
Luke Shulman-Ryan

Follow this and additional works at: http://digitalcommons.law.wne.edu/lawreview

Recommended Citation

INTRODUCTION

Eighty-three year old Frances Crowe stood in the road outside Westover Air Force Base dressed in traditional Iraqi attire.1 In her hands she held a sign,2 “PLEASE DO NOT BOMB ME,” it said.3 Crowe’s aim, on this January 2003 morning, was to persuade the military personnel arriving at the base not to participate in the impending invasion of Iraq.4 Like the other eight activists soon to be arrested,5 Crowe was acutely aware of the ongoing humanitarian crisis in Iraq6 and regarded the fast-approaching “preemptive war”7

1. Affidavit of Frances H. Crowe in Defendants’ Motion to Exercise a Defense of Necessity, Commonwealth v. Crowe (Chicopee Dist. Ct. 2003) (No. 0320CR 000 135) [hereinafter Defendants’ Motion].
2. Id.
3. Id.
4. Id.
6. In 1999, a Congressional delegation to Iraq reported that the image of emaciated babies and malnourished young children ill or even dying in Iraq is by now well-known is the U.S. The staff delegation, visiting hospitals in Baghdad, Amara, and Basra, found that reality unchanged, with most of these children dying from treatable diseases, usually the result of unclean water and exacerbated by malnutrition, for which basic medications and treatments are unavailable.
as an imminent danger. For the previous twelve years, she had advocated on behalf of Iraqi civilians by petitioning her representatives in Congress, writing letters to newspaper editors, showing films, participating in marches and vigils, and giving public addresses. In short, Crowe believed she had fulfilled the Gandhian prerequisite to civil disobedience by exhausting all legal alternatives.

Perhaps most important, Crowe had a reasonable expectation in the power of civil disobedience to alter the course of a soldier's life. Thirty years before, on International Women's Day, Crowe went to this same Westover road "dressed as a Vietnamese woman." That day, she touched the conscience of Lt. Donald Dawson, an Air Force B-52 Bomber pilot, who, shortly after encountering Crowe, concluded he could no longer fly his regular bombing missions over Vietnam and Cambodia.

This time, Crowe was arrested and charged with disturbing the peace. Prior to her trial, the Commonwealth filed a motion in

---

8. Defendants' Motion, supra note 1, at 1.
9. Affidavit of Frances H. Crowe in Defendants' Motion, supra note 1.
10. Civil disobedience is used here to describe (1) intentional, (2) illegal, (3) acts of protest, (4) conducted openly and (5) non-violently (6) by actors willing to risk punishment. See infra Part I.B.
11. Affidavit of Frances H. Crowe in Defendants' Motion, supra note 1, at 1-2; see also M. K. GANDHI, NON-VIOLENT RESISTANCE 4 (Bharatan Kumarappa ed., 1961) ("Civil Disobedience presupposes the habit of willing obedience to laws without fear of their sanctions. It can, therefore, be practiced only as a last resort . . . ").
12. Affidavit of Frances H. Crowe in Defendants' Motion, supra note 1, at 2-3. For an enlightening account of the impact of wars on those who survive them, see Dan Baum, The Price of Valor, THE NEW YORKER, July 12 & 19, 2004, at 48-49 (documenting the long-lasting psychological impact of turning "soldiers, momentarily, into reflexive, robotic killers").
13. Affidavit of Frances H. Crowe in Defendants' Motion, supra note 1, at 2-3.
14. Id. at 3.
15. Commonwealth's Motion Opposing the Presentation of a Necessity Defense at 1, Commonwealth v. Crowe (Chicopee Dist. Ct. 2003) (No. 03-0132-35, 39, 40) [hereinafter Commonwealth's Motion]. "[D]isturbers of the peace . . . may be punished by imprisonment . . . for not more than six months, or by a fine of not more than two hundred dollars, or by both such fine and imprisonment." MASS. GEN. LAWS ANN. CH. 272, § 53 (2004). According to two commentators, the elements of this offense are "(i) Actions, conduct, or utterances (ii) In or near a public place (iii) Which are unreasonably disruptive and (iv) Infringe the right of at least one person to be undisturbed." Howard J. Alperin & Lawrence D. Shubow, Disturbing the Peace, 14A MASS. PRAC.
limine asking the court to prevent Crowe and her fellow pro se defendants from asserting a necessity defense. On April 25, 2003, the court applied the standard set forth in Commonwealth v. Hood and orally granted the prosecution’s motion, thereby prohibiting the Crowe defendants from situating their conduct in its social context.

This Note addresses the issue of whether the Hood holding—affirmed in Commonwealth v. Brogan and applied in Crowe—permitting the use of “broad” motions in limine undermines an avowed First Amendment purpose by depriving the marketplace of ideas. This Note contends that such motions do often compro-


16. Commonwealth’s Motion, supra note 15, at 1. In Commonwealth v. Hood, 452 N.E.2d 188, 196 (Mass. 1983), the court characterized the motion in limine as a procedural tool used to bar the introduction of prejudicial evidence. See infra Part II.B.

17. The necessity defense is intended for those “rare and extraordinary circumstances” when illegal conduct “promotes some value higher than the value of literal compliance with the law.” Debbie A. Levin, Note, Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic, 48 U. CIN. L. REV. 501, 503 (1979) (citation omitted). See also Commonwealth v. Garuti, 504 N.E.2d 357, 359 (Mass. App. Ct. 1987) (distinguishing between the justification of necessity, which “one pleads when circumstances force one to perform a criminal act,” and duress, which “applies when human beings force one to act”). See generally infra Part II.A.

18. The Hood court held that since the necessity defense was “inapplicable to the defendants’ actions, they were not prejudiced by their inability to present their evidence to the jury.” Hood, 452 N.E.2d at 197. For a full discussion of Hood, see Part III.C.

19. As of January 31, 2005, the court had not provided the defendants with a written opinion.

20. Doerner, supra note 5. According to Doerner, the defendants had hoped to juxtapose the impact of their illegal conduct—“preventing several dozen people from getting to work on time”—with “sanctions our government acknowledges killed 500,000 Iraqi children.” Id. at 2.

21. 612 N.E.2d 656 (Mass. 1983). In Brogan, the defendant failed to overcome his initial burden of demonstrating that the harm of his crime was, “as a matter of policy . . . significantly exceeded by the harm that would have resulted if the defendant had not violated the law.” Id. at 659. Accordingly, the court concluded there was no need to analyze the defendant’s conduct in light of the four elements articulated in Hood. Id. at 660 n.10.

22. Broad motions in limine are relatively new and differ from the more traditional ones in that they have been used “to ‘knock out’ the entirety of the evidence supporting a defense before it can be heard by the jury.” Commonwealth v. O’Malley, 439 N.E.2d 832, 838 (Mass. App. Ct. 1982).

23. Although the concept of a marketplace of ideas was first articulated by Justice Holmes in Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (asserting that “the best test of truth is the power of the thought to get itself accepted in the competition of the market”), the exact phrase did not surface in a Supreme Court opinion until Justice Brennan’s concurrence in Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (“The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It
mise this free speech objective and proposes that courts refuse these prosecutorial requests in certain prescribed cases.

At the core of this proposal is an appreciation for the contribution civil disobedience has made in broadening the scope of political discourse. After exploring the concept of a "marketplace of ideas," Part I of this Note provides a brief history of this contribution in Massachusetts. Part II then addresses the origins of the necessity doctrine and in limine practice. In Part III, this Note discusses the evolution of these areas in Commonwealth jurisprudence by examining three principal cases. Part IV explores the criticism such cases have engendered. It suggests that while treatments of Crowe-like outcomes are often quite insightful, the solutions they proffer frequently overlook the vulnerability of human beings who have been, and will continue to be, the "objects" of "crimes of conscience." In offering a new approach to assertions of necessity in cases of civil disobedience, Part V seeks to balance the concerns of egalitarians and civil libertarians. This Note concludes by urging advocates, courts, and scholars to continue the search for creative and just solutions each time the commitment to promote liberty conflicts with the quest to eliminate inequality.

would be a barren marketplace of ideas that had only sellers and no buyers." (emphasis added). A focus upon the manner in which these motions impact the public's access to information does not mean other First Amendment objectives are not similarly compromised. See Barbara J. Katz, Note, Civil Disobedience and the First Amendment, 32 UCLA L. Rv. 904, 913-19 (1985) (discussing other Free Speech purposes served by allowing the civilly disobedient to present evidence of necessity). Nor is free expression the lone constitutional casualty. For a compelling account of how broad motions in limine run afoul of Due Process rights guaranteed by the Fifth and Fourteenth Amendments, as well the Sixth Amendment's guarantee of the right to trial by jury, see Douglas L. Colbert, The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial, 39 STAN. L. REV. 1271, 1272 (1987).

24. Because "most of the law of evidence ... involve[s] legal control of speech lying well beyond the boundaries of the First Amendment's concern," this Note refrains from subjecting in limine rulings to "the [higher] burden of justification imposed by the First Amendment." Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 HARV. L. REV. 1765, 1765 (2004). For an interesting discussion of "this lack of First Amendment coverage," see id. ("The explanation ... lies not in a theory of free speech or in legal doctrine, but instead in an often serendipitous array of political, cultural, and economic factors determining what makes the First Amendment salient in some instances of speech regulation but not in others."). See also Richard Delgado, Are Hate Speech Rules Constitutional Heresy? A Reply to Steven Gey, 146 U. PA. L. REV. 865, 870-71 (1998) (discussing the various "'exceptions' and special doctrines that riddle free speech law—libel, defamation ..., words of threat and of monopoly, state secrets, copyright, plagiarism, disrespectful speech uttered to a judge or other authority figure," etc.).
I. DEMOCRACY AND DISOBEDIENCE

A. The First Amendment and the Marketplace of Ideas

1. Definition

The First Amendment to the United States Constitution prohibits Congress from abridging the freedom of expression.25 "[T]he purpose of the First Amendment," the Court stated in an oft-quoted phrase from Red Lion Broadcasting Co. v. F.C.C.,26 is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ."27 This idea that "competition will correct pernicious ideas . . . as the invisible hand of the ideas market . . . guides the truth to victory"28 serves as the cornerstone of traditional marketplace theory. With the triumph of truth, its adherents contend, will come remedies for social ills and the suitable advancement of society.29

2. Origins

Although the concept of a marketplace of ideas was first championed by John Milton in the seventeenth century,30 it remained an unarticulated "theory of our Constitution" until Justice Oliver Wendell Holmes suggested that

[w]hen men [sic] have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.31

---


27. Id. at 390 (emphasis added). For a recent example of how the Red Lion Broadcasting holding has been utilized, see McConnell v. Federal Election Commission, 540 U.S. 93, 265 (2003) (Thomas, J., concurring in part, dissenting in part).


29. Ingber, supra note 25, at 3.

30. Id. at 3 n.8 (citing J. Milton, Areopagitica (London 1644), in 2 COMPLETE PROSE WORKS OF JOHN MILTON 486 (E. Sirluck ed., 1959)) ("[T]hough all the windes of doctrin were let loose to play upon earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter.").

Holmes' invocation of the marketplace came in *United States v. Abrams*, where the majority upheld the convictions of five defendants under the Espionage Act for their authorship and/or distribution of two leaflets critical of the United States' intervention in the Russian Revolution.32 Eight months earlier, in March of 1919, *Schenck v. United States,33 Frohwerk v. United States,34* and *Debs v. United States*35 had affirmed the convictions of various political dissidents who opposed the United States' intervention in World War I.36 Because Holmes had written for the Court in these three cases, his *Abrams* dissent sparked instant and sustained scrutiny.37

Not surprisingly, scholarly efforts to explain Holmes' embrace

32. Seven individuals had been indicted for writing and distributing two leaflets, which had been dumped onto the streets of New York City from rooftops throughout lower Manhattan. Vincent Blasi, Misleading Metaphor: Holmes and the Marketplace of Ideas, 4-5, available at http://www.law.berkeley.edu/ccnpro/kadish/Blasi%20Holmes.pdf (citing Richard Polenberg, Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech (1984)) (last visited July 17, 2004). One defendant was acquitted and another died while in custody the night before the trial. Id. at 8-10. For other details of the case, see id. at 3-12.

33. 249 U.S. 47, 52 (1919). According to Justice Holmes, the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. Id. at 52 (citations omitted). For a critique of the "clear and present danger test," see John M. Sier, Civil Disobedience and the First Amendment, 42 THE GUILD PRACTITIONER 18, 21 (1985) (claiming the test "protects only random mutterings and emasculated speech which either is not intended to incite or is expressed by an unthreatening or impotent individual").

34. 249 U.S. 204 (1919). See id. at 206 (holding that "a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion").

35. 249 U.S. 211 (1919). See id. at 214 (affirming the conviction of the famous Socialist Eugene V. Debs who told listeners that, "you need to know that you are fit for something better than slavery and cannon fodder"). For a thought-provoking critique of the defendant's war opposition, see Kathleen Kennedy, Manhood and Subversion During World War I: TheCases of Eugene Debs and Alexander Berkman, 82 N.C. L. REV. 1661, 1689-91 (2004).

36. According to Brooklyn Law School Professor Nan D. Hunter, "First Amendment jurisprudence has never fully comprehended the role that group identity dynamics played [in the 1919 speech cases] but has rather treated [them] as emerging from disconnected, atomistic encounters between a repressive state and dissenting individuals." Nan D. Hunter, Escaping the Expression-Equality Conundrum: Toward Anti-Orthodoxy and Inclusion, 61 OHIO ST. L.J. 1671, 1672 (2000). This failure to recognize that "our most cherished doctrinal charter of individual liberty in fact grew from group action intended to assert a claim of what was undeniably group rights" id. at 1715, has repercussions in the clash between equality and expression—a topic this Note will explore in greater depth in Parts IV and V.

37. See Blasi, supra note 32, at 17 ("Generations of law students have begun their
of the marketplace have been inconclusive. Prominent among the many theories are those claiming: Holmes was a staunch defender of free expression all along and only wrote the March opinions to inject standards that might later serve as safeguards for dissent;\(^{38}\) Holmes evolved as a result of his correspondence with Federal District Judge Learned Hand;\(^{39}\) Holmes feared losing the admiration of young progressives;\(^{40}\) Holmes changed course in the wake of criticism from Zechariah Chafee, Jr.;\(^{41}\) Holmes was chastened by Ernst Freund's critique of his *Debs* decision;\(^{42}\) Holmes finally came to accept a concept he first encountered in "The Metaphysical Club,"\(^{43}\) and; Holmes was disgusted by the "ugly mob psychology that emerged at the height of the Red Scare during the summer of 1919."\(^{44}\)

\(^{38}\) Id. at 16-17.

\(^{39}\) Id. (citing Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 Stan. L. Rev. 719 (1975)).


\(^{42}\) Bogen, supra note 41, at 98-99 (citations omitted).


> no scientist will ever try actively to interfere with our religious faith, provided we enjoy it quietly with our friends and do not make a public nuisance of it in the market-place. But it is just on this matter of the market-place that I think the utility of such essays as mine may turn. If religious hypotheses about the universe be in order at all, then the active faiths of individuals in them, freely expressing themselves in life, are the experimental tests by which they are verified, and the only means by which their truth or falsehood can be wrought out.

*Id.* (emphasis added).

\(^{44}\) Blasi, supra note 32, at 17 (Blasi's own explanation).
3. Evolution

According to Professor Stanley Ingber, once the marketplace doctrine became an accepted tenet of constitutional law, its usefulness expanded beyond "the search for truth and knowledge" and "came to be perceived by courts and scholars as essential to effective popular participation in government." Equating an uninhibited marketplace with an informed citizenry, some courts began to offer speech protection based on its perceived impact "on the audience rather than the speaker." These two views of speech—as a means to a desirable end and a value unto itself—help explain both the enshrinement of the marketplace of ideas in United States jurisprudence and the freedom of expression's preferred status within our constitutional scheme.

B. Civil Disobedience in the Commonwealth

1. Definition

Definitions of civil disobedience are as diverse as those who

45. Ingber, supra note 25, at 3. Some scholars, including Ingber, perceive the market as "strongly biased in favor of positions that support entrenched interests." Id. at 6 ("[T]he present marketplace simply fine-tunes differences among elites while defusing pressure for change and fostering a myth of personal autonomy essential to the continued popular acceptance of a governing system biased toward the status quo."). See also Richard Delgado & Jean Stefancic, Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?, 77 CORNELL L. REV. 1258, 1286 (1992) [hereinafter Delgado & Stefancic, Images of the Outsider] ("Elite groups use the supposed existence of a marketplace of ideas to justify their own superior position."); Susan H. Williams, Feminist Jurisprudence and Free Speech Theory, 68 TUL. L. REV. 1563, 1567 (1994) (suggesting that truth's dependence on social context makes the market "a poor test of truth indeed"). For a critique of the current marketplace, see infra Part V.A.3.

46. Ingber, supra note 25, at 4. For an example of one such court, see Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969) (calling it "crucial" that the public "receive suitable access to social, political, esthetic, moral and other ideas and experiences"). Many commentators reject "[a] market view of the first amendment [which] transforms the Constitution into a document, the purpose of which is to protect an idea's right of access and right to compete in the marketplace, instead of a document designed to protect all persons' right to express the idea." Peter J. Hammer, Free Speech and the "Acid Bath": An Evaluation and Critique of Judge Richard Posner's Economic Interpretation of the First Amendment, 87 MICH. L. REV. 499, 522 (1988).

47. Ingber, supra note 25, at 4. See also J. M. Balkin, Some Realism About Pluralism: Legal Realist Approaches to the First Amendment, 1990 DUKE L.J. 375, 392 (explaining how the First Amendment has come "to occupy a special position in the pantheon of constitutionally protected liberties"); Hunter, supra note 36, at 1709 n.198. According to Hunter: "The Court first referred to the 'preferred place' of the First Amendment in Thomas v. Collins, 323 U.S. 516, 530 (1945). It had earlier described the First Amendment as 'the matrix, the indispensable condition of nearly every other form of freedom.'" Id. (citing Palko v. Connecticut, 302 U.S. 319, 327 (1937)).
engage in it.48 For purposes of this Note, the term's use will be confined to: (1) intentional, (2) illegal, (3) acts of protest, (4) conducted openly and (5) non-violently,49 (6) by actors willing to risk punishment.50 Implicit in this definition is the notion of a social


49. The first five characteristics come courtesy of Bill Durland and his essay, The Philosophy of Civil Disobedience, in CONSCIENCE & THE LAW: A COURT GUIDE FOR THE CIVILLY DISOBEDIENT 2-3 (William Durland ed., 1982). As Durland acknowledges, “[t]he line between violence and non-violence is not sharp but rather infinitely graded.” Id. at 4. Notwithstanding the inescapably coercive nature of just about every political act, see RIENHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY 241 (1960) (“[N]on-violence does coerce and destroy.”); Bruce Ledewitz, Civil Disobedience, Injunctions, and the First Amendment, 19 HOFSTRA L. REV. 67, 70 (1990) (acknowledging the “coercion, which civil disobedience inevitably involves to some extent”), this fifth characteristic will be deemed present so long as “no harm is directed toward any persons.” Quigley, supra note 5, at 16. But see Howard Zinn, A Fallacy on Law and Order: That Civil Disobedience Must Be Absolutely Nonviolent, in CIVIL DISOBEDIENCE AND VIOLENCE 103-11 (Jeffrie G. Murphy ed., 1971).

Harm directed toward property will not preclude conduct from being classified as civil disobedience provided the six characteristics are present. See Charles R. DiSalvo, Necessity’s Child: The Judiciary, Disobedience, and the Bomb, 41 U. MIAMI L. REV. 911, 915 (1987) (describing the attack of “missile components, bomb-carrying submarines and airplanes, and missile silos with blood, carpenters’ hammers and jackhammers” as “acts of antinuclear civil disobedience”). But see Ledewitz, supra, at 70 n.15 (excluding intentional destruction of property from his definition based on the inability of the arrest to “restore the object of the protest to his former condition”). For perhaps the most famous example of civil disobedience involving the destruction of property, see Matthew 21:12 (“Then Jesus went into the temple of God . . . and overturned the tables of the moneychangers and the seats of those who sold doves.”).

50. This sixth element, which can be found in Sanford Jay Rosen’s, Civil Disobedience and Other Such Techniques: Law Making Through Law Breaking, 37 GEO. WASH. L. REV. 435, 455-56 (1969) (calling “an absolute willingness if need be to suffer personally the consequences that are provided for the enforcement of the violated laws” an “essential condition of the . . . disobedient act”) (emphasis added), is another source of contention. For “[s]ome legal theorists and philosophers . . . the act of civil disobedience is incomplete unless the actor willingly accepts punishment . . . and any defense is therefore inappropriate.” Laura Schuldkind, Note, Applying the Necessity Defense to Civil Disobedience Cases, 64 N.Y.U. L. REV. 79, 112 (1989) (emphasis added). Cf. Carl Cohen, Civil Disobedience and the Law, 21 Rutgers L. REV. 1, 6 (1966) (describing punishment as “more than a possible consequence of [the civil disobedient’s] act—it is the natural and proper culmination of it”) with Howard Zinn, The ZINN READER 378-83 (1997) [hereinafter THE ZINN READER] (“Why agree to be pun-
reformer working within the structure of the existing government. The civil disobedient, in other words, seeks the re-evaluation of a policy, not the destruction of the social contract. Conduct satisfying these six elements may be differentiated depending upon the nature of the law transgressed. Whereas "direct" civil disobedience involves the breach of a law that is the object of the demonstration, "indirect" civil disobedience signifies the violation of a law, inoffensive in itself and only tangentially con-


52 Steven M. Bauer & Peter J. Eckerstrom, Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1191-92 (1987). See also Martin C. Loesch, *Motive Testimony and a Civil Disobedience Justification*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'y 1069, 1094 (1991) ("Because it is a political act, done with the goal of benefiting the community, civil disobedience legitimizes both the government in power and the primacy of conscience."); Michael L. Kessler, Note, *Antinuclear Demonstrations and the Necessity Defense: State v. Warshow*, 5 VT. L. REV. 103, 105 (1980) (contrasting revolution, which "seeks to overthrow or repudiate the established authority," with civil disobedience, which "accepts the general legitimacy of authority but attacks some particular aspect of such authority in order to effect a change"); ABE FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 59 (1970) ("Civil disobedience, even in its broadest sense, does not apply to efforts to overthrow the government . . . .").


54 Id. For example, in 1996, when an Essex package store owner violated one of the state's "lingering, Puritan-era blue laws" by selling alcohol on Sundays, Sacha Pfeiffer, *Essex Liquor Store Owner Takes on Blue Law, High Court Hears Opening Arguments*, THE BOSTON GLOBE, APR. 10, 1999, at B1, available at 1999 WL 6056925, he engaged in direct civil disobedience by breaking the particular law he sought to change. Schulkind, *supra* note 50, at 112.
nected to the purpose of the protest.55

Another distinction sometimes drawn is between moral and political disobedience.56 According to philosopher Carl Cohen, "[m]oral civil disobedience is the protestor's response to a direct conflict between his [sic] personal ethical principles and some law of the state. It may or may not have some tendency to produce a desired political change . . . . Political civil disobedience is essentially a tactic."57 Of course, these two types of disobedience need not be mutually exclusive. One might act out of principle while simultaneously believing in the power of the action to alter the political landscape. The subject of this Note, then, is civil disobedience, "political in the sense that [a] motive is to effectively change conditions"58 by bringing marginalized perspectives into the marketplace of ideas.

2. Origins

The practice of civil disobedience in Massachusetts began with the quest for freedom of conscience.59 Not long after the Pilgrims' arrival in Plymouth, a Wampanoag sagamore named Massasoit befriended a Salem preacher by the name of Roger Williams and discussed with him "various questions of social organization, especially the religious tolerance issue, for which the red chief rightly judged Williams to be ready."60 Williams's subsequent injection of "the highly heretical"61 doctrine of religious freedom into the market-

55. Katz, supra note 23, at 906. On January 4, 1988, when eight members of MASS ACT OUT handcuffed themselves to chairs at the Boston State House, their objective was not to display their opposition to the trespass law they happened to break. David Arnold, Eight Gay Rights Supporters Fined for Roles in State House Protest, THE BOSTON GLOBE, Mar. 5, 1988, at B30, available at 1988 WL4599344. Rather, the members of this gay/straight alliance trespassed in order to demonstrate their dissatisfaction with "'homophobic' lawmakers who . . . refused to grant gays equal protection under the law." Id.


59. Straughton Lynd & Alice Lynd, Introduction to NONVIOLENCE IN AMERICA: A DOCUMENTARY HISTORY xii (Straughton Lynd & Alice Lynd eds., 1995) [hereinafter NONVIOLENCE IN AMERICA].


61. Id.
place led to his banishment from Massachusetts in 1636 and marked one of the first recorded acts of civil disobedience in the colony.62

Although most subsequent colonial protests involved challenges to the Puritan theocracy,63 Massachusetts authorities were also forced to deal with "ordinary white Englishmen" who chose not to fight in "King Phillip’s War"64 and crowds seeking to enforce "the rules of the moral economy."65 By the onset of the Revolu-

62. Williams refused to accept “that body-killing, soule-killing, and State-killing doctrine of not permitting, but persecuting all other consciences and ways of worship.” NONVIOLENCE IN AMERICA, supra note 59, at xiii. According to several commentators, Williams also insisted on espousing the equally heretical idea that “the land still belonged to Native Americans.” Quigley, supra note 5, at 20 n.64. See also DUANE CHAMPAIGNE, NATIVE AMERICA: PORTRAYAL OF THE PEOPLES 81 (1994).

63. See MARGARET HOPE BACON, THE QUIET REBELS: THE STORY OF THE QUAKERS IN AMERICA 26-35 (1985) (comparing the first Massachusetts Quakers to twentieth century civil rights leaders in their willingness to “go into the lion’s den and look their bloody laws in the face”); HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES: 1492-PRESENT 107 (1995) [hereinafter ZINN, A PEOPLE’S HISTORY] (chronicling the defiance of Ann Hutchinson, a mother of thirteen children who insisted that “she, and other ordinary people, could interpret the Bible for themselves”); W. J. Sidis, New Sects, in The Tribes and The States (1935) (unpublished manuscript by John W. Shattuck, pseud.) available at http://www.sidis.net/TSChapl10.htm (describing the civil disobedience that transpired after Massachusetts authorities decided that the children of a Quaker couple should be “sold into slavery to pay for their parents’ defaulted pew-rent in the Puritan meeting-house”) (last visited Apr. 28, 2005); NONVIOLENCE IN AMERICA, supra note 59, at xiii-xiv (recounting the Quakers’ “nonviolent invasion of Massachusetts Bay”); Ledewitz, supra note 49, at 73 (citing Massachusetts churches that refused to pay taxes on religious grounds); LEONARD W. LEVY, BLASPHEMY IN MASSACHUSETTS: FREEDOM OF CONSCIENCE AND THE ABNER KNEELAND CASE vii, xv n.26 (1973) (citing Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206 (1838)) (providing a documentary record of the last imprisonment by the Commonwealth for the crime of blasphemy).


65. Drake Bennett, The Mobs of Boston, THE BOSTON GLOBE, Jan. 26, 2003, at H1, H4 (defining the “moral economy” as what poor people were willing and able to pay for food). The extent to which crowd action in colonial Massachusetts comports with this Note’s definition of civil disobedience is difficult, if not impossible, to discern. Did the Bostonians who “demolished the public market in Dock Square” conduct themselves “nonviolently?” ZINN, A PEOPLE’S HISTORY, supra note 63, at 51 (noting the commentary of a contemporary conservative writer aghast at the crowd’s “murmuring against the Government & the rich people”). Historian Howard Zinn’s rather sparse account makes no mention of physical violence. Yet, it may well be that the so-called “rabble” did not adhere to the criteria set forth earlier. The “Boston Tea Party” presents a similar problem. Although many commentators point to it as a prime example of civil disobedience, see, e.g., A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 50 (James Melvin Washington ed., 1986), it was carried out by colonists disguised as Native Americans under the cover of darkness. Quigley, supra note 5, at 20 n.65. Was this act “conducted openly?” If nothing
tionary War, some commentators assert that civil disobedience in Massachusetts was more or less institutionalized.66

3. Evolution

Clearly then, civil disobedience in the Commonwealth did not commence with Henry David Thoreau’s “famed one night in jail for refusing to pay the Massachusetts Poll Tax.”67 Nor, obviously, did it end there. Indeed, civil disobedience would eventually play an integral part in battles for emancipation,68 women’s suffrage,69 diver-

else, such dilemmas serve to demonstrate the wisdom of Carl Cohen who noted “[a]bsolute precision in definition and the use of categories in this area is out of the question . . . . [B]orderline cases are sure to arise concerning which we are likely to remain in doubt.” Cohen, supra note 50, at 2. For two exegeses on this subject, see Ray Raphael, The First American Revolution: Before Lexington and Concord (2002) and Dirk Hoerder, Crowd Action in Revolutionary Massachusetts, 1765-1780 (1977).


67. Ledewitz, supra note 49, at 73. See also James Oliver Horton & Lois E. Horton, In Hope of Liberty 241 (1997) (recalling how black Massachusetts abolitionist Charles Lenox Remond “anticipated Thoreau’s ‘Civil Disobedience’ and argued that African Americans should be willing to go to jail rather than pay taxes to institutions that discriminated against them”); Carl Watner, Highway Tax vs. Poll Tax: Some Thoreau Tax Trivia, The Voluntaryist, Dec. 1994, at ¶ 6, 71, available at http://www.members.aol.com/vlntryst/wn71.html#hdt (indicating both Bronson Alcott and Charles Lane were arrested in 1843, more than two years before Thoreau, for the non-payment of their respective poll taxes). But cf. Cohen, supra note 50, at 4 (“Thoreau’s act may have been noble but in seeking to place himself above the law, or outside its jurisdiction, he acted as a rebel and strictly did not engage in civil disobedience.”). Even if the practice is not “as old as our species,” Harvey Wheeler, The Constitutionality of Civil Disobedience, 35 UWL A. L. Rev. 440, 440 (2003) (citing popular protests in “Homer and Rig-Veda, Bible and Scripture, Talmud and Koran”), it certainly pre-dates the act of the essayist who coined the phrase. See Durland, supra note 49, at 2 (noting Gandhi’s attribution of the term to Thoreau).

68. See Francis A. Allen, Civil Disobedience and the Legal Order, 36 U. Cin. L. Rev. 175, 187 (1967) (recalling the July 4, 1854 Framingham address of William Lloyd Garrison, during which the famed abolitionist burned copies of the Fugitive Slave Act and the Constitution); Ledewitz, supra note 49, at 75 (describing the 1856 Boston “rescue” of a slave named Shadrach in which he “was spirited right out of a federal courtroom”).

sity, labor rights, disability rights, welfare rights, convict rights, gay rights, convict rights, animal rights, and affordable housing, and against environmental degradation, nuclear energy, pornography, Puritanism, abortion, standardized testing, state budget
cuts, colonialism, militarism, and war.

so outraged by the post office’s refusal to carry Walt Whitman’s book of poems *Leaves of Grass* due to its alleged obscenity that he published his own edition and flaunted its sale. Addressing the post office and District Attorney Stevens, Tucker wrote: “You are hereby distinctly notified—all of you in general, and you, Oliver Stevens, in particular that I have now in my possession, and do now offer for sale, copies . . . Yours, disrespectfully.”


See War Resisters League, *History of War Tax Resistance*, at http://www.war resisters.org/history_wtr.htm (“[I]n 1989, the IRS seized and auctioned the Colrain, MA, home of war tax resisters Randy Kehler and Betsy Corner; shortly thereafter, the home of resisters Bob Bady and Pat Morse, neighbors of Kehler-Corner, was also seized and auctioned.”) (last visited July 8, 2004).

See The Zinn Reader, supra note 50, at 368 (describing the draft registration card burning in South Boston that gave rise to *United States v. O’Brien*, 391 U.S. 367 (1968), the leading case on symbolic speech); Alice Hinkle, *Lexington’s Other Battle: 30 Years after Clash over Vietnam, Sense of Respect Prevails*, The Boston Globe, May 20, 2001, available at 2001 WL 3934382 (remembering the “symbolic, Memorial Day weekend version of Paul Revere’s ride” undertaken by “disgruntled Vietnam veterans” which “prompted the largest mass arrest in Massachusetts up to that time”).

The effectiveness of civil disobedience has been, and will continue to be, the subject of scholarly studies and debates. See Bernard D. Lambeek, *Necessity and International Law: Arguments for the Legality of Civil Disobedience*, 5 Yale L. & Pol’y Rev. 472, 480 (1987) (noting the difficulty of isolating the effect of a particular factor on the overall success or failure of a broad social movement); Noam Chomsky, *Understanding Power: The Indispensable Chomsky* 1-4 (Peter R. Mitchell & John Schoeffel eds., 2002) (discussing “The Achievements of Domestic Dissidence”). Putting aside the question of whether the practice tends to help or hurt social protest movements, the attention it inevitably generates testifies to its efficacy in putting new or controversial notions into the marketplace of ideas. See Univ. of Utah Students Against Apartheid v. Peterson, 649 F. Supp. 1200, 1205 n.9 (D. Utah 1986) (“While the mass media often pays little attention to unorthodox or unpopular ideas, dramatic displays of action capture media attention when words alone will not.”); Elisabeth J. Beardsley, *Residents to draw a line on crosswalk*, The Boston Herald, June 5, 2003, available at 2003 WL 3027227 (demonstrating how the mere mention of civil disobedience is often
By the latter half of the twentieth century, the “sit-in” had become a particularly popular form of civil disobedience for those seeking to express “the passion of unconventional views in basically non-violent ways.” In Massachusetts, one such act at a Plymouth park precipitated a series of appellate court decisions that would ultimately preclude the Crowe defendants from asserting a necessity defense.

II. THE NECESSITY DEFENSE AND THE MOTION IN LIMINE

A. An Overview of the Necessity Defense

1. Definition

When successful, the necessity defense justifies criminal behavior, thereby avoiding the application of the usual criminal rule. Also known as the “competing harms” or “choice of evils” defense, it requires a “balancing test” to establish whether illegal conduct was perpetrated to prevent a more serious harm. If it was, enough to propel an obscure issue, such as “long-term dilly-dallying over promised crosswalks,” into public consciousness).


89. Id.


93. See Commonwealth v. Brugmann, 433 N.E.2d 457, 462 (Mass. App. Ct. 1982) ("[N]ecessity is fairly raised ‘only if there is evidence that would warrant a reasonable doubt whether the (trespass) was justified’ as a choice between evils.”) (citation omitted) (emphasis added).

94. Schulkind, supra note 50, at 82. See also BLACK'S LAW DICTIONARY 389 (2d Pocket ed. 2001). Black's defines jus necessitates as A person's right to do what is required for which no threat of legal punishment is a dissuasion. This idea implicates the proverb that necessity knows no
then the law concedes that punishing a person "who, with no legal alternative, acts reasonably" fails to "serve a useful purpose."95

2. Origins

The necessity doctrine is rooted in the ancient recognition "that 'justice' and 'law enforcement' are not always coterminous," and there are times when a technical breach of the law will bring about a more desirable result than adherence."96 Although Massachusetts, unlike many other states, has never codified the defense,97

---

95. Anne Lindquist, Comment, Job's Plight Revisited: The Necessity Defense and the Endangered Species Act, 33 ENVTL. L. 449, 460-61 (2003) (citing deterrence and rehabilitation as typical purposes of criminal sanctions); see also Susan B. Apel, Operation Rescue and the Necessity Defense: Beginning a Feminist Deconstruction, 48 WASH. & LEE L. REV. 41, 42 (1991) (noting the utilitarian and moral reasons for permitting the defense as well as the flexibility it provides to avoid unjust or foolish outcomes). The assertion of necessity often appeals to the political protestor "since it directly relates to the issues that compelled the defendant to commit civil disobedience" and "provides an opportunity for the defendant to educate the jury and judge about the subject of her protest." Deborah Greenblatt, Defense of the Civilly Disobedient, 13 N.C. CENT. L.J. 158, 181 (1982). See also Bauer & Eckerstrom, supra note 52, at 1176 (noting the attractiveness of the defense because it enables the civilly disobedient "to deny guilt without renouncing their socially driven acts").

96. Schulkind, supra note 50, at 83-84. Two commentators have traced the English common law origins of the defense back to the sixteenth century case of Reninger v. Fagossa, 1 Plowd. 1, 75 Eng. Rep. 1 (1551). Edward B. Arnolds & Norman F. Garland, The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil, 65 J. CRIM. L. & CRIMINOLOGY 289, 291 (1974) (quoting the Fagossa court's acknowledgment that '[a] man may break the words of the law, and yet not break the law itself ... where the words of them are broken to avoid greater inconvenience, or through necessity, or by compulsion'). Despite this long history, the defense in the United Kingdom has seldom been successful. Brent D. Wride, Comment, Political Protest and the Illinois Defense of Necessity, 54 U. CHI. L. REV. 1070, 1073 (1987) (describing the fear of English judges "that a broad necessity defense would too easily sanction departures from legality and encourage private determinations of law").

97. Schulkind, supra note 50, at 83 n.21. In Brugmann, the court cited Chapter 263, section 40 of the Proposed Criminal Code of Massachusetts which read in part: (a) Conduct is justified if it is necessary to avoid a harm, provided that: (1) the harm sought to be avoided by such conduct is clearly greater than that sought to be prevented by the law defining the offense charged; (2) neither this code nor any other statute defining the offense provides exceptions or defenses dealing with the specific situation involved; and (3) a legislative purpose to exclude the justification does not otherwise plainly appear. 

Brugmann, 433 N.E.2d at 460 n.5. Ultimately, the Proposed Criminal Code was sent to a special committee "for further study, and eventually failed to be enacted." Michael E. Malamut, Proposal for Revision of Archaic Statutes Implicating Private Consensual Noncommercial Adult Sexual Contact, 3 LAW & SEXUALITY 45, 47-48 (1993).
its highest court first indicated that it would accept a competing harms claim in 1840.98

The first major test of the defense’s availability in the Commonwealth came six years later in the wake of Dorr’s Rebellion99 when a Rhode Island militiaman named William Blodgett led a posse into Massachusetts in pursuit of four suspected insurgents.100 Upon finding the four suspects unarmed in a Bellingham inn,101 Blodgett ordered them bound and returned to Rhode Island.102 Massachusetts, in an apparent attempt to instill respect for its borders,103 charged Blodgett and an assistant with kidnapping.104

At the close of their trial, the defendants’ attorney asked the court to instruct the jury “that Rhode Island, being in a state of civil war and insurrection . . . had a right . . . to order her troops over the lines and into the territory of Massachusetts, to protect herself against insurgents . . . whenever she deemed it necessary so to do

98. Bishop, supra note 92, at 315 (citing Commonwealth v. Elwell, 43 Mass. (2 Met.) 190, 192 (1840)). Elwell involved an unmarried man named Charles Elwell and an unnamed married woman tried jointly for the crime of adultery. Elwell, 43 Mass. (2 Met.) at 190. In discussing whether the Commonwealth had the burden to prove Elwell had knowledge of the woman’s marital status the court noted that “if a man does an act, which would be otherwise criminal . . . by force or the compulsion of others, in which his own will and mind do not instigate him to the act, or concur in it, it is matter of defence, to be averred and proved on his part.” Id. at 192.

99. Commonwealth v. Blodgett, 53 Mass. (12 Met.) 56, 58-68 (1846). For the Blodgett court, the “great Rhode Island controversy” was one that “happily passed away.” Id. at 78. For a brief look at the causes of the insurrection, see ZINN, A PEOPLE’S HISTORY, supra note 63, at 209-11 (describing the rebellion as “both a movement for electoral reform and an example of radical insurgency . . . prompted by the Rhode Island charter’s rule that only owners of land could vote”). For a more in-depth treatment, see Paul M. Thompson, Is There Anything “Legal” About Extralegal Action? The Debate Over Dorr’s Rebellion, 36 NEW ENG. L. REV. 385, 396-431 (2002).


101. Id. According to the court, when the Bellingham innkeeper asked Blodgett “by what authority he acted, [Blodgett] replied, ‘by authority of this,’ presenting his gun and bayonet to the breast of [the innkeeper].” Id. at 58.

102. Id. at 57-58.

103. Id. at 75 (citing the Commonwealth’s argument that Rhode Island’s claim “to use the territory of this State, in case of civil war, in capturing her rebel citizens, who have fled hither, is wholly repudiated by the law of nations”).

104. Id. at 57. Blodgett and his assistant, Stephen Hendrick, were charged with violating REV. STS. c. 125, § 20, which provided for “the punishment of those who without lawful authority forcibly confine any person in this state, or carry any person out of the state against his will.” Id. at 56. The apparent impetus of the legislation was “to punish the kidnapping of negroes and others, for the purpose of making them slaves.” Id. at 72. In spite of a vote by the General Assembly of the Rhode Island legislature to remunerate the defendants “for loss of time and expenses in attending to prosecutions instituted against them in the State of Massachusetts . . . in the execution of a military order” id. at 68, the Governor of Rhode Island “disclaimed and repudiated the act” and “surrendered the defendants to be tried” in Massachusetts. Id.
for her own protection; she being . . . the sole judge of the necessity.” The judge refused. Instead, he informed the jurors that “such capture by the troops of Rhode Island . . . was unlawful, unless necessary in defence of the lives and property of the citizens of Rhode Island . . . .” As for whether such a necessity existed, the trial court concluded that “the jury, and not the State of Rhode Island, was the proper judge.”

“This instruction,” stated the Commonwealth’s highest court, “gave the defendants the full benefit of any excuse, arising from the use of force in the necessary defence of the State and its citizens . . . leaving a great latitude as to the means necessary to such defence.” Deeming it impracticable to draw “any exact line of distinction as to the measures which such necessary defence would warrant,” the court confessed its inability to see how Blodgett’s conduct could have been necessary. Nevertheless, it held that “the question was rightly submitted to the jury, as one of strictly necessary defence.”

3. Evolution

At 6:00 p.m. on October 7, 1978, the chief security officer for the Boston Edison Company’s nuclear plant in Plymouth announced the closing of a park, which the company maintained and made available to the public during the day. When a group of activists who had been distributing leaflets describing the risks of nuclear energy refused to leave, the company called the Plymouth police. After a constable told the activists they would be arrested if they did not disperse, they held their ground and were arrested as “they expected they would be.”

At trial, the defendants raised the claim of necessity and for three days offered testimony concerning the perils of nuclear energy. Finally, on the fourth day, the Superior Court judge exer-

---

105. Id. at 70.
106. Id. at 71.
107. Id.
108. Id.
109. Id. at 84.
110. Id.
111. Id. at 85.
112. Id.
114. Id.
115. Id. at 7.
116. Id. at 6.
cised the right he had reserved to stop hearing such evidence "if he concluded on so much of the evidence as he did hear that the defense would not be available."117

When the defendants challenged this ruling, the appellate court found itself in an area where Massachusetts jurisprudence was, as two commentators put it, "meagre [sic]."118 Lacking any bright-line rule to determine the availability of the competing harms defense, the court took the unusual first step of chiding the defendants for their attempt to avoid "a jail sentence or whatever less draconian sanction the law imposes."119 Based on a brief survey of other jurisdictions,120 the court concluded that "[a]ttempts to eliminate this disagreeable consequence of civil disobedience enjoy neither novelty nor a record of success."121 The primary reason for this poor record, the court determined, was the absence of a component at the core of all justification defenses.122

Unlike the defendant in Commonwealth v. Martin,123 "upon

117. Id. at 8.
118. Nolan & Sartorio, supra note 91, at 699 (citing Commonwealth v. Brooks, 99 Mass. 434 (1868), where "the Court held a wagon driver justified and hence not guilty of violating an ordinance which forbade stopping for over five minutes on a street because he had become unavoidably enmeshed in a traffic jam"). In 1974, two other commentators described the "law of necessity" as "poorly developed in Anglo-American jurisprudence." Arnolds & Garland, supra note 96, at 291.
119. Averill, 423 N.E.2d at 7. "Classically," the court wrote, "the [civilly disobedient] must accept the penalty for their violations of law." Id. (quoting Martin Luther King, Jr.) ("One who breaks an unjust law must do it openly . . . and with a willingness to accept the penalty."). But see Frances Olsen, Socrates on Legal Obligation: Legitimation Theory and Civil Disobedience, 18 GA. L. REV. 929, 960 (1984). A decade before the Averill court rendered its decision, David Daube observed that one motive behind the restriction of the term [civil disobedience] to the takers-of-the-consequences has to do with the honourable overtone nowadays attaching to it in a wide section of the public. Those who [attempt to] avoid or evade punishment are to be debarred from this honourable category, with effects which are obviously welcome to the authorities.
Id. (quoting D. DAUBE, CIVIL DISOBEDIENCE IN ANTIQUITY 4 (1972)).
121. Id.
122. Id.
123. 341 N.E.2d 885, 891 (Mass. 1976). The Martin court held:
An actor is justified in using force against another to protect a third person when (a) a reasonable person in the actor's position would believe his intervention is necessary for the protection of the third person, and (b) in the
which,” the court wrote, “the defendants mistakenly relied,”\(^\text{124}\) the Averill defendants did not expect their conduct “to have any immediate consequences in reducing the danger apprehended.”\(^\text{125}\) While news of their arrest might aid the defendants’ mission “in the long run,” the court held that “publicity designed to marshal public opinion could not extinguish an immediate peril, if there was one.”\(^\text{126}\) Ultimately, the court concluded, the competing harms defense did not apply because it concerns only “obvious and generally recognized harms, not . . . those which are debatable and, indeed, the subject of legislation and government regulation.”\(^\text{127}\)

At the close of its opinion, the Averill court dealt briefly with the protestors’ final “unmeritorious” argument: “that the opportunity afforded them to establish a defense of necessity earlier in the trial misled the defendants into abandoning other defenses.”\(^\text{128}\) Although the court refuted this claim by noting the defendants’ failure to identify “any defense which they were foreclosed from establishing,”\(^\text{129}\) the idea that justice required barring defendants from uttering a word to jurors about nuclear power was one that Massachusetts appellate courts would soon embrace.\(^\text{130}\)

B. An Overview of In Limine Practice

1. Definition

The term “in limine” means “on or at the threshold” or “at the very beginning.”\(^\text{131}\) Not surprisingly then, a motion in limine is usually brought prior to the start of a trial in order to obtain a court order precluding the opposition from presenting prejudicial evidence to the jury.\(^\text{132}\) Its purpose is to prevent such matters from being introduced,\(^\text{133}\) for even if a subsequent motion to strike is sustained, “all practicing lawyers know . . . that prejudicial effects [can-
not] be overcome by instructions to the jury."134

2. Origins

Because the motion in limine is generally brought prior to trial, its use has frequently gone unrecorded in reported decisions, making the historical path of in limine practice difficult to track.135 However, given the common law's strong inclination to conduct trials "cohesively from start to finish,"136 it seems all but certain that any pretrial technique giving rise to "bifurcated proceedings" would have been traditionally disfavored, if not altogether ignored.137 Not until courts came to see how pretrial devices, like discovery, enhanced efficiency did this prejudice begin to fade.138 When it did, the motion in limine made its first appearance in civil litigation.139

In search of the motion's progenitor in criminal proceedings, one commentator points both to "the motion to suppress, most commonly applied to illegally obtained evidence" and "the motion to strike or expunge matter, prejudicial or otherwise, from the pleadings."140 While its precise parentage may be unknown, it is

134. Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (calling this "naive assumption" an "unmitigated fiction"). See also Alperin & Shubow, supra note 131 (noting "the objection and the judge's corrective action may only reinforce the prejudicial effect of the matter in the minds of the jury").

135. Colbert, supra note 23, at 1275.

136. Jeffrey F. Ghent, Annotation, Modern Status of Rules as to use of Motion in Limine or Similar Preliminary Motion to Secure Exclusion of Prejudicial Evidence or Reference to Prejudicial Matters, 63 A.L.R.3D 311, 314 (1975).

137. Id. (citing the common law's bias in favor of procedures that allowed "the suitor, win, lose, or draw, literally (to have) his 'day in court'"). See also Henry B. Rosenblatt & David H. Leroy, Annotation, Motion in Limine Practice, 20 AM. JUR. TRIAL ADVOC. 441, § 3 (1973) ("Anglo-Saxon law encouraged the presentation of evidence in an orderly and consecutive manner at a single hearing or trial.").


139. Colbert, supra note 23, at 1275. According to Professor Colbert, the phrase "in limine" first began to surface in Supreme Court decisions as early as 1816. Id. at 1275 n.22. However, the motion's "modern-day version" did not appear until Mississippi v. Johnson, 71 U.S. 475 (1867), when, in response to the plaintiff's argument "that state sovereignty vested Mississippi with the right to resist federal military governance under the Reconstruction Act," the Attorney General moved to strike Mississippi's complaint. Id. at 1275. This, Colbert claims, was the first attempt to employ the motion in limine "to prevent prejudicial material from interfering with the judicial factfinder's determination." Id. At the state level, commentators generally trace the motion's use back to Bradford v. Birmingham Elec. Co., 149 So. 729 (Ala. 1933), "although one writer recently discovered a 1926 case involving motion in limine." Id. at 1275 nn.20-21 (citing Fort Worth & D.C. Ry. v. Westrup, 278 S.W. 490 (Tex. App. 1925), aff'd, 285 S.W. 1053 (Tex. Comm'n App. 1926)). For the origins of in limine practice in Massachusetts, see infra Part III.A.

140. Ghent, supra note 136, at 315.
generally acknowledged that the effort to preclude evidence prior to its introduction first became a criminal law issue in the case of *State v. Smith*.\(^{141}\)

In *Smith*, the defendant was charged with two counts of assault in a melee that erupted after union members chased the defendant and four other "private guards" of a lumber company through the streets of Bellingham, Washington.\(^{142}\) At the close of his direct examination of the accused, the defendant's attorney told the judge, outside the presence of the jury, that his client had previously deserted from the Marine Corps and that he feared the prosecutor intended to enlist "the destructive forces of prejudice"\(^{143}\) by cross-examining the defendant "upon this phase of his past life."\(^{144}\) After a brief oral argument, the court granted the defendant's motion in limine,\(^{145}\) the jury returned, and the prosecutor proceeded to ask the defendant how his tour of duty with the Marines happened to conclude.\(^{146}\) The defendant answered truthfully, and the jury found him guilty of assault in the third degree.\(^{147}\)

On appeal, a divided court expressed its approval of the trial judge's decision to grant the motion,\(^{148}\) calling the prosecutor's question "highly prejudicial and of such a nature that the prejudice largely consists in the mere asking [of it]."\(^{149}\) From this precedent, a considerable body of law concerning the applicability of the motion evolved.\(^{150}\)

3. Evolution

In his *Smith* dissent, Justice Holcomb stopped just short of complimenting the defense attorney for the shrewd way in which he

\(^{141}\) 65 P.2d 1075 (Wash. 1937).
\(^{142}\) *Id.* at 1076.
\(^{143}\) Rosenblatt & Leroy, *supra* note 137.
\(^{144}\) *Smith*, 65 P.2d at 1077.
\(^{145}\) *Cf.* Rosenblatt & Leroy, *supra* note 137 (contending that because the motion was made "prior to cross-examination of the accused rather than before commencement of the trial . . . it was not a motion in limine in the definitional sense") *with* Colbert, *supra* note 23, at 1275 (conceding that while the "in limine procedure occurs most frequently before the commencement of trial . . . the motion may be made at any time during the proceeding when a party first becomes aware that her adversary intends to use inflammatory material") (emphasis added).
\(^{146}\) *Smith*, 65 P.2d at 1077-78.
\(^{147}\) *Id.* at 1076.
\(^{148}\) Rosenblatt & Leroy, *supra* note 137.
\(^{149}\) *Smith*, 65 P.2d at 1078 ("It may well be that an objection to such a question, even though sustained, is more damaging to a defendant's case than almost any answer could be.").
\(^{150}\) Rosenblatt & Leroy, *supra* note 137.
convinced the trial judge to “erroneously” keep from the jury the circumstances surrounding the defendant’s departure from the Marine Corps. In the next twenty-five years, defense attorneys would mimic this “able strategy” by making similar motions in limine. Few, however, would be granted until the Warren Court’s historic decision in *Mapp v. Ohio* ushered in the era now famous for the rights it furnished the accused.

“In this judicial atmosphere,” Professor Douglas Colbert wrote, “the motion in limine became accepted as an additional mechanism to assure the accused’s sixth and fourteenth amendment rights to a fair trial.” As trial judges began to allow defense attorneys to employ the motion in limine to restrict the range of their clients’ cross-examinations, they encouraged the testimony of many defendants who would have otherwise remained silent. By permitting defense attorneys to prevent inquiries into their clients’ previous convictions, courts brought key witnesses before juries, aiding their fact-finding endeavors.

Of course, defendants were not the only witnesses with criminal records, and it was not long before prosecutors began using the motion in limine to curtail the cross-examination of government witnesses. As courts proved amenable to such motions, state at-
torneys began "to test the outer limits of judicial receptivity by using the motion to exclude entire defenses they regard[ed] as unduly prejudicial and irrelevant to the charges against the accused."¹⁶¹ Unlike earlier defense efforts to expand the motion's use,¹⁶² these attempts often garnered broad in limine rulings, especially in federal courts.¹⁶³

III. THE MOTION IN LIMINE COMES TO MASSACHUSETTS

A. Commonwealth v. Brugmann

The Supreme Judicial Court of Massachusetts had yet to make an in limine ruling¹⁶⁴ when, on June 2, 1979, twenty-one people strode past a barrier at the Yankee Atomic Electric Company in Rowe and sat down against the main gate by a fence.¹⁶⁵ Cognizant against a government informant on the grounds that "[t]he alleged murders were collateral to the issues at trial"); State v. Brown, 630 P.2d 731, 733 (Kan. Ct. App. 1981) (affirming the decision to preclude the cross-examination of two state witnesses previously convicted of arson on the grounds that "the charges [in those cases] did not involve dishonesty"); Scarborough v. State, 344 S.W.2d 886, 889 (Tex. Crim. App. 1961) (approving of trial court's decision to grant prosecutorial motion in limine requesting that no questions be asked of a witness regarding his pending indictment for income tax evasion).

¹⁶¹. Colbert, supra note 23, at 1283.
¹⁶². See, e.g., State v. Flett, 380 P.2d 634, 637 (Or. 1963) ("We have found no authority ... which requires the court to submit to a dress rehearsal in which the defendant may explore the state's evidence ... ").
¹⁶³. See, e.g., United States v. Best, 476 F. Supp. 34, 41 (D. Colo. 1979). The Best court made the effects of its in limine ruling quite clear, holding:

There will be no jury trial as to the morality or immorality of nuclear weapons or nuclear power. There will be no jury trial as to the wisdom or lack of wisdom of continuing any part of the nuclear program in this country. No jury will decide on the correctness vel non of any acts of Congress or the executive branch of the government. These are not decisions to be made by either judge or jury. There will be no jury trial involving the good or bad motives of any defendant. No jury will be asked to decide any political question, nor will a jury pass on the relevance or materiality of any defense.

Id.

¹⁶⁴. By the time Brugmann reached the Appellate Court, the Supreme Judicial Court had decided Commonwealth v. Diaz, 417 N.E.2d 950 (Mass. 1981) (affirming the trial court's denial of a defense motion in limine seeking to exclude evidence of the defendant's two prior convictions for the same crime with which he was charged) and Commonwealth v. Lopez, 420 N.E.2d 319, 322 n.2 (Mass. 1981) (upholding motion in limine which precluded the introduction of evidence relating to the defendant's previous acquittals on companion charges).

¹⁶⁵. Commonwealth v. Brugmann, 433 N.E.2d 457, 459 (Mass. App. Ct. 1982). Five weeks before, some of the defendants participated in a demonstration at the Yankee Atomic plant, which culminated with the presentation of six demands to plant officials regarding the safe operation of the plant. Appellants' Brief at 35, Brugmann (No. 81-908). "At that time it was stated that if a response was not forthcoming, that a non-
of a federal regulation requiring the nuclear power plant "to shut down if unauthorized people remain[ed] within twenty feet of its fence for any significant length of time,"166 the protestors refused to move and were arrested for trespassing.167

Prior to their trial, fourteen of the protestors informed the judge of their intention to assert a necessity defense.168 The Commonwealth responded by filing a motion in limine asking that the competing harms defense be made unavailable.169 Upon hearing what the defendants intended to prove, the judge orally granted the Commonwealth's motion.170 Eleven defendants were subsequently convicted, and they appealed the trial court's decision.171

After describing the "essence" of the necessity defense,172 Justice Greaney referenced a long history of understanding in Massachusetts "that compulsion may negate criminal purpose,"173 then

---

166. Brugmann, 433 N.E.2d at 459. In its amicus brief, Yankee Atomic claimed the defendants did not learn of this regulation until the plant superintendent offered testimony regarding it at trial. Brief of Amicus Curiae Yankee Atomic Electric Company at 12, 13, Brugmann (No. 81-908) (calling such testimony a "post-hoc rationalization of their criminal behavior").


168. Id. See also Defendant's Memorandum for Admission of de bene Testimony and Evidence at 7-8, Brugmann (No. 81-908) (claiming the plant superintendent "was familiar with all the safety questions which the defendants presented to him at the April 29th rally ... yet . . . he did not respond to those questions or demands"). Prior to this second demonstration, several of the defendants informed the plant that "twenty to thirty" people might engage in civil disobedience. Defendants' Motion for directed Verdict or Motion for requested finding of Not Guilty at 2, Brugmann (No. 81-908). In response, the plant designated the gate as "off-limits" and erected the barrier the defendants disregarded. Id. at 2-3.

169. Brugmann, 433 N.E.2d at 459. See also Commonwealth's Brief in Opposition to Defendant's Argument Concerning the 'Choice of Evils' Defense at 1-8, Brugmann (No. A-43-79).

170. Brugmann, 433 N.E.2d at 459. The judge subsequently "allowed a voir dire, at which he heard the testimony of two experts offered by the defendants. At the conclusion of the voir dire, however, he excluded their testimony, apparently ruling that the evidence was insufficient as [a] matter of law to raise the defenses stated." Id. The trial court denied the Defendants' Motion for a Written Statement of the Judge's Ruling Not to Allow the Necessity Defense at 1, Brugmann (No. A-73-79).

171. Brugmann, 433 N.E.2d at 459.

172. Id. at 460 (demonstrating how the defense "exonerates one who commits a crime under the 'pressure of circumstances'").

173. Id. at 460-61 (quoting Commonwealth v. Thurber, 418 N.E.2d 1253, 1256
noted the *Averill* court's recent approach to a claim of necessity.\textsuperscript{174} However, because that case and the instant one were "different both in fact and in law,"\textsuperscript{175} the court acknowledged that "until now, we have not directly considered the application of this defense in the present context."\textsuperscript{176} Hence, Justice Greaney's first task became deciding under what conditions the necessity defense might be properly raised. After considering the approaches of other jurisdictions,\textsuperscript{177} he concluded that

the application of the defense is limited to the following circumstances: (1) the defendant is faced with a clear and imminent danger, not one which is debatable or speculative; (2) the defendant can reasonably expect that his [sic] action will be effective as the direct cause of abating the danger; (3) there is no legal alternative which will be effective in abating the danger; and (4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue.\textsuperscript{178}

Proceeding under this rubric, the court placed the preliminary burden on the defendants to produce evidence demonstrating the existence of such circumstances,\textsuperscript{179} then held that they had "failed

\textsuperscript{174} See supra Part II.A.3.

\textsuperscript{175} Brugmann, 433 N.E.2d at 461 (distinguishing between the "informational protest" in *Averill* and "a protest directed at bringing an immediate end to what was, in the opinion of the defendants' experts, an emergency situation").

\textsuperscript{176} Id. (noting that aside from *Averill* and *Thurber*, the "competing harms" defense appeared without "any analogue in Massachusetts statutes or case law").


\textsuperscript{178} Id. Cf. Defendants' Memorandum: Admissibility of Choice of Evils Defense at 1, *Brugmann* (No. A-43-79) (advocating for allowance of the defense under the following circumstances: "(1) the defendant reasonably believed the act was necessary to avoid a substantial evil; (2) all other means of avoiding the danger had been exhausted; (3) the means used was not disproportionate to the threatened harm; and (4) the necessity occurred in an emergency situation") with Brief of Amicus Curiae Yankee Atomic Electric Company at 9, *Brugmann* (No. A-43-79) ("At the very least, the necessity defense has three elements. It requires a showing that (a) the danger was clear and imminent, not debatable and speculative, (b) the defendant reasonably believed that his action would stop the danger, and (c) no legal alternatives were available to stop the danger.") (citations omitted).

\textsuperscript{179} *Brugmann*, 433 N.E.2d at 462 (describing the shift of burden which would
to make a sufficient showing of the third element.” It was incumbent upon the defendants, Justice Greaney wrote, to make themselves “aware of existing alternatives and pursue those which are lawful, or show them to be futile in the circumstances.” Notwithstanding evidence which suggested that the defendants had: (1) initiated nationwide petitions; (2) lobbied elected officials; (3) contacted the United States Nuclear Regulation Commission (NRC); (4) presented their safety concerns to the plant superintendent; and (5) filed a show cause suit against Yankee Atomic, the court identified two alternatives the protestors impossibly failed to explore.

“First, the defendants could have sought to initiate action on the part of the NRC.” In support of this proposition, the court cited NRC regulations detailing the process by which the defendants might have enlisted “the government agency most directly in-occurred—provided the issue is properly raised—requiring the Commonwealth to prove lack of necessity beyond a reasonable doubt).

180. Id. (indicating the apparent satisfaction of the first two elements). Given the defendants’ inability to satisfy the third element, the court concluded, “we need not consider the question presented by the fourth element of the defense, i.e., whether it plainly appears that the Legislature has acted to exclude its operation in these circumstances.” Id. at 463.

181. Id. at 462.

182. Id. at 460. See also Agreed Statement of Facts at 11, Brugmann (No. A-43-79) (citing the testimony of defendant, Kristen Nelson, who “stated she had done everything in her power to bring to the attention of the public the harms of low level radiation and the disasters that an accident would create, including writing letters and signing petitions”) (emphasis added).

183. Brugmann, 433 N.E.2d at 460. See also Agreed Statement of Facts at 9, Brugmann (No. A-43-79) (citing the testimony of defendant, Jeb Brugmann, whose lobbying efforts allowed him to witness “the frustration [legislators] felt” in “their inability to stop the immediate harm to the public by the nuclear plants . . . ”).

184. Brugmann, 433 N.E.2d at 460. See also Defendants’ Memorandum for Admission of de bene Testimony and Evidence at 7, Brugmann (No. A-43-79).

185. Brugmann, 433 N.E.2d at 460.

186. Id. This suit was filed in 1974, five years before the occupation of the plant; however, because the defendants failed to provide the trial court with its particulars, the court considered reference to it incapable of demonstrating the futility of seeking injunctive relief. Id. at 463 n.8.

187. Id. at 462-63.

188. Id. at 462. In its amicus brief, Yankee Atomic urged the court to adopt a per se rule that would make the competing harms defense unavailable to any and all “anti-nuclear demonstrators who break the law by trespassing on the premises of a licensed nuclear power plant.” Brief of Amicus Curiae Yankee Atomic Electric Company at 4, Brugmann (No. A-43-79). In support of this argument, the company provided the federal court decisions and statutory provisions interpreting the NRC’s mandate that found their way into Justice Greaney’s decision. Cf. Brief of Amicus Curiae Yankee Atomic Electric Company at 6-8, Brugmann (No. A-43-79) with Brugmann, 433 N.E.2d at 462.
olved with policing the safety of nuclear plants."189 Sensitive, perhaps, to the general impression that federal bureaucracies like the NRC tend to be inefficient—thereby prolonging, in this case, the exposure of Rowe residents to radiation linked “to the possible damage of the bone marrow and white blood cells, and an increased risk of leukemia, infant mortality and congenital defects”190—the court highlighted the NRC’s authority to act expeditiously.191 “While revocation, suspension, or modification actions generally must be in accord with the Administrative Procedure Act . . . , if public health or safety so requires, such actions may be taken with immediate effect.”192 As an alternative to this alternative, the court pointed to the Massachusetts Department of Environmental Quality Engineering (DEQE)193 and invoked another long list of department regulations to demonstrate how the defendants might have reached their laudable end through legal means.194

Ultimately, the court concluded, “there was no showing that the defendants had pursued any of these remedies, or that such pursuit would have been futile.”195 Characterizing the protestors’ attempts to publicize the dangers at Rowe as “well intended,” the Brugmann court nonetheless affirmed the trial court’s decision to grant the Commonwealth’s motion in limine and refused to authorize the use of “the competing harms defense where established legal alternatives [had] been ignored.”196

B. Commonwealth v. O’Malley

Less than five months after Brugmann, Justice Greaney again wrote for a unanimous court in another case involving a motion in limine barring the assertion of a necessity defense.197 In 1974, while incarcerated at M.C.I., Walpole, Timothy O’Malley was approached by three members of the “Devlin gang . . . who were awaiting trial

189. Brugmann, 433 N.E.2d at 462-63 n.8.
190. Id. at 460.
191. Id. at 462.
192. Id.
193. Id. See Brief for the Commonwealth at 10 n.5, Brugmann (A-43-79).
194. Brugmann, 433 N.E.2d at 463 (citing MASS. REGS. CODE tit. 310, §§ 7.00, 7.01, 7.02, 7.03, 7.51, 7.52, 8.02, 8.15(1), 8.15 (3), 8.21, 8.22, 8.31 (1980); MASS. GEN. LAWS ch. 111, §§ 2B, 2C, 5B, 142A, 142B; MASS. GEN. LAWS ch. 211, § 23; MASS. GEN. LAWS ch. 111, § 2C, as appearing in ST.1975 MASS. GEN. LAWS ch. 706, § 162; MASS. GEN. LAWS ch. 111, § 142A, as appearing in ST. 1959, c. 422).
195. Id.
196. Id.
for conspiring to murder another inmate." 198 Aware of the defendant's upcoming temporary transfer to the facility where the primary witness against them was being held, the Devlin gang attempted to persuade O'Malley to murder the government witness. 199 When the defendant returned to Walpole that summer, having failed to fulfill his "mission," the gang's "execution squad" tried to kill him. 200

O'Malley testified against the Devlin gang at two trials and over the next six years had numerous threats made on his life. 201 By the summer of 1980, it had become clear to the defendant that he would be in particularly grave danger if ever he found himself in the Concord house of correction where a committed Devlin "executioner" named Larry McBride was serving time. 202

At approximately 10:00 p.m. on September 6, 1980, O'Malley returned to a pre-release center in Lancaster where he was confronted by an officer who asserted that earlier efforts to contact O'Malley had been unsuccessful. 203 When no one answered the telephone at the car dealership where O'Malley worked, 204 the superintendent's office was alerted and, the decision was made to treat O'Malley as an escaped prisoner and transfer him "to Concord that same night." 205

The defendant protested that he had not been trying to escape and attempted to communicate his concerns about going to Concord. 206 When the officer refused to listen, O'Malley fled. 207 Five days later, the defendant's worst fears were realized when he was apprehended and assigned to a Concord cell next to Larry McBride. 208

O'Malley was charged with escaping from the Lancaster facility. 209 At trial, the Commonwealth moved to preclude "evidence of

198. Id. at 833. The head of the Devlin gang "was convicted of manslaughter for a killing in which the victim was shot, dismembered and decapitated." See id. at 833 n.2.
199. Id. at 833.
200. Id.
201. Id. at 833-34.
202. Id. at 834.
203. Id.
204. O'Malley participated in the work release program at Lancaster. Id.
205. Id.
206. Id.
207. Id.
208. While McBride did not make good on his pledge to plunge a knife into O'Malley's chest, see id., it seems he did manage to break certain bones in the defendant's face. Id.
necessity on the ground that it would be insufficient to raise that 
defense as matter of law.”210 This oral motion, “directed at virtu­
ally all the defendant’s evidence,” caught defense counsel off guard
and prompted the judge to ask: “Can’t you argue that to the 
jury?”211 When the prosecution claimed it could not, the judge
scheduled a voir dire for the following day, and ultimately granted
the motion.212 O’Malley “stated his objection to that ruling,” and
“[h]aving preserved his rights, . . . waived his jury claim and . . .
proceeded before the judge, who found him guilty as charged.”213

For Justice Greaney, finding “that the ‘threats of force [made
against the defendant] . . . [were] not present, immediate or im-
pending and . . . such in nature as to induce a well-founded fear of
death or at least serious bodily injury’” constituted the first of the
trial court’s two major missteps.214 The second involved its deter-
mination that the defendant had other options besides escaping.215
Given these judicial errors, and the Commonwealth’s failure to
comply “with the explicit requirements of Mass.R.Crim.P.
13(a),”216 the decision to overturn the trial court’s in limine ruling
now seems hardly surprising.217 What makes the opinion notewor-

210. Id.
211. Id. at 836.
212. Id. The trial court ruled:
(1) that the “threats of force [made against the defendant] . . . [were] not
present, immediate or impending and . . . such in nature as to induce a well-
founded fear of death or at least serious bodily injury;” and (2) that the evi-
dence did not show that “there was no reasonable opportunity to avoid the
situation without . . . [escaping].”
Id. at 835.
213. Id. at 833.
214. Id. at 835 (recounting the “long history of threats on the defendant’s life; a
recent threat of death ‘if he returned to Concord;’ a prior attempt to kill him; and
another attack following his return to Concord”).
215. Id. (discussing evidence which tended to show “the defendant made a ‘com-
plaint to the authorities,’ that it was ‘futile,’ and that he was, in fact, prevented from
complaining further”).
216. Id. at 836. According to Rule 13(a), a pretrial motion “shall be in writing,”
and “shall state the grounds on which it is based and shall include in separately num-
bered paragraphs all reasons . . . which shall be set forth with particularity.” Id. at 836
n.9.
217. That being said, O’Malley was decided before the state’s highest court had
“formally recognize[d] the doctrine of necessity as a defense in [the prison escape] con-
text.” Id. at 835 n.7. Notwithstanding the various factors which now seem to make
O’Malley “a proper case” to “apply the [necessity] doctrine,” Commonwealth v. Thur-
ber, 418 N.E.2d 1253, 1256 (Mass. 1981), it bears noting that Justice Greaney took Mas-
sachusetts courts into uncharted waters. For the view that decisions like O’Malley were
motivated by a “hope that recognition of the defense in penal settings might embarrass
correctional officials and encourage them to improve conditions,” see Matthew Lipp-
thy is the dicta that followed.

Justice Greaney commenced what he called an "unnecessary" discussion of "the defendant's broader argument" by invoking O'Malley's fundamental right to assert a defense in accordance with his conception of the facts. Motions in limine used to gauge the adequacy of a defendant's case, he opined, were incompatible with that notion. For Justice Greaney, the suitable aim of the pretrial motion was "to prevent irrelevant . . . or prejudicial matters from being admitted in evidence," and rarely could it be "irrelevant or prejudicial to allow a defendant to tell his story to the jury."

Prosecutors had a duty, Justice Greaney continued, to employ the motion in limine "as a rifle and not as a shotgun." Permitting the Commonwealth to "choke off a valid defense in a criminal action, or to 'knock out' the entirety of the evidence supporting a defense before it can be heard by the jury," would turn "a criminal trial by jury . . . into a trial by motion, with the possible effect of directing a verdict against the defendant." Thus, Justice Greaney concluded, "[i]n the usual case . . . it is far more prudent for the judge to follow the traditional, and constitutionally sounder, course of waiting until all the evidence has been introduced at trial before ruling on its sufficiency to raise a proffered defense."

C. Commonwealth v. Hood

On December 21, 1981, three and a half months before the Brugmann decision, four individuals were arrested for refusing to leave the outdoor courtyard of Charles Stark Draper Laboratory, Inc. (Draper) where they had been passing out leaflets that "advo-
icated nonviolence as a means to avert nuclear war." Prior to their trial, the prosecution filed a motion in limine asking the court to exclude "evidence consist[ing] of the defendants' reason for being upon the premises alleged to have been trespassed, to wit: [distributing leaflets], and the content of said leaflets." In response, one of the pro se defendants read a short statement explaining the group's religious motivations, and the judge granted the Commonwealth's motion.

After outlining the defendants' argument, the Hood court summarized the holdings of Averill and Brugmann, then analogized State v. Marley—a Hawaii Supreme Court decision which held the necessity defense unavailable for defendants charged with trespassing on the premises of another weapons manufacturer. According to Hood, the soundness of the Marley court's reasoning rested on its recognition of available legal alternatives, the lack of imminent danger, and the absence of a reasonable belief that the defendants' actions might avoid the alleged harm.

Holding that the four defendants had no reason to believe passing out literature opposing the construction of nuclear weapons would "abate the alleged danger directly," the Hood court compared them to the activists in Averill, whose only stated intention was to influence "the general public . . . through the news of their..."
arrest." Assuming *arguendo* that the government's weapons policy constituted a "clear and imminent danger," the court quoted Averill for the proposition that "publicity designed to marshal public opinion could not extinguish an immediate peril . . . ." "Other [legal] avenues were available," the court concluded, "including use of publicity media, distribution of literature at an appropriate site, and participation in the political process."

Of course, ruling that the defendants failed to pass the Brugmann test did not require the court to uphold the motion judge's in limine decision. If, at the conclusion of the trial, the defendants' hypothesis of necessity lacked sufficient support, the judge could have taken the O'Malley approach and simply declined to instruct on it. Instead, by pursuing the path it did, the trial court "prevented even the introduction of evidence in support of the competing harms defense."

Rather than ignore O'Malley, Hood chose to mitigate the lower court's conclusions. Whereas O'Malley asserted that "it is far more prudent" for judges to deny broad prosecutorial pre-trial motions, Hood suggested only that "[i]t is, perhaps, "more prudent" to do so. Ultimately, because the necessity defense "was inapplicable to the defendants' actions," the court determined, "they were not prejudiced by their inability to present their evidence to the jury."


236. Id. (quoting Averill, 423 N.E.2d at 7-8). See also Marley, 509 P.2d at 1109 (noting that "under any possible set of hypotheses, defendants could foresee that their actions would fail").


238. That being said, the Hood court could have disregarded the Brugmann test and affirmed the Blodgett court's conclusion that "drawing any exact line of distinction as to the measures which such necessary defence would warrant [would] . . . perhaps . . . be [in]practicable; because it must depend much on the circumstances of each case." Commonwealth v. Blodgett, 53 Mass. (12 Met.) 56, 84 (1846).

239. See supra Part III.B.

240. Hood, 452 N.E.2d at 196.


243. Id.
D. Aftermath

Hood, in effect, sounded a death knell for competing harms claims in Massachusetts cases involving civil disobedience. Although the court concluded its opinion by cautioning against allowing motions that preclude potential defense evidence, this do-as-I-say-not-as-I-do advice has rarely been heeded, and judges who bar evidence of necessity have invariably had their rulings affirmed.

IV. Critiquing Crowe

Decisions to keep evidence of necessity from juries in civil disobedience cases have provoked considerable controversy and scholarship. Among commentators who condemn Crowe-like

244. Id. at n.5.


246. See Commonwealth v. Leno, 616 N.E.2d 453, 456 (Mass. 1993) (holding that defendants who operated an illegal needle exchange program to combat the spread of AIDS “did not show that the danger they sought to avoid was clear and imminent, rather than debatable or speculative”); Commonwealth v. Hutchins, 575 N.E.2d 741, 745 (Mass. 1991) (disallowing defendant to assert medical necessity defense based on the fact that the “alleviation of the defendant's medical symptoms ... would not clearly and significantly outweigh the potential harm to the public were we to declare that the defendant's cultivation of marihuana and its use for his medicinal purposes may not be punishable”). In Commonwealth v. Brogan, 612 N.E.2d 656, 656 (Mass. 1993), the court affirmed the allowance of a motion in limine to bar evidence of necessity in conjunction with a defendant's violation of a court order prohibiting him from

a. trespassing on, blocking, or in any way obstructing access (either ingress or egress) to any facility in the Commonwealth which provides abortion counseling or services, and b. physically restraining or obstructing or committing any acts of force or violence against persons entering, leaving, working at or seeking to obtain services from any facility in the Commonwealth which provides abortion counseling or services....

Id. 247. In addition to those Articles, Notes, and Comments previously cited, see Patrick G. Sentile, The Necessity Defense in Abortion Clinic Trespass Cases, 32 ST. LOUIS U. L.J. 523, 534-40 (1987-88); Joel H. Levitin, Note, Putting the Government on Trial: The Necessity Defense and Social Change, 33 WAYNE L. REV. 1221 (1987); Tammy A. Tierney, Note, Civil Disobedience as the Lesser Evil, 59 U. COLO. L. REV. 961 (1988); James L. Cavallaro, Casenote, The Demise of the Political Necessity Defense: Indirect Civil Disobedience and United States v. Schoon, 81 CAL. L. REV. 351 (1993); Arlene D. Boxerman, Comment, The Use of the Necessity Defense by Abortion Clinic Protestors, 81 J. CRIM L. & CRIMINOLOGY 677 (1990). Not surprisingly, defenders of the present jurisprudence find themselves in the minority. While there are, no doubt, numerous supporters of the status quo who have not seen the need to become its defender, it is perhaps noteworthy that several of the most vigorous defenders seem to predicate their defense, at least partly, on the impact a contrary rule might have, not on
outcomes, some accept the articulated elements of the defense and quarrel with their application,248 while others advocate for an entirely different approach.249 This next section will present summaries of these diverse camps and demonstrate how Crowe might have been analyzed and decided differently.

A. Reconsideration

1. Summary

Pleas for reconsideration250 presume that political protestors generally satisfy the threshold issue by choosing the lesser of two evils.251 Such pleas posit that inquiries into the imminence element should ask no more than the likelihood of the potential harm's oc-

society or the rule of law, but on the institution of civil disobedience. For example, one commentator claims the competing harms defense has no role to play in a strategy of civil disobedience. The point of civil disobedience is to force a society to recognize the contradiction of using a system of justice to defend an unjust institution. If the person practicing civil disobedience is set free not because the offensive institution has been removed but because the system of justice has made an exception, then the contradiction remains hidden, and the object of the protest is lost.

Wride, supra note 96, at 1094. See also Bauer & Eckerstrom, supra note 52, at 1200 (warning that those who attempt to justify their actions may compromise “the legitimacy of traditional civil disobedience”). But see Elliot C. Rothenberg, The “Necessity” to Restrict Appeals to Judicial Prejudice, 21 New Eng. L. Rev. 581, 582 (1985-86) ("[D]efendants who break the law to propagandize their various public policy views, which have previously been rejected through the democratic political process, should not then be afforded the opportunity to use the court system to advance their political ideologies."); Diana P. Nowezki, Note, “Justified” Nuclear and Abortion Clinic Protest: A Kantian Theory of Jurisprudence, 21 New Eng. L. Rev. 725, 729 (1985-86) (using Immanuel Kant’s “Categorical Imperative” to demonstrate “why the courts must be conservative in allowing recourse to the defense”).

248. See, e.g., Quigley, supra note 5, at 56 (suggesting “a straight-forward method of analyzing and applying the necessity defense [elements] in civil disobedience cases”).

249. See, e.g., Loesch, supra note 52, at 1099 (claiming the requirements of Brugmann-type formulas “are too strict, the standards too narrow, for a necessity defense to answer to the moral conflict faced by some dissenters of conscience”).


251. Indeed, because “dangers such as the harm of a foreign war . . . [are] generally considered to outweigh the harm of a trespass,” Cavallaro, supra note 247, at 357, arguments for reconstruction often devote little attention to the relatively “easy task” of demonstrating that the harm civil disobedients “sought to avert outweighs the harm of their protest activities.” Bauer & Eckerstrom, supra note 52, at 1182.
currence;\textsuperscript{252} they suggest that courts, called upon to evaluate the reasonable expectations of activists, should do so cognizant of "the fact that acts of nonviolent protest historically have served as a catalyst for social change";\textsuperscript{253} they urge judges to think critically about the effectiveness of the legal avenues ostensibly available to marginalized groups,\textsuperscript{254} and; they contend that legislative preclusion be limited to instances "when the law has dealt explicitly with the specific situation that presents the choice of evil . . . [and only where] the legislature has itself canvassed and determined what the choice [of evils] shall be."\textsuperscript{255}

2. Crowe Reconsidered

Applying this conception of the necessity defense to Crowe, it seems clear that the harm of the war the defendants sought to avoid "significantly exceeds"\textsuperscript{256} the harm of "preventing several dozen people from getting to work on time."\textsuperscript{257} Likewise, the state's absence of imminence claim is belied by the fact that the danger the defendants sought to abate actually came to pass.\textsuperscript{258}

\textsuperscript{252}Senftle, supra note 247, at 535 (noting the necessity defense "carries a broader definition of the term imminent than its common definition"). According to one widely cited argument for reconsideration, making "imminence" synonymous with "immediacy" undermines the internal consistency of the defense by placing "the actor in a catch-22 situation; the longer the actor waits in order to satisfy the immediacy requirement, the less likely her action reasonably can be expected effectively to avert the harm, thus failing to satisfy another element of the defense." Schulkind, supra note 50, at 97.

\textsuperscript{253}Lippman, Political Protest, supra note 217, at 347.

\textsuperscript{254}The Zinn Reader, supra note 50, at 385 (suggesting "the much-praised 'proper channels' are not channels at all, but mazes, into which we are invited, like experimental animals, to get lost").

\textsuperscript{255}Model Penal Code § 3.02 commentary at 6 (Tent. Draft No. 8, 1958).

\textsuperscript{256}Commonwealth v. Brugmann, 422 N.E.2d 457, 460 (Mass. App. Ct. 1982).\textit{But see} Levitin, supra note 247, at 1221-22 (There are "certain difficulties with the Brugmann court's formulation" including the assertion that "the harm sought to be avoided must 'significantly' exceed that resulting from the action taken. Merely tipping the scale, however, is sufficient under many formulations.").

\textsuperscript{257}Doerner, supra note 5.

\textsuperscript{258}The Commonwealth's motion concedes as much when it states that the "actual risk" was "two months away." Commonwealth's Motion, supra note 15, at 2. The state's first alternative argument that "none of the defendants faced personal harm" or "felt any degree of physical danger," \textit{id.}, appears improperly to ignore the finding of Commonwealth v. O'Kane, 760 N.E.2d 291, 295 (Mass. App. Ct. 2001), that the imminent danger element encompasses those harms "threatening the defendant or a third person." \textit{Id.} (citing Commonwealth v. Weaver, 511 N.E.2d 545 (Mass. 1987)). Assuming \textit{arguendo} that this element did compel defendants to act in the face of personal danger, what could be more dangerous to them, the defendants might ask, than having their government invade a country purported to possess weapons of mass destruction? See Kathleen T. Rhem, Rumsfeld Dismisses Iraqi Claims of Innocence Regarding
More problematic for the *Crowe* defendants is the state’s assertion that their conduct could not possibly “have stopped the war.”259 According to the Commonwealth:

The disruption of Westover Air Reserve base that January morning would have had no measurable impact on the incipient war effort. Preparing for an armed conflict of this size is a national and global undertaking. The concept that the burden of fighting a war in Iraq rests upon uninterrupted access to a single base in Western Massachusetts is not credible.260

Are the lessons of history,261 procedural posture,262 and the power of collective action263 enough to overcome the prosecution’s argument? Assuming they are, a critical look at the remaining elements seems to favor the defendants. While Crowe and her comrades could “demonstrate good faith efforts to remedy legally the harm being challenged,”264 the state would be hard-pressed to prove that another letter to the editor or phone call to a politician would have been effective.265

Finally, notwithstanding the Commonwealth’s invocation of the Congressional resolution authorizing force against Iraq,266 it ap-

---

WMDs, Nov. 14, 2002, available at http://www.defenselink.mil/news/Nov2002/n11142002_200211141.html (quoting the Defense Secretary's assertion that “they do have weapons of mass destruction”). The state’s second alternative argument that allegations of imminence are “undercut by the fact that they chose the date of their protest arbitrarily” is itself undercut the arbitrary nature of some of history's most famous acts of civil disobedience. See, e.g., infra notes 328-29 and accompanying text.


260. *Id.*

261. See *supra* notes 10-12 and Part I.B.

262. “Insufficiency as a matter of law is a stringent standard, and the law generally favors submitting defenses to the jury.” Bauer & Eckerstrom, *supra* note 52, at 1178 (citing Sandstrom v. Montana, 442 U.S. 510 (1979)).

263. See Doerner, *supra* note 5 (“With respect to expectations, the point was made that 20 went to Westover on January 15. On February 15, 10-million demonstrated in cities around the world. By March 22 we numbered 2,000 at the same Westover gate.”).

264. Lippman, *Towards a Recognition*, *supra* note 217, at 247. See also *supra* notes 9-11 and accompanying text.

265. See Commonwealth v. McCambridge, 690 N.E.2d 470, 474 (Mass. App. Ct. 1998). In *McCambridge*, the prosecution argued that a defendant who shot an armed antagonist “had an effective legal alternative, namely to wrestle the gun” away. *Id.* However, the court concluded that “[b]ased on the defendant’s evidence, there was no assurance that an attempt to take the gun away . . . would have been effective . . . .” *Id.* Based on the *Crowe* defendants’ evidence, there was no assurance that further attempts to influence foreign policy makers would have been effective.

pears that legislative preclusion in the Commonwealth is a non-issue. As a 1997 appellate court decision pointed out: “No Massachusetts court has yet precluded the [necessity] defense based on a determination that the Legislature has statutorily ruled it out.”

3. Reconsidering Reconsideration

For those who believe defendants like Frances Crowe deserve the chance to justify their conduct in the presence of juries, asking courts to “interpret the language of the test simply and reasonably” constitutes a considerable risk. As one commentator sympathetic to civil disobedients has noted:

When citizens protest a policy or law by engaging in demonstrations that violate a trespass statute, they do not expect that their action, by itself, will cause the reform of the law to which they object. They will, therefore, only very rarely meet the requirement that a rational person could have concluded that their disobedient action by itself would result in the change for which they hope.

Those who urge reconsideration might think it sensible to deem the claim’s act requirement “satisfied by public, nonviolent acts of protest, reasonably calculated to direct public attention to a situation reasonably perceived to pose a significant social harm.” However, if one applies the “fundamental canon of statutory construction . . . that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common

267. Commonwealth v. Lora, 681 N.E.2d 876, 879 n.5 (Mass. App. Ct. 1997). According to the Lora court, where the statute provides no clear guidance, judges should prevent jurors from engaging in an exercise of legislative interpretation. A judge should either omit the fourth element from the charge, or inform the jury that the Legislature has left the defense available, leaving the jury to decide whether the evidence satisfies the first three elements so as to justify the defendant’s violation of the law. Id. at 880. Seven years after this decision, there is no consensus on its impact. Whereas the majority of courts continue to include the element, see, e.g., Commonwealth v. O’Kane, 760 N.E.2d 291 (Mass. App. Ct. 2001); Commonwealth v. Janvin, 690 N.E.2d 470 (Mass. App. Ct. 1998); Commonwealth v. Pike, 701 N.E.2d 951 (Mass. 1998), at least one appellate court has followed Lora’s lead by eliminating it from the charge. See Commonwealth v. Ben B., 796 N.E.2d 432, 433 (Mass. App. Ct. 2003).
268. Quigley, supra note 5, at 50.
269. Loesch, supra note 52, at 1099.
270. Lippman, International Law Versus the American Judiciary, supra note 50, at 52.
meaning," then such an indirect approach cannot, by definition, be "the direct cause of abating the danger." 

Given the central role Westover Air Force base plays in transporting supplies to the Middle East, the Crowe defendants are perhaps better positioned than most protestors to claim their conduct could have averted a complex harm. Nonetheless, a successful challenge to the trial court's ruling appears unlikely. At the appellate level, nothing, it seems, succeeds like success. To date, the only Massachusetts defendants who have satisfied this element are those whose actions actually did abate the danger.

B. Auxiliary Approaches

Perhaps the most creative of proposed solutions to the motion in limine quandary are those which proffer alternate modes of analysis to supplement or supplant traditional necessity tests. For example, one student commentator, after analyzing choice of evil cases from across the country, suggests a modification of Judge Learned Hand's famous negligence formula might best decide

273. Doerner, supra note 5 (noting the defendants' contention during the motion hearing that "more than 50% of all Mideast material (tanks, helicopters, APCs) is transshipped from Westover .").
274. Of course, the Crowe defendants could also claim that their aim was not to stop the impending war. Cognizant of the conversion of Lt. Donald Dawson, see supra notes 12-14 and accompanying text, they could state that their more modest objective was to stop individual soldiers at Westover from participating in it.
275. See, e.g., Brugmann, 433 N.E.2d at 462; Commonwealth v. McCambridge, 690 N.E.2d 470, 474 (Mass. App. Ct. 1998). But see Commonwealth v. Weaver, 511 N.E.2d 545 (Mass. 1987). Although the defendant's unlawful possession of a firearm effectively abated a clear and imminent danger by taking the weapon from someone who had just used it to shoot a defenseless victim, the court was unwilling to infer that the defendant consciously opted for the lesser of two evils. Id. at 547-48.
276. Levitin, supra note 247, at 1228-38 (discussing State v. Warshow, 410 A.2d 1000 (Vt. 1979); State v. Greene, 623 P.2d 933 (Kan. 1981); State v. Dorsey, 395 A.2d 855 (N.H. 1978); Brugmann, 433 N.E.2d at 457; In re Weller, 164 Cal. App. 3d 44 (1985); People v. Marley, 509 P.2d 1095 (Haw. 1973); United States v. Simpson, 460 F.2d 515 (9th Cir. 1972); People v. Hubbard, 320 N.W.2d 294 (1982)). In addition, Levitin offers a comparison of various necessity codifications. Id. at 1238-51 (discussing N.Y. PENAL LAW § 35.05 (McKinney 1975); MODEL PENAL CODE § 3.02 (Tent. Draft No. 8, 1958); 18 PA. CONS. STAT. ANN. §§ 501, 503 (Purdon 1983); KAN. STAT. ANN. § 21-3209(1) (1981); ILL. ANN. STAT. CH. 38 § 7-13 (Smith-Hurd 1972)).
277. Judge Hand first articulated his formula in United States v. Carroll Towing, 159 F.2d 169, 173 (2d Cir. 1947) ("[i]f the probability [of harm] be called P; the [gravity of the resulting] injury L; and the burden [of adequate precautions], B; liability depends on whether B is less than L multiplied by P: i.e., whether B is less than PL.").
competing harms claims. This section will focus on the reasoning and potential implications of two other inventive approaches: Matthew Loesch's call to amend the Model Penal Code "to admit in some limited circumstances, testimony relevant to . . . motive," and the seemingly modest proposal of Professor John Rockwell Snowden that all defendants "be able to tell their stories and ask the judge or jury to find them not guilty, without regard to predetermined rules, elements, and the like."

1. Countenancing Extraordinary Crime

a. Why Civil Disobedients Deserve Better

At the heart of Martin Loesch's proposition is the belief that "those citizens who engage in civil disobedience are different from ordinary criminals." Unlike the typical deviant who "does what she does out of self-interest and in violation of the respect citizens are required to show other persons and their interests," the civil disobedient seeks "not only to resolve the conflict between conflicting moral and legal obligations, but also to right what she perceives as an unjust political order." Convinced these distinctions "should be accounted for in our criminal law," Loesch advocates amending the Model Penal Code to include a "Civil Disobedience Justification." This amendment would permit evidence describ-
ing the considerations which prompted the actors to break the law, provided they could prove: (1) their action was “nonviolent in character”; (2) their action was “specifically limited and narrowly tailored to suit the character of the conflict”; (3) they had previously pursued “all reasonable legal alternatives”; (4) they reasonably perceived a conflict between their legal and moral obligations; and (5) that vindicating their moral belief “substantially outweighs the governmental interest in prohibiting the conduct at issue.”

The civil disobedient capable of satisfying this criteria, Loesch believes, deserves the right “to do what they all want to do: make arguments to the jury about why they did what they did.”

b. Implications for Crowe

By substituting a nonviolence requirement for the most onerous of the Brugmann elements—the reasonable expectation that the illegal action “will be effective as the direct cause of abating the danger”—Loesch improves the Crowe defendants’ chances of placing their conduct in its social context. While replacing the easy-to-satisfy “no legislative preclusion” prong with a requirement that acts be suitably “tailored” is less helpful; the Crowe defendants did in fact carry out their protest in clothing “tailored to suit the character of the conflict.” Hence, one suspects their claim would survive this new inquiry as well.

Courts: Indifference, Hostility, Engagement, 33 U.C. Davis L. Rev. 1173, 1180, 1182 (2000) (citation omitted) (finding that “more state courts, rather than federal courts, are listening [to,] and learning [from, radical and progressive scholars]”). According to Backer,

Id. at 1182-83. See also Thomas Geoghegan, Take it to the Blue States: Maybe labor should give up on Washington in favor of friendlier terrain, The Nation, Nov. 29, 2004, at 14 (suggesting that the labor movement “[u]se state law as much as possible to set up the kind of social democracy we would like to see for the country as a whole”).

286. Loesch, supra note 52, at 1109.

287. Id. at 1104. Loesch would restrict this evidence “to the testimony of the actor[s], relevant experts, and documentary evidence, describing: (a) the legitimacy and substance of the belief at issue, and (b) the process by which the actor[s] arrived at the decision to violate the law.” Id. at 1110.


289. Id.

290. Loesch, supra note 52, at 1109.
More troublesome is Loesch's modification to the "legal alternatives" element. By compelling the pursuit of "all reasonable legal alternatives" Loesch actually exacerbates the burden for activists typically asked to exhaust only those alternatives that "will be effective." While this more stringent standard increases the likelihood that "courts in hindsight" will find, and fixate upon, "just one more alternative," the Crowe defendants could probably avoid this result by focusing on the four corners of the Commonwealth's motion, which inexplicably neglects this element. Given the explicit requirement that "all reasons" for a motion in limine "be in writing," the Commonwealth should be foreclosed from making legal roads not taken an issue on appeal.

The final two elements of Loesch's proposed affirmative defense involve subjective and objective evaluations of the defendants' beliefs. Since there is little doubt the Crowe defendants reasonably believed that obeying the law conflicted with their duty to stop an unjust war, telling a jury "why they did what they did" would depend on whether the court felt their quest for peace substantially outweighed the state's interest in keeping a road clear. While this formulation fails to rectify the onus Brugmann places on defendants by making them do more than merely tip the scale, balancing the prevention of carnage with the prevention of inconvenience should favor the defendants.

The Commonwealth's acceptance of this proposal would, therefore, probably give the Crowe defendants the benefits Loesch sought to bestow. The more interesting question is whether they would choose to accept them.

c. **Implications for the Marketplace of Ideas**

At the close of Crowe's in limine hearing, the Commonwealth informed the court "how refreshing it was to have [such atypical]
defendants. " Rather than accept the compliment, one of the defendants responded by asserting solidarity with "the socially and economically disadvantaged who [almost always] appeared opposite [the prosecutor]. "298 Calling these ordinary criminals "political prisoners," he told the court that they too "were part of [their] overall concern."299

This refusal, by the Crowe defendants, to accept the notion that they "are different from ordinary criminals" evinced an understanding that crime, in our "unjust political order," is "intimately associated with race."300 According to Professor Kenneth Nunn, "[c]rime sets the borders of race" providing "content to the image" of racial outsiders.301 For criminal law theorist Dorothy Roberts, "race does more than predict a person's propensity for committing neutrally defined offenses . . . . Crime is actually constructed according to race."302 While the truth of these observations is nowhere more evident than in the current drug war,303 the symbiotic relationship between crime and race304 means people of color "will constitute 'the usual suspects' no matter what the social concern."305

Ultimately, Loesch's failure to grapple with crime as a social construction causes him to forward a proposal that "challenge[s] the impact of [large-scale injustices] on more privileged populations


298. Doerner, supra note 297.

299. Id. It bears noting here that all the Crowe defendants are white.

300. Kenneth B. Nunn, Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" was a "War on Blacks", 6 J. GENDER RACE & JUST. 381, 433 (2002). See also Anthony Paul Farley, Sadomasochism and the Colorline: Reflections on the Million Man March, in BLACK MEN ON RACE, GENDER AND SEXUALITY 69 (Devon W. Carbado ed., 1999) ("[T]he black criminal is produced . . . in ghetto after ghetto after ghetto.").

301. Nunn, supra note 300, at 433.

302. Id. at 434 (quoting Dorothy Roberts, Crime, Race, and Reproduction, 67 TUL. L. REV. 1945, 1954 (1993)).

303. Id.

304. Id. at 433 ("[R]ace and crime share the same conceptual space within the discourse of social formation. They are both outside of the center, and the demarcation of one lends itself to the social construction of the other.").

305. Id. at 445.
while ignoring or even justifying [their] impact on people of color and immigrants.”

Because race and “class [often] determine who is able . . . to commit civil disobedience,” crimes of conscience frequently lead to “movement privilege, with activists who can afford to tally arrest counts granted subsequently more political [clout].” By further privileging this white resistance method of choice, Loesch threatens to erect a “major barrier to multiracial, anti-racist movement building.”

For civil disobedients conscious of the coherence of means and ends, a defense predicated upon racial and socio-economic inequality might prove philosophically unappealing. Even pragmatic disobedients anxious to inject their ideas into the marketplace might be reluctant to take advantage of Loesch’s proposal should doing so seem destined to delay the emergence of a new “multiracial, multinational, multilingual and multi-class mainstream.”

For astute activists, the current image of ordinary criminals as “cinematic villains” not only “severs our common


308. Id.

309. According to activist Helen Luu,

the clearest example [of white privilege in the social justice movement] may be

the (usually sole) focus on direct action, which almost always means direct

police confrontation. . . . [T]he emphasis on this method alone often works to

exclude people of colour because what is not being taken into account is the

relationship between the racist (in) justice system and people of colour.


310. Id.

311. See King, * supra* note 65, at 255 (“[E]nds are not cut off from means, because

means represent the ideal in the making, and the end in process . . . .”). While this

attitude has been perhaps most prevalent in various quests for peace, see, e.g., *id.* (criticizing the “conquerors of old who came killing in pursuit of peace”), it can be found in other movements as well. See Shelley Douglass, *A World Where Abortion is Unthinkable, in NONVIOLENCE IN AMERICA, supra* note 59, at 341.

[T]here’s Biblical quotation that goes like this—“If you can’t love your

brother, whom you have seen, how can you love God whom you have not

seen?” If we can’t love our sisters, whom we have seen, how can we love their

children, whom we have not seen? It seems to me that we start by learning

how to love those we can see.

Id.

312. See King, * supra* note 65, at 290 (“Injustice anywhere is a threat to justice everywhere.”).

313. Bloom et al., * supra* note 306.
bond of humanity," it exemplifies "the whole tradition of popular control . . . to keep people isolated." Isolation, they know, is what has kept "US peace and anti-war groups[,] . . . primarily composed of, and overwhelmingly led by, older white middle-class people," from grasping that "for most people in the world, peace is war—a daily battle against hunger, thirst, and the violation of their dignity." In order to assert solidarity with those presently perceived as "a permanent caste of moral inferiors," many civil disobedients might voluntarily confine themselves to legal options universally available. By doing so, they would minimize the impact of Loesch’s proposal on the marketplace of ideas.

Perhaps just as important, Loesch’s failure to countenance this (or any other) current feature of our unjust political order makes the legislative embrace of his proposal extremely unlikely. Proposed reforms, like Loesch’s, can only hope to garner the requisite support when those in power feel a “political or ideological need to restore an image of fairness that has somehow been tarnished.” Rather than draw attention to present-day injustice(s), Loesch concentrates almost exclusively on “inequities of the past,” implies future policies could prove problematic, and suggests we be prepared to honor dissent in the event they do. By characterizing our society as a “‘nearly just democracy’ . . . which, on the whole, attempts to realize the requirements of participatory government and which supports substantially just institutions,” Loesch under-

315. CHOMSKY, supra note 87, at 202.
317. ARUNDHATI Roy, AN ORDINARY PERSON’S GUIDE TO EMPIRE 15-16 (2004); see also NGUGI WA THIONG’O, MOVING THE CENTRE: THE STRUGGLE FOR CULTURAL FREEDOMS 117 (1993) (describing the peace poor people experience as “a permanent state of war”).
318. Yankah, supra note 314, at 1028-29.
320. Loesch, supra note 52, at 1086. Loesch does cite “Operation Rescue, the Plowshares, Act Up, the Sanctuary Movement, Earth First!, and Greenpeace” as successors to “The Intercolonial Sons of Liberty, the Underground Railroad, and the Wobblies.” Id. However, he refrains from detailing, or even stating, what these modern groups find so unjust about the present day.
321. Id.
322. Id. at 1087 (citing JOHN RAWLS, A THEORY OF JUSTICE 111-12 (1971)). Unlike Loesch, Rawls does seriously question whether “members of subjected minorities”
cuts his case for change. If our institutions do not “work substantially to the detriment of a significant portion of the population,” adopting a civil disobedience justification defense hardly appears necessary, let alone urgent.

2. Prying Open the Judicial Ear

a. Deconstructing Brugmann

Unlike Loesch, Professor Snowden cannot be accused of pulling any punches. Indeed, many and grave are the faults Snowden finds in the justice system in general and the necessity doctrine in particular. For starters, he cannot comprehend “why the genre for the justification story is so limited.” Snowden refuses to concede any logic to the notion that efforts at exculpation must naturally become stories of competing harms. “While it may be possible to translate any [story] into the genre of necessary choice of a lesser evil, just as one may force any story into iambic pentameter,” Snowden cannot fathom why that should be mandatory. “In fact,” he writes, “it seems unnatural.”

Snowden next targets key elements of the necessity defense. When exactly, he wonders, did Jim Crow become “a clear and imminent danger?” Did Rosa Parks overlook a duty to make herself “aware of existing alternatives and pursue those which [were] lawful, or show them to be futile in the circumstances?” Because the necessity doctrine demands such foolish questions, Snowden suggests it cannot “provide concrete, real answers to particular legal or social problems.”

Ultimately, such indeterminacy appears less troubling for Snowden than the manner in which Crowe-type rulings make “se-
cret the justification stories offered and [deny] their hearing or existence."331 Comparing such findings to lack of jurisdiction decisions, Snowden claims this “closing of the judicial ear”332 effectively substitutes “a hierarchal principle of authority in place of an interpretation of the right.”333 This refusal to “commit to any principle beyond secrecy and state power”334 engenders resistance,335 he submits, and keeps “our law” from being “the best it can be.”336

Finally, after casting Crowe and Brugmann-type rulings as a deprivation of the “practical deliberation” that sits at the core of our “tradition of civic-republicanism,”337 Snowden assaults the supposed “objectivity” of the necessity elements.338 Constructed to appear “detached,” these rules that seem “to transcend the results in particular cases” are founded, he claims, on an “abstract universal-ity [that] is ideology, pure and simple.”339 According to Snowden, this process of reification draws attention to “a very few and arguably irrelevant artificial details”340 and creates a legal construct which must suppress the humanity of each citizen it impacts.341

b. The Implications for Crowe

Unlike the reconsideration approach or the civil disobedience justification defense, the judicial acceptance of what Snowden advocates would guarantee Frances Crowe the right to state her reasons for committing civil disobedience. Simply put, Crowe, like all

331. Snowden, supra note 280, at 73.
332. Id.
333. Id. at 74.
334. Id. at 75.
335. Id. (“[S]ecrecy and denial” undermine dissidents’ natural inclination to “de­fer to the superior violence of the state; and next time, the resisters who remain will be hardened.”).
336. Id. at 76. Professor Snowden relies heavily on Ronald Dworkin’s notion of “law as integrity” as found in Law’s Empire. See Snowden, supra note 280, at I.B.
337. Snowden, supra note 280, at 78 (quoting Frank I. Michelman, Traces of Self-Government, 100 Harv. L. Rev. 4 (1986)).
338. Snowden, supra note 280, at 81.
339. Id. (quoting Ann Scales, The Emergence of Feminist Jurisprudence: An Essay, 95 Yale L.J. 1373, 1377-78 (1986)). Snowden would claim that Brugmann’s “official listing of things that are or are not necessary, imminent, alternatives, effective . . . [is] not indispensably true.” Id. His assertion that the competing harms doctrine has been “fancied by human will” is not easily refuted in light of the role the Amicus Brief of Yankee Atomic seems to have played in its formulation. See supra note 178 and accompanying text.
341. Snowden, supra note 280, at 82 (quoting Davis, supra note 340, at 421 n.5).
defendants, would "be entitled to tell . . . her story of justification and ask the judge or jury to find . . . her not guilty on that basis."342

c. Implications for the Marketplace of Ideas

Notwithstanding the benefits Snowden's approach would bestow upon the civilly disobedient themselves,343 there is no guarantee that opening the door to justification stories would benefit their causes or the marketplace of ideas. "Law narrows. And Law channels."344 But law also provides a vehicle for messages the public might otherwise be unwilling or unable to hear.

Social science has found that people cannot focus solely on the substance of a statement.345 According to Professor C. Edwin Baker, "subconscious repressions, phobias, or desires influence people's assimilation of messages . . . ."346 Factor in "the phenomenon of cognitive dissonance [which] insulates individuals from messages inconsistent with those perspectives that further their perceived self-interests,"347 and the deck is already stacked against the dissident.

The necessity defense, for all its faults, provides a "structure

342. Id. at 84-85.
343. Such benefits would surely include, but by no means be limited to, acquittals. See Quigley, supra note 5, at III.B. If Professor Kevin Smith's hypothesis is correct and civil disobedience does "help the civil disobedient develop or validate an attitude and a feeling of autonomy and self-direction," then further empowerment would seem to flow from the opportunity to tell a justification story "instead of passively being at the mercies of others." Smith, supra note 48, at 130.
344. Rhonda Copelon quoted in Martha L. Minow, Breaking the Law: Lawyers and Clients in Struggles for Social Change, 52 U. Pitt. L. Rev. 723, 732 (1991). See also Frances Lee Ansley, Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship, 74 Cornell L. Rev. 993, 1072 (1989) ("The institutionalized form, the need for expert assistance, the individualization of claims, the delay and delay and delay, the elaborate ritual, the scalpel of 'relevance,' the limited remedies, all work to channel our behavior and mold our perceptions of possibilities.").
345. Ingber, supra note 25, at 35.
346. Id. Moreover, narrative theory shows that we interpret new stories in terms of the old ones we have internalized and now use to judge reality. When new stories deviate too drastically from those that form our current understanding, we denounce them as false and dangerous . . . . Language requires an interpretive paradigm, a set of shared meanings that a group agrees to attach to words and terms. If racism is deeply inscribed in that paradigm—woven into a thousand scripts, stories, and roles—one cannot speak out against it without appearing incoherent.

Richard Delgado & David H. Yun, Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation, 82 Cal. L. Rev. 871, 882 (1994) [hereinafter Delgado & Yun, Pressure Valves].
347. Ingber, supra note 25, at 35.
for publicizing and debating political issues in the judicial forum.” Like iambic pentameter, it may be “unnatural,” but at least it gives users a chance to be heard.

As Professor Ingber has pointed out:

The public tends to focus more on the dissenting message’s packaging than on its content precisely because of the dissident’s unconventional personality, method of communication, and terminology. In fact, the public hostility and anxiety created by unconventional and disruptive presentations compound the difficulty the audience has in understanding, or even perceiving, the intended message. In contrast, orthodox positions generally are heard from respected “responsible” individuals in “responsible” contexts, thereby increasing their acceptability to the public.

Juxtaposed with the familiar legal arguments of respected, responsible public servants, most justification stories would suffer the fate of the hopeless “homespun attempts on public access channels” to challenge “the professionally packaged presentations” on commercial television.

A second problem with Snowden’s proposal is the havoc it could wreak in the lives of the disadvantaged. For a radical scholar writing at the height of the “Abortion Rescue Movement,” Snowden appears strangely unaware of the justification stories abortion clinic “trespassers” were anxious to tell. If

348. Bauer & Eckerstrom, supra note 52, at 1176. See also Lippman, International Law Versus the American Judiciary, supra note 50, at 56 (“The rules of evidence . . . will guarantee the orderly and effective presentation of opposing views.”) (emphasis added).

349. Ingber, supra note 25, at 48. See also Giles Gunn quoted in Martha Minow, Justice Engendered, 101 HARV. L. REV. 10,39 (1987) (“Anyone who deviates from the official norm . . . anyone who fails to bear a likeness to the Standard Product, is simply not viewed as fully human, and then becomes at best invisible, at worst a threat to national security.”).

350. Ingber, supra note 25, at 70.


352. Charles E. Rice, Issues Raised by the Abortion Rescue Movement, 23 SUFFOLK U. L. REV. 15 (1989). In the twelve years preceding Snowden’s article, there were “783 incidents of violence . . . including 34 bombings, 48 arsons, an additional 40 attempted bombings or arsons, 60 assault and batteries, and 72 death threats.” Apel, supra note 95, at 55 (citing figures from the National Abortion Federation).

353. But see Apel, supra note 95, at 54-63 (“[T]o term the activities of Operation Rescue as ‘trespass’ ignores the facts.”).

354. One can infer how misogynistic these stories might have been by considering
courts had suddenly been persuaded by Snowden to abandon the legal practice of curtailing responses to an accusation, one wonders what kind of courtroom tales might have come from the protestors who "punched a pregnant clinic worker in the stomach," causing her to miscarry. Or the "gunman [who] attacked two abortion clinics in the Boston area, killing two [female] receptionists." Or the activists who barred a bleeding woman they had cut from entering a clinic "for treatment of the laceration." Although it is fairly easy to imagine how the injuries to these victims might have been compounded, consistency compels this Note to ask another question: what effect would such injuries have on the marketplace of ideas?

For free speech absolutists, the answer appears: none whatsoever. Letting the "windes of doctrin" of violent misogynists "loose to play upon earth" could cause no societal harm, they seem to suggest, so long as "[t]ruth be in the field." Others scholars are not quite so sanguine.

According to Professor Robert Schopp, this particular "crime
of conscience” intrudes upon “a competent woman’s opportunity to exercise her legal right to make reproductive decisions” and thus “imputes lesser standing to her in the public sphere.”

Allowing her assailant the right to justify her assault would, in Professor Mari Matsuda’s eyes, further reduce the victim’s ability to have her “speech taken seriously.” To ask that truth and “falsehood” be afforded a place to “grapple” is not a fair request, Matsuda claims, for the tolerance sought is not “borne by the community at large. Rather, it is a psychic tax imposed on those least able to pay.”

Ultimately, the free-for-all Snowden envisions runs the risk of devaluing outsiders and treating them “in a degraded way.” The danger of such ambivalence towards the input and perspectives of marginalized populations is the further impoverishment of a marketplace already lacking in diversity and dominated by elites.

363. See supra note 30.
364. Matsuda, Public Response, supra note 351, at 2323. See also Lawrence, Regulating Racist Speech, supra note 360, at 472 (arguing that because society assigns this burden to subordinated groups “without seeking their advice, or consent,” the practice amounts to “taxation without representation”).
366. Ingber, supra note 25, at 31. See also Delgado & Yun, Pressure Valves, supra note 346, at 892 (“Free speech, like all marketplace activities, benefits those who are currently life’s winners, reinforcing their advantage while enabling them to say to them-
Of course, Snowden's primary purpose is not to persuade. If his objective was to expand the possible responses to an accusation he would not have written judges off as "people of violence," but would have crafted his appeal in words these decision-makers could conceivably hear.

Displaying "astounding deftness," Snowden instead "reveal[s] structure, de-construct[s] and de-Iegimate[s]." He thus becomes one of the "super-termites" Matsuda once described, scholars who "eat away at the trees of legal doctrine ... leaving sawdust in their paths." Matsuda concluded, "it suggests that this is what the smartest are doing. Never mind that no one knows what to do with themselves that won fair and square.")}; Bernard W. Bell, The Populism of Justice Byron R. White: Media Cases and Beyond, 74 U. Col. L. Rev. 1425, 1469 (2003) ("Speech may reflect and accentuate the inequalities in society. The powerful and the privileged may perhaps be heard more clearly in the marketplace of ideas not because of the cogency of their thought but because of the magnification of their voices by the very power and privileges they enjoy."); Patricia A. Cain, Feminism and the Limits of Equality, 24 Georgia L. Rev. 803, 847 n.167 (1990) ("The guarantee of free speech benefits those who have the power to draw listeners: those with the greatest access to the market of ideas."). Consequently, some scholars now believe "social justice is no longer satisfied by an abstract right to speak one's mind, but rather demands conditions under which each person may fully exercise her or his intellectual and political agency." Patricia S. Mann, Hate Speech, Freedom, and Discourse Ethics in the Academy, in Radical Philosophy of Law: Contemporary Challenges to Mainstream Legal Theory and Practice 261 (David S. Caudill & Steven Jay Gould eds., Humanities Press 1995).

See also Balkin, supra note 47, at 401 (calling "[e]ffective communication, or rather its substantive possibility ... an unavoidable component of the liberty of speech, just as effective bargaining, or its substantive possibility, is an essential component of economic liberty"). For an examination of the results when the exercise of intellectual and political agency is denied, see Williams, supra note 45, at 1577 ("[W]hen the voices of those harmed by hate are systematically silenced, the opportunity to search for common ground and to move forward together is lost ... "). See also Lawrence, Regulating Racist Speech, supra note 360, at 468 ([Racism] "decreases the total amount of speech that enters the market by coercively silencing members of those groups who are its targets."); Martha Minow, Regulating Hatred: Whose Speech, Whose Crimes, Whose Power?—An Essay for Kenneth Karst, 47 UCLA L. Rev. 1253, 1261 (2000) ("In the wake of biased speech, members of disadvantaged groups ... may be heard only through the distorting lens of hate speech, with stereotypes about Asians or Hispanics or women or disabled persons, coloring the impression of the speaker's ideas.").

367. Snowden, supra note 280, at 74 (quoting Robert M. Cover, Nomos and Narrative, 97 Harv. L. Rev. 4, 53 (1982)).

368. Crenshaw, supra note 319, at 1367 ("People can only demand change in ways that reflect the logic of the institutions that they are challenging. Demands for change that do not reflect the institutional logic—that is, demands that do not engage and subsequently reinforce the dominant ideology—will probably be ineffective.") (citing Piven & Cloward, supra note 73, at 22-25).


370. Id.
all the sawdust.”371

V. COUNTERING THE “CYCLOPS EFFECT”372

If this Note is correct in contending that *Hood* and its progeny have compromised an important free speech objective, the question becomes whether the marketplace is better served by countenancing all competing harms claims or only those that do not impede access by others. Based on the foregoing outsider insights, this section urges courts to adopt the latter approach and act, “not as a censor, but rather as a parliamentarian, requiring some to shut up so others can be heard.”373

A. “Operationalizing the Insight”374

Starting with *Hood*, Chief Justice Liacos wrote five separate times to express his concern “that evidence of necessity not be excluded by a motion in limine once a defendant has made a sufficient offer of proof.”375 In these five opinions, it is clear that the Chief Justice’s376 primary concern involved the respect he felt his fellow justices failed to afford the jury.377 Nevertheless, it seems equally

371. *Id.*

Social scientists have been painfully aware that the implementation of their well-thought-out-advice too often results in new (and unanticipated) problems. Sometimes this happens because the new policy has been based on a one-eyed vision. That is, the new policy is focused on what is known about one set of people, but then affects a larger set of people differently and sometimes adversely. That unfortunate, sometimes even monstrous, set of events is well-labeled the Cyclops effect.

*Id.* at 149.

373. Mann, *supra* note 366, at 261 (quoting Owen Fiss’s explanation of “this shifting locus of a democratic concern with speech rights”).
377. *See*, e.g., *Hutchins*, 575 N.E.2d at 747 (Liacos, C.J., dissenting) (describing the “vital functions of [the jury as] ‘[1] temper[ing] the application of strict rules of law
certain that he was aware of the benefits an alternative approach might bestow on the marketplace of ideas. In his *Leno* concurrence, for example, Chief Justice Liacos noted that "the overwhelming and uncontroverted expert evidence presented at trial describing the effectiveness of needle exchange programs in curbing the spread of AIDS will, I hope, indicate to the Legislature the importance of joining the vast majority of jurisdictions that have decriminalized possession and distribution of hypodermic syringes." \(^{378}\)

Integrating the approach to evidence of necessity favored by Chief Justice Liacos with the vision of the court as parliamentarian, this Note makes the following proposal: defendants who offer to prove each element of the *Brugmann* test deserve the chance to do so unless the crime for which they are charged involves the denigration of a natural person's\(^{379}\) standing.\(^{380}\)

This proposal presumes that while certain kinds of civil disobedience—such as protests that disrupt traffic—might prove inconvenient for many, they do not assign a subordinate status to any individuals since dissidents do not target particular people and infringe their typically protected rights.\(^{381}\) Thus, affording the necessity defense to these sorts of disobedients would not jeopardize anyone's equal status by sanctioning the contravention of an individual's legitimate interests.\(^{382}\) However, other acts of civil disobedience,

---

\(^{378}\) See *Leno*, 616 N.E.2d at 457 (Liacos, C.J., concurring) (emphasis added).

\(^{379}\) This formulation is intended to exclude from protection the corporate person. For a recent call to overturn *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886), and end this indefensible legal fiction, see William Quigley, *Catholic Social Thought and the Amorality of Large Corporations: Time to Abolish Corporate Personhood*, 5 LOY. J. PUB. INT. L. 109, 109 (2004) (arguing that the "legal DNA" of large corporations "prevents them from acting like humans and having the chance to act in moral ways").

\(^{380}\) See *Schopp*, supra note 361, at 2096. Because the focus here is the marketplace of ideas, this proposal does not address the question of how compelling evidence of necessity must be in order to merit a jury instruction on the defense. That being said, the approach favored by Justice Greaney in *O'Malley* seems quite reasonable. See Commonwealth v. O'Malley, 439 N.E.2d 832, 838 (Mass. App. Ct. 1982) (If, after all the evidence has been introduced, "the defendant has failed to produce some evidence on each element of the defense, the judge should decline to instruct on it. In that event, the judge may, if appropriate, give curative instructions to caution the jury against considering evidence not properly before them.") (citation omitted).

\(^{381}\) See *Schopp*, supra note 361, at 2105.

\(^{382}\) *Id.*
such as those involving trespass to private property or interference with the exercise of individual rights, directly violate the standing of identified individuals. When the offense charged constitutes a violation of the rights of an identified victim, [making the necessity defense available] nullification denigrates the standing of that victim by withholding condemnation of that violation and by acquiescing in the defendant’s imputation of lesser standing to that person.\textsuperscript{383}

Only by preventing competing harms claims under these circumstances can courts effectively fulfill their obligation to safeguard the standing of vulnerable citizens and protect the possibility that their speech might be heard.\textsuperscript{384}

1. Implications for \textit{Crowe}

Unlike the defendants in \textit{Hood} who, Justice Liacos determined, offered to prove neither the absence of legal alternatives nor legislative preclusion, the \textit{Crowe} defendants “allege[d] that they would introduce sufficient evidence on each element of the defense to generate a jury question.”\textsuperscript{385} Accordingly, they would satisfy the first prong of this Note’s proposed test.

In contrast to the defendant in \textit{Brogan} who, over the course of a five month period “trespassed and obstructed activities” at three separate abortion clinics (thereby disregarding a court order),\textsuperscript{386} the \textit{Crowe} defendants’ arguably inconvenient act did not violate anyone’s civil rights.\textsuperscript{387} Hence, they would satisfy the second prong and be entitled to assert a competing harms claim.

2. Implications for Other Civil Disobedients

Suppose that in the wake of \textit{Goodridge v. Department of Public Health},\textsuperscript{388} two groups, each committed to protecting the tradi-

\textsuperscript{383.} \textit{Id.}
\textsuperscript{384.} \textit{Id.} at 2106. For an examination of how subordinated communities are silenced, see \textsc{Catherine A. MacKinnon}, \textit{Feminism Unmodified: Discourses on Life and Law} 39 (Harvard University Press, 1987) (“[W]hen you are powerless, you don’t just speak differently. A lot, you don’t speak. . . . Not being heard is not just a function of lack of recognition . . . it is also silence of the deep kind, the silence of being prevented from having anything to say.”).
\textsuperscript{385.} \textit{Hood}, 452 N.E.2d at 198. For a detailed discussion of what the \textit{Crowe} defendants offered to prove, see \textit{supra} notes 256-75 and accompanying text.
\textsuperscript{387.} \textit{Id.} at 660.
\textsuperscript{388.} 798 N.E.2d 941, 948 (Mass. 2003) (“[T]he Commonwealth may [not] deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry.”).
tional conception of marriage, decide to engage in civil disobedience. Incensed most of all by the actions of un-elected "activist judges,"389 Group One chooses to stage a sit-in outside the chambers of the Massachusetts Supreme Judicial Court. Several days after their arrest, Group Two decides to take the battle to the "sinners"390 themselves and illegally occupies a church on the morning of a well-publicized same-sex wedding.391

Prior to their trials, the Commonwealth files identical motions in limine asking the courts to bar evidence of necessity. In response, each group offers to prove that: (1) the impending same-sex marriages constituted a clear and imminent danger to the very fabric of society; (2) by acting as they did the defendants had a reasonable belief that such marriages might be averted; (3) individually and collectively, they had written letters to editors, lobbied elected officials, attended marches, and participated in vigils, thereby exhausting all legal alternatives; and (4) the Legislature had not acted to preclude the necessity defense.

Like the Crowe defendants, Groups One and Two would each satisfy the first prong of the proposed test.392 However, given the loss of standing suffered by the same-sex couple at the hands of


Originally, the Clinic Act provisions were limited to abortion clinics. In Conference Committee, section (a)(2) was added, subjecting to the same penalties anyone who "by physical obstruction . . . interferes with or attempts to . . . interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship." This added section was plainly aimed at appearing politically "even-handed." Now the group "Act Up," for example, will be subject to federal jurisdiction and sanctions for disrupting church services.

Ledewitz, American Sit-in, supra note 88, at 566.

392. The fact that Group One's protest was more akin to the informational variety found in Hood and Averill would be irrelevant to Chief Justice Liacos. See Hood, 452 N.E.2d at 198 (suggesting that the defendants satisfied the second element of the defense by offering to prove that "their actions reasonably could be expected to be effective").
Group Two, only Group One would satisfy the second prong and be entitled to present a necessity defense.

Lest readers conclude this proposed test is hopelessly ideological, let us conclude this section by examining how the courts might respond to the civil disobedience of two hypothetical groups on the other side of the marriage equality debate.

Suppose that in response to the Legislature’s efforts to write discrimination into the state Constitution, Group Three stages a sit-in during the summer 2005 Constitutional Convention. Shortly thereafter, Group Four encircles the home of a religious leader inhospitable to their cause and prevents him from presiding at a Sunday morning service. Once again, the Commonwealth files identical motions in limine asking the courts to bar evidence of necessity. And once again, Groups Three and Four each offer to prove that: (1) the impending discriminatory actions constituted clear and imminent dangers to the health, safety and well-being of members of the gay, lesbian, bisexual, and transgender community; (2) by acting as they did the defendants had a reasonable belief that state-sanctioned heterosexism might be averted; (3) individually and collectively, they had written letters to editors, lobbied elected officials, attended marches, and participated in vigils, thereby exhausting all legal alternatives; and (4) the Legislature had not acted to preclude the necessity defense.

Like their philosophical adversaries in Groups One and Two, members of Groups Three and Four would satisfy the first prong of the test. And like Group Two members, Group Four activists would be barred from asserting a necessity defense based on their interference with an ascertainable victim’s constitutional rights.

As for Group Three, a heterosexual couple could conceivably seek to keep these civil disobedients from asserting a necessity defense by claiming that their act undermined the traditional conception of marriage, thereby denigring the couple’s standing.

393. Compare Thiong’o, supra note 317, at 126 (defining ideology as “the whole system of symbols, images, beliefs, feelings, thoughts, and attitudes by which we explain the world and our place in it”) with Henry Louis Gates, Jr., War of Words: Critical Race Theory and the First Amendment, in Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties 17, 35 (1994) [hereinafter Speaking of Race] (repeating the “old joke” that an “ideology” is “somebody else’s politics”).

394. See supra note 391.

395. One suspects such a couple’s amicus brief would rely heavily on the work of Hoover Institution fellow, Stanley Kurtz, who claims that gay marriage is having a deleterious impact on heterosexual marriage in Scandinavia. Stanley Kurtz, The End of Marriage in Scandinavia: The “Conservative Case” For Same-Sex Marriage Collapses,
However, given the judiciary's steadfast refusal to confer victim status on "offended" heterosexuals, there seems little chance of such a claim's success.

3. Implications for the Marketplace of Ideas

To predict this proposal's impact on the marketplace requires a preliminary assessment of its present state. According to Nicholas Johnson, former Commissioner at the Federal Communications Commission,

self-governing societies [are shaped] by their ideas and information. Rather than rely on folk music, stories, and a true marketplace of the people's ideas, we have turned this public responsibility over to commerce. And commerce naturally selects those... ideas, and information that will provide the best media environment for commercials... By offering the ideas of the marketplace rather than a marketplace of ideas, we are, in effect, rotting our seed corn.

Johnson is not alone in this appraisal. Instead of providing for "the widest possible dissemination of information from diverse and antagonistic sources," Professor Ingber believes the present marketplace "encourages the presentation of a limited range of preselected ideas." This deviation from "the open-minded evaluation [the marketplace] purports to foster" is, in Professor Ingber's opinion, a corollary of the authority increasingly entrusted

---

396. William B. Rubenstein, Since When Is the Fourteenth Amendment Our Route to Equality? Some Reflections on the Construction of the "Hate Speech" Debate from a Lesbian/Gay Perspective, in SPEAKING OF RACE, supra note 393, at 286 (citing "a whole line of cases that traces the formation of lesbian and gay student groups on college campuses" and the courts' rejection of the recurring argument that gay meetings "offended" heterosexual students).

397. Id.


400. Ingber, supra note 25, at 31. According to Noam Chomsky, "what are called opinions 'on the left' and 'on the right' in the media represent only a limited spectrum of debate, which reflects the range of needs of private power—but there's essentially nothing beyond those 'acceptable' positions." Chomsky, supra note 87, at 13.

401. Ingber, supra note 25, at 31.
to a vast bureaucracy that makes "the government, rather than individual citizens, the most pervasive participant in the marketplace."  

One recent example of this phenomenon was the media coverage preceding the Iraq war. On August 12, 2004, the *Washington Post* published a front-page story exploring the newspaper's treatment of anti-war activists before the U.S. invasion.  

"Across the country, the voices raising questions about the war were lonely ones," said Executive Editor Leonard Downie, Jr. "We didn't pay enough attention to the minority." Putting aside the dubious contention that those who opposed pre-emptive war constituted a "minority," the *Post's* startling admission that it serves "basically [as] a mouthpiece for whatever administration is in power" goes to the heart of Johnson and Ingber's argument. So, too, does the study conducted by Fairness & Accuracy in Reporting (FAIR), which analyzed two weeks of pre-war coverage and "the 393 on-camera sources who appeared in nightly news stories about Iraq on ABC World News Tonight, CBS Evening News, NBC Nightly News"

---

402. Id. at 37.


404. Id. (quoting Leonard Downie, Jr.).

405. "Are we really talking about the minority?" Amy Goodman asked. "If you look at the polls leading up to the invasion of Iraq, more than half of the people in this country were opposed to war [as opposed to] more inspections, and more diplomacy." Id.

406. Id. (quoting Karen D. Young, a Reporter and former Assistant Managing Editor). See also WILLIAM O. DOUGLAS, POINTS OF REBELLION 42 (1970) ("The mass media—essentially the voice of the Establishment—much of the time reflects the mood of the Pentagon and the causes which the military-industrial complex espouses."); Richard Delgado, Toward a Legal Realist View of the First Amendment, 113 HARV. L. REV. 778, 781-82 (2000) ("[B]ecause reporters depend on the establishment for information, while the networks depend on corporate advertisers for profits, this industry is unlikely to be a source of dissent.").

and PBS's NewsHour with Jim Lehrer."

Whereas over half the guests "were either current or former [U.S.] government or military officials," FAIR found that less than one percent "were identified with organized protests or anti-war groups."

How, then, would the acceptance of this Note's recommendation impact the marketplace of ideas? By making the necessity defense available to those capable of satisfying the proposed two-prong test, courts would permit defendants like Frances Crowe to bring to the public a broader range of viewpoints.

Consider, for example, the press coverage of two Commonwealth cases in which trial courts took seriously Hood's admonition against the preclusion of potential defense evidence.

On November 24, 1986, when demonstrators occupied an administration building at the University of Massachusetts in Amherst, readers of the next day's newspapers learned that those arrested were protesting the University's policy of permitting the CIA to recruit on campus. However, it was not until the trial began and the defendants asserted a necessity defense that readers learned why the protestors found the CIA's presence so appalling. Writing for the Boston Globe, reporter Jonathan Kaufman summarized the testimony of Edgar Chamorro, a former Contra leader, who "described how he translated into Spanish a CIA manual that advocated the assassination of judges and others to destabilize the Nicaraguan government." Kaufman

---


409. Id.

410. Id.

411. See Tierney, supra note 247, at 978 ("An act of civil disobedience probably cannot, by itself, effect the desired change. But it exposes the need for change and promotes public debate and citizen participation in the law and policy making processes."). But see CHOMSKY, supra note 87, at 3. According to Professor Chomsky, viewpoints such as Crowe's would still be subject to "a complex system of filters in the media . . . which end[ ] up ensuring that dissident perspectives are weeded out, or marginalized in one way or another." Id. See also BERTRAND RUSSELL, POLITICAL IDEALS 16 (1980) ("[O]nly an accident can enable the point of view or the interests of those who are not wealthy to find expression in a newspaper.").


414. Jonathan Kaufman, Ellsberg Backs Actions of CIA Protestors in Carter,
also gave *Globe* readers access to exchanges like the following one between defense attorney Leonard Weinglass and former CIA operative Ralph McGehee:

Q. (by Weinglass): Did you ever belong to a program of assassination and kidnapping run by the CIA?

A. Yes.

Q. What was the name of that program?

A. Operation Phoenix which took place in Vietnam ... 20,000 people were killed in that program.415

When the trial culminated with the defendants’ acquittal, the *Globe* concluded its coverage by printing an excerpt of an interview with a juror who said she was “shocked” by the CIA’s conduct and “kind of proud of the [protestors].”416

Of course, it is unlikely future necessity defenses would garner such extensive media treatment. Among those tried for their parts in the CIA protest were a renowned 1960s activist and the daughter of a former President.417 It isn’t every day that such well-known figures put their bodies on the line,418 and the wide interest their trial drew419 was surely due, at least in part, to the defendants’ celebrity status. That being said, the *Globe’s* coverage of a more recent competing harms claim suggests the efficacy of this Note’s proposed recommendation does not depend on the identity of the claimants.

On March 11, 1999, *Globe* correspondent, Sacha Pfeiffer, reported on the trial of the “Raytheon peacemakers,” eleven activists who conducted an unauthorized “citizen weapon inspection” at a missile plant in Andover, Massachusetts.420 Permitted to assert a choice of evils defense, the protestors argued that their admittedly illegal conduct was necessary to identify and eliminate weapons of mass destruction.421 “There is no experience like seeing a child die

---


419. See *Defense Cites CIA Past,* supra note 413.

420. See Pfeiffer, *supra* note 297.

421. Id.
and knowing your country had a hand in that," said defendant Scott Schaeffer-Duffy. "It motivates you to do everything your conscience and imagination and intellect can let you do to try to stop it."\textsuperscript{422}

Although such testimony failed to persuade the jury,\textsuperscript{423} what Pfeiffer described as "eloquent pleas of innocence in the name of peace and social change"\textsuperscript{424} did "dramatize [an evil] of our society"\textsuperscript{425} by forcing the Commonwealth to express its own conception of competing harms. "Necessity is something real," said Assistant District Attorney Murat Erkan, "something looking you in the eye, something that is a danger to you, your children, and your community, not people thousands of miles away."\textsuperscript{426} Compelled by the necessity defense to admit that it predicates human concern upon geographic proximity, the state made clear a position it rarely injects into the marketplace of ideas.\textsuperscript{427}

**CONCLUSION**

Beneath the surface of Crowe-like outcomes, many commentators insist, lies the judicial fear "that allowing the necessity defense will result in the collapse of the criminal law."\textsuperscript{428} Because the necessity doctrine makes possible the "ad hoc acquittal . . . of defendants who have committed acts prohibited by criminal statutes," courts perceive it as a threat to "the state's power to regulate and punish undesirable behavior."\textsuperscript{429} Such apprehension, to the extent

\textsuperscript{422} Id.

\textsuperscript{423} The defendants were convicted of trespassing and sentenced to "one year of unsupervised probation as well as a $35 'victim-witness fee' or seven hours of community service." Id.

\textsuperscript{424} Id.

\textsuperscript{425} \textit{King}, supra note 65, at 58 (describing how nonviolence seeks to bring to light injustice "in such a way that pressure is brought to bear against those evils by the forces of good will in the community and change is produced").

\textsuperscript{426} Pfeiffer, \textit{supra} note 297.

\textsuperscript{427} \textit{See}, \textit{e.g.}, Robert Zoellick, \textit{Countering Terror With Trade}, \textit{WASH. POST.}, Sept. 20, 2001, at A6. According to the U.S. Trade Representative, human concern for people thousands of miles away is "at the heart of America's . . . development agenda." \textit{Id.} ("Free trade agreements can help establish the basic building blocks for sustainable development, including private property rights, competition [and] the rule of law. Most importantly, free trade is about freedom and open societies.").

\textsuperscript{428} Levitin, \textit{supra} note 247, at 1251. \textit{See also} Commonwealth's Motion, \textit{supra} note 15 (claiming that to permit "the defendants to break the law attempting to subvert this expression of national political will is to invite chaos").

that it is genuine,\footnote{But see Lippman, \textit{International Law Versus the American Judiciary}, supra note 50, at 55 (calling it "ingenious to argue that judicial relaxation of the necessity defense . . . will lead to anarchy"); Quigley, \textit{supra} note 5, at 54-56 (suggesting judges contrive slippery slopes to "anarchy, chaos, pillage, plunder and robbery" to maintain institutional power); Rachael E. Schwartz, \textit{Chaos, Oppression, and Rebellion: The Use of Self-Help to Secure Individual Rights Under International Law}, 12 B.U. INT'L L.J. 255, 299 (1994) ("The notion that a single violation of a norm will bring down the entire system seems to be animated by the primitive notion that the infraction of sacred rites by even a mild deviation will anger the gods who will let loose the gravest consequences."); \textit{Rawls}, \textit{supra} note 322, at 383 (calling "civil disobedience . . . one of the stabilizing devices of a constitutional system").} is not entirely unfounded. After all, "when the necessity defense is actually submitted to the trier of fact . . . defendants have usually been acquitted."\footnote{Quigley, \textit{supra} note 2, at 54 (citation omitted).}

That being said, even if courts relaxed necessity requirements \textit{beyond} what this Note advocates, formidable deterrents to criminal conduct would still remain.\footnote{Levitin, \textit{supra} note 247, at 1252.} For starters, criminal proceedings are expensive and time-consuming affairs.\footnote{Id.} Few people have the requisite resources, not to mention the inclination, "to submit voluntarily to the costs, pressures, and demands of arrest and trial, and risk rejection of the necessity defense and a possible . . . conviction."\footnote{Lippman, \textit{International Law Versus the American Judiciary}, supra note 50, at 55.} While relaxed necessity requirements might inspire a few unlawful acts which would not otherwise occur,\footnote{Levitin, \textit{supra} note 247, at 1252.} "powerful psychological and sociological factors . . . [would continue to] compel most people to quietly conform."\footnote{Lippman, \textit{International Law Versus the American Judiciary}, supra note 50, at 55 n.391 (citing R. Lance Shotland \& Lynne L. Goodstein, \textit{The Role of Bystanders in Crime Control}, 40 J. SOC. ISSUES 9 (1984)).} Indeed, for those concerned with the survival of democratic institutions, the reality of widespread apathy\footnote{Johnson, \textit{supra} note 398, at 525 ("Levels of voter participation range between five and fifty percent in everything from school board to presidential elections."). \textit{See also} Lippman, \textit{International Law Versus the American Judiciary}, supra note 50, at 55 (discussing the "ideological indoctrination and psychic numbing which helps to account for societal indifference").} represents a far graver threat than the possibility of increased civil disobedience.\footnote{If democracy requires an informed citizenry to function effectively, see Ingber, \textit{supra} note 25, at 3-4, then widespread societal ignorance is every bit as dangerous as apathy. \textit{See Johnson, supra} note 398, at 526 n.9 (reporting the results of a recent survey that found that "[o]nly fourteen percent of those of potential draft age could find Iraq [on a map], a country where they may be sent into battle"); Eric Alterman, \textit{Faith-based Journalism: The Refs Work Themselves}, \textit{The Nation}, Nov. 15, 2004, at 11 (citing...
To maintain (or achieve) legitimacy, the marketplace of ideas must make room for presently excluded perspectives. By allowing certain civil disobedients the opportunity to assert necessity defenses, Commonwealth courts could participate in this important endeavor. After analyzing the market-opening proposals of others, this Note has settled upon an approach somewhere between what former Chief Justice Liacos advocated and what the Hood majority held. For those most concerned with safeguarding civil rights, this proposal may prove unsatisfactory. While the second prong does attempt to "encourage the right kind of listening," it does not privilege "the previously silenced." More disturbing, perhaps, are the loopholes that could permit in-court efforts to justify existing power disparities.

For those most passionate about protecting the freedom of expression, the second prong might prove equally upsetting. Distrustful of "giving the state the power to determine what people can say," free speech advocates could claim this Note fails to meet the burden of proof required of any proposed exercise of such

---

439. See John A. Powell, Worlds Apart: Reconciling Freedom of Speech and Equality, 85 Ky. L.J. 9, 72 (1997) ("If value and truth claims are to have any legitimacy, participation must be open to all as equals and uncoerced.").

440. Cain, supra note 366, at 844. In search of "legal tools that have progressive effect, defying the habit of neutral principles to entrench existing power," outsiders and their allies have advocated for speech laws that distinguish between minority- and majority-group speakers. Matsuda, Public Response, supra note 351, at 2325, 2358. See also Chris Demaske, Modern Power and the First Amendment: Reassessing Hate Speech, 9 COMM. L. POL'y 273, 280-83 (2004). Notwithstanding the dangers of "the neutrality trap," id. at 2374 (discussing how an anti-mask statute designed to combat the Ku Klux Klan was used to prosecute "Iranian students wearing masks [for symbolic and safety reasons while] opposing human rights violations by the Shah of Iran . . . "), this Note proceeds mindful of the fact that there is "[n]ot a single bias-crime law in the United States [which] distinguishes between minority and majority victims for purposes of establishing the elements of the crime." Lawrence, Enforcing Bias-Crime Laws, supra note 365, at 67.

441. But see Teemu Ruskola, Legal Orientalism, 101 MICH. L. REV. 179, 185 (2002). Professor Ruskola suggests that the "marvelous efficiency" of prejudice is such that it simply cannot be kept from the courtroom (or anywhere else). Id. Citing an observation of David Halperin, he explains, "if the message is already waiting at the receiver's end, it doesn't even need to be sent; it just needs to be activated." Id. (quoting David M. Halperin, St. Foucault: Towards a Gay Hagiography 13 (1995)).

442. Chomsky, supra note 87, at 273. See also Ansley, supra note 344, at IV.D.6 (discussing "The Problem of Dependence on Authority").
authority. These criticisms notwithstanding, there are reasons to believe that what this Note proposes might find support within each camp. While traditional civil libertarians concede that "the [F]irst [A]mendment should not necessarily protect targeted individual harassment just because it happens to use the vehicle of speech," egalitarians are wary of the dangers of censorship and advocate tolerance for those words which are merely offensive.

Of course, the inherent tension between the First and Fourteenth Amendments—between freedom and equality—remains unresolved. By confronting this tension along what has been called the "fault line of progressive politics," this Note has sought not to conclude a conversation but continue one. It has done so mindful of the notion that "[t]ension and conflict are not alien nor abnormal to growth but are the natural results of the process of changes."

Luke Shulman-Ryan *

---

443. CHOMSKY, supra note 87, at 201.
445. See Matsuda, Public Response, supra note 351, at 2357 ("The image of book burnings should unnerve us and remind us to argue long and hard before selecting a class of speech to exclude from the public domain.").
446. For an enlightening discussion on "the great difference between offense and injury," see Lawrence, Regulating Racist Speech, supra note 360, at 461. Professor Lawrence distinguishes between the offensiveness of words that you would rather not hear—because they are labeled dirty, impolite, or personally demeaning—and the injury inflicted by words that remind the world you are fair game for physical attack, evoke in you all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and imprint upon you a badge of servitude and subservience for all the world to see.

Id.

448. Like Professor Powell, I hope . . . that this [Note] will advance the dialogue concerning the tension between free speech and equality. Indeed, if I am right, the problem will not be solved in closed or abstract logic, but must be addressed in an open, dialogical process. These questions must remain open for present and future participants to examine. In others words, I do not intend for the approach I advocate to be a conversation-ending strategy.

Powell, supra note 439, at 92.
449. KING, supra note 65, at 98.
* I would like to thank my parents for their support, my mentors, Carlos, Rhonda, and Bill, for their guidance, and my wife, Mara, for being a constant source of wisdom, inspiration, and love.