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# Civil Resistance: The Dictates of Conscience and International Law Versus the American Judiciary

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## I. INTRODUCTION

This article draws upon the author's experience as an expert witness in civil resistance cases involving South Africa, Central America and nuclear weapons. It is dedicated to the incandescent memory of Lidia Janus. An award-winning actress in her native Poland and accomplished young scholar, Lidia died of brain cancer at the age of

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thirty-two. Zbigniew Herbert, one of Lidia's favorite poets wrote that there are too few souls for humanity; now there is one less soul. A beautiful comet has flickered across the sky, but she will never fade into the recesses of memory. To paraphrase the Indian poet Tagore, when I go from here let this be my parting word, what I have seen is unsurpassable — I have seen Lidia. Lidia always will be with me and with all those who loved her. She embodies the promise of what life can be. We know Lidia is with us and for us in death as she was in life. This essay is a modest memorial to her brilliant, omnipresent and magnetic spirit. The energy, passion and intelligence which she brought to this article will continue to inspire us.

Acts of civil disobedience increased markedly in the United States over the course of the last several years. Peace and anti-nuclear activists and those who object to governmental policies towards abortion, AIDS, nuclear power, immigration and the environment all have engaged in acts of civil disobedience. While the nonviolent movements for change in China and in Eastern Europe received a great deal of attention and praise, relatively little commentary or discussion is devoted to these domestic protests.[1]

Some indication of the extent of domestic civil disobedience in the United States is illustrated by the figures reported by the tabloid *The Nuclear Resister*.[2] In 1989, 5,500 arrests were made in the United States and Canada during approximately 150 protests at more than seventy nuclear and nuclear-related sites.[3] Roughly ninety people served or are serving prison sentences ranging from between two weeks to seven years in prison, while hundreds of others served lesser sentences.[4] Between 1983 and 1989, approximately 30,000 people were arrested in over one thousand separate acts of protest at 340 nuclear and nuclear related sites.[5]

This type of activity is a contemporary manifestation of America's historical tradition of civil disobedience. A central precept of civil disobedience is that disobedients should plead guilty and accept their punishment. The disobedient's guilty plea is intended to demonstrate

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1. *See generally* Matthew Lippman, *The Right of Civil Resistance Under International Law and the Domestic Necessity Defense*, 8 DICK. J. INT'L L. 349 (1990). Civil disobedience is the nonviolent violation of the law to protest government policies.

2. *Nuclear Resistance 1989*, THE NUCLEAR RESISTER (THE NUCLEAR RESISTER, TUCSON, AZ), Jan. 25, 1990, at 1, col. 1. *THE NUCLEAR RESISTER* records and reports on domestic and international civil disobedient actions.

3. *Id.*

4. *Id.*

5. *Id.* (these figures were calculated from the table included in the article).

their respect for the political system and commitment to the rule of law. In the 1960s, however, disobedients increasingly began to seek legal justifications for their formally illegal acts of protest. These defenses consistently were rejected by the judiciary.

A great deal of the criticism of the United States' involvement and activities in Vietnam focused on America's alleged breach of international law. This naturally led to international law, including the Nuremberg Principles, being invoked to justify illegal acts of protest against the Vietnam War. Although unsuccessful, these international law defenses gradually were refined and increasingly were raised by peace activists in the 1970s and 1980s. These activists also began to characterize their acts of illegal protest as civil resistance rather than as civil disobedience. This change in terminology was intended to convey that protesters no longer accepted the validity of domestic law and sanctions. They argued that they engaged in justifiable actions under international law which were intended to halt ongoing criminal conduct by their government. Defense attorneys increasingly began to rely upon the domestic defense of necessity as the vehicle through which to raise international law arguments. Although there has been limited recognition of international law defenses by trial courts, appellate courts generally rejected all such claims.

This essay traces the evolution of civil resistance in the United States and argues for judicial recognition of the applicability of the necessity defense for civil resisters. Initially, the history of civil disobedience in the United States and the theory of Gandhian civil disobedience are outlined. The response of courts in rejecting attempts to justify such protest activities is then described. Finally, the evolution of the theory of civil resistance is described; and American courts' rejection of the necessity defense to justify formally illegal acts of protest is criticized.

Virtually all of the major contemporary case law addressing the legal application of the necessity defense and international law to justify acts of civil disobedience involve protests against nuclear weapons. The significance of these cases transcend this particular area. They establish the basic principles and arguments which will be applied by courts and contested by defendants in future cases.

## II. An Overview of Civil Disobedience in the United States

The original American colonies largely were populated by those seeking religious freedom. Respect for individuals' religious beliefs was enshrined in the First Amendment to the United States Constitution and the assertion of individual conscience against governmental

strictures is a persistent theme in United States history.[6] One manifestation of the primacy of individual conscience is the tradition of nonviolent civil disobedience to governmental authority.[7] Gandhi[8] and Tolstoy[9] customarily are viewed as the intellectual progenitors of modern civil disobedience. However, both were profoundly influenced in the development of their thought by American theoreticians and practitioners of nonviolent resistance.[10]

The American tradition of civil disobedience stretches from the Quakers in Colonial America and the abolitionists in the pre-Civil War period through the Suffragettes and labor movement in the early twentieth century and the civil rights and anti-Vietnam demonstrators of the 1960s.[11] A survey of the historical record illustrates that civil disobedience was a feature of virtually every epoch of American history. It was relied upon by individuals and groups who represented an array of political ideologies and aspirations.

The Puritans in Massachusetts harshly repressed and prohibited the Quakers from entering the colony. The Quakers who emigrated to Massachusetts Bay Colony were subject to whipping, imprisonment, branding, ear chopping, sale into slavery and execution. Nevertheless, some Quakers persisted in entering the colony and nonviolently submitted to these draconian punishments.[12] Upon mounting the gallows in 1659, the Quaker Mary Dyer proclaimed that if one "must die that others may live, let me be the one, for if my life were freely granted by you, I could not accept it as long as my sisters suffered and my brothers died. For what is life compared to the witness of Truth?"[13]

One of the most significant civil disobedience campaigns was undertaken by the nineteenth-century Abolitionists in an attempt to end

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6. U.S. CONST. amend. I.

7. *See* THE POWER OF THE PEOPLE: ACTIVE NONVIOLENCE IN THE UNITED STATES (Robert Cooney & Helen Michalowski eds., 1987) [hereinafter POWER OF THE PEOPLE].

8. *See* JOAN V. BONDURANT, CONQUEST OF VIOLENCE: THE GANDHIAN PHILOSOPHY OF CONFLICT (rev. ed. 1988).

9. LEO TOLSTOY, WRITINGS ON CIVIL DISOBEDIENCE AND NONVIOLENCE (A. Maude & R. Sampson trans., 1987).

10. Staughton Lynd, *Introduction, in* NONVIOLENCE IN AMERICA: A DOCUMENTARY HISTORY XV (Staughton Lynd ed., 1966).

11. *See generally* POWER OF THE PEOPLE, *supra* note 7.

12. For a history of the use of the criminal law to repress deviancy in Massachusetts Bay Colony, see KAI T. ERICKSON, WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE (1966); *see also* POWER OF THE PEOPLE, *supra* note 7, at 16-17.

13. Margaret Bacon, *Let Me Be the One: Mary Dyer: Witness to Religious Liberty, in* THE UNIVERSE BENDS TOWARD JUSTICE: A READER ON CHRISTIAN NONVIOLENCE IN THE U.S. 9, 12 (Angie O'Gorman ed., 1990).

the enslavement of African-Americans.[14] Henry David Thoreau's famous essay on civil disobedience was written in 1846 after Thoreau spent a night in jail for refusing to pay six years of unpaid Massachusetts state taxes.[15] Thoreau's refusal to pay taxes and willing submission to imprisonment were intended to symbolize his opposition to slavery; and to the Mexican War which he viewed as an imperialistic effort to extend involuntary servitude.[16]

Thoreau wrote that individuals owed an obligation to do what they viewed as right rather than merely mechanically to obey the law. He argued that we should be "men first, and subjects afterward. It is not desirable to cultivate a respect for the law, so much as for right. The only obligation which I have a right to assume, is to do at any time what I think right."[17] Rather than pay taxes and help to support the government's pernicious policies, Thoreau urged people to act as "a counter friction to stop the machine."[18] Under the present circumstances, Thoreau observed that prison was the "only house in a slave-state in which a free man can abide with honor."[19] Thoreau urged others to follow his example and to clog the jails so as to force the government to emancipate the slaves and to end the war. Thoreau wrote that a minority "is powerless while it conforms to the majority; it is not even a minority then; but it is irresistible when it clogs by its whole weight."[20]

In January of 1917, Alice Paul, Lucy Burns and other Suffragettes began a vigil in front of the White House in Washington, D.C. Their purpose was to pressure President Woodrow Wilson to keep his promise to work for a constitutional amendment which provided women the right to vote. Despite violent attacks and harassment, the vigil lasted until May 22, when the police arrested the demonstrators for obstructing the sidewalk. In all, 218 women were arrested and nearly 100 were imprisoned in harsh conditions. Most of the women were sentenced to sixty days, but some were imprisoned for up to seven months for obstructing traffic. While in prison, the women made the

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14. The legal history of Abolitionism is recounted in ROBERT M. COVER, JUSTICE ACCUSED ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

15. Henry David Thoreau, *On the Duty of Civil Disobedience*, *in* HENRY DAVID THOREAU, WALDEN OR, LIFE IN THE WOODS AND ON THE DUTY OF CIVIL DISOBEDIENCE 222, 233 (1960).

16. *Id.* at 225.

17. *Id.* at 223.

18. *Id.* at 229.

19. *Id.* at 231.

20. *Id.*

first recorded, collective claim for political prisoner status in the United States.[21] In order to gain recognition for their claim, the imprisoned women refused to work, went on a hunger strike and proclaimed that "having acted in accordance with the standards of citizenship, we ask the Commissioners of the District to grant us the rights due political prisoners."[22]

During World War I, some 4,000 conscientious objectors refused military service. Some 500 ultimately were court-martialed and convicted. Most received between twenty and twenty-five years in prison, seventeen were sentenced to death (but none actually were executed) and 142 received life imprisonment (all of whom ultimately were pardoned).[23] These conscientious objectors received harsh treatment in prison. In Fort Leavenworth, Kansas, conscientious objectors who refused to work were thrown into solitary confinement and were manacled to the bars. Two contracted pneumonia and died.[24] Roger Baldwin, founder and first Executive Director of the American Civil Liberties Union, declared himself a conscientious objector and refused military service. Baldwin was convicted of draft evasion and sentenced to one year in prison. Baldwin stated at his trial,

> I have no bitterness or hate in my heart for any man. Whatever the penalty, I shall endure it, firm in the faith that whatever befalls me, the principles in which I believe will bring forth out of this misery and chaos a world of brotherhood, harmony and freedom for each to live the truth as he sees it.[25]

Between September 1936 and May 1937, nearly one-half million workers were involved in sit-down strikes. During these strikes, workers occupied industrial plants in a generally successful effort to compel employers to recognize and to collectively bargain with the workers' unions.[26] The famous pacifist A. J. Muste, reflecting on his experiences as a labor organizer, wrote that virtually every significant strike pro-

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21. POWER OF THE PEOPLE, *supra note* 7, at 58.

22. *Suffragettes, Letters from Prison, 1917, in* NONVIOLENCE IN AMERICA: A DOCUMENTARY HISTORY XV, *supra* note 10, at 160, 162.

23. POWER OF THE PEOPLE, *supra* note 7, at 44-45.

24. *Id.* at 45.

25. Roger Baldwin, *Refuses to Obey the Draft, in* INSTEAD OF VIOLENCE: WRITINGS BY THE GREAT ADVOCATES OF PEACE AND NONVIOLENCE THROUGHOUT HISTORY 237, 240 (Arthur Weinberg & Lila Winberg eds., 1963)

26. Joel Seidman, *Sit-Down, in* NONVIOLENCE IN AMERICA: A DOCUMENTARY HISTORY, *supra* note 10, at 241 (author's prefatory note).

vides "inspiring examples of non-resistance under cruel provocation and victory by 'soul force' alone — victory through patient endurance of evil and sacrifice, even unto death, for spiritual ends." Muste reported on numerous occasions that he had exhorted strikers "to fold their arms, not to strike back, to smile at those who beat them and trample them under horses' feet, and the strikers' response has been instantaneous, unreserved, exalted."[27]

During World War II, 6,086 men resisted conscription on religious, political and ethical grounds and were imprisoned. Pacifist David Dellinger, although eligible for a ministerial deferment, refused to perform alternative service and was imprisoned. Upon entering prison in 1943, Dellinger wrote that

> there is no choice between going to a camp for conscientious objectors and going to jail. I have only one choice — my ministry in response to God. If the government puts me in jail for following that ministry, that is its choice, not mine. Then my ministry will be in jail.[28]

Imprisoned objectors engaged in continual strikes to protest the poor conditions and the brutality of the guards and racial discrimination.[29] Corbett Bishop went for a total of 426 days without taking food or water and for 337 of those days maintained a policy of absolute non-cooperation with prison authorities. He refused to move from his cot throughout this period of non-cooperation. Bishop proclaimed that "authorities have the power to seize my body; that is all they can do. My spirit will be free."[30] Bishop's actions frustrated prison authorities who, in exasperation, released him a year prior to the expiration of his prison sentence.[31]

Following the dropping of the atomic bomb on Hiroshima, peace activists devoted themselves to halting the testing of atomic bombs and weapons. On May 2, 1958, anti-nuclear activists sailed the small boat, *The Golden Rule*, into a nuclear bomb test area in the South Pacific.[32] They were arrested and jailed. A month later, the crew undertook a second protest voyage and again were arrested and impris-

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27. A.J. Muste, *Pacifism and Class War* (1928), *in supra* note 13, at 111, 114.

28. David Dellinger, *Statement on Entering Prison*, *in* REVOLUTIONARY NONVIOLENCE ESSAYS BY DAVE DELLINGER 7, 15 (1971).

29. POWER OF THE PEOPLE, *supra* note 7, at 88-107.

30. *Id.* at 107.

31. *Id.*

32. *Id.* at 133.

oned for sixty days.[33] Albert Bigelow, a World War II naval commander, captained *The Golden Rule* and explained prior to the ship's protest voyage that he was

> going in the hope of helping change the hearts and minds of men in government. If necessary, I am willing to give my life to help change a policy of fear, force, and destruction to one of trust, kindness, and help . . . . I am going because I have to — if I am to call myself a human being.[34]

On December 1, 1953, Rosa Parks, a Black seamstress in a downtown department store, refused to give up her seat on a bus to white patrons and was arrested. This incident precipitated a boycott of the Montgomery, Alabama bus system which resulted in the integration of the transportation system fifty-five weeks following Rosa Parks' arrest.[35] The boycott was followed by sit-in demonstrations by those who sought to desegregate public and nominally private facilities throughout the South. During 1960, 3,600 demonstrators were arrested in an eight-month period; and four times that number were arrested during the same period of time in 1963.[36] These efforts were part of a larger movement which included "freedom rides" throughout the South designed to desegregate bus and railroad services; voter registration drives to politically enfranchise Blacks; consumer boycotts against merchants in towns with segregated public facilities; and marches and demonstrations intended to draw attention to racism and inequality.[37] The Reverend Martin Luther King Jr., in his famous 1963 *Letter From Birmingham City Jail*,[38] wrote that "freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed."[39] There "comes a time when the cup of endurance runs over, and men are no longer willing to be plunged into an abyss of injustice where they experience the blackness of corroding despair."[40] However, King argued that acts of civil disobedience do not lead to social anarchy. On the contrary, King contended "an individual who breaks a law that

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33. *Id.* at 107-108.

34. Albert Bigelow, *Why I Am Sailing This Boat Into the Bomb-Test Area, in* CIVIL DISOBEDIENCE: THEORY AND PRACTICE 146, 151-52 (Hugo A. Bedau ed., 1969) [hereinafter CIVIL DISOBEDIENCE].

35. POWER OF THE PEOPLE, *supra* note 7, at 154-56.

36. *Id.* at 165.

37. *Id.* at 165-75.

38. Martin Luther King, Jr., *Letter From Birmingham City Jail, in* CIVIL DISOBEDIENCE, *supra* note 34, at 72.

39. *Id.* at 76.

40. *Id.* at 77.

conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for law."[41]

There was open and widespread opposition to the Vietnam War. In a 1965 *Declaration of Conscience Against the War in Vietnam*,[42] a number of New York peace organizations proclaimed their "conscientious refusal to cooperate with the United States government in the prosecution of the war in Vietnam."[43] Those subject to the draft declared their intention to refuse to serve.[44] The signatories also declined to participate in the manufacture or transportation of military equipment or to work in the fields of military research and weapons development.[45] The Declaration concluded by encouraging acts of civil disobedience and resistance to halt the flow of American soldiers and munitions to Vietnam.[46]

In a 1967 manifesto, *A Call to Resist Illegitimate Authority*,[47] a number of Americans declared that "open resistance to the war and the draft is the course of action most likely to strengthen the moral resolve with which all of us can oppose the war and most likely to bring an end to the war."[48] They pledged to lend support to those who actively opposed the war by raising funds to hire attorneys, providing bail and supporting the families of draft resisters.[49] In 1968, to dramatize their opposition to the Vietnam War, Father Daniel Berrigan, along with several others, destroyed records at a draft office near Baltimore. Father Berrigan explained that the "time is past when good men can remain silent, when obedience can segregate men from public risk, when the poor can die without defense."[50] Those, who along with Father Berrigan, destroyed draft records "have chosen to say, with the gift of our liberty, if necessary our lives: the violence

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41. *Id.* at 78-79.

42. *Declaration of Conscience Against the War in Vietnam, in* CIVIL DISOBEDIENCE, *supra* note 34, at 160.

43. *Id.*

44. *Id.* at 161.

45. *Id.*

46. *Id.*

47. *Id.* at 162.

48. *Id.* at 164.

49. *Id.*

50. Daniel Berrigan, *A Meditation from Catonsville, in* DELIVERED INTO RESISTANCE: ESSAYS BY DANIEL BERRIGAN, BARBARA DEMING, JAMES FOREST, WILLIAM KUNSTLER, STAUGHTON LYND, RICHARD SHAULL; STATEMENTS OF THE CATONSVILLE NINE MILWAUKEE FOURTEEN DEFENSE COMMITTEE 68, 69 (1969) [hereinafter THE CATONSVILLE NINE].

stops here, the death stops here, the suppression of the truth stops here, this war stops here."[51]

The American tradition of resistance to governmental authority continues today. On October 20, 1984, the Twelfth General Convention of the American Lutheran Church adopted a statement on *Human Law and the Conscience of Believers*[52] by a vote of roughly ninety percent of the delegates. The statement recognized that Christians who live in a constitutional democracy, in certain instances, may be compelled to violate the law as an act of conscientious protest. However, such acts of civil disobedience only should be undertaken as a "last resort, nonviolently, and with willingness to pay the required penalty."[53] The Lutheran General Convention pledged spiritual support to those Christians who choose in good conscience to break the law in order to raise the visibility of an important issue or to change the law.[54] The statement specifically extended support to conscientious objectors to military service;[55] to those in the military who refuse to use weapons of mass destruction in combat;[56] to individuals who refused to pay taxes for weapons of mass destruction or engaged in protests against the production and deployment of such weapons;[57] and implicitly encouraged congregations to offer sanctuary to undocumented persons threatened with deportation to life-threatening situations in their countries of origin.[58]

A number of observations emerge from this survey of civil disobedience in America. First, civil disobedience is a constant feature of American life. To adopt a popular aphorism, nonviolent resistance to governmental authority is as "American as apple pie." Secondly, under the passion of the moment, disobedients were subjected to severe penalties. The harm inflicted on disobedients by the criminal justice system often far overshadows the disruption caused by civil disobedience. Yet, in the long term, civil disobedients invariably were vindicated by having their viewpoint adopted by larger society. Lastly, acts of nonviolent civil disobedience have proven to be central to the achievement of social and political reform.

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51. *Id.* at 70.

52. *Human Law and the Conscience of Believers: A Statement of The American Lutheran Church, reprinted in* Michael J. Perry, *Conscientious Disobedience*, 11 HAMLINE L. REV. 1, 22 (1988).

53. *Id.* at 22.

54. *Id.* at 22-23.

55. *Id.* at 39

56. *Id.*

57. *Id.*

58. *Id.*

American theorists and practitioners were instrumental in the development of the theory of civil disobedience. Their ideas, strategies and tactics helped to inspire Mohandas Gandhi who remains the leading proponent of civil disobedience in modern history.[59] Gandhi, in turn, profoundly influenced contemporary American thinking on civil disobedience.[60]

## III. THE THEORY AND PRACTICE OF CIVIL DISOBEDIENCE

Mohandas Gandhi is credited with refining the existing theory and practice of civil disobedience.[61] Gandhi termed his theory *Satyagrapha* or Truth-force.[62] The practice of *Satyagrapha* involves the open, "civil breach of unmoral statutory enactments."[63]

The disobedient's open violation of the law and willing acceptance of punishment demonstrates the *Satyagraphi's* respect for the sanctity of the rule of law. Their disobedience only is undertaken as a last resort[64] and is directed against immoral laws which do not serve the public welfare, rather than against the entire social and political order.[65] Thus, disobedients are reformers, not revolutionaries.[66]

In 1922, in India, Gandhi was arrested and convicted of sedition based upon his writing of three magazine articles critical of the British colonial regime.[67] In his statement to the court, Gandhi proclaimed that he was morally innocent, but conceded that he was legally guilty; and requested the judge to impose the harshest possible sentence.[68]

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59. *See supra* note 10.

60. *See generally* RICHARD GREGG, THE POWER OF NONVIOLENCE (2nd rev. ed., 1966) (Gregg was an American disciple of Gandhi whose writings had a major impact on American pacifists).

61. *See generally* BONDURANT, *supra* note 8. Gandhi did not provide a single, comprehensive statement of his views. An inquiry into his theory of civil disobedience necessitates an examination of his multitude of essays and newspaper articles.

62. Mahatma Gandhi, *Satyagrapha, Civil Disobedience, Passive Resistance, Non-Co-operation, in* NON-VIOLENT RESISTANCE 3 (1951).

63. *Id.* Gandhi distinguished between civil and criminal disobedience. The criminal disobedient or lawbreaker, surreptitiously violates the law and attempts to avoid detection and punishment. In contrast, the civil disobedient openly and nonviolently violates immoral laws. Their goal is not personal gain, but to benefit the public welfare. Rather than seeking to avoid detection and punishment, the civil disobedients accept their arrest, guilt and punishment meted out by the legal system. *Id.* at 6-7.

64. *Id.* at 6.

65. *Id.* at 7.

66. Mahatma Gandhi, *Work In Jails, in id.* at 60-61.

67. Mahatma Gandhi, *A Plea For the Severest Penalty, Upon His Conviction For Sedition, in* THE WORLD OF LAW, THE LAW AS LITERATURE 459-61 (E. London ed., 1960).

68. *Id.* at 465.

Gandhi's request not only symbolized his respect for the rule of law, but demonstrated his sincere commitment and willingness to suffer for his cause. Gandhi believed that law should serve a moral purpose.[69] By pleading guilty and requesting the harshest possible penalty, Gandhi implicitly forced the prosecutor, judge, jailer, and the entire colonial regime to examine whether they were able morally to justify and cooperate in the enforcement of the sedition statute.[70] Through his insistence on martyrdom, Gandhi transformed the courtroom into a forum for the examination of personal and societal morality.[71]

In addition to the acceptance of guilt and punishment, Gandhi practiced the disobedient act in a courageous, but nonviolent fashion. The disobedient's opponents should be emotionally and intellectually persuaded, rather than physically forced, to accept the disobedient's views. Since the objective truth is not easily determined, Gandhi argued that there is no justification for harming another in order to advance one's political goals. This insures that physical harm will not be inflicted upon innocents to pursue a potentially flawed cause. Thus, Gandhi wrote that self-suffering is infinitely superior to the infliction of pain on others.[72]

The use of violence, according to Gandhi, also invariably leads to an escalating cycle of retaliation and distracts attention from the disobedient's cause. Violence becomes an institutionalized mechanism for conflict resolution, and once unleashed, it is difficult to contain.[73] Furthermore, the harming or murdering of an opponent usually does not eliminate or resolve the grievance which motivated the attack. It only reduces those against whom it is directed to the status of objects and, thus, is contrary to the humanitarian values upon which civil disobedience is premised. Gandhi recognized that the use of civil disobedience may precipitate a violent response. However, Gandhi argued that the disobedient merely served as a catalyst to bring underlying societal tensions to the surface. Once brought out into the open, these conflicts could honestly be confronted and peacefully resolved.[74]

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69. Gandhi, *supra* note 62, at 6-7.

70. Gandhi suggested that if the Judge had doubts concerning the propriety of punishing him that the Judge should resign in order to disassociate himself from Great Britain's colonial policies. Gandhi, *supra* note 67, at 465-66.

71. The Judge, conceding that Gandhi's case presented him with a difficult decision, sentenced Gandhi to six years imprisonment. *Id.* at 460.

72. Gandhi, *supra* note 62, at 15, 17.

73. *Id.* at 19.

74. Mahatma Gandhi, *To English Friends*, *in* NON-VIOLENT RESISTANCE, *supra* note 62, at 222.

Gandhi stressed that the disobedient should develop and express love towards their antagonists. It is possible, he argued, to ardently oppose the views of others and yet, to learn to love them as fellow human beings. This loving attitude, in combination with the disobedient's willingness to accept abuse and harsh punishment, eventually penetrates the psychological defense mechanisms of those in opposition. Once having been forced to recognize the disobedient's humanity and individuality, those in power begin to question their own conduct as well as to reflect upon the justifiability of the disobedient's claims.[75] Thus, Gandhi viewed civil disobedience as a mechanism for transforming a physical confrontation into an opportunity for emotional and intellectual communication.[76]

Civil disobedience, then, in the view of Gandhi, is an expression of an entire discipline and lifestyle. Disobedients must purge themselves of anger, hatred, and material and physical desire and must develop courage and the ability to refrain from retaliation.[77] It takes courage to eschew violence and to voluntarily challenge immoral laws through self-suffering. Gandhi argued that it takes more fortitude to voluntarily absorb than to inflict pain.[78]

Gandhi argued that civil disobedience is a necessary adjunct to any democratic political system. It is an inherent right of citizens and a "sacred duty " when the State degenerates into corruption or lawlessness — "a birthright that cannot be surrendered without surrender of one's self-respect."[79] Civil disobedience is based upon a supreme belief in the power of disobedients to appeal to and mobilize popular opinion and to check the abuse of governmental power. The majority is not invariably correct and virtually all major reforms are due to actions of a determined minority which have convinced the majority of the merits of its point of view.[80] Gandhi concluded that only those regimes which fear public opinion will be concerned with curbing the expression of civil disobedience.[81]

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75. Mahatma Gandhi, *Satyagraphi's Duty*, *in* NON-VIOLENT RESISTANCE, *supra* note 62, at 192-93.

76. In the case of mass campaigns of civil disobedience, governmental authorities confront the added pressure of the overcrowding of courts and prisons which further encourages them to seek to resolve the conflict. *See* Mahatma Gandhi, *The Right of Civil Disobedience*, *in* NON-VIOLENT RESISTANCE, *supra* note 62, at 170, 172.

77. Mahatma Gandhi, *Moral Qualifications For Satyagrapha*, *in* NON-VIOLENT RESISTANCE, *supra* note 62, at 51, 54.

78. *Id.*

79. Mahatma Gandhi, *The Right of Civil Disobedience*, *in* NON-VIOLENT RESISTANCE, *supra* 62, at 174.

80. *Id.*

81. *Id.*

Gandhi profoundly impacted the practice and theory of modern American civil disobedience. Martin Luther King writes that in the Gandhian emphasis upon love and nonviolence, he discovered the method for social reform he had been seeking: "I came to feel that this was the only morally and practically sound method open to oppressed people in their struggle for freedom."[82] Unlike Gandhi, most Americans tend to view civil disobedience as a short-term practical political tactic rather than as a long-term spiritual discipline and enterprise.[83] In the United States, over the course of the last three decades, civil disobedience primarily has been employed to draw attention to a cause; to exert pressure on the government by straining the resources of the already overcrowded and underfunded criminal justice system; to coerce others into compliance with the disobedients' demands; or to force the courts to constitutionally review a statute.[84] In addition, in contrast to Gandhi, many American disobedients have not been willing to concede their legal guilt. Instead, they have viewed their acts as consistent with the American revolutionary tradition and as an expression of their fundamental civil and political rights. American courts, however, like the judges who convicted and punished Gandhi, have remained adamant in viewing acts of civil disobedience as unjustifiable criminal protest.

## IV. AMERICAN COURTS AND CIVIL DISOBEDIENCE IN THE 1960s

During the 1960s, the Supreme Court reviewed the conviction of individuals arrested for acts of civil disobedience directed against racial segregation. The Court clearly stated that it would neither legally justify nor morally countenance acts of disobedience, irrespective of how virtuous the motives of disobedients.[85]

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82. MARTIN LUTHER KING JR., STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY 97 (1958).

83. Gandhi's thought reflected Indian religious philosophy and values and was not easily accepted by most Americans. *See generally* BONDURANT, *supra* note 8, at 105-45. Despite Martin Luther King's adherence to Gandhian philosophy in his writings, it has been argued he came to appreciate that, in practice, it was necessary to view civil disobedience as a practical political tactic designed to elicit a violent response in order to attract widespread popular support for the civil rights movement. *See* DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965 221-36 (1978). The practical application of civil disobedience is termed *Duragrapha* rather than *Satyagrapha*. BONDURANT, *supra* note 8, at 42-44.

84. For a revision of the theory and practice of civil disobedience, see HOWARD ZINN, DISOBEDIENCE AND DEMOCRACY: NINE FALLACIES ON LAW AND ORDER (1968).

85. *See generally* ABE FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE (1968).

In *Adderley v. Florida*,[86] a group of roughly two-hundred university students entered the grounds of the jail in Tallahassee, Florida.[87] The students' intent was to protest the previous day's arrest of their fellow demonstrators and to express their opposition to state and local segregationist policies, which included the segregation of the jail.[88] The county sheriff ordered the students to leave and warned that those who did not would be arrested for trespass.[89] One-hundred and seven students defied the sheriff's order and were arrested.[90] The Court rejected the petitioner's argument that their arrest violated their rights of free speech and assembly.[91] It ruled that the State, like a private property owner, has the prerogative to prevent individuals who interfere with the use of its property.[92] The petitioners, according to the Court, posed a threat to security, blocked vehicular traffic, and possessed no right to remain on the jail grounds.[93] In conclusion, the Court observed that individuals do not have the right to demonstrate "whenever and however and wherever they please . . . . The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose."[94]

Justice Douglas, in dissent,[95] proclaimed that it is a tragedy when "a trespass law is used to bludgeon those who . . . protest . . . against one of the most grievous of all modern oppressions which some of our States are inflicting on our citizens."[96] He warned that "by allowing these orderly and civilized protests against injustice to be suppressed, we only increase the forces of frustration which the conditions of second-class citizenship are generating amongst us."[97]

Justice Douglas' fellow judges shared his sympathy for the aims and aspirations of the civil rights movement.[98] However, the majority

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86. 385 U.S. 39 (1966).
87. *Id.* at 40, 46.
88. *Id.* at 40.
89. *Id.* at 46.
90. *Id.*
91. *Id.* at 41.
92. *Id.* at 47.
93. *Id.*
94. *Id.* at 48.
95. *Id.*
96. *Id.* at 55.
97. *Id.* at 56.
98. The Court, at times, strained to acquit civil disobedients. *See* Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Brown v. Louisiana, 383 U.S. 131 (1966); Cox v. Louisiana (I), 379 U.S. 536 (1965); Cox. v. Louisiana (II), 379 U.S. 559 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

continued to admonish activists that they were not "free to ignore all the procedures of the law and carry their battle into the streets."[99] No individual "can be judge of his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics or religion."[100] The Court reminded activists that respect for legal processes "is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."[101]

The era of the Vietnam War was characterized by an outpouring of civil disobedience and resistance to conscription.[102] It is estimated that over 200,000 individuals were accused of violating the selective service laws, of whom 25,000 were indicted and 10,000 were subjected to trial.[103] The average prison sentence for draft offenders during 1968-69 was three years — a penalty more severe than the average sentence meted out to those convicted of similar offenses during World War II and the Korean War.[104]

Legal philosopher Ronald Dworkin, alarmed over the criminal prosecution of such "loyal and law-respecting citizens,"[105] argued that prosecutors and judges had a "responsibility" to halt the prosecution and conviction of those arrested for draft-related offenses.[106] Dworkin contended that citizens possessed the prerogative to violate laws — such as those which relate to conscription for combat in the Vietnam War — which contravene their conscience and which they reasonably believe to be unconstitutional.[107] The only limitation, according to Dworkin, is that the law violation may not interfere with the moral rights of others.[108] He contended that to prosecute individuals for breaching statutes whose constitutionality was uncertain violated due

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99. Walker v. City of Birmingham, 388 U.S. 307, 321 (1967).

100. *Id.* at 321-22.

101. *Id.* at 321. *See also* FORTAS, *supra* note 85 (At the time he wrote this book, Fortas was an Associate Justice of the Supreme Court of the United States.).

102. *See generally* STEVEN E. BARKAN, PROTESTERS ON TRIAL: CRIMINAL JUSTICE IN THE SOUTHERN CIVIL RIGHTS AND VIETNAM ANTIWAR MOVEMENTS 87-148 (1985).

103. LAWRENCE M. BASKIR & WILLIAM A. STRAUSS, CHANCE AND CIRCUMSTANCE: THE DRAFT, THE WAR AND THE VIETNAM GENERATION 69 (1978) (8,750 defendants were convicted after trial or following a guilty plea; while 1,305 defendants were acquitted. 4,000 individuals received prison sentences of which 750 were suspended).

104. *Id.* at 79. The length of sentences lessened as opposition to the war mounted. *Id.* at 78-79.

105. Ronald Dworkin, *Civil Disobedience, in* TAKING RIGHTS SERIOUSLY 206, 207 (1977).

106. *Id.* at 222.

107. *Id.* at 214-16.

108. *Id.* at 218.

process of law.[109] In addition, Dworkin pointed out that civil disobedience was a principle method by which the constitutionality of statutes could be judicially reviewed.[110] Such review helped to insure that statutory laws were consistent with democratic principles and the preservation of individual liberty.[111] Thus, Dworkin concluded that a legally tolerant attitude towards those who resisted the draft enhanced, rather than interfered with, the advancement of the rule of law.[112]

The government, however, refused to countenance the open defiance of law, and the prosecution of draft resisters continued. In 1969, the government prosecuted and convicted famed pediatrician, Dr. Benjamin Spock, along with four others for conspiracy to counsel, aid and abet selective service registrants to refuse service in the armed forces.[113] In overturning the conviction, Judge Coffin, dissenting in part in a separate opinion,[114] concluded that to apply the conspiracy doctrine to these public opponents of the war was "not compelled by conspiracy precedents, not consistent with First Amendment principles, not required to deal effectively with the hazard to public security, and not capable of discriminating application as between the culpable and the innocent."[115] He warned that such prosecutions would have a "chilling effect — indeed that of a sub-zero blast — on all kinds of efforts to sway public opinion" and that the "ranks of individuals enlisted in a controversial cause would visibly shrink."[116]

Some activists argued that the judiciary demonstrated that the courts were not neutral arbiters of fact and law. Instead, the courts were partisan institutions which rationalized and legitimized the policies of the political branches. Judges were portrayed as straining to interpret the law to convict defendants and, thereby, to stifle dissent, deter protest and discourage criticism of the war. Thus, these activists concluded that the judiciary was complicite in the perpetuation of the Vietnam War and that civil disobedience should extend

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109. *Id.* at 221.
110. *Id.* at 212.
111. *Id.* at 214.
112. *Id.* at 222.
113. *See* JESSICA MITFORD, THE TRIAL OF DR. SPOCK; THE REV. WILLIAM SLOANE COFFIN, JR.; MICHAEL FERBER; MITCHELL GOODMAN; AND MARCUS RASKIN (1969).
114. United States v. Spock, 416 F.2d 165, 184 (5th Cir. 1969).
115. *Id.*
116. *Id.* at 188.

into the courtroom. Defendants were urged to protest trial court rulings which denied them fair trials.[117]

New York University law professor Graham Hughes, in his essay *In Defense of Disobedience*,[118] concluded that the evidence pointed to a "serious breakdown of law and order."[119] He contended that those victimized by "real inequities and iniquities"[120] can "bring not unpersuasive moral arguments for their legitimate exemption from usual duties of cooperation with the processes of the legal system."[121] The "halls of justice must themselves be cleansed before those who are dragged inside them may be expected to show any respect."[122]

The tactic of confronting the judiciary climaxed in the 1969 trial of the Chicago Seven.[123] The defendants were indicted for conspiracy to travel to Chicago with the intent to incite, organize and promote a riot designed to disrupt the 1968 Democratic National Convention.[124] During the trial, the defendants increasingly became frustrated at Judge Julius Hoffman's evidentiary rulings which prevented them from presenting their planned political defense. The defendants aggressively challenged the judge. Their acts ranged from laughter and defiant remarks to civil disobedience.[125] The judge responded by levying 175 contempt citations against the defendants and instructed the marshals to bind and gag Black Panther Bobby Seale.[126] Defendant David Dellinger explained that since "we were not permitted to present our

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117. *See generally* LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS (Robert Lefcourt ed., 1971). *See* William Kunstler, *Open Resistance: In Defense of the Movement, in id.* at 267.

118. Graham Hughes, *In Defense of Disruption*, 30 THE ANTIOCH REV. 171 (1970).

119. *Id.* at 174.

120. *Id.* at 176.

121. *Id.* at 174.

122. *Id.* at 176.

123. *See* JASON EPSTEIN, THE GREAT CONSPIRACY TRIAL; AN ESSAY ON LAW, LIBERTY AND THE CONSTITUTION (1970).

124. *Id.* at 85-101. A study commission determined that a significant amount of the disruption was due to "unrestrained and indiscriminate police violence." National Commission on the Causes and Prevention of Violence, Rights in Conflict: The Violent Confrontation of Demonstrators and Police in the Parks and Streets of Chicago During the Week of the Democratic National Convention of 1968, a report submitted by Daniel Walker, Director of the Chicago Study Team.

125. *See* THE TALES OF HOFFMAN (M. L. Levine, G. C. McNamee & D. Greenberg eds., 1970) (edited from the official transcript).

126. See CONTEMPT TRANSCRIPT OF THE CONTEMPT CITATIONS, SENTENCES AND RESPONSES OF THE CHICAGO CONSPIRACY 10 (1970). Professor Harry Kalven, Jr., counts 175 contempt citations. Kalven, *Preface, in id.* at VII, XVIII. Judge Hoffman's levying of contempt citations against the defendants was reversed on appeal. *See* United States v. Dellinger, 461 F.2d 389 (7th Cir. 1972); *see also* United States v. Seale, 461 F.2d 345 (7th Cir. 1972).

case 'legally,' we had to present it 'illegally.'"[127] The defendants, according to Dellinger, refused to "sit silently through charges of lies and repressive rituals"[128] and collaborate in their own "destruction."[129]

The United States Supreme Court quickly provided trial judges with constitutional mechanisms to control disruptive defendants. In 1970, in *Illinois v. Allen*,[130] the Court described the judicial branch as "palladiums of liberty"[131] and "citadels of justice"[132] which must not be "bullied, insulted and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes."[133] The Court suggested three constitutionally permissible methods for a trial judge to control obstreperous defendants: to bind and gag them; to cite them for contempt; or to remove them from the courtroom until they promise to properly conduct themselves.[134]

Most defendants, while sympathetic to those who endorsed the disruption of trials, believed American courts remained capable of fairly adjudicating legal issues.[135] Rather than disrupt the trial, these defendants argued it was imperative to plead not guilty and seek formal legal vindication.[136] An acquittal would symbolically affirm the illegality and illegitimacy of the war.[137] Most defendants also desired to avoid conviction and incarceration since they believed they could make a more significant contribution to the anti-war effort outside of prison.[138] In addition, a trial offered the opportunity to educate the public.[139]

Defendants frequently relied upon a *pro se* defense.[140] They viewed a *pro se* defense as a symbolic assertion that they would not be intimi-

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127. David Dellinger, *Disorder in the Courtroom*, *in* MORE POWER THAN WE KNOW: THE PEOPLE'S MOVEMENT TOWARD DEMOCRACY 219, 233 (1975).

128. David Dellinger, *Sometimes the Duty of a Revolutionary Organizer is to Go to Jail*, *in id.* at 246, 256.

129. *Id.* at 257.

130. 397 U.S. 337 (1970).

131. *Id.* at 346.

132. *Id.* at 347.

133. *Id.* at 346.

134. *Id.* at 344.

135. *See* Noam Chomsky, Paul Lauter & Florence Howe, *Reflections on a Political Trial*, *in* TRIALS OF THE RESISTANCE 74, 80-81 (1970).

136. *Id.* at 79-80.

137. *Id.* at 92.

138. *See* David Mitchell, *What Is Criminal?*, *in* WE WON'T GO: PERSONAL ACCOUNTS OF WAR OBJECTORS 92, 107-08 (A. Lynd ed., 1968).

139. *See* Noam Chomsky, *On the Limits of Civil Disobedience*, *in* FOR REASONS OF STATE 74, 79-81 (1970).

140. *See* Faretta v. California, 422 U.S. 806 (1975).

dated; and that they would continue to struggle against the government in the courtroom. It permitted the defendants to directly address and establish a personal relationship with the jury and to impress them with their sincerity.[141] Judges, who realized the defendants lacked legal training, usually tolerated their ideological appeals and statements of opinion.[142]

The defense of jury nullification had particular attraction to defendants, who desired to directly challenge the morality and legality of the Vietnam War.[143] Jury nullification provides the judge the discretion to instruct the jury that they have the inherent right to disregard the law and facts, and to acquit the defendants if they believe a conviction would be unfair or unjust.[144] This instruction enabled defense attorneys to present a "political case" and largely ignore legal technicalities. Attorneys argued that the defendants acted in protest to an unpopular, immoral and illegal war, and the jury, as a matter of conscience, should disregard the law and acquit the defendants.[145] Defense attorneys attempted to inspire jurors to act in the same courageous fashion as the jurors who, in 1735, refused to convict newspaper editor Peter Zenger for seditious libel against the British colonial governor of New York; or those who refused to convict individuals who violated the Fugitive Slave Act of 1850; or the jurors who refused to convict those who violated laws enforcing prohibition in the early twentieth century.[146]

Jury nullification was successfully invoked in various local trial courts.[147] However, in the Berrigan draft records case, federal Judge Thomsen refused to issue jury nullification instructions and denied permission to William Kunstler to urge the jury to disregard the law.[148]

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141. *See* Cameron Cunningham, *The Trial of the Gainesville Eight: The Legal Lessons of a Political Trial*, 10 CRIM. L. BULL. 15 (1974).

142. *See* Robert A. Barker, *Evidence: Did Angela Davis Testify?*, 37 ALBANY L. REV. 1 (1972). Defendants also used sophisticated social scientific survey techniques in an attempt to select a sympathetic jury. *See* Jon Van Dyke, *Selecting a Jury in Political Trials*, 27 CASE W. RES. L. REV. 609 (1977).

143. *See* Joseph L. Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, 57 THE YALE REV. 81 (1968).

144. *See* Alan Scheflin, *Jury Nullification: The Right to Say No*, 48 S. CAL. L. REV. 168-69 (1972).

145. *Id.* at 199-201.

146. *See* Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 71-72 (1980).

147. Scheflin, *supra* note 144, at 199-201.

148. *See* DANIEL BERRIGAN, THE TRIAL OF THE CATONSVILLE NINE 104-05 (1970) (a dramatic account of the trial which utilizes the original transcript). *See generally supra* notes 61-62.

The Fourth Circuit Court of Appeals upheld District Court Judge Thomsen's rulings.[149] Judge Sobeloff recognized the undisputed power of the jury to acquit, even if its verdict is contrary to the legal instructions issued by the judge.[150] However, he ruled that the judge is not required to inform the jury of their right of jury nullification since this would result in "negating the rule of law in favor of the rule of lawlessness."[151] In *United States v. Dougherty*,[152] Judge Leventhal observed that it is unnecessary for the trial judge to inform the jury of their prerogative to disregard the law since the media and popular culture already have provided them with this information.[153] Judge Bazelon, in his dissent,[154] noted that Judge Leventhal's contention was disingenuous.[155] He pointed out that, even if jurors were aware of jury nullification, that judges strongly discouraged jurors from exercising their discretion.[156] Bazelon chastised his fellow judges for their decision:

> If revulsion against the war in Southeast Asia has reached a point where a jury would be unwilling to convict a defendant for commission of the acts alleged here, we would be far better advised to ponder the implications of that result than to spend our time devising stratagems which let us pretend that the power of nullification does not even exist.[157]

Defendants also attempted to persuade courts to recognize the good motive defense. They argued that their altruistic motive to protest and halt the Vietnam War exculpated them from criminal liability. Criminal law concerns itself with punishing morally blameworthy individuals; and the defendants contended that the legal system, therefore, should distinguish between those who violate the law out of goodness, from those who violate the law out of greed. It was pointed out that courts already analyzed defendants' motives to determine the applicability of criminal defenses such as duress and defense of self and

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149. United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

150. *Id.* at 1006.

151. *Id.*; *see also* United States v. Boardman, 419 F.2d 110, 116 (1st Cir. 1969), *cert. denied*, 397 U.S. 997 (1970).

152. 473 F.2d 1113 (D.C. Cir. 1972).

153. *Id.* at 1135.

154. *Id.* at 1138.

155. *Id.* at 1141-44.

156. *Id.* at 1140.

157. *Id.* at 1144.

others.[158] In 1969, in the *Oakland Seven Conspiracy*[159] case, the court acquitted the defendants of conspiracy to resist the draft and trespass on the grounds of the Oakland draft induction center.[160] Their acquittal, in large part, was due to the fact that the Superior Court instructed the jury that they were entitled to give the defendants' motive "the weight to which you find it to be entitled."[161]

The good motive defense, however, was expressly rejected in 1972 by the Seventh Circuit Court of Appeals in *United States v. Cullen.*[162] The Court conceded that Cullen's public burning of draft files was sincerely motivated by a noble and unselfish purpose.[163] Nevertheless, it ruled that the defendant's motive was irrelevant to the determination of guilt.

> In a case such as this, if the proof discloses that the prohibited act was voluntary, and that the defendant actually knew, or reasonably should have known that it was a public wrong, the burden to prove the requisite intent has been met; proof of motive, good or bad, has no relevance to that issue.[164]

The Court observed that recognition of the good motive defense would lead to anarchy. An "individual might commit bigamy to avoid eternal damnation; steal from the rich to give alms to the poor; burn and destroy, not merely public records or perhaps buildings but even public servants as well, to implement a utopian design."[165] The Court of Appeals concluded that the defendant's attempt to elevate his own conscience over the will of the majority evinced a "form of arrogance which organized society cannot tolerate."[166]

Defendants also claimed their protests constituted expression protected under the First Amendment. In most instances, however,

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158. The case for the good motive defense is set forth in Comment, *Criminal Responsibility and the Political Offender*, 24 AM. U. L. REV. 797 (1975). *See also* Comment, *The Excusable Motive Defense*, 6 SAN FERN. V. L. REV. 13 (1977).

159. JOHN F. BANNAN & ROSEMARY S. BANNAN, LAW, MORALITY AND VIETNAM: THE PEACE MILITANT AND THE COURTS 107-123 (1974).

160. *Id.* at 117.

161. *Id.* at 120.

162. 454 F.2d 386 (7th Cir. 1971).

163. *Id.* at 389.

164. *Id.* at 392.

165. *Id.*

166. *Id.* Courts also rejected religious motive as a justification for criminal acts. *See id.* at 390.

Courts ruled that the defendants' intent to communicate their dissatisfaction with the Vietnam War did not, in and of itself, convert their nonviolent criminal actions into protected expression.[167] In *United States v. O'Brien*,[168] O'Brien burned his Selective Service registration certificate on the steps of the South Boston Courthouse, and he was convicted of knowingly destroying and mutilating his draft certificate.[169] He stated at his trial that he had burned his card to express his dissatisfaction with the war and mobilize support for the anti-war effort.[170]

The Supreme Court rejected O'Brien's contention that the burning of his registration certificate constituted symbolic speech. In reviewing O'Brien's claim, the Court ruled that where speech and non-speech elements are intertwined in the same course of conduct, a sufficiently important governmental interest can justify incidental limitations on First Amendment freedoms.[171] The Court determined that the government had just such a substantial interest in preventing the mutilation and destruction of registration certificates. Such certificates, according to the Court, provided proof of registration; furnished a convenient record of the registrant's Selective Service number and classification; and informed registrants' of the address of their local board and of the procedures to be followed in the event of a change of address.[172] The law prohibiting destruction of Selective Service certificates thus, in the words of the Court, "no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records."[173]

The judiciary thus was hesitant to clothe nonviolent criminal acts with First Amendment protection and risk opening the floodgates of protest. In *United States v. Miller*,[174] the Second Circuit Court of Appeals warned that if the burning of draft cards and registration certificates were elevated to the status of protected expression that resisters would be encouraged to claim similar protection for acts involving even greater social disruption.[175] What is next, queried the

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167. United States v. Malinowski, 472 F.2d 850 (3d Cir.), *cert. denied*, 411 U.S. 970 (1973). *But see* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

168. 391 U.S. 367 (1968).

169. *Id.* at 369-70.

170. *Id.* at 370.

171. *Id.* at 376.

172. *Id.* at 378-79.

173. *Id.* at 375.

174. 367 F.2d 72 (2d Cir. 1966), *cert. denied*, 386 U.S. 911 (1967).

175. *Id.* at 79.

Court, "turning on water faucets, dumping of garbage in front of City Hall, stalling cars at an event attracting heavy traffic, burning an American flag on a street corner, or tearing up on television a court order or a document required to be kept under internal revenue regulations?"[176]

Defendants also unsuccessfully relied upon several traditional legal defenses which were predicated upon the illegality of the Vietnam War. In several cases, defendants relied upon the mistake of law defense.[177] They argued that they (mistakenly) believed their acts were justified in light of the illegality of the Vietnam War. Courts, however, ruled that the mistake of law defense was only available to defendants who genuinely misunderstood the requirements of the law. In contrast, the courts observed that these defendants knowingly and intentionally violated the letter of the law. In *United States v. Boardman*,[178] Boardman was a conscientious objector who declined to report for alternative service and was convicted for refusing civilian work. He claimed that he believed his refusal was justified in light of the illegality of the government's conduct in Vietnam.[179] The First Circuit Court of Appeals ruled that there was no "misunderstanding of what the law required, and the power of Congress to impose such requirements has long been settled."[180] Thus, the defendant "disobeyed a well-settled requirement in order to protest the entire conscription system, and hopefully to make new law, but that does not give him immunity from the sanctions of the old law if he is unsuccessful in his efforts."[181]

Those who invoked the justification defense were equally as unsuccessful.[182] The justification defense exculpates individuals from liability for acts taken in self-defense; in defense of others or of property; or undertaken to avert a public disaster or crime.[183] In *United States v. Simpson*,[184] Simpson illegally gained access to the local Selective Service Board's file room, and incinerated draft records.[185] He argued that his actions were a justifiable effort to avert the United States' criminal acts in Vietnam. The trial court ruled that the justification

176. *Id.*
177. *See* Leiss v. United States, 364 A.2d 805 (D.C. 1976).
178. 419 F.2d at 110.
179. *Id.* at 114.
180. *Id.* at 115.
181. *Id.*
182. *See* United States v. Kroncke, 459 F.2d 697 (8th Cir. 1972).
183. United States v. Simpson, 460 F.2d 515, 517 (9th Cir. 1972).
184. *Id.* at 515.
185. *Id.* at 516.

defense was inapplicable as a matter of law and refused to permit the defense to introduce the proffered evidence or to issue the instructions which the defense requested.[186] The Ninth Circuit Court of Appeals affirmed the trial court's rulings. It explained that the justification defense is based on the proposition that society benefits when an individual acts to prevent another from intentionally or negligently causing injury to others or to property.[187] In this case, the Court ruled that Simpson's "reckless, dangerous acts" were not reasonably related to the eradication of the harms he sought to prevent.[188] It was "unreasonable for Simpson to assume that any violent action he initiated might have any significant effect upon the supposed ills he hoped to remedy."[189]

Thus, courts refused to permit defendants to attempt to legally justify their criminal acts of protest. Such criminal acts were viewed by the courts as common crimes; and jurors were not exposed to evidence which related to the morality or legality of the war. The judiciary admonished defendants that those who deliberately violated the law, whatever their motivation, must accept their legal guilt. Otherwise, respect for the law would be diminished and anarchy would result.[190] Occasionally, defendants were successful in attacking the constitutionality of the statutes under which they were indicted. However, such due process claims did not involve the introduction of evidence which related to the Vietnam War.[191]

## V. Anti-War Protest and International Law

### A. *The Political Question Doctrine*

Unsuccessful in their efforts to gain legal vindication under domestic law principles, activists began to invoke arguments based upon international law.[192] A number of lawsuits in part, were premised on the contention that the Vietnam War was unconstitutional and violative of various multilateral agreements.[193] In virtually every instance, fed-

186. *Id.* at 517.

187. *Id.* at 517-18.

188. *Id.* at 518.

189. *Id.*

190. 472 F.2d at 857-58.

191. *See* Smith v. Goguen, 415 U.S. 566 (1973).

192. *See* Quincy Wright, *Legal Aspects of the Viet-Nam Situation*, 60 Am. J. Int'l L. 750 (1966).

193. *See* Robert P. Sugarman, *Judicial Decisions Concerning the Constitutionality of United States Military Activity in Indo China: A Bibliography of Court Decisions*, 13 Colum. J. Transnat'l L. 470 (1974), *cited in* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 597, 623 n.74 (1976).

eral courts invoked the standing and political question doctrines and refused to rule on the legality of the Vietnam War.[194] In *Mora v. McNamara*,[195] the Supreme Court refused to hear an action by draftees who sought to obtain an injunction to prevent their being sent to serve in what they alleged to be an illegal war in Vietnam.[196] Justice Stewart, in his dissent,[197] warned that the Court "cannot make the problems [of the Vietnam War] go away simply by refusing to hear the case of three obscure army pilots."[198]

In *United States v. Valentine*,[199] the defendants attempted to justify their refusal to submit to induction into the armed forces on the grounds that the Vietnam War was contrary to international law and to various treaty obligations of the United States government.[200] The District Court ruled that the defendants lacked standing to challenge the legality of the war.[201] The Court reasoned that the defendants were charged with refusing induction, not with refusing to obey an order which assigned them to Vietnam and that it was entirely a "matter of conjecture whether their induction ever would have led them to their receiving such an order."[202] In addition, judicial examination into the "conduct of foreign policy or the use and disposition of military forces by the executive branch would violate the doctrine of separation of powers which is at the heart of our constitutional system of government."[203] In *Luftig v. McNamara*,[204] the United States Court of Appeals for the District of Columbia refused to hear a suit brought by an Army private who sought to enjoin his being sent to Vietnam.[205] The Court, in a *per curiam* decision, emphasized that the legality of the Vietnam War is a political question and that "resort to the courts is futile, in addition to being wasteful of judicial time, for which there are urgent legitimate demands."[206] The Court observed that:

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194. *Id.*
195. 389 U.S. 934 (1967).
196. *Id.*
197. *Id.*
198. *Id.* at 935; *see also* Mitchell v. United States, 386 U.S. 972 (1966) (Douglas, J., dissenting).
199. 288 F. Supp. 957 (D.P.R. 1968).
200. *Id.* at 984.
201. *Id.*
202. *Id.*
203. *Id.*
204. 373 F.2d 664 (D.C. Cir. 1967).
205. *Id.* at 665.
206. *Id.*

> It is difficult to think of an area less suited for judicial action than that into which Appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.[207]

Judge Wyzanski, in *United States v. Sisson*,[208] noted that the invocation of the political question doctrine, in addition to being based upon the separation of powers, was a recognition that domestic tribunals were incapable of "eliciting the facts during a war"[209] and were "probably incapable of exercising a disinterested judgement which would command the confidence of sound judicial opinion."[210] He conceded that American courts were "entirely unfit to adjudicate the question whether there has been a violation of international law during a war by the very nation which created, manned, and compensated the tribunal seized of the case."[211]

Professor Graham Hughes, in 1968, observed that the judiciary's reliance upon the political question doctrine left disobedients in a "limbo of legality"[212] in which courts were perceived as having abdicated their constitutional duty to determine the legality of the Vietnam War.[213] Courts' invocation of the political question doctrine merely fueled the debate over the Vietnam conflict[214] and encouraged individuals to reach their own conscientious decisions as to the constitutionality of the war.[215] Hughes implied that given the judicial failure to rule on the legality of the war, it was unfair to hold civil disobedients legally liable.[216] He proposed that individuals who engaged in nonvio-

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207. *Id.* at 665-66.

208. 294 F. Supp. 515 (D. Mass. 1968). *See* United States v. Sisson, 294 F. Supp. 520 (D. Mass. 1968), *appeal dismissed*, 399 U.S. 267 (1970).

209. *Sisson*, 294 F. Supp. at 517.

210. *Id.* at 517-18.

211. *Id.* at 517.

212. Graham Hughes, *Civil Disobedience and the Political Question Doctrine*, 43 N.Y.U. L. REV. 1, 18 (1968).

213. *Id.* at 17-18.

214. *Id.* at 18-19.

215. *Id.* at 17. Hughes argued that the effect of the judiciary's reliance upon the political question doctrine was to settle the legality, but not the constitutionality of the Vietnam War. *Id.* at 18.

216. *Id.* 5-6.

lent acts of civil disobedience to challenge the constitutionality of the war should be permitted to rely upon a modified mistake of law defense.[217]

### B. *The Nuremberg Defense*

Those who refused induction or service in Vietnam, as illustrated by *Valentine* and *Luftig*, premised their opposition on the unconstitutional and illegal nature of the Vietnam War.[218] As the war persisted, opposition increasingly focused on the alleged war crimes perpetrated by the United States government.[219] Resisters began to attempt to justify their acts of civil disobedience on the Nuremberg Principles.[220]

The Nuremberg Tribunal convicted twenty-two high-level German governmental officials of Crimes against Peace (waging an aggressive war), War Crimes and Crimes against Humanity.[221] The Tribunal did not extend international criminal liability to low-level officials and combatants or to civilians.[222] The Nuremberg Judgment, however, stressed that individuals have international duties which transcend the national obligations imposed by domestic governments.[223] Those who violate such international duties, whether private citizens or governmental officials, are subject to prosecution and punishment under international law.[224]

Anti-war activists viewed these legal principles as creating a moral imperative for individuals to act to halt the international lawlessness of governments.[225] In 1971, Richard Falk observed that the Nuremberg

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217. *Id.* Hughes proposes the mistake of law defense, but is rather guarded and vague as to how it would apply to the case of those who violate the law in order to challenge the legality of the Vietnam War. *See also* Comment, *Civil Disobedience: A Case for Separate Treatment*, 14 WAYNE L. REV. 1165 (1968).

218. *See supra* notes 199-207 and accompanying texts.

219. *See* TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (1970); *see also* Matthew Lippman, *The My Lai Massacre and the International Law of War*, *in* TERRIBLE BEYOND ENDURANCE? THE FOREIGN POLICY OF STATE TERRORISM 313 (M. Stohl & G.A. Lopez eds., 1988).

220. *See* Frank Lawrence, *The Nuremberg Principles: A Defense for Political Protesters*, 40 HASTINGS L.J. 97 (1989).

221. XXII Trial of the Major War Criminals Before the International Military Tribunal (1947) [hereinafter Trial of the Major War Criminals].

222. The Nuremberg Judgement is discussed and criticized in Matthew Lippman, *Nuremberg*, 6 LAW IN CONTEXT 20 (1988).

223. Trial of the Major War Criminals, *supra* note 221, at 466.

224. *Id.*

225. *See* Francisa A. Boyle, *The Relevance of International Law to the "Paradox" of Nuclear Deterrence*, 80 NW. U. L. REV. 1407, 1431 (1986). The Nuremberg defense was raised by a taxpayer opposed to the Korean War. *See* Farmer v. Roundtree, 149 F. Supp. 327 (M.D. Tenn. 1956), *aff'd per curiam*, 252 F.2d 490 (6th Cir. 1958).

Principles dictate that any individual who reasonably believes that the Vietnam War is being waged in violation of law and morality has "an obligation of conscience to resist participation in and support of that war effort by every means at [their] disposal . . . . The imperatives of personal responsibility call upon each of us to search for effective means to bring the war to an immediate end."[226]

In *United States v. Berrigan*,[227] District Court Judge Northrop ruled that the defendants lacked standing to raise the so-called Nuremberg defense to justify their pouring of blood on draft files at a Baltimore Selective Service office.[228] The Court explained that it is not "clear what standing these defendants have to raise the legality of this country's involvement in Vietnam when they have not been called to serve in the armed forces, are not directly affected by our government's actions in that country, and are not even directly affected by the Selective Service apparatus."[229] The Court also determined that its consideration of the defendants' Nuremberg defense was barred by the political question doctrine. Judge Northrop ruled that whether the deployment of the armed forces abroad is in accord with international law is "a question which necessarily must be left to the elected representatives of the people and not to the judiciary. This is so even if the government's action are contrary to valid treaties to which the government is a signatory."[230] In a related case, the Fourth Circuit Court of Appeals reiterated the traditional view that "while in restricted circumstances a morally motivated act contrary to law may be ethically justified, the action must be non-violent and the actor must accept the penalty for his action."[231]

In 1973, in *State v. Marley*,[232] the Supreme Court of Hawaii also relied upon the standing and political question doctrines to avoid ruling upon the defendants' Nuremberg defense. The defendants, including

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226. Richard Falk, *The Circle of Responsibility*, *in* CRIMES OF WAR: A LEGAL POLITICAL-DOCUMENTARY, AND PSYCHOLOGICAL INQUIRY INTO THE RESPONSIBILITY OF LEADERS, CITIZENS, AND SOLDIERS FOR CRIMINAL ACTS IN WARS 222, 230 (Richard A. Falk, Gabriel Kolko & Robert Jay Lifton eds., 1971) [hereinafter CRIMES OF WAR]. *See also* Richard Falk, *The Nuremberg Defense in the Pentagon Papers Case*, 13 COLUM. J. TRANSNAT'L L. 208 (1974).

227. 283 F. Supp. 336 (D. Md. 1968), *aff'd sub nom.* United States v. Eberhardt, 417 F. 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 909 (1970).

228. *See* Recent Developments, *Civil Disobedience-Protests Beyond the Law*, 14 ST. LOUIS U. L.J. 719, 722-23 (1970).

229. 283 F. Supp. at 341.

230. *Id.* at 342.

231. United States v. Moylan, 417 F.2d 1002, 1008 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

232. 509 P.2d 1095 (1973).

an A.W.O.L sailor, occupied the corporate offices of the Honeywell Corporation in an attempt to halt the corporation's manufacture of anti-personnel weapons which were used by the United States in Vietnam.[233] The defendants argued that the deployment of these weapons was contrary to the law of war.[234]

The Supreme Court of Hawaii rejected the defendants' contention that their trespass was justified to avoid criminal liability under the Nuremberg Principles.[235] The Supreme Court determined that the defendants lacked standing to raise the Nuremberg defense since the Nuremberg Tribunal did not extend liability beyond those high-level officials who formulated and executed government policies.[236] The Court concluded that even assuming arguendo that "Honeywell is a war criminal, the applicable law does not give these defendants either a right or a duty to be present without invitation on the Honeywell premises."[237] The Supreme Court of Hawaii also ruled it is "improper for the judiciary to decide 'political questions' of the sort presented by reliance on a theory that one's own government violates its own treaty obligations."[238]

In sum, resisters were unsuccessful in justifying their acts of disobedience under domestic law. They began to appeal to international law and the Nuremberg Principles. Courts, however, invoked the standing and political question doctrines to avoid ruling on international law claims. The judiciary justified its refusal to entertain such arguments on the separation of powers. Courts also appear to have been conscious of the need to avoid becoming embroiled in the political controversy and constitutional debate which surrounded the Vietnam War.

Despite the judiciary's rejection of the Nuremberg defense, the fact remained that the Constitution recognized treaties as the "supreme law of the land;"[239] and the United States Supreme Court had continually declared that international law was part of American law and should be applied whenever applicable.[240] Richard Falk argued that the judiciary's refusal to rule on international law claims had

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233. *Id.* at 1099.
234. *Id.*
235. *Id.* at 1109-10.
236. *Id.* at 1111 n.17.
237. *Id.* at 1110.
238. *Id.*
239. U.S. CONST. art. IV.
240. *See* The Paquete Habana, 175 U.S. 677, 700 (1900); *see also* United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820); Lopes v. Schroeder, 225 F. Supp. 292, 295 (E.D. Pa. 1963).

placed those opposed to the Vietnam War in the "hopeless situation" of being subject to two irreconcilable obligations.[241] On the one hand, the Nuremberg Principles proscribed complicity in war crimes and, on the other hand, domestic law required adherence to the dictates of national authority.[242] Falk quoted Mr. Justice Roberts to the effect that prosecution of individuals under such circumstances was violative of due process of law.[243] Mr. Justice Roberts observed that if a "citizen was constrained by two laws, or two orders having the force of law, and obedience to one would violate the other, to punish him for violation of either would deny him due process of law. And I had supposed that under these circumstances a conviction for violating one of the orders could not stand."[244] Falk concluded that those who opposed the war based upon international law, at a minimum, deserved to present their defense.[245] He contended that to "deny judicial redress in such circumstances is to shatter any belief in the capacity of our legal system to secure justice."[246]

There developed two distinct legal world-views: the practical law of the moment, applied by courts as a matter of expedience and practicality; and the romantic law of principle which embodied the aspirational values of constitutionalism and international law.[247] Still, it was considered important to continue to raise international law defenses as part of the effort to introduce international norms in domestic law. Historian Staughton Lynd, in 1967, confidently predicted in a little noticed essay that:

> Ultimately, as the law of nations comes to be written into national statutory law, civil disobedience on behalf of natural rights will decrease. Mankind will recognize that in a nuclear

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241. Richard Falk, *The Question of War Crimes: A Statement of Perspective, in* CRIMES OF WAR, *supra* note 226, at 3, 7.

242. *See id.*

243. *See id.* at 7-8.

244. Korematsu v. United States, 323 U.S. 214, 232 (1944) (Reynolds, J., dissenting).

245. Falk, *The Question of War Crimes: A Statement of Perspective, in* CRIMES OF WAR, *supra* note 226, at 8.

246. *Id.*

247. *See* Noam Chomsky, Paul Lauter & Florence Howe, *Reflections on a Political Trial, in* TRIALS OF THE RESISTANCE 74, 96 (1970). The appeal of international law arguments, ironically, was accentuated by the failure of courts to consider these claims. International law defenses and analyses were developed and refined without being tarnished by judicial modification or rejection. To some, the judiciary's silence testified to its persuasive power. International law also comported with the political analyses which animated the anti-war movement. The United States was viewed as an ethnocentric, aggressive superpower which was insensitive to the views and concerns of developing nations. The fact that America's conduct in Vietnam was contrary to international law symbolized the gap between America and the rest of the world. *Id.*

age nation-states are chronic criminals far more dangerous than the solitary practitioner of nonviolent civil disobedience. In the meantime, by saying "No," that disobeyer will seek to recall authority to common sense.[248]

## VI. Civil Disobedience in the 1970s and 1980s: The Judiciary and the Anti-Nuclear Weapons Movement

### A. *The Development of the Anti-Nuclear Movement*

The late 1970s and the decade of the 1980s witnessed a resurgence in civil disobedience. These acts of protest focused on issues ranging from abortion[249] to homelessness,[250] nuclear power plants[251] and United States involvement in Central America.[252]

One of the most visible campaigns of civil disobedience was undertaken by the so-called Sanctuary Movement.[253] By 1985, over 180 churches and synagogues in eleven cities had declared themselves as sanctuaries which pledged to shelter refugees fleeing war-torn Central America.[254] It was alleged that the United States government systematically distorted international legal standards and manipulated the domestic administrative process to deport these refugees back to their country of origin.[255] Once having been involuntarily returned, the refugees faced death, torture and imprisonment.[256] This immigration policy in regards to Central American refugees was alleged to be in violation of international standards, including the principle of non-refoulment which prohibits the deportation of refugees to a country in

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248. Staughton Lynd, *Civil Disobedience in Wartime*, 19 ME. L. REV. 49, 54 (1967).

249. *See* Comment, *Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic*, 48 U. CIN. L. REV. 501 (1979); Comment, *The Necessity Defense in Abortion Clinic Trespass Cases*, 32 ST. LOUIS U. L.J. 523 (1987). For a discussion of civil disobedience by those favoring abortion, see Lynn M. Paltrow, *Women, Abortion and Civil Disobedience*, 13 NOVA L. REV. 471 (1989).

250. *See* Griffin v. United States, 447 A.2d 776 (D.C. 1982).

251. *See* Comment, *Antinuclear Demonstrations and the Necessity Defense*, State v. Warshow, 5 VT. L. REV. 104 (1980); Comment, *Necessity: The Right to Present a Recognized Defense*, 21 NEW ENG. L. REV. 779 (1985-86).

252. *See* State v. Drummy, 557 A.2d 574 (Conn. 1989).

253. *See* RENNY GOLDEN & MICHAEL MCCONNELL, SANCTUARY: THE NEW UNDERGROUND RAILROAD (1986).

254. Douglas Colbert, *The Motion in Limine: Trial Without Jury a Government's Weapon Against the Sanctuary Movement*, 15 HOFSTRA L. REV. 6, 47 (1986).

255. *Id.* at 33-38.

256. GARY MACEOIN & NIVITA RILEY, NO PROMISED LAND: AMERICAN REFUGEE POLICIES AND THE RULE OF LAW 42-6 (1982).

which they face a well-founded fear of persecution.[257] The Sanctuary Movement compared itself to those in Nazi Germany who passively witnessed the slaughter of the Jews. Unlike the German churches, however, they vowed to assist those in need.[258]

In 1985, in *United States v. Elder*,[259] Jack Elder was convicted of unlawfully transporting three undocumented Salvadoran aliens.[260] The Court, although it recognized that Elder's activities were motivated by his Christian faith, concluded that his "do-it yourself immigration policy, gives away what is not his to give away — the Government's legitimate right to examine every person who enters the country so that the Government can make informed decisions on who will be admitted."[261] Thus, Elder, despite his religious motivation, may not override the government's exclusive authority and responsibility to control immigration policies and procedures.[262] The Court also dismissed Elder's claim that the Salvadorans, although illegally in the United States, were entitled to refugee status under international law, and thus, Elder was justified in offering them assistance.[263] The Court invoked the political question doctrine and ruled that it would not "interfere with political decisions which the United States as a sovereign nation chooses to make in the interpretation, enforcement, or rejection of treaty commitments which affect immigration."[264]

Anti-nuclear activists were motivated by the same religious impulse which animated those in the Sanctuary Movement. In 1982, eight peace activists entered General Electric's defense plant in King of Prussia, Pennsylvania "to perform a nonviolent enactment of beating swords into plowshares."[265] They hammered and dented the nose-cones of two re-entry components for Minuteman III ballistic missile systems

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257. IGNATIUS BAU, THIS GROUP IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES 48-74 (1985).

258. *See* Robert McAfee Brown, *Biblical Concepts of Idolatry, in* SANCTUARY: A RESOURCE GUIDE FOR UNDERSTANDING AND PARTICIPATING IN THE CENTRAL AMERICAN REFUGEES' STRUGGLE 55, 61 (G. MacEoin ed., 1985). For an overview of the sanctuary movement, see Charles Stastny, *Sanctuary and the State*, 11 CONTEMPORARY CRISIS 279 (1987).

259. 601 F. Supp. 1574 (S.D. Tex. 1985).

260. *Id.* at 1576.

261. *Id.* at 1578.

262. *Id.* at 1579.

263. *Id.* at 1581.

264. *Id.* at 1581. *See also* United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989); United States v. Merkt (II), 794 F.2d 950 (5th Cir. 1986); United States v. Merkt (I), 764 F.2d 266 (5th Cir.), *reh'g denied*, 772 F.2d 904 (1985).

265. *See* POWER OF THE PEOPLE, *supra* note 7, at 7.

and poured blood over drafting plans and equipment before being arrested.[266] The protesters' statement explained that in

> confronting GE, we choose to obey God's law of life, rather than a corporate summons to death . . . . In our action, we draw on a deep-rooted faith in Christ, who changed the course of history through his willingness to suffer rather than to kill. We are filled with hope for our world and for our children as we join this act of protest.[267]

The action of the "Plowshares Eight" inspired numerous other Plowshares actions.[268] In 1982, approximately 4,000 individuals are estimated to have been arrested for civil disobedience against nuclear weapons and facilities.[269] In 1984, in one of the first protests directed against an active nuclear missile, four Plowshares activists, including two Catholic priests, entered a nuclear silo in Missouri. The silo's 120-ton steel and concrete cover concealed a fifty-seven foot Minuteman III missile whose warhead was one-hundred times more powerful than the bomb dropped on Hiroshima. The four activists attempted to symbolically disarm the missile with a jackhammer, sledgehammer and other instruments.[270]

The protesters called their action "Silo Pruning Hooks" to remind others of the biblical injunction to "beat swords into plowshares and spears into pruning hooks."[271] They splattered blood on the silo and hung a banner on the fence which carried the Old Testament quotation: "Why do you do this evil thing? Our brother's blood cries out to me from the earth."[272] They were arrested while they conducted a communion service.[273] In the statement placed on the silo, the activists stated that Christians must act as peacemakers.[274]

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266. *Id. See Majority of 8*, THE NATION, May 7, 1990, at 621.

267. Daniel Berrigan, *Swords into Plowshares, in* SWORDS INTO PLOWSHARES: NONVIOLENT DIRECT ACTION FOR DISARMAMENT 54, 65 (Arthur J. Laffin & Anne Montgomery eds., 1987).

268. *See* Arthur J. Laffin, *A Chronology of the Plowshares Disarmament Actions: September 1980-September 1986, id.* at 32.

269. Samuel H. Day, Jr., *The New Resistance*, THE PROGRESSIVE, Apr. 1983, at 22-23.

270. NUCLEAR HEARTLAND: A GUIDE TO THE 1,000 MISSILE SILOS OF THE UNITED STATES 22 (Samuel H. Day ed., 1988).

271. *Id.*

272. *Id.*

273. *Id.*

274. The Silo Pruning Hooks, *Silo Pruning Hooks Action Statement, in supra* note 267, at 150.

> Faithful to that mandate, we have come today to begin the disarmament of one missile silo. In cutting the fence, we remove the barriers to peace symbolized there. In pouring the blood, we expose the murderous intent inherent in the weapon and in our government's war policies. In hammering the silo cover and instruments, we render temporarily useless a weapon of mass murder, and in damaging the warning system, we express our intent to place our trust in the Lord of Life rather than in "gods of metal" (*Leviticus* 19:4, TEV).[275]

As the "Silo Pruning Hooks" trial opened, Martin Holladay was arrested after scaling the fence surrounding another missile silo. Holladay splattered the silo lid with blood and spray-painted signs that read: "No More Hiroshimas" and "Disarm Or Dig Graves."[276] Between 1980 and 1987, seventy persons participated in eighteen Plowshares actions. Thirty-seven of these individuals were sentenced to prison terms ranging from between one to eighteen years.[277]

Another major group of nuclear activists is the "Missouri Peace Planting."[278] The peace planters reclaimed the rich agricultural land of Missouri for peaceful purposes and claimed that missile silos were "scattered in farmers' fields like razors in a loaf of bread."[279] They proclaimed that: "We can no longer stand silent or inactive while the government of the United States pursues policies inimical to the well-being of earth's inhabitants. We declare our independence from these policies and commit ourselves to resist them, as we are able, in an ongoing and non-violent manner."[280]

In the Pacific Northwest, activists affiliated with the Ground Zero Center for Nonviolent Action attempted a sea blockade to prevent the first Trident submarine, the *Ohio*, from entering Bangor submarine base.[281] The Ground Zero group then began to block the path of "White Trains" which delivered warheads to Bangor.[282] Other major civil dis-

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275. *Id.* at 151.

276. Richard Pollak, *Crime & Punishment*, MOTHER JONES, May 1987, at 21, 23. *See also* Shirley Swede, *Who Is Jean Gump?*, Z MAGAZINE, Oct. 1989, at 95.

277. Richard Pollak, *Witnessing For Peace*, THE NATION, May 2, 1987, at 567.

278. *See* SAMUEL H. DAY, JR., CROSSING THE LINE FROM EDITOR TO ACTIVIST TO INMATE — A WRITER'S JOURNEY 197-205 (1991).

279. Missouri Peace Planters, *Reclaiming The Land* (1987) (available in the author's files).

280. Missouri Peace Planters, *We Declare Our Independence* (1987) (available in the author's files).

281. POWER OF THE PEOPLE, *supra* note 7, at 229.

282. *Id.* at 231-32.

obedience campaigns were directed against the Rocky Flats nuclear weapons plant outside Denver, Colorado;[283] the University of California's Lawrence Livermore and Los Alamos laboratories;[284] nuclear weapons testing, development and storage sites;[285] and the United Nations missions of the five major nuclear powers, where approximately 1,665 people were arrested in a mass action in June 1982.[286]

These actions were implicitly endorsed by various religious bodies and denominations which condemned nuclear weapons.[287] Archbishop Raymond Hunthausen, Bishop of Seattle, called upon people to refuse to pay fifty percent of their taxes in an act of nonviolent resistance to "nuclear murder and suicide."[288] He stated that he preferred to view what he advocated as "obedience to God" rather than civil disobedience to secular authority.[289] It is not "the way of the cross which is in question in the nuclear age," he stated, "but our willingness to follow it."[290] Shortly thereafter, Bishop Leroy T. Matthiesen, Bishop of Amarillo, Texas, called upon workers at the near-by Pantex plant to consider quitting their jobs manufacturing nuclear weapons.[291] He urged individuals involved in the production and stockpiling of nuclear bombs to "consider what they are doing, to resign from such activities and to seek employment in peaceful pursuits."[292] In 1983, the American Catholic Bishops expressed "profound skepticism" about the "moral acceptability of any use of nuclear weapons;"[293] and extended support for those committed to Christian nonviolence and pacifism.[294] As part of this anti-nuclear movement, numerous local communities adopted ordinances which declared their communities nuclear-free zones.[295]

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283. *Id.* at 230.

284. *Id.* at 230, 237.

285. *Id.* at 237-38.

286. *Id.* at 236.

287. *See* NUCLEAR DISARMAMENT: KEY STATEMENTS OF POPES, BISHOPS, COUNCILS AND CHURCHES (Robert Heyer ed., 1982) [hereinafter KEY STATEMENTS].

288. Archbishop Raymond Hunthausen, *Address at the Pacific Northwest Synod of the Lutheran Church in America* (July 12, 1981), *id.* at 131, 136.

289. *Id.*

290. *Id.*

291. Bishop Leroy T. Matthiesen, *Nuclear Arms Buildup* (Aug. 21, 1981), *id.* at 155-56.

292. *See id.*

293. NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *Pastoral Letter on War and Peace — The Challenge of Peace: God's Promise and Our Response, reprinted in* JIM CASTELLI, THE BISHOPS AND THE BOMB 185, 243 (1983).

294. *Id.* at 224.

295. *See* William N. Weaver, Fay Clayton, Brian D. Roche, Karl Krause, Marguerite M. Lloyd & Thomas J. Bumonte, *The Legality of the Chicago Nuclear Weapon Free Zone Ordinance*, 17 LOY. U. CHI. L.J. 553 (1986).

In September 1987, the government sent a clear message to activists that it would not accommodate or tolerate campaigns of civil disobedience which interfered with military operations. In June 1987, peace groups announced a series of "Nuremberg Actions" designed to call attention to and to halt the United States' violation of international law in Central America. In one of the first "Nuremberg Actions," demonstrators blocked the path of a train carrying arms bound for Central America. The train failed to stop or slow down and ran over Brian Willson, a Vietnam veteran and prominent activist.[296] Willson lost both legs in the accident. The United Deputy District Attorney of Contra Costa County blamed the demonstrators for the mishap.[297] Undaunted, Willson issued a public statement from his hospital bed following the accident:

> I'd like people to take responsibility to stop all the killing that is being done in our name. Each person's heart will tell them what is the best form in which to do that. Only we the people can stop the madness. Hopefully we can get enough people to stop the arms shipments . . . and then it will spread to the rest of the country. Hopefully no one else will have to lose their legs — but maybe they will.[298]

### B. *The Anti-Nuclear Movement and the Courts*

Anti-nuclear activists generally attempted to justify their protests on the basis of international law and the Nuremberg Principles. Activists, with their religiously-based morality, were attracted to international law's transcendent universalism and utopian visionary character. Courts, however, as in the 1960s, rejected international law arguments.

Defendants argued that, under the Nuremberg Principles, they had the privilege, if the not the duty, to violate domestic law to protest or halt violations of international law. Federal courts ruled that the Nuremberg Principles only imposed criminal liability on those engaged in acts violative of international law. Such individuals had the duty to refuse to commit such acts and, if necessary, were privileged to violate domestic law. In contrast, anti-nuclear activists were not required, under domestic law, to commit acts violative of the Nuremberg

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296. *See* James Ridgeway, *Blood on the Tracks*, VILLAGE VOICE, Sept. 15, 1987, at 36.

297. *Train Crew Is Cleared in Injury of a Protester*, N.Y. TIMES, Sept. 24, 1987, at 10, col. 1.

298. *Attempted Murder*, GUARDIAN, Sept. 16, 1987, at 1, 9, col. 2.

Principles. They did not face international criminal liability and, thus, could claim no privilege or duty to violate domestic law.[299]

The judiciary ruled that defendants "stand [the Nuremberg Principles] on [their] head in arguing that a person charged with no duty or responsibility by domestic law may voluntarily violate a criminal law and claim that violation was required to avoid liability under international law."[300] It would be "a great extension of [Nuremberg] to hold that persons who remain passive, neither aiding nor opposing their governments' international violations, were war criminals merely by virtue of their citizenship or residence in their given countries."[301] If failure "to object does not make one complicate, persons such as the defendants here are in no danger of sanction under international law and can claim no privilege to violate domestic law to protect themselves."[302] Courts concluded that to recognize the privilege of citizens to violate domestic law to uphold international law would "foment an anarchical result."[303]

The judiciary pointed out that only those individuals who are able to demonstrate a direct harm to themselves possess standing to bring a civil action against a governmental policy or program.[304] The courts accused the defendants of attempting to manipulate the judicial system by deliberately flouting the law to litigate the international legality of unrelated governmental programs.[305] Judges rejected this effort to transform the laws which penalize trespass, damage to property and disorderly conduct into political offenses;[306] and refused to be placed in the untenable position of reviewing the political branches exercise of their constitutionally exclusive powers.[307]

A significant development in 1987 was a litigation manual authored by Professor Francis Boyle of the University of Illinois on behalf of the Lawyers Committee on Nuclear Policy.[308] Boyle argued that lawyers should abandon their reliance on "separate and independent"

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299. *See* United States v. Kabat, 797 F.2d 580, 590 (8th Cir. 1986); United States v. Montgomery, 772 F.2d 733 (11th Cir. 1985).

300. 772 F.2d at 738.

301. 797 F.2d at 590.

302. *Id.*

303. People v. Weber, 208 Cal. Rptr. 719, 722 (1984).

304. United States v. May, 622 F.2d 1000, 1009 (9th Cir. 1980).

305. *Id.*

306. *Id.* at 1010.

307. *Id.* at 1009.

308. FRANCIS A. BOYLE, DEFENDING CIVIL RESISTANCE UNDER INTERNATIONAL LAW (1987).

international law defenses.[309] Instead, Boyle urged lawyers to integrate international law defenses into traditional common law and statutory defenses.[310] Boyle suggested that to defend those who engaged in acts of nonviolent resistance against United States nuclear weapons policies and international law, it is relevant to establish 1) defenses of compulsion, necessity, choice of evils, prevention of a crime or public catastrophe, 2) measures otherwise authorized by law, and 3) defense of self and others.[311]

Boyle termed this amalgam of domestic and international law "civil resistance."[312] He argued that civil resisters engaged in justified acts designed to halt ongoing international illegality by the government. Thus, Boyle brilliantly pointed out that when viewed through the prism of international law, it was the civil resister who acted to uphold the rule of law, and it was the government which engaged in criminal behavior. He admonished lawyers that they "must never refer to your case as one of civil disobedience since such a characterization assumes the guilt of your clients."[313]

A major contribution to the integration of international and domestic law was made by Aldridge and Stark, who, in a seminal article, suggested international law arguments could be combined with the domestic necessity defense to defend civil resistance against nuclear weapons.[314] The necessity defense justified a violation of law to avoid a greater harm. As developed by contemporary American courts, there are four requirements for the defense of necessity:

> (1) the defendant is faced with a clear and imminent danger, not one which is debatable or speculative; (2) the defendant can reasonably expect that his action will be effective as the direct cause of abating the danger; (3) there is no legal alternative which will be effective in abating the danger; and (4)

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309. *Id.* at 23.

310. *Id.*

311. *Id.* at 24.

312. *Id.* at 5, 17.

313. *Id.* at 17. Boyle emphasized that civil resisters were distinct from civil disobedients. The former were engaged in justified actions, while the latter admitted their guilt and primarily were concerned with appealing to conscience and to public opinion. *Id.*

314. Robert Aldridge & Virginia Stark, *Nuclear War, Citizen Intervention, and the Necessity Defense*, 26 SANTA CLARA L. REV. 299 (1986). For an exposition on how the Nuremberg Principles might be integrated into the common law claim of defense of others, see Arthur W. Campbell, *The Nuremberg Defense to Charges of Domestic Crime: A Non-Traditional Approach for Nuclear-Arms Protestors*, 16 CAL. W. INT'L L.J. 3 (1986).

> the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the value at issue.[315]

The necessity or choice of evils defense rests upon the utilitarian ground that the law should not punish those who act to avoid a greater harm than is occasioned by their violation of the law. The application of criminal law in such situations is thought to serve no deterrent function, and punishment of those who acted out of "necessity" would reduce respect for the law.[316]

Defendants increasingly began to rely on the necessity defense to justify their protests against nuclear weapons. They typically argued that: (1) it was reasonable to believe the use of such weapons was illegal under international law, and their deployment would cause global destruction; (2) the harm created by the defendants' actions was of lesser consequence than that which would result from the use of nuclear weapons; (3) the United States deployed nuclear weapons against the Japanese and approached the brink of initiating a nuclear attack on numerous other occasions (it is, therefore, reasonable to conclude, based on contemporary defense plans, that there is an imminent threat that such weapons will be used in the immediate future); (4) the acts of civil resistance historically served as a catalyst for needed social change in the United States (it is, therefore, reasonable to believe that such acts can eradicate the nuclear threat); and (5) the use of the necessity defense to justify protests against nuclear weapons has not been statutorily excluded. Defendants typically testify in their own behalf. In addition, they usually call experts on international law, defense policy, history of social movements, and those who have experienced or studied nuclear terror to testify. These experts offer testimony which supports the reasonableness of the defendants' beliefs.[317]

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315. Commonwealth v. Brugmann, 433 N.E.2d 457, 461 (1982). The early application and extension of the necessity defense to justify prison escapes suggested that the defense might be invoked in the future by those claiming the right to violate the law deliberately in order to protest, call attention to, or to bring about a change in social conditions or political policies. *See* People v. Lovercamp, 118 Cal. Rptr. 110 (1974). The recognition of the defense of necessity for those escaping from prison was an express effort by the judiciary to promote prison reform. *See* People v. Harmon, 220 N.W.2d 212, 215 (1974).

316. *See generally* Erica Luckstead, *Choice of Evils Defenses in Texas: Necessity, Duress, and Public Duty*, 10 AM. J. CRIM. L. 179, 181 (1982).

317. *See* Aldridge & Stark, *supra* note 314.

Prosecutors countered this new, sophisticated defense with several tactics. Various civil resisters were zealously prosecuted to deter others from engaging in such activities. For instance, the "Plowshares Pruning Hooks" defendants were indicted and convicted of sabotage.[318] However, the standard practice in civil resistance cases is to reduce or drop charges to prevent defendants from claiming the right to a jury trial.[319] Prosecutors also pioneered the application of the motion *in limine* in civil resistance cases. This motion was used to obtain pre-trial rulings which barred defendants from relying upon various defenses and arguments at trial and enabled the government to discover defense strategies and witnesses.[320] In addition, prosecutors and police agencies engaged in ethically questionable practices, which included infiltration of religious groups by informants.[321] In other instances, the government was accused of serious misconduct and wrongdoing in pursuing prosecutions against political dissidents.[322]

Nevertheless, civil resisters managed to achieve a number of significant victories at the state trial court level.[323] Trial court decisions which upheld defendants' reliance upon the necessity defense generally are unreported and have limited precedential value.[324] Their major importance is to inspire others to engage in acts of civil resistance and to invoke the necessity defense.[325] The importance of these victories at the trial court level is further diminished by appellate, state and federal courts which uniformally rejected defendants' reliance upon the necessity defense and affirmed their convictions.[326] Thus, the only generally available written judicial discussions on application of the necessity defense in cases which involve civil resistance to nuclear

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318. 797 F.2d at 584-88. The government singled out high profile defendants for prosecution in Selective Service cases, see Wayte v. United States, 470 U.S. 598 (1985).

319. *See* BOYLE, *supra* note 308, at 18. *See generally* Duncan v. Louisiana, 391 F.2d 145 (1968). For the possible abuse of the denial of jury trials for "petty offenses," see Frank v. United States, 395 U.S. 147, 153 (1969) (Warren, C.J., dissenting).

320. *See generally* Douglas Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 271 (1987). *See also* Colbert, *supra* note 254, at 5.

321. 883 F.2d at 697-705.

322. *See* United States v. Banks, 383 F. Supp. 389 (D.S.D. 1974) (judgment of acquittal based upon governmental misconduct).

323. *See* Aldridge & Stark, *supra* note 314, at 316-26.

324. Joel H. Levitin, *Putting the Government on Trial: The Necessity Defense and Social Change*, 33 WAYNE L. REV. 221, 1224 (1987).

325. *Id.*

326. *Id.* at 1223.

weapons reject its applicability.[327] The importance of these cases transcends the issue of the justifiability of protests against nuclear weapons. They establish principles which control the disposition of future claims by individuals who are justified to act to prevent internationally illegal and potentially harmful policies of the United States government.

### C. *The Necessity Defense*

The judiciary's mechanical application of the necessity defense in nuclear protest cases is reminiscent of the analysis employed by nineteenth century judges to justify decisions which upheld the institution of slavery.[328] The appellate decisions which rejected the use of the necessity defense concluded that a nuclear exchange is not sufficiently immediate or imminent to invoke the necessity defense; the protesters' acts are not calculated to eliminate the threatened harm; there are available legal channels through which to change government policy; and Congress precluded reliance upon the necessity defense in protests against nuclear weapons.[329]

Courts have conceded that a nuclear war is a more serious harm than the illegal, but generally peaceful actions of anti-nuclear protesters.[330] However, courts have ruled that the threat of nuclear war is not imminent and, thus, does not create a necessity for individuals to act to prevent it from occurring. In *People v. Weber*,[331] the defendants trespassed onto and blocked sidewalks and streets in front of General Dynamics and the U.S. Navy Submarine Base at Ballast Point, California.[332] Judge Milkes rejected the defendants' argument that their actions were required to avert a nuclear war. He concluded that "necessity is not a cause or a potentiality. It must be articulable to an immediate, imminent fear and compulsion."[333]

Since the threat of nuclear war is not imminent, Judge Milkes noted that the defendants had available, legal avenues of redress.[334]

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327. *Id.* at 1224.

328. *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975). Necessity arguably is a flexible doctrine. *See* Miller v. Monsen, 37 N.W.2d 543, 545 (Minn. 1949), *cited* in Aldridge & Stark, *supra* note 314, at 310.

329. *See infra* notes 331-53.

330. United States v. Quilty, 741 F.2d 1031, 1033 (7th Cir. 1984).

331. 208 Cal. Rptr. 719.

332. *Id.* at 720.

333. *Id.* at 721. Judge Milkes recognized that some view a nuclear holocaust as a matter of survival. But, in an ambiguous retort, he wrote that "it is equally arguable that hunger, pain and shelter are to those in need, similarly issues of survival." *Id.*

334. *Id.*

The judiciary, in the anti-nuclear weapons cases, stressed that necessity is a response to an emergency situation and may not be invoked by defendants who have the luxury to select from alternative courses of action.[335] The fact that defendants are impatient with "less visible and more time-consuming alternatives" does not constitute a legal necessity to act.[336] In *United States v. Quilty*,[337] the defendants entered the Rocky Island Arsenal and conducted an anti-nuclear prayer service.[338] The Seventh Circuit Court of Appeals determined that the defendants had legal avenues available to express their opposition to nuclear weapons. It noted that there "are thousands of opportunities for the propagation of the anti-nuclear message: in the nation's electoral process; by speech on public streets, in parks, in auditoriums, in churches and lecture halls, and by the release of information to the media, to name only a few."[339]

Defendants, in the view of the judiciary, not only possess reasonable legal alternatives through which to articulate their point of view, they also may select a means not calculated to avert a nuclear holocaust. In *United States v. Montgomery*,[340] eight members of the "Pershing Plowshares" group entered the Martin Marietta Aerospace Corporation defense plant in Orlando, Florida. They hammered and poured blood onto both nuclear and conventional missile launchers and components belonging to the United States Army, hung banners, and distributed pictures and documents which condemned nuclear weapons. They remained on the premises singing and praying until they were arrested for conspiracy and destruction of Army policy.[341] The Court ruled that the defendants "could not hold a reasonable belief that a direct consequence of their actions would be nuclear disarmament."[342] In *Commonwealth v. Berrigan*,[343] the appellees entered a General Electric plant in King of Prussia, Pennsylvania, destroyed missile components with hammers, poured human blood on the premises and caused some twenty-eight thousand dollars in property damage.[344] The plant only produced nuclear shell casings, and the

335. United States v. Dorrell, 758 F.2d 427, 431 (9th Cir. 1985).
336. *Id.*
337. 741 F.2d 1031 (7th Cir. 1984).
338. *Id.* at 1033.
339. *Id.*
340. 772 F.2d at 733.
341. *Id.* at 735.
342. *Id.* at 736.
343. 501 A.2d 226 (Pa. 1985).
344. *Id.* at 228.

Supreme Court of Pennsylvania ruled that the "process of manufacture is so far removed from the ultimate question of use as to be pure conjecture and speculation and presents, at most, a non-imminent danger."[345] Thus, the appellees' actions could not "under any hypothesis reasonably be expected to be effective in avoiding the perceived public disaster of a nuclear holocaust."[346]

The Pennsylvania Supreme Court also noted that since the manufacture of nuclear shell casings for nuclear warheads is legal, "it is the type of conduct to which the Legislature has spoken in excluding the justification defense."[347] Judge Wieand, concurring and dissenting in the Superior Court decision in *Berrigan*,[348] concluded that the "law pertaining to justification as a defense to criminal conduct does not permit a court or jury to overrule a properly made Congressional determination regarding the use of nuclear power for national defense."[349]

Courts concluded that since the defendants failed to satisfy one or more of the elements of the necessity defense, it was unnecessary to determine the international legality of nuclear weapons. As a result, appellate courts generally affirmed trial court rulings which excluded the testimony of international law experts.[350] The judiciary emphasized that it was unwilling to permit defendants to raise a criminal defense which would permit them to litigate indirectly the international legality of nuclear weapons. In *Kabat*,[351] the Seventh Circuit Court of Appeals stated that the defendants "would have lacked standing to bring a private suit challenging U.S. nuclear weapons policies, and they cannot by first committing crimes avoid the requirement that to invoke judicial authority they show an injury beyond that shared by all citizens."[352]

In general, the judiciary has harshly penalized civil resisters. Even sympathetic judges have explained that the moral potency of the defendants' cause and motivation does not "alter the duty" of the courts

345. *Id.* at 230.

346. *Id.*

347. *Id.* at 230 n.5.

348. Commonwealth v. Berrigan, 472 A.2d 1099, 1118 (Pa. 1984) (Wiend, J., concurring and dissenting).

349. *Id.* at 1124.

350. United States v. Cassidy, 616 F.2d 101-02 (4th Cir. 1979). *See generally* United States v. Komisaruk, 885 F.2d 490, 496-97 (9th Cir. 1989); United States v. Allen, 760 F.2d 447, 453-54 (2d Cir. 1985); United States v. Patz, 584 F.2d 927, 931 (9th Cir. 1978).

351. 797 F.2d at 580.

352. *Id.* at 592.

to enforce the law.[353] In *Weber*,[354] a California appellate court remanded the case to the trial court with directions to set aside the six-month sentences meted out to three of the defendants convicted of trespass and obstruction of a street or sidewalk.[355] The trial court judge stated that he viewed the defendants misdemeanor protests as constituting the felonious and immoral "theft" of the time of the court, the police and General Dynamics.[356] The trial court judge concluded by warning the defendants that "[f]or war the price is often times death."[357] In *Kabat*,[358] the four members of "Silo Pruning Hooks" were sentenced to terms which ranged from eight to eighteen years in prison plus other penalties. Judge Bright, in his dissent,[359] observed that

> the protest activities in this case injured no one and did not, and could not damage the missile capability at the missile site. The sentences are akin to penalties often imposed on violent criminals, such as robbers and rapists, or on those guilty of crimes considered heinous, such as drug dealers.[360]

### D. *Reformulation of the Necessity Defense*

Those who engaged in traditional Gandhian civil disobedience, openly violate the law, accept their guilt and accept their punishment. Civil resisters who invoke the necessity defense, in contrast, claim their formally illegal acts of protest are legally justifiable. Thus far, appellate courts have ruled the necessity defense to be inapplicable, as a matter of law, and, therefore, does not justify acts of civil resistance against nuclear weapons.[361] However, the interests of democracy

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353. 741 F.2d at 1034-52.

354. 208 Cal. Rptr. at 719.

355. *Id.* at 723. The Superior Court concluded that the sentencing Judge's equation of "three thefts together with the inconvenience to the court as equaling felonies was an improper standard for sentencing." *Id.*

356. *Id.*

357. *Id. See also* State v. Wentworth, 395 A.2d 858, 865 (1978) (conviction for criminal trespass at a nuclear power plant). Harsh sentences are required to deter morally motivated defendants.

358. 797 F.2d at 580.

359. *Id.* at 592.

360. *Id.* at 594; *see generally* United States v. Lowe, 654 F.2d 562, 568-69 (9th Cir. 1981) (Boochever, J., commenting on terms of probation which restricted the appellants First Amendment rights).

361. Francis A. Boyle, *International Law, Citizen Resistance, and Crimes by the State — The Defense Speaks*, 11 HOUS. J. INT'L L. 45, 350 (1989).

and public accountability call for a relaxation of necessity defense requirements to accommodate nonviolent, proportionate acts of civil resistance directed against large-scale violations of human rights and threats to human life.

The judiciary's rigid approach to the necessity defense overlooks the fact that the necessity defense was intended to be a flexible doctrine which could be employed to mitigate the harshness of the criminal law.[362] The United States Supreme Court, in *United States v. Bailey*,[363] recognized the fluid nature of the defense when, in attempting to explain the precise elements of the defense, it observed "we find ourselves in a position akin to that of the mother crab who is trying to teach her progeny to walk in a straight line, and finally in desperation exclaims: 'Don't do as I do, do as I say.'"[364]

The imminence test, as applied by the courts, virtually precludes application of the necessity defense in cases of nonviolent, proportionate political protest. In determining "imminence," courts should not require instantaneous harm. Imminence should be determined by balancing the severity of the harm and likelihood of its occurrence against the harm created by the defendant's criminal act. The more severe the potential harm, the less strictly the imminence standard should be interpreted. The necessity defense should be given a particularly liberal interpretation when human life is threatened and, in such cases, should be sufficient when the harm is reasonably foreseeable.[365] A nuclear exchange, arguably, is reasonably likely given contemporary arsenals and strategic doctrines; and the devastation which accompanies a nuclear war is greatly in excess of the harm caused by acts of civil resistance. Human rights violations, such as those in Latin America, are ongoing and severe and should satisfy the harm prong of the necessity defense. Although such violations are not strictly immediate, it should be sufficient that the protest was directed against a site which symbolically represented the harm they sought to alleviate.[366]

The essence of the necessity defense is to balance the harm sought to be averted against the harm created by the defendant's criminal act. The central question is whether a jury will ratify the defendant's

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362. *See* Hale v. Lawrence, 21 N.J.L. 14, 729, *aff'd sub nom.*, American Print Works v. Lawrence, 23 N.J.L. 90 (1851).

363. 444 U.S. 392 (1980).

364. *Id.* at 397.

365. *See* Aldrich v. Wright, 53 N.H. 398, 403 (1873).

366. *See generally* Lawrence P. Tiffany & Carl A. Anderson, *Legislating the Necessity Defense in Criminal Law*, 52 DENV. U. L. REV. 39, 854 (1975).

choice of values — do they view the social utility of the defendant's action as outweighing the harm sought to be averted? The imminence requirement was designed to insure that the defendant acted in good faith to avoid a concrete, anticipated evil. In cases of severe, foreseeable public evils, the potential harm is clear. Imminence should not be interpreted as a rigid threshold requirement which prevents political protesters from presenting their grievances to a jury of their peers. The social costs of inaction may far outweigh incidental harm created by nonviolent acts of civil resistance.[367]

The case for relaxing the imminency requirement is even more compelling in instances where the evil the protesters are attempting to remedy or prevent is reasonably believed to violate international law. In such cases, protesters act to uphold rather than violate the law.[368] The fact that defendants are to face criminal charges guarantees the necessary degree of adversarialness to satisfy the standing requirement.[369] In addition, it is unlikely that a jury's general verdict in a criminal case will embarrass or interfere with United States foreign policy. An acquittal merely will establish that the jury ratified the reasonableness of the defendant's actions.[370] In any event, while the choice between competing foreign policies is a political decision, the legality of such policies is subject to judicial determination.[371]

Courts also ruled that defendants, as a matter of law, possess available, effective legal alternatives. The existence of such alternatives should be established as a matter of fact, rather than mechanically determined to exist as matter of law. Unfortunately, our textbook views of democracy often do not fully correspond to social reality. Decisions, particularly in the area of foreign and defense policy, often are undertaken with limited public debate or consultation.[372] In addition, citizens often lack the resources, time and skill to impact public policy. A lack of success may indicate their views have not been heard, rather than rejected. Clearly, another letter always can be written, an additional vote cast or demonstration organized. It should be sufficient, as a threshold requirement, that individuals are able to dem-

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367. *See generally* Glanville Williams, *The Defense of Necessity*, 6 CURRENT LEGAL PROBS. 216, 223-24 (1953).

368. Boyle, *supra* note 361, at 350.

369. Frank Lawrence, *The Nuremberg Principles: A Defense for Political Protesters*, 40 HASTINGS L.J. 97, 424 (1989).

370. *Id.* at 419-21.

371. *Id.* at 421.

372. *See generally* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran Contra Affair*, 71 YALE L. REV. 1071 (1985).

onstrate a history of good faith, legal efforts to reform the policy which is the focus of their protests. This would attest to the sincerity of the defendant's beliefs and actions. It is not unreasonable to conclude that individuals, at some point, have exhausted their avenues of legal redress.[373]

The requirement that there is a direct causal relationship between the defendant's act and harm to be averted virtually insures that the necessity defense is unavailable to those who engage in nonviolent acts of criminal protest.[374] Acts of nonviolent protest historically have served as a catalyst for social change in the United States.[375] They focused attention on issues, provoked debate, influenced public opinion and mobilized popular action. Thus, the action of protesters, in conjunction with the actions of others, may lead to social change.[376] Obviously, the more complex and serious the harm, the less likely it is that an individual's act of protest will be successful in averting the harm. To require success is to preclude the use of the necessity defense in the case of large-scale threats. It would appear reasonable to consider the act requirement of the necessity defense to be satisfied by public, nonviolent acts of protest, reasonably calculated to direct public attention to a situation reasonably perceived to pose a significant social harm.

The legislative preemption argument also has been mechanically applied to prevent defendants from relying upon the necessity defense. Courts should require a plain and explicit legislative statement which precludes the use of the necessity defense before making such a determination. Such a legislative purpose should not be implied from the mere fact that the legislature adopted a particular legislative scheme or public policy.[377] In any event, a defendant has an inherent right to rely upon the defense of necessity to protect human life, and this right cannot be abrogated by legislative determination.[378]

By refusing to permit defendants to rely upon the necessity defense, courts are denying defendants the opportunity to have the justifiability of their actions evaluated by a jury of their peers. Professor

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373. Aldridge & Stark, *supra* note 314, at 334-35. For an extreme version of the exhaustion requirement, see 447 A.2d at 777-78 (defendants did not exhaust all alternatives prior to trespassing into churches and opening the doors to the homeless).

374. Peter Weiss & Anne Simon, Connecticut v. Drummy: *Brief of Amici Curiae*, 45 GUILD PRAC. 36, 42 (1988).

375. 797 F.2d at 592, 601 (Bright, J., dissenting).

376. 472 A.2d at 1115 (Spaeth J., concurring).

377. *See generally* Commonwealth v. Capitolo, 471 A.2d 462, 475-79 (Pa. 1984).

378. *See* Williams, *supra* note 367, at 224.

Francis Boyle argues that those who engage in putative criminal acts of nonviolent resistance have a constitutional right to rely on those statutory and common law defenses that are generally made available to other criminal defendants.[379] Boyle points out that even alleged murderers, robbers, and rapists are entitled to the "presumption of innocence, a vigorous defense, and all the protections of due process of law. Society's standards and expectation should be no less for those who have engaged in nonviolent resistance activities designed to prevent the ongoing commission of international and domestic crimes. . . ."[380] In *Bailey*,[381] Justice Blackmun noted in his dissent[382] that:

> Ruling on a defense as a matter of law and preventing the jury from considering it should be a rare occurrence in criminal cases . . . . The jury is the conscience of society and its role in a criminal prosecution is particularly important . . . . The case for recognizing the duress or necessity defenses is even more compelling when it is society, rather than private actors, that creates the coercive conditions. In such a situation, it is especially appropriate that the jury be permitted to weigh all the factors and strike the balance between the interests of prisoners and that of society. In an attempt to conserve the jury for cases it considers truly worthy of that body, the Court has ousted the jury from a role it is particularly well suited to serve.[383]

## VII. Civil Resistance in the Next Decade: A Daring New Perspective

The judiciary, then, should recognize the necessity defense for civil resisters who act in a nonviolent, proportionate fashion to defend their own human rights and the human rights of others. Defendants who seek to rely upon this right of "political self defense" should be required to demonstrate:[384] 1) a reasonable belief that a severe harm or evil is

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379. Boyle, *supra* note 361, at 350.

380. *Id.* at 351.

381. 444 U.S. at 392.

382. *Id.* at 419.

383. *Id.* at 435. *See also* Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. Crim. L. & Criminology 289, 296 (1974).

384. *See* M. Cherif Bassiouni, *Ideologically Motivated Offenses and the Political Offenses Exemption in Extradition — A Proposed Juridical Standard for an Unruly Problem*, 10 DePaul L. Rev. 217, 255 (1969).

imminent or reasonably foreseeable. The fact that a harm or evil is reasonably believed to be violative of domestic or international law is relevant in the determination of the severity of the harm or evil; 2) the harm created by the defendant's action is reasonably believed to be less than that which results from the harm or evil that they are attempting to avert. However, injury to others is never justified; 3) the defendant's act is reasonably believed to be calculated to directly or indirectly avert the harm. The defendant's action is not required to completely prevent the harm which they are attempting to prevent; 4) the defendant must reasonably believe there are no available, effective alternative courses of legal redress. The fact that the defendant is able to demonstrate a history of good faith efforts to change the policy which is the object of their protest is sufficient to satisfy this element of the defense; and 5) the legislature has not explicitly precluded the necessity defense in this specific situation.

The judiciary, by denying defendants the opportunity to rely upon the necessity defense, implicitly adopted a political stance in support of the *status quo*. It has been argued that the United States, which was founded by revolution, replaced the old and discarded doctrine of the divine right of kings with a new theory. This theory posits that "the self-correcting procedures under the constitution obviate the need, and therefore abolish the citizens' right to resort to extra-legal measures of reform."[385] In societies, such as the United States, which view themselves as having "discovered the ideal utopian socio-political order or the ideal procedures for attaining such order, the political offender has no redeeming social value. He appears from time to time merely as an apparition to challenge the perfection of those in power."[386] Despite the judiciary's tendency to dismiss civil resisters as self-indulgent moralists, the fact remains that when permitted to rely upon the necessity defense, most have been acquitted by a jury of their peers.[387]

The interests in democratic debate and decision-making dictate that courts flexibly interpret the necessity defense and permit the defense to be invoked by political protesters who nonviolently attempt to protect human rights. A humane, democratic society should resolve moral and political conflict through dialogue and debate and practice individualized justice. Professor Laurence Tribe argues that when con-

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385. Nicholas N. Kittrie, *Patriots and Terrorists: Reconciling Human Rights With World Order*, 13 CASE W. RES. J. INT'L L. 291, 295 (1981).

386. *Id.*

387. Boyle, *supra* note 361, at 352.

fronted with cases involving controversial issues over which there is no clear social consensus, courts should adopt procedures which facilitate a full debate.[388] Tribe observes that it

> would not seem a usurpation for courts to identify particular areas of moral and social flux; to hold that these areas are not characterized by normative agreement sufficient to warrant their continued codification in the form of binding and determinate rules; and to insist as a matter of due process in the formation (formulation and application) of law, that disputes in such areas must be resolved without resort to mechanical rules.[389]

It is ingenious to argue that judicial relaxation of the necessity defense, in cases involving nonviolent, proportionate action in defense of human rights, will lead to anarchy.[390] Those concerned about rampant lawlessness might best devote their energies to controlling violent crime and international aggression. Few individuals have sufficient moral commitment to submit voluntarily to the costs, pressures and demands of arrest and trial, and risk rejection of the necessity defense and a possible criminal conviction.[391] It must be remembered that those political protesters who invoke the necessity defense do not assert the prerogative to obey whatever laws they believe are "just." They act to compel the government to abide by its constitutional obligation to obey the dictates of international law. Civil resistance is necessary to counter the ideological indoctrination and psychic numbing which helps to account for societal indifference towards large scale violations of human rights.[392] In many cases, civil resisters act to protect the human rights of those abroad who do not have access to political avenues to redress their grievances.[393] The benefits of civil resistance far outweigh

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388. Lawrence Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 311 (1975).

389. *Id.* at 310.

390. *See* Comment, *Political Protest and the Illinois Defense of Necessity*, 54 U. CHI. L. REV. 1070, 1089-91 (1987).

391. There are powerful psychological and sociological factors which compel most people to quietly conform. *See* R. Lance Shotland & Lynne L. Goodstein, *The Role of Bystanders in Crime Control*, 40 J. SOC. ISSUES 9 (1984).

392. *See* ROBERT JAY LIFTON & ERIC MARKUSEN, THE GENOCIDAL MENTALITY: NAZI HOLOCAUST AND NUCLEAR THREAT (1990).

393. *See* State v. McCann, 541 A.2d 75 (Vt. 1987) (protest against United States policy in Central America).

the incidental social costs created by their activities.[394] It only will enhance respect for the legal system if courts, rather than defer to the political branches of government, provide a forum for the articulation of defendants' factual and legal contentions.[395]

The adjudication of civil resistance cases can be used to transform the courtroom into a forum for a "teach-in," a "judicial town-meeting" on the issues of the day. The rules of evidence and standards of judicial decorum will guarantee the orderly and effective presentation of opposing views. These judicial "town-meetings" can be used to educate the public, to encourage democratic debate, and to measure popular opinion on public policy questions.

The judiciary, despite fears of politicalization, is accustomed to litigating political issues. In fact, under international extradition treaties, the federal judiciary has jurisdiction over the determination of political offender status. Those who qualify as political offenders, in accordance with the terms of virtually all bilateral extradition treaties, may not be extradited to stand trial in the requesting country.[396] In 1981, for instance, a federal magistrate determined that a member of the Irish Republic Army charged with attempted murder of a British soldier in Northern Ireland was a political offender.[397] The political offense exception, in part, is based on a recognition that individuals have an inherent right to resort to political activism, including the limited use of violence, to achieve political change.[398] Thus, the political offense exception reflects a "modern consensus" that political crimes are distinct from and possess greater legitimacy than do common crimes.[399] As a result, political offenders are to be accorded special protections and are not to be returned to stand trial in a country where they face the possibility of persecution or an unfair judicial proceeding.[400] It is paradoxical that the United States provides

394. The rationales for the law not imposing a duty to rescue, for the most part, are administrative — the social costs of imposing a duty on the inept and unskilled and the risk of placing third parties in peril. These costs do not arise in cases of civil resistance. *See* Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980).

395. For an advocacy of an active judicial role in the enforcement of international law, see Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071 (1985).

396. *See generally*, Valerie Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo American Jurisprudence*, 20 HARV. INT'L L.J. 61 (1979).

397. *In re* Mackin, 668 F.2d 122, 124-25 (2d Cir. 1981).

398. Quinn v. Robinson, 783 F.2d 776, 793 (9th Cir. 1986), *quoting and citing* Note, *American Courts and Modern Terrorism: The Politics of Extradition*, 13 N.Y.U. J. INT'L L. & POL. 617, 622 (1981).

399. 783 F.2d at 793.

400. *Id.*

a safe-haven to often violent foreign political offenders, while denying domestic, nonviolent, civil resisters an opportunity to present their factual and legal claims in a court of law. Those resisters in prison are domestic political offenders who, in the eyes of the global community, may be appropriately viewed as political prisoners of conscience.[401]

The special status conferred upon political offenders also reflects an appreciation of the dynamic character of social values and public policies.[402] Today, we imprison individuals who protest policies which, in the future, may be viewed as barbarous and antediluvian. In retrospect, it is clear that individuals would have been morally justified to engage in acts of civil resistance to halt the internment of the Japanese during World War II.[403] Yet, this policy was endorsed by both the executive and legislative branches; received public support; and was proclaimed as legal by the United States Supreme Court.[404] Civil resisters confront society with views which it may not be entirely prepared to accept. Civil resisters are the guardians of those fundamental democratic freedoms and principles which society frequently is willing to unthinkingly compromise in the interests of societal stability or national security.[405] Judge Bright observed in *Kabat* that civil disobedience has been vital to social progress and reform:

> We must recognize that civil disobedience in various forms, used without violent acts against others, is ingrained in our society and the moral correctness of political protesters'

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401. On the right to rebellion under international law, see Jordon J. Paust, *Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights*, 18 EMORY L.J. 283, 297-98 (1986). The *Statute of Amnesty International* in art. 1(b) recognizes as political prisoners those who are detained pursuant to procedures that do not conform to internationally recognized norms. Statute of Amnesty International, *in* AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 1989 288 (1989). These internationally recognized norms certainly include the right to present a defense. *See generally* International Covenant on Civil and Political Rights, Dec. 10, 1948, art. 14, G.A. Res. 217 (111), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967) (opened for signature, Dec. 19, 1966; entered into force, March 23, 1976) (signed by the United States, Dec. 31, 1979).

402. The acceptance of moral pluralism has been identified as central in explaining the formal recognition of political crime. *See* B.L. Ingraham & Kazuhiko Tokoro, *Political Crime in the United States and Japan: A Comparative Study*, 4 ISSUES IN CRIMINOLOGY 145, 153 (1969).

403. *See* Korematsu v. United States, 323 U.S. 283 (1944).

404. *See generally* JACOBUS TENBROEK, EDWARD N. BARNHART & FLOYD W. MATSON, PREJUDICE, WAR AND THE CONSTITUTION (1954).

405. Civil rights and liberties are particularly vulnerable during wartime. *See* MICHAEL LINFIELD, FREEDOM UNDER FIRE: U.S. CIVIL LIBERTIES IN TIMES OF WAR (1990).

> views has on occasion served to change and better our society. Civil disobedience has been prevalent throughout this nation's history extending from the Boston Tea Party and the signing of the Declaration of Independence, to the freeing of the slaves by operation of the underground railroad in the mid-1800's. More recently, disobedience of "Jim Crow" laws served, among other things, as a catalyst to end segregation by law in this country, and violation of selective service laws contributed to our eventual withdrawal from the Viet Nam [sic] War.[406]

The early common law recognized the authority of private individuals to arrest wrongdoers. In fact, until "quite modern times police duties were the duties of every man."[407] This system of private law enforcement, in part, reflected the lack of effective, organized police forces.[408] In the contemporary era, the global society lacks strong international mechanisms to enforce the requirements of international law. The civil resister merely replicates the original common law model and acts to prevent criminal activity. The case for private law enforcement, of course, is even greater when it is the State, with its vast resources, which systematically violates human rights. In the long run, a refusal to permit civil resisters to present a constitutionally recognized defense may succeed to discourage acts of civil resistance. However, in the end, this may "prove to be detrimental to the maintenance of peace and good order in the community."[409]

The necessity defense specifically has been recognized as a justification for an act of rebellion. In 1834, in *United v. Ashton*,[410] Justice Story ruled that sailors had a right under maritime law to resist their commanding officer's order to proceed into a storm.[411] He stated that, in such a situation, the law considers the lives of persons far more valuable than property.[412] It is clear, Story concluded, that "the crew had a right to resist, and to refuse obedience. It is a case of justifiable self-defense against an undue exercise of power."[413] Those who man

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406. 797 F.2d at 601.

407. Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566, 579 (1936).

408. *Id.* at 579-85.

409. Stevenson v. State, 413 A.2d 1340, 1349 (1980).

410. 24 F. Cas. 873 (C.C.D. Mass. 1834) (No. 14,470).

411. *Id.* at 874.

412. *Id.*

413. *Id.*

the ship are not obligated to proceed merely because their chief officer has exercised the "rashness of judgement to proceed."[414]

The judiciary has morally and psychologically distanced itself from the issues raised by civil resisters. Judges, rather than analyze whether civil resisters may validly invoke the necessity defense, mechanically cited existing precedents to deny civil resisters the use of the defense.[415] It is ironic that, in rejecting the applicability of the necessity defense, judges frequently invoke "the fact" that legal mechanisms exist in the American democratic system to effect social change.[416] Thus, while preventing defendants from raising issues of governmental abuse and illegality, the judiciary ironically emphasized freedom and liberty available in the United States. One state court judge observed that protesters were denied the use of the necessity defense "merely because they express unpopular views."[417] Judge Bright, dissenting in *Kabat*,[418] is the only federal appellate judge who forthrightly challenged the judiciary's refusal to acknowledge the political, moral and religious imperatives which motivate acts of civil resistance.[419] Judge Bright reminded his colleagues that which "has distinguished our society from other countries whose governments are described as repressive is that our government has been able to limit its response to this sort of protest which, it must be specifically noted, is nonviolent as to persons."[420] Miles Lord, the retired Chief Judge of the United States District Court of Minnesota, is the other federal judge who voiced misgivings concerning the judiciary's unwillingness to acknowledge the vital moral claims articulated by civil resisters. In 1984, he sentenced two civil resisters to six months probation.[421] The protesters had hammered and poured blood on computers at Sperry Inc., which caused thirty-six thousand dollars in damage. At sentencing, Chief Judge Lord queried: "Can it be that those of us who build weapons to kill are engaged in a more sanctified endeavor than those who would by their acts attempt to counsel moderation and

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414. *Id.*

415. An intelligent, reasoned presentation of the applicability of the necessity defense is offered in Comment, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 9 (1989).

416. *See supra* notes 334-39 and accompanying texts.

417. State v. Warshow, 33 A.2d 1000, 1006 (1979) (Billings, J., dissenting).

418. 797 F.2d at 592.

419. *Id.* at 599.

420. *Id.* at 601.

421. United States v. LaForge & Katt, No. 4-84-66, slip at 20 (D. Minn. Nov. 8, 1984) (sentencing), *cited in* 797 F.2d at 593 n.4.

mediation as an alternative method of settling international disputes?"[422]

Scholars have beseeched the judiciary to recognize, or at least to reconsider, the applicability of the necessity defense to cases of civil resistance.[423] However, there is no indication that the judiciary took the time and effort to carefully review and evaluate the history and basic principles of the necessity defense. Instead, they continue to merely mechanically cite precedents and dismiss the claims of civil resisters. Unless there is an evident change in the judiciary's attitude, judges of conscience, such as Judge Bright and Judge Lord, should refuse to dignify civil resistance trials with their presence or participation. It is clear that token dissents, occasional probationary sentences, isolated state trial court decisions, and judicial statements in support of civil resisters have had little impact to discourage prosecutions or change legal doctrine. These dissident judicial actions merely reinforce the misconception that the judiciary can be persuaded through intellectual appeals and reasoned argumentation. Judicial abstention will serve as a symbolic protest against the refusal of judges to recognize the applicability of the necessity defense to civil resistance cases. Such abstention also will focus attention on the prosecution of civil resisters and place pressure on prosecutors and judges to conduct themselves during such trials in an objective and reasoned fashion. Thus, rather than excuse themselves because of personal prejudice or vested interest, judges should stand down to protest the inherent political bias of their colleagues.[424] This assertion of judicial conscience is consistent with the provisions of the Code of Judicial Conduct.[425] Judges are to maintain and enforce high standards of conduct so as to maintain the integrity and independence of the judiciary.[426] When confronted by colleagues who are swayed by "partisan interests, public clamor" and "fear of criticism," judges should, as is appropriate, ethically abstain.[427]

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422. *Id.*

423. Charles R. Disalvo, *Necessity's Child the Judiciary, Disobedience, and the Bomb*, 41 U. MIAMI L. REV. 911 (1987).

424. The classic statement on the capacity of liberal democracy to co-opt dissent is HUBERT MARCUSE ONE DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY (1968).

425. AMERICAN BAR ASSOCIATION CODE OF JUDICIAL CONDUCT (1972).

426. *Id.* CANON 1.

427. *Id.* CANON 3(A)(1). However, a judge should abstain from public comment about a pending or impending proceeding. *Id.* CANON (A)(6). *See generally* Bruce Ledewitz, *An Essay Concerning Judicial Resignation and Non-Cooperation in the Presence of Evil*, 27 DUQ. L. REV. 1 (1988).

This is more than a plea for a symbolic political protest. In *The Justice Trial*,[428] a United States Military Tribunal recognized that the judges and prosecutors who participated in the trial and punishment of anti-Nazi protesters were themselves guilty of complicity in war crimes. The Military Tribunal observed that "the laws, the Hitler decrees and the draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime."[429]

## VIII. CONCLUSION

Developments in technology confront humanity with unparalleled threats which range from ecocide and genocide to nuclear war. It is not the nonviolent rebel who threatens civilization; it is the compliant conformist. The tendency of people to quietly conform to the dictates of authority may have disastrous consequences — we may unwittingly acquiesce in policies which propel us into long-term disaster. Stanley Milgram concludes that the type of character produced in American democratic society "cannot be counted on to insulate its citizens from brutality and inhumane treatment at the direction of malevolent authority."[430] He sadly observes that a "substantial proportion of people do what they are told to do, irrespective of the content of the act and without limitations of conscience, so long as they perceive that the command comes from legitimate authority."[431] It is this "fatal flaw . . . which in the long run gives our species only a modest chance of survival."[432]

Despite their avowals of neutrality, the judiciary has unreasonably refused to permit those who engage in nonviolent protest to attempt to justify their actions before a jury of their peers. The prosecution, conviction and incarceration of these civil resisters serves little purpose other than to deter others from following their example. Ironically, the historical record strongly suggests that those "sinners" we imprison today may be feted as "saints" tomorrow.

It is these morally autonomous individuals who provide a vital check on the exercise of governmental power.[433] The Oliners, in their

428. The Justice Trial, 4 L. REP. TRIALS WAR CRIM. 1 (U.N. War Crimes Comm'n American Mil. Trib. Nuremberg, Germany 1947).

429. *Id.* at 49.

430. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1969).

431. *Id.* at 189.

432. *Id.* at 188.

433. *Id.*

study of those who assisted the Jewish victims of the Holocaust, observe that such people "assure us that people can shape their own destinies rather than merely stand by as passive witnesses to fate or to allow themselves to become nothing more than victimized objects."[434] Albert Camus urges us to remember that "on this earth there are pestilences and there are victims, and it's up to us, so far as possible, not to join forces with the pestilences . . . ."[435]

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434. SAMUEL OLINER & PEARL M. OLINER, THE ALTRUISTIC PERSONALITY: RESCUERS OF JEWS IN NAZI EUROPE 248 (1988).

435. ALBERT CAMUS, THE PLAGUE 236 (S. Gilbert trans. 1947).