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Towards A Recognition Of The Necessity Defense For Political Protesters

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TOWARDS A RECOGNITION OF THE NECESSITY DEFENSE FOR POLITICAL PROTESTERS

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The world has witnessed the rise of "people power." Regimes have been shaken and toppled due, in large part, to the mass, nonviolent actions of their citizens. In the United States, civil disobedience tactics increasingly have been deployed by unionists, environmentalists, peace activists, tax resisters, advocates for the homeless, educational reformers, and those embroiled in the debate over AIDS and abortion. Ironically, while American political leaders generally have praised, supported, and encouraged nonviolent movements abroad, they often have condemned, frustrated, and attacked such movements at home.

Much of this contemporary American civil disobedience is distinguished by the fact that disobedients, rather than following the traditional practice of entering a guilty plea and accepting their punishment, claim that their actions are justified under international law and argue that it is the state which is acting in a criminal fashion. These new self-proclaimed civil resisters view themselves as inheritors of the Nuremberg tradition that they claim morally and legally obligates citizens to resist the internationally illegal conduct of regimes. Such civil resisters typically have relied upon the common-law necessity defense as a mechanism that entitled them to raise indirectly their international law defense. The appellate judiciary, however, almost uniformly has ruled that the necessity defense is inapplicable as a matter of law in cases of political protest.

This essay contends that the United States, with its rich tradition of civil disobedience and commitment to democracy, should recognize the right of civil resisters to rely upon the necessity defense.[1] Initially, it is argued that the Nuremberg Principles and international human rights law establish an internationally recognized privilege of citizen intervention to prevent illegal governmental activity. This notion of legally justifiable civil resistance then is contrasted with the traditional concept of civil disobedience. In conclusion, the refusal of the appellate judiciary to permit civil resisters to

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1. The ideas discussed in this paper, in part, are elaborated upon in: Lippman, *The Right of Civil Resistance Under International Law and the Domestic Necessity Defense*, 8 DICK. J. INT'L L. 349 (1990); Lippman, *The Necessity Defense and Political Protest*, 26 CRIM. L. BULL. 317 (1990); Lippman, *Reflections On Non-Violent Resistance and the Necessity Defense*, 11 HOUS. J. INT'L L. 277 (1989); Lippman, *First Strike Nuclear Weapons and the Justifiability of Civil Resistance Under International Law*, 2 TEMPLE INT'L L.J. 133 (1989); Lippman, *Nuremberg*, 6 LAW IN CONTEXT 20 (1988); Lippman, *Civil Disobedience: The Dictates of Conscience Versus the Rule of Law*, 26 WASHBURN L.J. 233 (1987).

rely upon the necessity defense and to raise indirectly international law arguments is outlined and criticized.

NUREMBERG AND THE RELEVANCE OF INTERNATIONAL LAW

The Nuremberg Tribunal variously convicted twenty-two Nazi war criminals of crimes against peace, war crimes, and crimes against humanity. These narrowly based convictions perhaps are of less historical significance than are the broad principles enunciated in the Tribunal's decision. These principles served as a catalyst for a revolutionary shift in international law towards the protection of individual human rights.[2]

The Tribunal pronounced that individuals have international obligations that transcend the requirements of domestic law. These international duties apply to government leaders and to members of the military as well as to private individuals. The Tribunal also ruled that the act of state defense, that historically immunized government leaders from liability for acts committed in the course of their official activities, was not applicable. The Tribunal further established that the superior orders defense only was available in mitigation of punishment if, under the totality of circumstances, the defendant was unable to exercise a moral choice.[3]

The Tribunal's decision firmly established that the conduct of states, rather than being a cynical exercise of raw power, was constrained and guided by the rule of international law. International law was the standard by which the legality of government action was to be evaluated and individuals' ultimate loyalty was to universally applicable principles rather than to the dictates of a particular legal code.[4]

Nuremberg thus established that there are legal limits on state power and that respect for individual integrity is the duty of all sovereign states. A regime which persistently and systematically violates this obligation forfeits its claim to demand the loyalty of its citizens. Perhaps the most lasting significance of the Nuremberg trial is that the trial served as a catalyst for the creation of international system of individual rights and duties. The charge of crimes against humanity, that ironically the Tribunal vaguely defined and largely ignored, provided the intellectual basis for the development of a comprehensive regional and international system for the protection of human rights applicable during periods of domestic peace (wartime being ruled by the system of humanitarian law).[5] These human rights

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2. For a discussion of Nuremberg, see Lippman, *Nuremberg*, *supra* note 1.

3. *See* XXII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 466 (1947).

4. It is significant that the Nuremberg defendants were tried and convicted before an international military tribunal and proposals for their summary execution were rejected as contrary to due process and to the rule of law. A judicial trial was thought to be the best mechanism for establishing principles of international law to guide the future conduct of states. *See generally* Lippman, *Nuremberg*, *supra* note 1.

5. The Nuremberg Tribunal recognized that crimes against humanity are not limited

instruments, beginning with the 1948 Universal Declaration of Human Rights,[6] establish and protect certain civil, political, social, and cultural rights; and designate various severe deprivations of human rights as international crimes.

This system of individual rights and state duties, as suggested, is an extension of the spirit of Nuremberg. Following the horror of World War II, the Allied Powers were determined to spread democratic values to guard against the re-emergence of fascism. Democratic theory dictates that individuals not only should be free from government repression and persecution, but that states should be charged with the positive duty of guaranteeing the minimum conditions required for human development. While Nuremberg primarily was concerned with Germany's treatment of the citizens of occupied countries, the human rights movement imposed general standards of conduct on states towards their own citizens. All peoples were viewed as possessing inherent rights which transcend geography, ideology, and the sovereign prerogative of states. The rhetoric of rights was adopted to emphasize that these protections were envisioned as legally enforceable entitlements. Thus, the sphere of state sovereignty became limited by the international obligation to safeguard human rights. The respect for and the protection of these rights became matters of international concern that no longer were considered to be strictly within states' domestic jurisdiction. In terms of international law, the individual then was transformed from an "object" into an active "subject" with legal standing and justiciable claims against the individual's parent state.

NUREMBERG AND THE CONFLICT BETWEEN DOMESTIC AND INTERNATIONAL LAW

International human rights instruments provide for relatively ineffectual mechanisms for the receipt, investigation, and adjudication of complaints.[7] The primary responsibility for the protection of human rights, of necessity, is vested in domestic courts. However, many countries with records of human rights abuse are governed under states of emergency or by military regimes. The military in these countries has restricted the jurisdiction of civilian courts, or military tribunals have supplanted the courts. In such circumstances, there is little realistic opportunity for litigants to obtain

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necessarily to acts that occur during periods of armed conflict. However, it limited its jurisdiction to acts that occurred after the initiation of Germany's war of aggression in 1939. The concept of crimes against humanity suggests that "humanity" carries with it certain inherent minimal prerogatives and protections. *See* XXII TRIAL OF THE MAJOR WAR CIRMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 498 (1947).

6. Universal Declaration of Human Rights, United Nations General Assembly, Dec. 10, 1948, G.A. Res. 217A, 3 GAOR, Resolutions (A/810), at 7.

7. *See generally* Lippman, *Human Rights Revisited: The Protection of Human Rights Under the International Covenant on Civil and Political Rights*, 10 CAL. W. INT'L L.J. 450 (1980).

judicial redress of their grievances.[8] Even in democratic states, the judiciary has been reluctant to assume jurisdiction over governmental activities alleged to be violative of international law. In the United States, courts generally have ruled that the adjudication of international claims would violate the political question doctrine by compelling courts to determine issues constitutionally reserved to the executive or legislative branches.[9] Courts also have determined that individuals lack standing to raise international claims, in that they have been unable to demonstrate that they are uniquely harmed by the challenged policy.[10] In other instances, the judiciary has denied individuals standing based on the finding that the harm, such as a nuclear exchange, is distant, speculative, and uncertain.[11]

The refusal of the judiciary to entertain claims based upon international law has placed individuals in a paradoxical position. Constitutionally, the rule of law constrains their government. Yet, the judiciary refuses to determine whether the conduct of the government conforms to international law. This lack of a judicial avenue for the redress of grievances, creates a dilemma in the minds of many people of conscience. While law abiding, such individuals believe that Nuremberg creates a moral imperative, if not a legal obligation, to resist internationally proscribed governmental conduct. Thus, when confronted by the criminal conduct of the United States government, these individuals view themselves as having no alternative but to violate the law.

The actual holdings of Nuremberg and the associated postwar tribunals, however, do not impose specifically an affirmative legal duty upon individuals to prevent governmental acts violative of international law. In some isolated instances, an affirmative duty was placed upon high-level public and military officials to prevent the commission of criminal acts of which they had actual or constructive knowledge. The most infamous example is *In re Yamashita*,[12] in which the United States Supreme Court recognized the vicarious liability of military authorities. The Court imposed an affirmative duty upon military commanders to act within the scope of their authority and to prevent violations of the laws of war of which they were aware or should have been aware.[13]

The duty to take affirmative acts to prevent the commission of criminal acts, however, was not extended to ordinary combatants or to civilians.[14]

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8. *See generally* Lippman, *Disappearances: Towards a Declaration on the Prevention and Punishment of the Crime of Enforced or Involuntary Disappearances*, 4 CONN. J. INT'L L. 121 (1988); Lippman, *Government Sponsored Summary and Arbitrary Executions*, 4 FLA. INT'L L.J. 401 (1989).

9. *See* Davi v. Laird, 318 F. Supp. 478, 484 (W.D. Va. 1970).

10. *See* United States v. May, 622 F.2d 1000, 1009 (9th Cir.), *cert. denied*, 449 U.S. 984 (1980).

11. *Id.*

12. *In re Yamashita*, 327 U.S. 1 (1946).

13. *Id.* at 15-16.

14. Tribunals generally did not impose criminal liability upon civilians or lower level

The post-World War II tribunals noted that the German people were exposed to massive, skillful propaganda and generally were ignorant of Nazi atrocities. Those with knowledge of the barbarities committed by the Nazis who dared to protest met with savage repression. The Nuremberg Tribunal also observed that it would impose an inordinate burden on ordinary individuals to legally require them to discern and to apply ambiguous international law principles in an effort to assess the legality of the actions of their government leaders. Ordinary citizens would be placed in the untenable position of being compelled, at their peril, to choose between patriotism and treason. The imposition of collective, moral, and legal guilt on the German people would permit prosecutors, at their discretion, to pursue the mass prosecution and punishment of Germans. This not only was viewed as philosophically objectionable, but also was viewed as preventing the construction of a stable, post-World War II Germany integrated into the Western Alliance as a bulwark against the Soviet Union.[15]

However, ordinary Germans certainly had the legal privilege under international law to blockade trains which they reasonably believed were transporting individuals to concentration camps. Ordinary Germans also had the legal privilege to smuggle Jewish children out of Germany. Those who prosecuted and convicted such individuals, were themselves, subject to prosecution by post-World War II war crimes tribunals. Contemporary Americans, in contrast to the German inhabitants of the Third Reich, live in a democracy in which they have relatively free access to information concerning the activities of their government; and do not face severe repression or death if they protest or act to interfere with government policies. Americans also have the opportunity and theoretical ability to mobilize public opinion and to influence the policies of their government.

The moral imperative for Americans to act is compelling. The United States' foreign and economic decisions have a substantial impact on people throughout the world, many of whom have little capacity to influence America's international policies. Americans, unfortunately, are not immune from the "good German" syndrome. Psychological studies suggest Americans are prone to accept and to carry out the dictates of authority figures and to suppress their moral qualms.[16] The Nuremberg Tribunal, by implicitly portraying Nazi atrocities as the result of the machinations of a small, powerful, and monstrous clique, contributed to blinding many Americans. It is inconceivable to Americans that the conduct of their seemingly normal and responsible leaders might, in some instances, resemble that of the Nazis. Americans, for the most part, are entirely unaware that their unbridled

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combatants based solely upon their participation in a war of aggression. Instead, the Tribunal directed their attention to those who formulated, shaped, and directed the policies of the Third Reich. *See* Lippman, *Nuremberg*, *supra* note 1.

15. *See generally* Lippman, *The Denaturalization of Nazi War Criminals in the United States: Is Justice Being Served?* 7 HOUS. J. INT'L L. 169 (1985).

16. *See* S. MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1969).

patriotism may lead to the same tragic results as German passivity under the Third Reich.

The moral imperative of citizens to resist tyrannical authority is articulated explicitly by foundation democratic theorists such as Locke and Rousseau, by the Declaration of Independence of 1776, by the French Declaration of the Rights of Man and Citizen of 1789, and by colonial constitutions such as that of New Hampshire. In the contemporary era, this prerogative has evolved into a right of ideological self-defense that permits individuals to act in a limited, proportionate, and nonviolent fashion, to combat the systematic violation of the international human rights of all peoples. This right is not based, as in the past, upon seemingly amorphous concepts such as natural law or social contract theory, but derives from positive international human rights law. To the extent that such rights are inalienable and inherent in the human personality, a regime cannot claim legitimacy for policies which violate such entitlements. The right of citizen action, to protect the rights of citizens and others, is a necessary counter to the fact that individuals must look to governmental regimes that, for their self-preservation, often have a vested interest in curbing rights.[17] Unlike the right of revolution posited by democratic theorists, the right of "ideological self-defense" does not necessarily entail a grand uprising against tyrannical authority. Instead, it envisions "petty resistance" to intransgressions, in an attempt to prevent a regime from slipping into a repressive stance systematically violative of human rights.[18] Such acts of resistance are essential to intrude upon and to interrupt the psychological processes that assist in rationalizing, numbing, and disassociating decision-makers and citizens from evil.[19]

International human rights instruments, consistent with their purpose, should be interpreted so as to impose duties and obligations to protect human rights on individuals as well as on states.[20] The Covenant on Civil and Political Rights[21] and the International Covenant on Economic, Social and Cultural Rights[22] of 1966 both provide in the preamble that the individual, "having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant."[23] Professor

17. See *supra* note 8.

18. *See* Kaufman, *Small Scale Right to Resist*, 21 NEW ENG. L. REV. 571 (1985-86).

19. *See generally* R. LIFTON & E. MARKUSEN, THE GENOCIDAL MENTALITY: NAZI HOLOCAUST AND NUCLEAR THREAT (1990).

20. *See* Vienna Convention on the Law of Treaties, Art. 31(c), May 23, 1969, 1155 U.N.T.S. 331.

21. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force on March 23, 1976 and signed by the United States on December 31, 1979).

22. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 *U.N.T.S.* 3 (entered into force on January 3, 1967 and signed by the United States on December 31, 1979).

23. *Supra* notes 21 & 22, at Preamble.

Jordon Paust of the University of Houston goes so far as to argue that the people of a given community "have the right under international law to alter, abolish or overthrow an oppressive government."[24]

Thus, human rights instruments, when interpreted in light of their humanitarian purpose, at a minimum, formally establish a legal privilege for individuals to act in a nonviolent, proportionate fashion to protest and to attempt to prevent a regime's violation of international human rights. Contemporary civil resisters who are acting to safeguard human rights are the inheritors of the Nuremberg tradition and, in fact, they often refer to their protest activities as "Nuremberg actions." These individuals are serving as private attorney generals on behalf of the international community to ensure compliance with the "common standard of achievement for all peoples and nations."[25]

While recognition of an internationally recognized human right to engage in nonviolent resistance appears utopian, international law historically has provided for a political offender exception to extradition. This is an implicit recognition of the right of rebellion against government authority. Governments, including that of the United States, recognize the right of those abroad to engage in armed and often violent revolt. It is a modest extension for individuals to claim the prerogative to engage in the nonviolent proportionate violation of domestic law.[26] Historically, in the common law, there was no organized system of law enforcement, and individuals had the primary responsibility to protect their community. In the contemporary era, in the absence of an organized international force capable of limiting the conduct of nation-states, individuals must take the initiative to protect human rights.

Civil Disobedience and Civil Resistance

Traditional civil disobedience posits that disobedients' violation of the law must be undertaken in accordance with a number of strictures designed to limit the detrimental consequences resulting from protesters' activities. Individuals, if possible, should violate the specific law to which they object in an open, nonviolent fashion, plead guilty, and accept their punishment. The use of force will lead to an escalating cycle of violence and distract attention from the focus of the protest. Because inevitably there is uncertainty concerning the validity of a protester's views, the infliction of harm on others cannot be justified.[27] There is a close relationship between means

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24. Paust, *Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights*, 18 Emory L.J. 283, 297-98 (1986).

25. Universal Declaration of Human Rights, *supra* note 6, at preamble.

26. *See* Lippman, *The Political Offender Exception in International Extradition Law: Terrorism Versus Human Rights*, 13 Int'l J. Comp. & Applied C.J. 45-7 (1989).

27. It is this uncertainty as to the truth which led Gandhi and Martin Luther King to undertake self-reflection and purification prior to engaging in nonviolence to insure that they were reasonably certain of the virtuousness of their cause.

and ends, and the use of violence institutionalizes force as a mode of dispute resolution. Furthermore, violence is viewed as reducing people to impersonal objects, which is inconsistent with the very humanitarian values that disobedients seek to promote.

A major precept of civil disobedience is that the disobedients plead guilty and accept their punishment to indicate the depth of their commitment to their cause and to symbolize their willingness to suffer for their beliefs. This also demonstrates protesters' belief in and respect for the legal system and is a manifestation of the fact that protesters object to a particular law rather than to the entire legal system. By pleading guilty and accepting their punishment, protesters also minimize the possibility that others will be encouraged by their example to arbitrarily disregard the law. Moreover, there is the Socratic argument that, having benefitted from the largesse and opportunities presented by a society, a moral person would be acting unjustly if that person claimed exemption from societal laws and obligations.[28]

Civil disobedience is criticized as profoundly undemocratic in that disobedients are alleged to rely upon coercion and intimidation to achieve their goals. However, civil disobedience is based upon a supreme belief in the power of democracy. It is an attempt to appeal to public opinion and sentiment and to mobilize these forces behind the disobedients' cause. To the extent that disobedients violate the law to provide for judicial review of the statutes under which they have been indicted, they are helping to insure that existing laws conform to constitutional principles.

While traditional civil disobedience was justified primarily on amorphous moral grounds, the new civil resistance is based on international law. Civil resisters typically contend that the domestic law to which they object is contrary to international law, and they claim that their criminal act was a justified attempt to halt an ongoing governmental illegality. Resisters generally plead not guilty and attempt to introduce a defense based upon international law. These protesters thus prefer to view themselves as engaged in acts of justified civil resistance rather than in acts of concededly criminal civil disobedience.

By denying their guilt, civil resisters implicitly reflect a deep cynicism concerning the government. The government is not merely a benign, but occasionally misguided, enterprise. It is also an institution that is capable of intentionally engaging in illegitimate criminal conduct. In such circumstances, it would be ingenuous for resisters passively to plead guilty and to accept the punishment meted out. By seeking to offer a defense, resisters are symbolically distancing themselves from the activities of the government and are promoting the primacy of the rule of law. The resisters' trial

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28. The disobedient's plea of guilty and acceptance of punishment places the judge in the position of having to weigh the disobedient's actions and claims and to determine whether the judge is sufficiently confident in the justifiability of the public policy being challenged to punish the disobedient. The judge thus is confronted with a moral choice. The prosecutor, of course, is faced with the question of whether to prosecute the case.

provides them with the opportunity to focus public attention on the pattern and the impact of governmental illegality; and to obtain an independent evaluation of the justifiability of their conduct from a jury of their peers. Civil resisters are akin to selective conscientious objectors (those who object to a specific war rather than to all war) who refuse to compromise their sense of citizenship and patriotism and refuse to accept and contribute to what they view as governmental immorality and illegality.[29]

The judiciary, however, has rejected defenses based upon international law on the grounds that defendants lack standing to raise such defenses and that the introduction of such defenses would violate the political question doctrine. The judiciary, in essence, has concluded that it will not permit defendants to raise criminal defenses that indirectly necessitate the adjudication of the legality of United States foreign and national security policies. In the view of the judiciary, defendants are seeking to use the criminal law to circumvent the procedural barriers that prevent the litigation of such issues in civil injunctive actions.[30]

The so-called Nuremberg defense has been rejected explicitly by various courts on the basis that the defendants have not been able to demonstrate that they were required or ordered to engage in war crimes. Courts also have ruled that Nuremberg principles imposes no liability on private civilians or on low ranking combatants that would afford them either the duty or privilege to violate the law.[31] They have observed, in dicta, that no democratic principle compels a society to recognize the right of individuals to violate domestic law under the aegis of international law. In the view of the judiciary, the proper avenue for the redress of social grievances is the political process. Judicial endorsement of civil resistance would lead to an "anarchical result."[32]

In an attempt to circumvent the judiciary's rejection of international law defenses, defendants indirectly have raised international law arguments by relying upon the necessity defense.

THE NECESSITY DEFENSE

Civil disobedients have strained unsuccessfully to develop a theory upon which to legally justify their violation of the law. The judiciary, however, consistently has rejected justifications based upon theories ranging from freedom of expression and religion to mistake of fact. Courts also have

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29. *See* Lippman, *The Recognition of Conscientious Objection to Military Service as an International Human Right*, 21 CAL. W. INT'L L.J. 31 (1990). *But see* Gillette v. United States, 401 U.S. 437 (1971). It, of course, is paradoxical for civil resisters to look to the state judiciary to vindicate their actions. However, resisters appear to adhere to a firm belief in the inherent, independent authority of the rule of law.

30. *See* United States v. May, 622 F.2d 1000, 1009 (9th Cir.), *cert. denied*, 449 U.S. 984 (1980).

31. *See* United States v. Kabat, 797 F.2d 580, 590 (8th Cir. 1980).

32. *See* People v. Weber, 162 Cal. App. 3d 1, 6, 208 Cal. Rptr. 719, 722 (1984).

demonstrated little receptivity to innovative defenses such as the so-called good motive or jury nullification instructions.[33]

During the anti-Vietnam era, the first efforts were taken by defense attorneys towards the development of the necessity defense to justify political protest. In recent years, the defense has been invoked by those in the environmental, anti-abortion, and gay activist movements. However, the defense has been utilized most frequently by antinuclear and peace activists and has resulted in significant acquittals at the trial court level. However, the application of the defense in cases of political protest has been rejected almost uniformly by appellate courts.

Historically, necessity has been a rather loosely defined doctrine which has been applied sporadically by the courts to moderate the harshness of the criminal law in cases involving rather minor transgressions. The defense was applied in cases in which defendants broke the law to avoid the occurrence of a greater harm than was created by the defendant's illegal act. It usually was left to the jury to determine whether the defendant's act in jettisoning cargo to prevent a barge from sinking or killing wild animals out of hunting season to protect crops was justified on the basis of necessity.[34]

The Model Penal Code draft necessity statute of 1958 adopts a broad interpretation of necessity and imposes few threshold requirements on the defense. For instance, there is no requirement that the threatened "evil" be imminent or that an emergency exist.[35] In 1980, the United States Supreme Court conceded that the contours of the necessity defense were so vague that the defense could best be understood by viewing its application in concrete cases.[36]

One of the first indications that the necessity defense might be used by those seeking social reform was the judicial application and extension of the defense to justify prison escapes. Some judges expressed the hope that recognition of the defense in penal settings might embarrass correctional officials and encourage them to improve prison conditions.[37]

As the civil rights and anti-Vietnam movements of the 1960s gained momentum, the prospect of protesters relying on the common law necessity defense motivated various state legislatures to adopt rigid statutory limitations. These statutes were inspired by the restrictive New York necessity

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33. *See generally* Lippman, *Civil Disobedience: The Dictates Of Conscience Versus The Rule Of Law*, *supra* note 1.

34. The historical argument presented in this section is elaborated upon in Lippman, *The Necessity Defense and Political Protest*, *supra* note 1.

35. MODEL PENAL CODE 3.02 (Tent. Draft No. 8 1958). The Model Penal Code views necessity as a justification defense. This means that although it involves a formal violation of the criminal law, that it deserves neither criminal liability nor censure. Unlike excuse, which absolves only a particular defendant, justification serves as a defense for all similarly situated individuals. Necessity, in effect, is a recognition that certain obligations and values transcend those embodied in positive law. *Id.*

36. United States v. Bailey, 444 U.S. 392, 397 (1980).

37. *See, e.g.*, People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974).

law that, for instance, requires that the necessity actually existed, not merely that the defendant had a reasonable belief in the necessity of action. Under the New York statute, the defendant's conduct not only must be necessary as an emergency measure to avoid an imminent harm, but the desirability and urgency of avoiding the injury clearly must outweigh the harm sought to be prevented by the statute defining the offense committed by the defendant.[38] Most importantly, the commentary to the New York statute stipulates that the defense is unavailable to the "'mercy killer, the crusader who considers a penal statute unsalutary because it tends to obstruct his cause, and the like.'"[39] The latter comment clearly appears to be intended to deny the defense to those attempting to justify acts of civil disobedience directed at politically or morally objectionable policies.[40]

Even in the absence of statutory limiting provisions, appellate courts have demonstrated hostility towards the necessity defense. Appellate courts have, for instance, interpreted state statutes to require that defendants demonstrate that the harm sought to be avoided was imminent and immediate.

Thus, over time, the broad and flexible common-law necessity defense has been restricted by courts and legislatures. These precedents and statutes have been rigidly applied to deny civil resisters the opportunity to rely upon the defense at trial. This mechanical application of the necessity defense is reminiscent of the analysis employed by nineteenth century judges to justify decisions upholding the institution of slavery.

THE NECESSITY DEFENSE AND POLITICAL PROTEST

The restrictive, contemporary version of the necessity defense, as applied by federal and by most state courts, has four requirements: (1) the defendant is faced with a clear and imminent danger, not one which is debatable or speculative; (2) the defendant can reasonably expect that his action will be effective in abating the threatened danger; (3) there is no legal alternative which will be effective in alleviating the danger; and (4) the Legislature has not acted to preclude the application of the defense.[41]

Protesters relying upon international law typically claim that the alleged illegal activity which they are challenging (such as the deployment of nuclear weapons) is reasonably believed to pose a greater harm or threat than their violation of the law, that acts of civil disobedience historically have served as a catalyst for political reform, that legal efforts to eradicate the harm

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38. *See* N.Y. PENAL LAW § 35.05 (McKinney 1975).

39. *Quoted in* Tiffany & Anderson, *Legislating the Necessity Defense in Criminal Law*, 52 DENVER L.J. 839, 844 (1975).

40. *See* Sullivan, *The Defense of Necessity in Texas: Legislative Invention Comes of Age*, 16 HOUS. L. REV. 333, 336 n.29 (1979) (listing state statutes inspired by the New York necessity provision).

41. *See* Commonwealth v. Brugmann, 13 Mass. App. Ct. 373, 379, 433 N.E.2d 457, 461 (1982).

have proven ineffective and futile, and that the necessity defense is not precluded by statute.

Appellate decisions rejecting the necessity defense have concluded that the harm was not sufficiently immediate or imminent to invoke the defense, that the protesters' acts were not calculated to eliminate the threatened harm, that there were available legal alternatives through which the protesters might have modified the governmental policies that they view as posing a harm, and that the legislature intended to preclude reliance upon the defense in this particular instance. Protesters' failure to satisfy one or more of the threshold requirements has resulted in their being denied the opportunity to rely upon the necessity defense.

As stated, appellate courts have held that the harm sought to be prevented by the protesters is not sufficiently immediate or imminent to justify invocation of the necessity defense. For instance, a nuclear war or accident is considered by the courts to be speculative and uncertain and does not present an imminent danger. The judiciary also has rejected efforts to extend the defense to harms that are not immediate, reasoning that this would stretch the defense to encompass distant events far from the situs of the protest.[42]

Nonviolent protest activities, such as the confiscation of draft records, have been held to be insufficiently calculated to eliminate completely the threatened harm or to change governmental policy. The mobilization of public opinion that, in turn, may influence governmental policy, also is considered by the courts to be too indirect to satisfy the requirement that the act immediately extinguish the threatened danger.[43]

Given the lack of imminency (and immediacy) of the harm, courts consider appellants to possess the opportunity to utilize legally recognized avenues to achieve their desired goal. Although such activities often are conceded to be time consuming and onerous, courts note that mere impatience and frustration do not constitute a legal necessity for protesters to violate the law. The fact that the actions of protesters may have failed to bring about political reform, in the view of some judges, may indicate that their appeal has been considered and rejected by the electorate.[44]

In addition, courts have determined that the nature of legislation precludes reliance upon the necessity defense to justify criminal acts committed to protest allegedly harmful governmental programs. The fact that the legislative branch has statutorily enacted or, in some other manner, approved of a program is sufficient to conclude that the program does not constitute a social harm or evil. To rule otherwise would require the judiciary to question the judgment of the legislative branch and to violate the separation of powers. This would result in the courts substituting their judgment for that of the democratically elected legislature.[45]

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42. *See* State v. Warshow, 138 Vt. 22, 25, 410 A.2d 1000, 1002 (1979).

43. *See* Commonwealth v. Averill, 12 Mass. App. Ct. 260, 262, 423 N.E.2d 6, 7-8 (1981).

44. *See* United States v. Quilty, 741 F.2d 1031, 1033 (7th Cir. 1984) (per curiam).

45. *See* State v. Hubbard, 115 Mich. App. 73, 79, 320 N.W.2d 294, 297 (1982) (per curiam).

In the end, courts have refused to permit defendants who have violated various minor property laws to utilize the necessity defense to challenge indirectly governmental policies reasonably believed to violate international law. Courts express the fear that permitting defendants to rely upon the necessity defense in such instances would lead to anarchy, the pillaging of markets and banks to feed the poor, committing trespass to house the homeless, and occupying hospitals to alleviate the pain of the destitute. Those who are able to mobilize the strongest and most vociferous mob in the street then would be empowered to dictate public policy.[46]

The Necessity Defense Reconsidered

The judiciary, in ruling on necessity, must concede that the harm created by nonviolent protesters is minor when compared to the potential consequences of a nuclear accident or war or of a foreign military incursion. To wait until such a harm is about to occur is unrealistic and impractical. The value that society places upon human life dictates that courts should flexibly interpret the imminency standard when considering whether to permit defendants to rely upon the necessity defense. Imminency is not a rigid standard and must be interpreted in light of the values allegedly threatened.

Although complex and ongoing harms, such as state-sponsored terrorism, strictly are not immediate, they often are so severe and life threatening that the immediacy requirement should be considered satisfied. Those in the United States have a particular obligation to protect the victims of such harms who often do not have access to democratic institutions to protect their rights.

It is ingenuous to require that the acts of resisters completely remedy a complex harm. It, of course, is impossible to eliminate world hunger or homelessness through a single action. The contention of protesters is that their action, in combination with the actions of others, will eliminate the harm. America has a rich tradition of civil disobedience. In fact, many of the most significant events in American history, such as the Boston Tea Party, were acts of civil disobedience that helped to usher in social and political change.

The judiciary's admonition that protesters possess legal avenues for change is a talismanic chant that permits courts to avoid confronting the grievances of protesters. Another letter always can be written, an additional politician visited, or another foundation approached for funds. It should be sufficient that the defendants are able to demonstrate good faith efforts to remedy legally the harm being challenged. It is unfortunate that the democracy described in our civics books does not always resemble our contemporary reality and that well-meaning citizens may find themselves lacking the resources and the skills to influence public policy. In the end, the availability of effective legal alternatives is a question of fact rather than of law.

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46. *See* People v. Weber, 162 Cal. App. 3d 1, 5, 208 Cal. Rptr. 719, 721 (1984).

Legislative preemption of the necessity defense has been implied by courts through the conclusion that legislative action in an area precludes application of necessity. The common-law necessity defense, like self-defense, is an implied exception to criminal statutes. It is an inherent right, and courts, prior to making a finding of legislative preemption, are obligated to determine that there has been a clear legislative choice explicitly to preclude the defense in a given set of circumstances. State courts, of course, should be particularly hesitant to conclude that there is federal preemption of a defense recognized under a state criminal code.

Courts, as a matter of law, should not deny defendants in political protest cases involving international law claims, the opportunity to submit their necessity defense arguments to the jury. It never is strictly necessary for an individual to act to prevent a harm—they merely can suffer the consequences of inaction. When an individual is compelled to break the law to protest nonviolently what they reasonably believe to be a violation of international human rights, the jury should be permitted to determine whether the individual made a socially proper choice of values. This, and not the existence of an emergency, is the touchstone of the necessity defense.[47]

In sum, in civil resistance cases the necessity defense should be reformulated in accordance with its original broad and flexible nature.

Concluding Observation

Whether it is necessity, the admissibility of a defendant's motive, or jury nullification, a humane society should provide flexibility in the adjudication of politically inspired nonviolent crimes committed as part of a conflict over morally controversial international human rights issues. This interest is even more compelling when protesters are charged with property crimes committed to preserve human life. The courtroom should be transformed into a judicial town meeting whose integrity is safeguarded by the rules of evidence and decorum.

Such an approach is not likely to lead to anarchy. Few people are so deeply motivated and committed to a political cause that they are willing to violate the law to raise a political issue in court. A trial involves a significant drain on personal resources and presents the risk of criminal conviction and punishment. In any event, even if a large number of individuals were to engage in acts of civil resistance, it must be remembered that civil resisters are upholding rather than denigrating the rule of law.

To the extent that democratic institutions function efficiently and fairly, the temptation to engage in acts of nonviolent resistance are lessened. American society will not be strained by a liberal approach to nonviolent political crime. On the contrary, the political debate is likely to be enlivened

47. This helps to explain why economic necessity and the necessity defense as a justification for murder are not recognized. The values involved in the latter two cases are considered to outweigh any countervailing considerations.

and broadened. Those concerned about social anarchy might better devote their attention to the rampant crime in the streets and in the suites.

Courts, in addition to the fear that recognition of necessity for nonviolent political offenses will promote social anarchy, are concerned that the use of the judicial forum to adjudicate political causes will undermine the neutrality and integrity of the legal system and of the judiciary. Denying protesters the ability to rely upon the necessity defense, thus, in part, is motivated by a desire to channel political debates into other avenues of expression. Various courts, of course, have permitted defendants to rely upon the necessity defense without sacrificing judicial order and decorum. In the United States, political controversies inevitably have been transformed into legal disputes, and courts are not unfamiliar with the adjudication of explosive issues. By denying protesters the use of the necessity defense, courts merely are endorsing the status quo and abdicating their constitutional duty to permit criminal defendants to introduce a defense.

In my rather extensive experience, in civil resistance cases in which defendants have been permitted to rely upon the necessity defense, a significant percentage have been acquitted by a jury of their peers. It thus must be questioned whether the denial of the defense can be justified convincingly on the grounds of democratic principle. The political nature of the prosecution of nonviolent protesters is emphasized by the often harsh sentences meted out to protesters. In *United States v. Kabat*,[48] the defendants, including two Roman Catholic priests, who occupied and damaged a Minuteman II intercontinental ballistic missile site were sentenced to terms ranging from eight to eighteen years in prison plus other penalties. In his dissent, Judge Bright observed that the protesters neither physically harmed anyone nor interfered with the functioning of the missile.[49] Yet, Judge Bright noted that the "sentences are akin to penalties often imposed on violent criminals, such as robbers and rapists, or on those guilty of crimes considered heinous, such as drug dealers."[50] It is ingenuous for the judiciary to claim that they view nonviolent, political protest cases as common crimes and then, as in *State v. Wentworth*,[51] impose a six month prison sentence upon a first-time offender convicted of trespass at a nuclear power plant, under the rationale that such a penalty is necessary to convince the idealistically motivated defendant to rely upon lawful means of protest.[52]

Protesters are acting to uphold the rule of law and their violation of the law would not be required if courts were receptive to civil claims based upon international law. Those nonviolently breaking the law to protect human rights are not capriciously violating the law, but are seeking the opportunity to justify their conduct before a jury of their peers.

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48. 797 F.2d 580 (8th Cir. 1980).
49. United States v. Kabat, 797 F.2d 580, 594 (8th Cir. 1980).
50. *Id.* at 594.
51. 118 N.H. 832, 395 A.2d 858 (1978).
52. State v. Wentworth, 118 N.H. 832, 843, 395 A.2d 858, 865 (1978).

It must be recognized that while the rule of law is necessary to societal stability, not all laws are consistent with the social welfare. Particularly during periods of war and national emergency, societies may deviate from democratic norms. In retrospect, it would be difficult to deny the prerogative to nonviolently resist the law to Japanese-Americans facing internment during World War II, to Native-Americans being forcefully expelled from their homes, to African-Americans being sold into slavery or denied access to public facilities, or to an American combatant in Vietnam ordered to spray the Agent Orange defoliant.

It must be questioned whether the condemnation of those who violate the law based upon principle merely is a psychologically comforting reaction by the inhabitants of a politically passive and indolent society who prefer not to confront the wrenching issues of homelessness, racial discrimination, poverty, and inaction in the face of international lawlessness. The United States that was founded on revolution has replaced the old doctrine of the divine right of kings with a new theory. This theory posits that self-correcting constitutional procedures obviate the need to recognize the citizen's right to resort to extrajudicial measures of reform.[53] Democratic participation has come to be viewed a matter of periodic voting (and consumer choice) rather than of active and sustained political participation.

The necessity defense has been recognized as providing a justification for resistance to arbitrary authority. In 1834, in *United States v. Ashton*,[54] Judge Story ruled that the crew of an unseaworthy vessel rightfully was justified under the necessity defense in insisting that the captain return to port.[55] In language which United States courts should continue to heed in ruling on the right of contemporary protesters to rely upon the necessity defense, Judge Story observed that crew members are not bound to continue on a voyage which presents a risk to their lives "merely because the master and officers choose in their rashness of judgement to proceed."[56] In the event that the master and officers insist on continuing on an unsafe voyage, Story concluded that "the crew have a right to resist, and to refuse obedience."[57] One historian has noted that in the nuclear age, nation-states are "chronic criminals far more dangerous than the solitary practitioner of nonviolent civil disobedience. In the meantime, by saying 'No' that disobeyer will seek to recall authority to common sense."[58]

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53. *See* Kittrie, *Patriots and Terrorists: Reconciling Human Rights With World Order*, 13 CASE W. RES. J. INT'L L. 291, 295 (1981). Despite my argument, I recognize that a number of philosophical issues continue to cause concern and merit further exploration. These include: whether the use of the necessity defense will unduly politicize the judicial process, the extent to which a pluralism of belief and practice can be accommodated within a society, the infectious potential of law violation, the extent to which it is possible to distinguish between the justifiability of civil resistance in various instances, and whether political crime should be dealt with separately as a distinct category of offenses.

54. 247 F. Cas. 873 (C.C.D. Mass. 1834) (No. 14,4707).

55. United States v. Ashton, 247 F. Cas. 873, 874 (C.C.D. Mass. 1834) (No. 14, 4707).

56. *Id.*

57. *Id.*

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

Society has an abundance of quiet conformists who blindly follow authority and suppress all tendencies to place moral constraints on their conduct. The admirable virtues of patriotism and loyalty are the very traits that, when not tempered by moral autonomy, create the potential for collective involvement in, support for, or indifference to, the violation of internationally guaranteed human rights.[59]

The criminal justice system, that so often is condemned as a vehicle of repression and injustice, now should accommodate the expression of political dissent and help to preserve American democracy. A mark of a truly mature democracy is the willingness to accept that no political ideology has an absolute claim to truth and that today's dogmas may be replaced by ideas which presently are considered to be repugnant. Intolerance towards nonviolent dissent eventually leads to frustration and to violence. It is for these reasons, among others, that the voices of nonviolent dissent should be tolerated and permitted to compete in the judicial forum. It is time to tear down the Berlin Wall that prevents civil resisters from pleading the necessity defense in an attempt to justify their formally criminal conduct and to open the judicial politburo to the voices of change and reform.

59. *See* S. MILGRAM, *supra* note 16, at 89.