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Radical Environmentalism: The New Civil Disobedience?

César Cuauhtémoc García Hernández¹

God said, "I have given you every seed-bearing plant which is on the face of all the earth, and every tree that bears fruit with seed. It will be for your food. To every wild animal, to every bird of the sky, to everything that creeps along the ground, to everything that has the breath of life, I give every green plant for food." So it was. God saw all that he had made, and it was very good.

Book of Genesis²

We know that the white man does not understand our ways. One portion of land is the same to him as the next, for he is a stranger who comes in the night and takes from the land whatever he needs. The earth is not his brother, but his enemy, and when he has conquered it, he moves on. . . . He kidnaps the earth from his children. He does not care. His fathers' graves and his children's birthright are forgotten. He treats his mother, the earth, and his brother, the sky, as things to be bought, plundered, sold like sheep or bright beads. His appetite will devour the earth and leave behind only a desert.

Chief Seattle³

INTRODUCTION

Chief Seattle's apocalyptic message seems more relevant and accurate today than ever.⁴ Delivered in 1854, the Suquamish leader's lament bares the brutal scars of his community's experience with the nascent, expansionist industrialism of the United States of America.⁵ In describing the earth as the white man's "enemy," Chief Seattle was likely envisioning the massive ravaging of the natural world that occurred across what is now

the USA as expansionist pressures took white settlers and military expeditions into lands sustainably inhabited for centuries by indigenous peoples.⁶ However, it is not Chief Seattle's analysis of the events he personally experienced that is most remarkable. Rather, Chief Seattle's accusation that rapid expansionism in the service of financial gain "kidnaps the earth from his children" is most prescient.⁷

Just over 150 years after Chief Seattle's prophetic message, the ecological devastation that plagued the USA's western frontier in the middle of the nineteenth century now stretches across the earth and into the heavens. Today, information about climate change is "unequivocal":⁸ the world is warming at a rate unprecedented in recorded or discoverable history;⁹ the polar ice caps are melting;¹⁰ freak storms ravage the world with extreme weather patterns;¹¹ record high temperatures wreak havoc on nature;¹² rising ocean water levels caused by the melting ice caps submerge entire island nations and displace their inhabitants;¹³ and rain forests—Earth's protective lungs—are continuously destroyed.¹⁴ Indeed, the United Nations Food and Agriculture Organization recently described climate change as "the most serious challenge facing the human race."¹⁵

In recent years, news of the environmental devastation occurring across the globe has become widely known through the efforts of the media.¹⁶ In the United States, *An Inconvenient Truth*,¹⁷—a documentary film featuring former Vice President Albert Gore, Jr. and a book¹⁸ by the same title—recently gained widespread attention and earned millions of dollars.¹⁹ Similarly, in Scotland, a private energy company offered to finance a global warming curriculum for all Scottish schoolchildren modeled on Gore's film and book.²⁰

As a result, people across the world, including the USA, have initiated actions to curb the imminent crisis of ecological destruction. However, these actions, especially in the USA, have been primarily local and individualized.²¹ These localized efforts, increasingly becoming the grassroots component of mainstream environmentalism, often respond to

the realization that economic devastation is inextricably linked to climate change and other forms of environmental catastrophe.²² In addition, several municipalities, private developers, and building industry groups have recently considered adopting green building requirements for new construction or, in some instances, have already done so.²³

Unfortunately, localized efforts, though well intentioned, have not managed to curb climate change. In part, the efforts of individuals to alter their own practices or those of local communities have had limited effect because such efforts have not been met by similar action at the federal level.²⁴ Most notably, Congress has not ratified the Kyoto Treaty.²⁵ In addition, skeptics of global warming remain in highly influential governmental positions; significantly, one of these positions is the Senate Committee on Environment and Public Works.²⁶ Moreover, consumption of fossil fuels and emission of carbon into the atmosphere remain disproportionately high in the USA compared to the nation's percentage of the world's human population.²⁷

The federal government's inaction regarding climate change, ostensibly based in a belief that more environmentally protective policies would adversely affect the nation's economy, is reflected at the individual level.²⁸ While many people are willing to engage in limited actions to reduce their environmental "footprint," few are willing or able to drastically restructure their daily affairs to protect the environment.²⁹ Recently, such strategies as *carbon offsets*—a market-based approach that allows individuals to "pay to have their greenhouse gas emissions . . . cancelled out by a corresponding emissions reduction elsewhere"³⁰—have enabled individuals to limit their own contribution to environmental devastation while only mildly altering their lifestyle.³⁰

The limited actions of mainstream grassroots environmentalism are not sufficient for many environmentally conscious individuals. To a select few, imminent environmental crisis demands drastic action.³¹ For example, Dave Foreman, cofounder of a leading radical environmentalist

organization, Earth First! (EF!), and a prominent proponent of deep ecology, argues that people must do more than halt further destruction of the earth.³² To Foreman, humans must take proactive measures to undo the environmental devastation humans have already caused.³³ More than fifteen years ago, Foreman urged that “[i]t is not enough any longer to say no more dams on our wild rivers. We must begin tearing down some dams already built . . . and freeing shackled rivers.”³⁴

This article explores the work of radical environmental³⁵ activists, such as Foreman, who have engaged in actions designed to reverse environmental destruction. These are individuals who are not satisfied with waiting for the slow machinations of mainstream environmental advocacy to effectuate desired changes.³⁶ Rather than rely on what they perceive as the gradualist, compromised approach of mainstream environmental advocates, radical environmentalists have embraced a theory of direct action.³⁷ Through direct action—the noncooperation, obstruction, or defiance of objectionable policies or practices³⁸—these activists place their lives and personal liberty in peril to realize the world they envision. In rejecting the legitimacy of policies that facilitate the destruction of the natural world, radical environmentalists embrace Chief Seattle’s plea from a century and a half ago:

So, if we sell you our land, love it as we’ve loved it. Care for it as we’ve cared for it. Hold in your mind the memory of the land as it is when you take it. And *with all your strength, with all your mind, with all your heart, preserve it for your children*, and love it . . . as God loves us all.³⁹

Radical environmental activists have firmly situated themselves within the nation’s rich tradition of direct action civil disobedience by seeking to preserve the earth for future generations in spite of the risk to their own personal freedom and the intense personal sacrifice required.⁴⁰ As such, these activists should carefully delineate their tactics to maximize their

ability to avoid imprisonment. Acting in the spirit of an immense history of law-breaking, conscience-driven, nonviolent civil disobedience activists, radical environmentalists—increasingly targeted by law enforcement agencies—should tailor their actions to fit within the requirements of the necessity defense to criminal prosecution.

Having discussed the imminent environmental crisis facing the earth's population, this article will explore the origins of radical environmentalism, its location within the history of civil disobedience practitioners, and the legal implications of violating laws in the service of a morally driven agenda. Part I will discuss the emergence of radical environmentalism from the mainstream environmentalism of the 1970s. This section will present an overview of the two most prominent radical environmental organizations in the USA, Earth First! and the Earth Liberation Front. Part II will expand the discussion of radical environmentalism by exploring two leading philosophies—as exemplified by prominent deep ecology proponent Dave Foreman and social ecologist Murray Bookchin—that motivate radical environmental activists and the actions in which they engage. The use of *monkeywrenching*, the radical environmental movement's peculiar version of direct action tactics, will receive special emphasis. In Part III, this article will locate radical environmentalists within the immense body of past practitioners of civil disobedience in the USA, most notably the radical pacifists of the early and middle twentieth century. Finally, Part IV will adapt the necessity defense used by other civil disobedience criminal defendants to the peculiar situation of radical environmentalism.

I. THE BIRTH OF RADICAL ENVIRONMENTALISM

*We are the Elfin, /
Those who carry the /
Torch and flame, /
To live or die /
And no surrender, /
We are the venom of our /
Mother's fiery rain.*

Davey Garland⁴¹

We are the burning rage of this dying planet.

Anonymous, Earth Liberation Front communiqué⁴²

A. Origins of Mainstream and Radical Environmentalism

On the evening of May 18, 1998, five buildings and four ski lifts at one of Vail, Colorado's famed ski resorts went up in flames.⁴³ According to the Federal Bureau of Investigation, the fires caused an estimated \$12 million in damages.⁴⁴ Three days after the fires, a secretive coalition of radical environmental activists called the Earth Liberation Front (ELF) claimed responsibility.⁴⁵ An anonymous communiqué issued by the ELF Press Office to the local sheriff's department, the ski resort, and members of the media claimed the fires were intended to protect critical habitat for the lynx,⁴⁶ a long-limbed, short-tailed cat.⁴⁷ Unsatisfied with simply labeling the destruction of the ski resort's buildings and lifts a success, the ELF activists (the "Elfin" from Davey Garland's poem⁴⁸) warned that similar actions would occur in the future unless the lynx's habitat remained undeveloped.⁴⁹ "This action is just a warning," the communiqué read, characterizing its multimillion dollar action against the ski resort as a mild precursor to more audacious actions.⁵⁰ "We will be back if this greedy corporation continues to trespass into wild and unroaded areas."⁵¹

The Vail action by ELF activists dealt an enormous financial blow to the targets of radical environmentalists' actions. However, despite the powerful impact of ELF nationwide, ELF is only one of several radical environmental organizations that exist in the USA; moreover, these organizations represent only a sliver of the broader environmental advocacy movement in the nation.⁵² Environmentalism traces its modern roots in this country to April 22, 1970.⁵³ On that day, over twenty million people across the nation participated in the first Earth Day.⁵⁴ In communities throughout the country, people performed environmentally friendly activities outdoors, participated in educational teach-ins, and attended public lectures.⁵⁵

After a few years, the potential activism of the initial Earth Day remained too subdued for many ardent environmentalists. As a result, the thrust of environmental advocacy transferred from the grassroots focus of the first Earth Day to the so-called Gang of Ten, the largest ten environmental advocacy organizations in the nation.⁵⁶ These organizations quickly established themselves as integral members of the Washington political lobby.⁵⁷ Located in the center of political power peddling, the Gang of Ten "clamored for respectability and influence with politicians and polluters" alike.⁵⁸ Rather than emphasizing grassroots activism, the Gang of Ten "was corporate, careerist, compromising, and—a key issue for many—divorced from the complex of social-environmental issues affecting women, the poor, workers, and people of color."⁵⁹ Dave Foreman, then the chief lobbyist for a Gang of Ten member organization, the Wilderness Society, claims that the organizations, including the Wilderness Society, sought credibility and respectability in the eyes of Washington policymakers.⁶⁰ Foreman suggests that the Gang of Ten's quest for acceptance in influential policymaking circles did more than undermine their effective protection of the environment—it made them active participants in environmental destruction.⁶¹

To Foreman and others, the compromising attitude of the Gang of Ten represented a misguided, if not delusional, attempt at achieving minor

protections for the environment.⁶² In a particularly poignant episode, Foreman recalls a disappointing announcement that the United States Forest Service would only prohibit building roads on a small fraction of the national forest lands, thereby protecting those lands from logging companies.⁶³ As he walked to his office near the White House in the wake of the announcement, Foreman searched for a strategy that would keep the grassroots members of the Wilderness Society from criticizing the decision, hoping to keep them “in line.”⁶⁴ Rather than devise strategies for derailing the government’s decision to open previously protected federal lands from roads and logging companies, Foreman attempted to develop a strategy to quash, or at least control, the outrage that members of his organization would feel in response to the government’s decision.⁶⁵ “Something about all this seemed wrong to me,” he later wrote.⁶⁶

By the late 1970s, some environmentalists, Foreman among them, were concerned that the Gang of Ten organizations that ostensibly advocated for the protection of the environment had become indistinguishable from the corporations harming the environment.⁶⁷ These activists envisioned an action-oriented environmental movement rather than a Washington-based lobbying effort.⁶⁸ In response, in the late 1970s and early 1980s, these disillusioned activist environmentalists formed organizations such as Earth First! and the Sea Shepherd Conservation Society, marking the beginning of the radical environmental movement in the USA.⁶⁹ In 1992, a group of more radical EF! activists split from the British branch of EF! to launch the Earth Liberation Front in Britain, a precursor to ELF’s arrival in the USA.⁷⁰

B. Earth First! and the Earth Liberation Front

The most visible radical environmental organizations active in the USA are EF! and ELF.⁷¹ The activists who participate in these organizations possess a keen understanding of the environmental destruction currently underway across the planet.⁷² While mainstream environmentalists readily identify the symptoms of a suffering planet and locate the scientific causes

of these symptoms in such actions as the burning of fossil fuels, radical environmentalists go further by attempting to uncover and address the systemic cause of those symptoms.⁷³

To these radical environmentalists, much of the blame for the causes and symptoms of environmental destruction can be traced to rampant, unfettered capitalism,⁷⁴ a phenomenon that law professor Ruth Colker labels “hypercapitalism.”⁷⁵ According to Colker, hypercapitalism is a brand of capitalism that is “overly enamored with laissez-faire economics and insufficiently concerned with our health and well-being.”⁷⁶ Under this form of capitalism, policy decisions are guided by an unquenching zeal for utility and efficiency measured by their benefits to the entrepreneurial class.⁷⁷ By another name, this quest for utility and efficiency could be called the “ethic of improvement”;⁷⁸ that is, a jointly economic and political dynamic that defines all profitable production as “improvement” regardless of the secondary effects it produces—even if those secondary consequences include poverty, environmental destruction, or exploitation of less advantaged people.⁷⁹ Pushing this analysis further, some radical environmentalists, most notably Murray Bookchin, propose that environmental devastation is rooted in the hierarchy that preceded the current stratified, class-based society.⁸⁰

Emerging from the frustrated passions of committed environmental activists, radical environmental organizations display a daring disregard for political niceties, social approbation, and criminal proscriptions, leading, not surprisingly, to criminal prosecutions.⁸¹ For instance, EF! describes itself as an organization comprised of “unapologetic, uncompromising wilderness lovers with a bent for monkeywrenching and direct action.”⁸² Similarly, ELF deliberately targets the perpetrators of environmental destruction, whether corporations or individuals.⁸³ In one especially explicit pronouncement, ELF declared: “The earth isn’t dying, it’s being killed, and those who are killing it have names and addresses.”⁸⁴

Given radical environmentalism's origins as a response to the perceived apologetic and compromised position of the Gang of Ten, it is not surprising that today's radical environmentalists continue to perceive mainstream environmental organizations as at least partial accomplices in environmental destruction.⁸⁵ To these radical activists, mainstream tactics such as lawsuits are too costly, time-consuming, and unpredictable to effectuate the urgent measures necessary to protect the earth and its inhabitants from imminent, widespread devastation.⁸⁶

Interestingly, the uncompromising, critical attitude of radical environmental activists does not preclude them from working in conjunction with mainstream organizations while simultaneously criticizing those organizations. Some radical environmentalists are quick to add that the efforts of mainstream organizations are not always unwelcome.⁸⁷ Furthermore, Foreman argues that occasionally even mainstream tactics such as lobbying elected officials are useful.⁸⁸ Indeed, Foreman believes that the radicalism of EF! and ELF allows mainstream organizations to take positions that protect the environment while simultaneously appearing more moderate to people who are not already sympathetic to environmental concerns.⁸⁹ By adopting positions well beyond the accepted conventions of pro-environmental advocacy and leaving the politicking to mainstream environmental organizations, radical environmentalists insert proposals into the public discourse that they hope the mainstream will eventually accept.⁹⁰

II. PHILOSOPHIES OF RADICAL ENVIRONMENTALISM

The government can jail some of us, but they can not stop the phenomenon of compassion. It reached me as a boy on my way to school, and with each new action it has the chance of inspiring others to take sides. So long as I know that new warriors join the fight, and that old veterans refuse to bow, I will have hope that our small uprising will save the world. Stay safe, keep fighting as long as you have a breath left in your body, and victory may yet be yours.

Josh Harper⁹¹

Radical environmentalists are not a homogeneous group. On the contrary, radical environmentalists are as different from one another as they are from the mainstream environmental movement from which they split three decades ago. The activists that comprise organizations such as EF! and ELF, individuals similar to Josh Harper, are largely motivated by two philosophical traditions that claim distinct adherents: deep ecology and social ecology.⁹² These philosophies, rooted in the desire to realize fundamental social change, lend themselves to—indeed, encourage—the violation of criminal laws where such law breaking is performed in an effort to protect the environment.

A. Deep Ecology

Deep ecology posits that Earth is an organic “household.”⁹³ That is, humans and nonhumans are equal partners in earthly affairs.⁹⁴ According to deep ecologists, “all things in the biosphere have an equal right to live and blossom and to reach their own individual forms of unfolding and self-realization . . . [because] all organisms and entities in the ecosphere, as parts of the interrelated whole, are equal in intrinsic worth.”⁹⁵ Directly opposing the argument made by John Locke, the English philosopher, that “the intrinsic natural worth of anything consists in its fitness to supply the necessities or serve the conveniences of human life,”⁹⁶ deep ecologists

believe that humans are merely one equal member of an earthly partnership.⁹⁷

Because deep ecology emphasizes the equality of all organisms and entities on Earth, any social paradigms that impede or undermine the realization of this “[b]iocentric equality” are perceived as erroneous and dangerous.⁹⁸ The profound equality of deep ecology directly conflicts with the entrenched industrialist belief that humans should cultivate land and animals, in the words of the esteemed political and economic theorist Adam Smith, as “food for man.”⁹⁹ Beginning from the premise that the current dominant human societies, based as they are on capitalist notions of progress, do not allow this egalitarian relationship to exist, deep ecology expressly challenges the legitimacy of the fundamental premises of the dominant social paradigms.¹⁰⁰ Rather than adopt Locke’s or Smith’s calculations that value nonhumans only so far as they serve as sources for human life or wealth, deep ecologists redefine humanity’s role in the world to ensure that human existence is compatible with the existence of all organisms and entities, rather than compromising their existence.¹⁰¹ Deep ecology subordinates economic analyses to ecological and ethical criteria that facilitate an egalitarian existence.¹⁰²

The reformulation of human society in accordance with deep ecology principles would require drastic alterations of existing economic, technological, and ideological structures.¹⁰³ Deep ecologists fully support such drastic measures.¹⁰⁴ Leading deep ecology philosopher Bill Devall argues that hunter-gatherer lifestyles and subsistence gardening should be considered as goals for a new social order.¹⁰⁵ Similarly, deep ecologist Foreman¹⁰⁶ advocates “[r]eclaiming the roads and plowed land” to their pre-industrial state, destroying many of the large dams in the USA, and creating and maintaining more “blank spots” on the map where human development gives way to wilderness.¹⁰⁷

B. Social Ecology

The radical environmental philosophy known as social ecology shares much of deep ecology's concern about equality. The leading figure in the social ecology tradition, the recently deceased Murray Bookchin,¹⁰⁸ argued that "sprawling urban areas, massive industrialization, and giant corporate farms run like food factories" inevitably lead to "destructive social conflict" and "place an impossible burden on local water resources, the air we breathe, and all the natural features of the areas which they [human communities] occupy."¹⁰⁹ Social ecologists argue that human attempts to dominate nature result from the capitalist fetish with domination and hierarchy.¹¹⁰

In response to the hierarchies that led to environmental destruction, Bookchin proposed ecologically sustainable social organization.¹¹¹ These *eco-communities* would consist of small cities or towns "surrounded by small farms that practiced diversified, organic agriculture for the local area and were linked to each other by tree belts, pastures and meadows."¹¹² Small, densely populated areas of human habitation filled with green spaces, including gardens, parks, and waterways, would allow wilderness areas and sustainable food sources to exist nearby.¹¹³ These communities would also be able to satisfy human needs with safe and renewable energy sources such as wind, water, and solar power.¹¹⁴

Eco-communities, though idyllic, would not satisfy social ecologists unless they were also organized nonhierarchically.¹¹⁵ Anything less than complete elimination of social hierarchies would fail to accomplish the substantial alteration of social organization that social ecologists prescribe.¹¹⁶ Reflecting this orientation, ELF describes itself as nonhierarchical.¹¹⁷ Indeed, individuals choose their own actions; they even decide whether or not they describe themselves as ELF activists.¹¹⁸

Communities constructed on the social ecology model are decentralized¹¹⁹ and democratic.¹²⁰ For example, ownership of the means of production is communal within the eco-community and economic decisions

are governed by the standards of direct democracy—economic decisions are the responsibility and the province of all members of the community.¹²¹ According to Bookchin, “management, plans, and regulations [are] formulated democratically by popular assemblies” centered around municipalities where citizens decide community affairs through “face-to-face” meetings characterized by legislative and electoral processes, including decision making via majority voting.¹²² By using direct democracy decision-making processes, social ecologists avoid the dominance of individual leaders, thus preventing the redevelopment of hierarchies.¹²³ Adoption of direct democracy decision making as championed by social ecologists would drastically break from the dominant political paradigms that limit democratic decision making to norms of representative democracy.¹²⁴ In a representative democracy, select functionaries mediate the relationship between citizen and government;¹²⁵ direct democracy, as required by social ecology, mandates that all citizens have an integral role in the eco-community’s decision-making process if they are to be “truly free” people.¹²⁶

In spite of its many similarities to deep ecology, social ecologists aim sharp criticism at what they perceive to be deep ecology’s misanthropic tendency.¹²⁷ Indeed, Bookchin takes serious issue with deep ecologists, including EF! activists who suggest that human beings are an expendable component of the environment.¹²⁸ The intense equality of all organisms and entities in nature that deep ecologists embrace¹²⁹ requires a principle that Devall calls “species impartiality.”¹³⁰ According to this principle, all lives, whether a rattlesnake’s or one’s child at risk of being bitten by the rattlesnake, are equal.¹³¹ To opt for killing the rattlesnake over the child, claims Devall, is misanthropic and constitutes unwarranted bias.¹³²

Bookchin resoundingly rejects misanthropy and allegations that the mere existence of human beings is responsible for the breakdown of the environment.¹³³ Instead, Bookchin identifies social power dynamics and

social institutions as the cause of environmental destruction.¹³⁴ According to Bookchin, deep ecology's misanthropic tendency

mask[s] the fact that the social forces that are tearing down the planet are the same social forces which threaten to degrade women, people of color, workers, and ordinary citizens. It masks the fact that there is a historical connection between the way people deal with each other as social beings and the way they treat the rest of nature. It masks the fact that our ecological problems are fundamentally social problems requiring fundamental social change.¹³⁵

This cheapening of humanity, adds Bookchin, ignores the nuanced (and sometimes not so subtle) distinctions within human societies in favor of a new Malthusian glibness.¹³⁶ Rather than promote a delusional position that equates the environmental impact of marginalized individuals with those of wealthy, politically, and socially powerful individuals, Bookchin argues that humans can and should occupy a central role "in the creation of a truly 'free nature'" in which humans utilize their abilities in the service of biotic diversity, diminished suffering of all of nature, the promotion of and protection of ecologically valuable life forms, and the reduction of harmful impact on the earth.¹³⁷ Moreover, deep ecology's misanthropic tendency implies that biocentric equality is only possible if humans, individual per individual, adopt hunter-gatherer lifestyles or similarly primitive practices.¹³⁸ To Bookchin, however, such a view ignores the remarkable potential that social ecology presents: a process of social reorganization that creates the nonhierarchical eco-communities governed by direct democracy decision-making processes that social ecologists envision.¹³⁹

C. From Theory to Action

Regardless of the particular philosophy that radical environmentalists embrace, all share a sustained commitment to convert their theoretical explorations into effective actions to protect the environment.¹⁴⁰ Bookchin,

for example, founded the Institute for Social Ecology (ISE) in 1974.¹⁴¹ The ISE has operated as an “educational and activist organization . . . committed to the social and ecological transformation of society.”¹⁴² Bookchin also strongly supported community-organizing efforts as initial steps in the development of a new social organization that accords with social ecology principles.¹⁴³ Similarly, Foreman helped found EF! in 1980 in an effort to transfer environmental advocacy from policy circles to grassroots direct action and has remained a leading figure in that organization.¹⁴⁴ Representing the diverse strategies utilized by radical environmentalists, Bookchin and Foreman share a commitment to activist work though their personal emphases are distinct. Bookchin is a renowned public intellectual and author of over twenty books.¹⁴⁵ Many of his works are highly theoretical analyses of hierarchy and social power dynamics.¹⁴⁶ Indeed, he emphasizes: “it is not possible to overestimate the value of thinking insightfully and creatively about defending the Earth. We need ideas, good ideas, to guide our activist work.”¹⁴⁷ On the contrary, Foreman notes that he and other members of EF! “are willing to let our actions set the finer points of our philosophy rather than debating endlessly about our program.”¹⁴⁸ To date, Foreman’s principal work remains grounded in the direct wilderness protection that led him away from the Washington lobbyist circuit.¹⁴⁹ Working with the Wildlands Project, Foreman seeks to connect the protected wilderness areas of North America to create a linked thoroughfare for wildlife,¹⁵⁰ and his books are designed as activist resource guides.¹⁵¹

D. Monkeywrenching: Radical Environmentalism’s Direct Action

The opening pages of Edward Abbey’s novel *The Monkey Wrench Gang* describe, and have indeed inspired, the direct action tactics that many radical environmental activists use in defense of nature.¹⁵² Along a lonely stretch of the long Utah–Arizona border, the Colorado River cuts through the imaginary political boundary with the force of millions of gallons of

rushing water.¹⁵³ High above the Glen Canyon, local dignitaries stand alongside the governors of the two states waxing giddy while afar sit a group of indigenous people wistfully observing the unprecedented gathering perched 700 feet above the once mighty, now dammed, river.¹⁵⁴ Waiting along both sides of the gathering, within sight of the soon to be opened steel-and-concrete bridge, stretch impatient drivers yearning to travel the four hundred feet between the two states.¹⁵⁵ Only the tunes of the local high school bands delay the inevitable moment when progress caps its difficult, but short, march across the wet sliver that slices the desert's otherwise uninterrupted dry monotony.¹⁵⁶

As the politicians push down on their golden scissors to cut the customary red ribbon and photographers flash their bulbs, the unthinkable happens.¹⁵⁷ First, a puff of black smoke appears from the ends of the ribbon.¹⁵⁸ "And when the dignitaries hastily backed off the Indians saw the general eruption of unprogrammed fireworks which pursued them," Abbey wrote.¹⁵⁹ While the assembled crowd clapped for what it thought was a surprise fireworks display, the unthinkable became reality: "The bridge parted like a flower, its separate divisions no longer joined by any physical bond. Fragments and sections began to fold, sag, sink and fall, relaxing into the abyss."¹⁶⁰ The bridge was no more. So begins the story of monkeywrenching in defense of nature.

The bridge collapse in Abbey's novel was not accidental.¹⁶¹ Rather, individuals dedicated to protecting the environment deliberately destroyed it.¹⁶² Though fictional, Abbey's account, originally published in 1975, inspired some in the radical camp to adopt monkeywrenching at the time that the radical environmental movement was beginning to split from mainstream environmentalism.¹⁶³

Monkeywrenching is the deliberate, direct, and, almost without exception, unlawful interference with an action that activists perceive as damaging to the natural world. For example, activists concerned about the imminent logging of trees might insert metal rods into some or all of the

trees—resulting in damage to tree-cutting machinery without damaging the trees—in a practice known as tree spiking.¹⁶⁴ To ensure that the spikes do not inadvertently injure loggers, activists take precautionary measures, including warning the United States Forest Service if the trees are on federal land, warning the logging company if the trees are located on private property, or warning both.¹⁶⁵ Similarly, activists interested in preventing or delaying the construction of a road might remove survey stakes or damage construction vehicles.¹⁶⁶ One EF! activist has even described diligent pursuit of the federal government’s administrative appeals process followed by civil litigation as “paper monkeywrench[ing]” because the arduous appeals process has “stopped, slowed and reduced countless USFS [United States Forest Service] projects of destruction in the past.”¹⁶⁷

Monkeywrenching actions are an integral component of radical environmental actions. For example, EF! views monkeywrenching as necessary for the protection of the environment.¹⁶⁸ Likewise, ELF regularly describes its action as monkeywrenching.¹⁶⁹ While EF! most explicitly embraces monkeywrenching actions, other radical environmentalists utilize similar direct action techniques that are not described as monkeywrenching.¹⁷⁰ Bookchin, for example, argued that direct action strategies are necessary for effective environmental advocacy but did not use the term monkeywrenching.¹⁷¹ Similarly, in 2001, a listing of twenty-two instances of direct action performed by ELF members alone or in conjunction with other radical environmental groups describes only four of the twenty-two instances as monkeywrenching.¹⁷²

Descriptions of all twenty-two actions show that monkeywrenching, as well as those actions not labeled as such, target property. According to the compilation, ELF activists performed such acts as burning a wood products mill, burning construction vehicles, destroying a speaker system at a fast food restaurant’s drive-through window, and damaging a golf course.¹⁷³ These actions were not described by ELF activists as monkeywrenching; however, these acts bear significant resemblance to other actions that were

labeled as such (e.g., destruction of construction vehicles at development sites, damage to vehicles at a power plant, and damage to oil exploration equipment).¹⁷⁴ Financial costs resulting from actions that are not described as monkeywrenching are also comparable to damages from those that are considered monkeywrenching.¹⁷⁵ For example, various ELF actions not identified as monkeywrenching resulted in \$800,000, \$8,000, \$800, and \$500,000 in damages, whereas monkeywrenching by other groups resulted in \$100,000, \$100,000, and \$200,000 in damages.¹⁷⁶

The decision as to whether to describe radical environmental actions as monkeywrenching reflects more than semantic inconsistency; rather, there appears a theoretical nuance. In direct action, monkeywrenching is not synonymous with property destruction.¹⁷⁷ While monkeywrenching involves destruction of property, not all forms of property destruction are properly described as monkeywrenching.¹⁷⁸ Property destruction in the context of political activism can happen at any time and for any of myriad reasons.¹⁷⁹ Moreover, in the political action context, the goal of property destruction is primarily political change—that is, its proponents hope to convince particular actors (whether the citizenry or elected officials) to respond to the action in a particular manner.¹⁸⁰ In contrast, individuals who perform monkeywrenching actions do not do so with the goal of effectuating a particular policy change. Rather, they monkeywrench to prevent a specific act of environmental degradation.¹⁸¹ Indeed, monkeywrenching is a final resort, “a last-ditch tactic to preserve wild places, one that is employed only when all other avenues are closed off.”¹⁸² As such, monkeywrenchers target tools of environmental destruction before those tools can be used to carry out destructive acts.¹⁸³ They do not seek to destroy the symbols of past environmental destruction (e.g., existing buildings or golf courses); instead, they seek to prevent further destruction.¹⁸⁴ This preventative characteristic of monkeywrenching limits monkeywrenching to such actions as destruction of tools and equipment used to expand development sites and facilitate oil exploration.¹⁸⁵

III. IN THE FOOTSTEPS OF PRIOR CIVIL DISOBEDIENCE ACTIVISTS

There is always need of persons not only to discover new truths, and point out when what were once truths are true no longer, but also to commence new practices, and set the example of more enlightened conduct, and better taste and sense in human life. . . . Not only is it they who introduce good things which did not before exist; it is they who keep the life in those which already exist.

John Stuart Mill¹⁸⁶

Radical environmentalists are today's standard-bearers of the rich tradition of political dissent that has defined this nation's history, having reimagined civil disobedience to address the pressing needs of the early twenty-first century.¹⁸⁷ Millions of courageous people have participated in the numerous social movements that have improved this nation's moral, political, and economic wealth.¹⁸⁸ Alongside the abolitionists and labor unionists of the eighteenth and nineteenth centuries, and the disarmament activists of the twentieth century, among others,¹⁸⁹ radical environmentalists occupy the most recent position in the continuous thread of politically engaged individuals inspired by a purpose greater than their own comfort. These are people who are filled with, in the words of public intellectual and scholar Cornell West, righteous indignation¹⁹⁰ and are committed to risking their personal freedom for a cause.

A. Genealogy of Civil Disobedience

Radical environmental advocacy falls, albeit untidily, within the centuries-old tradition of active civil disobedience that shapes the USA's political culture.¹⁹¹ Reaching to the succinct instruction given by the apostles Peter and John to the earliest Christian communities, "Judge for yourselves whether it is right in God's eyes for us to obey you rather than God,"¹⁹² this nation's democratic experiment is filled with stories of individuals who pursued what they perceived to be their obligation to more

profound sources of justice than the laws crafted by humans.¹⁹³ From the seventeenth century to the mid-nineteenth century “non-resisters”¹⁹⁴ such as Henry David Thoreau argued that the obligation to obey the law was secondary to the obligation to do what was right.¹⁹⁵ To Thoreau, “If the injustice [inevitably performed by adherence to a particular law] . . . is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law.”¹⁹⁶ In the nineteenth century, abolitionists and labor organizers encouraged “passive resistance” and “moral force.”¹⁹⁷ Through moral suasion grounded in Christian exegesis, individuals such as David Walker, a free black resident of Boston, passionately appealed to black and white people to resist the “wretched state of slavery” even if it led to death.¹⁹⁸ Similarly, during the late 1800s, the USA experienced widespread militant labor unrest as hundreds of thousands, if not millions, of workers engaged in unprecedented mass strikes that several times paralyzed entire swaths of the nation and much more frequently brought large cities and their surrounding regions to a standstill.¹⁹⁹

Not until the twentieth century did the term *nonviolence* become intertwined with civil disobedience.²⁰⁰ Beginning in the 1920s and stretching through both world wars, pacifists who refused to comply with the government’s military draft process popularized the phrase *nonviolent resistance*.²⁰¹ Exemplifying the World War II era’s nonviolent resistance was Corbett Bishop, a young man who refused to cooperate with the draft system, who spent 426 days in prison without voluntarily taking food or water.²⁰² Eventually, prison officials issued Bishop early release from his four-year imprisonment because they were incapable of keeping him alive.²⁰³ Even at his release, Bishop maintained noncooperation, forcing prison guards to carry him out of prison.²⁰⁴

The evolution of nonviolent civil disobedience continued after World War II, when political dissenters adopted “revolutionary nonviolence” or “active nonviolence,” associated with more widely known social movements such as the civil rights campaigns of people of color in the

1950s, 1960s, and 1970s,²⁰⁵ and the disarmament campaigns of the 1970s and 1980s.²⁰⁶

B. Radical Pacifism

Of the many permutations that nonviolent civil disobedience has adopted, perhaps radical environmentalism most closely resembles the radical antiwar pacifism of the twentieth century. The nonviolent resisters of World War II—people such as Corbett Bishop—organized themselves into two principal bodies: the religious Fellowship of Reconciliation and, later, the secular War Resisters League.²⁰⁷ Similar to the early Christians²⁰⁸ and Thoreau²⁰⁹ before them, many radical pacifists were motivated by religious convictions,²¹⁰ including a belief in the primacy of conscience as opposed to law.²¹¹ Contemporary philosopher John Morreall explains an individual's decision to violate laws to comply with her conscience as a moral balancing test by invoking the memory of nineteenth century militant abolitionists.²¹² Morreall argues that this moral balancing test explains how an abolitionist would have been justified in interfering with a slave owner's pursuit of a slave, even if such interference would have constituted a violation of the Fugitive Slave Act.²¹³ To Morreall, the slave's right to be free would have superseded the law's blatant immorality, thereby justifying, perhaps even requiring, interference with the slave owner's pursuit.²¹⁴ Similarly, radical pacifists believed that they had a right to live lives free of violence and that that right superseded the government's ability to coerce their participation in war-making or war-enabling activities of any kind.

Foreshadowing radical environmentalism's antihierarchical drive for sustainable communities, radical pacifists sought to assert their autonomy by establishing decentralized, nonhierarchical, consensus-based rural communities or organizations.²¹⁵ While some radical pacifists turned to rural communes, sometimes referred to as "ashrams," to realize their ideal communities,²¹⁶ others simply utilized the principles of decentralization, nonhierarchicalism, and consensus decision making to structure pacifist

activist organizations.²¹⁷ The Peacemakers organization, for example, consisted of networks of radical pacifist cells whose participants engaged in localized actions, most notably individual refusal to pay taxes.²¹⁸

In a further parallel to radical environmentalists, radical pacifists embraced direct action activist tactics as the best strategy for practicing their deeply held pacifism.²¹⁹ Referencing the actions of Saint Paul, Dorothy Day, co-founder of the Catholic Worker movement, wrote that revolution “becomes an actual, living thing when you get out on the street corners.”²²⁰ Similarly, members of the Committee for Non-Violent Action (CNVA), on board the ship the *Golden Rule*, performed a well-publicized incursion into a portion of the Pacific Ocean near Hawaii zoned off for the purpose of testing a nuclear bomb.²²¹

C. Carrying Radical Pacifism to the Environmental Front

Radical environmentalists are likewise motivated by deeply held convictions evidenced in intense passion, though, significantly, they include within their belief system a commitment to protecting nonhuman animals and nonliving entities, such as bodies of water and mountains.²²² Even while social ecologists criticize deep ecologists for holding misanthropic views,²²³ radical environmentalists of all persuasions share unwavering respect for nonhuman life forms for their own sake rather than simply for their actual or potential benefit to humans.²²⁴ This respect is grounded in a belief that all earthly organisms and entities are interconnected in a global symbiotic relationship.²²⁵ The convictions that motivate radical environmentalists, like those that motivated radical pacifists, encourage them to risk and withstand tremendous personal sacrifice.²²⁶ It is not surprising, then, that both radical pacifists and radical environmentalists have often been prosecuted and imprisoned for acting on their beliefs.²²⁷

Furthermore, radical environmental organizations such as EF! and ELF are structured much like radical pacifist communities and organizations of decades past.²²⁸ Bookchin’s idyllic “eco-communities”²²⁹ resemble the

rural communities developed by radical pacifists.²³⁰ Both Bookchin and the radical pacifists emphasized the communities' decentralized, communal governance and use of environmentally sustainable technologies.²³¹ Similarly, social ecologists and radical pacifists intended their unorthodox communities to serve as models for the new social organization they envisioned based on social ecology or radical pacifist beliefs, respectively.²³² Moreover, the fierce decentralism of radical environmentalist organizations reflects the preferred organizational structure of many radical pacifist organizations. For example, Peacemakers was composed of "local radical pacifist cells," and CNVA did not even have membership.²³³ Likewise, radical environmentalists operate as independent small groups of people who know and trust one another.²³⁴

In addition, radical environmentalists, like radical pacifists before them, directly contradict political philosopher John Rawls's "realistic utopian" assertion: "Citizens accept existing institutions as just and usually have no desire to violate or to renegotiate the terms of social cooperation. . . ."²³⁵ Both groups clearly do have a desire to violate and renegotiate the terms of social cooperation.²³⁶ In fact, the reliance of radical environmentalists and radical pacifists on direct action seems to embrace Mills's enthusiastic encouragement of "new practices" that "set the example of more enlightened conduct" even when those practices violate firmly entrenched norms.²³⁷ Direct action allows activists to advocate views that are not well represented (radical environmentalism and radical pacifism, respectively) in dominant political, economic, or social paradigms.²³⁸ Through direct action, both groups hope to prefigure the world that they envision.²³⁹ Direct action presents activists who are convinced that irreparable harm is facilitated by the existing social order with "[t]he possibility of removing these evils" and encourages them to "no longer look upon them [the evils] with apathy and indifference."²⁴⁰ Instead, direct action allows activists to address societal wrongs with the understanding that, as Thoreau wrote, "it

matters not how small the beginning may seem to be: what is once well done is done forever.”²⁴¹

IV. CRIMINAL PROSECUTIONS AND THE AVAILABILITY OF THE
NECESSITY DEFENSE FOR RADICAL ENVIRONMENTAL
DEFENDANTS

Green is the new Red.

Will Potter²⁴²

A new civil war is unfolding—one between forces hell-bent on exploiting animals and the earth for profit whatever the toll, and activists steeled to resist this omnicide tooth and nail. We are witnessing not only the long-standing corporate war against nature, but also a new social war about nature.

Steven Best²⁴³

The two epigraphs above, written by a journalist and an academic who both closely track the radical environmental movement, suggest that people following the radical environmental movement are predicting a cataclysmic battle. On one side stand the activists of EF!, ELF, and similar organizations practicing nonviolent direct action civil disobedience. On the opposing side, the activists claim, are corporate and governmental actors readily willing to exploit the earth for profit and the law enforcement officials zealously committed to assisting them. A character in Abbey’s novel captures radical environmentalists’ perception of the vast corporate-state complex working against them:

They have everything. They have the organization and the control and the communications and the army and the police and the secret police. They have the big machines. They have the law and drugs and jails and courts and judges and prisons. They are so huge. We are so small.²⁴⁴

In spite of the asymmetrical power dynamics, both sides are intent to pursue their version of justice with unrelenting vigor.

A. Escalating the Confrontation

Law enforcement officials have long pursued radical environmentalists. In 1990, for example, the FBI announced the arrest of prominent northern California EF! members Judi Bari and Darryl Cherney.²⁴⁵ The FBI alleged that Bari and Cherney built a small bomb that accidentally exploded under the seat of Bari's car while she and Cherney were riding in it.²⁴⁶ After years of litigation, the federal government not only dropped its charges against the two activists, but a federal jury awarded them \$4.4 million for damages relating to the FBI's cover-up of critical exonerating information.²⁴⁷

The federal government's surveillance of radical environmental activists has increased exponentially since the tragic events of September 11, 2001.²⁴⁸ Indeed, less than five months after those terrorist attacks, the assistant director of counterterrorism and counterintelligence for the FBI reported to the Senate Select Committee on Intelligence that ELF and other direct action organizations had "emerged as a serious threat" in the country.²⁴⁹ In the aftermath of the terrorist attacks, government officials expanded the use of the newly minted term *eco-terrorist* to, in the words of journalist Will Potter, "describe everything from pouring sand in a bulldozer's gas tank to burning down a research facility."²⁵⁰ Soon thereafter, in November 2001, Scott McInnis, a member of Congress from Colorado, reflected the federal government's position when he described eco-terrorism as "one form of terrorism [that] is high on the . . . radar screen" of Washington policymakers.²⁵¹ Two years later, reporter Jim Hughes claimed, "environmental extremists have become the top priority for FBI domestic terrorism squads across the country."²⁵²

Invoking the specter of terrorism represents a powerful police tactic to discredit and repress radical environmentalists.²⁵³ By defining domestic terrorism as "the unlawful use, or threatened use, of violence by a group or

individual . . . against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof,”²⁵⁴ virtually all forms of direct action civil disobedience performed by radical environmental activists qualify as terrorism on par with the actions of al Qaeda.²⁵⁵ Not surprisingly, government officials and commentators have equated radical environmentalists with the perpetrators of the attacks of September 11,²⁵⁶ even though no human deaths are attributable to radical environmental actions, while several thousand deaths resulted from the September 11 attacks.²⁵⁷

B. An Overview of the Necessity Defense

The new vigor with which government officials have portrayed radical environmental activists as supremely dangerous to the nation’s public safety has raised the stakes for activists in criminal proceedings and requires that their attorneys adopt all available legal strategies for their clients’ defense. Given the remarkable similarities that radical environmentalist actions and philosophies share with past radical pacifists practicing direct action civil disobedience, it is opportune that criminal defense attorneys representing radical environmental activists utilize a defense strategy used by past civil disobedience activists—the necessity defense.²⁵⁸ The necessity defense is only relevant when defendants do not seek to challenge an accusation that they violated a criminal law.²⁵⁹ Rather, the defense assumes commission of a criminal offense.²⁶⁰

Federal courts require four elements to successfully argue necessity.²⁶¹ The first element, often described as the “choice of evils” element, asks defendants to prove that they acted in violation of a criminal prohibition to prevent a greater harm.²⁶² The second element is that the defendants acted to prevent imminent harm.²⁶³ Federal courts then require defendants to prove that they “reasonably anticipated a direct causal relationship between their conduct and the harm to be averted.”²⁶⁴ Lastly, defendants must prove that they acted only after all legal alternatives were exhausted.²⁶⁵

1. Choice of Evils Requirement

The first critical consideration in electing to present a necessity defense in federal court²⁶⁶ is whether “the defendant properly exercised her or his free will and violated a law in order to achieve a greater good or prevent a greater harm.”²⁶⁷ Rather than abide by a law perceived as unjust, necessity defendants must argue that their actions were not merely morally honorable, but indeed required by the greater obligation imposed by the pursuit of justice.²⁶⁸ Courts generally do not deny the necessity defense based on defendants’ claims that minor violation of criminal laws, such as trespass²⁶⁹ or property destruction,²⁷⁰ were less harmful than the threatened harm that the defendants purportedly acted to avert.²⁷¹ Radical environmental activists who trespass or destroy nonliving property are similarly likely to successfully argue that similar minor criminal violations represent a lesser evil than the devastating consequences of climate change.

2. Imminent Harm Requirement

The requirement that defendants prove that their actions prevented an imminent greater harm than caused by their criminal behavior poses a serious challenge for political activists.²⁷² Courts have narrowly defined *imminent harm* to mean a recognizable, immediate danger to the defendant or others.²⁷³ Furthermore, *imminent* is also narrowly defined to require proof that only the defendants’ behavior prevented harm that was otherwise certain to occur.²⁷⁴

Adding to the defendants’ burden is the tendency of courts to disbelieve assertions that imminent harm was prevented through direct action civil disobedience. Even the threat of nuclear war during the Cold War was not sufficient to satisfy one state court, though the court did not explain its reasoning.²⁷⁵ Similarly, a federal court found that the presence of a nuclear submarine was not sufficient to prove imminent harm from the detonation of nuclear materials.²⁷⁶ Paradoxically—perhaps even providing a disincentive to political activists interested in using litigation to promote

their goals—an Oregon appellate court decided that the activists' decision to litigate was sufficient proof that there was no emergency justifying extra-legal action.²⁷⁷

Courts' remarkable narrowing of the imminent harm requirement is not only problematic for civil disobedience defendants; it is antithetical to the USA's reliance on the court system to settle disputes.²⁷⁸ Justice Oliver Wendell Holmes, in his famous dissent in *Abrams v. United States*,²⁷⁹ wrote:

[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

. . . .

Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law abridging the freedom of speech."²⁸⁰

Holmes's admonition counsels that only instances of exceptional danger justify limiting access to the expression of speech.²⁸¹ Though *Abrams* concerned political activists who were arrested and convicted solely based on written material they printed and distributed and did not involve the necessity defense,²⁸² Holmes was likely aware that the trial was riddled with hostile questioning by a judge unsympathetic to the defendants' beliefs.²⁸³ Similarly, the narrow interpretation of the necessity defense, especially in federal courts,²⁸⁴ suggests hostility toward civil disobedience defendants' mere attempts to use the defense.²⁸⁵

Despite courts' reluctance to allow radical environmentalists to utilize the defense of necessity in direct action civil disobedience cases, radical environmental activists are certainly convinced that Earth's climate faces an unprecedented emergency.²⁸⁶ Foreman describes the current era as "the

most critical moment in the three-and-a-half-billion-year history of life on Earth.”²⁸⁷ The challenge for attorneys representing radical environmental activists in necessity defense cases that arise from direct action civil disobedience is to convert the crisis that activists such as Foreman perceive²⁸⁸ into the “imminent harm” required, but seldom granted, by courts.²⁸⁹

Reams of peer-reviewed scientific data and expert witnesses are certainly available to defendants trying to convince courts of the global climate crisis. However, courts’ skepticism that the actions of a small number of individuals can prevent harm that would otherwise undoubtedly occur²⁹⁰ suggests that the “harm” identified should itself be narrowly defined by activists prior to engaging in civil disobedience. This would increase the likelihood that a court would find that the defendants’ actions could indeed prevent the harm. Rather than make claims that their actions were intended to prevent such overwhelming threats as nuclear war,²⁹¹ civil disobedience activists should design actions that identify a particular, localized threat and seek to interfere with the actions that cause that threat. Similarly, radical environmental activists should refrain from designing actions targeting such broad concepts as global warming; instead, they should identify discrete threats—for example, the contamination of the water supply by a specific source²⁹²—and alter their direct action civil disobedience tactics accordingly to target the threat specifically. Such specific framing is readily available for radical environmentalists engaged in monkeywrenching because monkeywrenching is intended to prevent a particular act opposed by the activists; it is not utilized to effect mere symbolic impact,²⁹³ as would be the situation if a single defendant claimed to act to stop a phenomenon as amorphous as global warming.

Moreover, regardless of a potential defendant’s belief that a law or policy is unjust or immoral, if that law or policy is enacted constitutionally, then it cannot constitute harm for the purpose of the necessity defense.²⁹⁴ For example, a foreign policy objective such as a decision to use military action

cannot cause harm for purposes of the necessity defense. Therefore, activists should ensure that their actions are designed to prevent discrete and easily identifiable harmful effects of a particular law or policy, rather than to call into question the existence of a constitutionally enacted law or policy.

3. Direct Causal Relationship Requirement

Activists engaging in direct action civil disobedience must ensure that they directly, as opposed to indirectly, target a discrete threat²⁹⁵ because there must be “cause and effect between an act of protest and the achievement of the goal of the protest.”²⁹⁶ Federal courts have definitively held that so-called indirect attempts to prevent a threatened harm, even if the harm was imminent, are not sufficiently linked to the harm to allow defendants to continue with a necessity defense.²⁹⁷

According to philosopher Carl Cohen, this prong of the necessity defense indicates that “[d]irect civil disobedience is an act in which the law deliberately broken *is itself* the object of the protest.”²⁹⁸ To illustrate his definition, Cohen turns to Jim Crow legislation. He explains that a white person sitting in a black waiting room to protest a state statute mandating segregated waiting rooms would constitute direct civil disobedience because the target of the protest is the segregation imposed by the very law being violated by the protester.²⁹⁹ Similarly, the Ninth Circuit wrote that an individual who physically blocked the contamination of water by the immediate infusion of a suspected carcinogen required by an ordinance passed by a city council would be engaging in direct civil disobedience.³⁰⁰

On the other hand, Cohen wrote, “[i]ndirect civil disobedience includes all the rest, in which the law broken *is other than* (although more or less closely related to) the object of protest.”³⁰¹ The violation of statutes prohibiting trespass or destruction of government property in the form of draft cards to protest a war are examples of indirect civil disobedience³⁰² because these are instances in which the law actually violated is not itself

the target of the protester's actions.³⁰³ Symbolic actions, designed to affect public opinion, are also forms of indirect civil disobedience.³⁰⁴

Though commentators such as Cohen argue that acts of indirect civil disobedience can be justified and should be allowed to satisfy the necessity defense causation requirement,³⁰⁵ federal courts disagree.³⁰⁶ For purposes of the necessity defense, the requirement that "another *volitional* actor not controlled by the protestor . . . take a further step" to ensure that the imminent harm is avoided is sufficient to defeat the defendants' arguments.³⁰⁷ In light of this strict interpretation, radical environmentalists engaged in civil disobedience should design their actions so that the effect of the law that is violated is itself the target of the protest, thus subsuming the action's political nature in its criminal nature within the courtroom.³⁰⁸ Rather than perform symbolic actions intended to alter the opinion of the public, elected officials, or business executives, radical environmental activists must violate laws that have the direct effect of harming the environment in order to avail themselves of the necessity defense's potential.³⁰⁹

4. Exhaustion of All Legal Alternatives Requirement

After carefully tailoring their actions to satisfy the first three elements of the necessity defense, direct action civil disobedience activists should also ensure that their actions represent the only reasonable option available to prevent the threatened harm.³¹⁰ No legal alternatives to violating a law may exist if the necessity defense is to be argued successfully.³¹¹ This requirement is particularly difficult for civil disobedience defendants to prove given that courts have held that the requirement is not satisfied if the threatened harm could have been avoided by enactment of appropriate legislation.³¹² Importantly, such legislation need not be forthcoming, probable, or even realistically expected.³¹³ According to the Ninth Circuit, legislative action need only be a reasonable possibility.³¹⁴ That is, "the 'possibility' that Congress will change its mind is sufficient" to establish

that a legal alternative existed to the criminal behavior.³¹⁵ Such possibility exists, it seems, so long as a relevant, functioning, legislative body exists.

Courts' narrow interpretation of the available alternatives requirement leaves two possibilities for radical environmentalists practicing direct action civil disobedience. First, the Ninth Circuit's decision in *United States v. Schoon*, an opinion often cited by courts presented with a civil disobedience necessity defense case,³¹⁶ precludes acts of indirect civil disobedience but not direct civil disobedience.³¹⁷ The *Schoon* court's statement that the mere possibility of congressional action proves that a legal alternative existed to the defendants' criminal behavior is explicitly limited to acts of indirect civil disobedience.³¹⁸ Radical environmental activists may be able to satisfy the no available alternatives requirement by engaging in direct civil disobedience (e.g., unlawfully blocking the lawful contamination of a town's water supply) because *Schoon* does not expressly address acts of direct civil disobedience.³¹⁹ Second, courts' emphasis on the potential for legislative action raises the untested possibility of using the necessity defense in instances where the targeted harm was to be performed by a private actor who theoretically would be constitutionally protected from legislative infringement. For example, it is unlikely that there is potential for legislative action where the targeted harm stemmed from the time-honored, constitutionally protected right of private landowners' to use their land in a "reasonable" manner, even if the use is destructive to the environment.³²⁰

V. CONCLUSION

Radical environmentalism represents only a small portion of the environmental movement. Yet radical environmentalists' use of direct action civil disobedience to promote their vision of an environmentally sustainable future affords these activists a prominent role in the escalating environmental crisis facing Earth's human and nonhuman inhabitants. Moreover, the fundamental alterations to most existing human societies

posed by radical environmental philosophies face mammoth, perhaps insurmountable, obstacles to the actual reorganization of humanity.

As activists, legislators, and law enforcement officials each increase efforts to realize their respective goals,³²¹ courtroom confrontations will become much more commonplace. Activists that adopt the various philosophical traditions that comprise radical environmentalism must transcend their differences to face the common challenge of remaining free today to continue to advocate on behalf of Earth tomorrow. Careful adaptation of the necessity defense might provide radical environmental activists with the ability to leave the courtroom with their personal liberty, thus enabling them to return to their activist work.

Activists should carefully devise their actions in accordance with the requirements of the necessity defense to increase the likelihood of success in federal court. It might serve activists well to ensure that their criminal violation is significantly less harmful than the harm they seek to prevent;³²² that the action, if completed, would prevent an imminent harm that is otherwise certain to occur;³²³ that there was a direct causal relationship between their actions and the harm to be averted;³²⁴ and that they acted only after all legal alternatives were exhausted.³²⁵

As the most recent manifestation of the nation's cherished history of political dissent,³²⁶ radical environmental activists are likely to suffer the fate of their political predecessors in the radical pacifist movement: demonized now, but increasingly influential with the passage of time.³²⁷ Yet activists willing to sacrifice their own liberties for the sake of Earth should not passively accept history's lesson that political repression will limit the impact of their efforts. Radical environmentalists should plan strategically to maximize their success. In the words of the acclaimed novelist, essayist, and political activist Arundhati Roy, "It is not good enough to be right . . . it's important to win something."³²⁸

¹ BA, Brown University, with Honors, 2002; JD, Boston College Law School, 2007; Managing Editor, Third World Law Journal. Many thanks to the editorial staff of the *Seattle Journal for Social Justice*, especially Elizabeth Greene. I am indebted to Professor Anthony Paul Farley for his advice and encouragement and to Attorney Bekah Mandell, Director of Fair Housing at the Champlain Valley Office of Economic Opportunity, for her criticisms of early drafts of this article.

² *Genesis* 1:29–31 (Christian Community Bible).

³ Chief Seattle, *Chief Seattle's Message*, in *THE POWER OF THE PEOPLE: ACTIVE NONVIOLENCE IN THE UNITED STATES* 6, 6 (Robert Cooney & Helen Michalowski eds., 1987) (based on an original text by Marty Jezer with contributing pieces by Henry Bass, Jan Addams, Jim Peck, and Eileen Egan).

⁴ See RIK SCARCE, *ECO-WARRIORS: UNDERSTANDING THE RADICAL ENVIRONMENTAL MOVEMENT* 284–85 (2006).

⁵ See Chief Seattle, *supra* note 3. I will abbreviate “United States of America” as “USA” to recognize and respect the common use of the phrase “united states” in the name of another American nation, los Estados Unidos Mexicanos.

⁶ See, e.g., RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* 98–105 (1993) (describing the destruction of buffalo populations by the encroachment of white people).

⁷ See Chief Seattle, *supra* note 3.

⁸ Intergovernmental Panel on Climate Change [IPCC], Working Group I *Climate Change 2007: The Physical Science Basis, Summary for Policy Makers* 4, IPCC Fourth Assessment Report (Feb. 2007); see Elisabeth Rosenthal & Andrew C. Revkin, *Science Panel Says Global Warming Is “Unequivocal,”* N.Y. TIMES, Feb. 3, 2007, at A1.

⁹ See Andrew C. Revkin, *Global Warming Trend Continues in 2006, Climate Agencies Say*, N.Y. TIMES, Dec. 15, 2006, at A15.

¹⁰ See SCARCE, *supra* note 4; Juliet Eilperin, *U.S. Wants Polar Bears Listed as Threatened*, WASH. POST, Dec. 27, 2006, at A1; Raymond Hainey, *Climate Change: The Crack of Doom?*, SCOTSMAN (Edinburgh), Dec. 30, 2006, <http://thescotsman.scotsman.com/international.cfm?id=1928862006>; Steve Lillebuen, *Giant Ice Shelf Snaps Off from Arctic Island*, TORONTO STAR, Dec. 29, 2006, at A18; David Ljunggren, *Antarctic Melting a Critical Risk of Global Warming*, OTTAWA CITIZEN (Can.), Oct. 26, 2006, at A18; *North Pole Melting into Sea*, AUSTRALIAN, Dec. 13, 2006, at 3; Deborah Zabarenko, *Penguins Offer Evidence of Global Warming*, REUTERS, Dec. 16, 2006, <http://www.reuters.com/article/topNews/idUSB80778620061216>.

¹¹ See SCARCE, *supra* note 4; *Firing Up Global Warming*, BUFFALO NEWS, July 10, 2006, at A6.

¹² See SCARCE, *supra* note 4; see also Paul Kelbie & Jonathan Brown, *Do They Know It's Christmas?*, INDEP. (London), Dec. 18, 2006, available at 2006 WLNR 21930405 (discussing the disruption of the delicate balance between insect and plant life patterns in the United Kingdom caused by global warming).

¹³ See Geoffrey Lean, *Disappearing World: Global Warming Claims Tropical Island*, INDEP. ON SUNDAY (London), Dec. 24, 2006, at 6 (reporting that ten thousand people were displaced by the disappearance of Lohachara Island in India and that a total of seventy thousand people are at risk of losing their land due to rising water levels); Peter

Lloyd, *Indian Islands Disappear Under Rising Seas*, AUSTL. BROADCASTING CORP., Dec. 21, 2006, <http://www.abc.net.au/news/newsitems/200612/s1816787.htm>; Robert Mcleman, *Global Warming's Refugees: Canada Should Prepare for an Influx of Millions of People Displaced by Wild Weather*, GAZETTE (Montreal), Nov. 27, 2006, at A25.

¹⁴ See SCARCE, *supra* note 4.

¹⁵ U.N. Food & Agric. Org. [FAO], Livestock, Env't & Dev. Initiative [LEAD], *Livestock's Long Shadow: Environmental Issues and Options*, xxi (2006) (prepared by Henning Steinfield et al.).

¹⁶ A full 90 percent of the world's people have at least heard of global warming, including 87 percent of people in the USA. See *Global Warming: A Self-Inflicted, Very Serious Problem, According to More than Half the World's Online Population*, ACNIELSEN WORLDWIDE, Jan. 29, 2007, <http://www2.acnielsen.com/news/20070129.shtml> [hereinafter Global Warming Survey]. Nonetheless, residents of the USA are less informed about global warming than residents of other nations and they express significantly less concern about the seriousness of global warming. See *id.* According to a recent survey of Internet users conducted by the ACNielsen polling firm, "US citizens were among the least concerned about climate change" and "13 percent have never even heard about it . . ." See *Less Than Half of Americans Concerned About Global Warming*, SCOTSMAN (Edinburgh), Jan. 30, 2007, at 19. The number of people in the USA who reported not having heard of global warming was greater than every other country included in the survey of countries in Europe, Asia Pacific, North America, the Baltics, and the Middle East—except for residents of the United Arab Emirates, where 16 percent of residents reported not having heard of global warming. See *Global Warming Survey, supra*.

¹⁷ See generally AN INCONVENIENT TRUTH (Paramount Classics 2006).

¹⁸ See generally AL GORE, AN INCONVENIENT TRUTH: THE PLANETARY EMERGENCY OF GLOBAL WARMING AND WHAT WE CAN DO ABOUT IT (2006).

¹⁹ See Box Office Mojo, An Inconvenient Truth-Daily Box Office, <http://www.boxofficemojo.com/movies/?page=daily&id=inconvenienttruth.htm> (last visited Oct. 30, 2007) (reporting that the film earned over \$24 million in the USA).

²⁰ See Ian Johnston, *ScottishPower to Pay for Trips to Gore Film*, SCOTSMAN (Edinburgh), Dec. 4, 2006, at 13. Inspired by Gore's book, ScottishPower's director of human resources and communications led the company to fund copies of the book for hundreds of its employees and for screenings of the film to Scottish primary and secondary schoolchildren. See *id.*

²¹ According to environmental writer Bill McKibben, the USA's energy system encourages individualization to such an extent that people do not know how to cooperatively address climate change. See Bill McKibben, *How Close to Catastrophe?*, N.Y. REV. BOOKS, Nov. 16, 2006, available at <http://www.nybooks.com/articles/19596>.

²² See Chris Bunting, *I'm Melting!—Why Global Warming Is Changing the Way We Ski*, N.Y. POST, Dec. 5, 2006, at 66 (noting efforts by ski resorts to utilize green energy sources to curb climate change); Dave Caldwell, *For Skiers, Too Soon to Panic?*, N.Y. TIMES, Dec. 15, 2006, at F1 (discussing the impact of lack of snow on ski resorts in the Northeast); Jennifer Conlin, *Thinking Green About the White Stuff*, N.Y. TIMES, Dec. 24, 2006, § 5, at 2 (discussing the impact of global warming on ski resorts and efforts by avid

skiers to curtail climate change); Mark Landler, *Global Warming Poses Threat to Ski Resorts in the Alps*, N.Y. TIMES, Dec. 16, 2006, at A3 (discussing the economic effect of global warming on ski resorts in the Alps); Hal R. Varian, *Recalculating the Costs of Global Climate Change*, N.Y. TIMES, Dec. 14, 2006, at C3 (discussing the need to recalculate the costs of global warming). Local, private efforts also exist, including the Vermont-based 10% Challenge, “a volunteer program that encourages home and business owners to reduce their greenhouse emissions by 10 percent.” *Waldorf School Working to Cut Greenhouse Emissions*, TIMES UNION (Albany, N.Y.), Dec. 5, 2006, at B3; see also Alliance for Climate Action, 10% Challenge, www.10percentchallenge.org (last visited Oct. 31, 2007) (providing detailed information about the 10% Challenge program and mission).

²³ See Tim Knauss, *Building the Green Way: Construction Process Goes Well Beyond Saving Energy*, POST-STANDARD (Syracuse, N.Y.), Dec. 3, 2006, at D1 (discussing efforts in Syracuse, New York); Dan McKay, *Duke City Goes for the Green: Albuquerque Combines User-, Eco-Friendliness*, ALBUQUERQUE J. (N.M.), Dec. 26, 2006, at A1 (discussing green-friendly efforts in Albuquerque, New Mexico); Thomas C. Palmer, Jr., *Boston Ready to Go Green: Private Developers Face 1st-in-Nation Rules for Buildings*, BOSTON GLOBE, Dec. 20, 2006, at D1 (reporting on new regulations in Boston, Massachusetts). The U.S. Green Building Council (USGBC), a nonprofit coalition representing over seven thousand building industry organizations, has created the Leadership in Energy and Environmental Design (LEED) program to promote and measure sustainable construction. See U.S. Green Building Council, *Who We Are*, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1498&> (last visited Oct. 30, 2007); U.S. Green Building Council, *Leadership in Energy and Environmental Design*, <http://www.usgbc.org/DisplayPage.aspx?CategoryID=19> (last visited Oct. 30, 2007) [hereinafter LEED Description]; see also Emily Shartin, *Fitting in: The State's First LEED-Certified House Saves Energy Without Anyone Noticing*, BOSTON GLOBE, Feb. 4, 2007 (Magazine), at 36 (describing the first LEED-certified house in Massachusetts). According to the USGBC, the LEED criteria “promote[] a whole-building approach to sustainability by recognizing performance in five key areas of human and environmental health: sustainable site development, water savings, energy efficiency, materials selection, and indoor environmental quality.” LEED Description, *supra*.

²⁴ Vermont representative Peter Welch’s attempt to use his official budget to make his office “carbon neutral” epitomizes the disconnect between individuals who alter their personal behavior and the lack of a policy response at the federal level. See John Donnelly, *Vt. Lawmaker Brings Some Green to D.C.*, BOSTON GLOBE, Feb. 6, 2007, at A2; Evan Lehmann, *Welch To Make His Offices “Carbon Neutral,”* BRATTLEBORO REFORMER (Brattleboro, Vt.), Feb. 6, 2007, at 1. Welch, a first-term member of the House of Representatives and Vermont’s lone member, sought permission from House administrators to use \$672 of his annual budget to pay a Vermont renewable energy company an amount equivalent to the amount of carbon produced by operating his offices in Washington and Vermont. See Lehmann, *supra*. When House administrators denied Welch’s request he paid the costs from his personal money. See *id.*

²⁵ See Alan Greenblatt, *Say Hello to Kyoto*, GOVERNING, Sept. 2005, at 63; see also Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35

ENVTL. L. 1, 4 (2005) (noting that the Bush administration has rejected the Kyoto Protocol in favor of more research and voluntary efforts to promote energy efficiency). Importantly, there is disagreement about whether the measures required by the Kyoto Treaty are sufficient to stop global warming. See Richard N. Cooper, *Toward a Real Global Warming Treaty*, FOREIGN AFFAIRS, Mar.–Apr. 1998, at 66.

²⁶ See Daniel P. Schrag, Op-Ed., *On a Swift Boat to a Warmer World*, BOSTON GLOBE, Dec. 17, 2006, at K9.

²⁷ In 1998, the USA was responsible for approximately one-quarter of worldwide carbon emissions. See U.S. Environmental Protection Agency, Carbon Emissions in 1998, <http://yosemite.epa.gov/oar/globalwarming.nsf/content/EmissionsInternationalProjections.html> (last visited Nov. 18, 2007); Anastasia Telesetsky, *The Kyoto Protocol*, 26 ECOLOGY L.Q. 797, 813 (1999); see also Julian Borger, *Half of Global Car Exhaust Produced by US Vehicles*, GUARDIAN (London), June 29, 2006, at 17 (noting that the USA represents 5 percent of the world's population but accounts for one-third of its cars, "which in turn account for nearly half the carbon dioxide pumped out of exhaust pipes into the atmosphere each year").

²⁸ The Environmental Protection Agency's Personal Emissions Calculator is emblematic of this emphasis on individuals' actions. See U.S. Environmental Protection Agency, Personal Emissions Calculator, http://www.epa.gov/climatechange/wycd/calculator/ind_calculator.html (last visited Nov. 4, 2007). The description provided on the Web site explains that the calculator is intended "to help individuals (and households) reduce greenhouse gas emissions and take action." *Id.* The calculator asks a series of questions regarding the user's transportation habits, energy use, waste creation, and recycling, then informs the user of her total emissions and provides suggestions for reducing emissions. See *id.*

²⁹ Indeed, many efforts to curtail climate change focus on reducing energy consumption because doing so saves consumers money.

³⁰ See Drake Bennett, *Have Yourself a Carbon-Neutral Christmas*, BOSTON GLOBE, Dec. 17, 2006, at K1; Donnelly, *supra* note 24; Lehmann, *supra* note 24.

³¹ See DAVE FOREMAN, CONFESSIONS OF AN ECO-WARRIOR 19 (1991). Borrowing from historian Nikhik Pal Singh, I understand *crisis* as an exceptional moment, thus "impl[y]ing that a situation of normality exists *in comparison*, either as a precedent or as an expected resolution lying in wait in the future." Nikhil Pal Singh, *Toward an Effective Antiracism*, in DISPATCHES FROM THE EBONY TOWER: INTELLECTUALS CONFRONT THE AFRICAN AMERICAN EXPERIENCE 31, 34 (Manning Marable ed., 2000).

³² See FOREMAN, *supra* note 31; *infra* Parts II(A) and III(A).

³³ See FOREMAN, *supra* note 31.

³⁴ *Id.*

³⁵ Various terms exist to describe individuals who are not content with mainstream environmentalism and are willing to engage in drastic actions to promote their vision. See Steven Best & Anthony J. Nocella II, *A Fire in the Belly of the Beast: The Emergence of Revolutionary Environmentalism*, in IGNITING A REVOLUTION: VOICES IN DEFENSE OF THE EARTH 8, 20–21 (Steven Best & Anthony J. Nocella II eds., 2006); see also Donna E. Correll, Note, *No Peace for the Greens: The Criminal Prosecution of Environmental Activists and the Threat of Organizational Liability*, 24 RUTGERS L.J.

773, 773 nn.2–3 (1993). Correll’s article, which is virulently opposed to the work of such activists, not surprisingly terms them “militant” environmentalists and “eco-terrorists.” See Correll, *supra*. On the other hand, the sympathetic work of Best and Nocella terms these activists “revolutionary” environmentalists. See Best & Nocella, *supra*, at 20. According to Best and Nocella, revolutionary environmentalism “supports and/or employs illegal tactics ranging from property destruction for the purpose of economic sabotage to guerilla warfare and armed struggle, recognizing that violent methods of resistance are often appropriate.” *Id.* at 20–21. This article purposely uses “radical” environmentalism to denote the drastic alteration of existing political and economic paradigms desired by such activists while distinguishing from and excluding revolutionary environmentalism’s embrace of guerrilla warfare and armed struggle. See *id.*; see also CARYOLYN MERCHANT, *RADICAL ECOLOGY: THE SEARCH FOR A LIVABLE WORLD 1* (1992) (arguing that “[r]adical ecology emerge[d] from a sense of crisis in the industrialized world . . . [and] confronts the illusion that people are free to exploit nature and to move in society at the expense of others, with a new consciousness of our responsibilities to the rest of nature and to other humans”).

³⁶ For purposes of this article, *environmentalism* is defined as “an articulated philosophical and political concern human beings have with the destructive impact of their societies and lifeways on their surroundings and the natural world that sustains them.” Best & Nocella, *supra* note 35, at 19.

³⁷ See SCARCE, *supra* note 4, at 5; Murray Bookchin & Dave Foreman, *Looking for Common Ground*, in *DEFENDING THE EARTH: A DIALOGUE BETWEEN MURRAY BOOKCHIN AND DAVE FOREMAN* 27, 39 (Steve Chase ed., 1991).

³⁸ APRIL CARTER, *DIRECT ACTION AND DEMOCRACY TODAY 1* (2005).

³⁹ Chief Seattle, *supra* note 3, at 7 (emphasis added).

⁴⁰ See *Preface* to *THE POWER OF THE PEOPLE: ACTIVE NONVIOLENCE IN THE UNITED STATES*, *supra* note 3, at 9. For another examination of direct action civil disobedience, see generally César Cuauhtémoc García Hernández, *Ready or Not, the Velorution Has Arrived: Critical Mass—An Experiment in Democracy*, 8 *LOY. J. PUB. L.* 101 (2007) (examining the use of direct action civil disobedience by urban bicyclists).

⁴¹ Davey Garland, *To Cast a Giant Shadow: Revolutionary Ecology and Its Practical Implementation Through the Earth Liberation Front*, in *IGNITING A REVOLUTION: VOICES IN DEFENSE OF THE EARTH*, *supra* note 35, at 59.

⁴² *Earth Liberation Front Communiqués*, in *IGNITING A REVOLUTION: VOICES IN DEFENSE OF THE EARTH*, *supra* note 35, app. at 406, 408.

⁴³ *Id.* at 409.

⁴⁴ Jim Hughes, *Eco-terrorists Top FBI’s List: Attacks Intensify Since Fires 5 Years Ago at Vail*, *DENV. POST*, Oct. 19, 2003, at B1.

⁴⁵ See *Earth Liberation Front Communiqués*, *supra* note 42, at 409.

⁴⁶ See *id.*

⁴⁷ WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 856 (1996).

⁴⁸ See Garland, *supra* note 41, at 67 (using the labels “ELFin” and “elves” interchangeably to describe ELF activists).

⁴⁹ See *Earth Liberation Front Communiqués*, *supra* note 42, at 409.

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *See* Correll, *supra* note 35, at 773 n.2, 776 (listing Earth First! and the Sea Shepherd Society in the group of radical environmental organizations).

⁵³ *See* Best & Nocella, *supra* note 35, at 15.

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ *See id.* More useful as a short-hand descriptor of large mainstream environmental organizations than as a list of ten specific organizations, the Gang of Ten (or Group of Ten) is described by various commentators as including such organizations as the well-known Audubon Society, Sierra Club, Environmental Defense Fund, Wilderness Society, World Wildlife Fund, Natural Resources Defense Council, Friends of the Earth, League of Conservation Voters, National Wildlife Federation, Izaak Walton League, Environmental Policy Center, and National Parks, and Conservation Association. *See* David Gancher, *Foreword* to *THE GREEN READER: ESSAYS TOWARD A SUSTAINABLE SOCIETY* ix, x–xi (Andrew Dobson ed., Mercury House 1991); BRIAN TOKAR, *EARTH FOR SALE: RECLAIMING ECOLOGY IN THE AGE OF CORPORATE GREENWASH* 152 (1997); Correll, *supra* note 35, at 15, 16; Tracy McLellan, *Been Brown So Long It Looked Like Green to Me: The Politics of Nature*, *Z MAG.*, July–Aug. 2004, at 95, 96 (book review).

⁵⁷ *See* Correll, *supra* note 35, at 15; *see also* Bill Devall, *The Deep Ecology Movement*, 20 *NAT. RESOURCES J.* 299, 319 (1980) (“[D]uring the 1970s reform environmentalists have spent great amounts of time and resources maintaining the ‘images’ of their organizations . . . [so] that political leaders [now] view environmentalists as ‘just another constituency’ in the balancing of interest groups.”).

⁵⁸ *See* Best & Nocella, *supra* note 35, at 15; *see also* FOREMAN, *supra* note 31, at 45 (accusing the Gang of Ten in the mid-1970s of behaving like “reformist but loyal courtier[s] to the dominant industrial order”).

⁵⁹ Best & Nocella, *supra* note 35, at 16; FOREMAN, *supra* note 31, at 15; Correll, *supra* note 35, at 776; *see also* Bookchin & Foreman, *supra* note 37, at 38 (“I guess if you organize yourself like a corporation, you begin to think like a corporation.”).

⁶⁰ *See* Bookchin & Foreman, *supra* note 37, at 39; FOREMAN, *supra* note 31, at 15.

⁶¹ Bookchin & Foreman, *supra* note 37, at 39. According to Foreman, the Gang of Ten “kept . . . moving over towards the rape-the-land artists before we even opened our mouths.” *Id.*

⁶² *See* FOREMAN, *supra* note 31, at 14; *see also* CHRISTOPHER MANES, *GREEN RAGE: RADICAL ENVIRONMENTALISM AND THE UNMAKING OF CIVILIZATION* 4 (1990) (criticizing the mainstream environmental organizations, particularly the Sierra Club, for cooperating with the federal government’s building of a dam in Arizona’s Glen Canyon). Radical environmentalists continue to lodge similar criticisms against mainstream environmental organizations. *See* JEFFREY ST. CLAIR, *BEEN BROWN SO LONG IT LOOKED LIKE GREEN TO ME: THE POLITICS OF NATURE* 6 (2004) (“By the mid-1990s, mainstream environmentalism had become fattened and tongue-tied by foundation grants (many originating from the fortunes of big oil) and blinded by a reflexive loyalty to the Democratic Party. The new green executives sported six-figure salaries, drove around in limos and worked out of DC offices as plush as the headquarters of the Chemical

Manufacturer's Association. But the movement lacks heart and guts."); Robert Kuttner, *Beware of Corporate Do-Gooding*, BOSTON GLOBE, Mar. 3, 2007, at A11 (criticizing the mainstream environmental organizations that "served as corporate enablers of electricity deregulation and buyout deals that gouged consumers" by supporting the Texas utility company, TXU Corporation's, pledge to not build "five or six of the 11 coal-fired generating plants they were planning . . . [and] never should have entertained in the first place"); Megan Tady, *Big Enviro Groups 'Holding Back' Anti-Warming Movement*, NEWSTANDARD, Feb. 9, 2007 (ceased being published April 2007) (noting that environmental activists Bill McKibben and Derrick Jensen criticize the United States Climate Action Partnership, "a coalition of corporations and environmental groups" that includes the mainstream environmental organizations such as the Natural Resources Defense Council, Environmental Defense, and the World Resources Institute).

⁶³ See FOREMAN, *supra* note 31, at 14. According to journalist Jane Holtz Kay, discussing the Forest Service's road building as of the mid-1990s, "the Forest Service has 370,000 miles of road in 156 national forests. With 300,000 square miles of land, the Forest Services [sic] averages more than a mile of road per acre." JANE HOLTZ KAY, ASPHALT NATION 344 (1997).

⁶⁴ See FOREMAN, *supra* note 31, at 13–14.

⁶⁵ See *id.*

⁶⁶ *Id.* at 14.

⁶⁷ See Bookchin & Foreman, *supra* note 37, at 38; see also ST. CLAIR, *supra* note 62, at 19–20 (criticizing the Environmental Defense Fund's reliance on "corporate grants and donations" and its propensity for working closely with large corporations); MANES, *supra* note 62, at xi (accusing mainstream environmental organizations, which he satirically describes as "cool, rational minds in the environmental debate" of complicity in the world's ecological crisis).

⁶⁸ See Correll, *supra* note 35, at 776.

⁶⁹ See Bookchin & Foreman, *supra* note 37, at 38; FOREMAN, *supra* note 31, at 18; Correll, *supra* note 35, at 776. Manes provides a detailed description of the founding members of Earth First! and its initial meeting. See MANES, *supra* note 62, at 66–70.

⁷⁰ Noel Molland, *A Spark That Ignited a Flame: The Evolution of the Earth Liberation Front*, in IGNITING A REVOLUTION: VOICES IN DEFENSE OF THE EARTH, *supra* note 35, at 47, 49. The first ELF action in North America occurred in 1996 in Eugene, Oregon. *Id.* at 55.

⁷¹ While the remainder of this article will focus on the Earth First! and the Earth Liberation Front, other radical environmental organizations are active in the USA and elsewhere. See, e.g., John Vidal, *Antarctic Clash: Activists Race to Hunt Down Whalers*, GUARDIAN (London), Dec. 11, 2006, at 15 (reporting on the Sea Shepherd Conservation Society's recent attempt to impede a Japanese whaling expedition near Antarctica); 2001 *Year-End Direct Action Report*, 2002 N. AM. ANIMAL LIBERATION FRONT PRESS OFF., app. III, at 35–36 (listing actions performed by several radical environmental groups including Kangaroo Wilderness Defense, The Frogs, Lawn Liberation Front, and anonymous activists).

⁷² See Orin Langel, *Defining Practice from the Field: Revolutionary Ecology*, EARTH FIRST! J., 1994, at 14.

⁷³ See *id.* Philosopher Bill Devall suggests that the tendency of mainstream environmentalists (what he refers to as “reformist environmentalism”) to focus on achieving “better living” conditions is helpful but insufficient. See Devall, *supra* note 57, at 302.

⁷⁴ See Paul McIsaac et al., *Ecology and the Left*, in DEFENDING THE EARTH: A DIALOGUE BETWEEN MURRAY BOOKCHIN AND DAVE FOREMAN, *supra* note 37, at 47, 59; Langelles, *supra* note 72.

⁷⁵ RUTH COLKER, AMERICAN LAW IN THE AGE OF HYPERCAPITALISM: THE WORKER, THE FAMILY, AND THE STATE xi (1998).

⁷⁶ *Id.*

⁷⁷ See *id.* at 9.

⁷⁸ See ELLEN MEIKSINS WOOD, THE ORIGIN OF CAPITALISM 118 (1999).

⁷⁹ See *id.*; MURRAY BOOKCHIN, RE-ENCHANTING HUMANITY: A DEFENSE OF THE HUMAN SPIRIT AGAINST ANTIHUMANISM, MISANTHROPY, MYSTICISM, AND PRIMITIVISM 66 (1995). Colker and Wood disagree on whether all forms of capitalism are destructive. See COLKER, *supra* note 75, at 7; WOOD, *supra* note 78, at 121. Indeed, Colker’s book is intended to offer a version of capitalism that protects disadvantaged members of society while Wood explicitly states that market imperatives degrade the environment. See COLKER, *supra* note 75, at 7; WOOD, *supra* note 78, at 121.

⁸⁰ See McIsaac et al., *supra* note 74, at 58; see also *infra* Part III.B (discussing social ecology and its opposition to hierarchical human social organization patterns).

⁸¹ See *infra* Part V.

⁸² Bookchin & Foreman, *supra* note 37, at 39; see FOREMAN, *supra* note 31, at 18; see also MANES, *supra* note 62, at 70 (describing the EF! motto as “[n]o compromise in defense of Mother Earth”).

⁸³ See *Earth Liberation Front Communiqués*, *supra* note 42, at 411–12 (providing the name and business contact information for Philip H. Knight, the chief executive officer of Nike, in a communiqué regarding ELF actions against Nike).

⁸⁴ *Earth Liberation Front Communiqués*, *supra* note 42, at 408.

⁸⁵ See SCARCE, *supra* note 4, at 22–25; FOREMAN, *supra* note 31, at 17; MANES, *supra* note 62, at xi.

⁸⁶ See Denise R. Case, *The USA Patriot Act: Adding Bite to the Fight Against Animal Rights Terrorism?*, 34 RUTGERS L.J. 187, 193 (2002). Even removing the element of urgency perceived by many radical environmentalists, mainstream environmental justice activists, sociologists Robert D. Bullard and Glenn S. Johnson, characterized legal action as only one tool available to individuals and as “no substitute for having a well-organized, disciplined, and informed populace.” Robert D. Bullard & Glenn S. Johnson, *Just Transportation*, in JUST TRANSPORTATION 21 (Robert D. Bullard & Glenn S. Johnson eds., 1997).

⁸⁷ See Bookchin & Foreman, *supra* note 37, at 39; Langelles, *supra* note 72.

⁸⁸ See Bookchin & Foreman, *supra* note 37, at 39; see also Langelles, *supra* note 72 (encouraging radical environmentalists to work with mainstream environmental organizations even on reformist measures if adoption of the reform measure would prevent or delay environmental destruction).

⁸⁹ See Bookchin & Foreman, *supra* note 37, at 39; see MANES, *supra* note 62, at 70.

⁹⁰ See Bookchin & Foreman, *supra* note 37, at 39; Linda Davidoff et al., *Radical Visions and Strategies*, in DEFENDING THE EARTH: A DIALOGUE BETWEEN MURRAY BOOKCHIN AND DAVE FOREMAN, *supra* note 37, at 63, 79. Foreman cites the protection of old growth forests as an example of a proposal initially offered by radical environmentalists, but now readily accepted by mainstream environmental advocates. Bookchin & Foreman, *supra* note 37, at 39. Bookchin argues: “The highest form of realism today can only be attained by looking beyond the given state of affairs to a constructive vision of what should be. It is not good enough to merely look at what could be within the normal institutional limits of today’s predatory societies.” Davidoff et al., *supra*.

⁹¹ Josh Harper, *Facing the Agents of Omnicide: Hope in a Dark Time*, in IGNITING A REVOLUTION: VOICES IN DEFENSE OF THE EARTH, *supra* note 35, at 232, 240. At the time that Harper wrote these words, he was under indictment on terrorism charges related to his advocacy of direct action radical environmental actions. *Id.* at 423. As of this writing, Harper is imprisoned in Oregon. See Josh Harper, <http://www.joshharper.org/> (last visited Oct. 9, 2007).

⁹² Deep ecology and social ecology are the two most prominent types of radical environmental philosophies; therefore, this article is restricted to an examination of these philosophies. Another philosophical tradition is that of “revolutionary ecology.” Revolutionary ecology has been described as the synthesis of deep ecology and social ecology. See Langelle, *supra* note 72. From deep ecology, it borrows a profound commitment to drastically alter human lifestyles and promote equality of all organisms and entities in nature. See BILL DEVAL & GEORGE SESSIONS, DEEP ECOLOGY 67, 70 (1985); Langelle, *supra* note 72. In addition, revolutionary ecology shares deep ecology’s bias toward wilderness (Foreman’s “blank spots” on the map) and correlating distaste for management of nature. See FOREMAN, *supra* note 31, at 59; Langelle, *supra* note 72. Meanwhile, revolutionary ecology incorporates social ecology’s nonhierarchical vision, including a profound opposition to sexism, racism, and corporate control of land. See Langelle, *supra* note 72, at 14–15; see also TOKAR, *supra* note 56 (noting that revolutionary ecologists oppose all forms of domination including sexism, racism, and corporate control of land). It also accepts social ecology’s belief in the ability of all species to live harmoniously on earth. See Langelle, *supra* note 72. Similar to both of its predecessor philosophies, revolutionary ecology encourages people to “[g]o out today or tonight and do something for the Earth.” *The Four Laws of Revolutionary Ecology*, EARTH FIRST! J., Apr. 1, 2001, at 14. Other traditions identified by Martin W. Lewis, a critic of radical environmentalism, include: eco-marxism and eco-feminism. See MARTIN W. LEWIS, GREEN DELUSIONS: AN ENVIRONMENTALIST CRITIQUE OF RADICAL ENVIRONMENTALISM 31–34 (1992).

⁹³ DEVAL & SESSIONS, *supra* note 92, at 66; see MANES, *supra* note 62, at 149. According to Arne Naess, a prominent proponent of deep ecology, this philosophy conceptualizes “[o]rganisms as knots in the biospherical net” See Arne Naess, *Deep Ecology*, in THE GREEN READER: ESSAYS TOWARD A SUSTAINABLE SOCIETY, *supra* note 56, at 242, 243.

⁹⁴ See DEVAL & SESSIONS, *supra* note 92, at 66; see also Juan Estevan Arellano, *La Querencia: La Raza Bioregionalism*, NEW MEXICO HIST. REV., Jan. 1997, at 31, 35–36

(“We have to understand that we cannot save the land and water apart from the people or the people apart from the land and water. To save either, we must save both . . .”).

⁹⁵ DEVALL & SESSIONS, *supra* note 92, at 67. In emphasizing the equality of all organisms and entities on earth, including nonliving organisms and entities, deep ecologists exceed the antispeciesist attitude of many animal rights activists who merely reject a bias in favor of their own species, human beings. See PETER SINGER, *ANIMAL LIBERATION* 6 (rev. ed. 1990); see also MANES, *supra* note 62, at 146–47 (contrasting animal rights and deep ecology).

⁹⁶ Donald Worster, *The Wealth of Nature*, in *THE NEW AGRARIANISM: LAND, CULTURE, AND THE COMMUNITY OF LIFE* 174 (Eric T. Freyfogle ed., 2001) (quoting John Locke’s letter, *Some Considerations of the Consequences of the Lowering of Interest and Raising the Value of Money* (1691)); Austin J. Jafee & Kenneth M. Lusht, *The History of Value Theory: The Early Years*, in *ESSAYS IN HONOR OF WILLIAM N. KINNARD, JR.* 17 (C.F. Sirmans & Elaine M. Worzala eds., 2003). In his *Second Treatise of Government*, Locke proposed a similar relationship between humans and the land arguing in favor of privatization of lands previously held in common:

Whatsoever, then, he removes out of the state that Nature hath provided and left in it, he hath mixed his labor with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state of Nature placed in it, it hath by this labour something annexed to it that excludes the common right of other men.

JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 17 (Barnes & Noble Publ’g 2004) (1690).

⁹⁷ See DEVALL & SESSIONS, *supra* note 92, at 66; Devall, *supra* note 57, at 310; MANES, *supra* note 62, at 147; see also Arne Naess, *supra* note 93 (discussing the deep ecology principle of biospherical egalitarianism).

⁹⁸ See DEVALL & SESSIONS, *supra* note 92, at 66, 68. Targets of such criticism include social ecology proponents. See MANES, *supra* note 62, at 154–56.

⁹⁹ See ADAM SMITH, *THE WEALTH OF NATIONS* 253 (Edwin Cannan ed., Modern Library 2000) (1776).

¹⁰⁰ See Devall, *supra* note 57, at 299. Devall offers a detailed critique of the dominant paradigm. See *id.* at 300–03. His primary criticism is that the current dominant paradigm emphasizes economic growth as measured by the gross national product. See *id.* at 300.

¹⁰¹ See DEVALL & SESSIONS, *supra* note 92, at 70; Devall, *supra* note 57, at 311.

¹⁰² See Devall, *supra* note 57, at 312.

¹⁰³ See DEVALL & SESSIONS, *supra* note 92, at 70.

¹⁰⁴ See Devall, *supra* note 57, at 312.

¹⁰⁵ See *id.*

¹⁰⁶ David Levine, *Turning Debate into Dialogue*, *Foreward* to *DEFENDING THE EARTH: A DIALOGUE BETWEEN MURRAY BOOKCHIN AND DAVE FOREMAN*, *supra* note 37, at 1.

¹⁰⁷ See FOREMAN, *supra* note 31, at 19, 59 (quoting Aldo Leopold). An offshoot of deep ecology, bioregionalism stresses reduced human impact on the environment while celebrating the inherent joy found in protecting the earth. See *id.* at 45–46. According to a proponent of bioregionalism, Kirkpatrick Sale, “A bioregion is a part of the earth’s

surface whose rough boundaries are determined by natural rather than human dictates, distinguishable from other areas by attributes of flora, fauna, water, climate soils and landforms, and the human settlements and cultures those attributes have given rise to.” Kirkpatrick Sale, *Bioregionalism*, in *THE GREEN READER: ESSAYS TOWARD A SUSTAINABLE SOCIETY*, *supra* note 56, at 77, 79. Bioregionalism’s goal is to preserve biological diversity, where it still exists, and take the actions necessary to encourage the resurgence of biological diversity in areas where human activity has destroyed the region’s natural biological diversity. See SCARCE, *supra* note 4, at 5. On a technological level, bioregionalism encourages the use of “small-scale technology” and simple human lifestyles that are compatible with nature. See FOREMAN, *supra* note 31, at 46; Arellano, *supra* note 94, at 36. However, bioregionalism promotes more than a shift in human technologies. It also, and more importantly, recognizes the earth as sacred, thus justifying active defense of the earth and its biodiversity. See FOREMAN, *supra* note 31, at 46. Some debate exists among deep ecologists regarding the propriety of the prefix “bio” given that term’s implication that bioregionalism privileges living organisms. See also MANES, *supra* note 62, at 144. Some deep ecologists prefer the term “eco-centrism” instead so as to emphasize the equal importance of all organisms and entities in the ecology, living and nonliving. See *id.*

¹⁰⁸ Brian Tokar & Chaia Heller, *Remembering Murray Bookchin*, *EARTH FIRST! J.*, Sept–Oct. 2006, at 48; see LEWIS, *supra* note 92, at 31; see also Andrew Light, *Bookchin as/and Social Ecology*, in *SOCIAL ECOLOGY AFTER BOOKCHIN* 1, 5 (Andrew Light ed., 1998) (“Social ecology . . . as a theory . . . has come to be represented almost exclusively by Bookchin’s work.”).

¹⁰⁹ Davidoff et al., *supra* note 90; see BOOKCHIN, *supra* note 79, at 258; see also WENDELL BERRY, *SEX, ECONOMY, FREEDOM & COMMUNITY: EIGHT ESSAYS xvii–xviii* (1993) (criticizing the modern industrial food production system as unsustainable and unhealthy).

¹¹⁰ See Daniel Chodorkoff, *The Urban Ecosystem*, *EARTH FIRST! J.*, June 30, 1998, at 10; see also Stefan Wray, *End Capitalist Dominance*, *EARTH FIRST! J.*, Apr. 30, 1997, at 3 (writing that social ecologists propose a critique of capitalism as part of their broader critique of society). Indeed, Bookchin describes the current economic system as “a competitive market economy that obliges economic rivals to grow at the expense of each other or perish.” MURRAY BOOKCHIN, *Introduction: A Philosophical Naturalism*, in *THE PHILOSOPHY OF SOCIAL ECOLOGY: ESSAYS ON DIALECTICAL NATURALISM* 1, 32 (2d ed. 1996). In another essay he wrote, “Our age, with its endless array of ‘bottom lines’ and ‘investment choices,’ now threatens to turn society into a vast and exploitative marketplace.” MURRAY BOOKCHIN, *The Communalist Project*, in *SOCIAL ECOLOGY AND COMMUNALISM* 77, 86 (2007) [hereinafter BOOKCHIN, *The Communalist Project*].

¹¹¹ See Davidoff et al., *supra* note 90. “The power of social ecology,” Bookchin wrote in his essay *Freedom and Necessity in Nature*, “lies in the association it establishes between society and ecology, in understanding that the social is, potentially at least, a fulfillment of the *latent* dimension of freedom in nature, and that the ecological is a major organizing principle of social development. In short, social ecology advances the guidelines for an ecological society.” See MURRAY BOOKCHIN, *Freedom and Necessity in Nature: A Problem in Ecological Ethics*, in *THE PHILOSOPHY OF SOCIAL ECOLOGY: ESSAYS ON*

DIALECTICAL NATURALISM, *supra* note 110, at 71, 87 [hereinafter BOOKCHIN, *Freedom and Necessity in Nature*]. Similarly, in *What Is Social Ecology*, he explained, “Social ecology is an appeal . . . for social reconstruction along ecological lines.” MURRAY BOOKCHIN, *What Is Social Ecology?*, in SOCIAL ECOLOGY AND COMMUNALISM, *supra* note 110, at 19, 45 [hereinafter BOOKCHIN, *What Is Social Ecology?*].

¹¹² Davidoff et al., *supra* note 90. For a detailed critique of Bookchin’s conceptualization of the eco-community, see Adolf G. Gundersen, *Bookchin’s Ecocommunity as Ecotopia: A Constructive Critique*, in SOCIAL ECOLOGY AFTER BOOKCHIN, *supra* note 108, at 192, 199–208.

¹¹³ Davidoff et al., *supra* note 90, at 79–80.

¹¹⁴ *Id.* at 80; see BOOKCHIN, *What Is Social Ecology?*, *supra* note 111, at 19, 47; see also LEWIS, *supra* note 92, at 31 (noting that Bookchin “believ[es] that ingenious and environmentally benign technologies can render human want obsolete”). Bookchin’s eco-communities are similar to the “sustainable city” that Wendell Berry describes as “a city in balance with its countryside: a city, that is, that would live off the *net* ecological income of its supporting region, paying as it goes all its ecological and human debts.” BERRY, *supra* note 109, at 21.

¹¹⁵ See Davidoff et al., *supra* note 90, at 80–81. According to Bookchin, “[w]e are talking about uprooting *all* forms of hierarchy and domination, in all spheres of social life.” *Id.* at 57.

¹¹⁶ See *id.* at 80–81.

¹¹⁷ *Earth Liberation Front Communiqués*, *supra* note 42, at 406; Earth Liberation Front, Information About ELF, <http://www.earthliberationfront.com/main.shtml> (last visited Nov. 11, 2007).

¹¹⁸ *Earth Liberation Front Communiqués*, *supra* note 42, at 406.

¹¹⁹ See BOOKCHIN, *supra* note 79, at 259; Davidoff et al., *supra* note 90, at 80; see also *Earth Liberation Front Communiqués*, *supra* note 42, at 406 (describing ELF as having “no centralized organization or leadership”).

¹²⁰ See BOOKCHIN, *supra* note 79, at 259; Davidoff et al., *supra* note 90, at 81.

¹²¹ See BOOKCHIN, *supra* note 79, at 259; BOOKCHIN, *Freedom and Necessity in Nature*, *supra* note 111, at 93; Davidoff et al., *supra* note 90, at 81. Bookchin defines *direct democracy* as “face-to-face assemblies of free *citizens*, as distinguished from folk, ethnic, or gender groups guided by their own special interests.” BOOKCHIN, *supra* note 79, at 259. Bookchin’s definition of *citizen* appears similar to that of political philosopher John Rawls, who conceives of a citizen as a person “who can be a free and equal participant over a complete life.” See JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 24 (Erin Kelly ed., 2001).

¹²² BOOKCHIN, *The Communalist Project*, *supra* note 110, at 97, 101, 109.

¹²³ See CARTER, *supra* note 38, at 244. Carter’s position is similar to that of educator Paulo Freire and labor organizer Saul Alinsky who each argue that genuine democratic decision-making processes avoid reliance on a single person or group of persons. See PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 49 (2000); SAUL ALINSKY, *RULES FOR RADICALS: A PRAGMATIC PRIMER FOR REALISTIC RADICALS* 92 (1989). Instead, direct democracy involves all members of the relevant group in the decision-making processes. See FREIRE, *supra*, at 49; ALINSKY, *supra*, at 92.

¹²⁴ Michael Hardt and Antonio Negri provide an informative and concise discussion of various forms of representative democracy in their book *Multitude*. See MICHAEL HARDT & ANTONIO NEGRI, *MULTITUDE: WAR AND DEMOCRACY IN THE AGE OF EMPIRE* 245–47 (2004).

¹²⁵ See *id.* at 244–47.

¹²⁶ See BOOKCHIN, *supra* note 79, at 259; BOOKCHIN, *Freedom and Necessity in Nature*, *supra* note 111, at 93.

¹²⁷ See BOOKCHIN, *supra* note 79, at 105–06; Bookchin & Foreman, *supra* note 37, at 30.

¹²⁸ See BOOKCHIN, *supra* note 79, at 105–06 (quoting MANES, *supra* note 62, at 71); Bookchin & Foreman, *supra* note 37, at 30. In the passage cited by Bookchin, Manes refers to humanity as “expendable.” See MANES, *supra* note 62, at 71. Importantly, Foreman distanced himself from the racist strains of deep ecology. See Jim Haughton et al., *Racism and the Future of the Movement*, in *DEFENDING THE EARTH: A DIALOGUE BETWEEN MURRAY BOOKCHIN AND DAVE FOREMAN*, *supra* note 37, at 87, 90–95.

¹²⁹ See DEVAL & SESSIONS, *supra* note 92, at 66, 68.

¹³⁰ See BOOKCHIN, *supra* note 79, at 106.

¹³¹ See *id.*

¹³² *Id.*

¹³³ See Bookchin & Foreman, *supra* note 37, at 31.

¹³⁴ See *id.*

¹³⁵ *Id.* at 31–32; see also MURRAY BOOKCHIN, *Thinking Ecologically: A Diabolical Approach*, in *THE PHILOSOPHY OF SOCIAL ECOLOGY: ESSAYS ON DIALECTICAL NATURALISM*, *supra* note 110, at 97, 116 (describing biocentrism as “bluntly misanthropic and less an ecological principle than an argument against the human species itself as a life-form”); *id.* at 137–38 (explicitly criticizing deep ecologists Bill Devall and George Sessions and claiming that deep ecology “leads us into a foggy and dangerous logical realm from which there is usually no recourse but Eastern mysticism”). Bookchin’s statement somewhat misleadingly characterizes Devall and Sessions’s position. In *Deep Ecology*, the pair explicitly acknowledge that individuals in so-called developed (i.e., overdeveloped) industrial societies cause greater harm to the biosphere than do people in the developing world. See DEVAL & SESSIONS, *supra* note 92, at 72.

¹³⁶ See BOOKCHIN, *supra* note 79, at 106, 109. Thomas Malthus, an eighteenth-century writer and the namesake of Malthusianism, wrote in 1798 about the danger of overpopulation, in particular, food shortage as it related to poverty. See THOMAS ROBERT MALTHUS, *POPULATION: THE FIRST ESSAY* 4–5 (University of Michigan Press 1959) (1798); HAL D. SEARS, *THE SEX RADICALS: FREE LOVE IN HIGH VICTORIAN AMERICA* 191 (1977). Malthus’s most lasting contribution to political theory was that overpopulation was the major cause of poverty and that disasters such as war and famine were nature’s method of controlling overpopulation. See LINDA GORDON, *WOMAN’S BODY, WOMAN’S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* 75 (1976). Kenneth E. Boulding characterized Malthus as:

a prophet of doom—reform society as you will, he seems to say, population will catch up with you; give all you can to the poor, and their poverty will not ultimately be relieved. Science and technical improvement, Christian love and

generous impulses alike seem to be washed away down the stream of history on the awful flood of population.

Kenneth E. Boulding, *Foreword* to THOMAS ROBERT MALTHUS, *POPULATION: THE FIRST ESSAY*, *supra*, at viii. In its twentieth-century incarnation as neo-Malthusianism, this theory provided a suitable foundation for eugenist advocacy of birth control as a cure for poverty. See GORDON, *supra*, at 80.

¹³⁷ See Bookchin & Foreman, *supra* note 37, at 31, 33–34; LEWIS, *supra* note 92, at 31. Bookchin noted that it is disingenuous to compare the impact of “a black kid in Harlem” with that of the president of a large, multinational oil company. *Id.* Instead, he argued in favor of a special role for humans:

A humanity that has been rendered oblivious to its own responsibility to evolution—a responsibility to bring reason and the human spirit to evolutionary development, to foster diversity, and to provide ecological guidance such that the harmful and the fortuitous in the natural world are diminished—is a humanity that *betrays its own evolutionary heritage* and that ignores its species—distinctiveness and uniqueness.

BOOKCHIN, *Freedom and Necessity in Nature*, *supra* note 111, at 83–84.

¹³⁸ See BOOKCHIN, *supra* note 79, at 109; DEVALL & SESSIONS, *supra* note 92, at 66, 68; see also LEWIS, *supra* note 92, at 29 (describing “primitivism” as a branch of deep ecology and accusing its proponents of “glorif[ying] rather than abjur[ing] violence”).

¹³⁹ See Bookchin & Foreman, *supra* note 37, at 33–34; Paul McIsaac, *supra* note 74, at 57.

¹⁴⁰ See Bookchin & Foreman, *supra* note 37, at 28; Davidoff et al., *supra* note 90, at 74; *The Four Laws of Revolutionary Ecology*, *supra* note 92. Indeed, Manes criticizes Bookchin in particular and social ecologists in general by claiming “that social ecology succeeded only in sweeping the halls of the Institute for Social Ecology.” MANES, *supra* note 62, at 156.

¹⁴¹ See Brian Tokar, Murray Bookchin Tribute: Murray Bookchin, Visionary Social Theorist, Dies at 85, http://www.social-ecology.org/staticpages/index.php?page=mb_trib&topic=mb_trib (last visited Nov. 18, 2007).

¹⁴² Institute for Social Ecology, About the ISE, <http://www.social-ecology.org/staticpages/index.php?page=about&topic=about> (last visited Nov. 4, 2007).

¹⁴³ See Davidoff et al., *supra* note 90, at 82.

¹⁴⁴ See FOREMAN, *supra* note 31, at 17–18.

¹⁴⁵ See Tokar, *supra* note 141. See generally LEWIS HERBER, *OUR SYNTHETIC ENVIRONMENT* (1962) (written by Murry Bookchin under a pseudonym); MURRAY BOOKCHIN, *ECOLOGY AND REVOLUTIONARY THOUGHT* (1970); LEWIS HERBER, *CRISIS IN OUR CITIES* (1965) (written by Murry Bookchin under a pseudonym); MURRAY BOOKCHIN, *POST-SCARCITY ANARCHISM* (1971); MURRAY BOOKCHIN, *THE LIMITS OF THE CITY* (1974); MURRAY BOOKCHIN, *TOWARD AN ECOLOGICAL SOCIETY* (1980); MURRAY BOOKCHIN, *ECOLOGY OF FREEDOM: THE EMERGENCE AND DISSOLUTION OF HIERARCHY* (1982); MURRAY BOOKCHIN, *MODERN CRISIS* (1986); MURRAY BOOKCHIN, *THE RISE OF URBANIZATION AND THE DECLINE OF CITIZENSHIP* (1987);

MURRAY BOOKCHIN, REMAKING SOCIETY (1990); MURRAY BOOKCHIN, THE PHILOSOPHY OF SOCIAL ECOLOGY: ESSAYS ON DIALECTICAL NATURALISM (1990); MURRAY BOOKCHIN, DEEP ECOLOGY & ANARCHISM: A POLEMIC (1993); MURRAY BOOKCHIN, WHICH WAY FOR THE ECOLOGY MOVEMENT? (1994); MURRAY BOOKCHIN, TO REMEMBER SPAIN: THE ANARCHIST AND SYNDICALIST REVOLUTION OF 1936 (1994); MURRAY BOOKCHIN, FROM URBANIZATION TO CITIES: TOWARD A NEW POLITICS OF CITIZENSHIP (1995); MURRAY BOOKCHIN, SOCIAL ANARCHISM OR LIFESTYLE ANARCHISM: UNBRIDGEABLE CHASM (1995); 1 MURRAY BOOKCHIN, THE THIRD REVOLUTION (1996); 2 MURRAY BOOKCHIN, THE THIRD REVOLUTION (1998); MURRAY BOOKCHIN, ANARCHISM, MARXISM, AND THE FUTURE OF THE LEFT: INTERVIEWS AND ESSAYS, 1993-1998 (1999); 3 MURRAY BOOKCHIN, THE THIRD REVOLUTION (2004); 4 MURRAY BOOKCHIN, THE THIRD REVOLUTION (2005).

¹⁴⁶ See Tokar, *supra* note 141.

¹⁴⁷ Bookchin & Foreman, *supra* note 37, at 28.

¹⁴⁸ McIsaac et al., *supra* note 74, at 54.

¹⁴⁹ Bookchin & Foreman, *supra* note 37, at 39.

¹⁵⁰ In an interview by Derrick Jensen, Dave Foreman stated:

My job, which I do with The Wildlands Project, is to conceptualize a new kind of reserve system that does deep ecology on the ground, because deep ecology isn't deep ecology when it's just academic intellectual masturbation. Deep ecology becomes something real when it motivates our day-to-day actions, and there is no more honorable thing any of us can do with our lives than to work to put part of the world off-limits to the activities of human beings.

Interview by Derrick Jensen with Dave Foreman, in DERRICK JENSEN, LISTENING TO THE LANDS (1995) (transcript available at <http://www.ecofuture.org/pk/pkar9510.html>) (last visited Nov. 18, 2007). For information about the Wildlands Project, see Wildlands Project, What We Do, <http://www.twp.org/cms/page1090.cfm> (last visited Oct. 31, 2007).

¹⁵¹ See DAVE FOREMAN, REWILDING NORTH AMERICA: A VISION FOR CONSERVATION IN THE 21ST CENTURY (2004); ECODEFENSE: A FIELD GUIDE TO MONKEYWRENCHING (Dave Foreman & Bill Haywood eds., Abzug Press 1993); DAVE FOREMAN & HOWIE WOLKE, THE BIG OUTSIDE: A DESCRIPTIVE INVENTORY OF THE BIG WILDERNESS AREAS OF THE UNITED STATES (Harmony Books 1992); FOREMAN, *supra* note 31.

¹⁵² See EDWARD ABBEY, THE MONKEY WRENCH GANG 1-7 (HarperCollins Publishers 2000).

¹⁵³ *See id.* at 1, 2.

¹⁵⁴ *See id.* at 2.

¹⁵⁵ *See id.* at 2, 3.

¹⁵⁶ *See id.* at 4.

¹⁵⁷ *See id.* at 4, 5.

¹⁵⁸ *Id.* at 5.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 5-6.

¹⁶¹ *See id.* at 6-7.

¹⁶² See *id.*

¹⁶³ See Douglas Brinkley, *Introduction* to EDWARD ABBEY, THE MONKEY WRENCH GANG, *supra* note 152, at xv, xvi, xxii–xxiii; MANES, *supra* note 62, at xi (crediting Abbey with “virtually invent[ing] the radical environmental movement out of his inkhorn”).

¹⁶⁴ See SCARCE, *supra* note 4, at 175; FOREMAN, *supra* note 31, at 153; see also Mike Roselle, *Spike a Tree for Me*, EARTH FIRST! J., Feb. 2, 1995, at 9 (describing Roselle’s participation in tree spiking and encouraging other activists to engage in similar actions). Other radical activists also engage in tree spiking. For example, on May 5, 2005, twelve trees in Slocan Valley, British Columbia, were found to have been spiked. See *2001 Year-End Direct Action Report*, *supra* note 71, at 35.

¹⁶⁵ See SCARCE, *supra* note 4, at 175; FOREMAN, *supra* note 31, at 153; Roselle, *supra* note 164, at 9. For activists, informing the forest service or logging company has the added benefit of requiring that each tree be inspected prior to its being logged or pulped, thus raising the cost of logging. See FOREMAN, *supra* note 31, at 153.

¹⁶⁶ See *2001 Year-End Direct Action Report*, *supra* note 71, at 36. Abbey’s protagonist in *The Monkey Wrench Gang*, George Hayduke, poetically describes the importance of removing survey stakes: “Always pull up survey stakes Anywhere you find them. Always. That’s the first goddamned general order in the monkey wrench business. Always pull up survey stakes.” ABBEY, *supra* note 152, at 85.

¹⁶⁷ Wade Gruhl, *The Paper Monkeywrench: How to Appeal a US Forest Service Decision*, EARTH FIRST! J., Dec. 21, 1994, at 24.

¹⁶⁸ See FOREMAN, *supra* note 31, at 34; MANES, *supra* note 62, at 175.

¹⁶⁹ See *2001 Year-End Direct Action Report*, *supra* note 71, at 35. In 2001, four ELF actions were explicitly described as “monkeywrenching.” See *id.*

¹⁷⁰ See Davidoff et al., *supra* note 90, at 78; Correll, *supra* note 35, at 784; see also Vidal, *supra* note 71 (describing direct action tactics used by the Sea Shepherd Conservation Society).

¹⁷¹ Davidoff et al., *supra* note 90, at 78.

¹⁷² See *2001 Year-End Direct Action Report*, *supra* note 71, at 35–36.

¹⁷³ *Id.*

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

¹⁷⁶ See *id.*

¹⁷⁷ See SCARCE, *supra* note 4, at 275.

¹⁷⁸ See *2001 Year-End Direct Action Report*, *supra* note 71, at 35–36.

¹⁷⁹ See SCARCE, *supra* note 4, at 275.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² SCARCE, *supra* note 4, at 275. But see Naomi Klein, *Reclaim the Streets*, ANARCHIVES, Nov. 23, 1997, <http://www.ainfos.ca/A-Infos97/4/0552.html> (stating that the Reclaim the Streets project in the United Kingdom views direct action as “a corollary to direct democracy, a way for individuals to take control of their own lives and environments” rather than a final resort).

¹⁸³ See SCARCE, *supra* note 4, at 73.

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*; 2001 Year-End Direct Action Report, *supra* note 71, at 35–36.

¹⁸⁶ JOHN STUART MILL, ON LIBERTY 93 (Henry Regnery Co. 1955).

¹⁸⁷ See ARUNDHATI ROY, AN ORDINARY PERSON'S GUIDE TO EMPIRE 117 (2004) (arguing that political activists “need to reimagine the meaning of civil disobedience”). This article defines civil disobedience as an unlawful action motivated by the actor's sense of indignity toward a particular injustice and derived from a belief that it is one's duty to act to correct or bring attention to the injustice. For a more detailed discussion of the various alternative definitions of civil disobedience, see Martin C. Loesch, *Motive Testimony and a Civil Disobedience Justification*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1069, 1094–96 (1991).

¹⁸⁸ See *Preface*, *supra* note 40.

¹⁸⁹ See *id.* at 10. This list of conscience-driven activists does not portend to be comprehensive. Many other activists and organizations comprise the politically engaged thread of the USA's history. The individuals, organizations, and movements mentioned here are simply those most reflected by radical environmentalists.

¹⁹⁰ CORNELL WEST, DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM 180 (2004).

¹⁹¹ See *United States v. Kabat*, 797 F.2d 580, 601 (8th Cir. 1986) (Bright, J., dissenting) (stating that civil disobedience courses have occurred throughout the history of the USA at least as far back as the colonists' Boston Tea Party and the Declaration of Independence); LEWIS, *supra* note 92, at 6 (describing some radical environmental actions as civil disobedience); MANES, *supra* note 62, at 168–69 (linking radical environmental actions to the mid-twentieth-century civil disobedience tactics employed by civil rights activists); William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 20–25 (2003) (tracing civil disobedience in the colonies from 1635 to the revolution that led to the nation's independence, the suffrage movement, World War I peace activists, civil rights advocates, anti-Vietnam War activists, the anti-nuclear weapons movement, the 1980s sanctuary movement for refugees of the Central American wars, and advocates of the Navy's abandonment of the island of Vieques); Loesch, *supra* note 187, at 1086 (claiming that EF! is among the contemporary groups that has followed in the footsteps of eighteenth-, nineteenth-, and twentieth-century groups that practiced civil disobedience).

¹⁹² Acts 4:19 (Christian Community Bible).

¹⁹³ See Henry David Thoreau, *Civil Disobedience*, in THE POWER OF NONVIOLENCE 15, 17 (Beacon Press 2002) (1849); *Preface*, *supra* note 40, at 10.

¹⁹⁴ See *Preface*, *supra* note 40, at 10.

¹⁹⁵ See Thoreau, *supra* note 193, at 17.

¹⁹⁶ *Id.* at 23.

¹⁹⁷ See *Preface*, *supra* note 40, at 10.

¹⁹⁸ See David Walker, *David Walker's Appeal in Four Articles: Together with a Preamble, to the Coloured Citizens of the World*, in THE NORTON ANTHOLOGY OF AFRICAN AMERICAN LITERATURE 178, 178–79, 183, 187 (Henry Louis Gates, Jr., & Nellie Y. McKay eds., 1997) (1829). Originally published in 1829 and distributed

largely in used clothes sold to sailors from Walker's Boston secondhand clothing store, the *Appeal* riled southern white people and is suspected to have resulted in Walker's mysterious death in 1830. *See id.* at 178.

¹⁹⁹ *See* JEREMY BRECHER, *STRIKE!* 37, 39–40 (South End Press 1997) (1972). Brecher provides a detailed exposition of the widespread labor militancy of the nineteenth century in the first three chapters of his book. *See id.* at 13–114.

²⁰⁰ *See Preface, supra* note 40, at 10.

²⁰¹ *See id.* Many young men who refused to comply with the draft requirements during World War I were imprisoned, including 142 who received life sentences, seventeen who were given death sentences (though later commuted), and one who escaped execution by agreeing to travel to the front lines to retrieve the wounded from "No Man's Land." *See World War I and American Opposition, in* THE POWER OF THE PEOPLE: ACTIVE NONVIOLENCE IN THE UNITED STATES, *supra* note 3, at 38, 44–45..

²⁰² *See World War II and the Pacifist Community, in* THE POWER OF THE PEOPLE: ACTIVE NONVIOLENCE IN THE UNITED STATES, *supra* note 3, at 88, 107.

²⁰³ *See id.*

²⁰⁴ *See id.*

²⁰⁵ The long struggles by people of color in the middle of the twentieth century are remarkably well documented. As such, it seems unnecessary and unwise to attempt a superficial discussion of those diverse and important events here. In addition, I do not include activists whose principal focus was the civil rights of people of color within the rubric of "pacifism." This distinction is not intended to suggest that there were not pacifists involved in the civil rights struggles that have become emblematic of direct action civil disobedience. Rather, this distinction is helpful to emphasize the similar organizational structures used by radical environmentalists and those individuals and organizations I denote as *radical pacifists*. *See infra* notes 212–15, 225–31.

²⁰⁶ For a discussion of disarmament movements, especially the role of the Committee for Non-Violent Action and the Committee for Sane Nuclear Policy, see James Tracy's fabulous and concise treatment of these activists in *Direct Action*. *See generally* JAMES TRACY, *DIRECT ACTION: RADICAL PACIFISM FROM THE UNION EIGHT TO THE CHICAGO SEVEN* 99–124 (1996).

²⁰⁷ *See World War I and American Opposition, supra* note 201. The Fellowship of Reconciliation originated in England, but a branch was formed in the USA in 1915. *See id.* at 44. Eight years later, in 1923, the War Resisters League formed to provide support for nonreligious radical pacifists who claimed conscientious objector status. *See id.* at 45.

²⁰⁸ *See Acts* 4:19; *see also James* 2:17 (providing James's admonition: "faith without deeds . . . is totally dead.").

²⁰⁹ *See Thoreau, supra* note 193, at 23.

²¹⁰ *See TRACY, supra* note 206, at 2 (describing the Union Eight, a group of radical pacifist seminarians inspired by their religious beliefs who were imprisoned during World War II). *But see World War I and American Opposition, supra* note 201, at 45 (noting that War Resisters League was founded specifically to assist radical pacifists motivated by secular beliefs).

²¹¹ *See Preface, supra* note 40, at 11; *World War I and American Opposition, supra* note 201, at 44–45. Some radical pacifists, notably the Catholic Workers, cofounded by

Dorothy Day and Peter Maurin, and popularized by the Berrigan brothers, were motivated by their religious beliefs. *See generally* DANIEL BERRIGAN, *THE TRIAL OF THE CATONSVILLE NINE* (1970) (presenting a fictional portrayal of the trial of nine Catholic Workers prosecuted for destroying draft cards); DOROTHY DAY, *THE LONG LONELINESS: AN AUTOBIOGRAPHY* (1952) (presenting the life story of Catholic Worker cofounder Dorothy Day).

²¹² *See* John Morreall, *The Justifiability of Violent Civil Disobedience*, in *CIVIL DISOBEDIENCE IN FOCUS* 130, 137–38 (Hugo Adam Bedau ed., Routledge Philosophers in Focus Series 1991).

²¹³ *See id.*

²¹⁴ *See id.* at 138.

²¹⁵ *See* TRACY, *supra* note 206, at xiii–xiv, 126; *Preface*, *supra* note 40, at 11. The twentieth-century USA’s most famous advocate of direct action civil disobedience, Martin Luther King, Jr., did not embrace decentralization, nonhierarchical, consensus-based decision making. Even his important *Letter from a Birmingham Jail* reads as—in fact, is—a conversation among leaders of myriad communities. *See* Martin Luther King, Jr., *Letter from a Birmingham Jail* (Apr. 16, 1963), in *THE TIMES WERE A CHANGIN’: THE SIXTIES READER* 128, 128–34 (Irwin Unger & Debi Unger eds., 1998). In this important argument explaining direct action civil disobedience, King, writing as president of the Southern Christian Leadership Conference, addresses himself to leading white clergy who criticized his tactics. *See id.* at 128.

²¹⁶ *See* TRACY, *supra* note 206, at 6, 93. In addition to many Catholic Worker farms and houses in urban areas, at least three rural radical pacifist communities existed that “stressed the need for decentralized, regional groups with regional authorities to eliminate nations, and a global understanding which allowed the earth’s resources to be used equally by the earth’s inhabitants.” *See Towards Revolutionary Nonviolence*, in *THE POWER OF THE PEOPLE: ACTIVE NONVIOLENCE IN THE UNITED STATES*, *supra* note 3, at 108, 120–121.

²¹⁷ *See World War II and the Pacifist Community*, *supra* note 202, at 93; *Towards Revolutionary Nonviolence*, *supra* note 216, at 116.

²¹⁸ *See* TRACY, *supra* note 206, at 65–66; *Towards Revolutionary Nonviolence*, *supra* note 216, at 116. Peacemakers was established in 1948 by World War II conscientious objectors who honed direct action techniques in prison and Civilian Public Service camps, quasi-prisons established to confine conscientious objectors. *See* Scott H. Bennett, “Free American Political Prisoners”: *Pacifist Activism and Civil Liberties, 1945–48*, 40 *J. PEACE RES.* 413, 414–15 (2003). Peacemakers advocated direct action civil disobedience in efforts to resist draft registration and tax resistance. *See id.* at 415.

²¹⁹ *See* TRACY, *supra* note 206, at xiii; *see, e.g.*, *United States v. Dellinger*, 472 F.2d 340, 348 (1972) (concerning radical pacifist David Dellinger’s participation, alongside several other well-known direct action activists, in direct action civil disobedience during the 1968 Democratic Party’s national convention in Chicago).

²²⁰ DAY, *supra* note 211, at 204; *see also Direct Action for Disarmament*, in *THE POWER OF THE PEOPLE: ACTIVE NONVIOLENCE IN THE UNITED STATES*, *supra* note 3, at 124, 127 (quoting Day: “there is something fundamentally evil about this society [I]t’s

not going to be changed just by demonstrations. It's a question of risking one's life. It's a question of living one's life in drastically different ways.”).

²²¹ See *Direct Action for Disarmament*, *supra* note 220, at 133. After being stopped and arrested twice by the Coast Guard, the CNVA's mission was, without warning, taken up by a previously uninvolved shipowner and his family who were unaffiliated with CNVA. See TRACY, *supra* note 206, at 102–03. They were able to sail into the launch zone well beyond where the CNVA activists had sailed. See *id.* at 104.

²²² See FOREMAN, *supra* note 31, at 4–5; Davidoff et al., *supra* note 90, at 70.

²²³ See *supra* notes 126–38 and accompanying text.

²²⁴ See FOREMAN, *supra* note 31, at 3; Bookchin & Foreman, *supra* note 37, at 34.

²²⁵ See Jeffrey “Free” Leurs, *From Protest to Resistance*, in IGNITING A REVOLUTION: VOICES IN DEFENSE OF THE EARTH, *supra* note 35, at 211, 213; FOREMAN, *supra* note 31, at 3; Bookchin & Foreman, *supra* note 37, at 34; see also *Preface*, *supra* note 40, at 11 (noting that radical pacifists believed that all humans were interconnected); Chief Seattle, *supra* note 3, at 7 (“This we all know. All things are connected like the blood which unites one family. All things are connected. Whatever befalls the earth befalls the sons of the earth.”).

²²⁶ See Bookchin & Foreman, *supra* note 37, at 34; *World War II and the Pacifist Community*, *supra* note 202, at 107; TRACY, *supra* note 206, at 6.

²²⁷ See *World War II and the Pacifist Community*, *supra* note 202, at 107; TRACY, *supra* note 206, at 11; see also *Oregon v. Leurs*, No. A115208 (Or. Ct. App. 2007), <http://www.publications.ojd.state.or.us/A115208.htm> (reversing and remanding for resentencing Leurs's 266 month prison sentence for burning three trucks totaling \$50,000 in damages and resulting in no injuries to people); Leurs, *supra* note 225, at 222 (describing Leurs' twenty-two years and eight months sentence for burning sport utility vehicles); Rik Scarce, *Speak the Truth, Go to Jail*, in IGNITING A REVOLUTION: VOICES IN DEFENSE OF THE EARTH, *supra* note 35, at 257 (describing Scarce's five month imprisonment for refusal to cooperate with a federal grand jury); Steven Best & Anthony J. Nocella II, *Behind the Mask: Uncovering the Animal Liberation Front*, in TERRORISTS OR FREEDOM FIGHTERS? REFLECTIONS ON THE LIBERATION OF ANIMALS 9, 10 (Steven Best & Anthony J. Nocella II eds., 2004) (describing the federal government's post-September 11 interest in criminally prosecuting radical environmental and animal rights activists in the name of anti-terrorism).

²²⁸ See *Earth Liberation Front Communiqués*, *supra* note 42, at 406; *Preface*, *supra* note 40, at 11; TRACY, *supra* note 206, at xiii–xiv, 126; Mitchell Mobley, *The New Wave of Radical Environmentalism: America's Inaction and Reaction to Domestic Ecoterrorism*, 1 APPALACHIAN L.J. 19, 25, 28 (2002).

²²⁹ See Davidoff et al., *supra* note 90.

²³⁰ See TRACY, *supra* note 206, at 6, 93; *Towards Revolutionary Nonviolence*, *supra* note 216, at 120–21.

²³¹ See Davidoff et al., *supra* note 90; *World War II and the Pacifist Community*, *supra* note 202, at 93; *Towards Revolutionary Nonviolence*, *supra* note 216, at 120–21.

²³² See Davidoff et al., *supra* note 90; *Preface*, *supra* note 40, at 11.

²³³ See *Towards Revolutionary Nonviolence*, *supra* note 216, at 116; *Direct Action for Disarmament*, *supra* note 220, at 129.

²³⁴ See *Earth Liberation Front Communiqués*, *supra* note 42, at 406; Mobley, *supra* note 228, at 25, 28.

²³⁵ RAWLS, *supra* note 121, at 125. According to Rawls, “realistic utopia” “prob[es] the limits of practicable political possibility.” *Id.* at 4. He notes that his theory of “justice as fairness is realistically utopian: [because] it probes the limits of the realistically practicable, that is, how far in our world (given its laws and tendencies) a democratic regime can attain complete realization of its appropriate political values” *Id.* at 13.

²³⁶ Rawls neither contends that any existing human society satisfies the criteria of a just society nor that humans would behave in a just society as they do in actual societies. See *id.*

²³⁷ See MILL, *supra* note 186, at 93.

²³⁸ See CARTER, *supra* note 38, at 2, 4; see also SCARCE, *supra* note 4, at 5 (noting that radical environmentalists use direct action civil disobedience “to get their point across”); MANES, *supra* note 62, at 168–70 (stating that radical environmentalists have no pretensions of participating in a mass movement, but, nonetheless, perform direct action civil disobedience to bring attention to environmental destruction).

²³⁹ See RICHARD J.F. DAY, GRAMSCI IS DEAD: ANARCHIST CURRENTS IN THE NEWEST SOCIAL MOVEMENTS 37 (2005); see also David Dellinger, *Declaration of War*, DIRECT ACTION, Autumn 1945, at 6, 9 (writing that “[e]very act we perform today must reflect the kind of human relationships we are fighting to establish tomorrow”).

²⁴⁰ J. BLAIR SMITH, DIRECT ACTION VERSUS LEGISLATION 27 (1909).

²⁴¹ Thoreau, *supra* note 193, at 24.

²⁴² Will Potter, *Green is the New Red: How the Government Landed a Terrorism Conviction for Nonviolent Animal Activists*, EARTH FIRST! J., May–June 2006, at 18.

²⁴³ Steven Best, *It’s War! The Escalating Battle Between Activists and the Corporate-State Complex*, in TERRORISTS OR FREEDOM FIGHTERS? REFLECTIONS ON THE LIBERATION OF ANIMALS, *supra* note 227, at 301.

²⁴⁴ ABBEY, *supra* note 152, at 182.

²⁴⁵ See LANDMARK CASES LEFT OUT OF YOUR TEXTBOOKS 64 (Ann Fagan Ginger ed., 2006); Ben Rosenfeld & Dennis Cunningham, *Judi Bari vs. the FBI: Snatching Victory from the Jaws of Deceit*, 59 GUILD PRAC. 242, 243 (2002).

²⁴⁶ See LANDMARK CASES LEFT OUT OF YOUR TEXTBOOKS, *supra* note 245, at 64–65; Rosenfeld & Cunningham, *supra* note 245, at 242–43.

²⁴⁷ See LANDMARK CASES LEFT OUT OF YOUR TEXTBOOKS, *supra* note 245, at 65; Rosenfeld & Cunningham, *supra* note 245, at 244; see also Bookchin & Foreman, *supra* note 37, at 39 (describing FBI undercover infiltration of EF! resulting in the arrests and indictment of four EF! activists). Sadly, the jury’s decision arrived five years after Judi Bari’s death. LANDMARK CASES LEFT OUT OF YOUR TEXTBOOKS, *supra* note 245, at 65.

²⁴⁸ See Will Potter, *The New Backlash: From the Streets to the Courthouse, Activists Find Themselves Under Attack*, TEX. OBSERVER (Austin), Sept. 14, 2001, at 6 (“Authorities have responded with an increasingly aggressive backlash.”).

²⁴⁹ *The Terrorist Threat Confronting the United States: Hearing Before the S. Select Comm. on Intelligence*, 107th Cong. (2002) [hereinafter *Hearing*] (statement of Dale L.

Watson, Executive Assistant Director, Counterterrorism/Counterintelligence Division, Federal Bureau of Investigation).

²⁵⁰ Potter, *supra* note 248.

²⁵¹ Scott McInnis, *Terrorism in Any Form Is Intolerable*, DENV. POST, Nov. 25, 2001, at E4. McInnis, a Republican member of the House of Representatives, added that “[e]coterterrorism is not an imagined problem. Environmental vigilantism is on the rise and it is for real.” *Id.*

²⁵² Hughes, *supra* note 44.

²⁵³ See Jason Black & Jennifer Black, *The Rhetorical “Terrorist”: Implications of the USA Patriot Act on Animal Liberation*, in TERRORISTS OR FREEDOM FIGHTERS? REFLECTIONS ON THE LIBERATION OF ANIMALS, *supra* note 227, at 288, 289.

²⁵⁴ Hearing, *supra* note 249.

²⁵⁵ See Best, *supra* note 243, at 308.

²⁵⁶ See *id.* at 326–27 (reporting that a high-ranking law enforcement official in Minnesota described the ELF as more dangerous than Minnesota’s neo-Nazi and rightwing militias such as the Aryan Nation and the Posse Comitatus, as well as al Qaeda); McInnis, *supra* note 251 (“Whether it’s crashing a plane into the Pentagon . . . or burning the Vail lodge, terrorism has no place.”).

²⁵⁷ See Best, *supra* note 243, at 305. McInnis explains his application of the terrorism label to radical environmentalists by saying that, even though their actions have not caused any human deaths, “it is just a matter of time before human life is taken.” McInnis, *supra* note 251. Congressman George Nethercutt likewise claimed that “somebody is going to get killed, plain and simple,” by radical environmental actions. Potter, *supra* note 248.

²⁵⁸ See, e.g., *State v. Cram*, 600 A.2d 733, 734 (Vt. 1991) (using the necessity defense to defend against charges of trespassing stemming from entry onto the grounds of a gun manufacturer’s test firing range facility to prevent testing of guns being shipped to El Salvador); *Commonwealth v. Schuchardt*, 557 N.E.2d 1380, 1381 (Mass. 1990) (considering the necessity defense presented by a defendant who was convicted of property destruction after entering the facilities of a manufacturer of nuclear weapons, pouring blood on blueprints for warheads, and hitting various missile manufacturing equipment with a hammer); *Bird v. Municipality of Anchorage*, 787 P.2d 119, 120 (Alaska Ct. App. 1990) (presenting the necessity defense in a situation where the defendants blocked the entrance to an abortion provider’s offices). According to the Eighth Circuit, the necessity defense was traditionally allowed only where “the actor’s choices were dictated by physical forces beyond the actor’s control.” *United States v. Dorrell*, 758 F.2d 427, 430 n.2 (9th Cir. 1985). However, the defense has increasingly been considered when “the defendant assertedly acted in the interest of the general welfare.” *Id.* Perhaps given the necessity defense’s characteristic as a “profoundly revolutionary principle, both as a jurisprudential doctrine and as a vehicle for social change,” radical environmental activists have already identified the necessity defense as a potentially beneficial criminal defense strategy. See Shaun P. Martin, *The Radical Necessity Defense*, 73 U. CHI. L. REV. 1527, 1529 (2005). In an incident that raises questions about the proper role of attorneys sympathetic to the goals of direct action civil disobedience practitioners (a topic that is beyond the scope of this article), attorneys for

the environmental organization, Greenpeace, pressured activist Mike Roselle to plead guilty to charges related to an action in which activists placed a gas mask and banner across George Washington's face on Mount Rushmore. See SCARCE, *supra* note 4, at 167, 169. Roselle wanted to plead not guilty and present a necessity defense premised on acid rain's destruction of forests. See *id.* at 169. But see MANES, *supra* note 62, at 171 (discounting the necessity defense as a sound strategy for radical environmentalists because, historically, it has been "largely unsuccessful" for defendants); Martin, *supra*, at 1530 ("[A]s currently employed, the necessity defense may be more often used as a stabilizing, counterrevolutionary device than as an instrument of direct social change.").

²⁵⁹ See *United States v. Maxwell*, 254 F.3d 21, 27 (1st Cir. 2001); Quigley, *supra* note 191, at 11.

²⁶⁰ See *Maxwell*, 254 F.3d at 27; Quigley, *supra* note 191, at 11.

²⁶¹ See *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1991); *Maxwell*, 254 F.3d at 27; *United States v. Sued-Jiménez*, 275 F.3d 1, 6 (1st Cir. 2001); Quigley, *supra* note 191, at 49. The Model Penal Code presents somewhat different criteria for the necessity defense: the actor must have sought to avoid a greater harm than that created by the criminal violation, no other defenses to the crime or the specific situation involved may exist, there can not have been legislative preclusion of the act, and the actor may not have acted recklessly or negligently. See MODEL PENAL CODE § 3.02(1)–(2) (2001). Because much radical environmental direct action targets federal government policies, this article emphasizes the necessity defense requirements utilized by federal courts.

²⁶² See *Schoon*, 971 F.2d at 195; *Maxwell*, 254 F.3d at 27; *Sued-Jiménez*, 275 F.3d at 6. State courts similarly include the prevention of greater harm as one of several factors. See *Commonwealth v. Capitulo*, 498 A.2d 806, 809 (Pa. 1985); *People v. Gray*, 571 N.Y.S.2d 851, 854 (N.Y. Crim. Ct. 1991); *State v. Troen*, 786 P.2d 751, 753 (Or. Ct. App. 1990). Indeed, at least one court uses the term *choice of evils* rather than *necessity* to describe the defense. See *Troen*, 786 P.2d at 753.

²⁶³ See *Schoon*, 971 F.2d at 195; *Maxwell*, 254 F.3d at 27; *Sued-Jiménez*, 275 F.3d at 6; *United States v. Cassidy*, 616 F.2d 101, 102 (4th Cir. 1979); Quigley, *supra* note 191, at 12.

²⁶⁴ See *Schoon*, 971 F.2d at 195; *Maxwell*, 254 F.3d at 27; *Sued-Jiménez*, 275 F.3d at 6; *Cassidy*, 616 F.2d at 102; Quigley, *supra* note 191, at 12.

²⁶⁵ See *Schoon*, 971 F.2d at 195; *Maxwell*, 254 F.3d at 27; *Sued-Jiménez*, 275 F.3d at 6; *Cassidy*, 616 F.2d at 102; Quigley, *supra* note 191, at 12.

²⁶⁶ This article is limited to a discussion of the necessity defense as it might operate in federal courts. Though the defense is available to defendants in proceedings in state courts, for purposes of clarity, this article does not discuss the various interpretations of the necessity defense by state courts. Opinions by state courts are only referenced when particularly helpful. For state court cases interpreting the necessity defense, see Martin, *supra* note 258, at 1535 n.29.

²⁶⁷ See Quigley, *supra* note 191, at 11; see also Martin, *supra* note 258, at 1532 (noting that the necessity defense "excludes from punishment illegal conduct that is reasonably designed to achieve the common good"). The burden in a necessity defense rests on the defendant. See Quigley, *supra* note 191, at 14; see also *Schoon*, 971 F.2d at 196, 197 (explaining that "to forgive a crime taken to avert a lesser harm would fail to maximize

social utility”); therefore, the necessity defense requires that the criminal action was taken to avoid greater harm); *United States v. Dorrell*, 758 F.2d 427, 430 (9th Cir. 1985) (“The defense of necessity is available when a person is faced with a choice of two evils and must then decide whether to commit a crime or an alternative act that constitutes a greater evil.”).

²⁶⁸ See William Sloane Coffin, Jr. & Morris I. Leibman, CIVIL DISOBEDIENCE: AID OR HINDRANCE TO JUSTICE?, at 4 (Am. Enter. Inst. for Pub. Policy Research, Rational Debate Series No. 6, 1972); CARL COHEN, CIVIL DISOBEDIENCE: CONSCIENCE, TACTICS, AND THE LAW 21 (1971). The radical pacifist civil disobedient Catholic Workers, who used napalm to burn draft registration cards during the Vietnam War, wrote:

The time is past when good men can remain silent, when obedience can segregate men from public risk How many must die before our voices are heard? How many must be tortured, dislocated, starved, maddened? How long must the world’s resources be raped in the service of legalized murder?

COHEN, *supra*, at 54, 56. See *United States v. Moylan*, 417 F.2d 1002, 1008 (4th Cir. 1969). The Catholic Worker defendants known as the Catonsville Nine, who used homemade napalm to destroy draft registration documents,

argue that the motivation for their action was moral in the sense that they intended to protest a war which is outrageous to their individual standards of humanity. Therefore, their actions are said to be not punishable regardless of the literal motivation, which is subjective, the war in Vietnam is in fact illegal and immoral and hence their acts in protest of this war were themselves moral acts for which they must be similarly immunized from punishment. In effect the appellants focus upon the means by which an organized society treats those citizens who choose to commit an act of civil disobedience in the name of justice.”

Id. Law professor Charles I. Lugini references apartheid South Africa, “a classic example of rule by law under the guise of rule of law,” to justify violation of unjust laws. Charles I. Lugini, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119, 164 (2007). Indeed, Lugini argues that “a morally unjust law compels civil disobedience.” *Id.* But see JOHN RAWLS, A THEORY OF JUSTICE 351, 354 (1971) (arguing that in the theoretical context “of a state of near justice” members of society have a “natural duty to . . . comply with unjust laws and policies”).

²⁶⁹ See *Sued-Jiménez*, 275 F.3d at 5, 7 (failing to consider whether the defendant’s trespass onto a military base constituted a lesser evil than that which the defendant aimed to prevent and denying the necessity defense on other grounds); *Maxwell*, 254 F.3d at 23, 27 (assuming that unlawful trespass onto a military base was a lesser evil than that purportedly represented by the presence of Trident nuclear submarines); *United States v. Kabat*, 797 F.2d 580, 582, 590–91 (8th Cir. 1986) (implicitly agreeing with defendants that trespass constituted a lesser harm than that represented by nuclear weapons, but denying the necessity defense on other grounds); *United States v. Quilty*, 741 F.2d 1031–33 (7th Cir. 1984). This case involved defendants who trespassed onto a military arsenal

to protest nuclear war, and the court stated that “[i]t is, of course, impossible to argue that nuclear war is not a more serious harm than a peaceful, if unlawful, anti-nuclear prayer demonstration . . .”).

²⁷⁰ See *Kabat*, 797 F.2d at 582–83, 590–91 (implicitly agreeing with defendants that trespass constituted a lesser harm than that represented by nuclear weapons, but denying the necessity defense on other grounds); see also *Commonwealth v. Berrigan*, 535 A.2d 91, 94 (Pa. Super. Ct. 1987) (noting that the defendants using a necessity defense “beat missile components with hammers and poured human blood on the premises”).

²⁷¹ See Quigley, *supra* note 191, at 49; see also Martin, *supra* note 258, at 1562 (adopting a social utilitarian perspective and arguing that there is “a virtually limitless number of situations in which the violation of a law or right might result in a demonstrable (or, to a particular jury, persuasive) increase in the net social utility and the diminution of net social harm”).

²⁷² See Quigley, *supra* note 191, at 49; see also Martin, *supra* note 258, at 1570 (describing the imminence requirement as “philosophically and doctrinally unsound”). The Tenth Circuit explicitly noted that the necessity defense “is obviously not a defense to charges arising from a typical protest” because the defense “can be asserted only by a defendant who was confronted with such a crisis as personal danger.” *United States v. Seward*, 687 F.2d 1270, 1276 (10th Cir. 1982).

²⁷³ See *Maxwell*, 254 F.3d at 27; *Commonwealth v. Capitolo*, 498 A.2d 806, 808 (Pa. 1985).

²⁷⁴ See *Kabat*, 797 F.2d at 591.

²⁷⁵ See *Commonwealth v. Berrigan*, 535 A.2d 91, 101 (Pa. Super. Ct. 1987). Similarly, the purported danger of a nuclear power plant was not enough to satisfy the Massachusetts Supreme Judicial Court. See *Commonwealth v. Hood*, 452 N.E.2d 188, 196 (Mass. 1983).

²⁷⁶ See *Maxwell*, 254 F.3d at 27.

²⁷⁷ See *State v. Hund*, 708 P.2d 621, 623 (Or. Ct. App. 1985).

²⁷⁸ See Quigley, *supra* note 191, at 4, 5 (arguing that an expanded interpretation of the necessity defense for civil disobedience trials is required by the USA’s historical commitment to jury trials). Such narrow interpretation also disregards the principle upon which the necessity defense rests, that is, that the view of governmental actors might diverge from those of the electorate. See Martin, *supra* note 258, at 1540, 1544–45.

²⁷⁹ *Abrams v. United States*, 250 U.S. 616 (1919).

²⁸⁰ *Id.* at 630–31 (Holmes, J., dissenting).

²⁸¹ See *id.*

²⁸² See *id.* at 617–18.

²⁸³ See RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH* 118–25 (1987).

²⁸⁴ See Quigley, *supra* note 191, at 26, 37.

²⁸⁵ See *United States v. Schoon*, 971 F.2d 193, 199 (9th Cir. 1991) (criticizing civil disobedience defendants’ attempt to use the necessity defense). The court in *United States v. Moylan* explained:

To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standards was judged morally untenable. Toleration of such conduct would not be democratic . . . but inevitably anarchic.

417 F.2d 1002, 1009 (4th Cir. 1969).

²⁸⁶ See FOREMAN, *supra* note 31, at 29; see also MANES, *supra* note 62, at 170–71 (claiming that radical environmentalists see “no tomorrow. Once an old-growth forest is cut, it will not grow back for hundreds of years, if ever. Once a species becomes extinct the battle is lost. This sense of urgency often motivates the use of ecological civil disobedience . . .”).

²⁸⁷ FOREMAN, *supra* note 31, at 1.

²⁸⁸ See *id.* at vii, ix.

²⁸⁹ See *Schoon*, 971 F.2d at 195; *United States v. Maxwell*, 254 F.3d 21, 27 (1st Cir. 2001); *United States v. Sued-Jiménez*, 275 F.3d 1, 6 (1st Cir. 2001); Quigley, *supra* note 191, at 12.

²⁹⁰ See *Sued-Jiménez*, 275 F.3d at 5; *Maxwell*, 254 F.3d at 23; *United States v. Kabat*, 797 F.2d 580, 582 (8th Cir. 1986).

²⁹¹ See *Kabat*, 797 F.2d at 582; *United States v. Dorrell*, 758 F.2d 427, 432 (9th Cir. 1985).

²⁹² See, e.g., *Schoon*, 971 F.2d at 196.

²⁹³ See SCARCE, *supra* note 4, at 275.

²⁹⁴ See *Schoon*, 971 F.2d at 197–98; COHEN, *supra* note 268, at 36–37; see also *United States v. Kroncke*, 459 F.2d 697, 704 (8th Cir. 1972) (deciding that destruction of Selective Service records, “even if this is done as an act of conscience,” did not satisfy the necessity defense). The law review article cited by the *Schoon* court argues that the necessity defense must always fail when the defendant merely “assert[s] that her view of what is best should trump the decision of the majority of elected representatives.” Brent D. Wride, Comment, *Political Protest and the Illinois Defense of Necessity*, 54 U. CHI. L. REV. 1070, 1083 (1987). See *Schoon*, 971 F.2d at 197; see also *Dorrell*, 758 F.2d at 432. The court dismissed the defendant’s necessity defense argument because doing otherwise

would amount to recognizing that an individual may assert a defense to criminal charges whenever he or she disagrees with a result reached by the political process. . . . [Furthermore,] it does not follow that the law should excuse criminal activity intended to express the protestor’s disagreement with positions reached by the lawmaking branches of the government.

Id.

²⁹⁵ See *Maxwell*, 254 F.3d at 28; *Schoon*, 971 F.2d at 196.

²⁹⁶ *Maxwell*, 254 F.3d at 28; *Dorrell*, 758 F.2d at 431 (“[T]he defendant must establish that he reasonably anticipated the existence of a direct causal relationship between his conduct and the harm to be averted.”).

²⁹⁷ *Schoon*, 971 F.2d at 196; see also *United States v. May*, 622 F.2d 1000, 1002, 1009 (9th Cir. 1980) (ruling that the defendants' trespass onto a military base in order to dismantle the Trident missile system, which the defendants claimed was designed exclusively for waging war, were "so tenuous so as not to give them any basis for asserting the defense. . . . He must be able to show some direct harm to himself, not a theoretical future harm to all of us that may not occur."); *United States v. Simpson*, 460 F.2d 515, 516, 517–18 (9th Cir. 1972) (ruling that the burning of draft files in an effort to prevent continued military operations in Vietnam did not constitute a sufficiently reasonable connection between the defendant's actions and his goals). But see James L. Cavallaro, Jr., *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and United States v. Schoon*, 81 CAL. L. REV. 351, 352 (1993) (arguing that the *Schoon* court "not only misapplied the elements of the necessity defense, but it also failed to weigh accurately the constitutional questions and policy considerations raised by adopting a rule which restricts a criminal defendant's fundamental right to present a defense"). For a strong critique of *Schoon*, see generally Cavallaro, *supra*, at 367–80.

²⁹⁸ COHEN, *supra* note 268, at 52; see Luke Shulman-Ryan, *Evidence—The Motion In Limine and the Marketplace of Ideas: Advocating for the Availability of the Necessity Defense for Some of the Bay State's Civilly Disobedient*, 27 W. NEW ENG. L. REV. 299, 308 (2005) (stating that direct civil disobedience "involves the breach of a law that is the object of the demonstration").

²⁹⁹ See COHEN, *supra* note 268, at 52.

³⁰⁰ See *Schoon*, 971 F.2d at 196.

³⁰¹ COHEN, *supra* note 268, at 52; see Shulman-Ryan, *supra* note 298, at 308–09 (defining indirect civil disobedience as "violation of a law, inoffensive in itself and only tangentially connected to the purpose of the protest").

³⁰² COHEN, *supra* note 268, at 52, 54–56; see *Schoon*, 971 F.2d at 198.

³⁰³ See *Schoon*, 971 F.2d at 196.

³⁰⁴ *Id.* at 197. Indeed, symbolic, public actions might encourage courts to interpret the necessity defense narrowly. The Fourth Circuit's opinion in *Moylan*, the case arising from the Catonsville Nine's well-publicized destruction of draft cards to protest the Vietnam War, noted that "this publicly exploited action cannot be dismissed as de minimis" before going on to criticize the necessity defense generally and affirm the defendants' convictions. See *United States v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969).

³⁰⁵ COHEN, *supra* note 268, at 55–56.

³⁰⁶ See *Schoon*, 971 F.2d at 196.

³⁰⁷ See *id.* at 198; see also *United States v. Kroncke*, 459 F.2d 697, 701 (8th Cir. 1972) ("None of the cases even suggests that the defense of necessity would be permitted where the actor's purpose is to effect a change in governmental policies.").

³⁰⁸ See *Schoon*, 971 F.2d at 196, 198; see also *United States v. Kabat*, 797 F.2d 580, 592 (8th Cir. 1986) (explaining that cases of political protest will inevitably lack "a sufficient causal relationship between the act committed by the defendants and the avoidance of the asserted 'greater harm'").

³⁰⁹ In his article on the radical necessity defense, Shaun P. Martin states that:

The necessity defense is . . . most usefully employed as a means of both authorizing and sustaining direct remediation of existing social evils through deliberate illegality. . . . [L]oggers might be physically restrained from disseminating old growth forests 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 258, at 1593–94.

³¹⁰ See *United States v. Bailey*, 444 U.S. 394, 411 (1980); *United States v. Maxwell*, 254 F.3d 21, 28 (1st Cir. 2001); *Commonwealth v. Capitolo*, 498 A.2d 806, 808 (Pa. 1985).

³¹¹ See *Bailey*, 444 U.S. at 410; *Schoon*, 971 F.2d at 196, 197; *United States v. Dorrell*, 758 F.2d 427, 431–32 (9th Cir. 1985). *But see* Martin, *supra* note 258, at 1586 (arguing that the existence of legal alternatives should be considered as part of the necessity defense, but should not automatically bar its use).

³¹² See *United States v. Sued-Jiménez*, 275 F.3d 1, 7 (1st Cir. 2001); *Schoon*, 971 F.2d at 198; *Kabat*, 797 F.2d at 582; *Dorrell*, 758 F.2d at 432.

³¹³ See *Sued-Jiménez*, 275 F.3d at 7; *Maxwell*, 254 F.3d at 29.

³¹⁴ See *Schoon*, 971 F.2d at 198.

³¹⁵ *Id.* at 199; see *Maxwell*, 254 F.3d at 29 (“[A] defendant’s legal alternatives will rarely, if ever, be deemed exhausted when the harm of which he complains can be palliated by political action.”). The court in *United States v. Quilty* explained:

It is just as impossible . . . to argue that there are not reasonable alternatives to violating the [trespass] law under which these defendants were convicted. 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 the release of information to the media, to name only a few.

741 F.2d 1031, 1033 (7th Cir. 1984).

³¹⁶ See *United States v. Turner*, 44 F.3d 900, 902 (10th Cir. 1995); *Zal v. Steppe*, 968 F.2d 924, 929 (9th Cir. 1992); *State v. Chisholm*, 882 P.2d 974, 976 (Idaho Ct. App. 1994); *State v. Cozzens*, 490 N.W.2d 184, 190 (Neb. 1992).

³¹⁷ See *Schoon*, 971 F.2d at 198, 199.

³¹⁸ See *id.* at 199.

³¹⁹ See *id.* at 196, 198–99.

³²⁰ See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (determining that a South Carolina statute prohibiting construction on a barrier island constituted a taking under the Fifth Amendment, thereby, effectively allowing the land owner to construct single family homes on the property without regard to the adverse environmental consequences of construction); *Kaiser Aetna v. United States*, 444 U.S. 164, 167 (1979) (allowing a private business to dredge and fill a privately-owned pond and increase the depth of a channel even though these alterations might cause erosion of nearby beaches); see also *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 83 S.W. 658, 667 (Tenn. 1904) (deciding that an injunction against defendant metal working companies that were polluting the air and land surrounding their facilities sought by

private owners of surrounding land would be “a confiscation of the property of the defendants for the benefit of the complainants—an appropriation without compensation”); *Armstrong v. Francis Corp.*, 120 A.2d 4, 6, 10 (N.J. 1956) (allowing a private landowner to erect two hundred homes thereby destroying a stream that acted as a natural drain for neighboring land so long as the costs of the destruction of the natural drainage system are borne by the developer, not adjoining property owners); Molly S. McUsic, *Redistribution and the Takings Clause*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 617, 631 (David Kairys ed., 3d ed. 1998) (noting that the Supreme Court’s current interpretation of the Fifth Amendment takings clause puts environmental laws that prohibit development most at risk of being found unconstitutional).

³²¹ See *supra* text accompanying notes 244–56.

³²² See *Schoon*, 971 F.2d at 195; *United States v. Maxwell*, 254 F.3d 21, 27 (1st Cir. 2001); *United States v. Sued-Jiménez*, 275 F.3d 1, 6 (1st Cir. 2001).

³²³ See *Schoon*, 971 F.2d at 195; *Maxwell*, 254 F.3d at 27; *Sued-Jiménez*, 275 F.3d at 6; *United States v. Kabat*, 797 F.2d 580, 591 (8th Cir. 1986); Quigley, *supra* note 191, at 12.

³²⁴ See *Schoon*, 971 F.2d at 195; *Maxwell*, 254 F.3d at 27; *Sued-Jiménez*, 275 F.3d at 6; Quigley, *supra* note 191, at 12; Martin, *supra* note 258, at 1594.

³²⁵ See *Schoon*, 971 F.2d at 195; *Maxwell*, 254 F.3d at 27; *Sued-Jiménez*, 275 F.3d at 6; Quigley, *supra* note 191, at 12.

³²⁶ See *supra* text accompanying notes 186–205.

³²⁷ See *COFFIN & LEIBMAN*, *supra* note 268, at 5.

³²⁸ See *ROY*, *supra* note 187, at 92.