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LEGISLATING THE NECESSITY DEFENSE IN CRIMINAL LAW

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INTRODUCTION

The necessity, or choice of evils, defense has not been raised very frequently. This is, no doubt, partly due to the relative rarity of such situations and to the fact that police and prosecutors screen out most of those cases that do come to their attention. The importance of this body of law, however, may increase as recodification of criminal law spreads. About 24 new criminal codes have been adopted in the past dozen years, and almost as many are in the legislative process. Many of these new codes have a section dealing with the necessity defense. This analysis is based largely on these new statutes and proposals, whether or not they have been enacted, as they are likely to be interpreted in light of the existing, but rather meager, case law of this defense.[1]

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[1] The statutory analysis in this article is based on the following documents. The status of these materials is in flux and should be checked by the reader if an up-to-date citation is required. Hereinafter, we will cite the source as noted.

Alaska: S. Bill 6, 9th Legis., 1st Sess. § 11.13.020 (undated) and H. Bill 524, 7th Legis., 2d Sess. § 11.13.020 (1972) [these provisions are identical and are hereinafter cited as ALAS.].

Arkansas: Ark. Crim. Code, Act 280 of 1975 § 504 (effective Jan. 1, 1976) [hereinafter cited as ARK.].

California: Joint Legislative Committee for Revision of the Penal Code, *The Criminal Code* § 610(b) (Staff Draft, undated) [hereinafter cited as CAL.]. This proposed statute is not included in S. Bill 565 (unamended version, 1975).

Colorado: COLO. REV. STAT. ANN. § 18-1-702 (1973) [hereinafter cited as COLO.].

Deleware: DEL. CODE ANN. tit. 11, § 463 (1974) [hereinafter cited as DEL.].

Hawaii: HAWAII REV. STAT. tit. 37, § 302 (1973) [hereinafter cited as HAWAII].

Idaho: IDAHO CODE § 18-302 (Supp. 1972, repealed 1972) [hereinafter cited as IDAHO].

Illinois: ILL. ANN. STAT. ch. 38, § 7-13 (Smith-Hurd 1961) [hereinafter cited as ILL.].

Indiana: Criminal Law Study Commission, *Indiana Penal Code* § 35-11.1-5-7 (Proposed Final Draft 1974) [hereinafter cited as IND.].

Kentucky: KY. REV. STAT. ANN. § 503.030 (1975) [hereinafter cited as KY.].

Our analysis leads to two general conclusions: legislation recognizing the defense is needed; and the proposal of the Model

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Maine: S.P. 113-L.D. 314, An Act Creating the Maine Criminal Code, tit. 17A, § 103 (enacted June 1975, effective March 1, 1976) [hereinafter cited as ME.].

Maryland: Commisson on Criminal Law, *Proposed Criminal Code* § 35.05(2) (1972) [hereinafter cited as MD.].

Massachusetts: Massachusetts Criminal Law Revision Commission, *Proposed Criminal Code of Massachusetts* § 40 (1972) [hereinafter cited as MASS.]. S. Bill 200 § 40 (1972), which contained the necessity defense, failed to pass.

Michigan: Special Committee of the Michigan State Bar for the Revision of the Criminal Code and Committee on Criminal Jurisprudence of the State Bar of Michigan, *Michigan Revised Criminal Code* § 605 (Final Draft 1967) [hereinafter cited as MICH.].

Missouri: The Committee to Draft a Modern Criminal Code, *The Proposed Criminal Code for the State of Missouri* § 8.040 (1973) [hereinafter cited as Mo.].

Nebraska: Legislative Bill 329, 83d Legis., 1st Sess. § 60 (1973) [hereinafter cited as NEB.].

New Hampshire: N.H. REV. STAT. ANN. § 627:3 (1974) [hereinafter cited as N.H.].

New Jersey: New Jersey Criminal Law Revision Comm'n, *Vol. I: Report and Penal Code & Vol. II: Commentary* § 2C:3-2 (Final Report, 1971) and Assembly No. 3282 § 2C:3-2 (1975) [hereinafter cited collectively as N.J.].

New York: N.Y. PENAL LAW § 35.05 (McKinney 1967) [hereinafter cited as N.Y.].

Oklahoma: Committee Substitute for S. Bill 46, 35th Legis., 1st Sess. § 1-303 (1975) [hereinafter cited as OKLA.].

Oregon: ORE. REV. STAT. § 161.200 (1973 Replacement Part) [hereinafter cited as ORE.].

Pennsylvania: PA. STAT. ANN. tit. 18, § 503 (1973) [hereinafter cited as PA.].

South Carolina: Proposed Draft of the South Carolina Criminal Code § 12.10 (1971) and S. Bill 278 § 12.10 (1973) [hereinafter collectively cited as S.C.].

Tennessee: Law Revision Commission, *Tennessee Criminal Code and Code of Criminal Procedure* § 39-721 (Proposed Final Draft, 1973) and S. Bill 600 § 721 (1975) [hereinafter collectively cited as TENN.].

Texas: TEX. PENAL CODE § 9.22 (1974) [hereinafter cited as TEX.].

Vermont: Proposed Criminal Code of Vermont § 202 (1970), deleted from H. Bill 419 (1975) [hereinafter cited as VT.].

Washington: Revised Washington Criminal Code § 9A.16.020 (1970), deleted from Substitute Bill 2092, 44th Legis., 1st Sess. (enacted 1975, effective 1976) [hereinafter cited as WASH.].

Wisconsin: WIS. STAT. ANN. § 939.47 (1956) [hereinafter cited as WIS.].

A.L.I. MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962) [hereinafter cited as MODEL PENAL CODE].

Kommentarii Kugolovnomu Kodeksu RSFSR (Commentary on the Criminal Code of the R.S.F.S.R. § 14, Moscow 1971) [trans. by T. Larkovich and H. Clark] [hereinafter cited as U.S.S.R.].

Penal Code is superior to later legislative efforts to improve upon it.

I. THE VOLUNTARY ACT REQUIREMENT DISTINGUISHED

The necessity defense always involves a voluntary choice on the part of the actor and should, therefore, be distinguished from the "defense" based on the absence of a voluntary act.[2]

> [T]o treat leaving the ship under stress of perils of the sea as not distinguishable on principle from being torn bodily away from it by tempest . . . is one of the oldest fallacies of the law. The difference between the two is the difference between an act and no act. The distinction is well settled in the parallel instance of duress by threats, as distinguished from overmastering physical force applied to a man's body and imparting to it the motion sought to be attributed to him.[3]

A frequent problem from the defendant's perspective is that his claim of involuntariness will be wrongly classed by the court as necessity. Thus, attention is focused on the *desirability* of compliance with the law, rather than on the *possibility* of compliance, which is the true issue in involuntariness cases. The involvement of natural forces often leads some authorities to misinterpret a defense based on the lack of a voluntary act and to misclassify the case as one of necessity. This misclassification occurred in one case where the defendant was under an obligation to maintain a

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[2] The word "necessity" . . . is somewhat misleading. Strictly speaking there is no necessity in the sense that the thing is inevitable or unavoidable. For if it were, then there would be the legal defence that the accused's act was not voluntary. In reality the position is that the person (perhaps with very good reason) much prefers to do the thing which he does rather than something else, which would be more unpleasant.

KENNY'S OUTLINES OF CRIMINAL LAW 67 (J. Turner ed. 1962).

> [T]he word "necessity" is only used by the defence to a charge of crime in what is the vain hope of making the criminal deed appear to have been the result either of involuntary conduct, or of some irresistible external compulsion, instead of being what it really was, the result of a voluntary choice of that alternative which the accused felt to be the less disagreeable to himself.

1 RUSSELL ON CRIME 93 (J. Turner ed. 1964).

[3] Mr. Justice Holmes in The Eliza Lines, 199 U.S. 119, 130 (1905). Jerome Hall distinguishes "harms caused solely by the operation of physical forces and harms which were inflicted under pressure of such forces" and relies upon Aristotelian metaphysics to develop the term "teleological necessity" to describe the act which is the proper subject of the necessity defense. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 425 (2d ed. 1960). *See also* Ross v. State, 169 Ind. 388, 390, 82 N.E. 781, 781 (1907), wherein the court stated, "there must be, if not a physical, at least a moral, necessity for the act." (dictum).

road that could not be maintained because of natural forces;[4] and in another case where a ship, because of a storm, was forced upon the shore of a foreign country without the required entry permit.[5] Most of these cases, as Jerome Hall points out, involve an omission to perform an affirmative duty.[6] It should be clear that a failure to act without the ability to act does not involve the justification of necessity. There is no crime to justify. Similarly, where the defendant was caught in a traffic jam, conviction for illegal parking could not be upheld; not because defendant made the right choice, but because he had no choice.[7] Courts have also applied the doctrine to cases where a more appropriate analysis would justify the defendant's conduct on the theory that it did not cause the harm anticipated by the statute or, in the alternative, that the defendant's action was not within the harm sought to be avoided by the statutory prohibition.[8]

II. RELATIONSHIP OF THE HARMS

Codification of the necessity defense has tended, in most instances, to increase the stringency of the required relationship of the harm committed to the harm avoided.[9] At common law the

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[4] Regina v. Bambler, 5 Q.B. 279 (1843).

[5] The Diana, 74 U.S. (7 Wall.) 354 (1868). *See generally* The Struggle, 13 U.S. (9 Cranch) 71 (1815); The William Grey, 29 F. Cas. 1300 (No. 17,694) (C.C.D.N.Y. 1810); The Gratitudine, 3 C. Rob. 240, 165 Eng. Rep. 450 (In. 1801).

[6] J. HALL, *supra* note 3, at 424; Commonwealth v. New York Cent. & H.R.R., 202 Mass. 394, 88 N.E. 764 (1909).

[7] Commonwealth v. Brooks, 99 Mass. 434 (1868).

[8] Chesapeake & O.R.R. v. Commonwealth, 119 Ky. 519, 84 S.W. 566 (1905); State v. Burris, 10 Ore. App. 297, 500 P.2d 265 (1972), and cases cited therein.

[9] A comparison of foreign jurisdictions reveals a variety of formulations of the relation: **Argentina:** "caused a harm in order to avert another greater and imminent harm," [1963] *Anales de Legislacion Argentina* art. 34 (Argentina Penal Code). *See also* 6 AMERICAN SERIES OF FOREIGN PENAL CODES 28 (G. Mueller ed. 1963) [hereinafter cited as AMERICAN SERIES]. **Denmark:** the interests to be sacrificed to avoid the harm must be of "relatively minor importance," DANISH COMM'N ON COMPARATIVE LAW, DANISH AND SWEDISH LAW ch. 9, § 23 (1963). **Egypt:** "the danger must be great, not merely great in proportion to the gravity of the offense committed [and it] must be one of bodily evil," Egyptian Penal Code, art. 61 (1937). **Greenland:** "necessary to prevent impending damage to persons or property, when the offense is relatively insignificant," Greenland Criminal Code § 6 (1954). *See also* 16 AMERICAN SERIES 16 (1970). **Japan:** "the injury produced by such act is not out of proportion to the injury which was sought to be averted," Penal Code of Japan, Art. 37. *But see* J. TAKEUCHI, A PREPARATORY DRAFT FOR THE REVISED PENAL CODE OF JAPAN, art. 14 (1964), which states "the harm resulting therefrom does not exceed the harm sought to be averted." *See also* 8 AMERICAN SERIES 23 (1964). **Norway:** speaks of the "danger as extremely significant in relation to the damage his act might cause," Norwegian Penal Code § 47 (1902). *See also* 3 AMERICAN SERIES 29 (1961). **Poland:** "the

required relationship was that "the evil inflicted by [the defendant's act] was not disproportionate to the evil avoided."[10] The Model Penal Code and some of its adherents require the harm avoided to be "greater than" the harm done,[11] but some states go further and require that the harm averted "clearly outweigh" the harm caused.[12] The New York code is the strictest. It requires that "the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue."[13] Whether this issue can be clarified through objective criteria provided by legislation seems doubtful. The commentary to the Texas code, which adopts the New York language, underscores this point: "[W]hat is 'harm' and what 'harms' are greater than others are questions purposefully left for case-by-case determination . . . . [T]his is inevitable in stating a general principle . . . ."[14] Furthermore, some crimes deal with behavior that has no harm component.[15]

New York introduced a further explicit limitation on the balancing of the evils: "The necessity and justifiability of [the defendant's] conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder."[16] The New York com-

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good sacrificed does not represent a value manifestly greater than the good being rescued," Polish People's Republic Penal Code, art. 23 (1969). *See also* 19 AMERICAN SERIES 39 (1973). **Republic of China:** "the act averting danger [may not be] excessive," Republic of China Criminal Code art. 24; *see* 2 COMPILATION OF THE LAWS OF THE REPUBLIC OF CHINA 187 (D. Kang ed. 1971). **Soviet Union:** the "harm caused is less significant than the harm prevented," R.S.F.S.R. 1960 UGOL. KOD. (Criminal Code) § 14 (amended through July 1965) (U.S.S.R.). *See also* SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES 149 (2d ed. H. Berman & J. Spindler transl. 1972); Berman, *Principles of Soviet Criminal Law*, 56 YALE L.J. 803 (1947).

[10] J. STEPHAN, DIGEST OF THE CRIMINAL LAW, art. 32 (1878). *See also* Chesapeake & O.R.R. v. Commonwealth, 119 Ky. 519, 84 S.W. 566 (1905).

[11] MODEL PENAL CODE § 3.02 (Tent. Draft No. 8, 1958); *see* ALAS.; HAWAII; IDAHO; ILL.; IND.; KY.; NEB.; OKLA.; PA.; VT.; WASH.

[12] *See* COLO.; DEL.; ME.; MD.; MICH.; N.Y.; ORE.; S.C.; TEX.

[13] N.Y.

[14] TEX., Comment.

[15] It is precisely this absence of harm which makes much police work known as encouragement legally acceptable; *see* Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871 (1963).

[16] N.Y. States which have adopted New York's limitations are: ARK.; COLO.; DEL.; IND.; MD.; MICH.; MO.; ORE.

mentary points out that this provision renders the necessity defense "unavailable to the mercy killer, the crusader who considers a penal statute unsalutary because it tends to obstruct his cause, and the like."[17]

The thrust of this limitation is aimed at withholding the defense from persons attempting to justify acts of civil disobedience. However, courts have obtained the same result in the absence of legislative guidance by finding defendants unable to satisfy other elements of the defense, including imminence,[18] lack of alternatives,[19] and a reasonable nexus between the defendant's act and the harm sought to be avoided.[20] The doctrine of necessity is generically inappropriate to justify acts of civil disobedience, since the defendant's conduct, rather than attempting to directly avoid a specific harm, attempts to transcend accepted democratic processes and seeks to change a political decision of society which may only secondarily avoid a particular harm or evil.[21]

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[17] N.Y., Comment. In order to avoid possible confusion in interpreting the restriction, the commentary to the proposed Maryland statute says

> [t]he New York provision states that the defense may not rest on considerations pertaining "only" to the morality and advisability of the statute; this suggests that such considerations may properly be considered as a partial contribution to the defense. The Commission believes that they should not be relevant at all, and has therefore deleted the word "only".

MD., Comment.

[18] Where prisoners in a correctional institution held guards and civilians as hostages under threats to kill them if needed improvements in living conditions within the institution were not made, a New York court denied the necessity defense since the conduct could not be found to be "necessary as an emergency measure to avoid an imminent public or private injury which is about to occur." People v. Brown, 70 Misc. 2d 224, 333 N.Y.S.2d 342, 347 (1972).

[19] Finding that alternative opportunities for noncriminal protest were available; and that "the harmful acts to be prevented by defendants' actions were, at best, only tenuously connected with the situs of the crime" and were "not reasonably designed to actually prevent the threatened greater harm." State v. Marley, 54 Hawaii 450, 458, 509 P.2d 1095, 1109 (1973), upheld the conviction of defendants on charges of criminal trespass to private property during an attempt to stop "war crimes" by a major defense contractor.

[20] In United States v. Simpson, 460 F.2d 515 (9th Cir. 1972), defendant was convicted on charges of having destroyed government property. The court found an essential element of the necessity defense to be that "a direct causal relationship be reasonably anticipated to exist between the defender's action and the avoidance of harm," and held that it was unreasonable for defendant to assume that burning local draft board records would terminate United States involvement in the war in Southeast Asia. *Id.* at 518.

[21] Where defendant burned selective service records during an antiwar protest, United States v. Cullen, 454 F.2d 386 (7th Cir. 1971), the court rejected defendant's necessity defense and concluded that:

> [o]ne who elects to serve mankind by taking the law into his own hands

III. LIMITATIONS ON THE HARM THREATENED

At common law it seems to have been a generally recognized requirement of the necessity defense that the harm threatened be "imminent," although there is some confusion about the term's meaning. Under the current statutes and proposals it is unclear if there is a division of opinion on the "imminence" question. The Model Penal Code and many others have no such explicit requirement. On the other hand, New York and its followers appear to be quite rigid, requiring that defendant's conduct be "necessary as an emergency measure to avoid an *imminent* public or private injury."[22] Under codes taking the Model Penal Code approach of omitting an explicit reference to "imminence," a court could, of course, infer such a requirement from the words "necessary" or "emergency measure."[23]

Where imminence is thought to be a requirement, however, its meaning may be misunderstood, resulting in an erroneous limitation on the defense. The lay definition of "imminent" is "likely to happen *without delay.*"[24] However, given the purposes served by the necessity doctrine in criminal law, the proper use of the imminence requirement is to focus attention on the probability of the threatened harm actually occurring. While immediacy is obviously relevant to making that determination, the mistake sometimes made is to assume that it is all that is relevant, obscuring the point that other factors are also potentially rele-

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thereby demonstrates his conviction that his own ability to determine policy is superior to democratic decision making. [Defendant's] professed unselfish motivation, rather than a justification, actually identifies a form of arrogance which organized society cannot tolerate.

Id. at 392. *See also* Chase v. United States, 468 F.2d 141 (7th Cir. 1972); United States v. Kroncke, 459 F.2d 697 (8th Cir. 1972). The judicial concern towards this attitude about law is nicely represented by R. BOLT, A MAN FOR ALL SEASONS 66 (1960):

> *More:* [Would you] cut a great road through the law to get after the Devil?
>
> *Roper:* I'd cut down every law in England to do that!
>
> *More:* And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast . . . and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

[22] N.Y.; WIS.

[23] Texas requires the actor's conduct be "immediately necessary." TEX. Tennessee has used the same language. TENN.

[24] WEBSTER'S NEW WORLD DICTIONARY (2d College ed., 1970) (emphasis added).

vant. Furthermore, the existence *vel non* of reasonable alternatives ought to be relevant to determining whether the threatened harm is imminent: the threatened harm should not be considered imminent if there were alternative ways of preventing it other than by the commission of a crime.

In *Aldrich v. Wright*[25] the court observed:

> The term "imminent" does not describe the proximity of the danger by any rule of mechanical measurement . . . . The law does not fix the distance of time between the justifiable defense and the mischief, for all cases, by the clock or the calendar. The chronological part of the doctrine of defense, like the rest of it, is a matter of reasonableness; and reasonableness depends upon circumstances.[26]

The strongest recognition of this view is found in the commentary to the Missouri Proposed Code which, being patterned after New York's, includes the "imminent" requirement:

> [I]t must be remembered that what constitutes "emergency measure" and "imminent" does not depend solely on the interval of time before the injury sought to be prevented will occur. Additional circumstances of the particular fact situation must also be evaluated. Thus, if under the circumstances, the mere passage of time is such that a reasonable man would perceive no viable alternatives to his present course of conduct the fact that the injury sought to be prevented will not take place for some time hence, e.g., six hours, will not prevent the use of the defense of justification under this section, provided it is otherwise available.[27]

Yet, of all the states that use the same or an equivalent term, only the Missouri commentary makes it clear that imminence is not exclusively a temporal component.

In the context of the more specific justification of self-defense, it has been pointed out that "[i]f the threatened violence is scheduled to arrive in the more distant future, there may be avenues open to the defendant to prevent it other than to kill or injure the prospective attacker; but this is not so where the attack is imminent."[28] Thus, temporal "imminence" of the threat

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[25] 53 N.H. 398, 16 Am. Rep. 339 (1873). *See also* Reid, *Of Men, and Minks, and a Mischievous Machinator*, 1 N.H.B.J. 23 (1959).

[26] 53 N.H. at 402, 16 Am. Rep. at 344-45.

[27] MO., Commentary (1973). *See also* R.S.F.S.R. 1960 UGOL. KOD. (Criminal Code) § 14 (amended through July 1965) (U.S.S.R.), where "[e]xtreme necessity" is a defense when, *inter alia*, "such danger cannot be eliminated by other means," but the threat must be "real and immediate." *Id.* at 37.

[28] W. LAFAVE & A. SCOTT, CRIMINAL LAW 394 (1972) [hereinafter cited as LAFAVE & SCOTT].

may be defense evidence of a lack of alternatives, but the absence of temporal "imminence" is not proof of the existence of alternatives. A hypothetical self-defense case has been described as follows:

> [A] cuckholded husband [who] imprisons and chains his wife's latest lover in an abandoned cellar with the announced intention of killing him after the passage of sufficient time for the stir over his absence to quiet down, probably several months. Must the intended victim wait until the final moment when the husband is about to commit the fatal act, or may he kill the husband in self-defense at any time during the period of imprisonment he can succeed in laying hands upon him?[29]

Surely the answer to the question is clear. If the defendant has no alternative, the threatened harm need not be imminent in the lay and literal meaning of that term, that is, in time.

The second major failure of the case law development of necessity, even when recognizing that the purpose of the imminence requirement is, in part, to focus attention on the question of whether there were alternative and less drastic courses of action that would have averted the harm, has been the proclivity of judges to find, after the fact, the existence of unrealistic or unreasonable alternatives. In the famous case of *Regina v. Dudley & Stephens,*[30] the jury made a special finding of fact that at the time defendants killed, they had no *reasonable* prospect of rescue.[31] In discussing this case, Justice Cardozo said: "who shall know when masts and sails of rescue may emerge out of the fog?"[32] Under such a view, is death by starvation ever imminent? Jerome Hall has pointed out that:

> It is therefore clear that neither the English court nor Cardozo considered the ethics of the doctrine of necessity. They rejected the

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> It is sometimes said that the defense of necessity does not apply except in an emergency—when the threatened harm is immediate, the threatened disaster imminent. Perhaps this is but a way of saying that, until the time comes when the threatened harm is immediate, there are generally options open to the defendant, to avoid the harm, other than the option of disobeying the literal terms of the law—the rescue ship may appear, the storm may pass; and so the defendant must wait until that hope of survival disappears.

Id. at 388.

[29] S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 497 (1969), evidently based on Edgar Alan Poe's "The Cask of Amontillado."

[30] 14 Q.B.D. 273 (1884).

[31] *Id.*

[32] B. CARDOZO, LAW AND LITERATURE 113 (1930).

> doctrine because, in effect, they denied that a state of necessity could ever exist. Such repudiation of the doctrine of necessity amounts not to the invalidation of the principle to conserve the maximum value possible but to such a challenge of it on empirical grounds as to guarantee that it could never be applied.[33]

The persistence of these problems is clearly illustrated by a consideration of the prison escape cases when necessity is raised as a defense. One of the worst examples of this is found in *State v. Green*.[34] The 19-year-old defendant had been repeatedly attacked and homosexually raped by a number of inmates. After several unsuccessful requests for protection from prison officials, he was allegedly told to defend himself, submit, or "go over the fence." On the day of his escape, the defendant was confronted by five inmates who threatened him with death or serious bodily injury if he did not agree to submit to homosexual acts during the remainder of his term at the training center. They were going to return that night. That evening, before the inmates returned, the defendant escaped. The Missouri Supreme Court held the necess-

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[33] J. HALL, *supra* note 3, at 434.

> To say that a threat of future harm is not sufficient is to ignore the fact that the nature of a threat is to hold out a future harm. All danger to the "duressed" is in the future, for if it were in the present it would no longer be a danger or a threat but would be an accomplished harm. Wherever danger is the spring for human action, as when one seeks to avoid it, such avoidance implies a temporality not coterminous with the harm threatened. It is equally true that all harms done have been past threats, since these threats occur before the "duressed" acts. Thus, where the courts have required present danger to life rather than past or future fear of danger to life, such distinctions are meaningless. To be present, the threat or harm threatened would have to occur contemporaneously with the act done. . . .
>
> A better approach would be to . . . state that the threat . . . must occur within a "reasonable" time *before* . . . the harm . . . .

Newman & Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. CAL. L. REV. 313, 328-29 (1957).

[34] 470 S.W.2d 565 (Mo. 1971), *cert. denied*, 405 U.S. 1073 (1972); Note, *Necessity As a Defense*, 37 MO. L. REV. 550 (1972). Even the most gruesome and intolerable living conditions historically have afforded no justification. Aderhold v. Soileau, 67 F.2d 259 (5th Cir. 1933); People v. Whipple, 100 Cal. App. 261, 279 P. 1008 (1929); State v. Palmer, 45 Del. 308, 72 A.2d 442 (1950); State v. Cahill, 196 Iowa 486, 194 N.W. 191 (1923); State v. Davis, 14 Nev. 439, 33 Am. Rep. 563 (1880). However, an inmate may leave a burning prison to save his life. Baender v. Barnett, 255 U.S. 224 (1921). The distortion of the necessity defense in prison escape cases—cases to which it clearly applies—undoubtedly results from the courts' own "necessity" predicament. Those courts which reject the defense in that context are simply making the value judgment that recognition of the defense would lead to harms greater than the threat to escaping prisoners who raise the defense.

ity defense unavailable, since defendant had not adequately pursued alternative courses of action. They not only stressed alternatives that may have resulted in Green's death, but also held that the threatened danger which occasioned his escape was too remote in time from the commission of the offense.[35] The one dissenting justice pointed out the illusory nature of any alternative remedies, due to the reality of prison life and the defendant's previous experience.[36] The requirement of temporal immimence does not serve its normal purpose in this situation; the mere passage of time does not make reasonable alternatives available. The recognition in the Commentary to the Missouri Proposed Code that "imminence" is not exclusively a temporal concept may help overturn the majority opinion in *Green*.

A Michigan court of appeals, in a similar situation in *People v. Noble*,[37] had earlier refused to allow the defense. However, a different Michigan court of appeals, in *People v. Harmon*,[38] disagreed with the decision in *Noble* stating that "[t]he facts in [such a case] were more than sufficient to require the submission of the defense . . . to the jury" and that *"whether the alleged danger was immediate or imminent is, in all but the clearest cases, to be decided by the trier of fact taking into consideration all the surrounding circumstances, including the defendant's opportunity and ability to avoid the feared harm."*[39]

The court in *Noble* recognized that conditions in Michigan penal institutions were in need of reform, but maintained that such a reform was properly left to the legislature. However, while agreeing with the statement that "penal reform by the Legislature is the best solution to this difficult problem," the *Harmon* court did not "because of that fact, preclude a defendant from presenting available defenses."[40] Five years after the decision in *Noble*, and in the same year as *Harmon*, the division of the court

[35] 470 S.W.2d at 568. It should be noted that in Missouri, a person may use such force as is reasonably necessary to prevent a forcible attack of sodomy, even if such force results in the death of the attacker. State v. Robinson, 328 S.W.2d 667 (Mo. 1959); MO. ANN. STAT. § 559.040 (Vernon's 1953).

[36] 470 S.W.2d at 568-71.

[37] 18 Mich. App. 300, 170 N.W.2d 916 (1969).

[38] People v. Harmon, 58 Mich. App. 482, 484, 220 N.W.2d 212, 214 (1974).

[39] *Id.* at 485, 220 N.W.2d at 215 (emphasis added).

[40] *Id.*

of appeals that had decided *Noble* held in *People v. Luther*[41] that it was error to instruct a jury that necessity was not a defense to a charge of escape. *Noble* was not even cited. This year the Supreme Court of Michigan affirmed both *Luther*[42] and *Harmon*[43] and took the position that *Noble* did not really address the issue at hand. In *Harmon,* the Michigan Supreme Court pointed out that the defendant did not leave the prison until 24 hours after the homosexual threat, and nevertheless affirmed the opinion of the court of appeals, presumably indicating approval of the language quoted above from that decision.[44] Unfortunately, the court refers to the defense as "duress" thereby further confusing the distinction between duress and necessity.

In 1929 a California appeals court also rejected the defense of necessity in a prison escape case, *People v. Whipple.*[45] The court stated that "if no statutory excuse or justification apply as to the commission of the particular offense, neither the common law nor the so-called 'unwritten law' may legally supply it." Since the existing California Penal Code did not recognize a justification of necessity, neither did the court, despite the claim of "brutal treatment of extreme atrocity" by prison authorities.[46] *People v. Richards*[47] later upheld *Whipple* by rejecting a nonstatutory justification of necessity. There the defendant's escape was not found to be justified by duress,[48] since the threats were intended to force the defendant to commit homosexual acts, and were not intended to force him to escape.[49] However, a different California appellate court, in *People v. Lovercamp,*[50] held the necessity defense to an escape charge a "viable defense," but placed "rigid limitations" on that "viability" by making it available only under

[41] 53 Mich. App. 648, 219 N.W.2d 812 (1974).

[42] 232 N.W.2d 184 (Mich. 1975).

[43] 232 N.W.2d 187 (Mich. 1975).

[44] *Id.* at 188.

[45] 100 Cal. App. 261, 279 P. 1008 (1929); a similar result was reached in State v. Pearson, 15 Utah 2d 353, 393 P.2d 390 (1964).

[46] 100 Cal. App. 261, 267, 279 P. 1008, 1009-10 (1929). *See also* Note, *Duress and the Prison Escape: A New Use for an Old Defense,* 45 S. CAL. L. REV. 1062 (1972); Comment, *Escape: The Defenses of Duress and Necessity,* 6 U.S.F.L. REV. 430 (1972).

[47] 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1969), *citing* CAL. PENAL CODE § 26(8) (West 1969).

[48] *Id.* at 773-74, 75 Cal. Rptr. at 601.

[49] *Id.*

[50] 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974).

certain conditions.[51] Thus, the appellate courts of California are now divided on whether the necessity defense is available in prison escape cases. The Supreme Court of California has yet to address the question.

The Arizona Supreme Court[52] has followed the *Whipple-Richards* line of cases. Lack of imminence was also stressed by the Kansas Supreme Court in what was technically a duress situation,[53] when a deputy warden, according to defendant's offer of proof, threatened to kill him if he did not escape.

Two other cases may provide some inferential support for the *Harmon-Lovercamp* approach allowing the defense. In *Matthews v. State,*[54] the Supreme Court of Mississippi, in rejecting the defense argument that it was error to refuse to let the defendants present their evidence to the jury, stressed the fact that:

> [T]he failure of a prisoner to immediately return to lawful custody after the impending danger has been avoided, is within itself an escape and prevents a defense of escape because of necessity . . . .
>
> In the instant case the prisoners not only made their immediate escape from the alleged impending danger, but they continued to flee farther away from the place of their lawful confinement.[55]

The court also appears to have been influenced by the fact that the defendants had used a gun to effectuate their escape, a fact also present in the Arizona case.[56]

A recent Colorado Supreme Court case is less clear. In *People*

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[51] *Id.* at 827, 118 Cal. Rptr. at 112.

> (1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future; (2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory; (3) There is no time or opportunity to resort to the courts; (4) There is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and (5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.

Id. at 831-32, 118 Cal. Rptr. at 115 (footnote omitted). Although an inmate may be justified in escape from a penal institution, to thereafter remain at large on his own volition constitutes the crime of escape. United States v. Chapman, 455 F.2d 746, 749-50 (5th Cir. 1972).

[52] State v. Alberigo, 109 Ariz. 294, 508 P.2d 1156 (1973).

[53] State v. Milum, 213 Kan. 581, 516 P.2d 984 (1973), decided under KAN. STAT. ANN. 21-3209(1) (Supp. 1972) (a compulsion statute).

[54] 288 So. 2d 712 (Miss. 1974).

[55] *Id.* at 714.

[56] State v. Alberigo, 109 Ariz. 294, 508 P.2d 1156 (1973).

v. Barker,[57] the defendant was threatened by other prisoners. Defendant contended the trial court had committed error by refusing his motion for a directed verdict. The court said:

> Whether or not defendant's theory of the case constituted a viable defense to the crime of escape is beyond the pale of our immediate concern; nonetheless, this theory of duress [*sic*] as an excuse was fully presented to the jury by the trial court in its instructions. The jury, by its verdict, found the facts othewise than as contended by the defendant and his witnesses.[58]

Whether any weight was given on appeal to the fact that Barker did not turn himself in is unclear. The state's brief quoted from that part of the *Matthews* opinion quoted above, and pointed out that Barker was arrested in California almost a year after the escape.[59] While the court did advert to the fact that the defendant was arrested in California, if the jury was properly instructed on the necessity defense and found the escape unjustified, there was no reason for the court to go into the matter.

The courts are divided on the escape cases. Some stress the limitation on the defense of necessity that the harm threatened must be "imminent," and then find that it was not. They also stress unreasonable alternatives. Other courts require the defendant to terminate the continuing nature of the harm done (escape) by turning himself in when he has reached safety, and there is slight authority in these cases that the harm of escape must not be enhanced by use of a deadly weapon. It should be noted that none of these cases was decided under a modern necessity statute.

The already all too common judicial practice in prison escape cases of stressing unrealistic alternatives and the judicial habit of assuming that "imminence" is to be "measured by the clock" even in the prison context have both been given recent impetus by the Colorado Court of Appeals in *People v. Robertson*,[60] an opinion that not only perpetuates these approaches, but significantly expands them.

First, the defendant was not convicted of escape but of possession of a weapon in prison.[61] The defendant testified that he

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[57] 538 P.2d 109 (Colo. 1975).

[58] *Id.* at 109-10. While the court used the term "duress," presumably the reference should have been to necessity.

[59] Answer Brief for Appellee at 4, People v. Barker, 538 P.2d 109 (Colo. 1975).

[60] No. 75-088 (Colo. Ct. App., Sept. 3, 1975), 4 COLO. LAWYER 2130 (Nov. 1975).

[61] COLO. REV. STAT. ANN. § 18-8-203(1)(b) (1973).

left his cell in the morning of the day of the offense and locked it. When he returned later in the day it was open and his mattress had been moved. He looked under it and found a knife. He testified that he did not want to turn the knife in to the authorities for fear other inmates would learn of his cooperation. He said he was caught with the knife on his way to try to dispose of it himself. An official evidently partly corroborated his testimony regarding his fear of assault if he became known as one who cooperated with prison authorities. Thus, *Robertson* is the first necessity case to arise in the prison context that does not involve outright escape.

Secondly, *Robertson* is the first prison case to be decided under a modern necessity statute. The Colorado statute provides in part:

> [C]onduct which would otherwise constitute an offense is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no conduct of the actor, and which is of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.[62]

Thirdly, the appeal was taken because the trial court took the necessity defense from the jury and decided on its own that the defense was not made out by the testimony offered at trial. A trial court has statutory authority to do this under the Colorado provision that

> [w]henever evidence relating to the defense of justification is offered by the defendant, before it is submitted for the consideration of the jury, the court shall first rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification.[63]

This language originated in the New York statute and was copied in the Michigan proposal which served as the model for Colorado. The commentary to the Michigan code states:

> To control possible misuse of the "choice of evils" concept, the trial judge is to screen the evidence offered by the defense before the jury

[62] *Id.* § 18-1-702(1).
[63] *Id.* § 18-1-702(2).

> hears it; if the matter is mishandled it becomes a question on appeal.[64]

The Colorado Court of Appeals held that "an allegation by a defendant of a generalized fear of retaliation will not support the defense. Put simply, the threat to defendant's person must be so definite, specific, and imminent as to rise beyond mere speculation."[65] This application of the statutory "imminence" requirement was derived from *People v. Lovercamp,* the California Court of Appeals decision discussed earlier.[66]

There is an even more troublesome question about this case quite apart from the overly stringent definition of imminence. If one steps back a very short distance from this opinion, that question becomes clear: Why is Robertson being punished for what he did? He harmed no legally protected interest. He did not even increase the risk of harm to anyone as escape cases may tend to do. In fact, his conduct may have tended to decrease risk—he was trying to secretly dispose of a weapon.

The heart of the necessity defense involves a balancing of harms—the harm threatened against the harm done. How can the balance be tipped against a defendant who did *no* harm solely because the harm threatened might be thought by some to be too remote to satisfy a strict interpretation of the term "imminent"? No matter how improbable or temporally remote the threatened harm, should not the scales be tipped in favor of a defendant who sought to avoid that threatened harm by an act that posed no threat to anyone? The answer, we believe, lies not in the holding that the defendant's testimony did not satisfy the Colorado statutory definition of the necessity defense; the point rather seems to be that no one *believed* Robertson. Thus, despite the necessity defense being raised under a modern statute—indeed, largely because of it—defendant was allowed to be convicted of a harmless act (if the defendant's version is to be believed) in a prison setting without even being allowed to take his defense to the jury. We have serious questions regarding the consistency of this practice with the defendant's constitutional right to a jury trial.[67]

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[64] MICH. at 61.

[65] 4 COLO. LAWYER at 2131.

[66] *See* text accompanying notes 50-51 *supra.*

[67] Duncan v. Louisiana, 391 U.S. 145 (1968).

In addition to the imminence requirement, some jurisdictions further require the action of the defendant to be an "emergency measure."[68] New York finds this necessary so as to closely "limit its application and to preclude extension beyond the narrow scope intended."[69] Maryland has also added this phrase, finding that it "is probably sound caution; true necessity situations involve emergencies."[70] The commentary to the Massachusetts proposal refers to an "emergency situation," although the statute itself is silent on the point.[71] The Colorado Court of Appeals could as well have relied on this limitation to affirm Robertson's conviction.

Apart from the imminence limitation and the relational requirement that the harm threatened be greater than the harm done, most proposed codes and existing statutes do not limit the threats of harm which justify a person in committing what would otherwise be a crime. While most jurisdictions merely require that a "harm" or a "harm or evil" be avoided or sought to be avoided,[72] Illinois, New York, and some others require a "public or private injury,"[73] even though there appears to be no significance intended in the distinction. Wisconsin, however, requires a threat of public disaster, death, or great bodily harm.[74] California added "serious damage to property" to the Wisconsin formulation.[75]

Most new codes require that the actor entertain a "reasonable belief in the necessity of his conduct."[76] However, the New York statute and the states following it insist the actor be *right*—not just reasonable. The defense is available only when "such conduct is necessary" to avoid the injury.[77] None of the commentaries to statutes taking the New York approach explain

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[68] *See, e.g.*, ARK.; COLO.; DEL.; MD.; MICH.; MO.; N.Y.; ORE.

[69] N.Y., Comment. *See also* People v. Brown, 70 Misc. 2d 224, 333 N.Y.S.2d 342 (Sup. Ct. 1972).

[70] MD., Comment.

[71] *See, e.g.*, MASS.

[72] *See, e.g.*, PA.

[73] ILL.; N.Y.

[74] WIS.

[75] CAL. Maine restricts it to "physical harm to himself or another." ME. The limitation found in Wisconsin and California is comparable to the limitations on the duress defense at common law. LAFAVE & SCOTT at 374.

[76] *See* note 125 *infra*.

[77] *See* note 114 *infra*.

why criminal liability should depend on the actor being right, rather than reasonable. And since necessity is composed of three elements—perception of a threat of harm, absence of less drastic alternatives, and a value choice—under the New York formulation, the actor is required, presumably, to be right about all three of these components. Most jurisdictions require only that the actor be right in his value choice, not in his assessment of the necessity for such a choice. Other defenses, including the use of deadly force, are less restrictive.

What constitutes an acceptable source of the threatened injury has been categorically limited by some authorities to a *force majeur* or the "physical forces of nature."[78] This limitation requires the defendant to argue the duress justification rather than necessity when "natural" forces are not involved. The duress defense is usually (and inexplicably) more limited than is the necessity defense. Among other differences, it is required that some person intended by his conduct to coerce the defendant to commit a crime. Hence, duress is not available when defendant escapes prison to avoid harm to himself from authorities or other prisoners, since they did not intend defendant to escape.[79] To improperly classify defendant's necessity defense as a duress defense will, therefore, cause him to lose. To insist upon a duress-or-nothing approach, merely because human agency was culpably involved in bringing about the choice of evils situation, is clearly wrong. Indeed, it is often possible to find culpable human activity

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[78] LAFAVE & SCOTT at 381. However, a contrary view has been expressed.

> [T]here would be grave difficulties if a person's right to protect himself or another against, for instance, a danger created by fire, or an animal, turned on whether some person had caused the fire or had failed in his responsibility to control the animal. There is nothing to suggest that English law makes any such distinctions.

Glazebrook, *The Necessity Plea in English Criminal Law*, 30 CAMB. L.J. 87, 89 (1972) (footnote omitted). *See also* U.S.S.R. at 36:

> A danger that is alleviated in the state of extreme necessity can originate from different sources: from the action of natural forces (floods, fires started from lightening, etc.), or any mechanism (for instance a car without brakes), or from the attack of an animal. Danger can be provoked also by a man who is harming or threatening harm to any legally protected interests.

(Footnotes omitted.)

[79] Duress was properly relied upon in State v. Milum, 213 Kan. 581, 516 P.2d 984 (1973), because defendant was told by a deputy warden that he would kill him if he did not "run off." *Id.* at 583, 516 P.2d at 985. Defendant still lost his appeal on the "imminence" requirement.

behind the problematic situation even when it is conceded that the case is properly one of necessity. For example, if one leaves the scene of a car crash to rush an injured person to a hospital, human agency brought about the choice of evils situation, but no one would suggest that the driver's defense is duress-or-nothing. This is recognized by the codes in their virtually universal rejection of any limitation on the defense because of the source of the threatened harm. The lone exception is Wisconsin, which requires the "pressure of natural physical forces."[80] Classification problems will continue to exist even though, except in Wisconsin, choice of evils is not restricted to *force majeur* situations. The reason is that, given an adequately drafted necessity statute, there is no need for the more limited justification provided by the duress or coercion statutes.

A further question arises concerning the nature of the harm sought to be avoided—must the event threatened actually involve a harm or will it suffice if it is a crime? For instance, may the actor steal and destroy another's cache of marijuana, in order to prevent the other person from using or selling it? It is perhaps for cases such as this that the Model Penal Code uses the phrase "to avoid a harm or *evil*."[81] If the actor is limited to preventing "injury," as in New York, his case appears more difficult than if he is permitted to avoid "evils" as well.

At one time, the question whether a person who stole food as the only means of preventing his imminent death by starvation could be justified by necessity gave rise to considerable discussion

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[80] WIS.

[81] MODEL PENAL CODE § 3.02 (Tent. Draft No. 8, 1958).

> MR. SMITHERS: I have perhaps a picayune one. Is the word "evil" defined anywhere in this Code?
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> PROFESSOR WECHSLER: No, it is not. It was used deliberately rather than "harm" which is in some ways more conventional, because we thought it a word of broader meaning. If you are thinking only of personal crimes, crimes of personal violence, "harm" would be a better word; but we must have in mind even regulatory offenses, for example, given in the comments. There is the illustration of a physician who dispenses a limited drug in what he considers to be an emergency without prescription.
>
> There I think that all the evils that the Harrison Act is directed at would have to be taken into account in determining whether the emergency justified the violation.
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> It is, incidentally, the word that Holmes used in The Common Law in his essay on the criminal law.

ALI PROCEEDINGS 229 (1958).

among legal scholars.[82] Although legal scholars remained rather evenly divided on the subject, moral philosophers generally agreed that such an act was not ethically culpable.[83] There is no American case which directly addresses the question. In *State v. Moe*[84] the Washington State Supreme Court upheld the conviction of the defendants for grand larceny and riot when, during a demonstration in support of a demand for a greater allowance of flour from the Red Cross relief committee, the crowd entered a nearby store and "helped themselves to groceries." The court stated that "economic necessity has never been accepted as a defense to a criminal charge."[85] The precise issue in the case arose because the trial court excluded general "evidence of economic conditions at and before the time the offenses charged occurred . . . ."[86] The comment to the proposed Washington State necessity statute, a statute which was not adopted, concluded that "this section is not inconsistent with *Moe,* if for no other reason than the implicit holding in the case that that particular conduct produced greater harm or evil than the harm or evil it was designed to avoid."[87] The court in *Moe* was correct in denying the defense because an imminent threat was not alleged nor was it alleged that he lacked reasonable alternatives.[88] The difficulty with the opinion is that that court classed the defendant's defense as "economic necessity" and then held that "economic necessity" is *never* a defense. This is too broad and subject to misunderstanding. If all the other elements of the necessity defense are satisfied, it is of no significance that the cause of the immediate harm

[82] *See generally* G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 236 (2d ed. 1961).

[83] *See, e.g.,* T. AQUINAS, SUMMA THEOLOGIAE II-II, q. 66, a. 6; and V. BOURKE, ETHICS 389 (2d ed. 1966). Blackstone took the position that the defense in these circumstances was "an unwarranted doctrine" and "antiquated, the law of England admitting no such excuse." 4 W. BLACKSTONE, COMMENTARIES 31.

[84] 174 Wash. 303, 24 P.2d 638 (1929). *See also* United States v. Palmer, 458 F.2d 663, 665 (9th Cir. 1972); Harris v. State, 486 S.W.2d 573, 574 (Tex. Crim. App. 1972).

[85] 174 Wash. 303, 307, 24 P.2d 638, 640 (1929).

[86] *Id.* at 306, 24 P.2d at 638.

[87] WASH., Comment.

[88] Although defendants had demanded more flour from the Red Cross, it was never alleged that defendants or others were suffering from starvation or malnutrition or were threatened with any type of bodily injury due to a shortage of food. The fact that they did not possess as much flour as they may have liked, does not constitute the "harm or evil" required now by statute nor then by common law. Nor was it alleged that defendants were without reasonable alternatives for procuring food.

may be "economic." None of the new statutes place an "economic necessity" limitation on the defense.

Whether the defendant was successful in averting the threatened harm appears to be irrelevant. This is most clear under statutes which refer only to the harm "sought to be avoided"[89] or "the harm which the actor seeks to prevent."[90] Less clear are statutes, such as New York's, which refer to defendant's conduct which "is necessary . . . to avoid . . . injury."[91] To require the defendant to in fact avert the threatened harm would, of course, predicate the existence of the defense in many circumstances upon purely fortuitous events entirely outside the defendant's control.

IV. Limitations on the Harm Done

Taking the life of an innocent person has been the subject of much speculative commentary. An "innocent" person is evidently one not committing a crime and the limitation, where there is one, is confined to intentional killings. The only American authority on the question is a federal district court opinion, *United States v. Holmes*.[92] Following a ship wreck, crew members lightened the load threatening their life boat at the expense of a number of passengers. One of the crew members was indicted for manslaughter and a jury convicted him of that offense. Defendant received a 6-month jail sentence. The trial court seemed to have been willing to hold that had due deference been paid to the different status of passengers and crew members, and if lots had been used to select from each group, the defense of necessity might have been available. That dictum was rejected in an English counterpart, *Regina v. Dudley & Stephens*,[93] in which defen-

[89] Hawaii.

[90] Cal.

[91] N.Y.

[92] 26 F. Cas. 360 (No. 15,383), 1 Wall Jr. 1 (C.C.E.D. Pa. 1842).

[93] 14 Q.B.D. 273 (1884). *See also*, Comment, *In Warm Blood: Some Historical and Procedural Aspects of* Regina v. Dudley and Stephens, 34 U. Chi. L. Rev. 387 (1967), where the author observes that "Victorian juries customarily convicted in hardship cases, confident of royal reprieve. It is true that by the way [the trial judge] posed the choice between conviction and special verdict, he effectively deprived the prisoners of a chance of acquittal," *id.* at 396, and that "[b]y removing the genuineness of threat to Dudley and Stephens through the royal prerogative system, the judges left themselves freer than they might otherwise have been to decide the case on abstract rather than human—or even realistic—considerations." *Id.* at 405. *See also* Brody, *Son of the Speluncean Explorer*, 55 Iowa L. Rev. 1233 (1970); Fuller, *The Case of the Speluncean Explorers*, 62 Harv. L. Rev.

dants killed the weakest passenger of their open boat for food. Perhaps the rejection of the *Holmes* dictum by the English court was dictum there, as well, because the defendants did not use a random method of selection which the *Holmes* court had suggested was "the fairest mode, and, in some sort, as an appeal to God, for selection of the victim."[94]

The common law rejection of the defense when the intentional killing of an innocent person was involved,[95] appears now to be almost universally rejected itself.[96] The most common statu-

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616 (1949); Hicks, *Human Jettison*, 1 LAW. Q. REV. 387 (1927); Stephen, *Homicide by Necessity*, 1 LAW. Q. REV. 51 (1885).

[94] The trial court specifically rejected the *Holmes* dictum on the drawing of lots as an appeal to providence as it "would seem almost to verge upon the blasphemous." Comment, *supra* note 93, at 392.

[95] Justice Cardozo observed:

> Where two or more are overtaken by a common disaster, there is no right on the part of one to save the lives of some by the killing of another. There is no rule of human jettison. Men there will often be who, when told that their going will be the salvation of the remnant, will choose the nobler part and make the plunge into the waters. In that supreme moment the darkness for them will be illumined by the thought that those behind will ride to safety. If none of such mold are found aboard the boat, or too few to save the others, the human freight must be left to meet the chances of the waters. Who shall choose in such an hour between the victims and the saved?

B. CARDOZO, LAW AND LITERATURE 113 (1930). In R.I. Recreation Center, Inc. v. Aetna Cas. & Sur. Co., 177 F.2d 603 (1st Cir. 1949), the court, in determining the application of language in an insurance policy, stated in dictum that it "appears to be established . . . that necessity will never excuse taking the life of an innocent person . . . ." *Id.* at 605. Shannon v. United States, 76 F.2d 490 (10th Cir. 1935); Arp v. State, 97 Ala. 5, 12 So. 301 (1893).

[96] MODEL PENAL CODE, Comment 3 (Tent. Draft No. 8, 1958).

> It would be particularly unfortunate to exclude homicidal conduct from the scope of the defense . . . . For recognizing that the sanctity of life has a supreme place in the hierarchy of values, it is nonetheless true that conduct which results in taking life may promote the very value sought to be protected by the law of homicide. Suppose, for example, that the actor has made a breach in a dike, knowing that this will inundate a farm, but taking the only course available to save a whole town. If he is charged with homicide of the inhabitants of the farm house, he can rightly point out that the object of the law of homicide is to save life, and that by his conduct he has effected a net saving of innocent lives. The life of every individual must be assumed in such a case to be of equal value and the numerical preponderance in the lives saved compared to those sacrificed surely establishes an ethical and legal justification for the act.

Id. See Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701 (1937).

> So too a mountaineer, roped to a companion who has fallen over a precipice, who holds on as long as possible but eventually cuts the rope, must certainly

tory approach is to provide, merely, that if the other conditions of the defense are all satisfied, the actor's "conduct" is justified. The major exceptions are Wisconsin, where it is provided that "if the prosecution is for murder, the degree of the crime is reduced to manslaughter,"[97] and Kentucky and Oklahoma, where it is provided that "no justification can exist under this section for an intentional homicide."[98] The Missouri proposal would limit this defense to "conduct which would otherwise constitute any crime other than a Class A Felony."[99]

Yet, as clear as the majority of state statutes and commentaries appear to be on the point, the Commentary to the Tentative Draft of the Model Penal Code, when directly confronting the problem posed in *Regina v. Dudley & Stephens,* says: "Such a case must be decided if it arises but a legislator may consider that the course of wisdom is to go no further than to state a valid principle for its determination, without anticipating the decision to be made."[100]

Another situation involving the taking of the life of an innocent is euthanasia. At one point in the American Law Institute discussion about the Model Penal Code, it was stated: "I do not think [the proposed statute on the necessity defense] could

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be granted the defense that he accelerated one death slightly but avoided the only alternative, the certain death of both.

Id. at 738-39.

The Norwegian Penal Code Commission accepts the same position. Professor Andenaes commenting on their decision labels it "rather hardboiled justice." J. ANDENAES, THE GENERAL PART OF THE CRIMINAL LAW OF NORWAY § 16 (1965). There is no doubt that such a result is of utilitarian value; however, the question remains whether it is in fact "justice." If as the *Model Penal Code* states, "the sanctity of life has a supreme place," Comment at 8, it is not sufficient that the problem be resolved on quantitative terms alone. To allow the killing of an innocent person with intent to do so, even for the common good, is manifest injustice to the person killed.

[97] WIS. The draft of the Indiana Penal Code refers only to "conduct," yet on the question of taking life, the Comments state that the actor "arguably" would be justified in "killing some persons to save a greater number." IND., Comment at 41.

[98] KY. § 410. *See also* OKLA. § 1-3-3A. K. BRICKEY, KENTUCKY CRIMINAL LAW 30 (1974), takes the view that "[t]he penal law has traditionally reflected the value judgement that the intentional taking of innocent life is never privileged." (Footnote omitted.)

[99] MO.

[100] MODEL PENAL CODE, Comment at 10 (Tent. Draft No. 8, 1958). It has been suggested that where there is no social consensus on a major question such as whether the intentional taking of the life of an innocent person is ever justified, "the jury, as a cross section of the social unit, can through its finding of guilt or innocence apply the existing moral standards of the community to the case." Brody, *supra* note 93, at 1246.

apply in the case where there wasn't that numerical differential as to the lives saved, nor do I think that it could apply very well in cases of euthanasia, so-called, because while the doctor may act to alleviate pain I don't think a court could hold that pain was a greater evil than death, which is the evil sought to be averted by the law defining homicide."[101] But when pressed on the matter later, ("The question I had is whether or not the advisers and the reporter intentionally left this question open for possible adjudication, or whether it is your considered judgment that this section could not apply to a case of euthanasia."),[102] the reply was that "if the euthanasia problem were to be put explicitly, I have no warrant for saying what position the advisers would take or the position of the Council, and maybe it will have to be faced. But I thought that if it were to be faced it should be faced under homicide and not here."[103] In the Commentary to the proposed statute on "Causing or Aiding Suicide"[104] it is noted that "Under the draft, as under the present statutes dealing specially with aiding or encouraging a suicide, [that] special provision applies only when the actor goes no further than aid or solicitation; if he is himself the agent of the death, the crime is murder notwithstanding the consent or even the solicitation of the deceased."[105]

A question which needs to be clarified is posed by LaFave and Scott: "*A*, driving a car, suddenly finds himself in a predicament where he must either run down *B* or hit *C's* house and he reasonably chooses the latter, unfortunately killing two people in the house who by bad luck happened to be just at that place inside the house where *A*'s car struck . . . ."[106] It is urged that *A* is not liable in this situation because "it is the harm-reasonably-expected, rather than the harm-actually-caused, which governs."[107] This conclusion is based on the language of the Illinois statute which provides that the defendant must avoid an injury which would be "greater than the injury which might *reasonably* result from his own conduct."[108] The difficulty is that only the

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[101] ALI PROCEEDINGS 228 (1958).
[102] *Id.* at 235.
[103] *Id.* at 236.
[104] MODEL PENAL CODE § 201.5 (Tent. Draft No. 9, 1959).
[105] *Id.* at Comment 2.
[106] LAFAVE & SCOTT at 386.
[107] *Id.*
[108] ILL.

Illinois statute and the California Proposed Code make this conclusion clear.

Of course, the defendant in this case is guilty of no crime to begin with. Were defendant charged with manslaughter (reckless homicide), the difficulty would be that recklessness means a conscious disregard of a risk that is "substantial and unjustifiable."[109] The same is true of crimes defined in terms of negligence. Defendant needs no general justification defense when charged with a crime based on recklessness or negligence since it is implicit in the charge itself that the defendant's conduct was not justified; unjustifiability of conduct becomes an element of the charge itself and must be proved by the state.

It has been maintained that the necessity defense does not apply to strict liability crimes.[110] This is incorrect. What is meant is that "one cannot act by accident from necessity."[111] In other words, defendant must act with the conscious object to avoid a greater evil, and his discovery after the fact that he did avoid a greater evil will not satisfy the requirements of the defense. Thus, one who intentionally violates a traffic law because of necessitous circumstances may avail himself of the necessity defense even though the crime charged is a strict liability crime.

The Model Penal Code may have inadvertently included an additional limitation on the harms that can be justified. In a little-noticed provision near the end of the Article dealing with justification, and following the detailed provisions on the use of force, the Code provides as follows:

> Section 3.10. Justification in Property Crimes.
>
> Conduct involving the appropriation, seizure, or destruction of, damage to, intrusion on or interference with property is justifiable

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[109] MODEL PENAL CODE § 2.02(2)(c) (Proposed Official Draft, 1962).

[110] Where the statute prohibited possession, regardless of possessor's intent, necessity was not recognized as a defense. People v. Norris, 40 Mich. App. 45, 198 N.W.2d 430 (1972); Frasher v. State, 8 Md. App. 439, 260 A.2d 656 (1970); Commonwealth v. New York C. & H.R.R., 202 Mass. 394, 88 N.E. 764 (1909).

[111] MODEL PENAL CODE, Comment at 10 (Tent. Draft No. 8, 1958). A child may be kept from school for reasons of health without permission of school board as a statute required, State v. Jackson, 71 N.H. 552, 53 A. 1021 (1902); a motorist may leave the scene of an accident in which he is involved because of fear of bodily harm if he remained at the scene, Greer v. State, 108 Tex. App. 356, 300 S.W. 640 (1927); Isom v. State, 37 Ala. App. 416, 69 So. 2d 716 (1954); and a motorist may leave the scene of an accident in which he is involved where his passenger is injured and in need of medical care and he leaves so that she may receive treatment, Woods v. State, 135 Tex. App. 540, 121 S.W.2d 604 (1938).

> under circumstances which would establish a defense of privilege in a civil action based thereon, unless:
>
> (1) the Code or the law defining the offense deals with the specific situation involved; or
>
> (2) a legislative purpose to exclude the justification claimed otherwise plainly appears.[112]

It was said at the 1958 Proceedings that:

> Section 3.10 is a self-contained provision—it does not depend on any other provision—which says that if you are charging a crime against property, if the defendant can show that the conduct would have been privileged in tort, then it is privileged in crime unless the Code is inconsistent with that privilege . . . .[113]

The problem arises when defendant is charged with a property crime and cannot satisfy the defense provided for by section 3.10. For example, suppose defendant acted out of private—not public—necessity and caused a loss of property by his actions. In this situation he would have only an incomplete privilege under tort law and would be civilly liable for any damages he caused.[114] Because section 3.10 does not distinguish between complete and incomplete privileges, as does tort law, the statute is ambiguous. Because the defense under section 3.10 may be unavailable, the defendant would want to defend under the more general section 3.02, Choice of Harm or Evils.[115] But can he? Section 3.02 may be limited by section 3.10, which deals with property crimes. Yet, would it not be odd if a defendant who commits an act that would amount to a property crime may be found guilty because his justification defense is limited to section 3.10 and he cannot satisfy the privilege requirement of that defense, while a defendant who causes personal injury might have a defense under section 3.02 under otherwise similar circumstances?

The uncertainty in this situation is compounded by the fact that two of the illustrations provided under section 3.02 involve property offenses: "Property may be destroyed to prevent the spread of fire;" and "A cargo may be jettisoned . . . to preserve the vessel."[116]

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[112] MODEL PENAL CODE § 3.10 (Proposed Official Draft, 1962).

[113] A.L.I. PROCEEDINGS, 225-26 (1958) (remarks by Professor Wechsler).

[114] W. PROSSER, LAW OF TORTS 126 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 263, at 495 (1965); Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307 (1925-26).

[115] MODEL PENAL CODE.

[116] *Id.*, Comment at 9 (Tent. Draft No. 8, 1958).

It is perhaps for these reasons that section 3.10 has been so poorly received. This is speculation on our part, since not one of the commentaries to the necessity provisions in the new codes or proposals even advert to the existence of Model Penal Code section 3.10. Thus far, section 3.10 has been enacted only in Pennsylvania.[117] It is included in legislation pending in Alaska[118] and New Jersey.[119] It was included in the Idaho code, which adopted the Model Penal Code in toto, but that entire code has been repealed.[120] It was originally included in the Vermont proposal,[121] but has since been dropped from pending legislation.[122]

V. THE FAULT LIMITATION

Much of the law of necessity is rather vague, but the requirement that defendant be without fault in occasioning or developing the situation is especially so. It appears that the common law required the predicament to develop through "no fault" of the actor, and this requirement is perpetuated under many codes.[123] It has been said, for example, that a person lost in the wilderness may break into a cabin to seek food to prevent starvation, unless he was to blame in bringing about the situation.[124] Such an example provides little assistance in resolving the problem, since it neglects to provide a formula to determine what degree or type of fault would preclude the defense. It can hardly be supposed that liability of one lost in the wilderness for burglary of a cabin would be determined by reference to whether a reasonable person would have taken better maps, or whether the lost person recklessly crashed his airplane into a mountainside, or whether he took along the amount of food he should have taken.

If the level of culpability in occasioning or developing the situation is understood to be the same as that which would suffice for the commission of the crime charged in any event, the limita-

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[117] PA.

[118] ALAS.

[119] N.J.

[120] IDAHO (repealed the same year).

[121] VT.

[122] *Id.*

[123] *See, e.g.*, CAL.; DEL.; ILL. ("without blame"); IND.; MICH.; MO.; N.Y.; S.C. It should be noted that the statutes of three states do not provide a "fault" limitation: ORE.; TEX.; WIS.

[124] MD. § 35.05, Comment, *citing* MODEL PENAL CODE § 3.02, Comment at 9 (Tent. Draft No. 8, 1958).

tion appears reasonable. For example, if because of reckless driving, the defendant is required to make a choice-of-evils decision that results in death, there is little problem in holding the defendant liable for manslaughter of the reckless homicide variety. It is an entirely different matter, however, to conclude that negligent backpacking should result in denying the defendant his defense to a burglary that was necessary to save his or another's life.

Furthermore, the meaning of the term "without fault" is not clear from the cases. In an English case,[125] defendant, while drunk, awoke to discover that the car he was occupying was moving. He controlled the car and was convicted of driving while intoxicated. It is difficult to understand how the defendant was at fault, unless intoxication itself is enough to establish fault.

In another case, a Texas court upheld the denial of the defendant's tendered jury instruction on the necessity defense and his conviction on a charge of driving while intoxicated. The defendant testified that he took the wheel of the automobile in which he was a passenger only because the driver appeared more intoxicated than himself, and solely for the purpose of stopping the automobile. The court stated that "[i]f appellant here is found in a predicament, it is of his own doing, and he may not by such conduct claim the benefit of a defense to which he is not entitled."[126] In an earlier Texas case the defendant testified that he and a companion had been drinking during the night and when he returned home at about 1:45 a.m., he received a blow to the head and was rendered unconscious. When he awoke shortly thereafter he was lying in a pool of blood, and, since he lived alone and had no telephone in his apartment, he decided to drive himself to the hospital.[127] The defendant conceded that he was driving while intoxicated, but maintained he did so out of necessity, "only for the purpose of seeking medical treatment for a serious head injury." The court upheld the conviction and stated "[w]e are aware of no such defense and decline to hold that an intoxicated driver of an automobile upon a public highway commits no offense if it be shown that a necessity existed, or that it appeared to him to be necessary that he make the journey."[128] Thus, it

[125] Regina v. Kiston, [1955] 39 Crim. App. 66.
[126] Sansom v. State, 390 S.W.2d 279, 280 (Tex. Crim. App. 1965).
[127] Butterfield v. State, 317 S.W.2d 943, 944 (Tex. Crim. App. 1958).
[128] *Id.* at 943.

appears that in Texas the mere fact of defendant's intoxication, no matter how unrelated to the necessity situation, is sufficient to vitiate the defense, at least where intoxication is an element of the crime. It may have been the existence of these cases that led the drafters of the Texas statute to omit the fault limitation.[129]

The Colorado code stands alone on this issue. It provides that the situation must be "occasioned or developed through *no conduct* of the actor . . . ."[130] No mention is made of any kind of fault in bringing about the situation.

Besides the defendant's fault in occasioning the situation, his culpable behavior will limit the defense in other ways as well. The Model Penal Code addresses these limitations simultaneously in the following provision:

> When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.[131]

Another provision makes it clear that the actor must make a correct value choice, and if he does not, the other questions will not arise.

> When the actor has made a proper choice of values, his belief in the necessity of his conduct to serve the higher value exculpates—unless the crime involved can be committed recklessly or negligently. But when the latter is the case, recklessness or negligence in bringing about the situation requiring the choice of evils or in appraising the necessity for his conduct may be the basis of conviction. This treatment of the matter, which is followed elsewhere in the Article [dealing with the use of force], precludes conviction of a purposeful offense when the actor's culpability inheres in reck-

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[129] TEX.

[130] COLO. (emphasis added).

[131] MODEL PENAL CODE, Comment (Tent. Draft No. 8, 1958). The following states are in accord: ALAS.; ARK.; HAWAII; IDAHO; KY.; ME.; MD.; MASS.; NEB.; N.H.; OKLA.; PA.; VT.; WASH. In the Oklahoma proposed legislation the words "wanton" and "reckless" are used but are defined as recklessness and negligence. OKLA. §§ 1-107(3) & (4).

> The need for a special defense of necessity arises only with intentional acts. If the act charged is one of negligence, there is no need to introduce the technical doctrine of necessity, for the same result is achieved by inquiring whether the defendant has behaved like a reasonable man. The adjudication of negligence requires the same kind of value judgment as is involved in the doctrine of necessity.

G. WILLIAMS, *supra* note 82, at 734.

> lessness or negligence, while sanctioning conviction for a crime for which that kind of culpability is otherwise sufficient to convict.[132]

In determining whether defendant made a proper value choice, evidently the facts are taken as he perceived them.[133] However, even given a proper choice as the defendant understood the facts, he still may be liable if he was negligent or reckless in appraising those facts that, in his mind, gave rise to the necessity for committing a crime.[134] In the case of the negligent or reckless backpacker who commits burglary, the defendant would still have a complete defense because burglary cannot be committed negligently or recklessly and there probably is no lesser included offense that could be charged (unless one can find a prohibition of reckless trespass). But the reckless driver who chooses to kill *A* to avoid killing *B* and *C* could still be guilty of manslaughter. Presumably, also, the general effect of intoxication would remain the same in this context. That is "[w]hen recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial."[135]

The question of the reasonableness of the appraisal does not arise under the approach taken in New York and other states, where there is no necessity defense unless "such conduct is necessary."[136] On the other hand, other codes only require that the defendant "reasonably believes such conduct was necessary,"[137]

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[132] MODEL PENAL CODE, Comment (Tent. Draft No. 8, 1958).

[133] G. WILLIAMS, *supra* note 82, at 745.

[134] R. PERKINS, CRIMINAL LAW 956 (2d ed. 1969). The case law has developed a variety of formulations in articulating the limitation: "well founded fear," R.I. Recreation Center, Inc. v. Aetna Cas. & Sur. Co., 177 F.2d 603, 605 (1st Cir. 1949); "well-grounded apprehension," Shannon v. United States, 76 F.2d 490, 493 (10th Cir. 1935); "if they acted bona fide upon reasonable grounds," United States v. Ashton, 24 F. Cas. 873, 874 (No. 14,470) (C.C.D. Mass. 1834); "well-grounded apprehension," Browning v. State, 31 Ala. App. 137, 141, 13 So. 2d 54, 56 (1943); "reasonable grounds to believe," Hall v. State, 136 Fla. 644, 674, 187 So. 392, 409 (1939); "reasonably seemed to be necessary," Frasher v. State, 8 Md. App. 439, 449, 260 A.2d 656, 662 (1970); "reason to believe," State v. Goff, 79 S.D. 138, 139, 109 N.W.2d 256, 257 (1961); "founded on some reasonable ground," Morgan v. State, 35 Tenn. (3 Sneed) 475, 480 (1856).

[135] MODEL PENAL CODE § 2.08(2) (Proposed Official Draft, 1962).

[136] *See, e.g.*, ARK.; CAL.; COLO.; DEL.; MD.; MASS.; MICH.; MO.; N.Y.; ORE.; S.C.

[137] *See, e.g.*, ALAS.; ILL.; IND.; TENN.; WASH. Evidently the same approach is taken under the Soviet Code. U.S.S.R. at 37 states that "[i]f a person on the basis of circumstances did not and could not understand that the danger in reality did not and could not exist and if a person has done an act to alleviate this imagined danger . . . what was done cannot be considered an offense."

but since no other provision is made, a defendant who negligently brings about the situation or who is negligent in appraising the facts evidently loses the defense completely. Unlike New York, however, a defendant is only required to be reasonable, not right. Under the Model Penal Code it is only required that the defendant believe his conduct to be necessary, and this requirement is qualified by the language quoted above.[138] Some states which follow this approach have, nevertheless, considered it necessary to qualify this language by adding "reasonably believe."[139]

VI. LEGISLATIVE PREEMPTION

Most of the codes provide that "[t]he issue of competing values must not have been foreclosed by a deliberate legislative choice," and follow the language of the Model Penal Code requirements that:

> (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.[140]

For example, the specific defense of duress will govern those particular situations to which it applies, even though necessity may be involved and even though the necessity defense is usually broader than the duress defense. Duress defenses are often limited by what type of threats are required and by what harms can

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[138] *See, e.g.*, MODEL PENAL CODE (Tent. Draft No. 8, 1958); HAWAII; IDAHO; KY.; ME.; NEB.; N.H.; OKLA.; PA.; VT.

[139] The commentary to the Washington proposal said:

> The word "reasonably" has been inserted to indicate that any defense of justification must be based on something more than simply a "good faith" belief in the necessity of the conduct.

WASH., Comment 1. But at the same time the statutory provision retains the qualifying language that if defendant is negligent or reckless in "evaluating the necessity for defensive conduct," he may be guilty of any offense for which such negligence or recklessness suffices. *Id.* Suppose defendant is negligent in deciding he must intentionally kill *A* to save *B* and *C*. The Washington proposal says that when the defense is not established because of criminal negligence then, in effect, defendant would be guilty of criminally negligent homicide. That is the same result that would be obtained under the *Model Penal Code*. This modification of the *Model Penal Code* simply introduces a redundancy despite the fact that the Washington commentary refers to it as "narrowing of the MPC provision." *Id.* at Comment 1. The Washington proposal is also evidently the only one which confines the fault limitation to the question of evaluation of the necessity to act; it does not apply to bringing the situation about.

[140] MODEL PENAL CODE (Tent. Draft No. 8, 1958).

be done, while the trend in necessity statutes is to avoid such limitations.[141]

The major effect of this limitation involves the use of force.[142] All modern codes contain exhaustively detailed provisions on the use of force and deadly force by a variety of persons in many circumstances. The general justification of choice of evils is meant to deal only with those situations to which the legislature has not specifically addressed itself.[143] As one commentary to a necessity statute points out, "homicide committed by a private citizen to effect an arrest is not justified because [another statute] so provides."[144]

It is repeatedly said that the legislature is free to make specific value choices and to have its decision prevail when it does.[145] One may suppose, however, that these statements are overdone. In *Cross v. State,*[146] the Wyoming legislature had enacted a comprehensive game law for the protection of wild animals which enumerated those circumstances in which animals could be killed and which omitted the right to kill animals in the protection of

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[141] *See* notes 72-75 *supra.*

[142] The commentary to Washington's proposed code states that the section does not apply to the use of force because other statutes deal with that subject. WASH. at 65. This seems clearly wrong. The Washington statute is based essentially on the *Model Penal Code* and its commentary is largely devoted to the problem of taking life and, indeed, the hypothetical used in the Washington commentary deals with homicide.

[143] See particularly the Practice Commentary to NEW YORK PENAL LAW § 35.10 (1967). Prior to the Supreme Court's decisions in Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973), the most commonly cited example of a case in which the legislature has already resolved the question of value choices was legislation regulating abortion. *See generally* G. WILLIAMS, THE SANCTITY OF LIFE (1958); THE MORALITY OF ABORTION (J. Noonan ed. 1970); Davies, *The Law of Abortion and Necessity*, 2 MOD. L. REV. 126 (1938).

[144] TEX., Comment at 83.

[145] "The defense of necessity is available only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values. If it has done so, its decision governs." LAFAVE & SCOTT at 382. A Georgia court upheld the conviction of defendant for taking alcoholic beverage to a church for the use of his sick wife stating "the privilege given by law to the physician is by the same law withheld from the layman. The statute itself fixes the exceptions to the operation of the law. To these we cannot make any addition." Bice v. State, 109 Ga. 117, 118, 34 S.E. 202, 203 (1899). Where defendant was convicted of operating a snowmobile upon the shoulder of a highway, the court rejected defendant's necessity defense on several grounds, one of which was "that the legislative intent was to prohibit, with but two exceptions, the operation of snowmobiles upon the roadway" and that defendant's conduct was not within the stated exceptions. State v. Johnson, 289 Minn. 196, 199, 183 N.W.2d 541, 543 (1971).

[146] 370 P.2d 371 (Wyo. 1962).

one's property. The state argued that no further exceptions, specifically the necessity defense, could therefore be permitted. The court, however, recognized the defense, holding that protection of one's property is a constitutional right and that "[i]f it is true that the legislature intended that constitutional rights of persons could not be asserted in this connection, then it clearly exceeded its authority."[147] Although the Wyoming constitution lacks a specific provision directly granting a right to property, the court found it was an "inherent and inalienable" right of the people, contained within the state constitutional provision that "no person shall be deprived of life, liberty or property without due process of law."[148] And, of course, state legislatures had made their value choices in abortion cases, but this view did not prevail.[149] Thus, it is clear that legislative value choices are as amenable to constitutional review—both state and federal—in this context as in any other.

VII. WHO DECIDES WHAT?

While it is clear that the defendant must make a "proper" value choice in trying to avert the threatened harm, it is less clear who is to determine the propriety of the defendant's choice.[150] There is universal agreement that a defendant raising the defense must subjectively believe that he has correctly decided the issue, but it is just as certain that satisfaction of this requirement is not by itself sufficient. Someone must make an after-the-fact determination that the defendant did or did not make an accurate value choice, depending upon the jurisdiction, either in fact or

[147] *Id.* at 374. The court stated that its holding was supported by the following cases: Cotton v. State, 31 Ala. App. 399, 17 So. 2d 590 (1944); State v. Ward, 170 Iowa 185, 152 N.W. 501 (1915); Commonwealth v. Masden, 295 Ky. 861, 175 S.W.2d 1004 (1943); State v. Rathbone, 110 Mont. 225, 100 P.2d 86 (1940); Commonwealth v. Riggles, 39 Pa. D. & C. 188 (1940); Cook v. State, 192 Wash. 602, 74 P.2d 199 (1937); State v. Burke, 114 Wash. 370, 195 P. 16 (1921). 370 P.2d at 375.

[148] 370 P.2d at 376-77. The court also rejected the state's contention that a less drastic alternative was available to defendant since any property owner whose property is destroyed by a wild animal may file a claim for damages sustained. The court held that this was not "an adequate remedy" since, under the statute, defendant would logically be forced to watch a wild animal invade and possibly destroy even his home and if such invasions were of a continuous nature, would be forced to repeatedly file claims and perhaps engage in protracted litigation. *Id.* at 378.

[149] Roe v. Wade, 410 U.S. 113 (1973).

[150] Arnolds & Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil,* 65 J. CRIM. L. & C. 289, 296-98 (1974).

given the facts as he perceived them. Most statutes avoid the question by following the Model Penal Code:

> The draft does not attempt . . . to resolve how far the issue raised by the defense should be determined by the court as one of law or submitted to the verdict of the jury. The Council thought this question best remitted to the law that generally governs the respective functions of the court and jury.[151]

When the issue has been addressed directly by legislation, the New York statute is usually followed:

> Whenever evidence relating to the defense of justification under this section is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification.[152]

Presumably, the trier of fact must still make the underlying factual determinations, but the court's resolution appears conclusive in either direction, subject only to defendant's right to appeal.

While some courts have reached the same result as New York without a statute by treating the claim as an offer of proof and deciding the question as a matter of law,[153] a statutory provision such as New York's may be useful in avoiding procedures like those used in *United States v. Kroncke*.[154] There the trial court allowed extensive testimony by a number of witnesses on the necessity defense, but ultimately took the question away from the jury in its final instructions. This could have been accomplished more efficiently with an offer of proof.

A different view is expressed in an optional provision of the South Carolina draft code:

> Whenever evidence relating to the defense of justification under this section is offered by the defendant, the court shall rule *initially* on the matter out of the presence of the jury, according to the procedure used in determining the admissibility of a defendant's confession.[155]

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[151] MODEL PENAL CODE (Tent. Draft No. 8, 1958).

[152] N.Y. The relevant part of the Maryland statute follows the New York provision, but adds that "the court shall rule as a matter of law on its admissibility, according to whether the claimed facts and circumstances would, if established, constitute a defense." MD. This addition appears only to clarify rather than modify the New York language; Maryland thought it necessary in order "to avoid any problem with the jury-as-judge-of-the-law provision of the state constitution, by making it clear that the judge is ruling only on a question of admissibility of evidence." MD., Comment.

[153] *See, e.g.*, State v. Green, 470 S.W.2d 565 (Mo. 1971), *cert. denied*, 405 U.S. 1073 (1972).

[154] 459 F.2d 697 (8th Cir. 1972).

[155] *But see* Mullaney v. Wilbur, 95 S. Ct. 1881 (1975).

The adoption of such a procedural formulation may, depending upon the jurisdiction, result in disadvantage to the defendant. In some jurisdictions the confession procedure rules make the judges' determination final; in others the jury is instructed that they may find the confession involuntary even though the judge did not. The use of the word "initially" suggests that the court's determination is not final. If so, it would require that even if the judge finds the evidence sufficient to establish the defense, the jury is to be instructed that they are free to disagree and to convict. The redetermination by a jury of the voluntariness of a confession is, in those jurisdictions, designed to give a defendant two chances of winning on that issue. The South Carolina necessity provision, however, appears designed to give the defendant two chances of losing the defense.

Although the existence of the necessity defense is subject at least in part to resolution as a matter of law, it is unclear precisely to what extent this is so. Consider the Texas statute:

> Conduct is justified if:
> (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm; and
> (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and
> (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.[156]

The New York procedural approach, alluded to above,[157] clearly makes the determination under sections (2) and (3) a matter for the court. It is less clear, however, whether section (1) in all circumstances is to be resolved as a matter of law. Suppose, for example, a rush-to-the-hospital case in which the court concludes there was indeed need for harm avoidance and defendant's high speed driving was the lesser evil, but that defendant should have known that there was another hospital much closer to him on a safer route and that defendant was negligent in not knowing this fact. Does the defense go to the jury or is the judge to resolve it against the defendant? Ordinarily, of course, if defendant could satisfy section (2) above he could also satisfy the reasonableness

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[156] TEX.

[157] We refer, of course, to section 3.02, not section 3.10. We also have reservations about trying, in legislation, to resolve in advance the question of taking innocent life.

requirement of section (1); but not so in a case such as this, where the actor has made an improper assessment of his alternatives, *given* an acceptable emergency situation.

CONCLUSION: CODIFICATION OF THE NECESSITY DEFENSE

The most important issues regarding the necessity defense are whether it should be codified, and, if so, with what degree of detail. It is our view that the Model Penal Code provision ought to be adopted without modification.[158] We have surveyed in some detail the various attempts to improve upon that draft. Most of those states which have not accepted that version have ended up placing more restrictions on the availability of the defense and we are not convinced that all those restrictions were intentionally included. This is true, for example, of the common requirement that defendant be correct in his assessment of the need for action,[159] and Colorado's unique requirement that the situation not be brought about by defendant's "conduct."[160] Those restrictions are unreasonable and almost certainly would not be imposed by most courts if left greater latitude to develop the scope of the defense.

Apart from the highly restrictive proposals based on the New York model, there are three major approaches to the legislative problem: (1) the New Jersey approach; (2) non-codification; and (3) the Model Penal Code.[161] New Jersey takes a singular approach to codification of the defense by declining to adopt any particular statutory formulation, but incorporating the necessity defense into the Code

> to the extent permitted by law and as to which neither the Code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the justification claimed does not otherwise plainly appear.[162]

Although there were no prior New Jersey statutes or criminal cases dealing with the issue, the Revision Commission maintained that it was

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[158] *See* note 153 *supra*.

[159] *See* note 64 *supra*.

[160] *See* note 118 *supra*.

[161] Texas and those states following that model do not depart significantly from the *Model Penal Code*.

[162] N.J.

> more appropriate to leave the issue to the Judiciary [since] [t]he rarity of the defense and the imponderables of the particulars of specific cases convince us that the Courts can better define and apply this defense than can be done through legislation.[163]

This position is consistent with New Jersey civil case law development which recognizes the justification of necessity as "a natural right, of which government cannot deprive the citizen," but which is nevertheless

> a right not susceptible of any very precise definition, for the mode and manner and extent of its exercise must depend upon the nature and degree of necessity that calls it into action, and this cannot be determined until the necessity is made to appear.[164]

It is also interesting that the Commentary refers the courts to the Model Penal Code and the New York statute for guidance—those statutes are in conflict on most of the important questions that will arise.

The English took a similar approach in the late nineteenth century. Sir James Stephan's Criminal Code Bill of 1878 contained a provision dealing with the necessity defense, but it was deleted from the Draft Code of 1879, because of an inability to articulate the situations in which the defense would be available. Parliament resolved the problem by leaving the doctrine where they found it—a common law defense.[165] Stephan himself stated:

> [I]t is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it, but these cases cannot be defined beforehand. . . . I see no good in trying to make the law more definite than this, and there would I think be danger in attempting to do so.[166]

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[163] *Id.*, Commentary.

[164] Hale v. Lawrence, 21 N.J.L. 714, 729 (1848), *aff'd sub. nom.* American Print Works v. Lawrence, 23 N.J.L. 590 (1851).

> The common law doctrine of necessity is one that is now too firmly established to be drawn in question, and yet, perhaps, necessarily from its very character, it seems somewhat undefined as to its application and extent.

Id. at 604. *See also* Comment, *The Law of Necessity as Applied in the Bisbee Deportation Case*, 3 ARIZ. L. REV. 264 (1961); Note, *Necessity as a Defense*, 21 COLUM. L. REV. 71 (1921). For the development of the doctrine in the law of torts, see generally W. PROSSER, *supra* note 114, at § 24; Bohlen, *supra* note 114.

[165] G. WILLIAMS, *supra* note 82, at 724. *See also* Glazebrook, *supra* note 78.

[166] 2 J. STEPHAN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 109-10 (1883).

> [T]he law of cases of necessity is not likely to be well furnished with precise rules; necessity creates the law, it supersedes rules; and whatever is

Glanville Williams also takes the position that "[t]he peculiarity of necessity as a doctrine of law is the difficulty or impossibility of formulating it with any approach to precision."[167]

Other American authorities have enumerated the difficulties in codification of the defense.[168] The Study Draft of a New Federal Criminal Code by the United States Commission on Reform of Federal Criminal Laws (the Brown Commission) contained the following codification of the necessity defense:

> Conduct which Avoids Greater Harm. Conduct is justified if it is necessary and appropriate to avoid harm clearly greater than the harm which might result from such conduct and the situation developed through no fault of the actor. The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the penal statute defining the offense, either in its general application or with respect to its application to a particular class of cases arising thereunder.[169]

This section of the Code, however, was deleted from the Final Report of the Commission. The Comment to section 601, dealing with justification in general, includes this explanation:

> Congress has never enacted the rules which justify or excuse the use of force against another or which generally provide a justification or an excuse for the commission of otherwise unlawful conduct. Chapter 6 sets them forth: to change some undesirable judicial decisions, to clarify areas which are not clear under existing law and to codify aspects of the federal law on the subject. This partial codification is not an attempt to freeze the rules as they now exist. It may therefore be desirable to be explicit that the statutory definition of these rules is not intended to preclude the judicial development of other justifications. For example, the so-called "choice of evils" rule, i.e., that emergency measures to avoid greater injury may be justified, has not been included in this Chapter on the view that, while its intended application would be extremely rare in cases actually prosecuted, even the best of statutory formulations (see N.Y. Pen.L. § 35.10) is a potential source of unwarranted difficulty in ordinary cases, particularly in the context of the adoption of the broad mistake of fact and law provisions found in the Code. Codification, as

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reasonable and *just* in such cases, is likewise *legal;* it is not to be considered as matter of surprise, therefore, if much instituted rule is not to be found on such subjects.

The Gratitudine, 3 C. Rob. 266, 165 Eng. Rep. 450, 459 (In. 1801) (Sir W. Scott).

[167] G. WILLIAMS, *supra* note 82, at 728.

[168] MODEL PENAL CODE, Comment at 9 (Tent. Draft No. 8, 1958).

[169] New York City Bar Association, *The New Criminal Code Proposed by the National Commission on Reform of Federal Criminal Laws* 15 (1972).

> opposed to case-by-case prosecutive discretion, is regarded as premature. On the other hand, some Commissioners believe that a penal code is seriously deficient if it does not explicitly recognize that avoidance of greater harm is, if not a duty, at least a privilege of the citizen.[170]

It seems to us that there ought to be some legislative recognition of the defense—even as limited as the New Jersey approach—for two overlapping reasons. First, there are some states where the courts have flatly refused to recognize the defense in the absence of a statute.[171] Secondly, whether or not a court previously recognized it, the new codes are so comprehensive in their treatment of defenses in general that failure to include a necessity statute might well be taken as a legislative rejection of it, unless the code clearly indicates that it is not exclusive as to defenses, as few have. We have found only two states that make it clear by statute that while the codes are exclusive as to definitions of crimes,[172] they are not intended to be exclusive as to the existence or scope of defenses.[173] The matter is presently ambiguous in states with no significant legislative history available to indicate whether non-inclusion means non-recognition.

Indeed, the question might be raised whether a legislature in fact has the power to abolish the necessity defense or even severely restrict it as Wisconsin, New York, and some other states have done. Does there reside in the courts an inherent power—protected from infringement by the legislative branch by the separation of powers doctrine—to recognize necessity as a defense? The same question might be raised under the federal constitution with respect to those state courts which have flatly denied the existence of such a defense—does not due process

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[170] *Hearings on Reform of the Fed. Crim. Laws and Procedures Before the Subcomm. on Crim. Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., 43 (1971).

[171] *See, e.g.*, State v. Moe, 174 Wash. 303, 24 P.2d 638 (1929).

[172] Washington has retained a curious provision:

> Sec. 9A.04.060. COMMON LAW TO SUPPLEMENT STATUTE. The provisions of the common law relating to the commission of crime and the punishment thereof, insofar as not inconsistent with the constitution and statutes of this state, shall supplement all penal statutes of this state and all persons offending against the same shall be tried in the courts of this state having jurisdiction of the offense.

Laws of 1975, ch. 260, 44th Legis., 1st Sess. (effective July 1, 1976).

[173] These two states are California and Vermont. A similar provision is also found in S.1, 93d Cong., 1st Sess. (1972).

require recognition that a person may not be convicted of drunk driving when he took the controls of a vehicle solely to save himself from serious bodily injury or death? Or when he escapes from prison for the same reason? Surely in those cases the defense must be recognized. Yet, no one has advocated restricting the defense to what must constitutionally be recognized. The defense furthers utilitarian objectives that go beyond the actor's own interests and the defense ought to be recognized in that context as well.[174]

We agree that "it is better to be allowed a defense of uncertain ambit than none at all."[175] But to conclude, as the New Jersey Revision Commission has, that because all future situations cannot be anticipated none should be, goes too far in the other direction from those who have over-legislated the matter. The Model Penal Code: (1) distinguishes the defense from the defenses of duress and involuntary act; (2) requires only that the harm sought to be avoided be greater than that sought to be prevented by the law violated; (3) eliminates limitations on the harm threatened and the harm done; (4) omits reference to imminence; (5) includes a fault limiter but, unlike many of the codes, it is defined and the consequences of the limitation are made explicit; (6) recognizes legislative preemption; and (7) leaves to local law the allocation of decision making at trial.

The Model Penal Code is broad, to be sure. But the only danger in legislating broadly is that the statute might be thought to protect persons beyond what the legislature intended because of the impossibility of foreseeing all that might arise. But in the end, a court and jury will have to determine whether the claimed defense is reasonable.

Given the uncertain status of the defense under existing case law, given the uncertain power of the legislature to restrict courts in recognition of the defense, and given the unforeseeability of the myriad cases which will arise, we think it unwise to attempt to improve upon the Model Penal Code. The legislatures should codify what it is useful to codify or what must be codified. But legislative definition of the entire scope of the necessity defense

[174] H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 113-18 (1968).

[175] MODEL PENAL CODE at 9 (Tent. Draft No. 8, 1959).

is probably not useful and certainly not required.[176]

[176] In Glazebrook, *supra* note 78, it is argued that if the draftsman is careful in drafting the specific substantive statutes, there is no need for general recognition of the necessity defense. He says:

> A legal system in which a general defense of necessity was constantly invoked over a wide range of offenses would have no special merit, for that would simply reflect the draftsmen's failure to provide in advance for special cases.

Id. at 90. He later provides an example of the ad hoc approach to the necessity defense:

> Section 24(3) of the Sexual Offenses Act 1956, for instance, provides that "A woman shall not be liable to any legal proceedings, whether civil or criminal, for taking away or being found in possession of any clothes she needed to enable her to leave premises on which she was for the purpose of having unlawful sexual intercourse or to leave a brothel."

Id. at 107. It is our contention that any criminal code that needs Section 24(3) is itself deficient.