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THE DEFENSE OF NECESSITY IN TEXAS: LEGISLATIVE INVENTION COME OF AGE

J. Thomas Sullivan*

The law occasionally provides the criminal defendant with an opportunity to offer his jury a legal defense to an act admittedly done. Such a defense is usually the product of a consensus on the part of the community that the defendant's act may be justified on a specific moral or ethical ground. Thus, the defendant who commits homicide in defense of life or family may plead self-defense claiming, in effect, that the homicide was justified by the circumstances.1

In some instances, when confronted with a defense of conscience or justification that is not specifically authorized by the law of the jurisdiction, the defense attorney may seek to provide for the jury some basis for nullification of the prosecution.2 Thus, in a prosecution implicit with political overtones, for example, draft evasion, the defense attorney may attempt to interpose the client's personal sense of political ethical conscience in seeking to explain and justify his violation of the law.3

Legislatures generally do not favor nullification,4 and the Texas Penal Code (Penal Code) contains no procedural provision relating to a specific substantive right to present a nullification defense.5 The provisions incorporated in the Penal Code relating to justification defenses include a range of acts which are justified in specific situations, including use of force or other acts in the protection of persons6 and property,7 exercise of force in furtherance of law enforcement,8 and actions particularly relating to special

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3. E.g., United States v. Simpson, 460 F.2d 515 (9th Cir. 1972).
5. Provisions of the Penal Code which relate to justification of acts are found at TEX. PENAL CODE ANN., §§ 9.31–34 (Vernon 1974). Note, however, that the Texas Constitution provides that the jury is charged with determining the law and the facts in a libel case. Construing that provision, the Texas Court of Criminal Appeals held that it was not error to instruct the jury as to the law in a libel case. McArthur v. State, 41 Tex. Crim. 635, 639, 57 S.W. 847, 849 (1900).
7. Id. §§ 9.41–43.
8. Id. §§ 9.51–52.
relationships including parent-child, educator-student, and guardian-incompetent. Two general defenses involving justification are also included in the Penal Code: public duty and necessity. Public duty relates to extra-law enforcement means employed by a citizen to enforce the law or orders of a court. Necessity refers to conduct in violation of the law necessitated by the need to prevent a greater harm or injury.

The underlying rationale of the defense of necessity is simple: in some situations an individual may face a threat of harm or injury which is imminent, and the only alternative to suffering that harm or injury is to violate a criminal statute. The individual's conduct may, therefore, prove justifiable when the harm faced by the actor is balanced against the harm that results from the actor's violation of the criminal statute. The defense provides a philosophical ground on which to base a defendant's argument for nullification, a ruling by the trier of fact in opposition to the law charged in the prosecution. The defense would, therefore, prove desirable to a defendant whose defense lies solely on his reasoned response to an imminent threat of harm or injury.

I. Historical Perspective

Anglo-American jurisprudence has long recognized the defense of necessity, although the infrequency of its successful use is not likely to be encouraging to contemporary criminal defendants and defense practitioners. Wharton, for example, cites a number of cases in which the defense was asserted successfully. A California court in a recent prison escape case used as authority an eighteenth century English decision and sustained the proposition that a prisoner may, in certain extreme cases, justifiably escape from custody lawfully. The English case had involved a prisoner who fled a burning prison to save his life.

The classic situation in which the necessity defense was asserted and

9. Id. §§ 9.61-63.
10. Id. § 9.61.
11. Id. § 9.62.
12. Id. § 9.63.
13. Id. § 9.21.
14. Id. § 9.22.
15. See generally Arnolds & Garland, supra note 2.
17. See cases cited in WHARTON'S CRIMINAL LAW § 88 nn.51-58 (Tordúa ed. 1978).
18. People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974). The court cites 1 Hale P.C. 491 (1736) in support of its conclusion that necessity has traditionally been an available defense in prison escape cases. A Delaware court has ruled that prison conditions would not justify escape unless an emergency, such as a fire, required action other than redress through the courts. State v. Palmer, 72 A.2d 442 (Del. Ct. Gen. Sess. 1950).
rejected was in Regina v. Dudley and Stevens, in which shipwrecked sailors were prosecuted for having killed their companions and cannibalized their remains to save themselves from starvation. The court rejected the argument that necessity could justify the homicide of an innocent person. This conclusion apparently limits the applicability of the necessity defense. Interestingly, the outcome of the case points to another long-standing characteristic of the defense: although the court refused to condone the conduct of the sailors as justified by legal principle, the sentence imposed was relatively slight considering the nature of the offense. Thus, while courts may be reluctant to justify the defendant's claim of necessity, such factors and evidence generally are available to the defendant to mitigate punishment. Mitigation in the punishment stage of criminal proceedings, an important concept in the administration of criminal law, may be responsible for the rather erratic and unspectacular development of the necessity defense over the past two hundred years. The availability of other grounds for justification, such as self-defense, may also have hindered the expansion of necessity as a justification defense in criminal prosecutions.

Most successful uses of the defense of necessity in American courts have involved relatively minor violations of the law. Necessity has been asserted in traffic offense prosecutions, as well as civil cases involving destruction of property to prevent the spread of fire or disease and withdrawal of a sick child from school without permission. A Wyoming decision approved the use of the defense in a prosecution for violation of wildlife hunting laws when prevention of the destruction of property was involved. Recently a Minnesota court rejected the defense in a traffic violation case, but did not repudiate it in concept.

Perhaps the most significant use of the defense in an American court

19. Regina v. Dudley & Stephens, [1884] All E.R. 61 (Q.B.). See also United States v. Holmes, 26 F. Cas. 360 (C.C.E.D. Pa. 1849), a shipwreck case in which the jury, instructed on the defense of necessity, returned a verdict of guilty against a seaman charged with throwing passengers overboard to lighten a sinking life raft. The defendant was sentenced to six months at hard labor and a fine of twenty dollars upon his conviction for manslaughter.

20. Arnolds & Garland, supra note 2, at 295 n.80.

21. E.g., United States v. Holmes, 26 F. Cas. at 368, 369. Similarly, while rejecting the asserted defense of economic necessity, the Washington Supreme Court has noted the general acceptance by courts of evidence concerning the defendant's economic motives as a basis for mitigation in the punishment stage of the criminal proceedings against him. State v. Moe, 174 Wash. 303, 307-08, 24 P.2d 638, 640 (1933).


24. Seavey v. Preble, 64 Me. 120 (1874) (doctor's reliance on necessity defense in suit for damages for trespass to property upheld when destruction of property was necessitated by antismallpox epidemic procedures).


in this century was *State v. Wootton*, an Arizona case replete with political overtones. In response to a called strike of copper miners by the Industrial Workers of the World (IWW) in 1917, an Arizona sheriff raised a posse of more than 1,000 men and proceeded to arrest the strikers and their supporters. The arrestees were taken to Hermanos, New Mexico, and turned over to federal troops. The deportation of the workers, which was not effected under a declaration of martial law, resulted in prosecution of many of the posse members for kidnapping. One posse member asserted the defense of necessity and offered evidence that his actions were the result of his apprehension concerning the motives of the IWW, which he claimed to believe was plotting to overthrow the government. Furthermore, he offered testimony that the presence of the IWW members threatened the safety of the community and that the actions of the posse could be traced to the necessity for removing this threat to the lives and property of the community. The trial court charged the jury on the defendant’s theory of defense, noting the propriety in allowing the jury to decide the issue when raised by any evidence. The jury returned a verdict of not guilty after a fifteen minute deliberation.

The *Wootton* case demonstrates two peculiar aspects of the defense of necessity which may engender an adverse response to the defense by the legislature and the courts. First, Wootton’s defense was essentially political in nature. His reliance on the threat of conspiracy by the IWW was critical to his claimed belief that the union membership was about to launch an attack on the inhabitants of the community and damage property. Second, the defense proved useful in justifying the violation of the political rights and liberties of a minority within the community by others acting ostensibly under color of law.

This situation presents an interesting contrast to statutes enacted by legislatures fearful that individuals would use the necessity defense to justify criminal acts allegedly committed on the basis of moral, political, or ideological opposition to the statute. These statutes specifically exclude use of the defense when offered solely on those grounds. In *Wootton*, by contrast, the act done was justified by the need to prevent others from engaging in conduct that might ultimately prove criminal in nature. Rather than a member of a political minority seeking to justify a political crime
on the basis of opposition to the statute on some moral ground, a member of the political majority successfully used the defense to justify oppression of the minority.

In light of Wootton it would seem that no impediment exists to reliance on the necessity defense by an official acting under color of state law or by any other person who could link his conduct to the need to avert some danger posed by a political minority. Hence, the statutory limitations that render the defense unavailable to persons committing crimes of political conscience might not serve to restrict reliance by those persons who would violate individual rights and later claim justification on the same basis as that asserted by Wootton. An interesting chapter in the history of the defense might have been written had the Watergate defendants gone to trial on the theory that considerations of national security and internal threats to the government justified their actions.

Prior to enactment of the Texas Penal Code in 1974, Texas common law on necessity was inconsistent. On several occasions the Texas Court of Criminal Appeals had considered the availability of the necessity defense with varying results. In Woods v. State the court ruled that the defense

30. Typically, the restrictive language is similar to that of the New York statute: "The necessity and justification of such conduct may not rest upon consideration pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder." N.Y. Penal Law § 35.05(2) (McKinney 1975).

31. The general rule with regard to the necessity defense is that some actual threat must be perceived by the actor, sufficient in terms of its character, imminence, and quality to reasonably justify the illegal action taken. See J. HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 416 (2d ed. 1960); WHARTON'S CRIMINAL LAW §§ 88 (Tordy ed. 1978).


33. Interestingly, much of the case law with regard to necessity involved defenses to charges brought in connection with alleged violation of the Sunday closing laws. In reviewing the cases, the courts have engaged in an evaluation of the work performed and whether it is essential that it be performed on Sunday. The standard applied was not whether there was an absolute, unavoidable, physical necessity that the work be performed on Sunday, but whether an economic and moral necessity justifying the work could be established. Lane v. State, 68 Tex. Crim. 4, 7, 150 S.W. 637, 638 (1912) (work performed under a construction contract). See also Hennersdorf v. State, 25 Tex. Crim. 597, 8 S.W. 926 (1888) (ice house operation); Nelson v. State, 25 Tex. Crim. 599, 8 S.W. 927 (1888) (blacksmithing horses carrying United States mail); Ex Parte Kennedy, 42 Tex. Crim. 148, 58 S.W. 129 (1900) (barbering). The Court of Criminal Appeals held that the activities pleaded as necessary in Hennersdorf and Nelson were necessary and could be raised as a defense to prosecution for failing to observe the prohibition against Sunday labor.

34. 135 Tex. Crim. 540, 121 S.W. 604 (1938). In another prosecution for failing to stop and render aid the defendant was convicted by a jury after raising a necessity-related defense. The defendant had injured a Mexican-American child in an accident involving his automobile. He alleged that he failed to stop and render aid because a crowd of Mexican-Americans had gathered at the scene of the accident and he feared they would injure him if he returned to the injured child. The jury was charged on his fear of being in danger of bodily harm but the defendant was still convicted. The conviction was affirmed on appeal. Greer v. State, 108 Tex. Crim. 359, 300 S.W. 640 (1927).
was available to a criminal defendant. The defendant had been charged with failing to stop and render aid at the scene of an accident. He testified that he failed to stop and render aid because he had an injured passenger in his own vehicle who required immediate emergency medical assistance. The trial court refused to charge the jury on the issue of necessity. The reviewing court held this refusal to be error, concluding that when the issue of necessity is raised by the evidence it is "incumbent on the court to charge the jury fully and affirmatively as to the law applying thereto, whether the evidence raising such issue be strong or weak, unimpeached or contradicted."35

Although the Woods court clearly relied on its understanding of a common law defense of necessity and recognized it as applicable in Texas prosecutions,36 this ruling was not followed in two subsequent cases brought before the court, apparently on the ground that the defense had not been expressly authorized by legislative enactment. The court refused to find error in trial court denials of a requested charge relating to necessity as a defense in Butterfield v. State37 and Sansom v. State.38 In both cases the record before the court demonstrated that the defendant had voluntarily become intoxicated and, subsequently, sought to use the necessity defense to justify driving while under the influence of intoxicants ostensibly because of a need for emergency medical treatment. The court's less sympathetic treatment of the appellants' arguments, in comparison to the earlier holding of Woods, might be traced either to the legitimacy of the defense when a defendant's conduct has itself contributed to the necessity or to a concern on the part of the court in approving this type of defense in cases involving intoxication.39

The threat that the defense might easily be raised in any circumstance in which the defendant could make a plausible argument for driving while intoxicated, even the need to transport himself from the tavern to his home, did not clearly surface in the opinions. Rather, in both Butterfield and Sansom, the court ruled that no indication could be found that the defense was available to defendants under Texas law, ignoring its prior decision in Woods. This prompted a dissent from Judge Davidson in Butterfield in which he described the availability of the defense at the common law.40

35. Id. at 605.
36. Id.
37. 167 Tex. Crim. 64, 317 S.W.2d 943 (1958).
39. Id. at 280. The Sansom court concluded, "If appellant here is found in a predicament, it is of his own doing, and he may not by such conduct claim the benefit of a defense to which he is not entitled." Id.
40. "The law has long recognized that a criminal offense may be excused if committed under necessity." 167 Tex. Crim. at 66, 317 S.W.2d at 944 (Davidson, J., dissenting).
In *Harris v. State*, the Texas Court of Criminal Appeals rejected the argument of a defendant in a burglary prosecution who asserted economic necessity as a defense. The indictment charged the defendant with burglary with intent to commit theft. In rejecting the necessity defense, the court ruled that "[e]conomic necessity is not justification for a positive criminal offense." Whether the court was expressing its position regarding defense of necessity in general is unclear, since its language refers specifically to "economic" necessity.

The *Harris* court's opinion reflects the position taken by the Washington Supreme Court in 1933. In *State v. Moe* the court reviewed the conviction for grand larceny and riot of an individual who had been arrested with a group of unemployed persons demonstrating for more flour. In the midst of the Depression, the group had first sought additional food from the local Red Cross commissary. When turned down, they marched to a local store and seized the food that they claimed they needed for continued survival. The Washington court rejected the necessity defense, observing that "economic necessity has never been accepted as a defense to a criminal charge." The court noted that to extend judicial approval to such a defense would entail sanctioning lawlessness. The court indicated, however, that economic factors might be offered as evidence to mitigate punishment.

The position of both the Texas and Washington courts seems clear: Economic necessity cannot be recognized as a defense in criminal prosecutions. Regardless of whether the Texas court's restricted view toward use of the necessity defense in recent years may be traced to strict reliance on statutory enactments or concern that recognition of this defense by the courts could lead to widespread abuse, use of the defense has seldom been reviewed. The issue possibly could have failed to reach the reviewing court because of favorable disposition at the trial level either by an acquittal on other grounds or by achieving the desired impact at the punishment stage of trial. Additionally, the lack of statutory authorization prior to 1974 may have discouraged use of the defense at the trial level.

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42. *Id.* at 574.
43. 174 Wash. 303, 24 P.2d 638 (1933).
44. *Id.* at 305, 24 P.2d at 640.
45. *Id.*
46. *Id.*
47. In *United States v. Palmer*, 458 F.2d 663 (9th Cir. 1974), the court rejected defendant's asserted defense of economic necessity in a deportation prosecution. The court seemed to confuse the concepts of necessity and duress, ruling that a compulsion or duress theory could not be offered absent a threat of harm to a person, rather than property. *Id.* at 663.
II. NECESSITY BY STATUTE

A. Statutory Provisions

Texas is one of thirteen jurisdictions to statutorily recognize the defense of necessity. Other jurisdictions may recognize the defense as a result of common law tradition, judicial recognition, or with regard to specific offenses. All the statutory enactments roughly follow the outline of the defense provided in section 3.02 of the Model Penal Code. The Model Penal Code provision establishes the parameters of the defense both in terms of the conduct involved and in terms of other statutory provisions that may logically have a bearing on the availability of the defense in the individual prosecution. Thus, subsection (1)(a) establishes the critical hurdle for the defendant: that he be able to show that his act in violation of the law was of less harm than that harm which he perceived would have resulted in the absence of his act. A qualification of this requirement is that the defendant, through his own negligence or recklessness, not have caused the situation resulting in the need to make a decision in which the defendant faced a less harmful alternative involving violation of the law. When the culpability sufficient to convict involves only


49. Model Penal Code § 3.02 (1962) [hereinafter cited as Model Penal Code]. This section provides:

(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to 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 of defenses dealing with the specific situations involved; and
   (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

Id.

50. Id. § 3.02(1)(a).
51. Id. § 3.02(2).
recklessness or negligence, this section of the code would deny the necessity defense to the defendant.

A second area of limitation imposed on the defense involves the relationship of the statutory provision with other statutes. The defense is not available when another defense or exception to prosecution has been specifically provided by law. A less clearly defined limiting provision provides that the defense is not available if a legislative purpose to exclude the justification claimed is apparent. The form or context required for such an exclusion is not established.

The Texas Legislature enacted section 9.22 of the Texas Penal Code, roughly adopting the standards of the Model Penal Code. Section 9.22 is as follows:

Conduct is justified if:

1. the actor reasonably believes the conduct is necessary to avoid imminent harm;
2. the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law prescribing the conduct; and
3. a legislative purpose to exclude the justification claimed for the conduct does not plainly appear.

The provision differs from the Model Penal Code provision in one significant aspect: the Texas statute does not include the limitation excluding the defense in those situations in which the actor's own recklessness or negligence may have created the situation calling for his decision to violate the penal law to avoid the greater harm. Somewhat less significantly, the Texas statute does not follow the lead of the Model Penal Code in limiting use of the defense in those situations in which another exception or defense has been specifically provided by the legislature. This conceivably could give rise to a charge on both an affirmative defense specifically related to the offense charged, such as self-defense, and on the defense of necessity. The ultimate ground of justification relied upon could, therefore, be argued to the jury in a more abstract fashion claiming, for example, reliance on the moral rightness of the act.

B. Limitations on Assertion of the Defense of Necessity

The legislative provisions creating the defense of necessity impose three significant limitations on the availability of the necessity defense. First, the majority of state statutes have been drafted to follow the lead

52. *Id.* § 3.02(1)(b).
53. *Id.* § 3.02(1)(c).
55. See *Model Penal Code* § 3.02(2) (1962).
56. *See id.* § 3.02 (1) (b).
of the model statute by restricting use of the defense in situations where the actor's own recklessness or negligence may have created or contributed to the situation where a criminal statute was violated.\textsuperscript{57} Interestingly, the omission of such a provision from the Texas statute raises a question concerning the Texas Court of Criminal Appeals' consideration of the necessity defense in the Sansom and Butterfield cases. Despite the conclusion by the court that the defense was not available in Texas, these opinions betray hostility toward the defense when raised by defendants charged with operating motor vehicles while voluntarily intoxicated.\textsuperscript{58} The Texas Legislature seemingly missed an opportunity to restrict the availability of the defense in exactly this situation, although, arguably, the act of becoming voluntarily intoxicated does not, in itself, raise the issue of recklessness or negligence on the part of the defendant.\textsuperscript{59}

Second, several of the state statutes limit the use of the defense with regard to the motive for the defendant's action.\textsuperscript{60} The defendant is, therefore, not permitted to raise the necessity defense in situations in which a criminal act is based on a moral ground or protest of the statute violated. This would appear to be an effort to prevent reliance on the necessity defense for reaching the jury on the basis of nullification.\textsuperscript{61} Hence, political

\textsuperscript{57} Statutes defining the defense of necessity in the following states have some type of exclusion based on the defendant's own negligence or recklessness in causing or contributing to the adverse situation in which he finds himself: Ark. Stat. Ann. § 41-504(3) (1977); Colo. Rev. Stat. Ann. § 18-1-702(1) (1973); Del. Code Ann. tit. 11, § 683 (1974); Hawaii Rev. Stat. § 705-302(2) (1978); Ky. Rev. Stat. Ann. § 503.030 (Baldwin 1975); Me. Rev. Stat. Ann. tit. 17-A, § 103 (1978); N.H. Rev. Stat. Ann. § 627.3 (II) (1974); N.Y. Penal Law § 35.05(2) (McKinney 1975); Pa. Cons. Stat. Ann. tit. 18, § 503(b) (Purdon 1973). Interestingly, there is a split in the wording of these statutes with regard to the limiting effect of the provision. Arkansas, Hawaii, Kentucky, Maine, New Hampshire, and Pennsylvania have followed the lead of the Model Penal Code and provide that the defendant's own negligence or recklessness will bar the use of a defense in a prosecution for an offense for which negligence or recklessness is sufficient to establish culpability. The provision in the Colorado, Delaware, and New York statutes looks to whether the defendant's own conduct created the situation, or whether the defendant was at fault in any respect in the creation of the situation, giving rise to his choice to violate the statute to avoid some greater harm. The language of these statutes would appear to deny access to the defendant, regardless of whether his conduct met the statutory requirement of culpability in terms of intent, when he is at fault in the situation that necessitates his choice of action violating the penal law.

\textsuperscript{58} Refer to text accompanying notes 38 & 39 supra.

\textsuperscript{59} Using the Model Penal Code formula, the legislative action might not reach this situation. Employing the language of those state statutes not following the model statute, however, the legislature clearly could have limited the availability of the defense in precisely this fashion. Refer to note 57 supra.

\textsuperscript{60} Refer to note 29 supra. The states legislating this particular exclusion are: Arkansas, Colorado, Delaware, Maine, New Hampshire, New York, and Oregon.

\textsuperscript{61} Arnolds and Garland discuss the qualitative difference between the necessity instruction and the jury nullification instruction, which may authorize a verdict of not guilty in spite of instruction on the applicable law, based on a decision of conscience reached by the jury. They note that the necessity instruction is much more narrow, allowing acquitted only if the jurors find that the defendant's act represented a reasoned response to a threatened harm or injury of greater weight. Thus, the jury is not allowed to make a general ruling based on its feelings as to the advisability of the statute. Arnolds & Garland, supra note 2, at 298.
crimes, such as those growing out of opposition to the draft or a military action perceived by the actor to be immoral, could not be defended on the basis of necessity absent some imminent harm threatening the individual actor.\textsuperscript{62}

The Texas statute does not include this limiting provision, although such a limitation of the defense will likely be reached through other means. In weighing the competing harms facing the actor who is forced, in his own judgment, to commit a violation of the law, the courts could apply the definition of "harm" provided by the Penal Code. Harm is defined as "anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.\textsuperscript{63}"

Although this definition would appear broad enough for precisely the type of reliance claimed by the political defendant, including a perceived interest in the welfare of society and its individuals,\textsuperscript{64} the Texas Court of Criminal Appeals could limit the final clause to those persons in whom the actor's interest could be related through legal or familial duty.

A third limitation appears in the language of only the Colorado\textsuperscript{65} and New York\textsuperscript{66} statutes. The courts there are instructed to evaluate the defendant's evidence of necessity before charging the jury on the defense and allowing the defendant to present his theory. If the court finds that the evidence presented by the defendant is sufficient to establish a legal defense of necessity, in conformity with the terms of the statute, then the judge may allow the defendant to submit his theory of defense to the jury. This is far more restrictive than the application of the defense by the Texas court in \textit{Woods}, in which the court ruled that the judge must submit the defense and charge the jury on necessity when it is raised by any evidence offered by the defendant.\textsuperscript{67}

\textsuperscript{62} See United States v. Simpson, 460 F.2d 515 (9th Cir. 1972), a case involving destruction of Selective Service records by an opponent protesting United States military action in Southeast Asia. The defendant sought reversal of his conviction on the basis of the trial court's failure to charge the jury on the defense of necessity. He also sought to raise the issue of jury nullification. The conviction was affirmed by the Ninth Circuit which, although recognizing the model statute's basis for the defense, held that the defendant could not establish a causal relationship between his act and the evil he sought to avoid: the war. Arnolds and Garland speculate as to whether this is a reasonable assumption, given the fact that the end of the war must, in part, be traced to objections raised by members of the community in positions of responsibility. Arnolds & Garland, \textit{supra} note 2, at 300 nn.127-28.

\textsuperscript{63} TEX. PENAL CODE ANN. § 1.07(16) (Vernon 1974).

\textsuperscript{64} This is precisely the type of issue raised by political prosecutions, particularly in the prosecution of opponents of the Vietnam War for their efforts to obstruct the operation of the Selective Service System. See United States v. Baranski, 484 F.2d 556 (7th Cir. 1973); Chase v. United States, 468 F.2d 141, 148 n.21 (7th Cir. 1973); United States v. Cullen, 454 F.2d 386, 391 n.12 (7th Cir. 1971); United States v. Berrigan, 283 F. Supp. 336 (D. Md. 1969). In these prosecutions defendants sought unsuccessfully to raise the defense of necessity at the trial level.

\textsuperscript{65} COLO. REV. STAT. § 18-1-702(2) (1973).

\textsuperscript{66} N. Y. PENAL LAW § 35.05(2) (McKinney 1975).

\textsuperscript{67} Woods v. State, 135 Tex. Crim. 540, 542, 121 S.W.2d 604, 605 (1938).
The direction to be taken by the Texas courts in shaping the statutory defense is unclear but may well involve supplying judicial limitation to the defense in areas left unaffected by the legislature. Specifically, the Texas statute sets out the standards by which the jury may evaluate the defendant's conduct in the light of his claimed justification. Subsections 1 and 2 are directed toward the harm the defendant claims to have faced at the time he violated a criminal statute. They focus on the imminence of the threat, the need for immediate action to avoid the harm, and the weighing of the harms involved to determine if the alleged basis for justification actually appeared reasonable in the defendant's situation.

Subsection 3 follows the model statute by excluding reliance on the defense in cases in which the legislature has evidenced its intention to exclude availability of the justification. This provision is likely to prove a continuing source of trouble to the defense bar. Clearly, no statute limits the defense as applied in any prior cases, and no statutory language specifically excludes use of the defense in prosecutions for violations of particular statutes. The provision seems to grant the legislature the option to exclude use of the necessity defense in specific, future prosecutions. The danger is that the court may find evidence of legislative intention to exclude the justification defense in cases in which the legislature has not specifically spoken. In the absence of specific legislative exclusion, however, it would appear that the defense could be raised in any prosecution by presenting evidence that would raise an issue of necessity.

C. Application of the Texas Necessity Statute

The Texas Court of Criminal Appeals affirmed the denial of a requested charge concerning necessity as a justification in Roy v. State. The defendant was convicted of unlawfully carrying a weapon. At trial he alleged that he was arrested in a high crime area where it was necessary that he be armed to protect himself. The trial court ruled that he could not develop the necessity defense by offering the testimony of arresting officers that the area in which the arrest had occurred was, indeed, a high crime area and that police patrols in the area were inadequate to prevent crime.

The court affirmed the trial court's ruling, noting that the defense must meet the three-pronged thrust of section 9.22 to avail itself of this justification defense. The reviewing court held that the defense had failed in this respect because it did not demonstrate immediacy of the

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68. TEX. PENAL CODE ANN. § 9.22(1), (2) (Vernon 1974).
69. Id. § 9.22(3).
70. 552 S.W.2d 827 (Tex. Crim. App. 1977).
71. Id. at 830-31.
72. Id.
need to avoid imminent harm. Furthermore, the court observed that the defense would sanction the carrying of prohibited weapons in contravention of the legislative intent embodied in the statute that creates the offense of unlawfully carrying weapons. The court observed that allowing individuals to carry weapons in high crime areas would only serve to exacerbate the problem of crime.

Essentially, the Roy opinion reveals how the court will limit the use of the necessity defense. The direction taken by the court may seriously jeopardize the utility of the defense for defendants, particularly if the court is willing to find that no violation of a statute can satisfy the condition of subsection 3. The existence of the criminal offense itself could always be used to demonstrate the legislative intent to exclude this justification. Such a pattern of statutory construction by the court would emasculate the statute, effectively abrogating the legislative intent implicit in its inclusion in the Penal Code.

A more limited reading of the court's decision in Roy, however, would look to the pragmatic considerations before the court. The legislature clearly seeks to reduce crime, particularly violent crime, by penalizing the unauthorized possession of weapons. To permit the carrying of a weapon on the grounds that others, with a criminal intent, are carrying weapons or participating in criminal activity in a specific area would frustrate the specific goal of the legislature. This is a reasonable explanation of the court's action, particularly since the offense involved is one virtually predicated on a concept of strict liability, rather than an act requiring specific criminal intent. The notion of justification is designed to mitigate or cancel criminal intent, substituting a non-criminal or justifiable intent.

The danger in this posture is that it leads to the former in logical sequence: any enactment of a penal offense expresses a legislative policy for the punishment of the act, thus implicitly a legislative policy counter to justification. Therefore, the middle road, which accepts this reality while admitting that the legislature has authorized the use of the justification of necessity, may prove difficult for the Court of Criminal Appeals to follow. The court may find its role made easier, however, in evaluating individual cases in terms of the immediacy and imminence of the threat-

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73. Id. at 831.
74. TEX. PENAL CODE ANN. § 46.02 (Vernon 1974).
75. 522 S.W.2d at 831.
76. The intent in an unlawfully carrying weapons case is supplied by the actor's carrying of the weapon. No intent to commit any other criminal offense or to make any unlawful use of the weapon is needed for conviction. TEX. PENAL CODE ANN. § 46.02 (Vernon 1974). As a result, a number of acts which would otherwise be illegal are specifically excepted: (1) engaging in security activity, (2) traveling or hunting, and (3) carrying weapons on one's own premises. Id. § 46.03. In one sense, then, the legislature has expressed its intent with regard to what acts are justifiable.
ened harm and the relative weight of harms involved in violating or complying with the statute.

A more interesting question would have been raised by Roy had the actor actually been victimized by criminal actions immediately prior to his arrest, and thus, could have demonstrated immediacy and imminence, at least after the fact. This type of event would certainly have served to confirm the accuracy of the defendant's apprehension of traveling in a high crime area.

III. NECESSITY: A DEFENSE TO WELFARE FRAUD?

The Court of Criminal Appeals could face another question regarding availability of the necessity defense in the near future. Mayfield v. State, presently in the appeals process, seeks review of a conviction for welfare fraud. The trial judge denied a requested jury instruction relating to the defense of necessity, concluding that the evidence had failed to raise the issue. The case had been prosecuted under the then-applicable statute which governed welfare fraud providing a maximum punishment of two years and fine of $500. The information charged the defendant with fraudulently obtaining assistance through the Aid to Families with Dependent Children (AFDC) program to which she was not entitled by virtue of her failure to report earned income to welfare department caseworkers. The defendant admitted that she had, in fact, failed to report her employment or earnings to her caseworker and had filed false reports during the period of time when she was receiving benefits in which she denied that she was working.

The defense presented the evidence of three expert witnesses to establish the grounds for its requested instruction on necessity. A medical doctor, qualified as an expert on nutrition for young children, testified that the defendant's children were suffering from nutritional deficiencies in

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77. No. 56,431 (Tex. Crim. App., filed April 25, 1979). The Mayfield case was tried September 8-12, 1976. The defendant was found guilty and assessed a fine of $75. She was represented at trial by Roark M. Reed, a member of the Texas Bar and Director of the Criminal Justice Clinic at the Southern Methodist University School of Law. All references to this case are taken from the transcript of the proceedings and the briefs for appellant and appellee, filed respectively by the defendant's counsel on appeal, Professor Reed and the author, and by the Dallas County District Attorney's office.

The Texas Court of Criminal Appeals reversed the conviction in Mayfield because the trial court's charge contained fundamental error in authorizing conviction on a theory not alleged in the information. The court failed to reach the issue of appellant's requested instruction on the defensive theory of necessity. The state has filed a motion for rehearing en banc which is currently pending.


their diet resulting from the lack of resources available to the family to purchase food containing the required level of protein. He also offered his opinion that the children were suffering from starvation, according to the medical definition of that term.

A registered nurse, who had examined the defendant's children prior to the date on which the defendant began working, testified that the children were suffering from nutritional problems and asthma. The defense also qualified an economist on standards of living, who testified that the failure of the Department of Public Welfare to adjust the benefit levels available to qualified recipients over the period from 1969 to 1974 (the date of the alleged fraud) had resulted in a net loss of buying power of thirty percent for recipients.

Previously, the defense elicited testimony from state witnesses employed by the welfare department that showed the level of benefits granted recipients to be only seventy-five percent of that computed to be needed by families for a subsistence level of living.80 Hence, recipients received no more than seventy-five percent of the amount of assistance established to meet minimum standards of living, the figures used were computed in 1969, and a thirty percent loss of purchasing power had occurred by the time of defendant's alleged fraud in 1974.

Despite the evidence offered by the defense, the trial court held that the issue of necessity had not been raised and denied defendant's requested jury instruction. The position of the court in Woods would seem to mandate instruction since the quality of evidence is not a factor to be considered by the trial court in its ruling on the charge. The Woods court held that the defendant was entitled to the instruction "whether the evidence raising such issue be strong or weak, unimpeached or contradicted."

A careful reading of the necessity statute also leads to the conclusion that the defendant in Mayfield was entitled to her requested instruction on necessity. First, the testimony demonstrated a clear immediate need: that of additional income for the purchase of food; and an imminent harm to be avoided: starvation suffered by defendant's children as a result of nutritional deprivation.82 Second, the relative harms were put in issue by the evidence such that they should be weighed by the jury in its deliberation.83 The harm sought to be prevented by the conduct is economic loss to the state through fraudulent abuse of the welfare programs that provide public assistance to the deprived and economically disadvantaged. The harm sought to be avoided by the actor was long-term, serious physical

80. See Jefferson v. Hackney, 406 U.S. 535, 546, 549 (1972), in which the Supreme Court upheld the 75% distribution scheme and denied appellant's equal protection claim.
81. 135 Tex. Crim. at 542, 121 S.W.2d at 605.
82. See TEX. PENAL CODE ANN. § 9.22(1) (Vernon 1974).
83. Id. § 9.22(2).
and mental disability attributable to nutritional deprivation during the childhood of defendant's children. This is the type of evidence that may create a legitimate balancing test, for jury determination, with regard to whether the harm perceived by the actor as necessitating the commission of a criminal offense does, in fact, outweigh the harm attributable to the violation of the statute. By refusing the instruction, the court ruled on the issue as a question of law rather than fact. When the defendant has elected jury trial, such action by the court could amount to an abuse of discretion by effectively denying defendant access to a statutorily approved defense.

In assessing the impact of subsection 384 on prosecution for welfare fraud, it is instructive to consider statutory provisions that impose affirmative duties upon an actor who is a parent pleading the criminal act was necessitated by the immediate welfare of his or her children. Both the Texas Family Code and the Penal Code address the duty of the parent to provide for the welfare of dependent children. The Family Code mandates an affirmative duty upon the parent to provide for the welfare of the dependent child and creates civil penalties for neglect of the parental duty to the detriment of the dependent child. The Penal Code imposes criminal sanctions for failure to provide support for the dependent child or spouse, although an affirmative defense to prosecution is available in the event of financial or other inability to provide support. The importance of these sections, as well as those which require payment of court-ordered child support as a result of a valid child custody order, is that parents are on notice that the law expresses certain defined expectations of parental support for the welfare and health of their dependent children. Thus, rather than looking to subsection 3 as a limitation on the use of the necessity defense, the defendant may anticipate the issue by noting statutory provisions by which he is legally required to support his children. Since AFDC benefit eligibility is predicated on existence of dependent children in the home of the assistance recipient, prosecution

84. Id. § 9.22(3).
86. Id. § 15.02(1)(c)-(e).
88. Id. § 25.05(f).
91. The State's reply to appellant's argument on appeal in Mayfield was that the trial court had not erred in denying a requested instruction on the defense of necessity relying in part on § 9.22(3). The State argued that there was a legislative purpose to exclude the justification claimed, referring to section 35 of the Public Welfare Act of 1941 that provides: "The purpose of this Act is to inaugurate a program of social security and to provide necessary and prompt assistance to the citizens of this State who are entitled to avail themselves of its provisions." Tex. Rev. Civ. Stat. Ann. art. 695c, § 35 (Vernon 1964). The argument is essentially that the ineligibility for benefits alleged as to defendant rendered her without recourse to the defense of necessity
for AFDC fraud offers an appropriate situation for assertion of the necessity defense. The essential factor is the assertion by the defendant that any fraud committed was the result of an immediate need to deal with an imminent harm outweighing any harm caused by violation of the statute. This would seem to establish defendant's reliance on the defense and entitle her to the requested instruction.

The legislature recently has authorized prosecution for welfare fraud under the general theft statutes.\textsuperscript{92} Previously, the Texas Court of Criminal Appeals had held that welfare fraud prosecutions could not be commenced under the theft provisions,\textsuperscript{93} thus restricting the penalty range for the offense by excluding prosecution under a felony statute. The legislature's action requires welfare fraud prosecutions to be brought upon indictment and tried as felonies in district court\textsuperscript{94} when the amount of the alleged fraud exceeds $200.\textsuperscript{95}

The prospect of felony prosecution for welfare fraud may make the defense particularly attractive since the state may be able to document all aspects of its case with respect to non-reported earnings with applications signed by the recipient containing fraudulent information or answers and with payroll and benefit payment records. As in Woods the threatened harm concerns a third party who stands to suffer great injury in the absence of the actor's criminal act.\textsuperscript{96} Moreover, the third party is a child dependent upon the parent-actor in whom the law has vested an obligation for support.\textsuperscript{97} This would seem a more preferable situation for assertion of the necessity defense than that presented by Butterfield, Sansom, and Roy in which the object of the actor's concern was the safety and well-being of the actor himself. When the actor engages in a pattern of conduct creating the threat of harm upon which he seeks to justify avoidance through an otherwise criminal act, it appears likely the court will take a stricter view of the statutory requirements in light of the evidence allegedly raising the issue of necessity.

The impact of Harris v. State\textsuperscript{98} on the use of the necessity defense in welfare fraud prosecution should be considered. The court's emphatic conclusion that economic necessity offers no defense to a positive criminal

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  \item \textsuperscript{92} Tex. Crim. Code Ann. § 31.02 (Vernon 1974).
  \item \textsuperscript{93} Jones v. State, 552 S.W.2d 836 (Tex. Crim. App. 1977).
  \item \textsuperscript{94} Tex. Code Crim. Proc. Ann. art. 4.05 (Vernon 1974).
  \item \textsuperscript{95} Tex. Penal Code Ann. §§ 31.03(d)(4), (5) (Vernon 1974).
  \item \textsuperscript{96} In Woods, the defendant's passenger testified that she had asked the defendant to take her home immediately after she was injured in the collision. 135 Tex. Crim. at 541, 121 S.W.2d at 604.
  \item \textsuperscript{97} Refer to notes 85-89 supra and accompanying text.
  \item \textsuperscript{98} 486 S.W.2d 573 (Tex. Crim. App. 1972).
\end{itemize}
charge should, in fact, be reversed by virtue of legislative authorization of the defense in the enactment of the Penal Code in 1974. The Penal Code provides no exclusion of use with regard to specific offenses or with regard to prior holdings of the Texas Court of Criminal Appeals. Thus, even though prosecutions for welfare fraud must be commenced under the general theft statute, there would appear to be no impediment to assertion of the defense of necessity.

Second, although a defendant charged with welfare fraud who asserts the defense of necessity clearly relies on a theory of economic necessity, the situation may vary significantly from the normal use of the defense in theft cases. Welfare benefits available under the Social Security Act of 1936 (Act), principally the AFDC program, are only available to families with dependent children and insufficient economic resources to provide for basic human necessities. Hence, the goal of the Act is to provide benefits to these children rather than to the parents directly. The welfare fraud defendant can, therefore, almost certainly defend against the theft charge by interposing the interests of the children who are completely without culpability. Prosecution for welfare fraud would seem ideally suited for reliance upon the defense of necessity when the fact situation suggests such an approach, and particularly when expert testimony may be offered adding validity to the perceptions of the defendant who claims a need to protect her children from a perceived threat of imminent harm.

IV. RECOGNITION OF THE DEFENSE OF NECESSITY IN PRISON ESCAPE CASES

California, Illinois and Michigan, in dealing with the problem of the necessity or coercion/duress defense in cases involving escape from a penal institution, have authorized use of the defense when warranted by the set of facts present in the individual's act of escape. Generally, the

99. Id. at 574.
100. 42 U.S.C. §§ 602a, 602a(7).
101. Comparing § 9.22, which looks to avoidance of harm, with § 1.07(a)(16), which defines harm to include threatening a third person in whom the actor has an interest, it would appear clear that the defense could be asserted in this case if the actor's children were threatened with serious deprivation. Compare Tex. Penal Code Ann. § 9.22 with § 1.07(a)(16). In this context, it is interesting to note that the Penal Code authorizes use of force or deadly force in the defense of a third person. Id. § 9.33. Force is justified if "the actor reasonably believes his intervention is immediately necessary to protect the third person." Id. § 9.33(2) (emphasis added).

In City of Chicago v. Mayer, 56 Ill. 2d 366, 308 N.E.2d 601 (1974), a third-year medical student was charged with disorderly conduct and interfering with police when he intervened to stop officers from moving an injured man. The reviewing court reversed based upon the trial court's failure to grant defendant's requested charge on necessity.

cases involved situations in which the defendant offered evidence that the escape was necessitated by the threat of homosexual assault and a failure of the institution to properly safeguard the personal integrity of the individual inmate. The analysis offered by reviewing courts in these cases, however, differed somewhat in terms of the theoretical basis for the defense asserted.

A. The Defense of Duress/Coercion

A Michigan court has approved a defendant's use of the defense of duress to prosecution for escape. The distinction between duress or coercion and necessity may appear to be simply academic but could prove significant for Texas courts as well as other courts relying on specific statutory language creating the defense. Duress refers to a situation in which the actor commits the offense because of some immediate threat which can be avoided only by commission of the offense.

The element of coercion implicit in the concept of duress as typically applied is illustrated by State v. St. Clair. Defendant was charged with participation in an armed robbery. In defense he alleged that his participation was involuntary, induced by a threat against his life by the other armed robbers. The reviewing court reversed the trial court due to its


The United States Supreme Court has granted a writ of certiorari in a prison escape case involving the claimed defense of necessity. United States v. Bailey, 47 U.S.L.W. 3621 (No. 78-990) (U.S. Mar. 19, 1979).


104. The Texas Penal Code provision relating to duress, § 8.05, provides, in part: "(a) It is an affirmative defense to prosecution that the actor engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another." TEX. PENAL CODE ANN. § 8.05(a) (Vernon 1974). Note that prior to enactment of this section, the duress defense in Texas was available only if the threats were directed against the individual defendant. Jackson v. State, 504 S.W.2d 488, 499-90 (Tex. Crim. App. 1974), construing the defense raised in light of § 38 of the Penal Code, a statute in effect prior to the enactment of the new Penal Code, which became effective January 1, 1974.


106. 262 S.W.2d 25 (Mo. 1953).
failure to submit an appropriate charge to the jury that reflected the defense raised by the evidence. The court noted that "to constitute a defense to a criminal charge, the coercion must be present, imminent, and impending and of such a nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done." The court observed that a reasonable opportunity on the part of defendant to avert the threatened harm would negate the potential use of the defense and cautioned that a threat of future injury would not be sufficient to meet the evidentiary standard entitling submission of the appropriate instruction to the jury.

Commentators have observed that while the coercion/duress defense, available to St. Clair, is attributable to the oppression by other actors, the defense of necessity draws its validity from oppression by the forces of nature. Using this analysis, the situation in which a person suffering starvation steals food is distinguishable from that in which a person steals money to prevent injury to a family member threatened by a weapon-bearing robber. This distinction rings less true, however, in prison escape cases in which the threat is of a dual nature. In this situation the threat is attributable to oppression by another person but involves forced performance of an unnatural act rather than retaliation for failure to violate a statute. For this reason, the best approach to distinguish the two defenses may prove to be reliance on the language used by the legislature in those states where one or both defenses are recognized by statute.

B. Use of Justification Defenses in Prison Escape Cases

1. Rejection of the Defense. The Missouri court, confronted with the necessity defense in a prison escape case, relied on both the facts and the absence of such a defense in Missouri case or statutory law in affirming the trial court's refusal to instruct the jury on necessity. State v. Green involved a defendant who had been threatened with homosexual assault and had previously been assaulted homosexually at the institution. His prior record of reporting such incidents, the response of prison officials in transferring him or otherwise offering some measure of assistance as a result of such reports, and the six-hour lapse of time between the threats and his escape were cited by the court in concluding that the defendant could have sought assistance from prison authorities.

107. Id. at 27.
108. Id. at 27-28.
109. Id. at 27.
111. 470 S.W.2d 566, 569 (Mo. 1971), cert. denied, 405 U.S. 1073 (1972).
rather than resorting to escape.\textsuperscript{112} Although the court found no case law supporting the claimed defense, it distinguished the facts from those in which the defendant might have been immediately threatened and not had time to report the threat to authorities.\textsuperscript{113} Finally, the court held that defendant in reality sought to raise the defense as an attack on the conditions of his confinement, which, it noted, would not justify his escape.\textsuperscript{114} Another issue raised by defendant was the lack of legal assistance at the institution which, he claimed, denied him access to the courts to protect himself. The court responded by pointing to the large number of actions filed by inmates pro se and to the availability of legal representation through contact by way of the mail.\textsuperscript{115}

In dissent, Justice Seiler would have permitted defendant to rely on his asserted defense at trial.\textsuperscript{116} He compared the defense with two justification defenses approved by the court, coercion/duress and self-defense. The situation faced by defendant and persuasive to the dissent was crystallized in the response of a high prison official who had allegedly told defendant that he had three options in dealing with the threat of assaults: submit, defend himself, or escape. Given the fact that defendant had been threatened by five other inmates, Seiler concluded that escape was his only viable alternative.\textsuperscript{117}

The dissent further noted the court's prior approval of the self-defense ground for justification in a case involving forced sodomy.\textsuperscript{118} In State v. Robinson,\textsuperscript{119} in which defendant had been charged with manslaughter for killing an attacker who threatened homosexual assault, the Missouri Supreme Court held that the general authority of citizens to resist or prevent the commission of felonies with reasonable force was available as a justification for defendant's resistance of forced sodomy, a felony under Missouri law. Although the dissent did not draw the conclusion, it appears obvious that the court would have recognized Green's right to defend himself, even with deadly force, if the threatened attack had materialized; however, Green's avoidance of a violent confrontation by escaping would not be justified on the ground of necessity.

2. Authorization of the Defense. Confronted with facts similar to those

\textsuperscript{112} Id. at 569.
\textsuperscript{113} Id. at 568 (citing State v. St. Clair, 262 S.W.2d 25 (Mo. 1953)).
\textsuperscript{114} Id. at 568. Similarly, in People v. Brown, 70 Misc. 2d 224, 333 N.Y.S.2d 342 (1972) the court ruled that prisoners who had rioted, protesting general and specific conditions of the institution and their incarceration, could not raise a defense of necessity, based upon the New York statute. N.Y. PENAL LAW § 35.03(2) (McKinney 1975).
\textsuperscript{115} 470 S.W.2d at 567.
\textsuperscript{116} Id. at 568 (Seiler, J., dissenting).
\textsuperscript{117} Id. at 570 (Seiler, J., dissenting).
\textsuperscript{118} Id. at 570 (Seiler, J., dissenting) (citing State v. Robinson, 328 S.W.2d 627 (Mo. 1959)).
\textsuperscript{119} 328 S.W.2d 667, 670 (1959).
presented to the Missouri Supreme Court in *Green*, the Michigan Court of Appeals expressed its approval for the use of the duress defense in prison escape cases in *People v. Harmon*. In *Harmon* the defendant testified that his escape was the result of the threat of homosexual assault in a penal institution, that he had twice previously been assaulted by inmates who threatened him because of this refusal to voluntarily engage in homosexual activities, and that the escape was the only viable option he faced due to his perceived fear of reprisals for reporting the threat of continued assaults. His testimony was, in part, corroborated by another inmate who had interrupted one such assault before it could culminate in forced sexual attack and by a deputy warden who testified concerning the incidence of homosexual activity in the institution, the threat to the defendant, and the prospect of reprisals against individuals who report such threats to prison officials.

In contrast to the position taken in Missouri, the *Harmon* court characterized appellant’s argument as a justified attack on the conditions of his confinement. The *Harmon* court concluded that “[i]f our prison system fails to live up to its responsibilities in this regard (inmate safety) we should not, indirectly, countenance such failure by precluding the presentation of a defense based on those facts.” While the court expressed its recognition of such a defense in terms of duress, its discussion of that defense focused on an allegation that the violation was “necessitated by threatening conduct of another which resulted in defendant harboring a reasonable fear of imminent or immediate death or serious bodily harm.”

The court, agreeing with the Missouri court’s position in *St. Clair*, observed that a threat of future injury was insufficient to establish the defense. The issue of the imminence or immediacy of the threat, however, is one to be decided by the trier of fact. Thus, it becomes incumbent upon the trial court to grant the defendant’s requested instruction once a colorable claim to the defense is asserted and established by any evidence, and the defendant is entitled to have his jury evaluate the critical aspects of the claimed threat and his right to respond to it by escape.

121. *Id.* at 214.
122. *Id.*
123. *Id.*
124. *Id.* at 213 (citing Holt v. Sarver, 300 F. Supp. 825 (E. D. Ark. 1969)).
125. 220 N.W.2d at 213.
126. *Id.* at 214.
127. *Id.*
128. *Id.* The court observed: “[t]he issue of whether the alleged danger was immediate or imminent is, in all but the clearest cases, to be decided by the trier of fact taking into consideration all the surrounding circumstances, including the defendant’s opportunity and ability to avoid the feared harm.” *Id.*
The Harmon court responded to the state’s argument that recognition of a duress defense will encourage escape by noting that the duty to evaluate the credibility of testimony relating to the escapee’s claimed fear of homosexual assault will remain with the trier of fact. The court further noted that the availability of the duress defense might have the salutary effect of generating reform and improvement of prison conditions, thereby limiting the availability of the defense in a preventative fashion. In this manner the Harmon court sought to allay fears expressed in People v. Noble, which held that defendant’s fear of homosexual attack was insufficient to negate the culpability requirement inherent in the intent factor in a prison escape prosecution. The Noble court had speculated on the abuse of the defense and related incentive for inmate escape should a defendant be allowed to respond to prosecution with testimony concerning his fear of attack within the confines of the penal institution.

The California Court of Appeals dealt with the use of a necessity defense in a prison escape case in People v. Lovercamp. Although the court approved of the use of the defense, it laid down strict criteria to be met by a defendant. Defendant Lovercamp and her co-defendant at trial, Wynashe, sought to offer proof that they had been subjected to continuing threats of homosexual assault by lesbian inmates, that prison officials had failed to respond to the threats, and that, on the day of the escape, a fight between the defendants and the other inmates occurred.

The Lovercamp court, in tracing the history of the necessity defense in escape cases, drew upon a 1736 case which held that when the prisoner escaped in an effort to save his life after a prison had caught fire, the necessity to save his life would “excuseth the felony.” The court noted, however, that the defense offered problems if used only as a protest against generally inferior standards of life within the institution.

Thus, the court was careful to distinguish those situations in which the defense would be available as a result of some immediate threat of death or serious bodily injury from those in which the inmate’s concern
was principally directed to general, on-going conditions of confinement.\textsuperscript{138} Interestingly, the court discussed two cases in which the defense had been dealt with unfavorably by California courts. In \textit{People v. Whipple}\textsuperscript{139} defendant raised the issue of brutal and inhumane treatment at the hands of prison officials. The court, noting the "absolute necessity" doctrine,\textsuperscript{140} nevertheless observed that jail escape based on adverse conditions of confinement, even so adverse as to seriously imperil health and life, was an offense committed at the peril of the escapee and that the defense would not be available.\textsuperscript{141}

The court in \textit{People v. Richards}\textsuperscript{142} dealt with an escape alleged to have been necessitated by fear of death after refusing to participate in homosexual conduct. The court held that the defense required a weighing of the relative harms or evils involved in the threat to the escaping prisoner and those involved in escape itself. Accordingly, the court simply found that the threat to the individual was of lesser harm than the threat of his escape to society.\textsuperscript{143}

Thus, the \textit{Lovercamp} court reached its decision despite precedent that refused to recognize a defense of necessity based upon adverse circumstances surrounding confinement in a penal institution. In ruling that the defendant was, in law, entitled to have her defense presented to the jury and an appropriate instruction granted, the court accommodated prior case law to some extent by establishing five criteria that must be satisfied by a defendant seeking to defend a prosecution for prison escape on the ground of necessity.\textsuperscript{144} The court cautioned prisoners and the public alike that the defense would be "extremely limited in its application."\textsuperscript{145} Essential to its application would be the duty upon the prisoner to make himself available to authorities at the first opportunity for a return to custody.\textsuperscript{146} The court, therefore, offers a sobering note to those who might interpret its opinion as a general grant of freedom based on unfavorable prison conditions affecting the escapee and necessitating illegal departure from the institution.\textsuperscript{147} The five criteria specifically enumerated

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\item \textsuperscript{138} 43 Cal. App. 3d at 831, 118 Cal. Rptr. at 115.
\item \textsuperscript{139} 100 Cal. App. 261, 279 P. 1008 (Dist. Ct. App. 1929).
\item \textsuperscript{140} \textit{Id.} at 263, 279 P. at 1009.
\item \textsuperscript{141} \textit{Id.}
\item \textsuperscript{142} 269 Cal. App. 2d 788, 75 Cal. Rptr. 597 (Ct. App. 1969).
\item \textsuperscript{143} \textit{Id.} at 777, 775 Cal. Rptr. at 604.
\item \textsuperscript{144} 43 Cal. App. 3d at 831-32, 118 Cal. Rptr. at 115.
\item \textsuperscript{145} \textit{Id.} at 831, 118 Cal. Rptr. at 115.
\item \textsuperscript{146} \textit{Id.}
\item \textsuperscript{147} The requirement that the defendant return to custody voluntarily by turning himself into authorities at the first opportunity following the justifiable escape has also been held critical in federal prosecutions. The Supreme Court recognized the right of a prisoner to escape from a burning prison in an effort to save his own life in \textit{Baender v. Barnett}, 255 U.S. 224, 226 (1921); however, the element of return to custody has proved the basis for affirmed convictions in United States v. Chapman,
by the court were as follows:

(1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;
(2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;
(3) There is no time or opportunity to resort to the courts;
(4) There is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and
(5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.148

After applying the enumerated criteria, the court in Lovercamp held that the defendant had shown herself entitled to recourse to the defense of necessity in her prosecution for escape.149 The application of the criteria in strict fashion serves to reconcile Lovercamp with the prior decisions in Whipple and Richards. Lovercamp requires a specific threat of injury or death, rather than general adverse conditions of confinement, as the initial factor that may justify escape. Second, the other criteria tend to define and provide a standard for weighing the initial harm factor against the harm that may result from prison escape. In a sense, this harm is delineated by the parameters of duration of the escape, absence of injury to personnel or innocent persons, and the failure of the institutional safeguards to adequately protect the prisoner.

The strict guidelines of Lovercamp may well be attributable to a careful balancing of interests on the part of the reviewing court. In the absence of a statutorily established defense of necessity, the court fashioned its own rule based on the common law and strictly applied it. Hence, it cannot be supposed that California has recognized a general defense of necessity that would be available in other types of prosecution. The guidelines with respect to prison escape cases are so tightly drawn that in any other attempted use of the defense, the reviewing court would likely be called upon to draft guidelines appropriate to the offense charged.

The Illinois Supreme Court, dealing with the defense of necessity in a prison escape case, People v. Unger,150 applied a less rigid standard than did the California court in Lovercamp. Significantly, the Illinois Legislature previously had enacted a provision making the necessity defense

455 F.2d 746 (5th Cir. 1972) (defendant asserted that his escape was made under duress from other escaping inmates), and in United States v. Michelson, 559 F.2d 557 (9th Cir. 1977) (defendant's duress defense failed because of his failure to turn himself in to authorities for over two years after his escape).
148. 43 Cal. App. 3d at 831-32, 118 Cal. Rptr. at 115-16.
149. Id. at 832, 118 Cal. Rptr. at 115-16.
available to criminal defendants.\textsuperscript{151} The language of the statute does not limit the defense to certain prosecutions, nor does it establish the type of limiting criteria essential in the decision reached in Lovercamp.

The Unger court, considering the Lovercamp guidelines, noted that each presented a relevant factor to be considered in assessing the asserted defense.\textsuperscript{152} However, the court chose to interpret the statute as not requiring that each condition specified by the California court is, as a matter of law, a prerequisite in establishing a meritorious defense of necessity.\textsuperscript{153} The defendant in Unger had not made himself available to authorities for his return to custody, but the court held this was not absolutely determinative with regard to the availability of the necessity defense in his prosecution.\textsuperscript{154}

Arguably, requiring the defendant to turn himself in is the most oppressive of the five requirements established by the Lovercamp court. If there is sufficient evidence of threat of death or physical harm to the defendant and no prison official or other innocent person involved is injured in the escape, then the fact of a history of futile complaints or lack of concern on the part of authorities places the escapee in a most difficult position in choosing to turn himself in to the authorities after the escape. The prisoner is faced with returning to continuing threats and continuing official inaction as a result of his compliance with the Lovercamp court’s mandate, particularly since the escapee cannot be assured that he will not simply be returned to the same institution and face the same situation or conditions of confinement.

Distinguishing its holding from Lovercamp, the Illinois Supreme Court, by holding that the defendant had established the defense sufficiently to allow it to go to the jury, in effect ruled that the Lovercamp criteria are matters that go to the weight and credibility of the defense.\textsuperscript{155} Furthermore, the court ruled that an instruction on the defense of necessity must be given when the defendant offers evidence of the defense and that the trial court is not to weigh the evidence offered in deciding whether such an instruction may be justified.\textsuperscript{156} The absence of one of the criteria of Lovercamp, accordingly, would not be grounds for denial of the instruction in Illinois trial courts.

\textsuperscript{151} The provision states that:

Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning 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.

\textit{ILL. ANN. STAT.} ch. 38, § 7-13 (Smith-Hurd 1972).

\textsuperscript{152} 338 N.E.2d at 446.

\textsuperscript{153} Id.

\textsuperscript{154} Id.

\textsuperscript{155} Id.

\textsuperscript{156} Id.
Additionally, the Unger court speculated on the theoretical basis of defendant's defense, distinguishing the necessity defense from the compulsion defense, both recognized by statute in Illinois.\textsuperscript{157} Compulsion involves the loss of the individual's free will by the threat of imminent physical harm.\textsuperscript{158} The coercion/compulsion defense arises when the defendant is forced to commit an offense as a result of a direct personal threat against the individual if he fails or refuses to engage in the offense. Necessity, on the other hand, involves a choice made by an individual confronted with two admitted evils. Thus, Unger was forced to choose between homosexual assault and reprisal for seeking protection or escape. The majority found this distinguishable from the situation in which an inmate is threatened with death or physical harm unless he participates in an escape from the institution. In the latter instance, the defense of compulsion would be applicable.\textsuperscript{159}

C. Future Application of the Necessity Defense

The continuum from Green to Lovercamp to Harmon and Unger represents a rather interesting range of reaction to the situation facing inmates threatened with homosexual assault. Clearly, as evidenced by the Missouri and California decisions, some courts will rely on a strict reading of the facts to deny availability of the defense if, in fact, the court is willing to recognize its validity at all. In Green, the Missouri Supreme Court distinguished between the facts before it and a situation in which the threat was far more immediate and directed toward the inmate's commission of an illegal act without recourse to intervention by prison officials.\textsuperscript{160} even though it ruled that it could find no recognition of a defense of necessity in Missouri law.\textsuperscript{161} A less easily distinguishable fact situation might have forced a more charitable decision from the majority.

Contrary to the strict application of law to fact evidenced in Green and Lovercamp, the Harmon and Unger courts both proved more benevolent by affording the defendant an opportunity to put his theory of defense before the jury. Moreover, the Harmon court showed no timidity in discussing the underlying sociological problems relating to prison conditions and the perceived need for penal reform.\textsuperscript{162} The existence of a

\begin{itemize}
\item \textsuperscript{157} 338 N.E.2d at 444 (citing Ill. Rev. Stat. ch. 38, §§ 7-11, 7-13 (1973)).
\item \textsuperscript{158} 338 N.E.2d at 444.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} State v. Green, 470 S.W.2d at 568.
\item \textsuperscript{161} Id. at 567-68.
\item \textsuperscript{162} The Harmon court concluded: "While it is obvious that penal reform by the Legislature is the best solution to this difficult problem [homosexual assault within prison], we should not, because of that fact, preclude a defendant from presenting available defenses in the courts of this state." 220 N.W.2d at 215.
\end{itemize}
statutory defense, as in Illinois, would also ease the burden of the court in considering the equity of arguments presented in behalf of the necessity defense. At least two appellate courts have expressed approval of the necessity defense in prison escape cases, each declining to hold it applicable to the evidence offered and issues raised in the case before it. The Texas statute would seem to afford defendants in prison escape cases a similar basis for defense, since no apparent statutory limitation on its use in such prosecutions exists.

The prison escape cases present a difficult problem in the development of common law concerning the defense of necessity. First, the offense is one of particular sensitivity because it involves, by definition, defendants who have formerly been adjudged guilty of criminal conduct warranting incarceration. No defense is available for these defendants in the absence of an attack on the conditions of their confinement through the assertion of some duress or necessity justifying or excusing their escape. Legitimate societal concerns regarding the safety of the community mandate that individuals be successfully restrained during the period of their sentences. Hence, a community that is fearful of escape may prove less than sympathetic to the defense asserted in a prosecution growing out of that escape.

The recognition of these legitimate societal concerns on the part of the judiciary may be responsible for the fashioning of strict rules before accepting even a limited defense of necessity. Unfortunately, this judicial "legislation" may influence prosecutions not involving prison escape, resulting in rules limiting the availability of the defense when society's interest in doing so is less immediate.

Second, the language of the cases surveyed betrays a distrust of the jury on the part of some reviewing courts. By establishing rigid standards to be met by the defendant before he may be entitled to present his theory of defense to the jury, courts may tend to restrict judicially the availability of the defense even when statutory enactment or common law principles would not do so.

Third, the prison escape cases are, in effect, grounded in an attack on the conditions of confinement that might often be more appropriately litigated in another context and forum. This has undoubtedly led to restriction on the availability of the defense in escape cases. The question posed, however, is whether judicial skepticism resulting from this reality should extend to other types of cases. In a number of cases a defendant might

164.  Helton v. State, 311 So. 2d 381, 384 (Fla. Dist. Ct. App. 1975); State v. Boleyn, 325 So. 2d 95, 97 (La. 1976). The Florida and Louisiana courts, noting the availability of the defense in appropriate cases, did not have the benefit, or constriction, of prior legislation recognizing the necessity or necessity-theory duress defense.
attempt to use the necessity defense to litigate issues which should properly be raised in the legislature or in civil actions.\textsuperscript{166} It is not unreasonable to assume that courts, particularly trial courts, may seek some limitation of the defense in this context to keep the issues before the court consistent with the usual kinds of matters involved in criminal prosecutions.

V. CONCLUSION

The defense of necessity as adopted by the Texas Legislature could prove useful to the criminal defendant in a number of situations. Particularly in those cases when an otherwise "innocent" act, in terms of criminal intent, may still be sufficiently severe to subject the actor to prosecution, the necessity defense may be viewed as a general ground for jury nullification. The response of the Texas Court of Criminal Appeals, as evidenced by prior case law, may prove unfavorable to this use of the defense, predicated largely on the potential for abuse inherent in any general nullification-type defense.\textsuperscript{167}

Based on the broad applicability of the language of section 9.22,\textsuperscript{168} the defense will likely be raised in a number of contexts less serious than those involving prison escape or welfare fraud. For instance, the recognition of medically valuable uses of marihuana by a District of Columbia trial court\textsuperscript{169} may signal an attack on offenses related to marihuana based on medical necessity for possession and use. Medical evidence indicates that marihuana is valuable in treatment of glaucoma, asthma, and epilepsy as well as an analgesic for cancer patients undergoing chemotherapy.\textsuperscript{170}

\textsuperscript{166} In a prosecution for welfare fraud, for example, a defendant might raise the issues of earnings limits and benefit restrictions to prove the necessity of the fraud. Litigation aimed at reform of aspects of the welfare system has been both significant and widespread in recent years. Examples include: Shea v. Vialpando, 416 U.S. 251 (1974) (striking down a statutory scheme of flat grant maximum allowances for work-related expense deductions required by 42 U.S.C. § 602a(7) to be credited against working earnings of working welfare recipients in computation of benefit eligibility); Maryland v. Mathews, 415 F.Supp. 1206 (D.D.C. 1976) (governmental units participating in the welfare system challenged HEW regulations authorizing cutoff of federal monies in response to ineffective state control of over-payments).

\textsuperscript{167} Indeed, the Texas Court of Criminal Appeals seems already to have approached the defense with caution. Refer to notes 70-75 supra and accompanying text.


\textsuperscript{169} United States v. Randall, [1975-76] 20 Crim. L. Rep. (BNA) 2299 (D.C. Super. Ct., Nov. 24, 1976) (use in treatment of glaucoma). The trial court found substantial evidence to support defendant's claim that marihuana had a medically accepted use in treating glaucoma. The defendant had shown a progressive deterioration in his eyesight and offered testimony that all other drugs used in conventional treatment of the disease had proven ineffective in curbing the continuing loss of vision and offered expert testimony that surgery entailed a serious risk of immediate blindness. The court ruled that the defendant had supplied sufficient evidence to raise the defense of necessity, that it constituted an affirmative defense on which he would be charged with carrying the burden of proof, and that the grounds for criminalization of marihuana appeared to be less than well-founded, based on empirical data now available.

defendant not having a factual defense might be able to offer evidence of a medical need for marihuana to justify an instruction on necessity.

The Texas statute is sufficiently broad to allow wide use of the necessity defense unless restrictions, such as those imposed in Roy and Lovercamp, are imposed by the Texas Court of Criminal Appeals. Whereas the prison escape cases all involve actors faced with a threat of death or serious bodily injury, the language of the Texas statute, which is grounded in the word "harm," would appear to apply even where the threatened injury is less serious. The term "harm" is defined in the Texas Penal Code as "anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whom the person affected is interested." This definition clearly exceeds the concept of threat of death or serious bodily injury. The element of harm extending to other persons in whom the affected person may be interested should, in fact, make the defense available in all cases, including welfare fraud, in which the intent of the actor arises from parental duty or a moral obligation felt by a family member or close friend.

The necessity defense is one step toward returning the system of criminal justice to the community. The rigidity with which courts will apply or deny access to the defense will reflect the confidence of the appellate judiciary in the jury system. The Texas statute should afford a defendant an opportunity to have a jury weigh the factors involved in a decision to commit a criminal offense.

In this respect, the Texas statute is far more favorable than the Colorado and New York statutes that require the judge to rule on the sufficiency of the defendant's evidence of necessity before permitting the

171. TEX. PENAL CODE ANN. § 1.05(16) (Vernon 1974).
173. Chief Judge Bazelon supplies a perceptive rejoinder to the argument that the defense of necessity should not be allowed in cases in which the defendant's act stems from political or moral opposition to the statute violated. He notes:

If revulsion against the war . . . has reached a point where a jury would be unwilling to convict a defendant for commission of the acts alleged here, we would be far better advised to ponder the implications of that result than to spend our time devising strategems which let us pretend that the power of nullification does not even exist.

175. COLO. REV. STAT. § 18-1-702 (1973). The Colorado statute has been raised by a prisoner who was charged with possession of a knife during a search of his prison cell. People v. Robertson, 543 P.2d 533 (Colo. Ct. App. 1975). The court held that the defense was unavailable to the defendant because he failed to allege a specific and imminent threat of physical injury to his person, leaving him no alternative to violation of the law. The defendant had argued that his failure to turn the knife in to the prison authorities, which he alleged had been "planted" in his cell, was due to his fear of retaliation from other inmates. Id. at 534.
176. N.Y. PENAL LAW § 35.05 (McKinney 1967).
defense to be submitted to the jury. The Texas Court of Criminal Appeals, however, as evidenced by its decision in Roy, may permit trial courts to control use of the defense, rather than relying on the liberal approach of the Woods decision that granted defendants the right to have this theory presented to the jury. The direction to be taken by the court will bear directly on the value of the defense to prospective defendants and, concomitantly, on the quality of the jury trial right available to criminal defendants.

Furthermore, by failing to provide a restriction common to several of the necessity defense statutes that makes the defense unavailable if the defendant seeks to raise a defense predicated on moral conscience or the desirability of the statute, the Texas statute at least opens the door for use of the defense in such a context. The defendant should not be reticent to allow his peers to sit in judgment on his moral or political ideals and weigh them in light of community standards. Traditionally, the law has rested upon the consensus of the community that criminal actions warrant punishment. In the event community standards, as reflected in the decisions of its juries, no longer support the underlying rationale of the criminal law regarding a particular statute, we should not opt for enforcement of the law despite community sentiment.

The ultimate danger is exemplified by the Wootton case. The criminal law exists to protect individuals from those who would violate their personal and property rights, and the willingness of the community to excuse conduct directed at a racial, ethnic, or political minority is a real concern. The line is difficult to draw, but it seems highly questionable to draw it in opposition to faith in the jury system if we are to maintain the traditions of the constitutional guarantee to the right to jury trial.

The fact that the legislature has opened the line of communication between the defendant and the jury should influence both trial courts and the Texas Court of Criminal Appeals to recognize the right of the defendant to his requested instruction on necessity when the issue is raised by any evidence. The community dictates, in theory, the need and application of the criminal law and those standards of conduct with which we are to comply. The judiciary should never be too frightened, especially

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177. The United States Supreme Court relied directly on this principle in Miller v. California, 413 U.S. 15 (1973), establishing community standards in the locale in which the prosecution is brought in a determination as to whether material is to be considered obscene for purposes of prosecution, or permissible within the bounds of the first amendment.

178. The irony inherent in this question is apparent in Judge Bazelon's opinion in Dougherty, United States v. Dougherty, 743 F.2d 1113, 1139-44 (D.C. Cir. 1982). Refer to note 173 supra.

179. Tex. Penal Code Ann. § 1.02 (Vernon 1974). This section states: “The general purposes of this code are to establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which state protection is appropriate . . . .” Id.
an elected judiciary as in Texas, to permit the jury to review those standards in light of the facts of an individual criminal prosecution.

180. Tex. Const. art. V, §§ 4, 7, 15, 18. These sections govern, respectively, election of judges to the Texas Court of Criminal Appeals, district courts, county courts, and as justices of the peace.

181. Tex. Const. art. I, § 10 provides the constitutional guarantee of trial by jury in Texas.