can further reformers' goals of heightening public awareness and coalescing activist support, goals that public prosecutors would not consider. For example, in *Bowyer v. Morgan*, the Society lost a case in which it asked the court to condemn nose-branding of sheep in Wales as cruel.¹⁹⁴ The Society's case rested on three expert witnesses—two veterinarians and a professor of Veterinary Surgery—while the defense presented the evidence of three farmers and a local veterinarian.¹⁹⁵ Although the justices thought the practice might meet the standard of “unnecessary abuse,” they could not bring themselves to overrule the local magistrates, “which would in effect be saying that we know more about the people of Cardiganshire and about the sheep of the Welsh hills than they do.”¹⁹⁶ Thus, in this case the Society failed to disrupt a well-entrenched local custom. Certainly, a local Welsh prosecutor never would have brought a case that challenged such accepted practices, in the face of widespread local opposition.

Nevertheless, even in losing a case like *Bowyer*, the Society's prosecution succeeded in bringing the issue before the public, causing them to reconsider an animal husbandry technique heretofore unquestioningly accepted. Private prosecution provided numerous opportunities for such “impact litigation,” lawsuits that served to capture public attention and provide the focal point for the creation of a “collective identity” among supporters.¹⁹⁷ Regardless of the outcome, the Society could use the case to generate additional contributions from supporters and raise public awareness of its activities.¹⁹⁸

193. See, e.g., COLO. REV. STAT. § 18-9-201.5(1) (2011) (exempting “accepted” animal husbandry practices); 18 PA. CONS. STAT. ANN. § 5511(c)(3) (West Supp. 2012) (exempting “normal” agricultural operations); WASH. REV. CODE ANN. §§ 16.52.095, .180, .185, .205(6) (West 2006 & Supp. 2012) (exempting “accepted animal husbandry practices,” normal rodeo events, customary fair exhibitions, and accepted veterinary practices). In *Northwest Animal Rights Network v. State*, 242 P.3d 891 (Wash. Ct. App. 2010), the court declined to consider whether such statutory exemptions were unconstitutional, because the balance of interests regarding animal protection is “up to legislatures, not courts.” *Id.* at 895–96 (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963)).

194. *Bowyer v. Morgan*, (1906) 95 L.T. 27 (K.B.). Apparently a century later the practice of nose-branding sheep is still an acceptable practice in some jurisdictions. See IDAHO CODE ANN. § 25-1142 (2000).

195. *Bowyer*, 95 L.T. at 27–28.

196. *Id.* at 29–30.

197. Edward L. Rubin, *Social Movements and Law Reform: Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 71 (2001).

198. See Anderson, *supra* note 151, at 55–56 (describing the role of unsuccessful lawsuits in promoting public awareness and generating popular support for animal welfare causes).

Sociologists have observed that the development of the law typically lags significantly behind shifts in public opinion (called “cultural lag”).¹⁹⁹ Thus, public prosecutors and courts might be wary of pushing the concept of animal abuse until they are more certain of public acceptance. Certainly, they would be predicted to apply the new law conservatively, confining it to the most egregious cases of abuse. Conversely, the ability to bring private prosecutions allows the law to respond more quickly to shifts in public opinion and may therefore result in a shorter cultural lag. Clearly, the Society’s prosecutions helped to define the outer contours of the new norm of animal cruelty and push it beyond its accepted boundaries.

D. Conservation of Public Resources

One obvious advantage of private prosecution is that the cost is borne by those most interested in vigorous enforcement of this particular criminal category, rather than by the public at large. If the RSPCA had not taken on these prosecutions, most of the crimes would have gone unpunished and those that were prosecuted would have presented a significant drain on the public purse.²⁰⁰ Although there is little information about the costs of Society prosecution in the nineteenth century, contemporary figures indicate how much of a financial burden the Society has shouldered. In 2010, RSPCA prosecutions cost over £4.3 million, although the Society recovered about £1 million of those costs.²⁰¹ Most of the early cases were handled by Society inspectors, staff, or individual members, and costs to the Society were lowered significantly by a ruling that allowed RSPCA inspectors to prosecute on their own, without the aid of counsel.²⁰²

Critics might observe that requiring the allocation of limited prosecutorial resources is actually desirable, because it allows the public, through the prosecutor, to “vote” on which crimes it considers most dangerous to society. A determination to give particular crimes low priority can represent the public’s view of the relative harm of that category of offense. The introduction of private resources skews the balance and allows a smaller group to “overrule” this public

199. ALAN WATSON, *SOCIETY AND LEGAL CHANGE* 5, 8, 130 (2d ed. 2001); WILLIAM FIELDING OGBURN, *SOCIAL CHANGE WITH RESPECT TO CULTURE AND ORIGINAL NATURE* 200–13 (1950 ed.).

200. Stuart Harrop, *Challenges and Dilemmas Faced by Conservation and Animal Welfare Charities Who Both Enforce the Law and Press for Changes*, in *THE VOLUNTARY SECTOR, THE STATE AND THE LAW* 211, 211 (Alison Dunn ed., 2000). Harrop was formerly a Director of the RSPCA’s legal services. *Id.*

201. PROSECUTIONS DEP’T, RSPCA, *supra* note 18, at 5.

202. *Duncan v. Toms*, (1887) 56 L.T. 719 (Q.B.) (allowing a society inspector, who was also the informer, to prosecute a case without counsel).

determination. In a category of crime in which the victims are unable to voice an opinion or affect the prioritization themselves, however, it may be more equitable to allow prosecution outside the public system by individuals or charitable societies.

The economics of private prosecutions suggests that the use of an organized society was necessary to ensure adequate enforcement of animal cruelty cases. In the case of a generalized societal harm like animal abuse, no individual has a sufficient stake in any particular case to justify the expense and bother of bringing a prosecution. The prosecuting society provides an antidote to this problem by pooling the resources of those concerned about the matter. Moreover, in most cases, the Society required support from local subscribers to cover costs of bringing an action.²⁰³ This “local buy-in” ensured at least some community support for the Society’s prosecutorial actions and created a sense of empowerment among subscribers, who could see the immediate impacts of their contributions.²⁰⁴ Harrison notes that RSPCA subscribers not only provided money; they also were quite willing to intervene directly against cruelty or provide information or resources required for Society enforcement.²⁰⁵

E. Avoidance of Co-optation

When a major reform measure is enacted, the interest group that pushed for the reform in some cases tends to lose steam and become co-opted by the system.²⁰⁶ As government regulators take control of the enforcement system, reformers may lose their *raison d’être* and become disengaged. For example, once a government enacts a law establishing animal welfare conditions in confinement operations, supporters might feel reform has been achieved, even though the regulations ultimately adopted to implement the law may end up providing little progress and actually legitimize the practices originally condemned. The group may then become fragmented, with those who feel inclined to compromise splitting from those with more radical agendas. The group may waste resources in endless negotiation over incremental improvements to the regulations and in constantly having to pressure government to enforce the regulations it does have.

203. Harrison, *Animals and the State*, *supra* note 182, at 800 (citing RSPCA, *Minutes No. 8*, at 339 (Dec. 14, 1858)).

204. *See id.* at 799.

205. *Id.*

206. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 939 (2007) (“As they engage with the law, social reform groups become absorbed by the system even as they struggle against it”).

The availability and reliance on private criminal enforcement of animal abuse law seemed to avoid, in part, the problem of co-optation. In contrast with other social reforms in the nineteenth century, such as factory acts or public health measures, which tended to curtail or supplant the work of voluntary societies, Brian Harrison has observed that animal cruelty legislation increased the importance and responsibility of the animal welfare group: “here philanthropy and the State went hand in hand.”²⁰⁷ As one RSPCA supporter noted, “in other countries the intervention of the State would be invoked, and an organization of public prosecutors and overseers would be established, but in England it was their pride to do these things themselves, and to trust to the State nothing they could accomplish by local efforts.”²⁰⁸ Rather than negotiate and pressure public prosecutors to take action, the RSPCA could simply prosecute on its own.²⁰⁹

F. *Summary of Advantages of Private Prosecution*

Thus, in the particular context of animal cruelty, where the victims were not able to bring the cases themselves or obtain the notice of public prosecutors, the use of an active prosecuting society provided significant advantages in ensuring vigorous enforcement of the law. Because public prosecution tends to conform to current norms of acceptable animal treatment, private prosecution allowed for much faster norm development. The Society was able to develop an expertise in animal cruelty issues that public prosecutors could not hope to duplicate. The Society’s enforcement activity tended to avoid the dangers of co-optation and kept Society members involved and engaged. In these particular circumstances, private enforcement turned Martin’s Act into a truly effective instrument of social change. Nevertheless, as the next section details, the private prosecution mechanism has significant drawbacks which must be recognized.

V. DISADVANTAGES OF PRIVATE PROSECUTION

Although reliance on a private prosecuting society seemed particularly well-suited to animal cruelty offenses, several significant disadvantages to this approach soon became evident. Critics charged that the RSPCA engaged in class

207. Harrison, *Animals and the State*, *supra* note 182, at 787.

208. Brian Harrison, *Civil Society by Accident? Paradoxes of Voluntarism and Pluralism in the Nineteenth and Twentieth Centuries*, in *CIVIL SOCIETY IN BRITISH HISTORY: IDEAS, IDENTITIES, INSTITUTIONS*, 88 (Jose Harris ed., 2003) (citing RSPCA, *ANIMAL WORLD* 1870, at 96 (remarks of S. Liang)).

209. This did not eliminate the risk of co-optation, however. When the court allowed sheep nose-branding, for example, the judicial imprimatur might have made it harder to achieve reform of that practice than by use of extra-judicial means.

bias, pursuing working class defendants so relentlessly that they themselves became the victims of the Society's power.²¹⁰ Moreover, Society efforts were hampered by limitations on its ability to access private property.²¹¹ The Society itself faced hardship as well: allowing private individuals to intervene in the actions of others naturally raised the possibility of physical danger and retaliatory lawsuits against the organization or individual inspectors.

A. Unequal Treatment/Class Bias

Because Martin's Act sprang at least in part from a desire to "civilize" the lower classes, it is not surprising that the Society's prosecutions immediately generated claims of class bias.²¹² The vast majority of the RSPCA's financial support came from wealthy sponsors and its leaders were drawn from the ranks of nobles.²¹³ The society's annual reports painted animal abusers as rough, dirty fellows from the lower social classes.²¹⁴ Allowing a private group, funded and governed by upper-class donors, to determine which cases merit prosecution naturally raises the suspicion of unequal treatment.

In fact, the RSPCA's early prosecution efforts focused almost exclusively on cases involving working-class defendants. From 1838 to 1841, the RSPCA identified the occupations of 159 of the 243 offenders it prosecuted; of those, all but one were from the working-class.²¹⁵ This disparity can be partially explained by the fact that the early animal protection laws focused on the type of abuse more frequently associated with the working class: bear-baiting was prohibited while fox hunting was not, for example.²¹⁶ In addition, working class men han-

210. See, e.g., JULIAN MCALLISTER GROVES, *HEARTS AND MINDS: THE CONTROVERSY OVER LABORATORY ANIMALS* 35 (1988), see also ANDREW N. ROWAN, *ANIMAL LIBERATORS: BETWEEN THE SPECIES* 141 (1990) (reviewing Groves' book).

211. See RSPCA, *Cruelty in Secret Places—No. II*, ANIMAL WORLD, Jan. 1878, at 7 (indicating that, because mines and pits are located on private property, RSPCA agents attempting to investigate cruelty to colliery horses may be denied access or sued for trespass). The statutes allowed access only to provide food and water to malnourished animals. See Cruelty to Animals Act, 1835, 5 & 6 Will. 4, c. 59, §§ 4–5.

212. See GROVES, *supra* note 210, at 35.

213. Harrison, *Religion and Recreation*, *supra* note 13, at 108 (describing high number of aristocrats among Society donors).

214. Compare *id.* at 116–17 (quoting descriptions of defendants in RSPCA Annual Reports and Minute Books, including, "a rough, dirty, brutal-looking fellow"), with BODDICE, *supra* note 54, at 176 n.73 ("The annoying tendency of the rich also to be cruel was a continual bugbear for the society, and was a running theme from the earliest days.")

215. Harrison, *Religion and Recreation*, *supra* note 13, at 116.

216. See Police Magistrates, Metropolis Act, 1833, 3 Will. 4, c. 19, § 29; see also RICHARD D. RYDER, *ANIMAL REVOLUTION: CHANGING ATTITUDES TOWARD SPECIESISM* 96 (Oxford rev. ed. 2000).

dled animals much more frequently and, therefore, were more likely to commit offenses. Nevertheless, the Society's prosecution strategy heightened the resentful feeling among the working class that the RSPCA was imposing the standards of the rich on those who worked hard for a living.²¹⁷

The RSPCA's officers were dominated by nobility, giving the Society an aristocratic public image. From 1834, when the Earl of Carnarvon became President of the Society, until 1918, when Prince of Wales accepted that post, the society's top officers tended to be titled, and the aristocracy dominated its list of subscribers.²¹⁸ The patronage of the royal family only heightened the perception of class bias. While Queen Victoria supported the RSPCA, she also lent her royal patronage to Hurlingham deer-hunting meets involving tame deer.²¹⁹ Other members of the royal family continued enthusiastic participation in fox and pigeon hunting.²²⁰

Members of the working class might also have felt that the Society was more concerned about the welfare of laboring animals than about the human workers. For example, from 1850–1852, over 2000 British miners were killed in explosions, roof falls, and shaft accidents, among other dangers.²²¹ Yet, the Society's efforts were focused on the suffering of the pit ponies rather than the hardship endured by the miners. Similarly, during just six months of 1849, over 2000 factory accidents occurred, causing 22 deaths and 109 amputations.²²² Given the dangerous, unhealthy conditions endured by many British workers, they might have been understandably less sympathetic to animal welfare concerns, when Parliament had taken little effective action to improve workplace safety.²²³

217. See *Cruelty to Animals Nuisance*, JOHN BULL, reprinted in *TIMES* (London), Mar. 9, 1835, at 3; Harrison, *Religion and Recreation*, *supra* note 13, at 117–18.

218. RYDER, *supra* note 216, at 96. Ryder notes that this skew resulted in a focus on working-class cruelty. *Id.*

219. Antony Taylor, "Pig-Sticking Princes": *Royal Hunting, Moral Outrage, and the Republican Opposition to Animal Abuse in Nineteenth- and Early Twentieth-Century Britain*, 89 *HISTORY* 30, 35, 37–38 (2004) (citing LORD RIBBLESDALE, *THE QUEEN'S HOUNDS AND STAG-HUNTING: RECOLLECTIONS* (1897)).

220. *Id.* at 35–38.

221. JAMIE L. BRONSTEIN, *CAUGHT IN THE MACHINERY: WORKPLACE ACCIDENTS AND INJURED WORKERS IN NINETEENTH-CENTURY BRITAIN* 11 (2008) (citing JAMES MATHER, *THE COAL MINES: THEIR DANGERS AND MEANS OF SAFETY* 4 (1853)).

222. *Id.* at 15 (citing *PARLIAMENTARY PAPERS, ACCOUNTS AND PAPERS, REPORTS OF THE INSPECTORS OF FACTORIES TO HER MAJESTY'S PRINCIPAL SECRETARY OF STATE FOR THE HOME DEPARTMENT FOR THE HALF YEAR ENDING 31 OCTOBER 1848*, at 17, 103, 149 (1849)).

223. For example, not until 1860 did Parliament enact legislation requiring safety measures, such as adequate ventilation and timbering, in coal and iron mines. *Coal and Iron Mines*, 1860, 23 & 24 *Vict.*, c. 151, § 10. Still, in 1868, 1190 coal miners were killed. PLENER, *supra* note 166, at 54 n.

Indeed, in 1835, *The Times* reprinted an article from the *John Bull* criticizing animal cruelty prosecutors for caring more about animals than about the suffering of working class people.²²⁴ *The Times* noted that animal advocates often used terms such as “brutes,” “ruffians,” “barbarians,” or “vagabonds” to describe those who worked with animals, as if they “were so many *vegetables*,” and such terms were unfair “as applied *generally* to a class of men who have their bread to earn.”²²⁵ The article lamented the overzealous prosecution of cab-drivers, carters, and omnibus drivers by a humane association:

Men are animals as well as jackasses, and it would be a nice question for discussion whether the cruelty of correcting an unruly horse, or making an “experiment” with a bit of ground ash upon the hide of a stubborn donkey, is much greater than the fining [of] a poor “ruffian” with a large family, or sending a “recreant” omnibus driver to prison while his wife and children are left to starve at home.²²⁶

Certainly, the Society worked to counter the claims of upper-class bias. In the 1825 debate to expand the Act to prohibit bear-baiting, Martin was careful to address critics who claimed he “meddled only with the sports of the poor, and turned away his eyes from those of the rich.”²²⁷ To the contrary, Martin exclaimed, “he did no such thing, but was equally anxious to meddle with both, when he found them opposed to the dictates of humanity.”²²⁸ In fact, he claimed, “some persons of rank and name did patronize these cruel practices.”²²⁹ The Society did not prosecute nobility very frequently, however, until the latter half of the nineteenth century, in a concerted effort to combat charges of class bias.²³⁰ For example, in 1863 it prosecuted the Marquess of Hastings for promoting cock-fights at Donington Hall.²³¹ In addition, the Society began to charge owners more frequently for offenses committed by servants at their direction.²³²

Nevertheless, any procedural scheme that replaces the prosecutorial discretion of supposedly neutral government officials with one that allows a private group, funded by individuals with special interests, to determine which cases to bring is bound to raise concerns of bias.²³³ Because nineteenth-century prosecu-

224. *Cruelty to Animals Nuisance*, *supra* note 217, at 3.

225. *Id.*

226. *Id.*

227. *Bill to Prevent Bear-Baiting*, Feb. 24, 1825, *TIMES* (London), Feb. 25, 1825, at 2.

228. *Id.*

229. *Id.*

230. Harrison, *Religion and Recreation*, *supra* note 13, at 118.

231. *Id.*

232. *Id.* at 119 (citing RSPCA, 63RD ANNUAL REPORT 132 (1887); RSPCA, 76TH ANNUAL REPORT 103 (1900)).

233. The U.S. system of private enforcement also suffered from the danger “that private police might use their powers in highly selective and destructive ways.” PEARSON, *supra* note 22,

ing societies were motivated at least in part by a desire for greater social control of the vulgar masses, the emphasis on working class crimes was not surprising. In fact, the same charge was leveled against the various vice societies, which as far back as 1698 were criticized by Daniel Defoe as prosecuting only the vices of the poor, while ignoring those of the wealthy.²³⁴ A century later, British vice societies were said to concentrate on “suppressing the vices of persons whose income does not exceed £500 *per annum*.”²³⁵ In America, New York vice societies operating in the late nineteenth century similarly concentrated their efforts on the music halls frequented by immigrant and working-class patrons.²³⁶

Critics noted that these societies survived on subscriptions from the upper class, which accounted for their tendency to concentrate on offenses of the lower classes.²³⁷ Other critics went further, charging that the vice societies had so zealously enforced the law that they were suppressing individual freedom.²³⁸ As Joseph Hume put it during Parliamentary debate on the Vice Society’s prosecution of Mary Carlile for libel, the societies were “little better than conspiracies against the liberty of the subject, and the individuals prosecuted by them might be jointly considered as their victims.”²³⁹

The same charge could be leveled against the RSPCA, whose “meddling” was criticized as overzealous from the beginning.²⁴⁰ Critics of RSPCA prosecutions complained that the wealthy patrons behind the Society knew nothing about the handling of farm animals and were thus apt to consider standard husbandry practices as cruel.²⁴¹ In its prosecutions, the Society used well-

at 160. One commentator argues that private prosecution in the United States raises such dangers of bias and self-interest that it violates a defendant’s constitutional right to a neutral prosecutor who is interested only in “justice” and the public interest, rather than conviction on behalf of a private benefactor. John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 564, 592 (1994) (relying primarily on *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987)).

234. DANIEL DEFOE, *THE POOR MAN’S PLEA* (1698), reprinted in *A COLLECTION OF THE WRITINGS OF THE AUTHOR OF THE TRUE-BORN ENGLISH-MAN* 110 (1703).

235. RADZINOWICZ, *REFORM OF THE POLICE*, *supra* note 137, at 183; accord Sydney Smith, *Proceedings of the Society for the Suppression of Vice*, 13 EDINBURGH REV., Jan. 1809, at 342).

236. Gilfoyle, *supra* note 22, at 643–44.

237. RADZINOWICZ, *REFORM OF THE POLICE*, *supra* note 137, at 181–82.

238. *Id.* at 182–83.

239. 8 PARL. DEB., H.C. (1823) 709.

240. LYNAM, *supra* note 97, at 250–52 (describing criticism in press).

241. *Id.*; see, e.g., *Police: Bow-Street*, TIMES (London), November 28, 1822, at 3 (magistrate commenting that Martin’s Act “ought to be acted upon with great caution, as persons standing by, who were not used to horses, were very apt to think that cruelty which really was not”); *Police: Marlborough-Street*, TIMES (London), June 4, 1824, at 4 (coachman claiming that Mr. Martin knew little about horses and was “the devil among coachmen”).

established experts, such as professors of veterinary science, which blunted the criticism of the Society's naïveté to some extent.²⁴²

Aristocratic ladies, one of the Society's major funding sources,²⁴³ were singled out for ridicule. In one notable example, *The Times* reprinted an article from the *John Bull* lampooning the annual report of the "Ladies' Association for the more effectual Suppression of Cruelty to Animals."²⁴⁴ The Association, the members of which the paper describes as "our fair countrywomen," had complained about how sheep were treated before slaughter, suggesting that, instead of being thrown down to the stone floor of a cellar, they be led down a sliding board with a bag of straw at the bottom.²⁴⁵ The article sarcastically derides this idea as a

luxurious mode of mitigating the barbarity of the proceeding, by tenderly *chaperoning* a Lincolnshire ram down an inclined *chaise longue* with a pillow at its end, into a receptacle where, in five minutes afterwards, it is to have its innocent throat cut, in order to provide an *entrée* of *cotélettes* for the dinner of the sympathizing lady, the kind inventress of the mitigator of its sufferings. It would be an improvement, we think, upon this scheme, to put the sheep under the care of some fashionable physician, rather than leave them in the hands of the butcher, so that they might gradually leave the world under the best medical advice, which, while it infallibly answered the ulterior purposes of the cook, would afford the fair mourners the popular consolation in similar cases, that "everything was done for them that could be."²⁴⁶

As the article indicates, women were among the most fervent supporters of anti-cruelty activities.²⁴⁷ In both the United States and Britain, however, the leadership of the anti-cruelty societies was overwhelmingly male, and female animal welfare advocates experienced paternalism and marginalization.²⁴⁸

Perhaps the danger of bias inheres in any mechanism that allows selective prosecution of offenses by private societies. One could say that private prosecution simply becomes another opportunity for the upper class to use the legal system to control and dominate the lower classes. Public prosecution, while not free from bias and political influence, hopefully makes the choice of which cases to prosecute more democratic.

242. See, e.g., *Ford v. Wiley*, (1889) 23 Q.B. 203, 212–14 (Lord Coleridge C.J.).

243. Harrison, *Religion and Recreation*, *supra* note 13, at 108 (citing RSPCA, 77TH ANNUAL REPORT 35 (1901)) (noting that women "supplied 470 of [the Society's] 739 nineteenth-century legacies").

244. *Cruelty to Animals Nuisance*, *supra* note 217, at 3.

245. *Id.*

246. *Id.*

247. *See id.*

248. PEARSON, *supra* note 22, at 155–58.

B. *Limitations on Access to Private Property*

Government authorities can obtain a warrant to gain access to private property where criminal animal abuse is suspected, and they may have inspection authority over some facilities. At least some of the bias in RSPCA prosecutions stemmed from its lack of access to private property, limiting the type of cases it could bring. While some animal owners allowed RSPCA inspectors to inspect their premises (perhaps under a mistaken notion of their authority), the law granted the Society no particular right of access.²⁴⁹ As the Society complained in its 1895 annual report, “[t]he doctrine of the sacredness of alleged rights of the citizen, the domicile, and of private property . . . is a British fetish, and is responsible for the closure of private places against Officers of the Society. A sealed door bars mines, slaughter houses, and laboratories.”²⁵⁰ As a result, many of the RSPCA prosecutions involved animal abuse that took place in public, such as cab drivers abusing their horses or abuse of animals being driven to market.²⁵¹

In particular, the abuse of animals in mining operations was difficult to prosecute without inspection powers. In 1878, the RSPCA estimated there were over 200,000 “pit ponies” working in British mines; allegations of inhumane conditions and abuse were frequent.²⁵² Although some prosecutions were brought, the RSPCA complained that its ability to monitor the situation was severely limited: “Coal mines, however, are private property, and descents could only be made by permission of the mining authorities, which, as may be imagined, was not readily given.”²⁵³ By the late 1800s some government inspectors could be convinced to bring in the RSPCA when they observed abuse in the mines, but the Society still believed cooperation was insufficient.²⁵⁴ The Society was clearly annoyed at having its enforcement ability limited by the frequency

249. If some evidence of abuse existed, the Society could ask a magistrate for a warrant and could be allowed to accompany the constable who actually carried out the inspection. See Martin’s Act, 1822, 3 Geo. 4, c. 71, § 1 (granting investigative powers to the magistrate, not the individual).

250. RADFORD, *supra* note 2, at 84 (quoting RSPCA, 71ST ANNUAL REPORT (1895)).

251. See, e.g., *Bartholomew v. Wiseman*, (1891) 56 J.P. 455 (Q.B.); 8 T.L.R. 147 (RSPCA charged driver of coal cart with abuse of horse); *R v. Paget*, (1889) 53 J.P. 469 (Q.B.) (RSPCA inspector stopped driver of horse being worked despite foot injury); see also Harrison, *Religion and Recreation*, *supra* note 13, at 119 (noting that the RSPCA often raided public drinking places where cruel sports were carried out, and focused on the obvious and public instances of abuse).

252. CERI THOMPSON, *HARNESSED: COLLIERY HORSES IN WALES* 65 (2008); see also RSPCA, *Cruelty in Secret Places—No. II*, ANIMAL WORLD, Jan. 1878, at 7–8.

253. RSPCA, *The Slaves of the Pit*, ANIMAL WORLD, Sept. 1918, at 102.

254. *Id.*

and thoroughness of government inspections, which it considered woefully inadequate.²⁵⁵

Prosecution of vivisection cases was also hampered by the Society's inability to access laboratories where objectionable practices might be carried out.²⁵⁶ In 1875, the RSPCA made a formal request to the Royal Medical and Chirurgical Society (RMCS), asking that three of its members be allowed to witness "as mute spectators" those occasions "when operations on living animals are appointed to be performed at [the] institution."²⁵⁷ In reply, the RMCS denied that it had any current plans for such experiments; it added, however, that should such operations occur in the future, "they would certainly decline the presence or interference of any unqualified witnesses."²⁵⁸

In declining to permit access, the RMCS was certainly aware of the RSPCA's prosecution, just several months earlier, of five "medical gentlemen" for experiments on two dogs, which took place during the British Medical Society meeting in Norwich in August 1874.²⁵⁹ Several of those present protested the procedure, which involved injecting alcohol and absinthe directly into the dogs' veins, and a "great 'scene' followed."²⁶⁰ During the "altercation" that ensued, a self-described "sportsman" cut one of the dogs free of his bonds.²⁶¹ Despite the protests, the experiments eventually continued and one of the dogs died as a result.²⁶² RSPCA representatives were not present at the event, but a Society inspector interviewed several of the alleged participants later.²⁶³ The magistrates, while finding it "a proper case for the Society to prosecute," dismissed the case on the ground that there was insufficient evidence that any of the defendants actively participated.²⁶⁴ Thus, the Society's inability to have inspectors present during such experiments significantly hampered its ability to prosecute.

Interestingly, lack of access continues to plague modern animal welfare advocates. Many large animal agricultural operations keep livestock confined behind closed doors, where any abuse cannot be detected.²⁶⁵ Humane treatment

255. *Id.* 102–03 (decrying the infrequency of government inspection); Harrison, *Animals and the State*, *supra* note 182, at 810.

256. Harrison, *Animals and the State*, *supra* note 182, at 810.

257. C.J.B. Williams, *Reports of Societies: Royal Medical and Chirurgical Society*, 1 BRIT. MED. J. 221, 221 (1875).

258. *Id.*

259. *Prosecution at Norwich*, *supra* note 183, at 751.

260. *Id.*

261. *Id.* at 752.

262. *Id.* at 754.

263. *See id.* at 752–54.

264. *Id.* at 754.

265. Jerry Anderson & Jonathan Rosenbloom, Op-Ed., *Iowa's Answer to Inhumane Treatment of Animals? Shoot the Messenger*, DES MOINES REG., Mar. 11, 2011,

groups have resorted to planting undercover agents to film abusive practices, but agricultural groups have responded by sponsoring “ag gag” legislation that would prevent videotaping of such operations.²⁶⁶ Because there is little government regulation of these facilities, no one except the operation’s owner and employees know whether abuse is occurring. While our treatment norms have evolved over the last century, enforcement is still stymied by access issues.

C. Threats of Violence

As originally enacted, Martin’s Act merely allowed a private party who witnessed animal abuse to file a complaint upon oath with the local authorities.²⁶⁷ At that point, the magistrate could issue a summons and investigate the matter.²⁶⁸ This method worked fairly well for cab drivers, whose cab number could be taken down and reported, or for others whom the witness knew or could identify. But in other cases, the Society wanted the ability to intervene and immediately apprehend the perpetrator. The 1835 Act, therefore, allowed constables or animal owners to make warrantless seizures of offenders and convey them to the judicial authorities.²⁶⁹ Martin originally wanted even broader private power, which would have authorized any person to apprehend the perpetrator engaged in animal abuse.²⁷⁰ The Attorney General objected to this amendment, because he believed it would certainly lead to violent confrontations: “He knew from the zeal which the hon. member [Martin] had heretofore displayed in the cause of humanity, that not a week would elapse before he would be forced into some desperate conflict in attempting to enforce the law.”²⁷¹

Nevertheless, the Act still allowed the RSPCA to intervene by calling the crime to the attention of a nearby constable, by having its own inspectors appointed as special constables, or by relying on the general authority of any citizen to stop a crime in progress.²⁷² Anyone intervening to protect an animal, however, had to be prepared for violent confrontation. When the offense involved bull-baiting or cockfighting, or similar public amusements, the intervener could face

<http://www.desmoinesregister.com/article/20110311/OPINION01/103110321/Guest-opinion-Iowa-s-answer-inhumane-treatment-animals-Shoot-messenger>.

266. H.F. 589, 84th Gen. Assmeb., 1st Sess. (Iowa 2012); *see also* Anderson & Rosenbloom, *supra* note 265; Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES (Apr. 26, 2011), <http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/>.

267. Martin’s Act, 1822, 3 Geo. 4, c. 71, § 1.

268. *Id.*

269. Cruelty to Animals Act, 1835, 5 & 6 Will. 4, c. 59, § 9.

270. 10 PARL. DEB., H.C. (1824) 865–69.

271. *Id.*

272. Cruelty to Animals Act, 1835, 5 & 6 Will. 4, c. 59, § 9.

an angry mob. For example, Rob Boddice details the difficulty faced by two RSPCA representatives who observed the 1835 bull-running in Stamford, where a drunken mob of 500 townspeople participated.²⁷³ The RSPCA “dared not intervene” because they “quite understandably feared for their lives.”²⁷⁴ Two years later, the Society’s special constables were jeered and threatened by the Stamford crowd and again were unable to take action.²⁷⁵ In 1838, a troop of the 14th Light Dragoons and a dozen metropolitan police officers were able to put a stop to the event,²⁷⁶ but only after the crowd pelted them with stones.²⁷⁷ The next year, a mob estimated at 4000 again attacked the military and police force sent to prevent the spectacle.²⁷⁸ Without massive government assistance, the RSPCA had no prospect of halting an event that enjoyed such broad community support.

But even the prospect of facing a lone offender engaged in an act of cruelty could be dangerous.²⁷⁹ In the most salient example, Martin paid two men to “chastise” a driver who was abusing a horse because Martin was afraid to confront the abuser himself.²⁸⁰ As Martin became known to London’s cab drivers and carters, he became the target of their contempt.²⁸¹ RSPCA minutes from the latter half of the nineteenth century contain numerous examples of physical assaults on Society inspectors.²⁸² In 1838, a Society inspector died from wounds he received while trying to stop a cockfight.²⁸³ While such violence could occur in any criminal context, because the RSPCA lacked any official capacity, resentment against its “meddling” seemed to boil over into physical confrontation more readily than it might if the meddler were a recognized government agent, such as a police officer.²⁸⁴

273. BODDICE, *supra* note 54, at 188.

274. *Id.* at 189 (citing RSPCA, CM/21, MINUTE BOOK 2, at 20–25 (1835)).

275. *Id.* at 192–93.

276. *Id.* at 193 (citing RSPCA, THIRTEENTH ANNUAL REPORT 10 (1839)).

277. *Id.* at 194 (quoting STAMFORD MERCURY, Nov. 16, 1838).

278. *Id.* at 195 (citing STAMFORD MERCURY, Nov. 15, 1839).

279. Pearson notes that American animal welfare agents faced similar dangers in attempting enforcement activities. PEARSON, *supra* note 22, at 163.

280. *House of Commons, Friday June 1*, TIMES (London), June 2, 1821, at 3.

281. See, e.g., *Police: Bow-Street*, TIMES (London), Sept. 24, 1825, at 3 (describing a lawsuit Martin brought against the *Morning Chronicle* for libel. He claimed that the newspaper’s accounts were intended to “incite [the ruffians of Smithfield market] to murder him!”).

282. See Harrison, *Animals and the State*, *supra* note 182, at 795 (detailing several incidents of physical violence against inspectors).

283. Harrison, *Religion and Recreation*, *supra* note 13, at 116–17 (citing RSPCA, MINUTE BOOK NO. II 296–98).

284. For this reason, the Society’s inspectors began to wear uniforms and badges in the late nineteenth century. This practice continues today, although it leads to claims that Society

The Society's private enforcement efforts were met with a variety of reactions from the government's police force. As might be expected, in many cases the police resented the assertion of enforcement authority by private individuals.²⁸⁵ Other accounts indicate that the police often cooperated with RSPCA inspectors, viewing animal cruelty cases as the province of the Society, perhaps because in most cases the Society's activities antedated the establishment of a regular police force.²⁸⁶ The Society often hired former police officers as inspectors and gave rewards to those who cooperated with Society efforts.²⁸⁷ Similarly, in the United States, police relations with anti-cruelty groups ranged from very good to very bad.²⁸⁸ Anti-cruelty society officers sometimes wore a badge and uniform, which increased their authority with the public, but blurred the lines between public and private action. One historian concluded that the vice societies in New York "embarrassed and alienated the police,"²⁸⁹ which is not surprising given that the societies formed largely in response to the inadequacies and corruption rampant in the government's force.

D. Possibility of Retaliatory Suits

The zealous enforcement of animal abuse law, sometimes pushing the envelope of the Act's coverage, raised a significant risk of countersuits. These suits, against the Society or individual inspectors, alleged trespass, assault, false imprisonment, or abuse of process for frivolous claims. The 1822 Act itself allowed a defendant to recover up to twenty shillings from the complainant if the complaint turned out to be unfounded.²⁹⁰

Even before the 1822 Act, complaints of animal abuse carried a risk of liability. As noted above, Martin saw a man ill-using a horse on Ludgate Hill and paid two men five shillings to "chastise" him.²⁹¹ When the abuser found out who instigated the chastisement, Martin was called before the magistrate at Bow Street "to give bail for an assault."²⁹² The magistrate recommended that Martin

inspectors are "impersonating" police officers and misleading the public as to their authority. See Richard Girling, *Invasion of Privacy*, TIMES (London), June 3, 2007.

285. See Harrison, *Animals and the State*, *supra* note 182, at 810–11 (describing attempts by RSPCA to overcome "the initial jealousy between its constables and the police").

286. RYDER, *supra* note 218, at 99.

287. Harrison, *Animals and the State*, *supra* note 182, at 811.

288. PEARSON, *supra* note 22, at 161–65.

289. Gilfoyle, *supra* note 22, at 645.

290. Martin's Act, 1822, 3 Geo. 4, c. 71, § 5.

291. *House of Commons, Friday June 1*, TIMES (London), June 2, 1821, at 3.

292. *Id.*

“compromise the matter, by giving the person 5 pounds, and he did so.”²⁹³ Thus, before Martin’s Act there was not only no legal restriction against cruelty to animals, but a person intervening to stop it could be charged with assault and made to pay damages.

Martin’s Act and its progeny, while opening the door for cruelty prosecutions, also contained some limitations that the Society had to be careful not to exceed. For example, although the Act clearly empowered any person to file an information against an offender, a bystander was not allowed to trespass on private land (except to provide food or water) or take offenders into custody themselves.²⁹⁴ Indeed, even making a complaint to a police constable could be costly, should the court find that the complaint was unfounded.²⁹⁵ In *Line v. RSPCA*, the Society had to pay £15 to a biscuit company van driver who was taken into custody at the behest of an overzealous Society inspector.²⁹⁶ The driver and his companion testified that the driver had given the horse merely “a touch with the whip” and that the Society’s inspector, who was “excited with liquor” had inappropriately stopped him and “gave the plaintiff into custody” by calling upon a police constable to arrest him.²⁹⁷ The driver was taken to the police station, but the police commissioner declined to pursue the case after examining the horse.²⁹⁸ The Society was found liable under a false imprisonment theory.²⁹⁹ The judge rejected the argument that, because the inspector had exceeded the authority given him, the Society should not be vicariously liable.³⁰⁰

Another case imposing liability for trespass illustrates the fine line between “informing” and “charging” someone with animal cruelty. In *Hopkins v. Crowe*, a cab company owner hired Hopkins as a driver.³⁰¹ When Hopkins returned one night, the owner’s son believed the horse had been badly treated by the driver.³⁰² He called in a policeman, who took the driver into custody at the direction of the owner’s son.³⁰³ The driver charged the son with trespass for causing him to be arrested and taken into custody.³⁰⁴ The court noted that the anti-

293. *Id.*

294. *See* Martin’s Act, 1822, 3 Geo. 4, c. 71, § 1 (granting investigative powers to the magistrate, not the individual).

295. *Id.* § 5.

296. *Law Report, Feb. 27, TIMES (London), Feb. 28, 1902, at 13 (citing Line v. RSPCA, (1802) 18 T.L.R. 634).*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Hopkins v. Crowe, (1836) 111 Eng. Rep. 974, 4 Ad. & E. 767.*

302. *Id.* at 974–75.

303. *Id.* at 975.

304. *Id.*

cruelty act allowed only the animal's owner to "apprehend" those who mistreated their animals; other persons could merely provide "information" to police officers.³⁰⁵ If they "directed the constable to apprehend," they could be liable for trespass.³⁰⁶ Perhaps because of the Society's experience with these limitations, the New York law patterned on Martin's Act included specific authority for ASPCA officers to arrest offenders and to intervene to prevent acts of cruelty.³⁰⁷

The Society apparently became more cautious over time, not wanting to risk liability caused by intemperate or overzealous inspectors. The Society began to issue warnings, for example, before undertaking prosecutions, and to require Society headquarters' authorization before the initiation of criminal proceedings. In *R. v. Paget*, the Society sought a summons for abuse of a horse suffering from a painful foot condition, only after the owner failed to fulfill a promise to the Society to stop working the horse and to seek medical treatment.³⁰⁸ The magistrate, however, refused the summons, believing the law required immediate action in such cases.³⁰⁹ On appeal, however, the justices directed the magistrate to issue the warrant, noting that the statute allowed prosecutors a full month after the offense to lay out information and apply for a summons.³¹⁰ The Society's more cautious approach reduced the risk of violence as well as the risk of countersuit, but such caution would be less practical when the inspector observed abuse and felt immediate action was required.

Similarly, attempts to expand the coverage of the law were risky. In one early case, John Hill was convicted of bull-baiting, which was not specifically covered by the 1822 Act's prohibition against cruelty to "cattle";³¹¹ in fact, Parliament had rejected several amendments that would have added bulls to the protected list.³¹² Nevertheless, a magistrate convicted Hill, apparently finding that bull-baiting could fall within the statute's general prohibition on cruelty to cattle.³¹³ On appeal, the Chief Justice disagreed and granted the prisoner's writ of habeas corpus.³¹⁴ The following day, the magistrate who had convicted the prisoner requested that the appellate court protect him against an action for false imprisonment.³¹⁵ The Chief Justice refused: "If the imprisonment is illegal, I can-

305. *Id.*

306. *Id.*

307. Favre & Tsang, *supra* note 5, at 17 n.80 (citing N.Y. REV. STAT. §§ 375.8 (1867)).

308. *R v. Paget*, (1889) 53 J.P. 469 (Q.B.).

309. *Id.* at 470.

310. *Id.*

311. *Ex parte John Hill*, (1827) 172 Eng. Rep. 397, 3 Car. & P. 225 (K.B.).

312. *Id.* at 398.

313. *Id.*

314. *Id.*

315. *Id.*

not restrain the party from pursuing his remedy by action.”³¹⁶ Given the potential for such personal liability, magistrates undoubtedly would be conservative in applying the law.

E. Summary of Disadvantages of Private Prosecution

Thus, the advantages of empowering private enforcement of Martin’s Act must be set off against some significant disadvantages. Enforcement that challenges accepted norms goes against popular opinion about the scope of criminal behavior and therefore almost automatically evokes claims of overzealous prosecution. The Society worked to at least minimize the negative aspects of its enforcement efforts. For example, by prosecuting more upper-class offenders, the Society blunted class bias criticism. By cooperating with police and other government officials, it gained better access to private property. By centralizing control over prosecutions, the Society minimized “loose cannon” inspectors. Nevertheless, the historical evidence shows that none of these disadvantages of private prosecution could be completely eliminated.

VI. CONCLUSION

The Royal Society for the Prevention of Cruelty to Animals took full advantage of the opportunities for prosecution afforded by Martin’s Act and in so doing provided an excellent example of both the advantages and disadvantages of reliance on private prosecuting societies. Animal abuse crimes, in which the victims are powerless to act for themselves and the crime itself has not yet gained complete public acceptance, seem peculiarly suited to private interest group prosecution in light of an inherent reluctance on the part of public authorities to fully enforce the law. Private enforcement has side benefits, including broader inculcation of progressive norms of behavior and the continuing engagement of interested citizens. Private enforcement tends to benefit the Society as well, empowering its members with a sense of collective purpose and providing a public platform for its activities and views.

The downside risks of the private prosecution approach are not insignificant, however, even in the animal cruelty context. Public prosecutors are more responsive to public sentiment regarding the exercise of discretion. Of course, this may discourage public prosecutions that push societal norms in new directions or that challenge entrenched local opinions. Nevertheless, allowing a relatively small group of wealthy donors to set the agenda for criminal prosecution inevitably leads to at least the perception of bias. In that case, the exercise of

316. *Id.*

even well-intentioned private enforcement power may move beyond prosecution to become persecution, at least in the eyes of those targeted.³¹⁷

Despite these drawbacks, there is no question that the Society's extensive campaign of enforcement was instrumental, in fact essential, in turning Martin's Act into a powerful implement for reforming the treatment of animals in Britain during the nineteenth century. In turn, it became a model for similar statutes in the United States and elsewhere. While the substance of Martin's Act was a landmark in the development of a more humane animal welfare norm, the procedural enforcement mechanism was equally important in achieving Mr. Martin's goals. Modern reformers should consider whether some form of private enforcement could lead to more effective animal welfare laws today.

317. Today, the RSPCA's prosecutions continue to raise questions of overzealousness and lack of accountability. See Girling, *supra* note 284 ("It would be hard to think of a charity that stirs more controversy than the RSPCA").