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Nuclear War, Citizen Intervention, and the Necessity Defense

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ARTICLES

NUCLEAR WAR, CITIZEN INTERVENTION, AND THE NECESSITY DEFENSE*

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I. INTRODUCTION

There are exceptions to every rule and the same applies to law. The Principle of Necessity justifies breaking certain laws when necessary to prevent a greater harm.

The purpose of this article is to follow the evolutionary development of the common law Principle of Necessity from early American history to recent citizen intervention[1] to prevent the most colossal of

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* This article evolved from numerous citizen intervention trials in which the Principle of Necessity was invoked—sometimes successfully and other times not. Many are cited herein. To all the defendants in those trials, we extend recognition and credit, and our sincere appreciation. We also wish to thank the many people, both within and outside the legal profession, who have read and criticized early drafts of this article.

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1. "Citizen intervention," as it is referred to in this article, has been traditionally and erroneously termed "civil disobedience" in other forums. The terms, however, are distinct. Civil disobedience is one form of citizen intervention, but the reverse is not always true—citizen intervention is not disobedient when it is legally justified by the Principle of Necessity.

Civil disobedience in its pure form was used during the American colonial period. The Boston Tea Party is a notorious example. Later, civil disobedience was introduced into South Africa and then into India by Mahatma Gandhi. In both these examples, the activity involved the deliberate violation of a law because that particular law was unjust. Gandhi insisted that this be done in a nonviolent and civil manner; thus the term "civil" disobedience. The focus was on directly challenging the laws as unjust because they were British laws which oppressed indigenous people for the benefit of Britian.

A legal definition of Mahatma Gandhi's form of nonviolent civil disobedience is put forth in Commonwealth v. Capitolo: "Civil disobedience is breaking a law on the ground that it is immoral; one recognizes, and perhaps expects, that the court may uphold the law, and if that

all harms imaginable—nuclear war. A history of reported cases provides ample criteria to either justify or discredit any claim to necessity. However, courts have usually suppressed proof of this criteria when faced with citizen intervention cases. Nevertheless, a small but growing practice of allowing juries to hear a necessity defense can be gleaned from the decisions of non-reported citizen intervention trials. Furthermore, when such a defense has been put to a jury, the defendant has usually been acquitted. This fact raises the question of whether courts are really effecting justice by denying a necessity defense or whether the courts are acting upon political motivations.

Finally, this article discusses in detail the elements required to justify necessity and shows why applying these elements to citizen intervention aimed at preventing nuclear war is not a frivolous claim.

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occurs, one is willing, perhaps eager, to accept the punishment prescribed by law." Commonwealth v. Capitolo, 471 A.2d 462, 473 (Pa. 1984), *rev'd*, Commonwealth v. Capitola, 498 A.2d 806 (Pa. 1985); *see infra* text accompanying notes 74-76. The *Capitolo* court quoted Gandhi's statement to the English judge when Gandhi was convicted of sedition in 1922:

> Nonviolence implies voluntary submission to the penalty for noncooperation 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. The only course open to you, the judge, is either to resign your post, and thus disassociate yourself from evil if you feel that the law you are called upon to administer is an evil and that in reality I am innocent, or to inflict on me the severest penalty if you believe that the system and the law you are assisting to administer are good for the people of this country and that my activity is therefore injurious to the public weal.

Gandhi, *A Plea for the Severest Penalty Upon Conviction of Sedition,* March 23, 1922, *reprinted in* THE LAW AS LITERATURE 459, 465-66 (E. London ed. 1960).

Citizen intervention because of necessity can also involve breaking an immoral law. This occurred during the 1940-60 Civil Rights campaign when blacks held lunch counter sit-ins and refused to move to "the back of the bus." In these cases, however, the action of breaking the law was legal because a higher law—the United States Constitution—made such discrimination illegal. These actions involve the necessity to comply with a higher law. The duty to obey international law as a higher law also falls within this category of necessity.

The final form of citizen intervention is the necessity to prevent a great harm. This article will address this form of citizen intervention because nuclear war is the most colossal harm imaginable. It should be clearly recognized however, that when technically criminal acts are justified by the Principle of Necessity, the acts are not illegal, and the accused "has no need of forgiveness." Arnolds & Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil,* 65 J. CRIM. L. & CRIMINOLOGY 289, 290 (1974). Hence, these acts should not be referred to as civil disobedience. A group in the state of Washington dedicated to stopping the nuclear Trident submarine and missile weapons system, the Ground Zero Center for Nonviolent Action, has decided to use the term "Nuremberg Action" to refer to their citizen interventions to halt the government's criminal acts, rather than the misnomer of civil disobedience. *See also* Campbell, *The Nuremberg Defense to Charges of Domestic Crime: A Non-Traditional Approach for Nuclear-Arms Protestors,* 16 CAL. WESTERN INT'L L.J. 93 (1986).

II. COMMON LAW BACKGROUND OF THE NECESSITY DEFENSE

The concept that "one should not be punished when an act of breaking the law prevents more evil than it has caused"[2] is an essential and a basic one in our system of laws. The necessity doctrine originated in English common law and through time has become a well established principle in United States criminal law.[3] Early federal and state cases were quick to recognize that necessity is a legitimate defense in situations such as shipwrecks, fires and similar emergencies in which quick decisions and immediate actions are needed.

One of the earliest cases in United States history regarding the necessity defense occurred in 1834 and involved a mutiny in which the crew was justified in disobeying orders because they had a "bonafide reasonable belief" that the ship was unseaworthy.[4] Defendants in that case established that "[n]ot just actual peril but a well founded belief in impending peril is sufficient to raise the defense."[5] This case established early on that an accused's reasonable belief is an essential factual consideration.

The trier of fact decides if the elements establishing necessity are present once the proffered evidence has raised legitimate factual issues concerning those elements. In the 1810 case of *William Gray*,[6] a ship's owner was charged with violating the Embargo Act. The owner claimed a storm had forced the captain to put ashore for the safety of the crew and the cargo. This was probably the first American case to hold that the question of necessity should be decided by a jury.

In 1846, the Rhode Island Militia successfully argued necessity for an alleged kidnapping of people who participated in the "Dorr Rebellion."[7] This case established that the existence of a state of necessity is to be determined by a jury as a question of fact: "the jury and not the State of Rhode Island, was the proper judge [of necessity]."[8]

Two other early cases established the jury's role in determining whether actions meet the elements of necessity. *Mitchell v. Harmony* held that whether or not a danger existed or exists is for the jury to

2. U.S. Comm. on Reform of Federal Criminal Laws, Study Draft § 608 (1970).
3. Res Publica v. McCarty, 86 U.S. (2 Dall) (1781).
4. United States v. Ashton, 24 F. Cas. 873, 874 (No. 14,470) (C.C.D. Mass. 1834).
5. Arnolds & Garland, *supra* note 1, at 294.
6. *William Gray*, 29 F. Cas. 1300 (No. 17,694) (C.C.D.N.Y. 1810).
7. Commonwealth v. Blodget, 53 Mass. (12 Met.) 56 (1846).
8. *Id.* at 71.

decide, and *Aldrich v. Wright* provided that it is for the jury to determine if a danger is imminent.[9]

In the 1853 California case of *Surocco v. Geary*,[10] a large fire threatened the unburned half of the then small town of San Francisco. A public officer ordered the destruction of houses to create a firebreak and was subsequently sued by one of the owners. On appeal, the California Supreme Court held that the action was proper because:

> The right to destroy property, to prevent the spread of a conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society and the civil government. "It is referred by moralists and jurists as the same great principle which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard goods in a tempest, for the safety of the vessel; with the trespassing upon the lands of another, to escape death by an enemy. It rests upon the maxim, *Necessitas inducit privilegium quod jura private.*" [Necessity leads to privileges because of private justice].[11]

The court made a point of addressing who should decide if the situation constitutes a necessity justifying the destruction of property. It held that the best policy was to allow each individual to act at his or her own risk and to be held liable if found to have acted irresponsibly. The California Legislature expanded on the common law in 1872 when it enacted statutes providing for the private right to abate public and private nuisances.[12]

In 1910, another California case established that when one is in peril and immediate action is required to escape injury, the reasonableness of the act is a fact to be evaluated by the jury.[13] Another case stated that necessity is the quality or state of being necessary which, in its primary sense, signifies that which makes an act or event una-

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9. Mitchell v. Harmony, 54 U.S. (13 How.) 115, 133 (1851); Aldrich v. Wright, 53 N.H. 398, 402-403 (1873).

10. Surocco v. Geary, 3 Cal. 69 (1853).

11. *Id.* at 73.

12. CAL. CIV. CODE §§ 3495, 3502 (West 1970). Section 3495 reads: "Any person may abate a public nuisance which is specially injurious to him by removing, or, if necessary, destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury." Section 3502 reads: "A person injured by a private nuisance may abate it by removing, or, if necessary, destroying the thing which constitutes the nuisance, without committing a breach of the peace, or doing unnecessary injury."

13. Hoff v. Los Angeles-Pacific Co., 158 Cal. 596, 112 P. 53 (1910).

voidable.[14] Still another early California case defined necessity as that which is unavoidable, inevitable, or indispensable.[15]

The 1920 Arizona case of *State v. Wooten*,[16] better known as the *Bisbee Deportation*, involved social harm. Defendants were charged with kidnapping when, as part of a posse, they rounded up members of the Industrial Workers of the World (Wobblies) and deported them to New Mexico. Posse members claimed they had substantial belief that the Wobblies were involved in a conspiracy to strike the local copper mine and incite violence. Defendants were acquitted by the jury because of necessity, and the court made several important points: the distinction between self defense being justified to repulse a wrong and necessity as justifying the invasion of a right;[17] actions of necessity can be against persons as well as property;[18] the burden of proving the existence of necessity lies with the defendant;[19] and the right of citizens to act based on necessity is a natural right that appertains to the individual.[20] Finally, the court cited the 1846 Rhode Island Militia case[21] to reestablish that necessity is a fact to be determined by the jury. *Wooten* is credited as being the first authoritative discussion of necessity in the United States.[22]

III. Evolution of the Necessity Defense in the Modern Age

As the common law has clearly determined, deciding whether the accused has met the critical elements of a necessity defense are questions of fact to be decided by the jury. In *Morissette v. United States*,[23] the United States Supreme Court pointed out that the case would have been insignificant had the trial not been conducted in such a manner and the facts presented to the jury in such a way as to raise fundamental and far reaching questions in criminal law. The case was granted certiorari solely because essential questions of fact, such as the reasonableness of defendant's act, were excluded

14. Spreckles v. City & County of San Francisco, 76 Cal. App. 267, 244 P. 919 (1926).
15. Wheeler v. Barker, 92 Cal. App. 2d 776, 208 P.2d 68, 73 (1949).
16. Pattee, *State v. Wooten*, 6 A.B.A. J. 99 (1920).
17. *The Law of Necessity as Applied to the Bisbee Deportation*, 3 Ariz. L. Rev. 264, 266-67 n.50 (1961).
18. *Id.*
19. *Id.* at 268.
20. Arnolds & Garland, *supra* note 1, at 293.
21. Commonwealth v. Blodget, 53 Mass. (12 Met.) 56, 71 (1846).
22. For a fuller discussion of *Wooten*, see Arnolds & Garland, *supra* note 1, at 292-94.
23. 342 U.S. 246 (1952).

from the jury during trial.

The *Morissette* opinion specifically addressed the important function of the jury:

> Jurors may be perverse, the ends of justice may be defeated by unrighteous verdicts; but so long as the function of judge and jury are distinct, the one responding to the law, the other to facts, neither can invade the province of the other without destroying the significance of trial by court and jury . . . . It follows that the trial court may not withdraw or prejudge the issue . . . .[24]

"It is better to be allowed a defense of uncertain ambit than none at all."[25] Even when a doubt may exist in the judge's mind, there is no miscarriage of justice in submitting the issue to the jury. As commentators Arnolds and Garland eloquently point out:

> When activity falls within the "penumbra" of law or when disagreement exists within 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 value . . . . When the defendant raises a good faith defense of necessity, that is, makes a non-frivolous claim that his otherwise criminal act was done to preserve some higher value, the jury as representative of the community should be allowed to decide the issue of relative values . . . .[26]

This principle is the rule in California and the Ninth Circuit. "[D]oubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused."[27] A trial court should only make findings adverse to a proffered defense which are supported by the record if the case is tried by the judge without a jury.[28] In a jury trial, "[a] defendant has the right to have a jury resolve the disputed factual issues."[29]

Regarding the issue of who determines whether the alleged harm is greater than the action seeking to stop it, commentator Glanville Williams points out that "although the defense of necessity

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24. *Id.* at 274.
25. MODEL PENAL CODE § 3.02, comment, at 17 (1985).
26. Arnolds & Garland, *supra* note 1, at 296.
27. People v. Flannel, 25 Cal. 3d 668, 685, 603 P.2d 1, 160 Cal. Rptr. 84 (1979).
28. United States v. Contento-Pachon, 723 F.2d 691, 695-96, n.2 (9th Cir. 1984).
29. *Id.* at 696; *see* Sandstrom v. Montana, 442 U.S. 510, 523 (1974).

is subjective as to its facts, it is objective as to its values . . .[and] involves deciding whether, on the social view, the value asserted was greater than the value denied."[30] Because such a social value does exist, the reasonableness of a claim of necessity is left to the jury as a matter of fact, rather than to the judge as a matter of law.

The Principle of Necessity has been included in twenty-two state criminal codes.[31] Others recognize it by decisional law and/or rely on common law, or take judicial notice of a sister state's statutory and decisional laws.[32]

A 1974 jailbreak case was a milestone in the evolution of the common law Principle of Necessity through decisional law. In *People v. Lovercamp*,[33] the court of appeal held that by allowing the assertion of the necessity defense, it had not "formulated a new rule but rather ha[d] applied rules long ago established in a manner which effects fundamental justice."[34] The court stated that it was not creating a new defense for escape, "[w]e merely recognize, as did an English court 238 years ago, that some conditions 'excuseth the felony.' "[35] Moreover, the court of appeal made clear in *Lovercamp* that whether or not the elements raised in the defense were sufficient was a "question of fact to be decided by the trier of fact [the jury]

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30. G. WILLIAMS, THE CRIMINAL LAW § 239 (2d ed. 1961).

31. *See* MODEL PENAL CODE § 3.02, comment (1985).

32. *E.g.*, CAL. EVID. CODE § 452(a) (West 1966): "Judicial notice may be taken of the following matters to the extent that they are not embraced in Section 451: (a) The decisional, constitutional and statutory law of any state of the United States . . . ."
Section 453 adds that "[t]he trial court shall take judicial notice of any matter specified in Section 452 if a party requests it . . . ."

33. People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974); *see also* M. Gardner, *The Defense of Necessity and the Right to Escape Prison: A Step Towards Incarceration Free from Sexual Assault*, 49 S. CAL. L. REV. 110 (1975).

34. Lovercamp, 43 Cal. App. 3d at 827, 118 Cal. Rptr. at 112. Additional text from the court's opinion follows:

> In a humane society some attention must be given to the individual dilemma. In doing so the court must use extreme caution lest the overriding interest of the public be overlooked. The question that must be resolved involves looking at all the choices available to the defendant and then determining whether the act of escape was the only viable and reasonable choice available. By doing so, both the public interest and the individual's interest may adequately be protected. In our ultimate conclusion it will be seen that we have adopted a position which gives reasonable consideration to both interests. While we conclude that under certain circumstances a defense of necessity may be proven by the defendant, at the same time we place rigid limitations on the viability of the defense in order to insure that the rights and interests of society will not be impinged upon. We have not formulated a new rule of law but rather have applied rules long ago established in a manner which effects fundamental justice.

Id.

35. *Id.* at 834, 118 Cal. Rptr. at 116.

after taking into consideration all the surrounding circumstances."[36] *Lovercamp* has established a precedent that affects other areas. As Frank D. Berry wrote, "if society is prepared to forgive a felony escape under emergency circumstances, a fortiori it must be prepared to forgive a misdemeanor."[37] The elements formulated by the California court of appeal establishing necessity to escape from jail are the following:

> (1) The prisoner is faced with a specific threat of death, forcible sexual attack, or substantial bodily injury in the immediate future;
> (2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any results from such a complaint illusory;
> (3) There is neither time nor opportunity to resort to courts;
> (4) There is no evidence of force or violence used toward prison personnel or other "innocent" persons in the escape; and
> (5) The prisoner immediately reports to the proper authorities when he or she has attained a position of safety from the immediate threat.[38]

In a later case, *People v. Condley*,[39] the court of appeal emphasized that the threatened danger need not be imminent:

> The necessity in *Lovercamp* is not like the classical paradigm of absolute necessity where the prisoner escapes to save his life from immediate danger of a prison fire. [citations omitted] Absolute and imminent necessity are rare, and even rarer is prosecution under such circumstances. [citations omitted] Unlike duress, under *Lovercamp* the threat is in the "immediate future" . . . . Duress requires an imminent threat to one's life.[40]

"Imminence" of the feared harm, particularly in the modern age, is an element which requires interpretation. There is no known statutory definition of "imminence," but generally accepted definitions of words and phrases are used to guide the jury. However, neither lay nor legal definitions measure imminence in seconds or minutes, or even in weeks or months.[41] For that reason an adequate

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36. *Id.* at 832, 118 Cal. Rptr. at 116.

37. F. Berry, Jr., *The Mysterious Defense of Necessity*, 54 CAL. ST. B.J. 384, 387 (1979).

38. *Lovercamp*, 43 Cal. App. 3d at 831-32, 118 Cal. Rptr. at 115; *see also*, United States v. Michelson, 559 F.2d 567, 568 (9th Cir. 1977), United States v. Baily, 585 F.2d 1087 (D.C. Cir. 1978).

39. 69 Cal. App. 3d 999, 138 Cal. Rptr. 515 (1977).

40. *Id.* at 1012, 138 Cal. Rptr. at 522.

41. *See, e.g.*, WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LAN-

jury instruction would include the charge that all the surrounding circumstances must be considered and viewed in light of the factual situation of the particular case. The concept of imminence is subjective as to what must actually happen to prevent the harm, and the time required to prevent the harm. Citizen intervention actions, as we shall see below, often require a completely different dimension of time than do cases of absolute necessity and duress.

People v. Harmon also addressed the question of imminency. The court ruled that "imminency is . . . to be decided by the [jury] taking into consideration all the surrounding circumstances, including defendant's opportunity and ability to avoid the feared harm."[42] Other cases have further developed and substantiated the criteria of necessity to escape from jail, and that the elements of necessity are to be decided by the jury.[43] Of note in these cases is that imminency is established in relation to the surrounding circumstances and that relationship is a fact to be decided by the jury. The Model Penal Code also does not require that the evil to be avoided be imminent.[44] "[I]t is a mistake to erect 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."[45]

The Los Angeles County case of *People v. Pena*[46] addressed the Principle of Necessity under the concept of duress and established that it is applicable to situations in which the threatened harm is to persons other than the defendant.[47] The *Pena* court also held that, upon raising the issue of necessity, the defense is available to all crimes except taking the life of an innocent person.[48]

The *Pena* court then outlined six requisite elements for a necessity defense:

> (1) the act charged as criminal must have been done to prevent a significant evil;

GUAGE (unabridged) which defines "imminent" as follows: "1: ready to take place; near at hand; that is about to occur; hanging threateningly over one's head; menacingly near; 2: IMMANENT." *See also* BLACK'S LAW DICTIONARY 676 (5th ed. 1979) which defines "imminent" as follows: "Near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous."

42. People v. Harmon, 53 Mich. 482, 220 N.W.2d 212, 214 (1974).

43. People v. Unger, 66 Ill. 2d 333, 362 N.E.2d 319 (1977); People v. Martin, 100 Mich. App. 447, 298 N.W.2d 900 (1980).

44. MODEL PENAL CODE § 3.02, comment, at 16 (1985).

45. *Id.* at 17.

46. 149 Cal. App. 3d Supp. 14, 197 Cal. Rptr. 264 (1983).

47. *Id.* at 23-25, 197 Cal. Rptr. at 269-70.

48. *Id.* at 22-23, 197 Cal. Rptr. at 268-69.

(2) there must have been no adequate alternative to the commission of the act;
(3) the harm caused by the act must not be disproportionate to the harm avoided;
(4) the accused must entertain a good-faith belief that his/her act was necessary to prevent the greater harm;
(5) such belief must be objectively reasonable under all the circumstances; and,
(6) the accused must not have substantially contributed to the creation of the emergency.[49]

Citizen intervention to save numerous lives is but the latest common law evolution of the Principle of Necessity. The anti-Vietnam War movement of the 1960s and early 1970s provided numerous cases in which defendants tried to assert the defense of necessity to justify their acts of citizen intervention.[50] These cases spawned much language about three essential points of the defense: the question of the existence of a greater harm; the question of relative values; and, the connection between defendant's action and the prevention of harm. The Ninth Circuit case of *United States v. Simpson*[51] addressed the latter, albeit causally. On Christmas Eve 1970, Simpson burned selective service (draft) records in San Jose, California to protest the war in Vietnam. He claimed he was seeking to stop the killing. The court recognized the validity of the necessity defense because Simpson had apparently shown that the Vietnam War was a "public disaster." But the court did not agree that Simpson had established that his act was instrumental in alleviating that disaster. The decision states: "An essential element of the so-called justification defense is that a direct causal relationship be reasonably anticipated to exist between defendant's action and the avoidance of harm."[52]

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49. *Id.* at 25-26, 197 Cal. Rptr. at 271.

50. United States v. Berrigan, 283 F. Supp. 336 (D. Md. 1969); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969); United States v. Cullen, 454 F.2d 386 (7th Cir. 1971); United States v. Turchick, 452 F.2d 333 (8th Cir. 1971); United States v. Beneke, 449 F.2d 1259 (8th Cir. 1971); United States v. Chase, 468 F.2d 141 (7th Cir. 1972); United States v. Glick, 463 F.2d 491 (2d Cir. 1972); United States v. Simpson, 460 F.2d 515 (9th Cir. 1972); United States v. Kroncke, 459 F.2d 697 (8th Cir. 1972); United States v. Daugherty, 474 F.2d 1113 (D.C. Cir. 1973); State v. Marley, 54 Hawaii 450, 509 P.2d 1095 (1973).

51. United States v. Simpson, 460 F.2d 515 (9th Cir. 1972).

52. *Id.* at 518; *see also*, Arnolds & Garland, *supra* note 1, at 300, n.127, which comments on the findings of the court:

> Presumably Simpson offered to prove it was reasonable for him to believe these actions would have a significant effect. The Court of Appeals may have concluded from the record that no reasonable jury could make such a finding. But it

Another Vietnam War intervention case which took place in Hawaii, *State v. Marley*,[53] was helpful in further defining the elements of necessity. On May 14, 1971, eight citizens entered the Honolulu office of Honeywell Corporation and read a statement outlining Honeywell's involvement in the Indochina War. Defendants hung pictures on the office walls and engaged in singing and talking among themselves. Although considered disruptive to normal business, these activities were completely nonviolent. After about three hours the citizens were ordered to leave or they would be charged with trespass. They chose to remain and were arrested.

At trial much evidence was introduced about Honeywell's connection with the war. Defendants contended that they were justified in their trespass because Honeywell manufactured anti-personnel weapons which were being used to kill innocent people in Indochina. Although the weapons were not manufactured directly at the Honolulu office, it was undisputed that Honeywell Corporation was a major Defense Department contractor of those weapons. Expert testimony for the defense, several exhibits, and many jury instructions were refused by the court. Defendants were convicted.

On appeal, the court outlined the elements of necessity to stop a greater harm.[54] It stated that 1) the harm to be prevented must exceed the harm caused by defendants' breach of the law, 2) there be no legal alternative available, 3) the harm to be prevented is imminent, and 4) a causal relationship be reasonably anticipated to exist between defendant's act and avoiding the harm.

> is hardly clear that when respected persons in the community destroy records to protest a war these actions have no significant effect on the war policy of the country. Daniel Ellsberg's releasing of the Pentagon Papers arguably, at least, had a significant effect on the war.

Id.

53. 54 Hawaii 450, 509 P.2d 1095 (1973).

54. *Id.* at 1098. The appeal court's opinion on the required elements to justify a necessity defense to avoid a greater harm are presented in items 12 and 13 of that opinion and read as follows:

> 12. The "necessity" defense exonerates persons who commit a crime under pressure of circumstances if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendant's breach of the law.
>
> 13. Successful use of the "necessity defense" requires (a) that there be no third or legal alternative available, (b) that the harm to be prevented is imminent, and (c) that a direct causal relationship be reasonably anticipated to exist between defendant's action and the avoidance of harm.

Id.

IV. THE PRINCIPLE OF NECESSITY IN THE NUCLEAR AGE

The nuclear age has prompted further evolution of the Principle of Necessity, as a common law principle.

> The common law does not consist of absolute, fixed, and inflexible rules, but rather of broad and comprehensive principles based on justice, reason, and common sense. It is of judicial origin and promulgation. Its principles have been determined by the social needs of the community and have changed with changes in such needs. These principles are susceptible of adaptation to new conditions, interests, relations, and usages as the progress of society may require.[55]

The nuclear chain—from nuclear power plants that produce an essential part of the fuel for nuclear bombs, to the continued production of these weapons of mass destruction—is perceived to be threatening everyone, everywhere. Citizens are intervening to dismantle and abolish this threatening self-extinction chain in order to save lives, and will obviously continue to intervene as long as a group of policy-makers continues threatening to actually use these bombs to annihilate whole countries and, no doubt, everyone; in other words, nuclear genocide and nuclear ecocide.

A. *The Harm of Nuclear Power Plants*

Probably the first organized large-scale citizen intervention to prevent a grave harm which meaningfully asserted the necessity defense in the nuclear age has involved resisting the harm of nuclear power. An Oregon case which was well-publicized at the time is significant.[56] Faced with the futility of legal remedies and aware of the continuing harm emanating from the Trojan nuclear power plant, the Trojan Decommissioning Alliance acted to try to save lives by attempting on August 6, 1977 to shut down the plant. Several hundred supporters watched from the Visitors' Information Center as eighty-two people assumed positions in front of the plant's three gates and were prepared to stay as long as was necessary to terminate the plant's operation. Two days later, the plant manager ordered them to leave under threat of arrest. They refused, were arrested, and were charged with criminal trespass in the second degree.

Oregon is one of the states which has codified many elements of

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55. Miller v. Monsen, 37 N.W.2d 543, 545 (Minn. 1949).

56. State v. Mouer, No. 77-246 through 77-324 (Columbia Co. Dist. Ct., Dec. 12-16, 1977).

common law regarding necessity.[57] Oregon Revised Statute section 161.200, Choice of Evils, provides that conduct which would otherwise constitute an offense is justifiable if it is necessary to avoid an imminent public or private injury, provided that the threatened injury is greater than the injury caused by the action to prevent it.[58]

At trial, defendants raised the choice of evils defense and, after five hours of deliberation, were acquitted by the jury. One jury member later told the defense lawyer that had the judge allowed them to consider the expert testimony presented, they would have only deliberated five minutes, instead of five hours, to reach the "not guilty" verdict.[59] This is believed to be the first nuclear power plant citizen intervention case in which a necessity defense was successfully asserted.

Illinois also has codified the requirements of an affirmative defense of necessity. Illinois Revised Statutes state that conduct otherwise offensive is justified by reason of necessity, providing that the accused is blameless in causing the situation and reasonably believes such conduct is necessary to avoid a greater public or private injury.[60] This statute introduces the requirement that the accused must not be responsible for the situation and reaffirms the concepts of

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57. OR. REV. STAT. § 161.200 (1971) was derived from MODEL PENAL CODE art. 3, § 3.02, Draft 8; N.Y. REV. PENAL LAW § 25.05; and MICH. REV. CRIM. CODE § 4-605.

58. OR. REV. STAT. § 161.200 (1971), Choice of Evils, reads:

> (1) Unless inconsistent with other provisions of Chapter 743, Oregon Laws 1971, defining justifiable use of force, or with some other provision of the law, conduct which would otherwise constitute an offense is justifiable and not criminal when:
>
> (a) That conduct is necessary as an emergency measure to avoid an imminent public and private injury; and
>
> (b) The threatened injury is of such a gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.
>
> (2) The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of case arising thereunder.

Id.

59. Letter from Betty Stein, one of the attorneys in this case, to Robert Aldridge (undated May, 1978).

60. ILL. REV. STAT., ch. 38, § 7-13 (1962). The complete text reads:

> Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct.

Id.

"reasonable belief" and "relative harm."

An Illinois court heard what is believed to be the second case in which a necessity defense was successfully asserted.[61] Twenty citizens were arrested when they trespassed on Zion nuclear power plant property during October 1978. They claimed the Zion plant had been built and operated in such a manner as to pose a multifaceted threat to the surrounding Illinois and Wisconsin communities. The defense argued that it was necessary for defendants to trespass in order to prevent greater evils. After a six-day trial the jury brought in a verdict of "not guilty." The jury chairman said afterwards that the trial convinced him that nuclear power plants are "an imminent and immediate danger."[62]

California has also provided necessity defense case precedents applicable to citizens who intervene to save lives threatened by nuclear power plant harms. The Rancho Seco facility near Sacramento was the site of one such attempt on March 31, 1979—only a few days following the catastrophe at an identical plant on Pennsylvania's Three Mile Island. Two hundred and fifty people picketed while thirteen climbed the fence and sat inside. Their action was completely nonviolent. The thirteen were arrested for trespassing and eleven of them went to trial that same year.[63]

The defendants' points and authorities memorandum supporting their claim to necessity invoked United States and sister state laws as well as California cases. They also cited California statutes which have codified the common law right of a person to abate a public or private nuisance[64]—a public nuisance being defined as one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be different.[65] A private nuisance is every nuisance not included under the definition of a public nuisance.[66]

At trial, the defendants argued that the Rancho Seco plant is a public nuisance and that evidence should be allowed to show the necessity of defendants' trespass. The defense drew on *People v. Over-*

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61. People v. Brown, No. 78CM2520 through 78CM2540 (Lake Cty., January 1979).

62. Chicago Sun-Times, Jan. 31, 1979.

63. People v. Block, et al. (Galt Judicial Dist., Sacramento Co. Muni. Ct., Aug. 14, 1979).

64. *See* CAL. CIV. CODE §§ 3495, 3502 (reprinted *supra* note 12).

65. CAL. CIV. CODE § 3480 (West 1983).

66. CAL. CIV. CODE § 3481 (West 1983).

acher[67] as a precedent. In that case, a rancher was charged with shooting and killing a neighbor, and he pleaded self-defense. He contended that the neighbor had constructed a dam which was backing up water on his land. He had gone to the neighbor's land to remove the dam with a shovel, arguing that the dam was a nuisance and that he had a right to be there to abate that nuisance. The shooting occurred when the neighbor approached him.

Overacher wanted to present evidence on the nuisance issue to show that his trespass was justified and that his neighbor was the aggressor, but the trial court excluded such testimony. The court of appeal disagreed. "The defendant, in his effort to show that he acted in self defense, was entitled to have the whole situation, as it tended to furnish a reason for his act in going upon the land . . . or his right to do so, shown to the jury."[68]

The Rancho Seco defendants also drew upon the California Supreme Court decision in *People v. Roberts*[69] to support their claim of necessity. In *Roberts,* police officers approached an apartment when they heard what they thought were "several moans and groans that sounded as if a person was in distress."[70] The officers had the apartment manager let them in at which time they saw contraband that was later admitted as evidence against the defendant. Later, it was discovered that the moaning sound was only the "cooing" of pigeons.

Roberts claimed that the contraband should be excluded from evidence because the police committed a trespass in order to seize it. But the California Supreme Court ruled that "[n]ecessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose."[71] The court cited traditional civil trespass case law in support of this proposition.[72] *Roberts* not only set forth the proposition that necessity can excuse a trespass, it further affirmed that it is what "reasonably appears to the actor to be necessary" that is crucial to the necessity defense.

The judge allowed the necessity defense in the Rancho Seco trespass case and instructed the jury that commission of a crime be-

67. 15 Cal. App. 620, 115 P. 756 (1911).

68. *Id.* at 627.

69. 47 Cal. 2d 374, 303 P.2d 721 (1956).

70. *Id.* at 376.

71. *Id.* at 377.

72. *See* Ploof v. Putnam, 81 Vt. 471, 71 A. 188, 189 (1908), Metallic Compression Casting Co. v. Fitchburg, 109 Mass. 277, 280-81 (1872).

cause of necessity is justifiable and not unlawful. The judge further ruled that to prove necessity, the defense must show that the demonstrators were *motivated* by the desire to protect life and property, that the defendants *believed* their actions were necessary to alleviate the threatened danger, that a reasonable person under similar circumstances would also believe the actions were necessary, and that the danger to life and property was substantial and likely to occur in the immediate future. Expert testimony was admitted during the trial as to the history and danger surrounding the Rancho Seco plant.

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 jury that he had exhausted all legal means to stop the harm threatened by the nuclear power plant. The eleventh defendant was found guilty because he did not testify in his own defense. The case against those with a split jury was eventually dropped.

After the trial, the jury forewoman said: "The majority of us had no trouble deciding that, yes, the danger was substantial and in the future." But, she said, "Our problem was that in most cases we were just not ready to accept the act of civil disobedience . . . ."[73] This is a case in which the use of the common misnomer apparently worked against the defendants because of its connotation. "Civil disobedience," improperly used as in this case, can prejudice the jury. Had the term "citizen intervention" been used, it might have created a courtroom atmosphere more favorable to the defendants.

Another intervention to prevent a grave harm, which occurred shortly after the Three Mile Island incident, took place at the Shippingport Nuclear Power Plant in Pennsylvania.[74] On July 15, 1979, citizens ignored "No Trespassing" signs, crept under the fence and sat down ten to twelve feet inside. They refused to leave when asked to by security guards and deputy sheriffs, and were subsequently arrested.

Defending themselves at trial, the citizens relied on section 503 of the Pennsylvania Crimes Code in their offer of proof.[75] A neces-

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73. East Bay Gazette, Mid-Aug. 1979, at 1, col. 4.

74. Commonwealth v. Capitolo, 471 A.2d at 473.

75. 18 PA. CONS. STAT. ANN. § 503 (Purdon 1983) provides:

(a) General Rule — Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if:

(1) 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;

sity defense was denied and defendants were convicted. The case was appealed and the conviction was overturned. In its opinion, the court held that:

> [P]erhaps appellants would not have been able to prove justification anyway. The jury might have rejected their experts' testimony, and might have interpreted the documentary evidence differently than appellants do. But appellants were entitled to have the jury hear their evidence . . . . The values asserted by appellants were in no sense either frivolous or bizarre. If the jury had heard, and accepted, their evidence, it might have found justification . . . . It was therefore error for the trial court to reject appellants' offer of proof, thereby precluding them from proving justification.[76]

In subsequent trials involving citizen intervention at nuclear power plants, the necessity defense has sometimes been successfully asserted,[77] and at other times the court has refused the jury instruction on necessity.

When proffering an affirmative defense, it is unconstitutional to

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(2) Neither this title nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(3) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(b) Choice of evils — 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.

Id.

Section 501 of this code defines "believes" as meaning "reasonably believes." 18 PA. CONS. STAT. ANN. § 501 (Purdon 1983).

76. Commonwealth v. Capitolo, 471 A.2d at 468. The Pennsylvania Supreme Court disagreed with the appeals court, holding that the accused were not entitled to have the jury hear their evidence on the necessity defense. The proffered evidence first has to "pass muster with the trial judge" before the jury would be allowed to appraise the accused's evidence. Commonwealth v. Capitolo, 498 A.2d at 810. The court refused expert testimony on the grave harm of radioactivity emanating from the plant, but nonetheless concluded there was no "real emergency" and the so-called danger was uncertain and mere speculation. Its justification for withholding from the jury the expert testimony and the necessity defense that went to the heart of the issue was that resources had to be conserved so as not to "burden the jury." *Id.* at 809. This ruling represents a prime example of a trial court withdrawing or prejudging the issue, which is the result the U.S. Supreme Court warned against in Morissette v. United States, 342 U.S. 246 (1952).

77. Other known cases are: 1) an intervention by 50 citizens at the Commanche Peak nuclear powerplant at Glen Rose, Texas, which resulted in a split jury; and 2) at least two trials with acquittals for citizen intervention at the Duane Arnold nuclear power plant in Iowa.

have a different standard of proof for issues of justification.[78] But a court typically requires a much stricter offer of proof than it does for other affirmative defenses when it mischaracterizes citizen intervention as a "protest" of official government "policy," rather than what it actually is—an attempt to prevent grave harm or loss of life. This impossible standard was required, for example, in *United States v. Seward.*[79] Not only did the harm to be prevented have to be criminal under the law and had to have occurred in the defendant's presence, but there had to be "a showing that a reasonable man would think that blocking entry to Rocky Flats for one day would terminate the official policy of the U.S. Government as to nuclear weapons or nuclear power."[80] Federal courts are often more hostile than state courts when an accused is offering relevant evidence relating to government policy and is opposing a harm that has been officially sanctioned. This is true even when the threatened harm being opposed is the most colossal harm imaginable—nuclear genocide and ecocide.

B. *Preventing Nuclear War and Further Nuclear Weapons Proliferation*

A defense of necessity has also been asserted in trials involving citizen intervention to stop the harm of nuclear weapons proliferation. One of the first of these cases took place in California.

1. *People v. Aldridge*[81]

On March 1, 1979, the twenty-fifth anniversary of the Bikini hydrogen bomb test which contaminated Marshallese Islanders and Japanese fishermen, more than 200 people assembled to prevent a grave harm at Lockheed's "Naval Industrial Reserve Ordnance Plant" in Sunnyvale, California. The Trident missile program is managed from this facility, and it is here that much of the design work and manufacturing is done. Many citizens carried the 560-foot long "Trident Monster"—a bamboo pole and rope replica of the Trident submarine on which hung 408 black flags, one flag for each of the hydrogen bombs the vessel could carry.

Twenty-eight people carried a portion of the "monster" onto Navy property managed by Lockheed and were arrested. At trial

78. *See* MODEL PENAL CODE § 3.01, comment, at 7 (1985).

79. 687 F.2d 1270 (10th Cir. 1982).

80. *Id.* at 1273.

81. No. 49091 (Sunnyvale-Cupertino Judicial District, Santa Clara Co. Muni. Ct., May 21-23, 1979).

they were allowed a necessity defense. Defendants testified to their beliefs that Trident missiles were aggressive weapons which made nuclear war imminent, but no expert witnesses were called to establish that those beliefs were reasonable. The judge then read the following three instructions to the jury:

> Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to protect persons or property from serious harm.[82]
>
> Defendants have presented, as part of their defense, a Necessity Defense — that is, defending the lawfulness of their presence on the property in question under the principle of necessity. The following guidelines may be used as criteria for determining a case of necessity:
> (1) An act or event is occurring, or about to occur, in the presence of the defendants and is connected with the place of the defendants' offense;
> (2) The harm to be prevented is significantly greater than the harm resulting from defendants' trespass;
> (3) All other forms of noncriminal and less offensive actions to prevent the act or event have been previously exhausted by the defendants;
> (4) The act or event to be prevented is imminent; and,
> (5) A direct causal relation must be reasonably anticipated to exist between defendants' actions and the avoidance of harm.
> All of the above elements must be proved to establish the defense.
>
> Certain of the defendants have given testimony on the various elements needed to justify the principle of necessity. If you find that collective testimony adequate to justify such a defense you are to apply it to all defendants even though each defendant did not testify on each element or possibly none of the elements.[83]

2. *Commonwealth v. Berrigan*[84]

Another case is *Commonwealth v. Berrigan*, the so-called

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82. This is an example in which, upon defendant's request, the court took judicial notice of ILL. REV. STAT. ch. 38, § 7-3.

83. People v. Aldridge, No. 49091, "Partial Transcript on Appeal."

84. 472 A.2d 1099 (Pa. 1984). The Pennsylvania Supreme Court overruled this decision, Commonwealth v. Berrigan, J-156-84, Nov. 1985, but procedural errors remain to be resolved. At the time of this writing, defendants are considering petitioning the U.S. Supreme

"Plowshare-8" trial.[85] Early in the morning of September 9, 1981, the eight defendants entered the General Electric Reentry Systems plant at King of Prussia, Pennsylvania, where nuclear warhead shells were being manufactured. They carried blacksmith hammers and beat on the shells in a symbolic gesture of forging them into plowshares. They were arrested and charged with burglary, criminal mischief and criminal conspiracy.

At trial, defendants did not deny their actions, but sought to defend themselves according to Pennsylvania justification statutes sections 501, 503 and 510.[86] They were allowed to present character witnesses and testify to their own motivations, but expert testimony to support elements of the necessity defense was excluded and the jury found all eight guilty.

On appeal, the appellate court reversed the conviction for several reasons, including the following: "The lower court erred when it ruled that appellants could not introduce the evidence that they needed to show the objective reasonableness of their action."[87] The majority opinion disagreed with the dissent:

> [The dissent] seems to say that to avail themselves of the defense appellants must be able to show that their actions could totally avert nuclear war; we will not hold them to such a burden. Appellants must show that their actions could reasonably have been thought necessary to avert a public disaster . . . . Surely the use of the weapons, the components of which were damaged by appellants, would cause a public disaster on the order of a "conflagration, flood, earthquake or pestilence."[88]

In a concurring opinion Judge Spaeth added:

> [W]henever a defendant pleads justification, the court should

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Court for a writ of certiorari.

85. This was the first in a series of more frequently occurring "Plowshares" actions symbolizing the biblical imperative to beat swords into plowshares and spears into pruning hooks.

86. PA. CONS. STAT. ANN §§ 501, 503 (Purdon 1983) are cited *supra* note 75. Section 18 PA. CONS. STAT. ANN. § 510 reads:

> Conduct involving the appropriation, seizure or destruction of, damage to, intrusion on or interference with property is justifiable under circumstances which would establish a defense of privilege in a civil action based thereon, unless:
> (1) this title or the law defining the offense deals with the specific situation involved; or
> (2) a legislative purpose to exclude the justification claimed otherwise plainly appears.

Id.

87. Commonwealth v. Berrigan, 472 A.2d at 1107.

88. *Id.*

> ask, "What value higher than the value of literal compliance with the law is defendant asserting?" The trial court failed to ask this question . . . . But appellants . . . are pleading the danger arising from nuclear missiles. One who does not understand that danger does not understand appellants' plea . . . . No peril is greater—no peril even approaches—the peril of nuclear war . . . . It is in the light of this peril that the reasonableness of appellants' belief must be judged.[89]

3. *People v. Lemnitzer*[90]

People v. Lemnitzer involved an attempt to save lives by preventing further nuclear weapons proliferation, in which the defendant was acquitted based on the Principle of Necessity. On February 1, 1982, John Lemnitzer, a Lutheran minister, took part in a blockade at Lawrence Livermore National Laboratory (LLNL) in an attempt to stop further development of nuclear weapons. LLNL

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89. *Id.* at 1114-16 (Spaeth, J., concurring).

In overruling this decision, the Pennsylvania Supreme Court again prejudged the issue: "The mere manufacturing of [nuclear] bomb shell casings cannot be viewed as the type of dangerous activity which could result in a public disaster . . . ." Commonwealth v. Berrigan, J-156-7. The court ruled as a matter of law that the "process of manufacture is so removed from the ultimate question of use as to be pure conjecture and speculation." *Id.* at J-156-8. This type of reasoning has been rejected since the end of World War II. The mere manufacture of nuclear bomb parts or the assembly of them is really the "planning and preparing" of a war of aggression or war in violation of a treaty that is prohibited by the Nuremberg Principles as incorporated in United States law. 59 Stat. 1544, E.A.S. 472 (1945). *See also* Air Force Pamphlet 110-31, Nov. 19, 1976 at 15-3. "[I]nternational law creates rights and imposes obligations" on both States and individual civilians under the laws of war; United States Dep't of the Army Field Manual, FM 27-10, at 4 (1956) (as amended by change no. 1, 1976). The "mere manufacture" of the gas that helped exterminate the democratic left and the Jews of Europe did not excuse the criminal liability of the private manufacturers. Zyklon-B Case, *Military Tribunal VI, Trials of War Criminals Before the Nuremberg Military Tribunal* (1953).

The court erroneously concluded that manufacturing parts of weapons of mass destruction is "legal conduct" and also that "the legislature has spoken in excluding the justification defense" for their conduct, at J-156-6 n.5. The MODEL PENAL CODE grants supremacy to a legislative choice, "so long as it acts within constitutional limits." MODEL PENAL CODE § 3.02, comment, at 13 (1985). Treaty law and the law of the nations, i.e. customary international law, represent constitutional limits on all three of the independent branches of government. All weapon systems must "be consistent with the obligations assumed by the U.S. government under all applicable treaties, with customary international law, and, in particular, with the laws of war." Dep't of Defense Instruction, 5500.15, Oct. 18, 1974. The treaty laws of war prohibit weapons of mass destruction, (*see* the Geneva protocols 36 Stat. 2259, 2277, 2295, 2310, 2351, 2371; 47 Stat. 2021, 2074; T.I.A.S. 3362, 3363, 3364, 3365; and the United Nations Charter, 59 Stat. 1035), treaty and custom prohibit threats and plans of genocide. 78 U.N.T.S. 277.

90. No. 27106E (Pleasanton-Livermore Judicial District, Alameda Co. Muni. Ct., 1982).

is one of the two facilities in the United States where nuclear bombs are designed. Lemnitzer was arrested and charged with willful and malicious obstruction per section 647(c) of the California Penal Code.[91]

At trial, Lemnitzer raised the necessity defense. He was allowed to present evidence showing: 1) that he believed, at the time of his act, that the development of offensive first strike weapons at LLNL presented an imminent threat of overwhelming harm; 2) that his belief was reasonable; 3) that lawful attempts at redress had proven futile and left him with "no choice" but to act as he did; and 4) that by obstructing entry into the Lab he had clearly chosen the lesser of two evils. His first trial ended with a split jury, and at his retrial he was acquitted.

4. *State of Vermont v. Jeanne Keller*[92]

This case, more generally known as "Winoosky 44," stemmed from citizen acts to prevent further United States supported atrocities in Central America, as opposed to the prevention of nuclear ecocide. However, the issues are similar because both involve saving lives and the citizen's perceived right to intervene when the government is committing grievous international crimes.

On Friday, March 23, 1984—the weekend of the fourth anniversary of the assassination of Archbishop Oscar Romero and only a few days prior to a major debate in the Senate on Central American policy, and after repeated unsuccessful attempts to convince Senator Robert Stafford that he should hold a public meeting on the issue—a hundred or more local citizens went to the Senator's Winoosky office. They planned to ask him to withdraw support from the Administration's Central American policy, to vote against supplemental military aid to El Salvador, and to hold a public meeting. These requests were refused.

The group remained in the Senator's office over the weekend conducting workshops which were attended by about 400 people. On Monday morning the Senator's staff ordered everyone to leave. They offered to do so if the Senator would hold a public meeting. This offer was rejected and forty-four people stayed and were then arrested.

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91. CAL. PENAL CODE § 647(c) (West 1985) states: "Every person who willfully and maliciously obstructs the free movement of any person on any street, sidewalk, or other place open to the public is guilty of a misdemeanor."

92. No. 1372-4-84 CnCr (Chittenden Cir. Dist. Ct., Nov. 13-16, 1984).

Several individual trials went on during the summer of 1984, and the court refused to give jury instructions on a necessity defense. Finally, late summer negotiations determined that the remaining twenty-six defendants would be tried in a single trial if they were allowed to assert a necessity defense. At this same time the periodic rotation of District judges took place and Judge Frank Mahady was assigned to the case by Superior Court Judge Tom Hayes. Judge Hayes indicated that offensive judicial errors occurred in the earlier trials which he did not want to see repeated.[93]

Expert witnesses were called at trial. When the defense closed its case, Judge Mahady, reputed to be the best constitutional jurist in the state,[94] instructed the jury that "[t]he defense of necessity is well recognized in the law and was explicitly recognized as being the law of the State of Vermont by our own Supreme Court within the past year."[95] He then charged the jury, in determining if defendants had established the necessity of their acts, to consider:

> [F]our well established analytical elements of that defense . . . have been laid down by our State Supreme Court . . . . The four elements which must prevail are as follows: First, there must be a situation of emergency arising without fault on the part of the . . . defendants. Secondly, this emergency must be so imminent and compelling as to raise a reasonable expectation of harm either directly to the defendant or upon those he was seeking to protect. Third, the emergency must present no reasonable opportunity to avoid the injury without committing the unlawful act . . . . And fourth, the injury impending from the emergency must be of sufficient seriousness to outweigh the criminal wrong that has been alleged . . . .[96]

The judge then instructed the jury minutely on each element. The jury found all defendants not guilty.

Although it is beyond the scope of this article to delve into a defense based on international law, it should be noted that such a defense was allowed in this trial. To the authors' knowledge, this is the first time an international law defense was allowed in a citizen intervention case.

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93. Letter from Melrose Huff, one of the defendants in this case, to Robert Aldridge (Feb. 4, 1985).

94. *Id.*

95. State v. Keller, No. 1372-4-84 CnCr, Portion of Jury Charge in Trial by Jury, at 4-5. *See also* State v. Shotten, 458 A.2d 1105 (Vt. 1983) (listing the elements of a necessity defense).

96. State v. Keller, No. 1372-4-84 CnCr at 4-6. *See also id.* at 6-9 (detailed jury instructions on how to weigh the elements of necessity).

5. *United States v. LaForge and Katt*[97]

Recognition of the Principle of Necessity took place in a different manner in *United States v. LaForge and Katt.* On August 10, 1984, John LaForge and Barbara Katt gained entry to the Sperry Defense Systems Division plant near St. Paul, Minnesota and damaged a Trident submarine guidance system. They were arrested and charged with destroying property being manufactured for the United States government under Title 18, U.S.C. section 1361. Maximum sentence for the $36,000 damage was ten years in prison and a $5,000 fine.

At trial defendants were allowed a necessity defense and the court instructed the jury as follows:

> During their case in chief, the defendants have been allowed to attempt to assert a defense in this case which has been variously referred to as the defense of necessity or justification.
>
> The defense of necessity or justification requires evidence of each and every one of the following essential elements:
>
> (1) That the criminal conduct of which the defendants stand accused was taken to prevent a greater harm to themselves or others, which was imminent to occur;
>
> (2) That there was no effective legal alternative method or course of action available to them that could be taken to avert this so-called harm; and,
>
> (3) That there was a direct causal relationship between the criminal conduct taken and the avoidance of the alleged harm. It is not necessary that the steps be completely effective in order to use this defense; in other words, it wouldn't be necessary that they destroyed all nuclear weapons, but that they had an effect upon them.[98]

Defendants were found guilty by the jury. At sentencing the judge made a lengthy statement, excerpts from which follow:

> It is the allegation of these young people that they committed the acts here complained of as a desperate plea to the American people and its government to stop the military madness which they sincerely believe will destroy us all, friend and enemy alike . . . . Can it be that those of us who build weapons to kill are engaged in a more sanctified endeavor than those who would counsel moderation and mediation as an alternative method of settling international disputes?

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97. No. CR 4-84-66 (U.S. Dist. Ct., Minn., Nov. 8, 1984).

98. *Id.* at Partial Transcript of Proceedings, Portion of the Court's Final Jury Instructions, Nov. 8, 1984.

> Why are we so fascinated by a power so great that we cannot comprehend its magnitude? What is so sacred about a bomb, so romantic about a missile? Why do we condemn and hang individual killers, while extolling the virtues of warmongers? What is the fatal fascination which attracts us to the thought of mass destruction of our brethren in another country? . . . have we given thought that, in executing that decree, we will also die? . . . . [H]ave we so little faith in our system of free enterprise, our capitalism and the fundamental concepts that are taught us in our constitutions and in our several bibles that we must, in order to protect ourselves from the spread of foreign ideologies, be prepared to die at our own hands? . . . I would here in this instance, attempt in my own small way to take the sting out of the bomb, attempt in some way to force the Government . . . to remove the halo — which it seems to hold over any device which can kill — and, instead, to place thereon a shroud, the shroud of death, destruction, mutilation, disease and debilitation.[99]

The judge sentenced each defendant to six months in jail and then suspended that sentence on condition of six months probation.

6. *People v. Boelcke*[100]

On November 3, 1983, the defendants were one affinity group of a larger effort to blockade the gates of Williams International at Walled Lake, Michigan, where cruise missile engines are manufactured. They were arrested and charged with trespass and conspiracy to commit trespass. At trial in January 1985, they were allowed to assert a necessity defense. Instructions to the jury were:

> To constitute the defense of duress or necessity, the defendants must show:
>
> First, the threat must have been sufficient to create in the mind of reasonable persons the imminent fear of death or serious bodily harm to themselves or others.
>
> Second, the threat must have in fact caused such fear of death or serious bodily harm in the mind of the defendant.
>
> Third, the fear or duress must have been operating upon the mind of the defendant at the time of the alleged act.
>
> Fourth, the defendant must have committed the act to avoid the threatened harm.[101]

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99. *Id.* at Transcript of Sentencing, Nov. 8, 1984.

100. No. 101194-101203 (52nd Jud. Dist., Jan. 7-12, 1985).

101. *Id.* at Defendant's Proposed Jury Instructions as given by the trial court.

The trial court then instructed the jury on determining whether duress is imminent.

> (1) In determining whether the fear or duress was operating upon the defendant at the time of the alleged act, you should carefully consider all the surrounding circumstances as disclosed by the evidence.
> (2) Consider the nature of the threats or force, if you should find such threats or force to have been made.
> (3) Consider the situation of the defendant at the time he or she committed the alleged act. Consider whether he or she had either the opportunity or the ability to avoid the feared harm without committing the alleged act. In this regard you should also consider the reasonableness of any other course of action in view of all the circumstances which were known to the defendant at the time.[102]

7. *People v. Ann Jarka*[103]

For a week following the reelection of Ronald Reagan to the presidency, a series of actions occurred at the Great Lakes Naval Training Center in Illinois for the purpose of saving lives. The focus was two-fold: to stop United States naval activities in Central America and to stop the Navy's part in nuclear weapons proliferation, such as stationing nuclear submarines in the Caribbean and supplying nuclear-capable artillery to the Central American region.

On November 13, 1984, as part of that action, twenty-two people were arrested for blocking the entrance to the training center. All of them were charged with mob action—a sort of misdemeanor conspiracy charge which involves knowingly assembling with one or more people to break the law. About half were charged with resisting arrest because they did not get up and walk when arrested.

Sixteen of those arrested went to trial but charges against eight were subsequently dropped and a ninth was dismissed. The seven remaining were allowed to present a defense based on the Principle of Necessity. In ruling to allow such a defense, Associate Judge Alphonse Witt stated: "Let them have their day in court. The jury may or may not buy the story."[104]

After a one-week trial, the jury found the defendants were "not

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102. *Id.*

103. Nos. 002170, 002196-212, 002214, 002236-002238 (Cir. Ct. of Lake Cty., Ill., April 1985).

104. The News Sun (Lake Co., Ill.) Jan. 29, 1985, at 1.

guilty." Besides giving an instruction paralleling Illinois statutory law, the judge also instructed the jury that to find the defendants guilty of either mob action or resisting arrest, the prosecution must prove they did not act out of necessity.

In addition, the judge gave the following instructions to the jury regarding international law:

> International law is binding on the United States of America and on the State of Illinois.
>
> 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, failure to distinguish between combatants and noncombatants and poisoning its targets by radiation.[105]

These instructions are worthy of mention although international law is not the subject of this article. To the knowledge of the authors, this is the first time that a judge instructed a jury regarding international law as it pertains to nuclear weapons.

8. *Chicago v. Allen Streeter*[106]

In this Illinois case, citizen intervention was employed to stop apartheid in South Africa. This issue too, has parallels with anti-nuclear war actions and so is included here. The eight defendants included clergy, organized labor, elected officials, community organizers, college students and a wide range of ethnic and religious group members. On January 15 and February 7, 1985, defendants went to the Chicago offices of the South African Consulate and remained at the door until Consulate General Willie P.N. Lotz abandoned his long-standing refusal to discuss detentions, killings and deprivation of human rights in South Africa. They were arrested on charges of criminal trespass and brought to trial where they successfully raised a necessity defense to avoid the greater public harm of apartheid. After two-and-one-half hours of deliberation, the jury reached a "not guilty" verdict. This was reported as the nation's first full trial arising from attempts to stop South African government atrocities.

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105. People v. Jarka, Nos. 002170, 002196-212, 002214, 002236-38 (Cir. Ct. of Lake Cty., Ill., April 1985).

106. No. 85-108644, 85-108645, 85-108648, 85-108649, 85-108651, 85-108652, 85-120323, 85-120326, and 85-120327 (Cir. Ct., Cook Cty., Ill., May 1985).

V. Elements of a Necessity Defense When Citizens Intervene

The common law Principle of Necessity is becoming a more accepted defense for citizen intervention to prevent nuclear war and further nuclear weapons proliferation, as it is for avoiding the harm from nuclear power plants. With that in mind, and in light of the statutes and court cases described above, it seems that reasonable and meaningful criteria for such a defense can be condensed to six elements:

> 1) The defendant has a reasonable belief that a great harm is occurring or about to occur;
> 2) The harm to be prevented is likely to occur so soon that citizen intervention can reasonably be assumed necessary at the present time;
> 3) The harm defendant is attempting to prevent is greater than the injury resulting from defendant's intervention;
> 4) No reasonable traditional alternatives are available to stop or prevent the harm, or a history of futile attempts to use accepted means makes the results from those means, alone, illusory;
> (5) The accused has a reasonable belief that a causal relationship exists between the citizen intervention action and prevention of the harm; and
> (6) No evidence shows force or violence was used against other persons by the citizen intervention act.

These six elements would put the most stringent test to any claim that necessity justifies citizen intervention and would also raise questions of fact to guide the jury.

Applying the Principle of Necessity to citizen intervention actions attempting to prevent nuclear ecocide and genocide, and further nuclear weapons proliferation, introduces new concepts of harm, space and time. After helping to develop the atomic bomb, Albert Einstein, one of the most brilliant minds of this country, described perhaps the greatest danger of the nuclear age:

> Our world faces a crisis as yet unperceived by those possessing the power to make great decisions for good and evil. The unleashed power of the atom has changed everything save our modes of thinking and thus we drift toward unparalleled catastrophe . . . a new type of thinking is essential if mankind is to survive and move toward higher levels.[107]

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107. R. Lapp, *The Einstein Letter That Started it All*, N.Y. Times, August 2, 1964, §E (Magazine), at 54.

This new type of thinking is also critical in making judicial decisions. The nature of harm and of imminence is one thing for a person threatened with a fire, robbery or murder. But for the prevention of nuclear war, the elements of necessity must be perceived in a different dimension. The gravity of the harm—hundreds of millions of people killed and the rendering of this planet uninhabitable—must be realistically weighed against the means used to prevent it. Under some modern circumstances a time urgency can be measured in microseconds. In other areas, such as the 25,000-year radioactive half-life of plutonium, we can see the other extreme. In between is a wide spectrum of considerations. It is not possible to depend solely on classical concepts which are no longer realistic or meaningful. The following discusses each of the requisite elements.

1. *The Defendant has a Reasonable Belief that a Great Harm is Occurring or About to Occur*

The question of fact raised here is whether the defendant's belief that nuclear war will occur if corrective measures are not taken is a reasonable belief. The mere existence of nuclear weapons and their continued proliferation supports such a belief, *inter alia*, because:

a) History reveals that virtually every weapon that has been developed has been used for war.

b) History also teaches that peace is the exception and war is the rule.[108]

c) Official statements by the United States Executive Branch and the Pentagon clearly indicate that the United States is prepared to use nuclear weapons, and indeed, to use them first.[109]

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108. *See, e.g.*, Emerson, *War Powers Legislation*, 74 W. VA. L. REV. 53, 88-119 app. (1972), which itemizes 192 United States military hostilities abroad through 1971 which occurred without a declaration of war. *See also* J. NASH, DARKEST HOURS 771-776 (1977). (lists wars from 1479 BC through 1973 AD).

109. On June 1975, President Gerald Ford was asked if the United States would use tactical nuclear weapons if North Korea launched an attack across the 38th Parallel. He replied: "We have a strong deterrent force, strategic and tactical, and of course those forces will be used in a flexible way in our national interests." San Jose Mercury, June 26, 1975, at 24, col. 8.

On July 1, 1975, Defense Secretary James Schlesinger said: "Under no circumstances could we disavow the first use of nuclear weapons." San Jose Mercury, July 2, 1975, at 10, col. 2.

On June 23, 1978, Defense Secretary Harold Brown said: "Nuclear weapons are not the weapons of choice in Europe but they may have to be used if conventional weapons fail. We have not renounced the first use under those circumstances." Watsonville Register Pajaronian, June 23, 1978.

In addition, the United States is developing certain so-called first strike weapons which have a destabilizing effect.[110] The distinguishing characteristic of these nuclear weapon systems is that they will have the accuracy to destroy Soviet land-based strategic missiles in their concrete and steel underground silos.[111] Although these weapons are claimed necessary to destroy remaining Soviet weapons during a United States retaliation to a first strike by the U.S.S.R.—a policy called "second strike counterforce"—credible evidence from official sources indicates that these weapons could actually aggravate the Soviet first strike they are supposed to deter.

For example, the Congressional Budget Office said it would be "virtually impossible" to deploy a force of precision missiles large enough to provide significant retaliation after having absorbed a Soviet first strike, yet small enough to avoid threatening Soviet intercontinental ballistic missiles (ICBMs) with a United States first strike.[112] It also warned of the dangerous potential:

> Perhaps the most serious problem with U.S. forces designed for second strike counterforce stems from the possibility that they would be seen as first strike weapons and thus be destabilizing. Two types of nuclear stability might be threatened by the development of a U.S. counterforce capability: crisis stability and arms control stability. The first kind involves the incentive to strike first that each side would face in an international crisis . . . . Moreover, the Soviet Union, looking at

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During 1978, President Jimmy Carter pledged: "The United States will not use nuclear weapons against any non-nuclear state party to the NPT [Non-proliferation Treaty] . . . *except in the case of an attack* on the United States, its territories or armed forces, or its allies by such a state allied to a nuclear weapons state or associated with a nuclear weapons state in carrying out or sustaining the attack." (emphasis added — note that the attack does not have to be nuclear) Department of State Bulletin, Aug. 1978, at 52.

On April 6, 1982, Secretary of State Alexander Haig stated: "A 'no first use' policy would be the end of flexible response and thus of the very credibility of the Western strategic deterrent." U.S. DEPT. OF STATE, CURRENT POLICY No. 383, at 2.

In mid-1984, General Bernard Rogers, Supreme Allied Commander in Europe and Commander-in-Chief of United States forces in Europe, said the first-use option is necessary to maintain the deterrence. AVIATION WEEK & SPACE TECHNOLOGY, May 21, 1984, at 55.

For a history of occasions when first use of nuclear weapons was considered and for a description of flexible response options, see R. ALDRIDGE, NUCLEAR STRATEGY AND THE DEFENSE OF EUROPE (1984).

110. For a comprehensive discussion of first strike weapons, their history and their characteristics, see R. ALDRIDGE, FIRST STRIKE: THE PENTAGON'S STRATEGY FOR NUCLEAR WAR (1983).

111. The most obvious first strike nuclear weapons are the MX, Trident and Pershing-2 ballistic missiles, nuclear cruise missiles and the bombers carrying cruise missiles.

112. CONGRESSIONAL BUDGET OFFICE, PLANNING U.S. STRATEGIC NUCLEAR FORCES FOR THE 1980S, June 1978, at xv and 40.

> capabilities rather than intentions, might see a U.S. first strike capability in that light. Faced with a threat to their ICBM force, Soviet leaders facing an international crisis might have an incentive to use their missiles in a preemptive strike before they could be destroyed by the United States.[113]

Another cogent warning appeared in the President's *Arms Control Impact Statements* (ACIS).[114] These statements cautioned that the additive effects of these "potential advances in U.S. countersilo capabilities by the early 1990s could put a large portion of the Soviet fixed ICBM silos at risk."[115] They also warned that "under extreme crisis conditions, Soviet leaders, concerned that war was imminent, and fearing for the survivability of their ICBMs if the United States struck first, nonetheless, might perceive pressures to strike first themselves."[116]

The dangers just discussed are closely related to the escalation from conventional to "limited" nuclear war, which will develop into total nuclear annihilation. This three-step escalation is outlined in the United States' "flexible response" doctrine for responding to a massive conventional attack. Escalation to limited "first use" of theater nuclear weapons would happen in less than thirty days because munitions and supplies would not last that long and the resupply pipeline would be too slow.[117]

The certainty of escalation from a limited to a total nuclear war has been voiced by several high ranking military officials. Former Defense Secretary Harold Brown does not see how "an initial use of nuclear weapons—however selectively they might be targeted—could be kept from escalating to a full-scale thermonuclear exchange."[118]

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113. CONGRESSIONAL BUDGET OFFICE, COUNTERFORCE ISSUES FOR THE U.S. STRATEGIC NUCLEAR FORCES, Jan. 1978, at 32.

114. Pursuant to section 36 of the Arms Control and Disarmament Act, 22 U.S.C. § 2576, the President of the United States is required to submit Arms Control Impact Statements (ACIS) to Congress whenever he requests authorization or appropriation for military programs. The intent of Congress is to obtain additional information from the Executive Branch on possible impact of nuclear armament programs, major defense programs, and certain technology on arms control and disarmament negotiations and policy. The Arms Control and Disarmament Agency is responsible for preparing ACIS.

115. *Fiscal Year 1980 Arms Control Impact Statements*, March 1979, at 55 (prepared for the use of the Committee on Foreign Relations and Foreign Affairs of the Senate and House of Representatives, respectively).

116. *Fiscal Year 1979 Arms Control Impact Statements*, June 1978, at 21.

117. For a discussion of Western European conventional weapons and NATO defense, see, *Economics, Politics Portend Shifts*, AVIATION WEEK & SPACE TECH., May 21, 1984, at 50-63.

118. DEPARTMENT OF DEFENSE, ANNUAL REPORT FOR FISCAL YEAR 1979, Feb. 2, 1978, at 53.

Former Joint Chiefs of Staff Chairman, General David C. Jones, did not "see much chance of nuclear war being limited or protracted" and emphasized that there would be great difficulty in keeping any kind of nuclear exchange between the United States and U.S.S.R. from escalating.[119] General Bernard Rogers, present Supreme allied Commander of Europe, declared that "we cannot contain a nuclear war in Western Europe . . . [it] is going to escalate to the strategic nuclear exchange. It is just a question of how soon it escalates. I happen to be one who believes, under present conditions, that it is going to escalate very quickly."[120] Even President Ronald Reagan voiced skepticism, saying: "If war comes . . . would the opponent, faced with inevitable defeat, take that defeat without turning to the ultimate weapon?"[121]

This sampling of official warnings—which does not even mention critical analyses by experts or the dangers from false alerts, accidents and terrorists—should compel the recognition that the harm of nuclear war is a reasonable belief, and that corrective action by many citizens is urgently needed.

2. *The Harm to be Prevented is Likely to Occur so Soon that Citizen Intervention Can Reasonably be Assumed Necessary at the Present Time*

The traditional concept of the common law Principle of Necessity envisions emergency action to abate a here-and-now danger, such as saving life or property from fire or preventing murder, rape or robbery. Criminal law commentators LaFave and Scott speculate as to the rationale behind this traditional concept.

> It is sometimes said that the defense of necessity does not apply except in an emergency—when the threatened harm is immediate or 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.[122]

In recent cases, however, it has become evident that the lesser

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119. Washington Post, June 19, 1982, at 3.

120. *Defense Department Authorization and Oversight, 1984: Hearings before the House Armed Services Comm.*, March 10, 1983, Part 1, at 1300.

121. President's News Conference in Washington, D.C., Nov. 10, 1981; N.Y. Times, Nov. 11, 1981, at 24, col. 3.

122. LAFAVE & SCOTT, CRIMINAL LAW 388 (1972).

evil (defendant's act of necessity) sometimes must occur well in advance of the greater harm. In *People v. Harmon*, the defendant escaped from prison one evening after threat of assault, but where no present or impending assault existed. The *Harmon* court ruled that "imminency is . . . to be decided by the trier of fact taking into consideration all the surrounding circumstances, including defendant's opportunity and ability to avoid the feared harm."[123]

The courts recognized the need for longer term planning to protect our country, our planet, and our environment in *Environmental Defense Fund v. Environmental Protection Agency.*[124] It was also recognized that preventative action to avoid harm to those entities also required more time—more than just hours or days. In like manner, preventing nuclear war by preventing the development and deployment of destabilizing weapons systems also requires a longer period of time for three reasons: 1) it must deal with systemic forces deeply-rooted in society; 2) the current policymakers of these institutions, believing in the ethic that the best fighter survives,[125] will not stop at present nuclear capabilities; and 3) the nature of the preventative action in this case is dictated by the harm.

In 1853, it was necessary to blast a firebreak well ahead of the fire in order to save the unburned portion of San Francisco. Yet this was a small conflagration compared to the incineration which will be caused by a nuclear holocaust. The fact that nuclear annihilation appears likely at some time in the future must be weighed against the gravity of the harm when it does occur. It may indeed be the tremendous gravity of nuclear war which makes it seem so remote; the incomprehensible destruction seems unreal. This "psychic numbing," as it is termed by psychologists, could account for the many court rulings which term actions based on necessity to avoid nuclear war as frivolous.

Any reasonable understanding of an impending harm must allow an interpretation that encourages prevention of a colossal harm and that occurs at the climax of a long preparation process. In such cases, preventative action must also be a long process which begins early in the process leading to the harm.

The harmful process which results from destabilizing first strike weapons can be identified as starting about 1966 when a strategic exercise study was implemented to define the modernization of the

123. People v. Harmon, 220 N.W.2d at 214.
124. 465 F.2d 538 (D.C. Cir. 1972).
125. R. BARNETT, ROOTS OF WAR, ch. 3 (1972).

United States strategic nuclear triad. The process was accelerated during October 1981 when the Reagan Administration announced its plans for "modernizing" the strategic nuclear forces.[126] The harm is expected to become critical as early as 1988 when sufficient numbers of weapons will have been deployed to create the instability described above.

Neither time nor opportunity will exist for reasonable intervention, by citizens or any other means, at the time nuclear weapons are to be launched. Therefore, the concept of a harm about to occur can reasonably be held to include three essential requirements:

1) The feared harm is expected to happen so soon that preventative action must begin at once in order to be effective;

2) The harm is expected to occur far enough in the future that there is still time to stop it by immediate and ensuing actions; and,

3) The ensuing actions need be continuous, with the immediate action only in direction and intent, not necessarily in personnel.

3. *The Harm Defendant is Attempting to Prevent is Greater than the Injury Resulting from Defendant's Intervention*

While "necessity is subjective as to its facts, it is objective as to its values."[127] The objectification of these values is to be made in accordance with ordinary standards of intelligence and morality.[128] Under any ordinary standard of intelligence and morality it is impossible to equate trespass, blockades, sit-ins, or even the symbolic beating of weapons into plowshares with the harm of nuclear war and annihilation.

Destruction of cities and towns, death and injury to hundreds of millions of people, serious long-term birth defects, serious long-term alteration of the ecological system, and widespread starvation due to disruption of economic distribution systems are demonstrable harms.[129] The magnitude of nuclear war harm is succinctly de-

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126. N.Y. Times, Oct. 3, 1981, at 12, col. 2.

127. *See* G. WILLIAMS, THE CRIMINAL LAW § 239 (2d ed. 1961).

128. N.Y. PENAL LAW § 35.05.2 (1968).

129. NATION PREPARATORY COMM., A CALL FROM HIBAKUSHA OF HIROSHIMA AND NAGASAKI PROCEEDINGS: INTERNATIONAL SYMPOSIUM ON THE DANGER AND AFTER-EFFECTS OF THE ATOMIC BOMBING OF HIROSHIMA AND NAGASAKI, JAPAN (July 21-Aug. 9, 1977). DEFENSE CIVIL PREPAREDNESS AGENCY, HIGH RISK AREAS (April 1975); OFFICE OF TECHNOLOGY ASSESSMENT, THE EFFECTS OF NUCLEAR WAR (1979); U.S. DEP'T. OF DEFENSE, THE EFFECTS OF NUCLEAR WEAPONS (April 1962); *Proceedings of the First Congress of International Physicians for the Prevention of Nuclear War*, Airlie, Virginia (March 20-25, 1981); *Scientists Describe 'Nuclear Winter,'* 222 SCI. 822 (1983); U.S. DEP'T OF DEFENSE, THE POTENTIAL EFFECTS OF NUCLEAR WAR ON THE CLIMATE (March 1985).

scribed in United Nations General Assembly Resolution 1653:

> The General Assembly . . . declares that:
> a) The use of nuclear and thermonuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations;
> b) The use of nuclear weapons and thermonuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and the rules of humanity;
> c) The use of nuclear and thermonuclear weapons is a war directed not against an enemy or enemies alone but also against mankind in general, since peoples of the world not involved in such war will be subjected to all the evils generated by the use of such weapons; and
> d) Any state using nuclear or thermonuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against humanity and civilization.[130]

The gravity of the harm is an important fact when considering the harm from nuclear war. In *People v. Pena*, the court held that "it is plain that as the harm sought to be avoided decreases in seriousness the duress [necessity] defense will excuse fewer and fewer acts undertaken to avoid the harm."[131] It then follows that as the harm increases in gravity, an act to prevent it becomes more reasonable. It is in this light that actions intended to prevent nuclear annihilation, no matter how futile they may seem, should be weighed by the jury.

4. *No Reasonable Traditional Alternatives Are Available to Stop or Prevent the Harm, or A History of Futile Attempts to Use Accepted Means Makes any Anticipated Results from such Means Alone Illusory*

In *People v. Pena*, the court held that "the more imminent the peril, the less likely the existence of an alternative course of action."[132] This hypothesis probably holds true in traditional cases of necessity. But as Einstein so eloquently phrased it, the nuclear age requires a new way of thinking.

A momentum exists in the nuclear arms race. A person running

130. G.A. RES. 1653 (Nov. 24, 1961).
131. 149 Cal. App. 3d Supp. 14, 26, 197 Cal. Rptr. 264 (1983).
132. *Id.*

can stop within a few feet to avoid colliding with another. A heavy truck however, cannot grind to a halt in time to avoid hitting a person who leaps into its path six feet ahead. Nuclear weapons proliferation is a heavy truck rumbling along at high speed, and the drivers are and have been intelligence and military personnel, along with various elected representatives of the people. This momentum started in 1945 when the United States began using nuclear weapons in its military and foreign policy. After dropping two nuclear bombs on large civilian cities, the United States thereafter initiated the policy of threatening nuclear genocide on the Soviet Union. Since World War II, the United States has considered or threatened to use nuclear weapons at least a dozen times,[133] and its nuclear arsenal has multiplied from one in 1945 to 30,000 forty years later. During that time, the United States has designed 60,000 nuclear warheads of seventy-one different types for use in 116 weapons systems. Citizen intervention to stop the momentum before a catastrophe occurs is a reasonable belief, and what alternatives are available to prevent this colossal harm is a question of fact.

To give meaningful effect to the right to trial by jury requires that the defendant be allowed to assert a defense.[134] But the necessity defense to excuse citizen intervention to save lives is denied when the *judge* becomes the fact-finder and determines that adequate alternatives to such action exist. This is an example of a major failure of the case law development of necessity in the nuclear age in which judges "focus attention on the question of whether there were less drastic courses of action that would have averted the harm" and their proclivity "to find, after the fact, the existence of unrealistic or unreasonable alternatives."[135] These decisions never address the issue of why, in a democracy, a jury of one's peers is not the proper body to determine if reasonable alternatives exist. These courts have mistakenly converted issues of fact regarding availability of alternatives

133. Ellsberg, *First Strike, You're Out*, THE PROGRESSIVE, July 1985, at 32.

134. *See* Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (due process "is in essence, the right to a fair opportunity to defend against the State's accusations"); Bashor v. Risley, 730 F.2d 1228, 1240 (9th Cir.), *cert. denied*, 105 S. Ct. 137 (1984) ("the criminal defendant is also entitled to adequate instructions on his or her theory of defense"); United States v. Kenny, 645 F.2d 1323, 1337 (9th Cir.), *cert. denied*, 452 U.S. 920, *cert. denied*, 454 U.S. 828 (1981) ("When a defendant's jury instructions have been refused, the following principles apply. The jury must be instructed as to the defense theory of the case, but the exact language proposed by the defendant need not be used, and it is not error to refuse a proposed instruction so long as the other instructions in their entirety cover that theory."); United States v. Kaplan, 554 F.2d 958, 968 (9th Cir. 1977).

135. Tiffany & Anderson, *Legislating the Necessity Defense in Criminal Law*, 52 DEN. L.J. 839, 847 (1975).

into issues of law, and thereby have destroyed the integrity of the fact-finding process.

A recent example is *In re Weller*,[136] wherein the court held that "the issue turns on the availability of lawful means for accomplishing political change."[137] In *Weller*, the two defendants and other members of the Pacific Life Community were arrested for criminal trespass at Lockheed, a major nuclear weapons proliferator, after they had peacefully handed out leaflets to workers in an attempt to persuade them to cease designing weapons of mass destruction—a grievous harm—but refused to leave after 1.5 hours. The defendants had a long history of using "lawful means" to stop the proliferation momentum. One defendant had, among other lawful means, twice run for Congress, worked to pass the Transfer Amendment,[138] and also composed and performed songs regarding nuclear weapons proliferation. At their day in court, the judge erred in refusing to allow the jury to consider the defense of necessity. The defendants should not have been required to convince the judge that they had exhausted all alternatives. All that was required was for the defendants to proffer sufficient evidence of the elements of necessity to raise the factual issue so the jury could so find.[139] When the court ruled as a matter of law that the defendants had other adequate alternatives, it was asserting that regardless of how diligent a party is in pursuing alternatives, no matter how many years have been spent in legitimate efforts to prevent the harm, no matter how much democratic measures are ineffective to handle the problem, the court in hindsight can find just one more alternative, just one more letter to write to their legislator, that a citizen could have tried before acting out of necessity.

The court in *Weller* ruled that a free and democratic society always provides its citizens with inexhaustible lawful means to not only bring the United States into "[c]ompliance with international law,"[140] but also to determine national defense policy: "National de-

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136. *In re* Weller, 164 Cal. App. 3d 44 (1985). There were two defendants in this case. Defendant Weller has been sentenced, but defendant Goldsborough has chosen to pursue a federal habeas corpus remedy.

137. *Id.* at 49.

138. The Transfer Amendment sought to transfer a portion of money allotted for nuclear weapons to the creation and production of peaceful alternatives to nuclear weapons proliferation.

139. *See* United States v. Bailey 444 U.S. 394, 412, n.9 (1980); United States v. Peltier, 693 F.2d 96, 98 (9th Cir. 1982); United States v. Contento-Pachon, 723 F.2d 691, 694 (9th Cir. 1984); Commonwealth v. O'Malley, 439 N.E.2d 832, 837 (Mass. App. 1982).

140. *In re* Weller, 164 Cal. App. 3d at 49. Apparently the court is unaware that in our

fense policy is made through the political process, to which petitioners and most other citizens have free access."[141] Citizens who intervene to stop the harm of the nuclear weapons momentum, however, have reason to believe that the democratic process is not available to them, and a jury could so find.

The Ninth Circuit in *United States v. Contento-Pachon*[142] affirmed that the necessity defense was available to a defendant who acts to promote the general welfare, and in *United States v. Dorrell*[143] stated that the necessity defense recognizes "that, in certain circumstances, the choice made by the defendant is a choice that society would also have made and now is given the opportunity to ratify." A jury of ordinary United States citizens could very well ratify a defendant's conduct if allowed to consider the necessity defense. A jury could be willing to make the same considered judgment as the defendant—that after unsuccessfully utilizing the alternative of the "political process" year after year, in order to stop the harm of nuclear weapons proliferation, a reasonable person in the United States could conclude that the "political process alternative" is an empty label and not a real alternative. The jury could very well perceive that other action is necessary when trying to prevent the harm of our annihilation.

Ruling as a matter of law that reasonable alternatives are available, and denying defendants their fundamental right to a jury trial in which their peers decide fact questions, confirms that those whose views conflict with governmental "policy" are excluded by the political and judicial process. To accord citizens any less than a full hearing before a jury when they are trying to avert nuclear ecocide, seriously undermines our most basic rights by severing citizens from the concepts of popular sovereignty that our Constitution was designed to protect. It is hardly true as a matter of law that in 1986 the "po-

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"free and democratic" society courts do not allow standing to individual citizens or to our representatitives in Congress to seek United States government compliance with international law. Courts typically dismiss the claim of the United States government committing international law crimes because it is a "political question." *See, e.g.*, Greenham Women Against Cruise Missiles v. Ronald Reagan, 591 F. Supp. 1332 (S.D.N.Y. 1984); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.C. 1983); Pauling v. McElroy, 278 F.2d 252 (2d Cir. 1960). *But see* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (torture is a violation of customary international law). A court will also dismiss a constitutional claim because it calls for an "advisory opinion." *See, e.g.*, Johnson v. Weinberger, *discussed in* San Jose Mercury News, Nov. 20, 1985, at 14B.

141. *In re* Weller, 164 Cal. App. 3d 44, 49, 210 Cal. Rptr. 130 (1985).

142. 723 F.2d at 695.

143. 758 F.2d 427, 436 (9th Cir. 1985). The court, however, refused the defendant's right to assert the defense.

litical process" is a reasonable alternative and that twelve people on a jury could not possibly differ as to that conclusion. As one commentator observed: "Is there any reason why courts should be blind to the social reality that confronts them and treat American democracy as if it were still peopled by simple yeomen with equal financial and political power?"[144]

Even though American democracy was founded in 1776 upon the principle that all political power is inherent in the people, and that government derives its just powers from the consent of the governed, in 1986—in the nuclear age—these principles hardly conform to reality. We live in a time and in a country in which the National Security Agency, the nation's largest and most secretive intelligence agency, is currently investigating whether at least one-third of all the votes cast in the 1984 democratic elections were subject to computer fraud.[145] We live in a time in which "[t]hose who cannot afford to advertise in newspapers or circulate elaborate pamphlets"[146] do not have real access to the "political process." We live in a time in which private groups of wealthy people sell the Executive Branch's "Star Wars" system to the American public on national television.[147] We live in a time in which military men are "being given the power to control the information flowing into the nation's political debates,"[148] and when industry, outside of the "political process," substantially influences weapons policy, and a time when "many U.S. contractors fear that weapons they have researched and developed for years will become objects of superpower bartering before entering the lucrative stages of full production."[149] We live in a time when even if a small group is able to collect a few thousand dollars, television time is denied by local stations because the film the group hopes to show to their fellow Americans says that the United States government's policies and money are responsible for atrocities in El Salvador and Nicaragua.[150] And we live in a time in which the "world political process" cannot change United States nuclear policy. The United States is one of the few countries declining to support successive

144. Devir, *Towards A Political Theory of Public Interest Litigation*, 54 N.C. L. REV. 1133, 1155 (1976).

145. N.Y. Times, Sept. 24, 1985 at 11.

146. Adderly v. Florida, 385 U.S. 39, 50-51 (1969) (Douglas, J., dissenting).

147. San Jose Mercury News, Nov. 14, 1985, at 17E.

148. San Jose Mercury News, Jan. 3, 1986, at 7B.

149. San Jose Mercury News, Nov. 22, 1985, at 7B.

150. "Faces of War" film produced by Neighbor to Neighbor, San Jose Mercury News, Nov. 21, 1985, at 11C.

worldwide resolutions calling for a comprehensive test ban.[151]

Assuming that other options are always open to people in a democracy assumes that the democracy is pure, which can only be true in theory. A free flow of information rarely exists, and alternative democratic processes do not always work.

> The reality is not a system in which the citizen is master, but in which he or she is all too often a victim. The citizen's voice on policy questions is almost never heard. It is drowned out in elections by the multitude of issues that are presented in advertising agency simplifications. It is ignored in the legislature where it cannot compete against well organized and well financed lobbying efforts of special interest groups.[152]

It is not rhetorical to say that citizens can become captive specimens when secrecy and vested interests abound in government. In a recent trespass case in which the CIA was recruiting at the University of Massachusetts in Amherst, Chief Judge A. J. Moore of the Hampshire District Court made the following observation:

> Today, we in this court have been reminded that even our own government does not always act in conformity with the law, and therefore, in such cases, I firmly believe that citizens have a right to petition their government for a redress of grievances, and to take reasonable actions so as to keep their government within the bounds of constitutional authority and international law. The system of American democracy depends upon an informed public to which it can be held accountable. As defendants have argued, I believe defendants have established their right to have been on university premises for the purpose of petitioning the CIA. This right derives not only from the First Amendment, but also from international laws and treaties which give citizens the right to hold their government to the treaties of peace and friendship into which it has entered. Although I reserve judgment in this case, international law may even, as defendants have argued, impose an obligation upon citizens to act when having such knowledge of law violations. Finally, this right stems from the Ninth and Tenth Amendments, by which the United States citizens retain the inalienable right to self-government. This right includes the right to have government obey its own laws and the right to have the Executive Branch give complete and accurate information to Congress and

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151. Arbess & Epstein, *Disarmament Role for the United Nations?*, BULLETIN OF THE ATOMIC SCIENTISTS 26, 27 (May 1985).

152. Denvir, *supra* note 144, at 1160.

> the People when asking for their consent to public policy; and therefore, when it can be shown that our government refuses to obey its own laws and when it misinforms the Congress and the public, then citizens must retain that inalienable right to act in a reasonable way so as to keep their government within the bounds of the law. It is clear that defendants in this case held such deep convictions that they could not stand by silently and watch atrocious acts be funded and directed by the CIA, and a misguided foreign policy in Central America. Defendants believe, as I do in this case, that all citizens must exercise and protect those cherished rights by which they can call their government to account for its actions. Because in America our government derives its power from the governed, we Americans must rekindle the spirit of civic duty, and when our government refuses to obey the laws ordained by the People, we must exercise those rights which the Constitution guarantees us, so as to continue to strive toward a vibrant and effective democracy.[153]

Another cogent warning was sounded by the Senate Special Committee on National Emergencies and Delegated Emergency Powers:

> Congress has not yet enacted laws which would prevent the Executive from using classification to withhold information from Congress and the public. The problem of public accountability can affect, in a very profound sense, the viability of Constitutional Government. What the Executive does with public funds and who is entitled to know about executive directives, are among the most important questions now being asked of our system of Government. Until Congress grapples with these issues directly, it will be faced with a continuing wall of secrecy and be unable to carry out its constitutional task of overseeing the Executive. The Indochina war and "Watergate" tragically illustrate the results of such congressional inattention.[154]

It is to prevent this condition from maturing with regard to actual use of nuclear weapons that citizens must actively participate in a democracy. As the situation worsens, more severe citizen intervention is called for to convey the seriousness of that situation to fellow citizens. Citizen intervention is, in the final sense, a means of communication when other channels prove futile. But to assume that normal

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153. Commonwealth of Massachusetts v. Perry Amsellem, No. 84-CR-3137 (Hampshire Dist. Ct. of Mass. 1984).

154. SPECIAL COMM. ON NAT'L EMERGENCIES AND DELEGATED EMERGENCY POWERS, U.S. SENATE, SUMMARY OF EXECUTIVE ORDERS IN TIMES OF WAR AND NATIONAL EMERGENCY 9 (Aug. 1974).

democratic channels always work and are inexhaustable is unreasonable. In any event, it is for the jury to decide and not the judge because "that is what trial by jury is all about: to ensure that the defendant is not judged by a skeptical judge but by his peers."[155]

A continuing global campaign to control or to abolish nuclear weapons has existed since the advent of the nuclear age.[156] At the same time, there has been an ongoing proliferation of nuclear weapons systems in both quantity and sophistication. The strategic exercise study initiated in 1966 started the process of conceptualizing, developing, testing and deploying the destabilizing weapons which are giving the United States a disarming and unanswerable first strike capability. It was not until about 1970 that concerned people in the military contracting industry started to recognize this trend, and that the announced nuclear policy of the United States differed from what was actually being pursued.[157]

During the early 1970s, several major and complimentary campaigns to stop new nuclear weapons were initiated. These involved letter writing, lobbying, raising nuclear issues in political campaigns, public education through all means of communication, public demonstrations, picketing, civil lawsuits, and the like. Citizen intervention has been interspersed with these actions. It has ranged from mass non-cooperation to pay taxes which are used to build weapons, to small actions employing symbolic means of communicating the danger. But citizen intervention was employed only after "democratic" means proved ineffective on their own. Space prohibits describing the overall global anti-nuclear campaign, or even all the activity within the United States, but the anti-Trident element can be used as a representative example.

Opposition to the threatened harm of the Trident missile and submarine system first reached significant proportions in 1974 and has grown steadily. In that year, a group of people formed the environmentally oriented "Concerned About Trident" organization which collected thousands of signatures opposing the new submarine base at Bangor, Washington. Concerned About Trident filed civil lawsuits against the Navy and Defense Department seeking to halt plans for the base.[158]

Ongoing resistance to Trident continued with the formation of

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155. Commonwealth v. Berrigan, 472 A.2d at 1155.

156. G.A. RES. 1 (1946).

157. SOJOURNERS, Feb. 1977, at 29-31.

158. Concerned About Trident v. Schlesinger, 400 F. Supp. 454 (D.C. Cir. 1975); Concerned About Trident v. Rumsfeld, 555 F.2d 817 (D.C. Cir. 1977).

Pacific Life Community (PLC) in 1975 in the San Francisco Bay Area and the Pacific Northwest. PLC worked closely with a national network of anti-Trident organizations which were forming in the eastern and Great Lakes states. This new movement first carried on educational activities such as passing out leaflets, presenting slide shows, organizing Trident Concern Weeks, writing articles and letters, and testifying at hearings. Attempts were made to have Trident contractors and the Navy participate in public forums to discuss the new weapon.

When these "democratically" and legally acceptable means failed to persuade Congress that Trident could not be developed, citizen intervention actions began. They stimulated support from community and church groups to join the call for open public forums and thus moved legal protest activities to a new plateau of involvement. It may have been this potential for citizen intervention which prompted authors LaFave and Scott to recognize that one may have "not only a power to violate law but a duty to do so (much as a trustee, in appropriate circumstances, has a duty, and not simply a power, to deviate from the terms of the trust)."[159]

Citizen intervention to save lives should not be viewed as a last ditch stand to be employed only when all other means fail. On the contrary, citizen intervention is an integral part of the overall campaign. It is true that legal and popularly accepted means must first be tried and shown to be futile on their own, but citizen intervention does not replace those means. Preventing a harm as profound as nuclear ecocide and genocide requires every reasonable preventive action available. Analysis of successful campaigns indicates that it is the interaction of all activities which brings change.

What citizen intervention does is change the social climate to one in which protected legal processes regain their meaning and effectiveness. Symbolic citizen intervention has stirred the consciousness of people who work with nuclear weapons and has caused many to resign.[160] It has raised the moral issues which have prompted religious leaders to include nuclear weapons education in their pastoral duties. Citizen intervention has also created social awareness in professional communities and has prompted these groups to instruct the public from their area of expertise. A leapfrog effect occurs when

159. LaFave & Scott, *supra* note 122, at § 50.

160. *See, e.g.*, GROUND ZERO (July-Aug. 1982) & (Oct.-Nov. 1982) (interviews with and articles about several people who have resigned their work at the trident submarine base. Also, one of the authors of this article resigned from designing Trident missile warheads six months after witnessing a citizen intervention trial in Honolulu in 1972).

citizen intervention restores the meaningfulness and effectiveness of legal democratic channels.[161] Although citizen intervention to save lives may seem repulsive to some, it does create public awareness which enhances the effectiveness of less offending means.

5. *The Accused has a Reasonable Belief that a Causal Relationship Exists Between the Citizen Intervention Action and Prevention of the Harm*

To satisfy the requirement of a causal relationship when the feared harm is the culmination of a long process ending well in the future, the defendant's action must be within the context of the chain of events directed toward the prevention of the harm. This requirement would appear to be satisfied if the citizen intervention action is a vital, though a small part of the continuing process which shows potential for stopping or preventing the threatening harm. In this regard, the foregoing discussion about citizen intervention to enhance the effectiveness of legal means is applicable.

The process which can be used in the case of preventing nuclear war was used in the North American peace/environmental movement. The potential of this movement is indicated by its past growth and accomplishments:

1) Peace accomplishments since World War II include substantial contributions toward bringing about:

a) A truce in Korea in the early 1950s in place of efforts to conquer and occupy North Korea;

b) The failure of the United States Civil Defense Program in the early 1960s to regiment people to accept nuclear war;

c) The 1963 Partial Test Ban Treaty outlawing all nuclear weapons tests except underground;

d) Curtailing United States involvement in Vietnam followed by eventual withdrawal;

e) Reversal of American support for Pakistan in suppressing Bangladesh, accomplished through resistance and arms blockades;

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161. The legal and less questionable alternatives which must be shown as exhausted or ineffective, in order to justify citizen intervention to prevent nuclear war, are generally actions taken as part of an ongoing campaign over a long period of time. It is not reasonable that each individual defendant actually participate in every alternative choice of action. For that reason it is wise for the defense to request a jury instruction to the effect that, to justify necessity to prevent the harm of nuclear war, it is sufficient that defendant had knowledge that all legal and less offensive alternatives had been tried and found to be ineffective on their own.

f) An end to the active Selective Service System with amnesty for some draft resistors; and

g) A wave of state and local government resolutions calling for a bilateral and verifiable freeze on developing and deploying nuclear weapons.[162]

2) The growth of the movement is indicated by the following:

a) A dramatic increase in size and vigor of demonstrations during the Vietnam War and recently against Central America covert and military atrocities, nuclear power plants and nuclear weapons;

b) An increase in conscientious objection to war from 1-in-3,000 draftees registered in World War II to 1-in-200 registered during the latter part of the Vietnam War to more than 1-in-5 who failed to register in 1982;[163]

c) An increase in the number of people who refused to pay federal "war" tax on their telephone bills during the Vietnam War from zero to 550,000;[164] and

d) The concerted effort of many professional people and religious leaders to achieve a higher degree of awareness regarding social responsibility in their sphere of influence.[165]

Americans employing citizen intervention preventive actions have foreign examples to assure them of a reasonable belief in the

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162. By mid-1983, 11 state legislators, 56 county councils, 320 city councils, hundreds of organizations, more than 200 U.S. Senators and Representatives, and thousands of prominent citizens supported a bilateral and verifiable nuclear weapons freeze. A March 1983 Gallup Poll indicated that 70% of the United States public favored such a freeze.

163. According to a 1982 General Accounting Office report, the rate of compliance with Selective Service System registration laws is less than 80%. The number failing to comply is 20 times the entire federal prison population. San Jose Mercury News, July 28, 1982, at 1A.

164. Associated Press News dispatch from Internal Revenue Service, published in THE SEATTLE TIMES (1973) (cited in Defendants' Trial Brief, United States v. Kevin C. Patz, No. 77-196 M, United States Dist. Ct. West. Wash., Sept 12, 1977).

165. *See, e.g.*, the Sixth Assembly of the World Council of Churches (July 24 - Aug. 10, 1983 in Vancouver, British Columbia, Canada) resolved: "[T]he production and deployment of nuclear weapons as well as their use constitute a crime against humanity, and therefore there should be a complete halt in the production of nuclear weapons and in weapons research and development in all nations."

See also Pastoral Letter from the American Catholic Bishops, *The Challenge of Peace; God's Promise and Our Response* at 101-02 (May 3, 1983):

> The whole world must summon the moral courage and technical means to say 'no' to nuclear conflict; 'no' to weapons of mass destruction; 'no' to an arms race which robs the poor and the vulnerable; and 'no' to the moral danger of a nuclear age which places before humankind indefensible choices of constant terror or surrender.

Id.

nexus between their actions and the prevention of the harm. Their campaign has been molded after several other successful nonviolent social change movements abroad.

The Gandhian movement for India's self-rule started in 1919. Mohandas K. Gandhi was probably the first to employ nonviolent tactics on a large scale. His intention was not to punish or defeat the opponent but to keep communication open in order to arrive at the truth together. Violence was eschewed because that would close dialogue and obstruct the attainment of truth. The Gandhian campaign was vindicated and steeled by the massacre of 1,200 Indians on April 18, 1919 and the jailing of countless others at other times. It waxed hot in 1920-22 and again in 1930-34, and was completed in 1947 with the liberation of India—twenty-eight years after its start.[166] This philosophy and the tactics which flow from it can be seen in many of the nonviolent campaigns of today.

Another example which supports a citizen's reasonable belief occurred in 1956 when the United States Air Force decided to enlarge the Tachikawa Air Base near Tokyo. The first preventive action occurred October 3 when several hundred peasants and supporters attempted to nonviolently block the entrance of government survey teams. By October 15, several hundred citizens were occupying the land slated for expansion. The government eventually yielded and the base was not enlarged.

Still another example comes from France, where peasants and supporters in the Larzac region have continued to occupy lands wanted by the French Army for use as a military base. The peasants have been strictly nonviolent. They have mustered so much support that the Army obtained less than ten percent of the land desired, and even that land was reoccupied on several occasions. Not only did this campaign delay the Army's plans, but the French government has now officially abandoned enlargement of the base.

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166. The Gandhian movement of *Satyagraha* ("Truth Force") had five successive stages, each to be exhausted before the next commenced, in this order:

(a) Utilization of all regular constitutional machinery available;

(b) Agitation of the public through all types of expression;

(c) Ultimatum to the government, citing demands of the movement;

(d) Self purification to develop the spirit of harmlessness and remove any taint of self-interest—through prayer, fasting and introspection;

(e) Direct action: boycotts, sit-ins, nonpayment of taxes, mass resignation from public office, organized disobedience of certain laws. The training of Satyagrahis was intended to be as rigorous as that of any soldier.

See generally M.K. GANDHI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH (1957); M.K. GANDHI, NON-VIOLENT RESISTANCE (1966).

Again in Europe, a nuclear power plant in Whyle, Germany was partially occupied by mostly nonviolent means. Small numbers of people were involved at first, but they later escalated to 25,000. The government, though heavily committed to nuclear power, abandoned plans for construction at the site. The victory appears to have inspired the many interventions which have occurred since in both Europe and America. In the United States no new nuclear power plants are planned and even those in construction are being cancelled.[167] More recently, in the wake of a stiff resistance campaign, the nuclear reactor at the University of California in Los Angeles (UCLA) is being dismantled.

Americans can look to numerous examples in the United States which support the reasonable belief of a causal connection between citizen intervention and the prevention of harm. Nonviolent citizen intervention has deep roots in American history. It was truly "civil disobedience" at that time, and it was the primary tactic used in the early stages of the American Revolution. The Boston Tea Party and noncooperation with the Stamp Act are examples. The nonviolent aspects of that revolution were so effective that some scholars contend that with a little patience, the actual war could have been avoided.[168]

Henry David Thoreau refused to pay taxes to support the Mexican war and it was during his night in jail that he wrote his Essay on *Civil Disobedience* which has become an American classic. Gandhi gave Thoreau credit as a major source of his inspiration.

Another example from American history is the underground railroad which was organized to take slaves to freedom—a highly illegal activity at the time, but necessary for the participants. Nonviolent direct action also played a key role in the Women's Suffrage Movement. Alice Paul, leader of the Congressional Union for Women's Suffrage, developed the tactics of the White House vigil and the prisoner's hunger strike. Both were sustained over long periods and played important parts in gaining recognition of the women's right to vote.

The sit-down strikes of the 1930s were also viewed as technically illegal, but they contributed to a change in history. They are similar in several respects to the nonviolent occupations used against the harm of nuclear power plants and nuclear weapons facilities.

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167. NUCLEAR INFORMATION RESOURCE SERVICE, NUCLEAR ENERGY BASICS (in 1980, 16 reactor orders were cancelled nationwide and another were 70 delayed).

168. G. SHARP, THE POLITICS OF NONVIOLENT ACTION, PART ONE: POWER & STRUGGLE (1973).

Both involve trespass on the property of the opponent. It is a nonviolent tactic developed by the Women's Garment Workers during the early part of this century and later adopted as a major tactic in the 1930s. These sit-ins won major strikes against Woolworth, Hormel Packing Co., Good Year Tire, and General Motors.[169]

Citizen intervention was used in the civil rights campaign of the 1940s through the 1960s.[170] It started with the often illegal sit-ins, freedom rides and boycotts. It was stiffened by the murder and jailing of many participants. It achieved victories in the courts and in Congress, but these victories had to be ensured with further nonviolent direct action.[171]

Citizens who intervene to save lives have the reasonable belief that the process by which grass roots movements bring substantial change to government and against powerful interest groups requires bringing the issues and facts again and again to public attention and by ever-changing means. It requires arousing the public emotionally, when those intervening actions are based on truth and the truth is followed wherever it may lead.

Informed and encouraged by past history, the practitioners of nonviolent campaigns, including citizen intervention to prevent nuclear war, cannot fail to see that the harm of nuclear weapons proliferation can be stopped at some point. Continued escalation of citizen intervention to save lives will heighten awareness of the danger and imminence of nuclear war and will stimulate support and perhaps an obligation for resistance. Citizen intervention demonstrates the degree of belief and personal commitment necessary to change the public attitude that currently allows nuclear weapons to proliferate.

6. *No Evidence Shows Force or Violence was used Against Other Persons by the Citizen Intervention Act*

The final test in meeting the criteria of the Principle of Necessity is how the action was conducted. Establishing in court that the action was nonviolent to other persons is usually relatively simple. It

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169. The sit-in at General Motors involved 200,000 workers who ignored court orders. G.M. Production was cut from 53,000 vehicles per week to 1,500. After 44 days, GM recognized the United Auto Workers, a major victory for the C.I.O.

170. *See* Bell v. Maryland, 378 U.S. 226 (1963); Peterson v. City of Greenville, 373 U.S. 244 (1962); Garner v. Louisiana, 368 U.S. 157 (1961).

171. Picket lines, marches, rallies, sit-ins, wade-ins, and other forms of citizen intervention led to the Civil Rights Act of 1964. Nonviolent direct action and the bloody Selma marches led to the Voting Rights Act of 1965.

may help to identify some characteristics of a nonviolent action.

Most participants in citizen intervention to prevent nuclear ecocide are committed to nonviolence. They do not damage legitimate property and they inflict no injuries upon others. Though they may be treated violently, they do not respond with violence. Such nonviolent actors are usually readily identified by police and security personnel prior to and during the action.

Some distinguishing features of a nonviolent campaign are: 1) notification in advance to the authorities involved informing them of the time and type of action, the general location, and the objective; 2) advance publicity of the same nature to the media; and 3) intensive training and other preparation by the campaigners for the action in order for it to be totally nonviolent and based upon good will.[172] The motives and aims of such a nonviolent campaign are orderly education, persuasion, and gentle conversion. The means used are not coercive, but employed in an effort to win over opponents.

These six elements have been developed through decisional and statutory law, and will provide fair, reasonable, and even rigid criteria to guide the jury when an accused asserts a defense of necessity. Again, in order to insure the constitutional right to a trial by a jury of one's peers, the trier of fact must be instructed on these elements when applicable.

The function of the jury must be scrupulously assured. The jury's proper role in the criminal justice system was reaffirmed in *State v. Brechon.*[173] In an action organized by the "Honeywell Project" in Minneapolis, a large group of citizens entered the property of the Honeywell Corporation at approximately seven a.m. on April 18, 1983 as employees were arriving at work. They occupied gateways and doorways in an effort to obstruct entrances with the intention of preventing a grave harm by slowing production of nuclear weapons components and cluster bombs. When asked to leave, 148 adults refused to do so and were arrested.

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172. Training handbooks furnished to participants in many nonviolent citizen intervention actions include the following to which participants subscribe:

(a) Our attitude will be one of openness, friendliness, and respect toward all people we encounter.

(b) We will use no violence, verbal or physical, toward any person.

(c) We will not damage any property.

(d) We will not bring or use drugs or alcohol other than for medicinal purposes.

(e) We will not run.

(f) We will carry no weapons.

173. 352 N.W.2d 745 (Minn. 1984).

Most of those arrested requested jury trials. Forty-six were tried in Hennepin County Municipal Court on June 3, 1983 and were acquitted.[174] They were allowed to testify and argued that their conduct was justified because they were attempting, through their opposition to Honeywell business policies and United States nuclear policy, to prevent a greater harm from being committed; and that their belief, good character, and the results they wished to achieve gave them a right to trespass on Honeywell property.[175]

The second group consisting of eleven defendants came to trial, apparently planning to use the same defense, but the trial court refused to allow the defendants to testify as to their intent and motivations in trying to prevent further nuclear weapons proliferation and nuclear war. The Minnesota Supreme Court reversed because of this error. "The question of sufficiency to raise a reasonable doubt is for the jury to determine from all the evidence."[176] The error was so fundamental that the court in the concurring opinion warned: "The strength of our democratic society lies in our adherence to constitutional guarantees of the rights of people, including the right to a fair trial and the right to give testimony on one's behalf."[177] These principles were restated when the "Women's Peace Encampment" trespassed at Sperry-Univac, another nuclear arms proliferator in Minnesota.[178]

The role of juries in a democracy is also respected by California's Chief Justice because juries

> tend to temper the rigid procedural and substantive requirements of the law with the evolving customs, values, and common sense of the lay community. Thus, our citizens are able to participate directly in the constant reshaping and refinement of both the laws and the attributes of their government.[179]

Quoting Alexander Hamilton, the Chief Justice stated that the jury is "a 'valuable safeguard of liberty' and 'the very palladium of free government.' "[180]

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174. State of Minnesota v. Brechon & Carpenter et. al., No. 83094, at 2 (Fourth Judicial Dist. Ct., Hennepin Co., Oct. 25, 1983).

175. *Id.*

176. State v. Brechon, 352 N.W. 2d at 750.

177. *Id.* at 752.

178. State v. Schervee, 356 N.W.2d 772 (Minn. App. 1984).

179. Bird, *Jury Service, Legal Classroom at the Heart of the U.S. Justice System,* THE CHRISTIAN SCIENCE MONITOR, Oct. 26, 1984, at B2.

180. *Id.*

VI. CONCLUSION

The fundamental legal argument in citizen intervention to prevent a grave harm is the protected right to present a necessity defense to a jury. Numerous precedents exist to support that once the defendant offers some evidence of necessity, the facts raised must be presented to the jury to determine if necessity has, in fact, been established. Nevertheless, jury instructions for a necessity defense have been given in very few cases of citizen intervention to prevent grievous harms. During the past decade, the common law Principle of Necessity has gone through an evolutionary process, but the practice of most courts, both state and federal, is still to rule as a matter of law that defendants' offers of proof are either insufficient or frivolous; this practice thereby denies the accused the right to present a defense to the jury.

Courts seem to fear the consequences if the right to present a defense is allowed when the relevant evidence relates to government "policy." This evidence often reveals "central, physical, inescapably painful reality beyond all rhetoric and beyond the improvised ambiguities of 'policy.' "[181] The consequence of allowing juries to hear evidence supporting the necessity defense has resulted in acquittals. These acquittals have not gone unnoticed. The Reagan Administration's Justice Department is currently afraid to let juries hear substantive evidence regarding its nuclear "policy"—so afraid that when a federal district judge *is* satisfied that the proffered evidence is sufficient to establish a necessity defense for the jury to consider, the Justice Department petitions the Circuit for an extraordinary writ of mandamus. In *United States v. Fox & Manshardt*,[182] the Justice Department has asked the Ninth Circuit to order the trial judge to *not* allow evidence of necessity, asserting this remedy is proper because the Justice Department lacks alternative means to prevent the trial judge's abuse of descretion by allowing evidence of necessity. In this instance it is the Justice Department that should resort to the "political process alternative," rather than attempting to obstruct the administration of justice. To assert as clearly erroneous the trial judge's ruling to allow evidence of necessity is nothing more than an attempt to suppress the right to be judged by one's peers. The evidence of necessity has informed the public regarding government "policy" and has perhaps encouraged informed dissent, which is a

181. Rosenthal, *Poets Know Whereof They Speak*, San Jose Mercury News, Jan. 5, 1986, at 1P.

182. CR-85-152-TUC-RMB (filed Ariz. 1986).

normal sequence of events when the free flow of accurate information in a democratic society leads to correction of grave problems.

Trial judges typically avoid grave problems caused by the federal government, however, out of fear of appearing "political." Judge Ulf Panzer of a District Court in Hamburg, West Germany said about judges fearing to be political: "[L]et's not deceive ourselves. Being silent is just as political a statement as it is to stand up for the peace movement."[183] Speaking on behalf of 800 West German judges and prosecutors, Judge Panzer said: "German judges were silent 50 years ago, when the Third Reich began to install its regime of injustice, and later became a docile instrument of the Nazis and their immense crimes. Being silent today, we feel, would make judges guilty once again."[184] He said he sees "a certain parallel to the American judges. They have put up with the atrocities of the Vietnam War in complete silence, as far as I know."[185]

Some judges look upon necessity as an elusive and mysterious defense, not applicable to pragmatic affairs. In *People v. Weber,* the court held "the exact confines of the necessity defense remain clouded."[186] But that is not the case. The Principle of Necessity has been developed extensively in this country and the requisite elements have been expressed numerous times. The requisite elements of necessity to prevent nuclear ecocide and nuclear genocide proposed above will give ample guidelines for jurors to weigh the factual issues raised.

This comes back to the fundamental legal issue: *"It is the criminal liability of appellants that is at issue, not the merits of our nuclear policy.* The jury need not agree with appellants' views in order to acquit them. They need to find only that they acted reasonably."[187] The court added:

> Instead, at least so far as I can tell from the record, 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 unreasonable as a matter of

183. Letter by District Court Judge Ulf Panzer, Hamburg, West Germany, Minneapolis Star & Tribune, Jan. 11, 1985, at 11A.

184. *Id.*

185. Public letter from District Court Judge Ulf Panzer, Hamburg, West Germany, to Judge Spaeth of the Superior Court of Pennsylvania (July 25, 1984).

186. People v. Weber, 162 Cal. App. 3d Supp. 1, 4, 208 Cal. Rptr. 719 (1984).

187. Commonwealth v. Berrigan, 472 A.2d at 1108 (emphasis added).

fact. But that is for a jury to say, not the court.[188]

Reasonableness is an essential concept in the necessity principle. Did the defendant *reasonably* believe a greater harm was about to occur? Were there no *reasonable* alternatives? Was the action *reasonably* thought necessary to prevent the harm? The greater the harm, the more reasonable it is to do something about it, even if the likelihood of success is small. As the *Berrigan* court said:

> The fallacy in the trial court's and the dissent's reasoning is to equate "reasonableness" with "success:" If by breaking the law you did not succeed in gaining your objective, you may not plead justification. But reasonableness is a function of the actor's situation. If the peril to the town was slight, it may indeed have been unreasonable of me to make a firebreak by destroying my neighbor's house. But if the peril was great, my action may be seen in a very different light, and my plea of justification may prevail, even in the face of proof that the fire swept across the space I had cleared, and burned down the town.[189]

In a recent non-jury trial, the judge expressed similar views on the "reasonableness" of actions when the judge acquitted defendants of trespass at Williams International Corporation, a maker of cruise missile engines.

> The defendants simply came [to Williams] to protest and survive. They persuaded me their actions were motivated by fear of nuclear weapons. I don't think that it is irrational to think that by just standing in front of the gate you could prevent a nuclear holocaust. It is all they can do. If people believe this is what it takes, who can believe they are wrong.[190]

In the case of citizen intervention involving politically sensitive issues, it seems that the spirit of the law is frequently suppressed. It often appears that skeptical judges interpret offers of proof establishing the requisite elements in a necessity defense according to what will be acceptable to the influential and powerful sector of society. For that reason, it seems appropriate to conclude this discussion with excerpts from the closing statement of Chad Myers, a not-so-powerful accused defending himself at a citizen intervention trial:

> The defendants came prepared to give (a) testimony why

188. *Id.* at 1115 (emphasis in original).

189. *Id.*

190. People of the State of Michigan v. Lagrou, et. al., No. 85-000098 through 85-000102 (52-1 Dist. for the County of Oakland, March 22, 1985), *cited in* Detroit News, March 25, 1985, at 3.

their actions are justifiable under the supreme law of this land, (b) a justification defense—that is, breaking a lesser law to call attention to a greater harm—and (c) testimony to our state-of-mind at the time of our trespass.

Each of these defenses had been denied as irrelevant. Our only recourse is to stress the true nature of our trespass—an act of nonviolent, conscientious, law respecting, symbol employing citizen intervention . . . .

The jury, the court, is witnessing a citizen intervention case, perhaps the first for many of you. Citizen intervention, far from being irrespective of the law, is *by definition an appeal to law*; in its most profound sense, an appeal to law to question itself. It attempts to demand a dialogue about the legal, lawful and moral context of the law. What is tragically ironic is that many judges have denied citizen intervention defendants that dialogue, under the pretext of legality, and then have in turn admonished the defendants for their "lack of commitment to democratic processes."

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We are on trial today for an act of political and moral responsibility. At a time when there is a rapid disintegration of personal responsibility we would seek to invoke a moral crisis. Our purpose at Building 181 [at Lockheed], where Trident missiles are being constructed, on Good Friday was to challenge the legality and morality of the preparation to wage mass destruction. That was and remains today our purpose. Insofar as the court will not recognize that purpose by at least hearing it, the court is profoundly complicit with the widespread refusal to take responsibility concerning the legitimacy of nuclear weapons.

To consider the defendants' actions merely according to narrow legal definitions is to trivialize these proceedings, to trivialize Law and the true meaning of Rule by Law. We are appealing both to Law and Morality, both to conscience and responsible jurisprudence. We insist, precisely in choosing citizen intervention as the vehicle for the demonstration of our concern, that the Law be taken seriously; and morality, indeed the integrity of international vows, be a function of that law. We refuse to allow Truth and Common Good and Right and Law to be so particularized that they are hopelessly segregated one from the other. By intervening as citizens and coming to the court fully prepared to explain and dialogue about that, we are upholding the highest standards of an open society. Make no mistake, to trivialize conscientious citizen intervention is to undermine the

democratic ideal itself. We hope the court, the jury, the audience, and ourselves take that seriously.[191]

191. People of the State of California v. Conk et al, No. 44880 through 44890 (Sunnyvale-Cupertino Jud. Dist., Santa Clara Co. Muni. Ct., May 1-2, 1978).