Journal of Criminal Law and Criminology

Volume 65 | Issue 3 Article 2

1975

The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil

Edward B. Arnolds

Norman F. Garland

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Copyright © 1974 by Northwestern University School of Law

Vol. 65, No. 3
Printed in U.S.A.

THE DEFENSE OF NECESSITY IN CRIMINAL LAW: THE RIGHT TO CHOOSE THE LESSER EVIL

EDWARD B. ARNOLDS* AND NORMAN F. GARLAND†

Introduction

Criminal defendants who intentionally and knowingly violate a criminal statute may nevertheless claim that they have committed no crime. These defendants make this assertion even though they admit committing the act and possessing the mental element proscribed by the law. For example, the Supreme Court of Rhode Island held that a member of the United States Naval Reserve Force, on duty as a despatch driver, was not amenable to the speed laws of the state while on his way to deliver a message, at the command of his superior officer, which that officer deemed urgent.[1] The decision rested on the principal of public necessity, a principle which the court stated is "without application to cases which show a failure to comply with our laws and ordinances when no military necessity exists." [2]

This holding is an example of the application of the defense of necessity. The defendant admitted intentionally exceeding the speed limit knowing the act was illegal. But under the pressure of circumstances the act was justified by "necessity."

The National Commission on Reform of Federal Criminal Laws considered whether or not to codify the defense of necessity in the Proposed New Federal Criminal Code. The Commissioners initially adopted the defense as it is usually defined by the courts and legislatures.[3] However, in the *Final Report* they rejected this definition of the defense in favor of partial codification. Section 601 (1) of the *Final Report* thus provides: "Except as otherwise provided, justification or excuse under this chapter is a defense." [4]

This article will discuss the issue of codifying the defense of necessity. It will initially review the policy reasons and elements of that defense. It will then analyze two alternatives to a plea of necessity, jury nullification and prosecutorial discretion, to test their adequacy where a defendant makes a non-frivolous claim that he or she committed the otherwise criminal act to preserve some higher value. Finally, the article will discuss the effect codifying the defense will have on the right of the jury to determine the issue of relative values.

I. *Definitions and Policy Factors*

At the outset it is necessary to distinguish the defense of necessity from other related defenses to avoid confusion over labels. Glanville Williams defined necessity in the manner used in this article: "By necessity is meant the assertion that conduct promotes some value higher than the value of literal compliance with the law." [5]

Courts sometimes use the term justification as a synonym for necessity.[6] Justification, however, is a generic term which may comprise besides necessity, the defense of self-defense, defense of others, defense of property, or execution of official duty.[7] To justify does not mean to excuse; justification is a circumstance which actually exists and which makes harmful conduct proper and noncriminal, while excuse is a circumstance which excuses the actor from criminal liability even though the actor

* J. D., Northwestern University, 1973.
† J. D., Northwestern University, 1964; L.L.M., Georgetown University, 1965, presently Associate Professor of Law at Northwestern University.

[1] State v. Burton, 41 R.I. 303, 103 A. 962 (1918).

[2] *Id.* at 305, 103 A. at 963.

[3] 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.
UNITED STATES COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE, § 608 (1970) [hereinafter cited as STUDY DRAFT].

[4] FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS § 601 (1) (1971) [hereinafter cited as FINAL REPORT].

[5] G. WILLIAMS, THE CRIMINAL LAW § 229 (2nd ed. 1970) [hereinafter cited as WILLIAMS, CRIMINAL LAW].

[6] *See, e.g.*, United States v. Simpson, 460 F.2d 515 (9th Cir. 1972).

[7] FINAL REPORT §§ 606–608, *supra* note 4. *See also* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW §§ 47–57 (1972).

was technically not justified in doing what he did.[8] Examples of excuses are mistake and duress.[9]

The rationale behind the excuse defenses was stated by Mr. Justice Holmes: "Detached reflection cannot be expected in the presence of an uplifted knife." [10] The rationale behind the justification defense is that one should not be punished where his act of breaking the law prevents more evil than it causes.[11] The difference is the same as between being forgivably wrong and being right or between being pardoned and being praised. Neither pardon, mitigation nor excuse can substitute for justification for where a person has acted meritoriously (justification) he has no need of forgiveness.

Courts also sometimes confuse the justification defense of necessity with the excuse defense of duress.[12] If one commits an otherwise illegal act owing to the unlawful threats of another, the defense is duress, sometimes called compulsion, fear, or coercion (though coercion technically applies only to the defense by a wife that she was forced by her husband).[13] The general rule is that a well-founded fear of death or serious bodily injury is a defense to any criminal charge except murder.[14]

One explanation of the defense of duress is the free will theory: a person is not guilty of an offense by reason of conduct performed under pressure so great as to deprive an ordinary person of his free will under the circumstances.[15] Other commentators contend that the rationale for the defense of duress is deterrence: there is no likely deterrence when the punishment threatened is less motivating than the harm which the actor would suffer if he does not commit the "crime." [16] Under either theory courts limit the defense of duress to fear of serious bodily injury or death and make the defense personal to the person threatened.[17] It makes no sense, however, to put those restrictions on the defense of necessity, since necessity is a justification and not an excuse.[18]

---

[8] *See* FINAL REPORT § 601, *supra* note 4.

[9] FINAL REPORT §§ 610–11, *supra* note 4.

[10] Brown v. United States, 256 U.S. 335 (1921).

[11] STUDY DRAFT § 608, *supra* note 3.

[12] *See, e.g.*, United States v. Cullen, 454 F.2d 386, 391 n.13 (7th Cir. 1971) ("The rule is the same whether the label is 'compulsion,' 'coercion,' or 'necessity' . . .").

[13] *See* Perkins, *The Doctrine of Coercion*, 19 IOWA L. REV. 507 (1934); Note, *The Doctrine of Martial Coercion*, 29 TEMPLE L.Q. 190 (1956).

[14] R. I. Recreation Center v. Aetna Casualty and Surety Co., 177 F.2d 603 (1st Cir. 1949); Shannon v. United States, 76 F.2d 490 (10th Cir. 1935); Arp v. State, 97 Ala. 5, 12 So. 301 (1893); State v. Sappienza, 84 Ohio 63, 95 N.E. 381 (1911); *Contra*, Regina v. Tyler, [1838] 8 C&P 616 (per Lord Denman); 2 STEPHEN, HISTORY OF THE CRIMINAL LAW 108 (1883) ("[A]t the moment when temptation to crime is strongest . . . the law should speak most clearly to the contrary.").

In Georgia and Texas compulsion is a defense even to murder. Jones v. State, 207 Ga. 379, 62 S.E.2d 187 (1950); Montford v. State, 144 Ga. 582, 87 S.E. 797 (1916); Burns v. State, 89 Ga. 527, 15 S.E. 748 (1892); Beal v. Georgia, 72 Ga. 200 (1883); Turner v. State, 117 Tex. Crim. 434, 37 S.W.2d 747 (1931); Paris v. State, 35 Tex. Crim. 82, 31 S.W. 855 (1895).

In other jurisdictions compulsion instructions have been given in murder cases. *See, e.g.*, United States v. Bevans, 29 F. Cas. 1138 (No. 14,589) (C.C. Mass. 1816); People v. Lighting, 83 Ill. App. 2d 430, 228 N.E.2d 104 (1967); People v. Repke, 103 Mich. 459, 61 N.W. 861 (1895); Rizzolo v. Commonwealth, 126 Pa. 54, 17 A. 520 (1889). *Cf.* Leonard v. State, 217 Ala. 60, 114 So. 798 (1927); State v. Clay, 220 Ia. 1191, 264 N.W. 77 (1935).

See generally Newman and Weitzer, *Duress, Free Will and Criminal Law*, 30 So. CAL. L. REV. 313 (1954) [hereinafter cited as Newman and Weitzer]; Hersey and Avins, *Compulsion as a Defense in Criminal Cases*, 11 OKLA. L. REV. 544 (1917); Hitchler, *Duress as a Defense in Criminal Cases*, 4 VA. L. REV. 519 (1917) [hereinafter cited as Hitchler].

[15] *See* Newman and Weitzer, *supra* note 14.

[16] *See* Hitchler, *supra* note 14, at 521–22.

[17] *See generally* Newman and Weitzer, *supra* note 14. *But see* Rex v. Steane, [1947] K.B. 997; R. I. Recreation Center v. Aetna Casualty and Surety Co., 177 F.2d 603, 606 (1st Cir. 1949) (Magruder, J., concurring); STEIN, COMMENT ON JUSTIFICATION AND EXCUSE, 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS at 273–79 (suggesting threats to third persons should also be a defense).

[18] The confusion of duress and necessity has resulted in an improper limitation being put on the defense of necessity. *See, e.g.*, United States v. Cullen, 454 F.2d 386, 391, n.13 (7th Cir. 1971):

> The general rule on 'compulsion' was stated, citing numerous state cases, in Shannon v. United States, 76 F.2d 490, 493 (10th Cir. 1935):
> 'Coercion which will excuse the commission of a criminal act must be immediate, and of such nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. One who has full opportunity to avoid the act without danger of that kind cannot invoke the doctrin of coercion and is not entitled to an instruction submitting that question to the jury.' The rule is the same whether the label is 'compulsion,' 'coercion,' or 'necessity,'—*See* United States v. Anthony, 145 F. Supp. 323, 339 (M.D. Pa. 1956); R. I. Recreation Center v. Aetna Casualty and Surety Co., 177 F.2d 603, 605 (1st Cir. 1949): 'But to provide an excuse the compulsion must be present, immediate and impending, and of such nature as to induce a well-founded fear of death or at least serious bodily injury.'

Compare R. PERKINS, CRIMINAL LAW, 956 (2d ed. 1969):

> Where the act done was necessary, or reasonably seemed to be necessary, to save life or limb or health, and did not in itself in any way endanger life, limb or health, the exculpatory effect of the necessity is too clear for argument; but where the offense charged is not one of particular gravity the courts have not hesitated to recognize necessity as

The U. S. National Commission on Reform of Federal Criminal Law, probably to avoid the semantic difficulties engendered by the term necessity, chose to refer to the defense as conduct-which-avoids-greater evil in the *Study Draft* of the proposed criminal code.[19] But the defense is more commonly referred to simply as the defense of necessity, and that term will be employed herein.

II. *History and Elements of Necessity as a Defense*

Although the proposition is not beyond dispute,[20] it seems clear that necessity was a defense at common law. There are few cases dealing with necessity, probably because these cases often are not prosecuted. Because there are so few cases, the law of necessity is poorly developed in Anglo-American jurisprudence.[21] Contributing difficulties are the sematics problems noted above and the frequent failure of judges to discuss the doctrine in terms of relevant principles.[22] As a consequence, it is impossible to demonstrate with any degree of satisfaction an historical development of the law of necessity. Similarly, it is difficult, absent statutes, to state with certainty in what jurisdictions the defense as defined above is clearly recognized.

Legal commentators have not agreed on the development of the defense. Sir James Stephen thought the defense so vague that judges could lay down any rule they thought expedient.[23] Sir Walter Scott thought it not a matter of surprise that few rules existed about necessity because, "necessity creates the law; it supersedes rules; and whatever is reasonable and just in such circumstances is likewise legal." [24] Nevertheless, as Hall notes, the concept of necessity has been "anciently woven into the fabric of our culture." [25]

The English courts stated the principle of necessity as early as 1551 in *Reninger v. Fagossa*:[26] "A man may break the words of the law, and yet not break the law itself . . . where the words of them are broken to avoid greater inconvenience, or through necessity, or by compulsion." [27] The case cites the New Testament example of eating sacred bread through necessity of hunger or taking another's corn.[28] Older English cases contain many examples which recognize the general principle of necessity.[29] It was a defense to breaking a law that the person committed the act to save a life or put out a fire.[30] Jurors could depart without the permission of the judge in case of emergency.[31] Prisoners might escape from a burning jail without committing a crime.[32] A person did not commit the misdemeanor of exposing an infected person in public if the person was being carried through the streets to a doctor.[33] The courts recognized as a defense the failure to repair a road that water had washed the road and all material from which the road could be made.[34]

Modern English cases also recognize the defense. In 1939 the King's Bench held that the necessity

an excuse where the danger, or apparent danger to be avoided was less serious in nature.

[19] *Supra* note 3.

[20] *Compare* Williams, *Defense of Necessity*, 6 CRIM. L. REV. 216 (1953); WILLIAMS, CRIMINAL LAW §§ 229–41, *supra* note 5 (approved by the Court of Appeals Civil Division), London Borough of Southwork v. Williams [1971] ch. 734) *with* Glazebrook, *The Necessity Plea in English Criminal Law*, 30 CAMBRIDGE L.J. 87 (1972).

[21] *See* J. HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 416 (2d ed. 1960) [hereinafter cited as HALL, GENERAL PRINCIPLES].

[22] *Id.*

[23] H. STEPHEN, DIGEST OF CRIMINAL LAW, Art. 11 (9th ed. 1952) [hereinafter cited as STEPHEN, DIGEST].

[24] The Gratitudine, 3 C.Rob. 266, 165 Eng. Rep. 459 (In. 1801).

[25] *Supra* note 21.

[26] [1551] 1 Plowd. 1, 75 Eng. Rep. 1.

[27] *Id.* at 19, 75 Eng. Rep. at 29–30.

[28] *Matthew* 12:3–4.

[29] *See, e.g.*, Garland v. Carlisle, 2 C&M 77, 149 Eng. Rep. 681 (Ex. 1837); per curiam, Manby v. Scott, 1 Levinz 4, 83 Eng. Rep. 268 (K.B. 1672); Hobart, Colt v. Coventry, Hob. 300, 80 Eng. Rep. 307 (K.B. 1612); Moore v. Hussey, Hob. 227, 80 Eng. Rep. 246 (K.B. 1609); Coke, Mouse's Case, 7 Co. Rep. 63, 77 Eng. Rep. 1341 (K.B. 1608). *See also* 1 BRITTON 113 (Nichols ed. 1865); 1 THROPE, ANCIENT LAWS AND INSTITUTES OF ENGLAND, § 13, 47–49 (1840); 4 BLACKSTONE, COMMENTARIES 186.

[30] Cope v. Sharpe, [1912] 1 K.B. 496; Regina v. Tolson, [1899] 23 Q.B. 172; Governor, etc. of Cast Plate Manufacturers v. Meredith, 4 T.R. 794, 100 Eng. Rep. 1306 (K.B. 1792).

[31] [1499] Y.B. T. 14 H.7 296, p. 4.

[32] Baender v. Barnett, 255 U.S. 224 (1921); Renninger v. Fagossa, 1 Plowd. 1, 75 Eng. Rep. 1 (K.B. 1551); Y.B. T.15 H.7 2a, pl. 2.

[33] Vantandillo, 4 M&S 73, 105 Eng. Rep. 762 (K.B. 1815).

[34] Regina v. Bambler, 5 Q.B. 278, 286, 104 Eng. Rep. 1254, 1257. (Q.B. 1843). This case actually raises the defense of physical necessity or impossibility rather than the defense of justification, where the actor has a choice. *See* Chesapeake & O.R.R. v. Commonwealth, 119 Ky. 519, 84 S.W. 566 (1905); Commonwealth v. Brooks, 99 Mass. 434 (1868) (parking for a prohibited time is excused by a traffic jam). *But see* Commonwealth v. N.Y. Cent., & H.R.R., 202 Mass. 394, 88 N.E. 764 (1909) (keeping a train at a crossing more than five minutes not excused by physical necessity). The defense of physical necessity may be asserted where the agent is human as where A takes B's hand and shoots C with the weapon in C's hand. *Cf.* Sauers v. Sack 34 Ga. App. 148, 131 S.E. 98 (1925); HALL, GENERAL PRINCIPLES, *supra* note 21, at 433.

of saving a mother's life was a defense to abortion.[35] It is a defense to obscenity that the publication is for the common good.[36] Medical personnel may use narcotics to kill pain, even though they hasten the death of the patient, because the value of saving the patient from pain is preferable to the value of postponing death.[37]

Early federal cases also recognize the defense. In *The William Grey*,[38] a federal circuit court held that necessity excused the violation of an embargo act by entry into a forbidden port, even though the entry was not caused by mechanical forces. In *United States v. Ashton*[39] sailors charged with mutiny justified their refusal to obey the captain's orders on the grounds that the ship was not seaworthy. The court held that if the ship were unseaworthy the conduct was not criminal. In another case a long delay in reaching port because of foul weather justified withholding food from the crew of a ship in violation of a statute.[40] The military may seize property in case of necessity,[41] and, in *Korematsu v. United States*,[42] the Supreme Court held that all persons of Japanese descent could be excluded from their homes and communities by military fiat because "the power to protect must be commensurate with the threatened danger." [43] There is dicta that necessity will excuse high treason, parricide, murder, or any other of the higher crimes.[44]

A number of state cases hold that whenever it is necessary, or reasonably appears necessary, a person may destroy property to prevent the spread of fire[45] or disease.[46] Speeding may be justified to avoid ambush and unlawful arrest.[47] Selling alcohol without a prescription is justified in an emergency,[48] and a sick child may be withdrawn from school without permission if the parent is acting to save the child's health.[49]

Perhaps the fullest discussion of the doctrine of necessity is found in the Arizona case *State v. Wooton*,[50] better known as the *Bisbee Deportation* case. On April 26, 1917, the Industrial Workers of the World (I.W.W.) called a strike of the copper miners in the Warran District of Cochise County, Arizona. On July 12, the sheriff, with the help of a posse of more than 1,000 men, rounded up 1100 to 1200 of the strikers and their sympathizers, including practically every member of the I.W.W. in the area. The local authorities put the captives aboard a special freight train and transported

[35] Rex v. Bourne [1939] 1 K.B. 686. *See generally* G. WILLIAMS, THE SANCTITY OF LIFE, ch. 5 (1958); Davies, *The Law of Abortion and Necessity*, 2 MOD. L. REV. 126 (1938).

[36] Colder and Boyars Ltd., [1969] 1 Q.B. 151; Hichlin, [1868] 3 Q.B. 360; DeMontalk, [1932] 23 Cr. App. 182; STEPHEN, DIGEST, *supra* note 23, at 133.

[37] Adams (1957), unreported, cited in G. WILLIAMS, CRIMINAL LAW, *supra* note 5, at 726.

[38] 29 F. Cas. 1300 (No. 17,694) (C.C.C.D. N.Y. 1810). *See also* The Diana, 74 U.S. 354 (1864); The Struggle, 13 U.S. (9 Cranch) 71 (1815).

[39] 24 F. Cas. 873 (No. 14,470) (C.C.D. Mass. 1834). *Accord* United States v. Bordon, 24 F. Cas. 1202 (No. 14,625) (D.C.D. Mass. 1857); United States v. Nye, 27 F. Cas. 210 (No. 15,906) (C.C.D. Mass. 1855); United States v. Staley, 27 F. Cas. 1290 (No. 16,374) (C.C.D. R.I. 1846).

[40] United States v. Reed, 86 F. 308 (C.C.S.D. N.Y. 1897).

[41] Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1851).

[42] Korematsu v. United States, 323 U.S. 214 (1944).

[43] *Id.* at 220. *But see Ex parte* Mulligan, 71 U.S. (4 Wall.) 2 (1866) (necessity does not justify trying a civilian before a military court because the evil could be avoided by obeying the law and trying him according to the common law).

[44] United States v. Ashton, 24 F. Cas. 873 (No. 14,470) (C.C.D. Mass. 1834).

[45] *See, e.g.*, Surocco v. Geary, 3 Cal. 69 (1853): Cromwell v. Emrie, 2 Ind. 35 (1850); Field v. City of Des Moines, 39 Ia. 575 (1874); Hale v. Lawrence, 21 N.J.L. 714 (N.J. 1848), *aff'd sub. nom.* American Print Works v. Lawrence, 23 N.J.L. 590 (Ct. of Errors and Appeals, 1851); Keller v. City of Corpus Christi, 50 Tex. 614 (1879). *See generally* Beale, *Justification for Injury*, 41 HARV. L. REV. 553 (1923).

[46] Seavy v. Preble, 64 Me. 120 (1874).

[47] Browning v. State, 244 Ala. 251, 257, 13 S.2d 51, 56 (1943); *But cf.* Buckoke v. G.L.C. [1971] ch. 662, cited in Glazebrook, *The Necessity Plea in English Criminal Law*, 30 CAMBRIDGE L.J. 87, 96, n.32 (1972) (Court of Appeal (Civil Division) accepted the submissions of both counsel that the driver of a fire engine would commit an offense by running a stoplight, even though there was no risk to other vehicles and crossing the lights would appreciably increase the chance of saving life and property); Butterfield v. Texas, 317 S.W.2d 943 (Tex. Crim. 1958) (drunk driving not excused because one is seriously injured and has no other way of getting to the hospital); R. v. Kiston, [1955] 39 Crim. App. 66 (drunk driving not excused by waking up next to the driver and finding the car in motion).

[48] State v. Wray, 72 N.E. 253 (1885); Commonwealth v. Patterson, 16 Wkly. Notes Cas. 193 (Pa. 1885).

[49] State v. Johnson, 71 N.H. 552, 53 A. 1021 (1902).

[50] Crim. No. 2685 (Cochise Cty, Ariz. Sept. 13, 1919). The case is unreported as a consequence of a verdict of acquittal. The basic facts of the case, however, and the ruling of the trial judge, Samuel L. Pattee, on the defendant's offer of proof are reproduced in Comment, *The Law of Necessity as Applied in the Bisbee Deportation Case*, 3 ARIZ. L. REV. 264 (1963) [hereinafter cited as 3 ARIZ. L. REV.] and 6 A.B.A.J. 99 (1920). *See generally The Trial of Harry E. Wooton for Kidnapping, Tombstone, Arizona 1920*, 17 AMERICAN TRIALS 1; U.S. DEPT. OF LABOR, REPORT ON THE BISBEE DEPORTATIONS (1918); *The Law of Necessity as Applied in the State of Arizona v. H. R. Wooton* (Tucson: Bureau of Information, undated); Note, *Necessity As a Defense*, 21 COLUM. L. REV. 71 (1921) (critical of the case because the jury was not instructed that a less evil alternative had to be chosen if it was available).

them under guard to Hermanos, New Mexico, where they left the captives with federal troops.

Neither the federal nor the state governments declared martial law in the district and the sheriff and his posse did not claim to be acting as military. No one in authority took the arrestees before a magistrate as then required by state law. Eventually the State charged some 200 possemen with kidnapping, and one, H. E. Wooton, was brought to trial.

At the close of the state's case, the defendant asserted the defense of necessity. He offered to prove that the I.W.W. had been an organized anarchistic conspiracy to overthrow the government and the capitalistic system, that the conspirators were present in the Warran District in great numbers to destroy the lives and property of its inhabitants, and that as prudent men the defendant and his associates reasonably believed the deportation imminently necessary for the preservation of life and property in the district.[51] The defendant contended that proof of these facts should be admitted on the theories of self-defense and of necessity. The court said that self-defense could not lie, but that Wooton could assert the defense of necessity.[52]

Judge Pattee distinguished self-defense as justifying the repulse of a wrong and necessity as justifying the invasion of a right.[53] The latter defense, he said, springs not from the sovereign power, the civil government, the social compact, or any right of property, but from a natural right that appertains to the individual.[54] He wrote:

> [T]he rule seems to be settled that whenever it is necessary or reasonably appears to be necessary that property be destroyed . . . the right of destruction arising from necessity exempts those committing the destruction from the liabilities that would ordinarily obtain in the case of the invasion of one's property right by another.[55]

Judge Pattee also held that the principle applied to personality as well as to real estate, to life as to property.[56] One seeking to justify what would otherwise be an unlawful act on the basis of necessity had the burden of proving that the necessity existed, and of showing that the anticipated peril sought to be averted was not disproportionate to the wrong.[57] Relying especially on *Commonwealth v. Blodgett*,[58] Judge Pattee said the weight and sufficiency of evidence tending to establish necessity are for the jury, and the court may pass on that issue as a matter of law only where evidence is wholly wanting or where the state of facts could not in any way warrant the interposition of the plea.[59]

The court ruled that under the circumstances presented in the offer of proof, the jury should determine the question of the existence of the state of necessity as a question of fact.[60] At the conclusion of the trial, the case was submitted to the jury which deliberated fifteen minutes and

[51] The defendant also offered to prove that the strikes were designed to obstruct the war effort, that the co-conspirators had assaulted and threatened citizens, that the leader of the co-conspirators had told the sheriff he would no longer be responsible for the acts of his men, that the sheriff reasonably believed the co-conspirators intended to commit many felonies in the district, and that federal troops had been sought without avail.

[52] 3 ARIZ. L. REV., *supra* note 50, at 264–265. Self-defense is a species of necessity. *See* Oliver v. State, 18 Ala. 587 (1850); HALL, GENERAL PRINCIPLES, *supra* note 21, at 434:

> Technically, the privilege of self defense implies that there is a human assailant, one who is bound by a legal duty. In the exercise of the privilege of necessity, on the other hand, there is no violation of the actor's legal right. In self defense, the defender injures the creator and embodiment of the evil situation; in necessity, he harms a person who was in no way responsible for the imminent danger, one who, indeed, might himself have been imperiled by it.

[53] 3 ARIZ. L. REV., *supra* note 50, at 266–67.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 268.

[58] 53 Mass. (12 Met.) 56 (1846). This case involved a prosecution arising out of a controversy in Rhode Island in 1842 known as Dorr's rebellion. The defendant, a member of the regular militia of Rhode Island, allegedly kidnapped four followers of Dorr who had fled to Massachusetts. The defendant was tried and convicted in Massachusetts of kidnapping. The judge instructed the jury that:

> [S]uch capture of the troops of Rhode Island, was unlawful, unless necessary in defense of the lives and property of the citizens of Rhode Island, or in defense of the state, at the time; of which necessity, or probable cause of necessity, the jury and not the State of Rhode Island, was the proper judge.

Id. at 71.

In affirming the conviction, the Supreme Court of Massachusetts through Chief Justice Shaw approved the instruction given by the trial court. It noted that it was difficult to see how the act could be considered done in the necessary defense of the territory of Rhode Island, but said the question was rightly submitted to the jury, as one of "strictly necessary defense." *Id.* at 85. However, the holding implies only that it was more proper for the jury to decide the question of necessity than for the State of Rhode Island to determine it in advance.

[59] 3 ARIZ. L. REV., *supra* note 50, at 273, 276.

[60] *Id.* at 277.

returned a verdict of "Not Guilty" on the first ballot.[61]

The cases and the literature suggest three essential elements of the defense of necessity: (1) the act charged was done to avoid a significant evil; (2) there was no other adequate means of escape; and (3) the remedy was not disproportionate to the evil to be avoided. Not just actual peril, but a well founded belief in impending peril is sufficient to raise the defense.[62] The question of burden of proof is not clear. Some cases place the burden on the defendant not only to raise but to carry the issue.[63]

These generalizations are substantiated by the cases where the defense has failed: that liquor is used as a heart medicine does not justify having it near a church because one could stay home or get another medicine.[64] Economic necessity is no defense to stealing because the state provides another alternative through welfare.[65] Bad conditions do not justify escape from prison because there is the alternative of proceeding through proper channels.[66] Time of war does not justify trying a civilian before a military tribunal because he could be tried in accordance with law at a later time.[67] In a prosecution for the destruction of intoxicating liquors, it is not a defense that such intoxicants constitute a public nuisance because official agencies exist for dealing with public nuisances.[68]

In a plea of necessity, the defendant admits performing the act charged and admits the act technically violated a law. The defendant contends that the conduct was justified because it was the only feasible way to avoid a greater evil and that it would be unjust to apply the law in the particular case.

Pleas of necessity, then, involve two determinations. The first is a factual determination: did the situation as alleged by the defendant actually exist (was the ship actually in danger) and did the defendant have any legal way out (could a friendly port have been made safely). The second is a determination of values: whether the alternative chosen was, in itself, the lesser evil.

In most necessity cases, the question of which evil is the lesser is really not in dispute. No one in our society seriously debates whether property may be destroyed to save human life or whether an embargo act may be violated to keep a ship from sinking.[69] Property is of less value than human life. Thus the only question to be decided is the fact question: was the situation as extreme as the defendant alleged.

Two famous cases, however, *United States v. Holmes*[70] and *Regina v. Dudley and Stephens*,[71] present the problem of necessity more precisely. In those cases the value choice of the defendants as well as the facts of the case were in dispute.

In *Holmes*, after the shipwreck of the *William Brown*, members of the crew threw fourteen pas-

[61] *Id.* at 279.

[62] Townsend v. United States, 95 F.2d 352, 358 (D.C. Cir. 1938); United States v. Ashton, 24 F. Cas. 873, 874 (No. 14,470) (C.C.D. Mass. 1834). (The jury should be instructed to find the defendants not guilty of meeting "if they acted bona fide upon reasonable grounds of belief, that the ship was unseaworthy, and if the jury, from all the circumstances, are doubtful, whether the ship was seaworthy. . . ."); Hall v. State, 136 Fla. 644, 187 S. 392 (1939)(It was error to instruct the jury that actual peril must exist; well-founded belief in the impending peril is sufficient to raise the defense).

[63] State v. Wooton, Crim. No. 2685 (Cochise Cty., Ariz. Sept. 13, 1919). The embargo cases also generally put the burden of proof on the defendant. *See* cases cited *supra* note 38. *See also* Ensign v. United States, 291 F.2d 150, 155 (8th Cir. 1961) (not plain error to place the burdern of proof on the defense). *But see* Commonwealth v. Refitt, 149 Ky. 300, 148 S.W. 48, (1912). Regina v. Gill, [1963] 2 All E. R. 688 (Crim. App.) (burden is on prosecution once the issue is raised).

[64] Bice v. State, 109 Ga. 117, 34 S.E. 202 (1899).

[65] State v. Moe, 174 Wash. 303, 24 P.2d 638 (1933) (Unemployed persons took flour and groceries from a Red Cross Commissary. The case, however, does not raise the question of starvation or even of hunger.) *See also* United States v. Ramzy, 446 F.2d 1184 (5th Cir.), *cert. denied*, 404 U.S. 992 (1971) (economic coercion not available as a defense where the statute does not require specific intent).

[66] People v. Richard, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1969); People v. Whipple, 100 Cal App. 261, 279 P. 1081 (1929); People v. Noble, 18 Mich. App. 300, 170 N.E.2d 916 (1969); State v. Green, 470 S.W.2d 565 (Mo. 1971). United States v. Chapman, 455 F.2d 746 (5th Cir. 1972) (duress may be a defense to escape but prisoners have a duty to return); People v. Wester, 237 Cal. App. 2d 232, 46 Cal. Rptr. 699 (1965). People v. Cooper, Crim. No. 38602, Sacramento, California, Aug. 9, 1971, cited in Comment, *Escape the Defenses of Duress and Necessity*, 6 U.S.F.L. REV. 430, 438 (1972).

[67] *Ex parte* Mulligan, 71 U.S. (4 Wall.) 2 (1866).

[68] Nation v. District of Columbia, 34 App. D.C. 453, 455, 26 L.R.A. 996, 997-98 (1910).

[69] *See, e.g.*, United States v. Ashton, 24 F. Cas. 873 (No. 14,470) (C.C.D. Mass. 180).

[70] 26 F. Cas. 36 (No. 15,383) (C.C.E.D. Pa. 1842). For background see THE TRIAL OF WILLIAM HOLMES ET AL. ON AN INDICTMENT FOR MURDER ON THE HIGH SEAS (1920).

[71] 15 Cox C.C. 624, 117 Eng. Rep. 101 (Q.B. 1844). For background see J. SMITH-HUGHES, UNFAIR COMMENT ON SOME VICTORIAN MURDER TRIALS (1951); Cross, *Necessity Knows No Law*, 3 U. OF TASMANIA L. REV. 1 (1968); Hicks, *Human Jettison*, 1 LAW Q. REV. 387 (1927).

sengers overboard to lighten a lifeboat that was sinking. The federal government tried one of the crew for manslaughter and the principal defense was necessity. After counsel for both sides had argued the law and the evidence, Judge Baldwin instructed the jury that giving a favorable interpretation to evidence in order to mitigate an offense is different from justifying the act. Feelings of compassion may influence the jury's decision regarding mitigation, but only the law of necessity can "disarm the vindicatory justice of the country." [72] When a case does arise in which necessity is a valid defense, "the penal laws pass over such case in silence: for the law is made to meet but the ordinary exigencies of life." [73]

But Judge Baldwin carefully limited the defense stating that "the case does not become 'a case of necessity' unless all ordinary means of self-preservation have been exhausted. The peril must be instant, overwhelming, leaving no alternative but to lose our own life, or to take the life of another person." [74] Judge Baldwin first illustrated the point with the case of self defense against an attack aiming to destroy life or to inflict grievous injury. He also discussed "the taking of life under other circumstances where the act is indispensably requisite to self-existence." [75] Judge Baldwin noted that a person is not bound to save another's life by sacrificing his or her own life, and the person would commit no crime in saving his or her own life in a struggle for the only means of safety in a situation where both cannot survive. He concluded by stating that "when this great 'law of necessity' does apply, and is not improperly exercised, the taking of life is divested of unlawfulness." [76]

The judge also instructed the jury, however, that passengers must be favored over seamen who are not necessary to run the boat, and that those to be thrown overboard must be determined by lot.[77] There was evidence that only passengers had been thrown out and that their selection had been arbitrary. The jury, after deliberating sixteen hours, returned a verdict of guilty, and the defendant was sentenced to six months imprisonment in solitary confinement at hard labor, and fined twenty dollars.

In *Regina v. Dudley and Stephens*,[78] three men and the cabin boy escaped in an open boat from the shipwreck of the *Mignonette*. On the twentieth day having been eighteen days without food, the men killed the boy and fed on his flesh. Four days later another ship rescued the three men. Upon their arrival to England, two of the men were tried for murder and convicted. The two men raised the issue of necessity on the appeal. Lord Coleridge, although taking cognizance of *Holmes*, refused to recognize any principle of law which entitled a person to take the life of an innocent person to save his own.[79] The defendants eventually served a six month sentence.[80]

The two cases raise many questions. Commentators have suggested that the defense based on the principle it is better for some to live than for all to die, is valid in both England and America, but that the question is confused in England because of the element of cannibalism in *Dudley*.[81] But Cardozo supported the English decision stating, "Who shall know when masts and sails of rescue may emerge out of the fog." [82] Even if it is better that some live than that all die, is self preference proper? [83] And if self preference is improper, should the law punish where punishment cannot prevent infractions of the law because the threat of punishment at a future time is not sufficient to overcome the fear of present peril? [84] If, however, self preference is proper, but not when there is a duty owed as between crew and passengers, is it good to lay down a rule that might result in sailors throwing all the passengers overboard so there will not be witnesses?

The questions raised by *Holmes* and *Dudley* show that the defense of necessity, at base, requires a choice of values. As Williams put it: "[A]lthough the defense of necessity is subjective as to its facts, it is objective as to values . . . [and] involves deciding whether, on a social view, the value asserted was greater than the value de-

[72] 26 F. Cas. at 366.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 367.
[78] 15 Cox C.C. 624, 117 Eng. Rep. 101 (Q.B. 1844).
[79] 117 Eng. Rep. 111. *Accord*, R. v. Ross, [1854] 1 New So. W.S.C.R. App. 43.
[80] Originally they were sentenced to death. The Crown commuted the sentence.
[81] *See* CAHN, THE MORAL DECISION 71 (1956); Fuller, *The Speluncean Explorers*, 62 HARV. L. REV. 616 (1949); Stallybrass, *Principles of Criminal Law in England*, 14 J. COMP. LEG. & INT'L. L. 233, 237 (1932).
[82] B. CARDOZO, LAW AND LITERATURE 113 (1931).
[83] Justice Holmes would seem to allow the taking of an innocent life to save one's own. O. HOLMES, THE COMMON LAW 40 (1881).
[84] *See* Hitchler, *supra* note 14; WILLIAMS § 238, *supra* note 5 (for the proposition that punishment should not be imposed where it is likely to be a useless deterrent).

nied." [85] That the decisions in *Holmes* and *Dudley* should come out on opposite sides of the question whether one innocent life can be sacrificed to save two, illustrates how difficult the "value asserted" question can be.

III. *The Jury and Nullification*

Assuming a necessity plea where the question of values is in dispute, the problem becomes a question of who is to decide the lesser evil issue. In practice, of course, the judge decides whether or not the defense may present evidence and argue to the jury that the defendant broke a law because in the circumstances the law conflicted with a higher value in a particular set of circumstances. The real issue is whether in certain cases a judge should instruct the jury that they have the power to decide the question of competing values.

The Model Penal Code recognized that any formulation of the defense of necessity will be imprecise because there are disagreements over what constitutes an evil and over which of two evils is greater, and because "deep disagreements are bound to exist over some moral issues, such as the extent to which values are absolute or relative and how far desirable ends may justify otherwise offensive means. . . ." [86] However, the Code does not indicate how far the issue should be determined by the court as one of law or, in the alternative, submitted to the jury.[87]

Theoretically, submitting the value issue to the jury would be in keeping with the concept of trial by jury. Where activity falls within the "penumbra" of the law or where disagreement exists in a society about a moral issue or the extent to which a value is absolute (admitting of no exception) or relative, there seems to be little reason why a defendant should not be allowed in the first instance to have the jury as the "conscience of the community" and his peers decide whether he made an objectively correct choice of values. If the jury decides in the defendant's favor, he is vindicated. If the jury votes to convict, the defendant still has a right to appeal their decision.

When a defendant raises a good faith defense of necessity, that is, when he makes a non-frivolous claim that his otherwise criminal act was done to preserve some higher value, the jury as the representative of the community should be allowed to decide the issue of relative values. In determining whether or not to allow a defendant to raise the defense of necessity, a trial judge should only decide whether or not the question of values presented by the defendant is frivolous. If the values asserted by the defendant are so bizarre as to be clearly unacceptable to any significant portion of the community, the defense should not be allowed. In the United States, for example, a defendant should not be allowed to raise as a defense to homocide the necessity of saving a cow. But where the value question is not clear, the jury should be allowed to decide not only if the facts alleged by the defendant were as extreme as the defendant said they were, but if they were, whether the defendant made the correct choice.

Permitting the jury to decide the value issue in a necessity plea is, in a certain sense, permitting the jury to decide a question of law. In the United States, it is almost a blackletter principle that juries decide questions of fact and judges questions of law.[88] At the same time, it is common practice to allow juries to decide "mixed questions of fact and law" such as questions of negligence, reasonable man, reasonable doubt and obscenity.[89] Speaking to the jury's function in deciding the question of criminal responsibility, Judge Bazelon recently observed:

> In deciding whether a defendant in a negligence case owed a duty of care to the plantiff, the real question is whether by prevailing community standards the defendant was at fault, and whether the law should hold him responsible for the consequences of his conduct.[90]

The issue presented to the jury in a necessity plea, however, is different from other areas where juries decide interrelated questions of law and fact since in the case of necessity the jury is asked to decide whether the value asserted justified violating a clear precept of the law. This is very similar to instructing the jury that it may nullify the law.

[85] WILLIAMS § 239, *supra* note 5.

[86] MODEL PENAL CODE, Comment (Tent. Draft 8, 1958) at 9.

[87] *Id.* at 6.

[88] *See* Sparf and Hanson v. United States, 156 U.S. 51, 102 (1895). This is also the rule in all the states except Maryland and Indiana. *See* United States v. Moylan, 417 F.2d 1007, n.17 (4th Cir. 1969).

[89] *See, e.g.*, Miller v. California, 413 U.S. 15, 24 (1973) (obscenity to be determined by local community standard).

[90] United States v. Eichberg, 439 F.2d 620, 625 (D.C. Cir. 1971) (Bazelon, C. J., concurring). *See also* United States v. Brawner, 471 F.2d 969, 1010 (Bazelon, C. J., concurring).

The doctrine of jury nullification holds that jurors have the right to set aside the instructions of the judge and to reach a verdict of acquittal based on their own consciences and that the defendant has the right to have the jury so instructed. This doctrine has a venerable history in Anglo-American jurisprudence.[91] *Bushell's Case*[92] in 1670 established the right of jurors to reach a verdict without force or pressure. The court sentenced the jury to prison for failure to find William Penn guilty of preaching before an unlawful assembly when he had clearly done so. The Court of Common Pleas released the jurors and stopped the practice of punishing jurors for their verdicts. Chief Justice Vaughn wrote that the jury resolves both law and fact.[93]

In 1783 in the *Dean of St. Asaph's Case*[94] Thomas Erskine convinced the jury to disregard the court's instruction in a prosecution for seditious libel to which truth was no defense. The judge had instructed the jury they could not consider justification but could only decide the fact of publication, which was not in dispute. Similarly, a New York jury in 1735 acquitted John Peter Zenger after his counsel argued to the jury that it had the right to determine both the law and the facts where Zenger was being prosecuted for publishing material not authorized by the British Mayor.[95]

In 1794 Chief Justice John Jay in a civil trial held under the original jurisdiction of the Supreme Court instructed the jury, "You have, nevertheless, a right ... to determine the law as well as the facts in controversy." [96] As late as 1800, Justice Chase, in his own impeachment trial, was accused, among other things, of usurping the function of the jury by denying them the right to decide the law in a prosecution for treason.[97] Justice Chase appended to his answer the charge that he had given instructing the jury that in criminal cases they were the judges of both law and fact.

Justice Story in 1835 first questioned the jurys' right to decide issues of law in *United States v. Battiste*.[98] In that case, the trial judge, apparently fearing a jury would be too harsh on a sailor accused of transporting slaves, refused to let the jury decide an issue of law. Chief Justice Shaw followed in 1845 in *Commonwealth v. Porter*[99] by holding that a jury could not determine questions of law. Judge Curtis in *United States v. Morris*[100] argued that allowing the jury to decide the law in disregard of statute and precedent would result in the demise of law. Finally, in 1895, the United States Supreme Court in *Sparf and Hanson v. United States*[101] eliminated the principle of jury nullification, declaring: "Public and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves." [102]

The defendants in three recent cases[103] involving destruction of Selective Service files to protest the war in Southeast Asia argued on appeal that their proposed jury nullification instructions had been improperly refused since they had a right to inform the jurors of their "power to bring in a verdict in the teeth of both law and facts." [104] The courts, with varying amounts of discussion, reiterated the rule of *Sparf and Hanson*, saying that defendants have no right to have juries instructed that juries can disobey the law with impunity.[105]

Although the plea of necessity is similar to the concept of jury nullification, the two differ in one important respect. Under the jury nullification concept the court instructs the jury that they have the authority to acquit the defendant if, on the basis of conscience, they do not believe he should be convicted, even though the judge's instructions leave no alternative but conviction. A necessity instruction is much more narrow; the court instructs the jury that it can acquit only if the act charged was necessary to avoid a greater injury and if the defendant had no other adequate means of escape. The necessity instruction is thus limited

[91] *See generally* Sax, *Rex v. Dean of St. Asaph's, Conscience and Anarchy: The Prosecution of War Resisters*, 57 YALE REV. 481 (1968); Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1971) [hereinafter cited as Scheflin, *Jury Nullification*]; Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964).

[92] 6 HOWELL, STATE TRIALS 999.

[93] *Id.* at 1015–16.

[94] 21 HOWELL, STATE TRIALS 847.

[95] *See* J. ALEXANDER, A BRIEF NARRATION OF THE CASE AND TRIAL OF JOHN PETER ZENGER 99 (1963).

[96] Georgia v. Bradsford, 3 U.S. (3 Dall.) 1, 4 (1794).

[97] *See generally* Lillich, *The Chase Impeachment*, 4 AMER. J. LEGAL HIST. 49 (1960).

[98] 24 F. Cas. 1042 (No. 14,545) (C.C.D. Mass. 1835).

[99] 10 Met. 263 (Mass. 1845).

[100] 26 F. Cas. 1323 (No. 15,815) (C.C.D. Mass. 1851).

[101] 156 U.S. 51 (1895).

[102] *Id.* at 101–02.

[103] United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1973); United States v. Simpson, 460 F.2d 515 (9th Cir. 1972); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969).

[104] Horning v. District of Columbia, 254 U.S. 135, 138 (1920).

[105] United States v. Dougherty, 473 F.2d 1133 (4th Cir. 1972).

to cases where the trial court recognizes a question of competing values. Moreover, the jury is not told that it has the authority to decide the law in general, but only that it may decide that in a particular set of circumstances a defendant was justified in breaking the law to safeguard a higher value.

IV. *Prosecutorial Discretion*

Like jury nullification, however, necessity must be viewed as an exercise in discretion.[106] Discretion in criminal cases is most often exercised at the level of the cop on the beat.[107] Of the cases actually initiated, prosecutorial discretion in ordinary cases is a very effective means of assuring that justice will prevail over law.[108] When the values of a community at a particular time are at variance with the values of the community as reflected in a law written at an earlier time, or when a community considers a technical violation of the law excused by the particular circumstances surrounding the act, the technical violation is usually overlooked. The imperfection of the law's reflection of the values of the community is righted by a simple check: prosecutorial discretion. For example, one commentator notes that under a since repealed Illinois statute making possession of even a small amount of marijuana a felony, many cases simply were not prosecuted.[109] The United States Supreme Court decided in *Poe v. Ullman*[110] that an unenforced Connecticut anti-contraceptive law could not be the basis of a controversy and dismissed an action for declaratory judgment, saying that a strict policy of not carrying out a law was truer law than the dead words of the written text. Clearly, the government rarely brings cases where the values of a community would excuse a technical infraction of the law because of the particular surrounding circumstances: it may be assumed prosecutors do not often bring charges of breaking and entering against one who tried to save a baby from a burning building.

Prosecutorial discretion, however, becomes a poor check in certain circumstances, especially when the government is prosecuting a defendant for political reasons.[111] In such cases, the technicalities of the law are used to harass political persons for conduct the community might not consider criminal. There is a suspicion today that the federal government is prosecuting certain cases which would not be brought but for political motives.[112] For example, it appears that the federal government has never prosecuted anyone for smuggling letters in and out of prison until it recently prosecuted two anti-war activists.[113] The technicalities of the law of conspiracy are often used against political dissidents in an attempt to silence their vocal opposition to administration policies.[114]

Prosecutors and commentators have long recognized the great discretion of the prosecutor to decide who shall be charged with a crime. In 1940 Justice Robert Jackson, then Attorney General, warned that:

> The prosecutor has more control over life, liberty, and reputation than any other person in America.... While the prosecutor at his best is one of the most beneficient forces in our society, when he acts from malice or other base motives, he is one of the worst.[115]

In his book *Discretionary Justice*,[116] Professor Davis confirms Justice Jackson's appraisal:

[106] *See generally* K. L. DAVIS, DISCRETIONARY JUSTICE (1969).

[107] *See generally* J. SKOLNICK, JUSTICE WITHOUT TRIAL (1966).

[108] *See generally* F. MILLER, PROSECUTION (American Bar Foundation, 1969).

[109] *See* Fahey, *The Enforcement of the Illinois Felony Marijuana Law in Chicago*, WASH. U.L.Q. 281 (1970).

[110] 367 U.S. 497 (1961).

[111] It is difficult to define the terms "political trial" or "political defendant." Professor Jon R. Waltz suggests that there are at least six indicia: (1) where the defendants are "political persons" dissenting from current dogma or the conventional wisdom; (2) where the statute that is the source of the charge was enacted for the very purpose of combatting persons like the defendants who oppose particular administration policies; (3) where the defendants are being prosecuted partly for what they think and say; (4) where there is selective prosecution; (5) where it is necessary to rely on undercover agents and provocateurs; (6) where the trial is not a model of evenhandedness and judicial restraint. Waltz, Tensions Between Political Defendants and the Courts, Oct. 15, 1971 (unpublished lecture, DePaul College Speakers Program).

The various meanings of the term political trial, include: (1) trials which will have political repercussions; (2) prosecutions for technical crimes when the motive is to suppress political activity; (3) a fabricated case brought to silence a political person; (4) trials for political offenses. Scheflin, *Jury Nullification*, *supra* note 91, at 191, n. 85. *See* T. BECKER, POLITICAL TRIALS (1971); O. KIRCHHEIMER, POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS (1961); J. SHELAR, LEGALISM (1964).

[112] *See* Gilmare, *The Twilight Period*, 17 U. CHI. L. SCH. REC. 15 (1970); T. Allen, Oliver Wendell Holmes Lecture, (Harvard, March 15, 1973).

[113] Chicago Sun Times, April 6, 1972, at 8, col. 2.

[114] *See* J. MITFORD, THE TRIAL OF DR. SPOCK (1969).

[115] Jackson, *The Federal Prosecutor*, 31 J. CRIM. L.C. & P.S. 3 (1940).

[116] K. DAVIS, DISCRETIONARY JUSTICE (1969).

> Viewed in broad prospective, the American legal system seems to be shot through with many excessive and uncontrolled discretionary powers but the one that stands out above all others is the power to prosecute.[117]

In *United States v. Falk*,[118] the Court of Appeals for the Seventh Circuit extended the use of the equal protection clause for defendants who claim that the government discriminated against them when they were selectively prosecuted. Under the standard established in *Falk*, if a defendant raises a reasonable doubt as to whether there was improper discrimination in the prosecution, then the burden of going forward with proof shifts to the government to demonstrate that its motives were proper.[119] However, as one writer has already noted,[120] this approach will not help many defendants since it will be hard to raise even a reasonable doubt that they have been victims of intentional discrimination. Few defendants will be in a position to argue that their selection was improper. Of those defendants who can so argue, fewer still will be able to prove that the motives of the prosecutor were evil.

In those cases where law and justice do not coincide, and where prosecutorial discretion is not likely to be employed, the best chance for justice lies with the discretion of the jury. This function of the jury was expressed recently in *United States v. Dougherty*.[121] Although rejecting the defendants' contention that they had a right to a jury nullification instruction, Judge Leventhal wrote:

> Human frailty being what it is, a prosecutor disposed by unworthy motives could likely establish some basis in fact for bringing charges against anyone he wants to book, but the jury system operates in fact . . . so that the jury will not convict when they empathize with the defendant, as when the offence is one they see themselves likely to commit, or consider generally acceptable or condonable under the mores of the community.[122]

Assuming that jury nullification is a *passe* concept in American jurisprudence, the defense of necessity is a "safety valve," fully within our legal tradition, whereby juries may be informed of their discretionary function as the conscience of the community. A necessity instruction would be preferable to a jury nullification instruction because the nullification instruction, in essence, presents the jury with the disturbing anomaly of being told the law is that they may disregard the law. This is, at best, a confusing concept.[123] A necessity instruction on the other hand, tells the jury they may acquit the defendant if they find that given all the circumstances the defendant reasonably believed the results of breaking the law would be a lesser evil than the result of keeping the law.

The defendant in a recent "political case," *United States v. Simpson*,[124] attempted to appeal to the conscience and discretion of the jury by raising the defense of necessity. On Christmas Eve, 1970, in an effort to impede the war in Southeast Asia, Brother John Simpson entered the Local Board of the Selective Service System in San Jose, California, opened a file drawer, doused the contents with gasoline, and set the files ablaze. Simpson remained in the building and was arrested. He was subsequently indicted and convicted of destroying government property and interfering with the Selective Service System.

On appeal Simpson assigned as error, *inter alia*,[125] the trial court's refusal to allow evidence and to give a jury instruction regarding the defense of necessity. Simpson sought to introduce evidence that his actions were done to avert greater evil in the war zone. The trial judge rejected the proffered evidence and the requested instruction, noting the lack of authority supporting the necessity defense in the particular context.

The Court of Appeals for the Ninth Circuit, citing the A.L.I. Model Penal Code, recognized in *Simpson* the "theoretical basis of the justification defense . . . that, in many instances, society benefits when one acts to prevent another from intentionally or negligently causing injury to people or property."[126] The court said, however, that an essential element of the defense is a reasonable anticipation of a direct causal relationship between

[117] *Id.* at 188.
[118] 479 F.2d 616 (7th Cir. 1973).
[119] *Id.* at 624.
[120] Comment, *The Ramifications of United States v. Falk on Equal Protection from Prosecutorial Discretion*, 65 J. CRIM. L. & C. 62, 70–74 (1974).
[121] 473 F.2d 1113 (D. C. Cir. 1972).
[122] *Id.* at 1132.
[123] To tell [a juror] expressly of a nullification prerogative, however, is to inform him, in effect, that it is he who fashions the rule that condemns. That is an overwhelming responsibility, an extreme burden for the juror's psyche.
Id. at 1136.
[124] 460 F.2d 515 (9th Cir. 1972).
[125] The defendant also raised a jury nullification issue and a willfulness argument. At base all of these issues are the same.
[126] 460 F.2d at 518.

the otherwise criminal act and the avoidance of harm. The court concluded that it was unreasonable for Simpson to assume his actions might have a significant effect on the evils he wished to prevent[127] because the war would obviously continue whether or not the San Jose draft board continued to function.[128]

United States v. Baranski[129] involved facts almost identical to *Simpson*, except that the four defendants poured blood on the records instead of burning them. Again the defendants raised the defense of necessity by arguing that they reasonably believed their conduct was necessary to save those persons registered in the files they destroyed from imminent danger of death or serious bodily injury and from being compelled to commit war crimes in an illegal war. The defendants also asserted that they reasonably believed this action was necessary to impede the war. The defendants offered to prove that the Viet Nam war was illegal under international law, that draftees were in imminent danger of death in Viet Nam, and that draftees were compelled to commit war crimes in Viet Nam. They further offered to prove that the United States intent in Viet Nam was not strong enough to justify its participation in the war, and that the draft and the war were unconstitutional.[130] The trial judge accepted only a small portion of this proffered testimony.

The defendants tendered a defense of necessity jury instruction which the trial judge rejected. Nevertheless, the jury found the defendants not guilty of the three substantive charges alleged in the indictment (the same charges as in *Simpson*) but guilty of conspiracy. On appeal, the conspiracy count was reversed on other grounds.[131]

There have been numerous other cases involving the destruction of Selective Service records by anti-war protestors who claimed to have destroyed property in order to save lives.[132] In at least two of these cases, *United States v. Chase*[133] and *United States v. Cullen*,[134] the defendants formally attempted to raise the defense of necessity. The trial judge in each case did not permit the defense. The judge in another case, *United States v. Berrigan*,[135] added that the defense is outmoded in modern society.

Although in the above cases the protestors claimed they were destroying property to save lives, they sought to convince the jury that the symbolic destruction of property in which the defendants engaged was justified as a protest against an illegal war.[136] Such protestors often speak of obeying a higher moral law or their conscience.[137] To this argument the court in *United States v. Moylan*[138] responded that the defendants' motivation and sincere belief that they were breaking the law in a good cause is not acceptable as a legal defense or justification. The court stated that "[i]t implies no disparagement of their idealism to say that society will not tolerate the means they chose to register their opposition to the war." [139]

Yet this response seems rather to beg the question. Mere subjective good motive, as where one acts purely on a religious belief, is no defense to a criminal act.[140] Whether society will consider a particular form of opposition to its government's policies justified is a different question, and one

[127] *Id.* Presumably Simpson offered to prove it was reasonable for him to believe these actions would have a significant effect. The court of appeals may have concluded from the record that no reasonable jury could make such a finding. But it is hardly clear that when respected persons in the community destroy records to protest a war these actions have no significant effect on the war policy of a country. Daniel Ellsberg's releasing of the PENTAGON PAPERS arguably, at least, had a significant effect on the war.

[128] 460 F.2d at 518, n.7. Arguably, however, the appellant could have saved lives and property by merely impeding the war, or shortening it, without ending it.

[129] 484 F.2d 556 (7th Cir. 1973).

[130] For the argument that there ought to be special rules of evidence for proving issues of this kind, see D'Amato, Gould and Woods, *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Resister*, 57 CAL. L. REV. 1055, 1069–97 (1969).

[131] 484 F.2d 556 (7th Cir. 1973).

[132] United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972); United States v. Chase, 468 F.2d 141 (7th Cir. 1972); United States v. Glick, 463 F.2d 491 (2d Cir. 1972); United States v. Cullen, 454 F.2d 386 (7th Cir. 1971); United States v. Turchick, 451 F.2d 333 (8th Cir. 1971); United States v. Beneke, 449 F.2d 1259 (8th Cir. 1971); United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969); United States v. Berrigan, 283 F. Supp. 336 (D. Md. 1969).

[133] 468 F.2d 141 (7th Cir. 1972). *See* Trial Memorandum for this case prepared by William Cunningham, 69 CR 364 (N.D. Ill. 1969).

[134] 454 F.2d 386 (7th Cir. 1971). *See* Trial Memorandum for this case prepared by James Shellow, 68 CR 113 (E.D. Wisc. 1968).

[135] 283 F. Supp. 336, 339 (D. Md. 1969).

[136] *See generally* L. VELVEL, UNDECLARED WAR AND CIVIL DISOBEDIENCE 215 (1970); Dworkin, *On Not Prosecuting Civil Disobedience*, NEW YORK REVIEW OF BOOKS 14 (June 6, 1968).

[137] *See generally* D. BERRIGAN, NO BARS TO MANHOOD (1969); D. BERRIGAN, THE TRIAL OF THE CATONSVILLE NINE (1970); P. BERRIGAN, PRISON JOURNALS (1970).

[138] 417 F.2d 1002 (4th Cir. 1969).

[139] *Id.* at 1009. *But cf.* United States v. Bowen, 421 F.2d 193, 197 (4th Cir. 1970).

[140] Reynolds v. United States, 98 U.S. 145, 167 (1878).

that can really only be answered by the jury which acts as the spokesman for society.

Conclusion

As stated above, the STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE contained Section 608 entitled "Conduct which Avoids Greater Harm." [141] The Commission on Reform of Federal Criminal Laws stated in the Comments that this section embodied the doctrine of necessity. The Commission codified the defense because "[i]t makes no sense to punish persons who have acted to avoid great harm, even if they have 'broken a law' to do so." [142] The provision was to include the obvious cases such as speeding in order to reach a hospital in an emergency or destroying a house to stop a forest fire. The Commission also intended that Section 608 include extreme cases, such as killing some persons to save a greater number.[143]

The final Proposed Code deleted the codified necessity defense and added Section 601 which simply stated, "Except as otherwise provided, justification or excuse under this chapter is a defense." [144] The Commissioners explained that they did not want to "freeze the rules as they now exist." [145] They added that Section 601 did not include the "Choice of Evils" rule (that emergency measures to avoid greater injury may be justified) because "even the best statutory formulations . . . is a potential source of unwarranted difficulty in ordinary cases . . ." [146] Although some commissioners felt that the Code should explicitly recognize that avoidance of harm is a privilege of the citizen, the majority concluded that codification, as opposed to case-by-case prosecution discretion, is premature.[147]

Without a statutory definition of the defense of necessity, criminal defendants in federal cases must continue to seek necessity instructions to the jury in the face of unreceptive courts. Section 608 or a similar codification would give the defense of necessity the recognition that it has traditionally received in the common law cases. A statutory basis for the defense will result in a uniformity now lacking. Greater uniformity will enable trial judges to decide more consistently whether the defense is applicable or merely frivolously asserted.

When a person commits an allegedly criminal act, especially when the act is done in opposition to what that person considers an illegal government activity, the danger of the abuse of prosecutorial discretion is great. In times past, jury nullification instructions prompted juries to exercise discretion if they thought defendants were being unjustly prosecuted. Permitting juries to consider the pleas of necessity is another way of assuring that justice will not be abused by law. If it is feared that permitting juries to consider the plea of necessity in political cases will result in defendants being acquitted of crimes committed to protest government policies, "we would," in the words of Judge Bazelon, "be far better advised to ponder the implication of that result than to spend our time devising stratagems which let us pretend the power of nullification does not even exist." [148]

[141] *Study Draft*, *supra* note 3 and accompanying text.
[142] STEIN, COMMENT ON JUSTIFICATION AND EXCUSE, 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 261, 270 (1968).
[143] *Id.*
[144] FINAL REPORT, *supra* note 4.
[145] FINAL REPORT § 601, Comment, *supra* note 4.
[146] *Id.*
[147] *Id.*
[148] United States v. Dougherty, 473 F.2d 1113, 1144 (D.C. Cir. 1972) (Bazelon, C. J., concurring in part and dissenting in part).