

## Necessity and International Law: Arguments for the Legality of Civil Disobedience

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In April 1987, Amy Carter, Abbie Hoffman, and 13 other protesters were tried in Northampton, Massachusetts, for trespassing and disorderly conduct during a demonstration against the Central Intelligence Agency (CIA).<sup>1</sup> The defendants raised the "necessity defense," arguing that their actions were justified as reasonable efforts to "prevent other crimes that pose the 'clear and immediate threat' of greater harm."<sup>2</sup> District Court Judge Richard F. Connon instructed the jury on the availability of this defense under Massachusetts case law, and permitted the jury to hear extensive testimony on the harms caused by the CIA. The witnesses "described assassinations, murders, campaigns of misinformation and other alleged activities by the agency and groups it supports in Central America and elsewhere."<sup>3</sup> All the defendants were acquitted.

In contrast, earlier this year 18 activists were found guilty for demonstrating in the Rotunda of the Capitol, while protesting United States aid to the Nicaraguan Contras.<sup>4</sup> Judge Luke C. Moore, of the District of Columbia Superior Court, did not allow the jury to hear the defendants' arguments and testimony that international law required that they "take action to stop the United States' illegal war of aggression against the Nicaraguan people,"<sup>5</sup> and that their demonstration in the Capitol was a legitimate and effective means of altering national policy.<sup>6</sup>

In both cases, peace activists attempted to show that their acts of civil disobedience were legally justified, under either the doctrine of necessity or international law. Until recently, such justifications rarely have succeeded, simply because most judges have been un-

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1. *Commonwealth v. Carter*, No. 8745JC-0011A (Northampton Dist. Ct. Apr. 15, 1987). See *N. Y. Times*, Apr. 16, 1987, at A1, col. 5.

2. *N. Y. Times*, Apr. 16, 1987, at A1, col. 6.

3. *Id.* at B9, col. 1.

4. *United States v. Arnold*, No. M9198-86 (D.C. Super. Ct. Feb. 5, 1987). See *N.Y. Times*, Feb. 16, 1987, at A9, col. 4.

5. *N. Y. Times*, Feb. 16, 1987, at A9, col. 5 (quoting defense lawyer Nina Kraut).

6. *Id.* at col. 4 (report of the testimony of defendants' witnesses, former United States Attorney General Ramsey Clark, and former Defense Department analyst Daniel Ellsberg, who released the "Pentagon Papers").

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willing to allow the jury to hear the justifications. In most civil disobedience trials, judges have ruled as a matter of law that the defendants' theory of justification is not applicable, and they have excluded all supporting evidence and testimony.<sup>7</sup> The result has been conviction for most civilly disobedient defendants. In contrast, when the jury has been permitted to hear and consider the merits of the defendants' justifications, it has granted acquittals more often than not.<sup>8</sup>

The purpose of this Current Topic is to demonstrate that defenses based on the often interrelated claims of necessity and international law should be permitted in trials of peace activists who have committed civil disobedience, whether or not the defenses ultimately persuade a jury. The systematic rejection of the defenses and exclusion of evidence and witnesses raise serious constitutional questions pertaining to the defendants' right to a fair jury trial.<sup>9</sup>

### *I. The Concept of Civil Disobedience*

The proposition that civil disobedience—"the deliberate violation of law for a vital social purpose"<sup>10</sup>—can be legally justified may seem at odds with a common view that the civilly disobedient must

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7. See Vance, *The Necessity Defense in Political Trials: An Appraisal*, in *Por Amor Al Pueblo: Not Guilty!: The Trial of the Winooski 44* (B. Bradley, N. Hine, J. Vollmann & N. Wasserman eds. 1986) [hereinafter *Por Amor*]; Aldridge & Stark, *Nuclear War, Citizen Intervention, and the Necessity Defense*, 26 *Santa Clara L. Rev.* 299 (1986); Note, *Antinuclear Demonstrations and the Necessity Defense: State v. Warshow*, 5 *Vt. L. Rev.* 103 (1980); Comment, *Civil Disobedience and the First Amendment*, 32 *UCLA L. Rev.* 904 (1985).

8. Aldridge & Stark, *supra* note 7, at 300. Aldridge and Stark identify "a small but growing practice of allowing juries to hear a necessity defense." *Id.* at 300. Since criminal cases resulting in acquittal are not reported, the census is speculative.

In my research, I have found the following cases in which the civilly disobedient have been acquitted: *People v. Block* (Galt Jud Dist., Sacramento Co. Muni. Ct., Cal. 1979) (nuclear power); *Chicago v. Streeter*, No. 85-108644 (Cook Co. Cir. Ct., Ill. 1985) (apartheid); *People v. Jarka*, No. 002170 (Lake Co. Cir. Ct., Ill. 1985) (nuclear arms buildup and Central America); *People v. Brown*, 78 CM2522 (19th Dist., Lake Co., Ill. 1979) (nuclear power); *State v. Mouer*, No. 77-246 (Columbia Co. Dist. Ct., Ore. 1977) (nuclear power); *State v. Keller*, No. 1372-4-84 CnCr (Chittendon Cir. Dist. Ct., Vt. 1984) (Central America). See also *Washington v. Karon*, No. J85-1136 (Benton Co. Dist. Ct., Wa. 1985) (charges dismissed after the judge admitted evidence on necessity and international law).

Summaries and court documents of many unpublished cases involving civil disobedience are available from the Meiklejohn Civil Liberties Institute, Peace Law and Education Project, Box 673, Berkeley, CA 94701.

9. See *infra* text accompanying notes 31-37.

10. H. Zinn, *Disobedience and Democracy: Nine Fallacies on Law and Order* 39 (1968).

willingly submit to punishment.<sup>11</sup> "One who breaks an unjust law," wrote Dr. Martin Luther King from his Birmingham jail cell, must do it . . . with a willingness to accept the penalty. 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 law.<sup>12</sup>

A "willingness to accept the penalty" if legal justification fails, however, does not imply that the civilly disobedient must refrain altogether from efforts to legally justify their conduct. Moreover, Dr. King's reflections concerned the best political *strategy* for overcoming segregation. Accepting the penalty and staying in jail would "arouse the conscience of the community." It would "establish such creative tension that a community that has constantly refused to negotiate is forced to confront the issue."<sup>13</sup> For King, as for the civilly disobedient today, the goal was social change, not penance.

Unlike most civil disobedience today, in the civil rights movement of the 1950s and 1960s the disobeyed laws themselves were often the object of protest. Rosa Parks launched a citywide bus boycott by her lone and courageous refusal, on December 1, 1955, to move to the back of a Montgomery, Alabama, bus. Hers was an act of disobedience of a law, the Montgomery segregation ordinance, that was itself unjust—indeed, it was found to be unconstitutional.<sup>14</sup> This type of disobedience frequently is referred to as "direct" civil disobedience. By contrast, in "indirect" civil disobedience, the disobeyed law is not itself the object of protest.<sup>15</sup>

Some have held that the distinction between direct and indirect civil disobedience is fundamental. Justice Abe Fortas wrote that

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11. The most famous exponent of this view was Mohandas Gandhi. In 1922 Gandhi declared to the judge who was trying him on a charge of sedition: "Nonviolence implies voluntary submission to the penalty for non-co-operation with evil. I am here, therefore, to invite and submit cheerfully to the highest penalty that can be inflicted upon me for what in law is a deliberate crime and what appears to me to be the highest duty of a citizen." Gandhi, *A Plea for the Severest Penalty Upon Conviction for Sedition*, Mar. 23, 1922, *quoted in* *Commonwealth v. Capitulo*, 471 A.2d 462, 473 (Pa. 1984).

12. Letter from a Birmingham Jail (1963), in 1 A.J. Muste Memorial Institute Essay Series 21.

13. *Id.* at 16. For others, the avoidance of punishment may be the chosen strategy. The Berrigans, for example, refused to yield to state authorities following actions to end the Vietnam war. See N. Chomsky, *For Reasons of State* 285 (1970). Either strategy, of course, is consistent with efforts to legally justify the disobedient act.

14. *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala. 1956), *aff'd per curiam*, 352 U.S. 903 (1956).

15. Almost identical formulations of this distinction are found in Greenblatt, *Defense of the Civilly Disobedient*, 13 N.C. Cent. L.J. 158, 159-60 (1982); Note, *supra* note 7, at 105 n.13; Comment, *supra* note 7, at 906.

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only the former could be justified on moral or legal grounds: “In my judgment civil disobedience—the deliberate violation of law—is never justified in our nation where the law being violated is not itself the focus or target of the protest.”<sup>16</sup> This has never been the view of the Supreme Court, however. In *Boynton v. Virginia*, for example, the Court overturned the convictions of “Freedom Riders” who had been arrested on charges of violating a Virginia trespass statute after refusing to leave the “white” section of a bus terminal restaurant.<sup>17</sup> The Court held that they had a federal right to sit wherever they chose.<sup>18</sup> Their disobedience was justified even though the disobeyed law—the trespass statute—was not itself the direct focus or target of the protest.

The traditional dichotomy between direct and indirect disobedience ignores the essential similarity of the Montgomery bus sit-in and the Virginia Freedom Ride. Although the courts took some time to recognize the fact, both Mrs. Parks and the Freedom Riders had a legal right to remain seated in the “white” section. In both cases, the orders to move infringed on protected rights. Therefore, in neither case did the protesters need a *reason* to remain seated. That the sources of the orders differed—one a segregation statute, the other a trespass statute—is largely irrelevant.

Although they fall within the definition of indirect civil disobedience, most acts of civil disobedience committed by peace activists have a legal posture entirely different from that of the Freedom Rides. Whereas the trespass laws were invalid as applied to the Freedom Riders sitting-in at bus stations, the trespass laws used to evict nuclear protestors are valid, both on their face and as applied. Consequently, trespass at a weapons facility, unlike at a lunch counter, requires an affirmative legal justification. In other words, one needs a reason to sit-in at a weapons facility. The reasons most

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16. A. Fortas, *Concerning Dissent and Civil Disobedience* 63 (1968). As a jurist, however, Justice Fortas did not adhere to this rule. He joined the dissenting opinions in *Walker v. City of Birmingham*, 388 U.S. 307 (1966) (Warren, C.J., Douglas, J., Brennan, J., dissenting), in which the Court upheld the conviction of civil rights activists who had disobeyed a court order enjoining their planned march in Birmingham. The underlying statute at issue was a parade ordinance, and was not itself the focus or target of the protest.

17. *Boynton v. Virginia*, 364 U.S. 454, 456 (1960).

18. 364 U.S. 454 (1960) (protesters in bus terminal restaurant had a federal right, under the Interstate Commerce Act, to sit-in). Segregating facilities at bus terminal lunch counters and waiting rooms was declared unconstitutional in *United States v. Lassiter*, 203 F. Supp. 20 (W.D. La. 1962), *aff'd per curiam*, 371 U.S. 10 (1962). More generally, segregation in public places was outlawed by the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000a-6.

commonly asserted are those based on the doctrine of necessity and international law.<sup>19</sup>

## II. *The Necessity Defense*

Our legal system permits lawbreaking, even of valid laws, under certain circumstances. A reasonable belief that breaking the law is necessary to prevent the occurrence of a greater harm forms the basis of the necessity, or "choice of evils," defense. The rationale for the defense is grounded in public policy: The law ought to promote the achievement of higher values at the expense of lesser ones. At times, this goal may require that one ignore the literal language of the criminal law.<sup>20</sup>

While the doctrine of necessity has its roots in the common law,<sup>21</sup> over 20 states have now incorporated the defense in their penal codes.<sup>22</sup> Many of these adopt the formulation proposed by the American Law Institute in the Model Penal Code, entitled "Justification Generally: Choice of Evils":

- (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 un-

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19. The focus on necessity and international law is not intended to suggest the irrelevance of other defenses for the civilly disobedient. Defendants may pursue a variety of technical, statutory, and constitutional defenses. See Greenblatt, *supra* note 15, at 178-88.

20. W. LaFare & A. Scott, *Criminal Law* 441 (2d ed. 1986). See also Arnolds & Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 *J. Crim. L. & Criminology* 289, 289 (1974).

The necessity defense is also recognized in the law of torts. See Restatement (Second) of Torts § 196 (1965).

21. See Model Penal Code § 3.02 comment 1 (1985). See Aldridge & Stark, *supra* note 7, at 301-03 for a concise history of the necessity defense.

22. See Model Penal Code § 3.02 comment 5, nn.21-24 (1985) for citations to state statutes.

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available in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.<sup>23</sup>

Under subsection (1), the actor must believe that the conduct is necessary to avoid a harm that is greater than the harm sought to be prevented by the disobeyed law. Subsection (2) implies that for certain offenses, such belief must be reasonable. If the actor was unreasonable, that is, reckless or negligent, "in appraising the necessity for his conduct," then the necessity defense will be unavailable "for any offense for which recklessness or negligence . . . suffices to establish culpability."<sup>24</sup>

The dispute in civil disobedience trials does not generally turn on the "balancing of evils" element. The evils of bombing, apartheid, or nuclear annihilation unquestionably outweigh the evils of public disturbance or unlawful entry.<sup>25</sup> Nor does the dispute generally turn on the Model Code formulation of subsections (1)(b) and (1)(c), under which the general "choice of evils" defense must give way "if the issue of competing values has been previously foreclosed by a deliberate legislative choice."<sup>26</sup> Rather, the dispute usually concerns the requirement that the defendants reasonably believed that their conduct was *necessary* to avert the greater harm. This requirement entails that: (1) "a direct causal relationship [was] reasonably anticipated between the action taken and the avoidance of the harm,"<sup>27</sup> and (2) the defendants reasonably believed that there was no opportunity to avert the harm without doing the criminal act. An act would not be necessary, in other words, if it were unlikely to be effective or if alternative means existed to achieve the same goals.

In many jurisdictions, necessity has been saddled with a third element: that the evil the actor seeks to avoid be imminent. Pennsylvania, for example, requires that the actor face "a public disaster

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23. Model Penal Code § 3.02 (1985).

The Model Penal Code places the burden of persuasion on the prosecution: "The prosecution need not negative a justification defense until there is evidence supporting the defense, but it must disprove the defense beyond a reasonable doubt if evidence of the defense is introduced." *Id.* § 3.01 explanatory note at 5. *See id.* § 3.01 comment 1, nn.4, 5, for states that follow the Model Penal Code in this respect.

24. Other formulations of the necessity defense are stricter, and would deny the defense in prosecutions for all offenses where the actor's belief was unreasonable. *See, e.g.*, N.Y. Penal Law § 35.05(2) (McKinney 1984). *See* Model Penal Code § 3.02 comment 5, n.28 (1985) for states that follow the Model Penal Code rule on this question. *See generally id.* comment 5, for a discussion of the issue.

25. *But see infra* text accompanying notes 61-66.

26. Model Penal Code § 3.02 comment 2, at 13 (1985). *See infra* text accompanying notes 64-66 for further discussion of the issue of legislative preclusion.

27. *United States v. Cassidy*, 616 F.2d 101, 102 (4th Cir. 1979).

that was clear and imminent, not debatable or speculative."<sup>28</sup> A New York statute requires that the conduct be "necessary as an emergency measure to avoid an imminent public or private injury."<sup>29</sup> The authors of the Model Penal Code, however, explicitly reject imminence "as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future."<sup>30</sup>

#### A. *Matters of Fact and Law: The Importance of the Jury*

The main questions for decision at civil disobedience trials are factual ones. Was it reasonable to anticipate that the act of civil disobedience would be effective? Were there legal means to avert the harm? Was the harm imminent? These questions should be resolved by jury.<sup>31</sup> In *Morissette v. United States*, the Supreme Court underscored the importance of the jury's role as fact-finder:

Jurors may be perverse, the ends of justice may be defeated by unrighteous verdicts, but so long as the functions of the judge and 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 significance of trial by court and jury.<sup>32</sup>

In cases involving civil disobedience, however, judges consistently have invaded the province of the jury. In numerous trials,<sup>33</sup> they have refused to permit the jury to hear the necessity defense by ruling as a matter of law that the defendants' evidence failed to meet an

28. *Commonwealth v. Berrigan*, 501 A.2d 226, 229 (Pa. 1985).

29. N.Y. Penal Law § 35.05 (McKinney 1984). See Model Penal Code § 3.02 comment 5, nn.21, 23, 24 (1985) for citations to other states that require imminence as an element of the necessity defense.

30. Model Penal Code § 3.02 comment 3, at 16, 17 (1985). Cf. W. LaFave & A. Scott, *supra* note 20, at 449:

It is sometimes said that the defense of necessity does not apply except in an emergency—when the threatened harm is immediate, the threatened disaster imminent. Perhaps this is but a way of saying that, until the time comes when the threatened harm is immediate, there are generally options open to the defendant, to avoid the harm, other than the option of disobeying the literal terms of the law. (Footnotes omitted)

31. Contrast these questions to the question of balancing the harms, which the Model Penal Code describes as "an interpretation of the law of the offense." Model Penal Code § 3.02 comment 2 at 12 (1985). The Model Code leaves unresolved "the question of how far the balancing of values should be determined by the court as a matter of law or submitted to the jury." *Id.* Certain states, however, appear to confer this judgment on the court. See, e.g., N.Y. Penal Law § 35.05 (McKinney 1984). See Model Penal Code § 3.02 comment 5, n.33 (1985) for states that follow the New York statute.

32. 342 U.S. 246, 274 (1952) (quoting *People v. Flack*, 26 N.E. 267, 270 (N.Y. 1891)).

33. Aldridge & Stark, *supra* note 7.

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indeterminate “minimum standard.” The Pennsylvania Supreme Court described the judge’s role as follows:

As with any offer of proof, it is essential that the offer meet a minimum standard as to each element of the defense so that if a jury finds it to be true, it would support the affirmative defense. Where the offer is insufficient to establish any one element of the defense, the trial court may deny use of the defense and prohibit evidence as to the other elements of the defense.<sup>34</sup>

Nowhere does the court define the “minimum standard.” The result is a process that allows a trial judge unsympathetic to the disobedient activists to exclude evidence that the jury should hear.

The broad discretion thus assumed by the judge threatens the fundamental constitutional rights of the civilly disobedient defendant.<sup>35</sup> The fifth and fourteenth amendments to the Constitution provide that citizens shall not be deprived of “life, liberty, or property, without due process of law.” The sixth amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” Under these guarantees, criminal defendants must be permitted to defend themselves before a jury, and to present testimony relevant to their defense. “Few rights,” held the United States Supreme Court in *Chambers v. Mississippi*, “are more fundamental than that of an accused to present witnesses in his own defense.”<sup>36</sup> The Court elaborated:

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 . . . . “A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.”<sup>37</sup>

For the civilly disobedient defendant, there is no “fair opportunity to defend against the State’s accusations” if he or she is denied the right “to be heard in his [or her] defense,” “to present witnesses,”

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34. *Commonwealth v. Berrigan*, 501 A.2d at 229. See also N.Y. Penal Law § 35.05 (McKinney 1984) (“Whenever evidence relating to the defense of justification . . . is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a defense.”).

35. For the due process argument made in this subsection, I am indebted to Aldridge & Stark, *supra* note 7, at 303-04, 334, 347-49.

36. 410 U.S. 284, 302 (1973) (citations omitted).

37. 410 U.S. at 294 (quoting *In re Oliver*, 333 U.S. 257, 273 (1948) (Black, J.) (emphasis added)). See also *United States v. Sisson*, 297 F. Supp. 902, 912 (D. Mass. 1969) (court’s exclusion of basic issues relevant to defense would violate defendant’s right to due process).

and “to offer testimony” with respect to each of the elements of the necessity defense.

*B. The Causality Element*

In *Commonwealth v. Berrigan*, a group of pacifists called the “Plowshares Eight” were convicted for hammering nuclear warhead nosecones at the General Electric plant in King of Prussia, Pennsylvania. The Pennsylvania Supreme Court, reversing the appellate court, rejected the necessity defense because “the actions chosen by Appellees (destruction of the casings and pouring of human blood) could not under any hypothesis reasonably be expected to be effective in avoiding the perceived public disaster of a nuclear holocaust.”<sup>38</sup> Because of the court’s factual assumptions about the inefficacy of civil disobedience, the jury was robbed of its role as fact-finder, and the defendants were robbed of their constitutional rights and of possible acquittals.

It is difficult, of course, to prove that a single act of civil disobedience will be effective. In any broad social movement, the factors that lead to change are difficult to isolate. Nevertheless, civil disobedience campaigns clearly have played a central role in social change. The “Boston Tea Party,” violations of the Fugitive Slave Acts, the sit-down strikes of the 1930s—all were integral to the achievement of a more just society.<sup>39</sup> More recently, civil disobedience was the core and inspiration of the civil rights struggle. The lunch counter sit-ins and Freedom Rides combined with legal marches and meetings to abolish Jim Crow in the South. Although it is rare for policy makers to acknowledge the effectiveness of those whose methods they disparage, President Lyndon Johnson praised “the American Negro” as the “real hero of this struggle. . . . His actions and protests, his call to risk safety, and even to risk his life,

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38. 501 A.2d at 230. Other courts have ruled as a matter of law on the ineffectiveness of: spray painting government property to terminate the MX missile program, *United States v. Dorrell*, 758 F.2d 427 (9th Cir. 1985); blocking entry to the Rocky Flats nuclear facility to change United States weapons policy, *United States v. Seward*, 687 F.2d 1270 (10th Cir. 1982); trespassing on a naval installation to terminate the Trident submarine program, *United States v. May*, 622 F.2d 1000 (9th Cir. 1980); pouring blood and ashes on the Pentagon to change United States weapons policy, *United States v. Cassidy*, 616 F.2d 101 (4th Cir. 1979); burning selective service records to stop the Vietnam War, *United States v. Simpson*, 460 F.2d 515 (9th Cir. 1972); and trespassing at a Honeywell Corporation office to stop the Vietnam War, *State v. Marley*, 509 P.2d 1095 (Haw. 1973).

39. See generally S. Lens, *Radicalism in America* (1966); *The Power of the People: Active Nonviolence in the United States* (R. Cooney & H. Michalowski eds. 1977) [hereinafter *Nonviolence*]; H. Zinn, *A People's History of the United States* (1980).

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have awakened the conscience of this nation. His demonstrations have been designed to call attention to injustice; designed to provoke change; designed to stir reform.”<sup>40</sup>

There is also little question that civil disobedience tempered United States aggression in Indochina. Noam Chomsky, a critical observer of the Vietnam war, has written that evidence “supports the judgment that mass protest and resistance have been a major factor in bringing about the changes of tactics in executive policy in recent years.”<sup>41</sup> There is concrete evidence that the 1969 actions against the war caused President Richard Nixon to withdraw plans to escalate the war, when he became convinced that he would not have sufficient public support.<sup>42</sup> Those plans included the use of tactical nuclear weapons against North Vietnam.<sup>43</sup>

Too little time has passed for a confident measure of the influence of civil disobedience in the current movements for social change, such as the antinuclear movement and the movement to stop CIA covert activities.<sup>44</sup> But history’s lessons belie the *Berrigan* court’s confidence in the inefficacy “under any hypothesis” of the Plowshares action. That court should have adopted the more accommodating approach proposed by Justice Edmund Spaeth in his concurrence in the lower court’s opinion in *Berrigan*:

Appellants do not assert that their action would *avoid* nuclear war (what a grandiose and unlikely idea!). Instead . . . their belief was that their action, *in combination with* the actions of others, *might accelerate a political process* ultimately leading to the abandonment of nuclear missiles. And *that* belief, I submit, should not be dismissed as “unreasonable as a matter of law.” A jury might—or might not—find it

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40. Television address by President Lyndon B. Johnson (Mar. 15, 1965), *quoted in* *Nonviolence*, *supra* note 39, at 171.

At the Northampton trial for civil disobedience directed against the CIA, *see supra* note 1, former U.S. Attorney General Ramsey Clark testified on the role of civil disobedience at the beginning of the modern civil rights movement: “I believe that if Rosa Parks had not refused to move to the back of the bus, you and I might never have heard of Dr. Martin Luther King. It took that kind of dramatic action to awaken this nation to its flaw of racism.” *In These Times*, Apr. 29-May 5, 1987, at 3, col. 3.

41. N.Chomsky, *supra* note 13, at 292.

42. D. Ellsberg, Introduction: Call to Mutiny, in *Protest and Survive* xvi (E.P. Thompson & D. Smith eds. 1981).

43. *Id.* at xv.

44. Some comments, however, are suggestive of the impact of civil disobedience. After committing civil disobedience at the Nevada Nuclear Test Site on June 2, 1986, Harvard psychiatrist John Mack wrote: “Several Congressmen have told us that the August vote, in which the House committed itself to cutting off funds for nuclear-weapons testing, was very much affected by the demonstrations.” Mack, *Action and Academia in the Nuclear Age*, *Harv. Mag.*, Jan.-Feb. 1987 at 27.

unreasonable as a matter of *fact*. But that is for a jury to say, not for a court.<sup>45</sup>

Unlike the majority of the Pennsylvania Supreme Court, Justice Spaeth appreciated both the due process rights of the civilly disobedient and the lessons of past civil disobedience campaigns.

### C. *The Lack of Alternatives Element*

Some courts have rejected the necessity defense on the ground that the defendants' offer of proof was insufficient with respect to the requirement that no alternative legal means exist to avert the greater harm. The New Hampshire Supreme Court, for example, wrote that those "who oppose nuclear power have other lawful means of protesting nuclear power," so they need not trespass.<sup>46</sup> Similarly, with respect to trespassers on military property, the Seventh Circuit declared: "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."<sup>47</sup> On this view, the necessity defense would appear to fail as a matter of law as long as the defendants had alternative lawful means of conveying their "message."

There are, of course, many ways in which the civilly disobedient might express their views. But this fact by itself should not preclude the use of the necessity defense. The question for decision should not be whether any legal alternative exists, but rather whether any "legal alternative [exists] which will be *effective* in abating the immediate public disaster."<sup>48</sup> Thus a passerby who breaks into a burning house to rescue a trapped child need not first call the fire department—a lawful means of expressing the message—if he or she has good reason to believe that committing trespass would increase the chances of saving the child.

The civilly disobedient may have reason to believe that the available legal means of protest will not be effective. Activists frequently have spent years engaged in legal, but unsuccessful, efforts to avert the dangers they perceive before turning—often reluctantly—to civil

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45. *Commonwealth v. Berrigan*, 472 A.2d 1099, 1115 (Pa. Super. 1984) (Spaeth, J., concurring) (emphasis in original), *rev'd*, 501 A.2d 226 (Pa. 1985).

46. *State v. Dorsey*, 395 A.2d 855, 857 (N.H. 1978).

47. *United States v. Quilty*, 741 F.2d 1031, 1033 (7th Cir. 1984). *See also* *United States v. Dorrell*, 758 F.2d 427 (9th Cir. 1985); *United States v. Seward*, 687 F.2d 1270 (10th Cir. 1982); *In re Weller*, 164 Cal. App. 3d 44, 210 Cal. Rptr. 130 (1985); *State v. Marley*, 509 P.2d 1095 (Haw. 1973).

48. *Commonwealth v. Berrigan*, 501 A.2d at 229 (emphasis added).

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disobedience. The defense attorney for the Winooski 44, the Vermonters who occupied Senator Robert Stafford's office, told the jury: "They petitioned, and petitioned, and petitioned, and it didn't work. . . . Have they met with a stone wall? Yes, yes; they have repeatedly."<sup>49</sup>

The credibility of the defendants, and the reasonableness of their belief that legal recourse would be futile, are matters for the jury to decide. The determination may require testimony on the history of unsuccessful legal attempts to avert the perceived danger, on the inadequacies and inefficiencies of the electoral system, on the indifference of the media, and so on. In short, the inquiry is one that is particularly fact-laden. For the court to prejudge the matter is effectively to deny defendants their right to trial by jury.

### D. *The Imminence Element*

In other civil disobedience trials, courts refused the necessity defense on the ground that the defendants were unable to meet the minimum standard with respect to the imminence requirement. For example, in *State v. Warshow*, the danger of an accident at a nuclear power plant was held too "speculative and uncertain"—again, as a matter of law—to constitute an imminent danger.<sup>50</sup> The imminence test imposed on the defendants was strict: The danger "must be, or must reasonably appear to be, threatening to occur immediately, near at hand, and impending."<sup>51</sup> In *Berrigan*, discussed above, the Court held that the defendants' offer of proof, "as a matter of law, . . . was insufficient to establish that the harm was a clear and imminent public disaster."<sup>52</sup> Here, too, the imminence test was strict: "that the actor was faced with a public disaster that was clear and imminent, not debatable or speculative."<sup>53</sup>

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49. *Por Amor*, *supra* note 7, at 140, 141.

50. 410 A.2d 1000, 1002 (Vt. 1979). *See also* Commonwealth v. Capitolo, 498 A.2d 806, 809 (Pa. 1985). Note Justice Franklin Billings' dissent in *Warshow*: "Where there is evidence offered which supports the elements of the defense, the questions of reasonableness and credibility are for the jury to decide." 410 A.2d at 1005 (Billings, J., dissenting). He believed that "the trial court struck too soon in excluding the offered evidence" and that the defendants were denied "a fair trial merely because they express unpopular political views." 410 A.2d at 1006. *See* Note, *supra* note 7.

51. 410 A.2d at 1002.

52. 501 A.2d at 230.

53. 501 A.2d at 229. Note that the *Warshow* formulation of the imminence test allows for reasonable error, while in *Berrigan*, imminence has to be proven as a matter of fact. If literally construed, the *Berrigan* formulation is too harsh, and probably harsher than the *Berrigan* court intended. It would bar the defense whenever a harm is in fact nonimminent, even though in the circumstances all reasonable people would have believed that the harm was imminent and the preventive action warranted.

The necessity defense should have been allowed in these cases because the defendants were prepared to show a clear and substantial danger of nuclear accident or war, whether or not a *specific* accident or detonation was foreseeable. To disallow the defense on the theory that the defendants failed to pass the strict imminence test of *Warshow* and *Berrigan* contravenes the public policy behind the necessity defense. If forced to wait until a nuclear accident threatens "to occur immediately," protesters will surely lose the opportunity for effective action. Prior to the Three Mile Island crisis, for example, one could not have known that the accident threatened "to occur immediately." There comes a time when citizen intervention is too late.

The strict imminence test is most clearly inappropriate when imposed on citizen actions, like the Plowshares', aimed at preventing nuclear war.<sup>54</sup> The mere possibility of a nuclear war, the litany of horrors whose proportions dwarf all the catastrophes of history, suggests the absurdity of the focus on imminence. Whether nuclear war comes in 20 years or next week, either possibility should satisfy the minimal elements of necessity. Whether the imminence requirement is abandoned altogether or merely construed more leniently, the law should not require that citizens wait until the moment before their incineration before it permits a necessity defense for disobedient action.<sup>55</sup>

### III. *Defenses Involving International Law*

The civilly disobedient often attempt to introduce international law in aid of the necessity defense: If the government policy they oppose violates norms of international criminal law, then it is perforce a grave harm. Defendants also sometimes introduce interna-

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54. Actions to prevent nuclear annihilation are also justifiable as self defense. Lisa Peattie, M.I.T. Professor of Anthropology Emeritus, was arrested for civil disobedience at the Nevada Test Site in June 1986. In her defense she wrote: "Another basis for the right of citizens to take action toward stopping the preparations for nuclear war is the basic right of persons to defend themselves and their children." Mack, *supra* note 44, at 29.

To my knowledge, no nuclear protester has yet been acquitted on grounds of self-defense.

55. Jonathan Schell wrote:

[O]ur extinction will be swift; it will literally be over before we know it. We have to match swiftness with swiftness. Because everything we do and everything we are is in jeopardy, and because the peril is immediate and unremitting, every person is the right person to act and every moment is the right moment to begin, starting with the present moment.

J. Schell, *The Fate of the Earth* 226 (1982).

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tional law to support justifications different from the necessity defense, based on the common law crime prevention privilege and on the Nuremberg Principles. These justifications have received little recognition in the courts. Evidence on international law has often been excluded along with evidence on necessity.<sup>56</sup> In very few cases has a judge given the jury instructions on international law, and, even then, rarely have they been independent of instructions on the necessity doctrine.<sup>57</sup> The viability of defenses based solely on international law, therefore, is far from certain. This does not mean that civilly disobedient defendants should abandon international law defenses, for these defenses often reflect part of the underlying motive for the act of disobedience. Defendants will have more success in getting their arguments and testimony to the jury, however, if the international law elements of their defense are introduced as part of an overall necessity defense.

All the arguments based on international law begin with the recognition that international law is binding on federal and state courts in the United States. Article VI of the United States Constitution upholds treaties, along with federal laws and the Constitution itself, as “the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.” The Supreme Court stated in *The Paquete Habana*: “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”<sup>58</sup> Absent a later, superseding act of Congress, valid treaties signed and ratified by the United States must be honored in domestic courts.<sup>59</sup>

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56. See, e.g., *United States v. Cottier*, 759 F.2d 760 (9th Cir. 1985); *State v. Marley*, 509 P.2d 1095 (Haw. 1973); *Commonwealth v. Berrigan*, 501 A.2d 226 (Pa. 1985). Some courts have denied litigants the use of international law defenses on grounds of standing. See *United States v. May*, 622 F.2d 1000, 1009 (9th Cir. 1980); *United States v. Berrigan*, 283 F. Supp. 336 (D. Md. 1968), *cert. denied*, 397 U.S. 909 (1970).

57. See, e.g., *State v. Keller*, No. 1372-4-84 CnCr (Chittendon Cir. Dist. Ct., Vt. 1984).

58. 175 U.S. 677, 700 (1900). Treaties are not the only source of international law: “[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators.” *Id.*

59. See *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581 (1889); *Whitney v. Robertson*, 124 U.S. 190 (1888). See generally, L. Henkin, *Foreign Affairs and the Constitution* 156-167 (1972).

*A. International Law as Evidence*

International law may be introduced at trial in support of the necessity defense. First, evidence that the perceived harms are serious crimes under international law helps substantiate the defendants' claim that they outweigh the harm caused by the act of disobedience. This was the use to which international law was put in *State v. Keller*,<sup>60</sup> the trial of the Winooski 44. After instructing the jury on the relevant international legal principles, Judge Frank Mahady then charged the jury "to consider those legal principles in weighing the relative value of the injuries which the Defendants claim they saw impending from the perceived emergency in Central America against the seriousness of the criminal trespass allegedly committed by them."<sup>61</sup> The illegality of the harms—the bombing of civilians, for instance—was further evidence of their gravity.

Second, international law may be introduced as evidence of the harm's legal status. The necessity defense is unavailable if the alleged evil is not legally cognizable. This does not mean that the evil must be a crime: In the paradigmatic example of necessity involving trespass in a burning house, the defense is equally appropriate whether the fire was set by accident or arson. It does mean that a judicial determination may preclude the defendant's choice of evils. For example, a court that denied the necessity defense to anti-abortion activists who had interfered with women seeking abortions reasoned as follows: (1) necessity presupposes a choice between two evils; (2) since 1973 when the Supreme Court decided *Roe v. Wade*,<sup>62</sup> first trimester abortion is not a "legally recognized injury," or evil; therefore, by judicial preclusion, (3) the defendants could not justify their trespass by necessity.<sup>63</sup>

A similar argument in derogation of the necessity defense rests on the theory of legislative preclusion.<sup>64</sup> The Model Penal Code disallows the necessity defense if "a legislative purpose to exclude the justification . . . plainly appear[s]."<sup>65</sup> Such legislative purpose appears, the argument runs, if Congress has endorsed the government policies that are responsible for the harms in question. As applied to typical acts of civil disobedience, however, the legislative preclusion argument is not persuasive. Much government policy, espe-

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60. No. 1372-4-84 CnCr (Chittendon Cir. Dist. Ct., Vt. 1984).

61. *Por Amor*, *supra* note 7, at 149.

62. 410 U.S. 113 (1973).

63. *People v. Krizka*, 416 N.E.2d 36, 37 (Ill. 1981).

64. *See, e.g.*, *State v. Warshow*, 410 A.2d at 1003 (Hill, J., concurring).

65. Model Penal Code § 3.02(1)(c) (1985). *See supra* text accompanying note 26.

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cially foreign policy, is conducted without express congressional approval (the Iran-Contra affair providing a contemporary example). Even when the Executive acts pursuant to legislation, the scope of what Congress has approved remains unclear. For example, an aid package to the Contras does not imply that Congress has approved the terror inflicted by the Contras on the Nicaraguan people. And *that* harm, certainly, is a legally cognizable injury.

Furthermore, if the harm—torture, for example—is demonstrably illegal under international law,<sup>66</sup> then it becomes even less plausible to argue that, by passing an appropriations bill, Congress has precluded the defendants' balancing of evils. The argument is less plausible still if the Executive policy that Congress has authorized is itself in violation of international law.

### B. *The Privilege to Prevent the Commission of Crimes*

A defense closely related to necessity is the "crime prevention defense."<sup>67</sup> Many acts of civil disobedience involve attempts to stop or prevent the implementation of government policies that are believed to be in violation of international law. Defendants in these cases may argue that their otherwise unlawful actions were justified under the crime prevention defense as attempts to stop ongoing or imminent crimes. In this defense, international law is introduced to establish the illegality of the government policy. Unlike the necessity defense, where international law is raised as evidence of a greater harm, here international law is an essential component of the defense.

The common law privilege of crime prevention,<sup>68</sup> like the doctrine of necessity, has been codified in numerous state penal codes.<sup>69</sup> The American Law Institute proposes the following:

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66. Torture is prohibited under, *inter alia*, article 5 of the United Nations Universal Declaration of Human Rights, G.A. Res. 217A, U.N.Doc. A/810, at 73 (1948). The prohibition of torture as contained in the Universal Declaration of Human Rights forms a part of customary international law, and was therefore held to be binding in United States courts in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). Indeed, Congress itself has asserted that torture is a gross violation of internationally recognized human rights. *See, e.g.*, 22 U.S.C. § 2304 (1982 & Supps. 1985, 1986) (United States foreign assistance linked to human rights considerations).

67. *See generally* Campbell, *The Nuremberg Defense to Charges of Domestic Crime: A Non-Traditional Approach for Nuclear-Arms Protestors*, 16 Cal. West. Int'l L.J. 93 (1986).

68. *See* R. Perkins & R. Boyce, *Criminal Law* 1108-09 (3d ed. 1982) ("[A]ny unoffending person may intervene for the purpose of preventing the commission or consummation of any crime if he does so without resorting to measures which are excessive under all the facts of the particular case.").

69. *See* Model Penal Code § 3.07 comment 6, n.44 (1985).

*Use of Force to Prevent Suicide or the Commission of a Crime.*

(a) The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary to prevent such other person from committing suicide, inflicting serious bodily injury upon himself, committing or consummating the commission of a crime involving or threatening bodily injury, damage to or loss of property or a breach of the peace.<sup>70</sup>

The steps taken to prevent the crime must be reasonable, or the actor will be subject to liability for recklessness or negligence.<sup>71</sup> Thus the inquiry should be very like the inquiry into the availability of the necessity defense. Was the conduct "immediately necessary" to prevent the perceived crime? That is, was the danger imminent, was there no effective legal alternative, and was the chosen conduct reasonably calculated to abate the perceived crime? The factual nature of this inquiry raises the same due process concerns discussed above in relation to the necessity defense.<sup>72</sup>

The crime prevention justification, however, may have less utility for the civilly disobedient than the necessity defense. Some courts have limited the applicability of the former to circumstances where the crime sought to be prevented or terminated occurs in the defendant's presence.<sup>73</sup> The necessity defense has no equivalent requirement.

C. *The Nuremberg Defense: Civil Disobedience as an Effort to Avoid Complicity in International Crimes*

The principle that individuals may be held responsible for crimes under international law derives from the prosecution of Nazi war criminals at Nuremberg, West Germany, after World War II. The Nuremberg trials were conducted according to principles set out in a charter signed by the United States and other Allied powers.<sup>74</sup> Article 6 of the Charter, which defines war crimes, crimes against humanity, and crimes against peace, states in part: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any

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70. Model Penal Code § 3.07(5) (1985). The paragraphs that follow the passage quoted in the text limit the degree of force permitted, limitations that are not relevant to nonviolent civil disobedience.

71. Model Penal Code § 3.07 comment 6, at 129 (1985).

72. See *supra* text accompanying notes 31-37.

73. See *State v. Marley*, 509 P.2d at 1108.

74. Charter of the International Military Tribunal (London Agreement), Aug. 8, 1945, 59 Stat. 1546, E.A.S. No. 472. See Falk, *The Nuremberg Defense in the Pentagon Papers Case*, 13 Col. J. Transnat'l L. 208, 229-34 (1974).

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persons in execution of such plan.” Article 8 states: “The fact that the Defendant acted pursuant to order of his government or of a superior shall not free him of responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”

The case law that developed at Nuremberg elaborated on the scope of these responsibilities. According to Richard Falk, Milbank Professor of International Law at Princeton University, the cases established that

the zone of individual responsibility for crimes against the peace extended well beyond principal policy-makers and state leaders. The responsibility of secondary figures for war crimes generally turned upon whether they had voluntarily aided and abetted illegal acts in a situation in which they had or should have had adequate knowledge of their character. The basis of potential legal responsibility rested on the extent of complicity as reflected in actions and knowledge.<sup>75</sup>

The import for the civilly disobedient of this continuum of responsibility is that defendants who are close to the centers of power, either as policy makers in the military or civilian government or as leading industrialists,<sup>76</sup> have a more compelling justification for their disobedience than do citizens not so connected. The former may plausibly argue that their act of disobedience was justified as an attempt to terminate complicity and thereby discharge their obligations under Nuremberg.

For example, in the *Pentagon Papers* case,<sup>77</sup> Daniel Ellsberg and Anthony Russo were prosecuted for disclosing to the public major portions of the so-called “Pentagon Papers” on the Vietnam war. Although the charges were ultimately dismissed because of government misconduct, a Nuremberg defense had been prepared for the defendants by Professor Falk. He argued that: (1) the defendants had good reason to believe that the United States was violating international law in Vietnam; (2) the defendants could reasonably infer that they were accessories to the commission and execution of the illegal policies; (3) the defendants could have been indicted for these acts in accordance with precedents established at Nuremberg; and (4) disclosing the Papers was a reasonable effort to terminate their complicity.<sup>78</sup> For the court to disallow proof of the justifica-

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75. Falk, *supra* note 74, at 231.

76. See *United States v. Flick*, 6 *Trials of War Criminals* 1 (1952) (involving indictments brought against German industrialists for participation in Nuremberg crimes).

77. *United States v. Russo*, No. 9373 (C.D. Cal. Dec. 29, 1971) (dismissed on procedural grounds). See generally Falk, *supra* note 74.

78. Falk, *supra* note 74, at 209.

tion, wrote Professor Falk, would appear "to deny defendants a very fundamental ingredient of due process."<sup>79</sup>

The defense in this case is particularly compelling because the defendants had been active in the formulation of policy in Vietnam—Ellsberg as an advisor to the Assistant Secretary of Defense, Russo as a RAND Corporation analyst. "Both defendants occupied positions for which a presumption of legal jeopardy was not unreasonable if one were to assume an American willingness to implement relevant portions of international criminal law."<sup>80</sup> The viability of the Nuremberg defense is less obvious for defendants who are not involved in the formulation of government policy. Their culpability under the Nuremberg Charter, as a matter of law, becomes increasingly speculative.<sup>81</sup>

Some defendants, however, have urged courts to accept a broader interpretation of the Nuremberg Principles. In the narrow interpretation, complicity derives from proximity to power, and the minimal duty is to withdraw from, or refuse to participate in, the prohibited conduct. In the broader interpretation, complicity derives from the opportunity to prevent *others* from engaging in acts thought to be criminal under international law. Accomplices thus have an affirmative duty to take reasonable steps to stop or prevent the commission of the crimes.<sup>82</sup> Arguments based on the two interpretations often merge: Daniel Ellsberg and Anthony Russo hoped that by disclosing the "Pentagon Papers" they would help to stop the atrocities they believed were being committed by the United States in Vietnam, as well as end their own complicity.

Support for the broad interpretation is found in the Tokyo War Crimes Judgment, which concluded that persons may be held responsible for violations of international law if: "(1) [t]hey had knowledge that such crimes were being committed and having such knowledge they failed to take such steps as were within their power

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79. *Id.*

80. *Id.* at 234.

81. *See* State v. Marley, 509 P.2d at 1111 (dismissing as "frivolous any contention that [the civilian defendants] were legally obligated to act to avoid criminal liability" under Nuremberg).

82. Note that the broad interpretation of the Nuremberg Defense is analytically distinct from the domestic crime prevention justification as set forth *supra* text accompanying notes 67-73. The former involves an affirmative obligation on which defendants *must* act, in accordance with the dictates of the Nuremberg Principles; the latter is only a privilege. To be successful, however, both defenses ultimately turn on the reasonableness of the defendant's means of discharging his or her duty or acting on his or her privilege, as the case may be.

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to prevent the commission of such crimes in the future, or (2) they are at fault in having failed to acquire such knowledge.”<sup>83</sup>

No American court, however, has given the Nuremberg Principles such broad sweep. While the civilly disobedient may have a strong moral claim under Nuremberg, absent special circumstances such as those in the *Pentagon Papers* case, vindication through the courts appears unlikely. Furthermore, even if the courts did accept that activists in the peace movement have a duty under Nuremberg to stop government crimes, defendants would still encounter the judge’s reluctance to regard civil disobedience as a legitimate means of discharging that duty. The same obstacles that confront defendants who try to raise the necessity defense before a jury would confront defendants who claim that their disobedience was justified under the Nuremberg Principles.

### *Conclusion*

Civil disobedience is a direct challenge to the law, but it is also an appeal to “higher” law. In the civil rights movement, defendants were vindicated when the laws they disobeyed were found to be invalid under the Constitution or other supervening law. In the contemporary peace movement, civil disobedience usually involves the violation of valid laws, and defendants have sought to justify their conduct by raising defenses derived from the common law doctrines of necessity and crime prevention and from the Nuremberg Principles. These defenses have been rejected by most courts.

A trend has emerged among the courts, however, to acknowledge the utility of the necessity defense in civil disobedience trials. The burden on the defendant is still heavy. First, the disobedient act must reasonably be expected to lead to abatement of the harm. Second, no effective lawful remedies must reasonably appear to be available. Third, in many jurisdictions the harm must be imminent. These requirements will never be easy to satisfy. Consequently, carelessly planned or poorly executed civil disobedience actions will not be condoned.

The welcome development in the courts is the recognition that if defendants can produce factual evidence tending to prove each element of necessity, then due process requires that their arguments and testimony be submitted to the jury. Due process requires that the judge appropriately charge the jury on the elements of the de-

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83. Tokyo War Crimes Trial Decision, *quoted in Crimes of War* 113 (R. Falk, G. Kolko & R. Lifton eds. 1971), *reprinted in Falk, supra* note 74, at 231.

fense. Then the jury, as the conscience of the community, can cast its judgment.

For conscience is at the core of civil disobedience trials. Consider the debate between opposing counsel in *State v. Keller*,<sup>84</sup> the case in which the defendants had occupied United States Senator Robert Stafford's office prior to a critical Senate vote on aid to the Contras in Nicaragua. In closing argument, the prosecution told the jury:

It is not the United States policy that has been on trial here. . . . [M]y personal beliefs, the Defendants' beliefs, your personal beliefs, are not germane to the case which you have to decide. You have to look at the facts. You have to be objective. . . . This is a criminal courtroom, and it is not the place to determine the foreign policy of the United States.<sup>85</sup>

The defense countered:

It is relevant what the Defendants' beliefs are. It's very relevant. It's crucial, and you may consider it and you should consider it because their subjective belief about the emergency, and what is a reasonable way to meet that emergency, is absolutely essential to understand their actions and to realize the ultimate legality of what they did. . . . The trespass is a minor act of civil disobedience in an attempt to stop the horrendous wrong going on in Central America. . . . [The defendants] were not involved in a simple trespass action; they were involved in an act of conscience.<sup>86</sup>

Conscience was relevant for Vermont District Court Judge Frank Mahady as well. He advised the jury: "[T]he credibility of the witnesses, the believability if you will, of the witnesses, and the weight to be attached to their testimony, are entirely matters for your sound, practical judgment as fair-minded men and women."<sup>87</sup> The judge instructed the jury on the applicability of the necessity defense and of international law. All defendants were acquitted.

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84. No. 1372-4-84 CnCr (Chittendon Dist. Ct., Vt. 1984). Materials from the litigation are reprinted in *Por Amor*, *supra* note 7.

85. *Por Amor*, *supra* note 7, at 131, 135, 143.

86. *Id.* at 139, 140, 136.

87. *Id.* at 145.