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# Necessity's Child: The Judiciary, Disobedience, and the Bomb

Charles R. DiSalvo

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# Special Issues and Topics

## Necessity's Child The Judiciary, Disobedience, and the Bomb

CHARLES R. DiSALVO\*

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*This essay is about death.*

*Death—that will be yours when the bomb explodes. Death—that our civilization will suffer when the bomb explodes. Death—that is shrouded in the silence of a thousand missile silos, a thousand submarine tubes, a thousand bomber bays.*

*This essay is also about life. Life—that breaks the silence of death. Life—that is disorderly and chaotic. Life—that says the bomb shall not rule.*

*Finally, this essay is about the law. The law—one of the last institutions to which humans are turning to be rescued from the bomb.*

### I. INTRODUCTION

On August 6, 1945, the United States dropped an atomic bomb on Hiroshima, Japan killing tens of thousands of persons and injuring countless others. Three days later, the United States dropped a second atomic weapon on the city of Nagasaki, Japan causing similar devastation. Since that time, when the world's nuclear stockpile was

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\* Professor of Law, West Virginia University. St. John Fisher College, B.A., 1970; Claremont Graduate School, M.A., 1971; University of Southern California, J.D., 1974.

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reduced from two to zero, the United States and the Soviet Union have steadily and inexorably increased the number of nuclear bombs in their possession. Despite scores of negotiations since 1945, despite thousands of lawful protests since 1945, despite millions of words since 1945, there has been no serious retreat from the nuclear arms race. *Not once has the absolute number of nuclear bombs been reduced.* The world started September of 1945 with no nuclear bombs, and ended December of 1986 with 50,000 bombs.

Even a child would recognize that every added bomb increases the risk and magnitude of conflagration, whether accidental or intentional. Despite the bomb's threat to the continued existence of the species, there is no prospect of altering the situation through any conventional means. For, while individuals sense the dangers of the bomb, it is safe to say that the superpower societies, qua societies, do not. The failure of regular democratic methods to deal with the problem of extinction by the bomb reflects this insensitivity. The ballot box has failed us. Congress contains no effective constituency for the view that the bomb must go. The Reagan administration has gone one step further, pushing the Strategic Defense Initiative and actually advocating a break with SALT II.

The roots of this insensitivity can be explained in terms of power politics, economics, psychology, and theology.<sup>1</sup> But whatever the roots, some drastic remedy is obviously needed to break through the inertia of the present.

Whence will this remedy come? I submit in this essay that the remedy can come from but one source—the judiciary. The current campaign of antinuclear civil disobedience has vaulted judges into pivotal positions of tremendous historical significance. Because civilization itself may very well depend on their decisions, I address this essay to the judges. I suggest to them an explanation of civil disobedience's historical role in resolving major public policy disputes. I ask them to understand both the inherent limitations of the current campaign of antinuclear civil disobedience and the role the law can play in removing these limitations. Finally, I challenge judges to recognize, and to act on, the opportunity history affords them to help mankind rid itself of the bomb.

## II. CIVIL DISOBEDIENCE AND SOCIAL CHANGE

The problem of nuclear disarmament is not the first public issue

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1. The political and theological theories articulated by Reinhold Niebuhr in *Moral Man and Immoral Society* apply here, for example. See R. NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* (1932).

that normal democratic procedures have been unable to resolve. At the turn of the century, women activists found that they could not obtain the right to vote in federal elections through the normal democratic channels. Accordingly, they resorted to civil disobedience.<sup>2</sup> Many suffragists had to be jailed before sufficient pressure was exerted on Congress to pass the nineteenth amendment. Again, in mid-century, blacks found that voting and lobbying were ineffective to put teeth into the Supreme Court decisions condemning segregation. Accordingly, they resorted to the civil disobedience of the lunch counter sit-ins and the Freedom Rides. After hundreds of blacks were arrested, invalid laws and customs were discarded and enforcement policies were brought into being.

These two episodes in civil disobedience history illustrate two essential functions of civil disobedience: to advance debate and to promote curative, institutional action on "no-compromise issues"<sup>3</sup> when the normal democratic processes have failed.

#### A. *The Debate-Advancing Function of Civil Disobedience*

How does civil disobedience advance debate and move the public discussion of "no compromise issues" into higher levels?

Public debate on public issues is a result of the various forces contending in the public media. For example, if all candidates for a particular public office are on one end of the political spectrum, then, absent other factors, it is on that end of the spectrum that the issues will be debated. But let one or more representatives of the other end of the spectrum enter the debate, and the argument will gravitate, to some degree, toward the center. The same is true with policy debates:

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2. I adopt philosopher Morris Keeton's definition: "[A]n act of civil disobedience [is] . . . an act of deliberate and open violation of the law with the intent, within the framework of the prevailing form of government, to protest a wrong or to accomplish some betterment in the society." Keeton, *The Morality of Civil Disobedience*, 43 TEX. L. REV. 507, 508 (1965). Implicit in Keeton's definition is the notion that the disobedient willingly subjects himself or herself to trial and possible punishment. For an explanation of the virtues of Keeton's definition, see DiSalvo, *The Fracture of Good Order*, 17 GA. L. REV. 109, 139-41 (1982).

3. Professor Gene Sharp describes "no-compromise issues" as "conflicts concerning morality, religion, or the whole nature and direction of the society." G. SHARP, *SOCIAL POWER AND POLITICAL FREEDOM* 120 (1980).

The objects of the suffragist and civil rights movements were basic rights—the right to vote, the right to use public facilities, and the right to travel. As such, these issues took on for women and blacks the character of "no-compromise issues." "No-compromise issues" will not allow themselves to be subjected to the normal resolutions of the democratic process in which each side gets a piece of the pie. Instead, they must be resolved in such a way that the right gets full recognition. Often, when the normal democratic machinery for resolving "no-compromise issues" becomes clogged, it is only through civil disobedience that the issues can be resolved.

the positions of the public players determine, in large measure, the spot on the spectrum where the debate will take place.

Thus, we have an understanding of civil disobedience that says that civil disobedience alters the debate and forcefully advances discussion of the subject at hand. As mentioned, after the suffragists found that words were insufficient to create consideration for suffrage, they found that arrests and hunger strikes were sufficient. When the blacks of the 1960's found that quiet pleas for the enforcement of their rights went unanswered, they found that arrests and beatings at the hands of the police and the public worked to create a national debate on the race question. In each case, the disobedients brought public attention to focus upon those issues of vital importance that the normal democratic processes had ignored or refused to address.

### B. *The Action-Promoting Function of Civil Disobedience*

The action-promoting function of civil disobedience builds upon and extends the work of the debate-advancing function.

How does this function operate?

The feminist and civil rights disobedients were successful in promoting curative institutional action because the suffering they endured in challenging the status quo made the public ask: "Why? Why are these respectable women being arrested and hauled off to a workhouse? Why are these blacks being beaten?" And "Why are these disobedients suffering with such patience and not responding with violence?" By asking such questions, the public was able to perceive a connection between the disobedients' suffering and the evil under protest. The public was able to focus on the heart of the disobedients' grievances, and, as a consequence, to sympathize with the disobedients' sincere efforts to set things right. Politicians—Congress and President Woodrow Wilson in the case of the suffragists, and the Kennedy administration in the case of the blacks—quickly recognized a popular sympathetic response and reacted by taking action to support the disobedients' positions.

In each case, with the necessary political conversions made, an institutional response followed that effectively ended the crisis. Congress passed the nineteenth amendment to ensure women the right to vote, and the Kennedy administration, through the Interstate Commerce Commission, enacted new regulatory law that prohibited segregation in interstate bus transportation.

The objectives of the current campaign of civil disobedience against the bomb now become clear. The blocking of trains carrying missiles, the occupation of the offices of the corporate manufacturers

of the weapons, the spilling of blood at the White House and the Pentagon, the prayer protests in the Capitol building, and the unauthorized entering of military installations—all these are public statements that attempt to advance the disarmament discussion into a more serious context and to promote a curative institutional reaction.

### III. ANTINUCLEAR CIVIL DISOBEDIENCE: THE PLOWSHARES

The most daring, the most dramatic, and the potentially most productive of these acts of antinuclear civil disobedience have been the direct attacks made on the bomb itself. Since 1980, when the "Plowshares Eight" entered a General Electric facility in eastern Pennsylvania to hammer on the components of a Mark-12 re-entry vehicle and spill blood on the builders' blueprints, there have been more than a dozen other direct attacks on the bomb. These Plowshares' actions, as they have come to be called, have been undertaken with increasing frequency since 1980, as mainly religiously-motivated groups and individuals have attacked missile components, bomb-carrying submarines and airplanes, and missile silos with blood, carpenters' hammers, and jackhammers. In the course of damaging these weapons in varying degrees, the Plowshares have ostensibly violated a range of criminal laws stretching from federal statutes prohibiting destruction of government property and sabotage to state provisions prohibiting burglary, property destruction, and trespass. In each attack, the Plowshares have made no effort to evade responsibility for their actions, but instead have come fully prepared to make public statements supporting their actions. In each action, the Plowshares have remained on the scene to await arrest. In each case, the Plowshares have been convicted, with some sentenced to terms as long as eighteen years in federal penitentiaries.<sup>4</sup>

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4. To date, 68 persons have engaged in "Plowshares" actions. Four published judicial opinions have resulted. The Superior Court of Pennsylvania initially overturned the "Plowshares Eight" convictions. *Commonwealth v. Berrigan*, 325 Pa. Super. 242, 472 A.2d 1099 (1984), *rev'd*, 501 Pa. 118, 501 A.2d 226 (1985). The court found the defendants were entitled to a necessity defense. *See infra* notes 6-13 and accompanying text. The opinion is especially noteworthy for Justice Spaeth's stirring defense of the disobedients' effort to awaken the country to the danger at hand. The Pennsylvania Supreme Court later reversed the Superior Court's decision. *Commonwealth v. Berrigan*, 501 Pa. 118, 501 A.2d 226 (1985).

In *United States v. Montgomery*, the court affirmed the convictions of the "Pershing Plowshares." 772 F.2d 733 (11th Cir. 1985). The court rejected the defendants' necessity argument on two grounds: 1) the defendants could not have reasonably believed that their act would result in nuclear disarmament, and 2) the defendants had the alternatives of peaceful protests and petitions. *Id.* at 736.

*United States v. Kabat* affirmed the convictions of the "Silo Pruning Hooks," over the strong dissent of Senior Circuit Judge Bright. 797 F.2d. 580 (8th Cir. 1986), *petition for cert. filed*, No. 86-6248 (U.S. Jan. 22, 1987). The majority reasoned that the existence of

Despite the heroic actions of the Plowshares defendants, their antinuclear civil disobedience has, at least to date, failed to evoke the necessary institutional response that would lead to a resolution of this critically important "no-compromise" issue. Moreover, the disobedients have had only limited success in advancing the debate on the bomb.

If it is not premature to deem these efforts tactical failures, we must determine which conditions must change to allow civil disobedience to have, in the nuclear context, the mediating effect it historically has had on stubborn public policy issues.<sup>5</sup>

#### IV. CIVIL DISOBEDIENCE: SUFFERING, SYMPATHY, CONVERSION, AND ACTION

In any civil disobedience campaign, public response is the result of the perceived interplay between two variables: the suffering endured by the protestants and the evil protested. In some instances, the perceived connection between these two factors is close and clear. The lunch counter sit-ins offer an example. The arrests to which the diners were subjected were the immediate result of violating the customs and ordinances that prohibited integrated dining. The diners were arrested because *they were in the very act of doing that which was prohibited*. Consequently, the public easily made the connection between the evil and the unjust suffering the evil was causing. In other cases, however, the perceived connection is remote. For example, when environmentalists are arrested for climbing the fences of nuclear power plants under construction to protest the plants' lack of safety features, the relationship between the evil and the suffering is unclear and weak. There is nothing inherent in the nature of scaling a fence that relates to the *future* evil of a *possible* nuclear meltdown. Consequently, the public has trouble relating the suffering of the disobedients to the evil being protested. The connection, without more—such as an actual meltdown—is too remote; therefore, the disobedients' suffering fails to generate the popular sympathy for, and understanding of, their cause that is required to rally political sup-

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alternatives made the necessity defense unavailable. Moreover, the Court refused to accept the proposition that government policy could be the "greater harm." *Id.* at 590-91. Lastly, the Eighth Circuit could not find any causal connection between the defendants' disobedience and their goal. *Id.* at 592.

5. It is important to note that the purposes of the Plowshares in attacking the bomb are not limited to the tactical purposes of advancing debate and promoting curative, institutional action. They also include the honoring of conscience. The Plowshares have achieved by their actions a goal few others have—they brought their public lives into unison with their private consciences. This is a valuable end in itself.

port. The end result is that the disobedients fail to generate a positive institutional response.

It is not hard to determine where on this spectrum of connectedness the anti-bomb disobedients fall. When the Plowshares attack the bomb, components of the bomb, bomb-carrying planes and ships, or silos housing the bomb, they are arrested for burglary, trespass, sabotage, destruction of private and government property, and similar offenses. There is nothing inherent in the nature of any of these charges that relates directly to the evils associated with the bomb—moral bankruptcy, the possible extinction of the species, and the misordering of economic priorities. It is not surprising then that, at trial, judges usually confine the defendants' proof to that relating to the technical charges. Similarly, when the disobedients endure the suffering of sometimes long prison terms for their actions, no tangible evils of the bomb are apparent. Consequently, the public has difficulty relating the disobedients' suffering to the unseen evil being attacked. If this connection is not made, the public cannot feel the sympathy for the disobedients that is necessary for seriously advancing the debate or for motivating the political conversions of politicians which, in turn, produce some institutional response.

While the view of the Plowshares defendants that we must disarm immediately has received extensive coverage in the alternative and religious press and in the alternative cinema, the establishment print and broadcast media have afforded the idea and the defendants themselves very modest coverage. Moreover, the response of the academic community has been negligible. Consequently, the Plowshares have had only limited success in promoting discussion of their agenda.

Insofar as the action-promoting function of disobedience is concerned, the Plowshares have been even less successful. There is no evidence of widespread public sympathy, resultant political conversions, or institutional response.

This failure to promote action is a result of not only the perceived disconnection between the suffering endured and the evil protested; it is also the result of three interrelated characteristics inherent in the Plowshares' activities that inhibit the public's ability to empathize with the Plowshares' suffering. The Plowshares' actions are characteristically indirect, self-initiated, and destructive of public and private property.

#### A. *The Indirectness of the Plowshares' Actions*

There is no clear set of laws that protects the bomb, whereas for



blacks there were clearly identifiable laws that held segregation in place. Consequently, in order to attack the bomb, the Plowshares are forced to first confront and break the laws that protect public and private property—laws against burglary, trespass, sabotage, etc. These laws, of course, have no direct relationship with the Plowshares' objections to the bomb.

The danger of such indirect civil disobedience is obvious. Instead of focusing the public's attention directly on the evil under protest, the Plowshares succeed only in focusing the attention on the irrelevant law being violated.

### B. *The Self-Initiative of the Plowshares*

There is also the question of initiative. The public always has more sympathy for those who are innocently set upon in the exercise of what are colorably their rights than for those who are arrested for taking the initiative by putting themselves in places where they ordinarily have no right to be. To illustrate: the suffragists who marched for the right to vote in front of the White House received the public's sympathy when male onlookers beat them because, in part, they were viewed as passive recipients of gratuitous violence. The same chemistry was at work in the Freedom Rides and lunch counter sit-ins. The blacks were in places where they at least had an arguable right to be when they were set upon by violent whites, occasionally by ambush.

In contrast, the Plowshares enter manufacturing facilities and government installations without invitation and sometimes in violation of express prohibitions against such entry. They usually enter surreptitiously. They are apprehended, not in a public forum, but in the bowels of private offices or government facilities. As a result, the public views the Plowshares, not as the passive victims of unwanted injustice, but as troublemakers who deserve to be arrested.

### C. *The Destructiveness of the Plowshares' Actions*

Finally, the Plowshares' destruction of property inhibits public sympathy for their cause. Again, the disobedients are perceived as aggressors who, on their own initiative, are unnecessarily upsetting the societal apple cart—a cart that, in this instance, represents the sacredness of material property in the American culture. One is reminded of the scene in *Dr. Strangelove* in which the hero attempts to break into a vending machine to obtain a dime in order to warn the authorities by telephone of imminent nuclear disaster. The authority figure yells at our hero, "You can't do that! That's private property!"

Today the public makes the same, but unsatirical, response to the Plowshares.

These factors—the indirectness of the acts, the self-initiative of the Plowshares, and the destruction of property—conspire with the problem of disconnectedness to make it nearly impossible for the public to sympathize with the Plowshares' cause. Accordingly, the two functions of civil disobedience—to advance debate and to promote curative institutional action—are not being served by the Plowshares' actions, nor, indeed, by any other current form of antinuclear civil disobedience.

Consequently, the policy of nuclear armament continues substantially unchallenged. There is no normal democratic mechanism that is effective for challenging it. The usual supplement to normal democratic mechanisms—civil disobedience—has proven ineffective because no sympathetic public response has been forthcoming, the necessary political conversions have not taken place, and no curative institutional actions have been taken.

Nonetheless, the Plowshares' actions offer the opportunity for a dramatic breakthrough on the problem of the bomb, for there is a way to short-circuit the process, to capitalize on the Plowshares' sacrifices, and to provoke an institutional response.

That way is through the courts.

Throughout American history, it has usually been the legislative or executive branches of government that have reacted to civil disobedience and have provided the institutional responses that resolved seemingly unmanageable public policy problems. Thus, Congress resolved the suffrage problem with the nineteenth amendment, while the executive branch resolved the Freedom Ride crisis by creating new regulatory law and enforcing the integration laws already on the books.

Rarely has the *judiciary* provided the institutional action that resolved a policy crisis in response to civil disobedience. When it has done so, its role usually has been limited. In one notable instance—the civil rights movement—the courts on a number of occasions upheld the lawfulness of conduct in which blacks claimed they were entitled to engage, such as the use of public libraries and the opportunity to publicly demonstrate, march, and protest. The more important and lasting institutional response to civil rights disobedience came later when Congress and the executive branch enacted the great civil rights acts of the 1960's.

The crisis of the bomb now creates another rare opportunity for

the courts to set the stage for a final institutional resolution by the other branches.

### V. THE DISOBEDIENTS AND THE NECESSITY DEFENSE

In almost all the Plowshares cases and in many other cases of antinuclear civil disobedience, the defendants have attempted to raise necessity defenses. The philosophical roots of this defense reach at least as far back as Aristotle,<sup>6</sup> while the common law roots appear as early as the sixteenth century.<sup>7</sup> Today, in addition to being found in the common law of crimes, the defense is codified in various forms in state jurisdictions<sup>8</sup> and in the Model Penal Code.<sup>9</sup> The most commonly found elements of the defense are:

1. The harm that is avoided must be greater than the harm done by violating the law;<sup>10</sup>
2. The action taken must have some reasonable chance of success;<sup>11</sup>
3. Alternative courses of action must be unavailable;<sup>12</sup> and
4. There must be an immediate threat of the avoided danger occurring.<sup>13</sup>

Every attempted use of the defense by Plowshares defendants has met with ultimate failure. These attempts, as they have been structured until now, have been rebuffed by the courts as being inappropriate as a matter of law. The defendants are thus prohibited from adducing expert and other evidence in support of their proposition that substantial and immediate nuclear disarmament must take place.

The courts take a hostile view toward the defense because they generally believe that the defendants' actions are designed to rid the earth of *all* nuclear weapons.<sup>14</sup> Courts quickly conclude that the disarmament of a few silos or bombs is an act incapable of producing such a result, and that the action therefore has no reasonable chance of success.

The courts that take this view ignore history. The historical record demonstrates quite clearly that social change does in fact come

6. J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 419-21 (2d ed. 1960).

7. *Reniger v. Fogossa*, 1 Plowd. 1, 18, 75 Eng. Rep. 1, 29 (1550).

8. *See, e.g.*, N.Y. PENAL LAW § 35.05 (McKinney 1975); 18 PA. CONS. STAT. ANN. § 503(a) (Purdon 1983).

9. MODEL PENAL CODE § 3.02 (1962).

10. *See, e.g., id.* § 3.02(1)(a).

11. *See, e.g., United States v. Dorrell*, 758 F.2d 427, 433 (9th Cir. 1985); *United States v. Cassidy*, 616 F.2d 101, 102 (4th Cir. 1979).

12. *See, e.g., United States v. Bailey*, 444 U.S. 394, 410 (1980).

13. *See W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW* 388 (1972).

14. *See, e.g., United States v. Cassidy*, 616 F.2d 101, 102 (4th Cir. 1979).

about as a result of civil disobedience. History makes it clear that this problematic, "reasonable chance of success" element of the necessity defense can, under the proper conditions, be fulfilled.

But even those courts that recognize the operation of this dynamic of history find yet another stumbling block. If the Plowshares are engaged in *gradual* change of the political atmosphere, then the threat of the bomb is not immediate, alternatives become available, and elements 3 and 4 of the necessity defense are not fulfilled.

Thus, the Plowshares and other antinuclear activists who espouse the necessity defense find themselves in a logical corner. If they support their use of the defense by making the social change argument, they implicitly admit that there is time for gradual change. With the evaporation of the immediacy of the threat, however, the defense becomes unavailable. If the defendants forsake the social change argument, they then fail to meet the element of the defense that requires there to be some reasonable chance of success.

#### Catch 22.

Defendants face this legal and logical dilemma in part because of the special characteristics that attend the problem of the bomb. This point can be illustrated by considering the requirement that the danger be an immediate one. The nonnuclear necessity cases present factual pictures in which there is material, on-going physical action, either on the part of nature or people. For example, in case law, ships are being destroyed by the elements,<sup>15</sup> cars are being rammed by strangers,<sup>16</sup> and prisoners are being raped by other prisoners.<sup>17</sup> In each instance, the danger unfolded and developed in very material ways. Thus, precedent has conditioned the courts to look for situations of immediate danger that have developed in linear fashion over time and have reached a denouement. *The immediacy of the bomb's threat, however, cannot be understood in these terms.* It is unique to itself. While the threat of universal destruction has developed over time in linear fashion, it has now come to a restless pause. The situation is at once both static—there is no war—and volatile—we could all be dead in twelve minutes. We are in a showdown with death. No one knows when death will draw, but when he does, the game is lost. It is in these terms that the bomb's threat must be recognized as immediate.

There remains, however, element 2 of the necessity defense—the

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15. See, e.g., *The William Gray*, 29 F. Cas. 1300 (C.C.N.Y. 1810) (No. 17,694).

16. See, e.g., *United States v. Young*, 464 F.2d 160 (5th Cir. 1972).

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

requirement that the act have some chance of success. If the analysis of social change put forth in this essay is at all tenable, then it must be said that there are *no* conditions under which the Plowshares' civil disobedience could be successful—*unless we can say that the Plowshares' acts of disarmament are successes in themselves*. When the problem presented by the bomb is understood in the terms set forth in this essay, there is no other sense in which *any* action against the bomb could be successful. The normal democratic procedures have failed for forty years. Only civil disobedience that involves direct attacks on the evil itself remains. In this sense, when the Plowshares disable a bomber, or a missile in the making, or a silo that houses a missile, they are, by definition, successful, for the evil item that once threatened humanity no longer functions. By assuming authority over the property to which the government claims sole dominion and by destroying it, the Plowshares eliminate the evil that made their violation of the laws a necessity.

For the courts to take such a view would indeed require courage. The courts would have to implicitly say, or let the juries say, that since 1945 our legislative and executive leadership has failed miserably. *Yet who can doubt, with respect to the bomb, that this is exactly the case?*

What branch of government can now allow us to rescue ourselves but the judiciary? I call upon judges, therefore, to admit what they have always known—that the law responds to societal changes and political crises. I call upon judges to admit what the Plowshares know—that global extinction is in the offing. I call upon judges to admit that such a prospect constitutes the quintessential societal and political crisis of man's short history on earth.

I call upon judges to create, out of necessity, the parent, *nuclear* necessity, the child. A nuclear necessity defense would reinterpret and give new meaning to the requirements of the traditional doctrine of necessity:

1. *The harm avoided must be greater than the harm committed.* Who can doubt that almost any price should be paid to avoid global catastrophe?
2. *The action taken must have some reasonable chance of success.* Given the long-standing inability of the government to solve the problem of the bomb, there remains only one successful option—direct attack upon the evil itself.
3. *Alternative courses of action must not be available.* Forty years of normal democratic procedures have produced, not a solution, but a 50,000-fold increase in the number of nuclear weapons in the world.

4. *There must be an immediate threat of the avoided danger occurring.* Who can deny that the gun at the head of the world has a hair-trigger, and that each added missile increases the pressure?

I call upon the judges to acquit, whenever possible, Plowshares defendants on the nuclear necessity defense. When Plowshares cases must go to juries, I appeal to judges to instruct them in terms echoing those set forth here.

## VI. CONCLUSION

What good will be achieved, beyond the impairment of a few bombs and missiles, if the courts choose to recognize the defense of nuclear necessity? Will the debate be advanced? Will curative, institutional action be promoted? In order to answer these questions, we must imagine the reactions of the executive and the legislative arms of government and the reactions of the media. A declaration by the courts that the citizenry has, in effect, the right to dismantle the nuclear establishment would surely generate some response from these forces. Who can predict whether the response of the executive branch would be one of resignation or resistance? Who can predict whether the legislature would be open-minded or would instead enact laws seeking to override the courts' decisions? Who can predict whether the editorial writers would look favorably or unfavorably upon the courts and the Plowshares? What we can be sure of is this: the debate that will follow even one such court decision will be a high-charged, high-profile debate that will advance the discussion of the issues onto higher ground.

No one knows what institutional reaction would follow on the heels of this debate. But is it too much to hope that the executive and legislative branches will be pressured by the force of public opinion to act?

Was it too much to hope that, by asking for hamburgers at white luncheonettes, blacks could achieve the lofty freedoms of citizenship?