

“Drown the World”: Imperfect Necessity and Total Cultural Revolution

By J.C. Oleson*

I.	Introduction	20
II.	The Doctrine of Necessity	22
	A. A Brief Overview of Necessity	22
	1. Imminence	26
	2. Lawful Alternatives	27
	3. Proportionality	28
	4. Causality	28
	B. Civil Disobedience: A Problematic Application of Necessity	29
	C. Imperfect Necessity: The Outer Limit of Necessity	34
III.	Better Living through (Exothermic) Chemistry: A Trio of Devastation	42
	A. “[S]trips of venison on the empty car pool lane”: Tyler Durden and <i>Fight Club</i>	43
	B. “We’ve had to kill people”: <i>The United States versus Theodore John Kaczynski</i>	53
	C. “The real value of all our attacks today lies in the psych- ological impact, not in the immediate casualties”: <i>The United States versus Timothy James McVeigh</i>	61
IV.	Heroic Measures: A Hypothetical of Extremes	71
	A. The Pathology of Modernity	71
	B. Imperfect Necessity Revisited: Total Cultural Revolution	85
	C. Justification or Excuse?	99
V.	Conclusion	102

* Chief Counsel, Criminal Law Policy Staff, Administrative Office of the United States Courts; J.D., School of Law, University of California, Berkeley (Boalt Hall), 2001; Ph.D., University of Cambridge, 1998; M. Phil., University of Cambridge, 1995; B.A., Saint Mary's College of California, 1994. The views contained in this article are the author's own, and do not necessarily reflect the position of the Administrative Office of the United States Courts, the Judicial Conference of the United States, or any individual within the federal judiciary.

I owe an enormous debt of gratitude to the staff of *Unbound* (particularly Nate Ela, Lauren Coyle, Zina Miller, Meghan Morris, and Matt Littleton) for their insightful comments and for permitting the manuscript to go forward while a complementary piece (“Is Tyler Durden Insane?”) is being published in the *North Dakota Law Review*. Conversely, I would like to thank the staff (particularly Kara Gansmann and Mark Western) of the *North Dakota Law Review* for permitting this article to go forward in *Unbound*.

For better or for worse, a few individuals have unwittingly contributed to the fomenter of this argument: Meriko and Russell Borogove, Joshua Dressler, Becki Fogerty, Keith Garner, Derrick Jensen, and Will Rountree. I have received insightful substantive and editorial assistance from Susan Billheimer, Paul G. Cassell, Hope Johnston, Emery G. Lee III, Ed Mitchell, and Karen Redmond. The credit for this piece belongs to many, but as ever, the errors are entirely my own.

I. Introduction

*Drown the World, I am not content with despising it, but I would anger it if I could with safety.*¹

It is an interesting hypothetical: if you could travel back in time, would you kill the struggling watercolor artist Adolf Hitler in order to avert the Holocaust? If it could prevent a looming nuclear apocalypse, would you murder an innocent scientist?² Would you murder a president?³ These may seem like fanciful questions—they are, after all, the stuff of blockbusters and best sellers—yet at their roots are practical issues with real legal consequences. After all, people sometimes engage in actions, including criminal actions, in order to prevent greater social harms.

Within the sphere of the criminal law, crimes that are committed to avert a greater harm can be justified, thereby absolving the actor of punishment, under the doctrine of necessity.⁴ A driver can exceed the speed limit in order to rush someone to a hospital.⁵ A hiker, lost in a snowstorm, can break into a vacant cabin and take available food.⁶ A citizen can destroy someone else's home in order to prevent a fire from spreading to other houses.⁷ Necessity, then, properly understood, is an extraordinarily radical legal principle.⁸ Functionally, it permits juries to exempt individuals from

¹ JONATHAN SWIFT, THE WRITINGS OF JONATHAN SWIFT 585 (Norton Critical Edition, 1973) (whinging to Alexander Pope in a November 26, 1725 letter).

² See TERMINATOR 2 (Tristar Pictures 1991) (depicting the efforts of heroine Sarah Connor to stop nuclear annihilation by killing the Cyberdyne Systems computer scientist Miles Dyson, who is destined to develop Skynet, the computer network that develops sentience and destroys humankind).

³ See STEPHEN KING, THE DEAD ZONE (1979) (telling the story of Johnny Smith, who gains the ability to foresee the future, and who attempts to assassinate congressional candidate Greg Stillson because the politician would have gone on to become President of the United States and would have led the nation to apocalypse).

⁴ There is a considerable corpus of work available on the defense of necessity, but a few seminal works can provide the interested reader with a solid foundation. See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW (2d ed. 1995); GEORGE P. FLETCHER, RE-THINKING CRIMINAL LAW (1978); LEO KATZ, BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW (1987); PAUL H. ROBINSON, CRIMINAL LAW DEFENSES (1984); Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289 (1974); Alan Brudner, *A Theory of Necessity*, 7 OXFORD J. LEGAL STUDIES 339 (1987).

⁵ See, e.g., *State v. Cram*, 600 A.2d 733 (Vt. 1991) (describing such circumstances).

⁶ See *State v. Davenport*, 973 S.W.2d 283, 287 (Tenn. Crim. App. 1998) (quoting Tennessee Sentencing Commission, stating, “The necessity defense would bar a trespass conviction for a hiker, stranded in a snowstorm, who spends the night in a vacant cabin rather than risking death sleeping in the open.”).

⁷ See, e.g., *Surocco v. Geary*, 3 Cal. 69 (1853) (describing use of necessity defense to defend actions taken during 1849 fire in San Francisco).

⁸ See Shaun P. Martin, *The Radical Necessity Defense*, 73 U. CIN. L. REV. 1527, 1566 (2005) (“The doctrine of necessity . . . embodies a fundamentally radical set of core assumptions that are both doctrinally and practically revolutionary.”).

the general obligations imposed on citizens who live in societies founded upon the rule of law (i.e., to nullify the law).⁹ A successful necessity plea results in the defendant's complete exoneration.

But necessity is no get-out-of-jail-free card, permitting defendants to elude punishment whenever they subjectively believe that they are acting for the greater good.¹⁰ Indeed, courts have limited the doctrine of necessity in ways that have substantially restricted its application.¹¹ Admittedly, necessity has evolved over time, and some of its restrictions have been relaxed,¹² but the radical potential of the defense remains unrealized.¹³ Necessity is a giant that slumbers in chains.

I want to explore necessity's outer limits. What would happen if the giant were to awaken and cast off his shackles? In Part II, I review the doctrine of necessity, discuss the difficulties in applying necessity to civil disobedience cases, and consider the idea of "imperfect necessity" (a variation on the defense that might be employed in some cases). In Part III, I consider three case studies—one fictional, two real: the fictitious case of *Fight Club*'s Tyler Durden, and the real cases of Unabomber Theodore John Kaczynski and Oklahoma City Bomber Timothy McVeigh. I ask whether (and how)

⁹ See Steven M. Bauer & Peter J. Eckerstrom, *Note, The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1186 (1987) ("The political necessity defense places the jury in a position to acquit the defendant, nullifying the effect of the law that has been broken."); Martin, *supra* note 8, at 1544 ("The 'Rule of Law' may indeed be the essential principle of American government. The necessity defense, however, does not rest upon this fundamental assumption; indeed, the two principles are facially inconsistent.").

¹⁰ Even if a defendant succeeds in presenting the defense to a jury, overcoming the procedural hurdles engrafted to the defense in many jurisdictions (*see infra* notes 37-57 and associated text), there is no guarantee that the defendant will prevail.

An unsympathetic or overreaching activist may not be able to persuade a jury of the utility-enhancing nature of his illegal conduct. Skilled prosecutors may be able to convince a jury of the benefits of a categorical approach to the enforcement of existing legislation or the long-term disutility of ratifying the defendant's conduct. A conscientious jury may simply be unwilling to acquit a defendant in the face of an arguably principled executive decision to prosecute him for violation of a generally applicable statute to which all other members of the community are (facially) bound. There is, in short, no guarantee that the permitted articulation of a necessity defense will result in ratification of the defendant's attempt to achieve revolutionary social change. Indeed, the more transformative the defendant's conduct, the more likely the defense is to be rejected by a jury.

Martin, *supra* note 8, at 1562.

¹¹ See Bauer & Eckerstrom, *supra* note 9, at 1179 ("Many courts' interpretations . . . virtually guarantee the exclusion of the defense and make any examination of its elements an empty ritual"); Martin, *supra* note 8, at 1602 (suggesting that "the judiciary has been (to put it mildly) reluctant to embrace the radical potential of the necessity doctrine").

¹² See, e.g., Laura Schulkind, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U.L. REV. 79, 82 n. 17 (1989) ("Virtually all jurisdictions have rejected the traditional requirement that the emergency arise out of a physical force of nature, such as flood or fire.").

¹³ See Martin, *supra* note 8, at 1589 (arguing that "courts have deliberately limited the contours of the necessity defense in a manner designed to ensure that the doctrine is effectively employed only in cases that do not challenge the existing social order").

raising a defense of necessity (or imperfect necessity) could have affected the outcomes of these trials. Against the backdrop of this notorious trio, I press on to an even more extreme hypothetical. In Part IV, I argue that our modern lifestyle has placed the entirety of the world at risk. I ask whether, given this grave risk, unprecedented violence could be excused under the doctrine of imperfect necessity or justified under the doctrine of necessity. I conclude by suggesting that necessity, in one form or another, remains a relatively unexplored defense that could be employed in a variety of extreme legal applications.

II. *The Doctrine of Necessity*

Necessitas facit licitum quod alias non est licitum.

(Necessity makes that lawful which otherwise is not lawful).¹⁴

Below, I first provide a brief overview of necessity, describing its development and outlining the standards that govern its conventional application. I then focus upon cases of civil disobedience, and observe that either by accident or by design, courts have been reluctant to permit defendants to raise a necessity defense in politically motivated cases. Finally, I outline the concept of imperfect necessity (a central meme throughout the rest of this discussion), in which the requisite elements of necessity are not met, and yet the underlying rationale of the conventional necessity defense remains in effect.

A. *A Brief Overview of Necessity*

Although “[t]he development of the defense has not been particularly clear,”¹⁵ the defense of necessity is a venerated principle within Anglo-American jurisprudence.¹⁶ Every jurisdiction in the United States recognizes it.¹⁷ In some places, the contours of

¹⁴ 10 Coke’s Reports, 61.

¹⁵ Bauer & Eckerstrom, *supra* note 9, at 1175.

¹⁶ The precise origins of the doctrine of necessity are unclear. *See* Arnolds & Garland, *supra* note 4, at 291. Martin traces it in varying forms to the sixteenth century. *See* Martin, *supra* note 8, at 1533 n. 19 (identifying several sources tracing the defense to the 1551 case, *Reninger v. Fogossa*, 1 Plowd. 1, 18, 75 Eng. Rep. 1, 29). Cohan suggests that the defense predates common law, and traces the underlying rationale to Biblical passages. *See* John Alan Cohan, *Necessity, Political Violence and Terrorism*, 35 STETSON L. REV. 903, 904 n. 5 (2006). Whether necessity was actually a defense at common law in England is a matter of dispute. Glanville Williams notes “somewhat confidently” that it was. GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* § 231 (2d ed. 1961). The English Law Commission suggests that it was not. English Law Commission, No. 83, *Criminal Law Report on Defences of General Application* 20 (1977). In the United States, it is clear that necessity is a part of the common law tradition. *See* MODEL PENAL CODE § 3.02 (1985).

¹⁷ *See* Martin, *supra* note 8, at 1535 n. 29 (listing necessity cases and statutes state by state).

necessity have accreted through case law;¹⁸ in others the defense has been formally codified.¹⁹ In either case, necessity typically permits defendants to avoid punishment for criminal actions when their crimes were the products of choosing the lesser of two evils.²⁰ This is an interesting feature in criminal jurisprudence: people are rarely held criminally responsible for omissions;²¹ rather, they are held criminally responsible for their voluntary actions.²² I can stand beside a lake and watch you drown and it is no crime, yet if I push you in and you then drown, I may be convicted of homicide. With necessity, however, criminal acts are legitimized—made non-criminal—because a net social benefit results from the action.

Within the criminal law academy, necessity is often regarded as a “straightforward, innocuous, and virtually insubstantial legal principle.”²³ It is not, generally speaking, considered to be a *sexy* topic in the law. The little academic discussion devoted to the doctrine tends to focus upon the application of the defense in cases of civil disobedience,²⁴ or the question of whether there are deontological theories—as well as unabashed act-utilitarianism—that support the defense of necessity.²⁵ There is

¹⁸ Dressler suggests that about one half of the states statutorily recognize the defense, while the remainder of states applies “the vague contours of the common law.” DRESSLER, *supra* note 4, at 263.

¹⁹ The American Law Institute’s 1962 codification of the defense in the Model Penal Code prompted many states to follow suit and codify the defense. See Sanford Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 967 (1999).

²⁰ Some commentators prefer the more descriptive terms “choice of evils” or “lesser of two evils” to the term “necessity.” See, e.g., MODEL PENAL CODE, § 3.02 (1985) (employing “choice of evils”); ROBINSON, *supra* note 4, at 45 (preferring “lesser evils”).

²¹ See DRESSLER, *supra* note 4, at 86 (“Subject to a few limited exceptions, a person has no criminal law duty to rescue or render aid to another person in peril, even if the person imperiled may lose her life in the absence of assistance.”).

²² See *id.*, at 71 (“Subject to a few limited exceptions, a person is not guilty of a crime unless her conduct involves a voluntary act.”). Ethicists often distinguish between acts and omissions. For example, under the Hippocratic Oath, physicians are prohibited from helping patients to die, although they may withhold treatment that accomplishes the same goal. See D.V.K. Chao et al., *Euthanasia Revisited*, 19 FAM. PRAC. 128, 128 (2002). One has no duty to prevent a naturally-occurring harm from taking place, of course, but if one *does* act, and breaks a law to prevent it from occurring, then (in order to avoid criminal liability), the act must comport with the requirements associated with the necessity defense. See *infra* note 34 (describing traditional elements).

²³ Martin, *supra* note 8, at 1527.

²⁴ See, e.g., John Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUSTON L. REV. 397, 400 (observing that while the application of the necessity doctrine to civil disobedience cases has attracted a significant body of scholarship, analysis of the doctrine’s basic principles has been largely ignored). The topic of necessity in civil disobedience is discussed in more detail, and some of the literature addressing this issue is summarized, in Part II.B of the Article, *infra*.

²⁵ Compare, e.g., United States v. Schoon, 939 F.2d 826, 828 (9th Cir. 1991) (“Necessity is, essentially, a utilitarian defense.”), with Bauer & Eckerstrom, *supra* note 9, at 1174 (suggesting that necessity also rests on a deontological basis) and Cohan, *supra* note 16, at 913 (discussing necessity-based violence in Kantian philosophy).

also academic disagreement about whether necessity really is a justification (in which society approves of the defendant's action) or merely an excuse (in which case society understands the crime, but nevertheless condemns it).²⁶ Because both justifications and excuses result in acquittal when successful,²⁷ the distinction between the two categories of defense may seem like a historic vestige,²⁸ a distinction that is semantic at best.²⁹ Indeed, even courts sometimes use the terms "justification" and "excuse" interchangeably.³⁰ But because justification denotes social acceptance, even approval, while excuse denotes only understanding and forgiveness, the distinction remains

²⁶ See, e.g., Miriam Gur-Arye, *Should the Criminal Law Distinguish Between Necessity as a Justification and Necessity as an Excuse?*, 102 L.Q. REV. 71, 71-89 (1986); Edward M. Morgan, *The Defence of Necessity: Justification or Excuse?*, 42 U. TORONTO FAC. L. REV. 165 (1984). Greenawalt distinguishes justification and excuse, and explains why the boundaries of these seemingly discrete categories are in fact permeable:

The distinction between justification and excuse is roughly the difference between saying, "What you did was really all right," and "What you did was wrong in some sense, but we can't blame you for it." While a legal excuse, such as insanity, may correspond to notions of social morality about when people should be blamed, successful invocation of an excuse obviously does not show that an act was morally justified. Matters are somewhat complicated in Anglo-American law because the exact distinction between excuse and justification is disputed, and because any attempt to achieve precise conceptual delineation would establish that some instances of justification are covered by defenses labeled excuses and some instances of excuse are covered by defenses labeled justifications. Duress, for example, is an excuse, but if the threatened harm is great enough in comparison with the demanded act: "Throw me that money or I'll shoot three customers," people obviously think of compliance with the demand as proper, not merely as excused. On the other side, a person who stupidly (negligently) concludes that his life is threatened, may be able to claim self-defense, a justification, as a bar to conviction for a crime based on intention or recklessness, though he is really offering an excuse.

R. Kent Greenawalt, *Symposium, Human Rights and Human Wrongs: Establishing a Jurisprudential Foundation for a Right to Violence: Violence—Legal Justification and Moral Appraisal*, 32 EMORY L. REV. 437, 442-43 (1983).

²⁷ DRESSLER, *supra* note 4, at 185.

²⁸ Under early English law, the practical difference between justification and excuse was literally the difference between life and death. "In the case of felonies, a justified actor was acquitted of the offense; an excused actor, however, was subject to the same punishment as a convicted offender (the death penalty and forfeiture of his property) . . ." *Id.*

²⁹ Drafters of the Model Penal Code did not believe that sensible lines could be drawn between justification and excuse, and concluded that the complexity of such a statutory system would have outweighed the benefits. See MODEL PENAL CODE, cmt to art. 3, at 2-4 (1985).

³⁰ See, e.g., *United States v. Bailey*, 444 U.S. 394, 410 (1980) (noting that "[m]odern cases have tended to blur the distinction between [the excuse of] duress and [the justification of] necessity" and thereafter treating them as interchangeable); *State v. Cozzens*, 490 N.W.2d 184, 189 (Neb. 1992) ("Therefore, the justification . . . defense operates to legally excuse conduct that would otherwise subject a person to criminal sanctions.").

meaningful within this analysis.³¹ Later, in discussing imperfect necessity, I will ask whether acts of extraordinary violence can be justified or—at most—excused.³²

In practice, the justification of necessity is limited by stringent requirements.³³ To successfully plead necessity under the common law, a defendant must satisfy a number of conditions. Different commentators describe varying numbers of analogous elements in different terms,³⁴ but four key characteristics appear in almost all definitions. First, the defendant must show that he acted to avoid imminent harm. Second, he must demonstrate that no reasonable legal alternatives existed. Third, he must

³¹ There may be additional reasons to distinguish between justifications and excuse. *See, e.g.*, DRESSLER, *supra* note 4, at 196-97 (identifying moral guidance, retroactivity, accomplice liability, and third-party conduct considerations as practical reasons to differentiate between the two classes of defense).

³² *See* Part IV.C, *infra*.

³³ To raise the defense of necessity in a jury trial, the defendant must make a prima facie showing by producing evidence from which a reasonable juror could find that the defendant has met each required element. *See* 29 Am. Jur. 2d Evidence § 156 (1967).

³⁴ *See* DRESSLER, *supra* note 4, at 263-65 (identifying six elements: (1) a clear and imminent danger; (2) a direct causal relationship between the defendant's action and the harm to be abated; (3) the absence of an effective legal alternative; (4) the defendant's action is less harmful than the avoided harm; (5) the absence of contrary legislative decision-making; and (6) clean hands—the defendant did not wrongfully put himself into a situation where he is forced to engage in criminal conduct); Arnolds & Garland, *supra* note 4, at 294 (“The cases and the literature suggest three essential elements of the defense of necessity: (1) the act charged was done to avoid a significant evil; (2) there was no other adequate means of escape; and (3) the remedy was not disproportionate to the evil to be avoided.”); Cohan, *supra* note 16, at 909-10 (“[T]he Author will apply a comprehensive six-prong test that must be met in order for someone to invoke the defense. The defendant must prove that (1) he was faced with a choice of evils and chose the lesser evil; (2) he acted to prevent imminent harm; (3) he reasonably anticipated a causal relation between his conduct and the harm to be avoided; (4) there were no other legal alternatives to violating the law; and (5) the legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue. Finally, a sixth factor generally has been held to require that the circumstances that occasion the necessity were not caused by the negligent or reckless acts of the defendant in the first instance.”); Martin, *supra* note 8, at 1536-37 (“The defense most commonly applies, although its precise elements vary, when the following circumstances exist: (1) the defendant's illegal conduct was committed to avoid a significant evil or harm; (2) the defendant reasonably believed that her actions were necessary to avoid this evil; (3) the defendant had no alternative legal means of preventing this harm; and (4) the evil sought to be avoided is greater than the harm expected to result from the defendant's criminal offense.”); Schulkind, *supra* note 12, at 82 (“The common elements of the necessity defense found in virtually all common law and statutory definitions include the following: (1) the actor has acted to avoid a significant evil; (2) there are no adequate legal means to escape the harm; and (3) the remedy is not disproportionate to the evil sought to be avoided.”); *Note, And Forgive Them Their Trespasses: Applying the Defense of Necessity to the Criminal Conduct of the Newsgatherer*, 103 HARV. L. REV. 890, 893 (1990) (“A successful necessity defense consists of four elements: first, the harm to be prevented by the actor's illegal conduct must outweigh the harm caused; second, the prevented harm must be imminent; third, there must be no alternative legal route to reach substantially the same end; and fourth, the actor must believe that his conduct will abate the greater evil.”).

show that the harm of his act was proportional to the avoided harm. Fourth, he must show a direct causal relationship between his act and the avoided harm. Some jurisdictions engraft additional limiting elements onto the defense, such as limiting the defense to emergencies created by natural forces,³⁵ or prohibiting the defense in homicide cases.³⁶ Even in those jurisdictions that have not added new elements, however, courts have construed the four listed elements in narrow and mechanistic ways that have crippled the radical potential of necessity.³⁷

1. Imminence

The imminence requirement does not exist in the Model Penal Code's formulation of the defense,³⁸ but nearly all U.S. jurisdictions have adopted it either by statute or case law.³⁹ In practice, many courts have interpreted imminence as a synonym for immediacy. Of course, this is conceptually wrong. An action may be imminent without being immediate. An asteroid (such as Apophis) on a collision course with the Earth might be decades away from impact, but scientists may know with certainty, or near certainty, that it will strike the planet.⁴⁰ Mission Control could maneuver a manned space station into the path of the asteroid, sacrificing the crew in order to

³⁵ See, e.g., Wis. Stat. Ann. § 939.47 (1993) (describing “pressure of natural physical forces”). This was a required element under early common law, but has been rejected by almost all jurisdictions. See Schulkind, *supra* note 12, at 82, n. 17 (noting rejection of the natural force limitation).

³⁶ See John Makdisi, *Justification in the Killing of an Innocent Person*, 38 CLEV. ST. L. REV. 85 (1990).

³⁷ See Martin, *supra* note 8, at 1531 (describing “a plethora of individualized limitations that have been clumsily grafted upon the necessity doctrine, most of which constitute a deliberate attempt to constrain necessity’s fundamentally transformative central principles”); Bauer & Eckerstrom, *supra* note 9, at 1178 (describing courts that “exclude the defense . . . by means of an awkward and often myopic common law necessity analysis”).

³⁸ See MODEL PENAL CODE § 3.02 (1985) (including no imminence provision).

³⁹ See Martin, *supra* note 8, at 1566 n. 169 (identifying 44 states that employ such a provision), *but see* Kadish, *supra* note 19, at 967 (identifying only 14 states with an imminence requirement).

⁴⁰ Apophis (Greek for the Egyptian God, Apep, “The Destroyer”) is a near-Earth asteroid about 415 meters in length that was the subject of considerable attention in December 2004, when it was reported that there was about a 1-in-45 chance the object would collide with the Earth on April 13, 2029, impacting with the equivalent of about 1600 megatons of TNT (100,000 Hiroshima bombs). See, e.g., Alastair Dalton, *Why Friday 13th, 2029 May Be Earth’s Unluckiest Day*, THE SCOTSMAN, Dec. 28, 2004 (reporting 1-in-45 likelihood of impact). Subsequent observations ruled that event out, but suggested that Apophis would pass through a gravitational keyhole, leading to a future impact on April 13, 2036. See, e.g., Bruce Lieberman, *Can NASA Learn Enough about an Approaching Asteroid to Rule Out a Collision in 2036?*, SAN DIEGO UNION-TRIB., Feb. 1, 2006 (reporting a 1-in-6,250 chance of impact). More recently, astrophysicists have concluded that impact is extremely unlikely (1-in-45,000), and have reduced the Torino scale category (indicating risk of impact) to zero. See <http://neo.jpl.nasa.gov/risk/a99942.html#legend> (last visited May 6, 2007) (reporting most recent estimates).

deflect the asteroid away from Earth, and that decision could be justified under the doctrine of necessity, despite the fact that the threat was known for years.

Many courts, however, exclude remote-but-certain harms and restrict the availability of the defense to cases in which the greater evil must be immediately about to occur,⁴¹ thereby restricting necessity to circumstances involving sudden emergencies in which there is no time for deliberation or alternatives.⁴² Thus, the manner in which imminence is applied to cases of necessity conflates the fundamental justification of necessity—the fact that the actor is choosing the most palatable of two or more bad alternatives—with a rationale of excuse: that the actor had to make a split-second decision.⁴³ Yet so construing imminence means ignoring the essential role of tipping points in cases of necessity.

Consider a case of lifeboat cannibalism:⁴⁴ At what point are the risks of starvation and dehydration sufficiently imminent to justify killing and eating a crewman? If one must be on death's doorstep before the act can be justified, it may be too late: while starvation is gradual, multi-organ system failure is a tipping point from which one is unlikely to recover. There are occasions in which one must act, sometimes well in advance of the harm to be averted, if one's actions are to have any meaningful chance of averting disaster.

If necessity is a sound principle of legal justification, the speed with which the decision must be made should not be determinative, and if necessity is a meaningful defense, one should not have to traverse a tipping point before acting out of necessity. It is the choice that is made—not the haste with which it is made or the proximity to disaster—that supports a justification under the law. In the hands of many judges, however, the imminence requirement is imposed in clumsy mechanistic fashion, and immediacy, not imminence, determines whether the defense may be presented. The tail wags the dog.

2. Lawful Alternatives

Society wants its citizens to act through lawful channels whenever these can alleviate the harms to be averted, even if doing so would be somewhat less efficient than committing an otherwise-criminal act.⁴⁵ We do not want our streets teeming with

⁴¹ See, e.g., *Commonwealth v. Schuchardt*, 557 N.E.2d 1380, 1381 (Mass. 1990) (requiring that the actor be “faced with a clear and imminent danger”).

⁴² See, e.g., *People v. Roberts*, 938 P.2d 11, 15 (Colo. Ct. App. 1999) (requiring evidence that the act “was necessary because of the sudden and unforeseen emergence of a situation requiring the actor’s immediate action to prevent the occurrence of an imminently impending injury”).

⁴³ See, e.g., *Garcia v. State*, 972 S.W.2d 848, 849-50 (Tex. Ct. App. 1998) (“Imminent harm occurs when there is an emergency situation and . . . the actor is required to make a split-second decision.”).

⁴⁴ See *infra* Part II.C (describing the seminal lifeboat cannibalism case of *Regina v. Dudley and Stevens*).

⁴⁵ While it could be more efficient for a defendant to simply break an inconvenient law and justify the offense by citing the averted harm, there is counterbalancing value in maintaining respect for the law and safeguarding social expectations that the laws can be relied upon.

well-meaning vigilantes. Accordingly, most jurisdictions prohibit the availability of the necessity defense whenever a lawful alternative to the greater evil was available.⁴⁶ While the lawful alternatives requirement makes sense in principle, in practice the requirement has been construed in a clumsy and binary fashion.⁴⁷ Courts often inquire whether there was *any* legal alternative, and if there was, reflexively bar the introduction of the defense, never asking whether the lawful alternative would have mitigated the averted evil in a meaningful way. While this may not preclude the defense of actions taken in isolated and remote locales (e.g., blizzard-swept mountainsides, castaway lifeboats, parching deserts), so interpreting the lawful alternatives requirement means that the defense will be unavailable in many politically-motivated actions of necessity.⁴⁸ Voting and leafleting may have no viable chance of averting a harm, but because they exist as potentialities, under a binary approach courts will deny the introduction of the defense.

3. Proportionality

The proportionality requirement ensures that the actor's otherwise-criminal act is less harmful than the averted evil: sensibly, it guarantees that society enjoys a net benefit. Some jurisdictions go beyond a simple $X > Y$ analysis, and require that the avoided evil must "clearly outweigh" the harm caused by the actor.⁴⁹ While courts generally permit the necessity defense to lie in cases where an abstract property interest has been sacrificed in order to prevent death or serious injury,⁵⁰ the proportionality requirement may bar the introduction of the necessity defense when the difference between the avoided harm and the inflicted harm is modest or difficult to discern. In the law, "people's lives, and their other interests, are treated equally. One person cannot say his life or property (of a certain value) is *really* worth more than another person's life or property (of the same value)."⁵¹ Because of this assumption of fungibility, necessity may not be available unless the defendant can prove that *those* lives clearly outweighed *these* lives, or that saving *this* property justified destroying *that* property.

4. Causality

Finally, the causality requirement means that necessity may be invoked only if the defendant's illegal action could reasonably be expected to negate the averted harm. A subjective belief that the otherwise-criminal act will prevent the greater evil is insuffi-

⁴⁶ See Martin, *supra* note 8, at 1585 n. 256 (listing 37 U.S. jurisdictions that employ such a provision either by statute or case law).

⁴⁷ See *id.* at 1586 ("A lawful alternative is typically thought to exist or not exist, and the necessity defense viewed as available only when the defendant can establish the latter.").

⁴⁸ See Part II.B (describing problematic application of defense to cases of political necessity).

⁴⁹ See N.Y. Penal Law § 35.05 (McKinney 1975).

⁵⁰ See Martin, *supra* note 8, at 1549-51 (describing necessity's subordination of individual property rights under life and human suffering).

⁵¹ Greenawalt, *supra* note 26, at 452 (italics in original).

cient; rather, an objective showing of a causal link between the avoided evil and the inflicted harm must be established. Most U.S. jurisdictions apply a causality requirement of this kind.⁵² Furthermore, in addition to requiring that the defendant show that his actions would avert the greater evil, some jurisdictions further require proof that the amelioration is direct.⁵³ While the causality requirement might be simply satisfied in cases of natural disaster (e.g., fire, flood, or storm), it may be difficult—or impossible—for defendants to demonstrate causal links between their conduct and less tangible, ongoing harms, such as hunger,⁵⁴ disease,⁵⁵ or the threat of war.⁵⁶ Courts often bar the invocation of the necessity defense in civil disobedience cases, holding that actors' protests and trespasses cannot reasonably be expected to alleviate these social problems.⁵⁷

B. Civil Disobedience: A Problematic Application of Necessity

The doctrine of necessity has enormous potential to transform the social landscape. Martin has astutely noted that while necessity is dismissed as “an insubstantial principle unworthy of serious academic or social review,”⁵⁸ the defense is actually an inherently radical principle. Not only does it authorize individual legal disobedience in order to advance the collective social good (even when the violated law has been validly enacted by the legislature and is legitimately enforced by the executive),⁵⁹ but it does so by trumping a bedrock principle of the judiciary: the rule of law.⁶⁰ Thus, necessity is populist lightning in a jar, a fundamentally transformative legal force, a doctrine that casts a revolutionary shadow.⁶¹ It is only the difficulty of framing the

⁵² See Martin, *supra* note 8, at 1579 n. 233 (identifying 32 jurisdictions that employ the causation requirement by statute or case law).

⁵³ See, e.g., *United States v. May*, 622 F.2d 1000, 1008 (9th Cir. 1980) (restricting necessity to cases where averting harm is a “direct consequence” of defendant’s actions).

⁵⁴ See Martin, *supra* note 8, at 1573-74 (“Hunger remains an evil no matter how many people are starving; similarly, untimely deaths remain a legitimately prevented harm even though thousands die every day and will continue to do so. Longstanding harm is still harm.”).

⁵⁵ See, e.g., *Commonwealth v. Leno*, 616 N.E.2d 453, 456 (Mass. 1993) (holding that exchanging needles to prevent the spread of AIDS was not justified by necessity, although in this case the court premised its holding on imminence and not the causality requirement).

⁵⁶ See, e.g., *United States v. Seward*, 687 F.2d 1270, 1273 (10th Cir. 1982) (concluding that in order to present a necessity defense to the jury, activists must demonstrate that a single trespass could fundamentally alter U.S. nuclear policy).

⁵⁷ See Bauer & Eckerstrom, *supra* note 9, at 1180 (“[C]ourts have excluded many defendants’ political necessity pleas because the defendants failed to show a direct causal relationship between the defendants’ acts and the harm they seek to avert.”).

⁵⁸ Martin, *supra* note 8, at 1573.

⁵⁹ See *id.* at 1542-44.

⁶⁰ See *id.* at 1555-56.

⁶¹ *Id.* at 1593 (“The necessity defense is, at a minimum, a potentially valuable revolutionary beacon in a jurisprudential landscape that is otherwise almost entirely barren of any functionally transformative principles.”).

elements of necessity in established ways,⁶² and the conservative nature of the courts,⁶³ that prevent the doctrine of necessity from being effectively employed in cases of civil disobedience and political necessity.

Of course, lawyers try. While the defense has clearly not realized its potential, necessity is nonetheless argued in some cases of civil disobedience, which has been defined as “a nonviolent act, publicly performed and deliberately unlawful, that has as its purpose to protest a law, government policy, or action of a private body whose conduct has serious public consequences.”⁶⁴ To raise the necessity defense in cases of civil disobedience is something of a break from customary practice: historically, those who engaged in acts of civil disobedience have accepted voluntarily the consequences of their actions.⁶⁵ When sentenced for sedition in 1922, Mahatma Gandhi actually

⁶² To successfully realize the radical potential of the necessity defense, trial attorneys must be prepared to formulate the defense in sympathetic and imaginative terms. *See, e.g.*, Cohan, *supra* note 16 (describing application of defense in cases of terrorism). Bauer and Eckerstrom grimly note that courts often view the defense as “requiring juries to participate in inferential acrobatics too daring to warrant the defense’s submission,” but acknowledge that “[i]f the elements were reasonably formulated, . . . defendants could raise a factual issue under each [required element], thereby allowing presentation of the defense to the jury.” Bauer & Eckerstrom, *supra* note 9, at 1178-79.

⁶³ Some courts have been quite forthcoming in articulating the reasons why the necessity defense has not realized its radical potential. *See, e.g.*, Southwark L.B. v. Williams, 1971 L.R. Ch. 734 (Ch. App. 1971).

Necessity would open a door which no man could shut. It would not only be those in extreme need who would enter. There would be others who would imagine that they were in need, or would invent a need, so as to gain entry. Each man would say his need was greater than the next man’s. The plea would be an excuse for all sorts of wrongdoing.

Id.; *People v. Weber*, 208 Cal. Rptr. 719 (App. Dep’t Super. Ct. 1984).

To accept the defense of necessity under the facts at bench would mean that markets may be pillaged because there are hungry people; hospitals may be plundered for drugs because there are those in pain; homes may be broken into because there are unfortunately some without shelter . . . banks may be robbed because of unemployment.

Id. at 721; *United States v. Seward*, 687 F.2d 1270 (10th Cir. 1982); *cert. denied*, 459 U.S. 1147, 1274 (1983) (suggesting that an expanded necessity defense would “create a very dangerous precedent . . . [by making] each citizen a judge of the criminality of all the acts of every other citizen, with power to mete out sentence”); *United States v. Moylan*, 417, F.2d 1002, 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970) (warning that necessity would “encourage individuals to make their own determinations . . . [and thereby] invite chaos”).

⁶⁴ DRESSLER, *supra* note 4, at 265 (quoting Carl Cohen). Some forms of civil disobedience are direct, protesting a law by breaking it, such as deliberately violating segregationist laws in the south; other forms of civil disobedience are indirect, such as trespassing on private property to protest corporate practices. *Id.* at 265-66. Necessity might be argued in either class of disobedience, although the causality requirement would present a particularly difficult obstacle in cases of indirect civil disobedience.

⁶⁵ *See* Bauer & Eckerstrom, *supra* note 9, at 1176. Some would insist that

the civil disobedient must accept enforcement of laws with which he disagrees if he is to expect enforcement of his prospective social agenda. For this reason, he must ritualize

insisted on his punishment, thereby forcing the sentencing judge to choose between enforcing an unjust law and punishing an ostensibly innocent man. Gandhi said:

Nonviolence implies voluntary submission to the penalty for non-cooperation with evil. I am here, therefore, to invite and submit cheerfully to the highest penalty that can be inflicted upon me for what in law is a deliberate crime and what appears to me to be the highest duty of a citizen. The only course open to you, the judge, is either to resign your post, and thus disassociate yourself from evil if you feel that the law you are called upon to administer is an evil and that in reality I am innocent, or to inflict on me the severest penalty if you believe that the system and the law you are assisting to administer are good for the people of the country and that my activity is therefore injurious to the public weal.⁶⁶

Whether or not it is appropriate for a civil disobedient to claim necessity and thereby attempt to avoid punishment is an unsettled question,⁶⁷ but there are some obvious advantages to raising the defense.

The necessity defense is attractive to reformers who practice civil disobedience because it allows them to deny guilt without renouncing their socially driven acts. It offers a means to discuss political issues in the courtroom, a forum in which reformers can demand equal time and, perhaps, respect. Moreover, its elements allow civil disobedients to describe their political motivations. In proving the imminence of the harm, they can demonstrate the urgency of the social problem. In showing the relative severity of the harms, they can show the seriousness of the social evil they seek to avert. In establishing the lack of reasonable alternatives, they can assault the unresponsiveness of those in power in dealing with the problem and prod them to action. And in presenting evidence of a causal relationship, they can argue the importance of individual action in reforming society. Thus, the elements of the necessity defense provide an excellent structure for publicizing and debating political issues in the judicial forum.⁶⁸

There are tremendous advantages associated with invoking the necessity defense in a politically-motivated case. But, as noted previously,⁶⁹ overcoming the requirements associated with the common law defense of necessity can prove difficult. This is especially true in cases of civil disobedience. Acts of direct disobedience will be more suc-

his respect for law in general, even as he uses the persuasive strategy of defying a particular law. The reformer can achieve this by accepting the punishment for his unlawful acts.

Id. at 1190.

⁶⁶ Mahatma Gandhi, *A Plea for the Severest Penalty Upon Conviction of Sedition (1922)*, reprinted in *THE LAW AS LITERATURE* 95, 100-01 (Louis Blom-Cooper ed., 1961).

⁶⁷ See, e.g., Bauer & Eckerstrom, *supra* note 9, at 1189-94 (summarizing arguments for why a civil disobedient must accept the punishment associated with his transgression of the law, including, *inter alia*, the notion that disobedients operate within a social contract framework, the idea that disobedients effectuate change through persuasion, and the view that disobedients must—as moral political actors—remain ethically consistent).

⁶⁸ See *id.* at 1176.

⁶⁹ See *supra* notes 37-56.

cessful than those involving only symbolic, indirect protest,⁷⁰ but political necessity is a difficult defense to mount successfully. Courts subjecting claims of political necessity to common law analyses might take exception to any of the requisite elements. For example, courts sometimes exclude the defense of political necessity because imminence of harm cannot be established. Unlike a brushfire or a tsunami that emerges from nowhere and presents an obviously imminent threat, the problems that engender social activism tend to be *ongoing*. Martin makes a crucial point when he writes:

Hunger, malnutrition, homelessness, and pain of all sorts are clearly . . . evils, and their persistence in American society is undeniable. The doctrine of necessity, at least philosophically, equally applies to the avoidance and amelioration of even widespread harms. Indeed, systemic suffering often motivates application of the doctrine, and surely does not vitiate it.⁷¹

Unfortunately, in courtrooms guided by “myopic common law necessity analysis,”⁷² it can be difficult to establish a colorable claim of imminence when the harm has been going on for weeks, months, years, or even decades. For example, in *State v. Kealoha*,⁷³ the court reasoned that a harm (usurpation of native lands) that has been ongoing since the beginning of the twentieth century is not an “imminent” harm. And imminence is not the only obstacle that thwarts claims of political necessity. The “no reasonable legal alternatives” requirement is also commonly used by courts to impede necessity claims in civil disobedience cases.⁷⁴ Of course, Bauer and Eckerstrom are correct when they write that the real question is not whether *any* legal alternative is available, but whether an *effective* legal alternative is available.⁷⁵ But, unfortunately, courts do not always view things in this light. In *United States v. Quilty*,⁷⁶ an antinuclear

⁷⁰ Martin writes:

The necessity defense is instead most usefully employed as a means of both authorizing and sustaining direct remediation of existing social evils through deliberate illegality. Clean needles can potentially be exchanged for dirty ones notwithstanding a contrary law; AIDS drugs may perhaps be stolen and distributed; loggers might be physically restrained from decimating old growth forests; marijuana may be distributed to cancer sufferers; usurious loans can be made to worthy persons; illegal sexuality can be performed with impunity; a graceful death may be granted to the seriously ill. It is the potential to engage in this type of direct illegality—not the power to engage in wholly symbolic protest—that is the most powerfully transformative component of the necessity defense.

Martin, *supra* note 8, at 1593-94.

⁷¹ *Id.* at 1558.

⁷² Bauer & Eckerstrom, *supra* note 9, at 1178.

⁷³ 826 P.2d 884, 886 (Haw. Ct. App. 1992).

⁷⁴ See Michael D. Schwartz, *The Use and Abuse of the Necessity Defense in Criminal Cases: In Politically Motivated Cases the Defense Will Invariably Be Denied*, 20 LOS ANGELES LAWYER 24, 28 (1997) (suggesting because there may always be “legal” alternatives to politically motivated illegal acts, the necessity defense will fail).

⁷⁵ Bauer & Eckerstrom, *supra* note 9, at 1180.

⁷⁶ 741 F.2d 1031 (7th Cir. 1984).

protest case, the court wrote, “There are thousands of opportunities for the propagation of the anti-nuclear message: in the nation’s electoral process; by speech on public streets, in parks, in auditoriums, in churches and lecture halls; and by release of information to the media, to name only a few.”⁷⁷ If *that* is the standard, then necessity can never justify action that averts political harm. If *that* is the standard, “orthodox political channels always present a reasonable opportunity to change government policy.”⁷⁸ The proportionality requirement does not typically present a hardship in civil disobedience cases—it is a relatively simple matter to demonstrate that the harm of a trespass pales against the specter of nuclear apocalypse or a spreading plague of AIDS.⁷⁹ The causality requirement, however, *does* present another challenge to the defendant who would argue political necessity. Bauer and Eckerstrom write, “In civil disobedience cases . . . the courts have . . . erected a standard that is nearly impossible for defendants to surmount.”⁸⁰ In *United States v. Seward*,⁸¹ the court required defendants to do exactly that: to demonstrate that “a reasonable man would think that blocking the entry to Rocky Flats [nuclear weapons facility] for one day would terminate the official policy of the United States government as to nuclear weapons or nuclear power.”⁸² Similarly, in *United States v. Simpson*,⁸³ defendants who destroyed draft board files could not plead necessity because “[t]he Vietnamese conflict could obviously have continued whether or not the San Jose, California draft board was able to restore its files and continue its lawful operation.”⁸⁴ In the hands of judges who are hostile to the idea of lawbreaking (whether or not it is motivated by political necessity) and who do not wish to perceive necessity in acts of civil disobedience, fetishistic adherence to common law elements “virtually guarantee the exclusion of the defense and make any examination of its elements an empty ritual.”⁸⁵ What options, then, are available to politically-motivated defendants who have engaged in the most ex-

⁷⁷ *Id.* at 1033.

⁷⁸ Bauer & Eckerstrom, *supra* note 9, at 1179.

⁷⁹ *See id.* at 1182-83 (noting that the relative severity of harms requirement typically does not present problems for defendants in civil disobedience cases).

⁸⁰ *Id.* at 1181.

⁸¹ 687 F.2d 1270 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983).

⁸² *Id.* at 1273.

⁸³ 460 F.2d 515 (9th Cir. 1972).

⁸⁴ *Id.* at 518 n. 7.

⁸⁵ Bauer & Eckerstrom, *supra* note 9, at 1179. Their pessimism is echoed by Parry, *supra* note 24. He writes:

While invoked for a broad range of political causes, the necessity arguments employed by the protestors are numbingly similar. Following standard necessity doctrine, the protestors assert that their actions created only small harms and were necessary to prevent the occurrence of far greater harms - such as nuclear holocaust, abortion, or aid to Central American dictators. The protestors typically lose, at least in federal court. Inevitably, however, after each loss a law review article appears chastising the court for its inability to weigh the balance of harms correctly.

Id. at 400-01.

trème form of social protest: murder?⁸⁶ What justification is available to the assassin? To the terrorist? While it could be difficult (or impossible) to raise a successful defense of necessity in such cases, it might be possible to invoke the concept of necessity in other ways.

C. *Imperfect Necessity: The Outer Limit of Necessity*

There is some academic debate about whether or not necessity can justify the taking of human life. Some jurisdictions explicitly prohibit the defense in cases of homicide,⁸⁷ but there is no fundamental incompatibility between necessity and homicide.⁸⁸ Indeed, many law professors draw upon a seminal homicide case when teaching the doctrine of necessity: *Regina v. Dudley and Stephens*.⁸⁹ The facts of the case are memorable.⁹⁰ Three adult seamen (Dudley, Stephens, and Brooks) and a 17-year-old boy (Parker) were stranded in an open dinghy after their yacht, the *Mignonette*, sank in rough seas. After eleven days, they ran out of food; after seventeen, they grew weak, and yielded to despair.⁹¹ Parker tried to slake his thirst with seawater and became ill, delirious, and comatose.⁹² Finally, after about twenty days adrift, Dudley stabbed Parker in the neck, killing him. Ghoulishly, the castaways consumed his liver while it was still warm.⁹³ After twenty-four days, with just a few scraps of Parker littering the bottom of the dinghy, the three survivors were rescued by a German vessel. Upon their return to England, however, Dudley and Stephens were charged with murder.

⁸⁶ While it may make those who advocate nonviolent civil disobedience uncomfortable, it must be recognized that violence—including murder—is a radicalized form of civil disobedience. While murder has been condemned by society, the reality of things is that murder has the potential to profoundly transform the socio-political landscape. See Cohan, *supra* note 16, at 910 (“Political violence is generally a legitimate, justifiable means to wage a long-term ideological battle against a hostile government.”). For an examination of necessity doctrine in cases of homicide, see Parts III and IV.

⁸⁷ See, e.g., Wis. Stat. Ann. § 939.47 (1993).

⁸⁸ Under the model penal code, the defense is permitted in homicide cases as long as more people are saved than killed. See MODEL PENAL CODE, § 3.02 cmt. at 14-15 (1985). Claims of justified killing should be evaluated according to the number of lives saved and sacrificed, without regard to age, sex, status, or station. Typically, all human lives are valued equally. See *supra* note 51 and associated text (noting that lives are treated as fungible).

⁸⁹ 14 Q.B.D. 273 (1884).

⁹⁰ See A. W. BRIAN SIMPSON, CANNIBALISM AND THE COMMON LAW: THE STORY OF THE TRAGIC LAST VOYAGE OF THE MIGNONETTE AND THE STRANGE LEGAL PROCEEDINGS TO WHICH IT GAVE RISE (1984) (providing an authoritative account of the case); Joseph E. Simeone, *Essay*, “Survivors” of the *Eternal Sea: A True Short Story*, 45 ST. LOUIS L.J. 1123 (recounting in brief the story of the Dudley and Stephens case); Robert C. Berring, *Book Review*, *Cannibalism and the Common Law*, 73 CAL. L. REV. 252; Anthony Chase, *Book Review*, *Fear Eats the Soul*, 94 YALE L.J. 1253 (1985).

⁹¹ See Simeone, *supra* note 90, at 1128 (describing the plight of the castaways).

⁹² *Id.*

⁹³ *Id.* at 1129.

They raised the defense of necessity.⁹⁴ It was certainly a plausible defense: three lives had been spared by sacrificing one. The jury in the case returned a sympathetic special verdict, concluding that if the men had not fed on Parker's body, they probably would not have lived to be rescued, but the jury deferred to the judgment of the court on the legal question of whether necessity could justify murder.⁹⁵ In deciding this matter, Lord Chief Justice Coleridge reasoned that it could not. Eloquently and severely, he wrote:

To preserve one's life is generally speaking, a duty, but it may be the plainest and highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in this case a shipwreck, of a captain to his crew, of the crew to the passengers, or soldiers to women and children . . . imposes on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country—least of all England—will men ever shrink . . .⁹⁶

Coleridge also pronounced rather ominously that “[w]e are often compelled to set up standards that we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy.”⁹⁷ Fortunately for the defendants, the Home Office did not demand the same godlike fortitude of the men and exercised executive clemency: their sentences were commuted to six months. But the case of *Dudley and Stephens* has reverberated through the common law for more than one hundred years.⁹⁸ Based on the holding in this and analogous lifeboat cases,⁹⁹ some commentators have concluded

⁹⁴ See *id.* at 1134 (quoting defense counsel as arguing that “under the evidence, there was an inevitable necessity that one life should be sacrificed in order that the other three might be saved, and that they were justified in so doing in selecting the weakest”).

⁹⁵ See *id.* at 1135. The special verdict read:

If the men had not fed upon the body of the boy they would probably not have survived to be picked up and rescued . . . [a]ssuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men; but whether upon the whole matter, [the killing of the said Richard Parker be felony and murder or not,] the jury are ignorant and refer to the court.

Id.

⁹⁶ *Id.* at 1137 (quoting Coleridge).

⁹⁷ DRESSLER, *supra* note 4, at 269 (quoting Coleridge).

⁹⁸ Some scholars have astutely suggested that the holding in *Dudley and Stephens* may have had more to do with the collision between Victorian mores and the more-common-than-you-might-think practice of cannibalism at sea than with the doctrine of necessity. See, e.g., Berring, *supra* note 90, at 257-58.

[C]annibalism, it appears, was very much the question in *Regina v. Dudley and Stephens*. Those generations of first-year law students who have centered their study of *Regina v. Dudley and Stephens* on the grotesqueness of the concept of eating one's compatriot, thus missing the neat legal issue of necessity, were probably right on mark.

Id. at 257.

⁹⁹ See, e.g., *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (involving sailors who pleaded necessity when they threw 14 male passengers out of a leaking lifeboat).

that necessity cannot justify homicide;¹⁰⁰ others have reasoned that it can.¹⁰¹ Certainly, the act-utilitarian logic of the doctrine can be reconciled with acts of homicide,¹⁰² and there could even be a deontological basis for necessity in homicide cases.¹⁰³

In some cases, a defendant can satisfy the common law elements of necessity. In a case of lifeboat cannibalism, for example, the defendant may be able to establish that there was an imminent risk of death, that no lawful alternative was available while adrift on the open seas, that sacrificing the life of one individual saved the lives of several, and that killing one person would avert the greater evil of everyone's death. If the jurisdiction allows the defense of necessity in homicide cases, the lifeboat survivor charged with capital murder could plead necessity, and be exonerated of the crime if he could persuade the jury his act was justified. It is not unthinkable. In *Regina v. Dudley and Stephens*,¹⁰⁴ the jury was sympathetic and the general public hailed the defendants as heroes to be pitied.¹⁰⁵

Lifeboat cases are few and far between, however.¹⁰⁶ Most capital defendants don't commit their crimes under such obviously constrained circumstances.¹⁰⁷ Presumably,

¹⁰⁰ See, e.g., Simeone, *supra* note 90. Simeone writes:

[T]he significance of *Regina v. Dudley and Stephens* lies in the fact that the English courts, for the first time, decisively and absolutely laid down the common-law, civilized principle that life is very precious; that human life is to be protected at all costs except for the traditional defenses of justification and excuse, and that the defense of necessity is no excuse; that life shall not, under such circumstances, be taken or sacrificed even to preserve one's own life. That is a great civilizing principle.

Id. at 1138-39.

¹⁰¹ See DRESSLER, *supra* note 4, at 270 (“[I]t is at least plausible that a court might justify a homicide of an innocent person in necessitous circumstances.”).

¹⁰² See *id.* (“From a utilitarian perspective, ... [t]he calculus in a case such as *Dudley and Stephens* is simple: one person's life should be taken so that three may survive.”). As noted above, the model penal code adopts a utilitarian approach to the issue. *Supra* note 88.

¹⁰³ See, e.g., Tom Stacy, *Acts, Omissions, and the Necessity of Killing Innocents*, 29 AM. J. CRIM. L. 481, 512-13 (2002) (“The classic Kantian objections to necessity killing misconceive and misapply that ethical tradition. Instead of contradicting Kantian moral philosophy, necessity killing draws affirmative support from it.”).

¹⁰⁴ 14 Q.B.D. 273 (1884).

¹⁰⁵ The survivors of the *Mignonette* were widely celebrated in ballads and drinking songs. See SIMPSON, *supra* note 90, at 84-86, 253-55. A waxwork model of Captain Dudley was prepared for Madame Tussaud's exhibition. See *id.* at 248. Even the victim's brother visited the defendants in jail to shake their hands in understanding. See *id.* at 77 (describing this event).

¹⁰⁶ But see *id.* (describing a surprising number of shipwreck cannibalism accounts). In his review of the book, Chase summarizes Simpson's research neatly:

Simpson demonstrates with example after example that: (1) cannibalism with respect to passengers or crew who died of natural causes on seemingly doomed voyages was common; (2) cannibalism with respect to passengers or crew not yet dead but killed to be eaten was also common; and (3) it was unusual that stranded and desperate human beings would play the game of death by rules, drawing lots fairly to determine who would be sacrificed.

in most cases, the capital defendant will *not* be able to satisfy the common law elements of necessity.¹⁰⁸ Other defenses (e.g., self-defense, duress, insanity, or provocation) might square neatly with the facts of a homicide case; but, generally speaking, necessity will be difficult to establish in cases of homicide.¹⁰⁹

However, it is possible to argue an “imperfect necessity” defense, in which all elements of the justification of necessity cannot be established, but in which enough of the defense remains intact to excuse the and partially mitigate the offender’s conduct. Just as some jurisdictions recognize the defense of imperfect self-defense,¹¹⁰ so, too, could a court recognize the defense of imperfect necessity. Where one of these defenses is recognized, the other reasonably follows: there are obvious structural similarities between the two justifications.¹¹¹

Chase, *supra* note 90, at 1256-57.

¹⁰⁷ Whether the convergence of subtle influences like those described by Haney (*see infra* note 121 and associated text) effectively constrain defendants’ choices just as starkly as a starvation lifeboat is an interesting question with vast implications. The law is premised on a belief in free will. *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 181 (1968) (“Thus a primary vindication of the principle of responsibility could rest on the simple idea that unless a man has the capacity and a fair opportunity . . . to adjust his behaviour to the law its penalties should not be applied to him.”). Only in extraordinary circumstances (e.g., lifeboats) is that expectation of free will relaxed. Free will is defined in terms of the actor’s capacity to obey the law at the time of the offense, and the law myopically ignores antecedent events that might influence subsequent decision making. If in reality, some people are destined to kill (or are at much-heightened risk of killing) by virtue of their nature and/or their nurture, it seems unjust to punish them (or to punish them as severely) for behavior that is not freely chosen.

¹⁰⁸ *See supra* notes 37-56.

¹⁰⁹ *But see* D.V.K. Chao et al., *Euthanasia Revisited*, 19 FAM. PRAC. 128, 129-30 (2002) (describing Dutch legal framework in which euthanasia technically remains illegal, but physicians who plead “medical necessity” and adhere to rules of careful practice are guaranteed immunity from prosecution).

¹¹⁰ *See, e.g.*, *In re Christian S*, 872 P.2d 574, 575 (Cal. 1974) (recognizing defense of imperfect self defense); *State v. Faulkner*, 483 A.2d 759, 769 (Md. 1984); *Commonwealth v. Carter*, 466 A.2d 1328, 1332 (Pa. 1983); *but see State v. McAvoy*, 331 N.C. 583, 417 S.E.2d 489 (1992) (reconciling two conflicting lines of precedent and holding that unreasonable belief in necessity for self-defense will not reduce murder to manslaughter); *Ross v. State*, 211 N.W.2d 827, 833 (Wis. 1973) (noting that if any elements of self-defense are missing, the traditional common law rule is that the defense is wholly unavailable to the defendant).

¹¹¹ *See* 1 ROBINSON, *supra* note 4, at 86-88 (suggesting that all justifications contain a necessity component, a proportionality requirement, and a reasonable-belief rule). Another defense—diminished capacity—serves as the imperfect form of the insanity excuse, reducing the offense from murder to manslaughter. *See* Steven J. Mulroy, *The Duress Defense’s Uncharted Terrain: Applying it to Murder, Felony Murder, and the Mentally Retarded Defendant*, 43 SAN DIEGO L. REV. 159, 181 (2006).

Diminished capacity is an imperfect form of the insanity defense: The doctrine allows defendants to introduce evidence that, while they may have not met the legal definition of insanity at the time of the offense, they were nonetheless suffering emotional or mental distress or impairment so severe that they could not have had the requisite mens rea to commit the crime, or were otherwise deserving of leniency.

To justify the killing of another on the grounds of self-defense, a defendant must prove that he reasonably believed that deadly force was necessary to prevent imminent and unlawful use of deadly force by an aggressor.¹¹² Additionally, some jurisdictions prohibit claims of lethal self-defense when the defendant had a safe avenue of retreat.¹¹³ If a defendant kills another and can satisfy all the requisite elements, he will be totally exonerated (just as in cases of necessity). In jurisdictions that do not recognize imperfect self-defense, if a defendant kills another because he *unreasonably* believes the circumstances justify the killing, he will not be permitted to invoke a defense of self-defense, and he will be convicted of murder. In jurisdictions that do recognize imperfect self-defense, however, if a defendant kills another because he *unreasonably* believes the circumstances justify the killing, he will be permitted to claim imperfect self-defense. If successful in this claim, he will not be totally exonerated, but will instead be convicted of the lesser offense of manslaughter.

Imperfect necessity operates in the same way. If a defendant cannot satisfy any element of common law necessity (i.e., imminence, no lawful alternative, proportionality, or causality), a court might nevertheless permit the basic theory of necessity to operate, thereby diminishing—although not totally absolving—the defendant’s criminal culpability.¹¹⁴ Successfully establishing the excuse of imperfect necessity would not exonerate the defendant, but would instead result in a conviction for a lesser offense.¹¹⁵

Making the imperfect necessity defense available more widely within the law would have two important consequences. First, it would allow committed social actors to break (legitimately established and enforced) laws with the possibility of reduced punishment. Instead of forcing the court to choose between total exoneration

Id.

¹¹² See DRESSLER, *supra* note 4, at 199 (outlining common law rule).

¹¹³ See *id.* (“[I]n some jurisdictions, a person may not use deadly force against an aggressor if he knows that he has a completely safe avenue of retreat.”).

¹¹⁴ Imperfect necessity operates as an excuse. See generally Brudner, *supra* note 4; Morgan, *supra* note 26. In a case of perfect necessity, the jury says to the defendant, “You did the right thing. The net harm was less than if you had not acted. Accordingly, your actions were not criminal.” In a case of imperfect necessity, the jury says, “You did what you believed was the right thing, but some part of your judgment was wrong. Either the harm was not imminent (and you should have known that), or there were lawful alternatives (that a reasonable person would have sought out), or your action was actually more harmful than the averted evil (and a reasonable person would have known so), or there was no reasonable link between your action and the evil you hoped to avert. Accordingly, your actions were criminal, although by virtue of your belief that you were acting out of necessity, your actions were not as blameworthy as they would otherwise be.”

¹¹⁵ Defense lawyer Tony Serra explains imperfect necessity as a situation in which “you have a bonafide belief that you have to commit a crime in order to avoid a greater harm, but the belief ultimately from the main societal perspective is unreasonable. That’s why it’s imperfect . . . [i]t usually results in a lowered culpability but not a complete exoneration.” David S. Jackson, *A Better Defense for the Unabomber?* at http://www.time.com/time/reports/unabomber/980127_jackson.html (last visited May 5, 2005) (quoting attorney Tony Serra).

and the full punitive force of the law,¹¹⁶ however, the imperfect necessity defense would allow the court to punish the disobedient, but to mitigate the punishment in a way that reflects the defendant's genuine-but-unreasonable belief that his actions were necessary. In terms of social consequences, if judges who are unwilling to acquit politically-motivated unlawful conduct were willing to impose reduced sentences in cases of imperfect necessity, then marginal disobedients (unwilling to face the all-or-nothing alternatives of a judicially-circumscribed perfect necessity defense) might be willing to violate questionable laws, if it was known that imperfect necessity was an available defense. Some individuals, currently law-abiding, would weigh their strongly held personal views against the likelihood and severity of punishment, and defy laws. Second, inasmuch as the necessity defense serves a communicative function—providing the defendant a solemn forum in which to espouse his views, forcing a formal response from the government, and involving jurors and officers of the court in the debate over the legitimacy of the violated law—widespread availability of the imperfect necessity defense would also facilitate public dialogue of this kind. Unlike a defense of perfect necessity, in which jurors must agree that the disobedient is either entirely guilty or altogether blameless, the defense of imperfect necessity admits the possibility of graduated culpability.¹¹⁷ Jurors, in their own minds, would move beyond the binary categories of guilty and blameless, see the circumstances of the case with increased granularity, and wrestle with competing moral values: the importance of the stability afforded by the social contract versus the integrity of the individual who stands against perceived injustice; the need to obey the law versus the need to follow one's conscience. In cases of imperfect necessity, jurors will be asked to evaluate defendants who are neither blameless angels nor wicked villains, but people who, despite good intentions, acted unreasonably. Confronted with disobedients of this stripe, jurors and court officials could, themselves, come to think about the rule of law and our fealty to the law in more nuanced and sophisticated ways.

Thus, the imperfect necessity defense is radical in its own way. It is radical neither because it represents the populist rejection of a valid law by a jury, nor because it results in the total acquittal of a politically-motivated defendant for direct violations of law, but because it might be viable in a way that perfect necessity is not. Courts that are unwilling to exculpate political actors under a theory of necessity-as-justification may be more willing to allow a defense of necessity-as-excuse to lie, and to punish, but to temper the punishment meted out with understanding. And to the extent that imperfect necessity permits courts to evaluate criminal actions committed in the name of political necessity, the defense will also educate jurors and courtroom actors about the importance of following the law (and the importance of breaking the law when the commands of the law are untenable). The defense of imperfect necessity, then, has

¹¹⁶ See, e.g., *supra* note 66 and associated text (describing Gandhi's characterization of the sentencing judge's decision as a choice between embracing the legitimacy of the law and punishing a wrongdoer and enforcing an evil law and wrongly punishing an innocent man).

¹¹⁷ See generally LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT* (1981) (outlining a hierarchy of moral reasoning in which simple reward-punishment analysis of pre-conventional morality yields to social contractarian analysis of conventional reasoning, and in which conventional reasoning yields to post-conventional analyses involving universal principles).

tremendous potential. But it is not the only way to explore concepts of necessity when perfect necessity is barred.

In cases of death-eligible crimes, defendants may present mitigation evidence suggesting necessity during the penalty phase of their trials.¹¹⁸ Indeed, capital defendants have remarkably wide discretion in the types of mitigation evidence they present to juries.¹¹⁹ They can introduce anything that might induce one empathizing juror to vote for life during the penalty phase.¹²⁰ With the assistance of defense counsel (and sometimes mitigation specialists), capital defendants regularly trace the origins of their crimes to lives scarred by abject poverty, abandonment and neglect, harrowing childhood abuse, social dysfunction, organic brain damage, intellectual or emotional deficits, mental illness, alcohol and drug abuse, unemployment, race and racism, the collapse of community and the ascendance of gangs, and the failure of social institutions.¹²¹ Just as these recurring themes can be combined into a narrative that helps to explain how this human being could commit abominable crimes,¹²² so, too, can—in appropriate cases—the capital defendant explain his crime as the product of necessity.

There is value in invoking a claim of necessity during the penalty phase of a capital trial, particularly in cases of politically-motivated homicide. Beyond the possibility that a claim of necessity could lead a penalty-phase jury to vote for life,¹²³ the forum

¹¹⁸ See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (Burger, C.J.) (holding that “the sentencer, in all but the rarest kind of capital case, [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”).

¹¹⁹ See Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1162-64 (1991) (describing scope of Lockett discretion).

¹²⁰ See SCOTT E. SUNDBY, *A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY* (2005) (describing how real-life capital juries arrive at their decisions).

¹²¹ See Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547 (1995) (describing how all of these factors help to explain the crimes committed by capital defendants).

¹²² See *id.* at 580 (observing that real killers are not like villains from novels and films, but are characterized by characteristics of “poverty, childhood abuse and neglect, social and emotional dysfunction, alcohol and drug abuse, and crime [that] form a kind of social historical ‘profile’”).

¹²³ A sympathetic defendant who can persuasively demonstrate that killing his victim(s) saved the lives of many others may convince a jury to vote against imposing the death penalty. See *supra* note 105 (noting that the survivors of the Mignonette were viewed sympathetically by their jury). A sympathetic defendant whose reasoning appears bizarre or far-fetched (i.e., I tried to kill the king so that I could save the world from annihilation) may not prevail in convincing the jury that the crime was one of necessity, but might convince the jury that his sanity is in question. See, e.g., *Rex v. Hadfield*, 27 Howell State Trials 1281 (1800). In *Hadfield*, the defendant, James Hadfield, believed that the second coming of Jesus Christ was imminent, and that Christ’s reappearance would result in the salvation of humanity, but that in order to trigger Christ’s return, Hadfield must be sacrificed. He could not, however, kill himself. His ingenious solution was to make an assassination attempt on George III’s life, thereby ensuring his martyrdom. See NORMAN J. FINKEL, *INSANITY ON TRIAL* 14 (1988); DANIEL N. ROBINSON, *WILD BEASTS & IDLE HUMOURS* 148 (1996); Jodie English, *The Light Between Twilight and*

affords a political killer the platform to vindicate his crimes and express his beliefs.¹²⁴ In cases of political homicide, the opportunity to express one's reasoning will often be more important than saving one's life. During his proverbial day in court, the defendant will have the attention of the prosecution, the judge, and the jury. He will have the attention of the press, which will almost certainly be drawn to the story of a political killer who insists his actions were justified.¹²⁵ Even if the defendant is condemned to death, he will have publicly articulated his reasoning, creating a record for posterity. For defendants who do not fear death,¹²⁶ unequivocal insistence upon the necessity of their actions (and an acceptance of their consequences) is a powerful way to demonstrate unwavering commitment to one's ideology.¹²⁷ It is a path to martyrdom. Thus, necessity-themed mitigation evidence, like the justification of perfect necessity and the excuse of imperfect necessity, may provide defendants with a forum to express unorthodox or heretical social and political viewpoints.

Dusk: Federal Criminal Law and the Volitional Insanity Defense, 40 HASTINGS L.J. 1, 15 (1988) (all describing Hadfield's delusions). A Hadfield-like defendant explaining the necessity of his actions might not elicit clemency from the jury on the basis of necessity, but, rather, on grounds of mental illness.

¹²⁴ See *supra* note 68.

¹²⁵ See Peter Dreier, *How the Media Compound Urban Problems*, 27 J. URBAN AFFAIRS 193 (2005) (noting that "if it bleeds, it leads," which is to say media focus on social pathologies involving conflict and violence).

¹²⁶ Both Socrates and Joan d'Arc had the opportunity to avoid death, but felt compelled to die for their beliefs. See EDITH HAMILTON & HUNTINGTON CAIRNS, eds., *PLATO: THE COLLECTED DIALOGUES* (1989) (recounting the Apology); GEORGE BERNARD SHAW, *SAINT JOAN* 145 (Ayot St. Lawrence Ed., vol. 17, 1930) ("You promised me my life; but you lied. You think that life is nothing but not being stone dead."). See generally Parts III.B and III.C, describing the cases of Theodore John Kaczynski (who would have preferred execution to the mental illness defense he received) and Timothy James McVeigh (who waived his appeals and "volunteered" for execution).

¹²⁷ See Bauer & Eckerstrom, *supra* note 9, at 1191.

The argument that the civil disobedient may dispute the penalty for his act is this: The civil disobedient must show that he accepts the social contract. He certainly does so by passively accepting his punishment, but he can also do so by submitting himself to the judicial process. In this way, he allows society to judge his acts, and so ritualizes his respect for civil coexistence. Society may either punish him or acquit him. By giving society this option, he arguably shows a fidelity to the social basis for law and punishment, and thus shows a respect for the social contract.

Id.

III. Better Living Through (Exothermic) Chemistry: A Trio of Devastation

*Everything can collapse. Houses, bodies, and enemies collapse when their rhythm becomes deranged.*¹²⁸

Claims of necessity appear in cases of civil disobedience with remarkable regularity.¹²⁹ But most of these cases involve acts of indirect civil disobedience such as trespass or unlicensed demonstration; less common are cases involving direct civil disobedience.¹³⁰ Less common still are cases of necessity involving crimes of violence. But cases of socio-political violence *do* occur. In Chuck Palahniuk's novel, *Fight Club*,¹³¹ and the 1999 film of the same name,¹³² the character Tyler Durden destroys eleven corporate headquarters in a bid to liberate humankind from the shackles of modernity.¹³³ The *Fight Club* example has a real-life analogue, however: the case of Unabomber Theodore John Kaczynski.¹³⁴ Like *Fight Club*, the Unabomber's story is one written with explosives. Between 1978 and 1995, Kaczynski waged a one-man war against technology, orchestrating sixteen bombings that killed three people and injured another twenty-three.¹³⁵ Kaczynski's motives were muddled; revenge played an important role in his crimes, but there was also an undeniable element of necessity in his actions. He believed that his acts might catalyze an anti-technology revolution.¹³⁶

¹²⁸ MIYAMOTO MUSASHI, *A BOOK OF FIVE RINGS* 75 (Victor Harris, trans., 1974).

¹²⁹ See, e.g., Arlene D. Boxerman, *Commentary*, *The Use of the Necessity Defense by Abortion Clinic Protesters*, 81 J. CRIM. L. & CRIMINOLOGY 677 (1990); Cohan, *supra* note 16; Martin, *supra* note 8; Parry, *supra* note 24; Bauer & Eckerstrom, *supra* note 9; James L. Cavallaro, Jr., *Note*, *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and United States v. Schoon*, 81 CAL. L. REV. 351 (1993); Laura G. Kniaz, *Comment*, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 BUFFALO L. REV. 765 (1995); Schulkind, *supra* note 12; Brent D. Wride, *Comment*, *Political Protest and the Illinois Defense of Necessity*, 54 U. CHI. L. REV. 1070 (1987) (all describing claims of necessity in cases of civil disobedience).

¹³⁰ See Martin, *supra* note 8, at 1593 ("Both left- and right-wing activists have . . . almost entirely ignored the directly transformative nature of the necessity doctrine and have instead employed this defense almost exclusively in cases of indirect civil disobedience . . .").

¹³¹ See CHUCK PALAHNIUK, *FIGHT CLUB* (Hyperion Books, 1996).

¹³² See *FIGHT CLUB* (Fox Pictures 1999).

¹³³ See Part III.A., *infra*.

¹³⁴ See Part III.B., *infra*.

¹³⁵ See J.C. Oleson, "Evil the Natural Way": *The Chimerical Utopias of Henry David Thoreau and Theodore John Kaczynski*, 8 CONTEMP. JUST. REV. 211, 212 (2005).

¹³⁶ See *id.* at 225.

Kaczynski is a man who did not send bombs because he was vengeful but because he had *hope*; he believed that his acts of violence were *necessary* evils, catalysts to trigger the revolution that would set people free. This is the Kaczynski who—like a modern John Brown, the abolitionist who tried to spark an anti-slavery revolution by seizing the federal arsenal at Harper's Ferry—acted with violence because it was necessary to achieve a better world.

The case of Oklahoma City Bomber Timothy McVeigh is another story containing elements of both malevolence and necessity.¹³⁷ McVeigh believed that detonating a massive truck bomb at the Murrah Federal Building, killing 168 people, was necessary to draw attention to the reality that “the federal government that we rely on to protect us, serve us, had turned the tables, had become master, had declared war on the American people.”¹³⁸ Three men, three accounts of bombs. Three examples in which to explore the outer limits of the necessity doctrine.

A. “[S]trips of venison on the empty car pool lane”: *Tyler Durden* and *Fight Club*

Chuck Palahniuk’s 1996 novel, *Fight Club*, and director David Fincher’s 1999 film of the same name, are complex works of social satire.¹³⁹ *Fight Club* turns an unflattering mirror upon U.S. culture and, in one great sprawling work, touches upon a number of raw social nerves: consensual fighting as a legitimate vehicle for self-discovery;¹⁴⁰ corporate greed, and the litigation-driven calculus of product recalls;¹⁴¹

Id. (italics in original).

¹³⁷ See Part III.C., *infra*.

¹³⁸ Jo Thomas, *McVeigh’s Lawyers Cite Waco in Urging Jury to Spare His Life*, N.Y. TIMES, June 7, 1997, at § 1, 1.

¹³⁹ See Robert Bennett, *The Death of Sisyphus: Existentialist Literature and the Cultural Logic of Chuck Palahniuk’s Fight Club*, STIRRINGS STILL 65 (Fall/Winter 2005) (describing book as a sophisticated work of satire).

¹⁴⁰ The events in *Fight Club* were based upon author Chuck Palahniuk’s real-life experiences. See Edward Guthmann, *A Writer Fights the Odds*, SAN FRANCISCO CHRONICLE, Oct. 13, 1999, at E1 (“I went through a few years when I did nothing but fight . . . I fought anybody—it’s amazing how fast people in a bar can find a reason to fight each other. I fought people at work, I fought a dishwasher at a restaurant.”). Palahniuk characterizes fighting as a means of bonding.

It’s amazing how much fun [fighting] is, really seductive. I don’t know if I should be saying this stuff because it makes me sound not very politically correct. But I can see why the cowboys would hang all over each other getting drunk after they slugged it out in a bar. It comes from sharing that really intense experience.

Id.; Sam Jemielity & Chuck Palahniuk, *The Playboy Conversation*, available at <http://www.playboy.com/arts-entertainment/dotconversation/palahniuk/index.html> (last visited May 6, 2007) (describing being beaten up on a camping trip as the genesis of *Fight Club*). Although Palahniuk sees the fun in fighting, he claimed that organized fight clubs do not really exist. See Chuck Palahniuk, *I Made Most of It Up, Honest*, LOS ANGELES TIMES, Sept. 12, 1999, at Weekend 8 (“There’s no secret society of clubs where guys bash each other and gripe about their empty lives, their hollow careers, their absent fathers. Fight clubs are make-believe. You can’t go there. I made them up.”). But clandestine fighting clubs do exist. See, e.g., Athan Bezaitis, *At a Secret S.F. Fight Club, an Amateur with a Primal Urge to Test His Mettle Finds Himself in a Basement Ring with No Room to Run*, S.F. CHRONICLE, Jan. 19, 2004, at D1 (describing an underground fight club in San Francisco); Andrew Gumbel, *Blood Runs at Mormon Campus Fight Club*, LONDON INDEPENDENT, May 21, 2000, at 25 (describing the formation of a Mormon fight club in Provo, Utah); Christine Jackman, *Rise of Brutal Fight Clubs has Anti-Violence Activists on Ropes*, SUNDAY MAIL, Dec. 5, 1999, at 49 (describing the increasing popularity—and subsequent banning—of ultimate no-rules fighting, the only sport “in which there was a good possi-

bility competitors could actually be killed before the audience's eye"); Michael McCarthy, *Illegal, Violent Teen Fight Clubs Face Police Crackdown*, USA TODAY, Aug. 1, 2006, at A1-2 (describing prosecution of individuals who organized and filmed the pugilistic activities of juvenile fight clubs); Yvonne Ridley & Sophie Goodchild, *Bare-Knuckle Is All the Rage*, LONDON INDEPENDENT, Sept. 19, 1999, at 3:

There is plenty of blood. It will be pouring from a fighter's ears and probably from his groin where he has been bitten by his opponent. He will have soaked his hands in vinegar but his fists will end up shredded to ribbons. The impact of one man's bare fist on another is equivalent to the force of a 4lb lump hammer travelling at 20 miles an hour. The effect can be devastating, even after an average bout lasting a few minutes. There are no official rounds; instead the loser is the one whose injuries are so bad he can no longer stand up.

Id. A more-extreme version of fight clubs has emerged: sluggin'. In sluggin' matches, participants duct tape a pillow around a baseball bat, and then fight in one-on-one matches. *See American Idiots*, MAXIM (April 2006); *see also* www.sluggin4life.com (last visited May 27, 2006) (identifying enumerated rules of sluggin' a la Fight Club).

¹⁴¹ Most law students are familiar with Learned Hand's formulation of negligence: $B < PL$, where B is the burden of taking a precaution, P is the probability of harm occurring if no precautions are taken, and L is the loss or injury that could arise if precautions are not taken. Failure to invest amount B constitutes *prima facie* negligence. *See* United States v. Carroll Towing Co., 159 F. 2d 169, 173 (2d Cir. 1947). A similar algebra is employed in *Fight Club*. The protagonist, an automotive recall coordinator, explains:

Take the number of vehicles in the field, (A), and multiply it by the probable rate of failure, (B), then multiply the result by the average out-of-court settlement, (C). A times B times C equals X . If X is less than the cost of a recall, we don't do one.

This is not a fictional approach to business. Rather, the analysis cited in *Fight Club* is probably derived from the Ford Pinto case. In *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 174 Cal. Rptr. 348 (1981), a jury awarded over \$2.5 million in compensatory damages and \$125 million in punitive damages to Richard Grimshaw for injuries sustained from an accident involving a 1972 Ford Pinto with a fuel tank design defect. Ford had the ability to correct the Pinto design (which would have decreased the risk of a Pinto "igniting" after a rear-end collision) but determined it was more cost-effective to pay for deaths and injuries associated with the design defect. The Pinto case has become an iconic example of the tension between economics and ethics. *See* DOUGLAS BIRSCH & JOHN H. FIELDER, *THE FORD PINTO CASE: A STUDY IN APPLIED ETHICS, BUSINESS, AND TECHNOLOGY* (1994), Mark Dowie, *Pinto Madness*, MOTHER JONES 18 (Sept./Oct. 1977); but *see* Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013 (1991) (suggesting actual deaths associated with the Pinto have been much lower than predicted, and that the "smoking gun" memo at the center of the litigation was not actually about the Pinto, but about American cars in general).

Of course, it is possible that Palahniuk's recall coordinator wasn't referring to the Pinto case at all. History has a way of repeating, and similar litigation reached the California courts in 1999. In *Anderson v. General Motors* (Los Angeles Superior Court, No. BC116926), a Los Angeles jury awarded a \$4.9 billion dollar verdict against General Motors for adopting a purely economic approach to public safety, determining that it was more efficient to litigate "fuel fed fire related fatalities" than to make design changes to reduce the risk of gas tank explosions. The *Anderson* jury awarded a dizzying \$4.9 billion dollars in damages: \$107 million in compensatory damages, and a whopping \$4.8 billion in punitive damages. *See* Darlene R. Wong, *Stigma: A More Efficient Alternative to Fines in Detering Corporate Misconduct*, 3 CAL. CRIM. L. REV. 3 (Oct. 2000), available at: <http://www.boalt.org/bjcl/v3/v3wong.pdf> at ¶ 67 nn. 132-34.

addiction, self-help groups, and addiction to self-help groups;¹⁴² and the utilization of “culture jamming” techniques to reject the easy virtues of consumer culture.¹⁴³ It is this last theme—the unequivocal rejection of consumer culture—that is of particular interest. After Tyler Durden’s bare-knuckle fight club emerges from its basement locale transformed into “project mayhem,”¹⁴⁴ a militant conspiracy of black-clad anti-consumers who engage in creative-but-illegal acts of clandestine culture jamming to undermine the easy comforts of western capitalism,¹⁴⁵ the group’s “homework assign-

¹⁴² See Carina Chocano, *We Think, Therefore We Diagnose*, SALON, available at <http://archive.salon.com/mwt/feature/2001/05/30/syndromes/index.html> (May 30, 2001) (noting four in ten Americans attend support groups, and suggesting our fascination with therapy is “a movement that began with a fringe mid-19th century health craze and became a national obsession with compulsions and an addiction to self-help”). The idea that individuals might become addicted to treatment is not mere hyperbole; the medical literature contains several articles on surgical addiction. See, e.g., L. Chertok, *Mania Operativa: Surgical Addiction*, 3 PSYCHIATRY MED. 105-18 (1972); M. R. Wright, *Surgical Addiction. A Complication of Modern Surgery?* 112 ARCHIVES OF OTOLARYNGOLOGY—HEAD AND NECK SURGERY 870-72.

¹⁴³ See KALLE LASN, CULTURE JAM: HOW TO REVERSE AMERICA’S SUICIDAL CONSUMER BINGE—AND WHY WE MUST (2000) (identifying pathological aspects of modern consumer culture); NAOMI KLEIN, NO LOGO 279-310 (2001) (describing forms of culture jamming); Mark Dery, Culture Jamming: Hacking, Slashing, and Sniping in the Empire of Signs, available at <http://www.levity.com/markdery/culturjam.html> (last visited May 6, 2007) (outlining the theory of culture jamming); but see JOSEPH HEATH & ANDREW POTTER, NATION OF REBELS: WHY COUNTERCULTURE BECAME CONSUMER CULTURE (2005) (suggesting political usurpation of consumerism does not quell consumerism, but perpetuates it and condones criminal behavior as a legitimate form of dissent). For a good discussion of the tension between the values of culture jamming and the enforceability of copyright rights, see Giselle Fahimian, *How the IP Guerrillas Won: ©TMark, Adbusters, Negativland, and the “Bullying Back” of Creative Freedom and Social Commentary*, 2004 STAN. TECH. L. REV. 1.

¹⁴⁴ For a time, a real-life project mayhem emerged on the internet. See <http://www.project-mayhem.ndo.co.uk/> (last visited Sept. 25, 2006). This now-suspended website provided viewers with “homework assignments” (suggestions on how to undermine consumer culture) as well as video and audio clips. Although the members of the real-life group appeared to embrace the anti-consumerist philosophy of the film’s project mayhem, some critics believe that *Fight Club* satirized project mayhem in the same way it satirized the “IKEA world” of modern consumer culture. See Jesse Kavadlo, *The Fiction of Self-destruction: Chuck Palahniuk, Closet Moralist*, STIRRINGS STILL 3, 13 (Fall/Winter 2005) (“In their brutality and futility, Tyler’s followers . . . blur the lines between rebellion and conformity with the zeal of conversion, discarding tie-wearing, Starbucks-sipping, and IKEA-shopping by becoming mantra-repeating black shirts.”); Peter Mathews, *Diagnosing Chuck Palahniuk’s Fight Club*, STIRRINGS STILL 81, 82 (Fall/Winter 2005) (“Tyler Durden does not speak directly for Palahniuk any more than Heathcliff is the mouthpiece of Emily Brontë.”).

¹⁴⁵ See Bennett, *supra* note 139, at 72.

Far from being simply acts of masculine bravado or even a revolutionary assault on capitalism, the nasty tricks played by Jack and Tyler—from the splicing of pornography into family films and guerrilla waitering to the fighting, soap making, and terrorist mayhem—are perhaps better understood within this existentialist tradition to reclaim human beings’ “burden of freedom” in a world that has succumbed to the easy IKEA comforts of Danish modernist furniture.

ments” grow increasingly daring. The members of project mayhem begin with such modest exercises as employing an excrement catapult, shaving monkeys,¹⁴⁶ adulterating restaurant food,¹⁴⁷ using high-powered magnets to erase videotapes in a Blockbuster, and modifying a billboard to cheerfully provide disinformation, “Did you know you can use recycled motor oil to fertilize your lawn?”¹⁴⁸ From these preliminaries, they graduate to “operation latte thunder,” in which operatives blow up a piece of corporate art while simultaneously trashing a franchise coffee bar. During this ill-fated exercise, however, one of Durden’s minions is killed while fleeing from the police.¹⁴⁹ At this point, the potentially lethal consequences of subversive pranks come into focus.¹⁵⁰ One of the main characters, played by Ed Norton in the film, re-

Id.

¹⁴⁶ See Hakim Bey, *Poetic Terrorism*, available at <http://www.sniggle.net/Manifesti/poeticTerrorism.php> (last visited May 6, 2007) (“In Kampala, Uganda, an unknown poetic terrorist was shooting Gorillas with tranquilizer darts, then dressing them up as clowns while they were unconscious.”).

¹⁴⁷ Social critiques of the food service industry have been part of the American literary diet for decades. See, e.g. UPTON SINCLAIR, *THE JUNGLE passim* (Sharp Press 2003) (originally pub. 1905) (criticizing the meatpacking industry); ERIC SCHLOSSER, *FAST FOOD NATION* (2002) *passim* (criticizing proliferation of the fast food industry). But there is an even darker side to the American food service industry. The intentional introduction of adulterants to food is not limited to fiction. See, e.g., *Cabbie Caught Sprinkling Dried Feces on Food*, available at <http://www.wral.com/irresistible/5189706/detail.html> (last updated Oct. 27, 2005) (describing use of a cheese grater to sprinkle feces onto bakery goods); J.W. Brown, *Ex-cook Gets 45 Days for Tainting Officer's Burger*, PHOENIX GAZETTE, Nov. 14, 1991, at B2 (describing intentional adulteration of a hamburger by adding mucus to it); Ami Chen Mills, *Serves You Right*, available at <http://www.metroactive.com/papers/metro/03.14.96/waitprsn-9611.html> (“You can spit into food. If it's in salad dressing or soup, they can't see it. Or you can put chocolate Ex-Lax in desserts. You know what works good? Visine. If you drink Visine it makes you shit for days.”).

¹⁴⁸ Jim Uhls, *The Final Screenplay*, available at http://www.geocities.com/weekend_game/final_scr1.htm#top (last visited May 6, 2007); see also *Billboard Liberation Front* (2003), available at <http://www.billboardliberation.com/> (last visited May 6, 2007) (describing theory and practice of billboard hacking).

¹⁴⁹ Whether the police officers in *Fight Club* were justified in shooting the character “Bob” is an open question. The Supreme Court has held that lethal force may not be used unless necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. *Tennessee v. Garner*, 471 U.S. 1 (1985). Bob didn’t have a weapon and didn’t affirmatively threaten law enforcement officers, but he *was* dressed in black fatigues and was fleeing a crime scene involving explosives.

¹⁵⁰ Kennett suggests that this is the transformative moment for Norton’s character. “At the moment where he realizes that Project Mayhem is not just a story of revolution, not just an ideal masculine therapeutic space, but rather a physical organization that actually harms people, the Narrator becomes horrified and feels the weight of his personal responsibility.” Paul Kennett, *Fight Club and the Dangers of Oedipal Obsession*, STIRRINGS STILL 48, 59 (Fall/Winter 2005).

nounces the organization. But project mayhem proceeds without him,¹⁵¹ carrying out its masterpiece of anti-consumption: the orchestrated destruction of the TRW building and ten credit card headquarters with eleven vans loaded with approximately 4,400 gallons of nitroglycerin.¹⁵² The motive for demolishing these buildings is neither malice nor greed, but the liberation of all humanity from the oppression of the modern debt record.

Durden blows up the buildings because he believes it is necessary,¹⁵³ because he wants to free people from their self-imposed shackles and give them the kind of authenticity associated with life in traditional communities.¹⁵⁴ Like Colin Wilson's outsider, Tyler Durden is the man who sees too deep, and too much,¹⁵⁵ like Albert Camus' quintessential rebel,¹⁵⁶ he is the man who says no and rejects the world he's been handed; and like Ayn Rand's John Galt, he is the man who vows to "stop the motor of the world."¹⁵⁷ Thus Tyler Durden rejects "the shit job, fucking condo

¹⁵¹ This is more remarkable than the above text makes it seem. Ed Norton and Brad Pitt play two sides of a single split personality. While Norton quits the conspiracy after his friend, Bob, is killed during operation latte thunder, Pitt (the alter personality) continues to lead the organization in increasingly ambitious projects. See Uhls, *supra* note 148.

¹⁵² See *id.* ("You are now firing with a gun at your imaginary friend, near *four hundred* gallons of *nitroglycerin!*") and "You know there are ten other bombs in ten other buildings."). Four thousand four hundred gallons of nitroglycerin would do enormous damage. One U.S. gallon = 3.79 liters, and one liter of nitroglycerin weighs 1.13 kg, so 4,400 gallons of nitroglycerin would weigh 18,843.88 kg (45,550.76 pounds). Research suggests that nitroglycerin is approximately 1.5 times as powerful as TNT. See Engineering Skills Field Firing Exercise 2, available at <https://www.tbs.usmc.mil/Pages/Training%20Corner/sho's/R/BOR3405%20Engineering%20Skills%20Field%20Firing%20Exercise.doc> (last visited Sept. 15, 2006). Thus, 4,400 gallons of nitroglycerin would have the force of about 27.82 tons of TNT.

¹⁵³ The character of Tyler Durden stands resolute against a world of insipid consumerism, against the myopic hoarding of wealth, and the squandering of existence, and against a world where the social milieu does not provide us with the contact that human beings require. See Robert Wright, *The Evolution of Despair*, TIME, Aug. 28, 1995 (suggesting society does not afford the human contact that we, as organisms, require). Durden resists a world where people shop to be happy, but inadvertently become depressed instead. See Ben Summerskill, *Shopping Can Make You Depressed*, THE GUARDIAN, May 6, 2001. He stands against a world where people possess grand houses and vast estates, but have utterly no idea of who they are.

¹⁵⁴ Unnatural industrial-urban society was labeled "*Gesellschaft*" by the sociologist Ferdinand Tönnies. It represents one main approach to social grouping, based upon instrumental goals, while "*Gemeinschaft*," a village-like community of individuals based upon family and neighborhood bonds, represents the other. See FERDINAND TÖNNIES, COMMUNITY AND SOCIETY: GEMEINSCHAFT UND GESELLSCHAFT (C. P. Loomis, Trans., 1957) (1887). Durden's goal is to destroy the world of *Gesellschaft* and to replace it with a *Gemeinschaft* world.

¹⁵⁵ See COLIN WILSON, THE OUTSIDER 9 (new ed. 2001) (quoting Barbusse).

¹⁵⁶ See ALBERT CAMUS, THE REBEL 13 (Anthony Bower, Trans., 1956) ("What is a rebel? A man who says no . . . [h]e means, for example, that 'this has been going on too long,' 'up to this point yes, beyond it no,' 'you are going too far,' . . . [i]n other words, his no affirms the existence of a borderline.").

¹⁵⁷ AYN RAND, ATLAS SHRUGGED 671 (1957).

world, watching sitcoms;”¹⁵⁸ he shoves back against society’s veal-farm marketing of brands and labels and advertising;¹⁵⁹ and he resists a world in which psychopathic corporations have usurped the role of nation states.¹⁶⁰ Not content with small-scale culture jamming, Tyler Durden decides to do something decisive. Something definitive. He defies our world, and vows to undo it. And so he blows up eleven buildings in his bid to end modern civilization.¹⁶¹ It’s all part of his plan to raze the world and build a new Eden in its place. In a previous scene, Durden had described his vision of an ideal human future:

In the world I see—you're stalking elk through the damp canyon forests around the ruins of Rockefeller Center. You will wear leather clothes that last you the rest of your life. You will climb the wrist-thick kudzu vines that wrap the Sears Tower. You will see tiny figures pounding corn and laying-strips of venison on the empty car pool lane of the ruins of a superhighway.¹⁶²

Durden’s dream utopia is nothing novel. For decades, development critics have been arguing for something like this.¹⁶³ Anarcho-primitivists believe that “the shift from hunter-gatherer to agricultural subsistence gave rise to social stratification, coercion, and alienation. They advocate a return to non-‘civilized’ ways of life through deindustrialisation, abolition of division of labour or specialization, and abandonment of technology.”¹⁶⁴ That is the world that Tyler Durden seeks—a *Geme-*

¹⁵⁸ Uhls, *supra* note 148 (quoting Pitt).

¹⁵⁹ See KLEIN, *supra* note 143, at 37 (describing flipping point at which buses and taxicabs no longer bore advertisements, but *became* advertisements—“Now buses, streetcars and taxis, with the help of digital imaging and large pieces of adhesive vinyl, have become ads on wheels, shepherding passengers around in giant chocolate bars and gum wrappers, just as Hilfiger and Polo turned clothing into wearable brand billboards.”). She describes a whole town that has been privatized and branded. *Id.* at 38.

¹⁶⁰ See THE CORPORATION (Big Picture Media Corp. 2003) (recounting characteristics of the psychopath, and noting that all of these characteristics are readily apparent in corporate entities.).

¹⁶¹ Before the bombs detonate, Tyler Durden crows, “Out these windows, we will view the collapse of financial history. One step closer to economic equilibrium.” Uhls, *supra* note 148.

¹⁶² *Id.*

¹⁶³ See JACQUES ELLUL, THE TECHNOLOGICAL SOCIETY (John Wilkinson, trans., 1964) (suggesting technological society creates an artificial system that subordinates the natural world); DERRICK JENSEN, ENDGAME (2006) (arguing that industrial society is unsustainable, based upon the exploitation of natural resources and indigenous peoples, and urging people to think about how to confront such a society); DANIEL QUINN, ISHMAEL (1992) (contrasting a world of “takers,” who view the world as here for them, against “leavers,” who view themselves as here for the world); ALVIN TOFFLER, FUTURE SHOCK (1970) (describing accelerating pace of the world as we move from a hunter-gatherer lifestyle to agriculture to industrialization to a super-industrial society); JOHN ZERZAN, FUTURE PRIMITIVE AND OTHER ESSAYS (1994) (arguing that agricultural and industrial society is inherently oppressive and discriminatory, advocating a shift to a harmonious way of life based on Paleolithic hunter-gatherers).

¹⁶⁴ Wikipedia, *Anarcho-primitivism*, available at <http://en.wikipedia.org/wiki/Anarcho-primitivism>.

inschaft world of anarcho-primitivists where people value life because they play an active role in sustaining it.¹⁶⁵ Ultimately, Durden wants to nudge people into a state of wakefulness,¹⁶⁶ into the awareness of real freedom that Kierkegaard calls “dread.”¹⁶⁷ By rejecting technology, and by returning people to hunter-gatherer conditions better matched to the conditions under which we evolved, Durden hopes to create real meaning in lives that have been systematically stripped of authenticity. A way to realize this goal, of course, is to eliminate the debt record, crippling (or at least disrupting) the global economy.

So Tyler Durden fells eleven skyscrapers. In *Fight Club*'s final frames, the bombs go off and the buildings collapse under their own weight. Despite all of Durden's glib assurances,¹⁶⁸ the image resembles an eerily familiar act of American terrorism.¹⁶⁹

So let the question be asked: if a real-life Tyler Durden *did* destroy eleven corporate high rises, thereby obliterating the debt record and wiping the economic slate clean, could he possibly prevail in presenting a necessity defense? If we're talking about the Tyler Durden from Palahniuk's book and Fincher's movie, necessity is unlikely to be the defense of choice: Durden would be acquitted on grounds of insanity.¹⁷⁰ But if there were a real-life Tyler Durden who was not plagued by serious mental health issues, could such an audacious crime ever be justified by necessity? In

¹⁶⁵ See *supra* note 154 (describing Gemeinschaft conditions).

¹⁶⁶ See HENRY DAVID THOREAU, THE ANNOTATED WALDEN 221 (P. Van Doren Stern ed., 1970) (1854) (“The millions are awake enough for physical labor; but only one in a million is awake enough for effective intellectual exertion, only one in a hundred millions to a poetic or divine life. To be awake is to be alive. I have never yet met a man who was quite awake.”).

¹⁶⁷ See Bennett, *supra* note 139, at 70 (equating the protagonist's quest for experience—for both himself and others—as akin to Kierkegaard's state of dread).

¹⁶⁸ Uhls, *supra* note 148 (“The buildings are empty. Security and maintenance are all our people. We're not killing anyone, man, we're setting them *free!*”).

¹⁶⁹ See Kavaldo, *supra* note 144, at 21 (“In the film, of course, the bombs do explode, and the buildings indeed crumble, in pre-9/11 imagery that would surely never have been produced just a few years later.”).

¹⁷⁰ See J.C. Oleson, *Is Tyler Durden Insane?*, 83 N.D. L. Rev. (2007) (forthcoming).

If tried, Tyler Durden—a James Hadfield for the millennium—would be found not guilty by reason of insanity. A benign collusion between defense and prosecution, judge and jury, would shepherd him out of the justice system and into the mental health system. Even if that is not what the letter of the law required, even if this is not what Durden wanted. Tyler Durden would receive psychiatric treatment—not punishment—because, like Hadfield, his messianic objectives had been laudable. Because, as a man who had literally been at war with himself, he had already been sufficiently punished by his madness. But the main reason that he would be found not guilty by reason of insanity is because society could not bear to confront the justification behind Durden's crime. It is not ready.

Id. (citations omitted). Inasmuch as Durden's premises are sound (i.e., consumerism alienates people from each other and from themselves), Durden is sane, lucid, and responsible. We are collectively insane (e.g., unaware of the nature and quality of our actions in that we have no conception of the collateral effects of our conduct). Inasmuch as Tyler Durden is correct (and we are blind), our rapacious society has made each of us mad.

practice, it is unlikely that a court would permit a defense of necessity to go to a jury.¹⁷¹ Overcoming the obstacles presented by a literal common law analysis would be extraordinarily difficult, and establishing a prima facie case for each of the elements would be challenging.¹⁷² First, Durden would have to demonstrate imminence,¹⁷³ and would have to overcome judicial antipathy against ongoing harms.¹⁷⁴ Of course, “systemic suffering often motivates application of the doctrine [of necessity], and surely does not vitiate it.”¹⁷⁵ Durden could attempt to demonstrate that a great evil was not only imminent, but that it was occurring right now, and getting worse with every moment. He could argue that with every day rampant consumerism is permitted to go unchecked, more people are oppressed and alienated. He could attempt to make a prima facie showing of imminence by arguing that each day stained by consumption and hunger forfeits new human possibility.

I see all this potential—God damn it, an entire generation pumping gas and waiting tables; they're slaves with white collars. Advertisements have us chasing cars and clothes, working jobs we hate so we can buy shit we don't need. We are the middle children of history, man. No purpose or place. We have no great war, no great depression. Our great war is a spiritual war. Our great depression is our lives. We've all been raised by television to believe that one day we'll all be millionaires and movie gods and rock stars—but we *won't*. And we're learning slowly that fact. And we're very, *very* pissed off.¹⁷⁶

Each day, the situation worsens. Those with money make money, while those without money must borrow it at usurious rates.¹⁷⁷ Those who have, through imprudence

¹⁷¹ See *supra* note 33 (identifying need for a prima facie showing in order to present the defense to a jury). Even finding a judge who would be open-minded and impartial about such a radical claim of necessity might be difficult. See *supra* note 85.

¹⁷² See Part II.A, *supra*.

¹⁷³ See Part II.A.1, *supra*.

¹⁷⁴ See *supra* note 73.

¹⁷⁵ Martin, *supra* note 8, at 1558.

¹⁷⁶ Uhls, *supra* note 148.

¹⁷⁷ See, e.g., STEVEN D. STRAUSS & AZRIELA JAFFE, *THE COMPLETE IDIOT'S GUIDE TO BEATING DEBT* 75 (2d ed. 2003) (explaining the economic significance of the adage “those who have money, make money.”). An individual with one million dollars in principle that earns 5% simple interest will take home \$50,000 each year, enough that one can live frugally on the revenues. An individual who has to borrow money with credit cards, however, pays up to 21% APR—not only owing the principal that was borrowed but also the interest that has accrued. Those most in need of credit cards are often those least capable of repaying borrowed money in a timely and cost-effective way. In 2000, the average U.S. household carried revolving debt of nearly \$10,000, and many of those borrowers could not afford to repay their debt.

An estimated 55-60 percent of Americans carry credit card balances. One recent study found that nearly half of those with balances made just the minimum payment in February 2002. This means that about one out of four cardholders in the USA now make only the minimum payments. In the same month, about 37 percent of Americans who could not pay off their balances paid less than half their outstanding balance, and only

or misfortune,¹⁷⁸ had to declare bankruptcy and therefore bear a mark of financial stigma, find their options even more constrained. But the debt record does not only punish those who have declared bankruptcy. Most societies mark the crossing of the threshold between adolescence and adulthood by bestowing gifts upon young people, with which they can found new lives; a society with consumption at its nucleus, however, confers an inverted dowry of debt, forcing students to assume debts (often massive debts),¹⁷⁹ leading them to delay or forego altogether traditional community-building steps such as marriage, parenting, and home ownership.¹⁸⁰ In the aggregate, these decisions have serious consequences for society, and Durden could claim that his destruction of the buildings (and the debt records they contained) was necessary to avert the imminent collapse of social institutions.

Second, Durden would have to show that there was no lawful alternative to his actions.¹⁸¹ Courts typically assess this element by asking the binary question, “Was there *any* alternative?”¹⁸² Of course, in this case, there were alternatives: Durden could have done any of five thousand non-criminal things to help ameliorate the corrosive effects of consumerism and debt. He could have become a credit counselor,¹⁸³ could have written newspaper editorials, or could have lectured on the evils of IKEA

13 percent of consumers with an outstanding balance could afford to pay more than half the balance.

Bradley Dakake & the State PIRG Consumer Team, *Deflate Your Rate: How to Lower Your Credit Card APR 1* (Mar. 2002), available at https://www.uspirg.org/uploads/QU/sY/QUsYdm4nbDtbh4wfhqVR7A/deflateyourrate3_02.pdf.

¹⁷⁸ The stereotype of the deadbeat who files bankruptcy out of a lack of initiative is in fact deeply flawed. See David Nicklaus, *Theory Behind Bankruptcy Law Doesn't Seem to Hold Water*, ST. LOUIS POST-DISPATCH, July 2, 2006, at E1.

The image of the deadbeat borrower, defaulting on a debt out of sheer laziness, is a powerful one in the American psyche. Certainly the nation's bankers used that stereotype to great effect when they convinced Congress to overhaul the nation's bankruptcy laws last year. The trouble is, eight months after the law took effect, the stereotype doesn't appear to be true.

Id. In fact, many who declare bankruptcy do so because of catastrophic medical costs. See, e.g., Victoria Colliver, *Back Breaking Bills: Uncovered Medical Expenses Are Leading to Bankruptcies*, S.F. CHRON., Feb. 17, 2005, at C1 (noting that a Harvard University study found that 46.2% of bankruptcy filers cited illness and medical expenses as major causes of bankruptcy and that more than 75% of these filers had insurance at the onset of their illness).

¹⁷⁹ The average student currently graduates college with \$19,237 in student loans. See <http://www.finaid.org/loans/> (last visited May 6, 2007). For those in graduate programs, the average debt is much greater. For example, the mean debt for those graduating from law school is \$80,754. *Id.*

¹⁸⁰ See Christian Zappone, *Student Loans: A Life Sentence*, at http://money.cnn.com/2006/05/01/pf/college/reverse_dowry/index.htm?postversion=2006050211 (May 2, 2006) (“Call it a reverse dowry: college debt diverts careers and delays or impedes graduates’ plans to get married, buy a home or even to start a family.”).

¹⁸¹ See Part II.A.2, *supra*.

¹⁸² See *supra* note 47.

¹⁸³ Those who have seen the movie can recognize what a ridiculous idea this is.

furniture and Gap khakis.¹⁸⁴ Now, if an unprejudiced court asked if there were *effective* alternatives that could actually avert the evils associated with the debt record,¹⁸⁵ it might conclude that only something as radical as blowing up buildings could change society's fundamental dependence on consumption. But it is very unlikely that a court in the United States would interpret the requirement in such a manner—to do so would be nearly as radical (legally speaking) as the actual bombing of the TRW building.

Third, Durden would have to demonstrate proportionality between his actions and the evil he was trying to prevent.¹⁸⁶ He would have to show that blowing up the buildings was less harmful than the debt record was, and this, too, would be a difficult showing to make. Of course, the doctrine of necessity favors human life and the alleviation of human suffering over individually held property,¹⁸⁷ so the general tenor of Durden's acts are sympathetic: he sacrificed things (buildings) to protect (the quality of) human life. That much comports with necessity doctrine. But Durden's actions resulted in harm to property that was spectacular and easily-quantified, while the harm he was trying to prevent is far more abstract (i.e., something akin to an assault on human dignity) and difficult to conclusively relate to the debt record. Furthermore, if he attempted to explain himself by describing his vision of human freedom,¹⁸⁸ it is not at all clear that a court wouldn't perceive *that* as a harm (against which the debt record functioned as a benefit).

Fourth, Durden would have to show that there was a causal nexus between his action and the averted harm.¹⁸⁹ He would have to show that destroying the debt record *in these eleven buildings* could objectively prevent the degradation of the human condition. He would have to establish that blowing up the TRW building and the credit card headquarters, resetting the debt record, could reasonably be expected to ameliorate the evils of western consumer society. He could of course explain that by striking at the nation's commercial nervous center he was trying to bomb the United States back into the Paleolithic,¹⁹⁰ but, by definition, if there were prosecutors to file charges against him and a court to judge him, the debt record contained in the eleven ruined buildings was not essential for society to endure. If there is still a courtroom to try Tyler Durden, that court might conclude that the nexus between the pathologies of a debt-based society and the bombing of the credit companies was too insubstantial to warrant introduction of the necessity defense. All four elements look like long shots: imminence, lawful alternatives, proportionality, and causality.

¹⁸⁴ See Uhls, *supra* note 148 (“You are not your job . . . you are not how much money you have in the bank . . . not the car you drive . . . not the contents of your wallet. You are not your fucking khakis.”).

¹⁸⁵ This is the test advocated by Bauer and Eckerstrom. See *supra* note 75.

¹⁸⁶ See Part II.A.3, *supra*.

¹⁸⁷ See *supra* note 50.

¹⁸⁸ See *supra* note 162.

¹⁸⁹ See Part II.A.4, *supra*.

¹⁹⁰ See *supra* note 162 (describing primitivist Eden). This kind of society has been advocated by others. See *supra* note 163 (describing views of Zerzan and Jensen).

In summation, it would be extremely difficult for a real-life Tyler Durden to prevail in establishing the requisite elements of necessity. If the jurisdiction acknowledged imperfect necessity, Durden might be able to raise the defense: while most people would not agree that blowing up credit card buildings was an appropriate response to the malaise of a debt-society, his actions were motivated by (unreasonable) necessity. But if the jurisdiction did not acknowledge imperfect necessity, that avenue as well would be foreclosed. And because Durden's crime did not involve homicide, there would be no possibility of articulating themes of necessity during the penalty phase of a capital trial.

These limitations, however, were not constraints in a real-life analogue. When Unabomber Theodore Kaczynski attempted to arrest society's slide toward a technological apocalypse, he killed to do it. And if his case had gone to trial,¹⁹¹ he might very well have raised an imperfect necessity defense.

B. "We've had to kill people": The United States versus Theodore John Kaczynski

In several ways, Theodore Kaczynski *is* a real-life Tyler Durden.¹⁹² Like Tyler Durden, Kaczynski engaged in serious criminal conduct in order to save the world from itself. Of course his targets were not the TRW building and credit card companies—his focus was not consumer culture, but society's increasing dependence on technology.¹⁹³ Accordingly, Kaczynski's targets were not credit card buildings, but university professors, advertising executives, timber industry officials, and computer scientists.¹⁹⁴ While Kaczynski's goal was not to return humankind to the Paleolithic, he did want to turn back the hands of time. He hoped to trigger a cultural revolution that would return people to a self-sufficient way of life associated with the nineteenth century frontier.¹⁹⁵ To achieve this goal, Kaczynski did not (like Durden) use truck bombs laden with carboys of nitroglycerin, but he *did* employ explosives—mail bombs, in particular. In fact, between 1978 and 1995, using improvised but lethal explosives, Kaczynski killed three people and injured another twenty-three.¹⁹⁶

¹⁹¹ It did not. Indeed, the Unabomber case has been called the "non-trial of the century." See Michael Mello, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417 (2000).

¹⁹² See Oleson, *supra* note 170 (identifying at least three respects in which Kaczynski resembles Durden: (1) shared primitivist ideologies and a belief in a *Gemeinschaft* utopia; (2) a dualistic personality; and (3) sanity—both men were probably sane under prevailing legal standards).

¹⁹³ See Oleson, *supra* note 135, at 220 (2005) (citing the Unabomber manifesto to demonstrate that Kaczynski, presumably the author of the document, believed that the single greatest obstacle to genuine human freedom is technology, and that our society is addicted to technology).

¹⁹⁴ See JOHN DOUGLAS & MARK OLSHAKER, UNABOMBER: ON THE TRAIL OF AMERICA'S MOST-WANTED SERIAL KILLER 157-76 (1996) (listing the Unabomber crimes chronologically).

¹⁹⁵ See Oleson, *supra* note 135, at 221 ("Kaczynski does not wish to bomb modernity back into the Stone Age, but he does hope to regress us to an earlier social state. The 19th-century American frontier, in particular, is extremely attractive to Kaczynski.").

¹⁹⁶ See *id.* at 212.

The crimes of Theodore Kaczynski were not the acts of a man who *could* not succeed in conventional society; they were the acts of a man who *would* not. Kaczynski was a prodigy who attended Harvard at sixteen,¹⁹⁷ a brilliant mathematician,¹⁹⁸ and a young scholar who turned his back on a promising career at the University of California.¹⁹⁹ Kaczynski left the academy and went to Lincoln, Montana, where, upon a 1.4 acre plot of land that he'd purchased with his brother, he built a 10'x12' cabin, reminiscent of that constructed by Thoreau.²⁰⁰ There, on the periphery of society, his reclusiveness curdled into misanthropy.²⁰¹ He suffered from frustration and an unslakable thirst for revenge.²⁰² Kaczynski's diaries show that he vandalized the property of noisy neighbors,²⁰³ set booby-traps in the woods,²⁰⁴ and fired a rifle at a passing helicopter.²⁰⁵ In the fall of 1977, Kaczynski wrote in his diary, "I think that perhaps I could now kill someone."²⁰⁶ Months later, Kaczynski followed through on his diary entry, planting an explosive device in a parking lot at the University of Illinois, Chicago Circle campus. For seventeen years, Kaczynski lived alone in the woods of Lincoln, constructing explosives, waging a one-man war against technology. He kept a diary which, along with interviews conducted with psychiatrists, shed some light on his crimes. But most of what we know about Kaczynski's motives has been gleaned from the so-called Unabomber Manifesto, *Industrial Society and Its Future*.²⁰⁷

¹⁹⁷ See ALSTON CHASE, *HARVARD AND THE UNABOMBER: THE EDUCATION OF AN AMERICAN TERRORIST* 181 (2003).

¹⁹⁸ See *id.* at 301 (noting that Kaczynski's Ph.D. dissertation won the University of Michigan departmental prize for the year).

¹⁹⁹ See *id.* at 309 (describing Kaczynski at Berkeley).

²⁰⁰ See ROBERT GRAYSMITH, *UNABOMBER: A DESIRE TO KILL* 21 (1997).

²⁰¹ See Mello, *supra* note 191, at 484 (describing Kaczynski's acts of vandalism and violence).

²⁰² J.C. Oleson, *Review of Harvard and the Unabomber: The Education of an American Terrorist*, 5 *WESTERN CRIMINOLOGY REV.* 70, 72 (2004), available at <http://wcr.sonoma.edu/v5n1/oleson.pdf> (last visited May 6, 2007) (describing revenge as one of Kaczynski's driving motives).

²⁰³ CHASE, *supra* note 197, at 338.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 339.

²⁰⁶ *Id.* at 342.

²⁰⁷ *Industrial Society and Its Future* was published in the September 19, 1995 edition of the New York Times and the Washington Post. Kaczynski never acknowledged writing the manifesto, but there is reason to believe that Kaczynski is its author. See Oleson, *supra* note 135, at 218 (citing content analysis and linguistic matches as evidence of Kaczynski's authorship). Kaczynski, writing as the terrorist group, FC, had agreed to stop sending bombs if a major newspaper would publish its 35,000 word article. See CHASE, *supra* note 197, at 83-87; *Statement by New York Times and Washington Post*, available at <http://www.unabombertrial.com/manifesto/nytstatement.html> (last visited Sept. 22, 2006). The manifesto has been published commercially by Jolly Roger Press. See FC, *THE UNABOMBER MANIFESTO: INDUSTRIAL SOCIETY & ITS FUTURE* (1995). The full text of the manifesto is also available on a number of websites. See, e.g., <http://www.unabombertrial.com/manifesto/> (last visited May 6, 2007).

Some commentators have expressed disappointment in *Industrial Society and Its Future*, criticizing it for not saying anything new or important. Sale, for example, has dismissed it as unoriginal and convoluted,²⁰⁸ and claimed that the Unabomber is nothing special, standing “in a long line of anti-technology critics where I myself have stood.”²⁰⁹ Chase concurred, suggesting that—except for its call to violence—the manifesto’s message is ordinary and unoriginal,²¹⁰ echoing in particular the works of Jacques Ellul.²¹¹ Some, however, view the manifesto as profoundly revolutionary, challenging not only the American status quo but also rejecting the beliefs of radicals

Industrial Society and Its Future is a difficult text, ignored by most and misunderstood by many. See James B. Comey, *Address, Fighting Terrorism and Preserving Civil Liberties*, 40 U. RICH. L. REV. 403, 406 (2006) (referring to the manifesto as “wacko”), but see William Finnegan, *Defending the Unabomber*, NEW YORKER, Mar. 16, 1998, at 61 (quoting James Q. Wilson as noting, “If it is the work of a madman, then the writings of many political philosophers—Jean Jacques Rousseau, Tom Paine, Karl Marx—are scarcely more sane.”). The manifesto is difficult neither because it employs particularly novel or innovative concepts, nor because it relies upon technical language, but because “the essay eludes the grasp of most readers because it struggles to convey such expansive and nuanced ideas with such pedestrian language.” Oleson, *supra* note 135, at 219.

Said simply, the manifesto argues that we are slaves, and that technology has enslaved us. The manifesto suggests that the Industrial Revolution accelerated the pace of life, enslaved people to technology, and thereby created a dismal social landscape of anomie and apathy. This is because, argues the manifesto, human beings have a biological need for a “power process.” To satisfy this need, people must have goals, must exert effort to attain them, and must have a reasonable chance of attaining them. In modern society, though, virtually no effort is needed to satisfy biological needs, and people are left psychologically hungry, seeking other mechanisms to satisfy their need for power. Accordingly, people focus on wealth or status, or immerse themselves in work or identify with groups or organizations. These *surrogate* activities, however, cannot satisfy the need for the power process in a meaningful way. To find *real* fulfillment, people must satisfy their biological needs as individuals. Deprived of autonomy and meaningful goals, we have surrendered our freedom. The manifesto states that technology is fundamentally incompatible with freedom. It also suggests that our appetite for technology is more compelling than our love of freedom. Modern humans have become *addicted* to technology. Therefore, society employs subtle forms of coercion to socialize behaviors that support the sustainability of technological society. The manifesto references dystopian works, comparing America to an Orwellian society of surveillance, and comparing our growing use of mood-altering drugs to Huxley’s brave new world of soma. Because technology is fundamentally incompatible with freedom, and because freedom is indispensable to authentic happiness, the manifesto advocates for the revolutionary overthrow of technology. Such a revolution is not political in nature. In his essay, Kaczynski calls for a revolution that is bigger than politics, premised upon the wholesale rejection of technology and our modern approach to living. The manifesto is clear: It will take a bona fide revolution, executed on an international scale, to avert the evils of technology. See generally *id.* (summarizing *Industrial Society and Its Future*).

²⁰⁸ Kirkpatrick Sale, *Is There Method in His Madness?*, THE NATION 305 (Sept. 25, 1995)

²⁰⁹ *Id.*

²¹⁰ CHASE, *supra* note 197, at 89.

²¹¹ See ELLUL, *supra* note 163 (describing *The Technological Society*).

who persist in believing that meaningful change can be effectuated through legitimate political channels.²¹² Lydia Eccles writes:

The Manifesto blasphemed everything that knits together the worldview of not only the mainstream, but also that of many reformers and radical critics. Many are able to say that Orwell's vision threatens. But they think that to become alert to this danger is to solve the problem. They remain caught up in what Jacques Ellul has called "the illusion of politics"—the belief that in a democracy we actually shape our future through the political process. Many of the Unabomber's anti-mythical ideas are unthinkable to us, more so than the use of violence. Given the right rationale, our society is willing to kill not only guilty people, but innocent ones as well, and then call it collateral damage. The Unabomber questioned our faith in politics itself, and challenges concepts of self, freedom and happiness. He is a heretic at the deepest level.²¹³

Industrial Society and Its Future is a difficult, radical work. The ideas contained therein lead to bold and disturbing conclusions. Its author, Theodore Kaczynski, has documented a worldview, drafted a constitution, and declared a call to arms. Furthermore, Kaczynski acted with the courage of his convictions, lived in isolation in the wilds of Montana, and used his formidable intellect to maim and destroy other human beings.

After Kaczynski's brother, David, recognized some of the ideas and phrases from the *Industrial Society and Its Future*, he reported his brother to the police,²¹⁴ thereby ending the largest manhunt in United States history.²¹⁵ Interestingly, the Kaczynski case involved numerous legal proceedings, but there was never an actual trial.²¹⁶

²¹² Like Kaczynski, Thoreau quit society to escape materialism and was keenly aware of the difficulties involved in changing society through conventional mechanisms. In *Civil Disobedience*, he advocated immediate transgression. "Unjust laws exist: shall we be content to obey them or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once?" THOREAU, *supra* note 166, at 462. It is not clear whether Thoreau would have condoned Kaczynski's bombing campaign. Oleson, *supra* note 135. Thoreau advocated non-violent disobedience, but could imagine circumstances under which violence—even killing—would be unavoidable. See Henry David Thoreau, *A Plea for Captain John Brown*, available at <http://www.vcu.edu/engweb/transcendentalism/authors/thoreau/johnbrown.html> (last visited May 6, 2007) (1859) ("I do not wish to kill nor to be killed, but I can foresee circumstances in which both these things would be by me unavoidable.").

²¹³ MICHAEL MELLO, THE UNITED STATES OF AMERICA VERSUS THEODORE JOHN KACZYNSKI: ETHICS, POWER, AND THE INVENTION OF THE UNABOMBER 41 (1999) (quoting Eccles). A variation on this quote is cited in Mello's article. See Mello, *supra* note 191, at 475-76.

²¹⁴ See CHASE, *supra* note 197, at 109-14 (describing David Kaczynski's agonized decision to contact the FBI).

²¹⁵ Oleson, *supra* note 135, at 212. Theodore John Kaczynski was arrested on April 3, 1996. See CHASE, *supra* note 197, at 376. He was indicted by a grand jury in June. See Joel S. Newman, *Doctors, Lawyers, and the Unabomber*, 60 MONT. L. REV. 67, 72 n.19 (1999). He pled guilty on January 22, 1998, and on May 4, 1998, was sentenced to four consecutive life terms plus 30 years. CHASE, *supra* note 197, at 376.

²¹⁶ Luban summarizes Kaczynski's struggle for control over the kind of defense that was raised:

Of course, it almost didn't happen this way. Instead of being cornered into the mental illness defense that was abhorrent to him,²¹⁷ Ted Kaczynski nearly went to trial. Well-known defense lawyer Tony Serra had offered to represent him, and Serra

Kaczynski's lawyers, both of them first-rate federal public defenders, decided to put on a mental defense. The problem was that they could not get Kaczynski to go along. He didn't even want to be interviewed by a psychiatrist. He had his own theory of how he would win acquittal. His lawyers would move to exclude all the evidence seized from his cabin because the search was illegal, and without that evidence the government had no case. Of course, the chance that the court would exclude the evidence was approximately zero—a mathematician like Kaczynski would say that the chance was “epsilon”—and Kaczynski's optimism about the strategy was a product of legal naïveté, if not mental disturbance.

David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 827 (2005). The physical evidence was overwhelming. See GRAYSMITH, *supra* note 200, at 475-81. A search of Kaczynski's cabin had produced the typewriter used to type all identifiable Unabomber correspondence since 1982, a carbon copy of the manifesto (the original had been mailed to *The New York Times*), documents including the names and occupations of Unabomber victims, binders memorializing Kaczynski's bomb-making experiments, and a fully functional improvised explosive device resembling other Unabomber devices. Because the evidence was so damning, his lawyers believed that the one chance they had to save their client's life was to present a mental health defense. See MELLO, *supra* note 213, at 45 (noting “their strongest argument to save their client's life would be a mental defect defense.”). But that was an unacceptable option for Kaczynski, even if it meant that he was sentenced to death. See *id.* at 121 (suggesting Kaczynski pled guilty not because he feared the death penalty, but because it was the only way he could prevent his lawyers from portraying him as crazy). Luban describes Kaczynski's decision to represent himself:

His lawyers reassured him that the psychiatric evidence would be used only at the penalty stage if he was convicted, not at the guilt stage, and Kaczynski, convinced that the case would never get to the penalty stage because he would be acquitted, relented, and spoke to the psychiatrist. Apparently, his lawyers also reassured him that the main reason they wanted him to speak with a psychiatrist was to gather evidence to refute media assertions that he was demented. But then they double-crossed him. At the last minute, they announced that at the guilt phase they would undertake the mental defense—the only one that might save his life. Stunned and helpless, Kaczynski demanded to represent himself rather than let his lawyers put on the mental defense.

Luban, *supra*, at 828. At first, the judge tentatively granted Kaczynski's request, conditioning it upon a Faretta hearing to determine his competence. Newman, *supra* note 215, at 77-78. On January 20, both prosecution and defense agreed that Kaczynski was competent to stand trial, and on January 21, both sides agreed that Kaczynski was competent to represent himself. But on January 22, Judge Burrell rejected Kaczynski's request to represent himself, stating that it was not timely. Unwilling to permit the mental-illness defense his attorneys had prepared, Kaczynski agreed to a plea bargain in less than an hour. See MELLO, *supra* note 213, at 93-111.

²¹⁷ Mello, *supra* note 191, at 452 (“In his diary, Kaczynski wrote of his fear that his bombing campaign against technology would be dismissed as the work of a ‘sickie.’”).

was going to defend Kaczynski with a defense of imperfect necessity.²¹⁸ Serra had successfully employed this defense when he defended the distribution of clean hypodermic needles in Redwood City to halt the spread of AIDS, and he believed that it could be used effectively in the Unabomber trial.²¹⁹ Serra hoped to demonstrate that Kaczynski felt justified in planting bombs, acting not out of icy malignancy but out of desperation and benevolence.²²⁰ He hoped to show that Kaczynski thought that sacrificing a few of America's technological elites and waging a one-man war against modernity would draw attention to the costs of development and thereby prevent society's march toward spiritual Armageddon.²²¹

If Kaczynski *had* been permitted to discharge his lawyers and to replace them with Tony Serra, raising a defense of imperfect necessity instead of accepting an unwanted plea bargain based on mental illness, what might have happened? Of course, there is the possibility that a jury would have rejected Kaczynski's claim that his crimes were the product of imperfect necessity. A jury might very well have sentenced the Unabomber to death.²²² Even if Kaczynski had been permitted to present an imperfect necessity defense *and prevailed*, the result for him would have been—in practical terms—very similar to the existing outcome. Since Kaczynski's defense would have been an excuse and not a justification,²²³ Kaczynski would still have been found guilty of voluntary manslaughter and sentenced to prison. And because he was tried in federal court, and would have been sentenced under the real-offense sentencing guidelines,²²⁴ Kaczynski's sentence would have been based upon his relevant conduct (not

²¹⁸ See David S. Jackson, *A Better Defense for the Unabomber?*, available at http://www.time.com/time/reports/unabomber/980127_jackson.html (last visited May 6, 2007) (describing Serra's application of the imperfect necessity defense to Kaczynski's case).

²¹⁹ See *id.*

²²⁰ Tony Serra said that Kaczynski "did it not through some kind of loathsome hatred. He did it ultimately to save humanity from self-destruction . . ." *Id.*

²²¹ Kaczynski did not believe that the manifesto would, itself, save humanity from technology. But he believed that by killing people, he could draw attention to a socio-political screed that would otherwise be ignored. See *Industrial Society and Its Future*, *supra* note 207.

If we had never done anything violent and had submitted the present writings to a publisher, they probably would not have been accepted. If they had been accepted and published, they probably would not have attracted many readers, because it's more fun to watch the entertainment put out by the media than to read a sober essay . . . [*i*]n order to get our message before the public with some chance of making a lasting impression, we've had to kill people.

Id. (italics added). This belief was not delusional, but quite correct. The New York Times and Washington Post do not customarily offer full pages to their op-ed authors, but afforded Kaczynski seven full pages. See *supra* note 207.

²²² See MELLO, *supra* note 213, at 140 ("Arguing the political bases of his crimes would have increased the likelihood of a death sentence.").

²²³ See *supra* note 26 (describing the distinction between excuse and justification).

²²⁴ See United States Sentencing Commission, *Federal Sentencing Guideline Manual* (1998), available at <http://www.ussc.gov/guidelin.htm> (last visited May 6, 2007) (explaining application of federal sentencing guidelines).

just that charged), his criminal history, and the nature of his crimes.²²⁵ Even if he was convicted of manslaughter instead of murder, given the lengthy prison terms associated with the federal guidelines and the grave nature of his crimes, it is entirely possible that Kaczynski, already 55 years old at the time of sentencing, would spend the rest of his life in prison. The bottom line would be comparable to what transpired under the terms of the plea, but permitting Kaczynski to argue imperfect necessity would have resulted in a *very* different trial.

An imperfect necessity defense would have provided Kaczynski with a forum in which to expound the ideas articulated in *Industrial Society and Its Future*.²²⁶ He had disfigured and killed in order to draw attention to his claims,²²⁷ but a high-profile media trial would have provided him with a vastly superior vehicle for communicating his views.²²⁸ Would the media have come? You bet. Kaczynski had made the cover of both *U.S. News and World Report* and *Time*, and prompted an in-depth series of articles in the *Sacramento Bee* and the *New York Times*. “Cold as a lizard and ambitious as Lucifer,”²²⁹ Kaczynski was precisely the kind of defendant that, if unleashed, could have driven the media absolutely wild: a criminal genius,²³⁰ a mountain man who

²²⁵ In 1998, at the time of Kaczynski’s sentencing, voluntary manslaughter carried a base offense level of 25. USSG §2A1.3. For a first-time offender (someone with a criminal history score of I), this unmodified level results in a prison term of 57-71 months. Because Kaczynski’s sentence would have encompassed 16 bombings, three counts of manslaughter, and injuries to more than 20 people, his base offense level would be significantly higher. If, as would have been likely, Kaczynski was sentenced under the terrorism guideline (§3A1.4), his base level would have increased to 32, and his criminal history score would have increased to VI, resulting in a prison term of 210-262 months.

²²⁶ See *supra* note 68.

²²⁷ See *supra* note 221.

²²⁸ See Mello, *supra* note 191, at 477.

The Unabomber manifesto would have formed the core of any ideological defense against the death penalty. The defense would have situated the manifesto within an intellectual, cultural, and historical tradition. Eminent political scientists would then be called to interpret the manifesto, line by line, paragraph by paragraph, in excruciating detail.

Id.

²²⁹ Mello, *supra* note 191, at 435 (quoting Sam Houston).

²³⁰ Biographer Alston Chase reports Kaczynski’s childhood IQ as 167. See ALSTON CHASE, *HARVARD AND THE UNABOMBER: THE EDUCATION OF AN AMERICAN TERRORIST* 163 (2003). Psychiatrist Sally Johnson’s assessment placed it at 136. *Psychological Evaluation of Theodore Kaczynski*, available at <http://www.courtvt.com/trials/unabomber/documents/psychological.html> (last visited May 6, 2007). Whether merely 136 or a dizzying 167, such an IQ qualifies as borderline-genius. See DEAN KEITH SIMONTON, *GREATNESS* 219 (1994) (describing 132 as “borderline genius”). Only one person in 122 possesses an IQ of 136, and only one in 250,000 has an IQ of 167. See <http://www.iqcomparisonsite.com/IQtable.aspx> (last visited May 6, 2007). This suggests that Kaczynski’s IQ is as different from the population mean (IQ = 100) as that of someone with mild or moderate mental retardation. Since the law treats those with mental retardation differently than those with normal cognitive abilities, perhaps individuals with marked intellectual gifts should be treated differently as well, either exculpated for their difference or punished more severely, for having should have known better. Crimi-

cluded the largest manhunt in American history for seventeen years until his own brother turned him in,²³¹ a former Berkeley math professor who, acting as a serial killer, targeted other scientists and academics.²³² And he did it all because he believed that he *had to*—because he was trying to save the world.²³³ The Unabomber trial would have been media catnip.

The entire world would have lent an ear as a brilliant bomber explained, with the exacting detail of a mathematical proof, how the scientific developments that were supposed to liberate society had in fact made slaves of us all. While many television viewers would focus only on the celebrity of Kaczynski's infamy, no more interested in the eccentric former professor's diatribe than in *Industrial Society and Its Future*,²³⁴ some people would have attended to his arguments. They would have found his premises uncontroversial,²³⁵ and would have found themselves agreeing with many of his conclusions. It was far more comfortable for everyone involved to label Kaczynski as "mentally ill," even if so doing meant distorting diagnostic labels.²³⁶ The alterna-

more severely, for having should have known better. Criminologists actually know very little about the crimes of those with genius-level IQ scores. See J.C. Oleson, *Sipping Coffee with a Serial Killer: On Conducting Life History Interviews with a Criminal Genius*, 9 THE QUALITATIVE REPORT 219, 219 (2004), available at <http://www.nova.edu/ssss/QR/QR9-2/oleson.pdf> (describing paucity of criminological research on subject). Despite the lack of substantive information, the public remains transfixed by the idea of the criminal genius, the mastermind who uses his intellectual gifts for crime. See J.C. Oleson, *Contemporary Demonology: The Criminological Theories of Hannibal Lecter, Part Two*, 13 J. CRIM. JUST. & POPULAR CULTURE 29, 32 (2006), available at [http://www.albany.edu/scj/jcpc/vol13is1/Oleson%20\(3\).pdf](http://www.albany.edu/scj/jcpc/vol13is1/Oleson%20(3).pdf) (asserting that "there is no question that people are fascinated by a 'mastermind.'").

²³¹ See *supra* note 215; see also *supra* note 214.

²³² See *supra* note 194.

²³³ See *supra* note 220.

²³⁴ See *supra* note 207.

²³⁵ See *supra* notes 208-211.

²³⁶ The court-appointed psychiatrist, Dr. Sally Johnson, diagnosed Kaczynski as suffering from paranoid schizophrenia and paranoid personality disorder. See Psychological Evaluation of Theodore Kaczynski, *supra* note 230. His symptoms included the "delusion" that technology controls people and the "delusion" that his parents' psychological abuse compromised his ability to relate to women. But as one commentator noted, "there is no credible evidence that he hears voices, has hallucinations, or is 'out of touch with reality'—unless reality is defined as having conventional social and political views." William Finnegan, *Defending the Unabomber*, NEW YORKER, Mar. 16, 1998. Mello challenges the notion that Kaczynski suffered from delusions, writing:

If you think Kaczynski is a paranoid schizophrenic, I have a question for you: What are his delusions? The hallmark of paranoid schizophrenia is a delusional architecture: What are Kaczynski's delusions? That the Industrial Revolution has been a mixed blessing? Hardly a delusion. That technology is chipping away at our freedoms and privacy? Hardly a delusion. That committing murder—and threatening to commit more—was the only way to force the New York Times and Washington Post into publishing, in full and unedited, the 35,000-word Unabomber Manifesto? Hardly a delusion. That the powers that be in our culture would define the Unabomber as a pathetic lunatic? Hardly a delusion. That a simple, self-sufficient life, in one of the most physi-

tive to dismissing Kaczynski as a pitiable example of the “mad genius,”²³⁷ as a crank whose loneliness had fermented into something cruel, was to consider seriously the possibility that he was right. And the introduction of an imperfect necessity defense would have afforded him the opportunity to construct his best argument and issue a clarion call to action. Instead of turning the courtroom into a forum for the debate of these heretical arguments,²³⁸ into a media circus,²³⁹ it was easier to coerce Kaczynski into accepting a plea agreement. He was transferred to the “supermax” prison in Florence, Colorado,²⁴⁰ where he was removed from public view.²⁴¹

C. “*The real value of all our attacks today lies in the psychological impact, not in the immediate casualties*”: The United States versus Timothy James McVeigh

At 9:02 on the morning of April 19, 1995, a truck bomb—not altogether unlike those described in *Fight Club*²⁴²—went off outside the Murrah Federal Building in

cally beautiful places in America, is preferable to the rat-race of academia? Hardly a delusion.

Mello, *supra* note 191, at 472.

²³⁷ There is a vast body of work exploring the relationship between genius and madness. *See, e.g.*, GEORGE BECKER, *THE MAD GENIUS CONTROVERSY* (1978); HANS EYSENCK, *GENIUS* (1995); KAY REDFIELD JAMISON, *TOUCHED WITH FIRE* (1993) (all discussing association between genius and madness); J.C. Oleson, *The Evolution of the Concept of Genius*, 12 *TELECOM* 14 (1997). Certainly, the public representation of Kaczynski capitalized upon the romantic image of the mad genius. He was not the man of the year, yet on April 15, 1996, Kaczynski made the cover of both *Time* and *U.S. News & World Report* magazines, his bedraggled picture pasted under the sprawling, bold headlines that read respectively, “Twisted Genius” and “Odyssey of a Mad Genius.”

²³⁸ *See supra* note 213.

²³⁹ At the time of Kaczynski’s prosecution, the media circus of the 1995 O.J. Simpson trial was still fresh in the minds of many. *See* *People of Cal. v. Orental J. Simpson*, No. BA097211 (Cal. Super. Ct. acquitted Oct. 3, 1995). In the Simpson trial, the media frenzy surrounding the case made it difficult to conduct a fair trial. *See* Andrew G.T. Moore II, *Essay, The O.J. Simpson Trial—Triumph of Justice or Debacle?* 41 *ST. LOUIS L.J.* 9, 40 (1996) (suggesting that the O.J. case “tarnished the image of judges, lawyers, and worst of all, the entire system of justice”).

²⁴⁰ *See* Francis X. Clines, *A Futuristic Prison Awaits the Hard-Core 400*, *N.Y. TIMES*, Oct. 17, 1994, at A1; Mark Johnson, *Colorado Facility Is Pacesetter of Newest “Supermax” Prisons*, *HOUSTON CHRON.*, June 20, 1999, at A8; Michael Taylor, *The Last Worst Place*, *S.F. CHRON.*, Dec. 28, 1998, at A3; Bob Unruh, *Latest in Incarceration Outdoes Alcatraz; Prisons: Super Max Facility About to Open in Colorado Will House the Very Worst Federal Convicts, the Kind Once Sent to Island in San Francisco Bay. There’ll Be No Coddling Here*, *L.A. TIMES*, Dec. 11, 1994, at A18 (all describing the Florence ADX facility).

²⁴¹ In 2001, the Ninth Circuit denied Kaczynski’s appeal. *See* *United States v. Theodore Kaczynski*, 239 F.3d 1108 (2001). In 2002, the United States Supreme Court denied certiorari in his case, thereby extinguishing the possibility that he could use the federal courts to argue the necessity of resisting technological society. *See* *Theodore John Kaczynski v. United States*, 535 U.S. 933 (2002).

²⁴² *See supra* note 152 (describing composition of truck bombs employed in *Fight Club*).

Oklahoma City, Oklahoma.²⁴³ The ensuing explosion destroyed a third of the building, damaged 324 surrounding buildings, and blew out doors and windows in a 50 block area.²⁴⁴ The explosion could be felt 55 miles away, and measured 6.0 on the Richter scale.²⁴⁵ One hundred and sixty-eight people died in the blast; another 853 were wounded.²⁴⁶ It was, at least until the September 11, 2001, attacks on the World Trade Center and the Pentagon, the worst act of terrorism to occur on United States soil.²⁴⁷

The individual responsible for the attack was Timothy McVeigh.²⁴⁸ McVeigh had parked a Ryder truck laden with somewhere between 3,000 and 6,000 pounds of ammonium nitrate-fuel oil explosives in front of the Murrah Federal Building,²⁴⁹ and

²⁴³ See generally LOU MICHEL & DAN HERBECK, *AMERICAN TERRORIST: TIMOTHY MCVEIGH AND THE OKLAHOMA CITY BOMBING* (2001) (describing circumstances surrounding the attack and subsequent trial); KATHRYN M. TURMAN, U.S. DEPARTMENT OF JUSTICE, *RESPONDING TO TERRORISM VICTIMS: OKLAHOMA CITY AND BEYOND* (2000) (describing attack on Alfred P. Murrah Building with emphasis on victims).

²⁴⁴ See, e.g., TURMAN, *supra* note 243, at 1 (describing physical effects of explosion).

²⁴⁵ *Id.*

²⁴⁶ *Id.* (“The blast killed 167 men, women, and children, and injured 853 others. A volunteer nurse became the 168th fatality when falling debris struck her as she responded to the emergency.”) (citations omitted).

²⁴⁷ See, e.g., Jo Thomas, *McVeigh Described as Terrorist and as Victim of Circumstance*, N.Y. TIMES, May 30, 1997, at A1 (“Mr. Jones warned the jurors not to base their verdict on their sympathy for the 168 people who died in the bombing, the worst terrorist act ever committed on American soil.”).

²⁴⁸ Two other individuals were prosecuted for their involvement in the Oklahoma City bombing: Terry Nichols and Michael Fortier. Nichols twice avoided the death penalty for his role as McVeigh’s accomplice. He was convicted in federal court on December 23, 1997 of conspiring to bomb a federal building and eight counts of involuntary manslaughter (i.e., the eight federal law enforcement officers killed in the Murrah attack). See *United States v. Nichols*, 169 F.3d 1255, 1260 (1999) (describing Nichols’ conviction). He was sentenced to life imprisonment without parole on June 4, 1998, ordered to pay \$14.5 million dollars in restitution, and incarcerated in Florence, Colorado’s supermax facility. See Taylor, *supra* note 240 (describing Nichols placement in Florence ADX). He was subsequently convicted in Oklahoma state court on 161 counts of first-degree murder, for which he was sentenced to 161 consecutive life terms without the possibility of parole. See, e.g., Monica Davey, *Nichols is Found Guilty in Oklahoma Bombing*, N.Y. TIMES, May 27, 2004, at A16 (describing verdict of guilty on 161 counts of first-degree murder). Michael Fortier struck a plea bargain with prosecutors, and provided influential testimony in McVeigh’s trial. See *infra* note 267. In exchange for his testimony, on May 27, 1988, Fortier was sentenced to 12 years in prison and a \$200,000 fine. See *United States v. Fortier*, 180 F.3d 1217 (10th Cir. 1999), *modified*, *United States v. Fortier*, 242 F.3d 1224 (10th Cir. 2001) (describing terms of sentence and affirming after fine reduced on remand). He was released from prison on January 20, 2006. See Ralph Blumenthal, *Release of Oklahoma City Bombing Figure Kindles Fears*, N.Y. TIMES, Jan. 19, 2006, at A16 (describing Fortier’s release from federal prison).

²⁴⁹ See *United States v. McVeigh*, 153 F.3d 1166, 1177 (10th Cir. 1998) (“The Murrah Building was destroyed by a 3,000-6,000 pound bomb comprised of an ammonium nitrate-based explosive carried inside a rented Ryder truck.”). The explosives were the equivalent of 4,000 pounds of TNT. The resulting blast was powerful enough to rip through pavement 18

then walked away in time to avoid the explosion.²⁵⁰ As he drove away from the crime scene, however, McVeigh was stopped by an Oklahoma state trooper for driving without a license plate. Then, when he stepped out of the car, the trooper noticed a concealed handgun under McVeigh's jacket.²⁵¹ He was taken into custody, booked on four misdemeanor offenses,²⁵² and held until the assigned judge was available to hear his case. In the meantime, the vehicle identification number of the ruined Ryder truck had been located amid the rubble of the Murrah Building, and an artist's sketch of the man who had rented the truck (McVeigh) was circulated throughout the Oklahoma City area. A motel manager identified McVeigh and confirmed the make and model of his car. Officials quickly realized that the suspect was being detained in a local jail, and took him into federal custody, just half an hour before he was to be released on bond.²⁵³

As agents learned more about McVeigh, they began to understand just how politically motivated the bombing of the Murrah Building was. McVeigh, a former soldier who had served with distinction in the Persian Gulf War,²⁵⁴ viewed the United States government with distrust and contempt.²⁵⁵ He had been deeply disturbed by the 1992 shoot-out between federal agents and survivalist Randy Weaver,²⁵⁶ and was stirred to action by the federal government's assault on David Koresh and the Branch Davidians' compound in Waco, Texas.²⁵⁷ It was no coincidence that McVeigh set off the

inches thick and to create a 28-foot crater that was more than 6 feet deep. See Paul F. Mlakar Sr., et al., *Blast Loading and Response of Murrah Building*, FORENSIC ENGINEERING 36 (1997) (describing effects of blast on physical structure).

²⁵⁰ McVeigh followed a path he had previously reconnoitered so as to be behind a building when the bomb went off. Still, the blast lifted him a full inch off the ground and buffeted his cheeks. See MICHEL & HERBECK, *supra* note 243, at 231.

²⁵¹ See Jo Thomas, *Officer Describes His Arrest of a Suspect in the Oklahoma Bombing*, N.Y. TIMES, Apr. 29, 1997, at A13 (describing circumstances surrounding McVeigh's arrest).

²⁵² McVeigh was initially charged with "unlawfully carrying a weapon, transporting a loaded firearm in a motor vehicle, failing to display a current license plate, and failing to maintain proof of insurance". Ted Ottley, *Timothy McVeigh: License Tag Snag*, at http://www.crimelibrary.com/serial_killers/notorious/mcveigh/snag_2.html (last visited May 6, 2007).

²⁵³ See Stephen Cvengros, *Man, Oh, Manhunt: Hot on the Trail of Terror, Bomb Investigators Track Down a Suspect*, CHICAGO TRIB., May 2, 1995, at page 3 (North Sports Final Edition) (noting that McVeigh was only 30 minutes away from being released from custody).

²⁵⁴ See Hendrik Hertzberg, *Political Death*, NEW YORKER, May 14, 2001, at 47 (describing McVeigh as a "decorated Army veteran—a recipient of the Bronze Star for his service in the Gulf War").

²⁵⁵ See James Barron, *Terror in Oklahoma: The Suspect: A '92 Letter Says Violence is Road to Change*, N.Y. TIMES, Apr. 27, 1995, at A20 (quoting McVeigh's 1992 letter to the Lockport, New York newspaper, the *Union-Sun*, as demanding "What is it going to take to open the eyes of our elected officials? Do we have to shed blood to reform the current system?").

²⁵⁶ See, e.g., Gordon Witkin, *The Nightmare of Idaho's Ruby Ridge*, U.S. NEWS & WORLD REPORT, Sept. 11, 1995, at 24 (describing circumstances surrounding the shoot-out deaths of a U.S. Marshal, Weaver's wife, and 14-year-old son).

²⁵⁷ See, e.g., Committee on the Judiciary, *Materials Relating to the Investigation Into the Activities of Federal Law Enforcement Agencies Toward the Branch Davidians*, 104th Congress, Second Session

truck bomb on April 19, 1995; his attack on the federal building marked the two year anniversary of the BATF assault on Waco.²⁵⁸ And if that was not sufficient proof of a political motive, and if his dealings with members of the American neo-Nazi movement were not,²⁵⁹ the shirt that McVeigh wore when bombing the building *was*. McVeigh wore a shirt with a picture of President Lincoln and the words, “*sic semper tyrannis*” (thus ever to tyrants), the words that John Wilkes Booth called out while assassinating the president.²⁶⁰ On the back of the shirt, an image of a tree dotted with red droplets and the revolutionary words of Thomas Jefferson, “The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.”²⁶¹ As far as Timothy McVeigh was concerned, detonating a truck bomb outside the federal building was the act of a genuine patriot, of someone who loved his country enough to declare war upon his government.

Some have suggested that McVeigh wanted to get caught, that he intentionally left a trail that would ensure his arrest, so that he could have a platform from which to attack the federal government.²⁶² But McVeigh did not get the trial he wanted. When the trial began on April 24, 1997, he wanted Stephen Jones, his court-appointed attorney, to present a necessity defense. He ached for the opportunity to present evidence of the “crimes” that the bombing was intended to avenge and to prevent.²⁶³

(1997) (reviewing investigation into Waco events); PHILIP B. HEYMANN, LESSONS OF WACO: PROPOSED CHANGES IN FEDERAL LAW ENFORCEMENT (2003) (analyzing expert reports made to the Department of Justice); Jacob Sullum, *The Fire Last Time*, 30 REASON 52 (describing deviations from the rules of engagement in the February 1993 raid by the Bureau of Alcohol, Tobacco, and Firearms on the Branch Davidian compound at Mount Carmel, the subsequent 51-day FBI siege, and the April 19 assault that led to a fire that claimed the lives of 86 men, women, and children (including four BATF agents)).

²⁵⁸ While most FBI profilers initially believed that the bombing was the act of Middle Eastern terrorists, at least one FBI behavioral scientist noted the significance of the Waco anniversary, and suggested that the offender was white, male, in his twenties, with a military background. See Doug Saunders, “*We’re Living in 1930s Germany*”: Oklahoma Bomber Timothy McVeigh Was Executed this Week, GLOBE AND MAIL, June 16, 2001, at F4 (describing Clinton R. Van Zandt’s profile of the Oklahoma City Bomber).

²⁵⁹ See, e.g., STEPHEN JONES & PETER ISRAEL, OTHERS UNKNOWN: THE OKLAHOMA CITY BOMBING CASE AND CONSPIRACY (1998) (outlining a much larger conspiracy of actors, including neo-Nazis); Howard Witt, *To Him, Murrah Blast Isn’t Solved: Lawyer Investigating 1995 Oklahoma City Attack Says Loose Ends Indicate Likelihood of Neo-Nazi Connections*, CHICAGO TRIB., December 10, 2006, at C3 (suggesting that recent information supports the theory of a neo-Nazi connection to the Oklahoma City bombing).

²⁶⁰ See, e.g., Lou Kilzer & Kevin Flynn, *Did McVeigh Plan to Get Caught, or Was He Sloppy?*, ROCKY MOUNTAIN NEWS, Dec. 19, 1997, at 4A (describing shirt McVeigh wore while he committed the crime).

²⁶¹ See Steven K. Paulson, *McVeigh Trial Opens: Bombing Called an “Act of Terror”*, CHICAGO SUN-TIMES, Apr. 24, 1997, at 1.

²⁶² See, e.g., Kilzer & Flynn, *supra* note 260 (noting many simple steps that McVeigh could have taken to reduce his chances of being apprehended).

²⁶³ See, e.g., Kevin Flynn, *McVeigh Unhappy with Trial: Bomber Had Wanted Courtroom as Stage to Air Propaganda*, ROCKY MOUNTAIN NEWS, Apr. 4, 2001, at 7A (describing McVeigh’s objective of presenting a necessity defense).

Jones, however, did not believe that a necessity defense was viable, and settled upon the strategy of poking holes through the prosecution's case to raise reasonable doubt.²⁶⁴ Jones suggested that prosecutors had conducted a hasty two-week investigation of the bombing, then spent two years meticulously developing evidence against McVeigh, all the while ignoring crucial evidence and disregarding other leads.²⁶⁵ According to Jones, McVeigh was merely a designated patsy in a larger conspiracy of shadows.²⁶⁶ But the prosecution's case was overwhelming,²⁶⁷ and at the conclusion of the guilt phase, the jury convicted McVeigh on all counts after just four days of deliberation.²⁶⁸

During the penalty phase of McVeigh's trial, however, Jones *did* introduce evidence of his client's ideology. In the opening moments of the penalty phase, the defense team characterized McVeigh as a model soldier who had been traumatized by what happened at Waco. They told the jurors that McVeigh believed the "government had declared war on the American people."²⁶⁹ They also introduced evidence about Waco, insisting that "Mr. McVeigh acted out of concern about what he per-

²⁶⁴ See Jo Thomas, *McVeigh Defense Team Suggests Real Bomber Was Killed in Blast*, N.Y. TIMES, May 23, 1997, at A1. Jones has published a detailed explanation of the trial. See Stephen Jones & Jennifer Gideon, *United States v. McVeigh: Defending the "Most Hated Man in America"*, 51 OKLA. L. REV. 617 (1998).

²⁶⁵ A December 2006 report by Congressman Dana Rohrabacher (R-CA) suggests that there were, indeed, irregularities in the FBI investigation of the Oklahoma City Bombing case. See Dana Rohrabacher, *The Oklahoma City Bombing: Was there a Foreign Connection?* (Chairman's Report: Oversight and Investigations Subcommittee of the House International Relations Committee), available at: <http://rohrabacher.house.gov/UploadedFiles/Chairman's%20Report.pdf> (last visited May 6, 2007).

²⁶⁶ See generally JONES & ISRAEL, *supra* note 259 (suggesting existence of a conspiracy that includes Islamic fundamentalists and white supremacists).

²⁶⁷ The prosecution introduced 137 witnesses, including survivors of the attack, the most damning of whom were McVeigh's own friends and family. Lori Fortier described the day that McVeigh stacked soup cans to illustrate the kind of shaped charge he intended to employ in his truck bomb. See Jo Thomas, *For First Time, Woman Says McVeigh Told of Bomb Plan*, N.Y. TIMES, April 30, 1997, at A1. Her husband, and McVeigh's friend, Michael Fortier, described a conversation in which he had asked McVeigh about the deaths that a bombing would cause. McVeigh denied the harm by couching the attack in terms drawn from the movie, *Star Wars*. Fortier told the jury that McVeigh had characterized the bombing victims as stormtroopers—they may have been innocent individually, but because they were part of the evil empire, they were guilty by association. Lois Romano & Tom Kenworthy, *Prosecutor Paints McVeigh as "Twisted" U.S. Terrorist*, WASHINGTON POST, Apr. 25, 1997, at A1. Even McVeigh's sister, Jennifer, testified against him, describing his transformation from critic of government to lawless militant. She admitted that he had talked to her about explosives, and described one of his letters that ended with the ominous words, "I won't be back—forever." Michael Fleeman, *Sister Recalls McVeigh Hatred: Government Target of Anger, She Testifies*, CHICAGO SUN-TIMES, May 6, 1997, at News 18.

²⁶⁸ See *United States v. McVeigh*, 153 F.3d 1166, 1179 (10th Cir. 1998) (describing duration of jury deliberations).

²⁶⁹ Jo Thomas, *Political Ideas of McVeigh are Subject at Bomb Trial*, N.Y. TIMES, June 11, 1997, at A19.

ceived as a threat to his country, typified by the raid on the Branch Davidian compound near Waco.”²⁷⁰ In order to better understand McVeigh’s motives, the jury viewed documentaries about the events of Waco.²⁷¹ Mello quotes McVeigh’s attorney as stating eloquently, “You will hear ... that the fire in Waco did keep burning in McVeigh. He is in the middle of it.”²⁷² But tracing McVeigh’s fury to the fires of Waco was not the necessity defense, and as a mitigation strategy, reminding the jurors of McVeigh’s icy contempt proved to be a “catastrophe.”²⁷³ The jury sentenced McVeigh to death on Friday, June 13, 1997. Two months later, the sentence was formally pronounced. Judge Matsch

sentenced him to death for each of the 11 counts in his indictment, on all of which the jury had convicted him: one count of conspiracy to use a weapon of mass destruction, one count of use of a weapon of mass destruction, one count of destruction by explosives and one count of first-degree murder for each of eight Federal law-enforcement officers who died in the blast.²⁷⁴

The entire sentencing proceeding took only nine minutes.²⁷⁵ After the trial, the increasingly acrimonious relationship between McVeigh and Stephen Jones ruptured, and Jones was replaced as lead counsel for the automatic appeal.²⁷⁶ McVeigh was transferred to the supermax prison in Florence, Colorado,²⁷⁷ where he actually met Unabomber Theodore Kaczynski.²⁷⁸ His appeals were unsuccessful.²⁷⁹

²⁷⁰ Thomas, *supra* note 269.

²⁷¹ See Gaylord Shaw, *McVeigh and Waco: Jurors See Tapes of Siege Before Deliberating Fate*, Newsday, Jun. 11, 1997, at A5 (describing juror’s viewing of Waco documentaries “Day 51” and “The Big Lie”), *but see* Jones & Gideon, *supra* note 264, at 656.

The defense also wanted to prove as a matter of fact and law that the government committed murder against the Branch Davidians at Waco. Judge Matsch, however, restricted the defense to evidence of sources that McVeigh had used. Since many of these sources were themselves inflammatory, lacking objectivity, and containing demonstratively false statements, the defense was not likely assisted by this limited evidence. Had the jury heard the complete evidence concerning Waco, the verdict in the second stage may well have been different.

Id.

²⁷² Mello, *supra* note 213, at 139.

²⁷³ Peter Amin & Tom Morgenthau, *The Verdict: Death*, NEWSWEEK, June 23, 1997.

²⁷⁴ Jo Thomas, *McVeigh Speaks at Last, Fleetingly and Obscurely*, N.Y. TIMES, Aug. 15, 1997, at A14.

²⁷⁵ *Id.*

²⁷⁶ See Jo Thomas, *McVeigh Sees Lawyer’s Deal as Betrayal*, N.Y. TIMES, Feb. 11, 1998, at A19 (describing McVeigh’s anger upon learning that Jones had negotiated a book deal based on the case).

²⁷⁷ See *supra* note 240 (describing Florence supermax facility).

²⁷⁸ In a limited way, the two men were kindred spirits. Kaczynski found McVeigh to be an “intelligent” young man who thought seriously about social problems, especially those dealing with individual freedom. See MICHEL & HERBECK, *supra* note 243, at 398-402.

²⁷⁹ The Tenth Circuit Court of Appeals confirmed the sentence in September of 1999. *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998). In March of 2000, the Supreme

Before he was executed, McVeigh attempted to explain why he bombed the Murrah Building, and tried to justify his actions. First, of course, there was the certainty that the scale of the destruction would resonate in the public imagination. In the words that McVeigh had highlighted in his copy of *The Turner Diaries*,²⁸⁰ “The real value of all our attacks today lies in the psychological impact, not in the immediate casualties.”²⁸¹

He explained that he had considered a campaign of individual assassinations,²⁸² but chose to bomb the federal building instead because killing a large number of federal employees would increase media exposure.²⁸³ The bombing, McVeigh explained,

Court denied certiorari in the case. *McVeigh v. United States*, 526 U.S. 1007 (2000). In January of 2001, McVeigh decided to terminate his appeals and “volunteer” for execution. A date was set: May 16, 2001. See George Lane & Kit Miniçlier, *McVeigh Gets May 16 Death Date Okla. Bomber to Be Executed by Lethal Injection*, DENVER POST, Jan. 17, 2001, at A1. Just six days before McVeigh’s execution, however, the Department of Justice revealed that it had located more than 3,000 pages of potentially exculpatory evidence that had never been disclosed to McVeigh’s lawyers. See, e.g., Linda Gorov & Tatsha Robertson, *FBI Withheld Evidence from McVeigh Defense, US Says Evidence Not Exculpatory*, BOSTON GLOBE, May 11, 2001, at A46 (describing the release of evidence, including the “302” forms used by the FBI to document investigative leads). McVeigh was outraged by yet another example of the government’s lawlessness, and determined to renew his appeals. See Jo Thomas, *McVeigh Prepares for Death and Awaits Move from Cell*, N.Y. TIMES, Jun. 9, 2001, at A7.

Mr. McVeigh was originally scheduled to die on May 16. His execution was postponed on May 11 by Attorney General John Ashcroft after the F.B.I. found thousands of pages of documents that had not been given to Mr. McVeigh’s lawyers before trial. On Wednesday, a federal judge in Denver denied Mr. McVeigh’s request for a stay of execution, and his decision was upheld on Thursday by the United States Court of Appeals for the 10th Circuit. Mr. McVeigh has said he will not try again to stop his execution.

Id. After his first appeal was rejected, however, he waived all remaining appeals and expedited his execution. Timothy McVeigh was put to death by lethal injection on June 10, 2001, the first federal execution in more than 37 years. See Death Penalty Information Center, *Federal Executions 1927-2003*, at: <http://www.deathpenaltyinfo.org/article.php?scid=29&did=149> (noting that the last federal execution before Timothy McVeigh was that of Victor Feguer, in March of 1963).

²⁸⁰ *The Turner Diaries* is a 1978 action novel written by William L. Pierce, an important figure in the American neo-Nazi movement, under the pen name Andrew Macdonald. Its hero, Earl Turner, stands up against gun control policies by making a truck bomb and blowing up the Washington FBI Building. The book deeply influenced McVeigh. See, e.g., Jo Thomas, *Behind a Book that Inspired McVeigh*, N.Y. TIMES, Jun. 9, 2001, at A7.

²⁸¹ Thomas, *supra* note 251 (quoting a highlighted passage in McVeigh’s copy of *The Turner Diaries*).

²⁸² See Timothy McVeigh, *McVeigh’s Apr. 26 Letter to Fox News*, at <http://www.foxnews.com/story/0,2933,17500,00.html> (Apr. 26, 2001) (explaining his rationale for bombing the Murrah Building). Specifically, McVeigh had contemplated the murder of Judge Walter Smith (who presided over the Waco trial), Lon Horiuchi (the FBI sniper from Ruby Ridge), and Attorney General Janet Reno. *Id.*

²⁸³ MICHEL & HERBECK, *supra* note 243, at 186-88 (describing this strategic choice).

had been a retaliatory strike against the government for what had transpired in Waco and elsewhere.²⁸⁴ McVeigh believed that federal law enforcement agencies were using increasingly militarized “training, tactics, techniques, equipment, language, dress, organization, and mindset,”²⁸⁵ up to and including the use of tanks deployed against United States citizens.²⁸⁶ McVeigh saw the bombing of the Murrah Federal Building as a preemptive strike against a command and control center of this militarized government. He wrote, “When an aggressor force continually launches attacks from a particular base of operation, it is sound military strategy to take the fight to the enemy.”²⁸⁷ Finally, he meant the attack to serve as a moral lesson.

Bombing the Murrah Federal Building was morally and strategically equivalent to the U.S. hitting a government building in Serbia, Iraq, or other nations.... [W]hat occurred in Oklahoma City was no different than what Americans rain on the heads of others all the time.... Many foreign nations and peoples hate Americans for the very reasons most Americans loathe me. Think about that.²⁸⁸

But in a very real sense, all of this was too late to matter. If McVeigh’s attorney had employed an imperfect necessity defense at trial, it might have catalyzed real discussion in the United States. But McVeigh did not do that. He pleaded not guilty, remained silent, and put the prosecution to its proof.²⁸⁹ Instead of using the courtroom as a platform to criticize a federal government that has broken loose of its moorings, and instead of using the trial to express outrage that events like Ruby Ridge and Waco can go unchecked, McVeigh said nothing. The scant political justification that was proffered came during the penalty phase of his trial, by which point the media focus had shifted to the avenging of the bombing victims and to McVeigh’s pending execution.²⁹⁰ By then, it was far too late to suggest that the real origins of the Oklahoma City bombing were not in the aberrational thinking of a gun nut who had “twisted off,” but in the actions of a federal government that was overreaching, tyrannical, and no longer accountable through legitimate channels. The jury agreed that

²⁸⁴ See McVeigh, *supra* note 282 (“Foremost, the bombing was a retaliatory strike; a counter attack, for the cumulative raids (and subsequent violence and damage) that federal agents had participated in over the preceding years (including, but not limited to, Waco.)”).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* His attorney, Stephen Jones, noted that McVeigh was indeed loathed by many U.S. citizens. See Jones & Gideon, *supra* note 264, at 621 (“He was described often as ‘the most hated man in America.’”).

²⁸⁹ See Morris Dees & Mark Potok, *The Future of American Terrorism*, N.Y. TIMES, June 10, 2001, at Section 4, p. 15 (suggesting that if McVeigh had used his trial as a platform for political outrage, he might have become more of a martyr, but noting that he instead remained silent and pleaded not guilty).

²⁹⁰ See, e.g., Richard Willing, *Forgiveness and Vengeance: Clergy, Congregations Grapple with Meaning of McVeigh’s Death*, USA TODAY, Jun. 11, 2001, at 3A (describing tension between retribution and revenge).

McVeigh's motives were rooted in the events at Waco,²⁹¹ yet this was for them just one mitigating factor on a checklist (and not enough to overcome the overwhelming aggravating evidence). Throughout the trial, the focus was always on McVeigh and his actions; while the "crimes" of his government might have motivated McVeigh's crimes, federal misconduct and cover-up never became a central issue.²⁹²

If McVeigh had raised the defense he wanted, if his attorneys had argued imperfect necessity (since common law necessity was unlikely to be viable), would it have saved Timothy McVeigh's life? Would raising the defense of imperfect necessity have moved the jury to convict Timothy McVeigh of manslaughter instead of murder? Probably not.²⁹³ But if McVeigh's attorneys had established a prima facie case for imperfect necessity in the guilt phase of the trial, the proceedings could have been very different. He could have used the trial as a platform to educate the public about what happened at Waco and Ruby Ridge. In attempting to establish the imminence of harm, McVeigh could have demonstrated how urgently citizen action was needed to control the abuses of government. In attempting to establish the lack of reasonable alternatives, he could have condemned the other branches of government for their utter unresponsiveness. McVeigh was venomous about the lack of a government response to Waco:

I waited two years from "Waco" for non-violent "checks and balances" built into our system to correct the abuse of power we were seeing in federal actions against citizens. The Executive; Legislative; and Judicial branches not only concluded that the government did nothing wrong (leaving the door open for "Waco" to happen again), they actually gave awards and bonus pay to those agents involved, and conversely, jailed the survivors of the Waco inferno after the jury wanted them set free. Other "checks and

²⁹¹ See Peter Annin & Tom Morganthau, *The Verdict: Death*, NEWSWEEK, Jun. 23, 1997, at 40 (describing jury deliberations in McVeigh trial).

[T]he jurors, in a ritual required by law, announced their votes on each of 14 "mitigating factors" offered by the defense. They agreed unanimously that McVeigh had no prior criminal record and had won the Bronze Star during the Persian Gulf War. Four thought he had sometimes "done good deeds," two agreed that he was a "reliable, dependable" person and one kindly soul thought he "deals honestly" with others. All 12 accepted Burr's depiction of McVeigh's deep hostility toward the federal government after Waco and the FBI shootout at Ruby Ridge, Idaho. They agreed that McVeigh believed the FBI and the Bureau of Alcohol, Tobacco and Firearms were responsible for the deaths of the Branch Davidians, and they agreed that McVeigh thought the Feds had "failed to punish those responsible" for Waco and Ruby Ridge. They also agreed that McVeigh thought the Feds' ninja-warrior tactics in those incidents were "leading to a police state." But they unanimously rejected the most critical point of all: that McVeigh "believed deeply in the ideals upon which the United States was founded."

Id.

²⁹² See *supra* note 271 (describing presiding judge's restriction of Waco evidence).

²⁹³ See Annin & Morganthau, *supra* note 291 (suggesting that the jurors were looking for empathy and regret from McVeigh, not militant claims of political necessity); *supra* note 222 and associated text (quoting Mello as concluding that raising arguments of political necessity would not have spared Kaczynski's life).

balances” likewise proved futile: media awareness and outcry (the major media failed in its role as overseer of government ally); protest marches; letter campaigns; even small-budget video production; etc. - all failed to correct the abuse.²⁹⁴

In attempting to establish the relative severity of the harms, McVeigh could have denounced the government’s slide into tyranny and fascism. And in presenting evidence of a causal relationship, he could have insisted that things were so deranged in our country that only decisive action undertaken by individuals could ameliorate the problem.

Defending the case under a theory of imperfect necessity might not have changed the ultimate outcome for McVeigh *qua* defendant, but it would have transformed the nature of the trial. McVeigh might very well have looked more like a monster than a patriot to the jury, and he might very well still have been sentenced to death for destroying the Murrah Building, but mounting a defense on the theory of imperfect necessity would have forced the prosecution and the court to address in a serious way McVeigh’s grievances with the federal government. Defending the case on the theory of imperfect necessity could have led the public to consider McVeigh’s crimes as politically motivated acts of rage and defiance, and to think more carefully about whether they were in any measure justified.

For Tyler Durden, Theodore Kaczynski, and Timothy McVeigh, the political necessity defense was elusive. Tyler Durden, a mentally-ill defendant who blew up the debt record, would be far more likely to be acquitted on grounds of insanity than on a defense of necessity. Something analogous happened in the case of Unabomber Theodore Kaczynski. Although Kaczynski wanted to justify his murder of three people and wounding of 23 others with a necessity defense grounded in a frontal assault on technology, his attorneys viewed such a defense as suicide, and used a threat of a mental-illness defense to coerce Kaczynski into accepting a plea agreement. Timothy McVeigh also wanted a necessity defense that his attorneys would not pursue. Although some of his extremist views were eventually admitted during the penalty phase of his trial, the defense was based on the claim that McVeigh was just one actor in a much larger conspiracy. Taken together, the cases suggest defense attorneys—as with judges—disfavor the political necessity defense. Judges use common law analyses to suppress necessity’s radical potential; defense lawyers pressure and cajole their clients into accepting legal strategies that are less risky and less inflammatory.

But what if a defendant accused of unprecedented violence was to claim that his crimes were both political in nature and necessary? What if the evidence supporting a claim of necessity was credible? How might a court grapple with such a case?

²⁹⁴ McVeigh, *supra* note 282.

IV. Heroic Measures: A Hypothetical of Extremes

*Every mammal on this planet instinctively develops a natural equilibrium with the surrounding environment. But you humans do not. You move to an area and you multiply and multiply until every natural resource is consumed and the only way you can survive is to spread to another area. There is another organism on this planet that follows the same pattern. Do you know what it is? A virus. Human beings are a disease, a cancer of this planet. You are a plague. And we are ... the cure.*²⁹⁵

There are a host of pathologies associated with modern living, including frenzied consumption, and these pathologies have put not only American society but the entirety of the world at risk. Given the collateral effects of American consumption, could a defense of necessity (or, more likely, imperfect necessity) be used to justify crimes undertaken in an attempt to stem the evils of consumption? If so, would they be *justified* under the doctrine of necessity, or would *excuse* be the only possible outcome?

A. The Pathology of Modernity

We live at an extraordinary time in human history. Many modern humans live like gods. Although our jaded eyes no longer see the miracles in our everyday activities, we live in homes that are heated and cooled with central air, that are wired for electricity and natural gas and cable TV, and that have running hot and cold water and garbage disposals and toilets; we prepare our meals in microwave ovens; we watch DVD (or HD-DVD or Blu-ray) movies on high-definition televisions. We call our friends on cell phones, and check our email on Blackberries, and use the Internet to make instantaneous purchases from halfway around the world. We take photos on digital cameras and edit home movies on laptop computers. In vast cities with populations in the millions, we drive to work in automobiles that are capable of 100+ mph speeds, and when we arrive at our offices, we use desktop computers that possess five to ten times more computational power than the system that put man on the moon. We pick up food from drive-up windows, pick up our children from public schools, and shop in malls that contain dozens or even hundreds of stores. We get annual flu shots, take Viagra for sexual dysfunction, Prozac for depression, get LASIK for perfect vision, and get liposuction for perfect swimsuit bodies. We work out in gyms, each of us wrapped in the cocoon of an iPod, and grumble about being treated like cattle when we fly coach class between the United States and Europe. These things have become so ingrained in our lives that we no longer recognize them as extraordinary.

Previous generations of human beings, however, would be stunned by the way we blithely live. In his 1970 bestseller, *Future Shock*, Alvin Toffler describes the accelerating rate of change confronting modern humans. Using transportation as just one example, he writes:

²⁹⁵ THE MATRIX (Warner Bros. 1999).

[I]n 6000 B.C. the fastest transportation available to man over long distances was the camel caravan, averaging eight miles per hour. It was not until about 1600 B.C. when the chariot was invented that the maximum speed was raised to roughly twenty miles per hour. ... It was probably not until the 1880's that man, with the help of a more advanced steam locomotive, managed to reach a speed of one hundred mph. It took only fifty-eight years, however, to quadruple the limit, so that by 1938 airborne man was cracking the 400-mph line. It took a mere twenty-year flick of time to double the limit again. And by the 1960's rocket planes approached speeds of 4000 mph, and men in space capsules were circling the earth at 18,000 mph. Plotted on a graph, the line representing progress in the past generation would leap vertically off the page.²⁹⁶

The same exponential curve could be described for the speed of communications, the power of computers,²⁹⁷ or the destructive force of the engines of war. The archers at Agincourt would be astonished by the development of the Gatling gun, but they would be positively dumbfounded by Fat Man and Little Boy, the nuclear weapons that were dropped upon Nagasaki and Hiroshima.

But, as ever, there are costs associated with progress. There are always trade-offs.²⁹⁸ We surrender the pastoral life of *Gemeinschaft* for the urban advantages of *Gesellschaft*,²⁹⁹ and while this affords us the comforts of metropolitan living, we lose some-

²⁹⁶ ALVIN TOFFLER, *FUTURE SHOCK* 26 (1970). In order to accommodate all of these automobiles, we have covered significant portions of the United States in roads and parking lots. "Pavement now covers over sixty thousand square miles just in the United States. That's 2 percent of the surface area, and 10 percent of the arable land." JENSEN, *supra* note 163, at 195.

²⁹⁷ One might think about Moore's Law, noting that for a given cost, the number of transistors on an integrated circuit doubles every 24 months. See Gordon E. Moore, *Cramming More Components onto Integrated Circuits*, *ELECTRONICS MAGAZINE*, Apr. 16, 1965 (expressing Moore's law for the first time). The Intel Corporation recently made available posters celebrating the 40th anniversary of Moore's Law, using a bar chart to express increasing levels of computing power. See Moore's Law Poster, at ftp://download.intel.com/museum/Moores_Law/Printed_Materials/Moores_Law_Poster_Ltr.pdf (last visited Jan. 1, 2007).

²⁹⁸ See JENSEN, *supra* note 163, at 148.

We all face choices. We can have ice caps and polar bears, or we can have automobiles. We can have dams or we can have salmon. We can have irrigated wine from Mendocino and Sonoma counties, or we can have the Russian and Eel Rivers. We can have oil from beneath the oceans, or we can have whales. We can have cardboard boxes or we can have living forests. We can have computers and cancer clusters from the manufacture of those computers, or we can have neither. We can have electricity and a world devastated by mining, or we can have neither.

Id. These trade-offs affect even basic human abilities. Wade Davis suggests that in realizing the ability to drive an automobile, something that comes easily to us but would have terrified our ancestors, we have sacrificed the ability to perceive the planet Venus during daylight hours:

Astronomers know the amount of light reflected by the planet, and we should be able to see it, even in broad daylight. Some Indians can. And but a few hundred years ago, sailors from our own civilization navigated by it, following its path as easily by day as they did by night. It is simply a skill that we have lost, and I have often wondered why.

WADE DAVIS, *THE SERPENT AND THE RAINBOW* 173 (1986).

²⁹⁹ See TONNIES, *supra* note 154 (describing *Gemeinschaft* and *Gesellschaft* conditions).

thing, too.³⁰⁰ Whether or not we acknowledge, it weighs upon us. Toffler describes a psychological state of distress, *future shock*, in which too much change, too quickly, is uncomfortable.³⁰¹ But other critics of development perceive deeper, more profound problems associated with modernity. Jacques Ellul, for example, has warned that while man was truly free in earlier ages, today he has been enslaved by his creations. “The human being is no longer in any sense the agent of choice.”³⁰² Ellul is in no way alone in suggesting that modernity has stripped life of some essential human quality. He is joined in a chorus of criticism by individuals like Kafka,³⁰³ Gandhi,³⁰⁴ Thoreau,³⁰⁵ Fromm,³⁰⁶ Marcuse,³⁰⁷ Mumford,³⁰⁸ and Toynbee.³⁰⁹ In different ways, and

³⁰⁰ See JENSEN, *supra* note 163, at 141 (quoting B. Traven).

Whether it takes me four weeks or 14 hours to get to Hamburg from Munich is less important to my happiness and to my humanity than the question: How many men who yearn for sunlight just as I do must be imprisoned in factories, their healthy limbs and lungs sacrificed in order to build a locomotive? For me the only important thing is: The more swiftly our thriving economy is completely brought to ruin, the more pitilessly the last remnant of industry is wiped out, the sooner will people have enough to eat and have a small measure of that happiness to which every man has a right.

Id.

³⁰¹ TOFFLER, *supra* note 296, at 325-97.

³⁰² ELLUL, *supra* note 163, at 80.

³⁰³ See generally, e.g., FRANZ KAFKA, *THE TRIAL* (Willa & Edwin Muir, trans., E.M. Butler, ed. 1992) (criticizing bureaucratic society by distorting it slightly so as to remain recognizable but to carry the whiff of a nightmare).

³⁰⁴ See, e.g., MOHANDAS GANDHI, *THE STORY OF MY EXPERIMENTS WITH TRUTH—AN AUTOBIOGRAPHY* 177 (Mahadev Mesai, trans. 1993) (describing Gandhi’s elimination of needless spending and pursuit of simplicity), available at: http://en.wikisource.org/wiki/An_Autobiography_or_The_Story_of_my_Experiments_with_Truth (last visited May 6, 2007).

³⁰⁵ THOREAU, *supra* note 166 (urging people to find happiness by simplifying their lives).

³⁰⁶ See, e.g., ERICH FROMM, *THE REVOLUTION OF HOPE: TOWARD A HUMANIZED TECHNOLOGY* (1968) (suggesting that the seductions of technology has compromised human nature).

³⁰⁷ See HERBERT MARCUSE, *ONE DIMENSIONAL MAN* (1964) (suggesting that advanced industrial societies create false needs and thereby assimilate individuals into society’s dominant mode of production and consumption). Marcuse’s vision was echoed in *Fight Club* as “working jobs we hate so we can buy shit we don't need.” See Uhls, *supra* note 148.

³⁰⁸ See, e.g., LEWIS MUMFORD, *TECHNICS AND CIVILIZATION* (1934) (suggesting that many inventions are monotecnich in nature, technology for its own sake, oppressing human potentials and limiting choices); LEWIS MUMFORD, *THE CITY IN HISTORY* (1961) (criticizing the development of the urban city as an essentially human development, but one that is responsible for many social problems). In *Industrial Society and Its Future*, Kaczynski used an example of cars and roadways that limit human activity to illustrate monotecnich technologies that oppress human potential. See *Industrial Society*, *supra* note 207. This example was also used in Mumford’s 1934 book, *supra*.

³⁰⁹ See Arnold Toynbee, *Why I Dislike Western Civilization*, N.Y. TIMES MAGAZINE, May 10, 1964 (suggesting that technology’s march toward standardization reduces human choice).

for different reasons, these commentators have suggested that modern living diminishes us.

Perhaps Marcuse (and echoing him, Unabomber Theodore Kaczynski³¹⁰) was correct in suggesting that modern society creates false needs in its citizens. Perhaps people feel a hollow, an emptiness in their lives, and experience it subjectively as hunger. Perhaps they purchase and consume food and goods in a frenzied effort to satisfy their hunger, unaware that all the supersized french fries,³¹¹ big gulps, and sport utility vehicles in the world cannot satiate their appetites.³¹²

Certainly, there is compelling evidence suggesting that U.S. citizens consume at grossly pathological levels.³¹³ The American dream is not one of freedom, but of wealth.³¹⁴ Americans strive for economic success, telling themselves that “greed is good,”³¹⁵ and even those who by any reasonable standard enjoy unbelievable material prosperity ache for more.³¹⁶ Their hunger cannot be satisfied. Our dream is not one

³¹⁰ See *supra* note 207 (describing the argument contained in the Unabomber manifesto, *Industrial Society and Its Future*).

³¹¹ See *SUPERSIZE ME* (Samuel Goldwyn Films 2004) (documenting the filmmaker’s experiment in which he attempted to consume only McDonalds for every meal for 30 days).

³¹² But they certainly give it the old college try. Fast food has become a major socio-economic force:

In 1970, Americans spent about \$6 billion on fast food; in 2001, they spent more than \$110 billion. Americans now spend more money on fast food than on higher education, personal computers, computer software, or new cars. They spend more on fast food than on movies, books, magazines, newspapers, videos, and recorded music—combined.

ERIC SCHLOSSER, *FAST FOOD NATION 3* (2002).

³¹³ See, e.g., JOHN DE GRAAF ET AL., *AFFLUENZA: THE ALL-CONSUMING EPIDEMIC* (reprint ed. 2002) (describing “affluenza” as a painful, contagious, socially-transmitted condition of overload, debt, anxiety, and waste resulting from the dogged pursuit of more); OLIVER JAMES, *AFFLUENZA* (2007) (describing results from international interviews of 240 subjects and concluding that frenetic pursuit of material success is correlated with depression, anxiety, addictions, and personality disorders).

³¹⁴ See WILLIAM STRAUSS & NEIL HOWE, *13TH GEN: ABORT, RETRY, IGNORE, FAIL?* 114 (1993) (“We trust ourselves, and money—period.... A lot of this money fixation can be attributed to this generation’s premature affluence and its poor economic prospects down the road.... [They] trust hard green because their earliest life experiences taught them that you can’t trust anything else.”).

³¹⁵ This quote comes from the film, *Wall Street*. *WALL STREET* (20th Century Fox 1987) (“Greed, for lack of a better word, is good.”). The phrase has its roots in real life, however. During a 1985 commencement address at the University of California at Berkeley, arbitrageur (and insider-trader) Ivan Boesky told the graduates, “Greed is all right.... I want you to know that. I think greed is healthy. You can be greedy and still feel good about yourself.” JAMES COLEMAN, *THE CRIMINAL ELITE* 87 (5th ed., 2002) (quoting Boesky).

³¹⁶ See Matt Miller, *Revolt of the Fairly Rich: Today’s Lower Upper Class is Seething about the UL-trawwealthy*, Oct. 30, 2006, at: http://money.cnn.com/magazines/fortune/fortune_archive/2006/10/30/8391806/index.htm.

Lower uppers are professionals who by dint of schooling, hard work and luck are living better than 99 percent of the humans who have ever walked the planet. They’re also

of liberty, but one of accumulation.³¹⁷ People in the United States comprise just five percent of the world's population, but they consume nearly twenty-five percent of its resources.³¹⁸ We consume rapaciously. Comparing the average U.S. citizen to the average citizen of India, "the American uses fifty times more steel, fifty-six times more energy, one hundred and seventy times more synthetic rubber, two hundred and fifty times more motor fuel, and three hundred times more plastic."³¹⁹ This insatiable consumption of resources could lead to the collapse of civilization.³²⁰ Modern society requires a constant river of gasoline and electricity running through it to continue. Dr. Homi Bhabha has explained the exponential increase in energy consumption thusly:

[L]et us use the letter 'Q' to stand for the energy derived from burning some 33,000 million tons of coal. In the eighteen and one half centuries after Christ, the total energy consumed averaged less than one half Q per century. But by 1850, the rate had risen to one Q per century. Today, the rate is about ten Q per century.³²¹

Thus, half of the energy consumed in the last two millennia has been consumed in the last 100 years.³²² Energy consumption is expected to grow, especially in developing

people who can't help but notice how many folks with credentials like theirs are living in Gatsbyesque splendor they'll never enjoy. This stings. If people no smarter or better than you are making ten or 50 or 100 million dollars in a single year while you're working yourself ragged to earn a million or two—or, God forbid, \$400,000—then something must be wrong.

Id.

³¹⁷ See Eric Anderson Reece, *Epicurus at the Food Court*, HUMANIST 3 (Jan.-Feb. 2004), available at: http://www.findarticles.com/p/articles/mi_m1374/is_1_64/ai_111979623 ("The American dream has become a dream of accumulation."). A UCLA study found that nearly three-quarters of freshmen surveyed in 2006 thought it was essential or very important to be "very well-off financially." In 1980, only 62.5% of subjects so responded, and in 1966, only 42% so responded. See *Material World: Wealth is a Top Priority for Today's Young People*, CHICAGO TRIB., Jan. 23, 2007, at 3.

³¹⁸ Reece, *supra* note 317.

³¹⁹ JENSEN, *supra* note 163, at 115. Jensen also cites the example of a computer:

[T]he manufacture of the average computer takes about two tons of raw materials (520 pounds of fossil fuels, 48 pounds of chemicals, and 3,600 pounds of water; 4 pounds of fossil fuels and chemicals and 70 pounds of water are used to make just a single two gram memory chip.

Id. at 400.

³²⁰ See JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* (2004) (noting that among five factors—mismanagement of ecological resources, climate change, enemies, changes in friendly trading partners, and society's political, economic, and social responses to these changes—mismanagement of ecological resources is the factor that most often predicts the collapse of a society).

³²¹ TOFFLER, *supra* note 296, at 23 (quoting Bhabha).

³²² *Id.*

nations,³²³ but the U.S. continues (and will continue) to utilize a disproportionate share of the world's energy.³²⁴ And here is the rub: wherever energy is consumed, it unavoidably affects the environment. Every living human being has an ecological footprint, and is responsible for some destruction of the environment through his or her consumption. But whereas non-Americans are responsible for the destruction of about 2.5 acres of undeveloped land per person per year, Americans are responsible for the destruction of 10 acres per person per year.³²⁵ We may live like gods, but in so doing, we sacrifice the world.

In the last 24 hours, over 200,000 acres of rainforest were destroyed. Thirteen million tons of toxic chemicals were released. Forty-five thousand people died of starvation, thirty-eight thousand of them children. More than one hundred plant or animal species went extinct because of civilized humans. All of this in one day.³²⁶

Eminent biologist Edmund O. Wilson has noted that for everyone in the world to live like modern Americans do, we would need the existence of four more earths to exploit.³²⁷ William Catton suggests that it would not require four extra earths, but *ten*.³²⁸ And we have neither ten, nor four, but one. The net result is that resources are being consumed more quickly than they can be replaced, and the environment is being degraded at an unsustainable rate.

The United States is the world's largest consumer of energy,³²⁹ and 85% of its energy is derived from fossil fuels.³³⁰ The combustion of fossil fuels releases greenhouse

³²³ See Energy Information Administration, *International Energy Outlook 2006*, available at: [http://www.eia.doe.gov/oiaf/ieo/pdf/0484\(2006\).pdf](http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2006).pdf) (last visited May 6, 2007) (providing overview of international energy forecasts).

³²⁴ *Id.*

³²⁵ See Emilie R. Feldman, *Biologist Addresses ARCO Forum*, HARVARD CRIMSON ONLINE, Oct. 2, 2002, at <http://www.thecrimson.com/article.aspx?ref=254365> (quoting biologist Edward O. Wilson).

³²⁶ JENSEN, *supra* note 163, at 341.

³²⁷ See Feldman, *supra* note 325 (describing Wilson's lecture).

³²⁸ See WILLIAM R. CATTON, JR., *OVERSHOOT: THE ECOLOGICAL BASIS OF REVOLUTIONARY CHANGE* (1982).

[M]odern man would require an increase in contemporary carrying capacity equivalent to ten earths—each of whose surfaces was forested, tilled, fished, and harvested to the current extent of our planet. Without ten new earths, it followed that man's exuberant way of life would be cut back drastically sometime in the future, or else that there would someday be many fewer people.

Id. at 52.

³²⁹ See Energy Information Administration, *International Energy Annual, World Energy Overview, 1994-2004*, at: <http://www.eia.doe.gov/iea/overview.html> (last visited May 6, 2007).

The United States, China, Russia, Japan, and India were the world's five largest consumers of primary energy in 2004, accounting for 51.1 percent of world energy consumption.... The United States consumed 100.4 quadrillion Btu, more than one and two-thirds times as much as the 59.6 quadrillion Btu consumed by China, while Russia consumed 30.1 quadrillion Btu.

gases, especially carbon dioxide, into the atmosphere, trapping infrared solar rays that are otherwise reflected back into space. Increases in the human population have a double effect on greenhouse gas emissions, both increasing the raw volume of gases released (since more people consume more fuel), and reducing the amount of available forest to reabsorb carbon dioxide (since urban populations require large-scale agriculture to supply food). Since the emergence of the large-scale industry in the 1850s, levels of greenhouse gases in the atmosphere have increased by 25%.³³¹ The retention of these rays is believed to cause global warming.³³²

The literature on global warming is extensive, and it continues to grow. There is an overwhelming scientific consensus that human activity—especially human activity in recent years—has increased the temperature of the planet.³³³ The year 2006 was the hottest year in American history, “unprecedented in the historic record.”³³⁴ Globally, every year since 1993 has been in the top 20 warmest years on record.³³⁵ And the temperatures will continue to climb. The IPCC predicts the average temperature to increase by 0.6 to 4.0 degrees Celsius between 2000 and 2100.³³⁶ And even modest changes in temperature have profound implications with lasting consequences.³³⁷

Id.

³³⁰ See Energy Information Administration, *Greenhouse Gases, Climate Change, and Energy*, at: <http://www.eia.doe.gov/oiaf/1605/ggcebro/chapter1.html> (depicting sources of U.S. energy: petroleum (39%), natural gas (24%), coal (23%), and non-fossil (15%)). The World Bank reports that in 2003, high income economies accounted for just 15% of the world’s population, but consumed 52% of the world’s energy, although it produced only 41%. See World Bank, 2006 *World Development Indicators, Energy Production and Use*, 3.7, at <http://devdata.worldbank.org/wdi2006/contents/Section3.htm> (last visited May 6, 2007).

³³¹ See Energy Information Administration, *supra* note 330. Human activity in the U.S. releases approximately 6.1 billion metric tons of anthropogenic carbon dioxide into the environment each year. *Id.* While natural processes can absorb some of this output, approximately 3.2 billion metric tons are added to the atmosphere every year. A review of the concentration levels of the greenhouse gases carbon dioxide, methane, and nitrous oxide leaves one staring at the same kind of exponential curve that Toffler said expresses the increasing rate of transportation speed over time. See Intergovernmental Panel on Climate Change, *Climate Change 2007: The Physical Science Basis*, at 3, available at: <http://www.ipcc.ch/SPM2feb07.pdf> (depicting concentration of atmospheric carbon dioxide, methane, and nitrous oxide over the last 10,000 years).

³³² See generally Intergovernmental Panel on Climate Change, *supra* note 331, at 5 (concluding with very high confidence that human activities since 1750 have resulted in warming). Al Gore’s movie *An Inconvenient Truth* (Paramount 2006) is perhaps the most popular work on the topic of global warming, but there have been a host of books and articles on the subject.

³³³ See, e.g., Intergovernmental Panel on Climate Change, *supra* note 331, at 10 (“Most of the observed increase in globally averaged temperatures since the mid-20th century is very likely due to the observed increase in anthropogenic greenhouse gas concentrations.”).

³³⁴ See Marc Kaufman, *Climate Experts Worry as 2006 Is Hottest Year on Record in U.S.*, WASHINGTON POST, Jan. 10, 2007, at A01 (quoting the National Climatic Data Center report).

³³⁵ *Id.*

³³⁶ See Intergovernmental Panel on Climate Change, *supra* note 331, at 13.

³³⁷ See *id.* (noting that even if all warming emissions were held constant, temperatures would continue to increase by about 0.1 degrees Celsius per decade).

Warmer air holds more moisture than cooler air, which might cause storms of increasing violence,³³⁸ and paradoxically, cause droughts in currently unaffected regions.³³⁹ This is a *serious* threat. Swiss Re, the world's second largest re-insurer, predicts that increasing storm intensity might double the economic damage of natural disasters, costing the equivalent of one World Trade Center disaster every year.³⁴⁰ Lloyd's of London has suggested that if we do not take action now to understand catastrophe trends and their risks now, "the changing climate could kill us."³⁴¹ David King, the United Kingdom's chief scientific advisor, has stated that climate change is a far greater threat than international terrorism.³⁴² John Houghton, co-chair of the Intergovernmental Panel on Climate Change (IPCC), has said, "The impacts of global warming are such that that I have no hesitation in describing it as a weapon of mass destruction."³⁴³ This is not as hyperbolic as it may initially seem. It is predicted that by 2080, because of climate change, between 1.1 and 3.2 billion people will suffer from water scarcity, and between 200 and 600 million will suffer from hunger.³⁴⁴ Indeed, the Bulletin of the Atomic Scientists recently adjusted the "Doomsday Clock"

³³⁸ See Kerry Emanuel, *Increasing Destructiveness of Tropical Cyclones over the Past 30 Years*, 436 NATURE 686 (2005) (suggesting that violent storms originating in the Atlantic and Pacific since 1970 have increased in intensity and duration by approximately 50 percent).

³³⁹ Warm climates cause greater evaporation, causing droughts in some regions. The percentage of Earth's land area stricken by serious drought more than doubled from the 1970s to the early 2000s, and almost half that change is due to rising global temperatures rather than decreases in precipitation. See Aiguo Dai, et al., *A Global Dataset of Palmer Drought Severity Index for 1870–2002: Relationship with Soil Moisture and Effects of Surface Warming*, 5 J. OF HYDROMETEOROLOGY 1117 (2004). In addition to the research suggesting that global warming causes droughts, there is also research suggesting that droughts may cause (or contribute to) global warming. Forests that have been affected by drought are less effective at absorbing carbon dioxide. See Sarah Clarke, *Droughts Could Boost Global Warming: Scientists*, ABC News Online, Jul. 16, 2006, at: <http://www.abc.net.au/news/newsitems/200607/s1687819.htm> (last visited May 6, 2007).

³⁴⁰ See Thomas Atkins, *Insurer Warns of Global Warming Catastrophe*, Reuters, Mar. 3, 2004, available at: <http://www.commondreams.org/headlines04/0303-07.htm> (last visited May 6, 2007) (describing insurers concerns about global warming).

³⁴¹ See Lloyds of London, *360 Risk Project: 1: Catastrophe Trends*, at 3, available at: <http://www.lloyds.com/NR/rdonlyres/38782611-5ED3-4FDC-85A4-5DEAA88A2DA0/0/FINAL360climatechangereport.pdf> (last visited May 6, 2007).

³⁴² See BBC News, *Global Warming 'Biggest Threat'*, Jan. 9, 2004, at: <http://news.bbc.co.uk/1/hi/sci/tech/3381425.stm> (last visited May 6, 2007) ("Sir David said climate change was the most severe problem faced by the world").

³⁴³ John Houghton, *Global Warming is Now a Weapon of Mass Destruction*, THE GUARDIAN, Jul. 28, 2003, at: <http://www.guardian.co.uk/comment/story/0,3604,1007042,00.html> (last visited May 6, 2007).

³⁴⁴ See *Climate Change Means Hunger and Thirst for Billions: Report*, Jan. 30, 2007, at: http://news.yahoo.com/s/afp/20070130/sc_afp/australiaclimatewarming_070130081454 (summarizing draft of 2001 IPCC report). To lend these figures a sense of scale, 600 million starving people would be twice the current United States population. Three billion people without adequate water would be about half of the world's current population, and more than ten times the U.S. population.

from seven minutes until midnight to five-to-midnight.³⁴⁵ They did so because of the proliferation of nuclear weapons, but also because of the threat of global warming, noting that the “dangers posed by climate change are nearly as dire as those posed by nuclear weapons.”³⁴⁶ As a precautionary measure, on a remote arctic archipelago, a “doomsday vault” is being constructed in the side of a frozen mountain to store samples of the world’s seeds, “a last bastion in the battle against global warming.”³⁴⁷ Even the U.S. Pentagon is considering global warming as a potential threat to international stability, acknowledging that global warming will “challenge United States national security.”³⁴⁸

A warming earth will contain less ice. For years, scientists have observed that nearly all of the world’s large glaciers are in retreat.³⁴⁹ The storied snows of Mt. Kilimanjaro are likely to be gone within the next 50 years.³⁵⁰ In the Polar Regions, warming temperatures are causing massive disruptions in both the Arctic and Antarctic. In 2002, in Antarctica, 3,250 square kilometers of the Larsen B ice shelf disintegrated in just 35 days.³⁵¹ The area that broke up was larger than the entire state of Rhode Island and encompassed 720 billion tons of ice.³⁵² In 2005, the Ayles ice shelf, 66 square kilometers in size, broke free from Canada’s Ellesmere Island in just one hour.³⁵³ Today, the remaining Canadian ice shelves are 90 percent smaller than when first discovered in 1906.³⁵⁴ Of course, as U.S. consumers with other things on our minds, we might not be interested in the shearing of polar ice sheets, but we *should* be. We should be interested because ice helps to reflect solar radiation whereas ocean

³⁴⁵ See Bulletin of the Atomic Scientists, at: www.thebulletin.org (Jan. 17, 2007).

³⁴⁶ *Id.*

³⁴⁷ See Rick Weiss, *Ft. Knox of Seeds: High Security Arctic Vault to Store Source of Virtually Every Variety of Food on Planet*, CHICAGO TRIB., Jun. 21, 2007, at C17 (describing the Svalbard facility as a “Noah’s Ark” for food crops).

³⁴⁸ The Department of Defense prepared an analysis of the potential socio-political consequences of global warming. See Peter Schwartz & Doug Randall, *An Abrupt Climate Change Scenario and Its Implications for United States National Security* (Oct. 2003), at: http://www.environmentaldefense.org/documents/3566_AbruptClimateChange.pdf (last visited May 6, 2007).

³⁴⁹ See, e.g., *Africa’s Glaciers are Melting Away*, L.A. TIMES, Dec. 17, 2006, at A5.

³⁵⁰ *Id.* The loss of glacial melt exacerbates other problems associated with global warming. For example, the loss of glaciers exacerbates the environmental and social problems caused by drought. In Africa, desperate herdsman have raided points upriver, blocking farm irrigation intakes, and both livestock and agriculture compete against hydro-electric generators (powering much of Nairobi’s grid) for increasingly scarce river water. *Id.* Receding glaciers also play a role in rising ocean levels: one third of the 1” to 2” increase in sea-level during the last decade has been attributed to melting of the world’s glaciers. *Id.* The matter of rising sea levels is discussed in some detail later in this Article. See *infra* notes 356-367 and accompanying text.

³⁵¹ See National Snow and Ice Data Center, *Larsen B Ice Shelf Collapses in Antarctica*, Mar. 21, 2002, at: <http://nsidc.org/iceshelves/larsenb2002/> (last visited May 6, 2007)

³⁵² *Id.*

³⁵³ See Rob Gillies, *Giant Ice Shelf Breaks Free in Arctic*, WASHINGTON POST, Dec. 30, 2006, at A18.

³⁵⁴ *Id.*

water absorbs it; thus, the loss of significant bodies of global ice accelerates the rate of global warming.³⁵⁵ And as the world's ice melts, particularly on the West Antarctic ice sheet and the Greenland ice cap, ocean levels will rise.³⁵⁶ The IPCC predicts that mean sea level will rise 0.18 to 0.59 meters between 2000 and 2100,³⁵⁷ and other researchers have suggested that ocean levels will rise even faster than anticipated, swelling by as much as 1.4 meters by the end of this century.³⁵⁸ And even if all greenhouse gas emissions were to stop immediately, the oceans will continue to rise into the next century and beyond because of the long time scales on which the deep ocean adjusts to climate changes.³⁵⁹ An increase of just one degree Celsius could raise ocean levels by two to six meters, where the waters stood during the Eemian interglacial era of 120,000 years ago,³⁶⁰ and an increase of two to three degrees Celsius could increase sea levels by 25 to 30 meters.³⁶¹ This is not an abstract possibility: By 2100, the IPCC estimates that temperatures will have increased 1.4 to 5.8 degrees Celsius.³⁶² Taking a more conservative estimate, the IPCC notes that warming of more than 3° C, sus-

³⁵⁵ The loss of large bodies of ice could cause runaway global warming. It is believed that massive volcanic eruptions about 250 million years ago spewed massive amounts of carbon dioxide into the atmosphere and accelerated global warming by about six degrees Celsius. As Polar Regions melted, vast reservoirs of methane were released, causing more warming, thereby releasing more methane, until at least 90% of life on Earth died of oxygen starvation. See MICHAEL J. BENTON, *WHEN LIFE NEARLY DIED: THE GREATEST MASS EXTINCTION OF ALL TIME* (2002) (describing methane “belch” as cause of near-total extinction). Interestingly, the temperature at which CO₂ spiraled out of control is about that (6 degrees Celsius higher than present) predicted by the IPCC under models of rapid economic growth and intensive fossil fuel use. See *supra* note 331, at 13 (predicting a 2.4 – 6.4 C temperature change between 2000 and 2100 under these conditions).

³⁵⁶ See, e.g., Jonathan T. Overpeck, et al, *Paleoclimatic Evidence for Future Ice-Sheet Instability and Rapid Sea-Level Rise*, *SCIENCE*, Mar. 24, 2006, at 1747 (suggesting that sea level rise could be faster than commonly thought and that by the year 2100 may reach levels similar to those of 130,000 to 127,000 years ago that were associated with sea levels several meters above modern levels); Randolph E. Shmid, *Melting Polar Ice Threatens Worldwide Sea-Level Rise*, *USA TODAY*, Mar. 23, 2006, at: http://www.usatoday.com/weather/climate/2006-03-23-sea-level-rise_x.htm (last visited May 6, 2007) (quoting Michael Oppenheimer as noting “that a modest global warming may put Earth in the danger zone for a major sea level rise due to deglaciation of one or both ice sheets.”). Even if all greenhouse gas emissions were to stop immediately, because of the long time scales on which the deep ocean adjusts to climate changes, the oceans will continue to rise.

³⁵⁷ See Intergovernmental Panel on Climate Change, *supra* note 331, at 13 (describing estimated sea level rise).

³⁵⁸ See Franziska Badenschier, *Is the Sea Level Rise Doubling Its Speed?*, *SPIEGEL INTERNATIONAL ONLINE*, Dec. 15, 2006, at: <http://www.spiegel.de/international/0,1518,454891,00.html> (last visited May 6, 2007) (describing the research of oceanographer Stefan Rahmstorf).

³⁵⁹ See Intergovernmental Panel on Climate Change, *supra* note 331, at 17 (describing long time frames associated with ocean level increases).

³⁶⁰ See Badenschier, *supra* note 358 (describing possible scenarios).

³⁶¹ *Id.*

³⁶² See *supra* note 331 and associated text.

tained for 1,000 years could cause a complete melting of the Greenland ice sheet, which would raise ocean levels by 7 meters.³⁶³ One thousand years of a 3° C increase could also melt large portions of the West Antarctic ice sheet, contributing to further increases in ocean levels.

An addition to Google Maps, called “Flood,”³⁶⁴ depicts the geographic transformation that rising seas will cause. An increase of even one meter would submerge New Orleans and Miami, but the effects of rising seas will not be limited to the United States. As one writer remarked, “Entire nations, including the low-lying Maldives in the Indian Ocean and Vanuatu in the South Pacific, face extinction.”³⁶⁵ Rising seas could drown the world. An increase of just 16 feet would affect 669 million people and submerge 2 million square miles of land.³⁶⁶ A six-meter increase would result in catastrophic flooding in major metropolitan cities such as Manhattan, Miami, London, Beijing, Shanghai, Calcutta, and throughout the Netherlands and Bangladesh, resulting in unprecedented migration of refugees and potential loss of life in the millions.³⁶⁷ An increase of 100 feet (30 meters), as witnessed three million years ago during the Pliocene, would affect a billion people.³⁶⁸

Global warming has other deleterious consequences, as well. Climate change scientists speculate that by introducing large volumes of fresh water into the Atlantic, global warming could affect the thermohaline circulation of ocean currents, reducing or even stopping the flow of the Gulf Stream.³⁶⁹ Without the warm northward currents of the Gulf Stream, temperatures in the Northern Hemisphere would drop one or two degrees Centigrade, plummet eight degrees in some locations,³⁷⁰ and increase by less than one degree in the Southern Hemisphere.³⁷¹ Although in its 2001 report, the IPCC suggested that global warming should not result in a complete shut-down of

³⁶³ See Intergovernmental Panel on Climate Change, *supra* note 331, at 17 (describing 7 possible meter increase).

³⁶⁴ Flood is available at: <http://flood.firetree.net/> (last visited May 6, 2007). A somewhat more sophisticated flood modeling program is available at: http://www.geo.arizona.edu/dgesl/research/other/climate_change_and_sea_level/sea_level_rise/sea_level_rise.htm (last visited May 6, 2007).

³⁶⁵ Donald Smith, *The Case of the Vanishing Islands*, National Geographic News, at http://news.nationalgeographic.com/news/2000/04/0428_islands.html (Apr. 28, 2000).

³⁶⁶ *Study: Sudden Sea Level Surges Threaten One Billion*, CNN, at <http://www.cnn.com/2007/TECH/science/04/20/sea.levels.reut/index.html> (Apr. 20, 2007).

³⁶⁷ See AN INCONVENIENT TRUTH, *supra* note 332 (describing effects of rising ocean levels on low-lying cities and nations). For some of the possible consequences associated with climate-related refugee diasporas, see Schwartz & Randall, *supra* note 348.

³⁶⁸ See *Study*, *supra* note 366.

³⁶⁹ See, e.g., Bill McGuire, *Will Global Warming Trigger a New Ice Age?*, THE GUARDIAN, Nov. 13, 2003, at: <http://www.guardian.co.uk/climatechange/story/0,12374,1083419,00.html> (last visited May 6, 2007).

³⁷⁰ See Michael Vellinga & Richard A. Wood, *Global Climatic Impacts of the Atlantic Thermohaline Circulation*, 54 CLIMATIC CHANGE 251, 264 (2002) (modeling such patterns).

³⁷¹ *Id.*

thermohaline circulation before 2100,³⁷² the panel does note that “[b]eyond 2100, the thermohaline circulation could completely, and possibly irreversibly, shut-down in either hemisphere if the change in radiative forcing is large enough and applied long enough.”³⁷³

Finally, global warming kills species. This is not something that *could* happen in the future as a consequence of warming: biologists have made it absolutely clear that widespread species extirpation is happening *now*.³⁷⁴ Since 1980, more than one hundred species of amphibians have disappeared from the planet.³⁷⁵ It is said that ninety percent of the large fish in the oceans are gone,³⁷⁶ and without a food supply, harbor porpoises are starving to death.³⁷⁷ The rarest cetacean in the world, the baiji, can no longer be found, and has been categorized as “functionally extinct,”³⁷⁸ and scientists report a 26% chance that all Cook Inlet Beluga whales will be extinct in 100 years, estimating a 68% chance they will all be gone in 300 years.³⁷⁹ The coral reefs are bleaching, and 16% of the world’s corals went extinct between 1997 and 1998.³⁸⁰ Nearly half of the world’s waterbird species are declining, principally because of eco-

³⁷² See Intergovernmental Panel on Climate Change, *Climate Change 2001: The Scientific Basis*, at 16, available at: http://www.grida.no/climate/ipcc_tar/wgl/index.htm (describing effects of warming on ocean current circulation).

³⁷³ *Id.*

³⁷⁴ See Camille Parmesan, *Ecological and Evolutionary Responses to Recent Climate Change*, 37 ANN. REV. OF ECOL., EVOLUTION, AND SYSTEMATICS 637 (2006) (providing review of 866 peer-reviewed papers and concluding that climate warming is causing species adaptation and extinction).

³⁷⁵ See Juliet Eilperin, *Warming Tied to Extinction of Frog Species*, WASHINGTON POST, Jan. 12, 2006, at A01 (noting that as many as 112 species of amphibians have disappeared since 1980).

³⁷⁶ See JENSEN, *supra* note 163, at 235-36.

Industrial fishing practices have decimated every one of the world’s biggest and most economically important species of fish....Fully 90 percent of each of the world’s large ocean species, including cod, halibut, tuna, swordfish, and marlin, have disappeared from the world’s oceans in recent decades....[F]ishing has become so efficient that it typically takes just 15 years to remove 80 percent or more of any species unlucky enough to become the focus of a fleet’s attention.

Id.

³⁷⁷ See James Owen, *Porpoises Starving in Europe Due to Ocean Warming*, Jan. 10, 2007, at: <http://news.nationalgeographic.com/news/2007/01/070110-porpoises.html>.

³⁷⁸ See Robert L. Pitman, *A Fellow Mammal Leaves the Planet*, N.Y. TIMES, Dec. 26, 2006, at F3. Pitman notes that the baiji

is probably the first large animal that has ever gone extinct merely as an indirect consequence of human activity: a victim of market forces and our collective lifestyle. Nobody eats baiji and no tourists pay to see it—there were no reasons to take it deliberately, but there was no economic reason to save it, either. It is gone because too many people got too efficient at catching fish in the river and it was incidental bycatch.

Id.

³⁷⁹ See Protection Sought for Beluga Whales, L.A. TIMES, Apr. 20, 2007, at A26 (noting risk of extinction).

³⁸⁰ See Parmesan, *supra* note 374, at 652-53 (summarizing research on the ocean’s corals).

conomic development and climate change.³⁸¹ Birds and bees are also dying. Recently, dozens of dead birds mysteriously appeared in Austin, Texas,³⁸² and the U.S. bee population has mysteriously dropped by as much as 25% to 50%.³⁸³ Another 100 to 200 cold-dependent species, such as penguins and polar bears,³⁸⁴ are in “deep trouble.”³⁸⁵ In fact, computer models suggest that by 2050, more than a million plant and animal species could be driven to extinction.³⁸⁶ One in ten species will be extinct by 2050, and a quarter of land animals and plants will die.³⁸⁷ The authors of the study describe the results as “terrifying,”³⁸⁸ but other biologists commenting upon the computer model suggest that, if anything, the estimates are optimistic, and expect more species to die.³⁸⁹ If “mankind continues to burn oil, coal and gas at the current rate, *up to one third of all life forms will be doomed by 2050.*”³⁹⁰

All of this—the increasing temperatures, the rising seas, the extirpation of species—could happen very quickly. While the greenhouse effect takes considerable time—CO₂ emissions do not exert their effect until 25 or more years have passed³⁹¹—

³⁸¹ See Waterbirds in Decline Globally, CHICAGO TRIB., Jan. 24, 2007, at 17 (reporting that 44% of 900 species are declining, while 34% are stable, and 17% rising).

³⁸² See *Bird Mystery in Austin*, N.Y. TIMES, Jan. 9, 2007, at A12 (reporting 63 dead birds found near the Capitol).

³⁸³ See Joel M. Lerner, *We Need Bees’ Help—and They Need Ours*, WASHINGTON POST, Mar. 17, 2007, at F4 (“Perhaps a quarter of the bee population in the United States—in some places perhaps as much as 50 percent—has been lost since the 1990s, when hives were hard hit by mites. Now there’s a new threat, colony collapse disorder, in which whole hives suddenly become empty of adult bees. No one knows why the collapse occurs. It might be from a fungus, parasites, poison from insecticides, bacteria or virus, or some combination. We have no solution.”).

³⁸⁴ See *supra* note 374, at 653. Polar bears have attracted recent media attention, since the U.S. administration has acknowledged the once-thriving species is in danger, and requires threatened status under the Endangered Species Act. See, e.g., Juliet Eilperin, *U.S. Wants Polar Bears Listed as Threatened*, WASHINGTON POST, Dec. 27, 2006, at A01.

³⁸⁵ *Global Warming May Be Killing Species*, GRAND RAPIDS PRESS, Nov. 24, 2007, at A4.

³⁸⁶ See Paul Brown, *An Unnatural Disaster*, THE GUARDIAN, Jan. 8, 2004, at: http://www.guardian.co.uk/uk_news/story/0,3604,1118244,00.html (last visited May 6, 2007).

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Id.* (italics added).

³⁹¹ *Id.* See also Bruce Johansen, *Global Warming as a “Weapon of Mass Destruction,”* RATVILLE TIMES, Oct. 25, 2003, at: <http://www.ratical.org/ratville/GWasWMD.pdf> (last visited May 6, 2007).

The feedback loop: Payback for today’s emissions in three to five decades. Yesterday’s SUV exhaust does not become today’s rising temperature, not immediately. Through an intricate feedback loop, fossil fuel burned today is expressed in warming 30 to 50 years later. Today we are seeing temperatures related to fossil-fuel emissions from roughly 1960, when fossil fuel consumption was much lower. Today’s fossil-fuel emissions will be expressed in the atmosphere about 2040.

Id. at 3.

scientists acknowledge the existence of climatic tipping points.³⁹² The physical world might show little or no change for a long period and then, suddenly, react in dramatic and irreversible ways. An environment that has appeared resistant to human encroachment can suddenly shift, becoming much hotter or much colder in a short period of time. Climates can change radically in weeks, not millennia.

Remember in *The Matrix* when Agent Smith tells Morpheus that humans are a virus?³⁹³ Well, that wasn't just *ad hominem* hyperbole for science fiction fans. It's precisely what one eminent researcher believes. James Lovelock, father of the Gaia theory, believes that the Earth functions like a living organism, and believes that—in response to human action—the world is growing feverish.³⁹⁴ She will increase her temperature to cure herself of what ails her: us. Lovelock believes that we might have already traversed the tipping point, and are sliding toward apocalypse,³⁹⁵ a world that is indistinguishable from Hell.³⁹⁶ “[W]e discovered too late that ... the Earth system was fast approaching the critical state that puts all life on it in danger.”³⁹⁷ And Lovelock is not alone in this outlook. David King, Britain's chief scientist, has warned that unless greenhouse gas emissions are immediately curtailed, most of the Earth will be uninhabitable by 2100.³⁹⁸ The last place—the only place capable of sustaining human life—will be Antarctica.³⁹⁹ Whether or not global warming actually renders the planet uninhabitable by century's end,⁴⁰⁰ it is exceedingly difficult to read the emerg-

³⁹² See, e.g., RICHARD B. ALLEY, *ABRUPT CLIMATE CHANGE* (2002) (describing drastic changes in temperature, up to 16 degrees Celsius, within 10 or 20 years). Others have described tipping points. “We realize that there is a common pattern we're seeing in ecosystems around the world. Gradual changes in vulnerability accumulate and eventually you get a shock to the system, a flood or a drought, and boom, you're over into another regime. It becomes a self-sustaining collapse.” JENSEN, *supra* note 163, at 43-44 (quoting Stephen Carpenter).

³⁹³ See *supra* note 295.

³⁹⁴ See JAMES LOVELOCK, *THE REVENGE OF GAIA* 1 (2006) (“I speak as a planetary physician whose patient, the living Earth, complains of fever....”).

³⁹⁵ Some are not bothered by the destruction of the environment because they believe that increased devastation of the Earth marks the transition to the End of Days, the return of Jesus Christ, and the Rapture. See, e.g., JENSEN, *supra* note 163, at 226 (describing a conversation between Greenpeace activist Jeremy Leggett and Ford Motor Company executive John Schiller). This belief is not as unusual as it might seem. A recent U.S. poll showed that one person in four believed that 2007 will herald the Second Coming of Christ. See *Poll: 1 in 4 Expects 2007 to Bring Second Coming of Christ: More Expect Terrorist Attack*, USA TODAY, Jan. 1, 2007, at: http://www.usatoday.com/news/nation/2006-12-31-new-year-predictions_x.htm (last visited May 6, 2007).

³⁹⁶ LOVELOCK, *supra* note 394, at 147.

³⁹⁷ *Id.* at 5-6.

³⁹⁸ See Geoffrey Lean, *Why Antarctica Will Soon Be the Only Place to Live*, LONDON INDEPENDENT, May 2, 2004, available at: http://www.findarticles.com/p/articles/mi_qn4159/is_20040502/ai_n12755553 (last visited May 6, 2007).

³⁹⁹ *Id.*

⁴⁰⁰ See LOVELOCK, *supra* note 394, at color plate 7 (showing a photograph of Mars, captioned “Mars now—and what the earth will look like eventually”).

ing body of climate change research and to not dream dystopian dreams.⁴⁰¹ “It’s surreal to have pre-eminent scientists tell us very seriously that civilization as we know it is over.”⁴⁰² While not strictly focused on environmental matters, the iconic gonzo journalist Hunter S. Thompson wrote a cheery little column entitled “Welcome to the Big Darkness” shortly before committing suicide. The final words of this essay are haunting:

The American nation is in the worst condition I can remember in my lifetime, and our prospects for the immediate future are even worse. I am surprised and embarrassed to be a part of the first American generation to leave the country in far worse shape than it was when we first came into it. Our highway system is crumbling, our police are dishonest, our children are poor, our vaunted Social Security, once the envy of the world, has been looted and neglected and destroyed by the same gang of ignorant greed-crazed bastards who brought us Vietnam, Afghanistan, the disastrous Gaza Strip and ignominious defeat all over the world. The Stock Market will never come back, our Armies will never again be No. 1, and our children will drink filthy water for the rest of our lives. ... Big Darkness, soon come. Take my word for it.⁴⁰³

B. *Imperfect Necessity Revisited: Total Cultural Revolution*

This next part might be uncomfortable, but keep reading. It’s important.

In a recent issue of the *London Review of Books*, John Lanchester introduces the subject of climate change by making an unsettling observation:

It is strange and striking that climate change activists have not committed any acts of terrorism. After all, terrorism is for the individual by far the modern world’s most effective form of political action, and climate change is an issue about which people feel just as strongly as about, say, animal rights. This is especially noticeable when you bear in mind the ease of things like blowing up petrol stations, or vandalising SUVs. In cities, SUVs are loathed by everyone except the people who drive them; and in a city the size of London, a few dozen people could in a short space of time make the ownership

⁴⁰¹ See, e.g., *Protecting Polar Bears: Your E-Mails*, Dec. 28, 2006, at: <http://www.cnn.com/2006/TECH/science/12/28/polar.bears.reaction/index.html> (last visited May 6, 2007) (reporting reader reactions to global warming).

[T]he train has left the station, and the caps are going to melt, and in a hundred years, the only large animals left are going to be in zoos, behind bulletproof glass, or in farms being prepared to be cooked and put under glass. The average person will be eating rats and cockroaches and drinking very questionable water from lakes and springs with names that don't Google very well. The good news is that SUVs will continue to be available and that human body parts with genetics custom matched to your specifications will enable those who can afford it to live longer than your wildest dreams.

Id. (quoting Paul Reinstein)

⁴⁰² Bob Berwyn, *Global Warming Story Hits Critical Mass*, SUMMIT DAILY NEWS, at <http://www.summitdaily.com/article/20070313/NEWS/103130045> (Mar. 13, 2007) (quoting ABC News correspondent Bill Blakemore).

⁴⁰³ Hunter S. Thompson, *Welcome to the Big Darkness*, ESPN PAGE TWO, at <http://espn.go.com/page2/s/thompson/030722.html> (July 22, 2003).

of these cars effectively impossible, just by running keys down the side of them, at a cost to the owner of several thousand pounds a time. Say fifty people vandalising four cars each every night for a month: six thousand trashed SUVs in a month and the Chelsea tractors would soon be disappearing from our streets. So why don't these things happen? Is it because the people who feel strongly about climate change are simply too nice, too educated, to do anything of the sort? (But terrorists are often highly educated.)⁴⁰⁴

Why *don't* these things happen? Let us imagine that in fact they *do*. Let us imagine an individual. Let us imagine that we observe him reading, and let us take note of the books and magazines on his shelves. He has a copy of the latest IPCC report,⁴⁰⁵ a dog-eared copy of the *Global Warming Desk Reference*,⁴⁰⁶ Lovelock's book on Gaia's revenge,⁴⁰⁷ and a shelf of *Nature* and *Science*. Based on his reading habits, he might be a climatologist.⁴⁰⁸ There are, however, other, more perplexing, works on those shelves. There are books associated with Green-Anarchy: books by Zerzan⁴⁰⁹ and Jensen.⁴¹⁰ There's a much-studied copy of the Pentagon's report, *An Abrupt Climate Change Scenario and Its Implications for United States National Security*.⁴¹¹ And even more worryingly, there's a copy of the Unabomber Manifesto, *Industrial Society and Its Future*,⁴¹² and copies of three U.S. military manuals: the *Improvised Munitions Handbook*,⁴¹³ *Unconventional Warfare Devices and Techniques: Incendiaries*,⁴¹⁴ and *Explosives and Demolitions*.⁴¹⁵ There's a copy of *Introduction to the Technology of Explosives*,⁴¹⁶ and a thin volume entitled *Basement Nukes*.⁴¹⁷ There's even an article from *Popular Mechanics* entitled "E-Bomb: In the Blink of An Eye, Electromagnetic Bombs Could Throw Civilization Back 200 Years:

⁴⁰⁴ John Lanchester, *Warmer, Warmer*, LONDON REVIEW OF BOOKS, available at: http://www.lrb.co.uk/v29/n06/lanc01_.html (22 Mar. 2007).

⁴⁰⁵ See Intergovernmental Panel on Climate Change, *Climate Change 2001*, *supra* note 331

⁴⁰⁶ BRUCE E. JOHANSEN, *GLOBAL WARMING DESK REFERENCE* (2001).

⁴⁰⁷ See LOVELOCK, *supra* note 394.

⁴⁰⁸ It is not difficult to imagine that he started off as a climatologist, but ultimately came to doubt many of the fundamental assumptions of western society. See JENSEN, *supra* note 163, at 91 ("[M]any environmentalists begin by wanting to protect a piece of ground and end up questioning the foundations of Western civilization.").

⁴⁰⁹ See ZERZAN, *supra* note 163.

⁴¹⁰ See JENSEN, *supra* note 163.

⁴¹¹ See Schwartz & Randall, *supra* note 348 (describing Pentagon report).

⁴¹² See *supra* note 207 (describing publication history of the Unabomber Manifesto).

⁴¹³ DEPARTMENT OF DEFENSE, *IMPROVISED MUNITIONS HANDBOOK* (TM 31-210) (1969).

⁴¹⁴ DEPARTMENT OF DEFENSE, *UNCONVENTIONAL WARFARE DEVICES AND TECHNIQUES: INCENDIARIES* (TM 31-210-1) (1966).

⁴¹⁵ DEPARTMENT OF DEFENSE, *EXPLOSIVES AND DEMOLITIONS* (FM 5-25) (1967).

⁴¹⁶ PAUL W. COOPER & STANLEY R. KUROWSKI, *INTRODUCTION TO THE TECHNOLOGY OF EXPLOSIVES* (1996).

⁴¹⁷ EDWIN S. STRAUSS, *BASEMENT NUKES: THE CONSEQUENCES OF CHEAP WEAPONS OF MASS DESTRUCTION* (1984).

And Terrorists Can Build Them for \$400.”⁴¹⁸ This is no climate scientist, then, but a very brilliant and dangerous man. We can call him Galt, for this is the man who, in our hypothetical, has “stop[ped] the motor of the world.”⁴¹⁹

In our hypothetical, Galt is the man who grokked the IPCC report in fullness, understood that big darkness soon comes, and saw a scattered world of nations either incapable or unwilling to work against the threat of runaway global warming. Galt was the man who believed Nazi-resister Dietrich Bonhoeffer when he wrote, “We have spent too much time in thinking, supposing that if we weigh in advance the possibilities of any action, it will happen automatically. We have learnt, rather too late, that action comes not from thought, but from a readiness for responsibility.”⁴²⁰ Galt was the man who took Thoreau at his word when he advocated immediate transgression of wicked laws in *Civil Disobedience*, “Unjust laws exist: shall we be content to obey them or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once?”⁴²¹ Galt was the man who cast his lot with Derrick Jensen in “calling for people to bring down civilization. This will not be bloodless. This will not be welcomed by most of the civilized. But I do not see any other realistic options. I cannot stand by while the world is destroyed. And I see no hope for reform.”⁴²² And Galt was the man who, in our hypothetical, orchestrated a two-part plan to save the planet from human ignorance.

Stage one of Galt’s plan involved the use of computers, e-bombs, and high-energy radio frequency (HERF) guns to undermine and cripple the infrastructure of modern society. Working with a modest number of technically-savvy and ideologically-committed individuals,⁴²³ Galt launched coordinated attacks on major computer networks throughout the world. Working in cells, a dozen hackers were able to infiltrate a number of government and industrial systems, shutting down electrical grids, water pumping stations, and telephone switching centers. Homemade e-bomb devices, using flux compression generators, destroyed electronic devices (e.g., computers, telephones, televisions, radios, even automobiles) in their blast radius; the “late-time EMP effects” of these devices snaked through electrical and telecommunications systems, destroying traffic control systems, air traffic centers, and banking centers. Homemade

⁴¹⁸ Jim Wilson, *E-Bomb: In the Blink of an Eye, Electromagnetic Bombs Could Throw Civilization Back 200 Years: And Terrorists Can Build Them for \$400*, POPULAR MECHANICS, Sept. 2001, at http://www.popularmechanics.com/technology/military_law/1281421.html (last visited May 6, 2007).

⁴¹⁹ RAND, *supra* note 157 and associated text (quoting John Galt).

⁴²⁰ DIETRICH BONHOEFFER, DIETRICH BONHOEFFER: LETTERS AND PAPERS FROM PRISON: THE ENLARGED EDITION 298 (Bethge Eberhard, ed. 1953).

⁴²¹ THOREAU, *supra* note 166, at 462.

⁴²² JENSEN, *supra* note 163, at 683.

⁴²³ The number of individuals required to seriously disrupt modern U.S. society is actually quite modest. Jensen reports a conversation with a computer enthusiast:

I have to know. “If they were dedicated enough, and knew what they were doing, how many people do you think it would take to bring down civilization?” Brian says, “It would take far fewer than Jesus had Apostles.”

JENSEN, *supra* note 163, at 744.

HERF guns, in the hands of these grassroots operatives, took down additional systems. Like *Fight Club*'s Tyler Durden, Galt thereby destroyed the debt record;⁴²⁴ he also shut down the Internet, telephones, television, and radio. He grounded aircraft, and he ground the endless parade of American automobiles to a halt. After he acted, the United States was lit with candles and warmed with tindersticks. And Galt and a dozen peers did this without killing a single human being.

The second phase of Galt's plan was less gentle. Indeed, it was premised on violence.⁴²⁵ As civilization began to attempt to right itself, to get the power plants up and running again, the second wing of Galt's conspiracy sprang into action.⁴²⁶ Using no-fingerprint letters delivered to corporate buildings, as well as guerrilla billboards and jammed radio stations, eco-terrorist cells organized by Galt warned that anyone who tried to restore electricity or produce petroleum would be killed.⁴²⁷ They transmitted one unequivocal message: *Do not try to rebuild civilization*. And they were not bluffing. Refineries in the Gulf Coast region were destroyed by a number of ammonium nitrate-fuel oil truck bombs assembled for a few thousand dollars each (e.g., the sort used to level the Murrah Federal building in Oklahoma City).⁴²⁸ Detonating a truck bomb in a refinery is the equivalent of throwing a road flare onto a barrel of kerosene:

⁴²⁴ The similarity of this outcome—the elimination of the computer-maintained debt record—and Tyler Durden's ultimate objective in *Fight Club* should not be overlooked. See *supra* notes 152-162 and associated text (describing Durden's elimination of the debt record and the transformation from an urban *Gesellschaft* society to a pastoral *Gemeinschaft* society).

⁴²⁵ It should be noted that even Mahatma Gandhi and Henry David Thoreau—society's poster boys of nonviolent civil disobedience—did not condemn violence in all situations. See JOAN V. BONDURANT, *CONQUEST OF VIOLENCE: THE GANDHIAN PHILOSOPHY OF CONFLICT* 28 (1988) ("Gandhi guarded against attracting to his *satyagraha* movement those who feared to take up arms or felt themselves incapable of resistance. 'I do believe,' he wrote, 'that where there is only a choice between cowardice and violence, I would advise violence.'"); Henry David Thoreau, *A Plea for Captain John Brown*, *supra* note 212 ("I do not wish to kill nor to be killed, but I can foresee circumstances in which both these things would be by me unavoidable.").

⁴²⁶ See JENSEN, *supra* note 163, at 808.

I think that twelve hackers could take down the electrical grid of all of North America, a blackout lasting for months. That blackout itself would take out key components [of civilization]. Of course those in power would immediately start retooling, and because they have more resources than we do they'd eventually be able to come back online. We'd have to hit them again in the meantime.

Id.

⁴²⁷ See *id.* at 4 (describing the unsuccessful efforts of peaceful activists to stop the dumping of the defoliant and teratogen Agent Orange on Oregon forests, and noting that what did work was the threat of violence).

I'll tell you what did [stop the spraying]. A bunch of Vietnam vets lived in those hills, and they sent messages to the Bureau of Land Management and to Weyerhaeuser, Boise Cascade, and the other timber companies saying, "We know the names of your helicopter pilots, and we know their addresses." ... The spraying stopped.

Id.

⁴²⁸ See *supra* note 249 (describing Oklahoma City Bombing device).

virtually all of the unfortunate souls in the facilities at the time of the blasts were killed. Coal-burning facilities were bombed. Shipments of gasoline were hijacked and destroyed. Galt's attacks killed hundreds—perhaps thousands—of people and caused millions—perhaps billions—in property damage. Many oil company executives ceased coming to work, but those who did not were later killed when bombs were detonated in corporate headquarters and scattered research and development laboratories.⁴²⁹ The U.S. military tried to protect the nation's petroleum infrastructure, but Galt's co-conspirators were like ghosts.⁴³⁰ They looked like normal citizens, like you and me, but they organized in loosely-affiliated cells, and they struck fast and decisively. Once the attacks on the headquarters and labs were carried out, even committed employees stopped coming in to work. A third wave of attacks, then a fourth, and then a fifth, effectively stopped efforts to revive the petroleum industry and to rectify the nation's electrical utilities.

The United States awoke from an American dream into a nightmare. The electrical grid was downed, the petroleum industry was paralyzed, and the roadways were choked and made impassable with cars that had been crippled with EMP and a lack of fuel. Society began to fray, especially in the cities. Without electricity, there was no supply of potable water and no system of sanitation. Food could not reach urban markets, and pharmaceuticals could not reach city hospitals; hunger and disease began to spread. The hoarding and price gouging associated with natural disasters gave way to widespread looting and violence. Military efforts to ensure order and establish lines of supply were unsuccessful, but within cities of lawlessness and fear, people began to rely on one another and to form self-sufficient communities.

Then, three months after the e-bomb assault and ten weeks after the attacks on the refineries began, Galt turned himself into the police. He had fastidiously taken steps to ensure that he could not direct law enforcement officers to any of the others involved in the conspiracy, but he was interested in standing trial so that survivors in the United States would understand why his organization did the things that they did.⁴³¹ He would represent himself at trial, thereby avoiding uncooperative lawyers like those who bedeviled Kaczynski and McVeigh, and, of course, he would establish his defense with the doctrine of necessity. Galt did not expect to prevail in this defense, but he wanted to argue necessity in order to use the courtroom as a forum to explain his actions.

How did Galt's defense unfold in a U.S. court?

Unlike the fictional character of Tyler Durden (who ensured the credit card buildings were empty before he blew them up), Galt knowingly claimed human lives. Unlike Unabomber Theodore Kaczynski, however, Galt's motives were pure—malignancy and revenge played no part in his crimes. So, in many respects, Galt was

⁴²⁹ There are echoes of Kaczynski's crimes in this approach. *See* Part III.B (describing the Unabomber case).

⁴³⁰ Jensen's interviews suggest that 20 groups of 3-5 extraordinarily committed people, if supported by an underground railroad of supporters who could provide food, shelter, and supplies, could bring civilization down in "a short time." JENSEN, *supra* note 163, at 833.

⁴³¹ There are a host of reasons why an ideologically-motivated offender might wish to present a defense of necessity in a courtroom. *See, e.g., supra* note 68 and associated text (outlining communicative value of defense).

a near-perfect defendant for a defense of radical political necessity. He killed a large number of people in an attempt to save the lives of a greater number of people.

Of course, there was a very good chance that our hypothetical Galt would never live to stand trial. After blowing up one building, Timothy McVeigh was afraid to be moved, worried that like Lee Harvey Oswald, he would be silenced before he could tell his story.⁴³² It is not difficult to imagine that Galt might have died in “an accident” before ever getting to trial. And it is not difficult to imagine that, even when he *did* reach the courthouse to stand trial, every person in the room pre-judged him as guilty (i.e., both responsible and criminally culpable). Indeed, it is difficult to imagine a citizen—judge or juror—who could have approached Galt’s case in a fair and dispassionate manner. But let us imagine that Galt made it as far as the courthouse to stand trial. How might he argue necessity?

As noted in Part II of this Article, there are sometimes additional elements engrafted to the defense of necessity, but four traditional requirements must be demonstrated in order to raise the justification in a jury trial: imminence, the absence of lawful alternatives, proportionality, and a causal nexus.

In his opening remarks to the jury, Galt would explain that he had once been a scientist, a man who studied the physical world. He had, like others before him, made a study of the world’s changing climate and concluded that global warming was real. Like others before him, he waited for his government to regulate the emission of greenhouse gases; and like others before him, he despaired when his government left the atmosphere to the mercy of the free market.⁴³³ He waited for industry to regulate itself before realizing that corporations are psychopathic,⁴³⁴ focused myopically on short-term profit, and incapable of sacrificing market share today for a habitable world tomorrow.⁴³⁵ He waited for the media to warn the country,⁴³⁶ for people to demand that their leaders take action. And nothing happened.⁴³⁷

⁴³² See MICHEL & HERBECK, *supra* note 243, at 255 (describing McVeigh’s fear of pre-trial assassination).

⁴³³ See, e.g., David G. Victor, *Piety at Kyoto Didn’t Cool the Planet*, N.Y. TIMES, Mar. 23, 2001, at A19 (“President Bush met a barrage of criticism last week when he backed away from regulating carbon dioxide emissions, but he was only hastening the inevitable.”). The United States withdrew from the Kyoto Protocol in March 2001. The treaty would have required the U.S. to cut its emissions of greenhouse gases to 7 percent below 1990 levels, on average, from 2008 to 2012. *Id.*

⁴³⁴ See THE CORPORATION, *supra* note 160 (noting that corporations possess the characteristics associated with psychopathic personality disorder). This is not because corporations are defective, but because they are doing what they are designed to do. See JENSEN, *supra* note 163, at 383 (“To expect corporations to do anything other than the purpose for which they are expressly and explicitly designed, that is, to amass wealth at the expense of human and nonhuman communities, is at the very least poor judgment, and more accurately delusional.”).

⁴³⁵ But see Richard Simon, *CEOs Encourage Emissions Caps*, L.A. TIMES, Feb. 14, 2007, at A19 (noting that a group of influential chief executives, representing such powerful corporations as BP America Inc., DuPont Co., Caterpillar Inc., General Electric Co., and Duke Energy Corp., urged Congress to impose mandatory reductions in greenhouse gas emissions).

⁴³⁶ See AN INCONVENIENT TRUTH, *supra* note 332 (noting that while peer-reviewed studies were unanimous in concluding that global warming is real, and that human activity plays a role in it, 53% of the articles in the mass media characterize global warming as a theory lack-

Finally, after months and years of inertia, Galt asked himself a question: If he could travel back in time, would he be willing to kill Adolf Hitler in order to avert the Holocaust?⁴³⁸ After wrestling with this question, Galt answered in the affirmative, and began to look for others who believed that the world was teetering on the brink like “passengers on a small pleasure boat sailing quietly above the Niagara Falls, not knowing that the engines are about to fail.”⁴³⁹ He began to engage in lifeboat algebra,⁴⁴⁰ calculating how many people must be sacrificed in order to save the rest of the humanity (and the non-human world). He agreed that “[d]esperation is the raw material of drastic change. Only those who can leave behind everything they have ever believed in can hope to escape.”⁴⁴¹

In the end, Galt concluded that the nation’s infrastructure had to be destroyed beyond repair. Only then might the planet have a chance. Galt would tell the jury that

ing scientific consensus). Many members of the United States public have never even heard of global warming. *See Hot Issue*, CHICAGO TRIB., Jan. 30, 2007, at 3 (noting that among 46 polled countries, the U.S. is the least concerned with global warming, and that 13% of U.S. citizens have never heard or read about global warming). It has been suggested that this is not accidental. *See, e.g.*, Nicole Gaouette, *Altered Climate Reports Spark Stormy Climate Hearing*, L.A. TIMES, Mar. 20, 2007, at A10 (describing Congressman Henry Waxman’s suggestion that “[t]here may have been a concerted effort directed by the White House to mislead the public about the dangers of global climate change”); William Neikirk, *Warming Data Allegedly Manipulated*, CHICAGO TRIB., Jan. 31, 2007, at 3 (noting that 43% of scientists responding to a Union of Concerned Scientists survey reported having experienced pressure to remove references to global warming or climate change in their research).

⁴³⁷ Even in the 1950s, sociologist C. Wright Mills warned ominously, “The effective units of power are now the huge corporation, the inaccessible government, the grim military establishment. There is little live political struggle. Instead, there is administration from above, and the political vacuum below.” C. W. MILLS, *THE POWER ELITE* 308-09 (1956). Since Mills wrote, the military-industrial complex has grown in size and influence. *See generally* WHY WE FIGHT (Sony Classics 2005) (documenting the rise of the United States military-industrial complex).

⁴³⁸ The question is apt. Galt viewed the dawning of global warming as a new holocaust. And he believed that coordinated resistance was needed because under difficult circumstances human nature tends to inertia.

The lesson of the Holocaust is the facility with which most people, put into a situation that does not contain a good choice, or renders such a good choice very costly, argue themselves away from the issue of moral duty (or fail to argue themselves towards it), adopting instead the precepts of rational interest and self-preservation. In a system where rationality and ethics point in opposite directions, humanity is the main loser. Evil can do its dirty work, hoping that most people most of the time will refrain from doing rash, reckless things—and resisting evil is rash and reckless. Evil needs neither enthusiastic followers nor an applauding audience—the instinct of self-preservation will do, encouraged by the comforting thought that it is not my turn yet, thank God: by lying low, I can still escape.

ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST* 206 (1989).

⁴³⁹ LOVELOCK, *supra* note 394, at 6.

⁴⁴⁰ *See* Part II.C (describing necessity defense as applied to lifeboat cases).

⁴⁴¹ JENSEN, *supra* note 163, at 315 (quoting William S. Burroughs).

he trembled at the enormity of what he had to do, but that he did it because he loved the world.

Still, the defense of necessity would be difficult for Galt to raise.

In all likelihood, Galt's attempt to demonstrate imminence of the averted harm would result in a fabled "battle of the experts."⁴⁴² An imminent harm cannot be "debatable or speculative,"⁴⁴³ but must be tangible. It must be danger from "obvious and generally recognized harms."⁴⁴⁴ While it is generally recognized that human activity plays a role in global warming,⁴⁴⁵ there is disagreement among climate scientists about precisely how much impact humans play, and how quickly our effects will manifest in the world.⁴⁴⁶ The scientists testifying on behalf of prosecutors might describe environmental, health, and economic benefits of global warming,⁴⁴⁷ perhaps even suggesting that carbon dioxide is not a pollutant at all, but an essential part of the Earth's O₂-CO₂ cycle.⁴⁴⁸ On the other side, those testifying for Galt would warn of unpredictable tipping points,⁴⁴⁹ and stand by their views that in the absence of Galt's drastic actions, the whole of the world would have been uninhabitable by the century's end.⁴⁵⁰ Perhaps the testimony of these experts would be sufficient to establish a prima facie showing of imminence: in *United States v. Fox*,⁴⁵¹ a case involving nuclear protestors, the defendant was allowed to present an affidavit from a nuclear physicist asserting that

⁴⁴² See David G. Owen, *A Decade of Daubert*, 80 DENV. U.L. REV. 345, 345 n.1 (2002) (describing the use of experts in jury trials, presenting different interpretations of scientific and technical research, that juries are ill-equipped to evaluate).

⁴⁴³ *Commonwealth v. Brugmann*, 433 N.E.2d 457, 461 (Mass. App. 1982).

⁴⁴⁴ *State v. Dorsey*, 395 A.2d 855, 857 (N.H. 1978).

⁴⁴⁵ See *supra* note 333 and associated text (describing consensus).

⁴⁴⁶ See, e.g., LOVELOCK, *supra* note 394, at 61 (describing climatologists who predict a less severe outcome than does Lovelock).

⁴⁴⁷ See, e.g., MARLO LEWIS, *A SKEPTIC'S GUIDE TO AN INCONVENIENT TRUTH* (2006), at: http://www.cei.org/pages/ait_response-book.cfm (Nov. 21, 2006), but see *Scientist to CEI: You Used My Research to "Confuse and Mislead,"* at: <http://www.factcheck.org/article395.html> (May 26, 2006) (describing Professor Curt Davis's claim that the business-backed Competitive Enterprise Institute had misused his research).

⁴⁴⁸ The Competitive Enterprise Institute ran an advertisement entitled *Energy*. The voice-over states:

There's something in these pictures you can't see. It's essential to life. We breathe it out. Plants breathe it in. It comes from animal life, the oceans, the earth, and the fuels we find in it. It's called carbon dioxide: CO₂. The fuels that produce CO₂ have freed us from a world of back-breaking labor, lighting up our lives, allowing us to create and move the things we need, the people we love. Now some politicians want to label carbon dioxide a pollutant. Imagine if they succeed. What would our lives be like then? Carbon dioxide. They call it pollution. We call it life.

See ENERGY (Competitive Enterprise Institute 2006), at: <http://www.factcheck.org/video/CEIEnergyhi.wmv> (last visited May 6, 2007).

⁴⁴⁹ See generally ALLEY, *supra* note 392 (describing profound temperature changes that occur within a decade).

⁴⁵⁰ See Lean, *supra* note 398 (describing pessimistic views of Sir David King).

⁴⁵¹ No. 85-152 (D. Ariz. 1985).

there is a significant chance of accidental nuclear war and that U.S. policy destabilized the world.⁴⁵²

Yet even if the scientists who predict that the Earth will soon resemble the barren red face of Mars are correct, is such a shift in climate imminent? Recall that “imminence” has been construed by some courts to be synonymous with “immediate,” limiting claims of necessity to cases of sudden emergency.⁴⁵³ But even courts that acknowledge that imminent “does not describe the proximity of the danger by any rule of mechanical measurement [and recognize that] law does not fix the distance of time between the justifiable defence and the mischief, for all cases, by the clock or the calendar,”⁴⁵⁴ might struggle nevertheless with acts of necessity based on the threat of global warming. After all, warming is not something that is *coming*; it is something that, if the IPCC is to be believed, is *here*.⁴⁵⁵ What immediate and decisive action might achieve, then, is not the avoidance of global warming, but its amelioration. The rate of climate change might be slowed; the increase in temperatures might be restrained; and the likelihood of traversing a fatal tipping point might be minimized. But warming is upon us already. And a court that discounts all ongoing harms as not-imminent would be quite unlikely to permit Galt’s necessity defense to go forward.⁴⁵⁶ In fact, it would be extraordinarily easy for a court to reject Galt’s claim of necessity by rejecting his showing of imminence. The harm associated with global warming is a slow death by one thousand cuts, and very different from the sudden injury that typically justifies criminal action under the doctrine of necessity. Cohan, in considering the application of necessity to cases of terrorism, has suggested that imminence is irrelevant if there are no legal alternatives:

If there are no legal alternatives to breaking the law to avert the threatened harm, then the imminence factor becomes irrelevant in that, no matter how soon the danger will materialize, there is no legal way out, so that violating the law will be necessary in order to avoid the danger.⁴⁵⁷

But this brings us to the second hurdle for Galt: he would also have to demonstrate the absence of lawful alternatives. This requirement often presents insurmountable obstacles for politically-motivated actors,⁴⁵⁸ and Galt would face the same challenges. Galt would have to demonstrate that *nothing* else could have mitigated the harm of global warming—not publishing books, not making documentary films, not organiz-

⁴⁵² See Affidavit of Alex Dely, *United States v. Fox*, No. 85-172 (D. Ariz. 1985).

⁴⁵³ See *People v. Roberts*, 938 P.2d 11, 15 (Colo. Ct. App. 1999).

⁴⁵⁴ *Aldrich v. Wright*, 53 N.H. 398, 402 (1873).

⁴⁵⁵ See *supra* note 333 (concluding that much of the warming of the last 50 years is anthropogenic).

⁴⁵⁶ See *State v. Kealoha*, 826 P.2d 884, 886 (Haw. Ct. App. 1992) (rejecting necessity defense in case of longstanding harm).

⁴⁵⁷ Cohan, *supra* note 16, at 949.

⁴⁵⁸ See Martin, *supra* note 8, at 1586 (“A lawful alternative is typically thought to exist or not exist, and the necessity defense viewed as available only when the defendant can establish the latter.”); Schwartz, *supra* note 74 (noting that because there are always legal alternatives to politically motivated illegal acts, necessity is not viable in political cases).

ing peaceful protests, and not testifying before Congress. Of course, in his favor, Galt would be able to amass a vast bibliography of books and articles that had been written, and to no avail. He would be able to identify film after documentary film that had been produced, and that had not stopped the emission of greenhouse gases. He would be able to show that again and again, protests were ignored by decision-makers in government and industry. He would be able to show that the U.S. government does not lack information about global warming; rather, it lacks the political will to make hard sacrifices now to guarantee that there *is* a tomorrow. Galt would argue that “there are no reasonable nonviolent means that offer any hope of successful change in a dreadful situation.”⁴⁵⁹ Only the immediate and irreversible cessation of fossil-fuel use, coupled with a drastic reduction in the number of urban dwellers, could stop (or slow) society’s blind march into annihilation. Still, if a court construed the requirement by asking if there was *any* alternative to Galt’s campaign of terror, instead of asking if there was any *viable* alternative—any meaningful alternative—that court would easily dismiss Galt’s claim of necessity. It is not difficult to imagine that an as-yet-unwritten book, an as-yet-unproduced film, or as-yet-unwritten testimony could change the course of human events, and any court that looks to what is possible instead of what has happened might very well bar the defense. Even if terrorism was the only thing that could have shaken the country from its consumptive stupor, couldn’t a less-drastic attack have accomplished Galt’s goals? Did human lives really have to be taken? A court freed to speculate, post hoc, about the kinds of actions that would have averted the evils of global warming would probably be able to seize upon something less harmful than Galt’s war against modernity.

The requirement of proportionality might prove challenging for Galt, as well, especially because the conspiracy was responsible for such an unprecedented loss of human life. Could he show that his actions were, in fact, the lesser of two evils? Again, much of this depends on the harms associated with global warming: if the harm of warming is limited to modest increases in temperature and a modest rise in sea level, it may or may not be possible to demonstrate that taking down the electrical grid (the first phase of the attack), but it would be very difficult to justify the destruction of populated refineries and headquarters (phase two). The doctrine of necessity tends to value human life over property,⁴⁶⁰ and it would be difficult to establish that property loss—even on the scale of losing a whole island nation (e.g., Vanuatu)⁴⁶¹—warranted the death of a thousand people or more. But if pessimistic climate scientists like James Lovelock and Sir David King are correct,⁴⁶² and if the world really could be transformed into an uninhabitable hell by 2100,⁴⁶³ then perhaps both phases of Galt’s dark plan can be justified. If the alternative was to stand by and allow

⁴⁵⁹ Cohan, *supra* note 16, at 964.

⁴⁶⁰ See Martin, *supra* note 8, at 1549-51 (describing necessity’s subordination of individual property rights to life and human suffering).

⁴⁶¹ See *supra* note 365 (describing island nations that could be submerged by rising ocean levels).

⁴⁶² See *supra* note 394 and associated text (describing views of Lovelock); *supra* note 398 (describing views of King).

⁴⁶³ See *supra* note 396 and associated text (describing the world to come as a hell).

99.9% of the human and animal life on the planet to die, then even Galt's audacious crime—even killing people in the thousands—was justified. Against a nightmarish alternative, even Galt's brazen act of terrorism can be the lesser-of-two-evils.

Where the terrorist act is the less-evil act, the terrorist act should be done. We must not be evasive about this. It is, of course, morally wrenching when we have to make such choices. Not even a halfway decent person can accept with equanimity the killing or harming of the innocent. But are we going to accept with equanimity letting an even greater evil transpire where we can do something about it?⁴⁶⁴

Galt did not. He believed, based upon his own research on climate change, that the consequences of inaction were the functional extirpation of all life on this planet. He believed, like others, that the destruction of the ecosystem “so menaces fundamental human rights and international peace and security that it must be treated with the same gravity as apartheid or genocide.”⁴⁶⁵ For Galt, it really was a question as compelling as, “If you could travel back in time, would you kill the struggling watercolor artist Adolf Hitler in order to avert the Holocaust?”⁴⁶⁶ It was a question with even graver consequences. It was not just an ethnic group that could live or die, but *all* life on Earth.

If the climate research supporting a worst-case prediction was sound enough to satisfy the imminence requirement, it should also support a prima facie showing of proportionality. But it would be easy (and tempting) for a court to conclude that the harm associated with global warming is simply too remote, and too speculative, to guess what the ultimate consequences of greenhouse gas emissions will be.

Finally, Galt would have to show a reasonable causal nexus between his action and the harm he hoped to avert. Even this (which seems to be a straightforward matter) could present problems for Galt. Galt could show that his actions influenced climate change without difficulty. The mechanisms of global warming are reasonably well understood, and although it takes decades for the effect of CO₂ and methane to manifest, climatologists can model their consequences with some sophistication. Galt could show that while CO₂ reduction at the individual level is marginally helpful,⁴⁶⁷ it is not the individual, but industry and agriculture that consume the overwhelming majority of the world's resources.⁴⁶⁸ Thus, to mitigate global warming, Galt had to

⁴⁶⁴ Kai Nielsen, *On the Moral Justifiability of Terrorism (State and Otherwise)*, 41 OSGOODE HALL L.J. 427, 441 (2003).

⁴⁶⁵ Mark Allan Gray, *The International Crime of Ecocide*, 26 CAL. W. INT'L L.J. 215, 271 (1996).

⁴⁶⁶ Derrick Jensen describes his answer to the question: “What, given the opportunity, would he have said to Hitler?” He writes, “Bang, you're dead.” JENSEN, *supra* note 163, at 252-53.

⁴⁶⁷ See, e.g., Ten Things to Do, at: <http://www.climatecrisis.net/pdf/10things.pdf> (last visited May 6, 2007) (suggesting, *inter alia*, replacing a regular light bulb with a compact fluorescent bulb (saving 150 pounds of CO₂ per year), driving less (saving one pound of CO₂ for each mile not driven), and checking your tires for proper inflation).

⁴⁶⁸ See JENSEN, *supra* note 163, at 174.

stop industry and agriculture.⁴⁶⁹ But how? Taking down the North American electrical grid was an effective first step. Destroying refineries and corporate research laboratories was a rational second step. But Galt only affected CO₂ emissions from the *United States*. His actions, unless echoed by others in other nations, did nothing to stem the production of carbon dioxide in Europe, Asia, South America, Africa, or elsewhere. The United States produces a disproportionate share of CO₂, but even if 100% of the U.S. emissions were stopped immediately, more than 75% of the carbon dioxide produced each year would still be released into the atmosphere.⁴⁷⁰ And to restore U.S. infrastructure, utilities and industries would have to consume an enormous volume of fuel and resources. Thus, an unreceptive court might note that Galt's actions were causally linked to consumption in North America, but not to climate change *globally*, and thereby bar Galt's presentation of the necessity defense.

And even if Galt was able to establish all four of these elements, additionally grafted elements could prove to be insurmountable. If, for example, the jurisdiction requires the averted harm to emanate from natural forces,⁴⁷¹ global warming may or may not qualify.⁴⁷² Rising ocean levels and increasingly violent hurricanes seem like natural forces, but using the same climate change research that Galt would employ to show necessity, prosecutors could establish that the origin of the change was human

We're killing the planet, I say. Well, no, I'm not, but thank you for making me so powerful. Because I take hot showers, I'm responsible for drawing down aquifers. Well, no. More than 90 percent of the water used by humans is used by agriculture and industry. The remaining 10 percent is split between municipalities (got to keep those golf courses green) and actual living breathing humans. We're deforesting 214,000 acres per day, an area larger than New York City. Well, no, I'm not. Sure, I consume some wood and paper, but I didn't make the system. Here's the real story: If I want to stop deforestation, I need to dismantle the system responsible.

Id. (italics in original).

⁴⁶⁹ See *id.* at 551 (noting that modern civilization turns 1,400 square miles of land into desert every year, a rate more than double the rate measured 30 years ago, and that each summer agriculture kills 8,000 square miles in the Gulf of Mexico—a rate that has doubled each decade since the 1960s).

⁴⁷⁰ See G. Marland, et al., *Global, Regional, and National Fossil Fuel CO₂ Emissions*, in TRENDS: A COMPENDIUM OF DATA ON GLOBAL CHANGE (2006), at: http://cdiac.esd.ornl.gov/trends/emis/em_cont.htm (last visited May 6, 2007) (noting that North America [the U.S. and Canada] produced 26.1% of the world's CO₂ emissions in 2002).

⁴⁷¹ See *supra* note 35 and associated text (describing natural forces requirement in effect in some jurisdictions).

⁴⁷² While the manifestation of global warming would be classified as “natural forces,” the origins of climate change (at least in part) are man-made. See *supra* note 333 (describing consensus view of climate change as a function of human activity). Global warming is like pollution—emerging from the hand of humankind, but appearing in the world as a force of nature. Thus, in some ways, the phenomenon of global warming illuminates a false dichotomy between the natural and the human world. In truth, these worlds are not divorced: humans exist in nature, as part of nature, and their actions radiate outward, affecting the physical world around them.

activity, not nature. If the jurisdiction bars necessity claims in cases of homicide,⁴⁷³ obviously this defense will not be available to Galt.

That said, Galt should be permitted to present the justification of necessity to a jury. He could at least raise a colorable claim for each of the requisite elements: imminence, lack of lawful alternatives, proportionality, and causality. Therefore, unless barred by some other requirement peculiar to the jurisdiction, a court evaluating his claim should allow the defense to be raised.⁴⁷⁴ And because Galt would admit everything, his trial would not be about whether he did mastermind the conspiracy; rather, it would be about *why* he did so. In essence, he would ask twelve jurors to consider the bleak alternatives that he saw (i.e., the death of thousands of innocent people or the destruction of the entire world), and accordingly to nullify the effects of what would otherwise have been an atrocious crime.⁴⁷⁵ But this probably asks too much of Galt's jury.

Although the media reports environmental news on a daily basis, people do not perceive the potentially catastrophic effects of climate change. We ignore it.⁴⁷⁶ In the United States, 59% of those polled agree that global warming is underway, and 79% believe it poses a threat to future generations, but only 33% of us believe it will affect their own lives.⁴⁷⁷ As humans who have adapted to react to certain types of dangers, we are far more likely to respond to obvious and immediate threats than slow-but-certain threats.⁴⁷⁸ If terrorists were drowning entire nations,⁴⁷⁹ exterminating a mil-

⁴⁷³ See *supra* note 36 and associated text (describing prohibition of necessity in homicide cases in some jurisdictions).

⁴⁷⁴ See *supra* note 33 (describing requirements to present necessity to the jury).

⁴⁷⁵ See Bauer & Eckerstrom, *supra* note 9, at 1186 ("The political necessity defense places the jury in a position to acquit the defendant, nullifying the effect of the law that has been broken.").

⁴⁷⁶ See Lovelock, *supra* note 394.

I am old enough to notice a marked similarity between attitudes over sixty years ago towards the threat of war and those now towards the threat of global heating. Most of us think that something unpleasant may soon happen, but we are as confused as we were in 1938 over what form it will take and what to do about it. Our response so far is just like that before the Second World War, an attempt to appease. The Kyoto agreement was uncannily like that of Munich, with politicians out to show that they do respond but in reality playing for time.

Id. at 10.

⁴⁷⁷ See Jon Cohen & Gary Langer, *Poll: Many See No Need to Worry about Warming*, Jun. 15, 2005, at <http://abcnews.go.com/Technology/PollVault/story?id=850438> (last visited May 6, 2007) (describing results of telephone survey of 1,002 adults).

⁴⁷⁸ See Daniel Gilbert, *If Only Gay Sex Caused Global Warming*, L.A. TIMES, Jul. 2, 2006, at M1 (noting that humans are adapted to respond to threats possessing four characteristics: human origin, moral repugnance, immediate danger, and an observable rate of change). Louis J. Guillette, Jr. provides an example:

Imagine if, for the last fifty years, we had sprayed the whole earth with a nerve gas. Would you be upset? Would I be upset? Yes. I think people would be screaming in the streets. Well, we've done that. We've released endocrine disruptors throughout the world that are having fundamental effects on the immune system, on the reproductive

lion species,⁴⁸⁰ and making the planet uninhabitable,⁴⁸¹ people would dedicate every available resource to stopping them. We would spare no expense. Psychologist David Gilbert writes,

The human brain is a remarkable device that was designed to rise to special occasions. We are the progeny of people who hunted and gathered, whose lives were brief and whose greatest threat was a man with a stick. When terrorists attack, we respond with crushing force and firm resolve, just as our ancestors would have. Global warming is a deadly threat precisely because it fails to trip the brain's alarm, leaving us soundly asleep in a burning bed.⁴⁸²

Yet because climate change appears to be a natural phenomenon instead of an intentional act of destruction, we ignore it. We also ignore it because it happens so very slowly. The rate of climate change is rapid enough to terrify climatologists and biologists,⁴⁸³ but it is too slow to hold the attention of most people. Like the proverbial boiling frog that doesn't leap out of scalding waters because the temperature change is so gradual, we accept gradual changes that we would undoubtedly reject if they happened suddenly.

If Galt's jurors could travel in a time machine to 2050, they might return to the present horrified by what they had seen, and immediately acquit him. But because they don't see the effects of global warming on a daily basis, and have only speculative climate research to predict how the future might differ from the present, it would be difficult for twelve jurors to justify a crime of such enormity. "Indeed, the more transformative the defendant's conduct, the more likely the defense is to be rejected by a jury."⁴⁸⁴ Fearing planetary extinction, Galt stopped Western society. He engaged in *total* cultural revolution; he turned off the electricity, stopped the flow of petroleum, and shut down American society. This would be difficult for a jury—any jury—to accept.

And so it is extraordinarily difficult to imagine a jury acquitting Galt for his crimes. He might be able to *raise* the defense of necessity, and he even might be able to make a persuasive argument that global warming does in fact threaten all life on Earth, but in the absence of unanimous agreement of all scientists and prosecutors and courtroom officials that Galt was right, a jury of twelve would not permit a defendant—any defendant—to cripple the U.S. infrastructure and kill hundreds or thousands of people, and to walk out of the courtroom a free man. The law-abiding

system. We have good data that shows wildlife and humans are being affected. Should we be upset? Yes, I think that we should be fundamentally upset. I think we should be screaming in the streets.

THE ESTROGEN EFFECT: ASSAULT ON THE MALE (British Broadcast Company 1993).

⁴⁷⁹ See *supra* note 365 and associated text (describing this danger).

⁴⁸⁰ See *supra* note 386 and associated text (describing this danger).

⁴⁸¹ See *supra* note 398 and associated text (describing this danger).

⁴⁸² Gilbert, *supra* note 478.

⁴⁸³ See *supra* note 388 and associated text (quoting Professor Thomas).

⁴⁸⁴ Martin, *supra* note 8, at 1562.

general public will never be on the side of radical disruption of society.⁴⁸⁵ Not at such a cost.

The jury would convict Galt, just like a jury convicted Timothy McVeigh, just like a jury would have convicted Kaczynski. Undeterred, Galt would employ the theme of necessity in the penalty phase of his trial, wryly insisting that he should not be condemned to death, but instead offered maintenance in the Prytaneum.⁴⁸⁶ He would describe the dehumanizing influence of rapacious materialism and compulsive consumption. He would talk about the greenhouse effect, review the mounting evidence on rapid climate change, and paint an apocalyptic vision of what the future would have held.⁴⁸⁷ Perhaps this would not matter, and the jury would sentence Galt to die. And perhaps Galt would go happy to the death chamber, feeling like he had done something noble.

But perhaps Galt's demeanor would be enough to save his life. It would be incredibly difficult to overcome the aggravating evidence that the prosecution would be able to introduce, but perhaps one juror would see Galt as scientist who tried to destroy civilization in order to spare the world. Perhaps that one juror would accept that Galt truly believed his actions were necessary, and would therefore refuse to vote for the death penalty. Perhaps. If so, Galt would be permitted to live, and would probably be consigned to the federal supermax facility in Florence, Colorado,⁴⁸⁸ which holds Theodore Kaczynski and which held Timothy McVeigh. It would be life, but not much of a life. His would be a life of isolation and sensory deprivation. Under best case circumstances, Galt would be spared, and imprisoned in a 7' x 12' concrete cell for the remainder of his days.⁴⁸⁹

C. *Justification or Excuse?*

Ignoring for the moment the jury's verdict, could Galt's actions have been excused? Could they have been justified? While the terms are used interchangeably by

⁴⁸⁵ JENSEN, *supra* note 163, at 344 (noting that when deciding whether or not to participate in the take-down of Western society, one cannot expect the mass of civilized people to support the collapse of their society).

⁴⁸⁶ Here, Galt would be alluding to the trial of Socrates, in which the philosopher, proposing a suitable punishment for himself, suggested free meals in one of Athens' elite buildings. *See* I.F. STONE, *THE TRIAL OF SOCRATES* (1989) (describing the inflammatory audacity of Socrates' suggestion that, for serving Athens so faithfully, he should be indulged like an Olympic athlete); PLATO, *THE APOLOGY OF SOCRATES* (Benjamin Jowett, trans.), available at: <http://www.gutenberg.org/dirs/etext99/pplgy10.txt> (last visited May 6, 2007) (noting Socrates' recommendation).

⁴⁸⁷ Of course, survival may not be Galt's ultimate objective. He may be more interested in using the trial as a medium for expressing his views and disseminating information to a curious public than in saving his own life. *See supra* notes 126-127 and associated text (describing defendants who had opportunity to avoid punishment but chose not to do so, in order to make a principled statement).

⁴⁸⁸ *See supra* note 240 (describing Florence ADX facility).

⁴⁸⁹ *See* J.C. Oleson, *The Punitive Coma*, 90 CAL. L. REV. 829, 849-61 (2002) (describing crushingly stark conditions of supermax facilities).

some,⁴⁹⁰ and have obvious overlap,⁴⁹¹ justification denotes social acceptance, even approval, while excuse denotes only understanding and forgiveness. In justified cases, courts engage in cost-benefit analyses and conclude that otherwise-criminal acts result in a net advantage to society. Accordingly, when we analyze justifications (e.g., necessity, self-defense, privilege), we speak of causing harm instead of doing wrong.⁴⁹² We approve of what the defendant did,⁴⁹³ and therefore do not blame him. In cases of excuse, however, courts determine that the defendant's act was wrong (i.e., a criminal act), but for whatever reason (e.g., insanity, duress, mistake), *this* offender should not be punished.⁴⁹⁴ Even though his actions did not yield a net social benefit, he is nevertheless not entirely culpable. It is often said that justification focuses on the situation, while excuse focuses on the personal characteristics and subjective experience of the offender.⁴⁹⁵ Western and Mangiafico suggest that another way to think about the distinction is to analogize justification to a failure-of-proof defense that arises when a defendant has not committed the actus reus of an offense and to analogize excuse to a lack of necessary mens rea when the defendant has committed the actus reus.⁴⁹⁶

A jury might excuse Galt.⁴⁹⁷ He was, after all, a scientist, and his assessment of the available climate change research was a reasonable one.⁴⁹⁸ He had a good-faith belief that immediate and decisive action was necessary in order to avert a much greater

⁴⁹⁰ See *supra* note 30 (noting interchangeability).

⁴⁹¹ See *supra* note 29 (describing MPC's rejection of a distinction).

⁴⁹² See FLETCHER, *supra* note 4, at 454-91 (distinguishing between harm and wrong).

⁴⁹³ See Greenawalt, *supra* note 26, at 442 (characterizing a justification as meriting a response of, "What you did was really all right").

⁴⁹⁴ See Thomas Morawetz, *Reconstructing the Criminal Defenses: The Significance of Justification*, 77 J. CRIM. L. & CRIMINOLOGY 277, 279 (1986).

Excused behavior, on the other hand, is not approved. A harmful drunken assault is wrong and morally blameworthy. In allowing involuntary intoxication as a defense, the law does not part company with morality, but rather recognizes a distinction in seriousness and blameworthiness. Deliberate assaults by those who have their wits about them and carry out harmful intentions are more blameworthy than assaults by those who have lost control. Criminal law exists to punish the more serious lapses.

Id.

⁴⁹⁵ See, e.g., FLETCHER, *supra* note 4, at 761-62 (expressing this view).

⁴⁹⁶ See Peter Western & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—And Why It Matters*, 6 BUFF. CRIM. L. R. 833, 866-74 (2003).

⁴⁹⁷ I assume that no jury would excuse the killing of 1000+ people. The enormity of the crime is simply too great. See generally Part IV.B, *supra* (describing jury reactions). Had Galt and his co-conspirators merely hacked the electrical grid (phase one), a claim of necessity might be very viable. The taking of human lives in the truck bombing of refineries (phase two) makes a claim of necessity far more difficult, and a claim of imperfect necessity is all that might be available under these circumstances. See Part II.C, *supra*.

⁴⁹⁸ Other scientists have reached similar stark conclusions. See *supra* notes 394 and 398 and associated text (describing alarming views of Lovelock and King).

crisis.⁴⁹⁹ A jury might not agree that the sabotage of the electrical grid and the archipelago of refineries were appropriate responses to global warming, but it might conclude that Galt did not have a culpable mens rea. A jury might reason that Galt's actions were wrong—they were criminal—but that *he* was not a criminal. This is the thinking that would support the *excusing* of Galt's actions.

But it is harder to imagine a jury supporting the *justification* of Galt's actions, to imagine a jury concluding that his actions were not crimes at all. Even if the jurisdiction follows the Model Penal Code in permitting a claim of necessity in cases of homicide,⁵⁰⁰ it is hard to imagine that a jury would justify Galt's actions under these facts. This is not the notorious example of the runaway streetcar that will either kill five people (if the actor allows the car to run straight ahead) or kill one person (if the actor turns the trolley onto a tangential spur).⁵⁰¹ Rather, Galt's actions are like Dudley and Stephens' lifeboat killing of Richard Parker, involving the certain sacrifice of human life in an attempt to avert a likely—but uncertain—greater loss of life in the future.⁵⁰²

In the dinghy from the *Mignonette*, as soon as Dudley and Stephens killed Parker, the boy was forever and irrevocably dead. Until that moment, however, their circumstances, while dire, did not lead ineluctably to Parker's death: rainwater could have slaked the castaways' thirst; they could have caught food, found land, or been rescued. But everything changed in the moment that Dudley and Stephens slit Parker's throat. In that moment, all of the various imaginable outcomes condensed into a single actuality and a boy was murdered. Similarly, Galt's actions collapsed the risk that most life on Earth could be extinguished—a sobering possibility, assuredly—into *real* deaths. In economic terms of expected value, killing one person is equivalent to testing a device that has a one percent chance of killing one hundred people⁵⁰³—both

⁴⁹⁹ This parallels the suggestion that Unabomber Theodore Kaczynski acted from an altruistic desire to slow society's march toward a culture dominated by technology. See *supra* note 220 and associated text.

⁵⁰⁰ See *supra* note 88 (describing MPC position).

⁵⁰¹ See JUDITH JARVIS THOMPSON, RIGHTS, RESTITUTION, AND RISK 94-116 (1986) (describing the trolley problem).

⁵⁰² See *supra* notes 89-105 (describing case of *Regina v. Dudley and Stephens*).

⁵⁰³ During preliminary discussions of the fission and fusion bombs of 1942, physicist Edward Teller raised the possibility that the intense temperatures associated with nuclear blasts could initiate a fusion chain reaction of the hydrogen in the world's oceans and/or atmosphere and burn up the world. Pearl Buck describes her interview with Manhattan Project scientist Arthur H. Compton, writing, "If after calculation, [Compton] said, it were proved that the chances were more than approximately three in one million that the Earth would be vaporized by the explosion, [Compton] would not proceed with the project. Calculations proved the figure slightly less—the project continued." Pearl S. Buck, *The Bomb—The End of the World?*, THE AMERICAN WEEKLY, Mar. 8, 1959, at 9. Later calculations demonstrated that a sustained chain reaction was not only unlikely, but impossible. See E.J. Konopinski, et al., *Ignition of the Atmosphere with Nuclear Bombs*, Los Alamos National Laboratory Report, LA-602 (1946), available at: <http://www.fas.org/sgp/othergov/doe/lanl/docs1/00329010.pdf> (last visited May 6, 2007). But for a brief period of time, the fathers of the atomic bomb did not know if their discovery could end life on earth.

situations cost one life⁵⁰⁴—but people perceive them differently.⁵⁰⁵ This is not the discounting of future harms because of bounded rationality,⁵⁰⁶ but a reflection that the actions are morally different. Decisively *taking* a life entails greater culpability than *risking* a life. Accordingly, it difficult to imagine a jury that would ever tell Galt his actions were not crimes. His science might have been sound (the climate is warming), and his conclusions might have been reasonable (sea levels are rising and species are being driven to extinction), but because there is no *obvious* greater harm,⁵⁰⁷ because annihilation is not yet visible, and because the environment appears to tolerate human emissions,⁵⁰⁸ acts of violence—especially the acts of mass violence employed by Galt—will not be justified by a jury. They might be excused (by a jury that believes Galt’s intentions were good), but in the absence of a tangible threat involving substantial loss of life, they will not be justified. The jury, as a representative body of the community, lacks sufficient vision to do so. This is an important limitation upon the justification of political necessity: in the absence of an obvious and immediate threat, violations of the law will not be deemed to be justified even when they *should* be.

V. Conclusion

*To make the individual sacred we must destroy the social order that crucifies him. And this problem can only be solved with blood and iron.*⁵⁰⁹

Necessity is a tricky defense. It is dismissed as an “insubstantial legal principle unworthy of serious academic or social review,”⁵¹⁰ but it is a defense with enormous potential, allowing a jury to nullify the effect of a transgressed law on a case-by-case basis.⁵¹¹ Yet, while necessity has profound potential as a vehicle for progressive social

⁵⁰⁴ See Cass Sunstein, *Irreversible and Catastrophic: Global Warming, Terrorism, and Other Problems*, 23 PACE ENVTL. L. REV. 3, 15 (2006) (“Suppose that the government is deciding between two programs: one that will eliminate a one-in-ten risk that 2000 people will die, and one that will eliminate the one-in-a-million risk that 200 million people will die. Which should the government choose? They cost the same.”).

⁵⁰⁵ See Gilbert, *supra* note 478 (contrasting threats that humans recognize with those they do not).

⁵⁰⁶ See generally, e.g., Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000) (noting that the law and economics movement needs to draw from psychology to understand limitations of human rationality).

⁵⁰⁷ See Gilbert, *supra* note 478 and associated text (noting that harms such as traffic or pollution that subtly build over time are tolerated, while there would be hue and cry if they were to appear at once).

⁵⁰⁸ See *supra* note 392 (describing sudden climate shifts after tipping points have been crossed).

⁵⁰⁹ LEON TROTSKY, *TERRORISM AND COMMUNISM* 63 (Univ. of Michigan Press 1963).

⁵¹⁰ Martin, *supra* note 8, at 1566.

⁵¹¹ See Bauer & Eckerstrom, *supra* note 9, at 1186 (“The political necessity defense places the jury in a position to acquit the defendant, nullifying the effect of the law that has been broken.”).

change, this radical potential has remained unrealized.⁵¹² When confronted with cases that could stretch the limits of the doctrine in novel or exciting ways, courts maintain the status quo by prohibiting the defense with “myopic common law necessity analysis.”⁵¹³ This is especially problematic in cases of political necessity.⁵¹⁴ In the high-profile cases of *United States v. Theodore John Kaczynski*⁵¹⁵ and *United States v. Timothy James McVeigh*,⁵¹⁶ the defendants ached to use the defense of necessity, but were dissuaded by their attorneys.⁵¹⁷ Yet it is precisely cases such as these—cases in which the defendant engages in extraordinary violence in order to avert a catastrophe of epic scale—where the untapped potential of the necessity doctrine is most needed. When glib Tyler Durden, the anarchic and pugilistic mastermind of *Fight Club*, blows up the debt record to liberate modern people from their economic chains, it is the necessity defense that his attorney should invoke.⁵¹⁸ And if an individual was to blow up a hydroelectric dam,⁵¹⁹ cripple an electrical grid, or damage a petroleum refinery in a bid to stop global warming, it is the necessity defense that he should employ at trial.

It would be very difficult for a defendant to prevail with a claim of necessity in cases involving egregious acts of violence (e.g., the Unabomber case, the Oklahoma City bombing case, or the hypothetical killing of large numbers of United States citizens), and it would be virtually impossible to prevail if the averted evil is abstract (like the dehumanizing effects of technology against which Kaczynski founded a letter-bombing campaign) or intangible (like the consequences of climate change, which have not yet produced obvious human casualties unequivocally linked to global warming). Imperfect necessity may allow some defendants to avoid the full punitive force of the law, but even necessity-as-excuse will be elusive in such cases.

⁵¹² See Martin, *supra* note 8, at 1589 (arguing that “courts have deliberately limited the contours of the necessity defense in a manner designed to ensure that the doctrine is effectively employed only in cases that do not challenge the existing social order”).

⁵¹³ Bauer & Eckerstrom, *supra* note 9, at 1178.

⁵¹⁴ See Part II.B (describing common law analysis of civil disobedience cases).

⁵¹⁵ 239 F.3d 1108 (9th Cir. 2001).

⁵¹⁶ 153 F.3d 1166 (10th Cir. 1988).

⁵¹⁷ Which, of course, makes it sound more pleasant than it was. Recall that in the Unabomber case, Kaczynski’s attorneys deceived him into believing that they were attacking the prosecution’s evidence, and not preparing a mental illness defense. See *supra* note 216 and associated text. In the Oklahoma City bombing case, McVeigh’s attorney dismissed his suggestion to employ a necessity defense, instead deciding to put the prosecution to its proof, a choice that fueled acrimony between attorney and client. See MICHEL & HERBECK, *supra* note 243, at 297 (“He was investigating me, not defending me.”); Thomas, *supra* note 276 (characterizing Jones’ book deal as a betrayal).

⁵¹⁸ Though in reality it is far more likely that Durden’s lawyers would rely on an insanity defense. See Oleson, *supra* note 170 (noting that a defense of insanity would be viable, and that a defense of necessity, while intellectually honest and socially provocative, would end disastrously). This would parallel the Unabomber case. See Part III.B, *supra* (describing proceedings of the Kaczynski case).

⁵¹⁹ See JENSEN, *supra* note 163, at 172 (“Every morning when I wake up I ask myself whether I should write or blow up a dam.”).

Nevertheless, in cases where acquittal and mitigated punishment are less important than explaining why the criminal act was necessary, by relying upon the defense of necessity a defendant motivated by political or social goals could deny guilt without denouncing his actions, and use the grandeur of the legal forum to dignify his message.⁵²⁰ The defendant's message might reach (and resonate with) the jury, yet even if the jury rejects the defendant's claim of justified action (or of excused conduct), the necessity defense affords the defendant an opportunity to explain why that conduct should not be understood as criminal. In cases of political necessity, this opportunity will often be more important to social change than the jury's final verdict.

⁵²⁰ See Bauer & Eckerstrom, *supra* note 9, at 1173.