

## Justification: Necessity - Contours Of The Necessity Defense

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The Model Penal Code, which has generally been a template for many criminal statutes in the last thirty years, describes the necessity defense as follows:

(1) Conduct which the actor believes to be necessary to avoid an evil to himself or another is justifiable, provided that: (a) the evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (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. (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of 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. (§3.02)

Statutes based on the Model Penal Code often deviate from it by emphasizing the moral underpinnings of the necessity defense. The New York Penal Law is a good example. Conduct is justifiable when

such conduct 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 fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweighs the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. (§ 35.05 (2))

The New York statute makes clear that both the actor's weighing of relevant evils and her determination about the exigency of acting must meet "ordinary standards" of judgment. It also implies that the judgment should not be a close call.

Modern versions of the necessity defense tend to follow the Model Penal Code in reaching beyond its historical limitations.

1. Current statutes make clear that the defense is available whether the choice of evils is brought about by natural events—fires, earthquakes, brake failure, shipwreck—or by human agency. For example, several widely discussed cases recognize a necessity defense in prison escape situations (*People v. Lovercamp*, 43 Cal. App 3d. 823 (1974); *U.S. v. Lopez*, 622 F. Supp. 1083 (1987)). Escaped prisoners, under threat of imminent physical assault and injury by fellow prisoners or renegade guards, have argued successfully that escape was the lesser evil. Older statutes, by contrast, limit the necessity defense to natural occurrences.
2. According to most modern statutes necessity is available to defend oneself even against such

serious charges as homicide. A defendant may argue that taking one life prevented the otherwise inevitable loss of several lives. For example, homicide and cannibalism have arguably been justified within groups that, stranded in the wild or at sea, faced the risk of imminent starvation. Again, older statutes often limit the necessity defense to circumstances in which the actor brings about nonlethal harm.

3. The necessity defense is not limited to cases in which the actor is personally implicated and avoids harm to himself or his family. Nor is it limited to cases in which the actor acts altruistically. In other words, it does not matter what, if any, stake the actor had in the harm avoided as long as that harm was arguably the greater evil.
4. Unlike duress, the necessity defense is relevant even if the threat is to property rather than to life or physical well-being.

Note that the necessity defense, as the Model Penal Code makes clear, has both subjective and objective elements. A defendant may use the necessity defense even when her assessment of the situation turns out to be wrong. It may be wrong *ab initio*, as in the mistaken belief that actors rehearsing a murder scene are in fact setting about to commit homicide. It may also be wrong as a prediction. The cannibals, having dined on one of their party, may be rescued sooner than they expect, making their "criminal" conduct unnecessary from the standpoint of hindsight. In such cases the law only requires reasonable understanding and predictive powers. The test is subjective.

On the other hand, the weighing of evils under necessity must fit the shared values of reasonable persons. The captain of a sinking ship cannot justify saving a cargo of valuable paintings at the cost of letting passengers drown. One cannot justify saving the life of a captain of industry or a rock star at the cost of numerous other lives on the grounds that the saved life was more valuable. This aspect of the defense alludes to shared values, and it seems to presume that they are objective.

The fact that the necessity defense presupposes a consensus of values has troubled some commentators (Brudner). They find a crude and untenable form of utilitarianism at its core, and they object that the consequences of our acts do not have natural moral parameters that permit an objective measure of the component of evil. These writers suggest that the underlying determinations about the scope and relevance of the necessity defense in particular cases are moral and complex, involving judgments about harm, intention, motive, and character. Thus, they criticize such formulations as the Model Penal Code for camouflaging this complexity.

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bill clinton "billclinton <no\_spam>@<no spam> yahoo.com"

5 months ago

The necessity defence does not need to be entitled upon the arrival do due process.  
Habeus corpus allows the victum to have a fair trial until told.

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