Journal of Criminal Law and Criminology

Volume 81
Issue 3 *Fall*

Article 7

Fall 1990

# The Use of the Necessity Defense by Abortion Clinic Protesters

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0091-4169/90/8103-677
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 81, No. 3

Printed in U.S.A.

# COMMENTARY

## The Use of the Necessity Defense by Abortion Clinic Protesters

### I. INTRODUCTION

On July 3, 1987, Ann O'Brien and six companions entered the waiting room of Reproductive Health Services, a St. Louis abortion clinic, and began shouting anti-abortion slogans.[1] O'Brien refused to leave upon being asked, and was subsequently arrested and charged with criminal trespass.[2] She pleaded "not guilty," and moved for permission to present evidence regarding a defense of "justification" or "necessity," on the grounds that her actions were undertaken "solely to rescue, or protect, particular unborn children from death to be brought about by the abortion procedure."[3] O'Brien's motion was denied. She was convicted of criminal trespass and sentenced to serve seventy-five days in a medium security institution.[4] O'Brien appealed the trial judge's denial of her motion to raise a necessity defense to the Missouri Court of Appeals.[5]

The necessity defense is a criminal law defense in which a defendant claims that his or her commission of a crime was necessary to prevent a "greater harm" from occurring.[6] O'Brien's attempted use of the necessity defense was not novel. Since at least 1978, anti-abortion activists have been attempting to raise the necessity defense to criminal trespass charges arising out of abortion clinic demonstrations. The activists generally argue that their criminal acts were necessary to save the lives of fetuses that were about to be

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[1] Brief of Respondent at 4, State v. O'Brien, 784 S.W.2d 187 (Mo. Ct. App. 1989) (No. 55582).

[2] *Id.* at 4, app. XII.

[3] Brief of Appellant at 7, State v. O'Brien, 784 S.W.2d 187 (Mo. Ct. App. 1989) (No. 55582).

[4] *Id.* at 3.

[5] *Id.*

[6] W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 50, at 381 (1972) [hereinafter W. LAFAVE & A. SCOTT].

aborted.[7] Although some trial courts have accepted abortion clinic protesters' necessity claims,[8] appellate courts have uniformly held that abortion clinic trespassers are precluded, as a matter of law, from raising a necessity defense.[9] Nevertheless, anti-abortion activists continue to try raising the defense.[10]

In Missouri, the issue appeared to have been settled in 1982, when the Missouri Court of Appeals held in *City of St. Louis v. Klocker*[11] that abortion clinic trespassers could not meet the essential elements of the necessity defense.[12] O'Brien argued, however, that *Klocker* was rendered obsolete by the Missouri General Assembly's enactment of a new abortion statute[13] in 1986.[14] This statute's preamble contains "legislative findings" that human life begins at conception and that "unborn children" have protectable interests in life, health, and well-being.[15]

According to O'Brien, the preamble to the 1986 Missouri abortion act indicated the Missouri legislature's intent to permit abortion protesters to raise a necessity defense.[16] O'Brien's argument was bolstered by the fact that on two separate occasions after the Supreme Court's *Webster* decision upheld the 1986 abortion act, Missouri trial judges acquitted groups of abortion clinic trespassers on necessity grounds.[17] Nevertheless, the Missouri Court of Appeals in

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7 *See* Note, *Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic*, 48 U. CIN. L. REV. 501 (1979) [hereinafter Note, *Criminal Trespass in an Abortion Clinic*].

8 *See infra* note 17 and notes 209-210 and accompanying text.

9 State v. Diener, 706 S.W.2d 582, 585 (Mo. Ct. App. 1986).

10 For example, a group of anti-abortion protesters charged with trespassing at an abortion clinic in Los Angeles recently attempted to raise a necessity defense. L.A. Times, Aug. 8, 1989, § 2 (Metro), § 1 at 1, col. 1. The judge prevented the protesters from presenting the defense to the jury; nonetheless, the jury acquitted the protesters. L.A. Times, Sept. 14, 1989, § 1 at 1, col. 2.

11 637 S.W.2d 174 (Mo. Ct. App. 1982).

12 *Klocker*, 637 S.W.2d at 176-77. For the essential elements of the necessity defense, see *infra* section II.B.

13 Act approved June 26, 1986, 1986 Mo. LAWS 689.

14 Supplemental Brief of Appellant at 5, State v. O'Brien, 784 S.W.2d 187 (Mo. Ct. App. 1989) (No. 55582).

15 MO. ANN. STAT. § 1.205 (Vernon Supp. 1989). Although the Eighth Circuit Court of Appeals held these "legislative findings" unconstitutional, Reproductive Health Services v. Webster, 851 F.2d 1071 (8th Cir. 1988), the United States Supreme Court, in Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989), reinstated the findings without ruling on their constitutionality.

16 Supplemental Brief of Appellant, *supra* note 14, at 8.

17 St. Louis Post-Dispatch, Nov. 29, 1989, at 1. Because Missouri law requires that all official records pertaining to a criminal case be closed to the public if the defendant is acquitted, MO. ANN. STAT. § 610.105 (Vernon 1988), the author was unable to obtain any official documentation regarding these cases. One of the trial judges, Associate Circuit Judge George Gerhard, provided the author with an unofficial copy of his opinion. The opinion relies heavily on the preamble to the 1986 abortion statute. Opinion of

*State v. O'Brien* upheld O'Brien's conviction, ruling that even after *Webster*, the necessity defense is unavailable to abortion clinic trespassers as a matter of law.[18]

This Comment argues that the Missouri Court of Appeals was correct in ruling that abortion clinic trespassers are precluded from raising a necessity defense, even after the *Webster* decision. Sections one and two review the background and elements of the necessity defense, both at common law and in statutes. Since anti-abortion activists are essentially political protesters, section three examines the state and federal courts' unanimous refusal to accept the necessity defense in political protest cases. Finally, in section four, the application of the necessity defense to abortion clinic trespassers is explored. The author notes that under the analysis which courts apply in general political protest cases, abortion clinic trespassers are precluded from raising a necessity defense. The author further argues, however, that the most powerful arguments against allowing abortion clinic trespassers to raise a necessity defense arise from factors more closely associated with abortion clinic protests than with general political protests, including the lack of social consensus on the abortion issue, the current legal status of fetuses, and the constitutional protection which the Supreme Court has granted to abortion rights.

## II. BACKGROUND ON THE NECESSITY DEFENSE

### A. COMMON LAW DEVELOPMENT

The necessity defense justifies conduct which is criminal on its face, but which "promotes some value higher than the value of literal compliance with the law."[19] It is based on the theory that "sometimes the greater good for society will be accomplished by violating the literal language of the criminal law."[20] Thus, the necessity defense recognizes the societal advantage of encouraging people to avoid greater harms by bringing about lesser harms.[21]

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Judge George Gerhard, Associate Circuit Judge, St. Louis County Circuit Court, Aug. 16, 1989 [hereinafter Gerhard].

18 State v. O'Brien, 784 S.W.2d 187 (Mo. Ct. App. 1989).

19 G. WILLIAMS, CRIMINAL LAW § 229, at 722 (2d ed. 1961) [hereinafter G. WILLIAMS]. The necessity defense also is known as the "choice of evils" defense, *see* W. LAFAVE & A. SCOTT, *supra* note 6, § 50, at 382; 2 P. ROBINSON, CRIMINAL LAW DEFENSES § 124, at 45 (1984) [hereinafter P. ROBINSON]; MODEL PENAL CODE § 3.02 (1985), the "lesser evils" defense, *see* P. ROBINSON, this note, § 124, at 45, or the "competing harms" defense. *See* Commonwealth v. Hood, 389 Mass. 581, 590, 452 N.E.2d 188, 194 (1983).

20 W. LAFAVE & A. SCOTT, *supra* note 6, § 50, at 382.

21 *Id.* § 50, at 385; Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64

The precise development of the necessity defense in Anglo-American law is unclear, because early necessity cases are scarce.[22] However, the defense appeared early in both English and American common law.[23] Originally, the necessity defense was limited to cases in which the pressure compelling the choice of evils came from forces of nature.[24] More recent cases, however, have broadened the availability of the necessity defense to include scenarios where the pressure of circumstances comes from a human source rather than from nature. For example, some state courts have held that the necessity defense may be available to prison inmates who escape to avoid imminent and serious threats of death or assault from other prisoners.[25] In another case, a court permitted a medical student to raise a necessity defense to charges of disorderly conduct which

N.Y.U. L. REV. 79, 85 (1989) [hereinafter Note, *Applying the Necessity Defense*]. "Necessity" is distinct from "duress," although courts often confuse the two. United States v. Bailey, 444 U.S. 394, 410 (1980). The duress defense is available to a person who commits an illegal act because another person unlawfully threatens him or her with serious injury unless he or she commits the act. The duress defense is based on the theory that a person should not be held responsible for a criminal offense which was committed under pressure great enough to deprive an ordinary person of free will. *See* Arnolds & Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 290 (1974) [hereinafter Arnolds & Garland]. In contrast, the necessity defense assumes that the defendant possessed free will when he or she committed the charged offenses. The necessity defendant argues that the pressure of circumstances presented him or her with a choice of evils, and that he or she *elected* to avoid the greater harm by bringing about a lesser harm. W. LAFAVE & A. SCOTT, *supra* note 6, § 50, at 382. *But see* A. WERTHEIMER, COERCION 147 (1987), noting that Blackstone believed that when a person acts from "reason and reflection" and commits a criminal act because it is the "least pernicious" of "two evils," his or her will is not "freely active." *Id.* (quoting Blackstone, *The Elements of the Common Law of England* (1630) in XIII WORKS § 28 (Montague ed. 1830)).

22 Arnolds & Garland, *supra* note 21, at 291.

23 *See* Reninger v. Fagossa, [1551] 1 Plowd. 1, 19, 75 Eng. Rep. 1, 29-30 (cited in Arnolds & Garland, *supra* note 21, at 291) ("a man may break the words of the law, and yet not break the law itself . . . where the words of them inconvenience, or *through necessity*, or by compulsion.") (emphasis added). *See also* The William Gray, 29 F. Cas. 1300 (C.C.D.N.Y. 1810) (No. 17,694).

24 *See* W. LAFAVE & A. SCOTT, *supra* note 6, § 50, at 381. In one early necessity case, for example, the court held that a severely storm-damaged ship was justified in entering a port in violation of embargo laws. The William Gray, 29 F. Cas. 1300 (C.C.D.N.Y. 1810) (No. 17,694). Other early necessity cases held that sailors could justify a mutiny on the grounds that their ship was unseaworthy, United States v. Ashton, 24 F. Cas. 873 (C.C.D. Mass. 1834) (No. 14,470), that a person may destroy property to prevent a disease from spreading, Seavy v. Preble, 64 Me. 120 (1874), and that a parent may withdraw his child from school, in violation of compulsory school attendance laws, if the child is so ill that attendance would endanger her health. State v. Jackson, 71 N.H. 552, 53 A. 1021 (1902).

25 *See, e.g.*, People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974); People v. Luther, 394 Mich. 619, 232 N.W.2d 184 (1975); People v. Harmon, 53 Mich. App. 482, 220 N.W.2d 212 (1974), *aff'd*, 394 Mich. 625, 234 N.W.2d 187 (1975).

arose when he prevented police officers from moving an injured person without a stretcher.[26] Thus, the necessity defense potentially may apply whenever a person's nominally criminal act prevents more harm than it causes.[27]

### B. COMMON LAW ELEMENTS

The common law necessity defense is poorly developed in Anglo-American jurisprudence.[28] The cases and literature therefore are not uniform in defining the defense. A survey of cases and commentaries suggests, however, that the following elements are essential to establish common law necessity: (1) the criminal offense with which the actor is charged was committed to avoid a significant evil or harm;[29] (2) the actor reasonably believed that his or her actions were necessary and designed to avoid this significant harm;[30] (3) the actor had no alternative means of avoiding the threatened harm;[31] (4) the actor was without fault in bringing about the situation calling for the choice of evils;[32] (5) the harm which the actor sought to avoid is greater than the harm reasonably expected to be created by the criminal offense committed;[33] and (6) the legislature has not made a statutory pre-determination of values for the situation confronting the actor.[34]

#### *1. The Harm to be Avoided*

Although early necessity cases required that a necessity-triggering harm come from forces of nature, more recent common law does not restrict the type of harm which may give rise to a necessity defense.[35] One commentator has asserted that any unjustifiable

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26 City of Chicago v. Mayer, 56 Ill.2d 366, 308 N.E.2d 601 (1974).

27 Arnolds & Garland, *supra* note 21, at 290. Additional examples of the defense's application abound. It is generally recognized, for example, that a person may pull down a building to prevent a fire from spreading, G. WILLIAMS, *supra* note 19, § 231, at 725, or may jettison cargo to keep a ship from sinking. *Id.* at 726. In addition, an ambulance may go through a red light on its way to an accident, a mountain climber lost in a storm may take shelter in a vacant house, and a druggist may dispense medication without a prescription in a medical emergency. MODEL PENAL CODE § 3.02 comment 1, at 9-10.

28 Arnolds & Garland, *supra* note 21, at 291.

29 *Id.* at 294.

30 W. Lafave & A. Scott, *supra* note 6, § 50, at 386; Note, *Criminal Trespass in an Abortion Clinic*, *supra* note 7, at 504.

31 W. LAFAVE & A. SCOTT, *supra* note 6, § 50, at 387-88; Arnolds & Garland, *supra* note 21, at 294.

32 W. LAFAVE & A. SCOTT, *supra* note 6, § 50, at 388.

33 *Id.* at 386-87.

34 *Id.* at 382-83.

35 *Id.* at 381, 383. *But see* Cleveland v. Municipality of Anchorage, 631 P.2d 1073,

threat to a legally protected interest is sufficient to trigger a necessity defense.[36] In addition, the unjustifiable threat need not be an actual threat, provided the actor has a well-founded belief that impending harm will result unless he or she commits a criminal offense.[37]

Several early necessity cases, however, suggest that the defense applies only in extreme and extraordinary circumstances.[38] The doctrine of necessity recognizes that "law is made to meet but the ordinary exigencies of life."[39] The necessity doctrine therefore deals with the unusual circumstances not contemplated by criminal law.[40] Courts also have asserted that the threatened harm giving rise to a choice of evils must be clear and certain, not merely "remote or contingent."[41]

### 2. *Reasonable Belief that the Offense was Necessary and Designed to Avoid the Threatened Harm*

A defendant seeking to raise a necessity defense not only must have been faced with a significant, clear, and certain harm, but also must have acted with the intention of avoiding this harm.[42] In other words, the defendant must have believed that his or her criminal act was *necessary* to avert the threat.[43] A reasonable, but mistaken, belief in the necessity of the criminal act is sufficient to establish this element of the necessity defense.[44]

A closely-related requirement is that the defendant reasonably must have believed that his or her actions would be effective in averting the threatened harm.[45] This requirement was first articu-

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1078 (Alaska 1981) (mistakenly arguing that the harm giving rise to a necessity defense must come from physical forces of nature.).

36 P. ROBINSON, *supra* note 19, § 124(b).

37 In one case, for example, a group of sailors sought to justify mutiny on the grounds that their ship was not seaworthy. The court instructed the jury "that the defendants ought not to be found guilty, if they acted bona fide upon *reasonable grounds of belief* that the ship was unseaworthy." United States v. Ashton, 24 F. Cas. 873, 874 (C.C.D. Mass. 1834) (No. 14,470) (emphasis added).

38 *See, e.g.*, The Diana, 74 U.S. (7 Wall.) 354, 360 (1869) ("[t]he case . . . must be one of absolute and uncontrollable necessity"); State v. Wootton, Crim. No. 2685 (Cochise County, Arizona, Sept. 13, 1919) (reprinted in Comment, *The Law of Necessity as Applied in the Bisbee Deportation Case*, 3 ARIZ. L. REV. 264, 272 (1961)) ("The cases are and must be rare and the conditions exceptional in which such a rule may be invoked.").

39 United States v. Holmes, 26 F. Cas. 360, 366 (C.C.E.D. Pa. 1842) (No. 15,383).

40 Note, *Criminal Trespass in an Abortion Clinic*, *supra* note 7, at 515.

41 Mitchell v. Harmony, 54 U.S. (13 How.) 115, 133 (1851).

42 W. LAFAVE & A. SCOTT, *supra* note 6, § 50, at 386.

43 *Id.*

44 *Id.*

45 As one commentator has pointed out, in most cases, a defendant who believes that

lated by the Ninth Circuit in *United States v. Simpson*,[46] where the court rejected the necessity defense of a defendant who burned draft records to protest the Vietnam War. The court stated, "[a]n essential element of the so-called [necessity] defense is that a direct causal relationship be reasonably anticipated to exist between the defender's [sic] action and the avoidance of harm."[47] This "causal relationship" requirement advances the necessity defense's policy goal of promoting society's welfare by encouraging people actively to avoid significant dangers. Without a causal relationship between the criminal offense and avoidance of the threatened harm, the necessity defense is inappropriate, for "[i]f the criminal act cannot abate the threatened harm, society receives no benefit from the criminal conduct."[48]

### 3. *Absence of Alternative, Non-Criminal Means to Avoid the Threatened Harm*

Even if a defendant committed a criminal offense with a reasonable belief that the offense was necessary and designed to avoid a significant harm, the defendant may not raise a necessity defense if he or she had some alternative, legal way of avoiding the threat. A "case does not become 'a case of necessity,' unless all ordinary means of self-preservation have been exhausted."[49] Accordingly, the Supreme Court unequivocally has concluded that the necessity defense will fail "if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and

his or her action is *necessary* to avert a harm will also believe that his or her action is effectively designed to avert that harm. Note, *Applying the Necessity Defense*, *supra* note 21, at 102.

46 460 F.2d 515 (9th Cir. 1972).

47 *Id.* at 518.

48 United States v. Gant, 691 F.2d 1159, 1164 (5th Cir. 1982). In *Gant*, the court rejected the defendant's claim that his possession of a pistol, in violation of a statute prohibiting convicted felons from possessing firearms, was necessary to protect himself and his property from a perceived robbery threat. *Id.* at 1162. The court found that the defendant had failed to meet the "causal relationship" requirement because his possession of a firearm could not "be reasonably anticipated to abate the threat of death or serious bodily injury created by the presumed robbery attempt." *Id.* at 1165.

Another application of the "causal relationship" requirement appears in People v. Stephens, in which a prison escapee attempted to raise a necessity defense by claiming that he escaped to protect his wife and children from a third party's violent threats. The court denied the defendant's necessity defense because he failed to show how his escape reasonably could be expected to protect his family from harm. 103 Mich. App. 640, 644, 303 N.W.2d 51, 53 (1981).

49 United States v. Holmes, 26 F. Cas. 360, 366 (C.C.E.D. Pa. 1842) (No. 15,383) (excerpt from jury instructions in a case involving a ship's crewman who ordered some passengers to be thrown overboard in order to prevent a lifeboat from sinking in a storm).

also to avoid the threatened harm.' "[50]

Some courts and commentators suggest that the common law necessity defense is only available in cases where the threatened harm was "imminent" or "immediate" at the time the defendant committed his or her offense.[51] In general, however, a requirement that the threatened harm must have been imminent is identical to a requirement that the defendant must have had no alternative, legal means to avoid the threatened harm. In most cases, until the threatened harm is imminent, there are legal options for avoiding it.[52]

*4. Absence of Fault in Bringing About the Choice of Evils Situation*

A court may deny the necessity defense to a defendant who was at fault in creating the situation calling for a choice of evils. For example, one court has held that an intoxicated person who drove himself to secure medical care after sustaining a head injury could not raise a necessity defense to a driving-while-intoxicated charge.[53] In another case, a defendant who violated a statute by driving a snowmobile on the shoulder of a highway was precluded from raising a necessity defense based on the fact that the traffic was impassible. The court found that the defendant had caused the situation himself by not choosing an alternative travel route.[54]

*5. Harm Sought to Be Avoided Is Greater than the Harm Reasonably Expected to Result from the Actor's Conduct*

Unlike the first four elements of the common law necessity defense, which involve factual determinations, the fifth element of the defense involves a value judgment. A defendant who raises a necessity defense must show that he or she made the proper choice be-

50 United States v. Bailey, 444 U.S. 394, 410 (1980) (quoting W. LAFAVE & A. SCOTT, *supra* note 6, § 50, at 379). *See also* People v. Lovercamp, 43 Cal. App. 3d 823, 831, 118 Cal. Rptr. 110, 115 (1974) (a prison escapee may not raise a necessity defense unless he shows that he did not have the time or opportunity to complain to prison authorities about threats from other inmates or to seek court protection).

51 *See, e.g.*, G. WILLIAMS, *supra* note 19, § 232, at 729.

52 W. LAFAVE & A. SCOTT, *supra* note 6, § 50, at 388. *See also Holmes*, 26 F. Cas. at 366 ("The peril must be *instant*, overwhelming, *leaving no alternative*.") (emphasis added).

Some courts and commentators also use an "imminence" requirement as a surrogate for the requirement that a harm giving rise to a necessity defense must be clear and certain. Levitin, *Putting the Government on Trial: The Necessity Defense and Social Change*, 33 WAYNE L. REV. 1221, 1225 (1987) [hereinafter Levitin]. *See also* Mitchell v. Harmony, 54 U.S. (13 How.) 115, 133 (1851) ("the danger must be immediate and impelling, and not remote or contingent").

53 Butterfield v. State, 167 Tex. Crim. 64, 317 S.W.2d 943 (1958).

54 State v. Johnson, 289 Minn. 196, 183 N.W.2d 541 (1971).

tween the two "evils" he or she faced. Accordingly, the defendant must show that the harm he or she sought to avoid by committing a criminal offense is greater than the harm sought to be avoided by the statute defining the offense.[55]

In considering a defendant's necessity claim, a court views the facts of a case through the defendant's eyes. A defendant's reasonable but mistaken belief is sufficient to satisfy many of the factual elements of necessity.[56] In contrast, a defendant's belief, reasonable or otherwise, that he or she made the proper value choice is not enough to establish this fifth necessity element.[57] A defendant's sincere good motive for committing a criminal offense will not support a necessity defense if the court determines that the harm which the defendant sought to avoid is *not* greater than the harm sought to be avoided by the statute defining the offense.[58]

Thus, the court independently weighs the relative harmfulness of the two "evils" which the defendant faced.[59] Because the underlying purpose of the necessity defense is to achieve social benefits, the court must use shared societal values as the standard for evaluating a defendant's choice of harms.[60] In determining whether the defendant's value choice was correct, the court examines "whether, *on a social view*, the value assisted was greater than the value defeated."[61]

### *6. Absence of a Legislative Pre-determination of Values*

A defendant may not raise a common law necessity defense if the legislature has preempted the defense through a pre-determina-

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55 The purpose of the necessity defense is to allow people to avoid significant harms by bringing about *lesser* harms. *See supra* notes 19-21 and accompanying text.

56 *See supra* notes 37, 44 and accompanying text.

57 W. LAFAVE & A. SCOTT, *supra* note 6, § 50, at 386.

58 G. WILLIAMS, *supra* note 19, § 239, at 746.

59 *Id.*

60 Note, *Applying the Necessity Defense*, *supra* note 21, at 84.

61 G. WILLIAMS, *supra* note 19, § 239, at 746 (emphasis added). The classic English necessity case, The Queen v. Dudley & Stephens, is a case in which the propriety of the defendants' value choice was at issue. 14 Q.B.D. 273 (1884). The defendants, along with one other man and a cabin boy, escaped a shipwreck in an open boat. After 18 days without food, the men killed the boy, who by this time was sick and weak, and fed on his body. Four days later, the men were rescued, and the defendants were charged with murder. *Id.* at 274. The defendants may well have sincerely and reasonably believed that the death of the sickly cabin boy was a lesser harm than the death of the other three men. Nevertheless, the court rejected the defendants' claim of necessity, ruling that under the law of a civilized society, it is never permissible for a person to take an innocent life to save his own. *Id.* at 286-88. *Cf.* United States v. Holmes, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (court stated in its jury instruction that, absent a pre-existing duty, a person is not bound to save another person's life by sacraficing his or her own).

tion of values. Preemption occurs when the legislature already has made a choice between the competing values confronting the actor.[62] For example, suppose that a doctor performs a therapeutic abortion in order to save a mother's life, and is subsequently charged with murder for violating the jurisdiction's criminal abortion statute. If the abortion statute explicitly criminalizes *all* abortions, even those performed to save a mother's life, then the doctor is legislatively preempted from raising a necessity defense. The legislature has made a choice of values between the mother and the fetus which the court cannot overrule.[63] If, however, the statute does not address the criminality of abortions performed to save a mother's life, then there is no legislative preemption on the issue of therapeutic abortion. The court, in analyzing the doctor's necessity defense, may make its own determination of whether the value of the mother's life was greater than the value of the aborted fetus.[64]

The legislative determination of values need not be explicit. A statute defining a criminal offense may contain an exhaustive list of the situations in which a person committing the prohibited conduct will not be held criminally liable. A court appropriately may conclude that the legislature intended this list to be a complete enumeration of allowable exceptions to the criminal statute; therefore, the court may deny the necessity defense to anyone charged with violating the statute.[65]

### C. STATUTORY NECESSITY PROVISIONS

#### *1. Model Penal Code*

The necessity defense has been codified as the "Choice of Evils" defense in the Model Penal Code ("MPC") section 3.02.[66]

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62 W. LAFAVE & A. SCOTT, *supra* note 6, § 50, at 382.

63 *Id.*

64 *See, e.g.*, Rex v. Bourne, 1 K.B. 687 (1939) (cited in W. LAFAVE & A. SCOTT, *supra* note 6, § 50, at 382 n.5).

65 P. ROBINSON, *supra* note 19, § 124(d), at 54. *See also* Bice v. State, 109 Ga. 117, 34 S.E. 202 (1899) (court rejected a defendant's use of the necessity defense upon a finding that the statute, which prohibited the possession of alcohol near a church, explicitly provided only one exception—for doctors. The defendant was not a doctor. The court concluded, "[T]he statute itself fixes the exceptions to the operation of the law. To these we cannot make any additions.").

66 Justification Generally: Choice of Evils

(1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification claimed does not otherwise

This codification encompasses most of the elements of the common law necessity defense. Under the MPC formulation, for example, the defendant must have believed that his or her conduct was necessary and conducive to avoiding an evil.[67] The MPC does not restrict the type of evil which may give rise to a necessity defense or the type of criminal offense which may be justified.[68] Just as at common law, the balancing of evils under the MPC is not committed to the defendant's private judgment, but is an issue for determination at trial.[69] Furthermore, the legislative preemption doctrine expressed in the common law is codified in subsections (1)(b) and (1)(c) of the MPC necessity formulation.[70]

Unlike some common law necessity cases, the MPC does not categorically deny the necessity defense to defendants who are at fault in creating the choice of evils situation.[71] Subsection (2), however, provides that for offenses for which recklessness or negligence is sufficient to establish culpability, a defendant to whom the necessity defense would otherwise be available may be held criminally liable if he or she acted recklessly or negligently in bringing about the situation requiring the choice of evils or in evaluating the necessity for his or her conduct. The purpose of this provision is to match a defendant's degree of culpability with the level of culpability required by the statute defining the charged offense. In addition, the MPC formulation does not require the defendant to have acted to avoid an "imminent" harm. The Code drafters believed that an imminence requirement would be unnecessarily restrictive.[72]

### 2. *Missouri's Necessity Statute*

The Missouri necessity statute,[73] under which the *O'Brien* case

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plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

MODEL PENAL CODE § 3.02 (1985).

67 *Id.* § 3.02 comment 2, at 11-12.

68 *Id.* at 14.

69 *Id.* at 12.

70 *Id.* at 13.

71 *See supra* Section II.B.4.

72 MODEL PENAL CODE § 3.02 comment 2, at 17. The drafters noted, however, that in most valid necessity cases, the threatened harm will have been imminent because "genuine necessity rests on the unavailability of alternatives that would avoid both evils, and . . . typically when the evil is not imminent some such alternative will be available." *Id.*

73 The Missouri statute reads in part:

Justification generally.

1. Unless inconsistent with other provisions of this chapter defining justifiable

was decided, is based on both the MPC and the New York necessity statutes.[74] Missouri's statutory necessity defense applies in limited situations.[75] The defense may only be raised by a defendant who committed a misdemeanor or relatively minor felony as an "emergency measure" to avoid an "imminent public or private injury."[76] In addition, the choice of evils situation must have arisen through no fault of the defendant.[77]

Furthermore, the Missouri necessity statute provides that a defendant may not justify his or her conduct on the basis of the "immorality" of the statute he or she is charged with violating.[78] This

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use of physical force, or with some other provision of law, conduct which would otherwise constitute any crime other than a class A felony or murder is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability of avoiding the injury outweighs the desirability of avoiding the injury sought to be prevented by the statute defining the crime charged.

2. The necessity and justifiability of conduct under subsection 1 may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. Whenever evidence relating to the defense of justification under this section is offered, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification.

3. The defense of justification under this section is an affirmative defense.

MO. ANN. STAT. § 563.026 (Vernon Supp. 1989).

74 MO. ANN. STAT. § 563.026 comment to 1973 Proposed Code. The New York necessity statute, N.Y. PENAL LAW § 35.05(2) (McKinney 1987), has served as a legislative model for numerous state necessity laws. It is stricter than the MPC, in several ways. First, New York imposes an "immenence" requirement, which requires the defendant's commission of a criminal offense to have been "an *emergency* measure to avoid *imminent* injury," *id.* (emphasis added); second, the harm to be avoided must "clearly outweigh" the harm at which the statute defining the defendant's offense is directed, *id.*; third, the statute completely withholds the defense from a defendant who was at fault in bringing about the situation requiring the choice of evils, *id.*; and finally, fourth, the statute contains a requirement not found in the MPC, namely that the "necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder." *Id.*

For a more complete discussion of statutory codifications of the necessity defense, see Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914 (1975) [hereinafter Note, *Justification*]; Tiffany & Anderson, *Legislating the Necessity Defense in Criminal Law*, 52 DEN. U.L. REV. 839 (1975) [hereinafter Tiffany & Anderson].

75 MO. ANN. STAT. § 563.026 comment to 1973 Proposed Code ("The section is designed to cover unusual situations .... The phraseology of the section ... is designed closely to limit its application and to preclude extension beyond the narrow scope intended.").

76 MO. ANN STAT. § 563.026 (Vernon Supp. 1989).

77 *Id.*

78 *Id.* comment to 1973 Proposed Code. In this manner, the Missouri statute parallels that of its New York counterpart. Recall that the New York statute provides that the "necessity and justifiability of such conduct may not rest upon considerations pertaining

provision makes the necessity defense unavailable to "the crusader who considers a penal statute unsalutory because it tends to obstruct his cause."[79]

### D. LEGAL EFFECT OF THE NECESSITY DEFENSE[80]

Necessity is classified as a "justification" defense.[81] Under the theory of justification, a defendant concedes that his or her conduct met the literal requirements of a criminal offense, but claims that his or her conduct was not criminal because it was socially beneficial.[82] When a defendant successfully raises a justification defense, his or her nominally criminal conduct becomes lawful.[83]

There are several corollaries to the fact that necessity is a justification defense. First, because a successfully-raised necessity defense establishes the defendant's conduct as both lawful and socially beneficial, all other actors who are faced with the same circumstances faced by the defendant are justified in engaging in the same

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only to the morality and advisability of the statute . . . ." N.Y. PENAL LAW § 35.05(2) (McKinney 1987). Provisions of this type are intended to withhold the necessity defense from a defendant who commits an act of civil disobedience, intentionally violating a criminal statute because of a belief that the statute is unjust or a belief that it should not be applied to him or her. State v. Dansinger, 521 A.2d 685, 687-88 (Me. 1987); Tiffany & Anderson, *supra* note 74, at 843-44; Note, *Criminal Trepass in an Abortion Clinic*, *supra* note 7, at 510.

79 MO. ANN. STAT. § 563.026 (comment to 1973 Proposed Code). In 1985, a Missouri legislator attempted to limit this "crusader exception" to the Missouri necessity statute. The legislator proposed an amendment to the necessity statute which would have explicitly authorized the use of the necessity defense by abortion clinic protesters. L.A. Times, Mar. 3, 1985, § 1 at 27, col. 1. The bill died in committee. Index, Journals of the Senate and House of the State of Missouri at 75 (1985).

80 For a philosophical approach to the legal effect of the necessity defense, see Note, *"Justified" Nuclear and Abortion Clinic Protest: A Kantian Theory of Jurisprudence*, 21 NEW ENG. L. REV. 725 (1985-86).

81 *See* P. ROBINSON, *supra* note 19, § 124(a); W. LAFAVE & A. SCOTT, *supra* note 6, § 50, at 381; Arnolds & Garland, *supra* note 21, at 289-90; United States v. Lopez, 662 F. Supp. 1083, 1086 (N.D. Cal. 1987). In fact, courts sometimes refer to the necessity defense as the defense of "justification." *See, e.g.*, Commonwealth v. Berrigan, 509 Pa. 118, 126 n.5, 501 A.2d 226, 230 n.5 (1985). *But see* Comment, *Necessity Defined: A New Role in the Criminal Justice System*, 29 U.C.L.A. L. REV. 409, 415-16 (1981) [hereinafter Comment, *Necessity Defined*] (arguing that necessity properly should be classified as neither a justification nor an excuse, but as a separate and distinct defense).

82 *See* Comment, *Necessity Defined*, *supra* note 81, at 413.

83 *Lopez*, 662 F. Supp. at 1086. Justification defenses are distinct from defenses classified as "excuses." Under the theory of excuse, a defendant admits that his or her conduct was wrongful and social undesirable, but claims that he or she should not be held accountable for his or her actions for some reason, such as mental incapacity. *Id.* at 413-14. Excuse focuses on the blameworthiness of the actor, while justification focuses on the desirability of the actor's conduct. *Id.* at 414. The difference between justification and excuse is the difference between being right and being forgivably wrong. Arnolds & Garland, *supra* note 21, at 290.

conduct.[84] Second, because conduct justified by necessity is considered lawful, third persons are entitled to assist in it without incurring criminal liability.[85] Finally, third parties have no right to resist justified conduct.[86]

## III. THE NECESSITY DEFENSE IN POLITICAL PROTEST CASES

Anti-abortion protesters are not the first group of activists that has attempted to raise a necessity defense to criminal charges arising from protest demonstrations. The necessity defense has been used by such groups as Vietnam War protesters,[87] anti-nuclear power activists,[88] and nuclear weapons protesters.[89] Despite the widespread use of the necessity defense by political protesters, only two appellate cases have held that such protesters could present the defense to the jury; both cases were reversed on appeal to the Pennsylvania Supreme Court.[90] Thus, state and federal appellate courts

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[84] P. ROBINSON, *supra* note 19, § 121(c), at 8. *See also* G. FLETCHER, RETHINKING CRIMINAL LAW § 10.1.1, at 761-62 (1978) [hereinafter G. FLETCHER] ("Claims of justification lend themselves to universalization. That the doing is objectively right (or at least not wrongful) means that anyone is licensed to do it.").

[85] United States v. Lopez, 662 F. Supp. 1083, 1086 (N.D. Cal. 1987); G. FLETCHER, *supra* note 84, § 10.1.1, at 762; P. ROBINSON, *supra* note 19, § 121(d).

[86] G. FLETCHER, *supra* note 84, § 10.1.2 at 762; P. ROBINSON, *supra* note 19, § 121(d).

[87] *See, e.g.*, United States v. Kroncke, 459 F.2d 697 (8th Cir. 1972); United States v. Simpson, 460 F.2d 515 (9th Cir. 1972); State v. Marley, 54 Haw. 450, 509 P.2d 1095 (1973).

[88] *See, e.g.*, United States v. Seward, 687 F.2d 1270 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983); State v. Levering, 661 S.W.2d 792 (Mo. Ct. App. 1983); People v. Hubbard, 115 Mich. App. 73, 320 N.W.2d 294 (1982); State v. Greene, 5 Kan. App. 2d 698, 623 P.2d 933 (1981); and Commonwealth v. Averill, 12 Mass. App. 260, 423 N.E.2d 6 (1981).

[89] *See, e.g.*, United States v. Dorrell, 758 F.2d 427 (9th Cir. 1985); United States v. Cassidy, 616 F.2d 101 (4th Cir. 1979); United States v. Brodhead, 714 F. Supp. 593 (D. Mass. 1989); State v. Dansinger, 521 A.2d 685 (Me. 1987); State v. Diener, 706 S.W.2d 582 (Mo. Ct. App. 1986); and State v. Champa, 494 A.2d 102 (R.I. 1985).

The necessity defense also has been used by protesters of United States policy in Central America, State v. Drummy, 18 Conn. App. 303, 557 A.2d 574 (Conn. App. Ct. 1989), anti-apartheid demonstrators, City of Chicago v. Streeter, No. 85-108644 (Cook Cty. Ill., May 1985) (cited in Comment, *Political Protest and the Illinois Defense of Necessity*, 54 U. CHI. L. REV. 1070 & n.2 (1987) [hereinafter Comment, *Political Protest*]), and advocates of increased funding for AIDS research. People v. Alderson, 144 Misc. 2d 133, 540 N.Y.S.2d 948 (N.Y. City Crim. Ct. 1989).

[90] Commonwealth v. Berrigan, 325 Pa. Super. 242, 472 A.2d 1099 (1984), *rev'd*, 509 Pa. 118, 501 A.2d 226 (1985); Commonwealth v. Capitolo, 324 Pa. Super. 61, 471 A.2d 462 (1984), *rev'd*, 508 Pa. 372, 498 A.2d 806 (1985).

Several trial courts have permitted political protesters to raise a necessity defense. For a discussion of some of these trial court decisions, as well as arguments in favor of allowing the necessity defense in political protest cases, see Note, *Applying the Necessity Defense*, *supra* note 21; Levitin, *supra* note 52; Comment, *Civil Disobedience as the Lesser Evil*, 59 U. COLO. L. REV. 961 (1988); Aldridge & Stark, *Nuclear War, Citizen Intervention, and the Necessity Defense*, 26 SANTA CLARA L. REV. 299 (1986). Other articles on the use of the

are unanimous in their view that the necessity defense is unavailable, as a matter of law, to political activists who commit criminal offenses in the course of their protests and demonstrations.

Courts which have refused to allow political protesters to raise a claim of necessity have done so by strictly and narrowly applying the elements of the necessity defense. These courts have focused particularly on (1) the nature of the harm to be avoided; (2) the necessity of the defendant's actions; (3) the availability of legal alternatives; and (4) the presence of a legislative determination of values. In addition, the courts have relied heavily on public policy considerations to support their narrow interpretations of the necessity defense.

### A. APPLICATION OF THE ELEMENTS OF NECESSITY IN POLITICAL PROTEST CASES

Many of the courts which have denied the necessity defense to political protesters have asserted that the harms which the protesters sought to avoid were too speculative and uncertain to support the defense. These courts have implicitly adopted the Supreme Court's statement in *Mitchell v. Harmony* that the threatened harm giving rise to a choice of evils may not be "remote or contingent."[91] Thus, in most cases, courts have found that political protesters are precluded from raising a necessity defense because they failed to prove that they faced a clear and certain harm.[92]

Another ground on which courts have denied the use of the ne-

necessity defense in political protest cases include Lippman, *Reflections on Non-Violent Resistance and the Necessity Defense*, 11 HOUS. J. INT'L L. 277 (1989); Bauer & Eckerstrom, *The State Made Me Do It: Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173 (1987) [hereinafter Bauer & Eckerstrom]; Comment, *Political Protest*, *supra* note 89.

[91] Mitchell v. Harmony, 54 U.S. (13 How.) 115, 133 (1851). The adoption of language from *Mitchell* has not been explicit; none of the courts has cited *Mitchell* on this point.

Courts have expressed the *Mitchell* requirement of a clear and certain harm in numerous ways. *See, e.g.*, Commonwealth v. Brugmann, 13 Mass. App. 373, 379, 433 N.E.2d 457, 461 (1982) (defendant must have "faced . . . a clear and imminent danger, not one which is debatable or speculative); Commonwealth v. Averill, 12 Mass. App. 260, 262, 423 N.E.2d 6, 8 (1985) (necessity only available if defendant faced an "obvious and generally recognized harm"); Commonwealth v. Capitolo, 508 Pa. 372, 378, 498 A.2d 806, 809 (1985) (harm must be "readily apparent and recognizable to reasonable persons"); and State v. Greene, 5 Kan. App. 2d 698, 701, 623 P.2d 933, 937 (1981) (citing State v. Warshow, 138 Vt. 22, 25, 410 A.2d 1000, 1000 (1979)) (harm must be "reasonably certain to occur").

[92] *But see Brugmann*, 13 Mass. App. at 379, 433 N.E.2d at 462 (court found that defendants *had* presented enough evidence to establish that the threatened harm was not debatable or speculative; however, the necessity defense was held to be unavailable on other grounds).

cessity defense to political protesters is the protesters' failure to demonstrate a causal relationship between their actions and avoidance of the threatened harm. If a defendant reasonably could not have expected his or her criminal actions to prevent or diminish the perceived greater harm, then the defendant cannot argue that those actions were "necessary" to avoid that harm.[93] Some courts have applied the causal relationship requirement very strictly, holding that a defendant cannot claim necessity unless he or she could reasonably have expected his or her actions to completely eliminate the threatened harm.[94] Other courts have been more liberal, suggesting that a defendant need only demonstrate a reasonable belief that his or her conduct would reduce the risk posed by the threatened harm.[95] Under either standard, however, courts have rejected the notion that a person can reasonably expect to eliminate or lessen the "evils" of nuclear war, nuclear power, apartheid, or human rights violations in Central America by staging an illegal demonstration.

A third rationale which courts frequently use in denying the necessity defense to political protesters is the availability of legal alternatives. Several courts have noted that protesters need not resort to illegal tactics in order to publicize their causes or influence public opinion. Activists are free to participate in the political process, to make use of the electronic and print media, and to distribute literature and make speeches in public places.[96] Courts have been un-

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93 *See supra* section II.B.2. *See also Capitolo*, 508 Pa. at 379, 498 A.2d at 809.

94 Levitin, *supra* note 52, at 1235. *See, e.g.*, United States v. Seward, 687 F.2d 1270, 1273 (10th Cir. 1982) (defendants must show that a reasonable person would think that defendants' actions "would terminate the official policy of the United States government as to nuclear weapons or nuclear power"); State v. Marley, 54 Haw. 450, 472, 509 P.2d 1095, 1109 (1973) (defendants did not show that their conduct was "reasonably designed to actually *prevent* the threatened greater harm") (emphasis added); and Commonwealth v. Averill, 12 Mass. App. 260, 262, 423 N.E.2d 6, 7-8 (1981) (defendants' conduct "could not extinguish an immediate peril, if there was one").

95 Levitin, *supra* note 52, at 1235 n.63. *See, e.g.*, United States v. Simpson, 460 F.2d 515, 518 (9th Cir. 1972) (it was unreasonable for defendant to believe that his actions might "have any significant effect upon the supposed ills that he hoped to remedy"); State v. Dansinger, 521 A.2d 685, 688 (Me. 1987) ("there is no reason to believe that the Defendants' [sic] acts would *lessen* the threat of harm") (emphasis added); People v. Hubbard, 115 Mich. App. 73, 80, 320 N.W.2d 294, 298 (1982) (defendants' actions "could not reasonably be presumed *to have any effect* in halting the production of nuclear power") (emphasis added); Commonwealth v. Berrigan, 509 Pa. 118, 123, 501 A.2d 226, 229 (1985) (defendant reasonably must have believed that their actions "would be effective in avoiding or *alleviating* the impending harm") (emphasis added); Commonwealth v. Capitolo, 508 Pa. 372, 379, 498 A.2d 806, 809 (1985) (defendants' conduct could have "neither terminated nor *reduced* the alleged danger") (emphasis added).

96 United States v. Dorrell, 758 F.2d 427, 432 (9th Cir. 1985); United States v. Brodhead, 714 F. Supp. 593, 597 (D. Mass. 1989); Commonwealth v. Hood, 389 Mass. 581,

sympathetic to the argument that legal protests are inadequate or ineffective.[97] Courts also have denied the necessity defense to protesters who sought to convince government officials or government bodies to take specific remedial actions because these protestors also have the option of pursuing their complaints through legal channels.[98]

Finally, several courts have held that activists who protest government policies or governmentally-sanctioned activities are legislatively preempted from raising a necessity defense to criminal charges arising from their protests. These courts have given a liberal interpretation to the traditional legislative preemption element of the necessity defense.[99] These courts have found that legislatures can preclude political protesters from raising a necessity defense by making broad legislative choices in favor of particular policies or activities. They argue that by enacting a policy or sanctioning an activity, a legislature makes a value choice which courts may not reconsider through application of the necessity defense.[100]

For example, in some nuclear power protest cases, courts have asserted that in passing legislation encouraging and regulating nuclear power, state legislatures and Congress have exhaustively debated the merits and dangers of nuclear power and have made a value choice in favor of nuclear energy. The legislatures therefore implicitly have precluded the use of the necessity defense in nuclear power protest cases.[101]

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593, 452 N.E.2d 188, 196 (1983); State v. Diener, 706 S.W.2d 582, 585 (Mo. Ct. App. 1986).

97 *See, e.g., Seward*, 687 F.2d at 1275; *Brodhead*, 714 F. Supp. at 597.

98 *See, e.g.*, Commonwealth v. Brugmann, 13 Mass. App. 373, 380-381, 433 N.E.2d 457, 462-63 (1982) (protesters charged with trespass for occupying a restricted area of a nuclear power plant presented strong evidence of actual radiation leaks at the plant; court nevertheless rejected defendants' necessity claim because defendants had not attempted to abate the hazard by initiating court actions on behalf of the Nuclear Regulatory Commission or its state counterpart). *See also* People v. Alderson, 144 Misc. 2d 133, 144, 540 N.Y.S.2d 948, 955-56 (N.Y. City Crim. Ct. 1989) (necessity defense denied to demonstrators protesting reduction in AIDS funding in part because court found that protesters could have lobbied legislators or arranged a meeting with the health department's counsel).

99 For a more detailed discussion of legislative preemption, see *supra* section II.B.6.

100 For criticisms of this liberal interpretation of legislative preemption, see Levitin, *supra* note 52, at 1237-38; Note, *Applying the Necessity Defense*, *supra* note 21, at 107-110.

101 *See* Commonwealth v. Averill, 12 Mass. App. 260, 263, 423 N.E.2d 6, 8 (1985) (the necessity defense does not apply to harms which are "the subject of legislation and government regulation."); People v. Hubbard, 115 Mich. App. 73, 79, 320 N.W.2d 294, 297 (1982) ("the necessity defense is unavailable in an area where there has been exhaustive legislative debate and legislation"); *see also* State v. Diener, 706 S.W.2d 585, 586 (Mo. Ct.

B. POLICY CONSIDERATIONS

In effect, the necessity defense allows individuals to make private legal determinations in accordance with their personal convictions.[102] Fearing that widespread use of the defense will result in "ad hoc self help which forebodes legal chaos,"[103] courts understandably have been hesitant to extend the application of the necessity defense to political protest cases.[104] The fact that necessity is a justification defense, and therefore lends itself to universalization,[105] contributes to judicial reluctance to apply the defense widely.[106] Thus, several courts have stated flatly that the necessity defense may not be used by people who commit criminal offenses to show their disagreement with government policies.[107]

Another policy concern expressed by courts is the fear that acceptance of a political necessity defense would subvert the democratic process by transferring important political questions from a legislative or executive forum to a judicial forum.[108] In fact, political protesters often make claims of necessity so that they will have an opportunity to discuss political issues in court and "educate" the

App. 1986) (necessity defense denied to anti-nuclear weapons activists because Congress' national defense policies represent affirmative and conclusive value choices).

A more expansive interpretation of what constitutes a legislative choice of values is found in Commonwealth v. Berrigan, 509 Pa. 118, 501 A.2d 226 (1985). In *Berrigan*, the necessity defense was denied to trespassers at a plant manufacturing nuclear warheads because the harm sought to be avoided was a legal activity. "[S]ince the manufacture of shell casings for nuclear warheads is legal conduct . . . it is the type of conduct to which the Legislature has spoken in excluding the justification defense . . . . [T]he justification defense is aimed at stopping perceived *illegal* conduct, not legal conduct." *Id.* at 126 n.5, 501 A.2d at 230 n.5 (emphasis in original).

The issue of whether a legal activity can ever constitute a "harm" giving rise to a necessity defense is controversial and has played an important role in the question of whether the necessity defense is available to abortion clinic protesters. *See infra* notes 141-147 and accompanying text.

102 Comment, *Political Protest*, *supra* note 89, at 1087-88.

103 Commonwealth v. Capitolo, 508 Pa. 372, 381, 498 A.2d 806, 810 (1985).

104 *See also Hubbard*, 115 Mich. App. at 79, 320 N.W.2d at 297 (the necessity defense "cannot permit an individual to substitute his own convictions for those of a reasoned and democratic decision-making process"); People v. Alderson, 144 Misc. 2d 133, 144, 540 N.Y.S.2d 948, 956 (N.Y. City Crim. Ct. 1989) ("One's moral convictions alone can never be the basis for a justification defense.").

105 *See supra* note 84 and accompanying text.

106 *See* United States v. Dorrell, 758 F.2d 427, 433 (9th Cir. 1985) (acceptance of defendant's necessity defense "would amount to recognizing that an individual may assert a defense to criminal charges whenever he or she disagrees with a result reached by the political process.").

107 *Dorrell*, 758 F.2d at 432; United States v. Brodhead, 714 F. Supp. 593, 597 (D. Mass. 1989); State v. Diener, 706 S.W.2d 582, 586 (Mo. Ct. App. 1986); *Alderson*, 144 Misc. 2d at 143, 540 N.Y.S.2d at 955.

108 *Hubbard*, 115 Mich. App. at 79, 320 N.W.2d at 297.

jury about perceived social harms.[109] The courts have held, therefore, that a protester may not use the courtroom as "a platform from which one may expound his opinions upon political issues."[110]

## IV. Application of the Necessity Defense to Abortion Clinic Protests

Like other political activists, abortion clinic protesters have been uniformly unsuccessful at the appellate level in raising the necessity defense to criminal charges arising from their demonstrations and protests.[111] In denying the defense to abortion clinic trespassers, many courts have employed the same analysis used in cases involving other political protesters.[112] Although not all of the arguments used to deny the necessity defense to general political protesters apply with equal force to anti-abortion activists, abortion clinic protesters clearly are precluded from raising a necessity defense under the political protest analysis. The most powerful arguments against allowing abortion clinic trespassers to raise the necessity defense, however, stem from factors which are more closely associated with the abortion clinic protest context: the absence of social consensus on the abortion issue; the current legal status of fetuses; and the constitutional protection which the Supreme Court has granted to abortion rights.

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109 Comment, *Political Protest*, *supra* note 89, at 1090; Levitin, *supra* note 52, at 1225; Bauer & Eckstrom, *supra* note 90, at 1176.

110 *Diener*, 706 S.W.2d at 585.

111 *See* Cleveland v. Municipality of Anchorage, 631 P.2d 1073 (Alaska 1981); Bird v. Municipality of Anchorage, 787 P.2d 119 (Alaska Ct. App. 1990); Pursley v. State, 21 Ark. App. 107, 730 S.W.2d 250 (1987); Gaetano v. United States, 406 A.2d 1291 (D.C. App. 1979); People v. Smith, 161 Ill. App. 3d 213, 514 N.E.2d 211 (1987), *appeal denied*, 118 Ill. 2d 550, 520 N.E.2d 391 (1988); People v. Krizka, 92 Ill. App. 3d 288, 416 N.E.2d 36 (1981); People v. Stiso, 93 Ill. App. 3d 101, 416 N.E.2d 1209 (1981); Sigma Reproductive Health Center v. State, 297 Md. 660, 467 A.2d 483 (1983); State v. O'Brien, 784 S.W.2d 187 (Mo. Ct. App. 1989); City of St. Louis v. Klocker, 637 S.W.2d 174 (Mo. Ct. App. 1982); State v. Clowes, 100 Or. App. 266, 785 P.2d 1071 (1990); Commonwealth v. Markum, 373 Pa. Super. 341, 541 A.2d 347 (1988), *appeal denied*, 520 Pa. 615, 554 A.2d 507 (1988); *cert. denied*, 109 S. Ct. 1533 (1989); Commonwealth v. Wall, 372 Pa. Super. 534, 539 A.2d 1325 (1988), *appeal denied*, 521 Pa. 604, 555 A.2d 114 (1988); Erlandson v. State, 763 S.W.2d 845 (Tex. Ct. App. 1988), *cert. denied*, 110 S. Ct. 152 (1989); Bobo v. State, 757 S.W.2d 58 (Tex. Ct. App. 1988), *cert. denied*, 109 S. Ct. 2066 (1989); Crabb v. State, 754 S.W.2d 742 (Tex. Ct. App. 1988), *cert. denied*, 110 S. Ct. 65 (1989); Hoffart v. State, 686 S.W.2d 259 (Tex. Ct. App. 1985), *cert. denied*, 479 U.S. 824 (1986); Buckley v. City of Falls Church, 7 Va. App. 32, 371 S.E.2d 827 (1988); State v. Horn, 126 Wis. 2d 447, 377 N.W.2d 176 (Wis. Ct. App. 1985), *aff'd*, 139 Wis. 2d 473, 407 N.W.2d 854 (1987).

112 *See infra* section IV.A.

A. ANTI-ABORTION ACTIVITIES AS POLITICAL PROTESTS

Abortion clinic protesters are similar in many respects to other political protesters. Like anti-war activists and nuclear power protesters, most abortion clinics trespassers seek to change government policy. In fact, at least one group of anti-abortion activists explicitly has compared itself to other political protesters who intentionally break laws in an attempt to change them.[113] Abortion clinic protesters hope that by trespassing at abortion clinics, they can convince the Supreme Court to overturn *Roe v. Wade*, which granted constitutional protection to abortion rights.[114]

Thus, opposition to the government's current abortion policy lies at the root of virtually all abortion clinic demonstrations, even those demonstrations conducted by individuals who claim to have only non-political goals. In *Cleveland v. Municipality of Anchorage*, for example, the defendants, charged with trespassing at an abortion clinic, claimed that they were merely intervening to protect the "human lives" scheduled to be aborted that day. The court nevertheless found that the defendants' actions were more appropriately characterized as a general protest.[115]

Unlike most political protesters, however, abortion-clinic trespassers do have an immediately realizable, non-political goal as well: they seek to prevent individual abortions, which they view as murders.[116] Because abortion clinic protesters have a non-political

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113 Washington Post, Feb. 25, 1978, sec. B, at 1 (quoting attorneys for a group of anti-abortion protesters in Fairfax County, Virginia, after the group had been enjoined from demonstrating at an abortion clinic. For a more detailed analysis of this event, see *infra* notes 209-213 and accompanying text.)

114 Roe v. Wade, 410 U.S. 113 (1973), held that there is a constitutional right of privacy implicit in the fourteenth amendment which encompasses a woman's right to obtain an abortion. Under *Roe*, no state can impose any restrictions on a woman's abortion rights during the first three months of her pregnancy. *Id.* at 164. In addition, prior to the time that the fetus becomes "viable," or potentially able to live outside the womb, the state may only regulate abortion in ways that are "reasonably related to maternal health." *Id.*

115 Cleveland v. Municipality of Anchorage, 631 P.2d 1073, 1077, 1080 (Alaska 1981). *See also* Bird v. Municipality of Anchorage, 787 P.2d 119, 122 (Alaska Ct. App. 1990) (although trespassers claimed that their only goal was to prevent specific abortions, court held that "it would be inappropriate to characterize the trespasses as anything other than a protest"); Sigma Reproductive Health Center v. State, 297 Md. 660, 681, 467 A.2d at 493 (1983) (trespassing to "save the lives of the unborn" held to be a "protest of the activities of the clinic").

116 Comment, *The Necessity Defense in Abortion Clinic Trespass Cases*, 32 ST. LOUIS U. L.J. 523, 528 (1987) [hereinafter Comment, *Abortion Clinic Trespass Cases*]. *See, e.g.*, *Cleveland*, 631 P.2d at 1077; People v. Krizka, 92 Ill. App. 3d 288, 291, 416 N.E.2d 36, 37 (1981); People v. Stiso, 93 Ill. App. 3d 101, 102, 416 N.E.2d 1209, 1211 (1981); *Sigma*, 297 Md. at 681, 467 A.2d at 493; City of St. Louis v. Klocker, 637 S.W.2d 174, 175 (Mo. Ct. App. 1982); Commonwealth v. Wall, 372 Pa. Super. 534, 540, 539 A.2d 1325, 1328 (1988);

goal as well as a political goal, some of the arguments used by the courts to deny the necessity defense to other political protesters are less applicable in the abortion clinic trespass context. For example, the alleged "harm" which abortion clinic trespassers seek to avoid is, in most cases, less speculative and remote than the harms sought to be avoided by other political protesters. Abortion clinic protesters often can prove that abortions are scheduled to be performed at a particular clinic on the day of their demonstrations.[117] Thus, the perceived harm which abortion clinic trespassers hope to prevent, unlike the harms sought to be avoided by many other protesters, is not "a theoretical future [event] . . . that may or may not occur."[118]

Similarly, anti-abortion activists, unlike most other political protesters, often can establish a causal relationship between their activities and avoidance of the perceived harm. Admittedly, several courts have asserted that abortion clinic protesters cannot reasonably expect to stop abortions from taking place.[119] These courts argue that because of their limited numbers, trespassing demonstrators only can block access to some abortion clinics, and only for a limited time; at most, therefore, demonstrators can hope to postpone some abortions or to force some women to go to other clinics.[120]

Many other courts have recognized, however, that in the political protest context, a defendant raising a necessity defense need not demonstrate that his or her actions could have *eliminated* the threatened harm. To establish the requisite causal relationship, a protester need only show that his or her actions reasonably could have been expected to *diminish* or *abate* the threatened harm.[121] Abortion clinic protesters can argue that during the course of their demonstrations, they effectively prevent scheduled abortions from

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State v. Horn, 126 Wis. 2d 447, 455, 377 N.W.2d 176, 180 (Wis. Ct. App. 1985), *aff'd*, 139 Wis. 2d 473, 407 N.W.2d 854 (1987).

Other abortion clinic protesters have asserted a need to inform women of the psychological consequences of abortion, Pursley v. State, 21 Ark. App. 107, 109, 730 S.W.2d 250, 252 (1987); Buckley v. City of Falls Church, 7 Va. App. 32, 371 S.E.2d 827, 828 (1988), or to protect the "health and well-being" of women who are planning to undergo abortions. *Sigma*, 297 Md. at 663, 467 A.2d at 484.

117 *See, e.g.*, *Krizka*, 92 Ill. App. 3d at 289, 416 N.E.2d at 36; *Klocker*, 637 S.W.2d at 175.

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

119 *Cleveland*, 631 P.2d at 1080; Commonwealth v. Markum, 373 Pa. Super. 341, 349, 541 A.2d 347, 350-351 (1988); *Wall*, 372 Pa. Super. at 542, 539 A.2d at 1329.

120 *Cleveland*, 631 P.2d at 1080; *Markum*, 373 Pa. Super. at 349, 541 A.2d at 351; *Wall*, 372 Pa. Super. at 542, 539 A.2d at 1329.

121 *See supra* note 95.

taking place.[122] They thereby abate the "harm" of abortion, albeit only temporarily.[123] In addition, at least one group of anti-abortion activists has offered evidence of women who actually have been dissuaded from having abortions by abortion clinic protesters.[124]

Nevertheless, the other arguments which courts have used in denying the necessity defense to general political protesters do apply to abortion clinic protesters as well. Like other political protesters, anti-abortion activists have legal alternatives for airing their political views and seeking policy changes. Anti-abortion activists can lobby for legislative reform[125] or work for passage of a constitutional amendment restricting abortion rights. As various courts have noted, abortion opponents can legally express their opposition to abortion by peacefully demonstrating and distributing leaflets on public property,[126] by advertising on billboards or in other media,[127] by canvassing door to door,[128] by making telephone calls,[129] or by sending literature through the mail.[130] Abortion opponents also can advance their non-political goal of dissuading women from obtaining abortions through legal means, for they can demonstrate and distribute information to potential clients on public streets outside abortion clinics.[131]

Furthermore, the public policy concerns which have prevented courts from accepting the necessity defense in political protest cases are equally valid in abortion clinic trespass cases. As several courts have noted, accepting the necessity defense would permit abortion opponents to choose which laws to obey or disobey based on their personal beliefs, which is "tantamount to judicially sanctioning vigi-

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122 *See, e.g.*, People v. Krizka, 92 Ill. App. 3d 288, 289, 416 N.E.2d 36 (1980) (protesters physically interposed themselves between women seeking abortions and clinic employees); People v. Stiso, 93 Ill. App. 3d 101, 416 N.E.2d 1209, 1210 (1981) (protesters blocked door to abortion clinic's surgery room); Bobo v. State, 757 S.W.2d 58, 60 (Tex. Ct. App. 1988) (defendants chained the doors of an abortion clinic shut to prevent staff and patients from entering). *See also infra* notes 187-92 and 209-13 and accompanying text.

123 *See* Comment, *Abortion Clinic Trespass Cases*, *supra* note 116, at 535 (arguing that the actions of an abortion clinic trespasser who prevents a woman from obtaining an abortion at a particular clinic on a particular day are valuable, even though the woman may obtain an abortion at a later time).

124 Gaetano v. United States, 406 A.2d 1291, 1292 (D.C. App. 1979).

125 *See* Commonwealth v. Wall, 372 Pa. Super. 534, 542, 539 A.2d 1325, 1329 (1988).

126 Sigma Reproductive Health Center v. State, 297 Md. 660, 689, 467 A.2d 483, 497 (1983); Commonwealth v. Markum, 373 Pa. Super. 341, 349, 541 A.2d 347, 351 (1988); *Wall*, 372 Pa. Super. at 542, 539 A.2d at 1329.

127 Buckley v. City of Falls Church, 7 Va. App. 32, 371 S.E.2d 827, 828 (1988).

128 Northeast Women's Center v. McMonagle, 868 F.2d 1342, 1352 (3d Cir. 1989).

129 *Id.*

130 *Id.*

131 Commonwealth v. Wall, 372 Pa. Super. 534, 542, 539 A.2d 1325, 1329 (1988).

lantism,"[132] and may lead to "a society of strife and chaos."[133] In addition, allowing the necessity defense in abortion clinic protest cases would undermine the proper workings of the government. Abortion opponents should seek to change the legal status of abortion through appropriate legal channels rather than by committing criminal offenses.[134]

Finally, under the liberal legislative-preemption analysis employed in other political protest cases,[135] abortion clinic protesters are preempted from raising a necessity defense. First, many state legislatures have weighed the competing values involved in abortion clinic trespass cases and have achieved a legislative balance, reflected in state abortion statutes,[136] which cannot be disturbed by the courts.[137] Several courts have asserted that these regulatory statutes represent a clear and deliberate legislative choice in favor of abortion that precludes the necessity defense in abortion protest cases.[138]

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132 *Id.*

133 Commonwealth v. Markum, 373 Pa. Super. 341, 348, 541 A.2d 347, 350 (1988).

134 People v. Crowley, 142 Misc. 2d 663, 671, 538 N.Y.S.2d 146, 152 (N.Y. Just. Ct. 1989); State v. Horn, 126 Wis. 2d 447, 456, 377 N.W.2d 176, 180 (Wis. Ct. App. 1985).

135 *See supra* notes 97-101 and accompanying text.

136 *See, e.g.*, ALASKA STAT. § 18.16.010 (1986); ARK. CODE ANN. §§ 20-9-302; 20-16-801 through 20-16-808 (Supp. 1989); IDAHO CODE §§ 18-604 through 18-611 (1987); IND. CODE ANN. §§ 35-1-58.5-1 through 35-1-58.5-5 (West Supp. 1990); KY. REV. STAT. ANN. §§ 311-710 through 311-760 (Michie 1990); MINN. STAT. ANN. §§ 145.411-145.416 (West 1989); NEV. REV. STAT. ANN. §§ 442.240-442.270 (Michie 1986); N.C. GEN. STAT. § 14-45.1 (1986); OKLA. STAT. ANN. tit. 63, §§ 1-730 through 1-741 (West 1984); S.C. CODE ANN. §§ 44-41-10 through 44-41-80 (Law Co-op 1985); S.D. CODIFIED LAWS ANN. §§ 34-23A-1 through 34-23A-19 (1986); TENN. CODE ANN. §§ 39-15-201 through 39-15-203 (Supp. 1990); UTAH CODE ANN. §§ 76-7-301 through 76-7-305.5 (1990).

137 *See* Cleveland v. Municipality of Anchorage, 631 P.2d 1073, 1081 (Alaska 1981) ("The Alaska legislature is better suited to strike the balance [of values involved in abortion clinic protests] than is this Court.").

138 *See id.* at 1080-81; City of St. Louis v. Klocker, 637 S.W.2d 174, 177 (Mo. Ct. App. 1982); *Crowley*, 142 Misc. 2d at 671, 538 N.Y.S.2d at 151; Commonwealth v. Markum, 373 Pa. Super. 341, 349, 541 A.2d 347, 350 (1988); Commonwealth v. Wall, 372 Pa. Super. 534, 543, 539 A.2d 1325, 1329 (1988). This argument is weak, however, because many state statutes regulating abortion actually reflect a desire on the part of state legislatures to restrict abortions as much as possible. *See, e.g.*, MO. ANN. STAT. § 188.010 (Vernon Supp. 1989) ("It is the intention of the general assembly of Missouri . . . to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes.") *See also* ILL. ANN. STAT. ch. 38, ¶ 81-21 (Smith-Hurd Supp. 1990) (describing legislature's intention to return to a policy of permitting only abortions necessary to save the mother's life if Roe v. Wade is ever overturned or modified or if the Constitution is amended). Also, the Illinois statutes "regulating" abortion, like many state abortion statutes, are located in the Criminal Code.

One court has held that a state legislature's *repeal* of all laws which might inhibit or restrict a woman's abortion decision represents a legislative value choice in favor of

Second, even in states where the legislature has not made an implicit value choice in favor of abortion, abortion clinic protesters are preempted from raising a necessity defense by the fact that abortion rights are constitutionally protected.[139] Admittedly, it would be unreasonable to assert that today's society has uniformly embraced the *Roe* Court's value choice. Nonetheless, the constitutional protection afforded abortion has the legal effect of a declaration of society's values concerning abortion, which precludes the use of the necessity defense by abortion clinic protesters.[140]

Some courts and commentators have further liberalized the legislative preemption analysis by asserting that *legal* human conduct can never be a "harm" which gives rise to a choice of evils defense. They therefore argue that abortion clinic protesters are precluded from raising a necessity defense simply because abortion is not illegal.[141] This argument seems to suggest that a legislature's decision not to illegalize an activity represents an implicit value choice in favor of that activity which cannot be circumvented through application of the necessity defense.

Abortion opponents vigorously have challenged the notion that legal activities can never be considered necessity-triggering harms.[142] Under certain circumstances, one can argue persuasively

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abortion which cannot be challenged through application of the necessity defense. State v. Clowes, 100 Or. App. 266, 272, 785 P.2d 1071, 1074 (1990).

139 *See Markum*, 373 Pa. Super. at 349, 541 A.2d at 350 ("Were [abortion] not protected by [regulatory] legislation, the justification defense would continue to remain unavailable because a women's right to abortion is protected by the Constitution of the United States.").

140 *See* P. ROBINSON, *supra* note 19, § 124(d), at 52 ("as long as the law or policies being protested have been lawfully adopted, they are conclusive evidence of the community's view of the issue" and preclude the use of the necessity defense).

141 *See, e.g.*, Note, *Criminal Trepass in an Abortion Clinic*, *supra* note 7, at 513; Cleveland v. Municipality of Anchorage, 631 P.2d 1073, 1078 n.10 (Alaska 1981). These courts and commentators assume that abortion protests are conducted at clinics which perform legal abortions. Some judicial opinions suggest that the necessity defense may be available to anti-abortion activists who protest the performance of *illegal* abortions. *See* People v. Archer, 143 Misc. 2d 390, 537 N.Y.S.2d 726 (N.Y. City Ct. 1988); *Markum*, 373 Pa. Super. at 355, 541 A.2d at 354 (Tamilia, J., dissenting); Bobo v. State, 757 S.W.2d 58, 63 (Tex. Ct. App. 1988). *But see* Comment, *Political Protest*, *supra* note 89, at 1084 (arguing that the necessity defense is unavailable to *all* political protesters, even those who protest illegal activities, because of public policy considerations and the availability of legal protest alternatives.).

142 One anti-abortion commentator has cited Professor Robinson's treatise on criminal law defenses in support of the argument that legal human conduct *can* support a necessity defense. Comment, *Abortion Clinic Trespass Cases*, *supra* note 116, at 528 (citing P. ROBINSON, *supra* note 19, § 124(b), at 48). This commentator misreads Robinson's treatise, however. Professor Robinson asserts that a human-created "harm" which triggers a necessity defense "need not be unlawful, *as long as it is unjustified*." P. ROBINSON, *supra* note 19, § 124(b), at 48 (emphasis added). The distinction between "unlawful"

that a legal activity may constitute a "harm to be avoided." The appellant in *O'Brien*, for example, suggested that a person who sees a three-year-old child lighting matches and dropping them into a gasoline can, and who trespasses in order to take the matches away, may raise a necessity defense even though the threatened harm is not unlawful.[143] The *O'Brien* court, while not taking a clear position on the issue, acknowledged the possibility that in some cases, legal human conduct might support a necessity defense.[144]

Even if circumstances do exist in which legal human conduct can constitute a "harm to be avoided," however, abortion clinic protesters nevertheless are preempted from raising a necessity defense. Abortion is unlike those legal human activities that arguably give rise to a necessity defense because abortion is not only *legal*, but also *legally protected*.[145] The actions of a child who plays with matches or a police officer who moves an injured person without a stretcher are not illegal, but they are not affirmatively protected by law. In contrast, the "harm" which abortion clinic trespassers seek to avoid has been granted affirmative legal protection by both state legislatures and the Constitution, as interpreted in *Roe*. An activity which has been granted affirmative legal protection, much more than an activity on which the legislature and Constitution have been silent, is the product of a legislative value choice which preempts the use of the necessity defense.[146]

In addition, the necessity defense's underlying rationale requires that the defense be withheld from abortion clinic protesters, even if the defense is appropriate in other cases involving legal human conduct. As one commentator has noted, "[t]he [necessity]

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conduct and "unjustified" conduct makes the necessity defense available to a person who commits a criminal offense in response to a threat from a person who "is not criminally liable for his threats because of a nonexculpatory defense or a disability that would qualify him for an excuse." *Id.* Thus, according to Robinson, lawful human conduct can support a necessity defense only if the conduct *would have been* unlawful but for some defense, such as insanity, which excused the actor from criminal liability. This narrow exception does not apply to abortion clinic protesters, for abortion's legality is based on the Constitution, not on the availability of an exculpatory excuse to those who obtain or perform abortions.

143 Supplemental Brief for Appellant, *supra* note 14, at 11.

144 *O'Brien*, 784 S.W.2d at 192 n.5 (citing City of Chicago v. Mayer, 56 Ill. App. 2d 366, 308 N.E.2d 601 (1974) (necessity defense allowed medical student after he prevented police officers from moving injured person without a stretcher)). For another argument that legal activities may constitute "harms to be avoided," see People v. Archer, 143 Misc. 2d 390, 398, 537 N.Y.S.2d 726, 730-31 (N.Y. City Ct. 1988) (noting that prostitution, which is legal in Nevada, may nevertheless qualify as a "harm to be avoided," for although it is legal, it is not necessarily moral).

145 *See* People v. Stiso, 93 Ill. App. 3d 101, 104, 416 N.E.2d at 1209, 1212 (1981).

146 *See id.* at 104, 416 N.E.2d at 1211.

doctrine was developed to deal with unusual circumstances—ones never contemplated by the criminal or civil law."[147] Thus, legal conduct can give rise to a necessity defense only when the harm emanating from the conduct was not contemplated or foreseen at the time the conduct was legalized. Abortion is not an unforeseen or unanticipated "harm" arising from otherwise legal activity. The performance of abortions is precisely what the Supreme Court contemplated when it declared abortion to be constitutionally protected, and what state legislatures anticipated when they enacted statutes regulating abortion. Abortion clinic protesters therefore are precluded from raising a necessity defense.

### B. Abortion Clinic Protest Distinguished from Political Protest

In addition to the arguments applicable to political protests in general, independent grounds more closely associated with abortion clinic protests also exist for denying the necessity defense to abortion clinic trespassers. Abortion, the "harm" sought to be avoided by anti-abortion activists, differs fundamentally from the harms sought to be avoided by many other political protesters; there is no social consensus on the conflicting values involved in abortion clinic protests, and abortion threatens no legally recognized interest. In addition, the constitutional protection which the Supreme Court has granted to first-trimester abortions prevents courts from exculpating abortion clinic trespassers who attempt to prevent women from receiving abortions. These factors represent even stronger reasons for denying the necessity defense to abortion clinic trespassers than the arguments courts have used to deny the defense to other political protesters.

#### *1. Abortion as a "Greater Harm" or a "Harm to Be Avoided"*

Abortion clinic trespassers who assert a necessity defense claim that abortion is a "greater harm" than trespass because abortion is the killing of an "unborn child." Because there is no social consensus on the abortion issue, however, abortion clinic trespassers cannot claim that their "balancing of harms" advances collectively shared values.[148] The necessity defense is therefore unavailable to anti-abortion activists, for "[n]ecessity is meant to justify action that

147 Note, *Criminal Trepass in an Abortion Clinic*, *supra* note 7, at 515. *See also supra* notes 38-41 and accompanying text.

148 Recall that a defendant raising a necessity defense must have acted to avoid a harm that *society* considers "greater" than the harm sought to be avoided by the statute defining the charged offense. *See supra* section II.B.5.

society would *clearly* want to exonerate."[149]

For example, when a person destroys property to prevent the spread of a fire or a disease, he or she advances society's belief that human life is more valuable than property.[150] Similarly, when an ambulance on its way to an accident ignores a traffic signal, or a druggist dispenses medication without a prescription in an emergency, societal interests are advanced. Many political protesters also can argue that their actions reflect society's values; few people would disagree that criminal trespass is a lesser harm than cancer-causing radiation leaks, nuclear meltdown, or nuclear war.[151] In contrast, the basic claim of anti-abortion activists, that abortion is tantamount to murder and is therefore a "greater harm" which justifies criminal trespass, is not a collectively shared value. It is a highly controversial and hotly debated issue. Thus, a person who commits a criminal trespass in order to prevent abortions does not act in advancement of society's shared interests, and cannot raise a necessity defense.[152]

Beyond the fact that there is no social consensus on the abortion issue, the necessity defense is also unavailable as a matter of law to abortion clinic protesters because under the Constitution, as currently interpreted by the Supreme Court, abortion is not a "harm."[153] Professor Robinson defines a "harm" in the necessity context as an unjustified threat to a legally protected interest.[154] He goes on to define "legally protected interests" as "those interests that the community is willing to recognize and that are not specifically denied recognition by the legal system."[155] Under *Roe*, first-trimester abortions, performed in licensed facilities, do not threaten any legally protected interests.[156] The *Roe* Court specifically denied

149 Note, *Criminal Trepass in an Abortion Clinic*, *supra* note 30, at 515 (emphasis added).

150 W. LAFAVE & A. SCOTT, *supra* note 6, § 50, at 382.

151 Note, *Applying the Necessity Defense*, *supra* note 21, at 107.

152 *Id.* at 107 n.185 ("[I]f there is no moral consensus in the community, then an actor cannot claim to be acting upon the basis of shared societal values; in areas of moral controversy an actor cannot act on behalf of the community. Therefore, the [necessity] defense should be unavailable in such situations.").

153 Recall that one of the essential elements of the necessity defense is that the defendant acted to avoid a significant harm. *See supra* section II.B.1.

154 P. ROBINSON, *supra* note 19, § 124(b), at 47. *See also* City of St. Louis v. Klocker, 637 S.W.2d 174, 176 (Mo. Ct. App. 1982) ("a public or private injury . . . presupposes the actionable invasion of some right").

155 P. ROBINSON, *supra* note 19, § 124(b), at 47.

156 The fact that an activity is legal does not necessarily imply that it does not threaten any legally protected interests. The operation of a licensed nuclear power plant, for example, is a legal activity; however, its operation could threaten legally protected interests, though perhaps only remotely. These legally protected interests are the lives, health, and property of the people living nearby. A power plant's neighbors would have

recognition to a fetus's right to life, holding that the word "person" in the Fourteenth Amendment does not include the unborn.[157] In addition, the Court held that the other two interests implicated by abortion, a state's interest in protecting a pregnant woman's health, and a state's interest in protecting the potentiality of human life, do not become legally recognizable until after the first trimester of pregnancy.[158] Thus, abortion is not a "harm," and criminal offenses committed for the purpose of preventing abortions cannot be justified on necessity grounds.[159]

Despite the absence of social consensus on abortion, and the fact that first-trimester abortions threaten no legally-protected interests, some anti-abortion activists have suggested that the necessity defense is available to abortion clinic protesters in Missouri by virtue of the 1986 Missouri abortion statute.[160] These activists argue that the statute demonstrates the existence of both a social consensus against abortion and a legal recognition of a fetus' right to life in the state of Missouri. The 1986 abortion act amended the Revised Statutes of Missouri to read in part, "It is the intention of the general assembly of the state of Missouri to grant the right to life to all humans, born and unborn . . . ."[161] More significantly, the act's preamble[162] sets forth legislative "findings" that human life begins at

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a cause of action for damages resulting from a nuclear accident. Thus, arguing that abortion is not a necessity-triggering "harm" because it does not threaten any legally protected interests differs from arguing that abortion is not a necessity-triggering "harm" simply because it is legal. *See supra* notes 141-147 and accompanying text. For a good comparison of these two arguments, see State v. Clowes, 100 Or. App. 266, 785 P.2d 1071 (1990) (Graber, J., specially concurring).

157 410 U.S. 113, 158 (1973).

158 *Id.* at 162-63.

159 *See* People v. Krizka, 92 Ill. App. 3d 288, 290, 416 N.E.2d 36, 37 (1980) ("Under *Roe*, an abortion during the first trimester of pregnancy is not a legally recognizable injury, and therefore, defendants' trespass was not justified by reason of necessity.").

160 Act approved June 26, 1986, 1986 Mo. LAWS 689.

161 The complete statement of legislature intent reads as follows:

> Intent of general assembly.
>
> It is the intention of the general assembly of the state of Missouri to grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes.

MO. ANN. STAT. § 188.010 (Vernon Supp. 1989).

162 The preamble states:

> Life begins at conception—unborn child, defined—failure to provide prenatal care, no cause of action for
>
> 1. The general assembly of this state finds that:
>
> (1) The life of each human being begins at conception;
>
> (2) Unborn children have protectable interests in life, health, and well-being;
>
> (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.
>
> 2. Effective January 1, 1988, the laws of this state shall be interpreted and con-

conception and that "unborn children" have protectable interests in life, health, and well-being. The preamble also requires that all Missouri laws, presumably including the necessity statute, be interpreted to acknowledge that "unborn children" possess all the rights, privileges, and immunities of other persons, to the extent consistent with the United States Constitution as interpreted by the United States Supreme Court.[163] Although this preamble was struck down as unconstitutional by the Eighth Circuit Court of Appeals,[164] the Supreme Court, in *Webster v. Reproductive Health Services*,[165] reinstated the provision without passing on its constitutionality.

At least one abortion clinic trespasser has argued that the 1986 abortion act, which demonstrates the Missouri General Assembly's strong opposition to abortion, reflects the collectively shared values of the people of Missouri, for "the will of the majority is 'reflected by the executive and legislative branches of government.' "[166] Similarly, Judge George Gerhard, a St. Louis County trial judge who acquitted a group of abortion clinic protesters on necessity grounds, found that the act's preamble expressed "the sense of the people of the State of Missouri . . . that life begins at conception."[167] Thus, in the wake of the Supreme Court's *Webster* decision, abortion clinic protesters in Missouri claimed statutory support for the assertion that their actions reflected the social consensus of the people of Missouri, and not merely their own personal convictions.[168]

In addition, following *Webster*, Missouri abortion foes could cite the act's preamble as proof that abortion invades a legally protected interest and is therefore a harm which can support a necessity de-

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strued to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United State Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.

3. As used in this section, the term "unborn children" or "unborn child" shall include all unborn child or children of the offspring of human beings from the moment of conception until birth at every stage of biological development.

4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

MO. ANN. STAT. § 1.205 (Vernon Supp. 1989).

163 *Id.*

164 Reproductive Health Services v. Webster, 851 F.2d 1071, 1077 (8th Cir. 1988), *rev'd*, 109 S. Ct. 3040 (1989).

165 109 S. Ct. 3040 (1989).

166 Reply Brief for Appellant at 10, State v. O'Brien, 784 S.W.2d 187 (Mo. Ct. App 1989) (No. 55582) (quoting State v. Diener, 706 S.W.2d 582, 585 (Mo. Ct. App. 1986)).

167 Gerhard, *supra* note 17, at 2-3.

168 Supplemental Brief for Appellant, *supra* note 14, at 6.

fense. The appellant in *O'Brien*, for example, asserted that, "[i]n Missouri, under the current state of the law, an unborn child is recognized to be a human being, worthy of legal protection."[169] Judge Gerhard, after noting that "abortion kills an unborn child,"[170] declared "[t]he law of the state of Missouri . . . is, that an unborn child is a person entitled to all the rights (as, for instance, against being killed) owed to and possessed by a born child."[171] In short, many anti-abortion activists argue that by reinstating the preamble to Missouri's 1986 abortion act, *Webster* opened the door for Missouri abortion clinic protesters to raise a necessity defense.[172]

This argument, however, is based on an incomplete reading of both the *Webster* decision and current Missouri law. In *Webster*, the Supreme Court did not expressly approve the Missouri abortion act's preamble or endorse any particular interpretation of the preamble's meaning.[173] Instead, the Court stated that it could not rule on the preamble's meaning or constitutional validity because the Court was " '[l]acking any authoritative construction of the statute by the state courts . . . and [was faced] with a record which presents no concrete set of facts to which the statute is to be applied.' "[174] The Supreme Court left the task of interpreting the preamble to the Missouri state courts. The Court noted, however, that "the preamble does not by its terms regulate abortion," and suggested that the preamble could be interpreted to do nothing more than extend tort and probate law protections to the unborn.[175] The *Webster* Court thereby acknowledged that the preamble need not be interpreted to grant fetuses a legally recognizable interest in not being aborted, as Judge Gerhard had suggested.[176]

Furthermore, the Court asserted that the preamble's meaning would become an appropriate issue for federal court consideration if the statute was ever applied "to restrict the activities of appellees [Reproductive Health Services, a provider of abortion services] in some concrete way."[177] Allowing abortion clinic protesters to use the preamble as support for their necessity claims would concretely

169 *Id.* at 7.

170 Gerhard, *supra* note 17, at 3.

171 *Id.* at 3-4.

172 *See* Supplemental Brief for Appellant, *supra* note 14, at 5.

173 Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3050 (1989) (plurality opinion).

174 *Id.* (quoting Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 460 (1945)).

175 *Id.*

176 Gerhard, *supra* note 17, at 3-4.

177 *Webster*, 109 S. Ct. at 3050.

restrict abortion clinic activities. Anti-abortion activists would be able to engage in criminal activities which significantly disrupt clinic operations without fear of legal reprisal.[178] Such an application of the statute might well be unconstitutional.[179]

In addition, the "findings" of the Missouri legislature that fetuses are unborn children with legally protectable interests in life, health, and well-being,[180] are not unqualified. Like all state laws, these "findings" are subject to the United States Constitution and the Supreme Court's constitutional interpretations.[181] In fact, in its 1986 abortion act, the Missouri General Assembly explicitly recognized this limitation.[182]

Although *Webster* increased states' authority to regulate abortions, the *Webster* Court left *Roe*'s basic holding that a fetus has no protectable right to life before viability "undisturbed."[183] Thus, Missouri law cannot be interpreted to grant legal protection to a fetus's right to life, for such an interpretation would conflict with the Supreme Court's holding in *Roe*. As the *O'Brien* court correctly noted, the *Webster* decision does not change the fact that abortion clinic trespassers are precluded from raising a necessity defense because the "evil" they seek to avoid, abortion, threatens no legally protected interest and is therefore not a legally recognizable harm.[184]

### 2. *Constitutional Considerations*

Abortion clinic trespassers also are precluded as a matter of law from raising a necessity defense because judicial acceptance of this defense in abortion clinic protest cases unconstitutionally would interfere with a woman's right to secure a legal abortion. *Roe v. Wade*, in addition to denying legal recognition to a fetus's right to life before viability, also recognized a constitutional "right of privacy" which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[185] Although abortion rights are not absolute, they remain virtually unqualified during the first three months of pregnancy.[186] Thus, *Roe* granted broad constitu-

178 *See infra* notes 205-208 and accompanying text.
179 *See infra* section IV.B.2.
180 MO. ANN. STAT. § 1.205. (Vernon Supp. 1989).
181 State v. O'Brien, 784 S.W.2d 187, 191 (Mo. Ct. App. 1989).
182 MO. ANN. STAT. §§ 1.205.2; 188.010. (Vernon Supp. 1989).
183 *Webster*, 109 S. Ct. at 3058.
184 *O'Brien*, 784 S.W.2d at 187-193.
185 Roe v. Wade, 410 U.S. 113, 153 (1973).
186 During that time, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id.* at 164.

tional protection to a women's right to obtain an abortion.

Abortion clinic trespassers, however, frequently interfere with the exercise of constitutionally protected abortion rights. On some occasions, for example, protesters have denied women access to abortion facilities by entering the facilities and chaining the front doors shut.[187] One group of protesters also blocked a clinic's emergency entrance by parking a van in front of it.[188] To prevent women who already have entered an abortion clinic from obtaining abortions, protesters often physically block doorways leading to abortion procedure rooms[189] or interpose themselves between women seeking abortions and clinic personnel.[190] These demonstrations frequently make it impossible for abortion facilities to perform scheduled abortions.[191] In at least one case, abortion clinic protesters have also had a more lasting impact on the availability of abortion services. Through repeated demonstrations, in which they photographed patients, chanted through bullhorns, blocked building entrances, and knocked over police barricades, anti-abortion activists in Philadelphia caused an abortion clinic to lose its lease, thereby forcing the clinic to find a new location.[192]

Abortion clinic protesters often argue, however, that as private individuals, they are free to interfere with abortion rights despite abortion's constitutionally protected status.[193] These protesters note that the Supreme Court in *Roe v. Wade* found the constitutional right to an abortion implicit in the Fourteenth Amendment.[194] The Fourteenth Amendment restricts *state* actions which unduly interfere with personal liberties, but imposes no restrictions on the actions of

187 Bobo v. State, 757 S.W.2d 58, 60 (Tex. Ct. App. 1988); Crabb v. State, 754 S.W.2d 742, 743 (Tex. Ct. App. 1988).

188 *Bobo*, 757 S.W.2d at 60.

189 Northeast Women's Center v. McMonagle, 868 F.2d 1342, 1345 (3d Cir. 1989); People v. Archer, 143 Misc. 2d 390, 392, 537 N.Y.S.2d 726, 727 (N.Y. City Ct. 1988); City of St. Louis v. Klocker, 637 S.W.2d 174, 175 (Mo. Ct. App. 1982); People v. Stiso, 93 Ill. App. 3d 101, 102, 416 N.E.2d 1209, 1210 (1981); Gaetano v. United States, 406 A.2d 1291, 1292 (D.C. App. 1979); *Crabb*, 754 S.W.2d at 743.

190 People v. Krizka, 92 Ill. App. 3d 288, 289; 416 N.E.2d 36, 36 (1981). Some protesters employ more drastic measures, such as handcuffing themselves to the doors of operating rooms, Cleveland v. Municipality of Anchorage, 631 P.2d 1073, 1075 (Alaska 1981), barricading themselves inside operating rooms, Commonwealth v. Wall, 372 Pa. Super. 534, 537, 539 A.2d 1325, 1326 (1988), or attaching themselves to operating tables with, among other things, handcuffs, *Cleveland*, 631 P.2d at 1075, and "Superglue." Erlandson v. State, 763 S.W.2d 845, 849 (Tex. Ct. App. 1988).

191 *See, e.g., Krizka*, 92 Ill. App. 3d at 289, 416 N.E.2d at 36-37; *Archer*, 143 Misc. 2d at 392, 537 N.Y.S.2d at 727; *Crabb*, 752 S.W.2d at 743.

192 *McMonagle*, 868 F.2d at 1346.

193 *See, e.g., Krizka*, 92 Ill. App. 3d at 290, 416 N.E.2d at 37.

194 *See* Roe v. Wade, 410 U.S. 113, 152-53 (1973).

*private* individuals.[195] Thus, abortion foes argue that anti-abortion demonstrations by individual protesters do not violate the Constitution, even if they substantially obstruct abortion rights, because *Roe* has no affect on *private* anti-abortion activities.[196]

Admittedly, private demonstrations which obstruct abortion rights alone do not alone implicate the Constitution. However, judicial sanctioning of these activities through the acceptance of the necessity defense *is* an unconstitutional state restriction on abortion. As the Supreme Court held in *Planned Parenthood of Central Missouri v. Danforth*,[197] a state impermissibly interferes with abortion rights when it authorizes a private individual to prevent a woman from obtaining an abortion.[198] In *Danforth*, the Court ruled that a Missouri statute requiring a married woman to secure her husband's written consent before obtaining a first-trimester abortion was unconstitutional because it effectively granted the husband a "veto power" over his wife's abortion decision.[199] The Court found that *Roe v. Wade* prohibited states from granting this "veto power" to private individuals:

> We thus agree with the dissenting judge in the present case . . . that the State cannot 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy' . . . . Clearly, since the State cannot regulate or proscribe abortion during the first stage, . . . the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period.[200]

Like the statute at issue in *Danforth*, judicial acceptance of the necessity defense in abortion clinic protest cases unconstitutionally authorizes private individuals to interfere with abortion rights. Because their protest activities frequently prevent the performance of legal abortions,[201] anti-abortion activists effectively exercise a "veto power" over some women's constitutional abortion rights, just as husbands could effectively exercise a "veto power" over their wives' abortion rights under the statute struck down in *Danforth*. In addition, judicial acceptance of the necessity defense, like the spousal consent statute struck down in *Danforth*, represents state authoriza-

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195 The fourteenth amendment reads in pertinent part: "No *state* shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1 (emphasis added). *See also* Civil Rights Cases, 109 U.S. 3 (1883).

196 *See, e.g.*, Comment, *Abortion Clinic Trespass Cases*, *supra* note 116, at 541; Cleveland v. Municipality of Anchorage, 631 P.2d 1077, 1080 (Alaska 1981).

197 428 U.S. 52 (1976).

198 *Id.* at 67-69.

199 *Id.*

200 *Id.* at 69.

201 *See supra* notes 187-192 and accompanying text.

tion for the exercise of this private "veto power" over abortion rights. It thus grants official state sanction to the disruptive activities of anti-abortion demonstrators.

The fact that the state authorization for the exercise of a private "veto power" in abortion clinic trespass cases comes from the courts rather than the legislature is immaterial. A state can make law through its courts as well as its legislature; it is well-recognized that in the absence of contrary legislation, a judicial declaration of policy has the force and effect of a legislative enactment.[202] The proposition "[t]hat the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of [the Supreme Court]."[203] Thus, judicial acceptance of the necessity defense in abortion clinic protest cases is legally equivalent to the passage of a statute authorizing private individuals to block abortion clinic entrances and prevent women from obtaining abortions. This state authorization of private activities which restrict abortion rights is prohibited by *Danforth*.[204]

State sanctioning of abortion clinic protests through judicial acceptance of the necessity defense can have far-reaching effects. As one commentator has stated, "When a court justifies an illegal act, it creates a new rule of law to govern the same dilemma in the future."[205] Thus, judicial acceptance of the necessity defense in a single abortion clinic protest case legally authorizes all anti-abortion activists within the court's jurisdiction to trespass at abortion clinics.[206] In addition, if abortion clinic protests are held to be justified, clinic operators, abortion rights advocates, and others are legally powerless to prevent anti-abortion activists from interfering with

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202 21 C.J.S. *Courts* § 186 (1940). *See also* Self v. Wisener, 226 Ark. 58, 61, 287 S.W.2d 890, 892 (1956); State *ex rel.* Beil v. Mahoning Val. Distrib. Agency, Inc., 169 N.E.2d 48, 61 (Ohio Ct. Com. Pl. 1960), *aff'd*, 116 Ohio App. 57, 186 N.E.2d 631 (1962).

203 Shelley v. Kraemer, 334 U.S. 1, 14 (1948).

204 In fact, judicial acceptance of the necessity defense in abortion clinic trespass cases is even harder to defend than the spousal consent statute struck down in *Danforth*. If a state may not constitutionally grant a "veto power" over a woman's first-trimester abortion rights to the woman's husband, who arguably has a strong interest in the abortion decision, the state certainly should not be permitted to grant a "veto power" to complete strangers, whose interest in the abortion decision is much less compelling. *See* Cleveland v. Municipality of Anchorage, 631 P.2d 1077, 1080 n. 15 (Alaska 1981) ("If the legislature cannot delegate a 'veto power' to the patient's . . . spouse, . . . we think it unlikely that a state court could delegate such a 'veto power' to strangers, to be exercised in such an obstrusive manner.").

205 Note, *Criminal Trepass in an Abortion Clinic*, *supra* note 7, at 514.

206 *See supra* section II.D.

abortion rights, for third parties have no right to resist justified conduct.[207] Even the police may be without authority to stop disruptive abortion clinic demonstrations.[208] Abortion clinic protesters might therefore continue, for an extended period of time, to prevent women from exercising their constitutional abortion rights.

This scenario was graphically illustrated in late 1977 and early 1978 in Fairfax County, Virginia. Two Fairfax County District Court judges on separate occasions refused to convict protesters of trespassing at the Northern Virginia Women's Medical Center, an abortion clinic.[209] One of these acquittals was based on necessity.[210] Following these court decisions, county prosecutors instructed police to stop arresting abortion clinic protesters for trespass because they knew that they would be unable to secure convictions.[211] In addition, police expressed concern that if they attempted to arrest abortion clinic demonstrators for engaging in "justified" activities, they could be sued for violating the demonstrators' civil rights.[212] The demonstrations therefore continued until the clinic was forced to seek an injunction against the protesters in federal court.[213]

## V. CONCLUSION

The necessity defense is unavailable to abortion clinic protesters as a matter of law. Although abortion clinic demonstrators may be able to show that the "harm" they seek to avoid is not remote or speculative, and that their protest activities are effective at preventing women from obtaining abortions, these protesters are nevertheless precluded from raising a necessity defense to criminal charges arising from their protest activities. Abortion opponents have legal alternatives by which they can air their political views, seek political reform, and attempt to dissuade women from obtaining abortions. Public policy concerns demand that anti-abortion activists use these appropriate legal channels rather than committing criminal of-

207 *See supra* note 86 and accompanying text. *See also* Note, *Criminal Trepass in an Abortion Clinic*, *supra* note 7, at 514.

208 *Id.*

209 Washington Post, Feb. 16, 1978, at B3.

210 *Id.* The other acquittal was based on the judge's ruling that Virginia's abortion statute was unconstitutional. *Id.*

211 *Id.*

212 *Id.*

213 *Id.* The United States District Court for the Eastern District of Virginia granted an injunction under 42 U.S.C. § 1985, which concerns private conspiracies to violate civil rights. The injunction was upheld. Northern Virginia Women's Medical Center v. Balch, 617 F.2d 1045, 1047 (4th Cir. 1980); *see also* Cleveland v. Municipality of Anchorage, 631 P.2d 1073, 1080-81 n.15 (Alaska 1981).

fenses. In addition, legal and constitutional protections which have been granted to first-trimester abortions represent a social value choice which cannot be challenged through judicial application of the necessity defense.

More significantly, because there is no social consensus on the abortion issue, abortion clinic trespassers cannot claim to be acting on the basis of shared societal values, and therefore fail to meet an essential element of the necessity defense. Furthermore, legal first-trimester abortions invade no legally protected interest, for fetuses have no recognizable rights to life, health, or well-being until viability. Abortion is therefore not a "harm" which gives rise to a necessity defense. Finally, judicial acceptance of the necessity defense in abortion clinic trespass cases violates the Constitution because it grants state authorization to private individuals to deprive women of their constitutionally protected abortion rights.

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