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Part 1
The Rules of Law

1 The Courts

Criminal Trials as Strategic Arenas

Brian Doherty and Graeme Hayes

In this chapter we analyze cases where social movement activists are prosecuted in the courts for protest actions. The courthouse is a significant arena for social movement strategy, a symbolic site for the arbitration of collective disputes, the legitimization of political action, and the production of social meaning; the court is “one of society’s most sacred institutions since its role in defining, interpreting and enforcing the law puts it in close proximity to the moral basis of society” (Antonio, 1972: 291-292). The outcomes of trials depend on the organization of the criminal justice system but also the responses and strategies of multiple other players, inside and outside the court, including social movement activists, allies and supporters.

In common with the other chapters in this volume, our argument here is about “breaking down the state,” about thinking through the relationships of power and agency that define the interactions between state and non-state players. We seek to go beyond conceptualizations of state-movement relationships which might cast criminal trials merely as “state repression,” setting out the architecture of the court as an arena for political interaction and tactical choice, identifying the players who act within it, and arguing that more attention be given to the courts in analyses of protest action.

Social Movements and the Law

It is perhaps surprising therefore that the study of social movements has so far afforded relatively little place to analyzing and understanding the role, forms and outcomes of criminal prosecutions in the trajectories of movements and the fates of the individual activists that constitute them. The criminal law – “arguably the most direct expression of the relationship between a State and its citizens” (Law Commission for England and Wales, 1989) – fulfills a role of symbolic social regulation; it defines, delineates, and enforces the codes which demarcate the sphere of legitimate social and political action, enabling the identification and repression of what is considered deviant, illegitimate behavior. Yet it is precisely on this line of demarcation that social movements operate, because they represent

constituencies whose choices and identities are repressed by the law, or they organize challenges to the dominant arrangement of the social, political, cultural and economic order, or they engage in political actions which deliberately disrupt legitimated modes of interest representation. Indeed, as Dinos and Gibelin point out in their discussions of factory occupations in France in 1936, “all the achievements of the working class have involved methods operating either at the margin of the law, or in clear opposition to it” (1986: 130).

More generally, the relationship between social movements and the law is fundamental because the law is not just a system of social regulation and resource distribution but the site of production of systems of meaning. Courts are thus physical arenas in which defendants (one set of players) are ascribed symbolic roles: guilty or innocent, convicted or acquitted or discharged or, in some criminal justice systems, not proven; and, where guilt is demonstrated, they are arenas in which consequent tariffs are applied, reflecting the circumstances and gravity of the proscribed act. But courts are arenas for the production of meaning in other senses, including the construction of political and symbolic challenge, and the interplay of formal, rational-legal justice with other, “natural,” extra-legal, forms of justice. In this sense, the goal of social actors, when they are challengers within the legal system, is to reveal the claims of the law to neutrality and universality as particular and partial relations of power. If, as Melucci says, the function of players in social conflicts is “to *reveal the stakes*, to announce to society that a fundamental problem exists in a given area” (1985: 797), then criminal trials offer a regulated space of engagement for the construction and revelation of these stakes through the interplays of persuasion and coercion.

The extensive literature on “legal mobilization” – broadly, “the idea that the law has the potential to be an effective instrument for political or social change” (Vanhalta, 2011: 6) – has developed a wide understanding of the roles, motivations, and effects on social movement campaigns of one set of the many players in the courts – in particular, legal professionals. The emphasis is foremost on cause lawyers, those who “commit themselves and their legal skills to furthering a vision of the good society” (Sarat and Scheingold, 1998: 3) and so help movements “define the realm of the possible” (Sarat and Scheingold, 2005: 10), on collective litigation strategies articulated explicitly around rights claims making (Scheingold, 2010; McCann, 1994; Epp, 1998) and, on “legal opportunity,” where the emergence, progress and outcomes of litigation are influenced, if not determined, by the conditions of access to the court arena (the attribution of “standing”), the availability of potential

issue frames (“legal stock”), and the extent of judicial receptivity (Hilson, 2002; Andersen, 2005; De Fazio, 2012).

Here, we seek to broaden the analysis of social movements and the law. In the following sections of this chapter we therefore examine the strategies typically pursued by social movement players facing prosecution. Our principal focus is on groups involved in campaigns of deliberate lawbreaking in Western democracies, such as environmentalists, anti-advertising campaigners, and campaigners against nuclear weapons or militarism more generally. Following this, and as a necessary consequence, we examine how the formal rules of the judicial arena shape the choices available to various players, and how the players adapt tactically to the properties of the arena. We base our case mainly on evidence from civil (France and Belgium) and common law jurisdictions (England and Wales, and the United States), drawing out differences between the roles of judges, juries, prosecutors, and lawyers in each type of system, which then affect the form of the court as arena. Our data are drawn from observation of trials, trial reports, interviews with activists, and the alternative and mainstream media. We start by discussing the broad types of crime most relevant for social movement players.

Social Crime

In the late 1960s and 1970s, influential Marxist historians in Britain began to discuss the development of the legal code in early modern England, and especially the extraordinary extension in the eighteenth century of capital criminal offences in what was widely known as the “Bloody Code.” In their work (Hobsbawm, 1969; Hay et al., 2011; Thompson, 1975), they discussed and developed the notion of “social crime,” where “the perpetrators operated within a broad local custom or customary consensus of right,” and “often had the support or silent acquiescence of significant parts of the community” (Linebaugh, 2011: xlviii). The category of social crime revealed an embryonic working-class resistance to the development of the modern capitalist state based on individual property rights, opposing “customary forms of compensation” – poaching, smuggling, wrecking, the breaking of enclosures, and so on – to a criminal code that served the ruling class, “constantly recreating the structure of authority which arose from property and in turn protect[ing] its interests” (Hay et al., 2011: 25). In a 1979 essay, Rule refined social crime into two categories: “survival crimes,” activities integral to “getting or supplementing a living,” which were not held to be crimes by those committing them and were considered legitimate

by popular opinion; and “protest crimes,” such as pulling down fences, rick-burning, cattle-maiming and machine-breaking. In contrast, these were “not in themselves regarded as legitimate actions in all circumstances and by whomsoever committed” (Rule, 1997: 161, 156).

Defined in this way, “social” crime is closely connected with its particular historical context. The concept remains relevant, however, for understanding the choices and actions of players engaged in collective political challenges to prevalent social norms. Indeed, re-categorizing social crime as “direct action” and “civic” crime can enable us to better understand the kind of actions for which contemporary social movement players find themselves prosecuted in the courts. Here, “direct action” crime refers to action which is understood as unlawful even if politically legitimate by those undertaking it. It is deliberately undertaken as such in order to advance a collective cause. Our second category is “civic crime.” Like Rule’s “survival” crime, civic crime is not perceived or undertaken as deliberately unlawful, but is based in the customary praxis of a community or group which has been criminalized by power-holders, though it does not necessarily refer to actions integral to material survival. Contemporary examples of such praxis include struggles over civic rights and freedoms, and involve the criminalization of private behaviors as well as of public manifestations of collective identity in defense of a social, sexual or ethnic minority constituency. Those prosecuted for civic crime are not necessarily activists themselves, but their trials may become the focus for social movement campaigns. Examples might include the prosecution of homosexuality, of women for illegal abortions, or of women whose religious dress codes have been prohibited in public spaces.

Our focus in this chapter is on the first of our categories of social crime, direct action crime. We replace Rule’s broader category of protest crime with this specific term in order to reflect the changes in the relationship between protest and citizenship that have taken place in the states forming our study since the eighteenth century. In this we follow Tilly’s discussion of the transformation of protest in France and Britain between the mid-eighteenth and nineteenth centuries, from reactive to proactive claims by movements and from bifurcated to autonomous action repertoires (Tilly, 1978; 1995). This transformation resulted in the legalization of some forms of protest, and is reflected in the specificity of illegal forms of direct action in which discursive struggles for legitimacy are central, much as they were for Rule’s “protest crime” in the eighteenth century.

Protesters prosecuted for “direct action crime” in our chosen states typically (1) stress their non-violence, (2) defend their actions in courts as those of responsible citizens, acting on the basis of collective moral principles, and

(3) seek to persuade the magistrates and jury as fellow citizens that their actions were justified. Direct action crime thus includes civil disobedience but is not reducible to it. The latter is normatively considered to entail an acceptance of the right of the state to arrest and punish its adherents (Rawls, 1991; Bedau, 1991); but for some movements, illegal action is justified irrespective of whether the state decides to prosecute. A second difference from civil disobedience is that direct action crime is not necessarily intended as an appeal to the political authorities to place an issue on the political agenda or to “correct” oversights of the democratic system. Rather, direct action which causes material damage is often defended as politically legitimate in itself, whether carried out covertly or publicly. Furthermore, whereas for liberal political theory, once formal democratic rights have been achieved, social crime (both direct action and civic variants) is at best a theoretical paradox and at worst an oxymoron, for players engaged in contentious politics it captures the way that strategies for social and political change often involve illegal, challenging action and thereby establishes the political and normative, as opposed to the natural, character of law. In this sense, therefore, social crime is social movement politics by other means, and it is consistent with the argument that protest is likely to increase rather than decline in established democracies (Goldstone, 2004).

The idea of “social crime” has been the subject of much critical discussion, particularly over its unstable boundaries (see Lea, 2002: 37-39). We find the concept useful nevertheless because it highlights that the “anti-social” nature of criminal activity is not a pre-determined given. Rather, the social nature of crime depends upon its discursive production by movement players, as they seek to frame their (illegal) action such that its objectives are acknowledged to be not “individualistic, selfish, or cruel” (Linebaugh, 2011: xlviii). The definition of crime as social is thus one of the fundamental *stakes* of the trial *process*. The concept of social crime is useful, therefore, because it draws our attention to tactics and to interaction around the law; it enables us to cast our eyes toward the ways in which social movements seek to establish authority and legitimacy when their actions are criminalized.

Trials, Players, and Arenas

The significance of criminal prosecutions and trials therefore lies in the fact that they are regular, routine, “normal” activities for many social movements (Barkan, 2006: 183), undertaken in highly codified public settings, structured around the justification and opposition of ideas and actions, produced

by the dynamic interaction of players whose roles are clearly defined, and which potentially carry far-reaching consequences. We may surmise that the transformative potential of criminal trials lies in a combination of their dramatic and didactic functions; for Falk, “the very limitations of time and space afforded by the courtroom promote a social concentration that enhances the narrative and legitimation potential of the proceedings” (2008: 12). Above all, trials are a strategic arena for movement players. One experienced Belgian anti-militarist activist expressed it this way:

Law and the judicial system is part of the political battlefield. I am personally interested in how movements can act in this battlefield, keep their space for action open and disarm legal repression by turning it into something useful for their campaigns. Such strategizing means on the one hand looking at how legal systems frame the possibility to get rights and which space they leave for political action. This is both a question of finding legal arguments to base your cause on and coping with the framing of the debate through the legal procedure.

On the other hand trials take place in a political context. Of course legal repression is a mean to keep movements silent. For social movements strategizing implies looking at the possibilities to avoid prosecution, to turn trials into campaigning tools and how to be able to continue campaigning under repression. Court decisions and the decision to prosecute are heavily influenced by how society reacts. Coping with trials is not only a question of legal strategy, but also a question of media, mobilizing allies for public support and how to strengthen activists to drop their fear.¹

In the courthouse, trials therefore present a series of tactical dilemmas for movement actors, with tactical considerations dependent upon strategic definitions of successful outcomes (the relationship between ideology and objectives) and the likelihood of their attainability (the interplay between players, resources, culture, and systems). Tactical decision making can therefore be expected to vary as a function of both the specific properties of the trial arena and the strategies deployed by opposing players, such as prosecutors and, occasionally, countermovements. In common law systems especially, the presence of a third set of players, jurors, can also be expected to affect the strategic calculus of players on both sides. The

1 H., personal email communication, March 2012.

specific composition of trial arenas can therefore be a crucial factor in the structure of interaction.

In criminal trials in both civil and common law traditions, juries and magistrates broadly fulfill the same functions. Where they sit, it is the role of juries to decide on matters of fact, on the basis of the evidence and guidance in law presented to them; it is the role of magistrates to decide on matters of law, on the basis of analogy between the facts and the rules. In both civil and common law systems, where trials are heard without juries – in other words, by bench – magistrates combine the functions of ruling in fact and law; and in both systems, the vast majority of criminal cases are heard in this way.

These broad similarities of function mask significant cultural and operational differences between legal systems, however. In the Anglo-American tradition, juries are fundamental to the construction of the *fairness* of the criminal justice system. Juries are seen as representatives of the community and repositories of natural justice, capable of counterbalancing excessive state power; the defense in *United States v. Berrigan*, representing the Catonsville Nine (a group of anti-war activists who were put on trial in October 1968 for pouring napalm over and setting fire to draft board records in Catonsville, Maryland), said this to the jury: “[W]e are speaking to the community, and we are hoping to reach you, a microcosm, a small segment, 12 people, four alternates, who are the community sitting in judgment” (Kunstler, 1969: 72).

The jury remains a powerful symbol of citizen participation in the law – a symbolic power which may persist even where the jury’s sociological composition is structured *against* the defendant.² Tocqueville, indeed, recognizes that the jury is both a judicial and a political institution, placing fundamental social choices directly in the hands of the people,³ as important as universal suffrage to the exercise of popular sovereignty (1961: 405). In both England and the United States, the right to trial by jury is enshrined in the founding charters of the state (Magna Carta, the Declaration of Independence, the Constitution of the United States). As Pole points out, the jury’s importance lies not simply in its *socially representative* nature, but in its capacity for *moral agency*: in early modern England, for example,

2 To be sure, the nature of the community represented in the jury is dependent upon the long-run rules of access which determine its racial, gender, and class composition, as well as short-term considerations for specific cases, and upon the practices of jury packing or jury strengthening (on this point, see Thompson, 1986).

3 In the English case in the mid-nineteenth century, property-owning men.

juries frequently “notoriously mitigated the severities of the law by finding guilt of lesser crimes than those charged, where these could lead to the death penalty, and often showed a propensity to side with those accused of social crimes” (Pole, 2002: 102). The power of nullification – where a jury “refuses to follow the law and convict in a particular case even though the facts seem to allow no other conclusion but guilt” (Weinstein, 1992: 239) – remains part of the arsenal of Anglo-American juries, a power secured in both contexts through acts of resistance within the courthouse to the exercise of authoritarian control.⁴

Systems and Outcomes

In the civil law tradition, however, the cultural projection of justice is rather different. In such systems, fairness is imagined in the criminal procedure as centralized codification: as equality, rationality, professionalization, and the elimination of error. Where juries are therefore central to the common law projection of justice, they are much less significant in the civil law tradition. In France, for example, juries are only present in major criminal cases (“crimes,” defined by prospective sentences of at least ten years in prison), judged in *cours d’assises*, and even then the jury of twelve includes the three sitting magistrates. Less serious offences (“*délits*”) are held in *tribunaux correctionnels* before a magistrate, normally accompanied by two assessors, or for very minor offences carrying no possibility of a custodial sentence (“contraventions”), in *tribunaux de police*, again before a magistrate.⁵ Of cases brought to court in France in 2008, only 0.4 percent concerned *crimes*; the vast majority, 92.2 percent, concerned *délits* (Timbart, 2009). In contrast, the thresholds for accessing a jury trial are far lower in England and Wales. Here, again, there are three broad categories of offence: summary, tried by bench, in a Magistrates court; indictable, tried by jury in a Crown court; and “either way” offences, where defendants can elect to be committed for trial by jury in a Crown court. This last category includes theft, robbery, some forms of trespass, and under the 1971 Criminal Damage Act, criminal damage of an estimated value in excess of £5,000. This charge is faced frequently by direct action protesters.

4 See Barkan (1983) for a discussion of the restraints placed on nullification in the United States.

5 A similar hierarchy operates in Belgium.

The differential effects of juries on trial proceedings are perhaps most visible in trial outcome data. In England and Wales, juries produce acquittals in criminal cases more frequently than magistrates sitting alone. Conviction rates in Magistrates courts are traditionally high: for summary offences dealt with in these courts in 1999, only 2.2 percent produced not guilty verdicts after trial. In contrast, for indictable offences which came to trial in Crown courts (i.e., where defendants pleaded not guilty), 62 percent were acquitted (Auld, 2001, Appendix 4). More recent figures confirm this proportion: according to Ministry of Justice statistics, 64 percent of defendants who pleaded not guilty in cases dealt with in 2010 were acquitted, although only 28 percent of these were acquitted by the jury.⁶ The comparison is perhaps most relevant for either-way offences: of the 296,000 either-way cases tried by Magistrates courts in 1999, 11,000 resulted in acquittals (3.7 percent); in contrast, of the 56,000 either-way cases completed the same year after being committed to the Crown court for trial, 13,000 resulted in acquittal (23.2 percent) (Auld, 2001, Appendix 4). For a given criminal offence, therefore, the probability of acquittal is *significantly higher when tried by jury* rather than by bench.

In practice, therefore, where activists commit a criminal offence related to direct action – acts of trespass, criminal damage, theft, public order offences, and so on – there are structural differences between the type of trial that they can expect to face, and thus the composition and population of the court arena, depending on the judicial context. Indeed, for the type of offence likely to be committed by social movement actors, in civil law systems there is effectively no opportunity to make a case before a jury.⁷ The major difference is between a jury trial in the common law tradition with (in the broadest statistical terms) a significant possibility of securing an acquittal; and a bench trial in the civil law tradition, with a low probability

6 Of the rest, 62 percent were discharged by the judge, 8 percent were acquitted on the direction of the judge, and 1 percent were acquitted by other means (Ministry of Justice, 2011: 91).

7 It is of course possible that movement actors will commit serious violent crime. We have excluded “terrorist” offences from our discussion for reasons of space, but it is worth noting here that for a variety of reasons (the potential for jury intimidation, jury bias, the public dissemination of classified information), jury trials in such cases are considered problematic and defendants are often subjected to specific judicial regimes. In France, terrorist cases have been held in special assize courts without jury since 1986; in the United Kingdom, juries were suspended in Northern Ireland in 1973 (though not in the rest of the UK); in the United States, juryless military tribunals were introduced in November 2001 for foreign nationals indicted on terrorist charges (though US citizens are tried before a jury); in Belgium, the right of defendants in “political trials” to be tried before a jury is constitutionally protected, but since 2003, “terrorist” trials are held without a jury in special assize courts.

of acquittal. This probability is not nil, of course; magistrates in both civil and common law systems have on occasion demonstrated their own moral agency and capacity to produce relative innovation with respect to the law. However, Stengers argues that, in civil law systems especially, the concern for *sécurité juridique* – the security of the law – limits this, rendering this capacity for innovation necessarily weak (2004: 23-28).

Evidence comparing trials for criminal damage caused by anti-GMO “crop-trashers” in England and France supports this general hypothesis (Doherty and Hayes, 2012; 2014). In France, between February 1998 and January 2012, courts in 23 different towns heard 28 prosecutions, with 13 verdicts taken to appeal, with activists consistently pleading a “necessity” defense, arguing that their deliberate destruction of genetically engineered crops was designed to stop a greater harm. On three occasions magistrates did not convict, agreeing with the defendants that they had acted legitimately out of necessity, and acquitting them. On a further occasion, at Poitiers in June 2011, defendants were discharged after the trial was nullified for procedural reasons. On each of these four occasions, the decision was subsequently overturned on appeal. In other words, on each occasion, trial has resulted in conviction, either on initial hearing or on appeal.

Comparison with the fate of defendants tried for similar actions in England proves instructive. Most notoriously, Greenpeace UK destroyed a field of GM crops at Lyng in Norfolk in 1999; all 28 activists were twice acquitted at Norwich Crown Court the following year. Only one jury trial of “crop-trashers” produced a conviction (in 2003, for an action in 2001); the two activists found guilty received fines. This is in line with a broader pattern in England where over the previous ten years, prosecutions of protesters against new roads, incinerators and nuclear, chemical and arms trade companies frequently produced acquittals on the basis of lawful excuse defenses. In 2000-2001 the Crown Prosecution Service lost three major trials against anti-GMO activists, and this trend has carried on since the scaling-down of such activism: English juries have notably acquitted Greenpeace climate change activists at Maidstone Crown court in 2008, peace campaigners at Bristol Crown court in 2007 (for damaging US B-52 bombers at Fairford airbase in 2003, prior to the Iraq War) and at Brighton Crown court in 2010 (for breaking into and damaging the premises of EDO, a defense equipment manufacturer that had supplied the Israeli army).

For movement actors on trial, a jury is of both instrumental and symbolic value: the jury’s capacity for moral agency seemingly increases the probabilities of a successful outcome (here, measured as acquittal); equally, the jury’s *socially representative* function means that activists may state

their case in front of citizens representing the democratic community as a whole. For example, in the September 2008 trial of the “Kingsnorth Six,” six Greenpeace activists who had broken into a coal-fired power station in Kent, England, were cleared of causing £30,000 of criminal damage by the majority verdict of a jury at Maidstone Crown court. The acquittal was won after the defendants claimed “lawful excuse” under the 1971 Criminal Damage Act, in what became widely known as the first “climate change defense” (Hilson, 2010). Following the verdict, one of the defendants argued that

This verdict marks a tipping point for the climate change movement. When a jury of normal people say it is legitimate for a direct action group to shut down a coal-fired power station because of the harm it does to our planet, then where does that leave Government energy policy? We have the clean technologies at hand to power our economy. It’s time we turned to them instead of coal.⁸

In contradistinction, in April 2009, 114 activists were arrested in Nottingham, England, for “conspiracy to commit aggravated trespass” by planning to shut down a coal-fired power station at Ratcliffe-on-Soar, leading to two trials, of 20 activists in December 2010 and a further six, in January 2011. In the first trial, the activists, pleading lawful excuse, were found guilty (unanimously) by the jury, but given a mixture of small fines, conditional discharges, and unpaid community service sentences by the judge, who underlined their sincerity, commitment, and courage; the second prosecution collapsed when it was revealed on the eve of the trial that one of the activists was an undercover police officer, who had agreed to testify in favor of the defendants. One of the defendants initially found guilty in the first trial argued that in failing to convince a jury, they had failed a “revealing litmus test”:⁹

The jury received a more extensive education on climate change than most people get in a lifetime. That they could not vindicate our actions is nothing to get self-righteous about; it is deeply disturbing. If the jury,

8 Michael McCarthy, “Cleared: Jury Decides That Threat of Global Warming Justifies Breaking the Law.” *The Independent*, 11 September 2008.

9 Rob Evans and Paul Lewis, “Ratcliffe-on-Soar Activists Furious as No Disciplinary Charges Brought over Withheld Tapes.” *The Guardian*, 5 April 2012.

after everything they had heard, couldn't bring themselves to sympathise with our actions, who will?"¹⁰

Juries are thus important players within the court arena as they are potentially receptive to ideas of justice that exceed the justice that is limited to the letter of the law.

Legal Culture and Court Operation

This does not tell the whole story, however. Verdict possibilities are dependent on the contingent availability in law of certain defenses, such as that of "lawful excuse." And, beyond verdict probabilities, more complex are the effects that the presence of juries has on the organization and operation of the court arena. Civil law criminal procedure is inquisitorial and predominantly bureaucratic: the judge leads the questioning, with the role of lawyers for each side being to suggest to the judge the existence of certain problems or evidence, and to make a closing argument. The judge may retain witnesses until satisfied with their testimony; there is no cross-examination of defendants by counsel. As Spencer (2002) notes, the broad distinction between "inquisitorial" civil law and "adversarial" common law criminal procedures is over-stated. Yet, in the common law system, criminal procedure is essentially composed as (melo)dramatic performance, structured by rhetorical combat between defense and prosecution counsel, with the jury's verdict providing a theatrical climax. Carrington (2003: 92) points out that a key aspect of jury trials is the *oral* nature of the conduct of the trial, itself fundamental to the construction of the trial as "a dramatic and not a bureaucratic event."¹¹

The role of the judge in common law jury trials is formally that of a neutral arbiter. Yet the judge has two important powers: directing the jury through *summing up*, and acting as a *gatekeeper*, with the capacity to prohibit the defense from submitting certain forms of evidence to the court. Two cases are illustrative of this power. In July 2009, 29 climate activists were prosecuted at Leeds Crown court in England under the 1861 Malicious Damage Act, for obstructing a train carrying coal to the Drax power station

10 Bradley Day, "The Climate Movement Is in Desperate Need of Renewal." *The Guardian*, 5 January 2011.

11 This is, of course, the foundation for the jury trial as a staple of the plots of novels, plays, films, and multiple TV series.

in North Yorkshire the previous year.¹² Because they were prosecuted under the 1861 Act rather than the 1971 Criminal Damage Act, the defendants had no entitlement to make a “lawful excuse” defense; instead, they sought to make a “necessity” defense, potentially available to defendants facing any criminal charge (Schwarz, 2010). However, the judge in this case ruled that the defendants were not allowed to mount a necessity defense based on climate change, effectively disbarring them from calling expert witnesses.¹³ Unable to present the defense they had planned, the defendants were resigned in advance to being found guilty by the jury. The trial’s dramatic potential, and media and political impact, were minimized.¹⁴

The second case is *United States v. DeChristopher*, from another common law tradition. DeChristopher was sentenced in June 2011 to a two-year prison sentence in California for a climate change action in Salt Lake City in December 2008, for disrupting a federal auction of oil and gas drilling rights in south Utah by pretending to be a bona fide bidder. Offered pre-trial mediation, DeChristopher refused, choosing to put his case before a jury, arguing that

As citizens have been squeezed out of the political process in general, the role of citizens in our legal system has been minimized, and power has been concentrated into the hands of judges and into government officials.... And I wanted to put the power in the hands of citizens rather than in the hands of government officials.¹⁵

The trial judge, however, refused to let DeChristopher put forward a political necessity defense, arguing that in cases of so-called “indirect” civil disobedience – where action breaks not the contested law itself, but only a circumstantially related one (DeChristopher’s action did not break the law enabling the state to auction land permits, but rather the laws against false representation) – a defendant has no grounds to present such a defense. The judge’s decision is consistent with the jurisprudence set by a 1992 ruling of the Ninth Circuit, in *United States v. Schoon*, regarding the prosecution of activists who staged a protest against US policy in El Salvador by illegally

12 Seven pleaded guilty; the trial was thus of the 22 activists who pleaded not guilty.

13 Though the judge did in fact allow two defendants to discuss climate change during their own testimony.

14 Discussion with two Drax defendants, March 2012.

15 Jason Mark, “Tim DeChristopher Speaks about His Impending Prison Sentence.” 14 June 2011, http://www.earthisland.org/journal/index.php/elist/eListRead/tim_dechristopher_speaks_about_his_impending_prison_sentence.

entering the IRS offices in Tucson, Arizona, in December 1989. Prior to this ruling, activists had regularly been successful in US state courts (on issues such as US policy in Central America, nuclear power and weaponry, apartheid, the politics of the CIA), winning jury acquittals or having charges dropped (Cavallaro, 1993: 361-362). Unable to explain *why* he broke the law, DeChristopher was found guilty in March 2011 by the unanimous verdict of a jury able to hear the details of the offences, but not the motivations for committing them.

The Tactical Choices of Movement Players

Attention to criminal justice systems enables us to identify reasonably stable, long-term properties affecting the organization and operation of trial proceedings, which differ between state (and even sub-state) context, and which produce a balance of probabilities of *trial outcomes* for social movement players subjected to these proceedings. However, these properties, though (axiomatically) subject only occasionally to renegotiation and change, are also a site of strategic interaction, adversarial negotiation, and discursive contest, undertaken by state and non-state players seeking to maximize their political advantage within the court arena.

Defendants in criminal trials are faced with a profound power imbalance, which governs not just the potential outcomes, but also the terms of their appearance in court. The decision whether and whom to prosecute, and the terms of the indictment, are the preserve of the public prosecutor. These decisions may have powerful material effects on the defendants, dividing groups (when some are prosecuted and others not), excluding some defenses and allowing others, configuring arenas with or without juries, and permitting or denying players to go to trial.

For movement players faced with this power imbalance, the most fundamental decision is whether to recognize or reject the authority of the court. For example, considering trials a propaganda opportunity, in 1905 Lenin instructed members of the Russian Social Democratic Labor Party to represent themselves in court and challenge the legitimacy of the trial process. This model was subsequently developed by French communist lawyers representing combatants in post-war decolonization struggles in Africa. Most famously, in the 1957 trial of four members of the Front de Libération Nationale (FLN) accused of participating in a bombing campaign in Algiers, defense lawyer Jacques Vergès developed a *défense de rupture*, using the trial to challenge the legitimacy of the state, refusing courtroom

codes, and turning the judicial process into a political event located outside the courthouse (Israël, 2009: 63-71). More counterculturally, the defendants in the Chicago Eight conspiracy trial systematically violated the court's ceremonial codes of deference and demeanor, acting in a fashion "consistent with their self conceptions as revolutionaries" and "actively assert[ing] the validity of their values over those of the court and the wider society it represents" (Antonio, 1972: 295).

Such "rupture" defenses are relatively rare, anti-colonial, revolutionary and terrorist movements excepted (de Graaf et al., 2013). Few trials of movement actors involve explicit attempts to undermine the authority of the court in this way. Defendants therefore have to decide how to engage in the arena of the court tactically as players. Given that those indicted as movement players invariably believe that their own actions are legitimate, the strategic dilemma that they typically face is between maximizing their chances of acquittal, by exploiting the opportunities provided by the legal system, and prioritizing the presentation of their action as authentic, irrespective of the effects this will have on the legal outcome. The choice between these strategies can vary even within the same compound group of players.

For example, during the mid-1980s, there were hundreds of trials of women from the anti-nuclear peace camp at RAF Greenham Common in Berkshire, set up to protest the deployment of Cruise missiles in the UK. Rather than seeking an acquittal, the Greenham women often adopted symbolic defenses, stating their case in court by citing international law or their own personal experience. However, if the opportunity arose to expose inconsistencies (or downright lies) in the evidence of police or others, and gain an acquittal, most took it. Defendants typically refused to conform to the hierarchies of court decorum: supporters in the gallery frequently interrupted proceedings, humming or singing when the police were giving evidence. More than anything, the process was unpredictable. The court officials had no way of knowing if a defendant would plead guilty so that the case was over fast (which the defendants might do if, for example, they needed to be somewhere else the next day); or whether they would plead not guilty, calling expert witnesses, effectively making the trial last several days. As time went on, more women chose to defend themselves, partly as a matter of resources (because applications for legal aid were refused), partly as a matter of political strategy (because it gave them more freedom to speak). Having themselves attended so many trials as one type of player (supporters, defendants), they thus became able to act as other types

of player, becoming experts in cross-examination and court procedure, learning rules and gambits (Roseneil 1995: 253-259).

Securing access to particular arenas can be the subject of tactical battles in themselves. For example, in England in the late 1990s and early 2000s, anti-GMO activists waged a battle with the Crown Prosecution Service over access to jury trials: as an activist newsletter reported, "The Crown became somewhat reluctant to press for damages of over £5,000 because this gives activists the right to ask for a trial by jury rather than a magistrate."¹⁶ Prosecutors would claim that there had been hardly any damage; campaigners would claim that they had in fact caused plenty, in order to try to get a jury trial.

In France, Les Déboulonneurs commit regular, open and public direct action against billboards, seeking to impose a maximum size of 40 cm x 30 cm on commercial advertising posters. For the group, which is based in a handful of French cities but mobilizes relatively few core activists, being prosecuted is a strategic aim. Yet the complaint of many activists is that they are unable to get themselves prosecuted; often, they can't even get themselves arrested.¹⁷ Since 2005, activists have undertaken over 40 actions in Lille and over 50 in Paris; nationally, only about 1 in 15 actions has produced a prosecution. The tactical choices made in the knowledge that action would lead to arrest and thence to trial could thus be undermined by operational decisions made by police not to arrest, and state prosecutors not to pursue the case.

Tactical conflict between players therefore centers on liability, and on the configuration of and access to the judicial arena. In relation to this we can distinguish between three common strategic approaches by movement players: (1) where the trial is anticipated and planned for as an end in itself, as in the Plowshares anti-nuclear movements; (2) where activists seek to avoid arrest, but once arrested adapt their strategy to maximize the opportunities available in the legal arena, such as animal rights or radical environmental activists prosecuted for acts of sabotage; (3) an intermediate position in which individuals adopt a pragmatic position that varies according to the kinds of action taken, since in some cases arrest is to be expected (as in site occupations) whereas in others (such as covert crop trashes) it might be avoided. For the first of these types of group, preparation for trials is typically much more codified by movement traditions than for the other groups.

What is at stake for all those prosecuted in cases of citizenship crimes is precisely the symbolic meaning of acts, their definition as criminal or

16 *Genetix Update*, 20, Winter 2001.

17 Discussion with N., Paris, September 2011.

lawful. We may surmise that defendants, where they engage with the trial process and seek to present a justification of their acts, will have four broad objectives: (1) to construct the *social nature* of their offence; (2) to broaden the focus of the indictment from its narrowly legal character (whether a given offence has been committed in law) to its *political character* (the reasons for the committal of the offence); (3) to thus engage the *moral agency* of the court's decisional players, and secure favorable outcomes within and outside the court space; (4) in so doing, to reveal the norms and dispositions underpinning the legal system as ideologically structured. Though tactically disadvantaged by the structure of the trial process, defendants can mobilize five sets of players in order to achieve these goals: the defendants themselves; their lawyers; the witnesses that they call; their supporters, inside and outside the courtroom; third parties, such as the media.

The number of players who are actual or potential opponents for movements facing prosecution is at least as numerous, including – within the court – judges, prosecutors, witnesses (usually including the police); and beyond the court: government ministers (whose role varies according to the structure of the political system), corporate actors, countermovements and once again, the media. The separation of powers may protect the judicial system from overt political interference but in direct action prosecutions, normal practice may be broken or suspended. For example, following the acquittal of Greenpeace UK activists at Kingsnorth in 2008 the energy company that owned the power plant lobbied the government to impose stiffer sentences on climate campaigners as a deterrent against similar protests.¹⁸ The 2009 Drax and 2010 Ratcliffe-on-Soar UK convictions of climate activists (discussed above) were overturned on appeal when it emerged that the rules of the legal process had been broken by the Crown Prosecution Service, which had failed to pass crucial evidence gathered by an undercover policeman to the defense. Thus, although often disguised by state secrecy, the state is not a unitary institution: tactical interaction between different players within the state and with other opponents of movements is evidently a material factor affecting trials for direct action crimes. Furthermore, abuse of process by the state, when discovered, causes major political damage to the authorities.¹⁹

18 James Ball, "E.ON Lobbied For Stiff Sentences against Kingsnorth Activists, Papers Show," *The Guardian*, 19 February 2013.

19 The success of activists and journalists as well as the bravery of police whistleblowers in exposing the work of undercover units that target political activists led the UK government to concede, reluctantly, the need for an independent inquiry into their role.

Social Crime and Event Construction

As Vanhala points out, one of the main problems facing collective actors in the courts is that the justice system is “inherently individualistic,” with legal process generally focused on “an individual with a concrete issue that requires a legal resolution” (2011: 12). Indeed, prosecution players can be expected to mobilize the rules of the arena to change the nature of their opponents, to transform compound players into simple players; a strategic challenge for activists is therefore to *remain compound players*. Securing a *collective prosecution* with its attendant possibilities of imposing costs on opponents and creating occasions for solidarity displays from supporters can itself be a goal of action. State players thus face potential decision-making dilemmas over arrest and charging that mirror the plight of the *Déboulonneurs* (above).

For example, the French *Faucheurs Volontaires* have adapted their tactics across multiple trials in order to anticipate the response of police to their field actions. This adaptation involves establishing, prior to undertaking an action, a set of common verbal responses for use under police questioning, in order to forestall prosecutors from differentiating leaders from followers (and thus differentiating between them in *their* own decision making, including whom to prosecute and on what charges). This tactic has proved increasingly successful for the *Faucheurs*, resulting in a series of significant collective trials. In the UK, recent guidance from the Crown Prosecution Service explicitly directs prosecutors toward identifying and prosecuting protest organizers, and thus targeting the most disruptive players (Bowcott, 2012). In the case of the 145 UK Uncut activists arrested by the police for occupying the Fortnum & Mason’s luxury store in Piccadilly, central London, in a corporate tax avoidance protest in March 2011, prosecutors singled out 30 for trial. This whittling down was undertaken on the basis that protesters were prosecuted if they were carrying megaphones, beach balls, or at least 20 UK Uncut leaflets at the time of arrest. The seeming arbitrariness of this distinction produced an absurd outcome: during the trial, one defendant was released without charge when it transpired that some of her leaflets were in fact theater ticket stubs, and she did not after all have the requisite number to be prosecuted.

Within the court arena, penalties are applied individually, according to role and motive; again, while magistrates and prosecution lawyers may aim to differentiate, defendants and defense lawyers can be expected to maintain the collective nature of responsibility. Equally, in order to establish the collective legitimacy of their action, defendants are foremost

faced with *socializing their action*, whether by demonstrating community support, testifying to the integrity of their motives and the collective good of their objectives, or by mobilizing other players (supporters in the courthouse, moral witnesses). In their own testimony, defendants may seek to establish the ethical basis of their acts through the “moral presentation of self” (Schervish, 1984: 196), establishing their character, integrity, and biographical commitment to the cause, in the way that impressed the judge in the first Ratcliffe trial.

Whether players are individual or compound players, and what type of compound players, therefore emerges as a strategic outcome of the trial process. We may expect that, especially where defendant players have deliberately courted prosecution, socializing crime is both a key symbolic aim and embedded in the original strategic planning of illegal action. For example, in the Lyng anti-GMO action for which 28 activists were tried in Norwich, Greenpeace deliberately sought to replicate the social representativity of the trial jury by constructing the activist group as a cross-section of the general public (in age, regional origin, gender and social background).²⁰ In the trial of 62 French anti-GMO activists in Colmar in September 2011, the defendants similarly aimed to be representative of the French population as a whole.²¹ In Belgium, where 11 activists were prosecuted in January 2013 on charges of organized criminality for having destroyed a field of genetically modified potatoes in May 2011, the Field Liberation Movement consciously foregrounded the presence of Dutch-speaking activists, while adopting the tactic of self-indictment from the French *Faucheurs Volontaires* in order to build solidarity outside the courthouse; 80 supporters signed an affidavit demanding to be placed on trial alongside the defendants.²²

Defendants may also typically be expected to attempt to shift the focus from the defense of their own actions to the “prosecution” of their opponents, as the case of the December 2010 trial in Caen, France, of six anti-nuclear activists demonstrates. The previous month, the activists had physically blocked a train carrying vitrified nuclear waste traveling from Valognes in Normandy to Gorleben in Germany, using what is now the routine practice of chaining themselves to the rail track and to each other. Throughout the trial, the prosecution and defense were constantly engaged in a contest to define the process: the prosecution sought to restrict debate

20 Discussion with Greenpeace defendant, Stafford, June 2008.

21 Discussion with three *Faucheurs Volontaires* activists, Ghent, May 2011. Note that in neither case did social representativity involve ethnic diversity.

22 Discussion with FLM defendants, Brussels, July 2011.

to the bare facts of the action (themselves uncontested by the defendants), and thus to depoliticize the legal process; the defense sought to generalize, to draw the debate into political terms, establishing their motivation as democratic, asserting the contradiction between a nuclearized society and participative citizenship:

C.: Our goal is to create a real debate about nuclear power, the public has never been consulted.

State prosecutor: It's not in court that that type of debate can take place, but within the democratic organs of society. You are here to be judged for your actions, not to make the world anew.

C.: That's exactly why I am here.²³

The capacity of defendants to make these arguments is heavily dependent upon the gatekeeping role of the judge, who as a player in the court arena has scope for discretion. In the September 2011 Colmar trial, the presiding magistrate gave the floor to each defendant in turn to explain the reasons why they had participated in the destruction of a scientific trial of genetically modified vine roots at the French National Agricultural Research Institute's (INRA) local research facility the previous summer. In contrast, during the trial in Bobigny, France, in July 2012 of one environmental activist for having trespassed onto the runway at Charles de Gaulle airport and stood in front of an Airbus the previous month in a protest against global warming, the presiding magistrate refused to let the defendant explain the motivations for his actions, bringing the defendant's testimony to an abrupt close.²⁴

In trials for direct action crimes, the witnesses called by the defense are particularly important in providing "expert" testimony as scientific or moral authorities (Hayes, 2013). As we have seen in the Drax and DeChristopher cases, this is again heavily dependent upon both the gatekeeping role of the magistrate and of previous judicial decisions. Given the public and contestatory nature of trials, it is perhaps unsurprising that Jasanoff sees "expert" testimony by scientists (where it is allowed) as a privileged site of co-production, of the public socialization of scientific knowledge (2004: 3). For Lynch, criminal cases can "provide vivid public tutorials on the flexible and contentious way in which parties negotiate the boundaries between science and non-science, and expert and non-expert knowledge" (2004: 165). Thus in the Kingsnorth and Ratcliffe climate change trials, defendants

23 Personal trial notes.

24 Personal trial notes.

sought to substantiate a lawful excuse defense by calling expert testimony, arguing that their action prevented a greater harm. Climatologist James Hansen, Director of NASA's Goddard Institute for Space Studies, testified in court in both cases that accelerating coal use in the new century is "a prescription for planetary disaster," concluding that this "would leave a reasonable person to take steps to urgently and deeply cut CO₂ emissions."²⁵

Typically therefore, defendants stress their biographical and ethical commitment, underline the social nature of their action in various ways, and mobilize other players to contextualize and legitimize their action or deliver a public pedagogy. This will be particularly important where defendants seek to mount a necessity or lawful excuse defense. But the importance of these tactics is not limited to the courtroom; rather, it is also a communicational strategy outside the courthouse.

Media coverage is crucial in this respect. Protesters need media coverage to be able to reach beyond the audience in the court and their existing supporters. Ideally, for social movement actors, a trial will create a dramaturgy that will end with their vindication (through an acquittal), a demonstration of their commitment to the cause, and the wide publicization of their arguments. Conviction and harsh penalties may alternatively work to increase solidarities within and beyond the core movement group. However, even when the media play their part in this drama by sending reporters, their increasingly limited time and resources means that most media organizations only cover the first and last days of the trial. These are the worst days from the activists' perspective, since the first day is when the prosecution generally makes its case and the last day is when the verdict is given. The time in between, when activists give evidence and make their case, is the least likely to be reported.

Conclusion: Strategic Interaction in the Court Arena

There is perhaps no greater symbol of the power and purpose of the state than the criminal law, its procedures, processes, institutions, and personnel. As an arena, the criminal law functions to articulate, adjudicate, and discriminate: it defines and announces prohibited conduct; it assesses liability for transgression; it constructs hierarchies of harm and culpability (Robinson, 1994). By its very definition, it patrols and polices the boundaries

25 James Hansen, witness statement to trial of Ratcliffe activists, Nottingham Crown Court, September 2010.

of the dominant social and political order, and it sets the terms of the inclusion and exclusion of the citizenry within or from that order. Again by definition, when movement players oppose the specific or general terms of the social and political order, this brings them into the arena of the criminal law. But the courthouse is also an institutional arena in which various state (judge, prosecution, and police) and non-state players (lawyers, defendants, witnesses, civil parties, juries, media, even members of the public) come into direct discursive contact within the rules of engagement set by the law, by judicial procedure and process, and by the cultural organization of participation in this process. And as we have seen, it is also a site of the production of meaning in other senses, including of political challenge, and of the interplay of rational-legal justice with the “natural” justice of the jury.

We aim to stimulate further interest in the relationships between social movements and criminal justice, arguing that it is a vital area of collective action which has been curiously neglected in the literature until now. As readers will have noticed, our focus here is very much on Western democracies, and we recognize that this does not address the major gap in the study of prosecutions of activists in other political and judicial systems. Clearly, to take perhaps the most high-profile trial of activists of recent times, the enormous international attention given to the Pussy Riot trial in Russia in 2012 indicates the potential for taking the study of trials of direct action into non-Western and authoritarian settings. We hope this lacuna will rapidly be addressed.

Beyond this general goal, we make two specific arguments. The first is that, for criminal justice systems, we can identify stable, long-term, predictable terms of engagement set by formal rules of procedure which are different from system to system; that these rules are the subject of political and discursive engagement between players aiming to secure the most favorable terms within this arena; that the outcomes of this engagement will be central to our understanding of the outcomes of criminal prosecutions, in terms of both their judicial impacts (the verdicts handed down) and their political impacts (crucially, setting the terms of *meaning* of the criminal prosecution).

The second argument is that criminal trials are complex processes which cannot a priori be reduced to the simple imposition of authority by a unified state. We know that arrest and trial “can energize and elevate movements, increasing their support and chances of success” (Goldstone, 2004: 356; see also Koopmans, 2004: 29); we should at the very least note how prosecution enables solidarity and collective identity reinforcement processes. This is not to say that the courthouse is not also a theater of symbolic state power:

the rules of the game are set by state players, activists are rarely able to master the terms of engagement, arrest and trial are stressful events which impose financial, psychological, and emotional costs, irrespective of the court's verdict, and can have strong negative as well as positive effects on both intra-group solidarities and the capacity of movement players to wage campaigns, and we should certainly be wary of casting them as necessarily beneficial or productive episodes for challenging actors. As one Belgian anti-GMO activist put it to us à propos of being taken to court in 2004 for crop-trashing, "it's heavy, it's tiring, it destroys your life for years," "it's only when you're in it that you begin to realize what the consequences are," "you end up on the stand when you should be in a field." Yet the same activist also described the trial as "a miracle"; "we won, and sparked off a public debate."²⁶ Beyond the multiple anecdotes provided by particular cases, criminal prosecutions hold our attention because they are normative crucibles in which the challenge to the dominant social and political order can be made by collective social actors. These players make tactical choices to use the possibilities presented by the arena of the courthouse to level political as well as legal challenge. Occasionally, they even succeed.

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