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# CIVIL DISOBEDIENCE AND OPERATION RESCUE: A HISTORICAL AND THEORETICAL ANALYSIS

JOHN W. WHITEHEAD\*

Civil disobedience is an important part of the American heritage. Its use dates back to the very establishment of the United States, and it has continued to provide a means for significant changes in the law and policies of the United States without a need to resort to armed rebellion or anarchy.

In the contemporary era, Operation Rescue, an anti-abortion organization, uses civil disobedience to accomplish its goals. This article will discuss and examine this movement from several perspectives. Part One contains a brief review of several reform or protest movements in the United States and highlights the historical importance of civil disobedience in the development of American law and public policy. Part Two of this article provides a summary of several major theories regarding civil disobedience, which include justification, punishment, and defenses. Part Three analyzes Operation Rescue in light of the historical rationales and theories discussed in Parts One and Two.

## I. HISTORICAL REVIEW

The historical record provides ample evidence of the role that acts of civil disobedience have played in altering and directing policies underlying American governmental structure. This record indicates that many of the concepts and ideologies that were basic to the establishment of democratic government and its continuing vitality in the United States were directly implicated in these civil disobedience movements.

### A. *Protest Against the Stamp Act*

A series of acts of civil disobedience led to the American Revolution and the founding of the United States.<sup>1</sup> The first organized civil disobedience in the American colonies resulted from the enactment of the British Stamp

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1. The ultimate act of colonial civil disobedience was the drafting and ratification of the Declaration of Independence, which declared the tyranny of Great Britain and boldly proclaimed that the rights to life, liberty, and the pursuit of happiness, being absolute rights, were not subject to the state and could not be abrogated or terminated by any civil government. E. CHANNING, *A HISTORY OF THE UNITED STATES* 202-4 (1977). The thrust of the Declaration of Independence was essentially one of liberty and equality in which a high value was placed upon the individual conscience in allowing one to act upon what one perceived to be right. *Id.* at 202.

Act.<sup>2</sup> American colonists believed that the British government was attempting to use the Stamp Act to solve financial problems in England at the colonists' direct expense<sup>3</sup> and that the fees, considered excessive by the colonists, were imposed without advice from or consultation with the colonists themselves (*i.e.*, "taxation without representation").<sup>4</sup> As a result, the colonists decided to protest the enforcement of the Act.

The Stamp Act protest consisted of a deliberate, unified, and informed pattern of civil disobedience. Representatives of each colony gathered to form the Stamp Act Congress, a forerunner of the Continental Congress (which eventually declared colonial independence from Great Britain).<sup>5</sup> Colonial letter writing groups known as "town committees of correspondence" kept the separate colonies informed about news of the protests and other relevant issues and also inspired readers throughout the American colonies to reflect and react accordingly.<sup>6</sup> Thus, although stamps sent from England were required on a document before the document was legally enforceable in the American colonies, eventually no one was willing to enforce the requirement that the colonists use them.<sup>7</sup> As a result of colonial civil disobedience, the protest of the Stamp Act was successful in every colony.

### B. Abolition of Slavery

The Abolitionist movement differed from the Stamp Act protests and the American Revolution in that the abolitionists did not seek equality and liberty for themselves, but rather, equality and liberty on behalf of others. At the time of the Abolitionist movement, slaves in the United States were considered by law to be personal property, not persons endowed with the inalienable rights described in the Declaration of Independence and the United States Constitution.<sup>8</sup> The abolitionists questioned this proposition

2. E. CHANNING, *supra* note 1, at 50.

3. *Id.* at 34.

4. S. DWORETZ, *THE UNVARNISHED DOCTRINE: LOCKE, LIBERATION AND THE AMERICAN REVOLUTION* 73 (1990). Colonial acts of civil disobedience were not directed merely at the tax. They were also directed against those who collected the tax. E. CHANNING, *supra* note 1. In this respect, as part of their acts of civil disobedience, the colonists hung effigies of the tax collectors in front of their homes. Some colonists departed from nonviolent civil disobedience and destroyed the homes of some tax collectors. Eventually, no one would assume responsibility for collecting the tax. E. CHANNING, *supra* note 1, at 54-63.

5. E. CHANNING, *supra* note 1, at 57-58.

6. *Id.* at 127. In Virginia, the committee was appointed by Patrick Henry, Thomas Jefferson, and Richard Henry Lee in 1773. D. AMMERMAN, *IN THE COMMON CAUSE: AMERICAN RESPONSE TO THE COERCIVE ACTS OF 1774* 21-23 (1974). Samuel Adams also organized a committee in Boston in 1772 and encouraged other towns in Massachusetts to do the same. One historian notes that "Massachusetts organized a province, Virginia promoted a confederacy." *Id.*, citing G. BANCROFT, *HISTORY OF THE UNITED STATES OF AMERICA* 259 (1876).

7. E. CHANNING, *supra* note 1, at 127.

8. See L. FRIEDMAN, *THE WISE MINORITY* 30-31 (1971). The third paragraph in § 2 of Article IV (which has been superseded by the Thirteenth Amendment) of the Constitution of 1787 protected the right to own slaves. U.S. CONST. art. IV, § 2.

and asserted that human beings should not own other human beings.<sup>9</sup>

Although the violent activities of abolitionists such as John Brown<sup>10</sup> and those who illegally entered jails and released slaves<sup>11</sup> are well known, there were many other abolitionists who performed impressive acts of nonviolent civil disobedience. For example, it has been estimated that at least 60,000 slaves were smuggled from the South into the northern states (and later into Canada) through the "underground railroad."<sup>12</sup> The activities of the underground railroad resulted in economic losses to slave owners that were significant enough to prompt passage of laws forbidding assistance to escaping slaves<sup>13</sup> and mandating assistance to agents of slave owners who were hunting escaped slaves.<sup>14</sup> Moreover, other abolitionists simply bought slaves and freed them.<sup>15</sup>

### C. Women's Rights

According to one commentator, "[t]he women's rights movement developed in the dozen years before the Civil War."<sup>16</sup> In 1848, the first Women's Rights Convention at Seneca Falls, New York declared: "We hold these truths to be self-evident: that all men and women are created equal."<sup>17</sup>

9. Hayden, *Declaration of Sentiments of the Colored Citizens of Boston on the Fugitive Slave Bill*, in *CIVIL DISOBEDIENCE IN AMERICA* 99 (D. Weber ed. 1978) [hereinafter *CIVIL DISOBEDIENCE*].

10. L. FRIEDMAN, *supra* note 8, at 48.

11. *Id.* at 40.

12. *Id.* at 32-33.

13. *Id.* at 31. The first Fugitive Slave Law was passed in 1793 and allowed fines of up to \$500 to be imposed on anyone "harboring a fugitive or interfering with a slave owner."<sup>17</sup> *Id.*

14. *Id.* at 33.

15. *Id.* at 41.

16. E. DUBOIS, *FEMINISM AND SUFFRAGE, THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA 1848-1869* 22 (1978).

It [the women's rights movement] had two sources. On the one hand, it emerged from women's growing awareness of their common conditions and grievances. Simultaneously, it was an aspect of ante-bellum reform politics, particularly of the antislavery movement. . . . Female abolitionists followed the course of the antislavery movement from evangelism to politics, moving from a framework of individual sin and conversion to an understanding of institutionalized oppression and social reform. . . . Borrowing from antislavery ideology, they articulated a vision of equality and independence for women, and borrowing from antislavery method, they spread their radical ideas widely to challenge other people to imagine a new set of sexual relations. Their most radical demand was enfranchisement. More than any other element in the women's rights program of legal reform, woman suffrage embodied the movement's feminism, the challenge it posed to women's dependence upon and subservience to men.

*Id.* at 22-23.

Another commentator says that "[t]his movement [Abolitionist] was the most important direct cause of the upsurge of women's liberation activity that occurred in the 1830s and 1840s." B. DECKARD, *THE WOMEN'S MOVEMENT: POLITICAL, SOCIOECONOMIC, AND PSYCHOLOGICAL ISSUES* 252 (1983).

17. B. DECKARD, *supra* note 16, at 254.

Some factions in the women's movement organized activities which were quite militant for that era.<sup>18</sup>

In its attempts to obtain legitimacy and power, the women's rights movement endured turbulent relationships with national organizations seeking to emancipate and enfranchise African-Americans as well as the labor and settlement house organizations.<sup>19</sup> Significant progress was not made toward a federal constitutional amendment for women's suffrage until 1914—when Alice Paul was inspired by militant suffrage activities in England.<sup>20</sup> Paul organized a parade of 5000 women in Washington, D.C. on the day before Woodrow Wilson's inauguration.<sup>21</sup> In 1917, the Women's Party resorted to all-out militant tactics by picketing President Wilson at the White House for his total lack of effort in advancing women's suffrage.<sup>22</sup> In another event, the Women's Party, picketing the White House with signs saying "Democracy Should Begin at Home," was attacked by mobs of hoodlums and soldiers. Two hundred and eighteen women picketers were arrested for exercising their rights of free speech and ninety-seven were jailed.<sup>23</sup> "When the women protested against the illegality of their arrests, the bad conditions, and the brutality of their treatment by going on hunger strikes, the authorities . . . resorted to forced feeding, and made martyrs wholesale."<sup>24</sup> In January 1920, Wilson spoke publicly for women's suffrage, and the proposed constitutional amendment came to a vote in the House.<sup>25</sup> On August 18, 1920, after seventy-two years, and much divisiveness within the movement and throughout the nation, women gained the legal right to vote when the Nineteenth Amendment became a part of the United States Constitution.<sup>26</sup>

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18. *Id.* at 261. For example, in a centennial celebration of American independence in Philadelphia, Susan B. Anthony suddenly entered the stage and read a Declaration of Rights for Women, which her supporters then distributed as a leaflet. One women's rights organization also protested by having 150 women try to vote in 1872. Ms. Anthony was prosecuted for voting illegally and then was unable to testify at her own trial because the judge ruled her incompetent to do so. S. BARKAN, *POLITICAL TRIALS AND THE LEGAL PROCESS* 26 (1985). After her trial, Ms. Anthony promised, "I shall earnestly and persistently continue to urge all women to practice recognition of the old revolutionary maxim, 'resistance to tyranny is obedience to God.'" See Anthony, *Statement to the Court*, in *CIVIL DISOBEDIENCE*, *supra* note 9, 185, 188; see also S. BARKAN, *supra*, at 26. Although Ms. Anthony refused to pay, the government never tried to collect her \$100 fine because it did not want the case to be appealed. Anthony, *supra*, at 261.

19. See generally B. DECKARD, *supra* note 16.

20. *Id.* at 277.

21. *Id.*

22. *Id.* at 279.

23. *Id.* at 276.

24. *Id.*

25. *Id.* at 282. "Interests opposed [to the amendment] were: (1) liquor businesses; (2) big-city bosses; (3) the Catholic church; (4) southern whites; and (5) big business. The opposition organized antisuffrage organizations, led by wealthy women, as fronts for their own activity. Oppositionists spent huge amounts of money on all kinds of advertising and propaganda. They bought votes wholesale and paid bribes to steal elections. Besides sexist prejudice, they had economic and political interests to protect against possible votes by women." *Id.*

26. *Id.* at 284; see also U.S. CONST. amend. XIX.

Thereafter, the women's movement was unfocused and generally inactive until the turbulence of the 1960s, when the National Organization of Women ("NOW") was formed.<sup>27</sup> Although many of NOW's early methods included the traditional "establishment" protests,<sup>28</sup> it was not unreceptive to more radical means. NOW organized protests of the *New York Times* and Equal Employment Opportunity Commission offices and, even, disrupted a Senate Committee hearing.<sup>29</sup> This avenue proved disappointing to a number of NOW activists, and alternative groups were launched.

"The Radical Women" was a New York group formed in the Fall of 1967.<sup>30</sup> The group's first public action took place at an antiwar demonstration where "The Burial of Traditional Womanhood" was staged with a torchlight parade through Arlington Cemetery.<sup>31</sup> The Radical Women brought the women's liberation issue to the forefront with its protest of the 1968 Miss America Pageant.<sup>32</sup> There, the group made available a "Freedom Trash Can" into which many tossed bras, curlers, wigs and other "women's garbage."<sup>33</sup> A sheep was crowned Miss America.<sup>34</sup> A "nude-in" occurred at Grinell College when someone representing *Playboy* magazine began to speak on campus and female members of the audience stripped in protest.<sup>35</sup>

Even during this period of the women's movement, however, few groups resorted to civil disobedience as a form of social protest.<sup>36</sup> Feminist theory, apparently, contends that legislatures and law enforcement are unreceptive to moral arguments and, thus, the movement has "resorted to traditional lobbying techniques and other liberal democratic means of influencing legislation."<sup>37</sup> Only occasionally do feminists now resort to civil disobedience, and then, only to challenge the justice of selected laws or practices.<sup>38</sup>

#### D. Civil Rights for African-Americans

The movement for civil rights for African-Americans was reasonably active (but largely unsuccessful) before civil disobedience activities com-

27. B. DECKARD, *supra* note 16. The National Organization of Women (NOW) was formed on the last day of the National Conference of State Commissions in Washington, D.C. on June 28, 1966. Its first act was to petition Equal Employment Opportunity Commissioners to change their minds on the status of segregated employment advertisements. *Id.*

28. *Id.* at 330. These methods included establishing task forces, bringing lawsuits, and lobbying government officials.

29. *Id.* NOW demanded that the Senate Committee hold hearings on the Equal Rights Amendment.

30. *Id.* at 332.

31. *Id.*

32. *Id.* at 334.

33. *Id.*

34. *Id.*

35. *Id.* at 347-48.

36. A. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 183 (1983).

37. *Id.*

38. *Id.* at 184.

menced.<sup>39</sup> Most of the acts of civil disobedience in the civil rights movement were attempts to force implementation in southern institutions of the integration requirements mandated by the Supreme Court in *Brown v. Board of Education*.<sup>40</sup> Civil disobedience activities also provided unity and focus for the movement<sup>41</sup> and served to inform those outside the South of the plight of African-Americans in southern states.<sup>42</sup>

Noteworthy acts of civil disobedience included illegal sit-ins throughout the South by African-Americans in the "white" sections of restaurants<sup>43</sup> and the march through Birmingham, which was held without a permit.<sup>44</sup> Although these and other significantly successful acts of civil disobedience in Montgomery, Birmingham, and Selma focused the nation's attention on the problem, not all of such acts were successful.<sup>45</sup>

However, it was apparently the charismatic leadership and diplomatic skills of Dr. Martin Luther King, Jr. that held the movement together despite serious philosophical differences regarding civil disobedience within

39. See H. BEDAU, *CIVIL DISOBEDIENCE* 52 (1969).

40. 347 U.S. 483 (1954). Since attempts by the civil rights protestors to work through the system had failed, civil disobedience followed. King, *Letter From Birmingham Jail*, in *WHY WE CAN'T WAIT* 73 (1983) [hereinafter *King Letter*]. Reverend King listed the steps that must be taken before civil disobedience might be used: "(1) Collection of the facts to determine whether injustices are alive; (2) Negotiation; (3) Self-purification; and (4) Direct action. We have gone through all of these steps in Birmingham." *Id.* King wrote, "I had hoped that the white moderate would understand that law and order exist for the purpose of establishing justice, and that when they fail to do this they become dangerously structured dams that block the flow of social progress." *Id.*

41. *King Letter*, *supra* note 40, at 76.

42. *Id.* at 79. It was essentially the civil disobedience of one woman, Ms. Rosa Parks (in refusing to move to the back of a bus as required by law and demanded by the bus driver), which sparked one of the most effective efforts of the entire movement for civil rights (*i.e.*, the bus boycott in Montgomery). M. L. KING, *STRIDE TOWARD FREEDOM* 43-44 (1959); see also King, *Three Statements on Civil Disobedience*, in *CIVIL DISOBEDIENCE*, *supra* note 9, at 211 [hereinafter *King Statements*].

43. See *Peterson v. City of Greenville*, 373 U.S. 244 (1963), cited by L. FRIEDMAN, *supra* note 8, at 96.

44. See *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (contempt charges in connection with march upheld by Supreme Court); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (contempt statute clearly unconstitutional).

45. The Albany, Georgia, sit-ins and other civil disobedience activities, for example, were conducted for more than a year, with little change in the law or ambient social norms. S. BARKAN, *supra* note 18, at 60-69. Perhaps this was the result of the peaceful arrests of the protestors and the fact that the courts were effectively used to keep the tension at a low level. *Id.* The tactics used earlier by the Birmingham police had created an adverse nationwide reaction. *Id.* at 69. Thus, the Albany police responded with restraint to the acts of civil disobedience. *Id.* at 60-69. As had occurred with the Abolition movement, *id.* at 99, citing J. MITFORD, *THE TRIAL OF DR. SPOCK* 5 (1969), the courts in Albany and other southern towns discouraged individuals from participating in civil disobedience activities through the use of conspiracy and contempt of court charges. *Id.* at 60-69. Despite the effect on the authorities in Albany, the shrill reaction of the officials to the Montgomery bus boycott provided a unifying factor to the movement. *King Statements*, *supra* note 42, at 211. These acts included enforcement of a law which prohibited bus boycotts and harassment of those who drove in car pools. *Id.*

the movement's leadership. Some leaders of the civil rights movement believed that Dr. King used excessive tactics in willfully disobeying the law,<sup>46</sup> while others believed Dr. King should have taken a more violent and direct approach to reach the movement's goals.<sup>47</sup> This tension within the civil rights movement (*i.e.*, between Dr. King's preference for civil disobedience based upon the teachings of the Bible<sup>48</sup> and Gandhi<sup>49</sup> and the preference of those advocating open revolution<sup>50</sup>) appears largely unresolved even today.<sup>51</sup>

### *E. Protests of American Involvement in the Vietnam Conflict*<sup>52</sup>

Motivations for acts of civil disobedience regarding American involvement in Vietnam were varied and sometimes philosophically opposed to one another.<sup>53</sup> Some antiwar protesters called for a complete change in American government,<sup>54</sup> while others were more concerned with the moral evils of war in general and with the safety of those persons involved in the fighting on both sides.<sup>55</sup>

Unlike the civil rights movement, protests against American involvement in the Vietnam conflict were not conducted primarily within one geographic portion of the country.<sup>56</sup> Motivations for the antiwar movement more closely resembled the motivations of the Stamp Act protest, the Abolitionist move-

46. *King Letter*, *supra* note 40.

47. See Carmichael, *Black Power*, in *CIVIL DISOBEDIENCE*, *supra* note 9, at 225-29.

48. J. WILLIAMS, *EYES ON THE PRIZE* 79 (1987). According to Williams: King's first uses of the nonviolent method were based more on the Bible and Christian pacifism than on the teachings of Mahatma. As both sides of the [Montgomery] boycott dug in for what looked like a protracted battle, King preached the importance of meeting hate with love. For the struggle to be successful, the movement needed to win the support of morally decent and compassionate people. In the face of threats, being fired from work, or even being beaten, to react with violence would undermine the righteousness of the cause.

*Id.*

49. *King Statements*, *supra* note 42, at 214.

50. *Id.*

51. *Id.* While Dr. King struggled with the ideological preferences of those advocating open violence, he also had to deal with those who preferred to wait passively for incremental change and, ultimately, real progress. *Id.* Dr. King observed: "It is a strangely irrational notion that there is something in the very flow of time that will inevitably cure all ills. Actually time is neutral. It can be used destructively or constructively." *King Letter*, *supra* note 40, at 80.

52. According to some commentators: "It is generally incorrect to refer to a 'Vietnam War,' since war was never declared. In the Library of Congress Red Books, it is generally referred to as the 'Vietnam Conflict.'" See generally J. BANNAN & R. BANNAN, *LAW, MORALITY AND VIETNAM* (1974) [hereinafter J. BANNAN].

53. Former Justice Abe Fortas notes: "Most of our wars have met bitter and violent condemnation as 'immoral' and 'barbarous.'" A. FORTAS, *CONCERNING DISSENT AND CIVIL DISOBEDIENCE* 105-10 (1968).

54. See generally J. BANNAN, *supra* note 52.

55. *Id.*

56. S. BARKAN, *supra* note 18, at 88.



ment, and the Women's Suffrage movement, *i.e.*, the government was acting in an arbitrary manner which resulted in limited nongovernmental debate of the issues and which restricted effective sources of appeal.<sup>57</sup>

The antiwar civil disobedience movement included returning draft cards to the government,<sup>58</sup> holding antiregistration rallies at draft induction centers,<sup>59</sup> destroying draft records, and, in the tradition of the civil rights movement, blocking all entrances to draft and recruiting centers.<sup>60</sup> Contrary to the United States Supreme Court's earlier willingness to oppose government police actions toward the end of the civil disobedience phase of the civil rights movement, the Supreme Court was not willing to confront the federal government regarding its military policies during the antiwar protests.<sup>61</sup> Accordingly, meaningful courtroom debate of the constitutionality of the American involvement in Vietnam frequently was precluded when courts refused to allow any discussion of such policies.<sup>62</sup>

Antiwar protesters did not follow the example of the civil rights protesters by presenting the courts and the American public with respectful, self-sacrificial, and dignified acts of civil disobedience.<sup>63</sup> To the contrary, many of the most visible antiwar protestors, whatever their philosophical position, often were generally disrespectful of law and order and American institutions during acts of civil disobedience and at court proceedings and, thus, appeared openly belligerent.<sup>64</sup>

Perhaps as a result of their varied motivations, there was no obvious cohesiveness within the antiwar movement. Moreover, as in the civil rights movement, there were opposing philosophical viewpoints regarding which form of protest was most effective. The pacifist antiwar protesters brought tradition and a notion of ideology to the movement.<sup>65</sup> These leaders had been involved in antiwar activities in previous wars as well as in protests against nuclear weapons testing.<sup>66</sup>

Some in the American government were concerned about the spread of violence.<sup>67</sup> Although only a minority in the government had such fears,

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57. J. BANNAN, *supra* note 52, at 175.

58. L. FRIEDMAN, *supra* note 8, at 142.

59. *Id.* at 145.

60. J. BANNAN, *supra* note 52, at 157-58; S. BARKAN, *supra* note 18, at 92-93, 122-24.

61. J. BANNAN, *supra* note 52, at 6.

62. *Id.* at 209.

63. S. BARKAN, *supra* note 18, at 102.

64. *Id.* Even though such appearances may have been the result of frustration or attempts to impress and influence the American public, the effect was to create a perception that the antiwar movement as a whole was hostile to beliefs in patriotism and law and order which generally were held by the American public and its authorities. See J. BANNAN, *supra* note 52, at 166.

65. J. BANNAN, *supra* note 52, at 177-83.

66. *Id.* They remained with the movement despite their disapproval of "radicalism" because they feared "losing the middle group [of society and] noted that an unwillingness to associate with groups farther left would leave a vacuum which would be filled only by those with positions more radical." *Id.* at 181.

67. See generally A. FORTAS, *supra* note 53. Fortas apparently was willing to allow

many antiwar protesters, nonetheless, were arrested and tried,<sup>68</sup> and the government devised a unique deterrent for at least some of the antiwar protesters—the selective service rescinded draft exemptions of college students involved with political protests.<sup>69</sup>

The antiwar protesters promulgated their views effectively enough to create widespread disenchantment with the war among the American public and to cause the American government to revise its policies regarding Vietnam.<sup>70</sup>

Media coverage undoubtedly made a positive contribution to the dissemination and authentication of the protesters' views. As in the civil rights movement, television brought into the living and dining rooms of America

African-Americans to voice their concerns (as long as they were peaceful) because of the many years of oppression. However, Fortas had no sympathy for the antiwar demonstrations.

But we are also faced with the prospect of mass civil disobedience. Unless the greatest care is exercised, programs of this sort can disrupt the life and work of major cities. Mass demonstrations like the march on Washington in 1963 can be staged with good effect, by careful preparation and discipline, on the basis of cooperative planning between the leaders of the demonstration and the city officials. They can take place without appreciable law violation, under absolute constitutional protection. But when they are characterized by action deliberately designed to paralyze the life of a city by disrupting traffic and the work of government and its citizens—they carry with them extreme danger.

The danger of serious national consequences from massive civil disobedience may easily be exaggerated. Our nation is huge and relatively dispersed. It is highly unlikely that protesters can stage a nationwide disruption of our life. . . . But a program of widespread mass civil disobedience, involving the disruption of traffic, movement of persons and supplies, and conduct of government business within any of our great cities, would put severe strains on our constitutional system. . . .

However careful both sides may be, there is always danger that individual, isolated acts of a few persons will overwhelm the restraint of thousands. Law violation or intemperate behavior by one demonstrator may provoke police action. Intemperate or hasty retaliation by a single policeman may provoke disorder, and civil disobedience may turn into riot. This is the dangerous potential of mass demonstrations. When we add to it the possibility that extremists on either side are likely to be at work to bring about the cycle of disorder, arrest, resistance, and riot, the danger assumes formidable proportions.

*Id.* at 69-71.

68. S. BARKAN, *supra* note 18, at 99, *citing* J. MITFORD, *supra* note 45, at 5. One protestor noted: "It seems entirely possible that the government made a deliberate decision to increase the risks of ultimate reversal in order to change the kind of crime—a loosely knit, widespread and uncircumstantial conspiracy—that would have the greater impact of discouraging opposition to the Vietnam War." *Id.*

69. S. BARKAN, *supra* note 18, at 88. "In a memorandum to all local draft boards . . . [it was] recommended that any selective service registrant who mutilated or surrendered his draft card as an act of protest be declared delinquent and reclassified for prompt induction." *Id.*

70. *See* J. BANNAN, *supra* note 52, at 214; L. FRIEDMAN, *supra* note 8, at 24; Velvel, *Protecting Civil Disobedience Under the First Amendment*, 37 GEO. WASH. L. REV. 464, 483 (1968); Comment, *Civil Disobedience and the First Amendment*, 32 UCLA L. REV. 904, 918 (1985) ("Protests stimulated citizens to play a greater role in formulating government policy in important areas, and ultimately helped to bring about a more just society.").

graphic images of unarmed American protesters being beaten and gassed by state police and American military forces.<sup>71</sup> Perhaps more important was the fact that, for the first time, Americans were confronted in their own homes with the faces and other images of America's Vietnamese "enemies," and the spectacle of young Americans being killed and maimed thousands of miles away.

Finally, the success of the antiwar movement may be due partly to the fact that the movement initially was composed of American students who were, in the main, attending prestigious universities. This meant that there were potentially large numbers of bright, affluent, and independent protesters who had immediate and personal ties to the influential businessmen, educators, politicians, and military men who were their parents.<sup>72</sup>

#### *F. Protests Against Nuclear Weapons and Nuclear Power Stations*

The roots of the antinuclear movement began in 1957 when an amendment was added to the Atomic Energy Act which required a mandatory public hearing before a nuclear power station could be constructed or licensed for operation.<sup>73</sup> However, most of the "opposition via the public hearing was generally rather unorganized."<sup>74</sup> It was the energy crisis of 1974 and 1975 that brought the antinuclear opposition into prominence.<sup>75</sup> A coalition of diverse groups banded together to fight the spread of nuclear reactors in the United States.<sup>76</sup>

At first, the groups used traditional democratic measures to convince the public of the dangers of nuclear reliance. "Disillusionment with legal interventions and referenda," however, "led to a new strategy . . . direct action."<sup>77</sup> By occupying the Seabrook nuclear reactor site in New Hampshire, antinuclear dissidents hoped to draw attention to their cause, and perhaps close the reactor altogether.<sup>78</sup> In May 1977, over 2000 people staged the largest occupation of a nuclear power site in the history of the United States.<sup>79</sup> Fourteen-hundred demonstrators were arrested at the Seabrook plant by the National Guard, with some demonstrators being imprisoned for two weeks—an event which is credited with thrusting the antinuclear

71. See generally C. COOPER, *THE LOST CRUSADE: AMERICA IN VIETNAM* (1970).

72. *Id.*

73. S. DEL SESTO, *SCIENCE, POLITICS, AND CONTROVERSY: CIVILIAN NUCLEAR POWER IN THE UNITED STATES, 1946-1974* 118-20 (1979).

74. *Id.* at 120.

75. J. JASPER, *NUCLEAR POLITICS: ENERGY AND THE STATE IN THE UNITED STATES, SWEDEN, AND FRANCE* 120 (1990).

76. *Id.*

77. *Id.* at 122.

78. *Id.* at 122-23. Protesters took heart from the 1975 occupation of a German reactor site that succeeded in having the plant cancelled.

79. J. CAMILLERI, *THE STATE AND NUCLEAR POWER: CONFLICT AND CONTROL IN THE WESTERN WORLD* 98 (1984). The "Clamshell Alliance," a "loose coalition of antinuclear groups centered on New England spent several months training would-be occupiers in the tactics of non-violent resistance." *Id.*

movement into full public view and generating considerable national support for the antinuclear cause.<sup>80</sup> Within the next twelve months, more than 120 similar "direct actions" occurred across the country.<sup>81</sup>

Because of differences in their political philosophies, the antinuclear groups remained diverse and loose knit. However, as civil disobedience became the most successful method of accomplishing antinuclear goals, the groups became more cohesive. One author described the resulting political thought as follows:

Direct action relied on the intense moralism that came to characterize the antinuclear movement after 1974. It was "exemplary action" out of the Christian and Protestant molds, and these were Touraine's new saints showing the world . . . they were confident they were right, even though the majority of Americans disagreed. Not only were they right, but they felt obliged to follow a higher law than that of politicians and bureaucrats. If nature and human survival were at stake, trespassing and breaking laws of private property were permissible.<sup>82</sup>

Yet, it was this same moralistic attitude that occasionally damaged the movement's ability to attract the support of the American public.<sup>83</sup>

Orders for nuclear reactors subsided at precisely the same time the antinuclear movement blossomed, although the country remained decidedly pronuclear until 1979.<sup>84</sup>

### G. Protests Against Cruelty to Animals

The rights of animals were protected through legislation as early as 1641.<sup>85</sup> "Cruelty," as a violation of various state animal protection statutes, "has frequently been defined as including every act, omission, or neglect, whereby unjustifiable pain or suffering is caused or permitted."<sup>86</sup> Today,

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80. *Id.*

81. J. JASPER, *supra* note 75, at 123. "In April 1978, for example, 6,000 people protested against the plutonium factory near Rocky Flats, Denver, while at the other end of the country a march by 2,000 against the reprocessing plant in Barnwell, South Carolina, resulted in some 280 arrests." J. CAMILLERI, *supra* note 79, at 98.

82. J. JASPER, *supra* note 75, at 123.

83. *Id.* The majority of the antinuclear movement came from the American middle class, with little support from the working class or minorities. *Id.*

84. *Id.* The correlation between the fall of the nuclear industry and the rise of the use of civil disobedience is not documented, but it is theorized that the demonstrators had limited direct success in stopping particular plants and persuading the Nuclear Regulatory Commission to tighten its regulations. *Id.* at 124.

85. See generally Comment, *Creating a Private Cause of Action Against Abusive Animal Research*, 134 U. PA. L. REV. 399 (1986).

86. See generally Annotation, *Applicability of State Animal Cruelty Statute to Medical or Scientific Experimentation Employing Animals*, 42 A.L.R. 4th 861 (1985); 4 AM. JUR. 2D ANIMALS § 28 (1962).

all states have laws that regulate the treatment of animals in some way.<sup>87</sup> The federal Animal Welfare Act of 1970<sup>88</sup> was enacted to ensure that animals used in scientific research were treated humanely and with compassion. In the opinion of some, the Animal Welfare Act has been unsuccessful in protecting animals used in laboratory research and, as a result, many groups have been formed in an attempt to protect the rights of these animals.<sup>89</sup> The animal rights groups condemn high levels of pain for laboratory animals and trivial experimentation.<sup>90</sup> In arguing against all experimentation using animals, one animal rights advocate writes:

If the experimenter is not prepared to use an orphaned human infant, then his readiness to use nonhumans is simple discrimination, since adult apes, cats, mice and other mammals are more aware of what is happening to them, more self-directing and, so far as we can tell, at least as sensitive to pain, as any human infant.<sup>91</sup>

One animal rights activist group, the Animal Liberation Front (ALF), has been involved in laboratory break-ins and vandalism to sabotage research programs.<sup>92</sup> ALF took responsibility for releasing more than 1000 mice and other animals from a research lab at the University of Arizona.<sup>93</sup> A fire in the veterinary research laboratory at the University of California resulted in thousands of dollars in damage.<sup>94</sup> In June 1989, the Socialist Committee

87. E. LEAVITT, *ANIMALS AND THEIR LEGAL RIGHTS* (3d ed. 1978).

88. The Animal Welfare Act of 1970, 7 U.S.C. §§ 2131-2156 (1982).

89. See Comment, *supra* note 85, at 401.

The use of animals in laboratory research has become an issue of broad public debate. The recent outcry over the Department of Defense's plan to shoot dogs in order to train doctors in treating combat injuries illustrates that the concern over animal rights is no longer confined to a small group of animal rights advocates. Public exposure of the nature of some of the experiments—the sex manipulation research on cats and the baboon car crash tests, for example—is resulting in both a marked increase in the membership of animal rights groups and a growing sentiment that public control should be exerted over the work performed in the laboratory.

*Id.* [footnotes omitted].

90. *Id.*

91. Singer, *All Animals Are Equal*, in *ANIMAL RIGHTS AND HUMAN OBLIGATIONS* 156 (1976).

92. Zenner, *Of Mice and Men*, in *HELIK*, U. VA. HEALTH SCI. Q. 3 (Summer 1990); see also Comment, *supra* note 85, at 406-07. For example, when animal rights activists stole and released tapes of the National Institute of Health-funded ("N.I.H.") head injury tests at the University of Pennsylvania, the United States Department of Health and Human Services investigated the matter and ordered N.I.H. to suspend federal funding of the experiments because of serious concerns about the procedures used in the tests. *Id.*

93. N.Y. Times, Apr. 4, 1989, at B9, col. 5.

94. Bishop, *Growing Militancy for Animal Rights is Seen*, N.Y. Times, Jan. 19, 1988 at A14, col. 4. Some of the animal rights protesters have used more violent activities to further their causes. In 1990, animal rights activist, Fran Stephanie Trutt was sentenced to the time she had spent in jail and three years' probation for the possession of pipe bombs. N.Y. Times, Jan. 9, 1990, at B2, col. 6. Ms. Trutt, a college student, and a bank teller were accused of planting a bomb outside United States Surgical Corporation. The group was protesting the

for the Protection of Animals chained and glued shut the doors of Midwood High in Brooklyn.<sup>95</sup> The Committee was protesting the use of animals for dissection in the school science laboratories.<sup>96</sup>

These and other activist groups have been instrumental in raising the American public's awareness of cruelty to animals in laboratories. Their efforts have been responsible for stricter regulations regarding the use of research animals and the higher costs of research resulting therefrom.<sup>97</sup>

### H. Operation Rescue

"Operation Rescue" began as an organized anti-abortion movement on November 28, 1987, in a rescue at "Cherry Hill, New Jersey, across the river from Philadelphia. Nearly 300 rescuers sealed off access to a building, where abortions were performed. No abortions were performed that day, not just at this clinic but at two others that shut themselves down beforehand."<sup>98</sup>

Randall Terry, the founder of Operation Rescue, drew his inspiration for Operation Rescue's acts of civil disobedience from the Bible,<sup>99</sup> the study

corporation's use of dogs in its research. N.Y. Times, Jan. 29, 1990, at A30, col. 6.

In Fairfax County, Virginia, there was a protest at a rodeo following charges that animals were being abused. Brown, *Animal-Rights Activists Kick Up Some Dust as Rodeo Nears*, Wash. Post, Mar. 2, 1990, at C6, col. 1. There have been protests at the opening of deer hunting season in Maryland, Latimer, *Animal Rights Advocates Arrested at Deer Hunt*, Wash. Post, Nov. 26, 1989, at D3, col. 1., and marches in Washington, D.C. to seek government support for animal rights, Harrieta & Thomas-Lerter, *Animal Rights Activists Boo Moderator*, Wash. Post, June 11, 1990, at E1, col. 2. Some of the more well-known protests have occurred in front of fur stores to protest the use of animals for clothing. For example, Trans-Species Unlimited marched in front of Fred the Furrier's store on Fifth Avenue in New York to discourage customers from entering. Yen, *Animal-Rights Groups Harass Fur Wearers*, Wash. Post, Mar. 11, 1989, at A3, col. 1.

95. N.Y. Times, June 13, 1989, at B3, col. 1.

96. *Id.*

97. Zenner, *supra* note 92, at 3-4.

98. Connors, *Operation Rescue: An Observation* (pamphlet). See generally R. TERRY, OPERATION RESCUE (1988). Terry began his anti-abortion activities by talking to women in front of an abortion clinic on his lunch hour and on days when he was not working. He and others later began to picket the abortion clinic. Meeting with minimal success, Terry began a crisis pregnancy center for the purpose of stressing the condition of the unborn child and the health effects abortion had on the pregnant woman. As part of the services offered by the pregnancy center, Terry also arranged for unwed mothers to live in homes with caring families. In 1987, Terry established The House of Light, which provides a place for women who want to keep their children.

99. According to Terry:

If I asked, "Should Christians break the law?" most Christians would quickly answer "NO." However, if I asked, "Should Christians obey God's Word even if it means disobeying the ungodly laws of men?" many believers would probably say "Yes." Others would be unsure what to do!

Christians who insist we should never break man's law quickly quote the injunctions of Romans 13:10-5 and 1 Peter 2:13-15 to obey civil authority. But does the Bible instruct us to obey the laws of man, *no matter what they say*? Does the

of American history in general, and the life of Martin Luther King, Jr. in particular.<sup>100</sup>

Until *Webster v. Reproductive Health Services*,<sup>101</sup> attempts by states to limit the availability of abortion had been held unconstitutional under the *Roe v. Wade*<sup>102</sup> analysis.<sup>103</sup> Therefore, as one writer notes, the first purpose of Operation Rescue was:

[T]o save unborn babies from death at the hands of the abortionists. To do this, the effort is made to shut down one or more clinics for a day or even several days. On the principle that 20 percent of women who are prevented from keeping their first appointment for an abortion will not make a second one, the Operation Rescue people estimate that by shutting down a "mill" that averages 35 "procedures" a day, they succeed in saving seven babies.<sup>104</sup>

Another purpose was to generate "repentance"<sup>105</sup> by Christians for "tolerating abortion-on-demand throughout the United States for more than

Bible give civil government full authority over the lives of God's people, authority even above the Laws of God? Some thorough Bible study shows it does not.

Terry, *Higher Laws* (pamphlet containing article reprinted from *The Rutherford Institute Magazine*, Mar.-June 1987).

100. According to Terry:

History shows that great social change has always been preceded by great social tension. The American Revolution, the abolition of slavery, women's right to vote and the repeal of Prohibition were all preceded by great social unrest. In the late 1950s, the determination to disobey, in a non-violent way, the segregation laws of his era enabled Martin Luther King, Jr. and his followers to win civil rights for black people.

Connors, *supra* note 98. Connors adds:

The strategy of Operation Rescue is massive civil disobedience in the tradition of Henry David Thoreau, Mahatma Gandhi and Martin Luther King, Jr. In training sessions, rescuers pledge nonviolence in deed and in word. They promise never to call out to police, or to the pro-abortion hecklers, or even to the unfortunate women attempting to enter a clinic. No matter how they are taunted, they must do nothing more than pray or sing. On some rescues, they must go down on all fours when a police officer approaches within 20 feet, to indicate in a convincing way that they have no violent intentions. Operation Rescue takes great pains to prove that laws against trespassing, or blocking the entrance to a business, or preventing pregnant women from exercising their "constitutional" right to abortion, are struck down by the higher law of God.

*Id.*; see also R. TERRY, *supra* note 98, at 195.

101. 109 S. Ct. 3040 (1989).

102. 410 U.S. 113 (1973).

103. See *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 771 (1986) (holding that state may not require filing of extensive information without providing medical-emergency exception); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 456-57 (1983) (holding that state may not delay abortion after appropriate counseling and written informed consent).

104. Connors, *supra* note 98.

105. According to Terry:

First of all, I felt we needed a repentance in the church that would result

16 years."<sup>106</sup> This repentance should, according to Terry, inspire American churches and their members to become active in anti-abortion efforts.<sup>107</sup>

Operation Rescue also is intended:

[T]o raise the consciousness of people in the United States to the holocaust of unborn babies being carried out silently and invisibly in our midst. Even though a handful of dedicated rescuers, with special methods, can close down a clinic as tightly as many hundreds can, the larger numbers more effectively capture the attention of the public. No amount of money can buy the dramatic exposure which Operation Rescue receives in the media when rescuers are arrested in large numbers, and especially when the arrests are accompanied by unprovoked brutality on the part of the police.<sup>108</sup>

Finally, Terry intended that Operation Rescue serve as a stimulus for discouraged "pro-lifers," who could see that their rescue attempts could achieve tangible results as part of the anti-abortion movement.<sup>109</sup>

Operation Rescue includes members from all religious backgrounds. Beginning in 1988, the Operation Rescue movement spread throughout the United States, and Terry became a national figure. For example, during

in a national uprising against abortion. As Christians, I knew we needed to beg God's forgiveness for allowing this holocaust to continue unchallenged for fifteen years. We had allowed man's laws to dictate that we would turn our backs on those who were being killed instead of loving our neighbors as ourselves.

R. TERRY, *supra* note 98, at 22. Terry writes further that:

If we ever hope to see abortion defeated, *we must repent*. We need prophets—men and women whom God has raised up—to call the church to repentance for this atrocity against the children. Only when we, as leaders and followers alike, repent of our selfishness, our apathy, and our indifference will we be able to make the sacrifices necessary to win the war. Then God will fight with us. The church has *no chance* of defeating abortion, no chance of restoring our quickly disappearing liberties, no chance of bringing America back to moral sanity unless we repent of our idolatry and compromise. But if we repent, God can and will do wonders—even through a *remnant* of His people.

*Id.* at 174. Also:

If we repent, America can be turned. Righteousness could once again be honored and dominate the consensus. Wickedness would be called what it is—wickedness—instead of being flaunted and glorified.

*Id.* at 178.

106. Connors, *supra* note 98.

107. R. TERRY, *supra* note 98, at 22.

108. Connors, *supra* note 98. Terry believes that the civil disobedience of Operation Rescue is "the only way we can produce the social tension necessary to bring about political change." R. TERRY, *supra* note 98, at 27, 210. According to Terry:

Whether for good or bad, political change comes after a group of Americans bring about enough tension in the nation and pressure on the politicians that the laws are changed.

*Id.* at 95. Terry also hoped to increase such social tension by flooding the jails with civil disobedients and to tax the police intake system by directing those who were arrested to withhold their identification. *Id.* at 198.

109. R. TERRY, *supra* note 98, at 25.



Terry's appearance on "The McLaughlin Report" in December 1988, one panelist nominated Terry to be *Time* magazine's "Man of the Year."<sup>110</sup>

In April 1990, Terry announced that he was stepping aside from the day-to-day operations of Operation Rescue to "promote a new strategy of publicizing names, addresses and home numbers of judicial officials who he believes treat his group unfairly." Terry alleged that his organization had been losing courtroom battles because "flaming, pro-abortion lesbians" were putting pressure on judges and district attorneys.<sup>111</sup> It has been reported that Operation Rescue now has "[a]n estimated 500 lists [which] have circulated since mid-August, when some 50 Christian radio stations nationwide asked listeners to call an 800 number for more information about what Operation Rescue founder Randall Terry said were 'judicial abuses.'"<sup>112</sup> At the end of 1990, many members of Operation Rescue remained in jail,<sup>113</sup> some for unusually long periods of time, for their participation in the civil disobedience associated with attempted rescues.<sup>114</sup>

110. Connors, *supra* note 98.

111. Washington Post, April 14, 1990, at B3, col. 5.

112. Cox, *California Judges Targeted*, NAT'L L.J., Sept. 24, 1990, at 3, col. 3. The article notes that a "spokesman at the Washington, D.C.-based Christian Defense Coalition, organized to distribute the lists, says it will be expanded to include judges outside California perceived to be unduly harsh." *Id.* at 3, 39. The Southern California office of Operation Rescue plans to publish personal addresses of what it considers the most unfair judges to promote challengers to judges seeking re-election and to provide a package to California's Judicial Performance Commission which documents the "enormous disparity between the sentences given to our people and to those who have sit-ins over nuclear issues, gay rights and El Salvador." *Id.* at 39. Political consultant Joseph Cerrell, as a consequence, has advised judges to "try to keep low personal profiles and organize a group response through the California Judges Association" and that "'the best defense strategy is to tell the public about the importance of an independent judiciary.'" *Id.* Partly because of its judicial strategy and its change of focus, as of September 1990, Operation Rescue's paid staff, once as high as 23, is down to 3. Frome, *Time to Face the Consequences*, CHRISTIANITY TODAY, Sept. 10, 1990, at 48, 51. Operation Rescue still accepts donations but no longer solicits funds as a result of losing a \$50,000 judgment in a lawsuit filed by NOW. *Id.* at 51.

113. See Frome, *supra* note 112, at 48, 51. This includes Joseph Foreman, one of the organizers of Operation Rescue.

114. See Frome, *supra* note 112, at 48-49 (sentencing has included 300 hours of community service for first-time activists and jail terms of 30 days or more for trespassing although trespassing in cases where "rescues" are not involved typically draws only minor fines). According to this article: "'There have been more Christians put in jail on behalf of the unborn than for any other civil-rights movement in this country's history.'" *Id.* at 49. One pamphlet describes a sentence of "540 days in jail, plus another 360 days suspended and a \$2,000 fine, half suspended . . . in addition to 20 days in jail that he [Vernon Kirby] served in April and a fine of \$3,000 that is being garnished from his wages by the City and County of Denver" which has, according to the pamphlet, been meted out because Vernon Kirby "joined about 40 other people who sat down in front of the doors of the Planned Parenthood abortuary at 20th and Vine in Denver to prevent the scheduled killing of babies that morning. For this they were convicted of 'trespass' and, because they had to be carried when they were arrested, they were also convicted of 'interference' and Vern of 'resistance.'" *540 Days in Jail for Loitering?!*, apparently published by Pro Life Action Network of Denver, Denver, Colorado.

## II. THEORETICAL CONSIDERATIONS

A number of theoretical justifications for civil disobedience have been advanced. While each in its own way validates acts of civil disobedience, most acknowledge certain limitations.

### A. Justification

#### 1. Justification on the Basis of Integrity, Justice, and Policy.

Professor Dworkin classifies the bases for justification of civil disobedience as integrity, justice, and policy.<sup>115</sup> *Integrity*-based civil disobedience is a personal matter where one's conscience forbids obedience to a particular law or policy.<sup>116</sup> Situations of integrity-based civil disobedience are generally matters of urgency, although actions of violence and terrorism are not justified.<sup>117</sup> Integrity-based civil disobedience may be justified even if such disobedience actually makes matters worse,<sup>118</sup> *i.e.*, the "Northerner who is asked to hand over a slave to the slavecatcher . . . suffers a final loss if he obeys, and it does not much help him if the law is reversed soon after."<sup>119</sup>

*Justice*-based civil disobedience is used to oppose and reverse the majority's unjust oppression of a minority.<sup>120</sup> Those practicing justice-based civil disobedience must not break the law until the normal political processes have been fully exhausted and are found to offer no hope of success.<sup>121</sup> Moreover, justice-based civil disobedience may not be used if it will make matters worse.<sup>122</sup>

There are two approaches to activities within the category of justice-based civil disobedience: (1) persuasive strategies, which "force the majority to listen to arguments against its program, in the expectation that the majority will then change its mind and disapprove that program;"<sup>123</sup> and (2) nonpersuasive strategies, which aim "not to change the majority's mind, but to increase the cost of pursuing the program the majority still favors,

115. R. DWORKIN, *A MATTER OF PRINCIPLE* 107 (1985).

116. *Id.* For example, "[s]omeone who believes it would be deeply wrong to deny help to an escaped slave who knocks at his door, and even worse to turn him over to the authorities, thinks the Fugitive Slave Act requires him to behave in an immoral way. His personal integrity, his conscience, forbids him to obey. Soldiers drafted to fight in a war they deem wicked are in the same position." *Id.* at 107.

117. *Id.* at 108.

118. *Id.*

119. *Id.*

120. *Id.* For example, those who "sat at forbidden lunch counters seeking the privilege of eating greasy hamburgers next to people who hated them" did not break the law "because they could not, with integrity, do what the law required." *Id.* They did so to oppose the oppression of African-Americans by the white southern majority. *Id.*

121. *Id.* at 108-09.

122. *Id.* at 109.

123. *Id.*

in the hope that the majority will find the new cost unacceptably high."<sup>124</sup>

*Policy*-based civil disobedience is directed at policies or programs which are believed to be unwise, irrational, or dangerous for the majority as well as the minority involved.<sup>125</sup> In the case of policy-based civil disobedience, Dworkin argues that only persuasive strategies may be used to convince the majority that the minority's position is correct.<sup>126</sup> The use of nonpersuasive strategies in policy-based civil disobedience would:

strike at the roots of the principle of majority rule, to attack its foundations rather than simply to call for an elaboration or qualification of it. If that principle means anything, it means that the majority rather than some minority must in the end have the power to decide what is in their common interest.<sup>127</sup>

## 2. Justification Based Upon Higher Law or Utility.

According to Cohen, civil disobedience is, in essence, "an illegal public protest, non-violent in character,"<sup>128</sup> but it does not advocate revolution or a repudiation of governmental authority.<sup>129</sup> However, Professor Cohen notes that civil disobedience, by its very nature, cannot be "given a *legal* justification. The law cannot justify the violation of the law."<sup>130</sup>

Accordingly, "if justification for [civil disobedience] is ever possible, it must be justification of particular disobedient acts, each judged separately

124. *Id.* For example, "by making the majority choose between abandoning the program and sending them to jail. . . . At the other extreme lie non-persuasive strategies of intimidation, fear, and anxiety, and in between strategies of inconvenience and financial expense: tying up traffic or blocking imports or preventing official agencies or departments from functioning effectively or functioning at all." *Id.*

125. *Id.* at 107.

126. *Id.* at 111. This is because, according to Cohen, (i) there is no distinction between the interests of the majority and the minority, (ii) the protestors, *i.e.*, the minority, believe that they know better than the majority what the majority's own best interest is; and (iii) America is arguably a democracy.

127. *Id.*

128. Cohen, *Civil Disobedience and the Law*, 21 *RUTGERS L. REV.* 1, 3 (1966). Among the factors that are important to consider, for example, are the time, location, and nature of the act. *Id.* at 5.

129. *Id.* at 4. Moreover, Cohen states that "it is important that we not wrongfully accuse the civil disobedient of revolution, and then impose on him the far weightier task of justification rightly imposed only on the rebel or traitor." *Id.*

130. *Id.* at 7 (emphasis in original). Cohen writes:

Often, it is true, the laws conflict, or appear to do so. But such conflicts are ultimately resolved by determining which of the conflicting elements is controlling in the given case or by invoking some relevant higher principle. Sometimes laws may provide pressure valves which open legal avenues for those whose conscience or religion forbids their compliance, as in the case of provision for conscientious objectors in selective service laws. But the use of these provisions is certainly not disobedience of any kind. Deliberate disobedience to law can never receive a justification on legal grounds within the legal system.

on its merits."<sup>131</sup> The two bases for justification of particular acts of civil disobedience are higher law and utility.<sup>132</sup>

Justification of civil disobedience through appeal to law higher (*i.e.*, divine law or natural law) than the positive law "is a venerable line of argument and has often served worthy causes."<sup>133</sup> However, Cohen asserts

131. *Id.* at 10. Concerning the justification for civil disobedience, Cohen notes: [I]f there is any possible justification of civil disobedience it must come from outside the legal system. The disobedient protestor, if pressed, must give extra-legal reasons for breaking the law and, to justify his action, must show that these non-legal considerations override his obligation to obey the law. He will grant that the laws, in being legitimately enacted, ought to be obeyed, and that he, like all others, is under that obligation. But he will argue that he is under other obligations, moral obligations, which outweigh those imposed by the legal system and which constrain him to disobey under particular circumstances. . . . When the claim is made, therefore, that moral considerations compelled or justified disobedience to law, that claim needs to be closely examined in the light of the facts and principles that bear on the act in question.

*Id.* at 9.

132. *Id.* at 10.

133. *Id.* Addressing the tradition of higher law justification, Cohen states: [The] roots [of higher law justification] lie deep in the history of Western thought—in Cicero and Aquinas and Hooker and Grotius and Locke, in Jefferson and a host of others who have sought to justify conduct (even apparently illegal conduct) by virtue of its harmony with some antecedently established super-human moral law usually thought divine. The history of this tradition need not be reviewed.

*Id.* at 10-11. Cohen further explains:

This pattern of justification has been of central importance to many (but not to all) of those who, in recent years, have practiced civil disobedience in the United States. Martin Luther King speaks for them when he says that "one has a moral responsibility to disobey unjust laws." The difference between just and unjust laws, according to Dr. King is this: "A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Saint Thomas Aquinas: An unjust law is a human law that is not rooted in eternal and natural law." Dr. King then goes on to argue that any law which degrades human personality is unjust, that statutes enforcing segregation do just this, and that therefore they not only may but must be disobeyed.

A somewhat milder argument along similar lines is presented by some who fear the consequences of widespread resort to the "higher law" yet seek to justify civil disobedience in light of some super-human code. They will agree that the claim of obligatory disobedience because of one's understanding of the law of nature (or God) is, as Emil Brunner puts it, "an intolerable menace to the system of positive law." He continues, "No state law can tolerate a competition of this kind presented by a second legal system. The laws of the state actually obtaining must possess a monopoly of binding legal force for itself if the legal security of the state is to remain unshaken."

Nevertheless, this argument continues, if we may not appeal to the higher law as a binding *law*, we may appeal to it as a *criterion*. Natural law being our standard of conduct, we may resort to it in support of disobedience to laws we regard as so unjust that one cannot obey them in good conscience. Thus our conscience provides us with a criterion for conduct but is not itself law and does not exempt us from the governance of the laws.

*Id.* at 11 (footnotes omitted) (emphasis in original).

that justification on the basis of higher law is unsatisfactory because:

[It relies] upon claims to knowledge about the content of the "law of nature" or the "divine code" which are in principle not subject to public verification, and they therefore make the moral judgment of each person's conduct not merely dependent upon himself only, but entirely dependent upon his understanding and application of that "higher law."<sup>134</sup>

Moreover:

Higher law justifications have a further shortcoming. Their nature is such that they can serve to justify, if any, only *direct* civil disobedience—disobedience of the law protested. The divine code, whatever its particular content, will compel disobedience only to morally offensive commands. But indirect civil disobedience may involve the violation of statutes themselves entirely wholesome, in the effort to remedy serious injustice in another but related sphere.<sup>135</sup>

Cohen proposes a utilitarian pattern of justification.

The protester may argue that his deliberate disobedience of a particular law at a particular time, under particular circumstances, with the normal punishment for that disobedience ensuing, is likely to lead in the long run to a better or juster society than would compliance (under those circumstances) with the law in question.<sup>136</sup>

Additionally, "[i]n developing this utilitarian defense of his conduct the disobedient must employ two kinds of considerations, moral and factual."<sup>137</sup>

134. *Id.* at 12. In commenting on "higher law" arguments, Cohen adds:

What begins with a desire for universal objectivity ends, in this way, in a morass of idiosyncrasy and subjectivity. Speaking for myself, I find reliance upon supernatural codes (however named) a shaky support for what are often sound principles which might prove entirely defensible on wholly empirical but less dramatic grounds. Assertions about the content of divine law, or about how that content is to be found, are never generally agreed upon. One's claims that he knows such laws, that they have the overriding force he ascribes to them, and that they do govern in the given case (usually his own), are notoriously difficult to defend and impossible to prove. . . .

Attempts of this kind to justify political conduct, especially disobedient conduct, are very likely to lead to that impasse at which we are finally forced to say: "Here ends the argument and begins the fight."

*Id.*

135. *Id.* (emphasis in original).

136. *Id.* at 12-13.

137. *Id.* at 13. Cohen elaborates on the differences between moral and factual considerations behind civil disobedience:

Moral considerations enter in the evaluation of the laws, including the one he breaks, and in the evaluation of the goals the society seeks, and the ends which the protester, through his disobedience, seeks to further. Factual considerations enter in a great variety of ways, determining the degree to which his conduct actually does

Cohen argues that indirect civil disobedience may be justified on a utilitarian basis, but there must be a clear relation, actual or symbolic,

further the ends sought. . . .

Moral considerations are fundamental but are not likely to be the source of controversy between the utilitarian disobedient and his contemporary critics. If, as is usually the case, he seeks a society in which all are treated equally by the laws and all are given equal opportunity for employment, housing, and the like, his goals are likely to be shared by the vast majority of his fellow citizens. He is also likely to agree with them in finding deliberate disobedience to the law intrinsically objectionable. That his moral standards are sound and are essentially those shared by the community are the key points here. The ground of those standards, whether religious or metaphysical or pragmatic, does not affect his argument. Moral harmony in this sense is, happily, generally in vogue these days. In extraordinary cases, it is true, the civil disobedient may adopt moral standards in sharp conflict with those professed by his community. So a racist may engage in civil disobedience to defend segregation or members of the Nazi Party may practice civil disobedience to further their ends. Employing such moral standards, the utilitarian defense of civil disobedience is certain to fail; it can hope to succeed only when the moral ideals of the disobedient are themselves defensible. Most recent civil disobedients, seeking to further international peace, racial equality, and the like, do act upon solid and generally approved moral foundations.

Factual considerations are usually the chief source of controversy between the utilitarian defender of civil disobedience and his critics. In principle it may be that intensive inquiry could resolve the factual issues arising; in practice, these variables are so complex and so difficult to measure as to render a clear resolution of the issues often impossible.

*Id.* at 13-14. Furthermore:

The first set of factual questions concerns the background of the case at hand. How vigorously have the ends sought been pursued through normal, or at least lawful channels? If all channels within the law have not been explored, or have not been explored fully enough, the resort to law-breaking is sure to prove unjustifiable. . . . Critics of civil disobedience often argue that such conduct can never be justifiable if there are ways to effect the desired results peacefully and lawfully, even if more slowly. This is a reasonable claim only if those involved can tolerate prolonged delay. But if the delay in remedy has already been excessive, and greater speed of action through lawful channels seems most unlikely, the resort to extraordinary means may be justifiable.

A second set of factual questions concerns the negative effects of the deliberate disobedience.

(a) Will it encourage lawlessness, or break down the general respect for the laws? . . .

(b) Inconvenience, expense, and injury to the community resulting from the disobedience must also be assessed. . . .

A third set of factual questions concerns the positive effects of the deliberate disobedience. . . . Is it likely to bring effective pressure to bear upon law-making or policy-making authorities who can effect that change? How intensely will it focus public attention upon a community injustice long in need of remedy? If that public attention is so directed, what will be the outcome? Will the public, in turn, exert pressure upon the law-makers? Or might misunderstanding of the demonstrators and resentment of them do their cause more harm than good? . . . Note that this effectiveness of the disobedient protest is in turn affected by a number of other factual aspects of the situation, some of which are:

(a) *The nature of the law broken.* Especially if the disobedient protest is

between the object of the protest and the law which is disobeyed.<sup>138</sup> Obviously, if it were otherwise, the community would not understand the purpose of the indirect civil disobedience, and such civil disobedience would be futile.<sup>139</sup>

### 3. Justification Through Higher Law.

Although Professor Freeman generally accepts the definition of civil disobedience as "*disobedience of a law, a protest, public and non-violent in character*,"<sup>140</sup> he nevertheless contends that civil disobedience is "in fact obedience, that it respects the law and is within the law . . . that civil disobedience is within the proper ambit of the First Amendment" in constructing modern criteria by which one may justify civil disobedience in particular situations.<sup>141</sup>

"Legitimate law is to be obeyed; illegitimate law should be disobeyed. A legitimate law is one that is just, responsive to the needs of all the people, impartial and not according certain persons preference, not contrary to the Constitution and the dignity of man."<sup>142</sup> The human conscience, the Nuremberg principles, and natural law are all "sources of such higher law to which the civil disobedient looks, and to which society must look" to justify civil disobedience.<sup>143</sup>

As such, higher law provides a justification for civil disobedience if:

indirect, the relation between the law broken and the object of protest must be such as to make abundantly clear the reasons and seriousness of the protest.

(b) *The conduct of the demonstrators.* Unruly or offensive conduct is likely to be condemned without recognition of its objectives; conduct sober and restrained (as that of civil disobedients often is) is more likely to win consideration and respect.

(c) *The precise nature of the objective.* If the effectiveness of the protest is judged only in terms of its success in pushing through the desired change in law or policy—racial equality, or the immediate cessation of hostilities—it may not be highly regarded. On the other hand, if the demonstrators are seen to have a more limited immediate objective—that of focusing attention on a community wrong, with trust in the power of the public will when the wrong is recognized and understood—the effectiveness of this protest in achieving that restricted aim may be considerable.

*Id.* at 14-16.

138. *Id.* at 5. Cohen asserts that, "It is essential for the success of the protest that these relations . . . be widely understood by the members of the community in which they take place." *Id.*; see also Rosen, *Civil Disobedience and Other Such Techniques: Law Making Through Law Breaking*, 37 STAN. L. REV. 435, 445 (1969) (stating that "when referring to a protestor using civil disobedience '[p]ublicity is one of his main techniques and education is an immediate goal.'"); Comment, *supra* note 70, at 915 (stating that "the chief aim of civil disobedients is to *communicate* to others their concern over some social evil." (emphasis in original)).

139. Cohen, *supra* note 128, at 6.

140. Freeman, *Civil Disobedience and the Law*, 21 RUTGERS L. REV. 17 (1966) (emphasis in original).

141. *Id.*

142. *Id.* at 25.

143. *Id.*

[It is] affirming law generally and relying on one of the recognized justifications for disobeying *this* law—the right and duty of the citizens under the First Amendment, the ultimate force of conscience and non-violence, some higher law background of the Constitution (such as natural law, Nuremberg, or law of humanity). When he [the citizen] has decided that the highest demands of law, the highest morality, the highest values of humanity require a specific law to be challenged (and particularly when there is no other *effective* way for him to do so) then the conscientious citizen *must* humbly and contritely but courageously engage in civil disobedience.<sup>144</sup>

Finally, “in our society where mass communication is available to the government and ‘the establishment’ through controlled news releases, advertising, propaganda, and similar activities and not generally available to the protesters, civil disobedience must be recognized as the protesters’ form of free speech.”<sup>145</sup> Accordingly, it is argued that the full range of First Amendment protections should be extended to civil disobedience.<sup>146</sup>

### B. Considerations in a Democracy

Few would disagree that where there is a totalitarian government, individual citizens should be permitted to protest against such a government in any way possible.<sup>147</sup> This may be seen by the worldwide reaction to the reform movements in Eastern Europe<sup>148</sup> and China.<sup>149</sup> A more controversial issue is presented, however, by the consideration of protest and civil disobedience in a democratic state where the majority has the authority to determine law and policy. Some commentators believe that in such a democratic state only legal types of political recourse should be used because the state is supreme and anarchy will allegedly result from selective obedience to the law.<sup>150</sup>

In contrast, other legal commentators emphasize the importance of the individual conscience in the proper development of democratic society: “Even in matters which personalities have in common—the public good or common welfare—the consciousness and conscience of every soul may be unique in awareness of what the public good demands and what the good entails for a given person.”<sup>151</sup> One commentator writes further that

144. *Id.* at 26.

145. *Id.* at 24-25.

146. *Id.* at 23.

147. Commentators who suggest that citizens living in totalitarian regimes should not be permitted to protest in any way possible usually do so in an attempt to keep such citizens from needlessly sacrificing their lives. See T. BALL, *CIVIL DISOBEDIENCE AND CIVIL DEVIANCE* 13 (1974).

148. *Church Freedom*, *TIME*, Nov. 20, 1989, at 24-30.

149. Watson, *Beijing Bloodbath*, *NEWSWEEK*, June 12, 1989, at 24.

150. See generally A. COX, M. HOWE & J. RIGGINS, *CIVIL RIGHTS, THE CONSTITUTION, AND THE COURTS* (1967).

151. See M. SIBLEY, *OBLIGATION TO DISOBEY* 26 (1970).



he individual conscience must judge, for to refuse to do so would be to reject both freedom and responsibility. If someone suggests that we should indeed reject freedom and responsibility forever, there is nothing, of course, that we can say in reply, except to observe that one is in effect willing one's own slavery.<sup>152</sup>

Such commentators assert that citizens must carefully consider their obedience to the law.<sup>153</sup> Indeed,

apathetic obedience may in the long run be a greater source of violence than either active obedience or civil disobedience. Passive acquiescence assumes rather indifferent citizens, who are unconcerned with the social evils which tend to inevitably develop in large, complicated, and bureaucratic societies. The longer these evils fester, the more likely they are to provoke eventual violence in reaction.<sup>154</sup>

Another commentator notes that "[t]here are likely to be circumstances in which civil disobedience permits release of social pressure that might otherwise seek more violent egress."<sup>155</sup> In fact, one commentator describes civil disobedience as a "stabilizing device in a constitutional regime, tending to make it more firmly just."<sup>156</sup>

### C. *The Matter of Punishment*

An important but controversial component of civil disobedience concerns the willingness of participants to accept punishment for their activities. As a former Supreme Court Justice writes: "Let me first be clear about a fundamental proposition. The motive of civil disobedience, whatever its type, does not confer immunity for law violation."<sup>157</sup>

152. *Id.* at 38.

153. See generally S. MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974) (describing a well-known study where students were used in what was allegedly a study to see how well another student would learn when shocked with increasing voltage for a wrong answer). Unknown to the first student was that the learning student was a plant and that the shock machine was a fake. With only minimal prompting from the instructor, *i.e.*, to get credit for the class they had to finish the test, students were willing to increase the voltage even though the other student would be screaming in pain and eventually appeared to collapse. The study was condemned because of the stress the students went through, but it was incredible what students would do with so little coercion.

154. M. SIBLEY, *supra* note 151, at 94.

155. Rosen, *supra* note 138, at 458.

156. Rawls, *The Justification of Civil Disobedience*, in *CIVIL DISOBEDIENCE*, *supra* note 9, at 25.

157. A. FORTAS, *supra* note 53, at 63. Justice Fortas notes that:

Especially if the civil disobedience involves violence or a breach of public order prohibited by statute or ordinance, it is the state's duty to arrest the dissident. If he is properly arrested, charged, and convicted, he should be punished by fine or imprisonment, or both, in accordance with the provisions of law, unless the law is

The willingness to accept punishment serves various purposes. First, it reinforces the assertion by the protesters that their civil disobedience is not intended to destroy the law, but only to protest it.<sup>158</sup> To “suppose that the

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invalid in general or as applied.

He may be motivated by the highest moral principles. He may be passionately inspired. ‘He may, indeed, be right in the eyes of history or morality or philosophy. These are not controlling. It is the state’s duty to arrest and punish those who violate the laws designed to protect private safety and public order.

The Negroes in Detroit and Newark and Washington and Chicago who rioted, pillaged, and burned may have had generations of provocation. They may have incontestable justification. They may have been pushed beyond endurance. In the riots following the assassination of Martin Luther King, Jr., the Negroes may have been understandably inflamed by the murder of their leading advocate of nonviolence. But that provides no escape from the consequences of their conduct. Rioters should be arrested, tried, and convicted. If the state does not do so, it is either because of a tactical judgment that arrest and prosecution would cause more harm than good, or because the state is incompetent. . . .

Just as we expect the government to be bound by all laws, so each individual is bound by all of the laws under the Constitution. He cannot pick and choose. He cannot substitute his own judgment or passion, however noble, for the rules of law. . . .

Some propagandists seem to think that people who violate the laws of public order ought not to be arrested and punished if their violation has protest as its purpose. By calling the criminal acts “civil disobedience,” they seek to persuade us that offenses against public and private security should be immune from punishment and even commended. They seek to excuse physical attacks upon police; assaults upon recruiters for munitions firms and for the armed services; breaking windows in the Pentagon and in private stores and homes; robbing stores; trespassing on private and official premises; occupying academic offices; and even pillaging, looting, burning, and promiscuous violence.

We are urged to accept these as part of the First Amendment freedoms. We are asked to agree that freedom to speak and write, to protest and persuade, and to assemble provides a sanctuary for this sort of conduct. That is nonsense.

The Supreme Court of the United States has said . . . that the words of the First Amendment mean what they say. . . . They guarantee freedom to speak and freedom of the press—not freedom to club people or to destroy property. . . .

Dr. King was involved in a case which illustrated this conception [of peaceful, nonviolent disobedience of laws which are themselves unjust and which the protester challenges as invalid and unconstitutional]. He led a mass demonstration to protest segregation and discrimination in Birmingham. An injunction had been issued by a state court against the demonstration. But Dr. King disregarded the injunction and proceeded with the march as planned. He was arrested. He was prosecuted in the state court, convicted of contempt, and sentenced to serve five days in jail. He appealed, claiming that the First Amendment protected his violation of the injunction.

I have no doubt that Dr. King violated the injunction in the belief that it was invalid and his conduct was legally as well as morally justified. But the Supreme Court held that he was bound to obey the injunction unless and until it was set aside on appeal; and that he could not disregard the injunction even if he was right that the injunction was invalid. Dr. King went to jail and served his time. . . .

This, I submit, is action in the great tradition of social protest in a democratic society where all citizens, including protesters, are subject to the rule of law.

*Id.* at 63-68.

158. Cohen, *supra* note 128, at 6.

civil disobedient thereby makes light of the law is not to understand his act at all."<sup>159</sup> Second, it demonstrates the sincerity of the protester and "his submission to public punishment—indeed, his invitation of it—is vital in exhibiting his intense concern over the issue at hand."<sup>160</sup> Third, it demonstrates the sacrificial nature of the activities of civil disobedience as well as the lack of personal advantage in such activities.<sup>161</sup> Finally, the threat of punishment will have a limiting effect on the willingness of protesters to participate in activities of civil disobedience in that not all will believe that a particular cause is worth the potential cost.<sup>162</sup>

Some commentators assert that those who practice civil disobedience should be considered lawbreakers making a statement rather than criminals attempting to profit from their lawbreaking, and as such, they should be treated accordingly.<sup>163</sup>

159. *Id.*

160. *Id.*

161. See Fried, *Moral Causation*, 77 HARV. L. REV. 1258, 1269 (1964). Fried asserts that: The demonstrator's willingness to pay the penalty shows that his protest does not arise from a mere calculation of advantages. Thus he can afford the implication that others may disobey his own laws if they like him are willing to pay, for it is part of his position that his opponents' position has less (or no) moral force behind it, so that his opponents would be unwilling to support that position at the same cost that he, the demonstrator, gladly pays.

*Id.*; see also Bauer & Eckerstrom, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1194 (1987) (stating that "accepting punishment reminds the civil disobedient of his own ethical bearings. It forces him to consider the illegality of this act and to recall that he carries a heavy burden to justify that act.").

162. See M. SIBLEY, *supra* note 151, at 102 ("While judges, no doubt, must impose penalties, yet it would seem that if they can, within the limits of the law, take into account motivation and intention and conscientiousness, they should adjust penalties accordingly"); Cohen, *supra* note 128, at 7 (noting that "[i]t is unjust to discriminate either in favor of the civil disobedient or against him simply because his act was done knowingly and deliberately. He should be treated like anyone else who breaks the law he broke."); Freeman, *supra* note 140, at 235 ("[T]he purpose of the disobedience should cause the punishment to be nominal."); Keeton, *The Morality of Civil Disobedience*, 43 TEX. L. REV. 507 (1965) (contending that "a society should not make these consequences so onerous as to suppress demonstration short of a readiness for outright rebellion."); Rosen, *supra* note 138, at 461 (asserting that "when proceeding against the civilly disobedient, government officials must resist all temptations to deal out political, rather than ordinary criminal, justice.").

163. See R. DWORKIN, *supra* note 115, at 114. Professor Dworkin, for example, believes that "[n]obody should ever be punished unless punishing him will do some good on the whole in the long run all things considered." *Id.* Moreover, "[i]f an act of civil disobedience can achieve its point without punishment, then this is generally better for all concerned." *Id.* at 115. Further, some contend that civil disobedience is incomplete without punishment. Dworkin believes that this view:

cannot be sound, for a start, when we are considering integrity-based disobedience. Someone who refused to aid slavecatchers or to fight a war he thinks immoral serves his purpose best when his act is covert and is never discovered. Punishment may of course be part of the strategy when disobedience is justice- or policy-based. Someone may wish to be punished, for example, because he is following the nonpersuasive strategy I mentioned, forcing the community to realize that it will have to jail people like him if it is to pursue the policy he believes wrong.

*Id.*

Others believe that civil disobedience is actually moral obedience, and as such, civil disobedience shows respect for the law and is within the law.<sup>164</sup> One such commentator argues that blind obedience to the law is of no use to democracy and that it is through moral consent that citizens create and support authority. Therefore, citizens have a necessary duty to decide on the basis of conscience whether or not to support the law.<sup>165</sup> In such situations, activities of civil disobedience are fully within the protection of the First Amendment<sup>166</sup> and “[c]ivil disobedience, being non-violent, is a part of free presentation of ideas essential to democracy and the rule of law.”<sup>167</sup>

The contrary argument asserts that:

[I]f we want to preserve our freedom of expression, we must not allow it to be so extended as to include illegal actions, impairments of the rights and conveniences of others, and attempts to coerce others to act according to one’s views rather than to their own. A sit-in, a trespass, an unlawful assembly are acts which, whatever else may be said for them, cannot be regarded as though they were verbal expressions.<sup>168</sup>

Still other commentators observe that punishment is sometimes used, not to punish the lawbreaking, but to destroy the protest itself.<sup>169</sup> Professor Van Den Haag argues that punishment should be increased for acts of civil disobedience to make it an effective deterrent and to avoid institution of the “exchange theory of penal law,” which is obtaining a moral license to break the law by accepting punishment for breaking it.<sup>170</sup>

164. Freeman, *supra* note 140, at 17.

165. *Id.* at 23.

166. *Id.* ; see also Velvel, *supra* note 70, at 467. Velvel argues that some groups must rely on peaceful acts of civil disobedience so that the media will convey their message to the public and that this should be allowed because the media has such an influence on society. *Id.*

167. Freeman, *supra* note 140, at 25.

168. Van den Haag, *Civil Disobedience and the Law*, 21 *RUTGERS L. REV.* 27, 39 (1966).

169. For example, with respect to Operation Rescue, the charges against rescuers often include civil RICO suits and violations of 42 U.S.C. § 1985(3) (1982). See, e.g., *National Organization of Women v. Operation Rescue*, 726 F. Supp. 1483, 1490 (E.D. Va. 1989) (charging violation of § 1985(3)), *aff’d*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Clinic*, 1991 US LEXIS 1147; *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371, 373 (D. Conn. 1989) (charging violation of RICO), *vacated*, 915 F.2d 92 (2d Cir. 1990); *Amy Cousins v. Terry*, 721 F. Supp. 426, 428 (N.D.N.Y. 1989) (charging violation of § 1985(3)); see also J. BANNAN, *supra* note 52, at 214; S. BARKAN, *supra* note 18, at 60-69.

170. Van den Haag, *supra* note 168, at 27. Van den Haag, arguing for increased punishment for civil disobedience, states:

That the disobedience is deliberate, and that punishment is foreseen or sought, is certainly more reason to increase the punishment—so as to make it effectively deterrent—than to reduce it. If there be mitigating circumstances, they would flow from the moral motivation of the crime, not from the “acceptance” of punishment,

### D. Defenses

Although some commentators assert that protesters must accept punishment for their acts and that “[a]ttempting to avert punishment by raising necessity claims may undermine the justifications for civil disobedience; at the very least, the disobedient foregoes a strategically important symbolic event.”<sup>171</sup> Others respond that, although “putting on a defense delegitimizes the act of civil disobedience in some commentators’ eyes, [it] does not reduce a civil disobedient’s due process right to defend himself at trial.”<sup>172</sup>

#### 1. The Necessity Defense.

Freeman asserts that:

It is always the lawyer’s duty to present the morality, the motivation, the conscience of his client to reduce or avoid the penalty. . . . The judge must be educated on the nature of civil disobedience and its importance to our society as a consideration in his judging function. . . . Civil disobedience will then be the means of those who lack other power to challenge society to achieve equity, justice and the fulfillment of humanity. The courts should therefore weigh the motivation of civil disobedience as justification, and free the person from punishment. If a later determination that the law broken was unconstitutional frees one from punishment, then it

which here is part of it. . . . If a law violator sincerely repents and credibly promises henceforth to be lawabiding, his acceptance of the punishment signifies submission to the law, and may reduce the need for punishment and may, therefore, be regarded as a reason for mitigating it. But this is the case only when “acceptance” means repentance and implies a lawabiding future conduct. This is precisely what the “acceptance” of one engaged in civil disobedience does not mean. Hence there is no merit to the contention that his “acceptance” is a reason for mitigating his punishment, let alone for moral exoneration.

*Id.* at 41. Furthermore:

Whatever reasons there be for morally justifying civil disobedience, or for favoring mild punishment, “acceptance” cannot be one, for here it does not mean submission to, but defiance of law.

Another argument for mitigation of punishment, or moral exoneration rests not on equivocation about “acceptance” but on confusion about the nature of the obligation to obey the penal law. What may be called the “exchange theory of penal law” suggests that, by “accepting” punishment, the criminal has bought a moral license for the crime. If you pay the fine, you can violate the traffic law. Your “acceptance” of the duty to pay the fine for violation is as good a fulfillment of the obligation to obey the law as non-violation would have been. You can fulfill your duty to obey by accepting the penalty for not obeying. But the purpose of penal law is not the sale of licenses to commit crimes. On the contrary, penalties should be such as to deter from crimes. When penalties in practice become licenses, they are too low and serve, at best, as taxes.

*Id.*

171. Bauer & Eckerstrom, *supra* note 161, at 1189.

172. Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79, 79 n.2 (1989).

also should be true in a society which tries to improve itself that a law failing to meet the higher law and the highest principles of humanity should not impose penalty on him who speaks for humanity in challenging that law.<sup>173</sup>

The defense that civil disobedience is necessary rests upon the notion that it "is normally to be understood as a political action which addresses the sense of justice of the majority in order to urge reconsideration of the measures protested and to warn that in the firm opinion of the dissenters the conditions of social cooperation are not being honored."<sup>174</sup> When considering the validity of this defense, it has been asserted that "if justification for it is ever possible, it must be justification of particular disobedient acts, each judged separately on its own merits. It is practically senseless to talk of the justification of civil disobedience in general."<sup>175</sup> Furthermore, "[w]hen the claim is made, therefore, that moral considerations compelled or justified disobedience to law, that claim needs to be closely examined in light of the facts and principles that bear on the act in question."<sup>176</sup>

The elements required for the assertion of a successful necessity defense differ according to the situation and the jurisdiction involved. However, there are generally four elements that a defendant must show: (i) there must be no reasonable legal alternative available to the defendant; (ii) the defendant must be acting to avoid imminent harm; (iii) there must be a direct causal relationship between the defendant's act and the harm sought to be avoided; and (iv) the harm created by the defendant must not be disproportionate to the harm the defendant seeks to avoid.<sup>177</sup> Thus, successful assertion of the necessity defense depends upon the facts in each case.<sup>178</sup>

The necessity defense has been raised in connection with various situations throughout American history.<sup>179</sup>

173. Freeman, *supra* note 140, at 26-27.

174. RAWLS, *The Justification of Civil Disobedience*, in *Civil Disobedience*, *supra* note 9, at 240; see also A. FORTAS, *supra* note 53, at 118 (Nuremberg Principles established in 1945 to punish "military and civilians for their participation in the Nazi outrages before and during World War II").

175. Cohen, *supra* note 128, at 10. See Cohen, *supra* note 128, at 164; Van den Haag, *supra* note 168, at 40; Note, *The Nuremberg Principles: A Defense for Political Protestors*, 40 HASTINGS L.J. 397 (1989).

176. Freeman, *supra* note 140, at 20.

177. Bauer & Eckerstrom, *supra* note 161.

178. See, e.g., *The Case of William Gray*, 29 F. Cas. 1300 (C.C.D.N.Y. 1810) (No. 17,694). A federal court held that the question of whether the defendant has met the elements of the necessity defense is a question of fact for the jury. Many appellate courts have excluded the defense and have held that the defendant has failed to raise a question of fact under an element of the defense. Bauer & Eckerstrom, *supra* note 161, at 1178.

179. The necessity defense was raised in connection with the Vietnam war protests. For example, in 1970, John Simpson went to the offices of the Selective Service in San Jose, California. Mr. Simpson set the department's records ablaze in an attempt to hinder the Vietnam conflict. *United States v. Simpson*, 460 F.2d 515, 516 (9th Cir. 1972). A jury convicted

## 2. The Nuremberg Defense.

The Nuremberg principles:

[R]ecognize an obligation on the part of citizens to disobey state orders, to be civilly disobedient. The central concept of Nuremberg is that if an order or law of a nation is contrary to international law and the law of humanity, the citizen must violate the national law, since the national order is no protection for him when charged with violating the higher law. That principle generally demands civil disobedience.<sup>180</sup>

Three areas have been identified in which Nuremberg requires a person to refuse to obey the law: (1) crimes against peace, wars of aggression, and wars in violation of treaties; (2) war crimes, violations of laws, and customs

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Simpson of destroying public records and hindering the Selective Service system. *Id.* at 517. On appeal, Simpson asserted the necessity defense. *Id.* The court held that because no causal relationship was shown between Simpson's act of setting the files ablaze and stopping the war, Simpson did not act reasonably, and the defense should be excluded. *Id.* at 518. *See also* United States v. Boardman, 419 F.2d 110 (1st Cir. 1969) (use of necessity defense for failure to register with Selective Service), *cert. denied*, 397 U.S. 991 (1970); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969) (using necessity defense for destruction of files), *cert. denied*, 397 U.S. 910 (1970); State v. Marley, 54 Haw. 450, 509 P.2d 1095 (1973) (using necessity defense for disruption of corporation participating in Vietnam conflict).

Civil disobedients also have used the necessity defense in protests on nuclear issues. In one Kansas case, the necessity defense was not allowed because the element of imminent harm was not shown. State v. Greene, 3 Kan. App. 2d 698, 623 P.2d 933 (1981). Five defendants were charged with unlawful deprivation of property and failure to obey a police officer after a peaceful demonstration at a nuclear power plant construction site. 623 P.2d at 935. The protestors had blocked railroad delivery of nuclear core vessels to the plant for about two hours. *Id.* The court found the necessity defense inadequate because the plant did not constitute an immediate threat to the protestors since the site was still under construction and there was no radioactive fuel present. *Id.* at 936. In a similar case, a court also held that "low-level radiation and nuclear waste are not the types of imminent danger classified as an emergency sufficient to justify criminal activity." State v. Warshow, 138 Vt. 22, 25, 410 A.2d 1000, 1002 (1979); *see also* Commonwealth v. Brugmann, 13 Mass. App. Ct. 373, 375, 433 N.E.2d 457, 459 (1982) (using defense by nuclear war protesters for trespass charges); People v. Hubbard, 115 Mich. App. 73, 79-80, 320 N.W.2d 294, 297 (1982) (use of defense for protestors at nuclear power plant unavailable because of legislative decisions).

The necessity defense has been used most successfully in cases of prisoner escape. In one case, the defendant was serving a prison term for auto theft and was placed in the prison's minimum security honor farm. People v. Unger, 66 Ill. 2d 333, 336, 362 N.E.2d 319, 320 (1977). The defendant escaped and was captured two days later. The defendant claimed in court that his escape was necessary because he was being sexually molested by fellow inmates. 362 N.E.2d at 320. The prosecution argued that the necessity defense was unavailable to the defendant since he had alternatives to escape, including reporting the molestation to prison officials. *Id.* at 322-23. The court found this was a question of fact for the jury and that the defense should have been submitted to the jury. *Id.* at 323. *See also* United States v. Bailey, 444 U.S. 394 (1980) (concerning prisoner's escape due to threats, beatings, fires, and inadequate medical attention).

180. Freeman, *supra* note 140, at 20.

of war; and (3) crimes against humanity, including, *inter alia*, torture, killing of civilians, deportations, and forced labor.<sup>181</sup>

Some doubt that the Nuremberg principles constitute "a precedent in any legal system"<sup>182</sup> and conclude that "[t]he Nuremberg precedent seems so transparently disingenuous an excuse that [they would] regard any invocation of it as *prima facie* evidence for the political motivation of the defendant and for the absence of conscientious reasons for his law violation."<sup>183</sup>

### III. OPERATION RESCUE

Operation Rescue, and its attendant acts of civil disobedience, is historically similar to other protest movements, but departs from other such movements at significant junctures. Its theoretical justifications again are comparatively analogous to contemporary and historical movements with some deviations. The organization's defenses (such as the defense of necessity) against punishment for acts of civil disobedience generally have been unsuccessful.

#### A. *Historical Lessons: Comparisons and Contrasts*

##### 1. Rights to Life, Liberty, and the Pursuit of Happiness.

"All effective actions require the passport of morality."<sup>184</sup> Many of the successful reform movements have been based upon the notion that the

181. *Id.* at 21. The principles accepted at Nuremberg appear to have been considered in America, at least conceptually, prior to World War II. For example, although Jefferson Davis, President of the Confederacy, was not tried or punished for his part in the Civil War, Henry Wirz was tried, convicted and executed for committing "war crimes" through his brutal and inhumane treatment of Union prisoners at the prisoner of war camp in Andersonville, Georgia. Wirz defended his actions, which resulted in the deaths of thousands of Union soldiers through starvation and disease, by asserting that the Confederate government required him to act as he had. His defense was rejected. See generally M. BOATNER, *THE CIVIL WAR DICTIONARY* (1959).

182. See Van den Haag, *supra* note 168, at 40.

183. *Id.*

184. S. ALINSKY, *RULES FOR RADICALS* 44 (1972). Alinsky notes:

Moral rationalization is indispensable at all times of action whether to justify the selection or the use of ends or means. Machiavelli's blindness to the necessity for moral clothing to all acts and motives—he said "politics has no relation to morals"—was his major weakness.

All great leaders, including Churchill, Gandhi, Lincoln, and Jefferson, always invoked "moral principles" to cover naked self-interest in the clothing of "freedom," "equality of mankind," "a law higher than man-made law," and so on. This even held under circumstances of national crises when it was universally assumed that the end justified any means. *All effective actions require the passport of morality.*

The examples are everywhere. In the United States the rise of the civil rights movement in the late 1950s was marked by the use of passive resistance in the South against segregation. Violence in the South would have been suicidal; political pressure



rights to life, liberty, and the pursuit of happiness, being absolute rights, are not subject to state contravention, abrogation, or termination.<sup>185</sup> The Stamp Act protesters, for example, sought to claim such rights for colonial taxpayers; the Abolitionists sought to claim such rights for slaves who were considered to be slaveowners' personal property; and the Suffragists sought to claim such rights for themselves.

In this respect, Operation Rescue may be relatively unique.<sup>186</sup> Any equal rights argument, as advanced by prior movements, has been appropriated by the pro-choice movement and ratified by the United States Supreme Court. On the basis of "higher law," Operation Rescue attempts to make the rights of the unborn to life, liberty, and the pursuit of happiness superior to the Supreme Court-accorded privacy rights of pregnant women. Operation Rescue's efforts must diminish the *constitutional* rights of one group to assert the *moral* or *divinely-given* rights of another. This, of course, is the crux of the legal dilemma.<sup>187</sup>

In comparison, one antivivisectionist has written:

State anticruelty statutes embody the public consensus that persons have duties to animals. The common-law position that animals were property and "could be exploited, used, abused, or dispatched at [the owner's] pleasure" has been rejected in favor of defining

was then impossible; the only recourse was economic pressure with a few fringe activities. Legally blocked by state laws, hostile police and courts, they were compelled like all Have-Nots from time immemorial to appeal to "a law higher than man-made law." In his *Social Contract*, Rousseau noted the obvious, that "Law is a very good thing for men with property and a very bad thing for men without property." Passive resistance remained one of the few means available to anti-segregationist forces until they had secured the voting franchise in fact. Furthermore, passive resistance was also a good defensive tactic since it curtailed the opportunities for use of the power resources of the status quo for forcible repression. Passive resistance was chosen for the same pragmatic reason that all tactics are selected. But it assumes the necessary moral and religious adornments.

*Id.* (emphasis in original).

185. See generally R. TERRY, *supra* note 98.

186. The closest parallel to Operation Rescue's attempt to save the unborn may involve the issue of animal rights. One commentator writes:

In a system in which animals do not have legal rights, the question of how to ensure adequate protection of animal interests in the laboratory is problematic. One possible answer is to promote legislation at the state level that will recognize animals as having certain legal rights. This solution provides an answer to the inadequacies of current state anticruelty laws. Another possibility is turn to the federal government for improved regulations on the use of laboratory animals. These approaches, however, share a common difficulty: the need to wait for legislative action before animals can be protected. In light of the current abuses, it is necessary to examine possible means by which animals can be afforded some protection under existing law.

Comment, *supra* note 85, at 400 (footnotes omitted).

187. The Abolitionists faced a similar dilemma. The Supreme Court had declared that slaves were property, see *Dred Scott v. Sandford*, 60 U.S. 393, 411 (1856), and that those property rights were protected by the Constitution. *Id.*

acceptable levels of care, applicable to the owner as well as others. In most states, the infliction of unnecessary or unjustified pain on animals is a violation of the state anticruelty statute. That there may be some benefit to humans from a particular experiment should not preclude insisting that scientists adhere to these statutory limits in their use of laboratory animals [footnotes omitted].<sup>188</sup>

There is no such "public consensus" with respect to the issue of reducing the use of abortions.

## 2. Organization.

The success of reform or protest movements appears to be directly related to the organization of parties to carry out acts of defiance. According to one authority on reform, "[c]hange comes from power, and power comes from organization."<sup>189</sup> Unlike the colonial revolutionaries, Operation Rescue has not followed a deliberate, unified, and informed pattern of civil disobedience.<sup>190</sup> Operation Rescue appears to lack a coordinated and knowledgeable group of leaders who act behind the scenes to weigh the pros and cons of the group's activities.<sup>191</sup>

## 3. Nature of the Protestors.

Leaders of the Stamp Act protest were influential and educated; they had access to the highest levels of colonial political and governmental power.<sup>192</sup> Abolitionists counted among their numbers influential writers such as Harriet Beecher Stowe, Harriet Tubman, Frederick Douglass, and Walt Whitman.<sup>193</sup> Although those involved in the early struggles for women's rights did not have their own political power, they did have access to men

188. Comment, *supra* note 85, at 409.

189. S. ALINSKY, *supra* note 184, at 113. This is not to say that organizational matrices or other formal bureaucratic structures must be devised, but rather, there must be a leader (or cohesive leadership) who has the allegiance and respect, even if not the complete ideological agreement, of key figures in the movement.

190. For example, according to Connors: "From the beginning at Cherry Hill, NJ, there have now been over 450 rescues across the United States and Canada. Of these, less than 10% have been 'national rescues' organized directly by OR from Binghamton. The others have been local efforts, often organized back home by veterans of the national rescues." Connors, *supra*, note 98. According to an Operation Rescue spokesperson, "the pace of rescue has slowed to about eight to ten occurrences a month, down from about three times that many a year ago. But, she said, over 100 rescue organizations, none of which have any official ties to any other, remain active around the country." Frome, *supra* note 112, at 51.

191. For example, certain cities, geographic areas, or clinics appear to have been selected for Operation Rescue activities with no apparent strategic criteria. Moreover, the consummate political, leadership, and diplomatic skills attributed to Dr. King have not been attributed to the leadership of Operation Rescue. On the other hand, the various pro-abortion forces, including private and governmental agencies, seem to be very well-organized.

192. See generally E. MORGAN & H. MORGAN, *THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION* (1953).

193. R. SMITH, *THE RISE OF INDUSTRIAL AMERICA* 914-15 (1984).

of influence (even though such access appears to have been of little benefit to their cause).<sup>194</sup> Many antiwar protesters apparently had access to influence through their families and their attendance at prestigious universities, even if they did not possess it on their own.<sup>195</sup>

Operation Rescue, however, does not appear to have access to a significantly wide base of influence. To be sure, Operation Rescue may have some influential writers, politicians, and clergy among its supporters, but the lack of significant or broad-based support from these groups definitely has limited the success of Operation Rescue as a movement.<sup>196</sup>

#### 4. Consistency of Philosophy.

In terms of civil disobedience, the philosophy of Operation Rescue is no longer readily apparent from its activities. For example, are the purposes of Operation Rescue still to save the "20%," generate repentance by Christians, raise the American consciousness, and encourage other pro-life groups? As noted previously,<sup>197</sup> Operation Rescue's tactics appear to have shifted to the targeting of members of the judiciary rather than abortion providers.

One might argue that the intimidation tactics presently advocated by Operation Rescue appear to be directed primarily toward mitigation or elimination of punishment for the acts of civil disobedience by Operation Rescue members. Such tactics fail to affect directly the use of abortions or generate Christian "repentance." In fact, one might argue that such intimidation tactics might well generate the same type of negative response from the American public as was exhibited against the antiwar protestors, *i.e.*, that the protestors are seeking not to create a more just society, but rather that the protestors are seeking to destroy or denigrate some very fundamental premises of the American system—namely, the importance of an independent judiciary.

It is unclear how Operation Rescue's orchestration of hostile activities against the judiciary will be of any encouragement to others involved in the

194. See generally C. WILLIAMSON, *AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760-1860* (1960).

195. See generally C. COOPER, *supra* note 71.

196. In response to the comment that "a large segment of the Christian community doesn't care to defend OR. They feel that the rescue approach is wrongheaded," Terry stated:

Historically, silence and accommodation has done nothing to help the oppressed. It only strengthens the hands of the oppressors. That is the lesson of Nazi Germany and of the Eastern Bloc countries. Hitler went after the insane, the feeble, the elderly. The Christian community, by not taking action, contributed to Hitler's strengthening and its own weakening, and ultimately to the death of 30 to 40 million people. When the Christian community tolerates the oppression of a few, it paves the way for the oppression of the many. It doesn't stop with rescuers. Today, people are being arrested for praying or picketing on sidewalks, something they have a constitutional right to do.

Frome, *supra* note 112, at 49.

197. See *supra* Section I.H. and notes 111-12.

pro-life movement.<sup>198</sup> In fact, such acts of intimidation ultimately could make matters in the courtroom much worse in terms of judicial attitudes toward attorneys representing pro-life defendants in general and also might lead to a further deterioration of relations with prosecutors (resulting in more serious charges and harsher sentences imposed in connection with pro-life activities).<sup>199</sup>

#### 5. Respect for American Values in General.

The most successful reform movements have not threatened American society and values in general. Rather, they have concentrated on the need to revise a particular category of laws or policies. This focus on narrow objectives occurred in the colonial protests against the Stamp Act, the Abolitionist movement, and Suffragist movement.

“Unruly or offensive conduct is likely to be condemned without recognition of its objectives; conduct sober and restrained (as that of civil disobedients often is) is more likely to win consideration and respect.”<sup>200</sup> Although Operation Rescue participants have been directed by various movement leaders to be respectful toward authorities<sup>201</sup> and generally are perceived to be supportive of traditional value systems,<sup>202</sup> targeting of the American judiciary for protest may undermine this perception.

#### 6. Educational and Persuasive Effects.

When a reform movement fails to educate the general public on its aims and objectives, its effectiveness often is dramatically reduced.<sup>203</sup> To

198. Terry says:

When the Christian community rises up with a voice of outrage over either police brutality or judicial tyranny, the tyrants have a tendency to back down. We have to send a message that we will not tolerate oppression, that if you mess with a few of us, you're going to deal with a lot of us.

Frome, *supra* note 112, at 49.

199. Terry would disagree. He says:

The Christian community does not control the levers of power in any major institution in this country. . . . We've got to stop being like Neville Chamberlain and start being like Winston Churchill. Chamberlain wanted to appease Hitler, wanted to win him over, to reason with him. He never understood you cannot appease someone who is dedicated to your destruction. When we have godless enemies of Christ who are sitting in judgment on the Supreme Court bench, why are we concerned about winning their favor instead of calling them what they are: tyrants? . . . Blackmun and Stephens are enemies of Christ. When history's final editorial light is cast upon them 50 or 100 years from now, they're going to be remembered with Adolf Hitler and Joseph Stalin. Harry Blackmun opened the floodgate of bloodshed that will cost 30 million children their lives. He is a vile human being. Why should we wait for the next generation to say what's true?

*Id.*

200. Cohen, *supra* note 128, at 15.

201. See generally Connors, *supra* note 98.

202. See generally T. BALL, *supra* note 147, at 38.

203. Cohen, *supra* note 128, at 15-16. “If the effectiveness of the protest is judged only

date, Operation Rescue has not been successful in persuading and informing the majority of the American public as to the necessity and/or correctness of its activities. This failure appears to have occurred for two reasons. First, Operation Rescue previously limited its efforts only to conducting rescues at abortion centers. Second, the organization has not received favorable media attention.<sup>204</sup> However, it should be noted that the efforts of Operation Rescue may have contributed to a reduction in the number of physicians willing to perform abortions, even though such physicians may support a woman's right to an abortion.<sup>205</sup>

#### 7. Economic Effects.

As mentioned above, Abolition activities inflicted a significant economic loss on slaveowners.<sup>206</sup> The civil rights movement undoubtedly produced some detrimental economic effects through efforts such as the Montgomery bus boycotts. Nevertheless, economics may not be a significant factor in the success of domestic reform movements. In any case, the efforts of Operation Rescue do not appear to be directed at, and probably have not accomplished, significant detrimental economic effects aside from individual effects associated with disruption of individual businesses and canceled abortion appointments.

#### 8. Long-Term and Short-Term Objectives.

It could be said that all domestic reform movements sought both short-term and long-term objectives. Reformers have all asserted that their in-

in terms of its success in pushing through the desired change in law or policy . . . it may not be highly regarded. On the other hand, if the demonstrators are seen to have a more limited immediate objective—that of focusing attention on a community wrong, with trust in the power of the public will, when the wrong is recognized and understood—the effectiveness of their protest in achieving that restricted aim may be considerable.” *Id.*

204. See *Abortion Bias Seeps Into News Media*, FOCUS ON THE FAMILY CITIZEN, Oct. 15, 1990, at 10. “Many journalists believe complaints of abortion bias in the news media are exaggerated, but a growing number are re-examining their coverage. Some editors say the bias is so obvious it can no longer be ignored.” *Id.* According to this article, David Shaw of the *Los Angeles Times* reported the “results of an 18-month investigation that documented abortion bias in the news media. He found that this bias manifests itself, in print and on the air, almost daily in content, tone, choice of language or prominence of play.” *Id.* “Most major newspapers support abortion rights on their editorial pages, and reporters are decidedly pro-abortion. A 1985 *Los Angeles Times* poll found that 82 percent of journalists on newspapers of all sizes say they favor abortion rights.” *Id.* at 11. “The nation’s largest newspaper chains give money to pro-abortion groups,” including The Gannett Foundation and the Knight Foundation. *Id.* Another reporter believes that “[o]pposing abortion, in the eyes of most journalists . . . is not a legitimate, civilized position in our society.” *Id.*

Journalists tend to regard opponents of abortion as “religious fanatics” and “bug-eyed zealots . . . Among reporters, the anti-abortion movement is perceived as “one of those . . . ‘fringe’ things somewhere out there in Middle America or Dixie. . . . Journalists . . . not only are not part of the anti-abortion movement, but don’t know anyone who is.

*Id.*

205. N.Y. Times, Jan. 8, 1990, at A1, col. 1.

206. See *supra* Section I.B. and note 13.

tended beneficiaries were entitled to immediate benefits as well as the life-long benefits that would naturally follow and that America would become a more just and moral society for having acceded to their views.

Moreover, if the intended beneficiaries did not receive any short-term benefits, they could still obtain the life-long benefits of a permanent change in the law. For example, if women were not permitted to vote in an election at hand, there would eventually be another; if African-Americans were prohibited from attending a segregated elementary school, it could still be hoped that the student might later attend an integrated university.

Operation Rescue has two categories of intended beneficiaries, each of which will be provided different benefits as a result of its success.<sup>207</sup> The first, the unborn, will obtain a benefit which is, at the same time, short-term and long-term: life. The second category, pregnant women, will, Operation Rescue adherents argue, receive a short-term benefit (*i.e.*, a baby) and long-term benefits (*i.e.*, a child and avoidance of adverse emotional and physical effects that possibly might be generated by abortion).<sup>208</sup> However, since individual rescue activities may be easily thwarted or stifled by the police and the courts, individual rescues appear to have had little effect on the overall issue of abortion.

### 9. Perception of the Target.

The focus of the colonial Stamp Act protests included both the distant British legislature and the hated local tax collector; the Abolitionists revealed desperate pictures of cruel and despicable slaveowners mistreating their slaves; the civil rights protesters exposed unlovely southern bigots who were still enslaving people of color through social and legal "badges of servitude;"<sup>209</sup> and Vietnam protesters portrayed their target as a well-oiled machine of generally faceless and nameless military megalomaniacs and civilian bureaucrats working together to perpetuate war for profit.

In contrast, Operation Rescue must target: (1) relatively young women who, by virtue of their pregnancy, are in a constitutionally protected status and who hold Supreme Court-accorded constitutional privacy rights; and (2) physicians, whom the American public generally accords great deference. As one antivivisectionist has written, "almost any cruelty [is] tolerated in American laboratories if it [is] perpetrated by a man in a white lab-coat with letters after his name."<sup>210</sup> It does not seem to be an easy task to generate public hostility against these targets.

207. See generally R. TERRY, *supra* note 98.

208. For a comprehensive annotated bibliography on the subject, see MAJOR ARTICLES AND BOOKS CONCERNING THE DETRIMENTAL EFFECTS OF ABORTION, The Rutherford Institute (Charlottesville, Va.) (1988).

209. The phrase was coined by a dissenting Justice Harlan in *Plessy v. Ferguson*, 163 U.S. 537, 562 (1896).

210. See C. NIVEN, HISTORY OF THE HUMANE MOVEMENT 128-29 (1967). According to Niven, a major reason for the failure to date of the antivivisectionist movement is the high

### 10. Reaction of Authorities.

Largely as a result of the armed British overreaction, colonial civil disobedience—so effective with respect to the Stamp Act—escalated to violence a decade later in the Boston Tea Party incident and, still later, the American Revolution.<sup>211</sup> The reaction of state authorities to the civil rights movement is similar in many respects to that of Operation Rescue (e.g., violence at the scene of arrests),<sup>212</sup> but the public's response seems to be different. No matter what view one held regarding the issue of civil rights, it seems that the public response to the shocking scenes in the South generally resulted in outrage. Public reaction is largely uninformed and uninspired with respect to Operation Rescue. Escalation to the use of violence by Operation Rescue appears unlikely because of the pacifist beliefs of its leadership and because violence (e.g., killing or injuring pregnant women or doctors) would be extremely unlikely to produce any satisfactory results.

### 11. Response by the Courts.

The hostility at the trials of antiwar protesters during the 1960s and 1970s, such as the Berrigan Brothers, has been documented.<sup>213</sup> Courts apparently have exhibited nearly the same attitude toward rescuers appearing for trial.<sup>214</sup> In fact, one federal judge, after imposing a fine of more than \$400,000, stated, "I know these are high fines, but earlier fines were ignored and did not stop the protests [and] . . . [i]t was necessary to take coercive action."<sup>215</sup>

esteem in which the public holds scientists. Another commentator believes that this view is no longer widely accepted, at least with respect to animal rights since "[t]he American public's faith in scientists has been shaken by the dissatisfaction many feel towards the balance science has struck between animal and human interests." Comment, *supra* note 85, at 401.

211. E. CHANNING, *supra* note 1, at 128-30. See generally D. AMMERMAN, *supra* note 6.

212. See generally Allen, *Public Brutality—But No Outrage*, Wall St. J., Aug. 18, 1989, at 14, col. 1; Hentoff, *The Painful Education of a Schoolteacher*, Wash. Post, Sept. 2, 1989, at 25, col. 1; Thompson, *Atlanta Police Use Tougher Tactics as Abortion Foes Return to Streets*, Washington Post, Oct. 5, 1988, at A3, col. 5; Williams, *Police Rookies Experience First Hand the Pain of Resisting Arrest*, Hartford Courier, Aug. 14, 1989, at A5, col. 1.

213. See generally E. NELSON & B. OSTROW, *THE FBI AND THE BERRIGANS* (1972).

214. See, e.g., *National Organization of Women v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Clinic*, 1991 US LEXIS 1147; *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371 (D. Conn. 1989), *vacated*, 915 F.2d 92 (2d Cir. 1990); *Cousins v. Terry*, 721 F. Supp. 426 (N.D.N.Y. 1989). Terry believes that the judicial system has been harsh on Operation Rescue because:

Politically, our view on child killing is not the popular one right now. Most other activists find sympathizers in the media and in the judiciary. We find virtually none.

Frome, *supra* note 112, at 49.

215. *National Org. of Women v. Operation Rescue*, 726 F. Supp. 1483, 1498 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. denied sub. nom. Bray v. Alexandria Clinic*, 1991 US LEXIS 1147.

The civil rights and antiwar movements both sought to flood the jails and courts with protestors and, thereby, create disruption in the system significant enough to warrant the government's serious consideration of their views. Operation Rescue has expressed a similar intent.<sup>216</sup> Rescuers, for example, have been directed to refuse to provide arresting authorities with identification information.<sup>217</sup> Perhaps because the numbers of rescuers arrested have been limited, the result of such tactics has not been the disruption of jails and courts, but unusually long periods of time spent in jail both before and after sentencing.<sup>218</sup>

### B. Theoretical Justification of Operation Rescue

#### 1. Justice-, Policy- or Integrity-Based Civil Disobedience.

The civil disobedience associated with Operation Rescue does not seem appropriately classified as "integrity-based" since no one is required by present American law to have an abortion. Neither does such civil disobedience appear appropriately classified as policy-based since American laws regarding abortion arguably are not facially "unwise, stupid and dangerous for the majority as well as any minority",<sup>219</sup>

The activities of Operation Rescue do appear to meet the two qualifications proposed for justification on the basis of justice:<sup>220</sup> the rescuers may conclude that normal political processes have been fully exhausted (*i.e.*, the Supreme Court has reviewed the issue and made a decision<sup>221</sup>); and the rescuers may assume that their civil disobedience activities will not make matters worse.<sup>222</sup>

As noted above,<sup>223</sup> persuasive as well as nonpersuasive strategies may justifiably be employed in justice-based civil disobedience.<sup>224</sup> Since the persuasive strategies of Operation Rescue<sup>225</sup> largely have been unsuccessful, it appears that the nonpersuasive strategies of the rescuers<sup>226</sup> (such as

216. See generally Connors, *supra* note 98.

217. *Id.*

218. See Frome, *supra* note 112, at 51.

219. See *supra* Section II.A.1. and text accompanying note 125.

220. *Id.*

221. See *Roe v. Wade*, 410 U.S. 113 (1973). Until *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), all attempts by states to limit the availability of abortion have been held unconstitutional. See, e.g., *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

222. See R. TERRY, *supra* note 98; Terry, *supra* note 99.

223. See *supra* Section II.A.1 and text accompanying notes 123-24.

224. As such, "persuasive strategies improve the justification for justice-based disobedience. But they do so only when conditions are favorable for their success." R. DWORKIN, *supra* note 115, at 109.

225. For example, those used "to force the majority to listen to arguments against its program, in the expectation that the majority will then change its mind and disapprove that program." *Id.*

226. For example, those strategies making the "cost unacceptably high . . . intimidation, fear, and anxiety, and in between strategies of inconvenience and financial expense." *Id.*



disrupting traffic, preventing the efficient functioning of official agencies through nonviolent noncooperation with police during arrests, and blocking entrances to abortion clinics) would appear to be justified under this theory.<sup>227</sup>

## 2. Higher Law and Utilitarian Justification.

The civil disobedience of Operation Rescue cannot be justified according to the higher law justification criteria previously discussed.<sup>228</sup> Application of this theory would result in the conclusion that, to the extent that Operation Rescue premises its justification upon a "higher law,"<sup>229</sup> which is in principle not subject to public verification, the rescuers ask the American public to accept their moral judgment of each person's conduct on the basis of the rescuers' understanding and application of that "higher law."<sup>230</sup>

Even if one accepted the moral judgments of the rescuers, Cohen would restrict civil disobedience in connection with abortion to disobedience of the law protested; *i.e.*, since there is no law against abortion *per se*, and since trespassing laws are not *per se* morally offensive, there is no law appropriately to be violated for the sake of higher law.<sup>231</sup>

On the other hand, the activities of Operation Rescue might be justified under the theory of utilitarian justification.<sup>232</sup> Operation Rescue might well argue that deliberate disobedience of a particular law at a particular time, under particular circumstances, with the normal punishment for that disobedience ensuing, might be likely to lead over a period of time to a better or more just society than would result from compliance with the law in

227. *Id.*

228. See *supra* Section II.A.2. and accompanying notes (especially Cohen, *supra* note 128, at 10-12).

229. Terry has said:

Some might wonder if rescues are a valid application of the "Higher Laws" principle. Some believe we can disobey earthly rules only when we are told to *do* something evil. "When they tell me I have to abort *my* child, I won't obey." But what about when we are told to *not do* the good God commands us to do, and we thereby commit the sin of omission? Rahab was told, "Don't hide the spies." Daniel was told, "Don't Pray," The apostles were told, "Don't preach." And we are told, "Don't interfere with the killing of these children. Don't trespass!"

Yet god has commanded His people, "Rescue those who are unjustly sentenced to death," [Proverbs 24:11] and "Rescue the weak and the needy; deliver them out of the hand of the wicked." [Psalms 82:4]

To rescue someone is to physically intervene on his behalf when he is in danger. We have an obligation before God to try to rescue these children. Christians who do rescue missions are simply obeying God's command to rescue the innocent who are scheduled to die that day, regardless of man's godless law that permits and protects murder.

Terry, *supra* note 99.

230. *Id.*

231. See *supra* Section II.A.2. and text accompanying note 135.

232. Cohen, *supra* note 128, at 12-16.

question. As noted above,<sup>233</sup> as long as there is a clear relation, actual or symbolic, between the object of the protest and the law which is disobeyed, the indirect civil disobedience of Operation Rescue might be justified under this theory.

The activities of Operation Rescue meet the test of some commentators regarding moral considerations: namely, that such activities are based upon "solid and generally approved moral foundations."<sup>234</sup> However, the factual considerations surrounding Operation Rescue are more problematic, especially in view of the dramatically different activities now being pursued by the organization.<sup>235</sup> For example, the vigor of Operation Rescue's efforts through normal, or at least lawful channels, should be considered. Has the organization promoted legislative change? Has it formed letter writing or other lobbying groups? "If all channels within the law have not been explored, or have not been explored fully enough, the resort to law-breaking is sure to prove unjustifiable . . . [yet] if the delay in remedy has already been excessive, and greater speed of action through lawful channels seems most unlikely, the resort to extraordinary means may be justifiable."<sup>236</sup>

The abortion issue logically might be pursued through normal, or at least lawful channels. However, there is no time for such pursuits in connection with a particular abortion.<sup>237</sup>

Other factual considerations concern the negative effects of the deliberate disobedience. The rescue activities of Operation Rescue may not be said to "encourage lawlessness, or break down the general respect for the laws."<sup>238</sup> However, the same probably cannot be said for the judicial intimidation tactics conducted by the organization. Since an independent judiciary is a fundamental part of the American system of governance, attempts to undermine general respect for the judiciary by Operation Rescue cannot be justified under the general theories of civil disobedience.

A less difficult hurdle for Operation Rescue is presented by considerations of the "[i]nconvenience, expense, and injury to the community resulting from the disobedience."<sup>239</sup> The civil disobedience of Operation Rescue

233. *Id.* at 12-13.

234. *Id.* at 13.

235. See generally Frome, *supra* note 112.

236. Cohen, *supra* note 128, at 14.

237. Terry notes:

Some people in the pro-life movement claim that rescue missions are counter-productive, that the real solution must be achieved politically. While it is true that ultimate victory will be a constitutional amendment to outlaw all child killing, the question is, how do we get there? Over 14 years of mostly education and political lobbying has gotten us virtually nowhere. *Over 20 million children are dead*, and the situation is deteriorating. Euthanasia and infanticide are commonly practiced, school sex clinics are being established, and a political solution is as far away as ever.

Terry, *supra* note 99.

238. See Cohen, *supra* note 128, at 14.

239. *Id.*

has caused little personal injury (except to the rescuers themselves) or community inconvenience. It should be noted that "[h]ow well he succeeds in achieving publicity with minimal harm will be one factor in deciding upon the justifiability of his act."<sup>240</sup>

There are further factual questions:

[These concern] the positive effects of the deliberate disobedience . . . [H]ow successful that disobedience is likely to be in achieving the desired result. Is it likely to bring effective pressure to bear upon lawmaking or policy-making authorities who can effect that change? How intensely will it focus public attention upon a community injustice long in need of remedy? If that public attention is so directed, what will be the outcome? Will the public, in turn, exert pressure upon the law-makers? Or might misunderstanding of the demonstrators and resentment of them do their cause more harm than good?<sup>241</sup>

With respect to rescue activities, the answers to these questions may be in the negative; with respect to judicial intimidation, it is certainly a negative. Terry would probably disagree.<sup>242</sup>

### 3. Justification Through Higher Law.

Operation Rescue would perhaps find its greatest theoretical support with Freeman, who would accord justified activities of civil disobedience full First Amendment protection<sup>243</sup> and who believes that it is the right and duty of citizens under the "First Amendment, the ultimate force of conscience and non-violence, some higher law background of the Constitution

240. *Id.* at 15.

241. *Id.*

242. According to Terry:

Even a brief overview of American history proves that political change usually comes after social upheaval. The birth of America, the end of slavery, women's voting rights, repeal of prohibition, the civil rights movement, the anti-Vietnam war movement, and the feminist movement all testify to one truth: whether for good or bad, political change comes after a group of Americans bring enough tension in the nation and pressure on politicians that the laws are changed. Politicians see the light after they feel the heat!

The truth is, we don't stand a chance of ending this holocaust without righteous social upheaval occurring across the country that "inspires" politicians to amend the Constitution. Right now they have no reason to. The status quo is peaceful. But if even one percent of the evangelical and Catholic community (about 800,000 people) would take their own rhetoric seriously ("Abortion is murder!") and start acting like children are being killed, things would change. By doing *massive* rescues, we could create the tension needed to turn the tide. When government officials have to choose between jailing tens of thousands of good, decent citizens, or making child killing illegal again, they will choose the latter, partly because there are no jails big enough to hold us if we move together in large numbers!

Terry, *supra* note 99.

243. Freeman, *supra* note 140, at 23.

(such as natural law, Nuremberg, or law of humanity) . . . humbly and contritely but courageously [to] engage in civil disobedience."<sup>244</sup>

### C. Punishment and Defense

The decision to participate in rescues and risk time in jail is not a commitment to be taken lightly.<sup>245</sup> However, as noted above,<sup>246</sup> Professor Freeman believes that the morality, motivation, and conscience of those who are civilly disobedient should be presented to the judge to reduce or avoid the penalty for the civil disobedience. Nonetheless:

[A]ttorneys representing pro-life demonstrators say they have consistently been denied the opportunity to present an intelligent defense. Such a defense rests on the premise that a fetus is a human life with civil rights, including the right to survive. Judges have routinely barred this premise from juries' consideration by dismissing as irrelevant any testimony regarding defendants' motives.<sup>247</sup>

The intimidation tactics presently being planned by Terry and others<sup>248</sup> may further erode opportunities for the rescuers legitimately to defend their civil disobedience in court or at least to receive punishment appropriate for the crime instead of the message.

#### 1. Necessity Defense.

Assertion of the necessity defense in the cases of abortion protesters has been unsuccessful.<sup>249</sup> In excluding the necessity defense, one court held that "[t]he harm sought to be avoided, abortions, was not clearly greater than the harm caused by the trespass, which was the loss of the constitutional right to privacy."<sup>250</sup>

244. *Id.* at 26.

245. According to Terry:

There is a price to be paid. Making the decision to be arrested and/or jailed must be weighed carefully beforehand. Each of us must count the cost individually and decide what we're going to do for the children.

R. TERRY, *supra* note 98, at 202-03. Terry encourages would-be rescuers:

Besides, jail is not that bad. They feed you, wash your clothes, and it is a tremendous opportunity to preach the gospel. . . . Going to jail gives fresh vision and courage to others to join you. . . . As long as you keep your charges to violations or misdemeanors, your career plans will probably not be jeopardized.

*Id.* at 201-02.

246. See *supra* Section II.A.3. and accompanying notes.

247. See Frome, *supra* note 112, at 49.

248. See *supra* Section I.I. and notes 111-12.

249. For example, in one case, the defendants were found guilty of criminal trespass when they protested outside an abortion clinic. The protestors chanted, beat on walls, and chained the front doors shut. *Crabb v. State*, 754 S.W.2d 742, 743 (Tex. App. 1988), *cert. denied*, 110 S. Ct. 65 (1989).

250. *Id.* at 744.

As noted above,<sup>251</sup> there are four elements that a defendant must show to successfully assert the necessity defense. First, there must be no reasonable legal alternative available to the defendant. Apparently, rescuers believe that there is no reasonable legal alternative available.<sup>252</sup> Second, the defendant must be acting to avoid imminent harm. Terry asserts:

We have an obligation before God to try to rescue these children. Christians who do rescue missions are simply obeying God's command to rescue the innocent who are scheduled to die that day, regardless of man's godless law that permits and protects murder.<sup>253</sup>

Third, there must be a direct causal relationship between the defendant's act and the harm sought to be avoided. Terry argues:

That brings us to a present day application of this principle [reasons to defy civil authority]: rescue missions at abortion clinics. A "rescue mission" is a group of God-fearing people saying, "NO! We're not going to let you kill innocent children," and peacefully but physically placing themselves between the killer and his intended victims.<sup>254</sup>

Fourth, the harm created by the defendant must not be disproportionate to the harm the defendant seeks to avoid. According to an advocate of Operation Rescue, "the saving of over 375 unborn babies has actually been confirmed. The number of babies saved as projected by the 20% principle . . . would be vastly larger, but OR keeps its statistics conservatively to savings that can be proved."<sup>255</sup> Terry further asserts: "Without rescues,

251. See *supra* Section II.D.1. and text accompanying note 177.

252. According to Terry:

Over 14 years of mostly education and political lobbying has gotten us virtually nowhere. *Over 20 million children are dead*, and the situation is deteriorating. Euthanasia and infanticide are commonly practiced, school sex clinics are being established, and a political solution is as far away as ever. Even a brief overview of American history proves that political change usually comes after social upheaval.

Terry, *supra* note 99.

253. *Id.*

254. *Id.* Terry continues:

The rescuers may go right inside the abortion procedure rooms (before the patients arrive) and lock themselves in. They may fill up the waiting room, or they may come before the abortuary opens and block the door on the outside, so that no one can get in. Meanwhile, pro-life counselors, whether inside or outside the abortuary, can talk with the mothers scheduled to abort their children, win their confidence, and offer them help. Sometimes it takes the police hours to remove the rescuers, which gives the pro-life counselors plenty of time to reach the mothers—*time they would not have had any other way*. Many children are *alive* today because of rescue missions—children who would not have been saved simply by sidewalk counseling or picketing.

*Id.*

255. See Connors, *supra* note 98.

If the confirmed number seems small Bishop Vaughan likes to say that, as far was

children continue to die, and mothers continue to be maimed.'<sup>256</sup>

## 2. Nuremberg Defense.

Successful assertion of the Nuremberg Defense seems doubtful when considered in connection with the activities of Operation Rescue. According to Van den Haag, the Nuremberg principles apply only to leaders who plot or decide on an alleged crime.<sup>257</sup> The Nuremberg Defense has been limited to issues of *foreign policy*.<sup>258</sup> However, there is another view:

The modern Nuremberg Defense provides that private citizens have a duty or a privilege or both under international law and state crime prevention statutes to take action to prevent crimes against the peace, crimes against humanity, and war crimes. It is proper for courts to permit this Defense under both international and domestic law. . . . Permitting the Nuremberg Defense upholds the right of United States citizens to take action to prevent governmental violations of international law while ensuring that citizen action does not exceed the bounds of acceptable behavior as drawn by juries, the conscience of our communities.<sup>259</sup>

## CONCLUSION

Civil disobedience in the United States has a long and impressive history. A succession of civilly disobedient acts led to the establishment of the very governmental system which has subsequently prosecuted, both selectively and systematically, various movements performing such acts.

It is curious that anyone in the American system of government should in blanket fashion condemn, oppose, or punish (as some courts have in regard to Operation Rescue)<sup>260</sup> valid acts of civil disobedience. Such, it would seem, runs counter to the very ideals upon which the American government was founded.

Of course, some movements, such as the civil rights movement, have been successful in challenging and creating the climate for social change. Others, such as Operation Rescue, have not.

The lesson, as the analysis of Operation Rescue seems to indicate, is that certain basic historical and theoretical-conceptual guidelines must be

he knows, the only survivor of Pharaoh's slaughter of the male Hebrew babies was Moses, and the only survivor of Herod's slaughter of the innocents was Jesus. What price, he asks, do you put on a baby?

*Id.*

256. R. TERRY, *supra* note 98, at 200.

257. Van den Haag, *supra* note 168, at 40.

258. See *Vermont v. McCann*, 44 Guild Prac. 101, 108 (D. Vt. Jan. 26, 1987), *appeal denied*, 149 Vt. 147, 541 A.2d 75 (1987).

259. Note, *supra* note 175, at 435-36.

260. See *supra* Section III.A.11 and notes 214-15.

adopted and followed if any movement based upon civil disobedience is to succeed. To do otherwise, is to invite defeat and to fail to take into account the costs of one's acts.