Is There a Common Law Necessity Defense in Federal Criminal Law?

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INTRODUCTION

In the summer of 1884, three English sailors adrift in a lifeboat were rescued by a passing ship. The men were tremendously fortunate: they had been at sea for two weeks, and were on the brink of death from thirst and hunger. Their remarkable recovery was marred, however, by the fact that they had sustained themselves since the wreck by killing and eating one of their number. The Crown charged two of the survivors with murder.

Few doubted that, considering the circumstances, all of them would have died in the boat had they not resorted to cannibalism. The question was whether their circumstances created a necessity that justified their actions.

The case that followed, *Regina v Dudley & Stephens*,[1] is one of the classic statements of the common law necessity defense. At common law, the necessity defense, a form of justification, permitted defendants to avoid criminal liability by appealing to a "balancing of evils." If the defendant demonstrated that he perpetrated his crime in order to avert a greater evil, he would be acquitted.

This defense was controversial at common law and poses a perennial challenge to the rule of law even as it introduces flexibility into the criminal justice system. Today, the question of whether the defense exists in modern federal criminal law remains an open question.[2] The Supreme Court has avoided deciding the question squarely, and lower courts have addressed it inconsistently. Nonetheless, federal criminal defendants regularly claim the necessity defense, and the resulting case law is highly confused and fragmented. To remedy this disorder, this Comment will argue that the defense should

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1 14 QBD 273 (1884).

2 See *United States v Oakland Cannabis Buyers' Cooperative*, 532 US 483, 490 (2001) (considering whether the necessity defense, when not provided for in federal statute, may nonetheless be recognized by federal courts). The defense is widely available in state courts. See Wayne R. LaFave and Austin W. Scott, 1 *Substantive Criminal Law* § 5.4 at 628–29 & nn 5–6 (West 2d 1986) (listing states that provide either the necessity defense at common law or a statutory choice-of-evils defense).

be available to defendants charged with federal crimes derived from the common law but elsewhere prohibited unless expressly provided for by statute.

Part I presents a discussion and explanation of the necessity defense. Part II describes the defense's current status in federal criminal law with reference to Supreme Court precedent and the federal circuit courts. Part III analyzes the uncertainty in the case law and explains the importance of a properly limited federal necessity defense. Part IV proposes that the distinction between common law and regulatory offenses provides a novel solution to the unresolved question of whether—and to what extent—the necessity defense may be asserted in federal court.

I. THE NECESSITY DEFENSE

Because the criminal law inevitably leaves future circumstances and emergencies unaddressed, courts developed the necessity defense as a means of introducing flexibility. However, because the defense may threaten the consistent administration of the law, its application has always been controversial.

There is considerable disagreement in both federal and state courts, as well as in modern legal scholarship, over the defense's elements, and over its contours and purpose. This Part will address these substantive issues.

A. Elements of the Defense

No single definition of the defense holds in all United States jurisdictions.[3] In federal law, the Ninth Circuit's definition is typical. There, to present the defense at trial, defendants must meet the burden of production on four elements: "(1) they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) they had no legal alternatives to violating the law."[4]

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3 Compare *United States v Schoon*, 971 F2d 193, 195–97 (9th Cir 1992) (stating the rule as discussed in the text), with *United States v Patton*, 451 F3d 615, 638 (10th Cir 2006) (limiting the necessity defense to situations where three traditional requirements are met, including no legal alternative, imminency of harm, and a direct relationship between actions and avoidance of harm), and *People v Bordowitz*, 155 Misc 2d 128, 132–33 (NY City Crim Ct 1991) (stating a five-part New York state rule).

4 *Schoon*, 971 F2d at 195, citing *United States v Aguilar*, 883 F2d 662, 693 (9th Cir 1989).

The defense is widely available, in one form or another, at the state level.[5] The drafters of the Model Penal Code (MPC) introduced a version of the defense under the name "choice of evils."[6] But even when the defense is made available in some form (sometimes called "justification" or "lesser of two evils"), it is sometimes excluded for certain crimes, especially for intentional homicide.[7]

The necessity defense, when applied, turns statutory rules into standards. As such, it carries with it both the advantages and disadvantages of standard-like law.[8] On the one hand, necessity provides opportunities for courts to fill gaps left by legislatures when they enact criminal statutes—in effect, for individualized judicial legislation[9]—and

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5 See Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 Tul L Rev 191, 196 n 19, 232 (2007) (discussing when necessity is available at common law and noting states that have codified the defense); Adav Noti, *The Uplifted Knife: Morality, Justification and the Choice-of-Evils Doctrine*, 78 NYU L Rev 1859, 1861 (2003) (suggesting that most states recognize a form of the justification defense similar to the MPC's proposal). For an example, see *Bordowitz*, 155 Misc 2d at 132–33.

6 See MPC § 3.02(1):

> Section 3.02 Justification Generally: Choice of Evils
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> (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
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> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
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> (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
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> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

The MPC distinguishes between the lesser of two evils defense and duress. The Code's formulation of the latter defense requires that the defendant have yielded to a threat that "a person of reasonable firmness in his situation would have been unable to resist." MPC § 2.09.

7 George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 Duke L J 975, 1026–27 (1999) (noting state and MPC restrictions on the necessity defense in homicide prosecutions). See generally John Alan Cohan, *Homicide by Necessity*, 10 Chap L Rev 119 (2006) (discussing the history and "future" of the necessity defense in homicide prosecutions). This is consistent with the common law rule in *Dudley & Stephens*, 14 QBD at 287 ("[T]he temptation to the act which existed [for the stranded sailors] was not what the law has ever called necessity.").

8 See Cass R. Sunstein, *Problems with Rules*, 83 Cal L Rev 953, 969–95 (1995).

9 See *Schoon*, 971 F2d at 196–97 ("In some sense, the necessity defense allows us to act as individual legislatures, amending a particular criminal provision or crafting a one-time exception to it, subject to court review, when a real legislature would formally do the same under those circumstances."). Professor Fuller's *The Case of the Speluncean Explorers* is a hypothetical case closely resembling *Dudley & Stephens*, "decided" in the opinions of five imaginary judges—Foster, Handy, Keen, Tatting, and Truepenny—each written by Fuller himself. David L. Shapiro added opinions by contemporary "judges" in 1999. Compare Lon L. Fuller, *The Case of the Speluncean Explorers*, reprinted in David L. Shapiro, *The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium*, 112 Harv L Rev 1834, 1864, 1866–67 (1999) (Keen) (expressing

it introduces flexibility into laws that would lead to unjust results (that is, punishment of desirable conduct) if applied mechanically.[10] The defense also allows legislatures to enact straightforward moral judgments into criminal law without the need to enumerate lengthy—and inevitably imperfect—lists of exceptions.[11] In short, the defense may reduce both the cost of legislation and the error cost of law enforcement.

But by the same token, the defense (like all standard-like elements of law) increases decision costs and leads to inconsistency and uncertainty.[12] Because it invites defendants to ask trial courts to determine whether some harm that threatened the defendant was a "lesser evil" than the violation of the law that the defendant committed,[13] the defense has a potentially corrosive effect on the rule of law. Finally, because defendants sometimes use the necessity defense to challenge policies adopted by the political branches of government, its diminu-

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doubt as to whether statutes have true "gaps" for judges to fill, given judges' lack of ability to determine a statute's "purpose"), with id at 1854–59 (Foster) (reasoning that statutes should be interpreted in line with their purpose and that "the correction of obvious legislative errors or oversights is not to supplant the legislative will, but to make that will effective").

10 See Kimberly Kessler Ferzan, *Torture, Necessity, and the Union of Law & Philosophy*, 36 Rutgers L J 183, 185 (2004) ("[T]he defendant should be permitted to choose the lesser evil in those instances where had the legislature considered the situation, it would have authorized the defendant's conduct."). See also Richard A. Posner, *Economic Analysis of Law* 238 (Aspen 7th ed 2007) (arguing that a necessity defense is most appropriate when the transaction costs of a comparable legal alternative to the illegal conduct are prohibitively high).

11 Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought To Be*, 78 St John's L Rev 725, 874–76 (2004) (noting the impossibility of exhaustively describing contingencies in advance and the undesirability of attempting to do so).

12 One risk posed by widespread and unrestricted assertion of the necessity defense is inconsistency in federal case law as federal courts reach different conclusions concerning the applicability of the defense to given federal crimes. Compare *Gonzales v Raich*, 500 F3d 851, 858–60 (9th Cir 2007) (stating that the necessity defense is available in a federal prosecution under 21 USC §§ 841(a)(1), 844(a) for marijuana cultivation), with *Abigail Alliance for Better Access to Developmental Drugs v Von Eschenbach*, 495 F3d 695, 707–08 (DC Cir 2007) (en banc) (denying the necessity defense in a prosecution under 21 USC § 355(a) for use of "experimental" drugs not approved by the FDA). Compare also *United States v Mooney*, 497 F3d 397, 402–04, 409 (4th Cir 2007) (vacating the defendant's guilty plea to a 18 USC § 922(g)(1) charge for unlawful possession of a firearm because counsel had told him that no necessity defense would be available), with *Patton*, 451 F3d at 638 (expressing reservations as to the necessity defense's scope in § 922(g)(1) prosecutions).

13 Some commentators have suggested that the necessity defense serves a "radical" purpose that makes it a natural complement to civil disobedience and jury nullification, and that embraces its subversive effects. See, for example, Shaun P. Martin, *The Radical Necessity Defense*, 73 U Cin L Rev 1527, 1529 (2005) (arguing that the necessity defense "attacks the very foundation of American capitalist and democratic structures"); William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 New Eng L Rev 3, 5, 71–72 (2003) (arguing that juries should have more leeway to consider the necessity defense, including issues of "social justice and individual freedom"). This is a minority view, however, and has not enjoyed success in federal courts. See Part II.

tion of error costs may be partly reversed if it leads courts to exceed their policymaking competence.[14]

The resulting tension between the defense's conflicting consequences complicates the unresolved question of the status of the necessity defense in federal law.

B. Necessity Compared with Other Common Law Defenses

It is helpful to note that necessity—like duress, entrapment, self-defense, and insanity—is a distinct defense at common law. Briefly comparing necessity with these other defenses will further clarify its nature.

The contrast between necessity and duress,[15] the availability of which is undisputed in federal criminal law,[16] is the most subtle. Some recent cases, as a result, have neglected the distinction between them[17] or conflated the two defenses into a unified "justification" defense that strongly resembles necessity in practice.[18] The defenses, however, have been separate at common law,[19] and maintaining a properly defined distinction between them remains important for criminal law.

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14 See Sunstein, 83 Cal L Rev at 1003–04 (cited in note 8) (observing that standards are more likely when legislators do not doubt the capacity or judgment of adjudicators). See also Part II.B.2.

15 See generally Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S Cal L Rev 1331 (1989). See also *United States v Contento-Panchon*, 723 F2d 691, 693–96 (9th Cir 1984).

16 See *Dixon v United States*, 548 US 1, 5 n 2 (2006) (presuming the accuracy of the district court's statement of the elements of duress). See also id at 33 (Alito concurring) ("Duress was an established defense at common law. When Congress began to enact federal criminal statutes, it presumptively intended for those offenses to be subject to this defense.") (citations omitted). Like necessity, duress is not statutorily defined in federal law but is applied without significant controversy. Id. Some commentators have cast doubt on the legitimacy of any judicially created defense under modern statutory law. See, for example, Shapiro, 112 Harv L Rev at 1877 (cited in note 9) (Kozinski) ("Unlike common law judges, we have no power to bend the law to satisfy our own sense of right and wrong."). This Comment assumes that such defenses may be valid in some instances and, rather than considering the abolition of federal common law defenses, seeks to answer the question at hand consistently with the bulk of federal case law.

17 See *Dixon*, 548 US at 9–12 (noting that neither necessity nor duress negates the defendant's mens rea); *United States v Bailey*, 444 US 394, 409–10 (1980) ("Modern cases have tended to blur the distinction between duress and necessity.").

18 See *United States v Leahy*, 473 F3d 401, 405–08 (1st Cir 2007) (supporting this trend and citing cases while concluding that all of these defenses have the same burden of proof); *United States v Salgado-Ocampo*, 159 F3d 322, 327 n 6 (7th Cir 1998) (combining "necessity, justification, duress, and self-defense" under the "rubric" of justification).

19 See Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 Wayne L Rev 1155, 1170 & n 57 (1987) (noting how modern courts have blurred this important distinction between justification and excuse). See also MPC §§ 2.09 (duress), 3.02 ("choice of evils"). The distinction between justification and excuse has very ancient roots in the common law, extending to before the work of Coke and Hale. See generally Milhizer, 78 St

Briefly, necessity is best treated as a justification and duress as an excuse.[20] While some commentators have distinguished the defenses according to the type of threat a given defendant faced,[21] the better view is that necessity should be used by defendants who rationally chose an illegal course of action that is the lesser of two evils, and that duress should be used by those who, because of some sort of coercion, were unable to choose anything but an illegal course.[22] Because of the compulsion involved, acts performed under duress often will not be "the lesser of two evils," while those justified by necessity must be.[23]

In economic terms, this means that the necessity defense is best applied when high transaction costs make bargaining to mutually ad-

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John's L Rev 725 (cited in note 11) (describing the history of justification and excuse defenses in the Western legal tradition and distinguishing them). Justification defenses, in general, negate the blameworthiness of the defendant's act, while excuses negate the defendant's culpability.

20 See generally Milhizer, 78 St John's L Rev 725 (cited in note 11). See also Shapiro, 112 Harv L Rev at 1913–14 (cited in note 9) (Easterbrook) (noting that justifications are addressed by the legislature in specifying offenses and allowing exceptions, by the executive in granting pardons and refusing to prosecute, and by the judiciary in developing common law defenses). Both justifications and excuses typically lead to the acquittal of criminal defendants, and the distinction is often ambiguous in practice. See Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 L & Contemp Probs 89, 99–107 (1986) (arguing against a bright-line distinction). But the distinction is more than merely academic. See id at 90 ("[C]riminal law should illuminate the moral status of various courses of action, and the community should be concerned with the reason a particular individual goes unpunished.").

21 See, for example, Dressler, 62 S Cal L Rev at 1347–49 (cited in note 15) (noting the difference between justification and excuse at common law). Necessity has often been associated with threats posed by external forces, and duress, with human coercion. In particular, some argue that duress is most appropriate for defendants who perform illegal acts under human compulsion to further the purposes of the party who applies that compulsion. Under this theory, necessity serves those defendants who, while facing a nonhuman threat, choose an illegal course of action that is the lesser of two evils in light of that threat. See *Bailey*, 444 US at 409–10; John Kaplan, Robert Weisberg, and Guyora Binder, *Criminal Law: Cases and Materials* 559 (Aspen 5th 2004).

22 See generally Michael D. Bayles, *Reconceptualizing Necessity and Duress*, 33 Wayne L Rev 1191 (1987) (reframing the necessity defense as the "absence of a reasonable alternative" and the duress defense as the "inability to choose rationally"). See also MPC §§ 2.09, 3.02. This appears to be the most historically significant. See generally Milhizer, 78 St John's L Rev 725 (cited in note 11) (noting the centrality of this rationality distinction in and before the time of Blackstone). The Supreme Court has provided a rule for duress consistent with this view. See *Bailey*, 444 US at 410 & n 8 (endorsing the view that the claim of duress is available to defendants who could not have chosen otherwise). The Ninth Circuit emphasized this distinction as well. See *Contento-Panchon*, 723 F2d at 695 ("The theory of necessity is that the defendant's free will was properly exercised to achieve the greater good and not that his free will was overcome by an outside force as with duress."). This view should be distinguished, of course, from the notion that "statistically normal" criminal behavior is per se excused. See Dressler, 62 S Cal L Rev at 1363–67 (cited in note 15) (critiquing the "'I Am Only Human' Theory" of duress by noting that noncoerced criminal behavior may also be "statistically normal").

23 See Dressler, 62 S Cal L Rev at 1352–53 (cited in note 15) (observing that in cases of duress, unlike those of necessity, the unlawful act need not be the lesser of two evils).

vantageous outcomes prohibitively difficult,[24] while duress serves its purpose in situations of outright coercion and extortion.[25] A hiker caught in a snowstorm who finds and breaks into a cabin faces high transaction costs in that he will likely be unable to negotiate with the cabin's owner at all. The necessity defense, by justifying his conduct, allows the law to sanction the outcome that the parties would have bargained to if they had been given the opportunity.[26] Duress, in contrast, resolves cases where the given transaction would not have occurred at all without the pressure applied by one side.[27]

This approach shows that other common law defenses that are generally available in federal criminal law resemble duress more than necessity:[28] they negate the intentionality, voluntariness, or "evil will" required for a crime, or imply the defendant's undeterrability and the resulting inefficiency or injustice of punishment.[29] Entrapment, for example, requires that the intent to commit a crime have been implanted, so to speak, in the defendant's will by state agents.[30] Insanity,[31] depending on the definition used, generally applies to defendants who

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24 See Posner, *Economic Analysis of Law* at 238 (cited in note 10). See also Shapiro, 112 Harv L Rev at 1915–16 (cited in note 9) (Easterbrook) (arguing that "[n]egotiation, *actual* or potential, offers a good framework with which to assess defenses based on utility," but because "[h]ypothetical contracts are easy to devise," judges should ask what "actual contracts for risk-bearing provide").

25 Posner, *Economic Analysis of Law* at 115–18 (cited in note 10). Alternatively, duress may be an appropriate defense when the defendant's action was altogether undeterrable. Consider Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 Colum L Rev 1193, 1223 (1985) (arguing that society should "buy" less punishment of impulsive criminals because they are less easily deterred but suggesting alternatives such as incapacitation or increased penalties).

26 See Shapiro, 112 Harv L Rev at 1914 (cited in note 9) (Easterbrook). See also Posner, 85 Colum L Rev at 1229–30 (cited in note 25) (arguing that the necessity defense should have been allowed in *Dudley & Stephens* if it could have been shown that the men in the boat would have agreed in advance that the weakest would be cannibalized under the circumstances of the case but also suggesting the cheaper remedy of drawing lots to determine the victim).

27 See Milhizer, 78 St John's L Rev at 817–20 (cited in note 11). See also Dressler, 62 S Cal L Rev at 1365–67 (cited in note 15) (suggesting that duress is a defense for defendants "of non-saintly moral strength" who "lacked a fair opportunity to act lawfully or, slightly more accurately, ... lacked a fair opportunity to avoid acting unlawfully") (emphasis omitted).

28 See *Dixon*, 548 US at 39–43 (Breyer dissenting) (linking duress closely to self-defense, insanity, and entrapment on the theory that all such defenses involve defendants who do not act voluntarily and thus lack mens rea).

29 See Posner, 85 Colum L Rev at 1223 (cited in note 25). In a sense, all of the common law defenses discussed here provide means to avoid economically inefficient punishment, but the inefficiencies addressed by the defenses differ.

30 See *United States v Russell*, 411 US 423, 429 (1973). See also generally Richard H. McAdams, *The Political Economy of Entrapment*, 96 J Crim L & Criminol 107 (2005).

31 "Insanity" is used here to refer to mental health defenses generally. The distinctions between different insanity-related defenses and verdicts are beyond the scope of this Comment.

are "unable to appreciate the nature and quality or the wrongfulness of [their] acts,"[32] or who cannot conform their actions to the law.[33]

Self-defense, to be sure, is generally grouped with necessity as a justification, rather than with duress as an excuse.[34] The purpose of self-defense, though, is to minimize certain coercive acts by placing the perpetrator outside the reach of certain legal protections. Viewed in this light, the purpose that self-defense serves is more akin to that of duress.

II. THE NECESSITY DEFENSE IN FEDERAL LAW

The questions of whether federal courts may introduce necessity as a common law defense and how the applicability will be limited if permitted, remains unanswered. This Part will outline the principal aspects of federal case law in this area.[35] First, it will discuss the relevant Supreme Court precedents. Second, it will categorize and explicate different approaches to the necessity defense taken in the lower courts.

A. The Supreme Court

In *Baender v Barnett*,[36] the Court suggested that criminal statutes would be construed with the aid of the common law canons developed to prevent unjust punishments.[37] Thus, in accordance with "common sense," the prohibition against escaping from prison "does not extend to a prisoner who breaks out when the prison is on fire."[38] Since *Baender*, the Court has discussed the necessity defense on three important occasions. Each case has deferred deciding whether the necessity defense is available as a general matter, though in each case, the Court refused to allow the defendant to send the necessity defense to the jury.

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32 18 USC § 17 (2000) (stating the federal insanity defense).

33 See MPC § 4.01. The MPC's insanity defense includes both the "understanding" and "conformity" tests as alternatives. See also Dressler, 62 S Cal L Rev at 1360–61 (cited in note 15) (treating duress and insanity as defenses expressing "compassion" for criminal defendants).

34 See, for example, *United States v Panter*, 688 F2d 268, 271–72 (5th Cir 1982).

35 Congress has considered but never enacted a federal necessity defense. See Hoffheimer, 82 Tul L Rev at 232–34 (cited in note 5) (describing failed attempts of a national commission on reforming federal criminal law to codify the necessity defense).

36 255 US 224 (1921).

37 See id at 225–26 (construing a statute prohibiting possession of dies for minting US coins to require "conscious and willing" possession).

38 Id at 226, quoting *United States v Kirby*, 74 US (4 Wall) 482, 486 (1868). *United States v Michelson*, 559 F2d 567, 568 n 2 (9th Cir 1977), also suggests that duress would be available as a defense in some prison escape cases. The consequences of this for the necessity defense is discussed in Part IV.C.

The seminal Supreme Court case concerning the necessity defense is *United States v Bailey*,[39] which concerned a prison escape in violation of federal law. The Court discussed the defendant's necessity defense (and, in the alternative, duress) at some length.[40] It held, nonetheless, that even if the defense were available, a defendant who wished to assert it would bear the burden of production on each of its elements. Because the defendants in question had failed to meet their burden, the Court affirmed their convictions without determining whether necessity could be asserted under the proper facts.[41]

More than twenty years later, the Court revisited the issue in *United States v Oakland Cannabis Buyers' Cooperative*.[42] While the Court again refused to determine whether necessity is ever available in federal law,[43] it held that the defense is not available for crimes where Congress has preempted the defense through legislation.[44] Use of the necessity defense involves "social balancing;" when Congress has reserved to itself the authority to perform such balancing, judges or juries may not do so in the context of criminal cases.[45] Under *Oakland Cannabis*, then, necessity (if permitted at all) may not be claimed in contravention of a congressional decision to monopolize policy judgments in a field of law.

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39 444 US 394 (1980).

40 The *Bailey* Court did not distinguish sharply between necessity and duress. See id at 409–10 (noting that modern cases "blur the distinction between duress and necessity," but arguing that "we need not speculate now" on the "precise contours" of the two defenses because both defenses require, and the defendant failed to show, that there had not been a chance to avoid harm without breaking the law).

41 See id at 409–15.

42 532 US 483 (2001). For a general discussion of the case and its background, see James D. Abrams, Case Note, *A Missed Opportunity: Medical Use of Marijuana Is Legally Defensible*, 31 Cap U L Rev 883, 883–87, 901–08 (2003). While this Comment would take issue with the note's broadly (and atextually) purposive approach, see, for example, id at 908–09 (arguing that medical marijuana use fell outside Congress's concerns about "drug abuse"), the account of the case is useful. The case note's discussion of the other dimensions of the *Oakland Cannabis* decision (constitutional and otherwise), see id at 888–95 (discussing the Controlled Substances Act and preemption concerns), 896–901 (discussing Commerce Clause doctrine, substantive due process, and equity concerns), 912–14 (attacking the Court's decision on substantive due process, Commerce Clause, and equity grounds), is outside the scope of this Comment.

43 See *Oakland Cannabis*, 532 US at 490 n 3.

44 See id at 491 ("Under any conception of legal necessity, one principle is clear: The defense cannot succeed when the legislature itself has made a 'determination of values.'"); LaFave and Scott, 1 *Substantive Criminal Law* § 5.4 at 629 (cited in note 2). The crime at issue involved the possession and cultivation of marijuana for medical purposes. See *Oakland Cannabis*, 532 US at 486–87.

45 See *Oakland Cannabis* 532 US at 491 n 4.

The Court indirectly considered the issue once more in *Dixon v United States*,[46] a case involving a claim of duress. "Assuming" that common law defenses are available (and citing *Bailey* and *Oakland Cannabis* in support of that proposition),[47] the Court stated that because Congress has not exercised its authority to enact certain defenses, courts recognize them "as Congress may have contemplated [them] in the context of these specific offenses."[48] The crime at issue, possession of a firearm by a felon,[49] was not "incompatible" with a duress defense.[50] But the narrow issue on appeal concerned the burden of proving affirmative defenses, and as the burden had been correctly placed on the defendant, the Court affirmed the conviction.[51]

In short, though common law affirmative defenses are presumed valid, the Court has not yet allowed the necessity defense in a federal criminal case.[52] If available at all, the necessity defense can be asserted only when compatible with the particular federal crime at issue.[53] The defense's compatibility with the statute, in turn, hinges on whether Congress has decided in advance how the relevant evils should be balanced. Thus, the defense may not be asserted under circumstances that invite invasion of legislative areas by courts and juries.[54] The Court has not, however, provided a rule or theory for how the necessity defense is to be so limited.

B. The Circuit Courts

Like the Supreme Court, most circuits, have been reluctant either to explicitly approve a necessity defense for general use or to rule it out altogether. Courts have usually been more likely to rule the defense out on a case's facts or carve out areas of law where the defense is not permitted. (Lower courts have also decided cases on grounds

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46 548 US 1 (2006).

47 See id at 13 & n 7.

48 Id at 12 (quotation marks omitted).

49 See 18 USC § 922(g)(1) (2000) (prohibiting persons convicted of a felony from transporting, possessing, or receiving firearms and ammunition that is part of or affects interstate commerce).

50 See *Dixon*, 548 US at 13–14 & n 6.

51 See id at 17.

52 See id at 24–25 (Breyer dissenting) (listing other common law defenses recognized in federal case law, such as insanity, self-defense, and entrapment).

53 See *Oakland Cannabis*, 532 US at 491 ("The [necessity] defense cannot succeed when the legislature itself has made a 'determination of values.'").

54 See id at 491 n 4. See also *Gonzales v Raich*, 545 US 1, 33 (2005) (declining to reach the claimed medical necessity defense, which was not addressed by the court of appeals, but suggesting that "the democratic process" is the proper forum for this particular claim).

other than the asserted necessity defense.[55]) Defendants often assert the defense in cases involving possession, certain drug offenses, crimes involving federal prisons, and civil disobedience.[56]

The cases where courts have expressly ruled on the necessity defense's availability, either on the facts or as a matter of law, can be roughly divided into three main categories: a court may (1) grant a jury instruction on necessity and allow the defendant to present evidence concerning it; (2) find the defense incompatible with the offense involved; or (3) find that the defendant failed to meet his burden of production on at least one element of the defense.

This trichotomy, though simplistic, makes manageable a wide variety of factually distinct violations of multiple statutes.

1. Cases where the defense has been presentable to the jury.

Courts have mentioned escape from a burning prison, stealing food from a cabin in order to survive in the woods, violating an embargo to avoid a storm, mutinying to resist putting to sea in an unseaworthy ship, and destroying property to slow a fire as classic examples of crimes where the necessity defense would be permitted, even under federal law.[57] The necessity defense (or "justification," when blended

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[55] See, for example, *Abigail Alliance for Better Access to Developmental Drugs v Von Eschenbach*, 445 F3d 470, 478 n 9, 480–81 (DC Cir 2006) (citing authorities on the necessity defense in finding that plaintiffs had a substantive due process right to self-preservation that required strict scrutiny of FDA policies restricting experimental medication uses), revd, 495 F3d 695, 707–08 (DC Cir 2007) (en banc) (rejecting a necessity defense raised by plaintiffs on the ground that, as in *Oakland Cannabis*, Congress's actions had foreclosed the necessity defense by implication).

[56] Necessity in cases of civil disobedience cases has attracted particular judicial and scholarly attention in recent years.

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

John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 Hous L Rev 397, 400–01 (1999).

[57] See, for example, *United States v Schoon*, 971 F2d 193, 196 (9th Cir 2001). Prison escape cases are a very common context for necessity claims. Prisoners who escape custody in response to threats by other prisoners (and sometimes prison guards) regularly claim necessity as a justification for the escape. See, for example, *Bailey*, 444 US at 398–402 (claiming the necessity defense based on the threat of inmate-set fires and beatings by guards); *United States v Garza*, 664 F2d 135, 140–41 (7th Cir 1981) (claiming the necessity defense against an escape charge based on inadequate medical treatment and the threat of violence between different inmate factions).

with duress or self-defense) has been sent to the jury in some federal criminal trials.

In *United States v Lopez*,[58] in which the codefendants were charged with an escape from prison by helicopter,[59] the trial court instructed the jury on necessity.[60] In addition, various courts, blurring the line between necessity and duress, have acknowledged a "justification" defense to the felon-in-possession statute[61] and some have reversed for the trial court's failure to deliver that instruction.[62] These cases are the exception rather than the rule, for even when courts purport to "hold" that a necessity-like affirmative defense exists, they typically affirm the conviction itself.[63]

Another significant case in this category is *Raich v Gonzales*,[64] recently decided by the Ninth Circuit. While the *Raich* court found that the defendant satisfied the requirements of the necessity defense,[65] these findings were entirely dicta, as the court ultimately found on other grounds that the defendant could not receive the relief she sought (specifically, an injunction against prosecution).[66] The court, as a result, expressly avoided considering the defendant's case in light of *Oakland Cannabis*.[67]

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58 885 F2d 1428 (9th Cir 1989).

59 See id at 1430–31.

60 See id at 1433–35 (rejecting challenges to jury instructions on the necessity defense). The jury convicted the defendants nonetheless. See id at 1432.

61 See, for example, 18 USC § 922(g)(1). See *United States v Mooney*, 497 F3d 397, 403 (4th Cir 2007) ("Every circuit to have considered justification as a defense to a prosecution under 18 USC § 922(g) has recognized it.").

62 See generally *United States v Gomez*, 92 F3d 770, 777–78 (9th Cir 1996) (reversing a conviction for the failure to include a jury instruction on the necessity defense, where the government had revealed that the defendant was an informant and that the defendant had sought government protection from the resulting threats against his life before committing the violation in question); *United States v Paolello*, 951 F2d 537, 544 (3d Cir 1991). See also *Mooney*, 497 F3d at 403 (vacating the defendant's guilty plea to a charge of illegal gun possession under 18 USC § 922(g) because counsel had told him that no necessity defense would be available); *United States v Panter*, 688 F2d 268, 269, 271–72 & n 7 (5th Cir 1982) (reversing a conviction for illegal firearm possession when affirmative defenses were not allowed at trial whether labeled self-defense or necessity).

63 See, for example, *United States v Leahy*, 473 F3d 401, 409 (1st Cir 2007) (noting the defense and upholding the conviction in federal felon-in-possession case); *United States v Deleveaux*, 205 F3d 1292, 1301 (11th Cir 2000).

64 500 F3d 830 (9th Cir 2007), on remand from 545 US 1.

65 See *Raich*, 500 F3d at 859–60.

66 See id at 860–61 ("Because common law necessity prevents criminal liability, but does not permit us to enjoin prosecution for what remains a legally recognized harm, we hold that Raich has not shown a likelihood of success on the merits on her medical necessity claim for an injunction.").

67 See id at 859–60. The *Raich* court stated that a defendant claiming "medical necessity" must show that his illegal action "was taken at the direction of a doctor." Id at 860 n 7. The court cited no authority for introducing this requirement.

2. Cases where the defense has been kept from the jury as a matter of law.

Courts have carved out two main areas of law in which the necessity defense is not permitted. The first, as suggested in Part II.A, is in certain drug cases.[68] The second, developed primarily in the lower courts, prohibits the defense in cases of so-called "indirect" civil disobedience.[69]

Consider the example of the Ninth Circuit, which has made the second prohibition particularly explicit. Following denials of the defense on the facts in *United States v Mowat*[70] and *United States v Dorrell*,[71] the Ninth Circuit held in *United States v Schoon*[72] that "indirect" civil disobedience (defined as "violating a law or interfering with a government policy that is not, itself, the object of protest," or protest through "symbolic" action[73]) is by its nature inconsistent with a necessity defense.[74] The *Schoon* court reasoned that the "harm" to be averted in such cases is set by the political process and so is not legally cognizable;[75] that the act does not bear a causal relationship to the action in question (because, to be effective, it must persuade third parties to change their minds);[76] and that viable legal alternatives exist through participation in the political process.[77] The court therefore

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68 See *Oakland Cannabis*, 532 US at 491 (rejecting the necessity defense in part on the ground that Congress determined in the Controlled Substances Act that marijuana and certain other drugs had no medical value). See text accompanying notes 42–45.

69 The distinction between direct and indirect civil disobedience is a problematic one and is outside the scope of this Comment. See Quigley, 38 New Eng L Rev at 17–18 (cited in note 13) (arguing that the distinction is unclear and unhelpful as applied to the necessity defense). The essential point here is that certain courts subordinate civil disobedience to the rule of legislative judgments.

70 582 F2d 1194, 1208 (9th Cir 1978) (rejecting the necessity defense of a defendant who was trespassing on a naval target range in order to protest).

71 758 F2d 427, 430–35 (9th Cir 1985) (rejecting the necessity defense of a defendant who broke into a nuclear weapons facility to destroy missiles in order to protest).

72 971 F2d 193, 195–96 (9th Cir 1992) (rejecting the necessity defense of a defendant who trespassed in an IRS office to protest American involvement in El Salvador).

73 See id.

74 The Ninth Circuit has also ruled out the necessity defense in cases of direct civil disobedience. See, for example, *United States v Aguilar*, 883 F2d 662, 692–94 (9th Cir 1989) (rejecting the necessity defense of immigration protestors who helped smuggle immigrants illegally into the country, and who had claimed the defense on the grounds that the immigrants were political refugees but could not enter the country legally).

75 See 971 F2d at 197 ("[T]he mere existence of a constitutional law or governmental policy cannot constitute a legally cognizable harm.").

76 See id at 198 (observing that the very indirectness of indirect civil disobedience makes the relationship noncausal, because it is never the act itself that counters the threat).

77 See id at 198–99 (observing that the "possibility" of averting the threatened harm through legislative action implied that illegal activities are not the only alternative, regardless of the actual likelihood that petitioning the legislature would be successful).

concluded that three of the four prongs of the necessity defense can never be satisfied in indirect civil disobedience cases.[78] A necessity defense would henceforth be denied in such cases as a matter of law.

Other circuits have followed *Schoon* using analogous reasoning.[79] For similar reasons, federal courts have sometimes ruled out necessity as a defense to certain crimes resulting from protests at abortion clinics.[80]

3. Cases where the defense has been kept from the jury on the facts, but not necessarily as a matter of law.

In most cases where the defendant asserts necessity, federal courts find that the defendant's evidence on at least one of the defense's elements is not sufficient to support a jury instruction.[81] By

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78 See id at 196–97.

79 See, for example, *United States v Maxwell*, 254 F3d 21, 26 n 2, 28–29 (1st Cir 2001) (declining to adopt *Schoon*'s general rule against the necessity defense in "indirect" civil disobedience cases but holding that a defendant who trespassed on a naval range to protest nuclear submarines had a legal alternative through the political process, even if the political process was unlikely to bring success); *United States v Romano*, 849 F2d 812, 816 n 7 (3d Cir 1988) (suggesting that in a civil disobedience case, the only relevant testimony of the defendant would be concerning the defendant's specific intent in committing the property damage, not the more general intent to save lives); *United States v Kabat*, 797 F2d 580, 590–92 (8th Cir 1986) (rejecting the necessity defense for trespassing in missile silos to protest nuclear war, in part by arguing that "[t]he necessity defense was never intended to excuse criminal activity by those who disagree with the decisions and policies of the lawmaking branches of government"); *United States v Montgomery*, 772 F2d 733, 736–37 (11th Cir 1985) (arguing that because the purpose of defendants, who had trespassed on a nuclear weapons facility to protest and disable the weapons, "was to confront the political leaders with their message," the political process was a legal alternative, preventing the defendants from presenting a necessity defense); *United States v Quilty*, 741 F2d 1031, 1033–34 (7th Cir 1984) (rejecting the necessity defense of protestors who trespassed on a military arsenal on the grounds that there were "thousands of opportunities" legally available to spread their message, including the "nation's electoral process"); *United States v Seward*, 687 F2d 1270, 1274–76 (10th Cir 1982) (holding that the defendants trespassing on a nuclear plant to protest had other legal opportunities); *United States v Cassidy*, 616 F2d 101, 102 (4th Cir 1979) (determining "that the elements of lack of other adequate means or direct causal relationship could [not] be satisfied").

80 See, for example, *Zal v Steppe*, 968 F2d 924, 929 (9th Cir 1992), citing *Northeast Women's Center v McMonagle*, 868 F2d 1342, 1350–52 (3d Cir 1989) (emphasizing the legal alternatives to trespassing in an abortion clinic available to abortion protestors, such as marching, printing literature, or going door to door). But see *United States v Hill*, 893 F Supp 1044, 1048 (ND Fla 1994) (suggesting that facts may support use of the necessity defense in other cases, as long as show "sufficient evidence" to present the defense).

81 For purposes of this Part, denials of a "justification" defense are treated as equivalent to denials of a necessity defense. As discussed above, the elements of justification (which represent a blending of necessity with duress or self-defense) in practice resemble those of necessity.

treating the requirements of the defense strictly,[82] the circuits have avoided the question of whether it is generally available.

One recent example from this category of cases is *United States v Patton*.[83] The panel assumed without deciding that the necessity defense is available in the Tenth Circuit,[84] but it expressed concern that judge-made defenses such as necessity would "read the statute[85] out of existence."[86] At any rate, the court determined that the threatened harm was insufficiently imminent to allow the defense to go to the jury.[87]

Most frequently, courts fault defendants for failing to exhaust legal alternatives to violating the law or for not establishing that the threatened harm was imminent. Insufficiency of evidence on any of necessity's elements, though, precludes a jury instruction on the defense.[88] In some cases, defendants have been denied the opportunity to argue the necessity defense on grounds because courts have confused the defense's nature and elements.[89]

III. THE FUNDAMENTAL DILEMMA

While the necessity defense allows courts to tailor enforcement of criminal statutes to the circumstances of individual defendants, courts have found that the facts of federal criminal cases are seldom suitable for its use and have been concerned that making the defense generally available would undermine policy judgments best left to Congress.

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82 In appropriate cases, for example, courts often treat the political process as an option available to defendants that forecloses necessity. See Part II.B.2.

83 451 F3d 615 (10th Cir 2006).

84 See id at 637.

85 18 USC § 931 (2000 & Supp 2005) (prohibiting persons convicted of violent felonies from prohibiting or transporting body armor).

86 *Patton*, 451 F3d at 638 (refusing to relax the imminency requirements of the necessity defense).

87 See id. The Ninth Circuit expressed this concern in very similar terms in *United States v Arellano-Rivera*, 244 F3d 1119, 1126 (9th Cir 2001) (rejecting the necessity defense of a person who entered the United States illegally on the facts, but noting that "we do not mean to imply that necessity would have been a cognizable defense to unlawful entry even if the Attorney General had denied a request for parole"). See also *United States v Perez*, 86 F3d 735, 737 (7th Cir 1996) (rejecting the necessity defense of an ex-felon against a felon-in-possession conviction, explaining that "if ex-felons who feel endangered can carry guns, felon-in-possession laws will be dead letters," but noting that the necessity defense would lie against a § 922(g)(1) charge for defendants who "grab" guns to defend themselves against imminent attack).

88 See, for example, *United States v Al-Rekabi*, 454 F3d 1113, 1121–27 (10th Cir 2006); *United States v Poe*, 442 F3d 1101, 1104 (8th Cir 2006); *United States v Hargrove*, 416 F3d 486, 490–91 (6th Cir 2005).

89 See, for example, *United States v Contento-Pachon*, 723 F2d 691, 695 (9th Cir 1984) ("Contento-Pachon's acts were allegedly coerced by human, not physical forces. In addition, he did not act to promote the general welfare. Therefore, the necessity defense was not available to him.").

This Part explains judicial consternation over the necessity defense, as well as the defense's purpose and importance in federal law.

A. General Considerations

Underlying the discrepancies described above is the problem of institutional competence and design.[90] Courts generally explain their ambivalence regarding the defense in terms of abstention from policy judgment or deference to legislative decisions. For purposes of this Comment's analysis, however, this ambivalence could be restated as tension between rule- and standard-based adjudication, as applied to crimes arising under particular statutes. The effect with regard to necessity is similar, for just as courts avoid questioning legislative policy judgments, so also do they defer to the legislature as to how a statute is to be interpreted.[91] Accordingly, this Comment's analysis combines both of these approaches to the question.

As discussed in Part I, the necessity defense is in part a tool for introducing standard-like qualities into criminal law, allowing courts to temper ex ante moral judgments in light of the circumstances of particular cases. This flexibility increases decision costs in the courts but reduces error costs in at least some class of criminal cases, often serving the interests of justice.[92]

On the other hand, there may be other cases where the necessity defense, if introduced, would instead increase error costs. Because determinations of policy and institutional design are squarely within the competence of Congress,[93] courts have implicitly recognized that

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90 See Robert F. Schopp, *Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience*, 69 S Cal L Rev 2039, 2082–91 (1996) (discussing the competence of courts and juries to entertain necessity defenses as potentially in conflict with legislative judgment).

91 See generally Nicholas Quinn Rosecrantz, *Federal Rules of Statutory Interpretation*, 115 Harv L Rev 2085 (2002) (discussing Congress's power to require courts to interpret statutes in particular ways).

92 See *Schoon*, 971 F2d at 196–97 (observing that the necessity defense allows courts to act as "individual legislatures," creating "one-time exception[s]" to criminal statutes "when a real legislature would formally do the same under those circumstances"). For a discussion of error costs in criminal law, see, for example, Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U Pa L Rev 33, 61 (2003) (observing that error costs are high when an "inequitable or rigid application of an overbroad law" leads to "the most extreme deprivations of liberty the state can exact—criminal punishment," and so some jury discretion is appropriate despite risk to the rule of law); J. Gregory Deis, *Economics, Causation, and the Entrapment Defense*, 2001 U Ill L Rev 1207, 1226–30 (2001) (explaining that error costs are minimized when the "target" of law enforcement is "a true offender," that is, when the target would have committed a crime without government intervention).

93 Consider Sunstein, 83 Cal L Rev at 1003–05 (cited in note 8) (discussing the decision to create rules or standards, and the different costs and benefits associated with that decision).

modifying those determinations (as expressed by statute) in response to individual circumstances is seldom, if ever, appropriate. Courts therefore may not use the necessity defense to interfere with policy determinations,[94] to second-guess the legislature's judgment as to how rule-like a particular law ought to be, or to compromise the rule of law.[95]

This analysis illustrates why, despite the "lesser of two evils" formulation for the necessity defense, crudely utilitarian explanations for the defense do not entirely explain what courts have done. Courts have been willing to tolerate certain human costs in particular cases in order to vindicate legislative judgments that enact policy in the form of rules.[96] The need, then, is for a default rule that would properly distinguish between cases where deference to such legislative plans is best, and cases where courts should be able to adapt laws to individual circumstances.[97] When legislatures permit standard-like applications of

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94 See *Oakland Cannabis*, 532 US at 491.

95 Some commentators have treated judges who respect this concern in the context of necessity as furthering an "agenda" to foster "order" at the expense of "freedom," and as acting on their "deep fear" and "hostility" to juries by trampling on the right of defendants to urge juries to sit in judgment of federal law and policy. See, for example, Quigley, 38 New Eng L Rev at 54–56 (cited in note 13) (countering the holdings of the Fourth, Seventh, and Tenth Circuits with a brief quotation from John Rawls's *Theory of Justice*). This argument amounts to little more than a slur on the duty of judges to apply the laws. The challenge of determining when to apply the necessity defense, rightly understood, is to decide when courts may properly use it to temper the law and when its use would amount to an impermissible usurpation of legislative and executive authority.

96 See, for example, *Oakland Cannabis*, 532 US at 498–99 (reasoning that despite evidence that individuals will suffer serious medical harm without cannabis, "the Act precludes consideration of this evidence"). Lower courts have not always been consistent in this regard, though, and have sometimes permitted the necessity defense to defendants whose circumstances were trying in the extreme. See, for example, *United States v Gomez*, 92 F3d 770, 774–78 (9th Cir 1996) (allowing the "justification" defense for a government informant facing death threats). But this generosity is not entirely consistent with the Supreme Court's reliance on the text enacted by Congress. Even in *Dudley & Stephens*, the court implied that the sailors had what may even amount to a duty to die under certain circumstances rather than commit murder to stay alive. See 14 QBD at 287 ("To preserve one's life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it."). It is important to recall once more that the necessity defense has historically not been available in cases of intentional homicide. See generally Cohan, 10 Chap L Rev at 119 (cited in note 7).

97 The view that this distinction is the central one enjoys significant scholarly support.

> If a court were to accept the necessity defense in a case of political protest on the basis of its own determination that a constitutional statute or policy constitutes a greater evil by systemic standards than a violation of a constitutional offense definition, it would violate the standards of that system regarding the scope of its authority regarding legislative decisions.
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> . . .
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> [C]onventional morality includes the procedural principles which define the legitimate roles and authority of each branch, and thus, a court that independently evaluated a constitutionally valid law or policy for consistency with its interpretation of the conventional pub-

their enactments, courts presumably may consider the necessity defense; otherwise, courts must respect a law's rule-like nature.

The state-law necessity requirements described above leave the necessity defense very much at the discretion of judges.[98] But the question of whether there is a "legislative policy" against a defendant's proposed necessity defense will differ between state and federal law. Since most traditional criminal laws are enforced at the state level, error costs would be high if state law consistently presumed against the defense's availability. Because regulatory and policy judgments by state legislatures will be simpler and less comprehensive than congressional ones, the decision costs of generally allowing the necessity defense are lower.[99] Therefore, though state courts permit the defense as a general matter unless facts and circumstances militate against it in a particular case, federal criminal law requires a more detailed plan for determining when the defense is appropriate.

B. Limiting the Necessity Defense

The necessity defense, under most plausible rules governing its availability, would be used in relatively few instances of federal criminal law. Cases such as *Oakland Cannabis* demonstrate proper judicial deference to congressional policymaking.[100] Moreover, federal criminal law consists largely of crimes for which the necessity defense would be implausible, such as mail fraud.

Similarly, as the courts discussing indirect civil disobedience show, there can be no common law necessity in certain cases.[101] Not only is it impossible for defendants to satisfy the defense's requirements in such cases, but to allow necessity instructions would undermine the public policies involved. Federal courts accordingly agree that their authority to engage in standard-like adjudication does not extend so far. Allowing necessity claims may subvert the purpose of the defense as well: often in civil disobedience cases, for example, individuals who have

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lic morality or that subjected such a law or policy to review by the jury would in doing so violate its responsibilities under those principles.

Schopp, 69 S Cal L Rev at 2084–85 (cited in note 90).

98 See Part I.A.1. See also *People v Bordowitz*, 155 Misc 2d 128, 129 (NY City Crim Ct 1991) (stating that necessity is not a valid defense when there is a clear legislative policy against it).

99 State courts have, in fact, been much more willing than their federal counterparts to allow juries to receive necessity instructions in civil disobedience cases. See Quigley, 38 New Eng L Rev at 26–37 (cited in note 13) (discussing successful uses of the necessity defense in state civil disobedience cases).

100 See 532 US at 491. See also *United States v Perez*, 86 F3d 735, 737 (7th Cir 1996).

101 See *Schoon*, 971 F2d at 193.

lost in the political process violate a statute or policy in order to draw attention to causes of interest.[102] Such persons are ordinarily expected to back up their disobedience with a willingness to accept the prescribed punishment—in other words, to submit to rule-like adjudication.[103] In short, there is no reason why the defense need be available in cases such as these.

But though the necessity defense should often be foreclosed—standards not being appropriate (or within judicial authority) in all cases—some crimes will actually involve defendants forced to decide between uninviting courses of action where the better choice may be an illegal one. In these cases, when standard-based adjudication is appropriate, the necessity defense is one of various legal devices that exist to prevent unjust outcomes. As the *Baender* Court stated, courts should avoid forcing potential defendants to choose between being hanged and burnt,[104] and as another court observed, laws ought not to make felons "helpless targets for assassins."[105]

C. Informal Alternatives to the Necessity Defense

In the type of case for which the necessity defense is best suited, there may be no better alternative to it. If the necessity defense were never available in federal criminal law, then avoiding convictions of defendants who are not considered morally culpable would depend to a far greater extent on informal checks such as prosecutorial discretion, executive clemency, and jury nullification.[106] Such checks, however,

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102 See id at 199 (citation omitted).

103 See generally Brent D. Wride, Comment, *Political Protest and the Illinois Defense of Necessity*, 54 U Chi L Rev 1070, 1094 & n 98 (1987) (citing Martin Luther King, Jr., *Letter from Birmingham City Jail*, explaining the demands of civil disobedience). See also John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 Pierce L Rev 111, 173–75 (2007) (discussing arguments for and against application of necessity to civil disobedience); Quigley, 38 New Eng L Rev at 16 n 55 (cited in note 13) (same).

104 See *Baender*, 255 US at 226 (1921). See also *United States v Panter*, 688 F2d 268, 271 (5th Cir 1982) (denying the necessity defense to a § 922(g)(1) prosecution, although noting that it put some ex-felons "between a rock and a hard place—death being the rock and a federal penitentiary the hard place").

105 *Panter*, 688 F2d at 271 (considering the impact of not allowing a prisoner a claim of self-defense for a prison break when faced with imminent death).

106 See Email from Orin Kerr to Stephen S. Schwartz (Feb 28, 2007) (suggesting that the structure of federal law enforcement institutions may make the necessity defense less necessary). See also Sunstein, 83 Cal L Rev at 1008–10 (cited in note 8) (discussing legitimate informal methods of revising legal rules, such as police discretion not to arrest, prosecutors' discretion not to prosecute, judicial modification of rules, and desuetude).

would tend to corrode the rule of law if relied on too heavily and are not reliable substitutes for orderly and predictable law enforcement.[107]

Considerable legal literature has addressed prosecutorial discretion in law enforcement, and commentators have put varying degrees of reliance on it. However, most commentators recognize the limitations of that reliance. Judge Easterbrook, for example, describes the delegation of prosecutorial functions to professional prosecutors in terms of agency costs, which make it difficult to align a prosecutor's incentives with those of the civilian population.[108] Doubt that prosecutors will tend to choose cases justly (especially in light of political pressures), of course, is one of the reasons for the substantive and procedural protections afforded criminal defendants.[109] At any rate, "[t]he exercise of prosecutorial discretion does not lead to optimal lawbreaking unless potential lawbreakers expect not to be prosecuted at the time they are deciding whether to commit the proscribed act."[110]

The *Dudley & Stephens* court suggested that executive pardons are a better recourse than the decision not to prosecute.[111] Such pardons, however, are inconsistently granted, and vary widely in use between pres-

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107 In addition, some courts and scholars have suggested that the necessity defense is constitutionally required in some cases. See *Gomez*, 92 F3d at 774 n 7 (suggesting that the justification defense assures that § 922(g)(1)—which forbids felons from possessing firearms—"does not collide with the Second Amendment"). This line of reasoning is outside the scope of this Comment.

108 Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J Legal Stud 289, 295–96 (1983) (suggesting that prosecutors try to maximize marginal deterrence because they have limited budgets), 298–308 (arguing that political and other incentives lead to agency costs in delegating the prosecutorial function). See also McAdams, 96 J Crim L & Criminol at 131–34 (cited in note 30) (discussing the difficulties of relying on police, rather than courts, to regulate entrapment in undercover operations).

109 See Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 Cornell L Rev 401, 432–33 (1993) ("[I]f law enforcement officials could always be trusted to do the right thing, there need never have been a Bill of Rights."), quoting *United States v Kantor*, 677 F Supp 1421, 1435 n 64 (CD Cal 1987); Edward B. Arnolds and Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J Crim L & Criminol 289, 298–99 (1974) (arguing for the necessity defense as a better alternative than reliance on prosecutorial discretion or jury nullification).

110 Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U Pa L Rev 1663, 1671 (1993).

111 See *Dudley & Stephens*, 14 QBD at 288 (1884). The "Chief Justice" in Professor Fuller's *Case of the Speluncean Explorers* chooses to request clemency from the "Chief Executive" rather than modify the notional jury's verdict against the defendants. See Fuller, reprinted in Shapiro, 112 Harv L Rev at 1851, 1853–54 (Truepenny) (cited in note 9). But two of Fuller's other judges objected to that approach, though for opposite reasons: one claiming that the court was obligated not to "appeal[ ] to a disposition resting within the personal whim of the Executive," id at 1854 (Foster), and one countering that the court lacked any authority to ask the Executive for clemency, id at 1863–64 (Keen).

idential administrations.[112] At any rate, the objections to reliance on prosecutorial discretion—agency cost, political constraint, and deterrence—apply with similar force to executive clemency after conviction.[113]

Jury nullification is disapproved of in principle,[114] and juries are not instructed on their theoretical ability to acquit defendants notwithstanding the law and weight of evidence. The necessity defense and nullification may be closely related phenomena.[115] A number of commentators have written approvingly of express jury nullification in cases where the necessity defense would be a theoretical option. Despite the generally held view that jury nullification is antithetical to rule-like laws, and perhaps to the rule of law generally,[116] more aggressive commentators treat jury nullification instructions and the necessity defense as similar means to reach the same end.[117] This amounts to a contention, in effect, that juries should have greater power for balancing harms with regard to policy questions.

That power is not now a proper function for judges or juries, and the legislature reserves the authority to decide whether it can be done with regard to particular laws. One commentator observes, in addition,

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112 See DOJ, Office of the Pardon Attorney, *Presidential Clemency Actions by Administration 1945–2001*, online at http://www.usdoj.gov/pardon/actions_administration.htm (visited June 8, 2008); *Bush Issues Pardons, but to a Relative Few*, NY Times A31 (Dec 12, 2006) (noting that, as of December 2006, President George W. Bush had issued the fewest pardons of any president since World War II). Another one of Fuller's judges, furthermore, raises the possibility of an executive who is unreasonably opposed to pardons or commutations of sentences. See Fuller, reprinted in Shapiro, 112 Harv L Rev at 1851, 1872 (Handy) (cited in note 9) (stating that the hypothetical Chief Executive was "a man now well advanced in years, of very stiff notions").

113 See Shapiro, 112 Harv L Rev at 1898–99 (West) (cited in note 9) ("The statute puts the lives of these defendants at the dubious 'mercy' of an elected official whose own political survival is beholden to the whim of majoritarian politics. In short, it makes our own law unmerciful and the Executive's mercy lawless.").

114 At best, jury nullification is "widely understood as legitimate, so long as it does not occur very often." Sunstein, 83 Cal L Rev at 1009 (cited in note 8).

115 See *Zal v Steppe*, 968 F2d 924, 930–33 (9th Cir 1992) (Trott concurring) (suggesting that the necessity defense amounted to an improper attempt to urge jury nullification, an "illegitimate" and "fundamentally lawless act").

116 See Schopp, 69 S Cal L Rev at 2101–02 (1996) (cited in note 90). See also Arnolds and Garland, 65 J Crim L & Criminol at 296–98 (cited in note 109) (concluding that necessity, because "narrow[er]" than jury nullification and limited to situations where the jury can recognize "competing values," is superior).

117 See, for example, James L. Cavallaro, Jr., Casenote, *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and* United States v. Schoon, 81 Cal L Rev 351, 383 (1993) ("By allowing civil disobedients to raise the defense, courts leave open the possibility of jury nullification, long recognized as essential to the smooth operation of our justice system."); Quigley, 38 New Eng L Rev 3, 4 (cited in note 13) (denying that the necessity defense precludes the jury, the "bulwark of freedom, from playing its proper role in conflicts between the government and its citizens").

that instructing juries on nullification would "distort[] the expressive function of the criminal law"[118] or, by introducing the private moral judgments of jurors into the criminal trial, subvert the "conventional public morality of a liberal society," which requires consistency and predictability.[119] As a result, the role of jury nullification in criminal law is best minimized, and this is what modern law seeks to do. Though nullification remains a theoretical possibility in all cases, of course whether the jury receives an instruction on it or not, relying on nullification as an alternative to necessity is inappropriate for this reason.

IV. A POSSIBLE SOLUTION

Having explained the necessity defense, its history, and its uncertain applicability in federal law, this Comment proposes its novel answer to the question at hand.

A. Malum In Se versus Malum Prohibitum

Under *Dixon*, the availability of common law defenses depends on the nature of the federal crime at issue.[120] Some crimes permit or require the adjustment to individual circumstances that the necessity defense provides, while others represent congressional regulatory schemes and policy judgments that should be protected and enforced in court. The necessity defense should be available as a defense to the former sort of crime but not the latter.

The distinction between traditional crimes and regulatory offenses (sometimes, mala in se and mala prohibita) has been developed by courts to help distinguish between these sorts of crimes in other contexts. This Comment proposes that applying this distinction to the necessity defense will allow federal courts to determine when the defense should be allowed and when it should be denied as a matter of law.

1. The development and purpose of the distinction is consistent with determining the availability of the necessity defense.

Criminal offenses can be divided into two broad categories. These are the traditional moral offenses (mala in se: crimes that are bad in themselves, more likely descended from the common law) and regula-

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118 Schopp, 69 S Cal L Rev at 2095 (cited in note 90).

119 See id at 2100.

120 See 548 US at 21–22 ("[W]e are required to effectuate the duress defense as Congress 'may have contemplated' it in the context of these specific offenses."), quoting *Oakland Cannabis*, 532 US at 491 n 3.

tory offenses (mala prohibitum: crimes that are created by legislatures to keep public order—not evil in themselves but rather "wrong because prohibited").[121]

As this Part demonstrates, Courts have applied the distinction between these types of offenses to determine the requirements of the government's case against criminal defendants. There would be nothing extraordinary, then, in applying this distinction to the necessity defense's availability. Courts have developed considerable experience distinguishing between these types, and so would be able to use the distinction to determine the availability of the necessity defense in cases of congressional silence.

The practical effects of this distinction originated in the Supreme Court cases of *United States v Balint*,[122] *United States v Dotterweich*,[123] and *Morissette v United States*.[124]

Balint involved an early narcotics offense; the defendants claimed that they had not known what the substances they sold were.[125] Where a given statute's purpose is "achievement of social betterment," the Court said, rather than "the punishment of the crimes," defendants who are ignorant of the facts constituting the offense[126] may still be convicted of it.[127] In such cases, courts may assume that "Congress weighed the possible injustice of subjecting an innocent [defendant] to a penalty

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121 This Comment treats the terms "malum in se" and "common law offense," and "malum prohibitum" and "regulatory offense" as roughly interchangeable to emphasize the importance attached to the common law history and regulatory purpose of given criminal prohibitions. The moral content of a statute (measured by the extrinsic harm the statute is intended to prevent or by generally held views of the seriousness of violations) is correlated with this, but not perfectly so. See generally Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 Emory L J 1533 (1997) (arguing for a new conception of "moral neutrality" that would reclassify some regulatory criminal statutes as "malum in se").

122 258 US 250 (1922) (upholding a conviction under a statute that prohibited selling products containing coca or opium derivatives but did not contain any requirement that the seller know that the products contained opium or coca).

123 320 US 277 (1943) (upholding a conviction under a statute that prohibited marketing "adulterated" food products without any requirement of knowledge about such adulteration).

124 342 US 246 (1952) (reversing a conviction under 18 USC § 641 that prohibited knowing conversion of government property because the defendant was not allowed to present evidence that he did not know the property belonged to the government). See Alan C. Michaels, *Constitutional Innocence*, 112 Harv L Rev 828, 842–52 (1999), for an informative account of these three cases.

125 258 US at 251. The defendants' claim might have been decided differently under modern law. See note 65 and accompanying text.

126 That is, those who lack scienter as well as mens rea.

127 See *Balint*, 258 US at 252.

against the evil of exposing [other individuals to the regulated harm], and concluded that the latter was the result preferably to be avoided."[128]

The *Balint* Court left unclear how "crimes" and regulations for purposes of "social betterment" were to be distinguished. In *Dotterweich*, though, the Court noted the "now familiar type of legislation whereby penalties serve as effective means of regulation."[129] Under such statutes, enacted to safeguard aspects of public safety, which "are largely beyond self-protection" in a world of "modern industrialism," the common law requirement of "awareness of some wrongdoing" is removed.[130] When such laws are at issue, those in "responsible relation" to a public danger[131] may be subject to something resembling strict liability.[132]

The Supreme Court's fullest explanation of the regulatory offense came in *Morissette*. In that case, the defendant was accused of stealing government property in violation of 18 USC § 641.[133] He did not know that his actions constituted theft; on the contrary, he had thought that the property was abandoned.[134] Under the statute, however, intent was not listed as an element of the offense. Justice Jackson described statutes creating regulatory offenses as follows:

> [S]uch offenses ... may be regarded as offenses against [the state's] authority, for their occurrence impairs the efficiency of controls deemed essential to the social order .... In this respect, whatever the intent of the violator, the injury is the same .... Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. . . . [The p]enalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.[135]

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128 Id at 254.

129 *Dotterweich*, 320 US at 280–81.

130 Id.

131 Id at 281 ("In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."). See also *Staples v United States*, 511 US 600, 610–12 (1993).

132 Because of the "responsible relationship" language, which, as will be discussed below, has been followed in modern cases, the term "strict liability crime" is a misnomer.

133 The property in question consisted of spent bomb casings from a military artillery range, which the defendant sold for scrap. See *Morissette*, 342 US at 247–48. See also 18 USC § 641 (2000) ("Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another ... any property made or being made under contract for the United States or any department or agency thereof ... shall be fined under this title or imprisoned not more than ten years, or both.").

134 See *Morissette*, 342 US at 248–49.

135 Id at 256.

The Court did not attempt to clearly define which offenses fell into this category.[136] It noted, however, that certain crimes that "existed before legislation" do not generally fall into this category,[137] and distinguished between "adopting into federal statutory law a concept of crime already [ ] well defined in common law" and "creating an offense new to general law."[138]

"Enacted common-law offenses" are distinct, under *Morissette*, from the sort of offense involved in *Balint*.[139] Omitting a reference to intent in statutes codifying such recognized offenses does not itself eliminate the presumption that Congress is legislating against a common law background,[140] and courts may determine the intent requirement of a given federal crime by examining the statute's structure and context.[141]

All three of these cases are consistent with the reasoning of the necessity defense cases. As noted above, one paradigmatic necessity case is that of the hiker who breaks into a cabin for shelter in a snow storm.[142] If the defendant in *Morissette* had been forced somehow to take the shell casings in a life-threatening situation, it would be hard to imagine the necessity defense being denied to him. Rather than involving implicit conflict between competing policy preferences, as in *Balint* or *Dotterweich*, such a case would require compromise between conflicting rights, and it is this conflict that courts classically use the

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136 See id at 260 ("Neither this Court nor ... any other has ... set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static.").

137 See id (providing "[s]tealing, larceny, and its variants and equivalents" as an example).

138 See id at 262.

139 See id (treating the doctrine concerning mens rea in regulatory offenses as inapplicable to "offenses incorporated from the common law" and finding no "well-considered" state authority holding otherwise).

140 See id at 263 ("We hold that mere omission from § 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced."). The assumption that Congress legislates against the backdrop of legal history and therefore incorporates existing law into its actions has been narrowed. See, for example, *Alexander v Sandoval*, 532 US 275, 287–88 (2001) (stating that the "legal context" of legislation has no independent weight in determining whether legislation creates an implied cause of action). Preserving this assumption in the context of criminal statutes, however, does not create the same difficulties for the rule of law and should continue to be permissible as a result. See *Dixon*, 548 US at 33 (Alito concurring) ("Duress was an established defense at common law. When Congress began to enact federal criminal statutes, it presumptively intended for those offenses to be subject to this defense."). At any rate, the preservation of federal common law defenses such as self-defense and entrapment is not now disputed.

141 See *Morissette*, 342 US at 265–73. But see *Carter v United States*, 530 US 255, 264–67 (2000) (holding that the "canon on imputing common-law meaning applies only when Congress makes use of a statutory *term* with established meaning at common law").

142 See *Schoon*, 971 F2d at 196, citing Posner, 85 Colum L Rev at 1205 (cited in note 25).

necessity defense to negotiate. The nature of the offense, which required that the defendant's mens rea be an element of the offense, by the same token supports making the necessity defense available.

In short, there is a category of federal crimes that are already detached from the requirements of common law crimes and where defendants may be convicted without a showing of mens rea. Courts may assume that fundamental requirements of the common law crimes are obviated for these crimes. While strict liability is still highly disfavored,[143] the voluntary act itself may be punishable. In principle, the necessity defense could be detached as well, and such laws, almost by definition, involve legislative policy judgments to which the necessity defense has been found inapplicable. Not only would it be incongruous to allow a common law necessity defense against crimes for which mens rea may be dispensed with, but the description of the regulatory offense provided in these cases is closely consistent with the Court's justification for denying the necessity defense in *Oakland Cannabis*.[144]

Because, as discussed in Part II.A, the necessity defense must not be allowed to interfere with congressional policymaking and regulatory authority,[145] the defense should be presumed to be unavailable for defendants charged with regulatory offenses unless Congress expressly provides otherwise.[146] Because such a large proportion of federal criminal law is regulatory in nature,[147] the necessity defense will seldom be available. But consistent with the assumption that Congress legislates against a common law background, the necessity defense would

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143 *Staples*, 511 US at 607 n 3 ("By interpreting such public welfare offenses to require at least that the defendant know that he is dealing with some dangerous or deleterious substance, we have avoided construing criminal statutes to impose a rigorous form of strict liability.").

144 See Part II.A.

145 Compare *Schoon*, 971 F2d at 198–99 (noting that the "legal alternatives" requirement implies that a defendant cannot override policy or the political process by considering necessity), with *United States v Aguilar*, 883 F2d 662, 673 (9th Cir 1989) (observing that, in a trial for violation of immigration law, "a rule which would allow appellants essentially to put Reagan Administration foreign policy on trial would be foolish").

146 Interestingly, *The William Gray*, 29 F Cases 1300 (CCD NY 1810), an early circuit case from 1810, suggested the opposite conclusion. Specifically, the court argued that because the necessity defense is permitted in cases of serious crimes, then a fortiori it should be allowed for lesser offenses including "an offense which is malum prohibitum, and the commission of which is attended with no personal injury to another." Id at 1302 ("If the necessity which leaves no alternative .... be allowed as an excuse for committing what would otherwise be high treason, parricide, murder, or any other of the higher crimes, why should it not render venial an offence which is only malum prohibitum"). This view (expressed in dicta), however, came long before the development of the regulatory offenses described here and so describes a different sort of crime.

147 See Part III.A.

be presumed to be available in the remainder of cases unless Congress forbids it.[148]

2. Making the distinction in practice.

Modern courts must distinguish between traditional crimes and regulatory offenses with some frequency, typically when a defendant who lacked criminal intent is prosecuted for violating a statute unawares[149] and so have the capacity and expertise to do so for purposes of necessity. Modern cases treating this question have usually involved determining whether a statute incorporates a mens rea requirement.[150]

Courts determine whether, under a particular statute, the government must prove mens rea to convict a defendant, and they have developed various methods for making this determination.[151] These are the methods that would be necessary to determine the availability of the necessity defense, and a description of them will show the feasibility of using the distinction between mala in se and mala prohibita to determine whether the defense is available.[152] This survey will also provide further evidence that the category of regulatory offenses set out by the courts corresponds with the concerns that courts have had about allowing the necessity defense.

One method courts use is analysis of the statute's subject matter. For crimes of possession, courts rely on "the nature of the statute and the particular character of the items regulated."[153] The *Dotterweich* court's reference to "responsible relation" to a public danger has per-

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148 There is, of course, a class of cases in which the defense has traditionally been left unavailable at common law, namely intentional homicide cases. See generally Cohan, 10 Chap L Rev 119 (cited in note 7). Such crimes are seldom tried in federal court, of course, but the necessity defense should continue to be unavailable in such cases under this Comment's proposal.

149 The methods courts use are inconsistent and sometimes unsystematic, and proposing a comprehensive test for making the distinction is beyond the scope of this Comment. However, it is helpful to describe briefly how courts have gone about making this distinction in some cases.

150 See, for example, *Balint*, 258 US at 252 (explaining that courts may dispense with the mens rea requirement if the statute does not appear to incorporate it).

151 See Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 Am U L Rev 313, 359 (2004) (listing factors that courts may balance in determining whether a crime is to be classified as a regulatory offense).

152 But see Levenson, 78 Cornell L Rev at 428–30 (cited in note 109) (expressing the concern that "reinterpreting" statutes to create congruence between moral intuitions and the elements of offenses is dishonest). This Comment's approach, though, avoids this concern by adopting value-neutral criteria rather than by trying to ensure particular outcomes in given cases. This Comment proposes that by concentrating on the statute itself courts may vindicate both the individual interests at stake in cases such as *Morissette* and the legislative judgments relied upon in cases such as *Oakland Cannabis*.

153 *Staples*, 511 US at 607.

sisted, and statutes concerning individuals who stand in such a position are likely to be considered regulatory.[154] When a federal crime can be stated in terms of a common law offense, such as theft[155] or fraud,[156] courts may concentrate on the underlying common law current. Congress has broad authority to define the elements of crimes.[157]

Another is the policy underlying the statute. When Congress appears to want to make convictions easier than usual to obtain, the offense is likely to be regulatory.[158] As noted previously, Congress is presumed to weigh potential overinclusiveness against the risk to be regulated.[159] In addition, a crime's social implications—as identified by distinctions between innocent and immoral acts, and between felonies and nonfelonies, and between stigmatizing and nonstigmatizing offenses—have been used to distinguish regulatory offenses from ordinary crimes.[160] This is especially true when the statute is not a felony and provides for a relatively short sentence.[161] Courts may also pay attention to the overall logic of federal criminal provisions in construing even common law terms that appear in statutes.[162]

Statutory language is perhaps the most powerful tool available. Common law terms of art are presumed to incorporate common law definitions into statutes, and even if a statutory offense may be analogized to an older common law crime, courts will not assume that it is

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154 See id at 611, citing *Dotterweich*, 320 US at 281. Interestingly, gun possession apparently does not involve such a relationship. *Staples*, 511 US at 611–13 (arguing that because guns may be possessed in "perfect innocence," "regulation in itself is insufficient" to make guns like the narcotics proscribed in *Balint*).

155 See *Morissette*, 342 US at 270–73 (categorizing larceny as a common law crime and making comparisons to the civil tort of conversion).

156 See *United States v Marvin*, 687 F2d 1221, 1227 (8th Cir 1982) ("To require a lesser degree of intent would widen the net to include those who had no conscious desire to commit fraud nor even suspected that they might have done so.").

157 See *United States v Wells*, 519 US 482, 492, 498–99 (1997).

158 *Morissette*, 342 US at 263. ("The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction.").

159 See *United States v Morales-Palacios*, 369 F3d 442, 449 (5th Cir 2004).

160 See *Marvin*, 687 F2d at 1226 ("[T]he crime involved is a felony.... The normal purpose of the criminal law is to condemn and punish conduct that society regards as immoral. Usually the stigma of criminal conviction is not visited upon citizens who ... did not know they were doing wrong.").

161 See *Staples*, 511 US at 616 ("Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with mens rea.... As commentators have pointed out, the small penalties attached to such offenses logically complemented the absence of a mens rea requirement.") (emphasis omitted).

162 See *Wells*, 519 US at 491–92 & n 10 ("Congress did not codify the crime of perjury or comparable common-law crimes in [the statute at issue]; as we discuss next, it simply consolidated [thirteen] statutory provisions relating to financial institutions, and, in fact, it enacted a separate general perjury provision [elsewhere].").

to be construed as one unless its text incorporates such terms.[163] Statutory language connoting intent (in one case, "permit" or "suffer") is presumed to create an intent requirement.[164] Sometimes, however, more general analysis of the statute trumps the use of common law terms such as "attempt."[165] With regulatory offenses, courts will not assume that common law definitions are included.[166] Rather, courts will examine the nature of the offense in order to determine the meaning of the language.[167]

3. Applying the distinction to the necessity defense is appropriate.

As described above, in other areas of law courts inquire into the nature of the offense before determining whether the common law ought to be incorporated into it. A similar approach is appropriate for the necessity defense. If a court, employing the analysis developed in other cases, determined that a given offense was regulatory in nature, the court would then look for specific indications that the statute authorizes a necessity defense.[168] If none were present, the defense would not be allowed.

Granted the distinction between the treatment of mala in se and mala prohibita in federal common law, presumed unavailability of the necessity defense is only a small additional step. Regulatory crimes, which courts are well able to identify in practice, reflect ex ante legislative judgments that govern the way harms ought to be balanced, and courts have understood such crimes as requiring rule-like adjudication. As these offenses need not include other elements of the common law designed to protect criminal defendants, it is not necessary

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163 *Carter*, 530 US at 264–67 (rejecting petitioner's attempt to read common law elements into a federal bank robbery statute that contained no such common law terms of art).

164 See *United States v Launder*, 743 F2d 686, 689 (9th Cir 1984).

165 See *Morales-Palacios*, 369 F3d at 447 (arguing that "imputing the common-law meaning of elements of crimes into statutes is compelling only with respect to traditional crimes as distinct from regulatory offenses," in refusing to construe a specific intent requirement into the crime of attempted re-entry into the United States after deportation without permission of the attorney general).

166 See id at 447 ("[T]he scope of the cannon on imputing common-law meaning does not sweep so broadly as to apply to the unique nature of regulatory crimes."), citing *Balint*, 258 US at 251–52.

167 See, for example, *Morales-Palacios*, 369 F3d at 448.

168 See Part IV.A.2. To illustrate: the necessity defense would be presumed to be available in *Morissette* (law against converting government property), but not in *Dotterweich* (law against marketing "adulterated" food products) or *Balint* (law against marketing products containing coca or opium).

that they allow the necessity defense. The act need only be intentional and voluntary.[169]

Presumed unavailability of the necessity defense in mala prohibita would correctly limit the necessity defense (as well as the judiciary's role in applying it) to its appropriate scope, while reducing decision costs. The necessity defense, by its nature, challenges and undermines general rules: it is a justification;[170] as such, when it is employed, it carries the implication that violation of a given rule is positively desirable, thus turning it in to a standard.[171] But courts have concluded that the regulatory regimes that Congress protects with criminal penalties only make sense as general rules. Allowing the necessity defense would destabilize these regimes, lead to regular judicial review of congressional policy judgments, or force Congress to enact these regimes with a specificity that would be especially costly under the circumstances.

Some regulatory crimes, furthermore, use rules to keep defendants from calculating the costs and benefits of particular courses of conduct. Almost by definition, there can be no "necessity" for violating such a rule unless the necessity defense is established by statute.[172] Allowing a necessity defense for convicts who decide that remaining in prison is a worse evil than escaping, or felons who decide that it is worthwhile to possess a firearm (in violation of 18 USC § 922(g)(1)) would undermine statutory regimes established by Congress and implicitly endorsed by the Supreme Court.[173] At any rate, for a court to determine that "[m]embers of society expect, indeed hope, that other persons placed in the same position will act similarly"[174] to a defendant who freely decided to violate the policy judgment of a legislature—that is, that the defendant was justified under a common law defense—is, to say

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169 See *United States v Moore*, 486 F2d 1139, 1180 (DC Cir 1973) (distinguishing necessity from "psychic incapacity").

170 See Part I.A.2.

171 See Part III.A.

172 See *Schoon*, 971 F2d at 196–97 (ruling out the necessity defense in cases of indirect civil disobedience). See also *Gonzales v Raich*, 545 US 1, 33 (2005) (referring medical necessity claims to the "democratic process"); *United States v Deleveaux*, 205 F3d 1292, 1299 (11th Cir 2000) ("[T]here are common law affirmative defenses that serve only as a legal excuse for the criminal act and are based on additional facts and circumstances that are distinct from the offense conduct.").

173 See *Dixon*, 548 US at 9–14 ("The fact that petitioner's crimes are statutory offenses that have no counterpart in the common law also supports our conclusion that her duress defense in no way disproves an element of those crimes."); *Oakland Cannabis*, 532 US at 491 & n 4 ("The statute, to be sure, does not explicitly abrogate the defense. But its provisions leave no doubt that the defense is unavailable.").

174 Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 Colum L Rev 1897, 1899 (1984) (distinguishing between justification and excuse in paradigm cases).

the least, incongruous. Courts, then, must wait for Congress to provide for such a defense before introducing one themselves.

Presumed unavailability of the necessity defense is also consistent with the nature of the potential harms addressed by most regulatory offenses. Common law necessity requires that the harm be truly imminent, and objectively so.[175] In the regulatory regimes at issue in most of the cases described above, the harms will almost always be more probabilistic, remote, or hypothetical than is required to prove necessity.[176] In the unlikely event that a harm is truly imminent, allowing defendants to use the necessity defense in regulatory cases will tend to distract courts from the employment of other common law defenses (such as duress or self-defense) whose availability in federal law is not in doubt.[177]

If Congress wishes to attach a federal necessity defense for regulatory offenses, it is free to enact one. Congress may determine that a particular regulatory arrangement touches on circumstances that vary widely from case to case, or may set penalties severe enough that common law relief from the operation of the statute would be warranted. In such cases, Congress could choose to provide for a necessity defense. Congress has in fact enacted necessity as an affirmative defense to a variety of crimes,[178] demonstrating that the solution proposed by this Comment is practicable and consistent with actual congressional policy.[179]

In the absence of such an enactment, federal case law will clarify the classification of given offenses as mala in se or mala prohibita. A court may then determine with relative ease whether the necessity defense is available.

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175 *Dudley & Stephens*, 14 QBD at 273.

176 The Ninth Circuit's reasoning in *Schoon* is applicable here as well. 971 F2d at 198. Harms resulting from the political process are not legally cognizable, and when participation in the political process affords an alternative to illegal actions, those actions are not strictly necessary.

177 See Part IV.C.

178 See 18 USCA § 2250(b) (2008) (criminalizing failure to register as a sex offender); 18 USC § 3146(c) (2000) (criminalizing failure to appear in court).

179 In addition, state legislatures have on occasion responded to court decisions by enacting necessity defenses into law. Massachusetts actually did change its laws in response to a state court decision refusing to send the necessity defense to the jury in a case involving distribution of clean hypodermic needles to drug addicts. Compare *Commonwealth v Leno*, 616 NE2d 453, 456 (Mass 1993) (disallowing the defense in the case of the distribution of needles because "[t]he prevention of possible future harm does not excuse a current systematic violation of the law in anticipation of the eventual over-all benefit to the public"), with Mass Gen Laws ch 94C, § 27(f) (1995) ("Notwithstanding any general or special law to the contrary, needles and syringes may be distributed or possessed as part of a pilot program approved by the department of public health.").

4. The distinction explains and is consistent with federal case law.

The approach proposed in this Comment is consistent with the Supreme Court's holdings in *Dixon* and *Oakland Cannabis*, in addition to being appropriate for the purposes of federal criminal law. Under *Dixon*, when particular federal statutory crimes are incompatible with a common law defense, the defense is not available.[180] This is arguably the case with crimes established by Congress to enforce various regulatory regimes. Even before *Dixon*, for example in *Oakland Cannabis*, the Supreme Court ruled out the use of the "medical necessity" defense in cases of drug violations.[181] Congress, the Court said, has sole responsibility for performing the "social balancing" necessary for establishing a regulatory regime,[182] and the necessity defense, which requires a weighing of costs and benefits by courts and criminal defendants, is therefore inappropriate.[183] Thus, this Comment appears to explain the Supreme Court's approach to a question of criminal law that it has not yet expressly clarified.

Similarly, the presumed unavailability of the necessity defense coincides with the federal circuit decision in many cases ruling out the defense.[184] Under the approach proposed in this Comment, the courts could often substitute statutory analysis for case-by-case decisions on the facts when defendants assert the necessity defense, reducing decision costs and thereby saving resources and clarifying the cases ex ante.

Despite this consistency, it should be pointed out that the solution proposed here reverses an element of conventional wisdom. Commentators have emphasized that criminal statutes are and ought to be rule-like, noting the importance of predictability in criminal law. The Constitution, in fact, has been interpreted to forbid criminal law based

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180 See *Dixon*, 548 US at 21–22 (considering, in passing, the consistency of the offense at hand with the duress defense).

181 See *Oakland Cannabis*, 532 US at 491 & n 4 ("The statute, to be sure, does not explicitly abrogate the defense. But its provisions leave no doubt that the defense is unavailable.").

182 See id at 491 n 4 ("Considering that we have never held necessity to be a viable justification for violating a federal statute ... and that such a defense would entail a social balancing that is better left to Congress, we decline to set the bar so high.").

183 Furthermore, this Comment's approach supports the *Raich* Court's emphasis on the political process in providing remedies for injustices resulting from congressional regulation and policy. See *Raich*, 545 US at 33.

184 See *United States v Patton*, 451 F3d 615, 638 (10th Cir 2006) ("[T]o allow [the defendant's] modified necessity defense ... might effectively read the statute out of existence."); *Schoon*, 971 F2d at 196–98 ("[T]he mere existence of a constitutional law or governmental policy cannot constitute a legally cognizable harm.").

on standards.[185] This Comment, however, by linking decisions regarding regulatory offenses to those concerning the necessity defense, suggests that in at least one respect courts are willing to adopt (and in fact should adopt) more standard-like adjudication for traditional criminal offenses than in the remainder of federal criminal law. The full implications of this outcome deserve further attention but are beyond this Comment's scope.

B. Preventing Unjust Convictions in Criminal Cases

This Comment's proposal having been explained and justified, this Part discusses the significance of implied unavailability of the necessity defense for future federal court decisions and places it in the context of federal common law defenses.

Eliminating the necessity defense in trials for mala prohibita where Congress had not specified the defense's availability will tend to reduce decision costs: it will make the courts more efficient by answering the question, in most cases, of whether the defense ought to be allowed. The concomitant risk of increased error costs—that is, of convictions for desirable or otherwise justifiable conduct—is small. As an initial matter, because mala prohibita present law at its most "positive" and least "natural," there will seldom be an inherent injustice in denying defendants the opportunity to claim that their private weighing of evils trumps that of the legislature in given cases.[186] Punishments for regulatory offenses are typically lighter than those of more traditional crimes and carry lesser stigma.

Furthermore, other common law defenses, including duress and self defense, should remain available in mala prohibita.[187] These defenses are distinguishable from necessity:[188] excuses imply diminished

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185 See Sunstein, 83 Cal L Rev at 968 & n 48 (cited in note 8).

186 In *United States v United States District Court for the Central District of California*, 858 F2d 534, 542–43 (9th Cir 1988), citing *Sorrells v United States*, 287 US 435, 450 (1932), the Ninth Circuit implied that courts have considerable leeway to introduce defenses to certain crimes in order to avoid "absurd or glaringly unjust" results. Some commentators have extrapolated from this case to advocate a "good faith" defense to certain regulatory offenses. See Levenson, 78 Cornell L Rev at 409 (cited in note 109). *United States District Court*, however, presented an instance of non-obscene pornography and so may be better treated as a use of the constitutional avoidance canon.

187 Compare *United States v Richardson*, 588 F2d 1235, 1238–39 (9th Cir 1978) (ruling out the necessity defense for violation of 18 USC § 545, which prohibits the importation of experimental drugs not approved by the FDA), with *United States v Dominguez-Mestas*, 929 F2d 1379, 1383–84 (9th Cir 1991) (allowing in principle the duress defense for the same offense).

188 See Part I.A.3. Furthermore, by concentrating on the defendant's state of mind in cases where duress is the only defense available, courts would be spared the challenge of identifying the lesser and greater of two evils, or of making moral judgments about the defendant, or even of

responsibility and blameworthiness on the part of the defendant,[189] rather than judicial approval of lawbreaking. As a result, these defenses compromise the rule-like nature of regulatory statutes less than necessity does.

In many cases where federal courts have sent the necessity defense to the jury, a duress instruction would have served the same purpose.[190] In at least one case, for example, the duress defense has been cited as the proper defense in prison escape cases.[191] This appears to show that the duress defense is available and effective, in principle, in cases where defendants might now assert necessity.[192]

Allowing the duress defense, but presuming the unavailability of necessity, makes economic sense as well. With mala in se offenses, the defendant typically harms a victim. As suggested in Part I.A, the defendant and the victim may have interacted under circumstances of either high transaction costs (which may force the defendant to infringe on the victim's rights), or of coercion of the former by the latter. Since either case is likely to appear frequently, both necessity and duress should be available as defenses.

With mala prohibita, however, the parties are the defendant and the state or society as a whole.[193] Coercion (apart, of course, from the legitimate coercive force which the state may apply) may come from

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determining what outcomes count as a harms in certain highly contentious cases. See Dressler, 62 S Cal L Rev at 1352, 1357–59 (cited in note 15) (emphasizing the importance of the defendant's free will to excuse); Parry, 36 Hous L Rev at 414–32 (cited in note 56) (attempting to explain the necessity defense in terms of culpability rather than a balancing of evils).

189 See Greenawalt, 84 Colum L Rev at 1900 (cited in note 174) (distinguishing the connotations of justification and excuse defenses based on whether the criminal action was "warranted").

190 Even in some early cases, the language courts used to describe the necessity defense is at least as well suited to an excuse such as duress. See Cohan, 10 Chap L Rev at 146–47 (cited in note 7).

191 See *United States v Michelson*, 559 F2d 567, 568 n 2 (9th Cir 1977) ("This Court adopts the duress rationale, however, both because of the harmony between the excuse analysis and prior duress cases, and because duress has generally been applied when the pressure upon the defendant stems from other human beings rather than from the physical forces of nature.").

192 This may represent a modern development on the common law distinction, addressed by Dressler, between natural forces causing necessity and human coercion causing duress. See Dressler, 62 S Cal L Rev at 1347–49 (cited in note 15). This view may hinge on the significance of there being an actual human will preempting that of the defendant. Id at 1374–76. Because the distinction between justification and excuse is probably more useful than that between the two different sorts of force, this Comment suggests that this new approach—but not the trend toward unifying duress and necessity—is worth continuing. Dressler concurs with this view. See id at 1376 & n 237. Self-defense, naturally, must still be limited to actions against human force.

193 See *Morissette*, 342 US at 256 ("While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted.").

external sources and compel the defendant to commit crimes against the state. But problems of high transaction costs will not apply with nearly so much urgency. In the violations of federal law described above, the defendants in most cases could have avoided necessity by approaching state officials, such as police officers or prison guards, or by more effective participation in the political process.

The fact that necessity has been claimed instead suggests that defendants have attempted to use necessity as a spongier, less demanding version of duress. Defendants who prefer illegal outcomes but whose wills are not in fact overborne are understandably inclined to urge courts to treat the statutes they are charged under as standards rather than rules. (In any case, involuntary and coerced acts need not be culpable, even in mala prohibita.[194]) This Comment's proposal, by helping to define which statutes may be so treated, forecloses this strategy in many cases. As a result, it is probable that presuming the unavailability of the necessity defense while retaining certain other defenses does not increase error costs dramatically.

Limiting the federal necessity defense to cases where Congress has reserved to defendants the opportunity to rationally calculate the merits of courses of action will lead to a certain number of cases where defendants are convicted for actions in the face of genuinely serious dilemmas. But court precedents in the field suggest that this need not be a fatal criticism of rules of law designed to properly reinforce legislative judgments.[195]

CONCLUSION

Whether the common law necessity defense should be available in federal criminal law should depend on the nature of the offense at issue. In some cases, the defense would fulfill its usual purpose. In others, it would undermine systems of statutory regulation, increasing decision costs without reducing error costs as it is supposed to do. This Comment has proposed that the availability of the necessity defense should turn on the question of whether the matter at issue falls into the first category or the latter. Sensitivity to the variety of criminal statutes will ensure that the needs of justice are best served.

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194 See id at 251, 264 n 24 (showing the effects of intent on the nature and seriousness of various homicide offenses).

195 See, for example, *Oakland Cannabis*, 532 US at 491–92.