Et Al.

The necessity defense gets a new workout from protesters on both sides of the political spectrum

BY HOLLY METZ

Amy Carter and Abbie Hoffman used it successfully in Northampton, Massachusetts, this past April. So did eight anti-apartheid protesters who had been charged in 1985 with criminal trespass at the Chicago offices of the South African Consulate. And 26 Vermonters were acquitted in 1984 after using it at their trial for staging a sit-in at Senator Robert Stafford's Winsooki office in protest of U.S. involvement in Central America.

What these defendants have in common is the so-called "necessity" defense. When the necessity defense is successfully asserted, technically criminal acts are considered legal because a situation of extreme emergency nullifies the applicability of the normal rules of liability. The necessity defense argues that an offense is justifiable under three conditions: (1) the offenders believe that their actions will prevent a "clear and imminent danger" of greater harm to the community than that caused by their breach of the law; (2) the action can reasonably be expected to abate the danger (a causal relationship); (3) and lawful alternatives to the action taken are unavailable.

In the most publicized recent use of the principle, Leonard Weinglass and Tom Lesser, attorneys for Carter and thirteen other defendants (Hoffman defended himself), argued that the protesters should, because the CIA was breaking the law in Central America, be acquitted of trespass and disorderly conduct charges stemming from a 1986 protest against CIA recruitment at the University of Massachusetts.

On November 24, 1986, Hoffman, Carter, and thirteen student protesters had been charged with trespass, after occupying an administration building and demanding that the university bar recruitment of any government agency found in violation of U.S. and international law. The protestors claimed that the CIA has violated, among other laws, the 1984 Boland Amendment, which prohibited CIA operations in Nicaragua. When other activists, who had left the building, saw Hoffman and his associates being dragged and carried out by brusque state police in riot gear, they blocked police buses filled with protestors, and were then charged with disorderly conduct. Weinglass, who is perhaps best known for his 1969 defense of the Chicago Seven (see profile on page 34), asked the Northampton jury: "Was this lawlessness on the part of the defendants, or were they acting to stop the lawlessness?"

The jury, after hearing one week of expert testimony from such notables as former CIA employee Ralph McGehee, ex-contra leader and recruit Edgar Chamorro, Pentagon Papers tipster Daniel Ellsberg, and former U.S. Attorney General Ramsey Clark, decided that a former president's daughter, a 50-year-old unrepentant radical and author (Hoffman's most recent book, *Steal This Urine Test*, is about drug testing), and thirteen student protesters, were indeed trying to stop illegal CIA activities.

Media commentators balked at the verdict, criticizing the U.S. district court judge for permitting the defendants to present evidence to prove their assertion of "necessity," and further, for explaining the principle and its applicability to the jury. "Judge Richard F. Connon instructed the six-member jury in a manner that gave the defense team virtually everything it wanted," a *New York Times* reporter wrote in April. When asked in an interview following the trial why he allowed the defense to be used, Judge Connon quipped, "That's the $64,000 question," then explained that there have been several cases in the state where the Supreme Judicial Court has determined that "the best constitutionally-tested method would be to allow all evidence to be put forward, and, in the end, to rule on admissibility." In some Massachusetts cases, Connon said, "it was left to the fact-finder—in this case, the jury—to decide," adding that the prosecutor in the Carter-Hoffman case "didn't object to it." The prosecution had instead argued that *Commonwealth v. Calderia* (the name of the case) was a clear case of trespass/disorderly conduct—nothing more.

Conservatives fumed that the defense had turned the case upside down, putting the CIA on trial and conferring legitimacy on the distinctly left-wing political perspective of the defendants.

Some of the evidence provided by expert witnesses did not address alleged CIA crimes in Nicaragua, but elsewhere. To support his contention that the CIA committed domestic, as well as international crimes, book publisher and attorney William Shattuck was allowed to present evidence about CIA infiltration of student groups during the 1960s, which had violated the First Amendment rights of the organizers. Ralph McGehee testified about training Vietnamese secret police to torture and assassinate civilians—including innocents—during the Vietnam War. A first-hand account of the CIA's recent Central American activities was provided by Chamorro, however, who said that the Nicaraguan contras had received instructions from Argentinian soldiers, hired by the CIA, on how to torture civilians.

The protesters' insistence upon calling the whole exercise "The CIA on Trial Project" unnerved conservative critics, who noted that the successful use of justification defenses in two earlier Illinois cases had justified illegal acts by leftist protestors, creating a new rule of law which essentially acted as a blue-

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print for those later faced with the same values conflict. (*People v. Jarka*, a case tried in April 1985 in the Circuit Court of Lake County, in Waukegan, Illinois, involved defendants who had been charged with mob action and resisting arrest during a protest against U.S. intervention in Central America. They were permitted to assert the necessity defense—as incorporated into the Illinois Criminal Code—and won. A month later, anti-apartheid protesters, in *Chicago v. Streeter*, successfully used the *Jarka* ruling as a precedent.)

The necessity defense hasn't always been used primarily by leftists. It originally was raised only in cases involving harm caused by natural forces—as in the 1853 California case of *Surocco v. Geary*, in which the demolition of private houses to create a firebreak was considered proper. The common-law roots of the doctrine go back to sixteenth-century England. But it has been introduced, in various forms, into the criminal codes of 22 states, as well as the Model Penal Code. Some courts and legislatures have expanded the doctrine to allow for the threat of human-created harms, provided that such harms are illegal, says Kathryn Seligman, a lecturer on legal writing and research at the University of California's Boalt Hall School of Law in Berkeley. She cites the 1974 California case of *People v. Lovercamp*, in which the defense was considered applicable to a prison escape cases provoked by rape threats. Seligman has twice attempted, unsuccessfully, to assert the defense in antinuclear protest cases, and has contributed her briefs on "necessity" available to the brief bank at Western States Legal Foundation in Oakland (where, for the cost of postage and photocopying, pro se peace activists or attorneys for civil disobedients can obtain copies of briefs on international law and on the defenses of "necessity" and state of mind).

"Over the past ten years, the defense has been used much more frequently by people on the left, in protest cases against acts they consider illegal or unconstitutional," she says. But, she adds, it is often used by "people somewhat out of the mainstream—left *and* right—particularly those going against actions sanctioned by the government."

The Northampton defendants after their acquittal: "Was this lawlessness on the part of the defendants, or were they acting to stop the lawlessness?"

Feminists have been alarmed by the number of anti-abortion demonstrators who have raised the defense when brought to trial for trespassing at abortion clinics. "As a ballpark figure, I'd say the defense was raised in about fifty cases nationwide on the district court level this year alone," says John O'Keefe, spokesperson for the Pro-Life Non-Violent Action Project, a Gaithersburg, Maryland, group whose members use civil disobedience tactics. Although stalwarts from both camps would probably disagree, O'Keefe claims that pro-lifers "are all over the political spectrum—evenly split between left and right."

Most courts have denied the defense's admissibility in abortion clinic protest cases, although in two Fairfax County, Virginia, district courts a decade ago, anti-abortion protesters were acquitted after presenting evidence that included assertions that life begins at conception. However, courts, faced with such evidence, often dismiss rather than debate the issue of when life begins—a focal point for anti-abortionists, who believe the matter was wrongly sidestepped by the U.S. Supreme Court in *Roe v. Wade* in 1973. Despite the *Roe* precedent protection for first-trimester abortions, clinic protesters "routinely" try to raise the defense, O'Keefe says, "*expecting* overruling and conviction."

O'Keefe admits to some bitterness about the successful assertion of the necessity defense in the Carter-Hoffman trial, although he believes that "Amy Carter's protest was laudable." Yet he can't help comparing the greater harm claimed by the student protesters, he says, with the abortions his group has tried to prevent with clinic trespass. "On that Northampton campus, no one's life is in danger. No Nicaraguans were going to be killed in western Massachusetts that day." Pro-lifers, he says, are "cynical about the court system." While abortion is legally considered a fundamental right, neither the presence of a human-created illegal harm, nor the defendant's choice of a lesser harm, can truly be estab-

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lished in court, explains Debbe Levin in her 1979 *University of Cincinnati Law Review* note, "Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic."

Even those who have attempted to raise the necessity defense in antinuclear/anti-intervention cases acknowledge that its successes—like in the Carter-Hoffman trial—are limited. "The necessity defense is generally unsuccessful because the judge doesn't permit it to be raised," says Peter Goldberger, a former professor of criminal law at Villanova University and Whittier College, who contributed material on justification defenses to the appeals brief of the Plowshares Eight, a group of Christian antinuclear activists who hammered nuclear missile nosecones at a Pennsylvania manufacturing plant in 1980. At this writing, that case is still in the courts.

"I'd rather talk about justification generally—in the whole family of criminal law defenses," Goldberger says, adding that activists must realize that precedents from common law jurisdiction are irrelevant when raising the defense in a state where there are statutory restrictions. "There is no national body of precedent and no consistent unitary body of criminal law in the United States," the Philadelphia-based attorney says. The Carter-Hoffman trial may have received much publicity, but Goldberger does not think the necessity defense will be invoked more often as a result.

Francis Boyle, the University of Illinois professor of international law who provided testimony at the Carter-Hoffman trial, agrees. "There is an informal network of lawyers working on such cases pro bono, and they already know about the defense." The question to ask is whether the Northampton victory will stir more protest, says the professor, who is on the consultative council of the Lawyers' Committee on Nuclear Policy, a New York-based national organization of attorneys and scholars concerned with nuclear-related legal issues. He believes it will, although he says there has been no shortage of groups and individuals seeking his advice and counsel in cases involving "nonviolent citizen intervention." He worked with the defense on both the *Jarka* and *Streeter* cases. Since then, Boyle had received "an average of two telephone calls a week on these type of cases."

Antinuclear Plowshares-type actions have continued to occur since the first "disarmament" attempt in 1980. This past August, in the twenty-third such action, two Christians used sledgehammers and bolt cutters on a Missouri missile silo cover. Such defendants, like those at the Carter-Hoffman trial, often attempt to raise justification defenses at their trials, and to present expert testimony on U.S. foreign policy and principles of international law, but these protesters are rarely permitted to do so. The use of nuclear weapons is illegal, they say, according to numerous treaties, and under international law, such as the 1977 addition to the 1949 Geneva Convention, that condemns the use of weapons which cannot discriminate between combatants and noncombatants.

Peter Goldberger suggests that when these defendants' alternative defenses are not allowed to go before a jury, it is for "political, not legal reasons."

What would it mean politically, if a jury acquitted antinuclear defendants using the necessity defense? Unlike the University of Massachusetts protesters, who were charged with misdemeanors, nonviolent plowshares participants are often accused felons, facing charges including sabotage, possession of burglary tools, and destruction of national defense materials. An acquittal based on the necessity defense would justify their actions, and those of future actors under similar circumstances. And it would indicate that society looks upon such actions favorably, for "when a court applies necessity, its balancing of the harms reflects society's consensus," writes Debbe Levin. "Necessity is meant to justify action that society would clearly want to exonerate." ■