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New England Law Review

Fall, 2003

*38 New Eng. L. Rev. 3*

**LENGTH:** 22195 words

**ARTICLE:** THE NECESSITY DEFENSE IN CIVIL DISOBEDIENCE CASES: BRING IN THE JURY

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**BIO:** \* Janet Mary Riley Distinguished Professor of Law, Loyola University New Orleans. I have been honored to represent dozens of people engaged in civil disobedience in protests against local, national, and international injustices, particularly the people of conscience who engaged in civil disobedience to close the School of the Americas at Fort Benning, Georgia. Your actions taught me much about how to try to narrow the gap between justice and law: justice will prevail.

**SUMMARY:**

... Thousands of people were arrested for civil disobedience protesting the American invasion of Iraq. ... The most troubling federal case concerning the use of necessity in civil disobedience cases is the wrongfully decided United States v. Schoon. Schoon stands for the principle that the necessity defense is never available in cases of indirect civil disobedience, a point neither briefed nor argued by either party. ... The Schoon appellate panel affirmed the application of the following four-part necessity test: (1) the defendant must have chosen the lesser evil; (2) the defendant must have acted to prevent imminent harm; (3) there must have been a direct causal connection between the defendant's conduct and the harm to be averted; and (4) there must have been no legal alternatives to violating the law. ... A final reason the necessity defense does not apply to these indirect civil disobedience cases is that legal alternatives will never be deemed exhausted when the harm can be mitigated by congressional action. ... That, too, is probably not the actual theme of the protestor's necessity defense. ... There were other forms of protest available to the defendants which disembowel the defense of necessity. ...

**TEXT:**

[\*3]

I. INTRODUCTION

Thousands of people were arrested for civil disobedience protesting the American invasion of Iraq.<sup>1</sup> Many will consider raising the defense of necessity to their criminal prosecution, arguing to a jury that even though they broke a minor law, their actions were justified because they tried to prevent a more serious harm. These citizen-protestors want their actions judged not by the technical specifications of a minor statute, but by the vastly more important criteria of justice. They think, quite rightly, that the law should be subservient to justice, and that the necessity defense gives the jury an opportunity to weigh their technically illegal actions on the [\*4] scales of justice. Unfortunately, these citizens

will find that the law of the necessity defense, especially in the area of civil disobedience, is purposefully vague, subject to radically different interpretations, poorly developed, defined in a variety of ways, and often applied contrary to its stated language. The result is that their actions rarely get the chance to be weighed by a jury to see if they are just; instead, the jury only determines if these actions were technical violations of the law. This outcome is a serious error because it misreads and misapplies the necessity defense and precludes the jury, the bulwark of freedom, from playing its proper role in conflicts between the government and its citizens.<sup>n2</sup>

[\*5] As a policy matter, the law of the necessity defense in civil disobedience trials pits significant concerns about protecting law and order against serious concerns about social justice, dissent, and individual freedom. The decisions of courts, federal much more so than state, show judges engaging in unpersuasive verbal contortions trying to avoid giving the law of necessity the simple direct meaning of its words in civil disobedience cases. While there are many examples where juries get to hear the necessity defenses of protestors and, as a result, find them not guilty, judges often make pre-trial determinations that juries will not hear evidence of necessity in protest cases.

Some judicial opinions reflect the eternal and important tension between order and freedom. They indicate a fear that by allowing civil disobedience defendants the chance to argue the necessity and comparative worth of their minor illegal actions to juries of their peers, terrible consequences of disorder will be unleashed upon society.

Despite these fears, our national history demonstrates the importance of having juries decide our most important questions - exactly what the judges are trying to avoid. Our history shows that the people rightly fear too much order imposed by agents of the government, including judges. That is why there are juries in the first place. That is why juries are so critically important now. The people rightly fear that too much government-imposed order, without the check of juries, will result in loss to the overall health of the community and loss of individual freedom.

Civil disobedience trials are located at the clash of order and freedom. Judges often choose order and take the issues of freedom and social justice off the table before trial by precluding the jury from hearing evidence of necessity.

This article reviews the history of the necessity defense and the history of civil disobedience. It then illustrates and analyzes the conflicting applications of the necessity defense in civil disobedience trials in state and federal courts. Finally, this article outlines how this defense ought to be applied in these trials and concludes by arguing that the trend of refusing juries the ability to decide these defenses is seriously misguided and ought to be reversed.

The long term health of order, freedom, and justice, as well as the straightforward words of the necessity defense, argue that judges are not entitled to, and should not, make unilateral pre-trial decisions about the contest. That is for the jury to decide. If judges engage in a reasonable analysis and use the clear and simple words of the law, the jury should be allowed to hear the defendant and her evidence of necessity. In cases where [\*6] it is not clear whether the good of order or the good of freedom and justice should prevail - and most of the time it will not be clear - then, for the health of all, let the jury decide.

## II. THE NECESSITY DEFENSE

By necessity is meant the assertion that conduct promotes some value higher than the value of literal compliance with the law.<sup>n3</sup>

### A. History

Understandably, the law of the necessity defense in civil disobedience cases is unclear, given the overall state of the necessity defense in general. Necessity has been a defense at common law for centuries, but commentators underscore that the law "is poorly developed in Anglo-American jurisprudence."<sup>n4</sup> The crux of the problem of vagueness in the

necessity defense is that the defense is purposefully defined loosely in order to allow it to be applicable to all the myriad of situations where injustice would result from a too literal reading of the law. As pointed out by the American Law Institute's Model Penal Code, the necessity defense clearly gives a developed legal system the opportunity to expand the evaluation of otherwise criminal conduct beyond the "letter of particular prohibitions." n5 The historical development of the necessity defense suggests as much.

Consider an early discussion of the defense in the English case of *Reniger v. Fogossa*,<sup>n6</sup> involving a ship master who threw valued cargo overboard in the face of a storm:

For in every law there are some things which when they happen a man may break the words of the law, and yet not break the law itself;... . And therefore the words of the law of nature, of the law of this realm, and of other realms, and of the law of God also will yield and give way to some acts and things done against the words of the same laws, and that is, where the words of them are broken to avoid greater inconveniences, or through necessity, or by compulsion, or involuntary ignorance.<sup>n7</sup>

[\*7] This decision illustrates another problem - one not confined to the 1500s - the problem of considering, and often confusing, the necessity defense with other defenses like compulsion and duress. Courts, including the Supreme Court, and commentators noted that necessity is different than, but often confused with, the defense of duress. This confusion results in some courts wrongfully concluding that the necessity defense includes some element of compulsion.<sup>n8</sup>

From the beginning, the rules for the necessity defense always were purposefully flexible and included an overriding call for reasonableness in application, so that justice might be served. Sir Walter Scott, in another ship-in-a-storm case, underscored this need for reasonableness when he wrote about the application of the defense in an 1801 judgment: "In the first place, it is not improper to observe, that the law of cases of necessity is not likely to be well furnished with precise rules; necessity creates the law, it supersedes rules; and whatever is reasonable and just in such cases, is likewise legal."<sup>n9</sup>

Other older English cases allowed necessity defense for breaking the law in order to save a life, put out a fire, escape from a burning jail, bring an infected person through the streets to a doctor, or even fail to repair a road.<sup>n10</sup> But most of the famous nineteenth-century English and American applications of the necessity defense involved ships in peril. <sup>n11</sup> Three of these cases deserve brief discussion.

In 1834, sailors prosecuted for mutiny, argued in their defense that the ship was dangerously leaky and that the danger was concealed from them until they left port. Circuit Justice Story, after hearing the evidence about the condition of the ship and the need for crews to follow the mandate of the captain and owner, found the defendants not guilty. He observed the sensitive balancing act required to fairly analyze the defense of necessity: [\*8] "I am aware of the dangers of not upholding with a steady hand the authority of the master; but I am not the less aware of the necessity of having a just and tender regard for life."<sup>n12</sup>

While a number of other federal and state cases involving necessity were decided during this period, the commentators indicate that "the fullest discussion of the doctrine of necessity" is found in the 1919 Arizona decision of *State v. Wooten*, commonly called the Bisbee Deportation case.<sup>n13</sup>

The facts of this matter are aptly summarized by Professor Morris:

On April 26, 1917, soon after the United States entered World War I, the Industrial Workers of the World (IWW) called a strike of copper miners in Cochise County, Arizona. On July 12, 1917, the county sheriff led a posse that rounded up

and deported over 1,000 members of the IWW. One of the posse was brought to trial on charges of kidnapping. He offered to prove that the strikers were trying to obstruct the war, had stored up a large amount of ammunition, and had threatened citizens; that help from federal troops had been sought to no avail; and that the leader of the local strike had told the sheriff he could no longer control his men. On these facts, he asserted the defense of necessity.

The judge recognized the defense. He ruled that evidence of necessity could be excluded only if it were completely inadequate as a matter of law to establish the defense, and that the weight and sufficiency of the evidence were for the jury to decide - even in a case which "aroused great public interest."

The jury heard the evidence, deliberated for fifteen minutes, and returned a verdict of "Not Guilty" on the first ballot.<sup>14</sup>

The trial judge decided: "One seeking to justify what would otherwise be an unlawful act on the basis of necessity had the burden of proving that the necessity existed, and of showing that the anticipated peril sought to be averted was not disproportionate to the wrong."<sup>15</sup> The judge ruled that the jury was to make the decision of whether necessity existed and what weight [\*9] to place on it; as a matter of law, the judge could only exclude the necessity defense if there was no evidence or the evidence could not be interpreted as necessity.<sup>16</sup>

Then next two famous nineteenth-century shipwreck cases involved stark choices of life and death and, because of their compelling facts, have resulted in additional confusion between necessity and compulsion. The American case was the 1842 decision of *United States v. Holmes*.<sup>17</sup> Its English counterpart was the 1884 decision of *Regina v. Dudley and Stephens*.<sup>18</sup>

*Holmes* involved a shipwreck and the action of its crew members charged with manslaughter, who threw sixteen passengers overboard in a frantic attempt to lighten a sinking lifeboat. At the trial of one of the crew, the prosecutor argued that passengers must be protected at all costs, while defense counsel sought to put the jurors in the sinking lifeboat with the defendant:

This case should be tried in a long-boat, sunk down to its very gunwale with 41 half naked, starved, and shivering wretches, - the boat leaking from below, filling from above, a hundred leagues from land, at midnight, surrounded by ice, unmanageable from its load, and subject to certain destruction from the change of the most changeful of the elements, the winds and the waves. To these superadd the horrors of famine and the recklessness of despair, madness, and all the prospects, past utterance, of this unutterable condition. Fairly to sit in judgment on the prisoner, we should, then, be actually translated to his situation. It was a conjuncture which no fancy can image. Terror had assumed the throne of reason, and passion had become judgment.<sup>19</sup>

The judge's charge to the jury about necessity in this emotion-laden case is set out in the opinion:

But the case does not become "a case of necessity," unless all ordinary means of self preservation have been exhausted. The peril must be instant, overwhelming, leaving no alternative but to lose our own life, or to take the life of another person. An illustration of this principle occurs in the ordinary case of self-defense against lawless violence, aiming at the destruction of life, or designing to inflict grievous injury to the [\*10] person; and within this range may fall the taking of life under other circumstances where the act is indispensably requisite to self-existence.<sup>20</sup>

The jury deliberated for sixteen hours and returned with a guilty verdict, but requested leniency. The court complied and sentenced the defendant to six months in prison and a fine of twenty dollars.<sup>n21</sup>

In Regina, three crew members and a cabin boy escaped from a shipwreck only to spend eighteen days in a boat, over 1,000 miles from land, with no water and only two one-pound tins of turnips.<sup>n22</sup> After four days, they caught and ate a small turtle. That was the only food that they had eaten prior to the twentieth day of being lost at sea. Ultimately, two of the crew members killed the ailing cabin boy and "fed upon the body and blood of the boy for four days."<sup>n23</sup> Four days later, they were rescued. Two of the men were charged with murder. The court found that the cabin boy would likely have died by the time they were rescued and that the crew members, but for their conduct, would probably have died as well. The crew men raised the necessity defense arguing that their situation was like that of two shipwrecked men clinging to a plank that could only support one - under those circumstances, they argued, murder is justified by unavoidable necessity. The court discussed the necessity defense but refused to find the defense applicable to circumstances where one person takes the life of another to save their own - unless the killing is in self-defense, which is not a case of necessity. The opinion concludes: "It is, therefore, our duty to declare that the prisoners' act in this case was willful murder; that the facts as stated in the verdict are no legal justification of the homicide; and to say that, in our unanimous opinion, they are, upon this special verdict, guilty of murder." <sup>n24</sup> The court then proceeded to pass the sentence of death upon the prisoners. <sup>n25</sup>

These cases, though sensational, do not help to clarify the necessity defense, but rather they muddy it. The Holmes jury charge explicitly blends necessity into self-defense.<sup>n26</sup> Regina offers little better, veering off into a life and death value choice of evils. <sup>n27</sup> While these cases have great side stories of pedagogical value, they add little to the definition of necessity.

Until raised in civil disobedience cases, defendants rarely used the [\*11] necessity defense. In fact, a 1961 law review article described the defense as the "seldom-invoked law of necessity."<sup>n28</sup>

#### B. Essence of the Necessity Defense

The rationale of the necessity defense is not that a person, when faced with the pressure of circumstances of nature, lacks the mental element which the crime in question requires. Rather, it is this reason of public policy: the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law.<sup>n29</sup>

The basic theory of the necessity defense is that the defendant properly exercised her or his free will and violated a law in order to achieve a greater good or prevent a greater harm. Necessity is an imprecisely established area of the law, both in definition and application.<sup>n30</sup> There are numerous formulations of the necessity defense suggested by courts, commentators, and the Model Code. The rarely used two-part test states: "1) the defendants must reasonably believe their criminal conduct 'was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense,' and 2) there must be no 'reasonable legal alternative to violating the law.'" <sup>n31</sup> The classic three-part test requires that: "(1) the act charged was done to avoid a significant evil; (2) there was no other adequate means of escape; (3) the remedy was not disproportionate to [\*12] the evil to be avoided."<sup>n32</sup> The frequently used four-part test requires a defendant to establish that "(1) they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; (4) they had no legal alternatives to violating the law." <sup>n33</sup>

In his treatise on criminal law, Wayne LaFave provides an initial definition of necessity, but immediately begins to qualify and then abandon parts of it, illustrating the difficulties in making a precise working definition. He states:

The pressure of natural physical forces sometimes confronts a person in an emergency with a choice of two evils: either he may violate the literal terms of the criminal law and thus produce a harmful result, or he may comply with those terms and thus produce a greater or equal or lesser amount of harm. For reasons of social policy, if the harm which will result from compliance with the law is greater than that which will result from violation of it, he is by virtue of the defense of necessity justified in violating it.<sup>n34</sup>

As an example of the difficulty with Professor LaFave's definition, look at the very first phrase used: "The pressure of natural physical forces." In his treatise, LaFave initially suggested that the traditional definition of necessity included only physical forces of nature and excluded pressure from people, which would be duress.<sup>n35</sup> But then, in the same paragraph, he points out that modern cases, including those decided by the Supreme Court, "have tended to blur the distinction between duress and necessity," and that most modern re-codifications, including the Model Code's, contain a broader choice of evils defense "not limited to any particular source of danger."<sup>n36</sup> Finally, still in the same paragraph, LaFave abandons that formulation of the element altogether and states that the broader interpretation is the better one: "This is as it should be. "To restrict the [\*13] scope of the lesser evils defense to instances of threats from natural forces would be to remove the justification on grounds wholly irrelevant to the question of the actor's conduct producing a net benefit."<sup>n37</sup>

The Model Penal Code, Section 3.02, codifies the principle of necessity as a general justification for otherwise criminal conduct:<sup>n38</sup>

(1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

(b) neither the code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.<sup>n39</sup>

The defense of necessity is clearly intended to give a developed legal system the opportunity to expand the evaluation of otherwise criminal conduct beyond the "letter of particular prohibitions."<sup>n40</sup> There is discussion of the need for the defendant to "actually believe that his conduct is necessary to avoid an evil,"<sup>n41</sup> and that the defendant must not only believe that "his behavior possibly may be conducive to ameliorating certain evils; he must believe it is 'necessary' to avoid the evils."<sup>n42</sup> The Model Penal Code specifically rejects the requirement that there be some "natural physical force" compelling the act; nor does it require that the evil which is sought to be avoided be imminent.<sup>n43</sup> It acknowledges, as it must, that the principles are general and that "there is room for disagreement on what constitutes an evil, and which of two evils is the greater."<sup>n44</sup> The commentary goes on to admit:

[\*14]

The lack of precision in the general rule is unavoidable if the rule is not to be improperly constricted; the situation is

akin to the imprecision of such concepts as recklessness and negligence, which also call in part for weighing of conflicting values. Deep disagreements are bound to exist over some moral issues, such as the extent to which values are absolute or relative and how far desirable ends may justify otherwise offensive means. Thus, even when a specific legislative resolution is theoretically possible, it may be quite unattainable in practice. The alternative of submitting such issues to adjudication, as they arise in concrete cases, therefore has much strategic virtue.<sup>n45</sup>

The Code "reflects the view that the principle of necessity is one of general validity. It is widely accepted in the law of torts and there is even greater need for its acceptance in the law of crime."<sup>n46</sup>

Unfortunately, the Code did not resolve the critical issue of whether the judge or the jury should balance the factors that this test requires because there was disagreement over the proper distribution of responsibility.<sup>n47</sup> There is consensus that whatever the test, the burden of proof is on the defendant to raise and prove necessity. A necessity instruction tells the jury that "they may acquit the defendant if they find that given all the circumstances the defendant reasonably believed the results of breaking the law would be a lesser evil than the result of keeping the law."<sup>n48</sup>

### C. Civil Disobedience

I would agree with Saint Augustine that "An unjust law is no law at all."<sup>n49</sup>

Civil disobedience is an act of protest, deliberately unlawful, conscientiously and publicly performed. It may have as its object the laws or policies of some governmental body, or those of some private corporate body whose decisions have serious public consequences; but in either case the disobedient protest is almost invariably nonviolent in character.<sup>n50</sup>

[\*15]

We must recognize that civil disobedience in various forms, used without violent acts against others, is engrained in our society and the moral correctness of political protestors' views has on occasion served to change and better our society. Civil disobedience has been prevalent throughout this nation's history extending from the Boston Tea Party and the signing of the Declaration of Independence, to the freeing of the slaves by operation of the underground railroad in the mid-1800's. More recently, disobedience of "Jim Crow" laws served, among other things, as a catalyst to end segregation by law in this country, and violation of selective service laws contributed to our eventual withdrawal from the Viet Nam War.<sup>n51</sup>

Civil disobedience is the intentional violation of a law for reasons of principle, conscience or social change.<sup>n52</sup> The following examples provide the best definition of civil disobedience and attempt to capture its essentials. First of all, civil disobedience involves breaking the law: demonstrations, pickets or other protests are not civil disobedience unless they involve intentional violations of the law. On the other hand, not all [\*16] intentionally unlawful conduct is civil disobedience.<sup>n53</sup> Civil disobedience is traditionally non-violent in that no harm is directed toward any persons. <sup>n54</sup> Some practitioners of non-violent civil disobedience suggest that willing acceptance of punishment should be part of civil disobedience; others disagree. <sup>n55</sup>

[\*17] A person engaging in civil disobedience intends to bring about increased public attention to issues of social justice by appealing to a higher principle than the law being violated - the need to stop more severe violations of the rights of others, or appeals to natural law, religious beliefs, international law, justice, conscience, or other moral principles.<sup>n56</sup>

Civil disobedience can sometimes conceptually be described as either direct or indirect,<sup>n57</sup> but such distinctions

are often unclear and not very helpful, especially in the area of the necessity defense. Direct civil disobedience can be defined as the intentional violation of the specific law targeted for challenge; an example includes the violation of the legal systems in place to support segregation. Indirect civil disobedience can be defined as the violation of a law which itself is not sought to be changed; examples include trespassing or blocking a road to challenge unjust actions or the policies of a business or organization connected to the spot of the protest.

Unfortunately, this distinction offers little help in the analysis of civil [\*18] disobedience or the application of the law of necessity. Functionally, most acts of civil disobedience can be characterized as indirect because there is no realistic way to directly challenge the law of the unjust action. This is significant because an important though wrongfully decided case, discussed at length later in this article, suggests that people involved in indirect civil disobedience can never invoke the defense of necessity.<sup>n58</sup> But that position has the perverse impact of excluding the most serious harms, like nuclear war, human rights atrocities, and destruction of the environment, from any opportunity to raise the necessity defense. How does one directly challenge the law of pollution, nuclear weapons or human rights atrocities? Further complicating this issue is the fact that many civil disobedience actions cannot be clearly defined as either direct or indirect. One commentator has suggested that an individual's refusal to be drafted because of objections to conscription constitutes direct civil disobedience, while an individual's refusal to be drafted because of objections to an unjust war constitutes indirect civil disobedience.<sup>n59</sup> When people seek to prevent military action by trying to disarm weapons, are they engaged in indirect or direct civil disobedience? When people block a road to stop trucks from coming in to cut down virgin timber, is that indirect civil disobedience because it is a violation of a neutral traffic law or is it direct civil disobedience because it seeks to actually stop the challenged action? This distinction does not work well for the now historically-approved actions of those who protested against segregation: people like Martin Luther King, Jr., who famously spent time in 1963 in a Birmingham jail for engaging in an illegal march against segregation.<sup>n60</sup> Was he directly protesting the necessity of a permit, or was he trying to stop segregation? Under a rigid distinction, he was engaged in indirect civil disobedience and thus would not have been able to raise the defense of necessity.

Some writers suggest there is another form of protest called "civil resistance" which differs from civil disobedience in that the protestors do [\*19] not accept an assumption of guilt and do not accept punishment.<sup>n61</sup> However, for purposes of this article, all the activities of protestors charged with criminal actions will be defined as civil disobedience.<sup>n62</sup>

### III. CIVIL DISOBEDIENCE IN AMERICAN HISTORY

Civil disobedience has been discussed and practiced for thousands of years in many places outside America.<sup>n63</sup> But civil disobedience has been [\*20] practiced vigorously in America; even before and apart from the resistance that became the Revolution. As early as 1635, American colonists engaged in civil disobedience and refused to follow laws for reasons of conscience.<sup>n64</sup> The American Revolution was civil disobedience to the English crown, illustrated particularly in blatantly illegal actions like the Boston Tea Party.<sup>n65</sup> Opposition to slavery involved a wide range of legal and illegal actions, including the illegal assistance given to runaway [\*21] slaves.<sup>n66</sup> In 1846, Henry David Thoreau was jailed for refusing to pay his poll tax in protest of both slavery and the Mexican-American war and wrote his famous and influential essay, "On the Duty of Civil Disobedience."<sup>n67</sup> Since the early 1800s, groups of laborers walked off their jobs, conducted sit-ins, strikes, boycotts, and pickets in the efforts to gain recognition and bargaining power for unions, for living wages, and for safe working conditions.<sup>n68</sup> Advocates of women's suffrage, and later women's [\*22] rights, used "direct action, civil disobedience, public disruptions and passive resistance" in order to fight for their rights.<sup>n69</sup> In 1872, Susan B. Anthony was convicted for the crime of voting and in 1917, over two hundred women were arrested for illegally protesting in front of the White House.<sup>n70</sup> There was significant public opposition to America's involvement [\*23] in World War I. People were convicted for speaking against the war and for refusing to be inducted into the military - including seventeen men who were sentenced to death and another 142 who were given life sentences.<sup>n71</sup> [\*24] During World War II, there was an active peace movement that protested and lobbied; tens of thousands of men refused to kill in the military, thousands of whom were imprisoned for their actions.<sup>n72</sup> The civil rights experiences, however, constitute the most powerful examples of civil resistance and civil

disobedience. n73 During the 1960s, sit-ins resulted in over 3,000 prosecutions for criminal violations of civil disobedience. n74

In the last fifty years, the United States has also seen many other social justice campaigns involving civil disobedience on a wide range of issues, including: the Vietnam War,<sup>n75</sup> abortion,<sup>n76</sup> nuclear disarmament,<sup>n77</sup> nuclear [\*25] power,<sup>n78</sup> American policies in Central America and toward the sanctuary of Central American refugees,<sup>n79</sup> the environment,<sup>n80</sup> the United States Army School of the Americas at Fort Benning, Georgia (now known as the Western Hemisphere Institute of Security Cooperation),<sup>n81</sup> and American policies in South Africa.<sup>n82</sup> In the year 2000 alone, approximately 400 people were prosecuted for civil disobedience activities in protest of the American military occupation of Vieques, Puerto Rico. n83

[\*26]

#### A. Interpretation and Application of the Necessity Defense in Civil Disobedience Cases

The necessity defense is attractive to reformers who practice civil disobedience because it allows them to deny guilt without renouncing their socially driven acts. It offers a means to discuss political issues in the courtroom, a forum in which reformers can demand equal time and, perhaps, respect. Moreover, its elements allow civil disobedients to describe their political motivations. In proving the imminence of the harm, they can demonstrate the urgency of the social problem. In showing the relative severity of the harms, they can show the seriousness of the social evil they seek to avert. In establishing the lack of reasonable alternatives, they can assault the unresponsiveness of those in power in dealing with the problem and prod them to action. And in presenting evidence of a causal relationship, they can argue the importance of individual action in reforming society. Thus, the elements of the necessity defense provide an excellent structure for publicizing and debating political issues in the judicial forum.<sup>n84</sup>

The necessity defense has been employed successfully in state court civil disobedience cases, but its use typically has failed in federal court.

#### B. Success in State Courts

The necessity defense has remained vital in state courts in a wide variety of cases.<sup>n85</sup> This section of the article will review the successful use of the necessity defense in state courts solely in protest and civil disobedience matters. <sup>n86</sup> There is a rich history of employment of the defense in state [\*27] court civil disobedience proceedings. A brief review of some of these decisions shows the power of the necessity defense and its impact on juries, judges, and prosecutors.<sup>n87</sup> In 1977, dozens of protestors in Oregon conducted a sit-in at a nuclear power plant and were arrested and charged with criminal trespass. <sup>n88</sup> At trial, the judge allowed the defendants to raise the state necessity defense (called the choice of evils defense) and the defendants were acquitted by the jury. <sup>n89</sup>

In 1978, protesters in Illinois blocked the entrance to a nuclear power plant and were charged with criminal trespass.<sup>n90</sup> Relying on the defense of necessity, they argued that they had not created the situation that they had sought to correct and had reasonably believed that their conduct was necessary to avoid the harm of a nuclear accident. A doctor testified for the defense about the damaging effects of low-level radiation. All of the defendants were subsequently acquitted. <sup>n91</sup>

Eleven California protestors were charged with trespass and resisting arrest in connection with a March 31, 1979 demonstration at the Rancho Seco Nuclear Power Plant.<sup>n92</sup> The defendants had climbed over a fence and staged a sit-in on the grounds of the plant. At trial, the judge allowed the necessity defense to be presented to the jury. "After seven weeks of trial, nine of the defendants received a split jury verdict and one was acquitted, apparently because he had a long history of activism and had convinced the [\*28] jury that he had exhausted all legal means to stop the harm"

posed by the power plant.<sup>n93</sup> The cases against those defendants who received a split jury verdict were eventually dropped. <sup>n94</sup>

A very high profile Pennsylvania protest against nuclear weapons involving a group of disarmament activists known as the Plowshares Eight generated considerable judicial discussion of the necessity defense.<sup>n95</sup> These activists entered a General Electric plant in King of Prussia, Pennsylvania on September 9, 1981 and beat missile components with hammers, poured blood on the premises, and damaged about \$ 28,000 worth of property. <sup>n96</sup> At trial, they tried to raise the necessity defense and offer evidence about the dangers of nuclear weapons. The trial judge allowed the defense, but denied the defendants' request to present expert testimony in support of the defense. They were convicted of burglary, criminal mischief, and criminal conspiracy. On appeal, the appellate court reversed the convictions and remanded the case for a new trial. Pursuant to state statute, the appeals court defined the elements of the necessity defense as follows:

(1) The actor must believe his actions to be necessary to avoid a harm or evil to himself or to another which is greater than that harm or evil in which his conduct will result. This subjective belief must be held honestly and sincerely.

(2) Such a belief must also be determined to be an objectively reasonable one to hold.

(3) No law "defining the offense provides exceptions or defenses dealing with the specific situation involved ...."

[\*29]

(4) "[A] legislative purpose to exclude the justification claimed [must] not otherwise plainly appear."<sup>n97</sup>

The appeals court rejected the requirement that the danger protested must be imminent and that there must be no reasonable legal alternatives, noting that Pennsylvania law follows the Model Penal Code approach. "The actor's reasonable belief in the necessity [is] sufficient (assuming a valid choice of evils) ... Questions of immediacy and of alternatives have bearing of course, [but only] on the genuineness of a belief in necessity ... ." <sup>n98</sup> The court then found that the trial court had improperly and erroneously excluded relevant expert testimony and other evidence that the defendants sought to introduce in order to show that they reasonably believed that their actions were necessary to avert an imminent disaster. <sup>n99</sup> However, in 1985, the Pennsylvania Supreme Court reversed the appeals court in a 4-3 decision. <sup>n100</sup> The Pennsylvania Supreme Court excluded the necessity defense and re-instated the convictions. The court held that the justification defense was only available when the accused offers evidence demonstrating:

1) that the actor was faced with a public disaster that was clear and imminent, not debatable or speculative;

2) that the actor could reasonably expect that the actions taken would be effective in avoiding the immediate public disaster;

- 3) that there is no legal alternative which will be effective in abating the immediate public disaster;
- 4) that no legislative purpose exists to exclude the justification from the particular situation faced by the actor.<sup>n101</sup>

The Pennsylvania Supreme Court concluded that there was no imminent danger of nuclear holocaust, thus the actions of the defendants could not reasonably be expected to be effective in avoiding nuclear holocaust. Since the legislature allowed the production of bomb shell casings at the plant, justification was not available because that defense was only allowed in cases where the defendant had attempted to stop perceived illegal conduct, [\*30] rather than legal conduct.<sup>n102</sup>

In 1982, the trial of a protestor who condemned the development of nuclear weapons at the Lawrence Livermore Lab in California ended in a hung jury after the court allowed the presentation of evidence supporting the necessity defense. On retrial, the protestor, John Lemnitzer, was acquitted.<sup>n103</sup>

In 1984, protestors staged a sit-in at the Vermont office of United States Senator Robert Stafford in an effort to get a public meeting about American policy in Central America. These actions resulted in their arrest on trespass charges.<sup>n104</sup> At trial, the court allowed the defendants to raise the defenses of necessity, international law, including the Nuremberg principles, and the First and Fourteenth Amendments. The court allowed a number of impressive experts to testify about human rights atrocities in El Salvador and Nicaragua, as well as the important role of protest in American foreign policy. The defendants further testified they had attempted "every reasonable manner to communicate" with the Senator. <sup>n105</sup> The jury acquitted all of the defendants. <sup>n106</sup>

In 1984, there were nine separate trials in Michigan for prosecutions involving fifty-one defendants who blocked access to a plant where cruise missile engines were being manufactured. The defendants were charged with trespass, disturbing the peace, blocking access, and conspiracy. In a trial where the necessity defense was allowed, the jury acquitted the defendants of all charges except failure to obey a traffic officer. In other cases where the necessity defense was allowed, the juries acquitted the defendants on all charges. In trials where the judge did not allow necessity [\*31] defenses, the defendants were convicted on several counts.<sup>n107</sup>

Three protestors at a Michigan cruise missile plant were charged in 1985 with trespass and criminal damage to a fence. The court, in *Michigan v. Largrou*, found that although the defendants willfully violated the law, they did so without malice and for the public purpose of protest. All three were acquitted.<sup>n108</sup>

In 1985, in the case of *People v. Jarka*, an Illinois jury acquitted twenty defendants who protested against the American military invasion of Central America by conducting a sit-in which blocked the road to the Great Lakes Naval Training Center. The protestors successfully invoked the doctrine of necessity and were allowed to put eight expert witnesses on the stand to offer evidence of the effect of nuclear weapons, American intervention in Central America, and international law. The trial judge gave the jury an instruction that stated that the threat and use of nuclear weapons violated international law.<sup>n109</sup>

About a month later, in *Chicago v. Streeter*, a jury was faced with eight protestors who were charged with trespass for refusing to leave the office of the South African consul. The jury was allowed to hear expert evidence about the defense of necessity and international crimes committed by the apartheid policies of South Africa. It took the jury two and a half hours to acquit the defendants.<sup>n110</sup>

[\*32] In the 1985 case of *Washington v. Heller*, eight doctors were charged with trespassing for protests staged on the porch of the home of the South African consul. They were allowed to raise the defense of necessity and admit expert testimony about the medical and other effects of apartheid. The Seattle jury acquitted after little more than an hour and made a post-trial statement supporting anti-apartheid protests.<sup>n111</sup>

In Denver in 1985, twenty-two Pledge of Resistance members were charged with trespass for occupying the office of a United States Senator from Colorado to protest American policy in Central America. The jurors, who were allowed to hear evidence of necessity, were instructed that the defendants could use civil disobedience only as an "emergency measure to avoid imminent public or private injury" but that the injury did not have to be directed against the defendants. The jury acquitted all of the defendants.<sup>n112</sup>

In 1986, the daughter of former President Jimmy Carter, Amy Carter, was arrested with fifty-nine others and charged with trespass and disorderly conduct at Central Intelligence Agency (CIA) recruitment activities on the campus of the University of Massachusetts at Amherst. The fifteen defendants, who went to trial in *Massachusetts v. Carter*, were allowed to present evidence to support the necessity defense, international law, and the Nuremberg principles. The defendants argued that the crimes they [\*33] committed were of far lesser harm than those being committed by the CIA in Central America and offered testimony by a former contra leader and former CIA and government officials. The judge instructed the jury that they could acquit the defendants if they concluded that the defendants acted out of a belief that their protest would help stop the clear and immediate threat of public harm. The jury acquitted them in three hours.<sup>n113</sup>

In 1987, several dozen students of Evergreen State College sat in the Washington State Capitol in support of an anti-apartheid disinvestment bill. Seven students refused orders to leave and were arrested and charged with trespass and disorderly conduct. At their trial, the defendants were allowed to admit statistical and expert evidence of necessity, international law, and the Nuremberg defense about the situation in South Africa. The jury acquitted all of the defendants.<sup>n114</sup>

Also in 1987, twenty-six people were arrested for trespassing at the Arlington Heights Army Reserve Training Center. In *Illinois v. Fish*, the trial court allowed the jury to hear evidence about the necessity defense. All of the defendants were acquitted.<sup>n115</sup>

In 1988, fourteen protestors blockaded Diablo Canyon Nuclear Power Plant to prevent the loading of fuel rods. The trial judge allowed fourteen expert witnesses to offer testimony about related potential harm for the area and allowed the defendants to testify about their own related fears. The judge applied the necessity defense and acquitted the defendants.<sup>n116</sup>

In 1988, a North Carolina court acquitted two Tuscarora Indians of charges in connection with their taking of twenty hostages at the office of a local newspaper to protest the alleged corruption of county officials.<sup>n117</sup>

Several pro se anti-nuclear protestors were successful in raising the [\*34] defense of necessity in the 1989 case of *Massachusetts v. Schaeffer-Duffy*. The five defendants tried to pass out leaflets to employees at a GTE nuclear weapons facility and prayed outside the building when they were denied entry. The judge denied the prosecutor's motion in limine to prevent evidence of necessity. The jury was allowed to hear the defendants' testimony about their personal efforts to stop nuclear weapons and their religious beliefs, and expert testimony about the threats of the MX missile, religious teachings against nuclear weapons, and the historical effectiveness of civil disobedience. The jury acquitted the defendants of trespass.<sup>n118</sup>

In 1990, in Omaha, Nebraska, a jury acquitted seventeen anti-abortion protestors because of the necessity defense. The trial judge relied on the defense to overturn the trespassing convictions of an additional eighteen defendants.<sup>n119</sup>

Also in 1990, protestors were charged with criminal trespass after entering property on which Trident II nuclear missile engines were being manufactured in Salt Lake City. The trial judge in *West Valley City v. Hirshi* permitted evidence and instructed the jury on defenses based on necessity, international law, the First Amendment, and the Nuremberg Principles. The jury acquitted the defendants.<sup>n120</sup>

In 1991, a two-day bench trial resulted in the acquittal of six protestors for disorderly conduct because of the necessity defense.<sup>n121</sup> The protestors had blocked traffic in Manhattan to protest the opening of a bike and pedestrian

lane to vehicular traffic. Judge Laura Safer-Espinoza issued a forty-two page decision reviewing dozens of decisions involving the [\*35] necessity defense and provided the most extensive judicial overview of the necessity defense in state courts to date.

In 1991, a Chicago jury acquitted a Catholic priest of criminal charges for damage to the inner-city neighborhood where he was pastor after he admitted painting over three tobacco-and alcohol-related billboards. The defendant argued he should not be convicted because of the necessity defense. The jury deliberated ninety minutes before acquitting the defendant.<sup>122</sup>

In 1993, a jury acquitted a Chicago AIDS activist charged with illegally supplying clean needles because of the necessity defense.<sup>123</sup> A jury in California came to the same conclusion after hearing evidence that dispensing clean needles without a prescription, though illegal, was necessary to protect people from the spread of the AIDS virus. <sup>124</sup>

In a number of other state cases, the necessity defense, while not resulting in full acquittals, appeared very helpful to protesting defendants. In some cases, application of the defense resulted in reduced charges, hung juries, or more favorable pleas.<sup>125</sup> In other cases, charges were dismissed [\*36] after the defendant gave notice of his intent to raise the necessity defense.<sup>126</sup> Thus, state courts weigh the necessity defense on a case-by-case [\*37] basis, permitting the defense in a number of civil disobedience prosecutions. Unfortunately, this has not been the case in federal court.

### C. Failure in Federal Courts

In explaining the reasons for our decision, we find ourselves in a position akin to that of the mother crab who is trying to teach her progeny to walk in a straight line, and finally in desperation exclaims: "Don't do as I do, do as I say."<sup>127</sup>

The federal courts, led by the Supreme Court, have taken every opportunity to avoid the defense of necessity in civil disobedience cases. The Supreme Court, in fact, has refused to squarely address the defense of necessity in any case, much less a civil disobedience case. Similarly, the lower courts have made a number of rulings which have been unfavorable to defendants seeking to raise necessity defenses in civil disobedience cases. The reasoning of these courts ranges from scattered, to muddled, to flat wrong. Federal courts have achieved consistency only in their refusal to acknowledge the validity of the necessity defense. Denying civil disobedience defendants the right to offer evidence about the higher good that they hoped their illegal actions would address obviously saves the federal courts time and energy. However, excluding the goals of efficiency and preservation of the status quo (neither of which this author underestimates as a motivating force for the judiciary), it is difficult to determine the reasons for this near total abdication of responsibility by the federal courts. Whatever the reasoning, federal courts are currently not likely to allow the necessity defense in civil disobedience actions. Perhaps the federal judiciary will learn from their state counterparts to take the defense seriously and allow the triers of fact an opportunity to do their jobs.

### D. The Supreme Court

The Supreme Court has twice had the chance to consider the necessity defense, but has refused to endorse any specific formulation of the defense in federal cases. In a 1980 action, *United States v. Bailey*, the Supreme [\*38] Court had an opportunity to define the contours and elements of the necessity defense, but declined.<sup>128</sup> In *Bailey*, the defendant-prisoners were apprehended between four and fourteen weeks after their escape from a federal penitentiary. They were charged with a violation of *18 U.S.C. 751(a)*, which prohibits escapes and attempted escapes from federal custody. The defendants offered evidence that the prison was unsafe due to fires, poor ventilation, inmate beatings, deaths of prisoners, threats to themselves as individuals, and inadequate medical attention.<sup>129</sup> They sought to have these issues go to the jury and to have the jurors instructed on their affirmative defenses. The government objected, arguing that prison conditions were insufficient to create a defense and that the defendants were under a duty to turn themselves in once they escaped. <sup>130</sup> The case ultimately turned on the fact that because the defendants had remained

escapees for such a long time, any necessity or duress they might have experienced had subsequently lapsed. n131

Despite its refusal to define the defense of necessity, the Court did make some pertinent observations:

Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils. Thus, where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress, whereas if A destroyed the dike in order to protect more valuable property from flooding, A could claim a defense of necessity.

Modern cases have tended to blur the distinction between duress and necessity. In the court below, the majority discarded the labels "duress" and "necessity," choosing instead to examine the policies underlying the traditional defenses. In particular, the majority felt that the defenses were designed to spare a person from punishment if he acted "under threats or conditions that a person of ordinary firmness would have been [\*39] unable to resist," or if he reasonably believed that criminal action "was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense." The Model Penal Code redefines the defenses along similar lines.

We need not speculate now, however, on the precise contours of whatever defenses of duress or necessity are available against charges brought under 751(a). Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail. Clearly, in the context of prison escape, the escapee is not entitled to claim a defense of duress or necessity unless and until he demonstrates that, given the imminence of the threat, violation of 751(a) was his only reasonable alternative.n132

In 2001, the Court made a move in the direction of severely limiting the necessity defense, but again decided to evade the issue. Indeed, in what three concurring justices called dictum, the Court took pains to point out that it was not even clear whether the necessity defense was available in federal court.n133 In *United States v. Oakland Cannabis Buyers' Co-op*, a case that could have raised necessity in the context of medical use of marijuana, n134 On behalf of the Court, Justice Thomas explained:

We note that it is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute. A necessity defense "traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils." Even at common law, the defense of necessity was somewhat controversial. And under our constitutional system, in which federal crimes are defined by statute rather than by common law, it is especially so. As we have stated: "Whether, as a policy matter, an [\*40] exemption should be created is a question for legislative judgment, not judicial inference." Nonetheless, we recognize that this Court has discussed the possibility of a necessity defense without altogether rejecting it.n135

#### E. Lower Federal Courts

The federal courts have been consistently wrong in their interpretations of the necessity defense in civil disobedience cases and consequently have denied defendants the opportunity to offer evidence to allow this defense to get to the jury.<sup>n136</sup> This uniform result is not matched by a uniform rationale. These decisions have taken a wide range of routes to arrive at the same dead end for defendants. Given the numerous instances of the use of the necessity defense in state court and the silence on its use by the Supreme Court, one is left to wonder why the federal judiciary has so consistently refused to allow this evidence.

While denying almost every reported attempt to use the defense, the federal courts have conceded that defendants have a right to present exculpatory evidence to the jury: "As a general proposition, evidence that a defendant exhausted all available legal alternatives, and that such alternatives as a class had been futile over a long period, might be sufficient to allow a defendant to present his necessity defense to the jury."<sup>n137</sup> As appellate courts have stated, it is appropriate for the district courts to "entertain[] the possibility that a necessity defense could be interposed ... The question before us is not whether necessity ever can be a proper defense ... in the protest context, but, rather, whether [the defendant] showed that he could muster some evidence of a viable [\*41] necessity defense."<sup>n138</sup>

Before illustrating some of the unreasonable interpretations given by the federal courts to the straightforward words of the elements of the necessity defense, it is instructive to look at an oft-cited opinion that contains many analytical flaws that undermine any reasonable interpretations.

#### F. United States v. Schoon: An Example of the Federal Confusion in Indirect Civil Disobedience

There are some instances when a law is just on its face and unjust in its application. For instance, I was arrested Friday on a charge of parading without a permit. Now there is nothing wrong with an ordinance which requires a permit for a parade, but when the ordinance is used to preserve segregation and to deny citizens the First Amendment privilege of peaceful assembly and peaceful protest, then it becomes unjust.<sup>n139</sup>

The most troubling federal case concerning the use of necessity in civil disobedience cases is the wrongfully decided *United States v. Schoon*. *Schoon* stands for the principle that the necessity defense is never available in cases of indirect civil disobedience, a point neither briefed nor argued by either party.<sup>n140</sup> This decision has further confused an already muddled federal treatment of the necessity defense in civil disobedience cases.

As the words of Martin Luther King, Jr. in the epigraph illustrate, it makes little sense to draw an arbitrary legal line between direct and indirect civil disobedience: sometimes laws are justly applied, sometimes they are not; that is precisely what the necessity defense is all about. Neutral and fair laws can be used for negative and unfair reasons. Additionally, as one authority has observed, "civil disobedience often must be indirect because the protestors have no direct access to the injustice they seek to protest."<sup>n141</sup> Thus, a person seeking to protest nuclear war, human rights massacres or environmental damage, does not have a clear and direct method of protest and must take action indirectly.

Although *Schoon* draws a bright-line in the area of necessity and civil disobedience, the line is drawn in the wrong place. The *Schoon* court reached incorrect conclusions and thereby pointed other courts in the [\*42] wrong direction. *Schoon* is the rare erroneous judicial trifecta: it makes three erroneous points about the law of necessity and civil disobedience.

*Schoon* arose from a 1989 protest at the IRS office in Tucson, Arizona, where thirty people chanted "keep America's tax dollars out of El Salvador," splashed simulated blood on the counters, walls, and carpeting, and generally obstructed the office's operation. A federal police officer arrested the defendants after ordering the group, on several occasions, to disperse or face arrest. At a bench trial, the defendants proffered testimony about conditions in El Salvador as the motivation for their conduct. They attempted to assert a necessity defense based on the premise that their conduct

was necessary to avoid further bloodshed in that country. While the district court found that the defendants were motivated solely by humanitarian concerns, it nonetheless precluded the defense as a matter of law.<sup>n142</sup>

The Schoon appellate panel affirmed the application of the following four-part necessity test: (1) the defendant must have chosen the lesser evil; (2) the defendant must have acted to prevent imminent harm; (3) there must have been a direct causal connection between the defendant's conduct and the harm to be averted; and (4) there must have been no legal alternatives to violating the law.<sup>n143</sup> In regard to the second prong, the court merely emphasized the fact that "there can be indirect civil disobedience cases in which the protested harm is imminent."<sup>n144</sup> The Schoon court focused on the first, third, and fourth prongs of the test.<sup>n145</sup>

The court accurately characterized the first prong as a balance of harms test. The court's analysis of this prong was off track and fundamentally in error. Instead of actually engaging in the balancing test that the necessity defense requires, the court swept the test aside and made the overbroad and unsupported generalization that:

As a matter of law, the mere existence of policy or law validly enacted by Congress cannot constitute a cognizable harm. If there is no cognizable harm to prevent, the harm resulting from criminal action taken for the purpose of securing the repeal of the law or policy necessarily outweighs any benefit of the action.<sup>n146</sup>

Here, the Schoon court completely and utterly missed the logical, historical, and legal boat. The trier of fact should determine this prong of the [\*43] balancing test. The court suggested that "no cognizable harm" existed because congressional action authorized the American policy of providing financial and military support to the government and right wing paramilitaries in El Salvador and was not on its face unconstitutional.<sup>n147</sup>

This conclusion is nonsense. Violation of law for a higher purpose is precisely the point of civil disobedience and clearly the rationale for the necessity defense. For thousands of years, civil disobedience has been defined as a violation of an otherwise valid law for a higher purpose. Socrates, according to Plato, said: "Gentlemen of the jury, I am grateful and I am your friend, but I will obey the god rather than you..."<sup>n148</sup> St. Augustine argued: "An unjust law is not a law."<sup>n149</sup> Thomas Aquinas pointed out that "humanly enacted laws can be just or unjust," but that "we must obey God rather than men."<sup>n150</sup> But according to the logic of Schoon, if the act of civil disobedience is directed against a law, then the violation of that law cannot be defended on the basis of necessity.

Instead of outright dismissing the possibility of any harm because there of Congress' authorization for the government's intervention in El Salvador, the court should have taken the time to consider the results of the defendants' action. The court might have focused on the conclusions of internationally recognized human rights law professor, Thomas Buerghenthal, who reported to the United Nations Truth Commission on El Salvador.<sup>n151</sup> Tiny El Salvador lost 75,000 lives in the war that the Schoon court held could not be a cognizable harm. The Commission received over 22,000 complaints of serious acts of violence - mostly extra-judicial executions, disappearances, and torture; eighty-five percent of which were attributable to the government and to paramilitaries supported by the financial reserves and intelligence of the United States.<sup>n152</sup> According to a congressional task force, the United States Army trained a number of the soldiers implicated in the murder and rape of church leaders in El Salvador at the School of the Americas, located on the grounds of Fort Benning, Georgia.<sup>n153</sup> Yet according to Schoon, this, as a matter of law, did not [\*44] constitute cognizable harm and could not be considered by the trier of fact.

The Schoon court's interpretation also ignores the history of the necessity defense. Recall that one of the earlier uses and articulations of the necessity defense in the United States was in the Bisbee deportation case - a kidnapping case.<sup>n154</sup> The defendant, Wooten, did not challenge the constitutionality or underpinnings of the kidnapping law or even claim that it was an unjust law. Wooten merely argued that he was entitled to present evidence to the trier of fact regarding why his conduct, though on its face criminal, was defensible because it was intended to prevent a greater harm. There, the court found that the defendant "had the burden of proving that ... the anticipated peril sought to be

averted was not disproportionate to the wrong." n155 Commentators have noted that:

The weight and sufficiency of [the] evidence tending to establish necessity are for the jury, and the court may pass on that issue as a matter of law only where evidence is wholly wanting or where the state of facts could not in any way warrant the interposition of the plea.n156

The courts that decided the shipwreck cases employed the same type of analysis in their consideration of the application of the necessity defense.n157 Under *Schoon*, those seminal cases would have been decided differently and the entire development of the law of necessity would have been altered. The *Schoon* court did not explain or justify this shift.

Furthermore, the *Schoon* court significantly mischaracterized other areas of the law. As one commentator has noted:

The court correctly recognized that a direct civil disobedient will personally suffer cognizable harm, and therefore should be allowed to invoke the necessity defense. The court then distinguished the indirect civil disobedient from the direct, noting that the indirect civil disobedient is unlikely to face personal harm. What the court failed to see, however, is that personal harm, often necessary to establish standing, is not required in order to raise a defense to a criminal charge.

Thus, even assuming that the court's distinction was correct, and that direct civil disobedients face greater potential personal harm than indirect civil disobedients, it does not follow that the indirect civil disobedient should be barred from invoking the necessity defense. [\*45] There are innumerable circumstances in which an individual may lack standing to challenge a particular harm but would be able to present a successful defense to a criminal charge based on that harm. For instance, suppose that Bully attacks Victim in Samaritan's presence, and that Samaritan intervenes to protect Victim. Although Samaritan would not have standing to sue for injuries to Victim resulting from Bully's assault, Samaritan could invoke a valid defense to a battery charge based on her defense of Victim. This result comports with the logic behind both the doctrine of standing and the rules regulating defenses to criminal charges: while the former restricts federal court access to those litigants with a personal stake in a given matter, the latter allows defendants to raise all defenses to which they are entitled.

Accordingly, while potential litigants are ordinarily not permitted to raise claims of third persons, defendants are routinely allowed to raise the defense of others when arguing necessity. Legal harm for the purpose of determining standing is simply not coterminous with harm for the purpose of determining whether a defendant may raise a defense to a criminal charge. The *Schoon* court offers no rationale to support its characterization of the harms flowing from a government policy as per se insubstantial. More appropriately, the balancing of harms should be left to the jury.n158

The *Schoon* court also misinterpreted the third prong of the test - the prong that analyzes the causal relationship between the criminal conduct and the harm to be averted:

In political necessity cases involving indirect civil disobedience against congressional acts, however, the act alone is

unlikely to abate the evil precisely because the action is indirect. Here, the IRS obstruction, or the refusal to comply with a federal officer's order, are unlikely to abate the killings in El Salvador, or immediately change Congress's [sic] policy; instead, it takes another volitional actor not controlled by the protestor to take a further step; Congress must change its mind.<sup>n159</sup>

Again, it is not clear whether the Schoon court just got carried away with its theory that necessity should not apply to indirect civil disobedience cases or whether it in fact had an agenda to avoid trying these cases. The court's analysis was simply flat wrong and even internally inconsistent with the court's own opinion. Additionally, this court's reasoning would foreclose the necessity defense to protestors engaged in direct civil disobedience. Though earlier in its opinion the court stated that sit-ins at [\*46] lunch counters were examples of direct civil disobedience,<sup>n160</sup> who could argue that a sit-in at a lunch counter, or for that matter a permit-less march for integration or an attempt to register to vote, would immediately change congressional policy? Such acts were not aimed directly at Congress, yet it took the passage of several civil rights statutes to make them even lawful in many states. Under the severely narrow interpretation of the causal relationship prong of the necessity defense articulated in Schoon, no act of civil disobedience could ever qualify for the defense.

The final part of this three-legged stool is the Schoon court's analysis of legal alternatives, which the court also got clearly wrong:

A final reason the necessity defense does not apply to these indirect civil disobedience cases is that legal alternatives will never be deemed exhausted when the harm can be mitigated by congressional action. As noted above, the harm indirect civil disobedience aims to prevent is the continued existence of a law or policy. Because congressional action can always mitigate this "harm," lawful political activity to spur such action will always be a legal alternative.<sup>n161</sup>

According to Schoon, the necessity defense can never be raised in the judicial branch as long as there is a possibility that the legislative branch could at some time remedy potential harm. This analysis, despite the court's focus on indirect civil disobedience, would also preclude the use of necessity in direct civil disobedience cases, such as the lunch counter sit-in prosecutions (which the court cites with approval forty years after those protestors were routinely convicted and roundly condemned for not waiting for congressional action).

As one commentator has noted:

The court's rationale for this new rule is not convincing. The Schoon court not only misapplied the elements of the necessity defense, but it also failed to weigh accurately the constitutional questions and policy considerations raised by adopting a rule which restricts a criminal defendant's fundamental right to present a defense.<sup>n162</sup>

While people who engage in indirect civil disobedience will have a more difficult time showing the elements of necessity to a jury, there is no reason to preclude the presentation of that evidence to a jury for all defendants. As another commentator has pointed out:

It is wrong to maintain that cases of indirect civil disobedience cannot be justified because the law broken is not the object of protest. To argue [\*47] so is to beg the central question. If it will be granted that civil disobedience may, at some times or under some circumstances, prove justifiable, it remains to be seen what those circumstances are, and what forms that disobedience might reasonably take. There may be situations in which disobedient protest is called for, while direct disobedience is simply out of the question. For example, if the object of a protest is to be the conduct of a

war, or another issue of national policy, it may be impossible for the protestor to violate that policy directly. So if the object of protest is not a law but the absence of a law, or some other administrative nonfeasance, direct civil disobedience would be impossible. It does not follow, of course, that in such cases indirect civil disobedience is automatically justified, but neither can it be automatically condemned.<sup>n163</sup>

This distinction is artificial and essentially classifies similar actions differently.<sup>n164</sup> For example, Rosa Parks' refusal to move from her seat in the Montgomery bus would be classified as an act of direct civil disobedience because she was in direct violation of a segregation ordinance; but others who protested segregation, like the Freedom Riders who also rode buses but were arrested for trespass, would be characterized as engaging in indirect civil disobedience because the Freedom Riders did not attack the law they were arrested for violating.<sup>n165</sup>

Taking *Schoon* seriously would mean that the necessity defense would never be available to defendants who violated the law in an attempt to end nuclear war, human rights massacres, environmental degradation or any national or international harm. The *Schoon* court may have disapproved of these or other types of civil disobedience or they may have been wary of the expenditure of time that might be involved in allowing triers of fact to hear the defense in civil disobedience cases. Unfortunately, *Schoon* is merely the most blatant of the numerous federal cases which cavalierly dismiss the necessity defense in civil disobedience cases. While it may be quicker and easier to try a civil disobedience case if the court excludes everything but evidence of the disobedience, the goal of avoiding work or difficult issues is not supposed to be the primary concern of the federal judiciary as contemplated by the Constitution.

All litigators and commentators appreciate bright-line rules, but only if the lines are accurately drawn. Sadly, *Schoon* has been oft-cited as a good explanation of the law of necessity and civil disobedience. One opinion incredibly labeled it a "landmark case."<sup>n166</sup> In an observation that might not [\*48] surprise experienced observers of courts' general appreciation for their own insights, one of the *Schoon* judges later modestly referred to the decision as a "detailed and scholarly analysis."<sup>n167</sup> More accurately, one commentator concluded that the decision constituted "a foray into judicial activism [that was] entirely unnecessary in order to affirm the conviction. Not only did the court consider and decide issues which were neither briefed nor argued by the parties, but the court's justifications for rewriting this area of law are not convincing." <sup>n168</sup> *Schoon* "mischaracterized" the balance of harms test, "disregarded" the reasonableness requirement of the causal connection element, and went on to "eviscerate" the reasonableness inquiry as an element of the legal alternatives prong. As a result, the court misapplied the four-part test.<sup>n169</sup>

*Schoon* fundamentally misconstrued the legal, policy, and historical foundations for the necessity defense as well as civil disobedience, and thus served only to create more confusion in the handling of these cases. Prior to *Schoon*, courts did not make any real distinction between direct and indirect civil disobedience - for very good reason - because no logical coherent legal ground could distinguish them.<sup>n170</sup> *Schoon* made a legal conclusion that there was a policy-based difference between direct and indirect civil disobedience, but the court failed to articulate a rational basis for this distinction. The decision, if taken at face value, could have the effect of erasing the necessity defense in all civil disobedience cases.<sup>n171</sup> Contrary to the court's indications, the holding would not allow activists to raise the necessity defense; rather, it would have the effect of maintaining the status quo and disemboweling the right to let the jury decide. Perhaps that is indeed the intention of *Schoon*. If so, the court should have just said so instead of engaging in a seemingly artful, yet ultimately hollow, effort to chip away at the defense for indirect civil disobedience. The trier of fact should continue to consider the four-part test for necessity. The *Schoon* court's attempt to dismember that test does a disservice to the law and to those who seek its protection.

[\*49] While *Schoon* is perhaps the most vivid example of a federal court failing to interpret the words of the necessity defense fairly and reasonably, it is, unfortunately, not a unique decision. The next section illustrates how other federal courts have misinterpreted the elements of the necessity defense.

#### IV. ANALYSIS OF THE FOUR PRONGS OF THE NECESSITY DEFENSE BY FEDERAL COURTS

We begin with the "fundamental canon of statutory construction ... that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." n172

Recall that the Constitution, the Model Penal Code, and the history of the necessity defense direct courts to take a reasonable approach to necessity and all defenses, giving words their normal and fair meaning. With that instruction in mind, consider how the federal courts define and apply the four prongs of the necessity defense.

#### A. Lesser of the Evils

The first prong of the defense is usually not a significant hurdle, even in federal court, as judges usually admit, for example, that trespassing n173 or praying n174 is less of an evil than nuclear weapons. n175

#### B. Imminent Harm

However, the reported cases consistently find no evidence supporting the element of imminent harm. No evidence is ever deemed significant enough to allow a jury to hear it, even in the cases involving thermo-nuclear weapons. The courts reason that no jury could ever decide that nuclear weapons possibly pose an imminent harm to the community. Therefore, they conclude, the jury should never hear this evidence.

[\*50] The unreasonable decision by federal courts to exclude any evidence of harm is best illustrated in *United States v. Maxwell*, which held that even the presence of thermo-nuclear submarine weapons was not in and of itself evidence of imminent harm. n176 Even assuming arguendo that nuclear submarines do constitute a harm, the court held that the term "imminent harm" connotes a real emergency, a crisis involving immediate danger to oneself or to a third party. n177 With no evidence that nuclear submarines were even in the area, and even if they were, the court concluded, "it is doubtful that the mere presence of such a vessel, without some kind of realistic threat of detonation, would suffice to pose an imminent harm." n178 Thus, the court found that the record contained no evidence to support the defendant's naked averment that the harm he feared was imminent. n179 And, in a line that could have been written by Lewis Carroll, the court quoted itself in concluding that it need not accept "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like." n180

The current federal definition of imminent harm consistently precludes the possibility that even nuclear weapons might constitute a crisis or a real emergency. This approach suggests that no set of circumstances will likely meet the definition of imminent harm and that no jury will likely get to hear any evidence of the necessity defense in any civil disobedience case.

#### C. Direct Causal Relationship

On the direct causal relationship prong of the necessity test, federal courts have refused to interpret the language of the test simply and reasonably. Courts have uniformly decided that there have been no circumstances presented where evidence should ever be presented to a jury. [\*51] The manner in which the federal courts dismiss the defendants may vary; however, the consistency of the result does not.

Judges commonly belittle the defendants, twisting their beliefs into incredible absolutes that portray the protestors as morons or worse. In *United States v. Montgomery*, the court ruled that the defendants could not have reasonably believed that entry into a defense plant would bring about nuclear disarmament. n181 Does any reader agree with the court's interpretation of the defendant's argument? Or that the defendants would have liked to present this argument to the jury? Or might their argument have been a little more modest? In *United States v. Dorrell*, the court held that the defendant failed to establish that breaking into an Air Force base and vandalizing government property could reasonably be expected to lead to the termination of the MX missile program. n182 That, too, is probably not the actual theme of the protestor's necessity defense. In *United States v. Cassidy*, the court held that it was unlikely that splashing blood on

Pentagon walls would impel the United States to divest itself of nuclear weapons. n183 Would that have been a surprise to the defendants?

In *United States v. Maxwell*, the court believed that the Vieques protestors hallucinated the problems of bombs dropping on their island. The court stated that "[a] reasonable anticipation of averting harm, however, requires more than seeing ghosts under every bed. In this case, [the defendant's] anticipation is pure conjecture, not reasonable belief." n184 In *United States v. Kabat*, the Eighth Circuit directly dismissed this prong and any chance that it would be reasonably interpreted. "In political protest cases a sufficient causal relationship between the act committed by the defendants and avoidance of the asserted greater harm inevitably will be lacking." n185

#### D. Lack of Reasonable Alternatives

The lack of reasonable alternatives element of the necessity defense has also routinely been dismissed by federal courts - though in different and sometimes conflicting ways. One court held that civil disobedience protestors did not prove this element because they could have gone to court [\*52] to seek relief and had not. n186 Yet another court found that simply because protestors went to court and lost did not mean they met this element. n187 The Ninth Circuit has concluded that this element can never be met because protestors can always go to their representatives in Congress for help. n188 For individuals like the citizens of Puerto Rico, who do not have representatives in Congress and who have lost in prior attempts seeking injunctive relief, there are still alternatives. The court fails to list these alternatives, however, and defendants have "failed to offer sufficient evidence to demonstrate a lack of legal alternatives." n189 According to most courts, a lack of legal alternatives can never be shown in civil disobedience cases because there are always other ways to get one's political or social message to the public. "There are thousands of opportunities for the propagation of the anti-nuclear message: in the nation's electoral process; by speech on public streets, in parks, in auditoriums, in churches and lecture halls; and the release of information to the media, to name only a few." n190

Only one reported federal decision, *United States v. Hill*, has ever given these words a reasonable interpretation:

If the identified alternatives are illusionary, then there may well be no legal alternative. A defendant, in demonstrating that he had no [\*53] reasonable legal alternative, must "show that he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefit of the alternative." ... As a general proposition, evidence that a defendant exhausted all available legal alternatives, and that such alternatives as a class had been futile over a long period, might be sufficient to allow a defendant to present his necessity defense to the jury. However, in this case there has been no attempt by the defendant to proffer any such evidence, or any evidence at all in support of the necessity defense. n191

The most circuitous analysis is contained in the *Maxwell* decision which states that even if a defendant demonstrates that he exhausted other alternatives, then that simply means that numerous other alternatives exist. This fact thus precludes the jury from hearing about necessity, even if the court admits that the alternatives are unlikely to be effective:

In the case at hand, *Maxwell* testified at trial to the many avenues he has explored to further nuclear disarmament (e.g. participating in letter-writing campaigns, attending a nonproliferation treaty conference, and taking part in demonstrations). His level of commitment is laudable, but the panoramic range of his activities clearly demonstrates that he has many legal options for advancing his political goals....The fact that *Maxwell* is unlikely to effect the changes he desires through legal alternatives does not mean, ipso facto, that those alternatives are nonexistent. Accepting such an argument would be tantamount to giving an individual carte blanche to interpose a necessity defense whenever he becomes disaffected by the workings of the political process. n192

These kinds of decisions do not give the words of the necessity defense their "ordinary, contemporary, common meaning" and they fail to follow the plain and simple meaning of the defense's language.<sup>193</sup> The result is a diminishment not only of plain understandable language but also of the role of the jury.

[\*54]

#### V. POLITICAL AND PHILOSOPHICAL REASONS FOR COURTS TO DENY THE NECESSITY DEFENSE

When the necessity defense is actually submitted to the trier of fact ...defendants have usually been acquitted.<sup>194</sup>

The real reason that courts do not want to allow protestors to offer evidence of necessity may well be that they fear the protestors might win. As the previous and following opinions illustrate, judges clearly perceive that their job is to protect order from the conscience-based actions of protestors who violate the law, rather than to have a jury hear about what the protestors perceive as the greater harm to society. This perception is reflective of the conflict between order and freedom. Judges do not want to allow juries to make important decisions in these cases. Judges are ruling that order trumps all else and refuse to allow juries to hear any of the evidence. Federal judges make pre-trial policy decisions that preserve order - at least the order that exists in the minds of the judiciary - that trumps the right of citizens to have their defenses heard by a jury.

Judges assume not only that the necessity defense allows evidence of the protestors to be presented, but that the defense will be successful:

To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law by which his personal standard was judged morally untenable. Toleration of such conduct would not be democratic, as appellants claim, but inevitably anarchic.<sup>195</sup>

[\*55] The Tenth Circuit reasoned:

To allow the personal, ethical, moral, or religious beliefs of a person, no matter how sincere or well-intended, as a justification for criminal activity aimed at preventing a law-abiding citizen from exercising her legal and constitutional rights would not only lead to chaos but would be tantamount to sanctioning anarchy.<sup>196</sup>

The Seventh Circuit opined:

One who elects to serve mankind by taking the law into his own hands thereby demonstrates his conviction that his own ability to determine policy is superior to democratic decision making. Appellant's professed unselfish motivation, rather than a justification, actually identifies a form of arrogance which organized society cannot tolerate.<sup>197</sup>

To accept the defense of necessity under the facts at bench would mean that markets may be pillaged because there are

hungry people; hospitals may be plundered for drugs because there are those in pain; homes may be broken into because there are unfortunately some without shelter; department stores may be burglarized for guns because there is fear of crime; banks may be robbed because of unemployment. The defense of necessity is not a cause or a potentiality. It must be articulable to an immediate, imminent fear and compulsion. Some might argue that the apprehension of a nuclear holocaust is more than a potentiality; it is survival. But it is equally arguable that hunger, pain and shelter are to those in need, similarly, issues of survival. There were other forms of protest available to the defendants which disembowel the defense of necessity.<sup>198</sup>

Chaos, anarchy, and arrogance. Pillage, plunder, and robbery. These judicial expressions display both a deep fear of allowing juries to hear these cases and also a significant hostility about the possible role of the jury. One commentator believes that judges develop anxiety over the undefined nature of the necessity defense in civil disobedience cases. Judges are thus eager to block juries from fulfilling their roles of making appropriate judgments in these cases out of fear of engaging in "an open-ended moral [\*56] inquiry."<sup>199</sup>

Would allowing juries the chance to hear the evidence of a necessity defense in a civil disobedience case undermine social order? Would allowing juries to hear this evidence lead to anarchy, chaos, pillage, plunder and robbery? If those questions do not answer themselves, then contrast the fears of judges with the thoughts of legal philosopher John Rawls:

If justified civil disobedience seems to threaten civic concord, the responsibility falls not upon those who protest but upon those whose abuse of authority and power justifies such opposition. For to employ the coercive apparatus of the state in order to maintain manifestly unjust institutions is itself a form of illegitimate force that men in due course have a right to resist.<sup>200</sup>

## VI. HOW THE NECESSITY DEFENSE SHOULD BE ANALYZED IN CASES OF CIVIL DISOBEDIENCE

We may mystify any thing. But if we take a plain view of the words of the Constitution, and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation.<sup>201</sup>

This article suggests a straight-forward method of analyzing and applying the necessity defense in civil disobedience cases. The goal should be to give the language of the elements of this defense a fair, obvious, and reasonable meaning. If there is any supporting evidence that might allow a jury to decide the case, then let the jury decide if the defendant has met the test. Initially, this rationale may look too easy to be legal; but if followed, it could allow the law the opportunity to create a chance for justice to peek through the clouds that have concealed the necessity defense from juries in civil disobedience cases. As a logical matter, trying this approach can hardly be more difficult than forcing the courts to go through the verbal, conceptual, and philosophical contortions that they have already engaged in to prevent juries from hearing this evidence.

In this analysis, the key words are "fair" and "reasonable." The Model Penal Code cautions against getting too fixated on the letter of the law in [\*57] necessity.<sup>202</sup> It suggests that the necessity defense is supposed to be flexible; similar to the concepts of recklessness or negligence, in that the necessity defense is intended to cover a wide range of activities. <sup>203</sup>

Thus, in order to get to a jury, a defendant seeking to use the necessity defense must be prepared to present evidence sufficient to meet the four elements of the defense: (1) that they were faced with a choice of evils and chose the lesser evil; (2) that they acted to prevent imminent harm; (3) that they reasonably anticipated a direct causal

relationship between their conduct and the harm to be averted; and (4) that they had no reasonable legal alternatives to violating the law.<sup>n204</sup> As with all defenses, it is not necessary for the accused to prove that she is entitled to win at the pre-trial stage, only that "there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility."<sup>n205</sup> If these words are given their fair and obvious meaning and are fairly and reasonably applied in cases of civil disobedience, what might these four elements look like and what kinds of proof should they require?

#### A. Lesser Evil

Starting with the words themselves, the court must decide whether the defendant was faced with a choice of evils; if so, did she choose the lesser evil? A fair and reasonable analysis of lesser evil can be conducted quickly; courts readily find satisfaction of this element.

The first inquiry is to determine the alleged evil that the accused was [\*58] seeking to prevent. Most of the reported cases involved nuclear weapons, human rights violations and atrocities, major environmental damage, and war. Even if a jury does not agree with the wisdom of the protestor or their position on these controversial issues, there can be little doubt that these are significant evils.

Secondly, what evil is the defendant accused of? In almost all the reported cases on civil disobedience and necessity, the defendants were accused of minor offenses, including trespassing, blocking a street, and climbing a fence. Cases involving property damage were typically minor. Under any objective standard, the illegal actions of protestors are lesser evils than the evils they seek to prevent. Trespass, blocking traffic, and minor damage to property are all lesser crimes than damages to persons, much less intentional widespread damages from military actions or weapons.<sup>n206</sup> This conclusion is not automatic. <sup>n207</sup> It is reasonable to insist that the more serious the alleged crime, the deeper the court should look to see if there is evidence that this balancing test could be met.

#### B. Imminent Harm

The traditional second element of the necessity defense requires that the accused acted to prevent imminent harm. This element should probably be eliminated. The Model Penal Code specifically rejects the requirement that the evil which is sought to be avoided be imminent.<sup>n208</sup> If a court decides not to remove the requirement, then proving imminent harm should not be a significant hurdle for defendants. If the requirement is retained, the defendant will be expected to present proof that the evil she sought to prevent was, or is, likely to happen. <sup>n209</sup> For example, the respected Natural Resources Defense Council points out:

A single U.S. nuclear submarine carries up to 192 warheads and could kill or maim about a third of Russia's population, some 50 million people. The United States has 18 of these submarines. All told, the explosive power of America's nuclear warheads is 100,000 times greater than the single Hiroshima bomb. And our nuclear war plan [\*59] keeps many of these weapons on hair-trigger alert.<sup>n210</sup>

The World Court unanimously decided on July 8, 1996: "There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons."<sup>n211</sup> This sentence embodies the type of evidence for imminent harm that juries should be allowed to weigh in necessity cases involving protests against nuclear weapons. Federal courts have held that this element demands an emergency that imperils the defendant; these decisions are flawed, particularly their patently unreasonable conclusions that anti-nuclear protestors must prove prior to trial that nuclear war is just about to occur in order to utilize the defense. <sup>n212</sup>

As with all the elements, defendants need not show prior to trial that a jury will necessarily agree with the defense, but the courts must give this element a fair interpretation and allow a jury to decide whether it is sufficient to negate

guilt. Clearly, if there is any question whether the harm [\*60] was imminent, that is a question of fact for the jury.<sup>n213</sup> The courts should allow the trier of fact to review evidence on whether such harm existed.

### C. Direct Causal Relationship

The third element questions whether the protestor reasonably anticipated a direct causal relationship between her conduct and the harm to be averted. Defendants have a right to let the jury evaluate evidence on the causal connection between criminal acts of civil disobedience and harm.

As several state courts and many commentators have noted, this nation has had a long history of legislative change prompted by principled and non-violent, but nonetheless unlawful political protest.<sup>n214</sup> The courts could easily take judicial notice of the historical fact that movements opposing slavery, supporting women's suffrage, civil rights, and other peace and justice efforts, as well as the actions of people who chose the lesser of two evils, have demonstrated a causal connection between civil disobedience and the evils protestors have sought to overcome. <sup>n215</sup> Federal case law, [\*61] unfortunately, has not recognized this causal connection and should be jettisoned.

As one commentator has noted, a direct causal relationship is not

[A] rigid time/space nexus between the act and the perceived harm ... A court may find that an attenuated relationship between the act and the harm does not constitute a strict causal nexus. However, it does not follow from this finding that no reasonable juror [or the court itself] could find that the particular scenario created a reasonable belief in the efficacy of the act. The court should not use its power to interpret the meaning of the defense narrowly to keep the determination of reasonableness from the jury.<sup>n216</sup>

The jury must make this decision. Jurors may well think that the defendant is engaging in criminal behavior that has an insufficient causal relationship to the evil she seeks to stop, but they must be to the ones to make that decision. For a court to rule otherwise is to give these words an unfair, unreasonable, and pessimistic interpretation which effectively states that absolutely no action by the defendant could ever stop the harm she seeks to avert. History shows otherwise.

[\*62]

### D. Lack of Reasonable Legal Alternatives

The final element is that the accused had no reasonable legal alternatives to violating the law. The starting point to the analysis of this prong is the key word "reasonable." The Supreme Court in *Bailey* explicitly made this prong of the necessity defense a test of reasonability: "Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defenses will fail."<sup>n217</sup> Therefore, a defendant must be allowed to present evidence regarding the lack of reasonable legal alternatives to the actions taken.

An appropriate interpretation of "lack of reasonable alternatives" does not mean that there are not any available legal alternatives. Numerous federal courts have unfairly and unreasonably declared that defendants have always had an alternative.<sup>n218</sup> These courts commit another ironic miscarriage to language, to the law, and to justice by construing the word "reasonable" so narrowly. Courts cannot exclude the reasonableness part of this element without making a judicial finding of fact or law that there are always other alternatives to engaging in civil disobedience, though some obviously have done exactly that.

Such a result is suspect. As one commentator has noted, it is too convenient and may be somewhat unprincipled to deprive a defendant of her chance to put on evidence by concluding that there are always other alternatives to civil

disobedience. Such a position "allows for swift [\*63] punishment of civil disobedience at the same time that it espouses rhetoric supporting free speech and the individual's power in a free society. Although supporting free speech and punishing civil disobedience are not incompatible positions, one is suspicious of so simple a syllogism."<sup>219</sup> Under a fair and reasonable interpretation of the words themselves, this part of the test is not so stringent. This standard must be also premised on reasonable belief as held by the defendants:

Consider, for example, the case where defendants make a prima facie showing that they reasonably believed that history demonstrates the futility of legal action. Even if these defendants are before a judge who does not believe that a history of futile attempts constitutes a no-legal-alternative situation, due process entitles them to jury consideration of whether their belief in the futility of legal action was reasonable and whether this established a reasonable belief that no legal alternative existed.<sup>220</sup>

The defendant must be given the opportunity to admit evidence of the lack of reasonable legal alternatives to the action she took. Again, the jury should be given the chance to determine whether reasonable legal alternatives were available or not.

The defendant must be given the opportunity to demonstrate why available alternatives were not reasonable in her situation. Black's Law Dictionary defines "reasonable" as: "Fair, proper, or moderate under the circumstances. According to reason."<sup>221</sup> The question before the trier of fact is whether the defendant had reasonable (that is fair, proper, ordinary, usual, or appropriate) legal alternatives to violating the law. If a defendant provides weak evidence of a lack of alternatives, it should not be too difficult for the prosecutor and the jury to dispose of such alternatives. However, if the defendant presents evidence of substantial exhaustion of alternatives and also satisfies the other elements, then the jury may well decide that the necessity defense has been proven.

Finally, application of this part of the test cannot be premised on the availability of unrealistic or unavailable alternatives. As one commentator has noted:

Reasonable must mean more than available; it must imply effective. Surely a jury can believe that there are situations in which constitutionally protected free speech has proved so ineffective in changing undesirable laws or policies that a reasonable social reformer would feel compelled to resort to another strategy. Thus, some civil [\*64] disobedients can raise a question of fact as to whether reasonable legal alternatives exist. For example, antinuclear protestors can show that their previous political activities did not provoke an articulate response from the government, much less a policy change. And they can explain why their particular technique, with its direct confrontation and symbolic effect, is more promising. Sanctuary workers can show that there is no other way to save refugees' lives. Such a showing should entitle the jury to hear evidence on this element.<sup>222</sup>

Another commentator has stated that:

The problem is rarely so simple as that of choosing between a lawful and an unlawful course of equivalent effectiveness. The point is that lawful channels may exist on paper but not in fact; or they may be quite unusable in the existing circumstances... . Showing that lawful protest is possible, therefore, cannot by itself prove that disobedient protest is unjustifiable; what would have to be shown is that ... some practical form of legal protest would be equally (or almost equally) effective in accomplishing the much needed change.<sup>223</sup>

The defendant must be expected to offer proof that she has attempted to use other lawful means in order to make out a

prima facie case under this part of the test. Civil disobedience should neither be considered the responsible citizen's first act of advocacy, nor should it be considered the last. The rule says reasonable, and reasonable it must be.

## VII. THE IMPORTANCE OF LETTING THE JURY DECIDE

I consider [the trial by jury] as the only anchor, ever yet imagined by man, by which a government can be held to the principles of it's [sic] constitution.n224

Trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.n225

[\*65] Because the law of the necessity defense in civil disobedience cases is located precisely at the intersection of freedom and order, it is critical for democracy to permit the law to balance these critically important values by letting juries decide these cases. An appeal of a citizen to a jury is a unique opportunity for a person to challenge the government's abuse of authority. Perhaps that is exactly why the dichotomy exists: citizens who have engaged in civil disobedience frequently seek juries, while governments just as frequently seek to deny trial by jury. It is time to re-invigorate this "bulwark of individual liberty against the state" and let the juries decide these civil disobedience necessity cases.n226

It is ironic that in civil disobedience actions, judges, actors with substantial governmental power and authority, regularly make pre-trial rulings in favor of prosecutors, thus denying citizen-defendants the right to present evidence explaining the grounds for their necessity defense. These rulings preclude other citizens on the jury from deciding the defendants' guilt or innocence.n227

In the high profile sanctuary case, *United States v. Aguilar*, the defendants were accused of aiding refugees to enter into the United States. The defendants openly and publicly declared that they were motivated by religious, legal, and humanitarian concerns to assist refugees. The prosecution filed a motion in limine seeking to preclude the defendants from offering any evidence about: the law of necessity, freedom of religion, international law, lack of specific legal intent to break the law, references to their unindicted co-conspirators from Guatemala and El Salvador as refugees or asylum seekers, any information about civil strife in Central America, violations of international law by the United States, or American policies on immigration.n228 The prosecutors wanted to ensure that the jury did not hear about the necessity defense because the accused civil disobedients were using the refugees to advance their political agenda of protesting the American response to political conditions in El Salvador. n229 The appellate court agreed with the prosecutor and trial judge that the jury should not have heard any argument, evidence, or instruction about the defendants' state of mind concerning: the law, the necessity defense, freedom of religion and their religious motivations, immigration law, and United States foreign policy. n230

[\*66] Decisions such as these effectively deprive protestors of the opportunity to explain to the jury why they thought their actions were not criminal.n231 Pre-trial preclusion of the right to admit evidence of the necessity defense strips the protestors' constitutional right to a jury. Such judicial action is contrary to the purpose of a trial by jury.

It is important to recall the history of the right to trial by jury. This right was first secured in 1215 when rebel subjects forced King John to include the right in concessions which made up the Magna Carta.n232 Like most rights, it was not magnanimously bestowed by those in authority as an act of kindness - it was demanded. The most famous clauses of the Magna Carta are counted among the fundamental principles of law:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

To no one will we sell, to no one deny or delay right or justice.n233

[\*67] Blackstone placed the jury squarely between the arbitrary power of government and the freedom and due process of the citizen.n234 He recognized the demands on judicial economy, but rightly observed that such demands are but a small price to pay for the protections offered:

The trial by jury... is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter ... .

... .

Our law has, therefore, wisely placed this strong and twofold barrier of a presentment and a trial by jury between the liberties of the people and the prerogative of the Crown... . So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make), but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and other tribunals similarly constituted. And, however convenient these may appear at first, as doubtless all arbitrary powers, well executed, are the most convenient, yet let it be again remembered, that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposed to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.n235

Juries were always thought to be an important counterweight to judges. The right to trial by jury was a cornerstone of this country; judges, as an appointee of government and naturally partisan to the prosecution, were intended to be kept in check by the jury and to take up their proper role as referee, "enforcing the observance of the rules by both parties, thus ensuring a more objective verdict by a trial jury."n236

The Declaration of Independence addressed King George III's attempt to limit jury trials in three of its charges - yet the document only discusses [\*68] judges in one charge.n237 As one observer has noted, juries were prized in part because they were believed to offer protection from the power of judges:

Thus, even after establishing direct representation and an independent judiciary, colonists continued to fear potential executive and legislative overreaching as well as arbitrary exercises of power by judges, whom they believed would tend to favor the government. The founders therefore allocated juries considerable power to assure community oversight over potential misuses of governmental power. By involving [\*69] ordinary citizens in the execution of the laws, trial by jury was intended to safeguard individual liberty and prevent unjust governmental action.n238

This right was so important to early Americans "that it was the only procedural right included in the original Constitution."<sup>n239</sup> The Supreme Court has repeatedly stressed the importance of juries and has warned judges to retreat from attempts to limit the authority of juries. <sup>n240</sup> Indeed, protection against overbearing and oppressive judges was one of the main arguments of the proponents of jury trials when the Bill of Rights were enacted. <sup>n241</sup> Commentators agree that the purpose of the jury is to give the average person the opportunity to challenge governmental misconduct. <sup>n242</sup> This is particularly important in protecting the citizens from government oppression. As Roscoe Pound has stated: "The will of the state at large imposed on a reluctant community, the will of a majority imposed on a vigorous and determined minority, find the same obstacle in the local jury that formerly confronted kings and ministers." <sup>n243</sup> The Supreme Court has recognized that while juries are not perfect, they are essential to our judicial system:

Jurors may be perverse; the ends of justice may be defeated by unrighteous verdicts, but so long as the functions of the judge and the jury are distinct, the one responding to the law, the other to the facts, neither can invade the province of the other without destroying the [\*70] significance of trial by court and jury.<sup>n244</sup>

As the Supreme Court has repeatedly and explicitly recognized since 1968:

A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government... . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge... . Fear of unchecked power ... found expression in ... this insistence upon community participation in the determination of guilt or innocence.<sup>n245</sup>

It has long been settled that due process protects persons charged with criminal conduct by permitting them to present exculpatory evidence to the jury.<sup>n246</sup> Yet, in cases of civil disobedience, particularly in federal court, judges routinely have denied defendants the right to present the necessity defense to the jury. <sup>n247</sup> This decision contradicts the development of the necessity defense. One commentator, addressing the rationale offered by *State v. Wooten and Hale v. Lawrence*, two key cases in the history of the understanding of the necessity defense, has stated:

Ordinarily the question here involved [whether necessity is an appropriate defense] is one of fact to be determined by the jury...This justification, therefore, under a plea of necessity is always a question of fact to be tried by a jury and settled by their verdict, unless the sovereign authority shall have constitutionally provided some other mode. This, of course, must be taken to mean that where there is evidence tending to establish such justification, its weight and sufficiency are for the jury, and the Court may pass upon it as a matter of law only where evidence is wholly wanting and may exclude proof of [\*71] a given state of facts only when that state of facts could not in any event warrant the interposition of this plea.<sup>n248</sup>

As a policy matter, those judges who fear that anarchy will result from allowing juries to hear evidence of necessity in civil disobedience cases should recall their that there is little reason to fear that juries will only necessarily acquit. While there are examples of juries having acquitted people who openly opposed American policies,<sup>n249</sup> there are also numerous examples of the government successfully persuading juries to convict in political trials. <sup>n250</sup>

Further, it is precisely in controversial and confusing cases like civil disobedience cases involving the necessity defense, that the role of the jury finds its highest function:

Where activity falls within the "penumbra" of the law or where disagreement exists in a society about a moral issue or the extent to which a value is absolute (admitting to no exceptions) or relative, there seems to be little reason why a defendant should not be allowed in the first instance to have the jury as the "conscience of the community" and his peers decide whether he made an objectively correct choice of values ...When the defendant raises a good faith defense of necessity, that is, when he makes a non-frivolous claim that his otherwise criminal act was done to preserve some higher value, the jury as the representative of the community should be allowed to decide the issue of relative values...n251

The Model Penal Code suggests that adjudication may be messy, but that it is appropriate in determining necessity defenses.n252 Thus, taking the necessity defense away from the jury before the civil disobedience case begins undercuts the historical and actual importance of the jury. Civil disobedience cases cry out for jury trials even more than other cases [\*72] because they involve direct challenges to governmental powers. Pre-trial preclusion of the defense robs the defendant of the opportunity to present her facts to people other than the judge, who is, after all, a part of the government. And pre-trial preclusion of the right to jury deliberation of this defense only underscores the perception that indeed the government has stacked the deck against the protestor. This perception is why people have fought for the right to trial by jury. The efforts of the judges and prosecutors, as employees of government, should not be allowed to preclude or limit trial by jury of this important defense any longer. Proper application of the necessity defense lets the jury decide.

## VIII. CONCLUSION

The lack of precision in the general rule is unavoidable if the rule is not to be improperly constricted; the situation is akin to the imprecision of such concepts as recklessness and negligence, which also call in part for weighing conflicting values. Deep disagreements are bound to exist over some moral issues, such as the extent to which values are absolute or relative and how far desirable ends may justify otherwise offensive means. Thus, even when a specific legislative resolution is theoretically possible, it may be quite unattainable in practice. The alternative of submitting such issues to adjudication, as they arise in concrete cases, therefore has much strategic virtue.n253

The law of necessity in the area of civil disobedience is vague, fragmented, political, and fraught with contradiction. It pits concerns about protecting law and order against concerns about social justice and individual freedom. While state courts have often interpreted and applied the necessity defense properly, federal courts have failed to do so. The decisions of federal courts show judges engaging in logical contortions in an effort to avoid giving the words of the defense their simple and reasonable meaning. The history of this nation is littered with the acts of regular people who fear too much order imposed by the government will result in the loss of individual freedom.

Order and freedom. Civil disobedience trials represent the clash between these two goods. The health of both principles demands that judges should not make pre-trial decisions about which of these goods should prevail, absent the adherence to a reasonable exercise of judgment and a clear use of the simple words of the law. Federal judges can learn a great deal from their state court counterparts. For the health of both order and freedom, especially in the many cases where it is not clear which principle should prevail, let the jury decide.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Copyright Law Foreign & International Protections General Overview Criminal Law & Procedure Defenses Necessity Labor & Employment Law Collective Bargaining & Labor Relations Strikes & Work Stoppages

**FOOTNOTES:**

n1. By April 2003, over 7,500 people had been arrested in over 300 actions of resistance to the war on Iraq. In 2002, over 1,800 people were arrested for protests against the buildup to the invasion of Iraq and an additional 431 people were arrested for civil disobedience at anti-nuclear actions. See Jack Cohen-Joppa & Felice Cohen-Joppa, Resistance Reflections: Resistance 2002, *The Nuclear Resister*, Apr. 24, 2003, at 2, available at <http://www.nonviolence.org/nukeresister/133reflections.html> (last visited Nov. 19, 2003). Approximately 3,000 people were arrested for anti-war civil disobedience in San Francisco alone. See Dean E. Murphy, San Francisco Protest Brings Debate on Wages of Din, *N.Y. Times*, June 23, 2003, at A14.

n2. Those seeking to learn more about this area of the law will profit, as I have, from reviewing the Peace Law Packet on the necessity defense published by Meiklejohn Civil Liberties Institute. This packet contains many trial materials and summaries of unreported cases on the necessity defense. The Institute can be reached by mail at Box 673, Berkeley, CA 94701; by phone at (501) 848-0599; or on-line at <http://www.sfsu.edu/~mclifc>.

For more on the necessity defense, see *Power of the People: Active Nonviolence in the United States* (Robert Cooney & Helen Michalowski eds., 1977) [hereinafter *Power of the People*]; *Protest, Power, and Change: An Encyclopedia of Nonviolent Action from ACT-UP to Women's Suffrage* (Roger S. Powers & William B. Vogeled eds., 1997) [hereinafter *Protest, Power, and Change*]; *The Tree of Liberty: A Documentary History of Rebellion and Political Crime in America* (Nicholas N. Kittrie & Eldon D. Wedlock eds., 1998) [hereinafter *Tree of Liberty*]; Robert Aldridge & Virginia Stark, Nuclear War, Citizen Intervention, and the Necessity Defense, 26 *Santa Clara L. Rev.* 299 (1986); Edward B. Arnolds & Norman M. Garland, The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil, 65 *J. Crim. L. & Criminology* 289 (1974); Steven M. Bauer & Peter J. Eckerstrom, The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience, 39 *Stan. L. Rev.* 1173 (1987); James L. Cavallaro, Jr., The Demise of the Political Necessity Defense: Indirect Civil Disobedience and *U.S. v. Schoon*, 81 *Cal. L. Rev.* 351 (1993); Douglas L. Colbert, The Motion in Limine: Trial Without Jury - A Government's Weapon against the Sanctuary Movement, 15 *Hofstra L. Rev.* 5 (1987) [hereinafter Colbert, Trial Without Jury]; Douglas L. Colbert, The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial, 39 *Stan. L. Rev.* 1271 (1987) [hereinafter Colbert, Politically Sensitive Cases]; Bernard D. Lambeck, Necessity and International Law: Arguments for the Legality of Civil Disobedience, 5 *Yale L. & Pol'y Rev.* 472 (1986); John T. Parry, The Virtue of Necessity: Reshaping Culpability and the Rule of Law, 36 *Hous. L. Rev.* 397 (1999) [hereinafter Parry, The Virtue of Necessity]; Case Comment, The Law of Necessity as Applied in the Bisbee Deportation Case, 3 *Ariz. L. Rev.* 264 (1961); Laura J. Schulkind, Note, Applying the Necessity Defense to Civil Disobedience Cases, 64 *N.Y.U. L. Rev.* 79 (1989).

I also suggest visiting the Meiklejohn Civil Liberties Institute Archives of the University of California, Berkeley Bancroft Library. For decades, Ann Fagan Ginger has collected and organized legal materials about civil rights, civil liberties, and civil disobedience for the library. There are also several on-line resources of note, including the Peace Law and Human Rights and Peace Law Docket, 1945-1993. This archive is by far the most valuable resource for information on non-published opinions in this area. In this article, my references to these cases are summaries of what appears in the digital display of these archives. The archive is located at <http://bancroft.berkeley.edu/collections/meiklejohn/project.html>.

n3. Arnolds & Garland, *supra* note 2, at 289 (quoting G. Williams, *The Criminal Law* 229 (2d ed. 1970)).

n4. *Id.* at 291; see also Bauer & Eckerstrom, *supra* note 2, at 1175 (stating that "the development of the necessity defense has not been particularly clear").

n5. Model Penal Code and Commentaries 3.02 cmt. 1 (1962).

n6. *75 Eng. Rep. 1 (K.B. 1550)*.

n7. *Id. at 29*. In *Reniger*, the court held that the storm created a circumstance in which throwing cargo overboard "may break the words of the law, and yet not break the law itself." *Id. at 32*. This case continues to be cited. See, e.g., *Jenks v. Florida*, 582 So. 2d 676, 678 (*Fla. Dist. Ct. App.* 1991).

n8. The Supreme Court has acknowledged this confusion, but unfortunately has not reduced it. See *United States v. Bailey*, 444 U.S. 394, 410 (1980); *infra* Part III.D; see also Arnolds & Garland, *supra* note 2, at 290; Michael D. Bayles, *Reconceptualizing Necessity and Duress*, 33 *Wayne L. Rev.* 1191, 1191 (1987).

n9. *The Gratitude*, 165 *Eng. Rep.* 450, 459 (1801). In this shipping case, Sir Walter Scott found that the conduct of the shipmaster in sacrificing the cargo was justified by necessity due to the circumstances. See *id. at 462*.

n10. Arnolds & Garland, *supra* note 2, at 291 (citing supporting cases).

n11. See, e.g., *The William Gray*, 29 *F. Cas.* 1300 (*C.C.D. N.Y.* 1810) (No. 17,694). This early necessity defense case involved the ship *William Gray*, which left Virginia with a cargo of flour but could not dock due to bad weather and went instead to the West Indies despite an embargo on such voyages. When the government prosecuted, Circuit Justice Livingston found the evidence of bad weather supported the defense of necessity and found no crime.

n12. *United States v. Ashton*, 24 F. Cas. 873, 873-74 (C.C.D. Mass 1834) (No. 14,470).

n13. Arnolds & Garland, supra note 2, at 290-94 (discussing Wooten and the other federal and state cases involving the necessity defense). Wooten is unreported because it is an acquittal. Much of the opinion, however, is reproduced in *The Law of Necessity as Applied in the Bisbee Deportation Case*, supra note 2.

n14. Norval Morris, *The Verswami Story*, 52 U. Chi. L. Rev. 948, 989 (1985) (citations omitted); see also *The Law of Necessity as Applied in the Bisbee Deportation Case*, supra note 2.

n15. Arnolds & Garland, supra note 2, at 293.

n16. See *The Law of Necessity as Applied in the Bisbee Deportation Case*, supra note 2, at 273; Arnolds & Garland, supra note 2, at 293. The court was following the decision of *Commonwealth v. Blodgett*, 53 Mass. (12 Met.) 56 (1846), which also stands for the proposition that the jury is the proper trier of the defense. See Arnolds & Garland, supra note 2, at 293 n.58; *Blodgett*, 53 Mass. (12 Met.) at 71, 85.

n17. 26 F. Cas. 360 (E.D. Pa. 1842) (No. 15,383).

n18. 14 Q.B.D. 273 (1884).

n19. *Holmes*, 26 F. Cas. at 364.

n20. *Id.* at 366.

n21. See *id.* at 368-69.

n22. See *Regina*, 14 *Q.B.D.* at 273.

n23. *Id.* at 274.

n24. *Id.* at 288.

n25. *Id.*

n26. See *United States v. Holmes*, 26 *F. Cas.* 360, 366 (*E.D. Pa.* 1842) (No. 15, 383).

n27. See Arnolds & Garland, *supra* note 2, at 295-96.

n28. The Law of Necessity as Applied in the Bisbee Deportation Case, *supra* note 2, at 264. In reference to *State v. Wooten*, the author wrote: "Its popular fame rests on its sensational facts, its legal interest upon its application of the seldom-invoked law of necessity." *Id.*

n29. Wayne R. LaFave, *Criminal Law*, 5.4, at 477 (3d ed. 2000).

n30. See Parry, *The Virtue of Necessity*, *supra* note 2, at 401 n.17. Parry notes that civil disobedience cases and the necessity defense have not meshed well together and have revealed significant problems in both the necessity defense and criminal culpability in general. He gives a comprehensive critique of both the definition and the application of necessity and concludes that civil disobedience defenders, prosecutors, and judges talk past each other with no common points or anchors for the discussion. See *id.* at 402. The result is a very incomplete, very unobjective, and very flawed analysis. He proposes an entirely new approach to help resolve the dilemmas. Parry also accurately points out that necessity in the area of political protest follows a pattern: whenever any court rules against the use of the necessity defense, whether it be for protests against Central American policies, abortion, or nuclear holocaust, "a law review article appears chastising the court for its inability to weigh the balance of harms correctly." *Id.* at 400-01.

n31. *United States v. Quilty*, 741 F.2d 1031, 1033 (7th Cir. 1984) (quoting *United States v. Bailey*, 444 U.S. 394, 410 (1980)).

n32. Arnolds & Garland, *supra* note 2, at 294. Some courts also call for a three-part test that examines whether: "(1) the defendant acted to prevent imminent, immediate harm; (2) the defendant had no legal alternative to violating the law; and (3) the defendant reasonably anticipated a direct causal relationship between his conduct and the avoidance of the harm." *United States v. Katzberg*, 201 F.R.D. 50, 52 (D.R.I. 2001) (describing situation where defendants draped a black banner reading "No More Nuclear Victims" across a highway outside of the Newport Naval Station).

n33. *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 2001); see also *United States v. Duclos*, 214 F.3d 27, 33 (1st Cir. 2000); *United States v. Turner*, 44 F.3d 900, 902 (10th Cir. 1995).

n34. LaFave, *supra* note 29, 5.4, at 476.

n35. See *id.* at 476-77.

n36. *Id.* at 477.

n37. *Id.* at 477 n.6 (quoting 2 P. Robinson, *Criminal Law Defenses* 124(e)(1) (1984)).

n38. See Model Penal Code 3.02 (1962).

n39. *Id.*

n40. Model Penal Code and Commentaries 3.02, at 10 (1962).

n41. Id. 3.02, at 11.

n42. Id. 3.02, at 12.

n43. Id. 3.02, at 16-17.

n44. Id. 3.02, at 17.

n45. Id.

n46. Model Penal Code and Commentaries 3.02, at 14 (1962); see also *Restatement (Second) of Torts* 197, 262 (1965) (illustrating the acceptance of the principle of necessity in the law of torts).

n47. See Model Penal Code and Commentaries 3.02, at 12-13.

n48. Arnolds & Garland, *supra* note 2, at 299.

n49. Martin Luther King, Jr., Letter from a Birmingham Jail (1963), reprinted in *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.* 293 (James M. Washington ed., 1986).

n50. Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law* 39-40 (1971).

n51. *United States v. Kabat*, 797 F.2d 580, 601 (8th Cir. 1986) (Bright, J., dissenting). Judge Bright continued:

In these circumstances, the courts in assessing punishment for violation of laws have ordinarily acted with a degree of restraint as to the severity of the punishment, recognizing that, although legally wrong, the offender may carry some moral justification for the disobedient acts. What has distinguished our society from other countries whose governments are described as repressive is that our government has been able to limit its response to this sort of protest which, it must be specifically noted, is nonviolent as to persons.

Id.

n52. See Hugo Adam Bedau, *Civil Disobedience*, in *Protest, Power, and Change*, supra note 2, at 83-86. Bedau's entry is scholarly and thoughtful and he has written much on the subject, but, in the opinion of this author, the entry is overly narrow in its descriptions of and conclusions about civil disobedience. Two examples suffice here and a difference of opinion over the acceptance of punishment will be discussed in a later note. Bedau asserts that civil disobedience in societies that flout human rights verges on futility and martyrdom. This conclusion seems to unfairly diminish the actions of thousands of people who engaged and continue to engage in acts of civil disobedience, especially in tyrannical societies. Bedau suggests that the acts of civil disobedience in opposition to the Vietnam War marginally impacted national policy while similar actions opposing segregation had a major impact - an argument that can be validly made but one that is not nearly as clear and persuasive as he would suggest. Cf. Charles Chatfield, *Vietnam War Opposition*, in *Protest, Power and Change*, supra note 2, at 547-55 (arguing that Vietnam War opposition helped infuse dissent "into mainstream politics where it helped to mobilize popular and legislative opposition"); see also *Civil Disobedience in America: A Documentary History 17-32* (David R. Weber ed., 1978) [hereinafter *Weber, Civil Disobedience*] (introducing how civil disobedience fits into society).

n53. See Bedau, *Protest, Power, and Change*, supra note 2, at 84 (arguing, for example, that Henry David Thoreau's intentionally unlawful conduct was "more nearly a personal act of conscientious refusal, ... rather than an act of civil disobedience").

n54. Most definitions of civil disobedience assume non-violence toward people who are the opponents. But see Staughton Lynd, *Historical Perspectives on Civil Disobedience in the United States*, 43 *Guild Prac.* 27 (1986) (describing sit-ins where people defended themselves against violence by striking back). The question of whether a nonviolent protest can ever involve damage to property is quite open to debate. As Bedau notes, such a narrow definition would exclude two of the most famous illustrations of civil disobedience: the Boston Tea Party (during which hundreds of containers of tea were destroyed) and the Vietnam-era case of the Catonsville Nine (who destroyed draft files with napalm). See Bedau, *Protest, Power, and Change*, supra note 2, at 84; see also Howard Zinn, *Disobedience and Democracy: Nine Fallacies on Law and Order* 39-53 (2002). Zinn suggests that non-violence is indeed the best means of promoting change, but notes the difference between civil disobedience and non-violence. Zinn also reminds us that Gandhi said, "I do believe that where there is only a choice between cowardice and violence I would advise violence." *Id.* at 42.

n55. See, e.g., Bedau, *Protest, Power, and Change*, supra note 2, at 84-85 (suggesting that acceptance of punishment without protest is a requirement for civil disobedience - a notion that might come as a surprise to the union workers who performed sit-ins at auto factories to support their union drives, or to people who furtively sought to help slaves escape). This point is deeply contested: for example, Howard Zinn believes that it is a fallacy to suggest that a person, protesting an unjust law or action, must automatically accept punishment as part of such protest:

Why must the citizen "accept the result" of a decision he considers immoral? To support "the rule of law" in the abstract?

... .

... The sportsmanlike acceptance of jail as the terminus of civil disobedience is fine for a football game, or for a society determined to limit its reform to tokens. It does not suit a society which wants to eliminate long-festering wrongs.

Zinn, supra note 54, at 27, 31. Cohen suggests that acceptance of punishment is not automatic; rather, it depends on the circumstances. See Cohen, supra note 50, at 86-91; see also Kent Greenwalt, *Justifying Nonviolent Civil Disobedience*, in *Civil Disobedience In Focus* 170, 185-86 (Hugo Adam Bedau ed., 1991) (questioning the necessity to accept one's punishment for civil disobedience). Gandhi was the greatest example of accepting punishment after breaking the law in both a non-violent and deliberate fashion. For example, in his famous trial for sedition, Gandhi, in his address to the court at the close of the case, accepted responsibility and asked for punishment. He stated:

I do not ask for mercy. I do not plead any extenuating act. I am here, therefore, to invite and cheerfully submit to the highest penalty that can be inflicted on me, for what in law is a deliberate crime and what appears to me to be the highest duty of a citizen.

Statement of Mahatma Gandhi at March 18, 1992 Trial, reprinted in Robert Payne, *The Life and Death of Mahatma Gandhi* 364 (1969). Likewise, Martin Luther King, Jr., in his Letter from a Birmingham Jail, eloquently wrote on the same point: "I submit that an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for the law." King, supra note 49, at 294. In evaluating their positions, note that both Gandhi and King were, first and foremost, committed to non-violence, not civil disobedience. Their acts of civil disobedience were used, as Gene Sharp has noted, as "a technique capable of taking the initiative in active struggle. A link was forged between a means of mass struggle and a moral preference for non-violent means, although for participants this preference was not necessarily absolutist in character." Gene Sharp, *Gandhi as a Political Strategist* 14 (1979). Above all, Gandhi clearly prized action for justice and would not have likely quarreled with people challenging the legality of their arrests. Indeed, he even accepted the efforts of people who challenged injustice by means other than ones of non-violence. "It is better to be violent," he stated, "if there is violence in our hearts, than to put on the cloak of non-violence to cover impotence. Violence is any day preferable to impotence. There is hope for a violent man to become non-violent. There is no such hope for the impotent." Gandhi on Non-Violence 37 (Thomas Merton ed., 1965).

n56. See Bedau, Protest, Power, and Change, *supra* note 2, at 83-86; Cohen, *supra* note 50, at 92-128; Weber, Civil Disobedience, *supra* note 52, at 17-32.

n57. See Bedau, Protest, Power, and Change, *supra* note 2, at 84. This distinction is important due to the unfortunate and severely flawed decision of *United States v. Schoon*, 971 F.2d 193 (9th Cir. 1992). Schoon suggests that the necessity defense should not be available to defendants charged with indirect civil disobedience. *Schoon*, 971 F.2d at 196-200. No party briefed or argued this issue to the Schoon panel, and an analysis of the decision exposes the judges' misunderstanding of the issues. See *id.*

n58. See *infra* Part III.F.

n59. See Bedau, Protest, Power, and Change, *supra* note 2, at 84. Another commentator has noted that under this artificial distinction, essentially similar actions would be classified differently. For example, when Rosa Parks refused to move from her seat on the Montgomery bus, it was considered direct civil disobedience because she violated the actual segregation ordinance that prohibited her from refusing. In contrast, the Freedom Riders protested segregation by riding buses, but authorities arrested them for trespass. Therefore, since the riders did not directly attack the bus law, they were characterized as engaging in indirect civil disobedience. See Lambeck, *supra* note 2, at 475; see also Zinn, *supra* note 54, at 32-38 (claiming that the notion that civil disobedience must be limited to laws which are themselves wrong is a fallacy).

n60. See King, *supra* note 49, at 289.

n61. See Bedau, Protest, Power, and Change, *supra* note 2, at 84; see also *Schoon*, 971 F.2d at 196-200.

n62. Francis Boyle writes that civil resistance is quite different from civil disobedience. Civil resistance is a First Amendment-protected right to peaceably assemble and petition the government for redress of grievances. Though under some circumstances the actions may be found to violate a law, it is peaceable and enjoys its constitutional protection. Thus, the First Amendment should recognize a right for citizens who specifically intend to prevent or impede ongoing criminal activity by our government. The main distinctions between civil disobedience and civil resistance is that civil disobedience (1) carries with it an assumption of guilt and (2) the individuals that characterize their actions as civil disobedience accept punishment as a sign of moral purity. See Francis Anthony Boyle, *Defending Civil Resistance Under International Law* 1-8, 16-18 (1987).

n63. Socrates, according to Plato, said "gentlemen of the jury, I am grateful and I am your friend, but I will obey the god rather than you... ." Plato, *Apology* 29d, reprinted in *Plato: Complete Works* 17, 27 (John M. Cooper ed., 1997). According to St. Augustine, "an unjust law is not a law." King, *supra* note 49, at 293. The Judeo-Christian scriptures are filled with evidence of civil disobedience. In Exodus 1:17, Hebrew midwives disobeyed orders from the King of Egypt to kill all boys at childbirth. Moses survived only because of a woman's act of civil disobedience. See Exodus 2:1-4. Shadrach, Mesach, and Abednego flagrantly disobeyed the orders of King Nebuchadnezzar. See Daniel 3:12-19; see also Jeremiah 38:1-6; Acts 5:25-41; Acts 17:6-7; Hebrews 10:32-35. But see Romans 13:2 ("Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation.").

In 494 B.C., in a dispute between the plebeians and the consuls of Rome, the plebeians pulled out from the city, refused to cooperate in the life of the city, and successfully forced the authorities to make changes. Similarly, in 258 B.C., the army withdrew, threatened to begin a new city, and caused the Senate to change. The people of the Netherlands resisted occupation by the Spanish from 1565 to 1576. See Gene Sharp, *The Politics of Nonviolent Action: Power and Struggle* 75-76 (4th ed. 1980). According to Thomas Aquinas:

Humanly enacted laws can be just or unjust .... Laws however can be unjust: by serving not the general good but some lawmaker's own greed or vanity, or by exceeding his authority, or by unfairly apportioning the burdens the general good imposes. Such laws are not so much laws as forms of violence, and do not oblige our consciences except perhaps to avoid scandal and disorder, on which account men must sometimes forego their rights. Laws can be unjust by running counter to God's good, promoting idolatry say; and nobody is allowed to obey such laws: we must obey God rather than men.

Thomas Aquinas, *Summa Theologiae: A Concise Translation* 291 (Timothy McDermott ed., 1989) (emphasis provided).

The author's personal favorite example of civil disobedience is the Irish boycott of the 1880s. According to the *American Heritage Dictionary*:

Charles C. Boycott seems to have become a household word because of his strong sense of duty to his employer. An Englishman and former British soldier, Boycott was the estate agent of the Earl of Erne in County Mayo, Ireland. The earl was one of the absentee landowners who as a group held most of the land in Ireland. Boycott was chosen in the fall of 1880 to be the test case for a new policy advocated by Charles Parnell, an Irish politician who wanted land reform. Any landlord who would not charge lower rents or any tenant who took over the farm of an evicted tenant would be given the complete cold shoulder by Parnell's supporters. Boycott refused to charge lower rents and ejected his tenants. At this point members of Parnell's Irish Land League stepped in, and Boycott and his family found themselves isolated - without servants, farmhands, service in stores, or mail delivery. Boycott's name was quickly adopted as the term for this treatment, not just in English but in other languages such as French, Dutch, German, and Russian.

Entry for "Boycott," *American Heritage Dictionary*, available at <http://www.bartelby.com> (last visited Oct. 12, 2003).

n64. In 1635, the General Court of Massachusetts banished Roger Williams for criticizing the Puritan clergy's persecution of people of conscience and for insisting that the land still belonged to Native Americans. See *Power of the People*, supra note 2, at 15. Anne Hutchinson was banned in 1638 for publicly insisting that conscience was a higher authority than law. See *id.* The pacifist group, Society of Friends, was banned from Massachusetts from 1654 to 1661; a law was passed in 1657 which even levied a fine of one hundred pounds against anyone who brought a Quaker into the territory. See *id.* at 15-16. In 1658, a Quaker named Richard Keene was fined and beaten for refusing to be trained as a soldier. See *id.* at 18; Michael True, *An Energy Field More Intense than War: The Nonviolent Tradition and American Literature* 3-17 (1995) (addressing the United States' early traditions of nonviolence action).

n65. The celebrated Boston Tea Party of December 16, 1773, where 150 masquerading-men of the Sons of Liberty, led by Samuel Adams and John Hancock, leapt onto ships, broke open hundreds of chests of tea, and threw the contents into the Boston Harbor, was clearly an act of criminal trespass and damage to property. See Alan Brinkley, *The Unfinished Nation: A Concise History of the American People* 105-107 (1993); Samuel Eliot Morrison, *The Oxford History of the American People* 203-04 (1965); Douglas Brinkley, *American Heritage History of the United States* 61-64 (1998).

n66. Obviously, those people primarily involved in civil disobedience were the escaping slaves themselves. They were also assisted by many others. Harriet Tubman helped approximately 300 people escape slavery. It is estimated that over 100 people in Ohio alone assisted in the Underground Railroad. A Philadelphia group is estimated to have assisted about 300 slaves escape each year. When law enforcement tried to return runaway slaves to departing ships, tens of thousands of abolitionists tried to block their path. See Linda Rabben, *Fierce Legion of Friends: A History of Human Rights Campaigns and Campaigners* 40-58 (2002); True, supra note 64, at 18-36 (addressing passive resistance).

n67. See Henry David Thoreau, *Walden and Civil Disobedience* 224 (Owen Thomas, 1966) (1849). Regarding civil disobedience, slavery, and the Mexican War, Thoreau wrote: "There are nine hundred and ninety-nine patrons of virtue to one virtuous man ... ." *Id.* at 228. He continued:

Unjust laws exist: shall we be content to obey them, or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once?... If the injustice [of the machine of government] has a spring, or a pulley, or a rope, or a crank, exclusively for itself, then perhaps you may consider whether the remedy will not be worse than the evil; but if it is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law. Let your life be a counter friction to stop the machine.

*Id.* at 231. "I think," wrote Thoreau, "it is not too soon for honest men to rebel and revolutionize. What makes this duty the more urgent is the fact, that the country so overrun is not our own, but ours is the invading army." *Id.* at 227. He concluded: "Under a government which imprisons any unjustly, the true place for a just man is also a prison." *Id.* at 233.

n68. In 1886, fourteen hundred strikes involved a half-million workers. In 1898, after union workers walked off their jobs, Thomas I. Kidd, the general secretary for the union of woodworkers, was prosecuted for "criminal conspiracy" to injure the Oshkosh, Wisconsin company. Kidd's defense counsel, Clarence Darrow, stated in his two-day closing argument, presented without the benefit of notes, that:

For whatever its form, this is not really a criminal case. It is but an episode in the great battle for human liberty, a battle which was commenced when the tyranny and oppression of man first caused him to impose upon his fellows and which will not end so long as the children of one father shall be compelled to toil to support the children of another in luxury and ease.

Summation of Clarence Darrow for the Kidd Case (Oct. 31, 1898), in *Attorney for the Damned* 267, 269 (Arthur Weinberg ed., 1989). Mr. Darrow continued:

You have heard a great deal of evidence as to whether Thomas I. Kidd provoked this strike. I do not care whether he did or did not. Gentlemen, if it was in my power tomorrow to provoke another strike in this city that would succeed, I would do it, even though the jail opened to receive me. I would do it for the duty I owe to my fellow-men. I do not care whether Kidd provoked this strike or not. I know, gentlemen, that he did what he could in his poor way, with his poor strength, to fight those great monopolies in the interest of the men and women and little children that he loves; and for that you are asked to send him to jail.

*Id.* at 288. He also stated that:

The law is generally behind, because lawyers look to the past for their precedents, and are ever governed by the dead. The reformers of the world have always led the lawyers of the world ... . And these reformers have gone forth crying in the wilderness, and have been sent to jail and to the scaffold because they loved their fellow-men. But today I take it that every intelligent person who has investigated this question, outside of the counsel for the State, understand that workingmen have the right to organize; understand that if laborers are not satisfied with their conditions, they may stop work; they may stop work singly or collectively, exactly as they please, and no court will say them nay. That is the law today, and if it is not the law, it ought to be.

*Id.* at 297-98; see also *Power of the People*, *supra* note 2, at 33-36, 62-73, 176-81 (addressing changes in the tactics of the Labor Movement); John R. Commons, *History of Labor in the United States* (4 vols. 1918-1935); James R. Green, *The World of the Worker: Labor in Twentieth-Century America* (Univ. Ill. Press 1980); Rabben, *supra* note 66, at 61-78; True, *supra* note 64, at 37-74; William W. Winpisinger, *The Labor Movement and Civil Disobedience*, 43 *Guild Prac.* 17 (1986); Lynd, *supra* note 54.

n69. *Power of the People*, *supra* note 2, at 32.

n70. See *Power of the People*, *supra* note 2, at 58; Weber, *Civil Disobedience*, *supra* note 52, at 184. Seneca Falls, New York was the site of the first Woman's Rights Convention. Held in July 1848, the convention

resolved that women should have the right to vote. See *id.* at 179. In 1872, Susan B. Anthony and fourteen other women went to the polls in Rochester, New York and succeeded in registering and casting votes in the congressional election. For their actions, Anthony and the others were prosecuted and convicted by a male judge in a court with a male prosecutor, a male defense counsel, and before an all-male jury. The judge refused to allow the jury to deliberate and instead directed the jury to find the defendants guilty because they knowingly and wrongfully voted without having a lawful right to vote. See *United States v. Anthony*, 24 F. Cas. 829, 832 (C.C.N.Y. 1873) (No. 14,459). During sentencing, Anthony stood and attempted to eloquently speak of the cause of justice, despite the fact that the judge told her to sit down and be quiet at least four times. When the judge told her that she had been tried in accordance with the established forms of law, she replied:

Yes, your honor, but by forms of law all made by men, interpreted by men, administered by men, in favor of men, and against women; and hence, your honor's ordered verdict of guilty, against a United States citizen for the exercise of "that citizen's right to vote," simply because that citizen was a woman and not a man. But, yesterday, the same man-made forms of law declared it a crime punishable with \$ 1,000 fine and six months' imprisonment, for you, or me, or any of us, to give a cup of cold water, a crust of bread, or a night's shelter to a panting fugitive as he was tracking his way to Canada. And every man or woman in whose veins coursed a drop of human sympathy violated that wicked law, reckless of consequences, and was justified in so doing. As then the slaves who got their freedom [had to] take it over, or under, or through the unjust forms of law, precisely so now must women, to get their right to a voice in this Government, take it; and I have taken mine, and mean to take it at every possible opportunity.

Weber, *Civil Disobedience*, *supra* note 52, at 187. After the judge sentenced her to pay a fine of \$ 100, the defendant advised the court that she would "never pay a dollar of [the] unjust penalty" and that she would "earnestly and persistently continue to urge all women to the practical recognition of the old revolutionary maxim, that "Resistance to tyranny is obedience to God." *Id.* at 188.

In 1913, over 5,000 women marched in Washington on the day before the inauguration of Woodrow Wilson. Four years later, women initiated the first demonstration ever held at the White House. In May of 1917, the police began arresting women demonstrators for the now-common charge leveled against protestors - obstructing the sidewalk. Over 200 women from twenty-six states were arrested and ninety-seven were imprisoned; most served sixty days in prison, but others were sentenced to as long as seven months. Even in prison, the women demanded to be treated like political prisoners: they refused to work and went on hunger strikes, a tactic used by prisoners in Russia, Ireland, and England. Congress passed the suffrage amendment in early 1918 and it was ratified by the states on August 26, 1920. See *Power of the People*, *supra* note 2, at 56-61.

n71. See *Schenck v. United States*, 249 U.S. 47 (1919) (upholding a conviction for distributing 15,000 leaflets urging drafted men to refuse to report for active duty). The Court stated that while such speech may be protected by the First Amendment during peacetime, "when a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight..." *Id.* at 52. The defendant's words were "used in such circumstances and are of such a nature as to create a clear and present danger that will bring about the substantive evils that Congress has a right to prevent." *Id.*; see also *Frohwerk v. United States*, 249 U.S. 204 (1919) (upholding a conviction for preparing and distributing newspaper articles as part of a conspiracy to obstruct military recruiting); *Debs v. United States*, 249 U.S. 211 (1919) (upholding a conviction for delivering a speech criticizing the draft and praising draft resisters as an obstruction to the recruiting and enlistment service of the military). On September 14, 1918, Eugene Debs addressed the Court:

Your honor, years ago I recognized my kinship with all living beings, and I made up my mind that I was not one bit better than the meanest on earth. I said then, I say now, that while there is a lower class, I am in it; while there is a criminal element, I am of it; while there is a soul in prison, I am not a free man.

Power of the People, *supra* note 2, at 53. The death sentences of the seventeen draft resisters were later commuted. There were 56,830 conscientious objector claims approved by local draft boards. See L. William Yolton, Conscientious Objection, in *Protest, Power, and Change*, *supra* note 2, at 126; see also Power of the People, *supra* note 2, at 44-55 (noting 4,000 conscientious objectors and 20,873 men granted noncombatant classification by local draft boards); True, *supra* note 64, at 56-74.

n72. An estimated 52,000 men were declared conscientious objectors; of these men, about half were classified "1-A-O" to serve within the military in noncombatant service only. Approximately 12,000 of these men were assigned to one of over 150 work camps of the Civilian Public Service, where they worked without compensation. Roughly 6,000 men were sent to prison for refusing to cooperate with the draft. Julius Eichel was imprisoned as a conscientious objector during World War I and again in September 1942, making him the only person imprisoned in both World Wars for conscientious objection. For more about the resistance activities during this period, see Power of the People, *supra* note 2, at 88-107; see also True, *supra* note 64, at 75-98. For more about life in one of the work camps, see Gordon C. Zahn, *Another Part of the War: The Camp Simon Story* (1979). For more about the life for one of the prisoners, see David Dellinger, *From Yale to Jail: The Life of a Moral Dissenter* 61-98, 113-42 (1993).

n73. For descriptions of some of the thousands of civil disobedience actions during the campaign for civil rights in the American South, see Peter Ackerman & Jack DuVall, *A Force More Powerful: A Century of Nonviolent Conflict* 305-33 (2000); see also Taylor Branch, *Parting the Waters: America in the King Years 1954-63* (1988); Taylor Branch, *Pillar of Fire: America in the King Years, 1963-65* (1998); Clayborne Carson et al., *Reporting Civil Rights: American Journalism 1941-1963* (2003); Clayborne Carson et al., *Reporting Civil Rights: American Journalism 1963-1973* (2003); Power of the People, *supra* note 2, at 150-75.

n74. See, e.g., *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964) (vacating charges against defendants convicted of state trespass statutes for participating in sit-ins at lunch counters at retail stores); *Lombard v. Louisiana*, 373 U.S. 267 (1963) (reversing the convictions of four students who staged a sit-in demonstration at a whites-only lunch counter). Jack Greenberg, defense counsel in *Hamm*, estimated that there were 3,000 sit-in cases in the lower courts in 1964 alone. See Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* 316-17 (1994); see also Howard Zinn, *Out of the Sit-ins*, in *The Zinn Reader: Writings on Disobedience and Democracy* 47-66 (1997).

n75. See *United States v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969) (analyzing the destruction of draft records with homemade napalm at Catonsville, Maryland by Daniel Berrigan, Philip Berrigan, James Darst,

John Hogan, Thomas Lewis, Marjorie Melville, Thomas Melville, George Mische, and Mary Moylan). Several months before the events at issue in Moylan, Philip Berrigan, David Eberhardt, Thomas Lewis, and James Mengel poured a mixture of their own blood and animal blood on draft records at the Customs House in Baltimore. See *United States v. Eberhardt*, 417 F.2d 1009 (4th Cir. 1969). Philip Berrigan and Thomas Lewis had been convicted for the Baltimore action and were awaiting sentencing when they engaged in the Catonsville protest. See also *United States v. Cullen*, 454 F.2d 386 (7th Cir. 1971) (analyzing the burning of draft records in Milwaukee, Wisconsin); Daniel Berrigan, *The Trial of the Catonsville Nine* (1970); *Power of the People*, supra note 2, at 182-209; True, supra note 63, at 99-119.

n76. Over fifty cases have addressed the necessity defense in relation to abortion protestors. See, e.g., *United States v. Turner*, 44 F.3d 900 (10th Cir. 1995) (holding that the necessity defense did not apply as a matter of law in prosecution of abortion protestor).

n77. See, e.g., Aldridge & Stark, supra note 2, at 310-53.

n78. See, e.g., *State v. Dorsey*, 395 A.2d 855 (N.H. 1978) (analyzing mass occupation of construction site for Seabrook Nuclear Power Plant); *Schermbeck v. State*, 690 S.W.2d 315 (Tex. Ct. App. 1985) (analyzing self-chaining to door of utility to protest emission of low-level radiation); *State v. Warshow*, 410 A.2d 1000 (Vt. 1979) (analyzing the blocking of an entrance to nuclear power plant).

n79. See, e.g., *United States v. Schoon* 971 F.2d 193 (9th Cir. 1991) (analyzing protest against American involvement in El Salvador that was held inside an Internal Revenue Service building); *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989) (analyzing smuggling of political refugees from Central America into Arizona), cert. denied, 498 U.S. 1103 (1991); see also Gregory A. Loken & Lisa R. Bambino, *Harboring, Sanctuary and the Crime of Charity under Federal Immigration Law*, 28 *Harv. C.R.-C.L. L. Rev.* 119 (1993); Colbert, *Trial Without Jury*, supra note 2, at 24-48.

n80. See, e.g., *United States v. Scranton*, No. 97-30369, 1998 U.S. App. LEXIS 24541 (9th Cir. Sept. 29, 1998) (analyzing the blocking of a road in a national forest by staying on top of a tripod structure of logs); William W. Cason, Comment, *Spiking the Spikers: The Use of Civil RICO Against Environmental Terrorists*, 32 *Hous. L. Rev.* 745 (1995).

n81. See, e.g., *Liteky v. United States*, 510 U.S. 540 (1994) (analyzing whether federal trial judge was required to recuse himself in case concerning vandalism at Fort Benning); *United States v. Bichsel*, 156 F.3d 1148 (11th Cir. 1998) (analyzing a trespass onto Fort Benning in Georgia in protest of the United States Army

School of Americas); *United States v. Corrigan*, 144 F.3d 763 (11th Cir. 1998) (analyzing a similar trespass). For more information on the activities of School of the Americas protestors, visit <http://www.soaw.org> (last visited Oct. 12, 2003).

n82. See, e.g., *Wilson v. State*, 777 S.W.2d 823 (Tex. Ct. App. 1989) (discussing anti-apartheid sit-in on campus of the University of Texas); see also Ibrahim J. Gassama, Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs, and Apartheid, 19 *Fordham Int'l. L.J.* 1464, 1507 (1996).

n83. See *United States v. Maxwell*, 254 F.3d 21, 23 (1st Cir. 2001).

n84. Bauer & Eckerstrom, *supra* note 2, at 1176.

n85. See, e.g., *Chicago v. Mayer*, 308 N.E.2d 601 (Ill. 1974) (exemplifying the use of the necessity defense in matters other than civil disobedience). In *Mayer*, the court reversed the conviction of a medical student charged with interfering with a police officer and allowed the defendant to present a necessity defense to the jury on remand. See *id.* at 604. The defendant argued that it was dangerous for the officer to move an injured person without a stretcher and "that his conduct was necessary to prevent greater injury to the injured man." *Id.* at 602-03.

n86. There are obviously many state courts that have denied the use of the necessity defense. See, e.g., *Andrews v. People*, 800 P.2d 607, 610-11 (Colo. 1990); *City of Wichita v. Tilson*, 855 P.2d 911, 918 (Kan. 1993), cert. denied, 510 U.S. 976 (1993); *Commonwealth v. Berrigan*, 501 A.2d 226, 230 (Pa. 1985). There are also unreported rulings in which criminal courts have denied the use of the necessity defense. These decisions are included in the Meiklejohn Civil Liberties Institute Archives, Human Rights and Peace Law Docket, 1945-1993. The cases, and those cases cited in this article that are designated with a "PL," are summarized and reported in these Archives. The Archives are the most valuable resource for information on non-published opinions in this area. My references to these cases are frequently summaries of what appears in the digital catalog of the Archives. The digital catalog can be accessed through the web site of the Bancroft Library, Collections Division of the University of California, at <http://sunsite.berkeley.edu/meiklejohn/meik-peacelaw/meik-peacelaw-16.html> (last visited Oct. 12, 2003).

n87. In addition to the cases discussed in the text of this article, there are numerous cases in which the defendants successfully gained acquittals after using the necessity defense. See, e.g., *People v. Gray*, 571 N.Y.S.2d 851 (N.Y. Crim. Ct. 1991) (acquitting defendants of disorderly conduct charges because the government did not disprove elements of necessity beyond reasonable doubt). This opinion is extremely useful

because it contains numerous references to published and unpublished opinions in which defendants have been acquitted on the basis of the necessity defense. See also *State v. McCann*, 541 A.2d 75 (Vt. 1987) (holding that trial court did not abuse its discretion in granting defendant's motion for leave to present evidence supporting necessity defense); Note, And Forgive Them Their Trespasses: Applying the Defense of Necessity to the Criminal Conduct of the Newsgatherer, 103 *Harv. L. Rev.* 890, 895 (1990) (discussing the successful use of the necessity defense in *McCann*).

n88. See Aldridge & Stark, *supra* note 2, at 310 (discussing *State v. Mouer* (Columbia Co. Dist. Ct., Dec. 12-16, 1977)).

n89. See *id.* at 311.

n90. See *id.* at 312 (discussing *People v. Brown* (Lake County, Jan. 1979)).

n91. See Brent D. Wride, Political Protest and the Illinois Defense of Necessity, 54 *U. Chi. L. Rev.* 1070 n.4 (1987).

n92. See Aldridge & Stark, *supra* note 2, at 312-14 (discussing *People v. Block* (Galt Judicial Dist., Sacramento Co. Mun. Ct., Aug. 14, 1979)).

n93. *Id.* at 314.

n94. See *id.*

n95. See *Commonwealth v. Berrigan*, 472 A.2d 1099 (Pa. Super. Ct. 1984), *rev'd* 501 A.2d 226 (Pa. 1995); see also Swords and Plowshares: A Chronology of Plowshares Disarmament Actions, 1980-2003 13-14 (Arthur J. Laffin ed., 2003). The name "Plowshares" was first used by the group because "with hammers and blood they enacted the biblical prophecies of Isaiah (2:4) and Micah (4:3) to 'beat swords into plowshares' by hammering on two of the nose cones and pouring blood on documents." *Id.* at 1. According to Laffin, this was the first of more than seventy-five Plowshares and related disarmament actions charging over 150 people from 1980 to February of 2003 with symbolic and actual disarmament of "U.S. first-strike nuclear weapons systems: the MX,

Pershing II, Cruise, Minuteman ICBMs, Trident II missiles, Trident submarines, B-52 bombers, P-3 Orion anti-submarine aircraft, the Navstar system, the ELF communication system, the Milstar satellite system, a nuclear capable battleship and the Aegis destroyer." *Id.* Other Plowshares disarmament actions have focused on conventional weapons as well. See *id.* at 1-2.

n96. See *Berrigan*, 472 A.2d at 1102. The eight defendants were Daniel Berrigan, Philip Berrigan, Anne Montgomery, Elmer Maas, Carl Kabat, John Schuchardt, Dean Hammer, and Molly Rush.

n97. *Id.* at 1103-04 (citations omitted).

n98. *Id.* at 1104 (quoting Section 3.02 of the Model Penal Code).

n99. See *id.* at 1105-06. As a general statement, the accused has a fundamental right to present defense evidence so long as such evidence is relevant and not excluded by an established evidentiary rule. See also *Washington v. Texas*, 388 U.S. 14, 18-19 (1967).

n100. See *Commonwealth v. Berrigan*, 501 A.2d 226 (Pa. 1985).

n101. *Id.* at 229.

n102. See *id.* at 230.

n103. See Aldridge & Stark, *supra* note 2, at 319-20; see also PL 24/25.1, *California v. Lemnitzer*, No. 27106E (Pleasanton-Livermore Mun. Ct. Feb. 1, 1982). On retrial, the judge did not allow instructions on the necessity defense, but did allow instructions on malice.

n104. See PL 39/25.2, *Vermont v. Keller*, No. 1372-4-84-CNCR (Vt. Dist. Ct. Nov. 17, 1984).

n105. *People v. Gray*, 571 N.Y.S.2d 851, 861 (N.Y. Crim. Ct.1991) quoting Keller, No. 1372-4-84-CNCR.

n106. See Keller, No. 1372-4-84-CNCR; Aldridge & Stark, *supra* note 2, at 320-21. The expert witnesses included: Sonya Hernandez (political violence in El Salvador), Janet Shenk (human rights in El Salvador), Phil Bourgeois (Salvadoran refugees), Shaila Sherwin (refugees), David Rosenberg (United States/contra war on Nicaragua), David McMichael (contra aid), Richard Garfield (health programs of Nicaraguan Government), John Stockwell (CIA activities), Howard Zinn (history of American protest movements), Matthew Countryman (American military aid to Central America), Gladys Sanchez (government repression of Salvadoran churches), Richard Falk, and Ramsey Clark (citizens' role in American foreign policy). See also National Lawyers Guild 1985 Convention Workshop, *Creative Defenses in Civil Disobedience Cases*, 42 *Guild Prac.* 97-98 (1985) [hereinafter *Creative Defenses*].

n107. See PL 48/25.2, *Michigan v. Jones et al.*, Nos. 83-101194-101228 (Oakland County Dist. Ct. 1984); *Creative Defenses*, *supra* note 106, at 126-27.

n108. See PL 85/25.5, *Michigan v. Largrou*, Nos. 85-000098, 99, 100, 102 (Oakland County Dist. Ct. 1985). The trial court was apparently convinced by the defendants' arguments that methods other than trespass were ineffective, stating:

There are some who say that there is absolutely no prospect of the administration or the Congress to bring this matter to a successful conclusion and that the track record proves it and that the only possibility, however remote, the only possibility of survival lies in protest. If people believe that, who can say they are wrong?

*Gray*, 571 N.Y.S.2d at 867-68 (quoting transcript of judge's order in *Largrou*); see also *Creative Defenses*, *supra* note 106, at 126-27.

n109. See PL 123/25.3, *People v. Jarka*, Nos. 002170, 002196-002212, 00214, 00236, 00238 (Ill. Cir. Ct. Apr. 15, 1985); *Creative Defenses*, *supra* note 106, at 108-09. The jury was instructed: "The use or threat of use of nuclear weapons is a war crime or an attempted war crime because such use would violate international law by causing unnecessary suffering, failing to distinguish between combatants and noncombatants and poisoning its targets by radiation." Francis Anthony Boyle, *The Criminality of Nuclear Deterrence* 41 (2002).

n110. See PL 121/25.4, *Chicago v. Streeter*, Nos. 85-108644, 48, 49, 51, 52, 120323, 26, 27 (Cir. Ct., Cook

County Ill. May 1985). The expert witnesses on apartheid and anti-apartheid measures included United States Senator Paul Simon and United States Representative Charles Hayes. According to Francis Boyle:

In the Streeter case, the nine defendants attempted to meet with the South African Consul at his office in Chicago to discuss that country's criminal policy of apartheid. When he refused to do so, the defendants refused to leave the corridors of a building outside the Consulate offices, and were eventually arrested and prosecuted for violating a provision of the City of Chicago Municipal Code prohibiting "unlawful trespass."

To substantiate their defense of necessity, the Streeter defense attorney team presented at trial several expert witnesses who testified to the effect that the government of South Africa had been committing international crimes by pursuing its policies of apartheid and that the defendants acted reasonably in their efforts to prevent the continuation of these crimes. Once again, in this case too, the jury acquitted the defendants of all charges brought against them. To the best of my knowledge, Streeter was the first outright acquittal for a pure anti-apartheid protest case in the United States.

Boyle, *supra* note 109, at 42.

n111. See PL 151/25.4, *Washington v. Heller* (Seattle Mun. Ct. 1985). In post-trial comments, the jury stated: "only when arrests made in protests against apartheid were efforts made to reform the system." Val Varney, *Eight Apartheid Protestors Win Acquittal*, *Seattle Times*, Aug. 8, 1985, at D2.

n112. See PL 174/25.7, *Colorado v. Bock* (Denver County Ct. June 12, 1985). The trial judge accepted pretrial offers of necessity, Nuremberg defenses, and the Colorado Public Duty Statute. The prosecutor appealed this ruling to the District Court, which affirmed the trial court's rulings. This was reported as the first time a Colorado judge permitted "choice of evils" law in a political protest trial.

n113. See PL 187/25.9, *Massachusetts v. Carter*, No. 86-45 CR 7475 (Hampshire Dist. Ct. 1987); see also Wride, *supra* note 91, at 1071 n.5; Rick Hornung, *Necessity, Is it the Mother of Acquittals?*, 9 *Nat'l L.J.*, May 4, 1987, at 6; Lambeck, *supra* note 2, at 472; Matthew L. Wald, *Amy Carter Says Tells Court She Sat in Road to Alter C.I.A. Policy*, *N.Y. Times*, Apr. 14, 1987, at A17; Matthew L. Wald, *Amy Carter Acquitted in Protest*, *N.Y. Times*, Apr. 16, 1987, at A1.

n114. See PL 219/25.10, *Washington v. Bass*, Nos. 4750-038, -395 to -400 (Thurston County Dist. Ct. April 8, 1987).

n115. See PL 329/25.12, *Illinois v. Fish* (Skokie Cir. Ct. Aug. 1987). The arrestees were members of Pledge of Resistance.

n116. See PL 108/25.1, *State v. McMillan*, No. D 00518 (San Luis Obispo Jud. Dist. Mun. Ct., Cal. Oct. 13, 1987). This opinion is reprinted in part in Kenneth Lee Choxiner, *California v. McMillan: Diablo Canyon Nuclear Power Plant Protestors Case*, 45 *Guild Prac.* 1, 1-14 (1988). The protesters introduced expert testimony on the potential for release of harmful radioactivity if the plant were allowed to fire up. The prosecutor did not appeal and dismissed all charges. See *And Forgive Them Their Trespasses*, *supra* note 87, at 895.

n117. See *And Forgive Them Their Trespasses*, *supra* note 87, at 895; *Two Carolina Indians Acquitted in Hostage Taking*, *N.Y. Times*, Oct. 15, 1988, at 9.

n118. See PL 426/25.14, *Massachusetts v. Schaeffer-Duffy* (Worcester Dist. Ct. 1989). The protestors tried to give photos of Soviet people to employees at GTE's Westboro, Massachusetts nuclear weapons facility. Expert witnesses included: Ted Conna (Physicians for Social Responsibility), Paul Walker (defense analyst), and Professor Michael True (Catholic Peace Fellowship).

n119. See Leslie Boellstorff, *Judge Says Actions of Anti-abortionists at Clinic Justified*, *Omaha World-Herald*, July 17, 1990, available at 1990 WL 5218782. In a seventeen-page order discussing necessity and the priority of life over property rights, District Judge Robert Burkard reversed the convictions for trespassing. An additional seventeen abortion protestors were acquitted by a jury on similar grounds in June 2000. See *id.*

n120. See PL 400/25.16, *West Valley City v. Hirshi*, No. 891003031-3 MC (Salt Lake County, Ut. Cir. Ct., W. Valley Dept. 1990). Hundreds of peace activists held a monthly vigil outside the Hercules plant where Trident II missile engines were being manufactured. Three activists entered the property and were subsequently arrested and charged with criminal trespass. The judge allowed extensive voir dire, expert testimony, and jury instructions on all these defenses. See *id.*

n121. See *People v. Gray*, 571 *N.Y.S.2d* 851, 861-62 (*N.Y. Crim. Ct.* 1991). *Gray* is the single most detailed and comprehensive overview of the use of the necessity defense in a state court.

n122. See Terry Wilson, *Acquittal Answers Pflieger's Prayers*, *Chi. Trib.*, July 3, 1991, at 3.

n123. See Andrew Fegelman, AIDS Activist Found Innocent of Charges in Needle Exchange, Chi. Trib., Jan. 28, 1993, at 4.

n124. See PL 847/25.18, California v. Halem, No. 135842 (Berkeley Mun. Ct. 1991). The defendant was an AIDS counselor and a member of the Needle Exchange Emergency Distribution program who provided intravenous drug users with clean needles to prevent the spread of the AIDS virus. He was arrested for illegal distribution of hypodermic needles and was allowed to put on evidence supporting a necessity defense. The first jury to hear the case deadlocked and the case was declared a mistrial. On retrial, the trial court said it had no jurisdiction to accept the state's writ to exclude the necessity defense. See *id.*

n125. See, e.g., PL 77/25.5, Washington v. Brown, No. 85-1295N (Kitsap County Dist. Ct. N. 1985). Twenty-four protestors held a vigil in Washington State in protest of a "white train" carrying nuclear weapons. The state arrested twenty of the protestors and charged them with criminal trespass and conspiracy. The defendants filed extensive briefs on the right to present particular defenses to the jury, in support of their motion to dismiss conspiracy charges, and in opposition to the government's motion in limine. The judge dismissed the conspiracy charges and did not admit evidence on the necessity defense, but it did allow Daniel Ellsberg to testify as an expert on why first-strike nuclear warheads on a train are a potential threat to peace. One defendant pled guilty to both charges. The jury acquitted the remaining nineteen defendants.

See also PL 148/25.6, Washington v. Karon, No. J85-1136-39 (Benton County Dist. Ct. 1985). Four defendants blockaded a federal Plutonium-Uranium extraction facility at Hanford Nuclear Reservation. They were arrested and charged with disorderly conduct and failure to disperse. The defendants filed motions in limine to raise necessity, Nuremberg principles, and the Geneva and Hague Conventions as defenses. The trial judge allowed Nuremberg and necessity defenses, permitted expert testimony regarding radiation contamination, and refused expert testimony regarding nuclear war. The court agreed to give international law instructions to the jury. Immediately after the court ruling permitting scientists to testify on radiation contamination, the prosecution moved to dismiss the case and the court granted the motion.

See also PL 341/25.13, California v. Acton, No. 282899 (S. Coast Jud. Dist., Santa Barbara County 1988). A 1987 anti-CIA protest case at University of California Santa Barbara allowed the defendants to raise the necessity defense. The trial judge allowed the necessity defense but disallowed testimony by former CIA officials. The jury voted 9-3 to acquit of trespass and 7-5 to convict of resisting. As a compromise, the trespass charge was dismissed and six defendants plead *nolo contendere* to resisting arrest. See *id.*

In 1991, "a San Francisco jury caused a mistrial by voting 11-1 to acquit two people charged with wrongfully distributing sterile needles to intravenous drug users. The defendants, who blatantly violated laws against furnishing drug paraphernalia to addicts in an attempt to combat the transmission of AIDS, escaped conviction by invoking the rarely successful defense of 'necessity' - that their actions were essential to save lives. San Francisco's long-noted tolerance for deviance no doubt prompted the jurors to take heed of the AIDS epidemic and act accordingly." James P. Levine, *Jury Wisdom*, 16 *Crim. Just. Ethics* 49, 55 (1997) (reviewing Norman Finkel, *Commonsense Justice: Jurors' Notions of the Law* (1995)).

n126. See, e.g., PL 139/20.2, *United States v. Braden* (W.D. Ky. 1985). In 1985, twenty-nine demonstrators entered the office of a United States senator as part of the Pledge of Resistance. At their arraignment, the defendants announced their intent to use Nuremberg, necessity, and First Amendment defenses (freedom of speech includes freedom to be heard; today the only way to be heard is to act). The government dropped all charges prior to trial.

See also PL 222/25.11, *California v. Jerome*, Nos. 5450895, 5451038, 5516177, 5516159 (Livermore-Pleasanton Mun. Ct., Alameda County, Traffic Div. 1987). On Good Friday, April 17, 1987, more than thirty protestors blocked the main gate to the Lawrence Livermore Nuclear Weapons Lab in a nonviolent sit-in. They were arrested for traffic offenses of blocking and delaying traffic. The Traffic Commissioner agreed to consider expert testimony on the necessity defense and international law (including Nuremberg Principles, Geneva Protocols, and the Hague Convention) via affidavits. The defendants filed affidavits for Daniel Ellsberg (on the effectiveness of nonviolent protests in arousing citizen action), Frank Newman (on international law) and Charles Schwartz (on the role of Livermore Lab in promoting the arms race). Before trial, the judge granted the prosecution's request to drop all charges.

See also PL 183/25.6, *Richland, Washington v. Barnes*, No. 38323 (Benton County Dist. Ct. 1986). On Hiroshima Day in 1986, twenty-nine people blocked the road to the Hanford Nuclear Reservation. They were arrested for disorderly conduct. The defendants raised claims of lawful authority, including international law, Nuremberg Principles, and necessity. The defense also sought a hearing on the admissibility of expert testimony. The court dismissed the prosecution on its own motion declaring the disorderly conduct ordinance unconstitutionally vague.

In 1990, a New York "man was arrested for trespassing in an abandoned apartment building where he had sought shelter during a night of very bad weather. The defense attorneys planned to use the necessity defense, but the prosecution withdrew the charges." Michael M. Burns, *Fearing the Mirror: Responding to Beggars in a "Kinder and Gentler" America*, 19 *Hastings Const. L.Q.* 783, 808-09 (1992).

See also PL 567/25.18, *Washington v. Hill* (Bellingham Mun. Ct. 1991). More than 100 protestors who blocked Seattle streets to protest Congressional approval for use of force in the Persian Gulf were arrested for disorderly conduct. At a pro se trial of three defendants, the court allowed them to present non-expert evidence on defenses of necessity and international law. The defendants argued that the United States violated international law (Nuremberg Principles and Geneva Protocols) by planning and preparing for war, withdrawing from the International Court of Justice in 1985, and bombing civilian targets in Iraq. After the jury hung 4-2 for acquittal, the charges were dropped.

n127. *United States v. Bailey*, 444 U.S. 394, 397 (1980).

n128. See *id.* at 396-97, 410 (addressing prisoners who escaped by way of the proverbial knotted bed sheets and then sought to have a jury consider a defense based on the serious health and safety problems of the jail from which they escaped).

n129. See *id.* at 398.

n130. See *id.* at 412.

n131. See *id.* at 412-13.

n132. *Id.* at 409-11 (citations omitted).

n133. See *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 501-02 (2001) (Stevens, J., concurring). In his concurrence, Justices Stevens argued:

The Court gratuitously casts doubt on "whether necessity can ever be a defense" to any federal statute that does not explicitly provide for it, calling such a defense into question by a misleading reference to its existence as an "open question." By contrast, our precedent has expressed no doubt about the viability of the common-law defense, even in the context of federal criminal statutes that do not provide for it in so many words. Indeed, the Court's comment on the general availability of the necessity defense is completely unnecessary because the Government has made no such suggestion. The Court's opinion on this point is pure dictum.

*Id.* (citations omitted).

n134. See *id.* at 483.

n135. *Id.* at 490 (Thomas, J.) (citations omitted).

n136. Research has uncovered only one instance where a federal court allowed a necessity defense. See Aldridge & Stark, *supra* note 2, at 322-23 (discussing *United States v. LaForge and Katt*, Cr. 4-84-66 slip at 20 (D. Minn. Nov. 8, 1984), cited in *United States v. Kabat*, 797 F.2d 580, 594 n.4 (8th Cir. 1986)); see also Swords And Plowshares, *supra* note 95, at 21.

In *LaForge and Katt*, the defendants were arrested for damaging a Trident submarine guidance system on August 10, 1984. The judge allowed them to argue the necessity defense and gave an instruction to the jury on necessity. They were convicted of destruction of government property and faced up to ten years in prison and a \$ 5,000 fine. At sentencing, the district court judge, Miles Lord, gave an impassioned speech against nuclear

weapons and sentenced the defendants to six months each in prison and suspended the sentence. See *Kabat*, 797 F.2d at 594 n.4.

n137. *United States v. Hill*, 893 F. Supp 1044, 1047-48 (N.D. Fla. 1994) (excluding necessity defense after the defendant, who was charged with shooting an abortion-providing physician, failed to respond to the government's motion in limine to exclude evidence of necessity).

n138. *United States v. Maxwell*, 254 F.3d 21, 26-27 (1st Cir. 2001). "It is sufficient that the defendants have shown an 'underlying evidentiary foundation' as to each element of the defense, 'regardless of how weak, inconsistent or dubious' the evidence on a given point may seem." *Kabat*, 797 F.2d at 590-91 (citations omitted).

n139. *King*, supra note 49, at 294.

n140. See *Cavallaro*, supra note 2, at 367. See generally *United States v. Schoon*, 971 F.2d 193 (9th Cir. 1991).

n141. *Bedau, Protest, Power, and Change*, supra note 2, at 84.

n142. See *Schoon*, 971 F.2d at 195.

n143. See *id.* at 197; see also *United States v. Dorrell*, 758 F.2d 427, 430 (9th Cir. 1985); *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir.1989), cert. denied, 498 U.S. 1046 (1991).

n144. *Schoon*, 971 F.2d at 197.

n145. See *id.* at 197-99.

n146. *Id. at 198.*

n147. *Id. at 198.*

n148. Plato, *supra* note 63, at 27.

n149. King, *supra* note 49, at 293.

n150. Aquinas, *supra* note 63, at 291.

n151. See generally Thomas Buergenthal, The U.N. Truth Commission for El Salvador, 27 *Vand. J. Transnat'l L.* 497 (1994).

n152. See *id. at 529.*

n153. See Jack Nelson-Pallmeyer, *School of Assassins: Guns, Greed and Globalization 26-27* (Orbis Books ed., 2001). While the United States government tried to place the blame for the assassinations of six Jesuits, their housekeeper and her daughter at the Catholic University in San Salvador on the soldiers, the U.S. Congressional Task Force concluded in its April 30, 1990 report that the men responsible for the massacre were trained at the School of the Americas at Fort Benning. They were part of the elite U.S.-trained Atlacatl Battalion and had recently completed a course on "human rights." See *id. at 27.*

n154. See discussion of Bisbee deportation case, *supra* notes 13-16 and accompanying text.

n155. Arnolds & Garland, *supra* note 2, at 293.

n156. *Id.*

n157. See *supra* Part II.A.

n158. Cavallaro, *supra*, note 2, at 369-70 (citations omitted) (emphasis added).

n159. *United States v. Schoon*, 971 F.2d 193, 198 (9th Cir. 1991).

n160. See *id.* at 196.

n161. *Id.* at 198.

n162. Cavallaro, *supra* note 2, at 352.

n163. Cohen, *supra* note 50, at 55-56.

n164. See Lambek, *supra* note 2, at 475.

n165. See *id.*

n166. See *United States v. Santana*, 184 F. Supp 2d 131, 136 (D.P.R. 2001). Another appellate decision used Schoon for the proposition that a defendant who, according to the court, was a tree-sitting "logging protester who was discovered on top of a tripod structure of logs blocking a road in a national forest" and was convicted for blocking a forest service road, was not engaged in direct civil disobedience. *United States v. Scranton*, No. 97-30369, 1998 U.S. App. LEXIS24541, at 1-2 (9th Cir. Sept. 29, 1998).

n167. *United States v. Springer*, 51 F.3d 861, 866 (9th Cir. 1995) (dealing with a defendant who refused to surrender for prison on previous crime to protest against nuclear weapons).

n168. Cavallaro, *supra* note 2, at 367 (citations omitted) (emphasis added).

n169. See *id.*

n170. See *id.*

n171. See *id.*

n172. *Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters & Joiners of Am.*, 456 U.S. 717, 722 (1982) (citations omitted).

n173. See *United States v. Maxwell*, 254 F.3d 21, 27 (1st Cir. 2001) (holding that the defendant bore the burden of demonstrating that "the grave risks triggered by the deployment of Trident nuclear submarines [were] far greater evil than the commission of a criminal trespass designed to stop their deployment").

n174. See *United States v. Quilty*, 741 F.2d 1031, 1033 n.2 (7th Cir. 1984) (reciting prayer of St. Francis at Rock Island Arsenal despite ban and bar letter prohibiting entry onto premises). "It is, of course, impossible to argue that nuclear war is not a more serious harm than a peaceful, if unlawful, anti-nuclear prayer demonstration at the Arsenal." *Id.* at 1033.

n175. Few courts have followed the Schoon suggestion that authorization by Congress or the Executive Branch ends the inquiry right at the first prong. See discussion, *supra* Part III.F (addressing Schoon).

n176. *Maxwell*, 254 F.3d at 27.

n177. See *id.*

n178. *Id.*

n179. See *id.* Many other published opinions address the issue of nuclear protestors who could not show imminent harm because there was no proof that the nuclear weapons they protested to would actually be used. See, e.g., *United States v. Montgomery*, 772 F.2d 733 (11th Cir. 1985) (analyzing conduct of Pershing Plowshares group who cut through fence at Martin-Marietta plant in Orlando, Florida, on Easter morning 1984, and hammered and poured blood on nuclear and conventional missile launchers); *United States v. Cottier*, 759 F.2d 760 (9th Cir. 1985) (discussing entry onto Air Force base in Montana to protest nuclear missile system); *United States v. Dorrell*, 758 F.2d 427 (9th Cir. 1985) (considering protestors' damage of a missile system at Vandenburg Air Force Base); *United States v. Quilty*, 741 F.2d 1031 (7th Cir. 1984) (analyzing anti-nuclear protest); *United States v. May*, 622 F.2d 1000 (9th Cir. 1980) (discussing circumstances where protestors climbed a fence and entered a base in Bangor, Washington, which was home to a Trident missile system).

n180. *Maxwell*, 254 F.3d at 28 (quoting *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996)).

n181. See *Montgomery*, 772 F.2d at 736.

n182. See *Dorell*, 758 F.2d at 433-34.

n183. See *United States v. Cassidy*, 616 F.2d 101, 102 (4th Cir. 1979) (per curiam).

n184. *Maxwell*, 254 F.3d at 28. "We have combed the record in this case and find nothing ... to indicate the movement of [Trident submarines] likely would be influenced by the temporary disruption of the exercises." *Id.*

n185. *United States v. Kabat*, 797 F.2d 580, 592 (8th Cir. 1986) (holding that damaging two Minuteman II missile silos in Missouri would not reasonably lead to a reduction in nuclear weapons) (emphasis supplied).

n186. See *United States v. Willner*, No. 97-30061, 1998 WL 63051, at 3 (9th Cir. Feb. 13, 1998) (upholding the fines imposed on protestors who were chained and locked to barricades made from tripods of logs blocking road to timber site in Nez Perce Forest). "Appellants could have brought challenges in district court. These challenge [sic] could have included injunctions to prevent presently occurring harm." *Id.*

n187. See *United States v. Sued-Jimenez*, 275 F.3d 1, 7 (1st Cir. 2001). The First Circuit noted that "although appellants cite unsuccessful attempts to obtain temporary restraining orders against the U.S. Navy, they have not demonstrated an exhaustion of all legal options." *Id.*

n188. See *United States v. Schoon*, 971 F.2d 193, 198 (9th Cir. 1991).

n189. *Sued-Jimenez*, 275 F.3d at 7.

n190. *United States v. Quilty*, 741 F.2d 1031, 1033 (7th Cir. 1984). "Ms. Turner could go door-to-door conveying her views, distribute literature personally, through the mails or via publication, or simply continue her otherwise lawful protests." *United States v. Turner*, 44 F.3d 900, 902 (10th Cir. 1995). "Protestors ... cannot create 'necessity' through their own impatience with the 'less visible and more time-consuming alternatives.'" *Kabat*, 797 F.2d at 591 (quoting *United States v. Dorrell*, 758 F.2d 427, 431 (9th Cir. 1985)). "Opportunities for speech and political participation make the necessity defense unavailable to these defendants." *United States v. Katzberg*, 201 F.R.D. 50, 53 (D. R.I. 2001) (upholding the conviction of defendants who draped a black banner reading "No More Nuclear Victims" across a highway outside of the Newport Naval Station). "Without exception, the decided cases teach that a defendant's legal alternatives will rarely, if ever, be deemed exhausted when the harm of which he complains can be palliated by political action." *United States v. Maxwell*, 254 F.3d 21, 29 (1st Cir. 2001).

n191. 893 F. Supp. 1044, 1047-48 (N.D. Fla. 1994) (citations omitted) (emphasis added). Hill did not argue for the necessity defense or oppose the prosecution motion in limine. See *id.* at 1045.

n192. *Maxwell*, 254 F.3d at 28-29 (citations omitted).

n193. *Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters & Joiners of Am.*, 456 U.S. 717, 722 (1982).

n194. *People v. Gray*, 571 N.Y.S.2d 851, 853 (N.Y. Crim. Ct. 1991).

n195. *United States v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969) (discussing the burning of draft records with homemade napalm at Catonsville, Maryland on May 17, 1968 by Daniel Berrigan, Philip Berrigan, James Darst, John Hogan, Thomas Lewis, Marjorie Melville, Thomas Melville, George Mische, and Mary Moylan). On October 26, 1967, some months before the burning of the draft records at Catonsville, Philip Berrigan, David Eberhardt, Thomas Lewis and James Mengel poured a mixture of their own blood and animal blood on draft records at the Customs House in Baltimore. See *United States v. Eberhardt*, 417 F.2d 1009, 1011 (4th Cir. 1969). Philip Berrigan and Thomas Lewis were convicted for the Baltimore action and were awaiting sentencing when they engaged in the Catonsville protest. See Murray Polner & Jim O'Grady, *Disarmed and Dangerous: The Radical Life and Times of Daniel and Philip Berrigan, Brothers in Religious Faith and Civil Disobedience* 166-217 (Westview Press 1998). See generally Francine du Plessix Gray, *Divine Disobedience: Profiles in Catholic Radicalism* 45-231 (Alfred A. Knopf, ed., 1970).

n196. *United States v. Turner*, 44 F.3d 900, 903 (10th Cir. 1995) (involving the conduct of an anti-abortion protestor) (quoting *City of Wichita v. Tilson*, 855 P.2d 911, 918 (Kan. 1993)).

n197. *United States v. Cullen*, 454 F.2d 386, 392 (7th Cir. 1971) (burning draft records in Milwaukee) (citing *United States v. Kabat*, 797 F.2d 580, 587 (8th Cir. 1986)).

n198. *People v. Weber*, 208 Cal. Rptr. 719, 721 (Cal. App. Dep't Super. Ct. 1984) (blocking streets and sidewalks in front of General Dynamics and United States Navy submarine base to prevent nuclear war).

n199. Parry, *The Virtue of Necessity*, supra note 2, at 402. "When the defense is controlled by judges eager to block a potentially open-ended moral inquiry into the defendant's conduct and choices, the jury rarely has the chance to fulfill its role of making an appropriate judgment regarding the defendant's culpability." *Id.*

n200. John Rawls, *A Theory of Justice* 342 (rev. ed. 1999).

n201. *Ex parte Siebold*, 100 U.S. 371, 393 (1879).

n202. The defense is clearly one to give a developed legal system the opportunity to expand the evaluation of otherwise criminal conduct beyond the "letter of particular prohibitions." Model Penal Code 3.02 at 10 (1962).

n203. The Model Penal Code notes:

The lack of precision in the general rule is unavoidable if the rule is not to be improperly constricted; the situation is akin to the imprecision of such concepts as recklessness and negligence, which also call in part for weighing of conflicting values. Deep disagreements are bound to exist over some moral issues, such as the extent to which values are absolute or relative and how far desirable ends may justify otherwise offensive means. Thus, even when a specific legislative resolution is theoretically possible, it may be quite unattainable in practice. The alternative of submitting such issues to adjudication, as they arise in concrete cases, therefore has much strategic virtue.

Id. 3.02, comment on generality of section (1962).

n204. See *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989) (analyzing the smuggling of political refugees from Central America into Arizona and providing them sanctuary); see also *United States v. Dorrell*, 758 F.2d 427, 430-31 (9th Cir. 1985).

n205. *Tatum v. United States*, 190 F.2d 612, 617 (D.C. Cir. 1951); see also *United States v. Opdahl*, 930 F.2d 1530, 1535 (11th Cir. 1991); *United States v. Lively*, 803 F.2d 1124, 1126 (11th Cir. 1986); *United States v. Young*, 464 F.2d 160, 164 (5th Cir. 1972).

n206. Generally, crimes against persons are regarded as more serious offenses than crimes against property. See generally Albert J. Reiss, Jr., *How Serious Is Serious Crime*, 35 *Vand. L. Rev.* 541, 575 (1982) (emphasizing the difference in the level of seriousness between crimes of violence against property and crimes of violence against persons).

n207. See *United States v. Hill*, 893 F. Supp. 1048 (N.D. Fla. 1994) (involving allegations of the shooting of a physician and two others at an abortion clinic).

n208. Model Penal Code 3.02 cmt. 3, at 16-17 (1962).

n209. "Imminent" is defined as "ready to take place." Merriam-Webster's Collegiate Dictionary 621 (11th ed. 2003).

n210. Natural Resource Defense Council, Exposing The U.S. Nuclear War Plan, at <http://www.nrdc.org/nuclear/nwarplan.asp> (last revised June 15, 2001), based on, Natural Resource Defense Council, The U.S. Nuclear War Plan: A Time For Change (2001), available at [http://www.nrdc.org/nuclear/warplan/warplan&lt;\\_>start.pdf](http://www.nrdc.org/nuclear/warplan/warplan&lt;_>start.pdf) (last visited on Nov. 14, 2003).

n211. Legality of the Threat or Use of Nuclear Weapon, 1996 I.C.J. 226, at 266 (July 8), available at <http://www.icj-cij.org/icjww/icasess/iunan/iunanframe.htm> (last visited Nov. 14, 2003).

n212. See supra Part IV.B. "Assuming ... [nuclear] submarines ... constitute a harm ... the term 'imminent harm' connotes a real emergency, a crisis involving immediate danger to oneself or to a third party." *United States v. Maxwell*, 254 F.3d 21, 27 (1st Cir. 2001). There was no evidence that nuclear submarines were even in the area, and even if they were "it is doubtful that the mere presence of such a vessel, without some kind of realistic threat of detonation, would suffice to pose an imminent harm." *Id.* "The record contains no evidence to support [defendant's] naked averment that the harm he feared was imminent." *Id.*

Many of the other reported cases on necessity address situations where courts held that the protesters could not show imminent harm because there was no proof that the weapons would be used. See *United States v. Montgomery*, 772 F.2d 733, 735 (11th Cir. 1985) (holding that the Pershing plowshares group that cut through a fence at Martin Marietta plant in Orlando, Florida on Easter morning in 1984 and hammered and poured blood on nuclear and conventional missile launchers failed to establish imminent harm). See generally; *United States v. Cottier*, 759 F.2d 760 (9th Cir. 1985) (rejecting argument of protestors who gained entry onto Air Force base in Montana to protest nuclear missile system); *United States v. Dorrell*, 758 F.2d 427 (9th Cir. 1985) (upholding conviction of protestor who had damaged a missile system at Vandenburg Air Force base); *United States v. Quilty*, 741 F.2d 1031 (7th Cir. 1984) (holding protestors who had entered military property could not assert necessity defense); *United States v. May*, 622 F.2d 1000 (9th Cir. 1980) (denying the appeal of protestors who climbed a fence onto the base of Trident missile system in Bangor, Washington).

n213. A Michigan appellate court noted:

Although it is true, as the prosecution contends, that a mere threat of future injury is not enough to serve as such a defense, the issue of whether the alleged danger was immediate or imminent is, in all but the clearest cases, to be decided by the trier of fact taking into consideration all the surrounding circumstances, including the defendant's opportunity and ability to avoid the feared harm."

*People v. Harmon*, 220 N.W. 2d 212, 214 (Mich. Ct. App. 1974).

n214. See *supra* Part III.

n215. See generally *Tree of Liberty*, *supra* note 2. American University Professor of Law Nicholas N. Kittrie, who served as counsel for the United States Senate Judiciary Committee and as Chair of the Eleanor Roosevelt Institute for Justice and Peace, and University of South Carolina School of Law Professor Eldon D. Wedlock, are co-editors of this two volume work. These volumes include over seven hundred pages documenting of political protest and civil disobedience from colonial times to the present. Among the hundreds of incidents it details, a few examples will suffice: (1) imprisonment and trial of John Peter Zenger in 1735 for publishing true but critical attacks on the colonial government. See *id.* at 28; (2) Sons of Liberty Boston Tea Party in 1773. See *id.* at 44; (3) the 1786 Shays Rebellion to stop court foreclosures of the farms of impoverished soldiers. The actions to protect the impoverished from foreclosure were declared to be treason, but were ultimately enacted into laws protecting against unfair foreclosure. See *id.* at 70-71; (4) Striking down the South Carolina law that made it a crime for free black seamen to leave their vessels when their ships entered ports in the state. See *id.* at 113; (5) In 1853, Margaret Douglas was arrested in Norfolk, Virginia for the crime of teaching black children to read. She defended herself and was found guilty by a jury, which gave her a sentence of one dollar. The judge in the case overruled the jury saying that the prevention of Negro education was necessary "as a matter of self-defense against the schemes of Northern incendiaries," and sentenced her to one month in prison. *Id.* at 157; (6) In 1873, Susan B. Anthony was arrested for voting when women were not allowed to vote. The court said: "She undertook to settle a principle in her own person. She takes the risk, and she can not [sic] escape the consequences," and found her guilty of the federal crime of voting as a woman. *Id.* at 231-32; (7) In 1917, women were arrested and then imprisoned for sixty days for picketing in favor of the right to vote in front of the White House. See *id.* at 290; (8) a citizen of the United States, Gordon Hirabayashi, was arrested for and convicted of violating a military curfew regulation applicable only to those of Japanese descent. While the Supreme Court acknowledged that the Fifth Amendment requires the adherence to equality principles, the Court upheld the conviction due to the circumstances surrounding the war and Japanese population. See *id.* at 367-68; (9) In the 1960s, African American citizens were arrested and prosecuted for sit-ins at restaurants, freedom rides, and large and small demonstrations. See *id.* at 487; (10) Martin Luther King, Jr. was arrested and imprisoned many times. In 1963, while incarcerated in the Birmingham jail, he was severely criticized by white clergymen for "unwise and untimely" demonstrations and his willingness to break the law. His response included the following:

We can never forget that everything that Hitler did in Germany was "legal" and everything the Hungarian freedom fighters did in Hungary was "illegal." It was "illegal" to aid and comfort a Jew in Hitler's Germany. But I am sure that if I had lived in Germany during that time I would have aided and comforted my Jewish brothers

even though it was illegal. We who engage in nonviolent direct action are not the creators of tension. We merely bring to the surface the hidden tension that is already alive.

Id. at 489.

n216. Schulkind, *supra* note 2, at 103-04.

n217. *United States v. Bailey*, 444 U.S. 394, 410 (1980).

n218. See *United States v. Quilty*, 741 F.2d 1031, 1033 (7th Cir. 1984). In *Quilty*, the Seventh Circuit stated: "There are thousands of opportunities for the propagation of the anti-nuclear message: in the nation's electoral process; by speech on public streets, in parks, in auditoriums, in churches and lecture halls; and by the release of information to the media, to name only a few." Id.; see also *United States v. Maxwell*, 254 F.3d 21, 29 (1st Cir. 2001) ("Without exception, the decided cases teach that a defendant's legal alternatives will rarely, if ever, be deemed exhausted when the harm of which he complains can be palliated by political action."); *United States v. Turner*, 44 F.3d 900, 902 (10th Cir. 1995) ("Ms. Turner could go door-to-door conveying her views, distribute literature personally, through the mails or via publication, or simply continue her otherwise lawful protests."); *United States v. Kabat*, 797 F.2d 580, 591 (8th Cir. 1986) citing *United States v. Dorrell*, 758 F.2d 427, 431 (9th Cir. 1985) ("Protestors, the court reasoned, cannot create 'necessity' through their own impatience with the 'less visible and more time-consuming alternatives.'"); *United States v. Katzberg*, 201 F.R.D. 50, 51, 53 (D. R.I. 2001) (explaining how the defendants draped a black banner reading "No More Nuclear Victims" across a highway outside of the Newport Naval Station and the court held that "opportunities for speech and political participation make the necessity defense unavailable to these defendants.").

n219. Bauer & Eckerstrom, *supra* note 2, at 1179.

n220. Schulkind, *supra* note 2, at 93.

n221. Black's Law Dictionary 1272 (7th ed. 1999).

n222. Bauer & Eckerstrom, *supra* note 2, at 1180.

n223. Cohen, *supra* note 50, at 163-64.

n224. Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 15 *The Papers of Thomas Jefferson* 269 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958), quoted in Evan R. Seamone, *A Refreshing Jury COLA: Fulfilling the Duty to Compensate Jurors Adequately*, 5 *N.Y.U. J. Legis. & Pub. Pol'y* 289, 291 (2002). Thomas Jefferson also famously wrote: "Were I called upon to decide whether the people had best be omitted in the Legislative or the Judiciary department, I would say it is better to leave them out of the Legislative." 15 *The Papers of Thomas Jefferson* 282-83, (Julian P. Boyd & William H. Gaines, Jr., eds. 1958), quoted in William L. Dwyer, *In the Hands of the People* 1 (2002).

n225. Sir Patrick Devlin, *Trial by Jury* 164 (1966).

n226. Parry, *The Virtue of Necessity*, *supra* note 2, at 462 (arguing that it is not that important what the juries decide as much as it is that the juries are given the opportunity to do so; it is this opportunity that enhances the legitimacy of the entire criminal justice system).

n227. See generally Colbert, *Trial Without Jury*, *supra* note 2, at 14-24.

n228. See *id.* at 49.

n229. See *id.* at 64.

n230. See *United States v. Aguilar*, 883 *F.2d* 662, 684-690 (9th Cir. 1989); see also Colbert, *Trial Without Jury*, *supra* note 2, at 8.

n231. See Colbert, *Politically Sensitive Cases*, *supra* note 2, at 1283, 1291.

n232. Claire Brey, *Magna Carta: Manuscripts and Myths* 29, 45-46, 48 (2002). After several failed military

campaigns which were costly both in terms of operating mercenary armies and the loss of vast revenue producing lands, King John tried to impose the costs of his reign on a significantly reduced number of feudal subjects. The King extracted ever larger amounts of money from taxes on office holders, fines from the justice system, and from payments and assessments on the feudal holders of land. King John exacted these funds in increasingly unscrupulous ways, including seizing lands, taking hostages and imprisoning people who resisted his demands. In response to these actions, the feudal barons demanded more fairness in their treatment and repeatedly attempted to meet with King John to persuade him to change his conduct to no avail. Finally, in May of 1215, a group of barons met and renounced their allegiance to the king, effectively declaring civil war. The rebel barons captured the Tower of London later that month and by June they were engaged in negotiations with representatives of the King at Runnymede, a meadow between the camp of the barons and the castle of King John. On June 15, 1215, King John signed a series of concessions in an agreement with the barons; those concessions are now known as the Magna Carta. See generally *id.* at 7-33.

Other historians point out that while the jury system was as a right in the Magna Carta, it had been used before. Earlier forms of resolving disputes involved trial by battle and trial by ordeal. Twelve man juries were used by Henry II to resolve some land disputes. See Boyd C. Barrington, *The Magna Charta and Other Great Charters of England* 115-16 (Fred B. Rothman & Co. 1993) (1900); Patrick Devlin, *Trial By Jury*, 6-14 (Stevens & Sons 1966).

n233. Breay, *supra* note 232, at 7 (quoting the Magna Carta). These rights can also be found in the third revision of the Magna Carta. See also 1 Danby Pickering, *The Statutes at Large, from the Magna Charta to the End of the Eleventh Parliament of Great Britain* (Cambridge, J. Bentham 1762) at 10-11.

n234. 4 William Blackstone, *Commentaries on the Laws of England* 409-10 (Beacon Press 1962) (1765).

n235. *Id.*

n236. Leonard W. Levy, *The Palladium of Justice: Origins of Trial by Jury* 36, 40 (1999) (noting that this English system differed from the continental system where judges had much more unchecked power and consequentially became much more inquisitorial).

n237. See Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 *Wash. L. Rev.* 701, 779-80 (2001). The author stated:

Although the Declaration discusses judges in only one charge, it addresses juries in no fewer than three charges. This imbalance suggests the vital role that the drafters of the Declaration envisioned for the jury. Quite simply,

the jury was the democratic branch of the judicial department. Through juries, the people themselves would determine when to impose the coercive power of the state on an individual. The Declaration asserts that the King and Parliament had "deprived us, in many Cases, of the Benefits of Trial by Jury." The use of the term "Benefits" nicely captures the importance of the jury. Jury trial was not simply a "right" of the accused; it had "benefits" for the entire community. Tocqueville, one of the most astute observers of the American jury, would later observe, "The institution of the jury ... places the real direction of society in the hands of the governed ... and not in that of the government." It was this element of popular participation that drove the revolutionary generation's concern for the preservation of the jury. Popular participation on juries lies beneath two other charges that the Declaration lays against the King and Parliament. Immediately after the jury charge, the Declaration denounces "transporting us beyond Seas to be tried for pretended Offences." This charge echoes the Declaration's early dismissal of Parliamentary acts as "pretended Legislation." At issue was the application of a statute from the reign of Henry VIII allowing the trial in England of treasons committed outside the realm. The fundamental problem with this, of course, was that it destroyed the privilege of trial by a local jury. Not only would the individual be deprived of jurors drawn from his community, but the local community would also be deprived of its right to decide whether to apply the treason statute in a given case. In similar fashion, the Declaration denounces the protection of British troops by "a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States." A "mock trial" is one in which local civilian juries do not have a meaningful voice.

*Id.* at 779-80 (citations omitted).

n238. Kristen K. Sauer, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 *Colum. L. Rev.* 1232, 1248 (1995) (citations omitted).

n239. *The Oxford Companion to American Law* 454 (Kermit L. Hall, et. al. eds., Oxford University Press 2002). "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. Const. art. III. 2.

n240. This analysis applies to the need for civil juries as well. For example, in 1897 the Court held the "Seventh Amendment ... requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative." *Walker v. N.M. & S. Pac. R.R. Co.*, 165 *U.S.* 593, 596 (1897). "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 *U.S.* 474, 486 (1935).

n241. See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 *Minn. L. Rev.* 639, 670-71 (1973).

n242. See William V. Dorsaneo III, *Reexamining the Right to Trial by Jury*, 54 *SMU L. Rev.* 1695, 1696-97

(2001) (providing an excellent summary of additional commentaries supporting this claim in footnote nine).

n243. Roscoe Pound, *Law in Books and Law in Action*, 44 *Am. L. Rev.* 12, 18 (1910) quoted in *United States v. Dougherty*, 473 F.2d 1113, 1130 n.32 (D.C. Cir. 1972).

n244. *Morissette v. United States*, 342 U.S. 246, 274 (1952).

n245. *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); accord *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (stating that the purpose of jury is to guard against exercise of arbitrary governmental power); *Colgrove v. Battin*, 413 U.S. 149, 157 (1973); *Singer v. United States*, 380 U.S. 24, 31 (1965) (claiming that the jury trial clause "clearly intended to protect the accused from oppression by the Government").

n246. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973):

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

*Id.* at 294. The Court further stated that "few rights are more fundamental than that of an accused to present witnesses in his own defense." *Id.* at 302.

n247. See *supra* Part III.C (addressing failure of federal courts to allow necessity defenses to get to jury).

n248. *The Law of Necessity as Applied in the Bisbee Deportation Case*, *supra* note 2, at 273 (internal quotations omitted).

n249. See Colbert, *Politically Sensitive Cases*, *supra* note 2, at 1325 n.312 (providing examples and acquittals of Chicago Seven, Oakland Seven, the Camden 28, the Milwaukee 14, Gainesville 7, and several Black Panther cases in New York, California, and New Haven); Edward McGowan, *Peace Warriors: The Story of the Camden 28* (Circumstantial Productions 2001) (providing a very enlightening day by day narrative of one of those trials).

n250. See Colbert, *Politically Sensitive Cases*, supra note 2, at 1319-20 and ns. 281-85 (providing examples of convictions of labor organizers during World War I, anarchists, spies, and members of the communist party).

n251. Arnolds & Garland, supra note 2, at 296.

n252. See Model Penal Code, 3.02, at 17. Unfortunately, as noted above, the Model Code did not address the issue of the role of the judge and jury on this exact point, even they were divided.

n253. Model Penal Code, 3.02, at 17.