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Operation Rescue And The Necessity Defense: Beginning A Feminist Deconstruction

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OPERATION RESCUE AND THE NECESSITY DEFENSE: BEGINNING A FEMINIST DECONSTRUCTION

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While the United States Supreme Court continues to debate the right of procreative choice for women in its own inner sanctum, removed from the daily reality of most people's lives, the war over women's bodies is depicted more graphically in the streets, the doorways, and the parking lots of abortion clinics. Antichoice activists, such as Operation Rescue[1] have blockaded over 400 clinics in the past three and one-half years.[2] When arrested for these and related activities, defendants have attempted to raise the necessity defense.[3] This article discusses the role of the necessity defense

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* Copyright 1990, Susan B. Apel. Associate Professor, Vermont Law School; J.D., Northeastern University School of Law, 1977. Among the many people deserving of my gratitude for their help on this project are my research assistant, Joleen Payeur Olsen; my colleagues, Michael Mello, John P. McCrory, and Pamela Stephens; Edward Sutton, Deputy State's Attorney, Burlington, Vermont; Peter Drewniany for sharing his research; and Karen Schmidt, who assisted in the production of this manuscript. This article is dedicated to the memory of Anne Pride, past President of KNOW, Inc., former Director of Women's Health Services in Pittsburgh, Pennsylvania, a woman of many accomplishments and great courage, and my friend.

1. Operation Rescue is a national organization founded by Randall Terry. Operation Rescue has engineered and executed numerous protests and blockades of abortion clinics throughout the country. While other antichoice groups may engage in similar activities, for purposes of this article, I refer to Operation Rescue specifically because both its name and its characterization of its activities as rescue missions enables me to explore this direct action focus of the so-called right to life movement. Following a monetary judgement against Operation Rescue in New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990), the national headquarters of Operation Rescue reportedly closed its doors. Terry vows, however, that "the rescue mission is not through" and that its 110 local chapters across the country will carry on its rescue activities. TIME, Feb. 12, 1990, at 29.

2. NATIONAL ABORTION FEDERATION, INCIDENTS OF VIOLENCE AND DISRUPTION AGAINST ABORTION PROVIDERS (June 1, 1990).

3. *See* Cleveland v. Municipality of Anchorage, 631 P.2d 1073 (Alaska 1981); Gaetano v. United States, 406 A.2d 1291 (D.C. 1979); People v. Stiso, 93 Ill. App. 3d 101, 416 N.E.2d 1209 (1981); People v. Krizka, 92 Ill. App. 3d 288, 416 N.E.2d 36 (1980); Sigma Reproductive Health Center v. State, 297 Md. 660, 467 A.2d 483 (1983); State v. O'Brien, 784 S.W.2d 187 (Mo. Ct. App. 1989); City of St. Louis v. Klocker, 637 S.W.2d 174 (Mo. Ct. App. 1982); People v. Crowley, 142 Misc.2d 663, 538 N.Y.S.2d 1325 (1988); Erlandson v. State, 763 S.W.2d 845 (Tex. Ct. App. 1988); Bobo v. State, 757 S.W.2d 58 (Tex. Ct. App. 1988); Crabb v. State, 754 S.W.2d 742 (Tex. Ct. App. 1988), *cert. denied*, 110 S. Ct. 65 (1989); Hoffart v. State, 686 S.W.2d 259 (Tex. Ct. App. 1985), *cert. denied*, 479 U.S. 824 (1986); Buckley v. City of Falls Church, 7 Va. App. 32, 371 S.E.2d 827 (1988); State v. Horn, 126 Wis. 2d 447, 377 N.W.2d 176 (Ct. App. 1985), *aff'd*, 139 Wis. 2d 473, 407 N.W.2d 854 (1987). The defense was denied in all of the foregoing reported cases. *But see* Northern Virginia Women's Medical Center v. Balch, 617 F.2d 1045, 1048-49 (4th Cir. 1980) (referring to two unreported lower court cases allowing necessity defense). Additionally, at least three student authors claim that

in prosecutions of abortion clinic protestors. Part I resurrects, though it does not resolve, the debate over whether the necessity defense is appropriate in cases of civil disobedience and argues that Operation Rescue, despite claims to the contrary, is essentially a political movement. Part II discusses how courts have looked at the choice-of-values element of the defense and proposes a feminist redefinition of the harm committed. Part III contains reflections on why the defense should not be available to Operation Rescue even though it may be appropriate in other protest situations and probes the difficulty as well as the risk of defining values in a misogynist culture.

PART I

The necessity defense recognizes that under certain circumstances an individual may be justified in breaking the law in order to prevent or avoid a greater harm. The rationale for allowing the defense as part of our criminal justice jurisprudence includes both a utilitarian and a moral aspect. The utilitarian rationale allows the defense on the theory that society should grant some discretion to the individual in order to permit her to act in a manner which, the law notwithstanding, will promote the greater social good. The moral aspect has its underpinnings in natural law, which recognizes that in a given situation, morality may demand an actor to behave contrary to law. Finally, there may be a less lofty, although equally valid, reason for acceptance of the defense. Aristotle acknowledges and common experience confirms that virtually no rule can exist without an exception, that "about some matters the law cannot speak universally and correctly."[4] Therefore, a third rationale for the defense may be its injection of flexibility into application of the law, thus giving the legal system a legitimate escape when application of the law would cause the system to appear unjust or just plain foolish.

The history of the necessity defense in Anglo-American jurisprudence evinces early appearance of the doctrine.[5] More recently, the defense has

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the defense was successful in a few unreported cases. *See* Note, *"Justified" Nuclear and Abortion Clinic Protest: A Kantian Theory of Jurisprudence*, 21 NEW ENG. L. REV. 725, 737 n.62 (1985-86); Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79, 81 n.13 (1989); Note, *The Necessity Defense in Abortion Clinic Trespass Cases*, 32 ST. LOUIS U.L.J. 523, 524-25 n.10.

4. ARISTOTLE, ETHICA NICOMACHEA, Book X, Part 9 (W. Ross, trans. 1925); Note, *Applying the Necessity Defense to Civil Disobedience Cases*, *supra* note 3, at 83.

5. *See, e.g.*, The Case of the King's Prerogative in Saltpeter, 12 Co. Rep. 17, 77 Eng. Rep. 1294 (1607) (taking of saltpeter was necessary for making gunpowder and defense of realm); The Queen v. Dudley & Stephens, 14 Q.B. 273, 286 (1884) (rejecting utilitarian justification of taking innocent life for food and survival); United States v. Holmes, 26 F. Cas. 360, 368 (C.C.E.D. Pa. 1842) (No. 15,383) (precluding consideration of necessity defense for manslaughter for sailors' throwing of passengers off overcrowded lifeboat); United States v. Ashton, 24 F. Cas. 873 (C.C.D. Mass. 1834) (No. 14,470) (allowing necessity defense against charge of mutiny).

been raised in prison escape cases,[6] kidnapping cases and cases dealing with the reprogramming of members of religious cults,[7] and in cases involving the possession and use of marijuana.[8] Beginning, however, with the Vietnam War era in American politics, the defense emerged as reason to justify actions of antiwar protestors.[9] Other protest movements were soon to follow. The necessity defense has been raised by individuals prosecuted for criminal activity in conjunction with the antinuclear movement,[10] the sanctuary movement,[11] and most recently, antichoice movements such as Operation Rescue.[12]

The use of the necessity defense by protest movements has caused some commentators to question whether the defense ought to be categorically denied to those engaged in acts of civil disobedience[13] and acts that are

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6. *See* People v. Pitlock, 134 Cal. App. 3d 795, 184 Cal. Rptr. 772 (1982) (commenting on propriety of jury instructions limiting necessity defense); People v. Lovercamp, 43 Cal. App. 3d. 823, 831, 118 Cal Rptr. 110, 115 (1974) (enunciating limited defense of necessity for prison escapes); People v. McKnight, 626 P.2d 678, 684 (Colo. 1981) (en banc) (rejecting necessity defense); Commonwealth v. Clark, 287 Pa. Super. 13, 18, 429 A.2d 695, 698 (1981) (holding that adverse prison conditions will not support use of necessity defense in prison escapes). *See generally* Comment, *Intolerable Conditions as a Defense to Prison Escapes*, 26 UCLA L. REV. 1126 (1979); Case Comment, *Common Law Extension of Necessity:* People v. Lovercamp, 9 LOY. L.A.L. REV. 466 (1976); Case Comment, *Necessity a Defense to Escape When Avoiding Homosexual Attacks:* People v. Lovercamp, 3 W. ST. U.L. REV. 165 (1975).

7. *See* People v. Patrick, 126 Cal. App. 3d. 952, 960, 179 Cal. Rptr. 276, 281 (1981) (finding that cult reprogrammer did not meet elements of necessity defense); *see also* Note, *Cults, Programmers, and the Necessity Defense*, 80 MICH. L. REV. 271 (1981).

8. *See* State v. Diana, 24 Wash. App. 908, 916, 604 P.2d 1312, 1317 (1979) (applying necessity defense to use of marijuana in treatment of multiple sclerosis); *see also* Note, *Medical Necessity as a Defense to Criminal Liability*: United States v. Randall, 46 GEO. WASH. L. REV. 273, 276-78 (1978).

9. Chase v. United States, 468 F.2d 1211 (7th Cir. 1972); United States v. Kroncke, 459 F.2d 697 (8th Cir. 1972); United States v. Simpson, 460 F.2d 515 (9th 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. Moylan, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

10. *See* In re Weller, 164 Cal. App. 3d 44, 210 Cal. Rptr. 130 (1985) (denying necessity defense because defendant failed to provide legally sufficient evidence); People v. Weber, 162 Cal. App. 3d Supp. 1, 208 Cal. Rptr. 719 (Cal. App. Dept. Super. Ct. 1984) (holding defendants not entitled to necessity defense); Commonwealth v. Brugmann, 13 Mass. App. Ct. 373, 433 N.E.2d 457 (1982) (asserting that necessity defense failed to prove imminence); State v. Diener, 706 S.W.2d 582 (Mo. Ct. App. 1986) (finding defense of justification unavailable); People v. Cachere, 104 Misc.2d 521, 428 N.Y.S.2d 781 (Dist. Ct. 1980) (defendant failed to establish defense of justification to charge of trespass); Cleveland v. Egeland, 26 Ohio App. 3d 83, 497 N.E.2d 1383 (1986) (denying necessity defense); Commonwealth v. Capitolo, 508 Pa. 372, 498 A.2d 806 (1985) (denying necessity defense); Schermbeck v. State, 690 S.W.2d 315 (Tex. Ct. App. 1985) (denying instruction on necessity defense).

11. United States v. Aguilar, 871 F.2d 1436 (9th Cir. 1989) (refusing to allow necessity defense), *superceded by*, 883 F.2d 662 (9th Cir. 1989), *petition for cert. filed* (Dec. 1, 1989) (No. 89-6214).

12. *See generally supra* at note 3.

13. Definitions of civil disobedience abound. Howard Zinn defines it as "the deliberate violation of law for a vital social purpose." H. ZINN, DISOBEDIENCE AND DEMOCRACY 39

political.[14] There are some compelling arguments that use of the defense by those engaged in political protest or acts of civil disobedience is a philosophical oxymoron. While a basic tenet of civil disobedience is the right, perhaps even the duty, to disobey unjust laws,[15] one's moral integrity is sacrificed if one then seeks to avoid the consequences. Other commentators have argued that philosophy aside, the use of the defense weakens the protestor's stand from a tactical point of view. Strategically, it is the infliction of punishment upon the civil disobedients that may win others to their cause. "The imposition of punishment on a civil disobedient by a judge would force the judge into a hard ethical choice, and thereby influence public policy."[16] A legitimate escape such as the necessity defense would operate to help ease the judge or jury out of a difficult choice, thereby reducing the discomfort of some of the players in the legal system. Defendants, however, have no interest in easing a judge's or jury's pain; they are, in fact, relying on it, hoping that the discomfort will cause a change in the law.[17] One student commentator writes:

(1968). John Rawls defines it 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." J. RAWLS, A THEORY OF JUSTICE 364 (1971). Elsewhere, it has been defined as "an illegal public protest, non-violent in character." Cohen, *Civil Disobedience and the Law*, 21 RUTGERS L. REV. 1 (1966). Throughout this article, I will use the term civil disobedience to mean an illegal act that embodies a political purpose. While I do not necessarily subscribe to Hannah Arendt's requirement that civil disobedients always must act as a group rather than as a single individual, she, quoting de Tocqueville, aptly captures the persuasive nature of civil disobedience when she says, "It is my contention that civil disobedients are nothing but the latest form of voluntary association . . . What could better describe them than Tocqueville's words, 'The citizens who form the minority associate in order, first, to show their numerical strength *and so to diminish the moral power of the majority*'" (emphasis added). H. ARENDT, CRISES OF THE REPUBLIC 96 (1972).

14. Rice, *Issues Raised by the Abortion Rescue Movement*, 23 SUFFOLK U. L. REV. 15 (1989); Note, *Applying the Necessity Defense*, *supra* note 3; Note, *Justified Nuclear and Abortion Clinic Protest*, *supra* note 3; Note, *Political Protest and the Illinois Defense of Necessity*, 54 U. CHI. L. REV. 1070 (1987) [hereinafter Note, *Political Protest*] (authored by Brent D. Wride); Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience Cases*, 39 STAN. L. REV. 1173 (1987) [hereinafter Note, *The State Made Me Do It*] (authored by Bauer and Eckerstrom); Comment, *The Necessity Defense*, *supra* note 3.

15. "One who breaks an unjust law must do so openly, lovingly, . . . and with a willingness to accept the penalty." M. L. KING, *Letter from Birmingham City Jail*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 296 (J. Washington ed. 1986). *See* Commonwealth of Pennsylvania v. Capitolo, 508 Pa. 372, 498 A.2d 806 (1985) (defining one engaged in civil disobedience as "willing, perhaps eager, to accept the punishment prescribed by law"). *See generally* A. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE (1968); M. GANDHI, SELECTED WRITINGS (R. Duncan ed. 1971). Other commentators have, however, claimed that merely putting one's self at risk is sufficient and that actual infliction of the punishment is not necessary. *See* H. ZINN, *supra* note 13, at 27. *See generally* J.S. MILL, ON LIBERTY (1934); H.D. THOREAU, ON THE DUTY OF CIVIL DISOBEDIENCE (1903).

16. *See* Comment, *The Necessity Defense*, *supra* note 3; *see also* K. GREENAWALT, CONFLICTS OF LAW AND MORALITY 301 (1989).

17. Howard Zinn argues, and rightfully so, that there is a significant difference between

> The necessity defense has no role to play in a strategy of civil disobedience. The point of civil disobedience is to force a society to recognize the contradiction of using a system of justice to defend an unjust institution. If the person practicing civil disobedience is set free not because the offensive institution has been removed but because the system of justice has made an exception, then the contradiction remains hidden, and the object of the protest is lost.[18]

Courts continue to struggle with the question of whether political protest ought to be categorically excluded from the reach of the necessity defense, though it is fair to say that for the most part, they have not been receptive to its use in such circumstances.[19] Courts that deny the defense do not always explain the reasons for doing so clearly, however, and so one does not know if the courts are eliminating the defense for protestors entirely, or using the more traditional element-by-element analysis and finding the evidence lacking. Some courts are explicit. For example, the Pennsylvania Supreme Court appeared to favor a categorical exclusion in *Commonwealth v. Berrigan* when it denied the defense to protestors by differentiating between action taken to prevent a public disaster from action taken merely to raise the public conscience.[20] Similarly, in *United States v. Simpson* and *United States v. Kroncke* the courts found that the defense could not be used because the purpose of antiwar protest was political.[21] In other cases, however, courts have taken a more narrow approach and found that the defense should be denied to antinuclear protestors because the danger from nuclear accidents was not "imminent."[22] Most recently, a court denied the defense to members of ACT UP, a lesbian and gay rights organization, stating that defendants had failed to present evidence on each of the specific elements and, further, that the defense was not available "to justify unlawful action intended to limit the advancement of ideas contrary to one's own. One's moral convictions alone can never be the basis for a justification defense."[23] In contrast, one lower Vermont court cleared the way for the

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evaluating strategy and defining the essence of civil disobedience. Should an individual choose to go to jail (or suffer some other punishment) for her beliefs, she may be making the most strategic choice, but that is far different from saying that she must, as a condition of defining her act to be civil disobedience, accept the punishment. H. ZINN, *supra* note 13, at 121.

18. Note, *Political Protest*, *supra* note 14, at 1094.

19. K. GREENAWALT, *supra* note 16, at 301 (citing Arnolds and Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM L. & CRIMINOLOGY 289 (1974)); *see also* Note, *Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic*, 48 U. CIN. L. REV. 501, 508 (1979).

20. Commonwealth v. Berrigan, 509 Pa. 118, 124-25, 501 A.2d 226 (1985), *cert. denied*, 110 S. Ct. 219 (1989).

21. United States v. Simpson, 460 F.2d 515 (9th Cir. 1972); United States v. Kroncke, 459 F.2d 697 (8th Cir. 1972).

22. *See* Commonwealth v. Capitolo, 508 Pa. 372, 498 A.2d 806 (1985); State v. Warshow, 138 Vt. 22, 410 A 2d. 1000 (1979); Commonwealth v. Brugmann, 13 Mass. App. Ct. 373, 433 N.E.2d 457 (1982).

23. People v. Alderson, 144 Misc. 2d 133, 540 N.Y.S.2d 948 (Crim. Ct. 1989).

raising of the defense by activists opposed to United States intervention in Central America.[24]

Other arguments against use of the defense in political protest movements include the inadequacy of the court system as a resolver of political questions. The legislative process was designed for the thrashing out of competing values and points of view; courts are ill equipped to engage in such a process. Even if an argument could be made that courts should be free to do so, the control that the parties may exercise over the information supplied to the court argues against the legitimacy of any result the court might reach, particularly if the result is seen as one of more general application. Finally, some view raising the necessity defense as an offensive use of scarce court resources, a garnering of the court as a forum solely to present political views, or as one student commentator notes with distaste, "manufacturing litigation."[25]

Two commentators[26] have concluded that protestors should refrain from use of the defense and courts ought to be extremely guarded in its use in protest cases. They urge that the court first determine exactly what the protestors were doing, so as to differentiate political from other actions. Thus, the commentators argue, an individual who refuses to register for the draft claiming that he is morally opposed to war-related activities could claim the necessity defense because his act is more personal, not political in nature. He is not seeking to persuade or cause a change in policy. His primary motivation is to prevent himself from having to participate in certain military activity. Contrast the second example of an individual who refuses to register for the draft and in so doing, burns his draft card on the steps of a public building. Since he is in fact engaging in a persuasive act of social reform, the defense is inappropriate.

Assuming for the moment that the necessity defense and political protest/civil disobedience are ill suited to one another philosophically, it becomes crucial to determine exactly what Operation Rescue is doing at abortion clinics. Interestingly, one might have expected Operation Rescue advocates to join the Zinn et al. perspective on this issue and argue that acceptance of punishment is not required. Instead, it appears that some legal commentators, as well as Operation Rescue itself, have chosen to refrain from this debate by defining their activities as nonpolitical, as engaging only in rescues of small, quantifiable, and identifiable individuals (fetuses) from death. If the movement can be characterized as a "rescue" of a few individuals rather than as political activity, the issue of the connection between punishment and civil disobedience becomes moot.

Initially, to question whether Operation Rescue engages in acts of civil disobedience seems ludicrous. Thus it is surprising that commentators who argue in favor of the use of the necessity defense have attempted to

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24. *See* State v. McCann, 149 Vt. 147, 541 A.2d 75 (1987).

25. Note, *Political Protest*, *supra* note 14, at 1092.

26. Note, *The State Made Me Do It*, *supra* note 14.

characterize Operation Rescue protests as apolitical "rescues." One student commentator, for example, urges courts considering the defense to "focus on the defendant's criminal liability, not the possible political ramifications of the defendant's actions,"[27] indicating that the defendants themselves perceive their actions to be one thing, political ramifications another. Perhaps more pointedly, the commentator also states as follows:

> A defendant must have good cause for breaking the law; he cannot justify his actions just because his political, moral, or religious views differ from the law. Otherwise, a defendant could alter the established law or policy of a society by circumventing "accepted democratic processes," while only incidentally "avoiding a particular harm or evil."[28]

The author then explains why the court in *City of St. Louis v. Klocker* was wrong to deny the defense, claiming:

> While the trespassers shared a strong opposition to abortion, they did not initially intend to stand a protest at the abortion clinic. In fact, the defendants in Klocker arrived at the clinic before the scheduled abortions to avoid the appearance of a sit-in protest. These trespassers were reasonably concerned with preventing the greater and imminent harm at hand—the destruction of specific human lives.[29]

Another commentator, Charles Rice, in addressing the exclusion of the defense in political movements, also attempts to argue that actions taken by members of Operation Rescue are not political. The author says:

> The rescuers were not protesting abortion in general, nor engaging in symbolic acts that they hoped would lead the public to sympathize with the pro-life cause. Rather, they directly intervened to protect particular lives threatened with imminent destruction.[30]

Later in the same article, however, this same author is, at best, confused on this point. In discussing whether Operation Rescue tactics are defensible from a strategic point of view, Rice contradicts himself and argues that Operation Rescue is in fact and foremost a political movement. Contrast his following statement with his statement above:

> [T]he justification for Operation Rescue cannot be based upon a "body count" of "babies saved today." If that is the criterion, the lawful prayer vigil with sidewalk counseling is more effective. Operation Rescue, however, draws public attention to the abortion

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27. Comment, *The Necessity Defense*, *supra* note 3, at 533.

28. *Id.* at 540.

29. *Id.* The facts in the *Klocker* opinion do not support the allegations made by the author of this note as to defendants' intentions.

30. Rice, *supra* note 14, at 28.

> problem and thereby promotes a solution through creative tension on the streets and in the courts. Such a justification for Operation Rescue is similar to that advanced by Padraic H. Pearse for the 1916 Easter Uprising, which he led in Dublin against the British. While Pearse and his men expected defeat before they started, they offered themselves as a "blood sacrifice" to alert the Irish people to the injustice of continued British rule. Operation Rescue can be best understood as a sacrificial effort to awaken the nation to a re-examination of legalized abortion so as to achieve the wholesale elimination of abortion.[31]

Courts, however, certainly are not bound by how legal commentators may have chosen to characterize Operation Rescue. How, then, does Operation Rescue view itself? How does it characterize its own actions? It is interesting that contrary to his "rescue only" view, Rice himself quotes Newsweek magazine as defining Operation Rescue activity in Atlanta as a "demonstration to make Atlanta[32] 'the Selma of the pro-life movement.'"[33] It is even more significant that the Selma analogy did not originate with Newsweek, but rather, is the creative metaphor of Randall Terry, founder of Operation Rescue.

> Atlanta turned into a Selma, [Terry] says, in what has become a stock analogy he offers the press, Operation Rescue as a neo-SNCC.[34]

Additionally, Terry states:

> Ultimately, my goal is to reform this culture . . . the arts, the media, the entertainment industries, medicine, the sciences, education—to return to right and wrong, a Judeo-Christian base.[35]

That Terry sees his so-called rescue missions as the tool for changing the political and cultural landscape is not in doubt:

> "By our inaction we have sided with the death industry in America," he says. "Rescue missions are the upheaval that will help produce political change."[36]

> In an Operation Rescue training audiotape, Terry assures his listeners that "rescuing America from the path of destruction it's on" is his ultimate goal. "The future of America . . . will depend . . .

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31. *Id.* at 33.

32. Atlanta, Georgia was one of several United States cities targeted by Operation Rescue for massive numbers of clinic blockades.

33. Rice, *supra* note 14, at 15 n.2.

34. Faludi, *Where Did Randy Go Wrong?*, MOTHER JONES, Nov. 1989, at 22, 28.

35. *Id.* at 26.

36. Wilkinson, *The Gospel According To Randall Terry*, ROLLING STONE, Oct. 5, 1989, at 85, 86.

> in part upon the rescue movement," he announces. "If we do not bring this nation back to moral sanity through rescues, through upheaval, through repentance, then America is not going to make it."[37]

The hundreds of antichoice activists who invaded the Women's Health Center of Burlington, Vermont reinforce the same contradictory views about the nature and purpose of their activity. David Lynch, attorney for the defendants, remonstrated with an interviewer who referred to the group's actions as "protests." Lynch said that

> they (the defendants) don't call them protests; protest is a matter of protesting a political position. They see themselves as actually rescuing unborn children who are scheduled to die by abortion that day.[38]

Later in the interview, however, Lynch objected to the "confrontational" nature of the legal system toward his clients "on what are essentially First Amendment civil disobedience type things."[39]

In addition to self-characterization, the size and complexity of an organization like Operation Rescue, as well as its strategic choices, may also provide evidence of its essentially political nature. The Second Circuit dismissed Terry's claim that Operation Rescue is not really an entity for purposes of the Racketeer Influenced Corrupt Organizations Act (RICO) by finding that ". . . it produces literature, possesses a mailing address, engages in correspondence, tacitly enrolls a membership, seeks donations in its own name and regularly organizes protest demonstrations on a wide scale."[40] Exact numbers may be difficult to pinpoint, but an ongoing study by the National Abortion Federation shows that 24,820 protestors were arrested in 403 separate clinic blockades over the past three years, though it cautions that it records only reported incidents, and therefore, the actual numbers may be higher.[41]

Terry himself acknowledges the breadth of Operation Rescue when he describes its activities in Atlanta, Georgia, as the vehicle through which he became "a national media figure."[42] Nor is it likely that the media attention was accidental. The so-called "rescues" in Atlanta were held precisely when the national media would be in town.

> Terry arrived in Atlanta with four cellular phones and an entourage that took over most of a Days Inn hotel. Their plan was to seize

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37. *Id.* at 92.

38. Fitzhugh, *79 Days in Waterbury: Lawyers Reflect on the Experience and the Cases,* VT. B. J. & L. DIG., June, 1990, at 6.

39. *Id.* at 12.

40. New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989), *cert. denied,* 110 S. Ct. 2206 (1990).

41. *See* NATIONAL ABORTION FEDERATION, *supra* note 2; *see also* Wilkinson, *supra* note 36, at 86 (citing estimates of 30,000 arrests during two-year period ending October, 1989).

42. Faludi, *supra* note 34, at 62.

> the attention of the national networks, all in town for the Democratic convention, by throwing themselves in front of clinic doorsteps.[43]

Another writer described the political underpinnings of the rescue activities:

> Although the stated raison d'être of the pro-life movement has been to overturn the Supreme Court ruling through a constitutional amendment, activism has focused increasingly on local-level delivery of abortion services. Pro-life groups adopted, over the 1970's, direct action techniques—creating and imposing local ordinances, harassing local abortion providers, picketing facilities or staging sit-ins at clinics—not unlike those used by the more radical activists in the abortion rights struggle in the late 1960's. In both cases, the intent was, in part, to challenge the law and force judicial clarification on the issue.[44]

Reported cases involving a variety of antichoice protestors reveal that they have tried, at times, to characterize their activities as simply a rescue, devoid of political nuance.[45] At least one court spoke of and viewed the characterization as wholly transparent, an attempt to avoid denial of the necessity defense in cases of political activity. The court notes the convenient change:

> In spite of both argument and testimony offered at trial that is in apparent conflict with their present position, appellants now insist that: . . . "[they] were not protesting abortion in general or engaging in symbolic acts which they hoped would lead the public to sympathize with the pro-life cause. Rather, they were directly intervening to protect the particular human lives threatened with immediate destruction . . . on that very day."[46]

In this case, the protestors themselves conceded that if the court found the activities of the protestors to be political, the necessity defense would have to fail.

Ironically, protestors often invoke the First Amendment protections of free speech while incongruously denying the political content of their actions. In *New York State National Organization for Women v. Terry*, defendant

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43. *Id.*

44. F. GINSBURG, CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY 45 (1989).

45. *See, e.g.*, Commonwealth v. Wall, 372 Pa. Super. 534, 539 A.2d 1325 (1988); Cleveland v. Anchorage, 631 P.2d 1073 (Alaska 1981); *see also* Derby, *Protestors Share Bonds, Songs*, Burlington Free Press, Oct. 25, 1989, at 3A; Scagliotti, *Pro-choice Officials See Escalation in Abortion Foes Tactics*, Burlington Free Press, Oct. 26, 1989, at 6A (antichoice activists insisting on calling occupation of women's health clinic in Burlington, Vermont, a "rescue" rather than a "protest"). Mayor Clavelle of Burlington preferred the term "invasion." *Court Won't Free Protestors*, Burlington Free Press, Oct. 28, 1989, at 4B.

46. Cleveland v. Anchorage, 631 P.2d 1073 (Alaska 1981).

Terry challenged an injunction that prevented him and others from "trespassing on, blocking, or obstructing ingress into or egress from any facility [clinics in a specified geographical areas that performed abortions] . . . and from physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility. . . ."[47] The right to engage in so-called "sidewalk counseling" was specifically recognized as allowable by the court. Yet Terry argued that the curtailment of his activities violated the First Amendment because his activities constituted political speech. While arguing the alternative may have its peculiar place in American jurisprudence, this argument defies comprehension. One's actions are political, and therefore protected by the First Amendment, unless not, in which case, one's actions magically are transformed into the nonpolitical so as to allow one to raise the necessity defense. The First Amendment has been raised in numerous other abortion protest cases as well.[48]

Finally, one must ask whether the use of the necessity defense is per se evidence of the political nature of the actions undertaken by the defendants. Protestors raise the defense precisely to use the court for political purposes, to attract public and media attention for the purpose of persuading the citizenry of the trespasser's point of view. Having obtained a forum to express their views, whether the defense actually succeeds or not is secondary.

Upon examination, Operation Rescue's sometime attempts to characterize its actions as something other than political appear unpersuasive, suspiciously colored by whether or not it wants to raise the necessity defense or rely upon the First Amendment. Accordingly, if one agrees that the defense ought not to be available in instances of political protest, the defense must be precluded in prosecutions of Operation Rescue members. It is difficult to leave the analysis here, however. Obviously, one may argue that there is no justification for such a categorical exclusion. Secondly, either because of the difficulty in the conceptualization of what is political or because courts may want to avoid determinations of whether actions are primarily political or something else, the semi-bright line test that would exclude the defense altogether seems unworkable.[49] The following section, therefore, assumes that the political nature of Operation Rescue's activities will not per se exclude the defense.

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47. New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1345 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990).

48. Crabb v. State, 754 S.W.2d 742 (Tex. Ct. App. 1988), *cert. denied*, 110 S. Ct. 65 (1989); Hoffart v. State, 686 S.W.2d 259 (Tex. Ct. App. 1985), *cert. denied*, 479 U.S. 824 (1986); State v. Horn, 126 Wis. 2d 447, 377 N.W.2d 176 (Ct. App. 1985), *aff'd*, 139 Wis. 2d 473, 407 N.W.2d 854 (Wis. 1987).

49. I am particularly troubled, for example, by the examples used by Bauer and Eckerstrom. *See* Note, *The State Made Me Do It*, *supra* note 14. Are the differences between the draft card burner and the conscientious objector all that clear? And even if they are, do they not represent polar positions on a spectrum of behavior, *i.e.*, action that is purely political vs. action that is purely personal? If so, we are still without guidance as to where and how to draw the line.

PART II

Much of the literature focuses upon whether or not activities of trespassers in abortion clinics satisfy all of the elements of the necessity defense.[50] The defense varies from jurisdiction to jurisdiction, but the essence of the defense is the defendant's commission of an illegal act to prevent an even greater harm. The harm sought to be avoided must be imminent,[51] and there must be no reasonable alternative course of action available to the defendant. Some jurisdictions also require that there be no legislative preclusion in the choice of evils and that the act committed have a causal nexus to prevention of the greater harm.

The heart of the defense is the balancing of evils. While every other element is judged (depending on the jurisdiction) by a mixture of subjective standards (what the defendant actually believed) and objective standards (what she reasonably believed), the actor's personal conviction that the evil avoided is greater than the evil committed does not control. The judge or jury is charged with making that determination.[52]

> In contrast [to other elements of the defense], the defendant is held strictly liable for her value choice. She must choose correctly; a reasonable belief that she chose the lesser evil is not enough.[53]

Thus, the actor bears the risk of an incorrect decision.

Operation Rescue's argument on this element is simple. Defendants have committed the crime of trespass to avoid the greater harm of fetal (they would argue, human) death. Because trespass is a relatively minor crime against property and because there is no evil greater than the death of human beings, this element of the defense is satisfied easily.[54]

Courts and commentators have been fairly consistent in rebutting such arguments. That abortion is murder, that fetuses are legally protectable human beings, is not the absolute truth that antichoice advocates would hope it to be. When Charles Rice claims as blithely as he does in advocating the use of the defense in abortion protest cases, "Since abortion, in the objective, moral sense, constitutes murder, the common-law and statutory defenses of necessity and justification should apply to abortion rescue participants,"[55] one thinks he truly might be surprised to learn that most courts and most of the populace, do not agree with him. Even a conservative legal thinker such as Archibald Cox, a critic of *Roe v. Wade*, states:

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50. *See generally* sources cited *supra* note 14.

51. While this is the common law tradition, the Model Penal Code, for example, does not require that the harm sought to be avoided be imminent. *See* MODEL PENAL CODE § 3.02 (1985).

52. K. GREENAWALT, *supra* note 16, at 292.

53. Note, *Applying the Necessity Defense to Civil Disobedience Cases*, *supra* note 3, at 105.

54. *See* Rice, *supra* note 14; Comment, *The Necessity Defense*, *supra* note 14.

55. Rice, *supra* note 14, at 25.

> The argument depends upon the meaning of "person" and of "life." It is important not to tuck the conclusion into the definition. The biological and medical sciences can detail the manifold steps in the long progression from impregnation in the beginning to the emergence of the being we all recognize as a living man or woman, and they can then follow the progression to its end in the body's utter decay. But if we ask the scientist exactly when that life began or ended, they must ask, in turn, "What do you mean by life?" . . . To say that life begins at one particular stage in the process or ends at another is not simply to state a biological fact; it is to supply a legal, moral, or philosophical standard asserting that the actual factual condition should be treated as if there were present what we all recognize as "life".[56]

Furthermore, because the definition of life is not simply biological, it cannot be divorced from cultural and sexual politics:

> The value of life is not a simple attribute of any particular life form. . . . Culturally created, the value of life rests on social meanings, and importantly, on sexual politics. . . . Although in some sense arbitrary, the culturally defined value of fetal life reflects the relative value assigned to men's and women's lives. The life of sperm is not valued because it would be considered "impossible" or "too impractical" to try to preserve it. Yet surely sperm are alive; indeed, they are human life. The only reason society does not consider it "impossible" or "too impractical" to try to preserve all or most early fetuses is that society has not sufficiently valued women's lives.[57]

It is obvious that moral and philosophical standards differ. Unless, however, *Roe v. Wade* is overturned, the legal standard is clear. Both in *Roe* and in *Webster*[58] the United States Supreme Court has failed to uphold as a legally enforceable principle the moral/religious belief that life begins at conception. Thus, the characterization of the greater harm as "murder" has been rejected by the courts. Accordingly, the courts have held that defendants have not proved that the evil avoided is greater than the evil committed.

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56. A. Cox, The Court and the Constitution 330 (1987). *See* Commonwealth v. Wall, 372 Pa. Super. 534, 539 A.2d 1325, 1328 (1988) (recognizing that "people differ strongly in their views concerning abortion," but that such views constitute at best "a personal philosophical or religious matter").

57. Olsen, *Comment: Unraveling Compromise*, 103 Harv. L. Rev. 105, 128 (1989). The author continues by hypothesizing a law that would restrict men's sexuality by making it a crime to ejaculate anywhere outside a fertile woman's vagina, concluding that while the burden imposed upon men by such a law could not begin to compare with the burdens of compulsory pregnancy to term, such a law would never be passed nor upheld. *Id.*

58. Roe v. Wade, 110 U.S. 959 (1973); Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989).

While it is understandable that courts and commentators feel no need to go further in their analysis on this point, and so do not, it is disturbing that the other component of the balancing test, *i.e.*, the action taken, has received little attention. Defendants who occupy or blockade abortion clinics commonly are charged with the crime of trespass.[59] Speaking more generally of activists who engage in civil disobedience, one commentator brushes over this element by suggesting that "it is usually an easy task for civil disobedients to show that the harm they sought to avert outweighs the harm of their protest activities."[60] The ease of the task, however, depends upon how *each* harm is defined, not only how the greater harm is maximized by defendants, but on how the lesser harm is minimized as well.

Minimization occurs when trespass is dismissed by antichoice proponents as a relatively minor crime against property. One author characterizes the lesser harm as "damage to the abortionist's property," and then goes on to say, "[a] further consideration is that Operation Rescue's technique ordinarily does not involve even the destruction of property; rather, it has usually employed the obstruction of entrances to close the facilities, which is a type of (and presumably less) interference with property rights."[61] Similarly, another writer states that the court "must determine whether preserving human life outweighs violation of the clinic's *property rights*."[62]

Obviously, it is strategic for every defendant to attempt to minimize his or her actions, especially when considering this element of the necessity defense. However, an individual's assessment of his or her own crime as a minor interference with property rights, self-serving as it may be, is inapposite. The first part of this section will focus upon what I will call minimization in a very narrow and concrete sense, that the label of "trespass" obscures the more violent reality of Operation Rescue activities. Second, I will explore how the minimization of the harm engaged in by Operation Rescue protestors trivializes women.

Simply stated, to term the activities of Operation Rescue as "trespass" ignores the facts. Political commentator Bill Moyers states that "[T]he politics of abortion has grown ugly. Passionate feelings stir extremist acts. Fierce rhetoric yields to firebombs."[63] Studies have shown that violence by

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59. I assume that prosecutors select the crime with which defendants will be charged and that trespass is a relatively simple crime to prove. It is probably a misdemeanor in most states and, therefore, carries a relatively minor penalty. The discussion that follows, however, argues for a redefinition of the harm done, from which it logically follows that prosecutors ought to reconsider this choice. In fact, the State's Attorney offices in Burlington, Vermont have charged some individuals with impeding a public officer, a felony with a three-year, $4,500 maximum penalty, and at least one individual with obstruction of justice, which carries a five-year, $5,000 maximum penalty. Letter from Edward Sutton, Deputy State's Attorney, to Susan Apel (Aug. 14, 1990).

60. Note, *The State Made Me Do It*, *supra* note 14, at 1182.

61. Rice, *supra* note 14, at 28.

62. Comment, *The Necessity Defense*, *supra* note 14, at 538 (emphasis added).

63. F. JAFFE, B. LINDHEIM, & P. LEE, ABORTION POLITICS: PRIVATE MORALITY & PUBLIC POLICY, 137-38 (1981) [hereinafter F. JAFFE].

national antichoice groups at health clinics is not uncommon and that violence is escalating. Between 1977 and 1982, 46 clinics reported a total of 115 violent incidents involving antichoice protestors. During the next two and one-half years, there were 319 acts of violence involving 238 clinics. By the end of 1985, 92 percent of abortion clinics reported harassment of some sort, ranging from picketing to vandalism.[64] More recent and comprehensive figures show a total of 783 incidents of violence in the past twelve years, including 34 bombings, 48 arsons, an additional 40 attempted bombings or arsons, 60 assaults and batteries, and 72 death threats.[65]

The courts and the popular media have reported similar statistics and descriptions, of which the following are representative, though clearly far from exhaustive.

> *The activities at Reproductive Health Services in St. Louis, a city described as "one of the hotbeds" of the anti-choice movement, lends anecdotal support to the national statistics. Protests began with sit-ins at the clinic and picketing at the home of the clinic director, escalated to death threats directed at clinic personnel, and finally the act of arson which destroyed the clinic building. Hotbeds must know no state boundaries; in neighboring Illinois in 1982, a pro-choice doctor and his wife were kidnapped at gunpoint and held by anti-choice forces for eight days.[66]

> *"One month after the Los Angeles clinic blockade, Operation Rescue has descended on Sacramento for National Day of Rescue II. . . . A man in a baseball cap pushes his way to the front, presses his face before a woman hoisting a pro-choice sign. 'I'll smash you through the window,' he says, clenching his fists. But he keeps his hands at his side."[67]

> *At an Operation Rescue protest supervised by Randall Terry in Binghamton, New York, a protestor punched a pregnant clinic worker in the stomach; she was taken to the hospital in an ambulance and miscarried several weeks later.[68]

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64. E. GINSBURG, *supra* note 44, at 50; *see also* F. JAFFE, *supra* note 63, at 137-38 (noting similar statistics, including the firebombing of St. Paul, Minnesota clinic and invasion of operating rooms during medical procedures); American College of Obstetricians and Gynecologists v. Thornburgh, 613 F. Supp. 656 (E.D. Pa. 1985) (detailing violence, including firebombing, at nine clinics in Mid-Atlantic area).

65. *See* NATIONAL ABORTION FEDERATION, *supra* note 2. This study separates incidents at abortion clinics into the traditionally defined violent acts including those listed above, as well as what it refers to as "incidents of disruption." The latter category includes, for the same twelve year period, incidents of hate mail and harassing phone calls, bomb threats, instances of picketing only, and 403 clinic blockades.

66. Kort, *Domestic Terrorism: On The Front Line At An Abortion Clinic*, Ms., May 1987, at 49; *see also* NATIONAL ABORTION FEDERATION, *supra* note 2 (supporting kidnapping figure).

67. Faludi, *supra* note 34, at 25.

68. *Id.*

*A bomb threat to a clinic in Philadelphia, Pennsylvania resulted in evacuating patients within a short, forty-five minute deadline. One patient was under general anesthesia at the time and regained consciousness on a gurney in the clinic parking lot. At the same clinic, a lab technician was injured when protestors tried to get into the lab while she was drawing blood. She was repeatedly struck by the door that she fought to keep closed, resulting in injuries to her legs and back and requiring a two-week absence from work.[69]

*In Burlington, Vermont, fifty-four activists chose three of their number to pose as individuals desiring a pregnancy test. When the door opened to admit these individuals, the remainder forced their way into the clinic and physically prevented the director from calling the police until they had chained themselves at various places with bicycle locks. The clinic walls and the reception desk were damaged. Three police were injured, resulting in the filing of assault charges.[70]

*Women trying to escort patients into clinics during protests in California report being karate-chopped in the knees and kicked in the stomach. The names they get called typically center on sexuality, "whore" and "dyke" being two of the most common.[71]

Operation Rescue has attempted to distance itself from these activities, claiming it is nonviolent and peaceful. "But in training tapes Terry distributes to his flock, he suggests it may be necessary to 'physically intervene with violence . . . with force' because 'that is the logical response to murder. [A]nd abortion is murder.'"[72] In hearings before the House Judiciary Committee, Congresswoman Patricia Schroeder observed "as the one who represents the city that just hosted the last Right-to-Life convention, that people who did advocate these kinds of things [violence] were given forums, and while the leadership said they [did not] approve of it, nevertheless, there they were speaking. . . ."[73]

The facts of some reported cases do not reflect the violence one finds in media accounts, prompting one to question whether so-called violent attacks are few, and perhaps even sensationalized by the media. Most reported cases, for example, describe the actions of protestors as physically invading the clinic buildings, sitting or lying down and refusing to move, chaining doors or using automobiles to block entrances and exits, and handcuffing themselves to operating room tables and equipment. As every

69. American College of Obstetricians & Gynecologists v. Thornburgh, 613 F. Supp. 656, 661-62 (E.D. Pa. 1985); *see also Abortion Clinic Violence: Oversight Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 99th Cong., 1st and 2nd Sess. (1987) [hereinafter *Hearings*] (testimony of Mary Bannecker, Administrator Northeast Women's Center).

70. Derby, *supra* note 45, at A1.

71. Faludi, *supra* note 34, at 26.

72. *Id.*

73. *Hearings*, *supra* note 69, at 275.

first year law student knows, it may be that the facts become more sanitized as they are forced through the wringer of several layers of legal proceedings. It might also be that perpetrators of some of the more physically confrontational activities do not offer themselves for arrest as easily as do the less violent types and, when arrested, probably concede committing the actual crime less often, thereby prohibiting use of the necessity defense.

Even, however, if we grant that a majority of protests are nonviolent (in the common, narrow sense of the word), one must recognize that the climate of violence that now surrounds clinic protests intensifies the fear of physical confrontation. In other words, patients and clinic personnel find it impossible to determine whether a particular protest, the one at hand, is of a more peaceful, or life-threatening, nature. Katha Pollitt speaks of the constant presence of one lone antichoice activist who harasses women on their way into a building that houses a medical clinic and of the reaction of the clinic's director, Janine:

> Perhaps Ramon is consciously trying to provoke violence; perhaps, which seems more likely, he is simply provoking by nature. But to the clinic staff, his very presence is a potent reminder of the possibility of violence.
>
> Janine's clinic has received several bomb threats, and the staff conducts weekly drills to practice evacuating patients in case a threat is received during clinic hours. "Abortion is stressful enough without adding this to it," said Janine. "I check the flowerpots every morning when I come in."[74]

However small the percentage of violent acts, narrowly defined, to know that one is part of a targeted group is to live with fear. Speaking of the violence perpetrated against women in this culture, Catharine MacKinnon compares it to the function of lynching:

> Consider the data on lynching. The percentages are one thing, but the fact that Black people walk through life knowing that at any point that can happen to them . . . is as crucial and as central a point. It is how racism works as terrorism.[75]

A simple trespass, a slight interference with a supposed money-grubbing abortionist's property rights does not, then, capture the reality of Operation Rescue's activities. Patients and clinic workers are being threatened and harassed, at a minimum, and in some instances, subjected to direct physical violence. In virtually all instances, they are victimized by the climate of violence that breeds fear. Additionally, the danger caused by the not-so-

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74. Pollitt, *Our Right-to-Lifer: The Mind of an Anti-Abortionist*, 244 THE NATION 65, 84 (1987).

75. Marcus, Spiegelman, DuBois, Dunlap, Gilligan, MacKinnon & Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 29 (1985) [hereinafter *Feminist Discourse*].

simple trespass is not always as personal and need not be as direct as the above instances suggest. What of the harm, potential or actual, caused to patients who are undergoing a medical procedure (abortion or other) at the time a clinic is overtaken? One student commentator pointed out that courts have been more likely to restrict free speech activities (protests) that occur in close proximity to medical facilities on the theory that an interest in the health of patients deserved recognition; the commentator quoted, "Hospitals [one could substitute the word "clinics"], after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated."[76] Even if a medical procedure is not forcibly halted, the increase in anxiety may well adversely affect a patient's health. One doctor stated that:

> [I]nvasions range from severe cases such as that which occurred in Pensacola . . . when clinic employees were injured and equipment destroyed through other incidents in which the protestors never get past the receptionist, but no matter what the results of the invasion, my opinion as a physician is that such action jeopardizes the quality of medical care. . . .
>
> . . . We do not need to wait until a woman dies in a waiting room as a result of anti-abortion violence to recognize the truth of that statement.[77]

In *American College of Obstetricians & Gynecologists v. Thornburgh*, the court found that harassment by protestors could injure a woman's emotional state and, consequently, "have an adverse effect on the medical procedure itself and on the patient's psychological well-being thereafter,"[78] a conclusion supported and conceded by Operation Rescue's expert witnesses in *New York State National Organization for Women v. Terry*.[79]

Moreover, what is the effect of the distraction of a clinic worker's concentration on the physical well-being of her patient, her family, her colleagues, herself? The Pennsylvania Department of Health found in 1980 that "patient care may suffer if physicians or abortion clinics are under harassment."[80] B. J. Isaacson-Jones, associate clinic director, described the

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76. Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 HARV. L REV. 1856, 1865 (1988) (quoting Beth Israel Hosp. v. NLRB, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring)).

77. *Hearings*, *supra* note 69, at 244-45 (statement of Philip George Stubblefield, M.D., Chief of Obstetrics and Gynecology, Mount Auburn Hospital, and Associate Professor of Obstetrics and Gynecology, The Harvard Medical School).

78. American College of Obstetricians & Gynecologists v. Thornburgh, 613 F. Supp. 656, 666 (E.D. Pa. 1985).

79. New York State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247, 1261 n.17 (S.D.N.Y.), *aff'd as modified*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990).

80. *American College*, 613 F. Supp. at 666; *see Hearings*, *supra* note 69 (testimony of Philip George Stubblefield, M.D., Chief of Obstetrics and Gynecology, Mount Auburn Hospital, and Associate Professor of Obstetrics and Gynecology, The Harvard Medical School).

effect of a firebombing of her clinic in St. Louis upon herself and her family:

> The fire was the most alarming thing for my family . . . . They were frightened that something would happen to me at home. They also saw me at a time, after the arson, when it was hard for me to eat or sleep. I continued to smell the fire and hear the sirens for about two weeks.[81]

Additionally, in blockading clinics, Operation Rescue activists either fail to recognize or simply do not care that clinics furnish a variety of health services not limited to abortion. Because there is no way to distinguish a patient seeking an abortion from one who may be there for other gynecological care, all patients and staff are accosted and harmed. When protestors seized the health clinic in Burlington, Vermont on October 25, 1989, they prevented nine appointments for nonabortion related services, four of them for cancer screening tests.[82] Two Planned Parenthood clinics that have been firebombed in Atlanta had provided no abortion services at all; they offered only contraception.[83] One does not know the eventual fate of the teenager who was forced away, in a particularly gruesome fashion, from a New York clinic by Operation Rescue as she shouted repeatedly that she had just had a miscarriage and required medical attention; she retreated while the crowd repeatedly shouted, "Liar!"[84]

Finally, there are other serious health risks that arise from defendant's actions, an issue that bears discussion here although it also is intimately connected to the issue of causation. Operation Rescue protestors might characterize their action taken as the obverse of harm sought to be avoided. If, for example, the harm to be avoided is "murder of human fetuses," one could characterize the action taken not merely as trespass, but as "prevention of murder of human fetuses." The next question is whether that is an accurate assessment of what Operation Rescue workers are doing. Viewed from the causation requirement of the defense, the question might be phrased as whether Operation Rescue tactics actually prevent women patients from obtaining abortions.

Certainly Operation Rescue would like to believe that the disruption of a scheduled appointment prevents a woman from aborting her fetus. It is more likely, however, that the abortion simply is delayed. If that is the case, the action taken cannot be characterized as "prevention of murder of a fetus," but rather, at best and in the jargon of the antichoice movement,

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81. Kort, *supra* note 66, at 50.

82. Derby, *Clinic Patient's Fear Turns To Anger*, Burlington Free Press, Oct., 1989, at 6A.

83. *See Hearings*, *supra* note 69, at 34 (testimony of Joan Babbott, M.D.).

84. Tyre, *Holy War: On the Anti-Abortion Front Lines with Operation Rescue*, NEW YORK MAGAZINE, Apr. 24, 1989, at 49.

as "delay in murder of a fetus."[85] Delay in abortion poses additional health risks to the woman. The fact that *Roe v. Wade* allowed virtually no interference with abortions in the first trimester and allowed the states to regulate in the second trimester to protect the woman's health shows an acceptance of the medical fact that the earlier an abortion is performed, the fewer risks to the mother.[86] One study states that while "first trimester abortion has proved to be exceptionally safe, the risk of major complications increases by ninety-one percent and the risk of death rises almost fivefold between the eighth and twelfth week of gestation."[87] Other studies show that following the twelfth week, a woman's risk of dying from the abortion procedure increases fifty percent for each week of delay.[88]

How do we know whether the woman who is prevented from making an appointment will in fact abort later? How do we know that she is not persuaded by Operation Rescue's tactics? Operation Rescue's own statistics boast at best a twenty percent success rate. They claim that if they can disrupt a clinic for one day, they will have prevented roughly thirty-five abortion procedures. Eighty percent of the women will return; twenty percent will not. Thus, they claim they are able to save seven fetuses. The twenty percent figure has been attributed to research conducted by the Alan Guttmacher Institute, who subsequently disavowed it.[89] Anecdotal evidence from the Chief of the Department of Public Safety in Sunnyvale, California, (site of 450 Operation Rescue arrests) is that "The clinics are just re-scheduling appointments. . . . They [Operation Rescue] are not saving any lives."[90] Moreover, studies have shown that even when abortion is made illegal, women continue to choose abortion when they believe it appropriate to do so.[91] If women are willing to risk illegal abortion, surely a missed appointment does not seem much of a deterrent. As previously stated, however, the delay involved may make the later procedure significantly more dangerous for women patients.

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85. In Commonwealth v. Wall, 372 Pa. Super. 534, 539 A.2d 1325 (1988), the court denied the defense for several reasons, including the absence of evidence of causation. *Id.* at 542, 539 A.2d at 1329. Even assuming the standard to be a subjective one, the court concluded that any protestor must realize that the clinic is not going to permit him or her to remain indefinitely on the premises, preventing abortions from taking place. *Id.* At best, the court characterized the defendant's actions as a temporary, and hence, ineffective measure. *Id.*

86. Roe v. Wade, 410 U.S. 113, 1163 (1973); *see also* New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1348 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990) (stating that second trimester abortion is medically more serious than first trimester abortion).

87. F. JAFFE, *supra* note 63, at 10 (citations omitted).

88. H. RODMAN, B. SARVIS, & J. BONAN, THE ABORTION QUESTION 65 (1987) (citing several studies on abortion-related mortality).

89. Connors, *Operation Rescue*, 160 AMERICA 400 (1989).

90. *Id.* Connors, who, in addition to the disavowed Guttmacher Institute research, also cites a newspaper article in the Atlanta Constitution showing a 20 percent drop in the number of abortions at one health center.

91. *See* GINSBURG, *supra* note 44, at 33 n.15 (citing several studies); Jacobson, *The Global Politics of Abortion*, WORLD WATCH, July-Aug. 1990, at 97.

What is the significance for the necessity defense? Assuming that the so-called trespass activities of Operation Rescue are either directly or indirectly threatening or harmful to patients and clinic workers, the level of the harm committed begins to expand, making the balancing of harms not so clear as previous commentators have suggested. In what has to be a gross oversight or complete blindness to the realities of Operation Rescue activities, one writer stated:

> If a court accepts that some form of human life begins at conception, it must then determine whether preserving human life outweighs violation of the clinic's property rights. The appropriate response to this question should be obvious. Commentators and case law uniformly agree that saving human life out of necessity justifies the violation of property rights. A defendant's life-saving actions are justified unless the conduct threatens other life: "Where the act done was necessary, or reasonably seemed to be necessary, to save life or limb or health, and did not in itself in any way endanger life, limb, or health, the exculpatory effort of the necessity is too clear for argument."[92]

If the author's understanding of the defense is accurate (which is doubtful), this situation is hardly "too clear." What is "too clear" is that direct physical attacks, as well as the climate of potential violence and the health risks associated with delayed abortion, endanger life, limb, and health of the workers and patients. To trespass is to set foot on another's property. This definition is too shallow, and simply an inaccurate description, to encompass the reality of the physical violence and psychological terrorism of Operation Rescue activities.

Factual inaccuracy is not the complete story, however. The characterization of Operation Rescue activities as simple trespass must also be seen as yet something else, and that is the trivialization of the real issue, a neutralization of the very powerful presence of gender and its politics. To characterize the actions of antichoice activists as directed at abortionists' property is to mask the truth. The real targets are women and their ability to exercise what are now constitutionally guaranteed rights of choice.[93] For

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92. Note, *The Necessity Defense In Abortion Clinic Trespass Cases*, *supra* note 13, at 538, n.105 (citing R. PERKINS, CRIMINAL LAW 956 (2d ed. 1969)). What is interesting about Sentfle's argument is that even if one agrees that fetuses are human life and, therefore, are deserving of legal protection, the necessity defense cannot be used successfully if the actions taken by defendants pose a risk to others. Thus, assuming that the Supreme Court would reverse *Roe v. Wade*, the defense would still be likely to fail.

93. Throughout this article, I refer to the "rights" of procreative choice. I am aware of the discussion within the feminist and legal communities that questions whether trying to secure procreative choice through a rights-based theory is effective, whether it will hurt women somewhere down the line by, for example, reinforcing the private/public dichotomy of the dominant male-defined culture, and, finally, whether it is even consonant with feminist principles. For reasons of context, and because I have not made up my mind on the question,

Operation Rescue to continue to insist that all that is at stake is a property right is to deliver the gravest and most telling insult—women are invisible, women have no rights to participate at all, let alone fully, in this culture. *Women do not even figure into the argument.* The exclusion of the existence and the rights of women in the characterization of Operation Rescue activity as a property crime is by far the most arrogant of Operation Rescue's rhetoric, and the exclusion compounds the injury visited upon women. It is not enough that women are forced to suffer the trauma of fending off the unasked-for "sidewalk counseling,"[94] the disruption of clinic services, violence to their persons, the rescheduling of appointments, and the health risks of delay. On top of all of the harm they endure, they must then see their trauma made invisible.[95] Unfortunately, the reduction of human pain to legal categories (whether they fit or not) is the nature of the law as it currently exists. This phenomenon may be even more harmful, however, when it happens to persons whose presence in the culture already is mar-

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this article will not explore this issue. Because the issue is important and recurrent, however, one might want to pause to consider, among others, Catharine MacKinnon's condemnation of the gender-neutral privacy doctrine in the abortion context. *See* C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93-102 (1987). *But see* Olsen, *supra* note 57, at 116 (arguing that while rights-based privacy doctrine may not be ideal, it at least ought to operate in equal fashion). Finally, I am refreshed by Carolyn Heilbrun's view that women may have to continue in their insistence on an autonomous self because while it may be possible to build a world in which the individual and the community could harmoniously merge (a Gilliganesque, yet rights-based society?), "it seems to me too remote a possibility to divert our attention from the here and now in which women must live or lose their lives." C. HEILBRUN, REINVENTING WOMANHOOD 202 (1979); *see also* M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 50-52 (1987).

94. "Sidewalk counseling" is a term used by antichoice groups to describe their activities at health clinics. The term implies that antichoice activists attempt to "counsel" patients to change their minds about having an abortion. One administrator of a women's health center reports the following image of "counseling." "The number of demonstrators varies from five to more than 100. I personally have observed women's arms being grabbed when they have refused to acknowledge the picketers or pleaded with them to be left alone. Their arms are grabbed as these picketers are screaming within inches of their face, 'Don't murder your baby. They'll rip your baby's eyes out.'" *Hearings*, *supra* note 69, at 5 (testimony of Mary Bannecker, Administrator, Northeast Women's Center). A journalist, Mary Kay Blakely, refers to sidewalk counseling as "the modern, psychological equivalent of stoning." Blakely, *Remembering Jane*, N.Y. Times, Sept. 23, 1990, § 6 (Magazine) at 26.

95. A dramatic example of selective deafness and this exact kind of trivialization occurred in an exchange between Congressman Dannemeyer of California and several persons who were called to testify before a congressional subcommittee. After listening to the detailed testimony of three clinic administrators, one physician, and a teenaged patient and her mother describing antichoice activity with which they were personally familiar, including numerous death threats to clinic personnel, many instances of arson of occupied buildings, physical altercations with patients and staff, the enormous stress under which clinic workers perform their jobs, *and* health risks to women, Mr. Dannemeyer scornfully characterized their testimony as "limited to damage to physical property, buildings." *Hearings*, *supra* note 69, at 48. Another subcommittee member, Congresswoman Patricia Schroeder, doubting her own hearing ability, replied "I do not think I heard you right. Did you say we only heard about violence to property? I though we heard about damage to human beings." *Id.*

ginalized. In commenting on a recent case[96] involving the constitutionality of university hate speech regulations, one writer criticized the court's analysis in striking down the regulations with a sentiment that is appropriate in this instance as well. She commented that "analytically treating their [the victims of hate speech] wounds as beneath doctrinal acknowledgement sends a message of marginalization, compounding the initial injury that hate speech inflicted."[97]

Operation Rescue and its ilk are not, however, the only ones who trivialize the real issue by ignoring women. For all of their good intentions and good results, prochoice activists and courts who have decided "trespass" cases also may contribute to erasing women from the picture. Many of my colleagues and students are surprised by a feminist critique of *Roe v. Wade*, not for its result, but for the Court's emphasis on the physicians' rights to practice medicine.[98] In *New York State National Organization for Women v. Terry*, the court cannot be said to ignore totally the gender dimension of this issue;[99] nonetheless, one is struck by the prominence of the discussion about the standing of clinics (who sued on their own behalf and on behalf of their patients) and their property rights to conduct their business.[100] Additionally, in that same case the court, in upholding the summary judgement on the plaintiffs' section 1985(3) claim, found that the defendants did in fact conspire against the constitutional rights of a cognizable class of persons, *i.e.*, women, with the requisite animus. It then went on to discuss what those constitutional rights might be. Plaintiffs had argued that Operation Rescue activities violated a woman's right to travel and her constitutionally protected right to obtain an abortion under the existing law. Finding that the record below did in fact support the conclusion that defendant's actions infringed upon women's right to travel (apparently many women from other states use New York health clinics), the court tackled the real issue, the right to obtain an abortion, by saying:

> [H]aving already found the interference with a right to travel an independent constitutional ground upon which to affirm the district court's section 1985(3) holding, it is unnecessary for us to rule on this constitutional claim.[101]

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96. Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989).

97. Note, *Recent Cases, First Amendment—Racist and Sexist Expression on Campus—Court Strikes Down University Limits on Hate Speech*, 103 HARV. L. REV. 1397, 1400-01 (1990).

98. *See generally* Roe v. Wade, 410 U.S. 113 (1973); Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

99. *See* New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1357-61 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990) (discussing Plaintiffs' § 1985(3) claims that Operation Rescue conspired to deprive women of equal protection).

100. *Terry*, 886 F.2d at 1347-48.

101. *Id.* at 1361.

Once again, legal doctrine sidesteps the reality. As a lawyer, I understand the strategic decisions that might allow, or even argue strenuously in favor of, coupling women's interests with those of a politically stronger group, *i.e.*, doctors. I also understand the need to raise numerous theories in the hope that one will have the desired result, even if the result is not based upon the hoped-for theory. But it strikes me that if one asked any woman, even one from out of town, who had been denied access to that clinic for her view of what right had been infringed, I doubt that she would have chosen the right to travel. One wonders (or perhaps one does not) why the court could not have cast the section 1985(3) claim in opposite terms, by declaring that the right to an abortion had been infringed, and therefore, the right to travel was the issue it was unnecessary to address.[102]

That trivialization occurs by refusing to recognize the presence of women is bad enough, but there is yet another, class-based aspect that may be even less visible than gender. In *New York State National Organization for Women v. Terry*, the defendant attempted to argue that neither he nor his organization was guilty of class-based animus because their actions were directed only at a sub-group of women, *i.e.*, those seeking abortions. Ignoring for the moment that they in fact sweep other women into the fray, *i.e.*, those seeking other health services, one might say that Terry is not completely wrong. He has failed, however, in his definition of the sub-group.

The simple property crime of trespass is unmasked to reveal an assault on the rights and interests of women, and this crime is unmasked further to reveal an assault on a sub-group of women who are among the least powerful and hence least visible segment of our society. The clinics subject to invasion by Operation Rescue provide services to poorer women. Inasmuch as clinics provide abortion services at less cost, and the Hyde Amendment has prevented federal funds from being used to provide abortion services for women, clinics serve the needs of those for whom private physicians may be out of reach. Disruption and blockading of clinics is thus doubly loathsome, in that it impacts upon a group that labors under both sex and class discrimination. The trespass label does not speak to the class-based issue inherent in abortion clinic protests; certainly it does not call the protestors to account for activities that would intrude upon the constitutional rights of poor women only. It does not even provide room for such a dialogue.

There is yet a third aspect of trivialization. Women patients who are denied access to a clinic because other individuals have "trespassed" there are not simply persons who are women and may be poor, with all that that

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102. One reading of the opinion suggests that the court might have been uncomfortable with the strength of the record on the state action aspect of the right to obtain an abortion, but it is difficult to tell with any certainty. *Id.* A review of the district court's opinion, New York State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247 (S.D.N.Y. 1989), however, shows that the lower court had confidence in its finding of state action.

implies in a patriarchal and capitalist culture. They are, in addition, individuals who most likely are experiencing emotional trauma even before they arrive at the clinic. While I do not wish to dignify Justice White's lament that women will have abortions as a "convenience, whim, or caprice,"[103] because to do so buys into his assumption that "women naturally have babies—that having babies is what women are for—and that their choice not to procreate requires explanation,"[104] I must take issue with it to state what has to be obvious in the experience of most women. For whatever reason, the decision to terminate a pregnancy is for many, if not most, women a difficult one.[105] Arriving at a clinic, taking a step closer to realizing that decision, is probably not an easy time. A reporter who ostensibly accompanied a patient into a clinic parking lot that was under siege from antichoice activists said:

> When someone drives into the lot, a group swarms over the car, shouting slogans and trying to deliver anti-abortion pamphlets. To be inside that car, even as an observer, is to feel assaulted. One can imagine what if feels like to be driving into the lot for an abortion, having already made a difficult decision, only to be accosted by people screaming "Murderer!" at you.[106]

Trespass, the property crime, does not speak to such an assault upon an individual in emotional turmoil; nor does it allow us to acknowledge or give weight to the psychological harm inflicted upon a woman at this particularly stressful time.

Naming is a powerful tool. Labels both reflect reality and shape all of our perceptions. Until recently, we did not have words to describe accurately speech intended to demean the race, sex, sexual preference, or national origin of the listener. We used to call it free speech; now some call it hate speech. The label may not take the sting out of the act, but at least it does not compound the injury by pretending it is something else. We need to give more thought to what we ought to call the actions of antichoice protestors, and our first step is to reject the term "trespass."

PART III

The previous section discussed why most courts that have dealt with the issue have found that Operation Rescue's pleading of necessity failed to meet the choice of evils defense. The previous section has been critical of the rationale of these cases. Part III will take a more global view of the necessity defense and ask whether approval of the defense for some forms

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103. Doe v. Bolton, 410 U.S. 179, 221 (1973) (White, J., dissenting).

104. Olsen, *supra* note 57, at 123 n.82.

105. *See generally* American College of Obstetricians & Gynecologists v. Thornburgh, 613 F. Supp. 656 (E.D. Pa. 1985) (summarizing testimony of clinic directors about emotional state of clinic patients).

106. Kort, *supra* note 66, at 53.

of civil disobedience necessarily requires approval for Operation Rescue.

Operation Rescue claims affinity with a number of other groups that have engaged in civil disobedience. They have compared themselves to antinuclear protestors, sanctuary movement activists, antiwar groups, civilians who hid Jewish citizens from the Nazis,[107] and the 1960s' civil rights marchers. Perhaps because at least some members of each of those groups would like not to claim Operation Rescue as compatriots or because Operation Rescue does seem to give proponents of civil disobedience pause, there have been various rationales given for what makes Operation Rescue different. As I have tried to distinguish Operation Rescue, I find myself articulating small, highly legalistic points. For example, sanctuary movement activity differs from the "rescues" of Operation Rescue in that hiding refugees is almost by definition a secret, private activity, whereas the so-called rescues are deliberately constructed media events, thus raising the previous discussion concerning what is political and whether it makes a

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107. The equation of the prochoice movement with Nazism and antichoice activists with Nazi resisters is not accidental. Gloria Steinem calls Nazism one of the most potent of our modern metaphors for terror. One would hope, however, that antichoice advocates would check out their history more carefully before making comparisons. In a brief submitted by defendants arrested for trespass at a Burlington, Vermont clinic, defendants compare themselves to Anne Frank, one of the "well-known heroines of World War II who rescued and harbored Jews against deportation by the Nazis." Memorandum of Law in Support of Defendants' Motion for Allowance of Justification Defenses, State of Vermont v. Guy M. Page, et al., No. 2239-5-89 CnCr et al., Vermont District Court, Unit II, Chittendon Circuit, slip op. at 7 (Sept. 29, 1989). Even more important than ignorance of historical figures, however, is the failure of these antichoice groups to recognize that on the issue of abortion, Hitler and the antichoice groups are kindred spirits. In her essay, *If Hitler Were Alive, Whose Side Would He Be On?*, Gloria Steinem states:

> [T]he second flaw in the libelous equation of pro-choice advocates with Nazis is that Hitler himself, and the Nazi doctrine he created, were unequivocally opposed to any individual right to abortion. In fact, Hitler's National Socialist Movement preached against and punished contraception, homosexuality, any women whose main purpose was not motherhood, men who did not prove their manhood by fathering many children, and anything else that failed to preserve and expand the Germanic people and the German state. . . . In *Mein Kampf*, Hitler wrote that "We must also do away with the conception that the treatment of the body is the affair of every individual."

G. STEINEM, *If Hitler Were Alive, Whose Side Would He Be On?*, in OUTRAGEOUS ACTS & EVERYDAY REBELLIONS 309 (1983). Steinem goes on to comment on the casual use of this metaphor in antichoice rhetoric, quoting of all people, Dr. Bernard Nathanson, a physician famous for his once prochoice, now militantly antichoice, stance. (Coincidentally, an affidavit from Dr. Nathanson supporting antichoice protestors is attached to the Defendant's memorandum in *State v. Page*, *supra*, in which Anne Frank is misidentified.) He states: "As a Jew, I cannot remain silent at this facile use of the Nazi analogy, though I realize that some antiabortion Jews use it. If this argument is so compelling, why do Jews remain generally favorable toward abortion?" *Id.* at 312; *see also* Olsen, *supra* note 57, at 132 (challenging as misinformed former Surgeon General C. Everett Koop's exhortation that failure to protest abortion is a "slide to Auschwitz" by acknowledging that "the Nazi practice regarding abortion was the harshest and most restrictive anywhere in Europe").

difference. In some of the anti-United States' involvement in Central America and Vietnam War cases, defendants argued that alternatives to civil disobedience, *i.e.*, the political process, did not exist because government action itself had circumvented the democratic process by engaging in secret activities. However difficult the political scene may be for antichoice advocates, they cannot make similar claims. And so, as the analysis proceeds point by point through each element of the defense, gifted lawyers may be able to distinguish the use of the defense in this, and in other, situations.

From a legalistic vantage point, one probably does not need to go further. I do so, however, because I think that more is at stake than can, or ought to be, resolved by the jousting of lawyers for either side of the debate. To stop at this point is to engage in the kind of analysis I criticized in the foregoing section of this article; it is to become one who minimizes and trivializes. We ought not pretend that this defense should rise or fall on legal niceties, the presence or absence of which will depend on the relative skill of the lawyers involved. As Bauer and Eckerstrom point out[108] the necessity defense is not a set of rules to be applied in a mechanistic fashion. Rather, its existence is predicated on a sense of values. To restate the choice of evils element in larger terms, the defense will succeed when we, as a society, agree with the value choice made by the actor. Conversely, when we do not wish to place our imprimatur on the actor's choice of values, the defense will fail. In other words, we do not allow the defense to operate independently of the result; we never intended it to apply equally to all who may want to claim it. There is no need for consistency here. Unlike the First Amendment, which is another context in which consistent and "neutral" application are promoted endlessly,[109] the necessity defense is *not* content neutral; it is content specific.

Consider the following example. A black civil rights advocate in the 1960s is arrested for violation of a local ordinance forbidding black persons from sitting in the front of the bus. Her defense is that she broke the law because she believed it to be unjust and that she was doing so to avoid the greater harm of continued racial segregation. At the same time, the officer who arrested her is himself charged with aggravated assault for unnecessarily hitting her with a billy club. His defense is that he broke the law because in this case he believed that to do so would prevent a greater harm—racial integration. Assume the unlikely hypothetical of an identical jury. Assuming

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108. *See* Note, *The State Made Me Do It*, *supra* note 14, at 1183 (stating that application of necessity defense in new contexts requires careful consideration because necessity defense reflects social policy).

109. I am aware that there is emerging a substantial body of opinion that questions the neutral application of Constitutional principles such as freedom of speech, and even more importantly, whether such neutrality is a good idea. The impetus behind hate speech legislation, and even flag burning, is a notion that even freedom of speech ought to bend to conventional morality, whatever that might be. Nonetheless, my point is that however our thoughts may be changing on freedom of speech issues, the necessity defense, unlike the First Amendment, does not suffer from the same legacy of supposed consistent and neutral application.

that other elements of the necessity defense are satisfied in both cases, it would be logically impossible for the jury to acquit both individuals. Having established already that a subjective belief in the rightness of one's choice is not the test for this element of the defense, the jury must now decide in each case whether the defendant acted correctly. How would it go about its inquiry?

Some courts and commentators have resorted to the Constitution. One could argue, for example, that once the Constitution has been interpreted to mean that a state may not discriminate on the basis of race, the Constitution, as interpreted by the courts, has made the choice for the rest of us. Thus, in the example above, once we have something to articulate the correct value, the choice is made easier. Do the bus rider's actions or the officer's actions advance the value, already chosen, of racial equality? By his own admission, the police officer's actions are at odds with the articulated value. Accordingly, he has made an incorrect choice, and the necessity defense fails in his case. Conversely, the bus rider's defense will succeed.

Reliance on the Constitution makes the analysis in Operation Rescue cases particularly easy, at least for now. The Constitution has been interpreted by the Supreme Court as protecting a woman's right to choose whether to bear a child. Clearly, the actions of Operation Rescue run counter to this constitutional right.

Almost before one finishes the above paragraph, however, the use of the Constitution as a sole benchmark starts to appear a poor choice for many reasons. First, the applicability of the defense will be determined by proximity in time to Supreme Court announcements. Thus, those who engage in acts of civil disobedience to integrate schools pre- and post-Brown must be treated differently. Second, what of issues on which the Supreme Court has not ruled? Third, what if the Supreme Court is wrong? Should the necessity defense have been allowed for persons advocating the rights of women at the time of *Bradwell v. Illinois*?[110] While I am willing to grant that a Supreme Court decision might reflect our fundamental values, it might not as well. It may be relevant but not dispositive of the issue.

If the notion of the Supreme Court as the arbiter of values is dismissed, we are in effect sent back to square one to again muddle about how we choose for whom we will allow the defense. We might try to ascribe some more abstract, not necessarily Supreme Court-defined, values to our Constitution. Do we, for example, find within it a concern for equality? If so, perhaps we can use that as a universal value against which we can assess defendants' actions. One commentator has stated:

> for all of our failures in the pursuit of equality, and for all of our (justifiable) uncertainty about just what equality means, there are

110. Bradwell v. Illinois, 83 U.S. 130 (1876) (holding women unfit for the practice of law).

> few values, perhaps none, with deeper roots in our traditions or a firmer hold on our imaginations than the value of equal treatment under the law.[111]

If defendants target their activities so as to deny equality[112] to a subgroup of the population (women), their activities are not in accord with prevailing values. Unfortunately, reliance on the Constitution itself is not only subject to varying interpretations, but risky for groups whose interests and rights were ignored in its formation, particularly for women, who continue to receive short shrift under constitutional doctrine.

Perhaps we ought to wean ourselves from the Constitution and ask how else we might determine a society's values. In an introductory jurisprudence and constitutional analysis segment of my first year lawyering class, I ask students how we ought to determine what our collective conscience deems "right."[113] Natural law appeals to some students as a way of defining what values the law ought to reinforce, until we acknowledge the diversity of our culture. Sociological jurisprudence offers an inquiry that is more utilitarian—what is right is what is good for the society. History may provide some clues—what have we valued in the past, have those values endured, and what are the identifiable currents of change?

Recognizing that any approach has limits, but that perhaps each approach contributes to an understanding however amorphous, one might start with trying to define morality as it is conceived in this culture. Previously, Charles Rice seemed to believe that abortion somehow inherently and universally was thought to be murder, and hence immoral. The absolute nature of his position, and perhaps its source as well, is akin to the view of the Roman Catholic Church, which defers to a higher authority (God, or church leaders) to define right and wrong and then ensures that its members behave accordingly. Morality in this context is measured by whether or not one follows the pre-ordained rules.[114] That the rules themselves are politically gendered[115] and may even change over time depending

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111. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1621 (1979).

112. This argument assumes, of course, that denial of procreative choice to women is unequal treatment under the law. For an excellent discussion, see Olsen, *supra* note 57, at 117 (footnote omitted), in which she states that "although not yet fully recognizing the significance that the social and economic inequality between men and women has, or should have, for abortion law, the Court has begun to acknowledge that abortion law has something to do with the role and status of women." Regan, *Rewriting* Roe v. Wade, *supra* note 111 (giving earlier exposition of equality doctrine).

113. In New York, where the necessity defense is codified, the language used to describe the objective nature of the choice between evils is noteworthy for its attempt to state the concept and its consequent failure, though understandable, to formulate any guidelines to the process. The statute requires the fact finder to determine whether the defendant made the correct choice using "ordinary standards of intelligence and morality." People v. Crowley, 142 Misc. 2d 663, 664, 538 N.Y.S.2d 146, 147 (Just. Ct. 1989). In addition, the harm avoided must "clearly outweigh" the harm committed. *Id.*

114. H. RODMAN, B. SARVIS, & J. BONAN, *supra* note 88, at 37.

115. An insider's view of the rule-bound nature of the Catholic Church's sense of morality

on context is not recognized, or even if understood, is thought irrelevant.

But morality is not the sole province of antichoice proponents. Prochoice advocates believe that the morality of responsibility could compel a woman to abort rather than to give birth to a child for whom she could not assume responsibility.[116] Interestingly, this morality of responsibility is not unique to feminism, but is also part of more mainstream Protestantism. Theologian Harmon Smith echoes Gilligan by arguing that the abortion decision must be a contextual one, taking into account all competing values in each unique situation. He states, "I believe it arguably the part of mercy to foreclose the birth of nascent life which is or promises to be severely deformed, defective, or disadvantaged."[117] A substantial number of Catholics have articulated similar beliefs, though clearly unofficially and at risk of excommunication. Patricia Hussey and Barbara Ferraro, two former Roman Catholic nuns, have argued vociferously for the Church to recognize that the issue of abortion can never be the subject of a single, simple rule because it is a moral issue, and morality involves an examination of circumstances. Rather than requiring adherence to rules laid down by others, they have insisted that the Church re-examine its traditional notions of morality and accept women as contextual, moral decision makers.[118]

Moreover, prochoice advocates see another, perhaps most central, moral aspect to the abortion issue, and that is the immorality of subordinating women by means of compulsory pregnancy. Randall Terry once said that trespass was acceptable because abortion is murder, and, in an effort to express his puzzlement over those who did not share his views, stated, "No one would raise an eyebrow if I trespassed to prevent a rape."[119] What he fails to understand is that his trespass *is* a rape. It denies women the right to control their own bodies; it makes their bodies the subject of someone else's whim. Fran Olsen writes, "[T]he act of forbidding abortion is itself brutal and dehumanizing. In opposing abortion, one cooperates with the devaluation of women's lives and paves the way for the further devaluation of life."[120] She is echoed by Beverly Harrison, who makes clear the total absence of women in the moral analysis of antichoice groups, particularly the church:

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can be found in B. FERRARO & P. HUSSEY, NO TURNING BACK: TWO NUNS' BATTLE WITH THE VATICAN OVER WOMEN'S RIGHT TO CHOOSE (1990). Of the gendered nature of the rules forbidding abortion, Patricia Hussey, then a Roman Catholic nun, described the Church's teaching on abortion as the product of "a church run by celibate men who are afraid of sex and afraid of women and presume to insist that they know more about what God has in mind for women than we do ourselves." *Id.* at 172.

116. *See, e.g.*, C. GILLIGAN, IN A DIFFERENT VOICE—PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); *Feminist Discourse*, *supra* note 75, at 37-38 (Gilligan commenting on her studies of how women, as opposed to men, view abortion as a moral decision).

117. H. RODMAN, B. SARVIS, & J. BONAN, *supra* note 88, at 37.

118. *See* B. FERRARO & P. HUSSEY, *supra* note 115. The authors felt compelled to leave their orders as a result of advancing a competing idea of morality.

119. *The New Pro-Life Offensive*, NEWSWEEK, Sept. 12, 1988, at 25.

120. Olsen, *supra* note 57, at 132.

> [T]he selective perceptions operative in the historical judgments of Christian teaching on abortion are skewed, because women's well-being is not perceived as a central moral issue and women's experience and reality are not understood as relevant to a moral analysis of abortion.[121]

Accordingly, a prochoice position would of necessity require an individual to include women, and their physical, psychological, emotional, and spiritual well-being, as a very real part of moral decisionmaking.

So far, it appears that we have competing views of morality, one that favors rules and one that favors a more contextual approach. If we must choose, and the legal debate over abortion seems to indicate that we must, how do we decide whose morality should prevail? Perhaps there is yet a higher moral order, the idea that true morality is not a set of rules forced upon an individual but is itself a matter of choice, what we respect in our diverse culture as individual conscience.[122] Given that our culture at this point appears to have produced two competing moralities on the issue of abortion, we need to support the one that will allow both to continue, and the one that will not allow itself to be inflicted on the other. That the majority of the American people support the right to choose even if they themselves prefer to choose not to have an abortion is testimony to the preference for, and tradition in our culture of, the primacy of individual conscience. Michael J. Perry states:

> There is a significant difference between doing something because one believes it to be morally right and wanting others compelled by the law to do that same thing whether or not *they* believe it is morally right. In a traditionally and proudly pluralistic society, this is a distinction that matters.[123]

What of the utilitarian rationale? Are there cultural reasons that support the prosecution and conviction of those who seek to shut down abortion clinics? While there are many, I do not want to be guilty of distracting from the primary issue. The question is whether we want women, who constitute over one-half of the population, to participate fully as citizens of the state and members of the community. Is continued discrimination against women in the interest of this society? In speaking of what constitutes an unjust law, Martin Luther King said that:

> An unjust law is a code that a majority inflicts on a minority that is not binding on itself.

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121. B. HARRISON, OUR RIGHT TO CHOOSE: TOWARD A NEW ETHIC OF ABORTION (1983).

122. It is interesting to note the irony of antichoice protestors, who refuse to recognize the importance of individual conscience in determining the morality of the abortion decision yet invoke that same individual conscience, *i.e.*, the assertion that they are following a "higher law," when they raise the necessity defense in their own behalf.

123. Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689, 727 (1976) (emphasis in original); *see also* Wicker, *Rights and Morality*, N.Y. Times, Apr. 26, 1990, at A31, col. 1.

> . . . All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority, and the segregated a false sense of inferiority. To use the words of Martin Buber, . . . segregation substitutes an "I-it" relationship for the "I-thou" relationship, and ends up relegating persons to the status of things. So segregation is not only politically, economically and sociologically unsound, but it is morally wrong and sinful.[124]

Thus, if justice is measured by uniform application, it bears noting that it would be unjust for our culture to deny women the right to control their own bodies when the same is granted to men.[125] Secondly, to the extent that our laws or our institutionalized values, continue to separate, to segregate, to view women as the other, it is not only wrong but, to return to our utilitarian perspective, "politically, economically, and sociologically unsound."[126] One is reminded of the Supreme Court's pronouncements in *Brown v. Board of Education* of the irreparable harm to school children that results from unequal treatment. The Court stated that treating black children differently through segregation "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be to be undone."[127] Have we yet learned the costs to a society that perpetuates racism? If so, the costs of refusing equality to women cannot be denied.

Finally, we come to history. Because history by appellation is clearly not herstory, we ought to tread carefully here. Surely, this culture's history

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124. M. L. KING, *Letter from Birmingham City Jail*, *supra* note 15, at 293-94 (paragraphs rearranged).

125. *See Regan*, *supra* note 111, at 1583-91 (discussing disparate treatment and impact of antichoice policy, including exhaustive, and sobering, cataloguing of substantial physical and other burdens of pregnancy).

126. M. L. KING, *Letter from Birmingham City Jail*, *supra* note 15, at 293. There are other valid interests of a culture that are served by preventing blockades of abortion clinics, *e.g.*, the physical health of women and access to health care. One court, in denying the defense, stated that if one were to allow it clinic workers and patients would not be legally permitted to interfere with the protestors nor to protect themselves. The notion of such potential hand-to-hand combat in a medical clinic was thought to be inappropriate. *See* People v. Crowley, 142 Misc. 2d 663, 671, 538 N.Y.S.2d 146, 151 (Just. Ct. 1989); *see also* State v. O'Brien, 784 S.W.2d 187, 192 & n.6 (Mo. Ct. App. 1989) (denying the necessity defense citing the *Crowley* rationale). Moreover, studies show that maternal and infant health is significantly improved by access to legal abortion and worsened by restriction to access. *See* J. LEGGE, JR., ABORTION POLICY: AN EVALUATION OF THE CONSEQUENCES FOR MATERNAL AND INFANT HEALTH (1985). Studies have also concluded that compulsory childbearing has a detrimental effect on psychological and social development of children born to women who were denied abortions. *See generally* H. DAVID, BORN UNWANTED: DEVELOPMENTAL EFFECTS OF DENIED ABORTION (1988); H. RODMAN, B. SARVIS, & J. BONAN, *supra* note 88, at 84-87. For those who believe that pictures are more truthful and eloquent than words, see James Nachtwey's photo essay *Romania's Lost Children*, N.Y. Times, June 24, 1990, § 6 (Magazine), at 28 (depicting very real consequences to children who are products of government-ordained compulsory pregnancy).

127. Brown v. Board of Education, 347 U.S. 483, 494 (1954).

is replete with examples of the subordination of women. Nor can we argue that subordination is solely an historic relic of the past. But what of the current? In what direction is this culture moving on the question of the status of women? As clear as it is that women are still second-class citizens in many important respects, one might say that, however slowly, painfully, and, much of the time, half-heartedly, this culture has taken some initial steps to recognize women as equal beings.

Unfortunately, having identified possible sources of inquiry, none seem to satisfy. In searching for a clear indication of a value that would demand rejection of the necessity defense in Operation Rescue cases, we are looking to define how this culture views women. Even an optimist would find the evidence at best inconclusive and ambiguous. Moreover, the culture through which we search for clues is not our (women's) culture. The Constitution, its theories of interpretation, transcendent values, utilitarian views, and history come from, and are shaped by, men. Susan Moller Okin, in turning a feminist eye toward political theory, expresses the familiar and appropriate of women to include themselves in the use of the plural possessive, in the ownership of cultural values. She summarizes: "Concepts of rationality, justice, and the human good that are supposedly based on 'our' traditions are exposed as male-centric. Theories that rely on 'shared understandings' also reveal their tendencies to reinforce patriarchy by neglecting to examine the effects of past and present domination on these understandings."[128] As Carolyn Heilbrun states, "The past is male. But it is all the past we have."[129] When she states further that we must therefore use the past to reinvent a future that "will speak of womanhood,"[130] it is difficult to know in what sense she means it. If she means that we have no control over the past and, therefore, can work only to change the future, she is correct. But if she means that we can use the past to forge a new and better future for women, women need to be wary of the pieces of the past upon which they rely.

I confess that when I began this article, I had hoped to come to a clearer, more optimistic conclusion. After all, if the evidence from this (even male) culture is ambiguous, that must mean that an argument that women are valued and, hence, valuable can be made, even though there may be a counter-argument as well. Several things, however, have caused me to believe that such an argument can be made but only for argument's sake and, regrettably, after I had amassed all indicia of women's emergent equality, I was unable to find my argument convincing. I will discuss two seemingly minor but telling experiences of my own.

While reading an article about a proposed Louisiana statute that would have prohibited abortion even in cases of rape and incest, I read state Representative Carl Gunter's remarks on his own opposition to an incest exception. By way of explanation, he said:

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128. S. OKIN, JUSTICE, GENDER, AND THE FAMILY 110 (1989).

129. C. HEILBRUN, *supra* note 93, at 212.

130. *Id.*

Inbreeding is how we get championship horses.[131]

I tell you frankly that I could not then, and cannot now, describe or comprehend the level of hostility, arrogance, and total hatred of women found in Gunter's remark. But then something even worse, and more significant, happened. I started thinking about statistics, remarks, news accounts, and conversations of the following few days and realized that as horrible as Gunter's remark was, other horrors rivaled it. The following week, *Newsweek* magazine's cover story explored "The Mind of the Rapist,"[132] and the Central Park jogger took the stand to testify how being gang-raped had changed her life, as if her testimony were necessary to establish that. Whether to educate or titillate, television seems to offer up a movie of the week that mirrors nearly every abomination committed against women in this culture: rape, physical and psychological abuse, mental disorder, and workplace harassment. In my own community, as in many of our communities, police finally apprehended a male suspect who had attempted to sexually molest a four-year old girl. Pornography, described by Andrea Dworkin in part as "what we are under male domination," and "what we are for under male domination," is an eight billion dollar per year business in the United States.[133] There are countless more examples which every gender-conscious reader could supply. The point is that each of us, each woman, lives with innumerable reminders of her perceived, and culturally-imposed, worthlessness every day.

Second, the irony of my task finally dawned on me. I am writing an article on why abortion clinic protestors' actions ought not be excused under the law, why women's rights and well-being ought to supercede. I am writing at a time when the right to choose has already been eroded and "a chill wind blows."[134] If this culture clearly valued women, this article would not only be unnecessary, it would be unthinkable.

What then, is left for the necessity defense? First, by redefining the harm from that of trespass to an offense against women, and by recognizing the value-laden nature of the application of the defense, we cast the debate over its use in clearer and more accurate terms. At a minimum, courts must look behind a "trespass" or other innocuous label and perceive Operation Rescue's activities for what they are—a crime of significance, a harm against persons, and more particularly, against a group of persons traditionally denied power.

Secondly, in the more hopeful sense of Carolyn Heilbrun's words, we must act as good lawyers and insist on change. A culture, and its legal

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131. *The Right-to-Lifer's New Tactics*, NEWSWEEK, July 9, 1990, at 23.

132. *The Mind of the Rapist*, NEWSWEEK, July 23, 1990.

133. Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L. J. 1, 10 (1985).

134. Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) (Blackmun, J., dissenting). With the resignation of Justice William Brennan, the chill wind has grown several degrees colder.

system, are not ossified. Susan Estrich says that in a time of social change "the law can bind us to the past or help push us into the future."[135] If one perceives that certain steps have been taken to advance the status and value of women, those changes must be nurtured. If one perceives otherwise, then change must begin. The necessity defense is one small part of a legal system and a culture that is still dominated by patriarchy. It can, however, and it ought to be, one small place in which we acknowledge that the subordination of women must stop.

135. S. ESTRICH, REAL RAPE 101 (1987).