

The Necessity Defense Revisited: An Examination Through the Case of *Regina v. Dudley & Stephens* and President Bush's Order to Shoot Down Hijacked Aircraft in the Wake of September 11, 2001

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I. INTRODUCTION

[1] The necessity defense is one of the most debatable provisions in modern criminal law.

The reasons and justifications for the defense implicate religious, moral, and legal viewpoints.

[2] This note will examine the development of the necessity defense from a number of standpoints. First, this note addresses the influence of Christian legal thought on the defense, focusing primarily on the Catholic doctrine of double effect. Next, this note examines the nineteenth century English view of the necessity defense through the illustrative case of *Regina v. Dudley & Stephens*.¹ The approach taken by the court in *Dudley & Stephens* is compared to the modern American view of the necessity defense by focusing on various formulations of the necessity defense, including the common law approach, the Model Penal Code view, and various state law approaches. This note then applies the modern American view of necessity to President Bush's order to shoot down hijacked aircraft in the aftermath of September 11, 2001 and discusses how religious doctrines and pragmatic concerns offer support for the President's order. Finally, this note proposes that President Bush's order, although unpopular and subject to criticism, is the correct response because religious and legal doctrines, in addition to pragmatic concerns, offer support for the President's order.

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¹ 14 Q.B. 273 (1884).

II. CHRISTIAN PHILOSOPHY AND THE CHOICE OF EVILS PROBLEM

A. Development of the Doctrine of Double Effect

[3] According to the doctrine of double effect, a person may engage in acts that result in the death of another in order to save a greater number of people if the death is not intended and provided that the acts are not themselves a means of saving the lives of others.² Therefore, unlike utilitarianism,³ which employs a cost-benefit analysis – referred to as a “numerical calculus,” – the doctrine of double effect focuses on the actor’s motive from a moral standpoint.⁴

² SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 878 (Aspen Law & Bus. 6th ed. 1995). For example,

it is considered wrong to terminate the life of a fetus even if that is the only way the mother can be saved and even if the fetus will die in any event. On the other hand, an ordinary operation designed directly to protect the mother’s health is permissible, even if the inevitable effect is the death of the fetus, under the so-called principle of ‘double effect’ that death is only permitted, not intended, and is not itself a means to saving the mother’s life.

Id.

³ Jeremy Bentham established the school of utilitarianism to address the system of law in feudal England. RANDALL COLLINS & MICHAEL MAKOWSKY, THE DISCOVERY OF SOCIETY 82 (Phillip A. Butcher et al. eds., 5th ed. 1993). He believed that a system of rewards and punishments, rather than retribution, should be used to “induce people to be good.” *Id.* at 82-83. According to utilitarian principles, “the best action could be computed by a hedonistic calculus, by which one arrived at the greatest good for the greatest number. [Utilitarianism] provided a way of combining maximum individual freedom with the good of the whole society.” *Id.* (internal quotations omitted).

⁴ KADISH & SCHULHOFER, *supra* note 2, at 878. Kadish and Schulhofer demonstrate the difference between the two approaches through a number of examples. *See id.* For example, if intruders tell the inhabitants of a village that they must kill their mayor or be slaughtered, “they would have a substantial argument” for invoking the defense of necessity under a utilitarian point of view. *Id.* at 878 n.15. In contrast, under the doctrine of double effect these acts would not be excused because the death of the mayor was directly intended. *Id.* In other situations, the doctrine of double effect will yield the same result as a purely utilitarian approach. For example, “[d]iverting a flood to destroy a farmhouse instead of a town would be justifiable since the destruction of the farmhouse is not intended and is not a means of saving the town.” *Id.*

[4] The double effect doctrine stems from the writings of early Christian scholars, most notably Saint Augustine of Hippo.⁵ Saint Augustine contributed to “early Christian doctrine regarding *jus ad bellum* – the right to wage war.”⁶ Even though he did not directly address the issue of necessity in these writings, his work provides insight into the Christian view on the choice of evils problem.

[5] Saint Augustine examined both the proper motives for waging war and the proper behavior during war.⁷ He emphasized that the state’s war-making powers exist for the promotion of peace and the common good of society.⁸ Implicit in the notion of “the common good” is an understanding that any gain achieved through war should outweigh the cost of war. This view served as a basis for the concept of necessity and the doctrine of double effect.

[6] Although Saint Augustine laid the groundwork for the double effect doctrine through the just war concept, it was Saint Thomas Aquinas⁹ who both modernized and fully articulated

⁵ See Wray R. Johnson, *Just Law and Law of War: A Primer*, at <http://www.fs.huntingdon.edu/jlewis/Outlines/SajustWarWray.htm> (last modified Apr. 8, 2001). Saint Augustine (354 – 430 A.D.) served as the Bishop of Hippo in Northern Africa for thirty-five years. AUGUSTINE, THE CONFESSIONS, THE CITY OF GOD ON CHRISTIAN DOCTRINE vi (Robert Maynard Hutchins ed., William Benton 1952). Augustine is highly regarded by the Catholic Church as both a philosopher and a scholar. See Michael Mendelson, *Saint Augustine*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2000), at <http://plato.stanford.edu/entries/augustine/>.

⁶ Johnson, *supra* note 5. Augustine’s mentor, Saint Ambrose, first articulated the just war concept. *Id.*

⁷ Mark Edward DeForrest, *Just War Theory and the Recent U.S. Air Strikes Against Iraq*, 1 ACROSS BORDERS GONZ. INT’L L.J. 8, ¶ 10 (1997), at <http://www.law.gonzaga.edu/borders/documents/deforres.htm>.

⁸ *Id.* ¶ 12.

⁹ Saint Thomas Aquinas (1224 – 1274 A.D.) was born in Roccasecca, Italy. THOMAS AQUINAS I, at v (Robert Maynard Hutchins ed., Fathers of the English Dominican Province trans., revised by Daniel J. Sullivan, William Benton 1952) (1941). Aquinas entered the Dominican order and

the standard.¹⁰ Aquinas reasoned that three conditions must exist before a war is just.¹¹ First, the sovereign must authorize war.¹² Second, the war must be undertaken for a just cause.¹³ Finally, the war must be “undertaken with the right intention,” namely, to accomplish good or avoid evil.¹⁴ Therefore, Aquinas “focused on defining the right to make war and the importance of the intent which stands behind the decision to go to war.”¹⁵ It is this focus on intent that led to Aquinas’ construction of the double effect doctrine.

[7] In his writings, Aquinas rarely used the term “double effect.” Rather, he provided the conceptual foundation for the doctrine through his theory of a just war and by refining his

served as a teacher, lecturer, and philosopher. *Id.* at v-vi. Aquinas wrote a number of influential treatises, which continue to shape Catholic thought. *See id.*

¹⁰ *See* DeForrest, *supra* note 7, ¶ 13.

¹¹ *Id.*

¹² *Id.*

For it is not the business of a private person to declare war, because he can seek for redress of his rights from the tribunal of his superior. Moreover it is not the business of a private person to summon together the people, which has to be done in wartime. And as the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them.

THOMAS AQUINAS II, at 578 (Robert Maynard Hutchins ed., Fathers of the English Dominican Province trans., revised by Daniel J. Sullivan, William Benton 1952) (1941) [hereinafter AQUINAS II].

¹³ DeForrest, *supra* note 7, ¶ 13.

¹⁴ *Id.* “For it may happen that the war is declared by the legitimate authority, and for a just cause, and yet be rendered unlawful through a wicked intention.” AQUINAS II, *supra* note 12, at 578.

¹⁵ DeForrest, *supra* note 7, ¶ 13.

discussion of self-defense.¹⁶ Aquinas asserted that even though the state may, in some instances, invoke its power to intentionally kill a person, “[p]rivate persons on their own authority never have the right [to intentionally] kill anyone.”¹⁷ Yet, Aquinas recognized that private persons may kill an unjust aggressor when it is necessary to save their own lives.¹⁸ Those who kill in self-defense are excused only if they intend to save their own lives and not to kill another such that the killing of the assailant is purely a consequence of self-defense.¹⁹

[8] Aquinas’ analysis of intent and self-defense was a catalyst for the development of the double effect doctrine, which has gained wide acceptance within the Christian tradition and has

¹⁶ See THOMAS AQUINAS, 38 SUMMA THEOLOGIAE (Marcus Lefébure trans., 1975) (1485) [hereinafter SUMMA].

¹⁷ Charles E. Rice, *Showdown in Texas: The Pope vs. The Culture of Death*, 4 CATHOLIC DOSSIER: ISSUES IN THE ROUND No. 5 (Sept.-Oct. 1998), <http://www.catholic.net/rcc/Periodicals/Dossier/9-10-98/Article3.html>.

The just war and capital punishment are decreed by the state, which derives its authority from God The right to kill intentionally, therefore, can properly be asserted only by those responsible for the common good, that is, the state or those engaged in a rightful assumption of the power of the state through justified rebellion Note that the right of personal self-defense does not include the right intentionally to kill.

Id.

¹⁸ See SUMMA, *supra* note 16.

¹⁹ Aquinas stated that “[t]he act of self-defense can have a double effect: the preservation of one’s own life; and the killing of the aggressor The one is intended the other is not.” CATECHISM OF THE CATHOLIC CHURCH: PART THREE – LIFE IN CHRIST, Part 3, § 2, ch. 2, art. 5, ¶ 2263, (internal quotations omitted) [hereinafter CATECHISM OF THE CATHOLIC CHURCH], http://www.vatican.ca/archive/ccc_css/archive/catechism/p3s2c2a5.htm (last visited Sept. 21, 2002).

influenced religious teachings of the faith.²⁰ In addition, his articulation has influenced secular philosophy, including the work of Hugo Grotius, a sixteenth century Dutch Protestant jurist,²¹ who stated that his view of just war is in agreement with Aquinas' view of intent as it relates to the double effect doctrine.²² Grotius formulated the Protestant concept of just war.²³ He believed that for war to be just it must satisfy three conditions: "1) the danger faced by the nation is immediate; 2) the force used is necessary to adequately defend the nation's interests; and 3)

²⁰ See DeForrest, *supra* note 7. "The defense of the common good requires that an unjust aggressor be rendered unable to cause harm. For this reason, those who legitimately hold authority also have the right to use arms to repel aggressors against the civil community entrusted to their responsibility." CATECHISM OF THE CATHOLIC CHURCH, *supra* note 19, ¶ 2265.

If, however, non-lethal means are sufficient to defend and protect people's safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity to the dignity of the human person.

Id. ¶ 2267.

²¹ DeForrest, *supra* note 7, ¶ 16. Grotius "is sometimes referred to as the father of international law. Grotius, who lived in the aftermath of the brutal Thirty-Years War in Europe, wrote extensively on the right of nations to use force in self-defense." *Id.* (footnote omitted).

²² See HUGO GROTIUS, THE LAW OF WAR AND PEACE 173 (Francis W. Kelsey trans., Bobbs-Merrill Co., 1925) (1625). Grotius commented:

It has been well said by Thomas [Aquinas] . . . that if a man in true self-defence kills his assailant the slaying is not intentionally. The reason is not that, if no other means of safety is at hand, it is not sometimes permissible to do with set purpose that which will cause the death of the assailant; it is, rather, that in such a case the inflicting of death is not the primary intent, as it is in the case of procedure by process of law, but the only resource available at the time.

Id.

²³ DeForrest, *supra* note 7, ¶ 16.

the use of force is proportionate to the threatened danger.”²⁴ Grotius, who also focused on the requirement that a threat must be imminent in order to justify the use of force,²⁵ provided a secular application of the double effect principle in the legal system.

B. The Current Approach

[9] The current approach to the principle of double effect follows the general foundation laid by Augustine, Aquinas, and Grotius. The Roman Catholic Church continues to adhere to the principles set forth by Aquinas,²⁶ and the Church of England has articulated a similar view.²⁷ An examination of their respective approaches to euthanasia demonstrates this similarity.

[10] The Roman Catholic Church equates euthanasia to both murder and suicide.²⁸ In contrast, a death that is not intended but results as a byproduct of medical action or inaction,

²⁴ *Id.*

²⁵ GROTIUS, *supra* note 22, at 173. “The danger, again, must be immediate and imminent in point of time [T]hose who accept fear of any sort as justifying anticipatory slaying are themselves greatly deceived” *Id.* (footnote omitted).

²⁶ *See supra* text accompanying notes 9-19.

²⁷ *See generally The Church of England’s View On: Medical Ethics and Issues of Life and Death*, at <http://cofe.anglican.org/view/index.html> [hereinafter *The Church of England’s View*] (discussing the Church of England’s view on Euthanasia).

²⁸ POPE JOHN PAUL II, ENCYCLICAL LETTER: EVANGELIUM VITAE para. 65-66 (1995), at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html. Pope John Paul II stated:

euthanasia is a grave violation of the law of God, since it is the deliberate and morally unacceptable killing of a human person. This doctrine is based upon the natural law and upon the written word of God, is transmitted by the Church's Tradition and taught by the ordinary and universal Magisterium.

Depending on the circumstances, this practice involves the malice proper to suicide or murder.

carried out without the intent to cause death, is permissible under the doctrine of double effect.²⁹

Likewise, the Church of England denounces “the deliberate taking of a human life except in self-

Suicide is always as morally objectionable as murder. The Church's tradition has always rejected it as a gravely evil choice. Even though a certain psychological, cultural and social conditioning may induce a person to carry out an action which so radically contradicts the innate inclination to life, thus lessening or removing subjective responsibility, *suicide*, when viewed objectively, is a gravely immoral act

To concur with the intention of another person to commit suicide and to help in carrying it out through so-called “assisted suicide” means to cooperate in, and at times to be the actual perpetrator of, an injustice which can never be excused, even if it is requested. In a remarkably relevant passage Saint Augustine writes that “it is never licit to kill another: even if he should wish it, indeed if he request it because, hanging between life and death, he begs for help in freeing the soul struggling against the bonds of the body and longing to be released; nor is it licit even when a sick person is no longer able to live” Moreover, the act of euthanasia appears all the more perverse if it is carried out by those, like relatives, who are supposed to treat a family member with patience and love, or by those, such as doctors, who by virtue of their specific profession are supposed to care for the sick person even in the most painful terminal stages.

The choice of euthanasia becomes more serious when it takes the form of a *murder* committed by others on a person who has in no way requested it and who has never consented to it. The height of arbitrariness and injustice is reached when certain people, such as physicians or legislators, arrogate to themselves the power to decide who ought to live and who ought to die.

Id. (citations omitted).

²⁹ *See id.* Pope John Paul II declared:

[e]uthanasia must be distinguished from the decision to forego so-called “aggressive medical treatment[,]” in other words, medical procedures which no longer correspond to the real situation of the patient, either because they are by now disproportionate to any expected results or because they impose an excessive burden on the patient and his family. In such situations, when death is clearly

defence or the legitimate defence of others,” but it does not “insist[] that a dying or seriously ill person should be kept alive by all possible means for as long as possible.”³⁰ The similarity of the approaches applied by the Roman Catholic Church and the Church of England to the doctrine of double effect³¹ demonstrates that the doctrine has a moral and logical appeal which transcends any one religion.

C. Applying the Double Effect Doctrine to Legal Principles: A Double Effect Based Necessity Defense

imminent and inevitable, one can in conscience “refuse forms of treatment that would only secure a precarious and burdensome prolongation of life, so long as the normal care due to the sick person in similar cases is not interrupted” To forego extraordinary or disproportionate means is not the equivalent of suicide or euthanasia; it rather expresses acceptance of the human condition in the face of death.

In modern medicine, increased attention is being given to what are called “methods of palliative care[,]” which seek to make suffering more bearable in the final stages of illness and to ensure that the patient is supported and accompanied in his or her ordeal. Among the questions which arise in this context is that of the licitness of using various types of painkillers and sedatives for relieving the patient's pain when this involves the risk of shortening life Pius XII affirmed that it is licit to relieve pain by narcotics, even when the result is decreased consciousness and a shortening of life In such a case, death is not willed or sought, even though for reasonable motives one runs the risk of it: there is simply a desire to ease pain effectively by using the analgesics which medicine provides.

Id. (citations omitted).

³⁰ *The Church of England's View*, *supra* note 27.

³¹ *See Religious Education: Sanctity of Life – Christian Attitudes Towards Euthanasia*, BBC Schools – GCSE Bitesize Revision, at <http://www.bbc.co.uk/schools/gcsebitesize/re/sanctity/cheuthanasiarev2.shtml> (last visited Oct. 21, 2002).

[11] Although the doctrine of double effect has exerted a strong influence on the Christian tradition, it has had a more limited yet important influence on the necessity defense in the English and American legal systems.

[12] The doctrine's influence on the English legal system during the nineteenth century is apparent from the approach adopted by English courts when evaluating a necessity defense.³² In the United States, the doctrine of double effect continues to influence the legal view of the necessity defense and the law in general. For example, the doctrine's focus on the actor's intent to determine whether his actions are permissible has shaped the hierarchy of mental states, which criminal law uses to determine the blameworthiness of various crimes.³³ Furthermore, the doctrine has influenced many substantive provisions of modern criminal law, such as prohibitions against euthanasia.³⁴ Even though euthanasia is prohibited by law and viewed by

³² See Derrick Augustus Carter, *Knight in the Duel with Death: Physician Assisted Suicide and the Medical Necessity Defense*, 41 VILL. L. REV. 663, 696 (1996) (citing *Regina v. Dudley & Stephens*, 14 Q.B. 273 (1884)).

³³ See Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 480 (1992). Simons states:

First, there is a basic moral difference between intentionally bringing about a harm and knowingly bringing about a harm as an unfortunate side-effect of one's legitimate purposes. Greater blame attaches to those who intend harm than to those who merely foresee harm as a consequence of their actions; the philosophical doctrine of double effect attempts to clarify and explain this distinction.

Id. This concept is reflected in the Model Penal Code's hierarchy of blameworthy mental states, which consists of "four mental states or culpability terms:" 1) intent (most blameworthy), 2) knowledge, 3) recklessness, and finally 4) negligence (least blameworthy). *Id.* at 469.

³⁴ See Peter G. Daniels, *An Illinois Physician-Assisted Suicide Act: A Merciful End to a Terminally Ill Criminal Tradition*, 28 Loy. U. Chi. L.J. 763, 803 (1997) (indicating that double effect principles serve "as a statutory exception to the crime of physician-assisted suicide"). See generally John A. Alesandro, Comment, *Physician-Assisted Suicide and New York Law*, 57 ALB.

many as morally inappropriate,³⁵ there are other medically-related procedures that share similar qualities that currently escape any limitation imposed by the double effect doctrine. For example, even though there are many opponents who argue that abortion is immoral, the double effect doctrine has had little or no influence on current laws relating to the procedure.³⁶ Moreover, the double effect doctrine has been used to justify some medical procedures.³⁷

L. REV. 820, 901-02 (1994) (indicating that New York law prohibits euthanasia and assisted suicide but allows for the withholding or withdrawal of medical care in certain situations).

³⁵ See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 19, ¶ 2277 (“Whatever its motives and means, direct euthanasia consists [of] putting an end to the lives of the handicapped, sick, or dying persons. It is morally unacceptable.”).

³⁶ In the United States, the law permits a woman to have an abortion regardless of whether the procedure is necessary to save her life. See *Roe v. Wade*, 410 U.S. 113 (1973). In comparison, under the doctrine of double effect, and other Catholic teachings, abortion is not condoned unless necessary to save the woman’s life. See *A Lexicon of Death*, CHRISTIANITY TODAY, Nov. 17, 2000, <http://www.christianitytoday.com/ct/2000/013/30.44.html>.

[I]t is not morally permissible to abort a living fetus. But when a woman has a fetus developing in her fallopian tube instead of her womb, even the Roman Catholic tradition recognizes the legitimacy of removing her reproductive organs to save her life, even though the child may be destroyed.

Id.

³⁷ The doctrine of double effect has been cited to justify surgeries performed on conjoined twins where the procedure is intended to save one twin even though it is known that the other will die. George J. Annas, *The Limits of Law at the Limits of Life: Lessons from Cannibalism, Euthanasia, Abortion, and the Court-Ordered Killing of One Conjoined Twin to Save the Other*, 33 CONN. L. REV. 1275, 1281 (2001).

Dr. C. Everett Koop, the former United States Surgeon General, asked a Catholic priest for his advice on the permissibility of a surgery to separate conjoined twins that the doctor was scheduled to perform. *Id.* “The priest said you could fit separation of conjoined twins into the principle of *double effect* The priest argued that although separating the twins would kill one twin, she would not be killed intentionally or directly, but rather she would die indirectly from the legitimate treatment of the other twin.” *Id.*; see also *In re A*, [2000] All E.L.R. 969 (Ward, L.J.) (Canadian case holding that necessity allowed the separation of conjoined twins).

[13] Apart from its influence, or lack thereof, on law in general, the double effect doctrine's diminished impact on the modern legal approach to the necessity defense is demonstrated by comparing that approach to the religious perspective. Religious doctrine views situations of necessity as ones in which the actor intends to save lives and the death of an innocent is an unfortunate byproduct. In contrast, the modern legal view sanctions the behavior without examining intent provided there is a net benefit.³⁸ Consequently, most modern statutes that provide for a necessity defense do not even refer to intent.³⁹

[14] Two specific examples will serve to demonstrate the double effect doctrine's influence on both the English legal system and the modern American legal system. The first is an English

The decision was based on the necessity principle, and suggested that it would not be improper to kill the dependent twin because this twin was sucking the life out of the other one.).

³⁸ See Kent Greenawalt, *The Pope John XXIII Lecture: Natural Law and Political Choice: The General Justification Defense – Criteria For Political Action and the Duty to Obey the Law*, 36 CATH. U. L. REV. 1, 2-3 (1986). “The general justification, or ‘necessity,’ defense exempts an actor from criminal liability although his behavior violates a specific section of the penal code. The historical roots of the defense owe something to the idea that people should not be punished for understandable human reactions under circumstances of tremendous stress.” *Id.* Unlike the historical view of the defense, which does not view the killing as proper but rather as a means to save a greater number of lives, the modern view treats the defense as a justification instead of an excuse. *Id.* at 3. Therefore, a defendant who asserts the necessity defense “is not claiming that he should be excused because he acted under great pressure; rather he asserts that what he did was not wrong.” *Id.* Thus, it appears that the modern approach has shifted its focus away from the actor's intent.

³⁹ See 18 PA. CONS. STAT. § 503 (2002); N.J. Stat. Ann. § 2C:3-2 (2002); 720 ILL. COMP. STAT. 5/7-13 (2002). None of these statutes make reference to the actor's intent, which suggests that there is no inquiry into whether or not there is an intent to harm the victim. The Pennsylvania and Illinois statutes only address intent in terms of whether or not the actor intended to prevent a greater harm, not whether or not he cared about harming the victim.

case, *Regina v. Dudley & Stephens*,⁴⁰ the second is the recent order given by President Bush to shoot down hijacked civilian aircraft to prevent them from being crashed into targets.⁴¹

III. ENGLISH NECESSITY LAW IN THE NINETEENTH CENTURY

A. Regina v. Dudley & Stephens: Murder at Sea

[15] The English legal view concerning necessity, or choice of evils, is best demonstrated by the case of *Regina v. Dudley & Stephens*.⁴² Dudley and Stephens killed a teenage crewmember, Richard Parker, while they were stranded at sea.⁴³ The issue in the case was whether the sailor's actions should be excused under the concept of necessity because they would most likely have perished at sea for lack of food if they had not killed the boy.⁴⁴

B. The Decision of Lord Coleridge

[16] The Chief Justice, Lord Coleridge, delivered the court's verdict.⁴⁵ Before explaining his decision, Coleridge acknowledged that the defendants had faced an extremely difficult

⁴⁰ 14 Q.B. 273 (1884).

⁴¹ See James Gerstenzang & Paul Richter, *After the Attacks; Bush Gave Jets OK to Down Airlines*, L.A. TIMES, Sept. 17, 2001, § A, § 1, at 1.

⁴² 14 Q.B. 273.

⁴³ *Id.* at 273-74. A fourth person, Brooks, was also stranded in the lifeboat. *Id.* at 273.

⁴⁴ *Id.* at 274-76. The boy, Parker, was claimed to have been in a much weaker condition and closer to death than the others. *Id.* at 274.

⁴⁵ *Id.* at 279.

situation.⁴⁶ Nevertheless, he held that the English law of necessity could not justify the defendants' actions.⁴⁷ Thus, Coleridge declined to extend the principle of necessity to the killing of an innocent, rejecting the American view at the time⁴⁸ as embodied in *United States v. Holmes*.⁴⁹ Instead, he examined contrasting views on the subject, focusing on the opposing views of Lord Francis Bacon and Lord Hale.⁵⁰

[17] Lord Bacon's approach would seem to excuse the actions of the defendants in the present case.⁵¹ On necessity, Bacon wrote:

⁴⁶ *Id.* “[I]t appears sufficiently that the prisoners were subject to terrible temptation, to sufferings which might break down the bodily power of the strongest man, and try the conscience of the best.” *Id.*

⁴⁷ *Id.* at 287.

⁴⁸ *See id.* 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.”).

⁴⁹ KADISH & SCHULHOFER, *supra* note 2, at 134 n.a. (citing *United States v. Holmes*, 26 F. Cas. 360 (E.D. Pa. 1842) (No. 15,383)). Unlike Lord Coleridge, the Holmes court found that “[w]hen [a] ship is in no danger of sinking, but all sustenance is exhausted, and a sacrifice of one person is necessary to appease the hunger of others, the selection is by lot.” *Holmes*, 26 F. Cas. at 367. The court reasoned that drawing lots is “the fairest mode, and, in some sort, as an appeal to God, for selection of the victim.” *Id.*

In *Holmes*, the defendant, a crewmember onboard a ship that had been evacuated after it collided with an iceberg, helped other crew throw male passengers from an overloaded lifeboat that was taking on water. *Holmes*, 26 F. Cas. at 360-61. As a general rule, the court found that if two people are confronted by circumstances that require the loss of one life in order for the other person to be saved then neither owe a duty to sacrifice their life. *Id.* at 366. Turning to the case at hand, however, the court found the defendant guilty because he was a crewmember and, as such, he owed a duty to “make his own safety secondary to the safety of others.” *Id.* at 366-67.

⁵⁰ *See Dudley & Stephens*, 14 Q.B. 273, 282-83, 285-86 (1884).

⁵¹ *See id.* at 285-86.

The law chargeth no man with default where the act is compulsory and not voluntary, and where there is not a consent and election: and therefore, if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason as in presumption of law man's nature cannot overcome, such necessity carrieth a priviledge in itself.⁵²

Thus, Bacon distinguished between three categories of necessity: “necessity of conservation of life, necessity of obedience, and necessity of the act of God or of a stranger.”⁵³ For the first category of necessity, conservation of life, Bacon maintained that if a man is shipwrecked then he may save himself by pushing another man from a plank resulting in his drowning.⁵⁴ Lord Hale, on the other hand, takes a much different view of necessity.⁵⁵

[18] Unlike Lord Bacon, Lord Hale asserted that necessity is essentially limited to instances of self-defense, where the person killed is the initial transgressor.⁵⁶ To illustrate his view of necessity, Hale offered the example of a person who stole food to avoid starvation.⁵⁷ According to Hale, persons who live under the laws of a civil government, such as that of England, are guilty of a felony and thus unable to defend their theft by claiming necessity.⁵⁸

⁵² KADISH & SCHULHOFER, *supra* note 2, at 134 n.b. (quoting THE WORKS OF FRANCIS BACON 343 (James Spedding et al. eds., 1859) [hereinafter BACON]).

⁵³ *Id.* (internal quotations omitted) (quoting BACON, *supra* note 52, at 343).

⁵⁴ *Id.* (citing BACON, *supra* note 52, at 343).

⁵⁵ See *Dudley & Stephens*, 14 Q.B. at 282-83, 285. Hale contends that necessity will only excuse the killing of another under two circumstances: 1) private necessity, which includes self-defense and defense of another, and 2) public safety and justice. 1 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 478 (P.R. Glazebrook ed., Prof'l Books Ltd. 1971) (1736).

⁵⁶ HALE, *supra* note 55, at 479.

⁵⁷ *Id.* at 54.

⁵⁸ *Id.*

Ultimately, after comparing the two views of necessity, Lord Coleridge determined that Lord Hale's approach correctly stated the law of England and Coleridge found the defendants guilty.⁵⁹

[19] Besides analyzing the law, Lord Coleridge looked at the facts of the case from both a pragmatic⁶⁰ and a religious-moralist perspective.⁶¹ In analyzing the case from a pragmatic perspective, Coleridge considered the effect that an acquittal would have and the message that it would send. He stated that if necessity were allowed as a defense in *Dudley & Stephens*, it "might be made the legal cloak for unbridled passion and atrocious crime."⁶² When analyzing the case from a religious-moralist perspective, Coleridge observed that the law is, and should be, influenced by both secular moralism and religious doctrine.⁶³ In particular, he wrote:

⁵⁹ *Dudley & Stephens*, 14 Q.B. at 286-88. While Coleridge accepted Lord Hale's view of necessity, Coleridge failed to explain why Hale's rejection of necessity as a defense to theft when it occurs in a civilized society likewise precludes use of the defense in situations that occur outside civil society, such as on the high seas.

Even though the defendants were found guilty and sentenced to death, it seems that the Crown, by reducing their sentences to six months in prison, recognized the extreme circumstances they faced. See generally KADISH & SCHULHOFER, *supra* note 2, at 136 n.2 (indicating that the Crown commuted the sentence).

⁶⁰ Joshua K. Simko, Note, *Inadvertant Disclosure, the Attorney-Client Privilege, and Legal Ethics: An Examination and Suggestion for Alaska*, 19 ALASKA L. REV. 461, 482-83 (2002) ("Under the pragmatic view of the law, the debate about who is 'right' and who is 'wrong' in any universal sense of those words would be abandoned, and instead the focus would be on the practical results of competing positions.").

⁶¹ David M. Smolin, Symposium, *The Religious Voice in the Public Square: Cracks in the Mirrored Prison: An Evangelical Critique of Secularist Academic and Judicial Myths Regarding the Relationship of Religion and American Politics*, 29 LOY. L.A. L. REV. 1487, 1500-01 (June 1996) (explaining that the religious-moralist perspective stresses doing what is "right" even if costs are involved, and suggesting that this perspective often conflicts with the pragmatic approach).

⁶² *Dudley & Stephens*, 14 Q.B. at 288.

It would be a very easy and cheap display of commonplace learning to quote from Greek and Latin authors, from Horace, from Juvenal, from Cicero, from Euripides, passage after passage, in which the duty of dying for others has been laid down in glowing and emphatic language as resulting from the principles of heathen ethics; it is enough in a Christian country to remind ourselves of the Great Example whom we profess to follow.⁶⁴

Clearly, Coleridge considered Christian thought to be an important factor in the formation of English law. At the same time, however, he recognized that the law may set standards that even the best of men cannot attain.⁶⁵

C. Analysis of the Christian Influence on English Law in the Court's Decision

[20] Although Lord Coleridge grounded his decision in *Dudley & Stephens* in both law and Christian moral thought, the problem lies not in the outcome but with the principles upon which the decision was reached. By failing to adequately consider utilitarian concerns, which would allow otherwise criminal conduct if a greater number of lives would be saved,⁶⁶ Lord Coleridge

⁶³ See *id.* at 287. Coleridge stated: "Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence." *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 288.

It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy.

Id.

⁶⁶ See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985). See generally Eric Rakowski, *Taking and Saving Lives*, 93 COLUM. L. REV. 1063, 1065 (1993) (endorsing a life maximizing rule in the following circumstances: "(1) a majority of those

ignored the net benefit of life achieved through the murder of Parker. According to a utilitarian perspective, Dudley and Stephens should not have been punished for killing Parker because his death enabled three men to survive.

[21] Although the utilitarian view of necessity and choice of evils conflicts with traditional Christian moral thought,⁶⁷ proponents of the utilitarian view maintain that a person enhances social welfare by engaging in a lesser evil to avoid a greater evil.⁶⁸ Therefore, even though cannibalism is prohibited and recognized as an evil act in Western societies, the defendants' acts in *Dudley & Stephens* are not considered evil under a utilitarian view because they resulted in a net gain of social utility – saving three lives by sacrificing one life.

[22] The utilitarian approach to necessity also gains some support from philosophers who “argue[] that the [duress] defense is justified by the simple fact that a rule forbidding such acts could not be welfare enhancing because it would not be obeyed.”⁶⁹ An individual confronted by a situation that falls under the necessity defense would not be deterred by the threat of

affected by a life-saving decision either endorsed a policy maximizing the number of lives saved or would have welcomed that policy in the circumstances in which they found themselves were they aware of their moral and religious beliefs, their desires and aversion to risk, and their personal abilities and history, but ignorant of whether they would be killed or saved under the policy; (2) those who dissent or would have dissented for either moral or religious reasons . . . , and would be killed if the greater number were saved, could not fairly have been excluded from the benefits of a maximizing scheme, and (3) the dissenters' chances of staying alive would have been boosted by the prior adoption of a maximizing policy.”).

⁶⁷ KADISH & SCHULHOFER, *supra* note 2, at 878 n.15.

⁶⁸ Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 257 (1995). The necessity defense, similar to the defense of duress, works as a justification for the actor's conduct. *Id.*

⁶⁹ *Id.* at 262.

punishment because the penalty would not exceed the threat that he wishes to avoid.⁷⁰ In *Dudley & Stephens*, the defendants were undoubtedly in a situation where there did not appear to be any reasonable alternative to the actions that they took. Thus, even if Dudley and Stephens were not aware of the exact legal consequences of killing Richard Parker, and even though they clearly recognized the immorality of their actions,⁷¹ it is unlikely that the threat of receiving the death penalty would have been an effective specific deterrent as that punishment would not have exceeded the immediate threat of death and, as such, would not have prevented these particular defendants from committing murder. Moreover, denying the necessity defense to these defendants does not serve as an effective general deterrent, despite Lord Coleridge's assertion to the contrary,⁷² given the unusual circumstances of the case. As it is unlikely that persons will

⁷⁰ *Id.* Philosophers have stated this proposition in a number of ways. For instance:

Jeremy Bentham thought it would be impossible to punish an act performed out of mortal fear sufficiently to induce an actor to refrain from performing the act: "the [evil] which he sets himself about to undergo, in the case of his *not* engaging in the act, is so great, that the [evil] denounced by the penal clause, in the case of his engaging in it, cannot appear greater." Thomas Hobbes also adopted a deterrence rationale, saying that in a case in which a person is compelled to break the law by terror of present death, a person would reason thus, "If I [do] it not, I die presently; if I [do] it, I die afterwards; therefore by doing it, there is time of life gained." Strangely enough, even the most avid anti-utilitarian, Immanuel Kant, defended the duress defense on deterrence grounds, characterizing necessity as a situation in which "no punishment threatened by the law could be greater than losing [one's] life."

Id. (fifth alteration in original).

⁷¹ *Regina v. Dudley & Stephens*, 14 Q.B. 273, 274 (1884). "The prisoner Dudley offered a prayer asking forgiveness for them all if either of them should be tempted to commit a rash act, and that their souls might be saved." *Id.*

⁷² *Id.* at 287.

frequently find themselves in a situation similar to that encountered by the defendants in *Dudley & Stephens*, courts could readily limit the defense to similar extreme situations thereby preventing defendants from using necessity as a catch-all defense.⁷³

[23] As the punishment meted out in *Dudley & Stephens* cannot be justified by deterrence principles or a utilitarian net benefit analysis, retribution and an adherence to the Christian moralist tradition are the most likely justifications for the result.

IV. CURRENT AMERICAN LEGAL VIEWS CONCERNING THE NECESSITY DEFENSE AND CHOICE OF EVILS

A. The Common Law Approach

[24] The common law accepted necessity as a defense but attempts to assert the defense were seldom met with success.⁷⁴ English courts were concerned that defendants would abuse the defense, thereby frequently attempting to justify illegal conduct which would in turn “encourage private determinations of law.”⁷⁵ As a result of these fears, English courts limited the defense to

It is not needful to point out the awful danger of admitting the principle which has been contended for It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own [It] is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime.

Id. at 287-88.

⁷³ See Tom Stacy, *Acts, Omissions, and the Necessity of Killing Innocents*, 29 AM. J. CRIM. L. 481 (2002); Tom Stacy, *Changing Paradigms in the Law of Homicide*, 62 OHIO ST. L.J. 1007, 1042-43 (2001).

⁷⁴ Brent D. Wride, Comment, *Political Protest and the Illinois Defense of Necessity*, 54 U. CHI. L. REV. 1070, 1073 (1987).

⁷⁵ *Id.*

situations involving imminent harm to the defendant.⁷⁶ As the necessity defense developed in the United States, American courts emphasized two requirements: “First, a defendant needed only reasonable grounds of belief in the necessity of her illegal conduct in order to sustain a defense of necessity. Second, the question of necessity was for the jury, not the judge, unless the evidence was completely inadequate.”⁷⁷

[25] American courts today require defendants to meet the following four requirements before they are permitted to assert a necessity defense:

1) the harm to be avoided is greater than the harm caused by the defendant’s illegal activities; 2) there is no legal alternative to breaking the law; 3) the harm to be prevented is imminent; and 4) it is reasonable to believe that the defendant’s actions will be effective in abating the harm.⁷⁸

The first requirement reflects the utilitarian foundation for the law of necessity.⁷⁹ The second requirement emphasizes that those who wish to assert the necessity defense must pursue other “legal alternatives” before taking illegal action.⁸⁰ The third requirement is at times perceived of as requiring that the actor find himself in an emergency, “when the threatened harm is

⁷⁶ *Id.* (recognizing that the imminent harm requirement also led to the rule, as announced by the court in *Dudley & Stephens*, that the necessity defense was not a sufficient justification for taking the life of another. *Id.* (citing *Regina v. Dudley & Stephens*, 14 Q.B. 273 (1884))).

⁷⁷ *Id.* (internal quotations and citations omitted). While the question was generally considered to be one for the jury to decide, the judge was allowed to decide the issue as a matter of law in particularly clear cut cases. *Id.*

⁷⁸ *Id.* at 1074. “These rules reflect a reluctance easily to allow claims of necessity.” *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 1074-75. “If those legal alternatives would accomplish the same goal as the illegal conduct, the necessity defense will not be allowed.” *Id.* at 1075.

immediate, the threatened disaster imminent,” before he is able to assert the defense.⁸¹ Finally, the last requirement stresses that the action taken must be reasonably likely to prevent the harm that it seeks to avoid.⁸²

[26] Brent D. Wride notes that modern American courts have taken a more selective approach to the necessity defense.⁸³ According to Wride, even though a few persons may have the capacity to judge whether a violation of law is warranted under the circumstances, “[t]he chaos that would eventually result if each person made private determinations of law justifies a strong presumption in favor of obeying the commonly accepted law.”⁸⁴ A second justification for narrowing the defense focuses on the “imminence requirement.”⁸⁵ American courts have made the defense unavailable to defendants where the link between the defendant’s conduct and the harm to be avoided is tangential.⁸⁶ Other factors that argue in favor of restricting availability of the defense are “the uncertainty as to whether a disobedient act really is better and . . . the cost[] of engaging in such a calculation before every act.”⁸⁷ Finally, Wride maintains that “[t]he

⁸¹ *Id.* (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW, § 50 at 388 (1972)). “Perhaps this is but a way of saying that, until the time comes when the threatened harm is immediate, there are generally options open to the defendant, to avoid the harm, other than the option of disobeying the literal terms of the law.” *Id.* (quoting LAFAVE & SCOTT, *supra*, at 388).

⁸² *Id.* at 1076. “Note that this requirement ensures that the utilitarian calculus recognized by the necessity defense will not be used as a pretext for engaging in illegal conduct for its own sake.” *Id.*

⁸³ *Id.* at 1074.

⁸⁴ *Id.* at 1077.

⁸⁵ *Id.* at 1075.

⁸⁶ *Id.* at 1076.

⁸⁷ *Id.* at 1077.

stringent requirements against claiming necessity also reflect a strong presumption against resorting to force rather than consent in order to achieve public goals, even where the harm from force in a particular case might be dwarfed by the possible harm that force seeks to prevent.”⁸⁸

The Model Penal Code, although less strict than the common law approach, adheres to the same general philosophy.

B. The Model Penal Code and Choice of Evils

[27] The modern American perspective on the necessity defense is best understood by examining the Model Penal Code (“M.P.C”).⁸⁹ Under the M.P.C., the necessity defense is permitted subject to the fulfillment of certain requirements.⁹⁰ The basic requirements include: 1) the action taken is less severe than the harm avoided, 2) no other specific defense is provided for

⁸⁸ *Id.*

⁸⁹ *See* MODEL PENAL CODE (1985). The American Law Institute (“A.L.I.”) drafted the M.P.C. in 1962 as a proposed model for state penal statutes. *See* MODEL PENAL CODE (Proposed Official Draft 1962). The M.P.C. is not a binding document, states are free to adopt it in its entirety, adopt selected provisions, or reject the entire draft. *See* MODEL PENAL CODE, Foreword (1985).

⁹⁰ MODEL PENAL CODE § 3.02 (1985). Section 3.02 provides:

(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear. (2) When the actor was reckless or negligent in bringing about the situation . . . the justification afforded by this section is unavailable . . . [where] recklessness or negligence . . . suffices to establish culpability.

the situation, and 3) the defense has not been foreclosed by statute.⁹¹ In addition, the M.P.C. also requires that the person claiming the necessity defense was neither negligent nor reckless in causing the situation that resulted in the need to assert the defense.⁹² Contrary to the position taken by the court in *Regina v. Dudley and Stephens*, the M.P.C. favors a pragmatic, flexible approach to dealing with grave and unique situations in which necessity arises rather than a strict adherence to the law.⁹³ At the same time, however, the requirements provide a standard to which people can be held accountable and limit availability of the defense, as well as potential abuse.

[28] Professor Eric Rakowski favors the numerical calculus approach of the M.P.C., arguing that “killing some people to save a larger number of other people is, ignoring contrary legal requirements, morally imperative in certain instances.”⁹⁴ Apart from addressing what is moral, he also believes that codification will help shield defendants from judges and jurors who wish to impose their morality when deciding who may assert the necessity defense.⁹⁵ Therefore,

⁹¹ *Id.*

⁹² *Id.*

⁹³ See MODEL PENAL CODE § 3.02 cmt. at 10-16 (1985) (discussing the expansive nature and limitations of the M.P.C.’s approach). The Commentary reveals that the approach taken “reflects the judgment that such a qualification on criminal liability, like the general requirements of culpability, is essential to the rationality and justice of the criminal law, and is appropriately addressed in a penal code.” *Id.* The Commentary provides examples of situations where necessity arises, such as the destruction of property “to prevent the spread of a fire,” and states: “[a] developed legal system must have better ways of dealing with such problems than to refer only to the letter of particular prohibitions, framed without reference to cases of this kind.” *Id.*

⁹⁴ Rakowski, *supra* note 66, at 1151.

⁹⁵ *Id.* at 1151-52. See generally Paul H. Robinson et al., *The Five Worst (And Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 17 (2000) (stating that “a code that fails to include a defense leaves the definition of that defense to the courts. In this situation, not only is the legislative function of defining the scope of the defense delegated to the judiciary, but the

the M.P.C. offers a workable standard because it not only reflects morality as recognized by society at large while protecting against jurors and judges who wish to impose their own belief-system, but also because it seeks to hold people accountable for their actions while providing flexibility in difficult situations.

C. Various State Approaches to the Defense of Necessity

[29] In addition to the M.P.C., the majority of state penal laws address the necessity defense. There are, however, important differences among the various state statutes. Sanford H. Kadish and Stephen J. Schulhofer compared the M.P.C.'s necessity defense to the approaches adopted by the New York and New Jersey legislatures.⁹⁶ The New Jersey necessity provision, for example, favors judicial discretion and case-by-case decision-making rather than a definite standard.⁹⁷ The statute makes no mention of the numerical calculus utilized by the M.P.C.⁹⁸ The New York necessity provision⁹⁹ is more specific than the New Jersey rule and closer to the

courts may very well reach the unsatisfactory conclusion that the code's silence is meant to declare that the defense is not available – a particularly plausible statutory gloss for codes that define some defenses but not others. It is imperative, then, that a code include all appropriate defenses and leave nothing to the whim of the judiciary.”).

⁹⁶ KADISH & SCHULHOFER, *supra* note 2, at 868-70.

⁹⁷ *Id.* at 870. The statute provides:

Necessity. Conduct which would otherwise be an offense is justifiable by reason of necessity to the extent permitted by law and as to which neither the code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Id. (quoting N.J. STAT. ANN. § 2C:3-2(a) (2002)).

⁹⁸ See MODEL PENAL CODE § 3.02 (1985).

M.P.C. approach. When compared to the M.P.C., the New York statute employs a stricter test for balancing the harm caused with the harm avoided.¹⁰⁰ Thus, the M.P.C. requires that the harm avoided is “*greater*” than the harm caused,¹⁰¹ but the New York statute requires that the harm avoided “*clearly outweigh*” the harm caused.¹⁰² Moreover, unlike the M.P.C., the New York statute focuses on the act as an “emergency measure” used to address an “imminent . . . injury.”¹⁰³ Finally, “[a] more important variation from the Model Code is the requirement in the New York provision that the situation that gives rise to the necessity for action be occasioned or developed through no fault of the actor.”¹⁰⁴ Thus, the M.P.C. would allow an actor to assert the

⁹⁹ KADISH & SCHULHOFER, *supra* note 2, at 868-69 (citing N.Y. PENAL LAW § 35.05 (2002)). The New York statute provides that the necessity defense is available, unless specifically prohibited by another provision, when the conduct engaged in is

necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and . . . [where] the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

Id. (quoting N.Y. PENAL LAW § 35.05).

¹⁰⁰ See MODEL PENAL CODE § 3.02 (1985); N.Y. PENAL LAW § 35.05.

¹⁰¹ MODEL PENAL CODE § 3.02 (1985) (emphasis added).

¹⁰² N.Y. PENAL LAW § 35.05 (emphasis added).

¹⁰³ KADISH & SCHULHOFER, *supra* note 2, at 869 (quoting MODEL PENAL CODE § 3.02 cmt. at 19 (1985)) (internal quotations omitted).

¹⁰⁴ *Id.* (quoting MODEL PENAL CODE § 3.02 cmt. at 20) (internal quotations omitted). Similarly, an Illinois statute authorizing use of the necessity defense requires that the actor “was without blame in occasioning or developing the situation.” 720 ILL. COMP. STAT. 5/7-13 (2002).

necessity defense even if his negligence brought about the situation, whereas the New York approach will not permit the negligent actor to assert the defense as he was at fault.¹⁰⁵

[30] A comparison of the M.P.C. to an Illinois statute reveals that the Illinois statute is slightly stricter regarding the nature of the actor's belief that led him to engage in the conduct in issue.¹⁰⁶ For instance, the M.P.C. requires that an actor "*believes*" his conduct is "necessary to avoid a harm or evil to himself or another."¹⁰⁷ In contrast, the Illinois version of the necessity defense requires that an actor "*reasonably believe[s]*" his conduct is "necessary to avoid a public or private injury."¹⁰⁸

[31] It is with these various approaches in mind that we turn to an examination of the events of September 11, 2001 and President Bush's order to shoot down hijacked civilian aircraft.

V. THE MODERN AMERICAN VIEW APPLIED: PRESIDENT BUSH'S ORDER TO SHOOT DOWN HIJACKED AIRCRAFT IN THE WAKE OF SEPTEMBER 11TH

¹⁰⁵ KADISH & SCHULHOFER, *supra* note 2, at 869 (citing MODEL PENAL CODE § 3.02 cmt. at 20).

¹⁰⁶ See Wride, *supra* note 74.

¹⁰⁷ MODEL PENAL CODE § 3.02 (1985) (emphasis added).

¹⁰⁸ 720 ILL. COMP. STAT. 5/7-13 (emphasis added). The statute provides:

Conduct that would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct.

[32] The terrorist attacks which took place on September 11, 2001, along with their aftermath, provide a recent example of the choice of evils principle. At approximately 8:45 a.m. on September 11, 2001, American Airlines Flight 11, a hijacked airliner, flew into the north tower of the World Trade Center.¹⁰⁹ Shortly thereafter, at 9:03 a.m., United Airlines Flight 175, also hijacked, flew into the south tower of the World Trade Center.¹¹⁰ In the moments following the terrorist attacks on the World Trade Center towers and the Pentagon,¹¹¹ President Bush “ordered the military to shoot down hijacked commercial airliners if necessary to protect the nation’s capital. The extraordinary decision, which the President described as ‘difficult,’ was first disclosed . . . by Vice President Dick Cheney and was later confirmed by [President] Bush.”¹¹² The President explained that he gave the order because it was “necessary to protect Americans.”¹¹³ Although the order was never acted upon, United States defense officials stated that two air force F-16 fighters were prepared to intercept “an unidentified aircraft,” which was reportedly en route to the capital.¹¹⁴ That aircraft is believed to have been United Airlines Flight 93, the fourth hijacked airliner, which crashed in Pennsylvania¹¹⁵ at approximately 10.10 a.m.¹¹⁶

¹⁰⁹ *September 11: Chronology of Terror*, at <http://www.cnn.com/2001/US/09/11/chronology.attack/index.html> (Sept. 12, 2001) [hereinafter *Chronology of Terror*].

¹¹⁰ *Id.*

¹¹¹ *Id.* A third hijacked airliner hit the Pentagon at approximately 9.43 a.m. on September 11, 2001. *Id.*

¹¹² Gerstenzang & Richter, *supra* note 41, § A, § 1, at 1.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

[33] Regardless of whether the need arose for the president's order to be acted upon, the true issues are: 1) whether such conduct would be proper considering the likely death of those onboard the plane compared with the number of lives that may be lost were hijackers to choose targets similar to those selected by the September 11 hijackers; and 2) whether air force pilots would be willing to carry out the order. While the second question implicates the decision-making process and belief-system of each pilot who may be forced to confront such an order, and, thus, cannot be answered without considerable conjecture, it is clear that the tactics employed by the hijackers involved in the September 11 attacks have forced American military personnel to consider the consequences and potential for such action.¹¹⁷

[34] In terms of whether a pilot should follow an order to shoot down a hijacked commercial airliner, the doctrine of double effect and current statutory formulations of the necessity defense inform us that such conduct would be justifiable and proper under conditions similar to those on September 11 because a greater number of lives would be saved than would be lost if a plane were to fly into a large occupied building. This scenario meets the M.P.C. requirements for asserting the necessity defense because shooting down the plane is a less severe harm than the one avoided, resulting in a net saving of life; the defense does not appear to be foreclosed by statute nor is there another specific defense available; it is unlikely that the President would have caused such a situation through his own negligence or recklessness; and

¹¹⁶ *Chronology of Terror*, *supra* note 109.

¹¹⁷ See Gerstenzang & Richter, *supra* note 41, § A, § 1, at 1. When discussing the implications of September 11, Senator Smith of New Hampshire advocated arming airline pilots rather than potentially placing them in a situation where a hijacker could gain control of the airliner thereby forcing the President to issue an order for the plane to be shot down. 147 Cong. Rec. S10511 (Oct. 11, 2001) (statement of Sen. Smith).

likely that the President would not give the order unless he believed¹¹⁸ the action was necessary to avoid harm to a greater number of people.

[35] Complying with the order would also be proper under the more stringent New York approach. First, an airplane headed towards an occupied skyscraper for the purpose of killing the occupants would constitute an imminent situation. Second, an order to shoot down the plane would be an emergency measure as little else would be able to stop the plane from reaching its target. Finally, saving thousands of people would clearly outweigh, at least in terms of numbers, saving the lives of a few hundred passengers.

[36] In addition to the mentioned statutes, the doctrine of double effect would permit the course of action proposed by President Bush. The President would not directly attempt to kill the passengers by firing upon the airplane; rather he would be trying to deflect the plane from its path to ensure a less harmful result. Therefore, even though it is a near certainty that none of the passengers would survive, killing them is not the intent of the action and thus the order is permissible under the doctrine.

[37] Although the President's order is controversial, it is the proper decision to make in this type of situation. Not only do religious views justify this action, but pragmatic concerns similarly demand this response. Indeed this is the proper approach to the problem for a number of reasons. First, it is arguable that the order could serve as a deterrent to future acts of terrorism. The deterrent value lies not in threatening terrorists with the risk of losing their own lives, as such a threat may have little impact on a person willing to sacrifice his or her life in order to kill others, but by putting potential terrorists on notice that they will not be allowed to

¹¹⁸ Even though Illinois requires that the actor reasonably believed the action was necessary, an order to shoot down a hijacked plane would surely meet this requirement given the number of lives that were lost when the Twin Towers and the Pentagon were struck.

achieve their objective. Second, this response would satisfy basic utilitarian concerns if the order is issued to save a greater number of lives thereby ensuring a net benefit. For example, a significant number of lives would have been saved if pilots had shot down the hijacked aircrafts before they were flown into the World Trade Center and the Pentagon on September 11, 2001. Third, although financial and economic considerations are secondary to the saving of lives, the consequences of shooting down four planes would pale in comparison to the financial and economic loss, in terms of property, businesses, and future earnings of victims and survivors, that stemmed from September 11, 2001.

[38] Determining whether it is permissible to either comply with or issue an order to shoot down commercial aircraft must be considered in light of the circumstances under which the order was issued. President Bush's order to shoot down the planes is more comparable to an act of war rather than a domestic law enforcement action. Even though September 11 did not involve an official declaration of war, it did involve a hostile force engaged in an attack against the United States, a situation closely resembling a state of war. As such, the state's interest in self-defense becomes paramount and the action is indeed proper. Nevertheless, as acts of terrorism such as those that occurred on September 11 are not the official acts of a recognized governing body, it clearly can be argued that terrorism within the nation's borders constitutes a domestic crime – this would be especially true if the terrorists were American citizens.

[39] There will always be some uncertainty as to whether a terrorist intends to crash an aircraft or simply use the hostages as a bargaining chip. If the terrorists did not intend to crash the plane and it is shot down then the result is a net loss of life rather than a net benefit. Still, the decision would still be correct, provided that it is made prudently, with an evaluation of all available alternatives and without rushing to any conclusion as to the hijackers' motives, because

it can rarely be known with absolute certainty in cases of necessity that the course of action taken will prevent the harm which is sought to be avoided. Reasonable certainty is the standard which must be adhered to.

VI. CONCLUSION

[40] As demonstrated by *Regina v. Dudley & Stephens* and President Bush's order to shoot down hijacked aircraft, necessity law is implicated in a variety of situations. Over time, the legal approaches have undergone some substantial changes. Unlike the earlier eighteenth century English view, the current view of necessity in American law provides a more workable standard because it recognizes that people, when faced with impossible situations, will frequently act to achieve the greater good. Thus, the current American view is more closely aligned with realistic expectations of human behavior. Moreover, the current law's utilitarian-based approach to necessity better encompasses the pragmatic and practical concerns inherent in the choice of evils question. Therefore, in the event that President Bush's order must one day be followed, the action, although horrible to contemplate, should be considered the right thing to do.