

The Necessity Defense

There is a justification to killing in the criminal law, less well-known and less obvious than a plea of self-defense. Reference is made to it, however obliquely, in *Queen v. Dudley*. Did you catch it the first time 'round? It's the necessity defense and it would justify the defendants' killing of Roger Whetmore if they could successfully defend their actions on grounds of necessity.

What is the necessity defense exactly? And how might it be applied?

Say there is a fire in a maximum security prison, and the prisoners, threatened by death, break out of their cells. Surely they are not guilty of the crime of escape? Is this a situation where you might think that necessity could be a defense and that the prisoners who broke out of their cells "out of necessity" ought not to be convicted of escape? And what do you make of the following cases adapted from Katz:

1. CVS To the Rescue

John goes into his local CVS to buy some Dorito chips for Alice. While he is standing at the counter, he suffers a heart-attack. Unless he receives an immediate dose of nitroglycerine, he will die. John staggers back to the pharmacy, plunks a ten dollar bill down on the counter, and asks for the drug. Henry, the pharmacist on duty, sells the drug to John without a prescription because there is no time to find a doctor. Is Henry guilty of selling a drug without a prescription? What if the FDA had not yet approved the drug, if in fact there are significant risks associated with administering it which only a doctor can fully appreciate? What if John simply says, "Give me something quick, I'm having a heart attack," and Henry sells him the drug, but there is another drug that Henry could have sold to John for the same price but one with far fewer risks, but Henry did not know the difference because he does not have a medical degree?

2. *Woods v. State, Texas, 1938*

Texas, like many other states, has a statute that requires anyone in a car accident stop and wait for the police to arrive at the scene. Elmer Woods and Alice are off to the movies. Two blocks from the cinema Elmer collides with another car. Alice suffers several cuts and bruises which, in Elmer's opinion, require immediate attention. He drives away from the accident to the emergency room of the local hospital. Later Elmer is charged with violating the hit-and-run statute since he did not wait, as the statute requires, for the police to arrive. He left the scene of the accident. Should Elmer be found guilty, if, in his opinion, Alice was injured to such an extent that it was necessary that she receive immediate treatment?

3. *State v. Jackson, New Hampshire, 1902*

New Hampshire has a statute making school attendance compulsory. Parents who keep their children out of school commit a criminal offense. Samuel Jackson's daughter was in very poor health: he feared for her life since she needed medical attention throughout the day and night and, as a result, he did not dare send her to school. In fact, he never applied to the school board for a special exemption for his child or a dispensation. Did Samuel Jackson act criminally? The court appealed to the necessity defense: "A parent cannot be required to imperil the life of his child by delays incident to an application to the school board, before he can lawfully do what is apparently reasonably necessary for [his child's] protection."

4. *The William Gray, 1810*

In 1810 the United States Congress imposed an embargo on the West Indies. While sailing from Alexandria to Boston, a heavy storm forced the *William Gray* to put in at the harbor of Antigua in the West Indies. The West Indian Governor ordered the captain to sell his cargo and only then allowed him to leave. Was the ship guilty of a criminal violation of the embargo statute? The court noted that the embargo statute did not contain an explicit exception for ships caught in stormy weather. Nonetheless the ship's action was subject to "the principle of necessity" as recognized "from time immemorial," and the captain, whose decision it was to put in to Antigua to ride out the storm, was acquitted. What if the captain of the *William Gray* knew before he left Alexandria that the weather would be foul and that if caught in a storm, his ship would likely have to put in at the West Indies?

5. *United States v. Aston, Mass Circuit Court D, 1834*

The *Merrimack*, a sailing ship, set out in 1834 from Boston to Rio de Janeiro. She was leaky to begin with. Several days out of the harbor she met with a ferocious gale that further worsened her condition. The crew insisted on taking her back, but the captain turned a deaf ear. The crew eventually refused to go farther and the captain had no choice but to go back. In Boston the crew members were charged with mutiny. Invoking the idea of necessity, the court held that they should be acquitted if they reasonably thought the ship unseaworthy and a serious hazard to life. What if the *Merrimack* had been a naval vessel steaming toward some distant battleground? Ought a court still be willing to put the decision in the hands of the crew to turn the ship back because it seems unlikely to survive the next severe storm?

— See Katz, *Bad Acts and Guilty Minds*, Chicago, see pp. 8-81

The Model Penal Code which many states use as a template for the language of their criminal law statutes, defines the necessity defense (in full) as follows:

Section (§3.02):

(1) Conduct which the actor believes to be necessary to avoid an evil to himself or another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (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 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

Requirements of the Defense:

- (1) The defendant must be faced with a clear and imminent danger.
- (2) There must be a direct causal relationship between the action and the harm to be averted.
- (3) There must be no effective legal way to avert the harm.
- (4) The harm that the defendant will cause by violating the law must be less serious than the harm he seeks to avoid. The defendant's actions are evaluated in terms of the harm that was reasonably foreseeable at the time, rather than the harm that actually occurred.
- (5) There must be no legislative intent to penalize such conduct under the specific circumstances.
- (6) The defendant must come to the situation with "clean" hands, i.e., he must not have wrongfully placed himself in a situation in which he would be forced to commit the criminal conduct.

Limitations on the rule – availability of the necessity defense may be further limited to:

- (1) emergencies created by natural forces;
- (2) non-homicide cases
- (3) protection of persons and property only, i.e. excluding protection of reputation or economic interests.