THE NECESSITY DEFENSE AND THE MORAL LIMITS OF LAW

*Michele Cotton**

It is puzzling that American criminal law recognizes self-defense while rejecting the conceptually similar defense of necessity. Necessity applies where pressing circumstances provoke the defendant to commit an otherwise unlawful act, while self-defense applies where an assailing person does so. Different treatment would make sense if the two defenses were morally distinguishable. But they are morally equivalent, whether considered from the perspective of natural law, social contract theory, or utilitarianism. Rather, the motivation appears to be that the necessity defense, unlike self-defense, implies biological determinism, calling into question the criminal law's traditional assumption that human beings exercise free will in choosing their actions. And, as its treatment of the necessity defense indicates, American criminal law does not simply proceed from an assumption of free will but silences any contradiction. Such a stance means not only that the necessity defense cannot be accommodated, but also that the legal system cannot make use of the insights of the sciences and social sciences to the extent that they describe human behavior deterministically. However, it may be better for the law to embrace a more salutary kind of inconsistency, one that entertains the possibility that the law is capable of moral improvement and self-correction.

Keywords: *necessity defense, self-defense, determinism, free will*

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INTRODUCTION

The necessity defense has long been of interest to commentators, as presenting a problem about justification versus excuse.[1] But another interesting philosophical question arises with the necessity defense, which is whether it can be morally distinguished from self-defense, to which it is at least conceptually similar. The question arises because American criminal law has repeatedly declined to recognize necessity as a valid defense, while fully accepting self-defense, which suggests that there must be an important moral distinction between them. Indeed, the necessity defense apparently exists at the border between what constitutes an acceptable defense within the morality of the criminal law and what does not. To that extent, examination of the necessity defense, as compared to self-defense, provides an unusual if not unique opportunity to determine the fundamental moral nature of the criminal law.[2]

Both necessity and self-defense involve the situation where a person has committed an otherwise unlawful act as a means of protecting herself from an immediate threat. To use Sir Francis Bacon's famous example, a necessity defense may apply where two persons are stranded in the open ocean in danger of drowning, and one attacks the other in order to take away from her the only available plank of wood.[3] On the other hand, if

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1. *See*, *e.g.*, Khalid Ghanayim, *Excused Necessity in Western Legal Philosophy*, 19 CAN. J. L. & JURISPRUDENCE 31 (2006); Edward M. Morgan, *The Defence of Necessity: Justification or Excuse?*, 42 U. TORONTO FAC. L. REV. 165 (1984); Donald L. Horowitz, *Justification and Excuse in the Program of the Criminal Law*, 49 LAW & CONTEMP. PROBS. 109 (1986); Monu Bedi, *Excusing Behavior: Reclassifying the Federal Common Law Defenses of Duress and Necessity Relying on the Victim's Role*, 101 J. CRIM. L. & CRIMINOLOGY 575 (2011); Mark McBride, *Justifications and Excuses: Mutually Exclusive?*, 5 J. ETHICS & SOC. PHIL. 1 (2011).

2. As pointed out by Prof. John T. Parry, "Necessity is a defense that is both marginal and central: marginal because the defense emerges seriously in only a few cases, but central because it shows up our basic assumptions about culpability and challenges us to think more carefully about what we mean by criminal liability, moral responsibility, and the connections between the two." *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397, 468 (1999).

3. See SIR FRANCIS BACON, MAXIMES OF THE LAW 29–30 (1597) ("So if divers bee in danger of drowning by the casting away of some boate or barge, and one of them get to some plancke, or on the boates side to keep himself above water, and another to save his life thrust him from it, whereby hee is drowned; this is neither se defendendo nor by misadventure, but justifiable."). This hypothetical is apparently much older than Bacon; Cicero attributed it to Hecaton of Rhodes.

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the person being forced off the plank strikes back, even fatally, in order to maintain control of it, a plea of self-defense could be offered. The first situation is one where pressing *circumstances* provoke the defendant to commit an otherwise unlawful act, while in the second situation an assailing *person* provokes the defendant to commit the otherwise unlawful act. (Indeed, it could even be said that self-defense is a particular species of necessity.)

As the first part of this Article documents and describes, American criminal law has repeatedly and resoundingly rejected the necessity defense despite its similarity to self-defense. However, as the second part demonstrates, necessity and self-defense are morally equivalent, whether considered from the perspective of natural law, social contract theory, or utilitarianism, indicating that something else must explain the difference in treatment. The third part of this Article proposes that it stems from the fact that unlike self-defense, the necessity defense evinces a biological determinism that calls into question the criminal law's traditional assumption that human beings exercise free will in choosing their actions.

The assumption that persons are in fact the true authors of their acts and therefore may be held criminally responsible and punished is not a remarkable ethical position. However, as its treatment of the necessity defense reveals, American criminal law does not simply proceed from the assumption of free will but rigorously polices and excludes anything that might contradict that assumption. Such a stance toward deterministic explanation means not only that the necessity defense as such cannot be accommodated, but also that the legal system cannot make use of the insights of the sciences and social sciences in its response to criminal behavior, to the extent such insights describe human behavior deterministically, as they often do.

To accept necessity as a valid defense would indeed produce a degree of inconsistency in the criminal law, between its founding assumption and the account of behavior implicitly offered by the necessity defense. But the law is already inconsistent in treating self-defense and necessity so differently without moral justification. Accepting the necessity defense would not make an enormous difference for defendants, because few would be able to avail themselves of it. But for the law, accepting the defense would represent the embrace of a more salutary kind of inconsistency, one that at least entertains the possibility that the law is capable of moral improvement and self-correction.

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I. THE DISMAL HISTORY OF THE NECESSITY DEFENSE

The history of the necessity defense in Anglo-American law is one of remarkably consistent rejection, as a survey of the most prominent examples attests. One of the earliest published American cases on the necessity defense, and a harbinger of things to come, was *United States v. Holmes* (1842).[4] To prevent an overloaded lifeboat from sinking and drowning everyone in it, Holmes, a sailor, threw a number of the passengers overboard into the freezing North Atlantic, where they drowned or froze to death. When the lifeboat and its remaining passengers were found, Holmes was tried in federal district court in Pennsylvania for manslaughter of the others. He pled a defense of necessity, and argued that the "law of nature" supported such a defense even if it was not clearly established in the common law. The court was not receptive:

> [W]ithout stopping to speculate upon overnice questions not before us, or to involve ourselves in the labyrinth of ethical subtleties, we may safely say that the sailor's duty is the protection of the persons intrusted to his care, not their sacrifice. . . .[5]

Under the duty imposed by the law, the court insisted, the sailors on a ship were required to give precedence to the safety of the passengers. The court was not troubled by any possible discrepancy between law's treatment of self-defense and the necessity defense, remarking that "in a proper case (as of self-defence), homicide is justifiable, not because the municipal law is subverted by the law of nature, but because no rule of the municipal law makes homicide, in such cases, criminal."[6] In this conclusion, the court seemed to reject the idea of an evolving common law in which conceptual similarity between self-defense and the necessity defense might lead to extension of the law's toleration.

Later in the nineteenth century, the defense of necessity was raised in the famous English murder case, *Regina v. Dudley and Stephens* (1884).[7] Four crew members of a yacht wrecked by a storm were stranded in a lifeboat for twenty days, during which time, to avoid starvation, two of them killed, and three of them ate, the weakest and youngest crew member among

4. *Holmes*, 26 F. Cas. 360 (E.D. Pa. 1842).
5. *Id.* at 368–69.
6. *Id.* at 368.
7. *Dudley and Stevens*, 14 Q.B.D. 273 (1884).

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them. In presenting a necessity defense, the defendants described their action as permitted under their legal duty of self-preservation (as expressed, for example, in society's laws against suicide). The court emphatically disagreed:

> To preserve one's life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it. War is full of duty, in instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children . . . —these duties impose on men the moral necessity, not of the preservation, but of the sacrifice, of their lives for others. . . . It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life. . . .[8]

This English case, a part of Anglo-American common law, resembles the thinking of the court in *Holmes*, but stretches the scope of duty involved still further. In *Holmes* the court had indicated that "the sailor's duty is the protection of persons intrusted to his care," but also observed, "we must admit that sailor and sailor may lawfully struggle with each other for the plank that can save but one. . . ."[9] As the *Holmes* court evidently saw it, passenger and sailor had an enforceable contract imposing a duty on the sailor, but sailor and sailor were not similarly constrained. However, the *Dudley and Stephens* court did not even allow for a lawful struggle between sailor and sailor, but defined the moral duty more sweepingly, suggesting some general concept of self-sacrifice, perhaps Christian in nature,[10] which greatly limited if not eliminated any necessity defense available to defendants.[11] If the *Holmes* case held out the hope that someone somewhere might qualify for a necessity defense, the decision in *Dudley and Stephens* suggested that it was going to be difficult if not impossible for a defendant to thread the needle.

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8. *Id.* at 287.

9. *Holmes*, 26 F. Cas. at 367.

10. *Dudley and Stevens*, 14 Q.B.D. at 287 ("It is enough in a Christian country to remind ourselves of the Great Example which we profess to follow.").

11. It is true that the defendants in *Dudley and Stephens* were captain and mate while the person they killed and ate was a low-ranking crew member, and that the *Dudley and Stephens* court specifically mentions the duty "of a captain to his crew." But it seems unlikely that the court was proposing that rank determines the order of sacrifice in a situation of necessity, with captains having a duty to sacrifice themselves for first mates and first mates for cabin boys.

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More recent necessity defense cases have seldom taken place on the high seas. Instead, they have most often involved persons committing larceny, trespass, or other offenses in order to obtain the necessaries of life. However, these cases are analogous to the shipwreck cases in that they also involve a situation where dire circumstances can be said to provoke the person to act unlawfully in the interest of survival.[12] A starving person who kills and eats another person for sustenance is akin to a starving person who steals of a loaf of bread. Indeed, Bacon recognized such theft of necessities as fitting under the traditional definition of necessity.[13] In contrast to the shipwreck cases, however, these less dramatic twentieth-century cases have gotten almost no attention from legal scholars,[14] though they provide evidence of the American criminal law's continuing disdain toward the necessity defense.

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12. The necessity defense has also sometimes been interpreted more broadly to include acts of civil disobedience such as trespass onto the grounds of a nuclear facility to prevent its operation or the act of blocking access to an abortion clinic. *See*, *e.g.*, State v. Warshow, 410 A.2d 1000 (Vt. S. Ch. 1980); Commonwealth v. Capitolo, 471 A.2d 462 (Pa. Super. 1984), *rev'd* 508 Pa. 372 (1985). However, unlike the traditional version of the defense, there is no consensus that these situations present immediate danger to the persons engaging in the otherwise unlawful act. In addition, a number of necessity defense cases involve a prisoner who escaped as a means of evading a threatening fellow inmate or guard. *See* People v. Unger, 66 Ill. 2d 333 (1977). Such a situation would be better described, and has traditionally been described, as involving the defense of "duress." *See* United States v. Bailey, 444 U.S. 394, 409–10 (1980) ("Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils."). The Court is not accurately describing the "choice of evils" defense as it is defined in the Model Penal Code, the Comment to which states: "This section does not demand that the event that triggers the choice among evils be a 'natural physical force.' A claim of justification is possible when an actor responds to human threats of harm." American Law Institute, *Model Penal Code and Commentaries* (Official Draft and Revised Comments), Pt. I, at 16 (footnote omitted) (1985) [hereinafter *MPC*]. Note that the MPC limits *duress* to those situations where the actor was "coerced . . . by the use of, or a threat to use, unlawful force against his person"; *MPC* § 2.09 at 367.

13. *See*, *e.g.*, BACON, *supra* note 3, at 29, who includes, along with the plank hypothetical, the following: "If a man steale viands to satisfie his present hunger, this is no felony or larceney."

14. In fact, no other article discusses all of the cases covered here.

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In *State v. Moe* (1933), a group of unemployed men living in Washington state raided a store for food, and then, upon being prosecuted for the theft, asserted a claim of necessity. One of the defendants explained:

> The groceries were taken, of course, but remember this, there is a higher law that says a person holds his responsibility to himself first. There is a law of self-preservation, and how can you expect a man to go against the most fundamental urges—the most prominent is the quest for food.[15]

Though the defendant's references to "higher law" and the "responsibility" to oneself that comes "first" have echoes in the shipwreck cases, he also introduced the idea that hunger itself is an imperative worthy of respect. That the pressure of that hunger was truly exigent was something the defendants in *Moe* sought to demonstrate. They "offered to prove the conditions of poverty and want among the unemployed of Anacortes and Skagit county" as evidence of their "motive and justification for the raid on the Skaggs store."[16] But the court declined to hear that evidence. Instead, it responded:

> Economic necessity has never been accepted as a defense to a criminal charge. The reason is that, were it ever countenanced, it would leave to the individual the right to take the law into his own hands.[17]

The court cited no precedent or source for its conclusion that economic necessity had "never" been accepted as a defense to a criminal charge.[18] In fact, the case seems to be the first published American one to explicitly take such a position. (The court in *Dudley and Stephens* did, however, make reference *in dicta* to the idea that stealing to satisfy hunger was not approved by the weight of legal authority as giving rise to a necessity defense.[19]) The *Moe* court concluded that since the defense had "never" been accepted in such a situation, no evidence supporting the defense, no matter how compelling, would be permitted to be presented to the factfinder.

A couple of decades after *Moe*, legislatures began weighing in on the necessity defense for the first time, largely as a result of the example of the

15. *Moe*, 174 Wash. 303, 309 (1933).
16. *Id.* at 307.
17. *Id.*
18. The paragraph making the point contains no citation to any source of law.
19. *Dudley and Stevens*, 14 Q.B.D. at 285–86.

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American Law Institute's Model Penal Code (1962), which proposed a "choice of evils" defense for adoption by State legislatures. The MPC's § 3.02 states in relevant part that

> [c]onduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: . . . 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. . . . [20]

In this formulation, if the action taken by the defendant out of necessity produces a net benefit, then the defendant has a complete defense to the criminal charge. The MPC provision, it should be noted, is not based on the "classic" understanding of the necessity defense. In fact, according to the accompanying Comment to the provision, the situation where one shipwrecked man takes the plank from another would not give rise to a defense, because there would be no net saving of lives.[21] Rather, this version of the defense reflects the more limited justification-based version of necessity that has held greater appeal for some commentators than the traditional version of the defense, which allows for excuse.[22]

But courts and legislatures have been resistant to even this narrower version of the defense.[23] Michael Hoffheimer summarizes the chilly reception:

> [A] half-century after it was first proposed, the federal government and a majority of states have flatly refused to codify any form of the necessity defense. Seventeen of the nineteen states that codify some version of the

20. *MPC*, *supra* note 12, at 8.

21. As the Comment explains: "Nor would the defense be available to one who acted to save himself at the expense of another, as by seizing a raft when men are shipwrecked." *Id.* at 16.

22. *See*, *e.g.*, Morgan, *supra* note 1, at 182: " . . . since a defence by way of excuse admits of the wrong and attempts to assert the accused's personal weaknesses in a way which portrays him as non-human in nature (i.e., not a free will rationally cognizant of other equally free wills), it is a misconceived import into an analysis of criminal liability. As such, its acceptance should remain outside of the province of any court. . . . [T]he dictates of criminal justice . . . require that the only acceptable defence be one which denies the essence of criminality. It is only a justification which can answer to the type of assessment of the rightness or wrongness of the act in question which characterizes the issue of criminal liability, as any excuse diverts attention from the wrong to the wrongdoer."

23. Michael Hoffheimer, *Codifying Necessity: Legislative Resistance To Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 TUL. L. REV. 191 (2007).

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> defense reject the unrestricted balancing of harms proposed by the Model Penal Code. Only two states codify the Model Penal Code's version of the defense, and courts in those states impose additional requirements that limit its availability.[24]

The example of Colorado is illustrative. Whereas the MPC would provide a defense where "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,"[25] Colorado's statute requires that the conduct be

> necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no conduct of the actor, and which is of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.[26]

However, even that detailed circumscription of the defense, and its heavy burden of proof, did not seem sufficiently refined to the Colorado courts. They further interpreted it to mean that "[t]he defendant must offer proof of the *sudden and unforeseen* emergence of a situation requiring his or her immediate action to prevent an imminent injury."[27] The palpable discomfort of the Colorado legislature and courts with the necessity defense is suggested by their repeated attempts to limit its scope.

The hostility of pre-MPC courts toward the defense has persisted post-MPC. For instance, in a 1972 Texas case, *Harris v. State*, which recounted none of the facts (except that the defendant alleged that his commission of a burglary was a matter of necessity), the appellate court was dismissive of the defense. It stated:

> Appellant contends that he was forced into an economic situation which necessitated the commission of the crime of burglary. No pertinent authority

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24. *Id.* at 242–43.

25. *MPC*, *supra* note 12, at 8.

26. COLO. REV. STAT. § 18-1-702 (2013).

27. *People v. Fontes*, 89 P.3d 484, 486 (Colo. App. Div. 2 2003) (emphasis added). The court cites as precedent for this statement *People v. Roberts*, 983 P.2d 11 (Colo. App. 1998), but it is difficult to see how that decision, which says very little about the necessity defense, *id.* at 15, actually supplies that additional limitation to the scope of the statute.

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> is cited by appellant. Economic necessity is no justification for a positive criminal offense.[28]

Texas lacked a necessity defense statute, so the defendant had to rely on the common law. The court complained that the defendant cited no authorities to support the claim of necessity. The court cited to no authorities, either, in dismissing the claim.[29]

The court was no more receptive in a 1991 Ohio case, *State v. Ratliff*, in which the defendant had engaged in welfare fraud (working at a low-paying job while also receiving welfare benefits) and tried to make a defense of necessity.[30] The court cited *Moe* as precedent for rejecting the defense, remarking, "It has generally been held . . . that economic necessity is not a justification for a positive criminal act, such as larceny."[31] Interestingly, even though Ohio lacked a necessity defense statute, the *Ratliff* court engaged in the only published example of the cost-benefit analysis the MPC contemplated for its choice of evils defense. The court, in affirming, remarked that "the harm sought to be avoided would rarely be equal to or greater than the harm suffered by the victims of the theft, e.g., the prospective recipients of welfare benefits who would have received funds overpaid to appellant."[32] In other words, no cost-benefit analysis was necessary in the particular case because, according to the court, the cost would almost inevitably exceed the benefit in such a situation.

The obstacles that courts place in the path of the necessity defense can be seen in *People v. Fontes* (2003), in which the defendant was prosecuted for trying to cash a forged payroll check for $454.75.[33] His wife testified that money from the check was intended to buy food for their children.[34] However, the trial court struck this testimony and ordered the jury to disregard it as inadmissible, on the ground that a spouse was incompetent to testify about such confidential marital communications. The court also refused the defendant's request to present other evidence supporting the

28. *Harris*, 486 S.W.2d 573, 574 (Ct. Crim. App. Tex. 1972).

29. *Id.*

30. *Ratliff*, 1991 Ohio App. LEXIS 2943 (4th App. Dist., Scioto Cty.).

31. *Id.*, citation to AmJur omitted.

32. *Id.* at 11–12.

33. *Fontes*, 89 P.3d 484 (2005).

34. *Id.* at 485.

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necessity defense (and of course declined to give the jury any instruction on it).[35] The defendant had sought to establish that

> his three children, who ranged in age from sixteen months to eleven years, suffered from serious health problems. On the date the crimes occurred, the children had not eaten for more than twenty-four hours, and three different food banks had turned down defendant's requests for food. Defendant feared that a lack of food would exacerbate his children's health problems and lead to malnutrition and death.[36]

The appellate court found no error in the trial court's various rulings against the defendant's attempt to present a necessity defense, remarking, "While we are not without sympathy for the downtrodden, the law is clear that economic necessity alone cannot support a choice of crime," citing to *Moe*.[37] The court did discuss the Colorado choice of evils statute, but concluded that the defendant was not able to show that the forgery of the check was closely enough related to the harm sought to be averted and so was not entitled to avail himself of its coverage.[38]

The history of the necessity defense in American criminal law indicates that whatever the scenario—whether involving a homicide or a lesser offense like larceny—and whatever the context—whether considered by court or legislature—and whatever the year, forum, or formulation given to the defense, and whether offered as justification or excuse, the law's response has generally been the same: *no*.[39]

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35. *Id.* at 485–86.

36. *Id.* at 486.

37. *Id.*

38. *Id.*

39. As these examples indicate, cases involving persons who seek to employ the necessity defense in situations involving an unlawful action taken to avoid an emergency risk of harm are seldom allowed to go to the jury. *See also* People v. Turner, 249 Ill. App. 3d 474 (1993), in which the defendants were convicted of cruelty to children for leaving their two young children in a car on the street unattended for several hours on a cold winter night, during which time the defendants were nearby at their jobs assembling newspapers for distribution. The formerly homeless defendants presented a defense of necessity, saying that they needed the work to survive and on that particular occasion had not been able to obtain their usual means of child care. The court found that the defendants were precluded from employing the State's necessity defense statute. The court cited *Moe* (and an 1809 English case of inscrutable relevance) in concluding that "[e]conomic necessity, . . . such as the theft of food, has never been recognized or accepted as a defense to otherwise criminal conduct." *Id.* at 480. *But see* State v. Crawford, 308 Md. 683 (1987) (defendant entitled to instruction on

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II. THE ETHICAL UNDERPINNINGS OF THE NECESSITY DEFENSE AND SELF-DEFENSE

It is possible that the law's rejection of the necessity defense is based on moral grounds. Such a possibility is undercut, however, by the fact that self-defense presents many of the same ethical issues as necessity, without suffering a similar fate in the legal system. Whether looked at from the perspective of such varied moral theories as those involving natural law, social contract, or utilitarianism, the necessity defense is difficult to distinguish ethically from self-defense. Thus, moral distinctions do not provide an explanation for the law's rejection of one but not the other.

A. Natural Law

It is axiomatic among natural law theorists that intentional killing of unoffending persons is morally evil. As Thomas Aquinas puts it, "It is *never* lawful to kill the innocent."[40] Accordingly, the drafters of the MPC choice of evils defense observed in a Comment that some "Roman Catholic moralists" would argue as an objection to its version of the defense that "one should not cause effects that are directly evil even if they are thought to be a necessary means to a greater good."[41] That is, the necessity defense is believed by some to be ethically unacceptable because no consequence, no matter how beneficial, can justify or excuse the sacrifice of an innocent person. Such a view raises a potential ethical problem for the necessity defense. But it does not work well as a justification for the law's rejection of the defense, because under this theory self-defense and the necessity defense are similarly problematic.

Aquinas himself points out that the ethical justifiability of self-defense under natural law is subject to some doubt.[42] But he concludes that because an intentional homicide in such a case is the incident of an action

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necessity defense against illegal possession of handgun where he had been shot and picked up nearby handgun to protect him against his assailants), and In re Eichorn, 69 Cal. App. 4th 382 (4th App. Dist. Div. 3 1998) (homeless defendant allowed to present a necessity defense against ordinance prohibiting public camping).

40. Thomas Aquinas, *Summa Theologica*, Pt. II, Question 64, Article 6 (emphasis added).

41. *MPC*, *supra* note 12, at 15 n.15.

42. *Summa Theologica*, *supra* note 40, Article 7.

undertaken with an acceptable motive—to maintain one's own existence—acting in self-defense is excusable. He explains "[T]he act of self-defense may have two effects, one is the saving of one's life, the other is the slaying of the aggressor. Therefore this act, since one's intention is to save one's own life, is not unlawful. . . . "[43] In this way of thinking, the action is morally acceptable because its intention is good, irrespective of its effects.

But this rationale would also provide a basis for ethical acceptance of the necessity defense, because there, too, the intention—to maintain one's own existence—is good, regardless of the effect. If self-defense is ethically acceptable because of its motive, then the necessity defense would seem to be acceptable under its similar motive, leaving no ethical basis for distinguishing between them.

However, it has been argued that only the act of necessity involves the impermissible slaying of the "innocent." Immanuel Kant explains:

> [I]f a person, in order to preserve his own life, pushes a shipwrecked fellow away from the plank he grasps, it would be quite false to say that (physical) necessity gives him a right to do so. For it is only a relative duty for me to preserve my own life (i.e. it applies only if I can do so without committing a crime). But it is an absolute duty not to take the life of another person who has not offended me and does not even make me risk my own life.[44]

Kant suggests that the person killed in self-defense has "offended" his killer and that provides a basis for self-defense, whereas the person killed out of necessity is innocent of committing such offense, and to kill such an innocent person is the violation of an absolute duty. Accordingly, "it is monstrous to suppose that we can have a right to do wrong in the direst (physical) distress."[45]

In *Dudley and Stephens*, the defendants argued that they were acting out of a duty to preserve their own lives. The court took the Kantian perspective that there is greater value in a person sacrificing his life rather than in preserving it in any way that is itself immoral ("To preserve one's life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it."[46]). To put it in Kantian terms, the "relative duty" of preserving one's life is trumped by the absolute duty of not taking an innocent life.

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43. *Id.*
44. *Kant: Political Writings* (ed. Hans Reiss) 81 n. (1991).
45. *Id.* at 81.
46. *Dudley and Stevens*, 14 Q.B.D. at 287.

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The *Dudley and Stephens* court indeed stressed that the defendants in the case had killed an "*unoffending* and unresisting boy."[47]

The implication of this analysis is that self-defense is the killing of a person who is *not* "innocent." For this perspective to make sense, the person acting in self-defense must be making some judgment about the aggressor's blameworthiness (albeit summarily and while being the judge of his own case). But seemingly the judgment that the self-defender makes is not really one of desert but rather one of danger. This can be seen by looking at instances of self-defense that involve an "innocent aggressor." A small child unwittingly preparing to fire a loaded gun at someone may be killed by that person in self-defense, not because the actor has made a determination that the child deserves death, but because the child is a credible threat to the actor's life. Similarly, a police officer who believes that a person reaching for a wallet is in fact drawing a weapon may kill the person in self-defense, not because the police officer has determined that that person is guilty of any "offense," but because she sincerely believes that his reaching for something represents a danger to her life.[48]

These examples of unwitting and mistaken objects of self-defense indicate that the actor is essentially responding to a threat, not to a wrong-doer. Indeed, to the extent that courts and legislatures have burdened self-defense with conditions, it has been with regard to the quality of the actor's assessment of personal endangerment—not with regard to whether the actor has made a legitimate, or indeed, any kind of assessment of the blameworthiness of the party defended against.[49] The person who acts in self-defense against an innocent but dangerous person is in much the same situation as the necessity defense claimant in terms of the comparative innocence of the other party. The offensiveness of the other party therefore does not seem to be the distinguishing feature between necessity and self-defense. The object of self-defense is perhaps *statistically* more likely to

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47. *Id.* at 286 (emphasis added).

48. *See* Jane Fritsch, *The Diallo Veredict: The Overview; 4 Officers in Diallo Shooting are Acquitted of All Charges*, NEW YORK TIMES, Feb. 25, 2000, at B6.

49. *See, e.g.*, United States v. Taveras, 570 F. Supp. 2d 481, 493 (E.D.N.Y., 2008) ("Although the American Law Institute's Model Penal Code does not require that the person's belief in using self-defense be reasonable, see Model Penal Code § 3.04(1), most jurisdictions require a 'reasonable belief' on part of the defendant"; citing Peter D.W. Heberling, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914 (1975)).

qualify as blameworthy under a moral analysis, but that condition is still independent of the self-defender's decision making, and so to reward or punish the actor for achieving an unintended moral result is seemingly gratuitous.

Although regarding the necessity defense as morally distinguishable from self-defense, Kant nonetheless exhibited a surprisingly mild reaction to the fact that German law recognized the legitimacy of the necessity defense:

> [T]he teachers of general civil law are perfectly consistent in authorising such measures in cases of distress. For the authorities cannot combine a penalty with this prohibition, since this penalty would have to be death. But it would be a nonsensical law which threatened anyone with death if he did not voluntarily deliver himself up to death when in dangerous circumstances.[50]

Kant describes killing out of necessity as morally condemnable ("monstrous," the violation of an absolute duty), but at the same time as *practically* unworthy of legal condemnation. (Aquinas is also reluctant to see necessity treated differently from self-defense, remarking that "necessity bears with it dispensation since necessity knows no law."[51]) Kant's position is surprising, given how vehement he is about what should be done with murderers in general: "Even if civil society were to dissolve itself with the consent of all its members . . . , the last murderer in prison would first have to be executed in order that each should receive his just deserts. . . ."[52] In Kant's view, declining to execute the murderer is not acceptable—even if it would serve no civic purpose—because just deserts *must* be imposed. It is difficult, therefore, to see why Kant does not demand that the State find guilty of murder and punish the person who kills out of necessity, even if to do so would be (similarly) pointless.

This sort of split consciousness—in which an act is intellectually treated as a serious moral wrong but nonetheless not considered punishable or worthy of serious punishment—is not unique to Kant and Aquinas. Anglo-American criminal law expresses a similar ambivalence, by obstructing the use of the necessity defense by the defendant while mitigating the punishment. For instance, the court in *Holmes* insisted upon the guiltiness of the

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50. *Kant*, *supra* note 44, at 81–82 n.

51. *Summa Theologica*, *supra* note 40, Question 96, Article 6.

52. *Kant*, *supra* note 44, at 156.

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defendant, but though it could have sentenced him to three years in prison and a $1000 fine for manslaughter, it instead imposed a sentence of one year and a $20 fine.[53] The court in *Dudley and Stephens* was even more vociferous about the immorality of the defendants and sentenced them to death, as required by the law for the crime of murder. But the court also broadly hinted that the Queen could reduce the sentence,[54] which she did, to six months imprisonment (and not even at hard labor). Thus, it seems that the law formally condemns actions taken out of necessity but in practice demonstrates a reluctance to punish.

In sum, natural law theorists are somewhat uncomfortable with self-defense, as they are with the necessity defense. They do not articulate a convincing moral distinction between the two that would account for the law's different treatment.

B. Social Contract

Under social contract theory, civil society may regulate what its members do, including asking them to behave in ways contrary to what they would do in a "state of nature," if it is reasonable to conclude that those members would have willingly entered into a contract consenting to such regulation. But it is also proposed by social contractarians that limits arise on what can be required of members of society, insofar as no person would agree to a bargain in which she would have fewer benefits as a member of civil society than in a state of nature. It is not likely, for example, that a person would agree to join civil society as a slave, as she would lose too much of the freedom that is hers in a state of nature, without a counterbalancing benefit.[55] Thus, enslavement is not something that can be imposed upon any member of a civil society. Under social contract theory, an ethical arrangement is one in which persons live up to their (implicit) promises but are not expected to abide by promises no one could actually be expected to make.

53. *Holmes*, 26 F. Cas. at 369.

54. *Dudley and Stevens*, 14 Q.B.D. at 288 ("There is no path safe for judges to tread but to ascertain the law to the best of their ability, and to declare it according to their judgment, and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has entrusted to the hands fittest to dispense it.").

55. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 10–11 (1947).

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Accordingly, neither self-defense nor the necessity defense appears to be a behavior that civil society could prohibit to its members, because no one would give up the right of self-preservation to obtain the benefits of the social contract. Jean-Jacques Rousseau pointed out that man's "first law is that of self-preservation. . . . "[56] When one of the defendants in *Moe* says in defense of the raid on the store, "There is a law of self-preservation, and how can you expect a man to go against the most fundamental urges,"[57] he echoes Rousseau's implication that the right of self-preservation is something a citizen would not concede upon entry into the social contract. Self-defense and the necessity defense are both seemingly a means of exercising such a prior right.

John Locke used such thinking to justify self-defense, on the grounds that its objects "are not under the ties of the common law of reason" and "have no other rule, but that of force and violence, and so may be treated as beasts of prey."[58] That is, the person acting in self-defense is facing one who is acting as in a state of nature. It makes no sense to subject one responding to such a rule-less actor to rules, where rules cannot protect her or affect the other's behavior. Where the social contract is already breached by the other party, the actor is likewise relieved of its obligations, and thus can act in self-defense, committing an action that would otherwise be a breach.

A person acting out of necessity is in a similar situation—except that it might be said that she herself is the one who is the "beast of prey" in Locke's scenario. We do not subject beasts of prey to ethical judgment, because they cannot conform their actions to the dictates of morality. It would seem to make no more sense to describe a starving person's killing and eating of a weaker companion as criminal than to describe a hungry lion's killing and eating of a person as criminal. Although people have a general ability to conform to social standards, such exceptional circumstances as starvation and imminent death reduce them to the "state of nature" where the social contract cannot be expected to apply. (This particular point was in fact explicitly made by the defense in *Holmes*.[59])

Moreover, if the analogy to contract means anything, then the social contract should be subject to a *force majeure* provision. Under a *force*

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56. *Id.* at 6.

57. *Moe*, 174 Wash. at 309.

58. John Locke, *Second Treatise of Government*, § 16, p. 14 (1980).

59. A.W. Brian Simpson, Cannibalism and the Common Law 231–32 (1984).

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majeure clause, the parties to a contract are not bound by its promises if some extraordinary occurrence, beyond their control, prevents fulfillment. It would make no more sense to talk about the duties of the social contract in a situation involving necessity than it would to talk about the duty under a lease to fix the elevator in a building that has completely collapsed. Or, to put it another way, the social contract in such circumstances may be seen as defeated by "impossibility" or "impracticability."[60] A person who is in immediate danger may simply be unable to resist the compulsion to save herself, making the implicit contractual promise not to harm others, that otherwise applies, impossible to abide by. In the various ways of thinking about social contract, including its analogies to contract generally, the necessity defense and self-defense both seem like similar exceptional circumstances that render the contract unenforceable.

However, one aspect of social contract theory causes more ethical difficulty for necessity than for self-defense, and that is the social contract's assumption of the equality of all persons under law. Rousseau observes, "the social compact establishes among citizens such an equality that they are all engaged under the same conditions, and should all enjoy the same rights." Further, the compact "does not make any distinction among the individuals who compose it."[61] One of the sticking points for courts considering the necessity defense has been the concern that the defense undermines the egalitarian principles that otherwise guarantee social justice.

For instance, in *Dudley and Stephens*, the court is troubled by the idea that acceptance of the defense would legitimize inequitable behavior. It asks, "Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what?" The court adds: "In this case the weakest, the youngest, the most unresisting was chosen. Was it more necessary to kill him than one of the grown men? The answer must be, No."[62] From the court's perspective, the weak and the strong are equally entitled to the law's

60. 14 CORBIN ON CONTRACTS § 74.5 (2001) ("The essence of the defense [of impossibility] is that the promised performance has become impracticable because of some extreme or unreasonable difficulty, rather than scientifically or actually impossible." *Id.* at 31); SAMUEL WILLISTON, 30 A TREATISE ON THE LAW OF CONTRACTS, § 77:31 (2004) ("Courts may determine that a contractual act has become impracticable when it can only be done an excessive, unreasonable, or unbargained for cost." *Id.* at 365–66.)

61. ROUSSEAU, *supra* note 55, at 29.

62. *Dudley and Stevens*, 14 Q.B.D. at 287.

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protection, and the defendants are asking them to violate that principle. The necessity defense may therefore be ethically unacceptable in cases where it is an abrogation of this aspect of the social contract. If so, that would indicate that whether the necessity defense is valid under social contract theory would depend on how the defense is employed.

The court in *Holmes* indicated that the problem of inequality[63] could perhaps be addressed if defendants had drawn lots to decide who would die (although the court in *Dudley and Stephens* scoffed at this idea[64]). The *Holmes* court's position has been criticized by A.W. Brian Simpson as recommending a kind of religious prescription—insofar as the drawing of lots is perceived as entrusting the decision to God[65] (and indeed the court does briefly mention that idea[66]). But, in fact, the court is more emphatically concerned that the decision about whom to sacrifice be made impartially, that those with equal rights be treated equally—consistent with the implicitly agreed-upon principles of the social contract. The *Holmes* court explained, "In no other than this or some like way are those having equal rights put upon an equal footing, and in no other way is it possible to guard against partiality and oppression. . . . "[67] According to the court, the drawing of lots is the one means of maintaining equality in the situation.

In both *Holmes* and *Dudley and Stephens*, the defendants had contemplated the drawing of lots (as such was a recognized "custom of the sea"), but it was actually done in neither case. The social contract has the advantage of assumed consent, but the drawing of lots needs actual consent from all of the parties. To get such an agreement under the circumstances might be, practically speaking, all but impossible, especially if the number of persons is as large as that involved in *Holmes* (41 or 42 people were in

63. The MPC's choice of evils defense sought to address this concern by saying that the defense should be allowed "if the choice among lives to be saved is not *unfair*," although how that determination would be made is not specified. *MPC*, *supra* note 12, at 15 (footnote omitted) (emphasis added).

64. *Dudley and Stevens*, 14 Q.B.D. at 285 ("The American case . . . , in which it was decided, correctly indeed, that sailors had no right to throw passengers overboard to save themselves, but, on the somewhat strange ground that the proper mode of determining who was to be sacrificed was to vote upon the subject by ballot, can hardly . . . be an authority satisfactory to a court in this country.")

65. Simpson, *supra* note 59, at 234.

66. *Holmes*, 26 F. Cas. at 367 ("This mode is resorted to as the fairest mode, and, in some sort, as an appeal to God, for selection of the victim.")

67. *Id.*

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a lifeboat that could hold half as many[68]). In any event, one might question whether a person can even enter into a meaningful contract to agree to be killed after a drawing of lots, as the contract made under such a condition of extremity would seem void *ab initio*. Those drawing the short straws would have duress or perhaps unconscionability as a defense to their all-too-likely breach.

Further, this concern for equality is, it should be pointed out, an odd transposition. If the necessity defense is available under social contract theory, it is precisely because the situation in which the defendant finds himself closely resembles the archetypal state of nature, a state in which there is essentially no contract governing relations between persons. To apply any of the terms and conditions that would obtain in a contractual state therefore seems to lack a logical basis.

Moreover, a person acting in *self-defense* may act based on biases and beliefs that would also be troubling to an ethic of strict equality. For example, consider the situation where a man in a subway car full of people is accosted by a youth demanding five dollars (though not displaying any weapon or making any explicit threat). The man decides that the youth and his companions are would-be robbers, and pulls out a gun and shoots all four of them. That they are black while he is white, teenagers while he is in his late thirties, from lower-income backgrounds while he has led a more privileged life, may well play a role in his decision making. Still, the man (successfully) claims self-defense to all four attempted murder charges.[69] Or consider the case where a Japanese foreign exchange student who has gone to the wrong address for a Halloween party is shot and killed by a white Louisiana homeowner who had "observed an oriental person proceeding towards him" from the carport.[70] The student's race and age could well have been a factor in the homeowner's behavior, but that does not prevent his manslaughter acquittal on the ground of self-defense.[71]

68. Simpson, *supra* note 59, at 164. And, of course, in situations involving larceny or other similar criminal offense to obtain the necessaries of life, there can be no drawing of lots to apportion the sacrifice.

69. *See* People v. Goetz, 116 A.D.2d 316 (1986); and Kirk Johnson, *Goetz is Cleared in Subway Attack; Gun Count Upheld; Acquittal Won in Shooting of 4 Youths—Prison Term Possible on Weapon Charge*, New York Times, June 17, 1987, at A1.

70. *Hattori v. Peairs*, 662 So. 2d 509, 515 (La. App. 1 Cir. Oct. 6, 1995).

71. *Acquittal in Doorstep Killing of Japanese Student*, New York Times, May 24, 1993, at A1.

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Although prejudice and stereotyping may have affected the defendant's behavior in such situations—and we may even recognize and penalize that prejudice in the *civil* cases that often occur after such acquittals[72]—we generally permit defendants in criminal cases to respond to sincerely perceived threats as long as those threats have some credibility, even where the defendant's perceptions may be clouded by a degree of bias. When it comes to the intrusion represented by the government enforcing the criminal law, the norm is to expect people to live up to a basic standard (allowing for a certain amount of human frailty), not an ideal one. Conversely, in cases involving necessity, the risk of inequitable decision making by the defendant has been treated as enough in itself to shut down all access to the defense.

The social contract's concern for egalitarianism therefore does not seem to provide a compelling basis for distinguishing between necessity and self-defense. Both defenses would be conceived of as those that are retained by persons (from the state of nature) and therefore can be ethically invoked. Further, to expect persons in situations of necessity to engage in elaborate or extraordinary consideration of the social contract's egalitarian principles is simply beyond what we typically expect in criminal cases, including those where self-defense is claimed. Social contract theory thus provides little support for the law accepting self-defense but not necessity, or for burdening the necessity defense with substantially more demanding strictures than those placed on self-defense.

C. Utilitarianism

Under a utilitarian ethics, an action is moral to the extent that it increases the aggregate welfare, and immoral to the extent that it decreases it.[73] As a moral theory, utilitarianism supports recognition of the necessity defense as much if not more than it supports recognition of self-defense. However,

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72. *See* Adam Nossiter, *Bronx Jury Orders Goetz to Pay Man He Paralyzed $43 Million*, NEW YORK TIMES, Apr. 24, 1996, at A1; and *Hattori*, 662 So. 2d at 513 (judgment of over $650,000 to parents for wrongful death upheld).

73. An action conforms to the principle of utility when "the tendency it has to augment the happiness of the community is greater than any it has to diminish it." JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, Ch. 1, ¶6, 35 (1962). "Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness." JOHN STUART MILL, UTILITARIANISM 257 (1962).

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the ethical analysis involved is not straightforward: whether necessity is acceptable under a utilitarian ethics depends on how the defense is defined. The MPC "choice of evils" version of the necessity defense would seem well-designed to satisfy utilitarian morality, since it uses an explicit cost-benefit analysis, permitting the defense where "the harm or evil sought to be avoided is greater than that sought to be prevented."[74] But, in fact, this version of the defense would not satisfy a utilitarian ethics as well as the traditional common law version of the necessity defense, as described by Bacon.

The Comment to the MPC version of the defense explains how its utility calculation is to be made. It indicates, for example, that the defense would apply to a mountain climber who, in order to save his own life, cut the rope connecting him to another climber who had fallen off a precipice—as the benefit is one life saved instead of two lives lost. According to the Comment, the defense also applies to a person who diverts a flooding dike to inundate a farm house, killing the inhabitants of the house, in order to prevent the flood from drowning a whole town—as the loss of lives of those in the house is less costly than the loss of the whole town.[75] This concept of the necessity defense would presumably allow for the exoneration of Dudley and Stephens as well, and in fact an argument about utility was raised in the case. Simpson points out that Dudley and Stephens claimed, among other things, that it was better that one person in the lifeboat should die so that three should live, rather than that all four should die.[76] On the other hand, this version of the defense would not be available in the situation where one man takes the plank from another, because there

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74. *MPC*, *supra* note 12, at 8.

75. *MPC*, *supra* note 12, at 14–15.

76. SIMPSON, *supra* note 59, at 233. But the court evidently doubted the logic of this thinking, as the published decision in the case contains a curious footnote that reads:

> My brother Grove has furnished me with the following suggestion, too late to be embodied in the judgment but well worth preserving: "If the two accused men were justified in killing [the cabin boy], then if not rescued in time, two of these survivors would be justified in killing the third, and of the two who remained the stronger would be justified in killing the weaker, so that three men might be justifiably killed to give the fourth a chance of surviving."

Dudley *and Stevens*, 14 Q.B.D. at 288. The implication in this remark is that the calculus is not one life sacrificed to save three, but rather, taking the argument to its logical conclusion, potentially three lives sacrificed to save one. It is difficult, however, to see this analysis as

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would be no net saving of lives.[77] Using a "headcount," as described for the MPC version of the necessity defense, would seem to make the achievement of a net benefit an element of the defense itself and thus a guarantee of utilitarian value.

By contrast, a more traditional version of the necessity defense makes it available under "such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise."[78] In this version of the defense, it is a concept more of excuse rather than justification. The defense would be available in the plank hypothetical, as it does not matter that there is no net saving of lives, only that the person who takes the plank away from the other is in sufficiently dire straits that we would not expect him to act otherwise. Similarly, if one of the persons tossed out of the lifeboat by Holmes had clawed her way back into it and capsized it, drowning everyone in it, and managed herself to survive, she would still have a traditional necessity defense if tried for murder or manslaughter. And if the person who had the choice between inundating the town or inundating the farm house had inundated the town instead, because her child happened to be in the farm house, the traditional version of the defense would be available, as few have the self-control necessary to turn the flood on their own child. The traditional version of the defense differs substantially from the MPC "choice of evils" variation, and thus the two versions do not have the same degree of ethical justification under a utilitarian moral analysis.

An indication that the MPC choice of evils approach is more problematic for utilitarian ethics than the traditional version of the defense is suggested by the fact that if a headcount is the main or sole measure of utility, the necessity defense would in fact be *more* ethical than self-defense. After all, self-defense tends to be a wash when it comes to lives saved: if the actor kills a person attempting to kill him, then the net savings of lives is in fact zero. And a person who, in self-defense, kills multiple assailants would not be achieving an acceptable utility, because the behavior causes a net loss of lives. However, this comparison indicates that a headcount is an overly

anything other than mistaken, as, in fact, the actual choice presented to the actor at any given time is between all alive dying or some larger number surviving.

77. *MPC*, *supra* note 12, at 16.

78. The Criminal Code of Western Australia, ch. 13, § 25 (1969), cited in *MPC*, *supra* note 12, at 11 n.2.

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simplistic approach to assessing utility, not that necessity is more morally justified under a utilitarian ethics than is self-defense.

A famous thought experiment involving the "sacrificial organ donor" demonstrates the pitfalls of the headcount as a measure of utility. In this hypothetical, it is supposed that five persons in need of an organ transplant could claim necessity where they killed a single person to obtain the organs from that person's body in order to save their five lives.[79] This thought experiment might be understood as indicating that the necessity defense is morally defective (in that many people are inclined to disapprove of such a behavior).[80] But actually—like the examples from the Comment to the MPC choice of evils provision—the problem is with the use of the headcount as the sole or main measure of utilitarian value. The headcount entirely ignores secondary impacts, which can have a substantial effect on whether a given action is morally acceptable as a utility.

The thought experiment can be tweaked to illustrate the importance of secondary impacts. To truly resemble the situation of necessity, the hypothetical would have to involve five persons who found themselves lying next to a person who had the organs that could save all their lives, and they would have to have the power to remove those organs and surgically install them in themselves and do so under the pressure of believing that such was the only means of avoiding their imminent death. A law that excused such persons in that situation would, as a secondary impact, presumably create far less anxiety and fear in the general public than would a law that simply licensed the confiscation of people's organs by surgeons as material for redistribution whenever more than one person would benefit—and this cost in social anxiety and fear must be factored into the utility calculation. It is plausible that an objection to the latter, and a toleration of the former, stems from a more thorough utilitarian analysis than the headcount accomplishes.[81]

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79. *See* Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395, 1396 (1984–85).

80. It leads Thomson to remark: "Other things being equal, to kill a man is to infringe his right to life, and we are therefore morally barred from killing. It is not enough to justify killing a person that if we do so, five others may be saved: To say that if we do so, five others will be saved is merely to say that utility will be maximized if we proceed, and that is not by itself to justify proceeding. Rights trump utilities." *Id.* at 1408.

81. The thought experiment essentially illustrates what happens when an excuse-based version of necessity is treated as if it were a justification-based version of necessity.

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It may have seemed to the drafters of the Model Penal Code that focusing on the most immediate impact (as in a headcount) would have the virtue of preventing courts from wading into a morass of speculative and uncertain secondary impacts.[82] But, unfortunately, even consideration of the immediate impact of the defendant's action may present similar problems of calculation. For instance, in the *Ratliff* case the court concluded that the defendant's welfare fraud deprived other needy persons of support, and thereby imposed a greater cost than the benefit achieved for the defendant and her dependents. But whether the cost imposed by the defendant should simply be applied to the next individual in the benefits queue, as the court assumed, or instead spread across all welfare recipients evenly, or whether it should even be seen as a per-capita cost to the public fisc and not necessarily treated as a zero-sum game, is not self-evident. And if the defendant in *Ratliff* truly deprived another indigent person of the means of survival, it leads to a different conclusion about utility than if the defendant deprived all indigent persons of a fraction of a penny's worth of their welfare payments. The MPC's apparent focus on immediate impact (as conveyed by the headcount examples in the Comment) thus does not avoid the problem of speculative and uncertain calculations—while accruing all the deficits of its simplistic approach.

It is moreover odd for the MPC Comment to omit consideration of secondary impacts when the criminal law is in general highly concerned with them.[83] The criminal law is understood by many utilitarians as having a prescriptive or normative effect, as deterring particular behaviors for the benefit of society. Indeed, the law's concern for deterrent effect is implied in the Comment's example of the person who diverts the flood from the town to the house, reducing the loss of life. The law can theoretically incentivize such a person to choose society's preferred result by giving her the defense that rewards that choice. If the criminal law is meant to affect

82. The Comment does include a footnote that remarks, "The harm sought to be prevented by the law defining the offense may be viewed broadly enough to permit judicial attention to the effects on law enforcement of allowing the defense in the particular circumstances invoked. For example, a court could consider whether recognition of the defense when a prisoner has escaped to avoid assault would have the effect of substantially encouraging unjustified escapes." *MPC*, *supra* note 12, at 12 n.5. Nonetheless, the discussion in the Comment does not consider such effects on law enforcement in the examples that it gives.

83. However, see *supra* note 82.

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behavior in general, then to exclude secondary impacts from the cost-benefit analysis would risk undercutting or failing to maximize the achievement of such societal benefits.

The court in *Dudley and Stephens* is certainly aware of the importance of secondary impacts. The court feared, with regard to the rationale for the necessity defense presented in the case, that "such a principle, once admitted, might be made the legal cloke for unbridled passion and atrocious crime."[84] If in fact there is an immediate net saving of lives in the particular case, as there was in *Dudley and Stephens*, but a more thorough utilitarian analysis predicts that the allowance of the defense would lead to a general lessening of law-abiding behavior, then it might not make sense to allow the defense, even given the immediate benefits. Concern for negative secondary impacts is also displayed by the court in *Ratliff*. The court did not want to recognize an economic necessity defense because "if we were to rule otherwise, we would be encouraging all people who reasonably believed that they were in a 'tight spot' financially to steal,"[85] resulting in more social detriment than the benefit achieved by excusing the particular defendant. The court is pursuing the kind of thinking that the criminal law is seemingly intended to inspire, a consideration of whether the decision in the case is going to enhance or inhibit crime control. For the MPC to try to contain the analysis to immediate impacts is simply not consistent with this larger concern of the criminal law.

In fact, one way of understanding courts' reluctance to allow defendants access to a necessity defense is that courts have done a rough calculus of secondary impacts and concluded that the costs exceed the benefits. These courts may fear that the defense is too attractive to defendants (inviting them to commit disfavored acts) and too easy to present (allowing for inappropriate acquittals), undermining the deterrent and incapacitative effects of the law. But this implication does not serve as a basis for distinguishing necessity from self-defense. Indeed, self-defense is the easier defense to abuse—seemingly, many defendants could claim that the object of their aggression seemed to be about to draw a weapon or was otherwise threatening an attack.[86] If anything, the necessity defense is more highly

84. *Dudley and Stevens*, 14 Q.B.D. at 288.

85. *Ratliff*, 1991 Ohio App. Lexis 2943, citations to AmJur and *Moe* omitted.

86. See examples discussed in Part II.B.

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circumscribed in that a defendant cannot avail herself of the traditional version of the defense except in situations involving dire emergency.

Indeed, the *Ratliff* court's concern that the defense would license all those in a "tight spot financially" to steal is not a convincing argument, from a utilitarian perspective, against recognizing the defense. A defendant successfully pleading necessity would have to show, as an element of that defense, that serious peril to her was imminent if her otherwise unlawful action had not been taken. Those who can make such a showing are presumably going to be a small subset of all those who are in a "tight spot financially." If deterrence occurs when a person compares her situation with that of other similarly situated persons and calculates her likelihood of facing or not facing criminal punishment for a certain behavior, then allowing the defense to be used only by those in serious, imminent peril will not be likely to produce a significant antisocial effect. The cost to deterrence of recognizing the defense in such situations is thus considerably smaller than is implied by *Ratliff*. (Indeed, using the casual logic of *Ratliff*, allowing for self-defense would be unacceptable because it would encourage anyone who was ever given a "dirty look" by another to respond with violence. But we allow self-defense because we expect only those people whose behavior satisfies all the elements of self-defense to believe that they will receive the law's protection).

The MPC version of the necessity defense thus initially seems like one that would pass utilitarian muster, but it departs from the traditional approach in a way that actually makes it more problematic. The headcount and its ignorance of secondary impacts skews the defense away from a meaningful utilitarian analysis. The real measure of whether the necessity defense is acceptable under a utilitarian ethics might therefore look at the more traditional formulation, which excuses actors suffering under immediate threats to life or safety, regardless of whether such action is otherwise justified. Such a necessity defense is actually more likely to achieve an outcome acceptable under a utilitarian ethics, because it directly targets the defense to persons who probably could not in any event have been deterred by the law's threat of punishment.

Thus, for example, the mountain climber who cuts a rope attached to a companion who has fallen over a precipice should not be punished, not because there is a headcount benefit to his cutting the rope (one life saved instead of two lost), but because there is a net benefit to not punishing him for doing what he could not be expected to help doing (none punished

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instead of one punished pointlessly). The ability of the law to deter behavior in the case of this and similarly situated defendants is likely to be negligible.[87] Similarly, punishing a desperately hungry person who steals food or the means for obtaining food for herself and her family is unlikely to deter the behavior. If starving people will kill and eat another person for food, of course extremely hungry people will steal bread, even under the threat of punishment for larceny. Both Aquinas and Kant were reluctant to punish the person who acted out of necessity because of the ineffectuality of such punishment,[88] but such ineffectuality is most morally significant for the utilitarian perspective.

Where the law cannot realistically be a deterrent, a utilitarian ethics would not punish the undeterrable behavior, as that exacts an additional cost without a sufficiently compensating benefit. In that sense, behavior out of necessity is like self-defense, which is also difficult if not impossible to deter, and which punishing persons for engaging in is pointless and therefore not a utility. Accordingly, self-defense and the necessity defense, in its traditional formulation, would be similarly acceptable under a utilitarian ethics.

III. THE MEANING OF THE LAW'S REJECTION OF THE NECESSITY DEFENSE

If ethical distinctions do not explain why the law treats the necessity defense differently than self-defense, then something else must account for it. The real problem for law appears to be the greater apparent disharmony between that defense and the criminal law's traditional free will assumption.

It is this free will assumption that undergirds the law's self-description of itself as entitled to hold criminals morally responsible, and punish them in retribution, because they *choose* to commit their unlawful actions. For

87. Even if the law punished such behavior capitally, the imperiled mountain climber would rationally prefer the immediate saving of her life over the prospect of its eventual loss. But while this practical comparison suggests that a law requiring the mountain climber to do otherwise is unlikely to *deter* her, because of its insufficient penalty, it is not evident that many defendants in this or similar situations would experience the inclination to engage in such an analysis prior to acting.

88. See discussion in Part II.A.

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example, the Supreme Court has described as a "universal and persistent" element of our law the "belief in the freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[89] Indeed, "the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems."[90] The Court has further indicated that the adoption of "a deterministic view of human conduct" would be "inconsistent with the underlying precepts of our criminal justice system."[91] Maintenance of this free will assumption preserves the regime of retributive punishment it supports.[92]

However, the traditional version of the necessity defense, if accepted by the law, would excuse the defendant based on his claim that he was driven to act by dire circumstances, circumstances that imposed such pressure that he could not have been expected to act other than he did. Even calling it the "necessity" defense suggests that it is at odds with the law's assumption of free will. For the defendant to say that he acted *necessarily* indicates that he had no choice to do other than he did.[93] Further, "necessitarianism" is in fact another word for determinism. As John Stuart Mill observed, "On the theory of Necessity (we are told) man cannot help acting as he does; and it cannot be just that he should be punished for what he cannot help."[94] Given the assumption of free will that is deeply embedded in the criminal law, the law rejects the necessity defense rather than wrestle with the apparent inconsistency with that assumption that would be created by the acceptance of the defense.[95] The law evidently prefers the inconsistency that results from its

89. *Morissette v. United States*, 342 U.S. 246, 250 (1952).

90. *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937).

91. *United States v. Grayson*, 438 U.S. 41, 52 (1978).

92. *See* Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AMER. CRIM. L. REV. 1313 (2000).

93. *See* BACON, *supra* note 3, at 29: "The law chargeth no man with default where the act is compulsorie, and not voluntary, and where there is not a consent and an election, and therefore if either, there bee an impossibility for a man to doe otherwise, or so great a peturbation of the judgement and reason as in presumption of law mans nature cannot overcome, such necessity carrieth a privledge in it selfe."

94. John Stuart Mill, *An Examination of Sir William Hamilton's Philosophy* in FREE WILL 291 (Sidney Morgenbesser & James Walsh eds., 1962).

95. Even the "choice of evils" defense, though implying by its very name that the free will assumption is kept intact, describes situations in which the math decrees a result.

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different treatment of self-defense and necessity, finding it less undermining.

However, self-defense could be seen as posing a similar threat to law's free will assumption, insofar as self-defense also involves acts precipitated by a life- or safety-threatening experience that essentially forces the hand of the defendant. But self-defense can be conceptualized in ways that do not cause the law as much ontological discomfort. For example, it can be seen as involving two autonomous persons taking actions against each other—reinforcing rather than undermining the appearance of free will.[96] The necessity defense, on the other hand, involves a person whose behavior seems to be impelled by circumstances, and therefore risks becoming emblematic of a world ruled by forces other than the will. Moreover, it is easier to imagine many acts taken in self-defense as ones we would actually choose, as compared to many acts taken out of necessity—such as killing and eating someone or stealing food—which by their very unattractiveness emphasize what seems like a lack of choice. Although both defenses could in theory undermine the free will assumption, self-defense can be conceptualized in ways that better fit within the existing paradigm.

That concern for free will is the sticking point for law is suggested by how courts characterize the defendant's behavior in necessity cases. In *Dudley and Stephens*, the court repeatedly describes what the defendants did as giving in to "temptation":

> [T]he *temptation* to the act which existed here was not what the law has ever called necessity. . . . [T]he absolute divorce of law from morality would be of fatal consequence, and such divorce would follow if the *temptation* to murder in this case were to be held by law an absolute defence of it.[97]

According to Simpson, "the predominant view of English judges, then and now, is that it is just when temptations are strongest and the difficulties of self-control most acute that the law should reinforce the individual conscience with its threat of punishment."[98] The *Holmes* court implies

96. By contrast, cases involving duress are less problematic for law than the necessity defense because, like self-defense, they involve claims that other individuals (presumably acting autonomously) provoked the defendant's unlawful action. Cases involving "political necessity" are also less problematic because they use "necessity" to mean a lack of political alternatives, rather than an ontological lack of choice in the action taken.

97. *Dudley and Stevens*, 14 Q.B.D. at 287 (emphasis added).

98. SIMPSON, *supra* note 59, at 234.

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something similar when it declares that it would be "senseless, indeed, to absolve [such a defendant] exactly at those times when the obligation is most needed."[99] This understanding supposes the person should use her will to resist the "temptation," and that the law should support that effort by providing no "absolution" if she does not.

The idea in *Ratliff* that the law cannot condone theft by persons in a "tight spot" may reflect a similar idea that difficult circumstances should call forth the resistance of the will, and that the law should reflect such an expectation. *Fontes* likewise implies such a perspective when the court remarks that "the law is clear that economic necessity alone cannot support a *choice* of crime."[100] The law assumes that human beings have the power to choose their actions even in situations of great pressure, and can accordingly be held responsible for failing to do so. The law's rejection of the necessity defense thus protects the free will assumption by banishing the idea that the defendant's action may be understood as virtually or actually compelled.

Moreover, the necessity defense is problematic for the law not simply because it threatens the consistency of law's free will account but also because it offers—albeit in a submerged fashion—an alternative explanation for the defendant's behavior. Though defendants in necessity cases have often framed the question in terms of the exercise of natural rights or exemption from the social contract, their arguments implicitly invoke claims about biology. When the defense counsel in *Holmes* "insisted largely upon the existence of the state of nature, as distinguished from the social state, and contended that to this state of nature the persons in the long-boat had become reduced,"[101] he is arguably talking not about what persons are entitled to do in the absence of the social contract but about what persons are driven to do by instinct—by "nature" in that sense. The defendant in *Moe*, in stealing food from the mining company store while he was in a condition of extreme hunger, refers to what he does as reflecting at once a "higher law" and a "law of self-preservation." These "laws" resemble deontological claims via natural law, or inherent features of the human situation in the state of nature prior to the social contract, but they also call to mind the instinctive imperatives imposed by

99. *Holmes*, 26 F. Cas. at 369.
100. *Fontes*, 89 P.3d at 486 (emphasis added).
101. *Holmes*, 26 F. Cas. at 368.

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biology, where the law of self-preservation is not prescriptive but descriptive.

In such an account of behavior, when an organism is in serious danger—when extremely hungry, injured, ill, or imperiled—it will be driven by instinct to do what is necessary to survive, and increasingly so the more intense and imminent the threat to survival becomes. In this alternative account, after twenty days or even twenty-four hours without food for oneself and/or one's offspring, the pressure of instinct becomes strong, even strong enough perhaps to compel unlawful behavior. In rejecting the necessity defense, the law is therefore not simply rejecting a critique of its philosophical libertarianism but also rejecting an alternative biological explanation for the defendant's behavior.

It might seem, nonetheless, that the law could accommodate the necessity defense without fundamental ontological revision by conceiving of it as involving a situation where the pressures of instinct simply prevent the usual exercise of free will.[102] But it may be that the necessity defense is somewhat like the insanity defense in this regard, which at one time was described as the "exception that proves the rule" of free will.[103] In theory, the insane person, as a result of psychosis or other severe mental disorder, lacks the customary capacity to choose her behaviors, and therefore the law does not hold her responsible. But this idea of the insanity defense as representing a kind of respect paid to the free will assumption did not save the defense from becoming restricted in American law to the point of near-oblivion.[104] It turned out that psychologists and psychiatrists are inclined to deterministic descriptions of human behavior, and as that aspect of the world view of the mental health disciplines became clear, the law decisively and noticeably recoiled from giving it any prominence in the criminal courtroom.[105]

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102. As explained by Prof. Horowitz, *supra* note 1, at 125 (footnote omitted): "Where necessity exculpates, that is not because we approve of the conduct it permits, but because we have come increasingly to believe that dire necessity may affect free choice."

103. Alan Stone, *The Insanity Defense on Trial*, 33 HARV. L. SCH. BULL. 15, 21 (1982).

104. Michele Cotton, *A Foolish Consistency: Keeping Determinism Out of the Criminal Law*, 15 PUB. INT. L.J. 1, 18, and 18 n.90 (2005).

105. Certainly, public reaction played a role in the law's rejection of the defense, as in the response to the acquittal of John Hinckley in the assassination attempt on President Ronald Reagan—but that was merely the nail in the coffin of a largely judicial "backlash" against expansion the insanity defense. *See* Cotton, *supra* note 104, at 5–23.

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The story of the insanity defense, like the story of the necessity defense, is one of the law being unwilling to tolerate exposure to any account of human behavior different from its own.[106] Indeed, the law's conception of criminal behavior has not changed much over the last two centuries. The current version of the insanity defense in most jurisdictions closely resembles the *M'Naghten* test articulated in 1843,[107] while the necessity defense has no more of a foothold in the law than it did when *Holmes* was decided in 1842—both defenses have seemingly been constrained by the concern of courts and legislatures that the free will assumption be protected and remain uncontaminated by whatever revisions in the understanding of human behavior have been made in other spheres.

A similar situation can be seen in juvenile justice. During the first two-thirds of the twentieth century, many juvenile offenders were excused from criminal prosecution, based on deterministic descriptions of their behavior as reflecting environmental influences rather than their exercise of free will.[108] But difficulty in making a principled distinction between juveniles and adults in this respect helped to usher in the current regime, which more frequently tries and punishes juveniles "as adults."[109] As with the necessity defense and the insanity defense, our criminal law takes its cues here mostly from the distant past. Thus, our approach to juvenile offenders owes more to the nineteenth-century conception of children as "little adults" than to the modern scientific and social scientific sense of them as subject to developmental stages that shape their actions and capacities.[110] Indeed,

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106. Cotton, *supra* note 104.

107. 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

108. *See, e.g.*, *McKeiver v. Pennsylvania*, 403 U.S. 528, 551–52 (1971) (White, J., concurring) ("Reprehensible acts by juveniles are not deemed the consequences of mature and malevolent choice but of environmental pressures (or lack of them) or of forces beyond their control.").

109. Cotton, *supra* note 104, at 27–32.

110. *Id. See also* David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1558–59 (2004) (discussing the history of juvenile justice); Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case For Abolishing The Juvenile Court*, 69 N.C. L. REV. 1083, 1105–06 (1991) (discussing the increasing resemblance of juvenile proceedings to adult criminal trials); Jon-Michael Foxworth, *An Unjust Act: The Schizophrenic State of Maturity and Culpability in Juvenile Justice and Minor Abortion Rights Law: Current Trends in Virginia and Nationally*, 9 WM. & MARY J. OF WOMEN & L. 495, 502 (2003) (discussing the "ever growing understanding of children as little adults subject to criminal sanctions").

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necessity, the insanity defense, and juvenile justice all present situations where biological and psychological forces appear to cause the offender's behavior and might give rise to defenses based on such constraints or determinants. However, the law has been reluctant to accept the legitimacy of excuse in all these situations because doing so calls into question the correctness of its free will assumption.

That is not to say that scientific and social scientific evidence plays no role in decision making about those offenders who appear to suffer from biological and psychological influences upon their behavior. The law does entertain, and has long entertained, the use of such evidence in support of mitigation of punishment.[111] However, allowing it only in mitigation effectively compartmentalizes it and controls its impact, preventing it from affecting the more fundamental issue of guilt. Relegation of the evidence to mitigation also leaves it in the discretion of the court to decide its value, including deciding to give it little or no credence, subject to review only under an abuse of discretion standard.[112] The criminal law thus does not utterly ignore scientific and social scientific evidence about human behavior but is able to prevent it from challenging or contradicting the law's understanding of criminal guilt and responsibility.

The strong insistence on the part of American criminal law that such evidence play no role in the determination of guilt keeps our concept of criminal behavior from being enriched and developed by scientific and social scientific knowledge, and the alternative dispositions that such perspectives might support. Instead, the criminal law is left with its anachronistic, folk, and perhaps theological concepts of guilt, and the limitations they impose upon the evolution of the justice system. And it may be that the religious origins of the law—on display in cases like *Holmes* and *Dudley and Stephens*—continue to have an impact on how the law copes with these contrary descriptions of behavior, and help explain its adamant resistance to them. Excommunication of the purveyors of heresy is part of religious tradition.

Of course, the guardians of law do not describe their resistance to any accommodation in such terms. Rather, the objection that is often made is that a more scientific description of human behavior, whether based on

111. *See* discussion of necessity in Part II.A.

112. *See, e.g.*, *State v. Limpus*, 128 Ariz. 371, 378 (1981); *People v. McDowell*, 54 Cal. 4th 395, 428 (2012).

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psychology or biology, is too "unproven."[113] Certainly it is true that we are not at the point, and may never be, where it can be decisively demonstrated that a person's behavior in a given situation was caused by factors other than free will. But the idea that the legal account of human behavior must stay the same as it was in the nineteenth century is not the logical corollary of such a fact. The law's account of human behavior is itself unproven; no evidence proves that people have free will and can always or almost always have done other than they did. The idea that law must cling absolutely to its account of behavior until and unless some other account is proven correct holds the other account to a much higher standard than the law holds its own account.

It appears that the law insists upon the inviolability of the free will account not because it has a stronger ontological claim but because it is the basis for the criminal law's emphasis on retributive justice.[114] To hold persons accountable in the exact way that the law does, and has for centuries, assumes that they are the true authors of their acts. To begin to allow any exceptions to the free will assumption may be seen as exposing retributive punishment to death by a thousand cuts, and that—rather than moral distinction—appears to be the dispositive factor that accounts for the law's treatment of necessity, and other defenses based on excuse.

CONCLUSION AND IMPLICATIONS

As demonstrated in this Article, American criminal law has repeatedly and resoundingly rejected the necessity defense. And, as also demonstrated here, this rejection has occurred in spite of the fact that the necessity defense is morally and conceptually very similar to self-defense, which the law has fully accepted. This inconsistent treatment of the two defenses apparently arises because necessity, unlike self-defense, calls into question the free will assumption of the criminal law. Indeed, the necessity defense implies that the defendant's behavior was *necessitated* rather than

113. *See*, *e.g.*, Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397 (2005–06) (criticizing on that basis medical and psychiatric organizations for filing an amicus brief in *Roper v. Simmons*, 543 U.S. 551 (2005), that presented neuroscientific evidence on the adolescent brain as support for the abolition of the death penalty for minors, *id*. at 408).

114. *See* Cotton, *supra* note 104, at 38–40.

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freely chosen. Like other defenses that imply deterministic causation, the necessity defense has evidently been regarded as too threatening to the sanctity of the free will assumption and the system of retributive punishment upon which it is based.

The problem is not so much that American criminal law has chosen the wrong moral theory—it is not as if philosophy has resolved the big ontological question—as that it has so completely closed itself off from "contamination" by other perspectives. In avoiding anything that smacks of deterministic or even seemingly deterministic accounts of human behavior, the criminal law isolates itself from the influence of disciplines, including the sciences and social sciences, that could allow it to achieve more effective legal interventions. In addition, in its rigorous insistence upon orthodoxy, the criminal law insulates itself from the challenges and exchanges that could refine and improve its moral judgments. This stance does not bode well for the moral and social potential of criminal law. If the criminal law is kept as uniform and homogenous as the rooting out of heresy can make it, then it will stagnate and perhaps one day soon become the sole remaining outpost of a largely abandoned view of human behavior. Such an outcome would greatly undermine its social benefit and the achievement of justice.

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