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Chapter 6

Good and Harm, Excuses and Justifications and the Moral Narratives of Necessity

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Key words:- necessity, justification, criminal law, gender

Introduction

The formalisation of a body of rules and regulations set out the structure necessary for the execution of a consistent law governing conduct. Max Weber writing on the 'legality of enacted rules'[1] theorised the essentialness of rationalisation and structure. Simester and others agree that, 'The legal system will simply not work if its authority is optional.'[2] Of necessity they say this: 'Derogation from its rules is not permitted save in specific, confined circumstances.'[3] But Weber also recognised that with increasing rationalisation and formalisation legal rules can trap individuals in both an 'iron' and a 'figurative cage'. Contained in this critique of modernity and rationalisation are two considerations, first the morphological problem of over-rigid structures of authority which he addresses in his critique on bureaucracy and its limitations, and second, his exploration of conduct and action in an attempt to offer an interpretive understanding of social action wherein he focuses on the intersubjective meaning of action for the individual and the social construction of motive. The recalcitrant and unintended consequences of the rigidity and inflexibility of bureaucracy and legal rules has been variously depicted in the nightmare scenarios imagined by Franz

[1] Max Weber, *On Charisma and Institution Building* (Heritage of Sociology Series, 1968) 215.

[2] AP Simester, JR Spencer, GR Sullivan and GJ Virgo *Criminal Law* (Hart 2013) 798.

[3] Ibid 799.

Kafka. In both *The Trial*[4] and *The Castle*[5], Kafka envisages a labyrinth of enigmatic normative rules in a legal world from which there is no escape. The protagonist of *The Trial*, Joseph K, is a bank clerk, and significant to the plot, an ordinary man, who is arrested and prosecuted for a crime although neither he nor the reader discover what crime he has actually committed and so he finds himself trapped in a web of an abstracted and secretive legal system. The problem of the this reification of law is also depicted by Lewis Caroll[6] through his characterisation of the Red Queen who, when Alice is giving evidence, traps her in a legal abstraction. Legal theorists have been enthralled by Kafka's prophetic vista where legality becomes fetishised, rendering the individual subject helpless. Such reification results in the consciousness of law becoming a thing, dislocated and cleaved from its moral and ethical foundation. Thus law if it becomes over-objectified can result in a banal law, a violent law and an evil law. Law certainly reached banal and evil proportions when law became the absolute authority and was dislocated from morality, such that in Nazi Germany it became possible to implement laws that were positively harmful and, when authorised, promoted and legitimated hatred. For example, on September 15, 1935, the Nuremberg Laws revoked citizenship for Jews, prohibiting them from marrying or having sexual relations with persons of 'German or related blood.' Further example is provided where in South Africa, the Immorality Act of 1927 prohibited sexual relations between whites and blacks, later followed by the Prohibition of Mixed Marriages Act 1949.

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[4] F.Kafka, *The Trial* (Penguin 2000).

[5] F.Kafka, *The Castle* (Penguin 1970).

[6] Lewis Caroll, *Alice's Adventures in Wonderland* (Wordsworth Edition 1993) 141. 'Let the jury consider their verdict,' the King said, for about the twentieth time that day. 'No, no!' said the Queen 'Sentence first—verdict afterwards.'

In everyday legal life, in jurisdictions where there is harmony between legal authority and morality, circumstances nevertheless arise where the enforcement of the legal rule would be palpably wrong, banal, even absurd. In the criminal law, an exemption is provided by 'necessity' whose arguments respond in exceptional circumstances to valid moral claims and provide a defence for those who, when conducting themselves in a particular way that is right in the circumstances, break the law. Perhaps Glanville Williams poses the question most appositely when he considers '...how far the notion of necessity can create new rules or serve as an excuse for dispensing with the strict law where the exigency requires it.'[7] The clearest legitimate application he identifies is where life is in danger.[8]

This chapter explores the ambit of the defence of necessity and raises some questions around the negotiation of the 'higher' moral claims exploring the reasoning informing the sanctioning of some claims and the rejection of others. What is at stake here then is the relation of law to moral and ethical questions, to public policy, to the judicial craft and to individual motives for exemption. The ambit of necessity is unclear since its legally accepted claims are shaped by context, in an historical and cultural fluidity, crafted by the judiciary who as necessity's arbiters balance typifications of goods and harms in particular cultural and historical milieus. What we see at the surface is the playing out of these values and claims, and at times correspondingly the suspension of law, as judges act as the grand masters of morals. Judges as grand moralists in 17th century took to divining whether hunting on another's private property was a breach of the law of trespass to be permitted in the circumstances of necessity.[9] In the 20th century in *Leigh v Gladstone*,[10] Mrs Mary Leigh, a

[7] Glanville Williams, 'The Defence of Necessity' (1953) 6(1) Current Legal Problems 217-218.

[8] Ibid 219.

[9] Y.B.,M.12 H.8 10a,pl,2. Cited in Williams (n 7) 220-221.

suffragette who had been forcibly fed whilst on hunger strike in prison brought an action against the Home Secretary. Lord Alverstone CJ, in his judgment directed the jury in favour of necessity, and said 'It was the duty, both under the rules and apart from the rules, of the officials to preserve the health and lives of the prisoners, who were in the custody of the Crown. If they forcibly fed the plaintiff when it was not necessary the defendant ought to pay damages.'[11]The jury concurred although doctors had argued that it was a question best decided by them.[12] As Williams points out the doctrine of necessity 'becomes particularised in rules of law,'[13] as is clear by the instances above, with regard to whether the invasion of private property or personal liberty. In exploring the panoply of social claims that can arise in a defence of necessity, consideration is also given to the authorisation in law of particular personal or intersubjective narratives. Here, the legally accepted narratives as they inform communication, and, for our purpose the shaping of motives for action, is also considered. In exploring necessity's motives the dominant discourses are considered not merely at the intersubjective level of actor's motives for conduct (as explored by Schutz's[14] reading of Weber for example) but also as shaped by Foucault's[15] theorisation of discourse as preceding

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10 [1909-1910] 26 TLR 139, cited in Glanville Williams, *Textbook of Criminal Law* (London Stevens and Sons 1978) 571. See later Bobby Sands, *One Day In My Life* (Mercier Press 2001); *Secretary of State for the Home Department v Robb* Family Division 4 October 1994 Case Analysis [1995] Fam 127; [1995] 2 WLR 722.

[11] [My emphasis] ibid *Leigh* 142.

[12] Anyone reading the experience of suffragettes on the receiving end of forcible feeding may conclude with the medical profession at the time that it was an inhumane and disgusting practice. See Frank Moxon, *What forcible feeding means*, The Woman's Press at http://www.brynmawr.edu/library/exhibits/suffrage/MoxonForcibleFeeding.pdf (Last accessed January 1st 2014) see especially pages 6-7 for a commentary on the Leigh case.

[13] Williams (n 7) 222.

[14] Alfred Schutz, *The Phenomenology of the Social World* (Heinemann London 1972).

[15] Michel Foucault, *The Archealogy of Knowledge* (1969, Routledge 2008).

the subject. The significance of necessity's motive, either as a justification or as an excuse for infraction is specifically explored, concluding that necessity's motive is one of justification, which of itself presents a heretical challenge to law's authority providing a way out of the iron and the figurative cage.

Legal 'Necessity'

'Necessity' provides an exemption to criminal infraction when the claim that s/he was compelled or impelled to act as s/he did permitting and allowing a disregard for the normative constraints of the law when a claim to a higher morality, or more weighty need or situation is the more desirable end. Both self defence and duress are in fact sub species of a necessity defence. Clarkson argues in favour of collapsing the defences of self defence, duress by threats, duress by circumstances and necessity into one general defence of necessity, termed 'necessary action'.[16] This schema for conceptualisation has some support. Lord Woolf CJ in *Shayler*,[17] opined that the defences of necessity and duress of circumstance are 'simply different levels of the same thing.... None the less the distinction between duress of circumstances and necessity has correctly been by and large ignored or blurred by the courts.'[18] Chan and Simester,[19] in response to Clarkson's schema declare that such a general defence is not possible because the rationales for the various defences differ, either being a matter of justification, or a matter of excuse. They develop in some detail their objection to such classification and argue that there are in effect four categories of exculpation: (a) self-defence as justification, (b) duress where D may commit both a moral and a legal wrong

[16] CMV Clarkson, 'Necessary Action: A New Defence' [2004] Criminal Law Review 81-95.

[17] *R v Shayler* [2001] EWCA Crim 1977; 1 WLR 2206, *R v Shayler* [2002] UKHL 11 [2003] 1 AC 247.

[18] Ibid (CA) [52] and [55] respectively [Emphasis added].

[19] Winnie Chan and AP Simester, 'Duress, Necessity: How Many Defences?' [2005] 16 Kings College Law Journal 121-132.

where the pressure explains D's motivation, (c) necessity, where the pressure is motivated by a lesser evils defence and (d) the best interests intervention of necessity - where the authors refer to examples of medical intervention.[20] Each of these defences, say the authors, has a different rationale. Stark,[21] in his review of Clarkson's proposal and Chan and Simester's argument also considers excusatory necessity and justificatory necessity in his attempt to develop a rationalisation of the necessity defence as he rebuts the Clarkson thesis explaining why he considers it will not work. Whichever way the defences are cut – excuse or justification, or the infraction as weighed against the moral claim there are differences between them and in addition as Williams points out,[22] '[T]he language of necessity disguises the selection of values that is really involved.'

In both the circumstances of self defence and duress the defendant breaks the law, and, in the case of self defence[23] his conduct may be excused and may even be justified when he kills to ensure self preservation, or (where duress applies) is compelled to commit a crime (murder excluded) following another individual's threats of serious harm or death. Both self defence and duress, have in recent years, been further expanded. In the Martin case,[24] a farmer shot at intruders with a gun, loaded with birdshot, killing one of them, pleaded self defence and was convicted of murder. At the time, the law required no more than reasonable force to be used. Lord Woolf CJ said, 'In judging whether the defendant had only used

[20] Ibid 127.

[21] Findlay Stark, 'Necessity and *Nicklinson*' [2013] Criminal Law Review 949.

[22] Williams (n 7) 224.

[23] *Beckford v R* [1988] AC 130,'A defendant is entitled to use reasonable force to protect himself, others for whom he is responsible and his property.... It must be reasonable'. See also a plea under s 3 Criminal Law Act 1967. See also *Morris* [2013] EWCA Crim 436.

[24] *R v Martin* [2001] EWCA Crim 2245 [5].

reasonable force, the jury has to take into account all the circumstances, including the situation as the defendant honestly believes it to be at the time, when he was defending himself. It does not matter if the defendant was mistaken in his belief as long as his belief was genuine.'[25] Martin's conviction for murder was quashed and diminished responsibility manslaughter substituted on appeal.[26] Lord Woolf CJ identified the public mood. 'What has been the subject of debate is whether a defendant to a murder charge should be convicted of murder if he was acting in self-defence but used excessive force in self-defence.'[27] Section 76 of the Criminal Justice and Immigration Act 2008, provides further clarification to the common law and statutory defences by enshrining in statute the essentialness of a defence of self defence. Section 76(3) sets out what had been the position in the common law - that the more unreasonable the belief, the less likely it will be considered to be honestly held. However, the much needed clarity is lost since whilst the degree of force used must be reasonable, section 76(7) also recognises that a person may, in such circumstances of fear, surprise, alarm, be unable to 'weigh to a nicety' the exact measure of any necessary action.[28] Further attempts to refine the law on self defence have followed in the Crime and Courts Act 2013 with the introduction of an amendment to section 76. The force used may now be 'disproportionate.' This is qualified by the requirement - 'but not grossly so', as provided in section (5A) such that, 'In a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.' Such determinations will turn on the

[25] *Martin* ibid [5].

[26] *Martin* (n 24).

[27] *Martin* (n 24) [9].

[28] *R v Bristow and others* [2013] EWCA Crim 1540.

individual facts of each case in interpreting this confusing amendment 'disproportionate - but not grossly so'. Nicola Wake,[29] has noted the opacity, 'Perplexed jurors will be required to engage in mental gymnastics in order to determine whether the defendant's conduct is to be regarded as reasonable, disproportionate or grossly disproportionate.'

Turning to the defence of duress there has been some welcome and rather more comprehendible expansion. Such a defence applies where the defendant is forced by another person or by circumstances (duress of circumstances) to commit a crime. The trigger for such compulsion is a threat of serious harm or death.[30] I have critiqued the gendered nature of the criteria required for this defence particularly with regard to the exclusion of the factual compulsion created for victims facing the predicament of domestic violence.[31] In this regard, the Court of Appeal judgment in *R v Coats*[32] is to be welcomed. Here, the appellant, C, had been involved in drugs importation. She pleaded guilty and was sentenced to a term of imprisonment. However, one of the group, W, had been convicted of a brutal murder whilst C was serving a prison sentence. W had been previously in a relationship with C. W was violent to her and this was supported in complaints that C made to the police although subsequently withdrew out of fear. C made an application to the Criminal Cases Review Commission who referred her appeal against conviction to the Court of Appeal on the basis of fresh evidence of battered woman's

[29] Nicola Wake, 'Battered Women, Startled Householders and Psychological Self-Defence: Anglo-Australian Perspectives' (2013) Journal of Criminal Law 77 (433). See also *R v Dawes, Hatter and Bowyer* [2013] 2 Cr App R 3.

[30] *R v Dao, Mai and Nguyen* [2012] EWCA Crim 1717, where threat of false imprisonment was not sufficient, reaffirming *Hasan* [2005] UKHL 22, where the House of Lords limited the defence to threats of death or grievous bodily harm.

[31] Susan Edwards, 'The Straw Woman at Law's Precipice: An Unwilling Party' in, Reed and Bohlander [eds] *Participation in Crime: Domestic and Comparative Perspectives* (Ashgate Publishing 2013) 59-77.

[32] *R v Coats (Goldie Ann)* [2013] EWCA Crim 1472.

syndrome (BWS). The Court of Appeal did not accept that C was in fact suffering from BWS, but significantly, it did accept that BWS may be relevant to a defence of duress. What they did say was this. An accused would have to have suffered BWS in a severe form to be in a position where the will was overborne.[33] The Court of Appeal in recognising the effects of domestic violence on the will impliedly accepted the obiter remarks of Baroness Hale who in *Hasan* had attempted to educate their Lordships on just this specific form of duress.[34] Baroness Hale said, 'The battered wife knows that she is exposing herself to a risk of unlawful violence if she stays, but she may have no reason to believe that her husband will eventually use her broken will to force her to commit crimes. ... The battered wife knows very well that she may be compelled to cook the dinner, wash the dishes, iron the shirts and submit to sexual intercourse. That should not deprive her of the defence of duress if she is obliged by the same threats to herself or her children to commit perjury or shoplift for food.'

The defence of 'necessity' is also part of this expansionist project but it is piecemeal and lacking in coherence. Simester et al write, 'There is no unitary rationale of the necessity defence.'[35] Indeed, it is simply not possible to rationalise the exemption from liability provided by a necessity defence. As Lord Woolf CJ stated in *Shayler:*

> Any attempt at a definition of the precise limits of the defence is fraught with difficulty because its development has been closely related to the particular facts of the different cases which have come before the court... in 1953, Professor Glanville Williams said, in *Criminal Law, The General*

[33] *Coats* ibid.

[34] *Hasan* (n 30) [77].

[35] Simester et al (n 2) 799.

> *Part*, p 570, that the "peculiarity of necessity as a doctrine of law is the difficulty or impossibility of formulating it with any approach to precision."[36]

Stark[37] presents a valiant and at times persuasive attempt at conjuring an ex post facto rationale to its arbitrariness. But there is no one body of philosophy, ethics or morals that can be called upon to resolve whether, or when, the claim of a defendant should trump the claim of law. The judicial (and statutory) outcomes defy classification, rationalisation or formalisation, they are arbitrary, determined by location, culture, historical context and the ill defined and unruly horse of public policy.

Common Law to the Model Penal Code

In the UK, the legal defence of necessity still remains a matter for judges and the common law. In its draft Criminal Code, the Law Commission, when tasked with considering necessity, said, 'We are not prepared to suggest that necessity should in every case be a justification; we are equally unprepared to suggest that necessity should in no case be a defence.'[38] The ad hoc development of the common law of necessity has resulted in the Law Commission trying to inject some consistency proposing that a general defence of necessity be introduced into English law, and by 1985 that a defence of necessity - 'duress of circumstances' (excepting attempted murder and murder) should apply to all crimes.[39] The Draft Criminal Law Bill, 1993,[40] clause 26 provides:

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[36] *Shayler* (n 17) [46E-F] 2223.

[37] Stark (n 21).

[38] Law Commission *Draft Criminal Code,* (Law Comm No 177, 1989) Criminal Law: A Criminal Code for England and Wales, (2 vols). See also Law Commission *Legislating the Criminal Code*, (Law Comm No 218, 1993, Cmnd 2370).

[39] Law Commission (1993) ibid, see the discussion at 77 [40.1].

[40] Law Comm 1993 (n 38). See discussion at 35.1-35.12;35.3-35.7.

> '(1) No act of a person constitutes an offence if the act is done under duress of circumstances. (2) A person does an act under duress of circumstances if - (a) he does it because he knows or believes that it is immediately necessary to avoid death or serious injury to himself or another, and (b) the danger that he knows or believes to exist is such that in all the circumstances (including any of his personal characteristics that affect its gravity) he cannot reasonably be expected to act otherwise. It is for the defendant to show that the reason for his act was such knowledge or belief as is mentioned in paragraph (a). The defence would not apply to a person who knowingly and without reasonable excuse exposed himself to the danger known or believed to exist; the accused would have the burden of proving that he had not so exposed himself if the question arose.'

By contrast, in the US, a necessity defence is part of the Model Penal Code (a proposed criminal code drafted by the American Law Institute and used as the basis for criminal law revision). Following the case of *The United States v Holmes*,[41] (discussed below) necessity is explicitly sanctioned and many US states have adopted some form of 'lesser evils' defence.[42] Section 9.22. specifically sets out the defence of necessity, where conduct is justified if:

> (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;(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.[43]

California, for example, has laid down six criteria which are required before such a defence can be satisfied.(1) Preventing significant bodily harm or evil (2) No adequate legal

[41] *United States v Holmes* (1842) 26 F Cas 360.

[42] See Model Penal Code And Commentaries 3 .02 cmt. 5 (Official Draft and Revised Comments 1985) listing state statutes for 'general choice of evils defense'.

[43] Penal Code Title 2. General Principles Of Criminal Responsibility Chapter 9. Justification Excluding Criminal Responsibility sub chapter A. General Provisions.

alternative (3) Act did not create a greater danger (4) Actual belief that act was necessary (5) Reasonable to believe act was necessary (6) D did not substantially contribute to the emergency.

Whilst in the UK the common law defence of necessity has relied on three principles. First, the balance of harms test requires the harm of breaking the law to be balanced against the moral good to be achieved. Second, breaking the law to meet the higher moral claim and conduct must be objectively reasonable. Third, the principle of proportionality requires the breaking of the law to be proportionate to the higher moral good that will be accomplished. In both the cases of *Nicklinson,*[44] and *Re A,*[45] these three requirements, originally uttered by Sir James Stephen, were reiterated:

> ...there are three necessary requirements for the application of the doctrine of necessity: (i) the act is needed to avoid inevitable and irreparable evil; (ii) no more should be done than is reasonably necessary for the purpose to be achieved; (iii) the evil inflicted must not be disproportionate to the evil avoided.[46]

These principles are indeed enigmatic and fluid. They have been left for judges to divine and interpret as and when ambitious and creative counsel place such arguments before them.However, in some limited circumstances necessity arguments have been accommodated in specific statutes. For example, section 9 of the Midwives Act of 1951 makes it an offence for an uncertified person to attend a woman in childbirth other than under the supervision of a

[44] *R (Nicklinson) v Ministry of Justice R (AM) v Director of Public Prosecutions* Queen's Bench Division (Administrative Court) 16 August 2012 [2012] EWHC 2381 (Admin) [2012] HRLR [64].

[45] *A (Children) (Conjoined Twins: Surgical Separation), Re* [2001] Fam 147; [2000] HRLR 721

[46] *Nicklinson* (n 44) [64], *A (Children) (Conjoined Twins: Surgical Separation), Re,* ibid [225]**.** See also *Pipe v DPP* [2012] EWHC 1821(Admin).

qualified medical practitioner but no offence is committed if attendance was given in a case of sudden or urgent necessity.[47]

Balancing the Incommensurable - Fur with Feathers

Balancing the goods and harms or in the words of the common law 'balancing evils' requires making moral and ethical judgments. Williams recognised the philosophical and social maze of weighing necessity claims to any moral nicety. 'Necessity in legal contexts involves the judgment that the evil of obeying the letter of the law is socially greater in the particular circumstance than the evil of breaking it.'[48] In the case of *Shayler,*[49] Lord Woolf CJ said, 'the act must be done only to prevent an act of greater evil: the evil must be directed towards the defendant or a person... for whom he has responsibility... the act must be reasonable and proportionate to the evil avoided.'[50] And so round and round we go and all the recitations do not move us to a clearer place in an effort to identify any guiding rationale.[51] Necessity is presented with an incommensurability problem since it requires the weighing of one claim against another, a task of morals and ethics yet determined largely by judges of law and not of gnosis. Endicott expresses it thus, 'The incommensurability problem: if there is no rational

[47] Susan Edwards, 'In Whose Best Interest - Everybody's Talking 'bout ma Baby' The Leveller, November 1982, 22-23; see also PR Glazebrook, 'The Necessity Plea in English Criminal Law' (1972A) 30 Cambridge Law Journal 96.

[48] Williams, *Textbook* (n 10) 553.

[49] *S* [2001] 1 WLR 2206.

[50] *Shayler* (n 17) CA 2224, [49].

[51] For a wider discussion on incommensurability see Joseph Raz, *The Morality of Freedom* (Clarendon Press 1988), John Finnis, 'Commensuration and Public Reason', in Ruth Chang (ed.), *Incommensurability, Incomparability, and Practical Reason* (Cambridge, Mass. Harvard University Press 1997), see also Timothy Endicott, *Vagueness in Law* (Oxford University Press 2000).

basis for deciding one way rather than the other, then the result seems to represent a departure from the rule of law, in favour of arbitrary rule by judges.'[52]

Objectively Reasonable to Whom?

The second criteria founded on an objective test requires a consideration of whether the infraction is reasonable in the circumstances. The reasonable man of necessity, and the reasonable man of provocation (now loss of self control), as the reasonable man elsewhere in the criminal law, is not an ahistorical man. He is indeed a time traveller, travelling through time, through culture, and through place. Clarkson recognises the historical contingency which is evident in the language he chooses to articulate the precept of reasonableness - 'in our present society', 'culturally bound,' 'present time bound' and 'in this present law.' [53] Was the action of Captain Tom Dudley and Mate Edwin Stephens (discussed later) reasonable? It would appear from all that is known about this case that their actions in eating the cabin boy were indeed reasonable not only to seamen[54] but also to the people of the seaport of Falmouth,[55] but unreasonable to the court of law in London, and no doubt to ordinary men and women unfamiliar with the perils of the sea.

Proportionate to What?

[52] http://denning.law.ox.ac.uk/news/events_files/Proportionality_and_incommensurability.pdf

[53] Clarkson (n 16).

[54] See Neil Hanson *The Custom of the Sea*, (Doubleday 2000); AW Brian Simpson *Cannibalism and the common law* (Chicago University of Chicago Press 1984) 'In spite of the frequent occurrence of survival cannibalism, often preceded by deliberate killing, and the abundant evidence of nautical custom legitimating the practice of killing under necessity the survivors of the *Mignonette* have always been regarded as the first and indeed only individuals who ever faced trial for murder for killing committed in such circumstances'161. See also Donald McCormick *Blood on the sea* (Muller 1962).

[55] Hanson ibid, AW Brian Simpson, ibid.

The third principle enunciated by Stephen is that of proportionality. As with self defence or duress, it is difficult to balance to a legal nicety a proportionate response especially in situations requiring an immediate decision, a decision taken in an emergency situation, or in extremis or a decision taken when the defendant is in a state of shock, or fear, or blind panic. What is proportionate to what? The perceptive Clarkson again, 'Of course, an assessment whether a response is reasonable and proportionate must incorporate society's moral and political judgments about what sort of emergencies or threats can be averted.'[56] Lord Goff acceded in *Richards,*[57] 'the scope of the defence is by no means clear.'

The Legal 'Rationale' of Excluded Claims

In applying these three considerations, English law, has set down, in a series of common law cases the imperfect ambit of necessity recognising very few claims. Bohlander is of the view that successful cases should indeed be exceptional.[58] Simester and others also concur, 'necessity is a doctrine to be used sparingly...it is not a major organising principle of a modern legal system.'[59] Perhaps this parsimonious usage is because necessity is heretical to the rule of law itself. Williams asks, 'By what right can the judge declare some value, not expressed in the law, to be superior to the law'?[60] Indeed by what right! Past excluded claims simply tell us what necessity is not!

[56] Clarkson, (n 16) 89.

[57] *R v Richards; unreported* 10 July 1986, cited in Michael Jefferson, *Criminal Law* (8th Edition:Pearson 2007) 268.

[58] Michael Bohlander, 'Of Shipwrecked Sailors, Unborn Children, Conjoined Twins and Hijacked Airplanes—Taking Human Life and the Defence of Necessity Taking Human Life and the Defence of Necessity' (2006) Journal of Criminal Law 70 (147).

[59] Simester et al (n 2) 807.

[60] Williams (n 7) 224.

Dudley and Stephens,[61] is perhaps the most vigorous of all such rejections excluding murder from necessity's ambit. The case involved four men who found themselves in *in extremis* circumstances. Shipwrecked and 1,000 miles from land, without food for 18 days and exhausted, they decided to kill the weakest of their members - Parker. The stronger drew lots as to who should commit the actus reus, one of the remaining three opted out of the conspiracy to kill Parker. On the 20th day, Parker was killed, and in eating his flesh the two killers and the third man survived.

Captain Tom Dudley and Mate Edwin Stephens were prosecuted for murder at the Devon and Cornwall Winter Assizes. Huddleston, B., by way of a special verdict, adjourned the case until the 25th of November at the Royal Courts of Justice. After a further adjournment to the 4th of December, the case was argued before five judges. Counsel for the defendants relying on Stephen, *Digest of Criminal Law*, art. 32, argued that 'The facts found on the special verdict shew that the prisoners were not guilty of murder, at the time when they killed Parker, but killed him under the pressure of necessity. Necessity will excuse all acts which would otherwise be a crime.'[62]Coleridge CJ did not accede to defence argument. Dudley and Stephens were found guilty and sentenced to be hanged. Coleridge CJ ruled that necessity could never be a defence to murder. However both A W Brian Simpson[63] and Neil Hanson[64] in their researches discovered that the residents of Falmouth considered the conduct of the defendants both reasonable and proportionate since three were saved whilst only one

[61] *Dudley and Stephens* [1884] 14 QBD 273. Known at the time as the case of the *Mignonette*.

[62] *Dudley* (n 61) 273.

[63] AW Brian Simpson (n 54).

[64] Hanson (n 54) 250,262,334,389.387. 260.

died. Indeed it could be said that although Parker was 'designated' to die, he was after all the weakest and most probably the soonest to die and so Dudley and Stephens merely hastened his death. Their action was both pragmatic and desperate, committed in circumstances of *in extremis* where proportionality and reasonableness cannot be weighed with any exactitude. Bohlander in reviewing this case questions whether it was more necessary to kill him Parker than one of the grown men? He asserts, 'To preserve one's life is generally speaking, a duty, but it may be the plainest and the highest duty to sacrifice it.' [65] It was perhaps not more necessary, but in my view an argument could be made that as Parker was very probably going to die before the others, like Mary in *Re A*,[66] she dying gave life to Jodie, so Parker dying gave life to Dudley, Stephens and Brooks, as the fate of the men in the boat was conjoined in circumstances. Williams,[67] in his *Textbook of Criminal Law* said of this case, it 'involved in a common disaster... the victim was alive, but his prospect of remaining alive for more than a short time was minimal, so that his 'right to life' was of a very small value.' Williams suggests that a defence of necessity could have been accepted. I agree.[68] Terence Morris and Louis Blom-Cooper remarking on the case also said, 'It is hard to understand why a man who is driven to killing as a result of acts of provocation from his victims commits manslaughter, whereas the person who kills to preserve his own life and the lives of others has no such defence to murder.[69]

[65] Ibid Bohlander (n 58).

[66] *Re A* [2001] 2 WLR 480.

[67] Williams (n 10) 561.

[68] See (n 38) at 35.11 the Law Commission suggests that circumstances such as Dudley would be a matter properly for the jury.

[69] Terence Morris and Louis Blom-Cooper, *A Calendar of Murder* (Michael Joseph 1964) 289.

In the US case of *Holmes,*[70] the ship the 'William Brown' founded in icy seas and with only two life boats all its 83 passengers could not be saved. Whilst some passengers died on board as the boat went down, further lives were lost as one of the two life boats was severely overcrowded and as water was coming in, Holmes, following the order of a mate spent a gruesome night throwing 16 passengers overboard to lighten the load. Holmes was convicted of manslaughter since the grand jury refused to indict him for murder. The judge directed the jury that his act was illegal because the crewmen (and not the mostly Irish emigrant passengers) should have been so sacrificed and the choice as to which crewmen should have been forced off the boat was a matter to have been properly determined by the drawing of lots.[71]

More recent rejected necessity pleas have involved far less weighty considerations. In *Southwark London Borough Council v Williams,*[72] a number of homeless persons made an orderly entry into empty houses in Southwark owned by the council. The council's application to the court for immediate possession was granted.[73] The argument advanced by the homeless that necessity was a defence, was rejected. The circumstances in *Buckoke v Greater London Council,*[74] were also insufficient to exempt the defendants from liability. This case concerned whether the driver of a fire engine, when answering an emergency call, could cross a traffic light on stop. Lord Denning (obiter) set up a hypothetical situation in

[70] *Holmes* (n 41).

[71] Simpson ibid (n 54) 166-170.See also the case of the Euxine (1874) where lots were drawn and cannibalism followed 188.

[72] [1971] 2 All ER 175. *Southwark London Borough Council v Williams and Another, Southwark London Borough Council v Anderson and Another* [1971] Ch 734.

[73] Ibid at 744.

[74] [1971] Ch 655.

which he said, 'A driver of a fire escape with ladders approaches the traffic lights. He sees 200 yards down the road a blazing house with a man at an upstairs window in extreme peril. The road is clear in all directions. At that moment the lights turn red. Is the driver to wait for 60 seconds, or more for the lights to turn green. If the driver waits for that time, the man's life will be lost. I suggested to both counsel that the driver might be excused in crossing the lights to save the man. He might have the defence of necessity. Both counsel denied it. They would not allow him any defence in law. The circumstances went to mitigation, they said, and did not take away his guilt. If counsel are correct - and I accept that they are - nevertheless such a man should not be prosecuted. He should be congratulated.'[75]

Where individuals have cultivated cannabis for medicinal use to alleviate their own pain and suffering and advanced a defence of necessity the courts have held that necessity is not available.[76] Here, Alan Reed has this to say, 'The defence of medical necessity has been solipsistically deployed by the judiciary for reasons of policy rather than strict logic.'[77]

The Problem of the Door No Man could Shut

In limiting the ambit of necessity judges warn against the dangers of the misplaced development of this defence. In *Dudley and Stephens,*[78] Lord Coleridge warned that necessity could 'be made the legal cloak for unbridled passion and atrocious crime.' Whilst Denning J, a century later in *Southwark,* was at pains to point out that the doctrine so enunciated must, be carefully circumscribed otherwise necessity would open the door 'to many an excuse.'

[75] Ibid 668A-C.

[76] *R v Quayle (Barry) and others*, also known as: *Attorney General's Reference (No.2 of 2004), Re* Court of Appeal (Criminal Division) 27 May 2005, EWCA 1415.

[77] Alan Reed 'Necessity: Supply of Cannabis for Medical Purpose' (2005) 69(6) Journal of Criminal Law 464.

[78] *Dudley* (n 61).

‘Necessity would open a door which no man could shut. It would not only be those in extreme need who would enter. There would be others who would imagine that they were in need, or would invent a need, so as to gain entry. Each man would say his need was greater than the next man's. The plea would be an excuse for all sorts of wrongdoing. So the courts must, for the sake of law and order, take a firm stand. They must refuse to admit the plea of necessity to the hungry and the homeless: and trust that their distress will be relieved by the charitable and the good.’[79] Lord Edmund Davies in similar dissuasion said, ‘[T]he law regards with deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances. The reason for such circumspection is clear - necessity can very easily become simply a mask for anarchy.’[80]

But few accounts refer to the abuse of the defence of necessity that occurred in *Gregson v Gilbert* 1783,[81] the *Zong* case, where 150 slaves were pushed overboard because water was running short. Although Glanville Williams does indeed lead with this case in his article on necessity.[82] As slaves, the men were owned as chattel and had a property value, the loss of which could be estimated in monetary value, thus Gregson (the shipowners), brought a claim for the loss of their slaves (£30 each) from their underwriters (Gilbert) who refused to pay.

So divining what passes as necessity is a matter for judges. So on the one hand to accede to the defence advanced in *Dudley and Stephens* was perhaps to allow conduct beyond the moral pail and villainous, whilst to break the law in *Buckoke* was the course of action for

[79] *Southwark* (n 72) 744CD.

[80] *Southwark* (n 72*)* 740.

[81] *Gregson v Gilbert* (1783) 3 Doug KB 232, 99 ER 629 (KB).

[82] Williams (n 7) 224.

heroes. And so where is the rationale when questions inhabiting perhaps not the two ends of the spectrum of claims as above, are presented to the courts? Alan Reed,[83] writing on decision making in the context of drugs cases where necessity has been pleaded,[84] refers to what he calls the operation of a judicial divining rod. 'This body of jurisprudence is so inconsistent and policy themed that it seems to have come about by judicial divining rod.'

Accepted Claims

Whilst there may be perfectly legitimate moral and ethical arguments pressing for an exemption from the force of the criminal law, including pleadings of poverty, starvation, homelessness, and sickness, it is only in a very restricted set of circumstances that necessity pleas been accepted by the judiciary in judge made law as creating exonerable exemptions. So what claims have they accepted? Lord Denning in The *Closing Chapter* sets out some of these circumstances where presumably these exceptional claims of necessity have inhabited a higher or weightier moral ground. Starting with a case from the Year Book of 1499, when a prison caught fire and a prisoner who broke the door down in order to escape from the fire was held to have a defence of necessity 'for he is not to be hanged because he would not stay to be burned.' Denning then mentions the Great Fire of London in 1666, when it was lawful to demolish intervening houses in an effort to stop the fire from spreading,[85] and the jettisoning of cargo to save a ship from shipwreck on stormy seas in *Mouse's* case.[86]

[83] Reed (n 77).

[84] *Quayle* (n 76).

[85] Tom Denning, *The Closing Chapter* (Butterworths 1983) 68.

[86] (1608) 12 Co Rep 63.

In *Cope v Sharpe (No 2)*,[87] '[T]he plaintiff, an owner of land, let the shooting rights over the land to one C., whose bailiff and head gamekeeper the defendant was. A fire broke out on the land, and, while men in the employ of the plaintiff were endeavouring to beat it out, the defendant set fire to strips of heather between the fire and a part of the shooting where there were some nesting pheasants, the property of his master. Shortly afterwards the plaintiff's men succeeded in extinguishing the fire. The plaintiff brought an action of trespass in the county court. The Court held that (1.) 'Was the method adopted by the defendant in fact necessary far the protection of his master's property?' and (2.) 'If not, was it reasonably necessary in the circumstances?' [88] Denning stated, 'There is authority for saying that in case of great and imminent danger, in order to preserve life, the law will permit of an encroachment on private property.' The claims of private property and chattels have surrendered in these circumstances.

Doctors Duty and Necessity

In modern times necessity has been pleaded with regard to a number of medical decisions as the power of physicians in the modern world is recognised.[89] Physicians are in a very different position to others since 'their' necessity decisions involve the balancing of particular competing claims which inhabit the arena of ethical questions that are overlaid by religious precepts, matters of conscience, and in addition and most importantly their professional oath.[90] Physicians' claims to necessity Chan and Simester describe as 'best interests

[87] [1912] 1 KB 496.

[88] Ibid 500-501.

[89]See Ivan Illich, *Medical Nemesis* (Open Forum 1974).

[90] The Hippocratic Oath is not just about patient confidentiality it holds physicians to this duty, 'I will use treatments for the benefit of the ill in accordance with my ability and my judgment, but from what is to their harm and injustice I will keep them.'

interventions' which the authors claim involve some form of paternalism.[91] Stark,[92] in reviewing the necessity defence in this area of circumstances also speaks in the language of 'best interests interventions'. Physicians in saving lives or preventing harm have on occasion relied on the defence of necessity, aligning the physician's duty to alleviate human suffering[93] and the legal duty. In *R v Bourne*,[94] a doctor performed an abortion on an adolescent girl of 14 years of age who had been violently raped by five soldiers. It was his duty as a doctor to save life, both physical and mental and to alleviate suffering. Yet, Dr Bourne was prosecuted under (section 58 of the Offences Against the Person Act 1861.)[95] The evidence submitted on behalf of the defence was that the girl would have become a 'mental wreck' had the pregnancy continued. Dr Bourne in evidence asserted that he considered it his duty as a doctor to perform the operation. The judge, MacNaghten J, in his summing up impliedly made the case for a necessity defence and said that Dr Bourne performed the operation,

[91] Chan and Simester (n 19) 127.

[92] Stark (n 21).

[93] In life and death matters this duty has been variously articulated as a duty to save life, and in wardship cases over the years it has been differently articulated moving from 'letting a child live' or 'letting a child die', then to express these two positions as 'treatment to live' and 'treatment to die', in an attempt to inscribe 'treatment to die' formerly expressed as 'letting a child die' with a positive inflection rather than a negative expression of an act of omission or failing. More recently, the medical approach has now centred not on the outcome of treatment with regard to life or death outcomes, but instead focused on the medical objective of easing of pain and suffering as the primary objective of medical health care.

[94] *R v Bourne* [1939] 1 K.B 687.

[95] Section 58 'Administering drugs or using instruments to procure abortion. Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of a woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of a felony, and being convicted thereof shall be liable [...] to be kept in penal servitude for life[...]'.

'unquestionably believing that he was doing the right thing, and that he ought, in the performance of his duty as a member of a profession devoted to the alleviation of human suffering, to do it.'[96] The judge, drew on the provisions of the Infant Life Preservation Act 1929 which provided a defence to such a charge where it was carried out in good faith for the purpose of preserving the life of the mother. The jury acquitted Dr Bourne of performing an illegal abortion. However, in the case of *Attorney General v X*,[97] where a young adolescent who had been raped sought an abortion in England, public policy in Ireland, a Catholic country, took a different and more restrictive view, (albeit some 50 years later). The Irish Supreme court 4-1 held that it could be lawful in circumstances where there was risk to life as 'distinct from [risk to] the health' of the individual.[98] Culture and context, religion and ideology clearly influence the judicial divining rod with regard to the necessity defence where there are competing moral/ethical and religious interests. Interestingly, MacNaghten J in *Bourne* had also said this:

> 'On the other hand there are people who, from what are said to be religious reasons, object to the operation being performed under any circumstances. That is not the law either. On the contrary, a person who holds such an opinion ought not to be an obstetrical surgeon, for if a case arose where the life of the woman could be saved by performing the operation and the doctor refused to perform it because of his religious opinions and the woman died, he would be in grave peril of being brought before this Court on a charge of manslaughter by negligence. He would have no better defence than a person who, again for some religious reason, refused to call in a doctor to attend his sick child, where a doctor could have been called in and the life of the child could have been saved. If the father, for a so-called religious reason, refused to call in a doctor, he also is

[96] Ibid (n 94)690.

[97] *Attorney General v X* [1992] 1 IR 1[1992] IESC 1; [1992] 1 IR 1.

[98] Ibid 53-54.

> answerable to the criminal law for the death of his child. I mention these two extreme views merely to show that the law lies between them.'[99]

He was of course referring to protestant/Anglican/secular England and not a Catholic Ireland.

In cases involving those who are lacking mental capacity or in the case of minors lacking legal capacity, the inherent jurisdiction or the wardship jurisdiction provides a shield of protection for doctors who in the case of adults and minors unable to consent to medical treatment otherwise might face prosecution. In the following cases involving the inherent jurisdiction the common law defence of necessity has been invoked. In *F v West Berkshire* Authority,[100] Lords Brandon and Goff held that necessity was a defence where a 35-year-old adult who lacked mental capacity and was incapable of giving consent, was sterilized. The High Court made a declaration that the sterilization was not unlawful and no offence had been committed where it was performed out of necessity to protect the patient. In *Bournewood Community and Mental Health Trust,*[101] a mentally incompetent patient was informally admitted, the admission was held unanimously to be justified in application of the 'doctrine' of necessity. In *AM v South London & Maudsley NHS Foundation Trust Upper Tribunal,*[102] the House of Lords held that there was a common law power under the doctrine of necessity to detain and restrain patients who lack capacity and where detention was necessary in their own best interests. The common law defence of necessity has also been invoked in cases where adolescent minors have been warded. The golden thread in the wardship jurisdiction lies with ensuring the best interests of the child.

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[99] Ibid (n 94) 693.

[100] [1990] 2 AC 1.

[101] [1998] 3 All ER 289.

[102] Administrative Appeals Chamber, 6 August 2013, [2013] UKUT 0365 (AAC).

The question of whether necessity might provide a defence in assisted suicide reflects changing values as they impact on the law and perhaps presents the greatest challenge. Williams wrote in 1953 underscoring its chimeric quality, 'Necessity involves a scale of values, and a judge in adjudicating upon the defence may have to make a decision of the greatest ethical difficulty.'[103] Whether there is a necessity defence for a family member assisting in hastening the death of an already dying/terminally ill loved one who pleads to die or where a doctor assists in the death of already dying/terminally ill patient who pleads to die were questions raised in the case of *Nicklinson*.[104]At the heart of such actions lie conscience and the desire and necessity to end human suffering. That necessity, and, in the case of Heather Pratten,[105] that question of conscience and of duty was poignantly articulated and acted upon . At her trial she pleaded guilty to aiding and abetting the suicide of her son, Nigel Goodman, and was granted a conditional discharge:

> My son Nigel had the hereditary degenerative neurological disorder, Huntington's Disease. We'd both watched my husband die from the illness and knew the distress and agony it could cause. Nigel knew what was going on and that he did not want to be around to suffer anymore. On his 42nd birthday he told me the best present I could give him would be to end his life. He didn't want to die alone. I tried to persuade him against it but I would not let him die alone and promised him I would not let him fail. Looking back I still believe that it was his right to choose. Other people have tried to end their lives and failed and then been left in an even worse situation than they were previously in. I was put on bail for murder for being with Nigel and putting a pillow over his face when he lost consciousness from the overdose. In the end I was charged with aiding and abetting a suicide and received a conditional discharge for 1 year.[106]

[103] Williams (n 7) 234.

[104] *Nicklinson* (n 44).

[105] 'Caring mother helped son die - Woman freed by merciful judge' (The Journal, October 27, 2000).

[106] PA Newswire: Corporate Finance News (May 10, 2013).

In December 2013, the case of Nicklinson and Lamb was heard before nine Supreme Court judges in which they considered whether a prohibition on assisted suicide provided in the Suicide Act1961 is compatible with Article 8 right to respect for private and family life enshrined in the European Convention on Human Rights.[107] Counsel for Nicklinson(deceased) and Lamb argue that the law should include a defence of necessity.The judgment has been reserved until later in 2014.

Behind Closed Doors and Beyond The Fringe : Necessity's Negotiations

The cases which have come before the courts however are indicative only of a fraction of the causes and cases in which a defence of necessity is pleaded since the Crown Prosecution Service (CPS), especially in recent times, sifts through potential necessity pleas and takes the decision to prosecute, informed by conviction potential and also by public policy. The Law Commission,[108] recognised that where the infraction was a minor one and necessity might be pleaded as a defence then prosecutions were unlikely. In any event, Lord Shawcross the Attorney-General of England, in 1951, asserted with regard to the decision to prosecute, 'It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution.'[109] Although no research has been commissioned or conducted on this point certainly some of the CPS discontinuances will be cases where although the test of sufficiency of evidence may be satisfied a realistic prospect of conviction is considered unlikely to follow, such that necessity arguments then may well

[107] *The Times*, December 14, 2013.See also Stark's argument that Nicklinson is not a case of necessity 964 (n 21).

[108] Law Commission Report on Defences of General Application No 83 (1977) 556. Para 4.2.1.p 27.

[109] See http://www.dpp.gov.fj/default.aspx?page=decisionProsec (Last accessed January 1 2014).

be instrumental in decisions not to prosecute[110] and will subsequently impact on police decisions to prefer charges at the outset. For example, the Herald of Free Enterprise when it capsized killing some 193 passengers contained its own reality of a defence of necessity especially when considering the measures adopted by the rescue crew who sought to save the lives of the shipwrecked. A clear example of necessity was detailed in the evidence submitted to the coroner's inquest in October 1987.[111] Smith remarking on this tragedy asserts, 'The law has lost touch with reality if it condemns as murder conduct which right-thinking people regard as praiseworthy.'[112] The incident was later recalled in the case of *Re A*,[113] by Lord Justice Brooke, 'At the coroner's inquest conducted in October 1987 into the *Zeebrugge* disaster, an army corporal gave evidence that he and dozens of other people were near the foot of a rope ladder. They were all in the water and in danger of drowning. Their route to safety, however, was blocked for at least ten minutes by a young man who was petrified by cold or fear (or both) and was unable to move up or down. Eventually the corporal gave instructions that the man should be pushed off the ladder, and he was never seen again. The corporal and many others were then able to climb up the ladder to safety.'[114] Of course had he been the subject of a prosecution a necessity debate would have been pleaded in his defence and a moral and highly publicised public debate would have ensued in which the competing claims of saving ten lives as against saving one life would have been considered. For many, no doubt, the army corporal was a hero, (as was the fireman in Denning's hypothetical

[110] As Stark notes, ' It must be assumed that other decisions about whether to institute prosecutions, and about how to argue cases have also impacted upon the ability of the courts to develop the law' (n 21).

[111] JC Smith, *Justification and Excuse in the Criminal Law,* The Hamlyn Lectures (London Stevens 1989) 73.

[112] Smith, ibid 77.

[113] Ibid (n 45)[2000] 4 All ER 961.

[114] [2001] Fam 147, 229.

example in *Buckoke)*[115] acting swiftly and decisively in an *in extremis* situation. Yet, judges (following *Dudley and Stephens* cited earlier) have decided that necessity can never be a defence to murder. But Smith (again) in commenting on the apparent resiling from this rule in the Zeebrugge case asserts, '...we have breached the supposed rule that necessity can never be a defence to a murder charge.'[116]

The purpose and object of allowing a defence of necessity to succeed is to mitigate the harshness of the law. Clearly there is no consistent framework making it impossible to say with any certainty whether the law will consider a lesser evils justification defence or best interests intervention.[117] What moral claims trump? Who is to say? Williams writes, 'In a manner of speaking the whole law is based on social necessity.'[118] Certainly, the claims of necessity are cogitated and conceded or rejected against a background of socially constructed exonerations that are shaped by culture, time and place as standards of public morality change and depend on the nature of the competing claims and the unruly horse of public policy.

Necessity Claims in Disguise, Battered Women, Wives Mothers and children

Further instances of necessity claims entertained behind the legal framework of necessity include essentially necessity arguments run as other defences. Here such cases rather than being run a necessity defences have been shoehorned into existing defences as the law in recognising its own normative gaps tries to avoid injustice. But like the feet of the ugly

[115] *Buckoke* (n 74).

[116] Smith (n 111) 78.

[117] Chan and Simester (n 19).

[118] Williams (n 7) 217.

sisters defendants necessity claims have not properly fitted the shoes of the legal categories into which they have been pressed.

Statistics on the death of female partners at the hands of male partners[119] suggest that women in violent relationships face a crisis situation often only to be averted by victims themselves killing violent partners in self preservation. Yet such women find themselves convicted of murder/manslaughter. In the US, in such circumstances clemency is considered for such women and certainly a class action of necessity might be appropriate.[120] In the UK since the 1980s counsel and judges in avoiding injustice[121] have stretched provocations' elements[122] in order to bring battered women within the defence. Arguably battered women who killed violent spouses did so out of necessity for self preservation, but the defence of self defence, as framed, excluded them, as did provocation and duress, all of which embodied a masculinist framing of the elements required founded on gendered notions of reasonableness and proportionality, and in the case of provocation, immediacy. Necessity's absolute exclusion of killing from its ambit in my view furthers this masculinism. The new defence of loss of self control (fear) incorporates some understanding of the reasons why women might kill abusive spouses but falls short as it limits the plea to circumstances where the fear arises from 'D's fear of *serious violence* from V against D or another identified person.'[123] From the

[119] See Susan Edwards 'Loss of Self-Control: When His Anger is worth more than her fear' in Bohlander and Reed (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International* (Ashgate 2011) 79-96.

[120] Michigan project on Clemency. See https://www.legalmomentum.org/referral-directory/michigan-womens-justice-clemency-project.

[121] Lord Taylor in *Ahluwalia* [1992] 4 All ER 889; Lord Steyn in *Luc* [1996] 2 All ER 1033.

[122] Lord Hoffman in *Smith* [2000] 1 AC 146; 4 All ER 289, said that the law on provocation, 'has serious logical and moral flaws'.

[123] Coroners and Justice Act 2009 s 55(3) [Emphasis added].

defendant's experience and linguistic accounts, necessity has also been the driver where children have killed a violent parent. Accounts articulated by children who kill a violent father have been frequently couched in the language of necessity and the need for self preservation either of themselves and/or their mother. Again, as necessity is excluded from a defence to murder such circumstances have also been shoehorned into provocation or diminished responsibility defences. In *R v Rose*, where a son believed his father was about to kill his mother and so in preserving her life killed him, Lopes J said, '...homicide may be excusable...if the fatal blow inflicted was necessary for preservation of life.'[124]

Two sisters, Annette and Charlene Maw, killed a violent father of whom the mother, Beryl, had said that he had told her she should eat one meal a day like a dog. The wife said, 'The night he died I arrived home from work, he said he felt like punching me and he started drinking and then my youngest daughter came downstairs and tried to make some supper and he followed her into the kitchen and he started punching her and spitting in her face...'[125] Annette went on to stab him having been given the knife by Charlene. Lord Lane (CJ), Lord Justice Frederick Lawton and Judge Leslie Boreham, reduced Charlene's sentence to six months.[126] Lord Lane said the stabbing went beyond self defence or actions committed in the 'agony of the moment'[127] and asked '[W]hat should be the attitude of the law to those who unlawfully and with violence kill someone who has treated them badly? Can the law tolerate this kind of behaviour when there are ample remedies.'[128] In 1976, Noreen Winchester

[124] *R v Rose* [1884] 15 Cox 540.

[125] http://bufvc.ac.uk/tvandradio/lbc/index.php/segment/0014700491008 (accessed January 1 2014).

[126] *R v Maw and another*, Court of Appeal (Criminal Division) No 4795/R/80 (Transcript: Walsh, Cherer) December 3, 1980. See also *The Times* 18th November 1980.

[127] The Glasgow Herald, December 4, 1980 p 5. Also reported in the US in The Blade, Toledo, Ohio, December 4 p 16.

[128] Cited in Susan Edwards *Policing Domestic Violence* (Sage 1989) p 179 *The Times*, December 4, 1980.

received a seven year prison sentence for killing her father who had sexually abused her,[129] whilst William John Pearson, killed a violent father who was abusive to his mother and on appeal against a conviction for murder a manslaughter/provocation verdict was substituted.[130] In *R v Tyler,*[131] the defendant had been convicted of killing a brutal and bullying father who had threatened her mother and her brother, called her mother and the defendant sluts, and asked the mother if she wanted a vinegar bottle put up her vagina. All these cases turn on necessity (in fact) and necessity is found in the linguistic accounts presented by the defendants, but following the Dudley and Stephens rule no defence of necessity was available in law. Angela Browne,[132] concluding on the battered woman writes that their '...affective cognitive, and behavioural responses are likely to be distorted by their intense focus on survival' and are indeed necessity pleas 'to stop him from hurting me.'[133]

Necessity as a Challenge to State Secrecy

Necessity claims have also arisen in cases where defendants challenge state secrecy and rely on necessity arguments also evident in their intersubjective accounts explaining their actions. But legal necessity has never been acceded where an individual wishes to use it to challenge State power. Simon Gardner,[134] is also interested in this question. Clive Ponting admitted revealing the secrets of the Belgrano affair and was charged with a criminal offence under Section 2 of the Official Secrets Act of 1911. His defence was that disclosure was in the public interest and disclosure to a Member of Parliament was protected. He was acquitted by

[129] Susan Edwards, *Gender, Sex and the Law* (Croom Helm 1985) 141.

[130] *R v Pearson,* Court of Appeal (Criminal Division) (Transcript: Marten Walsh Cherer) November 11,1991.

[131] Edwards, ibid (n 128) 177-179.

[132] Angela Browne, *When The battered woman Kills* (New York Springer) 126.

[133] Ibid 160.

[134] 'Direct Action and the Defence of Necessity' [2005] Criminal Law Review 371.

the jury. The women of Greenham common certainly regarded their actions as not only necessary but a matter of conscience necessary to preserve the world and the future. Well before *Jones,*[135] committed criminal damage at an RAF airbase, Greenham Common peace women were prosecuted regularly in the courts where they pleaded necessity and appealed to higher loyalities.[136] One women charged with breach of the peace said: 'I challenge you now to show me this peace that you talk about. How can you say such/peace exists, when people are dying all over the world? If you ask me now to keep the peace, I shall say you are either blind or a fool.'[137]As Rebecca Johnson wrote in 1989:

> Our use of non violence is not synonymous with passive resistance, for in intervening to prevent violence, we challenge the militarists and those carrying out government orders, confronting then with their personal responsibility for what they are doing, whether they are planning for war, building silos, driving cruise missile launchers or policing the bases.[138]

There have been other claims couched in the language of necessity, for example Katharine Gun, a GCHQ employee, was acquitted in 2004 of leaking state secrets over the Iraq war. In her defence she was to have argued necessity. Yet, the case was dropped at the door of the court so we were not to hear it. [139] The defence of necessity clearly occupies a much more prominent place in legal defences than its case law reports. And like heretics its challenge must be supressed or eschewed for its presence casts a shadow over the sanctity of the law and its rules.

Necessity's Motives

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[135] *Jones* [2006] UKHL 16 on appeal from: [2004] EWCA Crim 1981 and [2005] EWHC 684 (Admin).

[136] Susan Edwards, *Women on Trial* (Manchester University Press 1984) 162.

[137] Ibid p 162, See also 'Greenham women the control of protest' in *The boys in Blue* (ed) C Dunhill (Virago 1989) 155.

[138] Ibid 155.

[139] See http://www.theguardiancom/world/2013/mar/03/katharine-gun-iraq-war-whistleblower (accessed Jan 1 2014).

Much of the academic legal debate on necessity has also considered whether necessity functions as a justification or an excuse. Why should it matter? The view is that the construction of necessity's ascribed motive may also intersect with whether the breach in question is accepted and if accepted how then is it dealt with. Adopting Fletcher's view '... justifications confer 'privileges' to infringe the prohibitory norm.'[140] For Austin, 'In the one defence [justification], we accept responsibility but deny that it was bad: in the other [excuse], we admit that it was bad but don't accept full, or even any, responsibility.'[141] The broad argument is that justifications and excuses function differently in the criminal law and convey different meanings. When an excuse is invoked the actor usually accepts that the conduct was wrong, both legally and morally,and that it was wrong to transgress the legal rule but was he unable because of some individual factor to conform. Diminished responsibility provides such an example of the functioning of an excuse in a recognition of rule breaking whilst pleading illness and an inability to control himself. When a justification is invoked to explain conduct the actor may not accept that the action was morally wrong although recognises that it is legally wrong. His justification may range from a rejection of the law to a strident expression of its moral fallibility.[142] Provocation provided an instance of justification with its rhetoric, 'She deserved it' serving as an example in partner homicide cases. What is being done is variously justified, condemned, excused, or permitted, by and through the use of language and rhetoric which is performative,[143] that is, when a word is

[140] George P Fletcher, *Rethinking Criminal Law* (Reprint, Little Brown, 2000) 562–66. George P Fletcher, *The Right and the Reasonable*, (1985) 98 Harvard Law Review 949, 978

[141] JL Austin, 'A Plea for Excuses' (1956–57) 57 Proc Aristotelian Soc 1. See JL Austin *Philosophical Papers* (Clarendon Oxford 1960). JL Austin *How to do things with Words* (Harvard Cambridge 1975).

[142] Clarkson (n 16) 82.

[143] See JR Searle, *Speech Acts: an Essay in the Philosophy of Language* (Cambridge University Press 1969, 1999); Austin,

spoken or written it becomes a relational entity; where words are used to justify and condone a behaviour or action, or otherwise condemn. The words themselves have a force and signify and give permission for, or else prohibit, the action. I want to rethink the relationship of legal categories of excuses and justification in the criminal law and particularly to rethink these constructs within the paradigm of necessity and the consequences the 'motive label' or attribution has for human agency has for permissions and development of the defence. Thinking outside the excuse/justification dualism in the context of necessity for a moment I want to examine and revert back to the dualism implicit in Schutz's[144] thought and examine his 'because of' and 'in order to' motives and their relevance for understanding necessity's claims and acceptances and rejections. The actor claiming necessity appeals to both 'because of' motives – because my conscience compelled me to do it and 'in order to' motives – a teleological prospective orientated action to achieve an ulterior future goal.

'Because of motives' notionally contain more of a duress or duress of circumstance motivator whilst 'in order to' action involves being drawn towards the accomplishment of an ulterior purpose. Are these motives examples of justifications or excuses? I think that both types of motive 'because of' and 'in order to'and their relationship to the cause or precursor of action can be regarded as justificatory. The real issue here and throughout all the academic debates on motive in necessity lies in the quality and the nature of the action to be accomplished regardless of whether the motive drives or pulls. It is the moral/ethical/philosophical/political imperative that really counts. Horder[145] states, and I

(n 138).

[144] Schutz (n 14).

[145] J Horder, 'Self-defence, necessity and duress: understanding the relationship' (1998) 11 Canadian Journal of Law and Jurisprudence 143.

agree, 'In necessity cases, the key issue is the m*oral imperative* to act: what matters is whether in the circumstances it was morally imperative to act, even if this might involve the commission of wrongdoing, in order to negate or avoid some other evil. In duress cases, the key issue is the *personal sacrifice* [the accused] is being asked to make: should [the accused] be expected to make the personal sacrifice involved in refusing to give in to a coercive threat, rather than avoid implementation of the coercive threat by doing wrong'?In expressing excuse it is usually the actor who is excused. In expressing justification it is the circumstances and herein we implicitly see a repudiation of law and a challenge to its figurative cage. Actors acting in justification may appeal to a variety of motives from an appeal to higher loyalties, altruism, preservation of others, or conscience.[146] Many actors convicted of criminal offences believe their actions were justified. However, in only limited circumstances is the law willing to accept justifications for conduct as functioning in mitigation. In fact it is here when justifications are mooted, either a change in the law is pressed for – - as in the case of householder-self-defence, or else necessity occupies that moral/legal space and is provided for in statute. As Stephen recognised, 'it is just possible to imagine cases in which expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it.'[147]

But how important is this excuse/justification distinction to necessity? Chalmers and Leverick,[148] in their distinction build on a considerable body of academic commentary. In teasing out the notion that necessity is really a defence where circumstances arises that call for the criminal law to be abandoned in favour of embracing the greater good, the term duress

[146] Itzhak Kugler, 'Necessity as a Justification in Re A (Children)' (2004) 68(5) Journal of Criminal Law 440-450.

[147] J F Stephen, *Digest of the criminal law* (Vol II, 1887) 108.

[148] J Chalmers and F Leverick 'Fair Labelling in Criminal Law' (2008) 71 Modern Law Review 217.

of circumstance has evolved. This more clearly denotes that circumstances outside the individual intervene or supervene to make obedience to the criminal law blind in the circumstances. Ashworth has argued that duress of circumstances has taken over necessity.[149] Into this framework for motives/excuses/justifications enters 'permission' which in effect places the power at least from a performative perspective back into the hands of the law presenting the law as a self reflective arena. Ashworth and Horder avoid the language of both excuse and justification instead using the language of 'residual permissions'.[150] When medical necessity is discussed they momentarily move from a doctor giving permission slipping back to the language of 'is it ever justifiable for a doctor,'[151] but quickly return to the use of the word 'permission'. They then go on to consider several examples where 'permissions' have been inserted into statute, citing for example s 5(4) Misuse of Drugs Act 1971 which allows a defence where D's purpose is to prevent another from committing an offence, s 87 of the Road Traffic Regulation Act 1984 which exempts an emergency vehicle from observing the speed limit.

Necessity Good and Harm - The Moral Mesh

Whatever the scheme either the one rationale ala Clarkson, or four as for Chan and Simester; necessity as an excuse or justification; the question of which moral/ethical/philosophical arguments in particular circumstances might trump legal arguments; nothing of any of this is fixed, all is negotiable. Outside the law there is considerable debate as to which moral goods or harms to be avoided trumps the harm of breaking which law. As Endicott has said in

[149] A Ashworth, *Principles of Criminal Law* (6th edn: Oxford University Press, 2009) 206.

[150] A Ashworth and J Horder *Principles of Criminal Law* (Oxford University Press 2013 edition) 130.

[151] Ibid 132.

another context we have the rule of judges and not the rule of law.[152]The defence of necessity clearly demonstrates that the law is not infallible and tries to provide a body of rules setting out when its veil of fallibility can be lifted. Necessity when it works outside the courtroom shows it is potentially a defence to all offences. 4Lawyers search for consistency and principle but the holy grail search for the sense in necessity is illusive. It is the product of competing morals, which in 1520 resulted in Brooke J asserting, 'It is said that if I come into your land and kill a fox, a gray, or an otter, I shall not be punished for this entry, because they are beasts against the common profit.'[153] On some occasions it does provide a route of escape from the figurative and iron cage of law when higher values deem. Certainly defence lawyers will continue to advance necessity claims on behalf of their clients. In *R v S*,[154] the appellant (S) appealed against a decision dismissing her defence of necessity to a charge of removing a child from the jurisdiction where she feared that her daughter would be sexually abused since the child had made such allegations in the course of proceedings to decide contact. The court did not accept this as reasonable or proportionate or indeed the lesser of two evils. Perhaps a court of mothers whose children had been abused may have done so. It is impossible to discern a rationale, the law has developed on a case by case basis and should do so to mitigate the iron cage of the law. The courts have responded in accordance with public or government policy and the social construction of reasonableness, proportionality and the social construction of lesser evils. All these concepts are shaped by societal codes and conventions about behaviour and persons and are informed by constructions of class, culture,

[152] Endicott http://denning.law.ox.ac.uk/news/events_files/Proportionality_and_incommensurability.pdf

[153] Williams (n 7) 220.

[154] *R v S* also known as *R v CS* [2012] EWCA Crim 389; [2012] 1 WLR 3081; [2012] 1 Cr App R 31; [2012] Criminal Law Review 623; Times, May 8, 2012.

power, (private power and state power), rights and gender of the day, time and place, it would be foolish to pretend otherwise.