ANTINUCLEAR DEMONSTRATIONS AND THE NECESSITY DEFENSE
STATE V. WARSHOW

INTRODUCTION

Acts of civil disobedience in protest of the use of nuclear power are proliferating.[1] On October 8, 1977, a peaceful antinuclear demonstration was conducted on the property of the Vermont Yankee nuclear power plant in Vernon, Vermont. The power station had been shut down for six to eight weeks prior to the demonstration. It was about to be refueled and to recommence operation when the demonstration occurred. Based upon their "reasonable belief that nuclear power presented real and substantial dangers, . . . [demonstrators] blocked the entrance to the power station to prevent its further operation."[2] The protestors were arrested and subsequently convicted of unlawful trespass.[3] Many of these protestors were not willing to accept a legal sanction for their acts of protest. Rather, six of the protestors sought to legally justify the acts of the group by raising the necessity defense.[4]

The defendants' acts were intended to be acts of civil disobedience. They attempted to justify their illegal acts of protest on both moral and legal grounds. It is the purpose of this note to explore the defendants' acts and allegations, and the opinions issued in *State v. Warshow*.[5]

The note begins with a brief discussion of the concept of civil disobedience and of its relationship to the instant case. Justification of an act of civil disobedience is an issue that is separate and distinct from the act itself. Both moral and legal justification argu-

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1. For example, *Nuclear Industry*, the monthly magazine of the Atomic Industrial Forum, lists ten American plants that were the sites of protest activities during June 1979. The magazine reports that such protest activities occurred in Europe, Canada, and Japan as well. *Anti-Nukes Make a Show of Civil Disobedien* [*sic*], 26 NUCLEAR INDUSTRY 20 (1979).

2. State v. Warshow, 138 Vt. 22, 26, 410 A.2d 1000, 1003 (1979) (Hill, J., concurring).

3. *Id.* at 23, 410 A.2d at 1001. The defendants were convicted of unlawful trespass under VT. STAT. ANN. tit. 13, § 3705 (1974).

4. State v. Warshow, 138 Vt. 22, 23, 410 A.2d 1000, 1001 (1979).

5. 138 Vt. 22, 410 A.2d 1000 (1979).

ments can be raised. This note will focus on the argument of legal justification embodied in the necessity defense. It is important to realize, however, that the moral justification arguments raised by the *Warshow* defendants have a fundamental relationship to the legal justification argument that was asserted. That is, the acts of unlawful trespass engaged in by the defendants were perceived by them as the lesser evil when compared with the harms they saw to be associated with the operation of a nuclear power plant. This competing harms or lesser-of-two-evils situation is the basis for the use of the necessity defense.[6]

The final segment of this note, concerning the historical development of the necessity defense and its application, ends with a discussion of the *Warshow* case itself. Other courts have previously been faced with assertions of necessity as legal justification for acts of civil disobedience.[7] Its use by antinuclear defendants, however, is novel in Vermont.

I. Civil Disobedience and Justification

Civil disobedience has historically been recognized as a method of encouraging change in our democratic society:

> Violation of the law for the purpose of protest in this country is a practice which stretches back through the sit-ins of the Civil Rights movement, the labor strikes, Thoreau, and the Boston Tea Party, to the early eighteenth century when a group of Quaker citizens in Pennsylvania refused to pay taxes to support that states's war against the Indians.[8]

Civil disobedience is defined as a deliberate act of lawbreaking which is both a public and a conscious act of protest.[9] An act of

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6. The necessity defense is often based on a "competing harms" rationale; see text accompanying notes 52-54 *infra*. *See also* 138 Vt. at 27, 410 A.2d at 1003 (Hill, J., concurring).

7. *See, e.g.*, United States v. Kroncke, 459 F.2d 697 (8th Cir. 1972); United States v. Simpson, 460 F.2d 515 (9th Cir. 1972); United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969); State v. Marley, 54 Hawaii 450, 509 P.2d 1095 (1973).

8. Knaup, *Civil Disobedience—Protests Beyond the Law*, 14 St. Louis L.J. 719, 719 (1970).

9. Cohen, *Symposium—Civil Disobedience and the Law*, 21 Rutgers L. Rev. 1, 2 (1966). *See* Rosen, *Civil Disobedience and Other Such Techniques: Law Making Through*

civil disobedience is distinguishable from revolutionary acts and from ordinary criminal acts. Revolution seeks to overthrow or repudiate the established authority. Civil disobedience accepts the *general* legitimacy of authority, but attacks some particular aspect of such authority in order to effect a change.[10]

In distinguishing acts of civil disobedience from ordinary criminal acts, it has been stated that "[c]ivil disobedience differs from most ordinary criminal acts in manner of execution and purpose. Acts of civil disobedience . . . are performed openly for the purpose of testing in the courts or the more general political society the laws, legally protected practices, conditions or mores that are being dishonored."[11]

The facts of the instant case and the statements made by the defendants in *Warshow*[12] clearly demonstrate that the Vermont Yankee protest and the intentional violations of the trespass law were acts of indirect, as opposed to direct, civil disobedience.[13] The law itself was not the object of protest. Rather, this symbolic protest[14] was intended to serve other goals: the shutdown of the nuclear power plant.

Law Breaking, 37 GEO. WASH. L. REV. 435 (1969), in which civil disobedience is referred to as a "kind of self-help which initially may be defined as open and purposeful lawbreaking that is politically motivated, and normally is accompanied by the actors' sense of moral indignation and duty." *Id.* at 442. There is dispute as to whether all such acts must necessarily be nonviolent. The question whether the use of violence is an act of civil disobedience is basically definitional. Either position can be consistently maintained. Cohen, *supra*, at 3.

10. Cohen, *supra* note 9, at 3.

11. Rosen, *supra* note 9, at 449.

12. State v. Warshow, 138 Vt. 22, 410 A.2d 1000 (1979).

13. The distinction must be made between direct acts of civil disobedience, where the law being disobeyed is itself the object of protest *(e.g.*, segregation laws), and indirect acts of civil disobedience, where the law being disobeyed is used as a medium of protest *(e.g.*, violation of trespass laws). The former has often been used to test the constitutionality of a law. The courts and commentators have been more apt to approve of such protest because "it rests in the legal tradition . . . of a 'case or controversy.' " Knaup, *supra* note 8, at 719 (citation omitted).

14. The notion of civil disobedience as "formalized dissent" also serves to distinguish it from ordinary acts of lawbreaking: "[T]he whole idea that the act is a symbol for something else—whether a political or moral philosophy—is important to the nature of the act." Smith, *The Legitimacy of Civil Disobedience as a Legal Concept*, 36 FORDHAM L. REV. 707, 708 (1968).

In the words of the defendants, the protestors had come to the Vermont Yankee plant to "prevent workers from gaining access to the plant and thus reasonably attempt to stop the flow of radioactive substances into the environment, by preventing its further operation."[15] Furthermore, the protest was intended to expose, and thus educate, the public to the alleged dangers of nuclear power.[16] The goal of such exposure was to precipitate public debate on the issue of whether nuclear power plants were safe[17] in the hope that a more conscious public would exert political and social pressure to halt the use of nuclear power.[18]

The definition of civil disobedience above[19] provides the criteria by which one *recognizes* an act of civil disobedience; moral and legal *justification* for such acts are separate issues that are subject to different criteria.[20] Two traditional positions regarding the justification of civil disobedience have been recognized by the commentators.

The strictest position is that civil disobedience is *neither* morally nor legally justifiable, regardless of the circumstances.[21] This position is premised on the belief that "a greater wrong always results when a law is broken than if it were followed."[22]

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15. Brief of the Appellants at 18, State v. Warshow, 138 Vt. 22, 410 A.2d 1000 (1979) [hereinafter cited as Brief of the Appellants].

16. National Lawyers Guild Conference at Vermont Law School, "Nuclear Power, Trespass and the Necessity Defense" (Oct. 14, 1978).

17. One of the defendants' main contentions was that the continued operation of the Vermont Yankee nuclear power plant was an imminent harm both to themselves and to others. See text accompanying notes 74-77 *infra*.

18. See text accompanying notes 181-87 *infra*.

19. See text accompanying note 9 *supra*.

20. Cohen, *supra* note 9, at 3. Civil disobedience should not be condemned out of hand for its illegality. "[E]ven in our predominantly 'open' society, special cases and circumstances exist where reasoning, but totally frustrated, individuals and groups are constrained to take grievous action." Rosen, *supra* note 9, at 440.

21. Van den Haag, *Symposium—Civil Disobedience and the Law*, 21 RUTGERS L. REV. 1, 28 (1966).

22. Smith, *supra* note 14, at 710. *See also* van den Haag, *supra* note 21, in which Professor van den Haag suggests that:

> The law peremptorily forbids some acts individuals might choose, regardless of whether they are motivated by a moral impulse or by anything else. If the law were not binding on all its subjects, regardless of the conscience of each,

The alternative position is that acts of civil disobedience may be *morally* justifiable as an acceptable means of protest, but that such acts are not *legally* justifiable in a democratic society.[23] The underlying premise of this position is that one's voluntary participation in a democracy precludes legal justification for illegal acts of protest. Furthermore, even though moral justification is possible under this theory, there are some limitations on the assertion of a moral justification for acts of civil disobedience.[24]

Many commentators have suggested that civil disobedience often contains a "sacrificial" element.[25] This element requires that the actor accept the legal consequences of his illegal act. This element has also been asserted as proof of the actor's respect for the law in that he is willing to accept the legal consequences of his illegal act in order to achieve a benefit for society. This view has led to the conclusion that civil disobedience cannot be legally justified, that the "[t]he law cannot justify the violation of the law,"[26] and that any possible justification must come from outside the legal system.

> it would be an option and, therefore, not law . . . . [T]his binding character [of law] is essential to the law's social function.

Id. at 29.

23. *See* Smith, *supra* note 14, at 710. The criticism of this view is that "even in a democracy there is no guarantee that an unjust law will not be passed." *Id.* at 710 n.7.

24. *Id.* at 712-13. One limitation on moral justification is that the act must conform to a standard of "just and fair behavior." This standard requires a nexus between the act undertaken and the law to be violated. This, in turn, requires a "proportion" between the means of protest chosen and the desired goal. *Id.* at 712.

A second limitation relating to moral justification is that the act must remain "controlled." The actor must consider the risk that others will act in a similar, illegal manner. If a majority of the people participate in acts of civil disobedience, a highly unlikely possibility, the result would be chaos, and the act would entirely lose its ritualistic character. Professor Smith therefore states that:

> There is arguably an implied limitation to the effect that the person engaging in a civilly disobedient act will not encourage others to join in his act, but rather will clearly indicate that the purpose of his act is to stimulate the legally constituted bodies to take action and hence there is no need for mass action.

Id. at 713.

25. Cohen, *supra* note 9, at 6. "This sacrificial element in civil disobedience is emphasized by the fact that, quite apart from punishment, the disobedience rarely works to the personal advantage of the protestor." *Id.*

26. *Id.* at 7.

Although the actor must undertake his acts *expecting* to be subjected to legal sanctions, he is by no means foreclosed from using the courts as a means both of demonstrating a moral justification and of achieving legal exoneration.[27] The right of the participant in an act of civil disobedience to assert that he is justified in breaking the law and to object to punishment's being meted out for that act has been recognized.[28] Vermont protestors are asserting that right and have sought to legally justify their acts of protest by raising the necessity defense.[29]

II. The Necessity Defense

A. *Historical Background*

By asserting the necessity defense, "[c]riminal defendants who intentionally and knowingly violate a criminal statute may nevertheless claim they have committed no crime . . . even though they admit committing the act and possessing the mental element proscribed by the law."[30]

The necessity defense has been applied to justify an illegal act where the "pressure of the circumstances" compels that act.[31] This pressure has traditionally been one that comes from a natural source—for example, a fire, a flood, or privation—and that acts upon the mind rather than upon the body of the actor.[32] Technically, necessity is a justification defense and is to be distinguished from excuses such as duress and self-defense.[33]

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27. Although the expectation of punishment remains, it is no longer intended that "the civilly disobedient [actors] should not avail themselves of any legal defense, constitutional argument or appeal to the discretion of the prosecutor, judge, jury or chief executive; nor should they forego efforts at political exoneration." Rosen, *supra* note 9, at 455.

28. *See* Smith, *supra* note 14, at 720.

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

30. Arnolds & Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. Crim. L. & Criminology 289, 289 (1974).

31. W. LaFave & A. Scott, Handbook on Criminal Law § 50 at 381 (1972).

32. *Id.* at 381-82.

33. Duress is distinguished from necessity in its source of compulsion. Typically, duress is associated with a *human* source of compulsion whereas necessity is associated with natural physical forces *(e.g.,* fire, disease, or flood). Duress has a further de minimus requirement, not generally associated with necessity, that the actor reasonably fear death or serious bodily harm. *See* Hawkins, *Necessity as a Statutory Defense in Texas: A Comparison with*

The foundations for the necessity defense have been traced to biblical origins,[34] and both English and American courts have since recognized the defense.[35] *The William Gray*[36] and *United States v. Ashton*[37] are examples of early federal cases that held the defense to be applicable. In *The William Gray,* a ship was condemned for violation of the embargo act.[38] In defense, the owner argued that a storm had forced the captain to land in forbidden territory to save the crew and cargo. Although the appellate court questioned the veracity of the facts alleged, the jury found that necessity justified the violation.[39] This determination was upheld on appeal.[40]

In *Ashton,* sailors who refused their captain's orders while on the high seas were found not guilty of mutiny because it was their intent to force the vessel to return to port since they believed it to be unseaworthy.[41]

There are a number of state cases that illustrate the use of the defense.[42] Commentators have summarized these cases by stating:

> [T]hat whenever it is necessary, or reasonably appears necessary, a person may destroy property to prevent the spread of

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Other States, 3 AM. J. CRIM. L. 233, 235 (1975).

The distinction between necessity and self-defense lies:

> in terms of the character of the conduct of the person affected by the defendant's acts. In the case of self-defense, the defendant is defending himself against conduct which . . . is unlawful . . . . In the case of necessity, the victim of defendant's act is not guilty of any unlawful act . . . , but the law allows the defendant to invade the victim's rights because of the defendant's necessity.

1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE 404 (1957).

34. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 417 (2d ed. 1960).

35. Arnolds & Garland, *supra* note 30, at 291-92 nn.29-37.

36. 29 F. Cas. 1300 (C.C.D.N.Y. 1810) (No. 17,694).

37. 24 F. Cas. 873 (C.C.D. Mass. 1834) (No. 14,470).

38. 29 F. Cas. at 1301.

39. *Id.* at 1302.

40. *Id.*

41. 24 F. Cas. at 874.

42. *See, e.g.,* Surocoo v. Geary, 3 Cal. 69 (1853); Cromwell v. Emrie, 2 Ind. 35 (1850); Field v. City of Des Moines, 39 Iowa 575 (1874); Seavy v. Preble, 64 Me. 120 (1874); State v. Jackson, 71 N.H. 552, 53 A. 1021 (1902); Hale v. Lawrence, 21 N.J.L. 714 (N.J. 1848), *aff'd sub nom.* American Privity Works v. Lawrence, 23 N.J.L. 590 (N.J. 1851); Keller v. City of Corpus Christi, 50 Tex. 614 (1879).

> fire or disease. Speeding may be justified to avoid ambush and unlawful arrest. Selling alcohol without a prescription is justified in an emergency, and a sick child may be withdrawn from school without permission if the parent is acting to save the child's health.[43]

Under the common law, the actor need not be in actual peril; "a well-founded belief in impending peril is sufficient to raise the defense."[44] Because necessity is an affirmative defense, the burden of raising it is on the defendant.[45] In pleading necessity, the actor first admits his technical violation of the law.[46] Then, as a defense, the actor contends that, for reasons of social policy and justice, his conduct was justified because it was intended to prevent a greater harm.[47]

There has also been legislative recognition of the defense. The Model Penal Code provides that the defense is applicable as a justification of a criminal act.[48] The National Commission on Reform of Federal Criminal Laws initially proposed the adoption of the

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43. Arnolds & Garland, *supra* note 30, at 292.

44. *Id.* at 294. *See* United States v. Ashton, 24 F. Cas. 873 (C.C.D. Mass. 1834) (No. 14,470).

45. *See* State v. Wooten, Crim. No. 2685 (Cochise County, Ariz., Sept. 13, 1919), discussed in Note, *The Law of Necessity as Applied in the Bisbee Deportation Case*, 3 ARIZ. L. REV. 264 (1961).

46. Arnolds & Garland, *supra* note 30, at 294.

47. *Id.*

48. MODEL PENAL CODE § 3.02 (Tent. Draft No. 8, 1958) states in full:

> (1) Conduct which the actor believes to be necessary to avoid an evil to himself or to another is justifiable, provided that:
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> (a) the evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
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> (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
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> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
>
> (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

defense as generally defined,[49] but in their Final Report[50] only provided that: "Except as otherwise provided, justification or excuse under this chapter is a defense."[51] The twelve states that have statutorily adopted the necessity defense have done so based upon the "choice-of-evils," or "competing harms," rationale.[52] When faced with a "competing harms" situation, the standard to be applied under the majority of these statutes is both subjective—the actor must "reasonably believe" his conduct is necessary,[53] and objective—the harm to be avoided must "clearly outweigh" the harm to be caused by the actor.[54]

B. *The Necessity Defense in Vermont*

In Vermont, there is no justification or "competing harms" statute. Vermont common law contains only one case defining the necessity defense—*Ploof v. Putnam*.[55] The plaintiff in *Ploof* was sailing his sloop on Lake Champlain when he was overtaken by a sudden and violent storm. Because there were no natural moorings available, and fearing for the safety of his wife, children, and property, the plaintiff moored the sloop to the defendant's dock. The defendant, through his servant, had the plaintiff's boat unfastened. In the violence of the storm, the boat was destroyed. The plaintiff

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49. *See* THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE § 608 (1970).

50. *See* THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS § 601(1) (1971).

51. *Id.* For an excellent discussion of the policy reasons underlying this change *see* Arnolds & Garland, *supra* note 30.

52. Those states that have statutory necessity defenses are: Arkansas—ARK. REV. STAT. ANN. § 41-504 (1977); Colorado—COLO. REV. STAT. § 18-1-702 (1973); Delaware—DEL. CODE ANN. tit. 11, § 463 (1974); Hawaii—HAWAII REV. STAT. § 703-302 (1976); Illinois—ILL. ANN. STAT. ch. 38, § 7-13 (Smith-Hurd 1972); Kentucky—KY. REV. STAT. ANN. § 503-030 (Baldwin 1975); New Hampshire—N.H. REV. STAT. ANN. § 627:3 (1974); New York—N.Y. PENAL LAW § 35.05 (McKinney 1975); Oregon—OR. REV. STAT. § 161.200 (1977); Pennsylvania—PA. STAT. ANN. tit. 18, § 503 (Purdon 1973); Texas—TEX. PENAL CODE ANN. tit. 1, § 9.22 (Vernon 1974); Wisconsin—WIS. STAT. ANN. § 939.47 (West 1958).

53. Nine states' statutes (Arkansas, Colorado, Delaware, Illinois, New Hampshire, New York, Oregon, Texas, and Wisconsin) contain such "reasonable belief" or similar language.

54. Five states' statutes (Colorado, Delaware, New York, Oregon, and Texas) contain this objective standard. *See also* City of Chicago v. Mayer, 56 Ill. 2d 366, 308 N.E.2d 601 (1974), for an application of the general statutory doctrine to a particular case.

55. 81 Vt. 471, 71 A. 188 (1908).

and his family were cast upon the shore and were injured.[56]

The plaintiff brought two charges against the defendant: "that the defendant . . . with force and arms wilfully and designedly unmoored the sloop," and "that it was the duty of the defendant . . . to permit [the sloop] to remain . . . moored during the continuance of the tempest."[57] The Vermont Supreme Court held that necessity justified the plaintiff's trespass.[58] Justice Mason stated that the doctrine of necessity "applies with special force to the preservation of human life."[59] In this case, it was "clear that an entry upon the land of another may be justified by necessity."[60] Thus, at least in the context of a civil case, necessity is a recognized defense in Vermont.

The defendants' first hurdle in *State v. Warshow*[61] was, therefore, to have the Vermont courts recognize the existence of the necessity defense with regard to criminal, as opposed to civil, trespass. Although the need for explicit recognition of the defense was expressed both by Justice Hill in his concurring opinion and by Justice Billings in his dissent,[62] the majority opinion gave only implicit recognition to the validity of its use in a criminal context. Chief Justice Barney, while recognizing the use of the defense in *Ploof*, stated that "[t]he doctrine is one of specific application insofar as it is a defense to criminal behavior."[63] Although the court did not find that the defense was applicable in this case, the fundamental requirements of the defense were recited by the court.[64]

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56. *Id.* at 474, 71 A. at 189.

57. *Id.*

58. *Id.* at 475, 71 A. at 189.

59. *Id.*

60. *Id.*

61. 138 Vt. 22, 410 A.2d 1000 (1979).

62. Justice Hill stated that: "Necessity has long been recognized at common law as a justification for the commission of a crime . . . . I see no reason why the defense should not be recognized in the criminal law context . . . . Although this holding is implicit in the majority opinion, I would make it explicit." *Id.* at 26, 410 A.2d at 1003 (Hill, J., concurring).

Justice Billings felt that the recognition of the existence of the defense was, in this criminal trespass action, "equally, if not more compelling . . . than in a civil law action." *Id.* at 29, 410 A.2d at 1004 (Billings, J., dissenting).

63. *Id.* at 24, 410 A.2d at 1001.

64. *Id.* at 24, 410 A.2d at 1001-02.

The outcome of *Warshow* turned upon the defendants' inability to satisfy one of the necessary elements of the defense—the imminent-harm element.[65] This implicitly leaves open the possibility that future defendants may be able to successfully assert the defense if they can satisfy the elements established by the court.

The court found the necessity defense comprised four elements. These elements, which are substantially the same as those identified in *Ploof*,[66] are: (1) an emergency situation must arise without fault on the part of the defendant; (2) the situation must raise a reasonable expectation of imminent or compelling harm, which is directed either at the actor or at those whom he is protecting; (3) there must be no reasonable opportunity to escape the situation without doing the criminal act; and, (4) the impending injury must "be of sufficient seriousness to outmeasure the criminal wrong."[67]

III. The *Warshow* Defendants' Allegations

In two briefs,[68] the *Warshow* defendants addressed each of the four elements of the defense. The defendants' first argument was that their conduct was reasonably necessary.[69] Second, the defendants asserted that they had exhausted all other means of avoiding the danger.[70] Third, the defendants argued that the necessity arose in an emergency situation, or in one of imminent danger.[71] Finally, the defendants argued that the means they used were not disproportionate to the threatened evil.[72] The defendants' arguments will be presented in this note in a sequence different from that of the

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65. *Id.* at 25, 410 A.2d at 1002.

66. 81 Vt. at 475-76, 71 A. at 189-90, *See* Hawkins, *supra* note 33, at 239-40. *See also* W. LaFave & A. Scott, *supra* note 31, at 381.

67. 138 Vt. at 24, 410 A.2d at 1001-02.

68. Brief of the Appellant, State v. Warshow, Nos. 1835-77 to 1851-77 WmC (Vt. Dist. Ct. Feb. 22, 1978) [hereinafter cited as Trial Brief] and Brief of the Appellants, *supra* note 15, at 28-31.

69. Brief of the Appellants, *supra* note 15, at 28-31.

70. *Id.* at 31-34.

71. *Id.* at 34-35.

72. *Id.* at 35-38.

Vermont Supreme Court.[73]

A. *Imminence of Harm and the Nexus Requirement*

The Vermont Supreme Court has required that, in order for the necessity defense to be applicable, there must be a reasonable expectation of imminent or compelling harm, directed either at the actor or at those whom he is protecting.[74] The *Warshow* defendants' first argument addressed this element of the defense.

The imminence-of-harm element is based on a reasonableness standard. That is, it looks to the defendant's subjective beliefs regarding the nature of the harm presented in a given situation. The historical case law standards defining the requisite sufficiency of the actor's belief are unclear. The test has been variously expressed in terms of whether the actor perceives an "urgent" situation[75] or an "absolute and uncontrollable" situation.[76]

In the instant case, the defendants alleged that they were faced with three types of imminent harm: (1) the potential harmful effects of extremely toxic radioactive waste product storage; (2) the harmful effects of the constant emissions of low-level radiation from the Vermont Yankee nuclear power plant; and, (3) the possibility of an accident which would release radioactivity into the air, water, and land "which would cause thousands of immediate deaths, tens of thousands of cancer cases, genetic damage to all life forms, and render thousands of acres of property useless for generations causing billions of dollars worth of damage."[77]

Regarding the imminence of the harm, the defendants asserted that, contrary to Nuclear Regulatory Commission safety studies, "Vermont Yankee inherently represents a real and present danger to human life both in the forms of constantly emitted, low-level radiation and the catastrophic effects of a major nuclear acci-

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73. See text accompanying note 67 *supra*.
74. 138 Vt. at 24, 410 A.2d at 1001-02.
75. The New York, 16 U.S. (3 Wheat.) 59, 68 (1818).
76. The Diana, 74 U.S. (7 Wall.) 354, 360-61 (1868).
77. Brief of the Appellants, *supra* note 15, at 29.

dent, a 'meltdown.' "[78] The defendants relied on the recent reevaluation of the Rasmussen Report[79] as support for the reasonableness of this assertion. This report has been used by the federal government since 1974 for its numerical risk estimates concluding that nuclear power plants pose only an infinitesimal chance of serious accident. Recently, however, the Nuclear Regulatory Commission accepted the conclusion of a review group that "the study should not be used uncritically either in the regulatory process or for public policy purposes."[80] The Nuclear Regulatory Commission has asserted that it is taking steps to assure that past reliance on the report will be reviewed.[81]

In their brief,[82] the defendants also cited *Carolina Environmental Study Group, Inc. v. Atomic Energy Commission*,[83] in which the court found that the "[o]peration of the nuclear power plants will have *immediate* or present effects and *potential* or future possible effects on plaintiffs and their environment."[84] In ad-

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78. *Id.* at 13-14. The most severe nuclear accident to date, which occurred at Three Mile Island (TMI) nuclear plant near Harrisburg, Pennsylvania, presents dramatic proof of the reality and the consequences of a major reactor malfunction. *See* N.Y. Times, Apr. 1, 1979, § 4, at 1. Although there was no danger of a bomb-like explosion, Dr. Roger Mattson of the Nuclear Regulatory Commission reported to members of a Senate subcommittee that there *was* the risk of a meltdown. NEWSWEEK, Apr. 9, 1979, at 25, col. 2.

The results of such an accident, especially in a heavily populated area, could be catastrophic. According to the best scientific estimates, "the worst possible reactor accident would result in 3,300 immediate deaths, 45,000 immediate injuries, 45,000 latent cancer deaths and 248,000 other injuries including genetic defects." N.Y. Times, Apr. 1, 1979, § 4, at 1, col. 3. Besides the possibility of physical injury, there was also immediate economic injury to the 50,000 to 60,000 area residents estimated to have evacuated, at least temporarily, from the vicinity of TMI. NEWSWEEK, Apr. 9, 1979, at 24, col. 1.

79. U.S. ATOMIC ENERGY COMMISSION, WASH-740, THEORETICAL POSSIBILITIES AND CONSEQUENCES OF MAJOR ACCIDENTS IN LARGE NUCLEAR POWER PLANTS (1957). *See also* UNION OF CONCERNED SCIENTISTS, THE RISKS OF NUCLEAR POWER REACTORS, A REVIEW OF THE NRC SAFETY STUDY (1977).

80. [1979] 9 ENVIR. REP. (BNA) 1768.

81. *Id.*

82. Brief of the Appellants, *supra* note 15, at 17 n.6, 44.

83. 431 F. Supp. 203 (W.D.N.C. 1977) *rev'd sub nom.* Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978).

84. 431 F. Supp. at 209 (emphasis in original). *But see* Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978), which reversed the district court ruling declaring nuclear accident liability limitations unconstitutional as violative of due process. The Supreme Court did not, however, directly reverse the lower court's findings with regard

dressing the alleged harm posed by Duke Power Company's several nuclear power plants, the federal court recognized the following immediate effects: low-level, nonnatural radiation emission; sharp increases in temperature in areas of the two lakes involved in cooling; objectively reasonable fear and apprehension as to the effect of the increased radioactivity in the air, land, and water; and, a continuing threat of accidental release of large or small quantities of radioactive material.[85] The court, in conclusion, found "as a fact that the probability of a major nuclear accident producing damages exceeding the $560,000,000 limit of the Price-Anderson Act is not fanciful but real."[86]

The consequences of an accident such as occurred in 1979 at the Three Mile Island nuclear power plant in Pennsylvania,[87] and such as the one recognized in *Carolina Environmental Study Group,* are not unique to those situations. Joseph Hendrie, chairman of the Nuclear Regulatory Commission, stated that it is "a little early to make a categorical statement that other plants are totally invulnerable to [the] kind of sequence" that crippled the Three Mile Island plant.[88] The human error factor is always present. The assertions of imminent harm by the defendants come at a time when the industry, the Nuclear Regulatory Commission, and the government are engaged in safety studies precipitated by events that many felt could never occur.[89]

In the past, the requirement that harm be imminent has been

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to the harm issue.

85. 431 F. Supp. at 209.

86. *Id.* at 214.

87. See note 78 *supra.*

88. [1979] 9 ENVIR. REP. (BNA) 2329. It is estimated that more than fifty percent of all operating nuclear reactors in the United States have gauges like the one that failed at the Three Mile Island nuclear power plant.

89. *See* PRESIDENT'S COMMISSION ON THE ACCIDENT AT THREE MILE ISLAND, THE NEED FOR CHANGE: THE LEGACY OF TMI (1979). The Commission's overall conclusion was:

> To prevent nuclear accidents as serious as Three Mile Island, fundamental changes will be necessary in the organization, procedures, and practices—and above all—in the attitudes of the Nuclear Regulatory Commisson and, to the extent that the institutions we investigated are typical, of the nuclear industry.

Id. at 7.

strictly enforced. In *United States v. Kroncke*,[90] the court emphasized this requirement. With regard to federal judicial policy, where the defense was being raised in a social protest situation, the court stated:

> The common thread running through most of [the] cases in which the defense of necessity was asserted is that there was a reasonable belief on the part of the defendant that it was necessary for him to act to protect his life or health, or the life or health of others, from a direct and immediate peril. None of the cases even suggest that the defense of necessity would be permitted where the actor's purpose is to effect a change in governmental policies which, according to the actor, may in turn result in a future saving of lives.[91]

The United States District Court for the District of Vermont has placed a similar restriction on the use of the defense when confronted with what it considered to be a future-harm situation. In *United States v. Berster*,[92] the defendant was charged with violation of immigration procedures. She made a motion for the expenditure of government funds for the production of expert witnesses to support her defense of necessity. In denying her motion, the court gave wide latitude to the presentation of this "novel" defense in a criminal case.[93] The court held, however, that the "threat of future injury is not sufficient to support" the necessity defense.[94]

Ultimately, it was the issue of the imminence of harm alleged by the *Warshow* defendants that caused the Vermont Supreme Court to hold that "the offered evidence was insufficient to support any possible defense of necessity."[95]

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90. 459 F.2d 697 (8th Cir. 1972). Defendant entered a Selective Service office and destroyed many draft files as a protest against the Vietnam war. The court of appeals upheld the district court in refusing to instruct the jury on the necessity defense as requested by defendant.

91. *Id.* at 701. *See also* United States v. Simpson, 460 F.2d 515 (9th Cir. 1972); United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969).

92. No. 78-33-1 (D. Vt. Sept. 27, 1978).

93. *Id.* at 3.

94. *Id.* at 4.

95. 138 Vt. at 26, 410 A.2d at 1002. See text accompanying notes 133-142 *infra*.

The imminence requirement of the necessity defense also incorporates the notion that there be a "nexus" between the defendant's actions and the harm to be avoided. The concept of nexus requires that the actions taken by the defendants must have been reasonably designed to prevent the threatened greater harm.[96]

Two cases, which involved acts of civil disobedience in protest against the Vietnam war, serve to illustrate the nexus requirement. In *State v. Marley*,[97] the Hawaii Supreme Court upheld the trial court's decision holding the necessity defense inapplicable.[98] In *Marley*, war protestors were arrested for criminal trespass undertaken as an act of nonviolent protest. The demonstration took place at a Honeywell corporation office in Honolulu, an alleged manufacturer of antipersonnel weapons.

The Hawaii court held that " '[a]n essential element of the so-called justification defenses is that a direct causal relationship be reasonably anticipated to exist between the defender's action and the avoidance of harm.' "[99] The *Marley* court's opinion was that the defendant's actions could not reasonably have been thought to be an effective means of stopping the war.[100]

In *United States v. Moylan*,[101] an antiwar case substantially similar to *Marley*,[102] the court expressed its idea of the policy underlying the nexus requirement. Of overriding concern was the judicial fear of the consequences of "encourag[ing] individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey . . . . Toleration of such conduct would not be democratic, . . . but inevitably anarchic."[103]

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96. State v. Marley, 54 Hawaii 450, 472, 509 P.2d 1095, 1109 (1973).

97. 54 Hawaii 450, 509 P.2d 1095 (1973).

98. *Id.* at 471-73, 509 P.2d at 1112.

99. *Id.* at 472, 509 P.2d at 1109 (quoting United States v. Simpson, 460 F.2d 515, 518 (9th Cir. 1972)).

100. *Id.*

101. 417 F.2d 1002 (4th Cir. 1969).

102. The defendants were convicted of violation of the federal statutes proscribing the mutilation and destruction of government documents. Such acts were undertaken as a protest against the Vietnam war. *Id.* at 1003.

103. *Id.* at 1009.

The *Warshow* defendants conceded that "[m]any if not most acts of civil disobedience are not justifiable through an appeal to the necessity defense. A principled refusal to obey a particular law may or may not involve an attempt to avoid an imminent harm, through an emergency action."[104]

Nonetheless, they asserted that "the nexus between the perceived harm and [their] action [was] clear"[105] because of the timing of their protest. The blockage of the facility occurred on the day of a start-up after a scheduled temporary shutdown of the plant. A protest at this time was alleged to be the most direct means of avoiding further harmful effects from the operation of the plant.[106] The *Warshow* defendants placed particular reliance on the fact that the nexus requirement is based on a reasonableness standard.[107] That is, the court will look to the defendants' subjective beliefs under the circumstances rather than using a stricter, objective test. The plea of necessity involves a determination of matters of fact and value.[108] The defendants argued that the jury, as triers of what is reasonable in cases of mixed questions of law and fact "should be allowed to decide not only if the facts alleged . . . were as extreme as the defendant said they were, but if they were, whether the defendant made the correct choice."[109] Following this reasoning, the *Warshow* defendants were eager to present their evidence to the jury sitting as the "conscience of the community."[110]

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104. Brief of the Appellants, *supra* note 15, at 29.

105. *Id.* at 30.

106. *Id.* at 30-31.

107. *Id.* at 31.

108. "Pleas of necessity . . . involve two determinations. The first is a factual determination: did the situation as alleged by the defendant actually exist . . . and did the defendant have any legal way out. The second is a determination of values: whether the alternative chosen was, in itself, the lesser evil." Arnolds & Garland, *supra* note 30, at 294.

109. *Id.* at 296. *See* Brief of the Appellants, *supra* note 15, at 36-38, 41-45.

110. It has been suggested that:

> Where [the] activity falls within the "penumbra" of the law but where disagreement exists in a society about a moral issue or the extent to which a value is absolute . . . or relative, there seems to be little reason why a defendant should not be allowed in the first instance to have the jury as the "conscience of the community" and his peers decide whether he made an objectively correct choice of values.

Arnolds & Garland, *supra* note 30, at 296.

B. *Exhaustion of Alternatives*

The *Warshow* defendants asserted that they had exhausted all other means of avoiding the danger before they undertook their criminal act.[111] The defendants asserted that they had sought to prevent the operation of the Vermont Yankee plant for years "through relentless and costly civil actions, and multiple involvements in the legislative process."[112]

Two reasons were offered for the ineffectiveness of such actions. First, there is an enormous amount of time, money, and expertise that must be invested for citizen intervention to be effective. In this instance, such costs proved to be "overwhelming."[113] Second, the defendants alleged that the inherent biases and complete control of the licensing of nuclear power plants by the Nuclear Regulatory Commission precluded effective citizen intervention in decisions about nuclear power plants.[114]

These factors, in conjunction with the alleged imminence of harm in the situation, led to the defendants' averment that all reasonable legal means of avoiding the danger had been sufficiently exhausted.[115]

The assertion that all reasonable legal means of avoiding the

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111. Brief of the Appellants, *supra* note 15, at 31.

112. *Id.*

113. *Id.* at 32.

114. *Id.*

115. *Id.* at 31-34. Similar arguments were raised in State v. Mouer Nos. 77-246 to 77-324 (Or. Dist. Ct., Columbia Cty., Dec. 1977) as cited in State v. Warshow, Nos. 1835-77 to 1851-77 WmC (Vt. Dist. Ct. Aug. 16, 1978) at 6, an Oregon nuclear protest case analogous to the instant case. In *Mouer*, the defendants asserted that they were faced "with the futility of legal remedies and . . . [were] cognizant of the continuing harm emanating from the Trojan nuclear power plant." Trial Memorandum of Defendant at 3, State v. Mouer, Nos. 77-246 to 77-324 (Or. Dist. Ct., Columbia Cty., Dec. 1977). The defendants therefore conducted a protest at the plant to force its shutdown. They were arrested on criminal trespass charges. These defendants sought to justify their acts by pleading Oregon's statutory necessity defense. They argued that " 'illegal' conduct may be necessary even though 'official channels' may exist which might theoretically remove the threatened danger." *Id.* at 11. This argument was never addressed by the Oregon appellate courts and the defendants were ultimately acquitted for lack of proof that they had ever been ordered to leave the premises by someone having authority to do so. *See* State v. Warshow, Nos. 1835-77 to 1851-77 WmC (Vt. Dist. Ct. Aug. 16, 1978) at 6.

alleged imminent harm posed by nuclear power had been exhausted failed to persuade the New Hampshire Supreme Court in *State v. Dorsey*[116] that trespass at a nuclear power plant was justified. The court stated that "[d]efendants and others who oppose nuclear power have other lawful means of protesting nuclear power; therefore, they are not justified in breaking the law."[117]

An important distinction between the New Hampshire case and the instant case is that in New Hampshire there is currently only a nuclear power plant under construction whereas in Vermont there is an existing and operating nuclear plant. To the degree that an existing nuclear power plant can be demonstrated to pose an imminent harm, there is a greater likelihood of a defendant's prevailing with the argument that reasonable means to avoid the harm no longer existed.

The availability of alternatives to civil disobedience and the imminency-of-harm elements of the defense are interrelated insofar as a more imminent harm may present fewer effective alternatives. The defendants' ability to legally justify their illegal acts, therefore, depends on their ability to convince the court that an imminent harm existed.[118]

C. *Balance of Harms and "Emergency"*

The concept of necessity, as defined by the majority of the *Warshow* court requires that "there must be a situation of emergency arising without fault on the part of the actor concerned"[119] and that "the injury impending from the emergency must be of sufficient seriousness to outmeasure the criminal wrong."[120] These are referred to, respectively, as the emergency element and the balance-of-harms element. They bear an obvious relation to both the imminence and exhaustion elements previously discussed.[121]

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116. 118 N.H. 844, 395 A.2d 855 (1978).
117. *Id.* at 847, 395 A.2d at 857 (citation omitted).
118. See text accompanying notes 73-86 *supra*.
119. State v. Warshow, 138 Vt. at 24, 410 A.2d at 1001.
120. *Id.* at 24, 410 A.2d at 1002.
121. See text accompanying notes 133-42 & 157-65 *infra*.

When presenting the necessity defense, the defendants must show that any harm resulting from their criminal acts was outweighed, at the time of their actions, by the imminence and degree of the threatened harm. The magnitude of the perceived harm and the availability of reasonable alternatives are determinative of what preventative action is legally appropriate in a particular emergency situation. In the instant case, the defendants felt that the balance between "the property interests protected by the trespass laws . . . [and] the continuing danger of low-level radiation exposure, the constant threat of a nuclear accident, and the inability of the Vermont Yankee Nuclear Power Corp. to safely contain radioactive nuclear wastes for over 250,000 years"[122] justified their illegal acts.

Inasmuch as the defense requires that the emergency situation present "no reasonable opportunity" of avoidance, the defendants asserted that, as in negligence cases, the question ought to be sent to the jury as a mixed question of law and fact.[123]

Indeed, as seen in each of the elements discussed to this point, the question of the reasonableness of the defendants' actions or beliefs permeates the defense. In *Ploof*,[124] Justice Munson stated that the validity of the defense "cannot be held irrespective of circumstance, and the question must be left for adjudication upon proceedings had with reference to the evidence."[125] The *Warshow* defendants interpreted this precedent[126] to mean that, once a valid offer of proof is made,[127] the question of reasonableness is one for the jury to decide. This position finds strong support in Justice

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122. Brief of the Appellants, *supra* note 15, at 36.

123. *Id.* at 37 (citation omitted).

124. Ploof v. Putnam, 81 Vt. 471, 71 A. 188 (1908).

125. *Id.* at 476, 71 A. at 189.

126. Brief of the Appellants, *supra* note 15, at 41-45, which discusses the common law function of the jury in Vermont and its role with regard to the necessity defense.

127. *See* State v. Warshow, 138 Vt. at 29, 410 A.2d at 1004 (Billings, J., dissenting), in which Justice Billings states that "[t]he offer must be only specific and concrete enough to make apparent to the trial court the existence of facts, which, if proved, would make the evidence relevant to an issue in the case and otherwise admissable," (citing Cushman v. Outwater, 121 Vt. 426, 432, 159 A.2d 89, 93 (1960); and State v. Lucia, 104 Vt. 53, 58, 157 A. 61, 63 (1931)).

Billings's dissenting opinion.[128]

IV. *State v. Warshow*

At trial, the *Warshow* defendants sought to present evidence relating to the hazards of nuclear power by which to establish their affirmative defense.[129] The trial court excluded the defendants' proffered evidence and also refused to grant compulsory process for the defendants' expert witnesses.[130] Jury instructions on the issue of necessity were also refused.[131] On appeal the defendants presented the issue of "Whether the refusal of the district court to allow appellants to present the defense of necessity to a charge of unlawful trespass violated their rights to due process under Article X and Article XII of the Vermont Constitution."[132]

A. *The Majority Opinion*

The Vermont Supreme Court held that the trial court's ruling, which rejected the defendants' offer of proof, "was sound, considering the offer."[133] As a matter of law, the Vermont Supreme Court

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128. 138 Vt. at 29, 410 A.2d at 1004 (Billings, J., dissenting).

129. *Id.* at 23, 410 A.2d at 1001; see text accompanying note 45 *supra*.

130. 138 Vt. at 23, 410 A.2d at 1001.

131. *Id.*

132. Brief of the Appellants, *supra* note 15, at 1. Article X of the Vermont Constitution provides in full:

> That in all prosecutions for criminal offenses, a person hath a right to be heard by himself and his counsel; to demand the cause and nature of his accusation; to be confronted with the witnesses; to call for evidence in his favor, and a speedy public trial by an impartial jury of the country; without the unanimous consent of which jury, he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any person be justly deprived of his liberty, except by the laws of the land, or the judgment of his peers; provided, nevertheless, in criminal prosecutions for offenses not punishable by death, the accused, with the consent of the prosecuting officer entered of record, may in open court or by a writing signed by him and filed with the court, waive his right to a jury trial and submit the issue of his guilt to the determination and judgment of the court without a jury.

VT. CONST. ch. I, art. 10 (Cum. Supp. 1979).

Article XII of the Vermont Constitution provides: "That when any issue in fact, proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred." *Id.*, art. 12.

133. 138 Vt. at 25, 410 A.2d at 1002.

held that the defendants' offer, even if it had been accepted by the trial court, would not have established the defense.[134]

The majority, with Chief Justice Barney writing the opinion, made two rulings concerning the nature of harm alleged which were subsequently attacked both by Justice Billings[135] and by the defendants.[136] As to the alleged danger posed by low-level radiation and nuclear waste buildup, the majority held that these "are not the types of imminent danger classified as an emergency sufficient to justify criminal activity. To be *imminent,* a danger must be, or must reasonably appear to be, threatening to occur *immediately,* near at hand, and impending."[137] The "specter of nuclear accident" also failed to satisfy the imminence requirement. It was noted by the majority that the defendants' pleadings failed to allege a serious accident at the Vermont Yankee plant.[138] The defendants' allegations did "not take the position that they acted to prevent an impending accident. Rather, they argued that they acted to foreclose a 'chance' or 'possibility' of accident."[139]

Without making explicit reference to the federal cases, the Vermont Supreme Court seems to be applying the same rationale as that applied by federal courts in the Vietnam war protest cases,[140] and in the *Berster* case.[141] In those cases, the use of the necessity defense was denied because of the speculative nature of the alleged harm. In the instant case, the Chief Justice stated that "[t]his defense cannot lightly be allowed to justify acts taken to foreclose speculative and uncertain dangers. Its application must be limited to acts directed to the prevention of harm that is rea-

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134. *Id.*

135. 138 Vt. at 29, 410 A.2d at 1004 (Billings, J., dissenting).

136. Motion for Reargument, Brief of the Appellants, State v. Warshow, 138 Vt. 22, 410 A.2d 1000 (1979). See text accompanying notes 171-75 *infra.*

137. 138 Vt. at 25, 410 A.2d at 1002 (citing State v. Huett, 340 Mo. 934, 950, 104 S.W.2d 252, 262 (1937) (emphasis added)).

138. 138 Vt. at 25, 410 A.2d at 1002.

139. *Id.*

140. *See, e.g.,* United States v. Kroncke, 459 F.2d 697 (8th Cir. 1972), and text accompanying notes 105-06 *supra.*

141. United States v. Berster, No. 78-33-1 (D. Vt. Sept. 27, 1978) discussed in text accompanying notes 107-09 *supra.*

sonably certain to occur."[142] Because the alleged harms were considered to be "speculative" rather than "imminent," the defendants' offer was refused and their use of the defense was denied.

B. *The Concurring Opinion*

Justice Hill reached the same result as the majority, but he did so for radically different reasons. Justice Hill felt that both the majority opinion and Justice Billings's dissenting opinion placed "the cart before the horse"[143] by even addressing the defendants' offers as to the elements of the defense. "It is illogical," wrote Justice Hill, "to consider whether the necessary elements of a defense have been shown before determining whether the defense is even available in a particular situation."[144] In the case of nuclear power, Justice Hill felt that the defense was not available.[145]

Justice Hill's opinion was based on a theory of legislative preclusion. Citing *State v. Dorsey*,[146] Justice Hill stated that "[t]he common law defense of necessity deals with imminent dangers from obvious and generally recognized harms. It does not deal with nonimminent or debatable harms; nor does it deal with activities that the legislative branch has expressly sanctioned and found not to be harms."[147] Justice Hill cited a series of state and federal legislative enactments[148] that he felt implied a policy choice by the legislature "that the benefits of nuclear energy outweigh its dangers."[149] Ultimately, declared Justice Hill, policy questions regarding nuclear power are for the legislature, rather than the judiciary, to decide.[150]

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142. 138 Vt. at 25, 410 A.2d at 1002 (citing State v. Dorsey, 118 N.H. 844, 846, 395 A.2d 855, 857 (1978)).

143. *Id.* at 28, 410 A.2d at 1004 (Hill, J., concurring).

144. *Id.*

145. *Id.*

146. 118 N.H. 844, 846, 395 A.2d 857, 857 (1978).

147. 138 Vt. at 27, 410 A.2d at 1003 (Hill, J., concurring).

148. *Id.*

149. *Id.*

150. Justice Hill stated:

> If we were to allow defendants to present the necessity defense in this case we would, in effect, be allowing a jury to redetermine questions of policy already decided by the legislative branches of the federal and state govern-

In *State v. Dorsey*,[151] the case upon which Justice Hill primarily relied, nuclear power protestors, arrested at the construction site of a nuclear power plant in Seabrook, New Hampshire, on criminal trespass charges, pleaded necessity as a justification of their actions.[152] The New Hampshire Supreme Court dismissed the plea as applied to the defendants' actions.[153] That court stated:

> To allow nuclear power plants to be considered a danger or harm within the meaning of [the necessity] defense either at common law or under statute would require lay jurors to determine in individual cases matters of state and national policy in a very technical field.
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> . . . .
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> . . . The matter of Seabrook Nuclear Power Plant has been before the regulatory agencies and the courts of both the United States and this State with a full opportunity for the opponents of nuclear power plant construction to be heard. Opponents still have the right to try to induce the people's representatives in Congress and the legislatures to change the statutes.[154]

The New Hampshire Supreme Court was careful to state its neutrality with regard to nuclear power,[155] but went on to hold that the defense was inapplicable in that case.[156]

C. *The Dissent*

1. *Due Process*

Justice Billings, in a well-reasoned and well-documented opinion, dissented. Justice Billings first attacked the majority opinion. The majority, stated Justice Billings, had "decided to so read the evidence as to give credibility only to that evidence offered on the

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ments. This is not how our system of government was meant to operate. *Id.*

151. 118 N.H. 844, 395 A.2d 855 (1978).
152. *Id.*
153. 118 N.H. at 847, 395 A.2d at 857.
154. *Id.*
155. *Id.*
156. *Id.*

effects of low-level radiation"[157] and chose to exclude a whole line of otherwise material evidence.[158] "It is not for this court to weigh the credibility of the evidence in this manner where there is evidence offered on the elements of the defense."[159]

Justice Billings was clearly in accord with the defendants' argument as to the role of the jury with regard to assertion of the necessity defense.[160] Citing *State v. Wilson,*[161] Justice Billings stated that "[w]here there is evidence offered which supports the elements of the defense, the question of reasonableness and credibility are for the jury to decide."[162] Examining the defendants' allegations as to each element of the defense, Justice Billings felt that the offers of proof at trial were sufficient under Vermont standards,[163] to present evidence on the defense of necessity. "I am of the opinion," stated Justice Billings, "that the offer here measured up to the standard required and that the trial court struck too soon in excluding the offered evidence."[164] Ultimately, Justice Billings thought that the denial of the right to present the evidence necessary to establish their affirmative defense deprived the defendants of a fair trial and was done "merely because they express unpopular political views."[165]

2. *Legislative Preclusion*

Justice Billings also rejected Justice Hill's argument that a legislatively mandated regulatory scheme precluded the courts

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157. 138 Vt. at 30, 410 A.2d at 1005 (Billings, J., dissenting).

158. See note 127 *supra* for Justice Billings's test of materiality with regard to the defendants' offer of proof. See also text accompanying notes 133-41 *supra.*

159. 138 Vt. at 30, 410 A.2d at 1005 (Billings, J., dissenting).

160. *See* Brief of the Appellants, *supra* note 15, at 41-45, and text accompanying notes 123-28 *supra.*

161. 113 Vt. 524, 527, 37 A.2d 400, 401 (1944).

162. 138 Vt. at 30, 410 A.2d at 1005 (Billings, J., dissenting).

163. See note 127 *supra.* Justice Billings stated that "[t]hrough this offer, it cannot be said, without prejudgment, that the defendants failed to set forth specific and concrete evidence, which, if proven, would establish the existence of an imminent danger of serious proportions through no fault of the defendants which could not be averted without the trespass." 138 Vt. at 32, 410 A.2d at 1006 (Billings, J., dissenting).

164. *Id.*

165. *Id.*

from hearing the necessity defense. Justice Billings asserted two grounds for the failure of the preclusion argument in the instant case. First, the defendants offered to prove an emergency which the regulatory scheme failed to avert.[166] "The defendants are entitled to show that although there is a comprehensive regulatory scheme, it failed to such an extent as to raise for them the choice between criminal trespass and the nuclear disaster which the regulatory scheme was created to prevent."[167] Second, Justice Billings examined the statutes which Justice Hill claimed to implicitly demonstrate a policy choice favoring the benefits of nuclear power. Justice Billings found no such categorical implication.[168] Thus, he felt that where there is no clear legislative policy choice, preclusion is unwarranted.[169]

V. The Defendants' Response

Immediately following the announcement of the *Warshow* decision, the defendants filed a motion for reargument.[170] The defendants first argued that the majority applied an improper definition of imminent harm[171] in that they failed to recognize the distinction between "imminence" and "immediacy."[172] The standard is one of "imminence."[173] Based on this standard, the defendants reasserted their position that "the majority opinion has misapprehended the appellants' factual contention as to the imminency of harm from low-level radiation, nuclear waste, and nuclear acci-

166. *Id.*

167. *Id.*

168. "It cannot be said categorically that 'implicit within these statutory enactments is the policy choice that the benefits of nuclear energy outweigh its dangers,' as the concurring opinion states." *Id.*

169. *Id.*

170. Motion for Reargument, Brief of the Appellants, State v. Warshow, 138 Vt. 22, 410 A.2d 1000 (1979) [hereinafter cited as Motion for Reargument].

171. The majority opinion required a showing of "imminent" harm, 138 Vt. at 24, 410 A.2d at 1001-02, but went on to deny the defendants' offer of proof with regard to both low-level radiation and the possibility of nuclear accident because they did not present an *immediate* harm. *Id.* at 26, 410 A.2d at 1002.

172. *Compare* State v. Huett, 340 Mo. 934, 950, 104 S.W.2d 252, 262 (1937) *with* Lapham v. Curtis, 5 Vt. 371, 377 (1833).

173. 138 Vt. at 24, 410 A.2d at 1001-02.

dent."[174] The fact that such harms are *latent*, asserted the defendants, does not mean that they are not *imminent* within the meaning of the defense.[175]

The second argument asserted by the defendants parallels Justice Billings's position[176] that there has been no legislative preclusion in Vermont.[177] "A close reading of the statutory authority . . . will reveal that none of them are as guiding in their determination of the legislature's intent as the findings of the legislature itself when it enacted the ban on the construction of nuclear power plants in 1975."[178] Furthermore, there is nothing to be found in the statutes cited by the concurrence[179] which specifically forecloses the use of the necessity defense with regard to the specific facts of the instant case. Notwithstanding the arguments raised by the defendants, the Vermont Supreme Court denied their motion for a rehearing.[180]

CONCLUSION

The *Warshow* defendants were trying to show a legal justification for their acts of civil disobedience protesting the continued operation of the Vermont Yankee nuclear power plant. The protestors believed that the plant posed an imminent harm that, on balance, they believed outweighed the harm associated with their illegal acts. This "competing harms" situation was the basis for their

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174. Motion for Reargument, *supra* note 170, at 7.

175. *Id.* at 7-8 (emphasis added).

176. See text accompanying notes 166-69 *supra*.

177. Motion for Reargument, *supra* note 170, at 9-11.

178. *Id.* at 10 (citing VT. STAT. ANN. tit. 30, 248(c) (Cum. Supp. 1979)). Examining the legislative history of this statute, the defendants found the following statement of purpose:

> The General Assembly recognizes that substantial questions have been raised concerning safety and the effect on public health of fission fueled generating plants. The reliability of the emergency core cooling system for fission fueled generating plants is uncertain and, in addition, there is no known way to safely dispose of the waste products of nuclear fission because these wastes retain their dangerous radioactivity for thousands of years. The effects of low-level radiation on life is the subject of intense scientific debate.

179. 138 Vt. at 27-28, 410 A.2d at 1003 (Hill, J., concurring).

180. The defendants' motion for reargument was denied by the Vermont Supreme Court on January 15, 1980. State v. Warshow, 138 Vt. 22, 410 A.2d 1000 (1979).

assertion of the necessity defense as a legal justification of their otherwise illegal acts.

This defense is based upon the actor's subjective beliefs in a given situation. One of the defendants' major objectives, therefore, was to have the jury decide whether their actions were reasonable under the circumstances. Because their offer of proof was denied by the trial court, the defendants appealed to the Vermont Supreme Court the question whether, under Vermont standards, the trial court's refusal of their offer was constitutional.

After grappling with this issue, the Vermont Supreme Court ultimately upheld the decision of the trial court. They did so, however, on the narrow ground that the imminent-harm element of the defense was not satisfied by the defendants' allegations. The court saw no need for a remand, nor did they allow a reargument.

As to the underlying nature of the defendants' acts, Chief Justice Barney said that "[t]hese acts may be a method of making public statements about nuclear power and its dangers, but they are not a legal basis for invoking the defense of necessity. Nor can the defendants' sincerity of purpose excuse the criminal nature of their acts."[181]

Justice Billings was correct in his recognition of the political nature of the defendants' acts.[182] The defendants have themselves indicated that their goals range beyond the personal justification of an individual act of protest.[183] Their ultimate goal is to stop the current use and development of nuclear power.[184] Furthermore, it seems clear that such acts of protest will continue in Vermont[185]

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181. 138 Vt. at 25, 410 A.2d at 1002.

182. In his dissenting opinion, Justice Billings said that by denying the defendants the right to raise the defense, the court was denying them a fair trial "merely because they express unpopular political views." 138 Vt. at 33, 410 A.2d at 1006 (Billings, J., dissenting).

183. See text accompanying note 15 *supra*.

184. *Id.*

185. During the course of the *Warshow* proceedings, a number of nuclear power opponents stated their goals at a conference held at Vermont Law School regarding nuclear power, trespass, and the necessity defense. The members of the antinuclear movement who were present were in general agreement that acts of civil disobedience, such as trespass or obstructing access to nuclear power plant construction, are valid means of preventing the

and that nuclear power opponents will continue to apply the concept of "trial as theater." In this manner, the defendants will use the courts as "a significant forum to present issues to the public."[186]

The controversy over the use and safety of nuclear power in Vermont continues. The question may be asked whether antinuclear opinion in Vermont is strong enough to have caused an acquittal had the necessity defense been allowed in *State v. Warshow*. Although the question remains unanswered for the *Warshow* defendants, it is clear that "[t]he law and the popular sense of what is fair sometimes are irreconcilable."[187]

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greater harm associated with nuclear radiation. Trunzo, *Nuclear Trespass Defense*, Vt. L. School Forum, Nov. 17, 1978, at 4, col. 2.

186. *Id.* at 4, col. 3. The Vermont press has also recognized that "[r]egardless of whether the judiciary allows nuclear power to be debated as a side issue in the courtroom, Vermonters who may be drafted for jury duty are being exposed to the arguments elsewhere." Davis, *Vermont Would Be the Place to Test a "Necessity Defense,"* The Burlington (Vt.) Free Press, Jan. 6, 1980, at 10A col. 5. In a small state such as Vermont, such exposure by a large number of defendants may be significant.

187. *Id.*