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I. INTRODUCTION

Freedom of expression in a free society includes freewheeling public dissent on controversial political issues of the day. Civil disobedience is a form of protest that, while usually peaceful, involves violating the law—usually by trespassing on government property, blocking access to buildings, or engaging in disorderly conduct. Civil disobedience has been called "the deliberate violation of law for a vital social purpose."[1] In their day in court, civil disobedients have at times sought to interpose the necessity defense to justify their conduct. The necessity defense asserts that breaking the law was justified in order to avert a greater harm that would occur as a result of the government policy the offender was protesting.

Protestors will seek to invoke the necessity defense not so much to gain acquittal from the relatively minor charges, but to advance the more important objective of publicly airing the moral and political issues that inspired their act of civil disobedience. There is the hope of gaining notoriety for a cause by discussing it in court, and "educating" the jury about political grievances or other social harms. The strategy is meant to appeal to a higher principle than the law being violated—the necessity of stopping objectionable government policies—and to let the jury have an opportunity to weigh their technically illegal actions on the scales of justice. Acquittal is of course hoped for in the end but may be quite low on the protestors' list of priorities.

> The necessity defense is attractive to reformers who practice civil disobedience because it allows them to deny guilt without renouncing their socially driven acts. It offers a means to discuss political issues in the courtroom, a forum in which reformers can demand equal time and, perhaps, respect. Moreover, its elements allow civil disobedients to describe their political motivations. In

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1. HOWARD ZINN, DISOBEDIENCE AND DEMOCRACY: NINE FALLACIES ON LAW AND ORDER 39 (1968).

> proving the imminence of the harm, they can demonstrate the urgency of the social problem. In showing the relative severity of the harms, they can show the seriousness of the social evil they seek to avert. In establishing the lack of reasonable alternatives, they can assault the unresponsiveness of those in power in dealing with the problem and prod them to action. And in presenting evidence of a causal relationship, they can argue the importance of individual action in reforming society. Thus, the elements of the necessity defense provide an excellent structure for publicizing and debating political issues in the judicial forum.[2]

The goal of describing their political motivations to the jury, and implicitly to the media, is subject to numerous hurdles inherent in the necessity defense. In most instances, as we will see, courts will rule as a matter of law that the actors have failed in the offer of proof regarding the elements of the necessity defense so that the jury rarely is given the chance to weigh in on the matter. On the other hand, if the defense is allowed, the jury is called upon to weigh controversial political issues and to function as the "conscience of the community." "Reflected in the jury's decision is a judgment of whether, under all the circumstances of the event and in the light of all known about the defendant, the prohibited act, if committed, deserves condemnation by the law."[3] In cases where judges have been persuaded to allow the necessity defense, juries have, often enough, delivered not guilty verdicts.

This article will first examine the nature of civil disobedience, and distinguish between direct and indirect civil disobedience. Part II highlights some historical examples of civil disobedience. Part IV then examines the principles of the necessity defense, analyzing each of the elements that make up the defense, illustrated with cases on point. Next, Part V will turn to an analysis of several abortion-protest cases that raise issues different from other types of civil disobedience cases. Part VI then will examine Viet Nam era civil disobedience cases. Following that, Part VIII will explore a unique defense known as the Nuremberg Principles defense.

2. Steven M. Bauer & Peter J. Eckerstrom, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1176 (1987).

3. Everett v. United States, 336 F.2d 979, 985–86 (D.C. Cir. 1964) (Wright, J., dissenting).

II. OVERVIEW OF CIVIL DISOBEDIENCE

A. *Definition of Civil Disobedience*

John Rawls defines civil disobedience as "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."[4] A more comprehensive definition of civil disobedience is:

> Civil disobedience is an act of protest, deliberately unlawful, conscientiously and publicly performed. It may have as its object the laws or policies of some governmental body, or those of some private corporate body whose decisions have serious public consequences; but in either case the disobedient protest is almost invariably nonviolent in character.[5]

Broadly construed, civil disobedience may be directed toward a law or policy of the government, or toward a corporate entity whose policy is the subject of protest. Civil disobedients hope that their conduct makes a dramatic appeal to the conscience of the community, affects public awareness of a particular social issue, and motivates citizens to demand change in certain policies.

Civil disobedience is a singular hallmark of a free country:

> We must recognize that civil disobedience in various forms, used without violent acts against others, is engrained in our society and the moral correctness of political protestors' views has on occasion served to change and better our society. Civil disobedience has been prevalent throughout this nation's history extending from the Boston Tea Party and the signing of the Declaration of Independence, to the freeing of the slaves by operation of the Underground Railroad in the mid-1880's. More recently, disobedience of "Jim Crow" laws served, among other things, as a catalyst to end segregation by law in this country, and violation of selective service laws contributed to our eventual withdrawal from the Viet Nam War.[6]

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4. JOHN RAWLS, A THEORY OF JUSTICE 364 (1971).

5. CARL COHEN, CIVIL DISOBEDIENCE: CONSCIENCE, TACTICS, AND THE LAW 39–40 (1971) (emphasis omitted); *see* BLACK'S LAW DICTIONARY 223 (5th ed. 1979) (defining civil disobedience as "a form of lawbreaking employed to demonstrate the injustice or unfairness of a particular law and indulged in deliberately to focus attention on the allegedly undesirable law").

6. United States v. Kabat, 797 F.2d 580, 601 (8th Cir. 1986) (Bright, J., dissenting).

Civil disobedience differs from other forms of peaceful protest in that there is a technical violation of the law such as trespass, blocking of public access, or disorderly conduct; and the violation is part of the effort to garner public attention to the cause. Ordinary forms of peaceful protest may simply involve peaceful picketing, circulating petitions, forming of rallies, and the like, in which proper police permits are obtained and there are no violations of the law.

B. *Distinction Between Direct and Indirect Civil Disobedience*

There are two kinds of civil disobedience—direct and indirect. Direct civil disobedience involves the intentional violation of a specific law that, in and of itself, is challenged as unjust. An example would be smoking marijuana in public to protest a law that makes it unlawful to engage in such an act. Rosa Parks' famous refusal to move from her seat on a Montgomery, Alabama bus was an act of direct civil disobedience because she violated the actual segregation ordinance then in place.

Indirect civil disobedience, which is undoubtedly the most frequent form of protest, involves the violation of a law which is not itself the object of protest. Indirect civil disobedience seeks to mobilize public opinion, typically through symbolic action. For example, the Freedom Riders protested segregation by riding buses, but authorities arrested them for trespass. Since they did not directly attack the bus law, they were characterized as engaging in indirect civil disobedience.[7] While a person might trespass and block access of shipments to a nuclear power plant, the act is not committed to protest *the trespass law* under which the defendants are charged, but to protest the use of nuclear power. Or, to cite another example, students in France recently engaged in acts of violence and disorderly conduct to protest a law that allows employers to dismiss workers under the age of twenty-six without cause during their first two years on the job.[8] The protestors do not contest the validity of the disorderly conduct laws, but believe their acts are *necessary* as a means to pressure officials to change the law.

Indirect civil disobedience might also target an unjust policy of a business organization, scientific laboratory, government facility, military contractor, or other entity. While trespass is the most frequent law that is violated, protestors commit other acts such as malicious mischief, obstruction of passage, assault, arson, or theft as a means of protesting an entirely

7. *See* Bernard D. Lambek, *Necessity and International Law: Arguments for the Legality of Civil Disobedience*, 5 YALE L. & POL'Y REV. 472, 475 (1986).

8. *See* Elaine Sciolino, *French Protests over Youth Labor Law Spread to 150 Cities and Towns*, N.Y. TIMES, Mar. 19, 2006, § 1, at 16.

separate issue or policy. Protests in modern times are often directed toward such issues as nuclear power, war, human rights violations, animal cruelty, and environmental pollution.

The distinction between direct and indirect civil disobedience is important because significant case law holds that the necessity defense is available only to defendants charged with direct civil disobedience. The leading case on this point is *United States v. Schoon*,[9] in which the Ninth Circuit held that the necessity defense, with respect to civil disobedience, is available only for direct, not indirect, civil disobedience. We will discuss the *Schoon* case in Part IV.

It may be difficult to make a clear distinction between direct and indirect civil disobedience.[10] One person may engage in civil disobedience by refusing to be drafted because of objections to the draft law, while another person may refuse to be drafted because of objections to an unjust war, with the former, not the latter, being direct civil disobedience.[11]

> When people seek to prevent military action by trying to disarm weapons, are they engaged in indirect or direct civil disobedience? When people block a road to stop trucks from coming in to cut down virgin timber, is that indirect civil disobedience because it is a violation of a neutral traffic law or is it direct civil disobedience because it seeks to actually stop the challenged action? The distinction does not work well for the now historically-approved actions of those who protested against segregation: people like Martin Luther King, Jr., who famously spent time in 1963 in a Birmingham jail for engaging in an illegal march against segregation. Was he directly protesting the necessity of a permit, or was he trying to stop segregation? Under a rigid distinction, he was engaged in indirect civil disobedience and thus would not have been able to raise the defense of necessity.[12]

Some of the most important advancements in civil rights have been a product of *direct* civil disobedience. In the 1960s there were a great many instances of direct civil rights protest, with direct violations of segregation

9. 971 F.2d 193, 196 (9th Cir. 1992).

10. William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 18 (2003). For example, when Rosa Parks refused to move from her seat on the Montgomery, Alabama bus, this was direct civil disobedience because she violated an ordinance that required segregation on buses. In contrast, the Freedom Riders protested segregation by riding buses, but police arrested them for trespass. As such, the group did not directly attack the bus law and thus were deemed to have engaged in indirect civil disobedience. Yet in both cases, the actions were similar and targeted the same unjust law. *See id.* at 47.

11. *Id.* at 18.

12. *Id.*

and discrimination laws. For example, in *Lombard v. State*,[13] the U.S. Supreme Court reversed the convictions of four students who staged a sit-in demonstration at a whites-only lunch counter in New Orleans, to protest that city's custom of refusing to allow segregated service in restaurants. In *Hamm v. Rock Hill*,[14] the Court vacated charges against defendants convicted of state trespass statutes for participating in sit-ins at lunch counters that had a policy of refusing service to blacks. These protests involved direct civil disobedience in that the actors specifically targeted the policies at these eating establishments, although the defendants were charged with trespass, not with violating the policies in question. Additionally, there were innumerable instances of *indirect* civil disobedience involving sit-ins, which resulted in over 3000 prosecutions for criminal trespass and similar violations. These violations culminated in the enactment of the Civil Rights Act of 1964, which set an end to discriminatory practices in public accommodations.[15]

C. *Historic Instances of Civil Disobedience*

Of course, civil disobedience is something of a democratic tradition. In numerous countries the government allows no public display of displeasure with government policies. For example, demonstrators in Arab republics have been known to be sentenced to public lashings and prison terms for taking part in demonstrations against the government.[16] In Arab countries, a sentence of flogging is seen as "an ultimate humiliation and carries connotations of heresy."[17] Additionally, political protests in China are dealt with by arresting the offenders and keeping them incarcerated for extended periods of time.[18]

As early as 1635, American colonists were persecuted for direct civil disobedience in refusing to obey certain laws by reason of conscience.[19]

13. 373 U.S. 267 (1963).

14. 379 U.S. 306 (1964).

15. *See* Quigley, *supra* note 10, at 24; *see also* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (prior to 1971 amendment).

16. *See* Hassan M. Fattah, *Saudi Court Orders Lashings for Fifteen Demonstrators*, N.Y. TIMES, Jan. 13, 2005, at A6.

17. *See id.*; *see also* Neil MacFarquhar, *Asterisk Aside, Saudis Prepare for Their First National Election*, N.Y. TIMES, Feb. 10, 2005, at A1.

18. *See* Christopher Buckley, *U.S. Cautious as China Offers Details on Political Prisoners*, N.Y. TIMES, Feb. 9, 2005, at A13.

19. Quigley, *supra* note 10, at 21; *see, e.g.*, POWER OF THE PEOPLE: ACTIVE NONVIOLENCE IN THE UNITED STATES 15 (Robert Cooney & Helen Michalowski eds., 1977). In 1635, the General Court of Massachusetts banished Roger Williams for criticizing the Puritan clergy's persecution of people of conscience and for insisting that the land still belonged to Native Americans. *See id.* Anne Hutchinson was banished in 1638 for publicly insisting that conscience was a higher authority than law. *See id.* at 15–16. The Society of Friends, a pacifist group, was banned from Massachusetts from 1654 to 1661; a

Acts of direct civil disobedience to the English crown were the hallmark of the American Revolution, including the Boston Tea Party.[20] Opposition to slavery involved numerous kinds of direct civil disobedience, including aiding and abetting runaway slaves.[21] In 1846, Henry David Thoreau wrote his famous and influential essay, *On the Duty of Civil Disobedience*, in which he gave a cogent argument on the necessity of direct civil disobedience:

> Unjust laws exist: shall we be content to obey them, or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once?
>
> . . . .
>
> . . . If the injustice [of the machine of government] has a spring, or a pulley, or a rope, or a crank, exclusively for itself, then perhaps you may consider whether the remedy will not be worse than the evil; but if it is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law. Let your life be a counter friction to stop the machine.[22]

Direct civil disobedience was in play in 1872 when Susan B. Anthony was indicted and convicted for violating a federal law that prohibited voting in congressional elections without having a lawful right to vote.[23] She managed to persuade a voting registrar to register her in violation of a state law that restricted voting rights to men and voted for a congressional election in New York State. Ms. Anthony fully conceded the facts alleged in the indictment, and the court directed the jury to find a verdict of guilty because the facts constituting guilt were undisputed.[24]

Before the judge pronounced sentence of a $100 fine, it was reported that Ms. Anthony

> had a great many things to say, and declared that in her trial every principle of justice had been violated; that every right had been denied; that she had had no trial by her peers; that the Court and the jurors were her political superiors and not her peers, and an-

law in 1657 imposed a fine of 100 pounds on anyone who brought a Quaker into the territory. *See id.* In 1658, a Quaker named Richard Keene was fined and beaten for refusing to be trained as a soldier. *See id.* at 18.

20. Quigley, *supra* note 10, at 21.

21. *Id.*

22. HENRY DAVID THOREAU, WALDEN AND CIVIL DISOBEDIENCE 231 (Owen Thomas ed., W.W. Norton 1966) (1854).

23. *See* United States v. Anthony, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873).

24. *See id.* at 832.

> nounced her determination to continue her labors until equality was obtained, and was proceeding to discuss the question involved in the case, when she was interrupted by the Court with the remark that these questions could not be reviewed.[25]

Following the conviction of Ms. Anthony, indirect civil disobedience quickly emerged as the mode of choice in the women's suffrage movement, with the fight for women's rights characterized by "direct action, civil disobedience, public disruptions, and passive resistance."[26] In 1913, over 5000 women marched in Washington on the eve of the inauguration of Woodrow Wilson.[27] In May of 1917, police arrested over 200 women for obstructing the sidewalk in front of the White House.[28] Congress later passed the suffrage amendment in early 1918, and it was ratified by the states on August 26, 1920.[29]

In more recent times we have seen many instances of indirect civil disobedience in the areas of nuclear disarmament,[30] nuclear power,[31] environmental pollution,[32] and anti-abortion advocacy.[33]

Sometimes civil disobedience will involve private rather than public acts, such as conscientious resistance to an unjust law in an effort to avert the evil effects of the law. An example would be secretly smuggling immigrants across the border for the purpose of securing their safety, rather than as a public challenge to immigration policy. Another example would be occupying an abortion clinic for the purpose of physically preventing abortions scheduled that day, rather than as an appeal for legal change of the law. Some acts can be hybrid, that is, a combination of a public appeal as well as conscientious resistance to the policy in question.

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25. *Miss Susan B. Anthony Fined $100 and Costs for Illegal Voting*, N.Y. TIMES, June 20, 1873, at 4.

26. POWER OF THE PEOPLE, *supra* note 19, at 32, 56–58.

27. *See* Quigley, *supra* note 10, at 22 n.70.

28. *See id.*

29. *See id.*

30. *See generally* Robert Aldridge & Virginia Stark, *Nuclear War, Citizen Intervention, and the Necessity Defense*, 26 SANTA CLARA L. REV. 299 (1986).

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

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

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

In the 1960s, a period of widespread civil disobedience, both direct and indirect, the norm was that one would willingly accept the penalty. Addressing the topic of direct civil disobedience, Dr. Martin Luther King, Jr. said from his Birmingham jail cell:

> One who breaks an unjust law must do so . . . with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.[34]

The idea is that accepting legal consequences shows that the civil disobedient seeks to better society within the parameters of the social contract, to be persuasive, and to behave ethically. In the event the protestor is convicted, serving time in jail will, according to Dr. King, "arouse the conscience of the community" over an unjust state of affairs.[35]

Accepting the consequences is something that judges today sometimes emphasize:

> One characteristic of civil disobedience is the recognition by its practitioner that he must face the legal consequences of his offense. Indeed, it is the appearance of martyrdom for a just cause which focuses public attention upon the disobedient crusader thereby hastening the achievement of his goal.[36]

However, in today's era of special interest groups seeking to persuade public opinion, civil disobedients inevitably seek acquittal of the charges rather than willingly accepting the legal consequences for their acts. By invoking the necessity defense, they hope to garner public awareness and sympathy for their cause. If the judge allows the jury to consider the necessity defense, this will often entail the introduction of expert testimony on the imminent danger that the protestors sought to avert, and significant media attention is likely to be given the case.

34. Martin L. King, Jr., *Letter from Birmingham Jail*, *in* THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. 187, 194 (Clayborne Carson ed., 1998).

35. *See id.*

36. *See* State v. Diener, 706 S.W.2d 582, 586 (Mo. Ct. App. 1986).

III. JUDICIAL RELUCTANCE TO ALLOW THE NECESSITY DEFENSE IN CIVIL DISOBEDIENCE CASES

It is a firmly engrained legal principle that judges decide questions of law, and juries decide questions of fact.[37] The question of whether the proffered evidence is sufficient to constitute the defense of necessity is first determined by the judge. The trial court's authority to decide whether the question should be submitted to the jury is sometimes mandated by statute. For example, New York's necessity statute states: "Whenever evidence relating to the defense of justification under this subdivision is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a defense."[38]

The judge's role has been described as follows:

> As with any offer of proof, it is essential that the offer meet a minimum standard as to each element of the defense so that if a jury finds it to be true, it would support the affirmative defense. Where the offer is insufficient to establish any one element of the defense, the trial court may deny use of the defense and prohibit evidence as to the other elements of the defense.[39]

Thus, the judge will allow an offer of proof from which it may be determined, as a preliminary matter, whether the defendant has sufficient evidence to make out a valid necessity defense.[40]

In making this threshold determination, the judge has the power to take a significant issue away from the jury. In effect, the judge decides whether the defendant's choice of action, in connection with what is claimed to be the lesser evil, conflicts with a higher value. The judge decides if the defendant has produced sufficient evidence in raising the defense, and in particular decides whether the defendant's belief in the necessitous circumstances was reasonable or unreasonable as a matter of law.[41] The judge may decide that the defendant's value choice was wrongheaded and refuse to allow the matter to go before the jury. Yet the value choice is ultimately a question of fact that would be decided by the jury if it were allowed to hear the defense. This raises the prospect of unfairness—where disagree-

37. *See* Sparf v. United States, 156 U.S. 51, 102 (1895).
38. N.Y. PENAL LAW § 35.05 (McKinney 2004).
39. Commonwealth v. Berrigan, 501 A.2d 226, 229 (Pa. 1985).
40. *Id.*
41. *See, e.g.*, Graham v. State, 566 S.W.2d 941, 952 n.3 (Tex. Crim. App. 1978); W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 37, at 237 (5th ed. 1984) (stating that a defendant's conduct may be reasonable or unreasonable as a matter of law).

ment may exist on the extent to which a value is relative or absolute—where the value question is unclear.

In some jurisdictions the courts will allow the defense of necessity to be charged to the jury even if there is simply "some" evidence, however weak, that raises the elements of the necessity defense, regardless of what the trial judge thinks about the credibility of the defense.[42]

Generally, there is judicial anxiety about allowing the jury to hear evidence of the necessity defense. For example, in *People v. Weber*,[43] the court stated:

> To accept the defense of necessity under the facts at bench would mean that markets may be pillaged because there are hungry people; hospitals may be plundered for drugs because there are those in pain; homes may be broken into because there are unfortunately some without shelter; department stores may be burglarized for guns because there is fear of crime; banks may be robbed because of unemployment.[44]

The concern is that widespread use of the necessity defense could lead to lawlessness and that evidence of the necessity defense allows juries to decide ambiguous issues of moral culpability and to "nullify" the application of criminal laws. Necessity has the potential to validate decisions according to sympathy, conscience, or prejudice rather than according to law.

Of course, this ignores the fact that simply allowing the presentation of testimony and other evidence in support of the necessity defense does not assure acquittal. However, when judges have allowed the necessity defense to go to a jury in civil disobedience cases, more often than not the defendants are acquitted.[45] There are a number of cases in which charges were dropped after the judge announced that the necessity defense would be permitted.[46] Thus, it comes as no surprise that judges unsympathetic to the protestors' cause will tend to exercise discretion by excluding the evidence from the jury. "Judges do not want to allow juries to make important decisions in these cases. Judges are ruling that order trumps all else and refuse to allow juries to hear any of the evidence."[47]

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42. *See, e.g.*, Brazelton v. State, 947 S.W.2d 644 (Tex. App. 1997).
43. 162 Cal. App. 3d Supp. 1 (Cal. App. Dep't Super. Ct. 1984).
44. *Id.* at 5.
45. When the necessity defense is actually submitted to the trier of fact in civil disobedience cases, defendants have usually been acquitted. *See* Lambek, *supra* note 7, at 473.
46. People v. Gray, 571 N.Y.S.2d 851, 853 (N.Y. Crim. Ct. 1991).
47. Quigley, *supra* note 10, at 54.

In effect, when a jury is permitted to entertain the necessity defense in a civil disobedience case, they are deliberating on policy issues. The jury decides whether the facts alleged by the defendant were as extreme as the defendant claims and, if so, whether the defendant made the correct choice based on prevailing community standards. "What these cases are really about is gaining notoriety for a cause—the defense allows protestors to get their political grievances discussed in a courtroom."[48]

The role of the jury in these cases has been criticized:

> For a jury to endorse illegal acts on the basis of political necessity undermines majority rule, implicates the separation of powers doctrine, and disrupts principles of equal justice. Testimony and instructions on political necessity promote jury nullification by providing the jury with a handy framework to negate duly enacted laws. Just as arguments for jury nullification are excluded from the courtroom, so the necessity defense might be excluded in civil disobedience cases.[49]

Courts that are reluctant to entertain the necessity defense in civil disobedience cases have expressed the fear that courts would "tread into areas constitutionally committed to other branches of government."[50] The defense would risk distortion of "the role of the [j]udiciary in its relationship to the [e]xecutive and the [l]egislature and open the [j]udiciary to an arguable charge of providing 'government by injunction.'"[51] The concern is that the necessity defense violates the principle of majority rule because the jury is asked to decide whether actors were justified in seeking to avert an unwise policy. In effect, this turns the jury into a quasi-legislative or executive body that can in effect veto duly promulgated policies. At the same time, juries are not accountable to the electorate as are the legislative and executive branches, and they never have to justify the decisions they make during jury service. When a jury acquits a defendant based on the necessity defense in such cases, this in effect compromises democratic decision-making processes, and allows the minority to frustrate majority will.

Another, more practical, concern is whether juries are suited to make fair and accurate policy decisions in the context of political questions, inasmuch as their function is to determine facts, not to formulate policy. In addition, jurors in civil disobedience cases will invariably be presented with expert witnesses whose testimony will be couched in a way that puts

48. United States v. Schoon, 971 F.2d 193, 199 (9th Cir. 1991).
49. Bauer & Eckerstrom, *supra* note 2, at 1195 (footnotes omitted).
50. *Schoon*, 971 F.2d at 199.
51. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974).

the necessity of the defendants' actions in the most favorable light. On the other hand, these experts are subject to cross-examination by the prosecution.

IV. ELEMENTS OF THE NECESSITY DEFENSE

The doctrine of necessity, with its inevitable weighing of choices of evil, holds that certain conduct, though it violates the law and produces harm, is justified because it averts a greater evil and hence produces a net social gain or benefit to society.[52] Glanville Williams expressed the necessity doctrine this way: "[S]ome acts that would otherwise be wrong are rendered rightful by a good purpose, or by the necessity of choosing the lesser of two evils."[53] He offers this example:

> Suppose that a dike threatens to give way, and the actor is faced with the choice of either making a breach in the dike, which he knows will result in one or two people being drowned, or doing nothing, in which case he knows that the dike will burst at another point involving a whole town in sudden destruction. In such a situation, where there is an unhappy choice between the destruction of one life and the destruction of many, utilitarian philosophy would certainly justify the actor in preferring the lesser evil.[54]

The utilitarian idea is that certain illegal conduct ought not be punished because, due to the special circumstances of the situation, a net benefit to society has resulted. This utilitarian rationale is sometimes criticized as "ends-justifying-the-means" in that the doctrine allows, within certain limits, that it is justifiable to break the letter of the law if doing so will produce a net benefit to society.[55]

Another commentator has observed: "[T]hese [justified] acts are ones, as regards which, upon balancing all considerations of public policy, it

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52. *See* Joseph J. Simeone, *"Survivors" of the Eternal Sea: A Short True Story*, 45 ST. LOUIS U. L.J. 1123, 1141 (2001).

53. GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 198 (1957).

54. *Id.* at 199–200.

55. Justice Brandeis stated:

> In a government of laws, existence of the government would be imperiled if it fails to observe the law scrupulously. . . . Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

seems desirable that they should be encouraged and commended even though in each case some individual may be injured or the result may be otherwise not wholly to be desired."[56]

The idea, in its simplest form, is that it is unjust to penalize someone for violating the law when the action produces a greater good or averts a greater evil. Had the unlawful action *not* taken place, society would have endured a greater evil than that which resulted from violating the law.

English and American courts have long recognized the defense of necessity, even in the absence of statutory law on the subject.[57] Today many states have codified the necessity defense in one form or another.[58]

With the necessity defense there will always be a prima facie violation of the law. For our purposes, the violation will usually be trespass, disorderly conduct, or obstruction of access laws.

In our discussion we will apply a comprehensive five-prong test that must be met in order for someone to invoke the defense. The defendant must prove:

> (1) that he was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law.[59]

The fifth factor is that "the [l]egislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue."[60] Courts generally require that all the factors be proven in order for the defendant to succeed in the necessity defense. In our discussion of civil disobedience we will refer to these factors as follows: (1) the choice of evils factor, (2) the imminence factor, (3) the causal nexus factor, (4) the legal way out factor, and (5) the preemption factor.

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56. JUSTIN MILLER, HANDBOOK OF CRIMINAL LAW 189 (1934).

57. *See* 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, 291–96 (1974).

58. *See, e.g.*, ALASKA. STAT. § 11.81.320 (2002); ARK. CODE ANN. § 5-2-604 (West 2006); COLO. REV. STAT. ANN. § 18-1-702 (West 2003); DEL. CODE ANN. tit. 11, § 463 (2001); HAW. REV. STAT. § 703-302 (2003); KY. REV. STAT. ANN. § 503.030 (West 2003); MO. ANN. STAT. § 563.026 (West 2004); N.J. STAT. ANN. § 2C:3-2 (West 2004); N.Y. PENAL LAW § 35.05 (McKinney 2004); TEX. PENAL CODE § 9.22 (Vernon 2004); WIS. STAT. ANN. § 939.47 (West 2003).

59. United States v. Aguilar, 883 F.2d 662, 693 (9th Cir. 1989).

60. Commonwealth v. Brugmann, 433 N.E.2d 457, 461 (Mass. App. Ct. 1982); *see also* State v. Diener, 706 S.W.2d 582, 586 (Mo. Ct. App. 1986) (quoting same language). A sixth factor is usually required in the necessity defense—that the defendant not be negligent or reckless in bringing about the necessitous circumstances in the first instance. *See, e.g.*, United States v. Agard, 605 F.2d 665, 667 (2d Cir. 1979) ("[D]efendant [must show that he] has [not] recklessly or negligently placed himself in a situation in which it was probable that he would be [forced to choose the criminal conduct]."). This sixth factor, however, is not relevant in civil disobedience cases.

A further consideration is what standard will apply in assessing the existence of a given factor. Courts will instruct the jury to scrutinize the facts based on the balance of human reason in light of all the relevant circumstances. The defendant must entertain a reasonable belief in the necessity of his conduct. The reasonableness standard ensures that a jury, in evaluating the defendant's action, shares the actor's evaluation of the necessitous circumstances. This standard has been expressed as follows:

> While an accused's perceptions of the surrounding facts may be highly relevant in determining whether his conduct should be excused, *those perceptions remain relevant only so long as they are reasonable*. The accused person must, at the time of the act, honestly believe, *on reasonable grounds*, that he faces a situation of imminent peril that leaves *no reasonable legal alternative* open. There must be a *reasonable basis* for the accused's beliefs and actions, but it would be proper to take into account circumstances that legitimately affect the accused person's ability to evaluate his situation. The test cannot be a subjective one, and the accused who argues that he perceived imminent peril without an alternative would only succeed with the defence [sic] of necessity if his belief was *reasonable* given his circumstances and attributes.[61]

Under this standard, it is not sufficient for a protestor to *subjectively* believe that his action "was necessary to prevent a greater evil."[62] Under the reasonableness standard, an actor must reasonably construe that there is an actual, imminent threat in the first place, and in making a choice of evils, that one evil was greater than the other. The threat need not be an actual threat, provided the actor has a well founded belief that impending harm will result unless he takes steps to avert it.[63] The balancing of evils

61. Latimer v. The Queen, [2001] S.C.R. 3, 33 (emphasis added).

62. *See* Tom Stacy, *Acts, Omissions, and the Necessity of Killing Innocents*, 29 AM. J. CRIM. L. 481, 518 (2002). In *People v. McDaniel*, 661 N.Y.S.2d 904 (N.Y. App. Div. 1997), the defendant and several others entered a gay congregation and loudly interrupted the liturgy in an effort to protest what they "anticipated would be a service honoring gay pride." *Id.* at 905. The defendant was charged and convicted of attempted aggravated disorderly conduct. The defendant sought to interpose the necessity defense. She described the harm sought to be avoided as the "sacrilege" inherent in the anticipated content of the religious service. The court held that this did not constitute an "imminent public or private injury" within the meaning of New York's necessity statute. *Id.* at 906. "Simply put, the defendant's moral convictions did not justify her criminal behavior." *Id.*

63. *See, e.g.*, United States v. Ashton, 24 F. Cas. 873 (C.C.D. Mass. 1834) (opinion of Story, J.). This involved a group of sailors charged with mutiny. The defendants sought to justify mutiny on the grounds that their ship was not seaworthy. The court instructed the jury "that the defendants ought not to be found guilty, if they acted bona fide upon reasonable grounds of belief, that the ship was unseaworthy." *Id.* at 874. The court said that if in fact the crew was mistaken as to the unseaworthiness of the ship, the jury could determine whether, nonetheless, the crew was reasonable in holding its belief and in taking action in accordance with that reasonable belief. *Id.* The jury could acquit if it found that

"cannot, of course, be committed to the private judgment of the actor, but must, in most cases, be determined at trial with due regard being given for the crime charged and the higher value sought to be achieved."[64] As one commentator has observed, "[n]ecessity does not excuse a person merely because *he* thought his conduct served a higher value; his opinion must be ratified by the court of trial."[65]

Let us now examine each element of the necessity defense in the context of civil disobedience cases.

A. *The Choice of Evils Factor*

The choice of evils factor is rarely in dispute. For instance, no one seriously disputes that criminal trespass or unlawful entry is a lesser evil than the evils of a nuclear disaster.[66] It is usually an easy task for a defendant to show that the harm sought to be averted (e.g., environmental pollution) was greater than the relatively minor criminal charges (e.g., trespass) now before the court. "It is, of course, impossible to argue that nuclear war is not a more serious harm than a peaceful, if unlawful, anti-nuclear prayer demonstration . . . ."[67]

State v. Diener[68] involved the arrest of the defendant and ten others at the corporate offices of the General Dynamics Corporation. The defendant was part of a large demonstration to protest the company's production of Trident nuclear submarines.[69] The defendant had attempted on several occasions to arrange a meeting with company executives, who refused. On the day of the incident the defendant and others positioned themselves in the lobby of the company in hopes of pressuring executives into meeting with them.[70] Instead, they were arrested and charged with criminal trespass.[71]

At trial the defendant sought to argue that the United States' continued production and deployment of nuclear weapons was illegal under international law, and that he and the others in his group were justified in believing that their remaining on General Dynamics' property was necessary to avert a potential nuclear disaster.[72] The court acknowledged that the

the crew, "having acted upon their best judgment fairly, and in a case where respectable, intelligent, and impartial witnesses should assert, that they should have done the same." *Id.*

64. State v. Warshow, 410 A.2d 1000, 1003 (Vt. 1979).
65. Glanville Williams, *Necessity*, 1978 CRIM. L. REV. 128, 134 (1978).
66. *See* Lambek, *supra* note 7, at 477.
67. United States v. Quilty, 741 F.2d 1031, 1033 (7th Cir. 1984).
68. 706 S.W.2d 582 (Mo. Ct. App. 1986).
69. *Id.*
70. *Id.* at 583–84.
71. *Id.* at 584.
72. *Id.* at 585.

choice of evils element is unchallengeable, "that on balance his trespass was trivial in the face of a possible nuclear disaster. However, this fact alone is insufficient to invoke the defense of justification."[73]

In *People v. Gray*,[74] six protestors were acquitted of disorderly conduct in a non-jury trial, based on the necessity defense. The defendants were all members of an organization called Transportation Alternatives, which is devoted to the promotion of non-vehicular, ecologically sound means of transportation. The protestors had blocked traffic in New York City to protest the opening of a bike and pedestrian lane to vehicular traffic. The judge issued a forty-two page decision that reviewed dozens of decisions involving the necessity defense and set forth an excellent judicial overview of the doctrine.[75]

On the choice of evils factor, the court noted that the harm perceived by the defendants was the "asphyxiation of New York" by automobile-related pollution.[76] The harm they sought to combat was the release of higher levels of pollution from vehicular traffic and the unnecessary death and serious illness of many New Yorkers as a result.[77] The court said that these harms could not be said to have developed through any fault of the defendants.[78] The court noted that the defendants were not asserting the necessity defense with respect to actions taken to mitigate a fundamental right of others articulated by courts (such as in abortion protests, which have asserted a necessity defense).[79] Indeed, there is no fundamental right to contribute to life threatening air pollution. The court concluded that the death and illness of New Yorkers as a result of air pollution and the danger to cyclists and pedestrians posed by vehicles are far greater harms than that created by the violation of disorderly conduct.[80]

B. *The Imminence of Harm Factor*

A significant hurdle with the necessity defense in civil disobedience cases is the requirement that the evil which is sought to be avoided be imminent. Courts will tend to find that the danger perceived by the civil disobedients was not in fact imminent, and therefore there was ample time in which to pursue reasonable legal alternatives.

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73. *Id.*
74. 571 N.Y.S.2d 851 (N.Y. Crim. Ct. 1991).
75. *See generally id.*
76. *Id.* at 857.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Gray*, 571 N.Y.S.2d at 859.

The majority of cases on this point have held that the harms which the protesters sought to avoid were too speculative or uncertain to support the defense. These courts have embraced the view of the U.S. Supreme Court in *Mitchell v. Harmony*,[81] that "rumors and suspicions" of a "secret design" must have an evidentiary foundation and that the threat must be "immediate and impending, and not remote or contingent" to support the necessity defense.[82] Imminence of harm connotes a real emergency, a crisis involving immediate danger to oneself or to a third party.[83] In considering the imminence factor the courts need not accept "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like."[84]

From the defense standpoint, the hurdle is to convince the judge that proffered evidence in the form of expert testimony will show that under certain situations there could well be a truly imminent danger of the harm—due to a nuclear accident, for example.

In *State v. Diener*,[85] mentioned above, the court said that the imminence requirement was lacking in that the occurrence of a nuclear catastrophe remains speculative.[86] Similarly in *United States v. Maxwell*,[87] it was held that the presence of thermo-nuclear submarine weapons was not in and of itself evidence of imminent harm. In *United States v. May*,[88] it was held that the existence of a Trident missile system failed to satisfy the imminence of harm factor. Also, in another case involving nuclear power protest, *State v. Dorsey*,[89] it was held that the necessity defense is limited to acts directed to the prevention of harm that is *reasonably certain to occur*. The defense is not available where the harm is non-imminent or debatable.[90]

In *Commonwealth v. Brugmann*,[91] the court, in ruling that the imminence factor was lacking in a case against protestors for trespassing at a nuclear power plant, noted that the "low level radiation, nuclear waste, and

81. 54 U.S. (13 How.) 115 (1851).

82. *Id.* at 133; *see also* State v. Greene, 623 P.2d 933, 937 (Kan. Ct. App. 1981) (harm must be "reasonably certain to occur"); Commonwealth v. Brugmann, 433 N.E.2d 457, 461 (Mass. App. Ct. 1982) (defendant must have "faced . . . a clear and imminent danger, not one which is debatable or speculative"); Commonwealth v. Averill, 423 N.E.2d 6, 8 (Mass. App. Ct. 1981) (necessity only available if defendant faced an "obvious and generally recognized harm[]"); Commonwealth v. Capitolo, 498 A.2d 806, 809 (Pa. 1985) (harm must be "readily apparent and recognizable to reasonable persons").

83. *See, e.g.*, United States v. Newcomb, 6 F.3d 1129, 1135–36 (6th Cir. 1993).

84. Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996).

85. 706 S.W.2d 582 (Mo. Ct. App. 1986).

86. *Id.* at 585.

87. 254 F.3d 21, 27 (1st Cir. 2001).

88. 622 F.2d 1000, 1008–09 (9th Cir. 1980).

89. 395 A.2d 855, 857 (N.H. 1978).

90. *Id.* at 857.

91. 433 N.E.2d 457, 461 (Mass. App. Ct. 1982).

the possibility of a nuclear accident" that the protestors cited in support of their necessity defense, have been regarded as "long term" hazards.[92]

In *State v. Warshow*,[93] which was precedent cited in *Brugmann*, the defendants were convicted of unlawful trespass in protesting at the main gate of a nuclear power plant known as Vermont Yankee.[94] The defendants argued that the specter of a nuclear accident satisfied the imminence of harm requirement of the necessity defense. The defendants expressed a sincere belief that the proliferation of nuclear power presented real and substantial dangers, and that they chose the course which would result in the least harm to the public, even though it meant violating the criminal law.[95] However, the judge excluded the proffered evidence relating to the hazards of nuclear power plant operations, and refused a jury instruction on the issue of necessity.[96]

The Vermont Supreme Court affirmed the conviction and said that the defendants failed to show that the nuclear power plant posed an imminent emergency. The court said that the "chance" or "possibility" of a nuclear accident was "too speculative and uncertain" as to constitute an imminent danger.[97] The danger perceived by the defendants was speculative, not actual. The court said: "[L]ow-level radiation and nuclear waste are not the types of imminent danger classified as an emergency sufficient to justify" the necessity defense.[98] The court noted that the hazards posed long-range risks, not an imminent threat, and hence the protestors had time to exercise reasonable legal alternatives in furtherance of their goals.[99]

In *State v. Dansinger*,[100] several defendants were found guilty of criminal trespass upon Maine Air National Guard property in Bangor, Maine. They were protesting the nuclear arms race. They argued that their actions were necessary to avoid imminent physical harm to themselves and others. The court held that the competing harms justification was inapplicable because the threat cited was not imminent. The court said that the word "imminent" in Maine's necessity statute means "appearing as if about to happen; likely to happen without delay; impending . . . ."[101] The threat of nuclear war cited by the defendants was not an "imminent" threat of physical harm as required by the statute, and there was no reason to believe that

92. *Id.* (quoting State v. Warshow, 410 A.2d 1000, 1002 (Vt. 1979)).
93. 410 A.2d 1000 (Vt. 1979).
94. *Id.* at 1001.
95. *Id.* at 1003.
96. *Id.*
97. *Id.* at 1002.
98. *Id.*
99. *Warshow*, 410 A.2d at 1002.
100. 521 A.2d 685 (Me. 1987).
101. *Id.* at 688 (quoting WEBSTER'S UNABRIDGED DICTIONARY 909 (2d ed. 1979)).

defendants' acts would lessen the threat of nuclear war. Further, the court affirmed the principle that it is not enough that an actor subjectively believe that an imminent threat of physical harm exists, but "it is further requisite that it be shown *as a fact* that such physical harm is imminently threatened."[102] The court added that the plain language of the necessity statute indicated that it was not designed as forming a basis for justifying acts of civil disobedience in the first place.[103]

Similarly, in *People v. Scutari*,[104] the necessity defense was rejected with respect to defendants who entered a congressman's office in an attempt to speak with him about U.S. foreign policy toward the government of El Salvador. The court held that the trespass was not necessary to avoid imminent public or private injury, and that in any event there was no evidence that the congressman's vote would have had any immediate impact on continued funding of the El Salvador government, and the trespass in an effort to arrange a meeting with the congressman was not an emergency measure that could reasonably have been thought to accomplish the goal of changing the foreign policy toward El Salvador.[105]

In *People v. O'Grady*,[106] a similar result was reached with respect to trespass of a naval facility in order to protect against nuclear weapons. The defendants scaled a fence containing signs warning against trespass and entered a naval facility under construction on Staten Island, New York. They did so to protest nuclear weapons which they believed would be aboard vessels entering the port once the facility was completed.[107] The court held that the perceived danger, which was the subject of protest, lacked the requisite immediacy, and that in any event the action taken, namely trespass, could not be deemed reasonably calculated to avoid it.[108]

The 1985 case, *Commonwealth v. Berrigan*,[109] is a well-known civil disobedience case that dealt with the imminence of harm factor. It involved a high profile protest against nuclear weapons by a group of disarmament activists known as the Plowshares Eight. They entered a General Electric plant, beat missile components with hammers, poured blood on the premises, and caused about $28,000 in damages to property.[110] They were charged and convicted of burglary, criminal mischief, and criminal con-

102. *Id.* (quoting State v. Kee, 398 A.2d 384, 386 (Me. 1979) (emphasis added)).
103. *Id.*
104. 560 N.Y.S.2d 943 (N.Y. Crim. Ct. 1990).
105. *Id.* at 443–44; *see also* People v. Craig, 585 N.E.2d 783, 787 (N.Y. 1991) (holding that the government's actions in Nicaragua did not constitute an imminent danger).
106. 560 N.Y.S.2d 602 (N.Y. App. Div. 1990).
107. *Id.* at 603.
108. *Id.*
109. 501 A.2d 226 (Pa. 1985).
110. *Id.* at 228.

spiracy. The defendants sought to present evidence from experts to support their contentions that their actions were necessary to prevent a nuclear holocaust.[111] The trial court rejected the offer of proof, holding that the defendants could not establish that the operation of the General Electric facility constituted an imminent danger to the public justifying their trespass and other criminal conduct. The appellate court reversed the conviction and ordered a new trial.[112]

However, the Pennsylvania Supreme Court reversed the appellate court's decision and reinstated the convictions.[113] The court construed Pennsylvania's necessity statute, section 510 of the Crimes Code, which remains unchanged to this day and reads:

> Conduct involving the appropriation, seizure, or destruction of, damage to, intrusion on or interference with property is justifiable under circumstances which would establish a defense of privilege in civil action based thereon, unless:
>
> (1) this title or law defining the offense deals with the specific situation involved; or
>
> (2) a legislative purpose to exclude the justification claimed otherwise plainly appears.[114]

The court noted that the necessity statute extends to actions taken to protect oneself, others, and property.[115] The court construed the statute together with section 196 of the Restatement (Second) of Torts, which says the law will excuse a trespass onto the land of another "if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting an imminent public disaster."[116] The court said that this defense is available only to

> one who is confronted with a widespread public crisis which does not allow the actor to select from among several solutions, some of which do not involve criminal acts. The threatened disaster (manmade or act of God) must be real and immediate, not imagined or speculative, and must threaten not only the actor but others as well. The actions taken to avoid the public disaster must support a reasonable belief or inference that the actions would be effective in avoiding or alleviating the impending harm. Addition-

111. *Id.*
112. *Id.* at 227.
113. *Id.*
114. 18 PA. CONS. STAT. ANN. § 510 (West 1998).
115. *Berrigan*, 501 A.2d at 229.
116. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 196 (1965)).

> ally, the defense cannot be available in situations where the conduct some perceive to engender public disaster has been specifically approved of by legislation making it legal conduct, or where a legislative purpose appears to exclude the defense.[117]

Thus, the court construed the necessity statute to apply to the destruction, damage, intrusion on, or interference with property only in situations where the actor seeks to avert a "widespread public crisis" or a "public disaster" that is clear and imminent.[118] The court did not provide guidance as to what constitutes a "widespread public crisis" or a "public disaster." It would seem clear that a nuclear holocaust would surely fall within the scope of a "widespread public crisis." However, on the imminence requirement the court said that the defendants' offer of proof "as a matter of law . . . was insufficient to establish that the harm . . . was a clear and imminent public disaster."[119]

A comment to section 196 of the Restatement (Second) of Torts says that "[a] reasonable belief on the part of the actor in the necessity of the entry for the prevention or mitigation of a public disaster is sufficient to justify the entry."[120] The court said that it would require a showing that "the actor was faced with a public disaster that was clear and imminent, not debatable or speculative," and that, under the facts of the case, the defendant's beliefs were reasonable. The court may have also been influenced by the fact that the actions taken by the defendants (e.g., pouring of human blood) were causally ineffective in averting the perceived danger.

In discussing the imminence of harm factor, the court in *People v. Gray*, discussed above, asked whether the defendants had "a well-founded belief in imminent grave injury."[121] The court heard testimony from various experts on the issue of whether air pollution constitutes a grave and imminent harm, and also on the dangerous situation faced by cyclists and pedestrians traveling at the same hours as vehicular traffic. The court found that "the resulting mixture of automobiles, bicycles and pedestrians represents an extremely dangerous situation with the potential for tragic consequences."[122] The court distinguished this situation from other cases where the harm was found to be too remote. The court said: "In this case, the threatened harm of increased deaths and illness through air pollution is a uniquely modern horror, very different from the fires, floods and famines

117. *Id.*
118. *Id.*
119. *Id.* at 230.
120. RESTATEMENT (SECOND) OF TORTS § 196 cmt. d (1965).
121. People v. Gray, 571 N.Y.S.2d 851, 856 (N.Y. Crim. Ct. 1991).
122. *Id.* at 858.

which triggered necessity situations in simpler days. However, the potential injury is just as great, if not greater."[123]

The imminence of harm factor is closely connected to the legal way out factor discussed below: if the harm to be avoided is not truly imminent, then there is time in which to pursue reasonable legal alternatives in an effort to abate the danger.

One might question the wisdom of requiring a strict construction of the imminence factor in civil disobedience cases. If forced to wait until a nuclear accident is truly imminent, neither protestors nor anyone else will have the opportunity to take effective action. "Prior to the Three Mile Island crisis . . . one could not have known that the accident threatened 'to occur immediately.' There comes a time when citizen intervention is too late."[124] In other words, certain hazards are of such *potential* danger that the imminence requirement must be relaxed to accommodate necessity. From the standpoint of civil disobedients, it is foolish for people to await the final denouement of a nuclear accident, when people may be immersed in fallout or gasping for their last breaths and then, only then, find the circumstances sufficiently advanced as to justify action.

The Model Penal Code specifically rejects the imminence of harm requirement.[125]

C. *The Causal Nexus Factor*

One of the greatest difficulties in advancing the necessity defense in civil disobedience cases is the need to show that there is a causal efficacy between the defendant's conduct and the evil sought to be averted. This is particularly difficult in cases involving indirect civil disobedience. Acts of trespass, disorderly conduct, or blocking access to facilities will draw attention, through the media, to the injustice that the protestors seek to vindicate, but in and of itself these acts are not likely to abate the evils by effecting a policy reversal. Courts will tend to find that the actors could not have had any reasonable expectation that their action would be effective in averting the danger and that their action was in fact ineffective.

The courts generally make two points in connection with the causal nexus factor: one, that the defendants failed to show a *reasonable belief* in a causal link between their conduct and averting the imminent danger; and two, that *in fact* there was no causal efficacy in that the action failed to avert the imminent danger.

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123. *Id.* at 860.
124. Lambek, *supra* note 7, at 484.
125. MODEL PENAL CODE § 3.02 cmt. 3, at 16–17 (1962).

Some courts have erected a seemingly insurmountable causal relationship standard, holding that defendants cannot claim necessity unless they could reasonably have expected their actions to *completely eliminate* the threatened harm.[126] Other courts have been more accommodating, holding that defendants must prove a reasonable belief that their conduct would be *in some way* effective in alleviating or reducing the risk posed by the threatened harm.[127] In any event, courts under both the strict and more accommodating view have consistently held that the defendants failed to show evidence of a causal relationship other than simply by the fervor of their convictions.[128] These cases suggest that an act of civil disobedience, in and of itself, is unlikely to help effect a change in policy.

To my view, the requirement that a protestor reasonably anticipate a *direct* causal relationship between the conduct and the harm to be averted is problematic. Civil disobedience is different from other situations in which the necessity defense is invoked. In necessity cases outside the context of civil disobedience, causation is seldom an issue, for if the defendant's action averted or failed to avert the greater evil, this is immediately apparent from the facts of the case.[129] With civil disobedience, there are many examples of causal efficacy in bringing about changes in government policy, not immediately, but after a period of time.[130] The action of a few protestors, in combination with the action of others, may well accelerate a political process that will lead ultimately to the policy change sought—

126. *See, e.g.*, United States v. Seward, 687 F.2d 1270, 1273 (10th Cir. 1982) (defendants must show that a reasonable person would think that defendants' actions "would terminate the official policy of the United States government as to nuclear weapons or nuclear power"); State v. Marley, 509 P.2d 1095, 1109 (Haw. 1973) (defendants did not show that their conduct was "reasonably designed to actually prevent the threatened greater harm"); Commonwealth v. Averill, 423 N.E.2d 6, 7–8 (Mass. App. Ct. 1981) (defendants' conduct "could not extinguish an immediate peril, if there was one").

127. *See, e.g.*, United States v. Simpson, 460 F.2d 515, 518 (9th Cir. 1972) (it was unreasonable for defendant to believe that his actions might "have any significant effect upon the supposed ills that he hoped to remedy" (footnotes omitted)); State v. Dansinger, 521 A.2d 685, 688 (Me. 1987) ("there is no reason to believe that the Defendants' acts would lessen the threat of harm"); People v. Hubbard, 320 N.W.2d 294, 298 (Mich. Ct. App. 1982) (defendants' actions "could not reasonably be presumed to have any effect in halting the production of nuclear power"); Commonwealth v. Berrigan, 501 A.2d 226, 229 (Pa. 1985) (defendant reasonably must have believed that actions "would be effective in avoiding or alleviating the impending harm"); Commonwealth v. Capitolo, 498 A.2d 806, 809 (Pa. 1985) (defendants' conduct could have "neither terminated nor reduced the [alleged] danger").

128. *See, e.g.*, United States v. Montgomery, 772 F.2d 733, 736 (11th Cir. 1985) (holding that defendants could not reasonably have believed that their entry into a defense plant would bring about nuclear disarmament); United States v. Dorrell, 758 F.2d 427, 433–34 (9th Cir. 1985) (finding that defendant had failed to establish that breaking into an air force base and vandalizing government property could reasonably be expected to lead to the termination of the MX missile program); United States v. Cassidy, 616 F.2d 101, 102 (4th Cir. 1979) (per curiam) (finding it unlikely that splashing blood on Pentagon walls would impel the United States to divest itself of nuclear weapons).

129. *See* example offered by Glanville Williams of making a breach in the dike that threatens to give way, *supra* notes 53–54 and accompanying text.

130. *See* Lambek, *supra* note 7, at 481.

perhaps years down the line. Our history is replete with examples in which legislative change has been prompted by principled and non-violent political protest.

> [C]ivil disobedience has often stirred our nation's collective conscience and spurred us to change or repeal unjust laws. Often, juries refused to convict good men of conscience whose love of justice had motivated them to violate the law. On some occasions, a jury would convict but the judge in recognition of the righteousness of the underlying cause would suspend sentence or issue a nominal find [sic].[131]

President Lyndon Johnson noted that the black American was the "real hero of this struggle . . . . His actions and protests, his call to risk safety, and even to risk his life, have awakened the conscience of this nation. His demonstrations have been designed to call attention to injustice; designed to provoke change; designed to stir reform."[132]

Movements opposing slavery, supporting women's suffrage, human rights, gay rights, environmental protection, and other causes have shown that there *is* causal efficacy between civil disobedience and the policy changes sought—but the change may take time and hence the causal connection is not "direct" in the immediate sense. Who is to say that the 1872 act of civil disobedience by Susan B. Anthony in illegally registering to vote did not result in the Nineteenth Amendment to the Constitution, the ratification of which was not completed until August 18, 1920?[133] Surely her action called attention to a significant injustice and was designed to provoke change. The ultimate passage of the Nineteenth Amendment took nearly fifty years, and was met with significant resistance by those who opposed women's suffrage, but inevitably there was victory in the movement.

One commentator on necessity and civil disobedience has noted that there is not

> a rigid time/space nexus between the act and the perceived harm. . . . A court may find that an attenuated relationship between the act and the harm does not constitute a strict causal nexus. However, it does not follow from this finding that no reasonable juror could find that the particular scenario created a reasonable belief in the

131. Commonwealth v. Markum, 541 A.2d 347, 351 (Pa. Super. Ct. 1988).

132. Lambek, *supra* note 7, at 480–81 (quoting television address by President Lyndon B. Johnson (Mar. 15, 1965)).

133. The Nineteenth Amendment states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend. XIX, § 1.

> efficacy of the act. The court should not use its power to interpret the meaning of the defense narrowly to keep the determination of reasonableness from the jury.[134]

Indeed, social scientists have considerable difficulty in ascribing causal relations between policy interventions and outcomes:

> [S]ocial science has been able to provide only what we would call "weak" causal theories. In the vast majority of cases the effects that are found are of modest size and only a small amount of the variation in the dependent variable is explained.
>
> . . . .
>
> What is problematic is that in arguing for particular policies we often argue as if social science's findings imply that there are strong determinative relations between particular causes and outcomes. Certainly, education affects earnings, but this does not mean that equalizing education will have much effect on earnings inequality. Similarly, economic poverty certainly affects child development, but this does not mean that reducing economic poverty will substantially improve child development.[135]

In ruling against the causal nexus factor, courts often do not articulate the *standard* which they are considering—i.e., whether they are relying on a direct causal nexus or a more attenuated relationship between the act and the policy change sought by the protestors. For example, in *State v. Dansinger*,[136] the court said that the necessity defense was inapplicable because there was no causal relationship between the defendants' acts and the avoidance of threat of harm of nuclear war,[137] but failed to specify what sort of standard it was invoking. In *United States v. Seward*,[138] protestors were charged with blocking a roadway during an antinuclear protest. The court challenged the defendants to establish that "a reasonable man would think that blocking the entry to [the nuclear weapons facility] for one day would terminate the official policy of the U.S. government as to nuclear weapons or nuclear power," but failed to specify what standard of causation the court had in mind.

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134. Laura J. Schulking, Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79, 103–04 (1989) (footnotes omitted).

135. Martin Rein & Christopher Winship, *The Dangers of "Strong" Causal Reasoning in Social Policy*, 36 SOC'Y 38, 40–41 (1999).

136. 521 A.2d 685 (Me. 1987).

137. *Id.* at 688.

138. 687 F.2d 1270 (10th Cir. 1982).

In *People v. Chachere*,[139] the court construed New York's necessity statute to require that the defendant must establish that there was a reasonable certainty that his actions would prevent the perceived harm, and that "the final result would be to stop the construction of the [nuclear power] plant."[140] The defendant trespassed onto the grounds of a nuclear power plant during a public demonstration concerning the plant's safety. The court said that "symbolic acts" of this sort do not meet the requirements of the necessity statute in part because there could not be any reasonable certainty of success in preventing the construction of the plant.[141]

In *People v. Gray*,[142] the defendants testified that in the past they had participated in civil disobedience that had produced successful results in obtaining bicycle access to a roadway and in preventing a ban of bicycles on public streets. They testified that in the present case they believed their actions would have a direct effect in avoiding the perceived harms in this case.[143] The court said that the standard for the causal relationship factor in New York is that the defendant's actions be "reasonably designed to actually prevent the threatened greater harm."[144]

The court rejected a rigid interpretation of the causal nexus factor, and said that an "after-the-fact requirement of an immediate relationship, constitutes a rule of per se unreasonableness, whereby a defendant who fails is held as a matter of law not to have reasonably believed in the efficacy of his action."[145] All that the court required was that the defendants offer sufficient evidence of a reasonable belief in a causal link between their behavior and ending the perceived harm, not that they expected a result immediately following their action.[146] "In the opinion of this Court, a defendant's reasonable belief must be in the necessity of his action to avoid the injury. The law does not require certainty of success."[147] The court added: "Penalizing them because a result reasonably expected did not actually occur immediately following their action, would be contrary to the purposes of the necessity defense."[148] Thus, the court recognized that the causal efficacy with indirect civil disobedience might not be direct and apparent, but relatively remote in time, or the results may be somewhat subtle, but nonetheless effective.

139. 428 N.Y.S.2d 781 (N.Y. Dist. Ct. 1980).
140. *Id.* at 783–84.
141. *See id.*
142. 571 N.Y.S.2d 851 (N.Y. Crim. Ct. 1991).
143. *Id.* at 863.
144. *Id.* at 862 (quoting *Chachere*, 428 N.Y.S.2d at 781).
145. *Id.*
146. *Id.* at 863.
147. *Id.*
148. *Gray*, 571 N.Y.S.2d at 863.

The court departed from precedent of other New York courts in construing the causal nexus factor. Most New York courts have held that the defendant must have a reasonable certainty that the condition acted against will be completely stopped or overcome.[149] The judge in *Gray* said: "A number of jurisdictions, New York among them, have included . . . [the requirement that] the action taken must be reasonably expected to avert the impending danger."[150] The court went on to say that it "has interpreted some of the elements of this defense in a manner which departs from prior decisions in this area."[151]

In some cases the causal nexus factor is rejected based on the finding that it was unreasonable to believe that the action could have had *any* effect in changing the policy in question. For example, *State v. Diener*[152] rejected the notion that the defendant could have had any reasonable expectation that his act of trespass would be effective in abating the danger. At best, it could have resulted in a meeting with General Dynamics executives. But "[a]ny expectation that such a meeting would result in the discontinuance of the manufacture of nuclear weapon systems is more accurately described as fanciful optimism than reasonable."[153] In *United States v. Simpson*,[154] the defendants were precluded from offering the necessity defense because "[t]he Vietnamese conflict could obviously have continued whether or not the San Jose, California draft board was able to restore its files and continue its lawful operation."[155] In *State v. Marley*,[156] the court found that the defendants could not have expected that their trespass at a nuclear arms plant would halt its production of war material.[157] In *Commonwealth v. Berrigan*, in considering the causal nexus factor the court said that "the actions chosen by Appellees (destruction of the casings and pouring of human blood) could not under any hypothesis reasonably be expected to be effective in avoiding the perceived public disaster of a nuclear holocaust."[158]

149. *See, e.g.*, *People v. Yajure*, 736 N.Y.S.2d 834 (N.Y. App. Term 2001) (The defendant was convicted of disorderly conduct and trespassing in connection with his attempt to prevent demolition of a historic building. The court rejected the defendant's argument that the unlawful conduct was necessary to prevent an imminent public or private injury within the meaning of the necessity statute and held that the defendant's conduct was not reasonably calculated to prevent the alleged harm.).

150. *Gray*, 571 N.Y.S.2d at 853.

151. *Id.* at 854.

152. 706 S.W.2d 582 (Mo. Ct. App. 1986).

153. *Id.* at 585.

154. 460 F.2d 515 (9th Cir. 1972).

155. *Id.* at 518 n.7.

156. 509 P.2d 1095 (Haw. 1973).

157. *Id.* at 1109.

158. Commonwealth v. Berrigan, 501 A.2d 226, 230 (Pa. 1985). Other courts have ruled as a matter of law on the ineffectiveness of other similar acts. *See, e.g.*, United States v. Dorrell, 758 F.2d 427 (9th Cir. 1985) (spray painting government property to terminate the MX missile program); United States v.

A leading case on the necessity defense and civil disobedience, *United States v. Schoon*,[159] did in fact specify the standard it was applying in evaluating the causal nexus factor. The defendants were accused of obstructing activities of the Internal Revenue Service. They "gained admittance to the IRS office in Tucson, [Arizona,] where they chanted 'keep America's tax dollars out of El Salvador,' splashed simulated blood on the counters, walls, and carpeting, and generally obstructed the office's operations."[160] The defendants contended that their acts in protest of American involvement in El Salvador were necessary to avoid further bloodshed in that country.[161]

Schoon cited *United States v. Aguilar*,[162] for the principle that the defendants must show that their conduct had "a *direct* causal relation[]" to averting the greater evil. Few acts of civil disobedience can meet this standard. The actions taken in obstructing the IRS office could hardly be said to have had a *direct* causal relation in abating the evils associated with American involvement in El Salvador. Moreover, it should be noted that *Aguilar* did not require a *direct* causal nexus in its evaluation of the necessity defense—but only required that the defendants show they "reasonably anticipated a causal relation between [their] conduct and the harm to be avoided."[163] Had *Schoon* permitted a looser construction of the notion of causation—as had clearly been advanced by *Aguilar*—the defendants would have had a better chance of getting their evidence to the jury.

D. *The Legal Way Out Factor*

Courts have frequently denied the necessity defense in civil disobedience cases on grounds that legal alternatives were available to the protestors instead of violating the law, even if such efforts might well be futile. The U.S. Supreme Court gave a classic statement of this factor in holding that if there is "a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm,

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Seward, 687 F.2d 1270 (10th Cir. 1982) (blocking entry to the Rocky Flats nuclear facility to change U.S. weapon policy); United States v. May, 622 F.2d 1000 (9th Cir. 1980) (trespassing on a naval installation to terminate the Trident submarine program); United States v. Cassidy, 616 F.2d 101 (4th Cir. 1979) (pouring blood and ashes on the Pentagon to change U.S. weapons policy); United States v. Simpson, 460 F.2d 515 (9th Cir. 1972) (burning selective service records to stop the Vietnam War); State v. Marley, 509 P.2d 1095 (Haw. 1973) (trespassing at a Honeywell Corporation office to stop the Vietnam War).

159. 971 F.2d 193 (9th Cir. 1991).

160. *Id.* at 195.

161. *Id.*

162. 883 F.2d 662 (9th Cir. 1989).

163. *Id.* at 693.

the [necessity] defense will fail."[164] Lower courts have seized upon this language as an automatic ground for excluding the defense in civil disobedience cases.[165]

The courts have consistently said that activists are free to participate in the political process, distribute literature, make speeches, petition legislators, express their disagreement with government policy in electronic and print media, and so on.[166] For example, "[t]here 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."[167]

Sometimes courts will simply refer to the notion that the defendants had "legal alternatives," but usually courts hold that this factor requires a showing that there were no *reasonable* legal alternatives.[168] Courts have been unsympathetic to the argument that legal processes to redress grievances are inadequate or ineffective.[169] The general attitude of courts in such cases is something like the following: You still had legal alternatives available; you could have continued to petition public officials to mitigate the harm with which you are concerned and engaged in other lawful political activity to induce a change in law or policy; you could have instituted litigation against the relevant political agency in an effort to show that the agency is violating international law or violating its own regulations, and have sought adjudication of your concerns in that manner.

In *State v. Diener*,[170] the court said that the defendant failed to show the absence of legal alternatives which would have been effective in abating the danger of nuclear power. On this point, the court noted that the defendant had access to electronic and print media as a means of expressing his disagreement with government policy and to help influence public

164. United States v. Bailey, 444 U.S. 394, 410 (1980) (internal quotations omitted).

165. *See, e.g.*, United States v. Quilty, 741 F.2d 1031 (7th Cir. 1984) (finding the defendant's contention, that he had no reasonable alternative to entering military property to engage in a prayer meeting to protest nuclear weapons, to be "impossible").

166. *See, e.g.*, United States v. Dorrell, 758 F.2d 472, 432 (9th Cir. 1985); United States v. Brodhead, 714 F. Supp. 593, 597 (D. Mass. 1989); Commonwealth v. Hood, 452 N.E.2d 188, 196 (Mass. 1983); State v. Diener, 706 S.W.2d 582, 585 (Mo. Ct. App. 1986).

167. *Quilty*, 741 F.2d at 1033.

168. *See, e.g.*, *id.*

169. *See, e.g.*, United States v. Seward, 687 F.2d 1270, 1275 (10th Cir. 1982); *Brodhead*, 714 F. Supp. at 597. In *Commonwealth v. Brugmann*, 433 N.E.2d 457 (Mass. App. Ct. 1982), protesters were charged with trespass for occupying a restricted area of a nuclear power plant, and presented strong evidence of an actual radiation leak at the plant. Nonetheless, the court rejected the necessity defense because defendants had not attempted to abate the hazard by initiating court actions on behalf of the Nuclear Regulatory Commission or its state counterpart. *Id.* at 462–63.

170. 706 S.W.2d 582 (Mo. Ct. App. 1986).

opinion.[171] The New Hampshire Supreme Court wrote that those "who oppose nuclear power have other lawful means of protesting nuclear power," so that they are not able to argue a need to trespass.[172]

However, from the perspective of civil disobedients, while "reasonable" legal alternatives indeed exist, they will not be *effective* in abating the evil in question, particularly in light of the imminence of the threat, which, from the perspective of the protestors, casts a special urgency on the need for change. Protestors may well believe that legal and time-honored democratic processes may simply be useless under the circumstances. "Activists frequently have spent years engaged in legal, but unsuccessful, efforts to avert the dangers they perceive before turning—often reluctantly—to civil disobedience."[173]

John Rawls addressed the concept of legal alternatives, saying that at a certain point, further attempts to engage in legal processes may be fruitless because reasonable appeals "have already been made in good faith and . . . they have failed."[174] He elaborates that in some instances the evil to be abated may be so imminent that the duty to engage in legal efforts may cease to apply:

> Note that it has not been said, however, that legal means have been *exhausted*. . . . [F]ree speech is always *possible.* But if past actions have shown the majority immovable or apathetic, further attempts may reasonably be thought fruitless, and a second condition for justified civil disobedience is met. This condition is, however, a presumption. Some cases may be so extreme that there may be no duty to use first only legal means of political opposition. . . . [E]ven civil disobedience might be much too mild, the majority having already convicted itself of wantonly unjust and . . . hostile aims.[175]

From the standpoint of protesters who have strong beliefs, the danger of nuclear accidents or other perils is so grave that it is disingenuous to suggest that legal alternatives such as seeking redress with political officials, publishing arguments in the electronic or print media, or obtaining a civil injunction in court, are *reasonable*.

Some courts take a restrictive view in the way they interpret the legal way out factor. In *United States v. Schoon*,[176] the court said that it was

171. *Id.* at 585.
172. State v. Dorsey, 395 A.2d 855, 857 (N.H. 1978).
173. Lambek, *supra* note 7, at 482–83.
174. RAWLS, *supra* note 4, at 373.
175. *Id.* (emphasis added).
176. 971 F.2d 193 (9th Cir. 1991).

implying a reasonableness standard in judging whether legal alternatives exist but added that "[w]here the targeted harm is the existence of a law or policy, our precedents counsel that this reasonableness requirement is met simply by the *possibility* of congressional action."[177] The court held that with respect to indirect civil disobedience, "legal alternatives will never be deemed exhausted when the harm can be mitigated by congressional action. . . . Because congressional action can *always* mitigate this 'harm,' [i.e., the policy sought to be mitigated by protestors] lawful political activity to spur such action will always be a legal alternative."[178] The court added that "the 'possibility' that Congress will change its mind is sufficient in the context of the democratic process to make lawful political action a reasonable alternative to indirect civil disobedience."[179] The legal alternative of appealing to Congress is "reasonable" even though lobbying Congress might be "futile," and "regardless of the likelihood of the plea's success."[180] Accordingly, *Schoon* held that the necessity defense in such cases "should be subject to a *per se* rule of exclusion. . . . Indirect protests of congressional policies can never meet all the requirements of the necessity doctrine. Therefore, we hold the necessity defense is not available in such cases."[181]

Gray rejected the view that because a democracy creates legal avenues of protest, legal alternatives must always exist.[182] This is in sharp contrast to *Schoon*, which held that reasonable alternatives are always available in connection with indirect civil disobedience.[183] *Gray* ridiculed that notion by saying:

> When courts rule as a matter of law that defendants always have a reasonable belief in other adequate alternatives, they are asserting that regardless of how diligent a party is in pursuing alternatives, no matter how much time has been spent in legitimate efforts to prevent the harm, no matter how ineffective previous measures have been to handle the emergency, the courts in hindsight can always find just one more alternative that a citizen could have tried before acting out of necessity.[184]

177. *Id.* at 198 (emphasis added).
178. *Id.* (emphasis in original).
179. *Id.* at 199.
180. *Id.*
181. *Id.* at 199–200; *see also* United States v. Maxwell, 254 F.3d 21, 29 (1st Cir. 2001) (construing legal way out factor to mean that the necessity defense must be denied as long as the protestors have *some* legal alternatives that *might* effect the desired changes).
182. People v. Gray, 571 N.Y.S.2d 851, 860 (N.Y. Crim. Ct. 1991).
183. *Schoon*, 971 F.2d at 199–200.
184. *Gray*, 571 N.Y.S.2d at 860–61.

The defendants had testified to a long history of attempts to prevent the harm they perceived. They made numerous formal protests to officials in the Department of Transportation and to other elected officials, and organized concerted petitioning and leaf-letting campaigns, but they were unable to get the Department of Transportation to hold a public hearing on their concerns. The court said that a history of futile attempts by others will meet the no-legal alternative requirement. Here, the members of Transportation Alternatives were completely excluded from the decision-making process concerning the closing of a very important roadway for pedestrians and bicyclists. Thus, the court held that it cannot be said as a matter of law that they did not reasonably believe their legal alternatives to be exhausted. The court found that the prosecution had failed to disprove any element of the necessity defense beyond a reasonable doubt, and acquitted the defendants.[185]

Some of these decisions have made an untenable interpretation to the idea of "reasonableness" in construing the legal way out factor. It seems absurd to suggest that even if it is futile to lobby Congress, nonetheless the protestors have a reasonable legal alternative. Yes, one can always lobby Congress. There is always the *possibility* of congressional action, but the existence of "further" legal options does not imply that the options are reasonable. "Reasonable," according to *Black's Law Dictionary*, means: "Fair, proper, or moderate under the circumstances. According to reason."[186] A reasonable alternative implies that it is more than available—that it will be effective as well:

> Reasonable must mean more than available; it must imply effective. Surely a jury can believe that there are situations in which constitutionally protected free speech has proved so ineffective in changing undesirable laws or policies that a reasonable social reformer would feel compelled to resort to another strategy. Thus, some civil disobedients can raise a question of fact as to whether reasonable legal alternatives exist.
>
> For example, antinuclear protestors can show that their previous political activities did not provoke an articulate response from the government, much less a policy change. And they can explain why their particular technique, with its direct confrontation and symbolic effect, is more promising. Sanctuary worker can show

185. *Id.* at 863.
186. BLACK'S LAW DICTIONARY 1272 (7th ed. 1999).

> that there is no other way to save refugees' lives. Such a showing should entitle the jury to hear evidence on this element.[187]

In this regard, another commentator observed:

> Consider, for example, the case where defendants make a prima facie showing that they reasonably believed that history demonstrates the futility of legal action. Even if these defendants are before a judge who does not believe that a history of futile attempts constitutes a no-legal-alternative situation, due process entitles them to jury consideration of whether their belief in the futility of legal action was reasonable and whether this established a reasonable belief that no legal alternative existed.[188]

Thus, the more enlightened view, which some judges have taken, is to allow juries to decide whether the defendant had reasonable (that is, fair, proper, ordinary, usual, or appropriate) legal alternatives to the act of protest that resulted in the criminal charges.

E. *The Preemption Factor*

The preemption factor is a significant hurdle in claiming that the civil disobedient was justified in violating the law based on necessity. The defense is not available where the subject matter of the protest has been specifically approved of or sanctioned by legislative or executive action. In such a situation, courts will hold that the matter has been "preempted" because the legislature or executive has made a policy determination that protects the "evil" which protestors seek to avert. The policies are simply not deemed to be "harms."[189] For instance, by sanctioning construction of a nuclear power plant, the legislature has debated the merits and evils of nuclear power and has made a value choice in favor of nuclear energy, so that the question of the "necessity" of violating laws in order to protest nuclear power has been preempted.[190]

The preemption factor may seem harsh in the context of civil disobedience cases. The mere fact that legislation exists in a particular area, such as nuclear power, or that the President has authorized a military engagement that protestors seek to avert, does not mean that Congress or the President has weighed the competing harms and made a preemptive value

187. Bauer & Eckerstrom, *supra* note 2, at 1180.
188. Schulking, *supra* note 134, at 93.
189. *See* Commonwealth v. Berrigan, 501 A.2d 226, 229 (Pa. 1985).
190. *See generally* Arlene D. Boxerman, *Commentary: The Use of the Necessity Defense by Abortion Clinic Protestors*, 81 J. CRIM. L. & CRIMINOLOGY 677, 694 (1990).

choice. In addition, even if such a determination had been made, new facts may emerge to show that the regulatory scheme has failed to such an extent that it needs to be reexamined. Perhaps there are risks that Congress did not contemplate in drafting legislation, which the defendant's civil disobedience is designed to spotlight. Even if the President acts pursuant to legislation, the scope of what Congress has approved may be unclear, and some actions of the President, such as deploying armed forces and engaging in armed conflict, often are not conducted with express congressional approval. Moreover, oftentimes civil disobedients do not attack the legality of policies, but the *morality* of the policies.

In *State v. Warshow*,[191] the court said that "the State of Vermont and the [f]ederal government have given their imprimatur to the development and normal operation of nuclear energy and have established mechanisms for the regulation of nuclear power."[192] The court said that the implication is that the benefits of nuclear energy outweigh its dangers, so that allowing the defendants to present the necessity defense would in effect permit the jury to redetermine questions of policy already decided by the legislative branches of the federal and state governments.[193]

A dissenting judge said that there was no inference from the legislature that the necessity defense should be precluded in this situation.[194] According to the dissent, the defendants offered to show an emergency that the regulatory scheme failed to avert, and were entitled to prove that their civil disobedience sought to avert a nuclear disaster that the regulatory scheme was designed to prevent. Moreover, the regulatory scheme made it clear that the people, as individuals and through their local and state representatives, have the right to evaluate the dangers of depositing, storing, or reprocessing high-level radioactive waste materials.[195] The dissent also noted that the defendants had "offered to show by expert testimony that there were defects in the cooling system and other aspects of the power plant which they believed could and would result in a meltdown within seven seconds of failure on the start up of the plant," which was relevant to the imminence requirement of the necessity defense. Thus, the dissent would have allowed the issue to go to the jury.

On the preemption factor, *Berrigan* noted that the activity of the General Electric plant in manufacturing bomb shell casings was lawful conduct

191. 410 A.2d 1000 (Vt. 1979).
192. *Id.* at 1003 (Hill, J., concurring).
193. *Id.*
194. *Id.* at 1004 (Billings, J., dissenting).
195. *Id.* at 1006.

so that there appears to be a legislative intention to preclude application of the necessity defense from this particular situation.[196]

The doctrine of separation of powers is often tied to the preemption factor in civil disobedience cases. This is alluded to above in our discussion on the reluctance of judges to allow the necessity defense in civil disobedience cases. As mentioned, courts have frequently held that to allow the necessity defense as a means of political protest would be a transgression of the principle of separation of powers, since it would force the courts to choose to side with or differ with policies adopted by Congress, and would require a jury to consider the complex issues already determined by elected representatives.[197] The idea is that by allowing the jury to hear the defense, this would impede democratic processes and could greatly frustrate policies that have been duly promulgated by the legislative and executive branches of government.

V. ABORTION PROTEST CASES

A. *How Anti-Abortion Civil Disobedience Differs from Other Types of Protest*

Anti-abortion activists have on numerous occasions attempted to raise the necessity defense in connection with criminal trespass charges arising out of abortion clinic demonstrations.[198] Invariably, the defense has been rejected as a matter of law.[199] Still, even in situations where the defense of necessity is denied, juries have in fact acquitted some protestors.[200]

Abortion protest cases started to emerge after the U.S. Supreme Court's decision in *Roe v. Wade*.[201] These protesters sought to change government policy that permitted first trimester abortions. The idea was that by trespassing at abortion clinics, they could bring public awareness to the immorality of abortions. Often, too, the protesters had the immediate goal of preventing individual abortions, which they regard as murders. That is, abortion protestors believed that "abortion represents the intentional taking of a human life, and preventing an abortion is thus seen by them as equivalent to preventing a murder."[202]

196. Commonwealth v. Berrigan, 501 A.2d 226, 230 (Pa. 1985).
197. State v. Diener, 706 S.W.2d 582, 586 (Mo. Ct. App. 1986).
198. *See generally* Boxerman, *supra* note 190, at 677.
199. *See id.* at 678.
200. *See id.* at 678 n.10.
201. 410 U.S. 113 (1973).
202. United States v. Hill, 893 F. Supp. 1044, 1047 (N.D. Fla. 1994).

There are four main areas in which anti-abortion civil disobedience differs from other types of civil disobedience. One distinction pertains to the choice of evils factor. In abortion protest cases defendants seek to argue that the necessity defense is available although the activity is a legal human act. The argument is that even if the abortion clinic is performing legal abortions, the protestors are nonetheless seeking to avert a *moral* harm and that the necessity defense ought to apply because criminal trespass is a lesser evil than the moral harm they wish to prevent.

A second distinction pertains to the imminence of harm factor. Assuming that an abortion is something that causes a harm, then from the standpoint of anti-abortion activists, their illegal methods of protest are clearly directed at an imminent harm. Under this reasoning, protestors will seek to provide evidence that "abortions were about to be performed by an abortion provider, and that injuring or interfering with the provider would avert the imminent peril of the abortion being performed."[203] This is distinguished from other forms of civil disobedience in which the defendant may be unable to present evidence that the harm sought to be averted was imminent.

A third distinction is with respect to the causal nexus factor. Defendants in the abortion protest cases are able to provide evidence that their illegal methods of protest had a direct causal connection in at least preventing some abortions from taking place on the day of the protest. Civil disobedients in other contexts, as we have seen, have had great difficulty for the most part in presenting evidence that satisfies the causal nexus factor.

A fourth distinction pertains to the preemption factor. While this hurdle has been noted to a significant extent in other types of civil disobedience, it is an especially great hurdle in the context of abortion protests because obtaining a first trimester abortion remains a constitutionally protected right. Almost every court which has considered the necessity defense has rejected it when asserted in trespass-abortion cases, largely based on the preemption factor.[204] Some courts have rejected the defense on the ground that since first trimester abortions are legally protected, there is the failure of the choice of evils factor in that "a public or private injury presupposes the actionable invasion of some right, and no actionable invasion of a right occurs in a legally protected activity."[205] Other courts have been open to the possibility that a lawful abortion could be construed to be a harm, but that nonetheless the necessity defense must be disallowed in

203. *Id.*
204. *See* State v. O'Brien, 784 S.W.2d 187, 192 (Mo. Ct. App. 1989).
205. *Id.*

trespass-abortion cases on the ground that the activity is constitutionally protected under *Roe v. Wade*.

Let us examine with some specificity the main elements abortion protestors have sought to advance under the necessity defense.

B. *Analysis of the Necessity Doctrine in Abortion Protest Cases*

1. *Choice of Evils Factor*

Defendants in these cases have argued that their action was necessary to avoid the death of the fetuses and that the trespass was a lesser evil. The courts generally have rejected the choice of evils factor in trespass-abortion protest cases on the grounds that the "injury" sought to be prevented is not a legally recognized injury because of the ruling in *Roe v. Wade* that the right to privacy guaranteed by the Constitution encompasses a woman's decision to terminate her pregnancy during the first trimester.[206] Thus, protestors have consistently been denied the necessity defense on the ground that they did not in fact face a valid choice of evils when the abortion provider and patient are seeking to abort a first trimester abortion.[207]

For example, *Commonwealth v. Markum*[208] involved protestors who were charged with trespass for forcibly pushing their way into an abortion clinic and destroying aspirator machines and other medical instruments.[209] The court said: "Appellants cannot use unlawful means in an effort to stop lawful behavior, no matter how morally reprehensible they feel that behavior to be."[210] The court noted, in construing Pennsylvania's necessity statute, that a constitutionally sanctioned activity such as abortion could not be considered a "public disaster" within the meaning of the statute.[211] This and similar cases suggest that legal human conduct (e.g., doctors providing and women seeking first trimester abortions) cannot ever constitute a "harm to be avoided" under the necessity doctrine.

In *Cleveland v. Municipality of Anchorage*,[212] the Alaska Supreme Court affirmed the conviction of abortion protesters at a clinic in Anchorage, Alaska. The court said that there are commentators who have "expanded" the necessity defense to encompass human threats, but that "we

206. *See, e.g.*, People v. Krizka, 416 N.E.2d 36 (Ill. App. Ct. 1980); Sigma Reproductive Health Center v. State, 467 A.2d 483 (Md. 1983); City of St. Louis v. Klocker, 637 S.W.2d 174 (Mo. Ct. App. 1982); Commonwealth v. Markum, 541 A.2d 347 (Pa. Super. Ct. 1988).
207. *See, e.g.*, Cleveland v. Municipality of Anchorage, 631 P.2d 1073, 1079 (Alaska 1981).
208. 541 A.2d 347 (Pa. Super. Ct. 1988).
209. *Id.* at 348.
210. *Id.* at 351.
211. *Id.* at 350.
212. 631 P.2d 1073 (Alaska 1981).

are in agreement with those commentators who have noted that it should be limited to cases in which the threatened man-made harm is illegal."[213] The court also interpreted the necessity doctrine to mean that the necessitous circumstances must generally be a result of physical forces of nature.[214] The court quoted one commentator as follows:

> [W]henever the harm emanates from a human source, this harm must be unlawful before the necessity defense can be used. This assumption, although not explicit in the cases or statutes, is solidly based in the common law as developed in both older and more recent cases. The early cases did not face the question as they dealt only with harms caused by natural forces, which can never be illegal. When faced with cases involving human-created harms, the courts modified the necessity doctrine and required that the threatened harm be illegal. This requirement continued in the prison escape cases. Although these decisions held necessity to be a proper plea when the threatened harm emanated from a human source, the facts of the cases involved human-created threats of unlawful acts, usually rape, homicide or felonious assault. Recent codifications and judicial opinions discuss the necessity defense in broad terms, neither expressly designating the source of the threatened harm nor its character. They are meant to codify the common law and can fairly be assumed to embody common-law principles. Several states' inclusions of self-defense and defense of another, which both justify otherwise unlawful conduct in the face of another person's unlawful act, support this thesis.[215]

Thus, the court held that the necessity defense does not apply in this case because "the alleged harm sought to be avoided did not arise from a natural source and was not unlawful."[216]

The view that the necessity defense is not properly asserted if the harm to be averted is a product of lawful human conduct appears to be flawed and has been challenged.[217] For example, in *City of Chicago v. Mayer*,[218]

213. *Id.* at 1079 n.10.
214. *Id.* at 1078.
215. *Id.* at 1079 n.10 (citing Debbe A. Levin, Note, *Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic*, 48 U. CIN. L. REV. 501, 513 (1979)).
216. *Id.* at 1079.
217. *See, e.g.*, Patrick G. Senftle, Note, *The Necessity Defense in Abortion Clinic Trespass Cases*, 32 ST. LOUIS U. L.J. 523, 527 (1987) (noting the view that the harm the actor seeks to avoid need not flow from unlawful activity, but may include *lawful* human-created harms); *see also* United States v. Hill, 893 F. Supp. 1044, 1046 (N.D. Fla. 1994); PAUL H. ROBISON, CRIMINAL LAW DEFENSE § 124, at 48 (1984).
218. 308 N.E.2d 601 (Ill. 1974).

the defendant successfully interposed the necessity defense for disorderly conduct and interfering with police officers in the performance of their *lawful* duties. Although the action of making a lawful arrest was a human action and lawful, the defendant reasonably believed, albeit incorrectly, that the police were endangering the life of the arrestee, and on that basis interfered with the arrest and was acquitted based on the necessity defense.[219]

It is also worthwhile to note that numerous necessity statutes provide a broad characterization of the defense, and do not limit the threats of harm which justify someone in violating the law. Many of the statutes simply use generic terms such as "harm" or "evil," without defining those terms.

The view that the necessity defense is unavailable if the activity to be averted is a legal human act would have counterintuitive consequences. For instance, take the case of someone who violates the traffic laws in order to speed someone who has gotten into an accident to the hospital. The harm to be avoided—death or aggravation of bodily injuries—may well have been caused by lawful human acts, such as by falling down accidentally. If the necessity defense demands that the human-created harm be illegal, the driver might not have a defense to charges of speeding and reckless driving because the human-created harm is legal. We might consider, again, the example of Glanville Williams, regarding the dike that gave way. Presumably, the evil to be averted was an act of God, not something that was human-created, yet intuitively the necessity defense should be available to the actor who diverts the dike.

The question of whether legal abortions can constitute a "harm to be avoided" under the necessity doctrine was addressed in *People v. Archer*.[220] The defendants were charged with criminal trespass and resisting arrest at a "sit-in" at a hospital to prevent performance of abortions that the actors claimed were beyond the first trimester. At trial the group contended that it had resisted being removed from the abortion wing because they intended to "rescue" the unborn children whom the medical group had scheduled for abortions that morning.[221]

> The court said that what constitutes an "injury to be avoided" under New York's necessity statute encompasses more than simply what is *criminally* illegal. Behavior that is permissively legal may nonetheless constitute an "injury to be avoided" under ordinary standards of intelligence and morality.[222] The language of the stat-

219. *Id.* at 604.
220. 537 N.Y.S.2d 726 (N.Y. City Ct. 1988).
221. *Id.* at 728.
222. *Id.* at 731.

> ute broadly refers to the injury to be avoided as that "which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue."[223]

The court said:

> In Nevada, for example, prostitution is legal, but still, immoral. Some type of gambling is almost everywhere legal, but many persons of ordinary intelligence and morality still consider it immoral. Traffic in alcoholic beverages is legal, but its byproduct, drunkenness, remains immoral. Divorce is legal, but in many cases, it is immoral, especially when it affects innocent children of the marriage. Thus, the two ideas—morality and legality—are not the same. Morality is the standard of conduct to which, as good and decent people, we all aspire. Legality is the standard of conduct to which, as members of a civilized society, and under penalty of the criminal sanction, we must all adhere.[224]

Although first trimester abortions are generally legal, still abortion can constitute a *moral* "injury to be avoided" under New York's necessity statute "because citizens of ordinary intelligence and morality remain free both as individuals and as jurors, to find [that abortions are injuries to be avoided] notwithstanding the fact that the [l]egislature has made most abortions 'justifiable' in relation to what would otherwise be a prohibited criminal act."[225] The court further held that the jury could find that "the urgency of avoiding such injuries clearly outweighs the desirability of avoiding injuries such as Trespassing and Resisting Arrest."[226] The court said:

> The jury may weigh the loss of the life of the developing fetus against the property rights the trespass statute protects, and the social order values the arrest statute supports. And if the jury finds that the value of these fetal lives clearly outweighs the competing values of private property and social order, then . . . they may acquit the defendants.[227]

223. N.Y. PENAL LAW § 35.05 (2006).
224. *Archer*, 537 N.Y.S.2d at 731 (footnote omitted).
225. *Id.* at 732.
226. *Id.*
227. *Id.* at 732–33.

The judge then seemed to contradict his entire line of reasoning by saying that the jury could not consider the necessity defense with respect to first trimester abortions since that would interfere with a constitutionally protected area of privacy mandated by *Roe v. Wade*.[228] However, the court said that the necessity defense may be applicable if the defendants could prove they were protesting because the obstetrical group was about to perform abortions outside of the first trimester. In the end, the jury found that the abortions scheduled on the day of the defendant's protest were all first trimester, and the defendants were found guilty of trespass and resisting arrest.[229]

Also in connection with the choice of evils factor, courts have argued the "slippery slope" as a policy consideration if abortion protestors could justify trespass or other illegal acts based on necessity. "To accept appellant's argument would be tantamount to judicially sanctioning vigilantism. If every person were to act upon his or her personal beliefs in this manner, and we were to sanction the act, the result would be utter chaos."[230] Another court echoed this view by saying:

> If abortion trespassers are given license to disrupt the activities of abortion clinics and refuse to desist upon being requested to vacate the premises . . . the continuing battle between those who abhor abortion and those that believe it is a private moral decision could well be joined in physical confrontations into which the police and the courts would be rendered unable to intervene.
>
> . . . .
>
> . . . [T]he enduring clashes of beliefs in this fractious dispute must be resolved not by physical confrontations at the front line, but rather through the legislative and judicial framework created for the very purpose of undertaking the sometimes formidable tasks of choosing between extreme positions and competing values.[231]

Some courts have said that the trespass was the greater evil, that it caused greater harm to the patients and the abortion clinic: "The Clinic's schedule was disrupted and its operating room required resterilization; and it was certainly foreseeable that the patients scheduled to undergo abortions at the time the demonstration occurred would suffer emotional dis-

228. *Id.* at 734.
229. *Id.* at 735.
230. Commonwealth v. Wall, 539 A.2d 1325, 1329 (Pa. Sup. Ct. 1988).
231. People v. Crowley, 538 N.Y.S.2d 146, 151–52 (N.Y. J. Ct. 1989).

tress as a result of appellants' invasion of their privacy during a particularly sensitive period."[232]

A final aspect of choice of evils involves abortion clinic bombings and killings. Courts have rejected the use of deadly force as justification under the necessity doctrine to protect unborn fetuses from abortion.[233] In *United States v. Hill*,[234] the court rejected necessity as a defense to the murder of a doctor who performed abortions.[235] The case involved Paul Hill, who in 1994 ambushed a doctor, his unarmed bodyguard, and the doctor's wife, in Pensacola, Florida, killing the doctor and his bodyguard. He was found guilty of murder and sentenced to death.[236]

2. *The Imminence of Harm Factor*

The harm that abortion protestors seek to avert is, in most cases, quite concrete, imminent, and much less speculative and remote than the harms sought to be avoided in other civil disobedience cases. Anti-abortion protestors seek to prevent abortions scheduled on the day of their trespass by blocking access to the clinics. These protesters often can prove that abortions were scheduled to be performed at a particular clinic on the very day of their demonstrations.[237] In other words, the harm that these protesters seek to avert is not "a theoretical future [event] . . . that may or may not occur."[238] With abortion protest cases the harm sought to be avoided, namely abortions, is not temporarily remote—as in cases where protesters trespass at nuclear power plants or weapon manufacturing plants. Abortion protestors point out that they seek to prevent abortions scheduled to be performed perhaps within moments of the time that they occupied and blocked the premises.

In *Cyr v. State*,[239] protestors sought to defend charges of trespass at an abortion clinic on the grounds that they reasonably believed that there was imminent danger that the clinic was going to perform *illegal late-term* abortions.[240] One witness testified that she had seen a woman in the clinic whom she *believed* to be at least seven or eight months pregnant, but the

232. Cleveland v. Municipality of Anchorage, 631 P.2d 1073, 1080 (Alaska 1981).

233. *See generally* Charles E. Rice & John P. Tuskey, *The Legality and Morality of Using Deadly Force to Protect Unborn Children From Abortionists*, 5 REGENT U. L. REV. 83, 101 (1995).

234. 893 F. Supp. 1044 (N.D. Fla. l994).

235. *Id.* at 1048.

236. *See Activist Guilty of Clinic Murder*, PITTSBURGH-POST GAZETTE, Nov. 3, 1994, at A5.

237. *See, e.g.*, People v. Krizka, 416 N.E.2d 36 (Ill. App. Ct. 1980); City of St. Louis v. Klocker, 637 S.W.2d 174, 175 (Mo. Ct. App. 1982).

238. United States v. May, 622 F.2d 1000, 1009 (9th Cir. 1980) (concerning political protest at a Trident submarine base).

239. 887 S.W.2d 203 (Tex. App. 1994).

240. *Id.* at 204–05.

court held that there was insufficient evidence to establish that these beliefs were reasonable. Hence, the court held that since the defendants' belief that there was imminent danger that third trimester (i.e., unlawful) abortions were going to be performed was unreasonable, they had failed to satisfy the imminence of harm factor under the necessity doctrine.[241]

3. *The Causal Nexus Factor*

Abortion protesters argue that they can establish a causal connection between their acts and the harm they wish to avert. That is, by blocking access to the clinic, at least for the time being, protesters can hope to postpone some abortions or force some women to go to other clinics.[242] They thereby abate the harm of abortion, albeit only temporarily. And they may also interact with women and try to dissuade them from having an abortion.

The acts of trespass-abortion protest appear to have a much more plausible causal nexus in averting the harm in question compared to other categories of civil disobedience, such as nuclear power plant protests. Those desiring abortions will not be able to have them, at least not that day; they will be forced to postpone the planned abortion and, perhaps in the interval, be persuaded by the abortion protesters to change their minds.

Some courts have been sympathetic to the causal efficacy factor in these cases, with one court reasoning that:

> While protestors of nuclear weapons cannot "hold a reasonable belief that a direct consequence of their actions [will] be nuclear disarmament," it is possible to hold a reasonable belief that injuring or interfering with abortion providers will prevent at least one or some abortions from occurring. The fact that the number of medical doctors willing to perform abortions continues to decline makes the causal connection stronger. One doctor may provide services for many clinics in several states: injuring or interfering with such a doctor could effectively eliminate services for a large number of patients for a period of weeks or months. Therefore, for

241. *Id.* at 206–07.

242. *See* Cleveland v. Municipality of Anchorage, 631 P.2d 1073, 1080 (Alaska 1981) ("[T]heir actions could not halt the alleged greater harm to which society had given its imprimatur, but rather that, at best, the harm could be only postponed for a brief interval, following which society's normal operations would reassert themselves."); Commonwealth v. Markum, 541 A.2d 347, 351 (Pa. Super. Ct. 1988) ("Appellants' occupation of the Women's Center did not stop its operation. Legal abortions continued to be performed in the Center and were available in other medical facilities throughout Pennsylvania."); Commonwealth v. Wall, 539 A.2d 1325, 1329 (Pa. Sup. Ct. 1988) ("There is no evidence that any women discontinued their efforts to obtain an abortion as the result of appellant's actions.").

> purposes of the necessity defense analysis, a causal connection may exist here that is lacking in the case of nuclear protestors.[243]

Moreover, in recent times the political climate concerning abortions seems to have shifted:

> Since its defeats in the November elections, nothing has put the fractured soul of the Democratic Party on display more vividly than abortion. Party leaders, including Senator Hilary Rodham Clinton of New York and the new chairman, Howard Dean, have repeatedly signaled an effort to recalibrate the party's thinking about new restrictions on abortion.[244]

4. *The Legal Way Out Factor*

Abortion protesters, like other political activists, have legal alternatives for airing their political views and seeking policy changes. Courts have generally stated that abortion clinic protestors can exercise their First Amendment rights by providing information regarding abortions to persons entering clinics, except insofar as the activity might violate the Freedom of Access to Clinic Entrances Act of 1994,[245] which we discuss below.

Abortion protestors may speak to individuals approaching the clinics, hand out literature on public property, peacefully carry picket signs on public property in front of abortion clinics, pray on public property, engage in advertising on billboards or in other media, canvass door to door, and lobby for legislative reforms in the area of abortion.[246]

On the other hand,

> [i]n the case of abortion, the efficacy of legal alternatives could arguably be questioned as to the likelihood of their success. As a general proposition, evidence that a defendant exhausted all available legal alternatives, and that such alternatives as a class had been futile over a long period, might be sufficient to allow a defendant to present his necessity defense to the jury.[247]

To abortion protestors, there are no reasonable legal alternatives because the right to obtain first trimester abortions appears to be firmly enshrined in

243. United States v. Hill (*Hill I*), 893 F. Supp. 1044, 1046–47 (N.D. Fla. 1994) (citation omitted).

244. David D. Kirkpatrick, *For Democrats, Rethinking Abortion Position Meets With Mix of Reactions in Party*, N.Y. TIMES, Feb. 16, 2005, at A18.

245. Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 (1994).

246. *See, e.g.*, Commonwealth v. Markum, 541 A.2d 347, 351 (Pa. Super. Ct. 1988) ("There are obviously numerous means in a democratic society to express a point of view or to attempt to prevent a perceived harm without resorting to criminal behavior.").

247. *Hill I*, 893 F. Supp. at 1047–48.

American jurisprudence and will remain so unless reconsidered by the Supreme Court or an amendment to the Constitution is passed. This leads some to conclude that: "Those attempting to exhaust legal alternatives in the anti-abortion field thus have few methods at their disposal."[248] And as some courts have observed, "[i]f the identified alternatives are illusionary, then there may well be no legal alternative."[249] Abortion protestors may well be able to show that they "had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefit of the alternative."[250]

5. *The Preemption Factor*

Under the preemption analysis, it appears that abortion clinic protesters are precluded from raising the necessity defense because the Supreme Court held, in *Roe v. Wade*, that a woman's right to a first trimester abortion is protected by the Constitution. "Admittedly, it would be unreasonable to assert that today's society has uniformly embraced the *Roe* Court's value choice. Nonetheless, the constitutional protection afforded abortion has the legal effect of a declaration of society's values concerning abortion, which precludes the use of the necessity defense by abortion clinic protesters."[251] In other words, first trimester abortion is not a "harm" but has been granted affirmative status as a legally protected interest, and this expresses a value choice which preempts the use of the necessity defense in abortion protest cases.

A separate preemption hurdle is the Freedom of Access to Clinic Entrances Act of 1994,[252] which says that whoever:

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services shall be subject to a fine or imprisonment according to the penalty provisions of the statute.[253]

248. *Id*. at 1050.
249. *Id.* at 1047.
250. United States v. Gant, 691 F.2d 1159, 1164 (5th Cir. 1982).
251. *See* Boxerman, *supra* note 190, at 700.
252. 18 U.S.C. § 248 (2006).
253. *Id.* § 248(a)(1).

The statute also makes it unlawful to intentionally damage or destroy the property of a facility that provides reproductive health services.[254]

The statute prohibits conduct, not speech. According to the Act's rules of construction, nothing in it "shall be construed . . . to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution . . . ."[255] However, it has been held that uttering warnings or threats to physicians through a bullhorn constitutes "intimidation" in violation of the Act,[256] and that making telephone threats to kill a person providing reproductive health care services constitutes terroristic threats in violation of the Act.[257] On the other hand, it was held that a priest who made statements on a nationally televised talk show that killing of abortion providers was justified if motivated by the desire to protect innocent human life, did not use a "threat of force" against a physician who performed abortions and who also appeared on the show.[258] In order for acts of "intimidation" to constitute a violation of the Act, the conduct must place a person in "reasonable apprehension" of bodily harm to himself or herself.[259]

The constitutionality of the Act has been upheld in numerous cases, including *Terry v. Reno*.[260] The Act clearly precludes protestors from invoking the necessity defense with respect to acts that seek to prevent individuals from obtaining abortions. The sweeping language of the Act would seem to extend its anti-intimidation prohibition even in situations where people might be seeking abortions beyond the first trimester. Whether the Act might pertain to protests over illegal abortions has not yet been determined.

VI. VIET NAM ANTI-WAR PROTEST CASES

A significant body of case law on civil disobedience involved anti-war protests over the Viet Nam War. In many of these cases, anti-war protestors charged with the destruction of Selective Service records, sought, but failed, to get the necessity defense before the jury.[261] In some of these

254. *Id.* § 248(a)(3).
255. *Id.* § 248(d)(1).
256. *See* United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996).
257. *See* Greenhut v. Hand, 996 F. Supp. 372 (D.N.J. 1998).
258. *See* Lucero v. Trosch, 928 F. Supp. 1124 (S.D. Ala. 1996).
259. *See* United States v. Brock, 863 F. Supp. 851 (E.D. Wis. 1994).
260. 101 F.3d 1412 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997).
261. *See, e.g.*, United States v. Chase, 468 F.2d 141 (7th Cir. 1972); United States v. Glick, 463 F.2d 491 (2d Cir. 1972); United States v. Cullen, 454 F.2d 386 (7th Cir. 1971); United States v. Turchick,

cases, the defendants claimed they were destroying property to save lives, and that at any rate the symbolic destruction of property was justified as a protest against an illegal war.[262] Some of these defendants spoke of obeying a higher moral law or their conscience.[263] However, most of the cases held that the sincere belief that the protestors were breaking the law for a good cause was not acceptable as a legal defense or justification. In one case, the court stated that "[i]t implies no disparagement of their idealism to say that society will not tolerate the means they chose to register their opposition to the war."[264]

On December 24, 1970, John Simpson entered the Local Board of the Selective Service System in San Jose, California, opened a file drawer, doused the contents with gasoline, and set the files ablaze. He remained in the building and was arrested. He was subsequently indicted and convicted of destroying government property and interfering with the Selective Service System. He sought to introduce evidence that his actions were done to avert greater evil in the war zone. The trial judge rejected the proffered evidence and refused to give the jury instructions regarding the defense of necessity.

The Ninth Circuit affirmed the conviction,[265] and its decision seems to emphasize the failure of the defendant to show a causal nexus between the acts of protest and the evil sought to be averted. The court said that it recognized the "theoretical basis of the justification defense[] . . . that, in many instances, society benefits when one acts to prevent another from intentionally or negligently causing injury to people or property."[266] However, the court said that "[a]n essential element in the so-called [necessity] defense is that a *direct causal relationship* be reasonably anticipated to exist between the defender's action and the avoidance of harm."[267] The court said that it was unreasonable for Simpson to believe that his actions might have a significant effect on the evils he wished to prevent because the war would undoubtedly continue whether or not the San Jose draft board continued to function.[268]

As noted above, there are good arguments to reject a strict construction of the causal nexus factor in civil disobedience cases because, in many

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451 F.2d 333 (8th Cir. 1971); United States v. Beneke, 449 F.2d 1259 (8th Cir. 1971); United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969); United States v. Berrigan, 283 F. Supp. 336 (D. Md. 1969).

262. *See* Arnolds & Garland, *supra* note 57, at 300.

263. *See id.*

264. United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969).

265. *See* United States v. Simpson, 460 F.2d 515, 520 (9th Cir. 1972).

266. *Id.* at 518.

267. *Id.* at 518 (emphasis added).

268. *Id.* at 518 n.7.

instances, the results may be indirect, subtle, and may not manifest after a period of years.

In a similar Viet Nam era case, *United States v. Baranski*,[269] four defendants poured blood on Selective Service records. They argued that they reasonably believed their conduct was necessary to save those persons registered in the files they destroyed from imminent danger of death or serious bodily injury and from being compelled to commit war crimes in an illegal war.[270] The trial judge accepted a small portion of the proffered evidence that draftees were in imminent danger of death in Viet Nam, that draftees were compelled to commit war crimes in Viet Nam, and that the war was illegal under international law. The defendants tendered a necessity defense instruction for the jury, but the judge rejected it. Nonetheless, the jury acquitted the defendants of three substantive charges (the same charges as in *Simpson*), but guilty of conspiracy. On appeal, the conspiracy count was reversed on other grounds.[271]

In *United States v. Kroncke*,[272] the defendant sought to justify the stealing of draft cards on the ground that interfering with the Selective Service would shorten the war in Viet Nam and thus save endangered human lives. The court of appeals rejected the defense, largely on the grounds that the imminence factor was not satisfied. The judges reasoned that the necessity defense applies only if the action was undertaken to avoid a "direct and immediate peril."[273]

Other cases involved protests over the production of Napalm and other controversial chemicals deployed in the war zone. In *United States v. Dougherty*,[274] the defendants broke into the Washington offices of Dow Chemical Company to protest Dow's production of Napalm. They threw papers and documents about the office and into the street below, vandalized office furniture and equipment, and defaced the premises by spilling a bloodlike substance. The defendants were convicted of malicious destruction of property. The judge refused to instruct the jury that "moral compulsion" or "choice of the lesser evil" constituted a legal defense.[275] In refusing to instruct the jury on the necessity defense, the judge quoted to the jury the following language from a Supreme Court case:

> The constitutional guarantee of liberty implies the existence of an organized society maintaining public order without which liberty

269. 484 F.2d 556 (7th Cir. 1973).
270. *See id.*
271. *Id.* at 571.
272. 459 F.2d 697 (8th Cir. 1972).
273. *Id.* at 701.
274. 473 F.2d 1113 (D.C. Cir. 1972).
275. *Id.* at 1121.

> itself would be lost. . . . We also reaffirm the repeated decisions of this Court that there is no place for violence in a democratic society dedicated to liberty under law, and that the right of peaceful protest does not mean that everyone with opinions or beliefs to express may do so at any time and at any place. There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations.[276]

The judge went on to tell the jury:

> Individuals who believe that the Vietnam War is illegal or immoral or that certain activities of the Dow Company are undesirable have the right under our system of government to express their views or to protest these events by any lawful means, such as by peaceful picketing or parading. But the Constitution of the United States does not protect as a form of symbolic speech the destruction of private property and the violation of valid laws designed to protect society.
>
> The defendants may have been motivated by the highest moral principles, and they may have been sincerely and passionately inspired. But such motives do not confer immunity from prosecution or conviction for the violation of a valid law, and as such the motives of the defendants are not controlling in the case which is before you for decision.[277]

The judge also refused to provide a "jury nullification" instruction requested by the defense to the effect that the jury had the right to disregard the law as he gave it to them. On appeal, the D.C. Circuit said that to instruct the jurors on the availability of jury nullification would run the risk of anarchy.[278] The court said that it would be unwise for a judge to expressly delineate to the jury its "charter to carve out its own rules of law."[279] It added:

> Moreover, to compel a juror involuntarily assigned to jury duty to assume the burdens of mini-legislator or judge, as is implicit in the doctrine of nullification, is to put untoward strains on the jury system. It is one thing for a juror to know that the law condemns, but he has a factual power of lenity. To tell him expressly of a nullifi-

276. *Id.* at 1137 n.54 (quoting Cox v. Louisiana, 379 U.S. 536, 554, 574 (1965)).
277. *Id.*
278. *See id.* at 1134.
279. *Id.*

> cation prerogative, however, is to inform him, in effect, that it is he who fashions the rule that condemns. That is an overwhelming responsibility, an extreme burden for the jurors' psyche.[280]

In *United States v. Moylan*,[281] the Fourth Circuit expressed similar views against providing specific instructions to the jury on jury nullification:

> To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic, as appellants claim, but inevitably anarchic.[282]

VII. ANIMAL WELFARE CIVIL DISOBEDIENCE

Civil disobedience is not always non-violent or limited to the simple acts of trespass or malicious mischief. Mahatma Gandhi actually endorsed violence in connection with civil disobedience: "I do believe that where there is only a choice between cowardice and violence I would advise violence."[283] And Jesus engaged in riotous civil disobedience when he threw out the moneychangers in the Temple.[284]

Many ordinary citizens are sympathetic to the animal liberation movement, which has the philosophy that animals have certain fundamental rights, parallel to those of humans, and that we, as moral agents, have a duty to advocate and insure that these rights are defended. Peter Singer's *Animal Liberation: A New Ethic for Our Treatment of Animals*,[285] and other works, helped spawn the philosophical imperative that animals, like humans, possess certain fundamental and inalienable rights, and therefore should be treated as equals. Many who advocate an animal rights agenda believe that the use of animals in research and industry is analogous to slavery and the Holocaust.

Most animal rights advocacy groups do not openly condone the use of violence or other unlawful means to further their agenda. Many animal welfare societies work within established legal channels to ensure that

280. *Dougherty*, 473 F.2d at 1136.
281. 417 F.2d 1002 (4th Cir. 1969).
282. *Id.* at 1009.
283. ZINN, *supra* note 1, at 42 (quoting Gandhi).
284. *See Matthew* 21:12.
285. PETER SINGER, ANIMAL LIBERATION: A NEW ETHIC FOR OUR TREATMENT OF ANIMALS (1972).

laboratory and other animals are treated humanely. They confine their efforts to lobbying government and other public institutions, launching demonstrations and protests, and sponsoring public education campaigns.[286]

However, in recent years the use of violence and other disruptive expressions of extremism on behalf of animal rights have been rapidly expanding.[287] Environmental activists have also been known to engage in what is termed eco-terrorism.[288] Fueling the radical animal liberation movement are such publications as *A Declaration of War: Killing People to Save Animals and the Environment*, a "call to arms" treatise that encourages violence and sabotage against animal enterprises and individuals such as research scientists.[289] Since the early 1980s, a broad range of enterprises, in both public and private sectors, that use or market animals in their commercial or professional activities, have been targeted by radical elements within the animal rights movement with acts of disruption, violence, intimidation, arson, supergluing of locks, death threats, letter bombs, car bombs, computer hacking, burglary in order to liberate animals, and the destruction of equipment involved in animal experimentation.[290]

For example, the Animal Liberation Front (ALF) is a militant, underground group dedicated to the liberation of all animals from "exploitation" by humans.[291] The ALF seeks to justify various illegal acts based on the necessity of saving animals in factory farms and laboratories from abuse. The ALF has used the slogan: "[I]f we are trespassing, so were the soldiers who broke down the gates of Hitler's death camps; if we are thieves, so were the members of the underground railroad who freed the slaves of the South; and if we are vandals, so were those who destroyed forever the gas chambers of Buchanwald and Auschwitz."[292] The ALF and similar organi-

286. *See Report to Congress on the Extent and Effects of Domestic and International Terrorism in Animal Enterprises*, 36 THE PHYSIOLOGIST 207, 207 (Dec. 1993), *available at* http://www.the-aps.org/publications/tphys/legacy/1993/issue6/207.pdf [hereinafter *Report to Congress*].

287. *Id.*

288. *See* Denise R. Case, *The USA Patriot Act: Adding Bite to the Fight Against Animal Rights Terrorism?*, 34 RUTGERS L.J. 187, 208 (2002). For instance, an act of eco-terrorism reported in a 1998 hearing in Congress involved equipment sabotage in the logging industry. *See id.*; *see also* People v. Bauer, 614 N.Y.S.2d 871 (1994); People v. Crowley, 538 N.Y.S.2d 146 (1989). Placing spikes in trees and in paths through the woods and burning down animal testing centers have become common tactics by various environment protection activists. Earth Now, for instance, a militant environmental group in the United States, has argued that if necessary, they would be justified in killing people to save trees.

289. *Report to Congress*, *supra* note 286, at 250.

290. *See* Rachel Monaghan, *Terrorism in the Name of Animal Rights*, *in* THE FUTURE OF TERRORISM 160–161 (Max Taylor & John Horgan eds., 2000).

291. *See Report to Congress*, *supra* note 286, at 248–49.

292. Garrett O'Boyle, *Theories of Justification and Political Violence: Examples from Four Groups*, *in* 14 TERRORISM AND POLITICAL VIOLENCE 23, 28 (2002) (quoting *Animal Liberation Front*).

zations have garnered considerable public sympathy despite their acts of violence and destruction.[293]

In 2004, the ALF, armed with axes and bolt cutters, vandalized the offices and trucks of a major concrete supplier in connection with construction of an animal research laboratory at Oxford University.[294] Activists from this group have been known to track down employees of pharmaceutical companies and threaten them, or gather outside their homes or offices to angrily protest against the use of animals for scientific research and testing.[295] They sent out a forged letter to shareholders of the company that was building the laboratory, supposedly from the company's chairman, telling them to sell their shares. The company's stock price plummeted, and the company soon withdrew from the project.[296] These illegal tactics produced a major victory for activists. Earlier in the year, "after months of pressure, intimidation and protests from the groups, Cambridge University abandoned plans to build a major primate research center."[297] Investors and drug manufacturers, on the other hand, have warned that Britain, which is a dominant force in the pharmaceutical industry, could face a serious erosion of biomedical investment if the violence and intimidation does not stop.[298]

Many of these acts constitute direct civil disobedience because they are violating the specific laws and rights of others that they believe are fundamentally wrong. Thus, it would seem that they would have a *stronger* case of asserting the necessity defense, under the *Schoon* ruling, than most other civil disobedients.

Congress sought both to punish those who engage in acts of "terrorism" against animal enterprises and to deter others from doing the same. The Animal Enterprise Protection Act of 1992[299] (AEPA) makes it a federal offense, punishable by fine and/or imprisonment for up to one year, to cause physical disruption to the functioning of an animal enterprise resulting in economic damage exceeding $10,000. The AEPA also imposes sentences of up to ten years or life imprisonment, respectively, in persons causing the serious bodily injury or death of another during the course of such an offense.

The AEPA defines "animal enterprise" as

293. *See Report to Congress*, *supra* note 286, at 249.
294. *See* Lizette Alvarez, *Animal Welfare Advocates Win Victories in Britain with Violence and Intimidation*, N.Y. TIMES, Aug. 8, 2004, at A6.
295. *See id.*
296. *See id.*
297. *Id.*
298. *See id.*
299. The Animal Enterprise Protection Act of 1992, 18 U.S.C. § 43 (2006).

> (A) a commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing;
>
> (B) a zoo, aquarium, animal shelter, pet store, breeder, furrier, circus, or rodeo, or other lawful competitive animal event; or
>
> (C) any fair or similar event intended to advance agricultural arts and sciences.[300]

In addition, over half the states have a criminal statute pertaining to animal enterprise terrorism.[301]

There apparently has been only one prosecution under the AEPA, involving a group of defendants associated with an organization known as Stop Huntingdon Animal Cruelty in Britain. The organization objects to the use of dogs, primates, and rats by a company called Huntingdon Life Sciences, and the group also undertakes protests against other firms as well. The group posted what it called the "top twenty terror tactics" to be used against companies and individuals, including: invading offices, chaining gates shut, writing graffiti on cars and houses, flooding houses with garden hoses, smashing windows, and sending defective e-mail messages in attempts to disrupt computers.[302] One of the defendant's lawyers said, "[a]ny activity he engaged in was lawful and was within his First Amendment rights."[303] On its Web site, the group likens itself to the Underground Railroad and the Boston Tea Party. The group has been successful in causing substantial economic damage to Huntingdon. Numerous companies severed their ties with the lab, including Aetna and March insurance companies, Goldman Sachs, and the Bank of America.[304]

The group and the organization itself were indicted in 2004 in New Jersey, where Huntingdon has a facility.[305] The defendants were accused of disrupting the New Jersey facilities of Huntingdon and threatened its employees and others who do business with the firm. After a jury trial, the organization and six of its members, including its president, were found guilty of violating the AEPA.[306] The organization was convicted on evidence that it used its Web site to incite threats, harassment, and vandal-

300. *Id.* § 43(d)(1)(A)–(C).
301. Case, *supra* note 288, at 200.
302. THE BRITISH TERROR INVASION, http://www.mitosyfraudes.org/Polit/Terror.html (last visited Aug. 15, 2007) (quoting from the magazine, *The Scientist*).
303. Robert Hanley, *Seven Animal Rights Advocates Arrested*, N.Y. TIMES, May 27, 2004, at B9.
304. *See* David Kocieniewski, *Six Animal Rights Advocates Are Convicted of Terrorism*, N.Y. TIMES, Mar. 3, 2006, at B3.
305. Hanley, *supra* note 303.
306. Kocieniewski, *supra* note 304.

ism.[307] This was the first instance of a conviction under the AEPA.[308] The defendants apparently did not seek the necessity defense, but argued that their acts and communications were protected by the First Amendment.[309]

There are numerous hurdles in asserting the necessity defense in a case involving violence in connection with animal rights advocacy. For one thing there is the choice of evils factor. Many believe that testing animals with proposed pharmaceuticals is the only way to determine the safety of new products, and this paves the way to eventual use by human subjects. The use of animals in such contexts ends up saving human lives, and thus on balance it would seem that the choice of evils weighs *against* seeking to avert such experiments. And various federal and state laws have been enacted to ensure humane treatment of animals in such situations.[310]

Another hurdle is the legal way out factor. It appears that lawful campaigns such as boycotts and less extreme forms of civil disobedience are available and have produced results. For instance, in 1989, People for the Ethical Treatment of Animals (PETA) engaged in protests at Procter & Gamble's headquarters, throwing cream pies at the company's chairman, and sponsoring a race car to spoof the company's "Tide" car.[311] Eventually, Procter & Gamble announced "it will immediately stop using animals to test many of its household products."[312] The change prompted the company to spend nearly $100 million to develop alternatives to animal testing.[313]

In another incident, PETA informed the Washington D.C. Dining Society, prior to a scheduled banquet where *foie gras* would be served, of the cruelty involved in obtaining *foie gras* from geese and ducks, and as a result the event's organizer removed the item from the banquet menu.[314]

These are examples in which nonviolent tactics can work to change policies concerning animal welfare. Also, raising public consciousness through education and boycotts is "more likely to garner respect from the general public (toward the animal rights movement) than accidentally killing someone in a laboratory firebomb."[315] On the other hand, activists may believe that peaceful methods such as boycotts and lobbying are not reasonable legal alternatives because they take a significant amount of time to become causally effective, during which many animals will die.

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307. *Id.*
308. *See id.*
309. *See id.*
310. *See* Case, *supra* note 288, at 191–92.
311. *Id.* at 229.
312. *Id.* at 229–30.
313. *Id.* at 230.
314. *Id.* at 230 n.255.
315. *Id.* at 230 n.252.

A final hurdle is the preemption factor, evidenced by the intention of Congress to make unlawful the very acts of civil disobedience that the group in the above AEPA case engaged in.

VIII. CIVIL DISOBEDIENCE DEFENSE BASED ON THE NUREMBERG PRINCIPLES

Some civil disobedients have interjected a separate and novel defense that is similar to, but analytically distinct from, the necessity defense. These protesters have sought to use the Nuremberg Principles as a defense, and in some cases have been successful.

The Allied Powers codified the Nuremberg Principles as international law at the end of World War II. On August 8, 1946, the United States, the Soviet Union, France, and Great Britain signed an Agreement for the Establishment of an International Military Tribunal, known as the London Charter, to try persons charged with war crimes.[316] The London Charter sets forth definitions for crimes against peace, crimes against humanity, and war crimes.[317] To civil disobedients, article 6 of the London Charter is of particular interest in that it holds individuals personally responsible for, among other things, "planning, preparation, initiation or waging of a war . . . in violation of international treaties, agreements or assurances."[318] Under the London Charter, it is not a defense to individual responsibility that an individual acted under superior orders.[319] The notion of individual responsibility, which forms the core of the Nuremberg Principles, applies not only to government officials, policy makers, and military personnel, but to

316. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (known as the London Charter).

317. *Id.* art. 6(a)–(c).

318. *Id.* art. 6(a). Article 6 defines war crimes as:

> [M]urder, ill-treatment or deportation to [slave] labor, or for any other purpose the civilian population of or in an occupied territory, murder or ill-treatment of prisoners of war or persons on the scene, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

Id. art. 6(b). Crimes against humanity are defined as:

> [M]urder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated . . . .

Id. art.6(c).

319. *See id.* art. 8.

private citizens as well.[320] Individual responsibility depends "on the extent of complicity as reflected in actions and knowledge."[321]

The strategy to civil disobedients is to argue that their actions were designed to prevent others from violating the law embodied in the Nuremberg Principles. It has been persuasively asserted that the application of the Nuremberg Principles in domestic courts is entirely proper, and that indeed courts have a duty to apply them.[322] The Nuremberg Principles became customary international law at the moment they were announced, or within a very short time thereafter.[323] As such, customary international

320. *See* The Zykon B Case, *reprinted in* THE LAW OF WAR: A DOCUMENTARY HISTORY 1487 (L. Friedman ed., 1972) (in which civilians were charged with providing Zykon B (prussic acid) used to kill prisoners in concentration camps). "[T]he provisions of the laws and customs of war are addressed not only to combatants and to members of state and other public authorities, but to anybody who is in a position to assist their violation." *Id.*

321. Richard A. Falk, *The Nuremberg Defense in the Pentagon Papers Case*, 13 COLUM. J. TRANSNAT'L L. 208, 231 (1974).

322. *See, e.g.*, Frank Lawrence, *The Nuremberg Principles: A Defense for Political Protesters*, 40 HASTINGS L.J. 397, 404–13 (1989).

323. According to one commentator, one of the objectives of the Nuremberg Trials was to lay down the rule of individual accountability:

> Henceforth, no matter how exalted your position, whether you were captains, kings, presidents, prime ministers, secretaries of parties, heads of parlor bureaus, military chieftains, bankers, industrialists, no matter how exalted, Justice Jackson [American Chief of Counsel of the Nuremberg Trials] said, "We will give you short shrift, a long rope, and into your hands, we will pass the poisoned chalice." In other words, if war comes . . . [n]o longer does exalted status confer immunity.

Thomas F. Lambert, Jr., *Recalling the War Crimes Trials of World War II*, 149 MIL. L. REV. 15, 16–17 (1995). According to another commentator:

> In neither the Tokyo nor the Nuremberg Trials was it sufficient for the defence [sic] to show that the acts of responsible officers or of government ministers and officials were protected as "acts of state." The twin principles of individual criminal responsibility and of universal jurisdiction in the prosecution and punishment of war criminals were firmly established.

R. John Pritchard, *The International Military Tribunal for the Far East and Its Contemporary Resonances*, 149 MIL. L. REV. 25, 33 (1995). Yet another commentator had this to say:

> Nuremberg was a historical landmark in other respects as well. It marked the start of the international human rights movement because it was the first international adjudication of human rights. Its effect in this respect is felt throughout the world in the United Nations Genocide Convention, the United Nations Universal Bill of Rights, American Convention on Human Rights, and above all, the European Convention on Human Rights and Fundamental Freedoms.

Henry T. King, Jr., *The Nuremberg Context from the Eyes of a Participant*, 149 MIL. L. REV. 37, 46 (1995). A further comment reveals the following:

> The judges at Nuremberg were concerned that the proceedings be seen as the enforcement of legal norms, not simply a process of the victors punishing the vanquished. . . . The defendants argued that the old legal system protected them against punishment, an argument that had proven effective in the war crimes trials held at the end of World War I. Although that argument may seem nonsensical to us today, it was not a trivial argument in its time. . . . We need not reexamine that claim today. But we should be cautious against assuming that what is true today has always been true. The decision at Nuremberg built on and confirmed the growing changes in international law, but it represented a turning point for individual responsibility and for international law. . . . The rejection of the "superior orders" defense is of necessity based on the presumption of an applicable legal order outside of and beyond the

law "is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[324] Customary international law is not foreign law, but is part of U.S. constitutional and federal law.[325]

The strategy for civil disobedients is to assert that they acted to prevent the commission of international crimes. Suppose a group of people are arrested for criminal trespass while protesting the production of weapons at a defense contractor's facility. The individuals will seek to argue that the basis of their protest is that the weapons being produced are for deployment by the government to quell civilian uprisings in, say, Country X, and to foment an illegal coup against the existing regime. The defendants will argue that the defense contractor and the government are conspiring to accomplish this, and this conspiracy is a violation of the Nuremberg Principles.

The defendants will then seek to assert that they acted "to prevent the commission of a crime about to be committed, or to prevent the consummation of a crime already underway. . . ."[326] They will seek to justify the action based on the common law privilege of using reasonable force to prevent a crime that is being committed or is about to be committed in their presence. This privilege to use force to prevent the commission of a crime is summarized as follows: "One who reasonably believes that a felony, or a misdemeanor amounting to a breach of the peace, is being committed, or is about to be committed, in his presence may use reasonable force to terminate or prevent it."[327] Perkins and Boyce articulate the privilege this way: "[A]ny unoffending person may intervene for the purpose of preventing the commission or consummation of any crime if he does so without resorting to measures which are excessive under all the facts of the particular case."[328] Most jurisdictions in the United States recognize this privilege to use force to prevent crime.[329] This defense, sometimes referred to as the

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nation state. This, in itself is the most important sign of transformation of the paradigm that was being made.

Fred L. Morrison, *The Significance of Nuremberg for Modern International Law*, 149 MIL. L. REV. 207, 212 (1995).

324. The Paquete Habana, 175 U.S. 677, 700 (1900).

325. Lawrence, *supra* note 322, at 407.

326. WAYNE R. LAFAVE, CRIMINAL LAW 513 (3d ed. 2000); *see also* Lawrence, *supra* note 322, at 407 n.36.

327. LAFAVE, *supra* note 326, at 513–14; *see, e.g.*, CAL. PENAL CODE §§ 693–94 (West 2004).

328. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 1108 (3d ed. 1982).

329. *See* LAFAVE, *supra* note 326, at 513 n.36; *see, e.g.*, CAL. PENAL CODE §§ 197 (privilege to take human life), 692–94 (crime prevention privilege generally) (West 2004); IOWA CODE ANN. § 704.1–704.9 (West 2003); N.Y. PENAL LAW § 35.00–35.25 (McKinney 2004).

"citizen's privilege,"[330] requires only that the defendants have a "reasonable belief that an ongoing or imminent violation of . . . law is occurring."[331] Thus, if the defendants are reasonable in their belief, but mistaken, the defense may still be asserted.[332]

Numerous courts have simply said that the defendants lacked standing to raise the Nuremberg Principles as a basis of their defense.[333] The doctrine of standing is based on constitutional and prudential considerations. The constitutional issue stems from the "case or controversy" requirement of Article III of the Constitution. The Supreme Court has considered the question of a plaintiff's standing to sue in a variety of cases.[334] For example, the Court has said that simply being a citizen interested in having the government act within the bounds of the Constitution generally does not afford a party standing to challenge governmental actions. Chief Justice Burger stated:

> [S]tanding to sue may not be predicated upon an interest . . . which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. . . . This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective upon the [case]. . . . Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions.[335]

In *United States v. May*,[336] which involved demonstrators who were accused of trespass in climbing a fence and entering a naval submarine base to protest the use of the Trident system, a submarine-based nuclear

330. *See* Lawrence, *supra* note 322, at 416.
331. *Id.*
332. *See id.*
333. *See, e.g.*, United States v. Montgomery, 772 F.2d 733 (11th Cir. 1985); United States v. Lowe, 654 F.2d 562 (9th Cir. 1981); United States v. May, 622 F.2d 1000 (9th Cir. 1980); United States v. Valentine, 288 F. Supp. 957 (D.P.R. 1968); United States v. Berrigan, 283 F. Supp. 336 (D. Md. 1968); *see also* Lawrence, *supra* note 322, at 422–24.
334. *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984); City of Los Angeles v. Lyons, 461 U.S. 95 (1983); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Rizzo v. Goode, 423 U.S. 362 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); O'Shea v. Littleton, 414 U.S. 488 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).
335. *Schlesinger*, 418 U.S. at 220–21.
336. 622 F.2d 1000 (9th Cir. 1980).

missile system, the Ninth Circuit addressed the standing issue in refusing to allow the Nuremberg defense, stating:

> The connection between what the defendants did and their claims that the Trident system is designed solely for the waging of aggressive war, and is therefore illegal, is so tenuous as not to give them any basis for asserting the defense. They can assert no harm to themselves from the allegedly illegal conduct of the government that is greater than, or different from, the potential harm that might affect every other person in the United States.[337]

Another ground for rejecting the Nuremberg Principles defense is that the political question doctrine forecloses the court from entertaining the defense.[338] Numerous courts have been reluctant to allow the defense because it would require an adjudication of the legality of U.S. foreign policy.[339] There is also reluctance to allow the defense because it would signal that private citizens have the right to take the law into their own hands.[340]

Nonetheless, some courts have allowed civil disobedients to introduce evidence, based on the Nuremberg Principles defense, that a given foreign policy is illegal, and the results have been acquittals or dismissals of actions. The most notable case of this kind was *Massachusetts v. Carter*,[341] which involved Amy Carter (former President Jimmy Carter's daughter), Abbie Hoffman, and thirteen others. The protestors targeted recruitment by the Central Intelligence Agency on the University of Massachusetts–Amherst campus. The protestors were charged with trespassing and disorderly conduct in their demonstration against the CIA. The defendants argued the necessity defense in addition to the citizen's privilege, based on their reasonable belief that the Nuremberg Principles were being violated. They asserted that the executive branch of the United States was violating international law through the actions of the CIA, and that the defendants had acted to prevent the CIA from committing further crimes.[342] Among other things in this line of argument, they asserted that the CIA was conducting a secret foreign policy which was designed to systematically murder, mutilate, and torture civilian populations and to destabilize governments in El Salvador, Chile, the Congo, Indonesia, and Viet Nam.[343]

337. *Id.* at 1009.
338. *See* Lawrence, *supra* note 322, at 417–22.
339. *See, e.g.*, *Berrigan*, 283 F. Supp. at 342–43, *cert. denied*, 397 U.S. 909 (1970).
340. *See* Lawrence, *supra* note 322, at 421.
341. Mass. v. Carter, No. 8745-JC-0091A (D. Ct., Hampshire County, Mass., Apr. 15, 1987); *see also* Rick Hornung, *'Necessity': Is It the Mother of Acquittals?*, NAT'L L.J., May 4, 1987, at 6.
342. *Id.* at 32.
343. Lawrence, *supra* note 322, at 434 n.252.

The court allowed the jury to consider these arguments. The defendants had expert witnesses who described to the jury assassinations, murders, campaigns of misinformation, and other alleged activities by the CIA in Nicaragua. Some witnesses testified that other means of protest, such as seeking action in Congress, were futile. The jury acquitted all the defendants.[344]

City of Richland v. Barnes[345] involved twenty-nine people who were charged with disorderly conduct for blocking the road leading to the Hanford Nuclear Reservation in Washington State. In addition to the necessity defense, the defendants argued the citizen's privilege with regard to their belief that international law was being violated by the activities at the facility. In a previous case, the Benton County District Court Commissioner had made favorable rulings on the admissibility of these defenses.[346] However, before the defendants had the opportunity to present their defense, the charges were dismissed by another judge based on his ruling that the disorderly conduct ordinance was unconstitutionally vague.[347]

In *Vermont v. McCann*,[348] the defendant was charged with disorderly conduct with respect to a protest over weapons production at the General Electric plant in Burlington, Vermont. In addition to the necessity defense, the defendant argued that the air-to-ground cannon being manufactured was used in attacks against civilians as part of a strategy of deterring civilian support for the overthrow of the government of El Salvador. The defendant argued that he acted to protect the lives of Salvadoran citizens threatened by the guns produced inside the plant, in violation of the Nuremberg Principles.

The court allowed this to go to the jury, on the grounds that the U.S. government had consistently demanded that domestic courts apply international law. The court said:

> The United States has applied treaty and customary international law with little hesitation when it was deemed appropriate to bring others to justice.
>
> . . . This Court is not prepared to hold that our law is that of the hypocrite nor is it that of the vengeful conqueror.

344. *See* Matthew L. Wald, *Amy Carter Is Acquitted over Protest*, N.Y. TIMES, Apr. 16, 1987, at A17.
345. City of Richland v. Barnes, No. 38323 (D. Wash. Oct. 31, 1986).
346. Lawrence, *supra* note 322, at 435.
347. *Id.*
348. Vt. v. McCann, No. 2857-7-86 (D. Vt. Jan. 26, 1987), *reprinted in* 44 GUILD PRAC. 101 (1987).

> Therefore, this Court holds that international law including specifically, the Nuremberg Principles, is law appropriate to be administered by this Court or any other court of justice.[349]

The court also discussed the political question doctrine, saying that an issue is not transformed into a political question merely because it involves matters of social policy or public interest.[350] The court said that the Nuremberg Principles defense involves issues of foreign policy, but that the defendant "offers to prove that a particular foreign policy is illegal, not that it is unwise or even foolish. That is an issue appropriate for the judiciary. Were it otherwise, the executive would be above the law; it is not, even in matters of national security."[351] The defendant was acquitted.

In *Vermont v. Keller*,[352] the citizen's privilege was again asserted by protesters who were charged with criminal trespass at the offices of Senator Robert T. Stafford. They had hoped to persuade him to hold a public meeting concerning U.S. policy in Central America. At trial, they argued that the U.S. government had aided and abetted the government of El Salvador in the commission of international crimes, that the U.S. policy with respect to Nicaragua violated international law, and that the defendants had a citizen's privilege to take appropriate action to prevent the continued violation of international crimes. After hearing the defense based on the Nuremberg Principles, the jury acquitted the defendants.

In *Chicago v. Streeter*,[353] eight demonstrators were charged with trespass in connection with a protest at the Chicago office of the South African Consulate. The court allowed the jury to hear evidence that the actions of the defendants were necessary to prevent violations of international law under the Nuremberg Principles. The accused argued that the government of South Africa had been committing crimes by its policies of racial segregation and that the defendants acted reasonably in their efforts to prevent the continuation of these crimes. All defendants were acquitted.

Similarly, in *Illinois v. Jarka*,[354] protestors charged with mob action and resisting arrest at a demonstration at the Great Lakes Naval Base presented a necessity defense that their action was designed to prevent violations of the Nuremberg Principles. The court allowed the defendants to present evidence concerning illegal U.S. actions in Nicaragua. The jury acquitted all defendants.

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349. *Id.* at 14–15, 44 GUILD PRAC. at 108.
350. *Id.* at 17, 44 GUILD PRAC. at 109–10.
351. *Id.* at 19, 44 GUILD PRAC. at 110 (citation omitted).
352. Vt. v. Keller, No. 1372-4-84 (D. Vt., filed Nov. 13, 1984).
353. Chi. v. Streeter, No. 85-108644 (Cir. Ct., Cook County, Ill. May 17, 1985).
354. Ill. v. Jarka, No. 002170 (Cir. Ct. Ill. Apr. 15, 1985), *reprinted in* 42 GUILD PRAC. 108–10 (1985).

IX. CONCLUSION

A. *Arguments in Favor of the Necessity Defense in Civil Disobedience Cases*

One may wonder, in considering the vast array of federal and state cases on the subject, whether the tendency to refuse juror access to evidence of the necessity defense is seriously misguided, and whether social justice, dissent, and individual freedom might be better served by tilting the scales in the opposite direction so that juries may have the opportunity to decide such questions in more cases.

The necessity defense allows the airing of views by those in most need of a hearing, i.e., individuals who are most frustrated by the workings of the political system. To them, there is no reasonable legal alternative available in the orthodox political structure to give them a voice in shaping government policy. Airing these issues in the courtroom sends a message to legislators and other officials by bringing the challenged law or policy to their attention. In addition, the jury is empowered to weigh controversial political issues. Traditionally, juries had the power to decide questions of law as well as fact.[355] Allowing a jury to consider the necessity defense simply underscores that traditional role.

The defendants in such cases admit committing the crime but hope that the jury, as "conscience of the community," will apply community standards of fairness. "Reflected in the jury's decision is a judgment of whether, under all the circumstances of the event and in light of all known about the defendant, the prohibited act, if committed, deserves condemnation by the law."[356]

The necessity defense in the context of civil disobedience cases allows

> a much needed infusion of individual expression and grassroots political activity. The defense promotes a more vibrant and empowered political culture by amplifying individual viewpoints, by empowering a cross section of the community (the jury), and by increasing the quantity and quality of public discourse. Even considering the arguments against the political necessity defense, one might find these ends alluring enough to permit its use.[357]

355. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 284–85 (1974); Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 176 (1972).

356. *See* Everett v. United States, 336 F.2d 979, 985–86 (D.C. Cir. 1964) (Wright, J., dissenting); *see also* United States v. Eichberg, 439 F.2d 620, 625 (D.C. Cir. 1971) (Bazelon, C.J., concurring) (jury's role in resolving moral issues should be made explicit in jury instructions).

357. Bauer & Eckerstrom, *supra* note 2, at 1184.

One way that the necessity defense might be made more available in civil disobedience cases is to relax the requirement of imminence of harm. Civil disobedients would prefer that the imminence requirement be interpreted to mean that the danger is something "inevitable," but not necessarily a threat immediately at hand. Of course, if courts construe the imminence factor, as some have, to require evidence showing merely that the threat is inevitable rather than temporally near at hand, there is the further hurdle concerning the legal way out factor. For if there is ample time to pursue legal courses of action in an effort to avert the policy being targeted, the protestors may be denied the necessity defense. In this respect, the more enlightened approach taken by some courts is that futile or unavailing legal options do not equate with reasonable legal alternatives.

Another component that could be relaxed is the causal nexus factor. Some courts have been accommodating in requiring only a showing that the defendants had a reasonable belief that their conduct would be in some way effective in changing the contested policy, and the reality is that there are many examples in which policy changes occurred in response to civil disobedience, not immediately, but after a period of time.[358]

The public is often unaware of certain government policies and practices. By permitting the necessity defense when defendants have a reasonable claim to it, society may benefit from a full airing of the political or social issues at hand. This could serve to bring public attention to important and controversial issues both inside and outside the courtroom. It could also serve as a check on low-level bureaucratic decisions of which the public would otherwise be unaware.

B. *Arguments Against the Necessity Defense in Civil Disobedience Cases*

There are serious drawbacks to allowing the necessity defense in civil disobedience cases. A main worry of judges is that political protesters try "to extend the necessity doctrine beyond its strict and logical limits, and to transform it into a principle that results in legalizing criminal activity in the pursuit of political ends."[359]

In addition, allowing the necessity defense in effect transfers political questions into the judicial arena, and thus interferes with the doctrine of separation of powers. Allowing a jury to decide whether civil disobedience is justified in effect rejects the legislative process altogether, and allows the jury to become a mini-legislator by ruling on the policy itself.

358. *See* Lambek, *supra* note 7, at 481.
359. Wilson v. State, 777 S.W.2d 823, 825 (Tex. App. 1989).

> For a jury to endorse illegal acts on the basis of political necessity undermines majority rule, implicates the separation of powers doctrine, and disrupts principles of equal justice. Testimony and instructions on political necessity promote jury nullification by providing the jury with a handy framework to negate duly enacted laws.[360]

Moreover, typical jurors are qualified as finders of fact, but may not be qualified to act as policy formulators. Thus, there is the concern that juries will make ad hoc policy determinations. "To allow nuclear power plants to be considered a danger or harm within the meaning of that defense . . . would require lay jurors to determine in individual cases matters of State and national policy in a very technical field."[361] On the other hand, juries who are allowed to consider the necessity defense may be aided by the introduction of expert testimony on the policy questions under consideration.

One final objection is that civil disobedients, like other citizens, have the opportunity to be heard before regulatory agencies and the courts, and they also have the right to lobby the legislature. If people could make out a case of necessity just because they failed in effecting legislative or executive changes, democratic processes would be eroded.

360. Bauer & Eckerstrom, *supra* note 2, at 1195.
361. State v. Dorsey, 395 A.2d 855, 857 (N.H. 1978).