The Nuremberg Principles: A Defense for Political Protesters

Frank Lawrence

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol40/iss2/4

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
Peace activists in the United States have advocated an end to war for many years. These efforts occasionally have involved the commission of acts of civil disobedience, for which individuals frequently are arrested on charges of trespass, disorderly conduct, or similar misdemeanors. Beginning with the Korean War, and continuing through the Vietnam War, the nuclear arms race and the present war in Central America, several defendants in these political protest cases have sought to raise the Nuremberg Principles as a defense.

The Allied powers codified the Nuremberg Principles as international law at the end of World War II. The Principles define three types

---

* B.A. 1985, University of California, Santa Cruz; Member, Third Year Class.

The Author would like to acknowledge Ann Fagan Ginger, President of the Meiklejohn Civil Liberties Institute, for her invaluable contribution to this Note.

1. See generally Bauer & Eckerstrom, The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience, 39 STAN. L. REV. 1174, 1175 n.14 (1987) ("Philosophers have long debated the definition, and thus the limits, of civil disobedience. Their definitions range from the general to the specific. John Rawls defines civil disobedience as 'a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.' . . . Howard Zinn defines it as 'the deliberate, discriminate, violation of law for a vital social purpose.' " (citations omitted)); Levitin, Putting the Government on Trial: The Necessity Defense and Social Change, 33 WAYNE L. REV. 1221, 1225 n.15 (1987) (Civil disobedience "is usually defined as peaceful, noncompliance with laws believed to be unjust in an effort to change them.").


3. For present purposes, the "Nuremberg Principles" are defined as enumerated in article VI of the London Charter. See infra note 16.

of international crimes: crimes against the peace; crimes against humanity; and war crimes.\(^5\) The Principles hold perpetrators of these international crimes\(^6\) individually responsible for their acts,\(^7\) and were applied in the trials of Nazi civilian, government, and military leaders at Nuremberg, Germany after World War II.\(^8\)

In the decades since World War II, peace activists in the United States have sought to use the Nuremberg Principles as a defense. For example, the Nuremberg defense could be raised in the following scenario: Suppose a group of people are arrested while protesting weapon production by a defense contractor, and are charged with disorderly conduct. The defendants targeted this particular factory because it produces a rapid-fire air-to-ground-cannon that the United States government supplies to the government of El Salvador. The defendants believe this weapon is used against civilians in El Salvador in violation of the Nuremberg Principles, and that the defense contractor and the United States government are therefore aiding and abetting this crime.

In their defense, the protesters rely on a state statutory privilege to prevent crimes, which is found in a majority of state criminal codes.\(^9\) A typical statute provides that a citizen, who reasonably believes that a felony or a misdemeanor amounting to a breach of the peace is being committed or is about to be committed in his or her presence, may use reasonable force to terminate or prevent such crime.\(^10\) The problem with using the privilege in this context is that the crime the defendants seek to prevent is not found in the state criminal codes. Rather, it is a violation of the Nuremberg Principles. Therefore, the defendants must present evidence to the fact-finder regarding the meaning and application of the Nuremberg Principles in order to complete their defense.\(^11\) If the court allows the defense, it is not required to rule on the legality of United States foreign policy in El Salvador. The issue is limited to the reasonableness of the defendants' beliefs that they were acting under legal authority when they violated the disorderly conduct laws. Additionally,

\(^5\) See infra note 16, at art. VI.

\(^6\) In this Note, the phrase "international crimes" means crimes against the peace, crimes against humanity, and war crimes as defined by the Nuremberg Principles.

\(^7\) See infra section I(A).

\(^8\) The Nurnberg Trial, 6 F.R.D. 69 (1946).

\(^9\) The great majority of modern codes treat crime prevention in two other privilege statutes: self-defense or defense of others, and defense of property. See W. LAFAVE & A. SCOTT JR., CRIMINAL LAW 474 n.33 (1986) [hereinafter LAFAVE]. There is a trend among states to add the privilege to criminal codes. R. PERKINS & R. BOYCE, CRIMINAL LAW 1111 (3d ed. 1982) [hereinafter PERKINS].

\(^10\) LAFAVE, supra note 9, at 474-75; see, e.g., CAL. PENAL CODE §§ 693, 694 (West 1988).

allowing the defense is not synonymous with acquitting the defendants; the question is simply whether the defendants will be allowed to present evidence concerning the Nuremberg Principles to the jury, and whether the court will instruct the jury on the Nuremberg Defense.

Until recently, domestic courts have not allowed criminal defendants to present evidence to juries concerning the Nuremberg Principles. This refusal is open to serious challenge from both legal and policy perspectives. A minority of courts have recognized the validity of this challenge and have permitted defenses involving the Nuremberg Principles.

In Section I, this Note begins with a brief history of the Nuremberg Principles: the circumstances under which they were promulgated, their contents, and how they apply to the United States, its courts, and its citizens. Section II describes the two formulations of the modern Nuremberg Defense—the Citizen's Privilege and the Citizen's Duty. Section III then examines the merits and flaws in the reasoning employed by domestic courts denying criminal defendants the right to present evidence relating to the Nuremberg Principles, and concludes that criminal defendants should be permitted to utilize the defense. Section IV summarizes several recent cases allowing the Nuremberg Defense, and argues that the decisions by courts permitting the Defense represent a more rational and legally sound approach. The Note concludes that allowing the defense is essential to protect the citizens' interests in acting to prevent international transgressions and the criminal defendant's constitutional rights, while also ensuring that the defendant's behavior does not exceed the tolerance of the local community.

I. The Nuremberg Principles and International Law

On August 8, 1946, the United States, the Soviet Union, France, and Great Britain signed an Agreement for the Establishment of an International Military Tribunal to try persons charged with crimes under a

12. The phrases "domestic courts" and "United States courts" refer to all federal and state courts within the United States.


15. Expressing their adherence to the agreement were Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay, and Paraguay. See Komarow, supra note 13, at 23.

16. Agreement for the Prosecution and Punishment of Major War Criminals of European
charter annexed to the Agreement. These documents are collectively known as the London Agreement and Charter. The London Charter summarized the laws of war in its definitions of crimes against the peace, crimes against humanity, and war crimes. Specifically, article VI of the London Charter provided a non-inclusive list of international crimes for which individuals would be held personally responsible, including the following definition of crimes against the peace: "planning, preparation, initiation of waging of a war in violation of international treaties, agreements or assurances." The London Charter codified what would become a central theme of the Nuremberg Trials: a defendant's official position, whether as a head of State or a responsible government official, does not exonerate him or her from personal responsibility for violations of international law.

At the signing of the London Agreement and Charter, United States Supreme Court Justice Robert K. Jackson, who served as chief American prosecutor at Nuremberg, noted that "for the first time four of the most powerful nations have agreed... upon the principle of individual responsibility for the crime of attacking international peace." This principle of individual responsibility was enforced in the war crimes trials at Nu-

---

17. The Nuremberg Principles have many historical antecedents. For an excellent review of the Principles' origin by a prosecutor at Nuremberg, see Appraisal, supra note 4.

18. London Charter, supra note 16, at art. VI (a), (b), (c), 59 Stat. at 1547, 82 U.N.T.S. at 288; see Agreements, supra note 4, at 86-88.


Article VI defines war crimes as:

[M]urder, ill-treatment or deportation to slave labor or for any other purpose the civilian population of or in an occupied territory, murder or ill-treatment of prisoners of war or persons on the scene, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

Id. (at 287-88).

Crimes against humanity are defined as:

[M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated . . . .

Id.


remberg and the Pacific theater war crimes trials in Tokyo.

In December 1946, the United Nations General Assembly unanimously adopted a resolution that affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal."  

A. Individual Responsibility

President Franklin D. Roosevelt emphasized the importance of individual responsibility in a 1944 speech on Nazi war crimes:

I ask every German and every man everywhere under Nazi domination to show the world by his action that in his heart he does not share [Hitler's] insane criminal desires. Let him hide these pursued victims, help them to get over their borders, and do what he can to save them from the Nazi hangman. I ask him also to keep watch, and to record the evidence that will one day be used to convict the guilty.  


The General Assembly has yet to vote on the Code. For many years, the main point of contention was finding an acceptable definition of "international aggression," upon which the Code relies heavily. See Komarow, supra note 13, at 25. In 1974, however, the United Nations agreed on a definition of aggression. See Garvey, United Nations Definition of Aggression, 17 VA. J. INT'L L. 177, 177-81 (1977). In 1978 the Code was circulated to member nations for comments and suggestions. Thus, the Code may soon be ratified by the General Assembly. See Snee, supra note 13, at 894-95.

26. Statement by President Roosevelt on German War Crimes, 1944, reprinted in CRIMES OF WAR 77 (R. Falk, G. Kolko & R.J. Lifton, eds. 1971). The following preceded the quoted portion of Roosevelt's speech:

The United Nations are fighting to make a world in which tyranny and aggression cannot exist; a world based upon freedom, equality and justice; a world in which all persons regardless of race, color or creed may live in peace, honor and dignity . . . [M]ost of Europe and in parts of Asia the systematic torture and murder of civilians—men, women and children—by the Nazis and the Japanese continues unabated . . .

We should again proclaim our determination that none who participate in these acts of savagery shall go unpunished. The United Nations have made it clear that they will pursue the guilty and deliver them up in order that Justice be done. That warning applies not only to the leaders but also to their functionaries and subordi-
Roosevelt's concern was not new. Individuals have been held responsible for their acts under international law for centuries. Punishment for the crime of piracy, for example, has been directed not "against the State whose subject or whose vessel had been responsible for acts of piracy [but instead] against the master and crew of the pirate ship as outlaws of the family of nations." Individuals also have been held personally responsible for such international crimes as espionage, sabotage, running blockades, and transporting contraband. In addition, individual responsibility has been imposed under international treaties governing the slave trade, freedom of the seas, and war and peace.

The United States Supreme Court specifically has recognized individual responsibility for international crimes. For example, in Ex Parte Quirin, the Court allowed Nazi spies to be prosecuted in the United States for violation of the 1907 Hague Convention. In the Court's view, the issue of individual responsibility was resolved by the fact that the defendants had chosen to violate international law.

The Nuremberg Principles codified this long-standing concept of individual responsibility for international crimes. While the concept of individual responsibility predated World War II, the war crimes trials greatly expanded the enforcement of this principle. For example, in United States v. Von Leeb, the American Military Tribunal stated:

International law operates as a restriction and limitation on the sovereignty of nations. It may also limit the obligations which individ-

28. Id. at 54.
29. Id. at 55.
31. Hague Convention, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539. The Hague Convention of 1907 is an international treaty governing the laws and customs of war. The 1907 Hague Convention, of which the United States is a signatory, stated that it is important "to revise the laws and general customs of war," so as to create "certain limits for the purpose of modifying their severity as far as possible." Id. The parties declared that "populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, and from the laws of humanity, and the requirements of the public conscience." Id. According to one scholar of international law, this rule "makes the principles of humanity and the dictates of public conscience obligatory by themselves, without the formulation of a treaty specifically prohibiting" the particular objectionable behavior. Meyrowitz, Nuclear Weapons Policy: The Ultimate Tyranny, 7 NOVA L.J. 93, 97 (1982).
33. See supra note 19.
uals owe to their states, and creates for them international obligations which are binding upon them to an extent that they must be carried out even if to do so violates a positive law or directive of state.\textsuperscript{35} The American Tribunal in \textit{Von Leeb} also held that complicity in the commission of a crime against peace, a war crime, or a crime against humanity is itself a crime under international law.\textsuperscript{36}

In \textit{The Nurnberg Trial}, the International Military Tribunal stated: \textquoteleft[\textit{T}he very essence of the [London] Charter is that individuals have international duties which transcend national obligations of obedience imposed by the individual state.\textquoteright\textsuperscript{37} The International Tribunal emphasized that \textquoteleft[crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.\textquoteright\textsuperscript{38} The International Tribunal concluded that the true test of an individual's culpability for an international crime is \textquoteleft[whether moral choice was in fact possible.\textquoteright\textsuperscript{39}

After the Nuremberg trials, a similar process took place in the Asian theater at the Tokyo War Crimes Trial.\textsuperscript{40} The Tokyo War Crimes Tribunal expanded the concept of personal responsibility, stating: \textquoteleft[A]nyone with knowledge of illegal activity and an opportunity to do something about it is a potential criminal under international law unless the person takes affirmative measures to prevent the commission of the crimes.\textquoteright\textsuperscript{41} Taken literally, this is a broad declaration of individual responsibility for international crimes. The statement is dicta and, depending on how one interprets \textquoteleft[opportunity," can be read to exclude the moral choice element of individual responsibility under the Nuremberg Principles. Nevertheless, the statement is evidence of how expansively individual responsibility may be interpreted, and indeed was interpreted, after World War II.

The principle that international law creates individual legal culpability also is found in the \textit{United States Army Field Manual}.\textsuperscript{42} The Manual, prepared by the United States Army to inform its personnel of applicable international law,\textsuperscript{43} states that \textquoteleft[\textit{T}he law of war is binding not only upon

\textsuperscript{35} United States v. Von Leeb, \textit{reported in} 11 \textit{TRIALS OF WAR CRIMINALS} 462, 489 (1950).
\textsuperscript{36} \textit{Id.} at 469-72.
\textsuperscript{37} \textit{Nurnberg Trial}, 6 F.R.D. at 110.
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.} at 111.
\textsuperscript{40} \textit{THE LAW OF WAR}, \textit{supra} note 24, at 1029-1183.
\textsuperscript{41} \textit{Id.} at 1283.
\textsuperscript{42} \textit{DEP'T OF DEFENSE UNITED STATES ARMY FIELD MANUAL, THE LAW OF LAND WARFARE} (1956).
\textsuperscript{43} \textit{Id.} at 3. The Manual states that its purpose is \textquoteleft[to provide authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land and to relationships between belligerents and neutral States.\textquoteright\textit{Id.}
States as such but also upon individuals . . . ."44 This express executive endorsement of individual responsibility is further evidence of the concept's vitality.

The notion of individual responsibility, which forms the core of the Nuremberg Principles, applies not only to government officials, policy makers, and military personnel, but to private citizens as well.45 The basis for such responsibility depends "on the extent of complicity as reflected in actions and knowledge."46 As the Tribunal noted when confronted with the question of civilian responsibility for international crimes committed during World War II:

Acts adjudged criminal when done by an officer of the government are criminal when done by a private individual. The guilt differs only in magnitude, not in quality. The offender, in either case is charged with personal wrong, and punishment falls upon the offender in propria persona. The application of international law to individuals is no novelty.47

Having discussed the origin of the Nuremberg Principles and reviewed their core concept—individual responsibility—this Note now examines the basis for domestic judicial application of those principles.

B. Application of the Nuremberg Principles in United States Courts

In order to use the Nuremberg Principles as a defense in domestic courts, criminal defendants must establish that the Principles are a part of the law that those courts have a duty to apply.48 The Nuremberg

44. Id. at 4.

45. The Zyklon B Case, reprinted in THE LAW OF WAR, supra note 24, at 1487, in which civilians were charged with providing Zyklon B (prussic acid) used to exterminate prisoners in concentration camps, also dealt with the question of civilian liability for complicity with international crimes:

[T]he provisions of the laws and customs of war are addressed not only to combatants and to members of state and other public authorities, but to anybody who is in a position to assist their violation.

The activities with which the accused in the present case were charged were commercial transactions conducted by civilians. The military court acted on the principle that any civilian who is an accessory to a violation of the laws and customs of war is himself also liable as a war criminal.

Id.


48. In an interesting case, Hirota v. MacArthur, 338 U.S. 197 (1948) (per curiam), the Supreme Court implied that judgments of international tribunals are not stare decisis in United States courts. Thus, the judgment of the International Military Tribunal at Nuremberg arguably is not binding precedent on domestic courts. Hirota involved several Japanese generals who, having been convicted of war crimes by an international military tribunal, appealed to the Supreme Court for leave to file a writ of habeas corpus. Explaining its refusal of the appeal, the Court noted that the "tribunal sentencing these petitioners is not a tribunal of the
Principles should apply in domestic legal proceedings for three reasons: (1) the Principles are an executive agreement and thus constitute a part of federal law; (2) the Principles are customary international law, thereby forming a part of domestic law; and (3) the United States government intended to be bound by the Nuremberg Principles when they were promulgated.

(1) **Nuremberg Principles Are an Executive Agreement**

Executive Agreements are international agreements entered into by the executive branch without the Senate ratification required by the Constitution for treaties. The United States Supreme Court has upheld the constitutionality of executive agreements on three occasions. In both *United States v. Pink* and *United States v. Belmont* the Court held that executive agreements are federal law and therefore override state law under the supremacy clause.

As an executive agreement, the London Agreement and Charter is part of the supreme law of the land. Domestic courts, therefore, are bound to apply the London Agreement and Charter, and its definition of the Nuremberg Principles, when relevant.

---

United States. . . . Under the foregoing circumstances the courts of the United States have no power or authority to review, to affirm set aside or annul the judgments and sentences imposed on these petitioners." *Id.* at 198.


51. *Pink*, 315 U.S. at 221-26; *Belmont*, 301 U.S. at 331-32; see U.S. Const. art. VI, cl. 2. This clause provides:

> This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

52. Since Supreme Court Justice Robert H. Jackson signed the agreement as a representative of the United States government, the London Agreement and Charter fits precisely the definition of executive agreements. See Jackson, supra note 22; supra text accompanying note 49. The Agreement and Charter are reported in the Executive Agreement Series and in part 2 of Volume 59 of United States Statutes at Large, which is titled "Private Laws, Concurrent Resolutions, Proclamations, Treaties, International Agreements Other Than Treaties." (Emphasis added). See supra note 16.

Whether the London Agreement and Charter has the status of a treaty apparently is undecided. In United States v. Mitchell, 386 U.S. 972, 973 (1966) (Douglas, J., dissenting), Justice Douglas dissented from a denial of certiorari, asserting: "This case presents the question [of] . . . whether the [London Agreement and Charter] is a treaty within the meaning of Art. VI, cl. 2 . . . ."
(2) Nuremberg Principles Are Part of Customary International Law

The second argument for applying the Principles in domestic courts is that they have become part of customary international law. In addition to executive agreements and treaties, the Supreme Court, for over two centuries, has recognized customary international law as “the Law of the Land.” Acknowledging the importance of this body of law, the Court has stated that customary international law “is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”

The Statute of the International Court of Justice, which is an integral part of the United Nations Charter, provides that sources of customary international law include: “(a) international conventions . . . ; (b) international custom, as evidence of a general practice accepted as law . . . ; (c) the general principles of law recognized by civilized nations; and (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations . . . .” Applying these principles, fed-

53. In addition to executive agreements, two other types of international law form a part of United States domestic law: treaties and customary international law. Formal treaties, to which the United States is a signatory are ratified by the Senate. The Supremacy Clause, U.S. Const. art. VI, cl. 2, of the United States Constitution makes treaties the supreme law of the land:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

54. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 430 n.34 (1964) (recognizing the court’s authority to consider questions of international law); Ex Parte Quirin, 317 U.S. 1, 36-39 (1942) (applying internationally recognized “law of war”); The Paquete Habana, 175 U.S. 667, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . .”); The Antelope, 23 U.S. (10 Wheat.) 66, 120-22 (1825) (“the law of nations . . . which has received the assent of all must be the law of all . . . .”); Rose v. Himely, 8 U.S. (4 Cranch) 241, 277 (1808) (“the law of nations is the law of all tribunals . . . .”); Respublica v. DeLongschamps, 1 U.S. (1 Dall.) 111 (1784) (“the law of nations . . . , in its fullest extent, is a part of the law of this state”).

55. Paquette Habana, 175 U.S. at 700. The Paquete Habana was one of two Spanish fishing vessels seized off the Cuban coast by the United States Navy as war prizes during the Spanish-American War. Id. at 677-78. The Supreme Court noted that the seizure was an official act by the United States Navy during wartime, yet nevertheless held that the action violated principles of customary international law, and ordered the ships returned. Id. at 714. Thus the Court made clear that governmental actions, even military acts during wartime, are reviewable in the courts and that the federal government should and will be held accountable for such acts under the rules of international law.

56. U.N. Charter, art. 38(1).

Both the United Nations Charter and the Statute were ratified by the United States Senate as a treaty. Hence, the Statute receives the full benefits and protection of the Supremacy Clause.

eral courts have, in recent human rights decisions, recognized the follow-
ing as sources of customary international law: Universal Declaration of
Human Rights; Declaration on the Protection of All Persons From Be-
ing Subjected to Torture; European Convention for the Protection of
Human Rights and Fundamental Freedoms; International Covenant on
Civil and Political Rights; the American Convention on Human Rights;
and the United Nations Standard Minimum Rules for the Treatment of Prisoners. While these documents lack the binding force
of treaties, federal courts have recognized that an instrument that "cre-
ates an expectation of adherence, and insofar as the expectation is gradu-
ally justified by State practice, . . . may by custom become recognized as
laying down rules binding upon the States." In other cases, individual
Supreme Court Justices have relied on the United Nations Charter and
General Assembly Resolutions as evidence of "standards of decency."

Additionally, the force of customary international law has been rec-
ognized in the United States Army Field Manual, which states:
The unwritten or customary law of war is binding upon all nations. . . .
The customary law of war is part of the law of the United States, and,
insofar as it is not inconsistent with any treaty to which this country is
a party or with a controlling executive or legislative act, is binding
upon the United States, citizens of the United States, and other persons
serving this country.

In summary, customary international law is not foreign law, rather
it is a part of United States constitutional and federal law. When princi-

58. G.A. Res. 217 A (III), U.N. Doc. A/180, at 71 (1948); see Filartiga v. Pena-Irala,
630 F.2d 876, 884-85 (2d Cir. 1980) (the court found a binding international prohibition
against torture); Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan. 1980) (the princi-
bles of customary international law could be drawn from "an overview of express international
conventions."); aff'd on other grounds, 654 F.2d 1328 (10th Cir. 1981).
59. G.A. Res. 3452, 30 U.N GAOR Supp. (No. 34) at 91, U.N. Doc. A/1034 (1975); see Filartiga,
630 F.2d at 882-83.
60. 213 U.N.T.S. 221 (1950); see Filartiga, 630 F.2d at 884; Fernandez, 505 F. Supp. at
797.
(1966); see Filartiga, 630 F.2d at 884; Fernandez, 505 F. Supp. at 797.
1, (1970); see Filartiga, 630 F.2d at 883-84; Fernandez, 505 F. Supp. at 795, 797.
E.S.C. Res. 2076, 6 U.N. ESCOR Supp. (No. 2) at 19, U.N. Doc. E/2372 (1977); see Lareau
In Lareau, the court stated that the United Nations Standard Minimum Rules for the Treat-
ment of Prisoners are part of the "body of international law concerning human rights which
has been built upon the foundation of the United Nations Charter." Id. at 1183.
64. Filartiga, 630 F.2d at 883.
65. Oyama v. California, 332 U.S. 633, 649 (1948) (Black, J., concurring); id. at 673
(Murphy, J., concurring); Estelle v. Gamble, 429 U.S. 97, 104 n.8 (1976); see Rudolph v.
Alabama, 375 U.S. 889, 889-90 & n.1 (1963) (Goldberg, J., dissenting from denial of cert.).
pies of international law are relevant to a case, courts must give them the same effect as they give to other principles of law. Since executive agreements and customary international law are part of federal law, they take precedence over state law.67

Given the widespread support for the Nuremberg Principles,68 their unanimous adoption by resolution of the United Nations,69 and their incorporation by statute into the law of several nations,70 there is a very strong argument that they are part of customary international law. Because of the leading role the United States played in drafting and enforcing the Nuremberg Principles,71 it is hypocritical for the United States courts to assert that the Principles do not constitute binding international obligations, or that the Principles may not or should not have application in domestic courts. Indeed, Mary Kaufman, a prosecutor at the United States War Crimes Trial of I.G. Farben72 at Nuremberg, believes that "the principles codified in the charter and established by the [International Military Tribunal's] judgment were so widely affirmed that their source as a statement of international law is not open to question."73

At least one commentator has contended, however, that the Nuremberg Principles are not part of customary international law.74 First, it has been argued that "more than a single event is necessary for a proposed principle to be considered part of customary [international] law."75 The Nuremberg Principles are characterized as having their origins and application exclusively in the context of World War II, which, in turn, is seen as a "single event."76

This view of the Nuremberg Principles is excessively narrow, and ignores both the Principles' substantial historical foundation and international reliance on the principles in the wake of World War II. The 1868 Declaration of St. Petersburg stated that "the progress of civilization should have the effect of alleviating, as much as possible, the calamities of war."77 This concept was a precursor to the London Agreement and Charter's prohibition against the plunder of private and public property, wanton destruction of cities or devastation not justified by military

67. See supra notes 49-51 and accompanying text.
68. See supra note 15 and accompanying text.
69. See supra note 25 and accompanying text.
70. See generally Komarow, supra note 13, at 30-35 (nations incorporating some or all of the Nuremberg Principles into their domestic law include the Soviet Union, Hungary, and Israel).
71. See Jackson, supra note 22 at 169-71.
72. Appraisal, supra note 4, at 62.
73. Id. at 79; see Glueck, The Nuremberg Trial and Aggressive War, 59 HARV. L. REV. 396, 407-08 (1946).
74. Snee, supra note 13, at 897-98.
75. Id. at 897.
76. Id. at 898.
77. Official Documents, 1 AM. J. INT'L L. SUPP. 89, 95 (1907).
necessity.  

The Kellogg-Briand Treaty of 1928 is another source of the origins of the Nuremberg Principles. The signatory nations, sixty-three in number including the United States, Germany, Italy, and Japan, declared "that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations to one another." This commitment set the stage for the London Agreement and Charter's prohibition against planning or preparing for aggressive war as a crime against the peace.

In addition to events preceding World War II, events during and after the war relating to the Nuremberg Principles are sufficiently numerous and diverse in time and place to qualify the Principles as customary international law. These events include the St. James Declaration, the Moscow Declaration, Control Council Law No. 10, the International Military Tribunal's trial of war criminals at Nuremberg, twelve separate war crimes trials conducted unilaterally by the United States at Nuremberg, similar trials in the Pacific theater, and numerous trials conducted by other nations.

Events subsequent to World War II also undermine the criticism that the Nuremberg Principles fail to achieve the status of customary international law because they stem from a single event. Prominent among these events are proceedings of the United Nations related to the Nuremberg Principles. The proceedings began in 1946 and continued for

78. See Campbell, supra note 32, at 102.
80. Agreements, supra note 4, at 84.
82. See supra note 31 and accompanying text.
83. The St. James Declaration resulted from a conference initiated by the Inter-Allied Commission on the Punishment of War Crimes. Signatories to the declaration, executed on January 13, 1942, included representatives of governments in exile from Belgium, France, Greece, Luxembourg, Norway, the Netherlands, Poland, and Yugoslavia. Representatives of England, Australia, Canada, India, New Zealand, South Africa, the United States and the Soviet Union attended the conference. See HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 90-94 (1948) [hereinafter HISTORY]; Agreements, supra note 4, at 84-85.
84. HISTORY, supra note 83, at 107-08; Agreements, supra note 4, at 85-86.
85. Subsequent to the International Military Tribunal's trial of war criminals at Nuremberg, the Control Council for Germany, consisting of the military commanders of the four occupied zones of Germany, enacted Control Council Law No. 10 on December 20, 1945. Under the law, tribunals were set up by the occupying powers in each zone to try the remaining war criminals. See Agreements, supra note 4, at 89-91.
86. The Nuremberg Trial, 6 F.R.D. 69 (1946).
87. Agreements, supra note 4, at 91.
88. See THE LAW OF WAR, supra note 24, at 1029-1183.
89. Id.; Agreements, supra note 4, at 89-91.
more than three decades following the war. Finally, as discussed below, the Nuremberg Principles, proffered in defense of political protesters, recently have been allowed by several domestic courts in the United States. In light of these events spanning more than a century, the criticism that the Nuremberg Principles are not part of customary international law because they stem from a "single event" cannot be seriously maintained.

The second argument presented against the Nuremberg Principles' status as customary international law relates to the three basic international crimes that the Principles establish: war crimes, crimes against humanity, and crimes against the peace. Commentators separate these three crimes. They maintain that "there is no dispute that [traditional war crimes] are part of customary and treaty international law," but they question whether crimes against the peace and crimes against humanity are included in such law. In support of the view that only war crimes are part of customary international law, commentators have argued that most of the Nuremberg defendants who received death sentences were convicted of war crimes along with crimes against the peace and crimes against humanity, and that those convicted solely of crimes against the peace were not executed.

This argument is misleading and unsound. The severity of the punishment imposed pursuant to a particular rule of law is not a yardstick for measuring that law's status as customary international law. This argument also fails on its merits: not one of the twenty-two defendants tried before the International Military Tribunal at Nuremberg was convicted solely on a count of crimes against the peace. The Rudolf Hess case comes closest to the critics' scenario. Hess was convicted on counts of crimes against the peace and conspiracy to commit crimes against the peace, crimes against humanity and war crimes and received a life sentence. Of the sixteen defendants charged with crimes against the peace, twelve were convicted. Of those twelve, seven were sentenced to hang, three received life sentences, one received a prison term of fifteen years and another a term of ten years. The twelve Nuremberg defendants sentenced to death were convicted on twelve counts of crimes against

90. See supra note 25 and accompanying text.
91. See infra notes 202-62 and accompanying text.
92. Snee, supra note 13, at 898.
93. Id.
95. Snee, supra note 13, at 898.
96. D'Amato, Gould & Woods, supra note 94, at 1061-63.
97. Id.
98. See Appraisal, supra note 4, at 83.
99. Id.
100. Id.
humanity, eleven counts of war crimes, seven counts of crimes against the peace and five counts of conspiracy to commit crimes against the peace, crimes against humanity and war crimes. Defendant Julius Streicher, who was sentenced to death and executed, was convicted for only one count of crimes against humanity. Thus, this criticism is unpersuasive.

In summary, the United States is bound by customary international law, and the Nuremberg Principles are part of that body of law. In addition to the above arguments, the United States should apply the Principles in domestic courts because it intended to be bound when the Principles were promulgated.

(3) The United States Intended to be Bound by the Nuremberg Principles

Attempts by commentators and courts to argue that the Nuremberg Principles do not apply in the United States courts are inconsistent with the United States government’s position during and after World War II. Representatives of the United States government, such as President Harry Truman and Supreme Court Justice Jackson, indicated that the participants in the Nuremburg Trials, including the United States, intended the Principles to be universally applicable. In his opening statement as chief allied prosecutor in the 1945 Nuremberg War Crimes Trials, Justice Jackson declared:

[W]hile this law is first applied against German aggressors, the law includes, and if it is to serve any useful purpose it must condemn, aggression by any other nations, including those who sit here now in judgment. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their people only when we make all people answerable to the law.

Justice Jackson acknowledged that if certain acts are crimes, “they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would be unwilling to have invoked against us.”

President Truman praised the Nuremberg Principles in an address to the United Nations General Assembly, declaring that they point “the path along which [international] agreement might be sought, with hope of success.” Acting at President Truman’s direction, the United States delegation introduced a resolution to the General Assembly that

101. Id.
102. Id.
103. 2 TRIAL OF THE MAJOR WAR CRIMINALS 154 (1947).
105. THE LAW OF WAR, supra note 24, at 1028. The first Secretary General of the United Nations, Trygve Lie, stated: “In the interests of peace and in order to protect mankind against
"[a]ffirms the principles of international law recognized by the Charter of the Nurnberg Tribunal." The General Assembly unanimously adopted the resolution on December 11, 1946.

The continuing force of the Principles in the United States is demonstrated not only by this country's leading role in the Nuremberg prosecutions and other war crimes trials, but by further actions demonstrating this nation's intention to rely on, and be bound by, the Principles in the future. The United States' intention and expectation to be bound by the Nuremberg Principles is evident in the incorporation of the principles into the United States Army Field Manual. That document states that any person, civilian or military, "who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment. Such offenses in connection with war comprise: (a) crimes against peace; (b) crimes against humanity; and (c) war crimes." The Manual includes as punishable "conspiracy, incitement, attempts, and complicity" in the commission of international crimes. Like the Nuremberg Principles, the Manual specifically excludes the defense of superior orders.

The legal proceedings following the massacre of Vietnamese civilians by United States military forces at My Lai provide additional evidence of the widespread acceptance of domestic application of the Nuremberg Principles. In Calley v. Callaway, a federal district court overturned Lt. William L. Calley, Jr.'s conviction by a military court for his role in the massacre. The reversal was based in part on a finding that Calley's constitutional rights of confrontation and the compulsory process for obtaining witnesses in his favor were violated. Calley had asserted that a number of United States military officials were not made available as witnesses at his military trial. The district court intimated that the Nuremberg Principles applied to the United States milit-

107. Id.
110. Id. § 500.
111. Id. § 509 ("The fact the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character as a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful.").
114. Id. at 692-708 (discussion of compulsory process and confrontation issue).
tary personnel when the court concluded that high ranking military officials refused to testify because they reasonably feared that they themselves would be charged with having committed international crimes. The court noted that "petitioner's superiors, in particular General Westmoreland, stood a very strong possibility that they would come to the same end that [Japanese General Yamashita] did." The reference is to In re Yamashita, in which a military tribunal sentenced the Japanese General to death for allowing soldiers under his command to commit international crimes. Thus, the Calley court assumed that the Nuremberg Principles applied to United States military personnel, and concluded that "there was reason to believe [Calley's] superiors had cause for concern as to their own status."

While Calley implicated the Nuremberg Principles indirectly, the Principles have been directly employed in domestic courts many times since World War II by use of the modern Nuremberg Defense. Having discussed what the Nuremberg Principles are and considered generally how they intersect with domestic law, this Note now examines the specific manner in which the Nuremberg Principles have been raised in domestic courts.

II. The Modern Nuremberg Defenses

German government officials, industrialists, and military leaders, whom the Allies accused of committing international crimes, presented the "original" Nuremberg Defense. These defendants argued that they should not be held personally responsible for their actions because they were not top government officials, they had not formulated policy, they were following superior orders, and that international law did not apply to individuals. This defense was rejected in the war crimes trials following World War II. The modern Nuremberg Defenses are the antithesis of the original defense: criminal defendants today build a defense based on the reasoning and principles used by the Allied nations to convict Germans at Nuremberg. There are essentially two modern Nurem-

115. Id. at 696.
116. Id. at 696.
120. THE LAW OF WAR, supra note 24, at 1283.
121. The Nurnberg Trial, 6 F.R.D. 69, 110 (1946).
berg Defenses: the Citizen’s Duty and the Citizen’s Privilege.  

A. Citizen’s Duty

Under the Citizen’s Duty defense, defendants assert that they could be held liable for complicity with international crimes if they fail to take action to prevent such crimes. Thus, in theory, the Citizen’s Duty is exercised in the defendant’s own individual interest. It shields the individual from future liability for failing to act to stop the commission of an international crime.

Under this formulation of the Defense, the defendant cites the Nuremberg Principles as creating a “citizen’s duty” under international and domestic law to take action to prevent international crimes when the citizen has knowledge of the crime. This duty is seen as supersed ing the citizen’s duty to obey domestic laws, such as those prohibiting trespass or destruction of private property.

The duty to prevent international crimes supersedes the duty to obey domestic laws for at least three reasons. First, the Nuremberg Principles, as enforced at the war crimes trials following World War II, require that international law predominate over domestic law when a conflict exists. The first lesson of those trials was that adherence to domestic law or superior orders does not insulate one from prosecution for violations of international law. Second, since the Nuremberg Principles, as an executive agreement and customary international law, are part of our federal law, the supremacy clause of the United States Constitution requires that the Principles take precedence over state law. Third, common sense indicates that the prevention of international crimes is

122. The Nuremberg Principles are also sometimes raised in conjunction with the common law defense of necessity, an examination of which is beyond the scope of this Note. For three recent discussions of the necessity defense, see Bauer & Eckerstrom, supra note 1; Levi tin, supra note 1; Note, Necessity: The Right to Present a Recognized Defense, 21 NEW ENG. L. REV. 779 (1985-86) (authored by Benjamin Reeve).

123. See, e.g., CAL. PENAL CODE § 602 (Deering 1979) (trespass to private property); IOWA CODE ANN. §§ 716.1-.7 (West 1979) (trespass on public or private property); N.Y. PENAL LAW § 140.10 (McKinney 1975) (criminal trespass).

124. See, e.g., CAL. PENAL CODE § 594 (Deering 1983) (destruction of private property); IOWA CODE ANN. § 723.1 (West 1979) (riot); N.Y. PENAL LAW §§ 145.10, 240.6 (McKinney 1975) (destruction of private property and riot).

125. See United States v. Von Leeb, reported in 11 TRIALS OF WAR CRIMINALS 462, 489 (1950). The Tribunal stated: International law operates as a restriction and limitation on the sovereignty of nations. It may also limit the obligation which individuals owe to their states, and create for them international obligations which are binding upon them to an extent that they must be carried out even if to do so violates a positive law or directive of state.

Id.

126. See supra section I(B)(1).

127. See supra text accompanying note 51.
THE NUREMBURG DEFENSE

January 1989

415

more important than avoiding misdemeanors such as trespass and disorderly conduct.

Courts, commentators, and common sense suggest that ordinary private citizens have little reason to fear prosecution for failing to act to prevent international crime. Proponents of this view argue that citizens have been prosecuted only for positively contributing to international crimes, never for failing to prevent such crimes. Realistically, it seems unlikely that private citizens would ever be held culpable for the international crimes of their nation. If and when war crimes trials take place against United States defendants, for example, surely there will be higher prosecutorial priorities than the private citizen who neither played a part in policy formation nor in its execution. This practical concern has led some courts to conclude that the defendants who asserted the Nuremburg Defense lacked a personal stake in the litigation, and therefore lack standing to assert the defense.

Still, some peace activists find the notion of a citizen's duty morally compelling. Certainly, as outlined above, the Principles have been interpreted to include such a duty. It follows that the drafters of the Principles may have intended such a duty, at least to some extent. This moral compulsion is reflected in the general perception that ordinary German citizens who had knowledge of their government's crimes, and who nevertheless remained silent and inactive in opposition, share some degree of culpability for those crimes. Pastor Niemoeller wrote:

In Germany they came first for the Jews and I did not speak out, because I was not a Jew. Then they came for the communists and I did not speak out, because I was not a communist. Then they came for the trade unionists and I did not speak out, because I was not a trade unionist. Then they came for me, and there was no one left to speak


129. While private citizens were tried at Nuremburg, these citizens were industrialists whose products contributed to the war effort. See The Zyklon B Case, reprinted in THE LAW OF WAR, supra note 24, at 1487, 1496-98.

130. See United States v. Lowe, 654 F.2d 562, 566 (9th Cir. 1981); United States v. May, 622 F.2d 1000, 1009 (9th Cir. 1980); United States v. Berrigan, 283 F. Supp. 336, 341 (D. Md. 1968). The issue of standing is discussed infra at section III(B).

131. Recall that the International Military Tribunal held that "the essence of the [London] Charter is that individuals have international duties that transcend national obligations of obedience imposed by the individual state." The Nurnberg Trial, 6 F.R.D. 69, 110 (1946).

The Tokyo War Crimes Tribunal stated that "anyone with knowledge of illegal activity and an opportunity to do something about it is a potential criminal under international law unless the person takes affirmative measures to prevent the commission of the crimes." THE LAW OF WAR, supra note 24, at 1283.

132. See Jackson, supra note 22, at 171 ("We have taken an important step forward in this instrument in fixing individual responsibility of war-mongering, among whatever peoples as an international crime.")
The Nuremberg Trials put the world on notice that individuals may have a duty to prevent the commission of, and complicity in, international crimes. In contrast to this duty, however, the Nuremberg Principles also may be viewed as creating a Citizen's Privilege to prevent international crimes.

B. Citizen's Privilege

Under the Citizen's Privilege formulation of the Defense, the Nuremberg Principles are joined with the statutory and common law privileges allowing citizens to prevent crime. This then creates a "citizen's privilege" to break domestic law.

As with the Citizens' Duty outlined above, the Citizen's Privilege is exercised by the individual acting to prevent the commission of an international crime as defined by the Nuremberg Principles. Here, however, the defendant does not seek insulation from future liability. Instead, the defendant asserts a statutory or common law privilege to violate domestic law in order to prevent commission of international crimes.

Professors LaFave and Scott, summarizing the common law privilege to prevent crime, note that "One who reasonably believes that felony, or a misdemeanor amounting to a breach of the peace, is being committed, or is about to be committed, in his presence may use reasonable force to terminate or prevent it." Professors Perkins and Boyce articulate the privilege as follows: "[A]ny unoffending person may intervene for the purpose of preventing the commission or consummation of any crime if he does so without resorting to measures which are excessive under all the facts of the particular case." Most jurisdictions in the United States recognize this privilege to intervene or use force to prevent crime. The trend is toward increasing the scope of the privilege.

Thus, under the Citizen's Privilege formulation of the defense, the defendant need only have a reasonable belief that an ongoing or imminent violation of international law is occurring. The defendant need not prove, nor must the fact-finder conclude, that international law is actually being violated.

---

134. See e.g., CAL. PENAL CODE §§ 692-94 (Deering 1985) (crime prevention privilege generally).
135. See LAFAVE, supra note 9, at 474-75 (footnote omitted).
136. Id.
137. PERKINS, supra note 9, at 1108-09.
138. See LAFAVE, supra note 9, at 474 n.33; see, e.g., CAL. PENAL CODE §§ 692-94 (crime prevention privilege generally), § 197 (privilege to take human life) (Deering 1985); IOWA CODE ANN. § 704.1-9 (West 1978); N.Y. PENAL LAW § 35.00-.25 (McKinney 1987).
139. See PERKINS, supra note 9, at 1111.
140. Campbell, supra note 32, at 97.
Until recently, defendants' attempts to assert the Nuremberg Defense have met with near unanimous rejection in domestic courts. This Note now examines the justifications domestic courts have used to prevent defendants from presenting both the Citizens' Duty and the Citizens' Privilege formulations of the Nuremberg Defense.

III. How Domestic Courts Have Handled the Modern Nuremberg Defenses

United States courts have largely based their rejection of the Nuremberg Defenses on the doctrines of political question and standing. These doctrines prevent the criminal defendant from presenting any evidence of the Nuremberg Defenses to the jury, and the courts often use both rationales to justify disallowing the Defense. Upon closer scrutiny, however, the doctrines do not provide an adequate justification for eliminating the use of the Nuremberg Defenses in domestic courts.

Recently, the government also has begun using motions in limine to prevent the defendant's use of the Nuremberg Defenses. In this context, such motions raise serious constitutional issues that the courts have not yet addressed.

A. Political Question Doctrine

The political question doctrine, which embodies a mixture of separation of powers principles and prudential considerations, is employed by courts to avoid deciding an issue.141 The leading case on the political question doctrine is *Baker v. Carr*, in which the Supreme Court corrected the misconception that all questions involving foreign policy are political questions.142 "[I]t is error to suppose that every case or controversy

---

142. *Id.* at 211 (holding that the constitutionality of legislative apportionment is not a political question). Some have claimed that executive and legislative decisions regarding foreign policy are per se political questions, and thus such issues are immune from judicial review. See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 1002-06 (1979) (Rehnquist, J. concurring) (question of whether the president has power to terminate a treaty is nonjusticiable); *United States v. Sisson*, 294 F. Supp. 515, 517 (D. Mass. 1968) ("[A] domestic tribunal is entirely unfit to adjudicate the question whether there has been a violation of international law during a war . . . ."); *Egnal v. Commissioner*, 65 T.C. 255, 259 (1975) (It is "highly doubtful that the legality or constitutionality of the Vietnam War is within the scope of judicial competence."); *Snee, supra* note 13, at 903.
One concern courts have identified is the need for finality and unity in the federal government's articulation of foreign policy. The court's comments in *Farmer v. Rountree*, 149 F. Supp. 327, 329 (M.D. Tenn. 1956), *aff'd per curiam*, 252 F.2d 490 (6th Cir. 1958), typify this concern:

If the judiciary should assume the power contended for [i.e. reviewing the legality of United States foreign policy], thus in effect reversing and condemning the considered judgment of the President and the Congress, the foreign and military policies of the Federal Government could have no real finality until approved by the courts at the
which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed . . . .” 143

The Court took pains to note that the doctrine is one of political questions, not political cases: “The courts cannot reject as 'no law suit' a bona fide controversy involving a claim that some action denominated 'political' exceeds constitutional authority.” 144 Then the Court listed six factors to consider in determining whether a case presents a political question:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. 145

None of the Baker factors, however, justifies prohibiting a criminal defendant from presenting the Nuremberg Defenses. Initial policy decisions are not a prerequisite to allowing the Defense because courts have well developed standards governing the admissibility of evidence. No disrespect is shown coordinate branches because the Defense does not require adjudication of the legality of the underlying governmental policy. No unusual need exists for unquestioning adherence to a political decision, as the political branches have not barred the Defense. Finally, the defense does not create a risk of multiple pronouncements because no judicial pronouncement of foreign policy need result from a trial in which the Defense was allowed.

Justice Frankfurter, dissenting in Baker, touched on what may be the true test employed by some domestic courts in disallowing the Nuremberg Defenses under the political question doctrine:

conclusion of interminable private litigation. The chaotic and disruptive effects of such judicial censorship are so obvious that to comment upon them is unnecessary.

This view is problematic because it places those who formulate foreign policy above the law, and strips the judiciary of its essential function of interpreting the Constitution. In Powell v. McCormack, 395 U.S. 486 (1969), Chief Justice Warren, writing for the majority, noted that "[o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." Id. at 549. In so stating, Chief Justice Warren recalled the central lesson of Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803), that the judiciary is the final arbiter of the constitutionality of executive and legislative acts.

143. Baker, 369 U.S. at 211.
144. Id.
145. Id. at 217.
The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstinence from injecting itself into the clash of political forces in political settlements.\(^\text{146}\)

Justice Frankfurter's comment raises a question as to which action will better sustain public confidence in the judiciary: allowing the accused to present the Defense to the jury, or prohibiting the Defense. When a defendant is tried for protesting against government policy,\(^\text{147}\) it may be argued that barring the Defense is the more political act. For in prohibiting the Defense, the judge—a government officer—impedes the flow of information from the defendant to the jury, which has the effect of censoring the defendant's criticism of the government. This appearance of quashing political dissent may, in the long run, constitute the greater threat to judicial legitimacy and authority by undermining the public perception of courts as detached and neutral.

Related to this concern for legitimacy is a judicial desire to avoid controversial subjects.\(^\text{148}\) Although this is not one of the Baker factors, perhaps it should have been. According to one commentator, the political question doctrine applies to all those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction. Sometimes this idea of inexpediency will result from the fear of the vastness of the consequences that a decision on the merits might entail.\(^\text{149}\)

Concern that allowing the Nuremberg Defense will require adjudication of the legality of United States foreign policy\(^\text{150}\) may explain why some courts have barred defendants from asserting the Nuremberg Defense. This view reflects a lack of understanding of what is actually

---

\(^{146}\) Id. at 267 (Frankfurter, J., dissenting).

\(^{147}\) The vast majority of cases in which the Nuremberg Defense has been raised involve a protest against government policy or actions. See infra notes 202-62 and accompanying text. While many protests are carried out against private corporations or institutions, these frequently are linked to an underlying government policy. For example, the defendants in State v. McCann, 149 Vt. 147, 541 A.2d 75 (1987), were arrested at a General Electric plant, but were protesting the government's policy of sending weapons made by G.E. to El Salvador's military. For a discussion of Vermont v. McCann, see infra note 202-13 and accompanying text.


\(^{149}\) Id.

\(^{150}\) United States v. Berrigan, 283 F. Supp. 336 (D. Md. 1968), cert. denied, 297 U.S. 909 (1970), involved a protest against the Vietnam War in which the defendants were accused of breaking into a Selective Service office and destroying draft files by pouring blood on them. The court cited the political question doctrine in part as grounds for not allowing the defendants to present the Nuremberg Defense. Id. at 342-43. One commentator shared the court's mistaken belief that in order to "resolve the question of the validity of this defense, the court would have had to make an initial finding that the Vietnam War was in violation of interna-
meant by “allowing” the Defense. Allowing the Defense does not require the court to adjudicate the legality of foreign policy. Rather, it simply means letting the defendants present evidence, and instruct the jury, on the Nuremberg Defense.

Allowing the Defense means recognizing that the jury, acting in its constitutionally mandated role as the conscience of the community, should decide whether, in light of all the relevant facts and law, the defendants are guilty of committing a crime. Thus, without actually finding a violation of international law, a jury could find the defendants’ acts were lawful under a crime prevention privilege because they reasonably believed an ongoing violation of international law was occurring. This is

The defendants in United States v. Valentine, 288 F. Supp. 957 (D.P.R. 1968), argued that since the Vietnam War violated international law, they could be held individually responsible should they submit to the draft. The court refused to allow the defendants to present the Nuremberg Defense in part because of the political question doctrine. Id. at 984-87.

United States v. Sisson, 294 F. Supp. 515 (D. Mass. 1968), also involved a defendant who refused induction. The court invoked the political question doctrine to avoid consideration of the Nuremberg Defense, Id. at 517, suggesting “that a domestic tribunal is entirely unfit to adjudicate the question whether there has been a violation of international law during a war by the very nation which created, manned, and compensated the tribunal seized of the case.” Id. at 517.

The defendant in Farmer v. Rountree, 149 F. Supp. 327 (M.D. Tenn. 1956), aff’d per curiam, 252 F.2d 490 (6th Cir. 1958), withheld payment of federal income taxes based on a belief that the Korean War violated international law. The court refused to hear the Nuremberg Defense for several reasons, one of which was the political question doctrine. Id. at 329. The Farmer holding has been followed consistently in the tax resistance context. See, e.g., Lull v. Commissioner, 602 F.2d 1167 (4th Cir. 1979) (taxpayer’s disagreement with the policies of the government, because they may not be in accord with the dictates of his conscience or religion, do not justify refusal to comply with law or refusal to pay income taxes); First v. Commissioner, 547 F.2d 45 (7th Cir. 1976) (taxpayer could not successfully defend against deficiency assessment on grounds that he was morally opposed to war in general, and that American involvement in Vietnam constituted an illegal war under the Treaty of London and the Nuremberg Principles); United States v. Malinowski, 472 F.2d 850 (3d Cir.) (taxpayer’s good faith belief in the immorality and illegality of the Vietnam War is not a legal defense to the charge that taxpayer, to protest the war, withheld his income tax), cert. denied, 411 U.S. 970 (1973); Autenrieth v. Cullen, 418 F.2d 586 (9th Cir. 1969) (the fact that the taxpayer objected, on religious grounds, to the payment of taxes for war purposes was a basis upon which he could assert a constitutional right not to pay part of his taxes), cert. denied, 397 U.S. 1036 (1970); Russell v. Commissioner, 60 T.C. 942 (1973) (taxpayer had no constitutional right to refuse to pay income taxes because the conduct of the United States in Southeast Asia was contrary to her religious convictions, or because of her belief that such conduct violated international law); Muste v. Commissioner, 35 T.C. 913 (1961) (petitioner cannot claim, as a defense for failing to pay his taxes, that use of the money in part for war purposes was contrary to the dictates of his conscience and religion).

The Nuremberg Defense was also unsuccessfully argued in United States v. Patz, 584 F.2d 927 (9th Cir. 1978). The Ninth Circuit reversed the conviction on other grounds, and expressly refrained from commenting on the Nuremberg Defense. Id. at 931.
precisely what happened in Vermont v. McCann.\textsuperscript{151} The McCann court did not find that the policy in question was illegal. Rather, it simply permitted the defendants to present the Nuremberg Defenses to the jury, allowing the jury to find that the defendants had legal authority to trespass.\textsuperscript{152}

The McCann court did, however, distinguish between choosing among competing lawful foreign policies (a political question), and finding a policy option illegal (a judicial question).\textsuperscript{153} It reasoned that the choice among legal options is a political decision in which the judiciary plays no role. The McCann court, however, viewed the legality of a particular foreign policy as appropriate for judicial determination.\textsuperscript{154}

The McCann court's distinction is consistent with the United States Supreme Court decision in Powell v. McCormack.\textsuperscript{155} In Powell the Court justified its conclusion that the issue in that case was not a political question, in part, by noting that it did not "involve an initial policy determination of a kind clearly for nonjudicial discretion."\textsuperscript{156}

In addition to judicial concerns about adjudicating foreign policy, "fear of the vastness of the consequences" might possibly include concern about fostering vigilantism or anarchy. If we allow citizens to break local laws because they reasonably believe they are enforcing superior law, when will it end? Does sanctioning the Nuremberg Defense give private citizens a green light to take the law into their own hands? If peaceful protesters may employ the Nuremberg Defense, why not those who bomb abortion clinics?

The response to these concerns again requires that we recall that allowing the Nuremberg Defense merely means letting the Defense go to the jury. It is the jury that will draw the line between acceptable and unacceptable behavior. Thus, the fear that acquitting peaceful demonstrators today will lead to acquitting violent demonstrators tomorrow ignores the role juries play in our system of criminal justice: they are arbiters of common sense. The precise line drawn in individual cases may vary according with individual juries, leading perhaps to inconsistent results. But by providing criminal defendants with rights to present a defense\textsuperscript{157} and to a trial by jury,\textsuperscript{158} the Constitution and the system of justice entrusts juries with the responsibility of deciding guilt. The Supreme Court has stated that "the essential feature of a jury obviously

\begin{itemize}
\item \textsuperscript{152} \textit{Id.} at 16, 44 \textit{Guild Prac.} at 110.
\item \textsuperscript{153} \textit{Id.} at 18-19, 44 \textit{Guild Prac.} at 109-10.
\item \textsuperscript{154} \textit{Id.} at 19, 44 \textit{Guild Prac.} at 110.
\item \textsuperscript{155} 395 U.S. 486 (1969).
\item \textsuperscript{156} \textit{Id.} at 498.
\item \textsuperscript{157} \textit{See infra} section III(C).
\item \textsuperscript{158} U.S. CONST. art III, § 2, cl. 3; amend. VI; \textit{see} Colbert, \textit{infra} note 177, at 1274.
\end{itemize}
lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group’s determination of guilt or innocence.”

A second response to potential concerns about vigilantism or anarchy is that the Nuremberg Defense is based on international, federal, and state laws that expressly recognize the individual’s privilege, to act to prevent crimes against the peace, crimes against humanity, and war crimes. Those who bomb abortion clinics can claim no such express authorization under the law. This distinction reflects the difference between a defense of jury nullification, in which the jury is asked to ignore the law and instead follow its conscience, and a defense based in law, such as the Nuremberg Defense.

B. Standing

The doctrine of standing stems also from both constitutional and prudential considerations. The constitutional concern derives from the “case or controversy” requirement of article III of the United States Constitution. As indicated in Allen v. Wright, the standing requirement has two components: (1) the party must have suffered an actual or threatened injury; and (2) the injury must be “fairly traceable” to the opposing party’s conduct and “likely to be redressed” by a favorable decision.

The United States Supreme Court has considered the standing doctrine primarily, if not entirely, in the context of a plaintiff’s standing to sue. For example, the Court has held that simply being a taxpayer

---

161. U.S. CONST. art. III, § 2, cl. 1. Article III provides in relevant part: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a party;-to Controversies between two or more States;-between a State and Citizens of another State;-between Citizens of different States;-between Citizens of the same State Claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
163. Id. at 751 (“A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”).
or a citizen\textsuperscript{166} interested in having the government act within the bounds of the Constitution generally does not afford a party standing to challenge governmental actions. Chief Justice Burger reasoned that:

standing to sue may not be predicated upon an interest \ldots which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. \ldots This personal stake is what the Court has consistently held enable a complainant authoritatively to present to a court a complete perspective upon the [case]. \ldots Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions.\textsuperscript{167}.

Relying on the Supreme Court's reasoning in these cases, lower domestic courts often have held that criminal defendants lacked standing to assert the Citizen's Duty formulation of the Nuremberg Defense.\textsuperscript{168} The Ninth Circuit Court of Appeals employed this reasoning in \textit{United States v. May}.\textsuperscript{169} In \textit{May}, a large number of demonstrators assembled outside the perimeter fence of a naval submarine base to protest the use of the Trident system, a submarine-based nuclear missile system. The demonstrators then climbed the fence and entered the base, where they were arrested by security police. The Ninth Circuit refused to allow the Nuremburg Defense, stating:

The connection between what the defendants did and their claims that the Trident system is designed solely for the waging of aggressive war, and is therefore illegal, is so tenuous as not to give them any basis for asserting the defense. They can assert no harm to themselves from the allegedly illegal conduct of the government that is greater than, or different from, the potential harm that might affect every other person in the United States.\textsuperscript{170}

A federal district court applied similar reasoning in \textit{United States v. Berrigan}.\textsuperscript{171} \textit{Berrigan} involved a protest against United States participation in the Vietnam War, in which the defendants were accused of break-

\begin{footnotesize}
\begin{enumerate}
\item 165. Frothingham v. Mellon, 262 U.S. 447 (1923). \textit{But see} Flast v. Cohen, 392 U.S. 83, 101-02 (1968) (Court examined nexus between plaintiffs' status as taxpayers and claim presented and concluded that plaintiffs had standing because they alleged government exceeded a specific limitation on taxing and spending power).
\item 166. \textit{See Schlesinger}, 418 U.S. at 213.
\item 167. \textit{Id.} at 220.
\item 169. 622 F.2d 1000 (9th Cir. 1980).
\item 170. \textit{Id.} at 1009.
\end{enumerate}
\end{footnotesize}
ing into a Selective Service office and destroying draft files by pouring
blood on them.\textsuperscript{172} The court held that the defendants lacked standing to
raise the Nuremberg Defense because “they have not been called to serve
in the armed forces, are not directly affected by our government’s actions
in that country [Vietnam], and are not even indirectly affected by the
Selective Service apparatus.”\textsuperscript{173}

This approach to the question of criminal defendants’ standing to
assert the Nuremberg Defenses is subject to criticism in light of the \textit{Allen}
factors of injury and redressability.\textsuperscript{174} First, such an approach ignores
the actual injury suffered by the defendants: criminal prosecution and
the threatened injury of imprisonment, fines, and other punishment that
could result from that prosecution. It also ignores the fact that these
injuries are not shared by the general public, but rather are experienced
by the defendants alone. These injuries are “fairly traceable” to the op-
posing party’s conduct—for example, the government’s conduct—be-
cause absent that conduct, the defendants would not face prosecution. In
addition, these injuries are “likely to be redressed” by a favorable deci-
sion, that is, dismissal or acquittal. In essence, the courts that have re-
jected the Nuremberg Defense for lack of standing have looked for a
particularized injury to the defendant everywhere but in their own
courtrooms.

The substantive purpose of the standing requirement is to ensure
that a litigant has “such a personal stake in the outcome of the contro-
versy as to assure that concrete adverseness which sharpens the presenta-
tion of issues upon which the court so largely depends for the
illumination of difficult constitutional questions.”\textsuperscript{175} It is the very act of
government prosecution that creates a personal stake in the outcome of
the controversy for the defendant political protester. This personal stake
is sufficient to satisfy the substantive purposes of the standing
requirement.\textsuperscript{176}

\textsuperscript{172} \textit{Id.} at 338.
\textsuperscript{173} \textit{Id.} at 341. \textit{See also} United States v. Valentine, 288 F. Supp. 957 (D.P.R. 1968), in
which the defendants argued that United States’ participation in the Vietnam War violated
international law and as a result they could be held individually responsible should they submit
to the draft. Again, the court refused to allow the defendants to present the Nuremberg De-
fenses based, \textit{inter alia}, on a lack of standing. \textit{Id.} at 984.
\textsuperscript{174} \textit{See supra} notes 162-63 and accompanying text.
\textsuperscript{175} Baker v. Carr, 369 U.S. 186, 204 (1962).
\textsuperscript{176} In response, some may argue that political protesters in effect ask to be prosecuted by
intentionally violating the law. Such a response ignores the distinction between the Nurem-
berg Defense and traditional civil disobedience. Protesters raising the Nuremberg Defense
believe their actions do not constitute violations of the law. In contrast, civil disobedience
protesters knowingly violate the law and willingly accept punishment for their acts. \textit{See supra}
ote note 1.
C. Government's Use of the Motion In Limine to Prevent the Nuremberg Defenses

Since the Vietnam War, government prosecutors have engaged in the relatively new practice of using motions in limine\(^\text{177}\) to exclude entire defenses, including the Nuremberg Defenses. Developed originally in civil cases, motions in limine traditionally have been used to exclude specific items of evidence that are likely to prejudice the jury or increase the complexity and length of trial.\(^\text{178}\) Recently, however, prosecutors have begun seeking pretrial rulings barring entire defenses from being heard by the jury.\(^\text{179}\) To support this use of the motion in limine, the government typically argues that the defenses it seeks to exclude are irrelevant, will confuse the issues, and will waste the court's time.\(^\text{180}\)

This argument was made in *United States v. Aguilar*, in which the government prosecuted religious workers for providing sanctuary to refugees fleeing persecution in Central America.\(^\text{181}\) The government's motion sought to bar defenses based on freedom of religion, the absence of criminal intent, the Refugee Act of 1980, international law, and necessity.\(^\text{182}\) In addition, the government moved to prevent defense witnesses from "testifying about, alluding to, or presenting any evidence..." on the following issues or subjects: reference to the unindicted Salvadoran and Guatemalan co-conspirators as "refugees" or "asylees"; the immorality of the United States Government's Central American policy; possible violations of international law by the United States; episodes, stories

---

177. Black's Law Dictionary defines "motion in limine" as a "written motion which is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions and statements." Black's Law Dictionary 914 (5th ed. 1979).

According to Professor Colbert, the motion in limine also is used to avoid prejudicial questions or evidence from being heard by a jury and is most commonly made before trial, although a judge may defer a final, absolute order until the matter actually is raised at trial. In the latter case, the trial court issues a preliminary order prohibiting either party from referring to the subject matter in the jury's presence until the court makes its final ruling. Commentators prefer this 'prohibitive-permissive' order to the 'prohibitive-absolute' in limine ruling because it allows the judge to rule upon the admissibility of an evidentiary item after he becomes more familiar with the issues in the case. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 Stan. L. Rev. 1271, 1271 n.1 (1987).

178. Id. at 1271.

179. Id. at 1272.


181. Colbert, *supra* note 177, at 1309 and n.232, 1310 and n.233. The defendants were charged with conspiracy to violate immigration laws, 8 U.S.C. § 1324(a), and with the substantive crime of transporting, concealing, or harboring aliens, and encouraging or inducing aliens to unlawfully enter or remain in the United States, 8 U.S.C. § 1324(a)(1)-(4).

or tales of civil strife in Central America; United States policy regarding
the granting or denial of asylum or refugee status to aliens from Central
America; the impact a guilty verdict would have on the immigration sta-
tus of the unindicted co-conspirators; and the policy of amnesty and ex-
tended voluntary departure for Salvadorans.183

The court granted the government’s motion in limine.184 The ruling
did not, however, produce the promised results: it did not avoid delay
and judicial involvement, nor did it simplify the issues at trial. As Pro-
fessor Colbert notes, “the pretrial motion practice lasted nine months
and included over 150 motions, applications, and memoranda submitted
by both parties before the court’s final in limine ruling . . . .”185 Thus,
Aguilar suggests that, far from streamlining trials, blanket motions in
limine186 actually may increase the complexity and length of litigation.
With core defenses at stake, an accused has a strong incentive to wage a
fierce battle to avoid an adverse ruling on an in limine motion. More
importantly, the blanket motion in limine raises constitutional concerns.
Professor Colbert suggests that these motions endanger the criminal de-
fendant’s right to a presumption of innocence,187 the privilege against
self-incrimination,188 the right to remain silent,189 the right to trial by
jury,190 and the right to due process of law.191

If the court requires a response on the merits to a blanket motion in
limine, the accused is forced to disclose his or her defense strategy prior
to trial.192 By forcing the defendant to speak, the blanket motion in
limine impinges on the defendant’s right to remain silent. Thus, even
when the motion in limine is not granted, Professor Colbert argues it
“provides a unique opportunity for the government to discover and pre-
pare to counter the specific defense or testimony that the defendant will
present at trial. As a result, the government’s responsibility and burden
to prove guilt beyond a reasonable doubt is diminished”193 since the de-

183. Id. at 2-3.
184. See Colbert, supra note 177, at 1312 and n.250, citing Court Order of Oct. 28, 1985,
Aguilar, no. CR-85-008-PHX-EHC.
185. Colbert, supra note 177, at 1312 (footnote omitted).
186. The phrase “blanket motion(s) in limine” is used hereinafter to denote pretrial mo-
tions to bar entire defenses.
187. The government must prove guilt beyond a reasonable doubt in criminal cases. No
burden exists on the defendant, who may rely on the presumption of innocence. See LAFAVE,
supra note 9, § 1.4(a), at 17 n.8.
188. See U.S. CONST. amend. V.
190. See U.S. CONST. art III, § 2, cl. 3; amend. VI; Colbert, supra note 177, at 1274.
191. See U.S. CONST. amend. V, XIV.
192. Criminal defendants generally are not required to disclose intended defenses unless
required to do so by statute. See, e.g., Fed. R. Crim. P. 12.1 (notice of alibi), 12.2 (notice of
insanity).
193. Colbert, supra note 177, at 1272.
fendant is forced to reveal generally undiscoverable material before trial.

The consequences are more serious when the motion in limine is granted. The Constitution and the Bill of Rights provide for jury trials in criminal cases because the framers of the Constitution believed that juries were “necessary to protect against unfounded criminal charges . . . .” 194 Juries serve as a vital check on the government’s prosecutorial power. The right to trial by jury has been called “the single greatest guarantor of constitutional protection of individuals from government misuse of power . . . .” 195 This function is all the more important when the accused is being prosecuted for activities related to political dissent. As Professor Colbert explains:

[T]he judiciary must carefully scrutinize the criminal procedures used by the government in politically sensitive trials to assure preservation of constitutional guarantees and respect for citizens’ rights. Absent such judicial control and government accountability to the people through the jury, the danger exists that the government will run roughshod over democratic principles in its fervor to quell political dissent. 196

Thus by eliminating the presentation to the jury of entire defenses by criminal defendants the blanket motion in limine directly impacts the right to a jury trial. 197

In addition to threatening the right to jury trial, the blanket motion in limine also may violate due process because it denies the defendant “an opportunity to be heard in his defense—a right to his day in court . . . .” 198 The Supreme Court has held that the right to present a defense is an essential component of due process. 199 In *Chambers v. Mississippi*, 200 the Court held that evidentiary rulings that frustrate a defendant’s attempt to develop an exculpatory defense constitute a denial of due process, requiring reversal in the event of a conviction. 201

Barriers that prevent criminal defendants from presenting the Nuremberg Defenses pose serious threats to core constitutional values. Whether these barriers result from government motions in limine, or from judicially created limitations, such as the political question doctrine or standing the result is the same: defendants are denied their day in court. A growing minority of domestic courts seem to agree, and are permitting defendants to present the Nuremberg Defenses.

---

196. *Id.* at 1274.
197. *Id.*
198. *In re* Oliver, 333 U.S. 257, 272 (1948).
201. *Id.* at 294.
IV. Recent Cases Recognizing the Modern Nuremberg Defenses

Typically, allowing the Nuremberg Defense is a pretrial procedural matter. As a result, observers have had few opportunities to learn the legal reasoning behind recent decisions considering the defense. Cases in which the courts have allowed the defense without comment are nevertheless instructive, because the defense was permitted and because of their outcomes. When the defense is permitted, the defendants usually win; they are either acquitted by a jury or the prosecution drops the charges.

A. Vermont v. McCann

In Vermont v. McCann, the defendant McCann was arrested while protesting weapons production at the General Electric plant in Burlington, Vermont, and charged with violating a statute that prohibited disorderly conduct. The plant manufactured air-to-ground cannon, which the United States government provided to the armed forces of El Salvador. The defendant offered to prove that the weapon was used in attacks against civilian populations as part of a strategy of eroding the civilian support for the armed opposition, which was fighting to overthrow the government of El Salvador. The defendant offered several defenses, one of which was the Nuremberg Principles.

In deciding to allow the Nuremberg Defense, the court relied on notions of equal justice, recognizing that the United States government consistently has demanded that domestic courts apply international law. The court stated:

If international law is proper for a court in the District of Columbia to consider when judging the conduct of the Union of Soviet Socialist Republics, intellectual honesty and fundamental concepts of justice mandate that international law is proper for a court in Vermont to consider...

The United States has applied treaty and customary international law with little hesitation when it was deemed appropriate to bring others to justice...

This court is not prepared to hold that our law is that of the hypocrite nor is it that of the vengeful conqueror. Therefore, this Court holds that international law including specifically, the Nuremberg

204. McCann, No. 2857-7-86, slip op. at 1, 44 GUILD PRAC. at 101.
205. Id. at 13, 44 GUILD PRAC. at 107-09.
Principles, is law appropriate to be administered by this Court or any other court of justice.\textsuperscript{207}

Another significant aspect of the \textit{McCann} opinion is its treatment of the political question argument. The court noted that an issue is not transformed into a political question solely because it involves matters of social policy or public interest.\textsuperscript{208} The court also noted that a lack of expertise about the substance of a particular issue on the part of judges and juries did not preclude its adjudication.\textsuperscript{209}

The court recognized that the Nuremberg Defense involved issues of foreign policy, which were constitutionally delegated to the executive and legislative branches.\textsuperscript{210} The court also noted that a choice between two competing foreign policies is a political question, and thus not justiciable.\textsuperscript{211} A prerequisite to this process, however, is that both of the competing foreign policies be legal.\textsuperscript{212} The \textit{McCann} court concluded: “Here, the Defendant offers to prove that a particular foreign policy is illegal, not that it is unwise or even foolish. That is an issue appropriate for the judiciary. Were it otherwise the executive would be above the law; it is not, even in matters of national security.”\textsuperscript{213}

B. Vermont v. Keller

\textit{Vermont v. Keller}\textsuperscript{214} involved a sit-in at the Winooski, Vermont offices of Senator Robert T. Stafford. The protesters had been unable to engage Stafford in a dialogue concerning United States policy in Central America, and they hoped by their action to persuade him to hold a public meeting to discuss the issue. On the third day, forty-four people were arrested and charged with trespassing under a Vermont criminal statute.\textsuperscript{215}

\textsuperscript{207} \textit{McCann}, No. 2857-7-86, slip op. at 14-15, 44 GUILD PRAC. at 108.


\textsuperscript{210} \textit{McCann}, No. 2857-7-86, slip op. at 18, 44 GUILD PRAC. at 110 (citing U.S. CONST. art. II, § 2; art. I, para. 8); \textit{see also} U.S. CONST. art. I, § 10.

\textsuperscript{211} \textit{McCann}, No. 2857-7-86, slip op. at 19, 44 GUILD PRAC. at 110.

\textsuperscript{212} \textit{Id.}\n
\textsuperscript{213} \textit{Id.}\n
\textsuperscript{214} Vermont v. Keller, No. 1372-4-84 (D. Vt., filed Nov. 13, 1984).

\textsuperscript{215} \textit{See} VT. STAT. ANN. tit. 13, § 3702(a) (1977). The statute provided: "A person shall be imprisoned for not more than three months or fined not more than $500.00 if, \textit{without legal}
The defendants, known as the "Winooski 44," argued that the United States government had aided and abetted the government of El Salvador in the commission of international crimes; that United States foreign policy with respect to Nicaragua violated international law; and that the defendants had both a citizen's privilege and a citizen's duty to take necessary actions to prevent the commission of further international crimes.216

The court, which also had decided McCann, allowed the defendants to present evidence on the Nuremberg Defense to the jury. The jury acquitted all twenty-six remaining defendants.217

The case received national news media attention, virtually all of which focused on the necessity defense rather than the Nuremberg Defenses, even though the Defenses constituted an essential component of the defendants' case. The New York Times, for example, failed to mention issues of international law, justifying the defendants' protest by asserting that "the depth and nature of the United States involvement in Central America made protest a moral necessity."218

C. United States v. Thomas

The five defendants in United States v. Thomas219 had occupied Congressmember Don Young's office, protesting a bill granting $100 million in aid to the Nicaraguan Contras.220 They were charged with disrupting the performance of official duties by government employees.221

The defendants invoked the Nuremberg Defense, among others. At the trial, the court allowed the defendants to present evidence on the Defense, with the exception of two expert witnesses proffered by the de-

217. N.Y Times, Nov. 18, 1984, at 15, col. 6. The jury's reason for acquitting the defendants is unclear. Although potentially interesting, it is irrelevant to this discussion. Keller is significant because the defendants were allowed to present evidence on the Nuremberg Principles to the jury, and the judge instructed the jury on the Nuremberg Defense.
220. See Defendants' Trial Brief at 3, Thomas, No. A86-034 [hereinafter Thomas Defendants' Trial Brief]; MEIKLEJOHN, supra note 111, at 6. The aid package was added as an amendment to the Military Construction Appropriations Bill, which the House of Representa-

tives passed on June 25, 1986. Id. at 6.
221. See 41 C.F.R. § 101.20.305 (1978). The regulation provided in pertinent part: Any unwarranted loitering, disorderly conduct, or other conduct on property which creates loud or unusual noise or a nuisance; which unreasonably obstructs the usual use of entrances, foyers, lobbies, corridors, offices, elevators, stairways or parking lots; which otherwise impedes or disrupts the performance of official duties by Gov-

ernment employees; or which prevents the general public from obtaining the admin-

istrative services provided on the property in a timely manner, is prohibited.
The court held that the defendants' conduct was not protected by the Defense, and convicted all defendants.\textsuperscript{222} Though willing to hear the Nuremberg Defense, the opinion suggests that the court either ignored or misunderstood the Defense. The court wrote that "the defendants have not provided this court with any persuasive legal authority to sanction their conduct because of their belief in moral and legal responsibilities as citizens of the United States to prevent their government from engaging in war crimes or crimes against humanity."\textsuperscript{223}

The court appeared to give little weight to the defendants' trial brief, which set out in detail individual responsibility under international law, the relationship between domestic and international law, specific violations of international law by the United States, and the defendant's reasonable belief about those violations.\textsuperscript{224} Even though the court was unpersuaded by the defendants' presentation of the Nuremberg Defense,

\textsuperscript{222} Karen Parker was to testify on the international legal implications of United States policy in Nicaragua and the corresponding domestic rights of concerned individuals. Dr. Ed Meyer, Jr., was to testify regarding his observations of the impact of United States policy on the civilian population of Nicaragua. MEIKLEJOHN, supra note 108, at 8 (letter from James A. Bamberger, defense counsel in United States v. Thomas to Meiklejohn Civil Liberties Institute (Oct. 22, 1986)).

\textsuperscript{223} Thomas, No. A86-034, slip op. at 9-10.

\textsuperscript{224} Id. at 10.

\textsuperscript{225} Thomas Defendants' Trial Brief at 4-9, 19-39. For example, the defendants' brief noted that in May 1984, in direct response to the mining of Nicaragua's harbors by the United States Central Intelligence Agency, Nicaragua petitioned the International Court of Justice (World Court) for an order granting preliminary injunctive relief and damages against the United States. President Ronald Reagan informed the World Court that the United States would not recognize the court's jurisdiction in actions brought by Nicaragua against the United States. The United States briefed and argued the Court's lack of jurisdiction; on May 10, 1984 the Court rejected the United States position by a vote of 14-1. It then entered a provisional order against the United States as follows:

The right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or of the world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principles that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter and the Charter of the Organization of American States.


Upon the World Court's finding that it had jurisdiction, the United States announced on January 18, 1985, that it would not participate in the proceeding and would not be bound by any judgment of the Court. For purposes of this discussion, Nicaragua's suit against the United States is interesting for two reasons. First, as noted, the Thomas defendants relied upon the suit as evidence of the reasonableness of their belief that the United States policy toward Nicaragua violated international law. Second, the case evinces the United States gov-
the case is significant because the court permitted the introduction of evidence, and thereby legitimized, the Defense.

D. Chicago v. Streeter

The eight defendants226 in Chicago v. Streeter227 had been demonstrating at the Chicago office of the South African Consulate, and were arrested and charged with trespassing228. The defendants raised the Nuremberg Defense and the necessity defense. The court permitted the defenses to go to the jury. The jury acquitted all the defendants.229

E. Washington v. Karon

The four defendants in Washington v. Karon230 were arrested while blockading the United States government plutonium/uranium extraction facility at the Hanford Nuclear Reservation, a facility which produces most of the plutonium used in United States nuclear weapons. They were charged with disorderly conduct231 and failure to disperse.232

The defendants filed a motion to raise the Nuremberg Defense, among others.233 At the hearings on the defendants' motion, the judge indicated he would instruct the jury on international law.234 In his opening statement, defense counsel was allowed to explain in depth the defendants' beliefs that international law gave them a right to act as they did.235 Defendant Scott Renfro, the first defense witness, covered the

226. The defendants were: Allan Streeter, a Chicago City Alderman; Jane Ramsey, Executive Director of the Jewish Council on Urban Affairs; Ralph Henley, Pastor; Stephen Culen, Director of the American Federation of State, County and Municipal Employees, AFL-CIO; Orlando Redekipp, Pastor; Thomas Savage, Metropolitan Sanitation District; Heather Booth, Organizational Consultant to Citizen Action; and Edward Palmer, President of the Black Press Institute. N.Y Times, May 18, 1985, at 4, col. 4.


228. See CITY OF CHICAGO MUNICIPAL CODE § 193-1.4 (1972) (unlawful trespass).


231. See Wash. Rev. Code § 9A.84.030(1) (1984). The statute provided that a person is guilty of disorderly conduct if she "intentionally obstructs vehicular or pedestrian traffic without lawful authority."


235. Id.
same area in detail, and read quotations from the London Agreement and Charter.236 The defense then offered its first expert witness, chemist Allen B. Benson.237 The prosecution objected, and the judge ruled that scientists could testify for the defense.238 After consulting with attorneys from the United Stated Department of Energy,239 the prosecution moved to dismiss the case.240 According to defense counsel Daniel N. Clark,

[t]he prosecution motion made under these circumstances created a sensation in the courtroom. The defendants and their counsel immediately called a news conference in the corridor in order to present their expert witnesses to the press, and to put forward the obvious conclusion that the prosecution and the Department of Energy were afraid of scientific testimony . . . .241

F. Illinois v. Jarka242

On November 13, 1984, nineteen persons were arrested at the Great Lakes Naval Base while protesting United States involvement in Central America and increases in nuclear arms buildup. The protesters were charged with mob action and resisting arrest.243 Charges against twelve of the protesters were dismissed. The remaining defendants in Illinois v. Jarka entered a defense of necessity based in part on the Nuremberg Principles.244

The court allowed the defendants to present evidence concerning illegal United States actions in Nicaragua.245 The defendants argued that "the principles of international law can only be effective through the serious adherence to them by peoples of all countries."246 The jury acquitted all defendants.247

236. Id.
237. Id.
238. Id.
239. Id.
240. Id.; Tri-City Herald, Dec. 11, 1985, at 1, col. 1; Walla Walla Union-Bulletin, Dec. 11, 1985, at 1, col. 5.
241. Clark, supra note 234.
244. Id.; Defendants' Memorandum in Response to State's Motion in Limine to Bar Necessity Defense at 9-10, Jarka, No. 002170.
246. Defendants' Memorandum in Response to State's Motion in Limine to Bar Necessity Defense at 9, Jarka, No. 002170.
G. Massachusetts v. Carter

On November 24, 1986, Amy Carter, Abbie Hoffmann, and fifty-eight others were arrested during a protest against recruiting by the Central Intelligence Agency (CIA) at the University of Massachusetts, Amherst. The demonstrators were charged with disorderly conduct, trespassing, and disturbing the school.

The defendants proffered evidence and expert witnesses on the defenses of necessity and international law, including the Nuremberg Principles. The defendants argued that United States domestic law expressly incorporated international law, and that considerations of international law were crucial to the defendants' ability to defend against the charges. They argued that the executive branch of the United States government was violating international law through the actions of the CIA, and that the defendants had a legal obligation under the Nuremberg Principles to prevent the CIA from committing further crimes.

The court allowed the jury to hear the defenses. The jury acquitted all the defendants.

H. City of Richland v. Barnes

On Hiroshima Day, August 6, 1986, twenty-nine people blocked the road leading to the Hanford Nuclear Reservation in Washington. The

249. See MEIKLEJOHN, supra note 108, at 19; N.Y. Times, Apr. 16, 1987, at 1, col. 5.
250. Defendants' Trial Memorandum at 4, 16, Carter, Cr. No. 8745-JC-0091A.
251. Defendants' Trial Memorandum at 4, 6, Carter, Cr. No. 8745-JC-0091A.
252. Specifically the defendants argued that the executive branch, through the CIA, sets and conducts secret foreign policy without the knowledge or approval of the American public or their elected legislators; the covert and illegal operations that constitute this secret foreign policy are in effect in Nicaragua and have been duplicated in past actions in other countries, including El Salvador, Chile, the Congo, Indonesia and Vietnam; these operations are expressly designed to systematically murder, mutilate, and torture civilian populations and to destabilize governments in those countries; these overt and illegal operations directly contradict public policy and violate numerous national laws, including the Boland Amendment, the War Powers Act, the Arms Export Control Act and the Neutrality Act; these acts breach international laws such as the Nuremberg Principles, the Geneva Conventions, the Charter of the United Nations and the Charter of the Organization of American States; recruitment of college and university students into the CIA is the lifeline of the agency and provides the personnel to conduct those covert actions and illegal activities; and finally that under both international and common law the defendants had either an affirmative duty, or in the alternative a privilege, to take reasonable steps to stop these crimes. Defendants' Trial Memorandum at 2-3, Carter, Cr. No. 8745-JC-0091A.
255. This demonstration followed one year after the action that led to Washington v. Karon, see supra text accompanying notes 230-41.
demonstrators were arrested and charged with disorderly conduct. The defendants' trial brief raised the defense of lawful authority, including the Nuremberg Principles, other principles of international law, and necessity.

Following the arraignments, the prosecution disqualified the Benton County District Court Commissioner, who had made the favorable rulings on the admissibility of these defenses in Washington v. Karon. At a hearing on October 31, 1986, Presiding Judge Eugene Pratt dismissed the charges on his own motion, ruling that the disorderly conduct ordinance was unconstitutionally vague. The statute made it a misdemeanor to obstruct vehicular traffic "without lawful authority," which the judge viewed as fatally ambiguous, as demonstrated by the various claims of lawful authority raised in defendants' brief.

Following the ruling, the judge stated: "I'm not obligated to provide [the defendants] with a podium to speak from. If they want a trial to speak from they're going to have to choose a constitutional statute to violate." Judge Pratt's comments led defense counsel to believe that "the prospect of hearing evidence and expert testimony on the proposed defenses motivated the court to seek a way out of a case that was potentially embarrassing to the atomic community."

The preceding cases illustrate that thoughtful and objective courts, seeking justice, have allowed the Nuremberg Defenses. It remains unclear to what extent the approach taken in these cases will be followed in the future. Still, by reexamining the merits of allowing the Nuremberg Defenses, these cases mark a distinct new jurisprudential path.

**Conclusion**

The modern Nuremberg Defense provides that private citizens have a duty or a privilege or both under international law and state crime prevention statutes to take action to prevent crimes against the peace, crimes against humanity, and war crimes. It is proper for courts to permit this Defense under both international and domestic law. The doctrines of political question and standing are not legitimate barriers to the Defense in most cases. Nor is the blanket motion in limine an appropriate vehicle for addressing the issues raised by the Defense. Indeed, con-

---

256. See Richland Municipal Code § 9.14.010(5) (1976) (disorderly persons are defined as: "any person who intentionally obstructs vehicular or pedestrian traffic without lawful authority").

257. Defendant's Trial Memorandum at 1, 3-27, Richland, No. 38323.

258. See supra notes 230-41.


260. Id.


262. See Richland Summary, supra note 259.
stitutional values, such as due process and the right to trial by jury, are upheld when courts allow the Defense. Domestic courts have allowed defendants to assert the Nuremberg Defense to a greater extent than is currently recognized in the literature. When allowed, the Defense has been effective.

The inquiry into the contemporary significance of the Nuremberg Principles aids in the discovery of the "erosion of the criminal boundaries and the need to restore their claims upon our actions." In so doing, the Principles may provide an important link in a chain of events promoting an end to war. According to Professor Falk, Americans must:

[E]ducate ourselves to the point that we know that waging aggressive war and committing illegal acts of war are war crimes. We also need to reorient our sense of citizenship toward the position that it is disloyal for citizens to abet the crimes of their government. As well, we need to make our governors sensitive to the criminal boundaries that restrict the exercise of political power.

Permitting the Nuremberg Defense upholds the right of United States citizens to take action to prevent governmental violations of international law while ensuring that citizen action does not exceed the bounds of acceptable behavior as drawn by juries, the conscience of our communities. Disallowing the defense damages judicial legitimacy by effectively censoring the defendant's criticism of governmental action and violates the defendant's constitutional rights. At the very least, political protesters whom the government chooses to criminally prosecute should have the opportunity to be heard.

263. See supra note 13.
264. See cases cited supra section IV.
266. Id. at 8-10.